

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

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IN RE HERALD, PRIMEO, and THEMA : 09 Civ. 289 (RMB)
SECURITIES LITIGATION :
:
: **DECISION & ORDER**
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I. Introduction

In these consolidated cases, three foreign (*i.e.*, non-U.S.) plaintiffs, (i) Neville Seymour Davis, a citizen of the United Kingdom (“Davis”); (ii) Repex Ventures, S.A., a corporation organized under the laws of the British Virgin Islands (“Repex”); and (iii) Dr. Shmuel Cabilly, a citizen of Israel (“Cabilly” and, collectively, “Plaintiffs”), each purport to represent a class of foreign (*i.e.*, non-U.S.) investors in foreign (*i.e.*, non-U.S.) investment funds (“Funds”). The Funds, which were closed to American investors, are (i) Thema International Fund plc (“Thema”), which is organized under the laws of Ireland; (ii) Herald Fund SPC-Herald USA Segregated Portfolio One (“Herald SPC”) and Herald (LUX) U.S. Absolute Return Fund (“Herald Lux” and, collectively, “Herald”), which are organized under the laws of the Cayman Islands and Luxembourg, respectively; and (iii) Primeo Select Fund and Primeo Executive Fund (collectively, “Primeo”), which are organized under the laws of the Cayman Islands. (See Davis’s Proposed Second Am. Compl., dated Apr. 1, 2011 (“Thema Compl.”), ¶¶ 15, 27; Repex’s Proposed Third Am. Compl., dated Apr. 1, 2011 (“Herald Compl.”), ¶¶ 8, 10, 15; Cabilly’s Proposed Second Am. Compl., dated Apr. 1, 2011 (“Primeo Compl.”), ¶¶ 15, 25.)

The foreign Plaintiffs assert claims against the foreign Funds and the Funds’ respective directors, administrators, custodians, investment managers, auditors, advisors, lawyers, and financial intermediaries, who invested (Plaintiffs’ money) in the infamous Ponzi scheme orchestrated by Bernard L. Madoff (“Madoff”) and Bernard L. Madoff Investment Securities

LLC (“Madoff Securities”). Madoff, in turn, told investors that he was buying and selling Standard and Poor’s 100 stocks and options for their accounts. (See Thema Compl. ¶¶ 319, 322, 346; Herald Compl. ¶¶ 488–500, 558; Primeo Compl. ¶¶ 58–59.)

Hundreds of lawsuits challenging these same Fund investments are currently pending against many of the same Defendants in the courts of Ireland and Luxembourg.¹ Davis, who, as noted, is a citizen of the United Kingdom, is also a resident of France. He has been a notice party to one of the cases pending in Ireland. (See Decl. of Jarlath Ryan, dated Sept. 30, 2011 (“Ryan Decl.”), ¶ 2.) Davis has acknowledged, in a submission to this Court, the foreign (i.e., non-U.S.) locus of these consolidated cases when, on June 17, 2011, he urged the Court to approve a settlement between him and the (Irish) custodian and administrator of the (Irish) Thema Fund for the reason, among others, that litigation in this Court “faces unique challenges,”

¹ One such case, Kalix Fund Ltd., et al. v. HSBC Institutional Trust Services (Ireland) Ltd., et al., is pending in Ireland and involves claims by more than 60 Thema investors against Thema and its Irish custodian, and is presided over by Justice Frank Clarke of the Irish High Court in Dublin (with whom this Court has exchanged transcripts of court proceedings). Justice Clarke has determined that the proceedings before him “will be linked, managed together, [and] come to trial together.” [2009] I.E.H.C. 457 ¶ 11.1 (H. Ct.) (Ir.), attached as Ex. L to Decl. of Michael E. Wiles, dated June 29, 2011 (“Wiles Decl.”). Discovery in Justice Clarke’s cases was made in September 2011 and “[i]t is anticipated that a trial date for the hearing of the [consolidated Irish cases] will be given in 2012.” (Decl. of Sharon Daly, dated June 28, 2011 (“Daly Decl.”), attached as Ex. 4 to Decl. of Evan A. Davis in Supp. of HSBC Defs.’ Mot. to Dismiss, dated June 29, 2011 (“Evan Davis Decl.”), ¶ 15.)

There are also many pending lawsuits brought by investors in Herald and/or Primeo, and by the liquidators of Herald Lux, in the Luxembourg District Court. (See Decl. of François Kremer, dated Oct. 27, 2011 (“Kremer Decl.”), attached as Ex. 2 to Decl. of Evan A. Davis in Supp. of HSBC Defs.’ Reply, dated Oct. 28, 2011, ¶¶ 3–11; Decl. of Jacques Delvaux, dated June 27, 2011, attached as Ex. A to Decl. of Marc A. Weinstein in Supp. of Ernst & Young Defs.’ Mot. to Dismiss, dated June 29, 2011, ¶¶ 13–14.)

including the possibility of *forum non conveniens* dismissal.² (Plaintiff Neville Seymour Davis’s Mem. of Law in Supp. of Mot. for Prelim. Approval, dated June 17, 2011 (“Davis Mem.”), at 1, 10.) Anticipating dismissal of this case on the basis of *forum non conveniens*, Davis proposed as part of the Thema settlement to set aside \$10 million from the \$62.5 million fund as legal fees for counsel to pursue future litigation in Ireland. (See Davis & Settling Defs.’ Jt. Ltr. to the Ct., dated Aug. 11, 2011 (“Settling Ltr.”), at 2 (“In contrast to the practice in the United States, [plaintiffs] in Ireland customarily retain multiple levels of lawyers . . . on an hourly-fee basis” and “must undertake the risk of having to reimburse any defendants for their legal fees and expenses, in the event [the plaintiffs] lose[.]. In light of these peculiar requirements . . . , litigating the non-settled claims in Ireland could be costly.”)); 2011 WL 4348140 (S.D.N.Y. Sept. 7, 2011); 2011 WL 4351492, at *8 (S.D.N.Y. Sept. 15, 2011) (where the Court stated: “**If Davis is concerned that he erred by filing suit against the [foreign Defendants] in this Court, the risk of any such miscalculation should fall on Davis, and not on the Thema investors he purports to represent.**” (citation omitted and emphasis added)).³

² The settling Defendants were HSBC Institutional Trust Services (Ireland) Ltd., HSBC Securities Services (Ireland) Ltd., HSBC Holdings PLC, and HSBC Bank USA, N.A. (collectively, the “HSBC Defendants”).

³ By Decisions and Orders, dated September 7 and 15, 2011, the Court rejected Davis’s proposed partial settlement as “not fair, reasonable or adequate – even at th[e] preliminary stage – to members of the proposed class of investors in Thema.” 2011 WL 4348140, at *1; see 2011 WL 4351492. The Court found that numerous “obvious deficiencies” – including Davis’s proposed \$10 million foreign future litigation fund and inadequate disclosure to class members of the terms of Davis’s applications for legal and other fees and expenses– “preclude[d] the Court from granting preliminary approval.” 2011 WL 4348140, at *1; see 2011 WL 4351492, at *6–9.

On the same day as oral argument of the instant motion to dismiss, by joint letter to the Court dated November 28, 2011, Davis and the HSBC Defendants requested that the Court “schedule a pre-motion conference on Mr. Davis’s anticipated [new] motion for preliminary approval” of a second amended proposed partial settlement agreement, executed by Davis and the HSBC Defendants on November 27, 2011. (See Davis & Settling Defs.’ Jt. Ltr. to the Ct.,

Davis and Repex – but not Cabilly – also assert claims against JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., J.P. Morgan Securities LLC, J.P. Morgan Securities Ltd. (collectively, “JPM”), and The Bank of New York Mellon (“BNY”), in their roles as bankers to Madoff Securities.

For the reasons set forth below, Davis and Repex’s claims against JPM and BNY are dismissed as precluded under the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 77bb(f) (“SLUSA”), and preempted under New York’s Martin Act, N.Y. Gen. Bus. Law §§ 352 et seq. (the “Martin Act”); and the claims against the remaining appearing Defendants are dismissed on the basis of *forum non conveniens* in favor of Ireland (Thema action) and Luxembourg (Herald and Primeo actions). See Scottish Air Int’l, Inc. v. British Caledonian Grp., PLC, 81 F.3d 1224, 1234–35 (2d Cir. 1996).

II. Analysis

Having reviewed the record herein, including, without limitation, (a) this Court’s Order, dated October 5, 2009, consolidating for general pretrial purposes Plaintiffs’ three actions, commenced on January 12, March 5, and March 19, 2009, respectively, and, at the same time, rejecting consolidation “for all purposes” (Order, dated Oct. 5, 2009, at 8–9); (b) Plaintiffs’ joint motion, dated April 1, 2011, for leave to amend their respective complaints (which have already been amended twice by Repex and once each by Davis and Cabilly); Plaintiffs’ respective proposed new amended complaints, dated April 1, 2011 (the “Complaints”), which assert claims

dated Nov. 28, 2011, attached as Ex. A to this Decision & Order, at 1.) According to Davis and the HSBC Defendants, this newly amended proposed partial settlement addresses the concerns that led the Court to deny preliminary approval of partial settlement in September 2011. See 2011 WL 4348140; 2011 WL 4351492; (Ex. A at 1–2.) The Court advised Davis and the HSBC Defendants that it would take their November 28, 2011 letter under advisement. (See Tr. of Proceedings, dated Nov. 28, 2011 (“Nov. 28, 2011 Tr.”), at 22:7-10 (COURT: “I just literally read the letter before the conference. I want to consider it. So this conference is not really th[e] promotion conference. But let me digest it and see.”)); see infra Part II.D.

against each of the Funds, their “directors, administrators, custodians, investment managers, auditors, advisors, lawyers, and financial intermediaries,” as well as, in the Complaints of Davis and Repex (but not of Cabilly), against JPM and BNY (collectively, “Defendants”). The gravamen of the proposed amended Complaints is that the Funds allegedly “fed, perpetuated, and profited from” the Ponzi scheme perpetrated by Madoff and Madoff Securities. (Thema Compl. ¶¶ 2–18; Herald Compl. ¶¶ 1–7; Primeo Compl. ¶¶ 2–14.) Specifically, Plaintiffs contend that Defendants “ignored many red flags that should have caused them, as professionals, to discover Madoff’s fraud or conduct further due diligence and/or alter their investment decisions” before the collapse of Madoff’s scheme in December 2008 (Thema Compl. ¶¶ 2–18; Herald Compl. ¶¶ 1–7; Primeo Compl. ¶¶ 2–14); (c) Defendants’ joint motion, dated June 29, 2011, to dismiss Plaintiffs’ Complaints (and also opposing as “futile” Plaintiffs’ April 1, 2011 motion to amend), arguing, among other things, that the Complaints should be dismissed under *forum non conveniens* because Plaintiffs are foreign investors, the Funds are foreign funds not open to American investors, and Defendants are primarily foreign entities that provided services to the Funds in foreign countries. (Defs.’ Mem. of Law (“Defs. Mem.”) at 1 n.2, 10–18.) Defendants also argue that the claims by Davis and Repex against Defendants JPM and BNY “are without merit” (Defs. Mem. at 17–18);⁴ (d) Plaintiffs’ opposition, dated September 30, 2011, arguing, among other things, that granting Defendants’ motion on *forum non conveniens* grounds would require litigation of these cases in Ireland for the Thema action and Luxembourg for the Herald and Primeo actions, neither of which jurisdictions, Plaintiffs contend, is “available or adequate.”

