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 SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT WITH FIVE DEFENDANTS, FINAL APPROVAL OF PLAN OF DISTRIBUTION, AND CERTIFICATION OF SETTLEMENT CLASS

TABLE OF CONTENTS

INTRODUCTION

Final approval is appropriate where the court determines that a class action settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see also City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). For the reasons outlined in Plaintiffs' opening memorandum, the Settlement amply satisfies this standard, as subsequent developments powerfully confirm. Dkt. No. 681 ("Final Approval Motion") at 11-24.

The deadline for Settlement Class Members to request exclusion or object passed, pursuant to Court Order, on October 13, 2018. To date, there is one single objection to Lead Counsel's fee application as it relates to the Approved Settlements.[1] There are ***zero*** objections to any other term of the Settlement. Not one single Settlement Class Member has objected to the monetary component of the Settlement Agreement, the Plan of Distribution applicable to all of the Settlements, the scope of the release, or any other provision. Also of significance is the fact that, despite the considerable size of the Settlement Class, only four timely opt-out requests have been received and, as detailed below, three of these are arguably invalid. The minimal number of opt-outs and near total absence of objections (with *none* directed to the Settlement itself) reflect a remarkable level of support from Settlement Class Members and favor final approval.

In addition to the reasons set forth in Plaintiffs' Final Approval Motion, the lack of objection to the Plan of Distribution also confirms it should be given final approval. This would be consistent with the Court's previous ruling granting final approval to the near-identical Plan for the Approved Settlements.

Finally, additional notice activities subsequent to the Final Approval Motion, as described below, confirm that the notice program employed in connection with the Settlement

[1] Lead Counsel addresses this objection in the Plaintiffs' Reply in support of the Fee Application, filed contemporaneously herewith.

fully satisfies the standards of Rule 23(e) and due process. As noted in Plaintiffs' Final Approval Motion, the Claims Administrator, other third-party agents, and certain Defendants directly mailed the Notice Packet to all reasonably identified potential Settlement Class Members. *See* Final Approval Motion at 25-28. This process was supplemented by extensive publication and internet notice. *See id.* The notice materials informed all potential Settlement Class Members of relevant deadlines, their rights and obligations, and where to find additional information about the Settlement. *See id.* Additional efforts to ensure the proper execution of the notice program, as detailed herein, were also made subsequent to the filing of Plaintiffs' Final Approval Motion. *See* Supplemental Declaration of Cameron R. Azari, Esq., on the Implementation and Adequacy of Class Notice Plan for Proposed Settlement ("Azari Supp'l Decl."), filed concurrently herewith.

ARGUMENT

I. THE SETTLEMENT SHOULD BE GRANTED FINAL APPROVAL

As set forth in Plaintiffs' Final Approval Motion (at 11-24), the Settlement is fair, reasonable, and adequate. It is the product of robust and arms'-length negotiation, is recommended by experienced counsel, and is therefore entitled to a presumption of reasonableness. Plaintiffs' Motion described how and why each of the *Grinnell* factors weighs in favor of final approval. The Settlement Class's nearly unanimous reaction can now be conclusively included in that analysis. Accordingly, Plaintiffs submit that the *Grinnell* factors uniformly weigh in favor of final approval.

Pursuant to the Court's June 26, 2018 Order (the "Notice Order"), any objections were required to be submitted to the Court by October 13, 2018. *See* Dkt. No. 669 ¶23. To date, just

one single objection, focused *entirely* on Lead Counsel's fee request, has been filed.[2] No objection to *any* other provision of the Settlement—including the notice program employed or the Plan of Distribution—has been received or filed.

Consistent with this response, the overwhelming majority of the Settlement Class has not opted out, underscoring the high quality of the result achieved and relief secured. To date, only four requests for exclusion have been received.[3] Azari Supp'l Decl. ¶20. It appears that only one of these requests for exclusion identifies relevant transactions as was required by the Notice Order.[4] Even if valid, these requests represent at most a *de minimis* percentage of the total notional value of relevant swap transactions.

