Howard Elisofon, Esq.
Christopher J. Sullivan, Esq.
John Oleske, Esq.
Kerry K. Jardine, Esq.
Attorneys for Plaintiffs
Herrick, Feinstein LLP
2 Park Avenue
New York, New York 10016
Tel: (212) 592-1400
Email: helisofon@herrick.com

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PHYLLIS MOLCHATSKY and STEVEN SCHNEIDER, M.D.,	:	Case No 09 CIV 8697 (LTS/AJP)
Plaintiffs,	:	
vs.	:	
UNITED STATES OF AMERICA,	:	
Defendant.	:	

SUR-REPLY MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

The Securities and Exchange Commission ("SEC") staffers who investigated Bernard Madoff might as well have fallen asleep on the floor of a bank vault while it was being robbed. The Government could not, and did not, argue that their conduct was any less grossly negligent than that. Instead, the Government has argued that SEC staffers, as law-enforcement agents, have the discretion to do *anything* during the course of an investigation, including falling asleep on the job, and that no level of abject laziness or sheer stupidity on the part of those agents can subject the United States to liability under the Federal Tort Claims Act ("FTCA"). This virtually all-encompassing vision of immunity runs directly afoul of the principle that the discretionay-function exception cannot be construed to swallow the rule of government liability for negligent conduct that injures innocent parties like Plaintiffs.

To sustain its dangerously far-reaching interpretation, the Government needed, in its moving papers, to provide some kind of factual justification for its claim that the SEC had the discretion to blindly wreck thousands of lives in the way it did when it set Madoff loose on the public time after time with a stamp of approval instead of a warning label. But it utterly failed to do so. It did not: (1) identify relevant policies, and then have SEC officials swear that they were not mandatory (as has been done in other FTCA cases involving the discretionary-function exception); (2) provide evidentiary proof that no other relevant policies existed, and could not be revealed through additional discovery; or (3) set forth the purported policy bases involved in the SEC's choice to remain silent as to the danger it knew Madoff posed to the public. Instead, the Government claimed blanket immunity for all acts and omissions by SEC staff made in the course of a regulatory investigation, no matter how grossly negligent, and regardless of the existence of potentially controlling mandatory policies, whether written or otherwise.

As Plaintiffs demonstrated in their opposition papers, the Government's showing was insufficient as a matter of law, requiring denial of its motion to dismiss. As Plaintiffs also noted in their opposition papers, the Government could not cure its failures with after-the-fact rationalizations in reply submissions. And yet that is precisely what the Government has tried to do in order to rescue its fatally-defective motion.

First, the Government makes a series of belated assertions that the mandatory policies identified by Plaintiffs were not binding on the SEC staffers in question. But its principal "evidence," submitted (improperly) for the first time on reply, is an Enforcement Manual created in 2008, well after the negligent conduct in question occurred. Moreover, even with respect to this irrelevant material, the Government fails to proffer any sworn statements from any SEC officials demonstrating that the SEC's abject failures in the Madoff investigation did not violate any mandatory requirements—whether or not those requirements were incorporated in a written document like the Enforcement Manual.

Second, the Government claims that there is "nothing to see here" in terms of additional SEC or government policy material, without even the barest explanation of *why* additional discovery would not reveal such material, and, again, without any sworn representation from any SEC officials that such material does not exist. Instead, and incredibly, the Government points to the SEC's own *blanket denial* of Plaintiffs' Freedom of Information Act ("FOIA") request as somehow proving that further discovery would be pointless. Given the fact that the SEC's Inspector General has determined that the SEC has: (1) exercised a "presumption of non-disclosure" in responding to FOIA requests; (2) overutilized the law-enforcement privilege it cited in response to Plaintiffs' requests; and (3) compiled a substantially worse FOIA compliance rate than all other federal agencies, the Government's reliance on the SEC's response to

Plaintiff's FOIA request as proof of full disclosure would be laughable were it not so cynical and disturbing.

Third, in its reply, the Government attempted for the first time to explain the purported policy bases that were implicated in the SEC's decision not to warn the public about the danger posed by the Madoff scheme. But none of these explanations provide any reasonable grounds for a determination that the SEC's choice to remain silent resulted from a decision-making process that could have actually involved any competing policy considerations. And in any event, the Government's belated assertion of these bases on reply, without any testimonial support from actual SEC officials, can carry no weight on this motion. If the Government wanted to justify the SEC's actions as being grounded in policy considerations, it had to do so with admissible evidence submitted with its moving papers. Having failed to do so, the motion must be denied on that basis alone.

