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 JAMES C. DUGAN IN SUPPORT OF WILLIAM FRY'S MOTION TO DISMISS ALL CLAIMS ASSERTED AGAINST IT

I, James C. Dugan, declare under penalty of perjury as follows:

1. I am a member of the bar of this Court and a partner with the law firm of Willkie Farr & Gallagher LLP.

2. William Fry, a law firm based in Dublin, Ireland, acted as legal counsel to Thema and, in that capacity, is alleged to have participated in drafting Thema's prospectuses and annual reports and in reviewing and approving contracts between Thema and BLMIS. (TC ¶ 225.) Plaintiff asserts claims against William Fry for aiding and abetting a breach of fiduciary duty and for unjust enrichment. (TC ¶¶ 518-521; 539-543.) These counts contain **no** allegations specific to William Fry; rather, Plaintiff has indiscriminately named "All Defendants" in these counts. (*Id.*) The claims against William Fry are defective and should be dismissed with prejudice for the following reasons specific to William Fry.[1]

3. Plaintiff's aiding and abetting breach of fiduciary duty claim against William Fry should be dismissed because: (i) Irish law applies to Plaintiff's tort claims and, under Irish law, there is no cause of action for aiding and abetting breach of fiduciary duty (Jt.

[1] In addition, William Fry joins in the following arguments in support of dismissal set forth in the Joint Memorandum of Law In Support of All Defendants' Motions to Dismiss ("Joint Brief" or "Jt. Brf.") and supporting declarations: (i) forum non conveniens, (ii) SLUSA, (iii) Martin Act preemption, (iv) Plaintiff's lack of standing, (v) Plaintiff's inability to bring derivative claims, and (vi) lack of duties owed to Plaintiff.

Brf. at 30-31; Sanfey Decl. ¶¶ 11, 16.1), and (ii) even if New York law were to apply, the TC's allegations against William Fry are insufficient to maintain a claim for aiding and abetting a breach of fiduciary duty for the following reasons.

4. First, as set forth in the Joint Brief and supporting declarations, Plaintiff fails sufficiently to allege a breach of fiduciary duty on the part of any alleged primary wrongdoers. Necessarily, then, Plaintiff's claim for aiding and abetting breach of fiduciary duty must also fail. Moreover, the crux of Plaintiff's allegations against William Fry is that it approved prospectuses and annual reports that failed to disclose Thema's relationship with BLMIS and certain alleged business conflicts involving Thema's directors. (TC ¶¶ 228-229.) Plaintiff's aiding and abetting therefore sounds in fraud, and the TC's allegations must satisfy the heightened pleading requirements of Rule 9(b). *See MLSMK Inv. Co. v. JP Morgan Chase & Co.*, No. 10-3040-cv, 2011 WL 2176152, at *1 (2d Cir. June 6, 2011) (Summary Order); *Kolbeck v. LIT America, Inc.*, 939 F. Supp. 240, 245 (S.D.N.Y. 1996)). And even if a heightened pleading standard did not apply, the TC would still be required to plead "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 557) (citation omitted).

5. Here, Plaintiff's allegations do not meet these pleading hurdles. Significantly, Plaintiff's breach of fiduciary duty claims against the alleged Thema primary wrongdoers are based on allegations that are entirely different from the those asserted against William Fry – namely, that the alleged Thema primary wrongdoers failed to perform adequate

due diligence on Madoff or to monitor his investment activities. (TC ¶¶ 503-510.) Notably, Plaintiff does not sufficiently allege that William Fry aided and abetted any of these alleged failures (except for the sole conclusory allegation that William Fry "participated in the inadequate due diligence" (TC ¶ 227)), and the aiding and abetting claims against William Fry should be dismissed on this basis as well. *See e.g.*, *Lefkowitz v. Bank of New York*, 676 F. Supp. 2d 229, 262-63 (S.D.N.Y. 2009).

6. Second, Plaintiff fails to plead with particularity, as he must, that William Fry had actual knowledge of the primary wrongdoers' breaches of fiduciary duty. *See Musalli Factory for Gold & Jewelry v. JP Morgan Chase Bank, N.A.*, 261 F.R.D. 13, 24 n.11 (S.D.N.Y. 2009) (actual knowledge "must be pleaded with particularity"); *Kirschner v. Bennett*, 648 F. Supp. 2d 525, 544 (S.D.N.Y. 2009). Allegations that William Fry was aware of red flags – even "extensive red flags" – are insufficient for this purpose. *See Rosner v. Bank of China*, No. 06 CV 13562, 2008 WL 5416380, at * 7, *10 n.10 (S.D.N.Y. Dec. 18, 2008) *aff'd* 349 F. App'x 637 (2d Cir. 2009).

