Anwar et al v. Fairfield Greenwich Limited et al Doc. 998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendants. This Document Relates To: 09-cv-118 (VM)	Master File No. 09-cv-118 (VM) (FM)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR (I) PRELIMINARY APPROVAL OF PARTIAL SETTLEMENT, (II) PRELIMINARY CERTIFICATION OF THE CLASS FOR PURPOSES OF SETTLEMENT, (III) APPROVAL OF NOTICE TO THE CLASS, AND (IV) SCHEDULING OF A FINAL APPROVAL HEARING

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The Representative Plaintiffs in this putative class action (the "Action"),[1] move for: (i) preliminary approval of a proposed partial Settlement under which the Settling Defendants, funded by the FG Individual Defendants,[2] will pay $80,250,000, including a minimum of $50,250,000 that will be distributed to the Settlement Class (the "Settlement Fund") upon final approval and an additional $30,000,000 that will be distributed if not used to resolve other claims; (ii) preliminary certification of the requested Settlement Class[3] for purposes of the Settlement; (iii) approval of the form and manner of giving notice to Settlement Class Members; and (iv) the scheduling of a hearing (the "Final Settlement Hearing") on the Representative Plaintiffs' motion for final approval of the Settlement, and for an award of attorneys' fees and for reimbursement of litigation expenses, including incentive awards and reimbursement of lost wages to Representative Plaintiffs.

The proposed partial Settlement resolves the claims asserted in this Action against all defendants associated with Fairfield Greenwich Group, which established and managed the

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[1] The "Representative Plaintiffs" are Pacific West Health Medical Center Employees Retirement Trust, Harel Insurance Company Ltd., Martin and Shirley Bach Family Trust, Natalia Hatgis, Securities & Investment Company Bahrain, Dawson Bypass Trust, and St. Stephen's School.

[2] The "Settling Defendants" are Fairfield Greenwich Limited ("FGL") and Fairfield Greenwich (Bermuda) Ltd. ("FGBL"). The "FG Defendants" are the Settling Defendants as well as Fairfield Greenwich Group, Fairfield Greenwich Advisors LLC, Fairfield Risk Services Ltd., Fairfield Heathcliff Capital LLC, and Fairfield Greenwich (UK) Limited (collectively, the "FG Entity Defendants"); and Walter M. Noel, Jr., Jeffrey H. Tucker, Andres Piedrahita, Lourdes Barreneche, Robert Blum, Cornelis Boele, Gregory Bowes, Vianney d'Hendecourt, Yanko Della Schiava, Harold Greisman, Jacqueline Harary, David Horn, Richard Landsberger, Daniel E. Lipton, Julia Luongo, Mark McKeefry, Charles Murphy, Corina Noel Piedrahita, Maria Teresa Pulido Mendoza, Santiago Reyes, Andrew Smith, Philip Toub, and Amit Vijayvergiya (collectively, the "FG Individual Defendants").

[3] Unless otherwise indicated, capitalized terms used in this Memorandum are defined in the accompanying Stipulation of Settlement. The "Settlement Class" is also defined at p. 12 below.

Funds. The settlement does not resolve Plaintiffs' claims against Defendants PwC Netherlands, PwC Canada, the Citco entities, or GlobeOp, which Plaintiffs continue to litigate vigorously.

INTRODUCTION

The FG Defendants comprised the sponsors, managers, and advisors to several feeder funds to Bernard L. Madoff Investment Securities ("BLMIS"), as well as individuals affiliated with Fairfield Greenwich Group. Plaintiffs' Second Consolidated Amended Complaint ("SCAC"), filed September 29, 2009 (ECF No. 273), asserts claims against the FG Defendants for common law fraud (Counts 1 and 2), federal securities fraud and control person liability (Counts 3 and 4), negligent misrepresentation (Counts 5 and 6), gross negligence (Count 7), breach of fiduciary duty (Count 8), third-party beneficiary breach of contract (Count 9), constructive trust (Count 10), mutual mistake (Count 11), and unjust enrichment (Count 33). Those claims were sustained in significant part by this Court in decisions of July 29, 2010, *Anwar v. Fairfield Greenwich Ltd.* ("*Anwar I*"), 728 F. Supp. 2d 354; and August 18, 2010 *Anwar v. Fairfield Greenwich Ltd.* ("*Anwar II*"), 728 F. Supp. 2d 372. The Court thereafter denied two separate motions to reargue *Anwar II* (*see* 800 F. Supp. 2d 571 and 2012 WL 3245478), except the Court, on the second motion to reargue, limited the claims against the PwC Defendants to subsequent investor and holder claims asserted by already existing investors in the Funds.

The Representative Plaintiffs and the Settling Defendants (the "Settling Parties") have reached agreement to settle and release all claims against the FG Defendants as provided in a Stipulation of Settlement dated as of November 6, 2012 (the "Stipulation") filed herewith. Under the proposed Settlement, the Settling Defendants, funded by the FG Individual Defendants, will pay a total of $80,250,000, as well as giving other consideration. The

Settlement provides a substantial, up-front monetary benefit to the Settlement Class of $50,250,000 in cash (the "Settlement Fund"). These funds, less administration expenses and attorneys' fees and expenses as may be awarded by the Court, will be distributed to Settlement Class Members as soon as the proposed Settlement is finally approved.

