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)
This Document Relates to: NEVILLE SEYMOUR DAVIS, Plaintiff, vs. 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 SPA, HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LTD., HSBC SECURITIES SERVICES (IRELAND) LTD., HSBC BANK USA, N.A., HSBC HOLDINGS PLC, 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 Defendants.	Case No. 09 Civ. 2558 (RMB)

HSBC DEFENDANTS' REPLY TO OBJECTIONS TO
PRELIMINARY APPROVAL OF PARTIAL SETTLEMENT

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Other Authorities

The HSBC Defendants identified on the signature page submit this Reply to Objections to Preliminary Approval of the Partial Settlement between the HSBC Defendants and Lead Plaintiff Neville Seymour Davis (the "Lead Plaintiff") filed by certain Non-Settling Defendants (the "Objecting Defendants").[1]

I. PRELIMINARY STATEMENT

This Court should grant preliminary approval not only because the Objecting Defendants' objections to the settlement are without merit, but also because it is desirable that investors in Thema International Fund plc ("Thema" or the "Fund") have an opportunity to decide for themselves whether their interests are best served by the proposed partial settlement with HSBC (the "Settlement") or, as Thema suggests, by maintenance of Thema's action in Ireland brought only against HTIE, the HSBC entity that was Thema's custodian. Because the HSBC Defendants have negotiated the Settlement with conditions designed to achieve global peace, investors effectively have to choose. HSBC thinks that there are numerous reasons why they should choose the Settlement here rather than the ongoing litigation against HTIE in Ireland.

First, Thema's directors claim to control the litigation commenced by Thema in Ireland. All of them, and the law firm prosecuting that litigation, are defendants here. Thema and its directors are also defendants in the SIPA Trustee's litigation, as are its promoters and investment advisers with which certain directors are affiliated. The conflict of interest is manifest.

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[1] With regard to the concerns raised by Repex Ventures, S.A. ("Repex"), about the scope of the release and assignment of claims, the Settling Parties already have addressed similar concerns raised by the Primeo Fund Lead Plaintiff, as reflected in the First Amendment. *See* Ex. F-1 to Lead Pls' Mot. for Preliminary Approval. Following that revision and contrary to Repex's contentions, no ambiguity exists and no further clarification is required. Likewise, Section 2.16 of the Settlement Agreement is clear that it applies only to discovery between the Settling Parties, and does not require the clarification Repex suggests.

Second, Thema's claim will be limited to its net loss of $312 million. Thema's hope to recover the $1.1 billion net asset value reported by Madoff at the time of his arrest and thereby recover fictitious profits is entirely unrealistic.

Third, whatever recovery Thema might secure, approximately $700 million of it likely will go, not to investors, but instead to satisfy the SIPA Trustee's clawback claim against Thema.

Fourth, the Thema litigation in Ireland puts all of the investors' eggs, so to speak, in the one basket of seeking recovery only from Thema's custodian. HSBC believes that it has good defenses to that litigation, including ongoing and appropriate diligence, see Declaration of Evan A. Davis, July 11, 2011, and that Thema will recover nothing. Also, HSBC invested and lost approximately $1 billion of its own money in the Madoff feeder funds, a fact that fatally undermines any allegation that it knew of Madoff's fraud.

Fifth, by participating in the Settlement, investors will share in any recovery in this action from the Non-Settling Defendants, including those with the ability to respond to a substantial judgment that might not be amenable to suit in Ireland. This is a benefit not to toss away lightly.

Sixth, the Settlement has provisions negotiated by Lead Plaintiff that facilitate investor litigation against any Non-Settling Defendants who cannot be sued here.

While the objections to the Settlement should be decided on the merits to the extent the Objecting Defendants have standing to raise them, they also should be viewed in light of their provenance, the benefits described above and the ability of investors to decide for themselves.

II. FACTUAL BACKGROUND

Thema, Thema's investors, the SIPA Trustee and the Lead Plaintiff in this action have sued various HSBC entities to recover losses arising from Thema's operation as a Madoff "feeder fund." Over the life of the Fund, Thema deposited approximately $1.05 billion of

investors' money into its BLMIS account and withdrew approximately $740 million, leaving a Fund net loss of approximately $312 million. This was done at the direction of the Fund's directors and its investment managers. None of the HSBC Defendants played any role in the Fund's investment decisions.

The Thema directors have caused the Fund to sue only its custodian, HTIE, in the Irish High Court. Thema seeks to recover not only the $312 million it actually lost, but also the false profits reported by Madoff based on his fictitious trading, a total of approximately $1.1 billion.

