UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AXIOM INVESTMENT ADVISORS, LLC, by and through its Trustee, Gildor Management LLC, Plaintiff, v. BARCLAYS BANK PLC and BARCLAYS CAPITAL INC., Defendants.	Case No. 15-CV-09323 (LGS)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF DISTRIBUTION

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiff Axiom Investment Advisors, LLC, by and through its trustee, Gildor Management LLC ("Plaintiff"), on behalf of itself and the Settlement Class, respectfully submits this Memorandum of Law in support of Plaintiff's motion for final approval of the proposed Settlement and for approval of the proposed plan of distribution of the proceeds of the Settlement (the "Plan of Distribution").[1]

I. INTRODUCTION

Subject to Court approval, Plaintiff, on behalf of the Settlement Class, has agreed to settle all claims in this Action in exchange for a cash payment of $50,000,000. The Settlement Agreement also provides for extensive cooperation from Barclays, which Class Counsel believe will assist in the prosecution of claims against other banks that engaged in similar practices to the "Last Look" practices at issue in this Action.

The Settlement is a favorable result in light of the substantial risks of continued litigation. As described further in the Zelcs Declaration, the Complaint alleges that Barclays used an automated function called Last Look, which delayed Barclays' response to trade instructions for FX Instruments submitted over BARX (whether submitted on BARX directly or via an electronic communications network ("ECN") or other connection to BARX). The Complaint further alleges that Barclays used the Last Look function to hold such trade instructions for a

[1] Unless otherwise defined herein, all capitalized terms have the meanings ascribed to them in the Stipulation and Amended Agreement of Settlement with Barclays Bank PLC and Barclays Capital Inc., dated April 20, 2016 (ECF No. 64-1) (the "Settlement Agreement") or in the accompanying Declaration of George A. Zelcs in Support of Plaintiff's Motion for Final Approval of Settlement and Motion for Attorneys' Fees and Reimbursement of Expenses ("Zelcs Declaration" or "Zelcs Decl."). The Zelcs Declaration is an integral part of this submission, and for the sake of brevity, the Court is respectfully referred to it for a detailed description of, among other things: the history of the Action; the nature of the claims asserted; and the negotiations leading to the Settlement. All citations to "¶__" in this Memorandum refer to paragraphs in the Zelcs Declaration.

programmed delay period during which Barclays determined whether to accept or reject such trade or trade instruction based on whether the market price moved beyond a certain threshold during that delay period. The Complaint brings claims against Barclays for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and violations of New York General Business Law Sections 349 and 350, which prohibit deceptive trade practices and false advertising. ¶9.

While Plaintiff believes the claims asserted against Barclays are meritorious, it recognizes that the Action presents a number of significant risks to establishing both liability and damages. Barclays likely would have asserted arguments with respect to liability, including that its Last Look practices were disclosed in Barclays' contracts with its customers. Barclays would have also likely asserted arguments regarding the fact of, and measurement of, damages. Even if liability was established, at trial, Plaintiff would face the complexities inherent in using expert testimony to prove damages to the jury. In light of all of these considerations, Plaintiff respectfully submits that the Settlement warrants final approval by the Court.

In addition, as described herein, the Plan of Distribution is a fair and reasonable method for distributing the Net Settlement Fund to Authorized Claimants and also warrants approval. Plaintiff also respectfully requests that the Court finally certify the Settlement Class for settlement purposes.

II. ARGUMENT

A. The Proposed Settlement Is Fair, Reasonable, and Adequate and Should Be Approved

Rule 23(e) provides that a class action settlement must be presented to the Court for approval, and should be approved if the Court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Public policy favors the settlement of disputed claims among private litigants,

particularly in class actions. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) ("We are mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context.'").[2] In ruling on final approval of a class settlement, the court should consider both the procedural and substantive fairness of a proposed settlement. *In re Am. Int'l Grp., Inc. Sec. Litig.*, 293 F.R.D. 459, 464 (S.D.N.Y. 2013); *see also Wal-Mart*, 396 F.3d at 116.

1. The Settlement Is Presumptively Fair, Reasonable, and Adequate

Where a settlement is the "product of arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation," the settlement enjoys a "presumption of fairness." *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173-74 (S.D.N.Y. 2000); *see also Wal-Mart*, 396 F.3d at 116.

Here, the Settlement is the result of arm's-length negotiations between well-informed, experienced counsel under the auspices of an experienced mediator, Kenneth Feinberg. On April 20, 2015, following initial settlement discussions among counsel, Class Counsel and Barclays' Counsel engaged in a supervised mediation with Mr. Feinberg and reached an agreement on the framework of a settlement. ¶23. Over the course of negotiations during the following months, Plaintiff received confirmatory discovery from Barclays, including information about Barclays' Last Look practices and industry practices generally. ¶24. By October 29, 2015, negotiations had progressed to the point that the Parties executed a term sheet. ¶25. The Parties continued to exchange information and, at the same time, negotiate the terms of a long-form settlement agreement. ¶26. An agreement in principal was disclosed to the Court at the initial pretrial conference in January 2016. ¶10. Settlement negotiations continued over the course of several

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[2] Unless otherwise noted, all citations are omitted and emphasis is added.

months. ¶26. On February 10, 2016, the Parties executed the Stipulation and Agreement of Settlement with Barclays Bank PLC and Barclays Capital Inc. (ECF No. 42-1). *Id*. Following a hearing on Plaintiff's motion for preliminary approval on April 7, 2016, the Parties executed the Stipulation and Amended Agreement of Settlement with Barclays Bank PLC and Barclays Capital Inc. (ECF No. 64-1), dated April 20, 2016. *Id*.

