United States Bankruptcy Court
District of Lipstick

In re Badoff Investment Services, LLC,
Debtor
_____/

Tom Tough, Trustee,
Plaintiff

and

James Dupe',
Representative of the Badoff Investor Class,
Plaintiff

v.

Bigbank, N.A.,
Defendant
_____/

Joint Final Pretrial Statement

I. Jurisdiction

All parties agree that:

A. The United States Bankruptcy Court has jurisdiction over this litigation under 28 U.S.C. § 1334(b).

B. The claims of trustee and of the Investor Class are "noncore" proceedings under 28 U.S.C. § 157(c)(1).

C. The parties consent that the bankruptcy court may enter a final judgment on the plaintiffs' noncore claims as provided in 28 U.S.C. § 157(c)(2).

D. The parties waive any objection to the entry of a final judgment by the bankruptcy court that they may have under *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

II. Plaintiffs' Claims

The plaintiffs are Trustee Tom Tough and the Investor Class, represented by James Dupe'. They claim that the defendant, Bigbank, is liable to them for $25,274,387.46 as a result

of Bigbank's knowing facilitation of the massive Ponzi scheme that Boris Badoff perpetrated from 2006 to 2009, when he was arrested by the Federal Bureau of Investigation. The plaintiffs also seek an award of punitive damages in an equal amount, plus costs, interest, and attorney fees.

The plaintiffs assert two specific legal claims against Bigbank:

Count I - Aiding and Abetting Badoff's Fraud
Count II - Negligence

The plaintiffs have determined to pursue these claims jointly because they believe that either one or both have standing to pursue both claims. The plaintiffs have agreed to negotiate in good faith to allocate any recovery that is achieved on their claims.

Each of the members of the Investor Class invested substantial sums with Badoff's firm, Badoff Investment Services, LLC, ("BIS"). In exchange for their investments, investors received "membership units," representing fractional ownership interests in BIS. Badoff represented that he would use all such investments for the purpose of investing in publicly available securities. The members of the class made these investments in reliance on Badoff's verbal and written representations that his securities investment strategy, although proprietary and confidential, carried virtually no risk, that it would result in annual appreciation of 8-12%, and that it would provide that performance regardless of market conditions.

Badoff sent monthly statements to each of his investors showing the investor's net asset value ("NAV"). These statements always showed NAV appreciations that were entirely consistent with the representations that he had made both to induce investors to invest with him and to retain their investments with him. In addition, on those occasions when an investor asked to redeem an investment, Badoff promptly caused BIS to pay the redemption in full, including all of the net asset value appreciations shown in the investor's last statement, less its fees. BIS's monthly statements (which Badoff alone prepared), along with its prompt and full redemptions, gave the members of the Investor Class confidence that Badoff and his confidential investment strategy were legitimate.

Several other factors also enhanced that confidence: Badoff was a well-respected, longstanding member of the community; his lavish lifestyle was seen in the community as evidence of his business acumen and success; he readily and generously gave to charitable causes.

Unfortunately for the Investor Class, it was all a massive fraud – a Ponzi scheme in the tradition of similar such schemes perpetrated by Charles Ponzi, Bernie Madoff, Scott Rothstein, Marc Dreier, Tom Petters, and hundreds of others who have defrauded millions of innocent investors out of their life savings, turning them into paupers who then had to rely on the grace and charity of the state, and their friends and relatives, just to survive.

Badoff never invested a single penny in any securities. All of the monthly statements that he ever sent to his investors were entirely fictitious. The money that poured into him –

estimated at over $500,000,000 over four years – was either paid out to investors who requested redemptions, embezzled to support his lavish lifestyle, given away to charity, or removed and concealed in some unknown location or locations. Badoff acted alone and ran the fraud for his own benefit. Badoff's suicide in jail five days after his arrest makes it highly unlikely that the millions of dollars in unaccounted for funds will ever be found.

