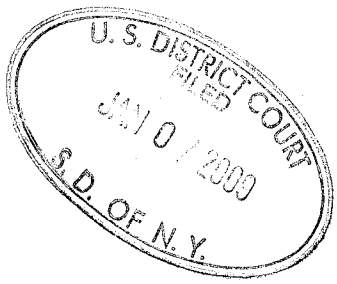
U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

January 6, 2009

BY FACSIMILE



Honorable Ronald L. Ellis
U.S. Magistrate Judge
Southern District of New York
500 Pearl Street
Room 1970
New York, New York 10007

Re: United States v. Bernard L. Madoff,
08 Mag. 2735

Dear Judge Ellis:

The Government respectfully submits this letter brief in further support of its motion to detain the defendant pending trial, pursuant to Title 18, United States Code, Section 3142(f)(2), and in response to the Court's request for additional briefing made at the January 5, 2009 bail hearing in this case.

Background

On December 11, 2008, the defendant was arrested and charged in a criminal complaint, and was presented before U.S. Magistrate Judge Douglas F. Eaton. The complaint alleged one count of securities fraud in violation of Title 15, United States Code, Sections 78j(b), 78ff, and 17 C.F.R. § 240.10b-5. Specifically, the complaint alleged that the defendant had admitted to two senior employees of Bernard L. Madoff Investment Securities LLC – the broker-dealer that defendant owned and operated – that the investment advisory business that he ran was, "basically, a giant Ponzi scheme," and that he estimated the losses from his fraud to be approximately $50 billion. The complaint further alleged that the defendant made similar admissions to FBI agents who spoke to him on the morning of December 11.

The following bail conditions were set at presentment: (1) a $10 million personal recognizance bond to be secured by the defendant's Manhattan apartment (valued at approximately $7 million), and to be co-signed by four financially responsible persons including the defendant's wife; (2) surrender of the defendant's passport; (3) travel restricted to the

Southern and Eastern Districts of New York and the District of Connecticut; and (4) release upon the signature of the defendant and his wife, with the remaining conditions to be fulfilled by December 16 at 2:00 p.m. On December 16, Magistrate Judge Gabriel W. Gorenstein extended from December 16, 2008, to December 17, 2008, at 2:00 p.m., the time within which the defendant would be permitted to meet all conditions of his bail.

On December 17, the Government, with the consent of the defendant, requested that the defendant's bail conditions be modified because of defendant's inability to obtain two of the required four cosigners on the bond. As a consequence, Judge Gorenstein issued an order modifying defendant's bail conditions to include: (a) home detention at the defendant's Manhattan apartment, with electronic monitoring; (b) the entry of confessions of judgment with respect to the defendant's wife's properties in Montauk, New York, and Palm Beach, Florida by December 22; (c) surrender of the defendant's wife's passport by noon on December 18; (d) imposition on defendant of a curfew of 7 p.m. through 9 a.m.; and (e) reduction of the number of required cosigners on the bond from four to two.

On December 19, the Government, with the consent of the defendant, requested that the defendant's bail conditions again be modified, pursuant to Title 18, United States Code, Section 3142, to further ameliorate the risks of harm or flight. Magistrate Judge Theodore H. Katz approved the proposed changes to defendant's bail conditions, which: (i) required the defendant to be subject to home detention at his Manhattan apartment, 24 hours per day, with electronic monitoring, other than for scheduled court appearances; (ii) required the defendant to employ by December 20, 2008, at his wife's expense, a security firm acceptable to the Government, to provide the following services to prevent harm or flight: (a) round-the-clock monitoring at the defendant's building, 24 hours per day, including video monitoring of the defendant's apartment door(s), and communications devices and services permitting it to send a direct signal from an observation post to the Federal Bureau of Investigation in the event of the appearance of harm or flight; and (b) additional guards on request if necessary to prevent harm or flight.

