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: *Da Silva Ferreira v. EFG Capital International Corp., et al., 11-CV-813(VM)*	Master File No. 09-CV-118 (VM)

PLAINTIFFS' MOTION FOR FINAL APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION WITH INCORPORATED MEMORANDUM OF LAW

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES AND RULES

Plaintiffs, Lorrene Da Silva Ferreira and Arlete Da Silva Ferreira, respectfully move for final approval of the settlement (the "Settlement") of this class action (the "Action") against EFG Capital International Corporation ("EFG Capital").

I. INTRODUCTION

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] This Settlement is fair, reasonable and adequate, and will resolve all claims asserted against the Released Persons in this Action.[2] 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 Limited ("Fairfield Sentry"). For example, the Settling Class Members may still seek to recover additional percentages of their overall net investment losses through (i) 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

---

[1] All capitalized terms not otherwise defined herein have the same meaning as set forth in the Stipulation of Settlement (the "Stipulation"), and filed with this Court on January 23, 2012 (D.E. 229-1).

[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.

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 more than 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 the depositions of six present and former officers and employees of EFG Capital, including its President and Chairman of the Board. EFG Capital produced, and Plaintiffs' Counsel reviewed, more than 125,000 pages of documents, including several key documents that Plaintiffs believe support their claims. Plaintiffs served and EFG Capital responded to, multiple requests for production, interrogatories, and requests for admission. Plaintiffs retained experts in due diligence and damages. 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 interests of the Putative Class. More than three years after Plaintiffs and Settling 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). For these reasons and those set forth below, Plaintiffs respectfully submit that the proposed Settlement is fair, reasonable and adequate, and accordingly warrants the

Court's approval. Additionally, the Plan of Allocation is fair and reasonable and should be approved by the Court.

Pursuant to the Court's Order Preliminarily Approving Settlement and Providing for Notice, dated February 23, 2012, [D.E. No. 823], and its subsequent Correction Order [D.E. 836] (the "Preliminary Approval Order"), EFG Capital, as Claims Administrator, sent each Putative Class Member a Notice of Pendency and Proposed Settlement of Class Action (the "Notice"). Objections to the Settlement are due by May 14, 2012. As of the filing of this Motion, no objections to the Settlement have been received. Requests to opt-out of the Settlement by Putative Class Members were due on April 9, 2012. There were six opt-out requests representing a total net investment of about $1.26 million, or 2.7% of the Putative Class' total net investment. Finally, requests for inclusion by Arbitration Claimants were due by March 29, 2012. No requests for inclusion were received because the Arbitration Claimants each settled with EFG Capital independently of this Action under material terms identical to this Settlement.

II. BACKGROUND OF THE LITIGATION AND SETTLEMENT

On December 11, 2008, when the Madoff fraud was revealed, 279 customers of EFG Capital lost their investments in Fairfield Sentry, totaling more than $46 million in net losses.[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. Settling Class Members were customers of EFG Capital, a small Florida-based firm affiliated with Swiss based EFG Bank, which offered non-U.S. residents the opportunity to invest with Madoff through Fairfield Sentry. Over the years, Fairfield Sentry (and Madoff) was

[3] "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.

EFG Capital's largest hedge fund offering, earning it millions of dollars in fees from its customers as well as from Fairfield Sentry. EFG Capital purported to have conducted substantial due diligence analysis of Fairfield Sentry, as well as ongoing monitoring of its performance.

Recovery from Fairfield Sentry for the Putative Class was problematic, as its assets fell woefully short of the aggregate losses of its limited partners worldwide, and it was not only subject to off-shore liquidation proceedings, but also was a "clawback" target of the Madoff Trustee. The Settling Class' broker, EFG Capital, denied any responsibility for its customers' losses, maintaining that any recovery for them must come from Fairfield Sentry. Two customers, Lorrene Da Silva Ferreira and Arlete Da Silva Ferreira, decided to challenge EFG Capital's disclaimer of any responsibility.

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 Florida's 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.

