UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE CREDIT DEFAULT SWAPS ANTITRUST LITIGATION This Document Relates To: All Actions	13 Md. 2476 (DLC)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT WITH ALL DEFENDANTS, APPROVAL OF PLAN OF DISTRIBUTION, AND CERTIFICATION OF SETTLEMENT CLASS

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Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiffs, through their counsel, Quinn Emanuel Urquhart & Sullivan, LLP, and Pearson, Simon & Warshaw, LLP (together, "Co-Lead Counsel"), respectfully submit this Memorandum in Support of Plaintiffs' Motion for Final Approval of Settlement with All Defendants, Approval of Plan of Distribution, and Certification of Settlement Class.

I. INTRODUCTION

The reaction of class members to the Settlement[1] in this case ($1.86 billion plus meaningful injunctive relief) has been overwhelmingly positive. Not one of the nearly 14,000 sophisticated class members has objected to the fact of settlement or any of its principal terms, and the number of requests for exclusion is truly *de minimis*. Dozens of class members have contacted Co-Lead Counsel to express their appreciation, and they are excited and eager to receive their distributions. Class members' enthusiastic reception of and desire to participate in the Settlement speaks to the remarkable nature of the recovery obtained.

At this writing, 585 class members have already filed claims, well before the May 27, 2016, claims deadline, and others are working through their claims submission process with the Claims Administrator. The money to be distributed here will make a real difference to many class members and their investors.

The terms of the Settlement are fair and reasonable and amply satisfy the criteria for final approval. The Settlement is the result of years of litigation and months of hard-fought and

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[1] As used herein, "Settlement" refers collectively to the 14 separate Settlement Agreements that Plaintiffs have entered into with Defendants. The Settlement Agreements were attached as Exhibits to the October 16, 2015 Declaration of Daniel L. Brockett in Support of Plaintiffs' Motion for Preliminary Approval of Settlement with All Defendants and Preliminary Certification of A Settlement Class ("Brockett Decl."). *See* Dkt. No. 445, Exs. 1-14. All citations to the Settlement Agreements are designated with "¶."

Capitalized terms not defined herein have the same meaning as in Plaintiffs' Preliminary Approval Motion and/or the Settlement Agreements.

arm's-length negotiations facilitated by an independent and respected mediator. As Judge Weinstein (Ret.), stated in a declaration submitted in support of preliminary approval: "I would go so far as to say that, in 30-plus years of mediating high-stakes disputes, this was one of the finest examples of efficient and effective lawyering by plaintiffs' counsel that I have ever witnessed. I have rarely, if ever, observed a Plaintiff in a case of this complexity and size, achieve a result of this magnitude with the speed that Plaintiffs achieved here."[2]

Judge Weinstein made those remarks while the European Commission's investigation into the Defendant banks for collusion regarding the credit default swaps ("CDS") market was still open. Subsequently, the EC closed its investigation stating it had found insufficient evidence of bank collusion. As noted in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Approval ("Preliminary Approval Motion"), the fact that neither the EC nor the U.S. Department of Justice imposed any penalties for the alleged conduct in this case, despite investigating it for years, further confirms the exceptional result achieved for the class here.

A small number of objections have been filed proposing vague and unworkable changes to the Plan of Distribution in an effort by the objectors to redistribute settlement proceeds in a way that favors them. As discussed below, these objections are meritless. The Plan of Distribution is the product of an extraordinary amount of effort, involving months spent processing *billions* of fields of data into a class-wide model that is capable of taking into account, in an objective manner, the factors affecting bid/ask spreads for CDS that have been reliably identified through empirical studies reported in the peer-reviewed, academic literature. The objectors, in contrast, offer impracticable and often contradictory proposals riddled with

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[2] Declaration of the Hon. Daniel Weinstein (Ret.) ("Weinstein Decl."), Dkt. No. 447 (Oct. 16, 2015) ¶ 4.

subjective and arbitrary assumptions that they believe will give them a slightly larger piece of the pie.

The Plan of Distribution, which is recommended by the counsel who have litigated this case for over three years, easily has "a reasonable, rational basis," and these few objectors should not be permitted to hold up the distribution of settlement proceeds to the many class members eager to receive them. *See In re Initial Pub. Offerings Sec. Litig.*, 671 F. Supp. 2d 467, 497 (S.D.N.Y. 2009) ("A Plan of Allocation has been recommended by plaintiffs' counsel, a group of competent and qualified counsel. As such, [the Court] need only review the plan to confirm that it has a reasonable, rational basis."); *see also In re AOL Time Warner, Inc., Sec. & "Erisa" Litig.*, No. 02 Civ. 5575 (SWK), 2008 WL 2941219, at *4 (S.D.N.Y. July 30, 2008) (to overcome objections, "[a]n allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel") (citations and internal quotes omitted and alteration in original).

Consequently, Plaintiffs respectfully request that the Court grant final approval, approve the Plan of Distribution, and enter judgment to provide the Settlement Class with the substantial relief that Plaintiffs and Co-Lead Counsel worked so hard to obtain.

II. THE SETTLEMENT MEETS THE REQUIREMENTS FOR FINAL APPROVAL

The procedural history of this case and the terms of the Settlement are discussed in detail in Plaintiffs' Preliminary Approval Motion. *See* Dkt. No. 444 at 1-12. On October 28 and November 4, 2015, the Court preliminarily approved the Settlement under Rule 23(e), preliminarily certified the Settlement Class, and entered an order providing for notice to the Settlement Class. *See* Dkt. Nos. 465, 468 (together, the "Preliminary Approval Order"). Accordingly, we refer the Court to the more detailed discussion of the case's procedural history, the history of the Settlement, and its key terms presented in the Preliminary Approval Motion.

Since the Preliminary Approval Motion, more is now known about the overwhelmingly positive reaction of the Class to the Settlement. Below, we highlight the key points relevant to final approval while focusing on the events reflecting the reaction of the Class, including the objections.

A. The Settlement is Procedurally Fair

Public policy favors the resolution of class actions through settlement. *See Bano v. Union Carbide Corp.*, 273 F.3d 120, 129-30 (2d Cir. 2001); *see also In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004). "[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).

Courts generally find settlements procedurally fair when they are "the product of arm's length negotiations between experienced and able counsel on all sides." *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06 Md. 1775 (JG), 2009 WL 3077396, at *7 (E.D.N.Y. Sept. 25, 2009) ("*Air Cargo*"). As detailed in Plaintiffs' Preliminary Approval Motion and the declarations filed in connection therewith, the Settlement was reached only after extensive arm's-length negotiations between counsel experienced in class action, antitrust, and trial practice.[3] The involvement of experienced counsel, on both sides, is strong evidence the Settlement is procedurally fair. *See In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 122 (S.D.N.Y. 2009) (noting the "extensive" experience of counsel in granting final approval of settlement).

[3] *See* Weinstein Decl. ¶¶ 9-12 (both parties "were represented by very able and experienced attorneys who specialize in complex antitrust, class action and financial litigation").

Settlement negotiations were facilitated by Judge Weinstein, an esteemed mediator with decades of experience in resolving complex cases.[4] As this Court has noted, "[t]he assistance of a well-known mediator . . . reinforces the conclusion that the Settlement Agreement is non-collusive." *In re Elec. Books Antitrust Litig.*, 11 Md. 2293 (DLC), 2014 WL 3798764, at *2 (S.D.N.Y. Aug. 1, 2014); *see also Toure v. Amerigroup Corp.*, No. 10 Civ. 5391 (RLM), 2012 WL 3240461, at *3 (E.D.N.Y. Aug. 6, 2012) (noting that involvement of a mediator "raise[s] a presumption that the settlement achieved meets the requirements of due process"); *In re Initial Pub. Offering Sec. Litig*, 226 F.R.D. 186, 194 (S.D.N.Y. 2005) (participation of a former judge weighed in favor of approval).

The numerous mediation sessions enabled Plaintiffs to appreciate the risks Defendants identified.[5] Representatives from many Defendants attended these sessions, as did Michael Herrera, Senior Staff Counsel for class representative Los Angeles County Employees Retirement Association ("LACERA"). Other class representatives, including Dan Donovan of Plaintiff Salix Capital US Inc., provided valuable input. By August 2015, after nine months of negotiations, all Defendants had determined it was in their interest to settle, and Plaintiffs had determined the Settlement was extremely favorable to the Class.

Throughout the discovery process, the parties had numerous opportunities to articulate and refine their positions, and Plaintiffs had engaged in several one-on-one negotiations with individual Defendants in order to address specific arguments related to liability and damages. The exchange of extensive information, including detailed presentations, written briefs, and a

[4] *See id.* ¶¶ 5-8 (describing Judge Weinstein's 28 years of experience mediating "over 3,000 complex disputes").

[5] *See* Weinstein Decl. ¶ 3 (noting that both Plaintiffs and Defendants "developed a very clear understanding of their respective theories and risks through detailed mediation presentations and other information exchanges").

functioning damages model, months before the deadline for class certification facilitated well informed settlement discussions. By securing more than $1.864 billion in cash compensation as well as injunctive relief that includes meaningful changes to ISDA's licensing procedures, the Settlement satisfies the standard for final approval — it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In the words of Judge Weinstein: "[T]he mediation and settlement negotiations that resulted in the comprehensive settlement of this case were complicated, exhaustive, and conducted at arm's-length by sophisticated, knowledgeable, and fully-informed counsel who consulted directly with senior client representatives throughout the process." Weinstein Decl. ¶ 27.

B. The Settlement is Substantively Fair Under the *Grinnell* Factors

Final approval of the Settlement requires analysis of the nine factors outlined in *Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000):

> (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; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Each factor weighs heavily in favor of final approval.

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

"[F]ederal antitrust cases are complicated, lengthy . . . bitterly fought, as well as costly." *In re Vitamin C Antitrust Litig.*, No. 06 Md. 1738 (BMC), 2012 WL 5289514, at *4 (E.D.N.Y. Oct. 23, 2012) (citations and internal quotes omitted). With fourteen Defendants, numerous third parties, over 50 million pages of produced documents, and twenty-seven depositions taken with five months remaining in fact discovery, the record for class certification alone would have been massive. Litigating this case through summary judgment and to a full trial on liability and damages would have been an enormous undertaking, requiring tens of millions, if not hundreds of millions, of dollars in additional fees and expenses on the part of Plaintiffs and Defendants.

The expert work alone in this complex financial market case was extremely costly, exceeding $7 million as of January 29, 2016.[6] Beyond that, the case presents an inherent level of risk and uncertainty because it involves a market wholly unfamiliar to the average juror. *See Park v. The Thomson Corp.*, No. 05 Civ. 2931 (WHP), 2008 WL 4684232, at *4 (S.D.N.Y. Oct. 22, 2008) ("The complexity of Plaintiff s claims *ipso facto* creates uncertainty."). Settlement provided an efficient resolution to this complex litigation. *See Meredith Corp. v. SESAC, LLC.*, 87 F. Supp. 3d 650, 663 (S.D.N.Y. 2015) ("The greater the complexity, expense and likely duration of the litigation, the stronger the basis for approving a settlement.") (citations and internal quotation marks omitted).