Bigbank was at the epicenter of Badoff's Ponzi scheme. BIS had only one account. It was with Bigbank – an ordinary checking account called the "1313 account." It was through that account that Badoff deposited every investors' investment and wrote every redemption check and every check to pay for his lavish lifestyle. Bigbank therefore knew *from its own records* that:

(1) Badoff and BIS never made a single transfer to a securities clearing house and there were no other hallmark signs of securities trading activity;

(2) Most of the redemptions that BIS paid in the year before Badoff's arrest were directly traceable to new investments that he solicited and deposited; and

(3) Therefore Badoff were perpetrating a massive fraud.

Bigbank also knew that it never received any inquiry from any auditing firm. It never investigated whether the "membership units" that Badoff and BIS sold to the members of the Investor Class were registered or exempt from registration. It never complied with any of the requirements of the Bank Secrecy Act or with any anti-money laundering requirements.

Most significantly, on the original application that Badoff submitted to Bigbank to request this account, Badoff failed to disclose the nature of BIS's business, as strictly required by Bigbank's written internal policy manual. Bigbank should never approved the account application and it should never have opened the 1313 account.

Having nevertheless opened the 1313 account, Bigbank then breached its legal duty to monitor, verify and audit the investments made by the members of the Investor Class.

Without the banking services that Bigbank provided, Badoff simply could not have succeeded in perpetrating his massive fraud. At any time, Bigbank could have exposed Badoff's fraud and terminated its relationship with him. Its negligent failure to do that caused Badoff's investors to lose millions of dollars.

The evidence will show that Bigbank did not expose Badoff's scheme for three reasons:

First, Bigbank earned enormous fees from the 1313 account. Our estimates are approximately $1,000,000 per year.

Second, Badoff was on Bigbank's board of directors from 2007 until his death after his arrest. Under Bigbank policy, this relieved Badoff and BIS of the scrutiny that the bank would have otherwise undertaken in examining him and his transactions and assured his continued success in perpetrating his fraud.

Third, the vice president and general manager at the Bigbank branch in the strip mall where the account was maintained turned out to be Badoff's secret half-sister, Dorothy Dolittle. By all appearances, Dolittle lived well beyond her means if her only income was the $100,000 yearly salary that she earned from the bank. The plaintiffs attempted to depose Dolittle to investigate her activities, her relationship with Badoff, and her lavish lifestyle. However, Dolittle asserted her right against self-incrimination to *every single question*. If she does the same at trial, as the plaintiffs fully expect, and the plaintiffs will ask the court for an adverse inference against her employer, Bigbank.

Still, the evidence will show that Dolittle did more than just keep quiet about Badoff's fraud while taking his bribes. She also provided assurances to several members of the Investor Class when, both before and after investing, they called to confirm the legitimacy Badoff's investment program.

Immediately after Badoff's arrest, several investors filed an involuntary chapter 7 bankruptcy petition against BIS. After this court entered an order for relief, plaintiff Tom Tough was appointed trustee and later joined with the Investor Class in filing this adversary proceeding. Subsequently the parties stipulated to the certification of the Investor Class and to the designation of investor James Dupe' as the representative of the class.

The total of all of the damages incurred by the members of the investor class is $25,274,387.46, based on the last statements that each received from Badoff. The plaintiffs also seek punitive damages in an equal amount. They also seek costs, interest and attorney fees.

III. Defendant's Claims

While Bigbank cannot deny Badoff's massive fraud, Bigbank vehemently denies any wrongdoing in connection with it or any liability resulting from it. Bigbank also contends that neither plaintiff has standing to pursue the claims made in this litigation.

Bigbank provided only ordinary banking services to BIS, for which it was paid only its usual fees.

It denies providing any substantial assistance to Badoff's scheme.

It denies any knowledge, whether constructive or actual, of Badoff's fraud before his arrest.

To the extent that Dolittle assisted Badoff, it was entirely for her own purpose and benefit, and that conduct was entirely beyond the scope of her employment. Therefore, Bigbank is not legally responsible for it.

