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)

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

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Pursuant to Rule 23(h) of the Federal Rules of Civil Procedure, Plaintiffs, through Quinn Emanuel Urquhart & Sullivan, LLP ("Quinn Emanuel"), Robbins Geller Rudman & Dowd LLP ("Robbins Geller"), and Scott + Scott, Attorneys at Law, LLP ("Scott + Scott," and, collectively, "Lead Counsel"), respectfully move for an award of attorneys' fees and payment of litigation expenses from the common fund established by Plaintiffs' settlements with Settling Defendants.[1]

INTRODUCTION

The Settlements achieved to date are a superb result for investors affected by Defendants' alleged manipulation of ISDAfix.[2] They provide significant compensation for investors harmed by Defendants' alleged misconduct in a timely fashion. Lead Counsel has secured over $408 million for injured investors, as well as confirmatory discovery and ongoing cooperation from the Settling Defendants that supports Lead Counsel's continued prosecution of the case against the five Non-Settling Defendants, who remain jointly and severally liable. As a result of the hard work and skill of Lead Counsel, if the Settlements are approved and the claims process proceeds on track, substantial monetary recoveries will likely be delivered to aggrieved investors in 2018—much faster than would be possible through continued, protracted litigation.

Lead Counsel secured these Settlements in the face of significant risks. This is not the typical case reflexively filed in response to the announcement of a Department of Justice or other government investigation. In fact, Lead Counsel here were *ahead of* government investigations and settlements, and did not rely on pressure arising from pending criminal charges. We

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[1] The Settling Defendants are Bank of America, N.A. ("Bank of America"); Barclays Bank PLC and Barclays Capital Inc. ("Barclays"); Citigroup Inc. ("Citigroup"); Credit Suisse AG, New York Branch ("Credit Suisse"); Deutsche Bank AG ("Deutsche Bank"); The Goldman Sachs Group, Inc. ("Goldman Sachs"); HSBC Bank USA, N.A. ("HSBC"); JPMorgan Chase & Co. LLC ("JPMorgan"); Royal Bank of Scotland, PLC ("RBS"); and UBS AG ("UBS").

[2] Capitalized terms not defined herein have the same meanings as supplied in Plaintiffs' motions for preliminary approval. *See* Dkt. Nos. 220 & 221 (Bank of America, Barclays, Citigroup, Credit Suisse, Deutsche Bank, JP Morgan, and RBS), 329 & 330 (Goldman Sachs), 488 & 489 (HSBC and UBS). All internal citations and quotations are omitted unless indicated.

investigated, litigated, and met the significant funding demands of this case on our own, without prior help from government settlements. And we did so while aligned against fifteen of the world's largest financial institutions represented by some of the world's biggest and most experienced law firms.

Advancing costs in a complex financial collusion case necessarily required Lead Counsel to engage a number of experts and to task them with, among other things, analyzing huge volumes of data. Out-of-pocket expert bills alone—advanced by Lead Counsel and Labaton—have amounted to over $12 million to date. Pursuing this case on behalf of the Class was, by any measure, a formidable task with inherent risk.

When counsel take risks like this and secure excellent results while serving the important role of private attorneys general to enforce the nation's antitrust laws, public policy dictates that their work be compensated with a fair and reasonable fee. As the Second Circuit has explained:

> [O]ne whose labors produce a favorable result deserves adequate recompense. Such a notion is particularly applicable in the area of antitrust class action, which depends heavily on the notion of the private attorney general as the vindicator of the public policy. In the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation.

Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc., 481 F.2d 1045, 1050 (2d Cir. 1973).

In this case, a fair and reasonable fee for plaintiffs' counsel is 30% of the monetary value of the settlement fund, or $122,550,000. This request is supported by this Circuit's standards for evaluating fee applications and by fee schedules adopted by a range of courts in other complex antitrust litigation with comparable recoveries. Prominent legal scholar Brian T. Fitzpatrick of Vanderbilt University School of Law, whose extensive research on attorneys' fees in class action settlements has been widely cited by federal courts, has submitted a declaration in support of

Lead Counsel's fee request ("Fitzpatrick Decl."). *See* Fitzpatrick Decl. ¶3 n.1 (collecting cases and other work that rely on his empirical research).

Lead Counsel also seek payment for the out-of-pocket expenses incurred while prosecuting this action, amounting to nearly $17 million. These expenses were all incurred for the benefit of the Class, and they were essential to the result achieved. Lead Counsel exercised careful judgment when incurring these expenses, especially given that they were advanced out of pocket with no guarantee that any would be reimbursed. These expenses are discussed below and in the declarations submitted herewith.[3]

ARGUMENT

I. THE WORK UNDERTAKEN BY LEAD COUNSEL SUPPORTS THE REQUESTED FEE

The results achieved so far are the product of years of hard work by Lead Counsel and the firms—in particular, Labaton Sucharow LLP ("Labaton")—working at their direction. This is not a simple case; effective litigation required Lead Counsel to master complex financial instruments, trading strategies, and market operations. We funded the empirical research and developed the legal theories that formed the basis for Plaintiffs' allegations of ISDAfix manipulation. After largely defeating Defendants' motion to dismiss, Lead Counsel have conducted aggressive discovery—obtaining and managing sprawling document production with diligence and skill, deposing dozens of witnesses, and winning numerous discovery disputes. All of this was done in time to meet the Court's class certification fact discovery deadline and to create a record that would support Plaintiffs' pending motion for class certification.

[3] Lead Counsel believe that the significant contributions of the class representatives in this matter warrant incentive awards, but will make an appropriate application for such awards at the conclusion of this litigation against all Defendants.

Along the way, ten of fifteen Defendants settled between April 2016 and June 2017. Lead Counsel's work that drove the Settling Defendants to the negotiating table, and the advocacy that Lead Counsel continues to perform on the Class's behalf, is described below. The work undertaken by Lead Counsel and the other firms working at their direction is elaborated on in further detail in the accompanying Joint Declaration of Daniel L. Brockett, Christopher M. Burke, and David W. Mitchell in Support of Class Counsel's Motion for Award of Attorneys' Fees and Payment of Litigation Expenses, and Class Plaintiffs' Motion for Final Approval of Settlement Agreements ("Joint Decl.").

A. Pre-Appointment Case Investigation and Initial Complaints

The over $400 million common fund could not have been achieved without Lead Counsel's initial pre-filing investigations. In the wake of scandals involving the manipulation of other financial benchmarks such as LIBOR, and as part of Lead Counsel's continuous efforts to monitor the landscape of financial markets for potential misconduct, counsel were already looking at the ISDAfix benchmark as one vulnerable to possible manipulation even before it was first reported in the press in April 2013 that the CFTC had opened an investigation. When the issue hit the press, we accelerated our investigation of ISDAfix and retained a private investigation firm and several economists to assist in their inquiry.

