EXHIBIT 1

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION,

Plaintiff-Applicant,

v.

BERNARD L. MADOFF INVESTMENT SECURITIES LLC,

Defendant.

In re:

BERNARD L. MADOFF,

Debtor.

IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

HSBC BANK PLC, et al.,

Defendants.

Adv. Pro. No. 08-01789 (SMB)

SIPA Liquidation

(Substantively Consolidated)

Adv. Pro. No. 09-01364 (SMB)

REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE TO THE <u>APPROPRIATE JUDICIAL AUTHORITY IN LUXEMBOURG</u>

Presenting his compliments to the appropriate judicial authorities of Luxembourg, this Request is made by The Honorable Judge Stuart M. Bernstein, of the United States Bankruptcy Court for the Southern District of New York, which is located at One Bowling Green, New York, NY 10004-1408, United States of America to Le Procureur Général d'État, Cité Judiciaire, Plateau du St-Esprit, L-2080 Luxembourg.

This request is made pursuant to, and in conformity with, Chapter I of the *Hague*Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

(the "Hague Convention"), to which both the United States and Luxembourg are party.

Specifically, the Court requests assistance in obtaining testimonial evidence from Nigel Fielding, a former director of **Alpha Prime Fund Limited** and an official of **HSBC Securities Services**(**Luxembourg**) S.A., for use as evidence in a trial of this proceeding in this Court. The Court has not yet made a determination of the merits of the plaintiff's, Irving H. Picard's, claims and allegations asserted in this action, which are set forth below.

SECTION I

1. SENDER:

The Honorable Stuart M. Bernstein United States Bankruptcy Judge United States Bankruptcy Court for the Southern District of New York One Bowling Green New York, NY 10004-1408

2. CENTRAL AUTHORITY OF REQUESTED STATE

Le Procureur Général d'État Cité Judiciaire Plateau du St-Esprit L-2080 Luxembourg

3. PERSON TO WHOM THE EXECUTED REQUEST IS TO BE RETURNED

Plaintiff's Legal Counsel:

Oren J. Warshavsky, Esq. Baker & Hostetler LLP 45 Rockefeller Plaza New York, NY 10111

On behalf of:

The Honorable Stuart M. Bernstein United States Bankruptcy Judge United States Bankruptcy Court for the Southern District of New York One Bowling Green New York, NY 10004-1408

SECTION II

- 4. IN CONFORMITY WITH ARTICLE 3 OF THE HAGUE CONVENTION, THE UNDERSIGNED APPLICANT HAS THE HONOR TO SUBMIT THE FOLLOWING INFORMATION REGARDING THE INSTANT REQUEST:
- 5. a. REQUESTING JUDICIAL AUTHORITY (Article 3,a):

The Honorable Stuart M. Bernstein United States Bankruptcy Judge United States Bankruptcy Court for the Southern District of New York One Bowling Green New York, NY 10004-1408

b. TO THE COMPETENT AUTHORITY OF (Article 3,a):

Luxembourg

c. NAME OF THE CASE AND ANY IDENTIFYING NUMBER

Picard v. HSBC Bank plc, et al., Adv. Pro. No. 09-01364 (SMB)

6. NAMES AND ADDRESSES OF THE PARTIES AND THEIR REPRESENTATIVES (Article 3,b):

Irving H. Picard	Legal Representatives
Trustee for the Substantively	Oren J. Warshavsky, Esq.
Consolidated	Tel: +1.212.589.4200
Liquidation of Bernard L. Madoff	Baker & Hostetler LLP
Investment Securities, LLC	45 Rockefeller Plaza
	New York, New York 10111
	Tel: +1.212.589.4200
	Fax: +1.212.589.4201
	Email: owarshavsky@bakerlaw.com
	Franz Schiltz
	Schiltz & Schiltz S.A.
	24-26 Avenue de la Gare
	L-1610 Luxembourg
	Tel: +352 45 64 80
	Fax: +352 45 64 44
	Email: franz.schiltz@schiltz.lu

Defendant: Alpha Prime Fund Limited

A corporation formed under the laws of Bermuda with a registered address at Bank of Bermuda Building, 6 Front Street, Hamilton HM11

Legal Representatives

Me. Didier Schönberger Tabery & Wauthier 10 Rue Pierre d'Aspelt L-1142 Luxembourg Tel: +352 251 51 51

Fax: +352 45 94 61

Todd Duffy DuffyAmedeo LLC 275 7th Ave. New York, New York 10001 United States of America Tel: +1.212.729.5832

Fax: +1.212.208.2437

Defendant: HSBC Bank plc

A British public limited company with a principal place of business at 8 Canada Square, London E14 5HQ, United Kingdom

Legal Representative

Thomas J. Moloney Cleary Gottlieb Steen & Hamilton LLP One Liberty Plaza New York, New York 10006 United States of America Tel: +1 212.225.2000

Defendant: HSBC Bank USA, N.A.

A national bank chartered by the Office of the Comptroller of the Currency with its principal executive office at 452 Fifth Avenue, New York, New York 10018, and its corporate headquarters at 1800 Tysons Boulevard, Suite 50, McLean, Virginia 22102

Legal Representative

Thomas J. Moloney
Cleary Gottlieb Steen & Hamilton LLP
One Liberty Plaza
New York, New York 10006
United States of America
Tel: +1 212.225.2000

Persons to Be Examined:

Nigel Fielding 2 Rue Tony Neuman, L-2241 Luxembourg

Legal Representative

Sam Dawson Carey Olsen PO Box 10008 Willow House Cricket Square Grand Cayman KY1-1001 Cayman Islands

7. NATURE AND PURPOSE OF THE PROCEEDINGS AND SUMMARY OF THE FACTS (Article 3,c):

A. NATURE OF THE PROCEEDINGS

This adversary proceeding arises from the massive Ponzi scheme orchestrated by Bernard L. Madoff ("Madoff"). Madoff was the sole owner, founder, chairman, and chief executive officer of Bernard L. Madoff Investment Securities ("BLMIS"). Through BLMIS, Madoff received billions of dollars in investments from customers and generated account statements purportedly showing that securities were purchased and sold on behalf of these customers. Although Madoff seemingly produced consistent investment returns for his customers, no securities were purchased or sold on any customer's behalf. It was a Ponzi scheme: Madoff satisfied his customers' redemption requests with the deposits of other customers. This scheme continued until December 2008, when the requests for withdrawals overwhelmed the flow of new investments and caused the inevitable collapse of the Ponzi scheme.

On December 11, 2008, Madoff was arrested by federal agents for his violations of criminal securities laws, including securities fraud, investment adviser fraud, and mail and wire fraud. In March 2009, Madoff admitted to having operated a Ponzi scheme and pleaded guilty to all charges filed against him. In June 2009, Madoff was sentenced to 150 years in prison.

On December 15, 2008, Judge Stanton of the United States District Court for the Southern District of New York appointed Irving H. Picard ("Trustee") as Trustee for the liquidation of BLMIS pursuant to the United States Securities Investor Protection Act of 1970 ("SIPA"). Under SIPA, the Trustee has the general powers of a bankruptcy trustee relating to the recovery and distribution of customer property. Pursuant to these powers, the Trustee is responsible for recovering and distributing customer property, assessing claims against BLMIS, and liquidating any other assets of BLMIS for the benefit of the estate and its creditors.

As part of his statutory duty to recover customer property, the Trustee is empowered

under the United States Bankruptcy Code (the "Bankruptcy Code") to bring "avoidance actions" to recover transfers of funds made by BLMIS prior to its collapse. *See* 11 U.S.C. §§ 544, 547, 548(a)(1), 550. The term "avoid" means to undo a transfer so that it may be returned to the BLMIS estate for equitable distribution to BLMIS's customers. By this and some one thousand other avoidance actions the Trustee has brought in connection with the liquidation of BLMIS, the Trustee seeks to maximize the recovery of fraudulently transferred funds and, consequently, the ultimate distribution to Madoff's defrauded customers, which is the purpose of this action. All sums recovered by the Trustee are distributed to customers with approved customer claims; neither the Trustee nor his counsel is compensated from the fund of customer property.

B. SUMMARY OF THE FACTS AND ALLEGATIONS PLEADED BY THE TRUSTEE¹

In *Picard v. HSBC Bank plc, et al.*, Adv. Pro. No. 09-01364 (SMB) (Bankr. S.D.N.Y.), the Trustee seeks to avoid and recover the initial transfers BLMIS made to defendant Alpha Prime Fund Ltd. ("Alpha Prime"), a Bermuda fund whose day-to-day operational tasks were performed in Austria. The Trustee also seeks to recover transfers made by BLMIS to other funds invested with BLMIS that were subsequently transferred to other defendants in the United States, including defendant HSBC Bank U.S.A., N.A. and certain of its affiliates. These claims are based on both federal law and sections 273, 274, 275, 276, 276-a, 278, and 279 of New York State's Debtor and Creditor Law, which provide the Trustee with remedies similar to those provided by the Bankruptcy Code and are made applicable to bankruptcy cases under Section 544 of the Bankruptcy Code.

The Trustee also asserts claims to disallow, pursuant to U.S. statutory law, specifically 11

¹ The Court's summary is derived from the plaintiff's allegations in its Amended Complaint filed on December 5, 2010 ("Am. Compl.") [ECF No. 170] and do not necessarily denote the Court's views of the allegations or reflect findings by this Court.

U.S.C. § 502(d), and to equitably subordinate, pursuant to 11 U.S.C. §§ 510(c) and 105(a), portions of Alpha Prime's customer claim.

The Trustee alleges that Alpha Prime is a BLMIS feeder fund operated by sophisticated directors and service providers. (*See, e.g.*, Am. Compl. ¶¶ 194, 224.) The Trustee contends that these directors and service providers either knew that BLMIS was engaged in fraud or were aware of evidence strongly indicating fraud. (Am. Compl. ¶¶ 171, 193.) The Trustee's complaint alleges that Alpha Prime received transfers of Customer Property, as defined by SIPA, of more than \$80,000,000. (*Id.* ¶ 334.)

In the early 1990s, the Trustee contends, Madoff turned to European investors to augment the flow of funds into his scheme. (*Id.* ¶¶ 2-7.) The Trustee alleges that, among others, Sonja Kohn, an Austrian investment professional with personal and professional ties to Madoff, helped attract new European investors to BLMIS. (*Id.* ¶¶ 5-7.) In 1993, Kohn was hired as an advisor and consultant for Unicredit Bank Austria AG. (*Id.* ¶7.) In the early 1990s, Kohn and others created a variety of BLMIS feeder funds, including Primeo Fund ("Primeo"). (*Id.* ¶¶ 7, 57, 230.) Primeo's apparent success, the Trustee alleges, led to the establishment of a network of feeder funds whose sole purpose was to direct investments into BLMIS. Alpha Prime was one such fund. (*Id.* ¶ 60.) In June 2003, Alpha Prime opened BLMIS customer account 1FR097, and began soliciting investments. (*Id.* ¶ 232.)

The Trustee alleges that Primeo and its service providers delegated many of their duties to BLMIS, concentrating in BLMIS the functions of investment adviser, custodian, and broker-dealer responsible for initiating and executing securities trades. (*Id.* ¶ 126.) Primeo's directors and service providers were, nevertheless, still responsible, according to the Trustee's pleadings, for ensuring the integrity of the fund's investments, assessing the fund's performance, and

ensuring that BLMIS's investment strategy aligned with the fund's objectives. (*Id.* ¶¶ 70-73, 75-76.) As with Primeo, Alpha Prime's account opening documents allegedly gave BLMIS complete authority to buy, sell, and trade in U.S. securities for Alpha Prime. (*Id.* ¶ 126.)

The Trustee alleges that Primeo's customer statements were replete with data showing Madoff's trading strategy to be impossible. (*Id.* ¶¶ 17-18, 144,226.) These impossible transactions, the Trustee contends, were reported on Primeo's customer statements which were provided to the fund's directors and service providers, all of whom were sophisticated financial professionals, and were thus aware of these impossible trades. (*Id.*)

The Trustee contends that by the middle of 2005, Alpha Prime and its directors accordingly knew that, among other things:

- (a) BLMIS's returns could not be replicated and appeared to be a product of illegal front running (Am. Compl. ¶ 19);
- (b) BLMIS's operational structure was vulnerable to fraud because it subverted checks and balances (*Id.* ¶ 18);
- (c) BLMIS customer statements showed impossible options trades (*Id.* ¶¶ 155-160); and
- (d) BLMIS customer statements showed trades outside published price ranges (*Id.* ¶ 161-165).

Alpha Prime's directors appointed HSBC Bank Bermuda Limited, formerly known as The Bank of Bermuda Limited ("HSBC Bank Bermuda") and HSBC Securities Services (Bermuda) Ltd., formerly known as Management International (Bermuda) Ltd. ("HSSB") as Alpha Prime's administrator and HSBC Bank Bermuda as its custodian. HSBC Securities Services (Luxembourg) S.A., formerly known as Bank of Bermuda (Luxembourg) S.A. ("HSSL"), was appointed as Alpha Prime's sub-administrator and sub-custodian. (*Id.* at 4-6.) BLMIS, however, acted as Alpha Prime's sub-sub-custodian. (*Id.* ¶¶ 166-171.)

8. EVIDENCE TO BE OBTAINED AND PURPOSE

Alpha Prime's knowledge of, or willful blindness to, BLMIS's fraud is a central element of the Trustee's claims to avoid and recover transfers to Alpha Prime and is a consideration central to the Trustee's claims to disallow and equitably subordinate a portion of Alpha Prime's customer claim and claims under section 502(h) of the Bankruptcy Code. The Trustee contends that Alpha Prime acted through its officers and directors, as well as through its service providers, which acted as agents to Alpha Prime, and accordingly acquired knowledge of Madoff's fraud through these officers, directors, and agents.

A senior HSSL officer, Nigel Fielding served as director to both Alpha Prime and Primeo. In this capacity, he participated in several Primeo board meetings where irregularities at BLMIS were discussed. Until 2005, Mr. Fielding was responsible for HSBC's due diligence of BLMIS, including at least two diligence visits to BLMIS in New York. In 2003, Mr. Fielding made a presentation to the Primeo board concerning HSBC's relationship with and due diligence on BLMIS. Mr. Fielding further discussed with other HSBC employees his due diligence on BLMIS and its role as custodian, administrator, and credit provider for several BLMIS feeder funds including Alpha Prime.

The Trustee anticipates that Mr. Fielding's testimony will reflect his specific knowledge of the detailed due diligence reviews and analysis on BLMIS that he undertook, as well as the discussions among HSBC employees regarding BLMIS in which he took part. The Trustee further believes that Mr. Fielding's testimony will yield evidence for use at trial concerning BLMIS discussed among Primeo's and Alpha Prime's board members.

The evidence sought in this Letter of Request is intended for use at trial as evidence in support of the Trustee's pleadings and claims to avoid fraudulent transfers to Alpha Prime and to

subordinate or disallow Alpha Prime's customer claim. The Trustee seeks to depose Mr. Fielding because his knowledge is directly relevant to Alpha Prime's knowledge of, or willful blindness to, BLMIS's fraud, and as an Alpha Prime director, Mr. Fielding's knowledge is imputable to Alpha Prime.

While this Court expresses no view as to the merits or otherwise of the amended complaint or related motions in the above-captioned case, it believes the evidence sought here will be relevant to and either support or contradict material facts relevant to the amended complaint and motions.

9. IDENTITY AND ADDRESS OF PERSON TO BE EXAMINED

Nigel Fielding 2 Rue Tony Neuman, L-2241 Luxembourg

10. STATEMENT OF THE SUBJECT MATTER ABOUT WHICH THE PERSON WILL BE EXAMINED

The Request includes a request for the oral examination under oath of Mr. Nigel Fielding.

A copy of the specific questions to be put the witness together with a schedule of defined terms is attached hereto as Attachment A.

11. DOCUMENTS AND OTHER EVIDENCE TO BE OBTAINED

None.

12. REQUIREMENT THAT THE EVDIENCE BE GIVEN UNDER OATH OR AFFIRMATION

This Court requests that Mr. Fielding's testimony be taken under oath. Pursuant to United States Federal Rule of Evidence 603, this Court requests that the witness, Mr. Fielding, be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with the duty to do so. Specifically,

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the Court requests that the duly appointed official require the witness to provide his deposition testimony under the following oath: "I, Nigel Fielding, swear that the testimony I am about to give is the truth, the whole truth, and nothing but the truth," or the corresponding wording for an oath under Luxembourg law.

13. SPECIAL PROCEDURES OR METHODS TO BE FOLLOWED

This Court requests: (1) that the examination be taken orally; (2) that the examination be taken in the presence of a commercial stenographer and videographer selected by the Trustee or the court; (3) that the videographer be permitted to record the examination by audio and visual means; (4) that the stenographer be allowed to record a verbatim transcript of the examination; (5) that the Trustee's counsel be allowed to use an interpreter selected by the Trustee to be able to follow and participate in the examination; (6) that counsel for both the Trustee and Alpha Prime be notified as soon as possible of the date, time and place of the examination, along with any other pertinent information, including what court is presiding over the deposition; (7) that counsel for both the Trustee and Alpha Prime be permitted to ask follow up questions of Mr. Fielding; and (8) that the witness be examined as soon as possible to ensure that the evidence may be obtained before the deadline for all fact discovery to be completed in the case. In the event that—due to mandatory provisions of Luxembourg law—the taking of evidence according to some or all of the procedures described above is prohibited, this Court requests that it be taken in such manner as provided by Luxembourg law for the formal taking of testimonial evidence in civil proceedings.

14. REQUEST FOR THE NOTIFICATION OF THE TIME AND PLACE FOR THE EXECUTION OF THE REQUEST AND IDENTITY AND ADDRESS OF ANY PERSON TO BE NOTIFIED

Clerk of the United States Bankruptcy Court for the Southern District of New York One Bowling Green New York, New York 10004-1408 United States of America

Oren J. Warshavsky
Baker & Hostetler LLP
45 Rockefeller Plaza
New York, New York, 10111
United States of America
Tel: +1.212.589.4200

Tel: +1.212.589.4200 Fax: +1.212.589.4201

Email: owarshavsky@bakerlaw.com

Franz Schiltz Schiltz & Schiltz S.A. 24-26 Avenue de la Gare L-1610 Luxembourg Tel: +352 45 64 80

Fax: +352 45 64 44

Email: franz.schiltz@schiltz.lu

Me. Didier Schönberger Tabery & Wauthier 10 Rue Pierre d'Aspelt L-1142 Luxembourg Tel: +352 251 51 51

Fax: +352 45 94 61

Todd Duffy DuffyAmedeo LLC 275 7th Ave. New York, New York 10001

Tel: +1.212.729.5832 Fax: +1.212.208.2437

15. REQUEST FOR ATTENDANCE OR PARTICIPATION OF JUDICIAL PERONSONNEL OF THE REQUESTING AUTHORITY AT THE EXECTION OF THE LETTER OF RQUEST

None.

16. FEES AND COSTS

It is requested that once the Request is executed, the Luxembourg judicial authority submit a note of reimbursable fees and costs to this Court and to Plaintiff's legal representative

as follows:

The Honorable Stuart M. Bernstein
United States Bankruptcy Judge
United States Bankruptcy Court for the Southern District of New York
One Bowling Green
New York, NY 10004-1408

Oren J. Warshavsky, Esq. Baker & Hostetler LLP 45 Rockefeller Plaza New York, NY 10111 Tel: +1.212.589.4200

Fax: +1.212.589.4201

Email: owarshavsky@bakerlaw.com

The Bankruptcy Court will guarantee that Plaintiff will reimburse the Luxembourg judicial authority in full for all costs incurred in the taking of the evidence sought.

SECTION IV

The Bankruptcy Court expresses its gratitude and states that the courts of the United States are authorized by statute, 28 U.S.C. Section 1782 of the United States Code, to extend similar assistance to the tribunals of Luxembourg and shall be ready and willing to provide reciprocal assistance in a similar case when required.

The Bankruptcy Court takes this opportunity to extend to the judicial authorities of Luxembourg the assurances of the highest consideration.

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Dated:	, 201	9 HON. STUART M. BERNSTEIN		
	New York, New York	UNITED STATES BANKRUPTCY JUD	UNITED STATES BANKRUPTCY JUDGE	
Officia	al Seal of the United St	ates Bankruptcy Court for the Southern District of N	New York:	

ATTACHMENT A

Definitions

The witness shall please review these terms prior to the provision of testimony:

- A. The term "AFS" refers to the Alternative Fund Services group at HSBC Securities Services, including, without limitation, its subsidiaries, divisions, officers, directors, managers, agents, representatives, and employees.
- B. The term "Alpha Prime" refers to Alpha Prime Fund Limited and anyone acting on behalf of or for the benefit of Alpha Prime Fund Limited, including, without limitation, its current and former parents, subsidiaries, divisions, officers, directors, principals, managers, members, shareholders, agents, representatives, employees, attorneys, nominees, servants, predecessors, successors, and affiliates.
- C. The term "BA Worldwide" refers to BA Worldwide Fund Management Limited, including, without limitation, its current and former parents, subsidiaries, divisions, officers, directors, principals, partners, managers, members, shareholders, agents, representatives, employees, attorneys, nominees, servants, predecessors, successors, and affiliates.
- D. The term "Bank Austria" refers to UniCredit Bank Austria AG, including, without limitation, its subsidiaries, divisions, officers, directors, principals, partners, managers, members, shareholders, agents, representatives, employees, attorneys, nominees, servants, predecessors, successors, and affiliates.
- E. The term "BLMIS" refers to Bernard L. Madoff Investment Securities LLC, including, without limitation, its subsidiaries, divisions, officers, directors, principals, partners, managers, members, shareholders, agents, representatives, employees, attorneys, nominees, servants, predecessors, successors, and affiliates.
- F. The term "Dr. Fano" refers to Ursula Radel-Leszczynski, and includes any other names she may have used, including without limitation Ursula Fano, Ursula Fano-Leszczynski, and Ursula Radel.
- G. The term "GFS" refers to the Global Fund Services group at Bank of Bermuda, including, without limitation, its subsidiaries, divisions, officers, directors, managers, agents, representatives, and employees.
- H. The term "HSBC" refers to the global banking and financial services organizations referred to as the HSBC Group, including, without limitation, HSBC Bank plc, HSBC Bank USA, N.A., HSBC USA Inc., HSBC Securities Services (Bermuda) Limited, HSBC Securities Services (Luxembourg) S.A., HSBC Bank Bermuda Limited, HSBC Institutional Trust Services (Bermuda) Limited, HSBC Fund Services (Luxembourg) S.A., HSBC Institutional Trust Services (Ireland) Limited, HSBC Securities Services (Ireland) Limited, HSBC Private Bank (Suisse) S.A., HSBC Bank (Cayman) Limited, and current and former parents, subsidiaries, divisions, officers, directors, principals, managers, members, shareholders,

agents, representatives, employees, attorneys, nominees, servants, predecessors, successors, and affiliates.

- I. The term "HSS" refers to HSBC Securities Services, including, without limitation, its subsidiaries, divisions, officers, directors, managers, agents, representatives, and employees.
- J. The term "HSSL" refers to HSBC Securities Services (Luxembourg) S.A., including, without limitation, its current and former parents, subsidiaries, divisions, officers, directors, principals, partners, managers, members, shareholders, agents, representatives, employees, attorneys, nominees, servants, predecessors, successors, and affiliates.
 - K. The term "Madoff" refers to Bernard L. Madoff.
- L. The term "Primeo" refers to Primeo Fund, including, without limitation, its subsidiaries, divisions, officers, directors, principals, partners, managers, members, shareholders, agents, representatives, employees, attorneys, nominees, servants, predecessors, successors, and affiliates.

Questions to Be Put to Witness

Roles at HSSL

- 1. Can you confirm that Exhibit 1 is a copy of your first witness statement from a trial in the Cayman Islands involving Primeo and HSSL?
- 2. In paragraph 19 on page 8 of Exhibit 1, you state, "My first position at HSSL was as General Manager of Corporate Trust (which later became known as Global Fund Services ('GFS')), in which capacity I had responsibility for fund administration, global custody, transfer agency, banking and credit services to collective investment funds and institutional investors. The day to day fund administration and custody services provided to funds were performed by specialist teams within HSSL and the head of each of the fund administration, custody, and transfer agency departments reported to me."
 - a. Is that statement still accurate?
 - b. Can you please explain what is mean by the term "specialist teams"?
 - c. What information did you receive from these "specialist teams"?
 - d. What were your specific responsibilities with respect to fund administration?
 - e. What were your specific responsibilities with respect to global custody?

- f. What were your specific responsibilities with respect to transfer agency?
- g. What were your specific responsibilities with respect to banking and credit services?
- 3. In paragraph 23 on page 9 of Exhibit 1, you state, "Credit was regularly extended by HSSL to its fund custody clients for foreign exchange, overdraft and (later) leverage purposes and a significant part of my work in the early 2000s involved reviewing credit proposals submitted to the Luxembourg credit committee."
 - a. Is that statement still accurate?
 - b. What was the Luxembourg credit committee?
 - c. Who were the committee members?
 - d. What did your work in connection with the Luxembourg credit committee entail?
- 4. In paragraph 75 on page 25 of the same document, you state, "In late 2001, I became Deputy Global Head of Client Services for GFS, which among other things involved reviewing credit proposals submitted by GFS offices globally. This was a global role, however I continued to be based in Luxembourg and to report to Mr Wilcockson, who had become Global Head of Client Services for GFS."
 - a. Is that statement still accurate?
 - b. Did this new position require you to review all credit proposals from GFS offices?
 - c. What were your other responsibilities as Deputy Global Head of Client services for GFS?
 - d. Did anyone report to you?
 - e. If so, who?
 - f. Did you report to anyone?
 - g. If so, to whom did you report?
 - h. Did you ever leave this position?
 - i. When did this position end?
- 5. In paragraph 155 on page 47 of Exhibit 1, you state, ". . . at the end of 2004 I was appointed Global Chief Administrative Officer of AFS."

- a. What were your responsibilities as Global Chief Administrative Officer of AFS?
- b. Did anyone report to you in your capacity as Global Chief Administrative Officer of AFS?
- c. If so, who reported to you?
- d. Did you report to anyone in your capacity as Global Chief Administrative Officer of AFS?
- e. If so, to whom did you report?
- f. How long were you in this position?

Primeo

- 6. In paragraph 52 on page 17 of Exhibit 1, you state that you were appointed a director of Primeo on August 15, 2000?
 - a. Is that statement still accurate?
 - b. Did anyone invite you to join the Primeo board?
 - c. If so, who invited you?
 - d. Were any reasons provided as to why you were asked to be a director?
 - e. Did you take any steps to prepare you for being a director?
 - f. What did you do to prepare for being a director of Primeo?
 - g. What did your role as director of Primeo entail?
 - h. Did your role as director of Primeo remain the same until you resigned from the Board of Directors?
 - i. How many hours per month did you devote to your duties as a Primeo Director?
 - j. What types of tasks did you perform as a Primeo Director?
 - k. With whom did you communicate about your responsibilities as a director of Primeo?
- 7. Can you confirm that Exhibit 2 is a copy of your third witness statement from the Primeo v. HSSL trial in the Cayman Islands?

- 8. In paragraph 15 of Exhibit 2 on page 6, you describe BA Worldwide as being "responsible for the day-to-day management of Primeo as well as advising the Primeo board in relation to the investment strategy and risks."
 - a. Is that statement still accurate?
 - b. What were the "day-to-day management functions" of BA Worldwide?
 - c. Who at BA Worldwide performed these management functions?
 - d. Please explain what BA Worldwide did to advise the board in relation to the investment strategy and risks.
 - e. What advice did BA Worldwide give the Primeo board regarding investment strategy and risks?
 - f. Who at BA Worldwide performed these advisory functions?
 - g. Who was responsible for the analysis underlying the advice?
 - h. Did BA Worldwide ever discuss with Primeo directors or management the risks with respect to BLMIS?
 - i. If so, what risks were discussed?
- 9. In paragraph 16 of Exhibit 2, you state that a "small team of people" from BA Worldwide "worked with Dr. Fano in respect of the work [BA Worldwide] performed as the investment advisor to Primeo."
 - a. Is that statement still accurate?
 - b. Who is Dr. Fano?
 - c. Who was on this "small team of people"?
 - d. Do you know what this "small team of people" did?
 - e. Can you please describe what this "small group of people" did?
- 10. Please refer to Exhibit 1. In paragraph 56 on page 20, you state that Dr. Fano's role was "fundamental to the management of the fund. In my experience, the board did not make any important decision concerning Primeo without her input. Dr. Fano was effectively the general manager of the fund (which did not have any of its own employees) on a day-to-day basis. She determined, for example, how to allocate the fund's assets, which was then approved by members of the board."
 - a. Is that statement still accurate?

- b. How did Dr. Fano determine the allocation of Primeo's assets?
- c. Did anyone assist Dr. Fano with the allocation of Primeo's assets?
- d. Who assisted Dr. Fano with the allocation of Primeo's assets?
- e. Would you describe Dr. Fano as highly knowledgeable about Primeo's trading activities?
- f. Did Dr. Fano have any responsibilities in connection with the allocation of Alpha Prime's assets?
- g. What was Dr. Fano's role with respect to the allocation of Alpha Prime's assets?
- h. Was Dr. Fano's role with respect to Alpha Prime analogous to her role at Primeo?
- i. Would you characterize her as the "general manager" of Alpha Prime as well?
- 11. In paragraph 57 on page 20, you state, "Dr. Fano seemed very knowledgeable about BLMIS and she told the board that she visited Mr. Madoff and BLMIS approximately twice a year in her capacity as the President of Primeo's investment adviser, BA Worldwide."
 - a. Is that statement still accurate?
 - b. Why did you think Dr. Fano was very knowledgeable about BLMIS?
 - c. Did you ever discuss any of these BLMIS due diligence visits with Dr. Fano?
 - d. If so, what did you discuss?
- 12. In paragraph 42 of Exhibit 1 on page 14, you state, "I recall that Dr. Fano had told me that Mr. Madoff was extremely protective of his trading strategy and that BLMIS also acted as broker-dealer to the stock transactions and held custody of the assets of his clients both as a means by which to protect the confidentiality of his trading strategy and to optimize the efficiency of his trading."
 - a. Is that statement still accurate?
 - b. When did Dr. Fano tell you this?
 - c. Did Dr. Fano make this statement in person, over the phone, or in writing?

- d. Was anyone else present when Dr. Fano told you this?
- e. Did Dr. Fano explain to you how she knew that Madoff was protective of his trading strategy?
- 13. In paragraph 32 of Exhibit 1 on page 12, you state, "I now recollect that Eurovaleur Inc ... (a company that I understand was effectively owned and controlled by Ms Kohn) acted as sub-investment adviser to Primeo under an agreement between BA Worldwide and Eurovaleur dated 1 January 1994."
 - a. Is that statement still accurate?
 - b. Does "Ms Kohn" refer to Sonja Kohn?
 - c. Who is Sonja Kohn?
 - d. Are you familiar with a company called Eurovaleur?
 - e. What is Eurovaleur?
 - f. What functions did Eurovaleur perform as sub-investment adviser to Primeo?
 - g. Did you ever have any communications with Ms. Kohn?
 - h. If so, what was the subject matter of those communications?
 - i. When did you have those communications?
 - j. Did you ever have any communications with Eurovaleur?
 - k. If so, what was the subject matter of those communications?
 - 1. When did you have those communications?
- 14. In paragraph 18 of Exhibit 2 on page 7, you state, "the primary purpose of the subadvisory relationship between [BAWW] and Eurovaleur was for Ms. Kohn to maintain the relationship with BLMIS."
 - a. Is that statement still accurate?
 - b. What did you mean by "maintain the relationship with BLMIS"?
 - c. What did you understand Ms. Kohn's role to be with respect to maintaining the relationship with BLMIS?
- 15. You also state in paragraph 18, "I was not aware of Eurovaleur performing any significant investment advisory activities with respect to Primeo. I do not recall Eurovaleur being visible at all."

- a. Is that statement still accurate?
- 16. Please refer to Exhibit 1. In paragraph 35 on page 13, you state, "When I met with Ms Kohn at Bank Medici's offices in Vienna in about 2003 she told me that she had been instrumental in the relationship between Mr Madoff and a number of funds, including Primeo. Ms Kohn was understood to have privileged access to Mr Madoff and was involved with a number of funds, including Primeo (and later Alpha and Herald), that placed substantially all of their assets with BLMIS."
 - a. Is that statement still accurate?
 - b. What was the purpose of your 2003 meeting with Ms. Kohn?
 - c. What was discussed at the meeting?
 - d. What did you mean by "Ms. Kohn was understood to have privileged access to Mr. Madoff"?
 - e. Who told you that Ms. Kohn had privileged access to Madoff?
- 17. In paragraph 33 of Exhibit 1, you described Ms. Kohn as a "gatekeeper" to Madoff, what did you mean by that?
- 18. In paragraph 36 of Exhibit 1, you also describe Ms. Kohn as being "protective of the relationship with Mr. Madoff," what did you mean by that?
- 19. In paragraph 32 of Exhibit 1 at page 12, you state, "I was aware that Dr. Fano was in contact with Sonja Kohn," how would you describe the relationship between Dr. Fano and Sonja Kohn?
 - a. Do you know what Dr. Fano discussed with Sonja Kohn?
 - b. If so, can you please describe what you know of those discussions?
- 20. In paragraph 23 of Exhibit 1 at page 9, you state, "Credit was regularly extended by HSSL to its fund custody clients for foreign exchange, overdraft and (later) leverage purposes and a significant part of my work in the early 2000s involved reviewing credit proposals submitted to the Luxembourg credit committee. It was during this work that I first became aware of Bernard Madoff . . . and Bernard L Madoff Investment Securities LLC."
 - a. Is that statement still accurate?
 - b. Had you already been appointed to the board of Primeo when you first learned of BLMIS?
 - c. Did you learn of BLMIS in connection with Primeo or another fund?

- d. Did you learn of BLMIS as part of the HSSL Credit Committee?
- 21. Can you confirm that Exhibit 3 is an email you received from David Bailey on May 26, 2000 concerning discussions he and Jesper Steiness had with Dr. Fano and Ms. Kohn concerning listing Primeo on the German stock exchange?
 - a. Can you confirm that fieldin@bankofbermuda.com was your email address as of May 26, 2000?
 - b. Who is David Bailey?
 - c. What was David Bailey's role at HSSL?
 - d. Who is Jesper Steiness?
 - e. What was Jesper Steiness's role at HSSL?
- 22. In that same Exhibit 3, Mr. Bailey writes, "To achieve a listing [on a German stock exchange] we will need to produce a weekly estimated valuation of the Fund. At present only monthly valuations are produced and these are based on the monthly statements produced by Madoff... We have explored this issue previously and the main problem is obtaining a constant supply of statements from Madoff to enable us to produce valuations."
 - a. Can you please explain your understanding of why Mr. Bailey is writing this to you?
 - b. Was this the first time you learned of Madoff?
 - c. Were you aware of Madoff's purported strategy at this point?
 - d. Were you aware of Madoff's structure at this point?
 - e. What is your understanding of the "problem" of "obtaining a constant supply of statements from Madoff"?
 - f. Was this the first time you learned of any such problem concerning the supply of statements from BLMIS?
 - g. Do you know if you were able to consistently obtain weekly estimated valuations from other funds?
 - h. Were you aware of any efforts at HSSL to cure the problem of "obtaining a constant supply of statements from Madoff"?
 - i. If so, can you please describe those efforts?

November 2, 2000 Visit to BLMIS

- 23. Please refer to Exhibit 1. In paragraph 66 on page 22, you state, "In November 2000, my HSSL colleague Saverio Fiorino and I were scheduled to travel to New York on HSSL business that was unrelated to Primeo or BLMIS. Mr Fiorino took the opportunity to arrange a meeting at the offices of BLMIS on 2 November 2000 as both a courtesy visit and to request the more frequent information that would be needed on account of the proposed change to Primeo's dealing frequency."
 - a. Is this statement accurate?
 - b. If not, can you please explain why not?
 - c. Who is Saverio Fiorino?
 - d. What was Mr. Fiorino's role at HSSL?
 - e. Was this your first contact with BLMIS?
 - f. What precipitated your visit to BLMIS in 2000?
 - g. Did anyone instruct you to visit BLMIS in 2000?
 - h. If so, who instructed you to visit BLMIS in 2000?
 - i. Did you speak to anyone at Bank of Bermuda prior to your visit to BLMIS?
 - j. Did you do anything to prepare for this visit to BLMIS?
 - k. What materials, if any, did you review in advance of your visit to BLMIS?
 - 1. What was the purpose of this visit?
 - m. Did you speak with anyone at BLMIS prior to your visit?
 - n. If so, with whom did you speak?
 - o. What did you discuss?
 - p. With whom did you meet at BLMIS during that trip?
 - q. Where did you meet with them?
 - r. What was discussed during each of those meetings?
 - s. Did you meet with Madoff?

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- t. Did Madoff discuss his investment management business during that trip? If so, what did he say?
- u. Did Madoff discuss his broker-dealer business during that trip? If so, what did he say?
- v. Did Madoff ever tell you that his investment management business was closed to new business?
- w. If so, did he give you a reason for that?
- x. Did Madoff's explanation as to why he was closed to new business make sense to you?
- y. Were you aware of other BLMIS feeder funds when you met with him in November 2000?
- z. Of how many BLMIS feeder funds were you aware?
- aa. Can you please name those BLMIS feeder funds?
- bb. Did you discuss HSSL receiving more frequent information from BLMIS due to the proposed change to Primeo's dealing frequency?
- cc. Prior to your visit to BLMIS, how often was HSSL receiving information from BLMIS?
- dd. Did BLMIS provide more frequent information to HSSL after this meeting?
- ee. Did this information include Madoff's trading activity on behalf of Primeo?
- ff. If so, in what form did HSSL receive the information on trading activity?
- gg. Did anyone at HSSL review this information?
- hh. Who at HSSL reviewed this information?
- ii. Did you discuss this visit with anyone at HSSL or Bank of Bermuda?
- jj. Did you or Mr. Fiorino prepare notes or a report on this visit to BLMIS?
- kk. If so, were those notes or reports circulated?

ll. To whom were those notes or reports circulated?

Credit Requests and Managed Accounts

- 24. Can you confirm that Exhibit 4 is an email you wrote to the Luxembourg Bank of Bermuda Board on June 8, 2001 with the subject "IMPORTANT High Risk Pricing"?
 - a. This email states that it was a "recap of our various discussions on" high risk pricing. With whom did you have these conversations?
- 25. In Exhibit 4, you also write, "Manager may not supply holdings information even at the clients [sic] request (Madoff??) in this case we need effective protection against pricing liability or we must exit/refuse the business," is this an accurate statement?
 - a. Does the "Manager" refer to BLMIS?
 - b. Did Bank of Bermuda ever receive holdings information from BLMIS?
 - c. Did you ever get "effective protection against pricing liability"? If not, why didn't you exit the business?
- 26. Under the heading, "Policy," you state, "Full price check of managed account holdings to be performed for each pricing of the fund."
 - a. Were "full price check[s] of managed account holdings... for each pricing of the fund" implemented for Madoff funds?
 - b. If not, why not?
 - c. If so, who performed these price checks?
- 27. Under "actions required", you wrote, "Sav Issue up to date list of affected funds and identify those where price 30th June 2001 protection is already required or we need to consider exit."
 - a. Is that correct?
 - b. Does "Sav" refer to Saverio Fiorino?
 - c. Did Mr. Fiorino ever issue this list?
 - d. Was Primeo on this list referred to in the email?
 - e. Did Bank of Bermuda consider exiting the relationship with BLMIS?
- 28. Exhibit 4 goes on to state, "Complete Implementation of policy and procedures for all funds 31st December 2001." Was this ever implemented?

- 29. The email then states, "Jean-Claude Implement price protection (if available) where required 30th September 2001. Jean-Claude Exit any that we are not able to make risk compliant 31st December 2001. Jean-Claude Attempt to implement price protection for all funds with high 30th June 2002 price risk investments as any of them could get into a problem situation."
 - a. Does "Jean-Claude" refer to Jean-Claude Stoffel?
 - b. What was Mr. Stoffel's role at HSSL?
 - c. Were these price protections ever implemented?
 - d. What were you referring to when you wrote about risk of getting into "a problem situation"?
- 30. Can you confirm that Exhibit 5 is a copy of the minutes from a Luxembourg Credit Committee meeting held on December 14, 2001?
- 31. On page 5, the minutes state, "The Committee resolved that Managed Accounts should be monitored monthly as all assets are in custody at broker (Madoff)."
 - a. Is that statement correct?
 - b. What types of monitoring were discussed during the meeting?
 - c. Were the Madoff managed accounts ever monitored monthly?
 - d. If so, what type of monitoring was performed?
 - e. Who at HSSL monitored the Madoff managed accounts?
- 32. Can you confirm that Exhibit 6 is an email chain between you, the Luxembourg Credit Committee, Isabelle Goethals, Chris Wilcockson, and Tom Young from March 4 and 5, 2002?
 - a. At page 3 of this email chain, you approve a credit request, is that accurate?
 - b. Whose credit request were you approving?
 - c. What does "OD" refer to in Ms. Goethals' original email?
 - d. What does "NVAC" refer to in your response?
- 33. In this same email chain, Ms. Goethals responds, "Sorry for the confusion, Madoff acts as sub custodian: all assets are their custody, is that correct?
- 34. In response, Mr. Wilcockson states, "presumably we therefore do not lend to the Madoff assets."

- a. Who is Chris Wilcockson?
- b. What was your understanding of Mr. Wilcockson's statement?
- c. Was it Bank of Bermuda's policy to not lend money to funds where the collateral was not within Bank of Bermuda's custody?
- d. Why would Bank of Bermuda not use assets out of its custody as collateral?
- 35. Ms. Goethals responds to Mr. Wilcockson by stating, "When received by [redacted] subscriptions for the Fund are paid to Madoff who then make the external investments statements are reconciled (twice a month) against IMS."
 - a. Who is Ms. Goethals?
 - b. Was it your understanding that Ms. Goethals was referring to BLMIS statements?
 - c. Did HSSL reconcile BLMIS statements twice a month?
 - d. What does "IMS" refer to?
 - e. Who at HSSL was performing this reconciliation?
- 36. Ms. Goethals also states, "A complete due diligence was carried on Madoff as the main issue was that Madoff acts 'without proper instruction.""
 - a. Is that statement accurate?
 - b. What due diligence is Ms. Goethals referring to?
 - c. Who carried out this due diligence?
 - d. What was your understanding of the statement, "Madoff acts without proper instruction"?
 - e. Why was "Madoff acting without proper instruction" an issue?
 - f. Who at HSSL was responsible for approving the Madoff credit requests?
 - g. Why was Luxembourg Credit Committee extending credit based on Madoff assets if it was against policy?
- 37. Ms. Goethals then states in the email chain, "it was resolved that Madoff would signed [sic] a side letter to the sub-custodian agreement stating that... 'any instruction relating to a free delivery or free transfer of cash/securities shall be subject to the approval of an officer of the Custodian of the Fund.""

- a. Why was this side letter necessary?
- b. Was such a side letter ever signed by Madoff?
- c. If he did not sign the side letter, did he provide any reasons for not signing?
- d. What reasons did Madoff provide for not signing the side letter?
- 38. Ms. Goethals then states, "I have contacted Emer and Louise in [redacted] office in order to confirm the actual process and to ensure that we are adequately covered by the documentation between [redacted] and Madoff. We will revert to the Committee in due course."
 - a. Does "Emer" refer to Emer McDonald?
 - b. What was Emer McDonald's role with respect to Madoff?
 - c. Does "Louise" refer to Louis Gough?
 - d. What was Louise Gough's role with respect to Madoff?
 - e. Was the process to ensure adequate documentation ever confirmed?
 - f. If the process to ensure adequate documentation was never confirmed, why not?
 - g. Did Ms. Goethals ever revert to the committee regarding the process to ensure adequate documentation?
- 39. Tom Young responds, "While we did follow up initially, it was considered the responsibility of Bermuda to take whatever action they deemed appropriate. I have now asked Bermuda (Tony Riker) for an update and will pass it on to you as soon as I receive it. You may wish to consider adding this to the Documentation Status report and track it at Credit Committee."
 - a. Who is Mr. Young?
 - b. What "follow up" was Mr. Young referring to?
 - c. Did Bermuda ever take "appropriate" action?
 - d. What is the "Documentation Status report"?
 - e. Was this tracked at Credit Committee?

- 40. Mr. Young then stated, "Dublin has now deemed it appropriate to put the issues surrounding Madoff on the agenda for its Credit Committee and plan to pursue them in that forum."
 - a. Did Dublin credit committee discuss the "issues surrounding Madoff"?
 - b. If the Dublin credit committee did discuss the "issues surrounding Madoff," what issues were discussed?
 - c. Was this ever reported to the European credit committee?
- 41. Michael May then responds, "If the 'free deliveries' side letter is NOT in place, then not only is the collateral position pretty weak and we are lending outside policy, but no-one has signaled this to either Lux CC or the GFS Credit Committee."
 - a. Who is Michael May?
 - b. What did Mr. May mean by "no-one has signaled this to either Lux CC or the GFS Credit Committee"?
- 42. Can you confirm that Exhibit 7 is an email dated June 6, 2002 in which Mr. Fiorino emailed Claude Franka and Caroline Agletiner, regarding concerns that Mr. Madoff both provided a managed account statement and managed and custodied assets.?
 - a. Who is Claude Franka?
 - b. What was Claude Franka's role at HSSL?
 - c. Who was Caroline Agletiner?
 - d. What was Caroline Agletiner's role at HSSL?
- 43. Mr. Fiorino writes "I am raising these issues to Nigel (in respect of Primeo). Claude as agreed, were you careful in not mentioning the name of Madoff?)"
 - a. Were you aware of requests such as Mr, Fiorino's that Mr. Madoff's name not be mentioned in communications?
 - b. Did Mr. Fiorino explain to you why he did not want Mr. Franka to mention Madoff's name?
- 44. In the same email, Mr. Franka stated, "I have brought to [redacted] attention [Mr. Fiorino's] question with regard to the potential risk as administrator to deal with managed accounts like Madhoff [sic] for which the managed account statement is provided directly by Madhoff [sic] who also manage the assets. The first question he raised to my attention was in relation to the custody of the assets managed by Madhoff [sic]? Are the assets held

in custody with Madhoff [sic]? Does that mean that Madhoff [sic] is also a banking institution? I assumed yes but I was not sure."

- a. To whose attention did Mr. Franka bring these issues regarding administrator risk?
- b. Did Mr. Fiorino ever discuss with you "the potential risk as administrator to deal with managed accounts like [Madoff] for which the managed account statement is provided directly by [Madoff] who also manage the assets"?
- c. Did Mr. Fiorino ever discuss the issues regarding custody raised in this email with you?
- d. Did you take any actions in response to the discussion of the custody issues?
- 45. In the same email, Mr. Franka states, "He suggested that as administrator we should carry out a due diligence in respect of the administrative ability of the management company in respect of: segregation of tasks; try and obtain copies internal procedures; visit them if necessary."
 - a. Was due diligence with respect to separation of tasks ever carried out?
 - b. If not, why was due diligence with respect to separation of tasks not conducted?
 - c. Was due diligence with respect to BLMIS's internal procedures ever conducted?
 - d. If not, why was due diligence with respect to BLMIS's internal procedures not conducted?

Primeo Considers Registering as a UCITS Fund

- 46. Please refer to Exhibit 1. In paragraph 102 on page 32 of this document, you state, "In early 2002, Dr Fano approached me to ask whether it would be possible to operate a fund similar to Primeo as a société d'investissement à capital variable ('SICAV'), an openended fund structure common in Luxembourg, under the UCITS Regulations. Such a fund would allow broader marketing and distribution to investors. As the UCITS Regulations were more stringent, I asked Mr Fiorino in about May 2002 to analyse BLMIS's investment activity to determine whether the investment strategy of BLMIS would be UCITS-compliant."
 - a. Is that statement still accurate?

- b. Did Dr. Fano explain to you why she was considering operating a separate fund as a SICAV under the UCITS regulations?
- c. Why did you ask Mr. Fiorino to analyze Madoff's trading activity?
- d. Did you have questions as to whether Madoff's trading activity could be UCITS compliant?
- 47. Can you confirm that Exhibit 8 includes Additional Due Diligence Information" memoranda from 2002 concerning BLMIS?
- 48. On page 3 of Exhibit 8, there is a report called "Additional Due Diligence Information Relayed by Ursula Fano, Bank Austria, Vienna, during a meeting with Nigel Fielding and Jill Irwin on 16th May 2002," is that correct?
 - a. Who is Jill Irwin?
- 49. This report states, "Ursula stated that she monitors Madoff's performance, and also pays a visit to Madoff usually twice year to satisfy herself that everything is running properly."
 - a. Did Dr. Fano provide you with summaries of her visits to Madoff's offices?
 - b. Did Dr. Fano provide summaries of her visits to BLMIS to the Primeo board?
 - c. Did Dr. Fano provide summaries of her visits to BLMIS to the Alpha Prime board?
 - d. Did Dr. Fano explain to you what she did to satisfy herself that everything was "running properly" at BLMIS?
 - e. Did Dr. Fano discuss monitoring Madoff's performance?
 - f. If so, what did Dr. Fano tell you about her monitoring of Madoff's performance?
 - g. Did she say how she analyzed Madoff's performance or what metrics she looked at?
 - h. Did she tell you about her twice-yearly visits to BLMIS?
 - i. If so, what did she tell you about those visits to BLMIS?
 - j. Did she report to the Primeo or Alpha Prime boards about her visits to BLMIS?
 - k. If so, are there records of those reports?

- 1. If Dr. Fano reported to the Primeo or Alpha Prime Boards about her visits to BLMIS, what did she say?
- m. Did she report to the Primeo or Alpha Prime boards about her monitoring of BLMIS's performance?
- n. If so, are there records of those reports?
- o. If Dr. Fano reported to the Primeo or Alpha Prime Boards about her monitoring of BLMIS's performance, what did she say?
- 50. Can you confirm that Exhibit 9 is an email chain between you, Mr. Fiorino and Jill Irwin dated May 27 and 30, 2002?
- 51. In Mr. Fiorino's original email to you, he is reporting on an analysis of BLMIS's trading activity, is that correct?
 - a. Was this analysis undertaken to check on whether Madoff's trading would have breached UCITS regulation?
 - b. Why was HSSL analyzing whether Madoff's trading would have breached UCITS regulations?
 - c. Who performed this analysis?
- 52. On the first page of his email, Mr. Fiorino refers to "Catherine, the fund accountant, looking after Primeo," is that correct?
 - a. Who was "Catherine"?
 - b. What department was she part of?
 - c. Did she work for other funds in addition to Primeo?
 - d. Did Alpha Prime have a dedicated fund accountant?
 - e. If Alpha Prime did have a dedicated fund accountant, who was he or she?
- 53. On the first page of his email, Mr. Fiorino states, "As we don't keep the account on IMS, I have asked further checks to be done to fully reconcile the movements for August 2001."
 - a. What did you understand Mr. Fiorino to mean by this statement?
 - b. What is "IMS"?
 - c. Were the August 2001 "movements" ever reconciled?

- On the second page of the email, under the heading, "Activity during September 2001," Mr. Fiorino states, "During September he closes his hedging and positions. He buys again S&P 100 top names," is that correct?
- 55. Under the heading "Position as at 31/9/2001," Mr. Fiorino states, "Portfolio 31/9 show approx. 30 holdings in S&P100/500 companies," is that correct?
 - a. What was your understanding of Madoff's strategy with respect to S&P 100 securities?
- On the second page of the email, where Mr. Fiorino is discussing the activity in August 2001, he states, "[Madoff] goes into buying put options & selling calls (in both cases he is hedging the market going down) on the S&P100 Index for a net profit of USD11mio. As a result of his hedging Madoff is up by 0.76%, when the S&P100 is down by 7.26% and S&P 500 down 6.4%. On the other hand he is making a profit on the hedging of 4.3%."
 - a. What was your understanding of this statement?
 - b. What was your understanding of the purpose of the options trading in Madoff's strategy?
- 57. Mr. Fiorino then states in the email, "This can only be due to (1) he has picked S&P100 stocks that performed best (2) he got a very good price from his UST Bills (3) he speculated on the S&P."
 - a. What was your understanding of this statement?
- 58. Mr. Fiorino also notes, "During the above period he has never dealt in OTC options or other derivatives."
 - a. What was your understanding of this statement?
- 59. Further down, at point 3 under the heading, "Ucits Part I restrictions & call options in relation with Madoff?" Mr. Fiorino states, "He hedges his long securities using options on indices traded on regulated market."
 - a. What was your understanding of this statement?
 - b. Is this consistent with your general understanding of Madoff's options trading?
- 60. On May 30, 2002, you responded to Mr. Fiorino, "I think the biggest issue is that while Madoff may have stayed within the restrictions, in this period at least, he is not likely to want to be restricted."
 - a. Do you have an understanding of why Madoff did not want to be restricted?

- b. What did you mean by the phrase "in this period at least"?
- 61. Can you confirm that Exhibit 10 is an email that you forwarded to Dr. Fano on May 30, 2002 containing Mr. Fiorino's analysis?
- 62. In this email, you state, "Some tightening up of the custody and sub-custody arrangements between ourselves and Madoff would also be need [sic] to comply with the UCITS Part I regulations."
 - a. What did you mean by "tightening up the custody and sub-custody arrangements"?
 - b. Why was a "tightening up" necessary?
- 63. Can you confirm that Exhibit 11 is a July 3, 2002 email to you, Mr. Fiorino and Ms. Irwin responding to the email in Exhibit 10?
- 64. The email states, "I feel myself a little bit uncomfortable with his using short puts."
 - a. What was your understanding of this statement?
 - b. Did Dr. Fano explain why she was "uncomfortable with his using short puts"?
 - c. Did you ever follow up on this?
- 65. Dr. Fano then states, "Generally there should be long puts and short (covered) calls since some months we make an analysis of the portfolio and there were no short puts so far..."
 - a. Did Dr. Fano share these analyses with you or with the Primeo board?
 - b. Do you know how often she analyzed Madoff's trading in this fashion?
- 66. Dr. Fano then states, "A serious problem could be, however, BoBLux' [sic] reinforcement of responsibility as the custodian I would have to check this issue (very cautiously) with Madoff first, in order to know how far could he go (if he would like at all...)."
 - a. What is BoB Lux?
 - b. Did Dr. Fano explain why she felt this issue would have to be broached "very cautiously with Madoff"?
- 67. Please refer to Exhibit 1. In paragraph 104 on page 32 of this document, you state, "I understood this to be a reference to Mr. Madoff's resistance to changing the BLMIS business model in any way. I also understood Dr. Fano to be concerned about the

requirement to register and disclose BLMIS as the investment manager in fund documentation."

- a. Is that statement still accurate?
- b. Why would registering and disclosing BLMIS as the investment manager in fund documentation be problematic?
- c. Did Dr. Fano ever tell you that she raised this issue with Madoff?
- d. Was Madoff disclosed in fund documentation relating to Primeo or Alpha Prime?
- e. If not, why was Madoff not disclosed in fund documentation relating to Primeo or Alpha Prime?
- f. Did Madoff mandate that he not be disclosed as the investment manager in fund documentation?

2002 Sub-Custody Agreement

- 68. Can you confirm that Exhibit 12 is a sub-custody agreement between BLMIS and HSSL dated August 7, 2002?
 - a. What was the purpose of the 2002 Sub-Custody Agreement?
- 69. Please refer to Exhibit 1. In paragraph 81 on page 26 of this document, you state, "in hindsight, a sub-custody agreement may not have been the most appropriate form of agreement."
 - a. Why was it created as a sub-custody agreement?
 - b. If this was not the most appropriate form of agreement, what would have been a more appropriate form?
 - c. Who drafted the 2002 Sub-Custody Agreement?
 - d. Was it approved by anyone at HSSL before it was signed?
 - e. If the 2002 Sub-Custody Agreement was approved, who approved it?
 - f. If the 2002 Sub-Custody Agreement was not approved by anyone at HSSL, why not?
 - g. Was HSSL's custody department involved in the drafting?
 - h. Did anyone who was part of the custody department review it?

- i. If someone in HSSL's custody department reviewed the 2002 Sub-Custody Agreement, who was it?
- j. If no one in HSSL's custody department reviewed the 2002 Sub-Custody Agreement, why not?
- k. Did you discuss it with anyone in HSSL's custody department?
- 1. If you did not discuss the 2002 Sub-Custody Agreement with anyone in HSSL's custody department, why not?
- m. Did you discuss the 2002 Sub-Custody Agreement with anyone in GFS's custody department?
- n. With whom, if anyone, did you discuss it in GFS's custody department?
- o. If you did not discuss the 2002 Sub-Custody Agreement with anyone in GFS's custody department, why not?
- p. Did you discuss the 2002 Sub-Custody Agreement with anyone in HSSL's credit department?
- q. Did anyone in the credit department review the 2002 Sub-Custody Agreement?
- r. If someone in HSSL's credit department reviewed the 2002 Sub-Custody Agreement, who was it?
- s. If no one in the credit department reviewed the 2002 Sub-Custody Agreement, why not?
- t. Did anyone at Primeo review the 2002 Sub-Custody Agreement before it was signed?
- u. Did you discuss the 2002 Sub-Custody Agreement with anyone at Primeo?
- v. If you did not discuss the 2002 Sub-Custody Agreement with anyone at Primeo, why not?
- 70. In paragraph 80 of Exhibit 1, you state, "I considered that there was a greater prospect of BLMIS agreeing to enter into an agreement with HSSL that could be presented as similar to that which was already in place between BLMIS and another entity within the BOB Group."
 - a. Is that statement still accurate?

