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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 PASHA S. ANWAR, ET AL,

4 Plaintiffs,

5 v.

09 CV 118 (VM)

6 FAIRFIELD GREENWICH LTD., ET
7 AL.,

8 Defendants.

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9 New York, N.Y.

10 June 1, 2012

2:17 p.m.

11 Before:

12 HON. VICTOR MARRERO

13 District Judge

14 APPEARANCES

15 LEVINE KELLOGG LEHMAN SCHNEIDER & GROSSMAN LLP

16 BY: LAWRENCE A. KELLOGG

JASON KELLOGG

-and-

17 COHEN KINNE VALICENTI COOK

18 BY: DAVID VALICENTI

Attorneys for Plaintiffs Lorrene and Arlete Da Silva Ferreira

19 GREENBERG TRAUIG

Attorney for Defendant EFG Capital International Corp.

20 BY: JOSEPH C. COATES, III

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1 (In open court; case called)

2 THE COURT: Good afternoon.

3 This is a proceeding in the matter of Anwar v.
4 Fairfield Greenwich docket number 09 Civil 0118.

5 We are here to consider final approval of a settlement
6 of one of the actions that is a component of that umbrella MDL
7 litigation. It is the Da Silva Ferreira v. EFG Capital
8 International Corp. originally docketed as 11 Civil 0813.

9 The Court authorized the parties to provide notice of
10 this settlement and schedule this proceeding in order to
11 consider final approval of the proposed terms of the
12 settlement.

13 The Court's determination is whether the terms of the
14 settlement are fair and adequate and reasonable. That
15 determination in this circuit is made pursuant to the Second
16 Circuit standard set forth in City of Detroit v. Grinnell, the
17 so-called Grinnell factors, of which there are at least nine
18 that the parties should address in some form.

19 Who leads for the plaintiff, Mr. Kellog.

20 MR. L. KELLOG: Yes, sir. Good afternoon, your Honor.

21 My name is Lawrence Kellog.

22 With me is Jason Kellog of Levine Kellog Lehman
23 Schneider & Grossman. My cocounsel, David Valicenti, a member
24 of this court, is also with me. I appreciate you giving us the
25 time to do this.

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1 I'd like to discuss the Grinnell factors and just go
2 through them one by one.

3 We've -- just so you know, we have given notice to
4 everyone both by -- there's an affidavit to this effect -- both
5 by mail, some by hand delivery, and the vast majority also by
6 e-mail. So three different ways.

7 The claims administrator, who is the defendant. The
8 defendant, in this case, most of the class members remain
9 customers of the defendant EFG Capital International. Spoke to
10 well over 70 of the class members. There are 249 of them.
11 Spoke to most of them. Or a number of them who had questions.
12 Each class member has been given a determination already of
13 what their net investment losses are as calculated by EFG. If
14 there was any issue as to that, it was worked out between them.

15 And we have no objections to the settlement. We had,
16 additionally, some arbitration claimants, twelve of them, who
17 were initially members of the class. They had the ability to
18 opt into the class if they wanted to. They decided not to opt
19 in. But they settled on the exact same terms after we had come
20 to this settlement, the very same terms as we had. But they're
21 not bound by this class determination. They've already settled
22 separately.

23 We have opt-outs of six class members. Totaling about
24 two-and-a-half percent of the net investment loss facility.
25 The reaction of the class overall of this settlement has been

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1 overwhelmingly positive in my view.

2 Now going through the Grinnell factors as to why we're
3 asking the Court to find that this is a fair and reasonable
4 settlement under the circumstances. The first factor is the
5 complexity, expense, and likely duration of this litigation.
6 This litigation began in the Southern District of Florida
7 before Judge Martinez. And he did us all a favor in a sense,
8 is that he immediately scheduled it for trial. Within a year.
9 He allowed us to do class certification discovery at the same
10 time we did merits discovery. He denied every motion that the
11 defendant filed to stay discovery while their motion to dismiss
12 was pending. And he said go at it.

