Anwar et al v. Fairfield Greenwich Limited et al Doc. 793

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA ANWAR, et al.,	)	
Plaintiffs,	)	
v.	)	Master File No. 09-CV-118 (VM)
FAIRFIELD GREENWICH LIMITED, et al.,	)	
Defendants.	)	
This Document Relates to: *Da Silva Ferreira v. EFG Capital International Corp., et al., 11-CV-813(VM)*	)	

PLAINTIFFS' UNOPPOSED MOTION FOR (I) PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT, (II) CERTIFICATION OF THE CLASS FOR PURPOSES OF SETTLEMENT, (III) APPROVAL OF NOTICE TO THE CLASS, AND (IV) SCHEDULING OF A FINAL APPROVAL HEARING, AND INCORPORATED MEMORANDUM OF LAW

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Plaintiffs, Lorrene Da Silva Ferreira and Arlete Da Silva Ferreira, move without opposition for: (i) preliminary approval of the settlement (the "Settlement") of this class action (the "Action") against EFG Capital International Corporation ("EFG Capital"); (ii) certification of the Putative Class for purposes of the Settlement; (iii) approval of the form and manner of notice to the Putative Class Members; and (iv) the scheduling of a hearing (the "Settlement Hearing") on final approval of the Settlement and Plaintiffs Counsel's motion for an award of attorneys' fees and reimbursement of litigation expenses.

INTRODUCTION

Plaintiffs have reached an agreement to settle this class action against EFG Capital, as provided in the Stipulation of Settlement (the "Stipulation") attached as **Exhibit 1**. The proposed Settlement provides a substantial, up-front monetary benefit to the Settling Class Members of at least $7,783,843.00 in cash, representing 16.7% of the aggregate net individual losses of the Putative Class Members.[1] The Settlement, if approved, will resolve all claims asserted against the Released Persons in this Action.[2] Importantly, however, Settling Class Members will not be required to give up any claims they may have against any other individuals or entities relating to their losses in Fairfield Sentry. For example, the Settling Class Members may still be able to recover additional percentages of their overall net investment losses through (i) any claim EFG

[1] Among the potential class members are 12 individuals who have brought claims against EFG Capital in two pending FINRA arbitrations. To the extent any or all of those potential class members opt to participate in the class, then the Settlement Amount will increase by an amount equal to 16.7% of each Participating Arbitration Claimant's Individual Net Investment.

[2] The Released Persons are: EFG Capital and EFG Bank and their past, present, and future affiliates, associates, entities, families, parents, subsidiaries, joint venturers, general partners, limited partners, and partnerships, and each and all of their respective past, present, or future officers, directors, principals, shareholders, employees, agents, attorneys, legal counsel, advisors, insurers, reinsurers, accountants, trustees, members, managers, financial advisors, associates, representatives, predecessors, beneficiaries, executors, personal representatives, estates, administrators, and any other individual or entity in which EFG Capital and EFG Bank had or has a controlling interest or which is related to or affiliated with EFG Capital and/or EFG Bank, and the current, former and future legal representatives, heirs, successors, successors in interest, and assigns of EFG Capital and EFG Bank, whether or not such Released Parties were named or appeared in the Action.

Bank files on their behalf against the Fairfield Sentry Liquidation Estate, (ii) any separate class actions pending against Fairfield Sentry and others of which EFG Bank on its clients' behalf, or EFG Bank's clients themselves, may be potential class members, and (iii) claims brought against individuals and entities other than EFG Capital, EFG Bank, and the Released Persons, including any claims that Settling Class Members may have made against such individuals and entities.

Plaintiffs and EFG Capital (collectively, the "Parties") reached this Settlement at a time when the Parties understood the strengths and weaknesses of their respective positions. Since Plaintiffs filed this case two years ago (in January 2010), the Parties have engaged in significant motion practice. The Parties fully briefed two dispositive motions and a motion for class certification. The Parties also conducted extensive discovery. Plaintiffs conducted six depositions of EFG Capital's officers and employees, including EFG Capital's chief executive officer and its Chairman. EFG Capital produced, and Plaintiffs' counsel reviewed, more than 125,000 pages of documents. The Parties engaged in extensive arm's-length settlement negotiations, including two mediations.

