UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE LIBOR-BASED FINANCIAL INSTRUMENTS ANTITRUST LITIGATION	MDL No. 11-md-2262 (NRB)
THIS DOCUMENT RELATES TO:	
The OTC Action	No. 11-cv-5450

MEMORANDUM IN SUPPORT OF OTC PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

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[1] *Laydon v. Mizuho Bank, Ltd.* (*Laydon II*), No. 12-cv-3419 (S.D.N.Y. Dec. 7, 2017), is attached as Exhibit A to the Declaration of Geng Chen in Support of OTC Plaintiffs' Motion for Attorneys' Fees and Expenses, filed concurrently herewith. Class counsel's brief in support of the attorneys' fee request granted in *Laydon II*, *see* Mem. of Law in Supp. of Class Counsel's Mot. for Award of Attorneys' Fees, *Laydon v. Mizuho Bank, Ltd.*, No. 23-cv-3419 (S.D.N.Y. Oct. 31, 2017), ECF No. 816 [hereinafter *Laydon II* Br.], is attached to that declaration as Exhibit B. All other unpublished pleadings, orders, and hearing transcripts not available on Westlaw that are cited in this memorandum were previously submitted to the Court as exhibits to the Declaration of Geng Chen in Support of OTC Plaintiffs' Supplemental Memorandum in Support of OTC Plaintiffs' Application for an Award of Attorneys' Fees and Expenses, filed on November 15, 2017. *See* Dkt. 2352.

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I. INTRODUCTION

Court-appointed interim co-lead class counsel Susman Godfrey L.L.P. and Hausfeld LLP ("Class Counsel") respectfully submit this memorandum in support of the OTC Plaintiffs' application for an award of attorneys' fees and expenses in connection with the settlement between defendants Citigroup Inc. and Citibank, N.A. (collectively, "Citibank") and OTC Plaintiffs (the "Citibank Settlement").

To date, OTC Plaintiffs have achieved settlements in this case totaling $250 million—$130 million from Citibank and $120 million from Barclays Bank plc ("Barclays"). Both the Citibank Settlement and the settlement with Barclays (the "Barclays Settlement") also included substantial cooperation agreements from both banks in the continued prosecution of the OTC Action. OTC Plaintiffs now request an award of attorneys' fees from the Citibank Settlement of $26 million, or 20% of the $130 million settlement fund. This request, when combined with OTC Plaintiffs' application for an attorneys' fee award from the Barclays Settlement, would result in an overall award 20% of the combined $250 million settlement fund.[2] Furthermore, as with OTC Plaintiffs' attorneys' fee application from the Barclays Settlement, OTC Plaintiffs respectfully ask that the Court reserve judgment on a request for the difference between the $26 million fee sought now and a final award of 30% of the net Citibank Settlement (after deducting expenses) until a later stage of this litigation. *See* Dkt. 2350 at 6, 13.

OTC Plaintiffs' application for an interim award of 20% of the Citibank Settlement is well within the range of awards found to be reasonable under this Circuit's precedents, aligned with awards regularly approved in comparable multi-defendant antitrust class actions, and will

[2] OTC Plaintiffs' request for attorneys' fees and expenses from the Barclays Settlement is currently pending before the Court. *See* Dkts. 2278-80, 2350-52, 2371. If the Court does not grant in full OTC Plaintiffs' prior request for a fee award of $24 million, or 20% of the Barclays Settlement, then OTC Plaintiffs respectfully request that the amount denied be granted from the Citibank Settlement, such that the cumulative award to Class Counsel totals $50 million, or 20% of the combined $250 million settlement funds.

reward Class Counsel for the outstanding result they have obtained for the OTC Class which was achieved only after years of hard-fought litigation undertaken entirely on a contingency fee basis. A comparison to the Yen LIBOR cases illustrates the reasonableness of Class Counsel's request. Despite the significantly higher total recovery of $250 million achieved so far by Class Counsel in the OTC Action—the total recovery achieved so far in *Laydon v. Mizuho Bank, Ltd.* (S.D.N.Y. No. 12-cv-3419) and *Sonterra Capital Master Fund Ltd. v. UBS AG* (S.D.N.Y. No. 15-cv-5844) is $206 million—Class Counsel's *combined* requests for attorneys' fees of $50 million are almost equivalent to the $49.4 million fee award already received by class counsel in the Yen LIBOR cases. *See* Dkt. 2371.

OTC Plaintiffs additionally seek reimbursement of $14,199,351.99 in unreimbursed expenses incurred by Class Counsel on behalf of the OTC Class through July 27, 2017, the date of the Citibank Settlement. This request, when combined with OTC Plaintiffs' pending application for reimbursement of expenses from the Barclays Settlement,[3] represents the total expenses incurred by Class Counsel through July 27, 2017. These expenses are composed largely of expert witness fees that produced a suppression and damages model used for both to support OTC Plaintiffs' pending motion for class certification and also underlies the plan of distribution that will be used for all settlements in this action. Courts approve reimbursement of such litigation expenses in class actions as a matter of course. *See, e.g.*, *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *18 (S.D.N.Y. Apr. 26, 2016) (approving $10 million in expenses "[m]ost of" which "were incurred in connection with retention of experts" where the case settled just prior to the due date for class certification motions).

[3] OTC Plaintiffs previously requested $656,337.56, the amount incurred through November 11, 2015, from the Barclays Settlement. *See* Dkt. 2350. If the Court does not grant that request in full, then OTC Plaintiffs respectfully request that the amount denied be granted from the Citibank Settlement, such Class Counsel is fully reimbursed for the $14,855,689.55 in expenses they have incurred on behalf of the OTC Class through July 27, 2017.

II. BACKGROUND

On July 27, 2017, almost six years into this hotly contested litigation,[4] Class Counsel entered into a settlement agreement with Citibank, the second settlement in the OTC Action to date. The Citibank Settlement provides a cash payment of $130 million and additional valuable non-monetary relief in the form of cooperation by Citibank which will assist OTC Plaintiffs in their continued litigation against the non-settling defendants. This Court preliminarily approved the Citibank Settlement on August 31, 2017, *see* Dkt. 2247, and approved the notice program and preliminarily approved the plan of distribution on September 26, 2017, *see* Dkt. 2290.