Applicable Law

Title 18, United States Code, Section 3142(e) provides that, "[i]f, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the [defendant] as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial." Section 3142(f)(2) provides, in pertinent part, that:

> The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community . . .[u]pon motion of the attorney for the

> Government or upon the judicial officer's own motion, in a case that involves -- (A) a serious risk that such person will flee; or (B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

18 U.S.C. § 3142(f)(2). Under Section 3142(g),

> The judicial officer shall . . . take into account the available information concerning --
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> (1) the nature and circumstances of the offense charged . . .
> (2) the weight of the evidence against the person;
> (3) the history and characteristics of the person, including --
> (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, . . .
> (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

18 U.S.C. § 3142(g).

The legislative history of the Bail Reform Act of 1984 makes clear that Congress intended that the "safety of the community" language in Section 3142 was expected to be given a broad construction. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 12 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3195 ("The reference to safety of any other person is intended to cover the situation in which the safety of a particular identifiable individual, perhaps a victim or witness, is of concern, while the language referring to the safety of the community refers to the danger that the defendant might engage in criminal activity to the detriment of the community. *The Committee intends that the concern about safety be given a broader construction than merely danger of harm involving physical violence.*") (emphasis added). Courts have, therefore, appropriately construed the statute to find that protection of the community from economic harm is a valid objective of bail conditions. *See United States* v. *Schenberger*, 498 F. Supp. 2d 738, 742 (D.N.J. 2007) (holding that "[a] danger to the community does not only include physical harm or violent behavior" and citing the Senate Committee Report language reproduced above); *United States* v. *Persaud*, 2007 WL 1074906, at *1 (N.D.N.Y. Apr. 5, 2007) (concurring with the Magistrate Judge that "economic harm qualifies as a danger within the contemplation of the Bail Reform Act"); *United States* v. *LeClercq*, 2007 WL 4365601, at *4 (S.D. Fla. Dec. 13, 2007) (finding that a large bond was necessary to, among other things, "protect the community from additional economic harm"); *United States* v. *Gentry*, 455 F. Supp. 2d 1018, 1032 (D. Ariz. 2006) (in a fraud and money laundering case, in determining whether pretrial detention was appropriate, the court held that danger to the community under Section 3142(g) "may be assessed

in terms other than the use of force or violence . . . [including] economic danger to the community"); *see also United States* v. *Reynolds*, 956 F.2d 192, 193 (9th Cir. 1992) (post-conviction for mail fraud and witness tampering, the Court held that "danger may, at least in some cases, encompass pecuniary or economic harm."); *United States* v. *Provenzano*, 605 F.2d 85, 95 (3rd Cir. 1979) (in a pre-1984 Bail Reform Act case, post-conviction, the Court rejected an application for bail finding that "danger to the community" is not limited to harms involving violence).[1]

The Changed Circumstances

As the Government submitted at the January 5 bail hearing, the circumstances have changed markedly since the defendant's bail was set on December 19, 2008. In direct contravention of the December 18 order issued by U.S. District Judge Louis L. Stanton in *SEC* v. *Bernard L. Madoff, et. al.*, 08 Civ. 10791 (LLS), barring the defendant from, among other things, dissipating, concealing, or disposing of any money, real or personal property in the defendant's direct or indirect control, the defendant and his wife sent multiple packages containing valuables to relatives and others. Specifically, the defendant sent a package containing a total of approximately 13 watches, one diamond necklace, an emerald ring, and two sets of cufflinks. The Government has been informed that the value of those items could exceed $1 million. Two other packages -- containing a diamond bracelet, a gold watch, a diamond Cartier watch, a diamond Tiffany watch, four diamond brooches, a jade necklace, and other assorted jewelry -- also were sent to relatives. The contents of those packages have been recovered by the Government. In addition, as indicated at the January 5 hearing, the defendant and/or his wife sent at least two additional packages (contents unknown) to the defendant's brother and an unidentified couple in Florida.

Defendant's actions are telling with respect to the question before this Court. First, they show the defendant's willingness to disobey an explicit court order -- one to which he had consented expressly on December 11 -- thereby calling into question the seriousness with which he will treat the orders of the Court in his criminal case, including orders requiring the defendant's appearance in court. Second, the transfer of these valuable assets shows that the current bail conditions are insufficient to assure the safety of the community from the defendant because they show that the defendant who, by his own admission, has valuable items of personal property in his three residences in the United States and his residence in France, may dissipate

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[1] Pretrial detention cases in which bail is determined pursuant to Section 3142 routinely cite the principle set forth in post-conviction cases, in which bail is determined pursuant to 18 U.S.C. § 3143, that economic harm may be considered a danger to the community. *See, e.g.*, *United States* v. *Zaragoza*, 2008 WL 686825, at * 3 (N.D.Cal. Mar. 11, 2008) (citing the principle regarding "pecuniary or economic harm" from *Reynolds* in the context of a pretrial detention analysis); *Gentry*, 455 F. Supp. 2d at 1032 (same).

those assets.

