UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALASKA ELECTRICAL PENSION FUND, et al., Plaintiffs, v. BANK OF AMERICA, N.A., et al., Defendants.	Lead Case No.: 14-cv-7126 (JMF)

REPLY IN FURTHER SUPPORT OF LEAD COUNSEL'S MOTION FOR ATTORNEYS' FEES, LITIGATION EXPENSES, AND INCENTIVE AWARDS

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PRELIMINARY STATEMENT

The response to the Settlements, the Plan of Distribution, and the Fee Application has been overwhelmingly positive. No Class Member has objected to any of the Settlements or to the Plan of Distribution. Only a few opt-outs have been filed, and none is likely to engender litigation. While no Class Member objected to the initial request for a 30% fee award from the Approved Settlements, there is now one objection to the new request. *See* Dkt. No. 716 (the "Objection" by the "Objector"). In the ordinary case, "[t]hat only one objection to the fee request was received is powerful evidence that the requested fee is fair and reasonable." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 594 (S.D.N.Y. 2008). Here, that logic is particularly apt, because the Objection comes not from any of the pension funds, hedge funds, insurance companies, or other sophisticated Class Members with significant stakes in the result of this case. Rather, it comes from a former Georgia doctor and his LLC, which appear to have only a *de minimis* stake in this action.[1]

The Objection seeks to limit Lead Counsel's fees to *less than what they would have been paid by billing their standard hourly rates*. In light of both the risk at the outset and the extraordinary results achieved for the Class, which even the Objector does not dispute, this would be inconsistent with decades of case law recognizing the importance of incentivizing counsel to vigorously and efficiently pursue large, complex contingent-fee cases like this one—particularly so to assist in the enforcement of the nation's antitrust laws. *See* Fee App. at 2, 26-27; Dkt. No. 698 ("Fitzpatrick Decl.") ¶¶14-19. In mega-fund antitrust cases such as this, courts regularly award upwards of 30% of the recovery to class counsel, going far *above* hourly rates. *See* Dkt. No. 682, Ex. 1 (chart summarizing attorneys' fee awards).

[1] Capitalized terms not defined herein have the same meanings as supplied in Plaintiffs' Fee and Expense Application ("Fee App."), Dkt. No. 697. All internal citations and quotations are omitted unless indicated.

The Objection is based on the false assertion that the remarkable relief secured by Lead Counsel was easily achieved because the CFTC investigated ISDAfix, and certain settlements occurred "early." The Objector appears to be unaware of the substantial differences between (1) the CFTC investigation into *unilateral* acts of *attempted* manipulation, and (2) the demands placed on Plaintiffs in this class action antitrust case. Unlike the CFTC, Lead Counsel needed to establish that Defendants *conspired* to engage in a *common course of conduct* that harmed the Class in a *common manner*. Lead Counsel then had to demonstrate the ability to *quantify* the resulting damages using a method *common to the Class*. The Objector also seems unaware that Rule 23 applies to settlement classes. Thus, a robust class certification showing against the remaining Defendants did not just benefit Class Members in securing the remaining Defendants' settlements—it also served those same Class Members by helping ensure the settlement class would also be certified.

The challenges Plaintiffs faced in meeting the unique burdens in this case were formidable—and *continuously* presented significant risk that Class Members would recover nothing and Lead Counsel's very large investments in time and out-of-pocket expenses would be for naught. Lead Counsel respectfully submit that these factors, along with the overwhelmingly positive reaction of the Class, support a 30% fee award in this case.

ARGUMENT

I. PLAINTIFFS FACED A SIGNIFICANT RISK OF RECOVERING NOTHING EVEN INTO 2018

A. The CFTC's Investigation into Unilateral Attempts to Manipulate Rates Did Not Lower the Risk of Proving a Conspiracy to Actually Manipulate Rates

The Objection asserts that Lead Counsel merely "piggybacked on the efforts of government regulators." Objection at 3. According to the Objector, this favors lowering the fee award because "the litigation was not especially risky." *Id.* at 8. In fact, the timing of the few settlements the CFTC reached, as well as the significant differences between the CFTC investigation and this class action antitrust case, made the CFTC's efforts of far less practical use than the Objector imagines.