The trustee's claims are barred by the doctrine of *in pari delicto*, because (a) under applicable Lipstick state law, Badoff's fraud is BIS's fraud; (b) BIS could not recover on any claim against Bigbank; and (c) the trustee stands in BIS's shoes and takes any of BIS's claims subject to all applicable defenses, including the *in pari delicto* defense.

The 1313 account was never a custodial account, nor was it intended to be a custodial account. Bigbank did not owe any duties to the members of the Investor Class, because none of them were ever its customers. Therefore it cannot be held liable on any negligence claims.

Bigbank asserts that the proximate cause of any losses incurred by the members of the Investor Class was their own negligence in failing to perform proper due diligence before investing with him. Blinded by the promise of above market returns, they clearly ignored and failed to investigate several "red flags" that required further investigation, including the following:

1. In the computer age, paper statements in lieu of electronic statements are highly unusual and suspicious.

2. In an era of volatile market swings, as was the case from 2006-2009, the consistent returns of 8-12% that Badoff represented were highly unusual and suspicious.

3. BIS's financial statements, which it made available to investors and prospective investors on request, were generated by BIS itself and were never audited.

4. Badoff vehemently refused to discuss his market strategy.

In the alternative and in addition, Bigbank asserts that Badoff's conduct was the superseding intervening cause of the plaintiffs' losses, if any.

Bigbank's conduct certainly does not warrant the imposition of punitive damages. Indeed, in many respects, Bigbank is as much a victim of Badoff's scheme as were his other victims.

IV. Stipulations of Fact

1. Boris Badoff was arrested in December of 2009 for perpetrating a massive Ponzi scheme. He died shortly thereafter and was therefore never indicted or convicted.

2. At all pertinent times before his arrest, Badoff was a well-respected, longstanding member of the community; his lavish lifestyle was seen in the community as evidence of his business acumen and success; he readily and generously gave to charitable causes.

3. There is no evidence that Badoff or BIS ever invested in any securities.

4. BIS had only one account with Bigbank, which was an ordinary checking account called the "1313 account."

5. Bigbank has no record that it ever received any inquiry from any auditing firm regarding BIS.

6. Bigbank has no record that Badoff ever made a transfer to a securities clearing house.

7. When applying for the checking account for BIS at Bigbank, Badoff failed to disclose the nature of BIS's business, as required by Bigbank's written internal policy manual.

8. Badoff was on Bigbank's board of directors from 2007 until the day after his arrest.

9. Dorothy Dolittle was the vice president and general manager at the Bigbank branch where the 1313 account was maintained.

10. Dolittle was fired the day after Badoff was arrested and has remained under investigation by the FBI since then

11. Dolittle was Badoff's half-sister, although Bigbank had no knowledge of this relationship until after Badoff was arrested.

12. Dolittle's salary was approximately $100,000 per year from 2006 to 2009.

V. Issues of Fact to be Litigated

1. Did Bigbank have actual knowledge of Badoff's fraud?

2. Did Bigbank substantially assist Badoff's fraud?

3. What damages, if any, were proximately caused by Bigbank's aiding and abetting Badoff's fraud?

4. Did Bigbank owe any duties to BIS?

5. Did Bigbank breach any duties to that it owed to BIS?

6. What damages, if any, were proximately caused by Bigbank's breach of duties to BIS?

7. Did Bigbank owe any duties to the members of the Investor Class?

8. Did Bigbank breach any duties to that it owed to the members of the Investor Class?

9. What damages, if any, were proximately caused by Bigbank's breach of duties to the members of the Investor Class?

10. Did Badoff act adversely to the interests of BIS?

11. Did BIS receive any benefit from Badoff's conduct in perpetrating his Ponzi scheme?

12. Was Badoff the sole actor in perpetrating the Ponzi scheme?

13. Were Dolittle's actions beyond the scope of her employment?

14. Were the losses incurred by the members of the Investor Class caused by their own negligence?

VI. Stipulations of Law

A. Regarding the plaintiffs' claim of aiding and abetting fraud:

1. The elements of a claim of aiding and abetting fraud are:
   a. The existence of a fraud.
   b. The defendant's actual knowledge of the fraud.
   c. The defendant's substantial assistance of the fraud.

