

EXHIBIT S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 10-2378

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In Re:

BERNARD L. MADOFF INVESTMENT
SECURITIES LLC.

ORAL ARGUMENT

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March 3, 2011, 11:06 a.m.

Moynihan U.S. Courthouse
Ceremonial Courtroom
500 Pearl Street
New York, New York 10007

B E F O R E:

HON. DENNIS JACOBS, Chief Judge
HON. PIERRE N. LEVAL
HON. REENA RAGGI

Reported by:

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1 settled the Picowers and got \$5 billion and put it
2 into the fund, that wasn't profits, that wasn't
3 stock. Mr. Picower had \$5 billion of other
4 customer's money, and he gave it back. Who should
5 get that? Who should get that out of that fund?
6 Those people who did not get their money out. It's
7 as simple as that.

8 Now, once all of those people, we
9 estimate that to be around \$20 billion, give or
10 take. It may be less, may be a little bit more.
11 We'll see. We're halfway home, we've collected 10.
12 Give us an opportunity to go get the rest and it's a
13 great aspiration that we'll get there, that this
14 Trustee is seeking to obtain \$20 billion.

15 He then pays the \$20 billion. Now
16 the two customers are on equal footing. Those who
17 got their money out and got some on top of that are
18 now equal to those who got their money out of the
19 fund of customer property. That's the goal, the
20 priority of the statute. That's what the statute is
21 all about, is that these who did not get their money
22 out get the opportunity, through the customer fund,
23 that priority. Once that priority is satisfied,
24 then all of them are on equal footing and they all
25 have a fraud claim. You're absolutely right, Your

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1 some concern among some of the appellants and that
2 is that who in their right mind would rely upon
3 these statements. That caused some concern.

4 JUDGE LEVAL: But you don't dispute
5 that those statements represent the obligation of
6 the debtor?

7 MR. SHEEHAN: No, I do dispute that.
8 I think they are one piece of evidence that
9 evidences the obligation of the debtor. That's it,
10 one piece, one of many, all of which we have to look
11 at. We have to look at the entire books and
12 records.

13 This Trustee is mandated by this
14 statute to do a complete and thorough investigation.
15 That's what he's done. And that complete and
16 thorough investigation yielded the truth that what
17 we have here is no trades, no profits.

18 JUDGE JACOBS: I'm not sure I
19 understand how the statement doesn't represent the
20 obligation of the debtor assuming, under the facts
21 that we have here, that people were permitted to
22 rely upon this and a defrauder undertook to pay them
23 that and in reliance they left their money in his
24 hands.

25 MR. SHEEHAN: I didn't say it didn't

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1 represent it. I said standing alone it's not
2 determinative. You cannot just take, as Your Honor
3 said earlier --

4 JUDGE JACOBS: Standing alone it
5 would work fine at a fraud trial, it seems to me.

6 MR. SHEEHAN: At a fraud trial that's
7 true.

8 JUDGE JACOBS: Well, that's -- the
9 debtor would be Madoff Securities and at a fraud
10 trial they would be a defendant and they would owe
11 that.

12 MR. SHEEHAN: And they sure as heck
13 would and they wouldn't get any of it, because
14 Bernie would have spent it all.

15 JUDGE RAGGI: No, no, but that's a
16 separate question.

17 MR. SHEEHAN: I know that.

18 JUDGE RAGGI: And avoids or doesn't
19 address our concern, that you are asking us to
20 conclude that the obligation for SIPA purposes is
21 different from the debtor's obligation. And I speak
22 only for myself, I'm having some trouble
23 understanding why you think that that is a different
24 obligation.

25 MR. SHEEHAN: I'm not suggesting

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1 that -- if you look at Article 8 that my adversary
2 relies upon, from which I think this question is
3 emanating, it says that once you have a SIPA
4 proceeding, these rules go by the board, and the
5 reason is because the SIPA rules dominate that.
6 They have to. It's a salutary statute designed to
7 provide certain relief under certain dire
8 circumstances. It isn't business as usual, it isn't
9 dealing with your broker on a daily basis. This is
10 a catastrophe and it's only in that catastrophe that
11 the Trustee can operate the way he does, by not
12 being bound by simply the statement itself, but by
13 what the statute suggests, you look beyond that to
14 the books and the records.

15 JUDGE JACOBS: Thank you.

16 MR. SHEEHAN: Thank you.

17 MR. CONLEY: Good morning. May it
18 please the Court -- it's still morning? It's
19 afternoon, actually. Michael Conley for the SEC.

20 I would like to address this morning
21 briefly why the Bankruptcy Court's ruling in this
22 case is entirely consistent with what SIPA provides
23 about how net equity claims are to be determined.

24 JUDGE JACOBS: It would help me at
25 least if you started out distinguishing your