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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE HERALD, PRIMEO, AND THEMA FUNDS SECURITIES LITIGATION	ECF Case Case No. 09 Civ. 0289 (RMB) Class Action
This Document Relates to: NEVILLE SEYMOUR DAVIS, Plaintiff, vs. ALBERTO BENBASSAT *et al.*, Defendants.	Case No. 09 Civ. 2558 (RMB) Class Action

MEMORANDUM OF LAW
IN SUPPORT OF LEAD PLAINTIFF NEVILLE SEYMOUR DAVIS'S
MOTION FOR PRELIMINARY APPROVAL OF PARTIAL SETTLEMENT

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Dated: June 17, 2011

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Lead Plaintiff Neville Seymour Davis submits this memorandum of law in support of his motion for preliminary approval of the partial settlement (the "Settlement") resolving all claims of the investors of Thema International Fund plc (collectively referred to, together with its sub-funds, as "Thema") against Defendants HSBC Holdings plc ("HSBC"), HSBC Securities Services (Ireland) Ltd. ("HSSI"), and HSBC Institutional Trust Services (Ireland) Ltd. ("HTIE") and proposed defendant HSBC Bank USA, N.A. (collectively referred to as the "HSBC Defendants") for a cash recovery of $62.5 million.

INTRODUCTION

This Settlement provides Thema investors the best vehicle to recover their losses from Bernard L. Madoff's Ponzi scheme for three main reasons:

- The $62.5 cash fund offers a substantial and immediate recovery;
- The Settlement avoids significant risks of litigation;
- The settling class members' assignment to Mr. Davis of their claims relating to this action allows them to obtain additional recovery from his continuing prosecution of those claims in the United States and/or elsewhere.

Indeed, the Settlement is a product of over two years of litigation led by Mr. Davis and his court-appointed Lead Counsel. Mr. Davis's counsel are extremely knowledgeable about the claims asserted in this action because they conducted a thorough investigation, which included a review and analysis of voluminous documents, interviews of multiple witnesses, and a deposition of a high-level executive in HSBC's risk management department. Mr. Davis and his counsel also participated in a mediation facilitated by a respected retired judge, the Honorable Daniel Weinstein. As demonstrated below, the mediation was conducted at arm's length and in good faith. All of these facts support the preliminary approval of the Settlement.

Moreover, Federal Rule of Civil Procedure 23's requirements are met. Numerosity is present because there are potentially thousands of Thema investors. Common issues of law and fact also exist since Mr. Davis alleges, among other things, that he and other Thema investors lost their investments due to defendants' failure to carry out their duties to perform due diligence on Madoff. Mr. Davis's claims are typical – he lost $1.1 million of his life savings due to defendants' course of misconduct that also harmed other Thema investors. As demonstrated by his active participation in the litigation and his retention of able and experienced counsel, Mr. Davis adequately represents other Thema investors. The Court should conditionally certify the settlement class.

Under these facts, the Settlement squarely falls within the range of reasonableness, warranting preliminary approval.

STATEMENT OF FACTS

I. The Litigation

A. This Class Action

This class action arises from the loss of the assets of the so-called "feeder funds" relating to Bank Medici AG (collectively, the "Medici Funds") to Bernard L. Madoff, who perpetrated the largest Ponzi scheme in history. Beginning in January 2009, multiple class actions were filed in this District against the directors, managers, promoters, auditors, and other advisors of the Medici Funds, including (1) Thema; (2) Primeo Select Fund and Primeo Executive Fund; and (3) Herald USA Fund and Herald Luxemburg Fund. In October 2009, the District Court consolidated these actions into *In re Herald, Primeo, and Thema Funds Securities Litigation*, No. 09 Civ. 0289 (RMB). The District Court also appointed Mr. Davis as the Lead Plaintiff for the Thema investors.

1. Mr. Davis's Amended Complaint

On February 10, 2010, after having conducted an investigation through his counsel and investigators, Mr. Davis filed the Consolidated Amended Class Action Complaint (the "Amended Complaint" or "Am. Compl.") setting forth over 600 paragraphs of fact-specific allegations. The Amended Complaint named dozens of defendants, including HSSI and HTIE for their roles as Thema's administrator and custodian, and their parent company, HSBC.[1]

In his Amended Complaint, Mr. Davis asserted two categories of causes of action: violations of the Securities and Exchange Act of 1934 (the "Exchange Act") and common law claims. Mr. Davis's Exchange Act claims were limited to Thema's directors, auditors, and other advisors based on their role in disseminating false and misleading information to investors. Am. Compl. ¶¶ 451-515 (Counts 1 through 11). Mr. Davis's common law claims included gross negligence; negligence; aiding and abetting gross negligence and negligence; professional negligence; breaches of fiduciary duties; aiding and abetting breaches of fiduciary duties; constructive trust; and unjust enrichment. *See id.* ¶¶ 528-660 (Counts 12 through 24). Specifically, Mr. Davis alleged that defendants failed to perform due diligence concerning Madoff, to detect the red flags surrounding Madoff's scheme, and to adhere to the duty of care imposed by law. *See id.* In essence, defendants' failure caused damages to the Thema Class.

