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

IN RE HERALD, PRIMEO, AND THEMA FUNDS
SECURITIES LITIGATION

This document relates to: Case No. 09 Civ. 289

ECF Case
Master File No. 09 Civ. 0289 (RMB) (HBP)

**REPLY DECLARATION OF JOSEPH SERINO, JR.
IN FURTHER SUPPORT OF HERALD FUND SPC, FRANCO MUGNAI,
AND FRIEDRICH PFEFFER'S MOTION TO DISMISS**

I, Joseph Serino, Jr., declare:

1. I am a member of the bar of this Court and a partner of Kirkland & Ellis LLP, counsel for Defendants Herald Fund SPC, and its two Directors, Franco Mugnai, and Friedrich Pfeffer. I submit this declaration in further support of Defendants' joint motion to dismiss and in reply to Plaintiff's opposition.

2. Herald SPC, Mugnai, and Pfeffer join only the arguments in Defendants' joint reply brief that correspond to the arguments they joined in Defendants' Opening Brief and do not rely upon any other declaration submitted with the reply brief, except for the Bagnall Reply Declaration (but only to the extent applicable to arguments in which Herald SPC, Mugnai, and/or Pfeffer join). By joining those arguments and that declaration, Herald SPC, Mugnai, and Pfeffer do not intend to waive or contradict, and expressly reserve, any positions any of them may have taken or may take in other litigation including, but not limited to, litigation with other Defendants in this action or their affiliates.

3. ***Personal Jurisdiction & Service of Process.*** Plaintiffs' only attempt to tie Herald SPC, Mugnai, or Pfeffer to New York are the bare assertions that Mugnai, an Italian citizen, "signed Herald Fund's BLMIS account opening documents and caused proceeds of Madoff's Ponzi scheme to be both sent to and received from accounts at JPM in New York City," that Mugnai and Pfeffer, a German citizen, knew that Herald SPC would send money to Madoff in New York City, and that Mugnai and Pfeffer's conduct is imputed to Herald SPC. (*See Opp.* at 26-27.) These vague and unsupported allegations are wholly insufficient to sustain personal jurisdiction over Herald SPC, Pfeffer, or Mugnai. Moreover, Plaintiffs' opposition does not address, much less rebut, the fact that Plaintiffs have not effectuated proper service of process over Pfeffer.

4. ***Plaintiffs' Common Law Claims Fail.*** As set forth in Defendants' moving and

reply brief, all common law claims against Herald SPC, Mugnai, and Pfeffer are preempted by SLUSA and also independently fail under both foreign and New York law. (*See* Mot. to Dismiss at 18-20, 22-24, 26-27, 30-33, 34-39; Reply at 9-16, 17-18, 20-27.)

5. ***Plaintiffs' RICO Claims Fail.*** Nothing in Plaintiffs' opposition changes the conclusion that the RICO claims against Herald SPC and Mugnai fail for the reasons set forth in Defendants' moving and reply briefs. (*See* Mot. to Dismiss at 39-45; Reply at 27-30.) In fact, Plaintiffs make no mention of Herald SPC, Mugnai, or Pfeffer (who is not named as a defendant in the RICO counts) when arguing that their RICO claims survive, except to suggest, apparently in an attempt to establish personal jurisdiction, that Mugnai and Pfeffer supposedly knew that Herald SPC was formed with the sole purpose of supplying money to Madoff and that this knowledge can be imputed to Herald SPC. (*See* Opp. pp. 26-27) As a matter of law, these conclusory allegations are insufficient to plead scienter under RICO where, as here, fraud forms the basis of the RICO claim. *See, e.g., MLSMK Investment Company v. JP Morgan Chase & Co.*, 737 F.Supp.2d 137, 142 (S.D.N.Y. 2011) (when a civil RICO claim is grounded in fraud, "the heightened pleading standard" of Rule 9(b) applies); *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 173 (2d Cir. 1999) (explaining that in the RICO context, "plaintiffs must allege facts that give rise to a strong inference of fraudulent intent."); *Morin v. Trupin*, 778 F.Supp. 711, 716 (S.D.N.Y. 1991) ("[A]ll of the concerns that dictate that fraud be pleaded with particularity exist with even greater urgency in civil RICO actions.").

6. ***The Reflective Loss Doctrine Applies to Herald SPC.*** In an attempt to manufacture standing, Plaintiffs argue, incorrectly, that the reflective loss doctrine does not apply to shareholders where the company elects not to pursue claims independently. (*See* Opp. at 104-05.) Even if this were the case, however, Plaintiffs' argument is of no moment, as Herald SPC has in fact actively pursued claims against third parties. In 2009, Herald SPC commenced

an action against the Fund's custodian, HSBC Securities Services (Luxembourg) ("HSSL"), to recover the full value of its assets. That action continues to be actively prosecuted by Herald SPC in Luxembourg courts. Herald SPC also has initiated proceedings against its auditors, Ernst & Young and Ernst & Young S.A., in the Cayman Islands.¹ Furthermore, Herald SPC has filed a SIPA claim in the underlying BLMIS bankruptcy action,² the proceeds of which (together with other recoveries) will be distributed among its stakeholders (including the Herald Plaintiffs) in accordance with Cayman Islands law. The Board of Directors of Herald SPC continues to monitor and consider, with appropriate counsel, the feasibility and merits of additional claims. So this is not a case where a company has refused to pursue obvious legal remedies to the detriment of its underlying stakeholders. Thus, even under Plaintiffs' own interpretation of the reflective loss doctrine, that doctrine applies to Herald SPC and, accordingly, Plaintiffs lack standing to sue Herald SPC.

WHEREFORE, on behalf of Defendants Herald SPC, Mugnai, and Pfeffer, I respectfully request that the Complaint against them be dismissed in its entirety and with prejudice.

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

Executed on October 28, 2011
New York, New York

/s Joseph Serino, Jr.
Joseph Serino, Jr.

¹ Herald SPC's Writ of Summons was issued in December 2009 but, pursuant to a standstill agreement, has not been served upon the defendants. The validity of the Writ of Summons has been extended on a number of occasions by order of the Grand Court of the Cayman Islands. While the Writ of Summons was issued in order to fully protect the interests of Herald SPC and its stakeholders, Herald SPC recognizes that it is not entitled to "double recovery" and does not therefore intend to serve the Writ of Summons and actively prosecute the action until its claim against HSSL is finally resolved. If Herald SPC is wholly successful in its claim against HSSL, it is anticipated that the Writ of Summons would never be served and pursued.

² Herald SPC's position is that this claim properly ought to have been filed by HSSL as the legal account holder. However, HSSL refused to do so, and Herald SPC was therefore forced to file the SIPA claim itself (with full reservations of its rights as against HSSL). Again, this filing was made in order to protect the position of Herald SPC and its stakeholders.