UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEPHEN SULLIVAN, WHITE OAK FUND LP, CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM, SONTERRA CAPITAL MASTER FUND, LTD., FRONTPOINT PARTNERS TRADING FUND, L.P., AND FRONTPOINT AUSTRALIAN OPPORTUNITIES TRUST on behalf of themselves and all others similarly situated,

Plaintiffs,

- *against* -

BARCLAYS PLC, BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., BNP PARIBAS S.A., CITIGROUP, INC., CITIBANK, N.A., COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., CRÉDIT AGRICOLE S.A., CRÉDIT AGRICOLE CIB, DEUTSCHE BANK AG, DB GROUP SERVICES UK LIMITED, HSBC HOLDINGS PLC, HSBC BANK PLC, ICAP PLC, ICAP EUROPE LIMITED, J.P. MORGAN CHASE & CO., JPMORGAN CHASE BANK, N.A., THE ROYAL BANK OF SCOTLAND PLC, SOCIÉTÉ GÉNÉRALE SA, UBS AG AND JOHN DOE NOS. 1-50,

Defendants.

Docket No. 13-cv-02811 (PKC)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF THE CLASS ACTION SETTLEMENTS WITH BARCLAYS PLC, BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., DEUTSCHE BANK AG, DB GROUP SERVICES (UK) LTD., HSBC HOLDINGS PLC AND HSBC BANK PLC

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INTRODUCTION

Under Rule 23 of the Federal Rules of Civil Procedure ("Federal Rules") and Paragraph 24 of the Order Preliminarily Approving Proposed Settlement with Deutsche Bank AG and DB Group Services (UK) Ltd., Scheduling Hearing for Final Approval of Proposed Settlements with Barclays plc, Barclays Bank plc, Barclays Capital Inc., HSBC Holdings plc, HSBC Bank plc, Deutsche Bank AG and DB Group Services (UK) Ltd., and Approving the Proposed Form and Program of Notice to the Class dated July 5, 2017, ECF No. 364 (the "Preliminary Approval Order"), Plaintiffs,[1] through their counsel, Lowey Dannenberg, P.C. and Lovell Stewart Halebian Jacobson LLP ("Class Counsel"), respectfully submit this Memorandum of Law, the accompanying Joint Declaration of Vincent Briganti and Christopher Lovell ("Joint Decl."), and Declaration of Brian J. Bartow ("Bartow Decl.") in support of Plaintiffs' motion for an order granting final approval of the settlements with Defendants Barclays,[2] Deutsche Bank,[3] and HSBC[4] (the "Settlements"), approval of the [Proposed] Plan of Distribution, and certification of the Settlement Class.

Pursuant to the Preliminary Approval Order, the Settlement Administrator executed the Class Notice plan to disseminate the Mailed Notice to Class members informing them, *inter alia*, that Barclays, Deutsche Bank and HSBC agreed to pay an aggregate amount of $309,000,000, in addition to providing cooperation in the ongoing prosecution of claims against the non-settling Defendants. *See* Miller Aff. ¶¶ 4-12 (ECF No. 384-1). The Class Notice plan was set forth at length in Exhibit A

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[1] "Plaintiffs" are California State Teachers' Retirement System ("CalSTRS"), Stephen Sullivan, White Oak Fund LP, Sonterra Capital Master Fund, Ltd., FrontPoint Partners Trading Fund, L.P., and FrontPoint Australian Opportunities Trust. Unless otherwise defined, capitalized terms herein have the same meaning as in the Barclays Settlement Agreement, Deutsche Bank Settlement Agreement and HSBC Settlement Agreement. ECF Nos. 218-1; 360-1; 276-1.

[2] "Barclays" means Barclays plc, Barclays Bank plc and Barclays Capital Inc.

[3] "Deutsche Bank" means Deutsche Bank AG and DB Group Services (UK) Ltd.

[4] "HSBC" means HSBC Holdings plc, and HSBC Bank plc. Together, Barclays, Deutsche Bank and HSBC are referred to as the "Settling Defendants." The Settling Defendants consent to the instant motion for final approval of their respective settlements with Plaintiffs and without prejudice to any position Settling Defendants may take in any other action, or in this Action if the Settlements are terminated.

to the Affidavit of Linda Young (ECF No. 360-2) submitted in connection with Plaintiffs' motion for preliminary approval of the Settlements. As Eric J. Miller, the Vice President of Client Services for A.B. Data, described in his affidavit previously filed with the Court, the Settlement Administrator implemented the Class Notice plan in accordance with the Preliminary Approval Order. *See* Miller Aff. (ECF No. 384-1).

This motion is being filed before the deadline for objecting to the Settlements. No objections have been received to date. *See* Joint Decl. ¶ 106. Plaintiffs will supplement this submission to address any objections in accordance with the schedule set by the Court for filing oppositions to any objections.

The terms of the Settlements are fair, reasonable, and amply satisfy the criteria for final approval under Rule 23 of the Federal Rules of Civil Procedure. The Settlements were the result of more than five years of hard-fought litigation and months of arm's-length negotiations between highly-sophisticated parties and their experienced counsel.

Class Counsel prepared the [Proposed] Plan of Distribution with the assistance, knowledge, and opinions of several experts and it has a "reasonable, rational basis." *See* Joint Decl. ¶ 102. Class Counsel has litigated this Action for over five years and, based on its extensive experience in class actions and its knowledge of this Action, recommends to the Court finally approve the [Proposed] Plan of Distribution.

Plaintiffs respectfully request that the Court grant Final Approval of the Settlements, in the form of the proposed order annexed hereto, approve the [Proposed] Plan of Distribution, and enter Final Judgment dismissing the claims against Barclays, Deutsche Bank and HSBC with prejudice on the merits, in the form of the proposed judgment annexed hereto, to provide the Settlement Class with the substantial relief that Plaintiffs and their counsel worked so diligently to obtain.

