UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE FOREIGN EXCHANGE BENCHMARK RATES ANTITRUST LITIGATION	No. 1:13-cv-07789-LGS

MEMORANDUM OF LAW IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

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EXPLANATION OF DEFINED TERMS AND CITATION FORMS

The following defined terms are used in this Memorandum:

Parties

- "Class Plaintiffs" are Aureus Currency Fund, L.P., The City of Philadelphia, Board of Pensions and Retirement, Employees' Retirement System of the Government of the Virgin Islands, Employees' Retirement System of Puerto Rico Electric Power Authority, Fresno County Employees' Retirement Association, Haverhill Retirement System, Oklahoma Firefighters Pension and Retirement System, State-Boston Retirement System, Syena Global Emerging Markets Fund, LP, Tiberius OC Fund, Ltd., Value Recovery Fund L.L.C., and United Food and Commercial Workers Union and Participating Food Industry Employers Tri-State Pension Fund, J. Paul Antonello, Marc G. Federighi, Thomas Gramatis, Doug Harvey, Izee Trading Company, John Kerstein, Michael Melissinos, Mark Miller, Robert Miller, Richard Preschern d/b/a Preschern Trading, Peter Rives, Michael J. Smith, Jeffrey Sterk, Kimberly Sterk, and Systrax Corporation.

- "Parties" or "Settling Parties" are Class Plaintiffs and Settling Defendants.

- "Defendants" are Settling Defendants and Non-Settling Defendant.

- "Settling Defendants" are Bank of America, BTMU, Barclays, BNP Paribas, Citigroup, Deutsche Bank, Goldman Sachs, HSBC, JPMorgan, Morgan Stanley, RBC, RBS, Soc Gen, Standard Chartered, and UBS.

- "Non-Settling Defendant" is Credit Suisse.

- "Bank of America" is Bank of America Corporation, Bank of America, N.A., and Merrill Lynch, Pierce, Fenner & Smith Incorporated.

- "BTMU" is The Bank of Tokyo-Mitsubishi UFJ, Ltd.

- "Barclays" is Barclays Bank PLC and Barclays Capital Inc.

- "BNP Paribas" is BNP Paribas Group, BNP Paribas North America Inc., BNP Paribas Securities Corp., and BNP Prime Brokerage, Inc.

- "Citigroup" is Citigroup Inc., Citibank, N.A., Citicorp, and Citigroup Global Markets Inc.

- "Credit Suisse" is Credit Suisse AG, Credit Suisse Group AG, and Credit Suisse Securities (USA) LLC.

- "Deutsche Bank" is Deutsche Bank AG.

- "Goldman Sachs" is The Goldman Sachs Group, Inc. and Goldman, Sachs & Co.

- "HSBC" is HSBC Holdings PLC, HSBC Bank PLC, HSBC North America Holdings Inc., HSBC Bank USA, N.A., and HSBC Securities (USA) Inc.

- "JPMorgan" is JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A.

- "Morgan Stanley" is Morgan Stanley, Morgan Stanley & Co. LLC, and Morgan Stanley & Co. International PLC.

- "RBC" is RBC Capital Markets LLC.

- "RBS" is The Royal Bank of Scotland Group PLC, The Royal Bank of Scotland PLC, and RBS Securities Inc.

- "Soc Gen" is Société Générale.

- "Standard Chartered" is Standard Chartered Bank.

- "UBS" is UBS AG, UBS Group AG, and UBS Securities LLC.

Settlement Agreements

- "Bank of America Stip." is the Stipulation and Agreement of Settlement with Bank of America Corporation, Bank of America, N.A., and Merrill Lynch, Pierce, Fenner & Smith Incorporated.

- "BTMU Stip." is the Stipulation and Agreement of Settlement with The Bank of Tokyo-Mitsubishi UFJ, Ltd.

- "Barclays Stip." is the Stipulation and Agreement of Settlement with Barclays Bank PLC and Barclays Capital Inc.

- "BNP Paribas Stip." is the Stipulation and Agreement of Settlement with BNP Paribas Group, BNP Paribas North America Inc., BNP Paribas Securities Corp., and BNP Prime Brokerage, Inc.

- "Citigroup Stip." is the Stipulation and Agreement of Settlement with Citigroup Inc., Citibank, N.A., Citicorp, and Citigroup Global Markets Inc.

- "Deutsche Bank Stip." is the Stipulation and Agreement of Settlement with Deutsche Bank AG.

- "Goldman Sachs Stip." is the Stipulation and Agreement of Settlement with The Goldman Sachs Group, Inc. and Goldman, Sachs & Co.

- "HSBC Stip." is the Stipulation and Agreement of Settlement with HSBC Holdings PLC, HSBC Bank PLC, HSBC North America Holdings Inc., HSBC Bank USA, N.A., and HSBC Securities (USA) Inc.

- "JPMorgan Stip." is the Stipulation and Agreement of Settlement with JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A.

- "JPMorgan Amended Stip." is the Stipulation and Amended Agreement of Settlement with JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A.

- "Morgan Stanley Stip." is the Stipulation and Agreement of Settlement with Morgan Stanley, Morgan Stanley & Co. LLC, and Morgan Stanley & Co. International PLC.

- "RBC Stip." is the Stipulation and Agreement of Settlement with RBC Capital Markets LLC.

- "RBS Stip." is the Stipulation and Agreement of Settlement with The Royal Bank of Scotland Group PLC, The Royal Bank of Scotland PLC, and RBS Securities Inc.

- "Soc Gen Stip." is the Stipulation and Agreement of Settlement with Société Générale S.A.

- "Standard Chartered Stip." is the Stipulation and Agreement of Settlement with Standard Chartered Bank.

- "UBS Stip." is the Stipulation and Agreement of Settlement with UBS AG, UBS Group AG, and UBS Securities LLC.

- "UBS Amended Stip." is the Stipulation and Amended Agreement of Settlement with UBS AG, UBS Group AG, and UBS Securities LLC.

- "Settlement Agreements" or "Settlements" are the Bank of America Stip., BTMU Stip., Barclays Stip., BNP Paribas Stip., Citigroup Stip., Deutsche Bank Stip., Goldman Sachs Stip., HSBC Stip., JPMorgan Amended Stip., Morgan Stanley Stip., RBC Stip., RBS Stip., Soc Gen Stip., Standard Chartered Stip., and UBS Amended Stip.

Declarations

- "Lead Counsel Decl." is the accompanying Joint Declaration of Christopher M. Burke and Michael Hausfeld in Support of (A) Class Plaintiffs' Motion for Final Approval of Settlements and (B) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses.

- "Feinberg Decl." is the accompanying Declaration of Kenneth R. Feinberg in Support of Class Plaintiffs' Motion for Final Approval of Fifteen Settlement Agreements.

- "Fitzpatrick Decl." is the accompanying Declaration of Brian T. Fitzpatrick (attached as Ex. 38 to the Lead Counsel Decl.).

- "Miller Decl." is the accompanying Declaration of Professor Geoffrey P. Miller (attached as Ex. 37 to the Lead Counsel Decl.).