"[T]he favorable reaction of the overwhelming majority of class members to the Settlement is perhaps the most significant factor in [the] *Grinnell* inquiry." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 119 (2d Cir. 2005). Thus, the lack of objections to the Settlement is a strong indicator of its adequacy. *See id.* at 118 ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.") (quotation omitted); *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 266-67 (S.D.N.Y. 2012) (same). The same is true for the dearth of opt out requests. *See, e.g., id.* (favorably commenting on rate of exclusion rate as only being 5.1%).

The lack of objections and opt-outs is especially significant where, as here, sophisticated institutions constitute a significant portion of the Settlement Class, given that savvy class

---

[2] Although pursuant to the Notice Order objections were properly directed to the Court, the supplemental declaration of the Claims Administrator also confirms that it has not received any objections. *See* Azari Supp'l. Decl. ¶20.

[3] The four entities to timely submit exclusion requests are: (1) Anadarko Petroleum Corporation, (2) Commonwealth Bank of Australia, (3) Qantas Airways Limited, and (4) Métropole Européenne de Lille.

[4] The requests for exclusion submitted by Anadarko Petroleum Corporation, Qantas Airways Limited, and Métropole Européenne de Lille do not appear to contain proof of membership in the Settlement Class, as is required by the Court's Notice Order ¶21.

members have greater resources and ability to critically evaluate the terms of the Settlement. *See, e.g., In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *8-9 (S.D.N.Y. Apr. 26, 2016) ("Out of almost 14,000 Class members, only twenty-one requests for exclusion were timely submitted. Only four objections have been pursued. This very low number of objections and requests for exclusion supports a finding that the Settlement is fair . . . . This sophisticated Class is in an excellent position to swiftly and competently assess whether the Plan [of Allocation], and the model upon which it is based, achieves a fair distribution of this very sizeable Settlement Fund. It has spoken. No Class member has objected that the Settlement Fund is inadequate."); *Woburn Ret. Sys. v. Salix Pharm., Ltd.*, 2017 WL 3579892 at *2-3 (S.D.N.Y. Aug. 18, 2017) (noting small number of objections and absence of institutional investor objections as factor supporting approval); *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006) (lack of objections from institutional investors supported approval of the settlement). Here, despite having mailed over 60,000 notices to Class Members, there was only one (very limited) objection filed, and only four Class Members opted out.

Accordingly, it is now clear that the second *Grinnell* factor—"the reaction of the class to the settlement"—strongly favors approval of the Settlement. Where a very small proportion of a class seeks exclusion or objects, the relevant *Grinnell* factor weighs in favor of approving a settlement. *See, e.g., D'Amato v. Deutsche Bank*, 236 F.3d 78, 86-87 (2d Cir. 2001) (where 27,883 notices were sent, and 18 objections and 72 requests for exclusion resulted, "[t]he District Court properly concluded that this small number of objections weighed in favor of the settlement"); *Precision Assoc., Inc. v. Panalpina World Trans. (Holding) Ltd.*, 2013 WL 4525323, at *7 (E.D.N.Y. Aug. 27, 2013) (granting final settlement approval where 183

members of a class estimated to number in the "hundreds of thousands" opted out and two objected).

II. THE PLAN OF DISTRIBUTION SHOULD BE GIVEN FINAL APPROVAL

The Plan of Distribution to be employed in connection with the Settlement should also be granted final approval as fair and adequate. As described in Plaintiffs' Final Approval Motion (at 28-31) and previously held by the Court, it reflects the considerable efforts of Counsel and experts who have developed detailed methods to reasonably account for, *inter alia*, different financial instrument and their relative sensitivities to the conduct alleged. The Plan is operationalized through a series of pools and multipliers that are well-supported by case law and reflect categorizations and adjustments to account for the nature of various instruments. *Id.* As noted above, for the second time now, no Settlement Class Member has taken any issue with the detailed Plan of Distribution.

III. THE EXTENSIVE NOTICE PROGRAM SATISFIES RULE 23 AND DUE PROCESS

As detailed in Plaintiffs' Final Approval Motion (at 25-28), and consistent with the Court's prior judgments as to the Approved Settlements, the notice program employed in connection with the last Settlement was the best practicable under the circumstances, in accordance with both Rule 23 and due process. Lead Counsel previously submitted declarations attesting to the notice efforts undertaken by the Court-appointed Claims Administrator, Epiq Systems, Inc. ("Epiq"), and certain third parties and Settling Defendants that effected notice primarily to foreign entities. *See* Dkt. Nos. 683-695.

