UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

JOINT DECLARATION OF LEAD COUNSEL IN SUPPORT OF THE PROPOSED PARTIAL SETTLEMENT AND FEE AND EXPENSE REQUESTS

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David A. Barrett, Robert C. Finkel and Victor E. Stewart, being duly admitted to the practice of law in the State of New York and admitted to the Bar of this Court, do hereby declare under the penalties of perjury of the State of New York and the United States of America:

I. INTRODUCTION

1. We are members of the law firms Boies, Schiller & Flexner LLP, Wolf Popper LLP, and Lovell Stewart Halebian Jacobson LLP, respectively, Co-Lead Counsel for the Representative PLSRA Plaintiffs ("Lead Counsel").[1] Our firms are responsible for the prosecution of the claims in this Action.

2. We make this Joint Declaration in support of the Representative Plaintiffs' application pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, for final approval of (i) certification of the Settlement Class, (ii) the Stipulation of Settlement, dated as of November 6, 2012, as amended by the Amendment to Stipulation of Settlement dated as of December 12, 2012 and the Court's Order entered January 25, 2013 (collectively, the "Stipulation"), providing for payments of $50,250,000 to establish a settlement fund (the "Settlement Fund") and $30,000,000 into a separate escrow account (the "Escrow Fund");[2] (iii) the proposed Plan of Allocation of the Net Settlement Fund among Settlement Class Members who submit valid claims; (iv) Lead Counsel's application for an award of attorneys' fees and reimbursement of

[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 ("SICO"), Dawson Bypass Trust, and St. Stephen's School. The Representative Plaintiffs are referred to herein as "Plaintiffs."

[2] The Settlement Fund, Escrow Fund and other benefits of the Settlement accruing to the Class are referred to as the "Settlement Consideration." All capitalized terms used herein have the same meaning as contained in the Stipulation.

expenses; and (v) compensation to the Representative Plaintiffs for their representation of the Class.

3. The Stipulation is executed between the Representative Plaintiffs, on their own behalf and on behalf of the Settlement Class, and defendants Fairfield Greenwich Limited ("FGL") and Fairfield Greenwich (Bermuda) Limited ("FGBL") (collectively, the "Settling Defendants").[3] Each of the FG Individual Defendants are contributing money to FGL and FGBL to fund the Settlement. Plaintiffs' claims against (i) the PwC Defendants (PricewaterhouseCoopers LLP Canada and PricewaterhouseCoopers Accountants N.V.) (Netherlands); (ii) the Citco Defendants (Citco Fund Services (Europe) B.V., Citco (Canada) Inc., Citco Bank Nederland N.V. Dublin Branch, Citco Global Custody N.V., Citco Fund Services (Bermuda), and The Citco Group Limited); and (iii) GlobeOp Financial Services LLC are not resolved by the Settlement and will continue to be prosecuted.

4. In the Second Consolidated Amended Complaint ("SCAC"), Plaintiffs alleged fraud and other claims against defendants FGG, FGL, FGBL, FGA, FRS, Noel, Tucker, Piedrahita, Vijayergiya, Lipton, and McKeefrey as "Fairfield Fraud Claim Defendants;" negligence and other claims against the Fairfield Fraud Claim Defendants and defendants FHC, LFCM, Landsberger, Smith, and Murphy as "Fairfield Defendants;" and fee-related claims

[3] The "FG Defendants" are the Settling Defendants as well as Fairfield Greenwich Group ("FGG"), 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"). The Settling Defendants, the FG Entity Defendants and the FG Individual Defendants are referred to herein collectively as the "FG Defendants." Defendants Noel, Tucker, and Piedrahita are referred herein collectively as the "Founders".

against the balance of the FG Defendants as "Fairfield Fee Claim Defendants." *See* SCAC (ECF No. 273), "Glossary of Defined Terms" at ix.

5. This Court, in its August 18, 2010 Decision and Order sustaining and denying in part defendants' motion to dismiss the SCAC, sustained Plaintiffs' claims against the FG Defendants, with the exception (among other things) of dismissing Plaintiffs' fraud-based claims against Piedrahita and the controlling person claims against all FG Defendants other than the Fraud Claim Defendants.

6. The Settlement, if consummated, will provide an immediate cash benefit to the Settlement Class defined in the Stipulation to include "all Persons who were Beneficial Owners of shares or limited partnership interests in Fairfield Sentry Limited ('Sentry'), Fairfield Sigma Limited ('Sigma'), Fairfield Lambda Limited ('Lambda'), Greenwich Sentry, L.P. ('Greenwich Sentry') and Greenwich Sentry Partners, L.P. ('Greenwich Sentry Partners') (collectively, the 'Funds') as of December 10, 2008."

II. PRELIMINARY STATEMENT

7. On August 3, 2012, after three and one-half years of litigation, the Settling Parties signed a Memorandum of Understanding ("MOU") to fully and finally settle the Action as against the Settling Defendants for $80 million in settlement and escrow funds and other specified consideration and to fully release all claims asserted against the FG Defendants. The substantive terms of the MOU are memorialized in the Stipulation.

8. Prior to entering into that MOU, Lead Counsel conducted an extensive factual investigation, prepared two consolidated amended complaints, served document requests on all defendants, reviewed over six million pages of documents produced in response to those requests, responded to paper discovery directed to twenty-seven class representatives and

named plaintiffs, defended twenty depositions of class representative or named plaintiffs, and conducted eleven depositions of FG Defendants and six depositions of Citco or PwC witnesses.[4]

9. Lead Counsel also analyzed 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 the SCAC, the motions to reargue the denial of those motions, the motion for class certification and numerous settlement, discovery and procedural disputes that have arisen between the parties.

10. Through their extensive factual investigation and legal analyses, continuing through the discovery process, Lead Counsel developed substantial evidence to support the claims asserted against the FG Defendants.

11. The FG Defendants asserted numerous legal defenses and contested many of Plaintiffs' factual assertions. While we do not believe these defenses are meritorious, the substantive issues in dispute between the Settling Parties included:

a. whether any of the FG Defendants acted negligently, recklessly, or with intent to defraud;

b. whether any of the FG Individual Defendants could be held liable for the acts and conduct of any of the FG Entity Defendants;

c. whether the misrepresentations and omissions alleged by Plaintiffs were material, false, misleading or otherwise actionable;

d. the extent to which Plaintiffs relied on the FG Defendants' alleged misrepresentations and omissions;

[4] Plaintiffs have continued to conduct extensive discovery of the non-settling defendants. Plaintiffs have conducted, after execution of the MOU, twenty-four additional depositions of Citco, PwC and GlobeOp witnesses in locations including New York, Miami, Toronto, Amsterdam and Bermuda, and have participated in two depositions of FG witnesses and one non-party witnesses. Plaintiffs anticipate over twenty additional merits depositions.

e. whether any of the FG Defendants owed Plaintiffs a fiduciary or other duty;

f. whether the Fairfield Greenwich Group acted as a legal or de facto partnership and if so, whether the individual FG Defendants can be held liable for the acts of the partnership as a whole;

g. whether Plaintiffs' state law claims are preempted by the Securities Litigation Uniform Standards Act ("SLUSA") of 1998;

h. whether Plaintiffs have standing to pursue their state law claims or whether those claims belong to the Funds;

i. where the relevant transactions occurred and whether the Plaintiffs' federal securities law claims are barred by National Australian Bank v. Morrison, 130 S. Ct. 2869 (2010); and

j. the method for determining whether, and the extent to which, investors suffered injury and damages that could be recovered at trial.

12. Plaintiffs also faced complex issues concerning class certification. Defendants, including the FG Defendants, had strenuously argued that many of the substantive issues (such as reliance) were individual to each class member and precluded class certification. Defendants also argued that many putative class members resided in foreign jurisdictions that would not bind absent class members to a judgment rendered on a class basis, and that those class members were required to be excluded from the Class.

