No.

IN THE

Supreme Court of the United States

Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,

Plaintiff-Appellee,

v.

Malcolm H. Sage, in his Capacity as Partner or Joint Venturer of Sage Associates and Sage Realty, Individually as Beneficiary of Sage Associates and Sage Realty, and as the Personal Representative of The Estate of Lillian M. Sage,

Defendant-Appellant,

Sage Associates, Martin A. Sage, in his Capacity as Partner or Joint Venturer of Sage Associates and Sage Realty, and individually as Beneficiary of Sage Associates and Sage Realty, Ann M. Sage Passer, in her Capacity as Partner or Joint Venturer of Sage Associates and Sage Realty, and individually as Beneficiary of Sage Associates and Sage Realty,

Defendants,

SIPC,

Intervenor.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Application to the Honorable Sonia Sotomayor, Associate Justice of the Supreme Court, and Circuit Justice for the Second Circuit:

Pursuant to Supreme Court Rule 13.5, Applicant Malcolm Sage hereby requests a 60-day extension of time, to and including April 26, 2024, within which to file a petition for a writ of certiorari.

1. The decision below is *Picard v. Sage et.al.*, (No. 22-1107 & 22-1110, Second Circuit, 2023). The Second Circuit issued its opinion on August 10, 2023, (*see* Appendix A), and a three-judge panel thereof denied rehearing on November 28, 2023, (*see* Appendix B). Unless extended, Applicant's time to seek certiorari in this Court expires February 26, 2023. Applicant is filing this application at least ten days before that date. *See* S. Ct. R. 13.5. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

2. This case concerns the interpretation of the SIPA statute, 15 U.S.C. §§ 78aaa–78lll which impacts the lives of every investor in capital markets in the United States.

3. This case is "squarely" a matter of first impression, involving the interpretation of the SIPA statute which does not set out a method to calculate "net equity." *("neither § 78fff-1, which covers the 'Powers and duties of a trustee' under SIPA, nor § 78lll (11), which defines net equity, discuss whether the Trustee has discretion for choosing how to calculate net equity, and if so, to what degree. Therefore, determining if the Trustee is permitted to use the Net Investment Method for calculating the Defendants' net equity may very well require the court to hold as a matter of law for the first time the scope of a Trustee's power to choose a method for calculating net equity under SIPA."* See: *Picard v Sage Associates et. al.* 20-cv-10109 AJN, @ P12 May 18, 2021) (see Appendix C). How net equity is defined and calculated impacts the life of millions of individuals who invest in capital markets under circumstances where they invest with a duly licensed and regulated brokerage house which fails, causing them to potentially lose their entire *"investment history"* (see: *In re Bernard L. Madoff Inv. Securities LLC*, 654 F.3d 229 @ p8 (2011) (see Appendix D) which under my particular set of facts would wipe out my entire investment history since approximately 1978 when I was 23-years old. I am currently 68 years of age.

4. The Trustee has determined that net equity in *every* case where a broker commits fraud by failing to purchase stock, the appropriate method to calculate net equity is the *"Net Investment Method,"* though in fact, the SIPA statute makes clear that a broker **need not purchase** stocks for a customer to receive net equity credit as does the legislative history of SIPA (see H.R. Rep. No. 95-746 @21 1977), as does the testimony of former chief executives of SIPA (See *In re New Times Securities Services*, Inc. 00-8178-JBR, p37-38, July 28, 2000). SIPA's legislative history further supports that the *non-purchase* of equities is not determinative of whether the Trustee can or must use the net investment method or whether he even has any discretion to employ the net investment method in terms of calculating Net Equity specifically in a buy and hold stock account at all.

5. The Second Circuit held in 2011, that under a very narrow and limited set of circumstances, the method of calculating net equity "*advocated*" by the Trustee was *"superior as a matter of law,"* assenting to the methodology of the Trustee though it is absent in statute but in doing so, made clear that: *"resort to the Net Investment Method would be rare because this method wipes out all events of a customer's investment history except for cash deposits and withdrawals."* (It was only the ***"extraordinary facts of this case"***...that made *"the Net Investment Method appropriate, whereas in many instances, it would not be."* See 654 F.3d 229 @ p.8) (see Appendix D).

6. This case originated in the Bankruptcy Court (Dkt. Numbers 10-04362 and 10-04400) and was removed to the District Court by now Circuit Court Judge Alison J. Nathan on May 18, 2021. Upon removal, Judge Nathan opined that: *"without delving into the merits prematurely, the Court notes that, contrary to the Trustee's contention, it may be the case that the most appropriate method for calculating the Defendants' net equity under SIPA is the Last Statement Balance method." (Picard v Sage Associates et. al.* 20-cv-10109 AJN, @ P10 May 18, 2021) (see Appendix C)

7. Because of Judge Nathan's elevation to the Second Circuit, the case was taken over by District Court Judge John F. Keenan on the very day direct testimony was placed on the docket. Judge Keenan then proceeded to not only overlook Judge Nathan's finding but misstated it. (*Picard v Sage et. al.* 20-Civ.-10109 & 20-Civ-10057, April 15, 2022 JFK) In short, Judge Keenan never addressed the critical question of whether a Bankruptcy Trustee may employ the "net investment method," outside of the *specific circumstances* of the Second Circuit opinion and more specifically, in a traditional buy and hold stock account like the one I maintained for decades and which is the most prevalent way of investing in capital markets nationwide as opposed to the Madoff scheme which was untethered to market realities and which formed the basis of the Second Circuit decision as well as every other case tried to date outside of the matter herein.

