

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

IN RE HERALD, PRIMEO AND THEMA  
FUNDS SECURITIES LITIGATION

This documents relates to: All Actions

ECF CASE

Civil Action No. 09 Civ. 0289 (RMB)  
(Consolidated with Nos. 09 Civ. 2032 and  
09 Civ. 2558)

**ATTORNEY DECLARATION OF EVAN A. DAVIS IN SUPPORT OF THE HSBC  
DEFENDANTS' REPLY IN FURTHER SUPPORT OF THE MOTION TO DISMISS**

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("Holdings"), HSBC Securities Services  
(Luxembourg) S.A., Bank of Bermuda (Luxembourg)  
S.A. ("HSSL"), Bank of Bermuda (Cayman) Limited,  
The Bank of Bermuda Limited, HSBC Institutional  
Trust Services (Ireland) Ltd. ("HTIE"), and HSBC  
Securities Services (Ireland) Limited ("HSSI"), and  
Proposed Defendant HSBC Bank USA, N.A.  
("HBUS") (together, "HSBC" or the "HSBC  
Defendants")

I, Evan A. Davis, declare under penalty of perjury as follows:

1. I am a member of the bar of this Court and a partner at Cleary Gottlieb Steen & Hamilton LLP, counsel for the HSBC Defendants. I respectfully submit this Declaration as a supplement to the Joint Reply in support of HSBC's motion to dismiss.

2. Plaintiffs' Opposition fails to show that they have alleged a factual basis for personal jurisdiction over Holdings. Plaintiffs point to the New York offices of HBUS, a defendant proposed to be added by amendment, Pls.' Opp. at 24, and an entity that would not challenge jurisdiction, but this is irrelevant to jurisdiction over Holdings because Plaintiffs have not alleged a basis to justify disregarding HBUS' and Holdings' separate and independent legal existences. Joint Br. at 9-10. Plaintiffs' repetition of generalized and conclusory allegations that "HSBC Defendants" wired funds to BLMIS and that an "HSBC representative met with Madoff[.]" Pls.' Opp. at 24, is insufficient unless those allegations address what Holdings specifically did, which they do not. Plaintiffs' allegation that Brian Pettitt, the "HSBC Representative" alleged to have met with Madoff held that meeting as the representative of the holding company of a global financial institution is implausible on its face and is directly refuted by specific evidence in the D'Aubney declaration, as is the allegation of wiring funds. D'Aubney Decl. at ¶ 4 ("To the best of my knowledge, HSBC Holdings did not transact business in New York . . . in connection with any of the matters referenced in Plaintiffs' Complaints, including wire transfers related to or for the benefit of the Herald Funds, the Primeo Fund or the Thema Fund. Equally, no one from HSBC Holdings has had any contact with New York relating to any of the matters alleged in Plaintiffs' Complaints. . . . Brian Pettitt is not and never was a representative or employee of HSBC Holdings[.]").

3. Plaintiffs likewise provide no basis to impute the conduct of other separate and independent HSBC entities to Holdings, because their bare and conclusory allegations of control,

HC at ¶ 39; PC at ¶ 46; TC at ¶ 41, fail to establish a plausible factual predicate for the required agency or alter ego relationship. Joint Br. at 29; *see also IMG Fragrance Brands, LLC v. Houbigant, Inc.*, 679 F.Supp.2d 395, 403-04 (S.D.N.Y. 2009) (a parent can be held liable for a subsidiary's breach of contract if plaintiff can show that the parent exercised complete domination of the subsidiary in respect to the transaction attacked); *JHW Greentree Capital, L.P. v. Whittier Trust Co.*, No. 05 Civ. 2985 HB 2005 WL 3008452, at \*5 (S.D.N.Y. Nov. 10, 2005) (to bind parent, plaintiffs must show subsidiary was delegated authority).

4. As to the exculpatory language in the Primeo and Herald SPC Offering Memoranda on which HSBC relies, Joint Br. at 27, Plaintiffs concede that the language “purports to protect the [funds’] administrators and custodians[.]” Pls.’ Opp at 89. The relevant language plainly allocates to investors the risk of “any loss arising as a result of an investment in [a managed] account[.]” Prüm Decl. at ¶¶ 59-61, unless (for Herald SPC only) the loss is caused by the Investment Manager or Investment Advisor(s)’s “fraud, gross negligence or willful default,” in which case those entities (not the administrator or custodian) would bear such risk.

5. At the outset of their Opposition, Plaintiffs devote much rhetoric to HSBC’s engagement of KPMG to conduct reviews of fraud and operational risks at BMIS. Pls.’ Opp. at 4-6. They fail to explain or attach legal significance to these engagements, which are not addressed or mentioned again in the remaining 95 pages of the Opposition. It seems no more than a chance to mischaracterize the KPMG engagements in a highly misleading way by suggesting that KPMG reported indicia that Madoff might be engaged in fraud. Pls.’ Opp. at 5 (“Chillingly, despite KPMG’s detailed review of Madoff’s fraud, the HSBC Defendants forged ahead in their complicity with Madoff[.]”). To the contrary, as shown in U.S. Department of Justice and U.S. Securities and Exchange Commission pleadings, KPMG’s failure to uncover any indicia of Madoff’s fraud occurred because its review and testing of BMIS accounts for,

among other things, sham transactions was foiled by BLMIS' provision of falsified documents, including documents purporting to tie Madoff's records to external Depository Trust Company reports.<sup>1</sup>

6. Contrary to Plaintiffs' assertion, Pls.' Opp. at 17, the important witnesses with regard to the conduct of the Ireland and Luxembourg domiciled HSBC Defendants are their present and former employees who are obviously largely located overseas. Herald SPC, for example, has identified such current and former HSSL employees as witnesses in its action against HSSL in Luxembourg. HSSI and HTIE have also identified witnesses with knowledge of relevant facts in the administration and custody of the Thema Fund. Supp. Mem. Ex. B, Potential Witness List, Dkt. No. 75-2, *In re Banco Santander Secs. – Optimal Litig.*, No. 09-MD-02073 (S.D. Fla. filed Mar. 15, 2010) (dismissed on *forum non conveniens* grounds), including former employees.

7. The HSBC Defendants rely on the supplemental foreign law declarations submitted in reply to Plaintiffs' Opposition, except those paragraphs of the supplemental declaration of Mark Sanfey relating to the enforceability of a class action judgment in Ireland.

8. Annexed hereto are true and correct copies of the following documents:

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| <b>Exhibit 1</b> | Supplemental Declaration of André Prüm, dated October 27, 2011 |
| <b>Exhibit 2</b> | Declaration of François Kremer, dated October 27, 2011         |

Executed on October 28, 2011, at New York, New York.

  
EVAN A. DAVIS

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<sup>1</sup> See, e.g., Information filed in *United States v. DiPascali, Jr.*, 09 Cr. 764 (RJS) (S.D.N.Y. filed Aug. 11, 2009), available at <http://www.justice.gov/usao/nys/depascali.html>; Indictment filed in *United States v. Bonventre*, 10 Cr. 228 (LTS) (S.D.N.Y. filed Nov. 18, 2010); available at <http://www.justice.gov/usao/nys/oharaperez.html>; Complaint filed in *Secs. & Exch. Comm'n v. Bonventre*, 10 Civ. 1576 (LLS) (S.D.N.Y. filed Feb. 25, 2010), available at [www.sec.gov/litigation/complaints/2010/comp21424.pdf](http://www.sec.gov/litigation/complaints/2010/comp21424.pdf).