⁴ **Defendants have advised the Court that, in the event of dismissal of these actions on *forum non conveniens* grounds, “each Defendant who has entered an appearance – except for JPM and BNY[] – consents to jurisdiction in Ireland to determine the validity of the Thema Plaintiff’s claims, and in Luxembourg to determine the validity of the Primeo and Herald Plaintiffs’ claims.”** (Defs. Mem. at 11–12 (emphasis added).)

(Pls.' Mem. of Law ("Pls. Mem.") at 10–20, 39.) Plaintiffs also contend that JPM and BNY committed "misconduct in connection with accounts maintained by [Madoff Securities]" in New York and, thereby, "concealed and perpetuated Madoff's fraud" (Pls. Mem. at 6 n.2); (e) Defendants' reply, dated October 28, 2011 (see Defs.' Reply Mem. of Law ("Defs. Reply")); (f) the transcript of oral argument held before the Court on November 28, 2011; and applicable law, the Court hereby respectfully denies as futile Plaintiffs' motion to amend [#191] and grants Defendants' motion to dismiss [#252] principally on the basis of *forum non conveniens*, as follows:

(A) Preliminary Issues

First, one of the three Plaintiffs, Davis, asserts claims against Peter Madoff and Andrew Madoff, Bernard Madoff's brother and son, respectively; and against the estate of Bernard Madoff's deceased son, Mark (collectively, the "Madoff Defendants").⁵ (See Thema Compl. ¶¶ 54–57.) Claims against the Madoff Defendants have been stayed by the United States Bankruptcy Court for the Southern District of New York (until such time as the action brought against the Madoff Defendants by Irving H. Picard, Esq., the trustee ("Trustee") appointed for the liquidation of Madoff Securities, has been concluded). (See Stip. of Stay in No. 10-3265 (Bankr. S.D.N.Y.), dated Jan. 26, 2011 ("Bankruptcy Stip.")). These claims presented here may be – and are hereby – severed from Plaintiffs' other claims and stayed on consent. (See Bankruptcy Stip. at 3 ("[C]ounsel for Davis has agreed to voluntarily stay prosecution of [the instant action in the United States District Court for the Southern District of New York] with respect to the Madoff Defendants until such time as the Trustee's Madoff [a]ction has

⁵ Repex and Cabilly do not assert claims against any of the Madoff Defendants. And, none of the Plaintiffs asserts claims against Bernard Madoff or against Madoff Securities.

concluded.”)); see also Hecht v. City of N.Y., 217 F.R.D. 148, 150 (S.D.N.Y. 2003); Coface v. Optique du Monde, Ltd., 521 F. Supp. 500, 511 (S.D.N.Y. 1980); (Defs. Mem. at 17 n.18).⁶

Second, Repex’s claims against Friehling & Horowitz, Madoff Securities’s auditor (“F&H”) (see Herald Compl. ¶¶ 36, 646–50, 655–60, 777–805), may be – and are hereby – dismissed pursuant to Rule 12(b)(5) and (2) of the Federal Rules of Civil Procedure (“Fed. R. Civ. P.”) for insufficient service of process and for lack of personal jurisdiction. See, e.g., Garmhausen v. Holder, 757 F. Supp. 2d 123, 141–42 (E.D.N.Y. 2010); Freedman v. Barrow, 427 F. Supp. 1129, 1134 n.1 (S.D.N.Y. 1976). The record in these consolidated proceedings does not reflect that F&H have ever been served or that they have ever entered an appearance. See Garmhausen, 757 F. Supp. 2d at 141–42; Freedman, 427 F. Supp. at 1134 n.1. Alternatively, Repex’s claims against F&H may be dismissed pursuant to Fed. R. Civ. P. 41(b) for Repex’s failure to prosecute such claims as, for example, by filing a motion for default judgment against F&H. See Rampersad v. Deutsche Bank Sec., Inc., No. 02 Civ. 7311, 2004 WL 616132, at *8 (S.D.N.Y. Mar. 30, 2004); United States v. JP Morgan Chase Bank, N.A., No. 09 Civ. 3133, 2011 WL 1380699, at *2 (E.D.N.Y. Mar. 25, 2011).⁷

Third, “resolution of [Defendants’] motion to dismiss requires concurrently ruling on Plaintiff[s’] motion for leave to amend.” Semper v. N.Y. Methodist Hosp., 786 F. Supp. 2d 566,

⁶ By Memorandum Decision and Order, dated September 22, 2011, United States Bankruptcy Judge Burton R. Lifland granted in part and denied in part the Madoff Defendants’ motion to dismiss the Trustee’s complaint against them. See In re Bernard L. Madoff Inv. Sec. LLC, -- B.R. --, 2011 WL 4434632 (Bankr. S.D.N.Y. 2011). A motion for leave to appeal, filed October 6, 2011 by Andrew Madoff and Mark Madoff’s estate, from Judge Lifland’s September 22, 2011 ruling is pending before United States District Judge William H. Pauley III. (See No. 11 Misc. 379 (S.D.N.Y.).)

⁷ For the same reasons, Plaintiffs’ claims against Erko, Inc., Windsor IBC, Inc., Infovaleur, Inc., and Eurovaleur, Inc., among other parties, are dismissed for insufficient service of process and for lack of personal jurisdiction, and alternatively for failure to prosecute, under Fed. R. Civ. P. 12(b)(5), (2), and 41(b).

573 (E.D.N.Y. 2011). In deciding whether an amendment is futile, “the [C]ourt uses ‘the same standard[s] as those governing the adequacy of a filed pleading.’” MacEntee v. IBM, 783 F. Supp. 2d 434, 446 (S.D.N.Y. 2011) (quoting Ricciuti v. N.Y.C. Transit Auth., 941 F.2d 119, 123 (2d Cir. 1991)). The Court denies Plaintiffs’ motion to amend because, as set forth below, Plaintiffs’ proposed amended Complaints do not survive Defendants’ motion to dismiss. See Amaker v. Haponik, 198 F.R.D. 386, 392 (S.D.N.Y. 2000).

(B) Preclusion/Preemption of Davis and Repex’s Claims against JPM and BNY

Davis’s claims against JPMorgan Chase & Co. and BNY, and Repex’s claims against the JPM entities, all under New York State common law, for aiding and abetting certain other Defendants’ alleged breaches of fiduciary duties, conversion, and gross negligence and negligence; aiding and abetting Madoff’s and Madoff Securities’s alleged fraud; unjust enrichment; and civil conspiracy, fail.⁸ (See Herald Compl. ¶¶ 646–50, 655–60, 772–805 (Counts 1, 3, 17–19); Thema Compl. ¶¶ 495–502, 518–21, 539–43 (Counts 11, 12, 15, 19); see also Pls. Mem. at 29–31; Decl. of Patricia M. Hynes on Behalf of JPM, dated June 29, 2011 (“JPM Decl.”), at 2 n.4; Decl. of Lewis J. Liman in Supp. of BNY’s Mot. to Dismiss, dated June 29, 2011 (“BNY Decl.”), at 3 n.1.) Such state law claims, which Davis and Repex assert on behalf of hundreds (if not thousands) of purported class members (see Thema Compl. ¶ 410; Herald Compl. ¶ 641), are “precluded” by SLUSA. See Romano v. Kazacos, 609 F.3d 512, 519 (2d Cir. 2010) (“[W]here plaintiffs proceed as a class of fifty or more, state law securities claims are no[t] . . . available to them [under SLUSA],” “which compels the dismissal of those claims.”); 15 U.S.C. § 77bb(f). They are also preempted by New York’s Martin Act. See Castellano v. Young & Rubicam, Inc., 257 F.3d 171, 190 (2d Cir. 2001) (“[S]ustaining [a New

⁸ As noted above, Cabilly does not assert any claims against either JPM or BNY. See supra page 4.

York State law] cause of action . . . in the context of securities fraud would effectively permit a private action under the Martin Act, which would be inconsistent with the [New York] Attorney-General's exclusive enforcement powers thereunder" "with respect to fraudulent and deceitful practices in the distribution, exchange, sale and purchase of securities." (internal quotation marks omitted)); N.Y. Gen. Bus. Law §§ 352 et seq.; see also Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd., 85 F. Supp. 2d 282, 291 (S.D.N.Y. 2000) ("[W]e will proceed with the analysis of [an American defendant's] . . . motion to dismiss before proceeding with the *forum non conveniens* analysis as it pertains to the rest of the defendants." (citing PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 74 (2d Cir. 1998))); Yung v. Lee, No. 00 Civ. 3965, 2002 WL 31008970, at *3–4 (S.D.N.Y. Sept. 5, 2002).

