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June 22, 2009

**BY HAND**

The Honorable Denny Chin  
United States District Judge  
United State Courthouse  
500 Pearl Street  
New York, New York 10007-1312

**Re: United States v. Madoff, 09-cr-213 (DC)**

Dear Judge Chin:

On behalf of our client Bernard L. Madoff, we respectfully submit this letter to assist the Court in determining an appropriate sentence following Mr. Madoff's guilty plea to the eleven counts charged in the Information. For the reasons set forth below, we respectfully submit that an appropriate sentence in this case would be a period of incarceration below the life sentence called for by the advisory Sentencing Guidelines and substantially below the 150 year statutory maximum.

We write to the Court not to dispute the severity of the crimes to which Mr. Madoff pled guilty. We seek neither mercy nor sympathy. Respectfully, we seek the justice and objectivity that have been – and we hope always will be – the bedrock of our criminal justice system.

We have read the unfortunate number of Victim Impact Statements and recognize that terrible losses have been suffered as a result of Mr. Madoff's conduct, and we have advised Mr. Madoff of their tenor and heart-wrenching stories of loss and deprivation. At sentencing, Mr. Madoff will speak to the shame he has felt and to the pain he has caused. Both he and his counsel acknowledge the scope and magnitude of those losses and understand the victims' calls for reprisal. The significant anger and resentment evident in the victims' words is no doubt justified in light of the circumstances of this case. Thankfully, none of the fury expressed in the victim statements has been as shocking as the death threats and anti-Semitic emails that have been directed toward Mr. Madoff and his counsel. Nevertheless, we believe that the unified tone of the victim statements suggests a desire for a type of mob vengeance that, if countenanced here, would negate and render meaningless the role of the Court. Instead, we respectfully submit that it is the duty of the Court to set aside the emotion and hysteria attendant to this case and render a sentence that is just and proportionate to the conduct at issue.

We are aware that the court is familiar with *United States v. Booker* and its progeny, which mandate that the Court give due consideration to all of the factors set forth in 18 U.S.C. § 3553(a) in imposing a sentence that is "sufficient, but not greater than necessary" to comply with the purposes enumerated in the statute's subsections, including deterrence, protecting the public,

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Indeed, this District has recognized “the utter travesty of justice that sometimes results from the guidelines’ fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense.” *United States v. Adelson*, 441 F.Supp.2d 506, 512 (S.D.N.Y. 2006). We respectfully submit that there are several considerations that support a sentence of a meaningful term of years yet one short of life or any period so lengthy as to amount to a *de facto* life sentence.

Specifically, we respectfully submit that the Court should consider that Mr. Madoff, rather than continuing the fraud up to the point of Government detection – or worse, fleeing the country – effectively turned himself in by confessing his scheme to his sons on December 10, 2008, knowing full well that his sons would do the right thing and advise the authorities. Mr. Madoff willingly submitted to F.B.I. custody early the following morning, confessed, and thereafter cooperated fully with the bail conditions imposed through the date of his guilty plea. At his plea allocution, Mr. Madoff accepted full responsibility for his actions and expressed regret and remorse for those victimized by his scheme. As the Probation Office reports, “Madoff has shown recognition of responsibility for the offense.” Presentence Investigation Report (“PSR”) at 34.

Furthermore, Mr. Madoff indicated at a very early stage his desire to cooperate in asset recovery for the benefit of the victims of his acts with various investigations led by the United States Attorney’s Office for the Southern District of New York (“USAO”), the Trustee for the Securities Investor Protection Corporation (“SIPC Trustee”), and the United States Securities and Exchange Commission (“SEC”), by supplying information, reviewing records, transferring assets, and providing assistance. Additionally, other regulators have recently expressed a desire to speak to Mr. Madoff, and he has agreed to do so.

Within days of his arrest, Mr. Madoff, through counsel, offered to transfer certain assets to either the USAO or the SIPC Trustee, including, among other things, Bernard L. Madoff Investment Securities (“BLMIS”) assets and personal assets located in the United States and abroad. Also, very soon after his arrest, Mr. Madoff, through counsel, entered into discussions with the SIPC Trustee to transfer certain BLMIS assets and personal assets to be liquidated for the ultimate benefit of victims. In fact, Mr. Madoff agreed in or about February 2009 to transfer certain assets to the SIPC Trustee pursuant to a formal “Assignment Agreement.” While agreed to in principal, this agreement has not yet been executed.

