Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re HERALD, PRIMEO and THEMA FUNDS SECURITIES LITIGATION	)))))	Civil Action No. 09 CIV 289 (RMG) (HBP) (Consolidated with 09 CIV 2032 and 09 CIV 2558)

REPLY DECLARATION OF GRAHAM FRASER RITCHIE QC

I, Graham Fraser Ritchie QC, of Charles Adams Ritchie & Duckworth, attorneys-at-law, Zephyr House, Mary Street, Grand Cayman, Cayman Islands, declare, under penalty of perjury under the laws of the United States of America that the foregoing is true and correct:-

FIRST DECLARATION

1. I am the same Graham Fraser Ritchie QC that deposed the First Declaration dated 29th June 2011 ("First Declaration").

2. For the purposes of this Reply Declaration, I will adopt the definitions and abbreviations contained in my First Declaration.

PURPOSE OF THIS REPLY DECLARATION

3. I have been requested by Hughes Hubbard & Reed LLP to respond to the opinions given by Thomas Lowe QC ("Mr. Lowe") in his affidavit filed in support of the Plaintiffs' memorandum of law in opposition to the Defendants' joint motion to dismiss made on 30th September 2011 (the "Lowe Affidavit") on whether or not EY Cayman owed a duty of care to the Plaintiffs in respect of its audit reports. This is primarily dealt with by Mr. Lowe at paragraphs 61 to 70 of the Lowe Affidavit.

4. Whilst I do not agree with Mr. Lowe's opinions on reflective loss and on the other causes of action under Cayman law as set out in the Lowe Affidavit to the extent that they take issue with the opinions expressed by Mr. William James Tyre Bagnall ("Mr. Bagnall") in his Declaration dated 29th June 2011, I am instructed by Hughes Hubbard & Reed LLP that since Mr. Bagnall will deal with this opinion evidence in his reply declaration I am not required to do so. However, the absence on my part of any commentary should not

be taken as acceptance by me of any of the differing opinions given by Mr. Lowe on such matters.

5. In addition to the documents referred to in my First Declaration and the Lowe Affidavit, I have also reviewed the following documents:-

   (i) Declaration of Mark Phillips QC dated 28th June 2011; and

   (ii) Declaration of Joseph Serino Jr. dated 29th June 2011; and

   (iii) Memorandum of Law in Support of Defendants' Joint Motion to Dismiss and in Opposition to Plaintiffs' Motion for Leave to Amend Complaints dated 29th June 2011.

SUMMARY OF KEY POINTS IN REPLY TO THE LOWE AFFIDAVIT

6. At paragraph 68 of the Lowe Affidavit, Mr. Lowe accepts that a duty of care is not in general owed by auditors to shareholders who receive a company's annual accounts to which audit reports are attached.

7. Mr. Lowe seeks to distinguish the Plaintiffs' claim against EY Cayman from *Caparo* on the basis that the audited accounts were prepared in *Caparo* for a statutory purpose. In my opinion *Caparo* turned on what the House of Lords found to be the purpose of the statutory requirement for the audited accounts rather than the existence of the statute.

8. The facts pleaded in the Consolidated Complaints are similar to the facts of *Caparo*. Both concerned claims brought by shareholders against auditors for losses allegedly sustained by reason of the dissemination of an audit report provided to the shareholders as a body.

9. Mr. Lowe does not refer to any authority for shareholders being owed a duty of care by a company's auditors.

10. The Consolidated Complaints appear to acknowledge that to establish that a duty of care was owed by EY Cayman to the Plaintiffs a "*special relationship*" must be shown to exist as they attempt, in my opinion without success, to plead that a "*special*

relationship" existed between the Plaintiffs and EY Cayman.[1] However, the only factor relied on in support of the "*special relationship*" is the fact that the Funds (not the auditors) were obliged to circulate the audited accounts to all shareholders in compliance with the provisions of the Amended Primeo Articles, the Primeo OM, the Herald Articles and the Herald OM. In my opinion, as a matter of Cayman law, this is insufficient to establish an owed duty of care by the auditors to the shareholders.

