UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE LIBOR-BASED FINANCIAL INSTRUMENTS ANTITRUST LITIGATION	MDL No. 2262
THIS DOCUMENT RELATES TO:	Master File No. 1:11-md-2262-NRB ECF Case
The OTC Action	

OTC PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENT CITIBANK, N.A. AND CITIGROUP INC. AND MOTION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

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I. PRELIMINARY STATEMENT

On December 15, 2017, OTC Plaintiffs filed their Memorandum of Law in Support of the OTC Plaintiffs' Motion for Final Approval of Settlement with Citibank, N.A. and Citigroup Inc. ("Final Approval Brief") (ECF No. 2377) and their Memorandum of Law in Support of the OTC Plaintiffs' Motion for Attorneys' Fees and Reimbursement of Litigation Expenses ("Attorneys' Fees Brief") (ECF No. 2387). Since those filings, the deadline for class members to exclude themselves from or object to the Citi Settlement has passed. Despite the vast size of the class and sophisticated institutions who comprise a large portion of the class, the parties received no objection to the appointment of Hausfeld LLP and Susman Godfrey L.L.P. as class counsel, and no objection to class counsel's application for attorneys' fees and expenses. As of the date of this filing, the Claims Administrator has received only fifteen (15) timely requests for exclusion, of which all but four (4) are by entities that filed their own individual complaints in this MDL.[1] *See* Supplemental Declaration of Jason Rabe ¶ 4 & Ex. A. And only one objection to the Citi Settlement has been filed. *See* ECF No. 2399.

The paucity of objections is a strong indicator of the adequacy of the settlement. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.") (internal quotations omitted); *see also In re Bear Stearns Cos., Inc. Secs., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 266-67 (S.D.N.Y. 2012). Virtually all OTC class members, many of

[1] It is OTC Plaintiffs' understanding that there are a few additional exclusions in the mail. Accordingly, OTC Plaintiffs will file a final proposed order that includes a list of all class members that have requested exclusion in advance of the fairness hearing on January 23, 2018.

them sophisticated investors and institutions, have raised no objection to the settlement nor opted out of the class, underscoring the phenomenal result achieved for the settlement class. As set forth in greater detail below, the lone objector, the Virgin Islands Public Finance Authority ("VIPFA") lacks standing to object and argues without support that the settlement amount is too low.[2] Accordingly, for the reasons stated in the Final Approval Brief and Attorneys' Fees Brief, OTC Plaintiffs respectfully request that the Court grant final approval to the settlement between OTC Plaintiffs and Citi and approve the application for attorneys' fees and expenses.

II. ARGUMENT

A. The Court Should Overrule The Objection By VIPFA

1. VIPFA Lacks Standing to Object

As an initial matter, it appears that VIPFA lacks standing. In order to qualify for inclusion in the settlement class, VIPFA must have, among other things, owned a U.S. Dollar LIBOR-Based during the class period. The settlement defines U.S. Dollar LIBOR-Based Instrument as:

> An instrument that includes any term, provision, obligation or right to be paid or to receive interest based upon the U.S. Dollar LIBOR rate, including but not limited to asset swaps, collateralized debt obligations, credit default swaps, forward rate agreements, inflation swaps, interest rate swaps, total return swaps, options or floating rate notes. For the avoidance of doubt, U.S. Dollar LIBOR-Based Instrument does not include an instrument that includes only a term, provision, obligation or right to pay interest based upon the U.S. Dollar LIBOR rate, such as business, home, student or car loans, or credit cards.

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[2] VIPFA's attorney, Les Jacobowitz of the law firm Arent Fox, is the same attorney that filed an objection to the Barclays Settlement, at the time on behalf of Maimonides Medical Center ("Maimonides"). *See* ECF No. 2320-1. Maimonides has not objected to the Citi Settlement.

Citi Settlement Agreement at ¶ 2(ss) (ECF No. 2226-1).

VIPFA submitted confirmation of an interest rate swap with UBS AG, Stamford Branch, dated September 19, 2006, as proof of membership in the settlement class. *See* ECF No. 2399-1 at 57-62.[3] However, ***VIPFA's interest rate swap does not pay interest based on LIBOR***; it pays interest indexed to the USD-ISDA-Swap Rate.[4] *Id.* at 58. Accordingly, it does not qualify for inclusion in the settlement class and VIPFA lacks standing to object. *See, e.g.*, *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 244 (2d Cir. 2007) (noting that "[n]onparties to a settlement generally do not have standing to object to a settlement of a class action" and rejecting objection submitted by non-class member) (internal quotations omitted); *Stinson v. City of N.Y.*, 256 F. Supp. 3d 283, 291 (S.D.N.Y. 2017) ("Only a 'class member may object to the [settlement] proposal' . . . ." (quoting Fed. R. Civ. P. 23(e)(5))).

