

THE HIGH COURT

COMMERCIAL

2008 No. / 10983P

2009 No. / 565TP

2009 No. / 566TP

BETWEEN:

THEMA INTERNATIONAL FUND PLC

Plaintiff

-and-

HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LIMITED

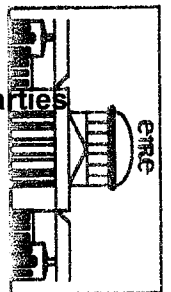
Defendant

-and-

THEMA ASSET MANAGEMENT LIMITED and  
2020 MEDICI AG

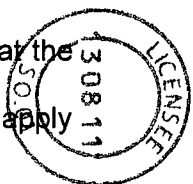
Third Parties

NOTICE OF MOTION

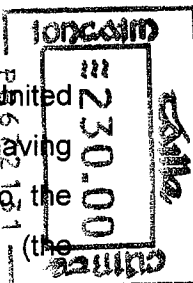


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TAKE NOTICE that on the 11th day of October 2011 at 11 o'clock in the forenoon or at the first available opportunity thereafter Counsel appearing on behalf of the Defendant will apply to this Honourable Court sitting at the Four Courts, Inns Quay, Dublin 7 for:



1. A declaration that (alternatively an Order to the effect that) in the event of the United States District Court for the Southern District of New York, or any Court having appellate jurisdiction over the judgements thereof, granting final approval to the Amended and Restated Stipulation and Agreement of Partial Settlement, (the 'Settlement') annexed to this Notice of Motion:



- i) The quantum of the Thema claim in these proceedings is reduced by an amount calculated by reference to the interest of the Settlement Class Members (as defined in the Settlement) in any Thema recovery who do not request exclusion from the Settlement in compliance with the timing, manner and other terms to be specified in the applicable Order or the Orders of the United States District Court for the Southern District of New York.
- ii) This Honourable Court will recognise, enforce and give effect to a judgment of the United States District Court for the Southern District of New York confirming and so ordering the Bar Order provisions contained in paragraphs 5.1 and 5.2 of the Settlement.
- iii) This Honourable Court will recognise, enforce and give effect to a judgment of the United States District Court for the Southern District of New York confirming and so ordering the releases to be given by the Settlement Class, including those who neither validly request exclusion nor file a proof of claim, as provided for in paragraphs 4.1, 4.2, 4.3 and 4.4 of the Settlement.
- iv) This Honourable Court will recognise, enforce and give effect to the judgment of dismissal with prejudice by the United States District Court for the Southern District of New York to be included in paragraph 12 of the Judgment as defined in the Settlement and annexed to this Notice of Motion entered upon approval of the settlement in respect of all Settlement Class Members including those who neither validly request exclusion nor file a proof of claim.

**WHICH SAID APPLICATION** will be grounded upon the proceedings had herein, this Notice of Motion, the Affidavit of Sharon Daly, the Affidavit of Service thereof, the nature of the case and the reasons to be offered.

Dated this 2th day of September 2011

SIGNED: Matheson Ormsby Prentice

**MATHESON ORMSBY PRENTICE**

Solicitors

70 Sir John Rogerson's Quay

Dublin 2

Ref: SD/AKEY/659201/4

TO: The Registrar  
High Court  
Central Office  
Four Courts  
Dublin 7

AND: The Commercial Court Registrar  
The High Court List Room  
Four Courts  
Dublin 7

AND: William Fry  
Solicitors for the Plaintiff  
Fitzwilton House  
Wilton Place  
Dublin 2

AND: Arthur Cox  
Solicitors for UBI Banca  
Earlsfort Centre  
Earlsfort Terrace  
Dublin 2

AND: Dillon Eustace  
Solicitors for Kalix Fund Limited  
33 Sir John Rogerson's Quay  
Wilton Place  
Dublin 2

AND: Byrne Wallace  
Solicitors for Neville Seymour Davis  
2 Grand Canal Square  
Dublin 2

**THE HIGH COURT**

**COMMERCIAL**

**2008 No. / 10983P**

**2009 No. / 565TP**

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**BETWEEN:**

**THEMA INTERNATIONAL FUND PLC**

**Plaintiff**

**-and-**

**HSBC INSTITUTIONAL TRUST SERVICES  
(IRELAND) LIMITED**

**Defendant**

**-and-**

**THEMA ASSET MANAGEMENT LIMITED and  
2020 MEDICI AG**

**Third Parties**

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**NOTICE OF MOTION**

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**MATHESON ORMSBY PRENTICE**

