UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE HERALD, PRIMEO AND THEMA FUNDS SECURITIES LITIGATION	:	Master File No. 09 Civ. 289 (RMB) (HBP)
This Document Relates to: *Davis v. Benbassat*, No. 09 Civ. 2558 *Repex Ventures, S.A. v. Madoff*, No. 09 Civ. 289	:	ECF Case Electronically Filed

DECLARATION OF PATRICIA M. HYNES ON BEHALF OF JPMORGAN CHASE & CO., JPMORGAN CHASE BANK, N.A., J.P. MORGAN SECURITIES LLC AND J.P. MORGAN SECURITIES LTD.

PATRICIA M. HYNES declares under penalty of perjury as follows:

1. I am an attorney admitted to practice before this Court and am Senior Counsel with Allen & Overy LLP, counsel for JPM. I make this declaration in support of JPM's motion to dismiss the Herald and Thema Complaints and in opposition to Plaintiffs' motion for leave to amend.

PLAINTIFFS FAIL TO STATE A CLAIM AGAINST JPM

2. Plaintiffs seek to hold JPM secondarily liable for various alleged breaches of duty by the managers, directors, administrators, custodians, advisors and auditors of the Thema and Herald funds that caused the funds' assets to be invested in Madoff's Ponzi scheme. TC ¶¶ 4, 7, 9, 16-53, 132-306, 417-94, 503-17, 522-38; HC ¶¶ 10-39, 62-78, 81, 651-54, 661-771. JPM did not have, and is not alleged to have had, any role in the management or operation of the funds, nor is JPM even alleged to have provided banking services to them. HC ¶¶ 70, 73. JPM's only tenuous connection to the events underlying this lawsuit is that Madoff's investment advisory business happened to have a bank account at JPM (the "703 account"). TC ¶¶ 59, 313-34; HC ¶¶ 79-80, 460-85.[1] The claims against JPM are based on nothing but conclusory assertions of "actual knowledge" that are largely plagiarized from complaints in other cases, including one whose dismissal the Second Circuit recently affirmed because the complaint did *not* plead that JPM had actual knowledge of Madoff's fraud. *See MLSMK Inv. Co. v. JP Morgan Chase & Co.*, No. 10-3040-cv, 2011 WL 2176152 (2d Cir. June 6, 2011) (summary order).[2]

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[1] Plaintiffs also allege that JPM invested its own money in certain funds that, in turn, invested with Madoff, to hedge its exposure on structured derivative notes sold outside the United States that paid a return based on the performance of those funds. *See* TC ¶¶ 335-57; HC ¶¶ 80, 431-59. Plaintiffs do not allege that they invested in those notes, or that they suffered any harm as a result of their issuance.

[2] Davis added JPM to this action after *MLSMK* was filed, copying liberally from the *MLSMK* complaint, including an allegation that JPM met with Madoff in the summer of 2008. *See* TC ¶ 347. The *MLSMK* plaintiff made up that allegation, which is false. *See MLSMK*, 2011 WL 2176152, at *2.

A. All Claims Against JPM Are Barred By The *In Pari Delicto* Doctrine

3. As Plaintiffs are suing derivatively to recover damages for injury suffered by the Thema and Herald funds as a result of alleged breaches of duty by the funds' agents, *see* Part II(C) & (D),[3] their claims against JPM are barred by the doctrine of *in pari delicto*. Under New York law,[4] the agents' alleged misconduct is imputed to the funds, so no derivative action can be sustained on their behalf against JPM for allegedly facilitating that misconduct. *See Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 465 (2010).