The extensive, arm's-length settlement negotiations and the involvement of an experienced mediator support the conclusion that the Settlement was achieved free of collusion and is presumptively fair, reasonable, and adequate. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (a mediator's involvement in settlement negotiations "helps to ensure that the proceedings were free of collusion and undue pressure").

Moreover, the Parties and their counsel were knowledgeable about the case's strengths and weaknesses before agreeing to settle. Class Counsel had, among other things: (i) conducted a wide-ranging investigation, including extensive interviews with market participants and traders, concerning the claims asserted in the Action; (ii) researched the applicable law with respect to the claims asserted in the Action and the potential defenses thereto; (iii) met with the New York Department of Financial Services ("NYDFS")[3] regarding the conduct at issue in this Action; (iv) drafted a detailed Complaint; (v) consulted with leading experts on the FX market; and (vi) conducted informal, confirmatory discovery as part of settlement negotiations. ¶¶15-19. The knowledge gleaned from the investigation and confirmatory discovery and Class Counsel's substantial experience in prosecuting class actions further strengthen the presumption that the

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[3] On November 18, 2015, Barclays and the NYDFS entered into a Consent Order, which fined Barclays $150 million for conduct relating to Barclays' electronic FX trading, including Barclays' use of Last Look to reject client orders. ¶8.

Settlement is fair, reasonable, and adequate. *See D'Amato*, 236 F.3d at 85 (presumption of fairness applies where "the settlement resulted from 'arm's length negotiations and . . . plaintiffs' counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests'"); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576 (S.D.N.Y. 2008) ("'great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation"). Accordingly, the Settlement is entitled to a presumption of fairness.

2. The *Grinnell* Factors Demonstrate that the Settlement Is Substantively Fair, Reasonable, and Adequate

The Settlement is also substantively fair, reasonable, and adequate. In *City of Detroit v. Grinnell Corp.*, the Second Circuit identified nine factors that courts should examine when considering the fairness, reasonableness, and adequacy of a class settlement:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). "'[N]ot every factor must weigh in favor of settlement[;] rather [a] court should consider the totality of these factors in light of the particular circumstances.'" *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 189 (S.D.N.Y. 2012); *see also D'Amato*, 236 F.3d at 86. Additionally, in reviewing a settlement, a court "'should not attempt to approximate a litigated determination of the merits of the case lest the process of determining whether to approve a settlement simply substitute one complex, time consuming and expensive litigation for another.'"

In re Marsh ERISA Litig., 265 F.R.D. 128, 138 (S.D.N.Y. 2010). As demonstrated below, the Settlement satisfies the criteria for approval under *Grinnell*.

a. The Complexity, Expense, and Likely Duration of the Litigation

In general, '"the more complex, expensive, and time consuming the future litigation, the more beneficial settlement becomes as a matter of efficiency to the parties and to the Court.'" *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 381-82 (S.D.N.Y. 2013). Further litigation would have required substantial additional expenditures of time and money, involving complex issues of law and facts, with a significant risk of a lower recovery. The subject matter of the claims and the nearly eight-year Settlement Class Period would increase the complexity and expense of the litigation.

In the absence of the Settlement, the Action would have required a resolution of a motion to dismiss, and should the case have gone forward, the Parties would have engaged in protracted and expensive fact and expert discovery with accompanying motion practice. The Parties anticipated extensive document and deposition discovery at considerable expense. Barclays' regulatory document production, which was produced as confirmatory discovery, was alone 65,242 documents consisting of 279,094 pages. ¶34. Barclays' data production included nearly 80 million trades. ¶42.

Throughout each litigation phase – at class certification and summary judgment – Plaintiff would undoubtedly have faced a robust defense from Barclays' experienced counsel. These motions would have required extensive assistance from damages and industry experts to be properly litigated. As to the class certification motion, the losing party would likely seek interlocutory review by the Second Circuit under F.R.C.P. 23(f), which would cause further delay in resolving the litigation. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 212 n.13 (E.D.N.Y. 2013), *rev'd and vacated on other*

grounds, 827 F.3d 223 (2d Cir. 2016) ("In the *Wal-Mart* case, twenty months elapsed between the order certifying the class and the Second Circuit's divided opinion affirming that decision.").

Even if Plaintiff could recover an equally large judgment after trial, which was far from certain given the risks discussed herein, the additional delay through post-trial motions and the appellate process could deny the Settlement Class any recovery for years. *See Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("the passage of time would introduce yet more risks . . . and would, in light of the time value of money, make future recoveries less valuable than this current recovery").