Through painstaking analysis of records and depositions, Plaintiffs' Counsel developed not only a factual record supporting the knowledge of red flags commonly alleged in other Madoff actions – such as EFG Capital's knowledge of the publications questioning Madoff's supposed "split-strike conversion" investment strategy, knowledge of Madoff's custody of the securities he was supposedly purchasing, and knowledge of the limitations of his two-person auditing firm – but also evidence of EFG Capital's knowledge of additional issues implicating Fairfield Sentry and Madoff. For example, Plaintiffs' Counsel uncovered a very pointed and prescient internal analysis of Fairfield Sentry and Madoff by an EFG Bank employee, provided to EFG Bank's President, as well as to EFG Capital's Chairman. Plaintiffs' Counsel also discovered facts suggesting that EFG Bank was so wary of the Fairfield Sentry/Madoff investment that it placed worldwide limitations on the amount that it would lend to its customers using Fairfield Sentry as security. Plaintiffs' Counsel also learned that affiliates of EFG Capital attempted to limit their customers' exposure to Fairfield Sentry and Madoff.

Plaintiffs' Counsel also consulted with and ultimately retained experts in the area of the due diligence required of financial advisors and banks in situations where the advisor or bank is sponsoring and selling hedge fund investments. Plaintiffs' Counsel also retained and consulted with experts regarding the standard for monitoring such hedge fund investments, and the appropriate response or action that should be taken when such monitoring reveals problems or potential problems.

On March 11, 2010, EFG Capital filed a Motion to Dismiss the Complaint, arguing that Plaintiffs' state law claims (i) are preempted by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. § 78bb(f)(1); (ii) are barred by the Economic Loss Doctrine; and

(iii) 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. 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 involv-

ing 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 Trustee, 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 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 final approval.

III. ARGUMENT

A. Final Approval of Proposed Class Action Settlement

1. The Court should finally certify the settlement class

In its Preliminarily Approval Order, the Court preliminary approved the Settling Class. Plaintiffs now request that the Settling Class be finally certified, that Plaintiffs be finally certified as class representatives on behalf of the Settling Class, and that Levine Kellogg Lehman Schneider + Grossman, LLP, the law firm Cohen, Kinne, Valicente & Cook, LLP, and attorney Daniel R. Solin, Esq. be appointed as Lead Counsel to the certified class. *See* Preliminarily Approval Order at ¶¶ 3-5. 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.

a. Settling Class Members are too numerous to be joined

The Settling 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 more than 270 Settling Class Members. 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). Thus, the Settling Class is sufficiently numerous that joinder of all members would be impracticable and accordingly satisfies Rule 23(a)(1). *See id.*

b. 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 Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 245 (2d Cir. 2007). "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 Settling 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.

c. Plaintiffs' claims are typical of those of the Settling 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, at *10 (S.D.N.Y. Dec. 23, 2009). 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), at *4 (S.D.N.Y. Dec. 27, 2004. 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 Settling Class, and liability for this conduct is predicated on the same legal theories. Plaintiffs allege that, like the rest of the Settling Class, EFG Capital failed to conduct adequate due diligence into Fairfield Sentry, BMIS and/or Madoff, or to warn the Settling Class of certain red flags. Plaintiffs' claims and the claims of all other members of the Settling Class rest on the same theories and require the same proof. Therefore, the typicality requirement of Rule 23(a)(3) is satisfied.

d. Plaintiffs will fairly and adequately protect the interests of the Settling 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 Settling Class; and whether (2) 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 Settling Class. *See id.* 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 Settling Class Members.

Moreover, Plaintiffs' Counsel have extensive experience and expertise in complex litigations and class action proceedings, and were qualified and able to conduct this litigation. *In re Auction Houses Antitrust Litig.,* 193 F.R.D. 162, 165 (S.D.N.Y. 2000). Plaintiffs' Counsel have, *inter alia*, conducted an extensive investigation of the information relating to the claims and the underlying events in the Complaint; researched the applicable law concerning the claims and the potential defenses thereto; prosecuted the case through discovery; fully briefed the class certification issue; and undertaken extensive arm's length negotiations and mediations with counsel for EFG Capital in achieving this Settlement. Therefore, Plaintiffs respectfully submit that Rule 23(a)(4) is satisfied.

e. Plaintiffs' claims satisfy Rule 23(b)(3)

In addition to satisfying Rule 23(a), a class action must satisfy the requirement of at least one of the subdivisions of Rule 23(b); here, the Action satisfies 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 Products, Inc. v. Windsor*, 521 U.S. 591, 614-15 (1997) (citations omitted). Certification of the Settling Class serves these purposes.

Here, the predominance of the common questions is apparent – at its core, this Action is about whether EFG Capital breached its fiduciary duties to the Settling 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 Settling 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 Settling Class and predominate over issues that any individual Settling Class Member faces, such as damages. 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.

