

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

JAMES CONTANT, <i>et al.</i> , Plaintiffs, v. BANK OF AMERICA CORPORATION, <i>et al.</i> , Defendants.	Civil Action No. 17-cv-3139-LGS (related to No. 13-cv-7789-LGS)
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**MEMORANDUM IN SUPPORT OF PLAINTIFFS’ MOTION
FOR DISBURSEMENT OF SETTLEMENT FUNDS**

I. INTRODUCTION

In accordance with this Court’s November 20, 2020, Final Judgment, Order of Dismissal with Prejudice and Order Granting Motion for Final Approval of Class Settlements (ECF 460) (“Final Approval Order”), whereby the Court approved all of the Settlement Agreements between Plaintiffs¹ and Settling Defendants² and approved the Plan of Allocation proposed in the May 22, 2020, Declaration of Janet S. Netz, Ph.D, ECF 420-6 (the “Plan of Allocation”), finding

¹ James Contant, Sandra Lavender, Victor Hernandez, Martin-Han Tran, FX Primus Ltd., Carlos Gonzalez, Ugnius Matkus, Charles G. Hitchcock III, Jerry Jacobson, Tina Porter, and Paul Vermillion (collectively, “Plaintiffs,” or “Settlement Class Representatives”).

² The Settlements are between Plaintiffs and the Settlement Classes and Settling Defendants (1) Citigroup (“Citigroup”) (the “Citigroup Settlement”); (2) MUFG (“MUFG”) (the “MUFG Settlement”); (3) Standard Chartered Bank (“SC”) (the “SC Settlement”); (4) Société Générale (“SG”) (the “SG Settlement”); and (5) Bank of America Corporation, Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Inc. (“Bank of America”); Barclays Bank PLC and Barclays Capital Inc. (“Barclays”); BNP Paribas (identified in the Complaint as BNP Paribas Group), BNP Paribas US Wholesale Holdings Corp., previously known as BNP Paribas North America, Inc., BNP Paribas Securities Corp., which now includes BNP Paribas Prime Brokerage, Inc. (“BNP Paribas”); Credit Suisse AG and Credit Suisse Securities (USA) LLC (“Credit Suisse”); Deutsche Bank AG (“Deutsche Bank”); The Goldman Sachs Group, Inc. and Goldman, Sachs & Co. (now known as Goldman Sachs & Co. LLC) (“Goldman Sachs”); HSBC Bank plc, HSBC North America Holdings Inc., HSBC Bank USA, N.A., HSBC Securities (USA) Inc. (“HSBC”); JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. (“JPMorgan”); Morgan Stanley, Morgan Stanley & Co. LLC, and Morgan Stanley & Co. International plc (“Morgan Stanley”); RBC Capital Markets, LLC (“RBC”); The Royal Bank of Scotland plc (now known as NatWest Markets Plc), RBS Securities Inc. (now known as NatWest Markets Securities Inc.) (“RBS”); UBS AG, UBS Group AG, and UBS Securities LLC (“UBS”) (collectively, “Group Settling Defendants”) (the “Group Settlement”).

that the Plan has a reasonable basis and is fair and adequate (Final Approval Order ¶ 6), Plaintiffs, through Class Counsel,³ and the Court's November 16, 2021 Order (ECF 531) requiring the motion for distribution of the settlement funds be filed by November 30, 2021, Plaintiffs respectfully move this Court for an Order: (i) approving the Court-appointed Claims Administrator Heffler Claims Group's (the "Claims Administrator")⁴ determinations concerning the claims filed in this case; (ii) approving the distribution of the Net Settlement Funds, after deduction of the payments requested herein to members of the Settlement Classes whose claims have been approved ("Claimants");⁵ (iii) approving the withholding of \$50,000 from the Net Settlement Funds to address any unanticipated disputes arising from the claims process and distribution of the Net Settlement Fund; (iv) payment of taxes, if any, to be paid from the withheld \$50,000; (v) payment of \$42,100 for future expenses associated with settlement distribution and the claims process; and (vi) finally and forever barring further Claims against the Net Settlement Fund. This motion is supported by the Declaration of Lori L. Castaneda in Support of Plaintiffs' Motion for Disbursement of Settlement Funds ("Castaneda Decl.") (attached hereto as Ex. 1), and the Declaration of Michael Dell'Angelo in Support of Plaintiffs' Motion for Disbursement of Settlement Funds ("Dell'Angelo Decl.") (attached hereto as Ex. 2), as set forth below.

