UNITED STATES DISTRICT COURT
FOR THE 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-9323-LGS

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

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The parties have reached a proposed settlement that would fully resolve this Action.[1] Instead of the lengthy, costly, and uncertain course of further litigation, the Settlement Agreement provides an expeditious route to recovery for the Class. It should be preliminarily approved.

If approved, the Settlement Agreement will provide a significant recovery for the Class including, among other things, Barclays' payment of $50,000,000 in cash and its agreement to provide information that Plaintiff's Counsel believe will assist Plaintiff in pursuing its claims (and those of similarly situated persons) against other banks that engaged in similar "Last Look" practices, as described herein.

Plaintiff's motion seeks entry of an order: (1) granting preliminary approval of the Settlement Agreement; (2) preliminarily certifying the Class for settlement purposes; (3) appointing Settlement Class Counsel and Plaintiff as class representative for settlement purposes; (4) appointing the proposed Claims Administrator and Escrow Agent; and (5) staying all proceedings in this Action until the Court has ruled on a final approval of the Settlement Agreement. As demonstrated below, the Settlement Agreement is an excellent result for the Class and is fair, reasonable, and adequate under the governing standards the Second Circuit.

I. SUMMARY OF CLAIMS, PROCEDURAL HISTORY, SETTLEMENT, AND THE SETTLEMENT NEGOTIATIONS

Barclays is one of the largest currency dealers in the foreign currency exchange ("FX") market and is a well-known "Liquidity Provider" or "Market Maker." As a Liquidity Provider, it acts as both a buyer and seller of currencies through its own proprietary electronic trading

[1] Unless otherwise defined herein, all capitalized terms have the meaning ascribed to them in the Stipulation and Agreement of Settlement with Barclays Bank PLC and Barclays Capital Inc. (the "Settlement Agreement").

platform known as BARX and through multi-party electronic communications networks ("ECNs") by placing limit orders to buy or sell a stated amount of a currency at particular prices. Compl., ¶¶2, 33-35, 40. Through BARX and other ECNs, Plaintiff and class members placed market orders to trade with Barclays a given volume of currency. *Id*., ¶3. The complaint alleges that these orders constituted offers to transact at the best, immediately available prices and, at the same time, as an acceptance of Barclays' outstanding unilateral offer to trade. *Id*., ¶¶3, 99, 106.

Plaintiff alleges that many times, however, Plaintiff and the class did not receive the agreed-on contract price (*i.e.*, the best, immediately available price), but rather, received a worse price. *Id*., ¶4. Plaintiff alleges that Barclays delayed the execution of matched trades, and when it determined during the delay that the trade would be unfavorable to its position or that it could extract a larger profit, it reneged on the agreed price and often then filled Plaintiff's and class members' orders at worse prices. *Id*., ¶¶4, 45-53. This practice has been dubbed "Last Look," and Plaintiff alleges that Barclays' Last Look practices caused Barclays to breach its contracts with Plaintiff and class members, as well as breach the covenant of good faith and fair dealing. *Id*., ¶¶4, 5, 99-115. Plaintiff further alleges that by promoting its prices as "executable," when they were not, Barclays has unfairly deceived Plaintiff and the class and caused significant damages to Plaintiff and the class while unjustly enriching Barclays. *Id*., ¶¶5, 119-44.

In settlement of these claims, the Settlement Agreement provides for $50,000,000 in monetary relief, and extensive cooperation from Barclays, which Plaintiff's Counsel believe will assist Plaintiff in pursuing its claims (and those of similarly situated persons) against other banks that engaged in similar practices. Zelcs Decl., ¶18. All funds are non-reversionary if there is final approval of the Settlement Agreement by the Court. Settlement Agreement, ¶10(j). It is estimated that there are fewer than 1,000 members of the Class. Zelcs Decl., ¶20. It is difficult

to predict claims volume and the settlement fund subscription rate at this time, but Class Members are likely to receive significant monetary compensation. *Id*.

