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

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

Defendants respectfully submit this reply memorandum in further support of their joint motion to dismiss the consolidated amended complaints and to deny Plaintiffs' motion for leave to amend.[1]

ARGUMENT

I. THESE CASES DO NOT BELONG IN A UNITED STATES COURT

A. The Court Lacks Personal Jurisdiction Over 28 Defendants

The Complaints fail to make the required *prima facie* showing of jurisdiction as to *each* defendant. The Opposition merely reiterates the Complaints' conclusory allegations, misstating and conflating the standards governing general and specific jurisdiction while meeting neither.

General Jurisdiction. CPLR 301 requires that a *defendant* engage in a "continuous and systematic course of doing business" in New York. Plaintiffs argue that general jurisdiction may be based on contacts of subsidiaries or agents (Opp'n 21, 23), however –

- Plaintiffs provide no facts to show that any arguably relevant subsidiaries "'[do] all the business which the [parent corporation] could do were it here'" or are financially dependent on and controlled by the foreign "parent" Defendants – indispensable showings for jurisdiction by agency. *Tese-Milner v. De Beers Centenary A.G.*, 613 F. Supp. 2d 404, 415-16 (S.D.N.Y. 2009) (citations omitted).

- To the extent Plaintiffs suggest that BLMIS was an "agent" through which Personal Jurisdiction Defendants conducted New York business (Opp'n 23-24), that suggestion is meritless. In order for a foreign entity to be "doing business" in New York through a representative agent, the local agent must be "primarily employed by the defendant and not engaged in similar services for other clients." *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000). BLMIS, however, managed accounts for thousands of investors.

- Plaintiffs do not contest that general jurisdiction over an individual requires that he regularly conduct activities in New York "in his or her individual capacity." (Mov. Br. 6.) The Complaints allege nothing to support that conclusion as to any individual Defendant here.[2]

---

[1] Each Defendant joins only those sections of this memorandum that reply to arguments it joined in Defendants' initial brief (Dkt. No. 253, the "Moving Brief") and reserves any disagreements noted therein. Unless otherwise defined, capitalized terms have the same meanings as in the Moving Brief or in Plaintiffs' opposition thereto (Dkt. No. 323, "Opposition").

[2] *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Montonave Achille Lauro in Amministrazione Straordinaria*, 937 F.2d 44 (2d Cir. 1991), and *Moneygram Payment System, Inc. v. Consorcio Oriental, S.A.*, 05 Civ. 10773, 2007 WL 1489806 (S.D.N.Y. May 21, 2007) (Opp'n 21 n.14), are *(cont'd)*

Specific Jurisdiction. Plaintiffs offer no facts to support the specific jurisdiction test on which they rely – namely, that "transacting business" jurisdiction may be based on a single act in New York. (Opp'n 22.) Plaintiffs' claims are based on overseas conduct – *i.e.*, soliciting investors and advising the foreign Funds. The sporadic telephone calls and U.S. meetings alleged as to some Defendants are merely ancillary to that conduct and are insufficient to support jurisdiction.[3] (Mov. Br. 5-6.) Likewise, the delivery of the Funds' assets to BLMIS cannot establish specific jurisdiction over the Funds, as Plaintiffs are not suing to enforce rights the Funds might have under any BLMIS account. Rather, Plaintiffs allege deficiencies in the Funds' disclosures to foreign investors, or in the quality of offshore services provided to the Funds by foreign Defendants.[4] (*Id.* at 8; *see also* Opp'n 79 ("Defendants here did not issue, sell or distribute securities to Plaintiffs 'within or from' New York.").) Further, no investment here can even arguably support jurisdiction over the Non-Fund Personal Jurisdiction Defendants, who themselves did not have BLMIS accounts. *See In re Banco Santander Sec.-Optimal Litig.*, 732 F. Supp. 2d 1305, 1320-25 (S.D. Fla. 2010), *aff'd sub nom. Inversiones Mar*

(cont'd from previous page)
inapposite. *Klinghoffer* held that general jurisdiction could be established for unincorporated associations, not individuals. *See* 937 F.2d at 50. *Moneygram* involved a permanent resident alien who operated a sole proprietorship and filed tax returns in New York. *See* 2007 WL 1489806, at *3-4.

[3] By contrast, in the cases on which Plaintiffs rely, plaintiffs' claims arose *directly* from defendants' alleged New York activities. *See Parke-Bernet Galleries, Inc. v. Franklyn*, 256 N.E.2d 506, 508 (N.Y. 1970) (auctioneer sought to enforce telephone bid made to in-state party); *Fischbarg v. Doucet*, 832 N.Y.S.2d 164, 166 (1st Dep't 2007) (fee dispute between non-resident and his New York attorney); *Catauro v. Goldome Bank for Sav.*, 592 N.Y.S.2d 422, 422 (2d Dep't 1993) (claim arising out of defendant's power of attorney grant over New York bank account).

[4] None of Plaintiffs' cited cases are to the contrary, as each authorized jurisdiction only where claims arose directly from defendants' investment accounts in this state. *See Credit Lyonnais Sec. (USA), Inc. v. Alacantara*, 183 F.3d 151, 153-54 (2d Cir. 1999) (breach of contract arising from sale of securities to New York broker); *Greenlight Capital, Inc. v. Greenlight (Switz.), S.A.*, 04 Civ. 3136, 2005 WL 13682, at *3 (S.D.N.Y. Jan. 3, 2005) (investment advisor's New York securities transactions led to confusion in marketplace); *Picard v. Elbaum*, 707 F. Supp. 144, 146 (S.D.N.Y. 1989) (suit to recover New York broker's transfers); *Rothschild v. Thompson*, 433 N.Y.S.2d 6 (1st Dep't 1980) (New York broker sought to recover funds from customer); *Steinberg v. A Analyst Ltd.*, 04-60898, 2009 WL 806780, at *5-7 (S.D. Fla. Mar. 26, 2009) (defendant's New York bank account facilitated alleged fraudulent transfer).

Octavia Limitada v. Banco Santander, 10-14012, 2011 WL 3823284 (11th Cir. Aug. 30, 2011).

Failure to Rebut Affidavits. Plaintiffs make no attempt to respond to the direct, highly specific, affidavits by PwC Ireland, HSBC Holdings and PGAM contradicting Plaintiffs' conclusory jurisdictional allegations. Consequently, those unsupported allegations should be "'deemed refuted'" and dismissal granted. *GCG Int'l, Inc. v. Eberhardt*, 05 Civ. 2422, 2005 WL 2647942, at *2 (S.D.N.Y. Oct. 17, 2005) (citation omitted); *see also Anchor v. Novartis Grimsby Ltd.*, 05-cv-7, 2006 WL 3419846, at *6-9 (W.D.N.Y. Nov. 27, 2006), *aff'd*, 282 F. App'x 872 (2d Cir. 2008).

Lack of Due Process. The Complaints' allegations of isolated contacts with New York are insufficient to establish that any Personal Jurisdiction Defendant purposefully conducted business here as required to satisfy Due Process.[5] (Mov. Br. 4-10.) Plaintiffs also ignore the reasonableness factors identified in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987), that weigh strongly against jurisdiction: New York has no interest in adjudicating a dispute between foreign parties over foreign acts; Plaintiffs may obtain relief in more convenient fora; and no considerations of public policy favor exercising jurisdiction over this foreign matter. *See id.* at 113-16; *accord Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568, 573-75 (2d Cir. 1996).

B. Each Complaint Should Be Dismissed for *Forum Non Conveniens*

Two federal courts have dismissed on *forum non conveniens* grounds materially indistinguishable suits brought by foreign investors in foreign Madoff "feeder" funds against foreign defendants. *See Erausquin v. Notz, Stucki Mgmt. (Bermuda) Ltd.*, 09 Civ. 7846, 2011 WL 3734387,

[5] The cases relied on by Plaintiffs merely underscore the Complaints' deficiencies, as the defendants in those cases had significantly stronger connections with the forum that related *directly* to the claims alleged. *See Deutsche Bank Sec. Inc. v. Montana Bd. of Invs.*, 850 N.E.2d 1140, 1142-43 (N.Y. 2006) (investor's trade with New York firm was basis of breach of contract claim); *CIBC Mellon Trust Co. v. HSBC Guyerzeller Bank AG*, 867 N.Y.S.2d 74, 76 (1st Dep't 2008) (defendant held New York mortgage in action to enforce lien against the property); *Banco Nacional Ultramarino, S.A. v. Chan*, 641 N.Y.S.2d 1006, 1009-10 (Sup. Ct. N.Y. County 1996) (defendant maintained New York bank account that was conduit for fraud).

at *1-4, 15 (S.D.N.Y. Aug. 25, 2011) (to be published in F. Supp. 2d); *Banco Santander*, 732 F. Supp. 2d at 1330. Indeed, in urging approval of the HSBC settlement, the Thema Plaintiff conceded that he "faces unique challenges . . . including *forum non conveniens*," citing specifically to *Banco Santander* as "dismissing a similar Madoff feeder fund case on *forum non conveniens* grounds." (Pls.' Settlement Mem. (Dkt. No. 235) at 10.) Yet Plaintiffs conspicuously fail to address *Banco Santander* (or *Notz, Stucki*), which demonstrates that this litigation should be dismissed in favor of litigation in Luxembourg and Ireland.

1. Herald, Primeo and Thema Are Separate Actions

The Herald, Primeo and Thema actions are separate suits, and Plaintiffs cannot treat them as one (Opp'n 13-14) to avoid *forum non conveniens* dismissal. As this Court noted when it declined to consolidate the actions for all purposes, the Funds "were managed by different defendants and were offered and sold by different issuers through different channels across the world," and "purchasers of each fund must allege facts **specific to the security [or fund] in question**, including who said what to whom concerning that **particular security**[.]" (Oct. 5, 2009 Order (Dkt. No. 60) at 9 (emphasis in original).) Likewise, the forum for each action should be considered separately. *See Anwar v. Fairfield Greenwich Ltd.*, 742 F. Supp. 2d 367, 375 (S.D.N.Y. 2010) (dismissing two of several consolidated cases on grounds including *forum non conveniens*).

2. Plaintiffs' Choice of a U.S. Forum Deserves Little or No Deference

Here, as in *Notz, Stucki*, "Plaintiffs' choice of this District appears to have been based more on forum shopping considerations than on legitimate reasons," as "Plaintiffs are foreign citizens and have no connection to the United States" and "the 'core operative facts' on which this litigation is based arise mostly out of the operations of foreign entities outside of the United States." 2011 WL 3734387, at *10; *see also Banco Santander*, 732 F. Supp. 2d at 1336. Indeed, Plaintiffs admit (Opp'n 12) that they filed here "to take advantage of the class action device," "avoid costly fee shifting," and "pursue

claims under RICO" – all indicia of forum shopping that have been held insufficient to give plaintiffs' choice of forum any weight.[6]

3. The JPM and BNY Mellon Defendants' Preference for a Local Forum Does Not Preclude Dismissal for *Forum Non Conveniens*

The JPM and BNY Mellon Defendants are not named in the Herald or Primeo Actions; only in the Thema Complaint. Although the Herald Plaintiffs seek to amend their Complaint for a third time to add JPM (a motion that should be denied as untimely and prejudicial[7]), none of this bars *forum non conveniens* dismissal. The Second Circuit explicitly authorizes dismissing certain defendants on the merits and the rest of a case for *forum non conveniens*.[8] (Mov. Br. 17-18.) Here, too, the Court should dismiss JPM and BNY Mellon on grounds discussed elsewhere in this brief and the foreign defendants for *forum non conveniens*.[9]

4. The Thema Action Belongs in Ireland, and the Primeo and Herald Actions in Luxembourg

(a) Ireland and Luxembourg Are Adequate Alternative Forums

It is untenable for Plaintiffs to argue that the Luxembourg and Irish courts are inadequate. The liquidators of Herald Lux, who have been appointed to represent the fund *and all its investors*, have

---

[6] *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 n.18 (1981); *Norex Petroleum, Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 155 (2d Cir. 2005); *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, 499 F. Supp. 2d 437, 444-46 (S.D.N.Y. 2007), *aff'd sub nom. Geier v. Omniglow Corp.*, 357 F. App'x 377 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 1491 (2011); *Gilstrap v. Radianz Ltd.*, 443 F. Supp. 2d 474, 479 (S.D.N.Y. 2006), *aff'd mem.*, 233 F. App'x 83 (2d Cir. 2007).

[7] It is untimely because made after this Court fixed a final deadline for service; it is prejudicial to the extent it could force existing defendants in the Herald Action to litigate in an inconvenient forum. Litigants cannot "skew the [*forum non conveniens*] analysis by joining claims that lack merit." *Scottish Air Int'l, Inc. v. British Caledonian Grp., PLC*, 81 F.3d 1224, 1235 (2d Cir. 1996).

