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**UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK**

IN RE HERALD, PRIMEO, AND THEMA FUNDS
 SECURITIES LITIGATION

This document relates to: Case No. 09 Civ. 289

ECF Case
 Master File No. 09 Civ. 0289 (RMB) (HBP)

**DECLARATION OF
 JOSEPH SERINO, JR.**

I, Joseph Serino, Jr., declare:

1. I am a member of the bar of this Court and a partner of Kirkland & Ellis LLP, counsel for Defendants Herald Fund SPC, Franco Mugnai, and Friedrich Pfeffer. I submit this declaration in support of Defendants' Joint Motion to Dismiss ("Joint Motions") to make points not covered in the Memorandum of Law in Support of that motion ("Memorandum of Law").

2. Herald SPC has been named in Counts 1-9 and 18-21 of Plaintiffs' Proposed Third Amended Class Action Complaint (the "Complaint"). Mugnai has been named in Counts 1-9 and 18-21. Pfeffer has been named in Counts 1-9, 18, and 19.

3. Each of those counts against Herald SPC, Mugnai, and Pfeffer fails for the reasons set forth in the Memorandum of Law. In that regard, Herald SPC, Mugnai, and Pfeffer join the following arguments set forth in the Memorandum of Law:

SECTIONS OF MEMORANDUM OF LAW	APPLICABLE DEFENDANTS	APPLICABLE COUNTS
I(A)(1); I(A)(2); I(A)(3)(a); I(A)(4)	Mugnai, Pfeffer	All Asserted Counts
I(A)(1); I(A)(2); I(A)(3)(d); I(A)(4)	Herald SPC	All Asserted Counts
I(B)	Herald SPC, Mugnai, Pfeffer	All Asserted Counts
II(A)	Herald SPC, Mugnai, Pfeffer	1-9, 18-19

SECTIONS OF MEMORANDUM OF LAW	APPLICABLE DEFENDANTS	APPLICABLE COUNTS
II(C)(1)	Herald SPC, Mugnai, Pfeffer	All Asserted Counts
II(E)	Mugnai, Pfeffer	4-6, 9, 18
III(A)	Herald SPC, Mugnai, Pfeffer	1-9, 18-19
III(B)(1), (3)-(8)	Herald SPC, Mugnai, Pfeffer	1-9, 18-19
IV	Herald SPC, Mugnai	20-21

4. Herald SPC, Mugnai, and Pfeffer do not join any arguments in the Memorandum of Law not listed above. Nor do they rely upon any declarations submitted with the Joint Motions, except for this declaration, the declarations attached as Exhibits A and B hereto, and the Bagnall Declaration (but only to the extent applicable to arguments in which Herald SPC, Mugnai, and Pfeffer join). By joining in certain arguments made in the Memorandum of Law and Joint Motions, Herald Fund SPC, Mugnai, and Pfeffer do not intend to waive or contradict, and expressly reserve, any positions any of them may have taken or may take in other litigation including, but not limited to, litigation with other Defendants in this action or their affiliates.

5. ***Personal Jurisdiction.*** Certain incontrovertible facts or realities, not discussed in the Memorandum of Law, make clear that this Court lacks personal jurisdiction over Herald SPC, Mugnai, and Pfeffer. Plaintiffs fail to meet their *prima facie* burden of establishing personal jurisdiction over Herald SPC which, I have been advised, is incorporated and domiciled in the Cayman Islands and never has had continuous and systematic contact with the United States. I have likewise been advised that Herald SPC has engaged in no conduct in the United States in connection with Plaintiffs' claims; indeed all monies invested on behalf of Herald SPC in BLMIS were invested through HSBC Securities Services (Luxembourg) SA, a Luxembourg custodian for Herald SPC. I further have been advised that Herald SPC never has marketed itself in the United States, never has solicited business or services from or in the United States, and never has counted any U.S. citizens among its shareholders—in fact the Fund's offering memorandum expressly provides that U.S. investors are not permitted to invest in the Fund. I

also have been advised that Herald SPC never has had any other investments or property in the United States. (See Declaration of Franco Mugnai, attached as Exhibit A, (“Mugnai Decl.”), at ¶¶ 2-3; Declaration of Friedrich Pfeffer, attached as Exhibit B, (“Pfeffer Decl.”) at ¶¶ 2-3.)