The $50 million all-cash Settlement at this juncture results in an immediate and substantial recovery without the considerable risk, expense, and delay of continued litigation, a trial, and likely appeals. Plaintiff respectfully submits that the Court should find that this factor weighs in favor of the proposed Settlement.

b. The Reaction of the Class to the Settlement

The reaction of the class to a proposed settlement is a significant factor to weigh in considering its fairness and adequacy. *See In re Bear Stearns Cos., Inc. Sec., Deriv., and ERISA Litig.*, 909 F. Supp. 2d 259, 266-67 (S.D.N.Y. 2012). The absence of objections and a low number of requests for exclusion provides evidence of Settlement Class Members' approval of the terms of the Settlement. *See Wal-Mart*, 396 F.3d at 118 ("'If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.'"). While the deadline set by the Court for members of the Settlement Class to object to the Settlement or exclude themselves from the Settlement has not yet passed, to date, no objections and no requests for exclusion have been received. Declaration of Jose C. Fraga Regarding (a) Mailing of the Notice and Proof of Claim Form; (b) Publication of the Summary Notice; (c) Website, Telephone Helpline and E-mail; (d) Coordination with Rust; and (e) Report

on Requests for Exclusion Received to Date ("Fraga Decl."), ¶14. Thus, the Settlement Class's favorable reaction to date also supports approving the Settlement.[4]

c. The Stage of the Proceedings

The third *Grinnell* factor looks to the stage of the proceedings and the amount of discovery completed. "The relevant inquiry for this factor is whether the plaintiffs have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement." *In re AOL Time Warner, Inc.*, MDL No. 1500, 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006).

"[C]ourts encourage early settlement of class actions, when warranted, because early settlement allows class members to recover without unnecessary delay and allows the judicial system to focus resources elsewhere." *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 474-75 (S.D.N.Y. 2013). Neither the lack of completed formal discovery, nor the lack of "extensive discovery" will preclude approval of a settlement. *Id.*; *see also In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981) (stating "we are not compelled to hold that formal discovery was a necessary ticket to the bargaining table"). Rather, it is enough for the parties to "have engaged in sufficient investigation of the facts to enable the Court to intelligently make . . . an appraisal of the Settlement." *AOL Time Warner*, 2006 WL 903236, at *10; *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 190 (S.D.N.Y. 2012) ("The threshold necessary to render the decisions of counsel sufficiently well informed, however, is not an overly burdensome

[4] The deadline for submitting objections and requests for exclusion is March 30, 2017. As provided in the Court's Order authorizing notice, Class Counsel will file reply papers on June 19, 2017 that will address any objections and requests for exclusion received. *See* ECF No. 97.

one to achieve − indeed, formal discovery need not have necessarily been undertaken yet by the parties.").

While the Parties executed the initial Settlement Agreement within three months of Plaintiff's filing of the Complaint, by the time the Parties agreed to settle, Class Counsel understood the strengths and weaknesses of the claims and defenses asserted such that they could make informed appraisals regarding the chances of success. As noted above and in the Zelcs Declaration, Class Counsel expended significant time and resources investigating and analyzing the legal and factual issues in this litigation over the course of approximately 18 months prior to filing the Complaint. *See* §II.A.1, *supra*; *see also* ¶¶15-19; *see*, *e.g.*, *In re Sinus Buster Prods. Consumer Litig.*, 12-CV-2429 (ADS), 2014 WL 5819921, at *9 (E.D.N.Y. Nov. 10, 2014) (finding that the litigants had "conducted meaningful pre-trial discovery," which included "an 'extensive' investigation" prior to filing the consolidated class complaint).

Class Counsel's investigation was also informed by the November 18, 2015 Consent Order between Barclays and NYDFS, which fined Barclays $150 million for conduct relating to Barclays' electronic FX trading, including Barclays' use of Last Look to reject client orders. ¶¶8, 18-19. *See*, *e.g.*, *Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331 (CM), 2014 WL 1224666, at *10 (S.D.N.Y. Mar. 24, 2014) (approving $218 million class settlement absent formal discovery where counsel collaborated with another investigation as well as conducting their own); *In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2010 WL 3070161, at *6 (E.D. Mich. Aug. 2, 2010) (approving settlement based on negotiations that were informed by governmental and other publicly disclosed investigations).

In addition, the Parties engaged in informed and hard-fought settlement negotiations over the course of several months. ¶¶20-26. *See In re Partsearch Techs., Inc.*, 453 B.R. 84, 100

(Bankr. S.D.N.Y. 2011) ("The fact that the parties were represented by capable and experienced counsel further indicates that each side had sufficient opportunity to understand the underlying factual issues."). And importantly, during the course of negotiations, Class Counsel had the benefit of confirmatory discovery, which further contributed to their understanding of the claims. ¶¶24, 26. Plaintiff received confirmatory discovery from Barclays, including information about Barclays' Last Look practices and industry practices generally. *Id*. Barclays also produced to Plaintiff documents produced to regulators concerning similar subject matter at issue in the Action, as well as its transaction data. ¶¶30, 33-34, 42. *See*, *e.g.*, *In re Nissan Radiator/ Transmission Cooler Litig.*, 10 CV 7493 (VB), 2013 WL 4080946, at *7 (S.D.N.Y. May 30, 2013) (stating "[a]lthough the parties have not engaged in extensive discovery, . . . the plaintiffs conducted an investigation prior to commencing the action, retained experts, and engaged in confirmatory discovery in support of the proposed settlement").