II. BACKGROUND

The Court's Final Approval Order granted final approval of the five Settlements fully

³ The Court's July 29, 2019 and July 17, 2020, Orders granting preliminary approval of the Settlements (the "Preliminary Approval Orders") designated Berger Montague PC as Class Counsel. ECF Nos. 297, 441.

⁴ The Court-appointed Claims Administrator changed its name to Kroll Settlement Administration in April 2021. The personnel responsible for administering the Settlements remain the same.

⁵ On November 22, 2021, AMA Filed a motion for reconsideration of the transactions for which it submitted supporting documentation after July 16, 2021. (ECF 535). The Court Ordered Plaintiffs to respond to the motion by December 3. (ECF 536). The Court's determination of this motion could materially alter the calculated payment amount for AMA and other Claimants.

resolving Plaintiffs' claims against all Defendants in exchange for cash payments from Defendants totaling \$23,630,000. Prior to final approval, the Claims Administrator complied with the Court-approved Notice Plan to members of the Settlement Classes informing them of the pendency of this case, the terms of the Settlement Agreements, their right to exclude themselves from or object to the Settlements, and the binding effect of the Final Approval Order and Judgment, among other things. The comprehensive Notice Plan reached approximately 95 percent of the members of the Settlement Classes an average of 3.9 times each. *see* Declaration of Jeanne C. Finegan, APR Concerning Class Member Notification, ECF No. 455-1, ¶ 3. The settlement funds were deposited in an escrow account at the Court-approved Escrow Agent Huntington Bank. After payment of Court-approved attorneys' fees and expenses and settlement administration costs, and inclusive of interest earned to date, less the \$50,000 reserve, and payment of future anticipated settlement distribution costs, the account has a balance of \$14,967,744.24.⁶ Dell'Angelo Decl. ¶ 14; Castaneda Decl. ¶ 33.

A. Claims Administration

Pursuant to paragraph 30 of the Final Approval Order, the Court retained jurisdiction over the Parties and "implementation of the Settlements and any award of or distribution of monies under the Settlements." In furtherance of that provision, Plaintiffs submitted two proposed Claim Forms on November 24, 2020, ECF Nos. 466-1, 466-2 (the "Claim Forms"), which the Court approved on November 25, 2020. ECF No. 467. The Claims Administrator posted fillable online versions of the Claim Forms to the Settlement website, fxindirectantitrustsettlement.com, and members of the Settlement Classes had the option of submitting a Claim Form online or by mail. *See* Castaneda Decl. ¶ 6. The Claim Form was

⁶ As of November 30, 2021, the Settlement Fund has accrued \$70,514.66 in interest, which is included in the pro rata distribution. Dell'Angelo Decl. ¶ 14.

mailed to 94,867 members of the Settlement Classes and emailed to 43,309 members of the Settlement Classes for whom the Claims Administrator had email addresses who had previously received direct mail notice of the Settlements. *Id.*

During the claims period, Class Counsel and the Claims Administrator also undertook additional efforts to increase the number of members of the Settlement Classes that filed claims. *See* Castaneda Decl. ¶¶ 8-10. Specifically, the Claims Administrator issued a press release during the claims period to remind members of the Settlement Classes of the claims filing deadline. *Id.* ¶ 8. The Claims Administrator, on February 12, 2021, emailed members of the Settlement Classes for whom it had a valid email address but had not yet filed a Claim Form a courtesy reminder that the deadline to file a Claim Form was March 19, 2021. *Id.* at ¶ 9. On March 12, 2021, a second email reminder that the deadline was approaching was sent to those who had still not filed a Claim Form. *Id.* After being provided with a list of the top one percent estimated highest payouts of members of the Settlement Classes, the Claims Administrator sent a personalized email and letter reminder to these individuals and entities that had not filed a claim and told them an estimated payment amount that could be realized if the Class Member filed a claim. A calling campaign was also conducted to reach these members of the Settlement Classes. *Id.* ¶ 10.

