UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE HERALD, PRIMEO AND THEMA FUNDS SECURITIES LITIGATION	:	**Case No. 09 Civ. 289 (RMB) ECF Case**
This Document Relates to:	:	
NEVILLE SEYMOUR DAVIS,	:	**Case No. 09 Civ. 2558 (RMB)**
Plaintiff,	:	**Class Action**
vs.	:	
ALBERTO BENBASSAT et al.,	:	
Defendants.	:	

OBJECTION BY CERTAIN DEFENDANTS TO MOTION FOR PRELIMINARY APPROVAL OF PARTIAL SETTLEMENT

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The undersigned Defendants[1] hereby object to the motion (the "Motion") by Neville Seymour Davis ("Davis") for preliminary approval of a proposed settlement with HSBC Institutional Trust Services (Ireland) Limited ("HTIE"), HSBC Securities Services (Ireland) Limited, HSBC Holdings plc and HSBC Bank USA, N.A. (collectively, "HSBC").

Preliminary Statement

The proposed settlement purports to settle direct claims that Thema shareholders might have against HSBC. Its real purposes, however, are quite different.

First, the real target of the proposed settlement (from HSBC's perspective) is not the claims asserted by Davis, but a different lawsuit over which this Court has no jurisdiction and over which Davis has no right to exercise control: namely, Thema's December 2008 action against HTIE in Ireland, in which Thema seeks approximately $1.2 billion in damages. Thus:

- The proposed stipulation of settlement and the proposed judgment each provide that all class members will be deemed to have assigned, to HSBC, "all" of the class members' rights (as shareholders) to receive distributions from Thema as a result of any recovery by Thema from its action against HTIE. *See* Motion Ex. A (the "Settlement Agreement"), § 2.13; Motion, Ex. D, ¶ 8 ("Proposed Judgment").
- Class members also would be deemed to have assigned, to HSBC, "the power and right to act" in the name and right of those shareholders in "all matters" relating to Thema's litigation against HTIE. Motion, Ex. D, ¶ 8.

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[1] Objectors are Defendants Thema International Fund plc ("Thema") and its directors (Alberto Benbassat, Stephane Benbassat, Daniel Morrissey, Gerald J. P. Brady and David T. Smith); Thema Asset Management Limited; Genevalor Benbassat et Cie; PricewaterhouseCoopers Ireland, PricewaterhouseCoopers (Bermuda), PricewaterhouseCoopers LLP, PricewaterhouseCoopers International Limited; William Fry; JPMorgan Chase & Co.; and UniCredit S.p.A. UniCredit S.p.A. only joins the objection as to Sections III, IV, and VI(A).

Certain Objectors have moved to dismiss the Complaint for lack of personal jurisdiction. These objections are subject to those motions to dismiss and without waiver of the same.

- This proposed assignment would occur without any action by class members and would be effective "whether or not" class members "submit a Proof of claim" or receive even a penny of the proposed settlement payment. *Id.*

The proposed settlement notice unabashedly confirms that the purpose of these involuntary assignments is "to facilitate the termination" of Thema's litigation against HTIE in Ireland. *See* Motion, Ex. A-1, at p. 5.

Second, the purpose of the settlement (from Davis's perspective) is not merely to resolve potential claims against HSBC, but instead to ensure the perpetuation of claims against Non-Settling Defendants. Thus, the proposed Settlement provides that all class members who wish to receive any portion of the proceeds of the proposed settlement would need to assign, to Davis, the right to litigate claims on their behalf against Non-Settling Defendants. Davis therefore seeks to perpetuate a de facto "class action" regardless of this Court's jurisdiction, without complying with the requirements of Rule 23 and without continued supervision by this Court.

Third, the proposed settlement would insulate HSBC from contribution claims, but would not provide the Non-Settling Defendants with an equivalent bar in return.

The proposed settlement, then, amounts to this: (1) Davis and his counsel would get a $10 million litigation fund, a $62.5 million pot from which to seek an additional 25% fee, and a guaranty of more work in the form of a forced assignment of other litigation claims;[2] (2) HSBC would get a "deemed" assignment of other shareholder rights (for use in an effort to derail a foreign lawsuit that seeks $1.2 billion in damages), plus a one-sided contribution bar; and (3) as

[2] The settlement provides for a $10 million litigation fund (which could go to Davis's counsel in the future) and anticipates that Davis's counsel will ask for 25% of the $62.5 million Gross Settlement Amount (or $15,625,000) in present attorneys' fees. Since the 25% is calculated on the Gross Settlement Fund, including the litigation fund, Davis's counsel would receive present fees based on a percentage of future fees.

compensation for facilitating these outcomes, Thema's shareholders would receive less than $38 million after the proposed deductions for legal fees.

Counsel to a group of shareholders who are pursuing separate lawsuits in Ireland, and who claim to hold approximately 20% of Thema's shares, have notified HSBC that they want no part of this proposed settlement. *See* **Wiles Decl. Ex. A.** It is easy to see why: the proposed settlement is a travesty and is a flagrant effort to sell-out the interests of Thema's shareholders and the rights of co-defendants. Davis admits that shareholders' direct claims are weak and that shareholders have doubtful standing even to pursue claims. Davis himself does not even appear to be a member of the proposed class. He also is a foreign citizen residing in France who has no legitimate reason to be pursuing claims in the United States and whose claims ought to be dismissed on numerous grounds. HTIE has argued (in response to claims asserted by very large Thema shareholders in Ireland) that shareholders may not assert claims directly against HTIE and that only Thema itself may do so. The proposed settlement therefore is the product of a negotiation by HSBC with the weakest available adversary (Davis) for the admitted purpose of trying to undermine the claims brought by a far stronger adversary (Thema) in a foreign court, and with the added effect of riding roughshod over the rights of non-settling parties.