[8] Indeed, the same procedure was followed in one of the cases Plaintiffs cite. *See Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 305 n.29 (S.D.N.Y. 2000), *aff'd*, 2 F. App'x 109 (2d Cir. 2001).

[9] Alternatively, the Court may *sever* the claims against JPM and BNY Mellon, as in *Notz, Stucki*, so the remaining claims may proceed in a more convenient forum. *See* 2011 WL 3734387, at *6-8, 12-15. JPM and BNY Mellon are alleged to have dealt with BLMIS but are not alleged to have had relevant business with the Funds or any other Defendant.

already brought suit in Luxembourg in a collective action that will allow all parties to resolve their claims with finality, including Plaintiffs. (Delvaux Decl. ¶¶ 10-14.) In addition, suits by hundreds of investors in Herald Lux, as well as suits by investors in Herald SPC and Primeo, are pending before one chamber of the Luxembourg District Court. (Kremer Decl. ¶¶ 3-11.) More than sixty investors have similarly brought actions against HTIE and/or Thema in Ireland, and Thema is suing HTIE there for the benefit of Thema's shareholders.[10] Plainly, many investors and their (freely chosen) counsel believe Luxembourg and Ireland "'permit[] litigation of the subject matter of the dispute.'"[11] *Norex Petroleum*, 416 F.3d at 157 (citation omitted); *see also Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 951-52 (11th Cir. 1997) (Luxembourg adequate forum even though plaintiffs could not assert RICO claims there). (Mov. Br. 13 (citing cases, unaddressed by Plaintiffs, dismissing for *forum non conveniens* where parallel litigation was pending in foreign forum).)

Plaintiffs' other arguments are equally without merit. *First*, as shown in the Moving Brief, Ireland and Luxembourg courts have personal jurisdiction over the relevant Defendants, and both permit litigation of the subject matter in dispute. Plaintiffs' speculation that these courts might "decline jurisdiction" (Opp'n 14-15) is an insufficient answer. Neither of Plaintiffs' experts actually opines that, if this Court grants *forum non conveniens* dismissal, the foreign courts would decline

---

[10] Plaintiffs' contention that they cannot "assess whether or how Plaintiffs' claims are related to ongoing Irish proceedings" (Opp'n 15) is baseless: Defendants have submitted extensive materials describing the parallel cases in Ireland (*see* Dkt. Nos. 271-6), and the Thema Plaintiff has previously told the Court he "[r]etain[ed] Irish counsel to analyze the related Irish litigation [and] advise Plaintiff on the litigation and implications for this case." (Pl.'s Settlement Mem. (Dkt. No. 235) at 12.)

[11] Indeed, the law firm of Plaintiffs' Luxembourg law expert Michel Molitor is representing a plaintiff in one such suit (Kremer Decl. ¶ 7), and he confirms that Luxembourg recognizes claims for the wrongdoing alleged here. (Molitor Decl. ¶¶ 63-130.) Likewise, Jarlath Ryan, Plaintiffs' Irish law expert, represents Lead Plaintiff Neville Davis in the Irish proceedings. (*See* Aug. 11, 2011 J. Ryan Decl. ¶ 2). For that very reason, both are not disinterested and their "expert" opinions must be treated accordingly as the interested views of the litigants. *See Evergreen Marine Corp. (Taiwan) Ltd. v. Global Terminal & Container Servs., Inc.*, 99 Civ. 10544, 2000 WL 1683449, at *4 (S.D.N.Y. Nov. 9, 2000); *Farrell Lines Inc. v. Columbus Cello-Poly Corp.*, 32 F. Supp. 2d 118, 128 (S.D.N.Y. 1997), *aff'd sub nom. Farrell Lines Inc. v. Ceres Terminals Inc.*, 161 F.3d 115 (2d Cir. 1998).

jurisdiction.[12] (J. Ryan Decl. ¶¶ 13-14; Molitor Decl. ¶¶ 38-44.) To the contrary, they are highly likely to accept jurisdiction.[13] (Sanfey Supp. Decl. ¶¶ 2.3-2.4; Prüm Supp. Decl. ¶¶ 7-13.)

Second, Plaintiffs argue that the proposed alternative forums are inadequate because "there is no class action device," "no mechanism for a lawyer to represent a client on a contingency basis," and more limited discovery than in the United States. (Opp'n 15-16.) Each of these arguments has repeatedly been rejected in other cases. *See Aguinda v. Texaco, Inc.*, 303 F.3d 470, 478 (2d Cir. 2002); *Murray v. British Broadcasting Corp.*, 81 F.3d 287, 292-93 (2d Cir. 1996); *Gilstrap*, 443 F. Supp. 2d at 482; *see also Banco Santander*, 732 F. Supp. 2d at 1330. A forum need not replicate U.S. procedures to be "adequate" for *forum non conveniens* purposes.[14] *See, e.g., Blanco v. Banco Industrial de Venezuela, S.A.*, 997 F.2d 974, 981-82 (2d Cir. 1993).

---

[12] Plaintiffs' suggestion that Luxembourg courts could decline jurisdiction over a Defendant that has consented to jurisdiction "elsewhere" (Opp'n 15) proceeds on a fiction, as *no* Defendant has consented to jurisdiction elsewhere to determine the claims asserted in the Herald and Primeo actions.

[13] Similarly irrelevant is Plaintiffs' expert's view that if all the Thema, Herald and Primeo Actions were transferred to Luxembourg, "they would not be tried through one single proceeding but through three separate proceedings." (Molitor Decl. ¶ 44.) First, it is not being suggested that the Thema Action be transferred to Luxembourg. And it is not disputed that the claims of the Herald and Primeo Plaintiffs would be coordinated with the cases related to these funds that are already pending in Luxembourg. Plaintiffs' Irish law expert, Jarlath Ryan, similarly opines that the Irish "Commercial Court is likely to admit proceedings, if any, brought by Mr. Davis, to the commercial list" with other proceedings against Thema and HTIE. (J. Ryan Aug. 11, 2011 Decl. ¶ 17.)

[14] Further, Plaintiffs' expert does not deny that partial contingent basis representation is permitted in Luxembourg, and Plaintiffs' assertion that document discovery is only permitted in "exceptional cases" is overblown. (Prüm Supp. Decl. ¶¶ 26-27.) In fact, the Luxembourg District Court has already entered an order requiring parties in Madoff-related litigation to produce documents. (Kremer Decl. ¶ 4.) Likewise, Plaintiffs' implication that Ireland does not allow third party discovery is untrue (discovery is proceeding in the cases pending there), and lawyers in Ireland may represent plaintiffs on a "no foal, no fee" basis. (Sanfey Decl. ¶¶ 2.4, 7.1-7.3, 7.5; Sanfey Supp. Decl. ¶¶ 6.2, 8.1.) Plaintiffs' "concern" that Luxembourg and Ireland have no class action device – a concern that appears not to have burdened the many investors who have already sought judicial relief there – is additionally unwarranted because they cannot assert a viable class action even in *this* Court. (Mov. Br. 17 n. 17.) Further, no Luxembourg investor could be barred from pursuing claims in Luxembourg by any class judgment in the U.S., as even Plaintiffs' expert observes. (Molitor Decl. ¶¶ 45-46; Prüm Supp. Decl. ¶ 6.) For just such reasons, *In re Alstom SA Securities Litigation*, 253 F.R.D. 266, 286-87 (S.D.N.Y. 2008), rejected class claims on behalf of French investors where the U.S. suit would expose defendants to double liability while offering investors only an illusory prospect of class recovery.

(b) The Private and Public Interest Factors Strongly Favor Ireland and Luxembourg

An Irish forum would be far more convenient for the parties and witnesses in the Thema action. Thema is a UCITS fund organized under Irish law, and its auditor, custodian, administrator, legal counsel and two of its five directors are located in Ireland. Most of the other Thema Defendants are located in Europe. Their employees, former employees and documents are located in Ireland or elsewhere in Europe. In addition, due to a mandatory forum selection clause, the Thema Plaintiffs' derivative claims against the PwC Defendants on behalf of the Thema Fund must be heard by Irish Courts. (A. Ryan Decl. ¶ 7; Weldon Decl. Ex. A, at 8; Sanfey Decl. ¶ 8.4.)

Similarly, the Herald and Primeo actions belong in Luxembourg. Herald Lux is a UCITS fund organized under Luxembourg law. The custodian and administrator to the Herald and Primeo funds are located in Luxembourg, as is the auditor for Herald Lux. Their employees and former employees are likely to be found there or nearby.[15] In addition, Plaintiffs do not deny that they agreed that "any dispute concerning our investment in [the Herald and Primeo Funds] . . . will be settled in Luxembourg according to Luxembourg law." (Davis Decl. ¶ 3.) While Plaintiffs' expert speculates that laws of several countries could apply (Molitor Decl. ¶¶ 50-56), *forum non conveniens* dismissal is appropriate "where the court may be required to 'untangle problems in conflict of laws, and in law foreign to itself.'"[16] *Overseas Nat'l Airways, Inc. v. Cargolux Airlines Int'l, S.A.*, 712 F.2d 11, 14 (2d

[15] Herald Lux's investment manager and its allegedly controlling shareholder are domiciled in Austria, and the Fund directors are located primarily in Austria and elsewhere in continental Europe, as are other Defendants. Contrary to Plaintiffs' contention (Opp'n 17), Defendants identified a number of witnesses unavailable to this Court by name. (*See* Weldon Decl. ¶¶ 10-12.) In contrast, Plaintiffs have not identified a single witness in New York or within 100 miles of Foley Square. And while Plaintiffs speculate that some witnesses would have to testify both in Luxembourg and in Ireland (Opp'n 18), Plaintiffs do not identify such witnesses, as the service providers to the Thema Fund are largely different from the service providers to the Herald and Primeo Funds.

[16] Even cases cited by Plaintiffs recognize that the need to apply foreign law "is a valid factor favoring dismissal." *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 145 F.3d 481, 492 (2d Cir. 1998); *see also Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 76 (2d Cir. 2003).

Cir. 1983) (affirming dismissal in favor of Luxembourg) (citation omitted).

Finally, there is no real U.S. interest in the U.S. "hosting" suits by foreign shareholders in foreign funds against foreign defendants over foreign conduct, despite the actions being "peripherally related to New York through Madoff," particularly where other countries have a strong interest in suits concerning investment funds and financial institutions domiciled and subject to regulation there. *Notz, Stucki*, 2011 WL 3734387, at *14; *see also Banco Santander*, 732 F. Supp. 2d at 1343-44.[17]

II. PLAINTIFFS' CLAIMS ARE BARRED, IN WHOLE OR IN SIGNIFICANT PART, BY NUMEROUS LEGAL DOCTRINES

A. Plaintiffs' Common Law Claims Are Barred by SLUSA

1. *Dabit* Rejected Any Requirement that Plaintiffs Themselves Purchase or Sell Covered Securities

To argue that SLUSA is inapplicable, Plaintiffs assert that they did not purchase "covered securities" but interests in exempt hedge funds. (Opp'n 69-72.) The Supreme Court rejected essentially the same argument, however, in *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71 (2006), holding that "it is enough that the fraud alleged 'coincide' with a securities transaction – whether by the plaintiff or by someone else." *Id.* at 85. Almost every court to consider the issue – including five judges of this Circuit who have addressed Madoff-related claims – has applied *Dabit* to conclude that SLUSA bars claims that allege deception[18] in the purported purchase or sale of covered

---

[17] Since Plaintiffs' Exchange Act claims were abandoned in light of *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), these cases present no local interest in enforcing U.S. securities laws. Plaintiffs do not dispute that courts should abstain from hearing claims that could interfere with bankruptcy proceedings abroad. *See, e.g., Royal & Sun Alliance Ins. Co. of Can. v. Century Int'l Arms, Inc.*, 466 F.3d 88, 92-93 (2d Cir. 2006). As shown in the Moving Brief (at 18), the Herald Lux Plaintiffs are among the parties represented by the Herald Lux liquidators in Luxembourg bankruptcy proceedings, which assert claims against several of the Defendants in this case. The inevitable interference Plaintiffs' claims will cause to the Luxembourg case provides separate grounds for declining jurisdiction, a point Plaintiffs concede by silence. *See, e.g., Levine v. Lawrence*, 03-CV-1694, 2005 WL 1412143, at *5 (E.D.N.Y. June 15, 2005).

[18] The Thema Complaint, like all the Complaints, makes numerous allegations of misstatements or deception, which are incorporated into each cause of action. (TC ¶¶ 228, 310, 313, 317, 319, 334, 345, *(cont'd)*

securities for the direct *or indirect* benefit of plaintiffs, regardless of whether plaintiffs themselves purchased them.[19] Madoff's announced intention to purchase covered securities (stocks and options) for the ultimate benefit of funds in which plaintiffs invested satisfies this SLUSA requirement.[20] *See, e.g., In re Beacon Assocs. Litig.*, 745 F. Supp. 2d 386, 429-30 (S.D.N.Y. 2010).