In addition to this guaranteed recovery of $50,250,000, the Settling Defendants, funded by the FG Defendants, also will transfer $30,000,000 into a separate account (the "Escrow Fund"), which will be distributed to the Settlement Class to the extent it is not used to pay certain other claims or judgments against the FG Defendants. *See* Stipulation ¶¶ 5, 18 and 30. In the event that the Escrow Fund is used to settle claims against the Settling Defendants that have been brought by the Trustee in the liquidation of BLMIS, the Settling Defendants must make an additional payment to the Settlement Fund of up to $5,000,000, measured by 50% of the amount, if any, by which such a settlement exceeds $50,125,000. *See* Stipulation ¶ 7.[4]

As additional consideration, the Settling Defendants have agreed to waive (i) indemnification claims they hold against the Funds for the $80,250,000 payments that they will make under the Settlement; and (ii) $20,000,000 of indemnification claims they hold against the Funds for legal fees and expenses incurred in defending the Action. *See* Stipulation, ¶ 6.

The Stipulation also contains provisions barring the remaining defendants in the Action, including without limitation various PricewaterhouseCoopers, Citco and GlobeOp entities (the "Non-Dismissed Defendants") from asserting claims against the FG Defendants for contribution and indemnification and providing for reduction of any judgment that may be entered against the

[4] Because a settlement of $50,125,000 with the Trustee would exhaust the Escrow Fund, the Settlement Fund ultimately may be enhanced either by the net amount of the Escrow Fund or the supplemental payment up to $5 million (or neither), but not both.

Non-Dismissed Defendants to account for Plaintiffs' recovery under the instant Settlement. *See* Stipulation, ¶¶ 26-27.

Further, in connection with the Settlement, Plaintiffs' Lead Counsel conducted informational interviews of FG Individual Defendants on matters relevant to the Settlement and to Plaintiffs' continued prosecution of claims against the remaining Non-Dismissed Defendants.

The Stipulation is subject to additional terms, including terms contained in a Supplemental Agreement dated as of November 6, 2012, which provides that if class members representing a Net Loss of principal in excess of a certain amount seek exclusion from the Settlement Class, the Settling Defendants may terminate the Settlement. *See* Stipulation, ¶ 47. In the event the Settling Defendants elect to terminate, but the Net Loss of opt-outs does not exceed a separate threshold specified in the Supplemental Agreement, the Settling Defendants shall incur a break-up fee in the amount of $1,000,000 which shall remain in the Settlement Fund. *Id.*

The Settling Parties reached this Settlement after strenuous and protracted negotiations at a time when the Settling Parties fully understood the strengths and weaknesses of their respective positions. Since Representative Plaintiffs filed this case in December 2008, the Settling Parties have engaged in substantial motion practice, including motions to dismiss, motions to reconsider rulings on motions to dismiss and a motion for class certification. The Settling Parties have conducted, and continue (with respect to the Non-Dismissed Defendants) to conduct, extensive discovery, including 20 depositions of persons associated with the Representative Plaintiffs or other Named Plaintiffs, 30 depositions of persons affiliated with the Defendants, with many more depositions scheduled in the next several months. The Settling Defendants and the Non-Dismissed Defendants produced, and Plaintiffs' Lead Counsel reviewed, more than six million

pages of documents with production still continuing; and Plaintiffs' Lead Counsel reviewed and produced to defense counsel more than 75,000 pages of documents on behalf of the Representative Plaintiffs and other Named Plaintiffs. In total, Plaintiffs' Counsel expended over 58,000 hours of attorney and paralegal in prosecuting the Action through July 31, 2012, and have incurred in excess of $1,450,000 in out-of-pocket expenses.

The Representative Plaintiffs and Plaintiffs' Lead Counsel believe that the proposed Settlement is an excellent result that is in the best interests of the Settlement Class. The Settlement must be considered in the context of the risk that protracted litigation, including a decision on class certification, motions for summary judgment, motion practice with respect to experts and trial evidence, trial itself, and likely appeals, could result in a lesser recovery against the FG Defendants, or no recovery at all. In this connection, the FG Defendants vigorously maintain that they did not know about wrongdoing at BLMIS until it was revealed to the public in December 2008, lost more than $72 million of their own and family members' money in the fraud, maintained a full-time professional staff to perform due diligence and risk monitoring, and were among many financial firms and regulators that were fooled by Madoff, including the Securities and Exchange Commission. They also point to the efforts to conceal the fraud by Madoff and seven others who pleaded guilty to crimes, including creating false trade blotters, trade confirmations and DTC reports which they were shown, and aspects of Madoff's activities that were not typical of a Ponzi scheme, including refusing new investments and redeeming billions of dollars upon request over many years.

Plaintiffs' Lead Counsel has conducted financial due diligence of the assets held by the Founding Shareholders of FGG – Walter Noel, Jeffrey Tucker and Andres Piedrahita – and of the remaining FG Individual Defendants. This included review of assets and liabilities and

written certifications by the Defendants of the material accuracy of the information provided. Plaintiffs' Lead Counsel are satisfied that the settlement consideration represents a substantial portion of the assets that might be recovered from these FG Defendants – but only if Plaintiffs were to prevail on dispositive motions, at trial, on appeal and in potentially long and hard-fought judgment enforcement proceedings.

