UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IOWA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, *et al.*, Plaintiffs, v. BANK OF AMERICA CORPORATION, *et al.*, Defendants.	Case No. 17-cv-6221 (KPF) (SLC) Hon. Katherine Polk Failla

OMNIBUS REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTIONS FOR (1) FINAL APPROVAL OF THE CREDIT SUISSE AND NEW SETTLEMENT AGREEMENTS, CERTIFICATION OF THE SETTLEMENT CLASSES, AND FINAL APPROVAL OF THE PLANS OF ALLOCATION; AND (2) ATTORNEYS' FEES, LITIGATION EXPENSES, AND SERVICE AWARDS

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PRELIMINARY STATEMENT

Plaintiffs' prior papers demonstrate how the proposed Settlements and the notice plan both meet the applicable standards for approval. *See* ECF No. 668 ("Final Approval Motion"). They also demonstrate how the request for $102,200,000 in attorneys' fees is well *below* awards in comparable cases, how the requested expenses are of the type for which courts routinely allow reimbursement, and how the requested service awards are in line with awards in similar situations. *See* ECF No. 672 ("Fee and Expense Motion").

The extraordinarily positive reaction of the class to the Settlement and the motion for attorneys' fees, expense reimbursement, and incentive awards reflects these facts. These sophisticated class members were notified and not a single class member made an objection to the settlement terms, the notice, the Plans of Allocation, or the Fee and Expense Motion. And only four requests for exclusion were received—one of which was received well after the deadline, and none of which could confirm they were actually class members to begin with.

In fact, the only "objection" received was from a single attorney purporting to represent a putative class member who apparently did not keep its own trading records, and apparently was having difficulty getting copies from its bank. ECF No. 678 (the "Objection," filed by "EMHA"). This single page "objection" does not ask for the Settlements to be rejected or modified. Rather, it requests an "amendment" to create an unidentified "mechanism" to allow "similarly situated potential claimants" to obtain financial data for use in filling out the claim forms. *Id.* ¶ 5.

The request is unnecessary. Defendants provided financial-record assistance to current and former clients. Co-Lead Counsel and defense counsel even cooperated in creating a system whereby class members can be given their transactional data from the database Plaintiffs created as part of this action. The reason *Mr. Fischbarg* (who represents the Objector) was initially not

given *EMHA's* financial data is because Mr. Fischbarg did not provide sufficient evidence of his authority to receive that data. That is not a flaw in the system. Rather, it means the system is working properly to protect the confidentiality of this highly sensitive financial information. Even more fundamentally, the Fischbarg authorization dispute (if you can call it that) has nothing to do with the terms of the Settlements.

Given the overwhelming support from class members, and the complete lack of any substantive opposition, the pending motions should be granted.

I. PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF THE SETTLEMENTS SHOULD BE GRANTED

A. It is Undisputed That the Settlements are Fair, Reasonable, and Adequate

1. The unchallenged facts, as well as the overwhelming support for the Settlements, confirm the fairness of the settlement terms

As set forth in the Final Approval Motion (at 4-19), both Settlements amply satisfy the "fair, reasonable, and adequate" standard. The only update is with respect to the reaction of class members. "[T]he favorable reaction of the overwhelming majority of class members to the Settlement is perhaps the most significant factor[.]" *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 119 (2d Cir. 2005). Here, despite an extensive advertising campaign, no substantive objections were received, and the only four opt-out requests were from unconfirmed class members. As discussed below, the only nominal opposition—the Objection—is a one-page complaint about an identity-authentication dispute.

This overwhelmingly positive reaction weighs heavily in favor of approving the Settlements. *See id.* at 118 (stressing the "small number of objections" in considering the reaction-of-the-class factor); *Stinson v. City of New York*, 256 F. Supp. 3d 283, 290 (S.D.N.Y.

2017) ("[i]t is the 'absence of significant exclusion[s] or objection[s]' that courts in this Circuit regularly consider").[1]

Thus, for the reasons set forth herein and in the Final Approval Motion, *all* Rule 23(e) factors—including, now, the reaction of the class—confirm the Settlements are fair, reasonable, and adequate, and should be given final approval.

