UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE HERALD, PRIMEO AND THEMA FUNDS SECURITIES LITIGATION	:	Master File No. 09 Civ. 289 (RMB) (HBP)
This Document Relates to: All Actions	:	ECF Case Electronically Filed

REPLY DECLARATION OF MARCO E. SCHNABL IN FURTHER SUPPORT OF THE MOTION TO DISMISS OF DEFENDANTS UNICREDIT S.p.A. ("UCG"), PIONEER GLOBAL ASSET MANAGEMENT S.p.A. ("PGAM") AND PIONEER ALTERNATIVE INVESTMENT MANAGEMENT LTD. ("PAI") (COLLECTIVELY, THE "UCG DEFENDANTS")

I, MARCO E. SCHNABL, declare as follows:

I am a partner at Skadden, Arps, Slate, Meagher & Flom LLP, counsel for the UCG Defendants, and offer this Reply Declaration in further support of their motion to dismiss.

1. **Failure To Controvert UCG Defendants' Showings**. *UCG* is mentioned barely seven times in Plaintiffs' Opposition, in contexts as innocuous as identifying it as a Defendant, noting that it purchased Bank Austria and characterizing it as an "aggressor" company. (*See* Opp'n 1, 87, 88, 94, 95, 97, 98.) *PGAM*, the one UCG Defendant that has challenged personal jurisdiction, is mentioned nine times, likewise noting its status as a defendant, repeating the incorrect and expressly rebutted allegation that PGAM has a New York office and claiming that a former PGAM officer once lived in the U.S. (*Id.* 25, 33, 35, 40, 60, 87, 88.) *PAI* is mentioned twice – in identifying one of its experts and stating that PAI is not identified in Primeo's Articles of Association. (*Id.* 87,88.) None of this, individually or collectively, controverts our prior showings that no viable claims exist against the UCG Defendants and no personal jurisdiction may be exercised over PGAM.

2. The Court cannot exercise **personal jurisdiction** over PGAM because Plaintiffs offer nothing to rebut PGAM's direct, highly specific evidence showing it has *no* office in New York and the address to which the Primeo Complaint refers belongs to a different company.[1] (Reply JM 3.) As Magistrate Pitman found, Plaintiffs did not even "serve[] any discovery requests aimed at [PGAM's] specific factual averments" on this point. (Dkt. No. 313 at 3.)

3. Although PAI is not mentioned in the **exculpation** clause in Primeo's *Articles of Association*, it is protected by a similar provision in the fund's *Advisory Agreement*. (Bagnall Decl. ¶ 47 & Ex. G.) UCG and PGAM are also protected by that provision, to the extent Plaintiffs seek to

[1] PGAM is not a defendant in the Thema Complaint, which alleges that a former PGAM officer had an "assign[ment]" in the U.S. (TC ¶ 87.) None of the allegations in the Primeo Complaint (the only Complaint to name PGAM) purports to arise out of that alleged assignment.

impose liability on them for PAI's acts. *See Official Comm. of Unsecured Creditors of Color Time, Inc. v. Investcorp S.A.*, 137 F. Supp. 2d 502, 514-15 (S.D.N.Y. 2001).

4. The Opposition does not identify any tortious act by UCG or substantial assistance to any other Defendant concerning the **Thema** Fund. As shown previously, there is no properly pled allegation (nor could there be) that UCG had direct or indirect involvement with that Fund. The **Herald** Complaint similarly contains no sufficient allegations that UCG aided and abetted a tort of any of its subsidiaries, or any other party. *See, e.g., In re TMJ Implants Prods. Liab. Litig.*, 880 F. Supp. 1311, 1319-20 (D. Minn. 1995) (rejecting liability of parent company).

5. **RICO Claims Against UCG**. We previously demonstrated that the RICO claims in the Herald Complaint fail because no facts are pled to show UCG: (1) committed the charged predicate acts (wire fraud, money laundering and unlawful monetary transactions); (2) acted with scienter; (3) engaged in a "pattern" of racketeering with required "continuity;" (4) "directed" or "controlled" the alleged enterprise's affairs; or (5) proximately caused Plaintiffs' purported injuries. The Opposition's scant mention of UCG does not cure these pleading deficiencies, much less make a "plausible" showing, *Bell Atl. Corp. v. Twombly*, 500 U.S. 544, 555 (2007), of RICO liability.

6. The Opposition only asserts, first, that UCG is an "aggressor company" vicariously liable "for the acts of [its] employees and officers and directors." (Opp'n 97 n.52.) But that is not a cognizable legal standard. A corporation cannot be held vicariously liable unless it is shown to be a "central figure" in the RICO enterprise, which requires pleading, *inter alia*, that an "officer[] or director . . . had knowledge of, or was recklessly indifferent to, the alleged unlawful activity." *Mikhlin v. HSBC*, 08-CV-1302, 2009 WL 485667, at *9 (E.D.N.Y. Feb. 26, 2009).[2] The Herald Complaint

[2] Even if knowledge had been pled, courts will also consider in determining if the corporate defendant was a "central figure" factors such as the number of high-level employees involved, their degree of participation in the alleged scheme, and the claimed benefit to the corporation. *Mikhlin*, 2009 WL 485667, at *8. Because none of these is pled, as a matter of law no vicarious liability can be found.

does not even assert RICO claims against a UCG officer or director, foreclosing vicarious liability based on *respondeat superior*. *See Lutin v. New Jersey Steel Corp.*, 93 Civ. 6612, 1996 WL 636037, at *12 (S.D.N.Y. Nov. 1, 1996). The conclusory allegations against two *non-defendant* UCG officers, Messrs. Profumo and Gutty (HC ¶¶ 126-27, 250, 299-300, 306, 308, 412), offer nothing to suggest those individuals knew of (or were recklessly indifferent to) Madoff's fraud or knowingly participated in the alleged RICO scheme.

7. We also demonstrated that no pled facts show UCG "fed" money to or received money from Madoff or BLMIS. Plaintiffs nonetheless assert UCG may be liable for acts of its *subsidiaries* under "theories of agency." (Opp'n 97 n.52.) Such vicarious liability fails not only under *Mikhlin*, but also under the rule that parent corporations are "not liable for the acts of [their] subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (internal quotations omitted). The "presumption of separateness" cannot be overcome with "bare allegation[s] that one corporation dominated and controlled another," *De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir. 1996), which is all Plaintiffs offer as to UCG here. (HC ¶¶ 302, 308, 324.)

8. Also, the Opposition does not dispute that the duration of UCG's alleged involvement (*see* HC ¶¶ 412-15) falls well short of the two-year span typically required to satisfy RICO's closed-ended continuity requirement. *See Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 184 (2d Cir. 2008).

9. For these reasons, and those stated in the joint reply brief, the Moving Brief, my initial declaration, the Bagnall, Howard and Trevisan Declarations and the attached Reply Declarations of each of those foreign law experts, Plaintiffs' claims against the UCG Defendants should be dismissed.

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

Dated: New York, New York
October 28, 2011

/s/ Marco E. Schnabl
Marco E. Schnabl