UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THE LAUTENBERG FOUNDATION, JOSHUA S. LAUTENBERG and ELLEN LAUTENBERG, Plaintiffs, -against- PETER MADOFF, Defendants.	Civil Action No.: 09-00816 (SRC) (MCA) ***Document electronically filed.***

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
THEIR MOTION FOR SUMMARY JUDGMENT
AS TO COUNT THREE OF PLAINTIFFS' COMPLAINT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 3

A. Madoff's Employment And Securities Background 3

B. Facts Admitted By BMIS In Its SEC Filing As An Investment Advisor 4

C. Bernard Madoff Confesses To The BMIS Ponzi Scheme And Violations Of Federal Securities Law. 4

D. BMIS' Securities Violations As Found By The Court At His Sentencing. 6

E. Red Flags About BMIS' Business Practices That Were Reported In 2001 By Reputable Financial Periodicals. 6

(1) Barron's Article 6

(2) MAR/Hedge Article 7

F. Facts Learned From SEC Investigations And Reports About Peter Madoff's Culpable Participation In The Ponzi Scheme 9

G. Facts Learned From The Markopolos Complaint 14

H. Exorbitant Profits Received By Peter Madoff From His Personal BMIS Accounts. 15

I. Madoff Invokes the Fifth Amendment On A Blanket Basis At His Deposition. 15

J. Plaintiffs' Losses As Victims Of the BMIS Ponzi Scheme 17

LEGAL ARGUMENT 18

POINT II PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON COUNT THREE OF THEIR COMPLAINT BECAUSE MADOFF VIOLATED SECTION 20(A) OF THE 1934 SECURITIESEXCHANGE ACT. 18

A. Standard Governing Motions for Summary Judgment 18

B. Plaintiffs Are Entitled To An Adverse Inference Based On Madoff's Assertion Of The Fifth Amendment During His Deposition. 19

C. The Substantial Undisputed Evidence Combined With The Adverse Inferences Drawn Against Madoff With Respect To His Culpable Participation In A Massive Ponzi Scheme Are More Than Sufficient To Warrant Entry Of Summary Judgment As To Count Three Of Plaintiffs' Complaint. 22

(1) Madoff was a Control Person of BMIS 23

TABLE OF CONTENTS
(continued)

Page

(2) BMIS Committed Primary Violations of the Securities Laws 23

(3) Substantial Undisputed Evidence Combined With the Adverse Inference To Be Drawn Against Madoff Show Madoff Was A Culpable Participant In The Ponzi Scheme. 24

(4) There is No Evidence of Record To Support A Finding of Good Faith. 26

D. Plaintiffs Are Entitled To Summary Judgment In The Amount Of Their Losses Proximately Resulting From Madoff's Ponzi Scheme 26

CONCLUSION.. 27

TABLE OF AUTHORITIES

PAGE(S)

CASES

Abraham v. Raso,
183 F.3d 279 (3d Cir. 1999) 18

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986).................................... 18

Baxter v. Palmigiano,
425 U.S. 308 (1976).................................... 20

Celotex Corp. v. Catrett,
477 U.S. 317 (1986).................................... 18

Cho v. Holland,
04-c-5227, 2006 WL 2859453 (N. D. Ill. Oct. 3, 2006) 21

G.A. Thompson & Co., Inc. v. Partridge,
636 F.2d 945 (5 Cir. 1981) 25

Henricksen v Henricksen,
640 F.2d 880 (7th Cir. 1981) 25

Interstate Commerce Comm'n v. Gould,
629 F.2d 847 (3d Cir. 1980) 19

Kravitz v. Pressman, Frohlich & Frost, Inc.,
447 F. Supp. 203 (D. Mass. 1978).................................... 25

Lapin v. Goldman Sachs Group, Inc.,
506 F. Supp. 2d 221 (S.D.N.Y. 2006) 24

National Life Ins. Co. v. Hartford Acc. & Indem Co.,
615 F.2d 595 (3d Cir. 1980) 19

Ridgewood Bd. of Educ. v. N.E. for M.E.,
172 F.3d 238 (3d Cir. 1999) 19

Rochez Bros., Inc. v. Rhoades,
527 F.2d 880 (3d Cir. 1975) 22, 24

SEC v. Chester Holdings, Ltd.,
41 F. Supp. 2d 505 (D.N.J. 1999).................................... 19, 20, 22, 26

SEC v. Colello,
139 F.3d 674 (9th Cir. 1998) 19, 21, 26

SEC v. Graystone Nash, Inc.,
25 F.3d 187 (3d Cir. 1994) 20

SEC v. Martino,
255 F. Supp. 2d 268 (S.D.N.Y. 2003) 21

SEC v. Pasternak,
561 F. Supp. 2d 459 (D. N.J. 2008) 23, 24, 26

Sterling Nat'l Mortg. Co. v. Mortgage Corner,
97 F.3d 39 (3d Cir. 1996) 19

United States v. One Million Three Hundred Twenty-Two Thousand Two Hundred Forty-Two Dollars & Fifty-Eight Cents,
938 F.2d 433 (3d Cir. 1991) 19

STATUTES

15 U.S.C. § 78t(a) 22

OTHER AUTHORITIES

Bromberg & Lowenfels On Securities Fraud and Commodities Fraud § 7:348-349 22

Massey,
Control Person Liability Under Section 20(A): Striking A Balance Of Interests For Plaintiffs And Defendants, 2005 Houston Business and Tax Law Journal, 109 22

RULES

Fed. R. Civ. P. 56(e) 18

Federal Rule of Civil Procedure 56(c) 18

This memorandum of law is respectfully submitted on behalf of Plaintiffs The Lautenberg Foundation, Joshua S. Lautenberg and Ellen Lautenberg ("Plaintiffs") in support of their motion for summary judgment against Defendant Peter Madoff ("Madoff") with respect to Count Three of Plaintiffs' Complaint.

PRELIMINARY STATEMENT

On September 9, 2009, this Court rendered a detailed Opinion (the "Opinion") upholding the legal sufficiency of almost all of the claims asserted in Plaintiffs' Complaint, including Plaintiffs' claim in Count Three for control person liability under Section 20(a) of the Exchange Act. As set forth in the Opinion, "the elements of a Section 20(a), or 'control person' claim are as follows: (1) the defendant controlled another person or entity; (2) the controlled person or entity committed a primary violation of the securities laws; and (3) the defendant was a culpable participant in the fraud." Opinion at 24. The Opinion then states that once the "plaintiff establishes a *prima facie* claim under Section 20(a), the burden shifts to defendant to show that he acted in good faith." *Id.* at 24-25.

Plaintiffs now seek summary judgment with respect to Count Three. As demonstrated more fully *infra*, based on the undisputed evidence in support of this motion combined with the adverse inference resulting from Madoff's blanket invocation of the Fifth Amendment, there are no genuine issues of material fact that: (1) Madoff controlled Bernard L. Madoff Investment Securities, LLC ("BMIS"), (2) BMIS committed multiple violations of the Exchange Act, and (3) Madoff was a culpable participant in the commission of the underlying Exchange Act violations. Madoff has not because he cannot show that he acted in good faith.