13 Initially we had two defendants. We had a small
14 broker-dealer EFG Capital International down in Miami and their
15 parent which is EFG Bank, which is a Swiss bank in Switzerland.
16 We sued them both.

17 The Swiss bank had in their papers a forum selection
18 clause requiring litigation to be in Switzerland.

19 And ultimately Judge Martinez agreed with them and
20 dismissed EFG Bank from the case but said go forward with EFG
21 Capital International.

22 So we were able to discover the case, both
23 documentary-wise. We took depositions of all their key
24 officers, their top officers. From the plaintiffs' perspective
25 we reviewed over 125,000 documents. We took the depositions.

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1 We hired expert witnesses, consulted with them. Had expert
2 reports that we exchanged with the other side.

3 From our perspective, we were almost ready for trial.
4 And trial was scheduled for August of 2011.

5 At the end of 2010, the case was moved up here. And
6 at that point we got pulled into the larger case involving
7 Fairfield Century which slowed -- the defendants wanted to take
8 the depositions of all of the Fairfield Century executives, so
9 forth. That slowed things down.

10 From our perspective, we knew this case.

11 Now we thought we were going to have a trial in 2011
12 and we were looking forward to it. Once we got up here we knew
13 we wouldn't. The complexity of the case, the duration of the
14 case, and the expense of the case changed dramatically when we
15 moved up here.

16 Was the case complex? Yes. Because it involved us --
17 when our particular class are customers of a feeder into the
18 feeder fund into Madoff. Madoff -- they were not direct
19 customers of Madoff. So they had no claim against the Madoff
20 bankruptcy estate. Fairfield Century, of course, is in
21 liquidation in the BVI. And you have class actions filed here.
22 Their assets, of course, the Fairfield Century assets are far
23 less than the potential claims worldwide that have been
24 asserted against Fairfield Century.

25 So our class was directed to go to the bank that had

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1 introduced them to the Fairfield Century; ergo, to Madoff.

2 And to make that complex, we had some legal issues
3 such as duty. Do they really have a duty to all of these class
4 members, or do they have to look at them one by one to see what
5 the duty is?

6 The SLUSA preemption issue looms all the time. Once
7 this case was shifted to the Second Circuit, while your Honor
8 has found the SLUSA preemption doesn't apply to these Madoff
9 cases, other district courts have held differently. And the
10 issue is still in front of the Second Circuit. As far as I
11 know, they still haven't ruled on it. And ultimately I think
12 may end up in the Supreme Court.

13 So we had some class certification issues. We had --
14 we were looking at a defendant who was third tier, if you will,
15 from Madoff. But we were able, because Judge Martinez let us
16 do discovery, we were able to find evidence that we thought
17 created -- showed that: A. the bank didn't conduct due
18 diligence. In fact, they had indications from internal
19 employees about problems with Madoff beyond what you'd read in
20 the paper about the accounting firm, the small -- the custody
21 of the securities was held by Madoff. Beyond that we had some
22 pretty sophisticated analysis of Madoff. And different
23 divisions of the bank -- our defendant is simply one division
24 of the bank -- other divisions said we're not touching this guy
25 for these reasons.

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1 We also had -- were able to develop evidence that with
2 respect to the broker-dealer in Miami, they dealt uniformly
3 with every one of their customers with respect to this Madoff
4 Fairfield Century investment. Whether or not it was a
5 discretionary account where the financial adviser was the one
6 making the decisions or whether the customer was, whether or
7 not there was simply a recommendation, they sent out
8 communications uniformly without regard to their relationship
9 as to things that the customer should know about Madoff -- or
10 about Fairfield Century and Madoff. And eventually the bank
11 was able to unilaterally decide to redeem all investments in
12 Fairfield Century without even talking to the customer.

13 So we thought we had a uniform duty. We thought we
14 had a lack of due diligence.

15 We would have to show gross negligence here. That was
16 the standard. Gross negligence is a much different standard
17 than negligence. If we argue negligence, are we going to be
18 confronted with comparative negligence which might have an
19 effect on the class certification? Are each of these different
20 with each of the class members?