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 "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 Settling Class Members brought individual FINRA arbitration claims against EFG Capital. Moreover, after this Settlement was preliminarily approved, each of those Arbitration Claimants settled with EFG Capital for the same amount negotiated by Plaintiffs' Counsel in this Action (16.7% of their aggregate new individual losses). The scope and complexity of the Plaintiffs' claims against EFG Capital, as described above, together with the high cost of individualized litigation, make it unlikely that, absent class certification, a significant number of the Settling Class Members would be able to obtain any relief from EFG Capital.

f. Plaintiffs' Counsel satisfy the Rule 23(g) standards

Rule 23(g) provides that class counsel "must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g). Class counsel must be "qualified, experienced and generally able to conduct the litigation." *See Drexel*, 960 F.2d at 291. Plaintiff's Counsel is highly qualified in conducting class actions and complex litigation[4] and has effectively prosecuted this Action, achieving a substantial benefit for the Settling Class by negotiating and procuring the Settlement.

---

[4] *See* Plaintiffs' Petition for an Award of Attorneys' Fees and Reimbursement of Expenses with Incorporated Memorandum of Law, at 8-11 (filed contemporaneously with this Motion).

2. Final approval of the settlement should be granted because the proposed settlement is fair, adequate and reasonable under the Second Circuit's *Grinnell* factors

As a matter of public policy, courts strongly favor the settlement of lawsuits. *See Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1983). This is particularly true in connection with complex class action litigation. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d. Cir. 2005). When evaluating a proposed settlement under Rule 23(e), a court must determine whether the settlement, taken as a whole, is fair, reasonable and adequate, and was not the product of collusion. *Maywalt v. Parker & Parsley Petro. Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995). A proposed class action settlement enjoys a presumption of fairness, where, as here, it was the product of arm's length negotiations conducted by capable, experienced counsel. *See, e.g., In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240, 2007 WL 2230177 (S.D.N.Y. July 27, 2007). Indeed, "absent evidence of fraud or overreaching, [courts] consistently have refused to act as Monday morning quarterbacks in evaluating the judgment of counsel." *Trief v. Dun & Bradstreet Corp.*, 840 F. Supp. 277, 281 (S.D.N.Y. 1993) (citation omitted). The principal factors in evaluating the fairness of a proposed settlement in the Second Circuit are well settled:

> (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.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) (internal citations omitted). In weighing these factors, courts recognize that settlements usually involve a significant amount

of give and take between the negotiating parties; therefore, courts do not attempt to rewrite settlement agreements or resolve issues that are left undecided as a result of the parties' compromise. *See, e.g., In re Warner Communications Sec. Litig.*, 798 F.2d 35, 37 (2d. Cir. 1986) ("It is not a district judge's job to dictate the terms of a class settlement.").

a. Complexity, expense and likely duration of continued litigation

Class actions are particularly "difficult and notoriously uncertain" with respect to both liability and damages issues. *See In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999). The complexity of Plaintiffs' claims weights in favor of the Settlement.

Additionally, although Plaintiffs' Counsel believes the claims alleged in the Complaint are viable, there is substantial uncertainty in continued litigation as this Action presents many difficult questions discussed in greater detail in subsection (d) below. Moreover, a trial on in this Action would be risky, lengthy and costly; and a favorable judgment for Plaintiffs could be the subject of post-trial motions and appeals, delaying any payment to Settling Class Members for years. *See Slomovics v. All For A Dollar, Inc.,* 906 F. Supp. 146, 149 (E.D.N.Y. 1995) ("The potential for this litigation to result in great expense and to continue for a long time suggest[s] that settlement is in the best interest of the Class."). This Settlement represents a significant and immediate all-cash benefit for the Settling Class. Additional litigation would only increase the risks and costs to Settling Class Members with no guarantee of recovery.

b. Adequate notice and reaction of the settling class

"One indication of the fairness of a settlement is the lack of or small number of objections." *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 478-80 (S.D.N.Y. 1998) (approving settlement where tiny percentage of the class objected). Here, no Putative Class Member has yet to object to the terms of the Settlement. Moreover, there were only six opt-out

requests, representing less than 3% of the Putative Class. The lack of objections and opt-outs strongly favors the Settlement's approval.

c. Stage of proceedings and discovery completed

This Settlement was reached at a time when the Parties understood the strengths and weaknesses of their respective positions. Since Plaintiffs filed this Action 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 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.