The Stipulation anticipates entry of the accompanying Preliminary Approval Order approving forms of mailed and publication notice to members of the proposed Settlement Class. *See* Stipulation, ¶ 20. The proposed Notice (Ex. A-1 to the Stipulation) informs Settlement Class Members of the scheduling of the Final Settlement Hearing to consider final approval of the Settlement and the request for an award of attorneys' fees and reimbursement of expenses. The Notice also informs Settlement Class Members of the opportunity to request exclusion from the Settlement Class, to object to the terms of the proposed Settlement, and to file Proofs of Claim to share in the Settlement proceeds. Inasmuch as (i) the proposed Settlement is well within the range of approvable settlements; (ii) the request for certification of a proposed Settlement Class meets the requirements for certification under Rule 23; and (iii) the plan for giving notice of the Settlement complies with applicable law, including the Private Securities Litigation Reform Act and due process, the Representative Plaintiffs respectfully request that the proposed Preliminary Approval Order be entered by this Court.

ARGUMENT

I. The Proposed Partial 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, to be exercised in accordance with public policy strongly favoring pretrial settlement of class action lawsuits. *Karpus v. Borelli, (In re Interpublic Sec. Litig.)*, Nos. 02-6527, 03-1194, 2004 WL 2397190, at *7 (S.D.N.Y. Oct. 26, 2004); *see also Riltmaster v. PaineWebber Group (In re PaineWebber Ltd. P'ships Litig.)*, 147 F.3d 132, 138 (2d Cir. 1998).

"Review of a proposed class action settlement generally involves a two-step process: preliminary approval and a 'fairness hearing.' First, the court reviews the proposed terms of settlement and makes a preliminary determination on the fairness, reasonableness and adequacy of the settlement terms." *In re Initial Pub. Offering Sec. Litig.*, 226 F.R.D. 186, 191 (S.D.N.Y. 2005) (citation omitted). During this first step, a court must consider whether the settlement warrants preliminary approval, providing notice to the proposed class and the scheduling of a final settlement hearing. 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 the settlement warrants "final approval." *Id.* at 200 n. 71.[5] *See also In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102

[5] A final approval determination is based on an analysis of nine factors established in *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.*

(S.D.N.Y. 1997) (citations omitted); *In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007).

The terms of the proposed Settlement here are clearly "within the range of possible approval." *Initial Pub. Offering*, 243 F.R.D. at 87. Although the Representative Plaintiffs and Plaintiffs' Lead Counsel believe that the claims asserted in the Action against the FG Defendants are meritorious, continued litigation poses the real risk that, following the Court's decisions on contested motions, and a trial on the merits and likely subsequent appeals, a lesser recovery (or no recovery at all) would result, or that collection of the full amount of any judgment would be difficult, if not impossible, against these defendants.

The Settlement was negotiated at arm's length, by counsel who were well-informed of the facts and issues in the Action, and are experienced in complex securities litigation. Among the reasons the Representative Plaintiffs believe that the proposed Settlement is in the best interests of the Settlement Class are:

(i) The Settlement will result in simplifying the remaining discovery, motion practice and trial by enabling Plaintiffs' Lead Counsel to focus on the remaining defendants, PricewaterhouseCoopers, Citco and GlobeOp. Among other things, the Citco Defendants acted as administrators of the Funds and custodians of the Funds' assets and were responsible for monitoring BLMIS as subcustodian of those assets, and PwC Netherlands and PwC Canada were the auditors of the Funds' financial statements. These defendants are believed to have substantial assets that may through settlement or judgment provide significant additional compensation to the Settlement Class.

(ii) The FG Entity Defendants lack assets to fund a judgment in excess of the Settlement – indeed, they essentially are out-of-business and could not be a source of substantial recovery by judgment or settlement.

(iii) The FG Individual Defendants acted primarily through the FG Entity Defendants and the Representative Plaintiffs may have difficulty in successfully prosecuting individual claims against the FG Individual Defendants. For example, the Representative Plaintiffs' claims for third-party beneficiary breach of contract are against the FG Entity Defendants, and the claims for common law fraud, federal securities fraud, negligent misrepresentation, gross negligence, and breach of fiduciary duty may be limited to those FG Defendants that had a fiduciary duty to investors or to whom a false statement in an Offering Memorandum or marketing materials may be attributed.

(iv) There exist substantial risks in proving the Representative Plaintiffs' claims that the FG Defendants held out Fairfield Greenwich Group as a legal partnership and that the FG Individual Defendants should be held liable as individual partners of a Fairfield Greenwich Group partnership.

(v) The FG Individual Defendants have limited financial resources and are being sued by other parties with respect to the same or similar claims as those asserted in this Action; they are incurring substantial legal expenses to defend the Action and such other proceedings; and they could well be unable to pay a substantially greater judgment or settlement to the putative class at a later time.

(vi) Certain of the FG Individual Defendants reside overseas and/or had transferred assets to trusts and retirement accounts prior to discovery of the Madoff fraud and the BLMIS bankruptcy. The Representative Plaintiffs may not be successful in enforcing judgments,

even if obtained against these defendants, in amounts greater than provided in the Settlement.

