UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendants. This Document Relates To: 09-cv-118 (VM)	Master File No. 09-cv-118 (VM) (FM)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF FINAL APPROVAL OF THE PROPOSED SETTLEMENT AND PLAN OF ALLOCATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

The Representative Plaintiffs,[1] on behalf of themselves and the Settlement Class, respectfully move for final approval of the proposed Settlement and Plan of Allocation. Plaintiffs also seek final certification of the Settlement Class.

I. INTRODUCTION

The proposed Settlement provides for the Settling Defendants, funded by the FG Individual Defendants,[2] to pay a total of $80,250,000, as well as other consideration, in exchange for a release of all claims asserted in this Action against the FG Defendants. The Settlement provides a substantial, immediate monetary benefit to the Settlement Class of $50,250,000 in cash (the "Settlement Fund"), and an additional $30,000,000 (the "Escrow Fund") that will be distributed in cash if not used to resolve other claims. The Settlement resolves claims with one set of Defendants, while simplifying and focusing the case that remains against several other defendants with greater ability to pay. The Settlement was reached after three and one-half years of hard-fought litigation, including comprehensive legal briefing which defeated in large part motions to dismiss as well as extensive investigation and discovery efforts by the Representative Plaintiffs. The Representative Plaintiffs' factual investigation involved the review of approximately nine million pages of documents, and depositions and interviews of dozens of witnesses.

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[1] The "Representative Plaintiffs" are Pacific West Health Medical Center Employees Retirement Trust, Harel Insurance Company Ltd., Martin and Shirley Bach Family Trust, Natalia Hatgis, Securities & Investment Company Bahrain, Dawson Bypass Trust, and St. Stephen's School. Unless otherwise indicated, capitalized terms are defined in the Stipulation of Settlement dated as of November 6, 2012 (as amended).

[2] The "Settling Defendants" are Fairfield Greenwich Limited ("FGL") and Fairfield Greenwich (Bermuda) Ltd. ("FGBL"). The "FG Defendants" are the Settling Defendants as well as Fairfield Greenwich Group, Fairfield Greenwich Advisors LLC, Fairfield Risk Services Ltd., Fairfield Heathcliff Capital LLC, and Fairfield Greenwich (UK) Limited (collectively, the "FG Entity Defendants"); and Walter M. Noel, Jr., Jeffrey H. Tucker, Andrés Piedrahita, Lourdes Barreneche, Robert Blum, Cornelis Boele, Gregory Bowes, Vianney d'Hendecourt, Yanko Della Schiava, Harold Greisman, Jacqueline Harary, David Horn, Richard Landsberger, Daniel E. Lipton, Julia Luongo, Mark McKeefry, Charles Murphy, Corina Noel Piedrahita, Maria Teresa Pulido Mendoza, Santiago Reyes, Andrew Smith, Philip Toub, and Amit Vijayvergiya (collectively, the "FG Individual Defendants"). Defendants Noel, Tucker, and Piedrahita are referred herein collectively as the "Founders."

The Settlement resulted from intense, arm's-length negotiations. As discussed in detail herein and in the accompanying Joint Declaration of Lead Counsel ("Jt. Decl."), the proposed Settlement is fair, reasonable and adequate to the Settlement Class.[3] Plaintiffs and class members faced significant hurdles to recovering more than the Settlement amount, including the ability to collect a full judgment from the FG Defendants' remaining and attachable assets.

It cannot be gainsaid that from the inception of FGG through Bernard Madoff's arrest in December 2008, the twenty-three Individual FG Defendants received total gross, pre-tax compensation of approximately $500 million attributable to the Funds, and that investors in the Funds incurred net losses estimated at over $1 billion. However, the Individual FG Defendants paid taxes on their compensation, and much of that money was spent both prior to Madoff's arrest and during the past four years, and that such spending – and large legal fees – would continue, absent a settlement.

Moreover, FG's Founders used tens of millions of dollars to fund trusts (purportedly for legitimate estate planning reasons) years prior to Madoff's arrest. A major portion of the Settlement is being funded from one of those trusts. The trustees have agreed to do for the benefit of one of the Founders, but would not be willing use funds from the trusts to pay any judgment.

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[3] The proposed Settlement Class consists of:

> All Beneficial Owners of shares or limited partnership interests in the Funds as of December 10, 2008 (whether as holders of record or traceable to a shareholder or limited partner account of record), who suffered a Net Loss of principal invested in Fairfield Sentry Limited, Fairfield Sigma Limited, Fairfield Lambda Limited, Greenwich Sentry L.P. or Greenwich Sentry Partners, L.P.

Stipulation, ¶ 1(ss). Excluded from the Settlement Class are (i) those individuals who timely and validly opt out of the Settlement; (ii) Fairfield Sigma Limited, (iii) Fairfield Lambda Limited, (iv) any Settlement Class Member who has been dismissed from this Action with prejudice; and (v) the FG Defendants and any entity in which the FG Defendants have a controlling interest, and the officers, directors, affiliates, legal representatives, immediate family members, heirs, successors, subsidiaries and/or assigns of any such individual or entity in their capacity as such. *Id*. Fairfield Sigma Limited and Fairfield Lambda Limited are excluded to avoid potential double recovery because their shareholders are included as members of the Settlement Class.

Lead Counsel, based on their review of the FG Individual Defendants' certified financial information, determined that the Founders contributed a substantial portion of their assets that would be subject to execution if Plaintiffs obtained a judgment today and, even more so, in the future at a time when a judgment could be enforced. In addition, by focusing the case on the Defendants whose businesses are still operating – the PwC defendants, the Citco defendants and GlobeOp – Lead Counsel believe the Class will maximize its overall recovery on its substantial losses.

