

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 IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY
APPROVAL OF AN ADDITIONAL SETTLEMENT AND THE RELATED PLAN OF
DISTRIBUTION, AND FOR APPROVAL OF THE MANNER AND FORMS FOR
NOTICE**

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INTRODUCTION

In March 2018, Plaintiffs moved for final approval of settlements with ten defendants (the “Approved Settlements”) and for final approval of a related plan of distribution for the net settlement proceeds. The Court granted Plaintiffs’ requests at a May 2018 fairness hearing. Plaintiffs have now reached a settlement agreement covering the five remaining defendants (the “Proposed Settlement” and the “Newly Settling Defendants”).¹ The Proposed Settlement is attached as Exhibit 1 to the concurrently filed declaration of Daniel L. Brockett. If approved, the Proposed Settlement will completely resolve this litigation.

The Proposed Settlement provides for payment of \$96 million by the Newly Settling Defendants. Because this amount is fair, adequate, and reasonable, Plaintiffs seek preliminary approval of the terms of the Proposed Settlement. Indeed, if the Proposed Settlement is eventually granted final approval, this case would become *one of only about twelve antitrust class actions in history* Lead Counsel is aware of with approved settlements totaling more than \$500 million.

Plaintiffs propose to use the same “pooling” and “multiplier” techniques to determine the distribution of the Proposed Settlement’s monetary fund as was approved for use in distributing the funds from the Approved Settlements. As the Court is already aware, that plan reflects the considerable work by Lead Counsel and a team of experienced and highly qualified experts. And to inform potential Settlement Class Members of the Proposed Settlement, Plaintiffs propose to use the same publication, direct mail, and other procedures used to inform potential

¹ The “Newly Settling Defendants” are: BNP Paribas (named in the Action as “B.N.P. Paribas SA”); ICAP Capital Markets LLC (now known as Intercapital Capital Markets LLC); Morgan Stanley & Co. LLC; Nomura Securities International, Inc.; and Wells Fargo Bank, N.A.

class members of the Approved Settlements. The Court previously found such a plan to satisfy both Rule 23(e)(1) and due process.

Thus, for all the reasons that follow—as well as those provided in greater detail in the papers submitted in support of the Approved Settlements—Plaintiffs respectfully request that the Court preliminarily approve the Proposed Settlement and the plan of distribution, and approve the manner and forms for notice.

THE TERMS OF THE PROPOSED SETTLEMENT

The Newly Settling Defendants have vigorously disputed Plaintiffs' allegations over the course of nearly four years of litigation. Likewise, they have contested almost every aspect of Plaintiffs' motion for class certification, filing hundreds of pages of expert reports and associated briefing in opposition. The Proposed Settlement that Plaintiffs have achieved in the face of this opposition and uncertainty represents a significant recovery for the class.

The Settlement Fund: The Proposed Settlement provides for \$96 million in monetary relief. That amount, plus interest earned, and less taxes, any costs associated with notifying the Settlement Class, claims administration, and Court-awarded attorneys' fees, expenses, and incentive awards to Class Plaintiffs, will be divided among all Settlement Class Members that submit valid Claim Forms. Upon the Effective Date, none of Newly Settling Defendants will have any right to the return of the settlement fund, or any portion thereof, for any reason. *See* Proposed Settlement Agreement ¶ 10.3.

Lead Counsel agreed to the settlement in principle on a lump-sum basis, with the fact the agreement would completely end the litigation providing, in Lead Counsel's view, additional benefits to the class. However, in formalizing the Proposed Settlement, the Newly Settling Defendants agreed amongst themselves to contribute to the Settlement Fund as follows: BNP Paribas (\$33,500,000); ICAP Capital Markets LLC (\$11,500,000); Morgan Stanley & Co. LLC

(\$33,500,000); Nomura Securities International, Inc. (\$8,750,000); and Wells Fargo Bank, N.A. (\$8,750,000).

Settlement Class Definition and Exclusion: The Proposed Settlement is made on behalf of a proposed class that is substantively identical to the settlement class certified for the purposes of the Approved Settlements:

“Settlement Class” means all Persons or entities who entered into, received or made payments on, settled, terminated, transacted in, or held an ISDAfix Instrument during the Settlement Class Period [January 1, 2006 through January 31, 2014]. Excluded from the Settlement Class are Defendants and their employees, affiliates, parents, subsidiaries, and co-conspirators, should any exist, whether or not named in the Complaint, and the United States Government, and all of the Released Defendant Parties, provided, however, that Investment Vehicles shall not be excluded from the definition of the Settlement Class.