Lawrence v. Bank of Am., N.A., 455 Fed. App'x 904 (11th Cir. 2012); *Wight v. BankAmerica Corp.*, 219 F.3d 79, 91 (2d Cir. 2000); *Zazzali v. Hirschler Fleischer, P.C.* 2012 WL 3597411 (D. Del. Aug. 21, 2012); *Facciola v. Greenberg Traurig LLP*, 2012 WL 910379 (D. Ariz. Mar. 19, 2012); *Platinum Estates, Inc. v. TD Bank, N.A.*, 2012 WL 760791 (S.D. Fla. Mar. 8, 2012); *In re Refco Inc. Sec. Litig.*, 2012 WL 996910 (S.D.N.Y. Jan. 17, 2012); *Groom v. Bank of Am.*, 2012 WL 50250 (M.D. Fla. Jan. 9, 2012); *In re Optimal U.S. Litig.*, 837 F. Supp. 2d 244 (S.D.N.Y. 2011); *Coquina Invs. v. Rothstein*, 2011 WL 4971923 (S.D. Fla. Oct. 19, 2011); *Cohain v. Klimley*, 2011 WL 3896095 (S.D.N.Y. Aug. 31, 2011); *de Abreu v. Bank of Am. Corp.*; 812 F. Supp. 2d 316 (S.D.N.Y. 2011); *Burns v. Del. Charter Guarantee & Trust Co.*, 805 F. Supp. 2d 12 (S.D.N.Y. 2011); *In re Agape Litig.*,773 F. Supp. 2d 298 (E.D.N.Y. 2011); *Berman v. Morgan Keegan & Co., Inc.*, 2011 WL 1002683 (S.D.N.Y. Mar. 14, 2011).

2. Constructive knowledge of the fraud is insufficient. *Platinum Estates, Inc. v. TD Bank, N.A.*, 2012 WL 760791 (S.D. Fla. Mar. 8, 2012); *In re Refco Inc. Sec. Litig.*, 2012 WL 996910 (S.D.N.Y. Jan. 17, 2012); *de Abreu v. Bank of Am. Corp.*, 2011 U.S. Dist. LEXIS 78388, at *14-15 (S.D.N.Y. June 29, 2011); *Groom v. Bank of Am.*, 2012 WL 50250 (M.D. Fla. Jan. 9, 2012); *In re Optimal U.S. Litig.*, 837 F. Supp. 2d 244 (S.D.N.Y. 2011); *de Abreu v. Bank of Am. Corp.*, 812 F. Supp. 2d 316 (S.D.N.Y. 2011); *Berman v. Morgan Keegan & Co., Inc.*, 2011 WL 1002683 (S.D.N.Y. Mar. 14, 2011).

3. Recklessness or willful blindness is also insufficient. *In re Agape Litig.*,773 F. Supp. 2d 298 (E.D.N.Y. 2011) *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 446 F. Supp. 2d 163, 202 n.279 (S.D.N.Y. 2006).

4. Actual knowledge may however be proven by circumstantial evidence. *Aetna Cas. & Sur. Co. v. Leahey Constr. Co.*, 219 F.3d 519, 536-37 (6th Cir. 2000); *In re Nat'l Century Fin. Enters., Inc., Inv. Litig.*, 580 F. Supp. 2d 630 (S.D. Ohio 2008); *In re Enron Corp.*

Sec., Derivative & "ERISA" Litig., 540 F. Supp. 2d 800 (S.D. Tex. 2007); *Gonzales v. Lloyds TSB Bank, PLC*, 532 F. Supp. 2d 1200 (C.D. Cal. 2006).