Separately, and subsequent to its reply, the Government submitted a decision in another case, *Dichter-Mad Family Partners, LLP v. United States*, CV 09-9061 (SVW) (C.D. Cal.) as "additional authority." In that case, the plaintiffs, who were proceeding *pro se*, plagiarized the Complaint filed by Plaintiffs here wholesale, erroneously named the SEC as a defendant, and then committed numerous rule infractions in the course of briefing the Government's motion to dismiss. The Government, apparently seeking to gain an advantage in this litigation, did not inform the Plaintiffs here that the *Dichter-Mad* case even existed, despite what should have been the obvious interest Plaintiffs would have had in that proceeding.

Shortly thereafter, the Government succeeded in their objective of obtaining a favorable decision against the *pro se Dichter-Mad* plaintiffs on a considerably shorter briefing schedule from a court in a district that has no connection to the Madoff scheme other than the residency of

the plaintiffs there. The Government is now obviously hoping to have this Court ignore the Government's gamesmanship and simply adopt the other court's non-controlling decision as the basis for a ruling here. But the decision rendered by the California court does not address the defects in the Government's motion practice in *this* case identified above. And, in any event, that decision was simply mistaken in its apparent adoption of the Government's position that falling asleep on the bank vault floor, if not specifically prohibited by a written policy manual, is a protected discretionary act as opposed to a fundamental breach of the most central obligations that government agents can owe to the citizens they are sworn to protect.

The Court cannot permit the Government to casually walk away from the wreckage that the SEC's negligence has left strewn across the country. The case law often posits a government employee's reckless driving as the *sine qua non* of non-discretionary conduct. But must the employee be literally behind the wheel to run over an innocent bystander? Or is it enough for Plaintiffs to prove here that the SEC's actions and inactions were equally outside the scope of permissible conduct, whether because they were specifically prohibited by a policy, or because they were simply forbidden by the rules and codes of conduct—written or unwritten—generally applicable to government agents? The answer to that question is yes, and the only way to determine whether the SEC's conduct crossed that line is to deny the Government's motion, and permit full discovery into the formal and informal policies that were supposed to control the SEC in its investigation, and which, had they been followed, might have prevented this tragedy from ever occurring.

ARGUMENT

The Government failed to meet the burden imposed on it by the law in its moving papers, as demonstrated in Plaintiff's opposition brief. Neither its attempt to rescue its original defective

submission with its belated arguments and "evidence" on reply, nor its subsequent reliance on the decision in the *Dichter-Mad* case, can change that fundamental reality. The Court must therefore deny the Government's motion to dismiss.

I. THE GOVERNMENT'S REPLY CANNOT CURE THE DEFECTS IN ITS MOVING PAPERS.

As noted above, the Government's reply papers attempt to remedy three key failings in its moving papers: (1) the failure to prove that known policies were not mandatory; (2) the failure to prove that there are no undiscovered policies; and (3) the failure to prove that the SEC's decision not to warn the public about Madoff was subject to competing policy considerations. Of course, having failed to do these things in the first instance, it is barred as a matter of law from trying to cure them on reply. *See Day Vill. L.P. v. CW Capital L.L.C*, No. 06 Civ. 3424, 2006 U.S. Dist. LEXIS 63715, *8 (S.D.N.Y. Sept. 6, 2006). But even if the Court were to consider the Government's untimely arguments, it would rightly reject them as the transparent dodges and crass attempts at blame-shifting that they are.

A. The Government's "Evidence" that its Policies were Non-Mandatory, in the Form of an Enforcement Manual Created in 2008 is Inadequate.

In their opposition papers, Plaintiffs pointed to a series of known, written policies, as well as presumptively effective, if unwritten, rules governing SEC staffers' conduct. (Opp. Br. pp. 26-31). Plaintiffs showed that the Government had failed to meet its burden of proving that the SEC's violation of these policies was somehow not a breach of mandatory duties. *Id.* By doing so, Plaintiffs did all that was required of them to mandate the denial of the Government's motion.

