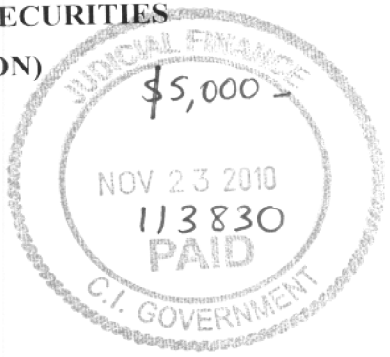
Cause No FSD 257 of 2010

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

IN THE MATTER OF THE COMPANIES LAW (2010 REVISION)

AND IN THE MATTER OF BERNARD L. MADOFF INVESTMENT SECURITIES LLC (IN SECURITIES INVESTOR PROTECTION ACT LIQUIDATION)



B E T W E E N :

IRVING H. PICARD (TRUSTEE FOR THE LIQUIDATION OF THE BUSINESS OF BERNARD L. MADOFF INVESTMENT SECURITIES LLC)

Petitioner

- and -

HARLEY INTERNATIONAL (CAYMAN) LIMITED (IN LIQUIDATION)

Respondent

PETITION

To the Grand Court

The humble petition of Irving H Picard of 45 Rockefeller Plaza, New York, New York 10111 shows that:

Introduction

1. Bernard L. Madoff Investment Securities LLC (the "Debtor") is a New York limited liability company founded in 1960 that was wholly owned by Bernard L. Madoff ("Madoff") prior to the events shown in paragraph 7 hereof.

2. The nature of the Debtor's business was that of securities broker-dealer and investment adviser. The Debtor's business had three divisions: (1) investment advisory (the "IA Business"); (2) market making; and (3) proprietary trading.

3. The Debtor's principal place of business during the relevant time frame was 885 Third Avenue, New York, NY 10022, USA. Madoff was the founder, chairman, and chief executive officer of the Debtor and ran the Debtor together with several family members and a number of additional employees.

4. Madoff purported to operate the IA Business as a legitimate and successful investment business in which the Debtor received monies from private and institutional investors and invested the same in stocks and options pursuant to a "split-strike conversion strategy" devised by Madoff, which would generate profits that would from time to time be paid out to investors upon their request for a redemption.

5. In reality, the IA Business was a fraudulent 'Ponzi' scheme on a massive scale. The IA Business engaged in no material investment activity and generated virtually no investment returns. The 'investments' made by customers were in fact simply commingled into a single bank account held at the New York Branch of JP Morgan Chase & Co ("JP Morgan"). The purported investment 'returns' paid to investors by the Debtor were nothing more than payments made from new funds paid into the scheme by new and existing investors.

6. In December 2008, when requests by investors for redemptions exceeded the amount of funds deposited by new investors, the Ponzi scheme collapsed.

7. The petitioner was appointed trustee for the liquidation of the business of the Debtor under the Securities Investor Protection Act of 1970 (15 U.S.C. section 78aaa *et seq*) ("SIPA") by order of the United States District Court for the Southern District of New York (the "New York Court") on 15 December 2008.

8. Under US law the principal duties and powers of the petitioner as trustee for the liquidation of the Debtor's business are:

(1) The identification and getting in of assets and property of the Debtor wherever they may be situated;

(2) The liquidation of those assets;

(3) The distribution of the same to the customers and creditors of the Debtor in accordance with the statutory regime established by SIPA affording priority as between customers and ordinary unsecured creditors of the Debtor to its customers as so provided;

(4) Maximization of the Debtor's estate by, where appropriate, the bringing of proceedings to recover assets and damages;

(5) The avoidance, where appropriate, of antecedent transactions such as preferential payments and transactions at an undervalue;

(6) In a case where assets are insufficient to meet customer claims, procuring the advance of funds from the Securities Investors Protection Corporation ("SIPC") to supplement the distribution up to a ceiling of US$500,000 per customer; and

(7) Causing SIPC to meet the administrative costs of the liquidation including legal fees incurred by the petitioner.