The Citibank Settlement follows OTC Plaintiffs' first settlement in this action with Barclays, which was executed on November 11, 2015. *See* Dkt. 1338. The Court heard OTC Plaintiffs' motion for final approval of that settlement on October 23, 2017. *See* Dkt. 1948. After the hearing, OTC Plaintiffs submitted a supplemental memorandum of law regarding their motion for an award of attorneys' fees, reimbursement of litigation expenses, and award of incentive payments to the class representatives. *See* Dkt. 2350. That motion, which requests an award of $24 million in attorneys' fees, reimbursement of $656,337.64 in litigation expenses, and incentive awards of $25,000 to named plaintiffs Mayor & City Council of Baltimore, the City of New Britain, Vistra Energy Corp., Yale University, and Jennie Stuart Medical Center, Inc., remain pending as of the submission of the instant motion.

Both the Barclays and Citibank Settlements are excellent results for the OTC Class, which has now recovered a quarter billion dollars and the right to substantial cooperation from Barclays and Citibank as the litigation proceeds against the remaining non-settling defendants. This outstanding recovery, achieved by Class Counsel working entirely on a contingent basis,

[4] OTC Plaintiffs' initial complaint was filed on August 5, 2011. *See* Class Action Complaint for Violation of the Federal Antitrust Laws, *Mayor & City Council of Baltimore v. Bank of Am.*, No. 11-cv-5450 (S.D.N.Y. Aug. 5, 2011), ECF No. 1.

and advancing substantial expenses on behalf of the OTC Class, undoubtedly merits the attorneys' fee award and expense reimbursement requested here.

III. ARGUMENT

A. Class Counsel's Fee Request Is Fair and Reasonable

1. Class Counsel Are Entitled to Fees from the Common Fund

"[A] lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). This principle applies to class action settlements, including interim settlements. *See In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *9 (E.D.N.Y. Oct. 23, 2012) ("Where a class action settlement creates a common fund the plaintiffs' attorneys are entitled to a reasonable fee—set by the court—to be taken from the fund. Fees can be awarded based on an interim settlement fund.").

2. The Requested Fee Award Is Fair and Reasonable Under the Percentage Method

The Second Circuit's preferred method for calculating a fair and reasonable attorneys' fee is to award "some percentage of the recovery." *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). "The trend in this Circuit is toward the percentage method" because it "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation'" *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005).

This principle and preference hold equally true for interim fee awards drawn from partial settlements with one or more defendants in a multi-defendant action. *See In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *9 (noting that "[f]ees can be awarded based on an interim settlement" and recounting the Second Circuit's "trend" of "utiliz[ing] the percentage method"

with the lodestar/multiplier method as a cross-check). Moreover, both in and outside this Circuit, courts regularly make successive interim fee awards over the life of a multi-defendant antitrust class action at percentages significantly higher than the 20% requested by Class Counsel here. Table 1 below describes fee awards made in a number of recent antitrust class actions—all cases where these awards were made from partial settlements—in descending order by size of the settlement fund. OTC Plaintiffs' current application for 20% of a $130 million common fund is near the bottom of that range.

Table 1

Case	**Settlement Fund**	**Fee Awarded**	**Fee Percentage**
In re Urethane Antitrust Litig. (*Urethane III*), No. 04-md-1616 (D. Kan. July 29, 2016), ECF No. 3276	$835 million	$278 million	33-1/3%
In re Air Cargo Shipping Servs. Antitrust Litig. (*Air Cargo V*), No. 06-md-1775 (E.D.N.Y. Oct. 25, 2016), ECF No. 2484	$388 million	$97 million	25%
In re Automotive Parts Antitrust Litig. (*Auto Parts II*), 2017 WL 3525415 (E.D. Mich. July 10, 2017)	$379 million	$75.7 million	20%
In re Air Cargo Shipping Servs. Antitrust Litig. (*Air Cargo IV*), 2015 WL 5918273 (E.D.N.Y. Oct. 9, 2015)	$333 million	$73.2 million	22%
In re Automotive Parts Antitrust Litig. (*Auto Parts I*), No. 12-cv-0103 (E.D. Mich. Dec. 5, 2016), ECF No. 545	$225 million	$44.9 million	20%
In re Air Cargo Shipping Servs. Antitrust Litig. (*Air Cargo III*), 2012 WL 3138596 (E.D.N.Y. Aug. 2, 2012)	$222 million	$54.4 million	24%
Precision Assocs., Inc. v. Panalpina World Transport (Holding) Ltd. (*Freight Forwarders II*), 2015 WL 6964973 (E.D.N.Y. Nov. 10, 2015)	$169 million	$42.2 million	25%
In re Steel Antitrust Litig. (*Steel I*), No. 08-cv-5214 (N.D. Ill. Oct. 22, 2014), ECF No. 539	$164 million	$54.1 million	33%
In re Air Cargo Shipping Servs. Antitrust Litig. (*Air Cargo II*), 2011 WL 2909162 (E.D.N.Y. July 15, 2011)	$154 million	$38.5 million	25%
Laydon v. Mizuho Bank, Ltd. (*Laydon II*), No. 12-cv-3419 (S.D.N.Y. Dec. 7, 2017), ECF No. 837	$148 million	$34.9 million	23.6%
OTC Plaintiffs' Request	**$130 million**	**$26 million**	**20%**

In re CRT Antitrust Litig. (*CRT I*), 2016 WL 183285 (N.D. Cal. Jan. 14, 2016)	$127.5 million	$38.2 million	30%
Precision Assocs., Inc. v. Panalpina World Transport (Holding) Ltd. (*Freight Forwarders III*), No. 08-cv-0042 (E.D.N.Y. Nov. 07, 2016), ECF No. 1396	$118 million	$29.7 million	25%
Precision Assocs., Inc. v. Panalpina World Transport (Holding) Ltd. (*Freight Forwarders I*), No. 08-cv-0042 (E.D.N.Y. Dec. 27, 2013), ECF No. 984	$112 million	$16.9 million	15%[5]
In re Municipal Derivatives Antitrust Litig. (*Muni Derivatives IV*), No. 08-cv-2516 (S.D.N.Y. July 8, 2016), ECF No. 2029	$101 million	$33 million	33-1/3%
In re Air Cargo Shipping Servs. Antitrust Litig. (*Air Cargo I*), 2009 WL 3077396 (E.D.N.Y. Sept. 25, 2009)	$85 million	$12.8 million	15%[6]
In re CRT Antitrust Litig. (*CRT II*), No. 07-cv-5944 (N.D. Cal. June 8, 2017), ECF No. 5169	$84.8 million	$25.4 million	30%
In re Urethane Antitrust Litig. (*Urethane II*), No. 04-md-1616 (D. Kan. Dec. 13, 2011), ECF No. 2210	$84 million	$28 million	33-1/3%
In re Municipal Derivatives Antitrust Litig. (*Muni Derivatives II*), No. 08-cv-2516 (S.D.N.Y. Dec. 14, 2012), ECF No. 1744	$81.6 million	$23.3 million	29%[7]
In re Urethane Antitrust Litig. (*Urethane I*), No. 04-md-1616 (D. Kan. July 22, 2009), ECF No. 995	$58.9 million	$19.6 million	33-1/3%
Laydon v. Mizuho Bank, Ltd. (*Laydon I*), No. 12-cv-3419 (S.D.N.Y. Nov. 10, 2016), ECF No. 723	$58 million	$14.5 million	25%
In re Municipal Derivatives Antitrust Litig. (*Muni Derivatives III*), No. 08-cv-2516 (S.D.N.Y. June 6, 2014), ECF No. 1903	$38.3 million	$11.5 million	30%
In re Steel Antitrust Litig. (*Steel II*), No. 08-cv-5214 (N.D. Ill. Feb. 16, 2017), ECF No. 680	$30 million	$9.9 million	33-1/3%
In re Processed Egg Prods. Antitrust Litig. (*Processed Egg II*), No. 08-md-2002 (E.D. Pa. Oct.	$28 million	$8.5 million	30%

