**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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| IN RE MF GLOBAL HOLDINGS LTD. INVESTMENT LITIGATION | Case No. 12-MD-2338 (VM) |
| JOSEPH DEANGELIS, et al.,<br><br>Plaintiffs,<br><br>- against -<br><br>JON S. CORZINE, et al.<br><br>Defendants. | Case No. 11-Civ-7866 (VM)<br><br>**ECF CASE** |
| THIS DOCUMENT RELATES TO:<br><br>The Commodity Customer Class Action | |

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSMENT OF LITIGATION EXPENSES**

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Counsel for the interim class representatives (the "Plaintiffs" or "Customer Representatives") in the consolidated action (the "Customer Class Action")[1] on behalf of former commodity customers (the "Customers") who held unreturned money, property and/or securities (the "Customers") at MF Global Inc. ("MFGI" or the "Company") following the Company's October 31, 2011 collapse (the "Net Equity" claims) respectfully submit this memorandum of law in support of their motion for an award of attorneys' fees and reimbursement of litigation expenses in conjunction with the contemporaneously-filed motion for final approval of the settlement (the "Settlement")[2] between the former commodity futures customers of MF Global Inc., CME Group Inc., and its subsidiaries and affiliates, including but not limited to Chicago Mercantile Exchange Inc. ("CME Group").[3]

## I. PRELIMINARY STATEMENT

Class Counsel, working closely with counsel for the Trustee, has obtained a very favorable result for former Customers of MFGI which, when combined with the prior settlement with JP Morgan Chase, N.A. ("JPMC") and (upon final approval of) the agreement between the Customer Representatives and the Trustee that will satisfy 100% of the Customers' Net Equity claims from MFGI's general estate (the "Net Equity Settlement Assignment Agreement"), will provide an additional $14,500,000 to be distributed to the Settlement Class as provided in the

[1] By Order dated May 21, 2012 (the "Appointment Order"), the Court appointed Berger & Montague P.C. and Entwistle & Cappucci LLP as Interim Co-Lead Counsel in the Customer Class Action, and Susman Godfrey L.L.P., Grant & Eisenhofer P.A., Nisen & Elliot LLC and the Fleischman Law Firm, along with Interim Lead Counsel, as the Executive Committee (collectively, "Class Counsel"). *See* ECF No. 10 at 13.

[2] The Settlement is memorialized in the Settlement Agreement attached as Exhibit 1 to the Declaration of Merrill G. Davidoff in Support of Plaintiffs' Motion for Preliminary Approval of Proposed Settlement with CME Group, Inc., dated January 29, 2014 (the "Davidoff Decl.") (ECF No. 631).

[3] Capitalized terms not defined herein shall have the meanings ascribed to them in the [Proposed] Final Judgment and Order of Dismissal With Prejudice (the "Proposed Final Judgment"), attached as Exhibit A to the notice of motion for final approval.

applicable assignment agreements, among other benefits as described below.

Pursuant to the Settlement: (i) the parties, in conjunction with the Trustee, obtained the entry of a So-Ordered Stipulation in the Bankruptcy Court for the Southern District of New York[4] allowing the CME Group's claim ("CME Claim") against the MFGI general estate as a superpriority claim against the general estate in the amount of $29,000,000; and (ii) the CME Group will direct the sum of $14,500,000 of the $29,000,000 allowed on the CME Claim pursuant to the So-Ordered Stipulation be deposited in accordance with the Settlement.[5] The Settlement will resolve all of the Customer Representatives' and the Settlement Class members' claims against CME Group arising from the Chicago Mercantile Exchange Inc.'s role as the designated self-regulatory organization of MFGI.

In addition to the distribution to the Settlement Class, the Settlement also provides important benefits that will facilitate the SIPA liquidation proceedings of MFGI, including, for example, increased certainty to the MFGI Estate (*e.g.*, in the So-Ordered Stipulation setting the CME Claim as a superpriority claim in the amount of $29,000,000, thereby extinguishing any litigation on claims by CME Group against the estate) and permitting the Trustee to reduce the amount of the MFGI estate assets that must be advanced to pay 100% of the Customers' Net Equity claims.

This third settlement in the Customer Class Action brings immediate benefits to the Settlement Class while avoiding protracted, costly and uncertain litigation against CME Group that would distract resources from the ongoing litigation against former directors and officers of

[4] *See In re MF Global Inc.*, No.11-2790 (MG) SIPA (Bankr. S.D.N.Y.), ECF No. 7536 (Feb. 2, 2014).

[5] *See* Joint Declaration of Merrill G. Davidoff and Andrew J. Entwistle in Support of Plaintiffs' Counsel's Motion for Award of Attorney Fees and Reimbursement of Litigation Expenses, dated February 21, 2014 (the "Fee and Expense Declaration"), ¶ 4.

MFGI and its parent MF Global Holdings Ltd. ("Holdings"), the primary wrongdoers responsible for the defalcation of Customers' property. Importantly, the Customer Representatives and the Settlement Class will retain their claims against the non-settling defendants, including the D&O Defendants.