If the case had not been settled and the Court had certified the class during the litigation phase, trial would have been all but inevitable because Defendants were determined to create genuine issues of material fact unfit for resolution on summary judgment. Defendants also undoubtedly possessed the resources to appeal any adverse ruling or verdict. In short, the possibility of protracted litigation with its attendant uncertainty was highly likely. By contrast, the Settlement provides class members with the certainty of substantial monetary and structural relief. The first *Grinnell* factor therefore supports approval of the Settlement. *See In re Initial Public Offering Sec. Litig.*, 243 F.R.D. 79, 93 (S.D.N.Y. 2007) ("The prospect of an immediate

[6] *See* Memorandum of Law in Support of Class Counsel's Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Incentive Awards for Class Representatives (Dkt. No. 481) at 34.

monetary gain may be more preferable to class members than the uncertain prospect of a greater recovery some years hence.").

2. The Reaction of the Settlement Class

"It is well settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *Allen v. Dairy Farmers of Am., Inc.*, No. 09 Civ. 230 (CR), 2011 WL 3361233, at *6 (D. Vt. Aug. 3, 2011); *Malay* v. *Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) ("the lack of objections may well evidence the fairness of the Settlement"). Here, the reaction has been overwhelmingly enthusiastic. The positive reaction is perhaps best evidenced by the fact that not a single objection to the amount of the Settlement Fund (or the attorneys' fee request) has been made.

In accordance with the Preliminary Approval Order, 13,923 Notices were distributed via class mail. Notices to class members with United States mailing addresses or foreign P.O. box address were sent via first class mail, and class members with international street addresses were mailed via FedEx International Priority Overnight. *See* Declaration of Stephen J. Cirami ("Cirami Decl.") ¶ 13. Of these, 1,031 notice packets were returned as undeliverable without forwarding address information. *Id.* ¶ 14. 748 notice packets were returned with updated address information and were promptly re-mailed. *Id.* ¶ 15.

Notice was also published in print and posted online. *Id.* ¶ 17. Stories about the Settlement also ran in many prominent media outlets both in print and online, including the *Wall Street Journal*.[7] Even with this exceptional coverage and with the great deal of attention paid to

[7] *See, e.g.*, Katy Burne, *Big Banks Agree to Settle Swaps Lawsuit*, Wall Street Journal (Sept. 12, 2015), www.wsj.com/articles/banks-wall-street-groups-agree-to-settle-credit-swaps-antitrust-case-1441988741; Jesse Druker, *Wall Street Banks to Settle CDS Lawsuit for $1.87 Billion*, Bloomberg (Sept. 11, 2015), www.bloomberg.com/news/articles/2015-09-11/wall-street-banks-reach-settlement-on-cds-lawsuit-lawyer-says; Reuters, *Major banks reach $1.86B*

the Settlement by the sophisticated members of the Class, only twenty-one exclusion or "opt out" requests were made (representing far less than 1% of the class members and approximately 0.49% of the total notional at issue)[8] and only five objections were filed, none of which challenge the fact of settlement or any of its principal terms. As discussed in detail in Section VIII *infra*, the five objections are not representative of the intensely positive sentiment that characterizes the vast majority of the settlement class, and principally propose unworkable modifications to the Plan of Distribution.

While a certain number of objections "are to be expected in a class action with an extensive notice campaign and a potentially large number of class members[, i]f only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." *Air Cargo*, 2009 WL 3077396, at *8 (quoting Newberg on Class Actions § 11.41 (4th ed.)); *see also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) (same); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86-87 (2d Cir. 2001) (holding that "[t]he District Court properly concluded that this small number of objections [18 where 27,883 notices

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settlement over fixing credit default swaps (Sept. 11, 2015), fortune.com/2015/09/11/ credit-default-swaps.

[8] Exclusion requests were made on behalf of the following class members: (1) Fairfax (Barbados) International Corporation; (2) Itau BBA International plc; (3) Itau Unibanco SA Nassau Branch; (4) NexPoint Credit Strategies Fund (Highland Credit Strategies Fund); (5) Highland CDO Opportunity Master Fund, L.P.; (6) Highland Multi-Strategy Credit Fund, L.P. (Highland Credit opportunities CDO LP); (7) Highland Credit Strategies Master Fund, L.P.; (8) Highland Special Opportunities Holding Company; (9) Granite Bay Long/Short Credit Master Fund, L.P.; (10) Tunstall Opportunities Master Fund, L.P.; (11) Highland Crusader Offshore Partners, L.P.; (12) Highland Long Short Equity Fund; (13) Highland Offshore Partners, L.P.; (14) Brigade Credit Fund II LTD; (15) Brigade Opportunistic Credit LBG Fund LTD; (16) Brigade Energy Opportunities Fund LP; (17) Brigade Structured Credit Fund LTD; (18) Tasman Fund LP; (19) Brigade Distressed Value Master Fund LTD; (20) Brigade Leveraged Capital Structures Fund LTD; and (21) Banco Safra SA - Cayman Islands Branch. *See* Cirami Decl. ¶ 28; Ex. C. Many of these twenty-one entities are, in fact, members of the same fund group (such as the Highland Funds), meaning that, in reality, only ***five*** class members have chosen to opt out.

were sent] weighed in favor of the settlement"); *Yang v. Focus Media Holding Ltd.*, No. 11 Civ. 9051 (CM), 2014 WL 4401280, at *7 (S.D.N.Y. Sept. 4, 2014) (small number of objections, especially where they only targeted the plan of allocation, "strongly supports final approval"). Settlements are routinely approved over far greater levels of exclusion and opposition. *See, e.g.*, *see Grant v. Bethlehem Steel Corp.,* 823 F.2d 20, 24 (2d Cir. 1987) (otherwise fair settlement should not be deemed unfair despite opposition by 36% of the total class).

The vast majority of communications between Co-Lead Counsel and class members have been positive and productive. The Claims Administrator has already received 585 claim forms — representing over *$1.6 trillion* in notional value of Covered Transactions — as of the filing of this motion, nearly two months before the claims submission deadline. Cirami Decl. ¶ 23.

As described in Plaintiffs' Preliminary Approval Motion, named Plaintiffs LACERA and Salix Capital US Inc. actively participated throughout the prosecution of the case, were consulted in connection with the decisions to enter into the Settlement, and fully support the Settlement. The other named Plaintiffs — Value Recovery Fund LLC, Delta Institutional, LP, Delta Onshore, LP, Delta Offshore, Ltd., Delta Pleiades, LP, and Essex Regional Retirement System — which were kept fully apprised of the status of negotiations, also support the Settlement.

The favorable response of the overwhelming majority of the class, the *de minimis* level of opt-outs and exclusions, and the engaged participation and enthusiastic support of class representatives all weigh heavily in favor of final approval.

3. The Stage of the Proceedings and Amount of Discovery Completed

The depth of Plaintiffs' and Co-Lead Counsel's knowledge of the strengths and potential weaknesses of their claims are more than adequate to support the Settlement. This knowledge is based on the extensive discovery, additional factual information learned in connection with the mediation process, and consultation with numerous sophisticated experts. All of this work allowed Co-Lead Counsel to be well-informed of the strengths and weaknesses of Plaintiffs' case and to engage in effective settlement discussions with Defendants. *See In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. at 458 ("[T]he question is whether the parties had adequate information about their claims."). This factor, too, strongly supports approval of the Settlement.

4. The Parties Faced Significant Risks Regarding Liability, Damages, Class Certification, and Trial

(a) Liability Risks

Plaintiffs built a strong liability case as early as their first mediation session in January 2015 and continued to build their case in the subsequent months. Nonetheless, "[l]iability is never automatic." *Park*, 2008 WL 4684232, at *4. Neither the DOJ nor the EC assessed any penalties against Defendants after years of investigation, and the EC even closed its case against the Dealer Defendants after the Settlement was reached — strong indications that litigating the case further would entail significant risk and uncertainty. *See In re NASDAQ Mkt-Makers Antitrust Litig.*, 187 F.R.D. 465, 475 (S.D.N.Y. 1998) (noting the lack of a prior conviction or an admissible civil judgment, as was the case here, may suggest the difficulty of establishing antitrust liability). This concern is particularly acute when litigating against top-flight defense counsel,[9] many of whom represented Defendants during the DOJ and EC investigations.

During the mediation process, Plaintiffs learned the liability defenses Defendants could be expected to raise. Among other things, Defendants were likely to argue that: (1) CME and Citadel bore the responsibility for not seeking a license for exchange trading; (2) any denial of a license to CMDX was the result of independent decision-making by Markit and ISDA rather than the product of collusion; (3) CMDX was not viable for a number of reasons, including

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[9] *See* Weinstein Decl. ¶ 12 (noting that Defendants were "represented by counsel with decades of relevant experience").

technological issues and a dysfunctional relationship between CME and Citadel; (4) there was little demand for exchange trading of CDS in 2008 and after; and (5) CME and Citadel decided to abandon their trading platform because clearing was the sole priority of the buy-side and regulators, and the best clearing platform at the time was The Clearing Corporation, which was owned by the dealers.

Plaintiffs vigorously disputed all of these arguments at mediation and were prepared to refute them at trial. Nonetheless, Plaintiffs are aware that, while they could adduce substantial evidence in support of their liability case, Defendants' arguments were colorable and had some basis in evidence.

(b) Damages Risks

"[T]he history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal." *Air Cargo*, 2009 WL 3077396, at *8 (internal citation omitted). As in any antitrust case, such a risk is acutely present here.

The expert work required to build a viable damages model was tremendous. Plaintiffs' experts processed over 100 million individual CDS transaction records in less than a year, and provided Defendants with a functioning (and defensible) damages model months before class certification. Given the sheer number of the CDS transactions at issue and the number of assumptions Plaintiffs' experts needed to make to arrive at class-wide damages, it is clear that causation and damages would be hotly contested and these issues would inevitably become a battle of the experts. As courts have routinely noted, "[i]t is impossible to predict which party's model of damages — if either — the jury would credit." *See Meredith Corp.*, 87 F. Supp. 3d at 665 (citations and internal quotes omitted); *see also In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y. 1997) ("[D]amages are a matter for the jury, whose determinations can never be predicted with certainty."). The certainty of the Settlement, compared to the (extremely costly) risks associated with trial, further supports final approval.

