CITATION: Mancinelli v. Royal Bank of Canada, 2017 ONSC 2324
COURT FILE NO.: CV-15-536174
DATE: 20170420

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JOSEPH S. MANCINELLI, CARMEN PRINCIPATO, DOUGLAS SERROUL, LUIGI CARROZZI, MANUEL BASTOS and JACK OLIVEIRA in their capacity as THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, and CHRISTOPHER STAINES

Plaintiffs

– and –

ROYAL BANK OF CANADA, RBC CAPITAL MARKETS LLC, BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., BANK OF AMERICA CANADA, BANK OF AMERICA NATIONAL ASSOCIATION, THE BANK OF TOKYO MITSUBISHI UFJ LTD., BANK OF TOKYO-MITSUBISHI UFJ (CANADA), BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., BARCLAYS CAPITAL CANADA INC., BNP PARIBAS GROUP, BNP PARIBAS NORTH AMERICA INC., BNP PARIBAS (CANADA), BNP PARIBAS, CITIGROUP, INC., CITIBANK, N.A., CITIBANK CANADA, CITIGROUP GLOBAL MARKETS CANADA INC., CREDIT SUISSE GROUP AG, CREDIT SUISSE SECURITIES (USA) LLC, CREDIT SUISSE AG, CREDIT SUISSE SECURITIES (CANADA), INC., DEUTSCHE BANK AG, THE GOLDMAN SACHS GROUP, INC., GOLDMAN, SACHS & CO., GOLDMAN SACHS CANADA INC., HSBC HOLDINGS PLC, HSBC BANK PLC, HSBC NORTH AMERICA HOLDINGS INC., HSBC BANK

Kirk Baert, *Louis Sokolov* and *Ronald Podolny* for the Plaintiffs

Andrea Laing and *Robert Kwinter* for the Defendants the Goldman Sachs Group, Inc., Goldman, Sachs & Co., and Goldman Sachs Canada Inc.

Michael Eizenga for the Defendants JPMorgan Chase & Co., J.P.Morgan Bank Canada, J.P.Morgan Canada and JPMorgan Chase Bank National Association

D. Michael Brown for the Defendants Citigroup, Inc., Citibank, N.A., Citibank Canada, and Citigroup Global Markets Canada Inc.

Allan Coleman for the Defendants, Royal Bank of Canada and RBC Capital Markets LLC

Jessica Kimmel for the Defendants, The Bank of Tokyo Mitsubishi UFJ Ltd., and Bank of Tokyo-Mitsubishi UFJ (Canada)

Donald B. Houston for the Defendants Credit Suisse Group AG, Credit Suisse Securities (USA) LLC, Credit Suisse AG, and Credit Suisse Securities (Canada), Inc.

Caitlin Sainsbury for the Defendant Deutsche Bank AG

Matthew Milne-Smith for the Defendants Morgan Stanley Canada Limited and Morgan Stanley

Neil Campbell and *Samantha Gordon* for the

USA, N.A., HSBC BANK CANADA, JPMORGAN CHASE & CO., J.P.MORGAN BANK CANADA, J.P.MORGAN CANADA, JPMORGAN CHASE BANK NATIONAL ASSOCIATION, MORGAN STANLEY, MORGAN STANLEY CANADA LIMITED, ROYAL BANK OF SCOTLAND GROUP PLC, RBS SECURITIES, INC., ROYAL BANK OF SCOTLAND N.V., ROYAL BANK OF SCOTLAND PLC, SOCIÉTÉ GÉNÉRALE S.A., SOCIÉTÉ GÉNÉRALE (CANADA), SOCIÉTÉ GÉNÉRALE, STANDARD CHARTERED PLC, UBS AG, UBS SECURITIES LLC and UBS BANK (CANADA) Defendants	)	Defendants Royal Bank of Scotland Group PLC, RBS Securities, Inc., Royal Bank of Scotland N.V., and Royal Bank of Scotland PLC *Chris Hunter* for the Defendants Société Générale S.A., Société Générale (Canada), and Société Générale *Ian C. Matthews* for the Defendant Standard Chartered PLC
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: April 13, 2017

PERELL, J.

REASONS FOR DECISION

1. Introduction

[1] This is an action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. There are two motions before the court. In the first motion, the Plaintiffs seek approval of three settlements with a combined value of $39.2 million. In the second motion, Class Counsel seek approval of fees and disbursements in the amount of approximately $10 million ($9,812,500) in fees and approximately $0.2 million in disbursements. Class Counsel also request an order that expert fees may be paid from the settlement funds on a monthly basis up to an aggregate amount of $0.5 million without further court order and that they may pay U.S. Consulting Counsel $0.25 million, plus applicable taxes, from the fees awarded to them.