21 So we had complex legal issues, and there are more of
22 them than that even.

23 We had a count for unfair trade practices. We ended
24 up abandoning that when we figured we couldn't prove it. It
25 wouldn't fly under the law in Florida.

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1 So, it was a complex case. The duration was -- once
2 we got up here, we knew, the duration of the case, we were not
3 going to get a quick trial. So where are we?

4 We have a situation where the customers, most of them,
5 remain customers of EFG. All of them are non-U.S. citizens.
6 They are either in South America or Mexico. That's who was
7 marketed.

8 Not too many of them, if any -- there was only twelve
9 that actually brought an arbitration -- not too many of them
10 wanted to either litigate in the United States in a FINRA
11 arbitration or litigate in Switzerland against the bank which
12 is what they had to do. So the vast majority of these class
13 members were not going to be compensated at all from EFG
14 Capital if we didn't do something. We were probably going to
15 have to wait until the underlying Fairfield Century class
16 action was before you, all get resolved, whenever that might
17 be, someday down the line in the future, or when a BVI
18 liquidation of Fairfield Century comes to pass.

19 So, the possibility and the opportunity of getting the
20 class members money now, cash money -- as far as I know this is
21 the first one that's settled before you -- getting some cash
22 money, substantial cash money, substantial percentage from the
23 introducing broker for the ability to continue as class members
24 through EFG Bank of the Fairfield Century class actions was a
25 good thing to try to accomplish, if we could get a nice enough

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1 number to make it satisfactory to those class of customers.

2 We mediated this case two times. Once before Judge
3 Weinstein here in New York and once before Judge Stretton down
4 in Florida. And these were not easy negotiations. This was
5 tough, hard-fought negotiations among counsel.

6 And counsel on the other side are excellent. They
7 raised every conceivable legal and factual argument that you
8 could raise.

9 Mr. Coates, who represents the defendant, and I,
10 between the two mediations did a lot of negotiating; the reason
11 being, once we were here, there was no other discovery we could
12 do. There was nothing more we could really do to learn the
13 case better. I think both sides knew the case intimately by
14 the time we mediated it. Because as I say, we did practically
15 all of the discovery that we wanted to do.

16 So the complexity of this case was huge. The expense
17 I'll get to in a minute. The duration of the litigation -- if
18 we had taken this thing all the way to trial with you, whenever
19 that would happen, my -- in my mind, what was going to happen
20 was no matter who wins or loses, there were going to be appeals
21 that had legal issues that could -- I didn't know how they were
22 going to go.

23 I don't know how this SLUSA preemption is ultimately
24 going to come out.

25 I don't know whether class certification indeed would

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1 have withstood a legal challenge before the Second Circuit.

2 And there might have been an appeal before we ever got
3 to trial if you had certified the class, because they could do
4 an interlocutory appeal.

5 So I thought the duration of this litigation was
6 unknowable once we got up here.

7 The second factor is adequate notice and the reaction
8 of the class. As I said, we have an affidavit. Every class
9 member knows about this settlement at least two if not three
10 ways. They've had an opportunity, and many of them have taken
11 it, to talk about whether their claims are as they've been
12 calculated. They've been able to ask any questions they want
13 to ask. We've had some contact with class members. And every
14 one, with the exception of six, agrees. And no one objects.
15 So the reaction speaks for itself in my mind.

16 The Grinnell factor stage of the proceedings. We
17 were, as I say, from the plaintiffs' perspective, practically
18 fully discovered. I hadn't done their expert depositions yet.
19 I wanted to take the chairman of the board of the Swiss bank's
20 deposition. And they had agreed to produce him ultimately
21 before we got moved up here. And it was going to happen at
22 some point. I wanted to take at least maybe one other
23 deposition. But that was it. I knew what the case was. I
24 knew what my case was going to be, and I fully discovered it.

