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.***

MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO COUNT THREE OF PLAINTIFFS' COMPLAINT AND IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR A STAY OF THE LITIGATION

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This memorandum of law is respectfully submitted on behalf of Plaintiffs, The Lautenberg Foundation, Joshua S. Lautenberg and Ellen Lautenberg ("Plaintiffs"), in further support of their motion for summary judgment against Defendant Peter Madoff ("Defendant" or "Madoff") with respect to Count Three of Plaintiffs' Complaint and in opposition to Defendant's cross-motion for a nine-month stay of this litigation.[1]

PRELIMINARY STATEMENT

In its September 9, 2009 Opinion ("Opinion"), this Court made clear, in denying Madoff's motion to dismiss, 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." Opinion at 24-25. In Plaintiffs' Memorandum of Law in Support of Their Motion for Summary Judgment ("opening brief" or "Pls. Br."), Plaintiffs presented undisputed evidence to support a *prima facie* claim under Section 20(a) of the 1934 Securities Exchange Act. Madoff offers no evidence to refute the unmistakable fact that he was a control person of Bernard L. Madoff Investment Securities, LLC ("BMIS"). Plaintiffs demonstrated that Madoff was the Chief Compliance Officer, Director of Trading, Senior Managing Director, and General Counsel of BMIS. Likewise, Plaintiffs demonstrated that BMIS committed multiple violations of the Exchange Act. Madoff does not even attempt to refute these facts. Plaintiffs offered compelling and multiple examples of facts that demonstrate Madoff either knew or should have known about the massive Ponzi scheme that was happening at BMIS. As this Court has already held, 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)). Plaintiffs have more than met the burden for establishing that Madoff is liable as a control person of BMIS.

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[1] Both Plaintiffs and Madoff have requested oral argument on this motion.

The burden thus shifts to Madoff to establish he acted in good faith. In response, Madoff offers ***no evidence*** to meet his burden of establishing good faith. Instead, Madoff wrongly claims this Court is not allowed at the summary judgment stage to draw an adverse inference based on his assertion of the Fifth Amendment and attempts to poke some holes at the evidence offered by Plaintiffs. In addition, Madoff attempts to delay resolution of this litigation by claiming: (a) the motion is premature, (b) he is liable for only a fraction of Plaintiffs' damages and the Court cannot determine damages until after the Trustee for the liquidation of the business of BMIS under the Securities Investor Protection Act (the "Trustee") completes his liquidation of BMIS, and (c) the court should grant a nine-month stay of the litigation. Each of theses responses is without merit and should be rejected by this Court.

First, the law is well settled that courts regularly draw adverse inferences at the summary judgment stage. A plaintiff at trial or on summary judgment gets the benefit of an adverse inference where, as here, the plaintiff has offered independent evidence to support its claim. Thus, Defendant is wrong when he contends that an adverse inference is inappropriate at summary judgment and a court can -- and this Court should -- draw an adverse inference based on Madoff's blanket assertion of the Fifth Amendment during his deposition.

Second, Madoff fails to adequately challenge the evidence offered by Plaintiffs in their Statement of Material Facts ("SMF"). This evidence more than adequately establishes a *prima facie* case of control person liability under Section 20(a). The evidence demonstrates that Madoff was a control person of BMIS. As Chief Compliance Officer and his other positions, Madoff indisputably had the legal duty to administer and enforce the compliance policies and procedures of BMIS as well as to identify and address significant compliance problems. It is not a defense to a Section 20(a) claim to argue, as Madoff does, that even though he held himself out as Chief Compliance Officer of BMIS, he allowed himself to be kept in the dark and was not really responsible for compliance at BMIS. Even if Madoff was in the dark, in holding himself out as at Chief Compliance Officer, he sent a message to the investing public that he would

ensure that there would be adequate control procedures in place at BMIS. As such, even if Madoff did not actively assist in the fraud, this knowing "inaction" by Madoff "further[ed] the fraud committed by" BMIS and, therefore, makes Madoff liable under Section 20(a). *See* Opinion at 27.

Third, Madoff argues that the Court should deny the motion for summary judgment in accordance with Federal Rule of Civil Procedure 56(f) because he claims he needs discovery from the Trustee, the Government, and the Plaintiffs. This 56(f) application should be rejected as Madoff has not even sought any formal discovery from either the Trustee or the Government. Having sat on his hands throughout the entire discovery period, Defendant cannot reasonably argue that he now needs discovery to respond to this motion. Moreover, with respect to discovery from the Plaintiffs, Madoff has failed to demonstrate how this purported discovery is needed to respond to this motion.

Fourth, Madoff wrongly claims that summary judgment is inappropriate because damages must be apportioned and because the injury suffered by Plaintiffs will not be known until the Trustee's liquidation process is complete. To the contrary, the evidence is undisputed that Madoff was a knowing culpable participant in BMIS's violations of the securities laws. There is no need to apportion, as Madoff is jointly and severally liable for all of Plaintiffs' damages. Moreover, Plaintiffs need not wait until the Trustee's investigation is complete before seeking recovery from a wrongdoer such as Madoff. The law is well settled that securities claims against officers and directors are not stayed during the pendency of a liquidation process.

And, lastly, Madoff makes a cross-motion for a stay in light of the ongoing criminal investigation. The motion for stay should be denied. Madoff has not been indicted or even identified as a "target" by the Government. Plaintiffs should not be forced to suffer the significant prejudice of a nine-month stay. Moreover, Madoff waited until the last moment to seek a stay. If he was to seek a stay, it should have been sought prior to his deposition, not at this late date, on the eve of entry of summary judgment.

For these reasons, the Court should deny the request for a stay and grant Plaintiffs' motion for summary judgment.

LEGAL ARGUMENT

POINT I

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

The law is clear that 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. In response, Madoff mistakenly argues that an adverse inference is inappropriate on summary judgment, *see* Def. Br. at 24, and that Plaintiffs have failed to demonstrate undue prejudice. *See* Def. Br. at 25.