The proposed settlement terms are not only unfair, they are contrary to law. Thema is an Irish fund and the laws of Ireland govern its affairs. Under the laws of Ireland the pursuit of Thema's litigation against HTIE is committed exclusively to the control and judgment of Thema; shareholders cannot assert claims to the extent their alleged losses are merely reflective of losses suffered by Thema. Davis nevertheless proposes that this Court should authorize a settlement of a purported *shareholder* action to "facilitate the termination" of the *direct* action that Thema has brought. Davis's proposal would turn the "reflective loss rule" on its head.

Similarly, Davis's effort to perpetuate a "virtual" class action, and his agreement to propose a one-sided contribution bar, are improper. They are impermissible efforts to maintain a class action without even a showing of proper jurisdiction (let alone compliance with Rule 23 requirements) and a plain violation of well-established rules regarding contribution bars.

As if the foregoing were not bad enough, the Motion proposes an unreasonably short period – barely three weeks in the best of circumstances – during which opt-out notices and objections could be filed by class members. Since most notices will have to be forwarded by foreign nominee banks it is highly likely that a substantial number of proposed class members would not even receive the notices until after the deadlines had passed, let alone have time to have the notices translated as necessary and to seek competent legal advice. The Motion also proposes to prevent shareholders from exercising their constitutional opt-out rights unless they comply with unreasonable and needless conditions. Instead of allowing class members to exercise rights, these terms are designed to trap class members in an ill-conceived settlement.

In contrast to Davis and his counsel, Thema and its directors actually are committed to the interests of Thema's shareholders, and to that end they are diligently pursuing the pending litigation against HTIE in Ireland. Thema is confident that it will succeed, and when it does so all shareholders of Thema will share ratably in the proceeds of the judgment that Thema obtains, without the need for those shareholders to take any action whatsoever. It is offensive that Davis and HTIE would even ask this Court to interfere with this foreign litigation.

For these reasons and those set forth below, this Court should deny the Motion.

Statement of Facts

1. Thema's Litigation against HTIE

Thema is an investment company organized under the laws of Ireland with its sole place of business in Dublin, Ireland. Thema is regulated by the Central Bank of Ireland in accordance

with the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations, as formulated in 2003 and as the same have been amended and implemented in Ireland (the "UCITS Regulations"). Thema was set up for investment by foreign investors; US Persons were not eligible to purchase shares in Thema. Thema sold two classes of shares, one denominated in US dollars ("USD Shares") and the other in euros ("EUR Shares").

HTIE is incorporated under the laws of Ireland, has its principal place of business in Dublin and has its business regulated and supervised by the Central Bank of Ireland. HTIE contracted with Thema to act as the custodian and trustee for the safekeeping of assets belonging to Thema. HTIE did so pursuant to the requirements of UCITS Regulations and UCITS Directives and also pursuant to the terms of a written contract (the "Custody Agreement"). A copy of the Custody Agreement was attached as Exhibit 4 to the proposed Second Amended Complaint and that copy is attached to the Wiles Declaration. **Wiles Decl. Ex. B.**

HTIE had responsibility under applicable UCITS Regulations and under the Custody Agreement to safeguard Thema's assets and to ensure that at all times they were segregated for safekeeping. The Custody Agreement permitted HTIE to appoint sub-custodians, but in that event HTIE undertook (as required under UCITS Regulations) to ensure that its sub-custodians similarly would segregate assets and ensure that those assets held for Thema were separately registered and identified as Thema's. *See* Custody Agreement ¶¶ 10(A), 16(B). HTIE also had regulatory obligations to ensure that its sub-custodian appropriately segregated Thema's assets from other assets. *See* **Wiles Decl. Ex. C** (UCITS Notice 4), at pp. 20-21. In addition, under the applicable regulations in Ireland the ultimate responsibility for safeguarding Thema's assets rested with HTIE, and HTIE's use of a sub-custodian did not relieve HTIE of its obligation. *See* **Wiles Decl. Ex. D** (Regulation 37(2) of SI 211/2003), at pp. 9-11.

HTIE appointed Bernard L. Madoff Investment Securities LLC ("BLMIS") as its sub-custodian. For more than 12 years HTIE certified that HTIE and BLMIS held certain securities and cash for Thema. Thema offered shares and redeemed shares based on those assets and their values, and funds that Thema received from sales of Thema shares were delivered to HTIE (as required under the UCITS Regulations) in reliance on HTIE's safeguarding of those assets.

In December 2008, however, Thema learned that neither HTIE nor HTIE's sub-custodian, BLMIS, possessed any of the assets that they reportedly held for Thema. Thema promptly filed suit in the High Court in Dublin to recover the full value of the assets that reportedly were bought and sold for Thema and that were supposed to be held in safekeeping by HTIE and HTIE's appointed agents. The lawsuit was filed in December 2008; it seeks damages of approximately $1.2 billion. That damage claim will be increased in the event that Thema must pay any monies to the BLMIS Trustee pursuant to avoidance action claims made by the BLMIS Trustee in the pending proceedings under the Securities Investor Protection Act.