The Parties also conducted extensive discovery. Plaintiffs conducted six depositions of EFG Capital's officers and employees, including its President and Chairman of the Board. EFG Capital produced, and Plaintiffs' Counsel reviewed, over 125,000 pages of document production in response to multiple requests for production, interrogatories, requests for admission (and responses thereto). Plaintiffs submit that much of the information discovered by Plaintiffs, including a handful of key documents, uncovered facts relating to EFG Capital's knowledge of "red flags" that went far deeper than what had been alleged in other Madoff-related cases.

With this knowledge, the Parties engaged in extensive arm's-length settlement negotiations, including two mediations. As a result, prior to entering into the Settlement, Plaintiffs' Counsel has a comprehensive understanding of the strengths and weaknesses of Plaintiffs' case. Resolution at this point maximizes Settling Class Members' recovery and minimizes the cost of further litigation.

d. Risks of establishing liability and damages

In assessing the Settlement, the Court should balance the immediacy and certainty of a recovery for Settling Class Members against the continuing risks of litigation. *See In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 591-92 (S.D.N.Y. 1992). While the claims asserted in this Action were brought in good faith, and Plaintiffs believe they have merit, there are always risks in attempting to achieve a better result through continued litigation.

Substantial legal and factual hurdles exist to recovery. EFG Capital has argued, *inter alia*, that (i) class certification is inappropriate for the reasons set forth in their responsive brief on that issue, (ii) SLUSA bars the claims from being asserted on class wide basis,[5] (iii) EFG Capital had no duty to class members to monitor the Fairfield Sentry Investment or to notify customers of red flags and certain risks,[6] (iv) EFG Capital conducted adequate due diligence of Fairfield Sentry, and (v) various other legal and factual defenses.

Each of these issues 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. Additionally, EFG Capital continues to deny that it committed any wrongdoing or breached its fiduci-

---

[5] While this Court has held that SLUSA does not apply to similar common law claims arising from investments in Fairfield Sentry, other district courts have gone the other way, and the Second Circuit is considering the issue in another Madoff related case. *See Backus v. Conn. Cmty. Bank, N.A.*, 2009 WL 5184360, at *5-*6 (D. Conn. Dec. 23, 2009) (Dorsey, J.); *Barron v. Igolnikov*, 2010 WL 882890 (S.D.N.Y. March 10, 2010) (Griesa, J.) (currently on appeal); *In re Beacon Assocs. Litig.*, 2010 WL 3895582 (S.D.N.Y. Oct. 5, 2010) (Sand, J.); *In re J.P. Jeanneret Assocs., Inc.*, 2011 WL 335594, at *33-*34 (S.D.N.Y. Jan. 31, 2011) (McMahon, J.).

[6] EFG Capital contends that the scope of any fiduciary duty depends upon the relationship of each Settling Class Member to EFG Capital -- which it also contends destroys the "commonality" element necessary to class treatment of the claims.

ary duties to Plaintiffs or any Settling Class Member. The risks of prosecuting this Action are, therefore, substantial.

e. Range of reasonableness of the settlement

To obtain a settlement, some discount must typically be offered to the defendants or they would otherwise have no economic incentive to settle. Moreover, in the context of a factually and legally complex class action, responsible class counsel cannot be certain of a judgment at or near the full amount of their proposed class-wide damages. Accordingly, the possibility that a class "might have received more if the case had been fully litigated is no reason not to approve the settlement." *Granada Invs., Inc. v. DWG Corp.,* 962 F.2d 1203, 1206 (6th Cir. 1992) (citation omitted). Moreover, "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that a proposed settlement is grossly inadequate and should be disapproved." *Grinnell*, 495 F.2d at 455 (footnote omitted). "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." *Id.* at 455 n.2. Courts agree that the determination of a "reasonable" settlement is not susceptible to a single mathematical equation yielding a particularized sum. *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.,* 718 F.Supp. 1099, 1103 (S.D.N.Y. 1989).

Here, the terms of the proposed Settlement are well "within the range of possible approval." The Settlement represents 16.7% of the aggregate net investment losses of the Putative Class. Although this is not a "securities" case, Plaintiffs note that the median settlement recovery for those cases in 2010 was only 2.4%. *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 Settlement provides for immedi-

ate payment to Settling Class Members, not a speculative payment of a hypothetically larger amount that could take years to obtain, if at all. *See In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396, 1405 (E.D.N.Y. 1985). Plaintiffs submit that the Settlement is well within the range of reasonableness, and is preferable to the possibility of delayed recovery or no recovery at all.

f. Settlement resulted from arm's-length negotiations and mediations

The Court should award great weight to the experience and reputation of the parties' counsel and their arm's-length negotiations. *See, e.g., Wal-Mart*, 396 F.3d at 116; *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 428 (S.D.N.Y. 2001) ("Courts have looked to ensure that the settlement resulted from arm's length negotiations between counsel possessed of experience and ability necessary to effective representation of the class's interests.") (quotations omitted). Here, the record demonstrates the Settlement's procedural fairness.