Released Class Claims: Settlement Class Members that do not exclude themselves will give up their rights to sue Newly Settling Defendants, as well as any of Released Defendant Parties, for Released Class Claims. Proposed Settlement Agreement ¶ 7.1. These releases are functionally identical to those in the Approved Settlements, with the core being that the releases are for all claims “arising from or relating to the factual predicate of the Action. Proposed Settlement Agreement ¶¶ 1.42, 12.2. A modification was made to the language underlying that term because the Proposed Settlement includes the only non-bank defendant, ICAP. The Proposed Settlement expressly refers to relevant acts done while “brokering,” where the prior agreements—applicable to bank defendants alone—did not.

Possibility of a Reduction or Termination: As with the Approved Settlements, based on the alleged relevance of Settlement Class Members who exclude themselves, the Proposed

Settlement provides a mediator-driven process whereby a Newly Settling Defendant can seek a reduction or termination of the agreement. Proposed Settlement Agreement ¶ 10.4.²

Cooperation: The Proposed Settlement provides that Newly Settling Defendants must cooperate with respect to the notice plan, or as otherwise necessary to facilitate approval of the Proposed Settlement. Proposed Settlement Agreement ¶ 12.1. The notice-related obligations are discussed in more detail in Section III below. The other parts of the cooperation requirement necessarily differ from the cooperation obligations of the previously settling defendants because the Proposed Settlement, if approved, would conclude this litigation in its entirety. Plaintiffs thus no longer have a general need for factual proffers, contemporaneous documents, or witness testimony, as was the case at the time of the Approved Settlements.

Relation to the Approved Settlements: Given the class definitions are substantially the same and the claims administration will likely overlap, Lead Counsel may eventually seek Court approval for a distribution that represents the Settlement Class Members' claims here as well as any claims they may also have as members of the class connected to the Approved Settlements. However, to avoid the risk that the approval process for the Proposed Settlements unduly delays class members' rights to be paid in relation to the Approved Settlements, Lead Counsel are not seeking to formally combine the two classes or two settlement funds at this time.

Nonetheless, Lead Counsel of course will administer both settlements with an eye towards efficiency and lowering the burden on class members. For instance, any Settlement Class Members who made a claim in connection with the Approved Settlements will not have to fill out more paperwork here. Instead, they will be automatically eligible to partake in the

² The mediation provisions here differ in insubstantial ways from those in the Approved Settlements, in light of Newly Settling Defendants' concerns regarding the recoveries Settlement Class Members may already be getting from the Approved Settlements.

distribution of the additional recovery. *See* Proposed Notice of An Additional Proposed Settlement Of Class Action, Question 12. And in appropriate circumstances, Lead Counsel may seek a distribution order that treats timely and valid claims submitted in connection with the Proposed Settlement as excused late claims in connection with the Approved Settlements. And Lead Counsel will exercise their discretion to accept late claims in connection with the Approved Settlements by doing so when, without limitation: (a) the Settlement Class Member is a member of, and did not opt of, the class associated with the Approved Settlements, and (b) a valid proof of claim form is received by October 13, 2018. (As seen in Section IV below, that is the date being proposed for the deadline for objecting to or opting out of the Proposed Settlement.)

I. THE PROPOSED SETTLEMENT SHOULD BE PRELIMINARY APPROVED

As the Proposed Settlement involves the same claims, on behalf of a class defined substantially the same way, arising out of the same facts as in the Approved Settlements, the Court should hold that the Settlement Class contained in the Proposed Settlement meets the requirements of Rule 23. *See* May 30, 2018 Tr. at 26:4-8 (“I also find that the proposed settlement class meets all of the requirements of Rule 23(a) and satisfies the requirements of Rule 23(b)(3) substantially for all the reasons stated in plaintiff’s first preliminary approval motion. *See* docket no. 221 at 20 to 24.”).

With respect to the fairness of the Proposed Settlement, at this stage the Court need only make a “preliminary evaluation of the fairness of the settlement, prior to notice.” *In re Nasdaq Mkt.-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (“*Nasdaq II*”). Preliminary approval is warranted where, as here, the settlement is “the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval.” *Id.*

The Proposed Settlement was the product of intense negotiations among experienced counsel, including in part through the use of an experienced mediator. The Proposed Settlement was also informed by years of litigation, which fully informed Plaintiffs regarding the strengths and risks associated with their claims, including at class certification, trial, and through any potential appeal. Indeed, as the Court has explained, Plaintiffs faced a difficult burden in certifying a litigation class. May 30, 2018 Tr. at 27:8-28:5 (May 30, 2018) (noting that after reviewing class certification papers and the fact that nearly every element had been challenged, “plaintiff’s success in certifying the class was by no means guaranteed”); *see also* Dkt. No. 625 (setting class certification evidentiary hearing with expert testimony on complex issues relating to impact and causation). The Proposed Settlement eliminates the continuing expense and uncertainty of litigation against the Newly Settling Defendants in favor of immediate, substantial compensation for the Settlement Class.

