UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE TREMONT SECURITIES LAW, STATE LAW AND INSURANCE LITIGATION	Master File No.: 08 Civ. 11117 (TPG) **JURY TRIAL DEMANDED** **"ECF Case"**
THIS DOCUMENT RELATES TO: ALL ACTIONS	

CLASS COUNSEL'S REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION FOR APPROVAL OF FUND DISTRIBUTION ACCOUNT PLAN OF ALLOCATION, DISTRIBUTION PROCEDURES, ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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PRELIMINARY STATEMENT

Class Counsel[1] respectfully submit this Reply Memorandum in further support of their Motion for Approval of Fund Distribution Account Plan of Allocation, Distribution Procedures, Attorneys' Fees and Reimbursement of Expenses ("Motion"). The Motion seeks Court approval of the Consensus Fund Distribution Account Plan of Allocation, as amended (the "Consensus FDA POA"), certain distribution procedures, attorneys' fees and the reimbursement of expenses. Class Counsel believe that approval of the Motion is in the best interest of all Fund Distribution Claimants, and that the Consensus FDA POA provides for the fair, reasonable and efficient allocation and distribution of the FDA.

After almost two years of hard-fought Mediation-related negotiations, Class Counsel have presented the Court with a Consensus FDA POA for distribution of Rye Fund assets that has the active support of the holders of approximately $3.62 billion in net investments.[2] In fact, not a single Rye Fund holder objects to the Consensus FDA POA or to the fee request. As the Mediator, retired District Court Judge Layn R. Phillips, has concluded in this matter, the Consensus FDA POA "is a fair and reasonable allocation respecting the various factual and legal arguments, and further accommodating the parties' various 'equitable' arguments that were presented in previous negotiations." *See* Declaration of Layn R. Phillips in Support of Motion for Approval of Fund Distribution Account Plan of Allocation ("Phillips Decl."), at ¶¶21-22 ("Based on my first-hand observations, I can represent to the Court that I have no reason whatsoever to believe that the FDA Consensus PoA, was anything other than the product of hard-fought arm-length negotiations by skilled, experienced and effective counsel").

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[1] The capitalized terms not herein defined have all the same meanings and definitions as those in Class Counsel's memorandum in support of their motion for approval of the Fund Distribution Account Plan of Allocation and related distribution procedures ("Moving Br.") (ECF No. 1089), the Consensus FDA POA (ECF No. 1089-1) and the Stipulation of Partial Settlement ("Stipulation") (ECF 392-1). The Court is respectfully referred to those documents, where appropriate.

[2] Responses, ECF No. 1134; ECF No. 1128; ECF No. 1129; ECF No. 1131; ECF No.1133; Joinder ECF No. 1132.

The only objections to the Consensus FDA POA are made by: (i) Michael S. Martin ("Martin"), a Tremont Fund investor in TOP II with no standing and no actionable losses due to the tender of his $40,257 in Madoff-exposed losses -- Martin seeks to recover almost three times his Madoff-related losses by diverting assets contributed to the FDA by Rye Onshore, Rye Offshore and Rye Insurance to himself and other Tremont fund-of-fund investors; (ii) Philadelphia Financial Life Assurance Company ("Philadelphia Life"), a net winner without standing to file an objection that seeks to re-litigate issues previously resolved by this Court during the approval of the Settlement and by the Second Circuit on appeal; (iii) the so-called Tremont Fund Objectors, who also lack standing to file an objection because they already received 100% of their Madoff-related losses from Tremont (and in the case of Attorney Gresham's two latest additions to his group, John Johnson and West Trust, neither of whom previously appeared nor filed a complaint in the Actions -- and whose arguments, in any event, have been repeatedly rejected over the past five years); and (iv) Antonio G. Calabrese whose objection regarding Rye Select Broad Market Insurance Portfolio LDC ("Insurance LDC") is without merit because it is the subject of liquidation in the Cayman Islands, was specifically excluded from the FDA by the terms of the Court-approved Settlement and, in any event, Calabrese is an excluded policy holder in an excluded insurer (Bermuda Life).

The objectors fail to recognize that the Consensus FDA POA provides the most appropriate method by which to allocate the assets of the FDA in that it:

- Gives deference to Fund structure (*see* Moving Br. at 6);
- Respects the Trustee Settlement by giving Rye Onshore, Rye Offshore and Rye Insurance an allocation based on their SIPC Claims in the Madoff Bankruptcy, which no other Funds received (*id.* at 22);
- Equitably provides Virtual SIPC Claims to those Funds that contributed to the Trustee Settlement, but did not have claims in the Madoff Bankruptcy equal to 80% of the money each Fund contributed to the Trustee Settlement -- which is the same treatment given under the Trustee Settlement to Rye Onshore and Rye Offshore for the money those Funds contributed to the Trustee Settlement (*id.* at 22-23);
- Gives the Fund Distribution Claimants who invested in the XL Fund a Priority Allocation for the cash the Fund contributed directly to the FDA, and now also resolves the dispute

between the XL Fund and HSBC Bank plc ("HSBC") over the XL Fund's investment in Rye Onshore that collateralized part of the HSBC/XL swap transaction (*id.* at 23); and

- Respects the overall FDA structure generally and specifically preserves all Cross Investments, as required by the approved Stipulation of Settlement (*id.* at 12).

The objectors to the Consensus FDA POA also ignore fact that the FDA exists to distribute *Rye Fund* assets. It does not distribute Tremont Fund assets. In fact, the Tremont Funds only have an interest in the FDA because Class Counsel, through the negotiated compromises embodied in the Consensus FDA POA, have preserved the Tremont Fund Cross Investments in the Rye Funds and provided them with Virtual SIPC Claims. If the Consensus FDA is not approved, then the investors in the Tremont Funds will have no claim to the FDA -- a circumstance that is wholly consistent with the approved Stipulation which provides that all Rye and Tremont investors are eligible to participate in the FDA, but does not create (as certain objectors suggest) an entitlement to a distribution. *See* Stipulation at ¶1,18.

Moreover, in spite of the overwhelming support for the Consensus FDA POA by Fund Distribution Claimants, Martin has chosen to pursue a plan of allocation that is bereft of any equitable, factual or legal basis. Martin continues to do so even though Tremont tendered all of his Madoff-related losses to him on May 21, 2015, leaving Martin with no stake in the litigation. *See* Ex. A to Class Counsel's Response, ECF No. 1134-1. That Martin rejected Tremont's tender (*see* Ex. B, *id.*, ECF No. 1134-2) is of no moment, and his insistence on pursuing this application in the face of that fact and the Second Circuit's prior decision on the issue is sanctionable. For that reason alone, his objection should be denied.

Even if Martin had standing, which he does not, his proposal should be rejected because it:

- Disregards the distinct structure of each of the Funds;
- Wrongfully takes the assets Rye Onshore, Rye Offshore and Rye Insurance contributed to the FDA, and improperly reallocates them to investors, including Martin himself, who contributed little or nothing to the FDA, in violation of the Trustee Settlement (*see* Class Counsel's Response at 18-21, ECF No. 1134);

- Improperly reallocates cash "off-the-top" from the FDA to Funds that contributed to the Trustee Settlement, although none of the cash contributed by those Funds was paid directly to the FDA, the payments did not result in a recognized claim in the Madoff Bankruptcy and the payment created a section 502(h) claim for only 80% of the total contribution, not a priority distribution (*see id.* at 22);
- Ignores the fact that Fund Distribution Claimants have varying Madoff Exposure when calculating their net investments, thus unfairly allocating FDA assets (*see id.* at 23); and
- Ignores the fact that the Court-approved Settlement requires the preservation of all net Cross Investments made by various Rye Funds in other Rye Funds, and the net Cross Investments made by various Tremont Funds in the Rye Funds.

In support of Class Counsel's fee and expense request, we note that:

- No Rye Fund Distribution Claimant objects to the fee request;
- Only four objections are filed -- three of which are filed by persons or entities (Calabrese,[3] Philadelphia Life and the so-called Tremont Fund investors) that lack standing to object. The fourth is a limited objection, by some of the insurers invested in TOF III who have no objection to payment of Class Counsel's lodestar and expenses, but object to any multiple on Class Counsel's time. Notably three insurer members of TOF III make no objection to the fee request, and neither does Mr. Martin. Ironically, the Insurer Group supports Class Counsel's Consensus FDA POA, and well they should since Class Counsel's efforts have resulted in the recovery of $46 million of TOF III's $66.45 million in Madoff-related losses on an assumed 80% payout from the Madoff Trustee -- an over 69% recovery of the Insurer Group's Madoff related losses and an amount the Insurer Group would not have been entitled to, absent the negotiated provisions of Class Counsel's Consensus FDA POA;
- Class Counsel filed the derivative complaints that drove the underlying Settlement in substantial part, and which directly resulted in Class Counsel creating and structuring the FDA as part of the Settlement here to preserve and liquidate Rye Fund assets, and thus providing a substantial benefit for Fund Distribution Claimants -- and Class counsel did this and assumed the burden of administration and safeguarding the FDA all before the Trustee Settlement was negotiated and finalized (*id.* at 32-34);
- Class Counsel worked with counsel for Tremont and Mass Mutual to structure the Trustee Settlement that has funded the FDA in its entirety (other than money being returned to XL on a priority basis) which settlement could return as much as $1.446 billion, net of fees and expenses to the Fund Distribution Claimants, assuming a payout by the Madoff Trustee at the 80% level -- a potential recovery that could have been wiped out, absent the Trustee Settlement;
- Class Counsel developed the FDA Mediation Protocol and spent two years working with all interested parties and the Mediator to develop the Consensus FDA POA, which, among other things, results in various Rye and Tremont Fund recoveries that are purely the product of compromises reached during the Mediation process, including, for example: XL Fund investors will receive a benefit in the amount of $57,995,639 (including the $25.545 million HSBC/XL settlement, described more fully below); investors in TOF III will receive over $46 million (assuming an 80% Trustee payout); investors in the Prime Fund will receive

[3] Calabrese has no standing to the extent Calabrese bases his objection on his interest in Insurance LCD.

over $43.5 million (assuming an 80% Trustee payout); investors in Tremont Market Neutral Fund, L.P. will receive over $1.87 million (on the same assumptions); investors in Tremont Market Neutral Fund II, L.P. will receive over $7.39 million (on the same assumptions); and investors in Tremont Opportunity Fund II L.P. will receive over $2.98 million (again, on the same assumptions) -- in all, Class Counsel's Consensus FDA POA creates out of purely negotiated compromises almost $160 million in benefits for the listed Funds, to which they would have had no right, absent the creation of the FDA, the Trustee Settlement and most of all the compromises negotiated by Class Counsel and embodied in the Consensus FDA POA. Ironically, if the same 30% fee applied by the Court to the portion of the fee award paid from the NSF were applied just to this $160 million benefit created through Class Counsel's efforts, the resulting $48 million fee award would be greater than Class Counsel can hope to earn even if the Trustee makes the highest expected payout to the FDA (*see* the Supplemental FDA Declaration of Andrew J. Entwistle ("Entwistle Supplemental Declaration"), at ¶7);