- "Silver Rep." is the accompanying Report of Professor Charles Silver on the Reasonableness of Class Counsel's Request for an Award of Attorneys' Fees (attached as Ex. 39 to the Lead Counsel Decl.).

Other Defined Terms

- "Eisenberg & Miller I" is the accompanying study titled *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 EMPIRICAL LEGAL STUD. 248 (2010) (attached as Ex. 34 to the Lead Counsel Decl.).

- "Eisenberg & Miller II" is the accompanying study titled *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. 937 (2017) (attached as Ex. 35 to the Lead Counsel Decl.).

- "Fitzpatrick" is the accompanying study titled *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811 (2010) (attached as Ex. 36 to the Lead Counsel Decl.).

- "Lead Counsel" means Scott+Scott, Attorneys at Law, LLP and Hausfeld LLP.

- "Plaintiffs' Counsel" means Korein Tillery, LLC, Kirby McInerney LLP, Labaton Sucharow LLP, Lowey Dannenberg, P.C., Robbins Geller Rudman & Dowd LLP, MoginRubin LLP, Boni & Zack LLC, Obermayer Rebmann Maxwell & Hippel LLP, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, Cafferty Clobes Meriwether & Sprengel LLP, Nussbaum Law Group, P.C., Wolf Popper LLP, Entwistle & Cappucci LLP, Grant & Eisenhofer, P.A., Motley Rice LLC, Glancy Prongay & Murray LLP, Berman Tabacco, Cohen Milstein Sellers & Toll PLLC, Louis F. Burke P.C., Criden & Love, P.A., Cera LLP, Morris and Morris LLC Counselors at Law, Cowper Law LLP, Cuneo Gilbert & LaDuca, LLP, Freed Kanner London & Millen LLC, Heins Mills & Olson, P.L.C., Young Law Group, P.C., Radice Law Firm, PC, Greenwich Legal Associates, LLC, and Keller Rohrback L.L.P.; and, unless otherwise specified, Lead Counsel.

Unless otherwise defined herein, all other capitalized terms have the same meaning as set forth in the Settlement Agreements.

I. PRELIMINARY STATEMENT

At the outset of this Action, any recovery, much less one exceeding $2.3 billion, was far from certain. Nevertheless, for over four years, Plaintiffs' Counsel have invested substantial time and money in prosecuting, on a contingency basis, one of the most complex antitrust class actions in history. Those efforts have yielded extraordinary results for the Settlement Classes: 15 settlements totaling $2,310,275,000 in proceeds ("Settlement Fund"). The partial settlement of the Action is already the third largest antitrust class action settlement ever achieved. Although government regulators and prosecutors have imposed fines and reached settlements with certain banks for FX-related misconduct, the 15 settlements here are the only ones that will return money to the victims of the misconduct. Lead Counsel estimate that the Settlement Fund represents a 33% to 43% recovery of single damages the Settlement Classes could have obtained through total success on the merits at trial.

Although the first settlements reached in this Action provided momentum and assisted in focusing and reducing the contentiousness of certain discovery, they did not substantially reduce the amount of work that Plaintiffs' Counsel had to do to prepare the case for class certification and trial. Class Plaintiffs still needed to prove a conspiracy among all Defendants in order to tie any non-settling Defendants to that conspiracy. Therefore, Plaintiffs' Counsel still had to collect Settling Defendants' transaction data, review their documents, take proffers, interview witnesses, and prepare to depose their key witnesses. Credit Suisse has not settled, is represented by experienced antitrust counsel, and continues to litigate aggressively.

Investigations by government enforcers targeted only some of Defendants' FX-related misconduct alleged by Class Plaintiffs. For example, Barclays, Citigroup, JPMorgan, and RBS pleaded guilty to a conspiracy to manipulate the price of a single currency pair – U.S. Dollars and Euros – over a limited number of years. Far from piggy-backing off government

investigations, Plaintiffs' Counsel developed evidence on their own by securing critical cooperation provisions from Settling Defendants and by pursuing discovery against non-settling Defendants. Six of the Settling Defendants that will pay a combined $246.2 million were never fined by any government agency for FX misconduct.

Plaintiffs' Counsel have skillfully litigated the case for over four years. Work of this scope and risk of this magnitude should be compensated with a fair and reasonable fee. On behalf of all Plaintiffs' Counsel, Lead Counsel respectfully request that the Court award 16.51% of the Settlement Fund (or $381,353,830.27, plus interest) as attorneys' fees and also move for reimbursement of $22,495,669.73 in litigation expenses, which equates to 0.97% of the Settlement Fund. These expenses were reasonably and necessarily incurred in the prosecution of the Action. The award is commensurate with Plaintiffs' Counsel's collective efforts, the substantial risks they undertook, the outstanding results they achieved, and is in line with fees awarded in other complex, contingency fee cases.[1]

II. SUMMARY OF WORK BY PLAINTIFFS' COUNSEL[2]

Plaintiffs' Counsel invested substantial time and money in the prosecution of the Action, including investigating background facts, interviewing industry insiders, drafting complaints, briefing dispositive motions, conducting discovery, reviewing documents, working with experts,

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[1] The notice informed the Settlement Classes that Lead Counsel would apply for an award of attorneys' fees and reimbursement of litigation expenses, the total of which would not exceed 18% of the Settlement Fund. While the notice and claims administration process in this case will have many variables that can impact the overall cost, based on our experience and discussions with experts and the claims administrator, Lead Counsel estimate that total notice and administration costs in this case will be approximately $12,000,000 (0.52% of the Settlement Fund). Accordingly, Lead Counsel estimate that approximately 82% of the Settlement Fund will be distributed to the Settlement Classes. Lead Counsel Decl., ¶227. Unless otherwise noted, the paragraph symbol ("¶" or "¶¶"), standing alone, refers to the Lead Counsel Declaration.

[2] This summary comes from the Lead Counsel Declaration, which is incorporated herein by reference.

building and working with the transaction database, preparing for, defending, and conducting depositions, and creating and implementing the Plan of Distribution that will allocate the Net Settlement Fund among Settlement Class Members that submit eligible claims. ¶24. Plaintiffs' Counsel highlight some of this work on the following pages.

A. Negotiations and Settlements

While Defendants' first motion to dismiss the Consolidated Amended Class Action Complaint ("CAC") was still pending, Lead Counsel negotiated an "icebreaker" settlement with JPMorgan. ¶121. After announcing that settlement in January 2015, Lead Counsel engaged in mediations and settlement negotiations one-by-one with UBS, Citigroup, Barclays, Bank of America, Goldman Sachs, RBS, BNP Paribas, and HSBC. ¶180. As the mediator notes, Lead Counsel's strategic sequencing of the mediations was designed to and had the effect of building settlement momentum. Feinberg Decl., ¶24. Class Plaintiffs reached agreements in principle with these Defendants by June and executed Settlement Agreements by October 2015. ¶182. The Court preliminarily approved the nine proposed Settlement Agreements in December 2015. ¶183. Reached under the guidance of Kenneth R. Feinberg, one of this country's most experienced mediators in high-stakes cases, each settlement was the product of hard-fought, arm's-length negotiations over many contentious issues, including the monetary components, extent and timing of cooperation provisions, the scope of the releases, and the scope of the settlement classes. ¶¶125, 136, 143, 150, 156, 162, 167, 172, 177; *see also* Feinberg Decl. ¶¶11-13, 16, 26.