[2] I approve the three settlements, grant Class Counsel's disbursements requests and approve an additional counsel fee of $2 million, without prejudice to a renewed motion for a counsel fee approval at the earlier of: (a) another round of settlements; (b) a motion to distribute settlement proceeds to Class Members; or (c) the contested certification motion.

2. Factual Background

[3] I shall describe the factual background below, but the general background facts are also set out in my Reasons for Decision reported as: *Staines v. Royal Bank of Canada*, 2016 ONSC 5270 (Consent Certification No. 1), *Mancinelli v. Royal Bank of Canada*, 2016 ONSC 6953 (Settlement Approval No. 1), and *Mancinelli v. Royal Bank of Canada*, 2016 ONSC 7857

(Consent Certification No. 2).

[4] The Plaintiffs, Joseph S. Mancinelli, Carmen Principato, Douglas Serroul, Luigi Carrozzi, Manuel Bastos, and Jack Oliveira, in their capacity as The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, and Christopher Staines, sue 16 groups of financial institutions; namely: Royal Bank of Canada, RBC Capital Markets LLC, Bank of America Corporation, Bank of America, N.A., Bank of America Canada, Bank of America National Association, The Bank of Tokyo Mitsubishi UFJ Ltd., Bank of Tokyo-Mitsubishi UFJ (Canada), Barclays Bank PLC, Barclays Capital Inc., Barclays Capital Canada Inc., BNP Paribas, BNP Paribas (Canada), BNP Paribas Group, BNP Paribas North America Inc., Citibank, N.A., Citibank Canada, Citigroup Global Markets Canada Inc., Citigroup, Inc., Credit Suisse Group AG, Credit Suisse Securities (USA) LLC, Credit Suisse AG, Credit Suisse Securities (Canada), Inc., Deutsche Bank AG, The Goldman Sachs Group, Inc., Goldman, Sachs & Co., Goldman Sachs Canada Inc., HSBC Holdings PLC, HSBC Bank PLC, HSBC North America Holdings Inc., HSBC Bank USA, N.A., HSBC Bank Canada, J.P.Morgan Canada, JPMorgan Chase Bank National Association, JPMorgan Chase & Co., J.P.Morgan Bank Canada, Morgan Stanley, Morgan Stanley Canada Limited, Royal Bank of Scotland Group PLC, RBS Securities, Inc., Royal Bank of Scotland N.V., Royal Bank of Scotland PLC, Société Générale S.A., Société Générale (Canada), Société Générale, Standard Chartered PLC, UBS AG, UBS Securities LLC and UBS Bank (Canada).

[5] In their class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, the Plaintiffs allege that the Defendants conspired with each other to fix prices in the futures exchange market (the "FX Market"). It is alleged that through the use of multiple chat rooms with names such as "The Cartel," "The Bandits' Club," and "The Mafia," the Defendants communicated directly with each other to coordinate their: (a) fixing of spot prices; (b) control and manipulation of FX benchmark rates; and (c) exchange of key confidential customer information to trigger client stop loss orders and limit orders. The Plaintiffs allege that the Defendants' conspiracy impacted all manner of FX instruments, including those trading both over-the-counter and on exchanges.

[6] The Plaintiffs, through Mr. Staines, commenced an action by way of Statement of Claim, which was issued on September 11, 2015. The Statement of Claim pleads several causes of action against the Defendants including a statutory right of action for contraventions of Part VI of the *Competition Act*, R.S.C. 1985, c. C-34; namely: civil conspiracy, and unjust enrichment. The Plaintiffs claim damages of $1 billion plus punitive damages.

[7] The Class Counsel team is made up of lawyers from Sotos LLP, Siskinds LLP, Koskie Minsky LLP, and Camp Fiorante Matthews Mogerman.

[8] Class Counsel agreed to pursue the action on a contingency fee basis. The Retainer Agreements provide for a sliding scale of counsel fees depending on the stage of the litigation. If recovery in the action occurs at an early phase of the litigation, Class Counsel fees would be based on a lower percentage. On the other hand, if recovery occurs later, Class Counsel fees would be based on a higher percentage.

[9] There is no third-party funding, and Class Counsel did not apply to the Class Proceedings Fund, which would have claimed 10% of any recovery for the Class. Class Counsel are financing disbursements and have provided indemnities for costs consequences to the Plaintiffs.

