UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE HERALD, PRIMEO and THEMA FUNDS SECURITIES LITIGATION This Document Relates To: 09 Civ. 289 and 09 Civ. 2032	MASTER FILE 09 Civ. 289 (RMB) (HBP) DECLARATION OF MARIA A. BARTON IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

I, MARIA A. BARTON, declare under penalty of perjury:

1. I am a member of the Bar of this Court and of counsel at the firm of Latham & Watkins LLP. I am familiar with all facts and circumstances set forth in this declaration. I submit this declaration in support of the Primeo and Herald SPC Director Defendants' Motion to Dismiss.

2. The Primeo and Herald SPC Director Defendants ("Director Defendants") are foreign individuals who served as directors of the Primeo and Herald SPC Funds as part of their employment at foreign institutions. *See* PC ¶¶ 26-30, 32-36. Plaintiffs do not allege any facts showing that the Director Defendants were active in New York, meaningfully involved with the daily operation of the Funds, or knew of Madoff's fraud. The claims must be dismissed.

Plaintiffs' Allegations Are Either Non-Existent or Insufficient to Establish Jurisdiction

3. After naming them as defendants, Plaintiffs *never again mention* Simon, Kaniak, Tiefenbacher, Spalek, Fielding, Murray, or Wheaton. *See* PC ¶¶ 26-30, 33, 36. In nearly 400 pages of complaints, La Rocca and Saleta are identified *just once more*, regarding conduct that, even though assumed to be true, is irrelevant to this Court's jurisdictional inquiry. *See* PC ¶ 90 (alleging La Rocca sent facsimile to Radel at BA Worldwide); HC ¶ 580 (alleging 11 defendants knew Herald SPC would invest through Madoff). The Complaints are mute as to these defendants' contacts with New York. Plaintiffs also cannot impute to any of these defendants

the New York contacts of the Funds they supervised. *See* Defendants' Brief ("Def. Br.") § I.A.3(a).[1] Claims against these defendants should be dismissed out of hand. *In re Banco Santander Secs.-Optimal Litig.*, 732 F. Supp. 2d 1305, 1326 (S.D. Fla. 2010).

4. Plaintiffs also fail to establish personal jurisdiction over Radel, the only Director Defendant alleged to have visited New York. Radel's handful of alleged meetings with Madoff fall far short of the extensive conduct necessary to establish general jurisdiction. *See* Def. Br. § I.A.3(a). Plaintiffs also expressly concede that Radel visited or contacted New York "on behalf of Bank Austria and BA Worldwide" (PC ¶ 34), which cannot subject her to general jurisdiction because she was acting on behalf of a corporation, not herself. *See* Def. Br. § I.A.3(a).

5. Specific jurisdiction is also lacking, because neither Radel's meetings with Madoff nor her routine communication with BLMIS gave rise to Plaintiffs' claims. *See* Def. Br. § I.A.3. Plaintiffs allege that Radel met Madoff twice a year to discuss marketing, but do not—and cannot—allege that she played any role in selecting him as an investment manager or negotiated terms of BLMIS's contract with Primeo. *See* PC ¶¶ 34, 79. Her contacts, years after Madoff was selected as an investment manager, were not "of substantive importance in concluding the contract" or "essential to the ongoing relationship of the parties" so as to have jurisdictional significance. *See* Def. Br. § I.A.3.

Plaintiffs Fail to State Claims for Which They, and Not the Funds, Can Recover

6. Plaintiffs' paltry and conclusory allegations regarding the Director Defendants are utterly insufficient under New York law. Plaintiffs do not allege that a relationship of privity exists with the Director Defendants, a fatal omission to their claims for negligence, gross negligence,

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[1] Nor can any conceivable argument be made that Primeo served as the agent for Wheaton or Fielding, the Fund's only non-executive directors. *See* Primeo Offering Memorandum ("OM") (2007), at 12; Primeo OM (2001), at 9.

negligent misrepresentation and breach of contract. *See* Def. Br. §§ III.B.1, 5. Nor do they provide—as required to allege fraud and civil conspiracy, and aiding and abetting fraud, breach of fiduciary duty and conversion—a single fact showing that the Director Defendants intentionally or recklessly defrauded or damaged investors, or had actual knowledge of Madoff's fraud.[2] *Id.* at §§ III.B.2, 4, 8. Further, Plaintiffs' breach of fiduciary claims fail because they provide no basis for their assertions that the directors failed to act. (PC ¶ 208; HC ¶ 667; *see* Def. Br. § III.B.3.) The claims for constructive trust and unjust enrichment fail for two reasons: (1) investors did not directly compensate the directors and (2) any compensation was provided pursuant to a written agreement with the Funds. Def. Br. § III.B.6.

