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: All Actions	:	ECF Case Electronically Filed

DECLARATION OF MARCO E. SCHNABL IN SUPPORT OF THE MOTION TO DISMISS OF DEFENDANTS UNICREDIT S.p.A. ("UCG"), PIONEER GLOBAL ASSET MANAGEMENT S.p.A. ("PGAM") AND PIONEER ALTERNATIVE INVESTMENT MANAGEMENT LTD. ("PAI") (COLLECTIVELY, THE "UCG DEFENDANTS")

I, MARCO E. SCHNABL, declare as follows:

1. I am a partner at Skadden, Arps, Slate, Meagher & Flom LLP, counsel for the UCG Defendants, and hereby offer, at the Court's instructions, arguments unique to the UCG Defendants' motion to dismiss and true copies of related exhibits. (*See* JM (Glossary) for definitions.)

2. **Allegations Against UCG (All Three Actions)**. The Complaints are barren of facts entitling Plaintiffs to relief against the UCG Defendants. Such allegations against UCG rely almost entirely on the conclusory and predictable assertion that UCG exerted control over its direct and indirect corporate subsidiaries (Bank Austria, PGAM and PAI) and Bank Medici, a Defendant in which Bank Austria held a minority 25% interest. (TC ¶¶ 17, 25, 84, 85, 89; HC ¶¶ 23, 24, 27, 39, 412-15; PC ¶¶ 6, 18, 21, 22, 24, 25, 79, 81, 87.)

3. **Allegations Against PGAM and PAI (Primeo Action)**. Plaintiffs say that PGAM (1) served as an investment adviser for Primeo beginning in April 2007 and has a local New York office; (2) "nominally owned" and "controlled" the Primeo Funds and marketed them to investors; (3) made misstatements and omissions to investors; (4) paid Bank Medici for "undisclosed access" to Madoff; and (5) received fees for its purported services. (PC ¶¶ 6, 24, 63-73, 87, 94, 337-72.) In fact, PGAM is a holding company, has no offices in New York and is not an "adviser" to any fund. (Yates Decl. ¶¶ 3-4 (appended as Ex. A).) All other allegations are conclusory. Similarly, the claims against PAI, a PGAM subsidiary, rely on the unsupported legal conclusion that PAI "controlled" the Primeo Funds after allegedly being appointed their investment adviser. (PC ¶ 39.)

4. **No Personal Jurisdiction Over PGAM**. There is no ***personal jurisdiction*** under CPLR 301 over PGAM, an Italian holding company with *no presence* in New York. Its supposed local office is in fact occupied by Pioneer Alternative Investment Management (NY) Ltd. (Yates Decl. ¶ 4), a *separate* company, and no allegations are (or could be) offered to impute that location to PGAM. (JM 9-10.) More broadly, no facts are offered for exercising personal jurisdiction over

PGAM on any "transacting business" basis under CPLR 302.

5. **No Viable Common Law Claims Against UCG, PGAM or PAI**. Plaintiffs lack standing to pursue common law claims because (1) they cannot plead injury that is fairly traceable to the UCG Defendants' alleged conduct and (2) all such claims are derivative and thus belong to the Funds, not shareholders. (JM 22-26.) In any event, Plaintiffs' claims are otherwise defective. Certain claims arise from an allegation that PAI advised Primeo. (PC ¶¶ 5, 71, 107.) ***Exculpation clauses*** in PAI's Advisory Agreement, however, bar the negligence and duty-based claims against PAI – and also against PGAM and UCG, to the extent based on PAI's supposed acts. (PC (C1-3).) These clauses provide that PAI shall not, "in the absence of gross negligence or willful default," be liable for acts or omissions taken thereunder. (Bagnall Decl. ¶ 47 (appended as Ex. B), at Ex. G ¶¶ 11.1, 11.2; Howard Decl. ¶¶ 67-69 (appended as Ex. C).) Neither gross negligence nor willful default is pled.[1]

6. Claims for ***gross negligence*** and ***constructive trust*** (PC (C2, 5); TC (C5, 18)) are not recognized under Irish and Cayman law and, in any event, are otherwise deficient. (Howard Decl. ¶¶ 40-42, 51-56; Bagnall Decl. ¶¶ 53, 66-67.) Claims for ***negligence*** and ***breach of fiduciary duty*** (PC (C1, 3, 20); TC (C7, 8, 13, 14)) are likewise barred because no allegation is offered that any UCG Defendants had contacts with Plaintiffs or owed them a duty. (Howard Decl. ¶¶ 29-39, 43-49; Bagnall Decl. ¶¶ 57, 59, 78-83.) The governing Advisory Agreement and a lack of privity bar quasi-

