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January 24, 2019

**BY ECF & EMAIL**

The Honorable Stuart M. Bernstein  
U.S. Bankruptcy Court for the Southern District of New York  
One Bowling Green, Courtroom 723  
New York, New York 10004-1408

Re: *SIPC v. Bernard L. Madoff Investment Securities LLC*, No. 08-1789 (SMB);  
*Picard v. Natixis Financial Products LLC*, No. 10-5353 (SMB)

Dear Judge Bernstein:

On behalf of defendant Natixis Financial Products LLC (as successor in interest to Natixis Financial Products Inc.) (“Natixis FP”) and in connection with the above-referenced action, we write to respectfully request a conference with the Court to address a streamlined procedure that will allow Natixis FP to respond directly to Plaintiff Irving H. Picard’s (the “Trustee”) proposed amended complaint (the “Amended Complaint”) – which is the subject of the Trustee’s Motion for Leave to File an Amended Complaint, filed on December 28, 2018 (the “Motion for Leave”) – in order to minimize motion practice and, thus, conserve the Court’s time and resources.

For background, in the summer/fall of 2018, the parties discussed the Trustee’s intention to amend his complaint in this adversary proceeding. At the time, Natixis FP was willing to consider consenting to the Trustee’s filing of an amended complaint, provided it had an opportunity to review the proposed amendments. The Trustee refused and instead proceeded to file the Motion for Leave. Currently, Natixis FP’s deadline to oppose the Motion for Leave is February 26, 2019. *See* Stipulation & Order entered on December 11, 2018, Dkt. No. 168. After the Court decides the Motion for Leave, Natixis FP can then move to dismiss the Amended Complaint. *See id.*

Subsequent to the Trustee’s filing the Motion for Leave, and Natixis FP’s reviewing the Amended Complaint for the first time, Natixis FP broached the idea of consenting to the Amended Complaint and proceeding directly to a motion to dismiss with an agreed upon briefing schedule. The Trustee responded that he would not be amenable to this approach unless Natixis FP agrees “that the as-filed proposed amended complaint meets the futility standard,” *see* email chain attached as Exhibit 1, which the Trustee would then use to attempt to negate Natixis FP’s motion to dismiss. In addition, the Trustee has even refused to consider a motion to dismiss in the form of a cross-motion to the Motion for Leave (under which, Natixis FP would request the opportunity to file a reply). *See* email chain attached as Exhibit 2.

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There is no support at all for the Trustee's position that as a condition to consenting to the filing of an amended complaint pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Rule 7015 of the Federal Rules of Bankruptcy Procedure, Natixis FP should somehow be required to concede that the Amended Complaint satisfies the futility standard that courts consider in connection with motions for leave to amend a complaint. Moreover, requiring Natixis FP to make such a concession would be prejudicial and could have a substantive impact on the motion to dismiss Natixis FP intends to file.

Accordingly, Natixis FP respectfully requests that the Court schedule a telephonic conference so that the Court can consider the process by which Natixis FP may now file a motion to dismiss, without conceding any of its rights or arguments as demanded by the Trustee, and set a briefing schedule that provides Natixis FP with sufficient time to respond to the 61-page Amended Complaint that contains wholly new allegations and references to more than 80 documents, including the opportunity to file a reply.

Respectfully submitted,

*/s/ James R. Serritella*

James R. Serritella

cc: Counsel for Trustee (by ECF and email)

# **Exhibit 1**

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**From:** Blattmachr, Jonathan <jblattmachr@bakerlaw.com>  
**Sent:** Tuesday, January 22, 2019 5:54 PM  
**To:** Ginsberg, Bruce  
**Cc:** Woltering, Catherine E.; Cioffi, Joseph; Serritella, James R.; Newman, H. Seiji  
**Subject:** RE: Motion for Leave to File Amended Complaint

Yes, that's what we're saying.