Lead Counsel first retained Professor Rosa Abrantes-Metz of the New York University Stern School of Business to analyze trading price data for the possibility of benchmark manipulation. Professor Abrantes-Metz is perhaps the most prominent academic in the world on benchmark manipulation, having authored numerous articles on screening for price manipulation and detecting collusion. She is largely credited with uncovering the manipulation of LIBOR that led to worldwide investigations and huge fines. We later retained Fideres Partners LLP ("Fideres"), a prominent economic consulting firm located in London and New York that has

extensive experience with benchmark and financial services analysis. The initial expert work uncovered aberrations in Defendants' ISDAfix submissions.

To assist in the expert work, Lead Counsel purchased a sizeable amount of trading data, which our experts and consultants studied using numerous well-established methods of analysis to determine anomalous trading patterns and the likelihood of collusion. Through examination of this data, our experts determined that numerous days throughout the Class Period exhibited highly anomalous, statistically-significant spikes just before the 11:00 a.m. benchmark-setting window. Further analysis revealed that the observed price spikes were consistent with collusion among Defendants.

Expert analysis was also able to demonstrate that, since at least 2009 (and likely before), the Defendant Banks regularly submitted the same or virtually the same USD ISDAfix rate quotes on almost every single day, down to five decimal points. This resulted in the official ISDAfix rates and the Defendant Banks' contributions being identical on the vast majority of the days covering the Class Period. And, tellingly, this stunning pattern of uniformity ceased when regulators began to focus on the manipulation of financial benchmarks. During this investigative phase, Lead Counsel consulted with numerous industry insiders knowledgeable about ISDAfix, the ISDAfix rate-setting process, and the financial instruments that are pegged to ISDAfix. We also conducted additional confidential efforts to confirm price manipulation and to identify the mechanics of Defendants' conspiracy.

All told, Lead Counsel invested over $1 million and numerous months analyzing data, learning about the ISDAfix benchmark (its calculation process, its uses, its history, and its strengths and weaknesses), and assessing whether investors may have been injured by the trends and irregularities uncovered. After extensive consultation with industry-leading economists and

experts in financial market manipulation, counsel determined that legal violations were likely. We then set about assembling a complaint that would document the findings of the investigation and seek relief for those who were injured by the misconduct.

Lead Counsel filed the first action arising out of ISDAfix manipulation, *Alaska Electrical Pension Fund*, on September 4, 2014, *before* it was revealed that the U.S. Commodity Futures Trading Commission ("CFTC") had uncovered evidence of possible criminal wrongdoing in connection with ISDAfix and referred the case to the Department of Justice.[4]

When four other class actions concerning ISDAfix manipulation were filed by different counsel (both in this District and in the District of New Jersey), Lead Counsel worked diligently to organize the litigation efficiently so as to avoid unnecessary delay or costs to the Class. Lead Counsel's negotiations resulted in the voluntary dismissal of the action filed in the District of New Jersey (and its refiling in this District) to avoid the unnecessary delay and expense associated with a proceeding before the Judicial Panel on Multidistrict Litigation. *See* Joint Decl. ¶19. Lead Counsel also engaged in extensive discussions to achieve unanimity regarding which firms would serve as Lead Counsel to avoid an unnecessarily contested leadership fight. *Id.* ¶20.

At the same time, Lead Counsel continued to work with our economists to carry out analyses of ISDAfix submission and trading patterns. As a result, the complaints filed by Lead Counsel were very well-developed, informed by considerable expertise, and supported by economic and other evidence.

[4] *See* Matthew Leising and Tom Schoenberg, *CFTC Said to Alert Justice Department of Criminal Rate Rigging*, BLOOMBERG, Sept. 8, 2014, http://www.bloomberg.com/news/2014-09-08/cftc-said-to-alert-justice-department-of-criminal-rate-rigging.html.

B. Pleadings and Motions to Dismiss

Following the appointment of Lead Counsel on November 25, 2014 (*see* Dkt. No. 137), Lead Counsel set about preparing a consolidated pleading. Without the benefit of government indictments or guilty pleas,[5] Lead Counsel scoured the public record for facts probative of collusion and continued their extensive work with experts to develop theories consistent with complicated economic evidence. Lead Counsel also identified and conducted interviews with witnesses with knowledge of the underlying facts. These efforts led to the filing of the Consolidated Amended Complaint in February 2015 (the "Amended Complaint"). *See* Dkt. No. 164. The Amended Complaint details in over 120 pages an alleged conspiracy by Defendants to manipulate ISDAfix rates at the expense of their counterparties and the interest rate swaps market more generally. At the time the Amended Complaint was filed, Lead Counsel had incurred almost $1.2 million in expert fees, not to mention millions of dollars more of lawyer time and other expenses.

Defendants moved to dismiss, filing (between opening papers and replies) nearly 90 pages of briefing. *See* Dkt. Nos. 172-175, 203, 204. Defendants argued, *inter alia*, that Plaintiffs: failed to plausibly allege each Defendants' participation in a conspiracy to restrain trade; lacked antitrust standing; did not plead injury-in-fact or damages; did not state claims for breach of contract, tortious interference, or unjust enrichment; and were barred by statutes of limitations from asserting many of their claims. *See id.* Lead Counsel's opposition briefs provided thoroughly researched responses to these arguments, and spanned nearly 65 pages. *See* Dkt. Nos. 194, 195. In March 2016, the Court largely denied Defendants' motion. *See* Dkt. No. 209.

[5] The first CFTC settlement arising out of ISDAfix manipulation (with Barclays) did not occur until May 20, 2015.

In January 2017, Plaintiffs moved for leave to amend to add additional named plaintiffs to protect against any purported standing or other class certification issues that Defendants might raise. *See* Dkt. Nos. 352, 353. Defendants opposed (*see* Dkt. Nos. 361, 362), but on February 1, 2017 the Court granted Plaintiffs' motion (*see* Dkt. No. 379) and a Second Consolidated Amended Complaint ("SCAC") was filed less than a week later (*see* Dkt. No. 387).

Defendants moved to dismiss the SCAC in three separate briefs (*see* Dkt. Nos. 397, 399, 402), arguing principally that Plaintiffs lacked standing to pursue antitrust claims arising from plain vanilla swaps outside the interdealer context, and also seeking to eliminate some common law claims against certain Defendant entities. Lead Counsel again devoted substantial time and resources to thoroughly and vigorously opposing these motions, *see* Dkt. Nos. 408-412, and the Court largely sided with Plaintiffs, granting Nomura Securities' partial motion, but refusing to dismiss the challenged aspect of Plaintiffs' antitrust claim and trimming other claims against Wells Fargo in a way that did not impact the class due to other proper Named Plaintiffs. *See* Dkt. No. 568.

