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PRO SE OFFICE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PHYLLIS MOLCHATSKY and STEVEN :
SCHNEIDER, M.D.,
Plaintiffs,
vs.
UNITED STATES OF AMERICA,
Defendant.

Case No 09 CIV 8697 (LTS/AJP)

MOTION TO FILE *AMICUS CURIAE* BRIEF IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS AND *AMICUS CURIAE* BRIEF

MOTION

Movant is a Madoff victim who has filed a claim with the Securities and Exchange Commission under the Federal Tort Claims Act because of its negligence in the BLMIS fiasco. Not only will the disposition of this litigation have a strong affect on the course of Movant's potential for recovery of damages, but Movant has asked the SEC to hold his claim in abeyance until this litigation has run its course. Movant has a stong interest in the outcome of this case. Accordingly, it is respectfully requested that this Honorable Court accept the below Brief.

BRIEF

The Government's MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS relies on the following argument (page 1):

"Even assuming that the SEC acted negligently in the course of its Madoff investigation, the discretionary function exception would still apply. Investigations are conducted to assist the SEC in deciding whether to commence civil proceedings against suspected wrongdoers. Those decisions, like prosecutors' decisions whether to charge criminal suspects, are quintessentially discretionary and subject to policy considerations. The discretionary function exception protects *all* such decisions, and therefore bars Plaintiffs' claims, regardless of whether the SEC's investigations were performed negligently." (emphasis in original)

The Government overlooks the following provision of SIPA:

(15 USC, Chapter 2B-1, Sec. 78eee (a) (1)):

"If the Commission...is aware of facts which lead it to believe that any broker or dealer subject to its regulation is in or is approaching financial difficulty, it shall immediately notify SIPC...." (emphasis added).

Without conceding that the sole reason the investigations of Avellino & Bienes and of BLMIS were done with a view to commencing civil proceedings, the fact remains that they were undertaken. And thus the SEC's duty under 15 USC Sec 78eee(a)(1) kicked in. The results of a proper investigation, a non-negligent investigation, would have made the SEC aware, would have made the SEC believe, and thus would have *required* the SEC to notify SIPA, no discretion allowed. It wouldn't matter whether the SEC decided to conduct a civil proceeding or not, BLMIS would have been stopped in its tracks by notification to SIPC.

So the Government's argument fails. The results of SEC investigation of SIPC members do not exclusively lead to discretionary decisions. Thus grossly negligent investigations of SIPC members that cause financial disaster to persons such as Plaintiffs and Movant are actionable under the FTCA.

Respectfully submitted,

Burnett H. Radosh, Pro Se



Service by e-mail to:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PHYLLIS MOLCHATSKY and STEVEN SCHNEIDER, M.D.

(In the space above enter the full name(s) of the plaintiff(s)/petitioner(s).)

09 Civ. 8697 (LTS) (AJP)

- against -

UNITED STATES OF AMERICA

AFFIRMATION OF SERVICE

(In the space above enter the full name(s) of the defendant(s)/respondent(s).)

I, BURNETT H. RADOSH, declare under penalty of perjury that I have
(name)


served a copy of the attached MOTION TO FILE AMICUS CURIAE BRIEF and AMICUS CURIAE BRIEF
(document you are serving)

upon HOWARD ELISOFFON, CHRISTOPHER J.SULLIVAN, K.K.JARDINE whose address is _____
(name of person served)

helisofon@herrick.com, csullivan@herrick.com, kjardine@herrick.com, respectively
(where you served document)

by e-mail. copy of e-mail is attached hereto. Service on 17 December 2010.
(how you served document: For example - personal delivery, mail, overnight express, etc.)

Dated: Lighthouse Point, Florida
(town/city) (state)
January 10, 2011
(month) (day) (year)


Signature
2533 NE 26 Avenue
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City, State
33064
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954-612-0509 (cell); 954-781-1228 (home)
Telephone Number

Subj: **Fwd: Pro Se Motion and Brief. You are served.**
Date: 1/10/2011 2:46:18 P.M. Eastern Standard Time
From: BHRadosh@aol.com
To: BHRadosh@aol.com

From: BHRadosh@aol.com
To: helisofon@herrick.com, csullivan@herrick.com, kjardine@herrick.com,
lperlov@herrick.com
Sent: 12/17/2010 7:06:14 P.M. Eastern Standard Time
Subj: Pro Se Motion and Brief. You are served.

Good Evening:

Now I'm filing it (as I said I would), ****

Motion and Brief attached.

Burnie

(Burnett H. Radosh)

*Edited version
Burnett H. Radosh*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PHYLLIS MOLCHATSKY and STEVEN SCHNEIDER, M.D.

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(In the space above enter the full name(s) of the defendant(s)/respondent(s).)

I, BURNETT H. RADOSH, declare under penalty of perjury that I have
(name)

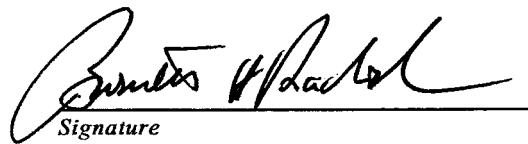
served a copy of the attached MOTION TO FILE AMICUS CURIAE BRIEF and AMICUS CURIAE BRIEF
(document you are serving)

upon TONY WEST, P.PYLES, M. LEACH and JEFFREY PAUL EHRLICH whose address is _____
(name of person served)

jeff.ehrlich@usdoj.gov
(where you served document)

by e-mail. copy of e-mail is attached hereto. Service on 17 December 2010.
(how you served document: For example - personal delivery, mail, overnight express, etc.)

Dated: Lighthouse Point, Florida
(town/city) (state)
January 10, 2011
(month) (day) (year)


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Subj: **Motion and Amicus Brief in Molchatsky. You are served.**
Date: 12/17/2010 7:27:29 P.M. Eastern Standard Time
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document is attached.

*verbatim
Bowers & Radosh*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PHYLLIS MOLCHATSKY and STEVEN SCHNEIDER, M.D.

(In the space above enter the full name(s) of the plaintiff(s)/petitioner(s).)

09 Civ. 8697 (LTS) (AJP)

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UNITED STATES OF AMERICA

AFFIRMATION OF SERVICE

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I, BURNETT H. RADOSH, declare under penalty of perjury that I have
(name)

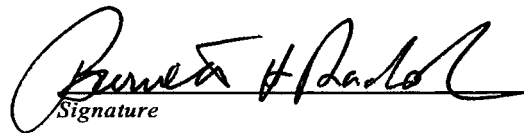
served a copy of the attached MOTION TO FILE AMICUS CURIAE BRIEF and AMICUS CURIAE BRIEF
(document you are serving)

upon PREET BHARARA and SARAH S. NORMAND, US ATTY + AUSA whose address is _____
(name of person served)

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by e-mail. copy of e-mail is attached hereto. Service on 17 December 2010.
(how you served document: For example - personal delivery, mail, overnight express, etc.)

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Sent: 12/17/2010 7:25:33 P.M. Eastern Standard Time
Subj: Re: Molchatsky case (Madoff - FTCA). Motion and Amicus Brief. You are served.

Dear Ms. Normand,

You may recall my name from correspondence we had nearly a month ago.

As a Madoff victim, I happened to be reading SIPA with an eye to our claim vs. SIPC. But I came upon a paragraph that I thought would be helpful to us with regard to the FTCA Claim we filed with the SEC at the last minute. ***

So since I think the SIPA citation will help the cause of all victims, I'm submitting it to the District Court in your case. My motion and brief are attached.

Yours truly,

Burnie
(Burnett H. Radosh)

*Edited version
Burnett H. Radosh*