With regard to the first element (control person), Madoff admits that BMIS filed with the SEC a Uniform Application for Investment Adviser Registration. In that SEC Form, Madoff is listed as a controlling person, indeed as *one of only two* controlling persons of BMIS along with his brother Bernard Madoff.

With regard to the second element (underlying Exchange Act violation), Bernard Madoff, admitted in open court that for approximately 20 years, up until his arrest on December 11, 2008, BMIS operated a multi-billion dollar Ponzi scheme.

With regard to the third element (Madoff's culpable participation), there is no genuine issue of material fact that Madoff was a culpable participant in the fraud. As demonstrated by the evidence set forth herein combined with the adverse inferences against Madoff stemming from his invocation of the Fifth Amendment, it is clear that Madoff knew or should have known that, for a period of twenty years, BMIS committed the largest financial fraud in American history by bilking charities, foundations, pensions, hospitals and other investors of billions of dollars.

Madoff was not only a BMIS control person he was also Chief Compliance Officer, Director of Trading, Senior Managing Director, and General Counsel of BMIS. In his capacity as Chief Compliance Officer, it cannot be disputed that Madoff had a legal duty to administer and enforce the compliance policies and procedures of BMIS as well as to identify and address significant compliance problems. In addition, as Chief Compliance Officer, Madoff had to have expertise in the process of gaining an understanding of the products, services, or line functions that needed to be the subject of written compliance policies.

When given the opportunity to show his good faith and non-culpable participation in the BMIS Ponzi scheme, Madoff elected to invoke the Fifth Amendment on a blanket basis. When asked about the red flags concerning BMIS' business practices about which he had to have had direct knowledge, his direct interactions with the SEC, the statistically impossible large returns purportedly earned by BMIS investors, his own huge profits from his personal BMIS accounts, and his brother's admission that BMIS's investment advisory business was nothing more than a 20 year-old multi-billion dollar Ponzi scheme, Madoff again elected to invoke the Fifth Amendment.

The undisputed evidence put forward by Plaintiffs combined with the adverse inferences resulting from his invocation of the Fifth Amendment, in lieu of giving factual answers to material questions presented to him at his deposition, establish that Madoff was a culpable participant in BMIS' Ponzi scheme in violation of Section 20(a). Accordingly, all of the elements needed to be satisfied to establish Section 20(a) liability – control person, underlying Exchange Act violations and culpable participation – are present here. Plaintiffs, therefore, are entitled to summary judgment.

STATEMENT OF FACTS

A. Madoff's Employment And Securities Background.

Madoff worked at BMIS (or its predecessor) from approximately June 1969 until December 2008. *See* Declaration of Ronald J. Riccio, dated March 12, 2010 ("Riccio Dec."), submitted herewith, Exhibit B at ¶11. Madoff is the brother of Bernard L. Madoff. *Id.* BMIS had offices on the 17th-19th floors of the building located at 885 Third Avenue, New York, NY. *Id.* at ¶7. At various times, Madoff was a senior managing director and Chief Compliance Officer at BMIS. *Id.* at ¶14.[1] In addition to being an attorney, Madoff formerly served as vice chairman of the NASD, a member of its board of governors and chairman of its New York region. *Id.* at ¶15. Madoff was also a member of the NASDAQ stock market board of governors, its executive committee and chairman of its trading committee. *Id.* In addition, Madoff is past president of the Securities Traders Association of New York, a member of the board of directors of the Depository Trust and Clearing Corp, and a member of the board of the Securities Industry Association. *Id.* *See also* SMF at ¶5.

[1] In BMIS' sale literature, Madoff is identified as "the" senior managing director. *See* Riccio Dec., Exchibit C at 1; Plaintiffs Statement of Material Facts ("SMF"), submitted herewith, at n.1.

B. Facts Admitted By BMIS In Its SEC Filing As An Investment Advisor.

Madoff admitted that BMIS filed on or about January 7, 2008, with the SEC a Uniform Application for Investment Adviser Registration ("Form ADV"). *See* Riccio Dec., Exhibit B at ¶11 and Exhibit D. The Form ADV contains the following information:

(a) there are only one to five employees at BMIS engaged in an investment advisory function. *See* Riccio Dec., Exhibit D at p. 7.

(b) BMIS's compensation arrangement for investment advisory services is only on a commissions basis and not, for example, as a percentage of assets under management. *Id.* at p. 8.

(c) BMIS held over $1.7 billion under management on a fully discretionary basis. *Id.*

(d) BMIS provides portfolio management for individual and/or small businesses as well as for businesses or institutional clients. *Id.*

(e) BMIS had custody of cash or bank accounts and securities of its advisory clients. *Id.* at p. 13.

(f) Madoff was Chief Compliance Officer and the Director of Trading at BMIS since June 1969. *Id* at p. 20.

(g) Bernard Madoff and Madoff are the only two controlling persons of BMIS. *Id.* (designating Bernard Madoff and Madoff as controlling persons); *see also id.* at pp. 21 and 23 (no further designation of any other controlling person).

See SMF ¶6.

C. Bernard Madoff Confesses To The BMIS Ponzi Scheme And Violations Of Federal Securities Law.

Bernard Madoff confessed in open court that "for many years until [his] arrest on December 11, 2008, [he] operated a Ponzi scheme through the investment advisory side of [BMIS]." Riccio Dec., Exhibit E at p. 23. Bernard Madoff explained that he "represented to clients and prospective clients who wished to open investment advisory and individual trading accounts with [him] that [he] would invest their money in shares of common stock, options, and other securities of large well-known corporations, and upon request, would return to them their

profits and principal." *Id.* at p. 24. Despite such representation, during an approximate twenty year span (*id.* at p. 25), the funds thought by the investors to be invested in securities were "*never* invested" but were merely deposited in a bank account in Chase Manhattan Bank. *Id.* at p. 24. Moreover, Bernard Madoff admitted that when BMIS "clients wished to receive the profits they believe they had earned . . . [he] used the money in the Chase Manhattan bank account that belonged to them or other clients to pay the requested funds." *Id.* The victims of BMIS' Ponzi scheme included "individuals, charitable organizations, trusts, pension funds, and hedge funds." *Id. See also* SMF ¶7.

Bernard Madoff admitted that the previously famous, now infamous, "split strike conversion strategy" that he said was the reason for his purported success was a complete sham and that he "never made those investments." Riccio Dec., Exhibit E at pp. 25-26. Bernard Madoff further admitted that the SEC had investigated the investment advisory business of BMIS in 2006 and that he testified falsely under oath to the SEC advising them that he executed trades of common stock, purchased and sold equities in European markets, and executed options contracts, all on behalf of the investment advisory clients when in fact no such transactions ever took place. *Id.* at pp. 26-27. *See also* SMF ¶8.

In an attempt to hide the fact that BMIS never executed any trades whatsoever on behalf of the investment advisory clients of BMIS, Bernard Madoff admitted that clients received statements and confirmations that were totally false and reflected fictional, bogus transactions. In an attempt to further conceal the fraud, BMIS filed false and misleading certified annual reports and financial statements with the SEC. *Id.* at pp. 27-28. *See also* SMF ¶9.

