

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

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**IN RE HERALD, PRIMEO, AND THEMA FUNDS  
SECURITIES LITIGATION**

**This document relates to:**

**Davis v. Benbassat et al., Case No. 09 Civ. 2558 (RMB)**

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) **ECF Case**  
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) **Case No. 09 Civ. 0289 (RMB)**  
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**DECLARATION OF MICHAEL E. WILES IN SUPPORT OF  
MOTIONS TO DISMISS THE ABOVE-CAPTIONED ACTION**

I, Michael E. Wiles, under penalty of perjury, declare as follows:

1. I am counsel to Thema International Fund plc (“Thema”) and (for purposes of preliminary proceedings and the motion to dismiss) counsel to (a) Thema’s directors, Daniel Morrissey, Alberto Benbassat, Stephane Benbassat, David T. Smith and Gerald J.P. Brady; and (b) two of Thema’s service providers, Thema Asset Management Limited (“TAM”) and Genevalor Benbassat et Cie (“Genevalor”).

**Personal Jurisdiction**

2. None of the above-named Defendants consents to jurisdiction in the United States. All of the above-named Defendants agree to jurisdiction in Ireland in the event this case is re-filed there.

3. Plaintiffs acknowledge that all of the above-named Defendants are foreign citizens with no offices or continuing presence in the United States. *See* Second Amended Class Action Complaint filed by Neville Seymour Davis, dated April 1, 2011 (“Complaint”) ¶¶ 27, 29, 30, 31, 32, 33, 34, 35, 36, 49, 50, 70, 71.

4. Plaintiffs have not alleged that any United States citizens or residents are shareholders in Thema. To the contrary: attached as **Exhibit A** is a true and correct copy of a

Prospectus for Thema, which was also attached to the Complaint and incorporated therein. As indicated at page 11, “US Persons” were not eligible to invest in Thema.

5. Plaintiffs’ other allegations in support of personal jurisdiction are deficient for the reasons stated in the Memorandum of Law in Support of Defendants’ Joint Motion to Dismiss and in Opposition to Plaintiffs’ Motion for Leave to Amend Complaints (the “Mem.”), including:

- A. Plaintiffs’ allegations (Complaint ¶¶ 29, 30, 97) that Alberto Benbassat obtained an MBA in the United States, that Stephane Benbassat once worked for a New York law firm, and that Daniel Morrissey and Gerald Brady have visited the United States for purposes unrelated to the asserted claims. *See* Mem. at 6.
- B. Plaintiffs’ allegations (Complaint ¶¶ 92, 93) that Alberto Benbassat and Stephane Benbassat met on sporadic occasions with Madoff in New York. *See* Mem. at 6.
- C. Plaintiffs’ allegations (Complaint ¶¶ 95) that assets of Thema were sub-custodied with Bernard L. Madoff Investment Securities LLC. *See* Mem. at 8.

**Thema’s Constituent Documents and Contracts with Service Providers**

6. Thema is an investment company incorporated under the laws of Ireland on 9 May 1996 and was authorized by the Central Bank of Ireland as a UCITS on 31 May 1996. A true and correct copy of Thema’s Memorandum and its Articles of Association are attached as **Exhibits B** and **C**.

7. Thema contracted with HSBC Institutional Trust Services (Ireland) Limited (“HTIE”) to act as custodian and trustee as specified by applicable UCITS regulations. True and correct copies of the agreements with HTIE were attached to the Complaint and are also attached hereto as **Exhibit D**.

8. Thema's other service providers included (a) its administrator, HSBC Securities Services (Ireland) Limited; (b) its distributor, TAM; and (c) its promoter, Genevalor. True and correct copies of Thema's contracts with those firms are attached as **Exhibits E, F, G, H, I and J**. As required by UCITS III regulations effective January 1, 2007, Thema appointed as designated persons two residents of Ireland responsible for the ongoing supervision in and from Ireland of Thema's delegates and service providers.

9. By signing their applications to subscribe for shares, Thema's shareholders agreed to be bound by the Memorandum, the Articles of Association, the Prospectus and the terms of Thema's material contracts as identified in the Prospectus. A true and correct copy of an Application Form and Payment Instructions for Thema is attached as **Exhibit K**.

10. All of Thema's contracts with its service providers (with the exception of the agreement with Genevalor) provide that the contracts are governed by the laws of Ireland. *See* Exhibit D § 31; Exhibit E § 25; Exhibit H § 20(1), Exhibit I § 13.9. The agreement with Genevalor is governed by Swiss law. Exhibit J § 11.1.

#### **Points of Disagreement with Co-Defendants**

11. This Court has directed that defendants file a single motion to dismiss. However, Thema has different interests from other defendants regarding some issues and different positions about them. As clarification:

- A. Thema agrees that no cause of action is properly asserted against any defendant under New York law and that the laws of Ireland govern all matters alleged unless a specific contract states otherwise.
- B. Certain defendants have argued that Madoff's fraud was a "supervening cause" that bars common law claims. Thema disagrees. Thema contends (for example)

that HTIE, as Custodian to Thema and as trustee under applicable regulations, had contractual and regulatory duties to monitor Madoff and to ensure that the assets of Thema reportedly held by Madoff were segregated for safekeeping. Thema's position in the litigation pending in Ireland is that Madoff's fraud could not be a supervening cause, because HTIE's duty was to prevent that fraud and to ensure that Madoff held the assets he claimed to hold.

- C. Thema agrees that the Complaint in the action against it is not based on injuries suffered directly by plaintiffs (as opposed to being reflective of losses suffered by Thema itself) and does not allege violations of duties owed directly to plaintiffs as opposed to Thema itself. However, Thema does not join in the overly broad argument that the Non-Fund Defendants owed "no duties" to shareholders.
- D. Thema has been advised that none of the other Defendants in the Thema Action is relying at this stage upon an argument that claims are barred by exculpatory clauses in contracts, and Thema therefore does not join in arguments regarding alleged exculpation clauses. Thema notes that the merits of any such argument would depend on the contract at issue.

#### **Pending Litigations in Ireland**

12. There are currently more than 60 actions pending in Ireland brought by shareholders of Thema. All of these actions name HTIE as a defendant. Attached as **Exhibit L** is a true and correct copy of a published decision by the High Court in Ireland that describes the pending cases and the steps taken to manage and coordinate proceedings in them.

13. Attached as **Exhibit M** is a letter from counsel to certain of the plaintiffs in the pending cases in Ireland, representing that such counsel represents persons who hold interests in

approximately 20% of Thema's outstanding shares, and that other shareholders are represented by other counsel.

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

Executed on June 29, 2011, at New York, NY.

DEBEVOISE & PLIMPTON LLP

/s/ Michael E. Wiles

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motion and other preliminary proceedings)*