**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK: COMMERCIAL DIVISION**

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| In re INFINITY Q DIVERSIFIED ALPHA FUND SECURITIES LITIGATION | Index No. 651295/2021<br><br>Part 53: Justice Andrew S. Borrok |

# CONSOLIDATED OBJECTION TO FINAL APPROVAL OF THE PROPOSED CLASS ACTION SETTLEMENT

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## OBJECTORS

The individuals and entities set forth below (the "Objectors") are members of the proposed Class (as defined by Doc. 177 at § 1.4) and have authorized the filing of this Consolidated Objection. (*See* Affirmation of Aaron T. Morris ("Morris Aff.") (Doc. 244) at ¶ 2).

| Name | Shares | Value As Of Last Reported NAV[1] |
|---|---|---|
| **Advenire Wealth Management, LLC**<br>7222 Commerce Center Dr., Suite 220<br>Colorado Springs, CO 80919 | 101,880[2] | $1,307,120.40 |
| **Arbor Capital Management**<br>800 East Dimond Blvd., Suite #3-310<br>Anchorage, AK 99515 | 455,607[3] | $5,845,437.81 |
| **Legacy Family Office, LLC**<br>9990 Coconut Road, Suite 225<br>Bonita Springs, FL 34135 | 62,418[4] | $800,822.94 |
| **Charles Sherck**<br>6326 Barrel Race Dr.<br>Colorado Springs, CO 80923 | 2,753 | $35,320.99 |
| **Todd Rowan**<br>855 S. Milwaukee St.<br>Denver, CO 80209 | 1,886 | $24,197.38 |
| **Ron Zagha**<br>4009 Via Pima<br>Palos Verdes Estates, CA 90274 | 33,850 | $434,295.50 |
| **Total[5]** | **653,755** | **$8,387,676.65** |

[1] NAV of $12.83/share reported on February 18, 2021.

[2] On behalf of all managed accounts.

[3] On behalf of all managed accounts.

[4] On behalf of all managed accounts.

[5] Charles Sherck and Todd Rowan are clients of Advenire Wealth Management, LLC, and thus their individual holdings are not included in the total amounts calculated above.

# PRELIMINARY STATEMENT

The Infinity Q Diversified Alpha Fund (the "Fund") was one of multiple mutual funds operated under the Trust for Advised Portfolios (the "Trust"), an entity created by U.S. Bancorp to offer fund operational services to investment advisers that lacked the resources and expertise to handle the operations themselves. Other than selecting the Fund's portfolio of securities, U.S. Bancorp was contractually responsible for, and controlled, virtually all of the Fund's operations, including valuing the Fund's securities and publishing its net asset value ("NAV") as well as preparing the Fund's offering materials filed with the SEC.

Between 2017 and 2021, U.S. Bancorp repeatedly represented to investors—in the Fund's public filings, which U.S. Bancorp drafted and its senior-level employees signed—that its valuation personnel were following procedures to oversee and verify the prices of the Fund's securities. In reality, U.S. Bancorp was not following those procedures, but rather was accepting, at face value, manipulated prices provided by the Fund's investment adviser, Infinity Q Capital Management, LLC ("Infinity Q"), which U.S. Bancorp then integrated into the Fund's net asset value ("NAV"). As a result, U.S. Bancorp published (or caused the Fund to publish) NAVs on every trading day for years that were overstated by hundreds of millions of dollars, and the SEC eventually forced the Fund to liquidate in early 2021, resulting in a discrepancy of nearly $500 million between the value that U.S. Bancorp last reported and the value of the Fund after liquidation. The Fund is in the process of winding down, and investors are certain to incur significant losses notwithstanding any potential recovery in this action or others.

These facts are well pled in *Sherck v. U.S. Bancorp Fund Services*, *LLC*, No. 22-CV-846 (Wis. Cir. Ct.) (the "Wisconsin Action") based on U.S. Bancorp's multiple agreements with the Fund, the Fund's public filings, and the SEC's investigation, and give rise to primary and secondary liability under the Securities Act of 1933 (the "Securities Act"). The Wisconsin Action

was the first case filed against U.S. Bancorp—which has never been a named defendant in this action—and U.S. Bancorp was only later added as a party to the consolidated federal class action, *Yang v. Trust for Advised Portfolios*, No. 1:21-cv-01047-FB-MMH (E.D.N.Y) (the "Federal Action"), after the other parties had made "substantial progress" toward a settlement.

In August 2022, the parties in this action revealed that they had orchestrated a "global" settlement that would, among other things, release all securities claims against U.S. Bancorp on behalf of investors in the Fund and a separate private fund managed by Infinity Q, the Infinity Q Volatility Alpha Fund, L.P. (the "Private Fund"), in exchange for $250,000—*i.e.*, far less than half a penny on the dollar relative to the $1 billion in losses at issue suffered by investors.[6] While other parties are contributing, before expenses and fees, up to $48 million, the aggregate recovery, after considering fees and expenses, will amount to *less than 2% of recoverable losses*. For this, Plaintiffs' counsel seeks a $15 million fee award after having done nothing more than file a complaint that failed to name a critical party, brief a motion to dismiss that was never decided, and settle the case for an inadequate amount, which counsel now claims required *44 attorneys between 4 firms and nearly 9000 hours* of attorney and staff time.

The Court should reject the proposed settlement because the amount to be paid is wholly inadequate, the terms are structurally unfair and coercive, and the fairness factors under New York law are not satisfied.

<u>First</u>, U.S. Bancorp is a non-party, and while the Court may have jurisdiction to enter a judgment releasing class-wide claims as to a non-party, it should not do so here under applicable precedent because U.S. Bancorp is not substantially contributing to the settlement. (§ I, *infra*.)

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[6] Like the Fund, investors in the Private Fund also lost approximately $500 million. (*See* Doc. 212 at ¶ 5.)

Second, U.S. Bancorp faces enormous liability under Section 11 of the Securities Act for misrepresentations in the Fund's registration statements regarding the process for valuing the Fund's securities and the Fund's NAVs. (§ II, A, 2, *infra*.) In the Wisconsin Action, U.S. Bancorp did not even dispute that the representations regarding its valuation procedures were false. At best, it argued that its NAV calculations were opinions and thus could not give rise to liability. But multiple cases involving precisely the same misconduct hold the opposite: such values are false and misleading when they are published without disclosing that the policies and procedures for calculating them were not followed. *Id.* U.S. Bancorp also argued that it is immune because it signed the registration statements through its senior-level employees, who it assigned to serve as the Fund's officers. But numerous cases hold that where an employer expressly contracts to provide services that result in securities violations, it cannot avoid liability by shifting the blame to the very employees it tasked with performing the services. (§ II, A, 3, *infra*.) U.S. Bancorp is also liable under Section 15 of the Securities Act as a control person of the Fund because it caused the Fund to make the same misrepresentations, and multiple cases demonstrate that service providers in U.S. Bancorp's position are liable for a mutual fund's violations. (§ II, A, 4, *infra*.)

Third, the settlement as to U.S. Bancorp, and in the aggregate, is facially inadequate because it amounts to, in reality, less than 2% of losses (§ II, B, 1, *infra*), and is unfairly coercive because members are being forced to waive any meaningful recovery from U.S. Bancorp in order to share in the recovery obtained from the other parties (some of which are tendering their last dollars). (§ II, B, 2, *infra*.) This Hobson's choice is entirely unnecessary, was created by Plaintiffs' counsel, and has been rejected by courts under similarly inequitable circumstances. The settlement is also coercive because it requires class members to decide whether to opt out in advance of this Court's ruling on objections (and thus without knowing whether the objections will result in an

improved deal) (§ II, B, 3, *infra.*) It also forces class members to assign their claims to certain of the Defendants in a manner that suggests they may be subsequently deprived of future recoveries made on behalf of the Fund.

Fourth, the allocation methodology proposed by the Plaintiffs relies on a data table of share price inflation that is inherently flawed because it adopts a single number for monthly inflation despite that share price inflation varied within a given month. (§ II, B, 5, *infra*.) Moreover, even as to the monthly values, the inflation data does not match the SEC's calculations, and thus is potentially inaccurate in multiple respects.

Fifth, the Objectors represent shares in the Fund worth over $8 million before its collapse, an amount that significantly exceeds the holdings of the named plaintiffs in this action. Their valid objections, set forth herein, are entitled to significant deference. (§ II, C, *infra.*)

Sixth, neither the judgment of Plaintiffs' counsel nor the record of negotiation in this case suggest that the deal is fair. (§ II, D & E.) Counsel filed this case based on incomplete information *merely two days* following the announcement that the Fund would liquidate, repeatedly chose not to amend the complaint to name U.S. Bancorp, and reviewed only a third of the confirmatory discovery temporarily made available to them before finalizing a deal. Indeed, all but one of the mediation sessions occurred before the Wisconsin Action was filed (*i.e.*, before U.S. Bancorp had been named as a party in any action), and it appears that Plaintiffs were unwilling to disrupt the deal they had negotiated with other parties in order to obtain a meaningful recovery from U.S. Bancorp. As a result, U.S. Bancorp has obtained a virtually free release in the largest misvaluation case ever.

Lastly, other relevant legal and factual considerations also suggest that the Court should reject the proposed settlement. The SEC has filed an action in federal district court, *SEC v. Infinity*

*Q Diversified Alpha Fund*, No. 1:22-cv-09608 (S.D.N.Y.) (the "SEC Action"),[7] and has stated that it will seek to establish through that action an expedited claims resolution process, overseen by the judge and a special master, to resolve all outstanding claims relating to the Fund so that it may promptly distribute its remaining assets (currently $566 million held in reserve). If this Court denies final approval, and the parties refuse to promptly submit a revised settlement, then the SEC has stated that the claims will be summarily adjudicated under its supervision. Therefore, by protecting the class and rejecting this inadequate settlement, this Court *does not risk creating protracted litigation or undue delay* in distributing the Fund's assets.

In addition, the Court should also reject the settlement under New York's rule of comity, which holds that claims initially filed in a different forum should be permitted to resolve there but for evidence of bad faith or other mischief (none of which is alleged here). The Wisconsin Action was the first filed against U.S. Bancorp and those claims should be permitted to proceed either in Wisconsin or through the SEC Action. Counsel in the Wisconsin Action stand ready to litigate those claims to a meaningful resolution.

For all of these reasons, the Objectors respectfully request that the Court deny final approval of the proposed settlement and instruct the parties to address, in consultation with the Objectors, the deficiencies identified herein within 30 days of the Court's order. In the alternative, if the Court approves the settlement, then it should, at a minimum, reject counsel's fee request of $15 million (which exponentially exceeds the fees awarded in "comparable" cases), given that this case is not even beyond the pleading stage (much less a "hard-fought litigation," as counsel claims) and the results speak for themselves. The Court should also extend the current deadlines to submit

[7] The Complaint in the SEC Action is attached to Morris Aff. as Ex. I (Doc. 253).

claims forms or their opt-out notices so as to give class members a fair opportunity to participate in the settlement or decline to do so.

