SULLIVAN & WORCESTER LLP
Franklin B. Velie
Jonathan G. Kortmansky
Mitchell C. Stein
1290 Avenue of the Americas
New York, New York 10104
Telephone: (212) 660-3000
Facsimile: (212) 660-3001

Attorneys for Defendant
UniCredit Bank Austria AG

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re HERALD, PRIMEO and THEMA FUNDS SECURITIES LITIGATION,	:	Civil Action No. 09 CIV 289 (RMB) (HBP) (Consolidated with 09 CIV 2032 and 09 CIV 2558)
This Document Relates To:	:	**ECF CASE**
ALL ACTIONS.	:	

REPLY DECLARATION OF FRANKLIN B. VELIE IN SUPPORT OF MOTION TO DISMISS CLAIMS AGAINST DEFENDANT UNICREDIT BANK AUSTRIA AG

FRANKLIN B. VELIE, pursuant to 28 U.S.C. §1746, declares:

1. In my declaration dated June 29, 2001 ("FBV Dec."), UniCredit Bank Austria AG ("BA") showed the pleadings against it allege only provision of ordinary banking and financial services. (FBV Dec. ¶3). Plaintiffs' opposition brief ("Opp. Br.") identifies only the following paragraphs beyond those discussed in the FBV Dec: Primeo Complaint ("P.") ¶26; Herald Complaint ("H.") ¶¶2, 31, 54, 228, 235-36, 248, 365. None of them allege anything other than ordinary banking services. As in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), the allegations are consistent with lawful conduct and fail to state any plausible claims against BA.

2. **Plaintiffs lack standing to sue BA.** In the FBV Dec. ¶¶3-4, BA showed that the Herald and Primeo Plaintiffs fail to allege they purchased their shares before BA's role with respect to the funds ended in April, 2007. Plaintiffs do not deny this, and concede that BA's alleged conduct was not the direct cause of their injuries. *See* Opp. Br. at 89. Plaintiffs have not pointed to a single allegation showing that BA "constrained or influenced the decision of the final actor in the chain of causation" to the extent required to show indirect injury, *see Carver v. City of New York*, 621 F.3d 221, 226 (2d Cir. 2010), nor have they identified the purported "final actor" who allegedly caused their injuries. Where, as here, "speculative inferences are necessary to connect [Plaintiffs'] injury" to BA's alleged conduct, *see Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 45 (1976), there is no standing to sue BA.

3. **The Herald Plaintiffs fail to state a RICO claim.** In the FBV Dec. ¶5, BA showed that the RICO claim should be dismissed because the allegations fail to show that BA: (1) conducted or participated in the affairs of the alleged enterprise, (2) managed or controlled the alleged enterprise, (3) had the requisite *scienter* or committed predicate acts, (4) engaged in a continuous pattern of racketeering, or (5) caused the alleged RICO injuries. The Herald Plaintiffs'

conclusory claim that they have "abundantly pled" *scienter* and causation (*see* Opp. Br. 94-96) is belied by the utter lack of particularized facts showing BA's *scienter*. The only allegation relating to BA's knowledge is that BA knew about "Madoff and the consistent returns that he generated for the accounts." (H. ¶228).[1] Further, Plaintiffs concede that BA's conduct was "not the very last step in the chain of causation." (Opp. Br. at 89), and therefore fail the RICO causation test set forth in *Hemi Group v. City of New York*, 130 S.Ct. 983, 989 (2010).

4. With respect to management and control and continuity of the enterprise, Plaintiffs improperly lump together BA and other defendants without identifying allegations that demonstrate BA managed or controlled the enterprise, or how BA's conduct satisfied RICO's continuity requirements. (Opp. Br. p. 97). The allegations, at best, show that BA provided services in support of the alleged enterprise, which does not constitute management and control, even if BA knew of the fraud (which it did not).[2] Plaintiffs have not refuted BA's argument that BA's three alleged predicate acts do not meet RICO's continuity requirements (FBV Dec. ¶5).

5. Plaintiffs' argument in Opp. Br. p. 97, fn.52 that BA can be held vicariously liable as an "aggressor corporation" misconstrues the pleadings and applicable law. Where, as here, Plaintiffs fail to allege any predicate acts by BA employees, vicarious liability does not attach.[3] Nor do Plaintiffs allege facts demonstrating that BA executives knew of or were recklessly

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[1] Each of the predicate acts alleged against BA require *scienter*. *See* FBV Dec. ¶4, Br. at 43-44. Plaintiffs have failed to allege the additional required elements of each individual predicate act.