II. THE PROPOSED PLAN OF DISTRIBUTION SHOULD BE PRELIMINARILY APPROVED

A plan of distribution supported by competent and qualified counsel is reviewed only to determine whether it has a “reasonable, rational basis.” *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *9 (S.D.N.Y. Apr. 26, 2016). This Court already found the plan of distribution proposed by Plaintiffs for the Approved Settlements to meet this standard. *See* May 30, 2018 Tr. at 30:13-32:2 (“I find that the plan of distribution is reasonable and rational. In doing so, I recognize that in cases of this sort, ‘the apportionment of a settlement can never be tailored to the rights of each plaintiff with mathematical precision.’”).

This is effectively dispositive here, because Plaintiffs seek approval to use the *final* plan of distribution for the Approved Settlements, *see* Dkt. No. 602-1, as the “preliminary” plan for the Proposed Settlement. Which is to say, Plaintiffs propose to use the same transaction-type

“pools,” the same percentages to allocate the funds across the pools, the same litigation and economic “multipliers” to distinguish between transaction types, and other techniques in the same way as employed for the monetary fund of the Approved Settlements. The only changes that will be made to the final plan of distribution for the Proposed Settlement will be ministerial—for example, references to the “Non-Settling Defendants” will be adjusted to account for the litigation’s different procedural posture. This will again ensure that the funds are distributed in a fair, reasonable, and efficient manner.

III. THE PROPOSED MANNER AND FORMS OF NOTICE SHOULD BE APPROVED

Federal Rule of Civil Procedure 23(e)(1) provides “[t]he court must direct notice in a reasonable manner to all class members who would be bound by the [proposed settlement].” Where a settlement class is to be certified under Rule 23(b)(3), “the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). The test for proposed notice to class members is reasonableness. *See Jermyn v. Best Buy Stores, L.P.*, 2010 WL 5187746, at *3 (S.D.N.Y. Dec. 6, 2010).

With respect to notice of the Approved Settlements, the Court held that the extensive plan, including individual mail notice and a robust publication campaign, satisfied the requirements of Rule 23 and due process. *See* Dkt. No. 521. Lead Counsel intend to provide notice of the Proposed Settlement in substantially the same manner, and respectfully request the Court authorize them to do so. The details of the proposed notice plan are once again summarized in a declaration by Cameron R. Azari, Esq., a class action notice specialist employed by the Court-appointed Claims Administrator (the “June 2018 Azari Decl.”).

Mail Notice: As was done for the Approved Settlements, a Notice and Claim Form will be distributed via United States Postal Service First Class mail, postage prepaid, or an international equivalent. It will be directed to all potential Settlement Class Members whose addresses can be reasonably identified in data furnished by Defendants. *See* June 2018 Azari Decl. ¶ 12.

As the Court is aware, certain potential Settlement Class Members may allegedly have their identifies protected by foreign countries' bank secrecy laws, data privacy laws, and/or similar confidentiality protections. Lead Counsel will be seeking the cooperation of Defendants in notifying such counterparties about the Proposed Settlement using means similar to those used in connection with the Approved Settlements. Discussions are already underway with respect to the Newly Settling Defendants. Such discussions have not yet begun with respect to the original settling defendants, due to the confidentiality of the Proposed Settlement up until the time of this filing. Lead Counsel will update the Court of any arrangements secured as discussions progress.

In addition, the Claims Administrator will again contact third party banks, brokerage firms, and other nominees—using information from an extensive, proprietary list—that may have traded ISDAfix Instruments on behalf of Settlement Class Members, and request that these nominees assist in disseminating notice to such beneficial owners.³ *See* June 2018 Azari Decl. ¶ 21. Firms that maintain trading records for client accounts, and generate and distribute trading records to clients, are typically a reliable source from which to ascertain the names and addresses of additional potential class members in an administratively feasible manner.

³ Lead Counsel notes that the Proposed Order here asks for a response within 25 days, rather than within 35 days as the Court previously provided. They respectfully submit this is reasonable in light of the fact the recipients of the request will be familiar with the impacted Beneficial Owners, and this case, by way of the same procedure undertaken in connection with the Approved Settlements.

