SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

BLACKROCK CORE BOND PORTFOLIO, et al., Plaintiffs, -against- WELLS FARGO BANK, NATIONAL ASSOCIATION, Defendant.	Index No. 656587/2016 Justice Andrew Borrok (Part 53)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR (1) FINAL APPROVAL OF SETTLEMENT AND PROPOSED PLAN OF ALLOCATION; (2) CERTIFICATION OF THE ACTION AS A CLASS ACTION FOR SETTLEMENT PURPOSES PURSUANT TO CPLR 901, *ET SEQ.*; AND (3) AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

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Plaintiffs and Plaintiffs' Counsel respectfully submit this reply memorandum in further support of their motion for: (i) final approval of the proposed settlement and plan of allocation as fair, reasonable and adequate, and in the best interests of the Class; (ii) certification of the Action as a class action for settlement purposes pursuant to CPLR 901, *et seq.*; and (iii) an award of attorneys' fees and reimbursement of litigation expenses.

I. INTRODUCTION

As detailed in Plaintiffs' opening motion, the proposed Settlement is the product of more than four years of hard-fought litigation and extended arm's-length settlement negotiations. The proposed Settlement resolves this litigation in its entirety in exchange for a cash payment of $43 million and the release of up to $70 million of Reserve Funds withheld or reserved by Defendant in connection with certain Trusts at issue in this litigation. The Settlement represents an excellent result for the Settlement Class, providing a real and immediate benefit for Settlement Class Members, particularly given the significant risks in this litigation with respect to liability and damages, and avoids the expense and uncertainty of protracted proceedings if the litigation were to continue. The Settlement will be distributed fairly to all Settlement Class Members under the proposed Plan of Allocation. Finally, the requested attorneys' fees of 20% of the Settlement Amount, net of Court-awarded litigation expenses, are fair and reasonable and well within the range of fees awarded in comparable, complex cases.

Pursuant to the Court's January 30, 2019 Order (1) Directing Notice to the Proposed Settlement Class of the Proposed Settlement and Fairness Hearing, and (2) Setting Date for Fairness Hearing (the "Notice Order") (ECF No. 156, Jan. 30, 2019), the Claims Administrator, under the supervision of Plaintiffs' Counsel, conducted an extensive notice program, including mailing the Notice to over 22,908 potential Settlement Class Members and nominees. In response to this notice program, only two potential Settlement Class Members objected to the Settlement. The "objections"

did not challenge the fairness, adequacy or reasonableness of the Settlement. Rather, both "objections" sought participation in the Settlement Class with certain clarifications. Specifically, the National Credit Union Administration Board ("NCUA") and Graeme W. Bush as separate trustee for NCUA Guaranteed Notes (together with NCUA, the "NCUA Plaintiffs") requested that they be permitted to participate in the Settlement as a Settlement Class Member for Trusts that are not at issue in its individual action against Wells Fargo. Similarly, the FHFA "objection" sought certain "clarifications" regarding the releases, which, according to the objection, would enable the FHFA to consent to and participate in the Settlement. Both "objections" have now been resolved and withdrawn. *See* Joint Stipulation Of The Parties And NCUA Plaintiffs Withdrawing NCUA Plaintiffs' Objections To The Settlement; Joint Stipulation Of The Parties And The FHFA Objectors Withdrawing The FHFA Objectors' Objections To The Settlement.

Accordingly, there are ***no objections*** to the Settlement, the certification of the Settlement Class, the proposed Plan of Allocation, or Plaintiffs' Counsel's request for an award of attorneys' fees and reimbursement of expenses. Further, only two sets of requests for exclusion have been submitted on behalf of eleven funds or trusts. As explained further below, this reaction of the Settlement Class demonstrates that the proposed Settlement, the Plan of Allocation, and the request for attorneys' fees and reimbursement of expenses are fair and reasonable, and should be approved.

