



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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	: ECF CASE
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IN RE HERALD, PRIMEO AND THEMA FUNDS	: No. 09 Civ. 0289 (RMB)
SECURITIES LITIGATION	:
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	:
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DECLARATION OF FERDINAND BURG IN SUPPORT OF MOTION TO DISMISS

I, FERDINAND BURG, declare under penalty of perjury under the laws of the United States of America that the following is true and correct:

Introduction

1. I am acting as *Avocat à la Cour* registered with the Luxembourg Bar Association, and was appointed along with Mr. CARLO REDING, *réviseur d'entreprises*, (auditor) registered with the Luxembourg Institute of auditors, by the *Tribunal d'Arrondissement de et à Luxembourg* Sixth Chamber (the "Luxembourg Court") by judgment given on April 2, 2009 (the "Judgment") to serve as one of the joint liquidators for Herald (Lux) Sicav ("Herald Lux"). See Judgment attached hereto as **Exhibit "A"** (along with English translation).

2. I submit this declaration in support of Herald Lux's joint motion to dismiss (the "Motion") the Amended Class Action Complaint (the "Amended Herald Complaint" or "AHC") and proposed Third Amended Class Action Complaint (the "Third Herald Complaint" or "THC" and together with the AHC, collectively, the "Herald Complaints") filed by lead plaintiff Repex Ventures, S.A. ("Repex") in the above referenced matter.

1. Lack of personal jurisdiction over Herald Lux



3. Herald Lux was an investment fund organized under the laws of Luxembourg (AHC ¶ 25, THC ¶ 15), in particular under part I of the Luxembourg law of 20 December 2002 on collective investment undertakings, maintained its office in Luxembourg and was subject to oversight by the Luxembourg Supervisory Authority for the Financial Sector (www.cssf.lu).

4. Herald Lux's lack of ties to the United States is further demonstrated by the fact that it was a foreign investment fund ineligible for investment by any U.S. citizens. The Herald Lux prospectuses referenced in the Herald Complaints contain the following statement prominently set forth as the second paragraph:

The shares have not been registered under the United States Securities Act of 1933 and may not be offered directly or indirectly in the United States of America (including its territories and possessions) to nationals or residents thereof or to persons normally resident therein, or to any partnership or persons connected thereto unless pursuant to any applicable statute, rule or interpretation available under United States law.

See relevant portion of Herald Lux Prospectus dated August 2008 attached hereto as **Exhibit "B"** at p. 2.

5. Herald Lux does not consent to the jurisdiction of this Court, and was not served with the AHC (or the THC) in the United States.

6. Given Herald Lux's lack of contacts with the United States, I'm advised by my U.S. counsel that the facts alleged by the plaintiffs are insufficient to support general jurisdiction over Herald Lux for the reasons more fully explained in the joint memorandum of law submitted in support of the Motion (the "MOL").

7. With respect to the alleged contacts Herald Lux had with the United States, the Herald Complaints contain the following minimal (and insufficient) allegations: (i) some investors purportedly sent money directly to New York banks (AHC ¶ 115, THC ¶ 61); (ii) Herald Lux purportedly maintained an account with BMIS, through its custodian (THC ¶ 68);



and (iii) a Customer Agreement, Option Agreement and Trading Authorization Limited to Purchases and Sales of Securities and Options were delivered to BMIS's headquarters in New York (Amended Repex Complaint ¶ 112, THC ¶ 68).

8. I'm advised by my U.S. counsel that such alleged contacts with the United States are not sufficient to establish specific jurisdiction over Herald Lux for the reason more fully set forth the MOL. *See also Casio Computer Co. v. Sayo*, No. 98 Civ. 3772, 1999 U.S. Dist. Lexis 14675, at * 82 (S.D.N.Y. Sept. 20, 1999) (wire transfers to bank accounts in the United States do not satisfy the minimum contacts required to establish personal jurisdiction over foreign defendants).