13. In addition to the FG Defendants' factual and legal defenses, Lead Counsel also considered the likely difficulty of obtaining a significantly greater recovery from the FG Defendants after trial. Lead Counsel were aware that there was no available insurance to fund a settlement or pay a judgment, that the individual defendants' assets were likely to be substantially less than their liability and that continued litigation would only further deplete the assets available to fund a later resolution or judgment.

14. The FG Individual Defendants, as part of the settlement process, certified written disclosures about their assets and liabilities. Although the FG Individual Defendants were paid some $500 million in gross pre-tax fees and other compensation during the years prior to the revelation of Madoff fraud, much of that money went towards payment of taxes, living expenses, and (after Madoff's arrest) legal fees. Moreover, arrangements were made to transfer funds and income of the FG Defendants, including primarily the Founders, into trusts (including offshore trusts), purportedly for estate planning reasons, many years prior to 2008. Plaintiffs anticipated great difficulty in reaching those trust assets to collect judgments if the Action were successful. Lead Counsel determined, based on our review of the financial information certified by the FG Individual Defendants, that the Founders are contributing to the Settlement a substantial portion of their assets that would be subject to execution if Plaintiffs obtained a judgment.

15. The FG Defendants also are being sued by the Funds and by Irving Picard, the Trustee of the Bernard L. Madoff Investment Securities bankruptcy estate ("BLMIS"). Lead Counsel considered the potential risks that the FG Defendants' assets could be further diminished, dissipated or made unavailable for reasons other than adverse rulings in the *Anwar* litigation, including defense costs, settlements, or judgments against the FG defendants in the Trustee's action or other proceedings.

16. Moreover, the Settlement will simplify the remaining discovery, motion practice and trial by enabling Lead Counsel to concentrate on the remaining defendants, PwC, Citco and GlobeOp. These defendants are believed to have substantial assets that may through settlement or judgment provide significant additional compensation to the Settlement Class.

17. Within that litigation context, the Settlement was reached only after lengthy and strenuous settlement negotiations that 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.

18. Taking into account the legal, factual and collection risks, 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 against the FG Defendants.

19. Lead Counsel have prosecuted this Action on a fully contingent basis and have advanced or incurred all litigation expenses. The complex nature and broad scope of the facts and law underlying the violations alleged and the protracted proceedings over a period of over three and one half years required the investment of over 49,000 hours of attorney and paralegal time, and expenses of $1,279,242. Lead Counsel have not received any compensation for their efforts, nor have they been reimbursed for their very substantial expenses.[5]

20. The fee application for 25% of the $50.25 million Settlement Fund is within the range of fees awarded in these types of actions and is entirely justified in light of the substantial

[5] Lead Counsel were assisted in the prosecution of this action by the following counsel for non-representative plaintiffs – Zwerling Schacter & Zwerling, LLP, Wolf Haldenstein Adler Freeman & Herz LLP and Cohen Milstein Sellers & Toll PLLC. All Plaintiffs' Counsel are participating in Plaintiffs' fee and expenses request pursuant to ¶¶ 34-37 of the Stipulation.

benefits conferred on the Class, the exceptional risks undertaken, the quality of representation, and the nature and extent of legal services performed.[6]

21. Recognizing that the MOU was signed on August 3, 2012, Plaintiffs' Counsel are submitting herewith only their lodestar fees and expenses through July 31, 2012. Moreover, Plaintiffs' Counsel have excluded from their expenses those costs that are directly related to the prosecution of this Action against the Non-Dismissed Defendants, such as fees paid to consultants and potential trial experts with respect to the claims against the PwC Defendants and Citco Defendants.

22. The 25% fee request represents a substantial discount, of over 50%, to the lodestar of Plaintiffs' Counsel for their work from inception of this Action through July 31, 2012.

23. Plaintiffs' Counsel also seek reimbursement from the Settlement Fund of $1,279,242 in expenses incurred in prosecuting this action through July 31, 2012. This amount includes costs associated with foreign law experts, electronic hosting and reproduction of discovery materials, electronic research, and costs of the numerous depositions taken and defended. These expenses were reasonably and necessarily incurred to successfully prosecute the Class claims and to obtain the Settlement.

24. Finally, as allowed under the Private Securities Litigation Reform Act (the "PSLRA"), the Representative Plaintiffs, as court-appointed Lead Plaintiffs and proposed Class representatives, seek $225,000 in the aggregate, as compensation for their efforts in bringing

[6] Plaintiffs' Counsel are not requesting any fees based on the $30 million Escrow Fund and will do so only if the Escrow Fund or part of the Escrow Fund becomes available for distribution to the Settlement Class. Lead Counsel recognize that fees awarded on this application will not establish a precedent for future fee awards, and that any future settlement or fee request will be evaluated on its own merits.

about the Settlement, including their substantial time and effort in supervising the prosecution of this litigation. Those requests are supported by the separate Declarations of each of the seven Representative Plaintiffs.

III. HISTORY OF THE ACTION

A. The Funds

25. On December 11, 2008, Madoff was arrested upon discovery that he had been engaged in a decades-long Ponzi scheme. The Funds, the assets of which were almost exclusively managed by and in the custody of Madoff, experienced a near total loss of value.

26. FG was founded in 1983 by Walter Noel and Jeffrey Tucker and was joined in 1997 by Andrés Piedrahita (one of Walter Noel's sons in law). SCAC ¶ 168. Beginning in 1990, FG operated what became the largest network of feeder funds to the Madoff Ponzi scheme, with a total value as reported by Madoff as of December 2008 of over $7 billion. *Id.*, ¶ 169.

27. Plaintiffs alleged in the SCAC filed with the Court on September 29, 2009, that the FG Defendants were paid fees in the aggregate of approximately $800 million from 2002 through Madoff's arrest in 2008. *See* SCAC, ¶¶ 236-49. Further investigation enabled Lead Counsel to estimate that the Individual Defendants' total gross, pre-tax compensation derived from the Funds from inception of the Madoff relationship through 2008 was approximately $500 million.

B. Initiation of the Action and Consolidation

28. On December 19, 2008, plaintiffs Pasha S. Anwar and Julia Anwar filed a class action lawsuit on behalf of themselves and all others similarly situated in the Supreme Court for the State of New York, entitled *Anwar v. Fairfield Greenwich Group, et al.*, No. 603769/2008 ("*Anwar*"). On January 7, 2009, *Anwar* was removed by defendants to this Court.

29. On and after January 8, 2009, additional class action lawsuits were filed by the Representative (and other) Plaintiffs on behalf of themselves and all others similarly situated in the Court, entitled *Pacific West Health Medical Center Inc. Employees Retirement Trust v. Fairfield Greenwich Group, et al.*, No. 09 Civ. 00134 ("*Pacific West*"); *Inter-American Trust v. Fairfield Greenwich Group, et al.*, No. 09 Civ. 00301 ("*Inter-American*"); *Laor v. Fairfield Greenwich Group et al.*, No. 09 Civ. 2222; *The Knight Services Holdings Limited v. Fairfield Sentry Limited, et al.*, No. 09 Civ. 2269 ("*Knight Services*"); and *Zohar v. Fairfield Greenwich Group, et al.*, No. 09 Civ. 4031.

30. On January 14, 2009, the Court consolidated the *Anwar* and *Pacific West* actions under the *Anwar* civil action number. On January 30, 2009, the Court consolidated the *Inter-American* action with *Anwar* under Docket No. 09-cv-0118 (VM); subsequent Orders consolidated other later-filed complaints into the Action.

