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 COUNSEL'S MOTION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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Court-appointed Class Counsel for the Settlement Class, Scott+Scott, Attorneys at Law, LLP and Korein Tillery LLC ("Class Counsel"), along with Hausfeld LLP and Nussbaum Law Group, P.C. (together with Class Counsel, "Plaintiff's Counsel") respectfully request that the Court grant their motion for an award of attorneys' fees in the amount of 17.5% of the Settlement Fund,[1] or US$8,750,000, plus interest earned at the same rate as the Settlement Fund.[2] Plaintiff's Counsel also seek reimbursement of $339,292.64 in litigation expenses that they reasonably and necessarily incurred in prosecuting and resolving the Action, and a $25,000 service award for the Class Representative.

PRELIMINARY STATEMENT

The proposed Settlement, which provides for a payment of US$50 million in exchange for resolving the Action, represents a very favorable result for the Settlement Class in light of the significant hurdles that Plaintiff would have faced in this complex action. As discussed in more detail in Plaintiff's Motion for Final Approval of the Settlement, the Settlement Fund represents 11% of the Class's total Claim Value. The Settlement Fund reasonably reflects the significant risk of litigation and the cooperation provisions of the Settlement.

Before initiating this litigation, Plaintiff's Counsel spent almost two years and significant amounts of their own resources independently uncovering Barclays' use of a Last Look practice in its algorithms for executing foreign exchange ("FX") trades that were matched on electronic trading platforms. Plaintiff alleged that Barclays' use of Last Look enabled Barclays to delay the execution of class members' trades in order to assess for a predetermined period of time whether

[1] Capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the Order Preliminarily Approving Settlement, Conditionally Certifying the Settlement Class, and Appointing Class Counsel and Class Representative for the Settlement Class (ECF No. 65) and/or the Order Approving the Form and Manner of Notice of the Settlement and Preliminarily Approving the Plan of Distribution (ECF No. 97).

[2] The Notice informed the Settlement Class that Plaintiff's Counsel would apply to the Court for an award of attorneys' fees in an amount not to exceed 17.5% of the Settlement Fund, reimbursement of litigation costs, and a service award for Plaintiff in an amount not to exceed $25,000. ECF No. 97, Ex. 2 at 14.

the market moved in its favor or in the customer's favor. Compl. at ¶¶4, 45-57. Depending on the market's movement, Plaintiff alleged that Barclays either reneged on the agreed-upon trade or executed the trade at a later time than it otherwise should have. Compl. at ¶¶4, 45-57. Plaintiff alleges that Barclays, in doing so, breached its contracts with class members. Compl. ¶5. Plaintiff further alleged that Barclays did not disclose its use of Last Look but made representations expressly or impliedly telling customers that matched trades would be executed as soon as possible (there are otherwise some inherent latency delays in transmitting data). Compl. at ¶¶ 5, 68, 75-85.

In investigating and undertaking this litigation over the past three years, Plaintiff's Counsel faced numerous challenges in independently uncovering Barclays' alleged misconduct, in determining the scope of that misconduct (e.g., which platforms were affected), in developing viable theories of liability, and in overcoming the inherent difficulties of successfully prosecuting a complex class action. At the inception of Plaintiff's investigation, the risk of losing was very real, and it was greatly enhanced by the fact that Plaintiff's Counsel would be litigating against a large, well-financed international bank most likely defended by one of the nation's top law firms. Despite these risks, Plaintiff's Counsel have worked nearly three years on a contingency basis and with no guarantee of ever being compensated.

Plaintiff's Counsel believe that an attorney fee award of 17.5% of the Settlement properly reflects the many significant risks they took and the excellent result achieved. When considering the percentage of the fund method for calculating attorneys' fees and the estimated market rate for Plaintiff's Counsel's services, the requested fee is not only reasonable, it is below that awarded in similar complex contingency cases. In addition, the costs and expenses incurred are reasonable and were necessarily incurred in successfully prosecuting this litigation.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff's Counsel refer the Court to the concurrently filed Declaration of George A. Zelcs in Support of Plaintiff's Motion for Final Approval of the Settlement and Motion for Attorneys' Fees and Reimbursement of Expenses ("Zelcs Decl."), for a detailed summary of Plaintiff's Counsel's investigation of the claims, prosecution of the action, and settlement discussions. In sum, Plaintiff's Counsel independently uncovered Barclays' use of Last Look while they were prosecuting the claims asserted in *In re Foreign Exchange Benchmark Rates Antitrust Litig.*, No. 13-cv-7789-LGS (S.D.N.Y.). Zelcs Decl. ¶ 15. After discovering a pattern of high reject rates and low fill rates of purportedly executable trades by banks on electronic FX trading platforms, Plaintiff's Counsel consulted or interviewed several FX traders and market experts. Zelcs Decl. ¶ 16. Specifically, Plaintiff's Counsel investigated the breadth of the practice (e.g., which platforms were affected), whether Barclays disclosed its use of Last Look, and how class members were damaged. Zelcs Decl. ¶¶ 16-17.

