

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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 IN RE HERALD, PRIMEO AND THEMA : Master File No. 09 Civ. 289
 FUNDS SECURITIES LITIGATION : (RMB) (HBP)
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**ATTORNEY DECLARATION OF ANTONY L. RYAN
IN SUPPORT OF THE PWC DEFENDANTS' MOTION TO DISMISS**

I, ANTONY L. RYAN, under penalty of perjury, declare the following:

1. I am a member of the firm of Cravath, Swaine & Moore LLP, counsel for PwC Ireland. I have coordinated this declaration with counsel for PwC U.S., PwC Bermuda and PwCIL, and submit this declaration in support of the motions to dismiss by each of the four PwC Defendants in the Thema-related action, *Davis v. Benbassat*.

2. PwC Ireland is an Irish professional services firm organized as a partnership under Irish law. PwC Ireland is a member firm of the PwC network of firms, as are PwC U.S. and PwC Bermuda. Each PwC member firm is a separate legal entity organized under the laws of its own jurisdiction. PwCIL is the coordinating entity for the PwC network and is itself a separate legal entity from each of the PwC member firms. PwCIL does not provide professional services and does not control the member firms in the PwC network.

3. PwC Ireland was engaged by Thema to audit its annual financial statements. PwC Ireland conducted those audits in Ireland. PwC U.S., PwC Bermuda and PwCIL were not retained by Thema, and did not issue reports on Thema's financial statements.

4. Plaintiff alleges that the PwC Defendants were negligent because they did not uncover the fraud by Madoff at BMIS, a firm none of the PwC Defendants was ever engaged to audit. As other courts in this District have found, "[t]he notion that a firm engaged to audit the financial statements of one client . . . must conduct audit procedures on a third party that is not an audit client (BMIS) on whose financial statements the audit firm expresses no opinion is unprecedented and has no basis". *Meridian*, 747 F. Supp. 2d at 413; *see also Stephenson*, 2011 WL 781936, at *14; *Tremont*, 703 F. Supp. 2d at 371.

Personal Jurisdiction, Venue and *Forum Non Conveniens*

5. PwC Ireland moves to dismiss under Fed. R. Civ. P. 12(b)(2). The Complaint does not make a *prima facie* showing of personal jurisdiction—either general or specific—over

PwC Ireland. *See Jazini*, 148 F.3d at 185. PwC Ireland submits a declaration from its partner Vincent MacMahon establishing that there is no general jurisdiction over PwC Ireland in New York. (MacMahon Decl. ¶¶ 9-15.) That PwC Ireland occasionally receives payments from clients in New York (TC ¶ 116) does not establish a “continuous and systematic course of doing business” in New York, as those services are provided in Ireland, and 1% or less of the firm’s revenue comes from such services. (MacMahon Decl. ¶ 12.) *See Overseas Media, Inc. v. Skvortsov*, 407 F. Supp. 2d 563, 569 (S.D.N.Y. 2006), *aff’d*, 277 Fed. Appx. 92 (2d Cir. 2008).

6. PwC Ireland submits a declaration from its partner Anthony Weldon establishing that PwC Ireland did not engage in conduct giving rise to specific jurisdiction. Mr. Weldon attests that no one from PwC Ireland visited the U.S. in connection with the Thema audit. (Weldon Decl. ¶ 5); *see also CRT*, 2011 WL 2225050, at *1 (auditor’s receipt of information from New York for use in audit conducted abroad does not create personal jurisdiction in New York). Mr. Weldon also sets out facts establishing that PwC U.S. and PwC Bermuda were not PwC Ireland’s agents for purposes of CPLR 302. (Weldon Decl. ¶¶ 6-7.) Based on nearly identical allegations as here, another district court held that PwC Ireland is not subject to personal jurisdiction in New York. *Banco Santander*, 732 F. Supp. 2d at 1326-29.

7. All the PwC Defendants move to dismiss under Fed. R. Civ. P. 12(b)(3) and for *forum non conveniens*. The *forum non conveniens* grounds are set forth in Defendants’ joint brief and supported by the declaration of Mark Sanfey, an expert on Irish law. In addition, the derivative claims against the PwC Defendants on behalf of Thema should be dismissed to enforce a mandatory forum selection provision. PwC Ireland’s contracts with Thema provided that “the Irish Courts shall have exclusive jurisdiction to settle any claim, difference or dispute . . . which may arise out of or in connection with such contract”. (Weldon Decl. Ex. A, at 8.) The PwC Defendants may each invoke the forum selection clause, as Plaintiff’s claims against

them are directly related to PwC Ireland's conduct in issuing its audit reports on Thema. *See Cfirstclass Corp. v. Silverjet plc*, 560 F. Supp. 2d 324, 328 (S.D.N.Y. 2008).

8. The PwC Defendants also move to dismiss under Fed. R. Civ. P. 12(b)(6). The PwC Defendants submit that (1) the claims against them are governed by Irish law, and should be dismissed for the reasons set forth in the Sanfey Declaration, but (2) the Court need not decide the choice-of-law issue for purposes of this motion as Plaintiff also fails to state a claim under New York law. The grounds for dismissal under both Irish and New York law are set forth here.

