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 PROPOSED PWC SETTLEMENT AND FEE AWARD

BOIES, SCHILLER & FLEXNER LLP
David A. Barrett
Howard L. Vickery, II
575 Lexington Avenue
New York, NY 10022
Telephone: (212) 446-2300
Facsimile: (212) 446-2350

WOLF POPPER LLP
Robert C. Finkel
845 Third Avenue
New York, NY 10022
Telephone: (212) 759-4600
Facsimile: (212) 486-2093

BOIES, SCHILLER & FLEXNER LLP
Stuart H. Singer
Carlos Sires
Sashi Bach
401 East Las Olas Boulevard, #1200
Ft. Lauderdale, Florida 33301
Telephone: (954) 356-0011
Facsimile: (954) 356-0022

LOVELL STEWART HALEBIAN JACOBSON LLP
Christopher Lovell
Victor E. Stewart
61 Broadway, Suite 501
New York, NY 10006
Telephone: (212) 608-1900

Lead Counsel for Plaintiffs

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The Representative Plaintiffs,[1] on behalf of themselves and the PwC Settlement Class, respectfully move for final approval of the $55 million proposed PwC Settlement and Plan of Allocation, and an award of attorneys' fees of 30% of the Settlement Amount and reimbursement of expenses of $1,803,816.

I. INTRODUCTION

The proposed Settlement provides for PwC's payment of $55 million, which is already being held in escrow, in exchange for release of all claims asserted against PwC in this Action. The Settlement provides a substantial, immediate monetary benefit to the Settlement Class, and culminates over $235 million in settlements in this Action, with an additional $30 million being held in escrow subject to resolution of non-party claims against the FG Defendants.

The Settlement was reached after the Court urged the parties on a number of occasions to try to resolve the case. The parties ultimately accepted the recommendation of the mediator – a highly-experienced former federal judge – but only after a three-year mediation process that included six separate mediation sessions and intense, arm's-length negotiations. The Settlement also culminates over seven years of hard-fought litigation, which included comprehensive legal briefing on the pleadings, class certification, summary judgment, *Daubert* motions and motions *in limine*, as well as extensive investigation and discovery efforts by the Plaintiffs. The Plaintiffs' factual investigation involved the review of more than nine million pages of documents, and depositions and interviews of over 100 fact and expert witnesses.

As discussed below and in the accompanying Joint Declaration, the proposed Settlement is fair, reasonable and adequate and warrants approval by this Court. Plaintiffs and class

[1] Capitalized terms used herein have the same meaning as in the Stipulation of Settlement (Dkt No. 1533) and the Joint Declaration of Lead Counsel in Support of the Proposed PwC Class Action Settlement and Fee and Expense Request ("Joint Decl.") filed herewith.

members would have faced significant hurdles to recovering more than the Settlement Amount, including uncertainty over multiple complex legal issues and the collectability of a substantially greater judgment from the PwC Defendants.

Lead Counsel respectfully seek attorneys' fees of 30% of the Settlement Fund and reimbursement of $1,803,816 in expenses. The 30% fee request ($16.5 million) combined with the $51,312,500 in fees previously awarded by the Court in the FG, GlobeOp and Citco settlements are still less than 87% of Plaintiffs' Counsel's lodestar of $78,776,260 through February 29, 2016 at current standard rates.[2] *See* Joint Decl. at ¶¶ 17, 19, 101-03.

In light of (i) the result obtained for the Settlement Class; (ii) the amount and quality of work done by Lead Counsel over the past seven years; (iii) the risks involved in this litigation; (iv) the complexity of the Action; and (v) the size of the fee in relation to the Settlement achieved, the fee request of 30% of the Settlement Amount is fair and reasonable under the standards applied in this Circuit. The notice distributed to Class Members ("Notice") advised that Lead Counsel would seek an award of up to 30% of the Settlement Fund and, to date, no Settlement Class Member has objected to such an award. The requested expenses also are reasonable, as they are of the type that are regularly reimbursed by courts in this Circuit, and were necessary for the effective prosecution of the Action. The Notice advised that Lead Counsel would seek reimbursement of expenses not to exceed $2.5 million, and to date no Class member has objected to the reimbursement of expenses.

[2] For Boies, Schiller & Flexner LLP, references to current standard rates mean 2015 standard rates.

II. STATEMENT OF FACTS

The Joint Declaration details the factual and procedural background and the events that led to the Settlement, and is incorporated herein by reference.[3]

III. ARGUMENT

A. The Proposed Partial Settlement Should Be Approved as Fair, Reasonable and Adequate

The Second Circuit recognizes a "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).

In order to approve a settlement, a district court must find that it 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 and citation omitted). The claims here were settled after over seven years of intense litigation, including exhaustive discovery. Highly competent counsel appeared on both sides, and settlement was reached only after extensive negotiations with the assistance of three mediators including Hon. Layn Phillips, a highly-respected former District Judge, whose mediator's proposal the parties ultimately accepted.

