

**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 THE INTEREST INCOME EARNED ON THE  
SETTLEMENT FUNDS**

On January 5, 2022, this Court issued an Order approving Plaintiffs' Motion for Distribution of Settlement Funds ("Distribution Motion") (ECF 562), in the above-referenced action ("Distribution Order"). However, implementation of the Distribution Order was subject to the outcome of a single contested claim determination embodied therein, the determination of which was appealed to the Second Circuit Court of Appeals. The Second Circuit Court of Appeals denied the claimant's appeal of the contested claim determination, the Distribution Order is final, and, by its terms, the claim determinations set forth therein may be effectuated. Since the entry of the Distribution Order, the Net Settlement Funds (including payments to approved Claimants, approved expenses, additional expenses, and approved attorneys' fees), have earned significant interest income ("Additional Net Settlement Funds") that must be allocated and distributed. Accordingly, Plaintiffs move this Court for an Order pursuant to which the interest income earned on the Net Settlement Funds may be distributed in conjunction with the previously approved distributions in order to avoid duplication, inefficiency and the administrative costs associated with multiple distributions.

Plaintiffs respectfully submit this memorandum in support of Plaintiffs' Motion for Disbursement of the Interest Income Earned on the Settlement Funds to authorized Claimants. As set forth below, Plaintiffs' Motion requests: 1) allocation and distribution of the approximately \$636,668.56 interest income accrued on the two settlement escrow accounts (FX Indirect Citigroup Settlement Fund Escrow Account and FX Indirect MUFG Settlement Fund Escrow Account) (collectively "Settlement Escrow Accounts"), held at the Court-approved Escrow Agent Huntington Bank, which accrued pending the resolution of a contested claim determination, as set forth in the Court's January 5, 2022 Order; 2) reimbursement of additional expenses incurred since the entry of the Distribution Order and expenses yet to be paid associated with disbursing the Net

Settlement Funds and Additional Net Settlement Funds; and 3) a modest reserve for potential disputes and additional unanticipated expenses.

## **I. BACKGROUND**

On November 20, 2020, the Court entered Final Judgment, Order of Dismissal with Prejudice and Order Granting Motion for Final Approval of Class Settlements (ECF 460) (“Final Approval Order”) in this class action. The claims filing and authorization process followed. Upon completion of that process, pursuant to the Court’s November 16, 2021 Order (ECF 531), Plaintiffs’ filed a Distribution Motion and supporting materials (ECF 538-541). On January 5, 2022, the Court granted the Distribution Motion. ECF 562. In the Distribution Order, in addition to approving the calculated payments to each authorized Claimant, the Court approved withholding \$50,000 for any disputes arising from the claims process, payment to the Claims Administrator of \$41,600 for management of the distribution process and a payment to Plaintiffs’ economic consulting firm related to claims administration, and payment of taxes owed by the Net Settlement Funds. *Id.* at ¶¶ 4-8. However, the Court stayed the distribution of the settlement checks to authorized Claimants until “resolution of Claimant AMA Capital Management, LLC’s appeal in favor of Class Counsel.” *Id.* at ¶ 4.

AMA Capital, LLC (“AMA”) then appealed the Court’s Orders relating to the portion of AMA’s claim that was denied. On April 14, 2023, the Second Circuit Court of Appeals entered an Order and Opinion affirming this Court’s orders. Second Cir. Document Nos. 168, 168-1. Specifically, the Second Circuit Court of Appeals concluded: “(1) that the claims administrator was not required to accept records during the contest process that were previously available to AMA, which is akin to a motion for reconsideration, and (2) that the district court did not err by denying AMA’s claims on the grounds that they lacked the requisite transactional records, we **AFFIRM** the orders of the district court on appeal in Nos. 21-3058 and 22-159.” Second Cir.

Document No. 168-1 at 4. On May 8, 2023, the Second Circuit Court of Appeals issued its mandate sending the case back to this Court. ECF 578.

As a result of the delay in issuing checks to the authorized Claimants pursuant to the Court's January 5, 2022 Order, the Settlement Escrow Accounts have collectively earned interest income of approximately \$636,668.56, from December 1, 2021<sup>1</sup> through May 15, 2023 and will continue to earn interest income until the funds are fully distributed.<sup>2</sup> Declaration of Michael Dell'Angelo in support of Plaintiffs' Motion for Disbursement of the Interest Income Earned on the Settlement Funds ("Dell'Angelo Decl.") at ¶ 6 (attached hereto as Exhibit 1). The interest income is attributable to (i) the funds to be paid to authorized Claimants, expenses and (ii) attorneys' fees previously approved for payment to Class Counsel. *Id.* at ¶¶ 10-11. As to attorneys' fees, on November 20, 2020, the Court awarded attorneys' fees in the amount of \$6,194,083.33, which was equal to 26.2 percent of the total settlement fund. ECF 462. The Court's fee award Order provided for Class Counsel to "receive one-quarter of their attorneys' fees (\$1,548,520.83) five business days after the entry of this Order, and [to] receive the remainder of their attorneys' fees (\$4,645,562.50) upon the mailing of claimant award checks." *Id.* As of the time Class Counsel filed the Distribution Motion on November 30, 2021, the total amount in the Settlement Escrow Accounts was approximately \$19,603,143.61. *Id.* at ¶ 11. The balance of the as yet distributed portion of the attorneys' fees award is \$4,645,562.50 which constitutes 23.7% of the total amount

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<sup>1</sup> The Distribution Motion was filed on November 30, 2021.