[1] These additional defendants include: Alberto Benbassat, Stéphane Benbassat, Genevalor Benbassat & Cie, Gerald J.P. Brady, John Holliwell, Sonja Kohn, Daniel Morrissey, Peter Scheithauer, David T. Smith, Werner Tripolt, Bank Medici AG, UniCredit S.p.A., PricewaterhouseCoopers International Ltd., PricewaterhouseCoopers (Dublin), PricewaterhouseCoopers LLP, PricewaterhouseCoopers Bermuda, Thema Asset Management Limited, Thema International Fund plc, BA Worldwide Fund Management Limited, Peter Madoff, Andrew Madoff, the Estate of Mark Madoff, William Fry, JP Morgan Chase & Co., and The Bank of New York Mellon.

2. Mr. Davis's Proposed Complaint

Because some defendants reside abroad, service of process on those defendants took over a year to complete. In the meantime, the Supreme Court decided *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), which rendered Mr. Davis's Exchange Act claims no longer viable. Additional facts regarding defendants' misconduct also surfaced in Mr. Davis's investigations, news accounts, and the complaints filed in related cases. Under these circumstances, Mr. Davis filed a proposed Second Amended Complaint ("Proposed Complaint" or "Proposed Compl.") with a motion for leave to amend on April 1, 2011.

The Proposed Complaint does not seek to add new claims or legal theories, and differs from the Amended Complaint in three ways. First, the Proposed Complaint omits the Exchange Act claims in compliance with *Morrison*. Second, the Proposed Complaint revises the class definition to include only "persons and entities who owned shares of [Thema] on December 10, 2008 (the "Class Period"), and suffered damages thereby." *See* Proposed Compl. ¶ 409.[2] Third, the Proposed Complaint adds a single defendant, HSBC USA. *Id.* ¶¶ 40, 188-207.

Based on the current scheduling order, defendants' response to the *Davis* Amended Complaint and his motion to amend is due June 29, 2011.

3. Related Proceedings

In April 2011, Irving H. Picard, the trustee (the "Trustee") appointed under the Securities Investor Protection Act for the liquidation of the Bernard L. Madoff Investment Securities LLC ("BMIS"), commenced an adversary proceeding against Mr. Davis in the bankruptcy court: *Picard v. Repex Ventures, S.A.*, Adv. Pro. No. 11-1727 (BRL) (Bankr. S.D.N.Y.) (the "*Picard-*

[2] In addition to this "holder" class, the Amended Complaint included a "purchaser" class: "who . . . purchased shares of Thema between January 12, 2004 and December 14, 2008 inclusive (the "Class Period"), and suffered damages thereby." Proposed Compl. ¶ 443.

Repex Action"). The Trustee alleged that the class action interfered with his proceedings in bankruptcy court. In May 2011, Mr. Davis filed a motion to withdraw the reference of the *Picard-Repex* Action to the bankruptcy court. This motion is pending in this District Court.

B. Other Actions Against The HSBC Defendants

1. The Trustee's Action

In December 2010 – almost two years after the class action was commenced and ten months after Mr. Davis filed his Amended Complaint – the Trustee filed an adversary proceeding complaint against the HSBC Defendants and others in the bankruptcy court: *Picard v. Alpha Prime Fund Ltd.*, Adv. Pro. No. 09-1364 (BRL) (the "*Picard-HSBC* Action"). The Trustee asserted avoidance and common law claims against the HSBC Defendants, including aiding and abetting and contribution claims relating to BMIS's fraud upon and breaches of fiduciary duties to its customers.

The HSBC Defendants have successfully moved to withdraw the reference of the *Picard-HSBC* Action to the bankruptcy court for resolution of certain issues, including whether the Trustee has standing. The HSBC Defendants' motion to dismiss based on these issues is pending in this District in *Picard v. HSBC Bank plc*, No. 11 Civ. 0763 (JSR).

2. The Irish Litigation

Thema and 61 Thema investors commenced actions against HTIE in the Irish High Court – Commercial Division in Dublin, Ireland. In those actions, HTIE is alleged to have committed various torts and unjustifiably failed to perform obligations under the laws and regulations relating to Undertakings for Collective Investment in Transferable Securities.

II. The Settlement Negotiations

In October 2010, Mr. Davis's Lead Counsel and the HSBC Defendants' counsel began discussing a potential settlement. Several e-mail exchanges and telephone calls ensued among

counsel, all of whom agreed to meet on November 15, 2010 in New York, New York to explore whether settlement discussions might be in the parties' best interests.

Mr. Davis's Lead Counsel met with the HSBC Defendants' counsel in New York on November 15, 2010 as planned. After the meeting, and at the HSBC Defendants' request, Mr. Davis made a settlement demand. In response, the HSBC Defendants' counsel conveyed their counter-offer to Mr. Davis's counsel in person in San Diego, California on December 22, 2010. A series of telephone conferences ensued after the meeting, resulting in a further counter-offer from Mr. Davis's counsel. In January 2011, Mr. Davis and the HSBC Defendants agreed to explore settlement through mediation before the Honorable Daniel Weinstein, a retired judge of the Superior Court of the State of California, County of San Francisco. At Mr. Davis's counsel's request, the HSBC Defendants produced certain documents in connection with the mediation.

To prepare for and attend the mediation, Mr. Davis traveled from France to New York, and stayed there for five days in February 2011. Mr. Davis actively participated in the mediation sessions on February 24-25, 2011. At one of the joint sessions, he presented to Judge Weinstein and the HSBC Defendants' counsel his account of how he lost his life savings (over $1.1 million) to Madoff through Thema.