Plaintiffs and Plaintiffs' Counsel believe that the proposed Settlement is an excellent result that is in the best interest of the Putative Class. More than three years after Plaintiffs and class members lost their investments in the Madoff fraud, the Settlement provides an immediate monetary benefit to the Settling Class. The Settlement must also be considered in the context of the risk that protracted and contested litigation, including dispositive motion practice, class certification, trial and likely appeals, could result in a lesser recovery against EFG Capital (or no recovery at all).

At the Settlement Hearing, Plaintiffs will submit additional papers supporting the proposed Settlement, and will ask the Court to determine whether the Settlement is fair, reasonable

and adequate. At this time, however, Plaintiffs request only that the Court grant preliminary approval of the Settlement so that notice may be provided to the Putative Class. Specifically, Plaintiffs request that the Court enter the proposed Order Preliminarily Approving Settlement and Providing for Notice (the "Preliminary Approval Order"), attached hereto as **Exhibit 1.A,** which among other things, will:

i. preliminarily approve the Settlement on the terms set forth in the Stipulation;

ii. approve the form and content of the Notice of Proposed Settlement of Class Action, Motion for Attorneys' Fees, Expenses, and Incentive Payments, and Settlement Fairness Hearing (the "Notice), attached as **Exhibit 1.C**;

iii. find that the procedures established for distribution of the Notice in the manner and form set forth in the Preliminary Approval Order constitute the best notice practicable under the circumstances, and comply with the notice requirements of due process, Rule 23 of the Federal Rules of Civil Procedure, and Section 27 of the Securities Act of 1933, 15 U.S.C. §77z-1(a)(7) as amended by the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), Pub. L. 104-67, 109 Stat. 737; and

iv. certify the Putative Class, for purposes of the Settlement only, under Rules 23(a) and (b)(3) of the Federal Rule of Civil Procedure.

BACKGROUND OF THE LITIGATION

On December 11, 2008, when the Madoff fraud was revealed, 279 customers of EFG Capital lost their investments in Fairfield Sentry Limited ("Fairfield Sentry"),[3] totaling more than $46 million in net losses.[4]

[3] Fairfield Sentry was a hedge fund sponsored by Fairfield Greenwich Group that had delegated all investment decisions, trade execution authority and physical custody of the securities to Madoff and/or BMIS.

[4] "Net Losses" means the total amount of subscriptions in Fairfield Sentry held by each class member on December 11, 2008 (i.e., the date Madoff's fraud was uncovered), less all redemptions made by class members.

On January 22, 2010, Plaintiffs filed a complaint in the U.S. District Court for the Southern District of Florida asserting claims against EFG Capital and EFG Bank SA f/k/a EFG Private Bank SA ("EFG Bank") for breach of fiduciary duty, gross negligence, unjust enrichment, and violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), relating to Plaintiffs' investment in Fairfield Sentry. Plaintiffs alleged that EFG Capital failed to perform adequate due diligence of Fairfield Sentry and Madoff, and failed to alert Plaintiffs of certain red flags.

The Parties and EFG Bank engaged in extensive discovery, including multiple requests for production, interrogatories, requests for admissions (and responses thereto) and depositions. EFG Capital produced more than 125,000 pages of documents pursuant to the Court's discovery order, including some nonpublic, proprietary and confidential documents relating to EFG Capital's operations, Fairfield Sentry, BMIS, and Madoff.

On March 11, 2010, EFG Capital filed a Motion to Dismiss the Complaint, arguing that Plaintiffs' state law claims (1) are preempted by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. § 78bb(f)(1), (2) are barred by the Economic Loss Doctrine, and (3) fail to satisfy certain pleading requirements. The Parties have fully briefed EFG Capital's Motion to Dismiss, which remains pending.

On April 30, 2010, EFG Bank also moved to dismiss the Complaint, asserting the same arguments made by EFG Capital and also raising improper venue as an additional ground for dismissal based on the forum selection and choice-of-law clauses set forth in Plaintiffs' contracts with EFG Bank. On November 8, 2010, the Court dismissed EFG Bank on the grounds of improper venue based on its forum selection clause.

On May 20, 2010, Plaintiffs voluntarily dismissed their FDUTPA claim against EFG Capital.