[10] Similar litigation has been commenced in Québec. Class Counsel in the Ontario action is

working cooperatively with the law firm of Siskinds Desmeules s.e.n.c.r.l ("Siskinds Québec"), counsel to the plaintiff in the Québec action (Court File No. 200-06-000189-152), to prosecute the Québec action.

[11] There is litigation in the United States dealing with similar misconduct as alleged in this action. In the American litigation, settlements were reached in respect of nine groups of defendants, including the defendants involved in the first and second round of settlements in the immediate action. In the U.S. settlements, in addition to compensating class members who transacted directly with a defendant (the "Direct Class"), the settlements included a component to compensate class members who traded in exchange-traded instruments (the "Exchange-Only Class") for which there is no equivalent in the case at bar. The particulars of the U.S. settlements, including the global market share of the settling parties and quantum of settlement per market share point, as calculated by U.S. counsel, are as follows:

Bank	**U.S. Settlement (USD) (Direct Class)**	**U.S. Settlement (USD) (Exchange-Only Class)**	**U.S. Settlement (USD) (Total – Including Notice and Administration)**	**Global Market Share (2003-2013)**	**U.S. Settlement / Market Share Pt. (USD)**
UBS	$135,000,000	$6,075,000	$141,075,000	11.96%	$11,795,569
BNP Paribas	$110,000,000	$5,000,000	$115,000,000	2.26%	$50,884,956
Bank of America	$180,000,000	$7,500,000	$187,500,000	3.90%	$48,076,923
Goldman Sachs	$129,500,000	$5,000,000	$135,000,000	3.88%	$34,793,814
JPMorgan	$99,000,000	$5,000,000	$104,500,000	5.60%	$18,660,714
Citibank	$394,000,000	$8,000,000	$402,000,000	9.97%	$40,320,963
RBS	$247,000,000	$8,000,000	$255,000,000	6.09%	$41,871,921
Barclays	$375,000,000	$9,000,000	$384,000,000	9.25%	$41,513,516
HSBC	$279,000,000	$6,000,000	$285,000,000	5.26%	$54,182,510

[12] Returning to this class action, in the first round of settlements, the court approved settlements with three groups of Defendants: (1) UBS AG, UBS Securities LLC and UBS Bank (Canada) ("UBS"); (2) BNP Paribas Group, BNP Paribas North America Inc., BNP Paribas (Canada), and BNP Paribas ("BNP"); and (3) Bank of America Corporation, Bank of America, N.A., Bank of America Canada and Bank of America National Association ("Bank of America"), (collectively, "the Previous Settling Defendants").

[13] With respect to the impugned transactions, the market share of the first round of settling Defendants, UBS, BNP, and the Bank of America, was around 15%.

[14] In the first round of settlements, the Plaintiffs recovered $15.95 million for the Class Members. UBS paid $4.95 million. BNP paid $4.5 million. Bank of America paid $6.5 million. The Settling Defendants of the first round also agreed to co-operate with the Plaintiffs in the

prosecution of the action against the non-Settling Defendants.

[15] In the first round of settlements, Class Counsel recovered fees of approximately $4 million and disbursements of $156,103.41. Class Counsel's fee was based on a contingency fee agreement and a 25% contingency fee. At the time of the fee approval, Class Counsel had dedicated over 2,896 lawyer hours with a time value of $1.5 million and had incurred disbursements exceeding $156,000.

[16] At the present time; *i.e.*, at the time of the second round of settlements, the total hours since the commencement of the action are 4,750 lawyer hours with a time value of $2.7 million, plus applicable taxes, and the total disbursements are approximately $0.4 million.

[17] In a second round of settlements, the Plaintiffs reached settlements with three more groups of Defendants: (1) The Goldman Sachs Group, Inc., Goldman, Sachs & Co., and Goldman Sachs Canada Inc. ("Goldman Sachs"); (2) JPMorgan Chase & Co., J.P.Morgan Bank Canada, J.P.Morgan Canada, and JPMorgan Chase Bank National Association ("JPMorgan"); and (3) Citigroup, Inc., Citibank, N.A., Citibank Canada, and Citigroup Global Markets Canada Inc. ("Citibank").

[18] The Defendants of the second round of settlements collectively constitute approximately 17% of the Canadian FX market.

[19] Of the Settling Defendants, there have been criminal and regulatory proceedings against JPMorgan and Citibank in the United States and in the United Kingdom. Goldman Sachs has not been the subject of any criminal or regulatory proceedings.