## BACKGROUND[8]

### A. U.S. Bancorp Established The Trust And Its Employees Ran The Fund's Day-To-Day Operations

U.S. Bancorp created the Trust and markets it as a "turn key" solution for investment advisers to provide a particular investing strategy without having to worry about all of the other operations required to offer a mutual fund to the public. ¶ 27. The Trust houses three dozen or so mutual funds (the "TAP Funds"), one of which was the Fund at issue. ¶ 27. As to each of the TAP Funds, U.S. Bancorp provides virtually all day-to-day operations other than portfolio management.[9] ¶¶ 33-48. This is documented through multiple extensive and partially overlapping service contracts, including the Administration Agreement (¶ 33), Fund Accounting Agreement (¶ 37), TA Agreement (¶ 44), and Custody Agreement (¶ 44), which combine to cover effectively all non-investment services required to offer the TAP Funds to the public.

#### 1. U.S. Bancorp Was Compensated To Provide Fund Officers

U.S. Bancorp agreed to provide a comprehensive suite of operational functions—what it referred to as "general fund management"—including providing "personnel to serve as officers of the Trust" (the Trust cannot operate without officers). ¶ 34. The personnel U.S. Bancorp selected to serve as officers were four senior-level U.S. Bancorp employees: Christopher Kashmerick, Russell Simon, Steven Jensen, and Scott Resnick. ¶ 29. These employees had no separate existence as Trust officers; rather, they were paid a salary by U.S. Bancorp like any other employee, and

[8] All "¶ __" references are to the amended complaint in the Wisconsin Action. (*See* Morris Aff., Ex. A (Doc. 245).) Emphasis added in quotations below unless noted otherwise.

[9] U.S. Bancorp advertised the same on its website. (*See* Morris Aff., Ex. H (Doc. 252) ("comprehensive services for mutual funds").)

performing the functions of a TAP Fund officer was merely a part of their normal duties and responsibilities within their roles at U.S. Bancorp. ¶ 30. In turn, U.S. Bancorp is paid by the TAP Funds under the Administration Agreement for all of the functions it provides, including for providing the Fund's officers. ¶ 36.

### 2. U.S. Bancorp Prepared The Fund's Public Filings

U.S. Bancorp was the only entity contractually responsible for the Fund's regulatory filings, including to "prepare and file [with the SEC] annual and semiannual shareholder reports" for the Fund, "prepare quarterly financial statements," and assist in the "annual update of the [Fund's] Prospectus and SAI [statement of additional information]." ¶ 34. Each year, U.S. Bancorp prepared, filed and distributed the Fund's prospectuses, summary prospectuses, statements of additional information, and shareholder reports (the "Offering Materials") with the SEC. ¶¶ 49-56. It performed these functions through dozens of back-office personnel in multiple departments specializing in mutual fund operations, and the Fund had no other personnel to perform these functions. ¶¶ 31, 57.

### 3. U.S. Bancorp Calculated The Value Of The Fund's Securities And Published Its NAV

U.S. Bancorp agreed to do everything required to calculate and publish to investors, every trading day, the net asset value ("NAV") of the Fund's portfolio of securities. ¶ 38. The Fund's NAV was a critical calculation because it told investors the value of the Fund and was used to execute buy and sell transactions in the Fund's shares. U.S. Bancorp's responsibilities included fair valuation of securities held by the Fund "where market quotations are not readily available" (which, as discussed below, was critical for this particular Fund). *Id.* As an example of its contractually overlapping duties, under the Administration Agreement, U.S. Bancorp also agreed

to "supervise the Fund's . . . fund accountants" (*i.e.*, itself) with respect to "the determination of net asset value." ¶ 34.

While a mutual fund's board of trustees is statutorily responsible for ensuring that the fund's securities valuations are accurate, the Fund's Board, in this case, delegated its responsibility through the Fund Accounting Agreement to U.S. Bancorp and a Valuation Committee consisting of U.S. Bancorp personnel. ¶¶ 61-63. And while the Fund's investment adviser, Infinity Q, was expected to provide certain input as to the fair value of securities held by the Fund, that input was subject to oversight, review, and approval by U.S. Bancorp—a critical function to protect investors from the adviser's conflicts of interest with respect to securities valuation.[10] (¶ 66)

**B. U.S. Bancorp Misrepresented To Investors That Its Personnel Were Conducting A Comprehensive Process For Valuing The Fund's Securities**

The Fund's investment strategy relied heavily on credit derivatives, convertible securities, futures, forwards, options and swap contracts ("Derivative Instruments"), the values of which are not readily available like, for example, the price of a publicly traded stock. ¶ 64. The Derivative Instruments had to be manually "fair valued" in order to calculate the Fund's NAV, and U.S. Bancorp was responsible for that process. ¶¶ 61-67.

In the Offering Materials, U.S. Bancorp stated that the "Board has delegated day-to-day valuation matters to a Valuation Committee" (*i.e.*, a group of U.S. Bancorp personnel), and the "function of the Valuation Committee is to review each Adviser's valuation of securities held by any series of the Trust for which current and reliable market quotations are not readily available.

[10] The investment adviser has a financial and reputational incentive to inflate the value of securities held by a fund to increase its asset-based fees and hide poor performance. For this reason, the Investment Company Act of 1940, § 2(a)(41), assigns responsibility for valuation of securities to a fund's independent trustees and the service providers that it retains. While investment advisers may assist in the process, such as providing information, they cannot be left unsupervised to determine prices unilaterally, as Infinity Q was in this case.

Such securities are valued at their respective fair values as determined in good faith by each Adviser, and the Valuation Committee gathers and reviews Fair Valuation Forms that are completed by an Adviser to support its determinations." ¶ 68. The Offering Materials likewise stated that "valuing securities at fair value is intended to ensure that the Fund is accurately priced," and that the determinations were purportedly "made in good faith in accordance with the procedures adopted by the Board." ¶ 69.

In reality, neither the Valuation Committee nor any other U.S. Bancorp personnel were making "good faith" fair value judgments or following the Fund's purported "valuation policies." ¶ 73. Rather, they permitted Infinity Q and its portfolio manager, James Velissaris, to unilaterally price hundreds of millions of dollars of Derivative Instruments using a software called Bloomberg B-Val. ¶¶ 73-76. Infinity Q exercised complete control over both the selection of the pricing models used in B-Val as well as the transaction terms and other inputs used to value the Derivative Instruments, which was a complete dereliction of duty on U.S. Bancorp's part. ¶ 77. As the SEC later found, U.S. Bancorp knew since at least 2018 that Infinity Q had "the ability to change inputs or calibrate any of the models," but provided "virtually no oversight or contemporaneous record." ¶ 78.

Contrary to its representations to investors that it was overseeing the valuation process and verifying the prices of the Fund's securities, U.S. Bancorp did not require Infinity Q to support or explain any particular valuation, did not collect valuation worksheets supporting the prices (as was supposed to be part of the standard valuation process represented to investors), and otherwise failed to independently verify any of the models or inputs used in B-Val to generate prices, such as cross-checking the prices with counterparties, brokers or other market participants. ¶ 79.

Left unsupervised, Infinity Q and Mr. Velissaris embarked on a years-long scheme to hide poor performance in the Fund by inflating the value of its securities. ¶ 80.

### C. U.S. Bancorp Reported Securities Valuations That Were Overstated By Hundreds Of Millions Of Dollars

Beginning as early March 2017, the true value of the Fund's securities began to diverge significantly from the values reported to investors by U.S. Bancorp. ¶ 83. By 2020 the Fund's NAV was overstated by nearly $500 million. *Id.* Each passing year made the scheme more difficult to maintain, and blatant red flags arose, including that the Fund's prices did not match those reported publicly by other funds and available to U.S. Bancorp; Infinity Q reported prices that were mathematically incapable of being accurate; and Infinity Q routinely permitted securities to expire as worthless despite having recently reported significant value. ¶¶ 84-102.

As a valuation expert and the Fund's sponsor, U.S. Bancorp and its personnel should have been able to identify and remedy the valuation errors (as the SEC eventually did); instead, it did nothing to independently verify or cross-check the Fund's securities prices, and thus was never in a position to make a "good faith" estimate of their values. ¶¶ 90-91. Nonetheless, it continued to integrate the erroneous prices into the Fund's NAV, which it published to investors on every trading day for at least four years. ¶ 83. As a result, investors purchased shares of the Fund during the Class Period at enormously inflated prices, and the inaccurate NAVs were integrated into the Fund's performance reporting that U.S. Bancorp prepared and published in the Fund's Offering Materials, rendering the Fund's historical performance inaccurate and unreliable. ¶¶ 121-23.

### D. The SEC Forced The Fund To Liquidate And It Ends Up Short $500 Million

In May 2020—tipped off by the mathematically impossible valuations and the conflicting swap prices reported by the Fund's counterparties—the SEC launched an inquiry into the Fund's valuation practices. ¶ 103. In November 2020, the SEC served a document subpoena on U.S.

Bancorp, and in December 2020 the Fund suspiciously announced that it would no longer accept new investments but made no additional disclosures. ¶¶ 105-06. In February 2021, the SEC informed the Fund's Board that the Fund's NAV had been extensively manipulated and that the Fund should be liquidated immediately, which was announced to investors on February 22, 2021. ¶¶ 107-09. Following the liquidation, the Fund held only $1.25 billion of the $1.73 billion in net assets last reported by the Fund—*i.e.*, it was *short nearly $500 million or a third of the Fund.* ¶¶ 107-17. Given that the Fund held roughly $1.2 billion in cash equivalents, it appears that the Fund was able to realize less than $50 million upon liquidation of its entire portfolio of Derivative Instruments—a tenth of the value previously calculated by U.S. Bancorp. ¶ 118.

### E. The New York Plaintiffs Rush To File And Then Rush To Settle Without Considering U.S. Bancorp's Extensive Role In The Misrepresentations

On February 24, 2021—*i.e.*, two days after the Fund revealed its forced liquidation and well before investors understood the extent of their losses, much less the surrounding circumstances—Andrea Hunter and her attorneys at Scott+Scott commenced this action. *See Hunter v. Infinity Q Diversified Alpha Fund*, Index No. 651295/2021. The *Hunter* case hastily named as defendants Infinity Q, the Fund's officers and directors, the Fund's auditor, EisnerAmper LLP, and a variety of other ancillary defendants, but failed to realize the critical importance of U.S. Bancorp, and thus did not name U.S. Bancorp as a defendant. (Doc. 1) Two days later, on February 26, 2021, the Federal Action was filed that took the same approach and did not name U.S. Bancorp as a defendant. (Morris Aff., Ex. D (Doc. 248).)

On February 9, 2022—following an extensive investigation of the facts and circumstances of the Fund's collapse—the Wisconsin Action was filed, which asserts claims against U.S. Bancorp for violations of Sections 11 and 15 of the Securities Act of 1933.

In March 2022, the parties advised this Court that the parties had made "substantial progress" toward a settlement (Doc. 137), but did not disclose whether U.S. Bancorp was part of those discussions. At that time, *U.S. Bancorp was not a defendant in this action or the Federal Action* and no claims were asserted against it except for those asserted in the Wisconsin Action.

On April 16, 2022, following the filing of the Wisconsin Action, the Plaintiffs in this action filed a consolidated complaint but again chose not to name U.S. Bancorp as a defendant, despite having the opportunity to review (i) the first-filed Wisconsin Action; (ii) a derivative complaint with extensive allegations against U.S. Bancorp filed in Delaware, *Rowen v. Infinity Q Capital Management*, C.A. No. 2022-0176-MTZ (Del. Ch.) (the "Delaware Action"), which was aided by non-public documents obtained through an inspection demand to the Fund; and (iii) multiple complaints filed by the SEC, U.S. Department of Justice, and Commodity Futures Trading Commission against Infinity Q's portfolio manager, James Velissaris.