[1] Cayman law governs claims against PAI that implicate PAI's internal affairs (such as breach of fiduciary duty) and claims that involve statements allegedly disseminated from the Cayman Islands (such as fraud). (JM 30-31 & n.35.) Irish law governs claims based on PAI's alleged conduct in Ireland (such as negligence). (*Id.*) Claims based on PGAM's alleged shareholding in Primeo implicate internal affairs and are governed by Cayman law, except for breach of contract, which is governed by Luxembourg under contractual choice-of-law clauses. (JM 30.) Claims against PGAM based on acts PAI allegedly took at its direction are governed by PAI's jurisdiction of organization. *See Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 132-33 (2d Cir. 1993). This principle also applies to claims against UCG that are based on the alleged acts of its subsidiaries. *Id.* Otherwise, the law of the Fund's jurisdiction of organization governs, as the place with the greatest interest. (JM 30 n.35.) Alternatively, if foreign law does not apply, the common law claims should be dismissed under New York law for failure to meet the requirements outlined in the Joint Memorandum.

contract claims for ***unjust enrichment*** (PC (C4); TC (C19)). (Howard Decl. ¶¶ 57-63, 67-69; Bagnall Decl. ¶¶ 47, 60-65.) The lone ***fraud claim*** (PC (C19)) does not plead adequately that PGAM made a statement to Plaintiffs, much less that it did so with scienter. (Bagnall Decl. ¶¶ 72-76; JM 33-34.) Finally, ***breach of contract*** claims against UCG (TC (C16)) and PGAM (PC (C6)) are barred because neither Defendant was party to any contract with Plaintiffs. (Howard Decl. ¶¶ 64-66; Bagnall Decl. ¶¶ 41, 68-70; Trevisan Decl. ¶¶ 14-17 (appended as Exhibit D).) And while PAI allegedly was party to the Advisory Agreement with Primeo, Plaintiffs do not identify a promise therein that was held "in trust" for them to enforce under a ***third party beneficiary*** theory (PC (C7)). (Bagnall Decl. ¶¶ 42, 71.)

7. All the Thema Plaintiffs' claims against UCG (TC (C5-8, 13-19)) separately fail because they rest solely on allegations that UCG (1) acquired Bank Austria in 2006 and, for that reason, (2) had unspecified "powers" to manage Bank Medici because, in turn, Bank Austria held a minority 25% stake in Bank Medici. (TC ¶¶ 16, 20, 25.) The Thema Complaint pleads no legally viable basis to hold UCG liable for the alleged acts of Bank Medici. (Howard Decl. ¶¶ 15, 16, 24.)

8. ***Aiding and abetting*** claims in the Herald Action against UCG (C3, 18, 19) are not recognized either under Luxembourg law for investors in Herald Lux or Cayman law for investors in Herald SPC. (Trevisan Decl. ¶ 18; Bagnall Decl. ¶¶ 92, 105-07.) Aiding and abetting a breach of fiduciary duty is not recognized under Irish law for investors in Thema either (TC (C15)). (Howard Decl. ¶ 50.) As for ***civil conspiracy*** (HC (C1)), it is not recognized under Luxembourg law. (Trevisan Decl. ¶ 18.) Under Cayman law, the Herald Complaint contains insufficient allegations that UCG intended to damage Plaintiffs or the putative class. (Bagnall Decl. ¶ 90.)

9. **RICO Claims Against UCG**. In addition to the arguments outlined elsewhere (JM, Part IV), the ***RICO claims*** against UCG (HC (C20, 21)) fail for the following reasons. First, there are no allegations from which to infer that UCG committed the charged predicate acts – wire fraud, money laundering and unlawful monetary transactions. (HC ¶¶ 412-15.) The thrust of the RICO

claim is that UCG "further[ed]" the alleged scheme by "directing" Primeo to invest with Madoff indirectly through Herald, thereby "conceal[ing]" the investment from the putative class. (HC ¶¶ 302, 308.) But as discussed below, no facts are pled from which to infer that UCG knew about Madoff's fraud or otherwise possessed the intent to conceal information from investors.