(c) Class Risks

While Plaintiffs believe they would win a contested motion for class certification, "it is at least possible that variations among the [plaintiffs] or other factors might have complicated plaintiffs' class-certification bid." *Meredith Corp.*, 87 F. Supp. 3d at 666. If the Court certified the proposed class, Defendants would almost certainly seek interlocutory appeal pursuant to Fed. R. Civ. P. 23(f), which would have the potential to delay the resolution of this action substantially. *See id.* The inherent "uncertainty of maintaining a class through trial" weighs in favor of settlement. *Id.*

(d) Trial Risks

Given both Plaintiffs' and Defendants' stated intention to defeat any motion for summary judgment the other side might make, the risk and uncertainty of a jury trial was very real. Litigation of these factual issues would consume substantial resources and jeopardize the settlements that the Plaintiffs have obtained for the Class. While Plaintiffs believe that their claims would be borne out by the evidence, they also recognize the difficulties of proving liability at trial. Defendants have articulated defenses to Plaintiffs' allegations that may have been accepted by the jury (as they apparently were by the EC).[10]

Although Plaintiffs are confident that they would have been able to support their claims with qualified and persuasive expert testimony, jury reactions to competing experts are inherently difficult to predict, and Defendants would have presented well-credentialed experts to

[10] *See* Weinstein Decl. ¶ 4 ("Plaintiffs faced significant factual and legal hurdles in proving liability, damages, and causation. Given the legal and factual risks Plaintiffs faced, the monetary result achieved for the Class is, in my judgment, exceptional.").

support their various defenses to liability and damages. Given the requirement of a unanimous verdict in federal court, it is not unusual for juries in antitrust cases to award minimal damages even where liability is established. *See, e.g.*, *U.S. Football League v. Nat'l Football League*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) (noting that jury found defendant liable for monopolization but awarded only nominal damages), *aff'd*, 842 F.2d 1335, 1377 (2d Cir. 1988).

5. The Ability of Defendants to Withstand Greater Judgment

While Defendants could survive a higher judgment, courts routinely observe that "this determination in itself does not carry much weight in evaluating the fairness of the Settlement." *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 Md. 1695 (CM), 2007 WL 4115809, at *14 (S.D.N.Y. Nov. 7, 2007) (citation and internal quotes omitted). With all other criteria satisfied, this factor is insignificant. *Cf. In re Elec. Books Antitrust Litig.*, 11 Md. 2293 (DLC), Dkt. No. 686 at 13:22-24 (Tr. of Nov. 21, 2014 Final Approval Hr'g) (granting final approval where defendant's ability to withstand greater judgment was not "in dispute").

6. The Settlement Is Reasonable in Light of Risks and the Potential Range of Recovery

"The adequacy of the amount achieved in settlement is not to be judged 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." *Meredith Corp.*, 87 F. Supp. 3d at 665-66 (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984)). Here, the monetary relief that Defendants will pay is very significant. ISDA's proposed changes to its licensing procedures will additionally ensure that the CDS market will be more competitive and transparent. Given the acknowledged risks Plaintiffs face in proving their case, the recovery for class members is more than reasonable — it is an exceptional result that few believed possible at the outset of this litigation,[11] and which has already produced concrete, procompetitive results.

III. <u>THE APPROVED NOTICE WAS ADEQUATE AND SATISFIED DUE PROCESS</u>

Rule 23(e)(1) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the [settlement]." For actions certified under Rule 23(b)(3), "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The standard for the adequacy of notice to the class is one of reasonableness. "There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Wal-Mart*, 396 F.3d at 114 (citation and internal quotes omitted). Settlement class members have received adequate notice and have been given sufficient opportunity to weigh in on or exclude themselves from the Settlement.

Through CDS trade data produced by third-party DTCC, Plaintiffs were able to identify by name virtually all potential class members. Pursuant to the Court's Preliminary Approval Order, Co-Lead Counsel, in collaboration with Claims Administrator Garden City Group, LLC ("GCG"), mailed the Court-approved Notice to each of 13,923 class members. *See* Cirami Decl. ¶¶ 12-16. Among other things, the Notice contained thorough and clear descriptions of the terms

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[11] *See* Weinstein Decl. ¶ 29 ("Based on all the knowledge I gained about the case and its potential strengths and weaknesses, it is my view that the $1,864,650,000 settlement achieved by Plaintiffs is not only fair and adequate to the class, but exceedingly favorable and reflects a recovery well beyond what I expected could be achieved during much of the mediation process.").

of the Settlement, the Released Claims, class members' right to object and mechanism for doing so, Co-Lead Counsel's maximum possible request for an award of attorneys' fees and expenses, and class members' right to exclude themselves and procedure for doing so.

Summary Notice was also published in national and global (Europe and Asia) editions of the *Wall Street Journal*, as well as in *Investor's Business Daily*, and in the *PR Newswire*. *Id.* ¶ 17. Information regarding the Settlement, including downloadable copies of the Settlement Agreements, Notice, Proof of Claim, Preliminary Approval Order, and other relevant documents (as well as a toll-free telephone number to answer class members' questions and facilitate filing of claims) were also posted on a dedicated website created and maintained by GCG, www.CDSAntitrustSettlement.com. *Id.* ¶¶ 18-20.

The notice procedures outlined above satisfy due process, especially in light of the fact that the Settlement Class is comprised of sophisticated entities, including investment funds, insurance companies, and pension plans, and the Notice mailing was based on data that enabled the specific identification of virtually all class members. *Id.* ¶¶ 3-8.

IV. THE SETTLEMENT CLASS SATISFIES ALL REQUIREMENTS OF RULE 23

For all of the reasons detailed in Plaintiffs' Preliminary Approval Motion and as held in the Court's Preliminary Approval Order (Dkt. No. 465 ¶ 4), Plaintiffs satisfy all requirements of Rule 23(a) — numerosity, commonality, typicality, and adequacy — as well as the predominance and superiority requirements of Rule 23(b)(3). The preliminarily certified Settlement Class should therefore be granted final certification for settlement purposes.

It is undisputed that CDS trading data analyzed by Plaintiffs documents a class comprised of nearly 14,000 entities, satisfying numerosity. Commonality is met by the existence and effect of Defendants' conspiracy to suppress competition and transparency in the CDS market since all class members allegedly suffered antitrust injury from Defendants' conspiracy. Typicality is satisfied because class representatives' and class members' claims arise from the same conspiracy, carried out by the same Defendants, giving rise to the same theories of liability.

The Settlement Class is adequately represented because class representatives and class members were all purchasers and sellers of CDS who were harmed by the same anticompetitive conduct, and as such share interests in recovery. Finally, common questions predominate and a class action is the superior method for resolving this case. Predominance exists because the question of whether Defendants engaged in an anticompetitive conspiracy is common across the class. A class action is superior because class members have no substantial interest in proceeding individually given the complexity and expense.

V. THE PLAN OF DISTRIBUTION MEETS THE STANDARD FOR FINAL APPROVAL

A distribution plan that is supported by competent and qualified counsel is reviewed only to determine whether it has a "reasonable, rational basis." *See In re Initial Pub. Offerings Sec. Litig.*, 671 F. Supp. 2d at 497. Co-Lead Counsel, who have lived and breathed this case for over three years and are highly experienced in antitrust class actions and banking litigation, stand behind the Plan of Distribution and support it unequivocally.[12]

A. How the Plan of Distribution Was Developed

As detailed in the declaration of Dr. Sanjay Unni ("Unni Decl."), filed herewith, the Plan of Distribution is the result of what may be the most comprehensive analysis of CDS trading and pricing data undertaken to date. *See* Unni Decl. ¶¶ 4, 22. Co-Lead Counsel, their expert consultants and industry experts, and the Claims Administrator have spent literally thousands of hours engaged in a painstaking analysis of *billions* of data points and the peer-reviewed

[12] The Plan of Distribution has been available on the settlement website (www.CDSAntitrustSettlement.com) since January 11, 2016, and a copy is attached as Exhibit A.

empirical studies published on the subject. They did so in order to develop a model that reliably and objectively estimates the bid/ask spread inflation paid by class members on their CDS contracts on a *daily* basis over the entirety of the eight-year class period.

The Plan of Distribution draws on aspects of the damages model Co-Lead Counsel and their experts spent months developing to litigate this case on a class-wide basis. Plaintiffs' damages theory is that class members paid inflated "bid/ask spreads" on their CDS transactions, which they transacted "over-the-counter" ("OTC") with Defendants, because Defendants blocked CDS exchanges from entering the market. But for Defendants' alleged collusion, some CDS transactions would have migrated from OTC trading to exchanges, and this migration would have resulted in greater pre- and post-trade transparency and other market efficiencies that would have compressed spreads paid by class members on CDS transactions across the board.

To develop a class-wide damages model, Co-Lead Counsel first worked with their consulting experts to model the spreads paid by class members in the actual world. This was a herculean task for many reasons — including because there was no available source of class-wide data on the spreads paid by class members in the OTC market. One of the reasons for this case, after all, is that Defendants had kept the market opaque and lacking in pricing transparency.

To solve this problem, Co-Lead Counsel and their economic consultants had to obtain, analyze, and combine two massive datasets: (1) the DTCC's Trade Information Warehouse ("DTCC Trade Dataset"), which is the single most comprehensive global repository for data concerning *executed* CDS transactions (but lacks information on the *spreads* applicable to those transactions); and (2) a dataset obtained from Defendant Markit, which provides certain *quote* data over the class period (but does not link those quotes to executed transactions).

Combined, these two datasets comprise nearly ten terabytes of data (reflecting billions of individual price and transaction records) that Co-Lead Counsel's economic consultants had to assemble, analyze, and combine in a way that would allow them to estimate, objectively, the spreads paid on every single CDS instrument on every single day of the Class Period. This took an extraordinary amount of work to accomplish, especially given the usual data problems that often accompany the production of massive datasets.

In connection with this work, Co-Lead Counsel's economic consultants reviewed all the published, peer-reviewed empirical studies of the factors determining and affecting spreads in the CDS market.[13] That review indicated that the contractual terms of the CDS, and certain market-related factors, are the primary determinant of bid-ask spreads paid on CDS instruments. *See* Unni Decl. ¶ 36. The consultants then used this information to incorporate those factors so as to be able to model the spreads paid by class members on every single instrument and on every single day over the entire class period.

In developing this model, Co-Lead Counsel and their expert consultants received input from their other experts, including Professor Darrell Duffie, perhaps the leading expert on OTC markets in the world, and a number of industry consultants who included former traders of CDS from the Defendants themselves. Aspects of the resulting model were also pressure tested during the mediation process, when these sophisticated and motivated Defendants were given the opportunity to raise objections to it. The Plan of Distribution accounted for all of the information that Co-Lead Counsel learned throughout the case and was prepared for the sole purpose of distributing the Settlement fairly and reasonably to the Class.

[13] *See* Unni Decl. at ¶¶ 4, 7, 36, Appendix A.

B. How the Plan of Distribution Works in Practice

The Plan of Distribution determines each class member's claim through three main steps: (1) identifying Covered Transactions; (2) estimating the amount of bid-ask spread inflation resulting from the Dealer Defendants' alleged conduct with respect to each Covered Transaction; and (3) calculating the pro rata share of a claimant's proceeds in relation to the total settlement proceeds for all claimants that submit a valid claim.