On February 17, 2022, the plaintiffs in the Federal Action filed a second complaint against the Private Fund in addition to the Fund, and that complaint named, for the first time, U.S. Bancorp as a defendant based on allegations borrowed from the Wisconsin Action. (Morris Aff., Ex. E (Doc. 249).) The Plaintiffs in this action, however, never amended their complaint to assert claims against U.S. Bancorp.

On August 17, 2022—having not proceeded past even the pleading stage—Plaintiffs announced that they had orchestrated a purported class-wide settlement that would release all securities claims not only against the named defendants in this action but also as to U.S. Bancorp, a non-party. The Stipulation of Settlement expressly seeks to bar the claims asserted in the Wisconsin Action. (Doc. 177 at § 1.26, § 10.1) Under the proposed deal, U.S. Bancorp would pay *only $250,000 in exchange for a release of liability of hundreds of millions of dollars* caused by

thousands of trades in the Fund's shares over the course of every trading day for four years, which were executed at inflated NAVs that were, in each instance, calculated and published by U.S. Bancorp. Other parties—with less central roles in the Fund's operations—are contributing up to $48 million, but investors will be left with more than $450 million in uncompensated losses.

## ARGUMENT

### I. THE COURT SHOULD DECLINE TO ENTER JUDGMENT AS TO U.S. BANCORP BECAUSE IT IS NOT A PARTY AND IS NOT MATERIALLY CONTRIBUTING TO THE SETTLEMENT

The settlement proposes to give U.S. Bancorp a nationwide class action release of all securities claims despite that it has never been named as a defendant in this action, there are no claims asserted against it, and Plaintiffs have repeatedly chosen not to litigate against it. While some courts have approved class action settlements that include releases of claims against non-parties, a court "must carefully consider the consequences," and cases granting approval involved non-parties with substantial contributions to the proposed settlement. *Jones v. Singing River Health Servs. Found.*, 865 F.3d 285, 302 (5th Cir. 2017). For example, in *Jones*, the Fifth Circuit affirmed the trial court's approval of a settlement releasing a non-party because it was paying "approximately 22%" of the damages at issue, and the objectors failed to show that the amount was "inadequate." *Id.* at 303.

Likewise, in *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 109 (2d Cir. 2005), the Second Circuit affirmed the trial court's approval of a settlement releasing claims as to certain non-party banks, which were subject to pending litigation elsewhere, because the banks "not only contributed to the [s]ettlement, but virtually *all of the relief* comes from them." In addition, they "agreed to lower temporarily their interchange rates, notify merchants of the cessation of the tying arrangement, and reconfigure their debit cards." *Id.*

Finally, in *Lloyd's American Trust Fund Litig.*, 2002 WL 31663577, at *11 (S.D.N.Y. Nov. 26, 2002), the court held that "it is appropriate for a class action settlement to include a limited release of a non-party . . . where that non-party has contributed substantially to making the settlement possible." In that case, the non-party had "agreed to accept and honor credit notes in excess of $11,500,000 as part of the settlement," and thus the court found it "entirely appropriate to release [the non-party] pursuant to the terms of the [s]ettlement." *See also Consolidated Pinnacle West Sec. Litig.*, 51 F.3d 194, 197 (9th Cir. 1995) (affirming approval of settlement releasing non-party where it was "a critical participant and contributor to the overall settlement").

Here, the settlement with U.S. Bancorp was an afterthought, represents *far less than half a penny* on the dollar relative to total losses, and effectively values the claims as worthless, despite that Plaintiffs in this action have never attempted to pursue them. To the extent that the Court has jurisdiction to enter the proposed settlement as to U.S. Bancorp, it should decline to do so on the basis that U.S. Bancorp was never made a party to this action and its meager contribution to the settlement is not substantial (or even material) and does not justify a class release. *See Jones*, 865 F.3d at 302; *Wal-Mart*, 396 F.3d at 109; *Lloyd's*, 2002 WL 31663577 at *11.

## II. THE COURT SHOULD DENY FINAL APPROVAL BECAUSE EACH OF THE FAIRNESS FACTORS UNDER *COLT* WEIGHS AGAINST THE SETTLEMENT

The Court has a duty to protect the absent class members from an inadequate and unfair resolution. C.P.L.R. § 908 requires that a class settlement be reviewed and approved by the Court, and in so doing the Court must determine "whether the settlement is fair, reasonable and adequate when its benefits are viewed against the risks and possible benefits of litigation." *Michels v. Phoenix Home Life Mut. Ins.*, 1997 WL 1161145, at *26 (N.Y. Sup. Ct. Jan. 7, 1997); *Klein v. Robert's Am. Gourmet Food, Inc.*, 808 N.Y.S.2d 766, 774 (2nd Dep't 2006) (reversing settlement

approval because record did not support determination that "the proposed settlement is fair, adequate, reasonable, and in the best interest of class members").

Under the "longstanding standard in *Colt*," the Court's analysis includes: "the likelihood of success, the extent of support from the parties, the judgment of counsel, the presence of bargaining in good faith, and the nature of the issues of law and fact," as well as whether the proposed settlement "is in the best interests of all of the members of the putative class of shareholders [and] the corporation." *Gordon v. Verizon Communications, Inc.*, 46 N.Y.S.3d 557, 566 (1st Dept. 2017) (citing *In re Colt Industries Shareholder Litig.*, 553 N.Y.S.2d 138 (1st Dept. 1990)). Each of these factors weighs against approving the proposed settlement as to U.S. Bancorp in this case.

## A. Likelihood Of Success: The Claims Against U.S. Bancorp Are Strong And Worth Hundreds Of Millions Of Dollars

As pled in the Wisconsin Action, there are strong and viable securities claims against U.S. Bancorp under Sections 11 and 15 of the Securities Act that are likely to survive a motion to dismiss. The arguments in favor of dismissal made by U.S. Bancorp in the Wisconsin Action are without merit, and U.S. Bancorp has strained to avoid a ruling on those claims in Wisconsin, despite its bluster before this Court regarding supposedly meritorious defenses.[11]

### 1. The Legal Standard For Securities Act Claims

The Securities Act of 1933 "protects investors by ensuring that companies issuing securities (known as issuers) make a full and fair disclosure of information relevant to a public

[11] U.S. Bancorp moved to stay the Wisconsin Action following this Court's preliminary approval of the settlement, despite having committed time and resources to filing the motion to dismiss, which is telling as to the strength of the claims in the Wisconsin Action and the expected outcome.

offering." *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 178 (2015). "Section 11 of the Securities Act prohibits materially misleading statements or omissions in registration statements filed with the SEC" while "Section 15, in turn, creates liability for individuals or entities that 'control any person liable' under Section 11." *Morgan Stanley Information Fund Sec. Litig.*, 592 F.3d 347, 358 (2d Cir. 2010).

Section 11 of the Securities Act. Section 11 imposes liability where a registration statement "contains an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." *In re Direxion Shares ETF Trust*, 279 F.R.D. 221, 232 (S.D.N.Y. 2012); *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 2004 WL 574665, at *13 (N.D. Ill. Mar. 22, 2004) (The "minimal proof requirements" of Section 11 "create extensive liability for issuers and those involved in the preparation and dissemination of the registration statements."). Proof of intent is not required, and thus defendants are "liable for innocent or negligent material misstatements or omissions." *Rafton v. Rydex Series Funds*, 2011 WL 31114, at *7 (N.D. Cal. Jan. 5, 2011).

Section 15 of the Securities Act. "To establish liability under Section 15, a plaintiff must show a primary violation of the Securities Act by the controlled person and control of the primary violator." *Youngers v. Virtus Inv. Partners Inc.*, 195 F. Supp. 3d 499, 523-24 (S.D.N.Y. 2016). Control may be demonstrated by the "power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." *Id.* at 524.

### 2. The Registration Statements Misstated U.S. Bancorp's Process For Valuing Securities And The Fund's NAV

Misrepresentations Regarding Valuation Procedures. The Fund's registration statements filed with the SEC represented that U.S. Bancorp's Valuation Committee would "review and

oversee [Infinity Q's] valuation of securities . . . for which current and reliable market quotations are not readily available," that the "Valuation Committee gathers and reviews Fair Valuation Forms that are completed by [Infinity Q] to support their determinations," and that Infinity Q's valuations were subject to "oversight by the . . . Valuation Committee." ¶ 126. The registration statements further stated that the Fund's valuation procedures would be "regularly evaluate[d] . . . in light of the specific circumstances of the Fund and the quality of prices obtained through their application by the Trust's valuation committee" ¶ 128.

These statements were false and misleading because U.S. Bancorp knew since at least 2018, according to the SEC's investigation and other sources, that Infinity Q "use[d] models on [B-Val] to complete valuations" and had "the ability to change inputs or calibrate any of the models." ¶ 78. Nonetheless, Infinity Q was permitted to input and generate B-Val prices with "virtually no oversight or contemporaneous record." *Id.* The Valuation Committee and U.S. Bancorp's other operations personnel never required Infinity Q to support or explain any particular swap valuation; failed to collect valuation worksheets supporting the prices; and never independently verified the models and inputs used by Infinity Q to generate prices, such as by independently calculating the prices themselves or cross-checking the prices with other market participants. ¶ 79. While the Registration Statements disclosed a range of risks relating to valuation, it failed to disclose that Infinity was not meaningfully supervised in setting securities prices, U.S. Bancorp was violating its valuation policies, and Infinity Q had an unchecked financial interest in overstating the Fund's prices. ¶ 129-30.

Such misrepresentations give rise to classic securities claims (*i.e.*, where a speaker said it was doing something when actually it was not). For example, in *Abrams v. Van Kampen Funds, Inc.*, 2002 WL 1160171, at *4 (N.D. Ill. May 30, 2002), the court upheld Section 11 claims where

the "NAV of the [f]und had been materially inflated during the proposed class period because of the overvaluation of many loans." The court found that representations regarding the fund's "valuation policy were false because the [f]und did not actually follow the stated policy" and stated that "it would use market pricing" when it "did not use market pricing for all loans for which market pricing was readily available." *Id.* at *10-11.

Likewise, in *White v. Heartland High-Yield Mun. Bond Fund*, 237 F. Supp. 2d 982, 984 (E.D. Wis. 2002), the court upheld Section 11 claims where an auditor "failed to disclose the material valuation uncertainty of the [f]unds' assets, the pricing violations, and the [f]unds' failure to adhere to their own stated investment policies and restrictions." The funds were not pricing their "portfolio securities daily" nor were they using the "valuation methods required by SEC rules" and the funds' "disclosures." *Id.* at 985; *see also Regions Morgan Keegan Sec.*, 2012 WL 12875982, at *9 (W.D. Tenn. Mar. 30, 2012) (upholding Section 11 claim where fund "claimed to abide by restrictions that prohibited it from holding more than 25% of its assets in securities related to the same industry" but "did not, in fact, abide by the restriction."); *Evergreen Ultra Short Opportunities Fund Sec. Litig.*, 705 F. Supp. 2d 86, 93 (D. Mass. 2010) (upholding Section 11 claims where fund "claimed that it "would not invest more than 15% of its net assets in illiquid securities when, in fact, the Fund invested a much greater portion of its assets in illiquid private placement securities").

