UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE HERALD, PRIMEO AND THEMA FUNDS SECURITIES LITIGATION This document relates to: All actions.	File No: 09 Civ. 289 (RMB) (HBP)

DECLARATION OF ME MICHEL MOLITOR IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS

I, Michel MOLITOR, declare under penalty of perjury under the laws of the United States of America that the following is true and correct:

INTRODUCTION

1. I am acting as *Avocat à la Cour* registered with the Luxembourg Bar Association, partner in the law firm MOLITOR, Avocats à la Cour in Luxembourg. My professional experience and qualifications that enable me to provide the foregoing expert report are attached as Exhibit 1 hereto.
2. I have been asked to submit this declaration (the "**Declaration**") by Cohen Milstein Sellers & Toll PLLC and Stull, Stull & Brody in their capacity as counsel to Plaintiffs in the above proceeding (the "**Proceeding**").
3. Regarding the Proceeding, I understand that class actions have been brought on behalf of investors in the Herald (LUX) U.S. Absolute Return Fund and Herald Fund SPC-Herald USA Segregated Portfolio One (together the "**Herald Funds**"), the Primeo Select Fund and Primeo Executive Fund (together the "**Primeo Funds**") and Thema International Fund plc (the "**Thema Fund**") against multiple defendants. I also understand that these class actions have been consolidated for pre-trial purposes.
4. This Declaration is based on:
   - the [proposed] third amended class action complaint of 1 April 2011 concerning the Herald Funds (the "**Herald Complaint**");
   - the second consolidated amended complaint of 1 April 2011 concerning the Primeo Funds (the "**Primeo Complaint**");
   - the second amended class action complaint of 1 April 2011 concerning the Thema Fund (the "**Thema Complaint**");

(the Herald Complaint, the Primeo Complaint and the Thema Complaint being together referenced as the "**Complaints**");

- the memorandum of law in support of the defendants' joint motion to dismiss and in opposition to the plaintiffs' motion for leave to amend the complaint of 29 June 2011 (the "**Defendants' Motion to Dismiss**");
- the declaration of Ferdinand BURG in support of the Defendants' Motion to Dismiss of 28 June 2011;
- the declaration of Jacques DELVAUX in support of the Defendants' Motion to Dismiss of 27 June 2011;
- the declaration of André PRÜM in support of the Defendants' Motion to Dismiss of 28 June 2011; and
- the declaration of Fabio TREVISAN in support of the Defendants' Motion to Dismiss of 28 June 2011

(together the "**Defendants' Declarations**").

5. For convenience, I adopt the definitions used in the Complaints.
6. I understand that this Declaration will be submitted to the U.S. District Court for the Southern District of New York in connection with this Proceeding.
7. This Declaration, which is a declaration of Luxembourg law exclusively, is strictly limited to the matters stated herein and does not cover any other matter.
8. For the purpose of this Declaration, I assume that the factual allegations contained in the Complaints are true.

I. ELEMENTS OF LUXEMBOURG LAW AND PROCEDURE RELATING TO *FORUM NON CONVENIENS*

Overview of Luxembourg territorial jurisdiction rules

Regulation 44/2001 principles

9. As a rule, Regulation EC n°44/2001 of 22 December 2000 regarding judicial jurisdiction, recognition and enforcement of judgments in civil and commercial matters ("**Regulation 44/2001**") is applicable by Luxembourg courts when the defendant is domiciled in a member state of the European Union ("**Member State**").
10. In principle, persons domiciled in a Member State may, whatever their nationality, be sued in the courts of that Member State (article 2 of Regulation 44/2001). On the other hand, if the defendant is not domiciled in a Member State, whether or not a particular Member State has

jurisdiction shall be determined by the law of that Member State (Article 4 of Regulation 44/2001).

11. In matters relating to a contract, persons domiciled in a Member State may also be sued in the courts of the place of performance of the obligation in question (article 5 of Regulation 44/2001).

12. In matters relating to tort, *delict* or *quasi-delict*, persons domiciled in a Member State may also be sued in the courts of the place where the harmful event occurred or may occur (article 5 of Regulation 44/2001).

13. As an exception to the above, if the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction (article 23 of Regulation 44/2001). Such jurisdiction clause must however meet certain requirements in order to be enforceable (see below, §§ 26 to 39).

14. Where several claims are directed against several defendants, persons domiciled in a Member State may be sued before the courts of the place where any one of them is domiciled, provided that the claims at hand are so closely connected that it is appropriate to have them tried together in order to avoid irreconcilable judgments resulting from separate proceedings (article 6 of Regulation 44/2001).

15. At first glance, pursuant to the above principles, insofar as at least one of the Defendants is domiciled in Luxembourg, Luxembourg courts should also have jurisdiction over the Defendants domiciled in other Member States.