In light of these efforts, Class Counsel possessed sufficient information to understand the strengths and weaknesses of the Action and were well-positioned to negotiate the Settlement. The confirmatory discovery received after the Settlement Agreement was executed does not change Class Counsel's opinion that the Settlement is in the best interest of the Settlement Class. Accordingly, this factor supports final approval of the Settlement.

d. The Risks of Establishing Liability and Damages

In assessing the fairness, reasonableness, and adequacy of a settlement, courts should consider the "risk of establishing liability [and] the risks of establishing damages." *Grinnell*, 495 F.2d at 463. In doing so, the Court need not "adjudicate the disputed issues or decide unsettled questions; rather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004). While Class Counsel believe that Plaintiff's claims are meritorious,

they also recognize that Plaintiff faced substantial obstacles to proving liability and establishing damages. When compared to the certainty of the significant recovery achieved by the Settlement, these risks militated against further litigation, and informed Class Counsel's belief that the Settlement is fair, reasonable, and adequate.

Proving liability against Barclays was fraught with risk, as Barclays had serious arguments with respect to liability and defenses. With respect to the breach of contract claim, Barclays would have likely argued that the terms of its trading contracts allowed it to reject trade instructions at its discretion. As to the claim for violations of N.Y. General Business Law Sections 349 and 350, Barclays would have likely argued that FX trading between sophisticated parties is not a "consumer-oriented" practice, thus falling outside the purview of these statutes. *See Axiom Investment Advisors, LLC v. Deutsche Bank AG*, No. 15 Civ. 9945 (LGS), 2017 WL 590320, at *5 (S.D.N.Y. Feb. 13, 2017) (dismissing similar claim). Barclays likely would also have argued that its trading policies were fully and accurately disclosed and, therefore, were not materially misleading.

Plaintiff also faced substantial risk in proving the existence and the amount of the Settlement Class's damages. To do so would require mastering a complex and large data set consisting of over 80 million trades. Plaintiff would have relied on expert testimony to assist the jury in determining damages. There is little doubt that Barclays would have proffered its own expert to offer contrary testimony. In such a battle of the experts, "it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors." *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985). Thus,

there is a substantial risk that a jury might accept one or more of Barclays' damage arguments and award far less than the settlement amount, or nothing at all.

Further risk is posed by the fact that Barclays, as a major global financial institution, has access to substantial financial resources that could, and no doubt would, be put to use to fight this litigation. Had Barclays not settled, it was prepared, and had the wherewithal, to vigorously contest liability. Barclays has denied, and continues to deny, any wrongdoing whatsoever. "Establishing otherwise [would] require considerable additional pre-trial effort and a lengthy trial, the outcome of which is uncertain." *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 199 (S.D.N.Y. 2012), *aff'd sub nom. Charron v. Wiener*, 731 F.3d 241 (2d Cir. 2013). Put simply, "[l]iability is never automatic." *Park v. The Thomson Corp.*, No. 05 Civ. 2931 (WHP), 2008 WL 4684232, at *4 (S.D.N.Y. Oct. 22, 2008).

For all these reasons, this factor weighs in favor of approving the Settlement.

e. The Risks of Maintaining the Class Action Through Trial

While Class Counsel believe that the Court would certify a litigation class under Fed. R. Civ. P. 23(a) and 23(b)(3), Barclays would almost certainly advance substantial arguments in opposition. Further, even if the Court certified a litigation class, class certification can be reviewed and modified at any time before trial. Thus, there is always a risk that this litigation, or specific claims within the litigation, might not be maintained as a class through trial. *See Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (noting that "[w]hile plaintiffs might indeed prevail [on a motion for class certification], the risk that the case might be not certified is not illusory"). The risks associated with class certification weigh in favor of approving the Settlement.

f. Barclays' Ability to Withstand a Greater Judgment

"[I]n any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and, against the weight of the remaining factors, this fact alone does not undermine the reasonableness of the instant settlement." *Weber v. Gov't Emps. Ins. Co.*, 262 F.R.D. 431, 447 (D.N.J. 2009). Moreover, "the benefit of obtaining the cooperation of the Settling Defendants tends to offset the fact that they would be able to withstand a larger judgment." *In re Pressure Sensitive Labelstock Antitrust Litig.*, 584 F. Supp. 2d 697, 702 (M.D. Pa. 2008). Given the substantial cooperation being provided by Barclays, the fact that it has been secured so early in the case, and that the Settlement amount represents a significant cash payment by Barclays, this factor weighs in favor of Settlement approval.

g. The Reasonableness of the Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation

Courts typically analyze the last two *Grinnell* factors together. *See Grinnell*, 495 F.2d at 436. In doing so, courts "consider[] and weigh[] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Id*. at 462. This is not a '"mathematical equation yielding a particularized sum.'" *Massiah v. MetroPlus Health Plan, Inc.*, No 11 CV 05669, 2012 WL 5874655, at *5 (E.D.N.Y. Nov. 20, 2012). Rather, the range of reasonableness "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972). In applying this factor, "[d]ollar amounts [in class action settlement agreements] are judged not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984); *see also In re Ionosphere Clubs, Inc.*, 156

B.R. 414, 431 (S.D.N.Y. 1993) ("'The weighing of a claim against compensation cannot be . . . exact. Nor should it be, since an exact judicial determination of the values in issue would defeat the purpose of compromising the claim.'").