The JPMorgan and UBS settlements − the first and second settlements executed – triggered immediate cooperation obligations, which proved to be exceptionally valuable. ¶¶121, 133; *see also* Feinberg Decl., ¶¶19-20, 26. To obtain the cooperation, Lead Counsel negotiated with the Department of Justice ("DOJ") for a partial lifting of the discovery stay to allow for the

production of transaction data and limited attorney proffers. ¶37. The JPMorgan and UBS cooperation helped to substantiate a conspiracy beyond that pleaded in the CAC, including collusion on setting bid-ask spreads and fixing FX benchmark rates throughout the trading day, rather than only the WM/Reuters 4 p.m. benchmark fixes as alleged in the CAC. ¶130. The cooperation brought to the fore additional chat rooms and helped Plaintiffs' Counsel identify additional conspirators. *Id*. As a result, Class Plaintiffs broadened their claims and added four new Defendants (BTMU, RBC, Soc Gen, and Standard Chartered) in the Second Consolidated Amended Class Action Complaint ("SAC"), and negotiated increasingly valuable settlements with the other Defendants. ¶¶39, 133, 139, 146.

In 2016 and continuing into early 2017, Lead Counsel mediated individually with each of BTMU, Morgan Stanley, RBC, Soc Gen, and Standard Chartered. ¶¶186-188, 191-193, 196-198, 201-203, 206-209. Aided by the cooperation obtained from prior settlements and ongoing discovery efforts, Lead Counsel reached settlement terms with these five Defendants. *Id*.; *see also* Feinberg Decl. ¶¶11, 17, 24, 26. Since 2015, Lead Counsel had discussed resolution with Deutsche Bank, which finally culminated in a mediated settlement in September 2017. ¶¶213, 216-217. Like the 2015 settlements, these six settlements also included broad cooperation obligations. ¶¶190, 195, 200, 205, 211. Once again, each settlement was the product of hard-fought, arm's-length negotiations by experienced counsel and was reached under the guidance of Mr. Feinberg. ¶¶188, 193, 198, 203, 209; *see also* Feinberg Decl. ¶¶11-13, 17-18, 26. The Court preliminarily approved these six proposed settlements in September 2017. ¶¶212, 220.

B. Discovery Efforts

To meet their task of proving that 16 of the world's largest banks engaged in a long-running conspiracy to fix prices in the FX market, Lead Counsel organized and deployed

Plaintiffs' Counsel, ensuring that sufficient attorney resources were dedicated to prosecuting the Action, in particular, to conducting voluminous discovery. ¶232.

With the assistance of industry experts, Lead Counsel held formal training sessions – dubbed "FX School" – to educate the attorneys conducting the document review. ¶94. FX School educated the attorneys about the facts of the case, litigation objectives, technical aspects of the review platform, how FX is traded, and the unique set of terms, phrases, and code words commonly used by FX traders in chat rooms. *Id*.

Under Lead Counsel's direction, Plaintiffs' Counsel then scoured nearly 1.6 million documents, totaling more than 16.5 million printable pages, including transcripts from over 500 individual chat rooms. ¶92. A team of attorneys also listened to more than 36,000 audio files. *Id*. To maximize the value of this review, Plaintiffs' Counsel created thousands of pages of work product, including evidentiary memoranda and summaries. ¶96. Senior attorneys reviewed and refined the resulting work product, which has served (and will continue to serve) as the evidentiary basis of mediations, depositions, and briefing. *Id*. Lead Counsel have also obtained 26 attorney proffers from Settling Defendants. ¶63. While analyzing Defendants' productions, Plaintiffs' Counsel were simultaneously collecting, reviewing, and producing over 100,000 documents on behalf of Class Plaintiffs. ¶88.

Plaintiffs' Counsel used the evidence derived from document review to prepare to take more than 50 depositions of Defendants' current and former employees. ¶100. That some Defendants settled did not reduce the scope of Class Plaintiffs' deposition discovery. Class Plaintiffs still needed to prove a conspiracy among all Defendants in order to tie any non-settling Defendant to that conspiracy. Taking depositions has been complicated by DOJ's repeated requests to extend the testamentary discovery stay, which has prevented most of the key

depositions. ¶¶54, 58-61. Plaintiffs' Counsel are prepared to take those crucial depositions when the stay is finally lifted.[3] ¶¶100-103. Lead Counsel have also taken steps to depose additional current and former employees of Defendants, including filing Hague requests, serving subpoenas, and negotiating with counsel for the witnesses. *Id*. In addition, Plaintiffs' Counsel have defended more than a dozen depositions of Class Plaintiffs and more depositions are scheduled to occur over the next several months. ¶104.

Following over 100 individual meet and confers, which included the participation of technical experts on both sides of the negotiations, Defendants and non-parties produced over 6.25 terabytes of transaction data in this Action. ¶¶63, 68; *see also* Feinberg Decl., ¶28 (describing data negotiations as "contentious and complex," requiring extensive expert involvement and, at times, the mediator's intervention). Defendants produced over 7,000 files from over 30 different trading systems, amounting to approximately 10 billion rows of data. ¶63. Lead Counsel believe this to be among the largest transaction databases ever assembled for use in a single litigation. *Id*. To effectively host this quantity of data in a secure environment, Lead Counsel established and continue to maintain a platform devoted exclusively to the transaction data produced in this Action and analysis performed by Class Plaintiffs' experts. ¶¶239-240.

The importance of this transaction database cannot be understated; it was an essential first step to allowing Class Plaintiffs' experts to perform reliable economic and statistical analyses to be used for additional mediations, class certification, trial, and during claims administration. ¶237. The development, oversight, and testing of the database, along with the

[3] To date, Lead Counsel have taken Rule 30(b)(6) depositions of Credit Suisse and Deutsche Bank.

vetting of complex expert analyses based on it, required more than a dozen senior attorneys to dedicate thousands of hours over the past two years. ¶¶68-75, 89-91, 106-110, 235, 237.

III. THE REQUEST FOR ATTORNEYS' FEES SHOULD BE APPROVED

A. The Common Fund Doctrine Applies to the Settlements

Under the common fund doctrine, "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Thus, when "a class plaintiff successfully recovers a common fund for the benefit of a class, the costs of litigation should be spread among the fund's beneficiaries." *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002). In antitrust and Commodity Exchange Act ("CEA") class action settlements, courts typically award attorneys "reasonable" fees from the common fund. *See In re Credit Default Swaps Antitrust Litig.*, No. 13-md-2476 (DLC), 2016 WL 2731524, at *16 (S.D.N.Y. Apr. 26, 2016) ("*CDS Litig.*") (antitrust); *see also In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 396-97 (S.D.N.Y. 1999) (CEA).

Here, if the Settlement Agreements are approved, the Settlement Classes will receive distributions from the $2,310,275,000 common fund generated by the efforts of Plaintiffs' Counsel. Paying reasonable attorneys' fees from the common fund compensates Plaintiffs' Counsel for bringing and prosecuting the Action and furthers the purpose of the antitrust and commodity exchange laws.