16. However, two exceptions may impact such jurisdiction:

    (i) where the claims against the Defendant are insufficiently connected within the meaning of the law (see below, §40 *et seq.*); and

    (ii) where at least one of the Defendants domiciled in a Member State has agreed to a valid jurisdiction clause which designates another court as the court having jurisdiction (see below §35 *et seq.*).

17. **Considering this, the jurisdiction of Luxembourg Courts over some of the Defendants might be challenged.**

Luxembourg NCCP principles

18. If a defendant is not domiciled in a Member State but in a state with which Luxembourg has not entered into any convention on the jurisdiction of courts, as is the case with the United States of America, the territorial jurisdiction of Luxembourg courts is governed by articles 27 to 48 of the Luxembourg New Code of Civil Procedure ("**NCCP**").

19. In matters concerning liability for tort, the court having jurisdiction will be the court of the domicile of the defendant or the court of the place where the harmful event occurred (article 42 of the NCCP).

20. Regarding contractual matters, the court having jurisdiction will be the court of the domicile of the defendant or the court of the place of the performance of the obligation (article 28 of the NCCP).

21. However, in contractual matters, parties may agree that a court has jurisdiction to settle disputes which arise from their contractual relationship. Such agreements, also called jurisdiction clauses, are valid and binding upon the parties, provided they are not contrary to territorial jurisdiction rules of public policy (article 29, paragraph 2 of the NCPC) (see below, §26 *et seq.*).

22. Should the case involve several defendants, the plaintiff will be entitled to sue all the defendants before the court of the domicile of one of them (article 30 of the NCPC).

23. Here also, pursuant to the above principle, insofar as at least one of the Defendants is domiciled in Luxembourg, Luxembourg courts should also have jurisdiction over the other Defendants.

24. However, two exceptions may impact such jurisdiction:

    (i) on the one hand, this rule will not apply if the claims against the Defendant are not sufficiently connected (see below, §40 *et seq.*); and

    (ii) on the other hand, this rule will not apply vis-à-vis the defendant who has signed a jurisdiction clause that identifies another court as the place of jurisdiction (see below, §35 *et seq.*).

25. **Accordingly, the jurisdiction of Luxembourg Courts over some of the Defendants might be challenged.**

Particular issues arising from jurisdiction clauses: consumer law issues

26. Pursuant to Luxembourg general rules on conflict of jurisdictions, jurisdiction clauses are valid provided (i) they are not contrary to territorial jurisdiction rules of public policy (article 29, paragraph 2 of the NCPC) and (ii) the chosen court has jurisdiction to rule over the case pursuant to its own rules (F. SCHOKWEILER, *opt. cit.*, n° 769).

27. Territorial jurisdiction rules of public policy cover, in particular, courts that have jurisdiction to rule on issues concerning consumers (F. SCHOKWEILER, *opt. cit.*, n° 768).

28. In this matter, it is generally considered that jurisdiction clauses are not enforceable against consumers, i.e. individuals who have entered into a contract for a purpose which can be regarded as being outside their trade or profession. In other words, a consumer cannot be forced to come to a court where the consumer is not domiciled or resident at the time of conclusion of the contract.

29. This principle is governed by article 17 of Regulation 44/2001 which honors jurisdiction clauses entered into by a consumer provided that such clauses (i) allow the consumer to bring proceedings in courts other than

those of the Member State where he or the other party is domiciled; or (ii) confers jurisdiction on the courts of the Member State where both the consumer and the other party are domiciled or habitually resident at the time of conclusion of the contract.

30. This principle also arises from the Luxembourg prohibition of unfair terms in consumer contracts. The Luxembourg Consumer Code considers it to be unfair when any term of a consumer contract may cause an imbalance in the rights and obligations of the parties to the detriment of the consumer. In case of doubt regarding the meaning of a clause, the most favorable interpretation for the consumer prevails (article L.211-2 of the Luxembourg Consumer Code).

31. Where a contractual clause is considered to be unfair, it will be considered as invalid and ineffective vis-à-vis the consumer.

32. Indeed, the European Court of Justice ("**ECJ**") has held that a clause conferring jurisdiction on the courts of the Member State where a seller or supplier has its principal place of business obliges the consumer to submit to the exclusive jurisdiction of a court which may be difficult for him to appear in (in terms of time, distance and costs). As a result such clause has the object or effect of excluding or hindering the consumer's right to take legal action. "*Therefore such clause must be regarded as unfair (...) as it causes (...) a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*" (CJCE 27 June 2000, n° C-240/98 to C-244/98, para. n°22 to 25).