<sup>2</sup> After the notice and claim process, \$122,683.24 of the Court-approved \$800,000 for notice and claims administration expenses remained (ECF 539 at 7) but those funds were included in the Net Settlement Funds that the Court previously approved to be distributed to authorized claimants. ECF 562. The Court previously approved the withholding of \$50,000 from the Net Settlement Funds to address any disputes arising from the claims process and distribution of the Net Settlement Fund, which includes payment of taxes. ECF 562 at ¶ 6.

in the Settlement Escrow Accounts as of November 30, 2021.<sup>3</sup> *Id.* Consequently, 76.3% of the interest income earned on the Settlement Escrow Accounts is attributed to amounts payable to class member claims and 23.7% of the interest income is attributable to previously approved attorneys' fees. *Id.*

Since the filing of the Distribution Motion on November 30, 2021 through the mandate from the Second Circuit Court of Appeals on May 8, 2023 ("Appeal Period), \$22,736.54 in unreimbursed expenses have been incurred that were not reflected in Plaintiffs' Distribution Motion and certain approved expenses have been paid, as follows. Dell'Angelo Decl. at ¶ 8. The Court previously approved \$41,600 for claims administration work plus \$3,000 for preparing tax returns for the Settlement Escrow Accounts. ECF 562 at ¶¶ 5, 7. The Claims Administrator has incurred \$44,407.30 "largely in connection with, among other things, preparation and finalization of the Initial Distribution Declaration and related reports, preparation for the distribution, keeping the website updated and answering claimant inquiries." Declaration of Justin R. Hughes in support of Plaintiffs' Motion for Disbursement of the Interest Income Earned on the Settlement Funds ("Hughes Decl.") at ¶ 11 (attached hereto as Exhibit 2). During the Appeal Period, Plaintiffs' economic consulting firm applEcon provided professional services resulting in fees of \$1,307.65 in connection with analyses associated with AMA's claim determination and the appeal thereof, which amounts Class Counsel advanced on behalf of the Settlement Classes. An additional \$600 in professional fees, as yet paid, was charged by applEcon for the recalculation of the *pro rata* distribution amounts of the Additional Net Settlement Funds that are the subject of Plaintiff's

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<sup>3</sup> Class Counsel spent significant time and effort on the determination, litigation and appeal of AMA's claim in the district court and the Second Circuit Court of Appeals. Class Counsel expended approximately 752 hours doing so on behalf of the Settlement Classes, resulting in \$534,833 of lodestar. Class Counsel is not seeking reimbursement for additional attorneys' fees. Dell'Angelo Decl. at ¶ 9.

Motion. Dell'Angelo Decl. at ¶ 7; Hughes Decl. at ¶ 11. In addition, during the Appeal Period, the \$50,000 reserve previously ordered by the Court has reverted to Settlement Escrow Accounts, the Settlement Escrow Accounts have paid \$14,956 in taxes on interest income for 2022, and it is estimated that the Settlement Escrow Accounts will incur another \$51,000 in taxes and associated professional fees for the preparation of tax returns for 2023 and \$41,600 in administrative fees and expenses associated with checks and the mailing of payments are estimated to be incurred. Dell'Angelo Decl. at ¶ 7; Hughes Decl. at ¶¶ 11-12.

In connection with the determination, litigation and appeal of AMA's claim determination, Class Counsel incurred and advanced \$21,233.54 for subject matter experts and other litigation costs and incurred, as yet paid, costs of \$903.00.<sup>4</sup> Dell'Angelo Decl. at ¶ 8.

After deducting for the additional expenses incurred (both advanced and as yet paid), a reasonable reserve of \$51,000 for future preparation and payment of taxes, \$41,600 in administration, and a reserve of \$10,000 for disputes that may arise regarding the distribution and unanticipated fees and expenses, if such expenses are approved by the Court, in total, there is now at least an additional \$357,454 in funds available for distribution to the Settlement Classes ("Additional Net Settlement Funds") beyond the amounts contemplated by the Court when the Distribution Motion was approved (ECF 562). Dell'Angelo Decl. at ¶ 12.

The portion of the Additional Net Settlement Funds in the Net Settlement Funds attributable to approved claims and expenses should be distributed on a *pro rata* basis to the authorized Claimants. Accordingly, applEcon has recalculated each authorized Claimant's *pro rata* share of the Net Settlement Funds to allocate the Additional Net Settlement Funds to eligible

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<sup>4</sup> On May 18, 2023, the Second Circuit Court of Appeals awarded costs taxed in the amount \$651.00. ECF 579. This amount has been excluded from the unreimbursed expenses sought to be compensated in this motion. Dell'Angelo Decl. at ¶ 8.