11. In circumstances where:

(i) it is acknowledged that a duty of care is not in general owed by auditors to shareholders who receive a company's annual audited accounts; and

(ii) there is nothing pleaded in the Consolidated Complaints that would in my opinion be sufficient to demonstrate that a *"special relationship"* existed between the Plaintiffs and EY Cayman to displace this general rule;

I remain of the view that a Cayman court would likely find that the Plaintiffs are unable to establish a sufficient proximity of relationship between themselves and EY Cayman to give rise to a duty of care for both the reasons set forth below and in my First Declaration. I deal with the specific matters raised by Mr. Lowe in support of his opinions below.

CASE LAW CITED BY MR. LOWE DOES NOT SHOW THAT AUDITORS OWE A DUTY OF CARE TO SHAREHOLDERS

12. Mr. Lowe has relied primarily on three cases to try to show that an auditor owes a duty of care to the shareholders of a company who receive the company's audited accounts. For the reasons set out below none of these cases turn on facts which are similar to the facts in this case, and none support his proposition that such a duty is owed.

13. Mr. Lowe at paragraph 63 refers to *Customs and Excise Commissioners v Barclays Bank plc* which considered two of the tests for a duty of care: (i) the "*assumption of responsibility*" test and (ii) the three-pronged test in *Caparo* namely, foreseeability, proximity and whether it is fair, just and reasonable. According to Mr. Lowe, Lord

[1] Paragraphs 260 and 268 of the Proposed Primeo Complaint, Counts 8 and 9 respectively; and paragraphs 713 and 721 of the Proposed Herald Complaint, Counts 10 and 11 respectively.

Hoffmann in that case said that these "*labels or slogans*" do not assist. With all due respect to Mr. Lowe that does not give an accurate description of what Lord Hoffmann had to say about those tests in his judgment. At paragraph 35 he had this to say:-

"*There is a tendency, which has been remarked upon by many judges, for phrases like "proximate", "fair, just and reasonable" and "assumption of responsibility" to be used as slogans rather than practical guides to whether a duty should exist or not. These phrases are often illuminating but discrimination is needed to identify the factual situations in which they provide useful guidance.*"

14. The *Barclays Bank* case raised a novel question of law on facts which were entirely different to the facts in this case; namely whether a bank having been served with a freezing injunction granted to a third party against one of the bank's customers owes a duty to the third party to take reasonable care to comply with the terms of the injunction. The court at first instance decided that no such duty was owed following a trial of a preliminary issue and that decision was overturned by the Court of Appeal. Barclays Bank then appealed that decision to the House of Lords. So it was against the background of a novel situation that the Learned Law Lords were considering the applicability of the two tests described above.

15. The House of Lords overturned the decision of the Court of Appeal and the commissioners' claim against the bank was dismissed. The House of Lords held that having been served with the injunction the bank was obliged to comply with its terms and would be exposed to the risk of punishment for contempt if it did not do so. In the circumstances, the bank had not voluntarily assumed responsibility for its actions so as to give rise to a duty of care to the commissioners; its duty was to the court to comply with the terms of the injunction. The House of Lords in its holding concluded, *inter alia*, that it would not be "fair, just and reasonable" to recognise a duty of care to the third party in those circumstances. In the result the commissioners had failed to establish the third limb of the three-pronged test. As Lord Bingham observed at paragraph 15 of the judgment:-

"*It is common ground that the foreseeability element of the threefold test is satisfied here. The bank obviously appreciated that, since risk of dissipation has to be shown to obtain a freezing injunction, the commissioners were liable to suffer loss if the injunction were not given effect. It was not contended otherwise. The concept of proximity in the context of pure economic loss is notoriously elusive. But it seems to me that the parties were proximate only in the sense that one served a court order on*

the other and that other appreciated the risk of loss to the first party if it was not obeyed. I think it is the third policy, ingredient of the three-fold test which must be determinative."

16. The Lord Justices found the "*assumption of responsibility*" test to be of little assistance and thus went on to consider the three-fold test in *Caparo*. As Lord Walker observed at paragraph 74:-

"In this case the appellant bank has not, in any meaningful sense, made a voluntary assumption of responsibility. It has by the freezing order had responsibility thrust upon it. But in any case it is not proximity that is the respondents' problem in this case. The duty of care for which the respondents contended successfully in the Court of Appeal, and which they seek to maintain in this House, is not a duty leading to "liability in an indeterminate amount for an indeterminate time to an indeterminate class" (in the very well-known words of Cardozo CJ in Ultramares Corpn v Touche (1931) 174 NE 441, 444). It would be a liability in a known maximum sum (in respect of a precisely identified account), for a brief period, to a single known body corporate. The respondents' problem is whether it is fair, just and reasonable to impose on a bank a novel and substantial liability (on top of its potential liability for contempt of court) if it carelessly fails to comply with a freezing order."