B. The Requested Fee Award Is Reasonable Under the Percentage or Lodestar Method of Determining Reasonable Attorneys' Fees

In common fund cases, the court may award attorneys' fees under the "lodestar" or "percentage" method, *see Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000), although "[t]he trend in this Circuit is toward the percentage method." *Wal-Mart Stores, Inc. v.*

Visa U.S.A., Inc., 396 F.3d 96, 121 (2d Cir. 2005). Second Circuit courts favor fee awards under the percentage method because it "'directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.'" *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 348 (S.D.N.Y. 2014).[4]

1. The Fee Is Reasonable Under the Percentage Method

"Under the percentage method, the fee is a reasonable percentage of the total value of the settlement fund created for the class." *Colgate-Palmolive*, 36 F. Supp. 3d at 348. To determine a baseline reasonable fee, courts look at the range of awards approved in "other common fund settlements of a similar size and complexity, based on the subject matter of the claims." *Id.* In mega fund cases, courts typically decrease the percentage of the fee as the size of the fund increases. *In re Initial Pub. Offering Secs. Litig.*, 671 F. Supp. 2d 467, 514 (S.D.N.Y. 2009). While fee awards must be reasonable, "[a]ttorneys should not fear that, at any point, by securing a larger award for the class, they will receive a smaller award." *Colgate-Palmolive*, 36 F. Supp. 3d at 349.

Although the number of settlements of comparable in size and complexity is limited, Lead Counsel's request of fee in the amount of 16.51% of the Settlement Fund is in line with what has been deemed fair and reasonable by other courts in mega fund cases.[5] If the settlements

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[4] Unless otherwise stated, all citations are omitted and emphasis is added.

[5] *See CDS Litig.*, 2016 WL 2731524, at *17 (awarding attorneys' fees of approximately 13.61% of a $1,864,650,000 fund in antitrust class action settlement); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827, 2013 WL 1365900, at *20 (N.D. Cal. Apr. 3, 2013) (awarding attorneys' fees of 28.6% of $1.08 billion fund in antitrust class action settlement); *In re Merck & Co., Inc. Sec., Derivative & "Erisa" Litig.*, MDL No. 1658, ECF No. 896 (D.N.J. June 28, 2016) (awarding attorneys' fees of 20% of $1.06 billion fund in securities class action settlement); *Allapattah Servs. Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1213 (S.D. Fla. 2006) (awarding attorneys' fees of 31.33% of $1.06 billion fund in class action settlement of contract dispute); *In re Urethane Antitrust Litig.*, No. 04 Civ. 1616, 2016 WL 4060156, at *6 (D. Kan. July 29, 2016) (awarding 33.33% fee on $835 million settlement); *Dahl v. Bain Capital Partners, LLC*, No. 07 Civ. 12388, ECF No. 1095 (D. Mass. Feb. 2, 2015) (awarding attorneys'

before the Court are considered to be 15 separate settlements, there are many more data points from this District and elsewhere that show that a 16.51% fee is reasonable.[6]

Studies collecting empirical evidence of attorneys' fee awards in class action settlements likewise support the requested fee, whether judged in terms of forum, subject matter, or magnitude of recovery.[7] This Court has previously consulted such studies, which can serve as an "unbiased and useful reference for comparing fee cases of similar magnitude." *Colgate-Palmolive*, 36 F. Supp. 3d at 349 (citing Eisenberg & Miller I and Fitzpatrick). Professors Miller and Fitzpatrick have each submitted a declaration in which each independently concludes that

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fees of 33% of $590.5 million fund in antitrust class action settlement); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467 (S.D.N.Y. 2009) (awarding attorneys' fees of 33.33% of $586 million fund in complex securities class action settlement); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1366 (S.D. Fla. 2011) (awarding attorneys' fees of 30% of $410 million fund); *In re Adelphia Commc'ns Corp. Sec. and Derivative Litig.*, No. 03 Civ. 5755, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006), *aff'd*, 272 F. App'x 9 (2d Cir. 2008) (awarding attorneys' fees of 21.4% of $455 million fund in complex securities class action settlement).

[6] *See In re Bank of New York Mellon Corp. Forex Transactions Litig.*, No. 12-MD-2335 (LAK) (JLC), ECF No. 637, slip op. at 3 (S.D.N.Y. Sept. 24, 2015) (awarding attorneys' fees of 25% of $335 million fund); *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 JG VVP, 2011 WL 2909162, at *6 (E.D.N.Y. July 15, 2011) (awarding attorneys' fees of 25% of $153 million fund); *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 JG VVP, 2012 WL 3138596, at *4 (E.D.N.Y. Aug. 2, 2012) (awarding attorneys' fees of 25% of $198 million fund); *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 JG VVP, 2015 WL 5918273, at *6 (E.D.N.Y. Oct. 9, 2015) (awarding attorneys' fees of 22% of $332 million fund); *In re Priceline.com. Inc. Sec. Litig.*, No. 00–1884, 2007 WL 2115592, at *5 (D. Conn. July 20, 2007) (awarding attorneys' fees of 30% of $80 million fund); *In re Comverse Tech., Inc. Sec. Litig.*, No. 06 Civ. 1825 (NGG), 2010 WL 2653354, at *6 (E.D.N.Y. June 23, 2010) (awarding attorneys' fees of 25% of $225 million settlement fund); *In re Oxford Health Plans, Inc. Sec. Litig.*, MDL 1222 (CLB), 2003 U.S. Dist. Lexis 26795 (S.D.N.Y. June 12, 2003) (awarding attorneys' fees of 28% of $300 million fund); *In re Polyurethane Foam Antitrust Litig.*, No. 1:10 MD 2196, 2015 WL 1639269, at *7 (N.D. Ohio Feb. 26, 2015) (awarding attorneys' fees of 30% of $147.8 million fund); *In re Rite Aid Corp. Secs. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (awarding attorneys' fees of 25% of $126 million fund).

[7] *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 EMPIRICAL LEGAL STUD. 248 (2010) ("Eisenberg & Miller I," attached as Ex. 34 to the Lead Counsel Decl.); Theodore Eisenberg, Geoffrey Miller, and Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. 937, 947 (2017) ("Eisenberg & Miller II," attached as Ex. 35 to the Lead Counsel Decl.); and Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 839 tbl. 11 (2010) ("Fitzpatrick," attached as Ex. 36 to the Lead Counsel Decl.).

the requested fee award in this Action is reasonable. *See* Miller Decl. ¶8; Fitzpatrick Decl. ¶8 (attached, respectively, as Ex. 37 and Ex. 38 to the Lead Counsel Declaration).