As an initial matter, litigation risk is assessed at the start of the case. *See In re Global Crossing Sec. & ERISA Litig*., 225 F.R.D. 436, 467 (S.D.N.Y. 2004). At the time the original complaint was filed (September 2014), no agency or regulator had initiated charges or imposed fines against any of the Defendants. It would be another eight months before the first CFTC settlement (with Barclays in May 2015), and then twelve months more for the second (with Citi in May 2016). *See* Appendix (timeline comparing Settlements to CFTC actions). The Objector's focus on when news reports revealed an investigation had begun misses the fact that Plaintiffs had to actually litigate their own case in the meantime. Indeed, Plaintiffs set about obtaining 2.5 million *more* pages in documentary discovery from the last five settling Defendants than what the CFTC obtained. Morgan Stanley alone produced twenty-five times as many documents to Plaintiffs than to the CFTC.

As commendable and important as the work of the CFTC has been, the scope of the CFTC's investigation was of limited use to Plaintiffs not just because of its chronology, but also because of its substance. Specifically, the CFTC's investigation focused on whether *individual traders* engaged in *unilateral* acts of *attempted* manipulation.[2] The CFTC did not pursue a theory of collusion. It did not need to show Article III or antitrust standing. It did not even need to demonstrate how any attempted acts of manipulation actually caused rate changes in the market, or how that impacted a particular instrument.

[2] *See, e.g.*, CFTC Order, *In re Barclays PLC, Barclays Bank PLC, and Barclays Capital Inc.*, CFTC No. 15-25, 2015 WL 2445060 (May 20, 2015); CFTC Order, *In re The Goldman Sachs Group, Inc., and Goldman, Sachs & Co.*, CFTC No. 17-03, 2016 WL 7429257 (Dec. 21, 2016); CFTC Order, *In re The Royal Bank of Scotland plc*, CFTC No. 17-08, 2017 WL 511925 (Feb. 3, 2017).

Plaintiffs, lacking regulatory authority, had no such luxury. They could only recover if they made a robust showing that could meet all the strictures of both the antitrust laws[3] and Rule 23. The core antitrust claims here required Lead Counsel to develop a legal theory showing how a series of supposedly unrelated, unilateral acts were actually part of an overarching conspiracy. Lead Counsel did this by centering the case around the panel banks' acts of "rubberstamping" ICAP's reference rate. Rubberstamping allowed a panel bank to try to manipulate the rate each day, comfortable in the knowledge the effects would not be nullified by the polling process.

While we believe there was ample support for this theory, we are not aware of any prior case in which such a legal theory of collusion has been presented or adopted. For their part, Defendants attacked the theory at every turn. Of particular relevance here, just one of the many attacks focused specifically on tension between the CFTC's theory that it was suspicious to *depart* from the reference rate, and Plaintiffs' theory that it was conspiratorial to *rubberstamp* the reference rate.[4] The Objector overlooks that the Court itself already commented on these differences,[5] and has already observed that this case involved "considerable risks."[6]

Developing a coherent legal theory of collusion was not enough. Plaintiffs then had to prove it. Unlike the CFTC, we had to identify acts of *actual* manipulation, and had to demonstrate and quantify how each one actually impacted the markets at issue on a class-wide basis. It also merits emphasis that we had to litigate with common proof, in ways that met the

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[3] Plaintiffs also brought unjust enrichment and breach of contract claims, but those faced unique state-law issues on class certification.

[4] *See, e.g.*, Dkt. No. 289 (Defs.' Opp'n to Mot. to Compel) at 11-12.

[5] *See* Dkt. No. 306 (Op. and Order) at 5-6. If the "notable distinctions" stood between Plaintiffs and even a clear right to *discovery* as to all CFTC materials, *id.*, it readily follows that the CFTC investigation in no way eliminated the risk from this case, as the Objector posits.

[6] *See* Dkt. No. 661 (May 30, 2018 Fairness Hr'g Tr.) 28:1-5 ("[S]uffice it to say, my engagement with those [class certification and *Daubert*] motion papers . . . gives me a firm basis on which to conclude that the matters here are complicated and [Plaintiffs'] success was by no means guaranteed."), 27:11-12, 17-20 ("Plaintiffs faced considerable risks in proceeding all the way to judgment. . . .").

rigorous standards of class certification. That was true regardless of the fact some Defendants settled "early." We painstakingly adduced this proof with the help of numerous experts, who developed a model of what prices would have been absent the alleged acts of manipulation. Much of this was arguably novel, and relied on sophisticated theories of financial markets.

The effort it took to meet these various challenges—not one of which was faced by the CFTC—was tremendous. The Objector's claim that this case was a risk-free ride on the backs of regulatory action is, simply put, uninformed.