Class Counsel has expended extraordinary time and effort pursuing Customers' statutory and common law claims against the named defendants in the Customer Class Action, preserving Customers' rights in the related-liquidations of MFGI and Holdings in the Bankruptcy Court (the "Liquidation Proceedings"), vigorously pursuing the prior settlement with JPMC, and pursuing this Settlement as part of a single coordinated strategy.[6] Among other things, Counsel extensively investigated the claims against CME Group; reviewed and analyzed a document production by the Trustee (of more than 1,800,000 pages), as well as other materials related to the Trustee's investigation; and had the benefit of detailed collaborative discussions with the Trustee's professionals, who had conducted their own exhaustive investigation of potential claims against CME Group. As a result, Counsel have a full understanding of the strengths and weaknesses of the claims against CME Group and the difficulties they would encounter in obtaining a favorable verdict. Based on that knowledge, they have settled with CME Group on terms favorable to the Settlement Class.

By motion and the accompanying proposed final judgment and order, Class Counsel seek a fee award and expense reimbursement (the "Fees and Expenses") totaling $2,900,000.00 (of which $177,976.58 are expenses) funded from the $14,500,000 contribution from the CME Claim. Indeed, when the requested award is added to the $7,237,600.81 in fees awarded to Class and

[6] Due to the complex and interrelated nature of the Customer Class Action and the Liquidation Proceeding, as well as with respect to the settled potential claims against JPMC, the wide-ranging efforts by and among Class Counsel and Ancillary Counsel (defined below) cannot fairly or accurately be disaggregated to attribute some assignments or professional time exclusively to the Customer Class Action, Liquidation Proceedings, and/or the Settlement.

Ancillary Counsel in connection with the JPMC settlement,[7] the $10,137,600.81 total to date is only 45.26% of lodestar.[8]

In light of the substantial benefit to Customers achieved in this Settlement, Class Counsel respectfully submits that the Fees and Expenses sought by this motion are very reasonable when viewed either as a percentage of the Settlement or against counsel's lodestar to date, and are amply supported by each relevant factor identified by the Second Circuit in *Goldberger v. Integrated Res., Inc.*, 209 F. 3d 43, 50 (2d Cir. 2000).

## II. STATEMENT OF FACTS

Class Counsel respectfully refers the Court to the Fee and Expense Declaration and Final Approval Declaration for a full discussion of, *inter alia*, the factual background and procedural history of the Customer Class Action, and the litigation efforts of Plaintiffs and Class and Ancillary Counsel.

## III. ARGUMENT

### A. Class Counsel Is Entitled to an Award of Attorneys' Fees and Expenses from the Common Fund Created by the Settlement

The U.S. Supreme Court has long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Goldberger v. Integrated Res., Inc.*, 209 F.3d at 47; *Savoie v. Merchants Bank*, 166 F.3d

[7] *See* Final Judgment and Order Awarding Fees and Expenses, dated July 3, 2013 (ECF No. 510).

[8] Pursuant to the Court's Preliminary Approval Order, notice was sent by first-class mail to Settlement Class members identified through the customer claims process in the SIPA Proceeding and the claims process used with the JPMC Settlement. *See* Preliminary Approval Order, ¶ 7(a); *see also* Declaration of Mary Adams, Epiq Bankruptcy Solutions, LLC ("Epiq Decl."), ¶¶ 2-8 (attached as Exhibit 1 to the Final Approval Decl.). The notice included information concerning Counsel's request for an award of attorneys' fees and litigation expenses. To date, no objections to the requested Fees and Expenses award have been received. *See* Epiq Decl., ¶ 11. Interim Co-Lead Counsel also posted to their respective firm websites materials concerning the Settlement and counsel's request for an award of fees and the reimbursement of litigation expenses. *See* Preliminary Approval Order, ¶¶ 7(b) &(c).

456, 460 (2d Cir. 1999).[9] The purpose of the common fund doctrine is to fairly and adequately compensate class counsel for services rendered and to ensure that all class members contribute equally towards the costs associated with litigation pursued on their behalf. *See Goldberger*, 209 F.3d at 47; *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115808, at *2 (S.D.N.Y. Nov. 7, 2007). In addition, courts have recognized that awards of reasonable attorneys' fees from a common fund should also serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future alleged misconduct of a similar nature. *See, e.g.*, *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002).

### B. The Percentage-Of-The-Fund Method Is Favored In Determining A Fee Award

In determining the amount of a common fund fee award, the United States Supreme Court consistently has held that it is appropriate for a fee to be determined as a percentage of the fund recovered. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("under the 'common fund doctrine,' ... a reasonable fee is based on a percentage of the fund bestowed on the class"); *see also Trustees v. Greenough*, 105 U.S. 527, 532 (1881); *Central R.R. & Banking Co. of Ga. v. Pettus*, 113 U.S. 116, 124-25 (1885); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165-66 (1939). The percentage-of-the-fund method is preferred, in part, because of its "ease of administration, permitting the judge to focus on 'a showing that the fund conferring a benefit on the class resulted from the lawyers' efforts' rather than collateral disputes over billing." *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 485 (S.D.N.Y. 1998).

[9] The Fees and Expenses are subject to evaluation as part of the "common fund" established in the Settlement because in the event that the amount of the Fees and Expenses finally awarded by the Court is less than the amount requested by counsel, the difference remains available to the Trustee for distribution to Customers.