During the entire time that BMIS operated, in the words of Bernard Madoff, a Ponzi scheme, his brother Peter was Bernard's co-control person, General Counsel, Senior Managing Director and Chief of Compliance for BMIS. And when given the chance to exculpate himself of wrongdoing, Peter Madoff invoked the Fifth Amendment on a blanket basis more than 250 times.

D. BMIS' Securities Violations As Found By The Court At His Sentencing.

When Bernard Madoff was sentenced on June 29, 2009 to 150 years in prison, Judge Chin found that the "breach of trust was massive." Riccio Dec., Exhibit F at p. 44. Specifically, Judge Chin found that "[i]nvestors – individuals, charities, pension funds, institutional clients – were repeatedly lied to, as they were told their moneys would be invested in stocks when they were not." *Id.* The Court further found that BMIS clients were sent millions of pages of account statements confirming trades that never existed and that Bernard Madoff repeatedly lied to the SEC. *Id.* *See also* SMF ¶10.

E. Red Flags About BMIS' Business Practices That Were Reported In 2001 By Reputable Financial Periodicals.

(1) Barron's Article

While Bernard Madoff only admitted to the fact that the investment advisory business of BMIS was a multi-billion dollar Ponzi scheme in December 2008 (Riccio Dec., Exhibit G at p. 4), there had been a number of news articles published in 2001 raising red flags regarding the business practices of BMIS. For example, the financial periodical, Barron's, published an article on May 27, 2001 entitled "Don't Ask, Don't Tell: Bernie Madoff is so secretive, he even asks his investors to keep mum." Riccio Dec., Exhibit H. *See also* SMF ¶11(a).

The Barron's May 2001 article identified the following red flags about BMIS:

i. It manages more than $6 billion for wealthy individuals, rendering it one of the five largest hedge funds. *See* Riccio Dec., Exhibit H at p. 1.

ii. It has "produced compound average annual returns of 15% or more for more than a decade. Remarkably, some of the larger billion-dollar Madoff-run funds have never had a down year." *Id.*

iii. "When Barron's asked [Bernard L.] Madoff how he accomplishes this, he says, 'It's a proprietary strategy. I can't go into it in great detail.' Nor were the firms that market Madoff's funds forthcoming." *Id.*

iv. A former BMIS investor stated that "Anybody who's a seasoned hedge-fund investor knows the 'split strike conversion' [strategy described in a

hedge fund offering memorandum of BMIS] is not the whole story." *Id.* at p. 2.

v. Three options strategists for major investment banks told Barron's "they couldn't understand how [Bernard L.] Madoff churns out such numbers using this strategy." *Id.*

vi. Some on Wall Street "remain skeptical about how [Bernard] Madoff achieves such double-digit returns using" the split strike conversion strategy. *Id.*

vii. BMIS charges no fees for its money management services and only earns commissions on the trades. *Id.*

viii. BMIS investors "don't understand" how BMIS performs consistently well. *Id.*

ix. Bernard Madoff "requests that his investors not reveal that he runs their money." *Id.*

x. One investment manager stated that Bernard Madoff told him that when you invest with him, you should never reveal that publicly and that when Bernard Madoff could not explain to his satisfaction "how they were up or down in a particular period," he pulled his money out. *Id.*

See also SMF ¶11(b). Madoff was asked at his deposition if he saw the article about the time it appeared in public print. In response to that question, he asserted the Fifth Amendment. *See* Riccio Dec., Exhibit W at 83:3-84:3.

(2) <u>MAR/Hedge Article</u>

In May 2001, an article by Michael Ocrant in MAR/Hedge (the "MAR/Hedge Article"), a widely circulated semi-monthly financial newsletter, revealed similar red flags regarding the operations of BMIS. *See* Riccio Dec., Exhibit I; SMF ¶12(a). For example, the MAR/Hedge Article disclosed the following:

i. BMIS, with its $6-7 billion in assets under management is "at or near the top" of any well-known database [for hedge funds] defined by assets. Riccio Dec., Exhibit I at p. 1.

ii. "Most of those who are aware of [BMIS'] status in the hedge fund world are baffled by the way the firm has obtained such consistent, nonvolatile returns month after month and year after year." *Id.*

iii. "[BMIS] has reported positive returns for the last 11-plus years in assets managed on behalf of the feeder fund known as Fairfield Sentry." *Id.*

iv. "Those who question the consistency of the returns . . . include current and former traders, other money managers, consultants, quantitative analysts and fund-of-funds executives, many of whom are familiar with the so-called split-strike conversion strategy used to manage the assets." *Id.*

v. These individuals "noted that others who use or have used the strategy . . . are known to have had nowhere near the same degree of success." *Id.*

vi. "The best known entity using a similar strategy, a publicly traded mutual fund dating from 1978 called Gateway, has experienced far greater volatility and lower returns during the same period." *Id.* at p. 2.

vii. "Skeptics who express a mixture of amazement, fascination and curiosity about the program wonder, first, about the relative complete lack of volatility in the reported monthly returns." *Id.*

viii. "Experts ask why no one has been able to duplicate similar returns using the strategy. . . [and] why [BMIS] is willing to earn commissions off the trades but not set up a separate asset management division to offer hedge funds directly to investors and keep all the incentive fees for itself." *Id.*

ix. In explaining the success of BMIS, Bernard Madoff in an interview with MAR/Hedge "pointed to long experience, excellent technology that provides superb and low-cost execution capabilities, good proprietary stock and options pricing models, well established infrastructure, market making ability and market intelligence derived from the massive amount of order flow it handles each day." *Id.* at p. 3.

x. "The strategy and trading, [Bernard Madoff] says, are done mostly by signals from a proprietary 'black box' system that allows for human intervention to take into account the 'gut feel' of the firm's professionals. 'I don't want to get on an airplane without a pilot in the seat,' says [Bernard] Madoff. 'I only trust the autopilot so much.'" *Id.* at pp. 3-4.

xi. "As for the specifics of how the firm manages risk and limits the market impact of moving so much capital in and out of positions, [Bernard] Madoff responds first by saying, 'I'm not interested in educating the world on our strategy, and I won't get into the nuances of how we manage risk.'" *Id.* at p. 4.

xii. "[Bernard] Madoff, who believes that he deserves 'some credibility as a trader for 40 years,' says: 'the strategy is the strategy and the returns are the returns.' He suggests that those who believe there is something more to it and are seeking an answer beyond that are wasting their time." *Id.* at p. 5.

See also SMF ¶12(b). Again, Madoff was asked at his deposition if he saw the article about the time it appeared in public print. In response to that question, he asserted the Fifth Amendment. *See* Riccio Dec., Exhibit W at 83:3-84:3.

For Peter Madoff to be unaware of either or both of these financial publications at the time they were published defies common sense. These publications receive widespread circulation in the world of finance and referenced red flags concerning the business practices of the entity Peter Madoff not only controlled but in which he personally had two accounts that yielded exorbitant profits for himself. To suggest he didn't know about these articles would be ridiculous.