The proposed Settlement was the result of lengthy negotiations between Plaintiffs' Counsel and EFG Capital's counsel. These negotiations were aided 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"). The attorneys on both sides are experienced and thoroughly familiar with the factual and legal issues, as evidenced by the procedural history of the case and the issues briefed before this Court. Courts recognize that the opinion of experienced and informed counsel supporting a settlement is entitled to considerable weight. *See Sumitomo*, 189 F.R.D. at 280 (when settlement negotiations are conducted at arm's length, "great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation") (internal quotations omitted).

Plaintiffs' Counsel urges final approval of the proposed Settlement based upon their experience, their knowledge of the strengths and weaknesses of this Action, their analysis of the investigation to date, the likely recovery at trial and on appeal, and all the other factors considered in evaluating proposed class action settlements.

g. EFG Capital's ability to withstand a greater judgment

In this Action, it is not clear or even likely that EFG Capital, a small Miami-based brokerage, could withstand a judgment equaling the Settling Class' total Net Losses (more than $46 million, without counting potential punitive damages). In fact, EFG Capital's insurance company denied coverage. Thus, collectability is an issue that favors settlement in this Action.

B. Approval of the Plan of Allocation

Like the settlement itself, the plan of allocation must be fair, reasonable and adequate. *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005). The standard for approval of a plan of allocation in not rigorous. "When formulated by competent and experienced class counsel," a plan of allocation "need only have a 'reasonable, rational basis.'" *Global Crossing*, 225 F.R.D. at 462 (citation omitted). A reasonable plan of allocation may consider the relative strengths and values of different categories of claims and class members. *Id.*; see *In re Corel Corp., Inc.*, 293 F. Supp. 2d 484, 493 (E.D. Pa. 2003) (courts "generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable") (citation omitted).

Here, the Net Settlement Fund will be distributed *pro rata* to Settling Class Members based on each Settling Class Member's Individual Net Investment as set forth in the Notice. The Plan of Allocation treats all Settling Class Members the same. The Plan of Allocation, like the Settlement, is fair and adequate and should accordingly be approved.

C. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court finally approve the proposed Settlement and Plan of Allocation.

Dated: May 2, 2012.

Respectfully submitted,

COHEN KINNE VALICENTI & COOK LLP
Co-counsel for Plaintiffs
28 North Street, 3rd Floor
Pittsfield, MA 01201
Telephone: (413) 443-9399
Facsimile: (413) 553-0331
KEVIN M. KINNE
Massachusetts Bar No. 559004
Kkinne@cohenkinne.com

DANIEL R. SOLIN, ESQ.
Co-counsel for Plaintiffs
401 Broadway, Ste. 306
New York, N.Y. 10013-3005
Telephone: (239) 949-1606
Facsimile: (239) 236-1381
New York Bar No. 8675
dansolin@yahoo.com

LEVINE KELLOGG LEHMAN
SCHNEIDER + GROSSMAN LLP
Attorneys for Plaintiffs
201 So. Biscayne Boulevard
Miami Center, 34th Floor
Miami, FL 33131
Telephone: (305) 403-8788
Facsimile: (305) 403-8789

By /s/ Jason Kellogg
LAWRENCE A. KELLOGG, P.A.
Florida Bar No. 328601
lak@lkllaw.com
JASON KELLOGG, ESQ.
Florida Bar No. 0578401
jk@lkllaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **May 2, 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.

SERVICE LIST

Joseph C. Coates, III, Esq.
CoatesJ@gtlaw.com
Jon A. Jacobson, Esq.
JacobsonJ@gtlaw.com
Lauren Whetstone, Esq.
WhetstoneL@gtlaw.com
GREENBERG TRAURIG, P.A.
Counsel for Defendant EFG Capital International Corp.
777 South Flagler Drive
Third Floor East
West Palm Beach, FL 33401
Telephone: (561) 650-7900
Facsimile: (561) 655-6222