***Identifying Covered Transactions*:** In order to be eligible for payment, a transaction must be a Covered Transaction, as defined in Paragraph 2(i) of the Settlements. A Covered Transaction is one in which a class member incurred a bid-ask spread in connection with the purchase or sale of a CDS contract with one of the Dealer Defendants or their affiliates in which the purchase or sale also had a sufficient jurisdictional nexus with the United States, as outlined in the Settlements.

To provide class members with a great deal of information early in the process, Co-Lead Counsel and their consulting experts took the initiative to identify the Covered Transactions applicable to each class member that could be identified in the DTCC Trade Dataset. This, too, took an enormous amount of work — work that, arguably, Co-Lead Counsel could have left for each class member to do itself as part of the claims process. After filtering out trades that did not meet the definition of "Covered Transaction," the consulting experts also removed transactions that would not have been adversely impacted by the alleged conspiracy or that do not meet certain legal requirements (*e.g.*, occurred outside the Class Period, trade compression transactions, etc.). *See* Unni Decl. ¶¶ 24-25. In addition, duplicate transaction records were removed (*e.g.*, where trade information was submitted to the DTCC by both counterparties) and other steps were taken to avoid the double counting of transactions or the overstatement of affected notional volume due to index rolls.[14]

As of January 29, 2016, this work yielded approximately 5.9 million transactions identified as Covered Transactions under the Settlement. Each class member was given access to a secure portal on which the class member could review its own transactions identified through this process.

Estimating Bid-Ask Spread Inflation: After identifying the Covered Transactions, it was necessary to estimate the spreads paid on each such transaction. Again, this case is more complex than many because the "price" paid for the CDS, for damages purposes, is not found on any price tag or bill or invoice; instead, it must be *modeled* in terms of the hypothetical spread paid on that transaction. And, given that this is a class action, it must be modeled on a *class-wide* basis.

Because the DTCC Trade Dataset does not include information about the spreads applicable to each executed transaction, and does not identify the time of day when a transaction occurred, Co-Lead Counsel and their consulting experts utilized the quote data collected and maintained by Defendant Markit (the "Markit Data"). The Markit Data (which contains billions of daily quote records) captures quotes provided to Markit by the Dealer Defendants throughout the Class Period. These quotes are time-stamped and can be used to estimates spreads applicable to specific CDS transactions, although they are not directly linked to executed transactions. The combination of the DTCC and Markit Data thus provided a sufficient dataset to estimate, on a

[14] As explained by Dr. Unni, "index rolls" refer to transactions where a class member substitutes a new index series for a previous index transaction. After consultation with industry experts, a determination was reached that any transaction in which a class member sold one series of index and bought the subsequent index series on the same day would be classified as an "index roll" and would, up to the notional amount "rolled," only be entitled to the spread inflation on one leg of the transaction. See Unni Decl. ¶ 27.

class-wide basis, the bid-ask spread paid on specific executed CDS transactions by class members.

To ensure reliability in estimating bid-ask spreads, Plaintiffs' consulting experts took a number of steps detailed in the Plan of Distribution, such as relying only on high-quality Markit Quotes, as ranked by Markit's own internal algorithm. *See* Ex. A ¶ 11. The resulting subset of quotes was sorted, and the narrowest spread within each hour was identified and averaged across all hours within a trading day to establish an average bid-ask spread for contracts with that reference entity (or index series) and tenor on each day of the Class Period (the "Markit Bid-Ask Spread").[15] *See id.* at ¶ 12.

Next, the notional amount of each Covered Transaction was matched to that transaction's respective Markit Bid-Ask Spread using a matching algorithm. *See* Unni Decl. ¶ 30. On certain dates when the Markit Data did not provide any quotes with a sufficiently high quality score, an algorithm was used to search for a contemporaneous Markit Bid-Ask Spread using data from a 30-day window of time that spanned both before and after the trade date. If no Markit Bid-Ask Spread could be found within this window, Plaintiffs' consulting experts used the average daily bid-ask spread for the Markit industry sector (*e.g.*, financial, consumer goods, or energy sectors) applicable to that CDS. For those categories of CDS contracts for which Markit Data quoted in upfront terms was not readily available, proxies were constructed using the ratio of known bid-ask on days when such data were available in upfront terms.

Because a buy-side entity incurs only one half of the bid-ask spread (commonly known as the "half spread") on a transaction, after the DTCC notional trading volumes for each Covered

[15] Some CDS contracts, such as certain single-name and index CDS, were quoted in "running spreads" in the Markit Data. Plaintiffs' consulting experts converted these quotes to equivalent upfront bid and ask prices using the ISDA CDS Standard Model, a publicly available CDS pricing model developed by Defendant ISDA.

Transaction was matched to a Markit Bid-Ask Spread, the spread was reduced by one-half (the "Markit Half-Spread") to determine the best objective estimate of the spread actually paid by the class member.

Finally, Co-Lead Counsel applied a spread compression percentage to the Markit Half-Spread to reflect the way in which the spread would have tightened in the "but for" world. Based upon a review of empirical evidence on spread compression experienced in other markets and evidence obtained in discovery from Defendants, the bid-ask spread inflation associated with each Covered Transaction was, solely for claims administration purposes, estimated to be 20%. *See* Ex. A ¶ 16.[16]

To illustrate the extraordinary granularity of the model resulting from this work, if one class member purchased a single-name CDS on General Electric on May 1, 2010 from a Defendant, and another class member purchased an otherwise equivalent single-name CDS on *AT&T* on the same day, the model would estimate different spreads (and different damages) for the two different transactions based on what the data shows about the different spreads paid for those different instruments and reference entities on that day.

Similarly, if a class member purchased a single-name CDS on General Electric on May 1, 2010 and sold that same instrument *the very next day*, the model would apply a different spread to that transaction if the data showed that spreads had changed on that instrument from one day to the next. As a result of the work performed by Co-Lead Counsel and their consulting experts, this level of specificity exists for every day and every instrument over the nearly eight-year Class Period. And, again, it does so using objective factors and class-wide data sources.

[16] Since this inflation percentage is applied consistently across all transactions, pro rata recoveries are not affected by the specific percentage applied for purposes of claims administration. *See* Ex. A ¶ 17.

As noted, since January 29, 2016, each class member has been able to log into a secured portal on the settlement website to review the Covered Transactions identified as applicable to that class member.[17] In addition, each class member can review exactly how the damages model applies to each one of its transactions — information provided in eighteen data fields. Class members were, in short, given great visibility into the treatment of their CDS trades, their claims, and the methodology utilized by the Plan of Distribution.

Calculating Claims on a Pro Rata Basis: The final step in the Plan, following the claims submission deadline on May 27, 2016, will be for the Claims Administrator to calculate each claimant's pro rata share of the settlement proceeds.[18]

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[17] Moreover, class members have the ability to add any missing trades to their set of Covered Transactions. *See* www.CDSAntitrustSettlement.com/challenge.php ("If . . . you believe that you engaged in additional Covered Transactions qualifying for claims under the Settlement that are not included in the list on the Claimant Portal, or that information provided in the Claimant Portal about one or more of your Covered Transactions is incorrect, you may contact the Settlement Administrator at 1 (888) 744-0531 or info@CDSAntitrustSettlement.com. The Settlement Administrator will guide you through the procedure for submitting a Challenge."); *see also* Cirami Decl. ¶¶ 24-27.

[18] Pro rata distributions of this sort are routinely approved. *See, e.g.*, *Beecher v. Able*, 575 F.2d 1010, 1013-14 (2d Cir. 1978) (affirming district court's final approval of pro rata plan of distribution); *In re Sturm, Ruger, & Co., Inc. Sec. Litig.*, No. 09 Civ. 1293 (VLB), 2012 WL 3589610, at *8 (D. Conn. Aug. 20, 2012) (approving pro rata plan of allocation); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 02 Md. 1486 (PJH), Dkt. No. 2093 (N.D. Cal. Oct. 27, 2010) (order granting final approval to pro rata plan of allocation); *U.S. Commodity Futures Trading Comm'n v. Rolando*, No. 08 Civ. 64 (MRK), 2008 WL 5225851, at *3 (D. Conn. Dec. 10, 2008) (rejecting objection of investor who argued that because his deposits were traceable to a particular account he was entitled to 100% of his losses instead of a pro rata share of the overall funds, and stating that "[a]s a general matter, courts have favored *pro rata* distribution of assets where victims were similarly situated with respect to the defrauder"); *Hicks v. Stanley*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *7 (S.D.N.Y. Oct. 24, 2005) (approving pro rata plan of allocation where allocation was based on the amount of alleged overpricing of the daily net asset value per share of a trust as calculated by counsel with the assistance of an economic consultant); *In re Lloyds' Am. Trust Fund Litig.*, 96 Civ. 1262 (RWS), 2002 WL 31663577 at *19 (S.D.N.Y. Nov. 26, 2002) ("*pro rata* allocations provided in the Stipulation are not only reasonable and rational, but appear to the fairest method of allocating the settlement benefits").

To make this calculation, the Claims Administrator will sum the spread inflation, as estimated for claims administration purposes using the methods outlined above, on each Covered Transaction for each class member that submits a claim. This figure will represent each claimant's individual spread inflation. The Claims Administrator will then sum the total spread inflation, as described above, across every claimant. This amount will represent the total spread inflation of all claimants.

The Claims Administrator will next compute each claimant's claim ratio, which is the ratio of the claimant's individual spread inflation to the total spread inflation of all claimants. Finally, the Claims Administrator will compute the individual claimant's pro rata share of the recovery by multiplying the individual claimant's claim ratio by the Net Settlement Fund. That money will then be distributed to class members by wire or check. We currently estimate that over 1,300 class members will receive payments exceeding $100,000 and over 230 of these will receive more than $1,000,000 as a result of this case.

VI. THE OBJECTIONS LACK MERIT

A small number of class members (the "Objectors") have filed objections seeking to increase the value of their own claims by changing aspects of the Plan of Distribution so CDS trades entered into by other class members would receive less damages for claims purposes. By diminishing the claims of other class members, these objectors aim to increase their own pro rata share. Generally speaking, these objections suffer from the following flaws.

First, they disregard the applicable legal standard. No damages model or distribution plan in a case where damages are this complex could ever be perfect, and perfection would not be demanded even if this case went to trial.[19] *See In re PaineWebber Ltd. P'ships Litig.*, 171

[19] *See, e.g.*, *In re Elec. Books Antitrust Litig.*, No. 11 Md. 2293 (DLC), 2014 WL 1282293, at *16 (S.D.N.Y. Mar. 28, 2014) ("[A]ntitrust jurisprudence not only limits the proof

F.R.D. at 133 ("it is obvious that in the case of a large class action the apportionment of a settlement can never be tailored to the rights of each plaintiff with mathematical precision"). The only question, as this stage, is whether the plan "has a reasonable, rational basis," *Initial Pub. Offerings Sec. Litig.*, 671 F. Supp. 2d at 497 — a test this plan easily passes.

