

IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION



CAUSE NO: FSD of 2013

0027

IN THE MATTER OF SECTION 92 OF THE COMPANIES LAW (2012 REVISION)

AND IN THE MATTER OF HERALD FUND SPC

WINDING UP PETITION



TO: The Grand Court

THE HUMBLE PETITION of Primeo Fund - In Official Liquidation (the "Petitioner") of Suite 776, 10 Market Street, Camana Bay, Grand Cayman, Cayman Islands, KY1-9006 acting by its joint official liquidators Gordon MacRae and Eleanor Fisher (the "Liquidators") shows that:

A. PREAMBLE

1. The Petitioner seeks an Order for the winding up of Herald Fund SPC (the "Company"). The Petitioner is a contributory of the Company.
2. The Petition is for the winding up of the Company as opposed to the appointment of a Receiver over a fund because the Company established one fund only.
3. The fund operated by the Company was Herald USA Segregated Portfolio One (the "Fund"). It invested all, or substantially all, of its assets into managed accounts run by Bernard L. Madoff Investment Securities LLC ("BLMIS").

4. BLMIS was, in fact, the largest "Ponzi" scheme in history. It engaged in no material investment activity and generated virtually no investment returns. The "investments" made by customers including Herald were commingled into a single bank account held at the New York Branch of JP Morgan Chase & Co and applied in a fraudulent Ponzi scheme.
5. In December 2008, when requests by BLMIS' investors for redemptions exceeded the amount of funds deposited by new investors, the Ponzi scheme collapsed. Bernard Madoff ("**Madoff**") was arrested by United States federal agents on 11 December 2008. He admitted that he had operated a Ponzi scheme through BLMIS. On 29 June 2009, Madoff was sentenced to 150 years in prison and is currently serving his prison sentence in the US.
6. As a consequence of its exposure to Madoff's fraud, the Company suffered the loss of all or substantially all of its investments. The resulting loss and damage to the Company has yet to be finally determined.
7. In response to such losses, the Fund suspended subscriptions, redemptions and the calculation of net asset value ("**NAV**") on 12 December 2008 purportedly pursuant to its Articles of Association dated 4 March 2004 (the "**Articles**"). Since that date the Fund has conducted no investment activity, has not undertaken any calculations of NAV and has not engaged in any distribution of assets or made any payment to any of its shareholders.
8. The Fund has not however initiated a winding up in accordance with its Offering Memorandum dated 3 April 2008 (the "**Offering Memorandum**") and the Articles. Instead the Board of the Company has engaged in the pursuit and defence of particular litigation claims. In the circumstances, and as further particularised below, such conduct is contrary to the reasonable expectations of participating shareholders based upon the representations in its Offering Memorandum.
9. In light of the above, it is just and equitable that the Company should be wound up:

- a) the Company has lost its substratum. It has become impossible, alternatively impractical, for the Company to carry on its business as an investment company and it has ceased to be viable; and/or
- b) the business and affairs of the Company require investigation which investigation ought to be conducted by an official liquidator.

**B. THE COMPANY**

- 10. The Company is an exempted segregated portfolio company incorporated in the Cayman Islands on 24 March 2004 and registered as a regulated mutual fund under the Mutual Funds Law (2003 Revision).
- 11. The registered office of the Company is situated at Maples Corporate Services Limited, PO Box 309 GT, Uglan House, South Church Street, George Town, Grand Cayman, KY1 1104, Cayman Islands.

**Share Capital**

- 12. The authorised share capital of the Company as of 3 April 2008 was:
  - a) 100 management shares of US\$1.00 par value each (the "Management Shares");
  - b) 10,000,000 participating non-voting shares of US\$0.001 par value each; and
  - c) 10,000,000 participating non-voting shares of Euro 0.001 par value each.

**Management Shares**

- 13. 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 sums shall at no time exceed the amount paid up in respect of the issued Management Shares.

14. The Management Shares of the Company are held by Herald Asset Management Ltd, which acts as Investment Manager to the Company.
15. As at the date of the presentation of the Petition the directors of the Company are Franco Mugnai and Friedrich Pfeffer (the "Directors"). It appears that Hannes Saleta resigned as a director in December 2008 or January 2009.