Davis and Repex (but not Cabilly) allege that JPM "acted as Madoff and/or [Madoff Securities's] primary banker," holding in an account ("JPM Account") "the vast majority of . . . monies obtained in [Madoff's] Ponzi scheme." (Thema Compl. ¶ 59; Herald Compl. ¶¶ 44, 313, 430.) Davis and Repex further allege that JPM "actively participated" in transfers to and from the JPM Account which "had many of the features of money laundering," thereby "ignor[ing] their federal [law] obligations"; "funneled hundreds of millions of dollars to Madoff and Madoff Securities by using structured derivative notes based on the performance of [Thema and] two [non-party] funds managed by Madoff feeder fund [and non-party] Fairfield Greenwich Advisors" ("Fairfield"), and "invested a substantial amount of [their own] money into the feeder funds," including the Herald Funds, "to hedge [their] bets"; prepared an "exposure health check" on Madoff before the collapse of his scheme which noted, among other things, a "lack of transparency," a "lack of effective due diligence and monitoring by the [various] feeder funds" which invested with Madoff Securities, and a "lack of an independent competent [Madoff

Securities] auditor”; was aware, as evidenced by, among other things, an alleged e-mail message sent by a JPM “Risk Officer” on June 15, 2007, that “there is a well-known cloud over the head of Madoff and . . . his returns are speculated to be part of a Ponzi scheme”; “quietly liquidated” much of their investment in Herald and the Fairfield funds in the fall of 2008, i.e., before Madoff’s collapse; and collected “an estimated half a billion dollars in [banking] fee and interest payments” through the JPM Account over the roughly two decades that JPM served as Madoff Securities’s banker. (Thema Compl. ¶¶ 59, 312–57 (emphases omitted); Herald Compl. ¶¶ 431–85 (emphases omitted).) According to Davis and Repex, JPM was “uniquely positioned to monitor and oversee [Madoff Securities’s] investment advisory accounts and . . . used that knowledge to assist [Madoff’s] fraud.” (Thema Compl. ¶ 319; see Herald Compl. ¶¶ 459–60, 485.)

As JPM’s attorney declaration of Patricia M. Hynes, dated June 29, 2011, correctly notes, “JPM . . . is not alleged to have had[] any role in the management or operation of the [F]unds, nor is JPM even alleged to have provided banking services to them.” (JPM Decl. ¶ 2.)

With respect to BNY, Davis alleges, among other things, that “[Madoff Securities] had its operating account for its broker-dealer business with [BNY]” (“BNY Account”) through which BNY allowed Madoff to transfer monies back and forth to London “[i]n violation of money laundering laws”; and that BNY “provid[ed] fund administrative services to [non-party] Tremont, another Madoff feeder fund, giving both Tremont and Madoff an added layer of legitimacy.” (Thema Compl. ¶¶ 359–58.) According to Davis, BNY “therefore knew and recklessly disregarded numerous red flags about Madoff’s Ponzi scheme.” (Id. ¶ 367.) Davis does not allege that “he was a customer [of Madoff Securities’s broker-dealer business]” but only “an indirect investor in a strategy implemented by an entirely different one of [Madoff

Securities's] three business units.” (BNY Decl. ¶ 5 (emphasis omitted).) Nor does Davis allege that BNY “provided any services to or had any business dealings whatsoever with [Davis or] . . . any other [D]efendants in [these consolidated cases].” (BNY Decl. ¶¶ 3–4.)

SLUSA

“Congress enacted SLUSA to prevent plaintiffs from seeking to evade the protections against abusive securities litigation codified in the Private Securities Litigation Reform Act . . . by filing class action fraud claims based on state law rather than on Federal securities law.” In re Kingate Mgmt. Ltd. Litig., No. 09 Civ. 5386, 2011 WL 1362106, at *6–9 (S.D.N.Y. Mar. 30, 2011). Accordingly, following SLUSA’s enactment, plaintiffs can only “bring state law claims alleging fraud in connection with transactions in covered securities . . . [if] they pursue their claims individually or as part of a class numbering fifty or less.” Romano, 609 F.3d at 519 n.2. “[W]here [as here] plaintiffs proceed as a class of fifty or more, state law securities claims are no longer available to them and federal law, which compels the dismissal of those claims, controls.” Id. at 519. As Defendants correctly note, “[v]irtually every attempt by an investor in an investment fund whose assets were held and purportedly invested by Madoff to assert common law class action claims has been rejected under SLUSA.” (Defs. Mem. at 19–20 (citing Kingate, 2011 WL 1362106, at *6–9; In re J.P. Jeanneret Assocs., 769 F. Supp. 2d 340, 378–79 (S.D.N.Y. 2011); Wolf Living Trust v. FM Multi-Strategy Inv. Fund, LP, No. 09 Civ. 1540, 2010 WL 4457322, at *3 (S.D.N.Y. Nov. 2, 2010); Newman v. Family Mgmt. Corp., 748 F. Supp. 2d 299, 311–13 (S.D.N.Y. 2010); In re Beacon Assocs. Litig., 745 F. Supp. 2d 386, 429–31 (S.D.N.Y. 2010); Barron v. Igolnikov, No. 09 Civ. 4471, 2010 WL 882890, at *3–5 (S.D.N.Y. Mar. 10, 2010); Backus v. Conn. Cmty. Bank, N.A., No. 09 Civ. 1256, 2009 WL 5184360, at *3–10 (D.

Conn. Dec. 23, 2009)); see also In re Merkin, -- F. Supp. 2d --, 2011 WL 4435873, at *10–12 (S.D.N.Y. 2011).

“SLUSA mandates dismissal when the following four-part test is met: (1) the suit must be a ‘covered class action’; (2) the action must be based on state or local law; (3) the action must concern a ‘covered security’; and (4) the defendant[s] must have misrepresented or omitted a material fact or employed a manipulative device or contrivance ‘in connection with the purchase or sale’ of that security.” Barron, 2010 WL 882890, at *4 (citing Felton v. Morgan Stanley Dean Witter & Co., 429 F. Supp. 2d 684, 690–91 (S.D.N.Y. 2006); 15 U.S.C. § 78bb(f)(1)). Plaintiffs do not dispute that the Thema and Herald cases against JPM and BNY are “covered class action[s]” under SLUSA, 15 U.S.C. § 78bb(f)(1), (5)(B)(i)(I); (see Herald Compl. ¶¶ 640–41; Thema Compl. ¶¶ 409–10); or that Davis and Repex’s claims against JPM and BNY are asserted under the common law of New York State, and, therefore, are “based on state or local law.” (See Herald Compl. ¶¶ 646–50, 655–60, 772–805; Thema Compl. ¶¶ 495–502, 518–21, 539–43; Pls. Mem. at 29–31; JPM Decl. at 2 n.4; BNY Decl. at 3 n.1); Barron, 2010 WL 882890, at *4.

Plaintiffs (unpersuasively) contend that Defendants have not established the third and fourth requirements of SLUSA preclusion with respect to Davis and Repex’s claims against JPM and BNY. Thus, Plaintiffs contend that Madoff’s Ponzi scheme – in which Defendants invested Plaintiffs’ monies – did not utilize “covered securities” within the meaning of SLUSA because “critically, Madoff *never purchased*” any securities (Pls. Mem. at 72 (emphasis in original)); and (both) that Davis “do[es] not plead any [fraudulent] misstatements or omissions” by JPM and/or BNY, and that any misstatements or omissions which are pled by Davis and/or Repex are not alleged to have been made by JPM and/or BNY “in connection with” Madoff’s purported purchase and sale of covered securities. (Pls. Mem. 69–76 (internal quotation marks omitted).)

The Court concludes that Madoff’s purported trading strategy utilized “indisputably covered securities.” Beacon, 745 F. Supp. 2d at 430 (internal quotation marks omitted). SLUSA defines covered securities as securities “listed, or authorized for listing, on the New York Stock Exchange” or another national exchange. 15 U.S.C. §§ 78r(b)(1)(A), 77bb(f)(5)(E). The Standard & Poor’s 100 securities that Madoff advised investors, as well as Defendants in this case, that he was purchasing and selling clearly fall within the statutory definition of covered securities. See Barron, 2010 WL 882890, at *4 (“[I]t is not necessary that the purchase or sale actually transpired.” (collecting cases)); Kingate, 2011 WL 1362106, at *7; Wolf Living Trust, 2010 WL 4457322, at *3; Newman, 748 F. Supp. 2d at 312; Jeanneret, 769 F. Supp. 2d at 363; Backus, 2009 WL 5184360, at *5 (“[T]he individual securities fraudulently represented to be bought, sold, and held by [Madoff Securities] are covered securities.”) (see also Thema Compl. ¶¶ 319, 322, 346; Herald Compl. ¶¶ 488–500, 558.)

The Court also finds that the gravamen of Davis and Repex’s allegations against JPM and BNY is that those Defendants misrepresented or omitted material facts or “used or employed . . . manipulative or deceptive device[s] or contrivance[s] in connection with [Madoff’s purported] purchase or sale of . . . covered securit[ies],” and that they did so with resources supplied by, among others, Thema and Herald.⁹ 15 U.S.C. § 78bb(f)(1); (see Thema Compl. ¶¶ 59, 212, 313, 317, 319, 334, 345, 352, 364, 390–95, 358–68, 495–502, 518–21, 539–43 (“Thema[’s investment manager] simply funneled Thema’s assets to Madoff and [Madoff Securities],” but “[e]ven though JP[M] knew . . . [feeder fund] investors’ funds [were] pouring into a company that JP[M] knew was engaged in fraud, the bank continued to accept deposits into the [JPM] Account.”; “B[BNY] was collecting such large fees . . . that it ignored the evidence

⁹ As noted, Cabilly, who purports to represent investors in Primeo, does not assert claims against JPM or BNY. See supra page 4, note 8.

of fraud and failed to disclose the fraud and the crucial fact that virtually all of the capital invested in . . . [Madoff] feeder funds, such as Thema, were being used in a massive Ponzi scheme.”); Herald Compl. ¶¶ 54, 61, 455, 459, 646–50, 655–60, 772–805 (“[T]he sole purpose of the Herald Funds was to funnel money directly to Madoff and [Madoff Securities]” and “all of the monies funneled to Madoff were wired [through the JPM Account].”)); see also Barron, 2010 WL 882890, at *4.