On August 30, 2010, Plaintiffs filed a Motion for Class Certification, which has been fully briefed by the parties and remains pending.[5] Between October 13, 2010 and January 19, 2011, Plaintiffs took depositions under oath of six present and former officers and employees of EFG Capital. On October 14, 2010, EFG Capital took the deposition under oath of Plaintiff Lorrene da Silva Ferreira.

In October 2010, EFG Capital and EFG Bank moved to transfer this case from the Southern District of Florida (where the case was set to be tried in August 2011) to the multidistrict litigation pending before this Court. On February 7, 2011, an MDL panel granted the motion, and this Action was transferred and consolidated with the related multi-district litigation styled *In re Fairfield Greenwich Group Securities Litigation*, MDL No. 2088.

On March 28, 2011, the Parties mediated this dispute in New York City with Judge Daniel Weinstein (ret.) of JAMS as the mediator. Judge Weinstein is one of the nation's preeminent mediators of complex civil disputes and has successfully mediated many complex cases involving Enron, Homestore, Qwest, Adelphia, Dynegy, Providian, Clarent, and other major NYSE and NASDAQ corporations.

When the first mediation resulted in an impasse, the Parties through their counsel continued to engage in arms-length settlement negotiations. The Parties mediated this dispute a second time in Miami on October 17, 2011 with Judge Herbert Stettin (ret.). Judge Stettin is a retired Circuit Judge with more than 40 years of legal experience, including extensive experience litigating, mediating and presiding over class actions. Currently, Judge Stettin is the Chapter 11 Trus-

[5] The class certification briefs included a 32-page Response in Opposition by EFG Capital and a 30-page Reply by Plaintiffs, both of which included citations to the considerable discovery.

tee, appointed by the U.S. Trustee's office, for Rothstein Rosenfeldt Adler P.A ("RRA"), Bankruptcy Case No. 09–34791–BKC–RBR (S.D. Fla.). RRA was discovered to be a $1.2 billion dollar Ponzi scheme orchestrated by a Ft. Lauderdale attorney, Scott Rothstein. Although litigation is still ongoing, Judge Stettin has been recognized for his efforts in recovering money for victims of RRA.

At the second mediation, on October 17, 2011, the parties agreed upon the basic Settlement terms, which were later incorporated into a signed Memorandum of Settlement and the subsequent Stipulation. At the time the Stipulation was executed, Plaintiffs and Plaintiffs' Counsel had considered: (i) the benefits to the Putative Class Members from the terms agreed to in the Memorandum of Settlement; (ii) the facts divulged during discovery in the litigation and the applicable law; (iii) the attendant risks of continued litigation and the uncertainty of the outcome of the Action, including but not limited to SLUSA (an issue that has not yet been resolved by the Second Circuit) and class certification; (iv) the desirability of permitting the Settlement to be consummated according to its terms; and (v) the conclusion of Plaintiffs and Plaintiffs' Counsel that the terms and conditions of the Settlement are fair, reasonable, and adequate and that it is in the best interest of Plaintiffs and the Putative Class to settle the Action as set forth below.

EFG Capital has denied and continues to deny that it has committed any wrongdoing or breached its fiduciary duties to Plaintiffs or any of the Putative Class Members. EFG Capital has concluded that it is desirable to settle the claims against them solely to avoid the costs, disruption and distraction of further litigation.

Therefore, in light of (i) the Settlement's substantial benefits (including the timely payment of $7,783,843.00 in cash); (ii) the cost and risks of continuing this Action against EFG Capital through trial (and likely appeals); (iii) the fact that the proposed Settlement resulted from

arm's length negotiations assisted by two experienced mediators; and (iv) the approval of the Settlement by the Plaintiffs, it is respectfully submitted that the Settlement warrants the Court's preliminary approval in order that notice can be provided to the Putative Class.

ARGUMENT

I. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL

The settlement of complex class action litigation is favored by public policy and strongly encouraged. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc*,. 396 F.3d 96, 116-17 (2d Cir. 2005) ("We are mindful of the strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy.") (internal quotation marks and citation omitted). Approval of a proposed settlement is within the discretion of the district court. *See In re Interpublic Sec. Litig.*, Nos. 02-Civ-6527, 03-Civ-1194, 2004 WL 2397190, at *7 (S.D.N.Y. Oct. 26, 2004).