C. <u>Discovery</u>

Lead Counsel began taking discovery in earnest immediately following the Court's May 2016 initial conference and Case Management Plan and Scheduling Order (Dkt. No. 224). Lead Counsel satisfied Plaintiffs' initial disclosure obligations, negotiated a comprehensive protective order (*see* Dkt. No. 257) and ESI protocol (*see* Dkt. No. 268), and initiated substantial fact discovery, prioritizing class certification discovery in accordance with the Court's scheduling order. *See* Joint Decl. ¶¶34-38.

Over the course of the next year, Lead Counsel served, among other things, 89 requests for production on the Defendant Banks and 75 requests for production on ICAP. After negotiations stretching over many months, the parties agreed to search terms and custodians.

Defendants eventually produced over 21 million pages of documents and hundreds of hours of audio. Plaintiffs' counsel reviewed and tagged over 12 million pages, compiling and synthesizing an enormous body of evidence with which to refine and prosecute their case. Audio files were also transcribed and reviewed—crucial evidence, as many participants in Defendants' conspiracy conducted their trades on recorded lines that captured important conversations and revealed evidence corroborating Plaintiffs' allegations. *See* Joint Decl. ¶¶15, 47, 63.

Lead Counsel reviewed this large volume of documents efficiently and effectively, dividing Defendants across the three Lead Counsel firms (and one additional firm, Labaton), but closely coordinating our efforts by using sophisticated web-based document review platforms and other innovative technology. Lead Counsel trained a large team to analyze the documents, and employed cutting-edge analytical tools to identify which categories of documents to review and the order in which to review them.

Lead Counsel reviewed thousands of documents per day, using what was learned on each day to inform which documents were reviewed the next. Important documents were circulated and discussed daily among the attorneys. As threads of the conspiracy were uncovered, Lead Counsel assigned responsibility for mastering them to associates on the team. Lead Counsel developed the various pieces of the conspiracy into a coherent narrative using a secure, internal website maintained by Lead Counsel that enabled real-time team-wide distribution and analyses of documents and work product. The proprietary knowledge-sharing tools we used in this case directly contributed to the speed and efficiency by which Lead Counsel were able to learn key elements of the case.

By the end of 2016, Lead Counsel had created a detailed, multi-year, and multi-layered chronology of the alleged conspiracy and had identified many of the key witnesses. This work

product was crucial for the initial round of depositions. It allowed counsel to master the topics on which we were deposing senior officers at the banks and led to several important admissions that we believe contributed to the Settlements.

Lead Counsel also served seven third-party document subpoenas and eight third-party deposition subpoenas, yielding tens of thousands of pages of documents containing relevant information and key information from these deponents including former employees of Defendants. *See* Joint Decl. ¶¶69-73. For example, Lead Counsel obtained important documents regarding the conduct of ICAP and panel banks from ISDA, a trade association involved in the formation of and responsible for overseeing ISDAfix. These documents enabled Plaintiffs to learn a considerable amount at the Rule 30(b)(6) deposition of ISDA in London, which led to important admissions about ISDA's lack of knowledge of the manner in which Defendants had secretly corrupted the protections established by ISDA for the ISDAfix setting process. Lead Counsel also served numerous interrogatories, filling crucial holes in Plaintiffs' knowledge.

Lead Counsel also ensured that Plaintiffs met their own discovery obligations, producing over five million pages of responsive communications, trade documentation, and other materials, in response to several rounds of lengthy requests for production, which were propounded both by Defendants as a collective group and by seven individual Defendants in May 2016, December 2016, and February 2017. *See* Joint Decl. ¶¶55-58. Plaintiffs also negotiated and responded to Defendants' (both collective and individual) May 2016 interrogatories.

Lead Counsel conducted Plaintiffs' discovery efforts aggressively, but professionally. Despite our best efforts, there were several instances where discovery disputes necessitated Court intervention. *See* Joint Decl. ¶¶37, 59, 73. Some of the more significant disputes were:

- Plaintiffs successfully moved to compel the production of regulatory materials when Defendants refused to produce materials exchanged with regulators investigating

misconduct related to ISDAfix. *See* Dkt. Nos. 269, 270, 306, 338, 349, 351. In response to Plaintiffs' persistent efforts on this issue, the Court ultimately issued an Opinion ordering the production of regulatory materials shown or provided to the CFTC or DOJ concerning ISDAfix manipulation. Dkt. No. 357.

- Plaintiffs defeated the motion to quash their subpoena issued to Charles Fletcher, Head of Global USD Interest Rate Derivatives and a Managing Director at Defendant Deutsche Bank during most of the alleged class period. *See* Dkt. Nos. 445, 446, 455. The Court denied the motion "substantially for the reasons set forth in Plaintiffs' opposition." Dkt. No. 456.

- Plaintiffs prevailed in their motion to compel the production of additional materials from Morgan Stanley. *See* Dkt. Nos. 434-36. Judge Peck ordered Morgan Stanley to produce the relevant documents within two weeks. *See* May 10, 2017 Unnumbered Docket Minute Entry & Dkt. No. 467.

Over the first half of 2017, Lead Counsel took nearly 40 fact depositions of defense witnesses. Depositions began on January 27, 2017, and continued at a rapid pace through the Spring and Summer of 2017. *See* Joint Decl. ¶¶60-64. Both traders and high-level superiors were deposed, filling out Plaintiffs' understanding of Defendants' scheme—its operations, its regularity, its participants, and its timeframe. The depositions taken by Lead Counsel were carefully prepared for and generally taken by seasoned examiners with considerable experience. As a result of these cumulative efforts, Plaintiffs believe that virtually every deposition led to damaging admissions and blows to the credibility of Defendants' witnesses. This was despite the fact that Defendants' witnesses were, uniformly, well-prepared by their own able counsel.

D. <u>Class Certification and Expert Work</u>

Lead Counsel marshaled their considerable discovery efforts in support of a motion for class certification filed in July 2017. *See* Joint Decl. ¶¶74-76. The motion was accompanied by three detailed expert reports, each of which supported Plaintiffs' theory of why class treatment was not only possible, but necessary to secure any meaningful relief for investors harmed by the alleged collusive scheme. Defendants have strenuously opposed Plaintiffs' motion, including by

seeking to exclude each of the experts who offered opinions in support of class certification. Lead Counsel defended Plaintiffs' experts in depositions, deposed Defendants' own experts (after extensively analyzing their theories and relevant literature), and filed papers (briefs and expert reports) in support of class certification as well as in opposition to the motions to exclude. *See* Joint Decl. ¶¶77-82. In all, the Court received over 300 pages of briefing on class certification and related expert issues (not to mention hundreds of pages of expert reports).

Lead Counsel have worked with multiple experts at all stages of this case. Pre-suit investigation, discovery, and the construction of a rigorous class-wide approach to proving injury and quantifying damages each depended heavily on close collaboration with highly knowledgeable, experienced experts. Some of the key areas in which experts were involved and their contributions are summarized below.

