

**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 PLAINTIFFS' MOTION FOR ENTRY OF
AN ORDER APPROVING AN INITIAL DISTRIBUTION OF THE SETTLEMENT
FUND**

Plaintiffs, by and through their counsel, Scott+Scott Attorneys at Law LLP and Hausfeld LLP (together, “Class Counsel”), respectfully submit this memorandum in support of their Motion for Entry of an Order Approving an Initial Distribution of the Settlement Fund (the “Initial Distribution Order”).

I. BACKGROUND

In November 2013, Plaintiffs filed a complaint alleging that twelve global banks had conspired to manipulate foreign exchange rates. ECF No. 1. Following receipt of settlement cooperation from certain of the Settling Defendants,¹ Plaintiffs broadened their theory of the case and added four new defendants. *See* ECF No. 172; ECF No. 465. Plaintiffs executed Settlement Agreements with fifteen of the sixteen defendant banks in October 2015, July 2017, and September 2017. (ECF Nos. 481-1-9, 822-1-5, and 877-1). The Court granted final approval to the

¹ Unless otherwise defined herein, all capitalized terms have the meanings ascribed to them in the Stipulation and Agreement of Settlement with Bank of America Corporation, Bank of America, N.A., and Merrill Lynch, Pierce, Fenner & Smith Incorporated (“Bank of America Stipulation”); Stipulation and Agreement of Settlement with Barclays Bank PLC and Barclays Capital Inc. (“Barclays Stipulation”); Stipulation and Agreement of Settlement with BNP Paribas Group, BNP Paribas North America Inc., BNP Paribas Securities Corp., and BNP Prime Brokerage, Inc. (“BNP Paribas Stipulation”); Stipulation and Agreement of Settlement with Citigroup Inc., Citibank, N.A., Citicorp, and Citigroup Global Markets Inc. (“Citigroup Stipulation”); Stipulation and Agreement of Settlement with The Goldman Sachs Group, Inc. and Goldman, Sachs & Co. (“Goldman Sachs Stipulation”); 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. (“HSBC Stipulation”); Stipulation and Amended Agreement of Settlement with JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. (“JPMorgan Amended Stipulation”); Stipulation and Agreement of Settlement with The Royal Bank of Scotland Group PLC, The Royal Bank of Scotland PLC, and RBS Securities Inc. (“RBS Stipulation”); Stipulation and Amended Agreement of Settlement with UBS AG, UBS Group AG, and UBS Securities LLC (“UBS Amended Stipulation”); Stipulation and Agreement of Settlement with The Bank of Tokyo-Mitsubishi UFJ, Ltd. (“BTMU Stipulation”); Stipulation and Agreement of Settlement with Morgan Stanley, Morgan Stanley & Co., LLC, and Morgan Stanley & Co. International plc (“Morgan Stanley Stipulation”); Stipulation and Agreement of Settlement with RBC Capital Markets, LLC (“RBC Stipulation”); Stipulation and Agreement of Settlement with Société Générale (“Soc Gen Stipulation”); Stipulation and Agreement of Settlement with Standard Chartered Bank (“Standard Chartered Stipulation”); and Stipulation and Agreement of Settlement with Deutsche Bank AG (“Deutsche Bank Stipulation”). ECF Nos. 481 (Ex. 1-9), 822 (Ex. 1-5), 877 (Ex. 1). The foregoing Stipulations are collectively referred to as the “Settlements” or the “Settlement Agreements,” and the foregoing defendants are collectively referred to as the “Settling Defendants.”

settlements on August 6, 2018, resolving the action against Settling Defendants for a total of \$2,310,275,000 and continuing cooperation agreements from each defendant. (ECF Nos. 1096-1110).

Pursuant to the Court's Orders authorizing notice (ECF Nos. 700, 864, and 882), the Court-appointed Claims Administrator ("Epiq"²); Rust Consulting ("Rust"); and certain Settling Defendants began mailing copies of the Mail Notice and proof of claim and release form ("Claim Form") (together, the "Notice Packet") to Settlement Class Members. Casey Decl. ¶ 3.³ Epiq also caused the Publication Notice to be published in numerous publications including *FX Week*; *The Wall Street Journal*; *Investor's Business Daily*; *Financial Times*; *The New York Times* (International Edition); *The Guardian* (U.K.); *Globe and Mail* (Canadian National Edition); and *La Presse* (Montreal). The Publication Notice was also issued as a global press release through *PR Newswire's Global Premier*. *Id.* ¶ 3; *see also* Cirami Decl. (ECF No. 927), ¶ 12. In addition, the Notice, Claim Form, Settlement Agreements, Preliminary Approval Orders, translations of the Notice Packet, and other important case documents were posted on the Settlement Website, which Epiq maintains in order to enable Settlement Class Members to access information about the case and settlements and to file claims. Casey Decl., ¶ 3; *see also* Cirami Decl. (ECF No. 927), ¶¶ 14-17.

