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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: HERALD, PRIMEO AND THEMA FUNDS SECURITIES LITIGATION	Master File No.: No. 09 Civ. 289 (RMB)
This Document Relates To: No. 09 Civ. 2558 (RMB)	

DECLARATION OF LEWIS J. LIMAN IN SUPPORT OF THE BANK OF NEW YORK MELLON CORPORATION'S MOTION TO DISMISS THE *THEMA* COMPLAINT

I, Lewis J. Liman, declare as follows:

1. I am a member of the Bar of this Court and a member of the firm of Cleary Gottlieb Steen & Hamilton LLP, counsel for The Bank of New York Mellon Corporation ("BNY Mellon"). I submit this declaration in further support of BNY Mellon's motion to dismiss the four claims asserted against it in Davis v. Benbassat et al., No. 09 Civ. 2558 (RMB), for aiding and abetting gross negligence and negligence (Count 11); aiding and abetting various defendants' breaches of fiduciary duties (Count 15), unjust enrichment (Count 19), and derivatively for aiding and abetting gross negligence and negligence (Count 12). I make this declaration based solely on my review of the allegations in Plaintiff's Second Amended Complaint in the Thema-related action ("TC") and applicable law, and do not purport to offer evidence on any other subject.

2. BNY Mellon hereby adopts the arguments set forth in Sections II(A), (B), (C)(1), (D), (G) and III(B) of the Joint Memorandum of Law, each of which arguments demonstrate that the claims against BNY Mellon should be dismissed.

3. The sole basis for Plaintiff's claims against BNY Mellon is the allegation that Bernard L. Madoff Investment Securities LLC ("BLMIS") "had its operating account for its broker-dealer business with" BNY Mellon. (TC ¶ 358.) Plaintiff's actual allegations against BNY Mellon are few: He alleges that, at times, BLMIS transferred money from its account at BNY Mellon to another BLMIS account at Barclay's Capital in London, and that certain of the money transferred to London was subsequently "funneled to Madoff, his family, and" back to BNY Mellon. (TC ¶ 359.) Plaintiff also alleges that BNY Mellon provided "fund administration, valuation, and custodial services to Tremont Partners," a third party investment management company that created and marketed a group of funds called the Rye Funds. (TC ¶ 360.) Plaintiff does not allege that he invested in the Rye Funds, or in any fund managed by Tremont, but rather that he invested elsewhere (in the Thema Fund) managed by a different manager (Bank Medici AG). (TC ¶ 15-16.)

4. Plaintiff does not allege that BNY Mellon provided any services to or had any business dealings whatsoever with Bank Medici AG, Sonja Kohn, UniCredit SpA, Thema, HSBC, PwC, Genevalor, Benbassat & Cie, BA Worldwide Fund Management Limited, or any other defendants in this case.

5. Plaintiff does not allege that he ever interacted with BNY Mellon, that he knew that BLMIS kept certain of its operating funds in an account at BNY Mellon, or that BNY Mellon ever provided any services for him whatsoever. Rather, the only fact that Plaintiff pleads regarding BNY Mellon is that BLMIS's market making business (of which Plaintiff does not allege he was a customer) held an account at BNY Mellon. (TC ¶ 358.) Plaintiff alleges that he was an indirect investor in a strategy implemented by an entirely different one of BLMIS's "three business units," (TC ¶ 121), through his investment in the Thema Fund.

6. **Plaintiff's Claims Are Preempted By The Martin Act.** BNY Mellon maintains its primary place of business at One Wall Street in New York City. (See TC ¶ 60, 70.)

BLMIS' account at BNY Mellon was located in New York. (TC ¶ 359.) Every single alleged act that forms the basis of Plaintiff's claims against BNY Mellon relate to banking services provided in New York to BLMIS exclusively within New York. (TC ¶ 327-68.)[1] None of the claims Plaintiff asserts against BNY Mellon require that he prove the element of scienter and, accordingly, each is preempted by the Martin Act. Castellano v. Young & Rubicam, Inc., 257 F.3d 171, 190 (2d Cir. 2001); Jain v. T&C Holding, Inc., No. 10 Civ. 1006 (RMB), 2011 WL 814659, at *6 (S.D.N.Y. Mar. 3, 2011) (Berman, J.).

7. **Plaintiff's Class Claims Are Preempted By SLUSA.** Plaintiff's putative class claims (Counts 11, 15 and 19) are preempted by the Securities Litigation Uniform Standards Act ("SLUSA") for all of the reasons set forth in the Joint Memorandum of Law.

8. **Plaintiff Lacks Standing To Assert Derivative Claims.** As set forth in the Joint Memorandum of Law, Plaintiff lacks standing under controlling Irish law to assert any claims derivatively of the Thema Fund. Whatever argument Plaintiff might have with respect to other defendants, however, there can be no argument that Plaintiff is excused from intracorporate remedies with respect to the Thema Fund's supposed claim against BNY Mellon (Count 15) – a third party entity that has no association with and is not accused of engaging in any conduct with the Thema Fund's managers. See Joint Memorandum of Law at 22-23.