(vii) The FG Defendants continue to assert significant defenses to the Representative Plaintiffs' claims, including in opposition to class certification, and substantive defenses to the merits under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"); *Morrison v Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010); *Janus Capital Grp. Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011); and other legal and factual defenses under federal and state law.

(viii) There is significant risk that the Representative Plaintiffs' claims could be dismissed or limited prior to or at trial, or on appeal from a jury verdict.

(ix) There exists a risk that no class will be certified and the Action would have to proceed through a series of individual trials.

(x) Continued litigation and delay would cause the FG Defendants to expend their limited resources on litigation fees and costs and otherwise result in dissipation of their assets.

(xi) The Funds are either in liquidation proceedings in the British Virgin Islands or bankruptcy proceedings in the U.S. and are actively marshaling assets and pursuing sources of recovery on their own behalf, including recovery on claims against the BLMIS estate. Investors are expected to receive recoveries in addition to those obtained in this Action and through the Settlement as a result of the Funds' liquidation proceedings.

The Settlement is proposed to be allocated among class members based on their Net Loss of principal, defined as, "the total cash investment made by a Beneficial Owner in a Fund, directly or indirectly through one or more intermediaries, less the total amount of any redemptions or withdrawals or recoveries by that Beneficial Owner in the same Fund." *See*

Notice, at 24 (Plan of Allocation). The Representative Plaintiffs cannot now determine the aggregate Net Losses that may be reflected in the claims that will be filed by Settlement Class Members. As described in the proposed Notice, estimates of the percentage recovery on the potential claims that may be filed vary depending on a number of factors including (i) the difference between losses at the Fund level (which are known and are estimated to equal approximately $1.33 billion) compared to losses at the beneficial owner level (which are not known), (ii) the number of Settlement Class Members who file claims and the aggregate Net Loss of those claims, and (iii) the ultimate amount distributed to the Settlement Class from the Escrow Fund, if any.

Based on the $1.33 billion in reported losses of investments in BLMIS at the Fund level (*i.e.*, the aggregate Net Loss of principal of the Sentry, Greenwich Sentry and Greenwich Sentry Partners funds[6]), distributions from the Settlement Fund, before deduction of Court-awarded attorneys' fees and expenses, are estimated at approximately 4% to 6% of the Funds' Net Loss of principal, depending on the amount distributed to the Settlement Class from the Escrow Fund, if any. That percentage recovery would be increased to the extent Settlement Class Members do not file claims and would be reduced to the extent the aggregate Net Losses of beneficial owners who file claims exceed $1.33 billion.[7]

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[6] The Sigma and Lambda funds are not included in this analysis because they were investors in Sentry. Including their net losses or net gains would double count their impact on the Sentry fund.

[7] Information from the Liquidator of the Sentry, Lambda and Sigma funds in early 2011 indicated that aggregate Net Losses of beneficial owners could exceed $5 billion. *See* Declaration of Sashi Bach Boruchow In Support of Motion for Class Certification (ECF No. 777). More recent information suggests this estimate may be high, although the amount may be several billion dollars depending on the claims filed.

The total amounts recovered by Settlement Class Members in respect of their investments in the Funds will be increased, perhaps substantially, by any amounts (i) recovered from the Non-Dismissed Defendants in the continuing litigation of the Action; and (ii) paid in liquidation through the bankruptcy proceedings of the Funds, which have entered into settlements entitling them to distributions from the BLMIS Trustee, and also are pursuing legal actions for their own direct claims and other recoveries.

II. Certification of a Settlement Class Is Appropriate

The proposed Settlement Class consists of:

> All Beneficial Owners of shares or limited partnership interests in the Funds as of December 10, 2008 (whether as holders of record or traceable to a shareholder or limited partner account of record), who suffered a Net Loss of principal invested in Fairfield Sentry Limited, Fairfield Sigma Limited, Fairfield Lambda Limited, Greenwich Sentry L.P. or Greenwich Sentry Partners, L.P.

Stipulation, ¶ 1(ss). Excluded from the Settlement Class are (i) those individuals who timely and validly opt out of the Settlement; (ii) Fairfield Sigma Limited, (iii) Fairfield Lambda Limited, (iv) any Settlement Class Member who has been dismissed from this Action with prejudice; and (v) the FG Defendants and any entity in which the FG Defendants have a controlling interest, and the officers, directors, affiliates, legal representatives, immediate family members, heirs, successors, subsidiaries and/or assigns of any such individual or entity in their capacity as such. *Id.* Fairfield Sigma Limited and Fairfield Lambda Limited are excluded to avoid potential double recovery because their shareholders are included as members of the Settlement Class.

Pursuant to the Stipulation, the parties have agreed to request certification under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure, for settlement purposes only, of Plaintiffs' claims against the Settling Defendants, and that the Final Judgment would provide for the dismissal with prejudice and releases of all FG Defendants.