31. On January 30, 2009 the Court appointed Boies, Schiller & Flexner LLP, Wolf Popper LLP, and Lovell Stewart Halebian Jacobson LLP as Interim Co-Lead Counsel to act on behalf of all Plaintiffs in the then-consolidated Action pursuant to Fed. R. Civ. P. 23(g)(3).

C. Pacific West's Order to Show Cause Why the FG Defendants' Assets Should Not Be Frozen During The Pendency of the Lawsuit

32. On January 9, 2009, Representative Plaintiff Pacific West filed, by Order to Show Cause, an application to freeze the FG Defendants' assets during the pendency of this

lawsuit. Pacific West argued in its application that it satisfied each of the elements for an injunction: likelihood of success on the merits, irreparable injury, and a balancing of the equities in its favor. Pacific West contended that it was not seeking a pre-judgment attachment, but rather to restrain Defendants from dissipating assets that rightfully belonged to Pacific West and the Class – inasmuch as any fees paid to the FG Defendants were paid pursuant to a mutual mistake of fact that Madoff was actually investing Plaintiffs' money.

33. This Court denied the application at a hearing on January 15, 2009, but gave notice to the FG Defendants to preserve their assets during the pendency of the lawsuit:

> The defendants are now on notice that this litigation exists, and they would be proceeding at their own risk should they undertake transfers that may be out of the ordinary course of business. We've already had experience in the case of Mr. Madoff concerning a large amount of transfers that would be sufficiently suspect to put others on notice that that kind of behavior could be counter-productive. Would not endear them, not only to the plaintiffs, but to the Court. [Page 29, lines 12-19.][7]

D. <u>The Consolidated Amended Complaint</u>

34. After the initial consolidation order was entered, Lead Counsel conducted a detailed investigation of the facts, including the disclosures and statements made to investors in the Funds and the conduct of the various defendants in their duties in connection with the offering, and management of the Funds. Lead Counsel also investigated the Defendants' relationship with Madoff, in particular, their due diligence and investigation of Madoff's operation, Madoff's role in the management and custody of the Funds' assets and certain "red flags" related to Madoff's investment advisory and asset management operation. Lead Counsel

[7] The January 15, 2009 transcript is Docket No. 24 in *Pacific West* (09 CV 134).

also analyzed the Defendants'[8] legal obligations and duties and the potential causes of action available to Plaintiffs.

35. Plaintiffs were not at that time entitled to take discovery. Accordingly, Lead Counsel's initial investigation was based primarily on public information, including information that was available on the FG website, public news stories, and information and documents obtained from the named plaintiffs as well as other investors who assisted Lead Counsel in their investigations.

36. On April 1, 2009, the Securities Division of the Office of the Secretary of the Commonwealth of Massachusetts filed an Administrative Complaint against FGA and FGBL. That Complaint described facts and attached internal FG records (including internal emails) providing evidence that the FG Defendants acted with scienter in assisting Madoff in his Ponzi scheme.

37. Lead Counsel analyzed the Massachusetts complaint and incorporated much of the substance of the appended exhibits into a consolidated, amended complaint.

38. On April 24, 2009, Lead Counsel filed the Consolidated Amended Complaint (the "Consolidated Complaint"), asserting common law claims under New York law against the FG Defendants, Citco Defendants and GlobeOp. The Consolidated Complaint asserted claims for common law fraud, negligent misrepresentation, negligence, breach of fiduciary duty, breach of contract, third party breach of contract and unjust enrichment.

[8] The non-FG Defendants include the PwC Defendants that were the auditors of the Funds; the Citco Defendants that were the administrator and custodian of the Funds and Funds' assets at various times; and GlobeOp that was the administrator of the domestic funds (Greenwich Sentry and Greenwich Sentry Partners) from 2003-2006. See SCAC ¶¶ 153-65.

39. Subsequent to the filing of the Consolidated Complaint, on April 29, 2009, the parties conferenced and thereafter submitted a Joint Rule 26(f) Discovery Plan.

E. The PSLRA Lead Plaintiff Process and Appointment of Lead Counsel

40. Plaintiffs had not asserted federal securities law claims in the Consolidated Complaint, among other things, to avoid the automatic stay of discovery under the PSLRA. Plaintiffs desired to aggressively prosecute the litigation to avoid any dissipation of assets caused by delay.

41. On March 11, 2009, other Plaintiffs' Counsel filed the *Knight Services* complaint, asserting claims pursuant to the Securities Exchange Act of 1934 and implicating the lead plaintiff provisions of the PSLRA. By order dated March 23, 2009, this Court consolidated *Knight Services* into this Action. By motion dated May 11, 2009, plaintiffs Harel, SICO, Pacific West, St. Stephen's, and AXA Private Management filed a joint motion pursuant to the PSLRA for appointment of Lead Plaintiffs and lead counsel (the "Lead Plaintiff Motion").[9]

42. On July 7, 2009, the Court granted the Lead Plaintiff Motion, appointing the PSLRA Lead Plaintiffs and Lead Counsel as lead counsel pursuant to the PSLRA.

F. Appointment of the Liquidator

43. In April 2009, it became apparent that the Fairfield Sentry fund and a related fund organized in the British Virgin Islands (which were then still being managed by the FG Defendants and advised by the same counsel who had represented the Funds prior to the Madoff collapse) were not going to place themselves into liquidation voluntarily. Lead Counsel did not believe that these Funds were being operated in the best interests of their

[9] Plaintiff AXA Private Management subsequently withdrew as a named plaintiff.

investors, most of whom are also members of the Settlement Class (some investors are net winners and hence are not class members). Acting quickly and on a fully contingent basis to preserve as much of the Funds' claims and assets as possible for the benefit of the Funds' investors, Lead Counsel retained BVI counsel, John Carrington, to file an application for the appointment of liquidators.

44. The Funds initially resisted the application, after which Lead Counsel retained Queens Counsel from London, Paul Girolami and subsequently Stephen Moverley-Smith, to advise on and ultimately amend their application in May 2009. Lead Counsel remained significantly involved in the application proceedings in the BVI in the ensuing months. Lead Counsel reviewed all pleadings and other filings in the BVI and an attorney from Boies Schiller attended Court hearings on April 23, 2009 and May 6, 2009. In July 2009, following extensive negotiations between Lead Counsel and counsel for the Funds, the Funds dropped their objections to Lead Counsel's application. On July 21, 2009, the BVI court approved the application and appointed liquidators over Fairfield Sentry and the related Fund.

45. At a Fairfield Sentry shareholders meeting on August 6, 2009, Sashi Bach Boruchow of Boies Schiller was elected to serve on Fairfield Sentry's liquidation committee, an ad hoc body established by Fairfield Sentry's liquidators to act as a general sounding board for the Liquidators and to consult with the Liquidators on key issues arising in the liquidation. In that capacity, both Sashi Bach Boruchow and David Barrett have actively participated in the liquidation committee and are continuing to do so as the liquidation proceeds. Lead Counsel's work on the liquidation committee includes attending monthly telephonic or in person meetings of the committee in New York, London, and the BVI, conferring frequently with the liquidators and with other members of the liquidation committee, and reviewing and commenting on the

liquidators' regular updates regarding the liquidation proceedings. The goal of Lead Counsel's participation always has been seeking to maximize investor returns in both the liquidation proceedings and this Action.[10]

G. The SEC Office of Investigation Report

46. On August 31, 2009, the SEC's Office of Investigation published a report entitled "Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme." Lead Counsel analyzed that Report and incorporated information from that Report (concerning among other things, defendants Tucker and Vijayvergiya) into the subsequently filed SCAC.

