

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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	: ECF CASE
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IN RE HERALD, PRIMEO AND THEMA FUNDS	: No. 09 Civ. 0289 (RMB)
SECURITIES LITIGATION	: (Consolidated with Nos. 09 Civ.
	: 2032 and 09 Civ. 2558)
This Document Relates To: 09 Civ. 0289 (RMB)	:
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**ATTORNEY DECLARATION OF BRETT S. MOORE IN SUPPORT
OF HERALD (LUX) MOTION TO DISMISS**

I, Brett S. Moore, declare under penalty of perjury as follows:

1. I am a member of the Bar of this Court and a principal at Porzio, Bromberg & Newman P.C., counsel to Me. Ferdinand Burg and Mr. Carlo Reding, the joint liquidators (the “Liquidators”) for Herald (Lux) Sicav (“Herald Lux”). I respectfully submit this declaration in further support of Herald Lux’s joint motion to dismiss (the “Motion”) the Amended Class Action Complaint (the “Amended Herald Complaint” or “AHC”) and proposed Third Amended Class Action Complaint (the “Third Herald Complaint” or “THC” and together with the AHC, collectively, the “Herald Complaints”) filed by lead plaintiff Repex Ventures, S.A. (“Repex”) in the above referenced matter.

2. In the Lead Plaintiffs’ Memorandum Of Law In Opposition To Defendants’ Joint Motion To Dismiss And In Further Support Of Plaintiffs’ Motion For Leave To Amend (the (“Opp. Br.”) the plaintiffs state the following: “The Liquidators first claim they are authorized under Luxembourg law to act on behalf of defendants Herald Lux. From this vantage point, they argue that the Herald Lux portion of the case should be stayed under Luxembourg law and that only the Liquidators have the authority to bring claims on behalf of Herald Lux investors. Each

of the Liquidators' arguments should be rejected, however, as they have no right to appear in this action." (Opp. Br. at pp. 89-90).

3. As an initial matter, the plaintiffs' mischaracterize the Liquidators arguments. The Liquidators have not sought a stay of the plaintiffs' case under Luxembourg law or otherwise.¹ In order to seek a stay of the plaintiffs' case as to Herald Lux, it is true that the Liquidators would likely need to first seek recognition through a Chapter 15 proceeding. That is not what the Liquidators have done in this matter, rather, they have jointly moved with the other co-defendants to dismiss the plaintiffs' complaint based on its legal insufficiencies under applicable law.

4. Chapter 15 applies where—

- (1) assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding;
- (2) assistance is sought in a foreign country in connection with a case under this title;
- (3) a foreign proceeding and a case under this title with respect to the same debtor are pending concurrently; or
- (4) creditors or other interested persons in a foreign country have an interest in requesting the commencement of, or participating in, a case or proceeding under this title.

11 U.S.C § 1501(b).

5. Chapter 15 recognition is not required for the Liquidators to appear and participate in this matter on behalf of Herald Lux because none of the above circumstances are present. Specifically, the Liquidators have not sought the assistance of this Court in connection with the Herald Lux liquidation proceeding pending in Luxembourg (e.g., sought a stay of this matter), nor is there any chapter 11 case pending in the US relating to Herald Lux.

¹¹ Although the Liquidators noted that the plaintiffs' case against Herald Lux violates a mandatory stay of proceedings under Luxembourg law, the Liquidators did not move for this Court to enter a stay of the plaintiffs' case.

6. Plaintiffs' argument is essentially that a foreign representative has no authority to appear or participate in any case pending in a US court unless the foreign representative first goes through a formal recognition process under Chapter 15. That is a vast overstatement and inaccurate interpretation of the law. *See e.g., Bickerton v. Bozel S.A. (In re Bozel S.A.)* 434 B.R. 86, 94-95 (Bankr. S.D.N.Y. 2010) (distinguishing the *Caxton* and *J.A. Jones* line of cases (both discussed below), and finding that foreign liquidators of parent company had standing to appear and prosecute adversary proceeding against subsidiary debtor in the US and were not required to obtain recognition under Chapter 15).

