

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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 IN RE HERALD, PRIMEO AND THEMA : Master File No. 09 Civ. 289
 FUNDS SECURITIES LITIGATION : (RMB) (HBP)
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 This Document Relates to: All Actions : ECF Case
 : Electronically Filed
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**SUPPLEMENTAL ATTORNEY DECLARATION OF ANTONY L. RYAN
IN FURTHER SUPPORT OF THE PWC DEFENDANTS' MOTION TO DISMISS**

I, ANTONY L. RYAN, under penalty of perjury, declare the following:

1. I am a member of the firm of Cravath, Swaine & Moore LLP, counsel for PwC Ireland. I have coordinated this declaration with counsel for PwC U.S., PwC Bermuda and PwCIL, and submit this supplemental declaration in further support of the motions to dismiss by each of the four PwC Defendants in the Thema-related action, *Davis v. Benbassat*.

2. Plaintiff conflates the PwC Defendants and ignores the fact that PwC Ireland, PwC U.S., PwC Bermuda and PwCIL are each separate legal entities. Only PwC Ireland was engaged by the Thema Fund to audit its annual financial statements, and PwC Ireland did so in Ireland. PwC U.S., PwC Bermuda and PwCIL were not retained by the Thema Fund, and did not issue reports on Thema's financial statements.

3. Plaintiff does not respond to many of the points in my previous declaration.

Personal Jurisdiction and Venue

4. PwC Ireland moved to dismiss under Fed. R. Civ. P. 12(b)(2) and submitted a declaration from its partner Vincent MacMahon establishing that there is no general jurisdiction over PwC Ireland in New York (MacMahon Decl. ¶¶ 9-15) and a declaration from its partner Anthony Weldon establishing that PwC Ireland did not engage in conduct giving rise to specific jurisdiction (Weldon Decl. ¶¶ 5-7). Plaintiff fails to address those declarations at all.

5. Where PwC Ireland has submitted factual declarations directly contradicting Plaintiff's unsupported jurisdictional allegations, and Plaintiff has failed to come forward with support, the allegations "may be deemed refuted". *GCG Int'l*, 2005 WL 2647942, at *2. That is particularly true where Plaintiff's allegation that PwC Ireland "traveled to New York to meet with Madoff" is made "[u]pon information and belief" (TC ¶ 241) and, as Magistrate Judge Pitman found, Plaintiff "[did] not serve[] any discovery requests aimed at the specific factual averments" in the PwC Ireland declarations (Order dated Sept. 8, 2011 [Dkt. No. 313], at 3).

6. Plaintiff's allegation that PwC Ireland "traveled to New York to meet with Madoff" (TC ¶ 241) is contradicted flatly by Anthony Weldon, who attests that no one from PwC Ireland visited the U.S. in connection with the Thema audits. (Weldon Decl. ¶ 5.) Similarly, Mr. Weldon contradicts Plaintiff's allegations that PwC U.S. and PwC Bermuda acted as agents for PwC Ireland or met with Madoff in connection with the Thema audits. (*Id.* ¶ 6.) Plaintiff's vague allegation of "substantial contacts with the United States" through "regular visits and receipts of payments" is not only rebutted by PwC Ireland's declarations (MacMahon Decl. ¶¶ 9-15) but, even if true, would be insufficient to establish a "continuous and systematic course of doing business" in New York. *See Overseas Media*, 407 F. Supp. 2d at 569.

7. Accordingly, Plaintiff fails to make a *prima facie* showing that PwC Ireland has sufficient contacts with New York to support general or specific jurisdiction over PwC Ireland. Based on nearly identical allegations as here, another district court held that PwC Ireland is not subject to personal jurisdiction in New York. *Banco Santander*, 732 F. Supp. 2d at 1326-29.

8. Plaintiff makes no response to the showing in paragraph 7 of my initial declaration that the derivative claims against PwC Ireland should be dismissed to enforce a mandatory forum selection provision (the provision is at Dkt. No. 264-6, at 8).

Forum Non Conveniens

9. All of the PwC Defendants move to dismiss for *forum non conveniens*. Plaintiff fails to address the dismissal of a substantially similar action against the PwC Defendants on *forum non conveniens* grounds in *Banco Santander*, 732 F. Supp. 2d at 1329-44, affirmed by the Eleventh Circuit on appeal, 2011 WL 3823284. Yet in support of the proposed settlement with HSBC, Plaintiff highlighted the risk of *forum non conveniens* dismissal in this action, and acknowledged the similarity of *Banco Santander*. (Dkt. No. 235, at 10.) The Thema Action

should be dismissed in favor of Ireland, where an action by the Thema Fund, and numerous actions by Fund investors, are proceeding under the supervision of Justice Clarke.

