UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE FOREIGN EXCHANGE BENCHMARK RATES ANTITRUST LITIGATION	:	No. 1:13-cv-07789-LGS

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF FACTS 2

III. ARGUMENT 7

A. Legal Standard 7

B. Quinn and Bernstein Have Made False and Misleading Statements that Warrant Further Scrutiny 9

1. False and Misleading Statements Relating to the Procedural Posture of the Case 9

2. False and Misleading Statements Relating to the Amount of Trading Attributable to the FX Settlements and the Fair Value of the FX Settlements 11

C. Quinn's and Bernstein's Communications with Class Members Are Not Privileged 12

IV. CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

Auscape Int'l v. Nat'l Geographic Soc'y,
No. 92 CIV.6441 LAK, 2002 WL 31250727 (S.D.N.Y. Oct. 8, 2002) 13

Bowne of N.Y. City, Inc. v. AmBase Corp.,
150 F.R.D. 465 (S.D.N.Y. 1993) 13

E.E.O.C. v. CRST Van Expedited, Inc.,
No. C07-0095, 2009 WL 136025 (N.D. Iowa Jan. 20, 2009) 13

Georgine v. Amchem Prod., Inc.,
160 F.R.D. 478 (E.D. Pa. 1995) 8

Gregg v. Indep. Blue Cross,
No. 00002 DEC.TERM 2002, 2004 WL 869063 (Pa. Com. Pl. Apr. 22, 2004), *aff'd sub nom. Pennsylvania Orthopaedic Soc. v. Indep. Blue Cross*, 2005 PA Super 344, 885 A.2d 542 (2005) 9, 12

Gulf Oil Co. v. Bernard,
452 U.S. 89 (1981) 7

In re Currency Conversion Fee Antitrust Litig.,
361 F. Supp. 2d 237 (S.D.N.Y. 2005) 8

In re Lupron Mktg. and Sales Practices Litig.,
MDL No. 1430, 2004 WL 3049754 (D. Mass. Dec. 21, 2004) 8

In re Lutheran Bhd. Variable Ins. Prod. Co.,
No. 99-MD-1309, 2002 WL 1205695 (D. Minn. May 31, 2002) 8

In re McKesson HBOC, Inc. Sec. Litig.,
126 F. Supp. 2d 1239 (N.D. Cal. 2000) 9, 10

In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.,
No. 05-MD-1720(JG), 2014 WL 4966072 (E.D.N.Y. Oct. 3, 2014) 7

In re Sch. Asbestos Litig.,
842 F.2d 671 (3d Cir.1988) 8

In re WorldCom, Inc. Sec. Litig.,
No. 02 CIV.3288(DLC), 2003 WL 22701241 (S.D.N.Y. Nov. 17, 2003) 9

Retiree Support Grp. of Contra Costa Cty. v. Contra Costa Cty.,
No. 12-CV-00944, 2016 WL 4080294 (N.D. Cal. July 29, 2016) 7, 8

U.S. v. Constr. Prod. Research, Inc.,
73 F.3d 464 (2d Cir. 1996)..13

Statutes, Rules, and Regulations

Federal Rules of Civil Procedure
Rule 23(d) 2, 7, 8, 14
Rule 23(d)(1)...8

I. INTRODUCTION

Plaintiffs bring this motion to uncover the facts necessary to protect class members' due-process rights to receive accurate, non-misleading information concerning the preliminarily approved settlements in this action. Plaintiffs have learned that as part of a campaign to represent class members in opting out of the settlements, Quinn Emanuel Urquhart & Sullivan, LLP and Bernstein Liebhard LLP have made false and misleading statements concerning the settlements to an unknown number of class members. As to certain statements, including the existence of an opt-out deadline, the timing of the first settlement, and the work done by class counsel to prosecute the action, Quinn and Bernstein admit the statements were incorrect. As to other statements concerning the value of the settlements, they contend that regardless of their actual accuracy, they were good-faith estimates. Given the inaccurate statements that Plaintiffs understand to have been made in communications to class members, and the time and manner in which at least some class members received those communications, Plaintiffs have serious concerns that the communications could confuse class members or convince them to compromise their rights under the settlements based on erroneous information. A class member's decision to make a claim, file an objection, or opt out should be made with the benefit of clear and accurate information approved by the Court. A class member's introduction to the pros and cons of a proposed settlement should not be from a communication that contains false and misleading information.