In consideration for Barclays' payment of $50,000,000 to the Class and its provision of cooperation and confirmatory discovery, and upon the Effective Date of the Settlement, Class Members who do not exclude themselves from the Class will give up any rights to sue Barclays or any of the Released Parties for the Released Claims. Stipulation and Agreement of Settlement ("Settlement Agreement"), ¶¶1, 2(kk). The releases are limited to only those claims that are or could have been alleged ***and*** arise under the factual predicate of the Action. *Id*. The release carves out claims arising under foreign laws based upon orders or trades either in or over BARX (whether placed directly or indirectly via an ECN, or via any other connection to BARX) that used a Barclays' server solely outside the United States and belonging to any Releasing Party that is domiciled outside the United States or Person that is domiciled outside the United States, as well as claims brought by plaintiffs in *In re Foreign Exchange Benchmark Rates Antitrust Litig.*, No. 13-cv-7789-LGS (S.D.N.Y.). Settlement Agreement, ¶2(kk).

II. THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS COURT TO GRANT PRELIMINARY APPROVAL

A. Standards for Preliminary Approval

There is a strong judicial policy favoring the negotiated resolution of litigation. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005). This is especially true with respect to class actions. *Wal-Mart Stores*, 396 F.3d at 117. *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y. 2010) ("There is a 'strong judicial policy in favor of settlements, particularly in the class action context.'") (quoting *In re PaineWebber Ltd. P'ships Litig.*, 147

F.3d 132, 138 (2d Cir. 1998)). Accordingly, '"the compromise of complex litigation is encouraged by the courts and favored by public policy.'" *Wal-Mart Stores*, 396 F.3d at 117.[2]

Preliminary approval is generally the first step in a two-step process before a class action settlement is approved. The first step requires the Court, in the exercise of its discretion, to preliminarily determine whether the proposed settlement falls within the range of possible approval. *In re Initial Pub. Offering Sec. Litig.*, 226 F.R.D. 186, 191 (S.D.N.Y. 2005) ("*IPO*"). Preliminary approval is appropriate when the court finds that there is '"probable cause to submit the [proposed settlement] to class members and hold a full-scale hearing as to its fairness.'" *Kelen v. World Fin. Network Nat'l Bank.*, 302 F.R.D. 56, 68 (S.D.N.Y. 2014) (quoting *In re Traffic Exec. Ass'n Eastern R.R.*, 627 F.2d 631, 634 (2d Cir.1980)). "Once preliminary approval is bestowed, the second step of the process ensues: notice is given to the class members of a hearing, at which time class members and the settling parties may be heard with respect to final court approval." *In re Nasdaq Mkt.-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997).

Preliminary approval is appropriate where the settlement '"is the result of serious, informed, and non-collusive negotiations, where there are no grounds to doubt its fairness and no other obvious deficiencies . . . , and where the settlement appears to fall within the range of possible approval.'" *Menkes v. Stolt-Nielsen S.A.*, 270 F.R.D. 80, 101 (D. Conn. 2010) (quoting *Reade–Alvarez v. Eltman, Eltman & Cooper, P.C.*, 237 F.R.D. 26, 33 (E.D.N.Y. 2006) (alteration in original)); *NASDAQ*, 176 F.R.D. 99, 102 ("Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations . . . and falls within the range

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

of possible approval, preliminary approval is granted."). "If the proposed settlement 'appears to fall within the range of possible approval, the court should order that the class members receive notice of the settlement.'" *Kelen*, 302 F.R.D. at 68 (quoting *Clark v. Ecolab, Inc.*, Nos. 07-Civ-8623 (PAC), 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009)).

The Settlement Agreement meets these requirements. The Settlement Agreement was the product of serious, arm's-length negotiations between experienced and informed counsel and reflects a compromise that provides substantial monetary and cooperation benefits to the Class, while avoiding the risk associated with further protracted and contested litigation.

Plaintiff proposes to file a separate Motion for Approval of the Plan of Distribution and Form and Manner of Notice of the Settlement Agreements. Plaintiff anticipates filing this separate motion as soon as practicable after Barclays produces a list of Class members and transaction data, which are necessary for development of the Plan for Distribution and Notice Plan. If the Court enters the Preliminary Approval Order (requested here) and enters the Notice Order (to be requested by separate motion), Plaintiff will give notice of the proposed settlements to the Class. Through this two-step process, Plaintiff seeks to trigger critical settlement cooperation upon entry of the Preliminary Approval Order, and to defer notice until such time as the Plan of Distribution is fully developed and, accordingly, may be comprehensively described to the Class.

B. The Proposed Settlement Is Entitled to a Presumption of Fairness

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). Moreover, in such circumstances, "'great weight' is accorded to the

recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation." *In re PaineWebber Ltd. P'ship Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997).