5. Substantial assistance may only be found where the alleged aider and abettor affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the fraud to occur. *Sharp Int'l Corp. v. State St. Bank & Trust Co.* (*In re Sharp Int'l Corp.*), 403 F.3d 43, 50 (2d Cir. 2005); *In re Optimal U.S. Litig.*, 837 F. Supp. 2d 244 (S.D.N.Y. 2011); *In re Agape Litig.*,773 F. Supp. 2d 298 (E.D.N.Y. 2011); *Berman v. Morgan Keegan & Co., Inc.*, 2011 WL 1002683 (S.D.N.Y. Mar. 14, 2011).

6. The plaintiffs must also prove that the actions of the defendant proximately caused the their harm; "but for" causation is insufficient. *Aetna Cas. & Sur. Co. v. Leahey Constr. Co.*, 219 F.3d 519, 536-37 (6th Cir. 2000); *In re Optimal U.S. Litig.*, 837 F. Supp. 2d 244 (S.D.N.Y. 2011); *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 471 (S.D.N.Y. 2001).

B. Regarding the plaintiffs' negligence claim:

1. The elements of a negligence claim are:
   a. A duty recognized by law, requiring the actor to conform to a certain standard of conduct for protection of others against unreasonable risks;
   b. Failure to conform to the standard required;
   c. A causal connection between the conduct and resulting injury; and
   d. Actual loss or damage resulting to interests of another.

Chaney v. Dreyfus Serv. Corp., 595 F.3d 219, 229-30 (5th Cir. 2010); *Bouriez v. Carnegie Mellon Univ.*, 585 F.3d 765, 771 (3d Cir. 2009); *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 286-87 (2d Cir. 2006); *Short v. Conn. Comm. Bank, N.A.*, 2012 WL 1057302 (D. Conn. Mar. 28, 2012); *Picard v. Madoff* (*In re Bernard L. Madoff Inv. Sec. LLC*), 458 B.R. 87 (Bankr. S.D.N.Y. 2011); *Burns v. Del. Charter Guarantee & Trust Co.*, 805 F. Supp. 2d 12 (S.D.N.Y. 2011); *Agile Safety Variable Fund, L.P. v. RBS Citizens, N.A.*, 793 F. Supp. 2d 1248 (D. Colo. 2011); *Grund v. Del. Charter Guarantee & Trust Co.*, 788 F. Supp. 2d 226 (S.D.N.Y. 2011); *Mandelbaum v. Fiserv, Inc.*, 787 F. Supp. 2d 1226 (D. Colo. 2011); *Haase v. GunnAllen Fin., Inc.*, 2011 WL 768045 (E.D. Mich. Feb. 28, 2011).

VII. Issues of Law to be Litigated

A. Regarding the plaintiffs' claim of aiding and abetting fraud:

1. Can ordinary banking services constitute "substantial assistance" on a claim of aiding and abetting fraud?

Yes: Henry v. Lehman Commercial Paper, Inc. (*In re First Alliance Mortg. Co.*), 471 F.3d 977, 994-95 (9th Cir. 2006); *El Camino Resources, LTD. v. Huntington Nat'l Bank*, 722 F. Supp. 2d 875 (W.D. Mich. 2010); *Benson v. JPMorgan Chase Bank, N.A.*, 2010 WL 1526394 (N.D. Cal. Apr. 15, 2010); *Neilson v. Union Bank of Cal.*,

N.A., 290 F. Supp. 2d 1101, 1109, 1129-32 (C.D. Cal. 2003); *Lawyers Title Ins. Corp. v. United Am. Bank of Memphis*, 21 F. Supp. 2d 785, 798-800 (W.D. Tenn. 1998).

No: de Abreu v. Bank of Am. Corp., 525 F. Supp. 2d 381, 390 (S.D.N.Y. 2007).