[20] In the criminal and regulatory proceedings:

a. In the United States, the Commodity Futures Trading Commission imposed a fine on JPMorgan of USD$310 million (in respect of conduct between 2010 and 2012) and imposed a fine on Citibank of USD$310 million (in respect of conduct between 2009 and 2012).

b. In the United Kingdom, on November 12, 2014, the Financial Conduct Authority imposed a financial penalty of £222 million on JPMorgan and £225.6 million on Citibank.

c. In the United States, on November 12, 2014, the United States Office of the Comptroller of the Currency assessed fines of USD$350 million against each of JPMorgan and Citibank and issued cease and desist orders requiring them to correct deficiencies and enhance oversight of their FX trading activity.

d. In the United States, on May 20, 2015, following an investigation by the United States Department of Justice, JPMorgan and Citibank agreed to plead guilty to conspiring to manipulate the price of the U.S. dollar and euro currency pair exchanged in the FX spot market. JPMorgan agreed to pay a fine of USD$550 million in respect of conduct that occurred between July 2010 and January 2013. Citibank agreed to pay a fine of USD$925 million in respect of conduct that occurred between December 2007 and January 2013.

e. In the United States, on May 20, 2015, the Federal Reserve fined each of JPMorgan and Citibank USD$342 million and issued cease and desist orders

> requiring them to improve their policies and procedures for oversight and controls over activities in the wholesale FX and similar types of markets.

[21] Under the Settlement Agreement, Goldman Sachs has agreed to pay $6.75 million and to provide cooperation in the prosecution of the case against the remaining Defendants.

[22] Under the Settlement Agreement, JPMorgan has agreed to pay $11.5 million and to provide cooperation in the prosecution of the case against the remaining Defendants.

[23] Under the Settlement Agreement, Citibank has agreed to pay $21 million and to provide cooperation in the prosecution of the case against the remaining Defendants.

[24] Thus, the recovery from the second round of settlements is $39.25 million for an aggregate recovery to date of $55.2 million.

[25] For the second round of settlements, the Plaintiffs brought a motion for an order certifying the action for settlement purposes, approving notices of certification and of the settlement approval hearing, and for related relief. I granted the consent certification for settlement purposes; see *Mancinelli v. Royal Bank of Canada*, 2016 ONSC 7857 (Consent Certification No. 2).

[26] The Plaintiffs now move for approval of the second round of settlements.

[27] In my Reasons for Decision for the settlement approval for the first round of settlements, I noted that for future settlement approval motions, the Court would require additional information on the Plaintiffs' calculation of damages. In my Reasons for Decision, I stated at paras. 34 and 35:

> 34. Like the objector, I was concerned that at this early juncture of this class proceeding, there was insufficient information about the amount of the settlements being reasonable having regard to the actual damages allegedly suffered by the Class Members, which has not yet been quantified.
>
> 35. Nevertheless, having regard to the information that was available from the proceedings in the United States and having regard to the Defendants' minority share of the Canadian market and keeping in mind the very significant litigation risks and also the value to be attributed to the Settling Defendants' co-operation in prosecuting the claims against the non-Settling Defendants who command 85% of the marketplace, I am satisfied that the amount of these early settlements is fair and reasonable. I will, however, expect more information about the methodology of the Plaintiffs' calculation of damages if there are more settlements.

[28] For this second round of settlement approvals, the Plaintiffs retained Professor Ilias Tsiakas, Professor of Finance at the University of Guelph and an expert in foreign exchange markets, to provide an estimate on the range of potential damages suffered by members of the putative class.

[29] Professor Tsiakas has estimated a range of total damages between $155 million and $619.9 million betweem 2008 and 2013 (*i.e.*, the period that was the subject of regulatory findings) and between $270 million and $1,080 million (approximately $1 billion) for the entire class period.

[30] The parties to the settlement seek an order barring any claim for contribution or indemnity against the Settling Defendants. The proposed bar orders provide that if the court ultimately determines that a right of contribution and indemnity exists between co-conspirators, the Plaintiffs and settlement classes shall restrict their joint and several claims against the non-

Settling Defendants. Should the court determine that no such right exists, the settlement Class Members will be entitled to advance the entirety of their claims subject only to a reduction for the value of the settlement payments received.

[31] Class Counsel recommend the settlement as fair, reasonable, and in the best interests of the class.

[32] The Representative Plaintiffs recommend the settlement and support Class Counsel's fee request.

[33] Notice of the proposed settlement was given in accordance with the order of this court.