33. The ECJ has also held that courts are entitled to determine, on their own motion, whether a term of a contract is unfair (CJCE 27 June 2000, n° C-240/98 to C-244/98, para. n°27 to 29). In other words, the Luxembourg courts could rule *sua sponte* that a clause entered into between a professional and a consumer is unfair and therefore void.

34. Therefore, should one of the investors of the Funds be considered a consumer, a jurisdiction clause or other agreement he may have entered into in favour of Luxembourg courts may be invalid if he was not domiciled or resident in Luxembourg at the time of conclusion of that agreement.

Particular issues arising from jurisdiction clauses: co-defendants

35. Assuming a jurisdiction clause is valid, the court chosen by the parties as the court of jurisdiction will have exclusive jurisdiction which means that, if the matter is brought before another court, that other court is obliged to decline jurisdiction if the defendant requests it (TA Luxembourg, 26 June 2008, n°10977).

36. The consequences of jurisdiction clauses are similar under Regulation 44/2001.

37. Therefore, where a jurisdiction clause determines that the court having jurisdiction is not a Luxembourg court, Luxembourg courts shall decline their jurisdiction in deference to the court prescribed by the clause. As an

example, if a defendant has agreed to a jurisdiction clause in favour of Irish courts, Luxembourg courts must decline their jurisdiction in deference to Irish courts.

38. This also applies where several jurisdiction clauses have been entered into among different parties to the same dispute. In such a case, the Luxembourg court identified by one of these clauses shall have exclusive jurisdiction for the dispute identified in the clause. This means that it (i) shall be the sole court having jurisdiction for the part of the dispute identified by one of the clauses but (ii) shall decline jurisdiction for parts of the dispute for which other courts have jurisdiction according to the other jurisdiction clauses. This situation could inevitably lead to fragmentation of courts' treatment of the dispute.

39. It seems that such concurrent clauses could arise from the Proceeding. Indeed, in Defendants' Motion to Dismiss, the Defendants state that "*each Defendant who has entered an appearance – except for JPM and BNY Mellon (...) consents to jurisdiction in Ireland to determine the validity of the Thema Plaintiff's claims, and in Luxembourg to determine the validity of the Primeo and Herald Plaintiffs' claims*" (pages 11-12). As a result, Luxembourg courts would not be the only courts that possessed jurisdiction to settle the dispute.

Luxembourg consolidation of actions

40. Under Luxembourg law, a judge can join two claims filed separately and try them together in a single proceeding. This operation results from a court decision made in the interests of the administration of justice. It cannot occur for pre-trial purposes only.

41. It may be effected only if (i) several cases are pending before the same court and (ii) the link between those cases is so strong that in the judge's opinion, it would be better to try them together in the interests of the administration of justice.

42. This is so when the cases derive from related claims or when there exists a link of dependence between the claims, and in particular when there is a risk of conflicting decisions if the claims are not tried together (Cour 30 January 1996, n°15876; TA Luxembourg 12 July 2006, BIJ 10/2006, p. 269).

43. However, where plaintiffs have sustained different harms and thus present different facts, the judge may refuse to artificially join their claims.

44. As such, if Plaintiffs' actions were transferred to the Luxembourg courts, they would not be tried through one single proceeding but through three separate proceedings. Indeed, a Luxembourg court would likely consider there to be no connection among the Complaints since they have been separately filed against three different investment funds by three different groups of investors. The Complaints are based on different facts and involve different relationships among the parties. Consolidation of the

Complaints would therefore almost certainly be considered artificial and declined by a Luxembourg judge.

Collective actions and Luxembourg law

45. As a principle, Luxembourg does not have class actions as they exist in the United States of America.

46. Indeed, opt-out class actions do not comply with the rule "*nul ne plaide par procureur*" (no one argues by attorney).

    The rule "*nul ne plaide par procureur*" is not established by any Luxembourg legal provision and appears in case law (TA Diekrich, 8 May 1913, Pas. 9, p. 218; Cour, 5 December 1972, Pas. 22, p. 338). It means that no one can act for someone else without power of attorney. Otherwise, a claim will be dismissed for lack of standing.

Luxembourg private international law

47. When Luxembourg courts have to decide a matter involving several jurisdictions, they do not automatically apply Luxembourg law. Luxembourg private international law may indeed lead to the application of a foreign law to the merits of the case.

48. In such a situation, the foreign law is considered to be a matter of fact (CA 22 December 1916, Pas. Lux. 10, p. 14) that needs to be evidenced by relevant supportive documents such as sources of foreign law and/or opinions of foreign legal counsel (F. SCHOKWEILER, *opt. cit.* n°160). The provision of such supportive documents and their relevant translation in local languages often is expensive in terms of both time and money.