The Court of Appeals for the Second Circuit authorizes district courts to employ the "percentage-of-the-fund" method when awarding fees in common fund cases. *See Goldberger*, 209 F.3d at 47 (holding that the percentage-of-the-fund method may be used to determine appropriate attorneys' fees, although the lodestar method may also be used). Indeed, in *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F. 3d 96, 122 (2d Cir. 2005), the Second Circuit recognized that the trend in determining the amount of a common fund fee in this Circuit is toward the percentage-of-the-fund method.[10]

In expressly approving the percentage method, the Second Circuit has recognized that "the lodestar method prove[s] vexing" and has resulted in "an inevitable waste of judicial resources." *Goldberger*, 209 F.3d at 48-49; *Savoie*, 166 F.3d at 460 (stating that "percentage-of-the-fund method has been deemed a solution to certain problems that may arise when the lodestar method is used in common fund cases"); *see also* Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 254-59 (Oct. 8, 1985) (recognizing the many shortfalls of the lodestar method and unequivocally recommending that courts use the percentage method in common fund cases).

Class Counsel respectfully submit that the Court should examine the reasonableness of the Fees and Expenses request herein using a percentage-of-the-fund analysis based on the increasing dominance of that approach and its overall efficiency compared to the lodestar method. As set forth below in Part III.D, under this method the requested 20% Fees and Expenses award sought by Class Counsel is eminently appropriate. However, under either

[10] *See also Clark v. Ecolab Inc.*, Nos. 07 Civ. 8623(PAC), 04 Civ. 4488(PAC), 06 Civ. 5672(PAC), 2010 WL 1948198, at *8 (S.D.N.Y. May 11, 2010) ("In this Circuit, the 'percentage-of-recovery' method is the 'trend.'") (citation omitted); *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071(RJH), 2005 WL 2757792, at *8 (S.D.N.Y. Oct. 24, 2005) ("The trend in the Second Circuit recently has been to use the percentage method."); *In re WorldCom, Inc. Sec. Litig.*, No. 02 CIV 3288(DLC), 2004 WL 2591402, at *21 (S.D.N.Y. Nov. 12, 2004); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 520 (E.D.N.Y. 2003).

approach, the fee award sought by Class Counsel is fair and reasonable under the *Goldberger* factors.

### C. The Requested Fee Is Fair and Reasonable Based On All Six "*Goldberger*" Factors

In *Goldberger*, the Second Circuit held that:

> [N]o matter which method is chosen, district courts should continue to be guided by the traditional criteria in determining a reasonable common fund fee, including: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

*Goldberger*, 209 F.3d at 50 (citation omitted).

As set forth below, the $2.9 million award sought by Class Counsel is fair and reasonable based on all six *Goldberger* factors.

#### 1. The Time and Labor Expended by Counsel

The first factor for determining whether a fee is reasonable is "the time and labor expended by counsel." *Id.* As of January 29, 2014, Class Counsel and Ancillary Counsel[11] and their staffs have spent more than 44,388.38 hours of professional time representing interests of Customer-victims of MFGI, Holdings, and the former directors and officers, at a total lodestar value of $22,396,821.55 (and a lodestar of $15,159,220.74 after deducting the prior fee award), far exceeding the requested Fees:

| FIRM | HOURS | LODESTAR |
|---|---|---|
| Berger & Montague P.C. | 10,050.55 | $5,750,665.75 |
| Entwistle & Cappucci LLP | 14,797.12 | $7,805,266.50 |
| Susman Godfrey L.L.P. | 1,528.60 | $911,896.50 |

[11] "Ancillary Counsel" consists of nine firms representing Customer plaintiffs that performed work at the request of Interim Co-Lead Counsel pursuant to the May 21, 2012 Appointment Order, in which the Court contemplated that Interim Co-Lead Counsel would "include other plaintiffs' counsel in ... work assignments." and "allocate responsibilities ... as appropriate among plaintiffs' counsel." *See* Decision and Order at 8, 11, ECF No. 292.

| FIRM | HOURS | LODESTAR |
|---|---|---|
| Grant & Eisenhofer, P.A. | 6,935.10 | $2,939,380.50 |
| Nisen & Elliot, LLC | 1,587.30 | $932,810.50 |
| Fleischman Law Firm | 3,671.00 | $1,586,643.75 |
| Ancillary Counsel | 5,818.71 | $2,470,158.05 |
| **TOTALS** | **44,388.38** | **$22,396,821.55** |
| Prior Fee Award | | ($7,237,600.81) |
| **NET FEE TOTAL** | | **$15,159,220.74** |

*See* Fee and Expense Declaration, ¶¶ 20-23.

The work performed by counsel to date has been complex and wide ranging. While pursuing and preserving Customers' interests in Customer Class Action against the named defendants and the Liquidation Proceedings, respectively, Class Counsel extensively investigated the claims against CME Group, reviewed and analyzed a document production by the Trustee (of more than 1,800,000 pages), participated in detailed collaborative discussions with the Trustee's professionals who had conducted their own exhaustive investigation of potential claims against CME Group, and extensively negotiated with counsel for CME Group, in conjunction with counsel for the Trustee, to arrive at the Settlement. *See, e.g.*, *id.* at ¶ 18.

Accordingly, the time and effort devoted by Class and Ancillary Counsel to obtain a $14,500,000 cash distribution, and other important relief associated with resolving claims against and by CME Group, supports the 20% Fee award, which is substantially less than counsel's lodestar to date, while also ensuring a timely and efficient distribution to the Settlement Class in conjunction with the Net Equity Settlement Assignment Agreement (upon final approval of that settlement). *See id.* at ¶ 23.