Plaintiff's Counsel informed the New York Department of Financial Services ("NYDFS") about Barclays' Last Look practices. Zelcs Decl. ¶ 18. As part of Plaintiff's Counsel's coordination with the NYDFS, Plaintiff's Counsel attended several meetings with NYDFS attorneys and economists to discuss Last Look practices and shared a draft complaint. *Id.*

Plaintiff's Counsel informed Barclays of their intention to file an action relating to Barclays' Last Look conduct. Zelcs Decl. ¶ 21. In the following weeks, Plaintiff's Counsel and Barclays' Counsel, Sullivan & Cromwell LLP, engaged in a mediation supervised by widely respected mediator Kenneth R. Feinberg. After hard fought, arm's-length negotiations, the parties eventually agreed on a settlement framework. Zelcs Decl. ¶¶ 20-26. Over the following

months, Plaintiff was able to conduct confirmatory discovery, including attorney proffers, about Barclays' Last Look practices and other similar practices in the FX industry. By October 29, 2015, Barclays and Plaintiff's Counsel executed a term sheet. Zelcs Decl. ¶ 25.

On November 18, 2015, the NYDFS entered into a consent order with Barclays concerning its Last Look practices in which Barclays agreed to pay a $150 million civil monetary penalty, terminate certain employees, and work with an independent monitor. *In the Matter of Barclays Bank PLC, Barclays Bank, PLC, New York Branch*, Consent Order Under New York Banking Law §44 (Nov. 18, 2015) (available at www.dfs.ny.gov/about/ea/ea15117.pdf). One week later, on November 25, 2015, Plaintiff filed this action.

On February 10, 2016, the Parties executed a Stipulation and Agreement of Settlement with Barclays Bank PLC and Barclays Capital Inc., and on April 20, 2016 they executed the Amended Stipulation and Agreement of Settlement. Zelcs Decl. ¶ 26. On April 21, 2016, this Court entered an Order Preliminary Approving Settlement, Conditionally Certifying the Settlement Class, and Appointing Class Counsel and Class Representative for the Settlement Class. ECF No. 65.

Since obtaining preliminary approval, Plaintiff's Counsel have spent considerable time developing the Plan of Distribution. Zelcs Decl. ¶¶ 42-45. To do so required expert analysis of a large and complex data set consisting of nearly 80 million trades. Zelcs Decl. ¶ 33. Plaintiff's Counsel requested frequent proffers from Barclays' counsel on data interpretation issues, which also required substantial expert assistance. Plaintiffs' counsel also searched for and reviewed a significant portion of the more than 62,000 documents produced by Barclays (over 279,000 pages) in order to answer various expert questions about the transaction data and Barclays' use

of Last Look. Zelcs Decl. ¶¶ 34, 42-44. A detailed understanding of how Barclays' Last Look algorithms operated was necessary to develop the Plan of Distribution, which estimates trading losses on a trade-by-trade basis for certain trades where detail transaction data is available and applies a model to estimate trading losses where detailed transaction data was not available, and estimate damages in order to confirm the reasonableness of the Settlement Amount. *Id.*

Plaintiff's Counsel have also spent considerable time affecting notice to potential class members. The presence of foreign plaintiffs in certain countries with privacy laws required Plaintiff's Counsel to work with Barclays to devise and implement a plan to provide notice to those class members in a manner that did not run afoul of a substantial number of foreign privacy laws. This involved coordinating notice between the Claims Administrator and Barclays' notice agent, including the development of protocols so that potential members of the Settlement Class would receive identical notice and be able to easily file claims, no matter where they reside. Zelcs Decl. ¶ 45.

On November 17, 2016, the Court entered an Order Approving the Form and Manner of Notice of the Settlement and Preliminarily Approving the Plan of Distribution. ECF No. 97. The Final Fairness Hearing is set for July 18, 2017.

ARGUMENT

I. THE COMMON FUND DOCTRINE APPLIES TO THE SETTLEMENT

The Supreme Court has long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). This Court has likewise confirmed that, in "Rule 23 class actions, the attorneys whose efforts created the fund are entitled to a reasonable fee—set by the court—to be taken

from the fund." *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 347 (S.D.N.Y. 2014) (quoting *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000)).

"The rationale for the doctrine is an equitable one: it prevents unjust enrichment of those benefitting from a lawsuit without contributing to its cost." *Goldberger*, 209 F.3d at 47; *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115808, at *2 (S.D.N.Y. Nov. 7, 2007). Reasonable "attorneys' fees from a common fund serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future misconduct of a similar nature." *Veeco*, 2007 WL 4115808, at *2; *see also Hicks v. Morgan Stanley & Co.*, 01 Civ. 10071 (RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005).