[34] There are no objectors to the settlement or to Class Counsel's fee request.

[35] A settlement approval motion for the second round of settlements will be heard in the Québec Proceeding on May 2, 2017. The settlements are conditional on approval by both the Ontario and Québec courts.

3. Settlement Approval

[36] Section 29(2) of the *Class Proceedings Act, 1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class: *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at para. 57; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.) at para. 43; *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868.

[37] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation. See: *Fantl v. Transamerica Life Canada*, *supra*, at para. 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.) at para. 38; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, *supra*, at para. 45; *Kidd v. Canada Life Assurance Company*, *supra*.

[38] In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10. An objective and rational assessment of the pros and cons of the settlement is required: *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 (Ont. S.C.J.) at para. 23.

[39] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows

for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation: *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at para. 70; *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.). A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally: *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 (S.C.J.) at para. 13; *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 (Ont. S.C.J.) at para. 17.

[40] Class Counsel submits that the second round of settlements constitute a very good result. As I shall explain below, I cannot say whether it is a very good result, but I regard the settlements as fair, reasonable, and in the best interests of the Class Members based on the information available at this juncture of the proceedings. The settlements are a respectable outcome, but they cannot yet be characterized as a very good result for the Class.

[41] Having reviewed the motion record and having regard to the various factors used to determine whether to approve a settlement, I am satisfied that the three additional settlements should be approved.

4. Class Counsel Fee

(a) General Principles

[42] Section 33 of the *Class Proceedings Act, 1992*, permits contingency fee agreements in class proceedings, but pursuant to s. 32 of the *Act*, contingency fee agreements are not enforceable until approved by the court. In class proceedings, the court must also approve the quantum of class counsel's fee.

[43] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of: (1) the degree of success or result achieved; and (2) the risk undertaken by class counsel in conducting the litigation: *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.)at para. 13; *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 (S.C.J.)at para. 25.

[44] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement: *Smith v. National Money Mart, supra*; *Fischer v. I.G. Investment Management Ltd., supra*, at para. 28.

[45] These risks of a class proceeding include all of liability risk, recovery risk, and the risk that the action will not be certified as a class proceeding: *Gagne v. Silcorp Ltd*, [1998] O.J. No. 4182 (C.A.)at para. 17; *Endean v. Canadian Red Cross Society*, 2000 BCSC 971 at paras. 28 and 35.

[46] Fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well: *Gagne v. Silcorp Ltd*. (1998), 41 O.R. (3d) 417 (C.A.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.) at paras. 59-61; *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962 at para. 37.

(b) Class Counsel's Submissions

[47] In the case at bar, Class Counsel submits that the fee request is fair and reasonable given the success achieved and the risks assumed and is below the range of fee percentages that Ontario courts have repeatedly endorsed as being fair and reasonable, where fees up to 30% are very common in class proceedings and are usually approved as fair and reasonable.

[48] Class Counsel submits that the settlement represents "a very good recovery for Class Members in an extremely complex case against some of the world's leading financial institutions" and that "the requested fees are reasonable given the significant risk Class Counsel took in this case, including the risk of no success and minimal recovery in this action, while at the same time having to devote a significant commitment of time, money, and other resources; *i.e.*, 4,750 lawyer hours with a time value of over $2.7 million and out-of-pocket disbursements exceeding $410,000."

[49] Somewhat repetitively, Class Counsel describe the significant risk they took on in this case at paras. 18, 30, and 56 of their factum as follows:

> 18. The prosecution of the Proceedings has involved significant risk. In commencing and continuing the prosecution of the Proceedings, Class Counsel were cognizant of the following specific litigation risks:
>
> (a) The risk that the case would not be certified or would be certified based on a narrower class. Despite favourable case law, and Class Counsel's belief that this case meets all of the certification criteria, Class Counsel expect that the certification motion will be vigorously contested by well-resourced Defendants who have retained experienced competition and class action defence counsel.
>
> (b) The risk that the court would find that:
>
> (i) there was no unlawful conspiracy or that the unlawful conspiracy was only operative for part of the class period or would have affected some, but not all, FX Instruments;
>
> (ii) there was no impact on the prices of FX Instruments that were transacted in by the class members;
>
> (iii) the effects of any unlawful manipulation were not passed-through to class members who did not transact directly with a Defendant; or
>
> (iv) the U.S. Release covers most of the claims for damages of the direct purchaser class members in Canada.
>
> (c) Procedural risks associated with multi-party litigation.
>
> (d) The risk that the litigation will be delayed by appeals in respect of multiple issues.