### **Objects of the Company**

16. The Company's Memorandum of Association dated 24 March 2004 (together, with the Offering Memorandum and the Articles, the "Constitutional Documents") defines its objects as follows:

*"The objects for which the Company is established are unrestricted and shall include, but without limitation, the following:*

- (i) (a) *To carry on the business of an investment company and to acquire, invest in and hold by way of investment, sell and deal in shares, stocks, call options, put options, debenture stock, bonds, obligations, certificates of deposit, bills of exchange and securities of all kinds created, issued or guaranteed by any government, sovereign, ruler, commissioners, public body or authority, supreme, municipal, local or otherwise, in any part of the world, or by any company, bank, association or partnership, whether with limited or unlimited liability, constituted or carrying on business in any part of the world, units of or participations in any unit trust scheme, mutual fund or collective investment scheme in any part of the world, policies of assurance and any derivatives of, rights to or in and interests in any of the foregoing, and from time to time to sell, deal in, exchange, vary or dispose of any of the foregoing.*
- (b) *To acquire any such shares, stocks, options, debentures, debenture stock, bonds, obligations, certificates of deposit, bills of exchange, securities, units, participations, policies of assurance, derivatives of or rights to or interest in the aforesaid by original subscription, tender, purchase, exchange or otherwise, to subscribe for the same either conditionally or otherwise, to enter*

*into underwriting and similar contracts with respect thereto and to exercise and enforce all rights and powers conferred by or incidental to the ownership thereof.*

- (c) To receive moneys on deposit or loan and to borrow or raise money in any currency with or without security and to secure or discharge any debt or obligation of or binding on the Company in any manner and in particular but without limitation by the issue of debentures, notes or bonds and to secure the repayment of any money borrowed, raised or owing by mortgage, charge or lien against the whole or any part of the Company's property or assets (whether present or future) including its uncalled capital.*
- (d) To advance, deposit or lend money, securities and/or property to or with such persons, and on such terms as may seem expedient and to discount, buy, sell and deal in bills, notes, warrants, coupons and other negotiable or transferable securities or documents.*
- (e) To act as promoters and entrepreneurs and to carry on business as financiers, capitalists, concessionaires, merchants, brokers, traders, dealers, agents, importers and exporters and to undertake and carry on and execute all kinds of investment, financial, commercial, mercantile trading and other operations.*
- (ii) To exercise and enforce all rights and powers conferred by or incidental to the ownership of any shares, stock, obligations, or other securities including without prejudice to the generality of the foregoing all such powers of veto or control and may be conferred by virtue of the holding by the Company of some special proportion of the issued or nominal amount thereof, to provide managerial and other executive, supervisory and consultant services for or in relation to any company in which the Company is interested upon such terms as may be thought fit.*
- (iii) To purchase or otherwise acquire, to sell, exchange, surrender, lease, mortgage, charge, convert, turn to account, dispose of and deal with real and personal property and rights of all kinds and, in particular, mortgages,*

*debentures, produce, concessions, options, contracts, patents, annuities, licenses, stocks, shares, bonds, policies, book debts, business concerns, undertakings, claims, privileges and choses in action of all kinds.*

- (iv) *To subscribe for, conditionally or unconditionally, to underwrite, issue on commission or otherwise, take, hold, deal in and convert stocks, shares and securities of all kinds and to enter into partnership or into any arrangement for sharing profits, reciprocal concessions or cooperation with any person or company and to promote and aid in promoting, to constitute, form or organize any company, syndicate or partnership of any kind, for the purpose of acquiring and undertaking any property and liabilities of the Company or of advancing, directly or indirectly, the objects of the Company or for any other purpose which the Company may think expedient.*
  
- (v) *To stand surety for or to guarantee, support or secure the performance of all or any of the obligations of any person, firm or company whether or not related or affiliated to the Company in any manner and whether by personal covenant or by mortgage, charge or lien upon the whole or any part of the undertaking, property and assets of the Company, both present and future, including its uncalled capital or by any such method and whether or not the Company shall receive valuable consideration therefor.*
  