Settlement Class Members with approved claims as approved by the Court on January 5, 2022. See Exhibit A to the Dell'Angelo Decl.

The Court retained “jurisdiction over any further application or matter which may arise in connection with these Settlements.” ECF 562 at ¶13. Plaintiffs respectfully move this Court for an Order approving: (i) the payment of additional costs and expenses incurred after entry of the Distribution Order, including costs and expenses incurred in connection with the determination, litigation and appeal of AMA’s claim determination; (ii) the *pro rata* distribution of the interest income earned on the Settlement Escrow Accounts until the time the funds are distributed, apportioned 76.3% to pay authorized Claimants and 23.7% on approved Attorneys’ fees; (iii) the Claims Administrator’s calculation of the *pro rata* allocation of the portion of the Additional Net Settlement Funds attributable to the approved claims in the Distribution Order and expenses; (iv) distribution of the Additional Net Settlement Funds, after deduction of the payments requested herein to members of the Settlement Classes whose claims have been approved (“Claimants”); (v) withholding of \$10,000 from the Net Settlement Funds to address any unanticipated disputes arising from the claims process and distribution of the Net Settlement Fund and to pay for any additional costs of administration; (vi) reserving funds for payment to prepare tax returns and to pay taxes on the Settlement Funds; and (vii) releasing and discharging any claims AMA may have relating to the distribution of the Settlement Funds. This motion is supported by the Dell’Angelo and Hughes Declarations.

## **II. RELIEF REQUESTED**

*Approval of allocations of the Additional Net Settlement Funds and authorizing distribution.* Plaintiffs respectfully request that the Court approve the allocation of the Additional Net Settlement Funds as made by the Claims Administration, in consultation with applEcon, based on the Court-approved Plan of Allocation, which accounts for the additional \$357,454 in interest

income, net of the additional costs and expenses requested herein. An Excel file containing the proposed distribution amounts, accounting for the Additional Net Settlement Funds 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 Exhibit A to the Dell'Angelo Decl. ("Proposed Supplemented Distribution Matrix"). For the Court's convenience, the Proposed Supplemental Distribution Matrix includes the distribution amounts approved by the Court on January 5, 2022 and the updated proposed amounts to include the Additional Net Settlement Funds.

*Payments of Fees and Expenses for Distribution of the Settlement Funds.* Plaintiffs request payment of \$41,600 to the Claims Administrator for uncompensated claims administration duties and 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 \$600 to applEcon for recalculating the proposed payments to authorized claimants to account for the Additional Net Settlement Funds. Plaintiffs also request payment of \$21,233.54 for costs and expenses paid by Class Counsel and \$903.00 in incurred, but as yet paid, costs for subject matter experts and other litigation costs associated with the determination, litigation and appeal of AMA's claim.

*Apportionment of interest income earned.* Plaintiffs request that the interest income earned on the Settlement Escrow Accounts from December 1, 2021 until the time the Net Settlement Funds are distributed to authorized Claimants be apportioned as follows: 76.3% to the funds to be used to pay authorized Claimants and reimbursement of expenses, distributed on a *pro rata* basis; and 23.7% to previously approved Attorneys' fees owed to Class Counsel. Approving the proposed



*pro rata* allocation of current and future interest earned through the time that the funds are distributed avoids burdening the Court with additional motions to distribute interest income earned after the filing of this motion, will benefit authorized Claimants and substantially reduces the likelihood that a material amount of undistributed funds remain in the Settlement Escrow Accounts.

*Withholding for unanticipated disputes and administration expenses.* The Court previously approved withholding \$50,000 from the Net Settlement Funds to address any unanticipated disputes arising from the claims process and the distribution of the Net Settlement Funds. ECF 562 at ¶ 6. Plaintiffs respectfully request that the Court approve withholding \$10,000 from the Net Settlement Funds for this purpose and for the payment of any future incurred administrative costs, thereby reverting \$40,000 of the original reserve amount to the Net Settlement Fund.

*Payment of Taxes.* Plaintiffs request \$51,000 for the anticipated costs of preparation and payment of taxes for 2023.

*Release and discharge.* The Court previously released and discharged “Class Counsel, Heffler [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, are released and discharged from any claims arising out of the administration of Settlement Funds except for any claim by AMA” until AMA’s claim was resolved. ECF 562 at ¶ 10. Now that AMA’s claim has been finally resolved, Class Counsel respectfully request that Class Counsel, the Claims Administrator (now known as Kroll Settlement Administration), 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, be released and discharged from any

claims by AMA arising out of the administration of Settlement Funds.

### III. CONCLUSION

For the reasons set forth herein, the Additional Disbursement Motion should be granted.

Dated: May 18, 2023

Respectfully submitted,

/s/ Michael Dell'Angelo

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