First, focusing upon “both the pleadings and the realities underlying the claims,” Romano, 609 F.3d at 523, it is clear that the allegations made by Davis and by Repex against JPM and BNY “sound[] in fraud,” Kingate, 2011 WL 1362106, at *6; (see Thema Compl. ¶¶ 59, 313, 317, 319, 334, 345–46, 352, 390–95, 357, 358–68, 495–502, 518–21, 539–43 (“JP[M] knew that . . . the market would have moved differently if Madoff was making the trades he claimed to be making,” “and [JPM] used that knowledge to assist the fraud” and “also chose to keep its knowledge of Madoff’s fraud private.”; “B[NY] was collecting such large fees . . . that it ignored the evidence of fraud and failed to disclose the fraud.”); see also Herald Compl. ¶¶ 54, 455, 646–50, 655–60, 772–805 (“Clearly, [JPM] knew or should have also known that Madoff and/or [Madoff Securities’s] business was fraudulent” but “kept their mouths shut to ensure their own profits at the expense of Plaintiffs.”)). Moreover, Davis and Repex’s claims against these Defendants are integrally tied to the underlying fraud committed by Madoff, for whom JPM and BNY served as bankers, as well as to the (alleged) misrepresentations and omissions of the other Defendants. (See Thema Compl. ¶¶ 228, 310, 390–95, 417, 426, 435, 449, 463, 469, 475, 481, 487, 491, 495, 499, 503, 511, 518, 522, 528, 534 (“Defendants have affirmatively and fraudulently concealed their unlawful scheme and course of conduct from [Davis] and the [c]lass through an elaborate scheme of affirmative acts including concealing the fact that Defendants

were feeding money belonging to [Davis] and the [c]lass into a massive [Madoff] Ponzi scheme.”); see Herald Compl ¶¶ 430–85 (“[JPM] ignored their federal [law] obligations with regards to Madoff, [Madoff Securities], the Herald Funds, and the [JPM] Account” because JPM “knew, or in the absence of negligence, gross negligence or recklessness, should have known that the Herald Funds (foreign entities) and [Madoff Securities] and/or Madoff were laundering money through the [JPM] Account.”).) “A claim sounds in fraud” (for purposes of SLUSA’s fourth requirement) when, “although not an essential element of the claim, the plaintiff alleges fraud as an integral part of the conduct giving rise to the claim.” Xpedior Creditor Trust v. Credit Suisse First Bos. (USA) Inc., 341 F. Supp. 2d 258, 269 (S.D.N.Y. 2004). Other courts have determined that preclusion under SLUSA is warranted where, as here, claims for aiding and abetting breach of fiduciary duty, gross negligence, and unjust enrichment “arise from the alleged misrepresentations and omissions by the [d]efendants with respect to their [Madoff-related] investment strategies and supervisory services.” Newman, 748 F. Supp. 2d at 313 n.9; see Kingate, 2011 WL 1362106, at *6 (“Because plaintiffs may seek to avoid SLUSA [preclusion] through artful pleading, courts must look beyond the face of the complaint to analyze the substance of the allegations made.” (internal quotation marks omitted)); Wolf Living Trust, 2010 WL 4457322, at *3; Jeanneret, 769 F. Supp. 2d at 346, 378–79; Barron, 2010 WL 882890, at *3–5; Beacon, 745 F. Supp. 2d at 434. In short, “[c]ourts have demonstrated a willingness to preclude cases under SLUSA where the plaintiffs clearly raise claims involving or sounding in fraud.” Grund v. Del. Charter Guar. & Trust Co., 788 F. Supp. 2d 226, 242 (S.D.N.Y. 2011).¹⁰

¹⁰ While Plaintiffs, in their latest (proposed) Complaints, appear to have abandoned the federal securities fraud claims asserted in their earlier complaints (see Repex’s Second Am. Compl., dated Feb. 10, 2010, ¶¶ 319–63; Davis’s First Am. Compl., filed Feb. 10, 2011, ¶¶ 451–

Second, Davis and Repex’s Complaints also satisfy the “in connection with” prong of SLUSA preclusion, *i.e.*, misstatements and omissions alleged by these Plaintiffs against JPM and BNY are alleged to have occurred “in connection with” Madoff’s purported trades in covered securities. 15 U.S.C. § 78bb(f)(1); (*see* Thema Compl. ¶¶ 312–68 (“As a result of its connections with Madoff and [Madoff Securities, JPM] had actual knowledge that [Madoff Securities] was violating its fiduciary duties and committing fraud because JP[M] knew that [Madoff Securities] was not purchasing securities on behalf of investors and was misusing investor funds.”; “B[BNY] was uniquely situated to discover Madoff’s Ponzi scheme” and “therefore knew and recklessly disregarded numerous red flags about Madoff’s Ponzi scheme.”); Herald Compl. ¶¶ 430–85 (“Put simply, [JPM] did not do their job. They ignored banking regulations and they ignored substantial numbers of red flags regarding both [Madoff Securities’s JPM Account] . . . and outside red flags regarding the fraudulent nature of Madoff and [Madoff Securities’s] business operations – all so they could make a substantial profit at the expense of Plaintiffs and the other members of the [c]lass.”).) “The ‘in connection with’ requirement is given broad construction,” Newman, 748 F. Supp. 2d at 312 (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 85–86 (2006)), and the “standard is met . . . where [the] plaintiff’s claims necessarily allege, necessarily involve, or rest on the purchase or sale of [covered] securities,” Romano, 609 F.3d at 521–22 (internal quotation marks omitted). “[I]t is enough that the fraud alleged ‘coincide’ with a securities transaction – whether

527; Cabilly’s First Am. Compl., dated Feb. 11, 2010, ¶¶ 319–37, 374–80, 395–403, 412–17, 430–51), they have not altered “the underlying narratives or dispens[ed] with the allegations of deception that underlie [such] claims” (Defs. Reply at 9–10 n.18 (citing Rowinski v. Salomon Smith Barney Inc., 398 F.3d 294, 304–05 (3d Cir. 2005) (“SLUSA[’s] . . . preemptive force cannot be circumvented by artful drafting.”))); *see also* Beacon, 745 F. Supp. 2d at 434 (“The claims are rooted in the same actions from which the securities law fraud claims arise, but do not require proof of scienter. They are therefore exactly of the kind routinely dismissed as preempted.” (collecting cases)).

by the plaintiff or by someone else,” Dabit, 547 U.S. at 85, and “**it is not necessary that the [securities transaction] actually transpired**,” Barron, 2010 WL 882890, at *4 (emphasis added).

Madoff’s announced intention to purchase covered securities (i.e., stocks and options) for the benefit of Funds in which Plaintiffs invested satisfies the requirement that Plaintiffs’ claims against JPM and BNY, Madoff’s bankers, were made “in connection with the purchase or sale of a covered security.” 15 U.S.C. § 78bb(f)(1)(B); (see Defs. Reply at 10.) JPM and BNY’s alleged misconduct arises directly from their alleged association with Madoff and Madoff Securities and from their alleged “fail[ure] to disclose,” and “assist[ing],” “knowledge,” and “ignor[ing]” of, Madoff’s scheme and fraudulent conduct. (Thema Compl. ¶¶ 312–68; Herald Compl. ¶¶ 430–85); see, e.g., Beacon, 745 F. Supp. 2d at 430 (where plaintiffs’ allegations of false and misleading statements and omissions regarding defendants’ due diligence and monitoring of Madoff and Madoff Securities were “sufficient to meet SLUSA’s broad requirement of a misrepresentation or omission in connection with the purchase or sale of a covered security” (internal quotation marks omitted)).¹¹ It is clear that Davis and Repex’s claims against JPM and BNY are “in connection with” Madoff’s fraud in that they “necessarily allege, necessarily involve, or rest” on Madoff’s purported intention to purchase and sell covered securities. Romano, 609 F.3d at 521–22.

Plaintiffs’ contention that Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869 (2010), bars the application of SLUSA to these consolidated cases because federal securities

¹¹ See Anwar v. Fairfield Greenwich Ltd., 728 F. Supp. 2d 372, 397–99 (S.D.N.Y. 2010) (finding SLUSA’s “in connection with” requirement not met as to claims against defendants who, unlike JPM and BNY in this case, did not have a direct relationship with Madoff but merely “audited, administered, or served as custodian of . . . [various Madoff feeder] funds” (citing Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 750 F. Supp. 2d 450 (S.D.N.Y. 2010))).

claims are limited to securities transactions that take place in the United States “may swiftly be dispatched.” Kingate, 2011 WL 1362106, at *7; (see Pls. Mem. at 68–69.) “SLUSA, by its terms, applies to class actions in State and Federal courts of the United States, 15 U.S.C. § [7]8bb(f)(1), and is applied here to a class action in a court of the United States. SLUSA is not being applied extraterritorially in this matter, and the logic of Morrison therefore has no effect on SLUSA’s applicability.” Kingate, 2011 WL 1362106, at *7; see Kircher v. Putnam Funds Trust, 403 F.3d 478, 484 (7th Cir. 2005) (“SLUSA[’s] . . . preemptive effect is not confined to knocking out state-law claims by investors who have *winning* federal claims, as plaintiffs suppose. It covers both good and bad securities claims – *especially* bad ones.” (emphases in original)), vacated on other grounds by 547 U.S. 633 (2006).