Thema's shareholders will share equally and ratably in all recoveries that Thema obtains in its litigation against HTIE, just as they will share equally and ratably in all other assets of Thema. Shareholders need take no action at all to be entitled to those benefits.

2. Other Litigation in Ireland

More than 60 parties have filed shareholder suits against HTIE in Ireland. Counsel to 50 of those parties, who claim to own approximately 20% of Thema's shares, has already voiced his strong opposition to the settlement that HTIE has negotiated with Davis. *See* Wiles Decl. Ex. A.

HTIE has argued in Ireland that Thema's shareholders may not make claims against HTIE because the shareholders were not parties to contracts with HTIE and because HTIE owed them no other duties. HTIE has also argued that to the extent that any shareholders may assert claims they can only do so if they are shareholders of record. HTIE has argued that Thema's

governing documents, and the laws of Ireland, do not permit beneficial owners to assert claims. *See* **Wiles Decl. Ex. E** (Decision by the High Court in Ireland in *Kalix Fund Ltd. v. HSBC Institutional Trust Services (Ireland) Ltd.*, Record No. 3152P/2009 (H. Ct.))**.**

The Court in Ireland has consolidated the pending cases and established detailed procedures under which they will proceed. *Id*. The parties are now in the discovery phase.

3. Davis and the Proposed Class Action

Davis is a citizen of the United Kingdom and a resident of France. He claims to represent a class of Thema shareholders who held shares as of December 2008. Davis primarily sought to assert claims under the securities laws of the United States. However, Thema's shares were not bought and sold in the United States and US Persons were not eligible to be shareholders in Thema. For that reason the securities claims have been dropped.

Davis's Amended Complaint and proposed Second Amended Complaint assert a variety of claims that essentially sound in negligence or gross negligence. In the proposed Second Amended Complaint Davis has also added "derivative" claims that he wishes to pursue in the name of Thema. This Court has not granted leave for the filing of the Second Amended Complaint. The Court also has not granted standing to Davis to pursue any derivative claims, and could not grant such rights under Irish law or in light of the requirements of Rule 23.1.

Defendants filed motions to dismiss this case on June 29, 2011. Those motions demonstrate (among other things) that this Court lacks jurisdiction, the case belongs in the courts in Ireland (not the United States), and Davis has no standing to assert derivative claims.

Argument

A "proposed settlement negotiated before class certification is subjected to a higher degree of scrutiny than a later settlement." *Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 329 (S.D.N.Y. 2005) (quoting 5-23 Moore's Federal Practice-Civil § 23.161 (3d ed.2004)). This

stems from the court's "fiduciary duty to the non-representative class members who were not party to the settlement agreement 'because inherent in any class action is the potential for conflicting interests among the class representatives, class counsel, and absent class members.'" *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004) (quoting *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 262 (S.D.N.Y. 1998)). This conflict of interest sometimes leads to proposed settlements that are so plainly inadequate, or otherwise improper, that they do not merit judicial approval. *See Norman v. McKee*, 290 F.Supp. 29, 32 (N.D. Cal. 1968) (refusing to approve a settlement that was grossly inadequate). These factors all point to denial of the request for preliminary approval of the proposed Settlement.

I. Davis is Not a Member of the Class He Purports to Represent

Thema is organized under the laws of Ireland. As a purported shareholder in an Irish fund Davis has only such rights as are recognized under Irish law and Thema's articles of association. *See Scottish Air Int'l, Inc. v. British Caledonian Group, PLC*, 81 F.3d 1224, 1234 (2d Cir. 1996) (the internal affairs doctrine requires that "questions relating to the internal affairs of corporations [be] decided in accordance with the law of the place of incorporation"); *Howe v. Bank of N.Y. Mellon*, No. 09 Civ. 10470, 2011 WL 781940, at *5 (S.D.N.Y. Mar. 4, 2011).

Thema's prospectus made clear that the term "shareholder" includes "the registered Holder of a Share and does not include any individual or entity for whose account the registered holder purchases Shares." *See* **Wiles Decl. Ex. F** (Prospectus for Thema), at p. 8. Similarly, Section 9 of Thema's Articles of Association provides:

> Except as required by law, no person shall be recognized by the Company as holding any shares upon any trust, and the Company shall not be bound by or be compelled in any way to recognize (even when having notice thereof) any equitable, contingent, future or partial interest in any share or (except only as by these Articles or by law otherwise provided) any other rights in respect of any share except an absolute right to the entirety thereof in the registered holder.

See **Wiles Decl. Ex. G** (Thema's Articles of Association), § 9.

HTIE itself has argued in the cases pending in Ireland that persons who claim beneficial ownership (but not record ownership) are not shareholders and cannot assert rights that belong to shareholders. *See* Wiles Decl. Ex. E at ¶ 5.1. Davis's citations to New York law regarding the rights of beneficial owners (Davis Mem. of Law at 18-19) are irrelevant, because Thema is an Irish fund and its shareholders' rights are governed by Irish law.

Furthermore, Davis has failed to establish that he was a beneficial owner of Thema shares. Davis contends that he was the beneficial owner of 3,813.4120 USD Shares for which a company named Rubicon International Limited ("Rubicon") was the record owner. *See* Davis Declaration ¶ 4. However, Davis has not produced his actual agreements with Rubicon. Furthermore, the available facts show that Rubicon was not Davis's nominee:

1. Rubicon represented, in subscription documents executed in November 2008, that Rubicon was not acting for any other person. *See* **Wiles Decl. Ex. H.** Consistent with that representation, Rubicon crossed out the provisions in the subscription documents that required disclosure of information regarding any trust or financial intermediary relationship.