Plaintiff's Counsel have the requisite experience to lead this litigation on behalf of the proposed Class (*see* Zelcs Decl., Exhibits 1-4), and it cannot be disputed that Barclays is represented by highly experienced and sophisticated counsel. In addition, as the accompanying Zelcs Declaration makes clear, settlement negotiations took place over the course of several months, were at arm's-length, and settlement was only reached with the assistance of a nationally-recognized mediator. *See* Zelcs Decl., ¶¶13-17. Under such circumstances, there is "a strong initial presumption that the compromise is fair and reasonable." *In re Michael Milken and Assocs. Sec. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("[M]ediator's involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure.").

C. The Settlement Is Substantively Fair

"In terms of the overall fairness, adequacy, and reasonableness of the settlement, a full fairness analysis is unnecessary at this stage; preliminary approval is appropriate where a proposed settlement is merely within the range of possible approval." *Reade-Alvarez*, 237 F.R.D. at 34; *In re Warner Chilcott Ltd. Sec. Litig.*, No. 06 civ 11515 (WHP), 2008 WL 5110904, at *2 (S.D.N.Y. Nov. 20, 2008) ("Although a complete analysis of [the *Grinnell*] factors is required for final approval, at the preliminary approval stage, 'the Court need only find that the proposed settlement fits within the range of possible approval to proceed.'").

Nevertheless, some courts have used the so-called *Grinnell* factors in assessing whether a proposed settlement merits preliminary approval. *See Reade-Alvarez*, 237 F.R.D. at 34 ("At this stage, brief consideration of these factors leads to the conclusion that the proposed relief awarded

to class members under the settlement is within the range of possible approval."); *Gross v. Washington Mut. Bank, F.A.*, No. 02-CV-4135 (RML), 2006 WL 318814, at *4-*5 (E.D.N.Y. Feb. 9, 2006). The *Grinnell* factors are:

> (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.

City of Detroit v. Grinnell Corp., 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). Each of the *Grinnell* factors supports preliminary approval of the Settlement Agreement.

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

There is little doubt that should this case go forward, there will be a motion to dismiss, protracted and expensive fact discovery with accompanying motion practice, summary judgment motions, *Daubert* motions, and a class certification motion. As to the class certification motion, the losing party would likely seek interlocutory review by the Second Circuit under Federal Rule of Civil Procedure 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) ("In the *Wal-Mart* case, twenty months elapsed between the order certifying the class and the Second Circuit's divided opinion affirming that decision."). Expert discovery would be extensive in light of the complex subject matter of the litigation. Finally, the trial of this action after completion of fact and expert discovery would be lengthy and difficult and would likely take several weeks. Furthermore, "[t]he losing parties would likely appeal any adverse jury verdicts, thereby extending the duration of litigation." *Payment Card*, 986 F. Supp.

2d at 212. In sum, "[t]here can be no doubt that this class action would be enormously expensive to continue, extraordinarily complex to try, and ultimately uncertain of result." *In re Nasdaq Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998) ("*Nasdaq III*"). This factor plainly weighs in favor of preliminary approval.

2. The Reaction of the Class to the Settlement

This factor is generally inapplicable prior to the dissemination of notice. *See Reade-Alvarez*, 237 F.R.D. at 34. In the event objections are received after notice is disseminated, Plaintiff's Counsel will address them in connection with the motion for final approval of the Settlement Agreement.

3. The Stage of the Proceedings

"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 complete 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.

Here, the volume and substance of Plaintiff's Counsel's knowledge of the merits and potential weaknesses of the claims support preliminary approval of the Settlement Agreement. *See* Zelcs Decl., ¶¶6, 10-12. This knowledge is based on Plaintiff's Counsel's extensive investigation during the initiation and prosecution of this Action, including: (i) thorough pre-filing investigation; (ii) researching the applicable law with respect to the claims asserted in the Action and the potential defenses thereto; (iii) drafting a detailed complaint; (iv) undertaking extensive interviews with market participants and traders; and (v) consulting with leading experts on the FX market. *Id.* *See, e.g.*, *In re Sinus Buster Products Consumer Litig.*, 12-CV-2429 (ADS) (AKT), 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).

Plaintiff's Counsel's investigation was also informed by the November 18, 2015 Consent Order between the New York Department of Financial Services ("NYDFS") and Barclays, fining Barclays $150 million for conduct relating to Barclays' electronic FX trading, including Barclays' use of Last Look to reject client orders. Zelcs Decl., ¶7. *See, e.g.*, *Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ 8331 (CM) (MHD), 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. Zelcs Decl., ¶¶13-17. During the course of negotiations,

Plaintiff's Counsel conducted informal, confirmatory discovery, which further contributed to their understanding of the claims. Zelcs Decl., ¶15. *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").