The Claims Administrator and Class Counsel received and responded to nearly 4,000 phone calls and over 700 emails from members of the Settlement Classes with questions about how to file their claim, or questions regarding their own records reflecting RFED transactional data. *Id.* ¶ 5.

The claims filing deadline was March 19, 2021. *Id.* ¶ 7. Claimants had the option of (a) having the Claims Administrator calculate their pro rata Settlement award based on transactional

data obtained from the four largest retail foreign exchange dealers⁷ (“RFEDs”) that operated during the Settlement Class Period of December 1, 2007, to July 19, 2019 (“Option 1”); or (b) submitting their own transactional records for purposes of calculating their *pro rata* award (“Option 2”). *See* ECF Nos. 466-1, 466-1. The Claims Administrator also built and maintained an electronic Claim portal on the Settlement website to allow members of the Settlement Classes to submit claims and any pertinent documentation on the website. Castaneda Decl. ¶ 13. Step by step instructions were included to easily walk Class Members through the process. *Id.* The Claims Administrator received and processed a total of 11,311 Claim Forms, of which 11,223 selected Option 1, 74 selected Option 2 and 14 selected both. *Id.* ¶¶ 14-15.

B. Claim Review and Audit Process

The Claims Administrator reviewed and audited each submitted Claim Form. Each received Claim Form was assigned a unique Claim number and scanned into the system and the Claim Administrator entered required information from the Claim Form into the proprietary, computerized database dedicated to this settlement (“Settlement Database”). *Id.* ¶¶ 12, 15. Claims submitted under Option 2 were also reviewed and audited to ensure the submission included all required information and transactional records to support the claim. *Id.*

The Claims Administrator contacted Claimants via telephone and/or email to inform them if a submitted Claim Form lacked a signature or other required information and to provide them with an opportunity to correct the deficiency and perfect the claim. Castaneda Decl. ¶¶ 20-26. For Claimants who failed to select Option 1 or Option 2 for their claim, or selected Option 2 but never submitted the required transaction records, and who did not respond to the Claims Administrator’s follow-up attempts, those Claims were defaulted to Option 1 if the claimant

⁷ Those RFEDs are: (1) Forex Capital Markets (“FXCM”); (2) GAIN Capital (which operated the RFED FOREX.com); (3) Oanda Corporation; and (4) FXDirectDealer, LLC (“FXDD”).

appeared in the data obtained from the four RFEDs. *Id.* ¶¶ 20-21.

C. Final Claim Determinations

The Claims Administrator and Class Counsel made sure all submitted claims were valid and perfected prior to calculating the amount each claimant's payment from the Net Settlement Funds so that all potential valid Claimants were treated equitably. 963 Claimants registered or returned necessary paperwork late but still in time to process the claims months before the filing of this Motion and the Court's approval of certain claims by AMA. Castaneda Decl. ¶ 17. The Claims Administrator and Class Counsel recommend that these valid claims be treated as timely. *Id.* ¶ 18; Dell'Angelo Decl. ¶ 10.⁸

Following the completion of the audit process, 156 Claimants' claims were rejected as deficient and despite opportunity to cure the deficiencies failed to do so. Castaneda Decl. ¶ 19. The Claims Administrator and Class Counsel recommend that these claims be rejected. *Id.*; Dell'Angelo Decl. ¶ 12. All Claimants whose claim were denied were mailed and/or emailed a letter telling them the claim was denied and the reason why.

A late claim using the Option Two Spreadsheet was filed by AMA Capital, LLC ("AMA") on May 20, 2021, without any supporting detailed transactional records. Dell'Angelo Decl. ¶ 9. AMA was promptly informed that its claim was invalid because it lacked any supporting detailed transactional records. *Id.* Thereafter, AMA revised its claim several times and provided some detailed transactional records through July 16, 2021. *Id.* After receiving its claim assessment letter denying certain claims while approving other claims, AMA contested

⁸ See generally *In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510 CPS/SMG, 2009 WL 803382, at *6 (E.D.N.Y. Mar. 25, 2009) ("there is an implicit recognition that late claims should ordinarily be considered in the administration of a settlement" unless untimely claims "cause[] significant delay to the distribution of the net settlement fund or otherwise prejudiced any claimant") (internal citations and quotation marks omitted).

many of the denied claims requiring the Court to resolve the dispute. *Id.* Following Court-ordered letter briefing, the Court Ordered: “that AMA’s claims already accepted for payment shall be accepted by Class Counsel and the Claims Administrator for calculating AMA’s pro rata award” (ECF 516) and “all of the claims denied by Class Counsel are denied because they all lack detailed transactional records as required by the settlement”⁹ (ECF 531). *Id.* On November 22, 2021, AMA filed a motion for reconsideration of the transactions for which it submitted supporting documentation after July 16, 2021, which is pending before the Court (ECF 535). On November 30, 2021, AMA filed a motion to intervene in which it indicated that it intends to appeal (ECF 537).