6. On or about June 22, 2009, Herald SPC did file a claim in the SIPA liquidation of Bernard L. Madoff Investment Securities LLC. But that single act is insufficient to establish general personal jurisdiction over Herald SPC for the reasons stated in the Memorandum of Law, and likewise is insufficient to establish specific personal jurisdiction over Herald SPC in this case because it bears no nexus to the allegations contained in Plaintiffs’ Complaint. N.Y. C.P.L.R. § 302; *Yellow Page Solutions, Inc. v. Bell Atl. Yellow Pages Co.*, No. 00 Civ. 5663, 2001 WL 1468168, at *7 (S.D.N.Y. Nov. 19, 2001).

7. Nor have Plaintiffs met their *prima facie* burden of establishing personal jurisdiction over Mugnai and Pfeffer. As a threshold matter, Plaintiffs have not pled any facts that relate to the exercise of jurisdiction over Mugnai and Pfeffer, let alone facts that would carry Plaintiffs’ burden of persuasion. This pleading defect alone is enough to warrant dismissal of the claims against Mugnai and Pfeffer on personal jurisdiction grounds.

8. Irrespective of these pleading failures, this Court lacks personal jurisdiction over both Mugnai and Pfeffer, who are directors of Herald SPC, because they are foreign citizens with no contacts in the United States. Mugnai and Pfeffer have advised me as follows: Mugnai is a citizen of Italy, while Pfeffer is a citizen of Germany; neither Mugnai nor Pfeffer ever has traveled to the United States in connection with his role as a director of Herald SPC, and neither has traveled to the United States for any purpose for at least ten years; neither Mugnai nor Pfeffer owns real estate in the United States; and neither Mugnai nor Pfeffer has any business interests in the United States. (Mugnai Decl. ¶¶ 2-3; Pfeffer Decl. ¶¶ 2-3.)

9. ***Insufficient Service of Process.*** Plaintiffs' Complaint against Pfeffer also fails because Plaintiffs have not effectuated proper service of process over him. Pfeffer resides in and is a citizen of Germany, a signatory to the Hague Convention on Service. *See* Germany's Declarations to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, November, 15 1965, available at http://www.hcch.net/index_en.php?act=status.comment&csid=402&disp=resdn. Consequently, all legal documents must be served on Pfeffer in accordance with this convention which, in Germany, prohibits service by direct mail, and instead requires service through Germany's Central Authority. *Id.* at ¶4 ("Germany objects to the use of methods of transmission pursuant to Articles 8 and 10 . . . Service pursuant to Article 10 [allowing service by direct mail] shall not be effected.") This case has been pending for almost two and one-half years, yet in that time Plaintiffs have not properly served Pfeffer. Accordingly, this Court should dismiss the Complaint against Pfeffer for failure to effectuate service of process pursuant to Fed. R. Civ. P. 12(b)(3). (*See* Pfeffer Decl. ¶¶ 2-3.)

10. ***Plaintiffs' Common Law Claims Fail.*** As set forth in the Memorandum of Law, all common law claims against Herald SPC, Mugnai, and Pfeffer are preempted by SLUSA and also independently fail under both foreign and, to the extent applicable, New York law. In addition, Plaintiffs' breach of contract claim (Count 9) fails as to Herald SPC, Mugnai, and Pfeffer because the Complaint does not even identify a single contractual obligation owed to Plaintiffs by Herald SPC, Mugnai, or Pfeffer, much less allege facts establishing a breach of any such obligation. Moreover, even if the Complaint had identified any such obligation, Plaintiffs' breach of contract claim still would fail as against Mugnai and Pfeffer under New York law because directors cannot be held liable for breaches of contracts executed in their capacity as

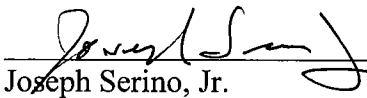
directors. *See, e.g., Stanley Agency, Inc. v. Behind the Bench, Inc.*, No. 7661/08, 2009 WL 975790, at *10 (N.Y. Sup. Ct. Apr. 13, 2009); *Lerman v. Ne. Permanente Med. Group*, 212 A.D.2d 672, 673 (2d Dep't 1995).