Review of a proposed class action settlement generally involves a two-step process of preliminary approval and a "fairness hearing." In the preliminary approval stage, the court reviews the proposed terms of the settlement and makes a preliminary determination on the fairness, reasonableness and adequacy of the settlement terms. *See In re Initial Public Offering Sec. Litig.*, 226 F.R.D. 186, 191 (S.D.N.Y. 2005). During this first step, the court considers the proposed notice to class members and the scheduling of a final settlement hearing.[6]

[6] In the second step, after notice of the proposed settlement has been provided to the class and a hearing has been held to consider the fairness and adequacy of the proposed settlement, the court considers whether settlement warrants "final approval." *See Initial Pub. Offering*, 226 F.R.D. at 200 n. 71. A final approval determination is based on an analysis of the nine factors established in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). The *Grinnell* factors are: (1) the complexity, expense and likely duration of the litigation being settled; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) risks of establishing liability; (5) risks of establishing damages; (6) risks of maintaining the litigation as a class action through trial; (7) ability of defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best possible recovery; and (9) the range of reasonableness of the settlement to a possible recovery in light of the attendant risks of litigation. *Id.* at 463.

As explained by Judge Robert Sweet:

> In considering preliminary approval, courts make a preliminary evaluation of the fairness of the settlement, prior to notice. Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted. Once preliminary approval is bestowed, the second step of the process ensues . . . .

In re NASDAQ Market-Makers Antritrust Litig., 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (citations omitted). In essence, the Court should determine whether the settlement is "at least sufficiently fair, reasonable and adequate to justify notice to those affected and an opportunity to be heard." *Id.* (citations omitted).

Here, the terms of the proposed Settlement are well "within the range of possible approval." *In re Initial Public Offering Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007). The Settlement, which represents 16.7% of the aggregate net investment losses of the Putative Class, significantly exceeds the median settlement recovery of 2.4% reached in similar cases in 2010. *See* Milev, Patton, Starykh, *Trends 2010 Year-End Update: Securities Class Action Filings Accelerate in Second Half of 2010; Median Settlement Value at an All-Time High* at 25 (NERA 2010).

Moreover, the terms of the proposed Settlement are reasonable given the potential for zero recovery. Although Plaintiffs and Plaintiffs' Counsel believe that the claims asserted in this Action against EFG Capital are meritorious, continued litigation poses the risk that, following heavily contested motions, including class certification and EFG Capital's Motion to Dismiss, a trial or appeals, a lesser recovery or no recovery at all could result. EFG Capital would likely continue to argue, *inter alia*, that (i) class certification is inappropriate for a number of reasons, including lack of superiority, typicality, commonality, etc., (ii) SLUSA bars the claims from be-

ing asserted on class wide basis, (iii) it had no duty to class members to monitor the Fairfield Sentry Investment or to notify customers of red flags, and certain risks, (iv) it conducted adequate due diligence of Fairfield Sentry, and (v) various other legal and factual defenses. Each of these issues, and those detailed below that are common to the Putative Class, involves complicated law and facts, and there remains a significant risk that the Court or a jury might agree with EFG Capital on one or more of the issues. Therefore, the substantial payment of $7,783,843.00, when viewed in the context of these risks and uncertainties involved with any litigation, makes the Settlement an adequate if not strong result for Settling Class Members.

The Settlement was negotiated at arm's length by counsel who was well-informed of the issues in this Action, and are experienced in complex class action litigation. This Action was actively litigated for nearly two years. Moreover, the Settlement was achieved with the significant assistance of two experienced mediators. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (a "mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure"). Accordingly, Plaintiffs respectfully submit that the Court should preliminarily approve the Settlement.