Prior to filing this motion, Plaintiffs demanded that Quinn and Bernstein cease and desist from making misrepresentations to class members regarding the settlements. Plaintiffs also requested that Quinn and Bernstein identify the class members to whom they had communicated erroneous information and to disclose their written communications. Quinn and Bernstein have repeatedly refused to provide copies of the relevant communications and to identify the affected

class members. Thus, the scope of the misinformation sent to class members by Quinn and Bernstein remains unclear to Plaintiffs, other than there has been one admittedly erroneous memorandum sent to class members and one purported attempt to correct the errors. How many class members have been affected and whether there are additional erroneous communications remains unknown.

Without the facts, *i.e.*, the identity of the class members and the content of communications directed to them about the settlements, neither Plaintiffs nor the Court can determine whether curative relief is necessary to abate the effects of inaccurate or misleading communications. As a necessary first step, Plaintiffs respectfully request that the Court exercise its supervisory authority under Fed. R. Civ. P. 23(d) to compel Quinn and Bernstein to: (i) produce copies of all communications with class members concerning the FX settlements, including but not limited to the so-called "outdated memoranda" and "updated memoranda," and any cover messages or attachments sent with outdated or updated memoranda; and (ii) identify all class members who received any of the above at any point in time.[1]

II. STATEMENT OF FACTS

Class counsel learned that Quinn and Bernstein have directed written communications containing false and misleading information about the litigation and settlements to class members in order to induce them to opt out. (Declaration of Christopher M. Burke in Support of Motion to Compel ("Burke Decl."), ¶3.) After learning of Quinn's and Bernstein's efforts in this

[1] Based on the meet and confer process with Quinn and Bernstein, class counsel believe that Quinn and Bernstein may assert that certain or all of the requested information is privileged. Without conceding whether a privilege attaches, if the Court orders production and Quinn and Bernstein withhold any of the materials based on privilege assertions, they have the burden of establishing the privilege, and they should be required to either log the privileged communications or to submit any documents over which they claim privilege for *in camera* review.

regard, class counsel began to investigate the contents and extent of Quinn's and Bernstein's communications. (*Id.*) Instead of proceeding directly to the Court, class counsel sent Quinn and Bernstein a cease and desist letter on April 5, 2017. (*Id.*, ¶4, Ex. 1.) In that letter, class counsel described four misrepresentations of which they were aware:

- a statement that there was an opt-out deadline of June 29, 2017, when no such opt-out deadline exists;
- statements that class counsel had not litigated the case on the merits and had not pursued discovery;
- an inflated total notional value covered by the scope of the settlements; and
- a misleading comparison of the value of the FX settlements to the value of the settlements in *In re Credit Default Swaps Antitrust Litigation*, No. 1:13-md-02476 (S.D.N.Y.).

(*Id.*, ¶4, Ex. 1 at 1.) Class counsel's letter further explained that class members have a right to receive accurate and non-misleading information about the settlements and that the Court has the duty and authority to supervise class actions to protect class members, including ordering corrective action. (*Id.*, Ex. 1 at 1-2.) Class counsel requested that Quinn and Bernstein identify the class members with whom they communicated about the settlements, provide copies of written communications with them, and cease and desist from further misconduct. (*Id.* at 1.)

On April 10, 2017, Christopher Burke of Scott+Scott had a telephone conversation with Daniel Brockett of Quinn regarding the April 5, 2017 letter. (Burke Decl., ¶5.) Without identifying any class members, Mr. Brockett stated that Quinn had sent a background memorandum on the FX case to Stanley Bernstein of Bernstein to send to potential clients. (*Id.*) In that conversation, Mr. Brockett acknowledged that the memorandum contained errors concerning the opt-out date, the timing of the settlements, and the work of class counsel, describing it as "outdated." (*Id.*) Mr. Brockett also indicated that he would consider providing a

copy of the outdated memorandum to class counsel, but likely only with certain conditions attached to its use. (*Id.*) Mr. Brockett stated that Quinn would send an updated memorandum to all class members who received the previous inaccurate communication with a cover email describing the corrections. (*Id.*) Mr. Brockett also indicated that he believed the outdated memorandum had been sent to a small number of class members. (*Id.*) Mr. Burke explained to Mr. Brockett that given Quinn's reputation, class members would take claims made by Quinn about the case and the settlements seriously and, therefore, inaccurate statements made by Quinn were particularly worrisome to class counsel. (*Id.*) Mr. Burke reiterated class counsel's request that Quinn and Bernstein produce what they had sent to class members. (*Id.*) Mr. Brockett concluded by stating that Quinn would send a letter in response setting out its position. (*Id.*)