Jonathan D. Blattmachr  
212.589.4607 | [jblattmachr@bakerlaw.com](mailto:jblattmachr@bakerlaw.com)

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**From:** Ginsberg, Bruce <BGinsberg@dglaw.com>  
**Sent:** Tuesday, January 22, 2019 3:45 PM  
**To:** Blattmachr, Jonathan <jblattmachr@bakerlaw.com>  
**Cc:** Woltering, Catherine E. <cwoltering@bakerlaw.com>; Cioffi, Joseph <JCioffi@dglaw.com>; Serritella, James R. <jserritella@dglaw.com>; Newman, H. Seiji <hsnewman@dglaw.com>  
**Subject:** RE: Motion for Leave to File Amended Complaint

Jon - When you ask us "to agree that the as-filed proposed amended complaint meets the futility standard," are you referring to the following as the "futility standard": "An amendment to a pleading is futile if the proposed claim could not withstand a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)"? If yes, are you saying that you're demanding that Natixis stipulate that the proposed amended complaint could withstand a 12(b)(6) motion to dismiss?

**BRUCE M. GINSBERG**

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**From:** Blattmachr, Jonathan [<mailto:jblattmachr@bakerlaw.com>]  
**Sent:** Tuesday, January 22, 2019 2:09 PM  
**To:** Ginsberg, Bruce  
**Cc:** Woltering, Catherine E.; Cioffi, Joseph; Serritella, James R.; Newman, H. Seiji  
**Subject:** RE: Motion for Leave to File Amended Complaint

Bruce,

After discussing internally, we would be prepared to agree to your idea to allow the Trustee to file his complaint and then have you file a motion to dismiss, but only if you were to agree that the as-filed proposed amended complaint meets the futility standard. Please advise if you would be amenable.

Regards,  
Jon

Jonathan D. Blattmachr  
212.589.4607 | [jblattmachr@bakerlaw.com](mailto:jblattmachr@bakerlaw.com)

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**From:** Ginsberg, Bruce <[BGinsberg@dglaw.com](mailto:BGinsberg@dglaw.com)>  
**Sent:** Thursday, January 17, 2019 4:23 PM  
**To:** Blattmachr, Jonathan <[jblattmachr@bakerlaw.com](mailto:jblattmachr@bakerlaw.com)>  
**Cc:** Woltering, Catherine E. <[cwoltering@bakerlaw.com](mailto:cwoltering@bakerlaw.com)>; Cioffi, Joseph <[JCioffi@dglaw.com](mailto:JCioffi@dglaw.com)>; Serritella, James R. <[jserritella@dglaw.com](mailto:jserritella@dglaw.com)>; Newman, H. Seiji <[hsnewman@dglaw.com](mailto:hsnewman@dglaw.com)>  
**Subject:** Motion for Leave to File Amended Complaint

Jon,

Please let us know if you are available for a call tomorrow to discuss Natixis's response to the Trustee's motion for leave to amend and a potential solution to streamline the process.

We are generally available tomorrow from 11:00 am on.

Regards,

**BRUCE M. GINSBERG**

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## **Exhibit 2**

**From:** Blattmachr, Jonathan <jblattmachr@bakerlaw.com>  
**Sent:** Monday, January 07, 2019 12:59 PM  
**To:** Ginsberg, Bruce; Woltering, Catherine E.  
**Cc:** Levy, Adam  
**Subject:** RE: Motion for Leave to File Amended Complaint

Bruce,

We do not consent to combining the Trustee's Motion for Leave to Amend and a motion to dismiss. We offered you in August the opportunity to deal with this on a motion to dismiss instead of the leave to amend, but you turned it down. Our team spent a lot of time and effort on the motion for leave and it should be dealt with now. Further to that, the Court was adamant about moving things along with respect to this motion, so we want to expeditiously move forward on it.