2. SLUSA's "In Connection With" Requirement Is Satisfied

Despite Plaintiffs' contrary argument (Opp'n 73-75), SLUSA's flexible "in connection with" requirement is met here. Plaintiffs entirely ignore *Romano v. Kazacos*, 609 F.3d 512 (2d Cir. 2010), which held that the "in connection with" requirement is satisfied whenever alleged misstatements or transactions "necessarily involve," "necessarily allege" or "rest on" the purchase or sale of a covered security.[21] *Id.* at 521-22. This broad construction has repeatedly been applied to dismiss Madoff-

---

(cont'd from previous page)
352, 390-95, 417, 426, 435, 449, 463, 469, 475, 481, 487, 491, 495, 499, 503, 511, 518, 522, 528, 534, 539.) Indeed, Plaintiffs simply jettisoned their federal securities fraud claims for common law claims without altering the underlying narratives or dispensing with the allegations of deception that underlie their claims. Thus, all of Plaintiffs' common law claims satisfy SLUSA's "misstatement" requirement. *See Backus v. Conn. Cmty. Bank, N.A.*, 3:09-CV-1256, 2009 WL 5184360, at *11 (D. Conn. Dec. 23, 2009); *see also Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 305 (3d Cir. 2005) (each finding that narratives of deception incorporated into non-fraud claims implicate SLUSA).

[19] *See In re Kingate Mgmt. Ltd. Litig.*, 09 Civ. 5386, 2011 WL 1362106, at *7 (S.D.N.Y. Mar. 30, 2011) (Batts, J.); *In re J.P. Jeanneret Assocs., Inc.*, 769 F. Supp. 2d 340, 378 (S.D.N.Y. 2011) (McMahon, J.); *Wolf Living Trust v. FM Multi-Strategy Inv. Fund, LP*, 09 Civ. 1540, 2010 WL 4457322, at *2-3 (S.D.N.Y. Nov. 2, 2010) (Sand, J.); *Newman v. Family Mgmt. Corp.*, 748 F. Supp. 2d 299, 311-13 (S.D.N.Y. 2010) (Sand, J.); *In re Beacon Assocs. Litig.*, 745 F. Supp. 2d 386, 429-31 (S.D.N.Y. 2010) (Sand, J.); *Barron v. Ignolnikov*, 09 Civ. 4471, 2010 WL 882890, at *3-5 (S.D.N.Y. Mar. 10, 2010) (Griesa, J.); *Backus*, 2009 WL 5184360, at *4-10 (Dorsey, J.); *see also Siepel v. Bank of Am., N.A.*, 526 F.3d 1122, 1127 (8th Cir. 2008); *Dommert v. Raymond James Fin. Servs., Inc.*, 1:06-CV-102, 2007 WL 1018234, at *10-12 (E.D. Tex. Mar. 29, 2007); *Spencer v. Wachovia Bank, N.A.*, 05-81016 CIV., 2006 WL 3408043, at *6-7 (S.D. Fla. May 10, 2006).

[20] The Supreme Court has rejected Plaintiffs' argument (Opp'n 72) that an intended purchase of covered securities must be consummated to implicate SLUSA. *See Dabit*, 547 U.S. at 88-89; *see also Barron*, 2010 WL 882890, at *4-6 (collecting cases and dismissing Madoff-related claims).

[21] Indeed, Plaintiffs rely on cases like *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372 (S.D.N.Y. 2010) ("*Anwar II*"), and *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 750 F. Supp. 2d 450 (S.D.N.Y. 2010), which also fail to cite or

(cont'd)

related claims indistinguishable from those asserted here. For example, in *Beacon Associates*, Judge Sand held in language that could have been written for this case:

> Plaintiffs allege misrepresentations in the [fund's offering memorandum] regarding "the investment strategies and objectives of the Beacon Fund." Although the shares of the Beacon Fund are not covered securities, the objective of the Fund was to manage Plaintiffs' investment using a strategy that inevitably included the purchase and sale of covered securities. Furthermore, Plaintiffs allege false and misleading statements and omissions regarding "Defendants' due diligence and monitoring of Madoff and BMIS," including "the performance and feasibility of Madoff's purported trading strategy" utilizing indisputably covered securities. These allegations are sufficient to meet SLUSA's broad requirement of a misrepresentation or omission in connection with the purchase or sale of a covered security.

745 F. Supp. 2d at 430.

3. *Morrison* Creates No SLUSA Loophole for Foreign Plaintiffs

Judge Batts confirmed in *In re Kingate Management Limited Litigation*, 09 Civ. 5386, 2011 WL 1362106 (S.D.N.Y. Mar. 30, 2011), that the Supreme Court's acknowledgement in *Morrison v. National Australia Bank, Ltd.*, 130 S. Ct. 2869, 2877 (2010), that "'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States'" (citation omitted), has no bearing here.[22] *See Kingate*, 2011 WL 1362106, at *7. Defendants do not seek to apply SLUSA extraterritorially but to preclude Plaintiffs from maintaining a putative "class action [in] federal court," 15 U.S.C. § 78bb(f)(1), *in the United States.* To speculate that Plaintiffs' now-abandoned securities claims would be barred by *Morrison* is irrelevant. SLUSA "is not confined to knocking out state-law claims by investors who have *winning* federal claims, as plaintiffs suppose. It covers both good and bad securities claims – *especially* the bad ones." *Kircher v. Putnam Funds*

(cont'd from previous page)
apply *Romano*. Those cases are in any event inapplicable here, as Judge Batts thoughtfully explained in *Kingate*. *See* 2011 WL 1362106, at *8-9.

[22] The "Delaware carve out" is also inapplicable. It requires a showing that the issuer sold securities "exclusively" to existing equity holders, or that plaintiffs' claims "concern[] decisions of such equity holders with respect to voting their securities." 15 U.S.C. § 78bb(f)(3)(A)(ii). Plaintiffs do not and cannot make such showings here. *See, e.g., Crimi v. Barnholt*, C 08-02249, 2008 WL 4287566, at *2-4 (N.D. Cal. Sept. 17, 2008).

Trust, 403 F.3d 478, 484 (7th Cir. 2005) (emphasis in original), *vacated on other grounds*, 547 U.S. 633 (2006); *see also In re J.P. Jeanneret Assocs., Inc.*, 769 F. Supp. 2d 340, 378 (S.D.N.Y. 2011).

B. Certain Common Law Claims Are Barred by the Martin Act

Neither of Plaintiffs' Martin Act arguments – that this Court should ignore *Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 190 (2d Cir. 2001), and the securities in this case were sold outside New York (Opp'n 76-80) – withstands scrutiny. First, absent a contrary decision from New York's Court of Appeals, *Castellano* is controlling, as Judge Batts recently observed in applying Martin Act preemption to other Madoff-related claims. *See In re Merkin*, 08 Civ. 10922, 2011 WL 4435873, at *13 (S.D.N.Y. Sept. 23, 2011); *see also Kaye Scholer LLP v. CNA Holdings, Inc.*, 08 Civ. 5547, 2010 WL 1779917, at *2 (S.D.N.Y. Apr. 28, 2010).[23] Nearly every judge in this District – including this Court[24] – has concluded that Martin Act preemption remains controlling in this Court. (Mov. Br. 20-21.)

Second, the conduct of certain Defendants (*i.e.*, JPM and BNY Mellon) allegedly occurred *exclusively* within New York. (TC ¶¶ 312-68.) The Act preempts claims based on such allegations. *See, e.g., Stephenson v. Citco Grp. Ltd.*, 700 F. Supp. 2d 599, 617 (S.D.N.Y. 2010) ("'[A] transaction is 'within or from' New York for purposes of the Martin Act if a plaintiff alleges that a 'substantial portion' of the events giving rise to the claim occurred in New York.'") (citation omitted)).

C. Plaintiffs Lack Standing

Plaintiffs' failure to articulate a harm that is not derivative of harm the Funds suffered is fatal

---

[23] In neither *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1941), nor *Jaworowski v. Ciasulli*, 490 F.3d 331 (3d Cir. 2007), cited by Plaintiffs, did the court suggest that a District Court may disregard a Circuit Court ruling in favor of a ruling by an intermediate state court of appeals.

[24] *See Jain v. T&C Holding, Inc.*, 10 Civ. 1006, 2011 WL 814659, at *6 (S.D.N.Y. Mar. 3, 2011) (Berman, J.) ("Plaintiffs' claims of negligence, unjust enrichment, and breach of fiduciary duty . . . ar[e] preempted by New York's Martin Act.").

to Plaintiffs' standing to assert direct claims under both governing foreign law[25] and New York law.

1. Plaintiffs Lack Standing Under Irish, Cayman and Luxembourg Law

Plaintiffs' "direct" claims are barred by the principle of no reflective loss. (Mov. Br. 22-25 (citing declarations of Irish, Cayman and Luxembourg law).) Plaintiffs' Irish law expert does not attempt to address this principle, and their only Luxembourg law expert expressly refrains from contesting Plaintiffs' lack of standing. (Molitor Decl. ¶ 65 ("I . . . express no opinion herein regarding the standing of Plaintiffs under Luxembourg law or the merits of any claims that would be brought by the Plaintiffs under Luxembourg law.").) This failure by itself warrants dismissal of Plaintiffs' claims relating to the Irish and Luxembourg-domiciled funds (Thema and Herald (Lux)). *See, e.g., Chateau Hip, Inc. v. Gilhuly*, 95 Civ. 10320, 1996 WL 437929, at *1 n.1 (S.D.N.Y. Aug. 2, 1996).

Plaintiffs' Cayman law expert acknowledges that reflective loss bars claims absent damage separate and distinct from a company's but, in conclusory fashion, asserts that none of Plaintiffs' claims "belong to the Fund entities." (Lowe Aff. ¶ 48.) Mr. Lowe fails to identify any well-pled allegations to support that assertion, however, and Plaintiffs' self-serving characterizations of their claims as direct are, of course, insufficient to establish standing. (Bagnall Reply Decl. ¶¶ 26-30

---

[25] Plaintiffs wrongly assert that New York law governs the threshold issue of standing. (Opp'n 80 n.45.) "New York choice of law rules recognize the so-called internal affairs doctrine[.]" *Koury v. Xcellence, Inc.*, 649 F. Supp. 2d 127, 135 (S.D.N.Y. 2009). Pursuant to that rule, New York courts routinely apply the law of the jurisdiction of incorporation to determine whether shareholders have standing. *See Galef v. Alexander*, 615 F.2d 51, 58 (2d Cir. 1980); *In re Optimal U.S. Litig.*, 10 Civ. 4095, 2011 WL 1676067 (S.D.N.Y. May 2, 2011), *aff'd in part, rev'd in part on other grounds on reconsideration*, 2011 WL 3809909 (S.D.N.Y. Aug. 26, 2011); *Seidl v. Am. Century Co.*, 713 F. Supp. 2d 249, 255 (S.D.N.Y. 2010); *In re BP p.l.c. Derivative Litig.*, 507 F. Supp. 2d 302, 307-09 (S.D.N.Y. 2007). Plaintiffs' cases are inapposite. *See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 613-15, 621-22 (1983) (noting that suit between two banks not subject to internal affairs where issue was collection of letter of credit); *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982) (finding that transfers of stock between stockholders and third parties did not implicate internal affairs of target company); *Zurich Ins. Co. v. Shearson Lehman Hutton Inc.*, 642 N.E.2d 1065, 1066-70 (N.Y. 1994) (analyzing choice of law in a contracts case not involving investor claims); *Norlin Corp. v. Rooney, Pace Inc.*, 744 F.2d 255, 262-64 (2d Cir. 1984) (applying New York law after determining that conflict between laws of state of incorporation and New York was purely illusory).

(demonstrating lack of "direct" claims). Moreover, the principle of no reflective loss applies whenever "'the loss which the shareholder suffers is merely a reflection of the Company's loss,'" regardless of the "owner" of any potential claim(s). (*See id.* ¶¶ 6-25 (quoting *Day v. Cook* [2003] B.C.C. 256 and highlighting deficiencies in Mr. Lowe's analysis).)