Martin Act

Davis and Repex’s claims against JPM and BNY are also subject to preemption under the Martin Act, New York’s so-called “blue sky” law. See N.Y. Gen. Bus. Law §§ 352 et seq. The Martin Act “prohibits various fraudulent and deceitful practices in the distribution, exchange, sale and purchase of securities,” and “[t]he New York Court of Appeals has held that there is no implied right of action under the Martin Act.” Castellano, 257 F.3d at 190 (citing CPC Int’l Inc. v. McKesson Corp., 514 N.E.2d 116 (N.Y. 1987)). “Most New York courts have further held that the Martin Act precludes a private right of action for common law claims the subject matter of which is covered by the Martin Act. The federal courts have, almost without exception, adopted the same position,” and have, therefore, dismissed as preempted New York State law claims “arising in the securities context” for breach (and abetting breach) of fiduciary duty, conversion, negligence, gross negligence, and unjust enrichment. Stephenson v. Citco Grp. Ltd., 700 F. Supp. 2d 599, 613–16 (S.D.N.Y. 2010) (internal quotation marks and alterations omitted)

(collecting cases); see Owens v. Gaffken & Barriger Fund, LLC, No. 08 Civ. 8414, 2009 WL 3073338, at *12–14 (S.D.N.Y. Sept. 21, 2009).

Davis and Repex’s claims against JPM and BNY, as noted by Defendants, “based on conduct within or from New York are precisely the type of claims relating to investments with Madoff that, with just one exception, every court in this District has held are preempted by the Martin Act under the Second Circuit’s holding in Castellano.” (Defs. Mem. at 21 (citing Jeanneret, 769 F. Supp. 2d at 378; Beacon, 745 F. Supp. 2d at 431–34; Stephenson, 700 F. Supp. 2d at 612–18; Meridian Horizon Fund, LP v. Tremont Grp. Holdings, Inc., 747 F. Supp. 2d 406, 414–15 (S.D.N.Y. 2010); In re Tremont Sec. Law, State Law & Ins. Litig., 703 F. Supp. 2d 362, 372–73 (S.D.N.Y. 2010); Barron, 2010 WL 882890, at *5–6)); see Castellano, 257 F.3d at 190; Merkin, 2011 WL 4435873, at *12–13. Notwithstanding the thoughtful decision of United States District Judge Victor Marrero in Anwar v. Fairfield Greenwich Ltd., 728 F. Supp. 2d 354, 371 (S.D.N.Y. 2010); along with two decisions of the New York State Supreme Court, Appellate Division, First Department, see CMMF, LLC v. J.P. Morgan Inv. Mgmt. Inc., 915 N.Y.S.2d 2 (App. Div. 2010); Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc., 915 N.Y.S.2d 7 (App. Div. 2010), and the New York Attorney General’s opposition to Martin Act preemption in an *amicus* brief filed before the United States Court of Appeals for the Second Circuit in the pending appeal in Barron (see Br. of Att’y Gen. of the State of N.Y. as *Amicus Curiae*, No. 10-1387-cv (2d Cir.), dated Aug. 13, 2010), “the weight of opposing authority, including Second Circuit Court of Appeals precedent, compels this Court to reaffirm its recognition of Martin Act preemption,” Beacon, 745 F. Supp. 2d at 433; see Merkin, 2011 WL 4435873, at *13 (“[T]he New York Court of Appeals has not examined this specific issue, and this Court remains bound

to apply the result in the only Second Circuit case that has addressed this subject: Castellano.” (emphasis and citation omitted)).

Federal Rule of Civil Procedure 12(b)(6) Motion

Because the Court has dismissed the claims against JPM and BNY as precluded under SLUSA, it need not reach JPM and BNY’s alternative grounds for dismissal, including “failure to state a claim upon which relief can be granted” under New York law. Fed. R. Civ. P. 12(b)(6); (see Defs. Mem. at 31–39; Defs. Reply at 21–27.) Assuming, arguendo, that the Court were to examine the merits of Davis and Repex’s claims against JPM and BNY, it would likely conclude that the parties’ arguments for and against dismissal are well presented and appear to raise substantive points.

JPM and BNY argue, among other things, that (i) the claims against them for aiding and abetting other Defendants’ alleged breaches of fiduciary duties, conversion, and gross negligence and negligence (see Herald Compl. Counts 3, 18; Thema Compl. Counts 11, 12, 15) must fail because Plaintiffs “have not met their . . . burden to plead that JPM [or BNY] had actual knowledge of the misconduct . . . that [they] allegedly aided and abetted” (JPM Decl. ¶ 4; see BNY Decl. ¶ 10 (“[Davis] does not allege that BNY[] even knew that the Thema Fund existed.”)). Similarly, these Defendants contend that Davis and Repex have not shown that JPM or BNY rendered “substantial assistance” to other Defendants’ alleged misconduct (merely) by “providing routine banking services to Madoff” (JPM Decl. ¶ 9; BNY Decl. ¶ 11); (ii) the claim against JPM for aiding and abetting Madoff’s underlying fraud (see Herald Compl. Count 19) must fail because “allegations about what a bank should or would have known if it had investigated red flags concede a lack of actual knowledge,” and “a bank does not substantially assist a fraud merely by providing routine banking services” (JPM Decl. ¶¶ 7, 10 (internal

quotation marks omitted)); **(iii)** the claims against JPM and BNY for unjust enrichment (see Herald Compl. Counts 17; Thema Compl. Count 19) must fail because Plaintiffs “do[] not plead that [JPM or BNY] ever received any fees from Plaintiffs, or that the account fees that [they] purportedly received from [Madoff Securities] were in any way unreasonable” (BNY Decl. ¶ 12; JPM Decl. ¶ 12); and **(iv)** the claim against JPM for civil conspiracy (see Herald Compl. Count 1) must fail because Plaintiffs have not pled that JPM “conspired” with other Defendants to commit any “underlying tort” (Defs. Mem. at 39; see Defs. Reply at 26–27).

Plaintiffs respond to JPM and BNY’s arguments by contending, among other things, that **(i)** JPM’s sale to investors (but not to Plaintiffs) of “structured notes derivative of the Funds despite severe suspicions that Madoff was operating an underlying fraud” satisfies the “actual knowledge” and “substantial assistance” requirements for aiding and abetting; **(ii)** “[c]reating, marketing, and profiting from derivatives of a Ponzi scheme certainly constitutes more than ‘routine banking services,’” as does “turn[ing] a blind eye to glaring irregularities in the [JPM Account],” which “allowed [JPM] to timely divest of their investments [in the Funds] before and at the detriment of Plaintiffs”; **(iii)** since “it does not matter whether the benefit is directly or indirectly conveyed” and “since Plaintiffs maintain that JPM [and BNY] retained proceeds to which [they] were not entitled, . . . dismissal [of the unjust enrichment claims against JPM and BNY] should be denied”; and **(iv)** allegations that “Defendants shared a knowing and malicious intent to . . . wrongfully deprive and defraud the property of Plaintiffs” sufficiently pleads a civil conspiracy claim connected to a “separate underlying tort.” (Pls. Mem. at 7, 39, 42 n.25, 44 (citing Herald Compl. ¶¶ 456, 648–49; Thema Compl. ¶¶ 141, 225–30, 312–57) (internal quotation marks omitted).)

(C) *Forum Non Conveniens*

Plaintiffs' remaining claims are dismissed on *forum non conveniens* grounds in favor of Ireland (the Thema action) and Luxembourg (the Herald and Primeo actions). See Norex Petrol Ltd. v. Access Indus., Inc., 416 F.3d 146, 153 (2d Cir. 2005) (“The central purpose of any *forum non conveniens* inquiry’ is, after all, ‘to ensure that the trial is convenient.’” (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 (1981))). Two very similar lawsuits brought by foreign plaintiffs who invested in foreign Madoff “feeder funds” have recently been dismissed on this basis. See In re Banco Santander Sec.-Optimal Litig., 732 F. Supp. 2d 1305, 1311, 1329–45 (S.D. Fla. 2010) (dismissing foreign claims in favor of Ireland), aff’d sub nom. Inversiones Mar Octava Limitada v. Banco Santander S.A., No. 10-14012, 2011 WL 3823284 (11th Cir. Aug. 30, 2011) (per curiam); Erausquin v. Notz, Stucki Mgmt. (Bermuda) Ltd., -- F. Supp. 2d --, 2011 WL 3734387, at *8–15 (S.D.N.Y. 2011) (dismissing foreign claims in favor of Switzerland); see also Anwar v. Fairfield Greenwich Ltd., 742 F. Supp. 2d 367, 375–78 (S.D.N.Y. 2010) (hereinafter, “Anwar III”) (where the court held that it would dismiss the lawsuit brought by foreign plaintiffs on grounds of *forum non conveniens* in favor of Singapore if it had not already found dismissal warranted based upon valid Singapore foreign selection clauses contained in agreements entered into by the parties).¹²

Courts in this Circuit employ a three-part test to analyze the application of *forum non conveniens*. See Anwar III, 742 F. Supp. 2d at 376 (citing Norex, 416 F.3d at 153; Iragorri v. United Techs. Corp., 274 F.3d 65, 73–74 (2d Cir. 2001) (en banc)). “At step one, a court determines the degree of deference properly accorded the plaintiff’s choice of forum. At step

¹² Davis has previously acknowledged to this Court, while urging (unsuccessfully) the Court to grant preliminary approval of a proposed settlement with various Defendants, that “this litigation faces unique challenges . . . including *forum non conveniens*.” (Davis’s Mem. of Law in Supp. of Mot. for Prelim. Approval, dated June 17, 2011, at 10.)

two, it considers whether the alternative forum proposed by the defendants is adequate to adjudicate the parties' dispute. Finally, at step three, a court balances the private and public interests implicated in the choice of forum." Norex, 416 F.3d at 153.

Plaintiffs' Choice of Forum

Plaintiffs' choice of the United States District Court for the Southern District of New York is entitled to "less deference" because Plaintiffs Davis, Repex, and Cabilly are not U.S. citizens or residents. They are citizens of Ireland, the British Virgin Islands, and Israel, respectively. Anwar III, 742 F. Supp. 2d at 376 (quoting Iragorri, 274 F.3d at 71); see Piper, 454 U.S. at 255–56; see supra page 1.

And, where, as here,

the more it appears that the plaintiff[s'] choice of a U.S. forum was motivated by forum-shopping reasons – such as attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, the habitual generosity of juries in the United States or in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum – the less deference the plaintiff's choice commands and, consequently, the easier it becomes for the defendant to succeed on a *forum non conveniens* motion by showing that convenience would be better served by litigating in another country's courts.