Regards,  
Jon

Jonathan D. Blattmachr  
212.589.4607 | [jblattmachr@bakerlaw.com](mailto:jblattmachr@bakerlaw.com)

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**From:** Ginsberg, Bruce <BGinsberg@dglaw.com>  
**Sent:** Friday, January 04, 2019 4:14 PM  
**To:** Blattmachr, Jonathan <jblattmachr@bakerlaw.com>; Woltering, Catherine E. <cwoltering@bakerlaw.com>  
**Cc:** Levy, Adam <alevy@dglaw.com>  
**Subject:** RE: Motion for Leave to File Amended Complaint

Jon and Cat,

Regardless of how the court decides the Trustee's motion for leave to amend, the next step in the litigation, as contemplated by the parties' stipulation, will be for defendants to move to dismiss. Although each motion obviously seeks different relief, the motions likely will raise overlapping substantive arguments. As such, bringing both motions now will be more efficient, conserve resources, and expedite resolution of issues that the court will have to address no matter what. It is precisely for these reasons that courts will direct a defendant to make its motion to dismiss an amended complaint as a cross-motion to a plaintiff's motion to amend.

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**From:** Blattmachr, Jonathan [<mailto:jblattmachr@bakerlaw.com>]  
**Sent:** Friday, January 04, 2019 10:55 AM  
**To:** Ginsberg, Bruce; Woltering, Catherine E.  
**Cc:** Levy, Adam  
**Subject:** RE: Motion for Leave to File Amended Complaint

Bruce,

Regarding our call yesterday, we would like to understand the purpose of your proposed combination of a motion to dismiss and the Trustee's Motion for Leave to Amend. Specifically, could you please articulate what issues you would need to address in a motion to dismiss that could not be addressed in connection with the Trustee's motion?

Thanks,  
Jon

Jonathan D. Blattmachr  
212.589.4607 | [jblattmachr@bakerlaw.com](mailto:jblattmachr@bakerlaw.com)

---

**From:** Ginsberg, Bruce <[BGinsberg@dglaw.com](mailto:BGinsberg@dglaw.com)>  
**Sent:** Thursday, January 03, 2019 11:44 AM  
**To:** Blattmachr, Jonathan <[jblattmachr@bakerlaw.com](mailto:jblattmachr@bakerlaw.com)>; Woltering, Catherine E. <[cwoltering@bakerlaw.com](mailto:cwoltering@bakerlaw.com)>  
**Cc:** Levy, Adam <[alevy@dglaw.com](mailto:alevy@dglaw.com)>  
**Subject:** RE: Motion for Leave to File Amended Complaint

Will do.

**BRUCE M. GINSBERG**

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**From:** Blattmachr, Jonathan [<mailto:jblattmachr@bakerlaw.com>]  
**Sent:** Thursday, January 03, 2019 11:43 AM  
**To:** Ginsberg, Bruce; Woltering, Catherine E.  
**Cc:** Levy, Adam  
**Subject:** RE: Motion for Leave to File Amended Complaint

Bruce:

4pm today works. Please use the following for the call:

866-468-2930  
Code: 212 589 4607

Thanks,  
Jon

Jonathan D. Blattmachr  
212.589.4607 | [jblattmachr@bakerlaw.com](mailto:jblattmachr@bakerlaw.com)

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**From:** Ginsberg, Bruce <[BGinsberg@dglaw.com](mailto:BGinsberg@dglaw.com)>  
**Sent:** Thursday, January 03, 2019 11:35 AM  
**To:** Woltering, Catherine E. <[cwoltering@bakerlaw.com](mailto:cwoltering@bakerlaw.com)>; Blattmachr, Jonathan <[jblattmachr@bakerlaw.com](mailto:jblattmachr@bakerlaw.com)>  
**Cc:** Levy, Adam <[alevy@dglaw.com](mailto:alevy@dglaw.com)>  
**Subject:** Motion for Leave to File Amended Complaint

Cat and Jon,

We'd like to run something by you. Is it possible to schedule a call for 2 or 4pm today? If not, how about 11am tomorrow?

Regards,

**BRUCE M. GINSBERG**

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