25 The risks of establishing liability and damages, I

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1 touched on those. This was -- this was a case that had, in my
2 mind, substantial factual merit and substantial legal risks,
3 legal issue risks, as being treated as a class-wide basis
4 because of the claims asserted being negligence. I also
5 thought there were risks with the SLUSA preemption. There may
6 also have been risks with whether or not there's a common duty
7 of EFG Capital International to the class members.

8 Is this within the range of reasonableness? We cited
9 to the Court various cases which show the -- what we're going
10 to be recovering here is 16.7 percent of the net investment
11 losses. That is well within the range of settlement amounts in
12 cases similar to this in size and in complexity.

13 We cited the Court -- if you got 90 percent, there
14 would be no question. But we have 16.7 percent plus the
15 ability for the class to get more, if the class lawyers here
16 for you are ultimately successful in settling or in trying the
17 case against Fairfield Century.

18 Did we have arm's length negotiations? Yes, we did.
19 With two different mediators. One of whom there was an
20 impasse. We negotiated some more. We came back and finally
21 were able to get it done.

22 An important consideration, and one of the Grinnell
23 factors, is: What is EFG Capital's ability to withstand a full
24 judgment hearing? Here is what we were faced with.

25 EFG Bank was dismissed from the case because they had

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1 a forum selection clause in Switzerland.

2 EFG Capital International is a relatively tiny
3 broker-dealer in Miami that caters to South Americans and
4 foreign investors.

5 Lloyds of London had a policy that would potentially
6 cover these claims, insurance policy, but they denied coverage.
7 They denied coverage at the eleventh hour right before our
8 first mediation.

9 So, I have no confidence that EFG Capital
10 International had the ability to pay any judgment were we to
11 win, at least an entire judgment. If we were going to go after
12 the insurance coverage, we would have to be arbitrating in
13 London because that's what the policy required. The bank
14 actually would have to arbitrate in London with the carrier
15 defined coverage. So collectibility was an issue here.

16 So for these reasons we believe this to be, and I'm
17 proud really to recommend this as fair and reasonable
18 settlement of this case. And ask that you approve it.

19 THE COURT: All right. Thank you.

20 Mr. Coates.

21 MR. COATES: Thank you, your Honor.

22 I represent EFG Capital International. And we join
23 with the plaintiff and request that the Court approve the --
24 finally approve the settlement.

25 In addition, your Honor, we submitted an affidavit of

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1 Mr. Steven Vogel which lays out in great detail the notice, how
2 it was accomplished in this case, which is truly remarkable for
3 a class action in that EFG Capital was able to identify,
4 through its records, the addresses, the current addresses of
5 the vast majority of the class members.

6 We also communicated with them by e-mail and/or
7 telephone to let the class members know that they would be
8 receiving the class notice.

9 As Mr. Kellog pointed out, approximately 20 of the
10 class plaintiffs requested that we deliver to them by courier,
11 by hand, the class notice for reasons of security in various
12 countries. And we did that.

13 And we also, in addition, of course, sent by mail to
14 all the class members the notice.

15 Unlike typical cases, we did not need to rely upon
16 publication. This class was a defined set of persons. As
17 Mr. Kellog mentioned, generally well-off persons who had
18 accounts at EFG Capital. And for that, your Honor, the notice
19 has been truly remarkable.

20 In response to that notice, we only received six
21 requests for exclusion representing a small percentage of the
22 overall net investment loss at issue.

23 Your Honor, based on those factors and the ones
24 mentioned earlier by Mr. Kellog, we request the Court enter the
25 final judgment as presented in the motion.

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1 THE COURT: All right. Thank you.

2 Mr. Kellog you also have an application for an award
3 of attorneys' fees. Would you address that application as
4 well.

5 MR. L. KELLOG: Yes, sir. Thank you.

6 We are requesting 33 percent of the settlement fund
7 plus reimbursement of our expenses. And we're asking for a
8 small incentive fee to be paid to the class plaintiffs. I
9 would like to address each of those issues.