H. Second Consolidated Amended Complaint

47. After further investigating the facts related to their claims and analyzing potential additional causes of action, including claims against the PwC Defendants, on September 29, 2009, the Representative Plaintiffs, along with 109 other named plaintiffs, filed the Second Consolidated Amended Complaint. The SCAC added the PwC Defendants to the Action and asserted claims against all the Defendants (with the exception of GlobeOp and the

[10] Lead Counsel incurred in excess of $60,000 in expenses in pursuing the appointment of the liquidator in the BVI on a fully contingent basis. With the approval of the BVI court that is supervising the liquidation of Fairfield Sentry and related funds, Lead Counsel has been reimbursed for essentially all expenses that it incurred in connection with the BVI liquidation and participation in the liquidation committee (including travel expenses and the fees of BVI and Queens Counsel), as well as for the time of Boies Schiller lawyers that was directly spent in mid-2009 on successfully petitioning for appointment of the BVI liquidators. Accordingly, no reimbursement is sought for any of the attorneys' fees and expenses for which Boies Schiller has been reimbursed by the Fairfield Sentry liquidation estate. Lead Counsel's fee application does include the time of Boies Schiller attorneys that has been spent after July 2009 participating in the affairs of the Fairfield Sentry Liquidation Committee, because Lead Counsel believe that such involvement has benefitted the Class by representing its interests in maximizing the recovery by the Sentry estate for distribution to investors.

Fairfield Fee Only Defendants) for violations of federal securities law, specifically Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, and against all defendants under various common-law theories. The SCAC built upon the factual allegations and legal analysis that formed the basis for the Consolidated Complaint.

48. Plaintiffs alleged that the FG Defendants (other than the Fee Defendants), fraudulently or negligently misrepresented their due diligence conducted on Madoff and that their failure to engage in proper due diligence and oversight of the Funds' investments with Madoff resulted in the loss of billions of dollars of assets invested by the Settlement Class in the Funds.

49. By orders dated on and after December 15, 2010, over forty other Persons joined the Action as Named Plaintiffs and were deemed parties to the same extent as if they had been named as plaintiffs in the SCAC. *See* ECF Nos. 597, 600, and 611.

I. Plaintiffs' Interviews of Jan Naess and Peter Schmid

50. Plaintiffs had named Jan Naess and Peter Schmid, purportedly independent members of the Boards of the off-shore funds (Sentry, Sigma, and Lambda), as defendants in the Consolidated Complaint. Subsequent to being named, Naess and Schmid contacted Plaintiffs' counsel, claiming, among other things, that they were innocent of any wrongdoing, and in any event were unable to satisfy anything greater than a very insubstantial judgment. Naess and Schmid, however, were willing to provide documents and participate in informational interviews concerning the off-shore funds in exchange for an agreement (without prejudice) not to name them personally in the SCAC. Plaintiffs subsequently executed a tolling agreement with Naess and Schmid and pursuant thereto, obtained approximately 10,000 pages

of internal Fund records, including Board of Director minutes. Plaintiffs also interviewed Naess and Schmid in London, England over two days in January 2010.

J. Plaintiffs' Telephone Interview of Gil Berman

51. The documents provided by Naess and Schmid identified by name an FG consultant (Gil Berman) who was retained by FG to assist in analyzing Madoff's option trading on behalf of the Funds. Subsequent to the Naess and Schmid interviews, Lead Counsel were able to locate Mr. Berman in Colorado. Mr. Berman provided Plaintiffs with documentation and information supportive of Plaintiffs' claims.

K. Exhibits to the SEC Report on the Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme

52. Subsequent to the filing of the SCAC, the SEC Office of Investigation released exhibits referred to in its Report on the failure of the SEC to uncover the Madoff fraud. Lead Counsel collected and analyzed those exhibits.

L. Defendants' Motions to Dismiss

53. On December 22, 2009, all Defendants moved to dismiss the SCAC. Defendants filed voluminous briefing and exhibits in support of those motions. In particular, the FG Defendants' motions to dismiss asserted numerous arguments including:

a. Plaintiffs' state law non-fraud claims were barred by the New York State Martin Act;

b. Plaintiffs' state law claims were barred by SLUSA;

c. Plaintiffs' failed to adequately plead scienter under either the common law or Exchange Act fraud claims;

d. Plaintiffs' claims were derivative and belonged to the Funds;

e. Plaintiffs' holder claims were barred as a matter of law;

f. The New York State economic loss rule barred Plaintiffs' tort claims.

54. With respect to the Martin Act, Lead Counsel was convinced that the District Courts in the Southern District of New York had historically misinterpreted the Martin Act as pre-empting state common law negligence claims. Lead Counsel contacted the New York Attorney General's Office ("NYAG") to solicit its interest in filing an *amicus* brief with this Court. The NYAG's office subsequently (on April 7, 2010) filed a brief on the issue of pre-emption in an appeal then pending in the Appellate Division, First Department.

55. On March 22, 2010, Plaintiffs submitted voluminous briefing and exhibits in opposition to Defendants' motions to dismiss, including a Declaration of Robert C. Finkel incorporating facts from the Naess/Schmid January 2010 London interviews, the February 2010 interview of Gil Berman, and exhibits to the SEC Office of Investigation Report.

56. On May 21, 2010, Defendants filed their reply submissions in further support of the motions to dismiss. As with the submissions initially filed in support of the motions to dismiss, Defendants filed voluminous briefs and supporting exhibits in further support of their motion.

57. Plaintiffs submitted on June 15, 2010 a Sur-Reply Memorandum in further opposition to Defendants' motion to dismiss the SCAC. That filing attached the New York Attorney General's April 7, 2010 *amicus curiae* brief filed with the First Department.

58. On June 24, 2010, after Defendants' motion to dismiss the SCAC was fully briefed, the Supreme Court decided *Morrison v Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), holding that only sales of securities on U.S. exchanges or territory could be challenged under U.S. securities laws. Defendants promptly raised with the Court the *Morrison* decision as a further ground for dismissing the SCAC. The parties subsequently submitted letter briefs at the request of this Court on the application of *Morrison* to this Action.

M. <u>The Court's Decisions on the Motions to Dismiss</u>

59. By Orders dated July 29, 2010 and August 18, 2010, the Court granted in part and denied in part the FG Defendants' motion to dismiss the SCAC. The July 29, 2010 Order, 728 F.Supp.2d 354, rejected defendants' arguments that the Martin Act preempted Plaintiffs' common law negligence claims. The August 18, 2010 Order, 728 F.Supp.2d 372, addressed the balance of defendants' motion to dismiss arguments, ruling as follows on the FG Defendants' primary arguments:

a. SLUSA did not pre-empt Plaintiffs' state law claims;

b. Plaintiffs' allegations supported a strong inference of fraudulent intent as to the FG fraud defendants and certain of the Citco Defendants; (the Court dismissed the fraud claims against PwC and Piedrahita);

c. Plaintiffs' adequately pled negligence claims against certain of the FG Defendants, the PwC Defendants, the Citco Defendants and GlobalOp under New York law;

d. Plaintiffs' claims for unjust enrichment to recover fees were direct claims that could be prosecuted by investors against certain of the defendants, including the FG Fee Defendants;

e. Plaintiffs adequately pled claims for breach of fiduciary duty against certain of the FG Defendants, the Citco Defendants and GlobeOp; and

f. Plaintiffs alleged sufficient facts to withstand Defendants' challenge based on *Morrison* on the location of sales of Fund securities.

60. Subsequent to the August 2010 decision, the Parties submitted a pre-trial discovery Order and exchanged compulsory disclosure.

N. Plaintiffs Continued to Ward-Off Challenges to the SCAC

61. Even after the Decisions denying in substantial part Defendants' motions to dismiss the SCAC, Defendants continued to present challenges to the SCAC.

62. Plaintiffs survived two motions to reargue filed primarily by the PwC Defendants alleging that PwC lacked a sufficient relationship to Plaintiffs to be liable for negligenct misrepresentation and negligence under New York law. Both motions to reargue were denied by this Court. 800 F. Supp. 2d 571 and 2012 WL 345378. However, the Court, on the second motion to reargue, limited the claims against the PwC Defendants to subsequent investor and holder claims asserted by already existing investors in the Funds.