7. In every case cited by the plaintiffs in the Opp. Br. in support of their argument that a Chapter 15 proceeding is required, the foreign representative had moved for a stay of proceedings pending in the US: *Reserve Int'l Liquidity Fund, Ltd. v. Caxton Int'l Ltd.*, No. 09 Civ. 9021(PGG), 2010 U.S. Dist. LEXIS 42216, at *15 (S.D.N.Y. Apr. 29, 2010) ("foreign representatives must be recognized under Chapter 15 in order to seek a stay from a federal court") *citing United States v. J.A. Jones Constr. Group LLC*, 333 B.R. 637, 639 (E.D.N.Y. 2005) ("finding that the court had 'no authority' to consider stay request made by an interim receiver appointed by a Canadian court 'in the absence of recognition under [C]hapter 15"); and *Orchard Enter. NY, Inc. v. Megabop Records Ltd.*, No. 09 Civ. 9607(GDB), 2011 U.S. Dist. LEXIS 2896 (S.D.N.Y. Mar. 4, 2011) (where court denied stay request by foreign liquidator in the absence of Chapter 15 recognition and entered default against defendant after liquidator advised the court that he would not defend the pending action).

8. Given that the Liquidators have not moved for a stay of the plaintiffs' case, all of the above cases cited by the plaintiffs' are distinguishable and inapplicable to the facts of this case. The plaintiffs' do not cite a single case to support the argument that a foreign representative must

go through a Chapter 15 proceeding before moving to dismiss a complaint under US law. In the instant matter, to this point, the Liquidators have simply moved to dismiss the plaintiff's complaint under applicable law and in concert with the other co-defendants.

9. Furthermore, aside from making a procedural argument under Chapter 15, the plaintiffs' do not even challenge that the Liquidators are the appropriate parties to act on behalf of Herald Lux or its investors. Indeed, the plaintiffs' themselves have already acknowledged the Liquidators authority as the appropriate representatives for Herald Lux as they assert that service of the AHC on Herald Lux was proper based upon their service on the Liquidators. *See attached Exhibit "A"* (true copy of plaintiffs Summons Returned Executed On Defendant Herald (Lux) that was served upon and executed by one of the Liquidators). It is entirely inconsistent for the plaintiffs' to assert that service upon the Liquidators qualifies as service upon Herald Lux, but at the same time argue that the Liquidators have no standing to appear in this matter on behalf of Herald Lux. Thus, any argument by the plaintiffs that the Liquidators lack standing to appear has been waived.

10. Finally, even if Chapter 15 was applicable in some way, the Liquidators would nevertheless still be able to appear and participate on behalf of Herald Lux with respect to the pending motion to dismiss. Under 11 U.S.C. § 1509(f), a foreign representative is permitted direct access to courts without seeking formal recognition under Chapter 15 in order "to sue in a court in the United States to collect or recover a claim which is property of the debtor."

11. Thus, Chapter 15 itself contains an exception whereby foreign representatives are not required to go through a Chapter 15 recognition process in order to appear in a US court with respect to claims concerning property of the debtor. Given that the plaintiffs' claims belong to the debtor (i.e., Herald Lux), a fact not challenged by the plaintiffs, the Liquidators could appear

in this matter under 11 U.S.C. § 1509(f) without the need for formal recognition through a Chapter 15 proceeding.

WHEREFORE, for the above reasons, the Court should disregard the plaintiffs' arguments regarding the Liquidators lacking authority to appear in this matter on behalf of Herald Lux absent formal recognition through a Chapter 15 proceeding, and grant Herald Lux's Motion to Dismiss the Herald Complaints.

I declare that the foregoing is true and correct.

Executed on October 28, 2011

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