First, the law is well settled that courts regularly draw an adverse inference stemming from invocation of the Fifth Amendment to support the grant of summary judgment. In *SEC v. Chester Holdings, Ltd.*, 41 F. Supp. 2d 505 (D.N.J. 1999), the controlling defendants asserted the Fifth Amendment and refused to answer any questions regarding the plaintiff's claims that the defendants made material misrepresentations and that the controlling defendants were liable under Section 20(a) of the Securities Exchange Act. This Court granted the plaintiff's motion for summary judgment and held that it "may draw an adverse inference with respect to scienter by virtue of defendants' invocation of their Fifth Amendment rights." *Id.* at 525. *See also SEC v. Colello*, 139 F.3d 674 (9th Cir. 1998) (affirming the district court's grant of summary judgment after the defendant asserted the Fifth Amendment and refused to testify); *Armstrong v. Collins*, 01-cv-2437, 2010 U.S. Dist LEXIS 28075, at *100 (S.D.N.Y. Mar. 24, 2010) (in action involving Ponzi scheme, the court held "an adverse inference may be drawn[] against a party asserting their Fifth Amendment privilege in the context of a motion for summary judgment"); *SEC v. Pittsford Capital Income Partners, LLC*, 06-6353, 2007 U.S. Dist. LEXIS 62338, at *49-

50 (W.D.N.Y. Aug. 23, 2007) (holding on summary judgment "the SEC . . . properly requested that the Court draw a negative inference from defendants' invocation of that privilege regarding each of the SEC's claims" and, therefore, "draw[ing] a negative inference from defendants' assertion of their Fifth Amendment privilege"); *Cho v. Holland*, 04-c-5227, 2006 LEXIS 76054, at *17 (N. D. Ill. Oct. 3, 2006) (concluding that an adverse inference is proper to support summary judgment when coupled with "sufficient other evidence" to support the claims); *SEC v. Roor*, 99-cv-3372, 2004 U.S. Dist. LEXIS 17416, at **2, 25 (S.D.N.Y. Aug. 30, 2004) (granting summary judgment on securities fraud claims based on individual defendants having "engineered and promoted fictitious investment programs" and "find[ing] that an adverse inference is appropriate given [defendants'] assertion of [their] Fifth Amendment privilege in the course of this litigation"); *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 defendants' assertion of her Fifth Amendment privilege); *Schruefer v. Winthorpe Grant, Inc.*, 99-cv-9365, 2003 U.S. Dist LEXIS 3650, at *14 (S.D.N.Y. Mar. 12, 2003) (granting summary judgment against brokerage firm and its principals and drawing an adverse inference from the defendant's assertion of the Fifth Amendment and failure to respond to plaintiff's allegations). Thus, as courts routinely and regularly draw adverse inferences on summary judgment where the defendant has asserted the Fifth Amendment, this Court should reject Madoff's argument that an adverse inference is inappropriate on summary judgment.

Second, contrary to Madoff's argument, Plaintiffs would be prejudiced if no adverse inference were granted. Here, Plaintiffs have provided the Court with substantial evidence establishing that Madoff was a control person of BMIS and that he had the requisite culpable conduct. *See* SMF ¶¶ 5-6 (establishing control status) and SMF ¶¶ 11-23 (establishing culpable conduct). Nonetheless, while offering no contrary evidence, Madoff claims Plaintiffs have not provided the Court with sufficient evidence. For example, Madoff contends that Plaintiffs failed

to offer evidence concerning Madoff's specific duties or his direct knowledge of the fraud. *See* Def. Br. at 32-41. Any such evidence not provided to the Court was because Madoff refused to answer even basic questions during his deposition. Madoff's refusal has "deprived" the Plaintiffs of "a source of information that might conceivably be determinative in a search for the truth." *SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 190 (3d Cir. 1994). As such, this is precisely the type of case in which imposition of an adverse inference is appropriate. Madoff has all the information Plaintiffs need to fully establish their claims. While Madoff has the right to assert the Fifth Amendment, courts routinely hold that: "[u]se of the privilege in a civil case may . . . carry some disadvantages for the party who seeks its protection." *Id.* Indeed, the only reasonable inference that can be drawn is that Madoff has something to hide -- namely his culpable participation in this massive fraud. Consequently, as a matter of law, based on Madoff's assertion of the Fifth Amendment during his deposition, this Court should draw an adverse inference that Madoff was a culpable participant in the largest financial fraud in American history.

B. Plaintiffs Made A Prima Facia Claim Of Under Section 20(a) And Madoff Has Offered No Evidence To Demonstrate That He Acted In Good Faith.

In Plaintiffs' opening brief, Plaintiffs presented substantial evidence that Madoff violated Section 20(a) of the 1934 Securities Exchange Act. First, Plaintiffs presented evidence that demonstrated that Madoff was a control person of BMIS. Second, Plaintiffs demonstrated that BMIS violated the securities laws. And, third, Plaintiffs presented evidence that Madoff had the requisite culpable conduct. Together, this evidence combined with the adverse inferences drawn against Madoff based on his assertion of the Fifth Amendment demonstrated, as a matter of law, that he violated Section 20(a) of the 1934 Securities Exchange Act. In his opposition, Madoff does not even attempt to establish that he acted in good faith. Having failed to meet this burden of good faith, partial summary judgment should be entered in favor of plaintiffs. *See* Opinion at 24-25 (holding once the plaintiff has made a "*prima facie* claim under Section 20(a), the burden

shifts to the defendant to show that he acted in good faith") (citing *SEC v. Pasternak*, 561 F. Supp. 2d 459, 502-503 (D.N.J. 2008)).

(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). This Court has already held that Plaintiffs' allegations in the Complaint demonstrate "that Peter Madoff was a controlling person of BMIS." Opinion at 25. In making the determination if one is a controlling person, "the courts have given heavy consideration to the power or potential power to influence and control the activities of a person, as opposed to the actual exercise thereof." *Rochez Brothers, Inc. v. Rhoades*, 527 F.2d 880, 890-91 (3d Cir. 1975); *see also G.A. Thompson & Co., Inc. v. Partridge*, 636 F.2d 945, 958 (5th Cir. 1981) (finding individual a control person where the individual "had the requisite power to directly or indirectly control or influence corporate policy").

As Chief Compliance Officer, General Counsel, Senior Managing Director and Director of Trading, Madoff had the power or at least the potential power to influence what was taking place at BMIS. *See* Opinion at 24 (holding that Congress enacted control person liability "to impose liability on those 'able to directly or indirectly exert influence on the policy and decision-making process of others'") (quoting *Rochez Bros.*, 527 F.2d at 884). *See also Baxter v. A.R. Baron & Co.*, 94-civ-3913, 1996 U.S. Dist. LEXIS 15098, at *6 (S.D.N.Y. Oct. 11, 1996) (principal officer with responsibility for compliance is a control person); *Arthur Children's Trusts v. Godfrey*, 994 F.2d 1390, 1397 (9th Cir. 1993) (stating that "'although a person's being an officer or director does not create any *presumption* of control, it is a sort of red light'") (emphasis in original) (quoting 4 Louis Loss & Joel Seligman, *Securities Regulation* 1724 (1990))); *In re Zenith Laboratories Secs. Litig.*, No. 86-3241A, 1993 U.S. Dist. LEXIS 18478, at *34-35 (D.N.J. Feb. 11, 1993) (Vice President of Medical Affairs who communicated with FDA and reviewed press releases was deemed a control person); *Neely v. Bar Harbor Bankshares*, 270

F. Supp. 2d 50, 54 (D. Ma. 2003) (senior executive officer, with the title managing director, who assisted the company's chief executive officer was deemed a control person); *In re Phillips Petroleum Secs. Litig.*, 738 F. Supp. 825, 841 (Del. 1990) (where "corporate officers are a narrowly defined group" court can infer that small group of officers and directors "had the power to control or influence the decisions and actions" of controlled entity).

