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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In re HERALD, PRIMEO and THEMA	:	Civil Action No. 09 CIV 289 (RMB) (HBP)
FUNDS SECURITIES LITIGATION,	:	(Consolidated with 09 CIV 2032 and
	:	09 CIV 2558)
This Document Relates To:	:	
	:	ECF CASE
09 CIV 289 and 09 CIV 2032.	:	

**DECLARATION OF FRANKLIN B. VELIE IN SUPPORT
OF MOTION TO DISMISS CLAIMS AGAINST
DEFENDANT UNICREDIT BANK AUSTRIA AG**

FRANKLIN B. VELIE, pursuant to 28 U.S.C. §1746, declares:

1. I am a member of Sullivan & Worcester LLP, counsel for UniCredit Bank Austria AG (“BA”). I submit this declaration in support of BA’s motion to dismiss the claims against it in the Herald Complaint (“H.”) and the Primeo Complaint (“P.”).¹ BA joins the following arguments in Defendants’ Joint Brief. (“Br.”) to the extent applicable to BA: Sections I(A)(1), (2), (3)(e), (4), (B), (C); II(A)-(C), (E)-(H); III(A), (B)(1), (3), (4), (6), (8); and IV. This declaration sets forth arguments unique to BA.
2. Stripped of improper group pleading, allegations that are conclusory and irrelevant, or made either “on information and belief” or “according to the [Madoff] Trustee,”² the Primeo and Herald Complaints allege only the provision of routine banking and financial services by BA. Both complaints allege that BA: (i) helped create and owned 25% of Bank Medici, which was controlled by and was the alter ego of defendant Sonja Kohn (P. ¶¶6, 18, 21, 22, 82, 84; H. ¶¶23, 27, 196, 247, 249); (ii) helped Bank Medici obtain its banking license and provided it with banking infrastructure (P. ¶83; H. ¶¶195, 249, 250, 252, 257, 270, 363); (iii) created and owned the majority of shares of BA Worldwide Fund Management (“BAWFM”), the investment advisor to Primeo until April 25, 2007 (P. ¶¶22, 38, 85, 86; H. ¶¶116, 237, 238) and that BA directly provided investment advisory services to the funds until that same date (P. ¶22); (iv) had certain of its representatives meet with Madoff in New York on various occasions (P. ¶¶34, 79;

¹ BA is named in P. Counts 1-5 and H. Counts 1, 3, 18-21.

² See P. ¶¶ 20, 23, 25, 74, 77 - 81, 83-84, 88, 202-244; H. ¶¶23, 193, 194, 231-233, 237, 255, 260, 263, 313, 329, 359, 360, 364, 646-50, 655-660, 777-823. Allegations that do not specify to which defendant they apply should be ignored for jurisdictional purposes. (Br. at 3). Similarly, group pleading is not allowed under Rules 8 and 9(b) as it does not provide the necessary notice to individual defendants. See *Atuahane v. City of Hartford*, 10 Fed. Appx. 33, 34 (2d Cir. 2001) (Rule 8); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Young*, 1994 WL 88129, at *7 (S.D.N.Y. Mar. 15, 2004) (Rule 9(b)).

H. ¶¶120-123, 234); and (v) received an assignment of the PRIMEO trademark from Eurovaleur in 2001 (P. ¶77; H. ¶¶229, 230). The Herald Complaint alleges that BA: (i) caused BA accounts to be opened at BMIS in New York (H. ¶123); (ii) caused proceeds to be sent and received from such accounts, from July 10, 1996 through September 20, 1996 (*Id.* at ¶113, 245, 378), and received profits from BMIS (*Id.* at ¶¶245, 378); (iii) paid Eurovaleur and Kohn a 20% commission for services rendered to BAWFM (*Id.* at ¶¶240, 401); and (iv) created, marketed and distributed the Herald Fund (*Id.* at ¶¶259, 269).

3. **The Primeo and Herald Plaintiffs do not have standing to sue BA.** The Primeo Plaintiffs have alleged that BAWFM, a liquidated remote subsidiary of BA, ceased serving as investment advisor to the Primeo Fund on April 25, 2007, the date on which BA sold its funds business to defendant Pioneer Global Management S.p.A. (*See, e.g.*, P. ¶38, H. ¶116). Cabilly, however, purchased his Primeo shares months later, in January and May of 2008. *See Certification* (of Shmuel Cabilly). (Dkt. No. 75). Primeo plaintiff Korea Exchange Bank and the Herald plaintiffs have never identified the date(s) on which they purchased fund shares. The Primeo plaintiffs have also admitted that “Pioneer [i.e., **not** BA] at all relevant times owned and controlled the Primeo Funds.” P. ¶24. Plaintiffs thus have not met their burden to allege facts expressly and clearly establishing standing to complain of BA’s conduct. (Br. at 22).

4. The Herald and Primeo Plaintiffs also lack standing because they cannot allege that their injury is “fairly traceable” to BA’s conduct. Not only have plaintiffs failed to allege that they purchased shares at a time when BA had any role whatever with respect to the funds, neither

complaint alleges facts showing that BA had a “determinative or coercive effect” upon Madoff, Kohn, or any other party that directly caused plaintiffs’ injuries.³

5. **The Herald Complaint fails to allege a RICO claim against BA.** There is no allegation that BA conducted or participated in the affairs of the alleged enterprise. (Br. at 43-44). The Herald Complaint states that Madoff and Kohn controlled the enterprise. *See* H. ¶¶1, 255. Nor do the allegations establish that BA committed a pattern of racketeering activity. The three withdrawals BA allegedly made from BMIS (*see* H. ¶378) do not constitute wire or mail fraud because the pleadings fail to allege that BA had the requisite *scienter* or that the withdrawals were in furtherance of the fraud. (Br. at 43-44). These three predicate acts, allegedly committed by BA in 1996, fail to constitute a “continuous” pattern of racketeering activity under the tests for both closed-ended and open-ended continuity. (*Id.*). Nor do any allegations show that BA intended to defraud anyone, (*id.*), or that the identified transfers were related to any purported scheme to defraud. (*Id.*). The complaint fails to plead facts showing that BA caused plaintiffs’ RICO injury. (Br. at 42-43).