- (vi) *To engage in or carry on any other lawful trade, business or enterprise which may at any time appear to the Directors of the Company capable of being conveniently carried on in conjunction with any of the aforementioned businesses or activities or which may appear to the Directors of the Company likely to be profitable to the Company."*

17. The Offering Memorandum states that the Fund's Investment Objective was to, "achieve long-term capital appreciation through diversification of investments." The Offering Memorandum also contains the following additional statements:

*"The Fund's principal investments will comprise one portfolio investing in funds, equities, bonds, and other investments in which the Shares participate."*

*"The Fund's objective is to provide investors with long-term capital growth while minimizing risks through the use of a very active trading style. The Fund will utilize a multi-strategy approach with respect to investment and management of the Fund's assets. The Fund, based upon the recommendation of the Investment Manager in consultation with the Investment Adviser(s), will appoint, on a continuous basis, investment managers ("Managers") managing collective investment schemes and/or discretionary portfolio management accounts ("accounts") with different backgrounds in terms of investment strategies, markets and financial instruments."*

*"Managers selected by the Investment Manager and appointed by the Fund will be allocated certain portions of the Fund's assets for investment in accounts and/or collective investment schemes."*

*"The Fund expects that Managers may invest accounts and collective investment schemes in a wide range of financial instruments, including, but not limited to, equities and equity-related instruments, fixed income and other securities and debt-related instruments, securities that lack active public markets and other financial instruments, such as futures and other derivatives."*

### **Suspension of dealings**

18. The Constitutional Documents do not make any provision for the indefinite or permanent suspension of dealings. The Offering Memorandum contemplates the temporary suspension of dealings:

#### ***Temporary Suspension of Dealings***

*The Fund may temporarily suspend the determination of the Net Asset Value the issue and redemption of Shares and delay the payment of redemption proceeds for Shares already redeemed during the whole or any part of any period:*

- (i) *when any of the principal markets on which any significant portion of the investments from time to time are quoted, listed, traded or dealt in is closed (otherwise than for customary weekend or ordinary holidays) or during*

*which dealings therein are restricted or suspended or trading on any relevant futures exchange or market is restricted or suspended;*

- (ii) *when, as a result of political, economic, military or monetary events or any other circumstances outside the control, responsibility and power of the Directors, any disposal or valuation of investments is not, in the opinion of the Directors, reasonably practicable without this being seriously detrimental to the interests of owners of Shares in general or if, in the opinion of the Directors, the redemption price cannot fairly be calculated or such disposal would be materially prejudicial to the owners of Shares in general;*
- (iii) *during which any breakdown occurs in the means of communication normally employed in determining the value of any of the investments or when for any other reason the value of any of the investments or other assets of the Fund cannot reasonably or fairly be ascertained;*
- (iv) *when the Fund is unable to repatriate funds required for the purpose of making redemption payments or when such payments cannot, in the opinion of the Directors, be effected at normal prices or normal rates of exchange or during which any transfer of funds involved in the realization or acquisition of investments or when payments due or redemption cannot, in the opinion of the Directors, be effected at normal prices or normal rate of exchange; or*
- (v) *when the Fund has issued a notice of a general meeting of Shareholders at which a resolution to wind up the Fund is to be considered provided that such suspension is in the best interests of Shareholders" (emphasis added).*

19. The Offering Memorandum states (at page 29), *"where possible, all reasonable steps will be taken to bring any period of suspension to an end as soon as possible"*.
20. The Articles of Association permit the Company's Directors to *"declare a temporary suspension of the determination of the prices of Participating Non-Voting Shares of any Separate Class...in the circumstances set out in the relevant Offering Memorandum"* (emphasis added).