2. Do the circumstances warrant an award of punitive damages?

Yes: [No case law found]

No: [No case law found]

B. Regarding the plaintiffs' negligence claim:

1. Did Bigbank owe duties to the members of the Investor Class?

Yes: Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1143 (C.D. Cal. 2003); *Short v. Conn. Community Bank, N.A.*, 2012 WL 1057302 (D. Conn. Mar. 28, 2012); *Levinson v. PSCC Services, Inc.*, 2010 WL 5477250 (D. Conn. Dec. 29, 2010).

No: Lerner v. Fleet Bank, N.A., 459 F.3d 273, 286 (2d Cir. 2006); *Conder v. Union Planters Bank, N.A.*, 384 F.3d 397 (7th Cir. 2004); *Eisenberg v. Wachovia, N.A.*, 301 F.3d 220, 226 (4th Cir. 2002); *MSMLK Inv. Co. v. JP Morgan Chase & Co.*, 431 Fed. App'x 17, at *20 (2d Cir. 2011); *Ballard v. Royal Trust Bank*, 202 F.3d 277 (9th Cir. 1999); *Brooks v. Bank of Boulder*, 891 F. Supp. 1469 (D. Colo. 1995).

2. Did Bigbank owe duties to BIS?

Yes:

No: O'Halloran v. First Union Nat. Bank of Fla., 322 Fed. App'x 900 (11th Cir. 2009); *SIPC v. Capital City Bank* (*In re Meridian Asset Mgmt. Inc.*), 296 B.R. 243 (Bankr. N. D. Fla. 2003)

C. Regarding Bigbank's *in pari delicto* defense:

1. Are the trustee's claims subject to the *in pari delicto* defense?

Yes: Peterson v. McGladrey & Pullen, LLP, 676 F.3d 594 (7th Cir. 2012); *Mosier v. Callister, Nebeker & McCullogh*, 546 F.3d 1271, 1276 (10th Cir. 2008); *Official Committee of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1152 (11th Cir. 2006); *Official Committee of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 357 (3d Cir. 2001); *In re Hedged–Invs. Assocs., Inc.*, 84 F.3d 1281, 1285 (10th Cir. 1996).

No: Goldstein v. FDIC, 2012 U.S. Dist. LEXIS 68491 (D. Md. May 16, 2012); Jeffrey Davis, *Ending the Nonsense: The In Pari Delicto Doctrine Has Nothing to Do with What is § 541 Property of the Bankruptcy Estate*, 21 EMORY BANKR. DEV. J. 519 (2005); Risa Lynn Wolf-Smith, *Innocent Trustee/Creditors Barred by Debtors' Past Wrongs: It Just Ain't Right*, 26 AM. BANKR. INST. J., No. 2, at 42 (Apr. 2007); William McGrane, *The Erroneous Application of the Defense of In Pari Delicto to Bankruptcy Trustees*, 29 CAL. BANKR. J. 275 (2007); Gerald L. Baldwin, *in pari delicto Should Not Bar a Trustee's Recovery*, 23 AM. BANKR. INST. J. 8 (Oct. 2004); Tanvir Alam, *Fraudulent Advisors Exploit Confusion in the Bankruptcy Code: How*

in pari delicto Has Been Perverted to Prevent Recovery for Innocent Creditors, 77 Am. Bankr. L.J. 305 (Summer 2003).

2. Does the adverse interest exception apply to bar the defense and thereby allow the trustee's claim?

Yes: Bankr. Servs., Inc. v. Ernst & Young (*In re CBI Holding Co.*), 529 F.3d 432, 448 (2d Cir. 2008).