Several lawyers, including a solicitor and a barrister from Ireland, represented Mr. Davis at the mediation. Lawyers from Cleary Gottlieb Steen & Hamilton LLP and an in-house lawyer from HSBC appeared on behalf of the HSBC Defendants. The negotiations at the mediation were at times heated, but always at arm's length and in good faith.

Mr. Davis and the HSBC Defendants could not agree on the principal terms of the settlement at the end of the two-day mediation. But settlement negotiations continued through Judge Weinstein through March 2011. After multiple telephonic conferences among and an in-

person meeting between Mr. Davis's counsel and Judge Weinstein, the parties agreed on a cash settlement in the amount of $62.5 million in mid-April 2011.

Additional negotiations ensued regarding other principal terms of the Settlement. In May 2011, Mr. Davis's counsel reviewed documents produced by the HSBC Defendants and deposed their most knowledgeable witness

Mr. Davis and the HSBC Defendants entered into the Stipulation and Agreement of Partial Settlement on June 7, 2011.

III. The Settlement

The Settlement provides a cash recovery of $62.5 million for the Thema Class. In addition, the Settlement has two important features. First, the Settlement provides potential for further recovery for settling Thema Class members. Under the Settlement, the settling Thema Class members will assign their non-settled claims to Mr. Davis, allowing him to pursue those claims in other jurisdictions if this action is dismissed. *See* Ex. A ¶ 2.14. Mr. Davis would then litigate the assigned claims against the non-settling defendants, using a $10 million litigation fund set aside from the Settlement. *See id.* § 1.33. Should Mr. Davis obtain a cash recovery from such litigation, the recovery would be distributed to the settling Thema Class members. *See id.* ¶ 2.14. Second, the Settlement envisions a robust notice procedure. *See id.* ¶¶ 3.1-3.8. It is structured so that not only will registered and beneficial owners receive Long-Form Notice by mail, but a Publication Notice would also be published weekly for two weeks in two financial publications of global circulation and in papers of general circulation in Ireland, the United Kingdom, Italy, Switzerland, France, Austria, Germany, Russia, Israel, Mexico, Argentina, and Brazil. *See id.* ¶¶ 3.3, 3.5.

LEGAL STANDARD

Federal Rule of Civil Procedure 23(e) requires court approval of all class action settlements. Approval involves two steps. *See In re Currency Conversion Fee Antitrust Litig.*, MDL No. 1409, 2006 U.S. Dist. LEXIS 81440, at *13 (S.D.N.Y. Nov. 8, 2006). First, once a settlement is reached, "a court . . . make[s] 'a preliminary evaluation' as to whether the settlement is fair, reasonable and adequate." *Id.* (citation omitted). Second, at the final approval stage, a court conducts a full analysis on whether the settlement is reasonable, after class members have received notice of the settlement and have had an opportunity to voice their views. *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 210 (S.D.N.Y. 1995); *see also* 5 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 23.81 [1] (3d ed. 2002). This motion involves only the first step – preliminary approval.

By definition, "preliminary" approval requires only a preliminary review. A court does not make a final determination of the merits of the proposed settlement. *In re State St. Bank & Trust Co. ERISA Litig.*, No. 07 Civ. 8488 (RJH), 2009 U.S. Dist. LEXIS 100971, at *14 (S.D.N.Y. Oct. 28, 2009). "Preliminary approval is 'at most a determination that there is what might be termed "probable cause" to submit the [settlement] proposal to class members and hold a full-scale hearing as to its fairness.'" *Id.* (citation omitted). A strong initial presumption of fairness attaches to the proposed settlement that is a product of arm's-length negotiations by experienced counsel. In fact, a court should accord great weight to the recommendations of counsel. *See In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993). Thus, a court should grant preliminary approval where the proposed settlement appears to be the product of serious, informed, and non-collusive negotiations and free of obvious deficiencies. *See In re NASDAQ Market-Makers Antitrust Litig*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (citing MANUAL FOR COMPLEX LITIGATION § 30.41 (3d ed. 1995)).

A court has broad discretion in determining what to consider before granting preliminary approval; this initial assessment can be made on the basis of information already known to the court. MANUAL FOR COMPLEX LITIGATION § 21.632 (4th ed. 2004). A court may consider the nine *Grinnell* factors the Second Circuit has identified for granting final approval of a class action settlement:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) (citations omitted). As discussed below, each of the applicable *Grinnell* factors supports preliminary approval of the Settlement.

ARGUMENT

I. The Settlement Warrants Preliminary Approval

A. The *Grinnell* Factors Are Satisfied

1. The Complexity, Expense, And Likely Duration Of The Litigation Supports Approval Of The Settlement

Courts have consistently recognized that the complexity, expense, and likely duration of litigation are critical factors in evaluating the reasonableness of a settlement. *See, e.g.*, *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071 (RJH), 2005 U.S. Dist. LEXIS 24890, at *16 (S.D.N.Y. Oct. 24, 2005). This case is no exception. Mr. Davis has advanced numerous complex legal and factual issues under the federal securities laws and under common law. Resolution of these issues would require significant discovery, motion practice, and trial. The Settlement obviates the need for the settling parties to litigate these complex issues. Moreover,

this litigation faces unique challenges based on grounds that defendants have indicated they will assert in their upcoming motions to dismiss, including *forum non conveniens*.. *See In re Banco Santander Sec.-Optimal Litig.*, 732 F. Supp. 2d 1305, 1344 (S.D. Fla. 2010) (dismissing a similar Madoff feeder fund case on forum non conveniens grounds).

