UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
-v-	:	S10 10 Cr. 228 (LTS)
DANIEL BONVENTRE, ANNETTE BONGIORNO, JOANN CRUPI, a/k/a "Jodi," JEROME O'HARA, and GEORGE PEREZ,	:	
Defendants.	:	

REPLY MEMORANDUM ON BEHALF OF THE UNITED STATES OF AMERICA IN SUPPORT OF ENTRY OF PRELIMINARY ORDERS OF FORFEITURE

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The Government respectfully submits this memorandum in further support of the entry of preliminary orders of forfeiture as to Daniel Bonventre, Annette Bongiorno, Joann Crupi, a/k/a "Jodi," Jerome O'Hara, and George Perez (the "defendants").

PRELIMINARY STATEMENT

After their conviction for participating in the largest known fraud in history, the defendants object to the Government's request for orders requiring them to forfeit the proceeds of this scheme and property traceable thereto. Their arguments that they could not foresee the scope of the fraud they were convicted of committing, or that it would be unconstitutional to require them to forfeit the scheme's gross proceeds, are unconvincing. With the exception of several objections that the

Government is addressing with amended forfeiture orders, their arguments against the forfeiture of specific property are meritless.

Apart from the question of their own mental states, which is ascertainable from the trial evidence, the defendants' only objections are either legal or, to the extent factual, purely documentary. As such, there is no reason the taking of testimony would assist the Court in determining the forfeitability of the property sought. As permitted by Rule 32.2(b)(1)(B), the Court should conduct the hearing by evaluating the parties's declarations and the trial evidence. Finally, the Court should enter the requested orders of forfeiture at sentencing and not stay their execution.

DISCUSSION[1]

A. This Court Should Order Forfeiture Based on the Submissions Before It

1. Applicable Law

Federal Rule of Criminal Procedure 32.2(b)(1) provides:

> **(A) Forfeiture Determinations.** As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the

[1] In this brief, references to "Tr." are to the trial transcript, and references to "GX" are to Government trial exhibits (copies of which can be provided and/or filed upon request). Citations to the defendants' submissions opposing forfeiture are the defendant's initials followed by "Mem." For example, references to "DB Mem." are to Daniel Bonventre's memorandum opposing forfeiture, ECF No. 1080.

> government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.
>
> **(B) Evidence and Hearing.** The court's determination may be based on evidence already in the record, including any written plea agreement, and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable. If the forfeiture is contested, on either party's request the court must conduct a hearing after the verdict or finding of guilty.

Fed. R. Crim. P. 32.2(b)(1).

Criminal forfeiture is "an aspect of sentencing." *Libretti* v. *United States*, 516 U.S. 29, 49 (1995). Accordingly, the Government's burden of proof is by a preponderance of the evidence. *See, e.g.*, *United States* v. *Fruchter*, 411 F.3d 377, 383 (2d Cir. 2005).[2]

The Rules of Evidence do not apply at a hearing pursuant to Rule 32.2(b)(1)(B), and accordingly "'information,' in addition to evidence, may be taken at" such a hearing. *United States* v. *Capoccia*, 505 F.3d 103, 110 (2d Cir. 2007) (citing Fed. R. Evid. 1101(d)(3)). In order to be considered at a hearing, information must be accepted by the Court as "relevant and reliable," Fed. R. Crim. P. 32.2(b)(1)(B), but if it is, there is no prohibition on relying upon hearsay or

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[2] Crupi suggests that the Supreme Court's recent decisions on the jury trial right silently overrule *Libretti*, but acknowledges that essentially this position has been rejected by the Ninth Circuit. *See* JC Mem. 2 n.1. In any event, this Court is bound by controlling precedent of the Second Circuit and the Supreme Court unless it is directly overruled. *See, e.g.*, *Agostini* v. *Felton*, 521 U.S. 203, 239 (1997).

documentary submissions not admissible under the Rules of Evidence in place of live testimony. *See Capoccia*, 505 F.3d at 110 (allowing use of hearsay); *United States* v. *Kahale*, No. 09 Cr. 159 (KAM), 2010 WL 3851987, *14 (E.D.N.Y. Sept. 27, 2010) (ordering forfeiture following hearing consisting of presentation of trial transcripts and exhibits and argument); *United States* v. *Stathakis*, No. 04 Cr. 790 (CBA), 2008 WL 413782, at *14 n.2 (E.D.N.Y. Feb. 13, 2008) (relying on hearsay).[3]

2. The Evidence and Information in the Record Carries the Government's Burden at a Hearing

As to each defendant, the Government has provided a declaration setting forth the evidentiary basis for the requested forfeiture. In response to the defendants' objections, the Government offers two more declarations. A supplemental declaration from Special Agent Paul F. Roberts, Jr. providing documentary evidence is attached hereto as Exhibit A. The declaration of Matthew B. Greenblatt, supporting the calculations of the cash additions to the Madoff Securities investment advisory business, is attached hereto as Exhibit B. Together with the evidence already in the record from trial, this evidence carries the Government's burden at a hearing.