(e) The risk that the court would not award the punitive, aggravated and exemplary damages sought.

(f) The length of time likely to pass before reaching trial and the risk that key witnesses would become unavailable and/or their recollection of events would diminish with time.

(g) The issue of whether rights of contribution and indemnity exist as between the Defendants and whether the Plaintiffs and settlement class members will be limited in their ability to recover full damages less only the value of any settlement payments received.

….

30. ... there are unique risks arising from the class proceedings procedure, including:

a. the risk that the action will not be certified as a class proceeding;

b. the risk that a large number of class members will opt out;

c. the risk that a defendant successfully moves to decertify a class proceeding;

d. the risk that an award of aggregate damages on a class-wide basis is denied and individual issues trials are ordered;

e. the risk that individual issues trials are ordered but are not economically feasible;

f. the risk that the court does not approve a settlement agreement after lengthy, time-consuming and expensive negotiations; and

g. the risk that the court does not approve class counsel fees, or approves them at a reduced rate.

….

56. By any measure, this is an extremely complex case, both in terms of the subject matter and the number of parties. Success against the Settling Defendants was not assured nor, even with cooperation, is it assured against the remaining Defendants. Those risks include:

(a) The risk that the case would not be certified or would be certified based on a narrower class. Despite favourable case law, and Class Counsel's belief that this case meets all of the certification criteria, Class Counsel expect that the certification motion will be vigorously contested by well-resourced Defendants who have retained experienced competition and class action defence counsel.

(b) The risk that the court would find that:

(i) there was no unlawful conspiracy or that the unlawful conspiracy was only operative for part of the class period or would have affected some, but not all, FX Instruments;

(ii) there was no impact on the prices of FX instruments that were transacted in by the class members;

(iii) the effects of any unlawful manipulation were not passed-through to class members who did not transact directly with a Defendant; or

(iv) the U.S. Release covers most of the claims for damages of the direct purchaser class members in Canada.

(c) Procedural risks associated with multi-party litigation.

(d) The risk that the litigation will be delayed by appeals in respect of multiple issues.

(e) The risk that the Court would not award the punitive, aggravated and exemplary damages sought.

(f) The length of time likely to pass before reaching trial and the risk that key witnesses would become unavailable and/or their recollection of events would diminish with time.

(g) The issue of whether rights of contribution and indemnity exist as between the Defendants and whether the Plaintiffs and settlement class members will be limited in their ability to recover full damages less only the value of any settlement payments received.

(c) Discussion and Analysis

[50] At the outset of the discussion, I note that at this juncture of the proceeding, and where funding has not been obtained from the Class Proceedings Fund and where the results so far achieved for the Class are below $60 million, I have no concerns about a 25% contingency fee for Class Counsel. In *Baker (Estate) v. Sony BMG Music (Canada) Inc*, 2011 ONSC 7105 at para. 63, Justice Strathy, as he then was, stated that fees in the range of up to 30% are very common in class proceedings.

[51] In recent years, there have been several cases in which the court has approved fees that fall within that range; visualize: *Abdulrahim v. Air France*, 2011 ONSC 512 (30%, for an award of $20.7 million); *Robertson v. ProQuest LLC*, 2011 ONSC 2629 (24% for an award $7.9 million); *Osmun v. Cadbury Adams Canada Inc*., 2010 ONSC 2752 (25% for an award $5.8 million; *Pichette v. Toronto Hydro*, 2010 ONSC 4060 (28.5% for an award $17 million); *Robertson v. Thomson Canada Ltd.*, [2009] O.J. No. 2650 (S.C.J.) (36% for an award $11 million); *Martin v. Barrett*, [2008] O.J. No. 2105 (S.C.J.) (29% for an award $14 million).

[52] I also agree with the sentiment in the case law that contingency fees are an appropriate way to remunerate class counsel for taking on the risk of class proceedings and preferable to the lodestar or multiplier approach, which reward counsel based on a multiplier of their base fee. The multiplier approach has been criticized for, among other things, encouraging inefficiency and duplication and discouraging early settlement: *Cassano v. Toronto-Dominion Bank* (2009), 98 O.R. (3d) 543 (S.C.J.) at paras. 55, 60, 63.

[53] This said, a problem with contingency fee agreements is that they have a tendency to incentivize too early settlements that may be very provident for class counsel having regard to class counsel's investment in the litigation and having regard to minimizing class counsel's exposure to risk, but the contingency fees may lead to an early settlement that is not very provident to the class members whose loss is a sunk and fixed loss.