Failure To State a Claim Under Irish Law

10. The PwC Defendants also move to dismiss under Fed. R. Civ. P. 12(b)(6), under both Irish and New York law. Plaintiff argues only under New York law, and does not respond to the opinions in the Sanfey Declaration (Dkt. Nos. 274-1–274-3) regarding the results under Irish law. Accordingly, if the Court decides to apply Irish law, the claims against the PwC Defendants should be dismissed for the reasons set forth in my initial declaration, based on Irish law as set out by Mr. Sanfey at ¶¶ 15.1–17.2. In particular, (a) the negligence-based claims fails for lack of proximity under *Caparo*; (b) the unjust enrichment claim fails because PwC Ireland’s contract was with the Thema Fund; (c) Irish law does not recognize causes of action for gross negligence or aiding and abetting; and (d) the purported derivative claims are barred by *Foss v. Harbottle*.

Failure To State a Claim Under New York Law

11. On the negligence-based claims (Counts 1–4, 9–10), Plaintiff, despite contending that New York law governs, ignores the recent controlling precedent from the New York courts applying the *Credit Alliance* test which requires dismissal here. *See Sykes*, 938 N.E.2d 325 (N.Y. 2010); *CRT*, 925 N.Y.S.2d 439 (1st Dep’t 2011). Contrary to Plaintiff’s contention, the facts that PwC Ireland’s audit reports were addressed to Thema Fund shareholders and were made available to shareholders by Thema (*see* TC, Ex. 2 at 2, 19, Dkt. No. 193-8), are legally insufficient to establish near privity. *See CRT*, 925 N.Y.S.2d at 441; *Saltz*, 782 F. Supp. 2d at 83-84. Moreover, there is no allegation, as required by *Sykes*, nor could there be, that PwC Ireland knew which shareholders, if any, would rely on its audit reports, or that PwC Ireland’s audits were conducted for the purpose of a specific, known transaction. *See Sykes*, 938 N.E.2d at

326-27; *Security Pacific*, 597 N.E.2d at 1084; *Credit Alliance*, 483 N.E.2d at 119. Plaintiff does not (and cannot) allege that he ever communicated with PwC Ireland or was specifically identified to PwC Ireland. *See id.* The cases on which Plaintiff relies, *Anwar II* and *Cromer* (Opp’n 52-54, 57-58), are at odds with the controlling precedent from the New York Court of Appeals in *Sykes*. As another court in this District recently held in a Madoff fund case, allegations that the plaintiffs “receive[d] annual and quarterly financial statements” and that the auditors knew that “audited and other financial reports would be provided to the Fund’s Members and potential investors in the Fund and would be relied on by them in making investment decisions concerning the Funds” are insufficient to establish “near privity” under New York law. *Saltz*, 782 F. Supp. 2d at 84.

12. PwC U.S., PwC Bermuda and PwCIL were not auditors of Thema, and therefore did not have a duty to the Thema Fund itself, let alone the Thema shareholders generally or Plaintiff here. The grounds for dismissal of the negligence-based claims against PwC Ireland apply with added force to the attenuated claims against PwC U.S., PwC Bermuda and PwCIL.

13. Plaintiff fails to state a claim for unjust enrichment against the PwC Defendants (Count 19) because (1) Plaintiff does not allege that he directly conferred a benefit on PwC Ireland, as the Thema Fund paid the audit fees, which were fixed and unrelated to shareholder payments to the Fund (unlike in Plaintiff’s cases, *see* Opp’n 59, which involved payments to an intermediary that triggered additional benefit to the defendants); and (2) the contract between the Thema Fund and PwC Ireland (the existence of which is undisputed) provides an adequate remedy at law. As for PwC U.S., PwC Bermuda and PwCIL, those parties never received a payment from Plaintiff *or* the Thema Fund, and Plaintiff does not allege otherwise.

14. Plaintiff fails to state a claim for aiding and abetting breach of fiduciary duty (Count 15), and the cause of action of aiding and abetting a third party’s negligence (Counts 11–

12) does not exist under New York law. *See Bayou Hedge Funds*, 472 F. Supp. 2d at 532.

Plaintiff does not deny that actual knowledge of the existence of the fiduciary duties and of their breach is required, and relies upon cases on aiding and abetting fraud for the proposition that “actual knowledge need only be pleaded generally”. (Opp’n 58-59.) Yet Plaintiff does not identify any such allegations in the Complaint—specific or general—as to the PwC Defendants. Moreover, Plaintiff does not address the substantial assistance or loss causation requirements for this tort, neither of which is pleaded against the PwC Defendants. That is all the more true for PwC U.S., PwC Bermuda and PwCIL, who did not issue any audit opinions.

15. Plaintiff’s attempt to hold PwCIL vicariously liable for the actions of the PwC member firms fails because Plaintiff has not alleged that PwCIL controlled the PwC member firms with respect to the Thema audits. *See, e.g., Star Energy*, 2008 WL 5110919, at *5; *Nuevo Mundo*, 2004 WL112948, at *5. Plaintiff concedes (Opp’n 63) that he does not plead that PwCIL was involved in the Thema audits. Plaintiff relies heavily on the *Anwar* decisions for other points, yet fails to address *Anwar*’s dismissal of the claims against PwCIL based on generalized allegations of control like those here. *Anwar*, 728 F. Supp. 2d at 459.

16. Attached as Exhibit 1 hereto is a true and correct copy of the Supplemental Declaration of Mark Sanfey dated October 28, 2011.



Antony L. Ryan