The accumulation of the information obtained from these sources has informed Plaintiff's Counsel about the strengths and weaknesses of the claims and allowed them to engage in effective settlement discussions with Barclays. In addition, "[t]he 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." *In re Partsearch Techs., Inc.*, 453 B.R. 84, 100 (2011). This factor, therefore, supports preliminary approval of the Settlement Agreement.

4. The Risks of Establishing Liability and Damages

'"In assessing the Settlement, the Court should balance the benefits afforded the Class, including the ***immediacy*** and ***certainty*** of a recovery, against the continuing risks of litigation.'" *Payment Card*, 986 F. Supp. 2d at 212 (emphasis in original). Here, Plaintiff faces significant risks to proving liability due to, among other things, the complexity of the subject matter of this litigation and the fact that Barclays is well-financed and can afford to litigate for years.

While Plaintiff is confident that it would prevail in the litigation, success is not assured. Settlement at this early stage not only provides a significant and immediate cash settlement to the Class, it also delivers Barclays' cooperation. Plaintiff's Counsel expect that the provision of information by Barclays will, among other things, enable Plaintiff to promptly develop similar claims against other banks engaging in Last Look practices and will apply substantial pressure on

banks in similar actions (whether currently pending or brought at a later date) to seriously consider engaging in settlement negotiations. Zelcs Decl., ¶21. Plaintiff believes there is a substantial overlap between members of the Class in this action and class members in similar actions against other banks. *Id*. *See In re Corrugated Container Antitrust Litig.*, No. M.D.L. 310, 1981 WL 2093, at *17 (S.D. Tex. June 4, 1981), *aff'd, In re Corrugated Container Antitrust Litig.*, 659 F.2d 1322 (5th Cir. 1981) ("The cooperation clauses constituted a substantial benefit to the class.").

The provisions requiring the parties to submit to the Mediator any disputes as to Barclays' cooperation ensures that those disputes will be resolved expeditiously and absent the delay and consumption of judicial resources that characterize discovery disputes in cases of this size and complexity. *See* Settlement Agreement, ¶¶13(d)(iii), (v), and (vi).

Additionally, the complexity of the case counsels in favor of settlement. "The complexity of Plaintiff's claims *ipso facto* creates uncertainty . . . . A trial on these issues would likely be confusing to a jury." *Park v. The Thomson Cor*p., No. 05 CIV. 2931 (WHP), 2008 WL 4684232, at *4 (S.D.N.Y. Oct. 22, 2008); *Nasdaq III*, 187 F.R.D. at 475 (noting difficulty and uncertainty of proving liability to a jury, "especially in a case of this complexity and magnitude").

Further risk is posed by the fact that Barclays, as a major global financial institution, has access to extremely 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. *See* Settlement Agreement, ¶1. "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*, 2008 WL 4684232, at *4.

Even if liability is established, Plaintiff would still face the problems and complexities inherent in proving damages to the jury. Plaintiff's theory of damages would be hotly contested at trial, and there is no doubt that at trial the issue would inevitably involve a "battle of the experts." *Nasdaq III*, 187 F.R.D. at 476. "In this 'battle of 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.

In short, "[t]here is a substantial risk that the plaintiff might not be able to establish liability at all and, even assuming a favorable jury verdict, if the matter is fully litigated and appealed, any recovery would be years away." *Cardiology Assocs., P.C., Pension Plan Trust v. Nat'l Intergroup, Inc.*, No. 85 Civ. 3048 (JMW), 1987 WL 7030, at *3 (S.D.N.Y. Feb. 13, 1987). "These factors therefore weigh in favor of the Settlement." *See Park*, 2008 WL 4684232, at *4.

5. The Risks of Maintaining the Class Action Through Trial

While Plaintiff is confident that the Court would certify its proposed litigation class, Barclays would almost certainly advance substantial arguments in opposition. There are no guarantees. Further, even if the Court certifies the proposed 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 plainly weigh in favor of approving the Settlement Agreement.

6. 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 extent of the 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 preliminary approval.

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

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.'").