[3] Plaintiffs also respectfully refer the Court to the prior Joint Declarations in support of the FG Settlement dated January 31, 2013 (Dkt No. 1038); the GlobeOp Settlement dated October 11, 2013 (Dkt No. 1205); and the Citco Settlement dated October 6, 2015 (Dkt No. 1423), for further information concerning Lead Counsel's litigation efforts.

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 Charron v. Wiener*, 731 F.3d 241, 247-48 (2d Cir. 2013) (district court properly utilized the *Grinnell* factors).

This Court has applied the *Grinnell* factors to approve settlements, including prior settlements in this case. *See, e.g., Rubin v. MF Global, Ltd.*, No. 08 Civ. 2233 (VM) (Nov. 18, 2011) (Dkt No. 200, ¶ 6); FG Final Judgment (Dkt No. 1097, ¶ 7); GlobeOp Final Judgment (Dkt No. 1232, ¶ 9); Citco Final Judgment (Dkt No. 1457, ¶ 7); Tr. of hearing on FG Settlement (Nov. 30, 2012, Dkt No. 1015).

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

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

A class action such as this one involving federal securities law and common law tort and contract claims is complicated by its very nature. Courts have recognized 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.); *In re Sumitomo Copper Litig*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999) (securities class actions are "notably difficult and notoriously uncertain."). 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.).

Beyond these inherent elements of securities class actions, this case was extraordinarily complex. PwC Netherlands audited the Funds' financial statements from the 1990s through December 31, 2005, and PwC Canada audited the Funds' financial statements for the years ended December 31, 2006 and 2007. PwC's work was largely conducted in The Netherlands and Canada and many fact witnesses were located overseas. The claims against the FG and Citco Defendants were intertwined with those against PwC, and in total, there were over 90 fact depositions and 22 expert witnesses whose reports totaled over 1900 pages. PwC alone produced almost 400,000 pages of documents, including lengthy work papers. All defendants were represented by outstanding law firms.

Moreover, there were a number of novel and unsettled legal issues, such as:

- Whether Plaintiffs' state law claims were barred by New York's Martin Act and the Securities Litigation Uniform Standards Act of 1995 ("SLUSA").
- Whether Plaintiffs could sustain negligence claims under *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y. 2d 536 (1985).
- Whether certain of Plaintiffs' claims were direct claims or were derivative claims that belong to the Funds.
- Whether Plaintiffs could sustain "holder claims" for damages.
- Whether a litigation class could properly be certified.
- The effect on Plaintiffs' claims of various proceedings involving the liquidations of BLMIS and of the Fairfield Funds.

See also Joint Decl., ¶¶ 6-7.

In short, litigating the claims against PwC has been protracted and extremely challenging. Absent settlement, it would continue to be so through trial and inevitable post-trial proceedings and appeals, as well as judgment enforcement proceedings.

2. The Settlement Class's Response to the Settlement

The reaction of the Settlement Class to the Settlement is a significant factor to be weighed in considering its adequacy. *See Maley v. Del Global Techs. Corp*., 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) (McMahon, J.). Class Members were advised of the dates to request exclusion from the Class (April 1, 2016), to object to the proposed Settlement or fee and expense requests (April 1, 2016) and to file a Proof of Claim (May 23, 2016). *See* accompanying Affidavit of Jason Rabe Regarding Class Notice ("Rabe Aff.") at ¶ 15. As of March 16, 2016, no objections have been filed.[4] Four Requests for Exclusion have been submitted as of March 16, 20106 (Rabe Aff., ¶ 16) and additional opt-outs may approximate those submitted in the Citco Settlement from plaintiffs who are pursuing litigation in The Netherlands against PwC. *See* Joint Decl., ¶73. Through March 16, 2016, 553 claims have been filed, with many more expected to be filed by the May 23, 2016 deadline. *Id*., ¶ 16.

Pursuant to 28 U.S.C. § 1715, PwC provided notice of the Settlement to the appropriate State and Federal officials on March 4, 2016 (the "CAFA Notice"). In order to allow the 90-day statutory period after notice, the proposed Final Judgment has been modified to defer its effective date with respect to the recipients of the CAFA Notice until June 2, 2016. *See* Joint Decl. ¶ 14 and Ex. E. In similar circumstances, courts have conducted settlement hearings without prejudice to the rights of CAFA Notice recipients to be heard. *See, e.g., Precision Associates, Inc. v. Panalpina World Transp. (Holding) Ltd.*, No. 08-CV-42 JG VVP, 2015 WL 6964973, at *8 n. 24 (E.D.N.Y. Nov. 10, 2015) (Gleeson, J.); *Watts v. Jackson Hewitt Tax Serv. Inc*., 1:06-cv-06042, Dkt 235, ¶ 17 (E.D.N.Y. Oct. 24, 2013) (Irizarry, J.).