As the Court is aware, Class Counsel made a "Covered Transaction" database available to potential members of the Settlement Class on the Settlement Website. Each Class Member is able to log into the Covered Transaction database and view the trades and trade instructions that were available from Barclays' records and covered by the Settlement. For each trade or trade instruction, a number of data fields are available for review. In addition to the basic economics of the trade or trade instruction (*e.g.*, date, time, price, accepted or rejected), Class Members are given a calculation of "Claim Value," for each of their trades and trade instructions. Claim Value is calculated pursuant to formulas set out in the Plan of Distribution. *See* §I.B., *infra*, for a description of the formulas.

The total Claim Value in the Covered Transaction database is approximately $450,000,000.[5] Class Counsel believe total Claim Value overstates the maximum damages that would be available to the Settlement Class assuming total success on the merits at trial. However, even when comparing the $50,000,000 Settlement Fund as a percentage of total Claim

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[5] In connection with preliminary approval of the Settlement, Class Counsel estimated damages at $167 million to $250 million, assuming total success on the merits at trial. ECF No. 60. At that time, Barclays had not yet produced its transaction data, so the range was necessarily based on public sources of market share and trading volume and assumptions about the impact of Last Look on trading volume. Confirmatory discovery revealed that a larger percentage of settlement-eligible volume occurred overseas than anticipated: over half of the total Claim Value belongs to non-U.S. domiciled entities. There was no available source of such information until the Barclays data was produced and analyzed. Further, assumptions Class Counsel applied with respect to the impact of Last Look underestimated its impact on trading volumes but were based on the best information Class Counsel had at the time about an undisclosed practice.

Value (*i.e.*, approximately 11%), Class Counsel respectfully submit that the Settlement is well within the range of reasonableness, especially in light of the Complaint's assertion of a then-untested contract claim on which liability was principally predicated.[6]

Total Claim Value overstates available damages at trial for a number of reasons. First, under the Plan of Distribution, both rejected and accepted trades are included in total Claim Value. Accepted trades are assigned Claim Values under the reasoning that even though Barclays executed the trade, it benefitted from the option to reject that trade – for which it paid nothing. The Plan of Distribution assigns Claim Values to accepted trades using an option pricing model. Class Counsel believe such a damages theory is unlikely to be available at trial – therefore inflating total Claim Value in comparison to available damages at trial.

Additionally, Claim Values attributable to "Platforms," which are entities that are excluded from the Settlement Class, are included in the total Claim Value amount cited above.[7]

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[6] *See City of Providence v. Aeropostale, Inc.*, 11 Civ. 7132, 2014 WL 1883494, at *9 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015) (approving $15 million settlement that "represent[ed] a recovery in the range of approximately 9.2% to 21% of estimated damages"); *In re Giant Interactive Group, Inc. Sec. Litig.*, 279 F.R.D. 151, 162 (S.D.N.Y.) (finding that settlement representing recovery of approximately 16.5% of class's maximum damages provable at trial "falls comfortably within the range of the reasonable"); *In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510, 2007 WL 2743675, at *12 (E.D.N.Y. Sept. 18, 2007) (approving $20 million settlement representing 10% of maximum damages); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02 MDL 1484, 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (approving $40.3 million settlement representing recovery of approximately 6.25% of estimated damages).

[7] Because publicly available information is insufficient to determine with certainty whether an entity is a Platform, all entities identified by Barclays as potential members of the Settlement Class were provided with Notice Packets (and included in the Covered Transaction database), even if an entity was potentially a Platform. Platforms, however, will not be allowed to claim in the Settlement. To protect against ineligible Platform entities submitting claims, in order to submit a claim form, each claimant must certify that it does not operate as a Platform. Class Counsel has also provided the Claims Administrator with information about potential Platforms for the Claims Administrator to use in connection with claims verification and auditing

The Settlement Class definition excludes entities that are market-makers operating electronic trading platforms in the FX market (*i.e.*, "Platforms"). *See* Settlement Agreement, ¶2(h), 2(hh). Accordingly, the inclusion of potential Platform Claim Values inflates total Claim Value in comparison to available damages at trial.