In its motion to dismiss in the Wisconsin Action, U.S. Bancorp generally contended that the complaint does not "allege a material misstatement" (Morris Aff., Ex. B (Doc. 246) at 24-25), but it made no rebuttal whatsoever as to the allegations that it falsely stated that it was overseeing securities valuations when, in fact, it was not. That concession was dispositive as to those misrepresentations.

Misrepresentations Regarding The Fund's NAV. The Fund's registration statements and other periodic filings reported false and inflated NAVs for the Fund for years, which were not independently verified by U.S. Bancorp, despite obvious red flags. Those misstatements give rise to liability under the federal securities laws. In *Bruhl v. Price WaterhouseCoopers Int'l, Ltd.*, 2006 WL 8431888, at *1 (S.D. Fla. Apr. 3, 2006), fund shareholders asserted securities claims against the fund's administrator—like U.S. Bancorp in this case—which was responsible for "calculating the Fund's net asset value ("NAV"), maintaining the Fund's corporate records and books of accounts, and communicating with shareholders and the general public." The court upheld claims under Section 10(b) of the Exchange Act (claims that are subject to a *higher pleading standard* than those in this case) based on allegations that the administrator "calculated the [f]unds' monthly NAVs and distributed them to the [f]unds' investors; that these NAV statements contained fraudulent values despite information contained in [third-party] position reports to which it was privy; and that [the administrator] knew or was reckless in not knowing that the NAVs were grossly inflated." *Id.* at *4.

Many, if not all, of the material facts credited by the court in *Bruhl* are at issue and well pled in this case, as demonstrated by the table below:

| **Allegation Against The Administrator In *Bruhl*** | **Analogous Allegation Pled Against U.S. Bancorp** |
|---|---|
| "As administrator of [the funds at issue], the [defendant] was responsible for calculating the fund's NAV," "publishing and furnishing the NAV," and "communicating with shareholders and the general public." (*4) | As "administrator since the Fund's inception" (¶ 33), U.S. Bancorp was responsible for "accurately calculating and publishing the Fund's NAV" (¶ 61) and "drafting, preparing and filing the Fund's public filings (¶ 57). |
| "Instead of conducting an independent valuation, as it was obligated to do, [the defendant] simply used [the investment adviser's] fraudulent valuations in preparing the NAV statements." (*4) | U.S. Bancorp was not "verifying the reported prices of the Fund's Derivative Instruments," and allowed "the Fund's Derivative Instruments to be unilaterally priced by Infinity Q" (¶ 73), which it "integrated without verification into the Fund's publicly stated NAV" (¶ 82). |

| Allegation Against The Administrator In *Bruhl* | Analogous Allegation Pled Against U.S. Bancorp |
|---|---|
| The administrator was provided "position reports" that were "generated by [the investment adviser] from [a third party's] computer system and were based on inputs made directly by [the adviser]." (*4) | U.S. Bancorp knew that Infinity Q "managed the B-Val database and exercised complete control over both the selection of the particular B-Val models used to value the Fund's Derivative Instruments and the transaction terms and other inputs." (¶ 77) |
| The administrator "knew or should have known that [the investment adviser or third-party] were engaged in generating fraudulent reports because, among other things, three of [its] employees were also members of these [f]unds' Board of Directors." (*4) | U.S. Bancorp "provided its own employees to serve in officer and trustee positions for the Fund" (¶ 29) and the Board "delegated day-to-day responsibilities for valuation to U.S. Bank and a 'Valuation Committee' consisting entirely of U.S. Bank employees" (¶ 62). |
| "[E]very single monthly statement mailed to investors [during the relevant time period] contained fraudulent and inflated NAV's created by [the administrator]," and "the inflated NAVs benefitted [the administrator] by increasing its compensation, which was directly tied to higher NAV levels." (*5) | U.S. Bancorp for at least four years "reported these false valuations to investors through the Fund's NAV on every trading day and reaped millions of dollars in fees taken as a percentage of the Fund's fraudulent and nonexistent assets." (¶ 84) |

As in *Bruhl,* the Wisconsin Action set forth in detail the "misstatements (the actual NAV numbers in the monthly statements [during the relevant period]), how they were fraudulent (they grossly overstated the actual value of the [Fund's] assets), to whom they were made (each investor who received them on a [daily] basis), and that [class members] relied on them to their detriment (they would otherwise not have purchased the shares)." *Id.* at *6.[12]

Likewise, in *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 464 (S.D.N.Y. 2001), the court upheld Section 10(b) claims against a fund's administrators that "disseminated materially inflated NAV statements to the Fund's shareholders." In that case, the administrators "knowingly

[12] In *Bruhl*, the court initially dismissed the Exchange Act claim despite finding that the plaintiffs had alleged material misrepresentations because plaintiffs had failed to allege scienter (an element not required to plead Securities Act claims against U.S. Bancorp). *See Bruhl v. Price Waterhousecoopers Int'l, Ltd.*, 2007 WL 983263, at *1 (S.D. Fla. Mar. 27, 2007). After repleading as to the element of scienter, the court denied the defendant's motion to dismiss and permitted the case to proceed. *Id.* at *3.

and/or recklessly used false data from [the investment adviser]—despite concurrent receipt of accurate financial statements from [a third party]—to prepare inflated NAV statements." *Id.* at 481. As in this case, where U.S. Bancorp accepted facially suspicious, contradicting and mathematically impossible valuations and deviated from its oversight procedures, the administrators in *Cromer* also relied on fictitious statements that were "suspicious on [their] face" and implemented a process that deviated from "defendants' own 'checklist' of procedures for NAV calculation." *Id.* at 464.

U.S. Bancorp does not (and cannot) dispute that the Fund's NAVs were inaccurate or that U.S. Bancorp personnel calculated and published them. Rather, in briefing in the Wisconsin Action, it argued that the NAVs were merely "statements of opinion," and that there were no allegations of "facts going to the basis for the issuer's opinion that were omitted, and thereby rendered the valuation opinions misleading." (Morris Aff., Ex. B (Doc. 246) at 26) But the Wisconsin Action alleged abundant undisclosed facts about the publication of the inaccurate NAVs that rendered them misleading, including that U.S. Bancorp (i) knew that its "Valuation Committee was not following the pricing guidelines" or "otherwise verifying the reported prices of the Fund's Derivative Instruments"; (ii) knew that the securities were being "unilaterally priced by Infinity Q"; and (iii) ignored numerous red flags, including mismatching, impossible and erroneous prices. (¶¶ 73-102) These undisclosed facts plainly contradict what a "reasonable investor" would have understood about the way in which U.S. Bancorp and its personnel were calculating the Fund's NAVs. *See Omnicare*, 575 U.S. at 189 (if "a registration statement omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion, and

if those facts conflict with what a reasonable investor would take from the statement itself, then Section 11's omissions clause creates liability").[13]

For these reasons, courts have repeatedly rejected opinion-based defenses in analogous circumstances involving the publication of erroneous valuations. For example, in *Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt. LLC*, 376 F. Supp. 2d 385, 396-97 (S.D.N.Y. 2005), the plaintiffs sufficiently alleged "that the NAVs were overstated during the [relevant] period" because the "disparity between NAVs based on [the adviser's] prices and those based on [broker] prices more than doubled" with no plausible explanation. *Id.* at 396. The court acknowledged that valuation of securities can be subjective, but held that "[w]hile judgments about valuation of complex securities can vary, one is not obliged to credit the notion that they suddenly varied by a factor of two absent some persuasive explanation." *Id.* at 397-97. As in this case, the pricing models in *Beacon Hill* were manually manipulated and the fund's liquidator and the SEC found that the value of its portfolio was vastly overstated. *Id.* at 397-98. Indeed, the extent of the overvaluation was even greater here, given that the Fund's securities were overvalued by a factor of 10 (*i.e.*, $50 million assets were reported at values in excess of $500 million). (¶ 118)

In *Gosselin v. First Trust Advisors L.P.*, 2009 WL 5064295, at *1 (N.D. Ill. Dec. 17, 2009), the plaintiffs sufficiently pled securities claims where defendants "failed to perform good faith

[13] U.S. Bancorp has previously cited cases in support of dismissal that are procedurally and factually inapplicable to this case. In *Hunt v. Bloom Energy Corp.,* 2021 WL 4461171, at *5 (N.D. Cal. Sept. 29, 2021), the court dismissed claims based on accounting opinions because plaintiffs failed to plead "what 'inquiry' [d]efendants did or did not make with respect to the service contracts or [the company's] GAAP compliance." In this case, the complaint alleges plainly that U.S. Bancorp calculated the Fund's NAVs without performing the valuation oversight it expressly told investors that it was performing (¶¶ 73-102) The court decided *Barclays Bank PLC Sec. Litig.*, 2017 WL 4082305, at *10 (S.D.N.Y. Sept. 13, 2017), on a full record at summary judgment and, unlike this case, the plaintiffs did not even argue that the "valuations were erroneous or that the underlying methodologies were unreasonable or inappropriate."

valuations of the Funds' investments and as a result the Funds' shares traded at artificially inflated prices." The court held that a reasonable investor would have "expected that the funds had controls in place to manage and monitor the inherent risks and [d]efendants represented they had such controls," and that defendants had misrepresented the fund's "valuation policies and procedures." *Id.* at *3-4. The court rejected defendants' contention that "valuation is 'an exercise in discretionary business judgment'" because the complaint did not merely allege a "poor job in making the valuation assessments," but rather that the errors stemmed from defendants' misconduct. *Id.* at *5.[14] The same is true here and U.S. Bancorp's defenses are meritless.

### 3. U.S. Bancorp Is Liable Under Section 11 Because It Prepared The Registration Statements And Its Employees Signed Them

U.S. Bancorp is a proper defendant under Section 11 because it assigned its senior-level employees to prepare and sign the Fund's registration statements and other public filings, and was compensated for doing so under contracts with the Fund. *See Global Crossing, Ltd. Sec. Litig.*, 2005 WL 2990646, at *5 (S.D.N.Y. Nov. 7, 2005) (holding that "respondeat superior applies in the federal securities context" and "has been embraced by virtually every circuit to address the question"); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 154 (1972) (holding that "liability of the bank [for a Section 11 claim], of course, is coextensive with that of [its employees]"). Under well-established federal securities law, the scope of an employer's liability corresponds "simply with scope or course of employment and whether the acts of the employee

[14] *Cf. Eaton Vance Corp. Sec. Litig.*, 206 F. Supp. 2d 142, 153 (D. Mass. 2002) (dismissing "allegation that the NAVs themselves were a misrepresentation" only because plaintiffs had failed to additionally "plead that the NAV of the [f]unds was not calculated in accordance with SEC rules"); *Yu v. State Street Corp.*, 686 F. Supp. 2d 369, 380 (S.D.N.Y. 2010) (dismissing claims based on inflated NAVs only because plaintiffs did not "aver a single concrete fact to suggest that defendants deviated from the prescribed valuation methods" or "which securities were overvalued or how any valuation conflicted with the procedures set out in the Registration Statements").

[at issue] can fairly be considered to be within the scope of his employment." *Marbury Management, Inc. v. Kohn*, 629 F.2d 705, 716 (2d Cir. 1980). In *Marbury*, the court upheld claims that a broker was vicariously liable for the securities violations of its employee because the employee "at all times acted as an employee of [the broker] and accounted to [it] for the transactions," there was "no indication that he profited by any of the transactions other than by reason of his compensation from [the broker] as one of its employees," and there was no "deviation from [his] services to his employer." *Id.* In sum, "what he did was done in [the broker's] service, though it was done badly and contrary to the practices of the industry." *Id.* The same is true here.