The prospect and timing of the Thema Class's recovery is further complicated by the related litigation in the United States and Ireland. As discussed above, the Trustee has initiated adversary proceedings against Thema and the HSBC Defendants in the bankruptcy court, seeking avoidance of Thema's claims and recovery of the alleged fraudulent transfers totaling $692 million. The Trustee seeks to disallow Thema's customer claim in the BMIS liquidation because Thema cannot or will not repay this sum and to equitably subordinate the claim because of Thema's alleged malfeasance.[3] Meanwhile, Thema is also pursuing claims against the HSBC Defendants in Ireland, but any recovery on these claims may not benefit investors given Thema's massive exposure to the Trustee's claw-back claims. Therefore, even if the Thema Class members may, in theory, benefit from the recovery of the Trustee's and Thema's proceedings, they could do so only after Thema satisfies the Trustee's nine-figure fraudulent transfer claims. In any event, any such recovery for the Thema Class will not materialize until at least several years of litigation in these jurisdictions.

In all, the Settlement eliminates these risks and enables the Thema Class members to recover cash much sooner than they would if the action proceeded to discovery and trial. *See Strougo v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("the passage of time would introduce yet more risks . . . and would . . . make future recoveries less valuable").

[3] At the same time, the Trustee has denied customer claims of those who invested with BMIS indirectly through funds like Thema, even though such investors are the real victims of Madoff's fraud, because they did not themselves hold an account with BMIS.

2. The Reaction Of The Class To The Settlement Is Expected To Be Positive

Mr. Davis has actively participated in these proceedings and supervised his counsel throughout the prosecution of this action. In February 2011, he traveled from Europe to New York to attend the two-day mediation before Judge Weinstein. Mr. Davis made a material contribution to the mediation by insisting on a significant settlement from the HSBC Defendants and telling his story to Judge Weinstein and the HSBC Defendants' counsel about losing his life savings to Madoff's Ponzi scheme through investing in Thema. He participated with his counsel in all material discussions in the weeks following the mediation, which ultimately produced the Settlement. In sum, he has diligently performed his duties as Lead Plaintiff.

Notice regarding the Settlement has not yet been distributed. Given the amount of this settlement, the potential of further recovery, and the risks of the class action, the Thema Class members are expected to react positively to the Settlement. Should any objections be received after the notice is disseminated, Mr. Davis's counsel will address these objections in his motion for final approval of the Settlement.

3. At This Stage Of The Proceedings – Over Two Years Into The Litigation – Mr. Davis And His Counsel Are Knowledgeable About The Class's Claims

Mr. Davis and his counsel have substantial knowledge about the merits, as well as the potential weaknesses, of this action. Mr. Davis's counsel began investigating the Thema Class's claims in December 2008. While actively litigating this action for over two years, Mr. Davis's counsel were directly involved in, among other things:

- Reviewing and analyzing Thema's prospectuses, agreements, newsletters, and account statements;
- Reviewing pleadings, motions, hearing transcripts, and orders in various related proceedings;

- Retaining and working with a team of private investigators to analyze the Thema Class's claims against dozens of potential defendants, to analyze the related litigation in Ireland, and to locate witnesses and documents in the United States and Europe (for example, Mr. Davis's private investigators interviewed Madoff's former secretary);

- Retaining Irish counsel to analyze the related Irish litigation, advise Plaintiff on the litigation and implications for this case, and attend the mediation in New York;

- Retaining bankruptcy counsel to analyze and advise Mr. Davis on the lawsuit and motion for a preliminary injunction filed by the Trustee against Mr. Davis;

- Interviewing witnesses and reviewing reports on witness interviews;

- Drafting two comprehensive fact-specific complaints;

- Reviewing documents obtained through the year-long investigation, including Madoff's appointment book;

- Researching and analyzing statutes, rules, and case law relating to the Class's claims and defendants' defenses; and

- Reviewing volumes of documents produced by the HSBC Defendants in anticipation of the mediation.

Thus, by the time the parties entered into an agreement to settle this action, Mr. Davis's counsel were extremely knowledgeable about the issues raised and able to recommend the Settlement to Mr. Davis and, upon preliminary approval by the Court, to the Class. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 458 (S.D.N.Y. 2004).

Moreover, before signing the Stipulation, Mr. Davis's counsel obtained documents from the HSBC Defendants concerning their due diligence on Madoff, including the communications with KPMG, their consultant. Mr. Davis's counsel also deposed a high-level executive in HSBC's risk management department in Europe, who had a thorough knowledge of, and was personally involved in due diligence on, Madoff and Thema. Mr. Davis only entered into the Stipulation after this discovery confirmed the reasonableness of the Settlement.

4. Mr. Davis Faces Real Risks Of Establishing The HSBC Defendants' Liability

In assessing the Settlement, the Court should balance the benefits afforded the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463. Although Mr. Davis believes that his allegations would ultimately be borne out by the evidence, he would face hurdles to proving liability. At the outset, Mr. Davis acknowledges that the securities fraud claims will likely be dismissed under the Supreme Court's 2010 decision in *Morrison*, and thus the Proposed Complaint omits those claims. Moreover, the HSBC Defendants will interpose a host of procedural defenses, several of which have been accepted by other courts in similar cases:

- *Forum non conveniens* (*Banco Santander*, 732 F. Supp. 2d at 1344);
- Lack of standing based on *Foss v. Harbottle,* (1843) 67 Eng. Rep.; and
- Lack of privity between the HSBC Defendants and the Class members (*ABF Capital Mgmt. v. Askin Capital Mgmt., L.P.*, 957 F. Supp. 1308, 1333 (S.D.N.Y. 1995)).