1. Professor Craig Pirrong

Lead Counsel retained and began working with Craig Pirrong, Ph.D., Professor of Finance and Director of the Global Energy Management Institute at the University of Houston Bauer College of Business, to develop a class-wide damages model. As described in detail in Plaintiffs' motion for class certification, based on market microstructure principles and economic analysis, Prof. Pirrong developed a model for how prices would have behaved in the absence of Defendants' manipulation. In connection with this assignment, Prof. Pirrong applied market microstructure concepts in an empirical analysis that generated an illustrative artificiality ribbon capable of quantifying damages in a formulaic way over the Class Period.

2. Compass Lexecon

Lead Counsel also retained Compass Lexecon ("Compass"), a world-renowned data analytics and economic consulting firm with expertise in derivatives and financial markets. Compass assisted with data-related tasks throughout the case. This work included, *inter alia*,

extensive efforts to help Lead Counsel understand the various complex financial products at issue. As discussed in the class certification papers and depositions relating thereto, Compass also supported Prof. Pirrong in the preparation and development of his expert reports and opinions. Compass has been vital in understanding the data at issue in this case and then translating that knowledge into class-wide techniques for measuring damages.

This work and the resulting expertise positioned Compass well to assist with the development of the Plan of Distribution for these ten settlements. Over the course of 2017 and into 2018, Lead Counsel and Compass examined substantial data from the Settling Defendants and engaged in a series of discussions in connection with the development of a multi-pool, multi-instrument distribution model able to account for substantive differences between the types of impact suffered by differently-positioned participants in the interest rate derivatives market and other markets connected to the ISDAfix rate setting process.

3. Other Experts

Lead Counsel retained a number of other experts at various stages of the litigation to assist with tasks ranging from empirical analysis to translating trader jargon. A summary of these experts' work is as follows:

- As noted above, Professor Rosa Abrantes-Metz and Fideres played a key role in Lead Counsel's pre-suit investigation, and were indispensable in acquiring, analyzing, interpreting, and applying collusion "screens" to the ISDAfix submission data that formed, in substantial part, the basis for Plaintiffs' antitrust theory in the pleadings.

- Lead Counsel worked extensively with industry veteran Robert Farrell throughout discovery to better understand the logistics, jargon, customs, and practices of the traders and brokers whose communications form the backbone of the documentary evidence obtained from Defendants. Mr. Farrell reviewed and provided commentary on discovery obtained from Defendants, including both interpretations of Defendants' communications and trading positions.

- Plaintiffs also retained Dr. Michael Williams, an industrial organization economist. Dr. Williams analyzed Defendants' practice of rubberstamping the ICAP reference rates—a

phenomenon alleged in the pleadings and confirmed by the documents obtained through the discovery process. Dr. Williams also analyzed whether rubberstamping was consistent with Defendants' unilateral self-interest in the absence of the conspiracy, and situated Defendants' conspiracy in terms of the economic concept of a focal point.

This expert work assisted the attorneys in developing legal theories and in turn developing evidence needed to prove Plaintiffs' claims. Because of the complex subject matter and nature of the claims, the use of numerous experts was required to present a coherent view of the case at class certification. Harmonizing the use of multiple experts required considerable skill and coordination among Lead Counsel. Each of these experts were invaluable, and their considerable costs are commensurate with the contributions they made. Without them, the results achieved for the Class would not have been possible.

E. <u>Settlement and Mediation</u>

As Plaintiffs diligently pursued their claims in all the ways outlined above, there were times when certain Defendants approached Lead Counsel to explore a potential settlement. The first such discussions began late in the summer of 2015, following the early June filing of Plaintiffs' oppositions to Defendants' motions to dismiss, and before a decision on the motions to dismiss had been issued. Plaintiffs initially obtained an agreement in principle with Barclays in September 2015. After this, Lead Counsel contacted other Defendants or, in some cases, received communications from other Defendants, regarding their interest in possible resolution of the case. These arms-length negotiations occurred over the course of several years, both in person and over the phone, from late summer of 2015 through summer of 2017. The negotiations with each Settling Defendant were hard-fought and at times contentious. Once the Court largely denied Defendants' motions to dismiss in March 2016, the pace and tenor of these negotiations changed dramatically, with the first seven Settling Defendants signing Settlement Agreements in the month following the Court's ruling.

As document discovery was well underway and a host of depositions loomed on the horizon, Goldman Sachs decided to settle in late October 2016. Lead Counsel also engaged in proactive mediation efforts before the Hon. Layn Phillips (Ret.). Judge Phillips conducted a structured mediation session at which the parties were given the opportunity to formally exchange their respective views of the merits of Plaintiffs' case. Judge Phillips also provided subsequent mediation assistance in the form of private conversations with each of the parties, relaying settlement offers and positions between the parties. These negotiations were crucial in Plaintiffs arriving at settlements with HSBC and UBS in June 2017.

Under the terms of all ten Settlements, Lead Counsel has received extensive document and data discovery, which was invaluable in helping Plaintiffs understand the scope and methods of Defendants' misconduct and informed Plaintiffs' motion for class certification. *See* Joint Decl. ¶¶39, 47-54. We also received proffers from each of the Settling Defendants, which further illuminated the role of the Non-Settling Defendants in the overall conspiracy. The negotiations regarding data and data systems were vital in securing needed information from the Settling Defendants, as well as guiding how to approach more adversarial data-related negotiations with the Non-Settling Defendants. The data received from all Defendants also informed, among other things, the Plan of Distribution.

II. <u>LEAD COUNSEL'S FEE REQUEST IS FAIR AND REASONABLE</u>

"Attorneys whose work created a common fund for the benefit of a group of plaintiffs may receive reasonable attorneys' fees from the fund." *See In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *16 (S.D.N.Y. April 26, 2016) ("*CDS*"). Fees can be awarded based on an interim settlement fund. *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *9 (E.D.N.Y. Oct. 23, 2012). Courts "may award attorneys' fees in common fund cases under either the 'lodestar' method or the 'percentage of the fund' method" although "the trend in this

Circuit is toward the percentage method." *McDaniel v. County of Schenectady*, 595 F.3d 411, 417 (2d Cir. 2010). *See also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (holding that percentage method is preferred approach); Fitzpatrick Decl. ¶¶11-12.

The percentage method provides "appropriate financial incentives" necessary "to attract well-qualified plaintiffs' counsel who are able to take a case to trial," while also "directly align[ing] interests of the class and its counsel" by providing "a powerful incentive for the efficient prosecution and early resolution of litigation." *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355, 359 (S.D.N.Y. 2005). Without "adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation." *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2011 WL 2909162, at *6 (E.D.N.Y. July 15, 2011).

Awarding reasonable attorneys' fees from the common fund recognizes and compensates Lead Counsel's efforts in bringing and prosecuting this case, and advances the purpose of the antitrust laws, which rely on private actions like this one to further important public-policy goals. *See Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983) (noting importance of private actions "as a means of furthering the policy goals of . . . the federal antitrust laws"); *see also N. Pac. Ry. Co. v. U.S.*, 356 U.S. 1, 4 (1958) (the federal antitrust laws protect "free and unfettered competition as the rule of trade," based on the notion that the "unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions").