70 Sir John Rogerson's Quay

Dublin 2

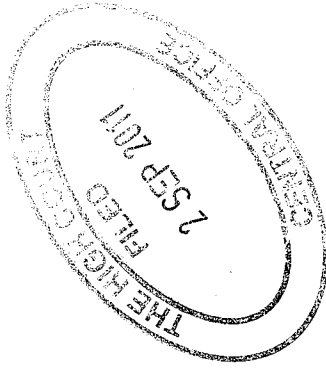
Ireland

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THE HIGH COURT  
COMMERCIAL

Record No. 2008/10983P  
2009/565TP  
2009/566TP

BETWEEN:

THEMA INTERNATIONAL FUND PLC

PLAINTIFF

-and-

HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LIMITED

DEFENDANT

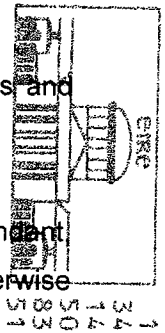
-and-

THEMA ASSET MANAGEMENT LIMITED  
AND 2020 MEDICI AG

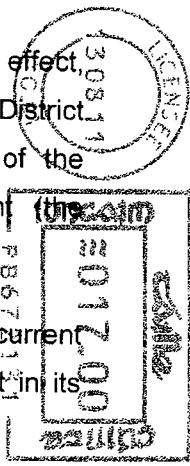
THIRD PARTIES

AFFIDAVIT OF SHARON DALY

I, **SHARON DALY**, of, 70 Sir John Rogerson's Quay, Dublin 2, aged eighteen years and upwards, **MAKE OATH** and say as follows:



1. I am a Partner in the firm of Matheson Ormsby Prentice, solicitors for the Defendant and I make this Affidavit from facts within my own knowledge save where otherwise appears and whereso otherwise appearing I believe the same to be true.
2. I make this affidavit in support of an application seeking declarations on the effect, recognition and enforcement of the anticipated judgment of the United States District Court for the Southern District of New York granting the final approval of the Amended and Restated Stipulation and Agreement of Partial Settlement ("**Proposed Settlement**") which is annexed to the notice of motion filed herein.
3. Before turning to the evolution of the Proposed Settlement, describing its current status and putting before this Court (the "**Court**") certain material to assist it in its



consideration of whether to grant the reliefs sought in this application, I wish to say something about the parties who may be interested in the reliefs sought. Quite clearly, Thema International Fund Plc ("**Thema**") has an interest in the relief sought at paragraph 1(i) of the Notice of Motion in that the quantum of its claim may be affected materially by the relief sought. Furthermore, Thema would appear to be interested in the relief sought at paragraph 1(ii) of the Notice of Motion in that Thema is a Non-Settling Defendant as defined in the Proposed Settlement and also as a co-defendant in most of the shareholder actions before the Court. There are a number of additional Non-Settling Defendants who are not a party to this application. Thema Asset Management Limited is one of the group of Non-Settling Defendants and also a third party to the lead shareholder actions before the Court. I say they should be put on notice of this application. In respect of the reliefs sought at paragraphs 1(iii) and 1(iv) the position appears a little less clear. Those reliefs essentially seek the recognition and enforceability of the US Judgment approving the Proposed Settlement as against shareholders (be they registered or beneficial) (collectively, "**Investor(s)**") who neither opt out nor file a proof of claim but who nonetheless are deemed subject to the jurisdiction of the US Court and therefore bound to the judgment under US law. As matters stand, the only Investor who is on notice of this application and who has to date indicated an intention to neither opt out nor file proof of claim is Kalix Fund Limited ("**Kalix**"). If Kalix maintains this position then clearly it is a party interested in the relief sought. If, however, it alters its position and chooses to either opt out or file proof of claim then it may be that the Court will conclude that there is no "*legitimus contradictor*" in respect of the reliefs sought in these paragraphs of the Notice of Motion. If that transpires the Applicant recognises that the Court may choose to make no Order in respect of the relief sought in those paragraphs at this time.