B. Plaintiffs Have Not Pleaded Any Aiding And Abetting Claim Against JPM

1. No Pleading Of Actual Knowledge

4. Plaintiffs have not pleaded any aiding and abetting claim because they have not met their "heavy" burden to plead that JPM had actual knowledge of the misconduct that it allegedly aided and abetted. *Chemtex*, 490 F. Supp. 2d at 546; Part III(B)(4). Plaintiffs plead no facts to support their conclusory assertions that JPM had actual knowledge of the alleged breaches of duty by the managers, directors, administrators, custodians, advisors and auditors of the Thema and Herald funds. *See* TC ¶¶ 495-502 (aiding and abetting negligence and gross negligence),[5] ¶¶ 518-21 (aiding and abetting breach of fiduciary duty); HC ¶¶ 655-60 (aiding and abetting conversion), ¶¶ 777-95 (aiding and abetting breach of fiduciary duty). Plaintiffs do not, therefore, plead an essential element of their aiding and abetting claims—that JPM actually knew that the alleged primary violators were breaching their duties to the funds. *See Mazzaro de Abreu v. Bank of Am.*

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[3] Citations in the form "Part __" are to sections of Defendants' Joint Memorandum of Law.

[4] As Plaintiffs allege that all relevant conduct by JPM took place in New York, *see* TC ¶¶ 67, 70, 327; HC ¶¶ 79-80, all claims against JPM obviously are governed by New York law.

[5] Davis's claims for aiding and abetting negligence and gross negligence, TC Counts 11 & 12, also should be dismissed because there is no such claim under New York law. *See* Part III(B)(4).

Corp., 525 F. Supp. 2d 381, 393 (S.D.N.Y. 2007).[6]

5. Although knowledge of Madoff's fraud clearly would not have given JPM actual knowledge that the funds' agents were breaching their duties to the funds, Plaintiffs attempt to plead that JPM knew about Madoff's fraud. TC ¶¶ 312-57; HC ¶¶ 430-85. As they are unsuccessful in that endeavor, the claim for aiding and abetting Madoff's fraud that Repex asserts indiscriminately against all defendants, HC Count 19, should be dismissed as to JPM.

6. First, Repex contends that JPM ignored or failed to investigate what it characterizes as "red flags" surrounding Madoff's 703 account. *See* HC ¶¶ 460-85. Repex opines that activity in the 703 account "*should have* prompted a check-kiting investigation, which undoubtedly would have revealed more suspicious behavior," and that, *if* JPM had been taking seriously its obligations under the federal money-laundering rules, it "*would have* noticed these red flags and notified the proper authorities." *Id.* ¶¶ 469-70, 478, 483 (emphases added). According to Repex, JPM "knew or, in the absence of negligence, gross negligence or recklessness, *should have known*" that the 703 account was being used for fraud and money laundering. *See* HC ¶¶ 468-69, 474-75, 480 (emphasis added).

7. Such allegations about what a bank should or would have known if it had investigated red flags "concede[] a lack of actual knowledge." *Rosner*, 2008 WL 5416380, at *6-7; *see also Renner*, 2000 WL 781081, at *8 (What a bank "should have known is irrelevant."); *Williams v. Bank Leumi Trust Co.*, No. 96 CIV 6695(LMM), 1997 WL 289865, at *5 (S.D.N.Y. May 30, 1997) (Allegations about irregular account activity fail to plead a bank's actual knowledge

[6] The civil conspiracy claim that Repex indiscriminately asserts against all Defendants, HC Count 1, should be dismissed as to JPM, first, because New York law recognizes no such claim, and, second, because Repex does not plead that JPM entered into any agreement to participate in any tortious conduct. *See* Part III(B)(8).

because they "[a]t most . . . raise the issue of constructive knowledge which is insufficient.").[7] Thus, Repex's contention that "the JPMorgan Chase Defendants did not do their job" with respect to the 703 account, HC ¶ 485, does not plead actual knowledge of Madoff's fraud.[8]

8. Second, Repex contends that "red flags" that JPM allegedly saw and questions it asked when considering whether to invest in Herald in 2007, *see* HC ¶¶ 430-44, show that JPM had actual knowledge of fraud. As the cases cited above hold, however, allegations about "red flags" do not plead actual knowledge. Moreover, JPM went on to invest its own money in Herald, *see id*. ¶ 446, confirming the implausibility of any inference that it actually knew that Madoff was engaged in fraud. Nor does the allegation that JPM withdrew some, but not all, its investments in certain funds in the midst of the severe market dislocations of October 2008 plead actual knowledge of Madoff's fraud, particularly as Repex pleads only that JPM "knew *or should have also known* that Madoff and/or BMIS' business was fraudulent." HC ¶ 455 (emphasis added).[9]

