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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE HERALD, PRIMEO and THEMA FUNDS
SECURITIES LITIGATION

This Document Relates To: 09 Civ. 289 and 09 Civ.
2032

MASTER FILE
09 Civ. 289 (RMB) (HBP)

ECF Case

**DECLARATION OF MARIA A. BARTON IN SUPPORT
OF DEFENDANTS' REPLY MEMORANDUM OF LAW**

I, MARIA A. BARTON, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746:

1. I am a member of the Bar of this Court and of counsel at the firm of Latham & Watkins LLP. I submit this declaration in support of the Primeo and Herald SPC Director Defendants' Reply Memorandum of Law.

2. Plaintiffs provide no basis for including the Primeo and Herald SPC Director Defendants ("Director Defendants") in this far-flung litigation. Instead, the Opposition largely ignores the foreign Director Defendants, citing no grounds to establish this Court's jurisdiction or their liability, other than by attributing to them the New York contacts and conduct of other defendants. (Opp'n 27.) Plaintiffs' claims fail under both Cayman and New York law.

3. **Personal Jurisdiction.** Plaintiffs do not dispute black letter law that jurisdiction cannot be exercised over the Director Defendants simply by virtue of their status as board members or the Funds' contacts with New York, absent evidence that the Funds acted "as the agent of the [directors]." (Mov. Br. 6-7.) Nonetheless, Plaintiffs neither attempt to meet that standard nor identify even a *single* New York contact for Fielding, Kaniak, La Rocca, Murray, Saleta, Simon, Spalek, Tiefenbacher, or Wheaton. With respect to Radel-Leszczyński, Plaintiffs do not address the clear case law establishing that her alleged sporadic correspondence and meetings in New York do not constitute "doing business" in this state. (Mov. Br. 5.) Nor do Plaintiffs explain how such conduct establishes specific jurisdiction where "[t]elephone calls and correspondence sent into New York" and meetings that were "not essential to the development...of the relationship" do not constitute "transacting business" in New York, particularly where Plaintiffs' claims do not arise directly from the alleged conduct. (Reply Br. 2; Mov. Br. 5-6.)¹

¹ Plaintiffs do not (and cannot) allege that their claims that Director Defendants failed to exercise due care in selecting and monitoring the Funds' investment managers arose from Radel-

4. Plaintiffs' Claims Are Barred or Not Recognized Under Cayman Law.² Plaintiffs' Cayman expert does not dispute that claims for gross negligence or aiding and abetting conversion, breach of fiduciary duty and fraud are not recognized under Cayman law. Lowe Decl. ¶ 51; Bagnall Decl. ¶¶ 92, 105, 107. Further, the reflective loss principle bars claims based not on the cause of action alleged (Lowe Decl. ¶ 48) but rather on the loss suffered. Bagnall Reply Decl. ¶ 23. Accordingly, because Plaintiffs seek to recover losses equivalent to losses sustained by the Funds themselves (Bagnall Reply Decl. ¶ 25), Plaintiffs state no claims for breach of fiduciary duty, negligence, unjust enrichment, constructive trust, negligent misrepresentation, and fraud.³ See Bagnall Decl. ¶¶ 52, 58, 65, 67, 77, 83, 94, 97; Bagnall Reply Decl. ¶¶ 5-30. Plaintiffs' breach of contract claims fail because the Director Defendants did not sign the relevant Subscription Agreements. Bagnall Decl. ¶ 69. Finally, Plaintiffs provide no facts showing that any Director Defendant knew of Madoff's deception or possessed the requisite intent to establish conspiracy or fraud. Bagnall Decl. ¶ 90.⁴

5. Plaintiffs State No Claim Under New York Law. Likewise under New York law, Plaintiffs lack standing to assert claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, unjust enrichment, negligence and gross negligence because those are "classic claim[s] of fund mismanagement that belong[] to the Fund[s]," and Director Defendants owed no

Leszczynski's alleged exchanges with Madoff about marketing the Primeo Fund. Reply Br. 2; PC ¶ 79.

² The Director Defendants' duties to the Funds (and alleged duties to the Funds' shareholders) are governed by Cayman law. (Reply Br. 20-21).

³ Plaintiffs' expert concedes that the Director Defendants owed fiduciary duties to the Funds separate from any duties allegedly owed to Plaintiffs. Lowe Decl. ¶ 54.

⁴ Plaintiffs' claims against Director Defendants for fraud, civil conspiracy, and aiding and abetting fraud, breach of fiduciary duty and conversion must be dismissed on the same grounds under New York law. Reply Br. 22-26.

independent duties of care to Plaintiffs. *In re Optimal U.S. Litig.*, No. 10 Civ. 4095 (SAS), 2011 WL 1676067 (S.D.N.Y. May 2, 2011); *see also Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 354, 438 (S.D.N.Y. 2010) (Opp'n 83); Reply Br. 16-17. Additionally, claims for breach of contract, constructive trust, and negligent misrepresentation fail because Plaintiffs were not in privity with the Director Defendants, did not confer a direct benefit on the Director Defendants and do not identify any misleading statement made by the Director Defendants. (Reply Br. 22 n.42, 25; Mov. Br. 32-33.)

6. Plaintiffs' Negligence Claims are Barred by Fund Contracts. Plaintiffs' contention that exculpatory and indemnity provisions in the Funds' contracts do not bar liability to shareholders is irrelevant because only the Funds may properly assert Plaintiffs' claims. (Opp'n 88; Reply Br. 17-18; Bagnall Reply Decl. ¶ 33.)⁵ Moreover, these clauses explicitly preclude the Funds from recovering for conduct short of actual fraud or willful default (Bagnall Decl. ¶¶ 43-48), and therefore mandate dismissal of Plaintiffs' claims for breach of fiduciary duty, negligence, gross negligence and negligent misrepresentation.⁶

I declare that the foregoing is true and correct.

Executed on October 28, 2011


MARIA A. BARTON

⁵ Even where not explicitly identified as an exculpation, an indemnity functions as an equivalent bar to liability because a Fund cannot assert claims against a defendant whom it must indemnify, and neither Plaintiffs nor their Cayman law expert suggest otherwise. Bagnall Reply Decl. ¶ 31.

⁶ Plaintiffs' argument that the exculpation clauses do not apply because Director Defendants did not "carry[] out [their] functions" is circular. Opp'n 77. Plaintiffs cannot assume the legal conclusion—that Defendants did not fulfill their duties—in order to find that the contractual limitation is exceeded. *See also* Bagnall Reply Decl. ¶ 32.