Finally, the data available from Barclays has some limitations that Class Counsel believe result in total Claim Value not accurately representing available damages at trial. For example, Barclays applied Last Look to each trade or trade instruction in the Covered Transaction database, but for some trade instructions that Barclays rejected due to Last Look, Barclays also rejected them due to trade validation reasons (*e.g.*, "Buying of CCYPAIR is restricted," "no details specified," "NACK," or "AntEconomic"). Due to data limitations, it was not possible to consistently and reliably identify such dually rejected trades over the entire Settlement Class period, so they were included in total Claim Value. However, a damages theory may be unavailable at trial for such dually rejected trades. Another data limitation was that the price that a customer actually received following a rejection was not an available data point. Accordingly, the Plan of Distribution made use of a proxy – by comparing the market mid-price at the time the trade instruction was submitted to the market mid-price at the time of the trade decision that resulted in a rejection.

Although it is not presently quantifiable, Barclays' obligation to provide confirmatory discovery and cooperation pursuant to the Settlement Agreement is likewise extremely valuable to the Class. The Settlement Agreement's confirmatory discovery and cooperation terms require Barclays to conduct attorney proffers, produce transaction data, produce documents turned over

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procedures. The Claims Administrator will, if necessary, make inquiries as to a claimant's potential status as a Platform.

to regulators, make its personnel available for interviews, and entertain other follow-up requests until at least April 21, 2020. Settlement Agreement, ¶13(d)(i)-(vi). Class Counsel believe that such information has been and will continue to be valuable in bringing and prosecuting claims against other banks that used Last Look. ¶30. As the court in *In re Cathode Ray Tube (Crt) Antitrust Litig.*, MDL No. 1917, 2015 WL 9266493, at *6 (N.D. Cal. Dec. 17, 2015), held, '"[t]he provision of such assistance is a substantial benefit to the classes and strongly militates toward approval of the Settlement Agreement'" (quoting *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003)). *See also Precision Assocs., Inc. v. Panalpina World Transp. (Holding) Ltd.*, No. 08-CV-42 (JG), 2013 WL 4525323, at *9 (E.D.N.Y. Aug. 27, 2013) (defendant's "cooperation adds considerable value to the Settlement and must be factored into an analysis of the overall reasonableness of the agreement"); *In re IPO Sec. Litig.*, 226 F.R.D. 186, 197 (S.D.N.Y. 2005) (court should "weigh the value of any nonmonetary or intangible benefits associated with [a class settlement] agreement").

Plaintiff respectfully submits that the Settlement is fair, reasonable, and adequate under the *Grinnell* factors.

B. The Plan of Distribution Is Fair and Reasonable and Should Be Approved

A plan for allocating settlement proceeds should be approved if it is "fair and reasonable." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997). Because "the apportionment of a settlement can never be tailored to the rights of each plaintiff with mathematical precision," *id.*, "[a]n allocation formula need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' Class Counsel." *In re Nasdaq Market-Makers Antitrust Litig.*, No. 94 Civ. 3996 RWS, 2000 WL 37992, at *2 (S.D.N.Y. Jan. 18, 2000). Under Rule 23, "'[t]o warrant approval

. . . the plan of allocation must also meet the standards by which the settlement was scrutinized, namely, it must be fair and adequate." *Maley v. Del Global Techs. Corp*., 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002); *see also In re Oracle Sec. Litig*., No. C-90-0931, 1994 WL 502054, at *1 (N.D. Cal. June 18, 1994) ("A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable."). The Plan of Distribution, which is submitted as Exhibit 1 to the accompanying Declaration of Christopher M. Burke,[8] is recommended by Class Counsel and complies with these standards.

Class Counsel developed the Plan of Distribution, in consultation with their experts, with the objective of an "equitable and timely distribution of a settlement fund without burdening the process in a way that will unduly waste the fund." *In re Credit Default Swaps Antitrust Litig.*, 13 md 2476 (DLC), 2016 WL 2731524, at *9 (S.D.N.Y. Apr. 26, 2016). Under the Plan of Distribution, a "Claim Value" is calculated for each eligible trade or trade instruction based the type of trade or trade instruction submitted to Barclays.

- For trade instructions that Barclays rejected, the Plan of Distribution formula approximates a contract theory of damages. Claim Value for rejected trades is calculated based on the difference between (i) the market mid-price at the time Barclays received the trade instruction and (ii) the market mid-price at the time Barclays rejected the trade instruction.[9] Plan of Distribution, ¶8.

- For trades that Barclays accepted, the Plan of Distribution formula is based on the class member's lost opportunity cost of trading during the hold period, which Plaintiff alleges

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[8] A redline comparison to the preliminarily-approved Plan of Distribution is attached as Exhibit 2 to the Burke Declaration. The revisions include the insertion of the stop loss trade methodology (*see also* ECF Nos. 98, 99) (letters regarding stop loss data subset) and the addition of certain details regarding the implementation of the allocation formulas, as well as miscellaneous typographical edits.

[9] Due to data limitations, the price at which a rejected trade instruction was eventually filled was not available. The market-mid price at the time Barclays rejected the trade instruction is used as a proxy for the eventual fill rate.

was unlawful even though the trade was accepted. Claim Value for accepted trades is calculated based on the volatility of the currency pair traded and the delay in trade acceptance, using an option pricing model. Plan of Distribution, ¶9.

