

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

IN RE HERALD, PRIMEO AND THEMA
FUNDS SECURITIES LITIGATION

This documents 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.

ECF Case

Case No. 09 Civ. 0298 (RMB)

Case No. 09 Civ. 2558 (RMB)

**DECLARATION OF
EVAN A. DAVIS**

I, Evan A. Davis, declare under penalty of perjury as follows:

1. I am a member of the bar of this Court and a partner at Cleary Gottlieb Steen & Hamilton LLP, counsel for the HSBC Defendants. I submit this declaration in support of the HSBC Defendants' Reply to Objections to Preliminary Approval of Partial Settlement.

2. In the Reply Memorandum that the HSBC Defendants have submitted to the Court they make the statement that they have good defenses, including ongoing and appropriate diligence. That diligence included two KPMG reviews of fraud and operational risks at Bernard L. Madoff Investment Securities ("BLMIS") that HSBC commissioned. In support of the statement as to ongoing and appropriate diligence, I wish to call the Court's attention to pleadings that indicate how the United States Department of Justice and the United States Securities and Exchange Commission believe those KPMG reviews were foiled through the use of forged documents.

3. In particular, I wish to call the Court's attention to the allegations of the Department of Justice and the S.E.C. in three charging pleadings; (1) the Information filed August 11, 2009, and available at <http://www.justice.gov/usao/nys/depascali.html>, charging Frank DiPascali, Jr., the manager of accounts involved in the Madoff fraud, with falsifying books and records, securities fraud and perjury (the "Information"); (2) the Indictment filed November 17, 2010, and available at <http://www.justice.gov/usao/nys/oharaperez.html>, charging BLMIS's Director of Operations Daniel Bonventre, programmers and other personnel at BLMIS with falsifying books and records and securities fraud (the "Indictment"); and (3) the Complaint filed by the S.E.C. on February 26, 2010, and available at www.sec.gov/litigation/complaints/2010/comp21424.pdf, charging Bonventre with securities fraud and fraud on the clients of BLMIS (the "Complaint").

4. All three of these pleadings describe the preparation of forged DTC reports. DTC stands for the Depository Trust Company, a U.S. entity independent of BLMIS to which BLMIS's books and records could be compared for independent confirmation of the existence of assets and the actual occurrence of transactions. As described in the Information and the Indictment, these forged reports were prepared to show to a "European Accounting Firm" that conducted reviews in 2005 and 2008 for a "European Custodian" that served as custodian for certain "European Clients" of BLMIS. Indictment ¶ 44, Information ¶ 26. Upon information and belief, the European Accounting Firm was KPMG, the European Custodian was HSBC, and the European Clients of BLMIS included Thema.

5. The Information charges that in 2005 DiPascali oversaw the creation of counterfeit DTC reports to deceive the European Accounting Firm. It is alleged that these counterfeit reports purported to show "that BLMIS had custody of the securities reflected on the account statements that had been sent to the European Clients and/or the European Custodian." ¶ 26. It also alleges that when the European Accounting Firm returned in 2008 to review BLMIS operations related to the European Custodian and the European Clients, DiPascali caused additional false and fraudulent documents to be created and provided to the European Accounting Firm "to persuade the European Accounting Firm that the securities positions reflected on the European Custodian's account statements actually existed when, in fact, they did not." ¶ 29.

6. The Indictment provides a detailed description of the steps taken to prepare these forged DTC reports. It explains that BLMIS computers were directly connected to DTC through password access and allowed generation of DTC reports for BLMIS's market making and proprietary accounts that could be compared to BLMIS's books and records. ¶ 70. The

Indictment further explains that one of the indicted BLMIS programmers created a program (DTC17EOM) designed to generate a monthly report that looked like the reports previously produced by DTC for BLMIS's market making and proprietary accounts, but which added the purported but non-existent holdings of BLMIS clients such as Thema. This new program permitted an operator to pull the DTC report for a given month using the backup tape for that month that contained the reports for the BLMIS market making and proprietary accounts and to add the positions in the purported but also fabricated stock records for BLMIS customers such as Thema. This program enabled a BLMIS computer operator to print fraudulent DTC reports that reflected the combined data. ¶ 71. These false and fraudulent DTC reports were intended to be shown to representatives of the European Accounting Firm who visited BLMIS. ¶ 72.

7. The Complaint in addition makes clear that the forged DTC reports that purported to reflect fictional balances maintained in investor accounts were reviewed in detail by Bonventre and Bernard Madoff himself, "so the reports would appear to be as legitimate as possible." It notes that fake DTC reports were found next to real DTC reports in Bonventre's file. ¶ 79.

Executed on July 11, 2011, at New York, New York.

CLEARY GOTTlieb STEEN & HAMILTON

LLP



Evan A. Davis