F. Facts Learned From SEC Investigations And Reports About Peter Madoff's Culpable Participation In The Ponzi Scheme.

On August 31, 2009, the SEC Office of Inspector General issued a Report (the "OIG Report") regarding the failure of the SEC to uncover the BMIS Ponzi scheme. *See* Riccio Dec., Exhibit J. The OIG Report found that the SEC received "detailed and substantive complaints over the years to warrant a thorough and comprehensive examination and/or investigation of Bernard Madoff and BMIS for operating a Ponzi scheme." *Id.* at p. 20-21. Between June 1992 and the date in December 2008 when Bernard Madoff confessed, the SEC reported six substantive complaints (one of which came in three different versions from 2000-2005 from Harry Markopolos and will be discussed in further detail below) that raised significant red flags concerning BMIS operations. *Id.* at p. 22. *See also* SMF ¶13.

Notwithstanding the fact that the SEC – despite three examinations and two investigations conducted of BMIS – never performed what the OIG labeled as a "thorough and competent investigation or examination" of BMIS, the facts learned from the OIG Report regarding numerous red flags are highly relevant to this motion for at least two reasons. First, as demonstrated below, the OIG Report recounts how the SEC conducted multiple examinations and investigations of BMIS and in connection therewith interacted with Peter Madoff in his

capacity the Chief Compliance Officer of BMIS. Second, it is simply unimaginable that many if not all of the red flags raised in the complaints sent to the SEC and referenced in the OIG Report were not already known to Peter Madoff as he was, for many years, the Chief Compliance Officer of BMIS, one of only two controlling persons there, the senior managing director, General Counsel, and an investor earning huge returns for himself.

The following is a summary taken from the OIG Report of the six complaints sent to the SEC that raised red flags regarding BMIS:

> The first complaint, brought to the SEC's attention in 1992, related to allegations that an unregistered investment company was offering "100%" safe investments with high and extremely consistent rates of return over significant periods of time to "special" customers. The SEC actually suspected the investment company was operating a Ponzi scheme and learned in their investigation that all of the investments were placed entirely through [Bernard] Madoff and consistent returns were claimed to have been achieved for numerous years without a single loss.
>
> The second complaint was very specific and different versions were provided to the SEC in May 2000, March 2001 and October 2005. The complaint submitted in 2005 was entitled "The World's Largest Hedge Fund is a Fraud" and detailed approximately 30 red flags indicating that [Bernard] Madoff was operating a Ponzi scheme, a scenario it described as "highly likely." The red flags included the impossibility of [Bernard] Madoff's returns, particularly the consistency of those returns and the unrealistic volume of options [Bernard] Madoff represented to have traded.
>
> In May 2003, the SEC received a third complaint from a respected Hedge Fund Manager identifying numerous concerns about [Bernard] Madoff's strategy and purported returns, questioning whether [Bernard] Madoff was actually trading options in the volume he claimed, noting that [Bernard] Madoff's strategy and purported returns were not duplicable by anyone else, and stating [Bernard] Madoff's strategy had no correlation to the overall equity markets in over 10 years. According to an SEC manager, the Hedge Fund Manager's complaint laid out issues that were "indicia of a Ponzi scheme."
>
> The fourth complaint was part of a series of internal e-mails of another registrant that the SEC discovered in April 2004. The e-mails described the red flags that a registrant's employees had identified while performing due diligence on their own [Bernard] Madoff investment using publicly-available information. The red flags identified included [Bernard] Madoff's incredible and highly unusual fills for equity trades, his misrepresentation of his options trading and his unusually consistent, non-volatile returns over several years. One of the internal e-mails provided a step-by-step analysis of why [Bernard] Madoff must be misrepresenting his options trading. The e-mail clearly explained that [Bernard] Madoff could not be trading on an options

exchange because of insufficient volume and could not be trading options over-the-counter because it was inconceivable that he could find a counterparty for the trading. The SEC examiners who initially discovered the e-mails viewed them as indicating "some suspicion as to whether [Bernard] Madoff is trading at all."

The fifth complaint was received by the SEC in October 2005 from an anonymous informant and stated, "I know that Madoff [sic] company is very secretive about their operations and they refuse to disclose anything. If my suspicions are true, then they are running a highly sophisticated scheme on a massive scale. And they have been doing it for a long time." The informant also stated, "After a short period of time, I decided to withdraw all my money (over $5 million)."

The sixth complaint was sent to the SEC by a "concerned citizen" in December 2006, advising the SEC to look into [Bernard] Madoff and his firm as follows:

> Your attention is directed to a scandal of major proportion which was executed by the investment firm Bernard L. Madoff . . . . Assets well in excess of $10 Billion owned by the late [investor], an ultra-wealthy long time client of the Madoff firm have been "co-mingled" with funds controlled by the Madoff company with gains thereon retained by Madoff.

In March 2008, the SEC Chairman's office received a second copy of the previous complaint, with additional information from the same source regarding [Bernard] Madoff's involvement with the investor's money, as follows:

It may be of interest to you to that Mr. Bernard Madoff keeps two (2) sets of records. The most interesting of which is on his computer which is always on his person.

See Riccio Dec., Exhibit J at pp. 21-22; SMF ¶14.

While Bernard Madoff interacted with the SEC in connection with its investigations and examinations, so did his brother Peter Madoff. For example, several document requests were directed by the SEC not to Bernard but to Peter Madoff, in his capacity as Chief Compliance Officer. In one document request, dated January 6, 2004, the SEC sought the following information and documents to be produced by January 21, 2004:

1. For the time period of January 1, 2001 through the present, provide the following:

    a. monthly profit and loss statements by security (to be provided electronically in an Excel spreadsheet);
    b. monthly commission revenues segregated by customer and by security (to be provided electronically in an Excel spreadsheet);

c. identity of all institutional customers of Madoff Securities;
d. all commission rates charged to institutional customers, including any changes to those commission rates, the customers charged those rates, and the monthly totals of commissions paid by customer;
e. a detailed organizational chart of Madoff Securities; and
f. the identity of each private equity investment held by [BMIS], including, but not limited to, a description of the investment vehicle (including whether or not the entity is a hedge fund), the amount invested, the ownership interest of the investment, the date of the investment, the date the investment was either sold or transferred, and any relationship between the investment vehicle or its affiliates and [BMIS].

2. Describe the "split-strike forward conversion" strategy used by some customers of [BMIS], list the customers using that strategy, list all securities traded as part of that strategy, and explain how [BMIS] is compensated for executing that strategy. Provide copies of communications and disclosures from the customers using the strategy to the investors or owners, or any prospective investors or owners, since January 1, 2001.

3. Identify all hedge funds managed or advised by any person or entity affiliated with [BMIS], and include the name of each fund, the identification of all advisers and managers of each fund, all affiliated entities of each fund, the investment objective and strategy of each fund, and all investors or owners of each fund since January 1, 2001.

See Riccio Dec., Exhibit K; SMF ¶15.

Similarly, on February 18, 2004, the SEC sent the following request addressed to Peter Madoff, Chief Compliance Officer of BMIS, demanding that the following information be given to the SEC on or before March 3, 2004:

1. For the time period January 2001 through the present, provide all written communications between [BMIS] and those clients utilizing the split-strike forward conversion strategy, their affiliates, subsidiaries, agents, investors, or owners, including, but not limited to, correspondence, reports, memoranda, account statements, and e-mails.