2. Plaintiffs Lack Standing Under New York Law

The result would be similar under New York law, which also does not allow investors to sue directly where, as here, they lack a distinct injury. *See Druck Corp. v. Macro Fund Ltd.*, 290 F. App'x 441, 443-44 (2d Cir. 2008); *Vincel v. White Motor Corp.*, 521 F.2d 1113, 1118 (2d Cir. 1975). Plaintiffs rely primarily on *Anwar II*, but that is an outlier case at odds with a multitude of other Madoff cases that have dismissed claims for lack of standing.[26] *See In re Optimal U.S. Litig.*, 10 Civ. 4095, 2011 WL 1676067 (S.D.N.Y. May 2, 2011); *Newman v. Family Mgmt. Corp.*, 748 F. Supp. 2d 299, 314-15 (S.D.N.Y. 2010); *W. Palm Beach Police Pension Fund v. Collins Capital Low Volatility Performance Fund II, Ltd.*, 09-80846-CIV., 2010 WL 2949856, at *3-4 (S.D. Fla. July 26, 2010); *Stephenson*, 700 F. Supp. 2d at 610-11.

3. The Thema Plaintiff Has Not Satisfied the Requirements for Derivative Standing

The Thema Plaintiff also has not established standing to assert derivative claims on behalf of that Fund, which is pursuing its own claims in Ireland. *First*, he fails to show that his claims fit within

[26] Plaintiffs' other cited cases are equally unavailing. The court in *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 282 F.3d 162 (2d Cir. 2002), did not apply New York law, and even so required an injury distinct from those suffered by funds. *See id.* at 171-72. Similarly, the Second Circuit has made clear that its holding in *Ceribelli v. Elghanayan*, 990 F.2d 62, 63-65 (2d Cir. 1993), is limited to the exceptional case where "the shareholder sustains an injury that is separate and distinct from the injury sustained by the corporation." *Manson v. Stacescu*, 11 F.3d 1127, 1131 (2d Cir. 1993). The court in *Fraternity Fund Ltd. v. Beacon Hill Asset Management LLC*, 376 F. Supp. 2d 385 (S.D.N.Y. 2005), found that a separate injury alleged as the principal wrong – a fraudulent misstatement of the fund's NAV – did not harm the Fund itself. *See id.* at 409. With the possible exception of alleged fraud in the inducement (a non-viable claim, as shown below), the conduct alleged here – Madoff's theft of the Funds' assets and Defendants' purported failure to detect his fraud – harmed the Funds.

any exception to the rule in *Foss v. Harbottle* [1843] 2 Hare 461, and Plaintiffs' own Irish law expert does not opine that they do. The Thema plaintiff cannot rely on the "fraud on the minority" exception because the Thema Complaint does not and cannot allege that Thema directors "'have 'control' over a majority of the stock voting rights'" of the Fund.[27] *Seghers v. Thompson*, 06 Civ. 308, 2006 WL 2807203, at *4 (S.D.N.Y. Sept. 27, 2006) (Berman, J.) (citation omitted). (*See also* Sanfey Decl. ¶ 15.15; Sanfey Supp. Decl. ¶ 7.6.) He cannot rely on the *ultra vires* exception because: (1) that exception only allows a shareholder to seek injunctive or declaratory relief, not damages, and (2) he has failed to allege any conduct outside the Thema directors' authority.[28] (Sanfey Decl. ¶ 15.17; Sanfey Supp. Decl. ¶¶ 7.3-7.5.)

Second, by bringing a direct claim against the Thema Fund, and derivative claims on its behalf, the Thema Plaintiff has a disabling conflict of interest. *See St. Clair Shores Gen. Emps. Ret. Sys. v. Eibeler*, 06-CV-688, 2006 WL 2849783, at *7 (S.D.N.Y. Oct. 4, 2006) (collecting cases). Fed. R. Civ. Pro. 23.1 bars derivative actions by plaintiffs who do not fairly and adequately represent the interests of the shareholders. "A plaintiff who maintains a direct claim against a corporation is not a fair and adequate representative of other shareholders in enforcing a right of the corporation derivatively." *In re Bank of Am. Corp. Sec., Deriv. & ERISA Litig.*, 10 Civ. 1234, 2010 WL 5248815, at *1 (S.D.N.Y. Dec. 14, 2010). *Brickman v. Tyco Toys, Inc.*, 731 F. Supp. 101, 109 (S.D.N.Y. 1990), and *Kamerman v. Steinberg*, 113 F.R.D. 511, 516 (S.D.N.Y. 1986), cited by Plaintiffs, make clear that it is *plaintiffs'*

---

[27] *In re Tyco International, Ltd.*, 340 F. Supp. 2d 94 (D.N.H. 2004), is of no avail because there, unlike here, director defendants allegedly controlled a majority of the company's voting shares. *See id.* at 99. Plaintiffs' argument that the Thema shareholders "cannot vote, and indeed have no say whatsoever in Thema-related matters" is contradicted by the Fund's prospectus, which states that shareholders are "entitled to attend and vote at general meetings of the Company." (Dkt. No. 272-1 at 19; *see also* Thema Articles of Association at 41-46, Dkt. No. 272-3.)

[28] *Messinger v. United Canso Oil & Gas Ltd.*, 486 F. Supp. 788 (D. Conn. 1980), provides no support to Plaintiffs, as it discusses shareholder demand requirements in Canada and says nothing about what constitutes an *ultra vires* act under Irish law. *See id.* at 795. (*See also* Sanfey Decl. ¶ 15.17; J. Ryan Decl. ¶ 36.)

burden to show a conflict does *not* exist.[29] The Thema Plaintiff has failed to carry that burden here.

D. The Accounting and Other Non-Fund Defendants Owed No Duties to Plaintiffs

Plaintiffs and their experts offer no grounds for departing from the United Kingdom and Luxembourg rule that directors and service providers of investment funds owe duties, if at all, only "'to the [Funds], and not the individual stockholders.'"[30] *Seghers*, 2006 WL 2807203, at *7 (citation omitted); *see also W. Palm Beach Police*, 2010 WL 2949856, at *3.

With respect to the Accounting Defendants specifically, Plaintiffs cannot allege a "near privity" relationship as required under New York law by *Credit Alliance v. Arthur Andersen & Co.*, 483 N.E.2d 110 (N.Y. 1985).[31] That EY Cayman was identified as *the Funds'* auditor in the Herald and Primeo Offering Memoranda (Opp'n 54) does not establish "near privity" with the Funds'

---

[29] The other cases cited by Plaintiffs do not discuss Rule 23.1 and are inapposite. (*Heilbrunn v. Hanover Equities Corp.*, 259 F. Supp. 936 (S.D.N.Y. 1966), was decided before Rule 23.1 even became effective.) There is no merit to Plaintiffs' additional argument that a conflict of interest inquiry is premature. *See Ryan v. AETNA Life Ins. Co.*, 765 F. Supp. 133, 136 (S.D.N.Y. 1991) (finding it "prudent" and "efficient" to dismiss conflicted derivative claims at the pleadings stage).

[30] Of Plaintiffs' experts, only Mr. Lowe (opining on Cayman law) suggests that this issue may present an issue of fact. (Lowe Aff. ¶¶ 57, 66.) He has identified no fact in the Complaints, however, sufficient to show the admittedly "'novel situation'" where a non-fund defendant "'assume[s] responsibility'" directly to fund investors. (*Cf. id.* ¶¶ 64-65 (citations omitted).) Plaintiffs' assertion that all Defendants owed Plaintiffs duties of care is equally defective under New York law. *See Anwar II*, 728 F. Supp. 2d at 438 (Opp'n 84) ("A corporate officer or director generally owes a fiduciary duty only to the corporation over which he exercised management authority[.]"); *Am. Mfrs. Mut. Ins. Co. v. Payton Lane Nursing Home, Inc.*, CV-05-5155, 2007 WL 674691, at *5-6 (E.D.N.Y. Feb. 28, 2007) (Opp'n 84) (dismissing claims against party with whom plaintiff lacked privity); *cf. Ossining Union Free Sch. Dist. v. Anderson LaRocca Anderson*, 539 N.E.2d 91, 95-96 (N.Y. 1989) (Opp'n 84) (despite lack of contractual privity, service provider potentially liable to party it *directly* consulted and billed); *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 617 F. Supp. 2d 216, 220-23 (S.D.N.Y. 2009) (Opp'n 84) (service provider potentially liable to parties it *directly* solicited, but not to others). In addition to failing to identify facts sufficient to establish any duty of care owed by a director or service provider Defendant, Plaintiffs do not and cannot identify any legal basis for finding that the parents or affiliates of such Defendants owed Plaintiffs duties.

[31] The Accounting Defendants provide this rebuttal under New York law, on which Plaintiffs rely, without conceding that New York law governs these claims against them. In any event, the result would be the same under the laws of Ireland, the Cayman Islands and Luxembourg. (Ritchie Decl. ¶¶ 9-10, 28; Ritchie Reply Decl. (generally); Sanfey Decl. ¶¶ 15.20-15.25; *cf.* Prüm Decl. ¶¶ 76-77; Delvaux Decl. ¶ 14.)

investors. Plaintiffs offer no authority to the contrary. Similarly, the allegation that PwC Ireland's audit reports were addressed to shareholders and were made available *by Thema* to shareholders (TC ¶ 418 & Ex. 2 at 2, 19) does not show "near privity" between PwC Ireland and the (nonclient) recipients. *See CRT Invs., Ltd. v. BDO Seidman, LLP*, 925 N.Y.S.2d 439, 441 (1st Dep't 2011) ("The fact that [Madoff feeder fund investor] plaintiffs were entitled to and received a copy of the audited financial statements . . . does not establish the requisite linking conduct."). Plaintiffs' claims against the Accountant Defendants that issued *no* audit reports as to the Funds are even less meritorious.[32]

Plaintiffs' reliance on the distinguishable *Anwar II*[33] ignores overwhelming contrary precedent, including two New York appellate decisions issued after *Anwar II*. *See Sykes v. RFD Third Avenue 1 Assocs., LLC*, 938 N.E.2d 325 (N.Y. 2010); *CRT Invs.*, 925 N.Y.S.2d 439. In *Sykes*, the New York Court of Appeals held that it is insufficient for defendants to know generally that prospective purchasers will rely on representations; rather, plaintiffs must establish that they *personally* were *known parties* because "[t]he words 'known party or parties' in the *Credit Alliance* test mean what they say." 938 N.E.2d at 327. In *CRT Investments*, the First Department rejected the very claims Plaintiffs assert here. *See* 925 N.Y.S.2d at 441; *see also Saltz v. First Frontier, LP*, 782 F. Supp. 2d 61, 84 (S.D.N.Y. 2010) (holding auditors' knowledge that audit reports were provided to investors in Madoff-related fund insufficient to demonstrate near privity).

E. Plaintiffs' Non-Fraud Claims Against Directors and Service Providers Are Exculpated

Because Plaintiffs seek to bring claims that properly belong to Funds themselves (*see* § II(C), *supra*), their claims are governed – and limited – by the Herald and Primeo Funds' contractual

---

[32] Plaintiffs do not dispute that EY Lux, EYG, PwC Bermuda, PwC U.S. and PwCIL issued no audit opinions on the financial statements of the Funds. These defendants should be dismissed on that ground alone, as they made no "statement" on which any Plaintiff relied.

[33] In *Anwar II*, plaintiffs alleged that, in their own audit plan, auditor defendants acknowledged delivering reports to shareholders. *See* 728 F. Supp. 2d at 455. No such allegations exist here.

commitments to hold harmless their directors, advisors and custodians for conduct short of gross negligence, actual fraud or willful default.[34] (Bagnall Decl. ¶¶ 43-48; Prüm Decl. ¶¶ 46, 59-63.) Plaintiffs also cannot seek to recover losses for which they expressly assumed risks pursuant to the offering documents. (Prüm Decl. ¶¶ 59-60.) Consequently, Plaintiffs' claims that do not allege gross negligence, actual fraud or willful default by the Director Defendants, the Advisors or, depending on the Fund, the HSBC Defendants, should be dismissed on exculpation grounds alone.[35]

F. Madoff's Criminality Was a Supervening Cause Barring Plaintiffs' Claims

Neither Plaintiffs' Luxembourg nor Irish law expert dispute that Madoff's plunder of the Funds is a supervening cause precluding Defendants' liability under those countries' laws. Even Plaintiffs' Cayman law expert concurs that "'one would have little difficulty'" in concluding that an intentional criminal act bars liability for those who "'merely provided [the criminal] with an occasion for what he did'" in many cases, but remarkably suggests a "factual inquiry" should be conducted here. (Lowe Aff. ¶¶ 76-78 (citations omitted).) Having failed to show that the theft of hundreds of millions of dollars by the former NASDAQ chairman (or any asset manager) was a "normal or foreseeable consequence" of any Defendant's acts, *Derdiarian v. Feliz Contracting Corp.*, 414 N.E.2d 666, 670 (N.Y. 1980) (Opp'n 85), however, Plaintiffs have failed to advance grounds under *any* jurisdiction's law to depart from *Goldweber v. Harmony Partners, Ltd.*, 09-61902-CIV., 2010 WL 3702508, at *5 (S.D. Fla. Sept. 16, 2010), and *Michael S. Rulle Family Dynasty Trust v. AGL Life Assurance Co.*, C.A. No. 10-231, 2010 WL 3522135, at *5 (E.D. Pa. Sept. 8, 2010), *aff'd*, 10-4034, 2011 WL 3510285 (3d Cir. Aug. 11,

---

[34] The Primeo and Herald Director Defendants are also indemnified for gross negligence. (Bagnall Decl. ¶ 46.) Even where not identified as an "exculpation" provision, an indemnity similarly serves to bar liability because a Fund cannot assert claims against a party whom it must indemnify. (Bagnall Decl. ¶ 46; Bagnall Reply Decl. ¶ 31.)