The FG Individual Defendants are also faced with other claims, primarily by Irving Picard (the "Trustee"), Trustee of the bankruptcy estate of Bernard L. Madoff Investment Securities ("BLMIS"), and could not be expected to contribute 100% of their available assets to settlement of this action alone.

Lead Counsel strongly believe that under these circumstances, the proposed Settlement is fair, reasonable, and adequate, and warrants approval by the Court.

II. STATEMENT OF FACTS

The Joint Declaration of Lead Counsel in Support of Final Approval of the Proposed Partial Settlement and Fee and Expense Requests, which accompanies this Memorandum, details the factual and procedural background of this case and the events that led to the Settlement. These facts are summarized here.

This Action arises from the largest Ponzi scheme in history, operated by Bernard Madoff. The FG Defendants comprised the sponsors, managers, and advisors to several feeder funds to BLMIS. Plaintiffs' Second Consolidated Amended Complaint ("SCAC"), filed September 29, 2009 (ECF No. 273), asserts claims against the FG Defendants for common law fraud (Counts 1 and 2), federal securities fraud and control person liability (Counts 3 and 4), negligent misrepresentation (Counts 5 and 6), gross negligence (Count 7), breach of fiduciary duty (Count

8), third-party beneficiary breach of contract (Count 9), constructive trust (Count 10), mutual mistake (Count 11), and unjust enrichment (Count 33). Those claims against the FG Defendants were sustained in significant part by this Court in decisions of July 29, 2010, *Anwar v. Fairfield Greenwich Ltd*. ("*Anwar I*"), 728 F. Supp. 2d 354; and August 18, 2010, *Anwar v. Fairfield Greenwich Ltd*. ("*Anwar II*"), 728 F. Supp. 2d 372. Representative Plaintiffs entered into the Settlement after extensive factual investigation and discovery. Plaintiffs' investigative efforts are detailed in the Joint Declaration and include, *inter alia*, reviewing and analyzing the many complex legal issues related to the merits, class certification and procedural issues in the case. Those legal issues were raised and addressed by the motions to dismiss, motion for class certification and numerous settlement, discovery and procedural disputes that have arisen between the parties. *E.g.*, Jt. Decl. ¶¶ 11, 53, 59, and 69.

The Settlement is the result of arm's-length negotiations, which were lengthy and laborious. Those negotiations began in 2009, and continued more intensively from May 21, 2012 through August 3, 2012. The 2012 negotiations occurred contemporaneously with the parties' ongoing participation in merits discovery in the Action. Jt. Decl. ¶¶ 89-92. Representative Plaintiffs and the Settling Defendants entered into a Memorandum of Understanding on August 3, 2012 (the "MOU") memorializing their agreement in principle to resolve the Action. Jt. Decl. ¶¶ 93-94. That Settlement was formalized in the Stipulation of Settlement dated November 6, 2012.

The Settlement provides a substantial, up-front monetary benefit to the Settlement Class of $50,250,000 in cash (the "Settlement Fund"). These funds, less administration expenses, attorneys' fees and expenses as may be awarded by the Court, will be distributed to Settlement Class Members after the claims process is concluded. In addition to this guaranteed recovery of $50,250,000, the Settling Defendants, as funded by the FG Defendants, also will transfer

$30,000,000, in cash or pledges of collateral into a separate account (the "Escrow Fund"), which will be distributed to the Settlement Class in cash to the extent the Escrow Fund is not used to pay certain other claims or judgments against the FG Defendants. *See* Stipulation ¶¶ 5, 18 and 30. In the event that the Escrow Fund is used to settle claims against the Settling Defendants that have been brought by the BLMIS Trustee, the Settling Defendants will be required to make an additional payment to the Settlement Fund of up to $5,000,000, measured by 50% of the amount, if any, by which such a settlement exceeds $50,125,000. *See* Stipulation ¶ 7.[4]

As additional consideration, the Settling Defendants have agreed to waive (i) indemnification claims they hold against the Funds for the amounts paid under this Settlement; and (ii) $20,000,000 of indemnification claims they hold against the Funds for legal fees and expenses incurred in defending the Action. *See* Stipulation, ¶ 6.

As part of the settlement process, Plaintiffs' Lead Counsel obtained certified written disclosures of the FG Individual Defendants' assets and liabilities.[5] *See* Jt. Decl., ¶¶ 95-97 .

The Stipulation provides for the order approving the settlement to contain typical provisions barring the remaining defendants in the Action, including without limitation various PricewaterhouseCoopers, Citco and GlobeOp entities (the "Non-Dismissed Defendants")[6] from asserting claims against the FG Defendants for contribution and indemnification and providing for reduction of any judgment that may be entered against the Non-Dismissed Defendants to account for Plaintiffs' recovery under the instant Settlement. *See* Stipulation, ¶¶ 26-27.

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[4] Because a settlement of $50,125,000 with the Trustee would exhaust the Escrow Fund, the Settlement Fund ultimately may be enhanced either by the net amount of the Escrow Fund or the supplemental payment up to $5 million (or neither), but not both.

[5] The Stipulation provides that if, at any time up to the earlier of the Effective Date or July 1, 2013 , Plaintiffs determine that any FG Individual Defendant's "net worth was materially greater than disclosed to Plaintiffs' Lead Counsel" then the Representative Plaintiffs "may, at their sole and absolute discretion, revoke the releases provided" to such defendant. Stipulation, ¶ 12.