## **BACKGROUND TO PROPOSED SETTLEMENT**

4. In order for the Court to fully understand the reasons why HSBC Institutional Trust Services (Ireland) Limited ("**HTIE**") is seeking the reliefs sought it is necessary to explain to the Court the background to the class action proceedings commenced against HSBC in New York and several other defendants in March 2009 in relation to Thema and two other funds based in Luxembourg which suffered losses as a result of the Madoff fraud. Following motions to appoint a lead plaintiff, Neville Seymour Davis (the "**Lead Plaintiff**"), an Investor in Thema, was named Lead Plaintiff with regard to Thema and filed an Amended Class Action Complaint in February 2010 in the United States Federal District Court for the Southern District of New York (the "**US Court**"). The action is known as Neville Seymour Davis v. Alberto Benbassat et al, Case no 09



CIV 2558 (RMB) (S.D.N.Y.) (the "**Class Action**"). Leave to file a further amended Complaint has been sought. The class for which certification is being sought by the Lead Plaintiff consists of all persons and entities who were registered or beneficial owners of shares in Thema on 10 December 2008 its sub-fund, the Thema Fund, and suffered damages thereby. This proposed Class Action has been consolidated for pre-trial purposes with two separate proposed class actions in respect of losses incurred by investors in the Primeo Select Fund, Herald USA Fund, and Herald (Lux) Fund as a result of the scheme which was operated by or on behalf of Bernard Madoff. The consolidated proceedings are known as In re Herald, Primeo and Thema Funds Securities Litigation, Case no 09 civ 0289 (RMB), and are presided over by the Honourable Richard M. Berman, United States District Judge for the Southern District of New York.

5. The Class Action makes various complaints against numerous defendants, including the promoters of the funds, the directors of the funds, Thema itself, the investment managers of the funds, the custodian and administrator to the funds, the lawyers to the funds, and the auditors to the funds along with various service providers to Bernard Madoff. In this regard HSBC Securities Services Ireland ("**HSSI**"), HTIE and HSBC Holdings plc ("**HSBC**"), are named as defendants and HSBC Bank USA is proposed to be added as a defendant. They are collectively referred to as the "**HSBC Defendants**".
6. The HSBC Defendants and most of the other defendants to the Class Action are named in numerous lawsuits initiated by funds who had exposure to Bernard Madoff and investors in those funds in various jurisdictions, including the USA, Ireland, Italy and Luxembourg. The HSBC Defendants are therefore required to incur the not insignificant cost of defending litigation in respect of the Madoff fraud in numerous jurisdictions. Notwithstanding the fact that the HSBC Defendants are fully defending all allegations in all jurisdictions, it makes commercial sense to explore the possibility of resolving the litigation with some or all of the parties with no admission of liability. Given the fact that it is fighting Investor litigation in Ireland, Italy and the United States, it makes sense for HSBC to seek to resolve the Class Action, as the Class Action provides a potential remedy to all Investors. This has the clear potential benefit for the HSBC Defendants of significantly reducing the number of claims they have to defend in all jurisdictions and has the potential to resolve all or substantially all the litigation if all or substantially all Investors who believe they were wronged choose to participate in the Proposed Settlement. At this stage, formal notice has not yet been

sent to the Investors with the details of the Proposed Settlement and the HSBC Defendants simply do not know how many of the Investors will participate. The US class action procedure allows class members a choice to continue litigation if they do not want to participate in the Proposed Settlement by requesting exclusion from the Settlement Class.

## THE SETTLEMENT PROCESS

7. In August 2010, counsel for the Lead Plaintiff approached counsel for the HSBC Defendants regarding mediation. On February 24 and 25 2011, a formal mediation took place in New York which, as the Court will be aware, resulted in the Proposed Settlement.
8. The Lead Plaintiff has, with the US Court's approval, held himself out as putative representative of the class and he has negotiated and agreed the Proposed Settlement with the HSBC Defendants on behalf of the entire class. In order for the Proposed Settlement to proceed the Lead Plaintiff has brought an application before Judge Berman to obtain the following:
  - Preliminary approval for the Proposed Settlement and preliminary certification of the class for settlement purposes.
  - At the preliminary approval stage the US Court must also approve the proposed notices to Investors and proposed plan for disseminating the notices, requesting exclusion and filing proofs of claim.
  - Notice is published and mailed as ordered by the US Court and following that members of the preliminarily approved class are given time to decide whether to request exclusion for the class (i.e. to "opt out"), to object to the fairness and adequacy of the settlement, or to do nothing, in which case the Investor will become a member of the class if it is finally certified by the US Court and will be bound by the settlement, including the releases contained in the Proposed Settlement if and as finally approved by the US Court.
  - The notice specifies a hearing date for the final approval of the Settlement Class as defined in the Proposed Settlement (the "**Proposed Settlement Class**") and approval of the Proposed Settlement (the "**Fairness Hearing**"). At that point the US Court will rule on any objections that have been filed and even if no objections

are filed will independently satisfy itself of the adequacy and fairness of the Proposed Settlement.