In the event that this class action is dismissed based on *forum non conveniens*, the Thema Class members would face significant hurdles in prosecuting their claims in Ireland. There is no class action mechanism in Ireland. Thus, each Thema Class member must prosecute his or her own individual action. A Thema Class member's ability to prosecute individual claims is further hindered by practices unique to Ireland in commencing action: each Thema Class member must (1) retain *both* a solicitor and a barrister; and (2) be willing to take the risk of paying defendants' costs and attorneys' fees, should a defendant prevail on the merits. The Settlement removes these hurdles by allowing Mr. Davis to bring the assigned claims on behalf of all Thema Class members and setting aside $10 million as a litigation fund to pay attorneys' fees and indemnify against any adverse costs award. *See* Ex. A ¶¶ 1.3, 2.14.

In the event that this action survives a motion to dismiss, Mr. Davis faces significant challenges to proving his claims against the HSBC Defendants on the merits. Mr. Davis must refute evidence demonstrating, among other things, that the HSBC Defendants (1) performed adequate due diligence in connection with their roles as Thema's administrator and custodian; and (2) properly relied on KPMG's review and inspection of BMIS. There is no guarantee that Mr. Davis would succeed at trial because class actions such as this one present difficult hurdles for plaintiffs to prove liability. *See, e.g., In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. MDL 1500, 2006 U.S. Dist. LEXIS 17588, at *39 (S.D.N.Y. Apr. 6, 2006). Thus, there is a very real risk of no recovery for the Class against the HSBC Defendants.

5. Mr. Davis Faces Real Risks Of Maintaining The Class Action Through Trial

Although the Court should certify the Thema Class, defendants would likely take the position that no class could be certified in this litigation. Moreover, even if the Court ultimately certifies the Thema Class, certification can be reviewed and modified at any time before trial. Thus, there is always a risk that the action, or particular claims, might not be maintained as a class through trial. *See Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005).

6. The Court Should Disregard The HSBC Defendants' Ability To Withstand A Greater Judgment

A defendant's ability to withstand a judgment greater than that secured by settlement is not a determining factor for approval of the settlement. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 538 (3d Cir. 2004) (affirming district court's finding that defendant's ability to pay more was irrelevant to assessment of settlement). Thus, the Court should not find the HSBC Defendants' ability to withstand a greater judgment to be an impediment to settlement when the other factors favor the settlement. Nor does their ability to pay more money render a settlement unreasonable. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001).

7. The Settlement Is Reasonable In Light Of The Best Possible Recovery And The Litigation Risks

The adequacy of the Settlement Amount must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987). The Court need only determine whether the Settlement falls within a "range of reasonableness" – a range that "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972). The Court should also consider that the Settlement provides for payment to the Thema Class *now*, rather than a speculative payment in the future. *See AOL Time Warner*, 2006 U.S. Dist. LEXIS 17588, at *44 ("the benefit of the Settlement will . . . be realized far earlier than a hypothetical post-trial recovery"). Given the present time value of money and the risk of failing to prove liability or establish damages in excess of the Settlement Amount, the Settlement "would save great expense and would give the Plaintiffs hard cash, a bird in the hand." *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 228 F.R.D. 541, 566 (S.D. Tex. 2005).

Moreover, the Settlement provides relief in addition to the $62.5 million settlement fund. Under the Settlement, the settling class members would assign their claims to Mr. Davis. And $10 million would be set aside as a litigation fund for Mr. Davis to pursue claims against other defendants. Should Mr. Davis recover additional funds from these defendants, the settling class members would receive their pro rata share from such future settlements or judgments. Accordingly, the Settlement is reasonable because it provides settling class members with not only hard cash, but also the prospect of receiving significant additional recoveries.

B. The Proposed Class Satisfies The Rule 23 Requirements

"Class actions serve an important function in our system of civil justice." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981). By providing a single forum in which to litigate the same or similar claims, a class action affords an indispensable mechanism for the conservation of judicial resources. *See, e.g., Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985) (holding that "'the effectiveness of the securities laws may depend in large measure on the application of the class action device'") (citation omitted). Rule 23 is therefore broadly structured so as to facilitate certification of class actions. When a court is in doubt as to whether or not to certify a class action, the court should err in favor of allowing the class to go forward. *Id.* (quoting *Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir. 1968)).

In considering a class certification motion, a court will focus only on whether the prerequisites of Rule 23 are met. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). While a court may resolve factual issues concerning the prerequisites of Rule 23 when those issues overlap with issues relating to the merits, here there are no merits-based issues that impact the Court's consideration of class certification. *See In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006). As demonstrated below, the Thema Class satisfies the prerequisites of Rule 23(a) and the requirements of Rule 23(b)(3).