In its reply, the Government has attempted to cure this fatal defect with a curious, self-defeating argument. Specifically, the Government cites an SEC Enforcement Manual, points to language in that manual that states that it is for the purposes of "guidance only," and then argues

that "because the 'guidance only' manual applies to every aspect of the challenged investigations, it renders implausible Plaintiffs' conclusory allegations that the SEC staff violated *mandatory* policies, and requires dismissal of Plaintiff's claim." (Reply Br. pp. 21-22, emphasis in original). But the Enforcement Manual in question was created in 2008, *subsequent to all of the negligent conduct in question in this lawsuit.* Thus, the Government's purportedly critical evidence, which it says demonstrates that all of the SEC's negligent acts and omissions were discretionary, is actually of no evidentiary value whatsoever on this motion.

Indeed, if the Government's citation of the 2008 Enforcement Manual tells the Court anything, it is: (1) that the Government was unable to find any written documents that were actually in existence at the relevant time that indicated any kind of discretionary, "guidance only" policy regime within the SEC relating to the conduct in question; and (2) that the creation of the Enforcement Manual in 2008 gives rise to the possibility, if not the presumption, that other policies existed prior to that time, whose character as written or unwritten, and mandatory or discretionary, can only be determined through additional discovery, as discussed below. In either case, the Government's submission of the 2008 Enforcement Manual has not done anything to cure the fundamental defect in the Government's original papers, where it failed to meet its burden of affirmatively proving, with admissible evidence, that the SEC's conduct did not violate mandatory policies.

B. The Government's Claim that the SEC's Blanket Denial of Plaintiffs' FOIA Request Proves the Absence of Discoverable Evidence is Ludicrous.

While the Government's reference to the 2008 Enforcement Manual may be simply ineffectual, its attempt to blame Plaintiffs for their failure to discover additional policies is outright objectionable. Specifically, the Government attempts to distinguish this case from

Ingatiev v. Untied States, 238 F.3d 464 (D.C. Cir. 2001), where the plaintiffs were held to be entitled to discovery of internal Secret Service policies, on this basis:

> [I]n *Ignatiev*, the plaintiffs had been unable to access internal policies. The Plaintiffs here, in contrast, by their own admission, obtained the SEC's Enforcement Manual in response to their FOIA request as early as February 23, 2009—more than six months before they filed suit. According to his own declaration, Plaintiffs' counsel, Howard R. Elisofon, submitted a FOIA request to the SEC on January 26, 2009. He specifically requested any "documents concerning any manuals, policies, procedures, practices, rules, regulations, directives, orders instructions or customs concerning the conduct by the SEC of audits, inquiries or other investigations of broker/dealers, investment advisory firms, or hedge funds." In response, the SEC referred Mr. Elisofon to its Enforcement Manual, which was (and still is) available on the SEC's website.

(Reply Br. pp. 24-25). In other words, according to the Government, the SEC's provision of the 2008 Enforcement Manual, which, as discussed above, is completely irrelevant to the SEC's conduct at issue here, somehow shows that the SEC made full disclosure.

The Government does not address—at all—Plaintiffs' explanation of the SEC's blanket rejection of nearly all of their FOIA requests. (Elisofon Decl. ¶ 3). Instead, the Government simply states that "[i]f Plaintiffs believed that [the SEC's] response was incomplete, they had a remedy under FOIA." (Reply Br. p. 25). Of course, this overlooks the fact that the SEC's own Inspector General has explicitly found that the SEC has disregarded the rights of FOIA requestors like Plaintiffs by exercising a presumption of non-disclosure and by abusing the law-enforcement privilege (repeatedly cited in the rejection of Plaintiffs' claims), resulting in a FOIA request denial rate far in excess of that found in other federal agencies. (See Report of the Inspector General, dated September 25, 2009, annexed as Exhibit A hereto, at pp. ii-v). It also

overlooks the fact that Plaintiffs appealed the SEC's rejection of its FOIA request, only to be ignored by the SEC's FOIA appeals office. (Elisofon Decl. ¶¶ 4-7).[1]

When the Government goes on to say that Plaintiffs' declaration "undercuts Plaintiffs' assertion that they 'have been thwarted'" in obtaining material from the SEC, it can only mean that the Government contends that it is Plaintiffs' own fault for not having commenced a costly, duplicative litigation to enforce their rights under FOIA, as opposed to expecting voluntary compliance with that statute by the agency funded with their tax dollars. Certainly, there can be no other explanation for the Government's citation of *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 153 (1989) and *McQueen v. Untied States*, 179 F.R.D. 522, 530-31 (S.D. Tex. 1998), which it points to as showing some kind of relevant distinction between FOIA and civil discovery.