- The Settlement here included the settlement of the consolidated Class and derivative claims and, as a result, a fee was sought on a combined basis in two parts. The Court previously awarded part of that fee to be paid from the NSF. The Court deferred consideration of that portion of the fee to be paid from the FDA in recognition of the significant work still to be done by Class Counsel in defending various appeals (including related to the Trustee Settlement, funding the FDA) and the Settlement here that created and structured the FDA to preserve and distribute Rye Fund assets) and to meet the Court's request to work with all interested parties to resolve plan of allocation issues. That task took some two years of hard-fought negotiations in the Mediation context to arrive at the Consensus FDA POA -- a plan that will require substantial additional efforts over the next few years to address possible appeals and administer allocation issues, all of which provides context for Class Counsel's belief that the requested fee is reasonable, in light of each of the *Goldberger* factors, including:
    - The tremendous amount of time and effort expended by Class Counsel on this matter (efforts that in just the past six weeks, alone, resulted in over $1 million in additional time and expense related to ongoing Mediation efforts and motion practice. In this regard, we note that the post Settlement lodestar presently before the Court is $17,036,789.50. The pre-Settlement lodestar for Class Counsel was $15,702,921.50. Joint State and Securities Action Fee and Expense Declaration at 29, ECF No. 452. While Class Counsel's pre-Settlement lodestar is not directly at issue here, it is relevant to note that in this matter, to date Class Counsel have a combined pre-Settlement and post-Settlement lodestar of $32,739,711.00 -- a clear reflection of the magnitude, risk, complexity and effort undertaken by Class Counsel to achieve the extraordinary recoveries described by the Settlement and through the FDA, Trustee Settlement and Consensus FDA POA (*id.* at 35-36);
    - The significant litigation risks Class Counsel undertook bringing the derivative claims that gave rise to the FDA portion of the Settlement and drove the Trustee Settlement, and the significant burden and risk Class Counsel undertook with respect to administering, protecting and preserving FDA assets before the Trustee Settlement was negotiated and finalized. (*id.* at 36-37);
    - The quality of the representation provided by Class Counsel (*id.* at 37);

- The reasonableness of the 3% fee requested in relation to the total FDA amount currently in hand of $623 million, and in light of the potential recovery of a total FDA-related recovery, net of fees and expenses of $1.446 billion (*id.* at 37-38);
- The reasonableness of the fee in comparison to Class Counsel's lodestar, which amounts to a current multiplier of 1.17 at prevailing market rates, which would rise to a multiplier of just 2.89 absent Class Counsel's agreement herein (and reflected in the amended proposed order, attached hereto as Exhibit A) to cap its fee at the lesser of 3% or a 2.5 lodestar multiple of Class counsel's lodestar at the time of any subsequent recoveries by the FDA from the Trustee, thereby providing certainty regarding Class Counsel's fees attributable to future FDA recoveries (*id.* at 38-39); and
- Public policy considerations, which include encouraging qualified plaintiffs' counsel to under undertake extensive efforts to take on and resolve complex common fund cases through mediation, thus preserving judicial resources (*id.* at 38); and

- Class Counsel's expenses constitute reasonable out-of-pocket costs, customarily charged to clients and necessary to the representation of Fund Distribution Claimants here (*id.* at 39-40).

As to the objections regarding the requested percentage fee and related multiplier, Class Counsel undertook a significant risk in bringing the derivative claims that drove the Settlement, gave rise to the FDA portion of the Settlement and ultimately drove the Trustee Settlement. While the Settlement and Trustee Settlement are long since final, the same risks that attended those Settlements (as discussed more fully in the initial fee application and approval order incorporated by reference here) are equally applicable to the present circumstances. This is particularly true where, as here, but for the creation by Class Counsel of the FDA structure and their ability to cause hundreds of millions of dollars to flow into the FDA as a result of the Madoff Trustee Settlement, there would effectively be no money to distribute to Fund Distribution Claimants, other than Rye Onshore, Rye Offshore and Rye Insurance. Moreover, Class Counsel continue to face the additional risk of further protracted litigation to defend the FDA POA and preserve the assets therein as they make additional distributions from the FDA.

For these reasons and those discussed below, the objections should be overruled, the Martin motion (and FutureSelect motions, to the extent they have not been withdrawn pursuant to the current agreement in principal) should be denied and Class Counsel's Motion should be granted in its entirety.

RELEVANT FACTS

At the August 8, 2011 hearing regarding approval of the Settlement, Class Counsel agreed with the Court to postpone until a later date consideration and resolution of all issues regarding the NSF and FDA plans of allocation, and that portion of Class Counsel's global fee application payable from the FDA. *See* Moving Brief, at 9. Class Counsel also agreed with the Court to work to create as broad a consensus as possible with respect to the relevant plans of allocation. *See* Hr'g Tr. 36, 66-67, Aug. 8, 2011, ECF No. 599. The Court approved the Settlement on August 19, 2011, and various proceedings in connection with the plans of allocation and related distribution issues took place following the Court's approval. Those proceedings, which required substantial additional effort on the part of Class Counsel, are described more fully below.

I. THE BANKRUPTCY PROCEEDING AND THE TRUSTEE SETTLEMENT

The Trustee Settlement was the culmination of proceedings that began on December 11, 2008, when the Securities and Exchange Commission ("SEC") filed a complaint in this District against Madoff and related defendants. On December 15, 2008, pursuant to section 78eee(a)(4)(A) of the Securities Investor Protection Act ("SIPA"), the SEC consented to a combination of its action with an application of the Securities Investor Protection Corporation ("SIPC"). On April 13, 2009, an involuntary bankruptcy petition was filed against Madoff. Prior to July 2, 2009, the bar date for filing claims in the bankruptcy proceedings, Rye Onshore, Rye Offshore, Rye Insurance, the Prime Fund and Insurance LDC filed customer claims with the Trustee (the "Customer Claims"). The Trustee denied the Prime Fund's Customer Claim; the Prime Fund did not file an objection to that determination. *See* Moving Brief, at 10.

On December 7, 2010, the Trustee filed an adversary proceeding against Tremont Group Holdings, Inc. and related entities seeking to recover more than $2.1 billion in direct transfers made from Madoff to the Funds, which could have wiped out any assets remaining in the Funds and any related claims in the Madoff bankruptcy. The Settlement here facilitated the structuring of the Trustee

Settlement with the participation of Class Counsel, Defendants and the Madoff Trustee, which required: (1) the defendants in that proceeding to pay to the Trustee $1 billion in cash; (2) upon the effective date of the Trustee Settlement, the Trustee to allow Customer Claims in the SIPA proceedings for the Rye Onshore, Rye Offshore and Rye Insurance Funds in the aggregate amount of $2,186,177,715.88 (comprised of (a) $1,647,687,625.00 for Rye Onshore, (b) $498,490,000.88 for Rye Offshore and (c) $40,000,000.00 for Rye Insurance); and (3) the Trustee to allow additional claims for Rye Onshore and Rye Offshore under Section 502(h) of the Bankruptcy Code in the aggregate amount of $800,000,000 (80% of the $1 billion in cash paid to fund the Trustee Settlement). *See* Moving Brief, at 11. Assuming, as discussed elsewhere herein (and in Entwistle Supplemental Declaration) in further support of this Motion, that the Madoff Trustee distributes assets at an 80% rate, then the Trustee Settlement will result in $1.446 billion in proceeds, net of fees and expenses being paid, to Fund Distribution Claimants.

II. THE APPEALS PROCESS

Following approval of the Settlement, various objectors engaged in post-approval motion practice and vigorously contested appeals both of the Settlement and the Trustee Settlement (the predominant source of funding for the FDA, without which there would be virtually no assets to distribute in the FDA). Joint FDA Decl. at ¶¶7, 9-10. In this regard, Class Counsel defended against multiple objectors to the Settlement and the related Trustee Settlement, addressing numerous legal and factual arguments contained in thousands of pages of filings concerning subject matter jurisdiction, the adequacy of the Settlement Class Representatives and Lead Plaintiffs, class certification and the overall fairness of the Settlement, all of which required extensive research and legal memoranda. *Id; see also* Moving Brief, at 11-12.

In the bankruptcy context, Class Counsel participated in strategic discussions with the Trustee and counsel for Defendants, performed legal research and drafted various legal memoranda in opposition to a complex set of objections to the Trustee Settlement, filed by a formidable group of

institutional investors that purchased interests in the XL Fund and the Prime Fund, each of which argued, among other things, that the Trustee Settlement's proposed allocation of Section 502(h) credits to only Rye Onshore and Rye Offshore was inequitable, and that adversary claims against Tremont and various bank defendants were unfairly released. Joint FDA Decl. at ¶11. The Bankruptcy Court overruled those objections, finding the allocation of the $800 million to Rye Onshore and Rye Offshore was appropriate and the adversary claims were properly released. *See Picard v. Tremont Grp. Holdings., Inc.*, (*In re Bernard L. Madoff Inv. Sec. LLC*) ("*Picard*"), Ch. 11 Case No. 08-99000-smb, Adv. No. 10-05310 (BRL), slip op. at 2 (Bankr. S.D.N.Y. Sept. 22, 2011); *See also* Moving Brief, at 12.

The objectors appealed that decision to the District Court and Class Counsel were actively involved in the appeal, working directly with the Trustee and Counsel for Defendants on various research assignments and legal memoranda. Joint FDA Decl. at ¶11. The District Court ultimately found the appellants lacked standing to challenge the Trustee Settlement and, on that basis, dismissed the appeal. *In re Bernard L. Madoff Inv. Sec. LLC* ("*BLMIS I*"), No. 11 CV 7330 (GBD), 2012 WL 2497270, at *1 (S.D.N.Y. June 27, 2012); *see also* Moving Brief, at 13.

III. THE MEDIATION PROCESS

During the appeals process and thereafter, Class Counsel engaged in countless telephone discussions and in-person meetings, both as a group and individually, with scores of investors in the various Rye and Tremont Funds regarding the terms of the Settlement, the operation of the NSF and FDA, the plans of allocation, anticipated distribution of the NSF and FDA and various other procedural issues and developments. Joint FDA Decl. at ¶¶12-21; *see also* Moving Brief, at 13. Class Counsel also worked extensively with prior objectors and various interested parties who invested in one or more of the Rye and Tremont Funds and expressed a desire to participate post-Fairness Hearing ("Interested Parties" or "Parties") through Mediation before Judge Phillips in an attempt to achieve a consensus on the allocation of the NSF and the FDA. The Mediator discusses these proceedings in

some detail in his declaration supporting the Consensus FDA POA as fair and reasonable and so we will not repeat those facts except in summary fashion. *See* Phillips Decl. at ¶6.

In this regard, Class Counsel created a process by which they first contacted in April 2014 persons who objected or appeared at the Fairness Hearing as well as other persons expressing a desire to participate post-Hearing, and solicited proposed FDA plans of allocation (or related commentary) from those individuals in advance of the two-day Mediation that would take place in late July 2014. ECF No. 989 at ¶11; *see also* Moving Brief, at 13-14. Finally, Class Counsel invited each of the Interested Parties to contact us via telephone or e-mail in advance of the July Mediation, so that we could address any questions or concerns and further facilitate the process. Class Counsel also agreed to provide to every participant a wide range of confidential documents detailing specific financial information for the Funds and the individual investors therein under strict confidentiality and solely for the purpose of Mediation. *See also* Moving Brief, at 14-15.