"Ultimately, the exact amount of damages need not be adjudicated for purposes of settlement approval." *Nasdaq III*, 187 F.R.D. at 478. The "essence of a settlement is compromise. A just result is often no more than an arbitrary point between competing notions of reasonableness." *Corrugated Container*, 659 F.2d at 1325. Consequently, "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Grinnell*, 495 F.2d at 455 n.2.

Continuing this complex litigation against Barclays would entail a lengthy, highly expensive legal battle involving complex legal and factual issues. Establishing damages would require reliance upon challengeable assumptions, presenting a very real risk of no recovery for the Class. These risks are substantial and potentially dispositive. *See In re Bear Stearns Cos., Inc. Sec., Derivative, and ERISA Litig.*, 909 F. Supp. 2d 259, 270 (S.D.N.Y. 2012) ("the propriety of a given settlement amount is a function of both (1) the size of the amount relative to the best possible recovery; and (2) the likelihood of non-recovery (or reduced recovery)").

In contrast, the Settlement Agreement provides both a significant cash component and secures Barclays' cooperation, which Plaintiff's Counsel expect will inure to the benefit of the Class and enable Class members to pursue comparable claims against other institutions. Zelcs Decl., ¶21. That the cash component will be paid in the near future, rather than after years of contentious litigation, weighs in favor of approval. *See AOL Time Warner*, 2006 WL 903236, at *13 (where settlement fund is in escrow earning interest, "the benefit of the Settlement will . . . be realized far earlier than a hypothetical post-trial recovery"). It is estimated that there are fewer than 1,000 members of the Class. Although at this time, without the benefit of transaction

data analysis, it is difficult to predict claims volume and the settlement fund subscription rate, payments to class members are likely to be significant. Zelcs Decl., ¶20.

Although it is not quantifiable, Barclays' obligation to provide information pursuant to the Settlement Agreement is likewise extremely valuable to Plaintiff and the Class in bringing and prosecuting claims against other banks that used Last Look. Zelcs Decl., ¶¶18, 21. As the court in *Crago v. Mitsubishi Elec. Corp. (In re Cathode Ray Tube (CRT) Antitrust Litig.)*, MDL No. 1917, 2015 WL 9266493 (N.D. Cal. Dec. 17, 2015), recently held, '"[t]he provision of such assistance is a substantial benefit to the classes and strongly militates toward approval of the Settlement Agreement.'" *Id.*, at *6 (quoting *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003)). *See also Precision Assocs. v. Panalpina World (Holding) Transp. Ltd.*, No. 08-CV-42 (JG) (VVP), 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"); *IPO*, 226 F.R.D. at 197 (court should "weigh the value of any nonmonetary or intangible benefits associated with [a class settlement] agreement").[3] The Settlement Agreement's confirmatory discovery and cooperation terms require Barclays to conduct attorney proffers, produce transaction data, produce documents turned over to regulators, make its personnel available for interviews, and entertain other follow-up requests. Settlement Agreement, ¶13(d)(i)-(vi).

Plaintiff and the Class have already benefited by attorney proffers regarding Barclays' Last Look practices and industry practices generally. Zelcs Decl., ¶15. Review of the

[3] *See also In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2011 WL 717519, at *10 (E.D. Mich. Feb. 22, 2011) (cooperation "has already been beneficial to the Plaintiffs in their continued prosecution of their claims against the non-settling Defendants"); *Pressure Sensitive Labelstock*, 584 F. Supp. 2d at 702.

documents Barclays produced to the regulators (including NYDFS, which fined Barclays $150 million for its Last Look practices) and interviews with Barclays' personnel will further Plaintiff in the prosecution of Last Look claims against other banks. In addition, access to Barclays' transaction data will give Plaintiff's experts a head-start on class certification and damages issues.

Given that the Settlement Agreement is both procedurally and substantively fair, Plaintiff respectfully requests that the Court grant preliminary approval.

III. CERTIFICATION OF THE SETTLEMENT CLASS UNDER FEDERAL RULE OF CIVIL PROCEDURE 23 IS APPROPRIATE

In accordance with the Settlement Agreement, Plaintiff respectfully requests that the Court preliminarily certify the following Class for the purposes of settlement:

> All persons to whom, between June 1, 2008 and the date of preliminary approval of the settlement (the "Class Period"), Last Look (or any other conduct the subject of a Released Claim) applied and who were either (i) domiciled in the United States, or (ii) domiciled outside the United States and had an order or trade either in or over BARX (whether placed directly or indirectly via an ECN, or via any other connection to BARX) that used a Barclays server in the United States. Specifically excluded from this Class are Barclays and any Platform; the officers, directors, or employees of Barclays or a Platform; any entity in which Barclays or a Platform have a controlling interest; any affiliate, legal representative, heir, or assign of Barclays or a Platform and any person acting on their behalf. Also excluded from this Class are any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

Settlement Agreement, ¶2(h).