Miller finds that among class action settlements in this District between 2009 and 2013 (78 cases), the mean fee was 27% and the median fee was 31%; for the Second Circuit during that time (116 cases), the mean fee was 28% and the median fee was 30%. Miller Decl., ¶22. Similarly, Fitzpatrick finds that for federal class action settlements in the Second Circuit between 2006 and 2007 (72 cases), the mean fee was 23.8% and the median fee was 24.5%. Fitzpatrick Decl., ¶14. Miller finds that for antitrust class settlements nationwide between 2009 and 2013, the mean fee was 27% and the median fee was 30%. Miller Decl., ¶22. Similarly, Fitzpatrick finds that for 2006 and 2007, the mean fee award in antitrust class settlements was 25.4% and the median fee was 25%. Fitzpatrick Decl., ¶15. The 16.51% fee request here is below those awarded in most Southern District and Second Circuit cases, and in antitrust cases nationwide.

Miller and Fitzpatrick both find a scaling effect that tends to reduce the fee percentage for the highest dollar settlements. Miller Decl., ¶23; Fitzpatrick Decl., ¶16. For settlements that recovered over $67.5 million (the highest decile reported by Miller) between 2009 and 2013, the mean fee was 22.3%. Miller Decl., ¶23. For settlements recovering more than $100 million, the mean and median fee percentages varied by year from a low of 16.6% to a high of 25.5%. Miller Decl., ¶23. Fitzpatrick finds that mean and median fee percentages awarded in $250 million to $500 million settlements were 17.8% and 19.5%, respectively. Fitzpatrick, ¶16. The 16.51% fee request here is below average compared to just the largest settlements studied.

Focusing on empirical comparisons of the more limited number of recoveries over $1 billion, Fitzpatrick's study found that the mean fee award for those settlements (9 cases) was 13.7%, but the standard deviation was large, meaning the fee range was broad. The highest fee

award was 31.33%. Here, the request for 16.51% falls within the study's range and the "mainstream of fee awards in billion-dollar cases." Fitzpatrick Decl., ¶18.

Fitzpatrick supplemented his data to include all known percentage-method fee awards in federal class action settlements over $1 billion in any year. Fitzpatrick Decl., ¶19. The fee percentages ranged between 0.25% to 31.33%, and the 16.51% requested here is within one standard deviation of the mean (11.4% of cash recoveries). Fitzpatrick Decl., ¶20. Similarly, Fitzpatrick finds that for the five antitrust cases over $1 billion, where fee awards ranged from a low of 6.5% to a high of 28.5%, a fee of 16.51% would be even closer to the antitrust mean (14.43%) than the mean for all cases over $1 billion. Fitzpatrick Decl., ¶21. And although the fee requested here would be on the higher end of the fee percentages awarded in the five antitrust cases, it would yield the lowest lodestar multiplier among those cases. Fitzpatrick Decl., ¶24.

2. Market Rate Fee Agreements Support the Requested Award

An "ideal proxy for the award should reflect the fees upon which common fund plaintiffs negotiating in an efficient market for legal services would agree." *Colgate-Palmolive*, 36 F. Supp. 3d at 352. Under the Private Securities Litigation Reform Act, for example, there is a "well-recognized rebuttable 'presumption of correctness' given to the terms of an *ex ante* fee agreement between class counsel and lead plaintiff." *CDS Litig.*, 2016 WL 2731524, at *16 (applying such presumption in a common fund antitrust case). The primary difficulty that sometimes, but not always, arises in common fund cases is "know[ing] precisely what fees common fund plaintiffs in an efficient market for legal services would agree to, given an understanding of the particular case and the ability to engage in collective arm's-length negotiation with counsel." *Goldberger*, 209 F.3d at 52. Even in those instances, however, "a court can learn about ***similar*** bargains. That is at least a starting point." *In re Synthryoid Mktg. Litig.*, 264 F. 3d 712, 719 (7th Cir. 2001) (emphasis in original).

Professor Charles Silver, who submits a declaration supporting the reasonableness of Lead Counsel's fee request, has studied the market for contingency fee agreements in complex class actions, and he concludes that the requested fee award in this case of 16.51% is below the prevailing market rates for high-stakes, contingency fee engagements negotiated between sophisticated clients and their counsel. *See* Silver Rep. ¶¶1, 22, 34, 40, 66 (attached as Ex. 39 to the Lead Counsel Decl.) (identifying the normal range of market rates as 25% to 40%, even in cases with more than $1 billion at stake). That is true for engagements in class actions and individual litigation. *Id.*, ¶¶23-34. Consistent with those prevailing market rates, in all operative retention agreements where Class Plaintiffs and Plaintiffs' Counsel negotiated a specific or maximum attorneys' fee percentage, that percentage was either 30% or 33.3%. *Id.*, ¶¶35-39. Even large federal agencies, which typically demand below-market rates for legal services for both fiscal and political reasons, have agreed to contingency fees of 25% when hiring private counsel in multibillion-dollar cases. *Id.*, ¶¶30-31 (describing NCUA's payment of $1.2 billion in attorneys' fees (roughly 25%) on recovery of $5.1 billion).

3. The Fee Is Reasonable Under the Lodestar Method

When using the percentage method, courts may also require "documentation of hours as a 'cross check' on the reasonableness of the requested percentage," *Goldberger*, 209 F.3d at 50, "to ensure that an otherwise reasonable percentage fee would not lead to a windfall." *Colgate-Palmolive*, 36 F. Supp. 3d at 353. When used as a "mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50.

Lodestar is calculated by multiplying the number of hours that counsel expended by a reasonable hourly rate. *Maley*, 186 F. Supp. 2d at 370. "[M]arket rates, where available, are the ideal proxy" for an attorney's compensation. *Goldberger*, 209 F.3d at 52. Courts use attorneys'

current rates to calculate the lodestar figure to account for the delayed payment and inflation. *See, e.g.*, *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 283-84 (1989).[8]

Plaintiffs' Counsel have spent 330,600.98 hours litigating the Action, producing a total lodestar amount of $174,041,760.50 based on standard hourly rates. No attorneys are billed in excess of their standard hourly rates, which have been accepted by courts in other contingency cases and/or are charged to (and paid by) hourly clients.[9] *See Luciano v. Olsten Corp.*, 109 F.3d 111, 115 (2d Cir. 1997) ("The 'lodestar' figure should be 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'"). Plaintiffs' Counsel's hourly rates are market rates for lawyers of similar quality litigating matters of similar magnitude in New York City. *See, e.g.*, *CDS Litig*, 2016 WL 2731524, at *17 (partner rates of $834 to $1,125 and associate rates of $411 to $714, *see* ECF No. 482); *Laydon v. Mizuho Bank, Ltd.*, No. 1:12-cv-03419-GBD, ECF No. 837 (S.D.N.Y. Dec. 7, 2017) (partner rates of $875 to $975 and associate rates of $325 to $600, *see* ECF No. 817).

Once lodestar is determined, courts typically enhance it by a positive multiplier "to reflect consideration of a number of factors, including the contingent nature of success and the quality of the attorney's work." *Maley*, 186 F. Supp. 2d at 370. A fee award of 16.51% of the Settlement Fund reflects a multiplier of 2.19. The crosscheck multiplier of 2.19 is reasonable in

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[8] *See also LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998) ("current rates, rather than historical rates, should be applied in order to compensate for the delay in payment"); *Colgate-Palmolive*, 36 F. Supp. 3d at 347 (calculating lodestar based on current attorney rates).