The Second Circuit recognizes the propriety of certifying a class solely for purposes of a class action settlement. *See In re Am. Int'l Group Inc. Sec. Litig.*, 689 F.3d 229, 238–39 (2d Cir. 2012); *Weinberger v. Kendrich*, 698 F.2d 61, 73 (2d Cir. 1982). *See also In re Marsh & McLennan Cos. Inc. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *8 (S.D.N.Y. Dec. 23, 2009). Indeed, certification of a settlement class "has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants." *In re Prudential Sec., Inc., Ltd. P'ships Litig.*, 163 F.R.D. 200, 205 (S.D.N.Y. 2005). "[S]ettlement classes are favored when there is little or no likelihood of abuse, and the settlement is fair and reasonable and under the scrutiny of the trial judge." *Id.* (*quoting In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 174 (5th Cir. 1979)).

A settlement class, like other certified classes, must satisfy the requirements of Rule 23(a) and (b). *Am. Int'l Group Inc.*, 689 F.3d 229; *Denney v. Deutsche Bank AG*, 443 F.3d 253, 270 (2d Cir. 2006). Nevertheless, the manageability concerns of Rule 23(b)(3) are not at issue with respect to the settlement class analysis. *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."). Here, the proposed Settlement Class meets the requirements of Rule 23(a) and Rule 23(b)(3), there is no likelihood of abuse of the class action device, and the settlement is fair, reasonable, and subject to the Court's approval. In fact, this Court in denying in part Defendants' motions to dismiss the SCAC noted that "core facts [are] implicated in every cause of action in this lawsuit." *Anwar II*, 728 F. Supp. 2d at 400.

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

Certification is appropriate under Rule 23(a) where: (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 interests of the class. Fed. R. Civ. P. 23(a). Inasmuch as Plaintiffs have already filed opening and reply memoranda in support of class certification, with supporting Declarations (ECF Nos. 776-84 and 865). Plaintiffs will summarize the bases for certification of a settlement class.

1. The Settlement Class Members Are Too Numerous to Be Joined

Certification requires that the class be so numerous that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). Joinder need not be impossible, only difficult. *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993). "[T]here is no fixed number which either compels or precludes class certification," *Zupnick v. Thompson Parking Partners Ltd. P'ship III*, No. 89 Civ. 6607, 1990 WL 113197, at *3 (S.D.N.Y. Aug. 1, 1990), and even "the difficulty in joining as few as 40 class members should raise a presumption that joinder is impracticable." *Robidoux*, 987 F.2d at 936 (citations omitted). Here, there are in excess of 1,000 record owners of shares in the Funds and a larger number of Settlement Class Members are beneficial owners. The sheer number of potential Settlement Class Members coupled with their widely-dispersed locations in the United States and dozens of different countries around the world makes joinder impracticable and class treatment appropriate. *See, e.g., Zupnick*, 1990 WL 113197, at *3; *Allen v. Isaac*, 99 F.R.D. 45, 53 (N.D. Ill. 1993).

2. There Are Common Questions of Law or Fact

The commonality requirement of Rule 23(a) is met if the claims involve questions of law or fact that are common to the class. *See Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 155 (2d Cir. 2001). Factual variations among class members' claims will not defeat the commonality requirement so long as the claims arise from a common nucleus of operative facts.

Teachers' Ret. Sys. of La. v. ACLN Ltd., No. 01 Civ. 11814, 2004 WL 2997957, at *4 (S.D.N.Y. Dec. 27, 2004). Because plaintiffs can "'identify some unifying thread among the members' claims,'" commonality is satisfied. *Cutler v. Perales*, 128 F.R.D. 39, 44 (S.D.N.Y. 1989) (citation omitted).

Consistent with this, "[t]he commonality requirement has been applied permissively in securities fraud litigation" and is easily met "where putative class members have been injured by similar material misrepresentations and omissions." *Fogarazzo v. Lehman Bros. Inc.*, 232 F.R.D. 176, 180 (S.D.N.Y. 2005) (footnotes omitted). Such "course of conduct cases" are particularly well suited to class treatment because the heart of plaintiffs' claim is that defendants withheld the same material information or made the same material misrepresentations to the entire class. *See Stott v. Capital Financial Services, Inc.*, 277 F.R.D. 316, 324 (N.D. Tex., 2011) (finding commonality where common questions included whether "a broker-dealer can be held liable for the misrepresentations in the PPMs [], [and] whether the PPMs contained misrepresentations or omissions of material facts..."); *In re Indep. Energy Holdings PLC Sec. Litig.*, 210 F.R.D. 476, 479 (S.D.N.Y. 2002); *In re Oxford Health Plans, Inc. Sec. Litig.*, 191 F.R.D. 369, 374 (S.D.N.Y. 2000).

The SCAC identifies numerous common issues of fact and law (SCAC at ¶ 353), including without limitation the following:

- Whether documents, including offering memoranda, annual reports, account statements, audit reports and other materials disseminated to Plaintiffs, including information on the FG Defendants' websites, misrepresented, omitted or were otherwise misleading with respect to material facts about the Funds.

- Whether the FG Defendants acted knowingly, recklessly or negligently in misrepresenting or omitting material facts about the Funds.

- Whether the FG Defendants breached duties owed to the Plaintiffs.

- Whether Plaintiffs' losses would have been prevented had the FG Defendants fulfilled their respective duties, and acted in accordance with their representations concerning due diligence.

- Whether the Settling Parties shared a mutual mistake that the assets of the Funds were in fact being invested by BLMIS.

- Whether the FG Defendants were unjustly enriched at Plaintiffs' expense.

