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' REPLY MEMORANDUM IN SUPPORT OF PROPOSED PWC SETTLEMENT AND FEE AWARD

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PRELIMINARY STATEMENT

Plaintiffs respectfully submit this Reply Memorandum in further support of their motion for approval of the proposed $55,000,000 Settlement with the PwC Defendants. The Settlement would finally conclude this action, which has been litigated for over seven years. Except for one individual, no Class Member has objected to the Settlement. There have been no specific objections to the requested fee or expense award or Plan of Allocation of the Settlement Fund. The only requests for exclusion from the Settlement are from investors associated with Deminor Recovery Services, who are litigating their own claims against PwC in the Netherlands. By contrast, the over 1,080 claim forms, already submitted in advance of the May 23, 2016 claim deadline, demonstrate Class Members' support of the Settlement.

SUPPLEMENTAL FACTS SUPPORTING THE SETTLEMENT

Plaintiffs respectfully apprise the Court of the following developments since the March 18, 2016 filing of the Memorandum, Joint Declaration and other papers in support of the Settlement and fee and expense award.

A. Settlement Administration

The Claims Administrator, Rust Consulting, Inc., has continued to mail notices and proof of claim forms ("Notice Packets") to Class Members. Through April 21, 2016, Rust has mailed 5,182 Notice Packets to potential Settlement Class members. *See* accompanying Supplemental Affidavit of Jason Rabe ("Supp. Rabe Aff.") ¶ 3. Rust also continues to operate a dedicated website and telephone inquiry lines to address Class Members' questions; these have received 6,828 total hits and 128 calls respectively through April 21, 2016. *Id.*, ¶ 4. As of April 21, 2016, Class Members have submitted 1,086 proofs of claim to participate in the Settlement. *Id.*, ¶ 8.

B. Requests for Exclusion

Rust Consulting received 542 requests to be excluded from the Settlement. All of the exclusion requests were submitted by persons connected with Deminor Recovery Services, a Luxembourg-based consultancy firm which focuses on "collective damage recovery claims" (*see* http://www.deminor.com/drs/en/about-deminor). Rabe Supp. Aff., ¶ 6. Deminor has been litigating direct claims against PwC on behalf of these investors in a mass action in The Netherlands. The total net loss for all opt-outs as of the April 1, 2016 deadline is $147.7 million, which represents approximately 4.5% of some $3.3 billion in claims that were filed in the earlier Fairfield Greenwich settlement.[1] These investors have decided that they prefer to continue prosecuting their Dutch action, rather than to participate in the Settlement. That is a choice, of course, that they 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.

The list of opt-outs (to be filed under seal) will be included as Exhibit 1 to the Final Judgment to be submitted at the May 6, 2016 final settlement hearing.

C. Objection to Settlement

The only objection to the Settlement was submitted by Alexander B. Richardson. *See* Dkt No. 1564.[2] Richardson's earlier and similar objections to the Fairfield Greenwich settlement

[1] These opt-outs are fewer in number and amount than the Deminor-related investors who opted-out of the Citco settlement. *See* Reply Memorandum In Support of Proposed Citco Settlement (Dkt No. 1445), at 2; Supplemental Affidavit of Jason Rabe Regarding Citco Class Action Notice (Dkt No. 1446), ¶¶ 6 and 8 (reporting 570 requests for exclusion from the Citco settlement with aggregate net losses of some $156 million). Moreover, while Deminor filed an objection to the Citco settlement (*see* Dkt. No. 1435), it has not done so with respect to the PwC Settlement.

