

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

<p>IN RE FOREIGN EXCHANGE BENCHMARK RATES ANTITRUST LITIGATION</p>	<p>x : : : : : : : : : : x</p>	<p>ECF CASE</p> <p>No. 13-CV-07789-LGS</p> <p>JURY TRIAL DEMANDED</p>
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**DECLARATION OF DAVID E. KOVEL IN SUPPORT OF
PLAINTIFFS’ MOTION FOR APPROVAL OF
NOTICE OF SETTLEMENT AND PLAN OF DISTRIBUTION**

I, DAVID E. KOVEL, hereby declare under penalty of perjury that the following is true and correct:

1. I am a member in good standing of the Bar of the State of New York. I am admitted to practice before this Court.

2. I am a member of the law firm of Kirby McInerney LLP. I have knowledge of the matters set forth herein.

3. This Declaration is submitted in support of the Motion for Approval of the Form and Manner of Notice of Settlements and Preliminary Approval of the Plan of Distribution, which are filed concurrently.

4. The role of my firm, along with our co-allocation counsel Nussbaum Law Group, P.C., co-counsel Morris and Morris LLC and Cafferty Clobes Meriwether & Sprengel LLP, in the settlement process has been to advocate for and represent the interests of the Exchange-Only Settlement Class. We are referred to as “Exchange Class Allocation Counsel”.

5. What this representation has meant, in the context of settlement, is that under

the auspices of a structure supported by Scott+Scott and Hausfeld LLP (“Class Counsel”) we have made legal and factual arguments on behalf of, and advocated for, the fair treatment of the foreign exchange traders whose trading occurred on futures exchanges like the Chicago Mercantile Exchange (“CME”) and the Intercontinental Exchange, Inc. (“ICE”).

6. We have represented exchange-based traders vigorously in the context of an overall settlement presently before the Court. In representing these types of traders, Exchange Class Allocation Counsel adhered to Second Circuit precedent, including *In re Literary Works in Electronic Databases*, 654 F.3d 242 (2d Cir. 2011). Exchange Class Allocation Counsel worked to maximize the recovery and minimize the burden of those who traded only exchange instruments. *See id.* at 251.

Background

7. As described more fully elsewhere, Class Counsel, on behalf of the plaintiffs and proposed classes in this litigation, have entered into and executed settlements with Bank of America Corporation, Bank of America, N.A., and Merrill Lynch, Pierce, Fenner & Smith Inc.; Barclays Bank PLC and Barclays Capital Inc.; BNP Paribas Group, BNP Paribas North America Inc., BNP Paribas Securities Corp., and BNP Prime Brokerage, Inc.; Citigroup Inc., Citibank, N.A., Citicorp, and Citigroup Global Markets Inc.; The Goldman Sachs Group, Inc. and Goldman, Sachs & Co.; HSBC Holdings PLC, HSBC Bank PLC, HSBC North America Holdings Inc., HSBC Bank USA, N.A., and HSBC Securities (USA) Inc.; JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A.; The Royal Bank of Scotland Group PLC, The Royal Bank of Scotland PLC, and RBS Securities Inc.; and UBS AG, UBS Group AG, and UBS Securities LLC (collectively, the “Settling Defendants”).

8. The Settling Defendants have individually agreed to pay amounts which in the aggregate total \$2,009,075,000 (the “Aggregate Settlement Funds”), including \$1,948,500,000

for the Direct Settlement Class (described below and defined in the [Proposed] Plan of Distribution), \$59,575,000 for the Exchange-Only Settlement Class (described below and defined in the [Proposed] Plan of Distribution) and \$1,000,000 toward Notice and Administration. Settling Defendants further agreed to provide reasonable cooperation in the continued prosecution of the Action.

9. The Direct Settlement Class includes investors of foreign exchange instruments who traded directly with the Settling Defendants over the counter or “OTC.” These investors may or may not have also traded foreign exchange instruments on futures exchanges. The Exchange-Only Settlement Class consists of traders who only traded foreign exchange instruments on futures exchanges. Traders of foreign exchange instruments on futures exchanges have unique claims as compared to those who traded OTC, in particular, they have claims under the Commodities Exchange Act (“CEA”). Other features of their trading may make their claims distinct as well. For instance, traders on futures exchanges on the CME and ICE have these exchanges as their counterparties. The clearinghouses maintain detailed records of the transactions on the futures exchanges.