D. Claims Administration Expenses

In the Court’s Preliminary Approval Orders (ECF No. 441 ¶ 22), the Court authorized Class Counsel to pay up to \$800,000 from the Settlement Fund for notice and claims administration costs. Dell’Angelo Decl. ¶ 13. As of November 30, 2021, 2021, \$337,264.57 of this amount has been used to compensate the Claims Administrator for professional fees and expenses related to settlement administration, and \$340,052.19 of this amount has been used to compensate Plaintiffs’ expert consulting firms for fees and expenses related to settlement administration. *Id.* After deducting the \$677,316.76 in total for fees and expenses related to settlement administration, there remains \$122,683.24 of the Court-approved \$800,000 for notice and claims administration expenses. This amount has been included in the Net Settlement Funds to be distributed to Claimants. *Id.* The Claims Administrator expects to incur an additional \$41,600 in professional fees and expenses and appEcon expects to incur an addition \$500 related to settlement administration costs and to perform the distribution of the Net Settlement

⁹ On November 22, 2021, AMA Filed a motion for reconsideration. (ECF 535). The Court Ordered Plaintiffs to respond to the motion by December 3. (ECF 536).

Funds and complete the administration of the Settlements. Castaneda Decl. ¶ 38.

E. Determining Amounts to be Distributed to Approved Claimants

The Plan of Allocation provides that Claimants who traded FX between December 1, 2007 and December 31, 2013, will receive a “*de minimis*” Settlement award of between \$12.50 and \$25; and Claimants who only traded spot FX on or after January 1, 2014, will receive a minimum payment of between \$5 and \$10. Declaration of Janet S. Netz, Ph.D., ECF No. 420-6, § IV. The Plan provides that the final values of *de minimis* payments would be the high ends of those ranges unless that would result in aggregate *de minimis* payments totaling greater than 20 percent of all Claimant awards, in which case aggregate *de minimis* payments would be capped at 20 percent of the Net Settlement Fund and adjusted accordingly. *Id.* Based on the actual claims received, payments will be on the high end.

If the Court approves all the proposed payments in the motion to distribute the Net Settlement Funds (all of which are reflected in the accompanying Proposed Order), the average payment to the 9,190 Option 1 Claimants will be \$966.82 (with a high of \$612,472.37), and the average payment to the 29 Option 2 Claimants will be \$209,746.60 (with a high of \$5,728,222.20). Castaneda Decl. ¶ 34; Dell’Angelo Decl. ¶ 17. A total of 667 claimants will receive the *de minimis* \$10 for trades after January 1, 2014 as they have no trade data. For the period between December 1, 2007 and December 31, 2013 no Claimant will receive just the \$25 *de minimis* payment because they receive that amount plus an additional variable amount based on the available trade data. *Id.* In total, 667 Claimants will receive *de minimis* awards; 1,148 Claimant received between \$10 and \$25; 3,962 Claimants will receive between \$25 and \$100; 1,989 Claimants will receive between \$100 and \$500; 522 Claimants will receive between \$500 and \$1,000; 631 Claimants will receive between \$1,000 and 5,000; 142 Claimants will receive between \$5,000 and \$10,000, and 149 Claimants will receive over \$10,000. *Id.*

An Excel file containing the proposed distribution amounts to individual Claimants, identifying Claimants by their claimant identification numbers provided to them during the registration process rather than by their names (to protect their identities), will be posted on the settlement website (fxindirectantitrustsettlement.com) and is being submitted to the Court as Exhibits B-D of the Castaneda Declaration. Castaneda Decl. ¶ 35. The distribution calculations in that excel file assume the Court endorses (a) honoring the 963 late Claimants, (b) rejecting the 156 ineligible Claimants, (c) approving the calculated payment amounts for each Claimant, including AMA, (d) authorizing the requested \$50,000 to be reserved for anticipated future claims administration expenses, and (e) authorizing payments of \$42,100 for the Claims Administrator and applEcon. If the Court orders or authorizes changes to any of those assumptions, Class Counsel and the Claims Administrator can easily adjust the proposed distribution to account for such changes.