21. The suspension of the calculation of NAV took place on 12 December 2008, over four years ago.

#### **Winding down**

22. The Offering Memorandum does not allow management to engage in a "soft wind-down" of the Company. The Offering Memorandum states:

*"The Company shall be wound up by the passing of a special resolution for a winding up or where the Company is unable to pay its debts and a liquidator is appointed.*

*Upon a liquidation of the Company, the assets of the Fund available for distribution to Shareholders will be applied in repayment by reference to the respective proportion of the Net Asset Value held by each Shareholder. The holders of Management Shares shall receive all 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."*

23. Articles 155 and 156 of the Articles provide, *inter alia*:

*"If the Company shall be wound up the liquidator shall apply the assets of each Segregated Portfolio in satisfaction of the relevant creditors' claims in such manner as he thinks fit."*

*"If the Company shall be wound up (whether the liquidation is voluntary, under the supervision or by the Court) the liquidator may...divide among the Shareholders in specie the whole or any part of the assets of the Company...and may determine how such division shall be carried out as between the Shareholders or different Separate Classes of Shareholders."*

#### **D. THE PETITIONER**

24. The Petitioner was incorporated in the Cayman Islands as an exempted company with limited liability on 17 November 1993.

25. On 23 January 2009, the Petitioner passed a special resolution that the Petitioner be wound up voluntarily and that liquidators be appointed.
26. On 8 April 2009, the liquidation of the Petitioner was continued subject to the supervision of the Court. Gordon MacRae and Eleanor Fisher are the current Joint Official Liquidators of the Petitioner.

#### **E. THE PETITIONER'S INTEREST IN A WINDING UP OF THE COMPANY**

27. The Petitioner is a shareholder of the Company. As far as the Petitioner is aware, it owns approximately 474,000 of the Company's USD class shares and 11,300 of the Company's Euro class shares, which represents an overall shareholding of between 35% and 40%. As far as the Petitioner is aware, it is the Company's largest shareholder.
28. The Company has substantial cash at bank which, subject to any prior claims, will fall to be distributed amongst participating shareholders, including to the Petitioner, in a winding up. As at 30 April 2012, the Company held €11,351,717 in a Euro denominated account with its custodian and administrator, HSBC Securities Services (Luxembourg) SA ("HSBC"). The Company also has a US dollar account with HSBC which, as at 30 April 2012, had a balance of US\$6,755.67.
29. The Company has a right to claim in the BLMIS estate, which claim was submitted in the sum of approximately US\$1.9 billion in June 2009 (the "SIPA Claim"). The trustee of that estate, Mr Irving Picard (the "Trustee"), has recovered approximately US\$9.3 billion of the estimated US\$17.5 billion in principal lost by BLMIS investors who have filed claims, which represents a rate of recovery of 53%. Even if credit is given in full for the claim of US\$586 million made by the Trustee against the Company in the United States Bankruptcy Court, Southern District of New York in July 2009, the Company has a substantial net claim which the Directors, at the investor meeting on 29 September 2011, stated to be "*approximately \$1.15 billion*". Any realisations or

dividends with respect to that claim will fall to be distributed amongst participating shareholders, including to the Petitioner, in a winding up.

30. In April 2009, the Company commenced proceedings against HSBC in Luxembourg seeking, *inter alia*, delivery of the assets which HSBC claimed to be holding on behalf of the Company (the "HSBC Proceedings") in the amount of approximately €2 billion (approximately US\$2.7 billion). The Company has expressed confidence in the strength of its case against HSBC, to its investors. As far as the Petitioner is aware, judgment has not yet been given in the HSBC proceedings.
31. The Company may have claims against persons other than the BLMIS estate or HSBC which require investigation and which are likely to produce or enhance a surplus to be distributed amongst participating shareholders, including to the Petitioner, in a winding up. Such claims and potential claims include claims and/or potential claims against:
  - a) the Directors;
  - b) the Company's investment manager, Herald Asset Management Ltd (the "Investment Manager"); and
  - c) the Company's promoter and distributor, Bank Medici SA (now known as 20:20 Medici).
32. In the premises, the Petitioner has a sufficient interest in its capacity as a member of the Company in a winding up of the Company.

#### **F. GROUNDS FOR WINDING UP**

##### **The Company has lost its substratum**

33. The Company's principal object was to carry on the business of an investment company, investing funds in equities, bonds and other investments. In

practice, the business of the Company was to make investments wholly or substantially through BLMIS.

