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:	ECF Case Electronically Filed
Davis v. Benbassat, No. 09 Civ. 2558 *Repex Ventures, S.A. v. Madoff*, No. 09 Civ. 289	

REPLY DECLARATION OF PATRICIA M. HYNES ON BEHALF OF JPMORGAN CHASE & CO., JPMORGAN CHASE BANK, N.A., J.P. MORGAN SECURITIES LLC AND J.P. MORGAN SECURITIES LTD.

PATRICIA M. HYNES declares under penalty of perjury as follows:

1. I am an attorney admitted to practice before this Court and am Senior Counsel with Allen & Overy LLP, counsel for JPM. I make this reply declaration in further support of JPM's motion to dismiss and in opposition to Plaintiffs' motion for leave to amend.

2. Plaintiffs attempt to defend their claims using misleading descriptions of the controlling cases and misrepresentations about the allegations in their complaints. All of their claims are factually unsupported and legally baseless, so they should be dismissed and leave to amend should be denied.

A. All Claims Against JPM Should Be Dismissed on the Basis of *In Pari Delicto*

3. As the New York Court of Appeals recently reaffirmed, a claim may be dismissed on the pleadings when, as here, the applicability of the *in pari delicto* doctrine appears on the face of the complaint.[1] *See Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 459 n.3 (2010); *see also Picard v. HSBC Bank PLC*, 454 B.R. 25, 37 (S.D.N.Y. 2011) (Rakoff, J.) (granting motion to dismiss claims arising out of Madoff's fraud where plaintiff failed to plead any exception to the "extremely broad[]" doctrine of *in pari delicto* and "the overwhelming wrongdoing of Madoff and his now-defunct company, Madoff Securities, is abundantly clear from the face of the [plaintiff's] own complaint"). Plaintiffs themselves characterize the Funds as "guilty corporate shells." Opp'n 81. Under *in pari delicto*, they cannot bring claims on behalf of those funds against JPM for allegedly aiding and abetting their own and their agents' wrongdoing, and dismissal on the pleadings is appropriate.

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[1] Plaintiffs argue that JPM's invocation of *in pari delicto* is premature, citing *Woods v. Rondout Valley Central School District Board of Education*, 466 F.3d 232 (2d Cir. 2006), but that case concerns immunity from suit under the Eleventh Amendment and has nothing to do with *in pari delicto*.

B. Plaintiffs' Aiding and Abetting Claims Should Be Dismissed

1. Actual Knowledge

4. As set forth in Part III(B)(4) of the Joint Reply, Plaintiffs concede their inability to meet the actual knowledge standard required to plead aiding and abetting claims under New York law by arguing that allegations of "conscious avoidance" suffice. No New York state court, however, has ever upheld an aiding and abetting claim based on allegations of "conscious avoidance," and the Second Circuit recently affirmed the dismissal of an aiding and abetting breach of fiduciary claim against JPM, holding that plaintiff failed to plead JPM's actual knowledge of Madoff's fraud. *MLSMK Inv. Co. v. JP Morgan Chase & Co.*, No. 10–3040–cv, 2011 WL 2176152, at *2 (2d Cir. June 6, 2011) (summary order). The Second Circuit also recognized that the allegations in the *MLSMK* complaint, which Plaintiffs here have copied, were not based on "anything more than speculation." *Id.*

5. Plaintiffs' argument that they need only plead "conscious avoidance" relies on a handful of cases in this District that either assumed, without analysis, that conscious avoidance of facts that would confirm suspicions of fraud was sufficient to plead actual knowledge, *OSRecovery*, 354 F. Supp. 2d at 378, or that stated in *dicta* that conscious avoidance might be sufficient, but ultimately relied on allegations of actual knowledge to find plaintiffs stated aiding and abetting claims, *Fraternity Fund*, 479 F. Supp. 2d at 368, 370.

6. Nor do Plaintiffs' allegations of "red flags" and "suspicions" suffice to plead actual knowledge. The district court's decision in *Anwar II*, on which Plaintiffs rely heavily, did not hold that "red flags" equaled actual knowledge. Rather, it held that an aiding and abetting claim against the administrator of a feeder fund was pleaded where the administrator "knew" that the funds' representations that they conducted "thorough due diligence, monitoring and verification"

were false, based not only on the administrator's knowledge of the various "red flags" regarding Madoff's operations, but also on its familiarity with the Fairfield funds, its "general experience" in the industry, and the "variety of key roles" it played for the funds. 728 F. Supp. 2d at 393, 443.

7. Notably, although the *Anwar II* court allowed aiding and abetting claims against the funds' administrator to proceed, it dismissed aiding and abetting claims against the funds' accountants who—unlike the administrator—were not alleged to have actual knowledge of the funds' misrepresentations about their Madoff due diligence. The "red flags" concerning Madoff's operations—standing alone—were not sufficient to support a claim of "actual knowledge." *Id.* at 453, 458. Similarly here, JPM is not alleged to have known of the representations that the Funds were making to their investors, and the "red flags" that were insufficient to plead actual knowledge of Madoff's fraud against auditors must also be insufficient to plead actual knowledge against a third party bank with no audit responsibilities.