17. It will be seen from the foregoing that the House of Lords applied the *Caparo* test in reaching its decision that there was no duty of care owed by the bank to the commissioners.

18. At paragraph 63 Mr. Lowe infers that the three-fold test in *Caparo* provides little more than a series of labels which do not assist. I disagree; they provide a "*convenient general framework*"[2] against which a plaintiff's pleaded case can be analysed to establish whether or not a duty of care is owed in respect of negligence. Indeed Smellie C.J in *Re Omni Securities,* a case upon which Mr. Lowe seeks to rely and which approved and followed *Caparo,* stated:

"In my view, this is an issue which can only go to the liability in tort, i.e. whether in tort the applicants may be liable for economic loss due to the negligent misstatements given to the plaintiff as ***the known recipient*** *of the audit report for the* ***specific purpose*** *of reliance upon it for the management of its affairs and upon which the plaintiff in fact relied to its detriment. That is the tripartite test - knowledge, reliance, detriment- laid down by the House of Lords in* Caparo Indus. PLC v. Dickman (6) *in delineating the circumstances under which liability may be incurred by accountants or auditors to third parties in respect of negligence, especially that arising from the performance of the audit function. It is a delineation which narrows the scope of liability to third parties (which was first defined in* Hedley Byrne & Co. Ltd v. Heller & Partners Ltd.

[2] per Lord Bingham in *Barclays Bank* at paragraph 93

(11)) *by the requirement of proof of knowledge on the part of the auditor that his report will be received and relied upon by the third party, as distinct from the mere foreseeability that it might be so used."* [3] (emphasis added)

He went on to state:[4]

"I intend to be guided by the test as laid down in Caparo Indus. PLC v. Dickman *as providing the definitive modern test in the context of an auditors' negligence claim...."*

19. In *Re Omni Securities* the plaintiff company in liquidation brought proceedings against its auditors DH&S (Zurich) and one of its affiliated firms DH&S (Cayman) and partners in DH&S (Cayman) for damages for breach of contract and negligent misstatement. DH&S (Cayman) and the partners in that firm made an application to strike out the proceedings which was dismissed by the court. The court found that on the basis of the pleaded facts it could not be shown that there was no reasonable prospect of success at trial. The facts in the *Re Omni Securities* case can be distinguished from the claims in the Consolidated Complaints here because the claims in *Re Omni Securities* were made by the company in liquidation through its liquidators – not by the company's shareholders – and the facts pleaded were sufficient in *Omni Securities* for there to be an arguable case in support of there being a sufficient proximity of relationship between the company and the defendants to arguably give rise to a duty of care. It is also important to note that in this case Smellie CJ when considering the potential liability of the defendants in tort, was able to identify the specific recipient of the audit report (*i.e.* the company) and a *"specific purpose"* for which the audit report had been provided to the company.

20. The Court of Appeal decision in *Coulthard v Neville Russell (a firm)* [1998] BCC 359 (*"Coulthard"*) which is also relied on in the Lowe Affidavit at paragraph 66 also turns on very different facts to the case pleaded by the Plaintiffs in their Consolidated Complaints.

21. In the *Coulthard* case the directors of a company, which went into liquidation, brought a claim against the company's auditors for damages for negligence in failing to advise them properly in relation to the treatment of certain monies as a loan which was found to be in breach of section 151 of the Companies Act 1985 and which rendered the loan

[3] 1998 CILR 275 @ pg 6
[4] 1998 CILR 275 @pg 7

illegal and unenforceable. The auditors sought an order striking out the claim against them. The application was dismissed at first instance and the auditors appealed. The statement of claim set out specific details of the advice which had been given by the auditors to the directors including details of meetings which took place and their dates and details of allegations that on three separate occasions discussions took place between the directors and the auditors regarding the loan. Chadwick LJ stated:[5]

"It would save in exceptional circumstances, be unwise for the directors of a company to approve a balance sheet in a form which gave the auditors concern; so that the auditors would find themselves unable to express the opinion that the balance sheet, in that form, showed a true and fair view of the state of the affairs of the financial year. A fortiori, if that balance sheet was to be used to demonstrate solvency in some regulatory context. It is for this reason that discussions between directors and auditors as to the proper treatment in the balance sheet of any item likely to be controversial will, almost invariably, take place before the accounts were approved and the audit report signed."