- Whether a valid contract governed the relationship between Plaintiffs and each of the FG Defendants.

Because Plaintiffs' allegations implicate a common course of conduct that caused injury to all members of the putative Settlement Class, the commonality requirement of Rule 23(a)(2) is satisfied.

3. The Class Representatives' Claims Are Typical

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Like the test for commonality, "[t]he typicality requirement is 'not demanding.'" *In re Initial Public Offering Sec. Litig.*, 227 F.R.D. 65, 87 (S.D.N.Y. 2004) (citations omitted). Typicality is established where "'the claims of the named plaintiffs arise from 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, 84-85 (S.D.N.Y. 2007) (citation omitted); *see also Oxford Health Plans*, 191 F.R.D. at 375.

The Representative Plaintiffs' claims are typical of the claims of other Settlement Class Members because their losses all derive from the same course of the FG Defendants' conduct. Where, as here, "the lead plaintiff alleges a common pattern of wrongdoing and will present the same evidence, based on the same legal theories, to support its claim as other members of the proposed class, courts have held the typicality requirement to be satisfied...." *Teachers' Ret. Sys. of La.*, 2004 WL 2997957, at *4. *See also In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 280

(S.D.N.Y. 2003) ("'When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met . . . .'") (citations omitted); *In re Blech*, 187 F.R.D. 97, 106 (S.D.N.Y. 1999) (typicality satisfied because "plaintiffs' claims of fraud arise from the same course of conduct" as the rest of the class); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 511 (S.D.N.Y. 1996) (typicality shown where claims "all [arose] from the same price-fixing conspiracy").

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

Rule 23(a)(4) requires that the representative parties "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement is met where: (1) the representative plaintiffs' interests are not antagonistic to those of the remainder of the class; and (2) class counsel is 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).

The Representative Plaintiffs and the Settlement Class share the common objective of maximizing their recovery, and no conflict exists between Representative Plaintiffs and the members of the Settlement 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 representatives and other class members"). Plaintiffs' Lead Counsel (Boies Schiller & Flexner LLP, Wolf Popper LLP, and Lovell Stewart Halebian & Jacobson LLP) have extensive experience and expertise in complex securities litigation and class action proceedings throughout the United States, and are qualified and able to conduct this litigation. *See* Declarations attached as Exhibits B, C, and D to

Plaintiffs' Memorandum of Law in Support of Motion for Consolidation of All Actions and Appointment of Interim Co-Lead Counsel dated January 27, 2009 [ECF No. 22].

On January 27, 2009, Plaintiffs' Lead Counsel were appointed Interim Co-Lead Counsel for the putative class and on July 7, 2009 the firms were appointed Lead Counsel for the PSLRA Plaintiffs. In this capacity, Plaintiffs' Lead Counsel have (i) conducted an extensive investigation of public and non-public information with respect to the class' claims; (ii) prepared initial complaints, a Consolidated Amended Complaint, and the subsequent SCAC; (iii) overcome in large part Defendants' motions to dismiss the SCAC; (iv) secured entry of a case management plan and scheduling order; and (v) commenced discovery including serving and responding to demands, including third party subpoenas, and obtaining and producing documents. In all, Plaintiffs have produced approximately 75,000 pages of documents and have received and reviewed approximately six million pages of documents; (vi) conducted 30 depositions of persons affiliated with Defendants to date, with many more scheduled, and defended 20 depositions of Representative and other Named Plaintiffs; (vii) filed a Memorandum and Reply Memorandum in Support of Plaintiffs' motion for class certification, accompanied by 14 opening and reply certifications of foreign law experts and a compendium of 62 factual exhibits; (viii) briefed and defeated in part two motions by the PwC Defendants and others to reargue the denial of dismissal of the SCAC; (ix) participated with defense counsel in dozens of meet and confer sessions with respect to document, deposition, and other aspects of merits discovery; (x) prepared written letter-briefs and argued to Magistrate Judges Katz and Maas multiple discovery disputes; (xi) retained and consulted with experts on investment fund auditing and administration; (xii) protected the interests of putative class members even outside the confines of this Action by, among other things, initiating proceedings for the liquidation of

Fairfield Sentry Fund in the British Virgin Islands, succeeding in a motion before the High Court of the Eastern Caribbean to appoint a Liquidator for Sentry, and actively participating in the liquidation process through the Sentry Liquidation Committee; and (xiii) otherwise vigorously represented the interests of putative class members in this extraordinarily complex dispute. Plaintiffs' Lead Counsel are amply qualified, experienced and capable of prosecuting this litigation. Therefore, Rule 23(a)(4) is satisfied.

B. The Proposed Settlement Class Satisfies the Requirements of Rule 23(b)(3)

Rule 23(b)(3) requires that the common questions of law or fact predominate over any questions affecting only individual class members and that a class action is superior to other available methods of adjudication. Both of these requirements are met.

1. Common Questions Predominate

Rule 23(b)(3) does not require a complete absence of any individual issues. *See Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 99 ("To be sure, individual issues will likely arise in this as in all class action cases."). Rather, it requires predominance, which entails that "some of the legal or factual questions" can be resolved through "generalized proof" and that "these particular issues are more substantial than the issues subject only to individualized proof." *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002).