10. My firm and co-counsel were well suited to represent the interests of traders on these futures exchanges because we filed cases in February 2015 seeking to represent solely these types of traders. ECF No. 384 at 1. Exchange Class Allocation Counsel do not represent any claim based on OTC trades with any defendant. Moreover, as described more fully below, the Exchange Class Allocation Counsel had been working with experts for some time to identify the magnitude of manipulation on the futures exchanges (as opposed to the OTC market) and to articulate claims under the CEA specific to futures traders.

The Allocation Process

11. Within this dynamic of two separate classes having settled and been impacted

by conduct alleged, Class Counsel designated Exchange Class Allocation Counsel on the one hand and the law firms Lowey Dannenberg Cohen & Hart, P.C. and Labaton Sucharow LLP as Direct Settlement Class Allocation Counsel on the other to represent these two sets of interests. This arrangement was consistent with my earlier discussions and agreement with Class Counsel in the summer of 2015 concerning the advantages to having representative plaintiffs and counsel “focused on prosecuting and representing the Exchange Class claims.” ECF No. 384 at 1-2. Direct Settlement Class Allocation Counsel and Exchange Class Allocation Counsel are referred to collectively as “Allocation Counsel.”

12. At the beginning of this process, Class Counsel and Allocation Counsel met on October 7, 2015, at the Hausfeld LLP law offices in Washington, D.C. to discuss the process by which Allocation Counsel would address any possible different treatment as between trades that occurred on futures exchanges as opposed the those trades that occurred directly with Defendants (i.e., over the counter, or OTC). It was agreed that Allocation Counsel would engage in arm’s-length, adversarial negotiations to determine the allocation of the settlement proceeds between those two types of trades. Kenneth Feinberg and his team also attended this meeting.

13. At the meeting it was decided that the first step would involve meetings among Allocation Counsel and experts retained by Class Counsel. It was also decided that any disputes between the two groups of Allocation Counsel were to be mediated by Mr. Kenneth Feinberg and his consultants.

14. At the outset Allocation Counsel considered many matters relevant to the allocation process, such as how to address the relative strengths of the claims of the Direct and Exchange-Only Settlement Classes, whether the specific settlement funds should be kept separate by type of claim, the handling of various types of traders, and how to treat class members with *de minimis* or relatively small claims.

15. On November 17, 2015, Allocation Counsel met at the New York offices of Class Counsel Scott+Scott for a detailed presentation by counsel and experts regarding the underlying facts and theories of the case.

16. Allocation Counsel next met a week later at the office of Kirby McInerney LLP on November 24, 2015. There, during the arm's-length negotiations, Allocation Counsel discussed the relative difficulty or ease of establishing liability for the OTC claims as opposed to the futures exchange claims, the size of the relevant OTC market as opposed to the exchange market, and other matters such as whether the relative volume of OTC versus exchange trades should be determined by the claims submitted or publicly-available data.

17. Class Counsel Christopher Burke further explained Allocation Counsel's role to the Court on December 3, 2015, at the hearing on Plaintiffs' Motion for Preliminary Approval of the settlements, explaining that Allocation Counsel would "be making recommendations to Mr. Feinberg in terms of how you would weigh the nominal value of claims that came through OTC trades as opposed to claims that resulted from trades on an exchange." Transcript (ECF No. 532, Dec. 3, 2015), at 22.

18. During this period, Exchange Class Allocation Counsel were active in analyzing the relative strengths of the claims of the exchange-based traders for both liability and class certification. We engaged in a similar exercise for the OTC trade claims.

19. Exchange Class Allocation Counsel met again with Direct Settlement Class Allocation Counsel at the offices of Kirby McInerney LLP on December 16, 2015 and December 21, 2015 to advocate on behalf of their classes. Those meetings included separate presentations as to relative strengths of the antitrust claims, Commodity Exchange Act claims, standing and class certification. The presentations were followed by extensive discussion as to how Allocation Counsels' conclusions should impact weighting for the purposes of allocation.

Allocation Counsel held multiple telephone calls and meetings, among themselves and with each other, over a three-month period in negotiating allocations issues.