- b. What is the BOB group?
- 71. Did you discuss the 2002 Sub-Custody Agreement with Madoff at the July 17, 2002 visit to BLMIS?
 - a. If yes, what did you tell Madoff about the purpose of the 2002 Sub-Custody Agreement?
 - b. What was Madoff's reaction?
- 72. Can you confirm that Exhibit 13 is the call notes from the July 17, 2002 meeting at BLMIS?
 - a. Who drafted these call notes?
- 73. This document indicates that a draft sub-custody agreement was left with Madoff for review, is that correct?
 - a. Did Madoff send you comments or revisions to the agreement?
- 74. Can you confirm that Exhibit 14 is a fax you sent to Madoff on July 26, 2002, sending him a revised Sub-Custody Agreement?
- 75. In the fax, you state, "We have confirmed with Bank Austria and [redacted] that they have no objection to the account names with you being re-designated to include Bank of Bermuda (Luxembourg) S.A."
 - a. Why was Primeo's account name "re-designated" to include HSSL?
 - b. Who instigated the re-designation?
- 76. Who signed the sub-custody agreement on behalf of HSSL?
 - a. Do you know if Chris Wilcockson and Michael May signed the agreement?
 - b. Did they have a role in drafting or approving the agreement?
 - c. What was Mr. Wilcockson's role with respect to Madoff?
 - d. What was Mr. May's role with respect to Madoff?

July 17, 2002 Visit to BLMIS

77. Please refer to Exhibit 1. In paragraph 88 on page 28 of this document, you state," On 17 July 2002, Mr. Healy and I visited BLMIS's New York offices and met with Mr. Madoff for approximately two hours."

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- a. What was the purpose of the visit to BLMIS?
- b. Was this visit part of due diligence you were conducting?
- c. If so, did anyone instruct you to conduct the due diligence?
- d. If you were instructed to conduct due diligence, who instructed you?
- e. Were you instructed to visit BLMIS?
- f. If you were instructed to visit BLMIS, who instructed you?
- g. What did you do to prepare for the meeting?
- h. During the visit, did you ask Mr. Madoff to fill out or respond to due diligence questionnaire?
- i. Who was involved in preparing the due diligence questionnaire?
- j. What kinds of questions did the due diligence questionnaire contain?
- 78. In paragraph 92 of Exhibit 1, you state, "There were a few items on the due diligence questionnaire that did not apply to BLMIS because it was not a bank."
 - a. Who made the determination that these questions did not apply to BLMIS?
 - b. How was this determination made?
 - c. Did you add any questions that would be applicable to BLMIS?
 - d. If you did not add any questions that would be applicable to BLMIS, why not?
 - e. Did you receive any documents or information from Madoff that was not requested on the questionnaire?
 - f. If you did receive any information not requested on the questionnaire, what was it?
- 79. In paragraph (g) on page 5 of Exhibit 1, you state, "From my perspective, [the due diligence] was to ensure that BLMIS was appropriately qualified, in accordance with relevant market practice, to handle custody of our clients' assets such that we could be suitably satisfied that BLMIS could effect the free transfer of such assets to HSSL upon our request for our credit protection purposes."
 - a. Is that statement still accurate?

- b. How did you go about ensuring that BLMIS was appropriately qualified to handle custody of your clients' and that it could effect the free transfer of assets to HSSL?
- 80. You also state, "I led that due diligence, which included a visit to BLMIS's New York offices on 17 July 2002."
 - a. Other than the visit to BLMIS, what comprised this due diligence?
- 81. In paragraph 87 on page 28 of Exhibit 1, you state, "I decided to ask Fergus Healy, a lawyer working in a business development role within GFS, to assist with the due diligence visit as I valued his experience and insight."
 - a. Who is Fergus Healy?
 - b. Why did you ask Fergus Healey to accompany you?
 - c. What expertise did he have?
 - d. Did you do any preparatory work with Mr. Healey before the meeting?
 - e. If so, what did that preparatory work entail?
 - f. Did Mr. Healey participate actively in the meeting?
 - g. How long did the meeting last?
 - h. What did you discuss at the meeting?
 - i. Did you discuss Madoff's strategy?
 - j. Did Mr. Healey record his observations during the due diligence visit?
 - k. If so, how did he record his observations?
 - 1. Were Mr. Healey's observations ever circulated?
- 82. In paragraph 99 on page 31 of Exhibit 1, you state, "Overall, the due diligence review and visit went well, and nothing seemed to be out of the ordinary."
 - a. On what basis did you conclude that the due diligence visit with Mr. Madoff "went well and that nothing seemed to be out of the ordinary"?
 - b. How many due diligence visits had you conducted at this time?

- c. Did you do anything to verify the answers that Madoff gave you at the meeting and in response to the questionnaire?
- 83. Please refer to Exhibit 7. In that email, Mr. Franka states, "... as administrator we should carry out a due diligence in respect of the administrative ability of the management company in respect of: segregation of tasks; try and obtain copies internal procedures; visit them if necessary."
 - a. Did you inquire about segregation of tasks during your due diligence visits to BLMIS?
 - b. If not, what was your reason for not asking Madoff about the segregation of tasks at BLMIS?
 - c. Did you try to obtain copies of BLMIS's internal procedures?
 - d. If not, what was your reason for not asking Madoff about BLMIS's internal procedures?
- 84. Please refer to Exhibit 8. Under the heading, "Additional Due Diligence Information Relayed by Bernard L. Madoff during meeting with Nigel Fielding and Fergus Healey on 17th July 2002," at the bottom of page one of this document states, "Company is not a bank. Overdrafts are not permitted...", who wrote that statement?
 - a. Does "Company" refer to BLMIS?
 - b. If "overdrafts are not permitted," would this also include margin trading not being permitted?
- 85. Please refer to Exhibit 13. This document states, "The only area where BLM was not prepared to answer was in relation to disclosing information about Madoff's client base. As a private company, Madoff is only required, and chooses only, to disclose this detail to the company's regulator, the SEC this seems reasonable."
 - a. Who is the author of this document?
 - b. Was this question regarding a company's client base part of your standard sub-custodian due diligence form?
 - c. Were there other sub-custodians who refused to answer this question?
 - d. Why did it seem reasonable that Madoff said he would only provide this information to the SEC?
 - e. At this time, did you know what part of Madoff's business was regulated by the SEC?

- 86. Please refer to Exhibit 1. In paragraph 96 on page 30 of this document, you state, "As part of the due diligence exercise, Mr. Madoff provided the most recent BLMIS audited financial accounts for the year ended 31 October 2001 and an Internal Control Report issued by its external auditors, Friehling & Horowitz. I reviewed these documents and noted that BLMIS was well capitalized and that no issues were raised. In particular, the auditors' Internal Control Report confirmed that client assets and records were properly controlled and maintained by BLMIS."
 - a. How did you come to the conclusion that BLMIS was well capitalized?
 - b. How did the auditors' Internal Control Report confirm that client assets and records were properly controlled and maintained by BLMIS?
- 87. Can you confirm that Exhibit 15 is a true and accurate copy of the transcript of Day 17, December 1, 2016, of the trial in the Cayman Islands involving Primeo and HSSL?
 - a. Can you confirm that this transcript includes your testimony?
 - b. Was your testimony given under oath?
- 88. On page 47 of the document, beginning at line 4 of page 181 of the transcript, you testify about an Ernst & Young document, Summary Review Memorandum for the year ending December 31, 2002, is that correct?
 - a. Was the Summary Review Memorandum regarding Primeo?
 - b. What was the Summary Review Memorandum?
 - c. Was the Summary Review Memorandum provided to the Primeo board?
 - d. Did you review the Summary Review Memorandum?
- 89. At line 25 of page 181 of the transcript, you state, "the custody confirmation is coming from what's called Madoff Investment Corporation," is that correct?
 - a. Did you ever review this custody confirmation?
 - b. Did you ask Ernst & Young to provide the custody confirmation to you?
 - c. Did Primeo's board request this custody confirmation from Ernst & Young?

- 90. Can you confirm that Exhibit 16 is an email chain concerning Madoff from September 19 and 20, 2002 between you and Tom Young?
 - a. Who is Tom Young?
 - b. What was his role with respect to Madoff?
- 91. In this email chain, Mr. Young asked you to "get independent verification that the assets of [redacted] are segregated from other assets held by Madoff" and noted that "while we have the Dec 01 report from Friehling & Horowitz, it is not specific on this point."
 - a. Did you take any steps to get independent verification of the segregation of assets as requested by Mr. Young?
- 92. In your response to Mr. Young, you state, "fully agree it makes sense for each fund with Madoff to have audit certification of those assets run by Madoff where they are material in the portfolio. This is a matter for the relationship office to arrange. I believe a fund auditor worth his salt would be doing this as a matter of course. The relationship manager or delivery account manager should first enquire with the fund auditor [redacted]. If it has not already been done by the fund auditors then attempt to agree with the client and auditors that it needs to be done and should be paid for by the fund. If this fails, ask them why they feel comfortable not having such a certification and if you don't like the response then it falls to the bank to see if you have the right to do it under the agreement you have with Madoff (at the bank's expense)... The review is finished and signed off for this year and I do not intend to do more unless the GFS Board supports it, risk versus cost versus relationship, etc."
 - a. Why did you think that confirmation of assets held by BLMIS was the responsibility of the client relationship manager?
 - b. Why did you think that a custodian should seek confirmation of a fund's assets only after the fund's auditor and fund itself failed to get confirmation?
 - c. Why did you not intend to do any further review of BLMIS?
 - d. What did you mean by the statement "risk versus cost versus relationship, etc."?
- 93. Can you confirm that Exhibit 17 is a September 23, 2002 email from David Smith to you concerning the email chain in Exhibit 16?
 - a. Can you confirm that nigel.fielding@bankofbermuda.com was your email address on September 23, 2002?
 - b. Who is David Smith?
 - c. What was your relationship with David Smith?

- d. What was David Smith's position at Bank of Bermuda at this time?
- 94. In the email, Mr. Smith states, "We need to be careful in how we respond to Tom. He is clearly on the risk side (is he their credit manager?) and wants everything tied down neatly."
 - a. What did you understand Mr. Smith's statement, "We need to be careful in how we respond to Tom" to mean?
 - b. Why did you need to be careful?
 - c. What did you understand Mr. Smith's statement, "He is clearly on the risk side (is he their credit manager?) and wants everything tied down neatly" to mean?
 - d. Why did it matter that he was "on the risk side"?
- 95. In this email, Mr. Smith also states, "I don't think [redacted] should seek [confirmation of the assets] directly. BoB should obtain it, preferably GFS rather than Operations..."
 - a. Is "BoB" Bank of Bermuda?
 - b. Did Mr. Smith explain why he thought that Bank of Bermuda should obtain confirmation of the assets?
 - c. What is "GFS"?
 - d. What was the difference between GFS and Operations?
 - e. Did Mr. Smith explain why he thought that GFS should obtain confirmation rather than Operations?
- 96. In this email, Mr. Smith also states, "Madoff refuses to appoint any of the big accounting firms as his group auditor because he believes they will intrude in his activity and give away trade secrets."
 - a. What did you understand Mr. Smith to mean by this statement?
 - b. At the time of Mr. Smith's email, did you think Madoff did not use any of the big accounting firms for any reason other than to protect his trade secrets?
 - c. Were you aware of any other fund managers that refused to use the big accounting firms?
- 97. Please refer to Exhibit 15. On page 19 of the document, beginning at page 72, line 4 of the transcript, you are testifying about an email sent by Brian Wilkinson in response to an email from you dated September 20, 2002, is that correct?

- a. Is the email dated September 20, 2002 that is referred to in the Exhibit the same email that is referred to in Exhibit 16?
- b. Who is Brian Wilkinson? What was his role with respect to Madoff?
- 98. In the email, Mr. Wilkinson states, "I feel there is still one vital piece of the 'jigsaw' missing, and that is independent confirmation that all securities held with Madoff are held in segregated accounts. Nigel's view is that we should obtain [independent confirmation that securities held at BLMIS are held in segregated accounts] from the fund auditors. However, I tend to disagree, and feel that Nigel on behalf of GFS should seek to obtain this confirmation for GFS independent to whatever verification the fund auditors have undertaken on the assets of the respective funds...."
 - a. Why did you think the fund auditors should obtain confirmation of account segregation at BLMIS?
 - b. Did Mr. Wilkinson explain why he disagreed with you regarding Bank of Bermuda obtaining confirmation of account segregation at BLMIS?
- 99. On page 20 of Exhibit 15, beginning at line 1 of page 74 of the transcript, you are testifying about an email in response from Paul Smith, is that correct?
- 100. In the email, Paul Smith states, "I am very worried about Madoff and I think we should seek independent confirmation. I would be prepared for GFS to pay. Its too big for us to ignore the warning signs."
 - a. Who is Paul Smith?
 - b. Did Paul Smith explain why he was "very worried about Madoff"?
 - c. What did you understand Paul Smith to mean when he wrote, "Its too big for us to ignore the warning signs"?
 - d. What were the warning signs to which Mr. Smith is referring?
 - e. What action was taken in response to Paul Smith's concerns?
- 101. You state at line 18 of page 74 of the transcript, "Michael May forwarded [the emails] to me."
 - a. Is that still an accurate statement?
 - b. If you no longer believe that this is an accurate statement, can you please explain why not?
 - c. Did you respond to Mr. May?

- d. If so, what was your response?
- On page 21 of Exhibit 15, page 77, line 9 of the transcript, you are testifying about a telephone call between you and Brian Wilkinson on September 30, 2002, is that correct?
- 103. In the transcript of the telephone call, you state, "I just had a chat with Chris about this too, because he ... (?) it to me earlier in the day and he's kind of a bit concerned in the sense that he doesn't understand quite what the concern is..."
 - a. Who does "Chris" refer to?
 - b. What did you mean when you said that Chris was concerned about Madoff "in the sense that he doesn't understand quite what the concern is"?
- 104. Beginning at line 22 of page 77 of the transcript, you state, "So... you know, everybody has some concerns about Madoff, or "made off" as he likes to call himself, which I think makes it even worse, 'made off with the money'."
 - a. What did you mean when you said that "everybody has some concerns about Madoff"?
 - b. To whom were you referring by "everybody"?
 - c. What were these concerns?
 - d. What did you mean when you said that he likes to call himself "made off... which I think makes it even worse, 'made off with the money'"?
- 105. Then, beginning at line 21 of page 81 of the transcript, Mr. Wilkinson states, "I could be wrong Nigel, and maybe I'll investigate that, but I'm just covering all of our backsides to make sure we've done everything possible if this thing ever went up."
 - a. To what was Mr. Wilkinson referring when he said, "I could be wrong Nigel, and maybe I'll investigate that"?
 - b. What did you understand Mr. Wilkinson to mean when he said, "if this thing ever went up"?
 - c. Did you have an understanding of what Mr. Wilkinson was referring to regarding "covering all of our backsides"?
- 106. In response, you state, "I'm not saying we shouldn't do it, I guess I wanted the board to say we wanted to do it, having heard David rant and rave about upsetting the guy before..."

- a. To what or to whom does the "board" refer?
- b. What action did you want the board to support?
- c. Does "David" in the transcript refer to David Smith?
- d. How often did David "rant and rave about upsetting the guy"?
- e. Does "the guy" refer to Madoff?
- f. What would David say "about upsetting the guy"?
- g. What effect did David's expressed desire not to upset Madoff have on your actions related to the due diligence on Madoff funds?
- 107. Beginning at line 9 of page 82 of the transcript, you are discussing the questions raised by Tom Young, and you state, "his financial statements are not very detailed, you know, what really is his source of revenue etc... which I think is important to us, cause we're really relying on the financial strength of Madoff, as well as much as anything...as a subcustodian."
 - a. What did you mean when you said that Madoff's financial statements are not very detailed?
 - b. What information was missing from his financial statements that you would have wanted?
 - c. Was there any other information other than Madoff's client base and source of revenue that you would have wanted to information about?
 - d. How would knowing this information from Madoff's financial statements helped you in your due diligence process?
 - e. In your experience, did Madoff's financial statements have the same level of detail as other companies?
 - f. If Madoff's financial statements did not have the same level of detail as other companies, what were the differences?
- 108. Then, beginning at line 12 of page 83 of the transcript, you ask, "But if we want more independence and we want to send our own auditor in regardless, I suppose what I'm trying to think, and I don't know off the top of my head what the answer is, do we ever send our external auditor in to our other sub-custodian to verify positions?"
 - a. What were your reasons for wanting a more independent auditor?
 - b. What made you want to send it an external auditor for Madoff even though you don't for other sub-custodians?

- 109. Can you confirm that Exhibit 18 is an October 1, 2002 email chain with you, Paul Smith, Brian Wilkinson, and the GFS board?
- On page 2 of this email chain, Brian Wilkinson forwards you Paul Smith's September 30, 2002 email and asks you to call him, is that correct?
 - a. Did Mr. Wilkinson's email instigate the telephone call about which you testified in Exhibit 25?
- 111. At the bottom of page 1 of this email chain, you emailed Mr. Wilkinson and the "GFS Board", proposing to "couch" "the bank's external auditor to undertake independent audit confirmation of the assets held by Madoff for our clients in Bermuda, Dublin and Luxembourg" as coming "from our Global Compliance team."
 - a. Why did you think that confirmation of assets should be "couched" as coming from the "Global Compliance team"?
- In response, Mr. Smith states, "I don't feel we should mislead Madoff. We have a problem with him. He is the manager, broker and custodian to his accounts, in today's world this is a red flag. We need to address it. Lets [sic] tell him so and get on with it with his support. If we continue to pussy foot around him we will get nowhere."
 - a. Did Mr. Smith explain why it was a problem that Madoff was "the manager, broker and custodian to his accounts"?
 - b. What did you understand Mr. Smith to mean when he said, "in today's world this is a red flag"?
 - c. Did anyone from HSSL or GFS ever "address" this issue with Madoff?
 - d. If no one from HSSL or GFS addressed the issue of Madoff performing multiple roles for his accounts, why not?
- 113. Can you confirm that Exhibit 19 is a true and accurate copy of the transcript of Day 16, November 30, 2016, of the trial in the Cayman Islands involving Primeo and HSSL?
 - a. Can you confirm that this transcript includes your testimony?
- On page 10 of Exhibit 19, you state, beginning at line 18 of page 34 of the transcript, concerning BLMIS, "when you are manager and broker-dealer, trading with yourself, I felt there was ample opportunity, maybe, for things like front running, or mispricing trades, which would be detrimental to the client."
 - a. Is that statement still accurate?
 - b. What did you mean by "front running"?

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- c. What did you mean by "churning"?
- d. What did you mean by "mispricing trades"?
- e. Why would "front running, or churning, or mispricing trades" be detrimental to the client?
- 115. In lines 20 and 21 of page 34 of the transcript, you state, "When I first became aware of the structure, to me, [the same person being investment manager and broker-dealer] was the bigger risk that I felt existed."
 - a. Is that statement still accurate?
 - b. If you no longer believe that this is an accurate statement, can you please explain why not?
 - c. To whose structure were you referring when you stated, "When I first became aware of the structure"?
 - d. When did you first become aware of the structure?
 - e. Did you share your concerns regarding front-running to anyone at HSSL or HSS?
 - f. Did you share your concerns regarding front-running to anyone on the Primeo or Alpha Prime boards?
 - g. Were you aware of anyone else at HSSL or HSS who had similar concerns regarding the possibility of front-running?
 - h. Were you aware of anyone else on the Primeo or Alpha Prime boards who had similar concerns regarding the possibility of front-running?
- Please refer to Exhibit 9. This is Mr. Fiorino's May 27, 2002 email to you and Ms. Irwin concerning his analysis of Madoff's trading. On page 2 of Exhibit 9, Mr. Fiorino states that Madoff buys "S&P100 top names" and the September 31, 2001 portfolio showed "approx. 30 holdings in S&P100/500 companies," is that correct?
 - a. Did Mr. Fiorino's description conform to your understanding of Madoff's strategy?
 - b. If Madoff used approximately 30 "S&P100 top names," how could they be mispriced?
 - c. Did you share your concerns regarding mispricing trades to anyone at HSSL or HSS?

- d. Did you share your concerns regarding mispricing trades to anyone on the Primeo or Alpha Prime boards?
- 117. Please refer to Exhibit 15. On page 24 of the document, beginning at line 3 of page 91 of the transcript, you are testifying about an email concerning confirmation of fund assets at BLMIS sent to you by David Smith in October 2002, is that correct?
- In the email, David Smith states, "I really think our new confirmations can wait until year end when we can include them in the annual review. Madoff is really cheesed off with us (BOB) and he may cut the umbilical if we go once more to the well. We may think our . . . has power in the market but he can replace that within a month. He may put us on the black list so we have to agree a plan of action."
 - a. Did Mr. Smith explain why he wanted to wait until the end of the year for "our new confirmations"?
 - b. Did Mr. Smith explain why Madoff was "cheesed off" with Bank of Bermuda?
 - c. Did Mr. Smith explain why he was afraid that Madoff would "cut the umbilical" and "black list" Bank of Bermuda?
- 119. On page 25 of Exhibit 15, beginning at line 12 of page 93 of the transcript, you testify about your email in response to David Smith dated October 22, 2002, is that correct?
- 120. In the email, you state, "In the meantime on Madoff the only follow-up I am aware of is from the Dublin Risk Management Committee having it noted on their action list. I told Michael it was in hand between you, me and Bill Jones."
 - a. To whom did "Michael" refer?
 - b. Who is Bill Jones?
 - c. What was Bill Jones's role with respect to Madoff?
 - d. What did you mean by I told Michael it was in hand between you, me and Bill Jones"?
- 121. On page 26 of Exhibit 15, beginning at line 1 of page 98 of the transcript, you testify about a November 27, 2002 email concerning Madoff you sent to Paul Smith, is that correct?
- 122. In the email, you state, "David mentioned there is still a concern over the level of due diligence we have on Madoff."
 - a. Does "David" refer to David Smith?

- b. Did David Smith explain why he was "concern[ed] over the level of due diligence we have on Madoff"?
- c. Did David Smith express to you concerns about the level of due diligence on Madoff?
- d. If David Smith did express concerns regarding due diligence on Madoff, when did he do so?
- e. Did he express these concerns by email?
- 123. In the same email, you continue, "I would mention that when Fergus and I visited Madoff in July year we had him complete a due diligence questionnaire based on the one used by FIG/Thomas Murray. . . . Not to say we should not do more, but perhaps we can use the upcoming NY visit to arrange for you to meet Madoff as a prelude to sending any further questionnaires or requests for information."
 - a. What is "FIG"?
 - b. Who is Thomas Murray?
 - c. Why did you want Paul Smith to meet Madoff and use that as a "prelude to sending any further questionnaires or requests for information"?
 - d. Do you know if Paul Smith ever met Madoff?
 - e. If Paul Smith met with Madoff, when did he do so?
- Beginning at line 1 of page 99 of the transcript, Paul Smith responds to your email, stating, "If Madoff is to be our sub-custodian, we need FIG to do a full review. We do not have authority to approve Madoff as sub-custodian. Only FIG with [sic] could do this. We need to put this in the hands of FIG."
 - a. Did Paul Smith explain why he thought that FIG needed to do a full review of BLMIS if it was to be sub-custodian?
 - b. What would FIG have looked at that you did not?
 - c. Did FIG ever conduct a "full review" of BLMIS?
 - d. If FIG did not conduct a full review of BLMIS, why not?
- On page 25 of Exhibit 15, beginning at line 8 of page 95 of the transcript, you testify about an email chain involving you, Paul Smith, and David Smith from December 2002, is that correct?
- Beginning at line 22 of page 95 of the transcript, you testify about an email sent by David Smith to you in this chain, is that correct?

- 127. In the email, David Smith states, "I need you to take control of Madoff. I don't think Bill Jones should visit them without you."
 - a. Did David Smith explain why he needed you to "take control of Madoff"?
 - b. Did David Smith explain why he did not want Bill Jones to visit BLMIS without you?
 - c. Did you have any concerns about Bill Jones visiting BLMIS?
 - d. Did Bill Jones ever visit BLMIS?
 - e. If Bill Jones did not visit BLMIS, why not?
- 128. Beginning at line 23 of page 96 of the transcript, you respond to David Smith's email. In the email you state, "Paul seems hell bent on irritating Madoff with FIG. I will take them but not until next year as I need to preserve the relationship with Bank Austria."
 - a. What did you mean "Paul seems hell bent on irritating Madoff with FIG"?
 - b. What did you mean by "I will take [FIG] but not until next year as I need to preserve the relationship with Bank Austria"?
 - c. Was it necessary to forestall due diligence to preserve the relationship with Bank Austria?
 - d. Did FIG ever conduct this due diligence on BLMIS?
 - e. If FIG did not conduct due diligence on BLMIS, why not?
- On page 27 of Exhibit 15, beginning at line 5 of page 101, you testify about an email from David Smith to you in response, is that correct?
- 130. In the email, David Smith states, "I agree with your observation on Madoff. Silly but there is nothing I can do about it."
 - a. What was your understanding of David Smith's email?
 - b. Did you think Paul Smith's approach was "silly"?
 - c. Do you know if Bank of Bermuda ever received independent confirmation of asset segregation at BLMIS?

March 3, 2004 Visit to BLMIS

131. Can you confirm that Exhibit 20 is a fax you sent to Mr. Madoff on February 26, 2004 with the subject "Meeting"?

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- 132. In the fax, you state, "I look forward to meeting at your office on March 3 at 4:30 p.m. I attach a copy of the questionnaire completed last time we met which I would like to update when we meet."
 - a. Did you meet with Mr. Madoff on March 3, 2004?
 - b. What was the purpose of your visit to BLMIS?
 - c. What prompted this visit to BLMIS?
 - d. Did anyone instruct you to visit BLMIS in March 2004?
 - e. If you were instructed to visit BLMIS, who instructed you?
 - f. Did you confer with Paul Smith before the visit?
 - g. Did you confer with anyone from FIG?
 - h. Did you do anything to prepare for this visit to BLMIS?
 - i. Did you review any materials in advance of your visit to BLMIS?
 - j. Why did Chris Wilcockson accompany you on this visit?
 - k. Did you do any preparatory work with Mr. Wilcockson before the meeting with BLMIS?
 - 1. If so, what preparatory work did you do?
 - m. With whom did you meet at BLMIS during that trip?
 - n. Where did you meet with them?
 - o. What was discussed during each of those meetings?
 - p. How long did the meeting last?
- 133. Can you confirm that Exhibit 21 is a copy of the questionnaire you went through with Madoff on March 3, 2004?
 - a. There are handwritten notes on this document. Is this your handwriting?
 - b. Did you ask Madoff any additional questions not on the questionnaire?
 - c. Did you do anything to verify any of the answers that Madoff gave you at the meeting and to the questionnaire?

- d. Did you ever circulate a call report for the visit to BLMIS?
- Can you confirm that Exhibit 22 is an email you sent to Tom Young and Monica Oranges on July 20, 2004 concerning your March 3, 2004 visit to BLMIS?
 - a. Who is Monica Oranges?
 - b. Did you create any memorandum or notes of the visit other than this email?
 - c. If you did not create any memorandum or notes of the visit other than this email, why not?
 - d. Did Mr. Wilcockson record his observations during this due diligence visit?
 - e. If so, how did Mr. Wilcockson record his observations during this due diligence visit?
 - f. Were Mr. Wilcockson's observations ever circulated?
- 135. The email states, "separate DTC account used for client assets in addition to segregated records at Madoff."
 - a. How did you make this determination?
 - b. Did you review any documents to make this determination?
 - c. If so, what documents did you review to make this determination?
 - d. Did you or anyone else attempt to verify that BLMIS maintained segregated accounts with DTC after this due diligence meeting in 2004?
 - e. If you did not attempt to verify that BLMIS maintained segregated accounts with DTC, why not?

Formation of Alpha Prime

- Can you confirm that Exhibit 23 is an email you sent to Jillian Irwin, Saverio Fiorino, Germain Birgen and Maryse Duffin on September 4, 2002 regarding a conversation with Dr. Fano?
- 137. In the email, you state, "UF confirmed [Bank of Bermuda] will be appointed administrator and custodian she asked me to be a director, I was not really planning to take more of these but given my role and relationship with Madoff, I will agree."
 - a. Does "UF" refer to Dr. Fano?

- b. Are you referring here to the formation of Alpha Prime?
- c. What were you referring to when you wrote "relationship with Madoff"?
- d. Did you develop a relationship with Madoff in connection with your role at Primeo?
- 138. You also state in the email, "UF mentioned that Madoff indicated in March that he would take money into a new account for BA even though he is generally closed for new accounts."
 - a. To whom or to what does "BA" refer?
 - b. Do you know why Madoff would let BA open a new account when "he was generally closed for new accounts"?
 - c. Did you regularly discuss Dr. Fano's communications with Madoff?
- 139. In the email, you also state, "compliments to Sav for helping with the Madoff portfolio analysis."
 - a. Does "Sav" refer to Saverio Fiorino?
 - b. What was the "Madoff portfolio analysis"?
 - c. Was this the analysis Mr. Fiorino had performed in connection with Primeo possibly becoming a SICAV?
- 140. Please refer to Exhibit 1. In paragraph 117 on page 37 of that document, you state, "In March 2003, Alpha, a Bermuda-incorporated investment fund, was established by Bank Austria, Ms Kohn and Dr Fano. On 17 March 2003, I became a director of Alpha. At that time, the other directors of Alpha were Dr Zapotocky, Ms Kohn and Dr Fano."
 - a. Is that statement still accurate?
 - b. Who is Dr. Zapotocky?
 - c. What did your role as director of Alpha Prime entail?
 - d. Did your role as director of Alpha Prime remain the same until you resigned from the Board of Directors?
 - e. What types of tasks did you perform as an Alpha Prime Director?
 - f. How many hours per month did you devote to your duties as an Alpha Prime Director?

- g. What types of tasks did you perform as an Alpha Prime Director?
- h. With whom did you communicate about your responsibilities as a director of Alpha Prime?
- i. Did you attend any Alpha Prime board meetings?
- j. If so, how many?

December 5, 2002 Primeo Board Meeting

- In paragraph 112 of Exhibit 1 on page 35, you state, "On 5 December 2002, I attended a Primeo board meeting held at HSSL's office in Luxembourg. The meeting included a discussion regarding the family connections within BLMIS. The fact that a number of members of the Madoff family held key roles within BLMIS and that the risks that could entail was covered."
 - a. Is that statement still accurate?
 - b. Do you recall why the issue of the family connections with BLMIS came up?
 - c. Who raised the issue of family connections within BLMIS?
 - d. What kind of risks did the fact that Madoff's family held key roles within BLMIS entail?
- 142. You also state in the document, "I understood that BLMIS was at heart something of a family business and that a number of Mr. Madoff's relations were working within BLMIS.... Dr. Fano, who I understood had visited BLMIS and met Mr. Madoff on a number of occasions, reassured the board and said that she was not concerned by the family connections existing within BLMIS."
 - a. Is that statement still accurate?
 - b. How did Dr. Fano reassure Primeo's board that the family connections existing within BLMIS was not a concern?
 - c. Did Dr. Fano explain why she thought the family connections within BLMIS were not problematic?
 - d. Did you think the family connections within BLMIS were problematic?
- 143. Also in paragraph 112 of Exhibit 1, you state, "The board nonetheless resolved that they would like to meet with Mr. Madoff and asked Dr. Fano to review the options with a view to such a meeting taking place in 2003. However, to my knowledge, no such meeting ever took place."

- a. Is that statement still accurate?
- b. Do you know why the board wished to meet with Madoff despite Dr. Fano's reassurances?
- c. Do you know why the meeting never took place?
- d. Do you know whether the board's concerns regarding Madoff's family connections were ever addressed?

May 2003 Presentation to Bank Austria

- 144. Can you confirm that Exhibit 24 is the presentation that you and Germain Birgen gave to Bank Austria on May 19, 2003?
 - a. Who is Germain Birgen?
 - b. What was Mr. Birgen's role at HSSL?
 - c. Who authored the presentation?
- On page 35, the presentation states, "The Fund Manager or Advisor is expected to perform initial and regular due diligence on BLM in relation to the Trading Account"?
 - a. What did you mean by that statement?
 - b. Does "BLM" refer to BLMIS?
 - c. What is your understanding of "initial" due diligence?
 - d. What is your understanding of "regular" due diligence?
 - e. Did the fund manager or advisor conduct initial due diligence on BLMIS?
 - f. Did the fund manager or advisor conduct regular due diligence on BLMIS?
- On page 35, the presentation states, "Bank of Bermuda personnel carry out regular due diligence on BLM in relation to the sub-custodian arrangements."
 - a. To which Bank of Bermuda personnel were you referring?
 - b. Is it correct that your July 2002 visit and the questionnaire comprised the only diligence Bank of Bermuda had carried out on BLMIS up to that point?

- 147. On page 39 the presentation states, "Asset reconciliations (to DTC) are performed at minimum monthly and no items are outstanding for more than month (breaks are generally cleared in one business day)."
 - a. What is DTC?
 - b. What are "Asset reconciliations (to DTC)"?
 - c. Who performed the "asset reconciliations (to DTC)"?
 - d. If Bank of Bermuda performed these reconciliations, how was this done?
 - e. What information was used to perform the asset reconciliation?
 - f. Who at Bank of Bermuda performed the reconciliation?
- 148. On page 41, the presentation states, "Where Bank of Bermuda is appointed as administrator to the Fund, as is the case with Primeo Fund, we provide a fund accounting and investment valuation service. As part of this service we validate the price of all investments to market data sources, this includes all investments held by BLM."
 - a. Are you familiar with the Bank of Bermuda's fund accounting and investment valuation service?
 - b. Can you please describe what the fund accounting and investment valuation service entailed?
 - c. What "market data sources" were used in providing these services?
 - d. Who at Bank of Bermuda performed the valuation?
 - e. How was the valuation performed?
 - f. How often was the valuation performed?
 - g. What questions did Bank Austria ask at the presentation?
- 149. Can you confirm that Exhibit 25 is an email chain with Germain Birgen, Robert Schultz, Brian Wilkinson, and you, dated June 16 and 17, 2003 concerning Madoff and Bank Austria?
 - a. Who is Mr. Schultz?
- 150. In the first email in the chain, Mr. Birgen states, "Bank Austria is currently performing a major audit on the Primeo Fund structure and the relation with BOB and Madoff. Nigel Fielding and myself had to go to Vienna 2 weeks ago to make a presentation and answer questions . . . We mentioned that BOB performed due diligence on Madoff. Now they came back asking us the copies of the QUARTERLY due diligence BOB is performing. I

am not aware of any quarterly review. Is any of your offices performing quarterly reviews on Madoff?" Mr. Wilkinson replied, "Quarterly due diligence, you have got to be joking!! The only due diligence we have on Madoff is what Nigel did some months ago."

- a. Was it common industry practice to conduct quarterly due diligence?
- b. Did HSSL conduct quarterly due diligence for funds other than Madoff where they were the custodian?
- c. Did you ever consider increasing the frequency of your due diligence visits to BLMIS?
- d. If you did not consider increasing the frequency of your due diligence visits to BLMIS, why not?
- e. Did Bank Austria request more frequent diligence visits to BLMIS?
- f. Did Primeo request more frequent diligence visits to BLMIS?
- g. Did Alpha Prime request more frequent diligence visits to BLMIS?
- 151. Mr. Birgen responded, "That's what I thought. It seems they (BA internal audit) are desperately looking to find a reason to kill this business."
 - a. What did you understand Mr. Birgen to mean by this statement?
 - b. Did Mr. Birgen explain why he thought that Bank Austria wanted to "kill the business"?
 - c. Did anyone from Bank Austria communicate the desire to "kill the business" to you at the May 19, 2003 presentation?
 - d. Who at Bank Austria wanted to "kill the business"?

June 23, 2003 Primeo Board Meeting

- 152. Please refer to Exhibit 1. In paragraph 131 on page 40 of the document, you state, "As was usually the case at Primeo board meetings, Dr. Fano gave a report to the board on behalf of the investment adviser, BA Worldwide. Dr. Fano explained that a Bank Austria internal control review involving Primeo had been triggered as a result of an internal NAV milestone having been reached (in this case, the NAV of Primeo exceeding US\$350 million)."
 - a. Is that statement still accurate?
 - b. Are you familiar with Bank Austria's internal control review?

- c. What did the Bank Austria internal control review involve?
- d. Who conducted the internal control review?
- e. Was Dr. Fano involved in the internal control review?
- 153. In paragraph 132 of Exhibit 1, you state, "Dr. Fano presented to the board the key findings made by Bank Austria in its review, as set out in its report of 11 June 2003"
 - a. Is that statement still accurate?
 - b. Who drafted this report?
 - c. To whom was the report circulated?
- 154. In paragraph 133 of Exhibit 1, you state, "The chief findings from the review as presented by Dr Fano to the Primeo board were as follows: (a) There was no formal agreement in place between Primeo and BLMIS concerning investment strategy, only a "gentlemen's agreement" as to the execution of Mr Madoff's strategy."
 - a. Is that statement still accurate?
 - b. What did you understand the report to mean by "There was no formal agreement in place between Primeo and BLMIS concerning investment strategy, only a "gentlemen's agreement" as to the execution of Mr Madoff's strategy"?
 - c. Did the report explain why was this the case?
 - d. Who made this arrangement on behalf of Primeo?
 - e. What actions did you take in response to finding this out?
 - f. Was there a formal agreement in place between Alpha Prime and BLMIS concerning investment strategy?
- 155. In paragraph 133 of Exhibit 1, you also state, "To my knowledge, it was correct that there was no formal agreement in place between Primeo and BLMIS beyond the Brokerage Agreements: in particular there was no written agreement setting out the parameters or limitations in respect of BLMIS's role as investment manager. In my view, the board was relatively relaxed about this as the relationship between Primeo and BLMIS had been in place for a long time and no problems had arisen with BLMIS straying outside its usual investment strategy. However, I suggested at the meeting that the existing Brokerage Agreements with BLMIS should be amended formally to record investment restrictions to which required BLMIS to adhere"
 - a. Is that statement still accurate?

- b. Why suggest that the Brokerage Agreements with BLMIS be amended to formally record investment restrictions?
- c. Was the board receptive to your suggestion?
- d. Were any actions taken to implement your suggestions?
- 156. Can you confirm that Exhibit 26 is the report of a Bank Austria audit of BA Worldwide dated June 11, 2003?
- 157. In the last paragraph of page 5 of the report, it states, "According to information from BAWFM management, it has not been possible to follow the advice of the 2001 audit to conclude a written agreement with the manager despite intensive talks with the Madoff management."
 - a. Did you review the 2001 audit report?
 - b. Do you know who had these "intensive talks with the Madoff management"?
 - c. Do you know what was discussed during these talks?
- 158. Please refer to Exhibit 1. In paragraph 133, you state that the Internal Control Review also indicated that Bank Austria "had to totally rely on Madoff for information regarding the Fund due to his position as both Manager and Broker of the account."
 - a. Is that statement still accurate?
 - b. How did the board react when Dr. Fano said Bank Austria and BA Worldwide had to rely on BLMIS for information?
 - c. Did any board members raise any concerns?
- 159. In paragraph 133 of Exhibit 1, you further state, "Dr. Fano said that the concentration of responsibilities with BLMIS would never change as Mr. Madoff insisted on BLMIS carrying out the investment management, broking and custody functions so as to avoid his trading strategy being exposed."
 - a. Is that statement still accurate?
 - b. Had you previously been aware that Madoff insisted on being manager, broker and custodian to avoid exposing his trading strategy?
- 160. Please refer to Exhibit 18. Paul Smith called this concentration of responsibilities a "red flag," is that correct?
 - a. Did you ever address this concentration of responsibilities with Madoff?

- b. Did anyone at HSSL ever address this concentration of responsibilities with Madoff?
- c. Did anyone from the Primeo board ever address this concentration of responsibilities with Madoff with Madoff?
- d. Did anyone from the Alpha Prime board ever address this concentration of responsibilities with Madoff?
- 161. Returning to Exhibit 1, in paragraph 133, you state, "Dr. Fano mentioned that the confirmation of transactions was an issue without an independent broker counter party. She further explained that this was viewed as an inherent but acceptable risk associated with the BLMIS asset management model."
 - a. Is that statement still accurate?
 - b. What did you understand Dr. Fano to mean when she said that the "confirmation of transactions was an issue without an independent broker counter party"?
 - c. What steps were taken to verify transactions?
 - d. Did Dr. Fano explain why she thought this was an acceptable risk?
- 162. Please refer to Exhibit 26. In the second box near the top of the first page of the report, it states, "review of evaluation of securities positions by BAWFM."
 - a. Does "BAWFM" refer to BA Worldwide?
 - b. Were BA Worldwide's reviews of the securities positions given to the Primeo board?
 - c. If BA Worldwide's reviews of the securities positions were given to the Primeo board, in what form were they given to the board?
 - d. Do you know what these reviews consisted of?
 - e. Do you know the methodology employed for the reviews?
- 163. Please refer to Exhibit 1. In paragraph 135 on page 42 of the document, you state, "Dr. Kaniak confirmed to the board that the Primeo board had the right to terminate the relationship between Primeo and BLMIS. This led to a discussion about what action the Primeo board might take if the fund were to cease its relationship with BLMIS. The options discussed included closing the fund, selling the fund and switching to a new investment manager in place of BLMIS. It was noted that a sale of the fund would risk Primeo losing shareholders."
 - a. Is that statement still accurate?

- b. Do you know why the board discussed terminating its relationship with BLMIS?
- c. Do you know why Primeo ultimately did not terminate the relationship with BLMIS?
- d. Was the risk of losing Primeo shareholders the primary reason for continuing the relationship with BLMIS?
- 164. Can you confirm that Exhibit 27 is the minutes of the June 23, 2003 meeting of the Primeo Board of Directors?
- 165. On page 4, the document states, "Alternatively, a legal opinion could be requested or amendments be made to agreements. The Chairman agreed with the second proposition and requested Mr Fielding to assist."
 - a. Did you ultimately seek to amend Primeo's agreements with BLMIS?
 - b. What changes were contemplated?
- 166. Can you confirm that Exhibit 28 is an email you sent on June 27, 2003 to Ursula Fano concerning Madoff due diligence?
- 167. In the email, you state, "Further to our conversation on Monday, I confirm that our normal cycle for a full due diligence review of agents is every two years... We increase the frequency to annual when the relationship becomes significant when measured against total assets under administration at the Bank of Bermuda group globally."
 - a. What did you and Dr. Fano talk about that prompted you to confirm the frequency of the Bank's diligence review?
 - b. What was the threshold total assets required to increase the frequency of the due diligence review to an annual basis?
 - c. Was this a Bank of Bermuda or GFS policy?
- 168. In the same email, you wrote, "The last full review of Madoff was performed in the 2nd quarter of 2002... Salient points from that review were included in the presentation we provided in Vienna. Unfortunately, Bank policy does not allow us to provide copies of our agent review files as these are proprietary to the relationship between the bank and its agents and are not client specific."
 - a. Who was the agent that you were referring to in this email?

May 14, 2004 Primeo Board Meeting

- 169. Please refer to Exhibit 1. In paragraph 157 on page 47, you state, "At this meeting, there was a follow-up to discussions had at the previous board meeting regarding the Brokerage Agreements and investment restrictions for BLMIS's management of Primeo's assets. In particular, the board again discussed the fact that there were no written investment restrictions in place between Primeo and BLMIS that would stop BLMIS from dramatically changing the investment strategy, for example to start trading gold or Japanese equities."
 - a. Is that still an accurate statement?
 - b. To your knowledge, had any steps been taken by the Primeo Board, Dr. Fano, or anyone else since the last Primeo Board meeting to address these concerns regarding the lack of investment restrictions in place between Primeo and BLMIS?
 - c. To your knowledge, where any steps taken after this May 2004 board meeting to address these concerns regarding the lack of investment restrictions in place between Primeo and BLMIS?
- 170. In paragraph 158, you state, "The board also again discussed the lack of independent confirmations, beyond what was being provided by BLMIS, regarding the existence of securities purportedly traded and held by BLMIS. It was noted in particular that there was no proof that such securities existed or that the transaction confirmation slips provided by BLMIS were valid and that such trades had actually been executed."
 - a. Is that still an accurate statement?
 - b. Did anyone on the Primeo board take any steps to verify whether any of the trades purportedly made by BLMIS had actually taken place?
 - c. If no one on the Primeo board took steps to verify whether any of trades purportedly made by BLMIS had actually taken place, why not?
 - d. Did anyone on the Primeo board raise these concerns with BLMIS or Mr. Madoff?
 - e. If no one on the Primeo board raised with BLMIS these concerns regarding the existence of securities purportedly traded by BLMIS, why not?
 - f. Did anyone identify any instances where a trade reported in a transaction slip did not match publicly available market information?

- 171. Can you confirm that Exhibit 29 is a copy of the draft minutes of the May 14, 2004 Primeo Board Meeting?
- 172. Can you confirm that Exhibit 30 is a copy of the final minutes of the May 14, 2004 Primeo Board Meeting?
 - a. Did the final minutes of the May 14, 2004 Primeo Board Meeting incorporate changes you made to the document?
- 173. In section 9 "Review of Investment Policy" on page 4 of Exhibit 29, the initial draft minutes state, "Madoff's Gentlemen's Agreement initiated an open discussion with the Board. The lack of an investment contract and objective confirmations raised concern of what proof securities were really there and if transaction slips provided by Madoff were valid and had actually been executed. Additionally, Dr Fano highlighted Madoff's technique of booking trades on his own private account, which caused concern within Bank Austria. Mr Fielding responded by advising the Board that BOBL receive confirmation forms Madoff every time a trade was made including the total positions. Mr. Fielding added that Bank Austria should be confident of the fact that Madoff was regulated by the United States Authorities, Securities Exchange Commission, ('SEC'), and that all investment restrictions were being met." Is that correct?
 - a. What does "BOBL" stand for?
 - b. Were your statements regarding the SEC's regulation of Madoff and the receipt of trade confirmations from Madoff intended to address the Primeo board's concerns about the validity of Madoff's trading?
- 174. In section 4 "Matters arising since the last Board of Directors' Meeting held on 23 June 2003" on page 3 of Exhibit 30, the final minutes state, "Mr Fielding asked Dr Fano for an update on the matters discussed in the last meeting regarding a point raised by Bank Austria Internal Control regarding the lack of a documented investment strategy with Madoff. The Board discussed the agreement in some detail. The lack of defined investment objectives or restrictions within the Customer Agreement raised concerns. Mr Fielding suggested that Madoff should be restricted to US markets only, noting that Madoff is regulated by the US Securities and Exchange Commission." Is that correct?
 - a. Did you delete the language concerning "concern of what proof securities were really there and if transaction slips provided by Madoff were valid and had actually been executed" from the final minutes?
 - b. If you did delete that language, why did you do so?
 - c. Did you rephrase "The lack of an investment contract and objective confirmations" as "The lack of defined investment objectives or restrictions" in the final minutes?

- d. If you did rephrase "The lack of an investment contract and objective confirmations" as "The lack of defined investment objectives or restrictions," why did you do so?
- e. Did you delete "Dr Fano highlighted Madoff's technique of booking trades on his own private account, which caused concern within Bank Austria" from the final minutes?
- f. If you did delete "Dr Fano highlighted Madoff's technique of booking trades on his own private account, which caused concern within Bank Austria" from the final minutes, why did you do so?
- 175. On page 5 of Exhibit 29, the initial draft stated, "It was finally agreed that the best approach would be for the Board to instruct BOBL as Custodian of the Fund to restrict Madoff to NY Stock Exchange and Nasdaq." Is that correct?
- 176. The final minutes state, at page 3 of Exhibit 30, "It was agreed that the best approach would be for Dr Fano to draft proposed investment restrictions on Madoff to be presented for approval by the Board and subsequently transmission to Madoff via the Custodian." Is that correct?
 - a. Did you change the final minutes to state, "It was agreed that the best approach would be for Dr Fano to draft proposed investment restrictions on Madoff to be presented for approval by the Board and subsequently transmission to Madoff via the Custodian."?
 - b. If you did change the final minutes to state, "It was agreed that the best approach would be for Dr Fano to draft proposed investment restrictions on Madoff to be presented for approval by the Board and subsequently transmission to Madoff via the Custodian," why did you do so?
 - c. Can you describe these proposed investment restrictions?
 - d. Did Dr. Fano ever draft the proposed investment restrictions?
 - e. Were any investment restrictions with respect to Primeo ever sent to BLMIS?
 - f. If no investment restrictions with respect to Primeo were sent to BLMIS, do you know why this was never done?
- 177. On page 4 of Exhibit 29, the draft minutes state, "Dr Fano highlighted Madoff's technique of booking trades on his own private account, which caused concern within Bank Austria. Mr Fielding responded by advising the Board that BOBL receive confirmation forms Madoff every time a trade was made including the total positions," is that correct?

- a. Do you know why this practice caused concern within Bank Austria?
- 178. Is it correct that this language does not appear in the final minutes?
 - a. Did you delete the statement, "Dr Fano highlighted Madoff's technique of booking trades on his own private account, which caused concern within Bank Austria. Mr Fielding responded by advising the Board that BOBL receive confirmation forms Madoff every time a trade was made including the total positions," from the meeting minutes?
 - b. If you did delete that statement, why did you delete it from the minutes?
 - c. Do you know whether HSSL received trade confirmations from BLMIS?
 - d. Do you know whether HSSL reviewed trade confirmations from BLMIS?
 - e. If HSSL reviewed trade confirmations from BLMIS, who reviewed them?
 - f. How did HSSL receive the trade confirmations?
 - g. How soon after the trades were purportedly made did HSSL receive the confirmations?

HSBC Acquires Bank of Bermuda

- 179. Please refer to Exhibit 1. In paragraph 152 on page 46, you state that after HSBC's acquisition of Bank of Bermuda, "Client credit approval and sub-custodian due diligence were among the functions that were centralised in London. However, all client facing custody and fund administration services continued to be provided to client funds by the relevant local offices, *i.e.* in Primeo's case these services continued to be provided by HSSL in Luxembourg."
 - a. Is that statement still accurate?
 - b. If you no longer believe that this is an accurate statement, can you please explain why not?
 - c. What did HSBC's acquisition of Bank of Bermuda mean for your role with respect to credit application review?
 - d. How did your role with respect to sub-custodian due diligence change as a result of the acquisition?

- e. How else did your role change as a result of the acquisition?
- 180. Can you confirm that Exhibit 31 is a December 17 and 20, 2004 email chain between you, Brian Wilkinson, and Peter Heaps?
 - a. Can you confirm that your email address as of December 17, 2004 was nigelfielding@lu.hsbc.com?
- 181. On page 1, there is a December 17, 2004 email from Peter Heaps requesting to schedule a call with you to talk about Madoff.
 - a. Who was Peter Heaps?
 - b. Did this call with Peter Heaps ever occur?
 - c. If the call with Mr. Heaps did occur, what was discussed?
- 182. In the first part of the email chain, on the second to last page, Mr. Heaps writes to Mr. Wilkinson that someone whose name has been redacted "called and asked if we could reconsider whether we would be prepared to acting [sic] as administrator and custodian (particular emphasis on custody) to the Optimal Strategic US Fund if it were to redomicile from Bahamas to Ireland this is the Madoff account. Effective it would be another [redacted]. I told him that I didn't think that we would be able to act as custodian, but I please can you confirm before I go back with a definitive response."
 - a. Do you know why Mr. Heaps intended to turn down business to act as custodian for another Madoff fund?
- 183. Mr. Heaps initially stated that the proposal was for HSBC to act as both administrator and custodian for the Optimal fund, but only said that he "didn't think that [HSBC] would be able to act as custodian."
 - a. Could HSBC have acted as administrator in this arrangement?
 - b. What was different about acting as custodian?
- 184. On the first page of this email chain, Mr. Wilkinson writes back to Mr. Heaps, "Please speak to Nigel Fielding on this. The whole Madoff issue is coming under focus now that we are part of HSBC. My gut reaction is that this will not fly."
 - a. Did Brian Wilkinson explain why he told Mr. Heaps to talk to you about HSBC serving as custodian to another Madoff fund?
 - b. What was your understanding of Mr. Wilkinson's statement, "The whole Madoff issue is coming under focus now that we are part of HSBC. My gut reaction is that this will not fly"?

- c. Did Mr. Wilkinson explain to you why he believed that HSBC would not serve as custodian for a Madoff account?
- 185. Can you confirm that Exhibit 32 is a February 3 and 8, 2005 email chain involving you, Christine Coe, Monica Oranges, and Brian Pettitt among others?
- 186. In the first paragraph of her initial email on page 2 of this document, Ms. Coe refers to an "HBEU charge."
 - a. Who is Ms. Coe?
 - b. Does "HBEU" refer to HSBC Bank, plc?
 - c. What is the "HBEU charge"?
- 187. At the bottom of the email, it indicates that the "Master Due Diligence Checklist" Ms. Coe attached to the email has been removed, is that correct?
 - a. How did this checklist differ from the due diligence questionnaire you presented to Madoff on your visits to BLMIS?
 - b. What information was missing from the diligence you had done on Madoff that was required to fill out the standard Network due diligence form?
- 188. In the third paragraph, Ms. Coe wrote, "Our due diligence must establish what activities are being undertaken and how we could effect our right under the sub-custody agreement."
 - a. What activities must be established to satisfy the due diligence requirements at HBEU?
 - b. What was your understanding of Ms. Coe's statement that the "due diligence must establish... how we could effect our right under the sub-custody agreement"?
- 189. Ms. Coe writes at the end of her email, "I cannot proceed with the [redacted] and Primeo reviews until I have the due diligence."
 - a. Did Ms. Coe explain what due diligence she was looking for?
 - b. Do you know if she ever received the due diligence she was looking for?
- 190. In response to Ms. Coe's email, on February 8, 2005, you emailed Monica Oranges, asking her to review the "Madoff explanations" in the credit committee memoranda.
 - a. What was Monica Oranges's role at HSSL?

- b. What did the credit memos explain about Madoff's strategy?
- c. Why did you ask her to review the Madoff explanations?
- 191. You also state, "There needs to be a clear statement of the trading strategy (not just period ends)."
 - a. Why did you think there needed to be "a clear statement of the trading strategy"?
 - b. Why did you specifically refer to "not just period ends"?
 - c. What information other than the period ends were you looking for when describing Madoff's trading strategy?
 - d. Did Ms. Oranges ever draft a clearer explanation of Madoff's strategy?
 - e. If Ms. Oranges did draft a clearer explanation of Madoff's strategy, what did she write in this explanation?
- 192. In the second paragraph, you state, "As far as I am aware Madoff never pledges or seeks to pledge assets to third parties as he writes the S&P 100 Options and also holds long positions from S&P 100 constituents in the portfolio at the same time."
 - a. What was your basis for this statement?
 - b. Did you or anyone else at HSSL analyze Madoff's trading patterns?

Meetings with Ernst & Young

- 193. Can you confirm that Exhibit 33 is a February 24 and 25, 2005 email chain between you, Saverio Fiorino and Germain Birgen concerning Madoff?
- 194. In the earliest email in the chain, Mr. Fiorino states, "[Mr. Fiorino and Mr. Birgen] met with E&Y.... [I]f nno satisfaction is received [regarding concerns with BLMIS], E&Y may resign"
 - a. Does "E&Y "refer to Ernst & Young?
 - b. Do you know what the auditors' concerns were?
 - c. Was it of concern to you that the auditors raised these issues?
- 195. Mr. Fiorino states that the auditors met with "[redacted] of Genevalor," who "understands the auditors concern and asked if their worries were based on the rumors (1) what is his real strategy, how on earth can he always produce 12%pa (2) where are the assets and are there really assets or is it all fictitious."