2. VIPFA's Objection is Without Merit

VIPFA does not dispute that the settlement is the product of arm's-length negotiations reached after years of hard-fought litigation. *See* ECF No. 2399. Nor does it dispute that OTC Plaintiffs' counsel are highly-regarded attorneys with substantial experience litigating and settling complex antitrust cases. *Id.* Instead, VIPFA disputes the adequacy of the settlement amount, arguing it is too low in light of the best possible recovery and the attendant risks of litigation. *Id.* This argument, however, is without merit and ignores the risks and expenses that OTC Plaintiffs

[3] The pages numbers for any ECF cite herein are to the ECF-stamped page numbers, not the page numbers on the original documents.

[4] There is a separate case pending before Judge Furman alleging a conspiracy to manipulate the ISDAfix benchmark rate. *See Alaska Electrical Pension Fund v. Bank of America Corporation*, Case No. 1:14-cv-07126 (S.D.N.Y.).

face in continuing to litigate this case against Citi.

a. VIPFA Ignores the Risks and Expenses of Continued Litigation

VIPFA's argument that because "[a] significant portion of the expense has already been incurred and the work already done in this matter, . . . there is no compelling reason to settle, or to include a discount in the settlement value, in exchange for avoiding the expense or mitigating against a long or complex litigation," ECF No. 2399 at 11-12, ignores the complexities and expenses ahead in this litigation. As the Court has recognized, OTC Plaintiffs still face a class certification hearing and decision, summary judgment, and trial on the merits, among other things. While OTC Plaintiffs are confident that they will ultimately prevail, these risks cannot be ignored. VIPFA does not address these and the other risks inherent in continued litigation or factor them into the determination of whether the settlement amount is fair and reasonable. Instead VIPFA simply asserts, without support, that the risks OTC Plaintiffs face are "significantly lessened" given the work they have already done in the case. ECF No. 2399 at 12. VIPFA's assessment is too amorphous and should not be credited. *See In re Corrugated Container Antitrust Litig.*, 659 F.2d 1322, 1327 (5th Cir. 1981).[5]

b. The Settlement Amount is an Excellent Result for the Class

"[I]n any case there is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks

[5] VIPFA also makes much of the fact that Citi can withstand a larger judgment. While the inability of a defendant to withstand a greater judgment weighs in favor of approving settlement, "the converse is not necessarily true; *i.e.,* the fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate." *In re PaineWebber Ltd. P'ships Litig.,* 171 F.R.D. 104, 129 (S.D.N.Y.1997); *see also D'Amato v. Deutsche Bank,* 236 F.3d 78, 86 (2d Cir. 2001) (holding that it is not an abuse of discretion to conclude settlement is fair even though the defendant may withstand a higher judgment when the other *Grinnell* factors weigh heavily in favor of settlement); *In re Nissan Radiator/Transmission Cooler Litig.*, No. 10 CV 7493 VB, 2013 WL 4080946, at *9 (S.D.N.Y. May 30, 2013) (same).

and costs necessarily inherent in taking any litigation to completion—and the judge will not be reversed if the appellate court concludes that the settlement lies within that range." *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir. 1972). Thus, the fairness and reasonableness of the settlement is not 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." *In re "Agent Orange" Prod. Liab. Litig.,* 597 F. Supp. 740, 762 (E.D.N.Y. 1984). In light of the risks of continued litigation described above and in the Final Approval Brief, the $130 million settlement amount clearly fits within the range of reasonableness, as demonstrated by the overwhelming support by the class.

Objections, like VIPFA's about "inadequate compensation," that concern the *amount* of a settlement are routinely rejected. *See e.g.*, *Nissan*, 2013 WL 4080946 at *14 (overruling an objection that a "settlement should have provided more compensation for plaintiffs"); *Johnson v. Brennan,* No. 10 Cit. 4712 (CM), 2011 WL 4357376, at *11-12 (S.D.N.Y. Sept. 16, 2011) (same, collecting cases).[6] Even assuming, *arguendo*, VIPFA's $23.9 billion damages estimate was reliable (and it is not),[7] the difference between that amount and the settlement amount is not

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[6] *See also Taft v. Ackermans*, No. 02 Civ. 7951(PKL), 2007 WL 414493, at *7 (S.D.N.Y. Jan. 31, 2007) (overruling objections that the settlement amount was insufficient because, among other things, plaintiffs faced serious challenges in establishing liability and damages); *Hicks v. Stanley*, No. 01 Civ. 10071(RJH), 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) (overruling class member objections that settlement amount was too low; "[t]here are obstacles that the plaintiffs would face in continued litigation with defendants, and it is uncertain whether they could overcome these obstacles to prove both liability and damages .... settlement amount represents a fair payment to plaintiff class due to the risk that protracted litigation may be fruitless"); *Cagan v. Anchor Sav. Bank FSB*, No. CV-88-3024, 1990 WL 73423, at *3 (E.D.N.Y. May 22, 1990) (overruling objections that settlement was too low; "The initial reaction of these objectors is understandable, but they fail to take into account the probabilities of success in this lawsuit.").