7. Here, Plaintiff's allegations do not suffice to establish that William Fry had actual knowledge of any breach. For example, Plaintiff alleges that William Fry negotiated, reviewed, approved and/or received Thema's account opening documents, trading authorizations, and custody agreements with BLMIS. (TC ¶ 226.) However, Plaintiff fails to allege what, if anything, about these documents established actual knowledge by William Fry of a breach of fiduciary duty on the part of any of the Thema defendants. Similarly, Plaintiff alleges that William Fry was aware that Madoff had asked not to be identified in the Thema prospectus, but does not allege why this fact, if true, would amount to actual knowledge by William Fry of a breach of fiduciary duty of a primary wrongdoer. (TC ¶¶ 228-229.)

8. Third, Plaintiff fails to allege that William Fry "substantially assisted" in any breaches of fiduciary duty. An aider and abetter provides substantial assistance only if it "affirmatively assist[s], help[s] conceal, or by virtue of failing to act when required to do so enable[s] the [underlying harm] to proceed." *Kirschner*, 648 F. Supp. 2d at 544. A mere failure to act is insufficient to constitute "substantial assistance" unless, unlike here, the defendant owes a fiduciary duty to plaintiff. *See In re Bayou Hedge Funds Inv. Litig.*, 472 F. Supp. 2d 528, 534 (S.D.N.Y. 2007) ("[i]n the absence of a fiduciary duty to speak, there can be no liability for aiding and abetting based on silence") (internal citations omitted); *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 562 (N.Y. 2009).

9. Here, even assuming that Plaintiff has adequately alleged an underlying primary violation, the aiding and abetting claim fails because there is no allegation that William Fry took any affirmative action with respect to the alleged disclosure violations. Merely approving (and thereby failing to stop) prospectuses and annual reports containing material omissions that were then disseminated by Thema to Plaintiff and other investors, which is all that William Fry is alleged to have done, is not enough absent any fiduciary duty between William Fry and the investors. (TC ¶¶ 225, 228.) *See Bayou*, 472 F. Supp. 2d at 534 (law firm does not incur liability for failing to disclose to investors that its client was engaged in a Ponzi scheme "if it had no fiduciary relationship with anyone except its own client"); *Eurycleia Partners, LP*, 12 N.Y.3d at 562.

10. Plaintiff's unjust enrichment claim also fails under both Irish and New York law. First, Plaintiff's claim fails under Irish law because Plaintiff cannot allege that he (or any member of the plaintiff class) was a party to any contractual relationship between Thema and William Fry, pursuant to which any fees received by William Fry for legal services would

have been paid. This is fatal to Plaintiff's unjust enrichment claim under Irish law. (Sanfey Decl. ¶ 17.2.) Second, under New York law, there can be no claim for unjust enrichment absent a showing that William Fry received something of value from Plaintiff. *See Bazak Int'l Corp. v. Tarrant Apparel Grp.*, 347 F. Supp. 2d 1, 4 (S.D.N.Y. 2004). Here, such a showing cannot be made because there is no allegation that William Fry's legal fees were paid with Plaintiff's money. *See Bayou*, 472 F. Supp. 2d at 532.

11. Moreover, even assuming that William Fry performed legal work during the class period and that William Fry was paid for that work, Plaintiff's unjust enrichment claim "would still have to be dismissed, because the payment by [the fund] of operating expenses (such as legal fees) using misappropriated funds does not confer a 'direct' and 'specific' benefit on [defendant law firm] at the expense of plaintiffs." *Bayou*, 472 F. Supp. 2d at 532 (citing *Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int'l N.V.*, 425 F. Supp. 2d 458 (S.D.N.Y. 2005) *aff'd on other grounds* 400 F. App'x 611 (2d Cir. 2010)). Further, Plaintiff does not allege "any facts from which a reasonable trier of fact could infer that [defendant law firm] is not equitably entitled to keep any legal fees it earned for services rendered." *Id.* (citing *Richardson v. Artageous, Inc.*, 93 CV 5221, 1993 U.S. Dist. LEXIS 15567, at *7 (S.D.N.Y. Nov. 4, 1993)).

12. For all of the above reasons and those set forth in the Joint Brief and supporting declarations, the Court should dismiss with prejudice the claims against William Fry.

13. The foregoing statements are true and correct to my knowledge and belief. June 29, 2011 in New York, NY.

James C. Dugan