[4] By Orders dated February 2 and 16, 2016 (Dkt Nos. 1547 and 1551), the Court denied the New Greenwich Litigation Trustee, LLC's motion to intervene for purposes of objecting to the proposed Settlement. *See* Joint Decl. at ¶ 82.

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) (Buchwald, J.) (internal citations omitted). Here, settlement was reached only after the completion of exhaustive factual and expert discovery and with guidance from multiple opinions of the Court, as well as mediation proceedings, thus giving the parties comprehensive information about the claims.

4. The Risks of Establishing Liability and Damages

In assessing fairness, reasonableness and adequacy, courts should consider such factors as the "risks of establishing liability" and "the risks of establishing damages." *Grinnell*, 495 F.2d at 463. While Plaintiffs and Lead Counsel believe that the claims asserted against the PwC Defendants are strong, there are risks inherent in summary judgment and a jury trial. Legal issues, even if resolved favorably before the District Court, are subject to further review on appeal and subsequent adverse changes in the law. The Court has addressed many of these issues in its opinions throughout the case.

All seven Representative Plaintiffs and 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 years of further uncertain litigation, including final disposition of the class certification order, a contested trial and likely appeals. *See* Joint Decl. ¶¶ 6-12, 87-92.

5. The Risk of Maintaining the Case as a Class Action

Plaintiffs believe the March 3, 2015 class certification order entered after remand from the Court of Appeals is proper and likely to be sustained. *See Anwar v. Fairfield Greenwich Ltd.*, 306 F.R.D. 134 (S.D.N.Y. 2015). Plaintiffs recognize, however, that risks are presented by PwC's pending petition for Rule 23(f) review. The Settlement avoids all risk with respect to whether a litigation class may be maintained, which supports 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."); *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) (risk of plaintiffs' not succeeding in certifying class supported approval of settlement); *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 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. The district court is asked 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.'" *Grinnell*, at 462 (citation omitted). 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) (Stein, J.) (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."). *See, e.g., In re IPO Sec. Litig.*, 671 F. Supp. 2d 467, 483 (S.D.N.Y. 2009) (approving settlement based on a 2% recovery).

Plaintiffs and Lead Counsel carefully considered the many risks of continued litigation, some of which are noted above and in the Joint Declaration, as well as the potential difficulties in collecting a substantially larger judgment.

The proration for the PwC Settlement Class would be approximately 1.68%, prior to fees and expenses, based on approximately $3.3 billion in claims that were allowed in the FG Settlement. *See* Joint Decl., ¶ 12, 85. In addition to amounts that they would receive under the PwC Settlement, Settlement Class Members have or will receive distributions from the $50.25 million FG Settlement and $125 million Citco Settlement, as well as the $5 million GlobeOp Settlement for domestic fund investors. The proposed settlement recovery, when combined with the FG, GlobeOp and Citco Settlements, would be about 7.0% of the FG claims amount; this proration is several times greater than the median recovery in comparable cases. *See* Joint Decl., ¶¶ 88-89 (median recovery in securities class actions with estimated damages between $1 billion and $5 billion was 1.1%). Moreover, Class Members have already received or are likely to

receive additional cash distributions from liquidation or bankruptcy proceedings involving the Funds,[5] and distributions from the Madoff Victim Fund. *See* Joint Decl. ¶¶ 12, 75-77, 86, 89.

With respect to collectability of a judgment, Plaintiffs claimed damages against PwC of about a billion dollars. PwC's insurance coverage would likely be exhausted by further litigation expenses, while PwC Canada and PwC Netherlands are limited liability companies that are unlikely to be able to pay a large judgment, while individual partners' assets are protected from execution. Other firms that use the PwC name, such as PwC U.S. and PwC International, are separate legal entities from which a judgment in this Action could not be collected. Any collection efforts could take years. *See* Joint Decl. ¶ 9.

Plaintiffs respectfully submit that the foregoing circumstances support the reasonableness of the Settlement.

C. The Plan of Allocation Is Fair, Reasonable and Adequate and Warrants Approval

A "plan of allocation . . . must be fair and adequate.'" *Maley*, 186 F. Supp. 2d at 367 (citation omitted). "'When formulated by competent and experienced counsel,' a plan . . . '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). The Court previously approved allocation plans in the FG, Citco and GlobeOp Settlements that apportioned recovery based on each Class Member's Net Loss. *See* Dkt Nos. 1097 and 1345. The PwC plan is identical.

[5] Liquidation proceedings involving Sentry, Sigma, and Lambda Funds 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 were filed in the Bankruptcy Court for the Southern District of New York (Case No. 10-16229 (BRL)).

D. The Court Should Finally Certify the Settlement Class

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. These requirements are met here.

Although the Court, in the litigated class, excluded certain countries from the definition of the Class to avoid prejudice to the Defendants if those countries did not recognize the preclusive effect of a litigated U.S. judgment (*see* 306 F.R.D. 134), that rationale does not apply to the Settlement Class, where each claimant will be required to sign a release to participate in the Settlement and where the PwC Defendants have consented to certification.