The extensive notice program, which included direct mailings of the notice materials to all reasonably identifiable potential Settlement Class Members, as well as various alternative methods of notice, has continued to be implemented since the Final Approval Motion was filed.

As reflected in the supplemental declarations filed concurrently herewith, Epiq, other third-party administrators, and certain Defendants have continued their notice efforts pursuant to the Court's Notice Order.[5]

Pursuant to the Notice Order, as of August 14, 2018, Epiq mailed direct notice to a total of 39,973 potential Settlement Class Members based on name and address information that was primarily obtained from the Defendants' business records. *See* Dkt. No. 683 (Sept. 26, 2018 Azari Decl.) ¶¶12, 17; *see also* Azari Supp'l Decl. ¶8. Similarly, Rust Consulting, Inc., due to foreign and/or other privacy concerns, mailed a total of 20,032 additional Notice Packets to potential Settlement Class Members. *See* Rabe Supp'l Decl. ¶5. Certain Defendants (or their third-party agents) also directly sent notice to another 2,673 potential Settlement Class Members, primarily to accommodate foreign privacy concerns.[6] In addition, the notice packets, together with a notice specific to Brokers, Banks, and Other Nominees, were disseminated by Epiq to 1,358 of the largest and most common banks, brokers, and other nominees, with the instruction to convey this information to all known beneficial owners. Azari Supp'l Decl. ¶9. As of October 12, 2018 and following this initial widespread distribution of notice in August 2018, Epiq had provided an additional four Notice Packets to each potential Settlement Class Member who requested one via telephone or mail. Azari Supp'l Decl. ¶10.

---

[5] *See* Azari Supp'l Decl.; Supplemental Declaration of Jason Rabe Regarding Mailing of the Proposed Settlement Notice and Proof of Claim Forms to Certain Settlement Class Members ("Rabe Supp'l Decl."); Supplemental Declaration of Jamuna D. Kelley Regarding Mailing of the Settlement Notice and Proof of Claim Forms; Supplemental Declaration of Sandra Adams Regarding Self-Mailing of Class Notice by Certain Foreign HSBC Affiliates in Connection with Proposed Settlement Agreement; Supplemental Declaration of Alan S. Gruber Regarding Mailing of the Proposed Settlement Notice and Proof of Claim Forms; Supplemental Declaration Regarding Mailing of the Notice of Proposed Settlement of Class Action (by Amanda Sternberg on behalf of Garden City Group); and Supplemental Declaration of Matthew Popowsky Regarding Mailing of the Additional Settlement Notice and Proof of Claim Form.

[6] *See* Dkt. No. 690 (GCG Decl.) ¶4 (395 Notice Packets mailed); Dkt. No. 685 (Deering Decl.) ¶6 (26 Notice Packets mailed); Dkt. No. 692 (Leuzinger Decl.) ¶7 (14 Notice Packets mailed); Dkt. No. 687 (Ng Decl.) ¶7 (2 Notice Packets mailed); Dkt. No. 691 (Gomez Decl.) ¶9 (41 Notice Packets mailed); Dkt. No. 695 (Adams Decl.) ¶3 (1,297 Notice Packets mailed); Dkt. No. 694 (Lee Decl.) ¶2 (40 Notice Packets mailed); Dkt. No. 686 (Gruber Decl.) ¶2 (98 Notice Packets mailed); Dkt. No. 693 (Popowsky Decl.) ¶¶7-8 (649 Notice Packets mailed); Dkt. No. 688 (Kelley Decl.) ¶3 (111 Notice Packets mailed), all in support of Plaintiffs' Final Approval Motion.

These direct mailing efforts were supplemented by an extensive publication and internet notice program, along with the establishment of a dedicated Settlement Website, telephone line, and email address for any potential claimant to seek further information. *See* Final Approval Motion at 25-26; *see also* Azari Supp'l Decl. ¶¶12-19. And to ensure Settlement Class Members continue to have the maximum possible opportunity to submit their claims prior to the December 23, 2018 deadline, Epiq has continued to mail Notice Packets upon request, and address potential claimant inquiries via the internet and established phone lines. *See* Azari Supp'l. Decl. ¶¶10, 16, 18-19.