11. ***Plaintiffs' RICO Claims Fail.*** Plaintiffs' RICO claims (Counts 20 and 21) fail for the reasons set forth in the Memorandum of Law and for four additional reasons with respect to Herald SPC. First, Plaintiffs fail to plead scienter adequately, a requisite element of their RICO claims because the alleged predicate acts are premised on fraud and require knowing participation. *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176 (2d Cir. 1993). Second, Plaintiffs fail to plead adequately that Herald SPC, *on its own*, engaged in two or more predicate acts sufficient to state a claim under RICO; instead, the Complaint alleges merely that the Defendants *collectively* took certain actions that supposedly violated RICO. *See Spool v. World Chile Int'l Adoption Agency*, 520 F.3d 178, 184 (2d Cir. 2008). Third, Plaintiffs fail to plead that Herald SPC had any role in directing the affairs of the alleged enterprise; quite to the contrary, Plaintiffs allege that Herald SPC was being directed by Sonja Kohn and others to take certain actions. *In re Agape Litig.*, 681 F. Supp.2d 352, 369-70 (E.D.N.Y. 2010) (dismissing RICO claims against bank for alleged role in customer's Ponzi scheme). Fourth, and finally, Plaintiffs do not plead that Herald SPC was a central or controlling figure in the alleged RICO enterprise, which is a prerequisite for imposing liability on it as a corporate entity. *See, e.g., Dubai Islamic Bank v. Citibank, N.A.*, 256 F. Supp. 2d 158, 165 (S.D.N.Y. 2003).

WHEREFORE, on behalf of Herald SPC, Mugnai, and Pfeffer, I respectfully request that the Complaint be dismissed in its entirety and with prejudice.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 29, 2011
at New York, New York



Joseph Serino, Jr.

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE HERALD, PRIMEO, AND THEMA FUNDS
SECURITIES LITIGATION

THIS DOCUMENT RELATES TO:

REPEX VENTURES, S.A., *et al.*,

Plaintiffs,

v.

BERNARD L. MADOFF, *et al.*,

Defendants.

ECF Case
Case No. 09 Civ. 0289 (RMB) (HBP)

DECLARATION OF
FRANCO MUGNAI

I, Franco Mugnai declare:


1. My name is Franco Mugnai. I am named as a Defendant in the above-captioned litigation in my capacity as a Director of Herald Fund SPC ("Herald SPC"), which also is named as a Defendant in this case.

2. I have reviewed the Declaration of Joseph Serino, Jr. on Behalf of Defendants Herald Fund SPC, Franco Mugnai, and Friedrich Pfeiffer (the "Serino Declaration") that is being submitted in further support of the Defendants' Joint Motions to Dismiss.

3. I hereby affirm that the statements contained in paragraphs 5 and 8 of the Serino Declaration are true and correct in all respects inasmuch as they pertain to myself and to Herald SPC.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 28, 2011



Franco Mugnai

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE HERALD, PRIMEO, AND THEMA FUNDS
SECURITIES LITIGATION

THIS DOCUMENT RELATES TO:

REPEX VENTURES, S.A., *et al.*,

Plaintiffs,

v.

BERNARD L. MADOFF, *et al.*,

Defendants.

ECF Case
Case No. 09 Civ. 0289 (RMB) (HBP)

**DECLARATION OF
FRIEDRICH PFEFFER**

I, Friedrich Pfeffer declare:


1. My name is Friedrich Pfeffer. I am named as a Defendant in the above-captioned litigation in my capacity as a Director of Herald Fund SPC ("Herald SPC"), which also is named as a Defendant in this case.

2. I have reviewed the Declaration of Joseph Serino, Jr. on Behalf of Defendants Herald Fund SPC, Franco Mugnai, and Friedrich Pfeffer (the "Serino Declaration") that is being submitted in further support of the Defendants' Joint Motions to Dismiss.

3. I hereby affirm that the statements contained in paragraphs 5, 8, and 9 of the Serino Declaration are true and correct in all respects inasmuch as they pertain to myself and to Herald SPC.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 28, 2011



Friedrich Pfeffer