Under Rule 23(g), Class counsel must be "qualified, experienced and generally able to conduct the litigation." *See In re Drexel Burnham Lambert Group*, 960 F.2d 285, 291 (2d Cir. 1992). Lead Counsel here are highly qualified in conducting class action and complex litigation and have effectively prosecuted this Action, achieving a substantial benefit for the Settlement Class.

In this Action, the Court has certified the prior settlement classes and affirmed the appointment of Lead Counsel. *See* Dkt Nos. 1097, ¶¶ 5-6; 1232, ¶¶ 5-6; and 1457 ¶¶ 5-6. The same result should obtain here under similar circumstances.

E. Lead Counsel's Petition for an Award of Attorneys' Fees Is Reasonable and Should Be Granted

1. Legal Standard

"[A] lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v.*

Van Gemert, 444 U.S. 472, 478 (1980); *see Goldberger v. Integrated Res., Inc*., 209 F.3d 43, 47 (2d Cir. 2000). The purpose of the common fund doctrine is to fairly and adequately compensate class counsel and to ensure that all class members contribute equally towards litigation expenses. *Id.* at 47; *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695(CM), 2007 WL 4115808, at *2 (S.D.N.Y. Nov. 7, 2007) (McMahon, J.). In addition to providing just compensation, awards of fair attorneys' serve to encourage skilled counsel to seek redress for damages suffered by entire classes of persons, and to discourage future alleged misconduct. *See, e.g.*, *Maley,* 186 F. Supp. 2d 358 at 369; *Hicks v. Morgan Stanley*, No. 01-cv-10071 (RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) (Holwell, J.) ("To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding.") (citation omitted).

2. The Requested Fee is Fair Under the Percentage-of-Recovery Method

The Supreme Court has suggested that in common fund cases, the fee should be determined on a percentage-of-recovery basis. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). This method is favored in this Circuit because it "'directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.'" *Wal-Mart Stores,* 396 F.3d 96 at 122 (citation omitted). Indeed, the "trend in this Circuit is toward the percentage method." *Id*. *See, e.g. Fogarazzo v. Lehman Bros., Inc*., No. 03-cv-5194 (SAS), 2011 WL 671745, at *2 (S.D.N.Y. Feb. 23, 2011) (Scheindlin, J.). *In re Blech Sec. Litig.*, No. 94 CIV. 7696, (RWS), 95 CIV. 6422(RWS), 2000 WL 661680, at *5 (S.D.N.Y. May 19, 2000) (Sweet, J.) ("the percentage of the fund method is more appropriate than the lodestar method for determining attorney's fees in common fund

cases."); PSLRA, 15 U.S.C. §78u-4(a)(6) (fees "shall not exceed a reasonable percentage of the amount" of damages).

This Court has applied the percentage-of-recovery method in awarding attorneys' fees in common fund cases, including earlier settlements in this action. *See* Dkt Nos. 1099, 1233, 1457. *Anwar v. Fairfield Greenwich Ltd. (Da Silva Ferreira v. EFG Cap. Int'l Corp.*, 11-cv-813), 2012 WL 1981505 (S.D.N.Y. June 1, 2012); *Rubin v. MF Global, Ltd. et al*., 08-cv-2233 (VM), Order dated Nov. 18, 2011 (Dkt No. 198).

3. The Requested Fee Is Supported by the Second Circuit's *Goldberger* Factors

In determining reasonable attorneys' fees, district courts are guided by the factors first articulated by the Second Circuit in *Grinnell Corp.*, 495 F.2d 448. As summarized more recently, these factors include:

> (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

Goldberger, 209 F.3d at 50. As set forth below and in the Joint Declaration, Lead Counsel's fee request is reasonable.

a. Time and Labor Expended by Counsel

Lead Counsel have devoted enormous time and effort to the prosecution this action and to the Settlement. In total, Lead Counsel have expended over 114,000 hours of attorney and paralegal time through February 29, 2016, resulting in a combined "lodestar" amount of $74,876,260 at Lead Counsel's standard billing rates. *See* Joint Decl. ¶ 101 and Exhs. A-D.[6]

[6] In addition, the three non-lead counsel firms, which assisted in the prosecution of this action, recorded over 7,800 hours through July 31, 2012, comprising a lodestar of in excess of $3.9 million with respect to this Action. *See* Joint Decl., ¶ 102.

The substantial time devoted to litigating the claims against the PwC Defendants reflects the tremendous effort needed to prosecute those claims and to bring them to a favorable resolution. There are a number of core attorneys on the case who have devoted large amounts of their time to the litigation in order to ensure continuity and build on their knowledge base.