For the common fund doctrine to apply, "the applicant's efforts must confer a 'substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread costs proportionately among them,' an award of attorneys' fees must operate to shift the costs of litigation to that group." *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (quoting *Mills v. Elec. Auto-Lite Co.,* 396 U.S. 375, 393-94 (1970)). The common fund doctrine applies here because Plaintiff's Counsel's efforts have conferred a substantial, $50 million benefit on an ascertainable class, and a fee award from the common fund will equitably "shift the costs of litigation" to the Settlement Class.

II. THE REQUESTED AWARD IS A REASONABLE PERCENTAGE OF THE COMMON FUND

This Court should analyze Plaintiff's Counsel's fee request under the "percentage of the fund method, which is the trend in this Circuit." *In re Colgate*, 36 F. Supp. 3d at 348. The Supreme Court has also suggested that attorneys' fees should be determined on a percentage-of-

recovery basis. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("[U]nder the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class . . .").

Courts "prefer" the percentage method because it: (i) "directly aligns the interests of the class and its counsel because it provides an incentive to attorneys to resolve the case efficiently and to create the largest common fund out of which payments to the class can be made"; (ii) is "closely aligned with market practices because it mimics the compensation system actually used by individual clients to compensate their attorneys"; (iii) "provides a powerful incentive for the efficient prosecution and early resolution of litigation"; (iv) "discourages plaintiffs' lawyers from running up their billable hours, one of the most significant downsides of the lodestar method"; and (v) "preserves judicial resources because it relieves the court of the cumbersome, enervating, and often surrealistic process of evaluating fee petitions." *Johnson v. Brennan*, No. 10 Civ. 4712 (CM), 2011 WL 4357376, at *14-15 (S.D.N.Y. Sept. 16, 2011) (citations and quotation marks omitted); *see also In re Colgate*, 36 F. Supp. 3d at 348 ("The percentage method directly aligns the interest of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.").

"In contrast, the lodestar method creates a disincentive to early settlements, tempts lawyers to run up their hours, and compels district courts to engage in a gimlet-eyed review of line-item fee audits." *In re Colgate*, 36 F. Supp. 3d at 348.

A. The Requested Attorneys' Fees Are Reasonable Under the Percentage-of-the-Fund Method

The first step in determining the reasonableness of Plaintiff's Counsel's fee request "is to determine a baseline reasonable fee with reference to other common fund settlements of a similar size and complexity, based on the subject matter of the claims." *Id.* Although "'courts typically

decrease the percentage of the fee as the size of the fund increases' … [a]ttorneys should not fear that, at any point, by securing a larger award for the class, they will receive a smaller award." *Id.* at 349 (quoting *In re Interpublic Sec. Litig.*, 02 Civ. 6527, 2004 WL 2397190, at *11 (S.D.N.Y. Oct. 26, 2004)).

The 17.5% fee requested by Plaintiff's Counsel in this case is below the range that courts in the Second Circuit typically award in comparable class actions. This is based on Theodore Eisenberg & Geoffrey P. Miller, *Attorneys Fees and Expenses in Class Action Settlements: 1993-2008*, 7 Empirical Legal Stud. 248 (2010) ("Eisenberg & Miller," Zelcs Decl., Ex. 1), and Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811 (2010) ("Fitzpatrick," Zelcs Decl., Ex. 2), which this Court has previously consulted as "an unbiased and useful reference for comparing fee cases of similar magnitude." *Id.* Both of these studies confirm that the requested fee award in this Action is below that typically awarded, whether judged in terms of magnitude of the recovery, case subject matter, or geographical forum. *See, e.g., Velez v. Novartis Pharm. Corp.*, No. 04-cv-09194 CM, 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010) ("District courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater [in class actions].") (citing cases); *Hernandez v. Merrill Lynch & Co.*, No. 11-cv-8472 KBF DCF, 2013 WL 1209563, at *9 (S.D.N.Y. Mar. 21, 2013) (noting that "Class Counsel's request for 33% of the Fund [was] reasonable and consistent with the norms of class litigation in this circuit") (internal quotation omitted); *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06-cv-4270 (PAC), 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009) ("Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit").

According to Eisenberg & Miller, settlements from 1993 to 2008 that recovered between $38.3 million and $69.6 million resulted in a median fee percentage of 21.9% and a mean fee percentage of 20.5%. Zelcs Decl., Ex. 1 at 18. Similarly, Fitzpatrick reviewed almost 700 settlements in 2006 and 2007, and he concluded that settlements between $30 million and $72.5 million resulted in a median fee percentage of 24.9%. Zelcs Decl., Ex. 2 at 839. Eisenberg & Miller also examined class action settlements between 1993 and 2008 by case subject matter. For consumer class actions such as this Action, the median fee percentage was 20%, and the mean fee percentage was 25%. Zelcs Decl., Ex. 1 at 15. Across all class action settlements in this District from 1993 to 2008, both the median and mean fee percentage was 22%. Zelcs Decl., Ex. 1 at 12. In their forthcoming study examining fee awards from 2009 to 2013, Eisenberg & Miller report that those percentages *have increased*—the mean fee percentage in this District was 27% and the median 31%, and the mean fee percentage for consumer class actions was 26% and the median 25%. Zelcs Decl., Ex. 3 at 11, 13. Thus, whether compared to other approved settlements based on the magnitude of the recovery, the subject matter of the Action, or the forum, the requested fee award of 17.5% of the Settlement is lower than typically awarded in comparable settlements.