Iragorri, 274 F.3d at 72. Plaintiffs' decision to sue in this District, as described by Plaintiffs in these proceedings, sought "to take advantage of the [U.S.] class action device," to "avoid costly fee shifting," and "to pursue claims under RICO" (Pls. Mem. at 12) suggests forum shopping by foreign plaintiffs. "[A]ttempts to win a tactical advantage resulting from local laws that favor plaintiff's case[, e.g., class actions, RICO]," to achieve "higher damages than are common in other countries," Norex, 416 F.3d at 155, and to avoid foreign, loser-pay jurisdictions, see Piper, 454 U.S. at 252 & n.18, taken together with the notoriety and conviction of Madoff in this District, "raise a strong inference that forum shopping motivated foreign plaintiffs' decision to

sue in the United States,” In re Ski Train Fire in Kaprun Austria on Nov. 11, 2000, 499 F. Supp. 2d 437, 444–45 (S.D.N.Y. 2007); see Gilstrap v. Radianz Ltd., 443 F. Supp. 2d 474, 481 (S.D.N.Y. 2006); Banco Santander, 732 F. Supp. 2d at 1336; Erausquin, 2011 WL 3734387, at *10 (“The filing of this putative class action in New York was undoubtedly fueled by the potential for attorneys’ fees and the likelihood that a New York jury will be unsympathetic toward defendants in a Madoff-related action.”). In addition, less deference to Plaintiffs’ choice of forum is called for because Plaintiffs have not identified a single potential witness in New York or within 100 miles of this courthouse (see Defs. Reply at 8 n.15); see *infra* pages 29–31, and the “core operative facts” of these cases involve the operations of foreign entities outside of the United States (see Defs Mem. at 3–10; Defs. Reply at 1–3); Erausquin, 2011 WL 3734387, at *10; see In re Alcon S’holder Litig., 719 F. Supp. 2d 263, 269 (S.D.N.Y. 2010).¹³ Plaintiffs, who are themselves foreign, each purport to represent a class of foreign investors (see Herald Compl. ¶¶ 640–45; Primeo Compl. ¶¶ 196–201; Thema Compl. ¶¶ 409–16; Defs. Mem. at 4, 10); Gilstrap, 443 F. Supp. 2d at 479 (“Plaintiffs’ choice of forum is . . . entitled to less deference where, as here, they are suing in a representative capacity.”), and appear to have little or no connection to the United States, except via their counsel, see Iragorri, 274 F.3d at 71 (“Even if the U.S. district was not chosen for . . . forum-shopping reasons, there is nonetheless little reason to assume that it is convenient for a foreign plaintiff.”). Plaintiff Davis’s counsel, despite filing suit in this Court, have recognized that **“obviously there is the risk that [the Court] might think that Ireland is a better forum.”** (Tr. of Proceedings before the Ct., dated Aug. 12, 2011,

¹³ “Because [*forum non conveniens*] is ‘a non-merits ground for dismissal,’ a district court ‘may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of . . . personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant.’” Palacios v. Coca-Cola Co., 757 F. Supp. 2d 347, 351 (S.D.N.Y. 2010) (quoting Sinochem Int’l Co. v. Malay. Int’l Shipping Corp., 549 U.S. 422, 432 (2007)); see also *infra* pages 28–33.

at 7:9-10 (emphasis added); see also Settling Ltr. at 2 (“[Davis] cannot ignore the risks that some defendants could be dismissed on *forum non conveniens*.”).)

Recognizing that “a lesser degree of deference to the plaintiff’s choice bolsters the defendant’s case but does not guarantee dismissal,” Iragorri, 274 F.3d at 74, the Court concludes that Plaintiffs’ choice of forum in these cases is entitled to “very limited deference,” Erausquin, 2011 WL 3734387, at *10; see Anwar III, 742 F. Supp. 2d at 376.

Adequacy of the Ireland and Luxembourg Courts

Ireland and Luxembourg are unequivocally adequate fora for these cases. Indeed, as noted, hundreds of similar cases brought by the Funds themselves and by the Funds’ investors are already pending in the courts of those two countries. See supra page 2 & note 1; infra page 26.

“An alternative forum is adequate if: (1) the defendants are subject to service of process there; and (2) the forum permits ‘litigation of the subject matter of the dispute.’” Capital Currency Exch., N.V. v. Nat’l Westminster Bank PLC, 155 F.3d 603, 609 (2d Cir. 1998) (quoting Piper, 454 U.S. at 254 n.22).

As noted, each Defendant who has entered an appearance – except for JPM and BNY – consents to jurisdiction in Ireland to determine the validity of Davis’s claims, and in Luxembourg to determine the validity of Repex and Cabilly’s claims. (Defs. Mem. at 11–12); see Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 75 (2d Cir. 2003); Erausquin, 2011 WL 3734387, at *11; Yung, 2002 WL 31008970, at *3–4; Odyssey, 85 F. Supp. 2d at 291 (“[I]n order to grant a motion to dismiss for *forum non conveniens*, a court must satisfy itself [among other things] that litigation may be conducted elsewhere against all defendants.’ . . . However, ‘any potential problem [is] cured [when] individual defendants [against whom

foreign litigation may not be conducted] are dismissed [and] are no longer parties before the court.” (quoting PT United, 138 F.3d at 74).

And, both Ireland and Luxembourg permit litigation of the subject matter of this dispute. See Capital Currency, 155 F.3d at 609. Defendants’ foreign law experts point out that the courts of Ireland and Luxembourg recognize claims in tort and contract similar to those asserted here. (See Decl. of Mark Sanfey, dated June 29, 2011 (“Sanfey Decl.”), attached as Exs. 1–3 to Decl. of Antony Ryan in Supp. of PwC Defs.’ Mot. to Dismiss, filed June 29, 2011, ¶ 5.1; Decl. of André Prüm, dated June 28, 2011 (“Prüm Decl.”), attached as Ex. 2 to Evan Davis Decl., ¶¶ 23–25.) More to the point, Defendants correctly point out that lawsuits very similar to these are already pending in Ireland and Luxembourg, including (i) a suit by Thema against Thema’s custodian in the Irish High Court in Dublin (see Daly Decl. ¶ 5); (ii) suits by more than sixty Thema investors, representing approximately 20% of all Thema shares, against Thema and/or Thema’s custodian in the Irish High Court, which have been consolidated with Thema’s lawsuit in the Irish High Court (see Daly Decl. ¶ 6; Wiles Decl. ¶¶ 12–13); (iii) a suit by the liquidators of Herald Lux against several Defendants in the Luxembourg District Court (see Delvaux Decl. ¶¶ 13–14); and (iv) suits by hundreds of Herald or Primeo investors against Herald and Primeo’s custodian, also in the Luxembourg District Court (see Kremer Decl. ¶¶ 3–11); see BBC Chartering & Logistic GMBH & Co., K.G. v. Siemens Wind Power A/S, 546 F. Supp. 2d 437, 445 (S.D. Tex. 2008); von Spee v. von Spee, 514 F. Supp. 2d 302, 309, 314 (D. Conn. 2007); see supra note 1.¹⁴

¹⁴ Plaintiffs’ own Irish law expert, Jarlath Ryan, has already represented Davis in the Irish proceedings. (Ryan Decl. ¶ 2.) And, the law firm of Plaintiffs’ Luxembourg law expert, Michel Molitor, is representing a Herald SPC investor in Luxembourg. (Kremer Decl. ¶ 7; see Decl. of Michel Molitor, dated Sept. 30, 2011 (“Molitor Decl.”).)

U.S. courts have, not surprisingly, found both Ireland and Luxembourg to be adequate alternative fora in cases raising comparable issues as those raised here. See Banco Santander, 732 F. Supp. 2d at 1332–33 & n.16 (“Because Ireland provides causes of action for aggrieved parties and awards damages to plaintiffs who prove the various elements of [plaintiffs’ Madoff-related] causes, Ireland is an adequate forum.”); Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1120–21 (S.D.N.Y. 1982) (“Plaintiffs, who are presently engaged in litigation with [one] defendant . . . before the Irish courts, do not seriously contest defendants’ assertion that an adequate alternative forum possessing jurisdiction over the subject matter of this action and over all the named defendants exists in Ireland.”); Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, 951–52 (11th Cir. 1997) (“[P]roceedings underway in . . . Luxembourg are adequate alternative fora.”).

In sum, Ireland and Luxembourg are **obviously** adequate alternative fora. See Banco Santander, 732 F. Supp. 2d at 1333. “It is well-established . . . that the unavailability of such procedural mechanisms as class actions and contingent fees, while it may be relevant to the balancing of the public and private interest factors addressed below, does not render a foreign forum inadequate as a matter of law.” Gilstrap, 443 F. Supp. 2d at 482; see Flex-N-Gate Corp. v. Wegen, No. 08 Civ. 2502, 2008 WL 5448994, at *5 (“Nor do . . . less liberal pretrial discovery rules[] render [the foreign forum] an inadequate forum.”); Blanco v. Banco Indus. de Venezuela, S.A., 997 F.2d 974, 982 (2d Cir. 1993); Aguinda v. Texaco, Inc., 303 F.3d 470, 478 (2d Cir. 2002); Murray v. British Broad. Corp., 81 F.3d 287, 292–93 (2d Cir. 1996); Anwar III, 742 F. Supp. 2d at 377; Erausquin, 2011 WL 3734387, at *11.

Private and Public Interest Factors Favor Litigation in Ireland and Luxembourg

Based upon a balancing of the relevant private and public interest factors, and “arm[ed] . . . with an appropriate degree of skepticism,” Iragorri, 274 F.3d at 74–75, the Court finds that these actions should be dismissed on the basis of *forum non conveniens*. See Erausquin, 2011 WL 3734387, at *12–15. That is, Defendants have met their burden of establishing that litigation of these disputes in the Southern District of New York is “genuinely inconvenient” and that Ireland and Luxembourg, respectively, are “significantly preferable” fora. Erausquin, 2011 WL 3734387, at *12–15; Banco Santander, 732 F. Supp. 2d at 1335–44; Anwar III, 742 F. Supp. 2d at 377–78.