2. Rubicon's founder and owner has recently confirmed that Rubicon purchased shares as principal and not as a nominee. *See* **Wiles Decl. Ex. I**.

3. Thema understands that Rubicon's owner and liquidator have refused a request by Davis for the release of Rubicon's trading information by HSBC. If Rubicon were Davis's nominee it would have to follow Davis's instructions, which obviously is not the case.

4. In the summer of 2009 Rubicon purported to transfer all of its Thema shares (consisting of 2,547.0526 USD Shares and 2,976.8386 EUR Shares) to an entity named Energy Claims Limited. Rubicon also notified Thema that it had separately assigned all litigation claims

associated with its Thema shares to Energy Claims Limited. *See* **Wiles Decl. Ex. J**. Davis apparently wishes to challenge the assignments, but that merely shows the existence of a dispute – not that Davis has the clear rights that a proposed class representative needs to have.

It is true (as Davis notes) that Thema refused to recognize Rubicon's proposed transfer of its shares because, among other things, Rubicon did not provide required information about the proposed transferee. Davis relies on Thema's refusal to recognize the transfer and contends that Rubicon still owns the shares. However, if Thema shares can belong only to the party recognized by Thema itself (as Davis argues), then that simply means that Davis himself has no rights, because Thema has never recognized Davis as a shareholder.

5. Davis claims that he purchased 4,466 USD Shares and that Rubicon continued to hold 3,813.4120 of those shares for Davis after December 2008. That is impossible because (as noted in the preceding paragraph) Rubicon did not own that many USD Shares.

6. Rubicon unquestionably cannot currently hold shares as a nominee of Davis, because Rubicon no longer exists. Rubicon was dissolved in 2009 - more than 18 months ago. *See* **Wiles Decl. Ex. I**. Its shares in Thema were necessarily transferred to someone upon dissolution (whether Energy Claims Limited or someone else), but obviously that was not Davis.

Even if the foregoing matters did not show that Davis is not a member of the class, they certainly show a unique series of questions that make Davis ill-suited to be a class representative.

II. The Proposed "Deemed Assignment" of Other Shareholder Rights to HSBC is Improper and Cannot be Approved

A. The Proposed Terms Would Interfere with Thema's Unfettered Right to Control the Irish Litigation and Would Be Contrary to Irish Law

Under Irish law, a shareholder does not have standing to sue for investment losses that are dependent upon an injury to a company. Such shareholder claims are barred by the rule of

reflective loss. *See* Sanfey Decl. ¶¶ 15.10-15.12; [3] *see also Druck Corp. v. Macro Fund Ltd.*, No. 02 Civ. 6164, 2007 WL 258177, at *1-2 (S.D.N.Y. Jan. 29, 2007), *aff'd*, 290 Fed. Appx. 441, 443-44 (2d Cir. 2008); *ABF Capital Mgmt. v. Askin Capital Mgmt., L.P.*, 957 F. Supp. 1308, 1332 (S.D.N.Y. 1997). The seminal English case of *Prudential Assurance Co. Ltd. v. Newman Industries* lays out the governing principle of law:

> [A shareholder] cannot … recover damage merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his share, or equal to the likely diminution in dividend, because such a 'loss' is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only 'loss' is through the company, in the diminution of the net assets of the company, in which he has (say) a 3% shareholding.

(*See* Sanfey Decl. ¶ 15.10.) The English House of Lords decision in *Johnson v. Gore Wood & Co.* made clear that "there is no discretion" in applying this rule and that only a company (and not its shareholders) may pursue claims where the reflective loss rule applies. (*Id.* ¶ 15.11.)

In this regard the proposed settlement would turn the reflective loss doctrine on its head. Davis and HSBC are asking this Court to permit a single purported shareholder (Davis himself) to determine the terms on which HTIE's liability to Thema should be compromised and to use that *shareholder* settlement to undermine the *Company's* claim against HTIE in Ireland. The plain rule of Irish law is that shareholder claims must yield to the Company's claims, with the result that shareholders are not entitled to assert claims on their own behalf and instead are entitled to receive only their respective shares of the proceeds of the Company's recovery.

Similarly, Davis cannot pursue derivative claims, as those claims are barred by the rule in *Foss v. Harbottle.* *See* Defendants' Joint Memorandum, June 29, 2011 [Docket No. 253], at 25-26; (Sanfey Decl. ¶¶ 15.10-15.17.). The directors of Thema are under no disability or conflict of

[3] References to the Sanfey Decl. are to the Declaration of Mark Sanfey filed with Defendants' motion to dismiss, as Exhibit 1 to the Declaration of Antony L. Ryan [Docket No. 274].

interest in their pursuit of Thema's claims against HTIE and Davis has no right under Irish law to interfere with Thema's pursuit of those claims.

B. The Proposed Settlement Terms are also Improper Under Rule 23(e)

The proposed settlement is improper because it purports to settle claims that are not before this Court. The proposed settlement does not merely provide for a judgment reduction for amounts actually received by particular class members. Instead, the settlement provides for a full assignment of all rights that class members may have, regardless of the amounts involved and regardless of whether a class member has even received any portion of the HSBC settlement payment. If the settlement were to be approved, shareholders who receive a form notice from a US court, and who ignore it – as class members frequently do, and as the foreign shareholders here undoubtedly would do – would find to their horror that they not only could not share in what Davis has negotiated, but that they also have lost other far more valuable rights that they had no reason to believe were at issue in the Davis case.