On April 11, 2017, Quinn sent its response. (Burke Decl., ¶6, Ex. 2.) The response admitted that incorrect information was sent to non-clients, including statements relating to the opt-out date, the timing of the first settlements, and class counsel's efforts to obtain information in light of the Department of Justice's stay. (*Id.*, Ex. 2 at 1-2.) Regarding Quinn's and Bernstein's statements about the size of the notional value encompassed by the settlements, the letter stated that Quinn did "not currently have an estimate of the exact size of the relevant class." (*Id.* at 2.) As a proposed curative measure, Quinn indicated that it would provide recipients of the outdated memorandum with an updated memorandum and "cover message highlighting that corrections have been made" and that they "will also ask direct recipients to confirm whether the original memorandum was passed on to anyone else." (*Id.* at 2.) This response was particularly troubling because it raised the possibility that direct recipients of the outdated memorandum may have shared it with other class members, thus resulting in the spreading of misinformation among class members. (*Id.*, ¶6.)

Recognizing the risk to class members stemming from further communications – even purportedly corrective communications – outside of the Court-supervised notice program, on April 13, 2017, Class Counsel again requested Quinn and Bernstein to identify the class members with whom they had communicated about the FX settlements and produce copies of written communications. (Burke Decl., ¶7, Ex. 3.)

On April 14, 2017, Quinn responded. (Burke Decl., ¶8, Ex. 4.) Quinn confirmed it was sending out an updated memorandum with a cover message highlighting the changes being made. (*Id*., Ex. 4 at 1.) Nevertheless, Quinn still refused to identify the class members or produce the outdated memorandum, updated memorandum, cover messages, or other communications with class members. (*Id.* at 1-2.) Quinn's April 14 letter also raised the possibility that class counsel's request could sweep in privileged communications. Quinn stated that it would consider a more tailored request by class counsel. (*Id*.) Quinn's April 14 letter also raised questions about the amount of notional value covered by the settlements and potential recovery rates. (*Id*. at 2.)

On April 19, 2017, class counsel responded in an effort to address Quinn's and Bernstein's privilege concerns. (Burke Decl., ¶9, Ex. 5.) Class counsel narrowed the scope of their request to copies of the following: (1) the outdated memorandum; (2) the updated memorandum; (3) any cover message attached to the outdated or updated memoranda; (4) all attachments to the outdated or updated memoranda; (5) all non-privileged solicitation or background memoranda sent to FX class members, including cover messages and attachments; and (6) the identities of all persons who received any of the above at any point in time. (*Id*., Ex. 5 at 1.)

In response to Quinn's questions about notional value and recovery rates, class counsel's April 19, 2017 letter explained that publicly available information, including the BIS Triennial Surveys and Euromoney FX surveys, demonstrated that Quinn's and Bernstein's estimate of class members' notional trading value was grossly inflated. (*Id*. at 1.) It further explained that one could not rely only on notional value covered by the settlements to determine any particular class member's claim value, since notional trading value will be adjusted to account for ticket size, currency pair, and FX instrument. (*Id*. at 1-2.); *see also* ECF No. 676-5 (preliminarily approved Plan of Distribution).

On April 21, 2017, Quinn and Bernstein sent their final letter. (Burke Decl., ¶10, Ex. 6.) Though Quinn previously stated during the April 10 meet and confer and in its April 11 letter that an outdated memorandum containing incorrect information had been sent to non-clients, Quinn asserted that it did not have any non-privileged documents to share with class counsel and refused all of class counsel's requests. (*Id*., Ex. 6 at 1.) Quinn also asserted that most of the discussions occurred by telephone with a small group of highly sophisticated entities, many of whom were pre-existing clients of theirs on other matters. (*Id*.) Although Quinn and Bernstein have admitted to providing inaccurate information to class members, Quinn and Bernstein concluded that Plaintiffs have no right to know which class members received the incorrect information and what precisely there were told.