[35] Plaintiffs' attempt to sidestep the exculpation clauses by arguing that the Director Defendants did not "carry[] out [their] functions" (Opp'n 77) is circular. Lacking any supporting allegations of fact, Plaintiffs cannot assume the legal conclusion – that Defendants did not fulfill their duties – to argue that the contractual limitation was exceeded. (*See also* Bagnall Reply Decl. ¶ 32.)

2011),[36] in holding that Madoff's theft is a supervening cause as a matter of law. Plaintiffs' claims are precluded on that separate ground. *See also McCarthy v. Sturm, Ruger & Co.*, 916 F. Supp. 366, 372 (S.D.N.Y. 1996) (Opp'n 85) (granting motion to dismiss), *aff'd*, 119 F.3d 148 (2d Cir. 1997).

G. Well-Accepted Limitations on Vicarious Liability Bar Claims Against Certain Accounting and Other Defendants

Courts consistently reject attempts to regard the legally separate firms within global accounting networks as "one firm," and refuse to find one firm vicariously responsible for conduct of another in the network.[37] For example, in *Nuevo Mundo Holdings v. Pricewaterhouse Coopers LLP*, 3 Civ. 0613, 2004 WL 112948 (S.D.N.Y. Jan. 22, 2004), the court held that "[m]ember firms in an international accounting association are not part of a single firm and are neither agents nor partners of other member firms simply by virtue of using the same brand name."[38] *Id.* at *3.

As shown in the Moving Brief (at 29-30), claims fail where no facts are offered to show a network coordinating entity (such as EYG or PwCIL) exercised control over member firms with

---

[36] Contrary to Plaintiffs' contention (Opp'n 86 n.48), the supervening cause determination in neither case turned on the investment expertise of the defendants or on the identity of the party who decided to invest with Madoff. Plaintiffs' claims were dismissed because, as here, "Plaintiff's damages were caused by Madoff's Ponzi scheme, not by Defendants." *Goldweber*, 2010 WL 3702508, at *5; *see also Rulle*, 2010 WL 3522135, at *5 ("[T]he injury was attributable to Madoff's conduct.").

[37] Plaintiffs do not even attempt to demonstrate that vicarious liability may be imposed on other (non-accounting) parent and affiliated companies (such as JPM, HSBC Holdings and PGAM) on the facts alleged here.

[38] *See also In re AM Int'l, Inc. Sec. Litig.*, 606 F. Supp. 600, 607 (S.D.N.Y. 1985) (same). A litany of cases have reached the same result in a variety of contexts. *See Tuttle v. Sky Bell Asset Mgmt. LLC*, C-10-3588, 2011 WL 4713233, at *7-8 (N.D. Cal. Oct. 7, 2011) (Ernst & Young Global and Ernst & Young LLC [Isle of Man]); *In re Elan Corp. Sec. Litig.*, 02 Civ. 865, 2004 WL 1305845, at *12 (S.D.N.Y. May 18, 2004) (KPMG US and KPMG Ireland); *Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654, 662-63 (S.D.N.Y. 1997) (Klynveld, KPMG's Dutch affiliate), *aff'd*, 173 F.3d 844 (2d Cir. 1999); *Reingold v. Deloitte Haskins & Sells*, 599 F. Supp. 1241, 1253-54 & n.10 (S.D.N.Y. 1984) (Deloitte Haskins & Sells Australia); *Young v. FDIC*, 103 F.3d 1180, 1190-93 (4th Cir. 1997) (PW Bahamas and PW US not "partnership by estoppel"); *Skidmore Energy, Inc. v. KMPG LLP*, 3:03 CV 2138, 2004 WL 3019097, at *3-5 (N.D. Tex. Dec. 28, 2004) (KPMG LLP and KPMG Morocco); *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. supp. 2d 334 (D. Md. 2004) (Deloite U.S. and Deloitte Netherlands); *In re Lernout & Hauspie Sec. Litig.*, 230 F. Supp. 2d 152, 170 (D. Mass. 2002) (rejecting "single entity theory").

respect to the specific audits at issue. Plaintiffs assert that "[a]t the pleading stage, the case law does not require that Plaintiffs allege that PwCIL or EYG were actually involved in performing the Funds' audits." (Opp'n 63.) But this argument, which rests on a distortion of the holdings in *Parmalat* and *Cromer,* was rejected in *In re Parmalat Securities Litigation*, 421 F. Supp. 2d 703 (S.D.N.Y. 2006), itself, where Judge Kaplan found that the "oft-repeated mantra" that Deloitte Touche Tohmatsu ("DTT") "and its member firms . . . are a unified, integrated firm" fails to "address the key issue of mutual right to exercise control over sister firms" relating to the *specific audit* in question. *Id.* at 717-18. The claim there survived dismissal only because, unlike here, it was specifically alleged that DTT "removed" a Brazilian audit partner from the audit and allegedly "had control over" the Brazilian auditor in the "conduct of the Parmalat audit."[39] *In re Parmalat Sec. Litig.*, 377 F. Supp. 2d 390, 405-09 (S.D.N.Y. 2005). This was emphasized in *Anwar II*, where the court distinguished *Parmalat* and *Cromer*, holding that in those cases plaintiffs had alleged facts from which one could infer *specific* involvement and control over the audits at issue. The same conclusory allegations of "control" over member firms' operations or audits as are offered here were deemed insufficient. *See Anwar II*, 728 F. Supp. 2d at 459-60 (rejecting vicarious liability claims against PwCIL); *see also Star Energy Corp. v. RSM Top-Audit*, 08 Civ. 329, 2008 WL 5110919, at *4-5 (S.D.N.Y. Nov. 26, 2008).

III. PLAINTIFFS FAIL TO STATE A CLAIM UNDER FOREIGN OR NEW YORK LAW AGAINST ANY DEFENDANT

A. Foreign Law Precludes Most of Plaintiffs' Claims, Including All Claims Asserted Against the Foreign Defendants

Plaintiffs' choice-of-law analysis is flawed in numerous respects:

---

[39] In *Cromer Finance Ltd. v. Berger*, 245 F. Supp. 2d 552 (S.D.N.Y. 2003), the court declined to dismiss claims against DTT under an agency theory where it was alleged that a Deloitte & Touche (Bermuda) audit partner who signed the audit opinions was acting on behalf of DTT in light of, *inter alia*, his membership and participation in DTT's "Global Financial Services Industries" team. *Id.* at 554-62; *see also Cromer Fin. Ltd. v. Berger*, 00 Civ. 2284, 2002 WL 826847, at *2, 4 (S.D.N.Y. May 2, 2002). Here, no facts support any such "agency" theory.

- *First*, a proper choice-of-law analysis must consider claims *separately*, by cause of action and by defendant – not in the "aggregate," as Plaintiffs attempt to do. *See, e.g., Tkaczevski v. Ryder Truck Rental, Inc.*, 22 F. Supp. 2d 169, 172 (S.D.N.Y. 1998).

- *Second*, all three of Plaintiffs' foreign law experts acknowledge that several of the claims asserted by Plaintiffs do not even exist in those jurisdictions (J. Ryan Decl. ¶ 47; Molitor Decl. ¶¶ 89, 101, 108, 119; Lowe Aff. ¶ 51), dooming Plaintiffs' argument that New York law should apply because there supposedly is no conflict "between New York law and the law of Ireland, Luxembourg, or the Cayman Islands" (Opp'n 29). (*See also* Prüm Supp. Decl. ¶¶ 28-29; Delvaux Decl. p. 6; Bagnall Decl. ¶¶ 53, 66, 92; Trevisan Decl. ¶¶ 18-19 (highlighting differences from U.S. law).)

- *Third*, Plaintiffs' Opposition fails to identify any alleged tortious conduct by the Foreign Defendants in New York (conceding that "Defendants here did not issue, sell or distribute securities to Plaintiffs' within or from New York'" (Opp'n 79)). Accordingly, New York does not have the "greatest interest" in the claims.[40]

- *Fourth*, Plaintiffs fail even to address what law should govern their contract and quasi-contract claims. The laws in the parties' contracts or of the location where each Defendant provided services to the Funds – in no case New York – govern those claims here. (Mov. Br. 30 n.35.)

As shown in the declarations submitted by Defendants' experts, Plaintiffs have failed to state a claim against any Defendant under governing Irish, Cayman and Luxembourg law because, among other things: (1) Defendants owed Plaintiffs no duties under those countries' laws, as required to establish negligence or breach of fiduciary duty; (2) Plaintiffs have not pled a violation of the duty of *loyalty* as further required to state a claim for breach of fiduciary duty; (3) "gross negligence," "aiding and abetting" and "constructive trust" are not cognizable causes of action (nor is "conspiracy" in Luxembourg); and (4) Plaintiffs have not established the strict privity required for breach of contract or unjust enrichment under those countries' laws.

B. Plaintiffs Fail To State a Claim Under New York Law

Plaintiffs' common law causes of action also fail to state a claim under New York law.

---

[40] Plaintiffs' cited cases are inapposite because they involved funds managed from New York. *See Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec. LLC*, 446 F. Supp. 2d 163, 194 (S.D.N.Y. 2006); *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 492-93 (S.D.N.Y. 2001).

1. Negligence, Professional Negligence and Gross Negligence

As shown above (§ II(D), *supra*), the Non-Fund Defendants owed Plaintiffs no duties of care, thus negating a necessary element for Plaintiffs' claims of negligence, professional negligence and gross negligence.[41] (Mov. Br. 31-33.) Furthermore, Plaintiffs have identified no non-conclusory allegations sufficient to show that each named Defendant was, in fact, negligent.

2. Common Law Fraud

In their Opposition, Plaintiffs identify no misleading statement by any Defendant, and thus necessarily fail to identify facts justifying reliance on any such statement,[42] nor to infer that any Defendant acted with scienter – confirming Plaintiffs' failure to allege fraud with the particularity required by Rule 9. Indeed, Plaintiffs do not even attempt to identify facts to support any one Defendant's scienter, arguing instead that less precision is required with respect to matters "within the Defendant's knowledge." (Opp'n 41.) To survive a motion to dismiss, however, a fraud claim must still be supported by facts that "'give[] rise to a 'strong inference' of fraudulent intent.'" *Stephenson*, 700 F. Supp. 2d at 619-20 (quoting *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990)). On that ground alone, Plaintiffs have failed to state a claim for fraud.[43]

Indeed, despite devoting inordinate space in their Opposition to the EY Defendants, Plaintiffs have failed to allege a single particularized fact with respect to those Defendants and thus have

---

[41] New York does not recognize an "independent action for gross negligence against accountants" or other professional service providers. *HAS Residential Mortg. Servs. of Tex. v. Carsuccio*, 350 F. Supp. 2d 352, 363 (E.D.N.Y. 2003). Plaintiffs' reliance on inapposite cases about "gross negligence" under a federal statute (CERCLA), or about indemnification under New York law (which permits indemnification for negligence, but not "gross negligence") (Opp'n 32-33) is unavailing.

[42] Plaintiffs' claims alleging negligent misrepresentation are deficient for the same reason, as well as the reasons stated in §§ II(D) and III(B)(1), above.

[43] *See Merkin*, 2011 WL 4435873, at *9; *Schulman v. Delaire*, 10 Civ. 3639, 2011 WL 672002, at *3 (S.D.N.Y. Feb. 22, 2011); *J.P. Jeanneret*, 769 F. Supp. 2d at 365; *Newman*, 748 F. Supp. 2d at 310; *Saltz*, 782 F. Supp. 2d at 77; *Meridian Horizon Fund, LP v. Tremont Grp. Holdings, Inc.*, 747 F. Supp. 2d 406, 413 (S.D.N.Y. 2010); *SEC v. Cohmad Sec. Corp.*, 09 Civ. 5680, 2010 WL 363844, at *4 (S.D.N.Y. Feb. 2, 2010) (each dismissing similar fraud claims in Madoff-related cases).

identified *no* reason for departing from the unanimous dismissal holdings of *every* other court to consider fraud allegations against auditors of so-called Madoff "feeder funds."[44] *See, e.g., J.P. Jeanneret*, 769 F. Supp. 2d at 378.

