

**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 LEAD COUNSEL'S MOTION FOR AWARD OF
ATTORNEYS' FEES AND PAYMENT OF LITIGATION EXPENSES**

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INTRODUCTION

Plaintiffs, through Lead Counsel, respectfully submit this Reply in support of their motion for an award of attorneys' fees and payment of litigation expenses (the "Fee and Expense Application").¹ See Dkt. Nos. 613-23.

For the reasons stated in Plaintiffs' Fee and Expense Application, Lead Counsel's fee and expense request is strongly supported by each of the *Goldberger* factors. The fee request is within the range of fees awarded in class actions of similar magnitude and complexity. It also fairly compensates the skilled attorneys who worked thousands of hours over the course of several years and put tens of millions of their own dollars at risk to achieve these ten Settlements.

The deadline for exclusion requests or objections has now elapsed, and despite the considerable size of the Settlement Class and the sophistication of its members, there were no objections to Lead Counsel's Fee and Expense Application. There have also been no objections to the monetary value of the Settlements, the Plan of Distribution, the scope of the releases, or any other term or condition of the Settlements. This uniform reaction provides further support for Plaintiffs' Fee and Expense Application. Below, Lead Counsel update the information regarding expenses and settlement administration provided to the Court in the March 30 Fee and Expense Application.

ARGUMENT

I. THE REACTION OF THE SETTLEMENT CLASS SUPPORTS THE REQUESTED FEE

"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." *In re Hi-Crush*

¹ The meaning of all capitalized terms not defined herein have the same meanings supplied in the March 30 papers filed in support of Plaintiffs' Fee and Expense Application.

Partners L.P. Sec. Litig., 2014 WL 7323417, at *18 (S.D.N.Y. Dec. 19, 2014). Indeed, “[t]he reaction by members of the Class” to a fee request by class counsel “is entitled to great weight by the Court.” *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 374 (S.D.N.Y. 2002).

No Settlement Class Member has objected to any aspect of the Fee and Expense Application. The absence of any objection is a testament to the reasonableness of the requests and the excellent results achieved by Lead Counsel. The Notice mailed on January 29, 2018 informed all potential Settlement Class Members that Lead Counsel may seek a fee of up to 30%, and the detailed Fee and Expense Application has been easily accessible on the Settlement Website since April 9, 2018.

That there have been no objections to Lead Counsel’s fee request lends substantial support to the request’s reasonableness. *See, e.g., In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 594 (S.D.N.Y. 2008) (“That only one objection to the fee request was received is powerful evidence that the requested fee is fair and reasonable.”); *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at *10 (S.D.N.Y. Nov. 7, 2007) (absence of objection where notice stated that class counsel would apply for 30% fee award “suggests that the fee request is fair and reasonable”); *Maley*, 186 F. Supp. 2d at 374 (“Not one person, company, or institution has filed an objection to the fee request or the expense reimbursement sought. . . . [T]his overwhelmingly positive response by the Class attests to the approval of the Class with respect to the Settlement and the fee and expense application.”).

The absence of any objection to the fee request is all the more significant given the large size of the Settlement Class and the fact that the Settlement Class is composed of sophisticated market participants, who are well-positioned to evaluate all term of the Settlements, including the fee request. *See, e.g., Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *23

(S.D.N.Y. Sept. 9, 2015) (“When a class is comprised of sophisticated business entities that can be expected to oppose any request for attorney fees they find unreasonable, the lack of objections indicates the appropriateness of the [fee] request.”) (citations and internal quotes omitted); *In re Bisysec. Litig.*, 2007 WL 2049726, at *1 (S.D.N.Y. July 16, 2007) (noting that only one individual raised any objection, “even though the class included numerous institutional investors who presumably had the means, the motive, and the sophistication to raise objections if they thought the one-third maximum fee was excessive”).

The minimal number of exclusion requests—just six (counting one vague, handwritten letter, *see* Dkt. No. 573)—further confirms the excellent outcome for the Settlement Class, as does the fact *no* objections were made to any terms of the Settlements themselves. This overwhelmingly favorable reaction further supports the conclusion that the fee request is reasonable. *See In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 400 (S.D.N.Y. 2013) (noting the “class’s overwhelmingly favorable reaction reflects” that “the recovery here is substantial” and “weighs in favor of a substantial fee award”); *In re Sturm, Ruger, & Co., Inc. Sec. Litig.*, 2012 WL 3589610, at *13 (D. Conn. Aug. 20, 2012) (noting “the reasonableness of the requested award is underscored by the favorable reaction of the class”).