II. CLASS CERTIFICATION FOR SETTLEMENT PURPOSES IS APPOPRIATE

In granting preliminary settlement approval, the Court should also certify the Putative Class for purposes of the Settlement under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure. The Putative Class consists of:

> the customers of both EFG Capital and EFG Bank who (i) subscribed for shares of Fairfield Sentry through EFG Capital, (ii) held all or a portion of their shares on December 11, 2008, and (iii) did not receive redemptions in excess of their investments in Fairfield Sentry. Excluded from the Settling Class are:
>
> a. Present and former officers and/or directors of EFG Capital;

> b. Those Persons who file a valid and timely Request for Exclusion from the Settling Class (excluding any Requests for Exclusion that may have been validly retracted) in accordance with the Court's Order Preliminarily Approving Settlement and Providing For Notice ("Preliminary Approval Order") concerning this Stipulation as set forth in Exhibit A; and
>
> c. Those Arbitration Claimants who do not file a valid and timely Request for Inclusion in the Settling Class in accordance with the Court's Preliminary Approval Order as set forth in Exhibit A.

Stipulation ¶ 32.

The Second Circuit has long recognized the propriety of certifying a class solely for purposes of a class action settlement. *See Weinberger v. Kendrich*, 698 F.2d 61, 73 (2d Cir. 1982). Certification of a settlement class is "the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants." *In re Prudential Sec. Inc. Ltd. P'ship Litig.*, 163 F.R.D. 200, 205 (S.D.N.Y. 1995).

A settlement class, like other certified classes, must satisfy all the requirements of Rule 23(a) and (b). *See Denney v. Deutsche Bank AG,* 443 F.3d 253, 270 (2d Cir. 2006). The manageability concerns of Rule 23(b)(3) are not at issue. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 593 (1997) ("Whether trial would present intractable management problems . . . is not a consideration when settlement-only certification is requested.").

A. The Class Satisfies the Requirements of Rule 23(a)

Certification is appropriate under Rule 23(a) if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interest of the class. *See* Fed. R. Civ. P. 23(a).

"Rule 23 is given liberal rather than restrictive construction and courts are to adopt a standard of flexibility in application in order to best serve the ends of justice and promote judicial economy." *Sharif v. N.Y. State Educ. Dep't*, 127 F.R.D. 84, 87 (S.D.N.Y. 1987); *see also Marisol A. v. Guiliani*, 126 F.3d 372, 377 (2d Cir. 1997). "Moreover, if an error is to be made with respect to class certification, it is to be in favor and not against the maintenance of a class action." *Sharif*, 127 F.R.D. at 87 (quotation omitted).

1. The Class Members are Too Numerous to Be Joined.

Numerosity is presumed when a class consists of 40 members or more. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995).

Here, the Putative Class comprises the customers of both EFG Capital and EFG Bank who (i) subscribed for shares of Fairfield Sentry through EFG Capital, (ii) held all or a portion of their shares on December 11, 2008 and (iii) did not receive redemptions in excess of their investments in Fairfield Sentry. There are currently 279 Putative Class Members. Thus, the Putative Class is sufficiently numerous that joinder of all members would be impracticable and accordingly satisfies Rule 23(a)(1). *See id.*

2. There Are Common Questions of Law and Fact.

Rule 23(a)(2) requires the existence of at least one question of law or fact common to the class. *See Cent. States*, 504 F.3d at 245. "It is not necessary that all of the questions raised by arguments are identical; it is sufficient if a single common issue is shared by the class." *Weiss v. La Suisse, Societe D'Assurances Sur La Vie*, 226 F.R.D. 446, 449 (S.D.N.Y.2005).

Here, Plaintiffs have asserted claims for breach of fiduciary duty, gross negligence and unjust enrichment. The claims present many questions of law and fact that are common to all Putative Class Members, including:

(i) whether EFG Bank and EFG Capital failed to perform their duties as fiduciaries to their customers;

(ii) whether EFG Bank and EFG Capital failed to conduct full and complete due diligence upon the Fairfield Sentry hedge fund;

(iii) whether EFG Bank and EFG Capital failed to adequately monitor the performance of the Fairfield Sentry hedge fund;

(iv) whether EFG Bank and EFG Capital failed to timely act to protect their customers from losing the entire value of their investments in the Fairfield Sentry hedge fund;

(v) whether EFG Bank and EFG Capital were grossly negligent in their actions and inactions;

(vi) whether EFG Capital was unjustly enriched by the fees charged for its services; and

(vii) whether Plaintiffs have suffered damages as a result of EFG Bank's and EFG Capital's actions and omissions.

Thus, the commonality requirement of Rule 23(a)(2) is met.