Accordingly, Professor Miller has submitted a Declaration in Support of Plaintiff's Counsel's Fee Request in which he concludes that the requested fee award in this Action is reasonable compared to the amounts awarded in similar actions. Zelcs Decl., Ex. 4. Professor Fitzpatrick has also submitted a Declaration in Support of Plaintiff's Counsel's fee request in which he similarly concludes that the requested fee award is reasonable based on his study of the amounts awarded in comparable litigation. Zelcs Decl., Ex. 5.

Awarding fees on a percentage basis is particularly appropriate here because it does not penalize attorneys for achieving prompt, efficient resolution of a case. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.,* 396 F.3d 96, 121 (2d Cir. 2005) (the percentage method "provides a powerful incentive for the efficient prosecution and early resolution of litigation") (citation omitted); *Savoie v. Merchs. Banks*, 166 F.3d 456, 461 (2d Cir. 1999) (the percentage method "removes disincentives to prompt settlement"). Plaintiff's Counsel's ability to reach an efficient resolution was greatly enabled by the quality and thoroughness of their preceding 18 month investigation and analysis. Where, as here, Plaintiff's Counsel have developed sufficient information concerning the strengths and weaknesses of the case necessary to make an informed decision about the value of the claims, the resulting fee award should incentivize efficient prosecution. Plaintiff's Counsel's fee request of 17.5% is below that routinely awarded in comparable cases where the parties were able to resolve their claims soon after filing. *See, e.g., In re Fuqi Int'l, Inc. Sec. Litig.*, 2016 U.S. Dist. LEXIS 20514, at *28 (S.D.N.Y. Feb. 19, 2016) (approving attorneys' fees of 33% of $7.5 million settlement prior to motion to dismiss); *Maley*, 186 F. Supp. 2d at 369 (approving 33 1/3% of $11.5 million with motions to dismiss pending).

In sum, Plaintiff's Counsel's request for a 17.5% attorneys' fee is below the range of fees awarded in the Second Circuit for comparable class actions and is therefore reasonable.

B. Market Rate Fee Agreements Support the Requested Award

This Court has recognized that the "ideal proxy for the award should reflect the fees upon which common fund plaintiffs negotiating in an efficient market for legal services would agree." *In re Colgate*, 36 F. Supp. 3d at 352. Under the Private Securities Litigation Reform Act, for example, there is a "well-recognized rebuttable 'presumption of correctness' given to the terms of an *ex ante* fee agreement between class counsel and Class plaintiffs." *In re Credit Default Swaps Antitrust Litig.*, 13md2476 (DLC), 2016 WL 2731524, at *16 (S.D.N.Y. April 26, 2016)

(citing *Flanagan, Lieberman, Hoffman & Swain v. Ohio Pub. Employees Ret. Sys.*, 814 F.3d 652, 659 (2d Cir. 2016)). There "is no reason not to apply such a rebuttable presumption to the examination of an *ex ante* fee arrangement in a common fund antitrust case, at least where it has been negotiated with a sophisticated benefits fund with fiduciary obligations to its members and where the fund has a sizeable stake in the litigation." *Id.* The primary difficulty that sometimes, but not always, arises in common fund cases is "know[ing] precisely what fees common fund plaintiffs in an efficient market for legal services would agree to, given an understanding of the particular case and the ability to engage in collective arm's-length negotiation with counsel." *Goldberger*, 209 F.3d at 52. Even in those instances, however, "a court can learn about *similar* bargains. That is at least a starting point." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 719 (7th Cir. 2001) (emphasis in original).

Plaintiff's expert Charles Silver has studied the arm's-length market for contingency fee agreements in complex class actions, and he concludes that the requested fee award in this case of 17.5% of the Settlement is well below the 25% to 40% of recovery that sophisticated clients normally agree to pay when hiring lawyers on a pure contingency arrangement. Zelcs Decl., Ex. 6. When considering the size of the potential recovery, the risks of litigation (including the existence or nonexistence of any parallel government investigations), the resources required, the nature of the plaintiff, and the type of Defendant(s) involved, sophisticated clients normally agree to pay 25% to 40% of their recoveries in fees in comparable cases. Thus, the requested 17.5% fee award is below the "ideal proxy" of an *ex ante* market-rate agreement.

C. A Lodestar Cross-Check Supports the Requested Fee

"The lodestar cross-check serves best as a sanity check to ensure that an otherwise reasonable percentage fee would not lead to a windfall." *In re Colgate*, 36 F. Supp. 3d at 353 (but noting, however, that "the lodestar method has fallen out of favor particularly because it

encourages bill-padding and discourages early settlements."). In this case, Plaintiff's Counsel invested 5,149.32 professional hours, at hourly rates ranging from $275-350 for paralegals, from $400-500 for associates and staff attorneys, and from $520-1100 for partners, which results in an overall lodestar of $3,484,108.14 and an effective lodestar multiplier of 2.51. *See* Decls. of George A. Zelcs, Daryl F. Scott, Michael D. Hausfeld, and Linda P. Nussbaum in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses, at Exs. 1.