The Mail Notice and Publication Notice informed Settlement Class Members that if they wanted to participate in the Settlement Fund, they were required to submit their Claim Forms either

² The Court approved Garden City Group ("GCG") as the claims administrator. GCG was subsequently acquired by Epiq, and Epiq has continued the prior duties of GCG.

³ *See also* Cirami Decl. (ECF No. 927), ¶ 8; Rabe Decl. (ECF No. 928), ¶ 11; Adams Decl. (ECF No. 929), ¶¶ 3-5; Corley Decl. (ECF No. 930), ¶ 2; Deering Decl. (ECF No. 931), ¶¶ 2-5; Hong Decl. (ECF No. 932), ¶¶ 2-4; Idzior Decl. (ECF No. 933), ¶¶ 3-4; Lee Decl. (ECF No. 934), ¶ 2; Ng Decl. (ECF No. 935), ¶¶ 2-4; Shilling Decl. (ECF No. 936), ¶¶ 9-12.

by mail or electronically on the online claims portal page of the Settlement Website no later than May 16, 2018. Casey Decl., ¶ 15; *see also* Ferrante Decl. (ECF No. 1025), ¶ 9.

The Claim Form presented Claimants with two claim filing options. Under Option 1 (the Estimated Claim Option), the Claimant's payment was calculated using the transaction data provided by Settling Defendants. Casey Decl., ¶ 5. Under Option 2 (the Documented Claim Option), the Claimant's payment was calculated using the transaction data submitted by the Claimant. *Id.* For Option 2 claims, Option 1 results were also calculated and presented (where available), and Claimants automatically will receive the higher of the two results. *Id.*, ¶ 8. For Option 1 Claims, Claimants could elect to switch to the other claiming option after having received their Option 1 estimates from Epiq. *Id.*, ¶ 7.

The Effective Date set forth in the Settlements having passed, and Epiq having completed the processing of the 26,937 Claim Forms that are proposed to be included in the Initial Distribution Order (the "Initial Distribution Claims"), Plaintiffs respectfully request that the Court enter the Initial Distribution Order, authorizing \$54,006,248.60 in total payments on these claims. *Id.*, ¶¶ 10, 14.

II. INITIAL DISTRIBUTION CLAIMS

Epiq sent each Authorized Claimant included in the Initial Distribution Order a Claim Assessment Notification, which provided, among other things, statistics on the claim's transaction volume and a payment estimate. *Id.*, ¶ 6. The Claim Assessment Notification also informed Claimants that they could request the transaction data underlying their claim, whether it be the Option 1 data provided by Settling Defendants, or Option 2 data submitted by the Claimant. *Id.*, ¶¶ 7-8. These transaction files include the basic financial information for each trade, as well a per trade Settlement Transaction Volume and Eligible Participation Amount, which were calculated

pursuant to the Plan of Distribution and form the basis of the payment estimates. *Id.*, ¶ 8. As referenced above, with respect to Option 1 claims, the Claim Assessment Notifications also stated that Claimants have 30 days to choose to convert their claims to Option 2 by submitting their own transaction records. *Id.*, ¶ 7. None of the Option 1 Initial Distribution Claimants elected to re-submit their claims under Option 2. *Id.*, ¶ 11. As referenced above, for Option 2 Initial Distribution Claims, where an Option 1 result was also available, the Claim Assessment Notification reported both results, and the Claimant was automatically given the higher of the values. *Id.*, ¶ 8. The Authorized Claimants that are included in the Initial Distribution Order (“Initial Distribution Claims”) did not dispute any aspect of their Claim Assessment Notifications within their 30-day response window. *Id.* ¶ 11.

Of the 23,019 Option 1 Initial Distribution Claims, 9,300 fall within the *de minimis* payment category and will receive \$15; 6,519 fall within the automatic payment category and will receive \$150; and 7,200 will receive pro rata payments above \$150 subject to a 35 percent holdback. *Id.* ¶¶ 11-12. Class Counsel, in consultation with our claims experts at Ankura Consulting, are recommending a 35 percent holdback on pro rata Initial Distribution Claims in order to create a reserve (the “Reserve”) that will enable us to adjust for potential fluctuations in the participation rate by volume and the amount of the Settlement Fund owing to the objector’s appeal. Funds remaining in the Reserve after final determinations of these amounts will be distributed pro rata to Authorized Claimants in subsequent distributions. Because *de minimis* and automatic payments are not subject to proration, they can be fully distributed now.