[6] The PwC Defendants were auditors of the Funds. The Citco Defendants were the administrator and custodian of the Funds and Funds' assets at various times. GlobeOp was the administrator of the domestic funds (Greenwich Sentry, L.P. and Greenwich Sentry Partners, L.P.). Jt. Decl. ¶ 34, fn. 8.

The Stipulation is subject to additional terms, including terms contained in a Supplemental Agreement dated as of November 6, 2012, which provides that the Settling Defendants may terminate the Settlement if class members representing a Net Loss of principal in excess of a certain amount seek exclusion from the Settlement Class. *See* Stipulation, ¶ 47. In the event the Settling Defendants elect to terminate the Settlement, but the Net Loss of opt-outs does not exceed a separate threshold specified in the Supplemental Agreement, the Settling Defendants shall incur a break-up fee in the amount of $1,000,000 which shall remain in the Settlement Fund. *Id.*

Given the legal, factual and collection uncertainties, and the time required to fully litigate the issues through appeal, the Representative Plaintiffs determined that the substantial and certain benefit of the Settlement Consideration, including the $50.25 million Settlement Fund and the $30 million Escrow Fund, significantly outweighed the risks and uncertain rewards of continuing to litigate the Action. Jt. Decl. ¶¶ 7-18 and 127-31.

The Settlement was preliminarily approved by this Court and notice was disseminated to Settlement Class Members pursuant to an Order dated November 30, 2012. ECF Nos. 1008, and 1012.

III. ARGUMENT

A. The Proposed Partial Settlement Is Fair, Reasonable, and Adequate and Should be Approved

Under Rule 23(e) of the Federal Rules of Civil Procedure, a class action settlement must be approved by a court. Courts in the Second Circuit realize the "strong judicial policy in favor of settlements, particularly in the class action context." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (internal quotation marks and citation omitted).

A district court's approval of a settlement is contingent on a finding that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). This entails a review of both

procedural and substantive fairness. *See, e.g., D'Amato v. Deutsche Bank*, 236 F.3d 78, 85-86 (2d Cir. 2001). With respect to procedural fairness, a proposed settlement is presumed fair, reasonable, and adequate if it culminates from "arm's-length negotiations between experienced, capable counsel after meaningful discovery." *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (internal quotation marks omitted). The claims here were settled after over three and one-half years of litigation, including extensive fact discovery. Competent, experienced counsel appeared on both sides, and settlement was reached only after contentious negotiations.

In *Detroit v. Grinnell Corp.* 495 F.2d 448 (2d Cir. 1974), the Court of Appeals held that the following factors should be considered in evaluating a class action settlement:

> (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. at 463 (citations omitted). *See also Blessing v. Sirius XM Radio Inc*., 11-3696-cv, 2012 WL 6684572, at *1 (2d Cir. Dec. 12, 2012) (citations omitted) (affirming the district court's finding of substantive fairness where the settlement stated that defendants would not raise its prices for five months, but that class members would receive no cash remedy).

This Court recently approved a proposed settlement after finding that settlement terms were fair, reasonable and adequate, and in the best interest of class members pursuant to the *Grinnell* factors. *See, e.g., Rubin v. MF Global, Ltd.*, No. 08 Civ. 2233 (VM) (Nov. 18, 2011).

Here, the Settlement clearly satisfies the *Grinnell* criteria for approval.

B. The *Grinnell* Factors Support Approval of the Settlement

1. The Complexity, Expense, and Likely Duration of the Action

This class action is extraordinarily complex. Litigating the claims against the FG Defendants through completion of merits and expert discovery, summary judgment, trial, post-trial appeals and judgment enforcement proceedings would be protracted and expensive.

First, by its very nature, a class action such as this one involving securities claims, is complicated. Indeed, courts have acknowledged the '"overriding public interest in favor of settlement'" of class actions because it is '"common knowledge that class action suits have a well deserved reputation as being most complex.'" *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 46, 53 n.6 (S.D.N.Y. 1993) (Pollack, J.) (citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)); For this reason, "[c]lass action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *In re Luxottica Grp. S.p.A. Sec. Litig*., 233 F.R.D. 306, 310 (E.D.N.Y. 2006) (Weinstein, J.).

Second, beyond its inherent complexities, this Action posed many challenges particular to the class's claims. Lead Counsel are confident in the strength of their case even though this action presents a number of novel and complex issues, including:

- **Whether Plaintiffs' state law claims are barred by the Securities Litigation Uniform Standards Act of 1995 ("SLUSA").** SLUSA, 15 U.S.C. § 78bb(f)(1)(A), states: "No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(5)(E) incorporates the definition of "covered security" contained in Section 18(b) of the Securities Act, essentially being a security that trades on a

national U.S. exchange. Many of Plaintiffs' claims against the FG Defendants are based on state law, including the fee claims and the surviving claims asserted against defendant Piedrahita.

This Court, in its August 18, 2010 Opinion, held that Plaintiffs' misrepresentation and omission claims were not barred by SLUSA: "[t]he allegations in this case present multiple layers of separation between whatever phantom securities Madoff purported to be purchasing and the financial interests Plaintiffs actually purchased." *Anwar I*, 728 F. Supp. 2d at 398. This Court added that even if SLUSA applied, it would not bar Plaintiffs' claims other than common law fraud and negligent misrepresentation. *Id.* at 399 n. 7.

While Lead Counsel believe this decision is correct, other courts in this District have reached contrary conclusions, including in *Kingate Management Limited Litigation*, 09 Civ. 5386 (DAB), 2011 U.S. Dist. LEXIS 41598 (S.D.N.Y. Mar. 30, 2011), and neither the Second Circuit, nor the Supreme Court, have definitively ruled on the issue. Indeed, the effect of SLUSA in a case involving a Ponzi scheme is presently before the Supreme Court. *See Proskauer Rose LLP v. Troice*, No. 12-88, 2013 U.S. LEXIS 912, *cert. granted*, (Jan. 18, 2013). An adverse decision could limit Plaintiffs' state law claims against the FG Defendants.