1. The Thema Class Satisfies Rule 23(a)

(a) Numerosity

For a class action to be appropriate, the proposed class must be so numerous that joinder of all of its individual members would be impracticable. FED. R. CIV. P. 23(a)(1). Rule 23 does not require joinder to be impossible, but "the difficulty or inconvenience of joining all members of the class [must] make [the] use of the class action appropriate." *Cent. States S.E. & S.W. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 244-45 (2d

Cir. 2007). Numerosity is presumed when a class consists of forty or more members. *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995).

To establish numerosity, a plaintiff need not allege the exact number or identity of class members. Rather, courts "'may make common sense assumptions to support a finding of numerosity.'" *In re Blech Sec. Litig.*, 187 F.R.D. 97, 103 (S.D.N.Y. 1999) (citation omitted). Here, confirmatory discovery has revealed that more than 140 investors were registered shareholders of Thema. Mr. Davis believes that thousands more investors are beneficial owners of Thema shares. Thus, Rule 23(a)(1) is satisfied.

(b) Common Questions Of Law And Fact

Rule 23(a)(2) requires that "'plaintiffs' grievances share a common question of law or of fact.'" *Cent. States*, 504 F.3d at 245 (citation omitted). In determining whether common questions exist, Rule 23(a)(2) "requires only that there be 'a common nucleus of operative fact,' not that there be an absolute identity of facts." *Gerber v. Computer Assocs. Int'l, Inc.*, No. 91 Civ. 3610 (SJ), 1995 U.S. Dist. LEXIS 21142, at **7-8 (E.D.N.Y. Apr. 7, 1995) (quoting *Port Auth. Police Benevolent Ass'n v. Port Auth.*, 698 F.2d 150, 153-54 (2d Cir. 1983)).

Common questions of law and fact are present here because Mr. Davis has alleged that the HSBC Defendants engaged in a common course of misconduct that affected all Thema Class members. These allegations give rise to common questions of law and fact, including:

- Whether the HSBC Defendants were negligent and/or reckless in failing to adequately investigate Madoff and BMIS;
- Whether the HSBC Defendants' misconduct was reckless, grossly negligent, or negligent in violation of fiduciary duties owed to Mr. Davis and the Thema Class and, therefore, in violation of the common law;
- Whether the HSBC Defendants aided and abetted other defendants' breaches of fiduciary duties and common law; and

- Whether Mr. Davis and other members of the Thema Class have been damaged, and if so, the proper measure of damages.

The presence of these common questions satisfies Rule 23(a)(2). *See, e.g.*, *In re Baldwin-United Corp. Litig.*, 122 F.R.D. 424, 426 (S.D.N.Y. 1986).

(c) Typicality

Rule 23(a)(3) requires that "the claims . . . of the representative parties [be] typical of the claims . . . of the class."[4] The typicality requirement is satisfied "'when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.'" *Cent. States*, 504 F.3d at 245 (citation omitted). To meet the typicality requirement, "[t]he claims need not be identical," so long as they derive from an over-all course of conduct. *Gerber*, 1995 U.S. Dist. LEXIS 21142, at **8-9.

Mr. Davis's claims are not only similar, but are virtually identical, to those of the other members of the Thema Class. All Thema Class members seek to prove that the HSBC Defendants failed to safeguard Thema's assets in violation of their duties as Thema's administrator, custodian, director, and/or advisors. As such, all Thema Class members have been injured by the same course of conduct by defendants. Thus, Mr. Davis stands in precisely the same position as other Thema Class members. *See In re Twinlab Corp. Sec. Litig.*, 187 F. Supp. 2d 80, 83 (E.D.N.Y. 2002) ("the element of typicality is met because the class members have been allegedly harmed by the same course of conduct"). Accordingly, Mr. Davis's claims are typical of those of other Thema Class members.

[4] The Supreme Court noted that the "commonality and typicality requirements of Rule 23(a) tend to merge." *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 157 n.13 (1982); *accord Ohman v. Kahn*, No. 87 Civ. 7117 (JFK), 1990 U.S. Dist. LEXIS 7781, at *10 (S.D.N.Y. June 26, 1990) ("The typicality requirement of Rule 23(a)(3) is a close cousin of the commonality requirement."). Accordingly, inasmuch as commonality has been established, typicality has been established as well.

At the June 8, 2011 pre-motion conference, Thema made two baseless assertions in an attempt to cast doubt on Mr. Davis's membership in the Thema Class and his standing to sue. Thema's assertions conflict with the evidence and case law. First, in his May 3, 2009 certification submitted with the Amended Complaint, Mr. Davis verified that he bought 4,466 Thema shares on May 24, 2006. Dkt. No. 76 at 199. Mr. Davis's shares were held by Rubicon International Limited, a registered shareholder of Thema. *See* Declaration of Neville Seymour Davis ("Davis Decl.") ¶ 2. By letters dated October 9, 2007 and October 17, 2008, Rubicon confirmed that it held thousands of Thema shares worth approximately $1.3 million "on [Mr. Davis's] behalf and to [his] order." Davis Decl. Exs. 1, 2. Such documentary evidence leaves no room for doubt that Mr. Davis is a beneficial owner of Thema shares. Nor is Mr. Davis's standing to sue subject to question because "federal law confers standing upon *beneficial shareholders*" in actions alleging securities fraud and common law claims. *See Drachman v. Harvey*, 453 F.2d 722, 727 (2d Cir. 1971) (emphasis added).

