UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re HERALD, PRIMEO and THEMA FUND SECURITIES LITIGATION,	Civil Action No. 09 CIV 289 (RMB)(HBP) (Consolidated with 09 CIV 2032 and 09 CIV 2558) **ECF Case** **Class Action**
This Document Relates To: NEVILLE SEYMOUR DAVIS, Plaintiff, vs. ALBERTO BENBASSAT et al., Defendants.	Case No. 09 Civ. 2558 (RMB) **Class Action**

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

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I. INTRODUCTION

Repex Ventures, S.A., ("Repex"), Lead Plaintiff for investors in the Herald (LUX) and Herald (USA) funds (collectively, the "Herald Funds"), hereby opposes the Motion for Preliminary Approval of the Partial Settlement (the "Motion") filed by Neville Seymour Davis, Lead Plaintiff for investors in the Thema Fund on grounds that: (1) the proposed definition of "Released Claims" is vague, overbroad and, without clarification, may adversely impact claims of investors in funds other than the Thema Fund, including investors in the Herald Funds; (2) similarly, the proposed Assignment of Claims is unclear and, without clarification, may result in the assignment of claims other than for investments in Thema Fund; and (3) because the Davis action and the Repex action have been consolidated for pre-trial purposes, the proposed settlement should make plain that discovery sought by Repex will not be impacted in any way by restrictions agreed to by Davis.

These defects are found not only in the parties Stipulation of and Agreement of Partial Settlement (the "Stipulation") (Exhibit A, Dkt. No. 234-1), and the amendment thereto, but also in the proposed class notice (the "Notice"), resulting in a notice which does not comply with Due Process and Fed. R. Civ. P. 23. For all these reasons, the Motion should be denied.

II. STATEMENT OF RELEVANT FACTS

A. Proposed Definition of Released Claims

The definition of Released Claims is set forth in the First Amendment to the Stipulation and Agreement of Partial Settlement (Exhibit F-1, Dkt. No. 234-10)(the "Settlement Amendment"), which states:

> 'Released Claims' shall mean ***all claims, counterclaims, rights, causes of action***, or liabilities of every nature and description, whether known or Unknown (as

> defined herein), whether arising under federal, state, common or foreign law, ***that were or could have been asserted in the Action or any other action in the United States*** or elsewhere in any jurisdiction throughout the world in which the Released Parties are domiciled or otherwise subject to jurisdiction, ***by any Settlement Class Member***, that arise out of, are based upon, or ***related to*** the allegations, transactions, ***facts, matters, or occurrences*** set forth or referred to in the Amended Complaint or the Proposed Amended Complaint ***concerning or relating to investments in the Fund*** . . . .
>
> 'Released Claims' does not include claims, rights or causes of action or liabilities whatsoever related to the enforcement of the Settlement, including, without limitation, any of the terms of this Stipulation or orders or judgments issued by the courts in connection with the Settlement or any claims asserted or that could be asserted against the Non-Settling Defendants.

Exhibit F-1, Dkt. No. 234-10. (Emphasis added).

The term "Action" is defined in the Stipulation to mean the class action complaint filed March 19, 2009, in the United States District Court for the Southern District of New York by Fabian Perrone and Chia-Hung Kao, captioned *Perrone et al. v. Benbassat et al.*, Case No. 09 Civ. 2558. (Stipulation at 2, ¶ A). In that complaint, **plaintiffs Perrone and Kao brought claims on behalf of** themselves and other **persons and entities who purchased shares of** Thema International Fund plc, Primeo Select Fund, **Herald USA Fund, and/or Herald (LUX) Fund** arising out of those funds' investments with Bernard L. Madoff Investment Securities ("BLMIS") and subsequent losses stemming from the Ponzi scheme perpetuated by Bernard L. Madoff. *Id.*

Thus, claims on behalf of investors in the Herald Funds **not only could have been asserted** in the Action as defined in the Stipulation, **claims on behalf of Herald Fund investors were asserted**.

Since "Settlement Class" is defined as all persons who were registered or beneficial owners of [Thema Fund], and who suffered damages thereby due to conduct alleged in the

Amended Complaints . . . [Stipulation, ¶1.35], the definitions of the terms Action and Released Claims make it unclear whether a member of the Thema Settlement Class would release claims for damages arising from investments in the alleged feeder fund scheme and other funds described in the Action, including the Herald Funds.