Madoff does not dispute the following facts that establish he is a control person:

- Madoff worked at BMIS (or its predecessor) from approximately June 1969 until December 2008. *See* SMF and Defendant's Response at ¶ 5.

- At various times, Madoff was a senior managing director and Chief Compliance Officer at BMIS. *Id. See also* Def. Br. at 10 (conceding that "Defendant was the Chief Compliance Officer of BLMIS and had certain responsibilities in that role."

- The January 7, 2008 Uniform Application for Investment Adviser Registration ("Form ADV") filed by BMIS with the SEC contained the following admissions:

  (a) there are only one to five employees at BMIS engaged in an investment advisory function.

  (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.

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

  (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.

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

  (g) ***Bernard Madoff and Madoff are the only two controlling persons of BMIS***.

  See SMF and Madoff's Response at ¶ 6.

- The NASD concluded in a report it issued in 2003 that "Bernard Madoff and **Peter Madoff** are involved in **every** aspect of the Firm's Business" and that since 1969, Madoff had been responsible for General Compliance and Written Supervisory Procedures. *See* SMF and Madoff's Response at ¶ 19.

These facts taken together clearly demonstrate that Madoff was by BMIS's own admission a control person. Madoff attempts to make a distinction in his brief between the investment advisory arm and the market-making and proprietary-trading businesses at BMIS. *See* Def. Br. at 5, 30. However, it is undisputed that there is only one entity -- BMIS -- and that Madoff was Chief Compliance Officer and General Counsel of that combined entity. Likewise, it is undisputed that the only two people held out by BMIS to be control persons are Madoff and Bernard Madoff. There were no other senior officers at BMIS in a position to control it.

Madoff's claim he was only a figure head who was not really involved in compliance, *see* Def. Br. at 10, does not relieve him of his control person status. *See In re Zenith Laboratories Secs. Litig.*, 1993 U.S. Dist. LEXIS 18478, at **1, 11 (individual who claimed he was only a figure head and refrained from closely supervising daily activities was deemed a control person). As Chief Compliance Officer, General Counsel, Senior Managing Director and Director of Trading, Madoff "'directly or indirectly'" ***could have*** "exert[ed] influence on the policy and decision-making process of" BMIS. *See* Opinion at 25 (quoting *Rochez Bros.*, 527 F.2d at 884).

Thus, this Court should find that Plaintiffs offered sufficient evidence to establish that Madoff was a control person of BMIS. Moreover, during his deposition, Madoff did not dispute that he was a control person of BMIS. *See* SMF ¶ 26. Therefore, Plaintiffs are entitled to an adverse inference that Madoff was a control person of BMIS. *See Chester Holdings*, 41 F. Supp. 2d at 525 (granting summary judgment against defendants on 10b-5 and 20(a) claims and drawing an adverse inference "by virtue of defendants' invocation of the[] Fifth Amendment"). Consequently, this Court should find Madoff was a control person of BMIS as a matter of law.

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

In his opposition, Madoff does not dispute 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.

In Plaintiffs' opening brief and statement of material facts, Plaintiffs introduced substantial evidence that Madoff was a culpable participant in the Ponzi scheme. *See* SMF ¶¶ 11-23. This evidence demonstrates that Madoff "knew or should have known" of the Ponzi scheme, including the articles that appeared in the Barron's and MAR/Hedge publications in 2001, *see* SMF ¶¶ 11-12; the multiple SEC investigations, *id.* at ¶¶ 13-19; the Markopolos Complaint, *id.* at ¶¶ 20-21; and the exorbitant profits Madoff received from his personal BMIS accounts, *id.* at ¶¶ 22-23.[2] This evidence, particularly when coupled with the adverse inference the Court should draw against Madoff based on his assertion of the Fifth Amendment, clearly demonstrates that Madoff is liable for his culpable participation.

This Court has recognized that Madoff's culpable participation could be established by his "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

[2] Although in his opposition, Defendant challenges the sufficiency of the evidence concerning the exorbitant profits generated in his BMIS accounts, he does not actually dispute the fact that he made such profits. *See* Defendants' Response to Statement of Material Facts ¶¶ 22-23.

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); *G.A. Thompson & Co.*, 636 F.2d at 958 (there is control person liability where controlling person "failed to establish, maintain or diligently enforce a proper system of supervision and control").

In response, Madoff makes several arguments, each of which misses the mark. First, Madoff argues that the Barron's and MAR/Hedge "articles . . . are classic inadmissible hearsay and cannot be considered on summary judgment as evidence of the existence of any such 'red flags,' or any other purported facts asserted in the articles." Def. Br. at 35. Likewise, Madoff claims that "the [SEC and Markopolos] complaints are simply allegations, not evidence, and are not admissible as evidence." Def. Br. at 38. Madoff misses the point. The articles and complaints are not being offered for the truth of their content.[3] Rather, they demonstrate that Madoff was aware or should have been aware of the red flags that were hoisted over BMIS.

As Chief Compliance Officer, it was incumbent on him to take steps to investigate the multiple red flags. *See Kravitz v. Pressman, Frohlich & Frost, Inc.*, 447 F. Supp. 203, 213 (D. Mass. 1978) (finding control person failed to implement "sufficient precautionary measures" 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"); *SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1473 (2d Cir. 1996) (finding control person liability where "purported compliance efforts were more cosmetic than real"); *In re Parmalat Secs. Litig.*, 594 F. Supp. 2d 444, 457 (S.D.N.Y. 2009) (where red flags were noted, the existence of compliance procedures and policies not sufficient to escape liability without evidence that such "procedures and policies actually were implemented during the period in question" by defendant). By holding himself out to the Public and the SEC as a senior officer, including the Chief

[3] Notably, Madoff does not dispute the truth of the contents, nor does he dispute that he was aware of the articles.

Compliance Officer and General Counsel of BMIS, Madoff had the obligation to assure himself that bad things were not happening at the company on his watch. Whether he chose to ignore it, did not investigate, or, as Plaintiffs' suspect, was well aware of the wrongdoing, need not be decided on this motion. His mere inaction is sufficient to make him liable under section 20(a).

