UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re HERALD, PRIMEO and THEMA FUNDS SECURITIES LITIGATION This Document Relates To: 09-cv-289 and 09-cv-2032	Master File No. 09 Civ. 289 (RMB) (HBP)

REPLY DECLARATION OF MARC A. WEINSTEIN IN FURTHER SUPPORT OF THE ERNST & YOUNG DEFENDANTS' MOTION TO DISMISS THE COMPLAINTS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND THE COMPLAINTS

Marc A. Weinstein, pursuant to 28 U.S.C. § 1746, declares under penalty of perjury as follows:

1. I am a member of the Bar of this Court and of the firm Hughes Hubbard & Reed LLP, attorneys for Defendant Ernst & Young Ltd. ("EY Cayman"). I submit this reply declaration in further support of the motions of EY Cayman, Ernst & Young, S.A. ("EY Lux"), and Ernst & Young Global Limited ("EYG") (collectively the "EY Defendants") to dismiss the Complaints.

2. For the reasons set forth in Defendants' Joint Reply Memorandum, Plaintiffs have failed to demonstrate why any of the claims asserted against any of the EY Defendants should not be dismissed. *See* Sections I.B. (*forum non conveniens*), II.A (SLUSA), II.B (Martin Act), II.C (Lack of Standing), II.D (Lack of Duty), II.F (Supervening Cause), II.G (Failure to Plead Vicarious Liability), and III (Failure to State Claims). I submit this reply declaration to address several additional points relating to the EY Defendants that further require dismissal of the claims against them.

3. **Improper Lump Pleading**: In their Complaints, Plaintiffs made no effort to particularize allegations against each of the three EY Defendants. We pointed out this improper pleading tactic in the Moving Brief, and there set out the authority in this Circuit holding that Complaints like Plaintiffs' that lump the EY Defendants together are deficient. (Moving Brief at III(B)(4)). Plaintiffs not only ignore that clear authority, they compound their error by extending the tactic to the opposition brief. Thus, Plaintiffs continue to group the three EY Defendants together indiscriminately, whether or not each particular EY defendant has been named in a particular complaint or count, in arguing, for example, that "there was sufficient privity between E&Y and the shareholders of the Primeo and Herald funds…to support claims for gross negligence, negligence, and misrepresentation under New York law." (Opp'n 48.) However,

those claims were not brought against EY Lux in the Herald Complaint (not to mention that EY Lux, much like EYG, never issued a single audit report at issue and thus made no statements to anyone, much less to any investor).

4. Moreover, in their opposition, Plaintiffs make little to no effort to distinguish the allegations against the EY Defendants from those against all other defendants in the three actions. For example, Plaintiffs reference purported allegations against the "EY Defendants" with respect to claims never asserted against any EY defendant (*see, e.g.*, Opp'n 48 (third-party beneficiary claims)) and defenses not raised by any EY defendant (*see, e.g.*, Opp'n Br. 25 (personal jurisdiction)). Plaintiffs cannot assert new allegations against parties in their opposition by relying on allegations from complaints in which those parties are not named. *Cf. Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998) (allegations that do not appear in the complaint may not enter the case for the first time in opposition papers). Plaintiffs' seeming indifference to the specific claims brought against each EY defendant makes evident the paucity of any allegations against each EY defendant.

5. **Statute of Limitations**: Plaintiffs concede that New York's three-year statute of limitations applies to all claims brought against the EY Defendants. (Opp'n 56.) Plaintiffs attempt to avoid this procedural bar to claims based upon audit reports issued more than three years before suit was filed by baldly asserting that EY Cayman's annual audits for the fiscal years 2003 through 2007 constituted one continuous representation rather than separate annual engagements. (Opp'n 56-57.) Plaintiffs' argument is unavailing.

6. The New York Court of Appeals has made clear that an accountant's standard provision of audit services on an annual basis is insufficient to trigger the "continuing representation" exception to the three-year statute of limitations for malpractice actions.

Williams v. PricewaterhouseCoopers LLP, 9 N.Y.3d 1, 10-11 (2007); *see also ATC Healthcare Inc. v. Goldstein, Golub & Kessler LLP*, 28 Misc. 3d 1237(A), at *3, *5 (N.Y. Sup. Ct. 2010) (finding continuous representation exception inapplicable to annual audits; to do otherwise would "in effect eviscerate the Statute of Limitations for accounting malpractice for the duration of an accountant and his client's relationship").