The SIPA Trustee is suing Thema and HSBC and has sought to enjoin this action. The Trustee seeks to recover from Thema $692 million in avoidable transfers that Thema withdrew from its BLMIS account. The Trustee also asserts claims against HSBC and many of the Non-Settling Defendants here (e.g., Thema's directors, Genevalor, Unicredit, and JPMorgan). The Trustee's ability to assert these claims is the subject of a pending motion to dismiss.

Finally, investors in Thema have brought suit. In Ireland, 61 investors have sued; in the United States, the instant case was brought in March 2009 as a class action on behalf of all Thema investors. The defendants in this action have recently filed a motion to dismiss.

The Settlement for which preliminary approval is sought contains certain conditions. As HSBC does not want to settle a claim that the Trustee contends is void *ab initio* only to pay damages twice for the same alleged misconduct, one condition bars the Trustee from pursuing its claims in respect of Thema. Another condition allows HSBC to seek rulings from the Irish Court as to the enforceability of this Court's judgment and its impact on the Thema litigation there. To advance HSBC's position that its Settlement payments should provide it global peace, there is a provision that requires those who do not exclude themselves from the Settlement Class to assign their interest in Thema's potential recovery against HTIE to the HSBC Defendants. Finally, to

serve class interests in the event some Non-Settling Defendants cannot be sued in the United States, the Lead Plaintiff negotiated a provision that class members filing a proof of claim will assign their claims to him so he can prosecute them for class members' benefit elsewhere.

III. ARGUMENT

A. This Court Has Jurisdiction

Citing no authority, the Objecting Defendants argue that the Court lacks jurisdiction "over most of the parties" and therefore should not entertain the Settlement. Obj. Defs.' Br. at 20. This argument is baseless. This Court's subject matter jurisdiction is not in dispute. Furthermore, provided that due process requirements such as notice, opportunity to be heard and opportunity to opt out are satisfied, as is plainly the case here, the Court has *in personam* jurisdiction over all class members who choose not to opt out of the Settlement, under the Supreme Court's decision in Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 811-812 (1985).[2]

The Objecting Defendants also contend (again citing no authority) that certain terms of the Settlement, such as the proposed bar order, "cannot be imposed without jurisdiction over other parties, and that jurisdiction is lacking." Obj. Defs' Br. at 21. New York law, to promote settlement and with a related judgment reduction obligation on plaintiff, provides that a release given by the plaintiff to a settling defendant relieves the settling defendant "from liability to *any* other person for contribution . . . " N.Y. Gen. Oblig. L. § 15-108(b) (2010) (emphasis added). The Court need not have jurisdiction over every such person to give effect to this provision, as the bar order is effected by operation of the New York law that governs this Settlement. A foreign court should enforce the bar order if it finds that New York law is controlling. In that

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[2] The act of opting out will not subject a class member to the Court's jurisdiction. See In re Real Estate Title and Settlement Serv. Antitrust Litig., 869 F.2d 760, 770-71 (3d Cir. 1989). HSBC supports amending the Proposed Preliminary Approval Order and Notices to make this absolutely clear.

connection, HSBC agrees with the Objecting Defendants that under New York law the contribution bar must be mutual, and would have no objection to the judgment reflecting that legal requirement.

B. Standards for Preliminary Approval

In deciding whether to grant preliminary approval, the Court's responsibility is to "ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing." In re Prudential Sec. Inc. Ltd P'ships Litig., 163 F.R.D. 200, 209 (S.D.N.Y. 1995) (internal quotation marks omitted). The inquiry at this stage is minimal, requiring a determination that the settlement is free from obvious deficiencies and falls within the range of permissible outcomes, In re NASDAQ, 176 F.R.D. 99, 102 (S.D.N.Y. 1997), and that the proposed notice adequately apprises class members of the general terms of the settlement, including the right to opt out. Torres v. Gristede's Operating Corp., No. 04-CV-3316 (PAC), 2010 WL 2572937, at * 3 (S.D.N.Y. June 1, 2010). The preliminary approval stage is not intended to reach the merits of the settlement: it is at most a determination that there is good reason to submit the settlement to shareholders, with determination of its substantive fairness left to a full-scale hearing. In re Traffic Exec. Assoc. East. R.R., 627 F.2d 631, 634 (2d Cir. 1980).

C. The HSBC Defendants Support Improving Timing and Procedure

Objecting Defendants misstate the notice period contemplated by the proposed Settlement schedule as "only 24 days." Obj. Defs' Br. at 22. The proposed schedule affords Settlement Class members 39 days from mailing, nearly six weeks.