10. Plaintiffs' other RICO allegations against UCG rest on wire transfers supposedly sent and received by UCG's subsidiary PGAM (HC ¶¶ 412-15), which is not a Defendant. There is, therefore, no basis to support a claim that ***UCG*** "fed" money to Madoff. In effect, UCG is charged with being the parent of a second entity, PGAM, which allegedly made payments and received fees in connection with Madoff investments by a third entity, Primeo. (HC ¶¶ 308, 415.) Plaintiffs may not impute RICO liability to UCG based on the purported acts of its subsidiaries absent non-conclusory allegations of domination or control, *see Atkins v. Apollo Real Estate Advisors, L.P.*, CV-05-4365, 2008 WL 1926684, at *8-9, 11 n.12 (E.D.N.Y. Apr. 30, 2008), which are lacking here.

11. Plaintiffs also fail to plead culpable knowledge, an element of each predicate act identified above. *See* 18 U.S.C. § 1957(a); *S.Q.K.F.C., Inc. v. Bell Atl. TriCon Leasing Corp.*, 84 F.3d 629, 633 (2d Cir. 1996); *Rosner v. Bank of China*, 528 F. Supp. 2d 419, 429-30 (S.D.N.Y. 2007). Plaintiffs must allege (1) motive and opportunity; or (2) conscious misbehavior or recklessness. *See Rosner*, 528 F. Supp. 2d at 430. Courts in Madoff cases, however, have refused to infer motive from a desire to earn fees and deposits, which is all Plaintiffs allege (HC ¶ 356). *See, e.g., MLSMK Invs. Co. v. JP Morgan Chase & Co.*, 737 F. Supp. 2d 137, 143 (S.D.N.Y. 2010), *aff'd*, 2011 WL 2176152 (2d Cir. June 6, 2011); *Schmidt v. Fleet Bank*, 96 Civ. 9030, 1998 WL 47827, at *6 (S.D.N.Y. Feb. 4, 1998) (implausible that financial institution would knowingly aid Ponzi scheme to earn fees).

12. Conscious misbehavior or recklessness is also absent. Aside from their flawed "red flags" theory (JM 33-34), Plaintiffs claim that UCG officials of unspecified identity and seniority learned of "significant defects in the relationships between and among Bank Austria, Bank Medici,

BA Worldwide, and Primeo Fund." (HC ¶ 301.) This is conclusory, as the Complaint fails to specify the "defects" or otherwise offer facts to support a strong (or plausible) inference that UCG knowingly participated in Madoff's fraud or the alleged predicate acts. This vague pleading is even less detailed than the RICO allegations dismissed in another Madoff suit. *See MLSMK*, 737 F. Supp. 2d at 144.

13. Plaintiffs do not plead close-ended or open-ended continuity. Here, UCG allegedly committed its first predicate act in 2007 and its last act in November 2008 (HC ¶¶ 412-15), a period well short of the two-year span typically required for close-ended continuity. *See Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 184 (2d Cir. 2008). Open-ended continuity is also lacking, as the alleged purpose of the RICO violations was to provide "fresh capital" for BLMIS (HC ¶¶ 1, 157), an objective that ended with the collapse of Madoff's scheme in December 2008. Also, Plaintiffs have not pled a predicate act in over two years (HC ¶ 429), suggesting the "scheme" has ended. *See First Capital Asset Mgmt., Inc. v. Satinwood*, 385 F.3d 159, 181 (2d Cir. 2004).

14. Plaintiffs also do not allege facts to establish that UCG "'played some part in ***directing*** [the enterprise's] affairs.'" *In re Agape Litig.*, 681 F. Supp. 2d 352, 369-70 (E.D.N.Y. 2010) (citation omitted). "'[P]rovid[ing] services that were helpful to an enterprise'" is inadequate to support this aspect of a RICO charge. *First Cent. Sav. Bank v. Meridian Residential Capital*, 09-CV-3444, 2011 WL 838910, at *8 (E.D.N.Y. Mar. 3, 2011) (citation omitted). And when the defendant is a corporation, the bar is even higher, requiring allegations that the entity was a central figure. *See, e.g., Schmidt v. Fleet Bank*, 16 F. Supp. 2d 340, 351-53 (S.D.N.Y. 1998).

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

Dated: New York, New York
June 29, 2011

/s/ Marco E. Schnabl
Marco E. Schnabl