Claim for turnover

Background

9. This claim relates to the Respondent's receipt of sums amounting to more than US$ 1 billion from the Debtor in connection with the fraud operated by Madoff. As pleaded below, the Respondent has retained the sum of approximately US$ 12 million and the Petitioner seeks an order under section 241(1)(e) of the Companies Law (2010 Revision) requiring the Respondent to turn this sum over to the Petitioner.

The Credit Balance

10. On or around 17 April 1996, the Respondent (or its predecessor, Harley International Limited) executed a Customer Agreement, an Option Agreement and a Trading Authorization Limited to Purchases and Sales of Securities (the "Account Agreements") and delivered such papers to the Debtor at the Debtor's headquarters at 885 Third Avenue, New York, New York.

11. Thereafter the Respondent maintained an account with the Debtor, which was designated account 1FN094 (the "Account"). That account, however, was by and large a fiction. Substantially all funds deposited into the Debtor's IA Business were comingled in the Debtor's bank account number xxxxxxxxxxx703 with JP Morgan (the "703 Account").

12. Between 24 April 1996 and 11 December 2008, Madoff caused the Debtor to make payments in excess of US$ 1 billion to (or for the account of) the Respondent (the "Transfers") including without limitation the following:

(1) US$ 20,000 on 27 November 1998.

(2) US$ 6,000,000 on 23 June 2004.

(3) US$ 50,000,000 on 27 February 2008.

(4) US$ 40,000,000 on 26 March 2008.

(5) US$ 56,000,000 on 12 May 2008.

(6) US$ 31,800,000 on 2 June 2008.

(7) US$ 120,000,000 on 27 June 2008.

(8) US$ 197,000,000 on 10 July 2008.

(9) US$ 147,000,000 on 3 September 2008.

(10) US$ 120,000,000 on 23 September 2008.

(11) US$ 40,000,000 on 30 September 2008.

(12) US$ 180,000,000 on 16 October 2008.

(13) US$ 10,000,000 on 22 October 2008.

(14) US$ 29,000,000 on 5 November 2008.

(15) US$ 46,000,000 on 9 December 2008.

13. The Respondent has retained the sum of approximately US$ 12 million of the Transfers which stands to its credit in its bank account in the Islands (the "Credit Balance").

The Complaint

14. On 12 May 2009, the Petitioner commenced proceedings against the Respondent by filing a complaint against it in the New York Court (the "Complaint") on the following basis under US bankruptcy law:

(1) The Credit Balance is property of the Debtor which is liable to be turned over to the Trustee under the United States Bankruptcy Code (the "Bankruptcy Code"), 11 U.S.C. §§ 541-542 ("Count 1").

(2) Alternatively, at the time of each of the transfers made during the 90 days prior to 11 December 2008 (the "90-Day Transfers"), the Respondent was a "creditor" of the Debtor within the meaning of section 101(10) of the Bankruptcy Code and pursuant to 15 U.S.C. § 78fff-2(c)(3). Each of the 90-Day Transfers constitutes a transfer of an interest of the Debtor in property within the meaning of section 101(54) of the Bankruptcy Code and pursuant to 15 U.S.C. § 78fff-2(c)(3). Each of the 90-Day Transfers was to or for the benefit of the Respondent. Each of the 90-Day Transfers was made on account of an antecedent debt owed by the Debtor before such transfer was made. Each of the 90-Day Transfers was made while the Debtor was insolvent. Each of the 90-Day Transfers was made during the preference period under section 547(b)(4) of the Bankruptcy Code. Each of the 90-Day Transfers enabled the Respondent to receive more than it would have received under Chapter 7 of the Bankruptcy Code if the transfers had not been made. Each of the 90-Day Transfers constitutes a preferential transfer avoidable by the Petitioner pursuant to section 547(b) of the Bankruptcy Code and is recoverable from the Respondent pursuant to section 550(a). As a result of the foregoing, the Petitioner is entitled

to a judgment pursuant to sections 547(b), 550 and 551 of the Bankruptcy Code: (a) avoiding and preserving the 90-Day Transfers, (b) directing that the 90-Day Transfers be set aside, and (c) recovering the 90-Day Transfers, or the value thereof, for the benefit of the estate of the Debtor ("Count 2").