Of the legions of trial court rulings finding employers liable for the securities violations of their employees, *Centennial Technologies Litig*., 52 F. Supp. 2d 178 (D. Mass. 1999), is perhaps most similar to this case. The *Centennial* court upheld securities claims brought under respondeat superior against a consulting company that "specialized in providing management and financial services to troubled companies." *Id.* at 181. The consulting company "entered into a contract" with a technology company pursuant to which an employee of the consulting company was to serve as the technology company's interim Chief Executive Officer ("CEO") *Id.* In other words, the consulting company was effectively renting its employee to serve as CEO just as U.S. Bancorp rented its personnel to serve as officers of the Fund. In exchange for "the services" of its employee, the consulting company "was to receive an hourly fee, reimbursement of expenses, and an equity stake." *Id.* While serving as CEO, however, the employee allegedly caused securities violations at the technology company. *Id.* On those facts, the court denied the consulting company's motion and held that it would be liable if the employee was "acting with (1) actual authorization, (2) apparent authority, or (3) within the scope of his employment." *Id.* at 186; *see also MBI Acquisition Partners, L.P. v. Chronical Publishing Co.*, 301 F. Supp. 2d 873, 886 (W.D. Wis. 2002) (upholding

securities claims under respondeat superior where employee of subsidiary had "actual authority to speak to plaintiff regarding financial matters").

It is undisputed that U.S. Bancorp's employees—namely, Christopher Kashmerick, a Senior Vice President at U.S. Bancorp, and Russell Simon, a Vice President at U.S. Bancorp—signed the Fund's Registration Statements—signed the Fund's registration statements and other SEC filings incorporated therein. (¶ 58) They did so *only at the behest of their employer,* U.S. Bancorp, which had contractually agreed under the Administration Agreement to "[p]rovide personnel to serve as [the Fund's] officers." (¶ 33) U.S. Bancorp was compensated by the Fund for providing officer services under the Administration Agreement; Mr. Kashmerick and Mr. Simon were not compensated by the Fund. (¶¶ 30, 36). Rather, they performed their Fund officer duties as part and parcel of their regular employment obligations at U.S. Bancorp, for which they received a salary from U.S. Bancorp and no other compensation, and had no other basis to be involved with the Fund other than by way of U.S. Bancorp's contract to provide the Fund's officers. (¶ 30) These employees could not have been acting in any way other than "within the scope of [their] employment" with U.S. Bancorp when they signed the Fund's filings. *See Marbury*, 629 F.2d at 716.

The cases cited by U.S. Bancorp in its motion to dismiss in the Wisconsin Action do not suggest otherwise. In *Global Crossing, Ltd. Sec. Litig.*, 2005 WL 1907005, at *6 (S.D.N.Y. Aug. 8, 2005), two software companies made an investment in a telecommunications company and, as part of that investment, three employees of the software companies joined the board of directors of the telecommunications company and its parent. While serving as outside directors, the employees signed registration statements for the telecommunications company that were alleged to contain securities violations. *Id*. The court declined to extend liability to the employers in that

case because the "bare facts and a number of legally unjustified presumptions" did not suggest that the employees were "acting within the scope of their employment." *Id.* at *3-4. The court found "no facts from which it could be inferred that these individuals acted at the behest of [the software companies] in exercising their duties as directors." *Id.* at *4, 10. Unlike in this case, there were no allegations in *Global Crossing* that the software companies (i) contracted specifically to provide directors to the telecommunications companies; (ii) that the companies were paid for providing such services; (iii) that the employees received no compensation for their board roles other than their preexisting salaries from the software companies; or (iv) that the employees' board roles had any relationship with their normal employment at the software companies. *See id.* at *10-11.

*Enron Corp. Sec., Derivative & ERISA Litig.*, 463 F. Supp. 2d 628 (S.D. Tex. 2006), is distinguishable from this case on the same grounds. The employee at issue "was approached by an independent search firm to join the [outside] board," the employer "did not ask or encourage [the employee] to serve on the board," the employer was never compensated and it "never compensated [the employee] in any way for serving as [an outside] director," the employee agreed to be "walled off" from any activity between the employer and the outside company, the employee stated that the outside board seat was of a "personal in nature," and the employer otherwise had "no role in [the employee's] decision to sign the registration statement" and "never discussed the registration statement." *Id.* at 637. No facts alleged in that case suggested that the employee was "acting in [the employer's] interest while fulfilling his role as an outside director," and the court ruled that "mere approval of a corporate officer's request to serve on outside boards" cannot give rise to vicarious without "chill[ing] the willingness of distinguished and qualified individuals to serve on

the boards of public companies." *Id.* at 642-43.[15] This case presents entirely different circumstances: U.S. Bancorp operates a fund administration business through *which it expressly contracts to provide competent professionals to serve as officers of the Fund*, and thus it is entirely reasonable (and necessary) to hold U.S. Bancorp responsible for misstatements made by its personnel specifically assigned to make them.[16]

**4. U.S. Bancorp Is Liable Under Section 15 Because It Controlled The Trust And Caused It To Violate Section 11**

As the issuer of its securities, the Fund is responsible under Section 11 for the misrepresentations in the Registration Statements set forth above. *See Morgan Stanley*, 592 F.3d at 358 at ("Section 11 "provides for a cause of action by the purchaser of the registered security against the security's issuer."); *In re Virtus Inv. Partners, Inc. Sec. Litig.*, 195 F. Supp. 3d 528, 540

[15] Defendant also cites *USAirways Group, Inc. v. British Airways PLC*, 989 F. Supp. 482 (S.D.N.Y. 1997), but that case involved novel breach of fiduciary duty claims under Delaware law and otherwise has no application to the claims asserted in this action.

[16] U.S. Bancorp's efforts to analogize its rent-an-officer business to an employee merely serving as an outside director for an unrelated company fails as a general matter. However, it is worth noting that even in such cases, courts have come to different conclusions where the facts suggest more of a connection to the employer. For example, in *Musicmaker.com Sec. Litig.*, 2001 WL 34062431, at *4 (C.D. Cal. June 4, 2001), the court denied a motion to dismiss where two vice presidents of a record label also served as directors on the board of an internet-based compact-disc ("CD") maker, in which the record label had invested. These employees served in their directorial role as "designees" of the record label. *Id.* at *12. Accordingly, the court held that if the employees "were acting within the course and scope of their employment with [the record label] while acting as directors of [the CD company], and when they signed the registration statement [of the CD company], it appears that [the record label] would be proper defendants under § 11(a)(1) and (2) and the doctrine of respondeat superior." *Id.* Likewise, in *Tharp v. Acacia Communications, Inc.*, 321 F. Supp. 3d 206, 213 (D. Mass. 2018), investors in a communications company asserted securities claims under respondeat superior against two venture capital firms, each of which had a high-level employee on the company's board of directors. The court held that the claims were sufficiently alleged under "Section 11 and the doctrine of respondeat superior" because the individuals "were associated with the [venture capital defendants]" and "signed or authorized the signing or issuance of the Registration Statement" at issue. *Id.* at 219; see also *Parmalat Sec. Litig.*, 474 F. Supp. 2d 547, 553 (S.D.N.Y. 2007) (distinguishing *Global Crossing* on similar grounds and denying motion to dismiss securities claims based on respondeat superior).

(S.D.N.Y. 2016) (finding that fund was primary violator because it "issued the registration statements and prospectuses at issue"). U.S. Bancorp is a control person of the Fund because it controlled its management and operations, including with respect to the preparation of the Fund's public filings, and thus is liable for the Fund's Section 11 violations under Section 15.

As an initial matter, signing the registration statement "alone is sufficient to allege control person status." *Youngers*, 195 F. Supp. 3d at 526. Thus, because U.S. Bancorp is vicariously responsible for its employees who signed the Fund's Registration Statements, it also is liable for the Fund's misrepresentations under Section 15. *See id.* (where person signs the registration statement, "courts have held that control as to the financial statements is sufficiently pled").

Moreover, courts have held that facts similar to those alleged in the complaint in the Wisconsin Action establish that the defendant exercised control over the primary violator and is liable as a control person under Section 15. For example, in *Virtus*, the court found that an investment manager was a control person with respect to a fund's misrepresentations about its performance history because the fund "operates from the same office as [the investment manager]," the fund's "officers are employed by [the investment manager]," the investment manager's "officers approved and signed the registration statements," the investment manager "was responsible for eliminating the references to [the performance data at issue] from the filings," and the investment manager's name appeared on "the front page of the registration statements." *Id.* All of those facts are equally true here. (*See* ¶ 34 (U.S. Bancorp agreed to provide office space and the Fund's address is listed as U.S Bancorp's Wisconsin office); ¶ 29 (the Fund's officers were all U.S. Bancorp employees); ¶ 58 (the officers prepared and signed the Registration Statements); ¶ 57 (U.S. Bancorp's personnel was responsible for the specific misrepresentations regarding

securities valuation and NAV in the Registration Statements); Morris Aff., Ex. C (Doc. 247) (U.S. Bancorp's name appears on the cover of the Fund's Registration Statements).)

In *Evergreen Ultra Short Opportunities Fund Sec. Litig.*, 705 F. Supp. 2d 86, 97 (D. Mass. 2010), the investment manager with a contractual position analogous to U.S. Bancorp's in this case did not even bother to move to dismiss the control person claims. *See In Re Evergreen Ultra Short Opportunities Fund Sec. Litig.*, No. 1:08-cv-11064-NMG, ECF 42 at 1, n. 5 (stating that it is "[t]elling, the remaining defendants in this action . . . filed an [a]nswer"). The fund's trustees did move to dismiss, but the court found that they were control persons because they "participated in the drafting, preparation, and/or approval of various untrue and misleading statements" and could "control the contents of the Offering Materials." *Evergreen*, 705 F. Supp. 2d at 96-97. Moreover, it noted that determining who is a "'controlling person' is usually a question of fact that cannot be resolved at the pleading stage."