Second, Thema challenges Mr. Davis's standing based on Rubicon's attempted – but failed – transfer of Thema shares and Rubicon's purported assignment of claims to a third party in July 2009. *See* Davis Decl. Ex. 3. Thema is wrong. No transfer of Thema shares ever took place because, by letter dated February 22, 2010, HSSI, as Thema's administrator, declined to process Rubicon's requests for transfer. Davis Decl. Ex. 5. Furthermore, Mr. Davis never authorized this failed transfer request, therefore it would have been invalid had it been processed (which it was not). Davis Decl. ¶¶ 5-6. Regarding the purported assignment, Rubicon purported only to assign its own rights of legal action, not the rights of Mr. Davis or anyone else. Davis Decl. Ex. 4. But even if Rubicon had assigned Mr. Davis's rights (which it did not), such an assignment would be invalid because Mr. Davis never authorized it. Davis Decl. ¶ 6. Absent

Mr. Davis's authorization, Rubicon cannot assign rights that it does not own, because those rights, including the right to prosecute this action, belong to Mr. Davis. *See W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 111 (2d Cir. 2008) (holding that an investment advisor lacks standing to sue on behalf of its clients – beneficial owners of the underlying securities – absent their assignment of claims). Accordingly, Mr. Davis is a member of the Thema Class and meets Rule 23(a)(3)'s typicality requirement.

(d) Adequacy Of Representation

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." This requirement is met if a plaintiff does not have interests that are antagonistic to those of the class, and his chosen counsel is qualified, experienced, and generally able to conduct the litigation. *See Baffa v. Donaldson*, 222 F.3d 52, 60 (2d Cir. 2000).

Mr. Davis satisfies both prongs of the adequacy test. None of Mr. Davis's interests are antagonistic to those of the Thema Class. All members of the Thema Class allege claims arising from the same wrongful conduct and are based on the same legal theories as the claims advanced by Mr. Davis. He is committed to the vigorous prosecution of this action. Thus, interests of the other members of the Thema Class will continue to be protected by Mr. Davis.

Moreover, Mr. Davis has retained Chapin Fitzgerald Sullivan & Bottini LLP[5] as Lead Counsel and Robbins Geller Rudman & Dowd LLP and Murray, Frank & Sailer LLP as additional counsel for the Thema Class. His counsel have substantial experience in prosecuting class actions and are qualified to represent the Thema Class. Mr. Davis and his counsel have

[5] Mr. Davis retained Francis A. Bottini, Jr. of Johnson Bottini, LLP as his counsel in this action. By orders dated October 5, 2009 and October 13, 2009, the Court appointed Mr. Davis as Lead Plaintiff and Johnson Bottini, LLP as Lead Counsel for the Thema Class. In May 2011, Mr. Bottini dissolved Johnson Bottini, LLP and joined Chapin Fitzgerald Sullivan & Bottini LLP, which has replaced Johnson Bottini, LLP as Lead Counsel for the Thema Class.

vigorously protected the interests of the Thema Class. Their efforts resulted in the Settlement of $62.5 million. *See In re Greenfield Online Sec. Litig.*, No. 07 Civ. 1118 (VLB), 2008 U.S. Dist. LEXIS 84175, at **11-12 (D. Conn. 2008). Thus, Rule 23(a)(4)'s requirements are satisfied.

2. The Thema Class Satisfies Rule 23(b)(3)

In addition to the requirements of Rule 23(a), Rule 23(b)(3) requires a proposed class representative to establish that (1) common questions of law or fact predominate over any questions affecting only individual members; and (2) a class action is superior to other available means of adjudication. FED. R. CIV. P. 23(b)(3). Here, both requirements are met.

(a) Common Questions Of Law Or Fact Predominate

This inquiry focuses on whether the issue of liability is common to members of the class. Indeed, "resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002).

As demonstrated in the discussion of commonality above, the nature of this class action and the elements of Mr. Davis's claims involve issues primarily focusing on defendants' breaches of their duties by failing to perform due diligence on Madoff and BMIS and to detect the numerous red flags that could have exposed Madoff's fraud. The Amended Complaint alleges that defendants pursued a common course of conduct that injured Mr. Davis and the other members of the Thema Class. Thus, all Thema Class members are substantially – if not identically – situated with respect to those claims. In this case, it is difficult to discern any liability issues that are not common to the claims of each member of the Thema Class. *See* 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE § 1778 (3d ed. 2010). Once common questions of liability are resolved, all that remains is the

ministerial act of computing the amount of damages suffered by each Thema Class Member. Thus, the predominance requirement is satisfied.

(b) A Class Action Is Superior

Rule 23 (b)(3) identifies four factors to be considered in making a "superiority" determination:

- the interest of members of the class individually controlling the prosecution of separate actions;
- the extent and nature of any litigation concerning the controversy already commenced by members of the class;
- the desirability of concentrating the litigation of the claims in the particular forum; and
- the difficulties likely to be encountered in the management of a class action.

In this litigation, the interest of members of the Thema Class individually controlling the prosecution of separate actions is minimal, because the costs and expenses of individual actions, when weighed against the individual recoveries potentially obtainable, would be prohibitive. Thus, the first superiority factor is satisfied. *See Blech*, 187 F.R.D. at 107 (superiority requirement satisfied as "[m]ultiple lawsuits would be costly and inefficient").