3. Breach of Fiduciary Duty

Where, as here, alleged breaches of fiduciary duty sound in fraud (Opp'n 36), even authority cited by Plaintiffs requires application of Rule 9(b). *See Rahl v. Bande*, 328 B.R. 387, 413 (S.D.N.Y. 2005). Plaintiffs do not contend that they have satisfied that rule – or, indeed, Rule 8(a) – but, rather, seek to defer any ruling until after discovery. (Opp'n 35-37.) Both "supporting" cases cited by Plaintiffs, however, make clear that courts should dismiss breach of fiduciary duty claims premised on deficient allegations.[45] *See Musalli Factory for Gold & Jewellry v. JP Morgan Chase Bank, N.A.*, 261 F.R.D. 13, 26 (S.D.N.Y. 2009); *Abercrombie v. Andrew Coll.*, 438 F. Supp. 2d 243, 274 (S.D.N.Y. 2006). Several unrebutted deficiencies in Plaintiffs' claims (including failure to overcome the presumptions of the business judgment rule) are set out in the Moving Brief. (Mov. Br. 34.)

4. Aiding and Abetting

Virtually conceding their fatal failure to allege any Defendant's *actual* knowledge of an underlying tort (Mov. Br. 34-35), Plaintiffs argue that constructive knowledge, such as "conscious disregard" or "recklessness," is sufficient for aiding and abetting. (Opp'n 38, 41-42.) That lax

---

[44] Plaintiffs' cited cases involved auditors who allegedly failed to heed "red flags" *at their own auditing clients* – not, as here, companies with whom auditing clients allegedly invested – and are clearly inapposite. *See Varghese v. China Shenghuo Pharm. Holdings, Inc.*, 672 F. Supp. 2d 596, 610 (S.D.N.Y. 2009) (auditor allegedly aware of serious internal control problems at its audit client); *In re Winstar Commc'ns*, 01 CV 3014, 2006 WL 473885, at *10-11 (S.D.N.Y. Feb. 27, 2006) (auditor actively facilitated client's fraud and ignored red flags in client's transactions).

[45] *People v. Merkin*, 26 Misc. 3d 1237(A) (table), 2010 WL 936208 (Sup. Ct. N.Y. County 2010), cited by Plaintiffs, does not support the imposition of a fiduciary duty on any Non-Fund Defendant. That case applied partnership law to find that the general partner of a limited partnership owes fiduciary duties to its limited partners and separately found that the manager of a hedge fund may owe fiduciary duties to the fund itself. *See id.* at *9-10. Neither finding applies to Plaintiffs (who are shareholders, not limited partners) or Defendants (none of whom is a general partner).

standard, however, is without foundation in New York jurisprudence and Plaintiffs cite *no* New York state case that has sustained an aiding and abetting claim on anything short of actual knowledge, relying instead on a handful of federal cases that have either assumed without analysis or suggested in *dicta* that "conscious avoidance" – a criminal law concept – might be sufficient for aiding and abetting under New York law.[46] Indeed, the clear majority of decisions in this District concur in the *actual* knowledge standard, including many cases Plaintiffs cite.[47] Moreover, the Second Circuit recently affirmed the dismissal of a similar claim for aiding and abetting Madoff's breaches of fiduciary duty to his investors because mere "red flag" allegations are "insufficient to support an inference that [defendants] had *actual knowledge* of Madoff's scheme."[48] *MLSMK Inv. Co. v. JP Morgan Chase &*

---

[46] *See Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC*, 479 F. Supp. 2d 349, 368 (S.D.N.Y. 2007) (suggesting in *dicta* that "conscious avoidance" could be sufficient but finding plaintiff pled defendant's actual knowledge that false valuations were transmitted to auditors); *OSRecovery, Inc. v. One Groupe Int'l, Inc.*, 354 F. Supp. 2d 357, 377-78 (S.D.N.Y. 2005) (concluding, without analysis, that "facts constituting strong circumstantial evidence of conscious misbehavior or recklessness" sufficiently alleged "knowledge of the primary wrongdoing").

[47] *See Musalli*, 261 F.R.D. at 24; *Pension Comm.*, 446 F. Supp. 2d at 203 (rejecting plaintiffs' attempt to apply "a lower standard of 'constructive knowledge,' such as 'recklessness' or 'willful blindness'" and holding "actual knowledge is required"); *Anwar II*, 728 F. Supp. 2d at 442 ("reckless disregard will not suffice"); *JP Morgan Chase Bank v. Winnick*, 406 F. Supp. 2d 247, 253 n.4 (S.D.N.Y. 2005) ("the weight of the case law . . . defines knowledge in the context of an aiding and abetting claim as actual knowledge"). Plaintiffs' argument that "red flags" were in themselves found sufficient to establish actual knowledge in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 05 Civ. 9016, 2007 WL 528703 (S.D.N.Y. Feb. 20, 2007), and *Anwar*, 742 F. Supp. 2d 367, is belied by the actual holdings in those cases.

[48] In any event, Plaintiffs have not met even the "conscious avoidance" standard they invite this Court to adopt, which requires a "culpable state of mind." *Fraternity Fund*, 479 F. Supp. 2d at 368. All Plaintiffs offer are the proverbial "red flags" that numerous courts have rejected as insufficient (Mov. Br. 35) and fall well short of the facts found in *OSRecovery* to plead "conscious avoidance." *See* 354 F. Supp. 2d at 378 (finding defendant's knowledge of scheme sufficiently established by allegations that defendant misrepresented to third parties his relationship with the primary violators and continued that relationship after fraud was revealed). Plaintiffs go even further astray, arguing that mere recklessness is sufficient (Opp'n 42). But even *Cromer Finance Ltd. v. Berger*, 00 Civ. 2284, 2003 WL 21436164 (S.D.N.Y. June 23, 2003), one of Plaintiffs' principal cases, held that "a showing of recklessness will *not* suffice." *Id.* at *9 (emphasis added).

Co., 431 F. App'x 17 (2d Cir. 2011) (emphasis added). The same result is warranted here.[49]

5. Breach of Contract and Third Party Beneficiary Breach of Contract

Plaintiffs concede that they are not parties to any contract with a non-Fund Defendant and fail to identify any contractual provisions allegedly breached by the Fund Defendants. (Opp'n 45-46.) Accordingly, their claims for breach of contract should be dismissed. *See, e.g.*, *Mandelbaum v. Fiserv, Inc.*, 09-cv-01222, 2011 WL 1225549, at *11-12 (D. Colo. Mar. 29, 2011) (dismissing breach of contract claim against administrator of account whose assets were stolen by Madoff). And because Plaintiffs have pointed to no language in any contract between a Fund and a Defendant "'clearly evidenc[ing] an intent to permit enforcement'" by Plaintiffs, their third party beneficiary claims also fail.[50] *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103, 108 (2d Cir. 2009) (citation omitted).

6. Unjust Enrichment and Constructive Trust

As to unjust enrichment, Plaintiffs fail to show *first* that they directly bestowed a benefit on Defendants. *See Kaye v. Grossman*, 202 F.3d 611, 616 (2d Cir. 2000). Unlike in *Manufacturers Hanover Trust Co. v. Chemical Bank*, 559 N.Y.S.2d 704 (1st Dep't 1990), where plaintiff's inadvertent transfer of funds reduced a third party's debt to the defendant bank and therefore directly benefited the bank, Plaintiffs here have conveyed no direct benefit on the Non-Fund Defendants. In addition, Plaintiffs do not plead contact, let alone a relationship with any Non-Fund Defendant. *See, e.g.*, *Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC*, 317 F. Supp. 2d 301, 334 (S.D.N.Y. 2003).

---

[49] Plaintiffs also have failed to plead substantial assistance adequately. They cite no authority disputing that routine arms-length business services (including auditing and banking) do not constitute "substantial assistance" and ignore the First Department's recent ruling on this issue. *See CRT Invs.*, 925 N.Y.S.2d at 440-41; *see also Renner v. Chase Manhattan Bank*, 98 Civ. 926, 2000 WL 781081, at *12 (S.D.N.Y. June 16, 2000), *aff'd*, 85 F. App'x 782 (2d Cir. 2004).

[50] This case is not like *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 925 F.2d 566 (2d Cir. 1991), where the plaintiff agreed with one defendant not to sue a second defendant. Since the explicit purpose of the agreement was to benefit the second defendant, the court found that the second defendant could enforce it. Here, the Funds contracted for services to be provided to the Funds themselves, and not to Plaintiffs or any other third party.

Second, written contracts preclude Plaintiffs' claims. (Mov. Br. 37.) Plaintiffs' reliance on *Bildstein v. MasterCard International, Inc.*, 03 Civ. 98261, 2005 WL 1324972 (S.D.N.Y. June 6, 2005), is misplaced because, unlike here, the dispute in *Bildstein* did not arise from the subject matter of the contract. Plaintiffs' argument that "unjust enrichment may be pleaded alternatively" (Opp'n 44, 59) does not apply because here there is no "'bona fide dispute regarding the existence of a contract.'" *Chiste v. Hotels.com L.P.*, 08 Civ. 10676, 2011 WL 2150653, at * 2 (S.D.N.Y. May 31, 2011) (citation omitted).

As shown in the Moving Brief (at 37-38) and not refuted by Plaintiffs, the Complaints' constructive trust claims are barred for the same reasons.

7. Conversion

Plaintiffs argue that they have stated claims for conversion because their investments "were not intermingled at the time Plaintiffs invested them" (Opp'n 45), but a claim for conversion of money requires funds to be identifiable *at the time their return is demanded. See, e.g., High View Fund, L.P. v. Hall*, 27 F. Supp. 2d 420, 429 (S.D.N.Y. 1998). Plaintiffs do not satisfy this requirement.

8. Civil Conspiracy

Allegations of conspiracy can connect a defendant to an independent tort *only* where plaintiffs have pled facts sufficient to show the tort itself and "'(1) an agreement between two or more parties, (2) an overt act in furtherance of the agreement, (3) the parties' intentional participation in the furtherance of a plan or purpose and (4) resulting damage or injury.'" *Galerie Gmurzynska v. Hutton*, 257 F. Supp. 2d 621, 630 n.12 (S.D.N.Y. 2003) (Berman, J.) (quoting *World Wrestling Fed'n Entm't, Inc. v. Bozell*, 142 F. Supp. 2d 514, 532 (S.D.N.Y. 2001)), *aff'd*, 355 F.3d 206 (2d Cir. 2004). Here, Plaintiffs intone in conclusory terms only that "Defendants formed a common understanding and agreement to carry out unlawful acts." (HC ¶ 647.) That is wholly insufficient. *See id.* at 630; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 548-49, 556 (2007) (dismissing conspiracy claims for failure to plead "some

factual context suggesting agreement, as distinct from . . . independent action").[51]

IV. THE HERALD COMPLAINT'S RICO CLAIMS SHOULD BE DISMISSED

A. The RICO Claims Are Barred by the PSLRA Amendment

The Herald Plaintiffs seek to distance themselves from *MLSMK Investment Co. v. JP Morgan Chase & Co.*, 651 F.3d 268 (2d Cir. 2011), where the Second Circuit held that the PSLRA Amendment bars RICO claims indistinguishable from those here, arguing that their BLMIS investments were made through a foreign fund. (Opp'n 92-93.) This is immaterial, as the RICO Defendants are charged with acts of deception to perpetuate a Ponzi scheme that claimed to buy and sell securities on a *domestic* exchange. "'[C]onduct undertaken to keep a securities fraud Ponzi scheme alive is conduct undertaken in connection with the purchase and sale of securities'" for purposes of the PSLRA Amendment. *MLSMK*, 651 F.3d 268, 277 n.11 (citing cases).

Moreover, the premise underlying Plaintiffs' argument – that the PSLRA Amendment applies only when a private plaintiff has standing to assert a securities fraud claim – was rejected in *MLSMK*. *See id.* at 277-79. The Amendment, the court held, is triggered whenever conduct proscribed by U.S. securities laws is an element on which the plaintiff relies for his RICO charge, even if the plaintiff elected not to make a fraud claim or had no standing to pursue it, and even if the relevant conduct is not the defendant's but someone *else's*. *See id.* at 275-76, 277-79.[52]

---

[51] This case is not like *Meisel v. Grunberg*, 651 F. Supp. 2d 98 (S.D.N.Y. Aug. 31, 2009), which confirmed that legal standard but found sufficient detailed allegations that a mother and son conspired to defraud the mother's business partner. *See id.* at 119, 121.