B. <u>The Case Was Risky Even After the First Agreements Were Executed</u>

The Objector's only other argument is that the case had *no* "financial risk" after the 2016 settlements, making a 30% fee award "out of line" with the work performed. Objection at 2, 7. The notion that no more serious work needs to be done for a common class after a *partial* agreement is signed would be questionable in any case. Here, it is demonstrably baseless.

To become effective, the agreements had to be given final approval and a settlement class had to be certified pursuant to Rule 23. Neither was guaranteed merely because an agreement was signed, or preliminary approval granted. Indeed, the remaining Defendants held nothing back in the scope and manner of their arguments against certification, and expressly tied those efforts to the Court's contemporaneous consideration of the settlement class.[7] The Objector ignores that a refusal by the Court to certify the litigation class, in whole or in part, could have led to the demise of the proposed settlement class as well. This means that all work done to support the litigation-class certification effort was directly and consciously done to also support the settlement-class certification effort. The Objector's implicit suggestion that Lead Counsel

[7] *See* Dkt. No. 516 at 1 (Non-Settling Defs.' Oct. 9, 2017 letter, arguing that their opposition to class certification is "relevant to the Court in considering the proposed settlement, Distribution Plan and Class Notice, which requires the Court to determine whether the proposed settlement class meets the requirements of Rule 23").

should have instead tanked the litigation-class effort and coasted effortlessly into the first fairness hearing ignores the complexities and challenges presented in this case.

Another reason the litigation effort cannot be meaningfully divided into pre- and post-agreement execution is because of the work required to effectuate the settlements. In some cases, providing notice and a plan of distribution might be a simple affair. But the Objector disregards that even getting the transactional data from Defendants here took almost a full year of continuous consultations with each Defendant and our experts.[8] Even when the data was received, the Plan of Distribution required extensive efforts by counsel and multiple experts.

In sum, *all* the work performed after execution of the first settlements was directly for the benefit of the Class. Such work was required to ensure certification of the Settlement Class, to ensure Class Members received notice and were treated fairly under the Plan of Distribution, and to obtain more relief for those same Class Members from the remaining Defendants. None of this work was risk-free merely because certain settlement agreements had been signed.

II. A FEE AWARD OF LESS THAN LODESTAR WOULD NOT "ADEQUATELY COMPENSATE" COUNSEL, GIVEN THE EXTRAORDINARY RESULTS

Lead Counsel took on a highly complex and risky antitrust case. Lead Counsel litigated the case without pay for years, and achieved extraordinary results such that not a single Class Member—not even the Objector—has opposed the approval of the Settlements, which constitute one of the largest antitrust recoveries in history. Nonetheless, the Objector posits that the 1.68 lodestar multiplier requested by Lead Counsel is improper, despite being well below multipliers in many comparable cases. The Objector would instead have Lead Counsel awarded ***$5 million less than Counsel's time invested in this matter***. Far from "adequate compensation," Objection at 2, this would effectively punish Lead Counsel on the facts here.

[8] *See, e.g.*, Dkt. No. 319, at 4:7-14:14.

To suggest otherwise, the Objector argues there is a "strong presumption" against awarding more than hourly fees. Objection at 5. But "the *Perdue* presumption against a lodestar enhancement does not apply when a court awards fees from a common fund created after a settlement." *In re BioScrip, Inc. Sec. Litig.*, 273 F. Supp. 3d 474, 480-90 (S.D.N.Y. 2017). Thus,"[t]he problem for the objector[] is that class counsel sought attorney's fees from a common fund rather than under a fee-shifting statute." *Muransky v. Godiva Chocolatier, Inc.*, No. 16-16486, 2018 WL 4762434, at *10 (11th Cir. Oct. 3, 2018). To ignore this distinction would upend decades of precedent, and would undermine the policy goals that courts consider in determining fee awards in class action cases. *See, e.g.*, Fee App. at 25-27; Fitzpatrick Decl. ¶19.[9]

The baselessness of the request to award less than lodestar, combined with the Objector's *de minimis* stake in the action, may call into question his true motivations.[10]

III. <u>THE FEE APPLICATION IS WELL-SUPPORTED BY PRECEDENT</u>

A. <u>The Objection is Inconsistent with the Percentage-of-the-Fund Method and Public Policy Favoring Early Settlement</u>

The Objector's focus on limiting the fee award to the amount of work done as of the time a particular settlement was executed is at odds with the trend of favoring the percentage-based methodology over a lodestar approach. *See* Fee App. at 17-18, 31-35; Fitzpatrick Decl. ¶¶9-11. This trend exists because the percentage method "directly aligns the interests of the class and its