O. Plaintiffs' Motion for Class Certification

63. On March 1, 2011, the Representative Plaintiffs served a motion for class certification requesting the Court to certify the Action as a class action and to appoint them as class representatives (the "Motion for Class Certification"). The Motion for Class Certification designated the seven Representative Plaintiffs as class representatives. The Motion was supported, *inter alia*, by extensive declarations by foreign law experts opining as to the enforceability of a U.S. class action judgment in jurisdictions where members of the Class reside.

64. Defendants sought extensive discovery in connection with the class certification motion, including from both the proposed Representative Plaintiffs and from all of the Named Plaintiffs.

65. Plaintiffs opposed discovery of the Named Plaintiffs other than the Representative Plaintiffs and the parties exchanged letter briefs to Magistrate Judge Katz on Defendants' entitlement to take discovery of the non-Representative Plaintiffs.

66. At a discovery hearing conducted on April 19, 2011, Judge Katz ordered that Defendants be limited to identifying twenty non-Class Representative Plaintiffs to respond to paper discovery. Plaintiffs subsequently agreed to produce an additional seven of those twenty Named Plaintiffs for deposition.

67. Thus, Lead Counsel were required to respond to document requests and interrogatories directed to twenty-seven plaintiffs (requiring in many cases retrieval of electronic records going back ten or more years) and to defend against twenty depositions of individuals who are associated with or who are the Representative Plaintiffs or other Named Plaintiffs in Arizona, Cleveland and New York, some of whom traveled from international residences including Israel, Bahrain, and Belgium for their depositions.

68. Following the extensive discovery on class certification issues, all defendants in the Action, including the FG Defendants, opposed the Motion for Class Certification, filing their submissions in opposition on January 13, 2012.

69. Defendants, in opposing class certification, repeated many of the same arguments as on the motion to dismiss, including that certain of Plaintiffs' claims were derivative and belonged to the Funds. In addition, Defendants argued that (i) individual issues of reliance precluded class certification of certain claims, in that not every class member or named plaintiff relied on Defendants' alleged false statements, and that certain of the class members and named plaintiffs relied primarily on other third-party advisors, (ii) individual issues precluded certification of fiduciary duty or negligence claims inasmuch as the relationship between Defendants and named plaintiffs and class members was not common throughout the Class, and (iii) individual issues on where transactions occurred precluded certification under *Morrison*. Defendants also argued that alternative forums were more efficient to resolve Plaintiffs' claims and individual issues existed with respect to recoveries from tax benefits or other litigation proceedings.

70. Defendants also submitted detailed affidavits of foreign law experts opining that foreign jurisdictions would not recognize a U.S. class action judgment, and accordingly that residents of those jurisdictions would not be included in the Class.

71. On April 27, 2012, the Class Representatives made their reply submissions in further support of Class Certification. Plaintiffs argued that Rule 23(b)(3) does not require that *all* issues of law and fact be common among *all* class members, but rather only that "questions of law or fact common to class members predominate over any questions affecting only individual members." Plaintiffs also argued that there was a common predominant thread

throughout Plaintiffs' allegations that Defendants failed to exercise due diligence or due care with respect to their obligations to the Funds and that Defendants knowingly, recklessly, or negligently misrepresented material facts with respect to their due diligence or due care with respect to the funds or Madoff.

72. Plaintiffs also submitted detailed reply declarations by foreign law experts opining that foreign law issues did not preclude certification of a global class.

73. Defendants subsequently filed a Sur-Reply on the class certification motion addressing recent cases first raised in Plaintiffs' reply briefing.

74. The Motion for Class Certification is currently *sub judice*.

P. Merits Discovery

75. Upon substantial denial of the motions to dismiss, the parties engaged in extensive discovery. Among other things, the parties exchanged their initial disclosures pursuant to Rule 26(a), and Plaintiffs served their first requests for the production of documents on the Defendants.

76. Plaintiffs engaged in extensive negotiations with defense counsel concerning the scope, timing and procedure for the production of documents, including the search terms to be used in conducting electronic discovery..

77. The Settling Defendants and the Non-Dismissed Defendants subsequently produced, and Plaintiffs' Counsel reviewed, more than nine million pages of documents.

78. Because of the volume of the production, Plaintiff's Counsel established an electronic database with an outside vendor that allowed Plaintiff's Counsel to review, code, organize, search, and retrieve the documents electronically. Examination and analysis of the documents required a massive effort by teams of attorneys to review the millions of pages of documents, to analyze, code, and organize them, to identify the documents that proved Plaintiffs' allegations, to identify relevant witnesses, and to establish and execute procedures to identify and ascertain additional necessary information.

79. At the time of the MOU, Lead Counsel had conducted eleven depositions of the FG Defendants, three depositions of PwC witnesses and three depositions of Citco witnesses. Subsequent to the MOU, Plaintiffs have conducted or participated in twelve additional PwC depositions, eleven additional Citco depositions, one GlobeOp deposition, two FG depositions, and one deposition of a non-party.

80. Merits discovery is ongoing. Pursuant to this Court's Scheduling Order, it is anticipated that fact discovery in the Action will be completed by June 30, 2013, with expert discovery to follow. The parties have scheduled and expect to schedule more than twenty additional depositions through the discovery cut-off.

Q. <u>The Madoff Trustee and Related Litigation</u>

81. On May 18, 2009, the Trustee for Madoff under the Securities Investor Protection Act ("SIPA"), 15 U.S.C. §§ 78aaa *et seq.* (the "Trustee"), brought an action in the Bankruptcy Court against the Funds, seeking to recover alleged fraudulent transfers of customer property by Madoff to the Funds, and later filed an amended complaint adding as defendants various of the FG Defendants (as amended on July 20, 2010, the "Trustee's Action").

82. On May 18, 2011 the Trustee filed a motion seeking approval of proposed settlement agreements ("Settlement Agreements") that he had reached with Greenwich Sentry L.P. and Greenwich Sentry Partners, L.P. (collectively the "Domestic Funds") in adversary proceedings pending in the Bankruptcy Court. *See* Trustee's Motion for Entry of an Order Pursuant to Section 105(a) of the Bankruptcy Code and Rules 2002(a)(3) and 9019(a) of the Federal Rules of Bankruptcy Procedure Approving Agreements By and Between the Trustee, Greenwich Sentry, L.P. and Greenwich Sentry Partners, L.P., *In re: Bernard L. Madoff Investment Securities LLC*, No. 09-01239-brl, ECF No. 71 (Bankr. S.D.N.Y. May 18, 2011). The provisions originally contained in the Settlement Agreements required the Trustee to obtain an order of the Bankruptcy Court that, by its terms, would have enjoined the prosecution of the direct claims in the *Anwar* Action against certain of the FG Defendants relating to Greenwich Sentry, L.P. and Greenwich Sentry Partners, L.P.

83. In response, on June 14, 2011, Plaintiffs filed an objection to approval of the Trustee's proposed Settlement Agreements unless the injunction provision was modified to allow prosecution of the direct claims being asserted by Plaintiffs in the *Anwar* Action. *See* Objection of the *Anwar* Plaintiffs to Motion for Entry of Order Approving Settlements Between the Greenwich Sentry Funds and the Madoff Trustee, *In re: Bernard L. Madoff Investment Securities LLC*, No. 09-01239-brl, ECF No. 99 (Bankr. S.D.N.Y. June 14, 2011).