[7] Employing a back of the envelope analysis, VIPFA's counsel estimates that damages attributable to Citi are $23.9 billion. *Id*. at 10. VIPFA fails to exclude from its analysis transactions that are not serving as a basis for damages sought by OTC Plaintiffs. For example, it appears that VIPFA includes all LIBOR-based instruments (not just those on which Citi was paying LIBOR), all transactions between Citi and other panel banks (which are excluded from both the settlement class and litigation class definition), transactions that were entered into outside of the United

sufficient to justify denial of the settlement. As the court explained in *PaineWebber*, "the dollar amount of the settlement by itself is not decisive in the fairness determination, and the fact that the settlement fund may equal only a fraction of the potential recovery at trial does not render the settlement inadequate. 'In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.'" 171 F.R.D. at 131 (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n.2 (2d Cir. 1974)).[8] "[Class M]embers who are not satisfied with the level of compensation provided may opt-out of the class and pursue their own claims." *Nissan*, 2013 WL 4080946, at *11.[9]

States, and non-LIBOR-based interest rate transactions. *Id*. at 2-8, 35-89. Given the flaws in VIPFA's analysis, its estimate of potential damages warrants no consideration. *See e.g., In re Checking Account Overdraft Litig.* No. 1:09-M-D-02836-JLK, 2014 WL 11370115, at *12 (S.D. Fla. Jan. 6, 2014) (overruling objections that settlement amount was too low; "None of the objectors submitted an expert affidavit or provided any evidence undermining the conclusions reached by Class Counsel and their nationally recognized experts.").

[8] VIPFA's reliance on *Schwartz v. Dallas Cowboys Football Club, Ltd*., 157 F. Supp. 2d 561 (E.D. Pa. 2001) is misplaced. Therein, the court rejected a settlement comprised of injunctive relief that the court found of little benefit to the class: a $7.5 million cash payment to the class and $7 million for settlement administration and attorneys' fees. *Id*. at 573-80. The court also found that the scope of the release was too broad because it extended far beyond the conduct challenged in the litigation and barred later claims based on future conduct. *Id.* The court faulted both class counsel and defense counsel for putting their own interest above that of the class and concluded that rejecting the settlement would serve the public policy interest in not rewarding counsel for bringing unmeritorious claims and not rewarding defendants with protection from future litigation. *Id*. at 581-82. The Citi settlement, which includes a cash payment to the class of $130 million and cooperation in the ongoing litigation, does not release future claims, and does not contractually establish the amount of Plaintiffs' counsel's attorneys' fees (a determination left to the Court in this instance),, does not suffer the same infirmities. VIPFA's reliance on *In re Traffic Executive Association-Eastern Railroads*, 627 F.2d 631 (2d Cir. 1980) in light of the more recent authority in this circuit cited above.

[9] As noted in the primary case relied upon by VIPFA, the "essence of a settlement is compromise. A just result is often no more than an arbitrary point between competing notions of reasonableness." *Corrugated Container*, 659 F.2d at 1325. Despite VIPFA's insinuations to the contrary, *Corrugated Container* supports approval of the settlement here. In the opinion relied upon by VIPFA, the Fifth Circuit declined to approve settlements and instead remanded to the district court for further consideration of the adequacy of the settlements. *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 225 (5th Cir. 1981). On remand, however, the district court found that the proposed settlements were in fact reasonable in light of the attendant risks of continued litigation, specifically, evidentiary problems with respect to proof of a conspiracy, impact, and damages, and the length and cost of trial. *In re Corrugated Container Antitrust Litig.*, No. MDL 310, 1981 WL 2093, at *5-7 (S.D. Tex. June 4, 1981). As the court explained, "While many antitrust actions are protracted and expensive, this case presents particularly difficult and complicated legal and factual issues. If all defendants went to trial, proof of a conspiracy and impact in this case

III. CONCLUSION

The settlement is plainly fair, reasonable, and adequate. Indeed, given the risks of ongoing litigation and other factors addressed in OTC Plaintiffs' prior submissions, the settlement represents a truly excellent result for the OTC class and was only achieved after years of hard-fought litigation. Only one objection (that of VIPFA) was lodged. As discussed above, that sole objection is without merit. No class member challenged OTC Plaintiffs' application for attorneys' fees and reimbursement of expenses. Thus, OTC Plaintiffs respectfully request that the Court overrule VIPFA's objection, grant final approval to the settlement, and grant the application for attorneys' fees and reimbursement of expenses.

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would involve the introduction into evidence of tens of thousands of pages of deposition testimony, the substance of thousands of documents and advanced economic theories. … The complexity of the issues which would be raised and the evidence which would be presented in a necessarily lengthy trial against thirty-seven defendants raise serious constitutional due process questions concerning a jury's ability to master the facts and reach a reasoned verdict." *Id.* at *15. The Fifth Circuit affirmed, rejecting the objector's assessment of the plaintiffs' likelihood of success on the merits as "too amorphous." 659 F.2d at 1327.

Dated: January 9, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2018, 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/ Hilary K. Scherrer
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