Additionally, at various times over the past several months, Mr. Madoff has entered into agreements with the USAO to transfer or liquidate certain assets for the benefit of victims. In agreement with the USAO and with the consent of this Court, Mr. and Mrs. Madoff have taken steps to maintain assets so as to preserve their value. They have identified buyers and made every effort to liquidate certain assets in order for the proceeds to be transferred to the USAO or the U.S. Marshal. In certain circumstances, Mr. and Mrs. Madoff have voluntarily entered into

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agreements to allow the government to seize property, without objection, in order to preserve the asset for the benefit of victims. Furthermore, Mrs. Madoff entered into a voluntary restraint agreement with the USAO early in this case, restricting her from selling, transferring, or otherwise disposing of certain assets. Mr. and Mrs. Madoff have also provided substantial assistance to the USAO by commencing litigation designed to free certain encumbered assets for the purpose of transferring the sale proceeds to the USAO. As of the date of this letter, counsel for Mr. Madoff is actively engaged both here and abroad in attempting to retrieve assets for the benefit of victims.

Moreover, Mr. Madoff met recently for several hours with the Inspector General of the SEC to provide information and insight into Mr. Madoff's conduct and the role of the SEC in connection with its examination of Mr. Madoff's business. The information exchanged during the meeting will no doubt shape and fortify the future of Wall Street regulation and oversight. Mr. Madoff's participation at the meeting was entirely voluntary.

Affording due consideration to Mr. Madoff's voluntary surrender, full acceptance of responsibility, meaningful cooperation efforts, and in light of the non-violent nature of his offense, Mr. Madoff should be sentenced to a term of years short of effective life imprisonment. Mr. Madoff is currently 71-years old and has an approximate life expectancy of 13 years.<sup>1</sup> A prison term of 12 years – just short of an effective life sentence – will sufficiently address the goals of deterrence, protecting the public, and promoting respect for the law without being “greater than necessary” to achieve them.

Alternatively, we respectfully submit that a 15 to 20 year prison term will effectively achieve the stated goals of § 3553(a) without disproportionately punishing Mr. Madoff. Indeed, such a range will appropriately eliminate concerns for disparate treatment among similarly situated non-violent offenders. We have attached the affidavit of Herbert Hoelter, co-founder and Chief Executive Officer of the National Center on Institutions and Alternatives (“NCIA”), which represents what we believe to be a comprehensive analysis of sentencing data for individuals who were facing extensive periods of incarceration. Significantly, for fraud-related cases between 1999 and 2008 in which a defendant was assigned a guideline range of life imprisonment, did not receive a downward departure pursuant to Sentencing Guidelines §5k1.1, and pled guilty, the average sentence imposed was 184 months, or approximately 15.3 years.

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<sup>1</sup> According to data published by the United States Social Security Administration, a 71-year old male has a period life expectancy of 12.66 years. The period life expectancy at a given age represents the average number of years of life remaining if a group of persons at that age were to experience the mortality rates for 2005 over the course of their remaining life. See <http://www.ssa.gov/OACT/STATS/table4c6.html>. Data published by the Center for Disease Control reflects that the period life expectancy for a 71-year old male is 13.1 years, based on 2004 morality rates. See [http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56\\_09.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_09.pdf).

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Hoelter Affidavit ¶ 8. Because the majority of these cases involved loss figures in excess of \$400,000,000 – as does Mr. Madoff’s case – we respectfully urge this Court to impose a sentence on Mr. Madoff that reflects a just degree of proportionality.

For the foregoing reasons, we respectfully request that the Court adopt the sentencing recommendations of Mr. Madoff’s counsel.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Ira Lee Sorkin', written over a horizontal line.

Ira Lee Sorkin

(212) 277-6733

sorkini@dicksteinshapiro.com

cc: Marc Litt, Esq. (By Hand)

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

----- X  
: **UNITED STATES OF AMERICA** :  
: :

**-against-** : **09 Cr. 213 (DC)** :

**BERNARD L. MADOFF** : **AFFIDAVIT OF** :  
: **HERBERT HOELTER** :

**Defendant.** :  
: **X**  
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STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss.:

HERBERT HOELTER, being duly sworn upon his oath, deposes and says:

1. I am the co-founder and Chief Executive Officer of the National Center on Institutions and Alternatives (“NCIA”). NCIA is a non-profit organization founded in 1977 working in a variety of settings within the criminal justice system.

2. NCIA was asked by counsel for Bernard L. Madoff to provide an analysis of United States Sentencing Commission (“USSC”) data for the purpose of assisting the Court in imposing an appropriate sentence on Mr. Madoff.

**THE USSC DATABASE**

3. The USSC maintains a comprehensive, computerized data collection system of federal sentencing information. Pursuant to 28 U.S.C. § 994(w), each chief judge of a district is required to ensure that within 30 days after entry of judgment in a criminal case, the sentencing court submits a report of the sentence to the Commission that includes: (1) the judgment and commitment order; (2) the statement of reasons (including the reasons for any departures); (3) any plea agreement; (4) the indictment or other charging document; (5) the presentence report; and (6) any other information the Commission needs.