The defendants' requests for hearings do not identify any issue on which the taking of testimony is appropriate. For the most part, the defendants' requests for a

[3] The Advisory Committee Notes for Rule 32.2 contemplate the use of live testimony only in "some instances" where it is "needed to determine the reliability of proffered information." Fed. R. Crim. P. 32.2 adv. comm. notes (2009 Amendments) ("The Committee foresees that in some instances live testimony will be needed to determine the reliability of proffered information.").

hearing are generic. DB Mem. 5 ("At the very least, Mr. Bonventre is entitled to a fact-finding hearing."); JC Mem. 2 ("[A]s the government has failed to provide appropriate support for its assertions, Ms. Crupi hereby moves this Court for a hearing as to forfeiture pursuant to Fed. R. Crim. P. 32.2(b)(1)(B)."), JO Mem. 15 ("We contest the amount of the money judgment sought and request a hearing on this issue."); GP Mem. 3 ("[W]e respectfully request an evidentiary hearing so that we may challenge the Government's factual assertion, and challenge the amount and nature of any forfeiture.").[4] Two of the defendants question the calculation of the money judgment amount, JC Mem. 4 & n.2 (questioning methodology of capital additions); JO Mem 10, 14-15 (questioning basis for calculation of amount of money judgment and requesting disclosure of documentation in support), and the Greenblatt declaration explains the methodology used. Crupi has requested supporting documentation for certain challenged assets, JC Mem. 2, 9-10, which the supplemental Roberts declaration provides.[5]

There is thus no need a testimonial hearing with witnesses. At the sentencing hearing, the Government will proffer the Roberts declarations as to each defendant, the supplemental Roberts declaration, and the Greenblatt declaration, as well as the evidence already in the trial record. That evidence, along with any

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[4] Besides joining in the arguments of her codefendants "to the extent those arguments are applicable to her," AB Mem. 1, Bongiorno does not request a hearing.

[5] Crupi's objection to the claim that investment advisory account 1-C1277 was overdrawn is the only challenge that even arguably goes to the reliability of the information submitted to the Court. But as the records attached to the supplemental Roberts declaration establish, that account *was* overdrawn.

evidence proffered by a defendant, *see* ECF No. 1077-2 (Bowen declaration in support of Crupi); ECF No. 1078-1 (Kranz declaration in support of Perez); ECF No. 1079-1 (Rudy Bongiorno declaration in support of Bongiorno), should comprise the evidentiary record with respect to the proposed preliminary orders of forfeiture. Because the contested forfeiture issues are all legal or can be decided on the papers, Rule 32.2(b)(1)(B) does not require live testimony at the hearing, and concerns of judicial efficiency strongly counsel against it.

B. The Requested Money Judgments Should Be Imposed

The defendants make several challenges to the Government's request for the entry of money judgments in the amount of the gross proceeds of the fraud during the time period of their participation in it. None of these challenges has merit.

1. The Defendants Must Forfeit the Gross Proceeds of the Fraud

The United States is entitled to forfeiture of "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation of . . . any offense constituting 'specified unlawful activity' (as defined in section 1956(c)(7) of this title [*i.e.*, Title 18]), or a conspiracy to commit such offense." 18 U.S.C. § 981(a)(1)(C).[6] Specified unlawful activity includes any violation listed in 18 U.S.C. § 1961(1), *see* 18 U.S.C. § 1956(c)(7)(A), which in turn includes any "act which is indictable under any of the following provisions of title 18, United States Code . . . 1341 (relating to mail fraud), 18 U.S.C. § 1961(1)(B), and "any offense involving . . .

[6] Although 18 U.S.C. § 981(a)(1)(C) provides for civil forfeiture, it is incorporated to criminal proceedings by 28 U.S.C. § 2461(c).

fraud in the sale of securities," § 1961(1)(D). A separate provision specifies that "the court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate . . . (A) section . . . 1344 of this title, affecting a financial institution . . . shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation." 18 U.S.C. § 982(a)(2).[7] Proceeds are "'property that a person would not have but for the criminal offense,'" *United States* v. *Daugerdas*, No. S3 09 Cr. 581 (WHP), 2012 WL 5835203, at *2 (S.D.N.Y. Nov. 7, 2012) (quoting *United States* v. *Grant*, No. S4 05 Cr. 1192 (NRB), 2008 WL 4376365, at *2 n.1 (S.D.N.Y. Sept. 25, 2008)), including property that a defendant obtained lawfully but retained only because of the offense, *United States* v. *Torres*, 703 F.3d 194, 200 (2d Cir. 2012)

The defendants argue that forfeiture must be limited to the net, and not the gross, proceeds of the fraud—that is, that in this case the forfeiture amount should be the net proceeds of approximately $20 billion instead of the gross proceeds, which exceed $150 billion. *See* DB Mem. 2 n.2 (contending net proceeds would yield "$17 to 20 billion" figure); JO Mem. 8-9. This is incorrect. For forfeiture under Section 981(a)(1)(C), Section 981(a)(2) provides two definitions of the term "proceeds":

> (A) In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term "proceeds" means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and

[7] Forfeiture for Counts One through Three and Six Through Eleven of the Indictment thus relies on 18 U.S.C. § 981(a)(1)(C), and forfeiture for Counts Three and Sixteen through Eighteen relies on 18 U.S.C. § 982(a)(2)(A).

> any property traceable thereto, and is not limited to the net gain or profit realized from the offense.
>
> (B) In cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the term "proceeds" means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services. The claimant shall have the burden of proof with respect to the issue of direct costs. The direct costs shall not include any part of the overhead expenses of the entity providing the goods or services, or any part of the income taxes paid by the entity.

18 U.S.C. § 981(a)(2). The offenses the defendants committed are "illegal services" and "unlawful activities" within the meaning of Section 981(a)(2)(A), and thus the gross proceeds of these offenses are forfeitable.

