

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 388 2009

IN THE MATTER OF SECTION 92 OF THE COMPANIES (AMENDMENT) LAW 2007  
AND IN THE MATTER OF HERALD FUND SPC



PETITION



TO: The Grand Court of the Cayman Islands

**THE HUMBLE PETITION** of Primeo Fund (in Official Liquidation) (The "Petitioner") of c/s Bank of Bermuda (Cayman) Limited, P.O. Box 513 GT, HSBC House, 68 West Bay Road, Grand Cayman KY1-1102 acting by its joint official liquidators G James Cleaver and Richard Fogerty (the "Liquidators") shows that:

**The Company**

1. The Herald Fund SPC (the "Company") is an exempted segregated portfolio company incorporated in the Cayman Islands under the Mutual Funds Law (2003) on 24 March 2004.

*Share Capital*

2. The authorized share capital of the Company as of 3 April 2008 was:
  - (i) 100 Management Shares of US\$1.00 par value each;
  - (ii) 10,000,000 participating non voting shares of US\$0.001 par value each;
  - (iii) 10,000,000 participating non voting shares of Euro 0.001 par value each.

*Management Shares*

3. The holders of the Management Shares have the right to vote at a general meeting. In the event of a winding up, the holders of the Management Shares shall receive sums comprising the general assets of the Company which sum shall at no time exceed the amount paid up in respect of the issued Management Shares.

4. The 100 Management Shares of the Company are held by Herald Asset Management Ltd, which acts as Investment Manager to the Company.
5. As at the date of the presentation of the Petition the directors of the Company are believed to be Franco Mugnai; Friedrich Pfeffer and Hannes Saleta.

*The Investment Strategy*

6. It is averred that the Company has only established one fund, namely Herald USA Segregated Portfolio One (the "Fund"). As a result the Petition is for the winding up of the Company as opposed to the appointment of a Receiver over the Fund.
7. The Fund's Investment Strategy was to provide investors with long term growth while minimizing risks through a "very active" trading style and diversification of investments.
8. The Fund invested and lost substantially all of its assets in Bernard L. Madoff Investment Securities LLC ("BLMIS").

*The Petitioner*

9. The Petitioner was incorporated in the Cayman Islands as an exempted company with limited liability on 18 November 1993.
10. On 23 January 2009, the Petitioner passed a special resolution that the Petitioner be wound up voluntarily and that the Liquidators be appointed as joint voluntary liquidators.
11. On 8 April 2009, pursuant to section 131(a) and (b) of the Companies (Amendment) Law 2007 the voluntary liquidation of the Petitioner, commenced by special resolution dated 23 January 2009, was continued but subject to the supervision of the Court
12. Pursuant to the Petitioner's "*Semi Annual Report and Financial statements for the period ending 30 June 2008*" the Petitioner held 558,799 shares in the Fund.
13. Pursuant to a letter from the Fund dated 19 June 2009, the Fund has sought compensation in respect of the BLMIS loses from the SIPC Trustee. A primary claim has been made to the SIPC Trustee in the amount of US\$1,894,066,134.18. It can reasonably be inferred that this represents almost the entire value of the Fund's investment.

14. HSBC Securities Services (Luxemburg) SA ("HSBC") are the Petitioners and the Fund's administrator and custodian. Pursuant to the Petitioners 31 November 2008 NAV computation issued by HSBC, the Petitioner's shares in the Fund had a market value of \$802,614,012.10.
15. It is averred, therefore, that the Petitioner holds approximately 42 percent of the shares held by the Fund.
16. On 11 December 2008, the Petitioner was notified that the directors of the Fund had passed a resolution (i) to stop the calculation of the NAV in relation to all participating classes of shares, (ii) to suspend the issuance of any new shares, and (iii) to halt the redemption of any existing shares with effect from 12 December 2008.

*Redemption of Shares*

17. Pursuant to the Fund's Offering Memorandum, requests for redemptions were to be made on the "Redemption Request Form" thirty five calendar days prior to the Redemption Day.
18. Pursuant to a side letter from the Fund, the Petitioner was entitled to make redemption requests with four working days notice prior to the Redemption Day.
19. On 27 November 2008, redemption requests in the amount of at \$154,775,000 were submitted to the Fund for the redemption date 1 December 2008.
20. This redemption request is confirmed by HSBC who value the redemption requests by the Petitioner to the Fund at \$154,775,000 for the redemption date 1 December 2008.
21. Full payment was due within twenty business days of the redemption date. No such payment was made and at the time of the presentation of the Petition the redemption request remains unsatisfied.
22. As a result of the resolutions of the Fund, the Petitioner is a creditor in the amount of US\$154,775,000.

## **Grounds of the Application**

*The Company is unable to pay its debts*

### *Management Fees*

23. Pursuant to a resolution of the Board of Directors of the Fund, it was agreed that the Fund would pay a rebate in Management Fees of 1.25% per annum to the Petitioner, such rebates to be calculated monthly and payable not later than the 24<sup>th</sup> of the following month, effective from 31 July 2006.