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- a. Whose name is redacted from the email?
- b. Is the person whose name is redacted Roberto Nespolo?
- c. Who is Roberto Nespolo?
- d. Were you familiar with these rumors regarding Madoff always producing 12% annual returns?
- e. Were you familiar with these rumors regarding assets held at BLMIS being fictitious?
- f. Do you know source of these rumors?
- g. Did Ernst and Young ever raise to you concerns or skepticism regarding BLMIS's returns?
- h. Did you ever discuss Ernst &Young's concerns with anyone other than Mr. Fiorino at HSBC?
- i. If you did not discuss Ernst &Young's concerns with anyone other than Mr. Fiorino, why not?
- j. Did you ever discuss the possibility that Ernst &Young might resign if they were unable to get satisfactory information with anyone at HSBC other than Mr. Fiorino?
- k. If you did not discuss the possibility that Ernst &Young might resign if they were unable to get satisfactory information with anyone other than Mr. Fiorino, why not?
- 1. Did you or anyone else at HSBC ever follow up on these rumors?
- 196. Mr. Fiorino also states, "as expected, Nespolo's comments were that HSBC must feel quite confortable [sic] with Madoff, since for the Dublin fund we appointed them sub-custodian, hence the group must have done and will do a regular due diligence on Madoff."
 - a. What was your understanding of Mr. Fiorino's use of the phrase "as expected"?
 - b. Were there conversations at HSSL or HSS regarding the due diligence expectations of clients invested with Madoff?
- 197. In response, you ask Mr. Fiorino to "try to keep track whiether [sic] and when EY go in."
 - a. What did you mean by "try to keep track whether and when EY go in"?

- b. Why did you want Mr. Fiorino to "keep track whether and when EY go in"?
- 198. Can you confirm that Exhibit 34 is a February 25, 2005 email chain between you, Germain Birgen, and Saverio Fiorino in response to Mr. Fiorino's email from Exhibit 33?
- 199. Mr. Birgen responded to Mr. Fiorino on February 25, 2005, stating, "Sonja Kohn does not want to be involved in this although she seemed to know Madoff very well. For whatever reason, she asked E&Y not to refer to Madoff anymore but to BMS."
 - a. Did Mr. Birgen's statement that "Sonja Kohn does not want to be involved in [E&Y due diligence]" concern you?
 - b. Were you aware of a request by Ms. Kohn not to refer to "Madoff" in correspondence?
 - c. Did HSSL comply with this request not to refer to Madoff in correspondence?
 - d. Did you follow up with anyone regarding Sonja Kohn's refusal to be involved in an audit of Madoff?
- 200. In that same email, Mr. Birgen states, "The other element of concern to E&Y is less justified, but they do not understand why Madoffs compensation by the funds is so low. How can he make so much money on transactions only. Why doesn't he charge a performance fee? Why does he say that this is not his core business as apparently he has with another bank in Lux [redacted]?"
 - a. Did Mr. Birgen explain why Madoff's low compensation was a cause of concern for Ernst & Young?
 - b. Were you aware of other companies performing the same tasks as Madoff's business that charged a performance fee?
 - c. Were you aware of any other investment managers that charged a commission instead of a management or performance fee?
 - d. Did anyone at HSSL address Ernst and Young's inquiries regarding Madoff's compensations by the funds?
- 201. In response to Mr. Birgen's question regarding Ernst & Young's concern that Madoff's compensation was so low, you state that Madoff's main business is as a broker-dealer and that brokerage commissions are his main revenue stream, is that correct?
 - a. Do you know why Madoff did not charge a performance fee as Mr. Fiorino asks?

- 202. Can you confirm that Exhibit 35 includes March 15, 2005 emails between you and Saverio Fiorino?
- 203. At the beginning of this email chain, Mr. Fiorino emailed you, copying Mr. Wilcockson and Mr. Birgen, stating that he "[s]poke to Chris and Nigel," did he mean to refer to Mr. Birgen rather than you?
- 204. Mr. Fiorino then wrote, "You should know that historically E&Y went directly to Madoff to get their confirmation. We did not countersign the confirmation."
 - a. Do you know why HSSL did not countersign the custody confirmations?
- 205. Mr. Fiorino also states, "By signing we don't comment on the advisory/trading part or how they achieve profitability."
 - a. Do you know why Mr. Fiorino wrote, "By signing we don't comment on the advisory/trading part or how they achieve profitability"?
 - b. Are you aware of whether HSSL had any concerns about this?
- 206. In response to Mr. Fiorino, you state, "it would be beat [sic] that HSSL had already successfully reconciled the sub-custodian holdings to statement at relevant date."
 - a. Did you mean to write "it would be best that HSSL..."?
 - b. Why did you write this? Did HSSL not ordinarily reconcile the holdings to the statement?
- 207. Please refer to Exhibit 16, the email you wrote to Tom Young on September 20, 2002. You state, "I fully agree it makes sense for each fund with Madoff to have audit certification of those assets run by Madoff where they are material in the portfolio. This is a matter for the relationship office to arrange. I believe a fund auditor worth his salt would be doing this as a matter of course. The relationship manager or delivery account manager should first enquire with the fund auditor . . . [redacted]. If it has not already been done by the fund auditors then attempt to agree with the client and auditors that it needs to be done and should be paid for the by the fund."
 - a. Here, you are saying that HSSL should rely on the fund auditor for confirmation of the assets at BLMIS, is that correct?
 - b. What changed between this September 2002 email and your March 2005 response to Mr. Fiorino?
 - c. Did you agree that HSSL should confirm the assets because Ernst & Young threatened to resign as auditor?

Preparation for Brian Pettitt's April 1, 2005 Visit to BLMIS

- 208. Can you confirm that Exhibit 36 is an email concerning Madoff you sent on February 20, 2005 to Brian Pettitt, Christine Coe, and Chris Wilcockson?
- 209. In the email, you state, "Madoff perform custody in connection with [managed accounts] but does not offer the service alone or charge for it, i.e. he is not seeking our business. Therefore, it would generally seem inappropriate to ask him market and certain other types of questions that we can find out ourselves..."
 - a. What did you mean by "market and certain other types of questions"?
 - b. Why would it be inappropriate to ask him "market questions" if he was not seeking HSBC's business?
 - c. If Madoff did charge for his custodial services, would that change the types of information that HSSL could ask from Madoff?
 - d. What additional information could HSSL ask for from Madoff if they paid for his sub-custodial services?
- 210. Can you confirm that Exhibit 37 is an email chain dating from March 14-17, 2005 involving you, Brian Wilkinson, Paul Smith, and Saverio Fiorino?
- 211. On March 14, 2005, Brian Wilkinson wrote to Paul Smith and the AFS Global Management Committee.
 - a. What is the AFS Global Management Committee?
 - b. Were you a member of the AFS Global management committee?
 - c. What did the AFS global management committee do?
 - d. What were the AFS global management committee's responsibilities?
 - e. What was your role as part of that committee?
- 212. In the email, Mr. Wilkinson states, "following a recent meeting in Dublin [redacted] has tabled several issues with Barry O'Rourke. The two issues which are causing us the most concern are as follows 1) during the trustee review, it was suggested by the trustee that GIS (HSBC) would be visiting Madoff to undertake a full sub-custodial review (as is normal practice). Clearly, HSBC will want to undertake this review and clearly this could have serious ramification, not only for Dublin but also for Luxembourg, which also has a substantial relationship with [redacted]. The consequences of the trustee review of the sub-custodian, Madoff, will be both painful and, it would appear, fatal. Clearly I am

not suggesting that GIS (HSBC) should ignore their fiduciary responsibilities. However, we should all be aware of the potential fall-out."

- a. Who is Barry O'Rourke?
- b. What was Barry O'Rourke's role with respect to Madoff?
- c. What is the "trustee review"?
- d. What is "GIS"?
- e. How would GIS's "full sub-custodial review" differ from the diligence you had done?
- f. Did you inform the Primeo board of this sub-custodial review?
- g. If you did inform the Primeo board of this sub-custodial review, what was the board's reaction?
- h. Did you inform the Alpha Prime board of this sub-custodial review?
- i. If you did inform the Alpha Prime board of this sub-custodial review, what was the board's reaction?
- j. Did it concern you that the redacted parties did not want this "full sub-custodial review" to happen?
- k. Do you know why they did not want it to happen?
- 1. What did you understand Mr. Wilkinson to mean by the statement, "The consequences of the trustee review of the sub-custodian, Madoff, will be both painful and, it would appear, fatal"?
- m. What did you understand Mr. Wilkinson to mean by the statement "we should all be aware of the potential fall-out" from HSBC's trustee review of Madoff?
- 213. In your response to Mr. Wilkinson's email, you state, "We have been told by Group that credit will not be permitted against funds holding assets at Madoff unless the review is handled by this unit in HSS."
 - a. To what does "Group" refer?
 - b. Why would credit be withheld from funds investing with Madoff without this review?
 - c. Were sub-custodians of non-Madoff funds reviewed?

- d. Was credit being withheld from other non-Madoff funds?
- 214. Paul Smith then responds, stating "This is potentially a very serious issue and it will get out of hand fast. We need to control this."
 - a. What did you understand Paul Smith to mean by that statement?
 - b. What was Paul Smith's role at HSBC at this time?
- 215. In your response to Paul Smith, you state, "Brian Pettitt is being pushed by Chris Coe to visit Madoff the week commencing 28 March."
 - a. Who is Brian Pettitt?
 - b. What was his role at HSBC?
 - c. Did Ms. Coe explain why Mr. Pettit was going to visit BLMIS rather than you?
 - d. Did Ms. Coe explain why she was pushing Mr. Pettitt to visit that week?
- 216. Can you confirm that Exhibit 38 contains emails in an email chain whose date has been redacted involving you, Brian Wilkinson, Paul Smith, Germain Birgen, and Saverio Fiorino?
- 217. At the bottom of page 3 and the top of page 4 is an email you sent to Paul Smith stating, "Partly, I think this is a matter of getting the correct spin."
 - a. What did you mean that statement?
 - b. Why did you have to "spin" performing due diligence?
 - c. Did you have to "spin" sub-custodial reviews to other clients?
- 218. In the email, you also state, "Perhaps a case can be made to [redacted] and Chris Coe that AFS handles but I doubt they will agree to this unless we identify someone they are comfortable with to handle (they want it away from Chris and I...)."
 - a. What is AFS?
 - b. Why did you want to suggest to Christine Coe that AFS handled the due diligence review?
 - c. Was it ever suggested to Ms. Coe that AFS handled the due diligence review?
 - d. If it was suggested to Ms. Coe that AFS handled the due diligence review, what was her response?

- e. Did Ms. Coe explain why she "want[ed] it away from" you and Chris?
- f. Does "Chris" refer to Chris Wilcockson?
- g. Did Ms. Coe explain why she was uncomfortable with AFS handling the due diligence review?
- 219. Paul Smith responded, stating, "We must make sure Brian comes up with the correct answer."
 - a. Does "Brian" refer to Brian Pettitt?
 - b. What was your understanding of Mr. Smith's statement?
 - c. What was "the correct answer"?
 - d. Did Mr. Smith explain why you had to make sure that Mr. Pettitt "came up" with the "correct answer"?
- 220. In the email, Paul Smith also states, "Brian is not very pre possessing [sic] so Madoff needs to be forewarned."
 - a. What was your understanding of that statement?
 - b. Did Mr. Smith explain what Madoff needed to be "forewarned" about?
- 221. Refer to Exhibit 37. The final email in this chain appears to be an email memo intended to go to Paul Smith drafted by Mr. Fiorino, and sent for your comment and approval, is that correct?
- 222. Mr. Fiorino's email reiterates Ernst & Young's concerns regarding Madoff's strategy, how he was always able to make profits even when markets were bad, the segregation of assets and whether they actually existed, and whether Friehling & Horowitz were truly independent, and that responses to E&Y's questions on this point were not clear.
 - a. Is that accurate?
 - b. Was this email ever sent? If so, what was the response?
 - c. Do you know whether anyone at HSS or AFS followed up on Ernst & Young's concerns?
- 223. Can you confirm that Exhibit 39 is the call report of a March 21, 2005 meeting you attended with Brian Pettitt, Chris Wilcockson, Saverio Fiorino, and Monica Oranges?
 - a. What was the purpose of the meeting?

- b. Did anyone other than you, Brian Pettitt, Chris Wilcockson, Saverio Fiorino, and Monica Oranges attend the meeting?
- c. The call report states that his meeting was held in preparation for a due diligence visit to BLMIS, is that correct?
- 224. In the call report, you were listed as the "Head of Business Services."
 - a. What were your responsibilities as Head of Business Services?
 - b. Who drafted the call report?
- 225. At the top of page 2, the Call Report notes that Madoff is "very secretive."
 - a. Was it your experience that Madoff was "very secretive"?
 - b. About what was Madoff "very secretive"?
- 226. The Call Report further states, "The funds where we are most at risk will be those domiciled in Luxembourg and Dublin as the local regulations leave a 'custodian' wholly liable rather like a UK trustee and unable to carve out responsibility for client directed agents."
 - a. Who drafted this paragraph?
 - b. Was custodian liability with respect to Madoff discussed at the March 21, 2005 meeting?
 - c. If custodian liability with respect to Madoff was discussed at the March 21, 2005 meeting, who raised this concern?
 - d. Was BLMIS a "client directed agent"?
 - e. Do you know why HSSL was concerned that it could not "carve out responsibility" with respect to BLMIS?
- 227. The call report also states, "Because it is done in-house it appears that the long positions are not used as collateral or margin as would normally be the case if it was done outside the company through an exchange and clearing house. This will need to be discussed during the visit and undertakings obtained. It appears from the deal tickets that there is no commission charged on the purchase and sale of cash stocks but there is on the options. As a broker/dealer presumably the money is made on the spreads."
 - a. Was this issue regarding long positions not being used as collateral discussed at the meeting?
 - b. If the issue regarding long positions not being used as collateral was discussed at the meeting, who raised this concern?

- c. Why did BLMIS's long positions need to "be discussed during the visit and undertakings obtained"?
- d. Do you know whether anyone at HSSL obtained the undertakings referred to in the statement?
- e. If no one at HSSL obtained the undertakings, why not?
- f. What was your understanding of the statement, "As a broker/dealer presumably the money is made on the spreads"?
- 228. The report also states, "[Fiorino] advised that periodic checks have been made against Bloomberg to see whether the prices are within the day's trading range and on each occasion they have been found to be fair prices. However, [Fiorino] noted that a check had not been made for 2 years."
 - a. Who at HSSL made the periodic price checks against Bloomberg?
 - b. What was your understanding of the statement, "on each occasion they have been found to be fair prices"?
 - c. Did Mr. Fiorino explain why the prices had not been checked for two years?
- 229. On page 4, the call report states, "Appendix 7 shows position checks: [Fiorino] confirmed that there are discrepancies from time to time and the responses from Madoff are sometimes slow but overall they have no major problems with them."
 - a. What does it mean that "there are discrepancies" but "they have been found to be fair prices"?
- 230. On page 2, the call report states, "It is believed that the size of the trades and the scale of the Madoff broker delaer [sic] operation allows the prices to be competitive and for both Madoff and funds to make money."
 - a. Why would the size of the trades and scale of Madoff's broker-dealer operation allow the prices to be competitive and allow both BLMIS and the fund to make money?
- 231. The call report recommends that "a diarised check be put in place to ensure the funds are not being disadvantaged. We should also check whether under Luxembourg regulations HSL have any obligations to check as a trustee would do in the UK."
 - a. Was a "diarized check" ever put in place?
 - b. If a diarized check was not put in place, why not?

- c. Did anyone at HSSL ever check the Luxembourg regulations to see if HSSL had obligations analogous to a UK trustee?
- d. If no one at HSSL checked the Luxembourg regulations regarding HSSL's obligations, why not?
- 232. The call report also states, "Sometimes the positions are unhedged."
 - a. Who drafted this paragraph?
 - b. Were unhedged positions discussed at the meeting?
 - c. If unhedged positions were discussed at the meeting, who raised this concern?
 - d. What was your understanding of this statement?
- 233. On page 3, the report states, "NF believes Madoff has only one account at the DTC which, if true means that they may be mixing client and proprietary trading assets."
 - a. Does "NF" refer to you?
 - b. When did you discover that Madoff has only on account at the DTC?
 - c. Did you ever follow up with Madoff about this?
- 234. Please refer to Exhibit 22, your email after your March 3, 2004 diligence visit to BLMIS. In the email, you state, "Separate DTC account used for client assets in addition to segregated records at Madoff."
 - a. What information did you receive that made you change your description of how BLMIS handled assets at the DTC?
 - b. Did HSBC ever get confirmation of how BLMIS handled assets at the DTC?
 - c. If HSBC did not get confirmation of how BLMIS handled assets at the DTC, why not?
- 235. Please refer to Exhibit 39. On page 4, the March 21, 2005 call report states, "Madoff provide reports and trade tickets usually on the Wednesday of the week following the activity. All info is sent by post!"
 - a. Who is the author of the call report?
 - b. Why is there an exclamation point after "all info is sent by post"?

- c. Were there concerns raised at HSSL about the fact that BLMIS sent reports and trade tickets through by post rather than electronically?
- d. If there were concerns raised at HSSL about the fact that BLMIS sent reports and trade tickets through by post, who expressed them?
- 236. The call report then states, "Appendices 3 and 4 provide examples of the Statements of Net Assets provided by the reporting system known as "Geneva" written by Advent."
 - a. What was the "Geneva" reporting system?
 - b. Where did HSBC maintain the Geneva reporting system?
 - c. How was the Geneva reporting system used with respect to Madoff?
- 237. The call report also states, "Appendix 10 provides the HSSL transaction record which is checked against the Madoff supplied reports"
 - a. How was the HSSL transaction report checked against the reports from BLMIS?
 - b. Was the HSSL transaction report checked against third-party information?
 - c. If the HSSL transaction report was checked against third-party information, what source was used?
 - d. Who at HSSL checked the report against third-party information?
 - e. If the HSSL transaction report was checked against third-party information, how often was this done?
- 238. Did you discuss Mr. Pettitt's due diligence visit to BLMIS outside of this meeting?
 - a. If you did discuss Mr. Pettitt's due diligence visit to BLMIS outside of this meeting, when did these discussions take place?
 - b. What did you discuss with Mr. Pettitt?
 - c. Did you or Mr. Pettitt make notes of those discussions?
- 239. Can you confirm that Exhibit 40 is an email you sent on March 23, 2005 to Tanya Nystrom, Brian Pettitt, Chris Wilcockson, and Margeretha Boekhout regarding Mr. Pettitt and Ms. Nystrom's upcoming diligence visit to BLMIS?
 - a. Who is Tanya Nystrom?

- b. What was Tanya Nystrom's role at HSBC?
- c. Who is Margeretha Boekhout?
- d. What was Margeretha Boekhout's role at HSBC?
- 240. In the email, you state, "be careful not to ask how he figures his trading strategy."
 - a. Why did you tell Mr. Pettitt and Ms. Nystrom not to ask Madoff about his trading strategy?
 - b. What did you think would have happened if Mr. Pettitt or Ms. Nystrom asked Madoff about his strategy?
- You also state, "To give you a sense how he is, he wanted to understand more about why we ask tax questions, he may do this with you and you may think he is trying to avoid the questions. This is not the case, I reckon he is usually trying to discover if a line of question is going somewhere that may lead you to ask for something to change his highly automated operating model (which he may resist) or worse still his trading strategy and if you cross these rubicons this is when he may get upset and in worst case contact the clients and bitch he does not need their business as he is closed for new business. Remember he is firstly hired by the client to run their managed accounts and the subcustody is a by product [sic] he has no great interest in as a business."
 - a. What did you mean by the statement, "the sub-custody is a by product [sic] he has no great interest in as a business"?
 - b. Why did you feel it was necessary to coach Mr. Pettitt and Ms. Nystrom as to how they approached Madoff at the due diligence visit?
 - c. Why were you seeking to limit the scope of Mr. Pettitt's and Ms. Nystrom's questions regarding his custody and trading strategy?

KPMG's 2005 Visit to BLMIS

- 242. Can you confirm that Exhibit 41 is an email chain concerning Madoff dating from May 30 to June 6, 2005 involving you, John Gubert, Christine Coe, Paul Smith, and Brian Pettitt?
 - a. Who is John Gubert?
- 243. On May 30, 2005, John Gubert sent an email to you, Christine Coe, Brian Pettitt, and Paul Smith stating, with respect to BLMIS, "we do not have full control of assets or real time sight of transaction flows; the transactions are all internal to the family firms and there is no proof of best execution or even actual execution; the audit is undertaken by a firm that is not on our recognised list of auditors."

- a. What was your understanding of Mr. Gubert's phrase "there is no proof of best execution or even actual execution"?
- 244. In the email, Mr. Gubert also states that HSBC should exit the Madoff relationship if HSBC's delegate could not arrive unannounced at BLMIS to "assess that all security was in place as advised."
 - a. What was your understanding of this statement?
- 245. On June 6, 2005 you emailed Paul Smith and Chris Wilcockson in response to Mr. Gubert's email and a conversation you had with Ms. Coe and her suggestion that KPMG "perform an operations/security review" of BLMIS.
 - a. What is an "operation/security review"?
 - b. How would an operation/security review differ from the due diligence you had conducted on BLMIS?
- 246. In the email, you also state, "I think a key question is whether to inform clients and/or plan how to respond if Madoff calls them and they call our offices. If I were Madoff I think I would have some difficulty understanding why after Brian did a review that HSBC want to send in another team to probe further and I would probably call my clients."
 - a. What did you mean by the statement, "If I were Madoff I think I would have some difficulty understanding why after Brian did a review that HSBC want to send in another team to probe further and I would probably call my clients"?
- 247. In the email, you also state, "I suspect it will be tough to get an acknowledgment of support" from "Sonja."
 - a. Does "Sonja" refer to Sonja Kohn?
 - b. Why did you think it would be difficult to get her to support KPMG's visit?
- 248. Can you confirm that Exhibit 42 is an email chain dated September 6 to 9, 2005 concerning a review of Madoff involving, among others, you, Ms. Coe, Mr. Pettitt, and Paul Smith?
- 249. The first email in the chain is from David Yim at KPMG to Brian Pettitt, copying David Luijerink and Christine Coe on September 6, 2005 planning an on-site review of BLMIS in New York on the week of September 19, 2005.
 - a. Did this visit ever occur?
 - b. What was the purpose of KPMG's review?

- 250. On page 5 of Exhibit 42, Ms. Coe states, "Can you/Paul Smith to discuss with the clients please."
 - a. What did Ms. Coe want you and Paul Smith to discuss with the clients?
- 251. On page 4, Paul Smith states, "Can we agree on a script please."
 - a. Why did you need a script to discuss the KPMG review with the clients?
 - b. Were these the discussions with clients you envisioned in Exhibit 41?
 - c. Did you and Paul Smith discuss the KPMG review with the clients?
- 252. At the top of page 4, you ask Ms. Coe if there are "any precedents/Group standards we might want to talk about where such a review has been performed at HSBC agents."
 - a. What did you mean by this statement?
 - b. Why would "precedents" or "Group standards" be necessary in presenting KPMG's visit to BLMIS to the clients?
- 253. On September 9, 2005, Ms. Coe responded, "This is a bit unusual as in our general due diligence we can validat [sic] trades at the central depositary given the segregation of our accounts. It is a matter of general routine to validate by checking ICSD records etc. That our agent is not comingling our [sic] diverting our clients [sic] assets. The only reason this is different is because we have the extra step between our contracted sub custodian and the DTC."
 - a. What are "ICSD records"?
 - b. Is it correct that it was HSBC's "general routine" to check securities depository records to ensure that sub-custodians were not commingling or diverting assets?
 - c. Do you know why HSBC did not check securities depository records with respect to BLMIS?
 - d. What was your understanding of Ms. Coe's statement, "The only reason this is different is because we have the extra step between our contracted sub custodian and the DTC"?
- 254. In the email, Ms. Coe also states, "In my eyes what we are seeking to do is absolutely routine but we are respecting Madoffs system by asking KMPG to do this for us."

- a. What was your understanding of this statement?
- b. What was your understanding of why it was necessary to "respect Madoff's system"?
- 255. You wrote in an email to Paul Smith on September 9, 2005 following Ms. Coe's email, "I suggest we explain that the Group's preferred agent for US assets such as those traded by Madoff is [redacted] and in all markets the Group sub-custodians for market traded assets are generally banks. However, at the client's request we have Madoff as sub-custodian for certain assets."
 - a. To what did the "Group" refer?
 - b. Which client requested that Madoff act as sub-custodian for certain assets?
 - c. For which assets did Madoff act as sub-custodian?
 - d. Who was the Group's preferred agent for US assets?
 - e. Why was this agent the preferred agent?
 - f. Were there any other sub-custodians who were not banks aside from BLMIS?
 - g. If so, what HSBC sub-custodians were not banks?
 - h. Did these other sub-custodians also both "trade and hold" client assets?
- 256. Please refer to Exhibit 1. In paragraph 185 on page 55, you state, "On 27 September 2005, Paul Smith emailed me and Ms Coe to say that he had spoken to Ms Kohn. Mr Smith's email said that Ms Kohn did not approve of the review of BLMIS that HSBC was commissioning and that she wanted Mr Madoff to know this. Ms Kohn's view was reportedly that she would rather live with restricted credit lines than risk upsetting Mr Madoff. Mr Smith's email said that he had explained that the review would have to be done and that Ms Kohn said if that was the case she wanted Paul Smith to inform Mr Madoff of the review in person."
 - a. Did Paul Smith inform Madoff in person of the review?
 - b. Were there any discussions at HSBC about Mr. Smith informing Madoff?
 - c. What was your understanding of why Ms. Kohn wanted Paul Smith to inform Madoff in person of the review?

- 257. Can you confirm that Exhibit 43 is an email chain between David and Paul Smith that was forwarded to you by Christine Coe on October 3, 2005?
- 258. The first email in the chain forwarded to you by Ms. Coe was sent on September 29, 2005 by David Smith to Paul Smith, is that correct?
 - a. Was David Smith's email in response to the discussions with clients you envisioned in Exhibit 41?
- 259. In the email, David Smith states, "I spoke with Alberto who expressed a personal wish that you do not specifically mention Thema rather that your enquiry is on behalf of all your clients whose assets are held with Madoff. Investors (including us) are all concerned that Madoff will turn the tap off on clients who cause him angst."
 - a. Does "Alberto" refer to Alberto Benbassat?
 - b. Who is Alberto Benbassat?
 - c. What was your understanding of the statement that Madoff may "turn the tap off on clients who cause him angst"?
 - d. Did you contact Dr. Fano about the KPMG review?
 - e. If you did contact Dr. Fano about the KPMG review, what was her reaction?
 - f. Did Dr. Fano ever express her misgivings to you about this review and that Madoff would "turn off the tap"?
- 260. In response, Paul Smith stated, "I understand and will make sure Bernie gets the right message."
 - a. What was your understanding of this statement?
 - b. Does "Bernie" refer to Madoff?
- 261. On September 30, 2005, David Smith sent another email to Paul Smith stating, "Madoff is not prepared to work with other custodians as it believes most of the industry participants in Wall Street follow the firm's activities which will dilute any potential for gain from the strategy if they are aware each time the strategy is invested. This is a fair observation. I know that Goldman Sachs tried to mirror this strategy on their proprietary trading desk but after 3 years they gave up which confirmed to our group that there is a magic formula whether systematic or fundamental which is quite unique."
 - a. Were you aware of Goldman Sachs' efforts to replicate Madoff's strategy before this email?

- b. Did you or anyone else at HSBC follow up on Goldman Sachs' efforts to replicate Madoff's strategy?
- c. Did it concern you that Goldman Sachs could not "mirror" Madoff's strategy?
- d. What was your understanding of David Smith's statement that Madoff had a "magic formula"?
- e. Did it concern you that David Smith believed Madoff had a "magic formula"?
- 262. In the email, David Smith also states, "We are off [sic] course aware Madoff resents interference in an unnecessary way and when you visit his office we expect your team will display full deference to the people they meet."
 - a. What did you understand David Smith to mean by "when you visit his office we expect your team will display full deference to the people they meet"?
 - b. Did it concern you that David Smith requested that KPMG "display full deference" to BLMIS?
 - c. Did any of your other clients request that HSBC display full deference to the subject of a due diligence review?
- 263. In the email, David Smith also stated, "Please don't mention Thema specifically but generally as one of your clients and may I suggest you state HSBC reviews all its sub custodian reviews through KPMG on a regular basis and this is the first review since BoB was acquired by HSBC."
 - a. Was it true that HSBC reviewed all of its sub-custodians through KPMG?
 - b. Was Madoff told that HSBC reviewed all of its sub-custodians through KPMG?
 - c. Was Madoff told that this review was a general review conducted by HSBC of all of its sub-custodians?
 - d. Did any of your other clients suggest how HSBC conducted its due diligence reviews?
- 264. Can you confirm that Exhibit 44 is an email you received from Paul Smith on October 13, 2005 concerning the KPMG review of BLMIS?
- 265. In the email, Paul Smith stated that he had spoken to Madoff that day "about the need for the KPMG review. He took this well and would like to see the brief for the review. What

do we have that I can send to him that sets out the scope of the review, its timespan and the areas that we intend to cover? I have promised to send this to him tomorrow."

- a. Was the brief and scope of the review ever sent to Madoff?
- b. If the brief and scope of the KPMG review was sent to Madoff, in what form was it sent?
- c. Did other sub-custodians request to see the brief for review?
- d. If other sub-custodians requested to see the brief for review, were such briefs ever sent?
- 266. Can you confirm that Exhibit 45 is a copy of the KPMG Review of Fraud and Operational Risks at BLMIS report dated February 16, 2006?
 - a. Did you receive a copy of this report?
 - b. If so, when did you receive a copy of the report?
 - c. Did you review this report?
- 267. On page 4, the report states, "The review was to include speaking to HSBC staff based in London, Luxembourg and Dublin and conducting a selective review at the offices of Madoff LLC."
 - a. Did anyone from KPMG speak to you regarding BLMIS?
 - b. If you did speak to anyone at KPMG regarding BLMIS, what was discussed?
 - c. When did these discussions take place?
 - d. Where did these discussions take place?
- 268. On page 8, in discussing its "Major Findings," the report states, "Asset ownership: Independent and external confirmation as to the ownership of individual HSBC client assets cannot be made."
 - a. What was your understanding of this statement?
- 269. Please refer to Exhibit 1. In paragraph 192 on page 57, you state, "the report did not identify any fundamental concerns. I noted that the report contained a lot of boilerplate language typical of review reports and that it made a number of recommendations, most of which I considered to be 'good housekeeping' matters."
 - a. Did you consider confirmation of the HSBC client assets to be a fundamental concern?

- b. Did you consider it a "good housekeeping matter"?
- 270. Please refer again to Exhibit 45. On page 9 of the report, it states, "Internal controls: The controls tested by KPMG during the course of the on-site work were found to be in place. However, they may not prevent fraud or error occurring on client accounts, if management or staff at Madoff LLC either override controls or undertake activities where appropriate controls are not in place." It then goes on to state, "HSBC staff in Luxembourg and Dublin receive information regards client accounts from BLM such as trading activity and price upon which a high level of reliance is placed."
 - a. What was your understanding of this statement?
- 271. Please refer to Exhibit 41. Among the concerns identified by Mr. Gubert are "we do not have full control of assets or real time sight of transaction flows; the transactions are all internal to the family firms and there is no proof of best execution or even actual execution," is that correct?
 - a. In that same email, Mr. Gubert suggested exiting the relationship with BLMIS if HSBC could not get comfort on these issues, is that correct?
- 272. Please refer to Exhibit 45. Beginning on page 9, the report sets forth a number of recommendations, including "**Trade Activity:** Discuss and agree with Madoff LLC a more appropriate approach by which HSBC are notified of trading activity on HSBC client accounts."
 - a. Was this recommendation ever implemented? Why not?
- 273. On page 10, the report recommends, "Undertake a review at HSBC's custody centres (Luxembourg and Dublin) in order to ensure that appropriate procedures are in place to independently confirm, where possible, the accuracy of transactions, identify possible risks and issues and record any errors, missing information or other operational issues."
 - a. Was this recommendation ever implemented? Why or why not?

Exhibit 1

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Witness Statement Nigel Fielding Defendants 4 March 2016 (Amended 12 September 2016)

IN THE GRAND COURT OF THE CAYMAN ISLANDS FINANCIAL SERVICES DIVISION

Cause No: FSD 30 of 2013 - AJJ

BETWEEN

PRIMEO FUND (IN OFFICIAL LIQUIDATION)

Plaintiff

AND

(1) BANK OF BERMUDA (CAYMAN) LIMITED
(2) HSBC SECURITIES SERVICES (LUXEMBOURG) SA

Defendants

WITNESS STATEMENT OF NIGEL FIELDING

I, Nigel Fielding, of 2 rue Tony Neuman, Luxembourg, L-2241, Grand Duchy of Luxembourg WILL STATE AS FOLLOWS:

Introduction

- I was between 15 September 2010 and 24 November 2015 the Country Chief Executive Officer of HSBC in Luxembourg, in which capacity I was responsible for all of HSBC's activities in Luxembourg. I am due to retire from HSBC on 31 March 2016. I was employed by the second defendant in these proceedings, HSBC Securities Services (Luxembourg) SA ("HSSL"), at all times between 15 March 1999 and the arrest of Bernard Madoff ("Mr Madoff") on 11 December 2008. I was also a director of Primeo Fund (in Official Liquidation) ("Primeo") between 15 August 2000 and 3 October 2006.
- Pursuant to the terms of a retention letter dated 4 February 2015 and signed by me on 9 July 2015, HSBC Bank plc ("HSBC") retained me to provide assistance with Madoff-related litigation, including these proceedings, on account of my involvement in relevant matters during my time

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as an employee of HSSL.¹ The retention letter expressly confirms, and I reiterate, that any testimony I may give as a witness does not form any part of my retainer.

3. I make this statement in connection with these proceedings commenced by Primeo in the Grand Court of the Cayman Islands against the Bank of Bermuda (Cayman) Limited ("BBCL") and HSSL (together, the "Defendants"). I am authorised to make this statement on behalf of both BBCL and HSSL by the relevant representatives for each company.

4. In preparing to make this witness statement I have read Primeo's Re-Re-Amended Statement of Claim dated 17 July 2015 (the "Re-Re-Amended Claim"), the Defendants' Amended Defence dated 18 November 2015 (the "Amended Defence") and Primeo's Amended Reply dated 11 December 2015 (the "Amended Reply"). I am also aware of the order made by Mr Justice Jones QC on 16 December 2015, striking out certain parts of Primeo's Re-Re-Amended Claim. I am therefore familiar with the claims currently made by Primeo against the Defendants in this litigation.

- 5. I make this statement from information acquired by me in the course of my involvement with matters relevant to issues in dispute in these proceedings. This statement is an outline of evidence only and is based upon my best recollection of events, and my review of documents that have been made available for me to review. It is true to the best of my knowledge and belief. I do not attempt in this outline to address every relevant event and document. I do not in this statement waive privilege in respect of any privileged discussions or documents to which I refer.
- 6. I have read the witness statements of Christine Coe, Brian Pettitt, Claude Quintus, Lucia Andrich and Maryse Duffin to be made on behalf of the Defendants in these proceedings. To the extent that the matters referred to in those statements are within my knowledge, and save where I say otherwise, I agree with the substantive contents of those witness statements.

¹ NF0001 {N/2945}

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Primeo's claims against the Defendants

7. I understand Primeo alleges in these proceedings that BBCL breached its duties as Primeo's administrator, and that HSSL breached its duties as Primeo's custodian.

8. I understand Primeo asserts that BBCL did not exercise reasonable care and skill in determining Primeo's net asset value ("NAV") and/or in keeping the accounts and/or financial books of Primeo, that it did not take reasonable steps to ensure that the information provided by Bernard L Madoff Investment Securities LLC ("BLMIS") as to the existence and value of Primeo's assets was accurate, and did not exercise reasonable care and skill in producing administration reports.

- 9. I understand Primeo asserts that HSSL did not exercise reasonable care and skill in keeping safe Primeo's securities, that it did not deal with Primeo's securities in accordance with the relevant custodian agreement between HSSL and Primeo, that there were no objectively reasonable grounds on which HSSL could be satisfied as to the ongoing suitability of BLMIS to provide custodial services and that HSSL failed to require BLMIS to implement the most effective safeguards under New York law to protect Primeo's assets, and it did not exercise reasonable care and skill in producing custodian reports.
- In the case of both Defendants, I understand that the central allegations now made by Primeo are that the Defendants failed to obtain independent confirmation of the existence of the assets of Primeo that were purportedly under BLMIS's management, that they failed to tell Primeo that they could not obtain independent confirmation of this kind and that, moreover, they did not tell Primeo that there were risks associated with BLMIS's business model, which should have caused the Defendants to tell Primeo they were unable to fulfil their contractual duties. Finally, I understand Primeo's case is that, if the Defendants had told Primeo that they could not carry out their duties because of their concerns, Primeo would immediately have withdrawn all of its assets under management with BLMIS and would have invested them elsewhere.
- 11. In overview, my observations concerning Primeo's key allegations against the Defendants are as follows:

- (a) Primeo originated its relationship with BLMIS and Mr Madoff. Primeo opened a "managed account" with BLMIS pursuant to which BLMIS provided investment management, brokerage and custody services to Primeo.
- (b) From 1996 onwards the majority of Primeo's assets were managed by BLMIS on Primeo's behalf pursuant to the arrangements that Primeo had put in place with BLMIS. Initially, Primeo placed its assets with BLMIS for management only directly, however Primeo later began doing so indirectly, through two other funds, Herald Fund SPC ("Herald") and Alpha Prime Fund Limited ("Alpha"), both of which placed virtually all of their assets with BLMIS for management. By 2 May 2007, Primeo placed its assets with BLMIS only indirectly, via Herald and Alpha.
- (c) It was HSSL policy (and common policy in the custody industry generally at the time) for custodians not to accept responsibility for clients' assets held by third parties pursuant to separate arrangements that the client had put in place with that third party. This was reflected in HSSL's standard custodian agreements with its clients, including Clause 6(B) of its custody agreement with Primeo {F/3/5} and Clause 6.2 of its custody agreement with Herald {F/21.3}. It was also reflected in clause 6(B) of the custodian agreement between Alpha and the Bank of Bermuda Limited ("BOB"). {F/19/7} Accordingly, HSSL was not in my view responsible for the safekeeping of Primeo's assets that were in the custody of BLMIS.
- (d) In my opinion, Primeo's investment advisers and its directors knew that BLMIS acted as broker and custodian as well as investment manager. They also knew that, on account of BLMIS's investment management model, Primeo was entirely reliant on BLMIS for information concerning the managed account and should have known that independent verification of the existence of BLMIS's trades and assets within BLMIS's custody was not possible. These were inherent limitations associated with BLMIS's investment model, however it must be remembered that BLMIS operated in a highly regulated environment.
- (e) The Defendants could not have obtained independent confirmation directly from the United States central securities depository, the Depositary Trust Company (the "DTC"), about assets held in BLMIS's omnibus client account with the DTC. Nor, in my experience,

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was it industry practice at the time to take the other steps suggested by Primeo in the Re-Re-Amended Claim (for example establishing sub-accounts at the DTC and with JPMorgan Chase for Primeo) as a means by which to perhaps obtain independent confirmation of information provided by BLMIS, nor would doing so have been practical. These allegations appear to me to have been formulated only with the full benefit of hindsight and changes in certain industry practices that occurred only subsequent to the 2008 financial crisis.

- (f) A sub-custody agreement between HSSL and BLMIS was first put in place in August 2002, not to formalise previous arrangements between BLMIS and HSSL, but for the purpose of giving HSSL the right to instruct BLMIS to make a free transfer of client assets held by BLMIS into HSSL's custody in the event of a credit default by the client towards HSSL. The 2002 sub-custody agreement was drawn up and discussed with BLMIS on my initiative. The intention of the sub-custody agreement was not to constitute BLMIS as a sub-custodian per se, nor was BLMIS treated as a sub-custodian for the purposes of the administration and custody services that were provided to Primeo by HSSL. Equally, BLMIS did not act in the manner of a sub-custodian of HSSL.
- (g) Although BLMIS was not a sub-custodian of HSSL in any real sense, it was nonetheless necessary for HSSL to conduct due diligence in respect of BLMIS before HSSL could enter into this sub-custody agreement with BLMIS. From my perspective, this was to ensure that BLMIS was appropriately qualified, in accordance with relevant market practice, to handle custody of our clients' assets such that we could be suitably satisfied that BLMIS could effect the free transfer of such assets to HSSL upon our request for our credit protection purposes. As BLMIS was not a bank and not a network sub-custodian, I led that due diligence, which included a visit to BLMIS's New York offices on 17 July 2002.
- (h) I led a further due diligence visit to BLMIS on 3 March 2004 for the purpose of refreshing the due diligence conducted in 2002. Following the 2004 acquisition of the Bank of Bermuda Group ("BOB Group") by HSBC Holdings plc, responsibility for such due diligence was centralised in London and led by the HSBC Securities Services ("HSS") Network Management team, the head of which was Brian Pettitt. Mr Pettitt led a further due diligence review of BLMIS, which included a visit to BLMIS's offices on 1 April 2005. On

account of Mr Madoff's stated confidentiality concerns, which related both to the protection of his trading strategy and non-HSS client information, a decision was then taken by HSS to commission an independent risk review of BLMIS by KPMG. I understand KPMG's review on behalf of HSS included a four day visit to BLMIS in November 2005 and it was reported that KPMG conducted end to end testing of trades purportedly made by BLMIS for HSS clients. I understand Mr Pettitt then conducted further on-site reviews of BLMIS in February 2007 and February 2008, including following up on various operational recommendations that had been made by KPMG. I understand that, in April 2008, KPMG conducted another detailed review of BLMIS on behalf of HSS, which again included end to end testing of randomly selected trades during their visit to BLMIS. I understand that Mr Pettitt then met again with Mr Madoff at BLMIS's offices on 19 November 2008. Based on my experience, these reviews conducted in respect of BLMIS, and most notably the KPMG reviews, exceeded market practice and any obligations the Defendants had in relation to Primeo.

- (i) None of the due diligence or review exercises led by me, Mr Pettitt or KPMG identified or reported any evidence of fraud or illegal activity at BLMIS. I now understand that this was because Mr Madoff perpetrated his fraud by generating vast quantities of illegitimate documentation, including trade confirmations, periodic statements and DTC records to provide evidence of trades that had never been made and assets that did not exist.
- (j) As to Primeo's contention that Primeo would have withdrawn all of its assets under BLMIS's management if the Defendants had notified it of the matters alleged by Primeo, I first dispute that there was any reason for the Defendants to notify Primeo of the matters alleged as, in my opinion, the Defendants were able to and did properly carry out their contracted duties to Primeo. Secondly, absent a reasoned suspicion or evidence of fraud or other serious irregularity at BLMIS, I consider it more likely that the investment advisors and remaining directors of Primeo would have sought other services providers to replace the Defendants rather than exit Primeo's arrangements with BLMIS under which BLMIS managed and held Primeo assets. Thirdly, in my opinion, Primeo's investment advisers and its directors were already aware of the inherent risks associated with Primeo's arrangements with BLMIS, including in relation to BLMIS holding Primeo's assets, potential

conflicts of interest arising from the multiple roles performed by BLMIS, reliance on BLMIS for information and services, and the inability to obtain independent verification of certain information.

Background and Roles

- 12. I have more than 35 years' experience in the financial services industry, gained working in markets around the world including the United Kingdom, the United States, Asia and Continental Europe. I have particular experience in the provision of banking, credit, global custody and fund administration services to alternative investment funds. I have also been a director of numerous investment funds.
- 13. In 1978, I commenced my career with Lloyds Bank International Limited in London, working in the area of accounting payments and control.
- 14. In 1981, I joined Continental Bank N.A. in London where I initially spent three years working as a financial and management accountant, followed by four years in the bank's international internal audit division and a year in European operations. In 1989, I was placed in charge of the bank's international custody services.
- 15. In 1992, I moved to State Street Bank & Trust Company ("State Street") in Hong Kong, where I was in charge of State Street's North Asia (excluding Japan) fund administration and global custody businesses. State Street was and continues to be regarded as a market leader among fund administration and custodian banks. In 1995, I moved to State Street's head office in Boston, where I initially worked on a proposed joint venture to set up a fund administration company in India. I then worked in the area of strategic business development focusing on new markets, a role that included establishing fund administration and global custody businesses in Latin America and South Africa. I gained significant further global custody and international fund administration experience during my time at State Street.

Bank of Bermuda

- 16. In February 1999 I left State Street and on 15 March 1999 joined what was then Bank of Bermuda (Luxembourg) S.A. ("BOBL"), now HSSL, the second defendant in these proceedings.
- 17. BOBL was incorporated in 1988 as a wholly owned subsidiary of BOB. BBCL was also a wholly owned subsidiary of BOB and both Defendants were therefore members of the BOB Group.
- 18. As I explain in more detail below, in February 2004, the BOB Group was acquired by HSBC Holdings plc and BOBL changed its name to HSSL. For convenience, I will refer to the second defendant only as HSSL hereafter.
- 19. My first position at HSSL was as General Manager of Corporate Trust (which later became known as Global Fund Services ("GFS")), in which capacity I had responsibility for fund administration, global custody, transfer agency, banking and credit services to collective investment funds and institutional investors. The day to day fund administration and custody services provided to funds were performed by specialist teams within HSSL and the head of each of the fund administration, custody, and transfer agency departments reported to me. I reported to Chris Wilcockson, who was then the Managing Director of HSSL. Mr Wilcockson became Global Head of GFS Client Services in 2001 before returning to the role of Managing Director of HSSL in 2008, which he maintained until his retirement from HSSL in 2011.
- 20. In early 2001, Paul Smith took over from Luis Douglas as the global head of GFS. Mr Wilcockson, to whom I reported, reported to Mr Smith. Mr Smith had a global remit, and wanted to increase the coordination between the various jurisdictions in which GFS operated (which by 2004 included Bahrain, Bermuda, Cayman Islands, Cook Islands, Dublin, Guernsey, Hong Kong, Isle of Man, Japan, London, Luxembourg, New York, New Zealand, Singapore, and South Africa). Following the acquisition of the BOB Group by HSBC Holdings plc in 2004, Mr Smith subsequently became head of AFS at HSBC (which I refer to later in this statement).

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21. In 2001, Mr Smith appointed various people to global roles in GFS, e.g. sales and relationship management, strategy and marketing, IT, finance and client services (the latter being the role taken up by Mr Wilcockson). In addition, he appointed regional heads of GFS in Europe, Asia and the Americas. Mr Smith also established a GFS global management committee whose role was to provide high-level coordination and oversight of the business of GFS across borders at a strategic level. However, it was not the role of this global management committee to provide day-to-day management of the fund services being provided by each office within GFS (including HSSL in Luxembourg).

Primeo Fund

- 22. Primeo was one of the many client funds for which I was responsible as General Manager of Corporate Trust at HSSL, and it accounted for only a small percentage of the total assets of all of the funds for which I was responsible for providing services.
- 23. Credit was regularly extended by HSSL to its fund custody clients for foreign exchange, overdraft and (later) leverage purposes and a significant part of my work in the early 2000s involved reviewing credit proposals submitted to the Luxembourg credit committee. It was during this work that I first became aware of Bernard Madoff ("Mr Madoff") and Bernard L Madoff Investment Securities LLC ("BLMIS").
- 24. By the time I joined HSSL, Primeo's relationship with BLMIS and HSSL was well established. I came to learn that HSSL had provided fund administration and custody services to Primeo since the commencement of the fund's operations in early 1994 following the establishment of the fund by its sponsor and promoter, Bank Austria AG ("Bank Austria") through two agreements dated 21 December 1993.

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Custodian and Administration Agreement

25. At the time I joined HSSL, services were provided to Primeo pursuant to a Custodian Agreement²

between Primeo and HSSL (the "Custodian Agreement") and an Administration Agreement³

between Primeo and BBCL (the "Administration Agreement"), both of which were dated 19

December 1996. I have reviewed the relevant Primeo board minutes and these agreements, and

it appears that the Custodian Agreement was signed on behalf of Primeo by Dr Stefan Zapotocky

and Dr Peter Scheithauer, both of whom I understand were nominated by Bank Austria as

founder directors of Primeo, and that the Administration Agreement was signed by Dr

Zapotocky and another Primeo director who I also understand had been nominated by Bank

Austria, Dr Karl Kaniak.

26. HSSL provided fund administration services to Primeo on behalf of BBCL pursuant to a back-to-

back Delegation Agreement⁴ between BBCL and HSSL, which was also dated 19 December 1996.

Accordingly, HSSL was the custodian and sub-administrator of Primeo.

Primeo Global and Select

27. At the time I joined HSSL, Primeo was one of two HSSL client funds that had chosen to establish

a managed account with BLMIS pursuant to the BLMIS model, which comprised investment

management, brokerage and custody services.

28. I understood that Primeo had initially launched one sub-fund when it first started business,

which was called Primeo Global. I understood that this was set up as a fund-of-funds structure,

and placed its assets with a number of different hedge funds and investment managers in

different jurisdictions (as its name suggested) in Europe (e.q. Odey Fund), the United States (e.q.

Perry Partners) and Asia (e.g. Hermes Asia). This is confirmed by the Primeo board minutes of 7

April 1994, 20 December 1995 and 12 June 1997, which I have reviewed.⁵ A certain portion of

² PRI_0000711 {F/14}

³ PRI 0015537 {F/13}

⁴ PRI 0001003 {N/80.1}

⁵ PRI 0001041 {N/80.2}, PRI 0011248 {N/29.1}, PRI 0014884 {H/4}

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the assets of this original Primeo Global sub-fund were also placed with BLMIS. This original Primeo Global sub-fund was subsequently wound down in February 2001.⁶

29. However, at the beginning of 1996 Primeo had undergone a restructuring, as a result of which certain shares of Primeo were designated as Series A and Series B shares. Later, in October 1996, these Series A and Series B shares were renamed Primeo Global Fund ("Global") and Primeo Select Fund ("Select") respectively. As the 1995 minutes I have referred to show, the purpose of Select was to place assets for investment management exclusively with BLMIS.

30. Primeo underwent a number of structural changes during my time as a director of the fund. In April 2001, Primeo Select Fund (€) opened which invested in Primeo Select Fund (\$). In November 2003, Primeo Executive Fund ("Executive") opened, which invested in Select, Alpha (of which I was at this time also a director) and certain money market funds. Then, in November 2004, Executive switched its investment in Select to a sub-fund of Herald. Both Alpha and Herald placed substantially all of their assets with BLMIS using a "managed account" structure. In December 2005, Select (€) and Select (\$) merged to become the Primeo Select Fund with \$ and € share classes. Substantially all of the assets of the Primeo Select Fund were placed with BLMIS, directly or indirectly, throughout the period of its existence.

Primeo's Investment Adviser

31. Primeo was a sophisticated investor and was advised by professional investment advisers, BA Worldwide Fund Management Ltd ("BA Worldwide"), which I understood to be a wholly-owned subsidiary of Bank Austria. The President of BA Worldwide, Dr Ursula Radel-Leszczynski (also known as Ursula Fano) ("Dr Fano"), was effectively responsible for the day-to-day management of Primeo, as well as advising Primeo in relation to its investment strategy and risks. BA Worldwide carried out its roles under an advisory agreement between Primeo and BA

⁶ PRI_0001336 {N/375}

⁷ PRI_0000943 {N/57}

⁸ PRI_0000990 {N/74}

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Worldwide dated 15 December 1993 (the "Advisory Agreement")⁹ (which was signed on behalf of Primeo by Dr Zapotocky and Dr Scheithauer). Dr Fano was based in Vienna.

I was aware that Dr Fano was in contact with Sonja Kohn ("Ms Kohn"), who effectively owned and controlled Bank Medici in Vienna ("Bank Medici"). Indeed, BA Worldwide and Bank Medici both had offices in the same building in Vienna when I visited Bank Medici in about 2003 as mentioned below. Having reviewed the documents, I now recollect that Eurovaleur Inc ("Eurovaleur") (a company that I understand was effectively owned and controlled by Ms Kohn) acted as sub-investment adviser to Primeo under an agreement between BA Worldwide and Eurovaleur dated 1 January 1994 (the "Sub-Advisory Agreement"). 10

33. I recall Dr Fano telling me that Ms Kohn had been involved in establishing the relationship between Mr Madoff and Primeo and I regarded Ms Kohn as a 'gatekeeper' to Mr Madoff. I note that the minutes of the Primeo board meeting on 20 April 1994¹¹ record that it was resolved that:

"In her function as manager of the firm Eurovaleur, Inc., Ms Sonja Kohn, who is investment adviser with the Primeo Fund by virtue of the sub-advisory agreement between Eurovaleur, Inc., and Bank Austria Worldwide Fund Management on 1st January 1994, is authorised to use business cards which carry the name "Primeo Fund" next to her personal information and business address in connection with the fulfillment of her duties under the above mentioned agreement"

34. Although I do not recall being aware of them at the time, I have for the purposes of preparing this statement reviewed an agreement between Primeo and Bank Medici dated 4 August 1997 (the "Medici Agreement")¹² and another agreement between Bank Medici, Eurovaleur and BA Worldwide dated 16 April 2003 (the "Sub-Sub-Advisory Agreement")¹³, which also evidence Ms Kohn's links to Primeo.

⁹ PRI 0015535 {F/1}

¹⁰ PRI_0015500 {F/4}

PRI_0011248 {N/29.1/3}

¹² NF0002 {F/16}

¹³ PRI_0014871 {F/20}

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35. When I met with Ms Kohn at Bank Medici's offices in Vienna in about 2003 she told me that she

had been instrumental in the relationship between Mr Madoff and a number of funds, including

Primeo. Ms Kohn was understood to have privileged access to Mr Madoff and was involved with

a number of funds, including Primeo (and later Alpha and Herald), that placed substantially all of

their assets with BLMIS.

36. As I explain below, Alpha was established in 2003 and Ms Kohn and I overlapped as directors of

Alpha for a period. I recall Ms Kohn mentioning that she was often in contact with Mr Madoff.

Ms Kohn was also known to be protective of the relationship with Mr Madoff. The way I

understood it worked was that if someone upset Mr Madoff, he would contact Ms Kohn and she

would then relay his displeasure.

The BLMIS Asset Management Model

37. As I have said, BLMIS's asset management model combined investment management, brokerage

and custody. This was well known and I was aware from conversations with, amongst others, Dr

Fano, that HSSL's clients who placed funds with BLMIS for investment management, including

Primeo, understood this and indeed had put in place this arrangement themselves.

38. Primeo and BLMIS were the parties to various agreements which regulated the arrangements

pursuant to which Primeo had engaged BLMIS. These had initially included a Customer

Agreement dated 18 January 1994, 14 an undated Option Agreement 15 and a Trading

Authorization dated 24 January 1994¹⁶ (together, the "1994 Brokerage Agreements") at the

time of the establishment of the original Primeo Global sub-fund.

39. There was also a later suite of agreements between Primeo and BLMIS, including a Customer

Agreement dated 29 February 1996, ¹⁷ a Trading Authorization dated 29 February 1996 ¹⁸ and an

¹⁴ PRI 0000879 {F/5}

¹⁵ PRI_0000878 {F/6}

¹⁶ PRI 0000880 {F/7}

¹⁷ NF0003 {F/9}

¹⁸ PRI_0000958 {F/10}

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Option Agreement dated 29 February 1996¹⁹ (the "1996 Brokerage Agreements"), which were entered into around the time of the establishment of Select (together with the 1994 Brokerage Agreements, the "Brokerage Agreements").

- 40. Although I was aware that Primeo had a managed account in place with BLMIS (which I refer to in more detail below), I do not recall specifically reviewing the Brokerage Agreements until I began preparing to visit BLMIS in July 2002 in connection with the due diligence exercise (to which I also refer below).
- 41. I came to learn that Mr Madoff's purported investment strategy basically involved periodically purchasing a selection of S&P 100 stocks and hedging these positions with options. By exercising discretion as to the timing and hedging of his purported stock investments, Mr Madoff was purportedly able to out-perform the S&P 100 index. In this way, Mr Madoff claimed to be able to generate consistent returns at relatively low risk over a sustained period. While investors' funds being managed by BLMIS were "out of the market", BLMIS purportedly invested the funds in US treasury bills or money market funds (including Fidelity), and my understanding was that the funds were typically purportedly fully invested. BLMIS's returns were never spectacularly high, particularly relative to the returns being generated by quite a number of other alternative funds at this time, but they were consistent.
- 42. I recall that Dr Fano had told me that Mr Madoff was extremely protective of his trading strategy and that BLMIS also acted as broker-dealer to the stock transactions and held custody of the assets of his clients both as a means by which to protect the confidentiality of his trading strategy and to optimise the efficiency of his trading. Maintaining confidentiality of trading strategies was quite the norm among alternative fund managers.
- 43. "Client-appointed" arrangements for the management and holding of such assets by third parties (outside of the control and responsibility of HSSL as custodian) were not unusual among alternative funds. Often, such third parties would be brokers. As I have said, as a matter of standard policy HSSL did not accept responsibility for the safekeeping of a client's assets that

¹⁹ PRI 0000950 {F/11}

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were being held, at the client's direction or pursuant to separate arrangements that the client had put in place, by such a third party.