The requested fee award of 17.5% of the Settlement Fund, when cross-checked with a lodestar multiplier of 2.51, is reasonable and well within the range of awards approved in comparable cases. *See, e.g., In re Credit Default Swaps Antitrust Litig.*, 13md2476 (DLC), 2016 WL 2731524, at *17 (S.D.N.Y. April 26, 2016) (approving $253 million fee award based on an effective lodestar multiplier of 6); *In re Colgate*, 36 F. Supp. 3d at 353 (approving $11.5 million fee award based on an effective lodestar multiplier of 5 and citing Fitzpatrick, Zelcs Decl. Ex. 2, at 834 n.80, as "suggesting that cases identifying multipliers are self-selected to report low multipliers"); *Maley*, 186 F. Supp. 2d at 369 (approving a fee request of 33% based on a lodestar multiplier of 4.65, which was "well within the range awarded by courts in this Circuit and courts throughout the country.").

III. OTHER FACTORS CONFIRM THAT THE REQUESTED FEE IS FAIR AND REASONABLE

The Second Circuit has set forth the following criteria that courts should consider when reviewing a request for attorneys' fees in a common fund case, each of which demonstrate that the requested fee is reasonable:

> (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.

Goldberger, 209 F.3d at 50 (internal quotes and citation omitted).

A. The Time and Labor Expended Support the Requested Fee

The amount of time and effort Plaintiff's Counsel expended to prosecute this case and reach a successful settlement demonstrate that a fee award equal to 17.5% of the Settlement Fund is reasonable. As set forth in greater detail in the Zelcs Declaration, Plaintiff's Counsel's work on this case included, among other things:

- Independently uncovering Barclays' Last Look practices on electronic platforms and investigating Barclays' disclosures (¶¶ 15-16);
- researching and drafting the detailed 38-page Class Action Complaint based on their investigation;
- consulting extensively with experts on damages issues in connection with preparing for settlement negotiations (¶ 17);
- engaging in a mediation process overseen by Kenneth R. Feinberg, which involved a formal mediation session, and extensive consultations with Plaintiff's experts (¶¶ 20-26);
- negotiating and drafting the Stipulation and related settlement documents (¶¶ 20-26);
- sorting through and reviewing the more than 62,000 documents produced by Barclays (¶ 34);
- drafting the preliminary approval motion papers;
- working with Plaintiff's damages expert to prepare the proposed Plan of Distribution (¶¶ 42-44);
- working with Barclays and outside consultants to provide notice to class members in compliance with foreign privacy laws (¶ 45); and

Moreover, the legal work on this case will not end with the Court's approval of the proposed Settlement. Additional hours and resources will necessarily be expended assisting Settlement Class Members with their Proof of Claim forms, responding to Settlement Class Members' inquiries, shepherding the claims process to conclusion, and filing a distribution motion. No additional compensation will be sought for this work. *See In re Facebook, Inc. IPO*

Sec. & Deriv. Litig., MDL No. 12-2389, 2015 WL 6971424, at *10 (S.D.N.Y. Nov. 9, 2015) ("Considering that the work in this matter is not yet concluded for Plaintiffs' counsel who will necessarily need to oversee the claims process, respond to inquiries, and assist Class Members in submitting their Proof of Claims, the time and labor expended by counsel in this matter support a conclusion that a 33% fee award in this matter is reasonable.").

The substantial time and effort devoted to this case by Plaintiff's Counsel to obtain the $50 million Settlement confirms that the fee request is reasonable.

B. The Risks of the Litigation Support the Requested Fee

"[T]he risk of success [is] 'perhaps the foremost' factor to be considered in determining" a reasonable award of attorneys' fees. *Goldberger*, 209 F.3d at 54; *see also Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331 (CM)(MHD), 2014 WL 1224666, at *21 (S.D.N.Y. Mar. 24, 2014) ("The Second Circuit long ago recognized that courts should consider the risks associated with lawyers undertaking a case on a contingent fee basis."). This is because "[n]o 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." *In re Colgate*, 36 F. Supp. 3d at 351 (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974)). "Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974). And "class actions confront even more substantial risks than other forms of litigation," *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-cv-1825, 2010 WL 2653354, at *5 (E.D.N.Y. June 24, 2010) (citation omitted); *see also Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01 Civ. 11814 (MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004) (Pollack, J.) ("Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation.").