A court may certify a class for settlement purposes where the proposed settlement class meets the requirements for Rule 23(a) class certification, as well as one of the three subsections of Rule 23(b). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). When considering certification in the context of a proposed settlement, '"courts must take a liberal rather than restrictive approach.'" *Cohen v. J.P. Morgan Chase & Co.*, 262 F.R.D. 153, 157-58

(E.D.N.Y. 2009). As demonstrated below, the Class meets the requirements for certification for settlement purposes.

A. Plaintiff Satisfies the Rule 23(a) Requirements

Rule 23(a) provides four threshold requirements applicable to all class actions: "(1) numerosity (a 'class [so large] that joinder of all members is impracticable'); (2) commonality ('questions of law or fact common to the class'); (3) typicality (named parties' claims or defenses 'are typical . . . of the class'); and (4) adequacy of representation (representatives 'will fairly and adequately protect the interests of the class')." *Amchem*, 521 U.S. at 613.

1. Rule 23(a)(1) – Numerosity

Rule 23(a)(1) requires that the class be so numerous that joinder of all members would be "impracticable." Fed. R. Civ. P. 23(a)(1). As set forth in the Complaint, Barclays is one of the largest currency dealers in the FX market, Compl., ¶ 2, and it used Last Look to reject millions of trades. *Id.*, ¶5. Although it is currently estimated that there are fewer than 1,000 class members (Zelcs Decl., ¶20), given the difficulty of joinder there is little question that the numerosity requirement has been met. *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (numerosity is presumed when a class consists of 40 or more members); *see also IPO*, 260 F.R.D. at 90-91.

2. Rule 23(a)(2) – Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality 'does not mean that all issues must be identical as to each member,' but rather requires 'that plaintiffs identify some unifying thread among the members' claims that warrants class treatment." *Romero v. La Revise Associates*, L.L.C., 58 F. Supp. 3d 411, 418 (S.D.N.Y. 2014) (quoting *Kamean v. Local 363, Int'l Bhd. of Teamsters, Chauffeurs,*

Warehousemen & Helpers of Am., 109 F.R.D. 391, 394 (S.D.N.Y.1986)). Because it requires only one common question, "Rule 23(a)(2) is generally considered a 'low hurdle' easily surmounted." *Prudential Sec. Inc. Ltd. P'ships Litig*., 163 F.R.D. 200, 206 n.8.

Here, the overarching question is whether Barclays breached its contracts by using Last Look, or uniformly misrepresented its use and effect. All of these claims arise under New York law and rise and fall for the entire class. Thus, the commonality requirement is satisfied.

3. Rule 23(a)(3) – Typicality

Rule 23(a)(3) requires that the claims of the representative parties be typical of the claims of the class. This requirement is satisfied when "'each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability.'" *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009). '"Since the claims only need to share the same essential characteristics, and need not be identical, the typicality requirement is not highly demanding.'" *Bolanos v. Norwegian Cruise Lines Ltd*., 212 F.R.D. 144, 155 (S.D.N.Y. 2002). "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993).

Here, Plaintiff's claims are co-extensive with those of the Class. Plaintiff's central claim is that using Last Look was improper and either breached the parties' contract or otherwise constituted fraud. This claim is the same for all of the members of the Class. Furthermore, to the extent differences exist as to the facts relevant to the claim of each Class member or the damages suffered by each Class member, such disparities do not preclude a finding of typicality. *See D'Alauro v. GC Servs. Ltd. P'ship*, 168 F.R.D. 451, 456-57 (E.D.N.Y. 1996); *In re*

Playmobil Antitrust Litig., 35 F. Supp. 2d 231, 242 ("Differences in the damages sustained by individual class members does not preclude a showing of typicality, nor defeat class certification."). Rule 23(a)(3)'s typicality requirement has, therefore, been met.