Second, the objections are wholly impracticable. To the limited extent they offer "solutions" to the problems they purport to identify, those solutions are either unworkable given the limitations of the available class-wide data, obviously subjective, or they even contradict each other, which powerfully illustrates that these solutions are not themselves objective or practicable. Neither in their written comments nor otherwise have these Objectors expressed any understanding of the practical limitations of what can be done with the available class-wide datasets or of the inherent challenges of building a claims model that works objectively on a *class-wide basis*. Their narrow focus on maximizing the value of their own claims has simply blinded them to any other considerations.

Third, the objections are speculative. While objectors assert that other class members may have engaged in trades or trading strategies that could have resulted in tighter bid-ask spreads and thus may have been overvalued by the Plan, they offer no citation to any objective evidence or source establishing how exactly such trades were performed, what the volume of such trades were during the relevant time period, or what impact there would be on spreads for such trades and why. The speculative nature of the objections is underscored by the absence of observable transactions in the class-wide dataset of the sort Objectors raise. Indeed, having gone

of damages in price-fixing cases to this formula, but it expressly refuses to impose extraordinary burdens on a plaintiff to construct the but-for price. Where the but-for price is uncertain, the plaintiff's burden of proving damages is, to an extent, lightened, for the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. Indeed, the Supreme Court has long taught that damage issues in antitrust cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts.") (internal citations and quotes omitted).

back (at the expense of the Class) to evaluate these types of transactions, Co-Lead Counsel and their consulting experts have not been able to identify anything other than *potentially* (using subjective and arbitrary criteria) a *de minimis* number of such transactions in the available dataset.

To be sure, other class members could have advanced equally conclusory claims about how the plan could theoretically be changed at the margins to increase the value of their own claims. If Co-Lead Counsel had to try to adjust, retroactively, to accommodate each such assertion, it would be a long, long time before anyone would ever see a dime under the Settlement. Class members would inevitably disagree about which modifications should take place and why. That is why the mechanics of distribution in a case like this one are entrusted to Class Counsel and reviewed deferentially only to determine whether the plan has a reasonable basis.

The road these Objectors have chosen to go down is, in short, not constructive nor in the best interests of the Class as a whole. *See Grinnell*, 495 F.2d at 464 (rejecting notion that "by merely objecting," absent class members "are entitled to stop the settlement in its tracks, without demonstrating any factual basis for their objections, and to force the parties to expend large amounts of time, money and effort to answer their rhetorical questions" and stating that allowing such disruption "on the basis of nothing more than [the objectors'] unsupported suppositions would completely thwart the settlement process").

Finally, if these entities truly feel that they have a superior way of proving their own *individual* damages, they were free to opt out. *See* 2 McLaughlin on Class Actions § 6:10 (12th ed.) ("courts frequently overrule objections that can be cured by the objector simply opting out of the class").[20] But they should not be permitted to stay in the Class and hold up a widely embraced distribution plan in the process. *See* Newberg on Class Actions § 12:30 (5th ed.) ("a court's goal in distributing class action damages is to get as much of the money to the class members in as simple a manner as possible").

A. Objections Based on Supposed "Package" CDS Transactions Are Unworkable

Four of the Objectors — Anchorage, MF Global, Saba, and Silver Point — assert that the Plan of Distribution does not adequately account for what they describe as "package" transactions, which allegedly include certain "arbitrage" and "correlation" trades. *See, e.g.*, Dkt. No. 491 at 2, 4 (MF Global); Unni Decl. ¶¶ 45-46, 51, 68. While these Objectors purport to raise numerous issues regarding such trades, each is a variation on a common theme: certain sets of transactions, which would appear to be two or more different trades in the DTCC database (or that are potentially not even included in the available DTCC database), may actually be part of a single "package" trade, done for arbitrage or correlation purposes, for which other class members allegedly would have received some undefined discount. *See* Dkt. No. 491 at 2; *see also* Dkt. No. 494 at 3 (Anchorage); Dkt. No. 497 at 1 (Saba); Dkt. No. 496 at 3 (Silver Point). In such situations, these Objectors claim, those other class members would not be charged the full bid-ask spread on both "legs" of the arbitrage transaction, and therefore such transactions should be discounted. *E.g.*, Dkt. No. 491 at 5; Unni Decl. ¶¶ 51-52.

The Plan of Distribution does not attempt to treat so-called "package" transactions differently because there is no objective way to do so using the class-wide dataset that forms the

[20] *See also* Newberg on Class Actions § 13:54 (5th ed.) ("class members generally may do only one of two things in responding to notice of a class settlement: object or opt out"); *Olden v. LaFarge Corp.*, 472 F. Supp. 2d 922, 930 (E.D. Mich. 2007) (observing that "opting out of a settlement and choosing to object logically are mutually exclusive options").

basis of the Plan of Distribution. Even assuming *arguendo* that these transactions occurred with any frequency — which, as set forth below, Co-Lead Counsel has no evidence of — Objectors' proposals for addressing them are unworkable, arbitrary, and facially contradictory. *See* Unni Decl. ¶¶ 55-88.

In order for a trade to be a true package transaction — on which a dealer incurs no actual risk and would theoretically be willing to discount the price of one leg of the trade — both legs of the trade would have to be executed *simultaneously*. *See, e.g.*, Dkt. No. 497 at 1 (Saba) ("Trading an index arbitrage package requires *simultaneously* buying or selling a credit index and buying or selling all of the underlying single names that make up the index."); Unni Decl. ¶¶ 51-52, 57, 63-64, 69. This is true of all such "packaged trades" identified by Objectors, including "single name rolls," "convexity/curve trades," "CDS index tranche hedging trades," (sometimes referred to as "correlation" trades) and others. *See id.*

But, as explained in the Plan of Distribution, the DTCC data does not "identify the time of day when a transaction occurred." Ex. A ¶ 9; *see also* Unni Decl. ¶ 17. It is therefore not possible to use the dataset underlying the model to determine whether two separate transactions were conducted *simultaneously* as part of an arbitrage trade.[21]

To the extent they recognize this problem with their claims, Objectors vaguely speculate that Co-Lead Counsel should be responsible for going on a hunt for granular, *individualized* data

[21] As a matter of economic logic, it would be surprising that a buy-side class member could engage in a full package trade with a single dealer. Unni Decl. ¶ 59. If an arbitrage opportunity is available, a single dealer would appear to have little incentive to allow a class member to take advantage of the opportunity through a discounted package trade because the class member would do so at the dealer's expense. *Id.* Accordingly, to the extent class members engaged in package trades, they would likely have conducted the various trades underlying the strategy with multiple dealers and potentially over various types of product types. *Id.* But, if they did that, then there is no "package" for a single dealer to discount and part of the purported "packaged" transactions may not even be a CDS trade. *Id.*

not in Co-Lead Counsel's possession from multiple sources at untold expense and complexity. At times, Objectors have suggested that Co-Lead Counsel should get the data from the Defendant banks. Alternatively, if the Defendant banks, which have no further discovery obligations under the Settlement, do not have it or are unwilling to produce it, Objectors claim Co-Lead Counsel should subpoena other class members.

There is no requirement that a distribution plan must use every piece of data hypothetically available, above and beyond that obtained by counsel during the litigation of the case. Here, even if any such approaches were practical or possible, which they are not, they would likely cost more in consulting fees to implement than the total value of all package arbitrage or correlation trades that might potentially be removed from the universe of Covered Transactions through application of a fair and objective methodology — and it would no doubt take many, many months if not more than a year.[22] This means that delaying the distribution of Settlement proceeds in an attempt to act on Objectors' proposals would amount to, at most, a Pyrrhic victory for the Class, and at worst, a complete waste of time.

Given the realities of the available data, any effort to identify such "package" transactions in the available dataset will fundamentally be subjective, arbitrary, and over- and under-inclusive. Unni Decl. ¶¶ 55, 80-86. This is, indeed, why Objectors' own proposed approaches to the package arbitrage issue are themselves arbitrary. For example, Anchorage and MF Global propose identifying certain arbitrage transactions by looking for transactions conducted on the "same day." *See* Dkt. No. 494 at 3; Dkt. No. 491 at 5. This methodology, however, would inevitably label some trades as "arbitrage" transactions even when they are not conducted

[22] Moreover, following notice of the revised Plan of Distribution there would, no doubt, be new objections to the adjustments made to address the "packaged" trades, or other new types of trades or purported failings of the Plan, and the process would invariably repeat itself.

simultaneously. Saba's proposal to look for "off market" trades is vague and also fails to provide any objective methodology of identifying simultaneous packaged transactions.

Similarly, for "CDS index tranche hedge trades" or "correlation trades" (trades in which an investor trades an index CDS at the same time as a tranche CDS referencing the same index), Anchorage and MF Global both propose looking to whether a CDS index contract and a CDS tranche contract were traded on the "same day." Dkt. No. 491 at 5 (MF Global); Dkt. No. 494 at 4 (Anchorage). But again, this definition is over-inclusive because it would inevitably capture transactions that are not simultaneous. Unni Decl. ¶¶ 68-70. Moreover, because such trades would typically involve different notional amounts on each leg of the trade, it is impossible to distinguish empirically such hedging trades from other pairs of non-package trades, and there is therefore no objective way to isolate such trades in the DTCC dataset. *Id.*

Underscoring the arbitrary and highly subjective nature of Objectors' proposals, Anchorage, MF Global, and Saba's proposed solutions to the alleged problem of "index arbitrage" trades are, in fact, contradictory. For example, to identify such transactions:

- Anchorage suggests looking to transactions "[w]here a CDS contract, option or tranche relating to an index was traded the same day as a CDS contract, option or tranche relating to at least ***75%*** of that index's underlying components";[23]

- MF Global suggests looking to "whenever a credit derivative index was traded the same day as at least ***60%*** of that index's underlying components";[24]

- Saba recognizes that "[t]rading an index arbitrage package requires simultaneously buying or selling a credit index and buying or selling all of the underlying single names that make up the index." Nonetheless, Saba asserts that because "[i]ndex Arbitrage Package [] trades are typically booked at 100bps or 500bps with fees

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[23] *See* Dkt. No. 494 at 3 (emphasis added).

[24] *See* Dkt. No. 491 at 5 (emphasis added).

passed on to the index trade [and a]ny off market trades done could be considered as part of the index arbitrage package";[25]

- For its part, Silver Point does not even attempt to offer a solution to the purported package arbitrage problem it raises in its objection. It simply asserts that "the plan for distribution of settlement funds should be adjusted so that the damage awards reflect the actual inappropriate bid-ask spreads incurred by each class member's trading strategies," without explaining any way in which this could reasonably be done.[26]

Plainly, Anchorage and MF Global have proposed conflicting solutions, as MF Global's proposed 60% threshold would require discounting some transactions which, under Anchorage's proposed 75% threshold, would not qualify as "arbitrage" transactions at all and would thus receive the same payment as they would under the proposed Plan of Distribution. Even taken individually, these proposals ignore that a true arbitrage transaction would involve trading ***100%*** of an index's underlying constituents. Unni Decl. ¶ 57. While Saba's Objection acknowledges this, Saba's proposal to use a different and even more ill-defined methodology nonetheless confirms that Objectors have not offered workable solutions.