During seven years of litigating this Action, Lead Counsel have, *inter alia*: (i) prepared multiple complaints based on extensive investigation of public and non-public information; (ii) overcome PwC's motions to dismiss the SCAC as to the negligence claim; (iii) defeated in part three motions by PwC to reargue the denial of dismissal of the SCAC; (iv) conducted extensive document discovery including Plaintiffs' production of some 75,000 pages of documents and review of over nine million pages produced by Defendants; (v) responded to detailed interrogatories served on the Representative Plaintiffs and some 20 additional named plaintiffs, (vi) conducted over one hundred fact and expert depositions of persons affiliated with Defendants and non-parties, as well as defending 18depositions of Plaintiffs; (vii) litigated and secured two orders certifying the Class; (viii) participated with defense counsel in dozens of meet and confer sessions with respect to document, deposition, and other aspects of discovery; (ix) prepared letter-briefs and argued to Magistrate Judges Katz and Maas multiple discovery disputes; (x) retained and consulted with experts on accounting, damages and related topics and filed hundreds of pages of expert reports; (xi) protected the interests of putative class members outside the confines of this Action by, among other things, successfully seeking the liquidation of the offshore Fairfield Funds in the British Virgin Islands, and actively participating in the Fairfield Sentry Liquidation Committee; (xii) prepared multiple mediation statements, analyzed PwC's mediation submissions and participated in six mediation sessions and further numerous communications; (xiii) opposed PwC's motion for summary judgment; (xiv) engaged in

extensive trial preparation, including designating hundreds of exhibits, filing pre-trial memoranda, filing and responding to numerous motions *in limine*, responding to *Daubert* motions, and preparing proposed jury instructions and verdict forms; and (xv) otherwise vigorously represented the interests of putative class members in this extraordinarily complex dispute.

As further supported by the lodestar cross-check, Lead Counsel submit that the first *Goldberger* factor weighs strongly in favor of the requested attorneys' fee.

b. Magnitude and Complexities of the Litigation

"Securities class litigation 'is notably difficult and notoriously uncertain.'" *Merrill Lynch Research Reports Sec. Litig.*, 246 F.R.D. 156, 172 (S.D.N.Y. 2012) (Keenan, J). *See, e.g.*, *Fogarazzo*, 2011 WL 671745, at *3 ("securities actions are highly complex") (citation omitted).

Although the Madoff Ponzi scheme was a major news event, the facts of this case were largely separate from the details of Madoff's fraud and required vast amounts of investigation and analysis. Moreover, Lead Counsel had to navigate a minefield of legal issues, any of which could have defeated or severely limited the Plaintiffs' claims or damages. *See* p. 5, *supra* and Joint Decl., ¶¶ 6-7.

Moreover, efforts to resolve the claims that ultimately led to the Settlement were protracted and required tremendous skill and tenacity on the part of Lead Counsel. As the Court knows from the pre-trial filings, Plaintiffs were ready for trial and fully prepared to litigate to judgment.

c. Risks of the Litigation

The Second Circuit has identified "'the risk of success as 'perhaps the foremost' factor to be considered in determining'" a reasonable award of attorneys' fees." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. at 467 (quoting *Goldberger*, 209 F.3d at 54); *In re Telik, Inc.*

Sec. Litig., 576 F. Supp. 2d at 592 (risk is "a pivotal factor"). Moreover, "class actions confront even more substantial risks than other forms of litigation." *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd*., No. 01 Civ. 11814 (MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004) (Pollack, J.).

Although Representative Plaintiffs and Lead Counsel believe that the claims against the PwC Defendants are strong, the risk of loss is significant and fully supports the requested fee. Lead Counsel acted on a strictly contingent-fee basis, and prosecuted the claims with no guarantee of compensation or of recovery of millions of dollars in out-of-pocket expenses. *See In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999) (Pollack, J.).

As discussed in the Joint Declaration, Plaintiffs faced numerous challenges. The PwC Defendants vigorously maintain that they were not responsible for Plaintiffs' losses and that since other professionals and even the SEC did not detect Madoff's fraud, they, too, should not be liable. As cited by PwC multiple times, nearly every other action against auditors of Madoff-related feeder funds has been unsuccessful. *See, e.g., DeLollis v. Friedberg, Smith & Co., P.C.*, 600 F. App'x 792 (2d Cir. 2015) (summary order) (affirming dismissal of negligence claims arising from auditor's alleged failure to investigate conduct of non-client); *McBride v. KPMG* Int'l, Nos. 650632/09, 101615/09, 101616/09, 650633/09, 2014 WL 3707977 (N.Y. Sup. Ct. July 25, 2014) (dismissing claims, including negligence and negligent misrepresentation claims, against KPMG UK); *In re Herald, Primeo and Thema*, 540 F. App'x 19 (2d Cir. 2013), (affirming dismissal of auditor claims on *forum non conveniens* grounds); *Sandalwood Debt Fund A, L.P. v. KPMG, LLP*, No. L-10255-11, 2013 WL 3284126 (N.J. Super Ct. App. Div. July 1, 2013), (granting KPMG's motion to compel arbitration); *Eastham Capital Appreciation Fund LP v. KPMG LLP*, Final Award (CPR Arbitration Aug. 21, 2013), *petition to confirm award*