84. Following filing of the objection, Lead Counsel negotiated with counsel for the Trustee and the Domestic Funds. Counsel for the Trustee and the Domestic Funds agreed to revise the Settlement Agreements to carve-out the claims asserted in the *Anwar* Action from the injunction and provided language that would ensure that the direct claims being pursued in this action against certain FG Defendants involved in the management of Greenwich Sentry and

Greenwich Sentry Partners would not be barred by the Settlement Agreements. The Bankruptcy Court approved the amended Settlement Agreements on July 7, 2011 after the Plaintiffs reached an agreement on the carve-out and withdrew their objections.[11]

85. Similarly, pursuant to Plaintiffs' efforts through Lead Counsel, the reorganization plans for the Domestic Funds also were modified to carve out the Class claims against certain FG Defendants involved in the management of Greenwich Sentry and Greenwich Sentry Partners asserted in this Action. *See* Debtor's First Amended Plan of Reorganization under Chapter 11 of the Bankruptcy Code at § 10.04.3(e), *In re: Greenwich Sentry, L.P.*, No. 10-16229-brl, ECF No. 211 (Bankr. S.D.N.Y. Sept. 26, 2011).

86. Pursuant to those Settlement Agreements, the Domestic Funds' claims against the FG Defendants were assigned to the Trustee.

87. The Trustee also entered into Settlement Agreements with the Liquidator of the Off-Shore Funds which assigned the Liquidator's claims against the FG Defendants to the Trustee.

88. To date, the Trustee has not asserted against the FG Defendants any of the assigned claims.

IV. SETTLEMENT NEGOTIATIONS AND CASH TERMS OF THE SETTLEMENT

A. The Negotiations

89. Beginning in October of 2009, the FG Defendants approached Plaintiffs in an effort to reach a global settlement among themselves, the Trustee, and Plaintiffs. The FG

[11] As discussed below, the Trustee, more than four years after commencement of the *Anwar* Action and two years after the Bankruptcy Court settlement proceedings, moved in Bankruptcy Court to void *ab initio* the *Anwar* Action and to enjoin this proposed Settlement.

Defendants maintained, at that time, that separate settlements with either the Trustee or the Plaintiffs were not appropriate because they would not put an end to all litigation against the FG Defendants.

90. Lead Counsel reviewed, at that time, confidential financial information from the Founders and, since the FG Defendants insisted on a global settlement, communicated with the Trustee to assess his interest in participating in a joint settlement.

91. Talks continued until April 2012, when Lead Counsel were informed by counsel for the FG Defendants and the Trustee that negotiations between them had reached an impasse.

92. At that time, the FG Defendants informed Plaintiffs that they would consider a separate settlement of the *Anwar* Action. Therefore, Plaintiffs and the FG Defendants entered into extensive settlement discussions with respect to the amount and terms of any settlement.

B. The Cash Settlement Terms

93. Ultimately, the Settling Parties agreed on the proposed Settlement providing for a minimum payment to the Settlement Class of $50.25 million and the $30 million payment into the Escrow Fund. A major portion of the Settlement is being funded from an offshore trust for the benefit of one of the Founders. Lead Counsel were informed that the trustees of this Trust were willing to fund the Settlement, but would not be willing to use funds from the Trust to pay any judgment, and believed that the Trust was immune from execution of a judgment.

94. The position of the Settling Defendants was that the additional $30 million be placed into the Escrow Fund, rather than distributed initially to the Settlement Class, because they anticipated continued litigation, principally with the Trustee, with the potential that they would have to satisfy a later judgment or fund a settlement.

C. Plaintiffs' Continued Due Diligence

95. The August 3, 2012 MOU, among other things, required that the Settling Defendants provide Plaintiffs with detailed financial information and submit to informational interviews with respect to both their financial assets and information relevant to Plaintiffs' claims against the FG Defendants and the Non-Dismissed Defendants.

96. Subsequent to execution of the MOU, Plaintiffs conducted in person interviews of defendants Noel, Tucker, McKeefry, Blum, Lipton, and Vijayvergiya, and a videoconferenced interview of defendant Piedrahita.

97. Plaintiffs determined, based on their investigation, that the Founders (defendants Noel, Tucker, and Piedrahita) paid a substantial percentage of their assets potentially available for execution of a judgment to fund the Settlement.

V. THE STIPULATION AND PRELIMINARY APPROVAL ORDER

A. The Stipulation and Preliminary Approval Hearing

98. On November 6, 2012, the Settling Parties signed and filed a Stipulation of Settlement providing for the settlement of all claims asserted by Plaintiffs in this action. Plaintiffs also filed on November 6, 2012, a motion in the District Court to preliminarily approve the Settlement. The Court scheduled a hearing on the preliminary approval motion for November 30, 2012.

B. The Terms of the Stipulation

99. Under the terms of the proposed partial Settlement, the aggregate amount of $50,250,000 will be paid into the Settlement Fund. Each of the FG Individual Defendants agreed to contribute amounts to FGL or FGBL to facilitate this payment. These funds (less Court-approved attorneys' fees and reimbursement of expenses) will be paid to the Settlement

Class pursuant to the Plan of Allocation. As noted above, the FG Settlement Class was defined in the Stipulation (¶ 1(ss)) to include "Beneficial Owners of shares or limited partnership interests in the Funds as of December 10, 2008, and who suffered a Net Loss of principal invested in the Funds."

100. The FG Defendants stated during settlement negotiations that their payment of settlement consideration greater than $50.25 million should recognize that absent a global settlement, they still needed to defend against and potentially settle or satisfy a judgment with respect to other actions, principally the Trustee's action. The parties agreed, however, that if the FG Defendants were successful in defending against the Trustee's action and others, that the Settlement Class should receive money that had been set aside for these purposes.

101. Accordingly, as additional settlement consideration, subject to conditions set forth in the Stipulation of Settlement, FGL and FGBL agreed to transfer $30,000,000, in the form of cash or security interests into a separate escrow account (the "Escrow Fund"). FG Individual Defendants Walter M. Noel, Jr., Jeffrey H. Tucker and Andrés Piedrahita are contributing cash or security interests to FGL or FGBL to facilitate the payment into the Escrow Fund. As set forth in more detail in the Stipulation, in the event that any of the FG Defendants settle certain other claims, or a judgment is entered against any of the FG Defendants arising from certain other claims, the Escrow Fund shall be reduced, pursuant to terms of the Stipulation. To the extent that funds remain in the Escrow Fund following the final resolution or disposition (including appeals) of such other claims commenced by June 15, 2016, the balance in the Escrow Fund less any additional attorneys' fee award permitted by the court shall be paid to the Settlement Class pursuant to the Plan of Allocation. The Escrow

Account may not be used by the FG Defendants to settle or pay judgments on any claims brought by Settlement Class Members who request exclusion from the Class.

102. The Settling Parties also negotiated a modified "most favored nation" provision so that the Settlement Class would benefit if the FG Defendants paid the Trustee in settlement or judgment in excess of $50.125 million. This additional payment will be equal to 50% of any amount of such a settlement with the Trustee in excess of $50,125,000, up to a maximum of $5,000,000. Because the payment of $50,125,000 to the Trustee would exhaust the Escrow Fund, the total consideration under the Settlement may be enhanced either by the net amount of the Escrow Account or the supplemental payment up to $5 million (or neither), but not both.

103. As further additional settlement consideration, subject to the conditions set forth in the Stipulation, the Released Parties agree to waive (i) indemnification claims they hold against the Funds for the amounts paid under the Settlement, and (ii) $20,000,000 of indemnification claims they hold against the Funds for legal fees and expenses incurred in defending the Action.

104. 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.

105. Because the Settlement Class members are also shareholders or limited partners of the Funds, they are likely to receive distributions from the liquidation of those Funds. The FG Defendants' agreement to waive claims against the Funds benefits members of the Settlement Class by potentially increasing the amounts that they may receive in the liquidation of those Funds.