The July 2014 Mediation session was attended by investors in virtually all of the eligible Rye and Tremont Funds, each represented by sophisticated counsel vigorously advocating their positions. *Id.* Indeed, the Mediation attendees consisted of some of the largest and most sophisticated financial institutions in the country. A large number of attendees had more than $50 million at stake, multiple parties had more than $100 million at stake, and some had in excess of $250 million at stake. *Id.* During the July 2014 Mediation sessions, which consisted of two full days, Class Counsel and the Mediator conducted numerous group sessions and individual sessions, in which the participants were able to express their views on various issues impacting the plans of allocation.

Class Counsel was ultimately able to confirm near-universal support for the NSF POA among the Interested Parties during the July 2014 Mediation session. Accordingly, Class Counsel subsequently moved for approval of the NSF POA on December 15, 2014. Class Counsel Mot. to Approve, ECF No. 987. There were no objections and the Court approved the NSF POA on December

22, 2014. Order, ECF No. 994. Thereafter, on February 27, 2015, Class Counsel moved for distribution of the NSF and in connection with that motion, sought the Court's approval to readmit to the Settlement Class a group of investors who had previously opted out of the Settlement Class. Class Counsel Mot. for Disbursement of Funds, ECF No. 1003. After considering supporting and opposing arguments, the Court approved distribution of the NSF and permitted the opt-outs to re-enter the Settlement Class. Orders, ECF No. 1071; ECF No. 1072.

On March 4, 2015, at the request of Class Counsel, Judge Phillips contacted via e-mail the Interested Parties who had not yet resolved their disagreements regarding the consensus FDA plan of allocation under consideration. *See* Joint FDA Decl. ¶20. Following additional submissions, the Mediator, in conjunction with Class Counsel, conducted a further confidential in-person Mediation session on May 8, 2015. *Id.*

Through the numerous discussions, meetings, vigorous negotiations among sophisticated counsel and investors and the extensive Mediation sessions over approximately the past two years, Class Counsel ultimately obtained broad-based support for the FDA POA of the Rye and Tremont Fund investors representing the vast majority of the aggregate net ownership interests in those Funds. Joint FDA Decl. at ¶21.

IV. ADDITIONAL MOTION PRACTICE IN CONNECTION WITH THE FDA POA

Class Counsel have continued to work with Fund Distribution Claimants to ensure that the proceeds of the FDA are reasonably, fairly and adequately allocated, and to defend the Consensus FDA POA, when necessary. Class Counsel have expended a significant amount of additional hours opposing motions in connection with the FDA POA and negotiating potential resolutions.[4]

[4] Charts summarizing the additional briefing in connection with the FDA POA are attached hereto as Exhibits G and H of Supplemental Entwistle Declaration.

A. FutureSelect Motion To Certify FDA Subclasses And Appoint Separate FDA Subclass Counsel

On June 25, 2015, FutureSelect Prime Advisor II LLC, The Merriwell Fund, L.P., and Telesis IIW, LLC (collectively, "FutureSelect") filed a motion seeking to certify subclasses and appoint separate counsel for those subclasses in connection with the FDA plan of allocation ("FutureSelect's Subclass Motion"). Class Counsel filed their opposition to FutureSelect's Subclass Motion on July 13, 2015 (the oppositions filed by Class counsel to both FutureSelect motions together with those filed by various investors are summarized in the chart found at Ex. H to Entwistle Supplemental Declaration). In their opposition, Class Counsel argued that FutureSelect's request was "the same request that was twice rejected in this litigation" and should be rejected again. (FutureSelect Opp'n at 8, ECF No. 1097). Class Counsel further argued that the Mediation process was structurally fair, "each of the subclasses [FutureSelect] request[ed] were well-represented during the Mediation" (*id.* at 12), that the findings of *In Re Literary Works In Electronic Databases Copyright Litigation*, 654 F.3d 242 (2d Cir. 2011) did not require that the Court appoint subclasses and that there was no "fundamental conflict" among Fund Distribution Claimants. FutureSelect filed a response in further support of its Subclass Motion on July 23, 2015. The relevant parties reached an agreement in principle resolving their issues in respect of both motions during the Mediation process and we anticipate that FutureSelect will withdraw those motions as soon as an appropriate writing is signed -- absent which, the FutureSelect motions should be denied for the reasons stated in the various opposition briefs.

B. FutureSelect Motion For Approval Of Investor Fund Distribution Account Plan Of Allocation

On July 6, 2015, FutureSelect filed a motion seeking approval of its own proposed plan of allocation for the FDA ("FutureSelect's POA Motion"). Class Counsel filed a response in opposition to FutureSelect's POA Motion on July 23, 2015, arguing that FutureSelect's proposed Plan of Allocation wrongfully reallocated Fund assets by "completely disregard[ing] Fund structure and ignor[ing] the Funds' varying Madoff exposures." Class Counsel Opp'n to Future Select Mot. at 12,

ECF 1123. We further argued that the Consensus FDA POA allocated "substantial assets to the XL and Prime Funds, neither of which would be entitled to recovery under the terms of the Trustee Settlement." *Id.* at 19. FutureSelect was scheduled to file a reply in further support of its motion on August 7, 2015, but did not do so and we expect FutureSelect will withdraw this motion as noted above -- absent which, it should be denied for the reasons stated in our opposition thereto.

C. Martin Motion For Approval Of Fund Distribution Account Plan Of Allocation, Certification Of Subclass And Related Discovery

On July 13, 2015, Martin filed a motion seeking approval of his proposed plan of allocation for the FDA, the certification of a subclass and related discovery (the "Martin POA Motion"). Class Counsel filed their opposition to the Martin POA Motion on July 30, 2015 as did various investors (see Chart summarizing submissions and arguments at Ex. G of the Entwistle Supplemental Declaration), contending that Martin had no standing to file the motion because Tremont had already tendered to him a check for his Madoff-related losses in TOF II. We further argued that the plan of allocation proposed by Martin disregards Fund structure, "takes the assets contributed to the FDA . . . and improperly reallocates them to investors who contributed little or nothing to the FDA." ECF 1134 at 18. As to Martin's argument for certification of a subclass, Class Counsel noted that subclass requests had already been rejected twice, and that *Literary Works* is inapplicable. Martin filed a reply in further support of his motion on August 10, 2015 and, for the reasons set forth in the oppositions thereto, it should be denied.

V. FUND DISTRIBUTION CLAIMANT BRIEFING IN SUPPORT OF CONSENSUS FDA POA

Several Fund Distribution Claimants have supported the Consensus FDA POA in connection with their oppositions to the foregoing motions of FutureSelect and Martin, or have otherwise advised Class Counsel that they support the Consensus FDA POA, further demonstrating that the plan properly allocates the assets in the FDA to Fund Distribution Claimants. This continued support for the Consensus FDA POA of Fund Distribution Claimants, and their respective financial interests, is

summarized in the chart below:

Fund Distribution Claimant	ECF Number	Net Investment In Eligible Hedge Funds
Dolos X LLC, Dolos XI LLC and Dolos XII LLC	1118; 1129	$390.8 in Rye Onshore, Rye Offshore and the XL Fund
Royal Bank of Scotland N.V. (formerly ABN AMRO)	1109; 1128	$1.04 billion in Rye Onshore and Rye Offshore
HSBC Bank plc HSBC Inc.	1121; 1133	$580.3 million in Rye Onshore and Rye Offshore (residual interest in $184.5M XL collateral net of $25.574M Settlement under the Consensus FDA POA) and is also the largest owner of TOF II, with an approximately $309.6K Madoff-exposed net investment
SOLA Ltd, Solus Core Opportunities Master Fund Ltd, Solus Recovery Fund II Master LP, Solus Recovery LH Fund LP, Ultra Master Ltd	1112; 1132	$106.2 in Rye Onshore
Halcyon Loan Trading Fund LLC	1112; 1132	$51.7 million in Rye Onshore
BMIS Funding I, LLC	1112; 1132	$106.2 million in Rye Onshore
SPCP Group, LLC	1125; 1131	$395 million in Rye Onshore, Rye Offshore, and the XL Fund
Ross Group	1141	$190.8 million in Rye Onshore, the Prime Fund, the XL Fund, TOP II, TMNF II
New York Life Insurance and Annuity Corporation, Metropolitan Life Insurance Company, New England Life Insurance Company, General American Life Insurance Company, John Hancock Life Insurance Company (U.S.A.), Pacific Life Insurance Company, Security Life of Denver, AIG Life Insurance Company, Delaware Life Insurance Company (f/k/a Sun Life (SLF) Assurance Company of Canada (U.S.)), Pruco Life Insurance Company, Nationwide Life Insurance Company	Verbal support	Total Interest in TOF III: $306.6 million Net Investment ($68.775M Madoff-exposed)

Fund Distribution Claimant	ECF Number	Net Investment In Eligible Hedge Funds
Acadia Life Limited, Scottish Annuity and Life International Insurance Company (Bermuda) Ltd., and Hartford Insurance Co.	Verbal Support	$21.66M net investment in TOF III ($6.22 million exposed)
Meridian Horizon Fund, LP, Meridian Horizon Fund II, LP, Meridian Diversified Fund, LP, Meridian Diversified Fund, Ltd., Meridian Diversified ERISA Fund, Ltd., Meridian Diversified Compass Fund, Ltd., and Meridian Absolute Return ERISA Fund, Ltd.	Verbal support	$43.1 million in the XL Fund
Austin Capital BMP Fund	Verbal support	$168 million in the Prime Fund.
Collins Capital Investments LLC	Verbal support	$76.1 million in the Prime Fund
Sandalwood Debt Fund A, L.P., Sandalwood Debt Fund B, L.P., Hudson Investment Partners, L.P., and Oxbridge Associates, L.P.	Verbal support	$32 million in the XL Fund
Meritage Capital, LLC	Verbal support	$21.8 million in the Prime Fund
TOTAL SUPPORT		$3.62 billion

(See also related information found in the Entwistle Supplemental Declaration at Ex. F and I)

ARGUMENT

I. THE CONSENSUS FDA POA PROVIDES THE MOST APPROPRIATE METHOD BY WHICH TO ALLOCATE THE ASSETS OF THE FDA

The Consensus FDA POA allocates and distributes Rye Fund assets and, therefore, it is particularly telling that no Rye Fund Distribution Claimant has objected to the Consensus FDA POA. In fact, the Mediation led by Class Counsel under the direction of the Mediator resulted in active support of the Consensus FDA POA by Mediation participants holding approximately $2.696 billion of Rye Fund net investments (see Chart at Ex. F to the Entwistle Supplemental Declaration). Moreover, as the Mediator has concluded, the Consensus FDA POA "is a fair and reasonable allocation respecting

the various factual and legal arguments, and further accommodating the parties' various 'equitable' arguments that were presented in previous negotiations." *See* Declaration Phillips Decl., at ¶¶21-22 ("Based on my first-hand observations, I can represent to the Court that I have no reason whatsoever to believe that the FDA Consensus PoA, was anything other than the product of hard-fought arm-length negotiations by skilled, experienced and effective counsel").