- 44. If HSSL had insisted that the BLMIS-managed assets of Primeo be transferred into the custody of one of the BOB Group's network sub-custodian banks (e.g. Citigroup in the United States), I have no doubt that, given Mr Madoff's "take it or leave it" approach to the terms of his asset management services, this would have been unacceptable to BLMIS and therefore also to Primeo. It would then have been up to Primeo to decide what to do and I expect that the fund would have reached the view that BLMIS was more important than HSSL and BBCL and therefore would have appointed another custodian and fund administrator.
- 45. At Primeo's instruction, money of Primeo was transferred by HSSL to BLMIS for investment management on behalf of Primeo pursuant to the managed account arrangements between Primeo and BLMIS. A managed account is simply an account with a third party who manages assets in accordance with a particular investment strategy and any investment restrictions that might be agreed with their client.
- 46. It was not, in my experience, unusual for large broker dealers such as BLMIS to handle management, clearing, settlement and custody of assets. For example, I understand that Merrill Lynch and UBS provided all of these services to their clients.
- 47. The investment management arrangements between Primeo and BLMIS were a matter for those parties. In my opinion, it was clearly understood by all of the relevant parties that Primeo assets were in the custody of BLMIS in connection with BLMIS's role as the manager of those assets.
- 48. As I have said, it was HSSL standard policy not to accept responsibility as custodian for assets held by a third party at the direction of a client or pursuant to separate arrangements that the clients had put in place in this regard. This was common practice within the funds industry at the time. This policy was reflected in HSSL's standard custodian agreements with its clients, including Clause 6(B) of its custody agreement with Primeo and Clause 6.2 of its custody agreement with Herald. It was also reflected in clause 6(B) of the custodian agreement between

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Alpha and BOB. Indeed, I understand that this was a standard provision that appeared in all of HSSL's custodian agreements with relevant fund clients during this period. I have also been shown relevant offering memoranda of Primeo (from 2001 onwards), which refer to this clause. This is unsurprising, and is consistent with both the standard policy of the bank and industry practice at the time.

- 49. Put simply, HSSL was the custodian in respect of Primeo's assets that were delivered into HSSL's custody. Such assets clearly did not include assets that were in the custody of BLMIS pursuant to the separate arrangements between Primeo and BLMIS, and these assets fell outside the scope of the Custodian Agreement and HSSL's custodian responsibilities.
- That is not to say that the Custodian Agreement had no purpose or object, or was otherwise meaningless. As I have said, the original Primeo Global sub-fund was a fund-of-funds, and HSSL held custody of the shares in the underlying funds pursuant to the Custodian Agreement. Furthermore, from 2003 onwards, Executive (and later Select) became a fund-of-funds, placing assets with BLMIS indirectly by investing in shares of Alpha and Herald and also investing in certain money market funds, and HSSL again acted as custodian of the shares held by Primeo in Alpha, Herald and the money market funds pursuant to the Custodian Agreement. HSSL also stood ready to accept custody of any other eligible assets that Primeo may have wished to deliver into HSSL's custody for safekeeping in accordance with the Custodian Agreement.
- Primeo's managed account arrangements with BLMIS concerned HSSL insofar as the bank was extending credit to Primeo that was secured against or supported by Primeo's assets that were in the custody of BLMIS. HSSL also required trade confirmations and periodic statements from BLMIS to enable HSSL to calculate Primeo's NAV pursuant to HSSL's duties under the Administration Agreement.

Primeo - the Board of Directors

52. It was part of the GFS service offering, where the bank acted as custodian or administrator for a fund, to provide employees of the bank to serve on the board of the fund when requested by

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the client. On 15 August 2000, I replaced my HSSL colleague David Bailey, who had been on the board since 1998, as a director of Primeo.²⁰

At the time I joined the Primeo board, the other directors of the fund were Karl Kaniak, Hans-Peter Tiefenbacher, Johannes Spalek and Alfred Simon, all of whom I understood were employed by Bank Austria, and Wolfgang Bauer from CA-IB Securities S.A., which I understood was a subsidiary of Bank Austria. Mr Bauer resigned as a director of Primeo a short time later on 2 November 2000.²¹

I considered the directors of Primeo to be experienced professionals with knowledge of the funds world. Dr Kaniak and Mr Tiefenbacher had been directors of Primeo since 1993 and had been involved in the establishment of Primeo and the original decision of the board to place assets with BLMIS for management. Mr Spalek had also been a Primeo director for a number of years, having joined the board in 1996. Mr Simon joined the board in May 2000, and had been appointed Chairman, President and Chief Executive Officer of Primeo. James O'Neill and Hannes Saleta, both of whom I also understood were from Bank Austria, joined the Primeo board in June 2003 and January 2005 respectively.

- 55. By the time I joined the Primeo board in August 2000, Primeo placed substantially all of its assets with BLMIS for investment management. However, I have reviewed the following Primeo board minutes, resolutions and offering memorandum with respect to asset allocation to individual managers and the decisions of Primeo's board to allocate an increasing percentage of Primeo's assets to BLMIS prior to me joining the board. I note as follows:
 - (a) Pursuant to a signed resolution of the Primeo board dated 20 December 1993, the initial allocation of Primeo's assets to various managers "as of 1st January 1994" provided that 7.5% of the fund's assets were to be allocated to "Madoff".²²

²⁰ PRI_0001292 {N/328}

²¹ PRI_0014833 {N/348}

²² PRI 0015148 {N/18/7}

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(b) Pursuant to a signed resolution of the Primeo board dated 1 March 1994, it was confirmed that 7.5% of the fund's assets had been allocated to "Bernard Madoff".²³

(c) The minutes of the Primeo board meeting on 20 April 1994 record that it was resolved that "the members of the Board of Directors of the Primeo Fund reserve the right to select the individual managers to whom funds are to be entrusted for investment", but that no one investment manager could be allocated more than 7.5% of Primeo's total fund volume (which was defined as all existing investments plus funds that had been received by the administrator but not yet invested). ²⁴ Resolution 6 made at the same meeting is recorded in the minutes as confirming that "new investments must be placed with the following entities", one of which is "Bernard Madoff".

(d) Pursuant to a signed resolution of the Primeo board dated 5 July 1994, it was resolved "to permit fund managers who have in excess of 7,5% of the asset allocation of the Fund... to maintain an allocation above 7,5%... as long as such allocation does not exceed 20%".²⁵

(e) The minutes of the Primeo board meeting on 20 December 1995 record that "Dr. Zapotocky reported about the project to set up a special share class of Primeo Fund (share class B) for Bernard L.Madoff Investment Securities fund only". ²⁶ I understand this to be a reference to the proposed establishment of what later became known as Select (i.e. the Primeo series B shares), which I understand was established for the purpose of placing the assets of such shareholders exclusively with BLMIS for investment management. ²⁷

(f) The minutes of the Primeo board meeting on 15 January 1996 record that "Mrs Kohn presented the project of Share Class B which should be for Madoff only". 28

(g) As I explained above, in January 1996 Primeo split into two share classes: series A shares and series B shares. Pursuant to Primeo's Offering Memorandum dated January 1996, Primeo

²³ PRI_0000781 {N/18/12}

²⁴ PRI 0011248 {H/2/2}

²⁵ PRI_0000892 {N/34/1}

²⁶ PRI 0014884 {H/6}

²⁷ PRI_0000990 {N/74}

²⁸ PRI_0017158 {H/7}

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would "utilize a multi-manager approach with respect to investment and management of the Fund's assets of Series A Shareholders". Conversely, Primeo's assets that were allocated to series B shares would be "invested in a large number (approx. 30) of U.S. equity securities or in equity related options". ²⁹ I also note that the documents state that "the Fund agrees with respect to Shares (other than Series B Shares), it will not invest more than 20% of the assets in any Investment Company or with any Manager" {G/2/13}. I understand that these are references to the assets of series A shareholders being managed by multiple investment managers (with not more than 20% of series A shareholders' assets being placed with any one manager) and the assets of Series B shareholders being placed solely with BLMIS for management (without any restriction being imposed on the allocation of assets to BLMIS).

- (h) Pursuant to a signed resolution of the Primeo board dated 4 March 1996, it was resolved "that the maximum percentage allocation to be allotted to each investment manager for Series A Shares, which is currently 7,5%, should be increased to 15%".³⁰
- (i) As I noted above, in October 1996 the Primeo Series A and Series B shares were named Global and Select respectively. The minutes of the Primeo board meeting on 12 June 1997 record that, with respect to Global, "[a]ccording to the Offering Memorandum the investment with a single manager may not exceed 20% of the Fund's assets. However one of the managers is likely to exceed this limit very soon due to his excellent performance. It was agreed to make a special resolution in this respect for Madoff...". There follows a resolution of the board which notes that "due to the positive performance of Madoff, the percentage of assets of the Fund managed by Madoff may exceed the maximum percentage of 20%. However the Fund does not wish to withdraw any assets from Madoff on this time, even if the assets under management with Madoff does exceed 20%." {H/14/2} Accordingly, by this point I understand that the restriction on the maximum percentage of Global's assets that could be held with BLMIS was waived (in the case of Select there was already no such restriction as Select was intended to be fully invested in BLMIS).

²⁹ PRI_0015154 {G/2}

³⁰ PRI 0000956 {N/64}

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Dr Fano, who was not a director of Primeo during the time I was on the board, attended all of the Primeo board meetings at which I was present. Dr Fano would provide a detailed report to the board concerning the investment activities of the fund. Her role was fundamental to the management of the fund. In my experience, the board did not make any important decision concerning Primeo without her input. Dr Fano was effectively the general manager of the fund (which did not have any of its own employees) on a day-to-day basis. She determined, for example, how to allocate the fund's assets, which was then approved by members of the board.

Dr Fano seemed very knowledgeable about BLMIS and she told the board that she visited Mr Madoff and BLMIS approximately twice a year in her capacity as the President of Primeo's investment adviser, BA Worldwide. I have been shown internal due diligence reports produced by BA Worldwide which confirm that she would visit BLMIS twice a year. Dr Fano was positive in her reports back about BLMIS and Mr Madoff. Regarding any issues or concerns raised by the board relating to BLMIS or Mr Madoff, Dr Fano would explain how she had considered them and in all cases that I remember she concluded she was not worried by them. In my view, the directors took comfort from the work performed by BA Worldwide and the fact that Dr Fano was satisfied with the arrangements concerning BLMIS.

- 58. When I joined the Primeo board, there was already a wealth of experience among the directors and they were familiar with how Primeo was both structured and managed. As one would expect, the Primeo board understood the fund's investment strategy and the roles of the various key parties involved in connection with the fund's activities.
- 59. Though I of course do not remember everything that was said at each and every board meeting, I have reviewed a relevant selection of the minutes of the board meetings which I attended, which have assisted me in some general recollections. I set out below my recollection of what, to my mind, the board members knew regarding certain key matters concerning the arrangements relating to BLMIS.

³¹ PRI 0001236 {N/271.1}

- 60. The board knew that Primeo had established a managed account with BLMIS. The term "managed account" was used in board meetings, and was how the arrangement between BLMIS and Primeo was described in the investment adviser reports. The directors were aware that BLMIS, in operating the managed account of Primeo, provided broker dealer services to Primeo and had custody of the assets of Primeo that were under BLMIS's management, and that those assets were not in the custody (or safekeeping) of HSSL. This arrangement was part and parcel of how BLMIS operated the managed account, and the directors in my view understood that BLMIS having these roles in relation to Primeo's assets was a non-negotiable term of BLMIS's investment management services insofar as Mr Madoff was concerned.
- 61. The sensitivity of Mr Madoff to maintaining confidentiality regarding his trading strategy and the fact that BLMIS was generally closed to new investment management business were also known to the Primeo board, and the former was a significant part of the reason why Mr Madoff insisted on BLMIS having brokerage and custody of the assets placed with it for investment management. Further, the board understood that HSSL was reliant upon information being provided by BLMIS concerning the assets of the fund that were held in the managed account, in particular when determining the NAV of Primeo.
- 62. The board took comfort from the fact that BLMIS was regulated by the US Securities and Exchange Commission ("SEC"), that BLMIS was independently audited, that the accounts of Primeo were independently audited by Ernst & Young, and from the fact that Mr Madoff was understood to be a highly respected person in the US securities market with a long-standing reputation. These were matters that were discussed among the directors at board meetings that I attended.
- 63. Primeo board meetings took place at minimum once a year. The meetings that I attended typically ran for more than two hours. The meetings were often recorded for the purpose of producing the minutes, however I understand that these audio tapes were overwritten once they were no longer needed. The agenda would typically include the approval of the minutes of the previous meeting, a consideration of matters arising from and since the previous meeting, a report from the administrator and the custodian, a report from the investment adviser, the approval of the audited annual accounts (where applicable) and any other relevant documents or agreements, and any other business. The minutes of the meeting were typically taken by an

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employee of HSSL (Debra Adams, for example, carried out this task), and the draft minutes were usually circulated to me and Dr Fano for any comments prior to being finalised for approval by the board (which was usually handled at the next board meeting). In the usual way, the meeting minutes did not document every word of the board's discussions, but endeavoured to capture and record all of the key points.

64. I resigned as a director of Primeo on 3 October 2006³² as HSS's general policy was no longer to offer HSBC Group employees as board members of client funds. I thereafter had very little direct involvement with matters concerning Primeo.

First meeting with Mr Madoff

- 65. In 2000, Primeo was considering increasing its dealing frequency, *i.e.* the regularity with which its investors could make subscriptions and redemptions.³³ A NAV calculation of the fund would need to be prepared by the fund administrator for the purposes of any dealing date. At this time, it was quite typical for alternative fund dealing dates to be monthly, as was the case for Primeo, however the increase in dealing frequency proposed by BA Worldwide would require weekly valuations of the fund to be prepared by HSSL. HSSL's fund administration department would therefore need to obtain more frequent trade information and statements from BLMIS. BLMIS provided such information to HSSL's fund administration department by post or fax, which was not unusual at the time, particularly in the alternative investment funds environment.
- 66. In November 2000, my HSSL colleague Saverio Fiorino and I were scheduled to travel to New York on HSSL business that was unrelated to Primeo or BLMIS. Mr Fiorino took the opportunity to arrange a meeting at the offices of BLMIS on 2 November 2000 as both a courtesy visit and to request the more frequent information that would be needed on account of the proposed change to Primeo's dealing frequency.

³² PRI_0015791 {H/37/6}; NF0004 {N/1952}

³³ HSBC 0055990 {N/311}

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At BLMIS's New York offices, Mr Fiorino and I first met with Frank DiPascali on the floor that Mr DiPascali told us handled BLMIS' investment management operations. I understood Mr DiPascali to be the head of investment management operations at BLMIS. We spoke with Mr DiPascali for about thirty minutes, explaining what it was that Primeo wanted to do in terms of weekly fund valuations and the more frequent information that HSSL would need from BLMIS as a result. At the end of this meeting, Mr DiPascali invited us to meet with Mr Madoff in Mr Madoff's office, which Mr DiPascali explained was on the broker dealer floor separate from the investment management operations. Mr DiPascali introduced us to Mr Madoff and we spent approximately fifteen minutes in discussion with Mr Madoff.

Mr Madoff told us about BLMIS. He explained that its main business was as a broker dealer and that its investment management activity was effectively a side-business. It was my experience that access to Mr Madoff's investment management services was regarded as exclusive, and was coveted by clients. My perception was that investment management services were something that Mr Madoff provided as a favour to the fortunate few. Mr Madoff said that he was closed for new investment management business. This made sense to me because if a particular trading strategy is deployed on too large a scale it is more likely to be identified and copied by others in the market or the strategy can become too large to be accommodated effectively by the market. Mr Madoff also explained that BLMIS's broker-dealer daily trade volume accounted for a significant percentage of the New York Stock Exchange turnover. Every indication was that BLMIS was a large, successful and well-run company.

69. The meeting was amicable and Mr Madoff and Mr DiPascali agreed to provide us with the more frequent information we had requested that would allow Primeo to increase its dealing frequency.

Establishment by Primeo of a Credit Facility with HSSL

70. On 24 January 2001, a Credit Application Memorandum was prepared by Jesper Steiness, who was at this time the client relationship manager ("CRM") within HSSL who was responsible for

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Primeo.³⁴ The application proposed to establish both a US\$50 million foreign exchange facility and a US\$500,000 unadvised overdraft facility for Primeo. The application records that "the [foreign exchange] facility is to be used to allow a series fund of The Primeo Fund, namely Primeo Select Fund, to convert and hedge the value of Euro denominated subscriptions to USD for investment in liquid US equity subscriptions". Importantly, it noted further that "the facility is to be cash collateralised: Bank of Bermuda does not have custody of the assets of the Select Fund as these are held at broker in New York". This was of course a reference to Primeo's assets being held in the custody of BLMIS. I also note that, under the heading 'Liquidity', the application states that "[a]ll assets are held at broker (Madhoff (sic) in New York) with approximately 12% of the portfolio remaining in cash at December 2000. [HSSL] will have a deposit equal to 5% of the position dealt, and further cash calls will be made if the unrealised loss exceeds 3% of position". Accordingly, the US\$50 million foreign exchange facility was proposed to be secured by cash collateral equal to 5% of the facility limit (i.e. US\$2.5 million). This percentage was intended to reflect the loss that the bank might suffer in the event of an adverse foreign exchange movement, but would be subject to further cash calls if the loss exceeded 3%.

- 71. The minutes of the HSSL credit committee dated 26 January 2001 record that the Primeo credit application was approved subject to US\$3 million being retained by HSSL as collateral (*i.e.* 100% of the US\$500,000 overdraft limit and 5% of the US\$50 million foreign exchange facility limit).³⁵

 The foreign exchange facility was capped at a maximum of 25% of Primeo's NAV.
- 72. By a written resolution dated 31 January 2001, the Primeo board resolved to establish a foreign exchange facility with HSSL to a maximum of US\$50 million or 25% of the NAV.³⁶ The resolution was signed by five Primeo directors, including me.
- 73. On 12 December 2001, a further credit application memorandum was prepared by Mr Steiness in respect of Primeo which recommended the renewal of Primeo's credit facilities.³⁷ Under the heading 'Liquidity', the application noted that "[a]II assets are held at broker (Madhoff in New

³⁴ HSBC_0011113 {N/368}

³⁵ HSBC 0072467 {N/371}

³⁶ PRI 0001335 {N/373}

³⁷ HSBC_0024627 {N/487}

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York). End of October the amount was \$272m." This was a reference to the purported value of Primeo's assets held in the custody of BLMIS. Under the heading 'Risks and Mitigants', the application stated "Risk: All money invested with Madoff would be lost and the Bank cannot get cash to pay for any FX losses".

74. The minutes of the HSSL credit committee meeting on 14 December 2001, which I attended, record that the renewal of the credit facility was approved.³⁸

BLMIS Sub-Custody Agreements and Due Diligence

75. In late 2001, I became Deputy Global Head of Client Services for GFS, which among other things involved reviewing credit proposals submitted by GFS offices globally. This was a global role, however I continued to be based in Luxembourg and to report to Mr Wilcockson, who had become Global Head of Client Services for GFS.

76. At the time I took on this new role, it was the standard policy of GFS that it would not accept assets that were not within the bank's custody or control as eligible collateral for the purpose of granting credit facilities to clients. For example, the overdraft and foreign exchange credit facilities that had been provided to Primeo by HSSL were cash collateralised because Primeo's assets were in the custody of BLMIS pursuant to the arrangements that Primeo and BLMIS had put in place between themselves.

77. In early 2002, when I was reviewing a credit proposal for Thema International Fund plc ("Thema"), ³⁹ a fund established in Ireland in December 1996 as a UCITS (*i.e.* a regulated mutual fund established and operated pursuant to the applicable European Union directives), I noted that there was a sub-custody agreement between Thema's custodian, Bermuda Trust (Dublin) Limited ("BTDL") and Bank of Bermuda Limited, and a further sub-custody agreement between Bank of Bermuda Limited and BLMIS (the "Thema Sub-Custody Agreement"). The Thema Sub-Custody Agreement was amended by a side letter dated 9 May 2002 to grant the bank the right to instruct BLMIS concerning the transfer of client assets in BLMIS's custody. I considered that

³⁸ HSBC_0058078 {N/489}

³⁹ NF0005 {N/428}; HSBC_0082272 {N/518}

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the terms of this side letter were important in terms of improving the position of the bank in relation to the credit facilities that the bank was offering to the fund.

- 78. Thema was different to Primeo. It operated in a different jurisdiction and, as a UCITS, it was more heavily regulated than Primeo, which I presumed was why the Thema Sub-Custody Agreement had been put in place. However, it occurred to me that a similar agreement between HSSL and BLMIS, and particularly the language of the amended terms giving the bank the right to instruct BLMIS to transfer client assets from BLMIS to the bank should the need arise, would provide additional risk protection and opportunities to HSSL in respect of credit facilities offered by HSSL to client funds whose assets were held by BLMIS.
- 79. I considered that it could be helpful to put in place an agreement between HSSL and BLMIS that would enhance the bank's credit position and potentially facilitate client assets held by BLMIS being considered as eligible collateral for the purposes of credit facilities sought by HSSL's clients, including Primeo, which had appointed BLMIS to run their managed accounts. I wanted HSSL to be able to instruct BLMIS concerning the transfer of client assets held by BLMIS should that become necessary.
- 80. Furthermore, I considered that there was a greater prospect of BLMIS agreeing to enter into an agreement with HSSL that could be presented as similar to that which was already in place between BLMIS and another entity within the BOB Group.
- 81. In hindsight, a sub-custody agreement may not have been the most appropriate form of agreement, not least because it wrongly suggests that HSSL sought to engage BLMIS as a sub-custodian, however the reason for which the agreement was entered into was clear. I recall explaining to Dr Fano, before proceeding, that I planned to visit BLMIS and to present Mr Madoff with such a proposed agreement for the purpose of enhancing HSSL's position in relation to credit provided by HSSL to its client funds. I do not recall Dr Fano expressing any objections to the proposed meeting or agreement between HSSL and BLMIS.
- 82. Before HSSL entered into an agreement of the type I had in mind with BLMIS, it was appropriate for due diligence to be conducted by HSSL concerning BLMIS and to refresh such due diligence

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at appropriate intervals thereafter for as long as such an agreement remained in force. I was not aware of any specific due diligence having been carried out by HSSL on BLMIS prior to this, however that did not surprise me as clients' assets held by BLMIS were outside of HSSL's responsibility.

- 83. The purpose of the due diligence was to ensure that BLMIS was a reputable and financially sound firm that was holding assets in line with market practice, such that the bank could be suitably satisfied that BLMIS would be able to comply with a request made for the free transfer of client assets to the bank. In essence, we needed to be satisfied that the client assets held with BLMIS would be effective security in the event of a credit default by the client. I did not regard it as HSSL's role to conduct due diligence concerning the risks associated with Primeo's decision to place assets in a managed account with BLMIS.
- 84. The division within the BOB Group that oversaw network sub-custodian due diligence was the Financial Institutions Group ("FIG"), which was based in Bermuda. When I approached FIG concerning due diligence in respect of BLMIS I was told that FIG handled due diligence for network custodian banks only and that, as BLMIS was neither a bank nor within the BOB Group custody network, it would be up to GFS to coordinate any due diligence in respect of BLMIS. In practice, this meant that I would need to conduct the due diligence myself.
- 85. I had experience participating in and reviewing this type of due diligence (including having attended due diligence site visits with network managers while I was at State Street) and was comfortable with this task. FIG assisted me by providing me with their standard due diligence questionnaire, which was from an organisation called Thomas Murray Network Management Limited. Although some of the questions were not relevant to a broker dealer entity, such as BLMIS, the questionnaire provided a logical framework for the due diligence and I therefore used it as the basis for my due diligence work on BLMIS.
- 86. I called Mr Madoff and said that I wanted to visit BLMIS to discuss a proposed agreement between HSSL and BLMIS in respect of Primeo and another HSSL client fund that held its assets with BLMIS, and to complete a due diligence questionnaire for that purpose. I mentioned to Mr Madoff that BLMIS was already a party to the Thema Sub-Custody Agreement with another BOB

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Group entity, and said that the agreement I proposed would not be substantially different. Mr Madoff said, on that basis, the further agreement should be fine.

- 87. I decided to ask Fergus Healy, a lawyer working in a business development role within GFS, to assist with the due diligence visit as I valued his experience and insight. He had broad experience with alternative funds. He was also based in New York, which I thought might prove useful, and his involvement would provide an extra pair of eyes and ears. Mr Healy and I did some preparatory work in advance of the due diligence visit and discussed the areas that we planned to cover.
- 88. On 17 July 2002, Mr Healy and I visited BLMIS's New York offices and met with Mr Madoff for approximately two hours. I explained to Mr Madoff that the due diligence was in connection with the proposed sub-custody agreement between HSSL and BLMIS, which was for the purpose of credit facilities that HSSL provided to BLMIS's clients, and that it would not otherwise affect the existing arrangements between the parties.
- 89. Throughout the meeting, Mr Madoff appeared open and relaxed, and was forthcoming in providing the information that we requested for the purpose of completing the due diligence questionnaire. He personally answered most of the questions, and called upon other BLMIS employees to provide information when necessary. The answers he gave were satisfactory and appropriately detailed.
- 90. Mr Madoff told us that BLMIS was regulated by the SEC, which had always been my understanding. I considered the SEC to be a strong regulator that would exercise its powers to ensure the firms it supervised had adequate controls and processes in place, including for appropriate record keeping, reconciliations and segregation of client activity and assets, as well as verifying that they were audited appropriately. The US is an advanced market and BLMIS was a sizeable firm that had been in business for a long time. I understood that the SEC would have periodically reviewed BLMIS's activities and operations as part of its ongoing supervisory and regulatory duties. I took significant comfort from the fact that BLMIS was SEC regulated and I note from my review of the board minutes that I referred to the fact of BLMIS's regulation by the SEC at a number of Primeo board meetings.

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91. Mr Madoff also talked during the meeting about his business and mentioned that he had been chairman of the National Association of Securities Dealers Automated Quotations ("NASDAQ"), and was asked to join a post-9/11 steering committee for the financial industry. It appeared to me that BLMIS was a substantial and successful company and that Mr Madoff was highly regarded in the US financial market. After we completed our meeting, Mr Madoff took us on a tour of the BLMIS trading floor and introduced us to a number of BLMIS employees.

92. There were a few items on the due diligence questionnaire that did not apply to BLMIS because it was not a bank. Also, a small number of questions required further follow up by Mr Madoff, so I left the questionnaire with him to complete the few remaining items. He returned the completed questionnaire around the end of July 2002. The only questions that Mr Madoff was not prepared to answer concerned the size and evolution of his client base. He said that this was because BLMIS was a private company and was only required to disclose that information to the SEC. I subsequently prepared additional notes of Mr Madoff's comments during our meeting, which supplemented the answers provided in the due diligence questionnaire.

- 93. My understanding, again confirmed by Mr Madoff in his questionnaire answers at our meeting, was that BLMIS maintained segregated records on its systems of the assets that BLMIS held for each client account, and that client securities (in the case of US stocks) were held in an omnibus account (segregated from BLMIS's proprietary assets) at the DTC. This arrangement was in line with US market practice in my experience.
- 94. It was not standard practice, nor did I consider it to be necessary or practicable, for the BOB Group to gain access to the 'back office' of BLMIS to review individual client activity performed by BLMIS. Indeed, I understood that the managed account trading performed by BLMIS was conducted on a bulk basis across multiple client accounts. Such access would therefore have involved breaching the confidentiality of other clients of BLMIS with whom the BOB Group had no relationship. Seeking access to such information would have gone beyond the scope of standard due diligence and would in any event no doubt have been denied for confidentiality reasons.

⁴⁰ HSBC_0060327 {N/722}; HSBC_006032 {N/575}

⁴¹ HSBC 0083515 {N/568}

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95. We were not in a position to confirm BLMIS's omnibus client account holdings at the DTC. The DTC account was held by BLMIS and the BOB Group had no right to enquire with the DTC about that account. I understood that the only parties other than BLMIS that could gain direct access to information concerning BLMIS's account at the DTC would be the US regulators and BLMIS' auditors, Friehling & Horowitz. If Ernst & Young had concerns as Primeo's auditors, I would have expected them to ask Friehling & Horowitz to confirm the client assets held in BLMIS's DTC account. I understood that Ernst & Young was in contact with Friehling & Horowitz and felt comfortable that Ernst & Young, as a reputable and experienced audit firm, would obtain any confirmations they considered to be necessary before they would sign off on Primeo's audited accounts in line with standard practice for fund auditors.

96. As part of the due diligence exercise, Mr Madoff provided the most recent BLMIS audited financial accounts for the year ended 31 October 2001 and an Internal Control Report issued by its external auditors, Friehling & Horowitz. I reviewed these documents and noted that BLMIS was well capitalised and that no issues were raised. In particular, the auditors' Internal Control Report confirmed that client assets and records were properly controlled and maintained by BLMIS.

97. As I was unfamiliar with Friehling & Horowitz, I enquired about them with Adrian Lockwood, a partner of Ernst & Young in Luxembourg who was involved in auditing funds, including Primeo, which placed assets with BLMIS. 42 Mr Lockwood informed me that he had looked into Friehling & Horowitz and had been told by his colleagues at Ernst & Young in New York that Friehling & Horowitz were known for their audit work of New York broker dealers. Mr Lockwood did not raise any concerns with me regarding Friehling & Horowitz. I also believed that the SEC would have ensured that firms which it regulated were audited by independent auditors of appropriate standing. I had no reason to question the standing of Friehling & Horowitz and did not consider it necessary to investigate further in this regard.

⁴² HSBC 0083515 {N/568}

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98. In addition to the due diligence visit that Mr Healy and I made to BLMIS, I spoke with Dr Fano, in her capacity as the President of BA Worldwide, concerning BLMIS. ⁴³ Dr Fano confirmed that BA Worldwide was also conducting ongoing due diligence in respect of BLMIS. Specifically, Dr Fano said that she closely monitored the performance of BLMIS and typically visited BLMIS twice a year to ensure that everything was running properly.

99. Overall, the due diligence review and visit went well, and nothing seemed to be out of the ordinary. I provided Mr Madoff with a draft of the sub-custody agreement between HSSL and BLMIS relating to Primeo and another HSSL client fund. Mr Madoff said he would arrange for his lawyers to look at the draft and, subject to any comments, that he would sign and return it as soon as possible. I subsequently wrote to Mr Madoff on 26 July 2002 enclosing a final version of the agreement⁴⁴. The agreement was signed on behalf of BLMIS and returned to HSSL in early August 2002. The agreement was then signed on behalf of HSSL by Mr Wilcockson and Michael May as witnessed by me.

100. I do not recall discussing this agreement with anyone in the HSSL custody department, nor do I think I would have or that doing so was necessary, as I did not regard the agreement as having any effect upon the day to day operational custody arrangements between HSSL and its clients, including Primeo. In fact, as I had assured Mr Madoff, the sub-custody agreement did not change nor was it intended to change anything as regards the commercial and operational relationship between Primeo and BLMIS, and the managed account arrangements continued to determine the dealings between those parties. As there was no change to the managed account operations between Primeo and BLMIS, and as this agreement was between HSSL and BLMIS, I do not at this time recall mentioning the sub-custody agreement specifically to the Primeo board (and do not recall having done so until the Primeo board meeting on 14 May 2004 when I mentioned it for different reasons I believe, most likely relating to an internal control review being performed by Bank Austria, which is dealt with later in this statement).

⁴³ HSBC_0083515 {N/568}

⁴⁴ NF0006 {N/573}

⁴⁵ PRI_0015522 {F/18}

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101. The August 2002 sub-custody agreement between HSSL and BLMIS was superseded by a sub-custody agreement dated 8 September 2004⁴⁶ which added a number of other clients of HSSL who by then placed funds with BLMIS, but which was otherwise in the same terms as the 2002 agreement. I did not have any involvement with the 2004 agreement. I later became aware, after Mr Madoff's arrest, that a further sub-custody agreement was entered into between HSSL and BLMIS in January 2008 which removed Primeo from the list of funds to which the agreement applied since Primeo no longer placed assets with BLMIS directly (and did so only indirectly as a shareholder in Alpha and Herald).⁴⁷

Possible establishment of a SICAV

102. In early 2002, Dr Fano approached me to ask whether it would be possible to operate a fund similar to Primeo as a société d'investissement à capital variable ("SICAV"), an open-ended fund structure common in Luxembourg, under the UCITS Regulations. Such a fund would allow broader marketing and distribution to investors. As the UCITS Regulations were more stringent, I asked Mr Fiorino in about May 2002 to analyse BLMIS's investment activity to determine whether the investment strategy of BLMIS would be UCITS-compliant.

103. Mr Fiorino reported back to me on 27 May 2002⁴⁸ that he had reviewed BLMIS' investment activity on Primeo's account between July and October 2001 and January and February 2002. He concluded that it could be feasible to operate BLMIS's investment strategy for a UCITS fund and reported to me that he had not identified any material discrepancies in BLMIS's trading activity during these periods. On 30 May 2002, I responded to Dr Fano that it might be possible to operate a fund similar to Primeo as a SICAV under UCITS Part 1 Regulations.⁴⁹

104. Dr Fano responded on 3 July 2002,⁵⁰ agreeing that Mr Madoff's strategy could comply with UCITS Part 1 Regulations, but that a "serious problem" could be HSSL's "reinforcement of responsibility as custodian". Dr Fano said that she would "have to check this issue (very

⁴⁶ HSBC_0066030 {F/21}

⁴⁷ HSBC_0045684 {N/2733}

⁴⁸ HSBC_0047967 {N/547}

⁴⁹ HSBC_0012047 {N/552}

⁵⁰ HSBC_0058598 {N/562}

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cautiously) with Madoff first, in order to know how far could he go (if he would like at all...)".51 I understood this to be a reference to Mr Madoff's resistance to changing the BLMIS business model in any way. I also understood Dr Fano to be concerned about the requirement to register and disclose BLMIS as the investment manager in fund documentation.

Follow Up to the Due Diligence Visit

105. On 26 July 2002, I sent an email to members of the GFS global management committee and Mr Healy summarising the due diligence which had been carried out on BLMIS.⁵² I also sent Tom Young, a credit and risk manager at Bank of Bermuda in Ireland ("BOBI"), a copy of the completed due diligence questionnaire along with the BLMIS audited financial accounts and the Internal Control Report issued by Friehling & Horowitz. 53

106. On 9 September 2002, Mr Gerry Brady, the Head of BOBI and also a Thema board member, asked me to "confirm that we have obtained or will obtain independent confirmation that the Thema assets in custody are not comingled with Madoff's prime broker assets." Mr Young followed this up with what he thought was required: "1. Independent auditor's confirmation that the assets are not co-mingled. Madoff's representation is not enough. 2. Annual audited accounts of Madoff'. 54 In reply, 55 I noted that I had already provided item 2 to Mr Young in the due diligence material I had sent him earlier. As to point 1, I understood that Ernst & Young, as Primeo's auditor, had obtained independent confirmation from Friehling & Horowitz concerning Primeo's assets held at BLMIS and therefore considered that Thema's auditor should do the same for Thema.

Mr Young and I exchanged further emails on 19 and 20 September 2002.⁵⁶ Mr Young had again 107. raised the matter of independent verification of asset segregation. My view was that the BOB Group was not in a position to seek more than what had already been provided as it was the funds, and not the BOB Group, that had appointed BLMIS.

⁵¹ HSBC 0058598 {N/562}

⁵² NF0007 {N/572}

⁵³ HSBC 0012132 {N/582}

⁵⁴ HSBC_0058969 {N/606}

⁵⁵ HSBC_0058969 {N/606} 56 HSBC_0058969 {N/606}

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108. As part of the ongoing due diligence process, I sent a letter to BLMIS on 29 April 2003⁵⁷ asking for a copy of the audited financial statements of BLMIS for the period ended 31 October 2002,

and the latest Internal Control Report issued by the independent auditors of BLMIS, Friehling &

Horowitz. BLMIS duly provided both, which I reviewed and again noted that BLMIS remained

well capitalised and that no issues were raised.⁵⁸

Primeo's Foreign Exchange Facility increases to US\$100 million

109. On 13 September 2002, a Credit Application Memorandum was submitted by Jill Irwin, who was

at this time the HSSL CRM responsible for Primeo.⁵⁹ The application sought to renew Primeo's

US\$500,000 overdraft facility and to increase Primeo's foreign exchange facility from US\$50

million (up to a maximum of 25% of the NAV) to US\$100 million (up to 100% of the NAV of the

Euro class shares). The "additional comments" in respect of the application stated:

"The facility is cash collateralised: Bank of Bermuda does not have custody of the assets

of the Select Fund as these are held at the broker in New York (Madoff).

...

The current agreement specifies that the facility must not be greater than 25% of the

NAV of the sub-fund and it is suggested that this be extended to cover total NAV of the

EURO Class - Primeo Fund."

110. The minutes of the HSSL Credit Committee meeting on 13 September 2002 record that the

proposed increase to Primeo's foreign exchange facility was approved. 60 It was noted in the

credit committee minutes that "[t]he facility is cash collateralised: Bank of Bermuda does not

have custody of the assets of the Select Fund as these are held at the broker in New York

(Madoff)." Cash-collateralised facilities such as these represented a relatively low credit risk to

the bank.

⁵⁷ NF0008 {N/730}

58 NF0009 {N/630}; NF0010 {N/813}

⁵⁹ HSBC_0026081 {N/603}

60 HSBC_0075551 {N/604}

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111. On 23 September 2002, the Primeo board resolved to approve the increase in the foreign exchange facility with HSSL to a maximum of US\$100 million.⁶¹

Primeo board meeting on 5 December 2002

112. On 5 December 2002, I attended a Primeo board meeting held at HSSL's offices in Luxembourg. The meeting included a discussion regarding the family connections within BLMIS. The fact that a number of members of the Madoff family held key roles within BLMIS and the risks that this could entail was covered. I understood that BLMIS was at heart something of a family business and that a number of Mr Madoff's relations were working within BLMIS. I understood that Mr DiPascali, who was not to my knowledge a relation of Mr Madoff, ran the investment management operations of BLMIS. Dr Fano, who I understood had visited BLMIS and met Mr Madoff on a number of occasions, reassured the board and said that she was not concerned by the family connections existing within BLMIS. The board nonetheless resolved that they would like to meet with Mr Madoff and asked Dr Fano to review the options with a view to such a meeting taking place in 2003. However, to my knowledge, no such meeting ever took place.

113. I recall that we also discussed the 'key man' risk associated with Mr Madoff. In my opinion, it was understood by the board that the BLMIS managed account activity was heavily reliant upon Mr Madoff. This was a matter of more concern to me than the family connections within BLMIS.

114. There was also discussion at this meeting about a further proposed increase to Primeo's foreign exchange facility with HSSL. As the minutes record:

"Dr Fano referred to the Foreign Exchange Facility with [HSSL] and requested if it would be possible to increase the Facility. Ms Irwin advised that if the Fund was to wait until January 2003 an extension to the existing Facility could be acceptable without any additional cost. Mr Fielding suggested that a Facility up to \$200,000,000 (two hundred million) could be put in place and that two directors should be delegated to sign the

⁶¹ PRI_0001441 {N/607}

⁶² PRI 0001459 {H/27/1-3}

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agreement. It was resolved to approve that any two directors may sign the foreseen Foreign Exchange Facility Agreement referred to above." {H/27/2}

Primeo's Foreign Exchange Facility increases to US\$200 million

115. On 13 January 2003, a further Credit Application Memorandum was prepared by Ms Irwin in respect of Primeo.⁶³ The application sought to increase Primeo's foreign exchange facility from US\$100 million to US\$200 million. The "additional comments" in respect of the application stated:

"The facility is cash collateralised: Bank of Bermuda does not have custody of the assets of the Select Fund as these are held at the broker in New York (Madoff).

...

The request to increase the facility has been made following discussions at a recent [Primeo] Board meeting whereby the directors noted that the current facility limit was almost attained and with the steady growth of the fund it would be reasonable to seek a significant increase in order to cover for future growth"

116. The minutes of the HSSL Credit Committee meeting on 17 January 2003 record that the proposed increase to Primeo's foreign exchange facility was approved. Again, cash collateralised facilities of this nature represented a relatively low credit risk to HSSL. I note from the minutes of this meeting that I was present, as was my colleague Mr May who had signed the sub-custody agreement between HSSL and BLMIS on behalf of HSSL. Although I cannot recall whether it was specifically discussed at this meeting, I believe that the approval of this significant increase to the foreign exchange facility may have been helped by HSSL having implemented the sub-custody agreement with the provisions it contained giving HSSL the ability to instruct the transfer of client assets from BLMIS to HSSL should the need arise.

⁶³ HSBC_0027374 {N/669}

⁶⁴ HSBC_0075814 {N/671}

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Establishment of Alpha

117. In March 2003, Alpha, a Bermuda-incorporated investment fund, was established by Bank Austria, Ms Kohn and Dr Fano. On 17 March 2003, I became a director of Alpha. At that time, the other directors of Alpha were Dr Zapotocky, Ms Kohn and Dr Fano.

118. Alpha Prime Asset Management Ltd (a Bermuda company) and BA Worldwide were the investment manager and investment adviser to Alpha respectively. BLMIS was Alpha's sub-investment manager and broker dealer. HSSL was both the sub-custodian and sub-administrator to Alpha pursuant to a delegation agreement between BOB and HSSL dated 12 March 2003. As I have set out above, Clause 6(B) of the custodian agreement between Alpha and BOB confirmed that the bank was not responsible for the safekeeping of assets that were held by third party brokers (such as BLMIS).

119. Alpha placed substantially all of its assets with BLMIS for management via a managed account structure, and BLMIS retained custody of these assets of Alpha for the purpose of executing Mr Madoff's trading strategy. As I have explained above, in November 2003 a sub-fund of Primeo, Executive, opened and acquired shares in Alpha.

120. I resigned as a director of Alpha on 29 December 2006. As already mentioned, this was because HSS's general policy was no longer to offer HSBC Group employees as board members of client funds. I thereafter had very little direct involvement with matters concerning Alpha.

Bank Austria Presentation

121. In March 2003, Bank Austria completed its merger with Creditanstalt, an Austrian bank based in Vienna, to create Bank Austria Creditanstalt.

122. Towards the end of April 2003, Dr Fano asked me to give a presentation to Bank Austria risk management and internal control executives about GFS and to explain the bank's perspective

⁶⁵ NF0011 {N/709.1}

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on the arrangements between Primeo and BLMIS. Dr Fano explained to me that this was in connection with an internal Bank Austria review being done as a result of the growth in the assets of Primeo. Around the end of May 2003, Germain Birgen, then the new Managing Director of HSSL, and I made the presentation as requested.

- 123. A section of the PowerPoint presentation that Mr Birgen and I used⁶⁶ was headed 'Madoff Relationship' and noted among other things that "assets are held with [BLMIS] when our client appoints [BLMIS] in relation to their fund, e.g. by opening a Trading Account". {N/740/34} This was an important point as it explained the arrangements between our fund clients and BLMIS (which involved BLMIS having custody of the clients' assets).
- 124. The following slide stated that: "(1) The Fund Manager or Advisor [in Primeo's case, BA Worldwide] is expected to perform initial and regular due diligence on [BLMIS] in relation to the Trading Account"; (2) Bank of Bermuda's due diligence of BLMIS was "in relation to the subcustodian arrangements"; and (3) "Bank of Bermuda completed its most recent due diligence review on [BLMIS] in the 3rd quarter of 2002."⁶⁷ The first point dealt with the fact that it was the responsibility of the funds' managers or investment advisers, and not the BOB Group, to conduct due diligence concerning the 'trading account' (i.e. managed account) arrangements between the relevant funds and BLMIS. The second point dealt with the fact that the BOB Group carried out due diligence in respect of BLMIS only in the context of the arrangements between the BOB Group and BLMIS, which in the case of Primeo concerned the ability of HSSL to exert control over Primeo's assets in BLMIS's custody in connection with credit facilities provided by HSSL to Primeo if need be, e.g. in the event of a credit default by Primeo. The third point was referencing the due diligence that Mr Healy and I had recently conducted in respect of BLMIS in July 2002.
- 125. On 27 June 2003, I emailed Dr Fano to confirm that BLMIS due diligence would continue to be conducted by the BOB Group at least every two years, but possibly more regularly "if the assets held with Madoff for all our clients continue to grow at the current rate". 68 My thinking on the

⁶⁶ HSBC_0048789 {N/740}

⁶⁷ HSBC_0048789 {N/740/35}

⁶⁸ PRI_0014721 {N/769}

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latter point was that if the amount of assets placed with BLMIS by BOB Group clients continued to grow considerably it was equally likely that the credit facility amounts requested from the BOB Group by these clients would grow in a similar fashion thus increasing the credit risk to the BOB Group and hence it may be appropriate for the BOB Group to conduct more frequent due diligence on BLMIS in order to satisfy the BOB Group from a credit risk perspective.

- 126. I note that Primeo alleges that the presentation that Mr Birgen and I made to Bank Austria was "misleading" because it (i) omitted to explain any of the concerns that had been expressed within the BOB Group about BLMIS (ii) emphasized and relied upon the fact that BLMIS had a 'clean external audit opinion' notwithstanding purported concerns about the ability to rely on Friehling & Horowitz and (iii) referred to the BOB Group carrying out regular due diligence in respect of BLMIS. I reject these allegations as I now explain.
- 127. As to the first allegation, the context and purpose of the presentation must be borne in mind. This was a high-level presentation to experienced finance professionals within a major client of the BOB Group. Bank Austria already had significant involvement with BLMIS on account of the various funds, including Primeo, that it had created, controlled or provided services (e.g. investment advisory services) to, and which placed their assets in the custody of BLMIS in relation to their investment management arrangements. It would not have been appropriate in my opinion to enter into gossip about possible concerns about BLMIS that in my opinion were no more substantiated than rumours.
- 128. As to the second allegation, it was a matter of fact that BLMIS had a 'clean external audit opinion', and there was nothing misleading about this statement. As I explained above, I had no reason to question Friehling & Horowitz's audit opinion. Indeed, Mr Lockwood at Ernst & Young in Luxembourg had told me that Friehling & Horowitz were known for their audit work of New York broker dealers and I understood that the SEC would have been satisfied with the standing of Friehling & Horowitz as BLMIS's auditor.
- 129. As to the third allegation, HSSL had not needed to undertake due diligence in respect of BLMIS prior to the proposed entry into the sub-custody agreement between HSSL and BLMIS. HSSL's clients' assets were held in the custody of BLMIS pursuant to the clients own arrangements with

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BLMIS. It was expressly stated in the presentation slides that Bank of Bermuda's due diligence of BLMIS was "in relation to the sub-custodian arrangements". {N/740/35} The slides also made reference to the fact that "Bank of Bermuda completed its most recent due diligence review on [BLMIS] in the 3rd quarter of 2002." {N/740/35} This was a reference to the due diligence visit to BLMIS that I had led in connection with the proposed sub-custody agreement. It was always my intention that such due diligence would be refreshed at appropriate intervals thereafter, which in fact it was.

Primeo board meeting on 23 June 2003

- 130. On 23 June 2003, I attended a Primeo board meeting in Madrid. Dr Kaniak, Mr Simon and Mr Spalek were also present, as were Dr Fano on behalf of BA Worldwide and my HSSL colleague Ms Irwin, who acted as secretary. As usual, minutes of the meeting were prepared.⁶⁹
- As was usually the case at Primeo board meetings, Dr Fano gave a report to the board on behalf of the investment adviser, BA Worldwide. Dr Fano explained that a Bank Austria internal control review involving Primeo had been triggered as a result of an internal NAV milestone having been reached (in this case, the NAV of Primeo exceeding US\$350 million).
- 132. I understood that this was the review to which Dr Fano had alluded prior to the presentation that Mr Birgen and I had made to Bank Austria the previous month. Dr Fano presented to the board the key findings made by Bank Austria in its review, as set out in its report of 11 June 2003 (which document I have subsequently reviewed, and which I see was circulated to, amongst others, Mr Simon, who was a director and the Chairman, President and Chief Executive Officer of Primeo, and to the management of BA Worldwide) (the "Bank Austria Audit Review"). 70
- 133. The chief findings from the review as presented by Dr Fano to the Primeo board were as follows:
 - (a) There was no formal agreement in place between Primeo and BLMIS concerning investment strategy, only a "gentlemen's agreement" as to the execution of Mr Madoff's strategy.

⁶⁹ PRI_0014650 {H/32/1-4}

⁷⁰ PRI_0014632 {N/763}

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To my knowledge, it was correct that there was no formal agreement in place between Primeo and BLMIS beyond the Brokerage Agreements: in particular there was no written agreement setting out parameters or limitations in respect of BLMIS's role as investment manager. In my view, the board was relatively relaxed about this as the relationship between Primeo and BLMIS had been in place for a long time and no problems had arisen with BLMIS straying outside its usual investment strategy. However, I suggested at the meeting that the existing Brokerage Agreements with BLMIS should be amended formally to record investment restrictions to which we required BLMIS to adhere (which in my view should have been entirely consistent with the investment strategy that BLMIS had purportedly followed to date). Dr Fano responded that she was due to meet with Mr Madoff twice a year) and would consider prior to that meeting how best to raise this matter with him.

(b) Bank Austria and BA Worldwide were totally reliant on BLMIS for information regarding Primeo's investments with BLMIS due to his roles as both investment manager and broker.

Dr Fano said that BA Worldwide had also identified that they had to rely totally on BLMIS for information regarding Primeo due to BLMIS' multiple roles. Dr Fano also said that the concentration of responsibilities with BLMIS would never change as Mr Madoff insisted on BLMIS carrying out the investment management, broking and custody functions so as to avoid his trading strategy being exposed. This was consistent with my understanding concerning the way in which Mr Madoff conducted BLMIS's managed account business so as to protect the confidentiality of his trading strategy and to optimise trading and operational efficiency. Dr Fano mentioned that the confirmation of transactions was an issue without an independent broker counter party. She further explained that this was viewed as an inherent but acceptable risk associated with the BLMIS asset management model.

134. None of what Dr Fano reported from the Bank Austria Audit Review came as a surprise to me, nor was there any indication that it came as a surprise to any of the other directors. It was

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consistent with my understanding of the arrangements and some of the risks associated with Primeo's relationship with BLMIS. Dr Fano regularly reported to the Primeo directors at board meetings concerning the activities of BA Worldwide and BLMIS with respect to Primeo and in my opinion, as one would expect, the board was aware of the arrangements and risks associated with BLMIS.

135. Dr Kaniak confirmed to the board that the Primeo board had the right to terminate the relationship between Primeo and BLMIS. This led to a discussion about what action the Primeo board might take if the fund were to cease its relationship with BLMIS. The options discussed included closing the fund, selling the fund and switching to a new investment manager in place of BLMIS. It was noted that a sale of the fund would risk Primeo losing shareholders. However, this was a theoretical discussion only and these options were not progressed and the fund continued its existing arrangements with BLMIS.

14 November 2003 Credit Committee Meeting

- 136. In August 2003, I became Global Head of Banking for GFS reporting directly to the global head of GFS, Paul Smith, and became a member of the GFS global management committee. I continued to be employed by HSSL. As Global Head of Banking for GFS, I had responsibility among other things for approving and monitoring clients' credit and banking activities.
- 137. In this capacity, I reviewed a Credit Application Memorandum in respect of Primeo dated 21 October 2003 that had been prepared by Ms Oranges and Ms Irwin of HSSL. The application sought to renew Primeo's existing overdraft facility (US\$500,000), to increase its foreign exchange facility from US\$200 million to US\$250 million (up to 100% of Primeo's NAV) and to introduce a new leverage facility (US\$10 million or 10% of the net value of assets under custody ("NVAC")).
- 138. The proposed introduction of the new leverage facility was significant in the context of HSSL's credit exposure to Primeo. Whereas the extension of cash collateralised credit to Primeo for overdraft and foreign exchange purposes was relatively low risk from a credit perspective,

⁷¹ HSBC 0028333 {N/800}

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lending for leverage purposes carried a far greater credit risk to HSSL because any investment losses suffered by Primeo in connection with leverage would be multiplied. Further, whereas overdraft facilities for liquidity purposes are typically utilised by clients on a less frequent and short term basis, leverage finance tends to be utilised by clients more fully and over longer periods, thereby increasing the credit risk to the bank. In addition to the introduction of the new leverage lending facility, Primeo sought to increase its foreign exchange facility to US\$250 million. If these facilities were approved, the credit risk to HSSL associated with Primeo would be significantly greater than it had ever been previously.

- 139. The application recorded that "Bank of Bermuda does not have custody of the assets of Select Fund as these are held at broker Madoff" and that Select's "investments are being managed by one manager (Madoff) through a managed account". {N/800/2}
- 140. Under the heading 'Risks and Mitigants' it was noted as a risk to HSSL that "next to all money invested [by Primeo] with Madoff could be lost and the Bank would be unable to recover cash to pay for any FX losses". It was also noted that "Madoff could be perceived as a family institution and therefore the risk of the performance changing if Mr Madoff is no longer in control may be significant". The mitigants in respect of this risk included that "Ursula Fano of Bank Austria ensures that at least two visits a year are paid to Mr Madoff in order to be aware of developments within his company". {N/800/4-5}
- 141. Under the heading 'Credit Risk Rating', the application stated:

"It is suggested that the rating applied to this client is 4-B, Average risk – Lower Tier, Stable. The reason being that the fund is invested mainly in US equities. It could be argued that this would merit a higher rating however assets are not actually in our custody but held with the prime broker – Madoff." {N/800/5}

142. It was also noted in the application that updated due diligence was required in respect of BLMIS in order to extend leverage lending to Primeo (this relates to due diligence in respect of the arrangements between HSSL and BLMIS, and shows that this was a factor in being able to consider increased lending to Primeo), but that it was suggested to defer the due diligence visit

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until early 2004 in order to allow sufficient time to coordinate a further meeting with Mr Madoff. As I explain below, I later conducted this further due diligence, which included a further meeting with Mr Madoff at BLMIS's offices, on 3 March 2004.

143. A further Credit Application Memorandum in respect of Primeo, dated 10 November 2003, was prepared by Ms Oranges.⁷² This memorandum included the following specific comment:

"With regards to assets held at Broker – Madoff, be informed that there is a subcustodian agreement in place between Madoff and the Bank. While Madoff and the agreement are not standard, agreement in place states that "the Sub-Custodian shall, upon receipt of Proper Instructions from the Bank, make a free delivery of any of the Property held or aministered [sic] by it hereunder to or to the order of the Bank provided always that any instrucion [sic] relating to the free transfer or cahs [sic] and/or securities shall be subject to the approval of an officer of the Bank".

- 144. I attended a meeting of the HSSL credit committee on 14 November 2003,⁷³ at which the committee considered this credit application for Primeo. I note from the minutes that this meeting was chaired by Mr May, who had signed the sub-custody agreement between HSSL and BLMIS on behalf of HSSL. We discussed at this meeting the ability of HSSL to exercise its rights under the sub-custody agreement to require BLMIS to effect the free delivery of Primeo's assets held by BLMIS to HSSL in the event of a credit default by Primeo. On account of this right, it was agreed that these assets could therefore be regarded as eligible collateral for the purposes of the proposed credit facilities. I note that the minutes of this meeting explicitly record that "[a]ssets held at Madoff can be used as collateral due to the sub-custodian agreement in place with Madoff". {N/822/2}
- 145. In effect, the free delivery right in the sub-custody agreement between HSSL and BLMIS was relied upon to support the introduction of a credit facility to Primeo for leverage purposes. It was my understanding that, if Primeo defaulted on its credit facilities, HSSL would instruct BLMIS to make a free delivery of Primeo's assets held by BLMIS to HSSL, against which HSSL

⁷² HSBC_0076231 {N/820}

⁷³ HSBC 0061275 {N/822}

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could then enforce its collateral rights over these assets. This was particularly important in light of the significant increase in the credit risk to the bank associated with Primeo on account of the introduction of lending for leverage purposes.

A further BLMIS due diligence visit

146. By early 2004 more than 18 months had passed since the due diligence visit I had made to BLMIS in July 2002. Ordinarily, a two-year interval between due diligence visits to BLMIS would have been appropriate in the context of the previous credit risk to the bank associated with clients who held assets at BLMIS. However, HSSL specifically needed the due diligence in respect of BLMIS refreshed on account of the leverage lending that was now being extended to Primeo as explained above. I therefore began preparations for another due diligence visit to BLMIS.

147. I had no difficulty in setting up a meeting with Mr Madoff for this due diligence. On 26 February 2004, I sent Mr Madoff a fax in preparation for our meeting providing the completed questionnaire from the previous visit in July 2002 and explaining that I wanted to cover it again during the next visit.⁷⁴

148. This second due diligence visit took place at BLMIS's New York offices on 3 March 2004. I was accompanied by Mr Wilcockson, the Global Head of Client Services for GFS, who had very considerable alternative fund experience. Mr Wilcockson and I went through the questionnaire with Mr Madoff, updating it when answers had changed since the previous due diligence visit, and Mr Madoff signed it again. The relatively few changes were recorded by hand on the 2002 questionnaire. I also made some handwritten notes on a copy of the fax cover sheet that I had sent to Mr Madoff prior to the meeting. To

149. Mr Madoff also provided us with the latest BLMIS audited financial accounts for the year ended 31 October 2003 and the latest Internal Control Report⁷⁷ issued by the independent auditors of BLMIS, both of which again provided me with assurance that BLMIS was financially sound and

⁷⁴ NF0012 {N/879}

⁷⁵ HSBC_0083915 {N/574}

⁷⁶ NF0012 {N/879}

⁷⁷ HSBC_0083915 {N/574}

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was properly controlling and maintaining client assets and records. I noted from the audited accounts that BLMIS's financial situation had continued to improve from its already strong position.