In insider trading, where lawful securities are being traded in an unlawful manner, only net proceeds are forfeitable. *See United States* v. *Contorinis*, 692 F.3d 136, 145 n.3 (2d Cir. 2012). However, in using false promises to obtain money in exchange for no consideration, the defendant is not providing any "lawful goods" or "lawful services," and thus Section 981(a)(2)(B) simply does not apply.[8] Instead, Ponzi schemes, where outright fraud is used to sell entirely fictitious instruments, constitute wholly "unlawful activities" justifying the forfeiture of gross proceeds. *See United States* v. *Sigillito*, 899 F. Supp. 2d 850, 865 (E.D. Mo. 2012) ("In this case, Defendant offered no lawful goods or lawful services as part of the BLP [*i.e.*, the British Loan Program]; rather, Defendant merely took lenders' investments

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[8] The only service arguably provided to Madoff Securities clients was paying some of them in other investors' funds, which is an "illegal service[]" within the meaning of Section 981(a)(2)(A).

under false pretenses, and, then, after deducting fees for himself and his co-conspirators, he redistributed new investments as interest or principal to old investors. Accordingly, the court finds that 18 U.S.C. § 918(a)(2)(A) provides the applicable definition of 'proceeds.'"); *see also In re Rothstein, Rosenfeldt, Adler, P.A.*, 717 F.3d 1205, 1212 (11th Cir. 2013) (applying § 981(a)(2)(A)'s gross proceeds definition to the proceeds of a Ponzi scheme based on fraudulent promissory notes and fictitious bridge loans); *United States* v. *Schlesinger*, 396 F. Supp. 2d 267, 278-79 (E.D.N.Y. 2005) (finding that gross proceeds of insurance fraud were forfeitable).[9]

2. The Losses From the Ponzi Scheme Were Reasonably Foreseeable to Each of the Five Defendants

The defendants claim that they should forfeit only what they personally received, not what other conspirators obtained as a result of the fraud. However, the defendants are each required to forfeit the reasonably foreseeable proceeds of

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[9] A further indication that the forfeiture of gross proceeds is appropriate is the lack of eligible costs to subtract from the gross proceeds. Section 981(a)(2)(B) provides that the only costs to be deducted from the gross proceeds are "the direct costs incurred in providing the goods or services," and explicitly provides that "[t]he direct costs *shall not include any part of the overhead expenses* of the entity providing the goods or services, or any part of the income taxes paid by the entity." § 981(a)(2)(B) (emphasis added). Since the defendants did not actually purchase any securities for any investment advisory client, there were no "direct costs" incurred. The costs were only the excluded "overhead expenses" and taxes from Madoff Securities, as well as redemptions paid to other investment advisory clients. Unlike the costs of obtaining securities sold in insider trading cases, these redemptions were not "direct costs" of any provision of goods or services; they were expenditures of victims' money to enrich the coconspirators and others and to perpetuate the Ponzi scheme. In any event, the burden is on the defendants to prove eligible "direct costs." § 981(a)(2)(B).

the conspiracy. The defendants acknowledge this point, at times explicitly, but simply argue that the fraud amounts were not reasonably foreseeable to them. *See* DB Mem. 2 (conceding joint and several liability as to foreseeable proceeds); *see also* AB Mem. 1-3; JC Mem. 4; JO Mem. 9, 13-14; GP Mem. 5-11. The trial evidence, however, proved that the full amount of the fraud was reasonably foreseeable as to each defendant on or before the dates the Government uses to calculate the money judgment amounts.

Where conspirators act jointly, a defendant must forfeit the amount of all of the proceeds received by coconspirators, so long as the actions generating those proceeds were reasonably foreseeable to the defendant. *See United States* v. *Contorinis*, 692 F.3d 136, 147 (2d Cir. 2012). Although the property "must have, at some point, been under the defendant's control or the control of his co-conspirators in order to be considered 'acquired' by him," *id.*, "property need not be personally or directly in the possession of the defendant, his assignees, or his co-conspirators in order to be subject to forfeiture," *id.* (internal quotation marks omitted).[10]

As explained at length in the Government's sentencing memorandum, the losses from the Ponzi scheme were reasonably foreseeable to each of the five defendants. *See* Gov.'s Sent'g Mem. 42-48. The scope and scale of the Madoff Securities investment advisory business was hardly a secret, and there was overwhelming evidence at trial of their knowledge of the fraud, discussed at length

[10] The defendants acknowledge this principle of law and simply argue that the amounts were not reasonably foreseeable to them. *See* DB Mem. 2; AB Mem. 1-3; JC Mem. 4; JO Mem. 9, 13-14; GP Mem. 5-11.

in the Government's sentencing memorandum and in the Government's response to the defendants' post-trial motions. The declarations submitted in support of the proposed forfeiture orders also each note trial evidence demonstrating that each defendant had knowledge of the fraud as of the date for which the Government seeks forfeiture. *See* ECF No. 1042-2 ¶ 10 (Bonventre instructing Cotellessa-Pitz not to use the word "customer" to bank employees as of no later than 1980);[11] ECF No. 1042-4 ¶ 10 (Bongiorno requesting historical arbitrage deals starting in mid-1970s); ECF No. 1045-2 ¶ 10 (Crupi requesting historical arbitrage deals starting in late 1980s);[12] ECF No. 1045-4 ¶ 10 (O'Hara comments in STMTPro code as of 1990); ECF No. 1050-2 ¶ 10 (Perez comments in STMTPro code as of 1991). When taken together with the other voluminous evidence of the defendants' knowledge at trial, as outlined in the Government's sentencing memorandum and memorandum in opposition to the defendants' post-trial motions, ECF Nos. 994, 1082, this evidence

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[11] Bonventre complains that this highly suspicious instruction was taken out of context, ignoring the context of the other trial evidence showing his intent. In addition to this, the Supplemental Declaration of Special Agent Paul F. Roberts, Jr. includes a handwritten journal kept by Irwin Lipkin which records, on page 28, Lipkin writing that "Danny changed the stock record ledger" in order to disguise the nature of a customer in April of 1982. *See* Ex. A ¶ 3 & Att. 1 at 28.