Rule 23(e) provides that the "claims, issues or defenses of a certified class may be settled . . ." Fed. R. Civ. P. 23(e). In this case, the "claims" of the proposed class represent direct claims that class members allegedly could assert in their own names, and on their own behalf, against HSBC and other defendants. No judgment on Davis's asserted claims would alter shareholders' rights to receive distributions from Thema, because those claims are not before this Court. Similarly, no judgment in favor of Davis would result in the involuntary assignment of shareholders' rights to HSBC. "If a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action ordinarily should not be able to do so either." *Nat'l Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9, 18 (2d Cir. 1981). The proposed confiscation of shareholder rights reaches beyond the claims before this Court and is beyond this Court's authority under Rule 23.

C. The Proposed Settlement – Given the Rights That Shareholders Would Be Forced to Give Up – Is Grossly Inadequate

Davis acknowledges that his claims against HTIE are subject to numerous standing and jurisdictional defenses. None of those obstacles applies to Thema's direct claim against HTIE. As noted above, the proposed settlement is the product of negotiations by HTIE with its weakest conceivable adversary. In analogous cases courts have warned of the "reverse auction" effect that such a settlement can represent and have identified the negotiating dynamics as a suspicious circumstance that requires a heightened review. *See Blyden v. Mancusi*, 186 F.3d 252, 271 n. 9 (2d Cir. 1999); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282-84 (7th Cir. 2002).

The settlement in this case is rife with circumstances that require careful scrutiny. HSBC's admitted objective is to control HTIE's exposure in an entirely different case pending in Ireland where Thema has sued HTIE for approximately $1.2 billion dollars. If the proposed settlement were to be approved, Davis's counsel would earn a large attorneys' fee in what is otherwise an exceedingly weak case, and HTIE would have purchased an extremely cheap cap on a gigantic exposure. In the process Thema's shareholders would find that only approximately $38 million (after deductions for fees) would remain as compensation for more than $1.2 billion of potential recoveries through their interests in Thema. Instead of serving the interests of class members, this proposed settlement would trample them.

III. The Proposed Assignment of Absent Class Members' Litigation Rights to Davis Would Improperly Circumvent Rule 23

Section 2.14 of the proposed Settlement Agreement requires settling class members who file a claim for payment to "irrevocably convey[] to Lead Plaintiff the right to pursue, *on their behalf and for their benefit*, claims arising out of" the transactions and events set forth in the Complaint as against the Non-Settling Defendants. *See* Settlement Agreement § 2.14 (emphasis added); Motion, Ex. A-4, Part V.B.3-5. Unless the putative class members assign the right to

pursue their claims to Lead Plaintiff, they cannot share in the proposed settlement fund. This forced designation of Davis as a litigation representative would set up a *de facto* class action for the claims against the Non-Settling Defendants.

"Rule 23 offers the *exclusive* route to forming a class action." *Kern v. Siemens Corp.*, 393 F.3d 120, 128 (2d Cir. 2004) (emphasis in original). Rule 23 strikes a "deliberate balance between facilitating class actions and protecting the interests of absent class members." *Brown v. Kelly*, 609 F.3d 467, 482 (2d Cir. 2010). It accomplishes this purpose by imposing requirements of "numerosity, commonality, typicality, and adequacy" to ensure that a class action is appropriate, and further requiring that the action fits into one of three categories, *see* Fed. R. Civ. P. 23(b), to ensure both the propriety of the class action mechanism and the protection of absent class members. *Brown*, 609 F.3d at 475-76. As the Supreme Court made clear earlier this month, courts do "not allow circumvention of Rule 23's protections . . . [that] 'create *de facto* class actions at will.'" *Smith v. Bayer Corp.*, 564 U.S. ___, 2011 WL 2369357, at *10 (June 16, 2011) (quoting *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008)).

As a practical matter the proposed assignment of litigation rights would mean one thing: Davis and his counsel could bring a *de facto* class action against the Non-Settling Defendants without certifying a class, without the supervision of this Court, and without the due process protections embodied in Rule 23. Tellingly, the Settlement Agreement itself acknowledges that such *de facto* class litigation lacks the safeguards supplied by Rule 23. Section 2.15 appoints the "Honorable Howard B. Wiener (Ret.) . . . as guardian ad litem for the Settlement Class to oversee Plaintiffs' Lead Counsel with respect to the litigation of the non-settled claims." *See* Settlement Agreement § 2.15. Why is a guardian *ad litem* needed? In a Rule 23 class action, that oversight would be provided by this Court, ensuring not only that counsel fairly vindicated

the best interests of the class, but also that the named plaintiff would "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Settling Parties offer the guardian *ad litem* as a substitute for the Court, in what can best be described as a privatized quasi-class action, governed by the Settlement Agreement rather than the Federal Rules.

Non-Settling Defendants are aware of no precedent to support such an assignment of absent class members' litigation rights, and Davis has cited none. Indeed, the only case turned up by exhaustive research is one a number of years ago in which a similar effort was rejected. Where the settling parties attempted to "gain the tactical advantage of becoming, in effect a class [action] . . . without the class being formally certified and thus subjected to the analysis prescribed by Rule 23," the court denied approval of the settlement due to the "problems" attendant to such a provision. *Fla. Power Corp. v. Granlund*, 82 F.R.D. 690, 693 (M.D. Fla. 1979). This Court should recognize this purported assignment of litigation rights for what it is: a prohibited "circumvention of Rule 23's protections" to "create [a] *de facto* class action[] at will." *Bayer*, 2011 WL 2369357, at *10.