10 With respect to the fee, the Goldberger factors, of
11 course, apply here.

12 The first factor being the time and labor expended on
13 this case. We have filed declarations and -- which reflect
14 that collectively the plaintiffs' lawyers have now spent over
15 3,500 hours prosecuting this case. As part of that, we have
16 not only investigated it, filed the complaint. We fully
17 briefed motions to dismiss. We did a full discovery, including
18 requests for productions -- requests for production, motions to
19 compel, litigation of Bank Secrecy Act issues in Switzerland,
20 combating motions to stay the prosecution of the case, motions
21 to continue the trial, a fairly heavy motion practice as you
22 would expect in a case proceeding towards trial.

23 We reviewed over 125,000 documents and analyzed them,
24 and were able to use them in depositions, key depositions that
25 we took of the top EFG Capital officers, the chairman, the

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1 president, board members. Took them by video.

2 We fully briefed class certification. That was ripe
3 for determination by this Court.

4 We conducted two full mediations and hours and hours
5 of negotiation between myself and Mr. Coates.

6 We hired, retained, consulted with expert witnesses.
7 And when I look at the time I was kind of surprised that's all
8 it was because really I think of it as a very efficient
9 prosecution of this case in terms of 3,500 hours.

10 So the time and labor expended, what we're asking for
11 totals at our ordinary time value a little over a million
12 dollars.

13 And the lodestar check that you would do here, we
14 would be asking for a multiplier of 2.4 percent of what would
15 be our ordinary hourly rate applied to the actual hours that we
16 spent.

17 But of course we did this on a contingency basis.

18 The second factor being the magnitude and complexity
19 of the litigation. Some of the legal issues here, as I
20 mentioned before, are simply unsettled. They are unsettled.
21 It's not clear where SLUSA preemption is going to come down on
22 these Madoff class actions and similar class actions.

23 And EFG was not a participant in the Madoff fraud. So
24 this was something that we had to prove liability under common
25 law theories of gross negligence and breach of fiduciary duty

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1 that in this context were fairly complex, both factually and
2 legally.

3 Litigating with a Swiss bank which is protected by
4 Swiss bankruptcy laws was not an easy task. We had to brief
5 that. And we had to argue it several times in front of a
6 magistrate judge in Florida.

7 We had excellent opposing counsel. And as I say, they
8 raised every conceivable legal and factual defense. And I
9 think their key move in this case was getting it transferred
10 here and thereby derailing the trial date that I'm confident we
11 would have had, knowing this judge as I do. And also moving it
12 to where the SLUSA preemption issue was quite unsettled.

13 The third factor, the risks of litigation. We took
14 this on a full risk, full contingency fee risk. We didn't get
15 a dollar from any of the plaintiffs. We funded the costs
16 ourselves out of our pockets; well over a hundred thousand
17 dollars in expert witness fees, deposition transcripts,
18 videographers, copying and creating documents and so forth.

19 We took on the full risk of getting nothing. And my
20 firm is fifteen lawyers. Mr. Valicenti's firm is smaller than
21 that. And so this was a true financial risk for my firm, for
22 me to take this case.

23 The quality of the representation. I mean I'm proud
24 of the work that we did. We developed factual evidence that
25 supported our legal theories. We got this Swiss bank to the

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1 table. And we got substantial money for class members who
2 don't have -- these class members do not have -- I won't say
3 the incentive. They don't want to come to the United States,
4 most of them, and do a FINRA arbitration. We got money for
5 people who would not have received money from either EFG
6 Capital or EFG Bank. I'm convinced this would not have
7 happened without our focused efforts. And they were focused.
8 And they were planned. And they were executed.

9 The amount of the requested fee in relation to the
10 settlement. We've cited to the Court various cases of similar
11 size or smaller size of which 33 percent or a little more is
12 totally appropriate in the Second Circuit. And I think it is
13 here. Dealing with a contingency fee and a total risk
14 representation of a number of clients.