[12] Crupi points to other portions of trial testimony to argue that she lacked knowledge until the 1990s. JC Mem. 2-3. In fact, however, as set forth in the supplemental Roberts declaration, *see* Ex. A ¶¶ 4-5, in two exhibits admitted at trial, Crupi took handwritten notes on calculating trades with guaranteed returns, *see, e.g.*, Ex. A ¶ 4 (GX 105-C122 at 3 describing "profit needed"), and including instructions on how to enter backdated trades or trades with predetermined rates of return, *see, e.g.*, Ex A ¶ 5 (GX 105-C172 at 15 stating "Whenever David gives us tickets the percent ALWAYS has to work out to 2 ½ no matter how many weeks the deal is for."). Both of these documents were written by Crupi in the 1980s. *See* Ex. A ¶¶ 4-5.

establishes that the fraud was foreseeable to the defendants as of the date for which the forfeiture is sought.

Accordingly, based on the trial evidence, the Court should find that the amount of the proceeds of the fraud was reasonably foreseeable to each of the defendants as of the respective dates for which forfeiture is sought, and hold them jointly and severally liable for the corresponding amount of proceeds generated by the conspiracy from that point forward.

3. Forfeiture of the Proceeds of the Fraud is Not Grossly Disproportionate

The defendants ask the Court to find that forfeiture of the gross proceeds of the largest known fraud in history is unconstitutionally disproportionate to the gravity of the offense.[13] This argument lacks any merit.

Under the Eighth Amendment, criminal forfeiture may not be "grossly disproportional to the gravity of the offense" of conviction. *United States* v. *Bajakajian*, 524 U.S. 321, 323 (1998). To evaluate the proportionality of a forfeiture, courts look to (1) the essence of the crime of the defendant and its relation to other criminal activity; (2) whether the defendant fit into the class of persons for whom the statute was principally designed; (3) the maximum sentence and fine that could have been imposed; and (4) the nature of the harm caused by the defendant's conduct. *See United States* v. *Varrone*, 554 F.3d 327, 331 (2d Cir. 2009).

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[13] *See* DB Mem. 2; AB Mem. 3 n.1; JC Mem. 12; JO Mem. 11-12; GP Mem. 10.

It is questionable whether the forfeiture of crime proceeds (as opposed to legally obtained property used to facilitate a crime) can ever be unconstitutionally disproportionate. *See, e.g.*, *United States* v. *Betancourt*, 422 F.3d 240, 250-51 (5th Cir. 2005) ("[T]he Eighth Amendment has no application to the forfeiture of property acquired with proceeds."); *United States* v. *Real Prop. Located at 22 Santa Barbara Dr.*, 264 F.3d 860, 874-75 (9th Cir. 2001) (finding Eighth Amendment does not apply to forfeiture of drug proceeds);*United States* v. *Peters*, 257 F.R.D. 377, 389-90 (W.D.N.Y. 2009) (expressing doubt that Eighth Amendment applies to forfeiture of proceeds); *cf. United States* v. *Jalaram*, Inc., 599 F.3d 347, 354-55 (4th Cir. 2010) (concluding that forfeiture of proceeds can be disproportionate but recognizing that "in most cases, courts ultimately will find a forfeiture of proceeds not grossly disproportional to the offense"). Regardless of that theoretical question, courts have repeatedly upheld the forfeiture of gross proceeds. *See, e.g.*, *United States* v. *Porcelli*, 440 F. App'x 870, 879 (11th Cir. 2011) (summary order) (forfeiture of gross amount of fraud scheme not disproportionate even when difference between gross receipts and net proceeds was three times the maximum fine); *Sigillito*, 899 F. Supp. 2d at 868 (requiring forfeiture of gross receipts).

Even if the forfeiture of crime proceeds could ever theoretically be grossly disproportionate, it plainly is not here. Each of the applicable factors strongly favors the requested forfeiture. Unlike currency reporting offenses that the Supreme Court and Second Circuit have found to implicate constitutional concerns, *see Bajakajian*, 524 U.S. at 323; *Varrone*, 554 F.3d at 331, the massive Ponzi

scheme the defendants committed was extraordinarily severe and harmful. As employees of Madoff Securities, convicted of defrauding the firm's investment advisory customers, the defendants were plainly those for whom the securities and fraud laws were designed. The maximum sentence and fine authorized for such serious conduct further supports the proportionality of the requested forfeiture. As set forth in the Government's sentencing memorandum, the defendants face maximum prison sentences of 220 years (Bonventre), 78 years (Bongiorno), 175 years (Crupi), 100 years (O'Hara), and 100 years (Perez) and at least millions of dollars of financial penalties in addition to forfeiture.[14] In such circumstances, it is not unconstitutional to require the defendants to forfeit the proceeds of their crimes.