In *Beacon Hill*, the court found that a part owner of an investment manager to three funds was a control person because it exercised "management and control" of the investment manager through a contract, and thus was responsible for misrepresenting that "NAVs were calculated in good faith" when they were, in fact, severely "overstated." 376 F. Supp. 2d at 405. The contract "authorized [the part owner] to take 'such actions as may be necessary to cause [the manager] to comply with [the law]," and the owner stated in a report that it was ensuring that the funds' "portfolios' marks are consistent with market values." *Id.* These facts suggest *significantly less control* than U.S. Bancorp exercised over the Fund in this case, but the Court still found the allegations to be "more than sufficient to allege control." *Id.*

Finally, in *First Trust*, the court found that an investment manager was a control person with respect to a group of funds that represented that they were "perform[ing] good faith

valuations" when, in reality, they significantly "inflated the valuation of the net asset values." 2009 WL 5064295 at *1. The court held that the investment manager exercised control over the funds because it was "responsible for the monitoring of the [f]unds' portfolio, managing the business affairs, bookkeeping, and clerical services" and had "access to information and ability to prevent issuance of misleading statements in [the] [r]egistration [s]tatements." *Id.* at *10. U.S. Bancorp's control over the Fund, given the structure of the Trust and the TAP Funds in this case, was remarkably more extensive than the level of control found by courts in the cases above to be sufficient to support Section 15 liability.[17]

**5. U.S. Bancorp Is Barred From Indemnification**

Plaintiffs have repeatedly (and mistakenly) asserted that the settlement is fair as to U.S. Bancorp based on the false premise that it "can seek indemnification from the Fund." (Doc. 170 at 14 ("U.S. Bancorp possesses indemnification agreements with the Funds that could render any judgment against it in the Actions a pyrrhic victory for the class"); Doc. 196 at 9 ("[I]ndemnification provisions require the other parties to indemnify U.S. Bancorp for any eventual liability").) As an initial matter, "indemnification for liability under the securities law is disfavored by the courts" and not routinely recognized. *Credit Suisse First Bos., LLC v. Intershop Commc'ns AG*, 407 F. Supp. 2d 541, 546 (S.D.N.Y. 2006); *see also Globus v. L. Rsch. Serv., Inc.*, 418 F.2d 1276, 1288 (2d Cir. 1969) (holding that the purpose of the Securities Act is to "deter negligence by providing a penalty for those who fail in their duties" and noting that "the SEC has

[17] Plaintiffs make much of the purportedly "complex factual issues (e.g., valuation of swaps when calculating fund NAVs) and complex issues of loss causation and damages (e.g., whether certain declines in value were recoverable)," but the facts of this case are neither complex nor disputed. We know the value of the Fund's securities were inflated and the extent of the inflation; we know the parties responsible for securities pricing and their respective roles in the scheme; and we know the damages to investors. If this case is too "complex" for the current class representatives, then they should be replaced rather than give way to a premature and inadequate settlement.

announced its view that indemnification of directors, officers and controlling persons for liabilities arising under the 1933 Act is against the public policy of the Act"); *Odette v. Shearson, Hammill & Co.*, 394 F.Supp. 946, 956 (S.D.N.Y.1975) (holding that prohibition on indemnification extends to cover negligent misconduct in violation of Section 12(2)); *Eichenholtz v. Brennan*, 52 F.3d 478, 484–85 (3d Cir.1995) (holding that the "policy against allowing indemnification extends to violations of sections 11 and 12(2), where the [defendant] is merely negligent in the performance of its duties"); *Comdisco, Inc.*, 2002 WL 31109431, at *5 (N.D. Ill. Sept. 23, 2002) ("Indemnification provisions which insulate professional advisors from their own negligence are arguably distasteful and potentially could excuse substandard performance"); *George K. Baum Advisors, L.L.C. v. Sprint Spectrum, L.P.*, 2013 WL 5719506, at *19 (D. Kan. Oct. 21, 2013) ("federal law precludes indemnification for violations of Section 15(a), even if the underlying action does not assert intentional misconduct").[18]

Moreover, even if indemnification were permitted under the securities laws in this case (it is not), U.S. Bancorp has no contractual right because of its misconduct. Both the Administration Agreement and Fund Accounting Agreement preclude indemnification where U.S. Bancorp (referred to as USBFS below) fails to satisfy its ordinary standard of care:

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[18] The SEC's view is the same: "in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is therefore unenforceable." *See, e.g.,* 17 CFR § 229.510.

> USBFS shall exercise reasonable care in the performance of its duties under this Agreement. USBFS shall not be liable for any error of judgment or mistake of law or for any loss suffered by the Trust in connection with its duties under this Agreement, including losses resulting from mechanical breakdowns or the failure of communication or power supplies beyond USBFS' control, except a loss arising out of or relating to USBFS' refusal or failure to comply with the terms of this Agreement or from its bad faith, negligence, or willful misconduct in the performance of its duties under this Agreement. Notwithstanding any other provision of this Agreement, if USBFS has exercised reasonable care in the performance of its duties under this Agreement, the Trust shall indemnify and hold harmless USBFS from and against any and all claims, demands, losses, expenses, and liabilities of any and every nature (including reasonable attorneys' fees) that USBFS may sustain or incur or that may be asserted against USBFS by any person arising out of any action taken or omitted to be taken by it in performing the services hereunder (i) in accordance with the foregoing standards, or (ii) in reliance upon any written instruction provided to USBFS by any duly authorized officer of the Trust, as approved by the Board of Trustees of the Trust, except for any and all claims, demands, losses, expenses, and liabilities arising out of or relating to USBFS' refusal or failure to comply with the terms of this Agreement or from its bad faith, negligence or willful misconduct in the performance of its duties under this Agreement. This indemnity shall be a continuing obligation of the Trust, its successors and assigns, notwithstanding the termination of this Agreement. As used in this paragraph, the term "USBFS" shall include USBFS' directors, officers and employees.

It is implausible that U.S. Bancorp will be able to show that it satisfied its ordinary duty of care, given that the Fund's securities were overvalued by hundreds of millions of dollars for four years or more; they were reported at mathematically impossible prices according to the SEC; they did not match prices reported by other parties for the same securities; and the SEC figured out the ruse from the outside without nearly the access to information that U.S. Bancorp had. As to the Securities Act violations at issue, U.S. Bancorp was contractually responsible for preparing the Fund's public filings and, in particular, the sections regarding its oversight of securities valuation; it controlled the Fund with respect to those filings; its senior employees signed the Fund's registration statement; and its representations regarding its process for valuing securities were false for years. Indeed, it is literally impossible for U.S. Bancorp to show entitlement to indemnification in this case because any judgment against it would *necessarily entail a finding of at least negligence*.[19] Quite the opposite, it is U.S. Bancorp, not the Trust, that has indemnification obligations arising from the Fund's collapse:

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[19] While Section 11 and 15 of the Securities Act do not require a showing of intent, proving that U.S. Bancorp stated that it was abiding by specific valuation policies when, in fact, it was not is, at a minimum, demonstrates negligent conduct for indemnification purposes, and thus if investors were to prevail on the Securities Act claims U.S. Bancorp will be barred from indemnification.

> USBFS shall indemnify and hold the Trust harmless from and against any and all claims, demands, losses, expenses, and liabilities of any and every nature (including reasonable attorneys' fees) that the Trust may sustain or incur or that may be asserted against the Trust by any person arising out of any action taken or omitted to be taken by USBFS as a result of USBFS' refusal or failure to comply with the terms of this Agreement, or from its bad faith, negligence, or willful misconduct in the performance of its duties under this Agreement. This indemnity shall be a continuing obligation of USBFS, its successors and assigns, notwithstanding the termination of this Agreement. As used in this paragraph, the term "Trust" shall include the Trust's directors, trustees, officers and employees.

Because the parties relied on the mistaken premise that U.S. Bancorp may be entitled to indemnification, the proposed settlement is fundamentally flawed with respect to U.S. Bancorp and should be rejected.

### B. Best Interests Of The Entire Class: The Settlement Is Facially Inadequate, Coercive And Flawed

#### 1. The Settlement Provides Less Than 2 Cents On The Dollar With Far Less Than Half A Penny From U.S. Bancorp

Plaintiffs admit that this action involves losses of "around $1 billion" between the Fund and the Private Fund, each of which lost around $500 million. (Doc. 212 at ¶ 141.) At best, Plaintiffs submit that the recovery represents "4.6% of this total theoretical damages maximum" even if the class receives the maximum of $48 million under the Stipulation of Settlement,[20] with far less than half a penny on the dollar from U.S. Bancorp.

After deducting costs and expenses, the settlement amount becomes virtually illusory. If Plaintiffs' counsel obtains their requested fee (*see* § III below), then only $33 million will be available for distribution. The Fund has incurred approximately $13.5 million in expenses to date as a result of its liquidation and the conduct at issue,[21] Plaintiffs' counsel's expenses are $130,000, and settlement distribution expenses are as much as $400,000, leaving approximately $19,000,000 for distribution to investors—*or 1.9% of recoverable damages.* In other words, an investor who

[20] Only $45 million is guaranteed. (Doc. 211 at 1.)

[21] *See* Infinity Q Liquidation *https://tinyurl.com/5bt6n4au*.

has realized out-of-pocket losses of $1 million would receive a mere $19,000 in exchange for a broad release of all relevant parties and no other guaranteed prospect of recovery.

Realizing the immateriality of this recovery, Plaintiffs attempt to bolster their position by citing a non-functional link to a report by NERA Economic Consulting that purportedly shows an average recovery percentage of 1.3%. (*See* Morris Aff., Ex. F (Doc. 250) (the "NERA Report").) But the NERA Report provides data regarding traditional securities class action settlements relative to "NERA-Defined Investor Losses," which is a "proprietary variable . . . constructed assuming investors had invested in stocks during the class period whose performance was comparable to that of the S&P 500 Index." *Id.* It is not an actual out-of-pocket damages analysis, but rather a calculation "assuming an investor had alternatively purchased stocks that performed similarly to the S&P 500 index during the class period."[22] This case is not a traditional stock-drop litigation and Plaintiffs do not suggest that NERA-Defined Investor Losses would be an appropriate comparator in this case or, if so, what such losses would be. Rather, the class has incurred actual, realized, out-of-pocket damages of $1 billion, and this settlement offers no more than 2 cents on the dollar.

While some parties are contributing all assets or insurance coverage, it is unclear whether Plaintiffs have even explored available coverage from U.S. Bancorp, and the settlement payment does not even cover the profits U.S. Bancorp harvested from the Fund while simultaneously causing its demise.[23] If a facially inadequate settlement with one party could ever be justified by contributions from other parties (a suspect premise to begin with), this is not the case: less than 2

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[22] *See* Recent Trends In Securities Class Action Litigation, Harvard Law School Forum on Corporate Governance (March 11, 2021).

[23] U.S. Bancorp collected approximately $1.1 million in administration fees during the time period. These fees were inflated because they were calculated based on reported NAV, which included US Bancorp's erroneous valuations.

cents on the dollar is nowhere near an exceptional enough recovery to justify a free release to a primary defendant.

**2. The Settlement Is Coercive Because Class Members Would Be Forced To Waive Claims Against U.S. Bancorp To Obtain A Recovery From Other Parties**

The proposed settlement, by design, creates a Hobson's choice that is unfair and coercive: class members are being asked to either (a) waive their claims to a material recovery against U.S. Bancorp (a primary party at fault) in exchange for settlement payments from other defendants; or (b) opt-out of the settlement in its entirety as to all defendants, even though multiple defendants are emptying their coffers and will have no assets or insurance coverage left to pursue. Indeed, as discussed further below, class members are being asked to make that decision *before this Court even rules* on the objections. This structural flaw is *not necessary*: it was created only by Plaintiffs' insistence in including claims against U.S. Bancorp in this settlement despite having repeatedly chosen not to advance them in this action.

Plaintiffs should not be permitted to rob absent class members of their claims against U.S. Bancorp—which are not even asserted in this case—in pursuit of a quick settlement with the parties here. For example, in *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 19 (2d Cir. 1981), the Second Circuit rejected "a settlement that forces class members to release claims not asserted in the class action." In that case, the case asserted claims as to *liquidated* futures contracts for potatoes, but the settlement tried to release claims for *unliquidated* futures contracts as well, despite a parallel action asserting those claims. *Id.* at 13, 16-17. The trial judge's ruling that the settlement was "fair and reasonable to the class as a whole [did] not pass muster," given that it was structurally unfair as to the unasserted claims that were being pursued in the parallel action. *Id.* at 19. The Second Circuit held that an "advantage to the class, *no matter how great*, simply cannot be bought by the uncompensated sacrifice of claims of members, whether

few or many, which were not within the description of claims assertable by the class." *Id*; *see also In re Auction Houses Antitrust Litig.*, 42 F. App'x 511, 519 (2d Cir. 2002) ("In the twenty-one years since *Super Spuds*, we have never affirmed the approval of a class action settlement which included the uncompensated impairment of non-class claims unless the non-class claims were based on the identical factual predicate as the class claims.").