- **Whether Plaintiffs' federal securities claims are barred by *Morrison v. National Australia Bank*, 130 S. Ct. 1869 (2010).** *Morrison*, held that § 10(b) of the Exchange Act applies to "only … [1] the purchase or sale of a security listed on an American stock exchange, and [2] the purchase or sale of any other security in the United States." This Court, on the motion to dismiss, found that "a more developed factual record [was] necessary to inform a proper determination as to whether Plaintiffs' purchases of the Offshore Funds' shares occurred in the United States." 728 F. Supp. 2d at 405. While Lead Counsel believe that recent discovery

has confirmed that *Morrison* does not bar the federal securities claims presented here, the issue has not yet been decided.[7]

- **Whether Plaintiffs' claims to recover fees paid to the FG Defendants are direct claims or are derivative claims that belong to the Funds.** Plaintiffs asserted two claims to recover the hundreds of millions of dollars of fees paid to the FG Defendants from the inception of the Funds – mutual mistake (Count 11) and unjust enrichment (Count 33). This Court sustained Plaintiffs' claims as direct rather than derivative (*Anwar II*, 728 F. Supp. 2d at 400-02), but limited the mutual mistake claims to the domestic funds and dismissed those claims against all the fee only and certain other defendants. *Id.* at 420-21. The Court also sustained the unjust enrichment claim but cautioned that "a claim of unjust enrichment … will be warranted only if … the evidence reveals that no valid contract governed the relationship between Plaintiffs and each of these defendants." *Id.* at 421. The FG Defendants, in opposing Plaintiffs' motion for class certification, reargued that Plaintiffs' fee claims were derivative rather than direct. *See* Class Cert. Opp. at 39-40. This issue has not yet been resolved.

- **Whether Plaintiffs can sustain holder claims.** This Court, in sustaining Plaintiffs' fraud, negligent misrepresentation and breach of fiduciary duty claims found that the Representative Plaintiffs had adequately pleaded that the the FG Defendants' alleged casued investors to retain their Fund holdings when they otherwise would have sold if the truth about Madoff had been disclosed. The Court sustained those holder claims on the motion to dismiss (*Anwar II*, 728 F. Supp. 2d at 444), but Plaintiffs recognized the risk of sustaining those claims through summary judgment and proving those claims at trial.

[7] Defendants revived their *Morrison* argument in opposing Plaintiffs' motion for class certification, arguing that *Morrison* presented individual issues of fact that precluded class certification. That motion is under submission.

- **Issues particular to class certification.** Plaintiffs faced complex issues concerning class certification, which have yet to be decided by the Court. Defendants, including the FG Defendants, strenuously argued that reliance and many of the substantive issues (such as *Morrison* and *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 493 N.Y.S.2d 435 (1985)) were individual to each class member and precluded class certification. Defendants also argued that a large percentage of putative class members resided in foreign jurisdictions that would not bind absent class members to a class certification judgment, and that those class members were required to be excluded from the class. The motion for class certification is *sub judice*.

- **Sophistication of the Defendants and their counsel.** The FG Defendants are represented by experienced and capable defense counsel who are expert in defending complex securities class actions. These firms and the individual attorneys representing the FG Defendants are among the most respected and accomplished lawyers in the defense bar and were sure to continue their vigorous and comprehensive defense through the remainder of the case, which would have added to the complexity and risks of continuing to prosecute Plaintiffs' claims.

Moreover, defendants Citco and PwC recently requested that Magistrate Judge Maas extend the merits discovery cut-off to June 30, 2013 to (among other things) accommodate coordinated depositions of the FG Individual Defendants and other witnesses in a New York State Supreme Court action prosecuted by a Trustee appointed in the liquidation of Greenwich Sentry L.P. and Greenwich Sentry Partners, L.P. (the "Domestic Funds"). That request was granted by Order dated January 30, 2013. ECF No. 1025. Pursuant to the Court's scheduling order, subsequent to the completion of merits discovery, Plaintiffs and the Non-Dismissed Defendants are scheduled to engage in at least four months of expert discovery and thereafter to brief motions for summary judgment.

Although the proposed Settlement will greatly simplify prosecution of the Action, even with the proposed Settlement, this case is not likely to be tried until mid-2014, and Plaintiffs win a judgment a lengthy appeals process is likely. The Settlement at this juncture avoids substantial, continued, and uncertain litigation while providing a substantial pecuniary recovery for the Settlement Class.

2. The Settlement Class's Reaction to the Settlement Favors Final Approval

The reaction of the Settlement Class to the Settlement is a significant factor in considering its adequacy. *See Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) (McMahon, J.). Settlement Class Members have until February 15, 2013 to file objections to the Settlement. All seven Representative Plaintiffs have submitted Declarations attesting to their belief that the Settlement provides the Settlement Class with a fair, reasonable, and adequate recovery on the claims against FG Defendants. *See* Jt. Decl., Exhibits F-L.[8]

3. The Stage of the Proceedings and the Amount of Information Reviewed and Analyzed

In considering this factor, "'the question is whether the parties had adequate information about their claims,' such that their counsel can intelligently evaluate the 'merits of [p]laintiff's claims, the strengths of the defenses asserted by [d]efendants, and the value of [p]laintiffs' causes of action for purposes of settlement.'" *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 190 (S.D.N.Y. 2012) (alteration in original) (citation omitted).