(3) Further or alternatively, the Transfers during the two years prior to 11 December 2008 (the "2-Year Transfers") were made by the Debtor with the actual intent to hinder, delay or defraud some or all of the Debtor's then existing or future creditors. The 2-Year Transfers constitute fraudulent transfers avoidable by the Petitioner pursuant to section 548(a)(1)(A) of the Bankruptcy Code and recoverable from the Respondent pursuant to section 550(a). As a result of the foregoing, pursuant to sections 548(a)(1)(a), 550(a) and 551 of the Bankruptcy Code, the Petitioner is entitled to a judgment: (a) avoiding and preserving the 2-Year Transfers, (b) directing that the 2-Year Transfers be set aside, and (c) recovering the 2-Year Transfers, or the value thereof, from the Respondent for the benefit of the estate of the Debtor ("Count 3").

(4) Further or alternatively, the Debtor received less than a reasonably equivalent value in exchange for each of the 2-Year Transfers. At the time of each of the 2-Year Transfers, the Debtor was insolvent, or became insolvent as a result of the 2-Year Transfer in question. At the time of each of the 2-Year Transfers, the Debtor was engaged in a business or transaction, or was about to engage in a business or a transaction, for which any property remaining with the Debtor was an unreasonably small capital. At the time of each of the 2-Year Transfers, the Debtor intended to incur, or believed that it would incur, debts that would be beyond the Debtor's ability to pay as such debts matured. The 2-Year Transfers constitute fraudulent transfers avoidable by the Petitioner pursuant to section 548(a)(1)(B) of the Bankruptcy Code and recoverable from the Respondent pursuant to section 550(a). As a result of the foregoing, pursuant to sections 548(a)(1)(B), 550(a) and 551 of the Bankruptcy Code, the Petitioner is entitled to a judgment: (a) avoiding and preserving the 2-Year Transfers, (b)

directing that the 2-Year Transfers be set aside, and (c) recovering the 2-Year Transfers, or the value thereof, from the Respondent for the benefit of the estate of the Debtor ("Count 4").

(5) Further or alternatively, at all times relevant to the Transfers during the six years prior to 11 December 2008 (the "6-Year Transfers"), there has been one or more creditors who have held and still hold matured or un-matured unsecured claims against the Debtor that were and are allowable under section 502 of the Bankruptcy Code or that were and are not allowable only under section 502(e). The 6-Year Transfers were made by the Debtor with the actual intent to hinder, delay or defraud the creditors of the Debtor. The Debtor made the 6-Year Transfers to or for the Respondent in furtherance of a fraudulent investment scheme. As a result of the foregoing, pursuant to sections 276, 276-a, 278 and/or 279 of the New York Debtor and Creditor Law, sections 544(b), 550(a) and 551 of the Bankruptcy Code, andsection 78fff-2(c)(3) of SIPA, the Petitioner is entitled to a judgment: (a) avoiding and preserving the 6-Year Transfers, (b) directing that the 6-Year Transfers be set aside, (c) recovering the 6-Year Transfers, or the value thereof, from the Respondent for the value of the estate of the Debtor ("Count 5").

(6) Further or alternatively, at all relevant times there were and are at least one or more creditors who held and hold matured or un-matured secured claims against the Debtor that were and are allowable under section 502 of the Bankruptcy Code or that were not and are not allowable only under section 502(e). The Debtor did not receive fair consideration for the 6-Year Transfers, and the Debtor was insolvent at the time it made each of the 6-Year Transfers. As a result of the foregoing, the Petitioner is entitled to a judgment pursuant to sections 273, 278 and/or 279 of the New York Debtor and Creditor Law, and sections 544(b), 550, 551 of the Bankruptcy Code and section 78fff-2(c)(3) of SIPA: (a) avoiding and preserving the 6-Year Transfers, (b) directing that the 6-

Year Transfers be set aside, and (c) recovering the 6-Year Transfers, or the value thereof, for the benefit of the estate of the Debtor ("Count 6").