**2. The Magnitude and Complexities of the Litigation**

As demonstrated herein and in the Fee and Expense Declaration and the Final Approval Declaration, the magnitude and complexity of the advocacy on behalf of Customers more than

supports the requested Fees and Expenses in connection with the Settlement. As a threshold matter, the issues in the case are novel and complex given that this is the first case on record where a futures commission merchant such as MFGI collapsed and failed to return a significant amount of customer property due to violations of the segregation requirements of the Commodity Exchange Act (the "CEA"), related Commodity Future Trading Commission ("CFTC") regulations, and exchange rules adopted by the Chicago Mercantile Exchange, Inc. *See, e.g.*, *id.* at ¶ 16.

Moreover, as this Court correctly predicted in its Appointment Order, this litigation has continued to involve a "complex procedural context" on multiple tracks in both this Court and in the Liquidation Proceedings before the Bankruptcy Court. *Id.* Indeed, as correctly noted by the Court, even prior to their appointment, Class Counsel recognized the need to appear and make submissions in the Liquidation Proceedings to protect Customers, including preserving Customers' interests in insurance proceeds that may ultimately be the source of the bulk of Customers' recovery. *Id*. at ¶¶ 14-15. To date, in the Liquidation Proceedings, Class Counsel has made more than a dozen submissions on behalf of Customers concerning, among other things: (i) Customers' rights to litigate their own claims; (ii) the Assignment by the Trustee to facilitate cooperation and efficient litigation of the Customers' claims; (iii) preservation of the insurance proceeds; and (iv) approval of settlements between the Trustee and third-parties that will benefit Customers. *Id.* at ¶ 15.

In the Customer Class Action, in the 28 months since the collapse of MFGI and 21 months since their appointment, Class Counsel has investigated and evaluated claims against dozens of potential defendants, including directors, officers and employees of MFGI and Holdings and third parties such as former auditor PricewaterhouseCoopers LLP, CME Group

and others. *See id.* at ¶ 14. In so doing, counsel has researched and evaluated novel and complex claims and areas of law arising from the unprecedented historical violations of the CEA, CFTC regulations and CME exchange rules by directors and officers of MFGI and Holdings. *Id.* In addition, Class Counsel negotiated and entered into a unique Assignment and cooperation agreement with the Trustee to timely gain access to relevant discovery and more efficiently to advance Customers' interests and, to date, Class and Ancillary Counsel have received from the Trustee and reviewed a material portion of 1.8 million MFGI corporate documents. *Id.* at ¶ 15.

Class Counsel's efforts have already obtained substantial benefits to the Settlement Class with two prior settlements. On July 3, 2013, the Court granted final approval of the JPMC settlement which provided hundreds of millions of dollars in benefits to Customers, including a negotiated allocation and advance of $200 million in general estate assets to Customers. *Id.* at ¶ 5. On December 20, 2013, the Court granted preliminary approval to the Net Equity Settlement Assignment Agreement between the Customer Representatives and the Trustee that will satisfy 100% of the Customers' unpaid Net Equity claims from MFGI's general estate assets. *Id.* at ¶ 6.

This third settlement with a defendant in the Customer Class Action provides an additional distribution amount to the Settlement Class, while also resolving or eliminating considerable litigation risks and facilitating the SIPA liquidation proceedings.

**3. The Risks of Litigation**

The Second Circuit has identified "the risk of success as 'perhaps the foremost' factor to be considered in determining" a reasonable fee award. *Goldberger*, 209 F.3d at 54 (citation omitted).

**a. Risks of Establishing Liability**

It is well settled that complex class actions are notoriously complex and difficult to

litigate. *See, e.g.*, *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01-CV-11814(MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004) ("Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation."). "The legal and factual issues are involved are always numerous and uncertain in outcome." *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000).

This litigation is no exception. It involves numerous complex and novel issues of fact and law, and the named defendants have asserted numerous factual and legal defenses in motions to dismiss totaling more than 150 pages. With regard to CME Group, it adamantly denies any wrongdoing and has repeatedly outlined for Class Counsel and the Trustee its numerous and significant legal and factual defenses to any potential liability.

Approval of the Settlement will provide the Settlement Class additional recompense, in conjunction with the Net Equity Settlement Assignment Agreement (upon final approval of that agreement), that Class members will receive now without further delay. Moreover, even if CME Group were ultimately found liable – a matter CME Group vigorously disputes and which is subject to significant uncertainty both factually and legally – the additional distribution to the Settlement Class and the certainty provided by resolving the CME Claim would be delayed for (at least) a number of years or even denied.

Assuming the Customer Representatives' claims against CME Group would survive dispositive motion practice, Class Counsel could not be certain that they would ultimately succeed in achieving a determination of liability in the Customers' favor.

**b. Risks of Establishing Damages**

Even if the Customer Representatives were able to defeat dispositive motions and to overcome the risks in proving liability, they would still face the risks of proving damages.

Proof of damages in complex class actions is always complex and difficult and often subject to expert testimony.[12] Here, even if Class Counsel could prove liability, CME Group has asserted substantial arguments in defense that any alleged shortfall was not legally or factually attributable to its conduct and that the shortfall should properly be made up through recoveries from other parties. Importantly, the Settlement does not involve the remaining named defendants in the Customer Class Action and will not alter the Customer Representatives' ongoing claims against the primary wrongdoers in the collapse of MFGI and the resulting shortfall in Customer Property – recoveries which the Customer Representatives and Trustee hope will remedy other damages suffered by the customers and MFGI.