In an effort to avoid further publicizing inaccurate information about the litigation and settlements, class counsel sought a confidential conference among the settling parties to seek permission to pursue the matter under seal or in another manner the Court deemed appropriate. (Burke Decl., ¶11.) Thus, on April 24, 2017, class counsel submitted a letter to the Court requesting a conference among the settling parties, and on May 2, 2017, the conference was held.

(*See* ECF Nos. 762, 761.) On May 4, 2017, the Court ordered class counsel to seek any appropriate relief no later than May 12, 2017. (ECF No. 761.)

Since that order, class counsel's concerns about the breadth of Quinn's and Bernstein's opt-out efforts and inaccurate information about the FX litigation and settlements have grown. A May 5, 2017 *Bloomberg* article underscores that Quinn's effort to persuade class members to opt out is gaining notoriety. (Burke Decl., ¶12, Ex. 7.) The article, which publicizes Quinn's efforts to represent opt-outs, contains a number of inaccuracies about the FX litigation and settlements. (*Id.*, Ex. 7.) The article incorrectly reports that the existing litigation is limited to trading around the FX benchmarks (a mistake class counsel understood was also made in the outdated memorandum Quinn and Bernstein directed to potential opt-outs). (*Id.*) The article also incorrectly reports that the settlements are limited to transactions that took place in New York. (*Id.*) Class counsel has fielded questions concerning the *Bloomberg* article, furthering concerns that misinformation about the settlements is spreading. (Burke Decl., ¶12.)

III. ARGUMENT

A. Legal Standard

Under Rule 23(d) of the Federal Rules of Civil Procedure, the Court "has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Gulf Oil Co. v. Bernard,* 452 U.S. 89, 100 (1981). This authority extends to class communications by non-parties. *Retiree Support Grp. of Contra Costa Cty. v. Contra Costa Cty.*, No. 12-CV-00944, 2016 WL 4080294, at *4 (N.D. Cal. July 29, 2016); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, No. 05-MD-1720(JG), 2014 WL 4966072, at *31 (E.D.N.Y. Oct. 3, 2014). Rule 23(d) allows the Court to issue orders that "require – to protect class members and fairly conduct the action – giving appropriate notice to some or all class members of any step in the action," "impose

conditions on the representative parties or on intervenors," or "deal with similar procedural matters." Fed. R. Civ. P. 23(d)(1). A district court's authority under Rule 23(d) extends not only to communications that mislead or coerce, but also to communications that '"threaten to create confusion and to influence the threshold decision whether to remain in the class."' *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 252 (S.D.N.Y. 2005) (quoting *In re Sch. Asbestos Litig.*, 842 F.2d 671, 683 (3d Cir.1988)).

"Class members have a due process right to not be misled while they are deciding whether to participate in a class settlement affecting their rights." *Retiree Support Grp. of Contra Costa Cty.*, 2016 WL 4080294, at *8; *see also Georgine v. Amchem Prod., Inc.*, 160 F.R.D. 478, 490 (E.D. Pa. 1995) (stating that the court must "closely monitor the notice process and take steps necessary to ensure that class members are informed of the opportunity to exclude themselves or to participate in the judgment"). In cases where opt-out counsel sent communications to class members containing false or misleading information that could affect class members' decisions regarding the case, courts have exercised their supervisory authority in ordering discovery of the communications and recipients, as well as other corrective action. *See, e.g.*, *In re Lutheran Bhd. Variable Ins. Prod. Co.*, No. 99-MD-1309, 2002 WL 1205695, at *4–*5 (D. Minn. May 31, 2002) (ordering attorney soliciting class members to produce list of class members who received false and misleading solicitation, prohibiting attorney from representing any person who responded to the solicitation, and ordering curative notice); *In re Lupron Mktg. and Sales Practices Litig.*, MDL No. 1430, 2004 WL 3049754, at *2 (D. Mass. Dec. 21, 2004) (ordering law firm that engaged in false and misleading communications to induce opt-outs from a preliminarily approved settlement class to produce list of class members who registered on the firm's websites, and ordering curative notice at Second Order on Curative Notice, ECF No. 306