III. RELIEF REQUESTED

Withholding for unanticipated disputes and AMA challenge. Plaintiffs respectfully request that the Court approve withholding \$50,000 from the Net Settlement Funds in the event of unanticipated disputes relating to the claims process and distribution of the Net Settlement Funds to Claimants as well as to address AMA's challenge of its claim determination which AMA had indicated it intends to appeal (ECF 537). Dell'Angelo Decl. ¶ 15. As noted above, there remains \$122,683.24 of the \$800,000 that the Court approved for claims administration. Therefore, even after the \$50,000 reserve, a substantial surplus remains, the balance of which will be included in the pro rata distribution to valid claimants. It is not uncommon for legitimate, but unanticipated, disputes or discrepancies to arise after distribution of a settlement fund for a variety of reasons. *Id.* There may also be taxes owed on interest earned by the qualified settlement funds. If no money remains in the Net Settlement Funds, there would be no means of

addressing or resolving any such legitimate concerns or paying taxes, if any. Should those monies be left over at the end of the process, Class Counsel will approach the Court with a proposal for dealing with these funds. Class Counsel anticipate that any monies remaining in the Net Settlement Funds after distribution is made will be distributed on a pro-rata basis for, at least, a minimum payment amount to claimants who cashed their checks.

Approval of Net Settlement Funds allocations and authorizing distribution. Plaintiffs further respectfully request that the Court approve the Net Settlement Funds allocation determinations made by the Claims Administrator in consultation with applEcon based on the Court-approved Plan of Allocation and authorize the Claims Administrator to distribute to each Claimant its *pro rata* share of the Net Settlement Funds.

Approval of late-filed claims. Plaintiffs request that the Court approve Class Counsel's and the Claims Administrator's recommendation to accept Claims from the 963 Claimants who registered or returned necessary paperwork late, but still in time to process the claims for payment without delaying distribution of the Net Settlement Fund. All of these Claims were submitted and reviewed months before the Court approved certain claims by AMA be paid as part of the distribution.

Rejection of deficient uncured claims. Plaintiffs request that the Court approve Class Counsel's and the Claims Administrator's recommendation to reject Claims for the 156 Claimants who submitted deficient claims where the Claimants were unable to cure their deficiency, did not respond to the Claims Administrator's requests to cure the deficiency, or otherwise did not satisfy the requirements to have a valid and perfected claim.

Payment of taxes. The Net Settlement Funds are Qualified Settlement Funds set up for distribution. The Qualified Set Funds will need to file tax returns and potentially pay taxes of up

to \$3,000, which if owed would be paid out the \$50,000 requested to be withheld for unanticipated disputes. Two years of tax returns may be required depending on when distribution occurs. The interest earned has been offset by costs of the settlement thereby having no taxable income or tax payment due at this time. Castaneda Decl. ¶ 39.

Payment of Fees and Expenses for Distribution of the Settlement Funds. Plaintiffs request payment of \$41,600 to Heffler (the Claims Administrator) for management of the distribution process including printing of checks, postage, the reissuance of checks, as needed, along with Class Member communications and any other duties deemed necessary to complete the distribution. Plaintiffs also request payment of \$500 to applEcon for fees to assist with the claims process and calculating payments to authorized claimants.

Release and discharge. Finally, Plaintiffs respectfully request that this Court enter an Order releasing and discharging Class Counsel, the Claims Administrator, applEcon and all persons who are involved in the review, verification, calculation, tabulation or any other aspect of the processing of the claims filed in this action, or who are otherwise involved in such activities, and, bar all members of the Settlement Classes, whether or not they are to receive payment from the Net Settlement Funds, from making any further claim against the Net Settlement Funds beyond the amount allocated to them by the Settlements as approved by the Court.

Dated: November 30, 2021

Respectfully submitted,

/s/ Michael Dell'Angelo

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