

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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**CO-LEAD COUNSEL’S RESPONSE TO THE APPEAL OF
BATTEA – CLASS ACTION SERVICES, LLC**

I. Introduction

On November 18, 2016, the Court issued an order approving the first distribution of settlement funds. Dkt. Entry No. 575. Pursuant to the order, notice of the opportunity to appeal final claim determinations was promptly posted on the settlement website and sent to claimants by email.

Plaintiffs, through Quinn Emanuel Urquhart & Sullivan, LLP and Pearson, Simon & Warshaw LLP (together, “Co-Lead Counsel”), submit this response to the single unresolved appeal of the final determinations made by the Court-appointed claims administrator Garden City Group, LLC (“GCG,” the “Claims Administrator”).¹ The sole appeal relates to a submission made by a third-party claim processor, Battea – Class Action Services, LLC (“Battea”), on behalf of Natixis Financial Products LLC (“Natixis”) (*see* Dkt. Entry No. 580, the “Battea Appeal”). Without leave of the Court, Battea made a further submission just before 6 p.m. on Friday December 9, 2016 (the “Supplemental Submission”) which we address in this response.²

Co-Lead Counsel have carefully considered the views presented in the Battea Appeal and consulted with GCG and economic experts from Berkeley Research Group (“BRG”). Co-Lead Counsel recommend that the Court reject the appeal for two reasons. *First*, the challenge filed by Battea on behalf of Natixis was incomplete and contained a significant amount of information

¹ While MFS Investment Management (“MFS”) (*see* Dkt. Entry No. 576) has not formally withdrawn its appeal, the subject of its appeal has been resolved and its challenged claims were allowed based on its submission of additional support. *See* Decl. of Loree B. Kovach Regarding Challenges and Late Claims Received to Date (“Kovach Decl.”) ¶2 n.1.

² While late on Friday afternoon Battea belatedly provided the type of additional support and evidence the Claims Administrator had been seeking concerning the manner in which the portfolio sales at issue were priced, the Claims Administrator and BRG have not, as of the time of this filing, been able to fully evaluate Battea’s submission or the reliability of the new transaction information contained in the Supplemental Submission.

Co-Lead Counsel's experts concluded to be unreliable. *See* Decl. of Elizabeth Kroger Davis ("Davis Decl.") ¶¶20-22.

Second, the appeal seeks to unjustifiably treat the sale of a portfolio of credit default swap ("CDS") transactions (the portfolio was sold in two bulks sales—one consisting of 63,953 transactions and the other consisting of 7,808 transactions) as over 70,000 *individual* CDS transactions. As now acknowledged by Battea's Supplemental Submission, far from being the product of over the counter ("OTC"), retail, buy-side trades with dealers, Natixis's portfolio was priced on an aggregate basis. *See* Decl. of Daniel Briggs in Supp. of Appeal of Natixis Financial Products LLC From Final Determination by Claims Administrator ¶¶6-9 (Dkt. Entry No. 592, "Briggs Decl.").³ To treat this portfolio sale as tens of thousands of distinct retail buy-side transactions would overvalue the claim and be inequitable to the rest of the class.

II. Final Claim Determinations

As described in Plaintiffs' Motion for the First Distribution of Settlement Funds, for nearly a year, the Claims Administrator, assisted by Co-Lead Counsel and economic consultants from BRG, has worked to review and process thousands of claims filed pursuant to the settlement in this matter. GCG and BRG have reviewed these submissions to determine whether the CDS transactions entered into by each claimant qualify for compensation pursuant to the Court-approved Plan of Distribution. *See* Davis Decl. ¶¶3-11; Kovach Decl. ¶¶4-7.

This process has resulted in the allowance of 4,898,189 transactions submitted by 7,712 class members. Kovach Decl. ¶9; Davis Decl. ¶4. Included among these are 17,635 transaction

³ While the portfolio sold on August 26, 2010 was not directly subject to a competitive bid process, presumably Morgan Stanley and Natixis agreed to extend the type of pricing Morgan Stanley offered in June, 2010 in connection with its competitive bid to the pricing and sale of the portfolio of transactions sold to Morgan Stanley on August 26, 2010. *See* Briggs Decl. ¶¶6-12.

submitted by numerous Natixis entities. *See* Briggs Decl. ¶3. Indeed, notwithstanding the rejection of their portfolio trades at issue here, Natixis is the *17th largest claimant overall* in the class. Kovach Decl. ¶9. Despite the substantial sums that Natixis funds (and Battea as their claim processor) already stand to receive, Battea now seeks to have Natixis's rejected submissions given preferential treatment and awarded a windfall at the expense of the rest of the class.