A. The Consensus FDA POA Is The Result Of Extensive Negotiations And Is Supported By The Vast Majority Of Investors On A Net Investment Basis

As discussed in our prior memoranda, numerous discussions, meetings, vigorous negotiations among sophisticated counsel and investors, extensive Mediation sessions and related discussions over approximately the past two years enabled Class Counsel to obtain broad-based support for the Consensus FDA POA from Fund Distribution Claimants representing the virtually all of the aggregate net ownership interests in the Funds. Joint FDA Decl. at ¶5; Entwistle Supplemental Declaration at Ex. F. Indeed, as discussed above, the Consensus FDA POA currently has the active support of the holders of approximately $3.62 billion in net investments.

Equally important is the view of the Settlement Class Representatives who were invested in the various Funds that the Consensus FDA POA is the most fair, reasonable and adequate resolution of the positions advanced by investors in prior objections and in the Mediation process. Joint FDA Decl. at ¶23; *see also* Declarations of Class Representatives at ¶¶14-20, Ex. K-N to the Entwistle Supplemental Declaration. The participation of Class Representatives, together with the various interested parties in the Mediation process, offered structural assurance of fair and adequate representation of all Fund Distribution Claimants. At the same time, the involvement and supervision of the Mediator assured that the Mediation and related proceedings were free of collusion and undue pressure. The fact that the Consensus FDA POA arises from protracted Mediation and related discussions, providing all prior objectors and interested parties with standing an opportunity to

participate, with the aid of extremely experienced and sophisticated counsel, provides additional assurance of fair and adequate representation. Joint FDA Decl. at ¶12-21.

B. The Consensus FDA POA Fairly And Reasonably Allocates The Assets Of The FDA To Fund Distribution Claimants

Under the Consensus FDA POA, three of the Rye Funds -- Rye Onshore, Rye Offshore and Rye Insurance -- have SIPC Claims. The Trustee Settlement, approved by the Bankruptcy Court, granted these three Funds nearly $3 billion in SIPC Claims in exchange for the nearly $1 billion contribution to the BLMIS estate (approximately $650 million was from loans provided by the Fortress-related entities). Settlement Agreement, *Picard* (July 28, 2011), ECF No. 17-1; *Picard*, slip op. at 7. Those SIPC Claims provide the principal source of assets flowing into the FDA and, thus, it is appropriate to give credit in the Consensus FDA POA to those Funds for the assets they contributed to the FDA in the form of their Madoff Bankruptcy claims. *See In re Bernard L. Madoff Inv. Sec. LLC* ("*BLMIS II*"), 708 F.3d 422, 426-27 (2d Cir. 2013); *Picard*, slip op. at 5.

The Trustee Settlement provided, in part, that only those Funds with recognized claims that contributed to the settlement (Rye Onshore and Rye Offshore) would receive an additional recognized claim under Section 502 equal to 80% of the value of the total cash contributed to the settlement. Of course, this meant that the Rye and Tremont Funds that contributed cash directly to the Trustee Settlement in exchange for releases, but that did not otherwise qualify for a SIPC Claim received no Section 502 claim from the Trustee. To address this inequity Class Counsel pressed for and ultimately achieved agreement that such Funds would receive a Virtual SIPC Claim under the FDA POA equal to 80% of the amount of their contribution to the Trustee Settlement-- the same percentage as the Trustee allowed for Rye Onshore and Rye Offshore.

In addition, the FDA POA preserves all Cross Investments by the Rye and Tremont Funds on a net basis, as required by the terms of the Settlement. *See* Stipulation at ¶1.50. The preservation of Cross Investments is appropriate because it ensures Fund Distribution Claimants receive the proper

credit for their Madoff-related losses. In this regard, Rye Fund investors will receive credit to the extent the Fund in which they invested held interests in other Rye Funds, which were fully exposed to Madoff, and Tremont Fund investors will receive a recovery from the FDA to the extent the Fund in which they invested was exposed to Madoff.

Lastly, the "XL Priority Allocation" is the priority distribution to XL Fund Distribution Claimants of the cash the XL Fund directly paid into the FDA. This payment returns to XL Fund investors the amount of cash the XL Fund directly paid to the FDA. The provision is the result of Class Counsel's extensive negotiations with various Mediation participants, who ultimately agreed to forego any claims they may have had to the cash contributed by the XL Fund to the FDA, thereby allowing investors in the XL Fund to receive this additional recovery.

In light of the foregoing, the Consensus FDA POA is the embodiment of an arm's-length compromise by Fund Distribution Claimants representing the vast majority of investors on a net investment basis, to facilitate distribution of the FDA on as expedited a basis as possible. *See* Phillips Decl. at ¶21-22. Accordingly the Consensus FDA POA should be approved by the Court.

II. THE ONGOING MEDIATION HAS LED TO CERTAIN AMENDMENTS TO THE CONSENSUS FDA POA, IN THE BEST INTERESTS OF FUND DISTRIBUTION CLAIMANTS

Class Counsel have submitted herewith a Consensus FDA POA which contains certain limited amendments made to accommodate certain issues that arose during the ongoing Mediation process. The first set of amendments to the FDA POA modify the Eligible Hedge Fund Allocated Interests for certain Funds. The second amendment consists of additional language regarding the resolution of the claim by HSBC against the XL Fund in connection with certain swap and collateral agreements. *See* HSBC Response at 10-11, ECF No. 1121. As discussed below, none of these modifications affects the operation or structure of the Consensus FDA POA.

A. Adjustment Of The Percentages Allocated To Certain Funds

1. The Tremont Funds' Eligible Hedge Fund Allocated Interests

During the ongoing Mediation, it came to our attention that the Consensus FDA POA contained a calculation error regarding the Virtual SIPC Claim percentages allocated to the Tremont Funds that contributed to the Trustee Settlement. The issue arose because of an assumption, made in error by certain Mediation participants that included two Tremont Funds in the calculation that do not fall within the Definition of Eligible Hedge Funds in the Stipulation or the FDA POA. This assumption caused a larger percentage of the FDA to be allocated to certain Tremont Funds than was proper. The recalculation of the percentages results in a minor reallocation of certain Tremont Funds' Eligible Hedge Fund Allocated Interests in the FDA POA (excluding Cross Investments), as follows:

Fund	Previous FDA POA Allocation	Revised FDA POA Allocation	Difference
Tremont Funds (collectively)	2.32%	2.11%	-0.21%
Tremont Market Neutral Fund L.P.	0.127%	0.115%	-0.012%
Tremont Market Neutral Fund II, L.P.	0.516%	0.469%	-0.046%
Tremont Opportunity Fund II L.P.	0.217%	0.197%	-0.02%
Opportunity Fund III L.P.	1.460%	1.329%	-0.131%

The above changes to the Eligible Hedge Fund Allocated Interests were negotiated and discussed with some of the largest holders in the affected Funds and with Class Representatives, all of whom support the changes.

2. The Rye Funds' Eligible Hedge Fund Allocated Interests

Certain members of the Insurer Group who attended the Mediation misinterpreted some of the confidential materials provided in connection with the Mediation and, as a result, made mistaken assumptions regarding recovery of Fund Distribution Claimants invested in the Rye Insurance Fund under the Consensus FDA POA. Class Counsel worked with the various impacted parties to reach an

accommodation that alleviated the impact of this misunderstanding, without otherwise impacting the operation of the FDA POA. The resulting reallocations to the Eligible Hedge Fund Allocated Interests of the Rye Onshore, Offshore and Insurance Funds were made with the agreement of Fund Distribution Claimants owning approximately 95% of Rye Onshore and Rye Offshore on a net investment basis, and all Fund Distribution Claimants invested in TOF III, which itself held 100% of Rye Insurance. Those reallocations are as follows:

Fund	Previous FDA POA Allocation	Revised FDA POA Allocation	Difference
Rye Onshore	75.46%	75.25%	-0.21%
Rye Offshore	20.05%	20.00%	-0.05%
Rye Insurance	1.29%	1.76%	0.47%
The Prime Fund	0.88%	0.88%	0.0%

B. Resolution Of The HSBC Claim

As part of the Mediation process, Class Counsel achieved a compromise with HSBC regarding its claim that it should receive a disbursement from the FDA corresponding to the XL Fund's $184.5 million Cross Investment in Rye Onshore (the "XL Cross Investment") under its swap and collateral agreements with the XL Fund. On August 31, 2007, HSBC entered into a swap transaction ("Swap") with the XL Fund and the XL Fund secured the XL Fund's obligations under that Swap by granting HSBC a security interest in the shares of Rye Onshore owned by the XL Fund (the "Collateral"). This transaction provided that HSBC has a right to the Collateral in the event the XL Fund defaulted.

HSBC claimed that the XL Fund defaulted under the Swap upon the collapse of BLMIS and, thus, HSBC owns the Collateral and any distribution from the FDA until their rights in the XL Cross Investment was satisfied. HSBC asserted that its rights under the documents created a priority of recovery that would allow it to lien (and recover) XL Fund assets including the XL Priority Allocation of $32.4 million and all other proceeds paid to the XL Fund under the FDA until the entire collateral

obligation was satisfied. These assertions would most certainly have resulted in protracted litigation and, toward that end, HSBC had already undertaken the steps necessary under the relevant contracts to trigger its rights and to seek to prevent the distribution of any XL Fund assets in the FDA until such time as the Court resolved the litigation. While HSBC faced certain structural issues that may have prevented it from fully asserting its rights to the Collateral, the Swap documents give HSBC significant rights in XL Fund assets until the entire face amount of the collateral is returned HSBC. In this regard, it is important to note that even adding the $32.4 million XL Priority payment to estimated recoveries by the XL Fund on its Cross Investment would have been insufficient to fully satisfy the XL Fund's obligations to HSBC under the Swap agreements. What this means is that if HSBC prevailed in litigation, then XL-related Fund Distribution Claimants would be paid nothing out of the FDA.

In light of this fact, Class Counsel, HSBC and certain XL Fund investors were able to reach a compromise with HSBC regarding HSBC's claim to the Collateral that is fair, reasonable and in the best interests of XL Fund investors. Pursuant to that compromise, HSBC waived all rights to the XL Priority payment and it further agreed that it would pay XL Claimants an additional $25,546,400 out of the XL Cross Investment FDA Recovery (the "XL Cross Investment Allocation") from the initial FDA distribution. Thus, the compromise reached with HSBC (and memorialized in the amendments to paragraph 22 of the FDA POA), means that Fund Distribution Claimants that were previously XL Fund investors will receive $57,995,639 out of the Initial FDA Distribution -- almost nine percent of the total amount of funds currently in the FDA.

The XL Cross Investment Allocation has priority over any distribution of the XL Cross Investment FDA Recovery made to HSBC and, thus, HSBC does not receive any of the XL Cross Investment FDA Recovery until the XL Cross Investment Allocation has been distributed entirely to XL Fund Distribution Claimants. In the event the first distribution from the FDA based on the XL Cross Investment Allocation is less than $25,546,400, the amount of any shortfall will be paid out of

any other money due to HSBC out of the initial FDA distribution. Once the XL Cross Investment Allocation and XL Priority Allocation are satisfied, XL Fund investors will not receive any further distributions from the FDA. Rather, HSBC will receive all remaining portions of the initial FDA distribution and any subsequent distributions related to the XL Cross Investment FDA Recovery (the "HSBC XL Cross Investment Allocation"), and shall be treated as a Fund Distribution Claimant with respect to the HSBC XL Cross Investment Allocation.

