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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: HERALD, PRIMEO AND THEMA FUNDS SECURITIES LITIGATION	Master File No.: No. 09 Civ. 289 (RMB)
This Document Relates To: No. 09 Civ. 2558 (RMB)	

DECLARATION OF LEWIS J. LIMAN IN FURTHER SUPPORT OF THE BANK OF NEW YORK MELLON CORPORATION'S MOTION TO DISMISS THE *THEMA* COMPLAINT

I, Lewis J. Liman, declare as follows:

1. I am a member of the Bar of this Court and a member of the firm of Cleary Gottlieb Steen & Hamilton LLP, counsel for The Bank of New York Mellon Corporation ("BNY Mellon"). I submit this declaration in further support of BNY Mellon's motion to dismiss the four claims asserted against it in Davis v. Benbassat et al., No. 09 Civ. 2558 (RMB), for aiding and abetting gross negligence and negligence (Count 11); aiding and abetting various defendants' breaches of fiduciary duties (Count 15); unjust enrichment (Count 19); and derivatively, for aiding and abetting gross negligence and negligence (Count 12). I make this declaration based solely on my review of the allegations in Plaintiff's Second Amended Complaint in the Thema-related action ("TC"), Plaintiff's Joint Opposition ("Opp'n") and applicable law, and do not purport to offer evidence on any subject.

2. In addition to the arguments previously adopted, BNY Mellon adopts the arguments set forth in Sections II(A), (B), (C), (F), and III(B) of the Reply Memorandum of Law.

3. Plaintiff does not respond to the substance of BNY Mellon's argument. Notably, in his Opposition, Plaintiff does not identify a single allegation that BNY Mellon provided

any services to or had any business dealings whatsoever with any other defendants in this case. (Liman Decl.[1] ¶ 3-4.) Nor does Plaintiff's Opposition dispute that he had no contact with BNY Mellon whatsoever. To the contrary, he does not dispute that his entire case against BNY Mellon is predicated solely on the fact that BLMIS (of which he was not a customer, Securities Investor Protection Corp. v. Bernard L. Madoff Inv. Secs. LLC, 454 B.R. 285, 295 (Bankr. S.D.N.Y. 2011) (holding that investors in "feeder funds" are not BLMIS customers)), kept certain of its operating funds in an account at BNY Mellon. (See Opp'n at 6 n. 2 ("BNY Mellon, is named in the Thema Complaint for its misconduct in connection with accounts maintained by BLMIS.").)

4. Except generally in respect of all defendants, Plaintiff does not respond to the arguments in my June 29, 2011 Declaration that (i) his claims are barred by the Martin Act, (ii) his class claims (Counts 11, 15 and 19) are preempted by SLUSA, and (iii) he lacks standing to assert derivative claims against BNY Mellon (Count 15).

5. Plaintiff ignores entirely BNY Mellon's argument that it was not unjustly enriched, identifying nothing that BNY Mellon ever received from him and offering no explanation of why any supposed "enrichment" was "unjust" (Count 19). (See Liman Decl. ¶ 12.)

6. In response to BNY Mellon's arguments in respect of Plaintiff's aiding and abetting claims, Plaintiff does not deny that he does not allege that BNY Mellon had any knowledge, much less the requisite "actual knowledge," of the underlying conduct at issue in this case – indeed, Plaintiff does not refute that his Complaint fails to allege BNY Mellon's knowledge that the Thema Fund even existed. (Liman Decl. Ex. 10.) Rather, Plaintiff concedes that the failure to plead actual knowledge is fatal to any aiding and abetting claim. (Opp'n at 32 n. 19 ("[T]he aider must have actual knowledge that he is aiding.").) Nor does Plaintiff dispute that the only conduct that BNY Mellon is accused of committing – permitting BLMIS to have a depository bank account – does not

[1] "Liman Decl." refers to my Declaration of June 29, 2011.

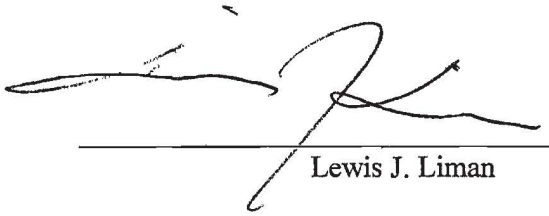
constitute the required "substantial assistance" as a matter of law. (See Liman Decl. ¶ 12.) That is independently fatal to Counts 11, 12, 15 and 19.

7. The only argument that Plaintiff even addresses is that there is no such tort as aiding and abetting negligence, because aiding and abetting is by definition a knowing violation. (Liman Decl. ¶ 9; Opp'n at 32 n.19.) In light of Plaintiff's failure to otherwise respond to BNY Mellon's arguments, his argument that aiding and abetting negligence is a cognizable cause of action is irrelevant. However, Plaintiff is also wrong on the law. Indeed, he does not distinguish the authority cited by BNY Mellon from this district and circuit. See United Nat. Ins. Co. v. Tunnel, Inc., 988 F.2d 351, 353 (2d Cir. 1993); In re Bayou Hedge Funds Inv. Litig., 472 F. Supp. 2d 528, 532 (S.D.N.Y. 2007). Instead, Plaintiff mischaracterizes the two New York cases that he cites, each of which involved intentional (rather than negligent) underlying violations.[2] To the extent it supports his argument at all, the other authority on which Plaintiff relies, decentially out-of-date authority from other states – reflects a minority rule not followed in this state, as Judge McMahon recognized in In re Bayou, 472 F. Supp. 2d at 532 ("Few states recognize aiding and abetting liability predicated on a third party's negligence.").

8. Accordingly, for the reasons stated herein, in my Declaration of June 29, 2011, in the Joint Memorandum of Law, and in the Joint Reply Memorandum of Law, the claims against BNY Mellon should be dismissed.

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

Dated: October 28, 2011
New York, New York



Lewis J. Liman

[2] Lindsay v. Lockwood, 625 N.Y.S.2d 393, 397 (N.Y. Sup. Ct. 1994), was not a case of negligence, as the court in that case observed, id. at 396 ("However it may be disguised, the real issue here is intentional rather than negligent conduct."). Likewise, Herman v. Westgate, 464 N.Y.S.2d 315, 316 (N.Y. App. Div. 1983), involved intentional conduct – the primary violator was accused of purposely throwing the plaintiff off a barge. Id. at 316.