Likewise, Madoff's claim that he was not aware of the fraud is not a defense, where he knew or should have known of the red flags/irregularities at BMIS (*see* SMF ¶¶11-23), and particularly when coupled with the purported efforts to exclude him from the operations. The publicly known red flags when coupled with Madoff's and his attorneys disclaimers (if you believe them) that:

- he was "never giv[en] access to BLMIS financial statements," Def. Br. at 6,
- BMIS "employ[ed] a full staff of people to work exclusively for the investment customer business," *id.* at 7
- he was "prohibited from interacting with the SEC during SEC reviews and investigations," *id.* at 7, and
- he had "virtually no compliance or other responsibilities relating to the investment advisory business" (even though he was Chief Compliance Officer of BMIS), *id* at 10,

should have put him on notice that something was seriously wrong at BMIS. Although Madoff attempts to deflect and shift all of his responsibility to Bernard Madoff, Madoff agreed to assume the positions of Chief Compliance Officer, Managing Director, General Counsel, Director of Trading and Senior Managing Director. Having assumed these positions, it was his responsibility to investigate possible irregularities, stemming from the many red flags that were all around him.

It was also incumbent on Madoff to put in place an adequate system of controls that would have enabled him to uncover the wrongdoing. It is not a defense to simply sit back and do nothing. A control person that is willfully blind to securities fraud violations is liable under

Section 20(a). *In re Parmalat Secs. Litig.*, 594 F. Supp. 2d at 458. *See also Arthur Children's Trusts,* 994 F.2d at 1395, 1397 (control person's declaration of innocence not a defense where control person "exercised no internal control or supervision to prevent violation of securities law," "either did not inquire as to the representations made to induce [certain] loans or knew that the loans were induced by fraudulent representations" and was aware of non-public information, such as the company's "dire financial straits").

The self-serving certification submitted by Madoff's brother does not exculpate Madoff. Even if this Court accepts Bernard Madoff's statements as true for purposes of this motion, a senior executive such as Madoff cannot escape liability where he knowingly and willfully allowed another executive to freeze him out. Put simply, burying ones head in the sand is not a defense to a Section 20(a) claim. This is precisely why Congress created control person liability. Even in cases where the control person does not put in place an effective system of controls, the control person is liable if he fails to exercise "his power in the day-to-day administrative matters to minimize the chance of a 10-b violation" or if he fails to "monitor" the controlled person's acts. *GA Thompson & Co.*, 636 F.2d at 959. At a minimum, this is precisely what Madoff did.

It does not matter what his specific duties were at BMIS. *See* Def. Br. at 33 (arguing that Plaintiffs failed to submit "evidence of what Defendant's duties were"). In assuming the mantel of Chief Compliance Officer, he sent a message to the investing public that he would put in place adequate procedures at BMIS to ward against the massive fraud that occurred at his company. He assumed a legal duty as Chief Compliance Officer, General Counsel, and Director of Trading to ensure that BMIS was being properly run and its customers were not being cheated. Having woefully and completely failed to fulfill that duty by his complete inaction, he is liable under Section 20(a). Moreover, Madoff attempts to equate himself with the failure of the SEC, major accounting firms and institutional investors to discover the fraud. *See* Def. Br. at 41. In so doing, he ignores the major difference -- he was on the inside and was privy to the irregularities

at BMIS. Thus, unlike the SEC, major accounting firms, and institutional investors, Madoff assumed a legal obligation at BMIS to ensure that fraud was not taking place there.

Thus, even if Madoff lacked actual knowledge of the fraud, Plaintiffs are entitled to summary judgment because Madoff consciously avoided detecting or preventing the fraud. 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. 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"). Together, the evidence when coupled with the adverse inferences to be drawn from Madoff's assertion of the Fifth Amendment demonstrate as a matter of law that Madoff was a culpable participant.

(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 shifted to Madoff to establish that he acted in good faith. *See* Opinion at 24-25 (citing *Pasternak*, 561 F. Supp. 2d at 502-03). Madoff offers no evidence that establishes that he acted in good faith in his opposition, and, therefore, Madoff does not even come close to meeting his burden of showing good faith. Consequently, the Court should find that Madoff is liable under Section 20(a) as a matter of law.

POINT II

THE COURT SHOULD NOT DELAY RESOLUTION OF THIS MOTION

Plaintiff have established an entitlement to summary judgment and, therefore, this Court should reject Defendant's efforts to delay the Court's consideration of this motion. First, summary judgment is not premature. Second, Plaintiffs' damages do not need to be apportioned and this Court does not need to wait until the Trustee completes the liquidation of BMIS to determine Plaintiffs' damages. And, third, the Court should not grant Defendant's motion for a nine-month stay of this litigation

A. Summary Judgment Is Not Premature.

Defendant claims that the motion should be denied because, according to Defendant, the motion is premature since "Defendant has been unable to gather and present facts essential to his defense." Def. Br. at 44. This attempted delay should be rejected out of hand as Defendant woefully fails to satisfy the requirements of Federal Rule of Civil Procedure 56(f). Rule 56(f) provides:

> If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) deny the motion; (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or (3) issue any other just order.

"The affidavit must specify 'what information is sought; how, if uncovered it would preclude summary judgment; and why it has not been previously obtained.'" *Mobley v. City of Atlantic City Police Dep't*, 89 F. Supp. 2d 533, 537 (D.N.J. 1999) (quoting *Dowling v. Philadelphia*, 855 F.2d 136, 140 (3d Cir. 1988)). As such, "[a] court may deny a continuance of discovery when a party's motion is based on speculation or raises merely colorable claims, when the party has already had an adequate opportunity to discover the information, or when the discovery requests

themselves are irrelevant." *City of Rome v. Glanton*, 958 F. Supp. 1026, 1039 (E.D. Pa. 1997) (citations omitted).

Here, Defendant claims that he needs discovery from the Government, the Trustee and the Plaintiffs. First, with respect to the Government and the Trustee, Madoff never sought formal discovery from those entities. Second, with respect to discovery from the Plaintiffs, Defendant fails to demonstrate how any discovery from the Plaintiffs is even relevant to responding to this motion. Finally, Madoff has engaged in delay tactics which precludes him from seeking relief under Rule 56(f).

(1) Defendant Cannot Delay Resolution of this Motion Based on His Purported Need for Discovery From the Government and/or the Trustee.

First, this Court should not delay resolution of this motion based on Defendant's claim that he needs discovery from the Trustee and the Government because Madoff never sought discovery from those entities during the many months of open discovery. Rule 56(f) "'will not be applied to aid a party who has been lazy or dilatory.'" *Mobley*, 89 F. Supp. 2d at 537 (quoting 10B Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure § 2740 (ed. 1998) at § 2741, n.18). Indeed, "[l]ast-ditch efforts to obtain discovery do not qualify as adequate diligence." *Glanton*, 958 F. Supp. at 1040. Here, ***Madoff never served discovery requests on either the Trustee or the Government.*** Rather, all Defendant did was send a letter – at the urging of the Court – to the Trustee and the Government investigators requesting they voluntarily produce documents. When both entities said no, Defendant did nothing further. He did not serve subpoenas *duces tecum* on either of those entities. Had he, he could have then sought to compel the production of the allegedly needed documents. Having sat back, Defendant is not in a position to now claim a need for more discovery.