9. If the US Court decides to approve the Proposed Settlement, it will issue a final approval order. It will also issue a judgment decree binding the Proposed Settlement Class (i.e. those who do not request exclusion from the Proposed Settlement in compliance with the timing, manner and other terms to be specified in the applicable order or the orders of the US Court) to the approved settlement which it is envisaged will include the releases contained in the Proposed Settlement and other terms provided for therein.
10. Even at the preliminary approval stage, the US Court can hear certain objections to the Proposed Settlement, and in this case objections have been filed, including objections by a group of the Non-Settling Defendants in the action including Thema (the "**Objections**"). I beg to refer to the full set of papers filed in this regard upon which pinned together and marked with the letters and number "**SD1**", I have signed my name prior to the swearing hereof. Since Objections were raised, the Lead Plaintiff has, in order to meet the concerns of the objectors, agreed to facilitate a more user friendly approach to the processing of claims by Investors who wish to participate or opt out whereby the claims administrator will process claims in Europe. In addition the parties have requested that the Preliminary Approval Order confirm that the submission of a request for exclusion shall not be deemed an appearance and will not subject the person or entity submitting the request to the jurisdiction of any US Court. The HSBC Defendants desire that as many of the class as possible exercise their choice to participate in the Proposed Settlement and they have tried to address all legitimate process concerns. As noted above preliminary approval is only the first step which gives necessary directions in advance of the hearing on final approval of the Proposed Settlement Class and the Proposed Settlement.
11. Plaintiffs in a class action are required, pursuant to Federal Rule of Civil Procedure 23 ("**Rule 23**"), to have the class certified by the US Court. As part of the hearing for preliminary approval Under Rule 23(a), the Lead Plaintiff must satisfy the US Court on a preliminary basis, and at the final approval hearing must definitively establish that:
  - 9.1 the class is so large that joinder of all parties is impracticable;
  - 9.2 there are questions of law and fact common to the class;

- 9.3 the claims and defences of the representative parties are typical of the claims and defences of the class as a whole; and
- 9.4 the representative of the parties will fairly and adequately protect the interests of the class.
12. In addition to satisfying the requirements of Rule 23(a) outlined above, the Lead Plaintiff must also establish that his action is maintainable as a class action under Rule 23(b). Rule 23(b)(3) provides that an action is maintainable as a class action if “questions of fact common to class members predominate over any questions affecting only individual members” (the predominance requirement), and “that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy” (the superiority requirement). A class certified pursuant to Rule 23(b)(3) is sometimes referred to as an “opt-out” class, because Rule 23(c)(2) provides that members of a class certified pursuant to Rule 23(b)(3) be given the opportunity to request to be excluded from the class.
13. In order to have the class certified, the Lead Plaintiff must show that the bringing of a class action is superior to other available methods of fairly and efficiently adjudicating the controversy. In considering the superiority requirements, the US Court may have regard to *res judicata* concerns when dealing with a proposed class that includes foreign class members but is not obliged to decide whether the class action judgment will be enforceable in every or any non-US jurisdiction. That is a matter for the court in which enforcement of the class action judgment is sought. It is for Judge Berman to rule initially at preliminary approval and definitively at final approval upon whether the requirements of Rule 23(a) and (b) are satisfied and whether the Proposed Settlement is fair, reasonable and adequate.
14. In the event that Judge Berman grants the motion for preliminary approval, the potential class members are at that stage notified of the terms of the Proposed Settlement. As the Court is aware, the only potential class members who have been informally notified as a courtesy are those who have commenced proceedings in the various jurisdictions identified above.
15. Once potential class members are officially notified of the Proposed Settlement, they have a very clear choice to make. They are free to exercise that choice by opting out, which means the Proposed Settlement does not impact in any way their rights to pursue the HSBC Defendants in any court which has jurisdiction to hear the dispute, or they can participate in the Proposed Settlement. If they choose to participate in

sufficient numbers such that HSBC chooses not to exercise its option to terminate the Proposed Settlement, the US Court is then required to consider the fairness, including the adequacy, of the Proposed Settlement. As explained above this occurs at the Fairness Hearing. A party who chooses to participate can object to the adequacy of the Proposed Settlement. Not unreasonably, parties who choose to continue to litigate rather than participate in the Proposed Settlement are not allowed to address the issue of adequacy. As I understand the procedure, the US Federal Court's role is to ensure that the Settlement Amount as defined in the Proposed Settlement and the other terms of the Proposed Settlement are fair, reasonable and adequate having considered the claims being made and the defences to the claims. In this regard, and as will be set out in detail below, Judge Berman has raised numerous queries on the structure of the Proposed Settlement initially to ensure he had a full understanding of the scope of the Proposed Settlement and subsequently indicating he wanted changes to be made to the Proposed Settlement if he was to proceed with preliminary approval.