III. The Battea Natixis Appeal

A. The Battea Natixis Submission

On May 27, 2016, Battea submitted transactions on behalf of multiple Natixis funds, including the fund that is the subject of this appeal. *See* Kovach Decl. ¶8. On behalf of Natixis, Battea submitted 91,346 transactions, one of the largest submissions among all class members. Davis Decl. ¶13. Nowhere did Battea disclose, however, that more than two-thirds of its submission related to its sale of Natixis's proprietary CDS portfolio to a single dealer: Morgan Stanley. This only became apparent upon BRG's review. *See id.* ¶¶14-15. Indeed, upon inspecting the submission, BRG quickly observed that 65,028 of the transactions appeared to have been executed on a single day, August 26, 2010, with a single dealer (Morgan Stanley). *Id.* ¶14. This relatively unique circumstance raised concerns that the submissions were part of a single transaction that would have been priced by Morgan Stanley on an overall basis.⁴ The overwhelming circumstantial evidence of a bulk transaction was corroborated by public news sources. *Id.* ¶15. Media reports from the time confirmed that Natixis was selling off its entire

⁴ In the one other instance in which BRG was confronted with data that facially indicated a large portfolio had been sold, the claimant timely supplied the type of pricing information that Battea failed to provide. *See* Davis Decl. ¶16.

CDS portfolio based on orders from the European Central Bank, and that this was a *negotiated portfolio sale* with Morgan Stanley.⁵

The Claims Administrator advised Battea on September 7, 2016 that a large number of submitted trades occurred on a single date. Kovach Decl. ¶13. The Claims Administrator's email provided examples of those transactions, and requested that Battea confirm whether such transactions were executed in conjunction with a portfolio or bulk sale agreement, and provide a copy of any such agreement. *Id.* This information was necessary to fairly value the price of the portfolio sale. *See* Davis Decl. ¶¶16-17.

Over ten days later Battea responded and stated that with respect to Natixis, "there is recollection that the high volume of trades with Morgan Stanley referenced below were related to a portfolio sale, however there is no agreement that we can find which indicates the pricing or other information was pre-determined." *See* Kovach Decl. ¶14 and Ex. B attached thereto; Davis Decl. ¶15 n.2. At no point did Natixis or Battea subsequently provide any information about how the pricing of the portfolio was arrived at as other claimants who submitted bulk sales had done. Davis Decl. ¶17. Notably, until its Supplemental Submission of December 9, Battea never disclosed that the portfolios were priced on an aggregate basis after a competitive bidding process among five different dealers.

At the same time, BRG identified numerous inconsistencies between the information set forth in Battea's submission and data maintained by the Depository Trust Clearing Corporation ("DTCC"). *Id.* ¶20. BRG subsequently asked the Claim Administrator to have Battea provide a

⁵ *See, e.g.*, Matt Cameron, "Morgan Stanley is mystery buyer of Natixis CDS portfolio," *Risk.net*, (Aug. 3, 2010), www.risk.net/risk-magazine/news/1725911/morgan-stanley-mystery-buyer-natixis-cds-portfolio; Natixis Press Release, "Natixis significantly reduces GAPC risk positions," (July 5, 2010), www.natixis.com/natixis/upload/docs/application/pdf/2010-07/pr_070510.pdf.

small sample of trade confirmations so as to further evaluate the reliability of the transaction information set forth in the submission. Davis Decl. ¶21; Kovach Decl. ¶17. Battea responded to this request on October 24, 2016. Kovach Decl. ¶18. These confirmations indicated that the individual trade information set forth in Battea's Natixis submission was unreliable. Davis Decl. ¶¶20-22. The confirmations also failed to provide pricing or other information that might have allowed BRG—had it concluded the information in the submission was accurate—to derive the bid-ask inflation to be applied to the portfolio trade, as it had done for at least one other claimant. *Id.* ¶21.

B. The Battea Submission Was Unreliable

BRG and GCG continue to regard the 71,761 Natixis trades at issue as inadequately documented and unreliable. The spreadsheet Battea originally submitted on behalf of Natixis contained more inconsistencies than nearly any other submission. *See id.* ¶¶13-14, 20-21. When the data in Natixis' spreadsheet was linked to and compared against the data in the DTCC database, it became clear the information provided by Natixis contained significant and extensive errors, including trade dates. *See id.* ¶20. In fact, the trade dates in the Battea submission did not match the dates in the DTCC records for 91% of the transactions. *Id.*

In order to assess whether the data supplied by Battea was reliable or accurate, BRG instructed GCG to request a sample of seven trade confirmations from Battea. *See* Davis Decl. ¶21; Kovach Decl. ¶17. Battea provided the requested confirmations, and based on these documents BRG concluded there were material trade date discrepancies between the confirmations and Battea's submission. Davis Decl. ¶21.