The XL Cross Investment Allocation reflects approximately 32% of what the market believes is the total potential recovery value of the Collateral. In the normal course, Fund Distribution Claimants who invested in the XL Fund would have to wait for any subsequent distributions from the FDA to recover the full value of their allocation. Instead, the negotiated compromise with HSBC permits XL Fund investors to receive a priority distribution out of the FDA, giving them more certainty and value than would normally be the case. Moreover, the agreement resolves what could have been a protracted and difficult litigation with HSBC.

III. THE COURT SHOULD REJECT THE ARGUMENTS OF EACH OF THE OBJECTORS TO CLASS COUNSEL'S MOTION

A. Several Objectors Lack Standing to Object To The Consensus FDA POA

1. Philadelphia Life is a Net Winner

Philadelphia Life is an insurance company that objected to the Settlement in 2011 and appealed the Court's approval of the Settlement to the Second Circuit. *See* Philadelphia Objections, ECF No. 500, and ECF No. 560; Appellate Br., *In re Tremont Sec. Law* ("*Tremont 2d Cir. Appeal*"), No. 11-3899 (2d Cir. Dec. 19, 2011), ECF No. 238-1. The Court rejected Philadelphia Life's objection because it is admittedly a net winner investor, withdrawing more from the Funds than it withdrew. *See* Hr'g Tr. at 27-28, 33-34, ECF No. 599. As a net winner, Philadelphia Life has no right to a distribution from the FDA as it did not lose money to Madoff, has no standing to object to the instant Motion and should not be allowed to re-litigate the now final Settlement by arguing its policy holders

are net losers. *See In re Bernard L. Madoff Securities LLC* ("*BLMIS III*"), 654 F.3d 229 (2d Cir. 2011). Nor do Philadelphia Life's policy holders have any right to object to the FDA, as they did not invest in the Rye or Tremont Funds. *See* Stipulation at ¶1.18.

2. The So-Called Tremont Fund Objectors Accepted a Tender of their Entire Madoff-Losses or Never Appeared in the Actions

The So-Called Tremont Fund Objectors also have no standing to file an objection. Madelyn Haines and Paul Zamrowski were tendered their Madoff-related losses in 2011 and, on that basis, the Second Circuit found they lacked standing in this litigation. *See In re Tremont Sec. Law, State Law & Ins. Litig*. ("*Tremont I*"), 561 F. App'x 61, 63 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 270 (2014); *In re Tremont Sec. Law, State Law & Ins. Litig.* ("*Tremont II*"), 542 F. App'x 43, 47 (2d Cir. 2013). In its June 5, 2015 decision approving distribution of the NSF, this Court reiterated that Haines and Zamrowski lacked standing and stated that George Turner, Bindler Living Trust, William J. Millard Trust and Stella Ruggiano Trust also lacked standing because Defendants tendered these investors their Madoff-related losses. *In re Tremont Sec. Law, State Law & Ins. Litig*. ("*Tremont III*"), No. 08-cv-11117, 2015 WL 3540723, at *7 (S.D.N.Y. June 5, 2015). Each of these Tremont Fund Objectors subsequently accepted the tender of their losses. The two remaining Tremont Fund Objectors, West Trust and John Johnson, do not have standing because they never filed a notice of appearance in this case, nor have they ever filed a complaint in the Actions. Even if they do have standing, Johnson and West Trust have collective Madoff-related losses of just $104 thousand and, unsurprisingly, their counsel Attorney Gresham asserts the same tired and repeatedly rejected objections that he asserted on behalf of the other members of his group.

3. Martin Received a Tender of his Entire Madoff Losses

As discussed in Class Counsel's memorandum in opposition to Martin's plan of allocation motion (ECF No. 1134), on May 21, 2015, Tremont tendered to Martin a check in the amount of $40,257, representing Martin's Madoff-related losses in connection with his investment in TOP II.

The tender of 100% of Martin's investment in TOP II is an amount equal to all Martin legally could receive under the Settlement. Accordingly, Martin lacks standing to object to Class Counsel's Motion. *See Tremont I*, 561 F. App'x at 63; *Tremont II*, 542 F. App'x at 47; *Tremont III*, 2015 WL 3540723, at *7.

Martin's prior claims that he still has standing because he was not tendered the full amount of his net investment in TOP II and because he has moved to certify a subclass are both unfounded. First, any claim Martin may have involving the non-Madoff portion of his investment in TOP II is not part of the Actions. *See* Stipulation & Order at 3, ECF No. 914; Stipulation at ¶¶1.19, 1.50. Second, as this Court has previously ruled, Martin's attempt to certify subclasses does not render the tender ineffective, and the cases upon which Martin relies "have no application here" because of their "vastly different procedural postures." *Tremont III*, 2015 WL 3540723, at *7; *see* Class Counsel's Response at 17, ECF No. 1134.

4. Calabrese's Investment is in a Non-Eligible Insurer in an Excluded Fund

To the extent Calabrese bases his objection on his investment in Insurance LDC through Bermuda Life, he has no standing because he is not a direct investor in Insurance LDC. Even if he were a direct investor in Insurance LDC, the Settlement explicitly excludes the LDC Fund from participating in the FDA and it also states that investors in the Liquidating Funds, including Insurance LDC, are excluded from the definition of Fund Distribution Claimants, and that any money in the Liquidating Funds is to be distributed to the Liquidators of those Funds, *not their investors*. Stipulation at ¶¶1.18, 1.19, 1.29, 1.50, 1.61. As Calabrese acknowledges, the Liquidating Funds are being liquidated in the Cayman Islands. *Id.*; *see* Calabrese Objection at 6 n.2, ECF No. 1153. In addition, the Stipulation here does not include Bermuda Life as an eligible insurer that would otherwise be entitled to participate in the Settlement. *Id.* at ¶ 1.10. Since Insurance LDC is not part of the FDA, its assets are not being distributed here and Bermuda Life is not an Eligible Carrier, Calabrese's objection should be rejected.

B. The Arguments Of The Objectors Otherwise Have No Merit

Even if they had standing the Objectors' arguments are without merit and their objections should be overruled.

1. The Objection Filed by Philadelphia Life Should be Overruled because its Policy Holders are not Fund Distribution Claimants

In its objection, Philadelphia Life argues that the Court has no right to approve the instant Motion because there is no "case or controversy regarding the FDA POA," since there was no complaint or summons served on Philadelphia Life. Philadelphia Life Objection at 11-12, ECF No. 1152. This argument is without merit as the FDA arises directly from Class Counsel's derivative claims included in their operative complaint and the Settlement of the Actions. Moreover, Philadelphia Life offers no support for its contention that Class Counsel was required to serve a summons and complaint upon it.

In a self-serving attempt to allow net winners, such as itself, to recover from the FDA, Philadelphia Life also argues the Consensus FDA POA should apply investors' ending balances to calculate Fund Distribution Claimants' Madoff-related losses. *See id*. However, it is well settled that, in the context of a Ponzi scheme, investors' losses are determined by their net investment in the Fund in which they invested, not their ending balance. *See BLMIS III*, 654 F.3d at 236-237.

Philadelphia Life's claim that the Consensus FDA POA conflicts with Paragraph 1.18 of the Stipulation is also unavailing. In this regard, Philadelphia Life argues the definition of "Fund Distribution Claimant" in Paragraph 1.18 of the Stipulation gives *all* investors in the Funds the right to a disbursement of funds from the FDA. *See* Philadelphia Life Objection at 14-15, ECF No 1152. However, the definition of Fund Distribution Claimant in the Stipulation merely states who is *eligible* to receive a distribution from the FDA. It does not create an entitlement to a specific allocation just as it does not say that everyone within the definition must receive a distribution. Moreover, Paragraph 1.18 is a definitional provision and should not be read to have the substantive effect that Philadelphia

Life attributes to it. The reading Philadelphia Life proposes here would lead to the absurd result of having even net winners recover from the FDA. For these reasons, Philadelphia Life's arguments should be rejected.

2. The Arguments of the So-Called Tremont Fund Objectors Have been Repeatedly Rejected by this Court and the Second Circuit over the Past Five Years and should be Rejected Here

Both this Court and the Second Circuit have repeatedly rejected the arguments made by the Tremont Fund Objectors here regarding the adequacy of representation of Tremont Fund investors, collusion, special benefits to "insiders," the Trustee Settlement payment and the purported lack of discovery -- including rulings on appeal of the Settlement, motion for rehearing *en banc*, petition for *certiorari* and Rule 60 motion. *See* Haines Objection at 24-25, ECF No. 559; Ex. B to Gresham Decl. at 8, ECF No. 568; Ex. G to Gresham Decl. at 41, ECF No. 568; Ex. H to Gresham Decl. at 12-15, ECF No. 568; Haines Br. at 8-12, ECF No. 801;Haines Reply Br. at 11, ECF No. 815; Tremont Fund Objectors Objection at 18, 21-22, ECF No 1022; Tremont Fund Objectors Reply Br. at 8-9, ECF No. 1030; Haines Mot. at 15, *Tremont 2d Cir. Appeal* (June 26, 2012) ECF No. 385; Haines Br. at 63, 68, SPA 22-23, *id.* (Dec. 11, 2012), ECF No. 581; Haines Reply Br. at 23-29, 86-88, *id.* (Apr. 16, 2013), ECF No. 761; Haines Reh'g Petition at 15, *id.*,(Apr. 16, 2014), ECF No. 873.[5] The Court should again

[5] As Class Counsel previously argued regarding the adequacy of representation, one of the Class Representatives and Lead Plaintiffs, Group Defined Pension Plan and Trust, invested in Tremont Market Neutral Fund L.P., the same Fund as one of the Tremont Fund Objectors (Class Counsel Response to Suppl. Haines Objection at 3, ECF No. 572), thus providing sufficient representation for that Fund. Moreover, the Tremont Fund Objectors' argument that the Court lacks subject matter jurisdiction "[b]ecause none of the derivative plaintiffs are Tremont Fund investors" (Tremont Fund Objectors Resp. at 8, ECF No.1149) is flawed because Lead Plaintiffs had "class standing" to represent the Tremont Funds as Lead Plaintiffs and the Tremont Funds were investors in the Rye Funds. *See* Class Counsel Br. at 40, *Tremont 2d Cir. Appeal* (Mar. 12, 2013) ECF No 711. Nor does the FDA POA contain any "special benefit provisions," as the FDA POA is the product of an extensive Mediation over a two-year period, and has the full support of the Mediator, Judge Philips. In addition, the Tremont Fund Objectors once again claim that Class Counsel's proposed plan of allocation contains "special benefit provisions" caused by "a lack of transparency" during the Mediation. *See* Tremont Fund Objectors Objection at 24-28, ECF No. 1022; Tremont Fund Objectors Resp. at 11-15, ECF No. 1149. The Tremont Fund Objectors' claims in this regard are completely unfounded, and just as it did previously regarding the NSF, the Court should ignore their erroneous assertions.

deny the Tremont Fund Objector's arguments here and consider sanctioning their counsel for these repeated filings.