[9] *See* Plaintiffs' Counsel Declarations attached to the Lead Counsel Declaration at Exhibits 2 through 33. The document review rates included in the lodestar calculation were capped. That means that many of the rates charged are, in fact, lower than the standard billable rates for those attorneys.

the Second Circuit. *See Wal*-Mart, 396 F.3d at 123 (upholding multiplier of 3.5 as reasonable and observing that '"multipliers of between 3 and 4.5 have become common'").[10]

C. The *Goldberger* Factors Confirm that the Requested Fee Is Reasonable

Regardless of fee method, courts examine the reasonableness of a common fund fee request under the following *Goldberger* factors: '"(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.'" *Goldberger*, 209 F.3d at 50. Each of the *Goldberger* factors confirms that Plaintiffs' Counsel's fee request is reasonable.

1. Plaintiffs' Counsel's Investment of Time Favors the Request

The first *Goldberger* factor, the time expended by counsel, weighs in favor of the requested fee. Plaintiffs' Counsel have devoted over 330,000 hours prosecuting the Action. ¶228. The unusual complexity and labor-intensive nature of the legal work is described earlier and in greater detail in the Lead Counsel Declaration. Lead Counsel maintained close control of and carefully monitored the work Plaintiffs' Counsel performed in order to avoid duplication of efforts. ¶229. Lead Counsel also audited the time and expenses Plaintiffs' Counsel submitted and removed unapproved hours and expenses. ¶111.

In addition to the time already spent, Lead Counsel will continue to devote many hours to administering the settlements. *See In re Facebook, Inc. IPO Sec. and Derivative Litig.*, MDL

[10] *See, e.g.*, *Maley*, 186 F. Supp. 2d at 369 (awarding a "modest multiplier" of 4.65, which was "well within the range awarded by courts in this Circuit and courts throughout the country"); *CDS Litig.*, 2016 WL 2731524, at *17 (multiplier of over 6); *Colgate-Palmolive*, 36 F. Supp. 3d at 353 (multiplier of 5.2); *see also* Fitzpatrick Decl., ¶24 (stating that a 2.19 multiplier is below the mean and median multiplier in all billion-dollar cases and billion-dollar antitrust cases); Miller Decl., ¶33 (noting that as recoveries increase, multipliers increase and that, for cases of this magnitude, a 2.19 multiplier is below what would be expected).

No. 12-2389, 2015 WL 6971424, at *10 (S.D.N.Y. Nov. 9, 2015) (considering class counsel's future efforts to oversee the claims process in awarding a 33% fee).

2. The Magnitude and Complexity of the Case Favors the Request

The second *Goldberger* factor, the magnitude and complexity of the litigation, also supports the fee request. In cases that require more expertise, a larger percentage of the fund should be awarded to the lawyers who can competently bring and prosecute the case. *Goldberger*, 209 F.3d at 55. Antitrust and commodities manipulation cases are recognized as two of the most complex types of actions to litigate. *See In re Linerboard Antitrust Litig.*, MDL No. 1261, 2004 WL 1221350, at *10 (E.D. Pa. June 2, 2004) (stating that '"[a]n antitrust class action is arguably the most complex action to prosecute'"); *Sumitomo Copper*, 74 F. Supp. 2d at 395 (stating that claims under the CEA are "notoriously difficult to prove").

This case has few peers in terms of its magnitude and complexity. From the outset, the case has presented complex legal and factual issues. The FX market is the world's largest, most actively traded financial market, and Defendants are among the world's largest financial institutions. *See Wal-Mart*, 396 F.3d at 122 (noting that the case was "especially large and complicated" where it involved "almost every U.S. bank" and millions of class members); *see also* Plaintiffs' Memorandum of Law In Support of Final Approval ("Final App. Mem.") at §III.A.2.a. Further, the primary source of liability evidence is the jargon-filled chat room transcripts, in which FX traders used language specifically intended to avoid detection by compliance monitors. ¶¶20, 21, 94, 95. Decoding the chats to develop liability evidence has been complicated and time-consuming, requiring Plaintiffs' Counsel to assign highly skilled and experienced attorneys to the document review, and requiring interpretive assistance from experts familiar with the unique language of FX trading, as well as dozens of attorney proffers from

Settling Defendants. ¶¶94, 95. In the recent trial of former HSBC FX trader, Mark Johnson,[11] DOJ attorneys spent much of their case explaining the FX market and characterizing conduct that must be gleaned from a mixture of trader slang and applied mathematics. And that was just for one trade on a single day. Here, the litigation involves conduct over multiple years by 16 Defendants, in more than 500 chat rooms involving over 100 currency pairs.

Class Plaintiffs faced legal challenges from the onset. When Class Plaintiffs filed the CAC, the key decision on antitrust injury in the financial benchmark context was *In re LIBOR-Based Financial Instruments Antitrust Litigation*, where the Court ruled that the plaintiffs failed to allege antitrust injury in the defendants' setting of the LIBOR benchmark. 935 F. Supp. 2d 666, 739 (S.D.N.Y. 2013) ("*LIBOR*"), *vacated and remanded by Gelboim v. Bank of America Corp.*, 823 F.3d 759 (2d Cir. 2016). This created substantial risk – no antitrust injury, no antitrust case. *LIBOR* was a centerpiece of Defendants' motion to dismiss. Lead Counsel, however, distinguished *LIBOR*, resulting in this Court holding that the CAC adequately pleaded antitrust injury. *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d 581, 596 (S.D.N.Y. Jan. 2015).

While there have been government investigations of some of the Defendants concerning their conduct in the FX market, Lead Counsel developed, litigated, and successfully negotiated settlements with 15 of 16 Defendants without "piggy backing" on the government regulatory and enforcement actions. *Compare Maley*, 186 F. Supp. 2d at 371 (recognizing that plaintiffs' counsel did not "piggy back" on prior governmental actions), *with Goldberger*, 209 F.3d at 54 (noting that "the government's prior efforts against [defendants] dramatically increased [plaintiffs'] chances of success"). When the original complaint was filed in late 2013, news

[11] *U.S. v. Johnson*, No. 1:16-cr-00457-NGG (E.D.N.Y.).

reports disclosed government investigations of bank conduct in the FX market, but no regulator or agency had concluded its investigation.

In November 2014, seven months after Class Plaintiffs filed the CAC, six of the 16 Defendants entered into the first settlements with regulators, but the findings were confined to failures of internal controls and instances of attempted or aiding and abetting manipulation and/or acting against the interests of clients. ¶¶244-247. Between 2015 and 2017, three more of the Settling Defendants entered into similarly limited regulatory settlements. ¶¶248-253. Even the guilty pleas that Barclays, Citigroup, JPMorgan, and RBS entered into with DOJ's Antitrust Division were limited to a conspiracy to manipulate the price of U.S. dollars and euros exchanged in the FX spot market. ¶248. Subsequent amendments made in later complaints also did not mirror the regulatory and enforcement agencies' findings. Instead, the complaints plead a conspiracy based on Plaintiffs' Counsel's own work and investigation, including information developed through settlement cooperation. ¶39. Moreover, six of the Settling Defendants that will pay a combined $246.2 million here were never fined by any government agency. ¶15.