[52] Citing *Morrison*, 130 S. Ct. 2869, Plaintiffs assert that no claimant would have standing to reach frauds stemming from overseas transactions in foreign shares. (Opp'n 92-93.) *Morrison*, however, is irrelevant to a statute, like the PSLRA Amendment, that is specifically directed at interdicting claims asserted *in domestic courts*. *Cf. Kingate*, 2011 WL 1362106, at *7 (SLUSA claim). Also, the Dodd Frank Act has restored the SEC's jurisdiction to pursue transnational frauds that meet the "conduct" or "effects" test rejected in *Morrison*. *See* SEC Release No. 34-63174, 2010 WL 4196006, at *2-3 (Oct. 25, 2010) (citing Pub. L. No. 111-203, § 929P, 124 Stat. 1376 (July 21, 2010)).

B. The RICO Claims Are Impermissibly Extraterritorial

The Herald Plaintiffs do not dispute that their RICO claims revolve around "'foreign parties who allegedly recruited foreign investors to invest in foreign funds'" (Opp'n 94), nor that RICO has no application to "foreign enterprises." *Cedeño v. InTech Group, Inc.*, 733 F. Supp. 2d 471, 474 (S.D.N.Y. 2010). However, pointing to the supposed domestic contacts outlined in their personal jurisdiction section (Opp'n 24-27), Plaintiffs invite this Court to find that the "nerve center" of the alleged enterprise is "in this District" (*id.* 93 (citing *European Cmty. v. RJR Nabisco, Inc.*, 02-CV-5771, 2011 WL 843957, at *6 (E.D.N.Y. Mar. 8, 2011))). This is insufficient to overcome the presumption against extraterritoriality, *see Morrison*, 130 S. Ct. at 2884, as most such "connections" – *e.g.*, a domestic office, a domestic affiliate – have no relationship to the alleged racketeering.

Indeed, the "nerve center" test, focusing on where the "brains" of an enterprise "'direct, control and coordinate'" its activities, *European Cmty.*, 2011 WL 843957, at *5-6 (citation omitted), points decidedly abroad. The Herald Complaint pleads that Kohn, the enterprise's reputed mastermind (HC ¶ 810-11), controlled the alleged criminal scheme since 1994 *from Europe* through a variety of foreign entities. (*Id.* ¶¶ 25, 28-32, 212-23, 236-37.) Further, five of the six *foreign* Funds were purportedly formed by Kohn after she left the U.S. for Europe in 1994. (*Id.* ¶¶ 10, 15, 140-43, 259, 310.) The alleged purpose of those foreign Funds was to recruit *foreign* investors, such as Plaintiffs, through sales efforts conducted *overseas*. (*Id.* ¶¶ 236, 256, 260-62, 269-70, 275.) Plaintiffs' own narrative contradicts the portrayal of the alleged enterprise as domestic.

C. The Herald Plaintiffs Do Not Have RICO Standing

RICO statutory proximate cause, the lynchpin of RICO standing, does not turn on whether the challenged conduct creates a "risk of harm," as Plaintiffs argue based on dated law, such as *Baisch v. Gallina*, 346 F.3d 366, 376 (2d Cir. 2003) (Opp'n 96). The "risk of harm" or "foreseeability" framework illustrated in *Baisch* was expressly rejected in *Hemi Group, LLC v. City of New York*, 130

S. Ct. 983 (2010). The Court held there that "(1) the injury alleged must, generally, be the 'first step' harm caused by the conduct invoked . . . and (2) the alleged conduct must be 'directly responsible' for the harm alleged rather than simply allowing that harm to come about more easily." *DDR Constr. Servs., Inc. v. Siemens Indus., Inc.*, 770 F. Supp. 2d. 627, 651 (S.D.N.Y. 2011) (citing *Hemi*, 130 S. Ct. at 989-90); *see also id.* at 654 (noting *Baisch*'s abrogation). In this case, UCG and BA are charged merely with owning service providers to foreign funds that, in turn, invested in other foreign funds (*i.e.*, Herald) that, in turn, invested with BLMIS. In other words, they (and other RICO Defendants) are accused of indirectly facilitating a Ponzi scheme run by someone else (*i.e.*, Madoff) – a chain of causality more indirect and removed than the one found inadequate for proximate cause purposes in *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 120 (2d Cir. 2003), itself a Ponzi scheme case that long preceded the *tightening* of RICO proximate cause requirements in *Hemi Group*.

D. The Herald Complaint Fails To State Claims Under Sections 1962(c) and (d)

Section 1962(c) "must be established *as to each individual defendant*." *DeFalco v. Bernas*, 244 F.3d 286, 306 (2d Cir. 2001) (emphasis added). Yet the Opposition indistinguishably lumps all "Defendants" together and fails to detail the RICO predicate offenses charged against UCG and BA. (Opp'n 97.) Further:

- Plaintiffs argue that they "have abundantly pled" scienter against the "Defendants." (*Id.* 95-96.) Yet their generic "red flags" theory, repeatedly rejected in other Madoff-related cases, *see, e.g.*, *Newman*, 748 F. Supp. 2d at 310-11, contains not one particularized fact relating to UCG or BA.

- Plaintiffs invoke general principles about the "operation or management" test (Opp'n 97) but fail to show, as they must, that UCG and BA each played some part in "*directing* the enterprise's affairs." *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993) (emphasis added).

- Plaintiffs offer not a single predicate act allegedly committed by UCG or BA since Madoff's confession in December 2008, which alone dispels their strained notion (Opp'n 97 n.54) that there is here a threat of continued illegality satisfying the requisite open ended continuity.

- Plaintiffs defend their enterprise allegations (Opp'n 96-97), but offer only speculation for the inference that this group of largely foreign Defendants worked together in pursuit of a common goal. *See Elsevier Inc. v. W.H.P.R., Inc.*, 692 F. Supp. 2d 297, 307 (S.D.N.Y. 2010).

The Herald Complaint also pleads no facts to support a RICO conspiracy. Although Plaintiffs offer bald claims of concerted action (Opp'n 97-98), their own cases confirm that Section 1962(d) requires a "substantial factual basis" to support an agreement, *Madanes v. Madanes*, 981 F. Supp. 241, 258 (S.D.N.Y. 1997) – a basis wholly absent here.

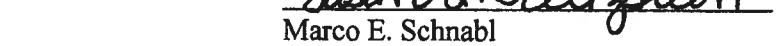
CONCLUSION

For the above reasons and the reasons stated in the Moving Brief, the Complaints and all predecessor pleadings should be dismissed in their entirety with prejudice.

Dated: October 28, 2011
New York, New York

Respectfully submitted,

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP



Marco E. Schnabl
Susan L. Saltzstein
William J. O'Brien III
Jason C. Vigna
Four Times Square
New York, New York 10036-6522
Telephone: (212) 735-3000
marco.schnabl@skadden.com
susan.saltzstein@skadden.com
wobrien@skadden.com
jason.vigna@skadden.com

Attorneys for Defendants UniCredit S.p.A., Pioneer Global Asset Management S.p.A. and Pioneer Alternative Investment Management Ltd.

ORRICK HERRINGTON &
SUTCLIFFE LLP

Richard A. Martin
Patryk J. Chudy
51 West 52nd Street
New York, New York 10019
Telephone: (212) 506-5000
Facsimile: (212) 506-5151
rmartin@orrick.com
pchudy@orrick.com

Attorneys for Defendant
Ernst & Young S.A.

CLEARY GOTTLIEB
STEEN & HAMILTON LLP

Evan A. Davis
1 Liberty Plaza
New York, New York 10006
Telephone: (212) 225-2850
edavis@cgsh.com

Attorneys for Defendants
HSBC Holdings plc, HSBC Securities Services (Luxembourg) S.A., Bank of Bermuda (Luxembourg) S.A., Bank of Bermuda (Cayman) Limited, The Bank of Bermuda Limited, HSBC Institutional Trust Services (Ireland) Ltd., HSBC Securities Services (Ireland) Limited, and HSBC Bank USA, N.A.

ORRICK HERRINGTON &
SUTCLIFFE LLP

Richard A. Martin
Patryk J. Chudy
51 West 52nd Street
New York, New York 10019
Telephone: (212) 506-5000
Facsimile: (212) 506-5151
rmartin@orrick.com
pchudy@orrick.com

Attorneys for Defendant
Ernst & Young S.A.

CLEARY GOTTLIEB
STEEN & HAMILTON LLP

Evan A. Davis

Evan A. Davis
1 Liberty Plaza
New York, New York 10006
Telephone: (212) 225-2850
edavis@cgsh.com

Attorneys for Defendants
HSBC Holdings plc, HSBC Securities Services (Luxembourg) S.A., Bank of Bermuda (Luxembourg) S.A., Bank of Bermuda (Cayman) Limited, The Bank of Bermuda Limited, HSBC Institutional Trust Services (Ireland) Ltd., HSBC Securities Services (Ireland) Limited, and HSBC Bank USA, N.A.

SULLIVAN & WORCESTER LLP

Franklin B. Velie
Jonathan G. Kortmansky
Mitchell C. Stein
1290 Avenue of the Americas
29th Floor
New York, New York 10104
Telephone: (212) 660-3000
fvelie@sandw.com
jkortmansky@sandw.com
mstein@sandw.com

Attorneys for Defendant
UniCredit Bank Austria AG

LATHAM & WATKINS LLP

Maria A. Barton
Jeff G. Hammel
885 Third Avenue
New York, New York 10022
Telephone: (212) 906-1200
Facsimile: (212) 751-4864
maria.barton@lw.com
jeff.hammel@lw.com

Attorneys for Defendants
Hannes Saleta, Karl E. Kaniak, Alfred Simon, Johannes P. Spalek, Dr. Hans-Peter Tiefenbacher, Declan Murray, Alberto La Rocca, and Ursula Radel-Leszczynski

SULLIVAN & WORCESTER LLP

Franklin B. Velie
Jonathan G. Kortmansky
Mitchell C. Stein
1290 Avenue of the Americas
29th Floor
New York, New York 10104
Telephone: (212) 660-3000
fvelie@sandw.com
jkortmansky@sandw.com
mstein@sandw.com

Attorneys for Defendant
UniCredit Bank Austria AG

LATHAM & WATKINS LLP

Maria A. Barton
Jeff G. Hammel
885 Third Avenue
New York, New York 10022
Telephone: (212) 906-1200
Facsimile: (212) 751-4864
maria.barton@lw.com
jeff.hammel@lw.com

Attorneys for Defendants
Hannes Saleta, Karl E. Kaniak, Alfred Simon, Johannes P. Spalek, Dr. Hans-Peter Tiefenbacher, Declan Murray, Alberto La Rocca, and Ursula Radel-Leszczynski

KIRKLAND & ELLIS LLP

Jay P. Lefkowitz, P.C.
Joseph Serino, Jr.
David S. Flugman
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900
jay.lefkowitz@kirkland.com
joseph.serino@kirkland.com
david.flugman@kirkland.com

Attorneys for Defendants Herald Fund SPC, Franco Mugnai and Friedrich Pfeffer

CRAVATH, SWAINE & MOORE LLP

Thomas G. Rafferty
Antony L. Ryan
Samira Shah
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
Telephone: (212) 474-1000
trafferty@cravath.com
aryan@cravath.com
sshah@cravath.com

Attorneys for Defendant PricewaterhouseCoopers Ireland

NEUBERGER, QUINN, GIELEN, RUBIN & GIBBER, P.A.

Price O. Gielen
One South Street, 27th Floor
Baltimore, Maryland 21202
Telephone: (410) 332-8516

Attorneys for Defendant Sonja Kohn

KIRKLAND & ELLIS LLP

Jay P. Lefkowitz, P.C.
Joseph Serino, Jr.
David S. Flugman
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900
jay.lefkowitz@kirkland.com
joseph.serino@kirkland.com
david.flugman@kirkland.com

Attorneys for Defendants Herald Fund SPC, Franco Mugnai and Friedrich Pfeffer

CRAVATH, SWAINE & MOORE LLP

Thomas G. Rafferty
Antony L. Ryan
Samira Shah
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
Telephone: (212) 474-1000
trafferty@cravath.com
aryan@cravath.com
sshah@cravath.com

Attorneys for Defendant PricewaterhouseCoopers Ireland

NEUBERGER, QUINN, GIELEN, RUBIN & GIBBER, P.A.