II. LEAD COUNSEL’S UPDATED EXPENSE FIGURES 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 In re Vitamin C. Antitrust Litig.*, 2012 WL 5289514, at *11 (E.D.N.Y. Oct. 23, 2012). (“Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course.”) (quotation marks omitted). For the reasons discussed in detail in the Fee and Expense Application, “substantial expenses were necessary in this complex antitrust case.” *See*

Meredith Corp. v. SESAC, LLC, 87 F. Supp. 3d 650, 671 (S.D.N.Y. 2015). There have been no objections to Lead Counsel's request for payment of expenses.

Lead Counsel has continued to incur significant expenses since January 31, 2018, and therefore have supplemented their request for expenses. The accompanying supplemental declarations of Daniel L. Brockett, Brian O. O'Mara, Daryl F. Scott, and Gregory Ascioffa filed concurrently herewith reflect expenses incurred by each firm individually (from February 1, 2018 through April 30, 2018), as well as unfunded litigation fund expenses incurred jointly through the litigation fund established by Lead Counsel (from March 16, 2018 through April 30, 2018). A substantial portion of the supplemental expenses stem from invoices for expert services performed, but not invoiced, prior to January 31, 2018.

Costs were also incurred implementing and ensuring the smooth and timely administration of a multifaceted notice program, including in fielding a wide range and large number of inquiries from potential Settlement Class Members. *See* Azari Supp'l Decl. ¶12. Lead Counsel thus requests payment of additional expenses associated with these activities, and to authorize future payments to Compass and Epiq for settlement-related work from the Settlement Fund without further application to the Court, as provided in the Settlement Agreements and Preliminary Approval Orders.

The accompanying supplemental declarations indicate that counsel have \$970,353.81 in expenses from February 1, 2018 through April 30, 2018. Combined with the expenses incurred through January 31, 2018, the total expenses incurred for which Lead Counsel seeks payment is \$17,931,632.62.

Finally, Lead Counsel request that class representatives Erste Abwicklungsanstalt ("EAA") and Portigon AG ("Portigon") be awarded payment of their actual out-of-pocket costs

incurred in serving as representatives. EAA incurred out-of-pocket costs of \$99,100 on (i) \$15,454 of travel associated with EAA's deposition and meetings with Lead Counsel in connection with this case, and (ii) \$83,646 paid to a third-party IT vendor to identify, recover, collect, and produce the voluminous records and data requested by Defendants. Portigon incurred out-of-pocket costs of \$8,036 on travel associated with Portigon's deposition and meetings with Lead Counsel. Together, as set out in the accompanying declarations of Enno Balz and Paul Edwards, respectively, these costs were reasonably and necessarily incurred in connection with EAA and Portigon's service to the Settlement Class as representatives in this Action. *See* Balz Decl. ¶8; Edwards Decl. ¶5.

CONCLUSION

Plaintiffs respectfully request that the Court approve Plaintiffs' application for attorneys' fees and costs in the amounts set forth in the Proposed Order attached as Exhibit A, which has also been submitted to the Court's Orders & Judgments Clerk pursuant to ECF Rules and Instructions Rule 18.2.

Dated: May 14, 2018

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EXHIBIT A

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)

[PROPOSED] ORDER GRANTING LEAD COUNSEL’S MOTION FOR AWARD OF ATTORNEYS’ FEES AND PAYMENT OF LITIGATION EXPENSES

Lead Counsel’s Motion for Award of Attorneys’ Fees and Payment of Litigation Expenses (the “Fee and Expense Application”) came before the Court for hearing on May 30, 2018. The Court has considered all papers filed and proceedings held in connection with the above-captioned Action, including the matters presented at the May 30 Fairness Hearing, and is fully informed of these matters. Adequate notice having been given to the Settlement Class as required by the Court’s October 24, 2017 Order Providing for Notice to the Settlement Class and Preliminarily Approving the Plan of Distribution (Dkt. No. 521), and having considered all papers and proceedings in this matter, the Court finds, concludes, and orders as follows:

1. This Order incorporates by reference the definitions in the Stipulations and Agreements of Settlement (*see* Dkt. Nos. 222-1, 222-2, 222-3, 222-4, 222-5, 222-6, 222-7, 331-1, 490-1, 490-2; collectively, the “Settlement Agreements”) and all capitalized terms used but not defined herein shall have the same meanings as in the Settlement Agreements.