Publication and Internet Notice: Also as before, a summary notice will be published in various print and online media outlets; banner notices will be placed on relevant financial focused websites; a press release will be sent over PR Newswire; and sponsored internet search listings will be used to direct traffic to the settlement website. June 2018 Azari Decl., ¶¶ 22-26. The proposed order submitted herewith, consistent with prior class settlement notice procedure in this case, approves expansion of the publication plan without further Court order, if prudence dictates.

Settlement Website and Phone Contact Information: Plaintiffs have already established a website dedicated to the Approved Settlements. This same website will be updated with all necessary details regarding the Proposed Settlement, and will enable anyone to easily access information about the Proposed Settlement, including the notice and claims process. All documents related to the Proposed Settlement will be posted on the settlement website. *See* June 2018 Azari Decl. ¶¶ 27-28. The Claims Administrator has also established a toll-free telephone number and email address to answer questions about the Approved Settlements. This same phone number will continue to be available to answer questions about the Proposed Settlement. *See* June 2018 Azari Decl. ¶ 29.

Contents of Notice: The Mail Notice and Claim Form, attached to the accompanying Proposed Order as Exhibits A-1 and A-2, provide potential Settlement Class Members with clear yet comprehensive information about the Proposed Settlement. And the Summary Notice attached to the Proposed Order as Exhibit A-3 communicates to potential Settlement Class Members the information required to reach an informed decision and where to access further details concerning this litigation and the Proposed Settlement. These documents are, once again, designed to be readily understood by Settlement Class Members, which primarily consist of

sophisticated investors, including pension funds, investment firms, and insurance companies.

See In re Stock Exchanges Options Trading Antitrust Litig., 2006 WL 3498590, at *7 (S.D.N.Y. 2006).

Indeed, as compared to the documents already approved by the Court in the context of the Approved Settlements, Exhibits A-1, A-2, and A-3 hereto only differ where necessary, such as in identifying settling parties and the settlement amount. Minor changes have also been made to indicate that there are no longer any defendants that have not entered into a settlement agreement, and to ensure that potential Settlement Class Members are aware of the efforts being made to administer the Proposed Settlement efficiently in light of the Approved Settlements.

In sum, courts routinely approve notice programs like the one proposed here, which combine individualized notice by mail, as well as publication and internet notice. *See, e.g., In re Credit Default Swaps*, 2016 WL 2731524, at *5; *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *8 (E.D.N.Y. Oct. 23, 2012). Plaintiffs therefore respectfully submit the proposed manner and forms for notice as to the Proposed Settlement satisfy the requirements of Rule 23(e) and 23(c)(2)(B) and should be approved by the Court, just as it approved substantively indistinguishable manner and forms for notice as to the Approved Settlements.

IV. PROPOSED SCHEDULE FOR FINALIZING APPROVAL

Plaintiffs respectfully propose the following schedule to guide further actions and proceedings related to the Proposed Settlement.⁴ As discussed above however, please note efforts to improve and secure execution of the notification plan are still ongoing. For example, Lead Counsel has not yet been able to contact the original settling defendants with respect to

⁴ To be clear, Plaintiffs are not proposing any changes with respect to the schedule in connection with the Approved Settlements.

their willingness to assist with notifying their foreign counterparties. If such negotiations or other ongoing efforts to prepare to execute the notification plan fail to progress sufficiently to make the below schedule feasible, Lead Counsel of course will promptly notify the Court.

EVENT	DATE
Commence Mail Notice and Publication and Update Settlement Website (the “notice date”)	August 14, 2018
File Papers in Support of Final Approval and Fee and Expense Application for Proposed Settlement	September 28, 2018 (45 days after notice date)
Last Day to Mail Request for Exclusion/Opt Out of Proposed Settlement Class and Last Day to Object to Proposed Settlement	October 13, 2018 (60 days after notice date)
File Reply Papers in Support of Final Approval and Fee and Expense Application for Proposed Settlement	October 23, 2018 (10 days after objection deadline)
Fairness Hearing for Proposed Settlement	No earlier than November 2, 2018 (at least 10 days after reply deadline)
Deadline to Submit Claim Forms for Proposed Settlement	45 days after Fairness Hearing

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court enter the Proposed Order preliminary approving the Proposed Settlement and the plan of distribution, approving the manner and forms for notice, and adopting the schedule outlined above for the Proposed Settlement.

DATED: June 22, 2018
New York, New York

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