(7) Further or alternatively, at all relevant times there were and are at least one or more creditors who held or hold matured or un-matured unsecured claims against the Debtor that were not and are allowable under section 502 of the Bankruptcy Code or that were and are not allowable only under section 502(e). The Debtor did not receive fair consideration for each of the 6-Year Transfers. At the time the Debtor made each of the 6-Year Transfers, the Debtor was engaged in or about to engage in a business or transaction for which the property remaining in its hands after each of the 6-Year Transfers was an unreasonably small capital. As a result of the foregoing, pursuant to sections 274, 278 and/or 279 of the New York Debtor and Creditor Law, sections 544(b) and 550(a) of the Bankruptcy Code, and section 78fff-2(c)(3) of SIPA, the Petitioner is entitled to a judgment: (a) avoiding and preserving the 6-Year Transfers, (b) directing that the 6-Year Transfers be set aside, and (c) recovering the 6-Year Transfers, or the value thereof, from the Respondent for the benefit of the estate of the Debtor ("Count 7").

(8) Further or alternatively, at all relevant times, there were and are at least one or more creditors who held and hold matured or un-matured secured claims against the Debtor that were and are allowable under section 502 of the Bankruptcy Code, or that were not and are not allowable only under section 502(e). The Debtor did not receive fair consideration for the 6-Year Transfers. At the time the Debtor made each of the 6-Year Transfers, the Debtor had incurred, was intending to incur, or believed that it would incur debts beyond its ability to pay as the debts matured. As a result of the foregoing, pursuant to sections 275, 278 and/or 279 of the New York Debtor and Creditor Law, sections 544(b), 550(a) and 551 of the Bankruptcy Code, and section 78fff-2(c)(3) of SIPA, the Petitioner is entitled to a judgment: (a) avoiding and preserving the 6-Year Transfers, (b) directing that the 6-Year Transfers be set

aside, and (c) recovering the 6-Year Transfers, or the value thereof, from the Respondent for the benefit of the estate of the Debtor ("Count 8").

15. The relevant causes of action under US law:

(1) are part of US bankruptcy law;

(2) are capable of being brought only by a duly appointed insolvency practitioner;

(3) exist to enable the duly appointed officeholder in the liquidation of the business of the Debtor to bring claims against third parties for the collective benefit of the creditors of the Debtor as a whole;

(4) are integral and central to the collective nature of bankruptcy and not merely incidental or procedural; and

(5) could not have been brought by the Debtor in the absence of the proceedings for the liquidation of its business.

16. On 15 May 2009, the Petitioner's counsel in the Islands served the Complaint upon the Respondent. The Respondent was fully aware of the Complaint. However, the Respondent voluntarily chose not to file an answer, move or otherwise respond.

The Judgment

17. On 10 November 2010, the Honorable Burton R Lifland, United States Bankruptcy Judge, granted summary judgment against the Respondent in respect of Count 2 and Count 3 and default judgment against the Respondent in respect of Count 1, Count 4, Count 5, Count 6, Count 7 and Count 8 (the "Judgment").

18. In the premises, the Judgment is a determination by the New York Court that the Credit Balance is property belonging to the Debtor. Further or alternatively, the Judgment has the result that the Credit Balance is property belonging to the Debtor.

19. Further, the Judgment exists for the purpose of the collective bankruptcy regime and is governed by the *sui generis* private international law rules relating to bankruptcy.

Jurisdiction to order turnover

20. For the following reasons, this Court has jurisdiction to make an order requiring the Respondent to turn the Credit Balance over to the Petitioner.

Recognition and enforcement of the Judgment

21. As a matter of Cayman law, the New York Court is the court with jurisdiction over the liquidation of the Debtor. The jurisdiction of the New York Court extends to the determination of any issues concerning the identification of assets belonging to the Debtor, which form part of the bankruptcy estate.

22. As pleaded above, the New York Court has determined in the Judgment that the Credit Balance is property belonging to the Debtor. Further or alternatively, the Judgment has the result that the Credit Balance is property belonging to the Debtor.

23. As a matter of Cayman law, this Court will and should:

    (1) recognise the jurisdiction of the New York Court to determine this matter; and

    (2) take appropriate steps to enforce and give effect to the Judgment.

Application of US law to the Debtor's bankruptcy

24. Alternatively, as a matter of Cayman choice of law rules, the Debtor's liquidation and the collection, realisation and distribution of assets belonging to the Debtor in that liquidation are governed by US law.