Class Plaintiffs, likewise, have not relied on regulatory findings or law enforcement actions to prove class-wide impact or damages for purposes of class certification, and the government has not performed those kinds of analyses, as far as Lead Counsel are aware. ¶¶15, 243, 254. Demonstrating a workable methodology for proving both class-wide impact and damages would be critical at the class certification stage, and actually proving both would be necessary at trial. *Id*. Plaintiffs' Counsel alone undertook these tasks. *Id*.

While the government actions are helpful in prosecuting the Action, in the aggregate, these actions do not suffice to prove the more expansive allegations in this Action, largely made possible by the cooperation Lead Counsel secured through these settlements. ¶¶15, 243, 254.

Put simply, Class Plaintiffs could not rely solely on the government actions for proof of any single liability element, for class certification purposes, or for damages. *Id*.

3. The Litigation Risks Favor the Request

The third *Goldberger* factor, the risk of the litigation, is "perhaps the foremost factor to be considered in determining whether to award an enhancement." *Goldberger*, 209 F.3d at 54. "The Second Circuit has recognized that the risk associated with a case undertaken on a contingent basis is an important factor in determining an appropriate fee award." *City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132, 2014 WL 1883494, at *14 (S.D.N.Y.). The "litigation risk must be measured as of when the case is filed." *Goldberger*, 209 F.3d at 55.

As further discussed in the Final Approval Memo, Plaintiffs' Counsel faced significant risks in proving liability, class-wide impact, and damages. Final App. Mem. at §§III.A.2.d and e; *see also* Silver Rep., ¶¶42-49 (discussing risks faced in certifying classes in antitrust cases).

Risks in proving liability. Defeating Defendants' motions to dismiss does not guarantee success at trial. Class Plaintiffs still need to prove liability. As mentioned above, Defendants' traders wrote in coded jargon, making development of the evidentiary record difficult and time-consuming. ¶¶94-95. While Class Plaintiffs located numerous documents in discovery showing a persistent pattern of conduct among all Settling Defendants, and believe the controlling law likewise supports that claim, reaching trial and then proving Class Plaintiffs' allegations to a jury would be a challenge. ¶117. Settling Defendants would have likely argued that the evidence shows collusion on individual trades, rather than, as Class Plaintiffs allege, an overarching conspiracy to fix prices in the FX market. Each Settling Defendant would have also likely argued that, even if an overarching agreement is established, it was not a participant in that agreement. There is a risk that the Court or a jury would credit Settling Defendants' arguments,

which could have resulted in the complete dismissal of the case or eliminated certain of the Settling Defendants.[12]

Risks from class certification through trial. There are formidable hurdles to surmount from class certification to summary judgment and through trial. Class Plaintiffs would have to prove through expert testimony that Settling Defendants' collusive conduct caused class-wide impact. Class Plaintiffs would further have to show that individual class members' damages could be computed on a common, formulaic basis. While Lead Counsel believe that Class Plaintiffs and their experts would bring forth sufficient evidence to support a finding of class-wide impact and damages, Settling Defendants have vast combined resources and are represented by top counsel from many of the nation's most prominent law firms. They would have coordinated a joint attack on each of Class Plaintiffs' experts. Either a successful *Daubert* challenge or effective cross-examination at trial could have resulted in a defense judgment or a significantly reduced verdict. As one court has noted, "the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal." *In re NASDAQ Mkt-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998). Indeed, even once a settlement is reached and approved by a court, there is still a risk of loss. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223 (2d Cir. 2016) (vacating final approval of $7.25 billion antitrust class action settlement). Additionally, any trial judgment would undoubtedly be appealed, leading to years of more uncertain compensation.

[12] For example, the Court already dismissed claims based on transactions executed before December 1, 2007, holding that the SAC failed to adequately allege the existence of a conspiracy prior to that date. *In re Foreign Exchange Benchmark Rates Antitrust Litig.*, 13-cv-7789-LGS, 2016 WL 5108131, at *16-*17 (S.D.N.Y. Dec. 1, 2017).

Risk of non-payment for services required and expenses advanced. "Class counsel undertook a substantial risk of absolute non-payment in prosecuting this action, for which they should be adequately compensated." *Maley*, 186 F. Supp. 2d at 372. Plaintiffs' Counsel represented Class Plaintiffs and the Settlement Classes on a purely contingent basis, investing considerable amounts of time and money in the prosecution of the Action without any guarantee that the investments would ever be repaid. ¶231.

4. The Quality of Representation Favors the Request

The fourth *Goldberger* factor, the quality of representation, supports Lead Counsel's fee request. "[T]he quality of representation is best measured by results." *Goldberger*, 209 F.3d at 55; *see also Maley*, 186 F. Supp. 2d at 373 ("'The critical element . . . is the result obtained.'").

The results here reflect the quality of the lawyering. *See* Feinberg Decl., ¶¶24-26 (describing the recovery as a "superlative value" to the Settlement Classes and attributing the success of the mediation to Lead Counsel's "tremendous effectiveness and determination"). The partial settlements, if approved, are collectively the third largest antitrust class action recovery in the history of the Sherman Act. ¶18. Lead Counsel estimate that the Settlement Fund represents a 33% to 43% recovery of single damages the Settlement Classes could have obtained through total success on the merits at trial. ¶11; *see also* Final App. Mem. at §III.A.2.g. The extraordinary result here was also achieved expeditiously through the use of cooperation provisions, which allowed Class Plaintiffs to develop the factual allegations of the case quicker than would have been possible in a purely adversarial posture. ¶133; *see also* Feinberg Decl., ¶26 (emphasizing value of the cooperation provisions).

Further, Plaintiffs' Counsel are among the most experienced and skilled antitrust and commodities litigation attorneys in the country. A number of Plaintiffs' Counsel's attorneys

have tried class actions, an increasingly uncommon event.[13] ¶230. This meant that, if necessary, Plaintiffs' Counsel have the skill and experience, as well as the resources, to present a persuasive case to a jury. *Id*. Defendants were no doubt aware that this team has the ability to try the case.

5. The Fee Is Reasonable in Relation to the Settlement

The fifth *Goldberger* factor, the relation of the fee to the settlement, was discussed at length in §III.B.1., *supra*. Lead Counsel's request for attorneys' fees is reasonable and consistent with approved awards by courts in this District and elsewhere in similar cases.

6. The Fee Is Reasonable Given Public Policy Considerations

Finally, the sixth *Goldberger* factor, public policy considerations, favors Lead Counsel's fee request. There is a "commendable sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest." *Goldberger*, 209 F.3d at 51. The "antitrust laws address issues that go to the heart of our economy" and it is "important to encourage top-tier litigators to pursue challenging antitrust cases." *See CDS Litig.*, 2016 WL 2731524, at *18. This Action served the public's interest by advancing the fundamental goals of the antitrust laws by protecting consumers from exploitation by dominant dealers in the FX market. *See Colgate-Palmolive*, 36 F. Supp. 3d at 353 (stating that the types of common fund cases that warrant adjustment "are based on laws reflecting important policy concerns − for example, the protection of consumers or investors"). Further, although government regulators and prosecutors have imposed fines and reached settlements with certain banks for FX-related misconduct, the settlements here are the only ones that will return money back to the victims of the misconduct.