2. For the time period January 2001 through the present, provide the following documents and information relating to the accounts of those clients of [BMIS] utilizing the split-strike forward conversion strategy:

a. Records of all transactions (to the extent not already provided in the account statements and summaries);
b. Reports (internal or otherwise) identifying profits, losses, expenses, fees, or commissions or any monies equivalent to commissions (e.g., "commission equivalent"); and
c. Memoranda and reports relating to trading strategies, investment strategies, or research.

3. Provide the following documents relating to any client of [BMIS] utilizing the split-strike forward document conversion strategy:

a. Agreements (including prime brokerage agreements and options trading agreements), and any amendments thereto;
b. New account opening documents, including any documents attached thereto, and any subsequently received documents relating to the new account opening;
c. Corporate and partnership documents; and
d. Trading authorizations.

See Riccio Dec., Exhibit L; SMF ¶16. The SEC also sent document requests directed to Peter Madoff in 2003 as well. *See* Riccio Dec., Exhibit M; SMF ¶17.

In addition to the document requests directed to Madoff, during the course of the SEC's examinations and investigations of BMIS, the SEC interviewed and spoke with Peter Madoff in his capacity as Chief Compliance Officer. Sometimes the principal contact person for the SEC was Madoff (*see*, *e.g.*, Riccio Dec., Exhibit N at p. 31; Riccio Dec., Exhibit O at pp. 72-73) and sometimes the SEC met with both Madoff and his brother (*see*, *e.g.*, Riccio Dec., Exhibit P; Exhibit Q at n. 1; Exhibit R at 2). One of these interviews took place as far back as 1993. *See* Riccio Dec., Exhibit S at pp. 1, n.3, 15. *See also* SMF ¶18.

Finally, in addition to the investigations conducted by the SEC, the OIG also cited to a report from the NASD concerning an investigation it did of BMIS. *See* OIG Report at 175-176. According to the NASD Report, "Bernard Madoff and **Peter Madoff** are involved in every aspect of the Firm's Business." *See* Riccio Dec., Exhibit T at p. 10 (emphasis added). The NASD also notes that Madoff is a minority owner of BMIS. *Id.* at p. 2. Finally, the report notes

that since June 1969, Madoff has been responsible for General Compliance and Written Supervisory Procedures. *Id.* *See also* SMF ¶19.

G. Facts Learned From The Markopolos Complaint.

One of the complaints referenced above that was sent to the SEC came from Harry Markopolos. After sending earlier versions of this complaint in May 2000 and March 2001, Markopolos sent a revised version to the SEC, dated November 7, 2005, entitled "World's Largest Hedge Fund is a Fraud" (the "Markopolos Complaint"). The Markopolos Complaint details approximately 30 red flags indicating that the investment advisory side of BMIS was in all probability a multi-billion dollar Ponzi scheme. *See* Riccio Dec., Exhibit U; SMF ¶20.

The red flags raised by the Markopolos Complaint generally fell into one of three categories: (1) the obsessive secrecy surrounding BMIS, (2) the statistical impossibility of the returns recorded by BMIS, particularly the consistency of those returns, and (3) the unrealistic volume of options BMIS was supposedly trading. *See* Riccio Dec., Exhibit U. For example, one of the red flags raised in the Markopolos Complaint was that BMIS does not permit "outside performance audits" and that when one hedge fund asked to send in a team of "Big 4" accountants to conduct an audit of BMIS, it was told that only the brother-in-law of Bernard Madoff, who has his own accounting firm, is allowed to audit BMIS. *Id.* at p. 10. Another red flag raised in the Markopolos Complaint was that only Bernard Madoff family members were privy to the investment strategy. *Id.* at p. 12. *See* SMF ¶21.

Madoff was asked at his deposition if he was aware of the Markopolos Complaint, the 30 red flags Markopolos identified, and whether he consciously avoided doing anything about those red flags. In response to each of these questions, Madoff asserted the Fifth Amendment. *See* Riccio Dec., Exhibit W at 77:21-78:20.

H. Exorbitant Profits Received By Peter Madoff From His Personal BMIS Accounts.

The Trustee for the liquidation of the business of BMIS under the Securities Investor Protection Act (the "Trustee") found that from 2001-2008, Madoff was paid $20,067,920 in salary and bonus from BMIS. Riccio Dec., Exhibit V at ¶65. In addition, Madoff had two of his own customer accounts in BMIS. *Id.* at ¶66. Madoff invested $32,146 in these two accounts – including only *fourteen dollars* after December 1995 – and yet he redeemed $16,252,004. *Id. See also* SMF ¶22.

The Trustee further found one account reflected a gain of $8,752,620 in a March 2002 statement despite the fact that there was *no* money or securities invested in that account and less than two months later Madoff redeemed nearly six million dollars from this account. *See* Riccio Dec., Exhibit V at ¶67. In addition, between April 2003 and May 2005, Madoff withdrew an additional $6.9 million. *Id.* at ¶68. *See also* SMF ¶23.

I. Madoff Invokes the Fifth Amendment On A Blanket Basis At His Deposition.

Pursuant to Magistrate Judge Arleo's November 6, 2009 order, Madoff was required to appear for a deposition. Madoff did not seek to stay his deposition and did not appeal the November 6 Order. Instead, Madoff appeared for his deposition and invoked the Fifth Amendment on a blanket basis. *See* Riccio Dec., Exhibit W; SMF ¶24.

For example, Madoff did not offer an explanation concerning his designation in an SEC form as Chief Compliance Officer, Director of Trading and co-control person of BMIS. *Id.* at p. 24. He did not say anything about precautionary measures he took to detect and prevent fraud, efforts he made to monitor trading activities, responses he made to regulatory inquiries, reactions he had to countless red flags and/or other alerts of fraudulent activity, as well as efforts he made to promote a culture of ethical behavior and compliance. He did not even say "I don't know". Instead he relied in a blanket fashion on the Fifth Amendment that included electing to invoke

the Fifth rather than dispute or deny the allegations in Plaintiffs' Complaint. *See* Riccio Dec., Exhibit W; SMF ¶25.

The following is a list of some of the questions that Madoff refused to answer, and instead pled the Fifth Amendment at his deposition:

- Mr. Madoff, do you deny having actual knowledge of the Ponzi scheme referred to in [the] Complaint [in this action]? *See* Riccio Dec., Exhibit W at p. 42

- Do you deny omitting to disclose material facts to the plaintiffs in this matter, to their great loss and detriment, for the entire time that they were BMIS customers? *Id.* at p. 43.

- Do you deny substantially assisting your brother Bernard in stealing money from the plaintiffs during the entire time that they were BMIS customers? *Id.*

- Do you deny being culpably involved and participating in the Ponzi scheme to defraud the plaintiffs? *Id.*

- Do you deny personally stealing more than $60 million from BMIS customers as a result of the Ponzi scheme referred to in the Complaint? *Id.*

- Can we agree that during a period of 20 years that BMIS operated a Ponzi scheme and you were a senior managing director and chief of compliance for that firm? *Id.* at p. 64.