As discussed in more detail in the concurrently filed Memorandum of Law in Support of Plaintiff's Motion for Final Approval, Plaintiff's Counsel, at the inception of their investigation, faced risks in prosecuting this Action. With respect to liability, Barclays would have argued that its prices were not firm offers to trade and that its contracts allowed it to reject or delay execution of matched trades, which would have raised complicated issues of law and fact. Barclays also would have argued that its execution policies were sufficiently disclosed, and that its Last Look practices were not "consumer-oriented" conduct within the purview of the consumer protection laws. In addition, Plaintiff would have faced risk in certifying a class and approximating damages in a highly complex market. As a well-funded defendant with able defense counsel, Barclays would have vigorously contested liability and the extent of damages, with proceedings dragging out over many years.

Plaintiff's Counsel thus understood at the beginning of their investigation in 2014 that they were embarking on an expensive and potentially lengthy investigation and with no guarantee of ever being compensated for the substantial investment of time and resources the case would require. In undertaking that responsibility, counsel were obligated to ensure that sufficient resources were dedicated to the prosecution of the Action, and that funds were available to compensate staff and to cover the considerable costs that a case such as this requires. *See In re Flag Telecom Holdings, Ltd. Sec. Litig.,* No. 02-cv-3400, 2010 WL 4537550, at *27 (S.D.N.Y. Nov. 8, 2010). Plaintiff's Counsel received no compensation during nearly three years of investigation and litigation, and they advanced or incurred over $339,292 in expenses in prosecuting this Action for the benefit of the Settlement Class. Had Plaintiff's Counsel not achieved the Settlement, this significant investment of time and money could have been lost:

> Indeed, the risk of non-payment in complex cases, such as this one, is very real. There are numerous class actions in which counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise. There is no guarantee of reaching trial, and even a victory at trial does not guarantee recovery.

Shapiro v. JPMorgan Chase & Co., 2014 WL 1224666, at *22 (S.D.N.Y. Mar. 24, 2014).

Despite the many uncertainties regarding the outcome of the case, Plaintiff's Counsel undertook this investigation and pursuit of the case on a wholly contingent basis, knowing it would require the devotion of a substantial amount of time and a significant expenditure of litigation expenses. Plaintiff's Counsel's assumption of this contingency fee risk strongly supports the reasonableness of the requested fee. *See Flag Telecom*, 2010 WL 4537550, at *27 ("Courts in the Second Circuit have recognized that the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award."); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("There was significant risk of non-payment in this case, and Plaintiffs' Counsel should be rewarded for having borne and successfully overcome that risk.").

C. The Magnitude and Complexity of the Action Support the Requested Fee

As noted above and in the Zelcs Declaration, the litigation raised a number of complex questions concerning the breadth of Barclays' Last Look practices, the scope of its disclosures, and liability and damages issues. Each of these required, and would have continued to require, extensive efforts by Plaintiff's Counsel and consultation with multiple experts to resolve. To build the case, Plaintiff's Counsel were required to, among other things: (i) conduct an extensive factual investigation, which included interviews with numerous market experts and traders around the world; spend significant time consulting with economic and damages experts to analyze and understand a complex financial market; and broadly review all available public and nonpublic information; (ii) make presentations to a well-respected mediator concerning

Plaintiff's theories of liability and damages; (iii) prepare the 38-page complaint; and (iv) devise and implement a plan of distribution appropriately accounting for the varying complexities and interconnected markets impacted. If the Action had not been settled, there would have been months, if not years, of likely contentious international discovery, depositions of fact and expert witnesses, several rounds of additional motion practice, a trial, post-trial motion practice, and (most likely) appeals.

Accordingly, the magnitude and complexity of the Action supports the conclusion that the requested fee is fair and reasonable.

D. The Quality of Plaintiff's Counsel's Representation Supports the Requested Fee

This Court recognizes that "the quality of its representation is best evidenced by the quality of the result achieved." *See In re Colgate*, 36 F. Supp. 3d at 352 (quoting *Goldberger*, 209 F.3d at 55). Here, the Settlement provides a very favorable result for the Settlement Class in light of the serious risks of continued litigation. It also represents a significant portion of the total Claim Value used to calculate the *pro rata* distributions. *See* Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Distribution at 14-15. Plaintiff's Counsel respectfully submit that the quality of their efforts in the litigation to date, together with their substantial experience in class actions and commitment to this litigation, provided Plaintiff's Counsel with the leverage necessary to negotiate the Settlement. *See* ECF No. 64, Exs. 2-5 (firm resumes).

This Court has acknowledged that "as a case requires more expertise—and, consequently, fewer lawyers could competently bring the case—a larger percentage of the fund should be awarded to those lawyers." *Id.* at 352. Plaintiff's Counsel believe that this case, which required years of investigation and economic analysis of complex, largely opaque interconnected

international financial markets, is one that only a few firms could have uncovered, prosecuted, and efficiently resolved in such a favorable manner.