Of course, there is a difference between FOIA and civil discovery, but not one that has any bearing here. Neither *John Doe* nor *McQueen* involved a claim by the Government that a plaintiff was not entitled to discovery because a federal agency had already successfully stymied the plaintiff in its attempt to obtain that material through FOIA. And the Government can cite no case, because there is none, even suggesting, let alone holding, that a plaintiff cannot cite an agency's undeniable stonewalling of its FOIA requests as evidence that it has not had a full and fair opportunity to discover relevant evidence.

Finally, the Government's citation of *Freeman v, United States*, 556 F.3d 326 (5th Cir. 2009) is similarly unhelpful in is attempt to avoid discovery. In *Freeman*, unlike here, the agencies in question were not investigatory law-enforcement agencies whose internal policies would be expected to be non-public, but rather search-and-rescue agencies active in the

[1] The SEC's FOIA office first denied having received Plaintiffs' FOIA appeal, then, when the appeal was resent, the SEC's FOIA office simply disregarded it. *Id.*

Hurricane Katrina recovery effort, whose policies had been repeatedly aired in public. *Id.* Indeed, it is remarkable for the Government to cite *Freeman*, where the issue was the public availability of the policies in question, when the SEC, in its denial of Plaintiff's FOIA request, cited the law-enforcement privilege as a reason for why its policies had to be kept secret.

The fact is, the SEC has refused to open its files, despite Plaintiff's repeated requests for material that reasonably should be within the SEC's possession, such as manuals that provide specific rules for the kinds of audit procedures the SEC must have undertaken in examining and investigating Madoff (Elisofon Decl. Ex. A, Request 6), the method by which it assigned personnel (*Id.*, Request 10), and the method by which those personnel were supervised. (*Id.*, Request 11). The Government cannot prevail on this motion by arguing that the SEC's refusal to answer these demands is Plaintiffs' own fault, or, illogically, that these materials are already public notwithstanding the agency's insistence that they must be shielded from view on account of a law-enforcement privilege. Instead, the Government can only prevail on the discretionary-function exception, *if ever*, after the SEC has been compelled to submit to full discovery.

C. *The Government's After-The-Fact Manufacture of Purported Policy Bases Does Not Establish that the SEC's Failure to Warn was Subject to Competing Policy Considerations.*

In their opposition papers, Plaintiffs demonstrated that the Government had failed to even explain, let alone provide evidence of, the SEC's competing policy considerations in choosing not to warn Plaintiffs about the danger posed by the Madoff scheme. (Opp. Br. pp. 32-36). In its reply, the Government tries to remedy this gaping deficiency with the following series of bald assertions:

> Whether to warn the public about a possible securities fraud...is susceptible to several important policy considerations. Most significant, perhaps, is that the issuance of warnings could frustrate the government's law-enforcement objectives, as warnings "tip off" not only a fraud's victims, but also its perpetrators. Also, the

> Commission must account for the market panic that such a warning could cause. As Plaintiffs themselves recognize, one aspect of the Commission's mission is to "maintain fair, orderly, and efficient markets." The issuance of a warning could, in some circumstances, frustrate this mission.

(Reply Br. p. 15). These purported policy considerations may sound reasonable, but they must be completely disregarded by the Court on this motion. They are not the words of an SEC official describing what considerations go into decisions about whether or not to warn the public. They are the words of attorneys from the Justice Department, who have no ability or authority to speak for the SEC or its commissioners when it comes to identifying the policy considerations that agency would weigh in the relevant circumstances.

If the Government wanted to cure the defect in its moving papers, it could at least have submitted the kind of admissible evidence that Plaintiffs identified in their opposition papers as having been sufficient in other cases. *See, e.g., Valdez v. United States,* No. 08 Civ. 4424, 2009 U.S. Dist. LEXIS 66823, *21 (S.D.N.Y. July 31, 2009) (declarations regarding policy considerations); *Woods v. United States,* No. 07-593, 2007 U.S. Dist. LEXIS 80931, 12 (D.N.J. Oct. 31, 2007), *aff'd*, 909 F2d 1477 (3d Cir. 1990) (same). Even if the Court were willing to overlook the Government's initial failure, and allow it to remedy its mistake on reply, the Court cannot permit the Government to ignore its burden twice and expect to prevail with attorney speculation instead of sworn statements of actual agency policy considerations.