9. Even if the above alleged contacts were deemed potentially sufficient by the Court, my U.S. counsel advises that it would offend traditional notions of fair play and substantial justice as described in the MOL for this Court to exercise personal jurisdiction over Herald Lux to determine claims asserted by foreign investors against a foreign investment fund that is in a court-supervised liquidation proceeding in Luxembourg as explained below.

2. Plaintiffs lack of standing to pursue the claims set forth in the Herald Complaints

10. By judgment given on April 2, 2009 Herald Lux was pronounced dissolved and ordered liquidated pursuant to Article 104 of Luxembourg Law of 20 December 2002 on undertakings for collective investments ("Luxembourg Law"), as amended.

11. As set forth in the Judgment attached hereto as **Exhibit "A"**, I was appointed by the Luxembourg Court to act as one of the Joint Liquidators of Herald Lux, along with Mr. Carlo Reding (collectively, the "Joint Liquidators").

12. As Joint Liquidators, we are charged with representing Herald Lux as well as its investors and creditors regarding any and all claims and assets of Herald Lux. In that regard, the



Luxembourg Court vested us with the widest powers to achieve our objective, whether those powers are exercised in the Grand Duchy of Luxembourg or abroad, subject to the supervision and with the assistance of the Luxembourg Court.

13. Mr. Reding and I, as the Joint Liquidators, are the exclusively authorized parties entitled to pursue claims for damages suffered by Herald Lux, and we do so not only on behalf of Herald Lux, but also on behalf of all Herald Lux investors and creditors.

14. The Judgment states in relevant part:

It follows that the company in liquidation [Herald Lux] forfeits management of all its property, which is entrusted to the liquidators, who act on behalf both of the company and of the investors and creditors whom they represent and they are vested with the widest powers for achievement of their objective.

See Exhibit "A" at the sixth page of the English translation.

15. Accordingly, neither the plaintiffs nor any other purported investors in Herald Lux have standing to directly pursue claims for damages suffered by Herald Lux, rather, we are pursuing such claims on behalf of all Herald Lux investors and creditors.

16. In our role as Joint Liquidators we indeed filed suit on behalf of Herald Lux, its creditors and its investors, on March 17, 2010 in the Luxembourg district court against certain of the same entities named as defendants in the Herald Complaints including, among others, HSBC Securities Services Luxembourg S.A., Bank Medici AG, Ernst & Young S.A. and the directors of Herald Lux (the "Luxembourg Litigation").¹ The Luxembourg Litigation seeks to recover all losses suffered by Herald Lux in order to make a distribution to all Herald Lux creditors and investors in accordance with Luxembourg law.

¹ As such, Herald Lux reserves all rights with respect to arguments it does not join that are made in the MOL by co-defendants including, but not limited to, arguments regarding exculpation and Madoff as a supervening cause.



17. Because none of the claims asserted in the Herald Complaints allege personal losses to plaintiffs that are separate and apart from the losses suffered by Herald Lux, the plaintiffs lack any standing to pursue such claims.

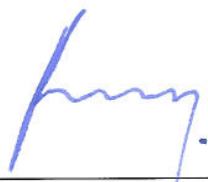
3. Mandatory stay of proceedings applicable under Luxembourg law

18. Also, a mandatory stay of proceedings and mandatory stay of enforcements against Herald Lux went into effect pursuant to Article 104(3) of the Luxembourg Law upon the appointment of Mr. Reding and I as Joint Liquidators. Thus, plaintiffs' suit against Herald Lux violates the mandatory stay of proceedings under Luxembourg law.

19. Indeed, to the extent that the plaintiffs believe they have claims against Herald Lux, they must file their claims in the Herald Lux liquidation proceeding where they will be administered in accordance with Luxembourg law. *See Exhibit "A"* at the sixth through eighth pages of the English translation.

20. In addition to the personal jurisdiction, standing and other arguments referenced herein, my U.S. counsel advises that the Herald Complaints should be dismissed for failure to state a claim against Herald Lux and for the additional arguments set forth in the MOL and accompanying submissions that Herald Lux joins to the extent identified in the Chart of Defendants submitted in support of the Motion.

DATED: June 28, 2011

By: 

FERDINAND BURG,
JOINT LIQUIDATOR