[5] In *Freight Forwarders I*, Judge Gleeson granted an interim fee award of 15% of the initial settlement fund, rejecting class counsel's request for 33-1/3% of that fund. Class counsel later requested and received 25% of the subsequent settlement funds in *Freight Forwarders II* and *III*.

[6] In *Air Cargo I*, the first settlement at issue was reached on September 11, 2006, a few months after the initial complaint was filed and before the motions to dismiss were briefed, and Judge Gleeson awarded class counsel $12.8 million in fees and $1.57 million in expenses out of that settlement. *Air Cargo I*, 2009 WL 3077396, at *1-2. Judge Gleeson later granted class counsel's requests for 22% to 25% to be paid out of subsequent settlement funds.

[7] Class counsel previously requested and received a combined award of $1.55 million for fees and expenses from an initial settlement for $6.5 million. *See In re Municipal Derivatives Antitrust Litig.* (*Muni Derivatives I*), No. 08-cv-2516 (S.D.N.Y. Dec. Oct. 7, 2011), ECF No. 1597.

10, 2014), ECF No. 1079			
In re Processed Egg Prods. Antitrust Litig. (*Processed Egg I*), 2012 WL 5471481 (E.D. Pa. Nov. 9, 2012)	$25 million	$7.5 million	30%

Fee awards reaching up to one-third of the proceeds of partial settlements, as shown in Table 1, are consistent with fee awards granted in class actions generally, where "fees that are 30 percent or greater" are "routine[]." *Velez v. Novartis Pharma. Corp.*, 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010); *see also Hyun v. Ippudo USA Holdings*, 2016 WL 1222347, at *3 (S.D.N.Y. Mar. 24, 2016) ("Fee awards representing one third of the total recovery are common in this District."). This benchmark furthermore holds true for settlements with common funds of similar size to this one, whether considering just the Citibank Settlement or considering the Citibank and Barclays Settlements together. *See In re Initial Public Offering Secs. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding plaintiffs' counsel one-third of the net settlement fund of $170 million); *In re Priceline.com, Inc. Secs. Litig.*, 2007 WL 2115592, at *4 (D. Conn. July 20, 2007) (awarding 30% of an $80 million settlement); *In re Deutsche Telekom AG Secs. Litig.*, 2005 WL 7984326, at *4 (S.D.N.Y. June 14, 2005) (Buchwald, J.) (awarding attorneys' fees of 28% of a $120 million settlement); *Kurzweil v. Philip Morris Companies, Inc.*, 1999 WL 1076105, at *3 (S.D.N.Y. Nov. 30, 1999) (awarding class counsel 30% of a $123 million settlement); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 394 (S.D.N.Y. 1999) (awarding plaintiffs' counsel attorneys' fees of 27.5% of a $116.6 million settlement).

The percentage method, by tying the fee award to the result achieved for the class, "allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure'"; thus, Class Counsel's request also corresponds neatly to the settlement from which it arises. *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 330 (3d Cir. 2011). The Citibank

and Barclays Settlements—which provide a total of $250 million in cash and additional non-monetary cooperation benefits—are by any measure a substantially favorable result for the OTC Class. As the primary measure of Class Counsel's success is the recovery they have achieved for the OTC Class, granting Class Counsel's application for 20% of that favorable result provides a proportionate and appropriate reward for Class Counsel's efforts. *See Laydon I*, slip op. ¶ 5(b)-(c), (f) (awarding "fair, reasonable, appropriate" fee of 25% of partial settlement fund, noting that "in the absence of a settlement, [the actions against the settling defendants] would have involved lengthy proceedings with uncertain resolution," and recognizing that "[h]ad Plaintiffs' Counsel not achieved the Settlements, a risk would remain that Plaintiffs and the Settlement Class may have recovered less or nothing from [the settling defendants]").

3. The Requested Fee Is Reasonable Under Lodestar "Crosscheck"

Class Counsel's request for an interim award of 20% of the $130 million settlement fund is amply supported by the Second Circuit's preference for the percentage-of-recovery method for calculating fee awards, and sits on the low end of the range of fees typically awarded in complex, multi-defendant antitrust class actions such as this. *See supra* Table 1. The reasonableness of Class Counsel's requested 20% fee is confirmed by the lodestar "crosscheck." The Second Circuit permits courts to utilize a lodestar "crosscheck" to test the reasonableness of a percentage method–based fee. *See Goldberger*, 209 F.3d at 50. The "lodestar" is calculated by multiplying the number of hours expended on the litigation by each particular attorney or firm professional by their current hourly rate,[8] and totaling the amounts for all timekeepers. When using this lodestar to crosscheck class counsel's requested award, courts look for a multiplier on the award that "represents the risk of the litigation, the complexity of the issues, the contingent nature of

[8] The lodestar is calculated at current hourly rates. *See, e.g.*, *Missouri v. Jenkins*, 491 U.S. 274, 283–84 (1989) (endorsing "an appropriate adjustment for delay in payment" by applying "current" rate); *Gierlinger v. Gleason*, 160 F.3d 858, 882 (2d Cir. 1998) (stating that rates "should be 'current rather than historic'").

the engagement, the skill of the attorneys, and other factors." *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004) (citing *Goldberger*, 209 F.3d at 47).