A. **Lead Counsel's Request is Within the Range of Fee Percentages Approved in the Second Circuit**

The fee request for Lead Counsel here totals 30% of the common fund, which falls well within the range of fees found to be reasonable by courts in this Circuit and elsewhere for comparable cases. As this Court has noted, "[i]n this Circuit, courts typically approve attorney's fees that range between 30 and 33⅓%." *Thornhill v. CVS Pharmacy, Inc.*, 2014 WL 1100135, at *3 (S.D.N.Y. March 20, 2014) (collecting cases) (Furman, J.). *See also Sanz v. Johny Utah 51 LLC*, 2015 WL 1808935, at *1 (S.D.N.Y. Apr. 20, 2015) (Furman, J.) (same). "Even in large-value cases, courts have sometimes awarded contingency fees exceeding 30% of the overall fund." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 447 n.11 (E.D.N.Y. 2014) (collecting cases). This conclusion is echoed by Prof. Fitzpatrick, who observes that the fee request here "fall[s] within *the most common fee range*: between 30% and 35%." Fitzpatrick Decl. ¶15.

Courts recognize that large, complex antitrust cases present considerable risk and require extensive work. As a result, courts often award fees at or even above the percentage requested here. *See In re Urethane Antitrust Litig.*, 2016 WL 4060156, at *8 (D. Kan. July 29, 2016) (awarding 33.33% of $835 million settlement); *Klein v. Bain Capital Partners, LLC*, No. 07-cv-12388, (D. Mass. Feb. 2, 2015) ECF No. 1095 (awarding 33% of $590.5 million antitrust settlement); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 WL 1365900, at *20 (N.D. Cal. Apr. 3, 2013) (awarding 28.6% of $1.08 billion settlement); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1358 (S.D. Fla. 2011) (awarding 30% of $410 million settlement); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding 33.3% of $510 million settlement); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1241 (S.D. Fla. 2006) (awarding 31.33% of $1.06 billion settlement); *In re Vitamins Antitrust*

Litig., 2001 WL 34312839, at *10 (D.D.C. July 16, 2001) (awarding 34.06% of $365 million settlement).[6]

Prof. Fitzpatrick, who has published some of the most comprehensive empirical research into class action settlements and attorneys' fees ever conducted, concludes that the requested fees are reasonable in light of "the fees that have been awarded in other class action cases and the research on the economics of class action litigation." Fitzpatrick Decl. ¶4. *See also id.* ¶8.

B. The Requested Fees Are Appropriate Under the *Goldberger* Factors

The requested fee award is also supported by the six-factors that guide fee determinations set forth in *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). Under *Goldberger*, courts weigh "(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." *Id.* at 50.

1. The Risk of the Litigation (Factor 3)

"The most important *Goldberger* factor is often the case's risk." *Payment Card Interchange Fee*, 991 F. Supp. 2d at 440; *see also Goldberger*, 209 F.3d at 54 (risk is "perhaps the foremost factor to be considered in determining whether to award an enhancement"). Risk can vary based on many factors, including the novelty of the legal claims, the complexity of the subject matter, and the existence or stage of a relevant (or even parallel) government action. *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 147 (S.D.N.Y. 2010). The risk Lead Counsel faced here was relatively high for a number of reasons.

[6] *See also In re Oxford Health Plans, Inc. Sec. Litig.*, 2003 U.S. Dist. Lexis 26795, at *13-14 (S.D.N.Y. June 12, 2003) (awarding 28% of $300 million settlement); *In re Steel Antitrust Litig.*, No. 08-cv-5214 (N.D. Ill. Oct. 22, 2014), ECF No. 539 (awarding 33% of $164 million settlement); *In re Polyurethane Foam Antitrust Litig.*, 2015 WL 1639269, at *7 (N.D. Ohio Feb. 26, 2015) (awarding 30% of $147.8 million settlement); *In re CRT Antitrust Litig.*, 2016 WL 183285, at *2-3 (N.D. Cal. Jan. 14, 2016) (awarding 30% of $127.5 million settlement); *In re Municipal Derivatives Antitrust Litig.*, No. 08-cv-2516 (S.D.N.Y. July 8, 2016), ECF No. 2029 (awarding 33.33% of $100.5 million settlement).

Notably, Lead Counsel did not have the benefit of government indictments, consent decrees, or guilty pleas. Although the CFTC eventually reached settlements with five Defendants arising out of misconduct related to ISDAfix, Plaintiffs were ahead of the CFTC. And the CFTC was not pursuing the same claims as Plaintiffs, and thus did not have to demonstrate elements such as collusion or actual damages. Nor did the CFTC even need to prove actual manipulation, as all of the settlements thus far concern only "attempted manipulation."

Thus, this is not an instance where plaintiffs were merely following the lead of the government, "arriving on the scene after some enforcement or administrative agency has made the kill." *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 597 (S.D.N.Y. 1992). *See also Wal-Mart*, 396 F.3d at 122 (noting risk that "plaintiffs' counsel did not have the benefit of 'piggybacking' off of a previous case"); *Payment Card Interchange Fee*, 991 F. Supp. 2d at 441 (observing case was "unusually risky" because "plaintiffs did not piggyback on previous government action").

Risk was also heightened here because Lead Counsel was up against fourteen massive banks and a highly profitable interdealer broker, which collectively have virtually unlimited resources and the ability to fight this case for years at the trial and appellate level. *See Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 670 (S.D.N.Y. 2015) (noting the substantial risk associated with antitrust litigation which is likely to be "lengthy and hard-fought"). Without investing the necessary resources and being willing to staff the right kind of and amount of attorneys and support personnel, it would have been easy for the army on Defendants' side to overwhelm the Plaintiffs.

Lead Counsel's legal theories also faced risks. Defendants have contested these legal theories vigorously. And there was always the chance their arguments might have prevailed (as they did on certain common law claims). Defendants also contested standing. At the time Plaintiffs filed their case and briefed their opposition to Defendants' motions to dismiss, Judge Buchwald's opinion in *In re LIBOR-Based Fin. Instruments Antitrust Litigation*, 935 F. Supp. 2d 666 (S.D.N.Y. 2013) ("*LIBOR I*"), which ruled that plaintiffs lacked antitrust standing in the context of another financial benchmark, had not yet been reversed. *See Gelboim v. Bank of America Corp.*, 823 F.3d 759 (2d Cir. 2016). Defendants relied on *LIBOR I* extensively in their 2015 motion to dismiss briefing. It was up to Lead Counsel to persuade the Court that *LIBOR I* was both incorrect and distinguishable, or else the case could have ended on the pleadings.