The prejudice to the Non-Settling Defendants is severe. Davis has no legitimate right to pursue claims in the United States and the Non-Settling Defendants have made motions to dismiss on that ground as well as others. Moreover, Davis will never be able to certify a Rule 23 class action on the claims against the Non-Settling Defendants. Among other reasons, reliance cannot be established on a classwide basis. Davis has withdrawn his securities claims, and therefore cannot invoke the "fraud on the market" presumption of *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988). As the Supreme Court observed last week in a significant decision on class certification, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. __, 2011 WL 2437013 (June 20, 2011), without the "fraud on the market" presumption, the commonality requirement of Rule 23(b)(3)

"would often be an insuperable barrier to class certification, since each of the individual investors would have to prove reliance on the alleged misrepresentation." *Dukes*, 2011 WL 2437013, at *7 n.6.

That is no doubt why the Settling Parties have tried to set up a *de facto* class action through compulsory assignment of litigation rights. But that violates Non-Settling Defendants' due process rights. If Davis proposes to bring all of the class members' separate claims together as one action in federal court, it fails as a blatant effort to circumvent Rule 23. *See Bayer*, 2011 WL 2369357, at *10. And if (as the Settling Parties hint) Davis proposes to bring all of these claims in his own name in a foreign court as a way around the fact that courts in most other countries do not recognize class actions, there is no legitimate basis or legal support for Davis's effort to have this Court circumvent both Rule 23 and foreign judicial procedures.

The prejudice to absent class members also is palpable. In place of the "careful judicial supervision" of this Court, as "fiduciary of the class", *Culver v. City of Milwaukee*, 277 F.3d 908, 910, 915 (7th Cir. 2002), class members are left dependent on the limited set of duties to which Davis would have agreed by contract. In fact, class members would be required to release Davis and his counsel for any claims "arising out of, based upon, or relating to their actions or conduct relating to the assigned claims, excluding only claims for lack of loyalty or good faith". *See* Motion, Ex. A-4, Part V.B.5. Class members have no assurance that Davis "will fairly and adequately protect the interests of the class," as would be the case in a class action supervised by this Court. Fed. R. Civ. P. 23(a)(4). A surrender of the ability to bring their own claims, and acceptance of these watered-down class-action procedures, is imposed on class members as a condition of accepting their share of the proceeds from the settlement with HSBC, in violation of the prohibition on "opt in" class actions under Rule 23. *See Siemens*, 393 F.3d at 124-26.

What makes this attempted end-run around the Rules even more outrageous is that the Settling Parties ask this Court to approve, under Rule 23, a settlement that has as one of its principal purposes an effort to evade that very Rule. That is an abuse of the class-action mechanism. The settlement with HSBC should never be approved on its own terms. Still less should Settling Parties be permitted to use a settlement class as to HSBC to set up their own privatized class action outside Rule 23 for a litigation class against the Non-Settling Defendants.

IV. The Settlement Calls for a One-Way Bar Order that Would Improperly Bar the Non-Settling Defendants while Permitting HSBC to Seek Contribution

The Settling Parties choose New York law to govern their proposed Settlement. *See* Settlement Agreement § 11.16. Yet they ask this Court to enter a non-mutual contribution bar order, in violation of Section 15-108 of the New York General Obligations Law. The proposed contribution bar order would prohibit the Non-Settling Defendants from seeking "contribution, indemnity, or otherwise against the Settling Defendants [HSBC]", but does not apply reciprocally to bar the same claims brought by HSBC against the Non-Settling Defendants. *See* Settlement Agreement § 5.1. This Court should either refuse to approve the proposed Settlement or should condition approval on entry of a mutual contribution bar.

Section 15-108 applies when "a release or a covenant not to sue . . . is given to one of two or more persons liable or claimed to be liable in tort for the same injury." N.Y. GOL § 15-108(a). Here, the Settlement Agreement contains a release that discharges the claims alleged in the Complaint against HSBC for the alleged loss of "over $1 billion," for which Lead Plaintiff alleges all Defendants were responsible. *See* Settlement Agreement, §§ 1.27, 4.1; Complaint ¶ 14. In such circumstances, two bars apply. *First*, the settling defendants (here, HSBC) are relieved from liability in contribution to any other person. N.Y. GOL § 15-108(b). And *second*, the settling defendants are themselves barred from seeking contribution from any other person:

"A tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person." *Id.* § 15-108(c).

As the New York Court of Appeals has explained, "the statute establishes a *quid pro quo* arrangement: the settlor limits its liability but in exchange forfeits any right to contribution." *Gonzales v. Armac Indus., Ltd.*, 611 N.E.2d 261, 263 (N.Y. 1993). "[T]he bar against contribution claims is a two-way street, such that non-settling defendants cannot bring contribution claims against settling defendants, *and* settling defendants cannot bring contribution claims against non-settling defendants." *Sherleigh Assocs. Inc. v. Patron Sys.*, No. 04 Civ. 907 (JFK), 2005 U.S. Dist. LEXIS 16385, at *5 (S.D.N.Y. Aug. 9, 2005). Mutuality of any bar order is sound policy, as "a mutual rule may avoid creating incentives for collusion between the settling parties, while not putting the settling defendant at any unfair disadvantage." *Gerber v. MTC Elec. Techs. Co.*, 329 F.3d 297, 308 (2d Cir. 2003) (bar order under federal common law).