6. The RICO conspiracy claim under 18 U.S.C. §1962(d) fails because it does not allege that Bank Austria knew of and agreed to participate in an illegal conspiracy. (Br. at 44-45) The only allegations that describe any conspiracy or illicit agreement involve Kohn and Madoff. *See* H. ¶¶91, 172, 185, 188, 190.

7. **Plaintiffs’ common law claims against BA should be dismissed under Fed. R. Civ. P. 12(b)(6).** The Herald and Primeo Plaintiffs’ common law claims assert that BA, among others, failed to detect certain “red flags” indicating that Madoff was a fraud. (P. ¶¶168-188; H. ¶¶538-

³ *See Bennett v. Spear*, 520 U.S. 154, 169 (1997); *Mosdos Chofetz Chaim, Inc. v. Village of Wesley Hills*, 701 F. Supp. 2d 568, 583-84 (S.D.N.Y. 2010).

639). These claims belong to the funds, not their shareholders, the plaintiffs, under New York, Cayman, or Luxembourg law. (Br. at 22-25). *See also* Bagnall Decl. at ¶¶13-28, 51, 60, 65; Prum Decl. at ¶¶46-56.

8. The Primeo Complaint's claims against BA for breach of fiduciary duty, gross negligence and negligence (P. ¶¶202-231) should be dismissed because plaintiffs have failed to allege that BA owed or breached any duty to plaintiffs. (Br. at 26, 30-33). The breach of fiduciary duty allegations also fail to meet the particularity requirements of Rule 9(b). (Br. at 34). *See also* Bagnall Decl. at ¶¶29-40, 51-59; Prum Decl. at ¶¶67-78.

9. The Primeo Plaintiffs' claim against BA for unjust enrichment (P. ¶¶232-238) is foreclosed by the existence of contractual provisions governing the fees received by BA. (P. ¶¶233-234). (Br. at 36-38). The Primeo Plaintiffs are not entitled to a constructive trust against BA (P. ¶¶239-244) because they have an adequate remedy at law – *i.e.*, damages. Plaintiffs also have failed to identify the required *res* to which a constructive trust would attach. (Br. at 37-38). *See also* Bagnall Decl. at ¶¶60-67; Prum Decl. at ¶¶79-80.

10. The Herald Complaint asserts a claim against all thirty-one Defendants for civil conspiracy. (H. ¶¶646-650). Civil conspiracy is not actionable under New York, Cayman or Luxembourg law. (Br. at 39). *See also* Bagnall Decl. at ¶¶84-89; Prum Decl. at ¶¶87-88.

11. The Herald Complaint's claims of aiding and abetting: (i) conversion (H. ¶¶655-660), (ii) breach of fiduciary duty (H. ¶¶777-795) and (iii) fraud (H. ¶¶796-805), all fail for lack of pleading required elements. Plaintiffs have failed to allege that BA (a) had actual knowledge of the underlying torts, (b) provided substantial knowing assistance to the alleged wrongdoers, or (c) proximately caused plaintiffs' injuries. (Br. at 34-36). The "red flag" allegations also fail to establish *scienter*. (Br. at 35). *See* Bagnall Decl. at ¶¶91-92, 103-05; Prum Decl. at ¶¶93-94.

12. **This Court lacks personal jurisdiction over BA.** The Primeo and Herald Complaints fail to allege sufficient minimum contacts to assert personal jurisdiction over BA. The only allegation regarding BA's contacts in the "Jurisdiction and Venue" section of the Herald Complaint that even mentions BA by name is the existence, until 1996, of a local branch office and several domestic subsidiaries, *see* H. ¶27, P. ¶22. The Primeo Complaint does not refer to BA in its Jurisdiction and Venue section. P. ¶¶193-95. The absence of well-pled contacts shows that BA did not purposefully avail itself of the forum. (Br. at 3-6, 9-10). Personal jurisdiction over BA also is improper because the claims asserted against BA do not "arise out of" its contacts with the forum.⁴ No claim involves services offered at the branch or the activities of alleged domestic subsidiaries or BA's accounts at BMIS in 1996. Plaintiffs' claims instead relate to BA activities outside of the United States. (Br. at 5-6). To the extent Plaintiffs seek to establish general jurisdiction over BA, a former NY branch is irrelevant. (Br. at 9).

13. **The Herald Complaint should be dismissed against BA for failure to serve.** The Herald Plaintiff's only attempt to serve BA was by first class international mail, which fails to comply with Fed. R. Civ. P. 4(m). *See* Aff. of Service filed February 11, 2011 (Dkt. No. 74). This Court made clear that all service was to be completed prior to Plaintiffs' filing their motion to amend. *See* Jan. 10, 2011 Hearing Tr. at 29:18-30:1 (Dkt. No. 169). After more than two years, the Herald Plaintiffs have no good cause for failing to serve BA.

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

Dated: New York, New York
June 29, 2011

/s/Franklin B. Velie
Franklin B. Velie

⁴ *See Chew v. Dietrich*, 143 F.3d 24, 27 (2d Cir. 1998); *Del Ponte v. Universal City Devel. Ptnrs., Ltd.*, 2008 WL 169358,*10 (S.D.N.Y. 2008).