3. The Class Representatives' Claims Are Typical of Those of the Class.

Rule 23(a)(3) requires the claims of the class representatives be "typical" of the claims of the class. *See* Fed. R. Civ. P. 23(a)(3). Typicality is established where "the claims of the named plaintiffs arise from the same practice or course of conduct that gives rise to the claims of the proposed class members." *In re Vivendi Sec. Litig.*, 242 F.R.D. 76, 85 (S.D.N.Y. 2007) (citation omitted). "Typical" does not mean "identical." *See In re Marsh & McLennan Cos. Sec. Litig.*, No. 04-Civ-8144, 2009 WL 5178546 (S.D.N.Y. Dec. 23, 2009), at *10. The focus of the typicality inquiry is not the plaintiff's behaviors, but rather the defendant's actions. *See Teachers' Ret. Sys. of La. v. ACLN Ltd.*, No. 01 Civ. 11814 (LAP), 2004 WL 2997957 (S.D.N.Y. Dec. 27, 2004), at *4. The critical question is whether the proposed class representative and the class can point to the same "common course of conduct" by defendants to support a claim for relief.

Here, the same alleged course of conduct by EFG Capital caused the injuries to the Plaintiffs and all other members of the Putative Class, and liability for this conduct is predicated on the same legal theories. Plaintiffs allege that, like the rest of the Putative Class, EFG Capital failed to conduct adequate due diligence into Fairfield Sentry, BMIS and/or Madoff, or to warn the Putative Class of certain red flags. Plaintiffs' claims and the claims of all other members of the Putative Class rest on the same theories and require the same proof. Therefore, the typicality requirement of Rule 23(a)(3) is satisfied.

4. The Class Representatives Will Fairly and Adequately Protect the Interests of the Class.

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

Plaintiffs and the rest of the Putative Class share the common objective of maximizing their recovery, and no conflict exists between the Plaintiffs and the rest of the Putative Class. *See Drexel*, 960 F.2d at 291; *In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) ("Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between the class representative and other class members"). Additionally, Plaintiffs lost the significant sum of more than $120,000 that they invested with EFG Capital. This is not a case in which the class representatives lost a few dollars on one share of stock. Plaintiffs have shown a strong desire to pursue this litigation vigorously and obtain the maximum recovery, both for themselves and for the other Putative Class Members.

Moreover, Plaintiffs' Counsel has extensive experience and expertise in complex securities litigation and class action proceedings throughout the United States, and is qualified and able to conduct this litigation. Class counsel and their experiences include:

(1) Lawrence A. Kellogg: Mr. Kellogg is a partner at Levine Kellogg Lehman Schneider + Grossman LLP. For over 30 years, Mr. Kellogg has acted as lead trial counsel in numerous complex commercial and securities cases tried to juries, judges and arbitrators. He has represented both plaintiffs and defendants in class actions, including the following:

(a) Cash 4 Titles: Co-lead counsel for Plaintiffs in class action against Bank of Bermuda in this District (Huck, J.) arising from the collapse of a Ponzi scheme. Net class recovery after settlement was over $60 million.

(b) Cash 4 Titles II: Co-lead counsel for Plaintiffs in class action in this District (Jordan, J.) against Leadenhall Bank & Trusts arising out of the collapse of a Ponzi scheme. Final judgment in favor of class in the amount of $325 million.

(c) AmeriFirst Securities Litigation: Lead defense counsel in this District (Hoeveler, J.) for senior officers of failed savings and loan association. Case settled.

(d) Muscletech: Co-lead defense counsel in class action in Florida Circuit Court in Palm Beach County. Judgment in favor of Defendants.

(e) FPA Securities Litigation: Lead defense counsel in class action in Federal District Court in San Diego. Case settled.

(f) Smuckers: Lead defense counsel in three class actions in Florida Circuit Court in Miami-Dade County. Cases Settled.

(2) Kevin Kinne: Mr. Kinne has 19 years of experience in complex commercial litigation and is a named partner at the Massachusetts law firm of Cohen Kinne Valicenti & Cook LLP. Mr. Kinne has successfully represented numerous investors, both in the United States and internationally, with respect to the types of claims being asserted in this case. Mr. Kinne also has been lead trial counsel on many commercial cases that have been successfully tried to juries.