II. THE PROPOSED SETTLEMENT WARRANTS FAIRNESS APPROVAL

A. The Court-Approved Notice Program

Pursuant to the Court's January 30, 2019 Notice Order, more than 22,908 copies of the Notice and Claim Form have now been mailed by first-class mail to potential Settlement Class Members and their nominees. *See* Supplemental Affidavit of Jack Ewashko Regarding (A) Mailing of the Notice and Claim Form; and (B) Report on Requests for Exclusion Received ("Supp. Ewashko Aff.") at ¶3. In addition, on March 4, 2019, Defendant published the Notice, Summary

Notice, Proof of Claim Form and a list of the Trusts on the home page of its website www.ctslink.com ("CTS Link"). DeLange Affidavit ("DeLange Aff.") (ECF No. 163) ¶74. Defendant also issued these notices via CTS Link for each of the Trusts' individual pages, which included the Notice, Summary Notice, and Proof of Claim Form. *Id*. Defendant also caused the Depository Trust & Clearing Corporation ("DTCC") to issue the Notice, Summary Notice, and Proof of Claim Form via its LENS legal notice system. *Id*. The Notice and Proof of Claim Form were posted and have remained available on the websites of the Claims Administrator and Plaintiffs' Counsel. *See* Supp. Ewashko Aff. at ¶4; Supp. DeLange Aff. at 4. Finally, copies of the papers filed in support of Plaintiffs' motion for final approval of the Settlement and Plan of Allocation and Plaintiffs' Counsel's motion for an award of attorneys' fees and expenses were posted to the Claims Administrator's website and Plaintiffs' Counsel's website. *See* Supp. Ewashko Aff. at ¶4; Supp. DeLange Aff. at ¶4.

The Notice informed Settlement Class Members of the terms of the proposed Settlement and Plan of Allocation, the proposed certification of the Settlement Class, and that Plaintiffs' Counsel would apply for an award of attorneys' fees in an amount not to exceed 20% of the Settlement Fund and reimbursement of Litigation Expenses in an amount not to exceed $9,500,000. *See* Notice ¶¶5-11. The Notice also apprised Settlement Class Members of their right to object to the proposed Settlement, the certification of the Settlement Class, the Plan of Allocation and/or the request for attorneys' fees, and expenses, their right to exclude themselves from the Class, and the April 15, 2019 deadline for filing objections and for receipt of requests for exclusion. *See* Notice at p. 13 and ¶12.

Notably, following this robust notice program, no Settlement Class Member objected to the Plan of Allocation, certification of the Settlement Class, or Plaintiffs' Counsel's application for fees and expenses. And, while two potential Settlement Class Members filed "objections," neither

challenged the fairness of the Settlement. As explained above, both "objections" have been satisfactorily resolved and withdrawn by stipulation of the parties and the objectors. Thus, following this robust notice program, there are ***no objections*** to the Settlement.

B. The Settlement Class Should Be Certified To Effectuate The Settlement

In their opening papers, Plaintiffs respectfully requested the Court certify the following class for settlement purposes:

> All persons or entities who purchased or otherwise acquired a beneficial interest in a security issued from the Trusts and (i) hold on the date on which the Court enters an order finally approving the Settlement or (ii) held at any time on or after June 18, 2014, but no longer hold as of the date on which the Court enters an order finally approving the Settlement (herein, the "Class" or the "Settlement Class").[1]

The U.S. Supreme Court has held that certification of a class for settlement purposes is appropriate. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).[2] The decision to certify a class solely for settlement purposes is within the court's discretion. *See*, *e.g.*, *Jacobs v. Macy's East, Inc.*, 792 N.Y.S.2d 574, 576 (N.Y. App. Div. 2d Dep't 2005).