2. The "objection" does not argue that the Settlements should be rejected

With only a single "objection" filed, the reaction of the class factor confirms the Settlements should be approved. This becomes even more apparent when the terms of the "objection" are considered. Even where there is "vociferous opposition," the district court has a "fiduciary responsibility to the silent class members." *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987). But here, the single-page filing is not an opposition to the Settlements at all, let alone a "vociferous" one. That is, EMHA does not dispute, for instance, that $580,008,750 is a tremendous financial recovery in light of the risks of continued litigation. Nor

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[1] *See also, e.g.*, *Berryman v. Avantus, LLC*, 2024 WL 2108824, at *8 (D. Conn. May 10, 2024) (lack of objections "an extremely strong indication" of fairness); *In re AOL Time Warner, Inc.*, 2006 WL 903236, at *9 (S.D.N.Y. Apr. 6, 2006) ("The reaction of the class is generally gauged by reference to the extent of objection to the settlement.").

The Settlement Administrator is still processing the claims that were actually filed. Co-Lead Counsel will be happy to answer any questions the Court has at the Fairness Hearing about how many claim forms have, by that time, been processed. But to be clear, as seen above the reaction-of-the-class factor is measured instead most often by way of the number of opt-outs. Courts by contrast do not give "great significance" to the number of claims filed, including because "many factors affect response rates." *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *14 (E.D. Mich. Dec. 13, 2011) (discounting relevance of response rate of below 1%). *See also, e.g.*, *In re SSA Bonds Antitrust Litig.*, No. 1:16-cv-3711, ECF Nos. 687-89 (S.D.N.Y. Apr. 2, 2021) (approving settlement even prior to claims deadline); *Alaska Elec. Pension Fund v. Bank of Am., N.A.*, No. 1:14-cv-7126, ECF No. 738 (S.D.N.Y. Nov. 13, 2018) (same); *In re Credit Default Swaps Antitrust Litig.*, No. 1:13-md-2476, ECF Nos. 539-52 (S.D.N.Y. Apri. 18, 2016) (same). *See also generally Poertner v. Gillette Co.*, 618 F. App'x 624, 625-26 (11th Cir. 2015) (approving settlement with claims rate of 0.75%); *In re CenturyLink Sales Pracs. & Sec. Litig.*, 2020 WL 7133805, at *16 (D. Minn. Dec. 4, 2020) (same, with claims rate of 0.698%); *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1377 (S.D. Fla. 2007) (same, with claims rate of 1%).

does EMHA dispute that Settlements *also* provide substantial and valuable industry reforms designed to prevent collusion in the future. Indeed, the single-page filing does not discuss *any* of the factors of Rule 23. This is just one of many flaws in that filing. Indeed, no relief, in any form, is necessary.

We understand the "Objection" really stems from Mr. Fischbarg's prior unwillingness or inability to demonstrate that he was an authorized recipient of EMHA's financial records. This is not a flaw in the system; it is exactly what one would expect. Given the risk of identity theft and the significant regulations governing banking information, a bank cannot (and should not) hand over financial records until it is persuaded the requesting party is actually entitled to receive them. A dispute about one bank's authentication requirements has nothing to do with the Settlements or any other issue before the Court today.

With respect to the ability of class members to get their data generally, Defendants did assist class members in obtaining historical financial records. And Co-Lead Counsel also worked with Defendants to navigate the privacy and other issues so as to allow class members to gain access to the data in Plaintiffs' litigation database as well. Moreover, when a claim is submitted that does not "conform to the data standards," Co-Lead Counsel may direct the Settlement Administrator to "accept the Claim, deny the Claim, or assign it a discounted value" depending on the circumstances and the data submitted. ECF No. 662-4 ¶ 70. We are not aware of any additional mechanisms to assist class members who did not keep their own records, and the Objection fails to identify any.

Finally, we note that EMHA has not been prejudiced. We understand that, as of the time of this brief, Mr. Fischbarg's request to be given EMHA's data has now been authenticated, and its data has been delivered. Under the Plans of Allocation, Co-Lead Counsel "shall have the

discretion . . . to accept late-submitted claims . . . so long as the distribution . . . is not materially delayed." ECF No. 662-4 ¶ 35. The Settlement Website made clear Co-Lead Counsel would be using such discretion in favor of class members who were not able to get all their transactional records in time. That is, we represented publicly that "[c]laims will not be treated as untimely merely because the transactional data section of the claim form is incomplete, or even blank, as-of July 8, 2024." Thus, even though EMHA did not have its transactional data by July 8, 2024, neither EMHA or any other class member has been or will be prejudiced by the issues raised by the Objection.