Courts have also recognized that the quality of the opposition faced by plaintiff's counsel should be taken into consideration in assessing the quality of counsel's performance. *See, e.g.*, *Veeco*, 2007 WL 4115808, at *7 (30% award of attorneys' fees was reasonable, in part, because defendants were represented by "one of the country's largest law firms"); *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, No. 03 MDL 1529 LMM, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006) ("The fact that the settlements were obtained from defendants represented by 'formidable opposing counsel from some of the best defense firms in the country' also evidences the high quality of Class counsels' work") (citation omitted), *aff'd*, 272 F. App'x 9 (2d Cir. 2008). Here, Defendants were represented by Sullivan & Cromwell LLP, an accomplished and well-regarded law firm that vigorously represented Barclays throughout this Action. Plaintiff's Counsel's thorough investigation, ability to present a strong case, and demonstrated willingness to prosecute the Action through trial and appeal enabled Plaintiff's Counsel to achieve the favorable Settlement.

E. The Requested Fee in Relation to the Settlement Amount

Courts analyze this factor based on the fee requested as a percentage of the total recovery. "When determining whether a fee request is reasonable in relation to a settlement amount, 'the court compares the fee application to fees awarded in similar securities class-action settlements of comparable value.'" *In re Comverse Tech., Sec. Litig.,* No. 06-cv-1825, 2010 WL 2653354, at *3 (E.D.N.Y. June 24, 2010) (citation omitted). As discussed above, the requested 17.5% fee is well within the range that courts in the Second Circuit award in comparable cases. Thus, the fee requested is reasonable in relation to the Settlement.

F. Public Policy Considerations Support the Requested Fee

There is an "important public policy goal of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest." *In re Colgate*, 36 F. Supp. 3d at 352 (quoting *Goldberger*, 209 F.3d at 55). Thus, this Court recognizes that "setting fees too low or randomly will create poor incentives to bringing large class action cases." *Id.* In this case, the Settlement also promotes the public policy of enforcing contracts and promoting honest consumer practices. *See generally, e.g., Jermyn v. Best Buy Stores, L.P.*, No. 08 Civ. 214 CM, 2012 WL 2505644, at *12 (S.D.N.Y. June 27, 2012) (recognizing public policy in enforcing consumer protection laws); *Steinberg v. Nationwide Mut. Ins. Co.*, 612 F. Supp. 2d 219, 224 (E.D.N.Y. 2009) (recognizing public policy in requiring insurance companies to better define and disclose its practices to consumers).

G. The Reaction of the Settlement Class to Date Supports the Requested Fee

The overwhelmingly positive reaction of the Settlement Class to date also supports the requested fee. *See In re Flag Telecom Holdings, Ltd. Sec. Litig.,* No. 02-cv-3400, 2010 WL 4537550, at *29 (S.D.N.Y. Nov. 8, 2010) ("numerous courts have noted that the lack of objection from members of the class is one of the most important factors in determining the reasonableness of a requested fee."). Through February 28, 2017, the Claims Administrator has sent mailed Notice to 1,373 potential Settlement Class Members informing them that Plaintiff's Counsel intended to apply to the Court for an award of attorneys' fees and reimbursement of litigation expenses. In addition, the Publication Notice was published in *The Wall Street Journal* (global edition), *Investor's Business Daily*, *FX Week*, and *Financial Times* (worldwide edition). 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. While the time to object to the Fee and Expense

Application does not expire until March 30, 2017, not a single class member has objected to date or excluded themselves from the settlement. The lack of objections is "strong evidence" of the reasonableness of the fee request. *Ressler v. Jacobson,* 149 F.R.D. 651, 656 (M.D. Fla. 1992).[3]

IV. PLAINTIFF'S COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARY TO ACHIEVE THE BENEFIT OBTAINED

Plaintiff's Counsel also request reimbursement of $339,292.64 in expenses incurred while prosecuting the Action. In support, Plaintiff's Counsel submit separate declarations attesting to the accuracy of these expenses. *See In re Flag Telecom Holdings, Ltd. Sec. Litig.,* No. 02-cv-3400, 2010 WL 4537550, at *30 (S.D.N.Y. Nov. 8, 2010) ("It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class"); *In re Indep. Energy Holdings PLC Sec. Litig.*, 302 F. Supp. 2d 180, 183 n.3 (S.D.N.Y. 2003) (court may compensate class counsel for reasonable out-of-pocket expenses necessary to the representation of the class). A significant portion of the expenses were incurred for professional services rendered by Plaintiff's experts, investigators and the mediator, and the remaining expenses are attributable to the costs of copying documents, legal and factual research, travel and other incidental expenses incurred in the course of the litigation. *See* Decls. of George A. Zelcs, Daryl F. Scott, Michael D. Hausfeld, and Linda P. Nussbaum in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses, at Exs. 2 (breakdown of expenses by category). These expenses were critical to Plaintiff's success in achieving the proposed Settlement, are reasonable in amount, and are customary and necessary expenses for a complex class action. As such, they should be reimbursed. *See Flag Telecom*, 2010 WL 4537550, at *30; *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004) ("The expenses incurred-which include

[3] Should any objections be received, Plaintiff's Counsel will address them in their reply papers.

investigative and expert witnesses, filing fees, service of process, travel, legal research and document production and review-are the type for which 'the paying, arms' length market' reimburses attorneys. For this reason, they are properly chargeable to the Settlement fund.") (citation omitted). Additionally, no objections to the expense request have been received, and the Notice disclosed that Plaintiff's Counsel would seek reimbursement of litigation expenses. Accordingly, Plaintiff's Counsel respectfully request payment for these expenses.