As explained in the Declaration of Dr. Unni, *any* set of assumptions used to identify supposed package trades (whether arbitrage or correlation) would inevitably identify both "false positives" and "false negatives." Unni Decl. ¶¶ 80-86. It would identify "false positives" — trades that are, in fact, isolated trades, but are deemed "package transactions" — because there is no set of assumptions that can reliably pinpoint package transactions given the available datasets. *Id.* Any proposal would also result in "false negatives" — failures to identify trades that Objectors likely *would* characterize as "package transactions" — because of the numerous

[25] *See* Dkt. No. 497 at 1, 2. Saba does not explain what it means by "off market" trades, and Co-Lead Counsel and their experts are not currently aware of any way to identify such alleged trades in the DTCC dataset.

[26] *See* Dkt. No. 496 at 3.

hypothetical forms such transactions could take. *Id.* ¶¶ 83-86. This means that any proposal to address package trades will necessarily be arbitrary and unreliable. *Id.*

Moreover, based on the work done by Co-Lead Counsel to investigate the Objections, there is no reason to believe that even if an objective identification mechanism existed these transactions represent anything other than, at most, a *de minimis* portion of the immense set of Covered Transactions in the DTCC dataset. Unni Decl. ¶¶ 87-111. Accordingly, altering the Plan of Distribution to account for such transactions is unlikely to impact materially the distribution of settlement funds among class members. *See Id.* ¶ 87.

The Plan of Distribution is vastly preferable to the ambiguous, under-specified, arbitrary alternatives proposed by Objectors to address overstated theoretical concerns. *See In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192-93 (S.D.N.Y. 2012) (rejecting objection which "criticizes the plan of allocation because it assigns a uniform inflation value" because in the context of settlement approval, the rationale for allocation "need not overwhelm . . . all competing theories of damages" but instead "need only be reasonable and rational"); *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115809, at *14 ("The Plan of Allocation fairly, equitably, and adequately allocate the proceeds of the settlement among the class members who submit valid claims, with a minimum of complication, ensuring efficiency in claims administration.").

B. MF Global's Other Distribution-Related Objections Are Meritless

MF Global makes a far more radical objection, asserting (without any support whatsoever) that the Plan of Distribution is flawed because it does not draw amorphous distinctions among the 14,000 class members that would advantage some and disadvantage others because, according to MF Global, "the Dealer Defendants generally treated class members differently depending on how they viewed the account, including, e.g., whether they viewed it as a 'fast money' or 'real money' account." Dkt. No. 491 at 4.[27]

It is, frankly, surprising that MF Global (or any other class member) would argue that, to be reasonable, the Plan of Distribution must make distinctions among each and every class member based on how the twelve Dealer Defendants supposedly "viewed the account." Dkt. No. 491 at 4. Such an approach is not just unworkable on its face; it is flatly inconsistent with class-wide treatment. It is also unclear what "fast money" or "real money" refer to, and MF Global never bothers to define these terms (or provides any support for its assertion) — and, of course, these are just presented as non-exclusive *examples* of things MF Global suggests comprise how accounts are "viewed" by twelve different banks.

MF Global's proposal to classify each class member on how it is "viewed" by the Defendant banks is also clearly unworkable. Every class member would have a financial incentive to show that it should qualify for the category that supposedly paid the higher spreads (so its damages numbers would increase). Such an approach would engender considerable objections if not outright hostility, pitting one class member against another. Countless disputes would arise. No one would see their money under the Settlement for years, if at all. MF Global betrays no concern for these outcomes at all.[28]

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[27] Notably, Silver Point appears to say the exact opposite in its Objection, and asserts that "the Defendants' most active clients in CDS … likely received discounted bid-ask spreads simply by virtue of their frequent use of the product[.]" Dkt. No. 496 at 3. Like MF Global, Silver Point's assertion is based on nothing more than its own say-so, and is not supported by analyses of the datasets reasonably available to Co-Lead Counsel. *See* Unni Decl. ¶¶ 118-123.

[28] The Court may recall that MF Global, through the same counsel who represents it as an objector, filed its own case as a class representative in this matter. After the Court selected Co-Lead Counsel for the case, we in fact invited MF Global to be one of the class representatives in the consolidated and amended complaint — but it declined the opportunity to do so.

MF Global's assertions are also wholly conclusory. The peer-reviewed literature on the CDS market does not support this assertion (that CDS pricing varies based on the customer), and instead shows that CDS pricing depends on the liquidity of the underlying instrument, among other factors. *See* Unni Decl. ¶¶ 36, 127-131. As noted, the Plan of Distribution already accounts for the factors affecting spreads that are actually supported by the literature. Moreover, Co-Lead Counsel's experts examined the Markit bid-ask spread quote data and determined that there is *no evidence that MF Global actually experienced worse bid-ask spreads than other class members*. *See id.* ¶¶ 118-123.

MF Global also argues that the Plan should not be approved until a variety of other esoteric types of trades are identified and discounted. *See* Dkt. No. 491 at 5 ¶ 5a-f. Again, MF Global does nothing to show that these trades were anything but *de minimis*.[29] Nor does it provide any feasible or practicable way to identify them given the limitations of the class-wide data. For example, MF Global's proposal for identifying "convexity/curve trades," would presumably require additional, novel, extensive modeling for very little if any benefit, as such trades cannot reliably be identified in the DTCC dataset and appear to occur very infrequently. *See* Unni Decl. ¶¶ 63-67, 98-104. Similarly, so-called "single-name rolls" cannot be reliably and objectively identified in the reasonably available class-wide datasets and, in any event, appear to represent an insignificant fraction of Covered Transactions in the DTCC dataset. The Settlement should not be held up on account of such marginal issues. *In re Nissan Radiator/Transmission Cooler Litig.*, No. 10 Civ. 7493 (VB), 2013 WL 4080946, at *13 (S.D.N.Y. May 30, 2013) (rejecting objection to plan of distribution, noting that "[a] line must be drawn somewhere and

[29] For example, even assuming MF Global's ill-defined criteria accurately identify arbitrage trades involving CDS options (which MF Global terms "single name Payer/Receiver options") such trades appear to comprise a truly marginal subset of all CDS transactions during the relevant time period. *See* Unni Decl. ¶¶ 75-79.

the line drawn in this action reflects a compromise by informed counsel appropriately balancing the risks of litigation with immediate rewards to the class”).

C. The Remaining Objections are Baseless

Three other objections have been raised, which are addressed in turn below.

1. Class Members Are Not Entitled to a Final Determination at this Stage and May Not Contingently Opt Out

Anchorage, MF Global, and Silver Point asserted, without citing any authority, that the Settlement should not be approved because the settlement website does not yet include certain of their Covered Transactions. *See* Dkt. No. 494 at 2 (Anchorage); Dkt. No. 491 at 2 (MF Global); Dkt. No. 496 at 2 (Silver Point). These objections are now moot because Objectors have successfully availed themselves of the “challenge” process available to every class member on the settlement website, and the vast majority of these trades will now be included in Objectors’ claims.[30]

Anchorage and Silver Point also claim (again without any legal support) that they should be able to defer the decision about whether to opt out until the final completion of the claims process. Unsurprisingly, they offer no legal support for this claim either. It is well accepted that “[o]ften … the details of allocation and distribution are not established until after the settlement is approved.” *Manual for Complex Litigation (Fourth)* § 21.312 (2004). *See also* 2 McLaughlin on Class Actions § 6:23 (12th ed.) (“The methodology or formula for the calculation of a

[30] To the extent these objections remain relevant, there is certainly no *legal obligation* that class counsel identify for every class member each and every one of their transactions that qualify for claims under a settlement. Here, Co-Lead Counsel went above and beyond what is required to identify the Covered Transactions for each class member from the DTCC dataset. The fact that Co-Lead Counsel did so should not now be turned around against them simply because there may be some additional transactions that were not identified.

claimant's share should be described. This is all that is required, and class members usually will not know the amount they actually will receive until after final approval is granted.").

The fact that "actual amounts" of the distribution "will be subject to further allocation procedures" is also not "any impediment to approval." *In re Michael Milken & Associates Sec. Litig.*, 150 F.R.D. 57, 67 (S.D.N.Y. 1993); *see also In re Drexel Burnham Lambert Grp., Inc.*, 130 B.R. 910, 925 (S.D.N.Y. 1991), *aff'd*, 960 F.2d 285 (2d Cir. 1992) ("It is not an impediment to approval of the Settlement that the actual amounts to be distributed to Class members will be subject to further allocation procedures. . . ."). It is impracticable for each class member to know with mathematical precision what its payment will be prior to making a decision about whether to remain a class member. *See In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 170 (2d Cir. 1987) ("To impose an absolute requirement that a hearing on the fairness of a settlement follow adoption of a distribution plan would immensely complicate settlement negotiations and might so overburden the parties and the district court as to prevent either task from being accomplished."). To adopt the logic of the objectors would be exceedingly complicated and costly, as "[c]laims administrators do not typically begin to process claims until a detailed plan of allocation has been developed and approved by the Court, because it will significantly increase the costs of administration to do so." *In re Worldcom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2005 WL 517331, at *2 (S.D.N.Y. Mar. 4, 2005).[31]

For the same reasons, Anchorage and Silver Point's assertion that they should be allowed to "contingently opt out," *i.e.*, file objections while reserving the option to opt out if the court rejects those objections, also lacks merit. *See* Newberg on Class Actions § 13:23 (5th ed.);

[31] Although in the different context of future legal proceedings, the Second Circuit recently reaffirmed the general principle that "[a] district court is capable of determining whether a settlement is fair and reasonable notwithstanding important contingencies." *See In re Elec. Books Antitrust Litig.*, No. 14-4649 L, 2016 WL 624505, at *3 (2d Cir. Feb. 17, 2016).

Olden, 472 F. Supp. 2d at 930 ("Rule 23(e) does not expressly allow for contingent objections or contingent opt-outs" and observing that "opting out of a settlement and choosing to object logically are mutually exclusive options"). "The Second Circuit has explicitly rejected the contention that Class Members must be given a second opportunity to opt out after the terms of a settlement are announced." *In re Worldcom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2005 WL 2319118, at *19 (S.D.N.Y. Sept. 21, 2005) (citing *Wal-Mart*, 396 F.3d 96).[32]

2. The Objections to the Release Provision Are Baseless

MF Global alone objects that the Settlement release provisions are ambiguous and overly broad. Dkt. No 491 at 2-3. The releases are reasonable, precise, and appropriate to resolve this complex litigation. As is standard and uncontroversial, the releases cover claims that were alleged and those claims that could have been alleged based on the identical factual predicate of the claims in this litigation. *See* ¶ 4(d) (limiting release to claims "that are alleged or that could have been alleged in the Action relating in any way to any CDS Transactions or Potential CDS Transactions").