49. Application of foreign law by Luxembourg courts is governed by the provisions of Luxembourg international private law. These rules are organized as follows: (i) regulation EC n°593/20089 of 17 June 2008 on the law applicable to contractual obligations ("**Regulation Rome I**") in contractual matters, (ii) regulation EC n° 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations ("**Regulation Rome II**"), or Luxembourg international private law ordinary rules depending on the date of occurrence of the tortious facts in non-contractual matters.

50. In contractual matters, the contract shall be governed by the law chosen by the parties (article 3.1 of Regulation Rome I). In the absence of choice, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract (*e.g.*, seller or service provider) has its habitual residence. However, where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than the above country, the law of that other country shall apply. Similarly, where the law applicable cannot be determined pursuant to the above rules, the contract shall be governed

by the law of the country with which the case is most closely connected (article 4 of Regulation Rome I).

51. Consumer contracts will nevertheless be governed by the law of the country where the consumer has his habitual residence provided that the professional (i) pursues his commercial or professional activities in that country or (ii) by any means, directs such activities to that country or to several countries including that country. However, the parties remain free to choose the law applicable to their contracts. This choice, however, may not deprive the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in absence of choice, would have been applicable (article 6 of Regulation Rome I).

52. As a result, the law applicable to subscription agreements entered into by the investors of the Funds and the Defendants should be the law chosen by the parties or, in the absence of choice, the law of the habitual residence of the Defendant or the law of the country with which the contract is most closely connected, where it is clear that the contract is more closely connected with a country other than the country of residence of the Defendant.

    Should investors of the Funds be considered consumers, the law governing their contracts shall be the law chosen by the parties – provided, however, such law does not deprive the investor of the protection of the laws of their country of residence.

53. In tortious matters, Regulation Rome II and Luxembourg international private ordinary law rules provide the same principles: the law applicable to a non-contractual obligation shall be the law of the country in which the damage occurs (article 4 of the Regulation Rome II).

    However, where the person alleged to be liable and the person sustaining the injury both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

    Finally, where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country, the law of that other country shall apply.

54. Regarding unjust enrichment, article 10 of Regulation Rome II provides that if a non-contractual obligation arising out of unjust enrichment concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.

55. As a consequence, the determination of the law applicable to tortious aspects of the Proceeding will depend of the place where the loss has been suffered by each investor.

56. The application of such rules of Luxembourg international private law would therefore result in the application of several different countries' laws to different claims of different plaintiffs in the Proceeding, complicating the treatment of the case and potentially leading to different results depending on the applicable law(s).

Discovery

57. Luxembourg is a civil law country where there is no real equivalent to pre-trial discovery proceedings as known in common law countries. The burden of proof lies, as a rule, with the plaintiff who must offer evidence to support his case. The plaintiff is, however, free to decide which documents he wants to provide the court and the defendant with. There is no requirement, as in the United States, that a plaintiff disclose certain relevant documents to defendants.

58. Additionally, there is no general obligation to retain documents or to provide the opposing party with documents likely to be evidence in civil proceedings.

59. Parties can only compel the production of documents in Luxembourg in exceptional cases. A party may obtain a court order forcing another party to produce documents but this is not routine and must be sought in a summary proceeding before any proceedings on the merits of the case. The party seeking the documents must clearly name and identify the documents, and thus can only seek documents it knows exist.

60. Additionally, Luxembourg law has no equivalent to interrogatories or requests for admission as those mechanisms are understood in the United States.

Luxembourg lawyer fees policy

61. Article 2.4.5.3 of the Rules of Procedures of the Luxembourg Bar Association prohibits lawyers from entering into a contingency fee agreement with clients. Such an agreement, also called a *quota litis* agreement, is one "*by which fees are based only on the outcome of the proceedings.*"

62. This prohibition is based on the traditional principle pursuant to which a lawyer should remain independent from his client and therefore should not be directly interested in the outcome of the dispute (Marc THEWES, *La profession d'avocat au Grand-Duché de Luxembourg*, Ed. Larcier 2010, n°182 and 292).

II. ELEMENTS OF LUXEMBOURG LAW REGARDING CLAIMS ALLEGED AGAINST THE DEFENDANTS

63. As Mr André Prüm stated in his Declaration in support of defendants' joint motion to dismiss the Herald and Primeo Actions, "if the Lead Plaintiffs were to institute proceedings in Luxembourg, they would, to a large extent, be able to make claims similar to the ones made in the Complaints" (§§ 23 of the Declaration of André Prüm in support of defendants' joint motion to dismiss the Herald and Primeo Actions).

64. It indeed appears that the causes of action invoked in the Herald and Primeo Complaints could be covered by an existing legal basis in Luxembourg. Thus, to the extent outlined below, there is no apparent conflict between New York and Luxembourg law.

65. I however express no opinion herein regarding the standing of the Plaintiffs under Luxembourg law or the merits of any claims that would be brought by the Plaintiffs under Luxembourg law.