In cases that involve a single, common scheme, the predominance requirement is met notwithstanding that there may be questions of individualized reliance. *See In re Beacon,* 2012 WL 1123728, at *8 (S.D.N.Y. Apr. 4, 2012) (Sand, J.); *Jenson v. Fiserv Trust Co.*, 256 Fed. App'x 924, 926 (9th Cir. 2007) (a Ponzi scheme presented a "center of gravity" for the fraud that predominated over individual issues); *In re HealthSouth Corp. Sec. Litig.*, 261 F.R.D. 616, 645 (N.D. Ala. 2009) ("individual issues of reliance do not predominate over questions common to

the class" where the class' claims are based on a "single, common fraudulent scheme"); *Walco Invs., Inc. v. Thenen*, 168 F.R.D. 315, 333 (S.D. Fla. 1996) (certifying a class in a case involving a Ponzi scheme, where (as here) defendants included third-party service providers because common issues predominated in spite of concerns over individualized reliance); *Bresson v. Thomson McKinnon Secs., Inc.*, 118 F.R.D. 339, 343 (S.D.N.Y. 1988) (same); *In re Home-Stake Prod. Co. Sec. Litig.*, 76 F.R.D. 351, 368 (N.D. Okla. 1977) (same). This is because such situations present an "overwhelming number of common factual and legal issues . . . common to the class" that "predominate over any questions affecting only individual members." *Walco*, 168 F.R.D. at 334.

Consistent with these decisions, class treatment is appropriate in this case. This case involves the type of "common nucleus of operative facts and issues with which the predominance inquiry is concerned." *In re Nassau County Strip Search Cases*, 461 F.3d 219, 228 (2d Cir. 2006). With respect to the claims against the FG Defendants, there are multiple common questions of law or fact that apply to the entire Settlement Class. Plaintiffs' claims of negligence, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, unjust enrichment and third-party breach of contract focus on the "the conduct of the defendants, not the plaintiffs." *Bunnion v. Consol. Rail Corp.*, No. 97-4877, 1998 WL 372644, at *6, (E.D. Pa. May 14, 1998). *See, e.g., Bruhl v. PriceWaterhouseCoopers Int'l.*, 257 F.R.D. 684, 698 (S.D. Fla. 2008) (granting class certification on breach of fiduciary duty claims where defendants owed same duty to each class member and breach could be established on class-wide basis); *Dupler v. Costco Wholesale Corp.*, 249 F.R.D. 29, 34 (E.D.N.Y. 2008) (granting class certification on unjust enrichment and breach of contract claims); *Westway World Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 224 (C.D. Cal. 2003) (granting class certification on unjust enrichment claims);

In re Towers Fin. Corp. Noteholders Litig., 177 F.R.D. 167, 172 (S.D.N.Y. 1997) (granting class certification on pendent state claims including negligence and breach of fiduciary duty in securities fraud action). As the Court has recognized, "core facts [are] implicated in every cause of action in this lawsuit." *Anwar II*, 728 F.Supp.2d at 400.

2. A Class Action Is the Superior Method 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." Considering these factors, proceeding by means of a class action is clearly "superior to other available methods for fairly and efficiently adjudicating" the claims against the FG Defendants.

a. Any Individual Interest in Controlling the Prosecution of Separate Actions Is Limited

The sheer scope and complexity of this controversy would make individual litigation difficult for the vast majority of Settlement Class Members. This is particularly true because thousands of Settlement Class Members reside outside the United States and are unfamiliar with the U.S. court system. Separate actions would also "risk disparate results among those seeking redress, [] encourage a race to judgment given the limited funds available to fund recovery here, [] exponentially increase the costs of litigation for all, and [] be a particularly inefficient use of judicial resources." *Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113, 133 (S.D.N.Y. 2001) (footnote

omitted). Apart from a single action in this Court[8], there is no indication that Settlement Class Members – let alone a significant number of Settlement Class Members – are interested in individually controlling the prosecution of separate actions against the FG Defendants.

b. Litigating All of the Claims in this Forum Is the Most Desirable Course of Action

The third superiority factor considers "the desirability or undesirability of concentrating the litigation of the claims in the particular forum." Fed. R. Civ. P. 23(b)(3)(C). For a number of reasons, this litigation should continue to proceed in the Southern District of New York. First, litigating this dispute in one forum – rather than in numerous courts throughout the world – is the most efficient method of resolving these claims. *See Anwar II*, 728 F. Supp. 2d at 417-418 ("[O]f any forum in the world with connections to the underlying transactions, New York has the most contacts with the litigation."). Second, this Court has presided over this action for nearly four years and is already deeply involved in the legal issues and the factual circumstances, having written exhaustive opinions on Defendants' motions to dismiss and for reconsideration. Finally, all Defendants are subject to the Court's personal jurisdiction. These factors weigh strongly in favor of litigating Plaintiffs' claims in this Court as a class action.

c. Settlement-Only Class Certification Moots Manageability Analysis

The final factor asks the Court to consider "the difficulties likely to be encountered in the management of a class action." Fed. R. Civ. P. 23(b)(3)(D). Although management of this case as a class action is not so difficult as to render individual actions a better alternative, the Court need not address this factor. As the Supreme Court explained in *Amchem*, and the Second Circuit recently highlighted in *In re Am. Int'l Group Inc.*, "[c]onfronted with a request for

[8] *Headway Investment Corporation v. American Express Bank Ltd., et al.*, No. 09-27777.

settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems for the proposal is that there be no trial." 521 U.S. at 620; 2012 U.S. App. LEXIS 16911, at *22–23 (internal citation omitted). Accordingly, the requirements of Rule 23(b)(3) are satisfied.

