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 DECLARATION OF JAMES C. DUGAN IN SUPPORT OF WILLIAM FRY'S MOTION TO DISMISS ALL CLAIMS ASSERTED AGAINST IT

I, James C. Dugan, declare under penalty of perjury as follows:

1. I am a member of the bar of this Court and a partner with the law firm of Willkie Farr & Gallagher LLP. I make this Reply Declaration in further support of William Fry's Motion to Dismiss all claims asserted against it in this action.

2. In the initial Declaration, William Fry demonstrated that the claims asserted against it – for aiding and abetting breach of fiduciary duty and unjust enrichment – should be dismissed for a host of reasons, including Plaintiff's failure adequately to allege: (i) a primary breach of fiduciary duty; (ii) William Fry's actual knowledge of any such breach; (iii) substantial assistance by William Fry in any such breach; and (iv) that William Fry received anything of value from Plaintiff. In response, Plaintiff resorts to mischaracterizing William Fry's arguments and its own claims in a vain effort to keep this lawsuit alive. As demonstrated below, none of Plaintiff's arguments have merit, and the claims against William Fry should be dismissed.[1]

[1] William Fry joins in the following arguments set forth in the Joint Reply Memorandum of Law In Further Support of All Defendants' Motions to Dismiss and supporting declarations: (i) forum non conveniens, (ii) SLUSA, (iii) Martin Act preemption, (iv) Plaintiff's lack of standing, (v) Plaintiff's inability to bring derivative claims, and (vi) lack of duties owed to Plaintiff. All abbreviations are as in the Initial Declaration of James C. Dugan in Support of William Fry's Motion to Dismiss ("Initial WF Decl.").

3. As an initial matter, Plaintiff's argument that New York, not Irish, law applies to his claims because "there is no genuine conflict between New York law and the law of Ireland," (Opp. Brf. at 29), ignores that a genuine conflict does exist between New York and Irish law with respect to Plaintiff's aiding and abetting breach of fiduciary duty claim since, under Irish law, this claim does not exist. *See Harris v. Provident Life and Acc. Ins. Co.*, 310 F.3d 73, 81 (2d Cir. 2002); *Commerce and Indus. Ins. Co. v. U.S. Bank Nat. Ass'n*, Index No. 07-civ-5731, 2008 WL 4178474, at *5 (S.D.N.Y. Sept. 3, 2008). Because Irish law applies to Plaintiff's common law claims and Irish law does not recognize such a claim, Plaintiff's aiding and abetting claim should be dismissed.

4. Plaintiff also fails to rebut, and therefore concedes, that his aiding and abetting allegations sound in fraud and must satisfy the heightened pleading standards of Fed. R. Civ. Pro. 9(b). (Initial WF Decl. ¶4). Indeed, although Plaintiff argues that "the Thema Plaintiffs do not plead any misstatements or omissions" (Opp. Brf. 76), this is plainly wrong insofar as the aiding and abetting claim against William Fry is premised on the allegation that William Fry drafted "solicitation documents" that "concealed Defendants' dealings with Madoff." (Opp. Brf. 39); (TC ¶ 228).

5. As to whether Plaintiff has adequately alleged that William Fry had actual knowledge of a breach of fiduciary duty by a primary wrongdoer, the best that Plaintiff can do is argue that William Fry "had actual knowledge of numerous breaches of fiduciary duty committed by Defendants" including "the concealment of Madoff as a sole investment advisor," "the minimal due diligence conducted," "Madoff's deficient qualifications," and "the numerous conflicts of interest ignored." (Opp. Brf. 41). But these are exactly the kind of vague and conclusory allegations regarding "red flags" that courts in this district have rejected as

insufficient to support an inference of actual knowledge of wrongdoing. *See MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 737 F. Supp.2d 137, 145 (S.D.N.Y. 2010), *aff'd in relevant part*, No. 10-3040-cv, 2011 WL 2176152 (2d Cir. June 6, 2011); *Stephenson v. PricewaterhouseCoopers LLP*, 768 F. Supp.2d 562, 578 (S.D.N.Y. 2011).

6. The result here should be no different. Indeed, Plaintiff fails to allege with any specificity what William Fry supposedly knew that should have caused it to doubt Madoff's qualifications as an investment adviser or to conclude that, by using Madoff as an investment advisor, Defendants were somehow breaching their fiduciary duties to Plaintiff. Plaintiff's claims therefore fall far short of alleging actual knowledge by William Fry and do not support a claim for aiding and abetting a breach of fiduciary duty.

7. Plaintiff fares no better with his allegation that William Fry "substantially assisted" in Defendants' breaches of fiduciary duty. The crux of Plaintiff's "substantial assistance" allegation is that, if only William Fry had withheld its approval – i.e., stopped Defendants from issuing the allegedly false and misleading prospectuses and annual reports – then Defendants would not have been able to breach their fiduciary duties by using Madoff as an investment manager. *See* TC ¶ 228: "*William Fry's approval* [of Thema's prospectuses and annual reports] *substantially assisted these Defendants' breaches by allowing them to continue to engage in their dealings with Madoff* . . . [had William Fry] *refused to approve* the prospectuses and annual reports, *these Defendants would have likely had to terminate using Madoff* because he would not agree to be Thema's investment manager and custodian if his name was disclosed." (emphasis added). But courts have repeatedly found allegations of this sort to be insufficient to allege "substantial assistance" by a law firm absent additional allegations, lacking here, that the law firm itself owed a fiduciary duty to Plaintiff. *See Eurycleia*

Partners, LP v. Seward & Kissel, LLP, 12 N.Y.3d 553, 562 (N.Y. 2009); *In re Bayou Hedge Funds Inv. Litig.*, 472 F. Supp. 2d 528, 534 (S.D.N.Y. 2007).

8. As to the unjust enrichment claim, Plaintiff fails to point to any allegations in the TC, as he must, that William Fry's fees were paid with Plaintiff's money, that William Fry was not equitably entitled to keep the legal fees it earned for services rendered, or that Plaintiff and William Fry were ever parties to a contractual or quasi-contractual relationship. (Initial WF Decl. ¶¶ 10, 11). As demonstrated in the Initial WF Decl., these deficiencies are fatal to Plaintiff's unjust enrichment claim. *See Bazak Int'l Corp. v. Tarrant Apparel Grp.*, 347 F. Supp. 2d 1, 4 (S.D.N.Y. 2004); *Bayou*, 472 F. Supp. 2d at 532; (Sanfey Decl. ¶ 17.2.)

October 28, 2011 in New York, NY.

James C. Dugan