Exchange Class Allocation Counsel's Work with an Independent Consulting Expert

20. During and preceding these meetings, Exchange Class Allocation Counsel worked closely with their consulting expert, a highly qualified Ph.D. professor of Finance.

21. My firm and our co-counsel had been involved in the analysis and understanding of the exchange-based claims for more than two years. We had brought separate actions and retained the consulting expert prior to the consolidation of the actions and the settlements that are the subject of this declaration. As such, this expert was (and is) intimately familiar with, and actively involved in, all of the quantitative aspects of the exchange-based claims as well as many of the legal issues. Over this period, the consulting expert has had the opportunity to provide expert analysis and insights regarding the foreign exchange market generally and the futures market specifically.

22. At the direction of Exchange Class Allocation Counsel, the consulting expert used economic, financial and statistical methodologies to analyze the impact that foreign exchange price manipulation had on the futures market. This work was relevant to, among other issues, the size of the futures class, the quantum of alleged market manipulation on futures prices in connection with the setting of specific fixes, including the 4:00 GMT London Fix and the 2:00 CT CME Daily Settlement Fix, as well as fixes generally over the course of the trading day or at various times of year. In addition, the consulting expert assessed the correlation between the liquidity of certain currency pairs and evidence of manipulation.

23. The results of the consulting expert's analyses provided insights to Exchange Class Allocation Counsel's understanding of the parameters of their claims and in their arm's-

length negotiations with Allocation Counsel for the Direct Settlement Class. The consulting expert was instrumental in assisting Exchange Class Allocation Counsel in developing and advocating the premise that spot and futures claims should be treated equally, with payment on a *pro rata* basis from the entire settlement fund.

24. The consulting expert was able to assist Exchange Class Allocation Counsel in their negotiations with Direct Settlement Class Allocation Counsel regarding the nature of the injury suffered by exchange-based claimants as compared with that suffered by OTC claimants, supporting Exchange Class Allocation Counsel's position that the impact of the injury in both markets was substantially identical.

Results of the Allocation Meetings

25. The meetings among the Allocation Counsel resulted in a couple of generalized conclusions that were agreed to and communicated to Class Counsel.

26. First, the advocacy for and analysis of the relative legal strengths of exchange-based as opposed to OTC claims by their respective Allocation Counsel resulted in the parties reaching a consensus. After Allocation Counsel argued and weighed the various legal issues as to liability, standing, class certification and measuring damages, it was agreed that traders on futures exchanges should receive no legal discount (or premium) based on their position in the market. This outcome was the result that Exchange Class Allocation Counsel zealously supported and believe to be in the best interests of futures traders.

27. Second, much of the negotiation between the two sets of Allocation Counsel centered around a debate about market size. Exchange Class Allocation Counsel had spent a significant amount of time and effort with their expert to estimate the size of the relevant futures (and option on futures) market relative to the relevant OTC market. Likewise, the Direct

Settlement Class Allocation Counsel had their own views of the size of the OTC market as compared to futures. As to this issue, both sides aggressively advocated their respective positions as it impacted allocation.

28. In the end, Allocation Counsel agreed that the claims administration process would be the best way to settle a disagreement about market size. The claims process, then, would serve as a better proxy for relative market size than the estimates of Allocation Counsel and their experts. Exchange Class Allocation Counsel believe that using the claims process to identify trades is a fair result for futures traders. By having the Aggregate Settlement Funds open to all claims, including futures and options on futures, the risk that the exchange-based claims receive an unfair payout vis-à-vis the OTC trades is significantly diminished.

29. Exchange Class Allocation Counsel have an ongoing role to play to ensure that futures traders receive a fair portion of the Aggregate Settlement Funds. This role involves at least two aspects. First, Exchange Class Allocation Counsel are working and will continue to advocate for a claims administration process that will maximize the claims rate for those who traded foreign currency futures. Second, Exchange Class Allocation Counsel will continue to work with Class Counsel to ensure that assumptions made in the [Proposed] Plan of Distribution are fair and equitable to exchange traders when compared with OTC traders. These issues are discussed more fully below.

Review of Plan of Distribution

30. Exchange Class Allocation Counsel have considered, and discussed with the other Allocation Counsel and Class Counsel, various issues relating to the [Proposed] Plan of Distribution.