II. THE *DICHTER-MAD* DECISION IS NOT CONTROLLING, WAS PROCURED IN AN INEQUITABLE MANNER, AND WAS WRONGLY DECIDED.

Two months after Plaintiffs filed their Complaint in this Court, four Madoff investors in California, including two attorneys representing themselves *pro se*, decided to plagiarize Plaintiffs' Complaint in its entirety and file it as their own in the Central District of California in

a proceeding entitled *Dichter-Mad Family Partners, LLP v. United States*, CV 09-9061 (SVW) (C.D. Cal.), in which they erroneously named the SEC as a party defendant. Subsequently, the attorneys handling that case for the Government insisted on a "rocket docket" treatment of the motion to dismiss filed by the Government there, during the course of briefing which motion the *Dichter-Mad* plaintiffs violated numerous court rules. As a result, that court issued a decision on April 20, 2010 granting the Government's motion to dismiss, denying the plaintiffs' request for discovery, but also granting leave to replead.[2] Now, the Government, which (in what could have only been a deliberate choice) did not advise Plaintiffs of the existence of the *Dichter-Mad* litigation, has submitted the decision as "additional authority," obviously hoping that this Court will adopt the other court's decision, notwithstanding its non-precedential nature and the gamesmanship whereby it was procured by the Government.

But the *Dichter-Mad* decision cannot guide the Court here. For one thing, it did not address, and cannot resolve, the defects in the Government's motion practice in *this* proceeding identified and discussed in Point I, above. Notwithstanding any of the analysis in the other court's decision, those defects alone require a denial of the Government's motion to dismiss. But more importantly, the *Dichter-Mad* decision must be disregarded because it relies on the same fundamentally flawed premise urged by the Government here—that law enforcement agencies can do no wrong, no matter how egregious their misconduct, in the course of their investigations.

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[2] The plaintiffs in *Dichter-Mad* did file an amended complaint, in which they allege that an SEC employee has informed them that a mandatory policy document exists governing the SEC's actions in the Madoff investigations, but that the SEC refuses to produce it. However, the *Dichter-Mad* plaintiffs did not submit any sworn statements to this effect, or more particularly describing the purported document. To the extent such a document exists, it would of course be important to be fully discovered before a decision here. But Plaintiffs respectfully submit that any such additional documentation is fully subsumed within the showing they have already made, through their rejected FOIA request and otherwise, that the SEC must be compelled to submit to discovery before any determination can be made with respect to immunity under the discretionary-function exception.

The *Dichter-Mad* court came to this conclusion despite acknowledging that the SEC may have violated mandatory policies. It stated that even if the SEC had done so, intervening discretionary decisions had been made about whether or not to take enforcement action. (Decision pp. 63-68). This ultimate discretion to make enforcement decisions, the court held, wiped out any liability based on the violation of mandatory duties. But this reasoning is flawed for two reasons.

First, the *Dichter-Mad* decision does not address the SEC's failure to warn investors, as opposed to take enforcement action, because the *pro se* plaintiffs in *Dichter-Mad* apparently did not raise the failure-to-warn issue. As such, the *Dichter-Mad* court's entire analysis about intervening discretionary choices is irrelevant in light of the non-discretionary duty to warn raised by Plaintiffs in this case—which was only belatedly, and ineffectively, addressed by the Government here in its reply, as discussed in Point I.C above.

Second, and just as critically, the *Dichter-Mad* court did not address Plaintiffs' fundamental argument that some conduct is so inattentive or foolish or self-absorbed that it violates mandatory duties, regardless of whether those duties are reduced to a policy relating to a specific agency, *or even reduced to writing at all*.

For example, with respect to written policies, in another recent case involving SEC negligence, SEC staffers responsible for investigating the Stanford fraud were found to have violated general codes of ethics applicable to all government employees, violating mandatory duties to "put forth honest effort in performance of their duties" and to "disclose waste, fraud, abuse, and corruption to appropriate authorities." (*See* Inspector General's Report dated March 31, 2010, at pp. 11, 16-28 (*citing* 5 C.F.R. § 2635.101), relevant portions annexed hereto as Exhibit B). Those same codes of ethics are obviously implicated by another recent report from

the Inspector General disclosing that SEC employees have been wasting time viewing pornography instead of doing their jobs. (See Summary of Pornography-Related Investigations, annexed hereto as Exhibit C).