16. As is clear from the above, the US approval procedure is thorough and designed to protect all class members and not just the representative of the class. In this case there are potential class members all over the world and the Lead Plaintiff will have to satisfy Judge Berman that the Proposed Settlement is fair, reasonable and adequate and that certification of a Proposed Settlement Class is appropriate.
17. The enforcement of the Settlement Approval Order and Judgment (as defined in the Proposed Settlement) in foreign jurisdictions and in particular the release and bar orders are issues that are relevant primarily to potential class members who do not opt out and do not file a proof of claim and the Non-Settling Defendants. If an Investor wants to preserve its right to continue or commence litigation against the HSBC Defendants it simply exercises its right to opt out and follows the procedure required to be excluded from the Proposed Settlement.

#### **PROPOSED SETTLEMENT AND COURT APPLICATIONS IN THE US**

18. The Class Action has not yet been certified by Judge Berman nor has the Proposed Settlement been granted preliminary approval. This process is still ongoing. It is anticipated that Judge Berman will make a decision in this regard within the next few weeks.
19. Judge Berman convened a status conference of all the parties to the Class Action on Thursday 21 July 2011. At this conference, Judge Berman asked Counsel for the

Lead Plaintiff and the HSBC Defendants (collectively, the "**Settling Parties**") various questions relating to the Proposed Settlement. I understand that the Court has already been provided with a transcript of this hearing but for ease of reference I beg to refer to a copy of the transcript upon which pinned together and marked with the letters and number "**SD2**", I have signed my name prior to the swearing hereof.

20. On 29 July 2011, Judge Berman made an Order seeking confirmation from the settling parties that they would be willing and able to revise the Proposed Settlement in order to make it less conditional. In this Order, one of the express conditions referred to by Judge Berman was 'applications to and rulings by the Irish High Court as to the proposed settlement'. The Court has already been provided with a copy of this Order but for ease of reference, I beg to refer to a copy of the Order upon which pinned together and marked with the letters and number "**SD3**", I have signed my name prior to the swearing hereof.
21. On 11 August 2011, the Settling Parties wrote to Judge Berman regarding the issues raised in his Order of 29 July 2011. This letter explained the latest development in these proceedings and the proposed timetable set by the Court for a directions hearing and the provisional hearing date of 11 October 2011. I beg to refer to a copy of the letter which enclosed the Proposed Settlement and other exhibits, upon which marked with the letters and number "**SD4**", I have signed my name prior to the swearing hereof. I understand that Judge Berman has not raised any further queries on the "Irish condition" which is set out at paragraph 5.5 of the Proposed Settlement .
22. Judge Berman then made an Order on 12 August granting all the parties until 19 August 2011 to file further submissions on the motion for preliminary approval of the Proposed Settlement as a result of the filing by the settling parties on 11 August. I beg to refer to a copy of that Order, upon which marked with the letters and number "**SD5**", I have signed my name prior to the swearing hereof. The HSBC Defendants filed further submissions on 18 August 2011. On 19 August 2011, Thema, the Lead Plaintiff and other parties to the US Class Action also filed further submissions. I beg to refer to a copy of those submissions, upon which pinned together and marked with the letters and number "**SD6**", I have signed my name prior to the swearing hereof. The HSBC Defendants wrote one further letter to Judge Berman on 22 August 2011 in response to issues raised by Thema and the other parties to the US Class Action in their submissions. I beg to refer to a copy of this letter, upon which marked with the letters and number "**SD7**", I have signed prior to the swearing hereof.

23. A decision from Judge Berman on whether he will grant preliminary approval or hold a preliminary approval hearing at this stage is awaited.