31. Exchange Class Allocation Counsel have actively reviewed summaries of what

is now the [Proposed] Plan of Distribution. This plan has been updated and revised based on the consultation between and among Class Counsel, Exchange Class Allocation Counsel and Direct Settlement Class Allocation Counsel.

32. Exchange Class Allocation Counsel have had several telephone conversations with Class Counsel and the experts since August 10, 2016. For example, on August 18, 2016, a call was held among Exchange Counsel, Allocation Counsel for the Direct Settlement Class, Class Counsel and the experts for the Class Counsel in which the proposed Plan of Distribution was discussed in detail and Exchange Class Allocation Counsel's questions were addressed. Since that telephone conversation, Exchange Class Allocation Counsel and Class Counsel have had several follow-up conversations.

33. Contemporaneously, Exchange Class Allocation Counsel's consulting expert has analyzed the [Proposed] Plan of Distribution and had several conversations with Class Counsel's experts to support the exchange-based traders' positions. For example, on August 25, 2016 and August 26, 2016, the experts discussed various issues arising in connection with fairly addressing assumptions made in the [Proposed] Plan of Distribution.

34. Overall the process has led to benefits for those who traded on futures exchanges. For example, as described above, Exchange Class Allocation Counsel successfully argued for modifying the treatment of the settlement funds. The \$59.75 million initially earmarked for those Settlement Class members who traded *only* exchange instruments has been modified to permit a pour-over from the funds for the Direct Settlement Class in the event the earmarked amount is over-subscribed. This ensures adequate funding for the compensation of all exchange-based traders.

35. Exchange Class Allocation Counsel (and their expert) have also worked to

ensure that certain assumptions made in the [Proposed] Plan of Distribution are fair to exchange-based claims. So, for example, Exchange Class Allocation Counsel have sought to diminish the role that trade size has played in impacting allocation as exchange transactions are typically smaller in size relative to over-the-counter transactions. Similarly, Exchange Class Allocation Counsel have sought to address the treatment that less liquid currency pairs will receive in allocation to ensure that the currency pairs traded on exchanges (which are generally more liquid pairs) receive a proportionate payout relative to the amount of estimated impact the alleged manipulation had on these pairs.

36. Exchange Class Allocation Counsel have been actively engaged with other matters as well. These include the other assumptions in the [Proposed] Plan of Distribution such as the “conversion rates” that will be applied to futures and other products from manipulation on the spot market. Exchange Class Allocation Counsel have sought (successfully we believe) to ensure that futures contracts are given a conversion rate of about one (1) for any manipulation of the spot market and have otherwise been treated fairly under the assumptions made in the [Proposed] Plan of Distribution.

37. Exchange Class Allocation Counsel have also sought to ensure that the claims administration process will result in a strong claims rate for futures traders. We have communicated extensively with counsel for ICE and the CME to identify large traders and to ensure that notice will get to them. In addition, we have worked to ensure that the claims administration process will allow us to follow up with these exchanges to obtain access to full trading records in the event that some individual trader records are lost either by the trader or by the trader’s futures commission merchant (“FCM”). We also anticipate that through the claims administration we will be able work iteratively with FCMs and the exchanges to help them

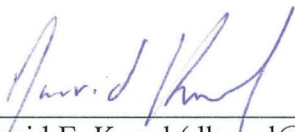
identify the records of class members who have a right to claim under the settlements.

Conclusion

38. In sum, at all times, including when reviewing the Proposed Plan of Distribution, Exchange Class Allocation Counsel has sought to ensure that the distribution of the Aggregate Settlement Funds fairly treats those who traded exchange-based foreign exchange instruments. Exchange Class Allocation Counsel have endeavored to satisfy their fiduciary responsibilities by representing their constituent class at each stage to arrive at a fair and equitable allocation of settlement proceeds between the Direct and Exchange-Only Settlement Classes and among all exchange traders.

39. Exchange Class Allocation Counsel anticipate continuing involvement in the further development of the Plan of Distribution, including with the advice of our independent experts, to ensure the continued fair treatment of the traders on futures exchanges.

Executed August 31, 2016
New York, New York



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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2016, 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. Executed on August 31, 2016.

/s/ Christopher M. Burke
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