III. Notice to the Settlement Class Should Be Approved

As set forth in the Preliminary Approval Order, Plaintiffs will notify Settlement Class Members of the Settlement by mailing the Notice and Proof of Claim to all potential Settlement Class Members who can be identified with reasonable effort. The Notice will advise Settlement Class Members of (i) the pendency of the class action; (ii) the essential terms of the Settlement; and (iii) information regarding the motion for attorneys' fees and reimbursement of litigation expenses by Plaintiffs' Counsel, as well as reimbursement of expenses including lost wages for Representative Plaintiffs.[9] The Notice also will provide specifics on the date, time and place of the Settlement Hearing and set forth the procedures for opting out of the Settlement Class and for objecting to the Settlement, the proposed Plan of Allocation and the motion for attorneys' fees and reimbursement of litigation expenses. The proposed Preliminary Approval Order further provides for the Summary Notice to be published twice in the global editions of *The Wall Street Journal* and to be issued globally over *PR*

[9] The Notice states that Plaintiffs' Counsel may seek an award of attorneys' fees of up to 25% of the Settlement Fund, and Plaintiffs and Plaintiffs' Counsel are seeking reimbursement of expenses of $1,450,000, and incentive awards and lost wages with respect to the Representative Plaintiffs of up to $225,000. *See* Notice (Ex. A-1 to the Stipulation) at 10. Although the PSLRA limits class representative plaintiffs to recovery of "reasonable costs and expenses (including lost wages)" (15 U.S.C. 78u-4(a)(4)), the SCAC contains, and Plaintiffs are settling, state law claims where incentive awards may be appropriate.

Newswire. Plaintiffs' Lead Counsel also will post the Notice on their websites and on a dedicated settlement website.[10]

The Preliminary Approval Order directs that the Settling Defendants, and the Citco and GlobeOp defendants (who served as Fund administrators) provide the Claims Administrator with the last known names and addresses of record owners of the Funds and known Beneficial Owners. The Claims Administrator will distribute copies of the Notice and Proof of Claim to all such persons, as well as to record and Beneficial Owners who are identified (i) as having filed proofs of interest in the U.S. Bankruptcy Court proceedings involving the Greenwich Sentry and Greenwich Sentry Partners funds, and (ii) are on lists of record owners with whom the BVI Liquidator of the Fairfield Sentry, Lambda and Sigma funds regularly communicates. The Preliminary Approval Order and Notice further direct that record owners either mail directly to Beneficial Owners or provide the Claims Administrator with the names and addresses of Beneficial Owners for the mailing of notice.

The form and manner of providing notice to the Settlement Class satisfy the requirements of due process, Rule 23, and Section 21D of the Securities Exchange Act of 1934, 15 U.S.C. §78u-4(a)(7), as amended by the PSLRA. The Notice and Summary Notice will "fairly apprise 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 marks omitted). The manner of providing notice, which includes individual notice by mail to all Settlement Class Members who can be reasonably identified, as well as publication in worldwide press and on the internet, represents the best notice practicable

[10] In the event that the Court were to grant Plaintiffs' pending motion for class certification as to the Non-Dismissed Defendants, the Stipulation provides (¶ 23) that the Court may order a revised, combined Notice.

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).

Plaintiffs respectfully suggest that the following schedule may be appropriate for notice and final approval of the Settlement:

Wednesday, November 28, 2012 (estimated) – Court grants preliminary approval

Tuesday, December 18, 2012 (20 days after preliminary order) – Last date for mailing of Notice to record owners and known Beneficial Owners.

Thursday, January 10, 2012 (43 days after preliminary order) – Last date for publication of the Summary Notice in global editions of *The Wall Street Journal* and for issuance of the Summary Notice over *PR Newswire*.

Thursday, January 24, 2013 (35 days after mailing of Notice and at least 50 days prior to the Settlement Hearing) – Motion is filed for final approval of Settlement.

Wednesday, February 13, 2013 (56 days after mailing of Notice and at least 35 days prior to the Settlement Hearing) – Deadline for objections and opt-outs; Settling Defendants notified of opt-outs.

Wednesday, March 6, 2013 (at least 14 days before the Settlement Hearing) – Responses to objections and reply in further support of settlement are filed.

Wednesday, March 20, 2013 or thereafter (at least 35 days after opt-out deadline) – Final hearing.

CONCLUSION

Plaintiffs respectfully request that the Court enter the proposed Preliminary Approval Order submitted herewith.

November 6, 2012

Respectfully submitted,

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Interim Co-Lead Counsel for Plaintiffs and Lead Counsel for PSLRA Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2012, I caused true and correct copies of the foregoing to be served by ECF on all parties registered with the Court's ECF system under docket number 09-CV-118 (VM).

/s/ Eli J. Glasser
Eli J. Glasser