(Feb. 25, 2005)); *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239 (N.D. Cal. 2000) (ordering curative notice, option to void retention agreements with law firms, and specified disclosures in any future solicitations by law firms because law firms' opt-out solicitations were misleading (if not intentionally deceptive) and disruptive to the class action process); *In re WorldCom, Inc. Sec. Litig.*, No. 02 CIV.3288(DLC), 2003 WL 22701241, at *6, *9 (S.D.N.Y. Nov. 17, 2003) (ordering separate notice to direct action plaintiffs who received communications from law firms that resulted in "some confusion and misunderstanding of the options available to putative class members"); *Gregg v. Indep. Blue Cross*, No. 00002 DEC.TERM 2002, 2004 WL 869063, at *60 (Pa. Com. Pl. Apr. 22, 2004), *aff'd sub nom. Pennsylvania Orthopaedic Soc. v. Indep. Blue Cross*, 2005 PA Super 344, 885 A.2d 542 (2005) (invalidating opt-out requests, ordering curative notice and new opt-out period, and enjoining law firms from communicating with class members without pre-approval from the court because firms sent class members "misleading communications" that "obstructed the court's efforts to ensure that class members receive only accurate information so that they could make informed and independent decisions whether to stay in or opt-out of the Class Action Settlement").

B. Quinn and Bernstein Have Made False and Misleading Statements that Warrant Further Scrutiny

1. False and Misleading Statements Relating to the Procedural Posture of the Case

Unlike in most cases where class members are approached to opt out after having received Court-approved class notice from a Court approved-agent, the class members Quinn and Bernstein approached had not yet received such notice, but were told that they were facing a time-sensitive decision and that an opt-out date of June 29, 2017 was looming. (Burke Decl., ¶¶3-4, Ex. 1 at 1.) In truth, there was no opt-out deadline because the Court adjourned the notice date in light of further settlement discussions and has not yet reauthorized notice to class

members. (*See* ECF Nos. 719, 761, at 2.) Communications that create a "gratuitous air of urgency . . . by directing prospective claimants to meet an arbitrary deadline" for retaining an attorney are misleading. *McKesson HBOC*, 126 F. Supp. 2d at 1245.

Class counsel understand that Quinn and Bernstein made other false statements about the procedural posture of the case. (Burke Decl., ¶¶3-4, Ex. 1.) Quinn admits to having incorrectly represented that the first settlement in this case was disclosed before the motion to dismiss was argued. (*See id*., ¶5, Ex. 2 at 1.) But, in fact, Plaintiffs disclosed the first settlement in this action on January 5, 2015 – two months after oral argument on the first motion to dismiss. ECF No. 233. Moreover, it is a matter of public record that meetings related to mediation between Plaintiffs and JPMorgan did not occur until November 25, 2014, with a joint mediation occurring on December 1, 2014. *See* ECF No. 482, ¶¶92-93. Both dates, of course, are after the motion to dismiss was fully briefed and argued. *See* Minute Entry for Oral Argument on Motion to Dismiss (Nov. 20, 2014).

Class counsel understand that Quinn and Bernstein also asserted that class counsel have not pursued discovery. (*See* Burke Decl., ¶¶3-4, Ex. 1 at 1, Ex. 2 at 2.) This statement combined with the false statements about the timing of the settlements creates the impression that class counsel have not been diligent in their responsibilities or knowledgeable about the misconduct underlying the action. In fact, while the Court has ordered discovery stays requested by the Department of Justice, class counsel have negotiated with the DOJ to narrow the stay to allow for certain types of cooperation as well as non-testamentary discovery. *See* ECF Nos. 274, 445.

Class counsel have obtained substantial cooperation in the form of proffers, documents, and transaction data from the settling defendants, as well as documents and transaction data from the non-settling defendants. (Burke Decl., ¶13.) The result is that millions of pages of

documents have been produced and have been and are being reviewed. (*Id.*) The transaction data has been painstakingly negotiated, cleaned, assembled, and interrogated at a specially constructed secure site over a period of two years and constitutes one of the largest transaction databases ever constructed for litigation. (*Id.*) These efforts enabled class counsel to broaden the theory of the case beyond the fixing of the WM/Reuters 4:00 p.m. benchmark rate and to name additional defendants. (*Id.*) This cooperation and discovery has also enabled class counsel to assemble a wealth of information which will allow Plaintiffs to fairly distribute the settlement funds, prove antitrust impact, and calculate damages in the aggregate and individually. (*Id.*) And while most of the specific discovery efforts of class counsel are not public, it strains credulity to assert that Quinn and Bernstein had a good-faith basis for asserting that class counsel had done little to nothing in this regard. In short, class counsel have devoted substantial time and resources to discovery and proving class members' claims, as well as developing a plan of distribution that will fairly apportion over $2 billion in settlements – an amount that Mr. Brockett described in his April 21 letter as "historic." (Burke Decl., Ex. 6 at 3.)