8. The issues presented are of exceptional importance because if the District Court decision as affirmed by the Second Circuit Court of Appeals is left to stand, no customer of a brokerage house under circumstances where a licensed but rogue broker, and whose fraud went undetected by the Securities and Exchange Commission despite repeated audits would be protected by a statute whose clear legislative purpose was consumer protection, if the broker failed to purchase securities under circumstances where a customer did not relinquish full investment authority to him or even where the customer authorized or directed the purchase of individual stocks.

9. The fact that this matter is indeed *sui generis* among Madoff cases should not dissuade this court from granting certiorari because this matter represents a circumstance where in fact what is *sui generis* impacts by far, the vast and overwhelming majority of the investing public but just by happenstance, arises out of a matter that is *sui generis* in the Madoff matter.

10. In short, unless this court grants certiorari, no customer of a licensed broker will have protection under SIPC where a broker engages in fraud by failing to purchase stock, even when the broker regularly and routinely produces trade confirmations and monthly account statements which mirror the market and where the stock prices reflect those published by reputable sources on an ongoing and regular manner. Moreover, those customers might be clawed back from as is the case with me for approximately three decades. If Justice Marshall said centuries back, *"the power to tax is the power to destroy,"* (see *McCulloch v. Maryland* 17 U.S.327 (1819)) it is axiomatic that the exercise of a power by an appointed fiduciary to claw back for an indeterminate period represents the ultimate power to destroy. And, same would be violative of the Fourth Amendment to the Constitution, especially in a situation where the exercise is not by the government directly or an individual who acts under color of governmental authority--but by a man who is not only interested in the outcome of the clawback personally, but is a member of the law firm that bills for the litigation, which in this matter is concededly in excess of $1.5 billion (excluding expenses in the hundreds of millions of dollars, and the charges of dozens if not hundreds of law firms who are employed by the Trustee's law firm).

11. Though this court carefully, and of necessity must limit the cases it hears, especially when there is not a divide between circuits, on a practical level, there will not be a division between circuits in a SIPA case like the one at hand because cases which involve brokerage failures in capital markets will invariably arise and be tried within the confines of the Second Circuit. Further, Judge Nathan's decision in the withdrawal of the reference, approximately a decade *after* the Circuit's *"Net Equity"* decision in 2011 essentially reflects a "split" within the Second Circuit itself which was not addressed by the three-judge panel in the appeal from which I seek a writ of certiorari. In fact, Judge Nathan stated in her *Memorandum Opinion & Order*, that: *"The question in this adversary proceeding is not merely which method*

is most appropriate to determine the Defendants' net equity, but whether the Net Investment Method, the method that the Trustee has already chosen, ***is a permissible method as a matter of law under SIPA.*** *" (Picard v Sage Associates et. al.* 20-cv-10109 AJN, @ P10-11, May 18, 2021) (see Appendix C) (Emphasis added).

12. A 60-day extension within which to cogently write and file a certiorari petition is reasonable and necessary because:

a) I am a pro se attorney who never practiced litigation prior to my retirement from practice of adoption law and transactional real estate law. In fact, the petition for rehearing, (see Appendix E), which took me over 1,000 hours to write was the very first document on the level of a legal brief I ever submitted to a Federal or State Court at any level.

b) I have several ongoing and concerning health issues as well as testing which I am currently undergoing and unlike the Trustee who has partnered with a nationwide law firm that employs more than 1,000 attorneys (including partners, and associates), researchers, experts, paralegals, and spokespeople. I am one person who can at most work 18 hours in a day under the best of circumstances.

c) The requested 60-day extension would cause no prejudice to Plaintiff as this litigation has been ongoing for well over a decade and has been protracted by him.

13. I have not contacted my adversary to obtain his consent (though I have sent him a copy of this extension request via email) for the following reasons:

a) He is not a financially disinterested party,

b) Because though he concedes that I am a victim of a heinous crime, his position is that he is the Trustee solely for individuals who he terms as "net losers," though the SIPA statute makes no such distinction between victims of a brokerage house failure. (Moreover, the Trustee and his law firm take this position although as set forth above, I was engaged in a buy and hold account which was apart from the Madoff "split-strike" scheme that formed the basis of the Second Circuit 2011 decision. Further, and unlike customers who were the subject of that appeal, documentation in the possession of the Trustee not only fails to show that I did not make a rigged steady return that was always positive but never made a steady return and lost money both monthly and annually over a nearly three-decade span, also apart from the customers in that case).

c) Because the Trustee has sought and obtained a judgment against me for in excess of three times the amount of money I personally withdrew from the Madoff brokerage house in the two years prior to bankruptcy and did so based on the fact that I was a "partner" of an "investment business" that included solely close family

even though it is has been abundantly clear and known to him and his law firm since discovery in 2016-2017 that I simply co-invested with my family as could be seen in the tax returns produced to him and was not involved in a business for profit with them, ever. Nevertheless, and although the Trustee works in a fiduciary capacity, he knowingly and in said fiduciary capacity sought and obtained a judgment against me which he was aware was based on representations he made and knew were false when he alleged them in the District Court and in the Circuit Court.

d) Because my adversary has willingly engaged in selective prosecution by seeking to hold me responsible for the debts of another co-account holder whom he elected not to sue but instead sought redress against me for large sums of money withdrawn by that individual and not me (approximately 75% of what I personally withdrew). This was violative of my rights under equal protection as the Trustee is employed by a corporation that receives government funding and as such, if he establishes a classification of individuals who he believes are subject to claw backs based on classifications he himself established, he has no authority claw back selectively, especially if they are members of the same class which he established.

Respectfully submitted,

Malcolm Sage
Pro se
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February 14, 2024