2. No Pleading Of Substantial Assistance

9. All the aiding and abetting claims should also be dismissed due to Plaintiffs' failure to

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[7] *See also El Camino Res., Ltd. v. Huntington Nat'l Bank*, 722 F. Supp. 2d 875, 923 (W.D. Mich. 2010) (noting that courts have "routinely rejected" the argument that a bank's violation of anti-money-laundering rules pleads actual knowledge for aiding and abetting liability).

[8] For the same reasons, Davis's allegations that the 703 account did *not* come under suspicion by JPM, *see* TC ¶ 59, that activity in the account "*should have* triggered an internal probe or triggered alarms," *id.* ¶¶ 319, 323, that JPM failed to investigate red flags, *see id.* ¶ 326, and that JPM violated the money-laundering rules, *see id.* ¶¶ 327-34, do not plead actual knowledge.

[9] Similarly, Davis's parallel allegations that JPM did a poor job when conducting diligence into the feeder funds and later withdrew a portion of its investments fail to plead actual knowledge. *See* TC ¶¶ 335-57. Also wholly inconsistent with actual knowledge is Davis's allegation that JPM filed a suspicious activity report ("SAR") as to Madoff in October 2008. *See* TC ¶ 344. First, SARs report suspicions, not actual knowledge, and several courts have held that the specific suspicions referenced in the SAR do *not* plead actual knowledge of Madoff's fraud. *See, e.g., In re Tremont Sec. Law, State Law & Ins. Litig.*, 703 F. Supp. 2d 362, 368, 371 (S.D.N.Y. 2010); *SEC v. Cohmad Sec. Corp.*, No. 09 Civ. 5680(LLS), 2010 WL 363844, at *5-6 (S.D.N.Y. Feb. 2, 2010). Second, Davis does not explain how it is plausible that JPM would report its suspicions to the authorities if, as he alleges, it was knowingly and deliberately facilitating fraud.

plead substantial assistance, as there is no logical connection between the alleged breaches of duties committed by the managers, directors, administrators, custodians, advisors and auditors of the Thema and Herald funds in permitting the funds' assets to be invested with Madoff, and the only acts alleged against JPM, *i.e.*, providing routine banking services to Madoff and investing its own money in certain funds. *See* Part III(B)(4).

10. Nor do Plaintiffs plead that JPM substantially assisted Madoff's fraud, because it is well-established that a bank does not substantially assist a fraud merely by providing routine banking services. *See Rosner*, 2008 WL 5416380, at *13; Part III(B)(4).

11. JPM's alleged failures to act do not plead substantial assistance either, because, in the absence of a fiduciary duty between the defendant and the plaintiff (and JPM owed no fiduciary duty to Plaintiffs), inaction does not constitute substantial assistance. *See Kolbeck*, 939 F. Supp. at 247; *see also Rosner*, 2008 WL 5416380, at *14 (holding that allegations that a bank "failed to comply with domestic and international bank secrecy, know-your-customer, and anti-money laundering laws, decrees, and regulations" did not plead substantial assistance).

C. Plaintiffs Have Not Pleaded An Unjust Enrichment Claim Against JPM

12. The unjust enrichment claims, TC Count 19; HC Count 17, should be dismissed because Plaintiffs do not plead that they directly conferred any benefit on JPM, *see* Part III(B)(6), and because there can be no quasi-contractual claim to recover sums that JPM received for providing banking services to Madoff or for any partial redemption of its investments, TC ¶¶ 313; HC ¶¶ 430, 458, 460, 791, 801, because those sums were paid pursuant to contract, *see* Part III(B)(6).

Dated: June 29, 2011
New York, New York

Patricia M. Hynes