The Need For Detention

The need for detention in this case is clear. The continued release of the defendant presents a danger to the community of additional economic harm and further obstruction of justice. *See* 18 U.S.C. § 3142(f)(2). As noted above, economic harm presents a danger to the community within the meaning of the Bail Reform Act. *See, e.g.*, S. Rep. No. 225, 98th Cong., 1st Sess. 12 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3195 ("The Committee intends that the concern about safety be given a broader construction than merely danger of harm involving physical violence."); *Schenberger*, 498 F. Supp. 2d at 742 ("[a] danger to the community does not only include physical harm or violent behavior"); *Persaud*, 2007 WL 1074906, at *1 ("economic harm qualifies as a danger within the contemplation of the Bail Reform Act").

Likewise, defendant's release on bail presents a clear risk of further obstruction of justice. Monetary penalties, including restitution and forfeiture, are an important part of justice and will, in the event of a conviction, be part of any sentence in this case. *See* 18 U.S.C. § 3663A (mandatory restitution provisions apply to cases in which an identifiable victim or victims has suffered a pecuniary loss). Dissipation of the defendant's assets through transfers to third parties obstruct justice within the meaning of the bail statute, *see* 18 U.S.C. § 3142(f)(2)(B), because they make it more difficult, if not impossible, to recover all available forfeitable assets to recompense victims. The Government is confident that there will be a conviction in this case given the strength of the evidence, including the defendant's confessions to numerous people, including FBI agents, and the Government will seek restititution and a forfeiture order in an effort to return the greatest possible amount to victims of the defendant's fraud. The scope of the defendant's crime is vast, and it is likely that thousands of victim-investors have lost sums in the billions of dollars. It is likewise clear that the defendant does not have sufficient assets to make those victims whole. Accordingly, it is of vital importance that the victims of defendant's offenses be protected from once again suffering losses as a result of the transfer of the defendant's valuable assets to third parties. In light of the defendant's failure to abide by Judge Stanton's order enjoining the transfer of his assets, and the fact that there is no practical way for the Court to prevent the dissipation of certain of the defendant's assets, no condition short of remand will suffice to protect the safety of the community.

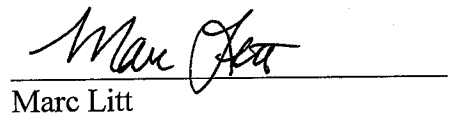
Defendant's conduct in transferring assets to third parties constitutes changed circumstances that justify this Court's revisiting of the current bail conditions *de novo* pursuant to Section 3142, taking into account all available information as specifically provided by Section 3142(g). And, defendant's efforts to transfer property in violation of Judge Stanton's order tangibly demonstrate a substantial risk of obstruction of justice that can not adequately be addressed by amended terms of bail. Defendant, accordingly, should be remanded.

Additionally, as the Government submitted at the January 5 hearing, there is also a serious risk of flight. The defendant has admitted to having perpetrated one of the largest frauds in history -- a giant Ponzi scheme that likely involves losses in the tens of billions of dollars. Given the scale of the losses, the number of victims, the defendant's role as an investment adviser, and other pertinent factors, it is probable that the applicable Sentencing Guidelines in the likely circumstance of a conviction, will almost certainly result in an advisory range at the top of the Guidelines. The defendant has assets that can not be effectively restrained, and his ties to New York have been largely severed by the loss of his New York business and his loss of status in the New York community. Moreover, to conduct such a long-standing and large scheme, the defendant had to deceive investors and regulators, among others, on virtually a daily basis. This combination of circumstances gives rise to a serious risk of flight. While the bail conditions in place may have been sufficient to address this risk prior to defendant's actions in distributing valuable personal property to third parties, they no longer provide such assurance. Defendant has demonstrated his willingness to violate court-imposed limits, and such conduct substantially elevates the risk of flight.

In light of all these facts and circumstances, there is no combination of conditions that reasonably will assure the presence of the defendant and the safety of the community. Accordingly, the defendant should be detained.

Respectfully submitted,

LEV L. DASSIN
Acting United States Attorney

By: 

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