(3) Daniel Solin: Mr. Solin has extensive experience in complex domestic and international litigation matters. He has engaged in the

practice of law in New York since 1966. Mr. Solin is a well known investor advocate and the author of a number of books about investing, including *The Smartest Investment Book You'll Ever Read, The Smartest 401(k) Book You'll Ever Read, The Smartest Retirement Book You'll Ever Read.* He testified before a congressional subcommittee on the unfairness of the mandatory arbitration system imposed on investors who do business with brokers who are members of FINRA.

(4) Jason Kellogg: Mr. Kellogg practices complex commercial litigation at Levine Kellogg Lehman Schneider + Grossman LLP. He has represented both plaintiffs and defendants in numerous class actions. Since 2004, Mr. Kellogg has edited the Florida section of the ABA's annual *Class Action Survey*, which is published as a supplement to the *Newberg on Class Actions* treatise.

Plaintiffs respectfully submit that Rule 23(a)(4) is satisfied.[7]

B. The Class Representatives' Claims Satisfy the Prerequisites of Rule 23(b)(3)

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

[7] At the final hearing, Plaintiffs' counsel intend to seek an award of attorneys' fees from the Gross Settlement Fund in an amount not to exceed thirty-three percent (33%) of the Gross Settlement Fund, and for reimbursement of expenses incurred in connection with the prosecution of this Action from the Gross Settlement Fund, in an amount not to exceed $120,000.

1. Common Legal and Factual Questions Predominate.

Common issues of fact and law predominate if they have a direct impact on each class member's effort to establish liability that is greater than the impact of the individualized issues of each class member. *See Brown v. Kelly*, 609 F.3d 467, 483 (2d Cir. 2010) ("The predominance requirement is met if the plaintiff can establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof."); *Moore v. Paine Webber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002) ("Class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.").

Here, the predominance of the common questions is apparent – at its core, the case is about whether EFG Capital breached its fiduciary duties to the Putative Class, or otherwise was grossly negligent and unjustly enriched by failing to conduct appropriate due diligence in Fairfield Sentry, failing to monitor the fund's performance, and then leaving the assets of the Class in the fund until they were rendered worthless. The factual and legal issues that must be resolved to answer this question relate to the entire Putative Class and predominate over issues that any individual Class member faces.

With respect to each individual claim, there are multiple common questions of law and fact that apply to the entire Putative Class. First, the gross negligence claim contains pivotal common issues relating to EFG Capital's breaches of its duty of care and duty to warn. These issues are common, as EFG Capital failed to disclose what it knew about BMIS and Madoff to

any of Putative Class Members. Thus, each Putative Class Member suffered the same harm in the same manner from EFG Capital's negligence.

Second, the breach of fiduciary duty claim contains common issues relating to the scope of EFG Capital's duty and its breach of that duty to all Putative Class Members. EFG Capital assumed a broader, advisory role toward all Putative Class Members and owed each Putative Class Member the same fiduciary duty. EFG Capital also treated each Putative Class Member in the same manner. For example, when the Madoff fraud was revealed, EFG Capital unilaterally applied for redemptions from Fairfield Greenwich for all Putative Class Members, without consulting any individual first. EFG Capital's (inadequate) due diligence was uniform to the entire Putative Class, and EFG Capital failed to disclose known risks to any Putative Class Member. Thus, common issues relating to EFG Capital's breach of fiduciary duty predominate.

Third, Plaintiffs' unjust enrichment claim contains common issues. It is undisputed that all Putative Class Members contributed in the same manner and at the same rate to the commissions EFG Capital received from the Fairfield Sentry investment. EFG Capital voluntarily accepted and retained all commissions from each Putative Class Member. Additionally, no Putative Class Member has received a refund of their commissions in any amount. Therefore, the issue of whether EFG Capital was unjustly enriched through the collection and retention of millions in commissions is also a common one.

The predominance requirement of Rule 23(b)(3) is, therefore, satisfied as each of Plaintiffs' claims contains common issues relating to EFG Capital's liability that predominate over any individualized issue.