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[14] Indeed, the fines statutorily authorized for the defendants' conduct dwarf the requested forfeiture. Even assuming that 18 U.S.C. § 3571(d) could not now be used to impose a fine in excess of the otherwise applicable statutory maximums because these amounts were not submitted to a jury, *see United States* v. *Pfaff*, 619 F.3d 172, 175 (2d Cir. 2010), had the jury found the facts that this Court has before it, the applicable fine would be twice the gross pecuniary gain caused by the offenses—*i.e.*, twice as great as the recommended forfeiture orders. Since the Eighth Amendment analysis is not limited to the set of facts found by the jury, *see United States* v. *Elfgeeh*, 515 F.3d 100, 139 (2d Cir. 2008) (finding forfeiture proportional based on trial evidence showing different amounts of illegally transmitted money from that found by jury), it is appropriate to consider the type of penalty that is authorized for the offense the defendants actually committed. In this case, that would be a fine of twice the requested forfeiture amounts, further demonstrating their proportionality. *See, e.g.*, *United States* v. *Vilar*, No. 05 Cr. 621 (RJS), 2010 WL 1491859, at *2 (S.D.N.Y. Apr. 7, 2010) (finding forfeiture not disproportional in comparison to fine authorized by § 3571(d) based on gross pecuniary loss); *United States* v. *Rudaj*, No. 04 Cr. 1110 (DLC), 2006 WL 1876664, at *7-8 (S.D.N.Y. July 5, 2006) (similar based on gross pecuniary gain, noting questions on applicability of Eighth Amendment to forfeiture of proceeds).

C. The Amended Specific Property is Subject to Forfeiture

The defendants' challenges to the forfeiture of the specific property largely rely on meritless global objections to forfeiture. The Government is proposing amended forfeiture orders as to Bongiorno and Crupi to avoid delaying sentencing, and as amended there is no basis for them not to be entered.

1. All of the Funds Received from Madoff Securities Were Fraud Proceeds

Defendants object to the Government's position that all of the benefits they received from Madoff Securities were fraud proceeds. *See* DB Mem. 2-3; JC Mem. 8-9, 11-12; JO Mem. 9, 15-16; GP Mem. 11-13. In fact, however, that is just what the trial evidence proved. The Government's evidence at trial established that funds from the investment advisory business were used to prop up the failing market making and proprietary trading businesses. *See* GX 5000-1 at pp. 142, 143. Since the legitimate business lines at Madoff Securities were not profitable, *all* of the profit that was extracted from the company—whether in the form of salary, fake trades, or other benefits—came from the Ponzi scheme. Accordingly, the property

traceable to the funds the defendants received from Madoff Securities is all traceable to the fraud and subject to forfeiture.[15]

2. The Defendants Have Identified No Basis For Contesting Forfeiture of the Amended Specific Property

Apart from their objections that the scope of the fraud was not foreseeable to them or their claims that not all of the money they received from Madoff Securities was part of the fraud, the defendants raise few objections to the evidentiary basis the Government has supplied for forfeiture of the specific property. As set forth below, the Government is proposing amended forfeiture orders for Bongiorno and Crupi that remove certain property in order to avoid protracting sentencing to resolve their objections, without prejudice to seeking the forfeiture of that property at a later time through means that can be pursued after sentencing. As amended,

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[15] Perez objects that the payments he received from Madoff Securities after December of 2008 could not be proceeds of the crime. This is incorrect; because the only profitable business line at Madoff Securities was the Ponzi scheme, the money Perez was paid both before and after Bernard Madoff's arrest ultimately came from Madoff Securities investment advisory clients. The Securities Investor Protection Corporation began paying salaries as advance payments after one pay period following Madoff's arrest, but these are only advances and reduce the value of the Madoff Securities estate correspondingly, subject to the statutory priorities of the Securities Investor Protection Act ("SIPA"). *See* 15 U.S.C. § 78fff-3(a) (allowing for advances with SIPC rights subrogated to those of customers). Thus these proceeds are funds that are traceable to the fraud in that they would not have been paid absent the fraud and they reduce the amount of Madoff Securities funds that would be available to make whole victims who do not meet the SIPA definition of "customer." *In re Bernard L. Madoff Inv. Secs. LLC*, 708 F.3d 422, 428 (2d Cir. 2013) (holding that indirect investors did not meet SIPA definition of "customer"); *see also Daugerdas*, 2012 WL 5835203, at *2 (applying "but for" test for proceeds). And in any event, Perez also continued in his participation in the conspiracies after Madoff's arrest through obstructive conduct. *See* Tr. 8558 (Hemrajani testifying that Perez told him not to provide information to the trustee, but to let Perez handle it instead).

the forfeiture orders accordingly identify specific property that the Government's evidence has established is subject to forfeiture.

a. Daniel Bonventre

Bonventre has no real objection to the Government's tracing of fraud proceeds to the specific property besides his contentions that the payments he received from Madoff Securities were not fraud proceeds, DB Mem. 2-3, and that the fraud was not reasonably foreseeable to him before 1986, when he purchased his Manhattan apartment and other unspecified property. DB Mem. 1-3. For the reasons explained in Sections B.2 and C.1, *supra*, both of those objections lack merit. The only profitable section of the Madoff Securities business was the Ponzi scheme, and so the money that Madoff Securities provided to the defendants was all the proceeds of fraud. And the trial evidence supports a finding, by a preponderance of the evidence, that Bonventre's knowledge of the fraud scheme dated back to before 1986. Accordingly, the specific property identified in the forfeiture orders was all purchased with fraud proceeds and is all subject to forfeiture on that basis.

b. Annette Bongiorno

In addition to her general objections regarding foreseeability, AB Mem. 1-3, Bongiorno contests the forfeiture of just three pieces of specific property, proffering a declaration by her husband Rudy Bongiorno in which he claims to have acquired these assets through funds that were not derived from Madoff Securities. *See* ECF No. 1079-1 (Rudy Bongiorno Decl.). To avoid unduly protracting sentencing proceedings, especially in light of the Government's ability to seek the defendant's

interest in this property as substitute assets, the Government will remove them from its amended forfeiture order, which is attached hereto as Exhibit C. This removal is without prejudice to the Government's right to seek the forfeiture of Annette Bongiorno's marital-property interests in these excluded assets as substitute assets at a later time, to seek to amend the forfeiture order under Rule 32.2(e) based on further investigation, or to pursue these assets in the pending *in rem* action. *See* Fed R. Crim. P. 32.2(e)(1)(A), (B) (allowing for amendment of order to add substitute assets or based on subsequent identification of property as forfeitable); *see also, e.g.*, *United States* v. *Ursery*, 518 U.S. 267, 270-71 (1996) (holding civil forfeitures do not implicate Double Jeopardy Clause); *United States* v. *U.S. Currency in the Amount of $119,984.00*, 304 F.3d 165, 174-79 (2d Cir. 2002) (Government's acquiescence at sentencing to a defendant's assertion does not bar contesting that fact at later *in rem* civil action in light of efficiency concerns and different procedures at sentencing).