Negligence

66. The Herald and Primeo Plaintiffs allege that Defendants have been negligent vis-à-vis the Plaintiffs as they failed, among other things, to exercise generally the degree of prudence, caution and good business practices that are expected of any reasonable investment professional. I understand that under New York law, to plead their claims for negligence, plaintiffs need to allege (1) duty, (2) breach of that duty, and (3) damages proximately caused by that breach.

67. Negligence may give rise under Luxembourg law to liability for torts by virtue of Article 1383 of the Luxembourg Civil Code which states that "*anyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence.*"

68. Under Luxembourg law, negligence is generally defined as any wrongful behavior which, because it is harmful to other persons, disturbs the social peace (G. RAVARANI, opt. cit., n° 70). In other words, negligence occurs when the defendant did not act with the care that a man or professional normally diligent would exercise in the same circumstances. Negligence that anyone would have committed under the same circumstances does not give rise to liability.

69. To evidence liability for negligence under Luxembourg law, the plaintiff therefore needs to allege (i) a wrongful negligence, (ii) a harm and (iii) a causal link between the negligence and the harm to consider the defendant liable in tort.

70. To this extent, Luxembourg liability for negligence seems to be similar to New York liability for negligence.

71. In addition, a claim for negligence may also be cognizable under Luxembourg contractual liability law. According to article 1147 *et seq.* of the Luxembourg Civil Code, a claim based on contractual liability requires a plaintiff to demonstrate that: (i) the defendant has breached one of its contractual duties; (ii) the plaintiff suffers a direct, certain, and expectable damage; and (iii) such damage is caused by the contractual breach committed by the defendant.

72. Basically, it is possible to distinguish two categories of contractual duties: obligations to achieve a result ("*obligations de résultat*") and best efforts obligations ("*obligations de moyens*"). Where the defendant is bound to a best efforts obligation, he is liable when he did not undertake all the appropriate steps to achieve a result and especially when he has been negligent in these respects

73. In other words, when alleging a breach of best efforts obligation, the plaintiff must evidence (i) negligence in performing a best efforts obligation, (ii) a harm and (iii) a causal link between negligence and harm.

74. To this extent also, Luxembourg law seems to be similar to New York law.

Gross Negligence

75. The Herald and Primeo Plaintiffs allege that Defendants have been grossly negligent vis-à-vis the Plaintiffs as they grossly failed, among other things, to: exercise the degree of prudence, caution, and good business practice that would be expected of any reasonable investment professional; perform necessary and adequate due diligence before investing in Madoff; monitor Madoff on an ongoing basis to any reasonable degree; take adequate steps to confirm Madoff's purported account statements, transactions and holdings of the Funds; take reasonable steps to ensure that the investments of the assets of Plaintiffs and the Class were made and maintained in a prudent and professional manner; take reasonable steps to preserve the value of Plaintiffs' and the Class' investments; and/or exercise generally the degree of prudence, caution, and good business practices that would be expected of any reasonable investment professional.

76. I understand that under New York law, gross negligence is an "*extreme departure from the standards of ordinary care.*"

77. This definition is close to the one of Luxembourg law under which gross negligence ("*faute lourde*") is defined as negligence which even the less cautious man would not commit or which leads to the non-performance of an essential duty (RAVARANI, *op. cit.*, n°72).

78. Under Luxembourg general principles of liability for torts, gross negligence is not a separate cause of action. Liability for gross negligence, however, is encompassed within liability for negligence. Indeed, as stated above, Article 1383 of the Luxembourg Civil Code holds liable anyone whose negligent conduct has caused damage to a third

party, regardless of whether such negligence is gross negligence or not. However, gross negligence may cause more serious loss than simple negligence and therefore may lead judges to award a plaintiff higher damages in compensation for his loss.

79. Under Luxembourg law, gross negligence especially impacts contract matters: gross negligence bars the enforceability of contractual exculpation clauses.

Negligent misrepresentation

80. The Plaintiffs allege that several Defendants have negligently made various deceptive and untrue statements of material facts or omitted to state material facts. The Plaintiffs argue that the purpose and effect of the said false and misleading statements were, among other things, to induce Plaintiffs and the Class to purchase shares in the Primeo and Herald Funds.

81. I understand that under New York law, to state a negligent misrepresentation claim, a plaintiff must allege that: (1) the defendant had a duty, as a result of a special relationship, to give correct information; (2) the defendant made a false representation that he or she should have known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the plaintiff reasonably relied on it to his or her detriment.

82. Liability for negligent misrepresentation under New York law may first find an equivalent in Luxembourg contractual liability. Indeed, in contractual matters, case law sometimes holds that, due to a special contractual relationship, a party is duty bound to give advice and information. Moreover, in specific cases, the law imposes on one party an obligation to provide the other party with certain information. For example, Luxembourg law specifies the information that must appear in a Fund memorandum.