“The private interest factors include: (1) the relative ease of access to evidence; (2) the cost to transport witnesses to trial; (3) the availability of compulsory process for unwilling witnesses; and (4) other factors that make the trial more expeditious or less expensive.” Erausquin, 2011 WL 3734387, at *12 (quoting Maersk, Inc. v. Neewra, Inc., 554 F. Supp. 2d 424, 453–54 (S.D.N.Y. 2008)). “The public interest factors include: (1) settling local disputes in a local forum; (2) avoiding the difficulties of applying foreign law; and (3) avoiding the burden on jurors by having them decide cases that have no impact on their community.” Id. (quoting Maersk, 554 F. Supp. 2d at 454).

Private Interest Factors

It is clear that litigation of these cases in Ireland and Luxembourg will facilitate access to the evidence needed to establish Plaintiffs’ claims. See id. The vast majority of documentary evidence relevant to Plaintiffs’ disputes with Defendants in these consolidated cases – which revolve around the actions of the foreign Funds; their foreign directors, managers, and owners; and their foreign administrators, custodians, investment advisors, auditors, and attorneys – is to

be found in Ireland with respect to the Thema Complaint and in Luxembourg with respect to the Herald and Primeo Complaints – if not elsewhere in Europe. (Defs. Mem. at 15–16; see Pls. Mem. at 20 (“This case is inherently international in scope, and the parties, witnesses and evidence are scattered throughout the world.”)); see Erausquin, 2011 WL 3734387, at *13 (“[W]hile ‘the costs of transporting documents are not as prohibitive as they once were,’ where ‘the majority of relevant evidence is located abroad, the burden imposed on the parties is still significant and favors dismissal.’” (quoting Online Payment Solutions Inc. v. Svenska Handelsbanken AB, 638 F. Supp. 2d 375, 388 (S.D.N.Y. 2009))). Plaintiffs appear to ignore certain additional costs of conducting discovery in New York, including, without limitation, the intensity and expense of U.S. discovery, and compliance with foreign (i.e., non-U.S.) privacy laws. See Erausquin, 2011 WL 3734387, at *13 (citing Crosstown Songs U.K. Ltd. v. Spirit Music Grp., Inc., 513 F. Supp. 2d 13, 17 (S.D.N.Y. 2007)); (see Defs. Mem. at 15 n.15 (“Parties may be prohibited from transferring such documents to the United States by EU Directive 95/46, 1995 O.J. (L 281) which permits the transfer of personal data (broadly defined) to a non-EU country only if the country ensures an ‘adequate level of protection,’ id. art. 25 – which many European courts believe the United States does not provide.”).)

Most of the potential witnesses are also located abroad – many in Ireland and Luxembourg – a fact which Plaintiffs do not dispute and which would certainly increase the cost of litigation in New York. Erausquin, 2011 WL 3734387, at *12; (see Defs. Mem. at 15–16.) As in Erausquin, Plaintiffs have not provided the name of a single witness to be found in New York, 2011 WL 3734387, at *12, and as in Banco Santander, the few “Defendants located in the United States did not play a central role in the due diligence functions central” to these consolidated cases, 732 F. Supp. 2d at 1336. “The location of the majority of parties and

witnesses clearly points to trial in Ireland [and Luxembourg] as . . . more convenient and less expensive for[a] than the United States.” Id.¹⁵ Many of the potential witnesses are not subject to process from this Court, see Cortec Corp. v. Erste Bank Ber Oesterreichischen Sparkassen AG, 535 F. Supp. 2d 403, 412 (S.D.N.Y. 2008), including Sonja Kohn, who is the “most prominently featured individual” Defendant described in the Complaints, Erausquin, 2011 WL 3734387, at *12. Ms. Kohn appears to reside in Switzerland and Plaintiffs have experienced significant difficulty effecting service upon her. (See Trs. of Proceedings before the Ct., dated Nov. 16, 2010 and Jan. 10, 2011); see also BlackRock, Inc. v. Schroders PLC, No. 07 Civ. 3183, 2007 WL 1573933, at *9 (S.D.N.Y. May 30, 2007).¹⁶ “Compulsory process would seem especially important where, as here, fraud and subjective intent are elements of the claim[s], making the

¹⁵ The remaining American Defendants are HSBC Bank USA, N.A. (“HSBC USA”) and PricewaterhouseCoopers LLP (“PwC U.S.”), which are named only in the Thema Complaint. They are subsidiaries of English parent companies. (See Thema Compl. ¶¶ 40–46 (“HSBC USA participated [with Irish HSBC affiliates and their English parent] in creating structured financial products involving Thema and other Madoff feeder funds” (emphasis omitted); “[PwC U.S.] participated in [Defendant PricewaterhouseCoopers (Dublin)’s] audit of Thema and conducted critical procedures relating to Madoff in New York City.”).) Courts regularly dismiss on the basis of *forum non conveniens* cases involving American defendants where, as here, the American defendants “submit to the jurisdiction of [the foreign fora] as a condition of dismissal,” “the real parties in interest are foreign,” the foreign fora have “a stronger local interest in the dispute,” and the private and public interest factors otherwise strongly favor dismissal. Pollux, 329 F.3d at 75–76; Capital Currency, 155 F.3d at 612; see Erausquin, 2011 WL 3734387, at *11; Skelton Fibres Ltd. v. Canas, No. 96 Civ. 6031, 1997 WL 97835, at *1, 4 (S.D.N.Y. Mar. 6, 1997); Ski Train Fire, 499 F. Supp. 2d at 445–46 & n.6 (rejecting Plaintiffs’ use of “American corporations as a pretext for asserting claims against their foreign affiliates who are the real parties in interest”); (see also see Defs. Mem. at 11–12.)

¹⁶ Plaintiffs allege that Ms. Kohn founded and, “at all relevant times, owned 75 percent of [Bank] Medici,” which served as an investment manager for Thema, Herald, and Primeo. (Thema Compl. ¶ 16; Herald Compl. ¶ 23; Primeo Compl. ¶ 18.) While Davis alleges that Ms. Kohn’s last known address is in Vienna, Austria (see Thema Compl. ¶ 21), Plaintiffs ultimately effected service upon her on February 7, 2011 in Zurich, Switzerland (see Cert. of Service as to Kohn, dated Feb. 7, 2011 [#177]; Decl. of Price O. Gielen in Supp. of Ms. Kohn’s Mot. to Dismiss, dated June 29, 2011, ¶¶ 2–3 (“Kohn is a foreign citizen” who “does not consent to jurisdiction in the United States and was not served in the United States.”)).

live testimony of witnesses for the purposes of presenting demeanor evidence essential to a fair trial.” Banco Santander, 732 F. Supp. 2d at 1337–38 (quoting Howe v. Goldcorp Invs., Ltd., 946 F.2d 944, 952 (1st Cir. 1991); citing Strategic Value Master Fund, Ltd. v. Cargill Fin. Servs. Corp., 421 F. Supp. 2d 741, 769 (S.D.N.Y. 2006)). Thema, Thema directors, and Thema’s auditor, custodian, administrator, and attorneys are all located in Ireland, *i.e.*, outside this Court’s subpoena power. (See Thema Compl. ¶¶ 27–28, 31–36, 38–39, 43, 48.) Herald Lux, Herald and Primeo’s custodian and administrator, and Herald Lux’s auditor are located in Luxembourg. (See Herald Compl. ¶¶ 15, 37, 33; Primeo Compl. ¶¶ 44, 149.) A subpoena may be issued by either party in Ireland to any witness to compel that witness’s attendance at trial, provided that the witness is residing or present in Ireland. (See Sanfey Decl. ¶ 7.1.) “Luxembourg courts may call witnesses from outside Luxembourg irrespective of the witness’s nationality or residency and often do.” (Prüm Decl. ¶ 40).

Plaintiffs unpersuasively contend that dismissal of these cases in favor of litigation in Ireland and Luxembourg would “result in extreme hardship and inconvenience” for Plaintiffs because, among other reasons, “[c]ommon witnesses would have to produce documents twice, sit for depositions twice, and testify at trial twice.” (Pls. Mem. at 18.) But, as noted, hundreds of (closely) related lawsuits are already pending in the courts of those jurisdictions. And, the Thema, Herald, and Primeo actions are – and have always been – three separate suits. Plaintiffs cannot “treat” them as one to avoid *forum non conveniens* dismissal. (Defs. Reply at 4.) Plaintiffs each purport to represent entirely different classes of foreign investors. (See Original Thema Compl., No. 09 Civ. 2558, dated Mar. 19, 2009; Davis’s First Am. Compl., filed Feb. 10, 2011; Original Herald Compl., No. 09 Civ. 289, dated Jan. 12, 2009; Repex’s First Am. Compl., filed Jan. 26, 2009; Repex’s Second Am. Compl., dated Feb. 10, 2010; Original Primeo Compl.,

No. 09 Civ. 2032, dated Mar. 5, 2009; Cabilly's First Am. Compl., dated Feb. 11, 2010.) They cannot now credibly contend that the Court's October 2009 consolidation for pretrial purposes precludes dismissal and referral to two fora (Ireland and Luxembourg) under the principles of *forum non conveniens*. (See Pls. Mem. at 14, 18–19.)