25. Therefore, in order to determine whether or not the Credit Balance is property belonging to the Debtor, this Court must apply US law.

26. According to the US law set out above, the Transfers are avoidable so that the Credit Balance is property belonging to the Debtor which forms part of the bankruptcy estate of the Debtor.

Choice of US law in the exercise of discretion

27. Alternatively, for the purpose of determining whether or not the Credit Balance is property belonging to the Debtor, this Court is able to choose in the exercise of its discretion whether to apply US law or Cayman law. For the following reasons, the Petitioner humbly requests this Court to apply US law to determine this issue:

(1) To the Respondent's knowledge, the Debtor was incorporated in the USA.

(2) To the Respondent's knowledge, the Debtor carried on business in the USA.

(3) The Debtor is now in liquidation in the USA.

(4) To the Respondent's knowledge, Madoff was domiciled in the USA.

(5) To the Respondent's knowledge, the USA was the focal point and centre of gravity of the global activity of the Debtor.

(6) To the Respondent's knowledge, the Account Agreements, by their terms, were deemed to be entered into in the State of New York.

(7) To the Respondent's knowledge, the Account Agreements were to be performed in New York through securities trading activity that would take place in New York.

(8) The Respondent knowingly and consistently wired funds to the 703 Account, which was an account at the New York branch of JP Morgan.

(9) To the Respondent's knowledge, the Transfers were made out of the 703 Account in New York.

(10) The Respondent knowingly wired funds to New York with the intent to profit from commercial activity it believed was taking place in that jurisdiction.

(11) The wrongdoing of Madoff and the other directors of the Debtor occurred in the USA.

The exercise of this Court's discretion to order turnover

28. For the following reasons, the Petitioner humbly asks Court to exercise its discretion in favour of making such orders as may be required to oblige the Respondent to turn the Credit Balance over to the Petitioner for distribution in the Debtor's estate:

(1) The turnover of the Credit Balance to the Petitioner will best assure an economic and expeditious administration of the Debtor's estate.

(2) The turnover of the Credit Balance to the Petitioner will be consistent with the just treatment of all holders of claims against or interests in the Debtor's estate in accordance with SIPA and the applicable distribution scheme, wherever they may be domiciled.

(3) The turnover of the Credit Balance to the Petitioner will be consistent with the protection of claim holders in the Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding.

(4) The turnover of the Credit Balance to the Petitioner will be consistent with the prevention of preferential or fraudulent dispositions of property comprising the Debtor's estate.

(5) The turnover of the Credit Balance to the Petitioner will be consistent with the distribution of the Debtor's estate amongst creditors substantially in accordance with the order prescribed by Part V of the Companies Law.

(6) The turnover of the Credit Balance to the Petitioner will be consistent with the recognition and enforcement of security interests created by the Debtor.

(7) The turnover of the Credit Balance to the Petitioner will be consistent with the non-enforcement of foreign taxes, fines and penalties.

(8) The turnover of the Credit Balance to the Petitioner will be consistent with the requirements of comity.

Your Petitioner therefore humbly prays that:

(1) the Court make an order under section 241(1)(e) of the Companies Law (2010 Revision) requiring the Respondent to turn the Credit Balance (as defined above) over to the Petitioner for distribution in the liquidation of the Debtor;

(2) further or alternatively, the Court make such further or other orders as may be required to recognize and/or enforce the Judgment in the Islands (including, if necessary, by way of an order directing the Respondent's liquidators to admit such proof of debt as may be lodged by the Petitioner on behalf of the Debtor);

(3) the Court make such different orders as it may deem fit; and

(4) the Respondent pay the costs of this petition or other just provision be made therefor.

Dated the 23rd day of November 2010

Higgs & Johnson

Higgs & Johnson, attorneys for the Petitioner

This petition is intended to be served on:
Harley International (Cayman) Limited (in Liquidation) c/o Mourant Ozannes,
Harbour Centre, 42 North Church Street, PO Box 1348, Grand Cayman KY1-1108

This petition was presented by Irving H. Picard whose address for service is:
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