In an effort to clarify this release language ambiguity in the proposed settlement documents, and to assure that claims other than those for investments in the Thema Fund are released in the proposed partial settlement, Repex proposed that release language be modified by the underlined and bolded phrase so that it would read:

> 'Released Claims' does not include claims, rights or causes of action or liabilities whatsoever related **to investments in securities other than in the Fund or** to the enforcement of the Settlement . . . .

See Email to A. Chang dated June 21, 2011, attached to the Declaration of Timothy J. Burke filed in support hereof ("Burke Dec.") as Exhibit "1." Repex further requested that the proposed release language be modified in all instances it appeared in the Stipulation and Proof of Claim. *See* Email to A. Chang and E. Davis dated June 21, 2011, attached to Burke Dec. as Exhibit "2" noting that the release language was mirrored in Paragraphs 6 and 7 of Part IV. Definitions and Release and in paragraph 7 of the proposed Proof of Claim.

B. Assignment of Claims

Assigned Claims is defined in the Stipulation as follows: ¶2.14:

> In consideration of the Settlement Amount, ***Settlement Class Members who elect to participate in the Settlement*** by filing a Proof of Claim, Release and Assignment ***will execute an assignment*** in the form set forth in Part V(B) of Exhibit A-4 attached hereto, ***irrevocably conveying to Lead Plaintiff*** the right to pursue, on their behalf and for their benefit, ***claims arising out of, based upon, or relating to the allegations, transactions, facts, matters, or occurrences set forth or referred to in the Amended Complaint or the Proposed Amended Complaint***

> ***against all Non-Settling Defendants, any of their affiliates, or any other persons or entities in any domestic or foreign forum*** ("the "Assigned Claims"). . .

Stipulation, ¶2.14.

Here again, the language in the proposed settlement papers is unclear and ambiguous as to whether a Settlement Class Member's participation in the partial settlement requires an assignment of claims to Davis, not just for Thema Fund claims, but for other fund claims, including Herald Fund claims, which arose out of the Madoff feeder fund scheme.

Thus, Repex requested clarification of the Assigned Claims definition to include the words "**Assigned Claims does not include claims, rights or causes of action related to investments in securities other than in the Fund**." *See* June 22, 2011 Email from Burke to A. Chang, E. Davis and F. Bottini attached as Exhibit "3" to Burke Dec.

C. Agreement with Respect to Discovery

The Stipulation at ¶2.16 concerning discovery, among other things, restricts the timing and amount of discovery sought from HSBC[1] in the Action. For example, ¶2.16 provides that "no discovery under this section shall occur until 12 months after the Effective Date" and limits the production of HSBC witnesses to "no more than two" for deposition and testimony at trial.

Since the Davis and Repex actions have been consolidated for pretrial proceedings, including discovery, Repex sought clarification that of the Stipulation would not apply to any non-settling party in the Consolidated Action, by adding the the end of ¶2.16 the language: "This agreement does not apply in any manner to discovery sought by any non-settling party to the

[1] "HSBC" means and includes HSBC Securities Services (Ireland) Limited, HSBC Institutional Trust Services (Ireland) Limited and HSBC Holdings plc, the defendant parties to the Settlement. HSBC Holdings plc is also a defendant in Repex's action filed on behalf of itself and the proposed Class of Herald Funds investors.

action consolidated for pre-trial purposes under the caption *In re Herald, Primeo and Thema Fund Litigations*, Case No. 09 Civ. 289 (S.D.N.Y) under the Federal Rules of Civil Procedure."

Notwithstanding Repex's counsels' efforts to clarify the proposed settlement documents, the Settling Parties have, thus far, declined each of the above requests. *See* Email dated June 22, 2011 from F. Bottini and June 24 from E. Davis, attached to Burke Dec as Exhibit "4." Thus, for the above reasons, the Court should deny the Motion.