2. This Court has jurisdiction over the subject matter of the Action and over all parties to the Action, including all members of the Settlement Class.

3. Notice of the Fee and Expense Application was provided to potential Settlement Class members in a reasonable manner, and such Notice complies with Rule 23(h)(1) of the Federal Rules of Civil Procedure and due process requirements.

4. Settlement Class Members were given the opportunity to object to the Fee and Expense Application in compliance with Rule 23(h)(2) of the Federal Rules of Civil Procedure.

5. No Settlement Class Member objected to the Fee and Expense Application.

6. The Fee and Expense Application is granted as described below.

7. Lead Counsel are hereby awarded attorneys' fees in the amount of \$122,550,000 (30.00% of the total Settlement Fund) and \$17,931,632.62 in expenses.

8. In making this award of attorneys' fees and expenses to be paid from the Settlement Fund, the Court has considered and finds that:

a. The ten Settlement Agreements have created a total Settlement Fund of \$408,500,000 that has been transferred to an Escrow Account administered by Escrow Agent Lead Counsel for the benefit of the Settlement Class pursuant to the terms of the Settlement Agreements;

b. Settlement Class Members who submit acceptable proof of claim forms will benefit from the Settlement Agreements because of the efforts of Lead Counsel;

c. The fee sought by Lead Counsel is fair and reasonable, as supported by the determinations of the sophisticated counsel involved in the prosecution and defense of this Action;

d. The Notice mailed to all potential Settlement Class Members stated that Lead Counsel could seek attorneys' fees of up to 30% of the total Settlement Fund, and further directed any potential Settlement Class Members to a website on which the full Fee and Expense Application was accessible as of April 9, 2018, and no objections to the fee and expense provision of the Settlement Agreements or Fee and Expense Application were made;

e. Lead Counsel have prosecuted the Action with skill, perseverance, and diligence, as reflected by the substantial Settlement Fund achieved and the positive reception of the Settlement Agreements by the Settlement Class;

f. The Action involves complex factual and legal issues that have been extensively researched and developed by Lead Counsel, and vigorously disputed in motion practice and discovery for over three years;

g. A significant risk exists that without the Settlement Agreements, Plaintiffs and Settlement Class Members may have recovered significantly less or nothing from Settling Defendants¹;

h. Public policy considerations support the requested fee, as the successful prosecution of this Action required lawyers with considerable expertise; and

i. The amount of attorneys' fees awarded and expenses paid is appropriate to the specific circumstances of the Action and consistent with awards in similar cases.

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

9. Lead Counsel shall allocate the awarded attorneys' fees and expenses among Lead Counsel and other counsel in a manner in which, in Lead Counsel's judgment, reflects the contributions of such counsel to the prosecution of and settlements achieved in the Action.

10. Settlement Class representative Portigon AG (f/k/a WestLB AG) is hereby awarded \$8,036 in costs from the Settlement Fund in recognition of its contributions and reasonable expenses related to the Action on behalf of the Settlement Class.

11. Settlement Class representative Erste Abwicklungsanstalt ("EAA") is hereby awarded \$99,100 in costs from the Settlement Fund in recognition of its contributions and reasonable expenses related to the Action on behalf of the Settlement Class.

12. For avoidance of doubt, nothing in this Order disturbs the Court's prior approval of ¶3.9 of the Settlement Agreements, which govern payments of Class Notice and Administration Expenses, both prior to and following the Effective Date, without separate application to or order by the Court.

13. This Fee and Expense Award is independent of the Court's consideration of the fairness, reasonableness, and adequacy of the Settlements and is also independent of the Court's consideration the Plan of Distribution. The fees and expenses awarded herein shall be payable from the Settlement Fund upon entry of this Order.

IT IS SO ORDERED.

DATED: New York, New York
_____, 2018

HON. JESSE M. FURMAN
UNITED STATES DISTRICT JUDGE