granted, *KPMG v. Eastham Capital*, No. 654139/13 (N.Y. Sup. Ct. Jan. 2, 2014), NYSCEF No. 26 (confirming arbitrators' rejection of claims due to plaintiff's failure to show what "other reasonably skillful and diligent accountants" would have done or "that any other audit of a Madoff investor ever resulted in a qualified opinion"); *Meridian Horizon Fund, LP v. KPMG (Cayman)*, 487 F. App'x 636 (2d Cir. 2012) (summary order) (affirming dismissal of audit claim under *Credit Alliance*); *Stephenson* v. *Citco Grp. Ltd.*, 700 F. Supp. 2d 599 (S.D.N.Y. 2010), *aff'd*, 482 F. App'x 618 (2d Cir. 2012) (summary order) (dismissing claims against PwC Canada on grounds it owed no duty to investor); *Saltz v. First Frontier, LP*, 782 F. Supp. 2d 61 (S.D.N.Y. 2010), *aff'd*, 485 F. App'x 461 (2d Cir. 2012) (causes of action against auditors failed to state claim); *In re J.P. Jeanneret Assocs., Inc.*, 769 F. Supp. 2d 340 (S.D.N.Y. 2011) (dismissing federal securities claim against fund auditor); *In re Merkin & BDO Seidman Secs. Litig.*, 817 F. Supp. 2d 346 (S.D.N.Y. 2011) (dismissing federal securities claims against auditor); *CRT Invs., Ltd. v. BDO Seidman, LLP*, 85 A.D. 3d 470 (1st Dep't 2011) (dismissing common law claims against auditor for failure to state a claim); *Wolf Living Trust v. FM Multi-Strategy Inv. Fund, LP*, No. 09 Civ. 1540 (LBS), 2010 WL 4457322 (S.D.N.Y. Nov. 2, 2010) (dismissing auditor claim for lack of subject matter jurisdiction).[7]

In addition to the inherent risks in a jury trial and the many novel and difficult legal issues presented by this case which might lead to reversal on appeal, there are foreseeable obstacles to collection of a large judgment against the PwC Defendants. *See* p. 10, *supra*.

[7] In one case that arose out of the Madoff Ponzi scheme and was tried in Seattle, Washington, the jury reached a verdict for the plaintiff against Ernst & Young LLP. However, that case was an action brought by a single investor, which did not implicate SLUSA and was governed by very favorable Washington law. *See FutureSelect Portfolio Management, Inc. v. Tremont Group Holdings, Inc.*, 180 Wash. 2d 954, 971 (2014) (E&Y was a "seller" of securities (*i.e.*, a "substantial contributive factor") under the provisions of an applicable Washington statute).

d. Quality of Representation

Lead Counsel respectfully submit that the quality of their representation supports the reasonableness of the requested fee. Lead Counsel have many years of experience in complex federal civil litigation, particularly securities litigation and other class actions. *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, Dkt No. 22.

The Settlement represents a favorable result for the Settlement Class in the face of extremely difficult legal and factual circumstances and can be attributed to the diligence, determination, and hard work of Lead Counsel. *See Veeco*, 2007 WL 4115808, at *7 ("Plaintiffs' Counsel's skill and expertise contributed to the favorable settlement for the class") (citation and internal quotation marks omitted).

Moreover, "[t]he fact that the settlements were obtained from defendants represented by formidable opposing counsel from some of the best defense firms in the country also evidences the high quality of lead counsels' work." *In re Adelphia Commc'ns Sec. & Deriv. Litig.*, No. 03 MDL 1529 (LMM), 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006), *aff'd*, 272 F. App'x 9 (2d Cir. 2008) (citation and internal quotation marks omitted). Here, the attorneys from Kirkland & Ellis LLP and Hughes Hubbard & Reed LLP representing the PwC Defendants are among the most respected and accomplished litigators in the country and were sure to continue their vigorous and comprehensive defense through the remainder of the case.

e. The Requested Fee in Relation to the Settlement

"When determining whether a fee request is reasonable in relation to a settlement amount, 'the court compares the fee application to fees awarded in similar securities class-action settlements of comparable value.'" *In re Comverse Tech., Inc. Sec. Litig.*, No. 06–CV–1825