III. ARGUMENT

A. The Proposed Notice to Class Members is Inadequate

1. The Proposed Notice Fails to Adequately Inform Class Members of the Scope of the Release

Fed. R. Civ. P. 23(c)(2)(B) states that, when certifying a class under Rule 23(b)(3), the court must "direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The required notice must include the following information: the nature of the action, the definition of the class certified, the class claims, issues, or defenses, that a class member may enter an appearance through counsel if the member so desires, that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and the binding effect of a class judgment on class members under Rule 23(c)(3). Fed. R. Civ. P. 23(e)(1) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the [settlement] proposal." While Fed. R. Civ. P. 23 establishes no specific requirements for the notice, in interpreting the Rule the Second Circuit has stated that:

> The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness. There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." Notice is "adequate if it may be understood by the average class member."

Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 113-14 (2d Cir. 2005) (internal citations omitted). *See also McReynolds v. Richards-Cantave*, 588 F.3d 790, 804 (2d Cir. 2009) ("[t]he notice must be of such nature as reasonably to convey the required information ... and it must afford a reasonable time for those interested to make their appearance") (quoting *Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2d Cir. 1983)) (additional internal quote omitted).

"In order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action." *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982); *see also In re Baldwin United Corp.*, 770 F.2d 328, 336-37 (2d Cir. 1985). Thus, a settlement may "prevent class members from subsequently asserting claims relying on a legal theory different from that relied upon in the class action complaint but depending upon the very same set of facts." *Nat'l Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9, 18 n.7 (2d Cir. 1981); *see also Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 382, 134 L. Ed. 2d 6, 116 S. Ct. 873 (1996).

It is essential, however, that there be adequate notice of the effect of the release and compensation for released claims. *Super Spuds*, 660 F.2d at 16, 18. *See also TBK Partners*, 675 F.2d at 460-62; *In re Auction Houses Antitrust Litig.*, 2001 U.S. Dist. LEXIS 1713, No. 00 Civ.

648 at *13 (S.D.N.Y. Feb. 22, 2001). Here, the Notice fails to apprise class members of the terms of the settlement or the effects of the release. Specifically, it remains unclear whether or not the Settling Parties are trying to settle the claims Herald Funds investors have against HSBC. The release is especially opaque for investors in both the Herald and Thema Fund. As noted *supra*, the Settling Parties define the "Action" so that the term includes claims brought on behalf of Herald Funds investors.

A release is a species of contract and "is governed by principles of contract law." *Bank of Am. Nat'l Trust and Sav. Ass'n v. Gillaizeau*, 766 F.2d 709, 715 (2d Cir. 1985) (applying New York law). Whether a contract is ambiguous is a question for the court. *Van Wagner Adver. Corp. v. S&M Enters.*, 501 N.Y.S.2d 628, 631 (N.Y. 1986). "Where contract language is ambiguous, the differing interpretations of the contract present a triable issue of fact." *Gillaizeau*, 766 F.2d at 715 (applying New York law). Thus, "[a]mbiguity within the release of a class action settlement agreement all but requires future litigation." *Wilson v. DirectBuy, Inc.*, No. 3:09-CV-590, 2011 U.S. Dist. LEXIS 51874, *50 (D. Conn. May 16, 2011).

When a release is so ambiguous that future litigation is needed to determine its scope, then the Settlement Notice fails to "fairly apprise the prospective members of the class of the terms of the proposed settlement." *Wal-Mart*, 396 F.3d at 114. Here, the Notice and Release are unreasonable because average class members, same as Repex, simply do not know whether their claims against HSBC related to their investment in Herald Funds are released. *Id.* The ambiguity of the proposed release language should be clarified now so that the potential for future disputes and litigation will be avoided.

Additionally, the Settling Parties' failure to identify pending actions that would be impacted by the partial settlement negates the Settling Parties' request for this Court's approval of the Notice as written. The Second Circuit has "strongly encourage[d]" courts to include specific references to pending actions in class notices. *Id.* at 116, n. 22. "If class members are to make informed decisions about what steps to take in response to the notice, it would indeed be helpful for them to be aware that other actions have been filed against these defendants, involving claims similar to those here." *Davis v. J.P. Morgan Chase & Co.*, 01-CV-6492, 2011 U.S. Dist. LEXIS 37704, 24-25 (W.D.N.Y. Apr. 6, 2011). Here, if the Settling Parties identified all of the pending actions impacted by their partial settlement, then class members and the parties to the litigation would better understand the scope of the release. The identity of all of the pending actions would certainly assist in alleviating some of the release's current ambiguities.