(2) Defendant Cannot Delay Resolution of this Motion Based on His Purported Need for Discovery From Plaintiffs.

Likewise, Defendant's claim that he needs discovery from Plaintiffs does not provide a basis for delaying resolution of this motion. Courts regularly deny applications for relief under Rule 56(f) where the party seeking a continuance fails to adequately describe the discovery it needs or the request for relief is based on speculation. *See Hancock Industries v. Schaeffer*, 811 F.2d 225, 230 (3d Cir. 1987) (affirming district court's denial of discovery pursuant to Rule 56(f) where plaintiffs "fail[ed] to explain the need for discovery and what material facts [plaintiffs] hoped to uncover to support their allegations"); *Schneider v. Twp. of Toms River*, No. 09-3866, 2010 U.S. Dist. LEXIS 32562, at *10 (D.N.J. Mar. 29, 2010) (denying request for relief under Rule 56(f) where Plaintiff "did not specifically state why the specific information would preclude summary judgment and why it has not been previously obtained"); *Mason Tenders Dist. Council Pension Fund v. Messera*, 958 F. Supp. 869, 894 (S.D.N.Y. 1997) (denying relief under Rule 56(f) where plaintiffs failed to "specifically identif[y] what information they [sought] to discover or how they would obtain it [and t]he affidavit submitted by the [plaintiffs'] counsel state[d] only that [plaintiffs] will conduct depositions of relevant witnesses and will seek to obtain the relevant documents"); *King v. School Dist. of Philadelphia*, No. 00-2503, 2001 U.S. Dist. LEXIS 10710, at *8 (E.D. Pa. July 26, 2001) (denying relief under Rule 56(f) where "Plaintiff claim[ed] that Defendants failed or refused to produce information generally . . . but [did] not identify any particular documents or information that she sought").

Defendant does not even come close to meeting this standard with respect to discovery from Plaintiffs. Defendant claims that he has not been able to depose Plaintiffs or Senator Lautenberg. *See* Def. Br. at 45. Defendant claims that the purpose of these depositions are "to determine how Plaintiffs came to invest in BLMIS, what information was provided to them, who they dealt with at BLMIS, and what representations were made to them about management of BLMIS or compliance functions." Def. Br. at 45. However, he completely fails to demonstrate how this information is in any way needed to respond to Plaintiffs' motion for partial summary

judgment. The Plaintiffs' ***reliance*** (or lack of reliance) ***is not an issue*** at issue in this motion, as reliance is not an element of a Section 20(a) claim. The only issues presented by this motion are whether Defendant is a control person and whether he had culpable conduct. Neither the Plaintiffs nor the Senator would have any evidence responsive to those issues. Thus, the failure to depose the Plaintiffs and the Senator does not provide a basis for delaying this motion.

(3) Defendant Engaged in Delay Tactics During the Discovery Period.

Courts also regularly deny applications for relief under Rule 56(f) where the party seeking a continuance has delayed during the discovery process. *See Mobley*, 89 F. Supp. 2d at 537 (denying relief under Rule 56(f) where plaintiff "offered no reasonable explanation for her failure" to depose two moving defendants); *Baker v. Am. Airlines, Inc.*, 430 F.3d 750, 756 (5th Cir. 2005) (affirming district court's denial of relief under Rule 56(f) where plaintiff "knew (or should have known) the briefing schedule and the discovery period [but n]evertheless . . . failed to act diligently in the pursuit of evidence"); *Grayson v. O'Neill*, 308 F.3d 808, 816 (7th Cir. 2002) (affirming district court's denial of relief under Rule 56(f) where plaintiff "had more than ample opportunity to discover and present evidence"); *Jocham v. Tuscola County*, 239 F. Supp. 2d 714, 735 (E.D. Mich. 2003) (denying relief under Rule 56(f) where plaintiffs could not "justify their failure to take the depositions of the witnesses allowed by the magistrate judge, or their failure to submit their Rule 26(a)(2)(B) disclosures"); *Nicholson v. Doe*, 185 F.R.D. 134, 137 (N.D.N.Y 1999) (denying relief under Rule 56(f) where plaintiff "offer[ed] no explanation [for] why he did not diligently pursue discovery immediately after identifying [key witness]").

Madoff has routinely sought to delay discovery in this proceeding. He initially refused to be deposed and was only deposed after Magistrate Judge Arleo ordered that he appear for his deposition. *See* SMF ¶ 24. Madoff did not seek to stay his deposition and did not appeal Magistrate Judge Arleo's Order. Instead, he appeared for his deposition and invoked the Fifth Amendment on a blanket basis, rather than question by question. *See* SMF ¶ 24. He invoked the

Fifth Amendment more than 250 times and essentially refused to answer a single question at his deposition. *See* SMF ¶ 26. Such a blanket assertion of the Fifth Amendment is improper and was designed to further delay resolution of this litigation. *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, 599 (3d Cir. 1980); *Interstate Commerce Comm'n v. Gould*, 629 F.2d 847, 861 (3d Cir. 1980). Moreover, Madoff has taken no affirmative steps to engage in any meaningful discovery. Having sat back, he cannot now seek to delay resolution of this motion. Therefore, this Court should deny Madoff's request for additional discovery before ruling on the motion.

B. The Court Does Not Need To Apportion Damages Nor Does It Need To Wait Until The Trustee Completes The Liquidation of BMIS To Determine Plaintiffs' Damages.

(1) Madoff is Jointly and Severally Liable for Plaintiffs' Damages.

Madoff wrongly argues that he cannot be held jointly and severally liable because pursuant to the Private Securities Litigation Act of 1995 ("PSLRA"), Plaintiffs are required to demonstrate that Madoff knowingly violated section 20(a). *See* Def. Br. at 46. In support of this argument, Madoff cites an Eleventh Circuit case, which, in a matter of first impression, held that the proportionate liability scheme of the PLSRA applies to control-person liability under section 20(a). *Id.* at 47 (citing *Laperriere v. Vesta Ins. Group, Inc.*, 526 F.3d 715, 727-28 (11th Cir. 2008)). Notably, the Third Circuit has yet to rule on this issue. However, even if this Court rules that the PLSRA does require Plaintiffs to establish that Madoff knowingly violated section 20(a), Plaintiffs have conclusively made this showing.