c. Joann Crupi

In addition to general objections about the foreseeability of the fraud and the claims that not all payments from Madoff Securities were tied to fraud, Crupi makes several challenges to the forfeitability of certain pieces of property based on the complexity of the analysis needed to trace fraud proceeds to them. As explained below, to avoid a complex and potentially academic dispute, the Government is proposing an amended forfeiture order, attached hereto as Exhibit D, limited to seeking readily ascertainable traceable funds as to disputed assets.

When crime proceeds are commingled with other property, in both civil and criminal cases, the Government has the option of treating the crime proceeds as remaining in the account (a lowest intermediate balance rule), as leaving the account (a first-in first-out rule), or to allocate the proceeds pro rata (an averaging rule). *United States* v. *Banco Cafetero Panama*, 797 F.2d 1154, 1159-60 & n.6 (2d Cir. 1986) (recognizing government's option of lowest intermediate balance or first-in first-out rule, accounting choices, noting government did not seek to use averaging); *United States* v. *Walsh*, 712 F.3d 119, 124 (2d Cir. 2013) (noting availability of *Banco Cafetero*'s three "accounting choices"). Additionally, where crime proceeds have been used to purchase some or all of an asset, the Government is entitled to the benefit of any appreciation and the defendant bears the risk of depreciation. *See, e.g.*, *United States* v. *Hatfield*, No. 06 Cr. 550 (JS), 2010 WL 4340632, at *1 (E.D.N.Y. Oct. 22, 2010) ("[I]f tainted funds were used to purchase some of Mr. Brooks' Point Blank stock, the United States' forfeitable interest equals the dollar amount of such proceeds traced into the actual shares, with the United States enjoying the benefit of appreciation but Mr. Brooks bearing the risk of depreciation." (internal quotation marks omitted)); *United States* v. *Kalish*, No. 06 Cr. 656 (RPP), 2009 WL 130215, at *6 (S.D.N.Y. Jan. 13, 2009) (finding Government entitled to appreciation on stocks bought with traceable proceeds), *aff'd*, 626 F.3d 165 (2d Cir. 2010).

Here, the tracing of assets directly to the fraud is a complex endeavor because of the multiple layers of transactions used by Crupi and her wife Bowen. However,

the issue of the portion of assets directly traceable to the fraud is somewhat academic, both because of the Government's ability to seek the forfeiture of Crupi's interest in any other property as substitute assets and because of the pending civil forfeiture action, which includes forfeiture of property involved in money laundering, as well as other *in personam* claims not present in this criminal forfeiture proceeding. Accordingly, in order to streamline the sentencing proceedings, the Government is submitting herewith a revised order seeking the forfeiture based on the lowest readily ascertainable intermediate balances in each of the assets at issue, for bank accounts, or the readily ascertainable proportions of fraud proceeds to other additions for appreciating assets, such as real property and stocks. As noted above, such an order would be without prejudice to the amendment of the forfeiture order under Rule 32.2(e) to forfeit of Crupi's interest in a greater portion of such assets as substitute assets or based on further investigation, or as or to the civil *in rem* forfeiture of the remainder of such assets.[16]

d. Jerome O'Hara

O'Hara levels several objections at the forfeiture order, few of which concern the forfeitability of the specific property identified in the proposed order. O'Hara principally argues that the fraud was unforeseeable, JO Mem. 9, 13-14, his payments from Madoff Securities are not all crime proceeds, JO Mem. 9, 15-16, that

[16] The supplemental declaration of Special Agent Paul F. Roberts, Jr., submitted herewith, encloses documentation regarding the disputed accounts, as requested by Crupi, including documentation for the fact that Crupi overdrew her Madoff Securities IRA account 1-C1277 by over $300,000.

forfeiture would be grossly disproportionate, JO Mem. 11-12, and that the money judgment should be limited to net proceeds, JO Mem. 8-9, 14.

O'Hara also requests various stylistic changes to the order unrelated to the forfeitability of his specific property, adding extraneous and sometimes incorrect language about the applicable legal standards and suggesting the removal of "unnecessary" language. *See* JO Mem. 16-17 (edits to paragraphs 3, 5, 7, and 8). These changes should be rejected. The fact that the order remains preliminary as to third parties and may be modified as a result of their interests, *cf.* JO Mem. 16-17 (paragraphs 3, 8), is adequately conveyed by paragraphs 5-8, which address the adjudication of third-party petitions and entry of a final order of forfeiture. The order should not include reference to Supplemental Rule G(4)(b)(i), which does not apply in criminal forfeitures. *Compare* JO Mem. 16 (paragraphs 5, 7) *with* Fed. R. Crim. P. 32.2(b)(6)-(7) (incorporating other sections of Supplemental Rule G but not G(4)(b)(i)). Finally, the direction that the specific property, if finally forfeited to the United States, should be applied in partial satisfaction of the money judgment is a protection for the defendant and should be included for clarity, not deleted as "unnecessary." *Cf.* JO Mem. 17 (paragraph 8).