- Am I correct that [BMIS] maintained two sets of books? *Id.*

- Am I correct that the reason [BMIS] maintained two sets of books was to defraud the investors and regulators? *Id.* at pp. 74-75.

- Am I correct that in your employment at [BMIS] that you did not establish a compliance program of internal controls? *Id.* at p. 75.

- Am I correct that the reason you did not establish a compliance program of internal controls was so that the Ponzi scheme would go undetected? *Id.*

- Am I correct that you did absolutely nothing to detect any violations of the securities laws at [BMIS] during the course of your entire employment at that firm? *Id.* at p. 76.

- Am I correct that you and your brother intentionally concealed from the SEC information that would allow them to have uncovered the Ponzi scheme? *Id.*

- Am I correct that you were aware of Mr. Markopolos' complaints? *Id.* at 78.

- Am I correct that you were aware of the 30 red flags identified by Mr. Markopolos? *Id.*

- Am I correct that in May of 2003, a hedge fund manager complained to the SEC about the business practices of [BMIS]? *Id.*

- Am I correct that you were aware of that complaint? *Id.* at p. 79.

- Am I correct that you intentionally hid from the SEC evidence that would have caused the SEC, in May of 2003, to uncover the [BMIS] Ponzi scheme? *Id.*

- Am I correct that had you not knowingly cooperated with your brother in concealing the information from the SEC, that as early as 1992 the SEC would have discovered that [BMIS] was a massive Ponzi scheme? *Id.*

- Am I correct that you discussed both of [the Barron's and MAR/Hedge] articles with your brother Bernard? *Id.* at p. 84.

- Am I correct that you knowingly and intentionally filed false documents with the SEC regarding [BMIS]' business practices? *Id.* at p. 85.

- And am I correct that you knowingly and intentionally filed false documents with the SEC in order to materially mislead the SEC and the public regarding the financial condition and business operations of [BMIS]? *Id.*

- Am I correct that every allegation contained in [the Complaint herein], from the beginning of the Complaint to the end of the Complaint, is true and correct in every material respect? *Id.* at p. 89.

- Am I correct that during the period of time that you had an account at [BMIS], that you redeemed from your investment over $16 million? *Id.* at pp. 89-90.

See also SMF ¶26.

J. <u>Plaintiffs' Losses As Victims Of the BMIS Ponzi Scheme</u>.

The Lautenberg Foundation (the "Foundation"), after accounting for all withdrawals, invested $6,322,000 in BMIS. *See* Declaration of Eleanor Rigolosi, dated March 10, 2010, submitted herewith at ¶¶2-4. The Foundation received a $400,000 payment from the Trustee. *Id.* at ¶3. Consequently, the Foundation lost at least $5,922,000. *Id.* at ¶4. *See also* SMF ¶27.

Joshua S. Lautenberg, after accounting for all withdrawals, invested $930,000 in BMIS. *See* Declaration of Joshua S. Lautenberg, dated March 8, 2010, at ¶¶2-4. Joshua Lautenberg

received a $500,000 payment from the Trustee. *Id.* at ¶3. Consequently, plaintiff Joshua Lautenberg lost at least $430,000. *Id.* at ¶4. *See also* SMF ¶28.

Ellen Lautenberg, after accounting for all withdrawals, invested $600,000 in BMIS. *See* Declaration of Ellen Lautenberg, dated March 8, 2010, at ¶¶2-4. Plaintiff Ellen Lautenberg received a $500,000 payment from the Trustee. *Id.* at ¶3. Consequently, plaintiff Ellen Lautenberg lost at least $100,000. *Id.* at ¶4. *See also* SMF ¶29.

Accordingly, in total, Plaintiffs lost at least $6,452,000 (*i.e.*, $5,922,000 + $430,000 + $100,000) in BMIS. *See* SMF ¶30.

LEGAL ARGUMENT

POINT II

PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON COUNT THREE OF THEIR COMPLAINT BECAUSE MADOFF VIOLATED SECTION 20(A) OF THE 1934 SECURITIES EXCHANGE ACT.

A. Standard Governing Motions for Summary Judgment.

Under Federal Rule of Civil Procedure 56(c), "summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To defeat summary judgment, Madoff must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "Any factual dispute invoked by the nonmoving party to resist summary judgment must be both material in the sense of bearing on an essential element of the plaintiff's claim and genuine in the sense that a reasonable jury could find in favor of the nonmoving party." *Abraham v. Raso*, 183 F.3d 279, 287 (3d Cir. 1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251 (1986)). Conclusory statements

and arguments are insufficient to prevent summary judgment. *Ridgewood Bd. of Educ. v. N.E. for M.E.*, 172 F.3d 238, 252 (3d Cir. 1999); *Sterling Nat'l Mortg. Co. v. Mortgage Corner*, 97 F.3d 39, 45 (3d Cir. 1996) ("Mere speculation about the possibility of the existence of such facts" does not raise a triable issue.).

It has been held that summary judgment is an especially appropriate procedural vehicle where, as here, a defendant has invoked his rights under the Fifth Amendment and refused to provide any information during discovery. *See SEC v. Chester Holdings, Ltd.*, 41 F. Supp. 2d 505, 517 (D.N.J. 1999) (granting summary judgment in SEC disgorgement proceeding where the defendants asserted the Fifth Amendment, "submitted no evidence in response to the . . . motion for summary judgment" and instead claimed "that various documents that would support their assertions [were] in the possession of the plaintiff"); *SEC v. Colello*, 139 F.3d 674, 677-78 (9th Cir. 1998) (affirming district court's grant of summary judgment based on the defendant's "failure to go forward with evidence, as well as his resort to the Fifth Amendment.").

B. Plaintiffs Are Entitled To An Adverse Inference Based On Madoff's Assertion Of The Fifth Amendment During His Deposition.

As a matter of law, this Court should draw an adverse inference, based on Madoff's assertion of the Fifth Amendment during his deposition, that he was a culpable participant in the largest financial fraud in American history. While a party may be free to assert the Fifth Amendment in a civil case and refuse to answer on a question by question basis some questions that are posed,[2] the law is settled that a court can -- and this Court should -- draw an adverse inference against Madoff based on Madoff's assertion of the Fifth Amendment. *See Baxter v.*

[2] Madoff did not invoke the Fifth Amendment on a question by question basis but, rather, on a blanket basis. He invoked the Fifth Amendment more than 250 times and essentially refused to answer a single question at his deposition. Such a blanket assertion of his Fifth Amendment was improper and subjects Madoff to sanctions. *See, e.g., United States v. One Million Three Hundred Twenty-Two Thousand Two Hundred Forty-Two Dollars & Fifty-Eight Cents*, 938 F.2d 433, 439 (3d Cir. 1991); *National Life Ins. Co. v. Hartford Acc. & Indem Co.*, 615 F.2d 595, 595 (3d Cir. 1980); *Interstate Commerce Comm'n v. Gould*, 629 F.2d 847, 861 (3d Cir. 1980).