2. To the Extent that the Settling Parties are Attempting to Release Herald Investors' Claims, the Proposed Settlement is Unfair

As written, the release is so ambiguous that it could constitute a waiver of all claims against HSBC that could be brought by Herald Funds investors. If it is true that the Settling Parties are attempting to settle claims against HSBC that could be brought by Herald Funds investors, then the Proposed Settlement is unfair to Herald Funds investors, and the Motion should be denied.

A proposed settlement of a class action should be preliminarily approved where it "appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval." *In re Nasdaq Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (citation omitted). "When a

settlement is negotiated prior to class certification, as is the case here, it is subject to a higher degree of scrutiny in assessing its fairness." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001).

The Second Circuit has recognized that when reviewing the fairness of a proposed class action settlement, the court must take "special care. . . to ensure that the release of a claim . . . not shared alike by all class members does not represent 'an advantage to the class. . . [bought] by the uncompensated sacrifice of claims of members, whether few or many.'" *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982) (quoting *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 19 (2d Cir. 1981). In other words, there is no reason why some class members should receive a benefit at the expense of other class members. *In re Auction Houses Antitrust Litig.*, No. 00 Civ. 0648, 2001 U.S. Dist. LEXIS 1713 at *56 (S.D.N.Y. Feb. 22, 2001).

Here, it appears that Herald Funds investors, especially those who also invested in the Thema Fund, may be making an uncompensated sacrifice of their Herald Funds related claims against HSBC. The Proposed Settlement does not provide compensation to Herald Funds investors for releasing Herald Fund related claims against HSBC. Only Thema Fund investors will be compensated. This potential sacrifice of Herald Funds related claims, with all of the compensation going to Thema Fund investors, makes the Partial Settlement unfair. *Id.*

3. Davis' Claims are Atypical of Herald Fund Investor Claims

Davis cannot represent a class of Herald Funds investors because his interests and theirs collide. *National Super Spuds*, 660 F.2d at 17. As show above, Herald Funds investors are

making an uncompensated, and thus impermissible, sacrifice of their Herald Funds related claims against HSBC in order for Thema Fund investors to be compensated. *Id.*

Furthermore, because there is no evidence that Davis ever was an investor in the Herald Funds, he does not have standing to pursue claims on behalf of the Herald Funds investors. *See Repex Ventures v. Madoff*, 09 Civ. 289, Opp. at 6-7 (S.D.N.Y. Oct. 5, 2009) (plaintiffs cannot meet the injury requirement for claims relating to funds in which they have not purchased shares because they cannot claim to be personally injured by the violations relating to those funds). Thus, Davis cannot serve as class representative for Herald Funds investors nor can he settle their claims. *Id.*

B. The Settling Parties' Agreement to Cooperate With Respect to Discovery Cannot Interfere With Discovery Sought by Any Non-Settling Party

This Court consolidated the Herald and Primeo actions with the Thema action for pretrial purposes pursuant to Rule 42(a)(2) of the Federal Rules of Civil Procedure. *Id*. at 8. The Stipulation at ¶2.16 contains an agreement that potentially relates to the timing and scope of discovery of allegations common to the three complaints. The Stipulation covers requests for documents, including the Settling Defendants' productions of documents to third parties. *Id.* The Stipulation limits the number of depositions of HSBC witnesses to "no more than two." *Id.* Further, the Stipulation prohibits the taking of such discovery until 12 months after the Partial Settlement's Effective date. *Id.*

Additionally, the Settling Parties have conducted what they characterize as "confirmatory discovery" without notice to any other party. This discovery included, *inter alia*, the production

of documents by the HSBC and a deposition of a senior HSBC official with knowledge of HSBC's dealings with and due diligence of BLMIS. *See* Stipulation at 6.

Given the Court's order consolidating these cases for purposes of discovery, it should be made clear that the Stipulation does not apply in any manner to discovery sought by any non-settling party to the action consolidated for pre-trial purposes under the caption *In re Herald, Primeo and Thema Fund Litigations*. The Stipulation contains no such limitation. The Court should ensure that the non-settling parties can proceed with discovery unimpeded by the Settling Parties' agreement.

IV. CONCLUSION

For these reasons outlined herein, Repex respectfully requests that this Court deny the Motion unless the changes Repex seeks are made to the Settlement papers.

Dated: June 30, 2011

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