[2] This one objection was untimely, as it was received by counsel on April 4, 2016. The Court's Preliminary Approval Order (Dkt No. 1533-1, ¶23) required that all objections be "filed" and "delivered" to counsel "on or before" April 1, 2016. The Class Notice (Dkt No. 1562-1, at p. 10)

(Dkt No. 1021) were overruled when the Court approved the Fairfield Greenwich Final Judgment (Dkt No. 1097). As discussed below, this objection should be similarly rejected.[3]

ARGUMENT

A. The Response of the Class to the Settlement Supports Finding that It Is Fair and Adequate

"It is well settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *In re Facebook, Inc. IPO Sec. & Derivative Litig.*, No. MDL 12-2389, 2015 WL 6971424, at *4 (S.D.N.Y. Nov. 9, 2015) (quoting *In re Bear Stearns Comp., Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 266 (S.D.N.Y. 2012)). *See also Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002).

"If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005*)* (internal quotation marks and citation omitted); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785, 812 (3d Cir. 1995); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 511 (E.D.N.Y. 2003) ("[A] certain number of objections are to be expected in a class action with an extensive notice campaign and a potentially large number of class members") (citation omitted).

Here, the submission of 1,086 claim forms, with over a month to go before the claim deadline, strongly supports the fairness and adequacy of the Settlement, in contrast to the filing

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also required that "[a]ny objection letter must be delivered such that it is received by [the Court and designated counsel] no later than April 1, 2016."

[3] Although the objection does not contain information about the objector's holdings in the Funds as required by the Class Notice, Mr. Richardson's objection to the Fairfield Greenwich settlement indicates holdings of $47,000 as of December 2008. *See* Dkt No. 1021.

of only a single objection and of opt-outs only from investors who are prosecuting their own claims in The Netherlands.

B. The Sole Objection Should Be Overruled

In essence, the objector asserts that the "PwC Defendants in failing to verify the existence and value of the assets of the fund failed in their most basic duty of care to the investors in the Fairfield Sentry fund" and a settlement of $55 million is disproportionately low in relation to "the $7.147 billion of net assets which [PricewaterhouseCoopers LLP ("PwC Canada")] audited at 31 December 2007."[4] Objection at 2.

Plaintiffs agree that the evidence would support a finding of liability against the PwC Defendants at trial (albeit not without risk) for failing to conduct a proper audit. The objection, however, ignores the substantial risk factors that would apply specifically to the objector's claim including that: (i) the Court dismissed the initial investor claims against the PwC Defendants (884 F. Supp. 2d 92); (ii) PwC has a pending motion for summary judgment to dismiss the holder claims on causation grounds (*see* Dkt. No. 1430 at 4); and (iii) PwC has preserved for appeal a statute of limitations defense to claims based on investments made before April 24, 2006. (*Id.* at 3).

In addition, among other factors common to all investors that support the Settlement are (i) the risk of defeating summary judgment and proving that investors in the Funds were "known parties" or could establish "linking conduct" between the PwC Defendants and themselves under *Credit Alliance v. Arthur Andersen & Co.*, 483 N.E.2d 110 (N.Y. 1985) (*see* Dkt No. 1430 at 4);

[4] The $7.1 billion in assets purportedly held by the Funds as of December 31, 2007 of course includes billions of dollars of "phantom income" and does not represent PwC's potential liability. Compensable net losses of Settlement Class Members are approximately $3.3 billion based on claims submitted in the FG Settlement.

(ii) whether Plaintiffs' claim for negligence would be found on appeal to be precluded by the Securities Litigation Uniform Standards Act (*see* Dkt No. 1396); (iii) whether the claim for negligence would be found on appeal to be derivative rather than direct (Dkt No. 1430 at 2-3); (iv) whether the jury would find that other persons, such as Bernard Madoff, the Fairfield Greenwich Defendants, the Citco Defendants, Plaintiffs' advisors, or Plaintiffs themselves, were responsible for some or all of the investors' losses; and (v) whether the recoveries that were already achieved in this Action – against the Fairfield Greenwich Defendants ($50 million, with an additional $30 million in escrow), GlobeOp ($5 million), and the Citco Defendants ($125 million); as well as the recoveries already achieved from domestic bankruptcy proceedings or that may be received from the Madoff Victim Fund and liquidation of the Sentry Fund – would have reduced Plaintiffs' damages. There also is the risk that class certification would have been reversed on PwC's pending petition for its review or on appeal after trial.