In addition to these line-edits, O'Hara also asks the Court to import unwarranted limitations into the order. He asks the Court to use a provision applicable only to civil cases to effectively grant a stay on the forfeiture of real property, bypassing the standard for a stay set forth in Rule 32.2(d). JO Mem. 16 (objection to paragraph 4); *see infra* at 28 & n.19 (explaining stay standard).

O'Hara asks the Court to prevent the Government from collecting on the money judgments, attempting to circumvent Rule 32.2(b)(4)(A)'s clear command that forfeiture is final as to the defendant at the time of sentencing and only remains preliminary with respect to third-party interests in specific property, not payments on money judgments. *Compare* JO Mem. 17 (objection to paragraph 10) *with* Fed. R. Crim. P. 32.2(b)(4)(A) ("At sentencing . . . the preliminary order of forfeiture becomes final as to the defendant. If the order directs the defendant to forfeit specific property, it remains preliminary as to third parties until the ancillary proceeding is concluded under Rule 32.2(c).") *and* Fed. R. Crim. P. 32.2(c)(1) ("[N]o ancillary proceeding is required *to the extent that the forfeiture consists of a money judgment*." (emphasis supplied)). Finally O'Hara asks this Court not to authorize discovery in advance but require the Government to make separate applications to the Court for each discovery request. JO Mem. 17 (objection to paragraph 12). Although the Government has multiple tools with which to seek to locate forfeitable property in connection with the Madoff Securities fraud, the request made by O'Hara would be unwarranted. Rule 32.2(b)(3) provides that the "[t]he entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to . . . conduct any discovery the court considers proper in identifying, locating, or disposing of the property." The Government respectfully submits that the requested discovery—discovery under the Federal Rules of Civil Procedure, *see* ECF No. 1045-3 ¶ 12—is proper in light of the massive scope of the fraud and amount of

forfeitable property not yet located, and asks the Court to so find in issuing the requested orders.

Beyond these general objections, O'Hara really has just two objections to the evidentiary showing the Government has made in support of the forfeitability of specific property, which is that after purchasing the Malverne Property with $687,000 in Madoff Securities funds, O'Hara paid back Madoff Securities. JO Mem. 16. This does not establish that the house was not bought with fraud proceeds. On the contrary, it shows that it was. The fact that O'Hara later paid Madoff Securities from a different source does not call into question the fact that the funds making up the $687,000 purchase price of the house were derived from fraud, and so, forfeitable. *See Daugerdas*, 2012 WL 5835203, at *2 (but-for test); *see also supra* Section B.1 (explaining that Government is entitled to forfeit gross proceeds).

O'Hara's other objection is that the Government does not discuss other funds he used to purchase the Malverne Property. Even if he used some untainted funds as part of the initial purchase of the Malverne Property, however, O'Hara used additional fraud proceeds to pay off the mortgage on the Malverne Property. As set forth in the initial declaration supporting the O'Hara forfeiture order, O'Hara used funds from the 5758 Bank of America Account, which were ultimately derived from Madoff Securities, to pay off much of the $170,000 mortgage taken out on the Malverne Property. *See* ECF No. 1045-4 ¶ 16. The Supplemental Declaration of Special Agent Paul F. Roberts, Jr. supplies the amount of such payments, which are at least $91,676.70. This amount exceeds the difference between the $687,000 in

Madoff Securities money that O'Hara applied to the initial purchase and the $752,000 purchase price. *See* ECF No. 1045-4 ¶ 15.[17] Accordingly, the entirety of the value of the Malverne Property is traceable to crime proceeds and forfeitable. *See Hatfield*, 2010 WL 4340632, at *1 (noting that Government has benefit of appreciation and defendant bears risk of depreciation).

e. George Perez

Perez's arguments are principally directed at forfeiture globally, and at the fact that his payments from Madoff Securities were fraud proceeds. GP Mem. 5-10 (knowledge and foreseeability); *id.* at 10 (proportionality); *id.* at 10-12 (challenge to Madoff Securities funds as crime proceeds); *id.* at 11 n.1 (challenge to post-December 2008 Madoff Securities payments as crime proceeds).

Beyond these, his only real challenge as to the forfeiture of specific property are his claim that the Government is entitled only to forfeit the amount by which Madoff Securities funds increased the principal of his house, not the extent to which they were used to pay interest. See GP Mem. 13-14. In support he includes a declaration indicating that the payments between June 18, 2002 and May 19, 2009 increased the principal of the house by only apparently $36,572.37. *See* Krantz Decl. The Court can accept the accuracy of this declaration and conclude that of the $212,922.24 in Madoff Securities funds that Perez used to pay for his house's

[17] O'Hara complains that the Government claims that he received fraud proceeds as early as 1982. JO Mem. 16. This date was a typographical error for 1992, and in any event not material either to the amount of his money judgment or to the specific property identified in the proposed order.

mortgage, approximately $36,572.37 went to principal and the remainder to interest, taxes, and homeowner's insurance. However, this fact does not establish that only $36,572.37 of the property is forfeitable. To the contrary, the entire $212,922.24 was made to payments that were necessary to preserve the value of the house. By encumbering the house with an interest-bearing note, Perez diminished its equity both by the face value of the note and by the interest that accrued on it. If Perez had simply allowed the interest to accrue, he would have thereby diminished the equity of the house further. The payments he made to avert this outcome (or to otherwise preserve the value of the property such as by insurance and tax payments) thereby went to increase or preserve its value, *see Torres*, 703 F.3d at 200 (finding that property interests retained as a result of fraud were forfeitable), and thus the amount of the house's value attributable to such payments is forfeitable as fraud proceeds.