In sum, given the lack of any substantive objection,[2] the Settlements should be given final approval forthwith.

B. It is Undisputed That the Extensive Notice Program Satisfies Rule 23 and Due Process

Notice Packets were mailed to potential class members as well as to potential intermediaries. We also carried out an extensive publication campaign using global print and online outlets. The comprehensive notice program was "the best notice . . . practicable under the circumstances," and satisfies Rule 23 and due process. Fed. R. Civ. P. 23(c)(2)(B).

C. The Proposed Settlement Classes Should Be Finally Certified, With the Few "Opt-Outs" Received Recognized in the Final Judgments

As set forth in the Final Approval Motion (at 22-23), there have been no changes that would undermine the Court's initial determination that certifications of the Settlement Classes are appropriate. Again, no objections to such certification have been presented.

[2] We also note that, to be valid, the Objections must be "signed by the member of the Settlement Class . . . even if the member of the Settlement Class is represented by counsel." ECF No. 664 ¶ 11. A freestanding signature page of "Gregg Ettin" was attached to the filing. Co-Lead Counsel have no way of verifying whether "Gregg Ettin" is a class member.

Three of the four requests for exclusion from the Settlement Class are included in the exhibits to the proposed final judgments filed concurrently herewith. We note that *none* of the four met the technical requirements of the Court's order. That is, all the submissions make clear the requesting person wants out, but none contained proof of actual class membership. *See generally* ECF No. 664 ¶¶ 14-15. Nonetheless, Co-Lead Counsel propose those three attempts to be excluded be accepted by the Court. The Settling Defendants have been made aware of these details, and to our knowledge none intend to oppose the request with respect to the three opt-outs included in the proposed orders.

We received a fourth attempted exclusion request. The request is facially dated June 7, 2024, but the envelope suggests it was mailed on June 17, 2024, and it was only received later still. *See id.* ¶ 15 (requests had to be "received no later than" June 7, 2024, which was 60 days after the Notice Date). That fourth request *also* lacked proof of membership in the class. Based on the combination of these failures, Defendants object to the recognition of the fourth request. While Plaintiffs defer to the Court's judgment, the fourth attempted opt-out party is *not* included in the proposed orders submitted herewith.

II. PLAINTIFFS' MOTION FOR FINAL APPROVAL OF THE PLANS OF ALLOCATION SHOULD BE GRANTED

A. The Unchallenged Plans of Allocation are Fair And Reasonable

As set forth in the Final Approval Motion (at 22), the Plans of Allocation also meet the fair and adequate test, and should be given final approval. The only update is with respect to the reaction to the class. Only one objection was filed, but, as described above, that was expressly aimed only at the Settlements, not the Plans of Allocation. *See In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *8-9 (S.D.N.Y. Apr. 26, 2016) ("Only four objections have been pursued. . . . This sophisticated Class is in an excellent position to swiftly and

competently assess whether the Plan [of Allocation], and the model upon which it is based, achieves a fair distribution of this very sizeable Settlement Fund. It has spoken.").

Nor does the Objection—which was not aimed at the Plans of Allocation—have any relevance to the Plans of Allocation. Courts recognize that it is fair to require class members to substantiate their own class claims, including because the same person would have to substantiate their legal claims if they filed an individual action instead. *See In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *30 (N.D. Ga. Mar. 17, 2020) (favorably citing Manual for Complex Litigation in upholding requirement for class members to show they meet eligibility requirements); *Friedman v. Guthy-Renker, LLC*, 2017 WL 6527295, at *9 (C.D. Cal. Aug. 21, 2017) (overruling objection that claims process "requires [the objector] to submit documentation that she no longer has," because "any lawsuit would require her to provide such documentation"); *In re Marsh & McLennan Companies, Inc. Sec. Litig.*, 2009 WL 5178546, at *25 (S.D.N.Y. Dec. 23, 2009) (rejecting "[t]he single objector's claim that the lawyers should fill out the Proof of Claim form and that potential Class members should simply verify the information" on the basis that such an objection "does not comport with the long-approved procedures for the efficient management of class-action settlement[s]").[3]