No: Mosier v. Callister, Nebeker & McCullough, 546 F.3d 1271 (10th Cir. 2008); *Cobalt Multifamily Investors I, LLC v. Shapiro*, 2012 WL 762129 (S.D.N.Y. Mar. 7, 2012); *Kirschner v. Grant Thornton LLP*, 15 N.Y.3d 446, 912 N.Y.S.2d 508, 938 N.E.2d 941 (2010); *Silverman v. Meister Seelig & Fein, LLP* (*In re Agape World, Inc.*), 467 B.R. 556 (Bankr. E.D.N.Y. 2012); *In re Nat'l Century Fin. Enters., Inc.*, 783 F. Supp. 2d 1003 (S.D. Ohio 2011).

3. What standard should be applied in evaluating the adverse interest exception – "total abandonment," "any benefit," subjective intent, long term v. short term benefit.

The court is referred to the cases applying these different standards, as discussed in PHELPS AND RHODES, *The Ponzi Book Book: A Legal Resource for Unraveling Ponzi Schemes* § 14.07[3] (LexisNexis 2012).

4. Does the sole actor rule negate the adverse interest exception to the application of *in pari delicto* to the trustee's claims?

Yes: Gold v. Deloitte & Touche LLP (*In re NM Holdings Co., LLC*), 622 F.3d 613, 620-21 (6th Cir. 2010); *Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 165 (2d Cir. 2003); *Thabault v. Chait*, 541 F.3d 512, 527 (3d Cir. 2008); *Official Committee of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340 (3d Cir. 2001); *Silverman v. Meister Seelig & Fein, LLP* (*In re Agape World, Inc.*), 467 B.R. 556 (Bankr. E.D.N.Y. 2012); *In re Nat'l Century Fin. Enters., Inc.*, 783 F. Supp. 2d 1003 (S.D. Ohio 2011); *USACM Liquidating Trust v. Deloitte & Touche LLP*, 764 F. Supp. 2d 1210 (D. Nev. 2011).

No:

5. If Dolittle asserts his Fifth Amendment rights at trial, are the plaintiffs entitled to an adverse inference against his employer, Bigbank?

Yes: SEC v. Herman, 2004 U.S. Dist. LEXIS 7829, at *20 n.4 (S.D.N.Y. May 5, 2004); *Court-Appointed Receiver of Lancer Mgmt. Grp. LLC v. Lauer*, 2010 U.S. Dist. LEXIS 31147, at *23 (S.D. Fla. Mar. 31, 2010); *Libutti v. United States*, 107 F.3d 110, 121 (2d Cir. 1997) (*quoting Brink's Inc. v. City of N.Y.*, 717 F.2d 700, 710 (2d Cir. 1983)); see also *Rad Servs., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 275 (3d Cir. 1986) ("[N]othing forbids imputing to a corporation the silence of its personnel.").

No:

6. Is Bigbank responsible for Dolittle's actions?

Yes: Lustgraaf v. Behrens, 619 F.3d 867, 883 (8th Cir. 2010).

No: Weshnak v. Bank of America, 451 Fed. Appx. 61 (2d Cir. 2012).

VIII. Evidence Problems Likely to Arise at Trial

Bigbank vehemently objects to any evidence regarding Dolittle or his activities on the grounds that he was acting outside the scope of his employment and all such evidence is therefore irrelevant and prejudicial.

The plaintiffs contend otherwise.

The parties understand and agree that the court has already overruled this objection and that it is preserved for the record.

Bigbank agrees the plaintiff's expert witness, Irving Eyeshades, is qualified to testify as an expert in forensic accounting.

IX. Witnesses

Plaintiffs' Witnesses:

Irving Eyeshades, Forensic Accountant

On direct examination, will testify to his conclusions regarding whether BIS was a Ponzi scheme; damages to the estate; and damages to the Investor Class.

On cross examination, will testify that investors' actual losses are much lower than shown on Badoff's last statements.

James Dupe', Representative and Member of the Investor Class

On direct examination, will testify regarding why he invested in BIS; the representations that Badoff made to him; the representations that Dolittle made to him; and his losses and the resulting poverty.

On cross examination, will testify about his failure to investigate "red flags."