34. In light of the Madoff fraud, the bankruptcy of the BLMIS estate and the loss of the Company's investments, it has become impossible, alternatively impractical, for the Company to carry on its business:
- a) the Company is not making investments, liquidating existing investments, receiving subscriptions or engaging in redemptions or distributions to its shareholders;
  - b) the Company admitted in its submission to the Court on a petition by Natixis SA (petition number 373 of 2009) that it is "*not...executing its investment strategy*"; and
  - c) the Company does not contemplate that its investment strategy should resume in the future. Any assertion that it might do so in the future is speculative, if not wholly theoretical. On 29 September 2011 and on 25 May 2012, in addresses to non-voting participating shareholders:
    - i. the Directors sought to justify its continued management, as opposed to a liquidation, on the ground that:

*"there would not be any material advantage if the Fund was to be placed into an immediate liquidation"*; however
    - ii. the Directors recognised that:

*"If and when substantive recoveries are made in the future, it may well be appropriate to consider a formal liquidation in order to objectively determine the status of stakeholders and the amounts they should receive."*
35. There is nothing in the Offering Memorandum or the Articles which would lead the Company's investors to anticipate an indefinite suspension of dealings

whilst the Directors attempt to carry out a long-term informal liquidation of the Company.

36. In the premises, the Company has lost its substratum. It has become impossible, alternatively impractical, for the Company to carry on its business as an investment company as pleaded in paragraph 33 above (whether by making investments through BLMIS or otherwise) and the Company has ceased to be viable.
37. In light of the above, it is just and equitable that the Company should be wound up. The Petitioner seeks the appointment of professional independent liquidators to investigate the Company's affairs, review the legal advice provided to the Company to date, and to take all appropriate action to maximise stakeholder recoveries.
38. Further, and in the alternative, it is just and equitable that the Company should be wound up because the business and affairs of the Company require investigation, which investigation ought to be conducted by an official liquidator.

**YOUR PETITIONER THEREFORE HUMBLY PRAYS THAT:**

- (1) The Company be wound up pursuant to section 92 of the Companies Law (2012 Revision).
- (2) That Gordon MacRae and Eleanor Fisher of Zolfo Cooper 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 Russell Smith of BDO Cayman Islands be appointed as conflict liquidator (the 'Conflict Liquidator'), with authority to deal with all matters of conflict which may arise as a result of the Official Liquidators' respective roles as joint official liquidators of the Petitioner.

- (4) That, in addition to their other powers, the Official Liquidators and the Conflict Liquidator have all the powers set out in Parts I and II of the Third Schedule of the Companies Law (2012 Revision).
- (5) That the Official Liquidators and the Conflict Liquidator are 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 Official Liquidators or the Conflict 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 (2012 Revision).
- (7) That neither the Official Liquidators nor the Conflict Liquidator be required to give security for their appointment.


In the alternative, to Orders (2) and (7), the following Orders (8) to (12) be made:

- (8) That Russell Smith and Niall Goodsir-Cullen of BDO Cayman Islands 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.
- (9) 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 Law (2012 Revision).
- (10) The Official 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;

- (11) No disposition of the Company's property by or with the authority of the Official 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 (2012 Revision).
- (12) That the Official Liquidators not be required to give security for their appointment.
- (13) That the costs of presenting this Petition be paid out of the assets of the Company as an expense of the liquidation.
- (14) Such further and alternative orders and/or directions that the Court should think fit.

**YOUR PETITIONER WILL EVER PRAY ETC:**

Dated the 14<sup>th</sup> day of February 2013

  
\_\_\_\_\_

Mourant Ozannes

**NOTE:** This Petition is intended to be served on the Company.

This Petition was presented by Mourant Ozannes, Attorneys-at-Law for the Petitioners, whose address for service is 94 Solaris Avenue, Camana Bay, PO Box 1348, Grand Cayman, KY1-1108, Cayman Islands (Ref: 8005124/56145740/17).

## NOTICE OF HEARING

**TAKE NOTICE THAT** the hearing of this Petition will take place at the Law Courts, George Town on                      2013 at              am/pm.

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.