V. THE REQUESTED SERVICE AWARD FOR THE CLASS REPRESENTATIVE IS REASONABLE

"Incentive awards are not uncommon in class action cases and are within the discretion of the court." *In re AOL Time Warner ERISA Litig.*, 2007 U.S. Dist. LEXIS 79545 *9 (S.D.N.Y. Oct. 26, 2007) (quoting *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 187 (W.D.N.Y. 2005)). While there are "no meaningful guidelines of broad applicability are discernible from the reported decisions as to the appropriate measure for an award" (*id*. (quoting *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 200 (S.D.N.Y. 1997)), courts consider the following factors when evaluating a requested service award: (1) the personal risk (if any) incurred by the plaintiff-applicant in becoming and continuing as a litigant; (2) the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (*e.g.*, factual expertise); (3) any other burdens sustained by that plaintiff in lending himself or herself to the prosecution of the claim; (4) the ultimate recovery; (5) sums awarded in similar cases; and (6) comparison of the named plaintiff's requested award to each class member's estimated *pro rata* share of the settlement. *AOL Time Warner*, 2007 U.S. Dist. LEXIS 79545, *10-11 (citing cases). These factors support Plaintiff's requested $25,000 service award.

A. The Personal Risk (If Any) Incurred By the Plaintiff-Applicant in Becoming and Continuing as a Litigant

Plaintiff is the only named plaintiff in this litigation and demonstrated a willingness to step forward when there was no other class member to do so. Stepping forward in this action was not done lightly. It placed Plaintiff in an adversarial posture with Barclays and was done notwithstanding the risk that being the named plaintiff in this case would imperil existing and future professional relationships with Barclays.

B. The Time and Effort Expended by Plaintiff in Assisting in the Prosecution of the Litigation

Axiom, through Ephraim Gildor ("Gildor"), its founder and the principal of the Trusteeship through which it is bringing this litigation, along with other former Axiom executives, have invested their time, expertise, and expense in the Action, which has benefitted the Settlement Class.

As detailed in the Zelcs Declaration, Axiom, through former executives Gildor, José Scheinkman, Kathleen Hartmann, and others, have assisted Plaintiff's Counsel in developing industry insight and understanding to develop this case's overarching legal theory, a coherent damages theory, and ultimately a viable plan of distribution.

C. Burdens Sustained by Plaintiff

In order to serve as a plaintiff here, Gildor, in 2016, revived the defunct Axiom entity and established a Trusteeship so as to pursue this Action. To revive the company (for the limited purpose of pursuing the company's claims), Gildor and other former Axiom executives assisted Plaintiff's Counsel in making the successful application before the Delaware Court of Chancery (Axiom had been a Delaware incorporated entity).

D. The Ultimate Recovery

As detailed in the accompanying Memorandum in Support of Final Approval, the $50 million dollar recovery for this class action is an excellent result

E. Sums Awarded in Similar Cases

There is ample support in the case law for Plaintiff receiving a $25,000 service award, which equals only a fifth of one percent of the overall $50 million award. Indeed, in this Circuit, service awards have been granted for comparable commitments by a class representative. *See, e.g., Bd. of Trs. Of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, 09 Civ. 686, 2012 WL 2064907, at *3 (S.D.N.Y. June 7, 2012) (awarding $50,000 to each of three named class representatives); *In re Vitamin C Antitrust Litig.*, 2012 U.S. Dist. LEXIS 152275, at *36 (E.D.N.Y. Oct. 22, 2012) (approving incentive award of $50,000).

F. Comparison of the Requested Award to Each Class Member's Estimated *Pro Rata* Share of the Settlement.

Each class member's *pro rata* share will be highly variable, as the Plan of Distribution allocates the settlement funds based on estimated trading losses on a trade-by-trade basis. Therefore, each Authorized Claimant's pro rata share of the settlement fund will depend on many class member-specific factors, such as volume of trading, currencies traded, relative exposure to Barclays' use of Last Look, and other idiosyncratic matters that make comparison with a requested service award less probative than the other five factors detailed above. Plaintiff's Counsel anticipate that distributions to many Authorized Claimants may exceed the service award requested here.

Weighing these six factors together, and comparing the service award relative to the size of the overall settlement, Plaintiff respectfully submits that a $25,000 service award is reasonable.

CONCLUSION

For the foregoing reasons, Plaintiff's Counsel respectfully request that the Court grant their Motion for Attorneys' Fees and Reimbursement of Expenses.

Dated: February 28, 2017

Respectfully Submitted:

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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, and I caused the foregoing document or paper to be mailed via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List.

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