**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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

# REPLY MEMORANDUM IN FURTHER SUPPORT OF PROPOSED CITCO SETTLEMENT

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## PRELIMINARY STATEMENT

Plaintiffs respectfully submit this Reply Memorandum in further support of their motion for approval of the proposed $125 million Settlement with the Citco Defendants.[1] The Settlement has been accepted without a single objection. No class member who will share in the recovery has objected to the Settlement, the Plan of Allocation or the request of Plaintiffs' counsel for payment of fees and expenses. Plaintiffs and the Citco Defendants are fully committed to effectuating the Settlement.

Indeed, the only question raised about the Settlement comes from representatives of several hundred investors who have been litigating their own claims in a mass action in the courts of The Netherlands since 2010. In essence, these investors have decided that they prefer to continue prosecuting their Dutch action, rather than to participate in the Settlement. Consequently, they have filed requests for exclusion from the Settlement Class. That is a choice, of course, that they (or any other potential class member) are entitled to make, but it does not change the fact that the Settlement is an excellent result that is fair, reasonable and adequate for all other Class Members who unanimously support it.

## SUPPLEMENTAL FACTS REGARDING THE SETTLEMENT

In accordance with the Preliminary Approval Order (Dkt No. 1402), the Settlement Claims Administrator, Rust Consulting, mailed 4,430 notices and proof of claim forms to potential Settlement Class members. In addition, a Summary Notice was published in the international edition of *The Wall Street Journal* and issued worldwide over PR Newswire. *See* accompanying Supplemental Affidavit of Jason Rabe ("Supp. Rabe Aff.") ¶3; Affidavit of Jason

[1] Capitalized terms used herein have the same meaning as in the Stipulation of Settlement (Dkt No. 1398) and the Joint Declaration of Lead Counsel In Support of the Proposed Citco Partial Settlement and Fee and Expense Request ("Joint Declaration"; Dkt No. 1423).

Rabe (Dkt No. 1424). Rust continues to operate a dedicated website and telephone inquiry lines, to address Class Members' questions; these have received 4,540 total hits and 159 calls respectively from August 27, 2015 through November 5, 2015. Supp. Rabe Aff. ¶¶ 4, 5. As of November 5, 2015, proofs of claim have been submitted by 508 class members, even though the deadline for claims submissions is December 28, 2015, and the vast majority of claims are typically filed shortly before the deadline. *Id.* ¶ 11. As noted, there have been no objections filed by any Class Members.

On October 30, 2015, well after the October 16, 2015 deadline for both opt-outs and objections, a letter to the Court was submitted by Deminor Recovery Services (Dkt No. 1435). Prior to the opt-out deadline, Deminor had delivered to the Claims Administrator exclusion requests for some 562 investors with aggregate Net Losses of $155.4 million.[2] These opt-outs comprise about 5% of approximately $3.265 billion in claims that Lead Counsel believe are likely to be filed based on the amount of allowed claims in the FG Settlement. *See* Joint Declaration, ¶ 84.

Deminor states in its letter that it is an "advisor to and representative of" the opt-out group. According to its website, Deminor is not a law firm, but a Luxembourg-based group that "originates and actively manages recovery actions on behalf of private and institutional investors." *See* http://www.deminor.com/drs/en/home; http://www.deminor.com/drs/en/services/recovery-of-losses. Plaintiffs adopt the arguments with respect to the Deminor opt-outs' lack of standing in the November 4, 2015 letter of counsel for the Citco Defendants (Dkt. No. 1444).

[2] Four additional Deminor investors with total losses of about $1.0 million submitted late requests for exclusion, which Lead Counsel recommend should be accepted by the Court. *See* p. 7 below.

The only non-Deminor opt-outs are two investors who initially made exclusion requests, but revoked their requests after communicating with Plaintiffs' counsel. *See* Supp. Rabe Aff. ¶7. Thus, there is unanimity among all remaining members of the Settlement Class in favor of the Settlement.