As the objector recognizes, even if Plaintiffs prevail at trial and on appeal, they may be unable to enforce a judgment against the PwC Defendants in excess of the settlement amount. And it is certain that any recovery on a judgment would not occur until years from now. Apparently, however, the objector would like to see what might well be a show trial that would further dissipate PwC's ability to pay (*see* Objection at 3). Plaintiffs submit that the certainty of a substantial settlement now is a far better result for the Class.

As discussed earlier, the PwC claims were extensively litigated and only settled after over six years of litigation. The case was mediated on six separate occasions and was settled based on a mediator's recommendation by former federal court 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").

The Settlement has been endorsed by all seven Class Representatives, many of whom are sophisticated investors with substantial PwC damages, and advised by in-house counsel. The response of absent class members who will participate in the Settlement has been entirely favorable, but for the sole objector. 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).[5]

[5] Objector also suggests that the request for fees and expenses is excessive in light of the "paltry settlement sum" (Objection at 2). Contrary to objector's statement (*id*.), the Class Notice (Dkt No. 1562-1) and Plaintiffs' fee request (Dkt Nos. 1560 and 1561) did "ma[k]e known" the amounts requested. In any event, objector provides no specific reasons for objecting to the fee beyond his general dissatisfaction with the settlement. For all of the reasons discussed above and in Plaintiffs' opening brief [Dkt No. 1560 at pp. 11-23], Lead Counsel respectfully submit that the requested fees and expenses are fair and reasonable.

C. Request for Reimbursement of Expenses

Plaintiffs, in the March 18, 2016 motion for fees and expenses, sought fees equal to 30% of the Settlement Amount, plus reimbursement of expenses of $1,803,816 (consisting primarily of expert costs, mediation fees and other expenses relating to the PwC claims). *See* Dkt No. 1561 at ¶ 20. The expense request was substantially below the $2.5 million of expenses estimated in the Class Notice. *See* Dkt No. 1562-1 at pp. 5 and 9. Subsequent to filing the March 18, 2016 expense request, plaintiffs received additional expense information from two non-lead counsel with respect to those firms' actual out of pocket costs expended to assist Co-Lead Counsel in discovery and at depositions. Those expenses aggregate $7,003, and bring plaintiffs' total expense request to $1,810,819. Because those expenses were reasonably incurred in prosecution of the claims against PwC and are substantially below the amount estimated in the Class Notice, plaintiffs request that the Final Judgment provide for reimbursement of expenses in the amount of $1,810,819.

D. The Court Should Enter the Final Judgment, Effective on June 3, 2016

The Settling Parties respectfully submit that if otherwise acceptable to the Court, the Final Judgment in the form appended as Exhibit E to the Joint Decl. (Dkt No. 1561-5), should be entered at the time of the final fairness hearing on May 6, 2016, to become effective if no objections have been received in response to the CAFA notices to governmental authorities for which of the 90-day CAFA notice period expires on June 2, 2016.[6] *See* Dkt No. 1560, at 6

[6] As noted in Plaintiffs' opening papers, pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715, PwC provided notice of the Settlement to the appropriate State and Federal officials on March 4, 2016. In order to allow for the statutory period of 90 days after notice, the Settling Parties revised the proposed Final Judgment to allow the recipients of the CAFA Notice to be heard with respect to the Settlement through June 2, 2016.

(citing cases in which courts approved settlements without prejudice to the rights of the CAFA notice recipients).

CONCLUSION

For the reasons stated herein and in Plaintiffs' opening Memorandum and supporting Declarations, the PwC Settlement should be approved as fair, reasonable and adequate.

Dated: April 22, 2016

Respectfully submitted,

By: /s/ David A. Barrett

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