#### **REDUCTION IN QUANTUM OF THEMA CLAIM**

24. The HSBC Defendants are faced with a situation where Thema has brought a claim to recover the loss in the value of the fund and certain Investors have also brought a claim for this loss. To the extent that the HSBC Defendants settle with some or all Investors in a manner which satisfies those Investors' claims against the HSBC Defendants in full, HTIE is seeking a declaration or Order from the Court to the effect that the quantum of the Thema claim in these proceedings is reduced by an amount calculated by reference to the total interest of the Proposed Settlement Class in any Thema recovery and not just the Settlement Amount. For the avoidance of doubt, HTIE does not seek any order in relation to the quantification of the reduction at this time.
25. HSBC Defendants cannot be expected to compensate both Thema and the Investors for the same loss and the structure of the Proposed Settlement is simply designed to prevent the opportunity for the Proposed Settlement being effectively an initial rather than final recovery from the HSBC Defendants on the part of the Investors. If it transpires that all Investors participate in the Proposed Settlement, then it must follow that the entire claim, made by Thema against HTIE has been satisfied.
26. In any event, the quantum of the Thema claim is a complex issue that is not required to be determined and arguably cannot properly be determined by the Court in advance of the trial of these proceedings. However, it may be necessary, to understand at a conceptual level the nature of the loss suffered by Thema and the Investors generally and the difference in the approach to the quantification of damages by HTIE and Thema, in order for this Court to grant the relief which HTIE is seeking at relief 1(i) of the notice of motion.
27. Thema in its statement of claim has sought to recover its net asset value as at 12 December 2008, being €483,144,279.24 and US\$498,799,662.15 (hereinafter "**Thema's NAV Claim**"). At current exchange rates (of €1 to US\$1.44) this amounts to approximately US\$1.2 billion. In addition to Thema's NAV Claim, Thema has claimed:

"(c) the cost of legal advice in many jurisdictions which costs are to be ascertained;

“(d) loss of investment monies and/or damage to its business reputation by virtue of the matters aforesaid and the suspension of investment in and trading by the Plaintiff as aforesaid and/or

(e) such other loss and damage as may be notified to the Defendant prior to the determination of these proceedings.”

28. As this Court will be aware from previous applications, Thema is subject to a potential claim by Irving H Picard, Trustee (the “**US Trustee**”) for the liquidation of Bernard L Madoff Securities LLC (“**BLMIS**”). On 9 July 2010 Thema wrote to its shareholders (the “**July Circular**”) outlining a proposed settlement with the US Trustee (the “**Proposed Trustee Settlement**”). I beg to refer to a copy of the July Circular upon which marked with the letters and number “**SD8**”, I have marked my name prior to the swearing hereof. In the July Circular, Thema advised its shareholders that it was subject to a US\$507 million clawback claim from the US Trustee based on the alleged preference payments and fraudulent transfers that Thema received from BLMIS (the “**US Trustee Clawback Claim**”). Thema also advised its shareholders that it had submitted a claim to the US Trustee under the Securities Investment Protection Act 15 U.S.C. §§ 78aaa et seq. It is my understanding that the US Trustee measures claims by reference to the net amount transferred to BLMIS, i.e. the total amount transferred less any amounts returned. This methodology for calculating claims is commonly referred to as “net equity”. According to the July Circular, the net equity claim as submitted by Thema in the BLMIS liquidation is US\$310 million (the “**Thema Net Equity Claim**”). Under the Proposed Trustee Settlement which was the subject of the July Circular, Thema would have had to pay US\$507 million to the US Trustee and would then have had a claim for US\$817 million in aggregate (representing the aggregate of the US Trustee Clawback Claim and the Thema Net Equity Claim). Thema would have recovered up to US\$817 million from the US Trustee depending on the US Trustee’s overall recovery of claims on behalf of the BLMIS estate. It is my understanding that even though the settlement did not proceed, in practice Thema remains subject to the US Trustee Clawback Claim. In fact it is my understanding that the US Trustee has since filed a claim against Thema seeking a total of US\$692 million. The Trustee claim seeks to deny the Thema Net Equity Claim because Thema has not repaid the amount of such transfers to the BLMIS estate, and to equitably subordinate the Thema Net Equity Claim to the claims of all non subordinated BLMIS customers due to Thema’s alleged lack of good faith with respect to the Madoff fraud. I beg to refer to a copy of the Trustee’s Amended



Complaint in *Picard v. HSBC Bank plc et al.*, Adv, Pro, No. 08-01789(BRL), at 66,329,340,349,390-99,405-449,457-465 (S.D.N.Y Bankr. Dec.5, 2010) upon which marked with letters and number “SD9”, I have signed my name prior to the swearing hereof.