3. The Objection Filed by Martin should be Overruled and his Proposal should be Rejected because it Wrongfully Reallocates the Assets of the FDA to Fund Distribution Claimants who Have No Claim to those Assets and Ignores the Varying Madoff Exposures of Each of the Funds

a. Martin's Arguments Lack Merit

Martin's claim that the Consensus FDA POA "unjustifiably" favors certain Fund Distribution Claimants also has no merit. First, "there is no rule that settlements benefit all class members equally." *In re Veeco Instruments Inc. Sec. Litig.,* No. 05 MDL 01695 (CM), 2007 WL 4115809, at *13 (S.D.N.Y. Nov. 7, 2007) (citation omitted). Rather, a plan of allocation may allow varying recoveries for claimants. *Id.* In any event, the FDA POA does not permit one group of investors to "unjustifiably" recover more than any other investor, as it takes into account all equitable, legal and factual considerations regarding the source of the cash in the FDA, the Trustee Settlement and the circumstances of each of the Funds and their investors. *See* Phillips Decl. at ¶¶21-22. Martin's claim that all Fund Distribution Claimants are "similarly situated" and, thus, should all share equally in the FDA is also unfounded because it ignores the differences in the Funds regarding customer status, net winner status, Madoff exposure and contributions to the Trustee Settlement and to the FDA.[6]

Martin's citations to the Stipulation in support of his objection are equally unavailing. Similar to Philadelphia Life, Martin claims the definition of Fund Distribution Claimant in Paragraph 1.18 of the Stipulation gives all investors in the Funds the right to a disbursement of funds from the FDA. *See* Martin Objection at 8, 12-13, 24, ECF No 1146. For the same reasons discussed above, this argument is without merit. In no way does the Stipulation's statement of eligibility create an entitlement to a distribution from the FDA.

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[6] In addition, as discussed in Class Counsel's memorandum in opposition to Martin's plan of allocation motion, the FDA is not a receivership and even if it were, not all investors share equally in the allocation of assets from a receivership estate. ECF No. 1134. Rather, the assets are allocated based upon the seniority of the respective interests, among other considerations.

Martin also erroneously states that Paragraph 2.21 and Paragraph 5.6 of the Stipulation "pools the SIPC recovery in the FDA." *See* Martin Objection at 12, ECF No 1146. In fact, Paragraph 2.21 governs how money flows into the FDA, but says nothing about how money should flow out of the FDA. The mere fact that certain Funds deposited cash into the FDA does not mean that those assets become the property of investors in all of the Funds. Paragraph 5.6 states that the Settling Defendants cannot receive a distribution from the FDA. It does not govern the allocation of funds from the FDA to Fund Distribution Claimants, and it does erase any ownership interest the investors may have in the assets deposited into the FDA by the Funds in which they invested.

Moreover, contrary to Martin's assertions, Class Counsel do not contend the Trustee Settlement exclusively governs the allocation of funds from the FDA. Rather, the Consensus FDA POA, which was developed by Class Counsel through the Mediation process and related negotiations, provides certain Funds with Virtual SIPC Claims, Cross Investments and/or the XL Priority Allocation, none of which is explicitly included in the Trustee Settlement. While, the Consensus FDA POA is consistent with the terms of the Trustee Settlement, it allocates the assets of the FDA in the most equitable manner possible.[7]

Martin's claim that Class Counsel is "judicially estopped" from arguing that the Trustee Settlement affects the allocation of the SIPC recovery is also flawed. *See id.* at 17-19. The statements of Class Counsel that Martin cites in this regard do not support his contention that Class Counsel would ignore the Trustee Settlement, or that it was irrelevant to the allocation of recoveries resulting from the SIPC Claims of the various Funds.

b. Martin's Proposal should be Rejected

In his proposal, Martin seeks to take the assets contributed to the FDA by Rye Onshore, Rye Offshore and Rye Insurance (direct customers of BLMIS and net losers), and improperly reallocate

[7] Despite Martin's contention (Martin Objection. at 14-15, ECF No 1146), Class Counsel never argued for "pooling" the SIPC recovery without regard to the respective assets of the Rye and Tremont Funds.

them to investors who contributed little or nothing to the FDA, and even to net winners. However, pursuant to the terms of the Trustee Settlement, only Rye Onshore, Rye Offshore and Rye Insurance were given Customer Claims, which were "to be fairly and equitably allocated among [those Funds] and their respective partners and/or investors." Settlement Agreement at 14, 16, *Picard* (July 28, 2011), ECF No. 17-1. The purpose of the FDA is to effect an orderly liquidation of the Rye Funds and distribution of those assets to their respective investors. While TOP II has a small interest in the XL Fund through a Cross Investment, it otherwise has no legal right to the assets of any other Rye Fund. Nothing in the Settlement or the Trustee Settlement supports Martin's proposal to reallocate the assets in the FDA to non-contributing Funds in a manner that would completely ignore the Trustee Settlement. In contrast, the Consensus FDA POA takes into account the relevant equities of the Funds and allocates the FDA in a manner that is consistent with the Trustee Settlement.[8]

Martin's proposal is also improper because it gives "off-the-top" to investors in the Funds that contributed to the Trustee Settlement 100% of the cash those Funds paid to the Trustee in connection with that settlement. This priority allocation is inappropriate because: (i) none of the payments to the Trustee were deposited into the FDA for distribution to Fund Distribution Claimants; (ii) the payments by the Prime Fund and the Tremont Funds did not result in a recognized claim in the Madoff Bankruptcy proceeding; and (iii) the payments that did result in a recognized claim in the Madoff Bankruptcy did not receive a priority, but only a claim equal to 80% of those payments.

In addition, Martin's proposal fails to address the fact that the Rye and Tremont Funds had different exposures to Madoff, and that the Tremont Funds may only participate in the FDA to the extent those Funds have Cross Investments in the Rye Funds, which were 100% invested in Madoff. The Madoff exposures of the Tremont Funds ranged from less than one percent to over 28 percent,

[8] Martin erroneously claims that Class Counsel maintain "the Trustee Settlement exclusively entitles Rye Investors to the SIPC Recovery." Martin Objection at 16, ECF No. 1146. Class Counsel has only stated that the Consensus FDA POA is "*consistent*" with the Trustee Settlement. Moving Br. at 21. Indeed, if the Trustee Settlement was the only factor in determining how the FDA was distributed, the Consensus FDA POA would not contain provisions for Virtual SIPC Claims, the preservation of Cross Investments and the XL Priority Allocation.

with TOP II, the Fund in which Martin invested, only 6.5 percent exposed to Madoff. Martin seeks to allocate the FDA to Fund Distribution Claimants based upon their net investment, without considering the percent to which their net investment was actually exposed to Madoff. This disregard for Madoff exposure would treat Fund Distribution Claimants invested in the Tremont Funds unfairly because they would receive a credit for 100% of their total net investment, regardless of the Madoff exposure of the Tremont Fund in which they invested. For this additional reason, the Martin proposal should be rejected.

4. The Objection Filed by Antonio G. Calabrese Should be Overruled because the Now Final Settlement Explicitly Excludes Rye Select Broad Market Insurance LDC from the FDA

Calabrese contends that the Consensus FDA POA does not provide a sufficient recovery for investors in Insurance LDC, in which Calabrese invested through Bermuda Life. As discussed above, given that (i) Calabrese is not a direct investor in Insurance LDC; (ii) the Settlement explicitly excludes the LDC Fund from participating in the FDA; (iii) investors in the Liquidating Funds, including Insurance LDC, are excluded from the definition of Fund Distribution Claimants; (iv) the Stipulation here does not include Bermuda Life as an Eligible Carrier; and (v) any money in the Liquidating Funds is to be distributed to the Liquidators of those Funds, *not their investors*, Calabrese's contention is without merit. *See* Stipulation at ¶¶1.18, 1.19, 1.29, 1.50, 1.61.

Calabrese's other arguments regarding the Consensus FDA POA -- like those of the other objectors -- are rife with erroneous assumptions and factual inaccuracies too numerous to correct here, but, by way of example, only Calabrese misstates the amount of cash currently in the FDA, thereby understating the recovery of many of the Funds. Calabrese Objection at 4, 17, ECF No. 1153. Calabrese also fails to recognize that the $650 million loan has already been repaid from the SIPC recoveries of Rye Onshore and Rye Offshore and, thus, the remaining balance of the FDA is not $358 million, but approximately $655 million.

Calabrese's contentions that the Stipulation contains language stating that (i) the FDA is a "single account" to hold the SIPC recoveries and (ii) only limited partners or shareholders can receive a distribution of the FDA somehow entitle him to a payment from the FDA based on his investment in Bermuda Life are also erroneous. *Id.* at 18-19. As discussed above, the Stipulation clearly excludes investors in the Liquidating Funds, such as Insurance LDC, from the definition of Fund Distribution Claimants, and states that any cash in the Liquidating Funds goes to the Liquidators of those Funds in the Cayman Islands, not their investors like Bermuda Life. Stipulation at ¶¶1.18-1.19. The Consensus FDA POA cannot change this fact simply because Calabrese wants investors in Insurance LDC to receive a recovery from the FDA.[9]

Finally, Calabrese's argument challenging the exclusion of policy holders from the definition of Fund Distribution Claimant is meritless, as the Court clearly decided this issue during the approval of the Settlement in 2011. Calabrese Objection at 22-25, ECF 1153. In this regard, the Court stated that the FDA is only available to "limited partner[s] or shareholder[s]" in the Rye and Tremont Funds. *See* Stipulation at ¶1.18; s*ee also* Hr'g Tr. 32, ECF No. 599 (the Court stating "[i]n this case, our case, you have to be an investor in the [F]unds"). During the approval of the Settlement, the Court also rejected the argument that policyholders are "investors" in the Funds, stating "[t]he policyholders did not do the investing in the Rye and Tremont [F]unds, as did the [C]lass members of the consolidated actions that are settling, and although they may have directed their investments, given directions to the insurance company, still it was the insurance company who actually did the investing . . . ." Hr'g Tr. 34-35, ECF No. 599.

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[9] The Consensus FDA POA also does not favor one party, as Calabrese claims. Calabrese Objection at 19-21, ECF 1153. Indeed, numerous Fund Distribution Claimants with interests in various Funds have expressed their support for the Consensus FDA POA, as discussed above.

IV. CLASS COUNSEL'S FEE AND EXPENSE REQUEST SHOULD BE APPROVED BY THE COURT

The FDA was created to marshal, protect, preserve and to distribute Rye Fund assets. Yet, not a single Rye Fund Distribution Claimant has objected to payment of Class Counsel's requested fees. Not even Mr. Martin, who has proposed a substantially different plan of allocation than the Consensus FDA POA, objects to the requested fee here.

In fact, the only objectors to the requested fee are Tremont Fund of Funds investors, two of which lack standing to make the objection (Philadelphia Life and Attorney Gresham's clients the so-called Tremont Fund Investors), Calabrese, a policy holder in an excluded insurer invested in an excluded Fund being liquidated in the Cayman Islands, and the limited objection of the Insurer Group which does not make an objection to payment to Class Counsel of their lodestar and expenses, but does object to the award of any multiple on that time -- apparently because over time, there is the possibility that the recovery from the Madoff Trustee could increase from the current net of $623 million to $1.446 million in the event, however unlikely, that the Madoff Trustee pays 80%. Ironically, the Insurer Group files their limited fee objection when Class Counsel's efforts have directly resulted in an FDA recovery for TOF III, the Fund in which they invested, of over $46 million (assuming an 80% payout) out of that Fund's total Madoff-related losses of almost $66.5 million, or more than 69% percent of their Madoff-related losses. In this regard it is worth noting that three TOF III insurer investors have not joined in the Insurer Group's limited objection.