150. I reconfirmed with Mr Madoff at this meeting that BLMIS used segregated accounts at the DTC for holding client assets separate from proprietary assets, and that BLMIS maintained individual client level records on BLMIS's systems for the assets held by BLMIS for each client. Mr Madoff also said that BLMIS remained closed for new investment management business and also talked generally about his business and the market. I felt that the responses given by Mr Madoff were entirely satisfactory and I had no reason to doubt their truthfulness. As on the previous visit, Mr Madoff took us on a tour of BLMIS's trading floor after our meeting.

151. Upon my return to Europe I sent an email to members of the GFS global management committee confirming that Mr Wilcockson and I had visited BLMIS and that no issues had come to light.⁷⁸

The acquisition of the BOB Group by HSBC

In February 2004, the BOB Group was acquired by HSBC Holdings plc. Thereafter, the integration of the BOB Group into the HSBC Group took place over approximately a year. As part of the integration and reorganisation that occurred, most GFS credit and treasury functions were centralised per region. In Europe, these functions were moved from Luxembourg, Guernsey, Ireland and the Isle of Man to HSBC in London. Client credit approval and sub-custodian due diligence were among the functions that were centralised in London. However, all client facing custody and fund administration services continued to be provided to client funds by the relevant local offices, *i.e.* in Primeo's case these services continued to be provided by HSSL in Luxembourg.

153. The former GFS alternative fund business of the BOB Group became Alternative Fund Services ("AFS") within HSBC Securities Services ("HSS"). The banking, credit and treasury services of AFS

⁷⁸ HSBC 0030649 {N/994}

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were migrated to a so-called "hub-and-spoke" model, which provided for the centralisation of certain functions.

154. As with GFS under the BOB Group, AFS had a global management committee, but it was not the role of this committee or its members to provide day-to-day management of fund services provided by the different offices (which included HSSL in Luxembourg).

155. I was extensively involved in the integration work and at the end of 2004 I was appointed Global Chief Administrative Officer of AFS. I had less involvement with matters concerning BLMIS and Primeo in this new role within the bank.

Primeo board meeting on 14 May 2004

156. I attended a board meeting of Primeo held in Madrid on 14 May 2004.⁷⁹

157. At this meeting, there was a follow-up to discussions had at the previous board meeting regarding the Brokerage Agreements and investment restrictions for BLMIS's management of Primeo's assets. In particular, the board again discussed the fact that there were no written investment restrictions in place between Primeo and BLMIS that would stop BLMIS from dramatically changing the investment strategy, for example to start trading gold or Japanese equities. I therefore suggested that, as BLMIS operated in the United States and was regulated by the SEC, it would be appropriate for BLMIS to be restricted to trading in US markets only. Others suggested that BLMIS should be restricted to trading in securities quoted on the New York Stock Exchange or NASDAQ. Dr Fano said she would prefer that BLMIS was limited to trading S&P500 securities, possibly S&P100 options, money market funds and cash deposits. Dr Fano undertook to draft proposed investment restrictions for review by the board. However, I do not recall receiving any such proposed restrictions. In the event, to my knowledge no investment restrictions between Primeo and BLMIS were documented prior to my resignation from the Primeo board in 2006. I do not know if there was any such agreement or restrictions formally put in place between Primeo and BLMIS thereafter.

⁷⁹ PRI 0001624 {N/948}

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158. The board also again discussed the lack of independent confirmations, beyond what was being provided by BLMIS, regarding the existence of the securities purportedly traded and held by BLMIS. It was noted in particular that there was no proof that such securities existed or that the transaction confirmation slips provided by BLMIS were valid and that such trades had actually been executed. I restated my view that Primeo should take comfort from the fact that BLMIS was regulated by the SEC, however I thought it was nonetheless appropriate for Primeo to document with BLMIS appropriate investment restrictions.

159. I also note that I made passing reference at this meeting to the sub-custody agreement between HSSL and BLMIS, however I do not believe that the Primeo board placed any particular reliance on the existence of this agreement concerning Primeo's arrangements or dealings with BLMIS. The board was in my view aware that BLMIS held custody of Primeo's assets pursuant to the managed account arrangements that had been put in place between BLMIS and Primeo directly.

The establishment of Herald

160. In March 2004, Herald was established by Bank Medici, which I understood was a company jointly owned by Bank Austria and Ms Kohn. I was aware that Ms Kohn was personally involved in the establishment of Herald and that Herald placed substantially all of its assets with BLMIS for management. HSSL was the administrator and custodian of Herald. As I have set out above, Clause 6.2 of the custodian agreement between Herald and HSSL confirmed that HSSL was not responsible for the safekeeping of assets that were held by third party brokers, such as BLMIS.

161. In November 2004, Executive switched its investment in Select to Herald USA Segregated Portfolio One, a sub-fund of Herald.

Concerns reportedly raised by Roberto Nespolo and Ernst & Young

162. On 24 February 2005, I received an email from my HSSL colleague Mr Fiorino which reported on a meeting that he had attended the previous day with Michael Ferguson and Kerry-Jane Nichol

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of Ernst & Young in Luxembourg, who were responsible for the audit of Primeo.⁸⁰ Mr Lockwood had passed away and I was informed by Mr Fiorino that Ernst & Young were conducting a review of their clients to ensure they remained comfortable with the risk profile. Mr Fiorino had worked for HSSL since 1989, and in 2005 was the head of AFS at HSSL, reporting to Mr Birgen.

Mr Fiorino's email referred to "rumours" regarding BLMIS which had reportedly been raised with Ernst & Young by Roberto Nespolo, who was not an HSBC employee, but who was involved in the management of Thema on behalf of its promoter, Genevalor Benbassat. Mr Fiorino's email also stated that Ernst & Young were meeting with other banks in Luxembourg that had connections with BLMIS and that thereafter Ernst & Young planned to visit BLMIS. The email said further that if Ernst & Young could not obtain satisfaction regarding BLMIS, Ernst & Young may resign as auditor or qualify the accounts of relevant funds that they audited. I responded to Mr Fiorino, asking him to keep track of this issue, including whether and when Ernst & Young conducted any visit to BLMIS.⁸¹

164. In the event, I am not aware if Ernst & Young conducted any visit to BLMIS. However, Ernst & Young did not to my knowledge qualify their audit of the accounts of Primeo and continued as Primeo's auditor.

Further BLMIS due diligence and reviews led by Christine Coe and Brian Pettitt, and conducted by KPMG

165. Following the acquisition of the BOB Group by HSBC Holdings plc, responsibility for credit approval in respect of AFS client funds (including Primeo) as well as sub-custodian due diligence was moved to Christine Coe, the Global Head of Credit (and later Risk Management) at HSS in London. As part of this process, Ms Coe reviewed the credit facilities provided to a number of client funds whose assets were with BLMIS. Ms Coe indicated that she wanted to become more familiar with BLMIS and in particular to understand how the return of assets from BLMIS was assured in the event of a credit default by any of these client funds.

⁸⁰ HSBC_0013866 {N/1159}

⁸¹ HSBC 0013866 {N/1159}

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166. Ms Coe knew that I had previously conducted due diligence concerning BLMIS and, on 3 February 2005, she sent me an example of the HSBC standard network due diligence questionnaire. She wanted further due diligence to be conducted on BLMIS to establish how HSBC could enforce its rights against client assets in the custody of BLMIS in the event of a credit default by the client funds. Ms Coe decided to put a hold on processing new credit proposals for client funds invested through BLMIS until this HSS due diligence was performed. This did not surprise me. Prior to the acquisition of the BOB Group, HSS had been orientated toward traditional funds, was quite conservative in terms of credit risk and was not as familiar with lending to alternative funds. So there was a lot of work needed to accommodate the BOB Group's alternative fund credit book. It made sense that Ms Coe would first want to understand how everything worked.

167. Brian Pettitt was the head of Network Management within HSS and Ms Coe directed that he would handle all relevant due diligence, including in respect of BLMIS, going forward. I wanted Mr Pettitt to know what had been done previously in relation to BLMIS so that he would not be starting from scratch. On 18 February 2005, I emailed my colleagues in AFS to let them know that Mr Pettitt would be conducting further due diligence concerning BLMIS and that I had suggested he meet with us in Luxembourg so that we could brief him fully before he visited BLMIS.⁸³ On 20 February 2005, I set out in an email to Mr Pettitt some background on BLMIS.⁸⁴

168. Like the standard BOB Group due diligence questionnaire, the HSBC Group standard due diligence questionnaire contained a number of questions that were relevant to banks and not to broker dealers such as BLMIS. I suggested that Mr Pettitt remove extraneous material from the questionnaire that would not be relevant to a review of BLMIS, and also to mark up a version with responses that BLMIS had given to our previous questionnaire so as to avoid going over the same ground with BLMIS again unnecessarily if there had not been any relevant change at BLMIS.

⁸² HSBC_0064753 {N/1141}

⁸³ HSBC_0003530 {N/1150}

⁸⁴ HSBC_0032042 {N/1151}

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As fund administrator and custodian I did not consider it was HSSL's responsibility to review BLMIS's remuneration arrangements, however I noted that BLMIS did not charge a custodian fee to clients. This was understandable for a broker dealer, such as BLMIS, when working with large client accounts. It was also around this time that Mr Birgen conveyed a concern regarding the apparently low level of compensation paid by the funds to BLMIS, and in particular why BLMIS did not charge performance fees. I responded to Mr Birgen that BLMIS was first and foremost a broker dealer and that its key revenue stream would be brokerage commissions.⁸⁵

170. I was a party to a series of emails beginning on 14 March 2005 with an email from Brian Wilkinson, who was the Head of AFS in Ireland, to Paul Smith in which Mr Wilkinson set out the reaction of David Smith, a former employee of the BOB Group who had since begun working for a Genevalor Benbassat entity based in Bermuda by the name of Equus, to HSS's planned due diligence review of BLMIS. 6 Genevalor Benbassat had established funds, including Thema, which placed their assets with BLMIS for management. David Smith had apparently stated that the HSS review of BLMIS would not be allowed to happen and that, if HSS persisted, the Benbassats would move their business to another service provider immediately. As typified by this example, it was my experience that funds which had established relationships with BLMIS did not want to do anything that might jeopardise what was considered to be privileged access to Mr Madoff's trading strategy.

171. On 15 March 2005, I emailed Paul Smith to confirm that the bank provided credit facilities to numerous AFS client funds, including Primeo, whose assets were held by BLMIS.⁸⁷ I noted in my email that the arrangements with BLMIS had been put in place by the clients themselves, which in my view restricted their ability to resist HSS conducting what it considered to be appropriate due diligence concerning the clients' appointee when the bank provided credit facilities to the clients that were underpinned by the clients' assets held in the custody of BLMIS.

172. Notwithstanding the concerns expressed by David Smith, HSS understandably pressed ahead with the further due diligence review of BLMIS. While being mindful of clients' concerns, HSS's

⁸⁵ HSBC_0064876 {N/1163}

⁸⁶ HSBC_0064995 {N/1189}

⁸⁷ HSBC 0077981 {N/1210/4}

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approach was always to do what was required to be satisfied concerning the arrangements that were in place where the bank was taking credit risk. HSS was generally quite conservative and the income generated by HSS as administrator and custodian to funds such as Primeo that had appointed BLMIS to run a managed account for them was not significant in the context of HSS's overall income. On 17 March 2005, I informed Paul Smith that Ms Coe was keen for Mr Pettitt to visit BLMIS and to meet with Mr Madoff as soon as possible.⁸⁸

- 173. Mr Pettitt met with me, Mr Wilcockson, Mr Fiorino and other HSSL staff in Luxembourg on 21 March 2005 to prepare for his review of BLMIS. We prepared an agenda⁸⁹ and Mr Pettitt later produced a note of our meeting.⁹⁰ The purpose of the meetings, which ran for several hours, was to explain to Mr Pettitt the client business that was with BLMIS and the due diligence that had been carried out by the BOB Group in respect of BLMIS.
- Mr Pettitt indicated in his note of his meetings in Luxembourg that I believed BLMIS had one account at the DTC which, if true, meant that BLMIS might be mixing client and proprietary assets. However, that does not accurately record what I said or my understanding, which was that in addition to maintaining client level records of the assets held by BLMIS for each client on BLMIS's systems, BLMIS held client assets on an omnibus basis at the DTC in an account that was solely used for holding assets of clients of BLMIS, and that these client assets were not comingled with BLMIS's proprietary assets at the DTC. This appears to have been a misunderstanding between Mr Pettitt and me. It was always my understanding, as was confirmed by Mr Madoff at our meetings in both 2002 and 2004, that BLMIS operated segregated accounts at the DTC: an omnibus client assets account and a separate segregated proprietary assets account. It is therefore not the case that I knew or suspected that BLMIS was not segregating its clients' assets from its proprietary assets at the DTC.
- 175. On 22 March 2005, I sent a fax to Mr Madoff introducing Mr Pettitt and confirming that a further due diligence visit to BLMIS would be conducted by Mr Pettitt and Tanya Nystrom, the

⁸⁸ HSBC_0032197 {N/1194}

⁸⁹ HSBC_0003638 {N/1201}

⁹⁰ HSBC 0065128 {N/1202}

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Head of Fund Administration at AFS in New York, on 1 April 2005. Ms Nystrom was knowledgeable about alternative funds and it was beneficial that she was based in New York. On 23 March 2005, Mr Wilcockson and I provided Mr Pettitt and Ms Nystrom with some further background and comments in advance of their due diligence visit to BLMIS. Among other things, I informed Ms Nystrom, as I had Mr Pettitt at our meeting on 21 March 2005, that caution should be exercised when asking Mr Madoff questions relating to his trading strategy, of which he was understandably protective, but that in my experience Mr Madoff was forthcoming and cooperative. As BLMIS was primarily a broker dealer business, I explained to Ms Nystrom that investment management was essentially a "by-product" of Mr Madoff's main business and something that he had "no great interest in". I reminded Ms Nystrom that BLMIS had been appointed by the bank's clients, including Primeo, to run their managed accounts. I also emailed Paul Smith to confirm that Mr Pettitt had been briefed and that Ms Nystrom would accompany Mr Pettitt on the visit to BLMIS.

- 176. On 24 March 2005, a query was raised by AFS in New York as to why the AFS client relationship managers were not involved in the BLMIS due diligence process. 95 Mr Wilcockson responded that BLMIS was not the bank's client, but rather had been appointed by our clients. 96
- 177. Also on 24 March 2005, I received a copy of Mr Pettitt's fax to Mr Madoff attaching the due diligence questionnaire that Mr Pettitt and Ms Nystrom planned to go through during their meeting at BLMIS in New York on 1 April 2005.⁹⁷
- 178. Following Mr Pettitt and Ms Nystrom's due diligence visit to BLMIS, I received an email summary from Mr Pettitt on 4 April 2005. Mr Pettitt reported that he was satisfied overall following the meeting, and noted a few follow-up points that would be covered in his final report, which I

⁹¹ HSBC_0003673 {N/1204}

⁹² HSBC_0065049 {N/1206}; HSBC_0013924 {N/1209}

⁹³ HSBC 0013924 {N/1209}

⁹⁴ HSBC 0077982 {N/1219}

⁹⁵ HSBC 0083973 {N/1216}

⁹⁶ HSBC_0083973 {N/1216}

⁹⁷ HSBC_0032231{N/1214}

⁹⁸ HSBC 0013959 {N/1234}

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later received.⁹⁹ There was no particular need for me to be involved further at this point, since these matters were being dealt with by Ms Coe and Mr Pettitt.

179. On 30 May 2005, I received an email sent by John Gubert, then the Global Head of HSS, to Ms Coe regarding BLMIS. Mr Gubert suggested an independent audit review of BLMIS and that if HSBC did not obtain sufficient comfort in relation to BLMIS then the relevant relationships between the bank and client funds that placed assets with BLMIS for investment should be exited. I understood that Mr Gubert's concerns were principally related to the credit risk to the bank where credit facilities were supported by client assets held in the custody of BLMIS pursuant to clients' managed account arrangements with BLMIS.

180. I followed up on this email with a call to Ms Coe and on 6 June 2005 I emailed a summary to Paul Smith and Mr Wilcockson. Ms Coe's proposal was to engage KPMG to perform a review of BLMIS at HSS's expense. This went far beyond normal due diligence. I cannot think of another example of such extensive review work being performed except where there had already been significant problems with actual performance.

- 181. On 17 June 2005, Paul Smith forwarded me an email that Ms Coe had sent to Mr Gubert on 23 May 2005 attaching her briefing papers concerning BLMIS.¹⁰²
- 182. It came to my attention on 20 June 2005 that Ms Coe had again placed a restriction on further credit approvals for client funds invested through BLMIS until the review by KPMG was completed, although existing client credit facilities would not be affected. I understood that Ms Coe wanted to further understand the BLMIS structure, and the ability of HSBC to enforce its credit facility rights against client fund assets in the custody of BLMIS, before new credit approvals were granted. I therefore asked Ms Coe to expedite the KPMG review so as to minimise any client issues that might arise in light of the credit restrictions imposed by Ms Coe. I did not consider it necessary to bring this to the attention of Primeo, nor would I expect Primeo

⁹⁹ HSBC 0065277 {N/1256}; HSBC_0084024 {N/1231}

¹⁰⁰ HSBC_0065529 {N/1293}

¹⁰¹ HSBC_0065529{N/1293}

¹⁰² HSBC_0078373{N/1284}; HSBC_0078374 {N/1285}; HSBC_0078375 {N/1286}; HSBC_0078376 {N/1230}

¹⁰³ HSBC_0032885{N/1302}

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to have otherwise become aware of this credit decision, unless they had applied for a further credit facility, as their existing credit facilities were not affected. At this time, credit had been centralised and HSBC was providing Primeo with a foreign exchange facility of up to US\$300,000,000, and a leverage facility of up to US\$10,000,000.¹⁰⁴

183. On 12 July 2005, I exchanged emails with Ms Coe concerning the KPMG review exercise. ¹⁰⁵ She let me know that she had met with KPMG to discuss the scope of the review, and I understood that these discussions continued over the summer. In late August 2005, Ms Coe forwarded me a draft of KPMG's engagement letter for my information ¹⁰⁶ and this led to further email exchanges with Paul Smith on 8 and 9 September 2005. ¹⁰⁷ As BLMIS had been appointed by the clients in the first place and knowing their sensitivities around maintaining access to Mr Madoff's trading strategy it was agreed with Ms Coe that the planned KPMG review should be discussed with the main clients using BLMIS in advance of the review taking place. The plan was for me to contact Dr Fano at Bank Austria whilst Paul Smith would contact Ms Kohn at Bank Medici and David Smith at Genevalor Benbassat to let them know about the KPMG review, and I accordingly briefed Paul Smith with some background information. ¹⁰⁸ I suggested that it should be explained that BLMIS was a client appointed service provider, that it was standard practice to conduct a review and that a slightly different process using KPMG was planned because of the nature of the BLMIS activity and Mr Madoff's confidentiality sensitivities.

184. On 20 September 2005, I emailed Ms Coe and Paul Smith to say that I had spoken with Dr Fano. 109 Dr Fano had indicated that she understood why we were conducting the review using KPMG and saw that it could benefit Primeo and its investors. She also recognised the risk that Primeo could lose access to Mr Madoff if it did not go well.

185. On 27 September 2005, Paul Smith emailed me and Ms Coe to say that he had spoken to Ms Kohn. 110 Mr Smith's email said that Ms Kohn did not approve of the review of BLMIS that HSBC

¹⁰⁴ PRI 0001696 {N/1070}

¹⁰⁵ HSBC_0014260 {N/1329}

¹⁰⁶ HSBC _0033449 {N/1361}

¹⁰⁷ HSBC_0033532 {N/1390}

¹⁰⁸ HSBC_0033532 {N/1390}

¹⁰⁹ HSBC_0033598 {N/1402}

¹¹⁰ HSBC_0033664 {N/1428}

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was commissioning and that she wanted Mr Madoff to know this. Ms Kohn's view was reportedly that she would rather live with restricted credit lines than risk upsetting Mr Madoff. Mr Smith's email said that he had explained that the review would have to be done and that Ms Kohn said if that was the case she wanted Paul Smith to inform Mr Madoff of the review in person.

186. On 30 September 2005, Paul Smith forwarded me and Ms Coe an email that he had received from David Smith of Genevalor Benbassat commenting extensively on the planned KPMG review of BLMIS. Among other things, he stated that Genevalor Benbassat did not want to be seen by Mr Madoff to be the instigator of the review out of a concern that their funds might lose access to BLMIS, and he made numerous statements as to why Genevalor Benbassat was comfortable with their funds' relationships with BLMIS. Ultimately, however, David Smith said that HSBC had the full support of Genevalor Benbassat in connection with the review. The various reactions were not unexpected. As I mentioned, my experience was that clients were very protective of their relationship with Mr Madoff and did not want to do anything that might jeopardise it.

187. On 13 October 2005, Paul Smith emailed me and Ms Coe to confirm that he had spoken with Mr Madoff about the KPMG review. Mr Smith reported that Mr Madoff received the news well and would like to see the brief for the review. 112

188. As requested by Ms Kohn, Paul Smith went to meet Mr Madoff in person, which happened on 17 October 2005, and Paul Smith reported back to me and Ms Coe on 18 October 2005. Paul Smith said that he was "mightily impressed" by Mr Madoff and that he found him to be both "pleasant" and "understanding". This was reassuring as Mr Smith was highly experienced in alternative funds.

¹¹¹ HSBC_0066072 {N/1442}

¹¹² HSBC_0033847 {N/1482}

¹¹³ HSBC_0033883 {N/1500}

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189. On 31 October 2005, Ms Coe emailed to say that the KPMG review visit to BLMIS's offices would begin on 7 November 2005. 114

190. Following the review, Ms Coe informed me that overall the review had gone well and that no major issues had been identified. She said that KPMG had made some operational recommendations that would be further outlined in their written report, but that based on KPMG's positive feedback she would lift the credit restrictions that had been in place for client funds investing via BLMIS. After speaking with Ms Coe, I sent a brief email to Paul Smith to update him accordingly.¹¹⁵

191. On 15 December 2005, Paul Smith and Ms Coe exchanged emails, copying me, regarding KPMG's review. 116 Ms Coe said that she had seen the draft report from KPMG and that, whilst it flagged a number of operational and documentation points to be addressed, the report did not identify any major issues regarding BLMIS. I understood that KPMG had not identified any material concerns with BLMIS but had highlighted a number of operational and efficiency issues, which KPMG suggested could be tidied up or improved. Ms Coe indicated that she would ask the HSBC legal department to start work on addressing the documentation points and the relevant HSS offices on the operational points, noting that the final report was expected from KPMG in the New Year.

192. On 28 February 2006, I noted that Ms Coe had received KPMG's final report and had asked Mr Pettitt to coordinate any necessary actions arising from it. Ms Coe later sent me a copy of the report as a courtesy. Consistent with what Ms Coe had told me, the report did not identify any fundamental concerns. I noted that the report contained a lot of boilerplate language typical of review reports and that it made a number of recommendations, most of which I considered to be 'good housekeeping' matters. I confirmed with Ms Coe that her team would be responsible for handling the matters arising from the report.

¹¹⁴ HSBC_0034016 {N/1542}

¹¹⁵ HSBC_0014806 {N/1577}

¹¹⁶ HSBC_0034364 {N/1605}

¹¹⁷ HSBC 0035212 {N/1688}

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193. I understood that KPMG conducted more extensive testing of BLMIS than that which HSS would have been able to conduct because KPMG were permitted greater access than would be made available to HSS. I believed that KPMG had the necessary expertise to conduct a review of this nature and understood that they did not identify any evidence of fraud or financial impropriety. The KPMG review provided me with further comfort regarding the integrity of BLMIS's operations.

Primeo board meeting on 9 June 2006

194. I attended a Primeo board meeting held in Venice on 9 June 2006¹¹⁸. The Chairman, Mr Simon, informed the board that, following the acquisition in June 2005 of Bank Austria Creditanstalt by Unicredit, which operated its investment management business through its Pioneer Investment subsidiaries, a review was taking place that might affect the investment advisory role performed by BA Worldwide for Primeo. This was the last Primeo board meeting that I attended prior to my resignation as a director on 3 October 2006, however I later learned that Pioneer Alternative Investment Management Limited ("Pioneer") had replaced BA Worldwide as the investment advisor to Primeo and that Dr Fano had been appointed as a director of Primeo.

Appointment as Global Chief Administrative Officer for HSS

195. In April 2007 I became the Global Chief Administrative Officer for HSS and thereafter I had very little involvement with matters concerning Primeo or BLMIS.

Mr Madoff's arrest

196. I was shocked and surprised to learn of Mr Madoff's arrest on 11 December 2008. It beggared belief that Mr Madoff was able to operate an entirely fraudulent scheme for as long as he evidently had been. It struck me that the scale of the fraud, including the creation of falsified records, must have been enormous. I could not understand how Mr Madoff was able to deceive

¹¹⁸ PRI_0015791 {H/37}

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so many people and organisations, including the SEC, audit firms, sophisticated investment funds and investors, and global banks. My view was that there must have been a major failure by the SEC in its regulatory oversight of BLMIS.

The parties' respective knowledge

BBCL and HSSL

197. I understand that it is Primeo's case in these proceedings that senior employees of the BOB Group and the HSBC Group had concerns about BLMIS by October 2002 at the latest, and that both BBCL and HSSL considered that their conduct might constitute a breach of their duties under the Administration Agreement and the Custodian Agreement and yet made a deliberate decision to continue to perform those duties without having any regard to the consequences.

198. As one of the individuals referred to, I would like to make it clear that at no point did I consider that HSSL was in breach of its duties under the Administration or Custodian Agreements, nor did I seek to conceal relevant facts from Primeo. Furthermore, I was not aware that any of the other senior employees referred to considered that HSSL was in breach of its duties or had deliberately decided to conceal relevant facts from Primeo. These are very serious allegations made against me and my colleagues, and I reject them entirely.

199. As my evidence about the due diligence I personally conducted clearly shows, I did not think that BLMIS was subject to insufficient due diligence on the part of HSSL, nor did I think there was a risk that BLMIS was perpetrating a fraud. Instead, to the extent that I or others in the bank had concerns about possible risks associated with the BLMIS business model (and, in particular, the concentration of roles and the inability to obtain third party verification of asset positions), we responded to those concerns by taking appropriate action (such as conducting due diligence and commissioning the reviews performed by KPMG) which left us comfortable about continuing our relationship with Primeo.

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Primeo

- 200. I understand that it is a key part of Primeo's case that BBCL and HSSL failed to warn Primeo about certain allegedly concerning features of BLMIS's operations, including that Primeo and its other service providers were totally dependent upon BLMIS for information and that it was not possible to verify such information independently. I also understand that Primeo alleges that the Defendants should have been put on a heightened inquiry about BLMIS's activities because of particular aspects about the way in which BLMIS did business, namely, the secrecy of BLMIS's operations, the lack of real time reporting by BLMIS, the self-clearing of trades by BLMIS and the fact that Friehling & Horowitz were relatively unknown. I understand that Primeo will seek to prove that these are all things that BBCL and HSSL should have brought to Primeo's attention and that if they had brought them to Primeo's attention certain consequences would have flowed from that.
- 201. As set out above, the obvious problem with Primeo's analysis is that Primeo knew about all of these features it claims were of concern, and yet chose to continue placing nearly all of its assets (directly or indirectly) with BLMIS for management.
- 202. It is my opinion that the investment advisers and directors of Primeo knew about the concerning features relating to BLMIS that Primeo now seeks to rely on, and in particular were aware that BLMIS retained custody of Primeo's assets in the course of managing the fund's investments. As I have said, during my time on the board many of the directors had already had many years' experience of Primeo and its structure, and several of them (Dr Kaniak and Dr Tiefenbacher) had been among the original promoters and founders of the fund through their employer, Bank Austria.
- 203. As several of the board minutes during my time on the board reflect, the directors actively discussed and therefore knew about issues such as BLMIS's multiple roles, the investment advisers' reliance on BLMIS for information, BLMIS's stance not to operate under any other arrangement, the lack of independent confirmations, the fact that there was no written investment restrictions agreement with BLMIS, the lack of third party evidence that the securities actually existed and BLMIS's obsession with confidentiality. The board minutes show

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that the board considered making its own visits to BLMIS and discussed terminating the fund's relationship with BLMIS. Having considered all of this, the board chose to continue to place nearly 100% of Primeo's assets with BLMIS for management.

- Dr Fano, acting on behalf of BA Worldwide, the investment adviser, which was part of Bank Austria, the promoter and founder. Dr Fano attended all Primeo board meetings that I attended (and, as the minutes show, had attended all Primeo board meetings since the late 1990s). As I have explained, she was the chief point of contact for the board, she had the closest knowledge of the fund's operations and she advised the board on all the major decisions that it was required to make. She was also the closest point of contact with BLMIS, given that we understood that she visited BLMIS twice a year. In my opinion, Dr Fano was aware of all of the concerning features referred to above, and also many of them came specifically to the board's attention in the context of the 2003 audit review conducted by Bank Austria whose key findings were shared with the directors at board meetings. For example, the Bank Austria Audit Review specifically referred to the lack of certain written agreements with BLMIS that they considered important and the lack of independent confirmations.
- 205. As well as being aware of the potentially concerning features about BLMIS, it is my opinion that Bank Austria and BA Worldwide specifically understood in the Bank Austria Audit Review, as well as in Primeo's offering memoranda documents which were always well known to these parties, that HSSL, under the terms of the Custodian Agreement, excluded liability for assets held in "managed accounts" with third parties such as BLMIS. As I have said, this was standard HSSL policy: the bank did not accept responsibility for the safekeeping of assets held by a client-appointed agent.
- 206. Though I ceased to be a director of Primeo in late 2006, I understand that Dr Fano was appointed as a director of the fund in April 2007 and continued to serve as a director until Mr Madoff's arrest.
- 207. I do not accept Primeo's position in this litigation that it was acting in ignorance of what it describes as the concerning features of BLMIS.

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Hypothetical actions of Primeo

208. I understand that another key aspect of Primeo's case is that, if BBCL and HSSL had informed Primeo that they were unable to discharge their duties under the Administration Agreement and the Custodian Agreement adequately, or the Administration Reports and the Custodian Reports had contained information about the bank's concerns about BLMIS (for example the inability to obtain independent confirmations) then Primeo would have withdrawn all of its investments placed with BLMIS, whether directly, or indirectly through Alpha and Herald.

209. This position is in my view based on premises that are false, and all of which I refute as I have already explained in this witness statement.

210. If the bank's concerns had reached that stage, including such that the bank considered it may be appropriate to terminate the relationship with the fund, then in my experience the decision of senior management at the bank would have been first to take advice from our compliance and legal departments and then to report the relevant matters to the relevant regulators in relation to all the client funds that may have been affected. In Luxembourg we would normally have reported to the Commission de Surveillance du Secteur Financier ("CSSF"), which is the main financial regulator, and possibly also the criminal authorities. Also, in the case of each fund that may have been affected, I expect that the bank would have reported the relevant matters to the relevant regulators or authorities in the place of the relevant fund's incorporation, whether that be the Cayman Islands (in the case of Primeo and Herald), Bermuda (in the case of Alpha), etc., and in any other countries that may be relevant, for example countries in which the funds were listed or registered for sale.

211. If the bank had concerns in relation to BLMIS or Primeo of a nature such that the bank did not consider it necessary to notify the regulators but nonetheless decided to stand down from the client relationships (e.g. because the bank was no longer comfortable with extending credit to clients using BLMIS), then the bank would have stood down from all relevant client relationships. In doing so, the bank would normally explain to each of the affected clients why it was exiting the relationship. Such a decision to terminate these client relationships would have

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affected a number of funds where the bank acted as administrator or custodian and therefore the impact would have been wide-reaching.

- 212. I do not accept the position that is now adopted by Primeo that it would in the circumstances alleged have sought to withdraw all of its investments from BLMIS. The comments I make below are based on my experience as a director of Primeo, as well as my experience and knowledge of the other directors of Primeo during the time I was a member of the Primeo board, and of others involved in the management of the fund during this period, in particular Dr Fano.
- 213. In my opinion, the directors of Primeo were content with the risk profile associated with BLMIS providing investment management, brokerage and custody services to the fund. The board was also pleased with the returns generated by BLMIS, which had been consistently strong. As a result, absent sufficiently reasoned or validated concerns that BLMIS may be conducting its business illegally or improperly in some way, in my opinion the Primeo board would have been very reluctant to withdraw its assets from BLMIS: among other things, there would be no guarantee that Mr Madoff would be willing to allow the fund to return as an investment management client (as I mentioned, BLMIS was ostensibly closed for new investment management business).
- 214. The Primeo directors would normally look to Dr Fano for her advice and guidance when it came to making key decisions. Dr Fano knew and had shared with the board the concerns which, on Primeo's hypothesis, would have caused BBCL and HSSL to notify the fund. In my opinion, BBCL and HSSL would have simply been telling the Primeo board what it already knew, and the board (and Bank Austria) would have sought to maintain the relationship with BLMIS even if that meant having to find another custodian and fund administrator. Further, the Primeo board had discussed options for what might be done if the fund were to sever its relationship with BLMIS once before in 2003 and it did not sever its relationship with BLMIS.
- 215. However, if Primeo had become sufficiently concerned by risks associated with BLMIS that it decided for 'commercial' reasons to withdraw its assets from BLMIS a considered decision would need to have been made as to what to do with assets withdrawn from BLMIS. In my view, the board would in the first instance have asked Dr Fano to prepare a proposal as to how the

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assets should be reinvested, or to consider whether the fund should be restructured, closed or sold. In any case, if there was to be a significant change to the investment strategy or a proposal to restructure, close or sell the fund, this would have needed to be notified to the investors in the fund and in some cases it would have needed shareholder (investor) approval.

The situation would be different if Primeo became aware of sufficiently reasoned or validated concerns that BLMIS may be conducting its business illegally or improperly in some way. It is difficult to envisage a scenario where Primeo became aware of fraud or similar valid concerns regarding BLMIS but was still in a position to withdraw its investments from BLMIS at will. If the board had such information, a prompt decision would need to have been taken by the board, and in my opinion such a decision should have been informed by legal and compliance advice, as to the most appropriate course of action. In my opinion, the outcome would most likely have been to notify the relevant regulators, including the SEC, and any other relevant authorities and then to follow instructions from the relevant authorities. In my opinion, it is unlikely that steps would have been taken by Primeo to withdraw its assets from BLMIS before the relevant regulators or other authorities had been consulted, not least because this would risk tipping off BLMIS, Mr Madoff and others that there was a problem.

Claims by Alpha and Herald

- 217. I note for completeness that HSSL is also being sued by Alpha and Herald in connection with losses that they claim to have incurred as a result of the BLMIS fraud.
- 218. Herald issued proceedings against HSSL before the Commercial Court in Luxembourg on 3 April 2009 for restitution and damages for breach of the custody agreement I referred to above, in which I understand Herald seeks restitution and damages for the loss of its investments with BLMIS.¹¹⁹

¹¹⁹ NF0013 {N/2777}; NF0014 {N/2778}

219. Alpha commenced proceedings against HSSL before the Commercial Court in Luxembourg on 20
October 2009. Alpha has also made cross-claims against HSSL and other HSBC Group
companies in the proceedings brought by the BLMIS Trustee in the United States. 121

Conclusion

- 220. In my view, Primeo's case in these proceedings is misconceived on account of the fact that it is based upon two key false premises. First, that HSSL was responsible for the safekeeping of Primeo's assets that were being held in the custody of BLMIS pursuant to the entirely separate arrangements that Primeo had put in place with BLMIS. Secondly, that Primeo was unaware of what it describes as the "concerning features" of BLMIS's business that are said to have been known to one or both of the Defendants but not to Primeo.
- 221. In any event, I firmly reject the notion that the Defendants not only breached their contractual obligations to Primeo but then deliberately concealed those breaches from Primeo.

Nigel Fielding 4 March 2016 (Amended 12 September 2016)

121 NF0017 {N/2940}

¹²⁰ NF0015 {N/2797}; NF0016 {N/2798}

Exhibit 2

Third Witness Statement Nigel Fielding Defendants 30 September 2016

IN THE GRAND COURT OF THE CAYMAN ISLANDS FINANCIAL SERVICES DIVISION

Cause No: FSD 30 of 2013 - AJJ

BETWEEN

PRIMEO FUND (IN OFFICIAL LIQUIDATION)

<u>Plaintiff</u>

AND

(1) BANK OF BERMUDA (CAYMAN) LIMITED (2) HSBC SECURITIES SERVICES (LUXEMBOURG) SA

Defendants

THIRD WITNESS STATEMENT OF NIGEL FIELDING

I, Nigel Fielding, of 2 rue Tony Neuman, Luxembourg, L-2241, Grand Duchy of Luxembourg WILL STATE AS FOLLOWS:

Introduction

- 1. I make this witness statement:
 - (a) in connection with these proceedings commenced by Primeo Fund (in Official Liquidation) ("Primeo") in the Grand Court of the Cayman Islands against Bank of Bermuda (Cayman) Limited ("BBCL") and HSBC Securities Services (Luxembourg) SA ("HSSL", and, together with BBCL, the "Defendants");
 - (b) further to my first witness statement dated 4 March 2016 ("Fielding 1") and second witness statement dated 11 May 2016 ("Fielding 2") in these proceedings; and
 - (c) in reply to the witness statements of Dr Stefan Zapotocky dated 13 July 2016 ("Zapotocky 1") and Mr Peter Fischer dated 28 August 2016 ("Fischer 1") on behalf of Primeo.

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I am authorised by the relevant representatives of the Defendants to make this statement on behalf of the Defendants. I make this statement from information acquired by me in the course of my involvement with matters relevant to issues in dispute in these proceedings. This statement is an outline of evidence only and is based upon my best recollection of events, and my review of documents that have been made available for me to review. It is true to the best of my knowledge and belief. I do not attempt to address every relevant event and document. I do not in this statement waive privilege in respect of any privileged discussions or documents to which I refer.

3. I endeavour in this statement not to repeat matters set out in Fielding 1 and Fielding 2, the contents of which are unaffected by Zapotocky 1 and Fischer 1. Where I do not in this reply statement respond to a part of Zapotocky 1 or Fischer 1, this should not be construed as indicating that I necessarily agree with that part of Dr Zapotocky's or Mr Fischer's statements. Unless otherwise stated, the defined terms in this statement have the same meaning as in Fielding 1 and Fielding 2.

A. Witness Statement of Dr Stefan Zapotocky

- 4. I have carefully read and considered Dr Zapotocky's witness statement.
- 5. I understand from the affidavit of Ms Eleanor Fisher dated 19 July 2016 in support of the Plaintiff's application for leave to adduce the witness statement of Dr Zapotocky that, for the purpose of preparing his statement, Dr Zapotocky reviewed my first and second statements in these proceedings. However, it strikes me that Dr Zapotocky does not fully address matters in those statements that I would expect to be within his knowledge. In particular, Dr Zapotocky does not in his statement address quite a number of my comments about various statements attributed to him in the transcripts of interviews that were attached to the Hearsay Notices served on the Defendants by Primeo on 4 March 2016, which I addressed in Fielding 2.
- 6. I also note that, like Mr O'Neill, Dr Zapotocky downplays the importance of the roles played by Bank Austria and BAWFM in respect of Primeo.

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Background

7. Dr Zapotocky states that he was a member of the board of Primeo from 2 December 1993 until

17 May 2000, during which period he states that he also occupied "senior managerial roles at

Bank Austria". 1 As I explained in Fielding 1, I joined HSSL on 15 March 1999 and was a director of

Primeo between 15 August 2000 and 3 October 2006. Accordingly, I joined the board of Primeo

approximately 3 months after Dr Zapotocky resigned his directorship. I do not recall ever having

met Dr Zapotocky. Although Dr Zapotocky and I had involvement with Primeo during largely

different periods, I am able to comment on a number of the matters set out by Dr Zapotocky in

Zapotocky 1 from my own knowledge.

Dr Zapotocky states that "Bank of Bermuda were the market leaders in the provision of 8.

administration and custody services", however this was the case only in respect of the

alternative funds sector, and not the mainstream or traditional funds sector. Bank of Bermuda

was a small bank by international standards.

Establishment of Primeo

9. As I explained in Fielding 1, I did not have any involvement with Primeo until after I joined HSSL

in 1999. However, Dr Zapotocky makes a number of comments concerning the establishment of

Primeo that are inconsistent with the roles normally performed by a fund administrator and

custodian, and with my later experience of working at Bank of Bermuda. For example, Dr

Zapotocky states that Bank of Bermuda "advised on the structure to be adopted for Primeo"³

and would have "carried out its own due diligence in relation to [the] operations and structure"4

of Primeo.

¹ Zapotocky 1, [2] {B/3/1-2}.

² Zapotocky 1, [18] {B/3/5}.

³ Zapotocky 1, [26] {B/3/7-8}.

⁴ Zapotocky 1, [24] {B/3/6-7}.

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10. A fund is typically structured by its promoter (Bank Austria, in the case of Primeo) with primary input from legal and investment advisors. As I explain further below, the role of the fund administrator and custodian with respect to the structuring of a fund and "due diligence" in relation to the operations and structure of the proposed fund is ordinarily limited to the fund administrator and custodian being satisfied that the structure is practicable in the sense that it will permit the fund administrator and custodian to function effectively. The structuring of a fund is not primarily the responsibility of the fund administrator and custodian, nor as a general rule do they have any role in the selection of investment managers. These are matters primarily for the promoter and its legal and investment advisors.

11. In the case of Primeo, I have been shown a note⁵ of a meeting that appears to have taken place in Vienna on 12 November 1993, the same month in which Primeo was incorporated and shortly before the launch of the fund on 1 January 1994. The note records that Austin O'Connor and Chris Wilcockson, on behalf of Bank of Bermuda, met with Sonja Kohn, Dr Zapotocky and Dr Kretschmer to discuss the launch of Primeo. It appears from this note that Bank Austria had already by the time of the meeting "been working on the proposed Primeo Fund" and had considered the appropriate structure of Primeo to satisfy legal, regulatory and other requirements. Indeed, the note indicates that the meeting with Bank of Bermuda had been arranged by Ms Kohn "so that administrative areas could be discussed" and "particularly so that the Bank Austria team who were working on the project could meet representatives of the Bank of Bermuda and gain some comfort as to the ability of the Bank to service their proposed Fund". That is in keeping with my expectation that the focus insofar as the proposed fund administrator and custodian were concerned would have been on their ability to service Primeo based on its intended structure.

12. It appears from the note that the structure of Primeo had already been largely determined;
Bank Austria had decided to incorporate Primeo in the Cayman Islands, to seed Primeo with
US\$10 million (I note that Dr Zapotocky refers in his statement to seed money denominated in
Euros;⁶ but that currency was not in circulation at the time), and to appoint BAWFM as

⁵ HSBC_0010118 {N/8.1}.

⁶ Zapotocky 1, [21] {B/3/6}.

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investment advisor to the fund. It does not appear from this note that Bank of Bermuda provided any structural advice, nor would I have expected them to have done so. Indeed, to the extent that Bank Austria wanted Primeo to "look entirely like a Bank Austria fund", Bank Austria would be better placed than Bank of Bermuda to determine the structure of Primeo.

Bank Austria Worldwide Fund Management Ltd

13. Dr Zapotocky describes Primeo's investment advisor, BAWFM, as an "affiliated" company that was "independent" of Bank Austria. My understanding was always that, although it was a separate legal entity, BAWFM was owned and controlled by Bank Austria. I note that Dr Zapotocky confirms that, although BAWFM was run by his "assistant", Dr Werner Kretschmer, Dr Zapotocky "had overall responsibility for BAWFM". This is consistent with my understanding that both Primeo and BAWFM were created and controlled by Bank Austria.

14. Dr Zapotocky says that BAWFM entered into an Investment Sub-Advisory Agreement with Eurovaleur Inc ("Eurovaleur") dated 1 January 1994 pursuant to which "all the core functions of the Investment Adviser, including monitoring and reporting, were delegated to Eurovaleur" and that "due to the delegation of management functions to Eurovaleur and the underlying managers, BAWFM had no real management function but it collected information and coordinated the operation of Primeo and Bank Austria's other funds". 10 It is not clear to me what Dr Zapotocky means when he refers to BAWFM having "no real management function", however, as I explained in Fielding 1 and Fielding 2, the role played by BAWFM in connection with the management of Primeo was of central importance.

15. Dr Zapotocky's comments in this regard are inconsistent with my experience of Primeo. During my involvement with Primeo, BAWFM was responsible for the day-to-day management of Primeo as well as advising the Primeo board in relation to the investment strategy and risks. As I

⁷ Zapotocky 1, [21] {B/3/6}.

⁸ Zapotocky 1, [23] {B/3/6}.

⁹ Zapotocky 1, [22] {B/3/6}.

¹⁰ Zapotocky 1, [23] {B/3/6}.

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explained in Fielding 1 and Fielding 2, Dr Ursula Fano (who took over from Dr Kretschmer as the President of BAWFM in February 2000) was highly active in this role during the period of my involvement. For example, Dr Fano attended all Primeo board meetings that I attended, at which she provided the report on behalf of the investment advisor (BAWFM) concerning the investment activities of Primeo. She was closely involved in the preparation of Primeo board agendas and material, reviewed and provided input to the minutes of Primeo board meetings, and had primary carriage of Primeo's offering documents. Dr Fano also determined, for example, how to allocate Primeo's assets, subject to approval by the Primeo board. In her role as the President of BAWFM, Dr Fano said that she visited BLMIS approximately twice a year and that BAWFM conducted ongoing due diligence in respect of BLMIS. During the period in which I was a member of the Primeo board, the board did not make any important decision concerning Primeo without Dr Fano's input.

- 16. Dr Fano was also the primary point of contact in the Bank Austria group for the Defendants with respect to Primeo, as is apparent from the extensive email correspondence to which Dr Fano was a party during the relevant period. During the period of my involvement with Primeo, a small team of people, some of whom I met and understood were from BAWFM, worked with Dr Fano in respect of the work BAWFM performed as the investment advisor to Primeo.
- In April 2007, at the time BAWFM was replaced by Pioneer Alternative Investment Management Limited as the investment adviser to Primeo, Dr Fano was appointed a director of Primeo. She was, in my view, the single person who was most knowledgeable about Primeo's activities during the period of my involvement. As I explained in my second statement, the other person who appeared to me to be very familiar with the operational aspects of Primeo's activities was Alfred Simon, who was a Bank Austria-nominated director of Primeo between 22 May 2000 and 25 April 2007, and the fund's Chairman, President and Chief Executive Officer. However, even Mr Simon appeared to me to rely upon Dr Fano's knowledge of Primeo and BLMIS at times during Primeo board meetings.

Fielding 2, [9; 15 – 16; 23 – 24; 27 – 29; 33; 39 – 42; 44 – 47; 50; 56; 58; 60; 62 – 68; 73 – 75; 85; 88; 99; 118; 136; 161; 165] {B/12}.

¹¹ Fielding 1, [31; 56 – 57; 81; 98; 112 – 114; 122; 130 – 135; 140; 156 – 159; 183 – 184; 204; 214 – 215]; {B/9}

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18. On the other hand, I was not aware of Eurovaleur performing any significant investment advisory activities with respect to Primeo. I do not recall Eurovaleur being visible at all. As I said in Fielding 2, I understand that the primary purpose of the sub-advisory relationship between BAWFM and Eurovaleur was for Ms Kohn to maintain the relationship with BLMIS.

19. I took considerable comfort from the involvement of BAWFM, a subsidiary of Bank Austria, performing the very important investment advisor role and was not aware that BAWFM had delegated "all the core functions" of the investment advisor to Eurovaleur.

20. For the reasons outlined above, I am surprised by Dr Zapotocky's statement that "BAWFM had no real management function" with respect to Primeo on account of the delegation of certain of its responsibilities to Eurovaleur. That is inconsistent with my experience of the central role that BAWFM played in the management of Primeo and what appeared to me to be the very minor involvement of Eurovaleur in terms of "management".

Due diligence in respect of investment managers selected by Primeo

21. Dr Zapotocky says that due diligence in respect of Primeo's investment managers was coordinated from a BAWFM perspective by Dr Kretschmer and that Dr Zapotocky believes that John Sullivan from the US law firm Walter, Conston, Alexander & Green was also involved.¹⁴

22. Dr Zapotocky says further that, in addition to the due diligence undertaken by BAWFM, he "would also have expected [the Defendants] to carry out [their] own substantive due diligence in relation to operations and structure [of the investment managers selected by Primeo] because [they] were ultimately responsible for safekeeping Primeo's assets and valuing the fund".

disagree with Dr Zapotocky in this regard.

¹² Zapotocky 1, [22] {B/3/6}.

¹³ Zapotocky 1, [23] {B/3/6}.

¹⁴ Zapotocky 1, [24] {B/3/6-7}.

¹⁵ Zapotocky 2, [24] {B/3/6-7}.

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23. The Defendants, in their capacities as the fund administrator and custodian of Primeo, were not in my view required to carry out "substantive due diligence" in relation to the operations and structure of investment managers selected by Primeo and its investment advisors. Such a requirement arises from neither the terms of the agreements between the Defendants and Primeo nor from market practice based on my experience during the relevant period.

24. In the alternative funds sector during the relevant period, particularly in the case of fund of funds and multi-manager structures, the selection and due diligence on investee or target funds and discretionary managers such as BLMIS was an investment management function that was typically the responsibility of the fund's investment advisors or promoter, as was the case with Primeo. Further, it was an express term of the custody agreement between HSSL and Primeo that HSSL was not responsible for the safekeeping of securities or cash held by brokers or other intermediaries, ¹⁶ nor for securities or cash delivered to a third party for direct investment management. ¹⁷

Primeo Offering Memoranda

25. Dr Zapotocky states that the Primeo Offering Memorandum that was issued on 15 December 1993 was "approved" by the Primeo board and by the Defendants. Although I was not involved at the time, it would be highly unusual for the Defendants to have "approved" the Offering Memoranda of Primeo. During the period in which I was a member of the Primeo board, HSSL was among the parties involved in providing input into and reviewing the Primeo Offering Memoranda, a task which was led by BAWFM; however, the approval of the Offering Memoranda was a matter solely for the Primeo board.

26. I understand there was a specific department within Bank Austria which assisted with the preparation of Offering Memoranda. I also recall that, once they were finalised in English, the Primeo Offering Memoranda needed to be translated into German, which was coordinated by BAWFM or Bank Austria.

¹⁶ Custodian Agreement, Clause 6(B) {F/3/5} {F/14/5-6}.

¹⁷ Custodian Agreement, Clause 6(C) {F/3/5} {F/14/6}.

¹⁸ Zapotocky 1, [25] {B/3/7}.

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HSSL's role as custodian

- 27. Dr Zapotocky states that the Defendants "advised on the structure to be adopted for Primeo" and, at the first board meeting of Primeo on 2 December 1993, HSSL was appointed as the Secretary of Primeo. However, Dr Zapotocky does not explain, or provide any evidence of, the advice said to have been provided by the Defendants in respect of the structure to be adopted by Primeo. The secretarial role performed by HSSL in respect of Primeo was administrative in nature and does not indicate such an "advisory" role. A fund is typically structured by its sponsor (Bank Austria, in the case of Primeo) with input from legal counsel and other parties as necessary.
- 28. Lawyers were often engaged to perform formal and primary advisory work in structuring funds, working with the sponsor/promoter. Other parties, such as the promoter, proposed investment advisor, investment manager(s), fund administrator, custodian and auditors may also have input. For example, the proposed fund administrator and custodian may provide input on things like the workability of the proposed timing and processes for pricing investments, NAV/price issuance, handling of subscriptions and redemptions, and payments. The proposed investment advisor may provide input on matters such as the investment strategy, investment risk profile, appropriate investment restrictions, relevant benchmarks, and investment or manager selection processes or criteria.
- 29. Dr Zapotocky states that the Defendants "put forward one of their high level investment fund experts to be a Primeo director". The majority of the Primeo directors were Bank Austria group employees, and those who were employees of the Defendants had expertise in fund administration and/or custody, but were not investment management experts. Dr Zapotocky says that the attendance of these directors at Primeo board meetings gave him "comfort from a due diligence and transparency perspective". ²⁰ It is not clear to me what Dr Zapotocky means in this regard, nor why the attendance of directors nominated by the Defendants would provide Dr Zapotocky with comfort "from a due diligence and transparency perspective" specifically with respect to Mr Madoff and BLMIS, especially given that BAWFM (Dr Fano in particular during the

¹⁹ Zapotocky 1, [26] {B/3/7-8}.

²⁰ Zapotocky 1, [24] {B/3/6-7}.

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period of my involvement) stated that they were conducting regular due diligence in respect of BLMIS and, I assume, reporting to Bank Austria.

- 30. Dr Zapotocky says further that the "single most important aspect of the structure" from his perspective was "engaging a bank for the administrator and custodian roles with suitable qualifications". ²¹ I find it difficult to understand why Dr Zapotocky apparently attached such relative importance to the engagement of the fund administrator and custodian. In my experience, the selection of investment managers and advisors is regarded by sponsors as being at least as important (and usually more important) as the selection of the fund administrator and custodian. Indeed, in contrast to investment management and advisory services, many sponsors regarded fund administration and custody as commoditised services that could be provided by any number of banks.
- 31. With regard to the requirements applicable to Primeo's custodian, Dr Zapotocky says that "domestic funds in Austria were heavily regulated and we were, therefore, particularly conscious of the need to comply with any applicable legal and regulatory requirements". However, Primeo was not an Austrian fund but a Cayman Islands fund and was therefore subject to different legal and regulatory requirements.
- 32. My understanding at the time was that the Cayman Islands imposed light regulations on Cayman-domiciled funds such as Primeo. In particular, I understood that the Cayman Islands did not impose a requirement that the custodian accept responsibility for all assets of the fund wherever they were held.
- 33. The light regulatory requirements for a Cayman fund meant that HSSL, in line with common practice among custodian banks, could and did apply a standard policy of not accepting responsibility for assets held by third parties such as BLMIS, as I explained in Fielding 1.²³ This standard policy also aligns with the regulatory expectation that banks, such as HSSL, appropriately limit and manage operational risks. Therefore, in its standard custodian agreements HSSL disclaimed liability for assets held with third parties such as BLMIS by way of

²¹ Zapotocky 1, [27] {B/3/8}.

²² Zapotocky 1, [27] {B/3/8}.

²³ Fielding 1, [11(c)] {B/9/4}, [43] {B/9/14-15}, [48] {B/9/15-16}.

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provisions such as Clause 6(B) of the Custodian Agreement. The Custodian Agreement also included, at Clause 6(C), an exclusion of responsibility for assets held at Bank Austria or other similar institution for the purpose of direct investment management by such institution.

34. Dr Zapotocky says that "it was necessary for the custodian of a foreign investment fund selling in Austria to be a bank authorised under Austrian or EU law to carry on custody business or an institution authorised to conduct safe custody business". 24 He continues: "Given that BLMIS did not separate custodial and investment management functions, it could not have satisfied the safe custody requirement" such that Bank Austria "would have been unable to publically offer Primeo in Austria". 25 As I explained in Fielding 1, BLMIS did not provide investment management services to its clients without also retaining custody of the client's assets. I understand Dr Zapotocky to be saying that he was aware that BLMIS "did not separate custodial and investment management functions", and therefore that BLMIS retained custody of Primeo's assets. Dr Zapotocky wrongly suggests that HSSL had safekeeping obligations with respect to such assets. As I have explained, HSSL was not responsible for the safekeeping of Primeo's assets held in the custody of BLMIS pursuant to the arrangements that had been put in place between Primeo and BLMIS.

35. Further, as I explained in Fielding 1, it was clear (at least by the time I became involved with Primeo) that the BLMIS investment management model combined investment management, brokerage and custodial services. I recall Dr Fano saying at a Primeo board meeting that BLMIS would not change its model, which I understood to mean that Primeo either agreed to the package of investment management, brokerage and custody services being provided by BLMIS, or it would not be able to place assets under the management of BLMIS.

Thema International Fund plc ("Thema")

36. Dr Zapotocky states that as part of his role at Bank Austria he was responsible for oversight of Investmentbank Austria A.G., which Dr Zapotocky states was a party to an Investment Advisory Agreement with Thema Asset Management Limited in respect of Thema.²⁶ Thema was a fund

²⁴ Zapotocky 1, [28] {B/3/8}.

²⁵ Zapotocky 1, [28] {B/3/8}.

²⁶ Zapotocky 1, [32] {B/3/9}.

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incorporated in the Republic of Ireland that was authorised as a UCITS. As I have already noted, Thema was therefore subject to a different regulatory regime to Primeo.