106. The Settling Defendants also agreed, as part of the Settlement, to facilitate the Plaintiffs' ability to take deposition or trial testimony of the FG Individual Defendants in connection with the prosecution of the Action against the Non-Settling Defendants.

107. Plaintiffs had not included claims of investors in Lambda in the SCAC primarily because no named plaintiff had invested in Lambda. However, in settlement negotiations, the parties agreed to include investors in that fund in the Class to avoid objections, opt-outs, and the potential for splintered litigation.

108. This is a partial settlement only. Plaintiffs will continue to prosecute pending claims against (i) the PwC Defendants (PricewaterhouseCoopers LLP Canada, PricewaterhouseCoopers Accountants Netherlands N.V), (ii) the Citco Defendants (Citco Fund Services (Europe) B.V., Citco (Canada) Inc., Citco Bank Nederland N.V. Dublin Branch, Citco Global Custody N.V., Citco Fund Services (Bermuda), The Citco Group Limited)) and (iii) and GlobeOp Financial Services LLC.

109. The Settlement with the FG Defendants will simplify the prosecution of the Action and enable Plaintiffs to concentrate their efforts on the two defendant groups that Plaintiffs consider "deep pockets" – PwC, Citco and GlobeOp.

110. The Settlement provides for a court order barring the Non-Dismissed Defendants and other similarly situated Persons from asserting claims for contribution, indemnification or other similar claims against the Released Parties. To compensate such Persons for the release of these claims against the Released Parties, the Stipulation provides that "any judgment that may be obtained by a Settlement Class Member against such Persons shall be reduced, to the extent permitted by applicable law, by the greater of (i) the amount that corresponds to the percentage of responsibility attributed to the Released Parties; or (ii) the

gross monetary consideration provided to such Representative Plaintiff or other Settlement Class Member or Members pursuant to this Settlement."

C. The FG Defendants' Rights to Terminate The Settlement

111. The Stipulation provides Settlement Class Members the right to request exclusion from the Settlement on or before February 15, 2013.

112. The FG Defendants did not want to settle Plaintiffs' claims for substantial consideration only to be named as defendants by investors with significant net losses who request exclusion from the Settlement Class.

113. Accordingly, the Stipulation provides for a customary "blow" provision that allows the FG Defendants to terminate the Settlement if Settlement Class Members with aggregate Net Losses above a certain threshold request exclusion from the Class.

114. In the event the Settling Defendants elect to terminate the Stipulation where 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.

D. Plaintiffs' Percentage Recovery From The Settlement

115. Estimates of the percentage recovery on the potential claims that may be filed vary depending on a number of factors. The Settlement Class is defined as "Beneficial Owners" of the Funds "who suffered a Net Loss of principal invested in the Funds." 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.[12]

116. Inasmuch as the fictitious profits paid to the net winners reduce the Net Loss of principal at the Fund level, Plaintiffs believe that the total amount of net losses at the investor level exceeds $1.33 billion. The recovery on claims that Lead Counsel anticipate may be filed will depend on (i) the difference between losses at the Fund level compared to losses at the Beneficial Owner level (which are not known), (ii) the number of Settlement Class Members who file allowed claims and the aggregate Net Loss of those allowed claims, and (iii) the ultimate amount distributed to the Settlement Class from the $30 million Escrow Fund or the $5 million "most favored nation" Clause, if any.

117. The aggregate Net Loss of principal of each possible Settlement Class Member is currently unknown to Lead Counsel 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.

118. Based however on the $1.33 billion reported losses of investments at the Fund level (*i.e.*, the aggregate Net Loss of principal of the Sentry, Greenwich Sentry and Greenwich Sentry Partners funds), Lead Counsel estimate (assuming that Settlement Class Members file claims equal in the aggregate to 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

[12] The Sigma and Lambda funds are not included in this analysis because they were investors in Sentry. Including their net losses or net gains in the analyses would double-count their impact on of the Sentry Fund.

distributed to the Settlement Class from the Escrow Fund, if any. That percentage recovery, however, could be greater if Settlement Class Members file claims valued in the aggregate at less than $1.33 billion and could be lower to the extent that the aggregate Net Losses of Settlement Class Members exceeds $1.33 billion.[13]

119. In addition to amounts that they would receive under the Settlement, Settlement Class Members also are likely to receive additional cash distributions from the prosecution of the non-settled claims and from the liquidation or bankruptcy proceedings involving the Funds (including amounts received as distributions from the Madoff Trustee in the SIPA liquidation). 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)). Actions are presently being pursued against service providers by Litigation Trusts established pursuant to the Greenwich Sentry and Greenwich Sentry Partners reorganization plans.

E. This Court's Preliminary Approval Order

120. On November 6, 2012, Plaintiffs filed a motion in the District Court to preliminarily approve the Settlement. The Court entered the Preliminary Approval Order on November 30, 2012, after taking argument by all interested parties, including the Non-Dismissed Defendants.

[13] Information from the Liquidator of the Sentry, Lambda and Sigma funds in early 2011 indicated that aggregate Net Losses of beneficial owners could exceed $5 billion. *See* Declaration of Sashi Bach Boruchow In Support of Motion for Class Certification (ECF No. 777). More recent information suggests this estimate may be high, although the amount may be several billion dollars depending on the claims filed.

121. The Preliminary Approval Order appointed Rust Consulting, Inc. as the Claims Administrator and directed the mailing of Mailed Notice and Proof of Claim forms and the publication of Summary Notice both in global editions of *The Wall Street Journal* and over *PR Newswire.*

122. The Mailed Notice provided investors with detailed information with respect to the proposed Settlement, Plaintiffs' Counsel's fee and expense request and the Representative Plaintiffs' expense request. Among other things, Class Members were advised of the dates to request exclusion from the Class (February 15, 2013), to object to the proposed Settlement or fee and expense requests (February 15, 2013) and to file a Proof of Claim (April 17, 2013).

123. Accompanying this Joint Declaration as Exhibit E is the Affidavit of Mailing of Daniel Polizzi of Rust Consulting, attesting to the mailing and publication of the Notice and Summary Notice pursuant to the Preliminary Approval Order.

124. To date, Lead Counsel have received one objection to the proposed Settlement. *See* ECF No. 1021. The Preliminary Approval Order directs that Lead Counsel respond to all objections no later than March 8, 2013. Lead Counsel will address objections at that time (rather than doing so piecemail at this time). We submit however that the information contained in this Joint Declaration and in the accompanying Memoranda in support of the Settlement and fee request responds fully to the one objection received.

VI. THE MADOFF TRUSTEE'S PRELIMINARY INJUNCTION MOTION

125. On November 29, 2012, on the eve of the Preliminary Approval hearing, the Trustee filed an adversary proceeding in the United States Bankruptcy Court for the Southern

District of New York (Adv. Pro. No. 08-01789) (the "Stay Proceeding"), seeking declaratory and preliminary injunctive relief purportedly enforcing the automatic stay under the Bankruptcy Code and declaring the *Anwar* Action void *ab initio* as against the FG Defendants. The Trustee further sought to enjoin consummation of the Settlement until the completion of the Trustee's Action, including the satisfaction by the FG Defendants of any settlement or judgment. The Stay Proceeding named certain of the FG Defendants and the Representative Plaintiffs as defendants. Since answers have not yet been filed in the Trustee's Action (which it has been pending over three years), the Stay Proceeding could potentially delay the Settlement or prosecution of the claims against the FG Defendants for years. The purported basis for the Stay Proceeding is that the assets being used to fund the Settlement are "customer property" of the BLMIS estate.