83. Failing to provide such information may give rise to contractual liability. It may also lead to cancellation of a contract by virtue of article 1116 of the Luxembourg Civil Code. This article states that willful misconduct/false representation ("*dol*") gives rise to cancellation of an agreement where one party would not have entered into a contract but for the fraudulent statements of the other party.

84. New York liability law for negligent misrepresentation might also find an equivalent in the Luxembourg ordinary regime of tort liability as stated in articles 1382 and 1383 of the Luxembourg Civil Code, under which anyone is liable to a third party if his wrongdoing, negligence or imprudence has caused damage to this third party. Such wrongdoing or negligence may be either a violation of the law (including criminal law) or an action or omission that the "*prudent man*" would not have undertaken in the same circumstances. The scope of application of these principles

is very wide and might cover the delivery of false information or the omission to provide essential information.

85. In addition to this general duty of honesty and integrity, under certain circumstances the law expressly prohibits the delivery of certain false information and creates specific liability schemes. For instance, Luxembourg law prohibits misleading advertising, it requires companies to have true and accurate accounts, etc. As a rule, the non-compliance with such specific legal prohibition may give rise to liability to third parties provided they prove they have suffered a loss as a result of it.

Breach of fiduciary duty

86. The Primeo and Herald Plaintiffs both allege in their Complaints that the Plaintiffs and the Class entrusted their assets to several Defendants by investing in the Herald Funds and the Primeo Funds and reposed confidence in them with respect to the management of their assets. According to Plaintiffs, those Defendants were in a superior position, in their capacities of advisors, to manage, control and oversee investment of their assets and more generally Madoff. Plaintiffs and the Class reasonably trusted the purported expertise and skill of the said Defendants who owed therefore a fiduciary duty to the Plaintiffs and the Class with respect to the management, oversight and protection of their assets.

87. Plaintiffs and the Class allege that the said Defendants breached the above duty because they failed among other things (i) to deal fairly and honestly with the Plaintiffs and the Class; (ii) to act with loyalty and good faith toward them; (iii) to manage the investments of Plaintiffs and the Class exclusively for the best interest of the latter; (iv) to make recommendations and execute transactions in accordance with the goals, investment objectives and permissible degree of risk and instruction of Plaintiffs and the Class; and (v) to exercise the degree of prudence, diligence and care expected of financial professionals managing client funds.

88. I understand that New York breach of fiduciary duty law is a specific application of such principle. It requires evidence of (i) the existence of a fiduciary duty between the parties (ii) a breach of those duties and (iii) damages resulting from that breach.

89. Luxembourg law does not have an exact equivalent to New York breach of fiduciary duty law.

90. However, the notion of fiduciary duty is similar to the requirement under Luxembourg contract law (article 1134 of the Civil Code) that one act in good faith, non-compliance with which may lead to contractual liability if the plaintiff evidences that such breach of duty causes him a loss.

91. In addition, the obligation to act in good faith also applies to pre-contractual conduct (Lux, 24 October 2003, n187/2003 III; G. RAVARANI,

opt. cit., n°435) and may lead to tort liability (CJCE, 17 September 2002, n°C-334/000; G. RAVARANI, opt. cit., n°431). Thus, non-compliance with one's duty to act in good faith during the period that precedes the conclusion of a contract may give rise to liability in tort if the plaintiff proves that such bad faith causes him a loss.

92. Moreover, the specific claims alleged by the Plaintiffs in their Complaints might fall under the provisions of article 37(1) of the law of 5 April 1993 on financial sector. This article requires each credit institution and financial sector professional (i) "*to act honestly and fairly in conducting its business activities in the best interest of its clients*" and (ii) "to *act with due skill, care and diligence, in the best interest of its clients.*" The breach of this duty may be constitutive of a tortious fault or, if applicable, a breach of contract.

93. As a consequence, it is possible that a duty of loyalty / fiduciary obligation may exist between parties irrespective of the nature (contractual or not) of their relationship.

Unjust enrichment

94. The Primeo and Herald Plaintiffs both allege in their Complaints that several Defendants were, among other things, enriched at the expense of Plaintiffs and the Class because they received unjust compensation or fees for duties they failed to perform. Plaintiffs and the Class allege as a result that they involuntarily conferred a benefit upon the Defendants without receiving adequate benefit or compensation in return and that both equity and good conscience require that they be reimbursed.

95. I understand that under New York law, to state a claim for unjust enrichment, a plaintiff must allege that (1) defendant was enriched; (2) the enrichment was at plaintiff's expense; (3) the circumstances were such that equity and good conscience require defendants to make restitution.