22. Whilst of course each case must turn on its own facts, it is unsurprising in light of the directors' pleaded case that the Court of Appeal was not persuaded that the directors' claim was bound to fail. In the *Coulthard* case the auditors dealt with the directors in respect of a known specific transaction, whereas in this case no such specific contact is alleged. Indeed, the only allegation Mr. Lowe makes is at paragraph 70 of the Lowe Affidavit where he makes reference to a document described as an Information Memoranda, which refer to valuations of the Funds and which contained *"statements that the auditors had consented to the inclusion of their name and report in the Information Memoranda"*. However, this allegation is unsupported by any documents exhibited by the Plaintiffs to their Consolidated Complaints or evidenced by any factual allegations made by the Plaintiffs in the Consolidated Complaints.

23. In my opinion the facts pleaded in the Consolidated Complaints do not establish any "*special relationship*" such as to give rise to a duty of care owed by EY Cayman to the Plaintiffs. As stated in my First Declaration, a *"special factor"* or "*extra ingredient*" is required to establish that EY Cayman and the Plaintiffs had such a special relationship.

24. Mr. Lowe does not agree that a "*special factor*" or an *"extra ingredient"* is required (see paragraph 64 of the Lowe Affidavit) to establish a duty of care owed by company

[5] [1998] 1 BCLC 143 @pg 7

auditors to shareholders who receive the annual accounts to which audit reports are attached; but he must accept that there has to be something extra present (however you may wish to describe it) in order to displace the general rule that no such duty is owed although he does not state what that extra factor is. The *"special factor"* or *"extra ingredient"* is a reference to the presence of those facts and circumstances required to be able to show that a proximate relationship existed so as to create a special relationship between the auditor and the third party, in this case shareholders, which is one of the criteria which must be proven to establish that a duty of care is owed by EY Cayman to the Plaintiffs.[6]

25. The English courts identified that there are essentially three tests which may be considered in establishing whether a duty of care is owed to a third party. Those three tests were all considered in *Caparo* and the House of Lords determined that the three-fold test –foreseeability, proximity and fairness justice and reasonableness -was the most appropriate given the facts and circumstances of the case. The first of those tests is, as the Lowe Affidavit states (at paragraph 65) the *"assumption of responsibility"* test where the question is asked did the defendant voluntarily assume a responsibility for what he said or did to the plaintiff. In *Caparo,* the facts of which are similar to the facts here, the House of Lords concluded that in the context of an auditor owing a duty of care to a third party, the three-fold test was the most appropriate test.[7]

26. The third test is the incremental test which was referred to by Lord Bridge in *Caparo* at page 618D where he referred to the judgment of Brennan J in the High Court of Australia in the case of *Sutherland Shire Council v Heyman*[8] where he stated that;

> *"The law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or reduce or limit the scope of the duty or the class of person to whom it is owed'".*

So if there is a sufficient compelling analogy with a previously decided case, the incremental test will be a useful starting point. Prior to *Caparo* the incremental test was of no assistance when considering whether an auditor owes a duty of care to

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[6] See in particular paragraph 14 of my First Declaration
[7] See Lord Roskill's judgment [1990] 2 A.C. 605@ 628G
[8] (1985) 60 A.L.R. 1,43-44

shareholders who receive their audited accounts as there were no cases which had considered this issue. However, following *Caparo*, in cases like this which present similar facts, the incremental test can be applied.