A specific risk also existed that Lead Counsel would be unable to prove collusion, with Defendants sure to advance their "bad apple" defense at every turn. As noted, ISDAfix-related conduct was referred to the DOJ by the CFTC, and one of the deponents invoked the Fifth Amendment rather than answer any questions.[7] But as of yet, the DOJ has not taken any public action related to ISDAfix, civil or criminal.

With respect to damages—an inherently complex matter in many antitrust cases—there were risks associated with establishing a class-wide damages model. *See In re Platinum and Palladium Commodities Litig.*, 2014 WL 3500655, at *12 (S.D.N.Y. July 15, 2014) ("in any market manipulation or antitrust case, Plaintiffs face significant challenges in establishing liability and damages"). Plaintiffs' case relies on proving what prices would have been in a hypothetical world where ISDAfix was not manipulated.

[7] At his deposition in this matter, a former Deutsche Bank employee invoked his Fifth Amendment right to avoid self-incrimination in response to questions about his desk's USD ISDAfix practices, highlighting that Defendants' misconduct may well have criminal implications.

Defendants argued from the outset that such an effort would be too speculative to support a damages award. They also took the position that damages could not be calculated on a class-wide basis, and attacked Plaintiffs' expert models. The Non-Settling Defendants will no doubt continue to do so at later stages, including any trial. *See In re Currency Conversion Fee Antitrust Litig*., 263 F.R.D. 110, 129 (S.D.N.Y. 2009) (noting that "uncertain" damages and issues pending regarding class certification "were significant risks remaining in this litigation"). *See also In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *18 (S.D.N.Y. 2010) (burden of proving class's damages weighed in favor of approving fee request because any verdict would "depend on [the jury's] reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable"); Fitzpatrick Decl. ¶22 ("If one goes through each step in this litigation decision tree and assigns probabilities of success to the classes at each step and then multiplies all of those probabilities together, it becomes quite clear that the recoveries here are much better than the classes were likely obtain had litigation continued").

It merits emphasis that Lead Counsel took this case on a fully contingent basis. Counsel expended thousands of hours of effort in spite of the possibility that we might never be compensated. For those of Lead Counsel that do not work exclusively on contingency arrangements, these hours could have been expended on other matters, including for clients paying hourly rates. "Counsel should be rewarded for undertaking [those risks] and for achieving substantial value for the class." *Payment Card Interchange Fee*, 991 F. Supp. 2d at 441. "If not for [Lead Counsels'] willingness to endure for many years the risk that their . . . efforts would go uncompensated, the settlement would not exist." *See also Jermyn v. Best Buy Stores, L.P.*, 2012 WL 2505644, at *10 (S.D.N.Y. June 27, 2012) ("[T]he risk of non-payment in

cases prosecuted on a contingency basis where claims are not successful . . . can justify higher fees.").

In total, through January 31, 2018, Lead Counsel (not including associated counsel) have invested over 115,000 hours to the dogged investigation and prosecution of this case over nearly four years. *See In re High-Crush Ptrs. L.P. Secs. Litig.*, 2014 WL 7323417, at *16 (S.D.N.Y. Dec. 19, 2014) (granting fee application in full and noting significance of how counsel undertook representation of the Class "on a wholly contingent basis, investing substantial time and funds to prosecute this Action, without any guarantee of compensation"); *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *21 (S.D.N.Y. Sept. 9, 2015) (granting fee application in full and noting that counsel "would not have been compensated . . . at all had it been unsuccessful in this litigation").

In short, Lead Counsel faced myriad risks with this case. The only certainty was that there was no guarantee of recovering our fees or expenses, and that any recovery would be achieved only after lengthy, difficult, and costly effort.

2. *Public Policy Considerations (Factor 6)*

Public policy also strongly supports the requested fee award. Without private counsel taking on the risk of this lawsuit, and having the skill and resources to pursue the claims vigorously, the class here would have recovered nothing, and important public interests would not have been vindicated. *See CDS*, 2016 WL 2731524, at *18 ("It is important to encourage top-tier litigators to pursue challenging antitrust cases . . . . Our antitrust laws address issues that go to the heart of our economy. Our economic health, and indeed our stability as a nation, depend upon adherence to the rule of law and our citizenry's trust in the fairness and transparency of our marketplace."). Even though the CFTC has reached settlements with certain Defendants that arise out of ISDAfix-related misconduct, it has not done so under the antitrust

laws, and injured investors will not receive compensation from these settlements. *See* Fitzpatrick Decl. ¶14 ("[T]he government has no obligation to distribute any of its penalties to class members. Thus, again, for many class members, it is the class action or nothing at all.").

This case is thus a prime example of why public policy favors enforcement of the antitrust laws through suits by private attorneys general. *See Pillsbury*, 459 U.S. at 262-63 (emphasizing "the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws"); *F.T.C. v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013) (noting the "fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws").

Awarding a reasonable percentage of the common fund properly motivates zealous enforcement of the antirust laws and incentivizes skilled counsel to bring meritorious cases even where, at the outset, the prospect of any recovery is uncertain. *Cf. WorldCom*, 388 F. Supp. 2d at 359 ("In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives."); Fitzpatrick Decl. ¶14 ("[I]t is important in my opinion that courts set fees such that class action lawyers have the incentive to maximize the compensation they recover and the deterrence they generate. In my opinion . . . granting class counsel's fee requests here are consistent with these goals.").

The Settlements achieved here were also accomplished relatively expeditiously, sparing Class members from "unnecessary delay" and allowing "the judicial system to focus resources elsewhere." *See Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 474 (S.D.N.Y. 2013); *see also Bano v. Union Carbide Corp.*, 273 F.3d 120, 129-30 (2d Cir. 2001) (public policy favors the resolution of class actions through settlement). An advantage of the percentage method of

calculating attorneys' fees is that it *incentivizes*, rather than *discourages*, such efficient resolutions. *See Manual for Complex Litigation (Fourth)* §14.121 (2004) ("[O]ne purpose of the percentage method is to encourage early settlement by not penalizing efficient counsel, thus ensuring that competent counsel continue to be willing to undertake risky, complex, and novel litigation."). Accordingly, public policy strongly supports Lead Counsel's requested fee.

3. Magnitude and Complexity of the Case (Factor 2)

"[A]ntitrust cases, by their nature, are highly complex," *Wal-Mart*, 396 F.3d at 122, and "[a]ntitrust class actions are notoriously complex, protracted, and bitterly fought." *Meredith*, 87 F. Supp. 3d at 669. All of the risks described in the foregoing section, as well as the scope of the action (the class period alleged, the volume of documents produced, the number of depositions taken, the length of the many rounds of briefing, and the difficulty of the subject matter) demonstrate that this case is more complex than most.