The objector in *Super Spuds* found himself in a similar position as the Objectors in this case, which the Second Circuit acknowledged. The named plaintiffs "were never authorized to represent" claims with respect to the "unliquidated contracts" (they were not alleged in the complaint), and the court noted that if a "judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action ordinarily should not be able to do so either." *Super Spuds*, 660 F.2d at 19. Based on that understanding, the objector had withdrawn a prior decision to "opt out" and had "returned to the class" to obtain compensation as to the liquidated contract claims at issue, only to find that the settlement then attempted to release the other claims as to *unliquidated* contracts, despite that they were asserted in the objector's parallel action. *Id.* That structure did not comport with the "principles of equity," but the court held that if the defendants agreed to adjust the "breadth of the release" accordingly, then the "district judge [may] approve the settlement without further hearing." *Id.* at 21.

While the class members in this case may be receiving *token* compensation for claims against U.S. Bancorp, they are in effect receiving nothing for viable claims against U.S. Bancorp that are otherwise being pursued in the Wisconsin Action. That structure is inequitable regardless of the fairness of the settlement as to other parties, and the court need only adjust the scope of the release to equitably resolve this matter. *See Super Spuds*, 660 F.2d at 19-21.

### 3. The Settlement Is Coercive Because It Requires Class Members To Opt Out In Advance Of The Court's Ruling On This Objection

The structure of the proposed settlement is coercive for a similar reason: by design, class members are being forced to decide whether to opt out by January 10, 2023 in advance of the Court's consideration of objections, such as this one, and thus class members have no way of knowing what deal they are opting out of. If the Court rejects approval based on this objection or others, it is highly likely that the same parties will renegotiate a better deal for the class and try again. Given the early stage of this matter, the egregiousness of the conduct at issue, the involvement of regulators, and the pending distribution to shareholders, it is nearly inconceivable that the parties will opt to litigate rather than reach an adequate settlement. Thus, shareholders should be given the option to see what the final deal looks like before choosing whether to opt out. If the Court does not reject the proposed settlement in the entirety, it should extend the opt out deadline to March 1, 2023.

### 4. The Assignment Of The Class's Claims To Certain Defendants Is Coercive And Has Caused Confusion

Sections 4.4 and 4.5 of the Stipulation of Settlement (Doc. 177) provide that class members will assign to EisnerAmper and certain parties affiliated with Infinity Q "any and all rights they have with respect to their respective Released Claims against each of [those parties], including any right to receive (directly or indirectly) any recoveries obtained from any of [those parties]" if those claims are asserted "in any litigation by or on behalf of TAP, the Diversified Fund, and/or the Diversified Fund's [Special Litigation Committee]." Further, § 4.8 provides that the class does not waive "any rights to receive distributions, or claims or potential claims arising therefrom, from the Diversified Fund *other than recoveries from the EisnerAmper Releasees or any of the IQCM Parties on account of Released Claims that Class Members assigned pursuant to Paragraphs 4.4 or 4.5*."

It is unclear what precisely these provisions are attempting to achieve, but one reading is that they would purport to bar a portion of the distribution of assets by the Fund to investors who participate in the class settlementin the event that the Fund makes a recovery in litigation brought by it or on its behalf against EisnerAmper or the Infinity Q parties. Notable confusion already exists among class members regarding the relationship between this class action settlement and the pending distribution of the Fund's remaining assets, and these provisions are likely aggravating that confusion.

In any event, why should class members be required to waive their right to receive any kind of distribution from the Fund as part of this settlement? The Fund's assets belong to investors, as do any claims that the Fund has asserted or may assert in the future, and any litigation brought by or on behalf of the Fund would seek recovery for harm suffered by the Fund (and indirectly by its shareholders) as a result of, *inter alia*, Defendants' breaches of contractual and/or fiduciary duties that are separate and distinct from the disclosure-based securities claims that are the subject of the proposed settlement. These provisions are but further examples of how Defendants have leveraged this inadequate settlement, facilitated by Plaintiffs' counsel, to evade liability for the Fund's collapse.

### 5. The Allocation Methodology Is Potentially Inaccurate

The methodology for allocating the settlement fund to investors is based on a table of NAV inflation (Doc. 177 at 95) that purports to set forth the amount of inflation in the Fund's NAV on a monthly basis between February 2017 and February 2021. Plaintiffs have not provided information as to where these numbers came from (whether from the Trust, the Fund's securities valuation consultant, U.S. Bancorp, the SEC or otherwise), how they were calculated or whether any third-party has verified them. In any event, the methodology appears to be inherently inaccurate and relies on potentially inaccurate data.

As an initial matter, given that the Fund published its NAV on every trading day during the period, the amount of inflation varied on each trading day throughout each month. It is unclear why Plaintiffs have proposed using a single inflation number for an entire month—despite that investors purchased shares at varying levels of inflation throughout the month—and doing so will necessarily result in an less than accurate allocation of the settlement fund to individual investors. Moreover, even if a single, monthly inflation number were appropriate (it does not appear to be), the amounts set forth by Plaintiffs do not match the numbers set forth by the SEC in its complaint. *See SEC v. Velissaris*, No. 1:22-cv-01346 (ECF 1) at 40. The differences are significant—as much as 50%—based on the Objectors' calculations shown below.

| Date | Plaintiffs' Inflation Calculation | SEC's Inflation Calculation | Difference |
|---|---|---|---|
| 3/31/17 | 3.80% | 3.97% | **4.47%** |
| 6/30/17 | 5.64% | 6.01% | **6.56%** |
| 9/30/17 | 3.52% | 3.67% | **4.26%** |
| 12/31/17 | 1.26% | 1.28% | **1.59%** |
| 3/31/18 | 1.24% | 1.80% | **45.16%** |
| 6/30/18 | 3.17% | 3.84% | **21.14%** |
| 9/30/18 | 1.68% | 2.09% | **24.40%** |
| 12/31/18 | 4.90% | 7.06% | **44.08%** |
| 3/31/29 | 4.95% | 6.22% | **25.66%** |
| 6/30/19 | 7.86% | 8.90% | **13.23%** |
| 9/30/19 | 9.17% | 10.29% | **12.21%** |
| 12/31/19 | 12.26% | 13.57% | **10.69%** |
| 3/31/20 | 42.57% | 65.77% | **54.50%** |
| 6/30/20 | 36.29% | 54.89% | **51.25%** |
| 9/30/20 | 30.09% | 42.21% | **40.28%** |
| 12/31/20 | 22.74% | 29.20% | **28.41%** |
| 2/18/21 | 22.75% | 29.83% | **31.12%** |

The Court should deny approval at a minimum so as to permit targeted discovery on the methodology and the source of underlying information that it relies on.

### C. Support Of The Parties: The Objectors Hold Shares In The Fund Previously Worth Over $8 Million

The Objectors hold approximately 653,755 shares in the Fund previously worth over $8 million based on the Fund's last reported NAV. (*See, supra,* page viii.) Numerous additional investors have also indicated their displeasure with the proposed settlement, but for various reasons were unable or unwilling to publicly join the Objectors in this submission. The Objectors are sophisticated investors, have taken a keen interest in this litigation as a result of their personal financial interests or the interests of their managed accounts, and their views should be afforded significant weight.

### D. Judgment Of Counsel: Plaintiffs Raced To The Courthouse, Neglected The Law And Facts, And Negotiated An Inadequate Settlement

Counsel's judgment in this case is not entitled to deference: Plaintiffs filed this action *only 48 hours* after the Fund revealed that it was liquidating, at which point the facts and circumstances of the Fund's collapse were not fully understood. Based on that limited information, Plaintiffs failed to name as a defendant the entity primarily responsible for the Fund's securities valuation and NAV, but did sue a variety of parties with tangential if any connection to securities valuation, including Bonderman Family Limited Partnership, LP and Infinity Q Management Equity LLC, which are merely passive part-owners of the investment adviser. Thereafter, even after seeing the Wisconsin Action, Delaware Action, and the actions filed by regulators, Plaintiffs never amended their complaint to name U.S. Bancorp and negotiated this inadequate settlement.

In an effort to cover their tracks, Plaintiffs now assert in conclusory fashion that securities claims against U.S. Bancorp would not be viable and that they "are not aware of any case holding that a mutual fund's administrator and/or custodian can be held liable under Section 11." (Doc.

212 at ¶ 110.) But that admission suggests that Plaintiffs have simply never looked for such cases, not that they do not exist. (*See, supra,* § 2, A.) Moreover, counsel appears to have blindly credited arguments, during negotiations, that U.S. Bancorp has "indemnification agreements that could result in investors essentially paying themselves, if for example the Funds used reserve assets to pay their indemnifications," despite that the plain language of the contracts provide no plausible basis for indemnification. (*See, supra,* § 2, A, 5.)

Plaintiffs also suggest that their assessment of the merits was informed by motions to dismiss submitted in this action (which were briefed but not decided) and pre-motion letters submitted by certain defendants in the Federal Action. (Doc. 212 ¶¶ 70-73.) But no motion to dismiss was filed by U.S. Bancorp in this action because no claims were asserted against it, nor did U.S. Bancorp submit a pre-motion letter in the Federal Action.[24] Thus, counsel's determination to release the claims against U.S. Bancorp was not informed by meaningful briefing.

Plaintiffs not only botched the law but also have done little to develop the facts in this case. Plaintiffs admit that they finalized the deal *having reviewed only one third of the documents produced* in "confirmatory discovery," and otherwise have never suggested why the limited documents they reviewed rebut claims against U.S. Bancorp. (See Morris Aff., Ex. G (Doc. 251) at 7-8 ("To date, we've received over 300,000 documents produced by the parties. We've reviewed about 100,000 of them so far. And, at the end of it, believe we were able to achieve really a remarkable result.").)[25] Further, Plaintiffs are *no longer in possession of any such documents* and

[24] While U.S. Bancorp filed a motion to dismiss in the Wisconsin Action, the proposed settlement was submitted before Mr. Sherck submitted his opposition brief, and thereafter U.S. Bancorp leveraged the Court's preliminary approval order to avoid further briefing. As set forth above, U.S. Bancorp's motion to dismiss was without merit and would have been denied. (*See* § II.A, *supra*.)

[25] Plaintiffs' statements in connection with their motion for approval of the settlement are plainly inconsistent with those made to the Court at the preliminary approval hearing. (*See, e.g.,* Doc. 212

*(cont'd)*

allegedly reviewed them through a portal temporarily made available to them by Defendants. Thus, whatever documents may have been made available at one time or another, the purported "record" supporting the proposed settlement no longer exists (but for self-serving affidavits from counsel). The Court and members of the class have no ability whatsoever to consider whether evidence supports the fairness of the settlement.