- 37. Dr Zapotocky says that his "understanding was that the custody arrangements in place with Bank of Bermuda and the brokerage arrangements in place with BLMIS were the same for both Primeo and Thema". 27 Dr Zapotocky does not explain the basis for his understanding in this regard, nor is it clear to me. Nor does he state when he arrived at this understanding. In any event, the custody arrangements concerning Thema and Primeo were quite different, particularly during the period of Dr Zapotocky's involvement prior to his departure from Bank Austria in March 2000.
- 38. Thema appointed Bermuda Trust (Dublin) Limited ("BTDL"), which was later renamed HSBC Institutional Trust Services (Ireland) Limited following the acquisition of the Bank of Bermuda group by the HSBC group in 2004, as its custodian pursuant to the terms of a Custodian Agreement dated 30 May 1996. Thema was a fund created by Benbassat & Cie that placed money with BLMIS for investment.
- 39. BTDL entered into a sub-custody agreement with Bank of Bermuda Limited dated 30 May 1996 in respect of Thema. In turn, Bank of Bermuda Limited entered into a sub-custody agreement with BLMIS in July 1996 (the "Thema Sub-Custody Agreement") in relation to Thema.
- 40. There was no sub-custody agreement between HSSL and BLMIS (or similar arrangement via Bank of Bermuda Limited) at any time prior to Dr Zapotocky's departure from Bank Austria in March 2000. The first sub-custody agreement between HSSL and BLMIS was dated 7 August 2002. I explained the background to this agreement, and the reasons behind it, in Fielding 1.²⁸
- 41. Dr Zapotocky's conclusion that "given the similarities between the arrangements for both funds, coupled with the mandatory regulatory requirements, I had no reason to think that Bank of Bermuda was not performing the role of custodian for all of Primeo's assets in the same way as it was doing so for Thema"²⁹ therefore appears to be based on a mistaken recollection or

²⁷ Zapotocky 1, [34] {B/3/9-10}.

²⁸ Fielding 1, [75 - 101] {B/9/25-31}.

²⁹ Zapotocky 1, [35] {B/3/10}.

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understanding of the contractual arrangements and regulatory requirements applicable to Thema and Primeo. Primeo and Thema were subject to different regulatory regimes and contractual arrangements at all times during the period of Dr Zapotocky's involvement.

Custody of Primeo's assets

- 42. Dr Zapotocky refers to a letter in German from HSSL to Dr Fano at BAWFM dated 10 December 1996.³⁰ I have been provided with an English translation of that letter, the first paragraph of which states: "We herewith state that we have assumed the custodial function for the Primeo Fund as of 21 December 1993."³¹ I understand this date to refer to the date of the first Custodian Agreement between Primeo and HSSL. This letter appears to me to do no more than confirm that HSSL was the custodian to Primeo which I understand, and am advised, is not in dispute in these proceedings. HSSL's letter does not detail the terms or scope of the custody arrangements between Primeo and HSSL.
- 43. Dr Zapotocky states that he understood that HSSL would safeguard the assets of Primeo,³² however he appears to ignore the terms of the custody agreements which explicitly state that HSSL was not responsible for the safekeeping of securities or cash in accounts with brokers, such as BLMIS, and other intermediaries.
- 44. With regard to the brokerage arrangements concerning Primeo, Dr Zapotocky says that he does not now and did not at the time of his involvement believe that the brokerage agreements between Primeo and BLMIS had the effect of appointing BLMIS as custodian in respect of Primeo's assets.³³ However, this appears to be inconsistent with Dr Zapotocky's confirmation earlier in his statement that he was aware that "BLMIS did not separate custodial and investment management functions".³⁴ It is therefore unclear to me on what basis Dr Zapotocky understood that Primeo had appointed BLMIS as a broker and investment manager without BLMIS retaining custody of Primeo's assets under its management.

³⁰ Zapotocky 1, [36] {B/3/10}.

³¹ PRI_000018027 {N/76} & {N/76.1}.

³² Zapotocky 1, [37] {B/3/10}.

³³ Zapotocky 1, [40] {B/3/11}.

³⁴ Zapotocky 1, [28] {B/3/8}.

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- Dr Zapotocky also refers to a letter from HSSL to Dr Kretschmer at Bank Austria A.G. dated 16 February 1995, which he says confirmed that Primeo's account with BLMIS was a broker account. The letter states that, during the 1994 audit year, Primeo "established a broker account with Madoff". I understand this to be a reference to the 1994 Brokerage Agreements between Primeo and BLMIS to which I referred in Fielding 1. However, assets can be held in a broker account, and Primeo was able to do so and did. Indeed, that situation is precisely covered by clause 6(B) of the First and Second Custodian Agreements between Primeo and HSSL which expressly confirm that HSSL was not responsible for the safekeeping of assets held in any such account.
- 46. As to this, Dr Zapotocky says that he believes clause 6(B) "would be designed to cover the situation where assets temporarily released into the possession of a broker or other intermediary for the purpose of executing a trade are lost as a result of the third party entering insolvency whilst in possession of the assets". While I agree, based on my experience of custodian arrangements over many years, that clause 6(B) would also be intended to exclude liability for assets temporarily held by a broker, the clause would equally be intended to apply to assets held on a longer-term basis by a broker. In my opinion, if there was a specific intention of the parties to the agreement to limit the exclusion of responsibility only to assets held temporarily, e.g. pending settlement of a trade, there would be wording to this effect in this clause. To the contrary, the clause expressly states that the exclusion of responsibility relates to securities or cash "deposited with or remaining in" (my emphasis) the accounts of a broker or other intermediary. Commercially, there is a greater (not lesser) need for such an exclusion of liability where (as here) Primeo's assets remained in the managed account at BLMIS.
- 47. In any event, clause 6(C) of the Custodian Agreement expressly stated that HSSL would not be responsible for the safekeeping of securities or cash in a segregated account at Bank Austria or at such other similar institution as the directors of Primeo may determine for the purpose of "direct investment management" by such institution. Accordingly, Clause 6(C) also applied to Primeo's investments placed under the direct investment management of BLMIS.

³⁵ PRI 000018025 {N/45}.

³⁶ Fielding 1, [38] {B/9/13}.

³⁷ Zapotocky 1, [42] {B/3/12}.

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- 48. Dr Zapotocky says that his "understanding in the context of the brokerage account was simply that BLMIS could decide what to buy and sell". Pursuant to the Brokerage Agreements between Primeo and BLMIS, Primeo gave BLMIS a mandate to trade Primeo's assets held in the broker account at BLMIS. There should have been no doubt that BLMIS retained custody of Primeo's assets for this purpose, and Dr Zapotocky confirms in his statement that he was aware that "BLMIS did not separate custodial and investment management functions". 39
- 49. It should have been clear to Dr Zapotocky that the assets of Primeo that were managed by BLMIS were not being held by HSSL's US sub-custodian. If Primeo's assets had been held by HSSL's sub-custodian in the US then for every trade/batch of trades, BLMIS would have to promptly send the trade information to HSSL's Custody Department which, after validation by the client, would then have had to instruct HSSL's US sub-custodian to settle the trades. Also, there would need to be a process in place whereby Primeo provided authorisation (*i.e.* proper instructions) to HSSL (*i.e.* the HSSL custody department) to enable the settlement of trades executed by BLMIS (*i.e.* by HSSL instructing HSSL's US sub-custodian). These steps would need to occur before the settlement date (which in the US market was usually "T+3" *i.e.* 3 days after trade execution). These processes would in my view have been unacceptable to BLMIS. In my opinion, Dr Zapotocky would have known that the directors of Primeo did not have a process in place whereby such instructions were given to HSSL to settle trades executed by BLMIS; without which HSSL would neither be permitted nor responsible for receiving and holding such securities (via HSSL's US sub-custodian).
- 50. Dr Zapotocky also says that, during his time on the board of Primeo (which ended on 17 May 2000), he never became aware that the Defendants had "delegated or assigned their responsibility as custodian to BLMIS as sub-custodian". That is because HSSL had not done so. Primeo had entered into separate arrangements with BLMIS for the management of its assets with the effect that such assets were never brought within the custody and safekeeping of HSSL.

³⁸ Zapotocky 1, [43] {B/3/12}.

³⁹ Zapotocky 1, [28] {B/3/8}.

⁴⁰ Zapotocky 1, [46] {B/3/13}.

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Dr Zapotocky's involvement after setting up Primeo

After Primeo had been set up, Dr Zapotocky says that BAWFM "did not carry out any direct supervision of the underlying managers, leaving that to the administrator and custodian". However, it is not the role of either the fund administrator or the custodian to "carry out direct supervision of the underlying managers". That is a role performed by the investment advisor. Indeed, it was an express term of the investment advisory agreement between BAWFM and Primeo dated 15 December 1993 that BAWFM was required to "monitor the performance of the Investment Companies and Managers" (clause 2). I always understood that BAWFM was performing this function and it would be troubling if they were not, particularly bearing in mind the very significant fees paid by Primeo to BAWFM.

- Instead, Dr Zapotocky suggests that the work performed by BAWFM was limited to reviewing "performance data to benchmark Primeo against other Madoff funds", carrying out "some double checking of information provided by Bank of Bermuda" and preparing "a report for the Board summarising the position in relation to the assets and investments". And This is considerably less work than I understood BAWFM to be performing and less work than I would have expected to be undertaken by a competent investment advisor, particularly one that was paid a total of more than US\$58 million for its investment advisory services. For example, Dr Zapotocky refers to BAWFM benchmarking Primeo's performance against other "Madoff funds", however I would have expected a competent investment advisor to benchmark Primeo's performance against not only other "Madoff funds" but also to the relevant market segment. I would also expect a competent investment advisor to be carrying out ongoing due diligence and supervision of the underlying managers, and Dr Fano said that BAWFM was doing this during my involvement with Primeo.
- As I explained in Fielding 1 and Fielding 2, by the time I became involved with Primeo, Dr Fano, who became the President of BAWFM in February 2000, was very actively engaged in the management of Primeo. Although I was not aware of precisely all the work BAWFM was

⁴¹ Zapotocky 1, [48] {B/3/13-14}.

⁴² PRI 0015535 {F/1/2}.

⁴³ Zapotocky 1, [48] {B/3/13-14}.

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undertaking during this period, it was always my impression and experience that Dr Fano was highly knowledgeable about Primeo's activities, including its structure, performance and investments. I have no doubt, for example, that Dr Fano was aware that BLMIS retained custody of Primeo's assets.

- Dr Zapotocky refers to the launch by Primeo in 1996 of a new Primeo share class that later became known as Primeo Select which placed its assets solely with BLMIS for management.⁴⁴ Dr Zapotocky says that, if the Defendants' (and my) understanding of the operation of clause 6(B) of the Custodian Agreement is correct then "there would have been no purpose at all in holding out Bank of Bermuda as custodian of the Primeo Select Fund".⁴⁵ I disagree with Dr Zapotocky on this point.
- 55. First, Primeo Select required various banking services that were performed by HSSL as a custodian bank, including handling as transfer agent the receipt and distribution of subscription and redemption monies to and from Primeo investors, maintaining cash accounts for Primeo (with respect to any cash not sent to BLMIS for investment), and from 2001 the provision of credit facilities.
- Secondly, Primeo Select did not explicitly name BLMIS as its sole manager. I understand that this was for two main reasons: to allow flexibility for other managers or investment companies to be appointed to manage Primeo Select's assets should this be deemed appropriate at any time, and on account of Mr Madoff's reported aversion, on confidentiality grounds, to BLMIS being identified publicly as the investment manager. Accordingly, HSSL stood ready to take custody of any other assets of Primeo Select pursuant to the Custodian Agreement should Primeo have decided to change its investment structure. Indeed, this happened when Primeo Select changed its investment structure in May 2007 from investing via a managed account with BLMIS to investing in Herald, at which point Primeo ceased to place any assets with BLMIS directly for management. I understand and am advised that there is no dispute between the parties that Primeo's shares in Herald (and Alpha) were held in HSSL's safekeeping. In addition, from 2003,

⁴⁴ Zapotocky 1, [51] {B/3/14}.

⁴⁵ Zapotocky 1, [51] {B/3/14}.

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Primeo Select invested in Bank Austria's Capital Invest Dollar Cash Fund, and HSSL was instructed to and did hold in its safekeeping Primeo's units in that fund.

- 57. Thirdly, the appointment of HSSL under the Custodian Agreement concerned Primeo, and was not limited to Primeo Select. HSSL was responsible for the safekeeping of various non-cash assets on behalf of Primeo for the significant majority of the period between Primeo's commencement in 1994 and Mr Madoff's arrest in 2008. At all times between the commencement of Primeo in 1994 and the winding down of Primeo Global in 2001, HSSL was responsible for the safekeeping of Primeo's shares in various funds in which Primeo (and later Primeo Global) invested. Then, in November 2003, Primeo Executive opened, which invested in Primeo Select, Alpha and certain money market funds. HSSL was again responsible for the safekeeping of Primeo's shares in those funds pursuant to the Custodian Agreement, in addition to Primeo Select's shares in Herald and Capital Invest Dollar Cash Fund as referred to above. By May 2007, HSSL was responsible for the safekeeping of the entirety of Primeo's non-cash assets in the form of its shares in Alpha, Herald and money market funds.
- 58. The suggestion that HSSL's role as custodian would have been defunct if HSSL was not responsible for the safekeeping of Primeo's assets that were in the direct custody of BLMIS is therefore incorrect.

B. Witness Statement of Mr Peter Fischer

- 59. I have also carefully reviewed the witness statement of Peter Fischer. Mr Fischer's statement overlaps significantly with the statement of Dr Zapotocky and I therefore do not repeat my responses to matters that I have already addressed arising from Dr Zapotocky's statement.
- 60. I do not recall ever having met Mr Fischer. I note that Mr Fischer, having been nominated by Bank Austria, was a director of Primeo during the period between 15 January 1996 and 31 December 1998. This predates my involvement with Primeo following my arrival at HSSL in March 1999. Although Mr Fischer and I were involved with Primeo during different periods, I am able to comment on a number of the matters set out by Mr Fischer in Fischer 1 from my own knowledge.

- 61. Mr Fischer refers to having given evidence to the Austrian financial regulator, the Finanzmarktaufsicht (the "FMA"), in connection with its investigation into the relationship between UniCredit Bank Austria A.G. and Bernard Madoff, and to a report of his evidence to the FMA. I have been provided by Campbells with a copy of a document that I understand is a transcript of Mr Fischer's evidence to the FMA on 6 April 2009 in German, together with an English translation, which I understand from the Defendants' attorneys they received from Primeo's attorneys on 23 August 2016.
- Mr Fischer states that, although BAWFM acted as the investment advisor to Primeo it "sub-delegated the majority of its functions to Eurovaleur, which acted as sub-adviser". As I said above, this is inconsistent with my understanding of the roles performed by BAWFM and Eurovaleur, at least during the period after I became involved with Primeo. In all of my dealings with Primeo, in my capacities as both an employee of HSSL and a director of Primeo, I understood that BAWFM was performing the functions of the investment advisor to Primeo. At the risk of repeating myself, Dr Fano of BAWFM was closely involved with Primeo and was effectively the day to day manager of the fund. I understood that the purpose of the sub-advisory relationship between BAWFM and Eurovaleur was primarily for Ms Kohn to maintain the relationship with BLMIS. While BAWFM and Dr Fano were highly visible in relation to Primeo, Eurovaleur and Ms Kohn were not, at least not to me or at Primeo board meetings during the period of my involvement.
- 63. Mr Fischer says that, at the time he was appointed as a director of Primeo, he was provided with copies of the old and current offering memoranda, which he reviewed, and that these offering memoranda indicated that "Eurovaleur acted as sub-investment adviser". ⁵⁰ However, I have rereviewed the Primeo offering memoranda prior to and at the date on which Mr Fischer became a director of Primeo and I do not see any reference to Eurovaleur acting as the sub-investment advisor to Primeo. Indeed, I have not been able to locate any reference to Eurovaleur in any of

⁴⁶ Fischer 1, [7] {B/4/2}.

⁴⁷ PRI_000018065 {N/2778.2}.

⁴⁸ PRI_000018064 {N/2778.1}.

⁴⁹ Fischer 1, [16] {B/4/4-5}.

⁵⁰ Fischer 1, [17] {B/4/5}.

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the Primeo offering memoranda. All of the offering memoranda that I have reviewed refer to BAWFM as the investment advisor.

64. Mr Fischer says that "the offering memoranda did not refer to BLMIS, although [Mr Fischer] learned from Dr Zapotocky and the other directors that BLMIS was acting as broker". ⁵¹ However, Mr Fischer must surely have known that BLMIS was acting not only as broker but also as an investment manager. Indeed, in the immediately preceding paragraph of his statement, Mr Fischer refers to the fact that "Primeo Select fund was set up in 1996 to invest solely through BLMIS". ⁵²

65. Mr Fischer then says that it was his "understanding that Bank of Bermuda was the custodian of Primeo and it had ultimate responsibility for the custody of Primeo's assets, including those which were being invested through BLMIS", 53 which Mr Fischer said he understood acted "as broker". Mr Fischer does not explain the basis for his understanding in this regard. However, clause 6(B) of the Custodian Agreements between Primeo and HSSL dated both 21 December 1993 and 19 December 1996 expressly stated that HSSL was not responsible for the safekeeping of securities or cash deposited with or remaining in broker accounts.

- 66. With regard to clause 6(B), Mr Fischer says that, although he did not consider it at the time, his current view is that the clause deals with assets that are temporarily released to a broker by the custodian to allow a trade to be executed. That is not my reading or understanding of the clause. As I explained above, Mr Fischer's interpretation is in my view inconsistent with both the language and purpose of the clause, which excludes responsibility for securities and cash "deposited with or remaining in" broker accounts.
- 67. Mr Fischer says further that clause 6(B) "appears to be designed to ensure that Bank of Bermuda is not liable if the broker becomes insolvent in the time between receiving the assets from the custodian and returning assets to the custodian once the particular trade has been executed."

⁵¹ Fischer 1, [17] {B/4/5}.

⁵² Fischer 1, [16] {B/4/4-5}.

⁵³ Fischer 1, [18] {B/4/5}.

⁵⁴ Fischer 1, [22] {B/4/6}.

⁵⁵ Fischer 1, [22] {B/4/6}.

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That very narrow interpretation appears to me to accord with neither the terms of the clause nor its purpose. There are sound reasons why a custodian such as HSSL would not take responsibility for the safekeeping of assets held by a broker or other intermediary, whether on a temporary or longer term basis. These include the regulatory expectation that banks, such as HSSL, appropriately limit and manage operational risk. Moreover, in my view it would not make commercial sense for a custodian to accept responsibility for the safekeeping of a client's assets held in a broker account at the direction of a client on a long-term basis but not on a temporary basis.

- 68. Even if Mr Fischer's interpretation were correct (and it seems to me that it cannot be), BLMIS did not return assets that it held "as broker" to HSSL as custodian after trades were executed and so clause 6(B) would in any event operate to exclude HSSL's responsibility for such assets.
- 69. I also note that Clause 6(C) of the Custodian Agreement, which is drafted in similar terms to clause 6(B), excluded liability for securities and cash delivered into accounts in the name of Primeo at Bank Austria. However, I do not read clause 6(C) as being limited to excluding liability of HSSL in the event that Bank Austria became insolvent only while it was temporarily holding such assets any more than it would for a broker under clause 6(B), nor would that make commercial sense.
- 70. Mr Fischer states that Bank of Bermuda was "held out as custodian, with its consent, in the offering memoranda". 56 Again, I understand it is not at issue that HSSL was Primeo's custodian. The terms upon which HSSL acted as Primeo's custodian, as set out in the Custodian Agreements between HSSL and Primeo, excluded the responsibility of HSSL for the safekeeping of assets held at BLMIS.
- 71. Mr Fischer says that while he was a director of Primeo, he "believed that Bank of Bermuda was ultimately responsible for safe keeping all of Primeo's assets", 57 however this ignores the provisions of clause 6 of the Custodian Agreements.

⁵⁶ Fischer 1, [23] {B/4/6-7}.

⁵⁷ Fischer 1, [25] {B/4/7}.

- 72. Mr Fischer refers to a letter from HSSL to the FMA dated 30 August 2006,⁵⁸ which he says was provided to the FMA as "evidence that Bank of Bermuda was the independent custodian".⁵⁹ I do not understand the relevance of this document, which relates only to Alpha not Primeo. It confirms that HSSL had been appointed "as Sub-Administrator, Sub-Registrar, Sub-Custodian and Paying Bank" of Alpha, and none of this, as I understand it and am advised, is in dispute. The letter goes on to briefly summarise HSSL's responsibilities to Alpha, which primarily concern fund administration rather than custody functions. The letter does not attempt to set out all of the terms on which HSSL was providing services to Alpha as its "Sub-Administrator, Sub-Registrar, Sub-Custodian and Paying Bank".
- 73. However, at the time Mr Fischer became a director of Alpha on 17 November 2006, the Private Placement Memorandum of Alpha stated as follows with respect to the use of managed accounts such as that which Alpha had with BLMIS:
 - "29. Investment in Managed Accounts. The Fund may allocate certain money to investment managers running managed accounts. A managed account is a commingled account held in the name of the investment manager in which the funds of all investors using that manager are pooled. Unlike an investment in a fund, the Fund will not receive shares or any other form of title, but will simply be entitled to a pro rata share in the contents of the account. There will be no investment capable of being held by the Custodian on behalf of the Fund, and the Custodian will not be involved in providing custody for the assets held in the managed account. Any loss arising as a result of an investment in a managed account will be borne by the shareholders." (Emphasis added)
- 74. The above makes clear what I always understood that HSSL was not responsible in any way for the safekeeping of client assets held in managed accounts operated by BLMIS.

Nigel Fielding 30 September 2016

⁵⁸ PRI 000018068. {N/1912.1}

⁵⁹ Fischer 1, [24]. {B/4/7}

⁶⁰ HSBC_0082880. {N/1266/32}

Exhibit 3

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Eurovaleur

From:

"Bailey, David" <"/o=bankofbermuda/ou=luxembourg/cn=recipients/cn=baileyd">

To:

LUX GFS Managers luxcorporatetrustmng@bankofbermuda.com, "Fielding, Nigel" luxcorporatetrustmng@bankofbermuda.com, "Fielding, Nigel" luxcorporatetrustmng@bankofbermuda.com, "Fielding, Nigel" luxcorporatetrustmng@bankofbermuda.com, "Fielding, Nigel" luxcorporatetrustmng@bankofbermuda.com, "Steiness, Jesper" luxcorporatetrustmng@bankofbermuda.com, "Steiness, Jesper" luxcorporatetrustmng@bankofbermuda.com, "Steiness, Jesper" luxcorporatetrustmng@bankofbermuda.com)

Cc:

"Shastri, Dave" <shastrdr@bankofbermuda.com>, "Wilcockson, Chris" <wilcocjc@bankofbermuda.com>, "Schirrmann, Christiane" <schirrc@bankofbermuda.com>, "Zammit, Sharon" <zammitsf@bankofbermuda.com>

Date:

Fri, 26 May 2000 17:34:20 +0000

The following call report can be obtained from the central Calle database.

The following call report can be obtained from the central Calls database.

CORPORATE TRUST INTERNATIONAL - CALL REPORT

GROUP:

Eurovaleur General Motors Building 767 Fifth Avenue Suite 507 New York NY 10153 United States

TELEPHONE: + 1 212 9356633 FACSIMILE: + 1 212 9350541

GROUP ATTENDEES:

Sonja Kohn, President, Eurovaleur

DATE: 11.05.2000 LOCATION:

BANK ATTENDEES: David Bailey

PURPOSE:

ASSESSMENT:

SUMMARY:

DETAILS: Sonya telephoned me to follow up on the discussions that Jesper and I had with Ursula Fano with regard to the setting up of an "income" version of the Primeo Fund.

Sonya was disturbed to understand that there would be a complication on the fees and I attempted to explain to her our reasoning (which Ursula Fano had agreed with). She did not want to understand that at present the Select Fund is financing the administration costs of the Global Fund and if an income fund were to be set up again this will be the case. However, it was agreed that I would set out in writing to her the principals involved.

However, Sonya's telephone call was followed up on Monday 15th May with a telephone call from Ursula Fano advising that there

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is no demand whatsoever for the Income Fund and as a consequence, this project should be considered dead. This is a little confusing bearing in mind Sonya's previous telephone call and I confirmed to Ursula that I would write to Sonya Kohn and copy Ursula stating that we understood that this proposed new Fund was now not going to proceed.

She did however advise that the Bank was very keen to progress with a Euro class of the Select Fund. They beleive that there is a huge demand for this Fund and the Bank is prepared to seed it with €3million and then after approximately 3 months commence the sales process. Ursula estimates that the Fund is likely to be valued at \$20million after 12 months.

The key to the success of the Fund will be its listing on a German stock exchange. To achieve a listing we will need to produce a weekly estimated valuation of the Fund. At present only monthly valuations are produced and these are based on the monthly statements produced by Maddof. It a Fund was a Fund when the produced are based on the monthly uses Maddof as its Fund Manager and produces its valuations on a basis. As a consequence therefore, Ursula Fano does not consider that our producing an estimated valuation should be a problem for us.

We have explored this issue previously and the main problem is obtaining a constant supply of statements from Maddof to enable us to produce valuations. It should however be noted that the weekly valuations will only be estimated and will not be traded on subs and reds will remain on a monthly basis. As a consequence, as far as accuracy is concerned, again, Ursula Fano does not feel that this is quite such an important issue, as of course for the monthly valuation.

FOLLOW UP: Jesper Steiness and JCS to discuss weekly valuation issue with Primeo Team and revert to Ursula Fano with propsal for dealing with weekly valuations.

The Euro Fund will invest US Dollars into the Maddof account and contain a Euro dollar hedge which will be booked via Bank Austria.

NEXT CONTACT DATE:

SERIAL: 2277

BY: Mackie, Michelle DATE: 24.05.2000

Exhibit 4

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RE: IMPORTANT - High Risk Pricing

From:

"Fielding, Nigel" <"/o=bankofbermuda/ou=luxembourg/cn=recipients/cn=fieldin">

To:

LUX GFS Board < luxcorporatetrustmng@bankofbermuda.com>

Date:

Fri, 08 Jun 2001 17:36:51 +0000

We are leaders again. Chris has commented on our excellent work here and he plans to apply it in the other offices!

----Original Message----From: Fielding, Nigel Sent: 08 June 2001 17:02 To: LUX GFS Board Cc: Wilcockson, Chris

Subject: IMPORTANT - High Risk Pricing

All,

Recap of our various discussions on this, policy, and actions required.

Following the Gsy problems we identified our greatest concerns regarding pricing risk, reviewed current procedures and identified improvements that can be made.

High risk pricing areas were identified as;

- Managed Accounts
- · Broker/Prime Broker Accounts
- Fund Investments
- · Unquoted Investments

Managed Accounts

<u>Risks</u>

Primary risk is that the manager can have an economic interest in the NAV progression of the portfolio where fees are based on NAV but there are other risks.

Policy

Full price check of managed account holdings to be performed for each pricing of the fund.

Issues

Manager may not supply holdings information even at the clients request (Madoff?) - In this case we need effective protection against pricing liability or we must exit/refuse the business

Extra effort required for full price check - We must automate as much of this as possible (it is not essential that the full portfolio be loaded to IMS but this would seem the best way to make it consistent for us and therefore Data Junction could help) and we must price the work and risk in our fees (if necessary we will review current fees if profitability drops to unacceptable levels and it certainly must be taken into account in new business pricing).

Broker/Prime Broker Accounts

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Risks

Same as Managed Accounts, although Prime Brokers are generally large custodian banks who should have proper pricing procedures but the risk still exists.

Policy

Same as Managed Accounts.

Issues

Extra effort issue is the same as for Managed Accounts but we generally have something already in place to fully load broker/prime broker accounts to IMS so less change in this area.

Fund Investments

Risks

Same as Managed Accounts but mitigated by the fact that there is often, but unfortunately not always, an independent administrator employed to do the pricing and funds are normally subject to regular external audit.

<u>Policy</u>

Fund price must be obtained from an 'official' source (e.g. stock exchange, administrator, authorized dealer) at each pricing of the fund we administer and we will ensure that the price received is not stale. External audit report of each fund investment to be obtained and reviewed within 6 months of its year end; any qualification in the auditors letter to be reviewed further.

Issues

What if we encounter a problem in the above policy process - Attempt to check the price of the underlying fund ourselves based on its holdings or obtain effective protection against pricing liability or exit/refuse the business.

<u>Unquoted Investments</u>

<u>Risks</u>

Often illiquid and open to wide price interpretation. Usually no 'official' price source. Investments may not be subject to audit or in locations where we are unable to satisfy ourselves of the quality of audit.

Policy

An independent valuation will be obtained wherever possible (e.g. professional valuer, recent broker trade). In all cases we should have the fund directors sign off on the price; mandatory where there is no independent source or price is state.

Actions Required

Responsible Task Complete by

Formalise the policy and procedures (sign off required) 30th June 2001

Sav Issue up to date list of affected funds and identify those where price 30th June 2001 protection is already required or we need to consider exit

Say Complete implementation of policy and procedures for all funds 31st December 2001

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Jean-Claude Implement price protection (if available) where required 30th September 2001 Jean-Claude Exit any that we are not able to make risk compliant 31st December 2001 Jean-Claude Altempt to implement price protection for all funds with high 30th June 2002 price risk investments as any of them could get into a problem situation

I personally hope we have none requiring mandatory price protection or exit but lets see!

Thanks,

Nigel

Exhibit 5



Credit Committee Minutes

Date of Meeting Friday, December 14th, 2001

Present N. Fielding, B. Biggar, C. Noesen, C. Quintus, H. Parize

In Attendance J. Steiness, G. Riego, D. Bijon, P. Yip, I. Goethals, V. Skripkine

Absent C. Wilcockson, M. May

Co Minutes K. Abbott, J. Fraser, P. Dutranoit, W. Newhook, S. Smith, Lux Management Committee,

T. Young, Y. Deceuninck, A. Ritchie, C. Whittet, D. Bowen, L. Tomasi

Encl. • Status Report

- OMR Violations Report
- GFS Excess Report

1. Review minutes and action list last meeting

There were no comments on the last meeting's minutes which were approved.

Action List:

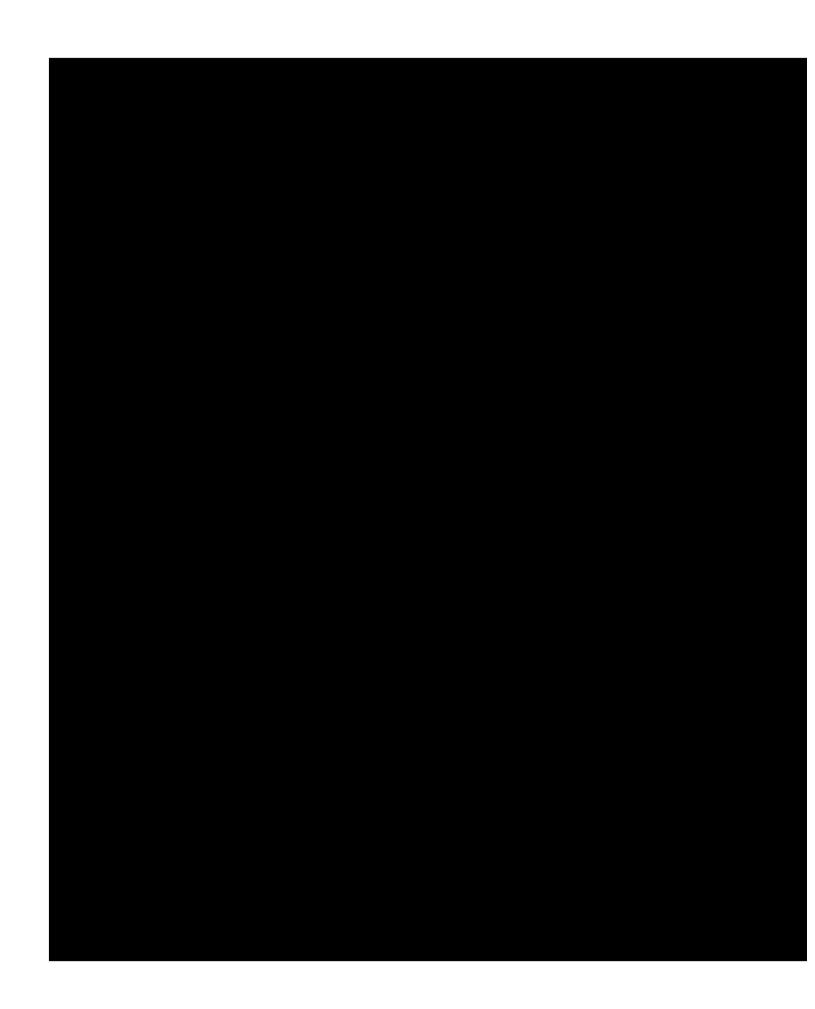
- Required controls/procedures for effective communication on "out-of-custody" transferred assets: after discussions between Lux Credit and CAR and PAU, a meeting is now scheduled to take place late next week (provisionally on 20th December 2001). The meeting will be attended by BB, HP, MO and Florence Labatut, with a view to finalise the issue by the year end
- Optima UCC-1 Filing: HP confirmed that the reviewed documents are now with the client and this is followed up on an ongoing basis; as the documents are going to be still circulated to the law firm, it was decided to move the deadline to mid-January 2002 for easier reference.
- Proposals for discussions on new products: the deadline is moved to mid January 2002 as it is unlikely to have such proposals ready now due to the increased workload before the year end.



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□ Primeo Fund

Request: Renewal of the existing credit facility

Facility: OD unadvised and uncommitted

Amount: \$500,000 or 1% of NVAC

Interest margin: IBOR+6% Renewal Fee \$1,000

Expiry: 31st January 2003

CRC: \$500,000

Facility: FX advised and uncommitted Amount: \$50,000,000 or 25% of NAV

Max tenor 30 days CRC % 5%

Expiry: 31st January 2003

CRC: \$2,500,000

Total CRC: \$ 3,000,000

Covenants to apply:

- NAVPs not to drop more than 10% within one month and 15% within two months
- No single security issued by the same issuer and held in the investment portfolio of the Subfund exceeds the value of 20% of the NAV of the customer.

Approved:

ratification by Chris Wilcockson and/or Michael May

[APG]

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Notes:

- 1) The Committee acknowledged that Nigel Fielding is a Board member of the Primeo Fund and has thus a conflict of interest in approving the above credit facility renewal request. To validate such approval on behalf of the Lux Credit Committee, a specific ratification will be required by Chris Wilcockson and/or Michael May as noted above.
- 2) The Committee requested Lux CRM (Jesper Steiness) to raise the issue of pledge of assets in favour of the Bank, to the Fund's Board.
- 3) The Committee resolved that Managed Accounts should be monitored monthly as all assets are in custody at a broker (Madoff).
- 4) The Committee requested CRM (Jesper Steiness) to adjust the CA template.



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3. Status Report

See attached report.

4. Treasury

See attached report.

[APG]

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5. Excess Report See attached report.
6. Any Other Business
7. Next Credit Committee
Friday 21st December 2001 / Luxembourg boardroom at 9:00am.
Approved:

Action List:

Nigel Fielding

[APG]

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Exhibit 6

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RE:	Madoff
RE.	IIVIAUUII

From:

"May, Michael" <"/o=bankofbermuda/ou=luxembourg/cn=recipients/cn=maymic">

To:

"Young, Tom" <tom.young@bankofbermuda.com>, "Goethals, Isabelle" <isabelle.goethals@bankofbermuda.com>

Cc

"Brady, Gerry" <gerry.brady@bankofbermuda.com>, "Wilkinson, Brian" <bri>brian.wilkinson@bankofbermuda.com>, GFS Europe Credit <gfseuropecredit@bankofbermuda.com>

Date:

Tue, 05 Mar 2002 14:23:06 +0000

Isabelle & I have just discussed this topic.

There are 2 issues:

(1) Due diligence

My understanding is that this was accepted by Lux CC sections, so for the time being this is a secondary concern and would not stop approval. Brian's comments throw an interesting light on the issue, however.

(2) Collateral

The line was approved on the basis that we are properly secured. If the 'free deliveries' side letter is NOT in place, then not only is the collateral position pretty weak and we are lending outside policy, but no-one has signalled this to either Lux CC or the GFS Credit Committee.

Given that this excess has been approved it is too late now, but it raises questions about the accuracy of the original temporary request.

Point 2 needs to be clarified asap.

Michael May BoB (Luxembourg) ext. (7)312 michael.may@bankofbermuda.com

----Original Message----From: Young, Tom Sent: 05 March 2002 14:39 To: Goethals, Isabelle

Cc: May, Michael; Brady, Gerry; Wilkinson, Brian

Subject: Madoff

Isabelle

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While we did follow up initially, it was considered the responsibility of Bermuda to take whatever action they deemed appropriate. I have now asked Bermuda (Tony Riker) for an update and will pass it on to you as soon as I receive it.

You may wish to consider adding this to the Documentation Status report and track it at Credit Committee.

At a board meeting of yesterday, the following was minuted: "A discussion took place regarding the subcustodian and the matter will be raised when Genevalor meet Madoff in the Spring".
Dublin has now deemed it appropriate to put the issues surrounding Madoff on the agenda for its Credit Committee and plan to pursue them in that forum.
Please let me know if you require anything further at this stage. Regards, Tom.
Original Message From: Goethals, Isabelle Sent: 05 March 2002 10:37 To: Wilcockson, Chris Cc: LUX Credit Committee; Gough, Louise; McDonald, Emer; Young, Tom Subject: RE: AMENDED xls
Chris,
The issue of not having assets in Custody was raised at the time the Facility was approved acts as Custodian and Administrator. Madoff acts as sub-custodian. When received by subscriptions for the Fund are paid to Madoff who then make the external investments - statements are reconciled (twice a month)against IMS. A complete due diligence was carried on Madoff as the main issue was that Madoff acts without "proper instruction" and it was resolved that Madoff would signed a side letter to the sub-custodian agreement stating that "any instruction relating to a free deliver or free transfer of cash/securities shall be subject to the approval of an officer of the Custodian of the Fund". I have contacted Emer amd Louise in office in order to confirm the actual process and to ensure that we are adequately covered by the documentation between and Madoff. We will revert to the Committee in due course.
Kind regards,
Isabelle
Original Message From: Wilcockson, Chris Sent: 04 March 2002 17:19 To: Goethals, Isabelle; Fielding, Nigel Cc: LUX Credit Committee Subject: RE: AMENDED xls
Isabelle, thanks, I am now confused, presumably we therefore do not lend to the Madoff assets. What is the amount of assets in our custody?
thanks Christophe
Original Message From: Goethals, Isabelle Sent: 04 March 2002 16:08 To: Fielding, Nigel Cc: LUX Credit Committee

09-01364-smb Doc 527-1 Filed 05/29/19 Entered 05/29/19 17:25:44 Exhibit 1 -Part 1 Pg 202 of 261 Subject: RE: AMENDED OD.xls Nigel, Sorry for the confusion, Maddoff acts as sub custodian: all assets are their custody. Isabelle ----Original Message-----From: Fielding, Nigel Sent: 04 March 2002 15:56 To: Goethals, Isabelle Cc: LUX Credit Committee Subject: RE: AMENDED .xls I approve but I thought the assets were mainly out of custody but it says NVAC ----Original Message----From: Goethals, Isabelle Sent: 04 March 2002 15:10 To: LUX Credit Committee Subject: FW: AMENDED Hello, Please find attached a request for temporary OD submitted by It is important to note that client has a Kind regards Isabelle

HSBC_0082272

Exhibit 7

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RE: Madhoff account -meeting with

From:

"Fiorino, Saverio" <"/o=bankofbermuda/ou=luxembourg/cn=recipients/cn=fiorino, saverio">

To:

"Franka, Claude" <claude.franka@bankofbermuda.com>

Cc:

"Agletiner, Caroline" < caroline.agletiner@bankofbermuda.com>

Date:

Thu, 06 Jun 2002 08:58:54 +0000

Thanks - I am raising these issues to Nigel (in respect of Primeo)

Claude (as agreed, were you carefull in not mentioning the name of Madoff?) Regards, Sav

----Original Message----From: Franka, Claude Sent: 04 June 2002 16:37 To: Fiorino, Saverio Cc: Agletiner, Caroline

Subject: Madhoff account -meeting with

Sav,

As discussed earlier this week, I have brought to attention your question with regard to the potential risk as administrator to deal with managed accounts like Madhoff for which the managed account statement is provided directly by Madhoff who also manage the assets.

The first question he raised to my attention was in relation to the custody of the assets managed by Madhoff? Are the assets held in custody with Madhoff? Does that mean that Madhoff is also a banking institution? I assumed yes but I was not sure.

He suggested that as administrator we should carry out a due diligence in respect of the administrative ability of the management company in respect of:

- * segregation of tasks
- * try and obtain copies internal procedures
- * visit them if necessary

I hope it helps.

Regards,

Claude

Exhibit 8

Bernard L. Madoff Investment Securities LLC

Additional Due Diligence Information

Relayed by Bernard L. Madoff during meeting with Nigel Fielding and Fergus Healey on $17^{\rm th}$ July 2002

Reference	
1.2	Currency is USD
1.3	Company is not public and not rated
1.4	Contracting party is parent company
1.5	Company is not a bank and not subject to Basle Agreement. Member's equity as of latest financial statements significantly exceeds Basle Agreement capital adequacy ratios
1.8 & 1.9	Company is private and only required to disclose client information to its regulator, the US SEC, and chooses not to disclose client information publicly
1.10 2.6	BLM stated that no clients left in the period at the client's instigation Response refers to US federal regulations
2.8 & 2.9 &	Orders are largely executed by phone instruction, the company is not a
3.4 b	SWIFT participant, however most trades are settled over the central depository, DTC, which can be considered to operate in an STP environment
3.6	BLM stated that if a computer outage at the company caused customer losses that in principle the company would accept liability
4.1.	BLM stated that no claims under insurance have been made in 40 years of operating
4.2	Insurance cover does not exclude foreign clients. Bankruptcy law is public/market information we can review
4.5	Dedicated disaster recovery hot site is in Queens, and one third of the company staff are rotationally located there using the facility on a live basis
5.1	BLM stated that no physical securities are held
5.2 & 5.3 &	BLM stated that less than 1% of positions are out balance in the
5.4	monthly reconciliation, these usually relate to failed trade settlements, and are usually only open for one business day but certainly nothing over one month
5.10a	Cede is the DTC nominee
5.12 to 5.15	None of our client holdings are currently eligible for a tax reclaim
5.17 to 5.20	Company is not a bank. Overdrafts are not permitted and all surplus cash is invested in a money market fund, usually a Fidelity fund

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Bernard L. Madoff Investment Securities LLC

Additional Due Diligence Information

Relayed by Partner at Ernst& Young, Luxembourg, in a telephone conversation with Nigel Fielding on 7th August 2002

Ernst & Young (E&Y) audit the and Primeo funds which are serviced by Bank of Bermuda (Luxembourg) S.A. (BOBL). These funds have a significant part of their portfolio with Madoff.

In order to gain comfort for their audit purposes, confirmed that E&Y had taken the following steps.

- Consulted with E&Y New York to obtain confirmation of Madoff's bona fides and regulator
- Obtained from Madoff's external auditors, Friehling & Horowitz, a confirmation that they have verified the asset statements produced by Madoff for the accounts held by and Primeo

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Bernard L. Madoff Investment Securities LLC

Additional Due Diligence Information

Relayed by Ursula Fano, Bank Austria, Vienna, during a meeting with Nigel Fielding and Jill Irwin on 16th May 2002

Ursula Fano is the President of Bank Austria Worldwide Fund Management (BAWFM) which is the promoter and manager of the Primeo fund serviced by Bank of Bermuda (Luxembourg) S.A. BAWFM selected Madoff.

• Ursula stated that she monitors Madoff's performance, and also pays a visit to Madoff usually twice year to satisfy herself that everything is running properly

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Exhibit 9

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RE: Madoff activity & UCITS I

_		
ᆫ		•
_	14 21	11.

"Fielding, Nigel" <"/o=bankofbermuda/ou=luxembourg/cn=recipients/cn=fieldin">

To:

"Fiorino, Saverio" <saverio.fiorino@bankofbermuda.com>. "Irwin, Jillian" <iillian.irwin@bankofbermuda.com>

Date:

Thu, 30 May 2002 09:55:01 +0000

Sav.

Great, this is very helpful.

In Jill absence I will send some of your note to Ursula re the Part I issues (I think the biggest issue is that while Madolf may have stayed within the restrictions, in this period at least, he is not likely to want to be restricted) and she can consider how she wants to progress.

Thanks,

Nigel

----Original Message---From: Fiorino, Saverio
Sent: 27 May 2002 20:25
To: Irwin, Jillian; Fielding, Nigel
Subject: Madoff activity & UCITS I

Nigel, Jill,

First, I need to apologise to Nigel for the delay in getting back on the first part of this analysis - but over the last week I have been spending more time in meetings than at my desk.

You will find below a few comments on

- Bernard Madoff activity
- Ucits Part I restrictions & call options in relation with Madoff?
- Would Madoff have been in breach of UCITS Part I rules?
- Conclusion

Bernard Madoff activity

Catherine, the fund accountant, looking after Primeo using Madoff has gathered some information on Madoff's activity at specific dates. For Primeo, we have looked at activity between July & August 2001, September & October 2001, January & February 2002. In addition we have analysed activity on some stocks to ensure that sold amount equalled bought amount and that purchase and sell price matched Bloomberg.

We found that generally he goes into S&P100 securities which he fully hedges using indices on the S&P. When he is not investing in securities he keeps his cash in US T Bills with 3mth + maturity. As we don't keep the account on IMS, I have asked further checks to be done to fully reconcile the movements for August 2001.

In the meantime, I have added below further details on specific months:

Positions as at 31/7/2001

Portfolio 31/7 shows 9 holdings, 1 line in a Money Market Fund (remaining uninvested cash) and 8 lines of US T

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Bills (1-6mths maturity) value of account USD259mio.

Activity in August 2001

- 1. he sells all his US T Bills
- 2. starting 24th August he buys and holds long until month end for approx. USD253mio of big names US companies all part of S&P100/500(Texas Instr, Procter&Gamble, Tyco, Hewlett Packard, Cisco, GE, Coca C,etc)
- 3. he goes into buying put options & selling calls (in both cases he is hedging the market going down) on the S&P100 Index for a net profit of USD11mio

As a result of his hedging Madoff is up by 0.76%, when the S&P100 is down by 7.26% and S&P 500 down 6.4%. On the other hand he is making a profit on the hedging of 4.3%. I am at this stage trying to reconcile exactly the movements for August to identify the missing 2-3% difference between the index movement and his performance.

This can only be due to (1) he has picked S&P100 stocks that performed best (2) he got a very good price from his UST Bills (3) he speculated on the S&P.

Activity during September 2001

During September he closes his hedging and positions. He buys again S&P100 top names.

Position as at 31/9/2001

Portfolio 31/9 shows approx 30 holdings in S&P100/500 companies, cash in a Money Market Fund and 15% of pf in 3mth UST Bill - value of account approx 270mio

Activity during October 2001

- 1. in/out UST Bills with maturity Feb. 2002
- 2. keeps same holdings than in September and realigns his hedging

During the above period he has never dealt in OTC options or other derivatives, he has also never gone short on securities.

• Ucits Part I restrictions & call options in relation with Madoff?

- 1. He goes into S&P long equity positions restrictions 5%, total exceeding 5% should not exceed 40%, not more than 10% of capital of one company. I don't see any issues with this part.
- 2. We have not seen him doing short sales if he did, this is not allowed under Part 1
- 3.He hedges his US long securities using options on indices traded on regulated market the only restriction is that the total premium should not exceed 15% of NAV (for covered options uncovered positions see below point 4). As of today that would mean US\$39mio of premium in our checks we saw that his premium on options never exceeded US\$15mio.
- 4. He hedges his US Long securities writing (selling) call and put options (in our examples he was short on puts). This may be THE issue as it is the risky part. But the law says that <<...in case of writing put options, the UCITS must be covered during the <u>entire</u> duration of the option contract by adequate liquid assets that may be used to pay for the securities which could be delivered to it in case of the exercice of the option by the counterpart....>> and <<...for sold/written call options, the UCITS must hold either the underlying securities, or equivalent call options or other instruments to statisfy the option. BUT, as an exception to this rule, a UCITS may write call options on securities it does not hold at the entering into the option contract, provided that the aggregate exercice price (final total value not the premium only) does not exceed 25% of the net assets of the UCITS....>>.
- 5. US-T Bills different maturity dates and guaranteed by the US Govt this should not be an issue. In the examples we looked at he never held more than 35% of one issue he can go up to 100% if he at least has 6 different issues. Note that, as advised by Caroline A, short term US T are considered liquidity investments. I am checking with E&Y if they will consider US T Bills with a life below 3-12month to be debt instruments or liquidity

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items. If these are to be considered as liquidity items, Madoff should not keep more than 49% of the portfolio in US T Bill with maturity below 3-12mth.

Would Madoff have been in breach of UCITS Part I rules?

When applying the UCITS investment restrictions on the Madoff account - this is what came out

July 2001 - no breach - All in US-T Bills and more than six issues

August 2001 - no breach - No breach on the equities side, long on put and short on calls on S&P Index (short call positions are covered as he has the securities of the underlying index in case he needs to deliver them to the counterpart) - total premium does not exceed 15% limit of NAV

September 2001 - no breach - comments see August + 2 US T Bills below the limit

October 2001 - no breach - comments see August 2001

February 2002 - no breach - comments see August 2001

Conclusion

In respect of making this fund a UCITS (part 1), I note that this could be feasable based on our findings (but one needs to be prudent and I would therefore, if this was to go any further, recommend that the auditors are also 'officially' asked by the client to review this issue) as long as Madoff was to respect UCITS guidelines, take action in case of breach, a solution is found to the 'prime broker' issue, the responsibility of the Lux custodian and 'more open' communication between Madoff and Custodians..

I hope the above helps -	have also sent a mail to working for Barry O'Rourke) who keeps Madoff on
IMS for the	to ensure that I am not missing something.
Thanks,	
Sav	

Exhibit 10

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FW: Madoff activity & UCITS I

From:

"Fielding, Nigel" <"/o=bankofbermuda/ou=luxembourg/cn=recipients/cn=fieldin">

To:

"U.Fano" <ursula.fano@bankaustria.com>

Cc:

"Irwin, Jillian" <jillian.irwin@bankofbermuda.com>, "Fiorino, Saverio" <saverio.fiorino@bankofbermuda.com>

Date:

Thu, 30 May 2002 11:20:47 +0000

Dear Ursula.

It was a pleasure to meet you recently, and thank you again for hosting a very enjoyable lunch.

Further to our meeting where we discussed the possibility of operating a fund exactly as Primeo as a SICAV under UCITS Part I regulations, Sav and the fund accountant undertook an analysis of the portfolio to test compliance with the regulations. The results appear below along with comments from Sav.

Generally, from an investment restriction standpoint the result is positive but there are items which could be considered close calls. I think the main issue to consider here is whether Madoff can be asked to continually ensure he complies with the UCITS Part I regulations or whether he feels this would overly restrict his investment style. Some tightening up of the custody and sub-custody arrangements between ourselves and Madoff would also be need to comply with the UCITS Part I regulations though I believe these should be achievable.

Once you have chance to consider this further we look forward to hearing whether you wish to take it forward.

Kind regards,

Nigel Fielding Bank of Bermuda

Tel. (352) 404 646 454

Email. nigel.fielding@bankofbermuda.com

You will find below a few comments on:

- · Bernard Madoff investment activity
- Ucits Part I restrictions & call options in relation with Madoff
- Would Madoff have been in breach of UCITS Part I rules
- Conclusion

. Bernard Madoff investment activity

Catherine, the fund accountant, looking after Primeo gathered information on Madoff's activity at specific dates. We looked at activity between July & August 2001, September & October 2001, January & February 2002.

We found that generally he goes into S&P100 securities which he fully hedges using indices on the S&P. When he is not investing in securities he keeps his cash in US T Bills with 3mth + maturity.

I have added below further details on specific months:

Positions as at 31/7/2001

Portfolio 31/7 shows 9 holdings, 1 line in a Money Market Fund (remaining uninvested cash) and 8 lines of US T Bills (1-6mths maturity) value of account USD259mio.

Activity in August 2001

- 1. he sells all his US T Bills
- 2. starting 24th August he buys and holds long until month end for approx. USD253mio of big names US companies all part of S&P100/500(Texas Instr, Procter&Gamble, Tyco, Hewlett Packard, Cisco, GE, Coca C,etc)
- 3. he goes into buying put options & selling calls (in both cases he is hedging the market going down) on the S&P100 Index for a net profit of USD11mio

As a result of his hedging Madoff is up by 0.76%, when the S&P100 is down by 7.26% and S&P 500 down 6.4%. On the other hand he is making a profit on the hedging of 4.3%.

Activity during September 2001

During September he closes his hedging and positions. He buys again S&P100 top names.

Position as at 31/9/2001

Portfolio 31/9 shows approx 30 holdings in S&P100/500 companies, cash in a Money Market Fund and 15% of portfolio in 3mth UST Bill - value of account approx 270mio

Activity during October 2001

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- 1. in/out UST Bills with maturity Feb. 2002
- 2. keeps same holdings than in September and realigns his hedging

During the above period he has never dealt in OTC options or other derivatives, he has also never gone short on securities.

. Ucits Part I restrictions & call options in relation with Madoff

- 1. He goes into S&P long equity positions UCITS Part I restrictions 5%, total exceeding 5% should not exceed 40%, not more than 10% of capital of one company. I don't see any issues with this part.
- 2. We have not seen him doing short sales if he did, this is not allowed under Part 1
- 3. He hedges his US long securities using options on indices traded on regulated market the only restriction is that the total premium should not exceed 15% of NAV (for covered options - uncovered positions see below point 4). As of today that would mean US\$39mio of premium - in our checks we saw that his premium on options never exceeded US\$15mio.
- 4. He hedges his US Long securities writing (selling) call and put options (in our examples he was short on puts). This may be an issue as it is the risky part. But the law says that << ... in case of writing put options, the UCITS must be covered during the entire duration of the option contract by adequate liquid assets that may be used to pay for the securities which could be delivered to it in case of the exercice of the option by the counterpart....>> and <<...for sold/written call options, the UCITS must hold either the underlying securities, or equivalent call options or other instruments to statisfy the option. BUT, as an exception to this rule, a UCITS may write call options on securities it does not hold at the entering into the option contract, provided that the aggregate exercice price (final total value not the premium only) does not exceed 25% of the net assets of the UCITS....>>
- 5. US-T Bills different maturity dates and guaranteed by the US Govt this should not be an issue. In the examples we looked at he never held more than 35% of one issue he can go up to 100% if he at least has 6 different issues. However, it should be noted that short term UST are considered liquidity investments. I am checking with E&Y if they will consider US T Bills with a life below 3-12month to be debt instruments or liquidity items. If these are to be considered as liquidity items, Madoff should not keep more than 49% of the portfolio in US T Bill with maturity below 3-12mth.

· Would Madoff have been in breach of UCITS Part I rules

When applying the UCITS investment restrictions on the Madoff account - this is what came out

July 2001 - no breach - All in US-T Bills and more than six issues

August 2001 - no breach - No breach on the equities side, long on put and short on calls on S&P Index (short call positions are covered as he has the securities of the underlying index in case he needs to deliver them to the counterpart) - total premium does not exceed 15% limit of NAV September 2001 - no breach - comments see August + 2 US T Bills below the limit

October 2001 - no breach - comments see August 2001

February 2002 - no breach - comments see August 2001

Conclusion

In respect of making this fund a UCITS Part I, this could be feasable based on our findings but to be prudent I would, if this was to go any further, recommend that the auditors are also 'officially' asked by the client to review this issue. It would be important for Madoff to continually respect UCITS guidelines, take action in case of breach. Further, we would need to reinforce our responsibility as the Luxembourg custodian with Madoff as sub-custodian ensuring adequate control and communication between Madoff and the Luxembourg custodian.

Thanks,

Exhibit 11

HSBC_0058598

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AW: Madoff activity & UCITS I

From:

FANO Ursula <ursula.fano@bankaustria.com>

To

nigel.fielding@bankofbermuda.com

Cc

jillian.irwin@bankofbermuda.com, saverio.fiorino@bankofbermuda.com

Date:

Wed, 03 Jul 2002 15:49:39 +0000

Many thanks for your e-mail - and sorry for my delayed response.

I found Sav's detailed analysis of Madoff's investment strategy very interesting. Obviously the strategy could comply with UCITS Part I. I feel myself a little bit uncomfortable with his using short puts. Generally there should be long puts and short (covered) calls - since some months we make an analysis of the portfolio and there were no short puts so far (we didn't look at the last year).

I would fully agree that the auditors should also review the whole issue. A serious problem could be, however, BoBLux' reinforcement of responsibility as the custodian - I would have to check this issue (very cautiously) with Madoff first, in order to know how far could he go (if he would like at all...).