Plaintiffs have presented substantial undisputed evidence that Madoff was a *knowing* culpable participant in the Ponzi scheme. *See* SMF ¶¶11-23. Madoff' was one of only two control-persons at BMIS, the firm's general counsel, its senior managing director, and an individual regularly in contact with regulatory agencies investigating BMIS. As such, 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. In response to the evidence Plaintiffs have piled up demonstrating Madoff's culpability, Madoff has asserted the Fifth Amendment, denying nothing. The substantial evidence produced by Plaintiffs in conjunction with Madoff's blanket assertion of the Fifth Amendment to every question that afforded him an opportunity to exculpate himself, presents more than enough evidence for the Court to infer that Madoff knowingly violated section 20(a). As such, Plaintiffs are entitled to summary judgment against Madoff, who is jointly and severally liable.

(2) The Court does not Need to Wait Until After the Trustee Completes the Liquidation of BMIS to Determine Plaintiffs' Damages.

Likewise, Madoff's argument that summary judgment "should be denied because the injury suffered by Plaintiffs will not be known until the Trustee's liquidation and asset recovery process is complete" is misplaced. *See* Def. Br. at 50. While Plaintiffs are not entitled to a double recovery for the damages they suffered,[4] they have the right to seek their damages through the Trustee in his liquidation of the Estate and from the individuals that caused their harm. Critically, Madoff's funds and assets have not been consolidated into the bankruptcy. Thus, while the Trustee may be pursuing his own claims against Madoff, his lawsuit is not entitled to any special preference over Plaintiffs' claims. *See In re CHS Elecs., Inc.*, 261 B.R. 538 (Bankr. S.D. Fla. 2001) (finding that nothing in law afforded the trustee a greater status than any other non-bankruptcy plaintiff with regard to an "unliquidated claim against third-parties that might be covered by insurance proceeds about to be used to settle or satisfy a judgment entered in favor of other plaintiffs"); *Goldin v. Primavera Familienstiftung Tag Assocs.* (*In re Granite Partners, L.P.*), 194 B.R. 318 (Bankr. S.D.N.Y. 1996) (rejecting trustee's argument that investor

[4] Plaintiffs have reduced their claimed damages in this proceeding by the payments they received from the Trustee. *See* SMF ¶¶ 27-29.

class action suit, alleging securities violations against insiders of debtor violated automatic stay or stood to interfere with property of the estate, and stating that investors' claims were not derivative, but were direct, belonging to the shareholders).

Indeed, there is no legal authority by which Plaintiffs' claims against Madoff may be stayed, pending the liquidation process. *See Reliance Acceptance Group, Inc. v. Levin* (*In re Reliance Acceptance Group, Inc.*), 235 B.R. 548 (D. Del. 1999) (holding that shareholders' securities claims against officers and directors of debtor were personal in nature and, and as such, the debtors had no right to prevent shareholders from pursuing litigation); *Official Unsecured Creditors' Comm. v. Bowan* (*In re Phar-Mor Sec. Litig.*), 164 B.R. 903, 907 (W.D. Pa. 1994) (holding that securities action maintained by debtor's shareholders against entities outside the bankruptcy are not property of the estate and, therefore, a debtor action against those entities will not generally be given priority over shareholders suit alleging those claims). Indeed, "the Bankruptcy Code was designed to protect the Debtor and to prioritize claims by creditors and equity owners against the Debtor's estate. It was not designed to destroy independent claims that the creditors and equity owners may have against nonbankrupt entities, or place a higher priority on the Debtor's claims against such entities." *In re Phar-Mor*, 164 B.R. at 907-08.

The one case Madoff cites for support, *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1099 (2d Cir. 1988) is inapplicable here. In *Bankers Trust*, plaintiff creditors filed an action against a corporation's principals for fraudulently concealing assets in the bankruptcy proceeding. *Id.* at 1099. Though the court recognized the plaintiffs' standing to pursue this claim, it found that the claim had not yet accrued because the trustee stood to recover for the identical injury on behalf of the corporation, which would cause the plaintiffs' injury to be reduced. *Id.* at 1106. In contrast, here, Plaintiffs claims against Madoff are for the securities fraud he committed as a Control Person. Plaintiffs have the option of seeking recovery of their damages from both the Estate of BMIS, and any individual or entity that caused them to be injured, including Madoff. *See In re Reliance,* 235 B.R. at 559 (holding that plaintiffs can

recover from officers and directors and need not wait until bankruptcy estate is liquidated). Therefore, the Court should not wait until the Trustee has fully liquidated the estate to rule on Plaintiffs' summary judgment motion. The only limitation on Plaintiffs is if they are made whole by Defendant, they will not be permitted to recover anything further from the Estate. Plaintiffs' claims against Madoff should go forward now.

C. Defendant's Motion For A Stay Should Be Denied.

Though Madoff has not been indicted or even identified as a "target" in the criminal investigation, he seeks at this late stage, the extraordinary remedy of a nine-month stay, in light of an ongoing criminal investigation, which has no end in sight.[5] This Court, Plaintiffs, and the public have a strong interest in seeing this case go forward. By contrast, the prejudice to Madoff in going forward with this case is less significant, considering that he has not been indicted, and indeed, may never be indicted. Moreover, Madoff waited until the last possible moment to seek a stay. He could have sought a stay prior to moving to dismiss, prior to the commencement of discovery, prior to his deposition, or at the very least prior to Plaintiffs moving for summary judgment. Instead, he sat back and waited to the last moment to make this motion. Under all of these circumstances, Madoff's motion for a stay should be denied.

A stay of a civil proceeding is an extraordinary remedy. *Walsh Sec. v. Cristo Prop. Mgmt.*, 7 F. Supp. 2d 523, 526 (D.N.J. 1998) (citation omitted). Thus, the movant seeking a stay "must carry a heavy burden to succeed in such an endeavor." *Microfinancial, Inc. v. Premier Holidays Int'l, Inc.*, 385 F.3d 72, 77 (1st Cir. 2004). Indeed, where pending parallel criminal proceedings exist, the Constitution does not require a stay. *Peiffer v. Lebanon School District*, 848 F.2d 44, 46 (3d Cir. 1988); *De Vita v. Sills*, 422 F.2d 1172, 1181 (3d Cir. 1970). In determining whether to grant a stay, "[t]he court must make such determinations in light of the particular circumstances of the case." *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C.

[5] Defendant concedes that he has not been "charged criminally with any wrongdoing in connection with his brother's fraud." Def. Br. at 9.

Cir. 1980). *See also Keating v. Office of Thrift Supervision,* 45 F.3d 322, 325 (9th Cir. 1994) (based on the facts and circumstances, refusal to stay civil proceeding against Charles Keating pending outcome of criminal cases did not unduly compromise Keating's due process rights).