In the present Action, this standard is overwhelmingly satisfied by the amount of formal discovery and investigation conducted. The investigation included, among other things, a pre-discovery factual investigation in connection with the Consolidated Amended Class Action

[8] To date, only one objection has been received. Rather than respond to objections piecemeal, all objections will be addressed by Lead Counsel after the February 15, 2013 deadline. Lead Counsel respectfully submit that the concerns raised in that one objection are sufficiently addressed in this Memorandum.

Complaint, based on information in the public record and from confidential witnesses as well as the factual record in the action brought by the Securities Division of the Office of the Secretary of the Commonwealth of Massachusetts (Jt. Decl., ¶¶ 36-37); a review of the SEC's Office of Investigation report entitled "Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme" and the exhibits thereto (Jt. Decl., ¶¶ 46 and 50); interviews with the purportedly independent directors of Fairfield Sentry (Naess and Schmid) (Jt. Decl., ¶¶ 50-51); and an interview of Gil Berman, who provided analyses to FGG in connection with the BLMIS implementation of Madoff's split-strike strategy (Jt. Decl., ¶ 52). Lead Counsel then conducted exhaustive merits discovery, including a review of over nine million pages of documents and depositions or interviews of over forty witnesses to date (*see* Jt. Decl., ¶¶ 75-80).

4. The Risks of Establishing Liability and Damages

Grinnell holds that, in assessing the fairness, reasonableness, and adequacy of a Settlement, courts should consider such factors as the "risks of establishing liability" and "the risks of establishing damages." 495 F.2d at 463. While Representative Plaintiffs and Lead Counsel believe that the claims asserted against the FG Defendants have great merit, they also recognize that there were considerable risks in pursuing the claims that could have led to a substantially smaller recovery or no recovery at all for the Settlement Class.

Among other things, Andrés Piedrahita, the most highly paid Founder, was dismissed from the SCAC as a fraud and control-person defendant. *See Anwar II*, 728 F. Supp. 2d at 409 (Piedrahita's "passive role is not enough to cross over the threshold into scienter"). Moreover, Mr. Piedrahita is a Spanish resident who years prior to Madoff's arrest arranged for funding of an off-shore trust with a substantial percentage of his net worth and income. It is unrealistic for Plaintiffs or absent class members to believe that Piedrahita's ultimate liability is assured or that the same moneys contributed to the Settlement on behalf of Piedrahita (and the two other

Founders) would be available on a non-voluntary basis from persons or trustees to satisfy a judgment after summary judgment, trial and appeals.

All seven Representative Plaintiffs and Plaintiffs' Lead Counsel, believe that the Settlement provides the Settlement Class with significant and certain benefits now and eliminates the risk of no recovery following what would be years of further uncertain litigation, including disposition of the class certification motion, motions for summary judgment, and if summary judgment is not granted to defendants, a contested trial and likely appeals.

Although Lead Counsel are confident that they would succeed on all issues (and will succeed as well in the continued prosecution of their claims against the non-Dismissed Defendants),Lead Counsel recognized that the FG Defendants had material legal and factual defenses to this Action, including with respect to the legal issues identified herein at 9-11.

Moreover, on the facts, the FG Defendants vigorously maintained that they did not know about wrongdoing at BLMIS until it was revealed to the public in December 2008, lost more than $72 million of their own and family members' money in the fraud, maintained a full time professional staff to perform due diligence and risk monitoring, and were among many financial firms and regulators that were fooled by Madoff, including the Securities and Exchange Commission. They also point to the efforts to conceal the fraud by Madoff and seven others who have pleaded guilty to crimes, including creating false trade blotters, trade confirmations and DTC reports which they were shown, and aspects of Madoff's activities that were not typical of a Ponzi scheme, including refusing new investments and redeeming billions of dollars upon request over many years.

Representative Plaintiffs, in proposing that the Court approve the Settlement as fair, reasonable and adequate to the Settlement Class, have considered, among other factors, Plaintiffs' ability to prevail on the contested factual and legal issues summarized in the Joint

Declaration (¶¶ 11, 53, 59 and 69) and herein at 9-11.. There was a significant risk that Plaintiffs' claims could have been dismissed or limited prior to or at trial, or on appeal from a jury verdict.

In addition, and importantly, Lead Counsel considered that, by reducing the number of defendants and defense counsel in the litigation, and the factual and legal issues in dispute, the Settlement may have a substantial beneficial effect on Plaintiffs' ability to successfully litigate the remaining claims against the Non-Dismissed Defendants, who are believed to have substantial assets that may through settlement or judgment provide significant additional compensation to the Settlement Class.

5. The Risk of Maintaining the Action as a Class Action Through Trial

Plaintiffs face uncertainty whether a litigation class will be certified, and if a litigation class is certified, whether individual issues would remain that will require class member participation to resolve disputed individual issues. The Settlement avoids any uncertainty with respect to whether a litigation class may be maintained against the FG Defendants, and the presence of these risks and uncertainty weighs in favor of the Settlement. *See, e.g., In re Marsh & McLennan Cos., Inc. Sec.*, No. 04 Civ. 8144, 2009 WL 5178546, at * 6 (S.D.N.Y. Dec. 23, 2009) ("Although Defendants have stipulated to certification of the Class for purposes of the Settlement, there would have been no such stipulation had Lead Plaintiffs brought this case to trial."). *See also In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, MDL Docket No. 1500, 02 cv. 5575 (SWK), 2006 WL 903236, at *12 (S.D.N.Y. Apr. 6, 2006) (finding that risk of plaintiffs' not succeeding in certifying class supported approval of settlement), and *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 460 (S.D.N.Y. 2004) (same).