To Mr. Davis's knowledge, no similar suits are currently pending against defendants in the United States. As such, there is no dispute that this Court is a desirable forum for concentrating the litigation of the Thema Class members' claims. *See In re AMF Bowling Sec. Litig.*, No. 99 Civ. 3023 (DC), 2002 U.S. Dist. LEXIS 4949, at *26 (S.D.N.Y. Mar. 26, 2002) ("For each investor to litigate individually 'would risk disparate results among those seeking redress, . . . would exponentially increase the costs of litigation for all, and would be a particularly inefficient use of judicial resources.'") (citation omitted). Although a number of Thema investors have brought claims in Ireland, those will not benefit all Thema Class members

because of the absence of any class action mechanism in Ireland. Accordingly, the second and third superiority factors are satisfied.

Finally, Mr. Davis does not envision any significant difficulties in the management of this case as a class action or the administration of the Settlement. This action embodies all of the hallmarks, both in form and in substance, of the types of actions that are routinely certified in this Circuit and elsewhere. Thus, a class action is superior to other available methods for the fair and efficient adjudication of a controversy affecting a large number of investors. *See Green v. Wolf Corp.*, 406 F.2d 291, 296 (2d Cir. 1968).

II. The Proposed Form And Method Of Class Notice Are Appropriate

A. The Scope Of The Notice Program Is Adequate

There are no "rigid rules" for determining the adequacy of notice for a class action settlement. Rather, when measuring the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules, the court should look to its reasonableness. *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 U.S. Dist. LEXIS 9450, at *26 (S.D.N.Y. Feb. 1, 2007). "Notice need not be perfect, but need be only the best notice practicable under the circumstances, and each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members." *Id.* at *27 (citing *Weigner v. New York*, 852 F.2d 646, 649 (2d Cir. 1988)). In fact, notice programs such as the one proposed by Mr. Davis's counsel have been approved as adequate under Due Process and Rule 23 in a multitude of class action settlements. *See, e.g., In re Prudential Sec. Ltd. P'ships Litig.*, 164 F.R.D. 362, 368 (S.D.N.Y. 1996), *aff'd sub nom., Toland v. Prudential Sec. P'ship Litig.*, 107 F.3d 3 (2d Cir. 1996). Here, by consulting with counsel for the HSBC Defendants, Mr. Davis's counsel are ensuring that every known avenue for obtaining delivery to the Thema Class members, including registered

and beneficial owners of Thema shares, is being utilized to disseminate the Long-Form Notice. The proposed notice program is adequate and should be approved by the Court.

B. The Proposed Form Of Notice Is Proper

The content of a notice is generally found to be reasonable if "the average class member understands the terms of the proposed settlement and the options provided to class members thereunder." *In re Stock Exchs. Options Trading Antitrust Litig.*, No. 99 Civ. 0962 (RCC), 2006 U.S. Dist. LEXIS 87825, at *22 (S.D.N.Y. Dec. 4, 2006); *see also Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982). The proposed Long-Form Notice contains all necessary information in compliance with the requirements of due process and Rule 23. The information is also provided in a format that is accessible to the reader. In addition, the Long-Form Notice advises recipients that they have the right to exclude themselves from the Settlement, or to object to any aspect of the Settlement. Furthermore, the Long-Form Notice provides recipients with the contact information for the Administrator and the Thema Class's counsel. Indeed, the proposed format is similar to formats that have been approved by many other courts in this circuit. *See Stock Exchs.*, 2006 U.S. Dist. LEXIS 87825, at *22.

C. The Claims Administrator Will Act In The Thema Class's Best Interests

Gilardi & Co. LLC is well suited to serve as the Notice and Claims Administrator of the Settlement. Gilardi is one of the largest and most experienced firms providing claims administration services in the United States. In the past 20 plus years, Gilardi has administered many notable settlements for both plaintiffs and defendants. As Notice and Claims Administrator, Gilardi will be responsible for, among other things, mailing the notices to the Thema Class, publishing the notices, reviewing claims from Thema Class members, and compiling a distribution schedule to settling Thema Class members.

III. The Court Should Endorse The Proposed Schedule

If the Court grants preliminary approval of the Settlement, Mr. Davis respectfully submits the following schedule for the Court's approval:

Event	Time for Compliance
Deadline for mailing the Long-Form Notice and Claim Form to Registered Shareholders with instructions to forward to Beneficial Owners	15 calendar days following issuance of the Preliminary Approval Order
Deadline for the initial publishing the Short-Form Notice	15 calendar days following issuance of the Preliminary Approval Order
Deadline for filing Claim Forms	90 calendar days after the initial mailing of the Notice
Deadline for submitting exclusion requests or objections	21 calendar days before the Fairness Hearing
Filing of memoranda in support of approval of the Settlement and Plan of Allocation, or in support of Mr. Davis's counsel's application for an award of attorneys' fees and expenses	45 calendar days before the Fairness Hearing
Filing of reply papers in support of approval of the Settlement and Plan of Allocation, or in support of Mr. Davis's counsel's application for an award of attorneys' fees and expenses	7 calendar days before the Fairness Hearing
Settlement Hearing	Approximately 75 days following execution of the Preliminary Approval Order, at the Court's convenience

CONCLUSION

For the reasons set forth above, the Court should (1) grant Mr. Davis's motion for preliminary approval of the Settlement; (2) conditionally certify the Thema Class for settlement purposes; (3) approve the form of the Notices and the proposed plan for disseminating the Notices and Proof of Claim, Release and Assignment; and (4) set a date for the final approval hearing.

Dated: June 17, 2011

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