Here, as established in Plaintiffs' opening motion, the proposed Settlement Class meets all five of CPLR 901(a)'s requirements and should be certified for purposes of the Settlement. *See*

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[1] Excluded from the Class are Defendant, the Originators, the Sellers, the Master Servicers and the Servicers to the Trusts, and their officers and directors, their legal representatives, successors or assigns, and any entity in which they have or had a controlling interest; provided, however, that Wells Fargo is not excluded from the Class to the extent that Wells Fargo holds Certificates in the Trusts as assets in its capacity as a trustee or indenture trustee (or similar capacity) for the benefit of third-party investors. Also excluded from the Class are IKB International, S.A., IKB Deutsche Industriebank A.G., and the plaintiffs or any entity a court determines to be the proper plaintiff(s) in the following actions: (i) *Royal Park Invs. SA/NV v. Wells Fargo Bank, N.A.*, Case No. 14-cv-9764 (S.D.N.Y.); (ii) *Nat'l Credit Union Admin. Bd., et al. v. Wells Fargo Bank, N.A.*, Case No. 14-cv-10067 (S.D.N.Y.), as to the Trusts at issue in that action; (iii) *Phoenix Light SF Ltd., et al. v. Wells Fargo Bank, N.A.*, Case No. 14-cv-10102 (S.D.N.Y.); (iv) *Commerzbank A.G. v. Wells Fargo Bank, N.A.*, Case No. 15-cv-10033 (S.D.N.Y.); and (v) any person or entity that properly requests exclusion from the Class.

Pursuant to the Stipulation withdrawing the NCUA Plaintiffs' objections to the Settlement, the exclusion provision regarding the *Nat'l Credit Union Admin. Bd., et al. v. Wells Fargo Bank, N.A.*, Case No. 14-cv-10067 (S.D.N.Y.), action has been amended to add "as to the Trusts at issue in that action."

[2] Under the terms of the Settlement, Wells Fargo agreed not to oppose certification of a settlement class only here. Stipulation of Settlement ¶¶3-4. The proposed Settlement preserves Wells Fargo's rights on these issues. *Id*.

Michels v. Phoenix Home Life Mut. Ins. Co., 1997 WL 1161145, at *12 (N.Y. Sup. Jan. 7, 1997) ("the difficulties likely to be encountered in the management of a class action are … minimal in light of the extensively negotiated provisions of the Settlement Agreement"); *see also Amchem Prods.*, 521 U.S. at 620 (internal citation omitted) ("Confronted with a request for settlement-only class certification, a [trial] court need not inquire whether the case, if tried, would present intractable management problems, ... for the proposal is that there be no trial."). Indeed, where certification is proposed for settlement purposes only, CPLR 901(a)'s criteria are to be "liberally construed" by the reviewing court. *Wilder v. May Dep't Stores Co.*, 804 N.Y.S.2d 423, 426 (N.Y. App. Div. 2d Dep't 2005). Notably, there are no objections and no opposition to the certification of the Settlement Class for settlement purposes.

C. The Reaction Of The Settlement Class Supports Approval Of The Settlement And Plan Of Allocation

Plaintiffs and Plaintiffs' Counsel respectfully submit that their opening papers demonstrate that approval of the motion is warranted. Now that the time for objecting or requesting exclusion from the Class has passed, the reaction of the Settlement Class supports approval of the Settlement. Only two "objections" were received, both of which have now been resolved and withdrawn. Moreover, the fact that only two sets of requests for exclusion (on behalf of eleven funds or trusts) have been received from potential Settlement Class Members provides additional support for approval of the motion. *See* Supp. Ewashko Aff. ¶5 & Ex. 1.

The limited number of objections and requests for exclusion from Settlement Class Members supports a finding that the Settlement is fair, reasonable, and adequate. Indeed, "the favorable reaction of the overwhelming majority of class members to the Settlement is perhaps the most significant factor" in the approval inquiry. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 119 (2d Cir. 2005). Under New York law, support for a proposed settlement from the opposing parties and class members demonstrates its fairness and reasonableness. *See, e.g., Hibbs*

v. Marvel Enters., 797 N.Y.S.2d 463, 464 (N.Y. App. Div. 1st Dep't 2005); *Fiala v. Metro. Life Ins. Co.*, 899 N.Y.S.2d 531, 539 (N.Y. Sup. Ct. 2010) (approving settlement when small fraction of class members objected or opted out); *Michels*, 1997 WL 1161145, at *26 (same). *See also In re Virtus Inv. Partners, Inc. Sec. Litig.*, 2018 WL 6333657, at *2 (S.D.N.Y. Dec. 4, 2018) ("the absence of objections by the class is extraordinarily positive and weighs in favor of settlement"); *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *6 (S.D.N.Y. Sept. 9, 2015) ("the absence of objections may itself be taken as evidencing the fairness of a settlement"); *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 176 (S.D.N.Y. 2014) ("The absence of . . . objections and minimal investors electing to opt out of the Settlement provides evidence of Class members' approval of the terms of the Settlement.").