“Though the lack of contingent fees and class actions in [Ireland and Luxembourg] may be considered relevant in weighing the private interests at stake, here, where the other private and public interest factors overwhelmingly favor dismissal,” Gilstrap, 443 F. Supp. 2d at 488, where Plaintiffs (and all the putative class members) are foreign investors, and where Plaintiffs have not contended in their opposition papers that dismissal “erects a pecuniary barrier to . . . commencement of a lawsuit there,” Gomez v. Banco Bilbao Vizcaya, S.A., No. 92 Civ. 7863, 1993 WL 204990, at *3 (S.D.N.Y. June 7, 1993); Erausquin, 2011 WL 3734387, at *15, such factor carries “little weight,” Gilstrap, 443 F. Supp. 2d at 488; see Murray, 81 F.3d at 294 (“The decision to permit contingent fee arrangements was not designed to suck foreign parties disputing foreign claims over foreign events into American courts.”).¹⁷

Public Interest Factors

The public interest factors also favor litigation in Ireland and Luxembourg. See Erausquin, 2011 WL 3734387, at *12–15; Banco Santander, 732 F. Supp. 2d at 1339–44. For one thing, it would appear that “New York has a relatively minimal interest in this litigation. While this action is peripherally related to New York through Madoff, his involvement alone does not give New York a substantial interest in this litigation.” Erausquin, 2011 WL 3734387, at *14. This is particularly true where the foreign Plaintiffs' remaining claims involve the

¹⁷ There may also be a concern that Plaintiffs, if successful here, might obtain a class judgment that could not readily be enforced abroad against the foreign Defendants. See Banco Santander, 732 F. Supp. 2d at 1339; see Ski Train Fire, 499 F. Supp. 2d at 451; (see also Prüm Decl. ¶ 43–44; Sanfey Decl. ¶ 9.1.)

foreign conduct of foreign Defendants and investments in foreign Funds. See Banco Santander, 732 F. Supp. 2d at 1341; Murray, 81 F.3d at 293 (“The United States . . . has virtually no interest in resolving the truly disputed issues.”). By contrast, Ireland and Luxembourg, respectively, as evidenced in part by the related proceedings in progress there, “have an undeniably significant interest in policing conduct within their borders by [Defendants, which are mostly] investment funds and financial institutions organized and regulated under their laws.” (Defs. Mem. at 12); see Pollux, 329 F.3d at 76 (where the derivative securities in question were purchased by plaintiffs in England, and the alleged fraud and misrepresentations primarily occurred there, “England possesses the stronger local interest” and “it would be burdensome for a New York jury to hear and decide th[e] case”); Banco Santander, 732 F. Supp. 2d at 1344 (“When the action is based on facts occurring in another jurisdiction, the interest of that sovereign favors dismissal of the action.” (internal quotation marks omitted)).

And, “[n]umerous courts have found that the public interest factors often favor dismissal where there is . . . parallel litigation arising out of the same or similar facts already pending in the foreign jurisdiction.” Argus Media Ltd. v. Traditional Fin. Servs. Inc., No. 09 Civ. 7966, 2009 WL 5125113, at *6 (S.D.N.Y. Dec. 29, 2009); see Otor, 2006 WL 2613775, at 5 & n.16. Here, as in Banco Santander and Erausquin, “there is no real U.S. interest in the U.S. ‘hosting’ suits by foreign shareholders in foreign funds against foreign defendants over foreign conduct . . . particularly where other countries have a strong interest in [ongoing] suits concerning investment funds and financial institutions domiciled and subject to regulation there.” (Defs. Reply at 9); Erausquin, 2011 WL 3734387, at *14; Banco Santander, 732 F. Supp. 2d at 1344.¹⁸

¹⁸ Also as in Erausquin, the choice of law analysis in these cases is somewhat complicated, and none of the parties have presented a persuasive argument demonstrating that the law of any single jurisdiction will govern. See 2011 WL 3734387, at *14; (see Sanfey Decl. ¶¶ 10.1–14.1;

(D) Davis and the HSBC Defendants' Most Recent Partial Settlement Proposal

On November 28, 2011 – nearly three months after their earlier proposed partial settlement was rejected, see 2011 WL 4348140 (S.D.N.Y. Sept. 7, 2011), one month after the parties' cross-motions to amend and dismiss the Complaints were fully briefed, and on the same date scheduled for oral argument – Davis and the HSBC Defendants submitted a letter to the Court advising that they had executed a second amended proposed partial settlement agreement on November 27, 2011. They also requested that a pre-motion conference be scheduled regarding Davis's anticipated motion for preliminary approval of the newly amended proposed partial settlement, and asked the Court to “forebear from ruling on [Defendants'] motion to dismiss solely as it relates to Mr. Davis's claims against the HSBC Defendants until after the Court has decided whether to approve the [new proposed partial] settlement and any rights of appeal of any order in respect of approval have been exhausted.” (Ex. A at 1.)

This is a somewhat unusual request (to “forbear”) because, among other reasons, Defendants appear clearly entitled to prevail on their joint motion to dismiss for *forum non conveniens*. See supra pages 22–33. It may also impact the other parties to these cases and the court proceedings in Ireland and Luxembourg. And, it appears difficult to this Court to structure a ruling that carves out these particular parties.

In the interest of affording all parties the opportunity to be heard fully on this latest settlement request, **the Court hereby temporarily stays its ruling on the parties' cross-motions but does so only as it relates to Davis's claims against the HSBC Defendants.** The Court will give counsel to Davis and the HSBC Defendants until Friday, December 2, 2011

Prüm Decl. ¶¶ 28–29; Ryan Decl. ¶¶ 13(e), 20; Molitor Decl. ¶¶ 47–56.) Accordingly, “the application of [foreign] law does not favor [any] forum.” Erausquin, 2011 WL 3734387, at *14 (internal quotation marks omitted).

(noon) to present compelling argument with authorities why any such stay should be continued. The other parties to this case may have until Tuesday, December 6, 2011 (noon) to respond if they wish.¹⁹

III. Conclusion & Order

Defendants' motion to dismiss [#252] and Plaintiffs' motion to amend [#191] are resolved as follows:

- Plaintiff Davis's claims against the Madoff Defendants are severed from this consolidated action and stayed;
- Plaintiffs' claims against Erko, Inc., Windsor IBC, Inc., Infovaleur, Inc., and Eurovaleur, Inc., among other parties, are dismissed for failure to serve and for failure to prosecute;
- Defendants' motion to dismiss [#252] is granted;

Plaintiffs Davis and Repex's claims against JPM and BNY are dismissed under SLUSA and, alternatively, the Martin Act;

Plaintiffs' claims against the remaining Defendants are dismissed based upon *forum non conveniens* in favor of Ireland (Thema action) and Luxembourg (Herald and Primeo actions); and

- Plaintiffs' motion to amend [#191] their respective amended Complaints is respectfully denied as futile.

The Court's ruling is stayed temporarily only as it relates to Plaintiff Davis's claims against the HSBC Defendants, as described above.

¹⁹ The Court expresses no opinion as to whether Davis and the HSBC Defendants' new proposed partial settlement is "fair, reasonable and adequate." In re Masters Mates & Pilots Pension Plan & IRAP Litig., 957 F.2d 1020, 1026 (2d Cir. 1992).

The Clerk of the Court is respectfully requested to close these consolidated cases, except as to (i) Plaintiff Davis's claims against the Madoff Defendants, which the Clerk is directed to place on the suspense calendar; and (ii) (for the time being) Plaintiff Davis's claims against the HSBC Defendants.

Dated: New York, New York
November 29, 2011



RICHARD M. BERMAN, U.S.D.J.

USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: 11/29/11

EXHIBIT A

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- Attorney's Fees and Expenses: The application for attorney's fees and expenses will be filed at the same time as the motion for final approval of the Amended Settlement, and all fees and expenses that may be deducted from the Gross Settlement Fund will be projected in the Motion for Preliminary Approval and disclosed in the proposed notice when it is sent to class members. See Amended Settlement ¶7.5; Ex. A-1 at 5-6; see also September 15 Decision at 12-14.
- Litigation Reserve Fund: The Amended Settlement deletes the proposed \$10 million litigation reserve fund. See id. at 15-18.
- Proposed Service Award: The application for approval of a service award for Mr. Davis will request a reduced amount of €20,000. See Ex. A-1 at 5; see also September 15 Decision at 18-19.
- Assignment to Mr. Davis: The Amended Settlement deletes the proposed assignment to Mr. Davis of class members' claims against the Non-Settling Defendants. See id. at 19-24.
- Assignment to HSBC Defendants: The Amended Settlement deletes the proposed assignment to the HSBC Defendants of class members' interest in any recovery by Thema in the HTIE Litigation. See id. at 23-24.
- Ruling by the Irish High Court: While the Amended Settlement still contemplates a prior ruling by the Irish High Court that the settlement would be recognized and enforced in Ireland, HSBC has now filed the application in Ireland seeking the specific relief that is needed, a copy of which is attached to the settlement papers. See Amended Settlement ¶5.5 & Ex. D; see also September 15 Decision at 24.
- "Blow Provision": The "blow provision" has been increased from \$60 million to \$300 million. See Amended Settlement ¶9.1; see also September 15 Decision at 24-25. The Amended Settlement now provides for an adjustment to the settlement amount dependant on opt out levels below the \$300 million trigger. See Amended Settlement ¶2.2.

Please find enclosed a copy of the Amended Settlement along with a redlined version that highlights the changes from the prior settlement agreement. We have also updated several of the exhibits to conform to the changes and enclose clean and redlined versions of the amended exhibits.

We respectfully submit that, with the amendments above, the Amended Settlement should be preliminarily approved and therefore request a pre-motion conference pursuant to Your Honor's Individual Practice Rules. If convenient for the Court, the conference could be held today before or after the oral argument on the pending motions to dismiss Mr. Davis's claims.

We further request that the Court forbear from ruling on the motion to dismiss as it relates to Mr. Davis's claims against the HSBC Defendants until after the Court decides

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whether to approve the Amended Settlement and any appeals from that decision have been exhausted. This sequencing would ensure that the Court continues to have jurisdiction to approve the settlement. Cf. In re AOL Time Warner ERISA Litigation, No. 02 Civ. 8853, 2008 WL 186194, at *1-2 (S.D.N.Y. Jan. 18, 2008) (citing cases where district court was held to have lacked jurisdiction to approve a settlement while appeal was pending). It also would not interfere with the Court's consideration of the motion to dismiss as it relates to Mr. Davis's claims against the Non-Settling Defendants or the Herald and Primeo lead plaintiffs' claims against any of the Defendants.

Respectfully submitted,



Evan A. Davis

Enclosures

cc: All counsel of record (by e-mail)