Leaving aside that the FDA is funded by the Trustee Settlement that Class Counsel worked to achieve and protect on appeal, that it flows through the FDA, created, structured and now administered by Class Counsel, and that it is allocated through an FDA POA that is the direct result of some two years of Mediation-related efforts, discussions and negotiations that resulted in the support of almost $3.62 billion in net investment (including the Insurer Group) -- it should be noted that the 3% fee request yields a current lodestar multiplier of just 1.17.

Any subsequent payout by the Trustee is uncertain and will take years to reach the $1.446 billion potential, by which time Class Counsel's lodestar is sure to have substantially increased because of the ongoing litigation of potential appeals, motions and claim-related issues and the time and expense associated with the ongoing claims issues and the administration of future distributions. To put this in perspective, the activities of various movants and ongoing claims and Mediation efforts over the last six weeks, alone, have increased our collective lodestar by $1,051,891.75. Supplemental Joint Fund Distribution Account Declaration, at Ex. 1. Even in the event the Trustee payout yields a net recovery of $1.446 billion, at the current lodestar of $17,036,789.50, the 3% fee yields a lodestar multiple of just 2.89, well within the range of lodestar multiples awarded by court's in this Circuit.

In any event, to provide certainty for the Court and in consideration of the Insurer Group's concerns, Class Counsel agree to cap their fees at the lesser of 3% or a total lodestar multiple at the time of any subsequent distribution of 2.5x.

A. Class Counsel's Fee Request Satisfies The Applicable Standard

1. Class Counsel Created a Meaningful Benefit For All Fund Distribution Claimants

As discussed in our Moving Brief and in some detail in the introduction above, Class Counsel's efforts were central to the creation, structuring and administration of the FDA, and a substantial factor in bringing about the Madoff Trustee Settlement that is the principal source of funding for the FDA. The Court will recall that Class Counsel agreed with the Court to defer consideration of the portion of attorneys' fees payable from the FDA, until such time as the FDA POA was submitted for approval, given the Court's anticipation that significant legal work would be required in defending the Settlement and Trustee Settlement, prosecuting related actions contemplated under the Settlement and, most significantly, bringing the NSF and FDA allocation issues to conclusion. *See* Moving Brief, at 27. Here, Class Counsel have secured meaningful benefits under the Settlement as a whole and, in particular, in connection with the FDA, worked tirelessly to defend the Settlement and bring about and

defend the Trustee Settlement, developed the allocation protocol and hammered out the proposed Consensus FDA POA through several Mediation sessions and countless related discussions to ensure the proceeds of the FDA are reasonably, fairly and adequately allocated among eligible claimants, and dedicated numerous hours to the administration of the FDA. *See* Moving Brief, at 28. These efforts have undoubtedly provided a substantial benefit to all Fund Distribution Claimants. *Id.*

In addition, Class Counsel have worked extensively with Defendants in connection with the Trustee litigation, the defense of the SIPC and BLMIS bankruptcy claims, and to address various issues related to the wind down of Tremont's operations in order to achieve the greatest amount of recovery for investors in the Funds. *See* Joint FDA Decl. at ¶7; *see also* Moving Brief, at 28. Without Class Counsel's efforts in securing the Settlement, any recovery from the Trustee Settlement would have only been directed to investors in Rye Onshore, Rye Offshore and possibly -- but not certainly -- to Rye Insurance (unless Cross Investments were preserved as they are in the Consensus FDA POA), as only those Funds had SIPC Claims. Accordingly, investors in the other Funds, which were either net winners or non-customers of BLMIS (the Tremont Funds, Prime and the XL Fund), would have been left with no recovery.

2. Class Counsel Undertook Significant Risk in these Actions

Class Counsel undertook a significant risk in bringing the derivative claims that gave rise to the FDA portion of the Settlement and ultimately drove the Trustee Settlement, and in undertaking the significant obligations related to the preservation, protection and administration of FDA assets before the Trustee Settlement was negotiated and finalized. While the Settlement and the Madoff Trustee Settlement are long since final, the same risks that attended those Settlements (as discussed more fully in the initial fee application and approval order) are equally applicable to the present circumstances. This is particularly true where, as here, but for the creation by Class Counsel of the FDA structure and their contribution in securing the hundreds of millions of dollars flowing in through the Madoff Trustee Settlement, there would effectively be no money to distribute to Fund Distribution Claimants.

As described above, Class Counsel have spoken or met with scores of investors in the course of preparing the proposed FDA POA, which investors represent the vast majority of the aggregate net ownership interests of the Rye and Tremont Funds. Joint FDA Decl. at ¶21; *see also* Moving Brief, at 29. This process involved drafting and proposing alternative plans of allocation, soliciting and reviewing feedback, engaging various parties in mediation and regular coordination and conducting of discussions with claimants to achieve support for the proposed plan. Joint FDA Decl. at ¶16; *see also* Moving Brief, at 29. The result is a proposed FDA POA that substantially benefits Fund Distribution Claimants because it protects each Claimant's interests and fairly and equitably allocates the proceeds of the FDA. Joint FDA Decl. at ¶23; *see also* Moving Brief, at 29.

Class Counsel have continued to work with Fund Distribution Claimants to ensure that the proceeds of the FDA are reasonably, fairly and adequately allocated, and to defend the Consensus FDA POA, when necessary. In that regard, Class Counsel have expended a significant amount of additional time and effort opposing motions in connection with the FDA POA and negotiating potential resolutions. Class Counsel expended more than 1,700 hours over the last six weeks, alone, addressing FutureSelect's Subclass Motion and POA Motion, Martin's Motion and ongoing Mediation-related issues. *See* Supplemental Joint Fund Distribution Account Declaration at Ex. 1. Moreover, Class Counsel anticipate they will spend a significant amount of additional time, as required by this complex administration and the need to distribute subsequent payments from the Madoff Trustee. The 3% fee request is clearly reasonable in light of the benefit secured by Class Counsel to date, as well as the continued benefit Class Counsel will provide as the administration proceeds. Moreover, the requested percentage is reasonable under the prevailing law in this Circuit. *See* Moving Brief, at 32-34.

Based upon the additional time expended by Class Counsel in this matter since the filing of this Motion, the total number of hours devoted to the prosecution of this and related post-May 6, 2011

proceedings has increased to 25,596.20. Accordingly, the requested fee now amounts to a multiple of only 1.09 of the total lodestar using the current value of the net FDA recovery of $623 million (and any future lodestar multiplier is capped at 2.5x as noted above regardless of what the subsequent FDA recoveries may be. *See* Moving Brief, at 33-34. Thus, we respectfully request the Court approve Class Counsel's fee and expense request in its entirety.

B. The Objections To Class Counsel's Fee Have No Merit

Four groups of investors have objected to Class Counsel's fee and expense request. For the reasons discussed below, those objections should be overruled.

1. Calabrese, Philadelphia Life and the Tremont Fund Objectors Lack Standing to Object to the Requested Fee

As discussed in Section III above, Calabrese, to the extent that he bases his objection on his investment in Insurance LDC, lacks standing because he is a policy holder in an excluded insurer invested in an excluded fund being liquidated in the Cayman Islands, Philadelphia Life lacks standing to object to Class Counsel's fee request because it is a net winner and, as such, is not entitled to any recovery from the FDA, and the Tremont Fund Objectors lack standing because they were either tendered their entire Madoff-related losses or never filed a notice of appearance or a complaint in the Actions.

2. The Insurers Group Mischaracterizes Class Counsel's Role as well as the Risks Associated with the FDA

The Insurer Group wholly mischaracterizes Class Counsel as "administrators" in connection with the FDA.[10] By mischaracterizing Class Counsel as such, rather than as counsel litigating on behalf of all Fund Distribution Claimants, the Insurers Group:

- Ignores Class Counsel's role in creating, structuring and preserving the FDA, which allows for various benefits to flow to investors in the Rye and Tremont Funds who would otherwise not receive such benefits;

[10] We note the Insurer Group has conceded that Class Counsel should be paid a fee equal to their lodestar, as well as the requested expenses. Thus, the Insurer Group's objection is limited to the application of a multiplier to Class Counsel's lodestar.

- Ignores Class Counsel's role as litigators in the Actions over the past four years, during which time they have fought to defend the Settlement and Class Counsel's role during the Mediation over the past two years, during which time they have successfully negotiated and fought for the Consensus FDA POA;
- Ignores Class Counsel's negotiations and efforts to preserve the Trustee Settlement in connection with the Bankruptcy claims -- in this regard, it is important to note that the recovery to the FDA, net of the proposed fees and expenses, at an assumed 80% payout by the Trustee is $1.446 billion;
- Ignores Class Counsel's role in creating out of the FDA structure various benefits that investors in none of the Funds (other than Rye Onshore, Rye Offshore and Rye insurance) would have otherwise received and, in this regard, but for the efforts of Class Counsel, the following benefits would not have been obtained: (1) the preservation of Cross Investments for all Funds; (2) the Virtual SIPC Claims for Funds other than Rye Onshore, Rye Offshore and Rye Insurance, and related concessions; (3) the XL Priority Allocation; and, most recently (4) the compromise among HSBC, the XL Fund and its investors, in connection with the Swap Collateral, pursuant to which an additional $25,546,400 will be directed to XL Fund investors on a priority basis;
- Ignores Class Counsel's role in litigating issues raised in motions directly challenging several of the benefits discussed above;
- Ignores Class Counsel's role in the future administration of the FDA, as well as anticipated motion practice and possible appeals involving payment amounts, assignor/assignee designations and related distribution issues, all of which will require us to continue to defend the FDA POA at every juncture, protect the assets of the FDA and ensure those assets are distributed properly; and
- Ignores the fact that Class Counsel developed the FDA Mediation Protocol and spent two years working with all interested parties and the Mediator to develop the Consensus FDA POA, which, among other things, results in various Rye and Tremont Fund recoveries that are purely the product of compromises reached during the Mediation process, including, for example: XL Fund investors will receive a benefit in the amount of $57,995,639; (and assuming an 80% payout from the Trustee for all of the following) investors in TOF III will receive over $46 million of its $66.5 million Madoff-related losses; investors in the Prime Fund will receive over $43.5 million; investors in Tremont Market Neutral Fund, L.P. will receive over $1.87 million; investors in Tremont Market Neutral Fund II, L.P. will receive over $7.39 million; and investors in Tremont Opportunity Fund II L.P. will receive over $2.98 million (*see* Entwistle Supplemental Declaration at Ex. E).

In addition, the Insurer's Group disregards the fact that when Class Counsel filed the derivative action, which ultimately gave rise to the FDA, Class Counsel took on the risk that we would not get paid. Moreover, when we agreed to the structure of the Settlement and the FDA, and worked with the Defendants on those issues, there was a substantial risk that there would be little or no proceeds from the Trustee to be deposited into the FDA. Indeed, at the time of the Settlement, the Trustee was still

litigating its clawback claims against the Defendants. The Trustee's case was only settled after Class Counsel, working with Defendants, forced the issue with the Trustee and promoted a settlement.