Once again many thanks and best regards to all of you.

Ursula

----Ursprüngliche Nachricht---Von: Nigel.Fielding@bankofbermuda.com
[mailto:Nigel.Fielding@bankofbermuda.com]
Gesendet am: Donnerstag, 30. Mai 2002 13:21
An: ursula.fano@bankaustria.com
Cc: Jillian.Irwin@bankofbermuda.com; Saverio.Fiorino@bankofbermuda.com
Betreff: FW: Madoff activity & UCITS I

Dear Ursula,

It was a pleasure to meet you recently, and thank you again for hosting a very enjoyable lunch.

Further to our meeting where we discussed the possibility of operating a fund exactly as Primeo as a SICAV under UCITS Part I regulations, Sav and the fund accountant undertook an analysis of the portfolio to test compliance with the regulations. The results appear below along with comments from Sav.

Generally, from an investment restriction standpoint the result is positive but there are items which could be considered close calls. I think the main issue to consider here is whether Madoff can be asked to continually ensure he complies with the UCITS Part I regulations or whether he feels this would overly restrict his investment style. Some tightening up of the custody and sub-custody arrangements between ourselves and Madoff would also be need to comply with the UCITS Part I regulations though I believe these should be achievable.

Once you have chance to consider this further we look forward to hearing whether you wish to take it forward.

Kind regards,

Nigel Fielding Bank of Bermuda

Tel. (352) 404 646 454

Email. nigel.fielding@bankofbermuda.com

> You will find below a few comments on:

^{*} Bernard Madoff investment activity

> * Ucits Part I restrictions & call options in relation with Madoff

> * Would Madoff have been in breach of UCITS Part I rules

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> * Conclusion
> * Bernard Madoff investment activity
> Catherine, the fund accountant, looking after Primeo gathered information
> on Madoff's activity at specific dates. We looked at activity between
> July & August 2001, September & October 2001, January & February 2002.
> We found that generally he goes into S&P100 securities which he fully
> hedges using indices on the S&P. When he is not investing in securities he
> keeps his cash in US T Bills with 3mth + maturity.
I have added below further details on specific months:
> Positions as at 31/7/2001
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> uninvested cash) and 8 lines of US T Bills (1-6mths maturity) value of
> account USD259mio.
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> 1. he sells all his US T Bills
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> Procter&Gamble, Tyco, Hewlett Packard, Cisco, GE, Coca C, ....etc)
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> hedging the market going down) on the S&P100 Index - for a net profit of
> USD11mio
> As a result of his hedging Madoff is up by 0.76%, when the S&P100 is down
> by 7.26% and S&P 500 down 6.4%. On the other hand he is making a profit on
> the hedging of 4.3%.
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> During September he closes his hedging and positions. He buys again S&P100
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> one company. I don't see any issues with this part.
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> risky part. But the law says that <<...in case of writing put options, the
> UCITS must be covered during the entire duration of the option contract by
> adequate liquid assets that may be used to pay for the securities which
> could be delivered to it in case of the exercice of the option by the
> counterpart....>> and <<...for sold/written call options, the UCITS must
> hold either the underlying securities, or equivalent call options or other
> instruments to statisfy the option. BUT, as an exception to this rule, a
> UCITS may write call options on securities it does not hold at the
> entering into the option contract, provided that the aggregate exercice
> price (final total value not the premium only) does not exceed 25% of the
> net assets of the UCITS....>>.
> 5. US-T Bills different maturity dates and guaranteed by the US Govt -
> this should not be an issue. In the examples we looked at he never held
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> more than 35% of one issue - he can go up to 100% if he at least has 6 \,
> different issues. However, it should be noted that short term UST are
> considered liquidity investments. I am checking with E&Y if they will
> consider US T Bills with a life below 3-12month to be debt instruments or
> liquidity items. If these are to be considered as liquidity items, Madoff
> should not keep more than 49% of the portfolio in US T Bill with maturity
> below 3-12mth.
> * Would Madoff have been in breach of UCITS Part I rules
> When applying the UCITS investment restrictions on the Madoff account -
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> the securities of the underlying index in case he needs to deliver them to
> the counterpart) - total premium does not exceed 15% limit of NAV
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> limit
> October 2001 - no breach - comments see August 2001
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> * Conclusion
> In respect of making this fund a UCITS Part I, this could be feasable
> based on our findings but to be prudent I would, if this was to go any
> further, recommend that the auditors are also 'officially' asked by the
> client to review this issue. It would be important for Madoff to
> continually respect UCITS guidelines, take action in case of breach.
> Further, we would need to reinforce our responsibility as the Luxembourg
> custodian with Madoff as sub-custodian ensuring adequate control and
> communication between Madoff and the Luxembourg custodian.
> Thanks,
> Sav
*******************
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Bank of Bermuda

Exhibit 12

DATED 7TH AUGUST . 2002

BANK OF BERMUDA (LUXEMBOURG) S.A.

- and -

BERNARD L. MADOFF INVESTMENT SECURITIES LLC

SUB-CUSTODY AGREEMENT

re! Primeo Fund

Bank of Bermuda (Luxembourg) S.A. 13 rue Goethe L-1637 Luxembourg

SUB-CUSTODY AGREEMENT

THIS AGREEMENT is made this 7 day of AUGUST Two Thousand and Two

BETWEEN

BANK OF BERMUDA (LUXEMBOURG) S.A. a banking company incorporated in Luxembourg whose registered office is at 13 Rue Goethe, L-1637 Luxembourg (hereinafter called the "Bank") of the first part and

BERNARD L. MADOFF INVESTMENT SECURITIES LLC whose registered office is at 885 Third Avenue, New York, NY 10022, United States of America (hereinafter called the "Sub-Custodian") of the second part.

WHEREAS:-

- (A) The Bank wishes to establish custody accounts with the Sub-Custodian to hold, maintain and/or administer certain property which the Bank holds as custodian for certain customers, that are listed in Annex "A" to this Agreement, which accounts may each be designated as being held for a particular customer; and
- (B) The Sub-Custodian agrees to establish such custody accounts and to hold, maintain and/or administer such property on the terms and conditions herein set forth.

NOW IT IS HEREBY AGREED AS FOLLOWS:-

1. <u>INTERPRETATION</u>

1.1 In this Agreement and in all amendments hereto the following words and expressions shall, where not inconsistent with the context, have the following meanings respectively:-

"Proper Instructions" shall mean (i) original instructions in writing in the English language signed or purported to be signed in accordance with the most recent authorised signatories booklet of the Bank delivered to the Sub-Custodian; (ii) instructions sent by tested telex or by telex from a telex number nominated by the Bank in writing, provided that the answer back corresponds to that advised by the Bank and the telex has been sent under the name of such person or persons as are designated by the Bank from time to time; (iii) instructions sent by facsimile message or electronic message, authenticated by test-key, password control or other procedure agreed upon in writing by the Bank and the Sub-Custodian; (iv) instructions sent by authenticated SWIFT message; and (v) such other forms of secured communications as from time to time shall be agreed upon in writing by the Bank and the Sub-Custodian.

"Property" shall mean cash, bullion, coin, precious metals, Securities and any other form of investment or property of any description.

"Securities" shall mean listed and unlisted equity and equity related securities including convertible bonds and warrants; shares, units or other interests in collective investment schemes; debt securities including government and corporate issues; warrants or options on or rights to acquire any of the foregoing or any derivative of any such instrument.

Unless the context otherwise requires words importing the singular number shall include the plural and vice versa, words importing masculine gender shall include the feminine and words importing persons shall include firms and companies and vice versa.

1.3 The division of this Agreement into sections, clauses and sub-clauses and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation hereof.

2. APPOINTMENT OF SUB-CUSTODIAN

The Bank hereby appoints the Sub-Custodian as sub-custodian for the Bank in respect of the Property delivered to, to the order of, or otherwise acquired by the Sub-Custodian pursuant to this Agreement to hold in safe custody and/or administer Property upon the terms and conditions hereinafter contained and the Sub-Custodian hereby accepts such appointment from the date hereof until its appointment shall be terminated as hereinafter provided.

3. NAMES, TITLES AND SIGNATURES

- 3.1 Forthwith after the execution of this Agreement the Bank will certify to the Sub-Custodian the names and signatures of persons authorised to sign any Proper Instructions and generally to give instructions hereunder to the Sub-Custodian and shall deliver to the Sub-Custodian a certified copy of a resolution of the Bank containing such authority or a copy of the authorised signatories booklet of the Bank or other evidence of such authority.
- 3.2 The Bank shall promptly notify the Sub-Custodian of any changes that may be made from time to time in respect of the persons so authorised.
- 3.3 In the event that the Sub-Custodian receives Proper Instructions which it reasonably believes are ambiguous, the Sub-Custodian shall immediately upon receipt notify the Bank of such belief and seek clarification thereof.
- 3.4 The Sub-Custodian shall carry out and effect such Proper Instructions in a timely and professional manner and strictly in accordance with the terms of such instructions and this Agreement.

4. **OPENING OF ACCOUNT**

The Sub-Custodian is authorised and directed to open and maintain custodial accounts which shall be for the exclusive benefit of customers of the Bank (that are listed in Annex "A" to this Agreement) entitled "Bank of Bermuda (Luxembourg) S.A. Special Custody Account for Customer (name of Customer to appear)" (the "Account") for the receipt and separate maintenance of Property delivered to the Sub-Custodian for the Account. The Sub-Custodian may entrust Property held in such Account as may be designated by the Bank to other sub-custodians or to securities depositories. If the Sub-Custodian does hold such Property with a sub-custodian or in a securities depository, the Sub-Custodian must identify on its books that such Property is being held for the account of the Bank as custodian for the Bank's customers and, upon the Bank's instruction, must identify on its books any Property which is being held on behalf of any given customer of the Bank. Any Property held by the Sub-Custodian shall be subject only to Proper Instructions of the Bank, given in accordance with this Agreement, and any Property entrusted by the Sub-Custodian to any other sub-custodian or eligible securities depository shall be subject only to instructions of the Sub-Custodian.

5. RECEIPT OF PROPERTY

5.1 The Sub-Custodian shall receive, record and hold in the Account and segregated from its own property, all Property delivered to it, or to its order, or otherwise acquired by it pursuant to this Agreement and shall arrange for all Property (including without limitation all certificates or other documents relating to Securities) to be deposited in its vault or, subject to Clause 4

above, otherwise held by or to the order of the Sub-Custodian for the purpose of providing for the safe custody thereof.

- 5.2 All Property required hereunder to be held in the Account shall be physically segregated from the general assets of the Sub-Custodian and (in so far as permitted by law or by any relevant Securities System) its other customers, and the Sub-Custodian shall mark its records so as to identify Property as Property held in a fiduciary capacity to the order of the Bank.
- 5.3 With respect to Property required hereunder to be held in the Account, the Sub-Custodian represents, warrants and undertakes as follows:-
 - (a) Property held in the Account shall not be subject to any right, charge, security, interest lien or claim in favour of the Sub-Custodian or any of its creditors except a claim of payment for the safe custody and administration of Property;
 - (b) beneficial ownership of any Property shall at all times be freely transferable by the Bank without the payment of money or value other than for safe custody or administration.

6. TRANSFER OF PROPERTY

- 6.1 The Sub-Custodian shall transfer, exchange or deliver in the required form and manner Securities held by it hereunder only upon receipt of Proper Instructions from the Bank given in accordance with this Agreement and only:-
 - (a) upon sales of such Securities and receipt by the Sub-Custodian of payment therefor;
 - (b) upon receipt by the Sub-Custodian of payment in connection with any repurchase agreement related to such Securities entered into by the Bank;
 - (c) upon receipt by the Sub-Custodian of payment when such Securities are called, redeemed, retired or otherwise become payable;
 - (d) upon receipt of payment or substitute securities for exchange or conversion pursuant to any plan of merger, consolidation, reorganisation, recapitalisation or readjustment of the Securities or pursuant to provisions for conversion contained in such Securities or pursuant to any deposit agreement;
 - upon receipt of substitute Securities representing the same aggregate face value as the Securities being released in connection with a stock split or similar exchange of Securities;
 - upon receipt of new Securities and/or cash in connection with the exercise of warrants, rights or similar Securities or the surrender of interim receipts or temporary Securities for definitive securities;
 - (g) for the purpose of collecting all income and other payments with respect to the Securities; or
 - (h) otherwise in accordance with Proper Instructions.

Where the Sub-Custodian has advance notice of the occurrences described in Clauses 6.1(d) (e) or (f), it shall endeavour to obtain the Bank's instructions, but should Proper Instructions not be received in time for the Sub-Custodian to take timely action, the Sub-Custodian shall take no action on behalf the Account.

Notwithstanding anything contained in Clause 6.1 the Sub-Custodian shall, upon receipt of Proper Instructions from the Bank, make a free delivery of any of the Property held or administered by it hereunder to or to the order of the Bank provided always that any instruction relating to the free delivery or free transfer of cash and/or Securities shall be subject to the approval of an officer of the Bank. A complete list of authorized signatories will be supplied to the Sub-Custodian by the Bank and this list is subject to unilateral amendment by the Bank. The Sub-Custodian will rely on the latest amended authorized signature list of which it is in receipt.

7. RECEIPT AND DISBURSEMENT OF CASH

- 7.1 The Sub-Custodian shall open and maintain a sub-account within the Account, in the name of the Bank for the deposit of cash (the "Cash Account") and shall establish such sub-accounts within the Cash Account as the Bank may specify to hold the funds of particular customers of the Bank, all of which sub-accounts shall be deemed to be part of the Account.
- 7.2 The Sub-Custodian shall credit all funds received by it to the Cash Account and such sub-accounts thereof as the Bank may specify and shall hold such funds exclusively in such accounts until the Sub-Custodian receives Proper Instructions to transfer such funds in accordance with Clause 7.4.
- 7.3 The Sub-Custodian shall promptly collect and credit to the Cash Account (and such sub-account as the Bank shall specify) all income, principal, proceeds from the transfer of and other payments with respect to Property held in the Account. In connection with the collection of income as aforesaid, the Sub-Custodian may execute such ownership or other certificates as may be required.
- 7.4 The Sub-Custodian shall, upon and in accordance with Proper Instructions from the Bank, effect disbursements from the Cash Account (and any sub-account specified for the purpose by the Bank) to:-
 - (a) convert cash into such currency as the Bank may direct;
 - (b) remit cash in connection with the purchase of Securities or such other Property specified by the Bank upon delivery of Property to or to the order of the Sub-Custodian;
 - (c) remit cash to the Bank or to such other persons as the Bank shall direct;
 - (d) remit cash in connection with the payment of taxes or
 - (e) perform any combination of the above.

8. RECORDS

The Sub-Custodian shall keep or cause to be kept such books, records and statements as may be necessary to give a complete record of all Property held and/or administered by the Sub-Custodian and transactions carried out by it on behalf of the customers of the Bank.

9. VOTING AND OTHER ACTION

The Sub-Custodian shall vote all proxies in the best interests of the Bank or the customers of the Bank.

10. REPORTING

The Sub-Custodian shall supply to the Bank in English:-

- (a) at such reasonable intervals as the Bank may require, and unless otherwise notified by the Bank, initially on a monthly basis, a written statement which lists all Property held in, or credited to, the Account (and separately in each sub-account, if any) together with a full account of all receipts and payments made and other action taken by the Sub-Custodian pursuant to this Agreement since the date of last preceding statement. If Property is held in the physical possession of a party other than the Sub-Custodian, that party shall be a U.S. registered recognized depository.
- (b) a copy of the most recent audited financial statements of the Sub-Custodian as such statements are prepared together with such information regarding its policies and proceedures.

11. STANDARD OF CARE

- In holding, maintaining, servicing and disposing of Property under this agreement, and in fulfilling any other obligations hereunder, the Sub-Custodian shall exercise the same standard of care that it exercises over its own assets provided that the Sub-Custodian shall exercise at least the degree of care expected of a prudent professional Sub-Custodian for hire and shall assume the burden of proving that it has exercised such care in the event of loss hereunder. The Sub-Custodian shall be liable to the Bank for any loss suffered by it as a result of the fraud, negligence or wilful default of the Sub-Custodian or its sub-custodians, agents or delegates or the Sub-Custodian's unjustifiable failure to perform its obligations or its improper performance of them under this Agreement.
- In performing its duties hereunder the Sub-Custodian may appoint sub-custodians, agents or delegates for the purposes outlined in Clause 4 hereunder provided that notwithstanding any such appointment, the Sub-Custodian shall remain fully liaible for any acts or omissions of such person or persons as if such acts or omissions were those ofthe Sub-Custodian and, more particularly, for any loss or damage to Securities deposited with such person or persons as if it had itself retained physical possession of them. The Sub-Custodian must exercise care and diligence In choosing and appointing sub-custodians, agents or delegates as a safekeeping agent so as to ensure that such person has and maintains the expertise, competence and standing appropriate to discharge the responsibilities concerned. The Sub-Custodian must maintain an appropriate level of supervision over such person and make appropriate enquiries from time to time to confirm that the obligations of such person continue to be completely discharged.
- 11.3 The Sub-Custodian shall hold harmless and indemnify the Bank, the Account and each of the Bank's customers to the extent of each such customer's interest in the Account from and against any loss, actions, proceedings, costs, claims, demands and expenses which may be brought against or suffered or incurred by the Bank arising out of the fraud, negligence or

wilful default of the Sub-Custodian or its sub-custodians, agents or delegates or the Sub-Custodian's unjustifiable failure to perform its obligations or its improper performance of them under this Agreement.

11.4 The Sub-Custodian shall use its best efforts to supply, on a timely basis, confirmation of all transactions on the Account prior to the settlement date

12. SUB-CUSTODIAN'S DUTIES

- 12.1 The Sub-Custodian must comply with the following:-
 - (a) ensure there is legal separation of non-cash assets held under custody and that uch assets are held on a fiduciary basis;
 - (b) maintain appropriate internal control systems to ensure that records clearly Identify the nature and amount of all assets under custody, the ownership of each asset and where documents of title to that asset are located;
 - (c) maintain records and amounts of all assets held by each of the Sub-Custodian's delegates or agents appointed by it;
 - (d) furnish to the Bank on an annual basis or as otherwise requested by the Bank confirmation from the Sub-Custodian that non cash assets are held by them on a fiduciary basis,
- 12.2 The Sub-Custodian shall use its best efforts to ensure that the Bank is in compliance with all relevant legislation insofar as required to comply with regulatory bodies that the Bank may be subject to as custodian for its customers.
- 12.3 The Sub-Custodian hereby represents and warrants that it will notify the Bank immediately in writing or by other authorised means of any development or occurrence which could render the Sub-Custodian unable to comply with any of the foregoing duties at any date.

13. CONFIDENTIALITY

The parties hereto agree that each shall treat confidentially the terms and conditions of this Agreement and all information provided by each party to the other regarding its business and operations. All confidential information provided by a party hereto shall be used by the other party hereto solely for the purpose of rendering services pursuant to this Agreement and, except as may be required in carrying out this Agreement, shall not be disclosed to any third party without the prior consent of such providing party. The foregoing shall not be applicable to any information that is publicly available when provided or which thereafter becomes publicly available (other than through a breach of this Agreement) or that is required or requested to be disclosed by (i) any banking or other regulatory authority having jurisdiction over the Bank or the Sub-Custodian; (ii) any auditor of the parties hereto; (iii) judicial or administrative process; (iv) statute or by any person empowered by statute; or (v) otherwise by applicable law or regulation.

14. TERMINATION

14.1 This Agreement and the appointment of the Sub-Custodian hereunder shall continue in force until terminated by either the Bank or the Sub-Custodian giving to the other not less than sixty days' notice in writing (or such shorter notice as such other party may agree to accept) expiring at any time provided that either the Bank or the Sub-Custodian may forthwith terminate this Agreement by notice taking immediate or subsequent effect if:-

- the Bank or the Sub-Custodian respectively has broken or is in breach of any of the (a) terms of this Agreement and shall not have remedied such breach within thirty days after service of notice requiring the same to be remedied; or
- a petition is made or a resolution is passed for the other party to be placed in (b) liquidation (except a voluntary liquidation for the purpose of reconstruction or amalgamation on terms previously approved in writing by the other party) or the other party is unable to pay its debts as they fall due or commits an act of bankruptcy under the laws of the jurisdiction under which it is incorporated or if a receiver or administrator is appointed over any of its assets; or
- 14.2 Upon the termination of this Agreement the Sub-Custodian shall, as soon as practicable following the delivery or receipt of a termination notice, deliver the Property in the Account or otherwise in its custody or the custody of any third party to which it has delegated any of its duties hereunder to such person or persons as the Bank may nominate.

15. NOTICES

Any notice, instruction or other instrument required or permitted to be given hereunder shall be in the English language and, subject to any provisions to the contrary with respect to Proper Instructions, may be delivered in person to the offices of the parties as set forth herein during normal business hours or delivered by prepaid registered mail or by telex, facsimile transmission. SWIFT, or such other means of communication as may from time to time agreed in writing by both parties, addressed to the parties at the following addresses or such other address as may be notified by either party from time to time.

TO THE BANK:

Bank of Bermuda (Luxembourg) S.A.

13 rue Goethe L-1637 Luxembourg LUXEMBOURG

Attention: General Manager - Global Fund Services

Telex No.: SWIFT:

60691 BOFB LU

Facsimile:

BBDALULX

Tel:

TO THE SUB-CUSTODIAN:

Bernard L. Madoff Investment Securities LLC

885 Third Avenue New York, NY. 10022

U.S.A.

Attention: Bernard Madoff/

Telephone: (212) 230-2400

Facsimile: (212) 486-81781

Such notice, instruction or other instrument shall be deemed to have been served, if hand delivered, upon delivery, if sent by registered letter at the expiration of five business days after posting, if sent by SWIFT upon acknowledgement by SWIFT, if sent by telex upon receipt of answerback confirmation, and, if sent by facsimile transmission immediately on despatch with a confirmed transmission report, provided that if any such notice, instruction

or other instrument shall be delivered outside normal business hours it shall be deemed to have been received at the next time after delivery when normal business hours commence and in the case of telex or facsimile transmission on the business day after the delivery thereof as aforesaid. Evidence that the notice was properly addressed, stamped and put into the post shall be conclusive evidence of posting.

16. MISCELLANEOUS

- 16.1 This Agreement may not be amended except by writing signed by both parties nor may any provision hereof be waived except by writing signed by the party granting the waiver.
- 16.2 This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.
- 16.3 This Agreement shall not be assignable by either party without the written consent of the other.
- 16.4 The Bank may record all telephone conversations between the Sub-Custodian and the Bank and any such tape recordings may be submitted in evidence in any proceedings relating to this Agreement.
- 16.5 The captions included in this Agreement are included only for the convenience of the parties and in no way define or delimit any of the provisions hereof or otherwise affect their construction or effect.

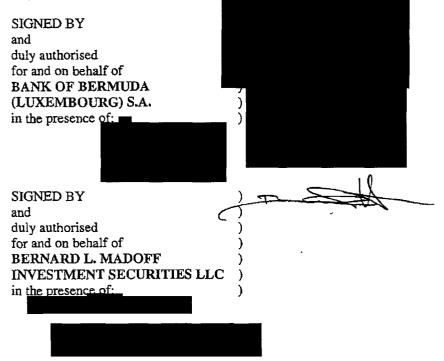
17. SEVERANCE

If any provision herein shall be determined to be void or unenforceable in whole or in part for any reason whatsoever such invalidity or unenforceability shall not affect the remaining provisions or any part thereof contained within this Agreement and such void or unenforceable provisions shall be deemed to be severable from any other provision or part thereof herein contained.

18. GOVERNING LAW

This Agreement shall be governed by and construed in accordance with the laws of Luxembourg and the Sub-Custodian hereby submits to the non exclusive jurisdiction of the Luxembourg courts.

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed in two originals as of the day and year first above written each of the parties having received one original.



Book Signature yerified by: on: 24/08/05

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ANNEX A

CUSTOMERS OF THE BANK FOR WHICH THE SUB-CUSTODIAN AGREES TO PROVIDE SUB-CUSTODIAL SERVICES

PRIMEO FUND

Exhibit 13

HSBC_0084413

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Madoff, New York - call notes

From:

"Fielding, Nigel" <"/o=bankofbermuda/ou=luxembourg/cn=recipients/cn=fieldin">

To:

"Wilcockson, Chris" <chris.wilcockson@bankofbermuda.com>, "Smith, David T. (CT)" <david.smith@bankofbermuda.com>, "Smith, Paul" <paul.smith@bankofbermuda.com>, LUX GFS Board <luxcorporatetrustmng@bankofbermuda.com>, "Wilkinson, Brian" <bri>brian.wilkinson@bankofbermuda.com>, "Healy, Fergus" <fergus.healy@bankofbermuda.com>, "Schultz, Robert" <robert.schultz@bankofbermuda.com>, "Bernardo, Allen J." <allen.bernardo@bankofbermuda.com>

Date:

Fri, 26 Jul 2002 08:12:16 +0000

Visit with Bernard L. Madoff on 17.07.02 at his offices by Nigel Fielding and Fergus Healey.

Follow-up

Nigel Confirm account designation change acceptable to Lux clients (done)
Nigel/Jim Amend agreement for account designation change and resend to BLM
Nigel Track return of completed due diligence questionnaire

- Meeting was framed around SAS 70. NF explained the process the bank undertook with KPMG and provided BLM the summary letter confirming certification
- NF noted that for the various accounts open in relation to clients of the bank (Primeo, Primeo, I that have been running for some time we found they are documented inconsistently. In particular, for the accounts relating to BOBLUX (Primeo and there is account opening documentation between Madoff and the fund but does not appear to be documentation between Madoff and the bank though the bank is custodian to the relevant funds. BLM agrees re putting this in order assuming the agreements are not substantially different from the one in place with BOBL/BTDL. A draft agreement was left with BLM for review. It was noted that it would be appropriate to change the account designations to reflect BOBLUX as well as the client name. BLM has no issue with this. Bank to confirm same with clients and send revised agreement to BLM
- In relation to SAS70, NF explained due diligence process and provided questionnaire. We went through the questionnaire during the meeting. BLM pencilled in most answers. He needed to confirm the accuracy of some technical answers with his team and obtain copies of some supporting material to complete the process. He indicated it will be completed and returned forthwith. Answers provided during the meeting were satisfactory. The only area where BLM was not prepared to answer was in relation to disclosing information about Madoff's client base. As a private company, Madoff is only required, and chooses only, to disclose this detail to the company's regulator, the SEC this seems reasonable
- When asked about new business, BLM confirmed that he is still closed for further managed accounts
- BLM enquired about BBNY and FH responded
- General discussion about the market and events of 09.11.01 followed
- . In summary, a positive meeting

Exhibit 14

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Facsimile

To Bernard L. Madoff
Bernard L Madoff Investment Securities LLC

From Nigel H. Fielding

Facsimile $00\ 1\ 212\ 838\ 4061$

Date July 26th, 2002

No. of pages 12 (incl. cover)

Subject Sub-Custody Arrangements

Bank of Bermuda (Luxembourg) S.A.

13 rue Goethe B.P. 413 L-2014 Luxembourg

Telephone (352) 40 46 46-454
Facsimile (352) 40 46 79
SWIFT Address BBDALULX
nigel.fielding@bankofbermuda.co
m

Dear Mr. Madoff,

Further to our meeting on July 17th, please find herewith the Sub-Custody Agreement, revised to address the client account name issue that we discussed. This involved minor amendments on the following pages.

Page 1 Section starting WHEREAS

Page 2 Clause 4

Annex A Customer Names

We have confirmed with Bank Austria and that they have no objection to the account names with you being re-designated to include Bank of Bermuda (Luxembourg) S.A. This would result in the following.

Existing Designation New Designation

Primeo Fund Class B Bank of Bermuda (Luxembourg) S.A. Special Custody Account for

Primeo Fund

Unless you have further comments on the agreement, I will arrange for originals to be prepared and forwarded for execution in the coming days.

I also look forward to receiving the completed sub-custodian due diligence questionnaire.

Kind regards,

Nigel H. Fielding

The information contained in this facsimile message is private and confidential. Please note that any unauthorised dissemination, distribution or copying of this facsimile message or any part thereof is strictly prohibited. If you are not the intended recipient or have received this message in error, please notify the sender named on this cover sheet immediately either by telephone or facsimile at the number given above so that arrangements can be made for the return of the original message at our cost. Thank you for your assistance.

Société Anonyme - R.C. Luxembourg B 28.531

Exhibit 15



Primeo Fund v (1) Bank of Bermuda (Cayman) Limited (2) HSBC Securities Services (Luxembourg) SA

Day 17

December 1, 2016

Opus 2 International - Official Court Reporters

Phone: +44 (0) 203 008 5900 Email: transcripts@opus2.com

Website: www.opus2.com

Primeo Fund v (1) Bank of Bermuda (Cayman Limited (2) HSBC Securities Services (Luxembourg) SA December 1, 2016

Thursday, 1 December 2016 1 themselves. (10.00 am) 2 MR SMITH: But given he was a director, I think I do need to MR NIGEL FIELDING (continued) 3 put them to him. Cross-examination by MR SMITH (continued) 4 MR JUSTICE ANDREW JONES: He was responsible for those 5 MR JUSTICE ANDREW JONES: Good morning. financial statements. MR SMITH: Good morning, my Lord. 6 MR SMITH: Indeed, ves. 7 Good morning, Mr Fielding. Could we go, please to, {M/21/1}, which is the 2004 8 A. Good morning. financial statements, and do you see these are My Lord, I would like to make a request to be 9 the financial statements for the Primeo Fund to 10 allowed to elaborate on an answer that I gave at the end 31st December 2004? 11 of yesterday, just as we were getting near time, which A. I see that. 12 I think is important. Q. If we go over to page 2 {M/21/2}, we see you're Q. I think that's probably a matter for re-examination, 13 a director, amongst others. isn't it? My learned friend can ask him in 14 A. I see that. 15 re-examination to identify the answer and can ask him Q. And over to page 3, {M/21/3}, these were approved by the questions about it if he wishes to do so. 16 Board on 29 April 2005, agreed? MR JUSTICE ANDREW JONES: I think that's probably right, 17 A. I agree. 18 isn't it, Mr Gillis. Q. So they would have been approved by you, amongst others, MR GILLIS: It's very much a matter for your Lordship. If 19 wouldn't they? 20 Mr Fielding thinks that it may affect the course of his A. That would be correct. evidence, it may be appropriate for your Lordship to 21 Q. Then if we go to page 9 {M/21/9}, and you see there hear it now, but I'm perfectly happy to ask Mr Fielding 22 there's a schedule of investments for Primeo Select Fund 23 what he wants to say in re-examination. as at 31 December 2004, and that's summarising MR JUSTICE ANDREW JONES: I think we'll deal with it in 24 the assets which are managed by BLMIS, isn't it? re-examination, so your counsel will ask you about it, 25 A. It summarises the assets managed by BLMIS, plus Page 1 Page 3 1 the Capital Invest Dollar Fund, which is not with BLMIS. hopefully later today. MR SMITH: Well, I make no comment or warranty. 2 O. Quite. A. Thank you, my Lord. It relates to the sub-custodian 3 And if we look about a third of the way down, you 4 question and the prospectus that I mentioned at the end see the heading "Segregated Portfolio at Broker 5 of yesterday. (Note 14)" and it's then underneath that that the assets 6 MR JUSTICE ANDREW JONES: All right, well, I'm sure your which are managed by BLMIS are summarised, isn't it? counsel will want to ask some further questions about 7 A. That is correct. 8 Q. And the reference to "Broker" is to BLMIS, isn't it? 9 MR SMITH: Mr Fielding, just picking up on that, obviously A. That is correct. 10 we were looking at certain documents from 2005 and 2006 Q. Then if we go to note 14, which is on page 19 $\{M/21/19\}$, 11 yesterday in which you had referred to BLMIS being this obviously marries up with the schedule we've just 12 a sub-custodian; do you remember that? been looking at and says: A. I remember that. 13 "The Investment Advisor invests certain assets of 14 Q. I just want to ask you now about the accounts and Select through a separate managed account. This financial statements of Primeo, please. First of all, 15 separate managed account is managed by a broker/dealer 16 if we could look -investment firm. The custodian bank has appointed this MR JUSTICE ANDREW JONES: Are we going on to a new subject, 17 broker/dealer investment firm as the sub-custodian to or are you still cross-examining him about 18 hold and maintain the assets of Select." 19

> Page 2 Page 4

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Do you see that?

A. That would be correct.

is BLMIS, isn't it?

Q. The reference to the "custodian bank" is to HSSL, isn't

Q. And the reference to the "broker/dealer investment firm"

A. I see that.

the sub-custodian issues?

MR SMITH: I'm just going to show him the references in

the accounts and that will then complete that subject.

Your Lordship knows -- I mean, I think I need to put to

him the notes in the accounts, my Lord, although they

do, to some extent, speak for themselves. MR JUSTICE ANDREW JONES: They do really speak for

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1 A. That would be correct. 1 sub-custodian of HSSL, that it was holding the assets of 2 2 Q. So this is telling the reader of the accounts that BLMIS Primeo Select in that capacity, and that's what you knew 3 3 is the appointed sub-custodian of HSSL, isn't it? and understood at the time, didn't you? 4 A. It's telling the reader that the bank has appointed 4 A. No, that's not what I understood at the time. 5 5 BLMIS as a -- entered into a sub-custodian arrangement Q. If we -- I assume you would have reviewed these accounts 6 with BLMIS. 6 carefully, would you, before you approved them? 7 7 Q. Well, that's not what it says, is it, Mr Fielding? It A. I would review accounts quite carefully as I would 8 8 expect all of the directors of the Fund to review them savs: 9 "The custodian bank ..." 9 before we approved them. 10 10 Which you agree is HSSL: Q. If we go on to $\{M/23/1\}$, we have the accounts for 11 "... has appointed [BLMIS] as the sub-custodian to 11 the following year, 31 December 2005. If you go to 12 hold and maintain the assets of Select." 12 page 2 {M/23/2}, you're still a director at this stage, 13 A. That's what it says. 13 and page 3 {M/23/3}, these accounts were approved by the 14 Q. So what this is saying is that HSSL has appointed BLMIS 14 directors on 2 May 2006. 15 as sub-custodian and BLMIS is holding the assets in that 15 Then if we go to page $11 \{M/23/11\}$, do you see again 16 capacity, isn't it? 16 the same schedule of investments for Primeo Select and 17 A. I don't think it says the capacity, but it does say what 17 about a third of the way down, "Segregated Portfolio at 18 18 Broker (Note 14)"? you've just said. 19 Q. You must have believed this statement was correct, 19 A. I see that. 20 20 mustn't you, when you approved these accounts? Q. Underneath that, that's setting out the assets which 21 A. I must have believed it was correct. 21 were being managed by BLMIS for Primeo Select, isn't it? 22 Q. So you must have understood at this time that BLMIS was 22 A. That is correct. 23 23 the sub-custodian of HSSL in respect of the assets being Q. If we go to page 18 {M/23/18}, you see note 14 again 24 managed for Primeo Select? 24 there, and again, this is telling the reader of 25 25 A. At the risk of -- of some repetition of yesterday, the accounts, isn't it, that the Primeo Select assets Page 5 Page 7 1 1 are held by BLMIS in its capacity as sub-custodian for I obviously understood that BLMIS was party to 2 the sub-custodian agreement. The basis on which he held 2 HSSL? That's right, isn't it? 3 the assets, I have a different view. 3 A. It says what it says. I disagree with the basis on 4 4 Q. Well, I'm sorry, just look again at the note. The final which Mr Smith is -- is saying I understood the assets 5 5 were held. 6 6 "The custodian bank has appointed this broker/dealer MR JUSTICE ANDREW JONES: I think actually, Mr Smith, you 7 ... as the sub-custodian to hold and maintain the assets 7 did refer to the wrong schedule, but it -- you referred 8 8 us back to the 2004 schedule, you meant to refer to 9 9 So you must have understood that BLMIS was holding the 2005 schedule, which is of course in the same 10 10 the assets as sub-custodian to HSSL; correct? format. 11 MR SMITH: Your Lordship is absolutely right. Let me just 11 A. BLMIS was holding the assets for Primeo. There was 12 the Sub-Custodian Agreement with BLMIS and the bank that 12 show you that, Mr Fielding, so there's no confusion. 13 created that connection as well. He was holding them 13 MR JUSTICE ANDREW JONES: It's page 9. 14 14 for the benefit of the customer. MR SMITH: Page 9. {M/23/9}. Yes, I showed you a moment 15 Q. That's not what this says, is it, with respect, 15 ago the 31 December 2004 schedule. This is 16 16 Mr Fielding? It says very clearly that HSSL has the 31 December 2005 schedule. Do you see a third of 17 17 appointed BLMIS: the way down, "Segregated Portfolio at Broker 18 "... as the sub-custodian to hold and maintain 18 (Note 14)", and then underneath that, this is then 19 the assets of Select." 19 setting out the assets purportedly managed by BLMIS for 20 And what this is saying, isn't it, that BLMIS is Primeo Select as at 31 December 2005, isn't it? 21 21 holding the assets as the sub-custodian of HSSL? A. That is correct. 22 22 A. I'm afraid I do have a different interpretation. Q. Then you see there the reference to note 14, and then if 23 I think I've made it quite clear. 23 we go to page 18 {M/23/18} -- as we were looking at 24 24 Q. Well, Mr Fielding, I have to put it to you, this is very a moment ago, you see the note at the bottom of 25 clear. It's very clearly stating that BLMIS was the 25 the page. Page 6 Page 8

December 1, 2016 Primeo Fund v (1) Bank of Berniuda (Cayman Limited (2) HSBC Securities Services (Luxembourg) SA

1 1 A. I see that. the year end. 2 2 Q. I suggest, Mr Fielding, this is making it clear to Q. When you say "made available", they were actually sent 3 the reader of the accounts that BLMIS is holding those 3 out, weren't they, as I understand it? assets as sub-custodian --4 A. I believe they would be sent out, yes. 5 MR JUSTICE ANDREW JONES: Well, it doesn't actually mention MR JUSTICE ANDREW JONES: When you say "actual investors", 5 6 BLMIS, of course. None of these financial statements --6 does that mean those whose names appear on the share 7 7 MR SMITH: It doesn't, I think he's agreed --8 MR JUSTICE ANDREW JONES: He's agreed, of course, that he 8 A. On the share register, I believe as at the 31st of 9 understood that, and no doubt his fellow directors must 9 the relevant year. 10 10 have understood that, but the reader doesn't necessarily MR SMITH: And they were sent out by Bank of Bermuda, 11 11 understand that. weren't they? 12 MR SMITH: That's true. 12 A. I actually don't know now whether they were sent out by 13 13 Bank of Bermuda or Bank Austria. Mr Fielding, I think on the basis of your own understanding, you understood the "broker/dealer 14 Q. Well, at this stage, I think we know that 15 15 investment firm" referred to in note 14 to be BLMIS, Bank of Bermuda has become the subscription agent, 16 didn't vou? 16 hasn't it, and the transfer agent, and indeed 17 A. I did. 17 the registrar. That's right, isn't it? 18 18 A. It -- yes, the Bank of Bermuda was the -- or HSSL was Q. So I suggest that when you read this note, you would 19 have understood that it was saying that HSSL has 19 the transfer agent registrar, but I think we've -- we've 20 20 appointed BLMIS as HSSL's sub-custodian to hold seen earlier that Bank Austria, for a lot of its 21 the assets we just saw set out in the schedule; do you 21 clients, had an omnibus nominee, so we may have then 22 22 sent the accounts to Bank Austria, who would then send 23 23 A. No, I don't agree. Again, I -- I have a different them on to all the underlying investors -understanding of the basis on which they were held by 24 Q. I see what you mean --25 BLMIS. 25 A. I don't know for certain, but --Page 9 Page 11 1 Q. But weren't you concerned --1 Q. No, I see what you mean, because Bank Austria may be MR JUSTICE ANDREW JONES: I take the point, there's no 2 2 recorded on the share register as the holder of an 3 material difference between those two sets of financial 3 omnibus shareholding, so Bank of Bermuda would have sent states, is there? 4 4 it to Bank Austria and then Bank Austria would have in 5 MR SMITH: No, there's not. 5 term sent them on to its own underlying investors; is MR JUSTICE ANDREW JONES: And he's giving the same answer in 6 6 respect of both. 7 A. One would -- I would hope they would send them on, but 8 MR SMITH: Yes. 8 obviously I don't -- I wasn't working at Bank Austria, Q 9 Do you agree that the annual accounts were an so I don't know what they actually did, but we'd expect 10 important part of the information provided to respective 10 that to happen. 11 11 Q. I understand, Mr Fielding. 12 A. They form one of the quite important documents. 12 Now, just turning to the topic of the due diligence 13 Q. Well, they're a key document, aren't they, which is 13 which you carried out in July 2002, I think we know you 14 provided both to prospective and actual investors? 14 visited Madoff for the purposes of carrying out some due 15 MR GILLIS: My Lord, I'm not sure they are provided to 15 diligence; is that right? 16 prospective investors. 16 A. That is correct. 17 MR SMITH: Well, that was the question. 17 Q. Do you agree that prior to this visit in July 2002, 18 MR JUSTICE ANDREW JONES: He may or may not know what was 18 Bank of Bermuda had not carried out any due diligence on 19 provided to prospective investors. 19 BLMIS at all? MR SMITH: Were you aware whether the accounts were provided 20 20 A. That seems to be the case, I agree. 21 to prospective investors? 21 Q. From your perspective, what was the purpose of carrying 22 A. I'm not aware in terms of prospective investors. 22 out this due diligence? 23 Q. But they were provided to actual investors, 23 A. I -- I had in mind that we would enter into 24 24 weren't they, on a yearly basis? the sub-custodian agreement. I felt it was appropriate A. They were made available to actual investors at 25 to ensure that this party, BLMIS, that already held

Page 10

Page 12

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1 1 didn't it? a question that hadn't been completely gone through, he 2 2 A. Yes, it was about two hours. would add to it. I also thought it was useful, because 3 3 he was in New York, if there was follow up -- if we Q. And then, during that meeting, Mr Madoff largely filled in the due diligence questionnaire, didn't he? 4 needed to go back -- I didn't want to go back from 5 5 A. I think we went through it question by question. I had Europe, Mr Healy could then go back, if it was 6 given it to him -- I think I'd given it to him in 6 necessary, to the offices of BLMIS. 7 advance. Some questions I had to explain to him, and we O. But that didn't in fact happen, did it? 8 discussed, and then he wrote -- wrote the answers in 8 A. No, it wasn't necessary. 9 the questionnaire. 9 Q. I think also at this stage you received a copy of 10 10 Q. So he mostly filled that in during the course of a report on an internal control signed by BLMIS' 11 11 auditors, Friehling & Horowitz, didn't you? the meeting; is that right? 12 A. Mostly. There were one -- a few questions he didn't 12 A. I did. Mr Madoff gave me that along with his annual 13 immediately have to hand the information and he asked if 13 audited report and accounts. he could fill that in after I had -- well, myself and 14 Q. If we go to {N/574/21}, which is also tab 97 of the core 15 15 Mr Healy had left, and send it back. bundle -- it's page 21 of the document in the core 16 Q. You yourself didn't do anything to check the answers he 16 bundle. This is actually an internal report, internal 17 actually supplied to the questionnaire, did you? 17 control report dated 10 December 20, 2003, because it's 18 18 A. I did some -- some further checking. I think there's added to an updated version of the due diligence 19 some evidence of that in some additional notes I made. 19 questionnaire. We don't have the one which was 20 I would call it kind of additional due diligence, where 20 presumably dated December 2001, which you must have been 21 I spoke to Mr Lockwood amongst others, Ms Fano. It was 21 provided with at the meeting, this is a letter of 22 22 more complementary information to get a complete the same internal control report; do you understand? 2.3 23 A. I understand, and I think the one I was provided with 2.4 MR JUSTICE ANDREW JONES: Mr Fielding, could you remind me 24 was as at 31 October 2001. The BLMIS year end was 25 25 who Fergus Healy is? October. Page 17 Page 19 1 1 A. Fergus Healy at that time, he had been in this Q. Thank you. 2 Bank of Bermuda as a while, first in Bermuda as a client 2 If you look at this internal control report and just 3 relationship business development -- no, sorry, as 3 cast your eye over it, you see on the first page, it 4 4 effectively summarises, doesn't it, the requirements of a lawyer, and then he had moved to New York into more of 5 5 a business development/client relationship role. the relevant SEC rules? 6 6 MR SMITH: So he was a lawyer, was he? A. It does that, and it sets out the scope of the work that A. I understood he was a lawyer. 7 Friehling & Horowitz were doing. 8 8 Q. So he would have read the draft Sub-Custody Agreement, Q. Then if you go over the page $\{N/574/22\}$, it continues at 9 9 wouldn't he, which you were presenting to Mr Madoff at the top of the page by describing a material weakness. 10 10 this meeting? Then, just at the end of that paragraph, effectively 11 11 A. I'm not sure whether I sent it to him. I would have what it says is: 12 12 obviously made him aware that that was the purpose, but "However, we noted no matters involving internal 13 I'm not sure that I sent it to him. 13 control, including control activities for safeguarding 14 MR JUSTICE ANDREW JONES: And at that time, he was based in 14 securities, that we consider to be material 15 the New York office? 15 weaknesses ..." 16 16 A. He was based in New York in this business development Do you see that? 17 17 client relationship role, obviously. I think I talked A. I see that. 18 before that I -- the interaction was with the lawyer in 18 Q. Then if you go on, you see there's then sort of further 19 Luxembourg, or lawyer in Europe on -- on the 19 description of the SEC requirements in the following two 20 Sub-Custody Agreement. paragraphs. Do you see that? 21 21 MR SMITH: So did Mr Healy participate in this meeting A. I see they're there. I haven't read them. 22 22 actively? Q. Now, what I suggest, Mr Fielding, is actually the only 23 A. The meeting was led by me. The purpose of him being 23 substantive opinion being expressed by 24 24 there was really second pair of eyes and ears, partly so Friehling & Horowitz is that in the final sentence of 25 that -- I valued his experience. If he felt there was 25 the paragraph at the top of the page we're looking at,

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1	where they simply state:	1	sub-custodian?
2	" we noted no matters involving internal control,	2	A. I think HSBC liked it if there was such a report,
3	including control activities for safeguarding securities	3	they liked to obtain that from a bank.
4	that we consider to be material weaknesses."	4	Q. Well, HSBC would expect, wouldn't they, any
5	Do you agree?	5	sub-custodian to have a SAS 70 report or equivalent
6	A. I think there's actually two. I think there is that	6	available?
7	statement that there is no material weakness around	7	A. Again, I'm not Mr Pettitt, I think, who's giving
8	control and safeguarding of securities.	8	going to give evidence, was running that. I think he'd
9	At the end of the next paragraph there's another	9	be much more familiar with it, unless it's in
10	assurance:	10	the FIM that we looked at yesterday.
11	" we believe that the Company's practices and	11	Q. We can certainly ask Mrs Kohn and Mr Pettitt, because
12	procedures were adequate at October 31, 2003 to meet	12	they're coming along, but I think what you're saying, so
13	the SEC's objectives."	13	far as you're concerned, you don't have any particular
14	Q. So essentially there's two bald statements of opinion by	14	understanding of that; is that right?
15	Friehling & Horowitz?	15	A. I don't have a close enough proximity on that particular
16	A. They're two opinions.	16	subject, on that particular point of SAS 70, to answer
17	Q. And the rest of the document is simply a summary of	17	that.
18	the SEC rules and requirements, isn't it?	18	Q. I think it must follow from your evidence yesterday that
19	A. It's largely that and it sets out what they're looking	19	you thought you weren't carrying out a due diligence
20	at; internal control and safeguarding of securities	20	exercise on a prospective sub-custodian; is that right?
21	I think is in the very first paragraph on the previous	21	A. Not a regular sub-custodian, but I was carrying out
22	page.	22	a due diligence exercise and it was informed by the type
23	Q. I suggest, Mr Fielding, that this isn't anywhere near	23	of due diligence.
24	the normal type of internal control report you would	24	Q. Was it the sort of due diligence exercise you would
25	expect to see carried out on a sub-custodian, is it?	25	normally carry out in relation to the appointment of
	Page 21		Page 23
1	A. I thought for a broker-dealer actually it was very	1	a prospective sub-custodian?
2	interesting. If if there was a sub-custodian who was	2	A. It fitted with the experience I had had, which was a few
3	going to be a very large bank, they may have different	3	years earlier when I was at another bank. At that
4	things. They may have a SAS 70 or an equivalent, they	4	point, as I say, I wasn't doing this day-to-day. I do
5	may not. People chose what what to do in terms of	5	think it it's a hard question for me to answer
6	reports for internal control.	6	without sorry, given my experience exactly at that
7	Q. Just focusing on a sub-custodian for a moment, my	7	time. I think Mr Pettitt would probably be in a better
8	suggestion is that this type of report is nothing like	8	position.
9	the normal type of internal control report you would	9	Q. No, I'm asking you. Proceed on the assumption that you
10	expect to see having been carried out on	10	had been intending to appoint BLMIS as a sub-custodian
11	a sub-custodian; do you agree?	11	in the normal sense. Assume that for the moment. Do
12	A. I think if it was a bank sub-custodian, particularly	12	you understand?
13	a large bank, there could be something else. I don't	13	A. Okay.
14	know whether I have done sub-custodian review work,	14	Q. Is this the type of due diligence exercise you would
15	I have some experience at it. It's not a job I held	15	have carried out on BLMIS as a prospective
16	day-to-day at any point, there would probably be better	16	sub-custodian?
17	people to ask that question to.	17	A. It's a hypothetical in the sense that I've been asked
18	Q. So that's not something you're able to express an	18	if if I was appointing BLMIS as a normal
19	opinion on, because you didn't do much sub-custodian	19	sub-custodian, is this the type of work I would do?
20	review work; is that right?	20	The answer is yes, although I would have taken the same
21	A. I did some. I was involved in some, and I was reviewing	21	step I did before this, which would be to ask
22	the results of some of that work, but I never did it	22	the department that normally did this work for banks if
23	hands on, day in, day out.	23	they would do it.
24	Q. Were you aware that it was normal practice to obtain	24	Q. So your evidence is that the due diligence exercise you
25	a SAS 70 report or equivalent on a prospective	25	did was exactly the same type of due diligence exercise
20	a 323 / o report of equivalent on a prospective	23	and was exactly the same type of the timgence exercise
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1 you would have done if you had been intending to appoint 1 I think March 2005 or thereabouts. Do you see that? 2 2 BLMIS as a normal sub-custodian; is that right? It's referring to a conversation which Mr Fiorino's had 3 3 A. I'm not sure I can say that, because I wasn't doing that with Ernst & Young, do you see? 4 particular work at that time. 4 A. I see that. 5 5 Q. So you don't know, because you weren't doing Q. And one of the things he was saying is: 6 sub-custodian due diligence work; is that right? 6 "over the last weeks, [Ernst & Young] raised some 7 7 A. Not at that time, but I believed it was appropriate. concerns about Madoff, as follows ..." 8 8 I -- I took guidance before doing it. Then do you see the third item: 9 Q. So if -- okay, but so far as you're concerned, based on 9 "iii) reliability and independence of 10 10 your own understanding and experience, you don't think Friehling and Horowitz CPA (auditors of BMadoff). 11 11 there's any difference, or any material difference Apparently F&H are related to BMadoff. Responses to 12 between the type of due diligence exercise you did do 12 questions raised by E&Y to BM auditors were not clear." 13 and the type of exercise you would have done if you had 13 Do you see that? 14 been intending to appoint BLMIS as a sub-custodian? 14 A. I see that. 15 15 A. I don't think I can say that. Q. So at this stage Ernst & Young were expressing concern 16 Q. So you think there is a difference; is that right? 16 about the reliability and independence of 17 A. I can't -- I can't clearly say whether there is. I took 17 Friehling & Horowitz. 18 18 guidance on what might be appropriate, I got the due A. I think this is coming to me indirectly. It's not E&Y 19 diligence questionnaire, I had previous experience, and 19 talking to me, this is Mr Fiorino relaying something 20 20 I -- I felt I was doing a good, proper due diligence. that he had understood from a meeting he had apparently 21 Is it exactly the same as what somebody who was doing 21 had, or a conversation he'd had with E&Y. And to put it 22 22 that day in, day out on mainly banks would have been in context, I believe this is about the point, shortly 23 23 doing? I really can't say. after Mr Lockwood had unfortunately passed away, E&Y had 24 Q. Okay. 24 obviously been auditors I think since the very 25 25 Now, had you previously heard of beginning, in 1994, and were -- you know, I'd never --Page 25 Page 27 1 1 Friehling & Horowitz prior to this meeting? never had those questions raised, or any concerns raised 2 A. I'm not sure that I had prior to this meeting. I do 2 by Mr Lockwood. Some new people were coming onto 3 think this -- this subject came up at the Primeo Board 3 the file who I think were reviewing the whole thing. 4 4 meetings, but I -- that might have been a little bit Probably they didn't recognise Friehling & Horowitz. 5 5 later. The subject of who BLMIS' auditors were. I don't know where they got the rumour that 6 6 Q. It's right, isn't it, that the view subsequently formed Friehling & Horowitz might be related to BLMIS. I'm not 7 within HSSL was that little reliance could be placed on 7 sure there's anything that says that. And they were 8 8 just starting to do some checking on it. Friehling & Horowitz? 9 9 A. There were people who expressed that view. I don't --Q. Well, we know now, don't we, that Friehling & Horowitz 10 10 it's not a well known firm, but my view was that's why weren't independent of BLMIS, because Mr Friehling was 11 11 I specifically, actually, checked this with a large investor in BLMIS? 12 12 Ernst & Young, with Mr Lockwood, who assured me -- he A. That's the first I have heard of that. 13 said he'd spoken to somebody in New York, or been in 13 Q. Did it concern you at the time that Ernst & Young were 14 14 contact with somebody in E&Y New York who said they were expressing doubts about the reliability of 15 known for doing broker-dealer work, and I didn't believe 15 Friehling & Horowitz? 16 16 the SEC would have registered him for 40 years if they A. It didn't particularly concern me for the -- for the 17 17 didn't think he had a qualified auditor. reason I'd been assured by Mr Lockwood and from the --18 Q. You say that in your witness statement about what 18 from the SEC being -- authorising Madoff -- BLMIS to 19 Mr Lockwood told you, but do you agree that 19 conduct business. 20 subsequently, the view was formed within HSSL that Q. If we go on, please, to $\{L/2/84\}$, to $\{L/2/85\}$, this is 21 21 little reliance could realistically be placed on an extract from the transcript of the Thema proceedings. 22 22 And this is around the same time, so it's March 2005. Friehling & Horowitz? 23 A. There were people who expressed that view. 23 If you look down at line 18, there's reference to a note 24 24 Q. If we look, please, at {N/11/92}, which is tab 190 of on the HSBC files which is in handwriting. 25 core bundle 3, this is an email in Mr Fiorino to you, of 25 Unfortunately, this hasn't been discovered to us in Page 26 Page 28

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MR JUSTICE ANDREW JONES: Right or not, that's what he says. 1 these proceedings, although it was obviously something 2 MR SMITH: Yes, I think he's almost certainly right about 2 available in the Thema proceedings so I have to show you 3 3 that. the transcript. But you see the quote begins at 4 4 Then it goes on: 5 5 MR JUSTICE ANDREW JONES: So this is counsel, in his "'Concern arose due to E&Y risk review'." 6 opening, quoting from a document in the trial bundle? 6 Were you aware at this time that Ernst & Young had 7 MR SMITH: That's exactly right, my Lord. carried out a risk review apparently in relation to --8 8 MR JUSTICE ANDREW JONES: Do we know what time we're talking And you see he begins at line 22: 9 "Ernst & Young have met Sav and Germain' ..." 9 10 10 MR SMITH: It's March 2005, or thereabouts. So that's Mr Fiorino and Mr Birgen, isn't it? 11 11 MR JUSTICE ANDREW JONES: And that's apparent from other A. That would seem to be correct. 12 Q. Then line 27: 12 parts of the transcript, is it? 13 13 "E&Y expressed concern re transparency of Madoff MR SMITH: I think if you follow the chronology through, I mean, that's certainly my note. We can try to check 14 activity'." 14 15 15 that. If we go back a couple of pages. Go back one Then the counsel comments: 16 "This is not in connection with the Thema fund, it 16 page, please. {L/2/84}. And perhaps go back another 17 is in connection with something else." 17 page {L/2/83}. 18 18 And if we go over the page $\{L/2/85\}$: Well, we'll look for a reference on that, but --19 MR JUSTICE ANDREW JONES: There's a reference there at 19 "Especially as Madoff audit firm (F&H) appears to 20 20 line 14 to the 2004 financial statements. be a two person shop and partners related to Madoff 21 21 MR SMITH: Yes, so it's looking at some point after that, 22 22 you're right. I'd certainly noted this as being in So were you aware of knowing at this stage that 23 23 the first part of 2005. Friehling & Horowitz was a two-person shop? 24 A. I'm not sure that I knew they were a two-person shop, 2.4 MR JUSTICE ANDREW JONES: Let's proceed on that assumption. 25 25 MR SMITH: We'll see if we can find something to tie it down no, at that time. Page 29 Page 31 1 Q. So --1 a bit more precisely. 2 A. I knew they were small. I don't know whether I exactly 2 If we go back, Mr Fielding, to page 85 of this 3 knew it was two. 3 document {L/2/85} which we were looking at, you see it 4 4 Q. Do you remember these concerns being expressed by says there in line 3, towards the end of that line: 5 5 Ernst & Young about Friehling & Horowitz being reported "'Concern arose due to E&Y risk review'." 6 6 back to you by Mr Birgen and Mr Fiorino? Now, do you remember E&Y having done a risk review, A. Mr Fiorino, for sure. I think we just saw that end of 7 apparently, in relation to Madoff funds? 8 some -- of an email chain, and I think I asked him, 8 A. I don't know whether it was specific to Madoff funds. 9 9 "Okay, they're doing their work, keep me informed It may have been. I think this is what I was 10 10 because I would be interested in it". I think they did referring to. I think there was a new partner. It 11 their work and concluded that they were fine to continue 11 might have been Ferguson. 12 12 being the auditors of Primeo. Q. Michael Ferguson? 13 Q. Well, if you go on and look at line 3, do you see: 13 A. Michael Ferguson maybe, who had taken on this from 14 14 "'Concern arose ..." Adrian Lockwood, and they were doing a review -- I don't 15 MR JUSTICE ANDREW JONES: Perhaps you should read 15 know whether it was of certain clients or of their 16 16 the previous sentence, just to put it in context. entire client base, but I do remember they were doing 17 Counsel said "the first ..." 17 a review. 18 MR SMITH: Yes: 18 Q. It looks like some issues had arisen out of that review, 19 "The first true and the second not true." 19 doesn't it? MR JUSTICE ANDREW JONES: So he was making the observation 20 A. I think we've got the concerns that were relayed to me

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indirectly via Mr Fiorino that we've seen.

a specific scope review at BLMIS?