- For trades that Barclays accepted resulting from triggered stop loss orders,[10] Claim Value is calculated based on the difference between (i) the price available to the class member at the time the stop loss order was triggered (*i.e.*, the price at which the trade should have been filled but for the hold period), and (ii) the price at which the stop loss order was executed. Plan of Distribution, ¶10.

Each such trade or trade instruction is given a "Claim Value," which was made available to potential members of the Settlement Class in the Covered Transaction database, which is accessible via the Settlement Website. The Net Settlement Fund will be allocated to Authorized Claimants on a *pro rata* basis based on the relative size of the total Claim Value of all claims submitted.

Class Counsel believe that the Plan of Distribution provides a fair and reasonable method to equitably allocate the Net Settlement Fund among Settlement Class Members who suffered losses as a result of the conduct alleged in the Action, and their opinion is entitled to "considerable weight" by the Court in deciding whether to approve the Plan of Distribution. *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 430 (S.D.N.Y. 2001) ("As with other aspects of settlement, the opinion of experienced and informed counsel is entitled to considerable weight.").

Further, to date, no objections to the Plan of Distribution have been received. *See Nasdaq Mkt.-Makers*, 2000 WL 37992, at *2 (holding that the "small number of objections to the Proposed Plan" was entitled to "substantial weight" in approving the plan).

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[10] A stop loss order is an instruction to trade when the market price reaches a specified price level.

Finally, the Plan of Distribution is similar in structure to plans of distribution that have been used to apportion settlement proceeds in other trading contexts. *See*, *e.g.*, *Credit Default Swaps*, 2016 WL 2731524, at *4 ("The Plan determines the amount to be paid on each Class member's claim through three main steps: (1) identifying qualifying Covered Transactions; (2) estimating the amount of bid/ask spread inflation resulting from the Dealer Defendants' alleged conduct with respect to each Covered Transaction; and (3) calculating each claimant's recovery based on its *pro rata* share of the available Settlement Funds in relation to the recoveries to which all claimants who have submitted a valid claim are entitled."); *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115809, at *14 (S.D.N.Y. Nov. 7, 2007) ("Each valid claim will then be calculated so that each authorized claimant will receive, on a proportionate basis, the share of the net settlement fund that the claimant's recognized loss bears to the total recognized loss of all authorized claimants."); *Global Crossing*, 225 F.R.D. at 462 ("Pro-rata distribution of settlement funds based on investment loss is clearly a reasonable approach."); *In re Platinum and Palladium Commodities Litig.*, No. 10 CV 3617, 2014 WL 300655, at *3 (S.D.N.Y. July 15, 2014) (allocations based on net artificiality on each trading day).

Plaintiff respectfully submits that the Plan of Distribution is a fair and equitable method for allocating the Net Settlement Fund among Authorized Claimants.

C. Notice to the Settlement Class Satisfied the Requirements of Rule 23 and Due Process

Notice of the proposed Settlement satisfied Rule 23(c)(2)(B), which requires the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *See also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). The Notice also satisfied Rule 23(e)(1), which requires that notice of a

settlement be "reasonable" – *i.e.*, it must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart*, 396 F.3d at 114. Both the Mail Notice's substance and method of dissemination to potential members of the Settlement Class satisfied these standards.

The Mail Notice contains the information required by Rule 23(c)(2)(B), including a plain language explanation of (i) the nature of the case, the claims and defenses, the class definition, the background of the Settlement, and how the Settlement Fund will be allocated upon final approval; (ii) the right to opt out of the Settlement Class, to object to the Settlement, and to appear at the Final Fairness Hearing, as well as the processes and deadlines for doing so; and (iii) the binding effect of judgment on those who do not exclude themselves from the Settlement Class, and the effect of final approval. In addition, and beyond that which is expressly required, the Mail Notice contains other information, such as Class Counsel's intent to request attorneys' fees, expense reimbursement, and a service award, and it prominently features contact information for the Claims Administrator and Class Counsel, which Class Members can utilize to obtain other information, if desired. The Mail Notice also provides recipients with information on how to submit a Claim Form in order to be potentially eligible to receive a distribution from the Net Settlement Fund.

Moreover, the Publication Notice is a plain language supplement to the long-form Mail Notice. The Publication Notice was widely disseminated, which further buttresses the adequacy of the Mail Notice. "Separately and together, these notices provide[] sufficient information for Class Members to understand the Settlement and their options." *Sykes v. Harris*, 09 Civ. 8486 (DC), 2016 WL 3030156, at *10 (S.D.N.Y. May 24, 2016).