9. **There Is No Such Tort As Aiding and Abetting Negligence.** Plaintiff's claims for aiding and abetting gross negligence and negligence (Counts 11 and 15) fail because New York law recognizes no such tort. See, e.g., In re Bayou Hedge Funds Inv. Litig., 472 F. Supp. 2d

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[1] For the same reasons, Plaintiff's claims against BNY Mellon are governed by the substantive law of the State of New York. See, e.g., GlobalNet Financial Com, Inc. v. Frank Crystal & Co., Inc., 449 F.3d 377, 384 (2d Cir. 2006) ("'If conflicting conduct-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders.'") (quoting Conney v. Osgood Mach, Inc., 81 N.Y.2d 66, 72 (1993)); Pens. Comm. of Univ. of Montreal Pens. Plan v. Banc of Am. Secs LLC, 446 F. Supp. 2d 163, 194 (S.D.N.Y. 2006) ("Because occurrences in New York and the parties' contacts with that forum bear the most relation to the torts at issue here, New York has the greatest interest in applying its law."); San Diego County Emples. Retirement Ass'n v. Maounis, 749 F. Supp. 2d 104, 125 (S.D.N.Y. 2010) (applying the law of "[t]he jurisdiction with the greatest concentration of occurrences and contacts with the issues presented.").

528, 532 (S.D.N.Y. 2007). Aiding and abetting is, by definition, a knowing violation. Kaufman v. Cohen, 760 N.Y.S.2d 157, 169 (1st Dep't 2003). Negligence is the unintentional failure to exercise care. United Nat. Ins. Co. v. Tunnel, Inc., 988 F.2d 351, 353 (2d Cir. 1993) ("'It is elementary that the words 'negligence' and 'intentional' are contradictory.'") (quoting Martin v. Yeoham, 419 S.W. 2d 937, 944 (Mo. Ct. App. 1967)). Thus, the concept of "aiding and abetting" is wholly inconsistent with the very nature of the underlying tort, and Plaintiff's claims accordingly are without legal merit.

10. **Plaintiff Alleges No "Actual Knowledge" Of Any Underlying Tort.** As set forth in the Joint Memorandum of Law, to state a claim for aiding and abetting, a plaintiff must plead facts demonstrating the defendant's "actual knowledge" of an underlying tort. See Joint Memorandum of Law at 34-35. Here, while asserting that BNY Mellon aided and abetted "the Medici Defendants, the Director Defendants, the HSBC Defendants, the Advisor Defendants, and/or the PwC Defendants" (TC ¶ 496; see also id. ¶¶ 500; 511), Plaintiff does not allege that BNY Mellon even knew that the Thema Fund existed. He certainly does not allege that BNY Mellon knew that the Thema Fund invested with Madoff, that any of the other defendants had any role with respect to the management of the Thema Fund, or that any of the other defendants breached any duty. All that is pled are Plaintiff's deficient allegations that BNY Mellon could have discovered Madoff's fraud. (TC ¶ 358-68.) Those allegations are not supported by facts and, even if they were, would not be sufficient to proceed with a claim against BNY Mellon for aiding and abetting.

11. **Plaintiff Alleges No "Substantial Assistance" By BNY Mellon.** As to substantial assistance, all that Plaintiff alleges is that BNY Mellon allowed BLMIS to have a bank account (TC ¶ 358) and that BNY Mellon permitted Madoff to transfer money to another BLMIS account at another major financial institution (TC ¶ 359). The Second Circuit has held that such conduct does not constitute "substantial assistance" under New York law. See, e.g., MLSMK Inv. Co. v. JP Morgan Chase & Co., No. 10-3040, 2011 WL 2176152, at *3 (2d Cir. June 6, 2011)

("Banks generally do not owe non-customers a duty to protect them from fraud perpetrated by their customers."); see also In re Agape Litigation, 681 F. Supp. 2d 352 (E.D.N.Y. 2010) ("The caselaw is clear that opening accounts and approving transfers, even where there is suspicion of fraudulent activity, does not amount to substantial assistance.").[2]

12. **BNY Mellon Was Not Unjustly Enriched.** Finally, Plaintiff does not plead that BNY Mellon ever received any fees from Plaintiffs, or that the account fees that BNY Mellon presumably received from BLMIS were in any way unreasonable. Accordingly, Plaintiff has not pled that BNY Mellon was unjustly enriched, or that such enrichment was at his expense (Count 19). See Kramer v. Lockwood Pension Servs., 653 F. Supp. 2d 354, 381 (S.D.N.Y. Sept. 1, 2009); Redtail Leasing, Inc. v. Bellezza, No. 95 Civ. 5191 (JFK), 1997 WL 603496, at *8 (S.D.N.Y. Sept. 30, 1997) (requiring "some type of direct dealing or actual, substantive relationship with a defendant").

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

Dated: June 29, 2011
New York, New York

/s/ Lewis J. Liman
Lewis J. Liman

[2] BNY Mellon does not understand the basis for Plaintiff's allegation that BNY Mellon "fail[ed] to file Suspicious Activity Reports" regarding BLMIS's account. First, the allegation assumes (without explaining) that the activity in the account (mere transfers of money between affiliated accounts) would have merited the filing of such reports. At a more basic level, however, "SARs are confidential," BNY Mellon is prohibited by law from revealing whether it filed such reports and Plaintiffs have no basis whatsoever for alleging that SARs either were or were not filed in connection with Madoff's account. See 12 C.F.R. § 21.11(k); 12 C.F.R. § 353.3(g).