4. Rule 23(a)(4) – Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." This requirement is met if a plaintiff does not have interests that are antagonistic to those of the class, and his chosen counsel is qualified, experienced, and generally able to conduct the litigation. *See In re Tronox Sec. Litig.*, 262 F.R.D. 338, 343 (S.D.N.Y. 2009). '"[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status.'" *Dziennik v. Sealift, Inc.*, No. 05-CV-4659 (DLI) (MDG), 2007 WL 1580080, at *6 (E.D.N.Y. May 29, 2007).

Plaintiff satisfies both prongs of the adequacy test. Indeed, it has already effectively represented the interests of the proposed Class by selecting qualified counsel, whose qualifications are discussed at §IV.C., *infra*, and it has further demonstrated its adequacy by pursuing this Action on behalf of the Class. Moreover, Plaintiff has no interests antagonistic to those of the proposed Class. All members of the Class have claims arising from the same allegedly wrongful conduct and the same legal theories as the claims advanced by Plaintiff. The requirements of Rule 23(a)(4) are satisfied. On this basis, Plaintiff also requests that the Court appoint it as class representative for settlement purposes.

B. Plaintiff Satisfies the Rule 23(b)(3) Requirements

In addition to satisfying all of the criteria of Rule 23(a), a party seeking class certification must also satisfy one of the requirements of Rule 23(b). *See Larsen v. JBC Legal Grp., P.C.*, 235 F.R.D. 191, 196 (E.D.N.Y. 2006). Certification of a class under Rule 23(b)(3) requires that:

(1) common issues predominate over individual issues; and (2) the class action mechanism be superior to other methods of adjudicating the controversy. Fed. R. Civ. P. 23(b)(3).

1. Common Questions of Law or Fact Predominate

Predominance exists where "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The "predominance" requirement asks if "resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 131 (2d Cir. 2010) (quoting *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002)). Rule 23(b)(3) "calls only for predominance, not exclusivity, of common questions." *Shelter Realty Corp. v. Allied Maint. Corp.*, 75 F.R.D. 34, 37 (S.D.N.Y. 1977). "Common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 139 (2d Cir. 2001), *overruled on other grounds by In re Initial Public Offerings Sec. Litig.*, 471 F. 3d 24, 42 (2d Cir. 2006). Although the question of damages is particular to each plaintiff, "the need for individualized determinations of the class members' damages does not, without more, preclude certification of a class under Rule 23(b)(3)." *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 382 (S.D.N.Y. 1996); *see also Vaccariello v. XM Satellite Radio, Inc.*, 295 F.R.D. 62, 73 (S.D.N.Y. 2013) ("[N]either the existence of individual defenses nor difficulties in calculating damages in and of themselves defeat the predominance requirement.").

Here, the criteria of predominance and fairness are satisfied. Plaintiff alleges that Barclays' use of Last Look has caused a common and measurable form of economic damage. All claims arise out of the same course of Barclays' conduct; thus, all share a common nucleus of

operative fact, which supplies the necessary cohesion. Class members' interests are aligned because shared issues of fact or law outweigh issues not common to the Class and individual issues do not predominate. *See Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 338 (3d Cir. 2011) (Scirica, J., concurring).

2. A Class Action Is Superior to Other Available Methods for the Efficient Adjudication of This Controversy

Not only do common questions predominate in the present litigation, but, as further required by Rule 23(b)(3), "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(b)(3) identifies four factors to be considered in making a "superiority" determination: (1) "the class members' interests in individually controlling the prosecution or defense of separate actions;" (2) "the extent and nature of any litigation concerning the controversy already begun by or against class members;" (3) "the desirability or undesirability of concentrating the litigation of the claims in the particular forum;" and (4) "the likely difficulties in managing a class action."

First, the interest of members of the Class in individually controlling the prosecution of separate actions is minimal because the costs and expenses of individual actions, when weighed against the individual recoveries potentially obtainable, are likely to be prohibitive. Further, to the extent that any individual Class members might be dissatisfied with the Settlement, they will have the right to object to it or to exclude themselves. Thus, the first superiority factor is satisfied. *See In re Blech Sec. Litig.*, 187 F.R.D. 97, 107 (S.D.N.Y. 1999).

With respect to the second factor, Plaintiff is aware of only similar individual suit currently pending against Barclays: *Value Recovery Fund LLC v. Barclays Bank PLC*, No. 15-cv-9486-LGS (S.D.N.Y.) ("*VRF*"), which is pending before this Court. *VRF* is in the very early

stages, with an amended complaint due on February 22, 2016 and a Rule 16 Conference set for March 3, 2016. *See VRF*, ECF No. 23. Accordingly, this factor supports certification.