Class Counsel, as well as four other firms that have worked on this case (collectively, "OTC Counsel"), together have spent over 46,000 hours, representing a lodestar of $26,320,144, from the inception of this matter through July 27, 2017.[9] *See* Joint Decl. ¶ 42.[10] That time represents Class Counsel's tireless efforts in investigating and prosecuting the OTC Plaintiffs' claims over an almost six-year period. By way of comparison, in the Yen LIBOR cases, class counsel recently reported a total lodestar of $54,532,316.55, corresponding to 105,775.61 hours worked, *before* any briefing on class certification. *See Laydon II* Br. at 29. Class Counsel's significantly lower lodestar is presumptively reasonable when considering the substantial additional progress made by Class Counsel in this action.

Class Counsel's fee request of 20% of the $130 million fund from the Citibank Settlement corresponds to a multiplier of 0.99 over Class Counsel's total lodestar. Should the Court also grant Class Counsel's pending request for an interim fee award of $24 million from the $120 million fund established by OTC Plaintiffs' prior settlement with Barclays, then Class Counsel's combined award of $50 million would correspond to a cumulative lodestar multiplier of 1.90.[11] Alternatively, should the Court consider only Class Counsel's lodestar from *after* the

[9] These four firms performed work for the benefit of the OTC Class by helping in evaluation of the plan of distribution. *See* Joint Decl. ¶ 27. Two other firms representing class representatives have also performed work related to those representations as well as other work at the direction of Class Counsel, but OTC Plaintiffs have not submitted their lodestar information at this time (though may do so in connection with future applications for attorneys' fees and expenses). *See* Joint Decl. ¶ 41. OTC Plaintiffs request that the Court grant Class Counsel authority to allocate and distribute any attorneys' fees and expenses awarded from the settlement funds among counsel who performed work on behalf of OTC Plaintiffs as is customary in class action litigation.

[10] The Joint Declaration of William C. Carmody & Michael D. Hausfeld in Support of OTC Plaintiffs' Motion for Attorneys' Fees & Expenses is filed concurrently herewith.

[11] When evaluating successive applications for interim awards of attorneys' fees, the relevant multiplier for courts to consider when performing the lodestar crosscheck is the *cumulative* multiplier that compares class counsel's *total* fee award to class counsel's *total* lodestar. *See, e.g.*, *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) (approving a second fee award that when combined with a prior award "in its aggregate gives Lead

date of the prior settlement with Barclays, then Class Counsel's 20% request from the Citibank Settlement when compared to that partial lodestar of $17,980,292 results in a "Citibank Settlement–only" multiplier of 1.45.[12]

All of these multipliers fall well within, if not below, the range considered reasonable by courts in the Second Circuit. *See In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *16 (S.D.N.Y. April 26, 2016) (approving fee award in complex antitrust action where lodestar was "just over 6"); *Beckman v. KeyBank N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) (approving an award of 33% of the common fund, representing a multiplier of 6.3, and explaining that "[c]ourts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers."); *Sewell v. Bovis Lend Lease, Inc.*, 2012 WL 1320124, at *13 (S.D.N.Y. Apr. 16, 2012) ("Courts commonly award lodestar multipliers between two and six."); *Johnson v. Brennan*, 2011 WL 4357376, at *13 (S.D.N.Y. Sept. 16, 2011) ("Courts routinely award counsel two to three times lodestar in class action settlements."); *In re Lloyd's Am. Trust Fund Litig.*, 2002 WL 31663577, at *27 (S.D.N.Y. Nov. 26, 2002 ("Here, the resulting multiplier of 2.09 is at the lower end of the range of multipliers awarded by courts within the Second Circuit."). Even in cases like this, where the settlement fund reaches the nine figures, courts typically award fees corresponding to multipliers significantly higher than what Class Counsel requests here. *See In re Bristol-Myers Squibb Sec. Litig.*, 361 F. Supp. 2d 229, 237 (S.D.N.Y. 2005) (citing a "survey of cases with megafunds over $100 million

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Counsel $336.1 million in fees based on a *total* lodestar of approximately $83.2 million" (emphasis added)). This is the approach utilized by class counsel in the Yen LIBOR cases, without objection from Judge Daniels, who approved class counsel's first and second fee applications in full. *See Laydon II* Br. at 29 (presenting cumulative multiplier of 0.91, which compared class counsel's total lodestar of $54,532,316.55 from the initiation of the action to class counsel's second fee request for $34.88 million aggregated with their prior $14.5 million award).

[12] Class Counsel's lodestar through November 11, 2015, the date the settlement with Barclays was executed, was $8,339,852. *See* Dkt. 2351 ¶ 39. $26,320,144 - $8,339,852 = $17,980,292.

show[ing] that lodestar multipliers of 1.35 to 2.99 are common"). Class Counsel's low multiplier confirms the reasonableness of Class Counsel's requested 20% fee.

It should further be noted that all of the work performed by Class Counsel through July 27, 2017, contributed to Class Counsel's understanding of the strengths and weaknesses of the claims against Citibank and informed Class Counsel's ability to negotiate a favorable settlement. As the Court recognized at the fairness hearing for the settlement with Barclays, OTC Plaintiffs have "alleged a conspiracy" and "the same action against everybody." Dkt. 2352-1, Tr. 66:23-24Class Counsel's efforts to strengthen the OTC Plaintiffs' litigation position as to all defendants thus increased the settlement pressure on each defendant, including Citibank. These efforts—which included motion practice, discovery efforts, and document review—generally involved all of the defendants or had case-wide implications. Moreover, all of the work performed by Class Counsel was undertaken to benefit the same OTC Class. Thus, it is not uncommon for courts to consider, when performing the lodestar crosscheck, all of class counsel's time from the beginning of an action. *See supra* note 11; *see also Auto Parts II*, 2017 WL 3525415, at *4 n.2 ("The Court rejects the argument . . . that time included with the Round 1 Settlement fee request should not be included in the lodestar cross-check for the Round 2 Settlements. In calculating the lodestar for purposes of the cross-check, it would be impractical to compartmentalize and isolate the work that EPPs' counsel did in any particular case at any particular time because all of their work assisted in achieving all of the settlements and has provided and will continue to provide a significant benefit to all of the EPPs classes.").

Finally, Class Counsel's hourly rates are also reasonable. The rates for Class Counsel who billed meaningful time to this case are Class Counsel's standard hourly rates and are regularly charged to hourly clients (and paid by those clients). Joint Decl. ¶¶ 36-37; *Luciano v.*

Olsten Corp., 109 F.3d 111, 115 (2d Cir. 1997) ("The 'lodestar' figure should be in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."). Class Counsel's hourly rates are market rates for plaintiffs' and defense-side law firms of similar quality litigating matters of similar magnitude in New York City.[13] Thus, OTC Plaintiffs' request for an award of 20% of the $130 million Citibank Settlement is fair and reasonable under the lodestar crosscheck method often employed by courts as a "sanity check" regarding the percentage award. *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 353 (S.D.N.Y. 2014).