15 What are the public policy considerations that will be
16 in play here? I think -- and I'm not shy to say -- that this
17 is the way that class actions should work. There is a real,
18 not an illusory, but a real recovery for class members. It was
19 done efficiently and quickly. As quickly as you can do it.
20 People got money who otherwise wouldn't have gotten it because
21 they're not going to go to Switzerland and litigate with the
22 bank and they don't want to come to the U.S. and subject
23 themselves to U.S. discovery. They're not used to it. They're
24 not used to having, as our class plaintiffs were, they're not
25 used to having themselves deposed, their financial paths being

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1 looked at, their sophistication being criticized, and the
2 things that happen in American litigation. They just wouldn't
3 have done it, and they wouldn't have gotten any money from EFG
4 Bank. So I think public policy really plays high here. It is
5 an important consideration. I think this is the way that class
6 actions ought to work.

7 So for that reason we're asking for a fee of a third,
8 a third of the recovery.

9 The expenses. I've filed my declaration which has a
10 list of the expenses that we actually -- these are
11 out-of-pocket expenses that the firms shouldered here including
12 travel and expert witnesses, court reporters, mediators' fees,
13 translation. You know, that's one thing we should mention is
14 that you have class members who speak other languages such as
15 Portuguese or Spanish. We had translations done of all the
16 notices. And we had translations done of various documents
17 that we had to hire translators for.

18 The amount of the expenses that the firms are seeking
19 collectively is \$114,100.05. As I say, the amount of money
20 that we had to spend.

21 Finally, we're asking for an incentive fee for the two
22 plaintiffs, mother and daughter, from Uruguay. Out of all the
23 EFG class members, they're the ones who stepped forward. And
24 initially they had asked EFG Bank and EFG Capital to simply
25 give their money back and were denied. And they came to

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1 Mr. Valicenti's partner who represented them in the past and
2 decided rather than file an arbitration just for themselves
3 that they would file a class action. And while others
4 contacted us about joining the class and as class
5 representatives, they were wary of doing it because of the
6 reasons I've said. They'd have to come to the United States
7 and be deposed. Ms. Lorrene Da Silva Ferreira came to the
8 United States for the first time in her life. She came not
9 only for her deposition, where she was raked through the coals
10 pretty good, but also for mediation. She looked over and --
11 and she participated in the settlement decision, in the
12 settlement negotiations in a real way. She looked over and
13 commented on key pleadings in the case. She understood what
14 the complaint was. She understood what the case was about.

15 So rather than arbitrating the case for themselves,
16 they decided to do it on behalf of the entire class. It took
17 effort. They're not getting anymore money than anybody else in
18 this class. And for that reason I think the class -- and we've
19 notified the class that we're going to be asking for this. And
20 the class I think owes them a little bit of a thank you and
21 that's what we're asking for here.

22 So for that reason we would ask you to approve and
23 grant our application for attorneys' fees, incentive
24 compensation for the plaintiffs, and reimbursement of expenses.

25 THE COURT: Thank you.

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1 The Court has considered the application for approval,
2 final approval, and judgment settling this case in accordance
3 with the proposed settlement agreement prepared by the parties,
4 advertised to the members of the class.

5 Having examined the submissions by the parties and the
6 settlement agreement and the accompanying papers and heard
7 arguments today, I am satisfied that the settlement is fair,
8 reasonable and adequate and will approve it in accordance with
9 the terms of the agreement.

10 I find that the various factors under the Grinnell
11 case have been satisfied in the litigation in terms of the
12 complexity and expense of the litigation and its duration, the
13 reaction of the class members overwhelmingly in favor, the
14 state of the proceedings and discovery taken to date and
15 implications of that, the risks involved in establishing
16 liability. And in other respects, the Court finds that the
17 Grinnell factors have been satisfied. Accordingly, I will
18 approve the settlement.

19 I also am persuaded that the application for
20 attorneys' fees and costs as outlined by Mr. Kellog is fair and
21 reasonable for the reasons that he articulated with which the
22 Court concurs.

23 So I will approve that application as well.

24 Is there anything else?

25 MR. L. KELLOG: No, sir. Thank you very much.

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1 THE COURT: Mr. Coates.

2 MR. COATES: That's all. Thank you.

3 THE COURT: Thank you. Have a good day and a good
4 weekend.

5 (Adjourned)

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