MF Global argues that the Settlement is ambiguous about whether it releases MF Global's purported claim that it was denied the ability to make markets on CDS trading platforms or to serve as a clearing member for a CDS clearinghouse. The Settlement does *not* release this claim. The Settlement only releases claims by *buy-side* entities in connection with *the payment of inflated bid-ask spreads*. It does not release claims by potential market makers or clearing members.

[32] Again, the Objectors fail to cite a single case in support of any of their positions, likely because none exist. *Cf. Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 641 (5th Cir. 2012) ("objectors point to no cases requiring a second round of notice to class members, nor an extended filing deadline, when a plan of allocation is amended").

"CDS Transactions" and "Potential CDS Transactions" are defined in ¶ 2(e) as involving transactions with quotes and spreads; that is, they refer to transactions where a class member is acting as a *customer* of the Dealer Defendants, not as a market maker or a clearinghouse member. Nor could such claims, which are necessarily specific to MF Global, "have been alleged" by the named Plaintiffs in this class action. ¶ 4(d). The named Plaintiffs had no standing or ability to pursue claims by MF Global as a market marker or potential clearing member; and they did not pursue such claims in the litigation.

In any event, to the extent MF Global believes the Settlement releases claims that it wants to prosecute, or that the Settlement will not properly compensate it for the release of claims, it could have opted out. *See* 2 McLaughlin on Class Actions § 6:10 (12th ed.) ("courts frequently overrule objections that can be cured by the objector simply opting out of the class, such as objections about the scope of the proposed release").[33] *See also In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2004 WL 2591402, at *13 (S.D.N.Y. Nov. 12, 2004) (rejecting objection regarding scope of release because "[i]f a member of the putative Norman class believed she would have been better served by pursuing her WorldCom related claims in the Norman action, that person could have 'opted out' of the consolidated class action").

The same is true of Silver Point's objection regarding the release of any post-September 2015 claims. No class member, including Silver Point, has contended that a recovery of over $1.86 billion is not a fair value for the release, which is limited to claims arising out of the same factual predicates as the claims alleged here, and does not extend to *any conduct* occurring after June 30, 2014. *See* ¶ 4(d).

[33] *See also* Newberg on Class Actions § 13:23 (5th ed.) ("class members may either object or opt out, but they cannot do both"); *In re Nat'l. Football League Players' Concussion Injury Litig.*, 307 F.R.D. 351, 423 (E.D. Pa. 2015) ("The choice between opting out and objecting is not coercive.").

3. Class Members Had Adequate Time to Assess the Settlement and to Decide Whether to Opt Out

Silver Point claims it did not have "sufficient opportunity" to assess its rights prior to the opt-out deadline. Dkt. No. 496 at 1. But notice and description of the Settlement were sent to class members on January 11, 2016, and individual claimants were provided a tremendous amount of additional information about their transactions on January 29, 2016. In fact, as of that date, Co-Lead Counsel had provided a detailed explanation of the Plan of Distribution *and* provided data to Silver Point showing exactly how the plan applies to *over 6,400 of Silver Point's own transactions* — transactions that Co-Lead Counsel and their experts collected and assembled for Silver Point. That accounting identified eighteen different data fields for each transaction, amounting to approximately 116,874 fields of data for Silver Point to review showing exactly how the claims model applies to each of Silver Point's identified transactions.

Thus Silver Point had over forty-five days to evaluate the terms of the Settlement and thirty days to evaluate its own transactions before it was required to make an opt-out decision. As this Court has held, sending notice "approximately thirty days before the opt-out deadline" is "an adequate notice period." *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2005 WL 1400175, at *3 (S.D.N.Y. June 15, 2005); *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 193 (S.D.N.Y. 2012) ("Courts have held that opt out periods of less than 45 days satisfy due process, even where unsophisticated class members must make decisions regarding complex issues of law or fact.").[34] Silver Point offers "nothing but conclusory assertions" for why the

[34] *See also In re Marsh & McLennan Companies, Inc. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *23 (S.D.N.Y. Dec. 23, 2009) (noting that "[c]ourts have repeatedly found [a thirty day] time period to constitute sufficient notice"); *Berman v. L.A. Gear, Inc.*, No. 91 Civ. 2653 (LBS), 1993 WL 437733, at *2 (S.D.N.Y. Oct. 26, 1993), *aff'd*, 29 F.3d 621 (2d Cir. 1994) (rejecting claim by class member that he had inadequate time to opt out when he had less than three weeks to evaluate settlement).

settlement is so complex that this period of time was insufficient. *In re WorldCom, Inc. Sec. Litig.*, 2005 WL 1400175, at *4. It provides no explanation as to what analysis it could not conduct within thirty days, or what additional analysis it would do over its proposed four-week extension of the opt-out deadline.

The FFI Fund Group[35] similarly objects that it has not received sufficient information to "analyze the methodology and pricing models and determine whether the proposed allocation . . . is fair and reasonable." Dkt. No. 489 at 1. What additional information the FFI Fund Group needs is never described. Like Silver Point, the FFI Fund Group was provided a tremendous amount of information in connection with the settlements and distribution plan. Information regarding the Settlement, copies of the Settlement Agreements, Notice, Proof of Claim, Preliminary Approval Order, and other relevant documents were posted on the settlement website. The FFI Fund Group was provided a detailed explanation of the Plan of Distribution, information about what transactions are covered, how they are valued, and how claims will be awarded. In total, this amounted to eighteen data fields for each of approximately 27,396 transactions entered into by the FFI Fund Group. This information is more than adequate for the FFI Fund Group to evaluate the Plan of Distribution. The Notice and other information provided was "comprehensive and yet comprehensible" and there is accordingly "no basis to find a flaw in this regard." *In re WorldCom, Inc. Sec. Litig.*, 2004 WL 2591402, at *11 (rejecting objectors' argument that the notice "did not adequately explain the benefits of the settlement to the class members").

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[35] The "FFI Fund Group" refers to FFI Fund Ltd.; FYI Ltd.; Olifant Fund, Ltd.; and Asset-Backed Recovery Fund, Ltd.

D. In the Event of An Appeal, Plaintiffs Will Request An Order Providing for Certain Payments by Any Objector-Appellant

If the Court grants final approval to the Settlement, a considerable cash fund will be available to class members. Any appeal by any of the Objectors, much like the objection on which it is based, would be without merit. Nevertheless, an appeal could delay payments for over a year. The delay caused by an appeal would harm the class by draining money from the Settlement Fund to pay for new costs brought about by an appeal. To safeguard the class from further injury, if an appeal is taken, Plaintiffs will likely request that the Court require any appellant-objector to post a bond.

Under Rule 7 of the Federal Rules of Appellate Procedure and the Court's inherent authority to protect the class, a court may require an appeal bond comprised of "'all costs properly awardable in an action.'" *In re Gen. Elec. Co. Sec. Litig.*, 998 F. Supp. 2d 145, 151 (S.D.N.Y. 2014) (Cote, J.) (quoting *Adsani v. Miller*, 139 F.3d 67, 72 (2d Cir. 1998)). In this case, Plaintiffs will likely request that an appellant-objector post a bond reflecting all costs of an appeal, including unnecessary delay and attorneys' fees.[36]

A district court may also "impose a Rule 7 Bond in the amount of the additional administrative expenses that are reasonably anticipated from the pendency of the appeal." *Id.* at 153. Courts often include the costs of delay and additional expenses associated with an

[36] Factors courts consider when assessing whether a Rule 7 bond should be imposed are: "(1) the appellant's financial ability to post the bond; (2) whether the appeal is frivolous; and (3) whether the appellant has engaged in any bad faith or vexatious conduct. Of these, the first two are of the greatest importance." *Id.* at 153. Here, as will be explained in detail in a formal motion for a Rule 7 bond if any appeal is taken, all criteria weigh in favor of imposition of a bond.

objector's appeal in a Rule 7 bond under the Federal Rule of Appellate Procedure 38 umbrella of "damages" or courts' inherent powers. *See id.* at 151-53 (collecting cases).[37]

Attorneys' fees may also be appropriate to include in a Rule 7 appeal bond. *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 124 (S.D.N.Y. 1999) held that attorneys' fees were properly included where "costs" under Rule 7 can include the definition of "costs" in the relevant substantive statute under which appeal is sought: "In the present action, the relevant substantive statute is section four of the Clayton Act, which provides for the recovery of the 'cost of suit, including a reasonable attorney's fee.'" *Id.* at 128 (internal citation omitted). Accordingly, the *NASDAQ* appellant-objector to the antitrust class action antitrust settlement was required to post a bond in the amount of $101,500, which included "(1) costs on appeal; (2) attorney's fees on appeal; and (3) damages resulting from the delay and/or disruption of settlement administration caused by his appeal." *Id.* at 129.[38]

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[37] *See also Hall v. Cole*, 412 U.S. 1, 4-5 (1973); *Adsani v. Miller*, No. 94 Civ. 9131 (DLC), 1996 WL 671108, at *3 (S.D.N.Y. Nov. 20, 1996) *aff'd,* 139 F.3d 67 (2d Cir. 1998) ("While I do not find that the 'costs' provision of Rule 39, Fed. R. App. P., should be read to include attorney's fees, I do find that I have the authority to require plaintiff to file a bond that would cover both costs and attorney's fees from the appeal."). *See also, e.g.*, *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. MDL 1361, 2003 WL 22417252, at *1-2 (D. Me. Oct. 7, 2003) (requiring objector to post Rule 7 bond where appeal "might be frivolous" and agreeing that "damages resulting from delay or disruption of settlement administration caused by a frivolous appeal may be included in a Rule 7 bond"); *Dennings v. Clearwire Corp.*, 928 F. Supp. 2d 1270, 1272 (W.D. Wash. 2013) ("courts have interpreted Rule 7 broadly to include increased expenses in settlement administration and administrative costs" and imposing $41,150.00 Rule 7 appeal bond, of which $39,150 was additional administrative costs).

[38] Other courts have followed this approach. *See In re AOL Time Warner, Inc., Sec. & "Erisa" Litig.*, No. 02 Civ. 5575 (SWK), 2007 WL 2741033, at *4 (S.D.N.Y. Sept. 20, 2007) (observing that "[t]he Second Circuit allows the inclusion only of those costs enumerated in Appellate Rule 39, 28 U.S.C. § 1920, or the substantive statute underlying the appeal" and citing as an example "*In re NASDAQ*, 187 F.R.D. at 128 (including attorney's fees in bond pursuant to Clayton Act)"); *Hill v. State St. Corp.*, No. 09 Civ. 12146 (GAO), 2015 WL 1734996, at *3 (D. Mass. Apr. 16, 2015) (imposing Rule 7 bond in the amount of $75,300, reflecting in part attorneys' fees and expenses); *In re Pharm. Indus. Average Wholesale Price Litig.*, 520 F. Supp. 2d 274, 277 (D. Mass. 2007) ("when the district court determines that an appeal may be frivolous,

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court (i) grant Final Approval, (ii) approve the Plan of Distribution, (iii) certify the Settlement Class, and (iv) overrule the objections. A Proposed Final Judgment and Order of Dismissal for each of the fourteen settling Defendants and a Proposed Order Approving Plan of Distribution and Overruling Objections have been submitted to the Orders and Judgments Clerk pursuant to Southern District ECF Rule 18.3.