Similarly robust notice programs, combining direct mail and publication notice and as detailed in Plaintiffs' Final Approval Motion, are routinely approved. *See In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *8 (E.D.N.Y. Oct. 23, 2012) (approving notice program "distributed widely, through the internet, print publications, and targeted mailings"); *CDS*, 2016 WL 2731524, at *5 (S.D.N.Y. Apr. 26, 2016) (same). Indeed, this Court previously found that a similar notice plan satisfied Rule 23 and due process in connection with the Approved Settlements. *See* Dkt. Nos. 648-657 ¶15.

For all these reasons, and because no Settlement Class Member has objected to any of the Settlement terms—including the adequacy of notice—the Court should again find that the notice program implemented in connection with the last Settlement constitutes the best notice practicable under the circumstances and thus satisfies Rule 23 and due process.

CONCLUSION

The Settlement, achieved after years of hard-fought litigation, is fair, reasonable, and adequate. Indeed, given the risks of ongoing litigation and other factors addressed in Plaintiffs' Final Approval Motion, it represents an excellent result for the Settlement Class.

Plaintiffs respectfully request that the Court certify the Settlement Class, grant final approval to the Settlement, and grant final approval of the Plan of Distribution. A proposed order entering final judgment and dismissing claims against the five final Defendants is filed contemporaneously herewith.

Dated: October 23, 2018

/s/ Daniel L. Brockett
Daniel L. Brockett
Daniel Cunningham
Marc L. Greenwald
Steig D. Olson
Jonathan B. Oblak
Justin Reinheimer
Kevin A. Janus
Toby E. Futter
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue
22nd Floor
New York, New York 10010
Telephone: (212) 849-7000
Fax: (212) 849-7100
danbrockett@quinnemanuel.com
danielcunningham@quinnemanuel.com
marcgreenwald@quinnemanuel.com
steigolson@quinnemanuel.com
jonoblak@quinnemanuel.com
justinreinheimer@quinnemanuel.com
kevinjanus@quinnemanuel.com
tobyfutter@quinnemanuel.com

Jeremy D. Andersen (*pro hac vice*)
865 South Figueroa Street
10th Floor
Los Angeles, California 90017
Telephone: (213) 443-3000
Fax: (213) 443-3100
jeremyandersen@quinnemanuel.com

/s/ David W. Mitchell
David W. Mitchell
Patrick J. Coughlin
Brian O. O'Mara
Steven M. Jodlowski
Lonnie Browne
ROBBINS GELLER RUDMAN & DOWD LLP
655 West Broadway
Suite 1900
San Diego, California 92101
Telephone: (619) 231-1058
Fax: (619) 231-7423
patc@rgrdlaw.com
davidm@rgrdlaw.com
bomara@rgrdlaw.com
sjodlowski@rgrdlaw.com
lbrowne@rgrdlaw.com

/s/ Christopher M. Burke
Christopher M. Burke
Julie A. Kearns (*pro hac vice*)
Hal Cunningham (*pro hac vice*)
SCOTT+SCOTT ATTORNEYS AT LAW LLP
600 W. Broadway, Suite 3300
San Diego, CA 92101
Telephone: 619-233-4565
Fax: 619-233-0508
cburke@scott-scott.com
jkearns@scott-scott.com
hcunningham@scott-scott.com

David R. Scott
Beth A. Kaswan
Peter A. Barile III
Thomas K. Boardman
The Helmsley Building
230 Park Avenue, 17th Floor
New York, NY 10169
Telephone: 212-223-6444
Fax: 212-223-6334
david.scott@scott-scott.com
bkaswan@scott-scott.com
pbarile@scott-scott.com
tboardman@scott-scott.com

Amanda A. Lawrence
156 South Main Street
P.O. Box 192
Colchester, CT 06415
Telephone: 860-537-5537
Fax: 860-537-4432
alawrence@scott-scott.com