27. With the exception of the fact that *Caparo* involved the preparation of audited accounts in compliance with a statutory provision, the facts of *Caparo* are similar to the facts set out in the Plaintiffs' Consolidated Complaints. Both concerned claims brought by shareholders against auditors for losses allegedly sustained by reason of the dissemination of an audit report provided to the shareholders as a body. The Lowe Affidavit seeks to distinguish the Plaintiffs' claim against EY Cayman from *Caparo* on the basis that the obligation of the company to disseminate the audited accounts in *Caparo* was derived from a statute, whereas here, the obligation derives from the Funds' governing documents. In my opinion *Caparo* turned on what the House of Lords found to be the purpose of the statutory requirement for the audited accounts. In the judgment of Lord Oliver[9] he stated:-

> *"In my judgment, accordingly, the purpose for which the auditors' certificate is made and published is that of providing those entitled to receive the report with information to enable them to exercise in conjunction those powers which their respective proprietary interests confer upon them and not for the purposes of individual speculation with a view to profit. Same considerations as limit the existence of a duty of care also, in my judgment, limit the scope of that duty and I agree with O'Connor LJ that the duty of care is one owed to the shareholders as a body and not to individual shareholders.*
>
> *To widen the scope of the duty to include loss caused to an individual by reliance upon the accounts for a purpose for which they were not supplied and were not intended would be to extend it beyond the limits which are so far deducible from the decisions of this House."*

28. As stated in my First Declaration, the basis upon which the Funds were obliged to provide the Plaintiffs with the audited accounts was that both the Amended Primeo Articles and the Herald Articles contain similar provisions, which provide that the auditors shall if so required by the directors, make a report on the accounts of the company at the next annual general meeting following their appointment in the case of the company registered as an ordinary company and at the next extraordinary general meeting in the case of a company which is an exempt company and at any time during

[9] [1990] 2 A.C. 605 at page 654B

their term of office upon the request of the directors at any general meeting of the members.[10] The Offering Memoranda for both Funds also provide that in each year the directors will cause to be prepared an annual report and audited accounts for the Funds which the Funds are to send to shareholders within a specified period of time after each financial year.

29. In these circumstances it is apparent that the purpose for which the Funds' audited accounts were prepared was not for any particular transaction or transactions of a particular kind under contemplation by any particular shareholder. In my opinion, the position is analogous to the purpose of the statutory requirement for which the audited accounts were prepared in *Caparo,* namely to provide information regarding the financial affairs of the Funds to enable the general population of shareholders to undertake the informed exercise of those powers which their respective proprietary interest conferred upon them in the articles for both Funds.[11] In this context, it is worth noting that the Canadian case of *Hercules Managements Ltd v Ernst & Young* relied on by Mr. Lowe at paragraph 33 of the Lowe Affidavit recognised the need to establish that the audited report had been provided to the shareholders for a "*specified purpose*" before a duty of care will arise. La Forest J stated:-

> *"The facts of Haig, supra, provide the basis for an example of where such a claim might arise. Had the investors in that case been shareholders of the corporation, and had a similarly negligent report knowingly been provided to them by the auditors for a* ***specified purpose****, a duty of care separate and distinct from any duty owed to the audited corporation would have arisen in their favour..."* (emphasis added).

In this case it is not alleged by the Plaintiffs that EY Cayman knew that the audited accounts would be provided to any specific shareholders for a specific purpose or transaction.

30. Accordingly, if one were to apply the incremental test here a compelling analogy can be drawn between this case and *Caparo*, such that in my view a Cayman court would be likely to conclude that no duty of care is owed by EY Cayman to the Plaintiffs.

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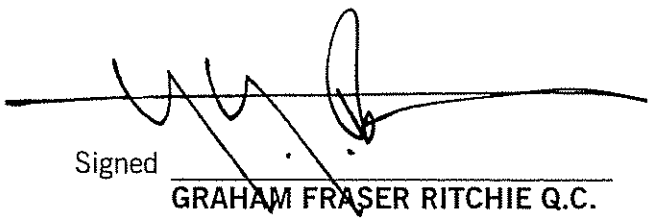
[10] See paragraphs 20- 22 inclusive of my First Declaration.
[11] See paragraphs 25 to 28 of my First Declaration.

31. For the reasons set out in my First Declaration and above I remain of the opinion that the Consolidated Complaints do not establish that EY Cayman owed a duty of care to the Plaintiffs in respect of any losses which they may have suffered as a result of any transactions they may have entered into in purported reliance upon the audited accounts which were delivered by the Funds to the general body of shareholders.

Dated this 28th day of October 2011



Signed _____
GRAHAM FRASER RITCHIE Q.C.