4. The *Goldberger* Factors Support the Requested Fee Award

Under either the percentage method or the lodestar multiplier approach, the "'*Goldberger* factors' ultimately determine the reasonableness of a common fund fee," *Wal-Mart Stores*, 396 F.3d at 121. The *Goldberger* factors, which the Court weighs in its discretion, are:

> (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

Goldberger, 209 F.3d at 50 (citation omitted). Courts regularly apply the *Goldberger* factors when considering applications for interim awards. *See, e.g.*, *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *9-10. Each of these factors confirms the requested fee is reasonable.

a. Time & Labor Expended by Counsel (Goldberger Factor 1)

The first *Goldberger* factor—the "time and labor expended by counsel"—strongly supports approval of the requested fee. Class Counsel have spent over 46,000 hours prosecuting

[13] *See* Sara Randazzo & Jacqueline Palank, *Legal Fees Cross New Mark: $1,500 an Hour*, The Wall Street Journal, Feb. 16, 2016 (finding that "[f]or lawyers at the very top of th[e] fields [of antitrust and high-stakes litigation and appeals], hourly rates can hit $1,800 or even $1,950" and citing a 2011 article and observing that the increases in hourly rates "mak[e] the $1,000-an-hour legal fees that once seemed so steep look quaint by comparison"), *available at* https://www.wsj.com/articles/legal-fees-reach-new-pinnacle-1-500-an-hour-1454960708.

this case and, as discussed above, the lodestar multiplier is on the low end of the range approved by courts in this Circuit. The substantial time devoted to this litigation over six years reflects the immense effort Class Counsel have exerted in prosecuting this case and was reasonable, particularly given the complex nature of this action. Class Counsel have, among other things:

- Conducted an initial investigation of this case to develop the facts and legal theories that formed the basis of the allegations in the complaint and drafted and filed the complaint, amended complaint, second amended complaint, proposed third amended complaint, and third amended complaint (collectively, the "Complaint").

- Defended the Complaint from five Rule 12(b) motions to dismiss filed by the defendants and from the defendants' opposition to the OTC Plaintiffs' motions for leave to amend the complaint.

- Written scores of letters to the Court, *inter alia*, providing supplemental authority, addressing discovery disputes, and presenting scheduling issues.

- Appealed the dismissal of the OTC Plaintiffs' antitrust claims to the Second Circuit, and successfully filed an amicus brief to the Supreme Court on an issue of appellate jurisdiction.

- Attended three full-day, in-person mediation sessions conducted by highly experienced mediators, preceded by mediation briefing, to achieve the first settlement in this action, with Barclays. The terms of the Barclays Settlement were also negotiated in extensive in-person meetings, telephone calls, and email discussions over the course of almost two years.

- Successfully briefed a motion for preliminary approval of the Barclays Settlement and worked with experts to develop a comprehensive notice program and plan of distribution.

- Reviewed more than 1.1 million documents produced by the defendants and third parties, as well as trial transcripts and evidence from civil and criminal trials in the United States and the United Kingdom relating to LIBOR manipulation.

- Listened to more than 6,000 audio files produced by the defendants.

- Drafted discovery requests to the defendants for trading, cash-flow, and borrowing data on the defendants' financial instruments and participated in scores of meet and confers to obtain the production of that data.

- Diligently pursued discovery from four third-party brokers that formed an important component of the OTC Plaintiffs' expert witness analysis.

- Defended six 30(b)(6) depositions of the named plaintiffs; defended three depositions of OTC Plaintiffs' experts; conducted two depositions of the defendants' experts.

- Worked with the OTC Plaintiffs' expert witnesses to draft extensive 30(b)(6) notices setting out questions essential to understanding the trade, cash-flow, and borrowing data produced by the defendants.

- Assisted the OTC Plaintiffs' expert witnesses in analyzing 686 gigabytes of data and developing two expert witness reports totaling more than 300 pages.

- Prepared more than sixty pages of briefing, more than sixty pages of attorney declarations, and 149 exhibits in support of the OTC Plaintiffs' motion for class certification and vigorously defendant against a *Daubert* challenge by the defendants against the OTC Plaintiffs' Nobel-prize winning expert witness Dr. Joseph Stiglitz.

- Attended a full-day, in-person mediation session conducted by the Honorable Layn Phillips, preceded by mediation briefing, and followed by extensive telephonic discussions and negotiations, to achieve the Citibank Settlement.

- Leveraged experience from the Barclays Settlement to successfully brief a motion for preliminary approval of the Citibank Settlement and adapt previously successful notice program for this second settlement.

- Collected, reviewed, and produced to the defendants thousands of pages of documents from the named plaintiffs, and prepared supplemental class certification briefing regarding one named plaintiff's adequacy as a class representative.

In sum, Class Counsel devoted substantial time and financial resources in prosecuting this case on behalf of the OTC Class.

b. Magnitude & Complexity of the Litigation (Goldberger Factor 2)

The second *Goldberger* factor—"the magnitude and complexities of the litigation"—also strongly supports approval of the requested fee. No other case better embodies the challenges faced by plaintiffs in antitrust litigation than this one. *See Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 263 (2d Cir. 2011) (noting the "factual complexities of antitrust cases"); *Wal-Mart Stores*, 396 F.3d at 118 ("Federal antitrust cases are complicated, lengthy, and bitterly fought."); *In re Vitamin C Antitrust Litig.*, No. 06-MD-2012 WL 5289514, at *4

(E.D.N.Y. Oct. 23, 2012) ("Federal antitrust cases are complicated lengthy, and bitterly fought, as well as costly.").[14] This action was initially filed over six years ago and has undergone multiple rounds of briefing on four motions to dismiss as well as an opposition to leave to amend that functioned as the equivalent to a motion to dismiss.