As the Court is aware, this case involves the sophisticated, hidden manipulation of a relatively obscure financial benchmark. Lead Counsel had to master market issues connected with complex financial instruments so as to be able to litigate effectively complex legal issues concerning the plausibility of conspiracy, antitrust standing, tolling, and contract interpretation. Two of the primary sources of evidence—trade data and recordings/transcripts of trader-broker interactions—required careful analysis in order to develop a coherent picture of what actually occurred and when. Lead Counsel coordinated closely with industry experts to ensure that the significance of this data and documentary evidence was appreciated, and that all possible inculpatory evidence was identified and understood in its proper context. The nature of this case also demanded that Lead Counsel master the intricacies of sophisticated financial products and derivatives in order to understand and marshal evidence, effectively take depositions, build a damages model, and brief dispositive, discovery, and class certification motions.

Complexity was also inherent in the case because Defendants' conspiracy involved fifteen entities, and occurred over more than seven years. *Cf. Wal-Mart*, 396 F.3d at 122 (noting the case was "especially large and complicated" where it involved "almost every U.S. bank" and millions of class members). Accordingly, a fee award that accounts for the prosecution of litigation that was "extraordinary in both complexity and scope" is appropriate. *In re Holocaust Victim Assets Litig.*, 2007 WL 805768, at *46 (E.D.N.Y. Mar. 15, 2007). *See also In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998) ("There can be no doubt that this class action would be enormously expensive to continue, extraordinarily complex to try, and ultimately uncertain of result."). *See also* Fitzpatrick Decl. ¶22 ("the classes faced a litany of legal and factual barriers").

4. Quality of Representation and Time Spent (Factors 4 and 1)

"[T]he quality of representation . . . may be measured in large part by the results that counsel achieved for the classes." *Payment Card Interchange Fee*, 991 F. Supp. 2d at 441. As detailed above, Lead Counsel obtained over $408 million in Settlements along with important cooperation provisions. Prof. Fitzpatrick characterizes this result as "impressive when measured against the considerable risks the classes faced in this litigation." Fitzpatrick Decl. ¶22. Lead Counsel's ability to obtain such substantial recoveries from aggressive, well-funded Defendants represented by top-flight counsel is a testament to the skill with which Lead Counsel has prosecuted this case. *See Fleisher*, 2015 WL 10847814, at *22 ("The quality of opposing counsel is also important in evaluating the quality of Lead Counsel's work."); *NASDAQ*, 187 F.R.D. at 489 (approving fee award where defense counsel included "the nation's biggest and best defense firms operating on a seemingly unlimited budget over a period of four years").

The quality of Lead Counsel's representation is also evidenced by our ability to staff this sprawling case as the needs of the litigation demanded. Lead Counsel met the challenge of

litigating against up to fifteen Defendants at once by employing a strategy that required the efficient deployment of a large amount of resources. To do so, Lead Counsel and Labaton drew upon almost 200 attorneys and support personnel who collectively billed over 139,000 hours. The case was massive, with nearly 21.5 million pages of documents produced by Defendants and third-parties (nearly 13 million of which were actually reviewed and analyzed by Lead Counsel). Lead Counsel also brought sufficient resources to the case to litigate it properly. When settlements occurred, Lead Counsel efficiently reallocated resources and leveraged the cooperation provisions of the settlement agreements to continue and enhance the prosecution of the case against the remaining Defendants.

Lead Counsel are also among the most experienced and skilled antitrust and class action litigators in the country. Each firm has led several prior mega-fund cases involving the financial markets and have tried class action cases. Their reputation conveyed a credible trial threat that no doubt entered Defendants' calculus when deciding to settle and negotiating terms.[8]

C. The Lodestar Cross-Check Supports the Requested Fee

The lodestar fee calculation method has "fallen out of favor particularly because it encourages bill-padding and discourages early settlements." *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 353 (S.D.N.Y. 2014). *See also* Fitzpatrick Decl. ¶10. Accordingly, the lodestar method is used in this Circuit only "as a sanity check to ensure that an otherwise reasonable percentage fee would not lead to a windfall." *Id.* "[W]here 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. The primary purpose of the lodestar cross-check is to ensure that counsel are not enjoying an unwarranted windfall.

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[8] Because *Goldberger* Factor 5 (the requested fee in relation to the settlement) is discussed above (*see* Section II.A), this topic is not addressed again in this Section.

The cross-check in this case makes abundantly clear there is no windfall. Plaintiffs' counsel has collectively spent over 148,000 hours on this matter as of January 31, 2018. At customary current rates, these hours translate into approximately $83.36 million in total lodestar.[9] Lead Counsel's request for $122,550,000 in attorneys' fees for plaintiffs' counsel thus represents a total multiplier of approximately 1.47.[10]

This is a modest multiplier, especially for a case of this size and complexity. And it is squarely within—indeed, well below—the range awarded by courts in this District, as well as across the country. *See, e.g.*, *Beckman*, 293 F.R.D. at 481 ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers."); *Asare v. Change Grp. of N.Y., Inc.*, 2013 WL 6144764, at *19 (S.D.N.Y. Nov. 18, 2013) ("Typically, courts use multipliers of 2 to 6 times the lodestar."); *City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *13 (S.D.N.Y. May 9, 2014) (noting that "lodestar multiples of over 4 are awarded by this Court"); *CDS*, 2016 WL 2731524, at *17 (awarding fees "equivalent to a loadstar multiple of just over 6"); *In re Lloyd's Am. Trust Fund Litig.*, 2002 WL 31663577, at *27 (S.D.N.Y. Nov. 26, 2002) ("Here, the resulting multiplier of 2.09 is at the lower end of the range of multipliers awarded by courts within the Second Circuit."); *Maley v. Dale Global*

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[9] The exact figure is $83,365,462.22. The lodestar is calculated at current hourly rates. *See Reiter v. MTA New York City Transit Auth.*, 457 F.3d 224, 232 (2d Cir. 2006) (lodestar should be calculated using "current rather than historic hourly rates"); *E.F. ex rel. N.R. v. New York City Dep't of Educ.*, 2012 WL 5462602, at *2 (S.D.N.Y. Nov. 8, 2012), *adopted*, 2014 WL 1092847 (S.D.N.Y. Mar. 17, 2014) ("Because a party is entitled to be compensated for the delay in payment, the appropriate rate to apply is counsel's current rate, rather than historical rates.").

[10] This request also includes discrete tasks performed by associated counsel Berger & Montague P.C.; Grant & Eisenhofer; Labaton Sucharow; and McCulley McCluer PLLC, who also filed cases that were consolidated into the lead action prosecuted by Lead Counsel. Lead Counsel delegated certain tasks to associated counsel where specific efficiencies existed that inured to the Class' benefit.

Techs. Corp., 186 F. Supp. 2d 358, 371 (S.D.N.Y. 2002) (describing as "modest" a "fair and reasonable" 4.65 multiple).[11]

Even in the less common cases where settlements reach nine figures, courts typically award fees corresponding to multipliers higher than what Lead Counsel requests. *See In re Bristol-Myers Squibb Sec. Litig.*, 361 F. Supp. 2d 229, 237 (S.D.N.Y. 2005) (citing a "survey of cases with megafunds over $100 million show[ing] that lodestar multipliers of 1.35 to 2.99 are common").