96. In Luxembourg law, unjust enrichment derives from case law. It is said to be a quasi-contract and claims based on such ground do not follow the requirements of claims based on tort liability.

97. Luxembourg courts recognize that where a person has been unjustly enriched to the detriment of another, the latter is allowed to claim compensation through "*actio de in rem verso*".

98. To state a claim for unjust enrichment under Luxembourg law, a plaintiff must allege that (i) defendant was enriched and the enrichment is not based on any legal ground, (ii) the enrichment was at plaintiff's expense and (iii) the plaintiff does not have any other legal remedy.

Fraud

99. The Primeo and Herald Plaintiffs both allege in their Complaints that several Defendants recklessly or knowingly made various deceptive and untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading to Plaintiffs and the Class. The purpose and effect of said false and misleading statements was, among other things, to induce Plaintiffs and the Class to purchase shares in the Funds. As a result, Plaintiffs and the Class relied on such statements in purchasing shares in the Funds and suffered substantial damages with respect to their investments.

100. I understand that under New York law, to successfully plead fraud, the plaintiff must allege a misrepresentation or failure to disclose a material fact, falsity, scienter, justifiable reliance by plaintiff and damages.

101. Under Luxembourg law, fraud is not an independent cause of civil action as such but may give rise to liability in tort or contractual liability.

Fraud in tortious matters

102. As stated below, pursuant to article 1382 of the Luxembourg Civil Code, anyone is liable if his wrongdoing has caused damage to a third party. Such wrongdoing may be either a violation of the law or a breach of the normal behavior of a "*prudent man.*" Under Luxembourg civil liability law, fraud is generally considered to be a particular category of wrongdoing, whose wrongfulness consists in the intent to harm the defendant. Fraud is obviously not the normal behavior of a prudent man and may therefore give rise to liability in tort.

103. Fraud might also be covered by article 496 of the Luxembourg Criminal Code; the use of fraudulent means to gain money from a person by abusing his trust while making him confident that he will benefit from an imaginary profit is constitutive of swindle ("*escroquerie*"). The non-compliance with such provision may give rise to civil liability. Indeed, Luxembourg law provides that any criminal fault is also constitutive of a civil tort and that plaintiffs are entitled to seek damages on this ground.

Fraud in contractual matters

104. In contractual matters, fraud is evidenced by the use of fraudulent means. In such a case it is not necessary for the plaintiff to establish that the defendant was aware of the potential damage that could result from his action or omission (G: RAVARANI, *opt. cit.* n°71).

105. Indeed, a party to a contract is allowed to seek the other's liability and to claim damages on the basis of deception as defined in article 1116 of the

Civil Code. There is deception where "*the schemes used by one of the parties are such that it is obvious that, without them, the other party would not have entered into the contract.*"

Conversion

106. The Herald Plaintiffs allege conversion against several Defendants as their assets invested with those Defendants were never invested pursuant to their agreements.

107. I understand that to sustain an action for conversion of an identifiable sum of money under New York law, plaintiff must allege that he had ownership, possession or control of the money which is the subject of the action and must show that he had an immediate superior right of possession to the identifiable fund and the exercise by defendants of unauthorized dominion over the money in question to the exclusion of plaintiff's rights.

108. Luxembourg law does not have conversion as such. However, such cause of action may fall under both Luxembourg liability for torts or contractual liability.

109. Indeed, in contractual matters, conversion of assets could be constitutive of a breach of the contractual duty to invest investors' assets in the manner agreed or a breach to agency agreements if applicable.

110. In tortious matters, conversion might be covered by at least two criminal offences linked to misappropriation of funds: fraudulent conversion of funds ("*abus de confiance*") (article 491 of the Criminal Code) and swindle ("*escroquerie*") (article 496 of the Criminal Code).

111. To successfully plead *abus de confiance*, the plaintiff must evidence that (i) he has provided the defendant with monies, (ii) the defendant had to return or to use such monies under a specific purpose, (iii) a fraudulent misappropriation of monies by the defendant and (iv) he has suffered a loss from such misappropriation.

112. Similarly, to successfully plead *escroquerie*, the plaintiff must evidence that the defendant has used fraudulent means in order to fraudulently misappropriate the goods of the plaintiff.

Breach of contract

113. The Herald and Primeo Plaintiffs allege in their Complaints that several Defendants breached their contracts with Plaintiffs and the Class. Indeed, they allege that those Defendants did not respect their duty to invest the Plaintiffs' and Class' monies in legitimate enterprises and to select investment managers such as Madoff on careful analysis. They further

assert that these obligations were material terms and fundamental assumptions of the subscription agreements.

114. I understand that to successfully plead a breach of contract under New York law plaintiffs must identify contractual obligations and a failure in performing those duties from which plaintiffs suffered damage.