Cases crediting the judgment of counsel have done so on facts, unlike here, suggesting that counsel committed significant effort and ingenuity in achieving the proposed settlement, and significant litigation and fact discovery provided the court with an actual record to consider the fairness of the settlement. *See, e.g., Fiala v. Metro. Life Insurance Co.*, 899 N.Y.S.2d 531, 539 (Sup. Ct. 2010) (noting that "the history and length of the litigation speak to the lack of collusion and coercion in negotiating the final settlement" where the "settlement occurred after comprehensive and meaningful discovery, on the brink of trial and with the help of an accomplished and scrupulous mediator"); *Saska v. Metro. Museum of Art*, 54 N.Y.S.3d 566, 570 (N.Y. Sup. Ct. 2017) ("The court cannot overstate the thoughtfulness demonstrated by counsel to the unique legal issues in the case and their diligence in the lengthy, complex and protracted settlement process."); *City Trading Fund v. Nye*, 72 N.Y.S.3d 371, 395 (N.Y. Sup. Ct. 2018) (rejecting settlement where "perverse incentive" of the lawyers did not support the fairness of the settlement). This case has not even survived the pleading stage and counsel has repeatedly demonstrated a misunderstanding of the law, facts, and applicable contracts by. No deference is required to their judgment.

at ¶ 60 (Plaintiffs "received access to 329,886 documents from Defendants . . . which were expeditiously reviewed and analyzed."); *id.* at ¶ 98 n. 7 (documents "were subject to a complete, linear review (*i.e.*, every single document was reviewed.").)

### E. Good Faith Bargaining: Plaintiffs Did Not Materially Engage With U.S. Bancorp On Any Of The Issues Raised In This Memorandum

While Plaintiffs make much of the purported length of their negotiations (*e.g.*, Doc. 170 at 4 ("nine-month mediation process")), the sequence of negotiation is telling as to why U.S. Bancorp's contribution is so inadequate. Plaintiffs contend that they started negotiating a resolution in December 2021, at which point neither the Wisconsin Case, the Derivative Case, nor the SEC's lawsuit against Mr. Velissaris had been filed. Thus, having failed to initially realize the importance of U.S. Bancorp as a defendant and without the benefit of the subsequently filed actions, Plaintiffs set out to resolve the case on a global basis. Three of the four mediation sessions were held before the Wisconsin Case was filed in February 2022 and, thus, *before U.S. Bancorp was named as a defendant in any action*. (Doc. 211 at 8.) Plaintiffs have refused to disclose whether U.S. Bancorp even participated in those sessions, given that it was not a party. If it participated, it did so only as an interested non-party and clearly was not the focal point of negotiations.

Objectors understand that U.S. Bancorp (not surprisingly) adopted an aggressive position in negotiations beginning with the refusal to make any contribution, while presumably other parties had already committed some or all of their assets and insurance coverage available. It appears that Plaintiff opted not to risk the negotiated settlement with the named parties by playing "hardball" with U.S. Bancorp, and thus relented to a minimal contribution from U.S. Bancorp in order to present a "global" resolution to the Court. Plaintiffs do not appear to have meaningfully engaged with U.S. Bancorp's various defenses (for example, Plaintiffs failed to rely on cases demonstrating that U.S. Bancorp is a proper Securities Act defendant and have adopted the baseless contention that U.S. Bancorp could be entitled to indemnification from the Fund).

Finally, beyond the deficiencies in the negotiation process leading to this settlement, the outcome should be permitted to speak for itself: little if any credit need be awarded for a result that

yielded far less than half a cent on the dollar from the Fund's primary service provider with direct responsibility for the misconduct at issue. While other parties may be contributing material amounts, losses to investors are still substantial and the failure to obtain a settlement amount that is adequate overall undercuts any perception of good faith bargaining.

### F. Other Relevant Legal And Factual Considerations Weigh Against The Settlement

#### 1. An SEC Action Will Resolve These Claims On Fairer Terms If The Parties Refuse To Renegotiate

The SEC Action, filed in the U.S. District Court for the Southern District of New York, settles the SEC's claims with the Fund and seeks appointment of a special master to oversee the resolution of all outstanding claims relating to the Fund and its service providers and, thereafter, the distribution of the Fund's remaining assets (currently $566 million held in special reserve) to investors.[26]

In connection with the SEC Action, the SEC has indicated that it plans to establish a summary procedure for resolution of any outstanding claims relating to the Fund, under the supervision of the special master and the district court, and will resolve the claims as promptly as possible so as to allow for the distribution of the Fund's remaining assets to investors. While the SEC initially exempted this action from the summary process (given that a near-term settlement is pending), it has stated that it will move to stay or transfer the case if the case returns to a litigation track.

Thus, even if the Court rejects the inadequate settlement and no replacement is proposed, there is little risk of unreasonable delay in the distribution of remaining funds to investors.

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[26] The matter is currently before Judge Castel and the SEC's motion for the appointment of a special master is pending. *See SEC v. Infinity Q Diversified Alpha Fund*, No. 1:22-cv-09608 (S.D.N.Y.).

Plaintiffs' argument that absent this inadequate deal the class would "wait years and incur significant additional expense before being able to collect an uncertain recovery" is baseless. (Doc. 212 at ¶ 113.) Instead, if the Court rejects this settlement and the parties refuse to promptly submit a revised proposal that provides meaningful relief for the class (and fixes the structural flaws set forth herein), then the claims will be summarily adjudicated through the SEC Action. This fact will create a strong incentive for the parties to return to this Court with an improved settlement proposal and, if they do not, the SEC will ensure that the interests of investors are protected.

### 2. The New York Rule Of Comity Suggests That This Court Should Not Undercut Claims First Asserted In A Different Action

New York courts generally take the position that "the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere." *City Trade & Indus., Ltd. v. New Cent. Jute Mills Co.*, 25 N.Y.2d 49, 58 (N.Y. 1969); *see also George Hyman Const. Co. v. Precision Walls, Inc. of Raleigh*, 517 N.Y.S.2d 263, 264-66 (1987) ("[T]he rule of comity forbids the granting of an injunction to stay proceedings which have been commenced in a court of competent jurisdiction of a sister state unless it is clearly shown that the suit sought to be enjoined was brought in bad faith, motivated by fraud or an intent to harass"); *In re Perceptron, Inc.*, 824 N.Y.S.2d 521, 522 (4th Dept 2006) ("[T]he court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere."). In this case, no matter how Plaintiffs spin it, the Wisconsin Action was the first securities action to assert claims against U.S. Bancorp, and this action has never named U.S. Bancorp as a defendant. Comity suggests that this Court should let the claims resolve in the jurisdiction where they were first filed (or where they are subsequently transferred), rather than allow the parties to this action to give them away for inadequate consideration.

## III. PLAINTIFFS' FEE REQUEST STRAINS CREDULITY

If the Court approves the settlement (which it should not do), the Court should not approve counsel's requested fee award, which is bloated beyond reason. "The amount awarded in attorney's fees must be based on the reasonable value of legal services rendered." *Klein*, 808 N.Y.S.2d at 776 (finding that record was "insufficient to support an award of an attorney's fee" where "481 hours of work performed by the firm serving as lead counsel for the plaintiffs was attributed only to 'drafting of pleadings, review of discovery, drafting of memoranda of law, and participation in settlement negotiations'").[27]

In this case, the legal services consisted of the following: (1) hastily filing a complaint that missed a critical party and made superficial allegations about the Fund's collapse; (2) opposing a motion to dismiss that was never decided; and (3) negotiating a premature and inadequate settlement. These three tasks purportedly required *44 attorneys between 4 firms*, which have reported *8,696.75 hours of staff and attorney time*. (*See* Docs. 223, 230, 234 & 238.) Counsel now asks for $15 million—a third of the recovery and more than a 2x multiplier on an already excessive lodestar—in light of the "excellent result obtained here." (Doc. 212 at ¶ 18.)

While many cases may merit a contingency fee of that nature, this one does not. Plaintiffs' case citations (all but one of which involved the same counsel in this case) do not support their request and, in reality, demonstrate how unreasonable the proposed fee is under the circumstances of this case:

[27] Notably, counsel's submissions are even more bare than in *Klein* and provide no information regarding what actual work the purportedly 44 attorneys in this case performed. The Court has little ability to assess the reasonableness of the lodestar amount.

| Case | Procedural Posture | Lodestar | Fee Awarded |
|---|---|---|---|
| *EverQuote, Inc. Sec. Litig.*, Index No. 651177/2019 | Motion to dismiss pending | $997,120[28] | $1,583,000[29] |
| *Altice USA, Inc. Sec. Litig.*, Index No. 71788/2018 | Motion to dismiss decided, Amended Complaint pending | $1,788,059[30] | $1,650,000[31] |
| *Douyu Int'l Holdings Ltd. Sec. Litig.*, Index No. 651703/2020 | Post-motion to dismiss with appeal; discovery pending | $5,896,888[32] | $5,000,000[33] |
| *Sciplay Corp. Sec. Litig.*, Index. No. 655984/2019 | Post-motion to dismiss with appeal; discovery; motion for class certification pending | $1,069,415[34] | $2,758,333[35] |

Plaintiffs' purported lodestar of $6,189,188.75 (Doc. 211 at 19) exponentially exceeds counsel's lodestar in cases with similar procedural postures and even exceeds the reported lodestar in post-motion-to-dismiss cases involving discovery and additional motion practice. As a result, counsel is seeking a "2.42x multiplier" (Doc. 211 at 19) on a lodestar that is already 2-3 times higher than amounts reported in cases that counsel has described as "comparable class action cases." *Id.* at 16.

Further, while Plaintiffs make much of the risks of "embarking on a complex, expensive, risky, and lengthy litigation with no guarantee of ever being compensated for the substantial investment of time and money the case would require," counsel ultimately opted to settle early and

[28] Doc. 110 at 23.

[29] Doc. 132 at 9.

[30] Doc. 144 at 18.

[31] Doc. 161 at 6.

[32] Doc. 172 at 11.

[33] Doc. 247 at 7.

[34] Doc. 130 at 14.

[35] Doc. 152 at 2.

*not take those risks* at the expense of the class. (*Id.* at 37.) It is an odd result for counsel to ask now to be compensated for theoretical risks they chose not to assume. Counsel also argues that their cases were the "first cases filed and prosecuted" and they "were required to develop the facts and legal theories in an effort to obtain a recovery." (*Id.* at 37-38.) But Plaintiffs' hasty filings served no one, and the "facts and legal theories" in this case are derived from the SEC's work in detecting and revealing the Fund's pricing errors and, as to U.S. Bancorp, the allegations in the Wisconsin Action and Delaware Action. Indeed, despite having others, including the SEC, plainly lay out the facts of this case for them, Plaintiffs still argue that the case is "highly complex, even among securities actions," which they suggest somehow supports their fee. (*Id.* at 38.)

At bottom, if Plaintiffs are successful in obtaining this premature and inadequate settlement, their counsel should be content with a fee that reflects the concessions it made at the expense of the class.[36]

## CONCLUSION

For the reasons set forth above, the Court should reject the proposed settlement and instruct the parties, in consultation with the Objectors, to fix the inadequacies and structural flaws set forth above and, if an agreement is reached, then promptly resubmit a revised settlement for this Court's approval. If, in the alternative, the Court determines to approve the settlement, then it should (i) not approve the requested fee award because it is not commensurate with the illusory benefits obtained by counsel; (ii) extend the opt-out deadline to March 1, 2023; and (iii) extend the claims submission deadline to March 1, 2023.

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[36] Objectors do not oppose the requested service awards to the Plaintiffs because, regardless of the actions of their counsel, investors who step up as named plaintiffs provide a valuable and often unappreciated service to both their follow investors and the financial markets generally.

Dated: January 10, 2023
New York, New York

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