[54] Contingency fees work best for rewarding the outcome of a trial judgment. It is difficult for the court to determine the justness of a settlement and difficult to determine whether class counsel have earned their contingency fee or whether the defendants are just paying a licence fee

for wrongdoing, while class counsel has profitably bailed out and avoided both the risk of prosecuting the class action and also the opportunity of achieving meaningful access to justice for the class and behaviour modification of the defendant.

[55] I hasten to add that I am not suggesting that any improvident settlements have occurred in the immediate case. Rather, I am saying that the court must be diligent and recognize that with the advantages of contingency fees there are also problems when contingency fees are a measure of what counsel should be paid for settling and not litigating a case.

[56] At the outset of the discussion, I also note that relying on *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd., supra*, at para. 71, Class Counsel submits that class action risks cannot be assessed with the benefit of hindsight and that the risks involved in pursuing class action litigation must be assessed as they existed when the litigation commenced and as the litigation continued. I agree with this sentiment, particularly the notion that the risk can be assessed as the litigation continues.

[57] Turning then to the circumstances of the immediate case, as noted above, the predominant factors in determining the fairness and reasonableness of Class Counsel's fee are: (1) the degree of success or result achieved; and (2) the risk undertaken by Class Counsel in conducting the litigation.

[58] I begin with the degree of success. In the immediate case, Class Counsel submits that the second round of settlements constitute "a very good result" for the Class Members. That is a debatable proposition.

[59] Based on Professor Tsiakas's opinion, Class Members lost between $270 million and $1 billion. After two rounds of settlements, Class Members have recovered $55.2 million gross of their losses. Deducting a contingency fee of 25% ($13.8 million), disbursements of approximately $1 million, and applicable taxes on the fees (approximately $1.8 million), the net recovery for Class Members is approximately $38.6 million against a pleaded loss (and one now supported by an expert opinion) that ranges from $270 million to $1 billion.

[60] Thus, to date, against a billion-dollar loss, the gross recovery of Class Members is 5 cents on the dollar and their net recovery is 4 cents on the dollar. Based on market share, the Settling Defendants from the two rounds of settlements are responsible for $341.9 million of the Class Members' losses. Thus, the Class Members' gross recovery against the loss caused by the Settling Defendants is a recovery of 16 cents on the dollar and their net recovery is 11 cents on the dollar. These results are within the range of what is fair, reasonable and in the best interests of the Class Members, but it is debatable that these results are a very good result for the Class Members. Moreover, it is debatable whether the results so far have achieved significant access to justice or behaviour modification of the Settling Defendants who it seems are retaining 84 cents on the dollar of their allegedly ill-gotten gains.

[61] As for Class Counsel, they have invested $2.7 million in time and are claiming a contingency fee of $13.8 million, which is a return of $5.1 dollars on the invested dollar.

[62] I turn then to the risk factor, given that the outcome so far is respectable but debatably not a very good result. Here, as noted above, Class Counsel submits that the risk they assumed in taking on this class action justifies awarding them their 25% contingency fee at this juncture before the final outcome is known.

[63] I disagree. Without prejudice to Class Counsel claiming their full contingency fee subsequently, in my opinion, the appropriate award at this juncture is to award the disbursements and an additional counsel fee of $2 million, bringing the total counsel fee to date to approximately $6 million.

[64] Speaking generally, what class counsel say about risk is self-serving and especially so because it is well known that class counsel carefully screen their cases and typically require some substantial indicia that the defendants are culpable or highly likely to settle. In general, the bravery of Class Counsel and their assumption of risk is somewhat exaggerated, and in the immediate case, it is likely that their courageousness is much exaggerated.

[65] In the case at bar, before the class action was commenced, there were regulatory investigations by: the U.S. Commodity Futures Trading Commission; the U.S. Office of the Comptroller of Currency; the U.S Department of Justice; the U.S Federal Reserve; Britain's Financial Conduct Authority; and the Swiss Financial Market Supervisory Authority. In the case at bar, before the first round of settlements, UBS and Bank of America collectively paid more than USD$1.8 billion in fines to regulatory authorities and UBS, BNP and Bank of America collectively agreed to pay USD$444 million to settle the U.S. litigation. In the case at bar, before the second round of settlements, JPMorgan, and Citi paid more than USD$3.6 million and £448 million in fines to regulatory authorities and Goldman Sachs, JPMorgan, and Citi paid $639.5 million to settle the U.S. litigation. These regulatory investigations and settlements ought to have given Class Counsel some comfort and some spine about the litigation risk they were voluntarily assuming.