In sum, courts recognize that in "a large class action the apportionment of a settlement can never be tailored to the rights of each plaintiff with mathematical precision." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 327 F.R.D. 483, 496 (S.D.N.Y. 2018). A plan should

[3] *See also, e.g.*, *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 640 (5th Cir. 2012) (the "alleged burden" on "small investors" of obtaining trading records that were required to verify their claims was "not undue"); *In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, & "ERISA" Litig.*, 4 F. Supp. 3d 94, 106 n.12 (D.D.C. 2013) (rejecting as "meritless" an objection that the requirements "under the Proof of Claim form are too onerous because class members must submit records going back several years").

"strike a reasonable balance between precision and efficiency." *Id.*; *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, 2007 WL 2230177, at *11 (S.D.N.Y. July 27, 2007) ("numerous courts have held . . . [that] a plan of allocation need not be perfect"). Courts therefore generally adhere to the "principal goal" of having an "equitable and timely distribution of a settlement fund without burdening the process in a way that will unduly waste the fund." *In re Credit Default Swaps*, 2016 WL 2731524, at *9.

The Plans of Allocation fairly balance the competing concerns of fairness to those who have full records, fairness to those who do not, and the administrative costs and burdens on both class members and the Settlement Administrator.

III. PLAINTIFFS' UNOPPOSED MOTION FOR ATTORNEYS' FEES, LITIGATION EXPENSES, AND SERVICE AWARDS SHOULD BE GRANTED

Co-Lead Counsel's request for an award of $102,200,000 and interest thereon is reasonable from the perspective of the factors considered by *Golberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000) (Fee and Expense Motion at 7-17), and from the perspective of the Lodestar "cross-check" (*id.* at 17-19). By one common measure, we are getting *less* than our hourly investment—which is known as a negative multiplier and is a strong indication of the reasonableness of the requested fee. *See id.* at 17.

The same policy considerations that drive courts to compensate attorneys for taking on large contingency cases also means courts routinely reimburse those attorneys for their reasonable out-of-pocket expenses and interest thereon. Fee and Expense Motion at 20-21. Co-Lead Counsel's motion and supporting materials confirm the reasonableness of their investments in this heavily expert and data-driven, lengthy, and complex case.

In the notice materials, Settlement Class members were informed that Co-Lead Counsel would seek a fee award of up to $105,000,000, and an expense award of up to $23 million, plus

interest. They were also later informed by our Fee and Expense Motion that our actual request was for *less* in fees and expenses, and were informed as to the detailed calculations behind our figures. And they were informed of our requests for service awards. Fee & Expense Motion at 22-25. Still, no class member objected to the fee, expense, or service-reward requests. As with the other aspects of the Settlements, the lack of objections strongly supports a finding that the Co-Lead Counsel's requests are reasonable. *See, e.g.*, *Tiro v. Pub. House Invs., LLC*, 2013 WL 4830949, at *14 (S.D.N.Y. Sept. 10, 2013).

CONCLUSION

Plaintiffs request that their Final Approval Motion be granted with respect to the Settlements, the notice plan, and the certification of the Settlement Class. Submitted concurrently herewith are two proposed final judgments, one related to the Credit Suisse Settlement Agreement and the other related to the New Settlement Agreement. Both are based on the forms agreed to during negotiations with the relevant Defendants.

Plaintiffs also request that their Final Approval Motion be granted with respect to the Plans of Allocation. Again, separate orders are included, one for each Settlement.

Finally, Co-Lead Counsel request that their Fee and Expense Motion be granted. Submitted concurrently are proposed orders separately approving the attorney fees, expenses, and service awards. As these are distinct from the underlying Settlements, one order for each issue is used approving the total awarded amounts.[4]

[4] Technically, absent Court guidance or absent unlikely, unforeseen circumstances such as if only one Settlement is approved, Co-Lead Counsel intends to take the total amounts awarded *pro rata* from each Settlement Fund based on the value of the relative value of the cash consideration in each Settlement.

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Respectfully submitted,

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