In weighing whether to grant a stay, courts consider the following factors:

> 1) the extent to which the issues in the criminal and civil cases overlap; 2) the status of the case, including whether the defendants have been indicted; 3) the plaintiff's interest in proceeding expeditiously weighed against the prejudice to plaintiff caused by a delay; 4) the private interests of and burden on defendants; 5) the interests of the court; and 6) the public interest.

Walsh Sec., 7 F. Supp. 2d at 527 (citing *Trustees of the Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mechanical*, 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995)).

(1) The Criminal and Civil Cases do not Overlap.

The court in *Walsh Sec. v. Cristo Prop. Mgmt.,* noted that the "similarity of issues has been termed the most important issue at the threshold in determining whether or not to grant a stay." *Id.* (internal quotation marks omitted). As such, "[a] court is less likely to grant a stay if the issues in parallel civil and criminal proceedings do not completely overlap." *Cress v. City of Ventnor,* No. 08-1873, 2009 U.S. Dist. LEXIS 22172, at *7 (D.N.J. Mar. 18, 2009). Though Madoff insists that the government's investigation "overlap[s] substantially" with this civil matter, he fails to specify what issues the government is investigating with regard to Madoff. *See* Def. Br. at 52. Rather, Madoff generally indicates that the government is investigating his potential involvement in the massive Ponzi scheme carried out by his brother, through BMIS. *Id.* Madoff's inability to describe the overlap of issues in this case is, of course, not a surprise, given that an indictment, which would describe the criminal issues, has not been returned against him.

Consequently, where an indictment has not been returned against a defendant, courts generally find that this first factor weighs in favor of denying the stay because it is impossible to determine the issues in the criminal case. For example, in *State Farm Mut. Auto. Ins. Co. v.*

Beckham-Easley, 2002 U.S. Dist. LEXIS 17896, at *2 (E.D. Pa. Sept. 18, 2002), the defendants, who were identified as "targets" in a grand jury investigation, but had not yet been indicted, sought a stay of the civil matter pending the outcome of the criminal proceedings. The court found that without an indictment, it was unable to determine the extent of overlap between the criminal and civil proceedings. *Id.* at *4-5. It explained:

> There are no criminal proceedings pending in the instant case. The defense simply asserts that the "complaint is similar to allegations currently under investigation by an investigating Grand Jury." The only information concerning the issues under investigation is derived from target letters received by two defendants. Moreover, most of the Defendants who have joined in this motion to stay have yet to file an answer. The absence of an indictment coupled with the fact that this Court does not have an answer before it, impedes the Court's ability to discern the extent to which the legal and factual issues in the instant case are related to those under investigation. Consequently, the first factor weighs in favor of denying the stay.

Id. (internal citation omitted).

Similarly, in *Soroush v. Ali*, No. 09-3703, 2009 U.S. Dist. LEXIS 100652 (E.D. Pa. Oct. 28, 2009), the defendants sought a stay of the civil matter, because of a pending criminal investigation against them. The court, however, found that because neither defendant had been indicted, "there [were] no readily-definable criminal proceedings." *Id.* at *5. As such, the court found that it was "impossible for [it] to determine the degree of overlap between the two proceedings, [and therefore], the first and most important factor militated in favor of denying the stay." *Id.*

Like the defendants in *State Farm* and *Soroush*, Madoff has not been indicted. He has only been identified as a "subject" in a grand jury investigation. Therefore, the extent of overlap between the criminal and civil cases is, at this point, unknown. As a result, the first factor under *Walsh* favors denying Madoff's motion for a stay.

(2) Stage of the Parallel Proceeding

The second factor -- the stage of the parallel proceeding -- is also afforded considerable weight in the analysis of whether to grant a stay. *See Walsh*, 7 F. Supp. 2d 523 at 527 (stating that "[t]he stage of the parallel criminal proceeding may also substantially affect the determination of whether a stay is warranted"). In fact, many courts hold that the major factor in determining whether to grant a stay is whether the defendant has been indicted. *See Dresser*, 628 F.2d at 1375-76 (stating that "the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter"); *Sterling National Bank v. A-1 Hotels Int'l, Inc.*, 175 F. Supp. 2d 573, 576 (S.D.N.Y. 2001) (holding that "district courts in this Circuit 'generally grant the extraordinary remedy of a stay only after the defendant seeking a stay has been indicted."); *Fidelity Funding of Calif., Inc. v. Reinhold*, 190 F.R.D. 45, 48 (E.D.N.Y. 1997) (stating that "[i]n practice, the major factor in determining whether a court will grant a stay is whether a defendant has been indicted") (internal citation omitted). As the court in *Walsh* explained:

> The strongest case for a stay of discovery in the civil case occurs during a criminal prosecution after an indictment is returned. The potential for self-incrimination is greatest during this stage, and the potential harm to civil litigants arising from delaying them is reduced due to the promise of a fairly quick resolution of the criminal case under the Speedy Trial Act.

7 F. Supp. 2d at 527 (internal citation omitted).

By contrast, "because there is less risk of self-incrimination, and more uncertainty about the effect of a delay on the civil case, preindictment requests for a stay are generally denied." *Id.* (citing *United States v. Private Sanitation Indus. Ass'n*, 811 F. Supp. 802, 805 (E.D.N.Y. 1992); *see also United States CFTC v. A.S. Templeton Group, Inc.*, 297 F. Supp. 2d 531, 534 (E.D.N.Y. 2003) (same); *Soroush*, 2009 U.S. Dist. LEXIS 100652, at *6 (noting that the Speedy Trial Act does not apply until an indictment is returned, and thus, "a criminal investigation could

potentially continue indefinitely"). Indeed, "[w]hen a defendant filing a motion to stay has not been indicted, the motion may be denied *on that ground alone*." *State Farm*, 2002 U.S. Dist. LEXIS 17896, at *6 (emphasis added) (citing *Private Sanitation*, 811 F. Supp. 802; *Dresser*, 628 F.2d at 1376.