The lack of objections from Settlement Class Members also supports approval of the Plan of Allocation. *See, e.g.*, *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 240 (E.D.N.Y. 2013) (conclusion that the proposed plan of allocation was fair and reasonable was "buttressed by the . . . absence of objections from class members"); *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115809, at *14 (S.D.N.Y. Nov. 7, 2007) ("not one class member has objected to the Plan of Allocation which was fully explained in the Notice of Settlement sent to all Class Members. This favorable reaction of the Class supports approval of the Plan of Allocation.").

D. The Reaction Of The Settlement Class Supports Approval Of The Fee And Expense Request

The positive reaction of the Class should also be considered with respect to Plaintiffs' Counsel's motion for an award of attorneys' fees and reimbursement of Litigation Expenses. Here, Plaintiffs' Counsel respectfully moves this Court for an award of $6,804,100 in attorneys' fees, or 20% of the net $43 million Settlement Fund and reimbursement of litigation expenses in the amount

of $8,979,500.72. Plaintiffs' Counsel's fee award request does not include an award request relating to the release of the $70 million Reserve Funds.

As detailed in Plaintiffs' opening motion and the Affidavit of Timothy A. DeLange, the fee amount requested, 20% of the net settlement fund, or $6,804,100, is well below the dollar amount determined by multiplying each attorney's hours by her or his hourly rate (lodestar of $27.2 million), *see* DeLange Aff., ¶87, Ex. 4B (Time Summary), even though the substantial risk and other factors justifying a multiplier were present in this case. In fact, although Plaintiffs' Counsel's lodestar totals more than $27 million, Plaintiffs' Counsel is applying for an award representing a negative multiplier of 0.25. *See* DeLange Aff. ¶¶87-88. Considering this discount, the results achieved in this novel and hard-fought case, and the favorable reaction from the Settlement Class, the requested amount is more than reasonable.

The absence of any objections to the requested fee supports a finding that the fee and expense request is fair and reasonable. *See, e.g.*, *Vaccaro v. New Source Energy Partners L.P.*, 2017 WL 6398636, at *8 (S.D.N.Y. Dec. 14, 2017) ("The fact that no class members have explicitly objected to these attorneys' fees supports their award."); *Asare v. Change Grp. of New York, Inc.*, 2013 WL 6144764, at *16 (S.D.N.Y. Nov. 18, 2013) ("not one potential class member has made an objection, a factor held by courts as supporting approval of an attorneys' fees award"); *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at *10 (S.D.N.Y. Nov. 7, 2007) (the reaction of class members to a fee and expense request "is entitled to great weight by the Court" and the absence of any objection "suggests that the fee request is fair and reasonable").

The lack of objections by institutional investors particularly supports approval of the fee request. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) (the fact that "a significant number of investors in the class were 'sophisticated' institutional investors that had considerable financial incentive to object had they believed the requested fees were excessive" and

did not do so, supported approval of the fee request); *In re Bisys Sec. Litig.*, 2007 WL 2049726, at *1 (S.D.N.Y. July 16, 2007) (lack of objections from institutional investors supported the approval of fee request because "the class included numerous institutional investors who presumably had the means, the motive, and the sophistication to raise objections if they thought the [requested] fee was excessive").

III. CONCLUSION

The proposed Settlement is fair, adequate, and reasonable and warrants final approval. Plaintiffs respectfully request that the Court certify the Class for purposes of settlement and order the Parties to comply with the terms of the Settlement Agreement, as set forth in the accompanying proposed Final Order and Judgment, and approve Plaintiffs' Counsel's Motion for Attorneys' Fees and Reimbursement of Litigation Expenses.

Dated: April 29, 2019
New York, New York

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