(NGG)(RER), 2010 WL 2653354, at *3 (E.D.N.Y. June 24, 2010) (quoting *In re Marsh & McLennan Co. Inc. Sec. Litig*., 2009 WL 5178546, at *19). As noted, the Settlement provides the Settlement Class with a cash benefit that was achieved despite many obstacles and risks. Fees in the amount of 30% of settlements of this size are within the range of fees that have regularly been awarded by the courts, particularly where, as here, the requested fee is significantly less than the lodestar amount. *See, e.g.*, *Velez v. Novartis Pharms. Corp.*, No. 04 Civ. 09194 (CM), 2010 WL 4877852, at *2 (S.D.N.Y. Nov. 30, 2010) ("District courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater."); *In re IPO Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding fee of one-third of $510 million settlement fund; adjusted lodestar multiple of .84); *In re Priceline.com, Inc. Sec. Litig.*, No. 3:00 cv 1884 (AVC), 2007 WL 2115592, at *4-5 (D. Conn. July 20, 2007) (awarding fees of 30% of $80 million fund; 1.98 lodestar multiple); *In re Bisys Sec. Litig.*, No. 04 Civ. 3840 (JSR), 2007 WL 2049726, at *3 (S.D.N.Y. July 16, 2007) (awarding 30% of $65.9 million settlement fund; lodestar multiple of 2.99); *Kurzweil v. Philip Morris Cos., Inc.*, No. 94 Civ. 2373 (MBM), 1999 WL 1076105 (S.D.N.Y. Nov. 30, 1999) (awarding 30% of $123.8 million settlement fund; lodestar multiple of 2.46); Dkt No. 1457 (awarding 30% of $125,000,000 Citco settlement fund).

f. Public Policy Considerations

"Public policy concerns favor the award of reasonable attorneys' fees in class action securities litigation." *Flag Telecom Holdings Ltd. Sec. Litig.*, No. 02-cv-3400, 2010 WL 4537550, at *29 (S.D.N.Y. Nov. 8, 2010). "In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives," *Id., quoting In re WorldCom Inc., Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005). Moreover, attorneys' fees must be sufficient "'to encourage plaintiffs' counsel to bring securities class actions that supplement the

efforts of the SEC.'" *In re Am. Int'l Group Inc. Sec. Litig.*, No. 04 Civ. 8141 (DAB), 2012 WL 345509, at *5 (S.D.N.Y. Feb. 2, 2012) (citation omitted); *Maley*, 186 F. Supp. 2d at 373 ("In considering an award of attorney's fees, the public policy of vigorously enforcing the federal securities laws must be considered.").

As a practical matter, lawsuits such as this one can be maintained only if competent counsel can be retained to prosecute them. This will occur if courts award reasonable and adequate compensation where successful results are achieved, often after years of litigation. As Judge Brieant noted:

> A large segment of the public might be denied a remedy for violations of the securities laws if contingent fees awarded by the courts did not fairly compensate counsel for the services provided and the risks undertaken.

In re Union Carbide Corp. Cons. Prods. Bus. Sec. Litig., 724 F. Supp. 160, 169 (S.D.N.Y. 1989).

g. Reaction of the Settlement Class to the Fee Request

"The reaction by members of the Class," while not one of the formal *Goldberger* factors, "is entitled to great weight by the Court." *Maley*, 186 F. Supp. 2d at 374 (citation omitted); *see In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d at 594 ("That only one objection to the fee request was received is powerful evidence that the requested fee is fair and reasonable.") (citation omitted).

Pursuant to this Court's Preliminary Approval Order, Lead Counsel caused more than 5,000 copies of the Notice of Proposed Settlement and Proof of Claim forms to be disseminated to potential Settlement Class Members. *See* Rabe Aff., ¶ 10. A Summary Notice was published in the international editions of *The Wall Street Journal* on either February 1 or 3, 2016 and transmitted for worldwide distribution over *PR Newswire* on February 1, 2016. *Id.* ¶ 11. The Notice and Proof of Claim were also posted on the Claims Administrator's website dedicated to this Action for easy downloading by potential claimants. *Id.* ¶¶ 12-13. The Notice advised

Settlement Class Members of the procedures and deadlines for objecting to any aspect of the Settlements. *See* Rabe Aff., Ex. A. It advised that Lead Counsel intended to seek an award of attorneys' fees that would not exceed 30% of the Settlement Fund, and reimbursement of expenses not to exceed $2,500,000. *Id*. at pg. 5.

Although the deadline is not until April 1, 2016, to date no objection to the fee or expense requests has been submitted. If there are objections, Lead Counsel will address them in reply papers.

h. The Requested Fee is Reasonable under the Lodestar "Cross-Check"

"'The Second Circuit has authorized district courts to employ a percentage-of-the-fund method when awarding fees in common fund cases, [and] has encouraged district courts to cross-check the percentage fee against counsel's 'lodestar' amount of hourly rate multiplied by hours spent.'" *In re Bear Stearns Cos.*, 909 F. Supp. 2d 259, 271 (S.D.N.Y. 2012) *quoting In re Giant Interactive Grp.*, 279 F.R.D. 151, 163 (S.D.N.Y. 2011) (quoting *Goldberger*, 209 F.3d at 47) (internal citation and quotation marks omitted). The lodestar is calculated by multiplying the number of hours expended on the litigation by a particular timekeeper times his or her hourly rate. "Current rates, rather than historical rates, should be applied in order to compensate for the delay in payment." *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998). The attorney's normal hourly billing rate applies, so long as it is consistent with the "market rate." *See Blum*, 465 U.S. at 895-6; *Luciano v. Olsten Corp*., 109 F.3d 111, 115 (2d Cir. 1997) ("The 'lodestar' figure should be 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'") (quoting *Blum*, 465 U.S. at 896 n.11).