126. In response to the Stay Proceeding, Plaintiffs have filed a Motion to Withdraw the Reference from the Bankruptcy Court so that this Court would hear the application to enjoin the Settlement (the "Reference Motion"). The FG Defendants joined the Reference Motion. Plaintiffs also filed an opposition to the Trustee's motion for a preliminary injunction in the Stay Proceedings on January 25, 2013, as did the FG Defendants, and a reply in support of the Reference Motion.

VII. REASONS FOR THE SETTLEMENT

127. All seven Representative Plaintiffs and all of Plaintiffs' Lead Counsel, who have extensive experience in securities and complex shareholder class-action litigation, believe that the Settlement provides the Settlement Class with significant and certain benefits now and eliminates the risk of coming up empty-handed following what would be years of further uncertain litigation, including disposition of the class certification motion on the claims against

the FG Defendants, motions for summary judgment, and if summary judgment is not granted to defendants, a contested trial and likely appeals as to the FG Defendants, with the possibility of no recovery at all.

128. Among the significant legal issues that the FG Defendants have raised, in addition to class certification issues are the stringent pleading requirements under the PSLRA, application of SLUSA, and issues involving the conflict between direct and derivative claims with respect to holder, fee based, and other claims. The FG Defendants vigorously maintain on the facts that they did not know about wrongdoing at Madoff 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 Depository Trust Company 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.

129. Throughout the settlement process, Lead Counsel communicated with Lead Plaintiffs to receive authorization to proceed with negotiations. Lead Counsel only executed the MOU after receiving the Representative Plaintiffs' authority to do so.

130. 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 herein and in the briefing on the class certification motion and the Court's opinions on the motions to dismiss and for

reargument. In addition, Plaintiffs' 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 will have a 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.

131. Plaintiffs' Lead Counsel also considered 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. No insurance is available to fund the Settlement. Plaintiffs' Lead Counsel determined, based on the certified financial disclosures provided by the FG Defendants and their assessment of the legal and factual risks of continuing the Action against the FG Defendants and proving their claims at trial, some of which are discussed above, that the proposed settlement is in the best interests of the Settlement Class.

VIII. THE PLAN OF ALLOCATION

132. Pursuant to the Order Preliminarily Approving Settlement and Providing for Notice of Proposed Settlement entered by this Court on November 30, 2012, and as set forth in the Notice of Proposed Partial Settlement of Class Action and Settlement Fairness Hearing (at 14-15), all Class Members who wish to participate in the distribution of the Settlement Fund must submit a valid Proof of Claim form postmarked on or before April 17, 2010.

133. Under the Plan of Allocation, the Net Loss for each Settlement Class Member who submits a valid Proof of Claim is the Net Loss of principal with respect to each Fund. Net Loss is defined in the Plan of Allocation as "the total cash investment made by a Beneficial

Owner in a Fund, directly or indirectly through one or more intermediaries, less the total amount of any redemptions or withdrawals or recoveries by that Beneficial Owner from or with respect to the same Fund." If approved, the Plan of Allocation will govern how the proceeds of the Net Settlement Fund will be distributed among Class Members who submit timely, valid Proof of Claim forms.

IX. LEAD COUNSEL'S APPLICATION FOR ATTORNEYS' FEES AND REQUEST FOR REIMBRUSEMENT OF EXPENSES IS REASONABLE

A. Request for Attorneys' Fees and Reimbursement of Expenses

134. The attorneys' fees and expenses requested represent payment to Plaintiffs' Lead Counsel and other counsel involved in the Action for their efforts in achieving this Settlement and the risk in undertaking this representation on a wholly contingent basis. Since the case began in 2008, Plaintiffs' Counsel have undertaken enormous work necessary to prepare the case for trial. Plaintiffs' Counsel conducted all of the investigation, drafted the SCAC, reviewed millions of documents, taken and defended dozens of depositions, employed experts, performed exhaustive legal research and filed many legal briefs on novel and complex issues, including opposing dismissal of the claims, supporting class certification and arguing discovery issues. To date, Plaintiffs' Counsel have not been paid for their services in conducting this litigation on behalf of the Representative Plaintiffs and the Settlement Class, nor for their substantial expenses.

135. The Class Notice informed Settlement Class Members that Plaintiffs' Lead Counsel would ask the Court to approve payment from the Settlement Fund of attorneys' fees of up to 25% of the Settlement Fund and for reimbursement of expenses that were advanced by Plaintiffs' Counsel through July 31, 2012 in connection with the litigation not to exceed $1,450,000.

136. Accompanying this Joint Declaration as Exhibits A through C are lodestar and expenses charts for Boies, Schiller & Flexner LLP, Wolf Popper LLP, and Lovell Stewart Halebian Jacobson LLP, respectively. We individually attest to the accuracy of our respective law firm's records. The hours and lodestar of Lead Counsel, in the aggregate, equals 49,606 and $27,299,521, respectively.

137. Lead Counsel have also reviewed affidavits and the lodestar and and expense charts of the three other Plaintiffs' Counsel, who recorded over 7800 hours, comprising a lodestar of in excess of $3,900,00 with respect to this Action. Those separate affidavits will be submitted if requested by the Court. Including non-Lead Counsel, the aggregate hours and lodestar of all Plaintiffs' Counsel are 57,400 hours and $31.2 million in lodestar. *See, e.g.*, Exhibit A-C.

138. Lead Counsel, on behalf of all Plaintiffs' Counsel, are also requesting reimbursement of $ 1,279,242 in expenses. The major categories of expenses are (i) expert fees, (ii) deposition expenses, including transcripts, video recordings, and travel expenses, (iii) maintaining a computerized database for the review and analysis of documents produced in discovery and deposition transcripts, and (iv) photocopying expenses. Lead Counsel's expenses are detailed in Exhibits A-C and are aggregated with other Plaintiffs' Counsel's expenses in Exhibit D.

139. Plaintiffs' Counsel made every reasonable attempt to allocate the work among them, working closely to avoid duplication of effort and to ensure efficient prosecution. They also worked to limit expenses.

140. Such sums as may be approved by the Court will be paid from the Settlement Fund.

141. Plaintiffs' Counsel may seek additional attorneys' fees at a later date based on any other recoveries, including any funds distributed to the Settlement Class from the Escrow Fund. Settlement Class Members are not personally liable for any such fees or expenses.

B. Support of the Representative Plaintiffs

142. Also accompanying this Joint Declaration are the Declarations of Representative Plaintiffs supporting the Settlement, and Plaintiffs' Counsel's fee and expense request.

X. AWARDS TO THE REPRESENTATIVE PLAINTIFFS

143. Accompanying this Declaration are the declarations of the seven Representative Plaintiffs seeking compensation for their actual costs and expenses (including lost wages) directly related to their representation of the Settlement Class, and/or an incentive award, in the aggregate amount of $225,000. *See* Exhibits F-L. Notice was given to Settlement Class Members that the Representative Plaintiffs would make this application. Under the PSLRA, compensation to the Representative Plaintiffs is capped at actual out-of-pocket expenses (including lost wages) incurred in their representation of the Class. For non-wage earners, the Courts have granted compensation at an hourly rate equivalent to what the Representative Plaintiffs would have earned if their time had not been devoted to the prosecution of this Action. *See* accompanying Memorandum In Support of Fee and Expense Award at 20-22. Because this Settlement involves both federal securities claims and state law claims, there is no restriction against this Court granting the Representative Plaintiffs, in the alternative, an incentive award with respect to the prosecution of the state law claims.

144. Lead Counsel have reviewed the Representative Plaintiffs' applications and submit that they comport with the requirements of both federal law (including the PSLRA) and New York state law.

XI. CONCLUSION

145. Lead Counsel submit that this is an excellent settlement taking into consideration all of the circumstances and we respectfully request the Court to approve the Settlement as fair, reasonable, and adequate to the Settlement Class.

Dated: January 31, 2013

David A. Barrett

Robert C. Finkel

Victor E. Stewart