Here, the multiplier of less than 1.5 is eminently justified given the factors discussed above, and especially the level of risk.[12] *See, e.g.*, *McDaniel*, 595 F.3d at 424 ("The level of risk associated with litigation . . . is 'perhaps the foremost factor' to be considered in assessing the propriety of a multiplier . . ."). To reduce a fee award because settlement was achieved at a relatively early stage would discourage efficient litigation. Even an upper range multiplier can be unproblematic because courts should not limit fee awards in a way that "penaliz[es] plaintiffs' counsel for achieving an early settlement, particular where, as here, the settlement amount is substantial." *Yuzary v. HSBC Bank USA, N.A.*, 2013 WL 5492998, at *11 (S.D.N.Y. Oct. 2, 2013) (awarding 31.7% in fees, where multiplier was 7.6). *See also Beckman*, 293 F.R.D. at 482 (awarding one-third of fund, representing a 6.3 multiplier, in part to avoid "penalizing plaintiffs'

[11] *See also Steiner v. Am. B'casting Co.*, 248 F. App'x 780, 783 (9th Cir. 2007) (multiplier of 6.85 "falls well within the range of multipliers that courts have allowed"); *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, 2009 WL 2408560, at *2 (D. Mass. Aug. 3, 2009) (awarding percentage representing multiplier of 8.3); *In re Rite Aid Sec. Litig.*, 362 F. Supp. 2d 587, 589-90 (E.D. Pa. 2005) (awarding percentage representing multiplier of 6.96).

[12] *See Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974) ("No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success."), *abrogated on other grounds by Goldberger*, 209 F.3d 43; *In re Am. Bank Note Holographies, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (appropriate to take this contingent fee risk "into account in determining the appropriate fee to award").

counsel for achieving an early settlement, particular where, as here, the settlement amount is substantial").

The settlements here occurred over 14 months. The very earliest occurred roughly a year and a half after the matter had been initiated (about two and a half years after Lead Counsel began their investigation). By this point, the Court had rendered its thorough March 2016 opinion resolving Defendants' lengthy motions to dismiss, validating the plausibility of Plaintiffs' legal theories and the extensive empirical work that supported them. The most recent settlements came just weeks before the end of fact discovery related to class certification (July 1, 2017—*see* Dkt No. 458). By the time of these June 2017 settlements, dozens of depositions—including of senior officials at Defendants—had been taken or noticed, millions of pages of documents had been produced by Defendants and reviewed by Plaintiffs, and Plaintiffs' anticipated motion for class certification was looming on the horizon. While the time varied somewhat among the settlements, Lead Counsel agreed to the settlements only when we thought the timing was right. We were motivated by a desire to provide prompt relief to the Class, secure confirmatory discovery to further advance the case against Non-Settling Defendants, and strengthen the evidence against the Non-Settling Defendants. Lead Counsel should be rewarded for settling when they did, as well as for their success in the face of great risk. As a result of Lead Counsel's work and willingness, the class will receive significant financial redress for wrongs they have already waited too long to see remedied.

D. <u>The Reaction of the Class Supports the Requested Fee</u>

Finally, the preliminary reaction of class members to the settlement and Lead Counsel's fee request, which was disclosed in the Notice mailed on January 29, 2018, confirms the reasonableness of the request. *See High-Crush*, 2014 WL 7323417, at *18 ("In addition to the criteria set forth in *Goldberger*, courts in the Second Circuit consider the reaction of the class to

the fee request in deciding how large a fee to award."). The notice informed Class Members that Lead Counsel may seek a fee of up to 30%. While Class members still have time to file objections to the fee request, to date none of have done so. Lead Counsel will update the Court on the reaction of the class on or prior to May 14, 2018, the deadline to file reply papers in support of Lead Counsel's petition for fees and expenses. *See* Dkt. No. 521 (Order granting preliminary approval of plan of distribution and setting schedule for notice and final approval).

III. LEAD COUNSEL'S EXPENSES ARE REASONABLE

"Counsel are entitled to be reimbursed for the reasonable expenses advanced in class litigation." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 469 (S.D.N.Y. 2004); *see also Vitamin C*, 2012 WL 5289514, at *11 ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course."). As detailed in the declarations of Daniel L. Brockett, Brian O. O'Mara, and Daryl F. Scott filed concurrently herewith, Lead Counsel have incurred a total of $14,582,076.24 in expenses. As also described in the declarations of Michael Dell'Angelo (Berger & Montague P.C.), Robert Eisler (Grant & Eisenhofer), Gregory Asciolla (Labaton Sucharow), and Stuart McCluer (McCulley McCluer PLLC), a total of $2,379,202.57 expenses was incurred by other counsel, for total expenses of all counsel in the amount of $16,961,278.81.

For the reasons discussed above, "substantial expenses were necessary in this complex antitrust case." *Meredith*, 87 F. Supp. 3d at 671. The lion's share of these expenses (nearly $12 million) are for Plaintiffs' experts, who were key to the successful prosecution of this matter. *See CDS*, 2016 WL 2731524, at *18 (reimbursing over $10 million in expenses and noting that "[m]ost of these expenses were incurred in connection with retention of experts" and that this "expert work was essential to the litigation and invaluable to the Class"). As described above and in the accompanying Joint Declaration, the work of experts was crucial to nearly every step

of this case, from conducting our pre-suit investigation to interpreting various discovery to developing models for class certification to crafting a plan of distribution for the common fund.

The balance of Lead Counsel's expenses are composed of industry-standard charges such as online legal research, document imaging and copying, deposition transcription and videotaping, travel expenses, other litigation support services, and mediation fees. These expenses have been reviewed by Lead Counsel and were found to be reasonable. To be conservative in this fee application, Lead Counsel have voluntarily made reductions to several expense categories. There is thus "no reason to depart from the common practice in this circuit of granting expense requests." *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 525 (E.D.N.Y. 2003) (granting $18.7 million expense request where bulk of expenses were "experts and consultants, litigation and trial support services, document imaging and copying, deposition costs, online legal research, and travel expenses").

In terms of ongoing expenses, we expect the Claims Administrator and assisting damages or administration experts to continue to perform important work in the claims process. We will continue to monitor their work and review their invoices before making such payments out-of-pocket. We will then seek at an appropriate future time Court approval for these additional out-of-pocket, ongoing expenses, which are not accounted for in the above figures because they have not yet been incurred.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court approve Plaintiffs' application for attorneys' fees and costs in the amounts set forth above. Plaintiffs will submit a Proposed Order in connection with their May 14 reply papers, which will include updated figures and current information as of that date.

Dated: March 30, 2018

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