Courts routinely approve notice periods of around thirty days. See In re Marsh & McLennan Companies, Inc. Sec. Litig., No. 04 Civ 8144, 2009 WL 5178546, at *23 (S.D.N.Y. Dec. 23, 2009) (collecting cases). That said, the HSBC Defendants want the opt out and objection procedure in this case to be beyond reproach. Therefore, the HSBC Defendants

support extending the notice period for an additional three weeks to provide a total of 60 days from mailing before exclusion requests or objections are due. Publication will occur over a two-week period. As for mailing, in a matter of such importance and given the direction to nominees that will be included in the preliminary approval order, it is reasonable to expect that beneficial owners will receive notice by mail within two weeks. Thus, 60 days from mailing assures at least 45 days for deliberation. We also note that several weeks ago Thema notified investors of the Settlement, albeit providing an incomplete account.

Objecting Defendants' criticism of requiring action by beneficial owners rather than nominees, Obj. Defs' Br. at 22-23, is groundless. Such a requirement is entirely reasonable in light of the need to ensure efficient administration of the Settlement. The beneficial owners ultimately suffered the loss of their investments, not their nominees. They are the true members of the Settlement Class, and it is their choice whether to participate, object, or exclude themselves. Allowing nominees to submit proofs of claim or objections serves no real purpose, and risks inconsistent and inefficient administration should nominees submit claims or requests duplicative of or inconsistent with those of their beneficial owners.

The Settling Parties have made every effort to ensure that the Settlement Class members' choices to participate or exclude themselves from the Settlement are as straightforward as possible. These efforts range from the robust notice mechanisms contemplated and the clear information and instructions outlined in the Notices, to which no objection is raised, to built-in protections intended to alleviate potential concerns that may have otherwise inhibited action by potential Settlement Class members.[3] As discussed above (see n.2 supra), requesting exclusion

[3] The Settling Parties' efforts to craft effective mechanisms for easy participation in or exclusion from the Settlement, and this Court's active scrutiny of those efforts, also will support under international norms this Court's jurisdiction to bind absent class members to the Settlement.

will in no way be construed as a consent to jurisdiction. Anticipating the very sort of privacy concerns the Objecting Defendants raise regarding required disclosures by beneficial owners, Obj. Defs' Br. at 23, the Settling Parties have included a strong confidentiality provision in the Settlement papers. (Ex. B ¶ 29). This ensures that Settlement Class members' information will receive a level of care and protection that is not normally provided in class action settlements, maintaining their privacy and rendering Objecting Defendants' concern baseless. And to avoid any conceivable EU data privacy issue inhibiting exclusion requests, the HSBC Defendants concur with Lead Plaintiff in having a European company process requests for exclusion.

D. Assuming that Non-Settling Defendants Have Standing to Object to Preliminary Class Certification, No Substantial Objection Is Raised

1. The Challenges to Davis's Class Membership and Adequacy Are Meritless

The Objecting Defendants offer nothing to rebut the evidence that Rubicon held Thema shares "on [Davis's] behalf and to [his] order," Davis Decl. ¶¶ 3-4, making him a beneficial owner of shares and thus a member of the class. The Objecting Defendants' challenges to Davis's class membership are fatally flawed because, no matter who now has legal title to Mr. Davis's shares, there is no dispute that he is the beneficial owner. Further, Irish law in relation to shareholder status has no bearing on the determination of who was injured in fact and may therefore seek damages.

The Objecting Defendants also contend that Davis has a conflict of interest because he seeks to represent all Thema investors, including those who suffered no out-of-pocket losses, whom Objecting Defendants claim would not share in the Settlement. Obj. Defs' Br. at 21. The Plan of Allocation does not limit distribution of Settlement proceeds to investors who suffered out of pocket losses; it is for class members, not the Objecting Defendants, to decide whether to accept or object to the proposed allocation, or to reject it entirely by opting out of the Settlement.

2. The Class-Wide Settlement Meets Rule 23(b)'s Superiority Requirement

The vast majority of Thema investors have not brought claims in any forum, and the minority of investors who have brought claims in Ireland are free to opt out of the Settlement, albeit the many reasons for them not to do so are elaborated above. The only way to give every investor the opportunity to share in recovery and the other benefits of this Settlement is certification of the Settlement Class. Certification of the Settlement Class here provides an incentive to settle where there otherwise would be none, see, e.g., In re Telik, Inc. Secs. Litig., 576 F. Supp. 2d 570, 584 (S.D.N.Y. 2008), and relieves investors from incurring costly expenses to pursue minimal individual recoveries, see, e.g., In re Top Tankers, Inc. Sec. Litig., No. 06 Civ. 13761 (CM), 2008 WL 2944620, at *10 (S.D.N.Y. July 31, 2008). Further, the Objecting Defendants point to "no indication that counsel are likely to encounter any difficulties in administering the settlement of [this case]." See In re Merrill Lynch Tyco Research Secs. Litig., 249 F.R.D. 124, 132 (S.D.N.Y. 2008). In circumstances such as these, "when the main objectives of Rule 23 are served, including the efficient resolution of the claims or liabilities of many individuals in a single action, as well as the elimination of repetitious litigation and possibly inconsistent adjudications[,]" Bourlas v. Davis Law Assocs., 237 F.R.D. 345, 354 (E.D.N.Y. 2006) (internal quotation marks and citation omitted), certification of the Settlement Class "is superior to other available methods for fairly and efficiently adjudicating [this] controversy." See Fed. R. Civ. P. 23(b)(3).