2. A Class Action is Superior to Other Methods of Adjudication.

Rule 23(b)(3) sets forth the following non-exhaustive factors to be considered in making a determination of whether class certification is the superior method of litigation: "(A) the class members' interests in individually controlling the prosecution . . . of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by . . . class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." *See* Fed. R. Civ. P. 23(b)(3). Considering these factors, this consolidated class action is clearly "superior to other available methods for fairly and efficiently adjudicating" the claims of the large number of investors in Fairfield Sentry through EFG Capital.

Here, only 12 of the 279 Putative Class Members brought individual FINRA arbitration claims against EFG Capital. Indeed, the scope and complexity of the Plaintiffs' claims against EFG Capital, together with the high cost of individualized litigation, make it unlikely that, absent class certification, a significant number of the Putative Class Members would be able to obtain any relief.

III. NOTICE TO THE CLASS SHOULD BE APPROVED

All of the Putative Class Members reside outside of the United States (primarily in South America). Presently, 261 of the 279 Putative Class Members remain customers of EFG Capital.

As outlined in the Preliminary Approval Order, EFG Capital will act as the Claims Administrator. EFG Capital maintains records as to the amount of each Putative Class Member's subscription in Fairfield Sentry and of each Putative Class Member's redemption of his, her, or its investment in Fairfield Sentry, which records were provided to Plaintiffs in the course of discovery. Based on a reasonable review of its records, EFG Capital has determined the Individual

Net Investment for each Putative Class Member.[8] As such, EFG Capital has direct and immediate access to the best records evidencing each Putative Class Member's net loss. EFG Capital also maintains records of each Putative Class Member's current or last known address and therefore is best positioned to communicate the Notice and other information regarding the Settlement to the Putative Class Members. By serving as the Claims Administrator, EFG Capital will also be able to ensure the Putative Class Members' personal financial information is kept private and confidential.

EFG Capital will notify the Putative Class by mailing the Notice, attached hereto as **Exhibit 1.C**, to each Putative Class Member. The Notices will be sent by U.S. Mail to (i) the current address that EFG Capital has in its records for each Putative Class Member who is currently a customer of EFG Capital or (ii) the last known address EFG Capital has in its records for each Putative Class Member who is no longer a customer of EFG Capital. Each Notice sent to a Putative Class Member will state EFG Capital's determination of the Individual Net Investment for that Settling Class Member or Arbitration Claimant. EFG Capital shall no later than ten (10) calendar days before the Final Settlement Hearing file an appropriate declaration of proof of mailing the Notices. No Putative Class Member will be relieved from the terms of the Settlement, including the releases provided for therein, based upon the contention or proof that such Putative Class Member failed to receive actual or adequate notice.

The forms and methods set forth herein of notifying the Putative Class of the Settlement and its terms and conditions meet the requirements of due process and Fed. R. Civ. P. 23, Section 21D(a)(7) of the Exchange Act, 15 U.S.C. 78u-4(a)(7), as amended by the Private Securities Litigation Reform Act of 1995; constitute the best notice practicable under the circumstances; and

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[8] EFG Capital has provided its calculations of the Individual Net Investment for each Putative Class Member to Plaintiffs, along with the underlying records upon which they are based.

constitute due and sufficient notice to all persons and entities entitled thereto. The Notice "fairly apprise[s] the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings," *Wal-Mart*, 396 F.3d at 114 (internal quotation mark omitted). The manner of providing notice represents the best notice practicable under the circumstances and satisfies the requirements of due process and Rule 23. *See In re Warner Chilcott Ltd. Sec. Litig.* No. 06-Civ -11515 (WHP), 2008 WL 5110904, at *3 (S.D.N.Y. Nov. 20, 2008); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 448-49 (S.D.N.Y. 2004).

CONCLUSION

Plaintiffs respectfully request that the Court (i) preliminarily approve the proposed Settlement as falling within the range of possible fairness, reasonableness and adequacy; (ii) certify the Putative Class for purposes of the Settlement only; (iii) approve the proposed form and manner of Notice to the Putative Class; and (iv) schedule a hearing on Plaintiffs' motion for final approval of the Settlement and Plaintiffs' Counsel motion for an award of attorneys' fees and reimbursement of litigation expenses.

Dated: January 23, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **January 23, 2012**, I served a true and correct copy of the foregoing via the CM/ECF system on all counsel or parties of record on the Service List below.

By /s/ Jason Kellogg
JASON KELLOGG, ESQ.

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