Palmigiano, 425 U.S. 308 (1976) ("permitting adverse inference to be drawn from [a defendant's] silence" in a civil case).

A plaintiff gets the benefit of an adverse inference against a defendant who invokes the Fifth Amendment where the plaintiff has offered independent evidence to support the allegations of the complaint. As the Court of Appeals for the Third Circuit explained: "a defendant's silence in itself is insufficient to support an adverse decision, but that such silence in conjunction with other evidence against the defendant could support that result." *SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 191 (3d Cir. 1994). The Court explained that such an inference against a defendant who takes the Fifth is appropriate because the "invocation of the Fifth Amendment poses substantial problems for an adverse party who is deprived of a source of information that might conceivably be determinative in a search for the truth." *Id.* at 190. This is particularly true where, as here, the information Plaintiffs need to support their Complaint is within the knowledge of the person taking the Fifth, *i.e.*, what Madoff knew about the Ponzi scheme and when did he know it.

Courts have expressly relied on an adverse inference stemming from invocation of the Fifth Amendment to support the grant of a summary judgment. The decision in *SEC v. Chester Holdings, Ltd.*, 41 F. Supp. 2d 505 (D.N.J. 1999), is instructive. In *Chester Holdings*, the SEC in a disgorgement proceeding, alleged that the defendants made material misrepresentations and that the controlling defendants were liable under Section 20(a) of the Securities Exchange Act. During their depositions, the controlling defendants, like Madoff here, asserted the Fifth Amendment and refused to answer any questions. The SEC moved for summary judgment based on the adverse inference as well as other "documentation and expert evidence." *Id.* at 521. In response to the SEC's motion, the defendants "submitted no evidence." *Id.* at 517. They claimed "that various documents that would support their assertions [were] in the possession of the plaintiff." *Id.* In granting summary judgment, the Court noted that the "defendants were given over eight months in which to conduct discovery, they choose not to take a single

deposition, request answers to interrogatories, or ask for a single document." *Id.* The Court also held that it "may draw an adverse inference with respect to scienter by virtue of defendants' invocation of the Fifth Amendment." *Id.* at 525. Likewise, as discussed below, this Court can and should draw an adverse inference in this litigation with respect to Madoff's culpable participation in the Ponzi scheme.

Similarly, in *SEC v. Colello*, 139 F.3d 674 (9th Cir. 1998), after the defendant asserted the Fifth Amendment and refused to testify, the district court shifted the burden to the defendant to come forward with evidence to defeat summary judgment and made an adverse inference against the defendant. *Id.* at 677. In granting summary judgment, the Ninth Circuit found that this burden shifting was an appropriate exercise of the trial court's discretion in fashioning an appropriate response to the defendant's invocation of the privilege. *Id.* at 678.

In *Cho v. Holland*, 04-c-5227, 2006 WL 2859453 (N. D. Ill. Oct. 3, 2006), the defendants, who were officers and directors of a debtor corporation, appealed a decision of the Bankruptcy Court, which granted summary judgment and declined to stay the litigation pending resolution of a related criminal proceeding. The defendants argued that "they were unfairly penalized for invoking their Fifth Amendment privilege and that the Bankruptcy Court should have waited so that the criminal case could go first." *Id.* at *1. The district court found the bankruptcy court did not abuse its discretion in denying the stay where the defendants delayed requesting the stay and the plaintiff had "expended time and money" preparing the case. *Id.* at *13. The court concluded that an adverse inference is proper to support summary judgment when coupled with "sufficient other evidence" to support the claims. Since the Trustee had provided additional evidence, the Bankruptcy Court did not err in granting summary judgment. *Id.* *See also SEC v. Martino*, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003) (granting the SEC summary judgment on claims that the defendant violated federal securities laws through market manipulation and drawing a "negative inference" from the defendant's assertion of her Fifth Amendment privilege.).

C. The Substantial Undisputed Evidence Combined With The Adverse Inferences Drawn Against Madoff With Respect To His Culpable Participation In A Massive Ponzi Scheme Are More Than Sufficient To Warrant Entry Of Summary Judgment As To Count Three Of Plaintiffs' Complaint.

Summary judgment should be entered on Count Three of the Complaint as the substantial undisputed evidence combined with the adverse inferences drawn against Madoff clearly demonstrate, as a matter of law, that he violated Section 20(a) of the 1934 Securities Exchange Act. Section 20(a) provides:

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

15 U.S.C. § 78t(a). This Court has already held, in denying Madoff's motion to dismiss, that the elements of a claim under Section 20(a) are as follows:

(1) the defendant controlled another person or entity;

(2) the controlled person or entity committed a primary violation of the securities laws; and

(3) the defendant was a culpable participant in the fraud.[3]

Opinion at 24. *See also Chester Holdings, Ltd.*, 41 F. Supp. 2d at 526 (identifying the elements of a Section20(a) claim and holding the individual defendants "are liable as controlling persons under Section 20(a) of the Exchange Act."). Once the plaintiff has made a "*prima facie* claim

[3] Although the Third Circuit adheres to the view that culpable participation is an element of a Section 20(a) claim, *see Rochez Bros., Inc. v. Rhoades*, 527 F.2d 880 (3d Cir. 1975), most circuits do not consider culpable participation to be an element of a Section 20(a) claim. For a discussion of the varying approaches among the circuits as to whether culpable participation is or is not an element of a plaintiffs Section 20(a) *prima facie* cause of action *see* Massey, *Control Person Liability Under Section 20(A): Striking A Balance Of Interests For Plaintiffs And Defendants*, 2005 Houston Business and Tax Law Journal, 109; and *Bromberg & Lowenfels On Securities Fraud and Commodities Fraud* § 7:348-349 (recognizing that the Third Circuit follows a distinctly minority view when making culpable participation a proof element of a Section 20 claim. The authors believe the better view is the majority view which does not make culpable participation an element to be proven by plaintiff asserting a Section 20(a) claim). Plaintiffs reserve the right to argue that culpable participation is not an element of a Section 20(a) claim.

under Section 20(a), the burden shifts to the defendant to show that he acted in good faith." Opinion at 24-25 (citing *SEC v. Pasternak*, 561 F. Supp. 2d 459, 502-503 (D.N.J. 2008)).

This Court has already held that the control person and primary violation prongs (elements 1 and 2) of Section 20(a) have been satisfied. *Id.* at 25. Madoff cannot and has not challenged this finding. Further, there is absolutely no evidence of record that Madoff acted in good faith. To the contrary, when given the chance to demonstrate he acted in good faith, Madoff asserted the Fifth Amendment. *See* SMF ¶¶24-26. Madoff's only hope of avoiding a finding that he violated Section 20(a) hinges on whether he was a culpable participant in the Ponzi scheme or not. As demonstrated by the Statement of Facts herein, there is substantial independent and uncontroverted evidence that Madoff was a culpable participant. *See* SMF ¶¶11-23. This evidence, when combined with the adverse inference to be drawn against Madoff by virtue of his invocation of the Fifth Amendment, show as a matter of law that Madoff violated Section 20(a).

(1) Madoff was a Control Person of BMIS.