**c. Risks to Counsel**

The Second Circuit long ago recognized that courts should consider the risks associated with lawyers undertaking a case on a contingent fee basis. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974) (citation omitted). Districts courts within this circuit have also recognized this risk.[13]

Here, Class Counsel undertook to represent Plaintiffs and the Customer-victims on a wholly contingent-fee basis. For approximately 21 months, Class and Ancillary Counsel have invested thousands of hours of time without any guarantee of compensation or even a recovery of out-of-pocket expenses. As this Court recently stated:

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[12] *See Am. Booksellers Ass'n v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1041-43 (N.D. Cal. 2001) ("Plaintiffs cannot prove causation of actual [antitrust] injury without ... expert testimony, because only expert testimony can demonstrate that any injury to plaintiffs was caused by defendants' lawful conduct, and not because of unlawful competition or other factors.").

[13] *See, e.g., Teachers' Ret. Sys.*, 2004 WL 1087261, at *3 ("Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation"); *Am Bank Note Holographics*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (concluding it is "appropriate to take this [contingent fee] risk into account in determining the appropriate fee to award") (emphasis omitted); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 985 F. Supp. 410, 417 (S.D.N.Y. 1997) ("Numerous courts have recognized that the attorney's contingent fee risk is an important factor in determining the fee award.").

> Indeed, the risk of non-payment in complex cases, such as this one, is very real. There are numerous class actions in which counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise. There is no guarantee of reaching trial, and even a victory at trial does not guarantee recovery.

*In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM)(PED), 2010 WL 4537550, at *27 (S.D.N.Y. Nov. 8, 2010) (quotation omitted).

In undertaking to represent Plaintiffs and Customers, Class Counsel knew that the litigation and related Liquidation Proceedings would be lengthy, complex and labor intensive with no guarantee of compensation for the enormous investment of time and money. To date, counsel has spent 44,388.38 hours representing Customers at a total lodestar of $22,396,821.55 (after deducting the prior fee award amount, counsel's lodestar is $15,159,220.74). *See* Fee and Expense Declaration, ¶¶ 20-23. Additionally, Class Counsel's total unreimbursed out-of-pocket expenses are $177,976.58. *Id.* at ¶ 38. Clearly, Class and Ancillary Counsel undertook enormous financial risks in representing Customers on a contingency basis.

**4. The Quality of Representation**

The fourth factor cited by the Second Circuit is the "quality of representation" delivered by counsel. *Goldberger*, 209 F.3d at 50. To evaluate this factor, courts in the Second Circuit "review the recovery obtained and the background of the lawyers involved in the lawsuit." *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 141 (S.D.N.Y. 2008).[14]

As the Court observed in its Appointment Order, Class Counsel includes "some of the most sophisticated and successful plaintiffs' firms in the nation," including "attorneys with substantial commodities futures experience," and "experience managing complex class actions,

[14] Moreover, an "indication of the quality of the result achieved is the fact that the Settlement will provide compensation to the [victims] expeditiously." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004).

including, crucially, civil actions with bankruptcy implications." *See* Decision and Order at 7-8, ECF No. 792.

**Berger & Montague, P.C.**

Berger & Montague is among the most experienced and accomplished law firms in the field of complex class actions, including financial class actions, in the United States, and has a demonstrated ability to prepare and try large scale, complex cases before juries to verdict and judgment. The firm has successfully litigated complex class actions for over 41 years, since the dawn of complex class action litigation in the United States in 1966, recovering $22 billion for its clients and the classes they represent. The firm has played a principal or lead role in numerous class actions and other complex litigation, including in the fields of antitrust, securities, mass torts, civil and human rights, *qui tam* and whistleblower cases, employment, and consumer litigation. Moreover, Berger & Montague has achieved the highest possible rating by its peers and opponents as reported in Martindale-Hubbell, and the National Law Journal has selected Berger & Montague in eight out of the last nine years (2003-05, 2007-11) to its "Hot List" of top plaintiffs' oriented litigation firms in the United States.

**Entwistle & Cappucci LLP**

Entwistle & Cappucci possesses extensive experience in complex litigation, including class actions, having successfully prosecuted some of the largest and highest-profile class actions in history. As sole or co-lead counsel in class actions, Entwistle & Cappucci has obtained billions of dollars in recoveries on behalf of defrauded class members. *See, e.g.*, *In re Royal Ahold, N.V. Sec. & ERISA Litig.*, No. 03-md-01539-CCB (D. Md. June 26, 2006) (order re-formatted on June 21, 2006) (served as sole lead counsel and obtained a $1.1 billion recovery for the Class); *In re BankAmerica Sec. Litig.*, No. 99-md-1264-CEJ (E.D. Mo. Oct. 18, 2002)

($490 million recovery); *In re DaimlerChrysler AG Sec. Litig.*, No. 00-CV-00993-LPS (D. Del. Feb. 5, 2004).