Dorothy Dolittle

On direct examination, will be asked to testify about her activities regarding BIS; her relationship with Badoff; the representations she made to members of the Investor Class; and the bribes she received from Badoff and her lavish lifestyle. She is however, expected to refuse to testify, as she did in her deposition.

No cross examination.

Defendant's Witnesses:

John Longmoney, III, President of Bigbank

On direct examination, will testify that Dolittle was not acting within the scope of her employment when she told the members of the Investor Class that Badoff and BIS were legitimate and that she violated strict bank policy if she took any bribes from Badoff.

On cross examination, will testify that Badoff's account application should have been required to disclose his business and that after Badoff was elected to the bank's board, his accounts and activities were subject to less scrutiny.

X. Exhibits

Plaintiffs' Exhibits
1. BIS Statement of Account dated 12/31/10, issued to James Dupe'
2. Report of Irving Eyeshades, Forensic Accountant

Defendant's Exhibits
None

XI. Objections to Exhibits

None. The parties stipulate to the admission of listed exhibits into evidence.

XII. Trial

(A) Jury or non-jury

This will be a non-jury trial. Neither party requested a jury.

(B) Estimated length of trial

The trial will take no more than one hour and twenty minutes, including the judge's decision.

Agreed:

For the Tom Tough, Trustee

____/S/_____

For the Investor Class

____/S/_____

For Bigbank

___/S/_____

Boris Badoff
Badoff Investment Services, LLC
2500 Fifth Avenue
New York, NY 10002

Period Ending: 12/31/08

James R. Dupe
2234 Calumniated Way
Pasture, WO 62437

Account No.: 24-32-4666
TIN: XXX-XX-1313

Date	Bought Received or Long	Sold Delivered or Short	Description	Price or Symbol	Amount Debited from Your Account	Amount Credited to Your Account
			BALANCE FORWARD		403,551.65	
12/3			NOV MARGIN INTEREST	INT	1,965.02	
12/4			FISTER INC DIV 11/09/07 12/04/07	DIV		910.60
12/11			JOHNSON & PADDOCK DIV 11/27/07 12/11/07	DIV		2,213.33
12/31			CAP ASSOCS INC DIV 12/14/07 12/28/07	DIV		106.67
			DEC MARGIN INTEREST	INT	1,935.25	
			NEW BALANCE		402,881.98	
			SECURITY POSITIONS	MKT PRICE		
	438		ADOBE BLDG CO	42.730		
	400		ALTRUISTIC GROUP INC	75.580		
	180		APPLE INC	198.080		
	1,600		CVS GROUP	39.750		
	800		CAP ASSOCS INC	24.950		
	1,600		SYSCO COMPUTING	27.070		
	4,000		EMULATE CORP	16.320		
	300		GOLDMAN SACKS GROUP	215.050		
	90		J.P. MOSTLY CHASTE & CO	43.650		
	600		JOHNSON & PADDOCK	66.700		
			CONTINUED ON PAGE 2			

Boris Badoff
Badoff Investment Services, LLC
2500 Fifth Avenue
New York, NY 10002

Date	Bought Received or Long	Sold Delivered or Short	Description	Price or Symbol	Amount Debited from Your Account	Amount Credited to Your Account
	278		KRAFTY FOODS CO	32.630		
	600		J C PENNILESS CO	43.990		
	942		FISTER INC	22.730		
			MARKET VALUE OF SECURITIES LONG SHORT 440,944.44			

PLEASE RETAIN THIS STATEMENT FOR INCOME TAX PURPOSES

Boris Badoff
Badoff Investment Services, LLC
2500 Fifth Avenue
New York, NY 10002

Date	Bought Received or Long	Sold Delivered or Short	Description	Price or Symbol	Amount Debited from Your Account	Amount Credited to Your Account
			YEAR-TO-DATE SUMMARY			
			DIVIDENDS			76,248.56
			MARGIN INTEREST		58,180.93	
			GROSS PROCEEDS FROM SALES			362,843.00