There is no dispute that Madoff is a controlling person within the meaning of Section 20(a). BMIS's Uniform Application for Investment Advisor Registration, at page 20, lists Peter Madoff as a "control" person. *See* SMF ¶6. Similarly, the NASD concluded in a report that it did that "Bernard Madoff and **Peter Madoff** are involved in every aspect of the Firm's business." NASD Report at 10 (emphasis added). *See* SMF ¶19.

(2) BMIS Committed Primary Violations of the Securities Laws.

Likewise, it is undisputed that BMIS violated the Exchange Act when it committed what is generally considered to be the largest financial fraud in history. *See* SMF ¶¶7-10.

(3) Substantial Undisputed Evidence Combined With the Adverse Inference To Be Drawn Against Madoff Show Madoff Was A Culpable Participant In The Ponzi Scheme.

There is substantial undisputed evidence that Madoff was a culpable participant in the Ponzi scheme. *See* SMF ¶¶11-23. This evidence, when coupled with the adverse inference based on Madoff's assertion of the Fifth Amendment, provides more than a sufficient basis for entry of summary judgment.

This Court has already held that a plaintiff can establish "culpable conduct" by demonstrating that the defendant "knew or should have known that the primary violator, over whom that person had control, was engaging in fraudulent conduct." Opinion at 26 (quoting *Lapin v. Goldman Sachs Group, Inc.*, 506 F. Supp. 2d 221, 247 (S.D.N.Y. 2006)). Thus, all Plaintiffs need to establish to support their Section 20(a) claim is that Madoff knew or should have known about the Ponzi scheme taking place for a period of 20 years at BMIS. As the Chief Compliance Officer for BMIS, one of two control persons, the firm's general counsel, its senior managing director, and an individual regularly in contact with regulatory agencies investigating BMIS, the evidence establishes that Madoff, at a minimum, should have known of the fraud at BMIS.

What is culpable participation? This Court has held that "inaction that intentionally furthers the fraud committed by the controlled person or entity or prevents its discovery establishes the controlling person's culpable participation in the fraud." *Id.* at 27 (citing *Rochez Bros.*, 527 F.2d at 890). This Court further recognized that "reckless failure to detect the fraud through enforcement of a reasonably adequate system of internal controls establishes [the defendant's] participation in the fraud for purposes of the Section 20(a) claim." *Id. See also Pasternak*, 561 F. Supp. 2d at 502-503 (recognizing that participation by the control person is culpable if that person did not have an adequate system of internal controls or did not enforce the internal controls in a reasonable and proper manner). Thus, even if Madoff could demonstrate that he lacked actual knowledge of the fraud -- which he has failed to do -- Plaintiffs are entitled

to summary judgment because Madoff consciously avoided detecting or preventing the fraud. Even if Madoff could establish he was completely left in the dark about the fraud -- a burden he has woefully fails to meet -- as Chief Compliance Officer and one of two control persons at BMIS, he failed to put in place any -- let alone sufficient -- internal controls to ensure that this massive, unprecedented Ponzi scheme did not happen on his watch.

Examples of action and/or inaction by controlling persons that have been held sufficient to show culpable participation under Section 20(a) include: (1) where, like here, the control person was alleged to be the "Vice President of Compliance" during the time that the Company "was wholly deficient in its compliance with FDA requirements" and "the company continued to violate FDA regulations" under the compliance officer's "watch," *see In re Able Laboratories*, 05-2681, 2008 U.S. Dist. LEXIS 23538, at *26 n.42 (D.N.J. Mar. 24, 2008); (2) where the control person failed to maintain and enforce a reasonable and proper system of supervision and internal control over controlled persons so as to prevent securities law violations and, like here, unusual trading activities "should have attracted the attention of management or compliance personnel," *see Kravitz v. Pressman, Frohlich & Frost, Inc.*, 447 F. Supp. 203, 213 (D. Mass. 1978); (3) where the control person had internal compliance controls but failed to enforce those controls, *Henricksen v Henricksen*, 640 F.2d 880 (7th Cir. 1981); and (4) where the control person failed to exercise his control power with respect to day-to-day administrative matters which, had he done so could have prevented the underlying securities law violations, *see G.A. Thompson & Co., Inc. v. Partridge*, 636 F.2d 945 (5th Cir. 1981).

The Statement of Facts herein shows there is ample, independent, undisputed evidence of predicate facts showing that Madoff "knew or should have known" of the Ponzi scheme. *See* SMF ¶¶11-23. And when given the chance during his deposition to refute the allegations of his culpable active participation in the Ponzi scheme, Madoff asserted the Fifth Amendment on a blanket basis. *See* Subsection I of Statement of Facts.

Based on the substantial uncontroverted and independent evidence that Plaintiffs have submitted to the Court in support of their motion combined with Madoff's repeated assertion of the Fifth Amendment, Plaintiffs are entitled to an adverse inference that Madoff culpably participated in BMIS' massive Ponzi scheme and is, therefore, liable under Section 20(a). *See Chester Holdings*, 41 F. Supp. 2d at 525 (granting summary judgment against defendants on 10b-5 and 20(a) claims and holding that this Court would "draw an adverse inference with respect to scienter by virtue of defendants' invocation of the Fifth Amendment.").

(4) There is No Evidence of Record To Support A Finding of Good Faith.

Having made a *prima facie* case that Madoff violated Section 20(a), the burden shifts to Madoff to establish that he acted in good faith. *See* Opinion at 24-25 (citing *Pasternak*, 561 F. Supp. 2d at 502-503). Such burden shifting is proper on summary judgment, especially where the defendant has asserted the Fifth Amendment. *See Colello*, 139 F.3d at 677 (affirming trial court's grant of summary judgment and holding trial court acted properly in shifting the burden to defendant to defeat summary judgment after defendant asserted the Fifth Amendment).

Madoff has placed absolutely no evidence in the record to support a finding that he acted in good faith. When given the chance at his deposition to demonstrate in any way that he acted in good faith, he hid behind the Fifth Amendment on a blanket basis and refused to answer a single relevant question. Consequently, there is absolutely no evidence of record that Madoff acted in good faith. Having failed to meet his burden of showing good faith, Madoff is liable under Section 20(a).

D. Plaintiffs Are Entitled To Summary Judgment In The Amount Of Their Losses Proximately Resulting From Madoff's Ponzi Scheme.

There are no disputed facts regarding the amount of losses suffered by Plaintiffs as a result of the fraud committed by Madoff and BMSI. The undisputed evidence of record establishes losses in the following amounts for each Plaintiff:

Plaintiff	**Amount of Loss:**
The Lautenberg Foundation	$5,922,000.00
Joshua S. Lautenberg	$ 430,000.00
Ellen Lautenberg	$ 100,000.00
Total	$6,452,000.00

See SMF ¶¶ 27-30. Under Section 20(a), Madoff is jointly and severally liable for these losses. Therefore, Plaintiffs are entitled to a judgment in the amount of $6,452,000 against Madoff together with interest, costs and counsel fees to be determined by the Court.

CONCLUSION

Based on the foregoing it is respectfully submitted that summary judgment be granted in favor of Plaintiffs with respect to Count Three of Plaintiffs' Complaint.

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