115. To seek the liability of his contracting party, Luxembourg law requires the plaintiff to evidence (i) a contract, (ii) duties arisen from such contract, (iii) a failure in the performance of such duties and (iv) a damage arisen from such failure (article 1147 *et seq.* of the Civil Code).

116. The breach of contract that the plaintiff needs to demonstrate depends on the nature of the contractual duty. As stated above, there are two kinds of contractual duties: obligation to achieve a result ("*obligation de résultat*") and best efforts obligation ("*obligation de moyens*"). Where the defendant is bound to an obligation to achieve a result, the plaintiff only needs to prove that the agreed result has not been reached to show that the defendant failed to comply with his contractual duty. Where the defendant is bound to a best efforts obligation, he is liable when he does not undertake all the appropriate steps to achieve a result.

Third party beneficiary claim for breach of contract

117. The Primeo Plaintiffs assert in the Primeo Complaint that as third-party beneficiaries they have suffered damage from the breach by the Primeo Advisor Defendants of the contract entered into, for Plaintiffs' benefit, with the Primeo Funds.

118. I understand that to successfully plead a third-party beneficiary claim for breach of contract under New York law, Plaintiffs have to identify, as in claims for breaches of contract, contractual obligations and a failure in performing those duties from which plaintiffs suffered damage. However, they need also allege facts sufficient to evidence they were intended third-party beneficiaries.

119. Under Luxembourg law, as a rule, a third party to a contract is not entitled to file a claim against one of the contracting parties on the grounds of contractual liability. Indeed article 1165 of the Civil Code expressly provides that "*agreements produce effect only between the contracting parties; they do not harm a third party, and they benefit him only in the case provided for in article 1121.*"

120. There are however some exceptions to this principle. Indeed, Luxembourg law allows – under certain circumstances or in the case of fraud - a third party to file a claim against the debtor of its debtor (see Article 1166 of the Luxembourg Civil Code on "*action oblique*" and article 1167 of the Luxembourg Civil Code on "*action paulienne*"). Finally, Luxembourg case law provides that a third party could be allowed, under specific circumstances and conditions, to directly file a claim against a

contracting party. Should it be the case, the plaintiff's claim would derive from a contract to which he is a third party (*action directe*).

121. In addition, the plaintiff might be free to engage the liability of one of the contracting parties on the grounds of liability in tort.

122. Indeed, even if Luxembourg case law traditionally provided that, because of provisions of article 1165 of the Civil Code, a plaintiff should evidence a fault other than a breach of a contractual duty, it now tends to admit that the breach of contract is constitutive of an injury the third party is entitled to assert where he evidences he has suffered a damage from that injury (CA, 1 July 1998, n°20546; CA, 31 March 1999, n°21150; G. RAVARANI, *opt. cit.*, n°446).

Aiding and abetting

123. Luxembourg law develops the concept of "*aiding and abetting*" in both civil and criminal matters.

124. In criminal law, a person should be regarded as aiding or abetting an offence where (i) he/she offers the principal author means or assistance to perpetrate the offence (ii) with knowledge (*i.e.*, clear understanding and intention) of participating to this offence (articles 66 and 67 of the Criminal Code).

125. Aiding or abetting an offence, which is punishable under a criminal law, constitutes a criminal fault and therefore also a civil tort which gives rise to civil damages.

126. Aiding and abetting wrongful action or contractual faults is not a cause of action as such under Luxembourg law. However, it is possible to be held liable for aiding and abetting tortious and contractual faults in application of the general principles governing civil liability.

127. Under liability for tort, people aiding or abetting wrongdoing which causes a loss may be regarded – under certain circumstances – as the co-authors of the loss and therefore may be held liable to damaged parties together with the author of the wrongdoing.

128. Also, accomplices in a contractual fault may be held liable under Luxembourg contractual law. Indeed, third parties may aid or abet the nonperformance of a contractual obligation. This would be the case where (i) a contract has been entered into by and between a debtor and a creditor, (ii) a third party enters into a contract with the debtor; and (iii) that contract prevents the latter from performing his obligations vis-à-vis his initial creditor (G. RAVARANI, *opt. cit.*, n°449).

129. To successfully plead aiding or abetting nonperformance of a contractual obligation, the plaintiff must evidence that the defendant (i) had

knowledge of the initial contract entered into by and between a creditor and a debtor, (ii) has aided or abetted breach of that contract (iii) with knowledge he was aiding or abetting such breach.

130. The above principles are general and are likely to apply to aiding and abetting breaches of fiduciary duties and aiding and abetting fraud alleged by the Plaintiffs against certain of the Defendants.

Luxembourg, 30 September 2011.

Michel MOUTOR