With respect to billing rates, the current standard hourly rates used for calculating the lodestar range from $435 to $1150 for partners, $410 to $950 for counsel, and $395 to $720 for associates. *See* Joint Decl. Exhs. A-C. Similar billing rates have been approved by other courts in this District. *See, e.g., In re Tower Group International Ltd. Securities Litigation*, Master File No. 1:13-cv-5852-AT (S.D.N.Y. Nov. 23, 2015) (approving rates up to $1,000 an hour) (Dkt No. 178); *In re Lehman Bros. Sec. & ERISA Litig.*, No. 1:08-cv-05523 (LAK) (GWG) (S.D.N.Y. Mar. 2012) (approving billing rates up to $975 per hour); *In re Wachovia Sec. Litig.*, No. 09-civ. 6351 (RJS) (S.D.N.Y.) (*same*); *Plumbers' & Pipefitters' Local #562 Supplemental Plan & Trust v. J.P. Morgan Acceptance Corp. I*, No. 08-cv-01713 (PKC) (WDW) (E.D.N.Y. July 24, 2014) (*same*).

As noted, the total lodestar of Lead Counsel, derived by multiplying each timekeeper's hours by the respective firm's hourly rates, is $74,876,260. This represents more than 114,000 hours spent by attorneys, paralegals, investigators, and professional analysts furthering the prosecution of the claims. *See* Joint Decl., Exhs. A-C. Lead Counsel compiled these hours from contemporaneous time records. Because attorneys' fees totaling $51,312,500 were previously awarded from the FG, GlobeOp and Citco Settlements, Lead Counsel's unreimbursed lodestar through February 29, 2016 is $23,563,760.

Here, the lodestar "cross-check" fully supports the requested percentage fee. The requested 30% fee (or $16,500,000) divided by Lead Counsel's total unreimbursed lodestar yields a fee equivalent to 70% of Lead Counsel's unreimbursed lodestar. A lodestar cross-check that results in a negative multiplier is "a strong indication of the reasonableness of the proposed fee." *In re Bear Stearns Co. Inc. Sec. Litig.*, 909 F. Supp. 2d at 271 (citing *In re Blech Sec. Litig.*, No. 94 Civ. 7696(RWS), 2002 WL 31720381, at *1 (S.D.N.Y. Dec. 4, 2002)).

IV. Plaintiffs' Counsel's Request for Reimbursement of Expenses Should Be Granted

In addition to a reasonable attorneys' fee, Plaintiff's Counsel respectfully seek reimbursement of $1,803,816 for litigation expenses reasonably incurred in connection with prosecuting the claims against Defendants. *See* Joint Decl., Exhs. A-D. It is well-established that such expenses are properly recovered by counsel. *See, e.g., Am. Int'l Grp*., 2012 WL 345509, at *6 ("'Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were 'incidental and necessary to the representation' of those clients.'") (citing *In re Indep. Energy Holdings PLC Sec. Litig*., 302 F. Supp. 2d 180, 183 n.3 (S.D.N.Y. 2003) (Scheindlin, J.)).

The declarations submitted by Lead Counsel itemize the categories of expenses incurred. *See* Joint Decl., Exhs. A-C. Lead Counsel submit that these expenses were reasonable and necessary to prosecuting the claims and achieving the Settlement. Lead Counsel further submit that these expenses are the type for which "the paying, arms' length market" reimburses attorneys and should therefore be reimbursed from the Settlement Fund. *See Global Crossing*, 225 F.R.D. at 468. The Notice advised potential Settlement Class Members that Lead Counsel would seek reimbursement of expenses of up to $2,500,000.

V. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court approve the PwC Settlement and enter the Final Judgment annexed as Exhibit E to the accompanying Joint Declaration, subject to any modifications that may be requested in connection with the Final Fairness Hearing scheduled for May 6, 2016, and including attorneys' fees and expense reimbursement as requested herein.

Dated: March 17, 2016

Respectfully submitted,

By: /s/ David A. Barrett

David A. Barrett
Howard L. Vickery, II
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue
New York, NY 10022
Telephone: (212) 446-2300
Facsimile: (212) 446-2350

Stuart H. Singer
Carlos Sires
Sashi Bach
BOIES, SCHILLER & FLEXNER LLP
401 East Las Olas Boulevard, #1200
Ft. Lauderdale, Florida 33301
Telephone: (954) 356-0011

Robert C. Finkel
WOLF POPPER LLP
845 Third Avenue
New York, NY 10022
Telephone: 212.759.4600
Facsimile: 212.486.2093

Christopher Lovell
Victor E. Stewart
LOVELL STEWART HALEBIAN JACOBSON LLP
61 Broadway, Suite 501
New York, NY 10006
Telephone: 212.608.1900

Co-Lead Counsel for Plaintiffs