2. False and Misleading Statements Relating to the Amount of Trading Attributable to the FX Settlements and the Fair Value of the FX Settlements

Class counsel informed Quinn and Bernstein that they understood that the firms communicated to prospective opt outs a grossly inflated calculation of the amount of commerce issue in FX settlements. (Burke Decl., ¶¶3-4, Ex. 1 at 1.) Quinn and Bernstein concede in their April 11 letter that they "do not currently have an exact estimate of the size of relevant class." (*Id.*, Ex. 2 at 2.) Whether they have an exact estimate, their estimate of notional value covered by the FX settlements that was distributed to class members was clearly unreasonable. Quinn's and Bernstein's calculations could not have used an accurate average of FX daily volume, correctly accounted for global trading volume that is not a part of the class, or made proper

adjustments for ineligible trades, such as interdealer trades and trades with non-defendant counterparties.

Class counsel understand that Quinn and Bernstein further contend that the settlement in *In re Credit Default Swap Antitrust Litigation*, No. 1:13-md-02476-DLC (S.D.N.Y.) ("*CDS*") provides a benchmark to assess the reasonableness of the FX settlements. (*See* Burke Decl., ¶¶3-4, Ex. 1 at 1, Ex. 2 at 2.). Class counsel believe that the comparison to the *CDS* case could leave class members to erroneously conclude that this case should have settled for an amount exponentially larger, many times greater than the largest antitrust class action settlement ever obtained. (Burke Decl., ¶3.) Any comparison between this case and *CDS* would have to include a discussion of the many differences between the two markets and cases, such as the differences between average spreads in the markets, the measures of damages in the cases, and the conduct at issue. A comparison that omits such material facts would not allow a class member to reasonably make a conclusion about the comparison. *See Gregg v. Indep. Blue Cross*, No. 00002 DEC.TERM 2002, 2004 WL 869063, at *57 (Pa. Com. Pl. Apr. 22, 2004), *aff'd sub nom. Pennsylvania Orthopaedic Soc. v. Indep. Blue Cross*, 2005 PA Super 344, 885 A.2d 542 (2005) (finding opt-out solicitation's comparison of class settlement to the settlement in a prior case misleading and unfair because it did not explain what the claims were or compare the risks of proving liability and damages in the two cases).

C. Quinn's and Bernstein's Communications with Class Members Are Not Privileged

In refusing to provide copies of the requested materials and the identity of recipients to class counsel, Quinn and Bernstein rely, in part, on sweeping assertions of privilege. (Burke Decl., Ex. 2 at 2, Ex. 4 at 1-2, Ex. 6 at 1, 2.) The party asserting a privilege has the burden of

proving each element of the claim. *Bowne of N.Y. City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 470 (S.D.N.Y. 1993).

At minimum, certain of the communications cannot be protected by the attorney-client privilege. In their April 11 letter, Quinn and Bernstein admitted that certain of the materials went to non-clients. (Burke Decl., Ex. 2 at 1, *see also id.*, ¶5, Ex. 6 at 1.) *See, e.g.*, *Auscape Int'l v. Nat'l Geographic Soc'y*, No. 92 CIV.6441 LAK, 2002 WL 31250727, at *1-*2 (S.D.N.Y. Oct. 8, 2002) (holding that letters to prospective clients for representation are not protected by the attorney-client privilege); *E.E.O.C. v. CRST Van Expedited, Inc.*, No. C07-0095, 2009 WL 136025, at *3 (N.D. Iowa Jan. 20, 2009) (stating that "[c]ommunications which occur prior to the establishment of an attorney-client relationship are not privileged, even if an attorney-client relationship is later established").