Pursuant to the Court's Order authorizing notice (ECF No. 97), the Court-appointed Claims Administrator, Garden City Group ("GCG"); Barclays' notice agent, Rust Consulting ("Rust"); and Barclays began mailing copies of the Mail Notice and Claim Form (together, the "Notice Packet") on December 1, 2016. Fraga Decl., ¶3; Declaration of Jason Rabe Regarding Mailing of the Settlement Notice and Proof of Claim Form to Non-U.S. Class Members ("Rabe Decl."), ¶¶10, 15; Declaration of Judith van der Werff Regarding Mailing of the Settlement Notice and Proof of Claim Form to Mexican-Domiciled Class Members ("van der Werff Decl."), ¶¶2, 4.[11] As of December 22, 2016, GCG, Rust, and Barclays disseminated a total of 2,131 Notice Packets to 1,373 potential members of the Settlement Class identified by Barclays.[12]

GCG mailed Notice Packets to U.S.-domiciled potential members of the Settlement Class, and Rust and Barclays mailed Notice Packets to those domiciled outside of the United States. Between all the mailings, the entire population of 1,373 potential members of the Settlement Class identified by Barclays were mailed notice. Coordination processes are in place between GCG and Rust to ensure that the notice and claims process is the same for all potential members of the Settlement Class, regardless of where they are domiciled. Fraga Decl., ¶¶11-13.

Also pursuant to the Order authorizing notice, GCG and Rust sent letters to 55 potential brokers who may have traded on behalf of potential members of the Settlement Class. These brokers were identified by Barclays. The letters sent to the brokers explain that the options the

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[11] Due to the potential application of bank secrecy and/or privacy laws, Barclays directly mailed the Notice Packet to one potential member of the Settlement Class located in Mexico. van der Werff Decl., ¶¶2-4.

[12] Each record within Barclays' data is associated with a unique Barclays identification number, known as an "SDS ID." Any records with the same SDS ID as another record, but a different address, were mailed a Notice Packet at all addresses. Fraga Decl., ¶¶3-4; Rabe Decl., ¶¶4, 15.

brokers and give-up banks have to get notice to their clients under the Settlement. *See* Fraga Decl., ¶4; Rabe Decl., ¶8.

GCG caused the Publication Notice to be published in *The Wall Street Journal* (global edition) on December 1, 2016, *Investor's Business Daily* on December 5, 2016, *FX Week* on December 5, 2016, and *Financial Times* (worldwide edition) on December 1, 2016. Fraga Decl., ¶7. The Publication Notice was also issued as a global press release through *Global Premier*, which distributes content to local, regional, and international media outlets to approximately 100 countries or regions in 18 languages.[13]

GCG also established a website dedicated to the Settlement, www.BARXLastLookSettlement.com, to provide potential Settlement Class Members with information about the Settlement and the applicable deadlines, as well as access to downloadable copies of the Mail Notice, Claim Form, Publication Notice, Plan of Distribution and related explanatory materials, Settlement Agreement, Preliminary Approval Order, Order Approving the Form and Manner of Notice, and Complaint. A telephone helpline and email address were also established to assist potential Settlement Class Members with obtaining information about the Settlement. Fraga Decl., ¶¶8-10.

This combination of individual first-class mail to all members of the Settlement Class who could be identified with reasonable effort, supplemented by notice in widely circulated publications, and transmission over a newswire, and a dedicated settlement website, telephone helpline, and email address was "the best notice . . . practicable under the circumstances." Fed.

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[13] The press release of the Publication Notice was translated from English into the following languages: Arabic, Chinese, Czech, French, German, Hebrew, Indonesian, Japanese, Korean, Malay, Polish, Portuguese, Russian, Slovak, Spanish, Thai, and Urdu.

R. Civ. P. 23(c)(2)(B). Such multi-faceted notice programs combining direct mail and publication are routinely approved.[14]

D. Final Certification of the Settlement Class

The Court's April 21, 2016 Preliminary Approval Order preliminarily certified the Settlement Class for settlement purposes only under Rules 23(a) and (b)(3). ECF No. 65. Nothing has changed to alter the propriety of class certification for settlement purposes, and for all the reasons stated in Plaintiff's Memorandum of Law in Support of Motion for Preliminary Approval of Settlement (ECF No. 41) and in the Court's Preliminary Approval Order, Plaintiff respectfully requests that the Court grant final certification of the Settlement Class under Rules 23(a) and 23(b)(3).

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[14] *See*, *e.g.*, *Credit Default Swaps*, 2016 WL 2731524, at *5 ("Class Counsel mailed notice packets to each of 13,923 identified Class members. . . . . The Summary Notice was also published on January 11 in several important business publications. . . . The Garden City Group (the 'Claims Administrator') launched a website for the Settlement which posted the Settlement agreements, notices, court documents, and other information relevant to the Settlement."); *In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 (BMC), 2012 WL 5289514, at *2 (S.D.N.Y. Oct. 23, 2012) ("Pursuant to this plan, a copy of the settlement notice was mailed to every potential member of the Direct Purchaser Damages Class whose address was provided by defendants. The notice that was ultimately mailed to 147 members of this class also contained a claim form. Additionally, the class notice was published in eight print publications, as well as on Facebook and on the approximately 800 websites that comprise the 24/7 Network. Finally, the settlement notice, along with other lawsuit and settlement-related information, was made available on a website operated by the settlement administrator.").

III. CONCLUSION

For all of the forgoing reasons, Plaintiff respectfully requests that the Court approve the proposed Settlement and Plan of Distribution and finally certify the Settlement Class for purposes of settlement only.

Dated: February 28, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2017, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Christopher M. Burke

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