Of the 3,918 Option 2 Initial Distribution Claims, 2,309 fall within the *de minimis* payment category and will receive \$15; 1,609 fall within the automatic payment category and will receive

\$150. *Id.*, ¶ 11, 13. There are no pro rata Option 2 claims included in the Initial Distribution Order.

III. SUBSEQUENT DISTRIBUTION CLAIMS

The Initial Distribution Claims represent approximately 50.3 percent of Estimated Authorized Claims. Casey Decl., ¶ 10. Estimated Authorized Claims are submitted claims, which based on their current status, have indicia that Epiq will be able to accept them and they will become Authorized Claims that will receive payments either in the initial distribution or a subsequent distribution.

As explained in the Casey Declaration, to date, Epiq has determined that approximately 34,685 of the submitted claims are unlikely to be successful based on their current status as withdrawn, deficient, in conflict, containing no eligible transactions, or having not passed foreign data privacy compliance (together, “Unauthorized Claims”). *See* Casey Decl., ¶¶ 17-23 (description of all categories of submitted claims that are not included in Estimated Authorized Claims). For example, there are claims currently pending as deficient because they were not Option 1-eligible but were filed under Option 1 or because of the filer’s failure to provide documentation showing that the signatory on the claim is authorized to act on behalf of the Claimant. *Id.* ¶ 18(a). Another example is conflicting claims, where multiple Claimants have submitted claims including the same claim number. 12,445 Claimants who submitted deficient claims or conflicting claims have been provided with notice of the deficiency or conflict and afforded 30 days to cure the condition. Casey Decl., ¶¶ 18, 20. Many of the deficient and conflicting claims have been pending for over 120 days, received two notices, and still remain unresolved. *Id.*, ¶ 21; Casey Decl., Ex. 4.

Epiq and Class Counsel will continue to work, as appropriate, to help Claimants who have Unauthorized Claims to resolve their claims. *See id.*, ¶ 24. However, in Epiq’s opinion, given the circumstances of such claims and based on their claims administration experience, only a small percentage of them are likely to become Authorized Claims in a subsequent distribution motion. *Id.*

IV. DISTRIBUTION PLAN FOR THE INITIAL DISTRIBUTION

Plaintiffs respectfully request that the Court authorize distributions from the Settlement Fund to the Authorized Claimants listed in Exhibits 1 (*de minimis* claims), 2 (automatic claims), and 3 (pro rata claims) to the Casey Declaration.

In the Initial Distribution, Plaintiffs propose that Epiq will distribute *de minimis* (\$15), automatic (\$150), or pro rata payments for each Authorized Claimant based on the Authorized Claimant’s Eligible Participation Amount, in accordance with the Court-approved Plan of Distribution. Casey Decl., ¶ 38; Distribution Order, ¶ 3(c). Authorized Claimants entitled to a pro rata distribution will receive 65 percent of their payment amount. The remaining 35 percent of payments will be held back to address any fluctuations in the participation rate by volume and amount of the Net Settlement Fund and will be distributed in a subsequent distribution.

Claimants entitled to *de minimis* payments will receive a check. *Id.*, at ¶ 38(d). Claimants entitled to automatic or pro rata payments will have the option of receiving a check or wire payment. *Id.* Claimants who provide deficient wire instructions, will be sent a check. *Id.* In order to encourage Authorized Claimants to promptly deposit their distribution checks, and to avoid or reduce future expenses relating to unpaid distribution checks, all distribution checks will bear a notation “CASH PROMPTLY; VOID AND SUBJECT TO RE-DISTRIBUTION IF NOT

NEGOTIATED BY [DATE 90 DAYS AFTER ISSUE DATE].” *Id.*, ¶ 38(e); Distribution Order, ¶ 3(c).

In an effort to have as many Authorized Claimants as possible cash their checks, Epiq will perform extensive follow-up with those Authorized Claimants whose checks are initially uncashed, either because they are returned to Epiq as undeliverable or because the Authorized Claimant simply did not cash the check after a period of time elapses. *Id.*, at ¶ 38(f).

Authorized Claimants who do not deposit their distribution checks within the time allotted will be presumed to forfeit their payments. *Id.*, at ¶ 38(i). The funds allocated to all such stale-dated checks will be available for re-distribution to other Authorized Claimants in subsequent distributions. *Id.*

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court accept Epiq’s administrative determinations accepting the Authorized Claims set forth in Exhibits 1, 2, and 3 to the Casey Declaration and authorize payments on the 26,937 Authorized Claims included in the Initial Distribution Order.

Dated: March 1, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2019, 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.

s/ Michael D. Hausfeld

Michael D. Hausfeld