[13] A study of over 250 class actions noted that in every case where a class was certified, a settlement was eventually negotiated and approved. Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., *Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions* 6 (2008).

IV. THE REQUEST FOR REIMBURSEMENT OF LITIGATION EXPENSES SHOULD BE GRANTED

"It is well established that counsel who obtain a common settlement fund for a class are entitled to the reimbursement of expenses that they advance to a class." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 671 (S.D.N.Y. 2015). In a common fund case, compensable expenses include "reasonable expenses normally charged to a fee paying client." *See generally* 5 NEWBERG ON CLASS ACTIONS §16:5 (5th ed.) (collecting cases).

To date, Plaintiffs' Counsel have incurred $22,495,669.73 in litigation expenses while prosecuting the Action. *See* Lead Counsel Decl., Ex. 1 (expense summaries by firm and category). Most of the litigation expenses, $17,222,662.19, were for expert work, which courts consider "essential to the litigation and invaluable to the Class." *See Colgate-Palmolive*, 36 F. Supp. 3d at 353 ("Courts routinely award [expert] costs."). Preparing to prove liability, class-wide impact, and damages required engaging highly skilled and specialized FX market experts, FX scholars, finance experts, industrial organization economists, and other subject matter experts who were willing to take the professional risk of testifying against the largest banks in the world. ¶17.

Lead Counsel first retained Velador Associates whose expertise was crucial to the successful prosecution of the Action. ¶235. The Velador professionals have over 200 years of combined trading experience. *Id*. Lead Counsel relied on Velador's expertise on various issues throughout the course of the Action. *Id*. Velador's professionals participated in the development of the Plan of Distribution and data analysis to produce the detailed allocation formulas. ¶¶108, 235. Velador professionals also served as Class Plaintiffs' experts in the lengthy transaction data meet-and-confer process. ¶¶68-71, 235; *see also* Feinberg Decl., ¶28 (stating that the experts "proved indispensable in these discussions"). Significantly, once the data was produced,

Velador's team "cleaned" the data and "normalized" it by combining the data from over 30 different trading systems into a common format in the form of unified extracts. ¶¶72-74, 235. Velador's data work was a prerequisite to empirically testing models of class-wide impact and damages. ¶235. Without their data work, the claims administration process would not have been possible. *Id.* Velador's FX market experts were also essential to training attorneys to review documents and providing guidance on chat interpretation issues. ¶¶94-95, 235.

Preparing to prove liability, class-wide impact, and damages also required locating and engaging highly skilled and specialized FX scholars, finance experts, and industrial organization economists. ¶236. Lead Counsel engaged two of the world's leading academic scholars on FX microstructure who have published extensively on FX matters in the academic literature, as well as leading experts on finance and related antitrust issues. *Id.* These experts were engaged to develop models of class-wide impact and damages. *Id.* In addition, Lead Counsel engaged an industrial organization economist to assist in investigating class-wide liability issues, as well as one of the world's leading statisticians. *Id.*

Engaging these experts was indispensable to Class Plaintiffs' prosecution of the Action.[14] ¶17, 237. Claims administration would not be possible without a reliable transaction database, and Settling Defendants would not have entered into such high-value settlements without Lead Counsel being able to demonstrate a methodology that could prove a persistent pattern of unlawful conduct, class-wide impact, and damages. *Id.*

Lead Counsel also incurred significant expenses to establish and maintain databases for the vast amount of documents and transaction data produced in this litigation. ¶¶93, 238. As to the document database, a key factor in Lead Counsel's decision to engage an outside vendor,

[14] Lead Counsel engaged other undisclosed experts, as needs arose, for more limited projects. ¶236.

Recommind, to host the document review was its technology assisted review ("TAR") capabilities. *Id*. Lead Counsel knew that document productions in this Action would consist of lengthy chat room transcripts, and TAR would bring efficiencies to the document review. *Id*.

As to a transaction data platform, Lead Counsel found no off-the-shelf solutions from outside vendors that could comply with rigorous data security requirements applicable to financial data and provide access to multiple experts in different locations simultaneously. ¶¶239-240. Therefore, Scott+Scott, through its Information Technology Director, Ted McBride, built and maintained a platform for hosting transaction data, internally called the "Sandbox." *Id*. The costs incurred in building the Sandbox included Mr. McBride's fees (because the work was outside the scope of his normal consultancy arrangement with Scott+Scott), hardware dedicated solely to storing the transaction data produced in this Action, server space at a data center, and software and licenses. *Id*. These e-discovery expenses were necessary and indispensable to the prosecution of this e-discovery-intensive Action. *See Meredith Corp.*, 87 F. Supp. 3d at 671 (awarding reimbursement for e-discovery expenses).[15]

Finally, Lead Counsel incurred other reasonable expenses in prosecuting the Action: (i) mediator fees; (ii) court fees and service of process; (iii) online factual and legal research; (iv) court reporters and transcripts; (v) travel and meals; and (vi) other expenses, such as document

[15] *See also Skelton v. Gen. Motors Corp.*, 661 F. Supp. 1368, 1384 (N.D. Ill. 1987) *aff'd & rev'd in part on other grounds*, 860 F.2d 250 (7th Cir. 1988) (stating that "[i]f a case involves unusual expenditures over and above the expenses necessary for the operation of a law firm, then these expenses are properly chargeable to the fund" and allowing reimbursement of expenses for automated answering machine services, storage space and office supplies, as in the context of that case, given its size and the need to store class information, those expenses were not overhead); *see, e.g.*, *In re "Agent Orange" Product Liability Litig.*, 611 F. Supp. 1296, 1330-31 (E.D.N.Y. 1985), *aff'd & rev'd in part on other grounds*, 818 F.2d 226 (2d Cir. 1987) (allowing reimbursement of expenses – including "rent paid for office space, rental of furniture and office equipment, as well as payments made to office staff and telephone and photocopying expenses" – for running a Brooklyn office set up exclusively for the prosecution of the case).

reproduction, telephone and facsimile, postage and delivery, and secretarial overtime. ¶241. These collective expenses were reasonably incurred and should be reimbursed. *See Yang v. Focus Media Holding Ltd.*, No. 11 Civ. 9051(CM)(GWG), 2014 WL 4401280, at *19 (S.D.N.Y. Sept. 4, 2014) (approving mediator fees, expert fees, computer research, photocopying, postage, meals, and court filing fees); *see also Brown v. Pro Football, Inc.*, 839 F. Supp. 905, 916 (D.C. Cir. 1993) ("Plaintiffs' out-of-pocket costs for telephone, telecopier, air and local couriers, postage, photocopying, [electronic case law] research, secretarial overtime, and counsels' travel expenses were routinely billed to fee-paying clients, and thus all compensable").

V. CONCLUSION

For all of the foregoing reasons and for the reasons set forth in the Lead Counsel Declaration, Lead Counsel respectfully request that the Court grant their application for an award of attorneys' fees and reimbursement of litigation expenses.

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2018, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

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