Meanwhile, the briefing on the OTC Plaintiffs' pending motion for class certification has been extensive, and whichever side loses that motion will likely pursue a Rule 23(f) petition. After class certification, the OTC Plaintiffs face the monumental task of completing merits discovery, including additional expert discovery, summary judgment briefing, and then a weeks- if not months-long trial from which the losing party will almost certainly appeal. *See, e.g.*, *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *4 ("This litigation has been pending since 2005 and has involved the production of thousands of documents, at least 17 fact witness depositions, expert discovery, and extensive motion practice. The Certified Classes are scheduled for a trial against the non-settling defendants that is expected to take at least three weeks."). In spite of the significant resources already expended preparing this case for trial, "[t]here can be no doubt that this class action would be enormously expensive to continue, extraordinarily complex to try, and ultimately uncertain of result." *Id.*

c. Risk of the Litigation (Goldberger Factor 3)

The third *Goldberger* factor—the "risk of the litigation"—also strongly supports approval of the requested fee. The Second Circuit has identified "the risk of success as perhaps the

[14] OTC Plaintiffs' efforts should not be discounted merely because various governmental entities also investigated the defendants' manipulation of the various LIBOR currencies, as OTC Plaintiffs' allegations were not the main focus of the governmental investigations. *See In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d at 357 ("While the criminal and regulatory investigations were of enormous assistance to the Lead Plaintiff in its prosecution of this action, particularly in the description of the accounting manipulations, since those investigations concentrated on wrongdoing by WorldCom's insiders, they were of little assistance in the development of the Lead Plaintiff's claims against the Underwriter Defendants or even Andersen, which required the Lead Plaintiff to explain how Andersen's audits failed to comply with Generally Accepted Auditing Standards (GAAS).").

foremost factor to be considered in determining [a reasonable fee award]." *Goldberger*, 209 F.3d at 54. Class Counsel have taken on and overcome significant risks in this litigation.

i. Contingency Risk

"No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success." *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *21 (S.D.N.Y. Sept. 9, 2015) (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974)). Here, OTC Counsel have invested more than 46,000 hours of time with a lodestar value of more than $26 million and yet, more than six years after this litigation began, have not yet been compensated for any of that time nor been reimbursed for any of the over $14 million in litigation expenses they have incurred. *See In re High-Crush Ptrs. L.P. Secs. Litig.*, 2014 WL 7323417, at *16 (S.D.N.Y. Dec. 19, 2014) ("Lead Counsel undertook the representation of Lead Plaintiffs and the Class in this Action on a wholly contingent basis, investing substantial time and funds to prosecute this Action, without any guarantee of compensation of of recovering out-of-pocket expenses."); *Fleisher*, 2015 WL 10847814, at *21 ("[T]he firm would not have been compensated for its time or expenses at all had it been unsuccessful in this litigation.").

Moreover, Class Counsel would not have been compensated for its time or expenses at all had they been unsuccessful in this litigation. *See Grinnell*, 495 F.2d at 471 ("[D]espite the most vigorous and competent of efforts, success is never guaranteed."); *In re Beacon Assocs. Litig.*, 2013 WL 2450960, at *13 (S.D.N.Y. May 9, 2013) ("And all of these matters were taken on contingency, so in view of the novelty of the issues there was some possibility that counsel would recover nothing at all."); *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 366 (S.D.N.Y. 2002) ("The enormous risks of litigation are why settlement is frequently preferred.

Settling avoids delay as well as uncertain outcome . . . ."). The risk of no recovery in complex class actions is real and supports Class Counsel's request.

Contingency risk takes on an additional layer in multi-defendant actions such as this one, where class counsel's efforts in securing partial settlements with certain defendants protect against the risk that there might *never* be any recovery from other defendants. Courts recognize this dynamic when awarding fees—and cite it as a reason to *reward* class counsel for the risk they take. For instance, in the *Online DVD Rental* case, plaintiffs settled with one defendant for $27.25 million and then lost the entire case against the remaining defendant a few months later, when the court granted that defendant's motion for summary judgment. *See In re Online DVD Rental Antitrust Litig.*, No. 09-md-2029 (N.D. Cal. Sept. 2, 2011), ECF No. 492 (granting preliminary approval to settlement); *In re Online DVD Rental Antitrust Litig.*, 2011 WL 5883772, at *1 (N.D. Cal. Nov. 23, 2011) (granting motion for summary judgment). The court not only granted class counsel's fee request for 25% of the settlement fund, *see In re Online DVD Rental Antitrust Litig.*, No. 09-md-2029, slip op. ¶ 1 (N.D. Cal. Mar. 29, 2012), ECF No. 607, *aff'd*, 779 F.3d 934, 955 (9th Cir. 2015), but in fact, specifically cited the summary judgment order as one reason to approve the fee request as reasonable:

> At this time, I'm prepared to find that the settlement is fair, reasonable, and adequate given the totality of the circumstances, ***particularly given the fact that half the case has been kind of wiped off the books for the plaintiffs***, I find that the settlement is fair, reasonable, and adequate, that something's better than nothing in this kind of case, and that ***the bench mark is a reasonable fee*** for this case. So I approve.

Transcript of Hearing, *In re Online DVD Rental Antitrust Litig.*, No. 09-md-2029 (N.D. Cal. Mar. 14, 2012), ECF No. 602 (emphasis added). In that case, class counsel's diligence in pursuing what turned out to be an unsuccessful claim was a compelling reason to *reward* class counsel for the contingency risk it took on and *award* the requested fees from the recovery that

class counsel *did* achieve. Although Class Counsel is confident in the merits of the OTC Class's claims against the non-settling defendants, there still remains significant contingency risk associated with those claims, which counsels in favor of granting an interim fee award from the substantial and concrete recovery Class Counsel has obtained to date.

ii. Liability Risk

"Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *14 (S.D.N.Y. May 9, 2014). The OTC Plaintiffs face significant risks in continuing to litigate, amplified by the complexity of the market for LIBOR-linked financial instruments and the fact that Citibank is a global financial institution with virtually unlimited litigation resources. Indeed, this case presents the Court, the parties, and eventually a jury with the task of understanding complex derivative instruments in an opaque, unregulated market, during a period of extraordinary economic upheaval. "The complexity of Plaintiff's claims *ipso facto* creates uncertainty . . . . A trial on these issues would likely be confusing to a jury." *Park v. The Thomson Corp.*, 2008 WL 4684232, at *4 (S.D.N.Y. Oct. 22, 2008); *see* 31 No. 7 Futures & Derivatives L. Rep. 1 ("Derivative instruments, in most cases, are highly complex and difficult to understand for even highly sophisticated and intelligent investors.").