3. Third-Party Interests and Substitute Assets Are Not Yet Before the Court

Certain defendants make reference in their submissions to third parties who claim an interest in some of the specific property subject to the proposed forfeiture orders. *See* DB Mem. 4; AB Mem. 2-3; JC Mem. 7-8; *see also* GP Mem. 13. These claims are not yet before the Court. Under Rule 32.2, the preliminary order of forfeiture must be entered without regard to third-party interests. *See* Fed. R. Crim. P. 32.2(b)(2)(A) ("The court must enter the order without regard to any third party's interest in the property. Determining whether a third party has such an

interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).”). Third parties will then receive notice of the forfeiture of specific property and have an opportunity to assert their interests, if any, in an ancillary proceeding. *See* 21 U.S.C. § 853(n); Fed. R. Crim. P. (b)(6), (c). Other than through these procedures, third parties cannot intervene in this case. *See* 21 U.S.C. § 853(k)(2) (barring intervention by third parties).[18]

O’Hara also claims that the Government is “attempt[ing] to short-circuit the showing it must make to entitle it to substitute assets.” JO Mem. 3; *see also* JO Memo at 15 (contending that Government “has not made a showing that it is entitled to forfeit any substitute property”). This objection is confusing. As O’Hara acknowledges, the issue is not yet before the Court, as the Government is not yet seeking the forfeiture of substitute assets. *See* ECF No. 1042 at 1 n.1; ECF No. 1045 at 1 n.1; JO Mem. 15 (citing *id.*); ECF No. 1050 at 1 n.1; DB Mem. 3 (acknowledging Government is not yet addressing substitute assets).

D. No Stay Is Appropriate

Finally, the defendants seek to stay the forfeiture orders pending appeal, so they need not forfeit anything—and can continue living in the real properties at issue—until the conclusion of their appeals. JO Mem. 17-18. The Government strongly objects.

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[18] In any event, the interests of third parties in property that is directly traceable to the offense are inferior to the United States’s interest. Pursuant to 21 U.S.C. § 853(c), all right, title, and interest in forfeitable crime proceeds “vests in the United States upon the commission of the act giving rise to forfeiture.”

Rule 32.2(d) provides that "[i]f a defendant appeals from a conviction or an order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review." In assessing requests to stay, courts generally consider the following factors: "(1) the likelihood of success on appeal; (2) whether the forfeited asset is likely to depreciate over time; (3) the forfeited asset's intrinsic value to the defendant (i.e., the availability of substitutes); and (4) the expense of maintaining the forfeited property." *United States* v. *Peters*, 784 F. Supp. 2d 234, 235 (W.D.N.Y. 2011) (citing *United States* v. *Davis*, No. 07 Cr. 11 (JCH), 2009 WL 2475340, at *2 (D. Conn. June 13, 2009)).

Here, the relevant factors strongly counsel against a stay. The defendants were convicted based on overwhelming evidence. *Cf. Peters*, 784 F. Supp. 2d at 23 (denying stay even when "reasonable minds could differ" on issue raised on appeal because of possibility of depreciation of property). Many of the assets sought, as pieces of real property, may depreciate and will cause the Government expenses to maintain. Certain of the accounts are not presently restrained and may be dissipated during the pendency of an appeal. And even those assets that are residences are not so unique that they could not be replaced through reimbursement from the Government if the defendants prevail on appeal. *See, e.g.*, *Davis*, 2009 WL 2475340, at *2-3 (D. Conn. June 15, 2009) (denying stay as to residence and jewelry); *United States* v. *Ambler*, 11 Cr. 54, 2013 WL 5770505, at *2 (N.D.W.V. Oct. 24, 2013) (denying stay as to primary residence with handicap accessibility and custom structures); *United States* v. *Evanson*, No. 05 Cr. 805 (TC),

2008 WL 4335549, at *1 (D. Utah Sept. 22, 2008) (denying stay when defendant "has not made a showing that the property at issue is unique and cannot be replaced through reimbursement from the government if he succeeds on appeal").[19]

An additional factor of great importance in this case is the fact that the Government is engaged in efforts to restore forfeited funds to the many victims in this case. The Department of Justice has recently completed the process of soliciting claims to the Madoff Victim Fund, which will distribute the more than $4 billion collected in civil and criminal forfeitures in this case to date. Forfeited assets recovered in these proceedings will be applied to this fund as well. *See* ECF No. 318 (order finding restitution impracticable and authorizing Government to proceed through remission process). The victims in this case should not have to wait throughout the pendency of appeal for their funds to be returned. *See Davis*, 2009 WL 2475340, at *3 (denying stay, noting, "[A] substantial portion of the value of the forfeited assets is being used to create a restitution fund for victims of Davis's conduct. Further delaying the forfeiture will only prolong the ability of Davis's victims to receive distributions from the Victim Restitution Fund, and would only serve to further harm Davis's victims.").

Accordingly, the defendants' request for a stay should be denied.

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[19] As these cases indicate, forfeiture orders are often enforced as against real property during the pendency of appeals in criminal cases. O'Hara and Crupi's citation of 18 U.S.C. § 985(b)(1)(B) is misplaced, JO Mem. 16 (objection to paragraph 4); JC. Mem. 11, as that provision only applies in civil forfeiture actions.

CONCLUSION

For all of the foregoing reasons, the Government respectfully requests that the Court enter the proposed forfeiture orders as to Daniel Bonventre, Annette Bongiorno, Joann Crupi, Jerome O'Hara, and George Perez.

Dated: New York, New York
July 21, 2014

Respectfully submitted,

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