2. Substantial Assistance

8. Having failed to plead any facts in their amended complaints to allege JPM's substantial assistance of primary tortfeasors, Plaintiffs assert in their opposition brief for the first time that JPM substantially assisted by "approving" transactions. Opp'n 39. Not only do the cited paragraphs of the Thema Complaint allege nothing of the sort, but Plaintiffs allege no basis on which JPM as a mere provider of a bank account would have the right or ability to "approv[e]" transactions for the funds or for BMIS.

9. Plaintiffs selectively quote from *Balance Return Fund Ltd. v. Royal Bank of Canada*, 83 A.D.3d 429, 921 N.Y.S.2d 38 (1st Dep't 2011), to support their claim that a bank's approval of transactions constitutes substantial assistance, but there the defendant bank set up the allegedly fraudulent fund and knew that the fund's NAV was overstated, yet continued to approve

transactions designed to mask the financial problems. *Id.* at 39-40 (citing allegations that the bank had "the ability to control assets in the fund," could "releverage and deleverage fund assets and exercise control over portfolio managers," and "helped develop the structure of the subject fund"). JPM did not structure the Thema and Herald funds, nor "approv[e] transactions" they entered into. JPM only provided a bank account to a different entity—BMIS.

10. It is well-settled law that provision of banking services—*a fortiori* the provision of banking services to a third party—does not constitute substantial assistance. *See, e.g.*, *Rosner v. Bank of China*, 06 CV 13562, 2008 WL 5416380, at *14 (S.D.N.Y. Dec. 18, 2008) (Marrero, J.); *Nigerian Nat'l Petro. Corp. v. Citibank, N.A.*, 98 Civ. 4960, 1999 WL 558141, at *8 (S.D.N.Y. July 30, 1999) (Mukasey, J.). Despite the rhetorical flourish that "profiting from" transactions related to "a Ponzi scheme certainly constitutes more than 'routine banking services'" (Opp'n 39), Plaintiffs have pled no basis for any inference that JPM knew either that Madoff was a Ponzi scheme or that the funds' agents were breaching their duties to the funds.

11. Plaintiffs also fail to counter JPM's showing that alleged violations of money-laundering rules cannot plead either knowledge or actual assistance. *Rosner*, 2008 WL 5416380, at *14; *El Camino Resources Ltd. v. Huntington Nat'l Bank*, 722 F. Supp. 2d 875, 923 (W.D. Mich. 2010).

C. Plaintiffs' Unjust Enrichment Claims Should Be Dismissed

12. Plaintiffs argument that they "most certainly did not receive 'what they paid for'" (Opp'n 43) does not suffice to make out a claim for unjust enrichment against JPM because Plaintiffs paid JPM nothing and had no expectation of receiving services from JPM. Instead, Plaintiffs invested money in offshore funds that deposited with BMIS the comingled funds of numerous investors. BMIS in turn commingled these with funds received from other feeder funds and

direct investors in a demand deposit account held at JPM from which account fees allegedly were deducted. Thus, BMIS received what it paid for—a bank account.

13. By contrast, in the cases Plaintiffs cite where an unjust enrichment claim was sustained, defendants were obligated to provide money or services to plaintiffs. *See Anwar II*, 728 F. Supp. at 421 (holding unjust enrichment claim pled for "fees [defendants] collected for, broadly speaking, managing Plaintiffs' mirage investments"); *Intellectual Capital Partner v. Inst'l Credit Partners LLC*, No. 08 Civ. 10580(DC), 2009 WL 1974392, at *8 (S.D.N.Y. July 8, 2009) (Chin, J.) (holding plaintiff pled claim for unjust enrichment where defendant "accepted and benefited from its services but failed to share fees generated"); *Cruz v. McAneney*, 31 A.D.3d 54, 816 N.Y.S.2d 486 (2d Dep't 2006) (holding unjust enrichment claim could be maintained against decedent's representative for retaining a death benefit owed to decedent's domestic partner).

14. Finally, Plaintiffs cite no case in which a plaintiff could recover funds paid to a defendant under a contract with a third party. In both cases Plaintiffs do cite, the plaintiff was a party to the contract raised as a defense. *See Auguston v. Spry*, 282 A.D.2d 630, 723 N.Y.S. 2d 704, 708 (2d Dep't 2001); *Bildstein v. Mastercard Int'l, Inc.*, No. 03 Civ. 98261 (WHP), 2005 WL 1324972, at *5 (S.D.N.Y. June 6, 2005) (Pauley, J.). By contrast, as a stranger to the account agreement between BMIS and JPM, Plaintiffs are precluded from seeking the funds paid pursuant to that contract. *See Am. Med. Ass'n v. United Healthcare Corp.*, No. 00 Civ. 2800(LMM), 2007 WL 683974, at *10-11 (S.D.N.Y. March 5, 2007) (McKenna, J.) (dismissing physicians' unjust enrichment claim against insurance companies based on their reimbursement policies because contracts between insurance companies and patients covered payments under those policies).

Dated: October 28, 2011
New York, New York

Patricia M. Hynes