Although the OTC Plaintiffs believe fervently in the merit of their case, it was not known at the time the Citibank Settlement was reached how the Court would resolve the OTC Plaintiffs' anticipated motion for class certification (now pending before the Court). *See Athale v. Sinotech Energy Ltd.*, 2013 WL 11310686, at *6 (S.D.N.Y. Sept. 4, 2013) ("Absent settlement, there is no assurance that Lead Plaintiff's motion for class certification would be granted or that Class status, if granted, would be maintained throughout trial."). Nor is it clear how a jury would respond to the OTC Plaintiffs' claims or Citibank's defenses at trial. *See Sykes v. Harris*, 2016 WL

3030156, at *18 (S.D.N.Y. May 24, 2016) ("Defendants asserted numerous novel defenses to Lead Plaintiffs' claims which put recovery for Class Members and Class Counsel at risk."); *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970) ("[N]o matter how confident one may be of the outcome of litigation, such confidence is often misplaced."). That trial, moreover, would have required extensive fact and expert testimony, and regardless of outcome, the parties would be expected to pursue appeals from any result at trial.

iii. Damages Risk

Equally as significant as the risks in establishing liability in this case were the OTC Plaintiffs' risks in establishing damages. The damages estimates in this case are heavily expert-driven, and, although the OTC Plaintiffs are confident in our ability to prove damages, the prospect of an expert battle at class certification and ultimately at trial adds substantial risk to the OTC Plaintiffs' claims. *See In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *18 (S.D.N.Y. 2010) (noting that the burden in proving the extent of the class's damages weighed in favor of approving fee request, and that "[t]he jury's verdict . . . would . . . depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable"); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998) (observing that "[d]amages at trial would inevitably involve a battle of the experts" and noting that it is "difficult to predict with any certainty which testimony would be credited").

* * *

The only certainties from the outset of this litigation were that there would be no attorneys' fees or reimbursement of expenses without a successful result, and that a successful result, if any, could be achieved only after lengthy, difficult, and expensive effort.

d. Quality of the Representation (Goldberger Factor 4)

The fourth *Goldberger* factor, "the quality of representation," also supports approval of the requested fee. Courts have consistently recognized that the result achieved is a major factor to be considered in making a fee award and in assessing the quality of the representation. *See, e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). Class Counsel respectfully submits that the $130 million settlement is strong evidence of the quality of Class Counsel's representation.

"To determine the 'quality of the representation,' courts review, among other things, the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *Taft v. Ackermans*, 2007 WL 414493, at *10 (S.D.N.Y. Jan. 31, 2007). "Susman Godfrey has significant experience with . . . class actions, including settlements thereof . . . [and] [t]he lawyers working for the Class have substantial experience prosecuting large-scale class actions." *Fleisher*, 2015 WL 10847814, at *22; *see also* Joint Decl. Ex. A. Hausfeld LLP's attorneys "are highly experienced practitioners in complex litigation generally and antitrust litigation specifically." *Air Cargo IV*, 2015 WL 5918273, at *7; *see also* Joint Decl. Ex. B.

"The quality of opposing counsel is also important in evaluating the quality of Lead Counsel's work." *Fleisher*, 2015 WL 10847814, at *22. Courts recognize that the caliber of the opposition faced by plaintiffs' counsel aids assessment of the quality of the plaintiffs' counsel's performance. *See Anwar v. Fairfield Greenwich Ltd.*, 2012 WL 1981505, at *2 (S.D.N.Y. June 1, 2012) (considering "the quality and vigor of opposing counsel"). Citibank is represented by skilled and highly regarded counsel from Covington & Burling LLP, a prestigious firm with a well-deserved reputation for vigorous advocacy in the defense of complex civil cases, and the same is true of the other defendants in this action. *See In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d at 357–58 ("Lead Counsel obtained remarkable settlements for the Class while facing formidable opposing counsel from some of the best defense firms in the country.").

e. Requested Fee in Relation to the Settlement (Goldberger Factor 5)

The fifth *Goldberger* factor—"the requested fee in relation to the settlement"—also supports approval of the requested fee, as discussed in *supra* section III.A.2.

f. Public Policy Considerations (Goldberger Factor 6)

Finally, the sixth *Goldberger* factor—public policy considerations—weighs heavily in favor of the requested fee. *Goldberger*, 209 F.3d at 50. Public policy considerations strongly favor incentivizing skilled private attorneys to undertake class action litigation both to vindicate the rights of class members and the law enforcement function of private action litigation. *See In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d at 359 ("[T]o attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives."); *Hicks v. Stanley*, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) ("To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding."); *In re Sumitomo*, 74 F. Supp. 2d at 399 ("[T]he Second Circuit and courts in this district also have taken into account the social and economic value of class actions, and the need to encourage experienced and able counsel to undertake such litigation.").

Those interests are particularly salient in this case, which has required a massive investment of attorney time and expenses by Class Counsel with no avenue for compensation for their services until more than six years into the litigation. In order to incentivize the very best private attorneys to take on complex, lengthy, difficult, and expensive class actions, the fee awarded must be sufficient to justify the opportunity cost of foregoing hourly and fixed-fee cases where counsel are assured of compensation regardless of the outcome of the litigation at hand.

B. Class Counsel's Request for Reimbursement of Expenses Is Reasonable

Class Counsel also request reimbursement in the amount of $14,199,351.99 for out-of-pocket expenses reasonably and necessarily incurred in connection with the prosecution of this case. "Courts routinely note that counsel is entitled to reimbursement from the common fund for reasonable litigation expenses." *Anwar,* 2012 WL 1981505, at *3 (citing *Reichman v. Bonsignore, Brignati & Mazzotta, P.C.*, 818 F.2d 278, 283 (2d Cir. 1987))); *see also In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig.*, 2017 WL 6040065, at *11 (N.D. Cal. Dec. 6, 2017) ("All expenses that are typically billed by attorneys to paying clients in the marketplace are compensable."); *In re Arakis Energy Corp. Sec. Litig.*, 2001 WL 1590512, at *17 (E.D.N.Y. Oct. 31, 2001) ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course."); *In re Vitamins Antitrust Litig.*, 2001 WL 34312839, at *13 (D.D.C. July 16, 2001) ("Courts have routinely awarded expenses for which counsel would normally directly bill their clients.").

The expenses incurred by Class Counsel include fees charged by experts, mediation fees, court fees, electronic research, photocopies, and travel in connection with this litigation. Courts regularly approve similar cost applications in large, complex antitrust class actions. *See, e.g.*, *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *18 (approving $10 million in expenses "[m]ost of" which "were incurred in connection with retention of experts" where the case settled just prior to the due date for class certification motions); *In re Bank of Am. Corp. Secs., Derivatives & ERISA Litig.*, 2013 WL 12091355, at *1 (S.D.N.Y. Apr. 8, 2013) (approving $8 million in litigation expenses); *In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 380 (S.D.N.Y. 2013) (approving $7.3 million in litigation expenses); *In re IPO*, 671 F. Supp. 2d at 505 (approving $46 million in expenses). Indeed, "[t]he fact that Class Counsel [were] willing to [incur these expenses], where reimbursement was entirely contingent on the

success of this litigation, is perhaps the best indicator that the expenditures were reasonable and necessary." *Fleisher*, 2015 WL 10847814, at *23.