## ARGUMENT

### A. The Settlement Is Fair, Reasonable and Adequate

Given the absence of any objections, Plaintiffs respectfully refer the Court to the opening Memorandum in Support of Proposed Settlement and Fee Award (Dkt No. 1422) and the supporting Joint Declaration (Dkt No. 1423). We note again that the Settlement was based on a mediator's recommendation – after almost two years of multiple formal mediation sessions and vigorous interim negotiations, all at arms' length – by one of the nation's leading mediators in billion-dollar-plus litigation, former federal judge Layn Phillips. "[A] strong presumption of fairness attaches to a class action settlement where, as here, it is reached in arm's length negotiations among able counsel." *Yang v. Focus Media Holding Ltd*., No. 11 Civ. 9051 (CM)(GWG), 2014 WL 4401280, at *5 (S.D.N.Y. Sept. 4, 2014); *Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331(CM)(MHD), 2014 WL 1224666, at *7 (S.D.N.Y. Mar. 24, 2014) ("A class action settlement is entitled to a presumption of fairness when it is the product of extensive arm's-length negotiations."); *In re Bear Stearns Cos. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 265 (S.D.N.Y. 2012) (finding settlement fair when parties engaged in "arm's length negotiations . . . mediated by retired federal judge Layn R. Phillips, an experienced and well regarded mediator of complex securities cases"); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 160 (S.D.N.Y. 2011) (finding settlement entitled to presumption of

fairness where product of “arms-length negotiation . . . facilitated by [Judge Phillips,] a respected mediator”).

In short, in this case the "settlement amount is sufficient when limited insurance coverage, minimal domestic assets, and significant risk of being unable to collect any judgment against . . . Defendants are taken into account." *See In re Adv. Battery Tech., Inc. Secs. Litig.*, 298 F.R.D. 171, 179 (S.D.N.Y. 2014).

**B. <u>The Settlement Class Unanimously Supports the Settlement</u>**

As noted, there have been no objections from anyone who stands to share in the Settlement recovery. This includes all of the more than 300 Named Plaintiffs, many of whom are institutional investors, as well as the 13 class members who filed the largest claims in the FG Settlement, ranging in Net Loss amount from $40 million to $401 million and totaling approximately $*1.5 billion*, or almost ten times the losses of the Deminor opt-outs. *See* Rabe Declaration In Support of Entry of [FG Settlement] Distribution Order, Exhibit C (Dkt No. 1344-3). These are highly sophisticated institutional investors who are no doubt advised by experienced litigation and corporate counsel. The approval of the largest and most sophisticated class members who would share in the Settlement confirms its fairness. “[T]he reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy.” *In re Bear Stearns Comp., Inc. Sec. Litig*., 2012 U.S. Dist. LEXIS 161269, *at 16 (S.D.N.Y Nov. 9, 2012) (quoting *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp.2d 418, 425 (S.D.N.Y. 2001)).

Although the Deminor opt-outs lack standing to object or appeal here,[3] much of their concern appears to be that they were not involved in settlement negotiations and believe their claims are more valuable than the Settlement recovery. However, the duty of Lead Plaintiffs and Lead Counsel is to obtain a "fair, reasonable and adequate" settlement of the Action that was brought in *this* Court on behalf *all* Class Members, including the 95% who unanimously support the Settlement. *See Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987), affirming settlement approval although 36% of class members objected: "[I]t is well established that a settlement can be fair notwithstanding a large number of objectors."; *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 462-63 (2d Cir. 1982) (affirming approval notwithstanding objections by 54-58% of class members because "[a] settlement can, of course, be fair notwithstanding a large number of objectors."); *In re Bear Stearns Cos.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012) (approving settlement in part because of "the absence of significant exclusion or objection—the rate of exclusion is 5.1% and the rate of objection is less than 1%—[and finding that] this factor weighs strongly in favor" of settlement); *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 185 (W.D.N.Y. 2005), approving settlement although 21% of potential (6