7. Plaintiffs' reliance on *Symbol Technologies, Inc. v. Deloitte & Touche, LLP*, 69 A.D.3d 191 (2d Dep't 2009) (Opp'n 56-57), is misplaced. In *Symbol Technologies*, plaintiffs alleged that Deloitte continued to provide auditing services in connection with the restatement of prior audits without seeking the execution of new engagement letters, thus making the audit services continuous through the period of restatement. *Id.* at 196. There are no such allegations here. In fact, the Complaints here lack any allegations of a continuous representation, as opposed to separate annual engagements. Similarly, unlike in *Buchwald v. The Renco Group*, 399 B.R. 722, 753-54 (Bankr. S.D.N.Y. 2009), the continuous representation exception does not apply here because the Complaints fail to allege that the malpractice built upon itself or relied on previous year's audits.

8. Because the continuous representation exception does not apply, all claims against the EY Defendants based on audit reports issued prior to March 19, 2006 are time-barred.

9. **Aiding and Abetting:** The EY Defendants fully endorse the arguments made in Part III(B)(4) of the Joint Reply Brief, and in the reply affidavit of Patricia M. Hynes on behalf of JPM demonstrating Plaintiffs' failure to allege any cognizable claim of aiding and abetting under New York law. In addition to those points—which amply support dismissal of Plaintiffs' aiding and abetting claims—it is noteworthy that all such claims have been dismissed against accounting defendants in all the *Madoff*-related decisions. Even *Anwar II* rejected aiding and

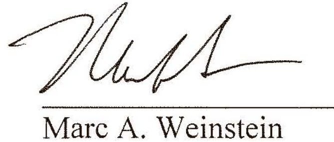
abetting claims against the funds' accountants, finding that the same series of "red flags" Plaintiffs point to here, as well as similar conclusory assertions of "knowledge", failed to meet New York's requirement of establishing "actual knowledge". 728 F. Supp. 2d at 453, 458.

10. Likewise, Plaintiffs' conclusory allegations that the "audit work that the [accounting firm defendants] must have conducted *would* have given it actual knowledge or information that it willfully ignored" (HC ¶ 559), is deficient because it sets forth *no specific facts* that would give rise to an inference that any of the accounting firm defendants had actual knowledge of the fraud. Such allegations that the accounting firm defendants "knowingly or recklessly disregarded . . . 'badges of fraud'" do not demonstrate actual knowledge or recklessness. *Nigerian Nat'l Petroleum Corp. v. Citibank, N.A.*, No. 98 Civ. 4960, 1999 WL 558141, at *7-8 (S.D.N.Y. July 30, 1999). Further, in the cases Plaintiffs rely upon, specific facts were alleged – such as the existence of emails in which the defendant acknowledged likely fraudulent activity, *see, e.g., Pension Committee of the Univ. of Montreal v. Banc of Am. Secs.*, No. 05-Civ-9016, 2007 WL 528703, at *5 (S.D.N.Y. Feb. 20, 2007) – that arguably gave rise to an inference of actual knowledge. Plaintiffs have alleged no such facts here.

11. Plaintiffs have also failed to adequately plead substantial assistance against the EY Defendants. They ignore the First Department's ruling that arms-length audit services do not constitute "substantial assistance", *see CRT Invs. Ltd. v. BDO Seidman, LLP*, 85 A.D.3d 470, 472 (N.Y. App. Div. 2011) ("routine business of auditing" not sufficient basis for substantial assistance), and cite no authority to the contrary. *See also Renner v. Chase Manhattan*, 98-Civ-926, 2000 WL 781081, at *12 (S.D.N.Y. June 16, 2000). Thus, the claims must be dismissed against the EY Defendants.

12. **Foreign Law Applies**: The accompanying foreign law reply declaration of Graham Ritchie (attached hereto as Exhibit A) demonstrates that Plaintiffs' allegations against the EY Defendants remain insufficient under the laws of the Cayman Islands. The EY Defendants also rely upon the reply affidavits of Andre Prum and François Kremer (Luxembourg law) and James Bagnall (Cayman law) to the extent those affidavits address claims asserted against one or more of the EY Defendants.

Executed on October 28, 2011



Marc A. Weinstein