6. The Amount of the Settlement

The last three substantive factors courts consider are (i) the ability of the defendants to withstand a greater judgment; (ii) the range of reasonableness of the settlement fund in light of the best possible recovery; and (iii) litigation risks. *Grinnell*, 495 F.2d at 463.

Representative Plaintiffs and Lead Counsel carefully considered the risks of continued litigation, including the likely difficulty of obtaining a significantly larger recovery from the FG Defendants in light of their depleted finances, continued payment of large legal fees and expenses, and the substantial potential difficulties in collecting on a judgment. Among other things, the FG Defendants, as part of the settlement process, provided Plaintiffs' Lead Counsel with certified written disclosure about their assets and liabilities. Jt. Decl. ¶¶ 95-97. Plaintiffs also anticipated great difficulty in reaching substantial assets that had been placed in trusts well before 2008, primarily by the Founders, even if the Action were successful. No insurance is available to fund the Settlement. *Id.* at 97.

Further, in connection with the Settlement, Plaintiffs' Lead Counsel conducted informational interviews of the principal FG Individual Defendants on matters relevant to the Settlement and to Plaintiffs' continued prosecution of claims against the remaining Non-Dismissed Defendants. Jt. Decl. ¶¶ 14, 93, and 96. As a result of those interviews, Plaintiffs satisfied themselves that it was unlikely that a judgment substantially larger that the settlement could be collected, or that a substantially larger settlement could be negotiated, from the FG Defendants. *See, e.g., In re Am. Bank Note Holographics*, 127 F. Supp. 2d 418, 427 (S.D.N.Y. 2001) (finding that the substantially weakened financial condition of defendant, along with the possibility of filing for bankruptcy protection, favored approval of the settlement agreement); *accord In re EVCI Career Colls. Holding Corp. Sec. Litig.*, Master File No. 05 CV 10240 (CM), 2007 WL 2230177, at *8 (S.D.N.Y. July 27, 2007). The FG Defendants' financial limitations

have been exacerbated because many of them have had difficulty obtaining employment since Madoff's arrest, which significantly constrained their ability to earn income or preserve assets.

Estimates of the percentage recovery on the potential claims that may be filed vary depending on a number of factors. The Settlement Class is generally defined as "Beneficial Owners" of the Funds' shares or limited partnership interests who incurred a "Net Loss." Based on information provided by the Funds in bankruptcy and liquidation proceedings, Plaintiffs determined that Greenwich Sentry, Greenwich Sentry Partners and Fairfield Sentry had an aggregate net loss at the fund level of $1.33 billion. However, inasmuch as the loss at the Fund level consists of both net winners and net losers, Plaintiffs believe that the total amount of net losses at the investor level exceeds $1.33 billion. The percentage recovery on the claims that may be filed will depend on (i) the difference between losses at the Fund level (estimated to be approximately $1.33 billion) compared to losses at the Beneficial Owner level (which are not known)[9], (ii) the number of Settlement Class Members who file claims and the aggregate Net Loss of those claims, and (iii) the ultimate amount distributed to the Settlement Class from the $30 million Escrow Fund or the $5 million "most favored nations" provision, if any.

Based on the $1.33 billion reported losses of investments in BLMIS at the Fund level, Plaintiffs approximate (assuming that claims are filed equal to the aggregate of the Funds' losses) that Settlement Class Members will receive from the Settlement Fund, before deduction of Court-awarded attorneys' fees and expenses, approximately 4% to 6% of the Funds' Net Loss of principal, depending on the amount distributed to the Settlement Class from the Escrow Fund, if any. That percentage recovery could be higher if Settlement Class Members with aggregate Net Losses below $1.33 billion file claims and could be lower to the extent the aggregate Net Losses of Settlement Class Members exceed $1.33 billion.

[9] The aggregate Net Loss of principal of each possible Settlement Class Member is currently unknown to Plaintiffs because many of the Funds' holders of record are nominees and custodians who aggregate numerous different Beneficial Owners, some of whom have net gains that offset net losses.

In addition to amounts that they would receive under the Settlement, Settlement Class Members are likely to receive additional cash distributions from liquidation or bankruptcy proceedings involving the Funds[10] (including based on distributions from the BLMIS Trustee to those Funds) and from the prosecution of non-settled claims against Citco, PwC, and GlobeOp.

In analyzing the reasonableness of the Settlement, the issue for the Court is not whether the settlement represents the best possible recovery, but how the settlement relates to the strengths and weaknesses of the case and the recoverability of defendants' assets. In *Grinnell*, the court instructed district courts to "'consider and weigh the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable.'" *Id.* at 462-3 (citation omitted). Courts agree that the determination of a "reasonable" settlement "is not susceptible of a mathematical equation yielding a particularized sum." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 130 (S.D.N.Y. 1997) (citation and internal quotation marks omitted). Instead, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

"'The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.'" *In re Marsh & McLennan Cos.* 2009 WL 5178546, at *7, *quoting Grinnell*, 495 F.2d at 455 & n. 2 ("In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.").

[10] Liquidation proceedings involving Sentry, Sigma, and Lambda are pending in the British Virgin Islands (Claim No. 0074/2009) (Lambda), Claim NO. 0136/2009 (Sentry, (Claim No. 0139/2009 (Sigma)). Bankruptcy proceedings involving Greenwich Sentry and Greenwich Sentry Partners are pending in the U.S. Bankruptcy Court for the Southern District of New York (Case No. 10-16229 (BRL)).