[3] Only those who are members of a class are permitted to object to a settlement. *See* Fed. R. Civ. P.23(e)(5) ("[a]ny class member may object to the proposal if it requires court approval"); Newberg on Class Actions § 11:55 (4th ed.) ("as a general rule only class members have standing to object to a proposed settlement"). Because opt-outs are no longer class members, they lack standing. As the Court of Appeals held in this case, a purported objector to a settlement lacks standing where the "settlement . . . does not cause the . . . party 'formal' legal prejudice." *Bhatia v. Piedrahita*, 756 F. 3d 211, 219 (2d Cir. 2014). *See, e.g., In re Oil Spill by the Oil Rig "Deepwater Horizon,"*, 910 F.Supp.2d 891, 941 (E.D. La. 2012) ("The Court has made this point abundantly clear…[i]f you opt out or if you are excluded, you legally have no standing to object to the settlements because…the settlements do not affect your rights in any way, one way or the other"); *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 110 (D.N.J. 2012) ("The case law does not suggest that a class member requesting exclusion from a settlement may nonetheless object to that settlement," citing cases); *Olden v. LaFarge Corp.*, 472 F.Supp.2d 922, 930-31 (E.D. Mich. 2007) ("opting out of a settlement and choosing to object logically are mutually exclusive options: if one actually opts out, she has no standing to object to the settlement as she will not be bound by it").

of 28) class members opted out: "Even if this Court were to assume that all six of the potential plaintiffs who elected to opt out did so because they believed the terms of the settlement to be unfair, the objection percentage would still amount to only 21%, a rate similar to those found acceptable in other cases," citing *Grant* among other cases); *Tornabene v. General Dev. Corp.*, 88 F.R.D. 53, 61-62 (E.D.N.Y. 1980) (approving settlement where 2,179 of approximately 44,000 class members (4.95%) opted-out: "By approving this settlement the majority who never objected and the very significant number who opted-out are satisfied.").

### C. Plaintiffs Propose Minor Revisions to the Final Judgment

The Settling Parties propose three revisions to the proposed Final Judgment filed on August 12, 2015 as Exhibit B to the Citco Stipulation of Settlement (Dkt No. 1398-5) to address matters raised during the notice period. A copy of the revised proposed Final Judgment containing these revisions is attached as Exhibit A to this Memorandum.

First, the Successor Trustee of the Greenwich Sentry and Greenwich Sentry Partners Litigation Trusts has requested that Paragraph 16 of the Judgment be revised because the referenced litigation is not "derivative litigation," but rather direct actions brought by the Successor Trustee. The Settling Parties would revise the language in the first three lines of Paragraph 16 (up to the semi-colon) to read: "This release does not include any claims asserted or which may be asserted by the Funds in the proceedings entitled (i) *New Greenwich Litigation Trust, LLC, as Successor Trustee of Greenwich Sentry, L.P. Litigation Trust v. Citco Fund Services (Europe) BV, et al.*, New York County Clerk's Index No. 600469/2009; and (ii) *New Greenwich Litigation Trust, LLC, as Successor Trustee of Greenwich Sentry Partners, L.P. Litigation Trust v. Citco Fund Services (Europe) BV, et al.*, New York County Clerk's Index No. 600498/2009."

Second, the BVI court-appointed Liquidator of the Fairfield Sentry and Fairfield Sigma Funds has requested that the underlined words be added for clarification to Paragraph 19 as follows: "The Released Parties shall further waive all rights to seek recovery on claims for contribution or indemnity that they hold or may hold against the Funds or any party indemnified by the Funds, the FG Defendants, GlobeOp, and the PwC Defendants for any expenses incurred or amounts paid in settlement or otherwise in connection with the Action."

Third, four Persons affiliated with the Deminor group submitted late Requests for Exclusion. Three of the Requests were received on October 19, 2015, one business day after the exclusion period expired. The fourth Request was received on November 5, 2015. The aggregate claimed dollar value of the four Requests, determined by Net Loss of principal, is approximately $1 million. *See* Supp. Rabe Aff. ¶8. Citco does not object and we respectfully request that the Court exercise its discretion to accept these late Exclusions as reflected in ¶14 of the annexed revised Final Judgment.

## CONCLUSION

For the reasons stated herein, and in Plaintiffs' opening Memorandum and Joint Declaration, Plaintiffs respectfully request that the Court approve the Settlement and Plan of Allocation and enter the Final Judgment, including approval of Plaintiffs' request for an award of attorneys' fees and reimbursement of expenses.

Dated: November 6, 2015

Respectfully submitted,

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