Here, the vast majority of the expenses for which Class Counsel seek reimbursement are expert witness fees associated with OTC Plaintiffs' economic expert Dr. Douglas Bernheim and his firm Bates White LLC (collectively, "Bates White"). OTC Plaintiffs have previously provided to the Court a detailed description of the substantial work undertaken by Bates White to help prosecute the claims of the OTC Class. See Dkt. 2351 ¶¶ 41-59. Class Counsel's willingness to advance the associated expenses was critical to the Class, which benefited from experts of exceptional skill, experience, and integrity that developed a highly reliable suppression and damages model—an essential component both of class certification as well as a central component of the plan of allocation for the Citibank Settlement (as well as the Barclays Settlement). The proof of the reasonableness of these expert expenses is in defendants' reaction—Dr. Bernheim is the *only* plaintiffs' expert whose suppression and damages model is not subject to a *Daubert* challenge by the defendants at the class certification stage.[15]

The quality of Dr. Bernheim's work has been recognized by other courts, which have granted similar reimbursement requests in complex antitrust class actions. Of particular note is Judge Hogan's decision in *In re Vitamin Antitrust Litigation*, 2004 WL 6080000 (D.D.C. Oct. 22, 2004), which reimbursed class counsel for over ***$16 million*** in expenses incurred from a settlement fund of $172 million. *Id.* at *4, *9. There, class counsel initially retained different economic experts but switched to Dr. Bernheim and Bates White LLC; the court later approved reimbursement of *all* expert expenses, including expenses associated with the expert that was

[15] *See* Dkt. 2021 (motion to exclude Lender Plaintiffs' expert Professor Robert Webb); Dkt. 2053 (motion to exclude Exchange Plaintiffs' expert Eric Miller); Dkt. 2055 (motion to exclude Exchange Plaintiffs' expert Dr. Janet Netz); Dkt. 2057 (motion to exclude Exchange Plaintiffs' expert Dr. Nejat Seyhun); Dkt. 2059 (motion to exclude Exchange Plaintiffs' expert Dr. Craig Beevers).

replaced by Dr. Bernheim. *Id.* at *9. Judge Hogan commended class counsel's decision to "shift" strategy and noted that all expenses for experts retained by class counsel "in good faith" as necessary "to achieve a successful result for their clients" should be reimbursed. *Id.*[16]

The size of the reimbursement request in *In re Vitamin Antitrust Litigation* is not uncommon in antitrust class actions, where expert expenses "are a substantial but necessary burden." *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig.*, 2017 WL 6040065, at *5. The *Freight Forwarders* case provides an illustrative example: Over the course of that action, the court approved three successive applications for reimbursement of litigation expenses, totaling $6.4 million by the conclusion of the case, even though *no class certification motion was ever submitted*. *See Freight Forwarders III*, slip op. at 3 (reimbursing $1.76 million in expenses); *Freight Forwarders II*, 2015 WL 6964973, at *8 (reimbursing $4.05 million in expenses); *Freight Forwarders I*, slip op. at 1 (reimbursing $0.61 million in expenses). Here, OTC Plaintiffs' request for $14,199,351.99 in expenses, including $13,838,163.78 in expert witness fees, corresponds to a fully briefed motion for class certification.

Moreover, in multi-defendant antitrust cases, when initial settlements are reached with some, but not all defendants, courts regularly reimburse from the initial funds all of the litigation expenses incurred through the motion for final approval of those settlements. *See, e.g.*, *Auto Parts I*, slip op. at 2 (granting request for reimbursement of expenses); End-Payor Pls.' Mot. for an Award of Attorneys' Fees at 22-24, *In re Auto. Parts Antitrust Litig.*, No. 12-cv-0103 (E.D. Mich. Mar. 10, 2016), ECF No. 433 (describing request for reimbursement of $7.2 million in expenses incurred through February 29, 2016, the last full month before the fee and expense petition was filed). This is routinely done because in antitrust cases, the *same* class that benefits

[16] In that case, class counsel also received an attorney's fee award of $46.6 million, or 27% of the settlement fund. *In re Vitamin Antirust Litig.*, 2004 WL 6080000, at *8.

from the initial settlement also benefits from the continued prosecution of the case on their behalf after the date of that settlement. Here, OTC Plaintiffs seek only those expenses incurred through July 27, 2017, when the Citibank Settlement was executed, though Class Counsel have continued to advance significant expenses on behalf of the OTC Class since that date.

OTC Plaintiffs' application for reimbursement of litigation expenses is reasonable under "the common practice in this circuit of granting expense requests." *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 525 (E.D.N.Y. 2003) (granting request for reimbursement of $18.7 million in expenses, of which the "lion's share . . . reflects the costs of experts and consultants, litigation and trial support services, document imaging and copying, deposition costs, online legal research, and travel expenses"), *aff'd sub nom. Wal-Mart Stores*, 396 F.3d 96. Furthermore, OTC Plaintiffs' combined requests for reimbursement of expenses, when added to OTC Plaintiffs' requests for attorneys' fee awards of 20% of the Citibank and Barclays settlement amounts, would result in a cumulative fee and expense award of $64,855,689.55, or only 25.9% of the $250 million combined fund. As courts regularly approve larger *fee* awards, without counting expenses, *see supra* section III.A.2, Class Counsel's requests for fees and expenses are fair and reasonable and should be approved.

IV. CONCLUSION

For the foregoing reasons, OTC Plaintiffs respectfully request that the Court award from the Citibank Settlement the requested attorneys' fees in the amount of $26 million and expenses in the amount of $14,199,351.99. If the Court does not grant in full OTC Plaintiffs' pending fee and expense requests from Barclays Settlement, then OTC Plaintiffs respectfully request that the amount denied be granted from the Citibank Settlement, such that the cumulative fee award to Class Counsel totals $50 million, or 20% of the combined $250 million fund, and such that the $14,855,689.55 in expenses incurred through July 27, 2017, are fully reimbursed.

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By: */s/ Michael D. Hausfeld*

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2017, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List. I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Geng Chen
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