The Objecting Defendants contend that a class action is not superior because "[c]ourts in Ireland are not likely to recognize a judgment in an 'opt-out' class action under US rules." Obj. Defs.' Br. at 22. HSBC disagrees, but in any event, under the Settlement the Irish High Court can decide this issue after final approval by this Court, and litigating it in the context of a motion for preliminary approval is premature and inappropriate.

E. The Assignment to HSBC Is Fair and Reasonable

Objecting Defendants make four arguments against the condition in the Settlement that Thema investors not requesting exclusion assign to HSBC their interest in Thema's litigation against HTIE, contending that this assignment (1) usurps Thema's right to control its litigation, (2) is contrary to Irish law, (3) violates Rule 23(e), and (4) renders the consideration for the Settlement grossly inadequate. Obj. Defs' Br. at 10-13. These contentions have no merit.

Obviously it is reasonable for HSBC to seek global peace insofar as the law allows. To that end, the Settlement offers investors the choice of accepting a direct payment from HSBC and, in consideration for this benefit, foregoing their interest in an uncertain indirect recovery through Thema's litigation in Ireland. This choice is fair because HSBC cannot be expected to both settle with the injured investors on whose behalf Thema purports to act, and separately pay Thema (assuming HTIE lost the Irish litigation), particularly since money paid to Thema would go not to investors but to the SIPA Trustee. If investors prefer the uncertain chance of recovery they enjoy from Thema's Irish litigation, all they need do is opt out. However, as already explained, many reasons support choosing the Settlement. This is a decision investors should be allowed to make.

Furthermore, this assignment does not wrest from Thema control of its litigation. It merely changes one potential beneficiary of that litigation as to those not requesting exclusion from the Settlement Class. The assignment is not contrary to Irish law because it has no impact whatsoever on whether a shareholder can maintain a direct action and does not assume in any way that a shareholder can. It merely assigns to HSBC the interest in the Thema litigation of investors not requesting exclusion. The assignment also is not contrary to Rule 23(e) or the case law Objecting Defendants cite because it does not extinguish or create any claim, but merely assigns an interest in a preexisting claim. Such assignments are a common feature of class

action settlements. See, e.g., D'Amato v. Deutsche Bank, 236 F.3d 78 (2d Cir. 2001) (affirming approval of a class action settlement that included the defendants' assignment of restitution and indemnification claims against non-parties to the plaintiffs); In re Initial Pub. Offering Sec. Litig., 226 F.R.D. 186 (S.D.N.Y. 2005) (approving a class action settlement that included the settling defendants' assignment to plaintiffs of claims against non-settling defendants).

Finally, the assignment does not render the Settlement grossly inadequate. Assuming *arguendo* that the Objecting Defendants have standing to challenge adequacy, which they do not, see 4 NEWBERG ON CLASS ACTIONS § 11:55 (4th ed. 2002) (explaining that non-settling defendants have no standing to challenge adequacy or fairness), Thema investors could view assigning their interests in Thema's litigation as involving no detriment whatsoever. Those investors may agree with HSBC's position that any recovery by Thema would be limited to its net loss, which is approximately $312 million. They may agree that any recovery by Thema would first go toward repaying its creditors, including the Trustee, who has brought claims to recover $692 million in avoidable transfers received by the Fund. (Thema has submitted a $312 million net loss SIPA claim for its net loss in the BLMIS liquidation and has therefore submitted to the jurisdiction of the Bankruptcy Court. The assignment to HSBC does not apply at all to investors' interest in this SIPA claim). Notably, Thema received more than half of this amount – $355.5 million – in the 90-day preference period under the Bankruptcy Code, see Trustee Compl. ¶ 349, leaving Thema no defense to the avoidance and recovery of this amount. This would leave nothing for investors, which means that they are giving up nothing by the assignment.

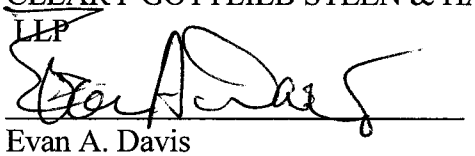
IV. CONCLUSION

For the foregoing reasons, and for those advanced by Lead Plaintiff, it is respectfully submitted that preliminary approval should be granted.

Dated: July 11, 2011
New York, New York

Respectfully submitted,

CLEARY GOTTLIEB STEEN & HAMILTON LLP



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