[2] *Dep't of Econ. Dev. v. Arthur Anderson & Co. (USA)*, 924 F. Supp. 449, 467 (S.D.N.Y. 1996); *Indus. Bank of Latvia v. Baltic Financial Corp.*, 1994 WL 286162 at *3 (S.D.N.Y. June 27, 1994); *Madanes v. Madanes*, 981 F. Supp. 241, 256-257 (S.D.N.Y. 1997); *see also* Br. pp. 43-44.

[3] *Lutin v. New Jersey Steel Corp.*, 1996 WL 636037, at *12 (S.D.N.Y. Nov. 1, 1996).

indifferent to the illegal activity of the purported enterprise. *USA Certified Merchants v. Koebel*, 262 F. Supp. 2d 319, 328 (S.D.N.Y. 2003).

6. **The Herald Plaintiffs fail to state a claim for RICO conspiracy**. In the FBV Dec. ¶6, BA showed that the Herald complaint fails to allege that BA knew of or agreed to participate in any illegal conspiracy. Plaintiffs do not rebut, and thus concede, this point. The Herald pleading confirms that Madoff's alleged unlawful agreement with Kohn was secret. (H. ¶¶173-179).

7. **Plaintiffs' common law claims against BA should be dismissed.** In the FBV Dec. ¶¶7-11, BA showed that all common law claims against it should be dismissed. Plaintiffs do not deny they purchased securities only after BA was no longer involved with the funds (Opp. Br. p. 89). BA therefore owed no duty to Plaintiffs, nor could BA have caused Plaintiffs' alleged harm.[4] Plaintiffs' "aiding and abetting claims" against BA must fail because Plaintiffs do not allege that BA had "actual knowledge" of Madoff's fraudulent activity (Defendants' Reply Brief ("Rep. Br.") pp. 23-25), nor do Plaintiffs allege specific acts by BA that amount to providing "substantial assistance" to Madoff.[5] Plaintiffs do not rebut BA's arguments with respect to the "aiding and abetting conversion" claims, but instead attempt to rebut arguments raised by other

[4] *See, e.g.*, *MLSMK Investments Co. v. JP Morgan Chase & Co.*, 737 F. Supp. 2d 137, 146 (S.D.N.Y. 2010), *aff'd in part*, No. 10-3040-cv, *MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 2011 WL 2176152 (2d Cir. June 6, 2011).

[5] Plaintiffs' only allegations that identify any "assistance" by BA are that BA "generated misleading Primeo marketing materials" or participated in other activities to market and distribute the Primeo and Herald Funds. See, e.g., HC ¶¶ 231, 269, 270. Plaintiffs do not specify any "materials" in particular and fail to explain how these materials were "misleading" or fraudulent. Such allegations fall far short of the requirements of Rule 9(b). *See Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 446 F. Supp. 2d 163, 184 (S.D.N.Y. 2006).

defendants. See Opp. Br. 54-56. The remaining common law claims are foreclosed for the reasons set forth in the FBV Dec. ¶¶7-11.[6]

8. **This Court lacks personal jurisdiction over BA**. In the FBV Dec. ¶¶12-13, BA showed that this Court should dismiss the Primeo and Herald actions against BA for lack of personal jurisdiction, and dismiss the Herald action for failure to serve the summons and complaint. The Herald Plaintiffs do not deny, and therefore concede, they have failed to serve BA without good cause. Plaintiffs' response to BA's personal jurisdiction arguments fails to explain how Plaintiffs' claims "arise out of" the contacts Plaintiff identify for BA, namely a former BA branch office in NY (H. ¶62), trips to NY to meet with Madoff (H. ¶¶120, 334) and the opening of BA accounts at BLMIS and transfers in and out of those accounts (P. ¶34). Nor do such contacts create general jurisdiction over BA. Plaintiffs allege no facts showing the BA branch, which closed in 1996, was an agent or "mere department" of BA (Reply Br. at p. 1). Nor do plaintiffs refute BA's argument that a former branch cannot create jurisdiction (FBV Dec. ¶12). Likewise, occasional trips to New York and the transfer of money through New York accounts are insufficient to establish a "continuous and systematic course of doing business" in New York as required by CPLR 301. *See Landoil Res. Corp. v. Alexander & Alexander Servs., Inc.*, 918 F.2d 1039, 1045-1046 (2d Cir. 1990).

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

Dated: New York, New York
October 28, 2011

/s/ Franklin B. Velie
Franklin B. Velie

[6] Plaintiffs allege a conspiracy "in connection" with aiding and abetting fraud. *See* Opp. Br. at 42 n.25. The conspiracy claim thus is subject to Rule 9(b) pleading requirements, which are not satisfied by Plaintiffs' vague allegations that "Defendants" entered into a "common understanding and agreement." *See* H. ¶647. Absent an actionable aiding and abetting claim against BA, Plaintiffs' civil conspiracy claim upon which it is based also must be dismissed.