Q. Were you aware that what Ernst & Young were proposing to

do, as is says in the next sentence, was to go in and do

A. I do. I've seen something where I think Mr Fiorino

the Madoff family.

that the "partners related to Madoff family" was not

relationship between Mr Friehling and any members of

MR SMITH: So I think he's right, there's no familial

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1 relays that to me, that if they -- if they can't just 1 independent comfort that we would ordinarily look to." 2 get comfortable from a paper review, they may go and 2 Do you see that? 3 3 meet -- go to see BLMIS. A. I see that. 4 Q. They never in fact did that, did they? 4 Q. So, by this stage at least, it's fair to say that 5 5 A. I don't know whether they did or didn't. All I know is the view had been reached within HSSL that no real 6 that they obviously concluded they were fine to 6 reliance could be placed on Friehling & Horowitz, 7 7 continue. 8 8 Q. The basis on which they concluded that was that, going A. This is Christine Coe, who works in HSBC London, 9 forwards, they would seek a custody confirmation from 9 saving -- saving this. 10 10 HSSL, wouldn't they? Q. Did you disagree with what she was saying there? 11 11 A. I don't know whether that's the basis of the conclusion. A. (Pause) 12 I think their review was quite broad in its scope, so 12 It's -- she had a view, clearly. 13 I'm sure they took a lot into account in forming their 13 Q. She was someone who did carry out sub-custodian due 14 14 diligence reviews, didn't she? 15 Q. But you agree it was at this stage that HSSL began 15 A. I'm not sure that she did herself, it was Brian Pettitt. 16 supplying custody confirmations to Ernst & Young, didn't 16 She may have done at a previous time, but I don't 17 17 they? remember her carrying them out. 18 18 A. I think from the material we saw the other day, this is Q. But certainly the carrying out of those reviews fell 19 at the point at which E&Y approached -- around the point 19 within her responsibility, didn't they, of Chief Risk 20 at which E&Y approached HSSL to ask if they could 20 Officer, I think, at this stage, for HSS? 21 receive some form of confirmations. 21 A. Her job was changing around that time. Originally she 22 22 Q. So it looks like the decision of Ernst & Young to see was more of a credit person within -- in the traditional 23 custody confirmations in relation to the BLMIS assets is 23 business. She'd picked up some responsibilities for 24 tied up with the fact they've done this risk review in 24 Risk, and in fact later then she went back to a more 25 the early part of 2005, doesn't it? 25 credit-oriented role. Page 33 Page 35 1 1 A. It could be one outcome of it, or it could be in their Q. But certainly her view was that really no reliance at 2 annual audit planning that they decided to add this 2 all could be placed on the Friehling & Horowitz internal 3 3 control statement, could it? extra step in 4 4 Q. Well, do you have any recollection of this being A. She says it's not really independent enough. That's her 5 5 discussed within Bank of Bermuda or with Ernst & Young? opinion. And --6 6 A. No, not -- not specifically that I can recall. Q. Well, not only that, she says: 7 Q. Well, let's just go back to Friehling & Horowitz for 7 "... it's sort of a page and a half long, isn't it, 8 8 a moment. Do you remember discussing it's not really SAS 70 or even FAC 21 ..." 9 9 Friehling & Horowitz with Ms Coe in June 2005? I'll That's one of the points she's making, isn't it? 10 10 bring the document up on the screen. It's {N/1299/1}, A. It's a point she's making. I think she means -- because 11 11 209 of core bundle 3. it maybe just the way the transcript comes -- I think it 12 I'm afraid it's very heavily redacted, but there's 12 means FRAG 21, which is a UK, or the equivalent of 13 a section at page 6 {N/1299/6}, and this is 13 SAS 70 --14 14 a conversation between yourself and Ms Coe which has Q. So you're familiar with that, are you? 15 taken place on 6 June 2005, so a little bit later on 15 A. I'm aware of FRAG 21 being something that's been 16 16 from the email we were just discussing. mentioned as similar, but these are things that generally banks would do, not broker-dealers. 17 17 And you see she says there, about a third of the way 18 down the page: 18 Q. Well, it's something you would expect a sub-custodian to 19 "The biggest single concern is the whole process, 19 do, wouldn't you, Mr Fielding? 20 20 once it gets into Madoff's hands, is fairly incestuous A. A bank. A bank sub-custodian may or may not. I --21 21 within Madoff and their internal control statement, there might have been a requirement generally for -- in 22 22 which is done by ... it's sort of a page and a half HSBC where it was appointing a bank into the normal 23 long, isn't it, it's not really SAS 70 or even FAC 21 23 network to, wherever possible, obtain one of these 24 24 level. And it's also done by his mate, the accountant. reports. It's not really independent enough to give us a level of 25 Q. But Ms Coe is clearly expecting that this is something Page 34

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1	that ought to have been produced or obtained in relation	1	{N/578/1}. Just out of interest, we've got a transcript
2	to BLMIS, isn't she?	2	of this telephone call. Did telephone calls within
3	A. No, I don't think she's saying that. She's saying it's	3	Bank of Bermuda (Luxembourg) tend to be recorded at this
4	not one of those, "What we've got is not as detailed as	4	time?
5	that", which is absolutely correct, "And I would like	5	A. I think some lines were recorded and some weren't.
6	something more". Which is, I think, fair enough.	6	Q. It looks like your line was recorded, doesn't it,
7	Q. You're familiar with SAS 70 reports, aren't you?	7	because we've obviously got a transcript of this call?
8	A. We saw one of the other day. I wouldn't say I've	8	A. It looks
9	never done a SAS 70 audit myself. I've received	9	Q. On 7 August.
10	the summaries that KPMG allowed us to use with our	10	A. Assuming this document came from HSBC or HSSL, it would
11	clients.	11	appear that the line I was using at that time was
12	Q. Would you agree that the internal control report	12	recorded.
13	produced by Friehling & Horowitz was nothing like	13	Q. Yes, and this document did come from HSBC, I can
14	a SAS 70 report, was it?	14	confirm.
15	A. No, it's not the same level of detail.	15	This is this the only transcript I think we have at
16	Q. Nothing like it, is it? You're talking about the	16	this time of a telephone call between yourself and
17	difference between a one and a half page document and	17	Mr Lockwood.
18	something that would run to potentially hundreds of	18	If we just skip over the pages, you see at page 1
19	pages.	19	there's some introductory remarks. Page 2 is redacted
20	A. Well, what I don't know is what level of work	20	{N/578/2}. And page 3 {N/578/3}, you begin discussing,
21	Friehling & Horowitz came up I agree the documents	21	towards the bottom of that page, the position in
22	are different in length, but I don't know how much work	22	relation to BLMIS, and Mr Lockwood says:
23	Friehling & Horowitz would have done to come to	23	" when I say internal control, we get their ought
24	the internal control, but, on the face of it, I would	24	tours to uhm, to confirm to us that they audit Madoff
25	agree, a SAS 70 is more detailed.	25	and that the statement that they've sent to us is
	Page 37		Page 39
1	Q. As you said a moment ago, one of the things you say in	1	covered by their audit."
2	your witness statement is Mr Lockwood told you that he'd	2	Then there's discussion and he mentions at the
3	looked into Friehling & Horowitz and had been told by	3	bottom of the page:
4	his colleagues at Ernst & Young in New York that	4	" their auditors are Friehling & Horowitz."
5	Friehling & Horowitz were known for their audit work of	5	Do you see that?
6	New York broker dealers. We see that in your witness	6	A. I see that.
7	statement as paragraph 97 {B/9/30}. Let's just pull	7	Q. Then, going over the page, we have the section we were
8	that up on the screen to remind you. It's really	8	looking at a moment ago {N/578/4}
9	the second sentence of paragraph 97, do you see that?	9	Then on to page $5 \{N/578/5\}$, at that point you see
10	A. I see that.	10	you then refer to the due diligence questionnaire, and
11	Q. On the basis of what you now know, do you accept that	11	you see a little way down the page you then refer to
12	Friehling & Horowitz were not in fact known for their	12	the internal control report, which you'd obviously
13	audit work of New York broker dealers?	13	received from Friehling & Horowitz?
14	A. I don't know what other clients they had, but I clearly	14	A. I see that.
15	know now that Friehling & Horowitz were probably not	15	Q. Then, towards the bottom of that page you, say:
16	exactly suitable as BLMIS' auditors.	16	"So uhm oh well, that's really why I was
17	Q. Would you agree it seems rather unlikely that	17	calling, just to follow up on that"
18	Mr Lockwood was told by his colleagues at Ernst & Young	18	And I think you're referring to some sort of
19	in New York that Friehling & Horowitz were known for	19	document Ernst & Young may have received from
20	their audit work of New York broker-dealers?	20	Friehling & Horowitz.
21	MR JUSTICE ANDREW JONES: How can he answer that question?	21	And then Mr Lockwood says:
22	That's just a comment.	22	"Ok, not, that's very useless. We, uhm I,
23	MR SMITH: Let's move on and see what you actually discussed	23	I think, I don't know if I told you, we got our people
24	with Mr Lockwood then, at tab 98, core bundle 1,	24	to confirm to us from the States, to confirm that Madoff
25	the document that we were just looking at a moment ago. $% \label{eq:controlled}%$	25	is, yes, he's regulated and he has a good
	Page 38		Page 40
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1 1 reputation ..." that Mr Lockwood said to you at the time, or whether 2 2 And you go: you've made a mistake; do you understand? 3 "Hmhm. 3 A. I thought I wrote it somewhere in my due diligence 4 " ... etc and he's very well known. Yes, no, we 4 notes, and if I did, then I would be very clear 5 5 feel a lot more comfortable now as well." about it. 6 So what he's telling you there relates now to BLMIS, 6 Q. Well, your due diligence notes we can look at. I think 7 7 doesn't it, not Friehling & Horowitz? the relevant note is $\{N/568/1\}$. So these are what 8 8 I understand to be your due diligence notes. They're A. I think there's a lot in here. I think we're talking 9 about BLMIS and Friehling & Horowitz, because I see he 9 the notes you've effectively compiled as part of your 10 10 talks about getting very specific audit reports for due diligence exercise. Do you see? It runs to 11 11 Primeo and something else, which I presume is probably a number of pages, so I'll turn the pages so you can see 12 Hermes, which is I think -- this is the point E&Y 12 what it is. You make a number of remarks on this page, 13 13 were -- Adrian Lockwood was a very professional and then if we go over to the second page {N/568/2}, you 14 gentleman. He had obviously satisfied himself E&Y were 14 then refer to what you were told by Ernst & Young as 15 15 using Friehling & Horowitz specific audit reports on part of your notes, and what you say there is that: 16 the funds in their audit. 16 "In order to gain comfort for their audit 17 Q. But there's no mention anywhere in this conversation of 17 purposes ..." 18 18 Mr Lockwood saying to you that he'd been told by Then I think the name blanked out must be 19 Ernst & Young in New York that Friehling & Horowitz were 19 Mr Lockwood: 20 20 known for their audit work of New York broker-dealers? "... confirmed that E&Y had taken the following 21 A. Not in this conversation. I think it was another one. 21 22 Q. What he's actually telling you here relates to BLMIS, 22 "- Consulting with E&Y New York to obtain 23 23 doesn't it, at the bottom of the page, and not to confirmation of Madoff as bona fides and regulator." 24 Friehling & Horowitz? 24 Do you see that? 25 25 A. I'd just like to take a moment to read it again. A. I see that. Page 41 Page 43 1 1 Q. Absolutely, of course. O. And then: 2 A. (Pause) 2 "- Obtained from Madoff's external auditors, Friehling & Horowitz, a confirmation that they have verified the asset statements ..." What I suggest actually has happened, Mr Fielding, is you have confused what Mr Lockwood was telling you about BLMIS with Friehling & Horowitz, because what he was telling you was that BLMIS had bona fides and was

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3	Yes, at the very end, I think he switches to	3
4	talking I think earlier he's talking about	4
5	Friehling & Horowitz and the audit process, and then he	5
6	switches to talk about Madoff right at the end.	6
7	Q. So I think you agree, he doesn't say in here anything	7
8	about having been told by Ernst & Young in New York that	8
9	Friehling & Horowitz were known for their audit work of	9
10	New York broker-dealers, does he?	10
11	A. No, not not as I recall, it's not in this	11
12	conversation, it's a separate conversation.	12
13	Q. So when did you think that separate conversation took	13
14	place?	14
15	A. I do believe it's around this time. I do wonder if we	15
16	actually met Adrian, because I used to meet him fairly	16
17	regularly well, reasonably regularly.	17
18	Q. And this is a conversation you have a specific	18
19	recollection of, is it?	19
20	A. I believe I believe I wrote it somewhere in some of	20
21	my due diligence notes, so I would be very clear on my	21
22	recollection if I wrote it at the time.	22

Q. It's referred to, I think, in a subsequent email you

send, that's right, but I'm just trying to explore with

you, Mr Fielding, whether this was in fact something

regulated, he wasn't actually telling you about
Friehling & Horowitz, and I suggest what's happened is
you've confused the two, haven't you?

A. No, I don't think so. I think this additional due
diligence relates specifically to the phone conversation
transcript we've looked at, where it's correct at the
end Mr -- Mr Lockwood talks about Madoff's bona fides,
earlier he talks about the specific confirmations that

I do believe it's a separate conversation.

I believe there is a -- somewhere in this documentation, somewhere where I've very specifically written it out,

I don't know whether -- it's probably in this year -Q. It's --

A. -- and I think, therefore, if I wrote that, I would be very clear about my recollection of it.
 Q. Well, there's a subsequent email which comes a little

E&Y obtained from Friehling & Horowitz.

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A. I wasn't inside E&Y. It sort of seems that way, but 1 later where, exactly, you do say that, but what I'm 2 2 suggesting is actually you've confused the position, and obviously we do have this thing about custody 3 what you were actually told by Mr Lockwood related to 3 confirmations which was discussed with Mr Quintus. 4 BLMIS and not in fact to Friehling & Horowitz. Do you 4 MR JUSTICE ANDREW JONES: This witness is not really in 5 5 a position to say what Ernst & Young were relying upon understand? 6 A. I understand, but I don't believe that I got confused. 6 and how they came to their opinion. 7 7 MR SMITH: Well, I'm --Q. One of the other things you say in your witness 8 8 MR JUSTICE ANDREW JONES: We know they gave a clean opinion, statement and you mentioned a moment ago is that you 9 believed that the SEC would have ensured that firms 9 we know that part of the audit evidence they relied upon 10 10 was the Friehling & Horowitz report. which it regulated were audited by independent auditors 11 11 MR SMITH: Yes, but I just want -- I think I need to of appropriate standing. Do you recall? 12 A. I do recall I said something along those lines. 12 explore --13 MR JUSTICE ANDREW JONES: Obviously I'm going to draw 13 Q. Did you check what rules the SEC in fact had in place 14 the inference that they relied upon that report. for auditors of broker-dealers? 14 15 15 MR SMITH: Yes A. No, I didn't. 16 Q. Based on what you now know, do you accept there was in 16 MR JUSTICE ANDREW JONES: This witness is not in a position 17 fact no SEC rule applicable to broker-dealers like BLMIS 17 to say what else they relied upon, or how they formed 18 18 which required auditors to have any particular standing? their opinion. 19 MR SMITH: No, but I want his understanding of what they 19 A. I didn't know they -- I didn't know they took that 20 20 approach until you just told me -- until I was just were relying on. 21 21 MR JUSTICE ANDREW JONES: But how would he have an 22 Q. I think you also knew, didn't you, that Ernst & Young, 22 understanding of what they were relying on? Did he 23 23 discuss it with Mr Lockwood? You need to ask that so far as their audit of Primeo's financial statements 24 was concerned, were essentially just relying on 2.4 question first, don't you? 25 25 MR SMITH: I think that is what I have been asking him. Friehling & Horowitz? Page 45 Page 47 1 A. Could you just -- could I just have that question 1 What did you -- so far as the assets managed at 2 repeated, please? Sorry. 2 BLMIS was concerned, what did you understand 3 Q. So far as their audit of Primeo's financial statements 3 Ernst & Young were relying on in respect of their audit 4 4 was concerned, and in relation to the assets being of those assets? 5 managed at BLMIS, Ernst & Young were essentially just 5 A. I understood that they were largely relying on 6 relying on what they were told by Friehling & Horowitz, 6 the Friehling & Horowitz confirmation. 7 weren't they? 7 Q. Just looking at the position where we've got to, 8 A. No, I don't think that's the case, from how I knew 8 I think -- and just to bring it together, what you had 9 9 Ernst & Young were. I think they were relying on done by way of due diligence at this stage was you'd 10 10 Friehling & Horowitz for the confirmation of the assets done the preparatory work for your meeting with 11 being safekept at BLMIS. There was a whole load of 11 Mr Madoff; correct? 12 other audit work that E&Y would have done: checking 12 A Correct 13 the valuations, the accounts, working with HSSL on some 13 Q. You'd had the meeting with Mr Madoff and received 14 14 of that and other parties too. the answers to the questionnaire; correct? 15 Q. Let's just focus on the verification of assets and 15 A. Correct. 16 16 trading. What other audit work did you think Q. Those answers had largely been filled in at the meeting, 17 17 and you hadn't yourself checked any of the answers Ernst & Young were doing to verify the existence of 18 assets being held at Madoff? 18 against an independent source, had you? 19 A. I believe their primary -- what they did primarily, from 19 A. Largely no. The only additional work I did is in these 20 what I've seen, is they went to Friehling & Horowitz and 20 additional notes. 21 asked them to confirm back the holdings that were at 21 Q. And I think the final piece is you'd received 22 22 BLMIS. the internal control report of one and a half pages from 23 O. So, so far as the verification of existence of assets at 23 Friehling & Horowitz, hadn't you? 24 24 Madoff is concerned, they were relying on MR JUSTICE ANDREW JONES: Mr Smith, I should indicate that Friehling & Horowitz, weren't they? 25 I don't regard that document as an internal control

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broker-dealer?

Q. When did you ask Mr Fiorino to do checks about

A. I had -- I don't remember the exact date, but it was

question. So let me start with -- this risk that I felt

fairly early on when I came into contact with Primeo,

possibly after I joined the Board. I would say it would

have been 2000/2001, where I asked him a very specific

the concern of BLMIS being the investment manager and

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long.

safekeep the assets for HSSL, and I firmly believe

the work that I did was adequate for the purpose.

Q. I understand that, Mr Fielding. I just wanted to put

And it's on the assumption that you were in fact

A. I disagree with the assumption, but I follow it.

the question to you on an assumption, do you understand?

appointing BLMIS as sub-custodian in the normal sense.

Do you follow the assumption I'm asking you to make?

report.

MR SMITH: Yes

essentially --

1	was there was about mispricing: could Madoff be unduly	1	securities?
2	enriching himself, or BLMIS, at the disadvantage of	2	A. No. No, I didn't at that point.
3	the clients? The check I asked him to do, which	3	Q. Would that not be something which you would have done if
4	I thought was a fairly reasonable check, was to take	4	you had been appointing a sub-custodian in the normal
5	a sample of trades over a period of dates, which he did,	5	sense and that sub-custodian was the sole source of
6	and check that the prices on the individual trade	6	information about securities and trades?
7	tickets were within a tolerance of the market on that	7	A. Again, but this is absolutely not the normal sense, it's
8	day. He did that and he came back to me and said he'd	8	a very specific arrangement.
9	done a check over several days, he'd found that, as	9	Q. Well, that's the point, Mr Fielding, you see? Because
10	I recall, all the trades were within the day range, and	10	you're in a situation here where you've got BLMIS, we
11	were spread within the day range, so in other words they	11	would say as sub-custodian, broker and investment
12	weren't all at the beginning, the high or the low. That	12	manager, where it's the sole source of information as to
13	seemed a good plausibility check.	13	the existence of securities, so wouldn't you accept that
14	Q. So this is concerned with checking the pricing, isn't	14	if you were entering into that sort of an arrangement,
15	it, of trades being reported by Madoff; correct?	15	an important thing to do would be to ascertain whether
16	A. That. I think I also asked him what the level of	16	it's possible to get an independent confirmation of
17	activity was to see if there was evidence of churning.	17	securities and trades?
18	Q. So are you referring to the analysis we saw yesterday	18	A. It was he was holding the assets. I I never
19	which Mr Fiorino did as part of the work in assessing	19	believed there was an issue, and to be honest, because
20	whether the new Primeo Luxembourg fund might be	20	of the nature of what we were doing, I wasn't bringing
21	compliant with the UCITS requirements?	21	them into our responsibility, I was leaving them where
22	A. No, I believe this was before. He may also have done	22	they were. This was the risk of the clients, and it's
23	that check again during that. I can't remember exactly	23	very clearly stated in the Offering Memorandums and
24	what was in that now.	24	prospectuses, and they understood it. So if I'm not
25	Q. But what you're doing, isn't it, is you're checking	25	bringing those assets in, I'm not sure I would have
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	Page 53		Page 55
1	to you say you're checking two things. Firstly,	1	given it much more thought.
2	whether the prices being reported by Madoff are	2	Q. Let's assume you're wrong about that and that what you
3	consistent with market prices; is that right?	3	were doing was bringing the assets in, to adopt
4	A. Checking that the individual trade prices are within	4	the phrase you use. Wouldn't you accept that, in those
5	the range of the day, and checking they're not all	5	circumstances, a very important thing to have considered
6	loaded to one part of the range.	6	is whether it would have been possible to get some form
7	Q. I see.	7	of independent confirmation of the securities and
8	But what checks, if any, did you do in relation to	8	trades?
9	verifying the existence of assets at BLMIS?	9	A. I think if we were bringing the assets in, I'm not sure
10	A. I didn't do any specific additional checks. I took	10	we would have appointed BLMIS.
11	comfort from the SEC regulation and the auditors both	11	Q. Really? Well, we've seen from the accounts, haven't we,
12	the audit of Madoff himself as a firm and the report	12	and from your emails, that you plainly did consider
13	that I think it is actually, on its cover, called an	13	you'd appointed BLMIS as your sub-custodian?
14	internal control report. I took comfort from E&Y as	14	A. No. We entered into the agreement. But you're talking
15	well. Those would be the principal sources I took	15	now about giving all the liability to HSSL for those
16	comfort from.	16	assets. I perhaps need to consider that, but I think
17	Q. Did you apply your mind at all to the issue which arose	17	it
18	from BLMIS being the sole source of information as to	18	Q. That's not
19	the existence of trades and holdings of securities?	19	A. We either might have had to do a lot of work, I
20	A. Not a great deal. I just didn't believe a firm of that	20	I potentially agree. Whether we would have got comfort,
21	scale, that regulated, that large, could possibly be	21	I don't know.
22	producing fiction. Unfortunately, they obviously were.	22	Q. Well, let's I'm just asking you, Mr Fielding
23	Q. So you didn't take any steps at all at that stage to	23	I know you say you didn't intend to appoint BLMIS as
24	investigate whether it might be possible to obtain some	24	sub-custodian in the normal sense, but I want you to
25	form of independent confirmation of trading activity or	25	assume that you're wrong about that and that
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1	his Lordship concludes that you did intend that. And my	1	subject?
2	question to you is that, in those circumstances,	2	MR SMITH: Broadly. It would be convenient if you would
3	wouldn't a very important thing to have considered be	3	like to break now, my Lord.
4	whether it would be possible to get independent	4	MR JUSTICE ANDREW JONES: Shall we take a break. We'll
5	confirmation of the information as to securities and	5	resume in 10 minutes.
6	trades.	6	(11.24 am)
7	A. At the risk of repeating, I don't agree with	7	(A short break)
8	the assumption. But working on the assumption we were	8	(11.37 am)
9	trying to bring in the assets and be liable for them,	9	MR JUSTICE ANDREW JONES: Yes.
10	I think we probably would have done more work. Whether	10	MR SMITH: Thank you, my Lord.
11	it would have been independent confirmation, or sending	11	Mr Fielding, I was about to ask you about the email
12	in getting a more detailed review done, exactly what	12	chain discovered to us yesterday, which I think you have
13	form I don't know. I do agree more work would would	13	a copy of in front of you, and I hope there's a copy in
14	probably have had to be done.	14	front of my Lord as well.
15	Q. What sort of detailed review do you think might have	15	MR JUSTICE ANDREW JONES: Yes, thank you.
16	been done?	16	MR SMITH: Mr Fielding, just looking at that first of all,
17	A. I mean, we really are twisting away from the fact that	17	on the second page, do you see that, on 22 August,
18	he's a broker-dealer. Maybe we would have asked for	18	there's an email from Mr Young, who we know is in
19	a more thorough internal control review, or something	19	Dublin, and you've obviously forwarded to him by this
20	like that.	20	stage a copy of the due diligence questionnaire you'd
21	Q. Done by a major accountancy firm?	21	obtained. Do you see that?
22	A. It could have gone towards what we later know as	22	A. I see that.
23	the KPMG review. It's one option. There could have	23	Q. Then above that there's a further email from Mr Brady,
24	been a range of things.	24	who I think was managing director of the Irish business,
25	Q. But anyway, I think you say you would have looked at	25	wasn't he?
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1	addressing in some way the issue which arose from	1	A. I think he was Managing Director of the Bank of Bermuda
2	the fact that BLMIS was the sole source of information	2	entities in Dublin.
3	as to the securities and trades; do you agree?	3	Q. What he was seeking, or what he thought ought to be
4	A. It's actually very difficult to address, because this is	4	obtained, was independent confirmation that the Thema
5	the situation. He's the managed account manager. He is	5	assets in custody are not commingled with Madoff's prime
6	the sole source. That's the structure that was set up.	6	broker assets; do you see?
7	We know that structure exists in the market. Others do	7	A. I see that.
8	it. So you you either have two choices: either you	8	Q. I think, if we just follow the page over, there's then
9	go in and you do more detailed review work, or you	9	a further email from Mr Young at the bottom of the page.
10	actually stand back and say, "Actually, we need to	10	Then, on 11th September, he emails you saying:
11	change this structure".	11	"When you get back, maybe you could look at this
12	Q. Do you remember, following your visit in July 2002, that	12	again. What is required is independent auditor's
13	certain parts of Bank of Bermuda were not happy with	13	confirmation that the assets are not commingled.
14	the due diligence which you had carried out in relation	14	Madoff's representation is not enough annual audited
15	to BLMIS?	15	accounts of Madoff."
16	A. I don't think I agree with that characterisation.	16	Now, it looks like, by this stage, you have been
17	I suspect it refers to Dublin. But I think they were	17	charged with responsibility for carrying out due
18	actually very happy that I'd gone to do due diligence,	18	diligence on Madoff generally, haven't you?
19	but they had some additional things they wanted.	19	A. I haven't been charged with it per se, nobody asked me.
20	Q. We've got copies last night of an email chain which took	20	I mean, it was part of my plan to continue doing due
21	place between you and other individuals in	21	diligence.
22	September 2002. I'm afraid, because we only got it last	22	${\bf Q}.\;{\bf But}\;{\bf certainly}\;{\bf the}\;{\bf Dublin}\;{\bf operation}\;{\bf in}\;{\bf relation}\;{\bf to}\;{\bf Thema}$
23	night, I'm going to have to hand up a paper copy; it has	23	are looking to you, aren't they, as the person who's
24	not yet been included in the trial bundle.	24	carrying out the due diligence in respect of BLMIS?
25	MR JUSTICE ANDREW JONES: Is this moving on to a new	25	A. Yes. They're aware I've done it, and they're asking me
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1 1 for some further information. were doing, an independent audit. 2 2 Q. Well, they're asking you to do more, aren't they? MR SMITH: It is, exactly, taking a view about 3 3 A. They're setting out what they require. Friehling & Horowitz, and one sees how it develops. 4 Q. What they're seeking, according to your email at the top 4 I don't want to jump ahead too far, but that's obviously 5 5 of the page, is some form of independent audit in where we get to. 6 relation to the Thema assets; do you agree? 6 So what's being discussed at this stage, I think you 7 7 A. That's correct. agree, is the possibility of some form of independent 8 8 audit in relation to the Thema assets; correct? Q. You say, in response to that question: 9 "BTDL." 9 A. It is correct, to get some sort of independent audit of 10 10 Which we know is Bermuda Trust (Dublin) Limited: segregation, and the question is specifically to ensure 11 "... should request this via the client or the 11 that BLMIS is not commingling his own assets with client 12 external auditor. The external auditor of the Lux funds 12 13 13 with Madoff did this as a matter of course." Q. It's not really a question of commingling, is it? An 14 14 Now, what was that a reference to? independent audit necessarily involves some sort of 15 15 A. So that's a reference to me saying: if you've got confirmation that the asset exists, doesn't it? 16 a fund, Thema, it's got an auditor -- I don't know which 16 A. That's not what it says in -- in this particular series 17 firm it was for Thema, exactly -- they should go and --17 of emails. I think Mr Brady's quite clear he's looking 18 18 and enquire about this, and I'm pointing out that in at -- and I think Mr Young also says, he uses 19 Luxembourg for the clients that invest with BLMIS, 19 the word "commingling". 20 20 the external auditor of those funds, which is Q. If we look at your response, you certainly understand 21 Ernst & Young, is -- is doing that, is getting that 21 this as an independent audit in relation to the Thema 22 confirmation from Madoff or Madoff's auditors. 22 assets, don't you, Mr Fielding? 23 23 Q. But what this is referring to, isn't it, is an A. I'm responding in what's in the emails below, which is 24 independent audit of the assets held at Madoff; correct? 24 independent confirmation that the assets are segregated. 25 25 A. Correct. Q. Well, I suggest any form of independent audit is going Page 61 Page 63 1 Q. Ernst & Young had not carried out, had they, an 1 to involve some form of check that the assets actually 2 independent audit of the assets held at Madoff? 2 exist, doesn't it? 3 A. I don't know what they had done, but I do know they had 3 A. Not necessarily at this stage, because that's not what 4 followed a procedure to go to the auditor of BLMIS, 4 Dublin are asking. 5 which they presumably considered to be independent. 5 Q. Are you seriously suggesting that what was being 6 6 contemplated here was simply instructing someone to go 7 MR JUSTICE ANDREW JONES: Mr Smith, we do know that at some 7 along to BLMIS, look at BLMIS' books, see that 8 8 stage they instructed Friehling & Horowitz, didn't they? the assets were held in two separate ledgers and then 9 MR SMITH: We do. 9 report back? Is that seriously what you're saying was 10 That's my very next question. We know what they'd 10 in your mind at this stage. 11 done, in fact, was essentially to rely on 11 A. I don't know whether it would just have been looking at 12 Friehling & Horowitz, don't we? 12 BLMIS' records, or even going further than that, but 13 A. I don't know if that was the only thing, but yes, they 13 looking for the -- the segregation through the chain, to 14 did rely on that. 14 the extent it was right to segregate through the chain 15 MR JUSTICE ANDREW JONES: I mean, in principle, that is an 15 the asset pools. 16 independent audit, isn't it? 16 Q. Exactly. So the auditor would be looking at the chain 17 MR SMITH: What we're going to come to, my Lord, is just 17 of title, wouldn't he, to confirm the assets existed, 18 show the view that was reached within GFS in response to 18 and that there was appropriate segregation at each part 19 this email chain that that wasn't sufficient and what 19 of the chain? 20 20 they needed to do was send in the .bank's own auditors. A. I don't know that they would necessarily go and 21 21 That's what this is leading up to. double-check the assets themselves. They could do that, 22 MR JUSTICE ANDREW JONES: Right. But that's taking a view 22 but actually they may approach it from a control point 23 about Friehling & Horowitz. 23 of view and say -- let's say they went to 24 MR SMITH: It is, exactly 24 Friehling & Horowitz or any independent party to MR JUSTICE ANDREW JONES: But in principle that's what they 25 say: how is Madoff structured, does he keep things Page 62 Page 64

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1	separate, what's his procedure?	1	"Would it be possible to get independent
2	Q. But the whole concept of an audit, Mr Fielding, involves	2	verification that the assets of"
3	some sort of check, I would suggest, against a third	3	That must be "Thema":
4 5	party or independent source of information, doesn't it? A. It's getting an independent party to verify how BLMIS is	4 5	" are segregated from our assets held by Madoff? This [would] ideally [come] from the [something] auditor
6	holding things.	6	or be independently requested on [the] behalf of
7	Q. But if you instructed a firm of auditors to go into	7	Bank of Bermuda. While we have the Dec 01 report from
8	BLMIS to carry out an audit of the assets, that auditor	8	Friehling & Horowitz, it is not specific on this point."
9	is not merely going to look at BLMIS' ledgers, is he,	9	So he was of the view that the Friehling & Horowitz
10	he's going to carry out some form of check against	10	report or certificate, whichever we call it, is not
11	a third party source of information?	11	sufficient for their purposes, is it?
12	A. But this isn't a request for an independent audit of	12	A. That's what he's saying. He's saying it's not specific
13	the assets, it's a request it's in the three or four	13	on the point, he he doesn't actually say he doesn't
14	emails below, several times, that they are not	14	attach any value to to the report.
15	commingled.	15	Q. No, my question was he doesn't regard it as sufficient,
16	Q. I suggest, Mr Fielding, that any request made to an	16	does he?
17	independent auditor to check that assets are not	17	A. Sufficient for this particular point he's asking,
18	commingled will necessarily involve that auditor	18	that that there is segregation of the assets held
19	checking the existence of the assets against a third	19	that Madoff segregates the assets.
20	party source. Do you agree?	20	Q. Then you see he refers below that to the audited
21	A. No, I don't agree.	21	financial statements, and one of the questions he raises
22	Q. We'll come and see how it's then developed and where you	22	there is (b):
23	actually end up.	23	"Do we know of the standing of the audit firm,
24	Can we go to {N/606/2}, tab 103 of the core bundle,	24	Friehling & Horowitz?"
25	we get an email of 20 September 2002, from Mr Fielding,	25	Do you see that?
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	Page 65		Page 67
1	from you, to Mr Young; do you see that?	1	A. I see that.
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1 should be paid for by the fund." 1 "You are right that [someone] appointed BoB who in 2 So you're clearly envisaging some form of further 2 turn appointed Madoff so ..." 3 3 process being carried out, aren't you? And I suggest that's probably a reference to 4 A. I'm suggesting in response to the questions Mr Young has 4 the auditors: 5 5 raised that this is a way for him to address those "... have not gone directly to Madoff for any 6 6 confirmations. I don't think that ..." questions. 7 7 Q. Then if we look down, just looking at the second points, And again I suggest that's the auditors: 8 which are the points that Mr Young's made about the 8 "... should seek that directly. BoB should obtain 9 financial statements, in (b), I think there was 9 it, preferably GFS ... and as part of our annual reviews 10 the statement you may have been referring to earlier; do 10 we should receive any additional confirmations you 11 11 you see that? consider necessary." 12 A. I -- I see the statement, I see it's here. It may also 12 So what he's suggesting is that the auditors 13 be elsewhere. 13 shouldn't go directly to BLMIS, but rather BoB should 14 O. Well, this is the only place, I think, I've been able to 14 provide the confirmation to the auditors, isn't he? 15 find it, and I suggest actually you've, in making that 15 A. I think what he's actually saying is that if there's 16 statement, misremembered or mischaracterised what you 16 going to be some sort of work done to verify 17 were told by Mr Lockwood, and actually what he told you 17 the segregation, that rather than going the Fund auditor 18 related to BLMIS and not Friehling & Horowitz; do you 18 route, which would probably then be to 19 agree? 19 Friehling & Horowitz, it would be better if 20 A. No, I don't agree. 20 Bank of Bermuda instructed somebody, an audit form, 21 Q. If we go on, {N/611/1}, there's an email from 21 presumably, who would then go to, presumably, 22 22 David Smith to you a couple of days later: Friehling & Horowitz. 23 "We need to be careful in how we respond to Tom." 23 Q. So he's envisaging that Bank of Bermuda would obtain 24 Now, what did he mean by that, as you understood it? 24 the confirmation here and then in turn provide it to 25 A. It could have meant a few things. I think he's probably 25 the fund's auditors, isn't he? Page 69 Page 71 1 1 thinking people just need to think all of this through A. I think for the additional work, I think he's already 2 and understand the structure and what we're dealing 2 pointing out that there are some -- confirmations issue 3 with. He could, because he was very much on the client 3 in relation to Thema, I would say this relates to. 4 side, have also been thinking forward a bit, that if Q. Just following the emails through, {N/615/2}, we then 4 5 5 see Mr Brian Wilkinson sends an email which he -- at the this leads to some situation where there's a lot of 6 6 people actually bothering BLMIS, that this may -- we bottom of the page, you see he refers to the attached 7 just have to think about the client relationship, 7 email from yourself of 20 September 2002: 8 8 because it's their relationship and they're very "I feel that there is still one vital piece of 9 9 sensitive about it. the 'jigsaw' missing, and that is independent 10 10 Q. What he then goes on to say in the next paragraph is: confirmation that all securities held with Madoff are 11 11 "[Someone] are auditor ..." held in segregated accounts. "Nigel's view is that we should obtain this 12 And that must be of Thema, I think: 12 13 "... and they rely on confirmation from the Bank on 13 confirmation from the fund auditors. However, I tend to 14 14 assets under custody." disagree, and feel that Nigel on behalf of GFS should 15 So, in your recollection, was Bank of Bermuda 15 seek to obtain this confirmation for GFS independent to 16 16 providing custody confirmations to Thema's auditors in whatever verification processes the fund auditors have 17 17 undertaken of the assets of the respective funds ..." relation to assets being managed by BLMIS for Thema? 18 A. I've no idea. I was not in the Dublin office and not 18 So what he was saying was it was not sufficient to 19 at all close to the Thema operation. 19 rely on the Fund's auditors, wasn't he? 20 20 Q. But you're obviously discussing this with Mr Smith, A. He was saying he didn't feel it was the correct 21 21 aren't you, at this time? procedure to ask the Fund auditors to independent -- go 22 22 A. Well, Mr Smith's stating a point, I've no reason to through the independent route to verify that Madoff was 23 23 segregating the assets. He felt that the bank should disbelieve him. 24 24 Q. If you go on and look at the rest of that paragraph, he initiate that process. 25 25 Q. He felt that that should be done actually by GFS, didn't says: Page 70 Page 72

1	he, independent to whatever processes the Fund's	1	the clients have got these multiple roles being carried
2	auditors were doing?	2	out by BLMIS which could could carry some risk.
3	A. Yes, that's correct.	3	Q. That was the warning sign, wasn't it, the concentration
4	Q. Then if you go up the page you see David Smith's	4	of roles in one entity?
5	response to Mr Wilkinson, and all of this is copied into	.5	A. I think yes, that's one I seem to remember coming up
6	the GFS Board as well, so he was also of the view,	6	particularly.
7	wasn't he, GFS shouldn't be relying on the Fund's	7	Q. Did it concern you to know that the Head of GFS was very
8	auditors to confirm Madoff was holding assets in	8	worried about BLMIS at this time?
9	segregated accounts?	9	A. It concerned me no because in one sense I'd done
10	A. That's what he says.	10	the due diligence, so I felt pretty confident and I'd
11	Q. And that became, didn't it, the general view within GFS	11	done additional due diligence, I had been close to E&Y
12	at this stage?	12	on this, but as he's a very senior experienced
13	A. Wasn't my view, but the board took a different decision.	13	individual I wouldn't ignore it, I would say, "Okay,
14	I wasn't on the board at the time.	14	somebody wants something more to be done, let's see what
15	Q. And he actually thinks this ought to be done as part of	15	in the end they want to do".
16	the review of Madoff's custodial capability, which he	16	Q. Then you would have seen Mr David Smith's response to
17	seemed to think you were doing when you conducted your	17	that:
18	due diligence; do you see that?	18	"The external audit firm is not Madoff's
19	A. I see that.	19	brother-in-law which is a rumour introduced by
20	Q. Did you think you were doing a review of Madoff's	20	[someone] after his failed attempt to secure
21	custodial capability at the time?	21	the business. But they are a small firm and it is an
22	A. I was doing a sub-custodian review. I mean, I was	22	excellent idea to engage KPMG."
23	reviewing whether he looked like a fit and proper	23	So the proposal at this stage was to send KPMG in,
24	the organisation BLMIS looked fit and proper to hold	24	wasn'tit?
25	assets.	25	A. It was an idea that David put out. It seems I wasn't
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1	Q. Then if we go over the page to page 1, please $\{N/615/1\}$,	1	a party to this, but it seems they must have had some
2	there's an email from Mr Wilkinson at the bottom of	2	discussions, or other email traffic.
3	the page, and then just above that you see an email from	3	Q. And he seems to be envisaging at this stage, doesn't he,
4	Mr Paul Smith, the Head of GFS:	4	that you're the person who is going to arrange for that
5	"I am very worried about Madoff and I think we	5	review to be done?
6	should CEO seek independent confirmation. I would be	6	A. He's suggesting that I could organise it.
7	prepared for GFS to pay. Its too big for us to ignore	7	Q. And he's saying if it's agreed he will brief you
8	the warning signs."	8	about it; do you see?
9	Did you have any discussion about that with	9	A. I see that.
10	Paul Smith at the time?	10	Q. Then Mr May forwards it to you, as you observed at
11	A. I don't recall a discussion about it with him.	11	the top of the page, with four question marks. Do you
12	Q. Was there any discussion you had with the members of	12	know what that denoted?
13	the GFS Board about the fact that they considered there	13	A. I think it's Mr May going: well, hold on a minute, I've
14	were warning signs in relation to Madoff?	14	seen some traffic here. I guess he was probably on
15	A. I don't recall discussions. I recall there was a lot of	15	the Dublin Risk Management Committee email address
16	traffic by email.	16	I see Nigel's name, we sat we work very closely
17	Q. Do you recall seeing these emails at the time then?	17	together, I see it looks like he's going to be asked to
18	A. Michael May forwarded it to me, so I I do recall	18	do something, let's see if he knows about this.
19 20	them.	19 20	Q. If we go on, {N/616/2}, tab 106 of core bundle 2, you
21	Q. So when you saw this from Mr May sent it to you on	21	see at the top of the page Mr Wilkinson emails you on
22	30 September, what did you think Mr Smith was referring to when he was speaking of the warning signs.	22	30 September: "Nigel,
23	A. I I don't know specifically at that time, and I don't	23	"Please see below, can you please call me when you
24	know whether he says it later, but some other people say	24	get a. I think Paul is absolutely correct."
25	it later. You know, we've got these multiple roles,	25	Do you see that?
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1	A. I see that.	1	when I went to sort of learn when I went to see him,
2	Q. He's referring to Mr Smith's email we've just been	2	that actually the pronunciation should be "made off".
3	talking about	3	Q. But there is, I would suggest, Mr Fielding, at least at
4	A. I think he could be referring to this whole chain of	4	the back of people's minds, the possibility that there
5	conversation as well as that.	5	is a risk to the assets here, isn't there?
6	Q. Well, he's referring to what Mr Smith said, isn't he,	6	A. Not at the back of my mind.
7	because he says, "I think Paul is absolutely correct"?	7	Q. Really?
8	A. Yes, fair enough.	8	Well, let's
9	Q. Then if we go to {N/617/1}, I think you then in fact	9 10	A. Other than the concern I had about him unduly enriching
10	have a call with Mr Wilkinson on 30 September, and this	11	himself, which I felt I had done an adequate check on.
11	is presumably a call further to the email we've just	12	MR JUSTICE ANDREW JONES: How do you distinguish between
12 13	been looking at. And we see on the first page you	13	issues surrounding segregation and issues surrounding
14	exchange greetings. If we go over the page {N/617/2}, it you say:	14	existence of the assets? Isn't segregation and existence interrelated? Don't you have to do
15	" I just had a chat with Chris about this too,	15	completeness testing to satisfy yourself about
16	because he (?) it to me earlier in the day and he's	16	segregation.
17	kind of a bit concerned in the sense that he doesn't	17	A. It depends how far you want to go. You can just view it
18	understand quite what the concern is"	18	from a process, which is really what I had done at that
19	Then at the bottom of the page, you say, do you see:	19	point in my due diligence, of, are the answers to
20	"In fact Primeo are trying to open another account	20	the questions about segregation do they make sense
21	with him. Let's see where they get to with that.	21	about how Madoff is doing the process, BLMIS is doing
22	"So I I, you know, everybody has some concerns	22	the process? You can go further and say, "Let's
23	about Madoff, or 'made off' as he likes to call himself,	23	actually go and do an audit of all the assets", and in
24	which I think makes it even worse, 'made off with	24	that we will also see that they're segregated.
25	the money'."	25	MR JUSTICE ANDREW JONES: Right, but it seemed to me that it
20	the money.	10	introduction for not inguly out to decide to the time to
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1	What would be concerns which everybody had about	1	would be difficult to do a systems-based audit when you
2	Madoff at this time?	2	don't have three separate entities within the Madoff
3	A. I find that question very broad. "Everybody" being?	3	group. It's all done through one company and there's
4	I'm a bit it could be narrowed.	4	only one account.
5	Q. Well, I think this is your statement in the telephone	5	A. It is all done through one company. I actually
6	conversation.	6	I don't know behind the scenes how they were structured.
7	A. Okay, so	7	The broker-dealer arm was physically separate, and they
8	Q. So what do you think you're likely to have been	8	may have had their own systems, which I I didn't look
9	referring to there?	9	at or see any I don't know whether the statements we
10	A. "Everybody" I'm referring to thank you for	10	see come from that, or come from the investment
11	the clarification would be the those members of	11	management operation, which was on another floor. So
12	the GFS Board that I have in the interaction, which	12	there was some physical separation.
13	looks primarily like Paul, David and maybe Brian.	13	MR SMITH: Well, I do suggest, Mr Fielding, that an
14	Q. What do you think the concerns were then?	14	independent audit of segregation of assets would
15	A. I think the concern is about actually, the initial	15	necessarily involve an audit of the existence of
16	concern, it starts off with this segregation. I think	16	the assets as well, wouldn't it?
17	maybe some people are applying a little more to it and	17	A. It could do, as my Lord has said. But you could do an
18	saying, "Actually, it's it's maybe these multiple	18	audit of the asset existence without necessarily looking
19	roles, maybe there's more to this".	19	at segregation, but you would see segregation in
20	Q. And I know you're jocular about it in this telephone	20	the process.
21	conversation, but clearly, at the back of your mind,	21	Q. But in this context, and in respect of what was in mind
22	there is a possibility of a risk to the assets at	22	here, it was clearly contemplated, wasn't it, that there
23	Madoff, isn't there?	23	would be an independent audit which would include
24	A. I didn't think that at the time. I actually used to	24	confirming the assets held by BLMIS?
25	pronounce him as "mad off", and then I was told, I think	25	A. I think it might be relevant to go a bit further,
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1 because I think this phone call is really Brian 1 A. It was my view that we had a sub-custodian agreement. 2 2 setting out his thoughts on what needs to be done. O. Well, let's move on. 3 Q. Absolutely. And if we -- well, let's go on in the phone 3 Then if we look towards the middle of the page, 4 call. Turn the pages, please, page 3 {N/617/3}. 4 Mr Wilkinson says: 5 5 There's then reference to what you were doing in "Would it be possible to get Ernst & Young since 6 6 they've already done it for your funds, rather than Luxembourg, do you see, and you say: 7 7 "... we actually have an audit confirmation from KPMG, I suggest to E&Y to go in and they've already done 8 8 it and they just give us a clearance for all Ernst & Young.' 9 Which I think you knew is what they'd based on what 9 the accounts that we have there?" 10 10 they had internally received from Friehling & Horowitz, And then there's some discussion about that, but 11 11 then at the bottom of the page, you say: 12 A. I believe they had largely based it on that. I don't 12 "But if we want more independence and we want to 13 13 know what other checks they might have done. send our own auditor in regardless, I suppose what I'm 14 14 O. And you say: trying to think, and I don't know off of top of my head 15 15 "So we're quite happy with that ..." what the answer is, do we ever send our external auditor 16 Then he refers to the position in Dublin where he 16 in to our other sub-custodian to verify positions?" 17 thinks it would only go to the custodian or the 17 Do you see that? 18 18 sub-custodian. A. I see that. 19 Then there's some reference to difference in 19 Q. I'm sorry to keep repeating the point, Mr Fielding, but 20 20 standards, "Laughing": you did clearly understand BLMIS was a sub-custodian, 21 "BW: I could be wrong Nigel, and maybe I'll 21 22 22 A. Here I'm talking about other sub-custodians. investigate that, but I'm just covering all of our 23 23 backsides to make sure we've done everything possible if Q. "... to our other sub-custodian ..." 24 this thing ever went up, you know. 24 So you regard BLMIS as a sub-custodian, don't you? 25 25 "NF: Yeah, and I guess my ... I'm not saying we A. I think I've explained on what basis I felt we had Page 81 Page 83 1 1 shouldn't do it, I guess I wanted the board to say we entered into the agreement. 2 wanted to do it, having heard David rant and rave about 2 Q. Then, if we look down the page, you say: 3 upsetting the guy before ..." 3 "You know our agreements of normal sub-custody 4 I suggest that David is David Smith, isn't it? agreements, they say that Madoff must maintain records, 4 5 5 A. Logically, it would be David Smith. he's liable if he loses anything, but they ... none of 6 6 Q. Then it continues, there's then some further discussion. them, as far as I can see, say that we have the right to 7 If we go over to the next page, page 4 {N/617/4}, 7 inspect his books and records with an external audit 8 8 you discuss at the top of the page some of the responses firm." 9 9 you've got from Madoff, and Tom Young has raised Do you see that? And you were making the point 10 10 the question: there, weren't you, that the terms of the 11 11 "... his financial statements are not very detailed, Sub-Custody Agreements did not give Bank of Bermuda 12 the right to send in an external audit firm; correct? 12 you know, what really is his source of revenue, etc ... 13 which I think is important to us, cause we're really 13 A. That's correct. And interestingly, I say BLMIS is 14 14 relying on the financial strength of Madoff, as well as liable for everything. 15 much as anything ... 15 Q. Yes, exactly. So far as HSSL's concerned, that's 16 16 "NF: ... as a sub-custodian." exactly right, and that's because that arises under the 17 17 So you knew he was a sub-custodian, didn't you? terms of the Sub-Custody Agreement, doesn't it? 18 A. As I've said before, I knew the agreement was there, 18 A. That's not what I say here. I talk about "normal 19 I have a different view of the effect. 19 sub-custody" arrangements. He's liable to the client. 20 20 Q. You're very easily using in conversation with Q. Well, no, Mr Fielding, he's liable to HSSL under 21 21 Mr Wilkinson the fact -- the term that BLMIS is the terms of the Sub-Custody Agreement, isn't he? 22 22 a sub-custodian, aren't you? A. I don't read it that way. It's -- it's the same point 23 again. I don't agree with that. 23 A. I use the term there, yes. 24 24 Q. That's because that was your view, wasn't it, at this Q. Well, I suggest that's exactly what you're referring to, 25 time? 25 Mr Fielding. Page 82 Page 84

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1 1 ordinarily do with an agent." A. I disagree. 2 2 Q. We'll go on. Then you say: Correct? 3 "Paul's made a decision, yeah, and I think if we're 3 A. That's correct. 4 going to send someone, I would personally rather send 4 Q. And if we look, just bring it up quickly, in your 5 5 them as a compliance request." witness statement in the Thema proceedings, 6 And that reflects the fact that Mr Paul Smith has 6 paragraph 46, at {Y/1/11}, do you see you say in 7 7 already decided, hasn't he, that Bank of Bermuda's the first sentence of paragraph 46 that your 8 external auditor is going to go in and do the work? 8 understanding was that the GFS Board decision was to ask 9 A. I don't know the exact chronology, but it's -- it's 9 KPMG to undertake an independent audit confirmation of 10 10 the assets held by BLMIS for the Bank of Bermuda clear the GFS Board or Paul makes the decision that we 11 11 need to do something more. clients? 12 Q. And if we go back to {N/616/1}, 106 of the core 12 A. I see that. It may well refer to the email we just 13 13 bundle -looked at. 14 14 A. I would say, I haven't seen clarity of whether O. That was your understanding at that time, wasn't it? 15 Mr Wilcockson -- if Mr Wilkinson defined what he felt 15 A. That was my understanding. 16 needed to be done 16 Q. Now, if we go back to $\{N/616/1\}$, tab 106 of the core 17 Q. Well, we get that from your email which you send to him 17 bundle, you see Mr Smith, Paul Smith, then emails you, 18 18 and others immediately following that conversation, copying in various others, in response to your email: 19 which is at {N/616/1}, tab 106 of core bundle 1. If you 19 "I don't feel we should mislead Madoff. We have 20 20 see at the bottom of the page, you email Mr Wilkinson a problem with him. He is the manager, broker and 21 and the GFS Board. You say: 21 custodian to his accounts. In today's world this is 22 22 a red flag. We need to address it. Lets tell him so "I spoke with Brian ..." 23 23 Which is obviously a reference to the conversation and get on with it with his support. If we continue 24 we've just been looking at. And then there are two 24 pussy foot around him we will get nowhere." 25 25 names which have been incorrectly redacted again, So Paul Smith's view was this concentration of Page 85 Page 87 1 because that's obviously a reference to other people 1 function was a red flag, wasn't it? 2 within Bank of Bermuda: 2 A. That's what he says. 3 "I understand the board decision is to ask for 3 Q. Did that concern you when you read it, that this was 4 the bank's external auditor to undertake independent 4 the view of the head of GFS? 5 5 audit confirmation of the assets held by Madoff for our A. It would be important to me. 6 6 clients in Bermuda, Dublin and Luxembourg even though Q. You then say in response to that at the top of the page: 7 this is not something we would ordinarily do with an 7 "I believe Madoff understands our position, it was 8 8 agent." covered in the due diligence meeting and process - which 9 9 Do you see that? was a massive upgrade from anything done previously on 10 10 A. I see that. this relationship. You are asking for more which is 11 11 Q. So the position that had been reached is the GFS Board fair enough." 12 had decided that KPMG should go in and undertake 12 Now it's right, isn't it, that this independent 13 independent audit confirmation of the assets; correct? 13 audit confirmation of the assets held by BLMIS was never 14 14 A. They've decided to send an independent auditor in. in fact obtained, was it? 15 I think I say at the end I presume it would be KPMG. 15 A. At this time, I -- that's what -- having gone through 16 16 Q. Well, who was the bank's external auditor at this time? the material, I've come to that conclusion, that it was 17 A. Yes, actually, it was KPMG, that's correct. 17 never done. 18 Q. So when it says "bank's external auditor", the decision 18 Q. Right. 19 of the GFS Board is they are going to send in KPMG, and 19 A. At that time. 20 20 what KPMG is going to do is to undertake independent Q. No, it was never done, was it, Mr Fielding? There was 21 21 audit confirmation of the assets held by BLMIS, isn't never an independent audit confirmation of the assets 22 22 held by BLMIS, was there? 23 A. Held by BLMIS for the clients, yes. 23 A. By the bank's external audit firm. 24 24 Q. It then goes on to say: O. Yes. "... even though this is not something we would 25 A. There was confirmation the clients had got it, E&Y had

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