4. Data from these documents are extracted and coded for input into the USSC databases. The Commission's computerized datasets, without individual identifiers, are available via tape and the Internet through the Inter-University Consortium for Political and Social Research at the University of Michigan ("ICPSR") and the Federal Justice Statistics Resource Center.

5. This collection contains information on federal criminal cases sentenced under the Sentencing Guidelines and Policy Statements of the Sentencing Reform Act of 1984. The data files included in this study contain all cases received by the USSC that were sentenced between October 1, 1998, and September 30, 2008. United States Federal Courts handled over 670,000 criminal cases between the fiscal years 1999 and 2008. The USSC estimates that 99% of all cases are included in this dataset.

#### ANALYSIS

6. In order to obtain the requested information, NCIA took the following steps:
  - (a) NCIA downloaded the datasets from fiscal years 1999-2008 from [www.icpsr.umich.edu](http://www.icpsr.umich.edu).
  - (b) Data files were extracted and imported into SPSS utilizing the SPSS setup files provided by the ICPSR website.
  - (c) NCIA sorted and selected cases where the defendant was scored according to the Fraud Guideline (U.S.S.G. §2F1.1/2B1.1), tallying 79,198 cases.
  - (d) NCIA deleted those cases where the defendant was not Criminal History Category I (25,958 deleted). 53,240 cases remained.
  - (e) NCIA deleted those cases with missing mode of adjudication information (56 deleted). 53,184 cases remained.
  - (f) NCIA deleted those cases with missing or incomplete sentencing information (376 cases deleted). 52,808 cases remained.
  - (g) NCIA deleted those cases with missing or incomplete Guideline Manual and/or Guideline calculation information (107 deleted). 52,701 cases remained.

- (h) NCIA sorted the dataset by loss amount and deleted those cases that contained either missing or incomplete loss information (503 cases deleted). 52,198 cases remained.
- (i) NCIA deleted those cases where the defendant did not plead guilty (2,416 deleted). 49,782 cases remained.
- (j) NCIA sorted these 49,782 cases by reason of departure and excluded those cases where the defendant received a downward departure pursuant to USSG §5K1.1 (7,729 defendants received a §5K1.1). The remaining 42,053 cases were sorted by loss amount and loss categories were set up based on the November 1, 2008 Manual. NCIA then tallied the total number of cases sentenced to a term of imprisonment versus those receiving a probationary or fine only sentence to determine the percentage of each category (“Prison” or “Fine/Probation Only”). For those who received a term of imprisonment, the average sentence length was determined.

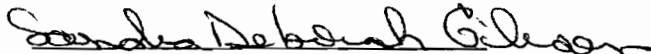
7. Of the 42,053 defendants included in this analysis, 20,839 defendants (49.6%) received a probationary/fine only sentence. Of the remaining 21,214 defendants (50.4%) who received a term of incarceration, the average sentence length was 17.7 months (see chart below).

<b>USSG §2B1.1/2F1.1 Sentences Imposed National Analysis (5K1.1 cases excluded) FY 1999 - FY 2008</b>				
<b>Loss Amount</b>	<b>Total Cases</b>	<b>Probation/ Fine Only</b>	<b>Prison</b>	<b>Average Prison Length</b>
<b>0 - \$1 Million</b>	<b>n=38,919</b>	<b>20,608 (53.0%)</b>	<b>18,311 (47.0%)</b>	<b>38.4 MO</b>
<b>&gt; \$1 Million - \$20 Million</b>	<b>n=2,897</b>	<b>222 (7.7%)</b>	<b>2,675 (92.3%)</b>	<b>43.3 MO</b>
<b>&gt; \$20 Million - \$100 Million</b>	<b>n=182</b>	<b>6 (3.3%)</b>	<b>176 (96.7%)</b>	<b>78.4 MO</b>
<b>&gt; \$100 Million - \$400 Million</b>	<b>n=40</b>	<b>2 (5.0%)</b>	<b>38 (95.0%)</b>	<b>94.6 MO</b>
<b>Over \$400 Million</b>	<b>n=15</b>	<b>1 (6.7%)</b>	<b>14 (93.3%)</b>	<b>96.6 MO</b>
<b>All Cases</b>	<b>n=42,053</b>	<b>20,839 (49.6%)</b>	<b>21,214 (50.4%)</b>	<b>17.7 MO</b>

8. Of the 42,053 defendants included in this analysis, 14 defendants had a guideline range of Life Imprisonment. Despite this range, no defendant received a life sentence. Of these 14 defendants, the average sentence imposed was 184 months (range: 60-360 months). A description of each of these 14 cases is attached as Exhibit A.