Regarding the third factor, Plaintiff has shown a desire to focus the litigation in this Court by filing the first action, as well as an action against another bank for the same or substantially the same course of conduct, in the Southern District of New York. Plaintiff is not aware of other cases filed by class members outside of this District. Furthermore, the Court is familiar with the facts and legal issues of the case. The third factor, therefore, supports certification of the Class.

Finally, courts certifying a settlement class do not need to consider the fourth factor, which focuses on the manageability of a class action. As the Supreme Court noted in *Amchem*, when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620.

C. The Court Should Appoint Korein Tillery and Scott+Scott as Settlement Class Counsel

Under Rule 23(g), a court that certifies a class must appoint class counsel. Class counsel is charged with fairly and adequately representing the interests of the class. *See* Fed. R. Civ. P. 23(g)(1)(B). In appointing class counsel, the Court must consider: (i) the work counsel has done in identifying or investigating potential claims; (ii) counsel's experience in handling class actions, other complex litigation, and similar claims; (iii) counsel's knowledge of the applicable law; and (iv) the resources counsel will commit to representing the class. *See* Fed. R. Civ. P. 23(g)(1)(A)(i-iv).

The Korein Tillery and Scott+Scott firms have significant experience litigating complex class actions. *See* Zelcs Decl., Exs. 2, 3 (the firms' résumés). The firms have committed the resources necessary to effectively and efficiently litigate this case, and they have vigorously done

so. *See, e.g.*, Zelcs Decl., ¶¶10-12, 13-17. For these reasons, the Court should now appoint George A. Zelcs of Korein Tillery and Christopher M. Burke of Scott+Scott as Settlement Class Counsel.

IV. THE COURT SHOULD APPOINT HUNTINGTON NATIONAL BANK AS ESCROW AGENT AND THE GARDEN CITY GROUP AS CLAIMS ADMINISTRATOR

Plaintiff's Counsel propose Huntington National Bank ("HNB") as Escrow Agent, as indicated in HNB's résumé, the bank is qualified to serve as Escrow Agent. *See* Zelcs Decl., ¶32 and Ex. 6. HNB was established in 1866, holds over $60 billion in assets, and has more than 700 branches nationwide. HNB's National Settlement Team has handled more than 1,000 settlements for law firms, claims administrators, and regulatory agencies. *Id*.

Plaintiff's Counsel propose The Garden City Group ("GCG") as Claims Administrator. GCG is offering the class the same pricing as offered in *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, No. 13-cv-7789 (S.D.N.Y.), allowing Plaintiff and the Class to benefit from the rigorous bidding process conducted before selecting GCG to administer claims in that action. Zelcs Decl., ¶33. As indicated in GCG's firm résumé, GCG has been in the business of administering class action settlements for 20 years and has administered hundreds of class action settlements, including several well-known antitrust settlements. *See* Zelcs Decl., Ex. 7.

V. PLAINTIFF'S SEPARATE MOTION FOR APPROVAL OF A NOTICE PLAN AND THE PLAN OF DISTRIBUTION

Plaintiff proposes to file a separate Motion for Approval of the Plan of Distribution and Form and Manner of Notice of the Settlement Agreements. At that time, Settlement Class Counsel will recommend to the Court a proposed Plan of Distribution and Notice Plan (including the claim form). Plaintiff anticipates filing this motion as soon as practicable after Barclays produces a list of Class members and transaction data, which are necessary for development of

the Plan of Distribution and Notice Plan. As a practical matter, that means the notice and claim form will issue to members of the Class a single time and will include a description of the case, the terms of the settlement, and the mechanism and plan of distribution, sufficient for the Class to intelligently and meaningfully participate, object, opt-out, or otherwise comment on the settlement while avoiding confusion caused by multiple rounds of notice.

VI. CONCLUSION

Plaintiff respectfully requests that the Court: (1) preliminarily approve the Settlement Agreement as within the range of possible fairness, reasonableness, and adequacy; (2) preliminarily certify the Class for settlement purposes; (3) appoint Settlement Class Counsel and Plaintiff as class representative for settlement purposes; (4) approve HNB as Escrow Agent and GCG as Claims Administrator; and (5) stay all proceedings in this Action until the Court has ruled on a final approval of the Settlement Agreement.

February 17, 2016

Respectfully submitted,

s/ Christopher M. Burke

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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2016, 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 hereby certify that 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.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 17, 2016.

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