Accordingly, in giving effect to partial settlements like this one, courts ensure that settling parties do not circumvent the requirement that bar orders be mutual. In *Gonzales*, the Court of Appeals recognized that a pre-trial agreement in which a defendant stipulated to liability for a low percentage of plaintiff's total damages was a disguised effort to get around Section 15-108(c). The court held that "[a]greements such as these violate the *quid pro quo* system envisioned by the statute and allow a defendant to effectively avoid litigation without making the concomitant sacrifice the statutory scheme contemplates." 611 N.E.2d at 263. Similarly, in *Sherleigh*, the court sustained the objection by non-settling defendants and refused to enforce a settlement agreement with a one-way bar order until it was modified to make the contribution bar mutual. 2005 U.S. Dist. LEXIS 16385, at *5. The same result should apply here.

The release in the Settlement clearly falls within the scope of GOL § 15-108.[4] It provides for consideration greater than one dollar, *see* N.Y. GOL § 15-108(d)(1), and proposes to end all disputes with HSBC by "fully, finally, and forever release[ing], relinquish[ing] and discharg[ing]" (Settlement Agreement § 4.1), "all claims, counterclaims, rights, causes of action, or liabilities of every nature and description . . . that were or could have been asserted in the Action" (*id.* § 1.27); *see* N.Y. GOL § 15-108(d)(2) (requiring that the release "completely or substantially terminate[] the dispute between the plaintiff . . . and the person who was claimed to be liable"). There has been no determination of liability or entry of judgment in this case. *See* N.Y. GOL § 15-108(d)(3) (requiring a release be obtained prior to entry of judgment). Finally, the provision in Section 15-108(a) that "two or more persons [be] liable or claimed to be liable in tort for the same injury" is not a limitation on the statute's application here. The statute covers not only joint-tortfeasors but also "concurrent, successive, independent and even intentional tortfeasors". *Roma v. Buffalo Gen. Hosp.*, 481 N.Y.S.2d 811, 813 (N.Y. App. Div. 1984).

The non-mutual nature of the contribution bar is evident on the face of the Settlement Agreement and the Proposed Judgment the Settling Parties ask the Court to enter. Section 5.1 of the Settlement Agreement and Paragraph 9 of the Proposed Judgment contain a contribution bar in favor of HSBC. *See* Settlement Agreement § 5.1; Motion, Ex. D, ¶ 9. There is no such

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[4] In their motions to dismiss most of the Non-Settling Defendants argue that foreign law applies to the claims against them—except for JPMorgan and BONY, who argue that New York law applies to the claims against them. In their motion for preliminary approval, Davis and HSBC do not argue for application of foreign law. Indeed, they choose New York law to govern the interpretation and application of their proposed Settlement Agreement. *See* Settlement Agreement § 11.16. Since the parties have consented to the application of forum law for purposes of this motion, the Court should apply forum law on contribution. *See In re Parmalat Sec. Litig.*, No. 04 MD 1653, 2007 U.S. Dist. LEXIS 11767, at *23 n.3 (S.D.N.Y. Feb. 22, 2007). In any event, the Non-Settling Defendants are unaware of *any* foreign jurisdiction whose law would authorize a one-way contribution bar of the kind included in the proposed Settlement.

contribution bar in the other direction, in favor of the Non-Settling Defendants. Rather, Section 5.3 of the Stipulation states that HSBC agrees that "as part of any later settlement by Lead Plaintiff with any Non-Settling Defendant(s)", they will "provide a full and complete release of all claims against such Non-Settling Defendant(s)" if the later-settling Defendant similarly releases them. *See* Settlement Agreement § 5.3. As this provision is not contained in the Proposed Judgment (Motion, Ex. D), it is unclear whether and how it would be enforceable against HSBC. Moreover, the agreement to provide mutual releases does not apply if (1) a Non-Settling Defendant prevails against Davis on the merits or (2) Davis obtains a judgment against a Non-Settling Defendant. Rather, the agreement to provide mutual releases applies *only* in the event of a settlement between Davis and a Non-Settling Defendant. On the other hand, the proposed bar order in favor of HSBC applies regardless of the outcome of Davis's claims against the Non-Settling Defendants, so that there is no mutuality between HSBC and the Non-Settling Defendants. Accordingly, the proposed settlement is fundamentally unfair to the Non-Settling Defendants and runs afoul of New York law, and the Court should not approve the proposed Settlement even on a preliminary basis.

V. The Court Should Not Certify a Class Even on a Preliminary Basis

A. This Court Lacks Proper Jurisdiction

This action involves foreign investors in a foreign fund that was not open to US investors and that has no meaningful connection to the United States. As demonstrated in the pending motion to dismiss, this Court lacks personal jurisdiction over most of the parties. Any claims to be asserted belong in Ireland, not in the United States. This Court should not entertain the proposed settlement (and the exercise of this Court's jurisdiction that the approval of the settlement would require) under these circumstances. If it would be improper for the Court to render a judgment in a trial of the case, then it would be equally improper for the Court to

exercise jurisdiction (and to apply Rule 23) in the context of a proposed settlement. In addition, certain terms of the proposed settlement (such as the proposed contribution bar) cannot be imposed without jurisdiction over other parties, and that jurisdiction is lacking.