29. While Thema has not to date amended its claim in these proceedings to seek recovery of any losses resulting from the US Trustee Clawback Claim from HTIE, in a letter to the United States District Court for the Southern District of New York (the “**Thema US Court Letter**”) referred to in paragraph 22 and exhibited at SD7 above, Thema’s US lawyers stated as follows:

“If Thema were required to return any of the amounts that it previously received, that would increase Thema’s damages. In other words, a judgment against HTIE would not be swallowed up by payments owed to the [US] Trustee. Instead, the reverse is true: anything owed to the [US] Trustee would increase Thema’s claim against HTIE.”

30. I must assume, from the Thema US Court Letter, that Thema may seek to amend its claim at some point to also seek recovery of the US Trustee Clawback Claim. If this is correct, then Thema’s claim could potentially be increased prior to trial by a further US\$507 million or US\$692 million and further again in respect of its as yet unquantified additional claims in respect of legal fees and loss of investment monies and business reputation.

31. While as stated above the quantum of the Thema claim is a complex issue which cannot be properly determined by the Court in advance of the trial of these proceedings, in the context of the Court’s consideration of the reliefs sought in this motion, I would like the Court to be aware that in the view of HTIE, should Thema be successful in its proceedings against HTIE, first that Thema’s NAV Claim is not an appropriate measure of its loss, and secondly the US Trustee Clawback Claim is not recoverable by Thema from HTIE. The Court may ultimately determine that the appropriate measure of damages would be Thema’s Net Equity Claim against the US Trustee which Thema has calculated as US\$310 million. In this regard, I would like to draw the Court’s attention to a recent decision of US Second Circuit Court of Appeals, *In re Bernard L. Madoff Inv. Sec. LLC*, F.3d, 2011 WL 3568936 (2d Cir. Aug. 16, 2011) where the court had to consider whether the net equity methodology used by the US Trustee was appropriate, or whether claims should be admitted based on a “last statement method”. I beg to refer to a copy of the judgment in this case, upon

which marked with the letters and number "SD10", I have signed my name prior to the swearing hereof. Under the last statement method, Thema's claim against the US Trustee would essentially equate to the Thema NAV Claim (which includes very substantial false profit). In giving the court's judgment in favour of the net equity methodology used by the US Trustee Jacobs, CJ stated as follows:

"Use of the last statement method in this case would have the absurd effect of treating fictitious and arbitrarily assigned paper profits as real and would give legal effect to Madoff's machinations."

For the avoidance of doubt, HTIE does not necessarily accept that the Thema Net Equity Claim is either the appropriate measure of damages or that Thema has calculated the amount correctly at US\$310 million.

## **BAR ORDERS**

32. The purpose of the bar order provision in paragraph 5.1 and 5.2 of the Proposed Settlement is to prevent the Non-Settling Defendants in the Class action from bringing a contribution or indemnity claim against any of the HSBC Defendants in any future proceedings brought by the Lead Plaintiff or any other Investors bound by the Proposed Settlement. The inclusion of this provision is paramount to the Proposed Settlement as it ensures that the HSBC Defendants have some degree of finality from the Proposed Settlement and do not face open ended liability in the form of contribution or indemnity claims which could arise from the other Non-Settling Defendants.
33. I am advised that bar order provisions are standard in settlements of this nature in the US. In this regard, I beg to refer to the Affidavit of Evan Davis, a partner in Cleary Gottlieb Steen & Hamilton LLP who represents the interests of the HSBC Defendants in the Class Action, sworn herein on 1 September 2011 [TBC with CGSH], upon which marked with the letters and number "SD11", I have signed my name prior to the swearing hereof. Mr Davis' affidavit contains averments as to the purpose and necessity of bar order provisions in the context of class actions settlements.
34. The bar order provisions highlight the clear conflict in which Thema finds itself as a result of being a plaintiff and a defendant in respect of the same loss in the Thema and Investor litigation. As is clear from the Objections filed by the Non-Settling Defendants, Judge Berman will consider the position of all the Non-Settling Defendants before granting final approval and he will not approve the Proposed

Settlement if he considers any of the provisions of the Proposed Settlement unfair to the parties.

35. Clearly, Thema is concerned that the HSBC Defendants will be released by the Investors, leaving Thema and the other Non-Settling Defendants to answer the claims made against them. US procedure allows this to occur and there is nothing underhand about following normal practice and procedure in the US where the HSBC Defendants and Thema are sued. The Investors have the opportunity to recover additional damages from Thema, William Fry, the directors of Thema, JP Morgan Chase, UniCredit and PricewaterhouseCoopers, amongst others, and the Proposed Settlement is only a partial settlement in respect of the potential proportionate share of the HSBC Defendants.