Battea's suggestion that it was advised that the seven trade confirmations it provided were somehow intended to or even could serve as sufficient proof of market pricing for 71,761 trades (Battea Appeal ¶¶9-10, *see also* Decl. of J. Timothy Garland in Supp. of Appeal of Natixis

Financial Products LLC From Final Determination by Claims Administrator ¶8 (Dkt. Entry No. 593)) is meritless. The confirmations were solely requested in order to assess the scope of the inaccurate trade dates in the data Natixis had submitted, and the Claims Administrator said nothing from which Battea could fairly infer its submission would be accepted in part or full based on these seven confirmations. *See* Kovach Decl. ¶19 and Ex. B attached thereto. Nor did the Claims Administrator ever state that the seven trade confirmations could or would serve as an adequate substitute for the pricing documentation it previously indicated was necessary to support Battea's claims. *Id.* The trade confirmations do not contain the information necessary to evaluate the pricing of the trades. Davis Decl. ¶21.⁶

C. **Battea Failed to Provide Any Indication of How the Transactions in Natixis' Portfolio Sale Were Priced**

Despite being in discussions with the Claims Administrator since September 7, 2016 concerning the bulk nature of the portfolio transaction at issue (*see* Ex. B to Kovach Decl.), it was not until three months later, in the late afternoon of December 9, 2016 that Battea came forward in its Supplemental Submission with any information or evidence concerning how its portfolio was priced. This information now confirms what BRG suspected when presented with the clear signs of a large portfolio sale.

Specifically, it is now beyond dispute that the pricing was arrived at on a portfolio basis. Indeed, Natixis's June 15, 2010 e-mail to the dealers could not have been clearer that Natixis was asking the dealers [REDACTED]

[REDACTED] *See* Ex. A to Briggs Decl. (emphasis added). Similarly, the August 26, 2010 trade was priced at "an *aggregate* \$39 million bid-ask spread . . .

⁶ While Battea has now belatedly submitted additional information that may, upon careful investigation, be sufficient to fully evaluate the two Natixis portfolios sales at issue, the Claims Administrator and BRG have not, as of the date of this filing, been able to evaluate them.

with Morgan Stanley improving the *aggregate* price by ‘about 4.5 [million]’ based on corrections of prices on individual trades.” Briggs Decl. ¶12 (emphasis added). A party that sells tens of thousand of CDS transactions to a single dealer through a competitive bidding process among five dealers based on “absolute” or “aggregate” pricing is not pricing each transaction as if it was traded in the retail OTC market.

To award Natixis spread inflation on these 70,000+ portfolio transactions as if they were entered into one by one with dealers in an OTC retail environment would award Battea/Natixis a substantial windfall at the expense of the rest of the class. *See Newberg on Class Actions* §13:59 (5th ed.) (noting, in context of final approval, that “a court is striving to ensure that similarly situated class members are treated similarly and that dissimilarly situated class members are not arbitrarily treated as if they were similarly situated”).⁷ As a fiduciary for the class, Co-Lead Counsel, accordingly, respectfully request that Battea’s appeal be denied and that the Claims Administrator’s rejection be affirmed.⁸

IV. Conclusion

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Natixis’s appeal to overturn the final determination of the Claims Administrator, and dismiss as moot or grant the appeal of MFS.

⁷ *See also Parker v. Time Warner Entertainment Co., L.P.*, 239 F.R.D. 318, 340 (E.D.N.Y. 2007) (class settlements “may not arbitrarily distinguish between similarly situated plaintiffs”); *Staton v. Boeing Co.*, 327 F.3d 938, 975-76 (9th Cir. 2003) (higher payments to certain class members must be supported by evidence that their claims differ from other class members); *Petruzzi’s, Inc. v. Darling-Delaware Co.*, 880 F. Supp. 292, 300-01 (M.D. Pa. 1995) (“while disparate treatment of class members may be justified by a demonstration that the favored class members have different claims or greater damages, no such demonstration has been made here”) (internal citation omitted).

⁸ Of course, should the Court direct, the Claims Administrator and BRG can review Battea’s Supplemental Submission and determine if it is reliable and contains information sufficient to calculate a fair and equitable spread inflation that takes into account the portfolio nature of the transaction.

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