It follows that where an indictment has not been returned, the second factor of the *Walsh* test, favors denying the stay. For example, in *Cress v. City of Ventnor*, the court considered whether to grant a motion for a stay, where the plaintiff in the civil trial had been served with a criminal complaint, but had not been indicted. 2009 U.S. Dist. LEXIS 22172, at *7. The court observed that "[u]nlike when an indictment has been returned, here there is less certainty that [the defendant's] criminal trial will begin shortly." *Id.* Because "a stay would be indefinite, prejudicing Plaintiffs" the court found that the second factor favored denying the stay. *Id.*

Similarly, in *Forman v. Otlowski* (*In re NJ Affordable Homes Corp.*), the court considered a motion for a stay by a defendant in a civil matter, who was allegedly identified as a "target" in a grand jury investigation, and whose attorney allegedly was informed by the government that "a criminal indictment against [the defendant] was imminent." No. 05-60442 2007 Bankr. LEXIS 1000, at *6 (Bankr. D.N.J. Mar. 19, 2007). Notwithstanding the defense counsel's claim regarding the imminence of the defendant's indictment, the court found that this second factor weighed against granting a stay. *Id.* at *18. In so finding, the court emphasized that an indictment had not been returned and the government had not confirmed the status of its investigation against the defendant. *Id.*

Other courts have similarly found that the absence of an indictment favors denying a stay under this second factor. *See Soroush*, 2009 U.S. Dist. LEXIS 100652, at *6 (holding that because no indictment had been returned, the second factor "weigh[ed] in favor of denying the stay"); *State Farm*, 2002 U.S. Dist. LEXIS 17896, at *6 (finding that even though defendants had received target letters, the absence of an indictment weighed in favor of denying a stay); *see also Fidelity Funding*, 190 F.R.D. at 53 (finding that defendant was not entitled to stay because

he was not indicted); *A.S. Templeton*, 297 F. Supp. 2d 531 (denying defendants' motion for a stay where no indictment had been returned).

In this case, not only has an indictment not been returned against Madoff, but he has not even been named as a "target" in the investigation. A "target" is "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant," whereas a "subject" is only "a person whose conduct is within the scope of the grand jury's investigation." United States Attorneys' Manual, § 9-11.151. While the criminal case has not even been commenced, this case is well under way. Plaintiffs are moving for summary judgment and discovery is almost closed. Therefore, even if the Court denies Plaintiffs' motion, this case will be ready for trial later this summer or early fall at the latest. As such, this factor weighs heavily against granting a stay.

(3) Prejudice to Plaintiffs

Plaintiffs' interest in proceeding expeditiously in this matter is significant. Defendant represented to this Court in November 2009 that he was a "subject" of the United State Attorneys Office's investigation. Def. Br. at 15. It is six months later and that status has not changed. Defendant has offered no evidence at to when that status may be changed or when the investigation may be completed. Even if the Court grants the requested nine-month stay, there is no guarantee that anything will change during those nine months. Moreover, should Defendant be indicted during this time period, he will likely seek a further stay. Even if he is not indicted, he may seek a further stay claiming yet again that an indictment is imminent. Notably, neither United States Attorneys Office, nor the Securities and Exchange Commission have sought a stay of these proceedings.

Plaintiffs have suffered tremendous financial losses, totaling nearly $6,500,000, due to the fraudulent mismanagement of their funds by BMIS, for which Madoff is joint and severally

liable. *See Fidelity*, 190 F.R.D. at 49 (recognizing Plaintiff's "strong interest in the continuation of civil proceedings" where it alleged that defendant defrauded it out of more than $5.3 million); *Sterling National Bank*, 175 F. Supp. 2d at 575 (recognizing "it would be perverse if plaintiffs who claim to be the victims of criminal activity were to receive slower justice than other plaintiffs because the behavior they allege is sufficiently egregious to have attracted the attention of the criminal authorities"); *Karimona Investments, LLC v. Weinreb*, 02-civ-1792, 2003 U.S. Dist. LEXIS 3324, at *11 (S.D.N.Y. Mar. 7, 2003) (recognizing the harm to Plaintiff from an "indefinite delay").

Indeed Plaintiffs' interest in proceeding expeditiously is stronger than a typical private plaintiff, considering that the bulk of the damages were incurred by the Lautenberg Foundation. Staying this matter would deprive the Lautenberg Foundation from providing millions in grants to worthy charitable, educational, and scientific causes. In this way, the Foundation's concerns in proceeding with this litigation are similar to the fiduciary duties of a Bankruptcy Trustee. *See In re NJ Affordable Homes Corp.*, 2007 Bankr. LEXIS 1000, at *18 (recognizing that staying an adversary proceeding would cause the Trustee to "suffer great prejudice due to his roles as Plaintiff here and as fiduciary for the bankruptcy estate," which consisted of at least 490 defrauded investors). Moreover, Plaintiffs have fully litigated this case and are prepared now for summary judgment. Defendant could have moved for a stay much earlier in these proceedings, including before discovery was initiated, or at least before Madoff was deposed. Instead, Madoff allowed Plaintiffs to incur additional legal fees and waited until the last moment to seek a stay. This delay on Defendant's part further warrants a denial of the stay.

(4) Burden on Defendant

Madoff asserts that he would be significantly burdened if he was forced to litigate this civil matter due to his alleged difficulties in obtaining discovery from the Trustee and the government. *See* Def. Br. at 54-56. However, given Defendant's failure to actually seek

discovery from either the Government or the Trustee -- which would be irrelevant to the issues on this motion -- this argument should carry little weight. Madoff cannot argue that he would face an undue burden to obtaining discovery when he has failed to actively seek discovery in this case. Moreover, even though Madoff faces the risk of an adverse inference based on his assertion of the Fifth Amendment privilege, this risk is insufficient to support a stay of this matter. *See Keating*, 45 F.3d at 326 (denying stay and holding that "the extent to which defendant's Fifth Amendment rights are implicated is . . . only one consideration to be weighed against others.") Thus, the burden on Defendant does not warrant entry of a stay.

(5) The Interests of the Court

Courts have an interest in maintaining judicial efficiency with regard to managing their caseloads. *Walsh*, 7. F. Supp. 2d at 528. This interest is particularly strong, where as here, the defendant seeking a stay has not been indicted, and as a result, there is no way to know if or when the criminal matter will proceed. *See Soroush*, 2009 U.S. Dist. LEXIS 100652, at *9-10 (holding that the judicial efficiency factor weighed in favor of denying the stay where defendant had not been indicted); *State Farm*, 2002 U.S. Dist. LEXIS 17896, at *9 (holding that "[t]his case is shrouded with uncertainty as there is no way to predict when, if ever, the criminal investigation will ripen into an indictment or end without one [and t]his limbo status weighs against a stay as it is unrealistic to postpone indefinitely the pending action until criminal charges are brought or the statute of limitations has run for all crimes conceivably committed by the defendants") (internal quotation marks omitted). Given that Madoff is only a "subject" in the grand jury investigation, it is unclear as to when, if ever, he will be indicted. As such, this factor militates toward denying a stay.

(6) Public Interest

The fraud committed by Madoff has deprived the Lautenberg Foundation of $6,000,000. These funds would have been used for worthy charitable, educational, and scientific causes. In

seeking to stay this matter, Madoff would further delay the recovery by the Foundation and its ability to continue its charitable endeavors. The public, which stands to benefit from the work of foundations like the Lautenberg Foundation, maintains a strong interest in Plaintiffs' action against Madoff, which seeks the return of its significant investment.

For all the above reasons, the court should deny Madoff's efforts to delay resolution of this motion.

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.

By: s/ Michael R. Griffinger

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Newark, New Jersey

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