#### **RELEASES AND DISMISSALS WITH PREJUDICE**

36. The purpose of clause 4.1 and 4.3 of the Proposed Settlement is to ensure the Proposed Settlement with the Proposed Settlement Class is a full and final settlement on a global basis with the HSBC Defendants. Therefore it is reasonable for the Proposed Settlement Class to release all such claims. They also are expected to be dismissed with prejudice in the Judgment that would accompany Court approval of the Proposed Settlement.
37. It is proposed to give extensive notice to all potential members of the Proposed Settlement Class to ensure the Proposed Settlement Class has the opportunity to exercise its options under the Proposed Settlement.
38. As is clear from the foregoing paragraphs of this affidavit, the Investors have a clear choice to continue to litigate in Ireland or elsewhere or share in the Proposed Settlement. If they want to participate in the Proposed Settlement, they cannot continue to litigate against any of the HSBC Defendants anywhere else in the world. The Investors who may be impacted by the enforceability of the order in Ireland or elsewhere in the world are Investors who ignore the Proposed Settlement despite very extensive notice of same (i.e. Investors who do not validly request exclusion and who do not file a proof of claim). Notice of the Proposed Settlement has not as yet occurred and will not occur until directed by Judge Berman. The reality is that no Investor is obliged to participate and Judge Berman determines the fairness of the offer for all Settlement Class members, present and absent.

39. If Judge Berman approves the Proposed Settlement and all conditions are met, the Proposed Settlement will be reflected in the Final Approval Order and Judgment and the US Court will have jurisdiction to make that order in circumstances where the HSBC Defendants have submitted to its jurisdiction. Also assuming proper notice, the in personam jurisdiction of the US Court over absent class members is, I am advised, beyond question as a matter of US law and should therefore be enforced in this jurisdiction. This issue will be dealt with in greater detail in HTIE's legal submissions.
40. In light of the above, I would ask this honourable Court to grant the relief sought in the Notice of Motion.

**SWORN** by the said **SHARON DALY**

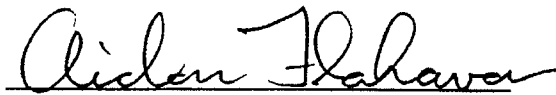
on this 1 day of Sept 2011  
at Sir John Rogerson's Quay  
in the City of Dublin

before me a Practising Solicitor

and I know the Deponent



DEPONENT



PRACTISING SOLICITOR  
AIDAN FLAHAHAN

Filed this 2nd day of September 2011 by Matheson Ormsby Prentice, Solicitor for the  
Defendants  
~~Plaintiffs~~, 70 Sir John Rogerson's Quay, Dublin 2

**THE HIGH COURT  
COMMERCIAL**

Record No. 2008/10983P

2009/565TP

2009/566TP

**BETWEEN:**

**THEMA INTERNATIONAL FUND PLC**

**PLAINTIFF**

**-and-**

**HSBC INSTITUTIONAL TRUST SERVICES  
(IRELAND) LIMITED**

**DEFENDANT**

**-and-**

**THEMA ASSET MANAGEMENT LIMITED  
AND 2020 MEDICI AG**

**THIRD PARTIES**

---

**AFFIDAVIT OF SHARON DALY**

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23537389.10**

THE HIGH COURT  
COMMERCIAL

RECORD NO 2008/10983P  
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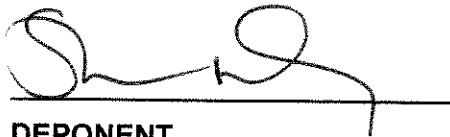
DEFENDANT

-AND-

THEMA ASSET MANAGEMENT LIMITED AND 2020 MEDICI AG

THIRD PARTIES

This is the Exhibit marked "SD1" referred to in the Affidavit of Sharon Daly sworn in these proceedings on the 1 day of Sept 2011



DEPONENT



PRACTISING SOLICITOR

THE HIGH COURT  
COMMERCIAL

RECORD NO 2008/10983P

BETWEEN:

THEMA INTERNATIONAL FUND PLC

PLAINTIFF

-AND-

HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LIMITED

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Third parties

Folder 1

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THE HIGH COURT  
COMMERCIAL

RECORD NO 2008/10983P

**BETWEEN:**

**THEMA INTERNATIONAL FUND PLC**

**PLAINTIFF**

**-AND-**

**HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LIMITED**

**DEFENDANT**

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**THEMA ASSET MANAGEMENT LIMITED AND 2020 MEDICI AG**

**Third parties**

**Folder 2**

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**1 SEPTEMBER 2011**

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