In addition to its extensive experience leading complex national class actions, Entwistle & Cappucci possesses extensive experience in cases with a liquidation or bankruptcy component. For example, acting as one of the lead counsel in the Tremont Fund Litigation (arising out of the Madoff Ponzi scheme), Entwistle & Cappucci has recovered more than $100 million from third parties, preserved the customers' rights to certain fidelity bond proceeds, and worked with defendants and the SIPA trustee to negotiate a resolution of certain SIPC claims and related litigation which will result in customers recovering in excess of a billion dollars on those claims. Additionally, Entwistle & Cappucci acted as Special Litigation Counsel to the estate of Global Crossing, Ltd. in prosecuting claims of the estate for the benefit of unsatisfied creditors and was appointed to act as Special Counsel for the Receiver in "clawback" actions on behalf of victims in the Ponzi scheme of Edward T. Stein.

**Susman Godfrey L.L.P.**

Susman Godfrey is a nationally-renowned trial law firm with extensive experience in complex litigation, including securities, derivative, consumer, and antitrust class actions. Each of the firm's 89 trial attorneys specialize in complex commercial litigation, and the firm has been named by *The American Lawyer* as one of the top litigation boutiques in the nation. In just the past 10 years, the firm has secured numerous jury awards and settlements in complex litigation and class actions totaling hundreds of millions of dollars.

Susman Godfrey also possesses extensive bankruptcy experience. The firm currently represents Lehman Brothers International (Europe), now in insolvency administration in the U.K., in a series of separate negotiations with such entities as Citibank, N.A., Barclays Capital

Inc., and JPMorgan Chase Bank, N.A. to recover and repatriate assets. Susman Godfrey also represents Vitro S.A.B. de C.V., a multi-billion dollar Mexican glass manufacturer, in litigation related to its multi-venue international bankruptcy proceedings, and the firm successfully represented the bankruptcy estate of Enron Corp. against numerous investment banks.

**Grant & Eisenhofer, P.A.**

Grant & Eisenhofer is a powerhouse national litigation boutique with more than seventy attorneys who concentrate on securities, consumer, and financial fraud; corporate governance; antitrust; and other complex class and commercial actions; and is among the most respected plaintiffs' class action firms in the nation. The firm has been named to the National Law Journal's Plaintiffs' Hot List nearly every year since its founding and, in 2008, the firm was named to the National Law Journal's Plaintiffs' Hall of Fame. Grant & Eisenhofer is also listed as one of America's Leading Business Lawyers by Chambers and Partners. Grant & Eisenhofer has particular expertise in actions involving the financial industry, and has served as sole or co-lead counsel in many significant class actions which have resulted in substantial recoveries, many in the realm of hundreds of millions of dollars.

**Nisen & Elliot, LLC**

Nisen & Elliott, LLC and lead attorney Michael Moirano have extensive experience in complex class action and commercial litigation, including commodities litigation. The Nisen firm has represented participants in the commodities markets for more than 30 years, including commodities customers, contract market members, member firms, and clearing firms. The Nisen firm currently represents the National Futures Association, the industry wide, self-regulatory organization for the U.S. futures industry. Nisen's attorneys also have significant experience in bankruptcy related matters, regularly representing bankruptcy trustees

in a variety of complex bankruptcy cases.

The Nisen firm has served as lead counsel or co-lead counsel for numerous classes of consumers in state and federal court lawsuits. Mr. Moirano currently serves as lead counsel for the class in *Lewis v. Lead Indus. Ass'n, Inc.*, 342 Ill. App. 3d 95 (1st Dist. 2003), the only class in the nation successfully certified in an action against participants in the lead pigment manufacturing industry. Mr. Moirano also served as lead counsel for a class of Illinois purchasers in *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 401 F.3d 143 (3d Cir. 2005), the resolution of which resulted in a $4.5 billion nationwide settlement.

**The Fleischman Law Firm**

Lawyers at the Fleischman Law Firm have unique experience investigating and litigating large, national cases involving complex financial fraud. Keith M. Fleischman, principal of the Fleischman Law Firm, was previously a trial lawyer for the United States Department of Justice. During his tenure at the Department of Justice, Mr. Fleischman successfully tried to verdict several of the largest criminal prosecutions brought by the government during the savings and loan crisis, including serving as the chief federal prosecutor in a two year investigation that culminated in a four month trial in *United States v. Heath*, 970 F.2d 1397 (5th Cir. 1992). As a civil litigator, Mr. Fleischman has extensive experience working on large, complex litigations and class actions including serving as co-lead counsel in *In re BellSouth Corp. Sec. Litig.*, No. 1:02-CV-02142 (N.D. Ga.), which achieved a $35 million settlement for the class members and *In re Marsh & McLennan Co., Inc. Sec. Litig.*, No. 04-8144, 2009 WL 5178546 (S.D.N.Y. Dec. 23, 2009), which achieved a $400 million settlement for the class members and is the 25th largest class action settlement recorded in the United States.

Class Counsel respectfully submits that its demonstrable expertise in wide-ranging complex litigation, including in bankruptcy matters – expertise it has exercised in this matter – underscores the quality of the representation of Customers.[15]

**5. The Requested Fee in Relation to the Settlement**

As discussed above, Class and Ancillary Counsel have expended thousands of hours representing the interests of Customers and, in conjunction with the Trustee, have achieved the Settlement that provides further compensation to the Settlement Class, above and beyond the 100% satisfaction of their Net Equity upon final approval of the Net Equity Settlement Assignment Agreement, along with other benefits that facilitate the SIPA liquidation process. Moreover, the Settlement does not involve the remaining named defendants in the Customer Class Action and will allow Class Counsel to pursue additional recoveries against the primary wrongdoers in the collapse of MFGI and the resulting shortfall in Customer Property while securing timely distributions to Customer-victims. For these reasons, the requested Fees and Expenses are 20% of the cash portion of the Settlement and are substantially less than Class and Ancillary Counsel's lodestar to date, and are well within the range of reasonableness compared to similar settlements in this district.[16]