Additionally, Quinn and Bernstein admit that recipients of the materials may have passed on the materials to other class members. (Burke Decl., Ex. 2 at 2.) This also shows that the materials are not privileged because they were not confidential. *See U.S. v. Constr. Prod. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996) ("To invoke the attorney-client privilege, a party must demonstrate that there was: (1) a communication between client and counsel, which (2) ***was intended to be and was in fact kept confidential***, and (3) made for the purpose of obtaining or providing legal advice.") (emphasis added). Thus, Quinn's sweeping assertions of privilege are unfounded.

IV. CONCLUSION

While the precise scope of Quinn's and Bernstein's false and misleading communications with class members about the settlements remains unknown to Plaintiffs, Plaintiffs are aware of (and Quinn and Bernstein have admitted to) a sufficient number of misstatements to cause serious concerns that the misinformation may, and perhaps already has, affected class members'

ability to make an informed choice as to whether to remain in the class or to opt out. To evaluate the impact of these statements and to protect the class members' due-process rights to receive accurate and non-misleading information regarding the settlements, Plaintiffs seek to establish a factual record of what was communicated and to whom the communications were made. This factual foundation is necessary to determining whether further curative relief is required.

Plaintiffs respectfully request that the Court exercise its supervisory authority under Fed. R. Civ. P. 23(d) to compel Quinn and Bernstein to: (i) produce copies of all communications with class members concerning the FX settlements, including but not limited to the outdated memorandum, updated memorandum, and any cover messages or attachments sent with outdated or updated memorandum; and (ii) identify all class members who received any of the above at any point in time. Quinn and Bernstein should be required to log or to submit any documents over which they claim a privilege for *in camera* review. (*See* note 1, *supra*.)

Dated: May 12, 2017

Respectfully submitted,

SCOTT+SCOTT, ATTORNEYS AT LAW, LLP

s/ Christopher M. Burke

CHRISTOPHER M. BURKE (CB-3648)
WALTER W. NOSS (WN-0529)
KRISTEN M. ANDERSON (*pro hac vice*)
707 Broadway, Suite 1000
San Diego, CA 92101
Telephone: 619-233-4565
Facsimile: 619-233-0508
cburke@scott-scott.com
wnoss@scott-scott.com
kanderson@scott-scott.com

-and-

SCOTT+SCOTT, ATTORNEYS AT LAW, LLP
DAVID R. SCOTT (DS-8053)
JOSEPH P. GUGLIELMO (JG-2447)
DONALD A. BROGGI (DB-9661)
PETER A. BARILE III (PB-3354)
SYLVIA M. SOKOL (SS-0317)
THOMAS K. BOARDMAN (TB-0530)
The Helmsley Building
230 Park Avenue, 17th Floor
New York, NY 10169
Telephone: 212-223-6444
Facsimile: 212-223-6334
david.scott@scott-scott.com
jguglielmo@scott-scott.com
pbarile@scott-scott.com
ssokol@scott-scott.com
tboardman@scott-scott.com

HAUSFELD LLP
MICHAEL D. HAUSFELD
REENA ARMILLAY GAMBHIR
TIMOTHY S. KEARNS
NATHANIEL C. GIDDINGS
1700 K Street, NW, Suite 650
Washington, DC 20006
Telephone: 202-540-7143
Facsimile: 202-5407201
mhausfeld@hausfeldllp.com
rgambhir@hausfeldllp.com
tkearns@hausfeldllp.com
ngiddings@hausfeldllp.com

-and-

HAUSFELD LLP
MICHAEL LEHMAN
CHRISTOPHER LEBSOCK
44 Montgomery Street, Suite 3400
San Francisco, CA 94104
Telephone: 415-633-1949
Facsimile: 415-693-0770
mlehman@hausfeldllp.com
clebsock@hausfeldllp.com

Interim Co-Lead Counsel

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2017, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List, and I hereby certify that I caused the foregoing to be served by email on Daniel Brockett of Quinn Emanuel Urquhart & Sullivan, LLP and Stanley Bernstein of Bernstein Liebhard LLP.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 12, 2017.

s/ Christopher M. Burke

CHRISTOPHER M. BURKE
SCOTT+SCOTT, ATTORNEYS AT LAW, LLP
707 Broadway, Suite 1000
San Diego, CA 92101
Telephone: 619-233-4565
Facsimile: 619-233-0508
Email: cburke@scott-scott.com