3. The Arguments of Philadelphia Life, the Tremont Fund Objectors and Calabrese Regarding Class Counsel's Requested Fee are Without Merit

Even assuming Philadelphia Life and The Tremont Fund Investors have standing to object, their argument that Class Counsel cannot recover fees "under Rule 23(h)" misstates the applicable law in the Second Circuit. There is no requirement a class must be certified for an award of attorneys' fees in common fund cases, nor is it "unfair" to award fees in such a case. *See City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM) (GWG), 2014 WL 1883494, at *12 (S.D.N.Y. May 9, 2014) (court awarded lead counsel attorneys' fees in a derivative case that was not a class action), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015).

Moreover, the objections by Philadelphia Life, the Tremont Fund Objectors and Calabrese erroneously contend that Class Counsel's efforts and the creation of the FDA resulted in no benefit to Fund Distribution Claimants, and that Class Counsel's fee is unearned, despite the thousands of hours of work Class Counsel spent on this case and the overwhelming benefits created, allocated and distributed through the Settlement, the Trustee Settlement and the Consensus FDA POA. However, without Class Counsel's efforts (i) there is no guarantee the Trustee Settlement would have resulted in as large of a recovery as it did, (ii) Fund Distribution Claimants would have to hire and pay for their own counsel to navigate the distribution of assets from the Trustee Settlement by the Defendants, (iii) the Funds without SIPC claims would have not received any portion of the recoveries related to those claims, (iv) HSBC would have potentially prevailed in its claim against the XL Fund based upon the Swap Collateral, thus preventing XL Fund investors from receiving any payment out of the FDA, (v) Defendants would have been able to recover from the FDA and (iv) part of the SIPC recovery would have gone to Defendants, who would have incurred significant costs in distributing those assets to investors while winding down the Funds. *See* Settlement Agreement at 18, *Picard* (July 28, 2011),

ECF No. 17-1 (stating that Defendants can use the SIPC recovery for accounting, tax, legal regulatory and other costs of winding up the Defendant entities -- a result avoided by the creation of the FDA by Class Counsel). Indeed, we believe the Court would not have approved the Settlement containing the FDA if it thought Class Counsel's efforts regarding the FDA would not create a benefit for investors in the Funds. *See* Hr'g Tr. 78, ECF No. 599 (the Court stating "there is a beneficial purpose to this fund distribution account"). Put another way, the objectors' arguments that Class Counsel's fee request should be denied simply overlooks the entirety of the record before the Court.

The other objections of the Tremont Fund Objectors concerning Class Counsel's fee request are similarly without basis. In this regard, the Tremont Fund Objectors claim there was no notice regarding the requested fee. In fact, the original notice disseminated directly to the investors in 2011 specifically stated that Class Counsel intended to request 3% of the FDA for attorneys' fees. *See* Aff. of Jose C. Fraga Regarding Notice & Suppl. Notice, Exhibit A at 7-8, ECF No. 569. Moreover, the instant Motion, filed by ECF and related submissions were posted on each of the Firm's websites and on the website for the Actions at the time of filing.[11]

Finally, the arguments by the Tremont Fund Objectors and Calabrese that Class Counsel's fee and expense request are not supported by any evidence, are contradicted by the affidavits submitted in connection with this Motion, which attest to the work performed by Class Counsel and contain details regarding the time and expenses incurred. *See* Class Counsel Decl., ECF No. 1090.

[11] The Tremont Fund Objector's citation to fee proposals made to New York State Common Retirement Fund Division of Legal Services (the "Fee Grid") is also unavailing. Indeed, the Fee Grid actually demonstrates that Class Counsel's fee here is reasonable because, under the grid, Class Counsel would be entitled to $33.44 million in fees from the current distribution of the FDA -- as opposed to the $ 18.7m payable currently under Counsel's current 3% proposal. Gresham Decl. at 3, ECF No. 1148-3.

CONCLUSION

For the foregoing reasons, Class Counsel's Motion for Approval of Fund Distribution Account Plan of Allocation, Distribution Procedures, Attorneys' Fees and Reimbursement of Expenses should be granted, the Martin objection should be overruled in all respects and the Martin motion and FutureSelect motions should be denied to the extent they are not withdrawn.

Dated: August 17, 2015
New York, New York

ENTWISTLE & CAPPUCCI LLP

/s/ Andrew J. Entwistle
Andrew J. Entwistle
Arthur V. Nealon
Robert N. Cappucci
280 Park Avenue, 26th Floor West
New York, NY 10017
(212) 894-7200
aentwistle@entwistle-law.com

HAGENS BERMAN SOBOL SHAPIRO LLP

/s/ Reed R. Kathrein
Reed R. Kathrein
Lee Gordon
715 Hearst Avenue, Suite 202
Berkeley, CA 94710
(510) 725-3000
reed@hbsslaw.com

Co-Lead Counsel for the State Law Actions

BERNSTEIN LIEBHARD LLP

/s/ Jeffrey M. Haber
Jeffrey M. Haber
Stephanie M. Beige
10 East 40th Street
New York, NY 10016
(212) 779-1414
haber@bernlieb.com

Lead Counsel for the Securities Actions

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

IN RE TREMONT SECURITIES LAW, STATE LAW AND INSURANCE LITIGATION	:	**Master File No.: 08 Civ. 11117 (TPG)**
This Document Relates to: All Actions	:	

[PROPOSED] ORDER AND FINAL JUDGMENT GRANTING PLAINTIFFS' SETTLEMENT CLASS COUNSEL'S MOTION FOR APPROVAL OF FUND DISTRIBUTION ACCOUNT PLAN OF ALLOCATION, DISTRIBUTION PROCEDURES, ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

Plaintiffs' Settlement Class Counsel ("Class Counsel") filed a motion with this Court (the "Motion") for an order approving the Consensus Fund Distribution Account ("FDA") Plan of Allocation ("FDA POA"), as amended, distribution procedures, attorneys' fees and reimbursement of expenses in the above-captioned actions (the "Actions"), and the Court having considered all the submissions and arguments in support of the Motion, including the Affidavit of Stephen J. Cirami of the Garden City Group, LLC ("GCG"), with exhibits (the "Cirami FDA Affidavit"), the Joint Declaration of Andrew J. Entwistle, Reed R. Kathrein and Jeffrey M. Haber, with exhibits, the Supplemental Joint Declaration of Andrew J. Entwistle, Reed R. Kathrein and Jeffrey M. Haber, with exhibits, the Declaration of Andrew J. Entwistle in Further Support of the Motion, with exhibits, the Declaration of Layn Philips, the Memorandum in Support of Motion for Approval of Fund Distribution Account Plan of Allocation, Distribution to Fund Distribution Claimants, Attorneys' Fees and Reimbursement of Expenses and the Memorandum in Further Support of Motion for Approval of Fund Distribution Account Plan of Allocation, Distribution to Fund Distribution Claimants, Attorneys' Fees and Reimbursement of

Expenses, and the Court also having considered the responses to the Motion filed by various investors;

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. This Order and Judgment incorporates by reference the definitions in the Consensus FDA POA, as amended, Stipulation of Partial Settlement dated as of February 23, 2011 (ECF No. 392-1) (the "Stipulation") and any additional definitions in the Cirami FDA Affidavit, and all terms used herein shall have the meanings as set forth in the Stipulation, the Consensus FDA POA, as amended, and the Cirami FDA Affidavit.

2. This Court has jurisdiction over the subject matter of the Actions and over all parties to the Actions, including the Fund Distribution Claimants.

3. The portion of Class Counsel's Motion seeking approval of the Consensus FDA POA, as amended, attached hereto as Exhibit A, is **GRANTED**;

4. The portion of Class Counsel's Motion seeking approval of the administrative determinations by GCG with respect to calculating Fund Distribution Claimants' disbursements, the creation of the FDA Reserve, the claims resolution and related procedures described in the Cirami FDA Affidavit, the Initial Disbursement of the unreserved portion of the FDA to Fund Distribution Claimants, and the Further Disbursement and Unclaimed Balance procedures, with remaining balance after all Further Disbursements, if any, to be disbursed equally to the American National Red Cross and American Cancer Society, Inc., as appropriate, is **GRANTED**;

5. The portion of Class Counsel's Motion seeking attorneys' fees and the reimbursement of expenses is **GRANTED** as follows:

a. Class Counsel is awarded 3% of the current FDA and all future amounts deposited into the FDA (excluding: (i) the amounts used to repay the loan taken out by the two Rye Funds to complete the settlement with the Madoff Trustee; and (ii) the XL Priority Allocation) which may be paid on entry of this Order and Judgment and without further application to the Court, however, such award shall not exceed 2.5 times Class Counsel's lodestar, to be determined at the time of any subsequent FDA recoveries;

b. Class Counsel is reimbursed for $975,322.56 in total out-of-pocket costs and expenses that were reasonably and necessarily incurred in respect of post-May 6, 2011 litigation and related activities; and

c. To the extent any award of attorneys' fees and expenses to Class Counsel is paid before this Order and Judgment becomes Final, Class Counsel shall repay to the FDA the amounts so paid, plus accrued interest at the same rate as earned on the FDA, if and when, as a result of any appeal and/or further proceedings, or successful collateral attack, any fee or expense award is modified or reversed, or for any other reason this Order and Judgment does not become Final.

6. The objections filed in response to the Motion are **OVERRULED**;

7. The motion for approval of a plan of allocation, certification of a subclass and discovery filed by Michael S. Martin (ECF No. 1095) is **DENIED**; and

8. The motion for approval of a plan of allocation (ECF No. 1123) and the motion for certification of subclasses (ECF No. 1097) filed by FutureSelect Prime Advisor II LLC, Telesis IIW, LLC and The Merriwell Fund, L.P. are **DENIED**.

9. The provisions of this Order at par. 3, par. 4, par. 5, par. 6, par. 7 and par. 8 are independent of each other, and an appeal from any one (or more) of par. 3, par. 4, par. 5, par. 6, par. 7 and par. 8 shall not impact the effectiveness of the others. Moreover, Class Counsel are hereby authorized to determine and proceed to distribute, in accordance with the Consensus FDA POA, as amended, and Distribution Plan and this Order, any portion of the FDA that is not directly impacted by any appeals. This distribution shall proceed regardless of the pendency of any appeal. The purpose of this provision is to assure the expeditious distribution of the FDA and, in particular, to assure that one or more self-interested investors do not seek to hold up the distribution of the FDA through post-judgment proceedings, including but not limited to an appeal of this Order and Final Judgment.

10. Payments to Fund Distribution Claimants by GCG pursuant to the Consensus FDA POA, as amended, and Distribution Plan shall be conclusive against all Fund Distribution Claimants. No Person shall have any claim against Class Counsel or GCG based upon disbursements or determinations made substantially in accordance with the Consensus FDA POA, as amended, and Distribution Plan or orders of this Court, except in the case of fraud or willful misconduct.

11. The Court retains jurisdiction over the Actions and all parties thereto, including the Fund Distribution Claimants and over any further application or matter that may arise herein.

12. In light of all the relevant circumstances, and in light of the factors appearing from the moving and reply papers, the Court expressly finds and determines that no just reason exists for delay in entering final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure with respect to this Order and Final Judgment. Further, the direction of the entry of

final judgment pursuant to Rule 54(b) is appropriate and proper because this Judgment will expedite the distribution of the FDA to Fund Distribution Claimants.

SO ORDERED

Dated: New York, New York

August ___, 2015

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HONORABLE THOMAS P. GRIESA
UNITED STATES DISTRICT JUDGE