B. Davis Has an Irreconcilable Conflict of Interest with the Proposed Class

Davis has asked for permission to represent a class consisting of shareholders of Thema who held shares as of December 12, 2008 and who were "damaged" by the conduct of defendants. *See* Complaint ¶ 1. By bringing an action on behalf of shareholders who allegedly "lost over $1 billion," Davis purported to represent shareholders who had alleged cash losses, as Davis claims he did, and shareholders who had no cash losses but who had lost the reported net asset values of their shares. Yet, in the proposed settlement only those investors with cash losses would be entitled to share in the proceeds of settlement in proportion to their cash losses. Other shareholders, although still members of the putative class, would not share in the settlement.

Davis alleges that he invested more money than he withdrew and that he has an out-of-pocket loss in the amount of $1.13 million. To the extent that Davis purports by the proposed settlement to bind class members who did not have out-of-pocket losses, and also purports to deprive those class members of their rights to recover damages based on Thema's action against HTIE (in which Thema seeks recovery of the full reported value of the assets that HTIE claimed it held for Thema), Davis's interests are in plain conflict with those of other class members.

C. A Class Action Is Not A Superior Method of Proceeding

Rule 23(b)(3) does not permit certification of a class for settlement or for any other purpose unless the Court determines that a class action "is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The Rule also specifies the following factors as pertinent to this determination:

(A) the class members' interests in individually controlling the prosecution of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Id. These factors cry out for the denial of class certification in this case. Courts in Ireland are not likely to recognize a judgment in an "opt-out" class action under US rules. *See* Sanfey Decl. ¶ 9.1; Joint Memorandum of Law in Support of Motion to Dismiss at 14. Furthermore, more than 60 other shareholder actions are pending in Ireland, brought by persons who claim to hold more than 20% of Thema's outstanding shares. The plaintiffs in those cases have made known, in the strongest possible terms, that they wish to control the litigation of their own cases. *See* **Wiles Decl. Ex. A**. If there is any Court where litigations should be consolidated it is the High Court in Ireland, where Thema's action against HTIE already has been consolidated with the pending shareholder actions. Instead of considering the request to certify a class for settlement, this Court should dismiss Davis's case and require that Davis proceed (if at all) in Ireland.

VI. The Proposed Opt-Out and Objection Procedures Are Deficient and Unfair

A. The Proposed Notice Period

The proposed schedule set forth in the Motion would provide class members with only 24 days after the mailing of notices in which to submit opt-out elections and objections to the settlement. This is an absurdly short period – so short, in fact, that one questions how it could even have been suggested in good faith.

The problem is compounded by the fact that the settlement purports to require action by beneficial owners and to prohibit the submission of opt-out elections and objections by record

owners. To begin with, foreign nominees are frequently not prompt in forwarding notices; some even refuse to forward such notices. Thema has received shareholder complaints about significant delays in receiving communications it has sent. The problems will only be worse with respect to notices sent during summer months, when businesses slow down and when many beneficial owners may not be at their residences and may not even be receiving their mail.

Added to this inevitable delay and uncertain receipt is that many recipients will require the notice to be translated, a costly and time-consuming process. Only then will the class member be in a position to seek advice from a lawyer knowledgeable about U.S. class action procedures and the substantive issues raised by the proposed settlement, a further challenge for shareholders residing abroad.

Shareholders are entitled to a notice period that gives them a meaningful opportunity to read and absorb what is being proposed and to consult with advisors to determine how they wish to proceed. The proposed notice period is calculated to deprive them of that right.

B. Opt-Out Rights

Davis has asked the Court to forbid the submission of opt-out notices by nominees. There is no justification for this proposition. Nominees are legal representatives, and they ought to be able to file opt-out notices, just as they were entitled to purchase shares in the first place.

Davis also has asked the Court to require beneficial owners to identify themselves by name and to provide other information as a price for exclusion from the class. There is no basis for the imposition of these disclosure requirements. Foreign investors use nominees for scores of reasons. Under the procedures proposed by Davis a foreign investor who wished to preserve the nominee relationship, and to keep his own identity secret, would not even be allowed to forego participation in the class. That suggestion violates due process rights.

Conclusion

For the foregoing reasons, the undersigned Defendants respectfully request that the Court deny the Motion and grant such other and further relief as may be just and proper.

Dated: June 30, 2011

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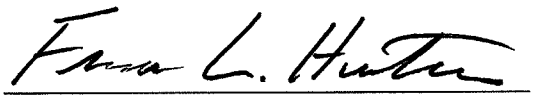
WILMER CUTLER PICKERING HALE & DORR LLP  Fraser L. Hunter, Jr. (fraser.hunter@wilmerhale.com) Brad E. Konstandt (brad.konstandt@wilmerhale.com) 399 Park Avenue New York, New York 10022 Telephone: (212) 230-8800 Facsimile: (212) 230-8888 *Attorneys for Defendant PricewaterhouseCoopers International Limited*	WILLKIE FARR & GALLAGHER LLP _____ Mitchell J. Auslander (mauslander@willkie.com) James C. Dugan (jdugan@willkie.com) Emma-Ann L. Deacon (edeacon@willkie.com) 787 Seventh Avenue New York, New York 10019 Telephone: (212) 728-8000 *Attorneys for Defendant William Fry*
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