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Asset Management Argues for Rate-Rigging Payout Stemming From Bank Settlement

An attorney for the firm, Fortinbras Asset Management, argued that his client's work unwinding interest rate swaps for defendant Credit Suisse had made it eligible to receive a payout from the class action settlement, reached in 2016 in Manhattan federal court.

By Tom McParland | February 01, 2021



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A Germany-based asset-management firm told a panel of the U.S. Court of Appeals for the Second Circuit on Jan. 29 that it was improperly excluded from a settlement in private litigation accusing major financial institutions of rigging a key interest rate benchmark in the global derivatives market.

An attorney for the firm, Fortinbras Asset Management, argued that his client's work unwinding interest rate swaps for defendant Credit Suisse had made it eligible to receive a payout from the class action settlement, reached in 2016 in Manhattan federal court.

U.S. District Judge Jesse M. Furman of the Southern District of New York, however, ruled two years that Fortinbras's transactions, which were based on a model linked to the ISDAfix benchmark rates, were not "real" exchanges, but merely hypothetical references to an index calculation. The finding was also supported by a claims administrator and class counsel in the case.

Fortinbras' attorney, Eric Jaso of Spiro Harrison, said that Furman's finding had ignored the plain language of a plan for distribution that was meant to open funds to "any party whose investments were in any way affected by" the banks' manipulation of the ISDAfix benchmark, which is used primarily to price swaps transactions, commercial real estate mortgages and structured debt securities.

"This is an intentionally broad definition, meant to capture any and all affected transactions," Jaso said.

"We did hold those securities and the investment monies ... were under our management," he said.

According to Jaso, more than \$3 trillion of Fortinbras' transactions were affected by the benchmark manipulation, and Fortinbras wanted to submit its own distribution plan among its investors, based on their level of involvement with the alleged conspiracy.

The dispute stemmed from a \$324 million settlement with seven large financial institutions, including Credit Suisse Bank of America, JP Morgan and Deutsche Bank, in 2016.

The banks were accused of conspiring to daily benchmark rate for interest rate exchange contracts, or swaps, between 2009 and 2012 by placing multiple electronic orders just before setting the rate and delaying other ongoing operations that had been made at different rates. The remaining five defendants settled in 2018, bringing the total payout in the case to more than \$500 million.

On Jan. 29, an attorney for the plaintiffs, Hal Cunningham, said that Fortinbras had filed a claim for itself—not on behalf of its third-party investors—and there was no documentary evidence to back up its "notional" swap claim. Fortinbras, he argued, had only performed an advisory service for Credit Suisse, signaling whether to take long or short positions on swaps in exchange for a fee.

"Fortinbras' evidence in support of its claims does not show that it entered into swaps," said Cunningham, a San Diego-based attorney with the firm Scott & Scott.

"There's simply no evidence that Fortinbras' transacted in swaps," he said.

Jaso, meanwhile, argued that Furman had overlooked documents that he said showed Fortinbras had acted as a "counter-party" to swaps, and questioned Cunningham's characterization of his client's work.

"Putting aside the question of why Credit Suisse would pay anyone to crunch hypothetical numbers, that's not what we did. We were, in fact, both an investment advisor and a counter-party for trading on the underlying investments," Jaso said. "Those are not mutually exclusive and banks and investment managers do that all the time."

The Jan. 29 panel, which included Judges Debra Ann Livingston, Gerard E. Lynch and Jose A. Cabranes, adjourned the hearing without a ruling.

The case is captioned *Alaska Electrical Pension Fund v. Fortinbras Asset Management*.

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