[9] The Objector cites *In re Petrobras Securities Litigation*, 317 F. Supp. 3d 858 (S.D.N.Y. 2018), but that case merely quoted *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 554-55 (2010). *Perdue* dealt with 42 U.S.C. § 1988, which authorizes fee-shifting for the prevailing party in civil rights cases. The extension of *Perdue* outside the statutory context has been explicitly rejected, as noted above. *Klein v. O'Neal, Inc.*, 705 F. Supp. 2d 632, 683 (N.D. Tex. 2010); *In re Vioxx Prod. Liab. Litig.*, 760 F. Supp. 2d 640, 661 n.25 (E.D. La. 2010). *See also Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003). It has also been implicitly rejected by the many cases routinely recognizing the unique policy considerations in class action antitrust cases. Notably, the award in *Petrobras* had a 1.78 multiplier, even though the case had been "heavily investigated by the authorities." 317 F. Supp. 3d at 876-77.

[10] *See, e.g., In re Initial Public Offering Secs. Litig.*, 728 F. Supp. 2d 289, 295 (S.D.N.Y. 2010) (observing that "numerous courts" have recognized that objections can be brought "in the hopes of extorting a greater share of the settlement for themselves and their clients"); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1361-62, n.30 (S.D. Fla. 2011) (objectors to 30% fee award request were "motivated by things other than a concern for the welfare of the Settlement Class," as the objectors' "sole purpose" was to secure a fee reward for themselves).

counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). The lodestar approach, by contrast, creates a "disincentive to early settlement" and "tempt[s] lawyers to run up their hours." *Id.* Courts thus recognize that counsel should not be punished for effectively advancing the important public policy of early settlement. *See Yuzary v. HSBC Bank USA, N.A.*, 2013 WL 5492998, at *11 (S.D.N.Y. Oct. 2, 2013); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 474 (S.D.N.Y. 2013); *cf.* Fitzpatrick Decl. ¶19.

The Objector's fixation on assigning work to one settlement or the other is thus legally infirm, in addition to being factually inappropriate for the reasons discussed above. The Objection's few case citations do not show otherwise.

In *In re Citigroup Inc. Securities Litigation*, 965 F. Supp. 2d 369, 392 (S.D.N.Y. 2013), the court excluded from the lodestar calculation fees attributable to the hiring of a "score of new contract attorneys" following a *global* settlement. With the case fully settled, there was no reason for a hiring spike to do nothing but review documents. As discussed above, all the efforts here after the *partial* settlements were for the benefit of the Class, both to secure those proceeds by ensuring certification of the settlement class and to get even more from the remaining non-settling Defendants. And in *In re Air Cargo Shipping Services*, 2009 U.S. Dist. LEXIS 88404 at *49-51, 90-91 (E.D.N.Y. Sept. 25, 2009), a reduction was made only because the first settlement was reached—with an amnesty applicant under the DOJ's leniency program—before a consolidated complaint was even filed. Notably, all subsequent fee awards in the same case were based on all the other time that later accumulated, often including time that post-dated a particular settlement.[11] Thus, neither case supports the Objection's core theory that work

[11] *See, e.g.*, *Air Cargo*, No. 06-md-1775 (E.D.N.Y. Oct. 25, 2016), Dkt. No. 2484 (awarding percentage fee for settlements dated July 1, 2014 through July 31, 2016 where lodestar was based on work conducted from

performed after a partial settlement *per se* presents no benefit to the Class. Nor do such cases justify reaching such a conclusion on the facts here.

The Court should thus decline the invitation to base Lead Counsel's fees on arbitrary divisions, and instead recognize the reasonableness of Lead Counsel's fee request in light of all their work, all of the results they achieved, and all of the challenges faced in achieving those results. *See* Fee App. at 17-31; Fitzpatrick Decl. ¶¶28-30.

B. <u>The Total Amount Requested is In Line With Precedent</u>

The Objector cites a handful of securities cases where fee awards were lower than 30%. Objection at 8. But "the mere fact that courts have awarded lower fees in several other cases does not weigh against" a particular request. *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156, 177 (S.D.N.Y. 2007). This is because "a fee award should be assessed based on scrutiny of the unique circumstances of each case." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 53 (2d Cir. 2000).