However, the *Dichter-Mad* decision explicitly limits potential government liability to circumstances where there is in place a written, mandatory policy, like the specific SEC policies identified in Plaintiffs opposition papers or those more general governmental policies that have subsequently come to light, as noted above. (Decision, pp. 46-49). In this respect, the *Dichter-Mad* court committed reversible error. If its interpretation of the discretionary-function exception were to be enforced, then all the Government would need to do to avoid all liability under the FTCA would be to rewrite all of its operational manuals in discretionary language. Fortunately, the Fifth Circuit has already encountered an attempt to do precisely that, and rejected it, an example the Court should follow here in deciding that a mandatory written policy is not necessary to create a mandatory duty on the part of government agents.

In *Garza v. United States*, 161 Fed. Appx. 341 (5th Cir. 2005), the plaintiff was a prisoner who was injured because the prison guards did not patrol the prison's recreation yard in accordance with a written manual. The Government invoked the discretionary-function exception, arguing that because the manual indicated that the guard was to "use good judgment and initiative" in patrolling the yard, this effected a "disclaimer" of any mandatory requirement. *Id.* at 345. The Fifth Circuit found this unpersuasive, holding that the Government "should not be allowed to sweep [the manual's] directives back under the shield by inserting a general 'disclaimer.' Permitting this kind of immunization clearly sidesteps the remedial objective of the FTCA by allowing the exception to swallow the rule." *Id.*

Just as the court in *Garza* would not permit the Government to transform a mandatory written policy into a discretionary one by inserting a written disclaimer, this Court should not permit the Government to transform obvious, required duties—the equivalent of keeping one's eyes open while doing one's job—into discretionary ones simply by virtue of the Government deciding not to write those duties down at all. The incentive that would be created by adoption of the *Dichter-Mad* formulation would be perverse and detrimental not only to FTCA plaintiffs, but indeed, to the operation of all federal agencies, as critically important rule books and policy manuals would inevitably be discarded to avoid any potential for liability under the FTCA.

The question before the Court is one that *Dichter-Mad* failed to address other than with its unsatisfactory, exclusive focus on written policies: can the Government avoid liability by claiming that everything a regulator does, no matter how egregiously reckless, is automatically discretionary? How far can immunity under the discretionary-function exception go? As Plaintiffs demonstrated in their opposition papers, when it comes to an agency's failure to warn, it cannot go so far as to confer blanket immunity, as the Ninth Circuit explained in *Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992). Of course, that case was not dealt with in *Dichter-Mad* because of the *pro se* plaintiffs' failure to raise the issue.

But if immunity is not absolute, then where is the limit? Can it possibly protect the kind of laziness and self-absorption admitted by the SEC staffers in the unprecedented inspector general's report that details their undeniable misconduct in the Madoff affair? Can that conduct be deemed any more "discretionary" than visiting pornographic websites instead of regulating market participants? Is dereliction of duty "discretionary" simply because the SEC has not adopted a written policy specifically forbidding it? Plaintiffs respectfully submit that the answer to these questions is no. But even if the Court could decide otherwise, it could not do so at this

stage of the proceedings. Plaintiffs submit that this Court cannot come to the same conclusion as the *Dichter-Mad* court without real discovery as to the SEC's internal policies, the mandatory rules controlling government employees generally, and the SEC's policy considerations with respect to its decisionmaking when warning investors about dangerous Ponzi schemers on the loose in the marketplace.

CONCLUSION

The Government failed to meet its burden the first time around on this motion. It tried to make up for that failure with improper submissions on reply, and with a decision from another court that was improperly obtained and wrongly decided. But it has failed on all counts. No amount of characterizing a government agency's conduct as "investigative" or "regulatory" can render the act acts at issue here, which are at least as bad as falling asleep on the job, as somehow being "discretionary." The SEC agents who investigated Madoff may not have run Plaintiffs over with a car, but their actions and inactions were just as inattentive and unconnected to any reasonable policy objective. Nero may have had imperial discretion to fiddle while Rome burned, but U.S Government employees are not emperors, and our Government is not above the law. The Court must deny the Government's motion to dismiss.

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HERRICK, FEINSTEIN LLP

By:_____/s/_____
Howard Elisofon
Christopher J. Sullivan
John Oleske
Kerry Jardine
2 Park Avenue
New York, New York 10016
Telephone: (212) 592-1400
Facsimile: (212) 592-1500
Attorneys for Plaintiffs