C. THE PLAN OF ALLOCATION IS FAIR, REASONABLE AND ADEQUATE AND WARRANTS APPROVAL

"'To warrant approval, the plan of allocation must also meet the standards by which the … settlement was scrutinized – namely, it must be fair and adequate.'" *Maley*, 186 F. Supp. 2d at 367 (citation omitted). "'When formulated by competent and experienced counsel,' a plan for allocation of net settlement proceeds 'need have only a reasonable, rational basis.'" *In re IMAX Sec. Litig.*, 283 F.R.D. at 192 *citing In re Telik Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 580 (S.D.N.Y. 2008) (quoting *In re Global Crossing*, 225 F.R.D. at 462). This Court recently approved a proposed allocation plan put forth by experienced counsel as being fair and reasonable, and directed the defendant to implement the allocation plan according to the terms of the stipulation. *See Da Silva Ferreira v. EFG Capital Int'l Corp., et al*., No.09-cv-00118-VM (S.D.N.Y. Jun. 1, 2012) (Marrero, J.).

Here, the Plan, contained in the Stipulation and Notice (and discussed in the Joint Declaration) includes a Net Loss formula, which is intended to equitably apportion the Net Settlement Fund among Settlement Class Members.

D. THE COURT SHOULD FINALLY CERTIFY THE SETTLEMENT CLASS

The Court's Preliminary Approval Order conditionally certified the Settlement Class pursuant to the Stipulation. Since then, nothing has occurred indicating that the Settlement Class does not meet the requirements of Rule 23(a) and (b)(3). Accordingly, because this Action satisfies the relevant provisions of Rule 23, this Court should fully and finally certify the Settlement Class for settlement purposes.

Specifically, Rule 23(a) imposes four threshold requirements on a putative class action: numerosity, commonality, typicality, and adequacy of representation. In addition, Rule 23(b) requires that: (i) common questions must predominate over any questions affecting only

individual members; and (ii) class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy.

As set forth in detail in Plaintiffs' opening and reply memoranda in support of class certification, with supporting Declarations (ECF Nos. 776-84 and 865), and in Plaintiffs' Memorandum in Support of Preliminary Approval (ECF No. 998), the bases for certification of a settlement class are clearly present here:[11]

1. SettlementClass Members Are Too Numerous To Be Joined

Numerosity is presumed when a class consists of 40 members or more. *See Consol. Rail Corp.* v. *Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Here, there are in excess of 1,000 record owners of shares in the Funds and a larger number of Settlement Class Members are beneficial owners. The sheer number of potential Settlement Class Members, coupled with their widely-dispersed locations in the United States and dozens of different countries around the world, makes joinder impracticable and class treatment appropriate. *See, e.g., Zupnick v. Thompson Parking Partners*, No. 89 Civ. 6607 (JSM), 1990 WL 113197, at *3 (S.D.N.Y. Aug. 1, 1990). Thus, the Settling Class is sufficiently numerous that joinder of all members would be impracticable and accordingly satisfies Rule 23(a)(1). *See id.*

2. There Are Common Questions of Law or Fact

Rule 23(a)(2) requires at least one question of law or fact common to the class. *See Cent. States Se. & Sw. Areas Health & Welfare Fund* v. *Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 245 (2d Cir. 2007). In this Circuit, "[i]t is not necessary that all of the questions raised by arguments are identical; it is sufficient if a single common issue is shared by the class." *Weiss* v. *La Suisse, Societe D' Assurances Sur La Vie*, 226 F.R.D. 446, 449 (S.D.N.Y.

[11] The standards for certification of a settlement class are less stringent than for certification of a litigation class, among other reasons, because manageability of the class action for trial is not at issue. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

2005). The SCAC identifies numerous common issues of fact and law (SCAC at ¶ 353), including:

- Whether documents, including offering memoranda, annual reports, account statements, audit reports and other materials disseminated to Plaintiffs, including information on the FG Defendants' websites, misrepresented, omitted or were otherwise misleading with respect to material facts about the Funds.

- Whether the FG Defendants acted knowingly, recklessly or negligently in misrepresenting or omitting material facts about the Funds.

- Whether the FG Defendants breached duties owed to the Plaintiffs.

- Whether Plaintiffs' losses would have been prevented had the FG Defendants fulfilled their respective duties, and acted in accordance with their representations concerning due diligence.

- Whether the Settling Parties shared a mutual mistake that the assets of the Funds were in fact being invested by BLMIS.

- Whether the FG Defendants were unjustly enriched at Plaintiffs' expense.

- Whether a valid contract governed the relationship between Plaintiffs and each of the FG Defendants.

Because Plaintiffs' allegations implicate a common course of conduct that caused injury to all members of the putative Settlement Class, the commonality requirement of Rule 23(a)(2) is satisfied.

3. Plaintiffs' Claims Are Typical of Those of The Settling Class

Rule 23(a)(3) requires the claims of the class representatives be "typical" of the claims of the class. *See* Fed. R. Civ. P. 23(a)(3). Typicality is established where "'the claims of the named plaintiffs arise from the same practice or course of conduct that gives rise to the claims of the proposed class members.'" *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 85 (S.D.N.Y. 2007) (citation omitted).

The Representative Plaintiffs' claims are typical of the claims of other Settlement Class Members because their losses all derive from the same course of the FG Defendants' conduct.