7. Moreover, Plaintiffs' claims are invalid under Cayman Islands law. The Director Defendants, by virtue of their offices, owed fiduciary duties to the Funds they supervised, not directly to Plaintiffs. Bagnall Decl. ¶¶ 29-30. Thus, the Funds (in the case of Primeo, under the control of its court-supervised liquidators) are the "proper plaintiffs" to assert claims for breach of fiduciary duty, negligence, unjust enrichment and constructive trust. *See id.* at ¶¶ 13-16, 17-23, 29-30, 51, 55-56, 65, 67, 93, 96,100-101. Even if Plaintiffs could assert these claims (and where they allege fraud and negligent misrepresentation), the damages sought by Plaintiffs represent losses suffered by the Funds, and are therefore barred by the "reflective loss" principle. *See id.* at ¶¶ 11-12, 24-28, 52, 58, 77, 83, 94, 97.

8. Additionally, Cayman Islands law does not recognize causes of action for "gross negligence," "aiding and abetting conversion," "aiding and abetting breach of fiduciary duty" or

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[2] Allegations that Radel caused funds to be transferred to or withdrawn from accounts at J.P. Morgan (PC ¶ 34) and that she "directed [] payments to Kohn and Eurovaluer" (*id.* at ¶ 88), even assumed to be true, reflect the unremarkable assertion that Radel performed ordinary business activities on behalf of her employer, and cannot serve as evidence of her allegedly fraudulent intent.

"aiding and abetting fraud." *See id.* at ¶¶ 53, 92, 95, 105, 107. Privity requirements bar Plaintiffs' breach of contract claims, as the Director Defendants were not parties to the relevant subscription agreements. *Id.* at ¶¶ 41-42, 68-70, 102-04.[3] Finally, the Herald Plaintiffs' claim for conspiracy fails because they are silent as to any allegation that Saleta possessed an actual intent to injure or damage another party. *See id.* at ¶ 90.

Certain Fund Contractual Clauses Bar Claims Based on Negligence

9. Even if Plaintiffs did not lack standing to bring causes of action against the Director Defendants, exculpatory and indemnity clauses in the Primeo and Herald SPC Funds' governing documents preclude liability for directors' allegedly negligent conduct and bar Plaintiffs' claims for breach of fiduciary duty, negligence and negligent misrepresentation. As the Primeo OM (2007) explicitly informed investors, the Fund's Articles of Association limit liability for a director to acts "aris[ing] through the actual fraud or willful default of such Director." Primeo OM (2007), at 12. Likewise, Herald SPC indemnified each director from "damages . . . otherwise than as a result of the willful neglect or default of the Directors or by failing to act honestly and in good faith." Herald SPC OM (2008), at 30.[4] These clauses are enforceable under Cayman law. Bagnall Decl. ¶¶ 43-44. Accordingly, Plaintiffs' claims for negligence and negligent misrepresentation must be dismissed as a matter of law. For the same reason, Plaintiffs' breach of fiduciary duty claims also fail. The complaints merely allege negligence: that the Director Defendants "fail[ed] to act with reasonable care" to protect Plaintiffs' investments or "fail[ed] to perform adequate due diligence" on Madoff. *See* PC ¶ 208; HC ¶

[3] To the extent that choice of law provisions in some subscription agreements mandate that Luxembourg law governs these claims, privity nonetheless bars them. Prum Decl. at ¶¶ 46, 57.

[4] This indemnity clause functions as an exculpation under Cayman Islands law because the Fund, which is the only "proper plaintiff" as discussed above, cannot pursue a cause of action against a person whom it must indemnify. *See* Bagnall Decl. ¶ 46.

667. Plaintiffs do not allege that any of these individuals engaged in the level of knowing or reckless conduct necessary to support a finding of "willful neglect or default." *See* Bagnall Decl. ¶ 48.

10. All claims against Wheaton are barred for the additional reason that, as non-executive director of Primeo in 2007, he served in a limited capacity, and the Fund expressly disclaimed any responsibility on his part for information contained in the Offering Memoranda, the Fund's investment strategy, valuation of Fund assets and any loss caused by the Fund's service providers. Primeo OM (2007), at 2, 12.

11. Ultimately, the Complaints suffer the same fundamental defects that prompted the dismissal of similar claims against directors of another Madoff "feeder fund." The "complaint[s] contain[ ] only threadbare assertions that lack any detail whatsoever, do[ ] not differentiate between the various 'director defendants,' and do[ ] not specify any actions that the directors took that would alter the standard legal presumption that directors and officers were agents of the corporation, not the other way around." *Banco Santander*, 732 F. Supp. 2d at 1326. This Court should likewise dismiss these insufficient pleadings.

WHEREFORE, it is respectfully requested that an order be entered granting the Primeo and Herald SPC Director Defendants' Motion to Dismiss the Proposed Amended Complaints.

I declare that the foregoing is true and correct.

Executed on June 29, 2011

Maria A. Barton
MARIA A. BARTON