### *Performance Fees*

24. Pursuant to a resolution of the Board of Directors of the Fund, it was agreed that the Fund would pay to the Petitioner a rebate in Performance Fees of 50% of the amount of the performance fee payable in the Fund, such rebates to be payable quarterly, not later than the 24<sup>th</sup> of the following month after quarter end, effective July 31 2006.

### *Debt Owed*

25. Pursuant to the Petitioner's Statement of Affairs as at 23 January 2009, the Petitioner is due outstanding rebates from the Fund in respect of Management Fees and Performance Fees in the amount of US\$2,238,811.09. The rebates are calculated:

- (i) Herald Management Fee Rebates (Select US\$): US\$1,116,746.18
- (ii) Herald Performance Fee Rebates (Select US\$): US\$1,089,967.62
- (iii) Herald Management Fee Rebates (Executive Euro): US\$20,362.12
- (iv) Herald Management Fee Rebates (Executive US\$): US\$8,823.69
- (v) Herald Management Fee Rebates (Executive US\$): US\$1,762.83
- (vi) Herald Performance Fee Rebates (Executive Euro): US\$1,178.65

26. On 19 June 2009, the Petitioner wrote to the Fund seeking, inter alia, payment of "*all outstanding monies owed by Herald to the Fund.*"

27. To date the Petitioner has had no substantive response from the Fund. At the time of the presentation of the Petition, the monies due have not been paid.

28. In light of the foregoing it is averred that the Fund and by extension the Company is unable to pay its debts.

29. The Fund and by extension the Company, by its own admission, has lost almost the entirety of its assets in the BLMIS fraud thereby suffering losses of at least US\$1,894,066,134.18.
30. Pursuant to a letter from the Fund dated 27 April 2009 it is averred that on 3 April 2009, the Fund commenced proceedings against its custodian for the release of the Fund's assets.
31. At the date of the presentation of the Petition the proceedings against HSBC are on going. It is to be inferred that in such circumstances, the Fund has no access to the monies held at HSBC.
32. It is averred, therefore, that unless the Fund has access to monies in excess of US\$2,238,811.09 in accounts other than with HSBC, the Fund and by extension the Company must be unable to pay its debts.
33. It is averred that given the debt remains outstanding and payable some six months after it became due it can be inferred that no such account exists.
34. It is further averred that the Fund has tacitly acknowledged that the monies held at HSBC constitute the only assets of the Fund. By letter of 23 February 2009 the Fund under the heading "Location of Fund's Assets" states that HSBC have been unable to confirm the safe custody of the Funds assets. It is averred that had the Fund held significant other assets elsewhere, the location of these assets would have been confirmed to investors in this letter.

**YOUR PETITIONER THEREFORE HUMBLY PRAY AS FOLLOWS:**

- (1) That pursuant to section 92 of the Companies (Amendment) Law 2007 the Company be wound up.
- (2) That G James Cleaver and Richard Fogerty be appointed as joint official liquidators ("Official Liquidators") of the Company and that the Official Liquidators be granted the power to act jointly and severally.
- (3) That the Official Liquidators not be required to give security for their appointment.
- (4) That in addition to their other powers, the Official Liquidators do have all the powers set out in Parts I and II of the Third Schedule of the Companies (Amendment) Law 2007.

- (5) The Liquidators be authorised to do any act or things considered by them to be necessary or desirable in connection with the liquidation of the Company and the winding-up of its affairs and to prevent the dissipation of the Company's assets;
- (6) No disposition of the Company's property by or with the authority of the Liquidators in carrying out their duties and functions and exercise of their powers under this Order shall be voided by virtue of section 99 of the Companies Law (2007 Revision).
- (7) That the costs of presenting this Petition be paid out of the assets of the Company as an expense of the liquidation.
- (8) Such further and alternative orders and/or directions that the Court should think fit.

**YOUR PETITIONER WILL EVER PRAY ETC:**

Dated the 18<sup>th</sup> day of August 2009

Maurice du Feu & Jeune  
Mourant du Feu & Jeune

**NOTICE OF HEARING**

**TAKE NOTICE THAT** the hearing of this Petition will take place at the Law Courts, George Town on 2009 at 10.00am.

Any correspondence or communication with the Court relating to the hearing of this Petition should be addressed to the Registrar of the Financial Services Division of the Grand Court at PO Box 495, Grand Cayman KY1-1106, Telephone (345) 949-4296.

This **Petition** is filed by Mourant du Feu & Jeune, Attorneys-at-Law for the Petitioner, whose address for service is PO Box 1348, Second Floor, Harbour Centre, 42 North George Street, George Town, Grand Cayman, KY1-1108 (ref: 2042504/DICKI/MdFJ/2105340/1)