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[15] Another consideration for assessing the quality of the services rendered is the quality of the opposing counsel in the case. *See In re KeySpan Corp. Sec. Litig.*, No. 01 CV 5852(ARR), 2005 WL 3093399, at *11 (E.D.N.Y. Sept. 30, 2005) (citing *In re Warner Commc'n SEC. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985) ("The quality of opposing counsel is also important in evaluating the quality of Class Counsels' work"); *Maley*, 186 F. Supp. 2d at 373. In this action, Defendants are represented by a number of highly respected and nationally recognized law firms, many of which have considerable experience defending class actions, including for example, Dechert LLP, Kramer, Levin, Naftalis & Frankel LLP, King & Spaulding LLP, and Jenner & Block LLP (the latter for CME Group). The Trustee is represented by Hughes, Hubbard & Reed LLP.

[16] *See, e.g.*, *Fogarazzo v. Lehman Bros., Inc.*, No. 03 Civ. 5194 (SAS), 2011 WL 671745, at *4 (S.D.N.Y. Feb. 23, 2011) (one-third of $2.25 million settlement); *In re Flag Telecomm.*, 2010 WL 4537550, at *31 (30% of $24.4 million settlement, less expenses); *In re Bisys Sec. Litig.*, No. 04 Civ. 3840(JSR), 2007 WL 2049726, at *2-*3 (S.D.N.Y. July 16, 2007) (30% of $65.87 million settlement); *In re Priceline.com, Inc. Sec. Litig.*, No. 3:00-CV-1884(AVC), 2007 WL 2115592, at *4-*5 (D. Conn. July 20, 2007) (30% of $80 million settlement); *Hicks*, 2005 WL 2757792, at *9 (30% of $10 million settlement); *In re Warnaco Group, Inc., Sec. Litig.*, No. 00 Civ. 6266 (LMM), 2004 WL 1574690, at *3 (S.D.N.Y. July 13, 2004) (30% of $12.85 million settlement); *In re*

**6. Public Policy Considerations**

Congress viewed private lawsuits as "critical to protecting the public and fundamental to maintaining the credibility of the futures market." *Cange v. Stotler & Co.*, 826 F.2d 581, 594-595 (7th Cir. 1987) (citing to H.R. Rep. No. 565, 97th Cong., 2d Sess., pt. 1 at 56-7, *reprinted* in 1982 U.S. Code Cong. & Admin. News 3871, 3905-06).

In *In re Initial Public Offering Sec. Litig.*, 671 F. Supp. 2d 467, 515-16 (S.D.N.Y. 2009), this Court recognized the importance of private enforcement actions and the corresponding need to incentivize attorneys to pursue such actions on a contingency fee basis:

> [C]lass actions serve as private enforcement tools when … regulatory entities fail to adequately protect investors … plaintiffs' attorneys need to be sufficiently incentivized to commence such actions in order to ensure that defendants who engage in misconduct will suffer serious financial consequences … awarding counsel a fee that is too low would therefore be detrimental to this system of private enforcement.

*See also Maley*, 186 F. Supp. 2d at 374 ("Private attorneys should be encouraged to take the risks required to represent those who would not otherwise be protected from socially undesirable activities.").

Public policy considerations here strongly support the modest Fees and Expenses award, particularly given that Class Counsel is pursing recovery on behalf of Customers due to unprecedented violations of the segregation requirements of the CEA, CFTC regulations and CME Group exchange rules that present highly novel and complex legal and factual issues. Skilled counsel must be incentivized to pursue complex and risky claims such as those at issue here.

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*Blech Sec. Litig.*, No. 94 Civ. 7696(RWS), 2002 WL 31720381, at *1 (S.D.N.Y. Dec. 4, 2002) (33.3% of settlement); *Kurzweil v. Philip Morris Cos., Inc.*, Nos. 94 Civ. 2373(MBM), 94 Civ. 2546(BMB), 1999 WL 1076105, at *1 (S.D.N.Y. Nov. 30, 1999) (30% of $123.82 million settlement); *Becher v. Long Island Lighting Co.*, 64 F. Supp. 2d 174, 182 (E.D.N.Y. 1999) (one-third fee, plus expenses, is "well within the range accepted by courts in this circuit"); *In re Medical X-Ray Film Antitrust Litig.*, No. CV-93-5904, 1998 WL 661515, at *7 (E.D.N.Y. Aug. 7, 1998) (awarding 33.3% of $39.36 million after concluding such an award is "well within the range accepted by courts in this circuit").

### D. The Requested Attorneys' Fees Are Also Reasonable Under the Lodestar Cross-Check

The Second Circuit has approved district courts' use of counsel's lodestar as a "cross check" to ensure the reasonableness of a fee awarded under the percentage-of-the-fund method. *See Goldberger*, 209 F.3d at 50. Where counsel's lodestar is used as a cross-check, "the hours documented by counsel need not be exhaustively scrutinized by the district court." *Id.* Instead, "the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case." *Id.*

A lodestar analysis begins with the calculation of the lodestar, which is "comprised of the amount of hours devoted by counsel multiplied by the normal, non-contingent hourly billing rate of counsel." *In re Prudential*, 985 F. Supp. at 414. Additionally, "[u]nder the lodestar method, a positive multiplier is typically applied to the lodestar in recognition of the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors." *In re Marsh & McLennan*, 2009 WL 5178546, at *20 (citing *Goldberger*, 209 F.3d at 47); *Savoie*, 166 F.3d at 460. Here, performing the lodestar cross-check confirms that the fee requested by Class Counsel is reasonable and should be approved.