DATED: New York, New York
April 1, 2016

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it may require security for the costs, including appellate attorneys' fees that may be awarded on appeal pursuant to Fed. R. App. P. 38 and 39 as a sanction for a frivolous appeal").

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Exhibit A

In Re: CDS Antitrust Litigation

Overview of Plan for Distributing the Settlement Fund to Claimants

1. The Net Settlement Fund (that is, the $1,864,650,000 fund including any interest earned and net of any Court-approved attorneys' fees, expenses, and incentive awards) will be distributed to Class Members who submit qualifying claims on a *pro rata* basis. This process will occur in three steps: (1) identifying the "Covered Transactions," as defined in Paragraph 2(i) of the Settlements, qualifying for claims under the Settlements; (2) for each qualifying Covered Transaction, estimating the amount of bid-ask spread inflation resulting from the Dealer Defendants' alleged conduct; and (3) calculating the *pro rata* share of an individual claimant's Settlement proceeds in relation to the total Settlement proceeds for all claimants that submit a valid claim.

   Further information about each of these steps is provided below. To the extent changes to this Plan of Distribution are made, this document will be updated to reflect them.

I. Identifying Covered Transactions

2. In accordance with the terms of the Settlements, a transaction must be a Covered Transaction, as defined in Paragraph 2(i) of the Settlements, to be eligible for Settlement proceeds.

3. To qualify as a Covered Transaction under the Settlements, a class member must have incurred a bid-ask spread in connection with the purchase or sale of a CDS contract with one of the Dealer Defendants or their affiliates in which: (i) the purchase or sale was by or on behalf of a Person either domiciled or located (*e.g.*, had a principal place of business) in the United States or its territories at the time of such purchase or sale; (ii) if the Person was domiciled and located outside the United States and its territories at the

time of any such purchase or sale, where such purchase or sale was in United States commerce; or (iii) such purchase or sale otherwise falls within the scope of the U.S. antitrust laws.

4. To identify Covered Transactions, Plaintiffs' counsel and their consulting experts have obtained and analyzed records maintained in the Depository Trust & Clearing Corporation's ("DTCC's") Trade Information Warehouse ("DTCC Trade Dataset"). The DTCC Trade Dataset is a global repository that captures information about each CDS transaction registered with the DTCC.

5. Plaintiffs' counsel and their consulting experts have taken a number of steps to assemble, organize, and analyze the data in order to identify Covered Transactions for each potential claimant.

6. Transactions that would not have been adversely impacted by the alleged conspiracy or that do not meet certain legal requirements do not qualify for claims under the Settlements. These transactions have been removed from the set of Covered Transactions. The following are examples of transactions that do not qualify for claims:

   a. Transactions that fall outside the Class Period of January 1, 2008 – September 25, 2015;

   b. Transactions that were not directly between a Class Member and one of the Dealer Defendants or their affiliates; and

   c. Transactions that are not confirmed trades, terminations, or assignments in the DTCC Dataset, such as bookkeeping entries or other entries that are noneconomic in nature, including trade compression entries or entries with $0 notional amounts.

d. In addition, Plaintiffs' consulting experts have removed duplicate transaction records (such as where trade information was submitted to the DTCC by both counterparties) and taken other steps to avoid the double counting of transactions or the overstatement of affected notional volume due to index rolls. They also removed transaction records containing an invalid DTCC reference ID.

7. Plaintiffs' counsel and their consulting experts have also worked with the Settlement Administrator (Garden City Group, LLC) to remove transactions that do not have a sufficient connection to United States commerce to qualify as a Covered Transaction under the settlement. This work involved, among others, the following steps:

a. Using public databases and information provided by the DTCC and the Dealer Defendants, Plaintiffs' counsel worked with the Settlement Administrator to determine the domicile and location of Class Members. All qualifying transactions involving a Class Member domiciled or located in the United States or its territories are treated as Covered Transactions.

b. Plaintiffs' counsel also worked with the Settlement Administrator to determine the domicile and location of the Dealer Defendants. All qualifying transactions between Class Members and a Dealer Defendant that is domiciled or located within the United States or its territories are also treated as Covered Transactions.

c. Qualifying transactions between a Class Member domiciled and located outside of the United States and its territories and a Dealer Defendant domiciled and located outside of the United States and its territories are not treated as Covered Transactions unless data provided by a Dealer Defendant (or otherwise) shows that the transaction was executed at a U.S. trading desk or that the trade otherwise occurred in U.S. commerce or falls within the scope of the U.S. antitrust laws.

8. All qualifying Covered Transactions were sorted by Class Member in order to make them available to each potential claimant. Additionally, Plaintiffs' consulting experts converted non-U.S. dollar denominated transactions into U.S. dollars.

II. Estimating the Bid-Ask Spread Inflation on Covered Transactions

9. Because the DTCC Trade Dataset does not include information about the bid-ask spread paid by a Class Member on each transaction, and it also does not identify the time of day when a transaction occurred, Plaintiffs' counsel and their consulting experts have worked to estimate the applicable bid-ask spread for each Covered Transaction using data produced by Defendant Markit ("the Markit Data").

10. The Markit Data captures quotes provided to Markit by the Dealer Defendants throughout the Class Period. Unlike the DTCC Trade Dataset, the Markit Data includes the date and time of each upfront bid and ask quote provided by the Dealer Defendants for a specific CDS contract and tenor. The Markit Data also provides a measure of the quote quality based on algorithms created by Markit (from 0 at the low end, to 10 at the high end).

11. In estimating the bid-ask spreads, Plaintiffs' consulting experts utilized quotes in the Markit Data only when: (a) both the bid and ask fields were populated for an individual quote; (b) the quotes came from one of the Dealer Defendants or their affiliates; and (c) the Markit quote quality score was 8.5 or higher. Any Markit quotes that were published

as part of "blast" runs (*i.e.*, where the quotes were sent contemporaneously to multiple recipients and appeared as multiple records in the Markit Data) were reduced to a single entry.

12. The resulting subset of quotes was sorted by reference entity (or index series), tenor, date, and time-stamp. Plaintiffs' consulting experts identified the narrowest spread within each hour and averaged across all hours within a trading day to establish an average bid-ask spread for contracts with that reference entity (or index series) and tenor on each day (the "Markit Bid-Ask Spread").

13. Some CDS contracts, such as certain single name and index CDS, were quoted in running spreads in the Markit Data. Plaintiffs' consulting experts converted these quotes to equivalent upfront bid and ask prices using the ISDA CDS Standard Model. The source code for this model is available on ISDA's website. *See ISDA CDS Standard Model*, http://www.cdsmodel.com/cdsmodel/ (last accessed Jan. 8, 2016).

14. Plaintiffs' consulting experts then matched the notional amount of each Covered Transaction to that transaction's respective Markit Bid-Ask Spread.

    a. Most Covered Transactions were matched using the CDS contract's reference entity (or index series), tenor, and trade date as reported in the DTCC Trade Dataset.

    b. As single name, index, and tranche CDS contracts with tenors of 3, 5, 7, and 10 years were traded more frequently than other tenors, contracts with different tenors were matched with the Markit Bid-Ask Spread for the most similar 3, 5, 7, or 10 year tenor on the same reference entity (or index series) and trade date.

c. On certain dates when the Markit Data did not provide any quotes with quality scores of 8.5 or higher, Plaintiffs' consulting experts used an algorithm to search for a contemporaneous Markit Bid-Ask Spread using data from up to 15 trading days before and up to 15 trading days after the trade date. If no Markit Bid-Ask Spread could be found within this window, they used the average daily bid-ask spread for the Markit industry sector (*e.g.*, financial, consumer goods, or energy sectors) applicable to that CDS.

d. For some categories of CDS contracts, Markit Data quoted in upfront terms was not readily available for certain periods. This was the case for CMBX from January 1, 2008 to mid-April 2009 and tranche CDS before 2010. For CMBX, Plaintiffs' consulting experts constructed a proxy using the ratio of CMBX bid-ask spreads to ABX bid-ask spreads on days when both were available in upfront terms. This ratio was then applied to the ABX bid-ask spreads and used as an estimate for CMBX spreads on days where CMBX spreads in the Markit Data were unavailable. For tranche CDS, Plaintiffs' consulting experts constructed a proxy using the relationship between the tranche bid-ask spread and a related index bid-ask spread. For POS and MBX contracts, Plaintiffs' consulting experts derived a proxy from the average bid-ask spread for IOS contracts. In other cases, a proxy was constructed using the underlying institutional and economic characteristics of the CDS contracts.

15. A buy-side entity does not incur the full spread on a transaction, but rather incurs only one half of the bid-ask spread, commonly known as the "half spread." To account for this, when the DTCC notional trading volumes for each Covered Transaction are matched

to a Markit Bid-Ask Spread, the spread is reduced by one-half (the "Markit Half-Spread").

16. Plaintiffs' consulting experts then estimated the amount of spread inflation (for claims purposes only) on the Markit Half-Spread applicable to each Covered Transaction. Based upon a review of empirical evidence on spread compression experienced in other markets and evidence obtained in discovery from Defendants, Plaintiffs' counsel and their consulting experts have estimated the bid-ask spread inflation associated with each Covered Transaction, for claims administration purposes only, to be 20%.

17. This percentage does not necessarily reflect the percentage that Plaintiffs would have advocated for in the litigation of these claims, but is being used only for purposes of this claims administration process. Since this inflation percentage is applied consistently across all transactions, *pro rata* recoveries are not affected by the specific percentage applied for purposes of claims administration.

III. Calculation of Each Claimant's Pro Rata Share of Settlement Proceeds

18. Each Class Member may submit a claim for its share of the Net Settlement Fund.

19. Each Class Member will be able to review the Covered Transactions that have been identified as applicable to it based on the processes outlined above. Class Members will also have the opportunity to submit additional transactions and information for consideration.

20. Upon the Settlements and the Plan of Distribution being granted final approval by the Court, and after all claims have been submitted, reviewed, and processed, each individual

claimant's *pro rata* share of the Net Settlement Fund can then be calculated by the Settlement Administrator.

21. To make this calculation, the Settlement Administrator will sum the spread inflation, as estimated using the methods outlined above, on each Covered Transaction for each Class Member that submits a claim. This sum will represent each claimant's individual spread inflation.

22. The Settlement Administrator will then sum the total spread inflation, as described above, across each and every claimant. This amount will represent the total spread inflation of all claimants.

23. The Settlement Administrator will then compute each individual claimant's claim ratio. This is the ratio of the claimant's individual spread inflation to the total spread inflation of all claimants.

24. Finally, the Settlement Administrator will compute the individual claimant's *pro rata* share of the Settlements by multiplying the individual claimant's claim ratio by the Net Settlement Fund.

25. Payment of each claimant's *pro rata* share of the Net Settlement Fund will be made by check or wire transfer as designated on the claimant's claim form.