[66] Speaking generally - and I emphasize that I am not speaking specifically about the case at bar - the unique risks of class actions described by Class Counsel in para. 30 of their factum have, over time, been much attenuated as class action practice and jurisprudence has matured. Further, once again, the risks associated with class action procedure are reduced by the known fact that class counsel carefully screen their cases.

[67] Over the years, the risk that a carefully selected action will not be certified has diminished and the risk that a large number of class members will opt out has never materialized. The risk that a court would not approve a settlement agreement after lengthy, time-consuming and expensive negotiations is remote to the extreme.

[68] The risk that the court does not approve class counsel fees or approves them at a reduced rate is a not a risk but a responsibility that Class Counsel must assume as part of their professional responsibilities to Class Members and as officers of the court.

[69] I obviously cannot and do not speak about the procedural risks and the litigation risks of the action that is continuing against the non-Settling Defendants, but I am not considering a fee request for a contested certification motion; rather, I am determining the appropriate fees for a second consent certification motion (for which there can be no opt-outs), and the fee for a partial settlement.

[70] Put shortly, in my opinion, having regard to the results achieved and the risks assumed, and with the real work left to be done, and with the Class Members having received nothing to date, Class Counsel have not yet earned a fee of $13.8 million.

[71] In my opinion, the appropriate award is an additional $2 million in fees plus the payment

of disbursements. This award is without prejudice to a renewed motion for fee approval at the earlier of: (a) another round of settlements; (b) a motion to distribute settlement proceeds to Class Members; or (c) the contested certification motion.

5. Conclusion

[72] For the above reasons, I approve the three settlements, grant Class Counsel disbursements, and dismiss the motion for fee approval without prejudice to a renewed motion for fee approval at the earlier of: (a) another round of settlements; (b) a motion to distribute settlement proceeds to Class Members; or (c) the contested certification motion.

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Perell, J.

Released: April 20, 2017

CITATION: Mancinelli v. Royal Bank of Canada, 2017 ONSC 2324
COURT FILE NO.: CV-15-536174
DATE: 20170420

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JOSEPH S. MANCINELLI, CARMEN PRINCIPATO, DOUGLAS SERROUL, LUIGI CARROZZI, MANUEL BASTOS and JACK OLIVEIRA in their capacity as THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, and CHRISTOPHER STAINES

Plaintiffs

– and –

ROYAL BANK OF CANADA, RBC CAPITAL MARKETS LLC, BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., BANK OF AMERICA CANADA, BANK OF AMERICA NATIONAL ASSOCIATION, THE BANK OF TOKYO MITSUBISHI UFJ LTD., BANK OF TOKYO-MITSUBISHI UFJ (CANADA), BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., BARCLAYS CAPITAL CANADA INC., BNP PARIBAS GROUP, BNP PARIBAS NORTH AMERICA INC., BNP PARIBAS (CANADA), BNP PARIBAS, CITIGROUP, INC., CITIBANK, N.A., CITIBANK CANADA, CITIGROUP GLOBAL MARKETS CANADA INC., CREDIT SUISSE GROUP AG, CREDIT SUISSE SECURITIES (USA) LLC, CREDIT SUISSE AG, CREDIT SUISSE SECURITIES (CANADA), INC., DEUTSCHE BANK AG, THE GOLDMAN SACHS GROUP, INC., GOLDMAN, SACHS & CO., GOLDMAN SACHS CANADA INC., HSBC HOLDINGS PLC, HSBC BANK PLC, HSBC NORTH AMERICA HOLDINGS INC., HSBC BANK USA, N.A., HSBC BANK CANADA, JPMORGAN CHASE & CO., J.P.MORGAN BANK CANADA, J.P.MORGAN CANADA, JPMORGAN CHASE BANK NATIONAL ASSOCIATION, MORGAN STANLEY, MORGAN STANLEY CANADA LIMITED, ROYAL BANK OF SCOTLAND GROUP PLC, RBS SECURITIES, INC., ROYAL BANK OF SCOTLAND N.V., ROYAL BANK OF SCOTLAND PLC, SOCIÉTÉ GÉNÉRALE S.A., SOCIÉTÉ GÉNÉRALE (CANADA), SOCIÉTÉ GÉNÉRALE, STANDARD CHARTERED PLC, UBS AG, UBS SECURITIES LLC and UBS BANK (CANADA)

Defendants

REASONS FOR DECISION

PERELL J.

Released: April 20, 2017