Where, as here, "the lead plaintiff alleges a common pattern of wrongdoing and will present the same evidence, based on the same legal theories, to support its claim as other members of the proposed class, courts have held the typicality requirement to be satisfied." *Teachers' Ret. Sys. of La. v. ACL N. Ltd.*, No. 01-CV-11814 (LAP), 2004 WL 2997957, at *4 (S.D.N.Y. Dec. 27, 2004). *See also In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 287, 280 (S.D.N.Y. 2003) ("'When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met . . . .'") (citations omitted); *In re Blech Sec. Litig.*, 187 F.R.D. 97, 106 (S.D.N.Y. 1999) (typicality satisfied because "[p]laintiffs' claims of fraud arise from the same course of conduct" as the rest of the class); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 511 (S.D.N.Y. 1996) (typicality shown where claims "all [arose] from the same price-fixing conspiracy").

4. Plaintiffs Will Fairly and Adequately Protect the Interests of Settlement Class Members

Rule 23 (a)(4) is satisfied if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Court must measure the adequacy of representation by two standards: whether (1) the claims of the Plaintiffs conflict with those of the rest of the class; and whether (2) plaintiffs' counsel are qualified, experienced, and generally able to conduct the litigation. *See In re Drexel Burnham Lambert Group, Inc*., 960 F.2d 285, 291 (2d Cir. 1992).

The Representative Plaintiffs and the Settlement Class share the common objective of maximizing their recovery, and no conflict exists between Representative Plaintiffs and the members of the Settlement Class. *See Drexel*, 960 F.2d at 291; *In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) ("Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between the class representatives and other class members"). Plaintiffs' Lead Counsel (Boies Schiller & Flexner LLP, Wolf Popper LLP,

and Lovell Stewart Halebian & Jacobson LLP) have extensive experience and expertise in complex litigation and class actions throughout the United States, and are qualified and able to conduct this litigation. *See* Declarations attached as Exhibits B, C, and D to Plaintiffs' Memorandum of Law in Support of Motion for Consolidation of All Actions and Appointment of Interim Co-Lead Counsel dated January 27, 2009, ECF No. 22.

Plaintiffs' Lead Counsel were appointed Interim Co-Lead Counsel for the putative class on January 27, 2009, and the firms were appointed Lead Counsel for the PSLRA Plaintiffs on July 7, 2009. In this capacity, Plaintiffs' Lead Counsel have effectively performed extensive work as detailed in the Joint Declaration. Therefore, Rule 23(a)(4) is satisfied.

5. Plaintiffs' Claims Satisfy Rule 23(b)(3)

In addition to satisfying Rule 23(a), a class action must satisfy the requirement of at least one of the subdivisions of Rule 23(b); here, the Action satisfies Rule 23(b)(3). Rule 23(b)(3) authorizes class certification if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3) is "designed to secure judgments binding all class members save those who affirmatively elect[] to be excluded," where a class action will "achieve economies of time, effort, and expense, and promote . . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem Products, Inc.* v. *Windsor,* 521 U.S. 591, 614-15 (1997) (citations omitted). Certification of the Settlement Class serves these purposes.

a. Common Questions Predominate

In cases that involve a single, common scheme, the predominance requirement is met notwithstanding that there may be questions of individualized reliance. *See In re Beacon Assocs.*

Litig., 282 F.R.D. 315, 333 (S.D.N.Y. 2012); *see also Bresson v. Thomson McKinnon Secs., Inc.*, 118 F.R.D. 339, 343 (S.D.N.Y. 1988) (certifying a class in a case involving a Ponzi scheme, where (as here) defendants included third-party service providers because common issues predominated in spite of concerns over individualized reliance).

Here, the Settlement Class should be finally certified for purposes of settlement because the predominance of common question is apparent. With respect to the claims against the FG Defendants, there are multiple common questions of law or fact that apply to the entire Settlement Class, *i.e.*, Plaintiffs' claims of negligence, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and unjust enrichment and third-party breach of contract. As this Court has recognized, "core facts [are] implicated in every cause of action in this lawsuit." *Anwar II*, 728 F. Supp. 2d at 400.

b. A Class Action Is the Superior Method of Adjudication

Rule 23(b)(3) sets forth non-exhaustive factors to be considered in making a determination of whether class certification is the superior method of litigation: "(A) the class members' interests in individually controlling the prosecution…of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by…class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3). Considering these factors, proceeding by means of a class action is clearly "superior to other available methods for fairly and efficiently adjudicating" the claims against the FG Defendants. *Id*. Specifically, the sheer scope and complexity of this controversy would make individual litigation difficult for the vast majority of Settlement Class Members.

Because thousands of Settlement Class members reside outside the United States and unfamiliar with the U.S. court system it makes sense to centralize the litigation here. This Court

has presided over this action for four years and is deeply involved in the legal issues and the factual circumstances. Moreover, this Court need not consider "the likely difficulties in managing a class action" because a district court need not consider whether management difficulties would arise if a case were to be tried when the parties request settlement-only class certification. Fed. R. Civ. P. 23(b)(3)(D); *see Amchem*, 521 U.S. at 620 (1997); *see also In re Am. Int'l Group Inc.*, 689 F.3d 229, 238-39 (2d Cir. 2012).

6. Plaintiffs' Counsel Satisfy the Rule 23(g) standards

Rule 23(g) provides that class counsel "must fairly and adequately represent the interests of the class." Class counsel must be "qualified, experienced and generally able to conduct the litigation." *See Drexel*, 960 F.2d at 291. Lead Counsel are highly qualified in conducting class action and complex litigation and have effectively prosecuted this Action, achieving a substantial benefit for the Settlement Class.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court approve the Settlement and enter the Final Judgment annexed as Exhibit B to the Stipulation filed November 6, 2012 (ECF No. 996-5), subject to any modifications that may be requested by the Settling Parties in advance of the hearing before the Court scheduled for March 22, 2013.

Dated: January 31, 2013

Respectfully submitted,

By: /s/ David A. Barrett

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