Here, the Fee Application amply justifies the requested 30% fee award by referencing both the aspects unique to this action *and* how the requested award would fit into a much larger survey of the case law in this area. *See* Fee App. at 17-31; Fitzpatrick Decl. ¶¶14-19, 21, 23-25, 29 (after analyzing a broad landscape of fee awards, concluding that Lead Counsel's request was empirically supported, justified by the specifics of this litigation, and properly aligned with important public policy goals and incentives); Dkt. 682 Ex. 1 (gathering cases, noting average fee award percentage for settlements of $500 million to $1 billion was 28.82%, the median award was 29.56%, and the average lodestar multiplier where available was 2.57). The Objection ignores all this, mustering only that in some of the cases cited in the Fee Application,

leadership appointment through July 31, 2016, excluding work done on discrete first settlement); *see also id.* Dkt. No. 2472 (Joint Decl. of Class Counsel) ¶126.

there was no objection. Objection at 9. If anything, that only confirms the propriety of the requested rewards. The argument also ignores that each court had to scrutinize the fee request, even without the presence of an objector. *See McDaniel v. Cty. of Schenectady*, 595 F.3d 411, 419 (2d Cir. 2010) (district court has a fiduciary duty to absent class members).

In contrast to the extensive analysis set forth in the Fee Application, the Objector cites to just four cases before returning to arguments about the timing of the settlements. Objection at 8. As discussed above, those arguments misunderstand both the applicable laws and the relevant facts. Nor are they saved by the Objector's conclusory citations. The Objector does not explain why the cases he cites should guide the Court's analysis, nor does he explain why the circumstances and holdings of those cases are instructive. He does not address those cases' length or complexity, the nature of claims pursued, the existence of or relation to government investigations, the quality of counsel's work, the successes achieved and challenges faced, or any of the myriad other factors discussed in the Fee Application and the supporting materials that justify a 30% award.[12] If the Objector had done any such analysis, he would have found the cases, if anything, to support Lead Counsel's position.[13]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court overrule the Objection and grant the Fee Application.

[12] These factors are relevant for a variety of reasons, including that "as a case requires more expertise—and, consequently, as fewer lawyers could competently bring the case—a larger percentage of the fund should be awarded to those lawyers." *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 352 (S.D.N.Y. 2014).

[13] In *In re Wachovia Preferred Sec. & Bond/Notes Litigation*, the matter was investigated and litigated in less than half the time spent here, yet the multiplier there was still 2.3. 2012 WL 2589230, at *3 (S.D.N.Y. Jan. 3, 2012). *In re Merrill Lynch* was settled a mere seven months after filing, but counsel there received their full fee request after investing only $16 million in attorney time, receiving a lodestar multiplier of 2.26. No. 07-cv-9633 (S.D.N.Y.), Dkt. Nos. 245 at 2-3, 267 at ¶3. And *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400, 405-08, 412 (D. Conn. 2009) concerned a fee award from a common fund nearly 50% larger than at issue here, in litigation the court found to be *at most* as risky as a "typical case." Finally, in *In re HealthSouth Corp. Stockholder Litigation*, the fee award was limited by an express retention agreement term. No. 03-cv-1500 (N.D. Ala.), Dkt. No. 1607 at 9.

Dated: October 23, 2018

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Appendix
Timeline of Settlements

Date	Class Action Event	CFTC Settlement
September 4, 2014	Initial Complaint filed	
May 20, 2015		CFTC Barclays Settlement
April 8, 2016	Deutsche Bank Class Settlement	
April 8, 2016	Barclays Class Settlement	
April 11, 2016	Credit Suisse Class Settlement	
April 11, 2016	JPMorgan Class Settlement	
April 11, 2016	RBS Class Settlement	
April 12, 2016	Citigroup Class Settlement	
April 18, 2016	Bank of America Class Settlement	
May 25, 2016		CFTC Citibank Settlement
October 26, 2016	Goldman Sachs Class Settlement	
December 21, 2016		CFTC Goldman Settlement
February 3, 2017		CFTC RBS Settlement
June 8, 2017	HSBC Class Settlement	
June 8, 2017	UBS Class Settlement	
February 1, 2018		CFTC Deutsche Bank Settlement
May 14, 2018	Five Remaining Non-Settling Defendants Class Settlement	
June 18, 2018		CFTC JPMorgan Settlement
August 29, 2018		CFTC BNP Paribas Settlement
September 18, 2018		CFTC ICAP Settlement
September 19, 2018		CFTC Bank of America Settlement

* Six Defendants—Morgan Stanley, Credit Suisse, Nomura, HSBC, UBS, and Wells Fargo—have yet to settle with the CFTC.