Negligence, Gross Negligence and Professional Negligence (Counts 1–4, 9–10)

9. Under New York law, the *Credit Alliance/Sykes* test requires dismissal of the negligence-based claims against Defendants here. Plaintiff fails to establish that he was in privity or near-privity with any of the PwC Defendants. (Brief Part III.B.1.) The *Caparo* test under Irish law is to the same effect. (Sanfey Decl. ¶¶ 15.20-15.24.) The fact that PwC Ireland's audit opinion was addressed to Thema shareholders is legally insufficient. As the First Department held in *CRT*, 2011 WL 2225050, another Madoff fund case: "The fact that plaintiffs were entitled to and received a copy of the audited financial statements, or that BDO Seidman knew that the investors would rely upon the information contained in the financial statements, does not establish the requisite linking conduct." *Id.* at *2. Nor does Plaintiff allege that the audits were conducted for the purpose of a specific, known transaction. *Security Pacific Business Credit, Inc. v. Peat Marwick Main & Co.*, 597 N.E.2d 1080, 1084 (N.Y. 1992); *Credit Alliance*, 483 N.E.2d at 119. Plaintiff does not (and cannot) allege that he ever communicated with PwC Ireland or that he was specifically identified to PwC Ireland.

10. That is all the more true for PwC U.S., PwC Bermuda and PwCIL, who were not auditors of Thema, and therefore were not in privity with Thema itself, let alone the Thema shareholders. Plaintiff does not even come close to alleging "linking conduct" or any other

prong of the *Credit Alliance/Sykes* test with respect to PwC U.S., PwC Bermuda or PwCIL.

11. Plaintiff's negligence-based claims also fail because Plaintiff fails to plead actual reliance. Absent from Plaintiff's Complaint are allegations that Plaintiff actually read, or even received, PwC Ireland's audit reports—let alone that Plaintiff took any action in reliance on them. As PwC U.S., PwC Bermuda and PwCIL did not opine on or make any statement related to Thema, Plaintiff cannot possibly have relied on a statement by any of them.

Unjust Enrichment (Count 19)

12. Thema paid PwC Ireland \$18,010 in 2006 and \$28,050 in 2007 for its audits—fees Plaintiff describes as “paltry” (TC ¶ 240). Plaintiff fails to state a claim against the PwC Defendants for unjust enrichment under New York or Irish law. (Brief Part III.B.6; Sanfey Decl. ¶ 17.2.) *First*, Plaintiff does not allege that he directly conferred a benefit on PwC Ireland, as Thema paid the audit fees. *Second*, the contract between Thema and PwC Ireland provides an adequate remedy at law.

Aiding and Abetting (Counts 11–12, 15)

13. Plaintiff fails to state a claim for aiding and abetting breach of fiduciary duty under New York law, and the cause of action does not exist under Irish law. (Sanfey Decl. ¶ 16.1.) *First*, Plaintiff fails to allege that any of the PwC Defendants had actual knowledge of the existence of fiduciary duties. *See Kolbeck*, 939 F. Supp. at 246; *Mazzaro de Abreu v. Bank of Am. Corp.*, 525 F. Supp. 2d 381, 394 (S.D.N.Y. 2007). *Second*, Plaintiff fails to plead with particularity that the PwC Defendants had actual knowledge of a breach of fiduciary duty. *Third*, Plaintiff fails to plead that any of the PwC Defendants substantially assisted a tort. An auditor's failure to act cannot constitute substantial assistance, because auditors do not stand in a fiduciary or similar relationship with their clients. *Kaufman v. Cohen*, 760 N.Y.S.2d 157, 170 (App. Div. 2003); *Able Energy, Inc. v. Marcum & Keligman LLP*, 893 N.Y.S.2d 36, 37 (App. Div. 2010).

Fourth, the PwC Defendants' conduct "had little if anything to do with plaintiffs' losses".

Kolbeck, 939 F. Supp. at 249. Plaintiff fails to allege how PwC Ireland's issuance of audit reports contributed to Plaintiff's loss, as Plaintiff does not allege that he read the audit reports, let alone relied on them. This is particularly true for PwC U.S., PwC Bermuda and PwCIL, who did not issue any audit opinions.

Vicarious Liability Against PwCIL

14. Plaintiff's attempt to hold PwCIL vicariously liable for the actions of the PwC member firms fails because Plaintiff has not alleged that PwCIL controlled the PwC member firms with respect to the Thema audits. In *Anwar*, 728 F. Supp. 2d at 459, another Madoff fund case, the court rejected similar generalized allegations that PwCIL had the right to control PwC member firms and dismissed the claims against PwCIL, ruling that a "principal auditor's control of its agent auditor must come in a more focused form". Plaintiff has not alleged any facts suggesting that PwCIL "ever participated in the decision as to how the [Thema] audit reports . . . were completed, and certainly none which would support an inference that [PwCIL] . . . in fact contributed to . . . those audit reports". *Nuevo Mundo*, 2004 WL112948, at *5. Accordingly, PwCIL cannot be vicariously liable for the PwC member firms' actions.

15. Attached hereto are true and correct copies of the following documents:

Exhibit 1 Declaration of Mark Sanfey dated June 29, 2011

Exhibit 2 Declaration of Vincent MacMahon, dated June 22, 2011

Exhibit 3 Declaration of Anthony Weldon, dated June 27, 2011

Ex. A thereto: December 18, 2006 engagement letter between Thema and PwC Ireland



Antony L. Ryan