  
HERBERT HOELTER

Sworn to before me this  
19 day of June, 2009

  
Notary Public



## **EXHIBIT A**

Sentences Imposed – National – FY 1999 – FY 2008  
 Guilty Pleading, CHI Defendants Scored According to USSG §2B1.1  
 Guideline Range of Life

USSCIDN/ NCIAIDNO	Circuit	District	Sentenced Pre/Post Kimbrough	Number of Counts	Statute(s) of Conviction	Statutory Range	Guideline Manual	Guideline Applied	Loss Amount	Guideline Range	Sentence Imposed	Reason(s) for Departure
1036814	2	NY - East	Pre	8	18 USC 371; 15 USC 78FF; 18 USC 1512C2; 18 USC 16211; 18 USC 1512K	0-1080 mo.	2005	2B1.1	\$400,000,001	Life	84 mo. Imprisonment	18 USC 3553(a)(1); (a)(2)(A); (a)(2)(B); Family Ties & Responsibilities; Reasonableness
1035833	2	NY - East	Pre	8	18 USC 371; 15 USC 78FF; 18 USC 1512C2; 18 USC 1001A2; 18 USC 1512K; 18 USC 1001A1	0-960 mo.	2005	2B1.1	\$400,000,001	Life	144 mo. Imprisonment	Military Record/Charitable Works/Good Deeds; Offense Level Overstates Offense Seriousness; Reasonableness
1097640	2	NY - East	Pre	2	18 USC 371; 15 USC 78; 15 USC 78FF	0-180 mo.	2006	2B1.1	\$179,890,608	Life	180 mo. Imprisonment	#NULL!
1168412	2	NY - South	Post	20	18 USC 371; 15 USC 78JB; 15 USC 78D; 15 USC 77X; 18 USC 1343; 15 USC 78M; 18 USC 1344; 18 USC 1957; 15 USC 78FF	0-3780 mo.	2007	2B1.1	\$400,000,001	Life	192 mo. Imprisonment	18 USC 3553(a)(1); Non-Violent Offense/Offender; Restitution; General Guideline Adequacy Issues; Cooperation/Attempted Cooperation
1137091	2	NY - South	Post	4	18 USC 371; 15 USC 808; 18 USC 1341; 18 USC 2; 18 USC 1343	0-600 mo.	2006	2B1.1	\$400,000,001	Life	240 mo. Imprisonment	18 USC 3553(a)(1); (a)(2)(A); (a)(2)(B); (a)(2)(C); General Guideline Adequacy Issues
833499	4	VA - West	Pre	2	15 USC 78JB; 18 USC 1343; 18 USC 2	0-180 mo.	2002	2B1.1	\$75,000,000	Life	180 mo. Imprisonment	Pursuant to a Binding Plea Agreement

Sentences Imposed – National – FY 1999 – FY 2008  
 Guilty Pleading, CHI Defendants Scored According to USSG §2B1.1  
 Guideline Range of Life

USSCIDN/ NCIAIDNO	Circuit	District	Sentenced Pre/Post Kimbrough	Number of Counts	Statute(s) of Conviction	Statutory Range	Guideline Manual	Guideline Applied	Loss Amount	Guideline Range	Sentence Imposed	Reason(s) for Departure
879840	6	OH - South	Pre	2	18 USC 1344; 18 USC 371	0-720 mo.	2002	2B1.1	\$33,935,878	Life	360 mo. Imprisonment	General Aggravating or Mitigating Circumstance
22876	9	CA - Cent	Pre	3	18 USC 1343; 18 USC 1957; 18 USC 2	0-420 mo.	2002	2B1.1	\$94,796,530	Life	240 mo. Imprisonment	18 USC 3553(a)
750389	9	WA - West	Pre	3	18 USC 371; 15 USC 78FFA; 18 USC 1343; 15 USC 78JB	0-240 mo.	2001	2B1.1	\$86,797,994	Life	240 mo. Imprisonment	#NULL!
1078198	11	FL - South	Pre	1	18 USC 371	0-60 mo	2006	2B1.1	\$826,839,642	Life	60 mo. Imprisonment	#NULL!
1105177	11	FL - South	Pre	1	18 USC 371	0-60 mo.	2006	2B1.1	\$826,839,642	Life	60 mo. Imprisonment	#NULL!
1105189	11	FL - South	Pre	1	18 USC 371	0-60 mo.	2006	2B1.1	\$826,839,642	Life	60 mo. Imprisonment	#NULL!
1050510	11	FL - South	Pre	1	15 USC 78JB	0-240 mo.	2006	2B1.1	\$400,000,001	Life	240 mo. Imprisonment	#NULL!
1158730	11	FL - Mid	Post	4	18 USC 371; 18 USC 1957; 18 USC 1524	0-300 mo.	2007	2B1.1	\$300,000,000	Life	300 mo. Imprisonment	#NULL!

#NULL! = Information not available.