Class and Ancillary Counsel and their paraprofessionals have spent, in the aggregate, 44,388.38 hours representing Customers in the Customer Class Action, Liquidation Proceedings, the JPMC settlement, and the CME Group settlement negotiations, with a resulting lodestar of $22,396,821.55. *See* Fee and Expense Declaration, ¶¶ 20, 22. The $2.9 million Fees and Expenses award is 20% of the cash Settlement, but, when added to the $7,237,600.81 in fees awarded to Class and Ancillary Counsel in connection with the JPMC settlement, the $10,137,600.81 total (awarded or requested here) represents just 45.26% of the $22,396,821.55 total lodestar. The request for a percentage fee representing a significant discount from

counsel's lodestar (and without any multiplier) provides additional support for the reasonableness of the fee request.[17]

### E. The Requested Attorneys' Fees Are Reasonable Under Either the Percentage-of-the-Fund Method or Lodestar Method

Under either method – percentage-of-the-fund or lodestar – the fees awarded in common fund cases must be "reasonable" under the circumstances. *Goldberger*, 209 F.3d at 47. The Fees and Expenses requested in this case – 20% of the Settlement distribution amount – are well within the range of fees awarded by courts in this Circuit, whether considered as a percentage-of-the-fund or as a multiple of counsel's lodestar.

### F. Class Counsel's Expenses Were Reasonable and Necessary

"Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course." *Arakis Energy Corp. Sec. Litig.*, No. 95-CV-3431(ARR), 2001 WL 1590512 at *17 n.12 (E.D.N.Y. Oct. 31, 2001). From the outset of this litigation, Class Counsel was aware that it might not recover any expenses and, at the very least, would not recover anything until the action was successfully resolved. *See* Fee and Expense Declaration, ¶ 40. Class Counsel was motivated to, and has, taken steps to mitigate expenses wherever practical without jeopardizing Customers' interests. *Id.*

Class Counsel respectfully requests reimbursement of $177,976.58 in expenses – from the $14.5 million payment amount from the CME Claim – as itemized by firm and/or item below:

[17] *See, e.g.*, *In re Veeco*, 2007 WL 4115808, at *10 ("Not only is Plaintiffs' Counsel not receiving a premium on their lodestar to compensate them for the contingent risk factor, their fee request amounts to a deep discount from their lodestar. Thus, the lodestar 'cross-check' unquestionably supports a percentage fee award of 30%."); *In re Flag Telecom*, 2010 WL 4537550, at *26; *In re IPO Sec. Litig.*, 671 F. Supp. 2d 515 (awarding fees of 33.3%, noting that even in a mega-fund case, there is "no real danger of overcompensation" where the award represents a fractional multiplier to the lodestar).

| FIRM/EXPENDITURE | EXPENSES |
|---|---|
| Berger & Montague P.C. | $27,544.59 |
| Entwistle & Cappucci LLP | $53,352.33 |
| Susman Godfrey L.L.P. | $1,408.00 |
| Grant & Eisenhofer P.A. | $1,141.62 |
| Nisen& Elliot LLC | $1,027.97 |
| Fleischman Law Firm | $495.88 |
| Beautyman Alvstad, LLP | $196.50 |
| Roger J. Bernstein Law Firm | $111.84 |
| Cohen & Malad, LLP | $48.33 |
| Milberg LLP | $2,506.77 |
| Finklstein & Krinsk | $1,884.66 |
| Levin, Fishbein, Sedran & Berma | $2,187.24 |
| McCulley McCluer PLLC | $500.00 |
| Krislov & Associates, Ltd | $4,011.35 |
| Vendor Document Hosting | $81,559.50 |

A significant portion of Class Counsel's expenses were incurred for document hosting, experts, and fees in connection with the ongoing mediation against the named defendants. *Id.* at ¶ 41. The remaining expenses are attributable to the costs of computerized research, copying documents and other incidental expenses incurred in the course of litigation that were critical to Class Counsel's success in achieving the Settlement. *Id.*; *see also In re Global Crossing*, 225 F.R.D. at 468 ("The expenses incurred – which include investigative and expert witnesses, filing fees, service of process, travel, legal research and document production and review – are the type for which 'the paying, arms' length market' reimburses attorneys ... [and] [f]or this reason, they are properly chargeable to the Settlement fund."). Moreover, the Expenses are a miniscule 1.23% of the Settlement amount. *See* Fee and Expense Declaration, ¶ 40; *see also Fogarazzo*,

2011 WL 671745, at *4 (approving as fair and reasonable expenses that constituted 9.4% of the settlement fund); *In re IPO*, 671 F. Supp. 2d at 505 (approving as fair and reasonable expenses that constituted 8% of the settlement fund).

## IV. CONCLUSION

Based on the foregoing and the entire record herein, Class Counsel respectfully requests that the Court award Fees and Expenses of $2,900,000.00 (which includes $177,976.58 in Expenses).

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