Price O. Gielen
One South Street, 27th Floor
Baltimore, Maryland 21202
Telephone: (410) 332-8516

Attorneys for Defendant Sonja Kohn

KIRKLAND & ELLIS LLP

Jay P. Lefkowitz, P.C.
Joseph Serino, Jr.
David S. Flugman
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900
jay.lefkowitz@kirkland.com
joseph.serino@kirkland.com
david.flugman@kirkland.com

Attorneys for Defendants Herald Fund SPC, Franco Mugnai and Friedrich Pfeffer

CRAVATH, SWAINE & MOORE LLP

Thomas G. Rafferty
Antony L. Ryan
Samira Shah
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
Telephone: (212) 474-1000
trafferty@cravath.com
aryan@cravath.com
sshah@cravath.com

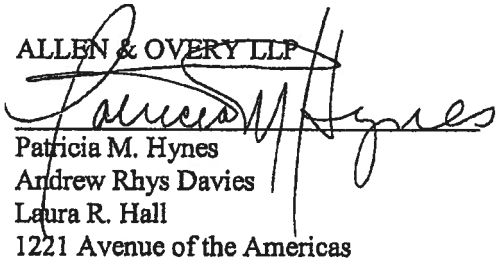
Attorneys for Defendant PricewaterhouseCoopers Ireland

NEUBERGER, QUINN, GIELEN, RUBIN & GIBBER, P.A.

Price O. Gielen
One South Street, 27th Floor
Baltimore, Maryland 21202
Telephone: (410) 332-8516

Attorneys for Defendant Sonja Kohn

ALLEN & OVERY LLP



Patricia M. Hynes
Andrew Rhys Davies
Laura R. Hall
1221 Avenue of the Americas
New York, NY 10020
Telephone: (212) 610-6300
patricia.hynes@allenovery.com
andrew.rhys.davies@allenovery.com
laura.hall@allenovery.com

Attorneys for Defendants JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., J.P. Morgan Securities LLC and J.P. Morgan Securities, Ltd.

PORZIO, BROMBERG & NEWMAN, P.C.

Brett S. Moore
156 West 56th Street
Suite 803
New York, New York 10019-3800
Telephone: (212) 265-6888
Facsimile: (212) 957-3983
bsmoore@pbnlaw.com

Attorneys for Ferdinand Burg and Carlo Reding,
Court-Appointed Liquidators for Defendant Herald (LUX) SICAV

ALLEN & OVERY LLP

Patricia M. Hynes
Andrew Rhys Davies
Laura R. Hall
1221 Avenue of the Americas
New York, NY 10020
Telephone: (212) 610-6300
patricia.hynes@allenovery.com
andrew.rhys.davies@allenovery.com
laura.hall@allenovery.com

Attorneys for Defendants JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., J.P. Morgan Securities LLC and J.P. Morgan Securities, Ltd.

PORZIO, BROMBERG & NEWMAN, P.C.

Brett S. Moore
156 West 56th Street
Suite 803
New York, New York 10019-3800
Telephone: (212) 265-6888
Facsimile: (212) 957-3983
bsmoore@pbnlaw.com

Attorneys for Ferdinand Burg and Carlo Reding,
Court-Appointed Liquidators for Defendant Herald (LUX) SICAV

HOGAN LOVELLS US LLP

Sanford M. Litvack
Dennis H. Tracey, III
Lisa J. Fried
875 Third Avenue
New York, New York 10022
Telephone: (212) 918-3000
sandy.litvack@hoganlovells.com
dennis.tracey@hoganlovells.com
lisa.fried@hoganlovells.com

Attorneys for Defendant
PricewaterhouseCoopers, Chartered Accountants, a Bermuda partnership

CLEARY GOTTLIEB
STEEN & HAMILTON LLP

Lewis J. Liman
Jeffrey A. Rosenthal
1 Liberty Plaza
New York, New York 10006
Telephone: (212) 225-2000
lliman@cgsh.com
jrosenthal@cgsh.com

Attorneys for Defendant
The Bank of New York Mellon Corporation

ARNOLD & PORTER LLP

Claudius O. Sokenu
John C. Massaro (admitted *pro hac vice*)
Arthur Luk
555 Twelfth Street, NW
Washington, DC 20004-1206
Telephone: (202) 942-5000
Facsimile: (202) 932-5999
claudius.sokenu@aporter.com
john.massaro@aporter.com
arthur.luk@aporter.com

Attorneys for Defendant
Ernst & Young Global Limited

HOGAN LOVELLS US LLP

Sanford M. Litvack
Dennis H. Tracey, III
Lisa J. Fried
875 Third Avenue
New York, New York 10022
Telephone: (212) 918-3000
sandy.litvack@hoganlovells.com
dennis.tracey@hoganlovells.com
lisa.fried@hoganlovells.com

Attorneys for Defendant
PricewaterhouseCoopers, Chartered Accountants, a Bermuda partnership

CLEARY GOTTLIEB STEEN & HAMILTON LLP

Lewis J. Liman
Jeffrey A. Rosenthal
1 Liberty Plaza
New York, New York 10006
Telephone: (212) 225-2000
lliman@cgsh.com
jrosenthal@cgsh.com

Attorneys for Defendant
The Bank of New York Mellon Corporation

ARNOLD & PORTER LLP

Claudius O. Sokenu
John C. Massaro (admitted *pro hac vice*)
Arthur Luk
555 Twelfth Street, NW
Washington, DC 20004-1206
Telephone: (202) 942-5000
Facsimile: (202) 932-5999
claudius.sokenu@aporter.com
john.massaro@aporter.com
arthur.luk@aporter.com

Attorneys for Defendant
Ernst & Young Global Limited

HOGAN LOVELLS US LLP

Sanford M. Litvack
Dennis H. Tracey, III
Lisa J. Fried
875 Third Avenue
New York, New York 10022
Telephone: (212) 918-3000
sandy.litvack@hoganlovells.com
dennis.tracey@hoganlovells.com
lisa.fried@hoganlovells.com

Attorneys for Defendant
PricewaterhouseCoopers, Chartered Accountants, a Bermuda partnership

CLEARY GOTTLIEB
STEEN & HAMILTON LLP

Lewis J. Liman
Jeffrey A. Rosenthal
1 Liberty Plaza
New York, New York 10006
Telephone: (212) 225-2000
lliman@cgsh.com
jrosenthal@cgsh.com

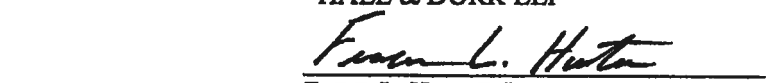
Attorneys for Defendant
The Bank of New York Mellon Corporation

ARNOLD & PORTER LLP

Claudius O. Sokenu
John C. Massaro (admitted *pro hac vice*)
Arthur Luk
555 Twelfth Street, NW
Washington, DC 20004-1206
Telephone: (202) 942-5000
Facsimile: (202) 932-5999
claudius.sokenu@aporter.com
john.massaro@aporter.com
arthur.luk@aporter.com

Attorneys for Defendant
Ernst & Young Global Limited

WILMER CUTLER PICKERING
HALE & DORR LLP



Fraser L. Hunter, Jr.
Brad E. Konstandt
399 Park Avenue
New York, New York 10022
fraser.hunter@wilmerhale.com
brad.konstandt@wilmerhale.com
Telephone: (212) 230-8800
Facsimile: (212) 230-8888

Attorneys for Defendant
PricewaterhouseCoopers International Limited

SEWARD & KISSEL LLP

Jack Yoskowitz
Mandy DeRoche
One Battery Park Plaza
New York, New York 10004
Telephone: (212) 574-1200
Facsimile: (212) 480-8421

Attorneys for Defendant Michael Wheaton

WILLKIE FARR & GALLAGHER LLP

Mitchell J. Auslander
James C. Dugan
Emma-Ann L. Deacon
787 Seventh Avenue
New York, New York 10019
Telephone: (212) 728-8000
mauslander@willkie.com
jdugan@willkie.com
edeacon@willkie.com

Attorneys for Defendant William Fry

WILMER CUTLER PICKERING
HALE & DORR LLP

Fraser L. Hunter, Jr.
Brad E. Konstandt
399 Park Avenue
New York, New York 10022
fraser.hunter@wilmerhale.com
brad.konstandt@wilmerhale.com
Telephone: (212) 230-8800
Facsimile: (212) 230-8888

Attorneys for Defendant
PricewaterhouseCoopers International Limited

SEWARD & KISSEL LLP

Jack Yoskowitz
Mandy DeRoche
One Battery Park Plaza
New York, New York 10004
Telephone: (212) 574-1200
Facsimile: (212) 480-8421

Attorneys for Defendant Michael Wheaton

WILLKIE FARR & GALLAGHER LLP

Mitchell J. Auslander
James C. Dugan
Emma-Ann L. Deacon
787 Seventh Avenue
New York, New York 10019
Telephone: (212) 728-8000
mauslander@willkie.com
jdugan@willkie.com
edeacon@willkie.com

Attorneys for Defendant William Fry

WILMER CUTLER PICKERING
HALE & DORR LLP

Fraser L. Hunter, Jr.
Brad E. Konstandt
399 Park Avenue
New York, New York 10022
fraser.hunter@wilmerhale.com
brad.konstandt@wilmerhale.com
Telephone: (212) 230-8800
Facsimile: (212) 230-8888

Attorneys for Defendant
PricewaterhouseCoopers International Limited

SEWARD & KISSEL LLP

Jack Yoskowitz
Mandy DeRoche
One Battery Park Plaza
New York, New York 10004
Telephone: (212) 574-1200
Facsimile: (212) 480-8421

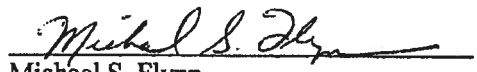
Attorneys for Defendant Michael Wheaton

WILLKIE FARR & GALLAGHER LLP

Mitchell J. Auslander
James C. Dugan
Emma-Ann L. Deacon
787 Seventh Avenue
New York, New York 10019
Telephone: (212) 728-8000
mauslander@willkie.com
jdugan@willkie.com
edeacon@willkie.com

Attorneys for Defendant William Fry

DAVIS POLK & WARDWELL LLP



Michael S. Flynn
Michael P. Carroll
James H.R. Windels
James W. Haldin
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
Facsimile: (212) 701-5800
michael.carroll@davispolk.com
james.windels@davispolk.com
michael.flynn@davispolk.com
james.haldin@davispolk.com

Attorneys for Defendant
PricewaterhouseCoopers LLP

HUGHES HUBBARD & REED LLP

William R. Maguire
Marc A. Weinstein
Gabrielle S. Marshall
Kathryn R. Vogel
One Battery Park Plaza
New York, New York 10004
Telephone: (212) 837-6000

Attorneys for Defendant
Ernst & Young Ltd. (Cayman Islands)

DAVIS POLK & WARDWELL LLP

Michael S. Flynn
Michael P. Carroll
James H.R. Windels
James W. Haldin
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
Facsimile: (212) 701-5800
michael.carroll@davispolk.com
james.windels@davispolk.com
michael.flynn@davispolk.com
james.haldin@davispolk.com

Attorneys for Defendant
PricewaterhouseCoopers LLP

HUGHES HUBBARD & REED LLP

William R. Maguire
Marc A. Weinstein
Gabrielle S. Marshall
Kathryn R. Vogel
One Battery Park Plaza
New York, New York 10004
Telephone: (212) 837-6000

Attorneys for Defendant
Ernst & Young Ltd. (Cayman Islands)

DEBEVOISE & PLIMPTON LLP

Michael E. Wiles /gj

Joseph P. Moodhe
Michael E. Wiles
919 Third Avenue
New York, New York 10022
Tel. (212) 909-6000
mewiles@debevoise.com
jpmoodhe@debevoise.com

Attorneys for Defendants Alberto Benbassat, Stephane Benbassat, Genevalor, Benbassat & Cie, Gerald J.P. Brady, Daniel Morrissey, David T. Smith, Thema Asset Management Limited and Thema International Fund plc (for purposes of this motion and other preliminary proceedings)

BRUNE & RICHARD LLP

Susan E. Brune
David Elbaum
One Battery Park Plaza
New York, New York 10004
Tel: (212) 668-1900
Fax: (212) 668-0315
sbrune@bruneandrichard.com
delbaum@bruneandrichard.com

Attorneys for Defendant Nigel Fielding

DEBEVOISE & PLIMPTON LLP

Joseph P. Moodhe
Michael E. Wiles
919 Third Avenue
New York, New York 10022
Tel. (212) 909-6000
mewiles@debevoise.com
jpmoodhe@debevoise.com

Attorneys for Defendants Alberto Benbassat, Stephane Benbassat, Genevalor, Benbassat & Cie, Gerald J.P. Brady, Daniel Morrissey, David T. Smith, Thema Asset Management Limited and Thema International Fund plc (for purposes of this motion and other preliminary proceedings)

BRUNE & RICHARD LLP

Susan E. Brune
David Elbaum
One Battery Park Plaza
New York, New York 10004
Tel: (212) 668-1900
Fax: (212) 668-0315
sbrune@bruneandrichard.com
delbaum@bruneandrichard.com

Attorneys for Defendant Nigel Fielding