BACKGROUND

On October 30, 2015, Plaintiffs moved for preliminary approval of the Barclays Settlement. *See* ECF Nos. 216-20 (the "Barclays Preliminary Approval Motion"). On December 15, 2015, the Court issued an order preliminarily approving Plaintiffs' motion. ECF No. 234. On January 11, 2017, Plaintiffs moved for preliminary approval of the HSBC Settlement. *See* ECF Nos. 274-78 (the "HSBC Preliminary Approval Motion"). On January 18, 2017, the Court issued an order preliminarily approving Plaintiffs' motion. ECF No. 279. On June 12, 2017, Plaintiffs moved for preliminary approval of the Deutsche Bank Settlement. *See* ECF Nos. 358-62 (the "DB Preliminary Approval Motion" and, collectively with the Barclays Preliminary Approval Motion and the HSBC Preliminary Approval Motion, the "Preliminary Approval Motions"). On July 6, 2017, the Court issued an order preliminarily approving Plaintiffs' motion. ECF No. 364. Through these three negotiated Settlements, the Settlement Class will receive a substantial monetary recovery of $309,000,000 (less such fees and expenses as approved by the Court), in addition to the cooperation Barclays, Deutsche Bank and HSBC have provided and will continue to provide to Plaintiffs to assist in prosecuting claims against the non-settling Defendants.

ARGUMENT

I. THE SETTLEMENTS MEET THE REQUIREMENTS FOR FINAL APPROVAL

A. The Settlements are procedurally fair

Public policy favors the resolution of class actions through settlement. *Bano v. Union Carbide Corp.*, 273 F.3d 120, 129-30 (2d Cir. 2001); *see also In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 439, 455 (S.D.N.Y. 2004). "[C]ourts encourage early settlement of class actions, when warranted, because early settlement allows class members to recover without unnecessary delay and allows the judicial system to focus resources elsewhere." *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 474-75 (S.D.N.Y. 2013).

Courts presume settlements are procedurally fair when they are "the product of arm's length negotiations between experienced and able counsel on all sides." *In re Air Cargo Shipping Servs. Antitrust Litig.,* No. 06-md-1775 (JG), 2009 WL 3077396, at *7 (E.D.N.Y. Sept. 25, 2009); *see also In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173-74 (S.D.N.Y. 2000), *aff'd sub nom., D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001) (where a settlement is the "product of arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation," the settlement enjoys a "presumption of fairness").

As detailed in the declarations filed with Plaintiffs' Preliminary Approval Motions and with this motion, the Settlements were reached after extensive arm's-length, non-collusive negotiations. *See* Joint Decl. ¶ 87; ECF Nos. 220, 276, 360. Plaintiffs have been represented by counsel with extensive class action, antitrust, Commodity Exchange Act ("CEA"), and trial experience, which is strong evidence that the Settlements are procedurally fair. *See In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 122 (S.D.N.Y. 2009) (noting the "extensive" experience of counsel in granting final approval of settlement); *see also Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331 (CM) (MHD), 2014 WL 1224666, at *2 (S.D.N.Y. Mar. 24, 2014) (giving "great weight" to experienced class counsel's opinion that the settlement was fair); ECF Nos. 218-2, 220-1 (attaching Class Counsels' firm resumes).

For each of the Settlements, the Class benefitted from being represented by Class Counsel who were well informed about the strengths and weaknesses of the claims and defenses presented. Class Counsel had the benefit of their own investigations, government orders and settlements with certain Defendants, and certain cooperation materials. *See* Joint Decl. ¶¶ 52, 64, 72. Class Counsel spent considerable time researching a wide range of relevant legal issues and analyzing the facts uncovered to date. Further, throughout the negotiation process, Plaintiffs and Settling Defendants had numerous opportunities to articulate and refine their positions, and holding in person meetings

and conference calls to address specific arguments related to liability and damages. *Id.* ¶¶ 40, 43, 57, 62, 67, 70. The exchange of extensive information facilitated well-informed settlement discussions. *Id.*

The involvement of three respected, qualified mediators was invaluable in reaching a resolution and further exemplifies the fairness of the settlement process. *See In re Indep. Energy Holdings PLC Sec. Litig.*, No. 00 Civ. 6689, 2003 WL 22244676, at *4 (S.D.N.Y. Sept. 29, 2003) ("[T]he fact that the [s]ettlement was reached after exhaustive arm's-length negotiations, with the assistance of a private mediator experienced in complex litigation, is further proof that it is fair and reasonable."); *deMunecas v. Bold Food, LLC,* No. 09 Civ. 00440 (DAB), 2010 WL 3322580, at *4 (S.D.N.Y. Aug. 23, 2010) ("Arm's-length negotiations involving counsel and a mediator raise a presumption that the settlement they achieved meets the requirements of due process."); *In re Elec. Books Antitrust Litig.*, No. 11-md-2293 (DLC), 2014 WL 3798764, at *2 (S.D.N.Y. Aug. 1, 2014) ("The assistance of a well-known mediator . . . reinforces the conclusion that the [s]ettlement [a]greement is non-collusive."). In each of the Settlements, the work of the mediator was integral in striking an agreement that the mediators themselves considered to be fair, reasonable and adequate (two of the three Settlements were the result of a mediator's proposal). *See* ECF Nos. 219 [Feinberg Decl.] ¶ 15; 278 [McGowan Decl.] ¶ 11; 362 [Weinstein Decl.] ¶ 14.

The Barclays Settlement was the result of months of arm's-length, non-collusive negotiations by experienced counsel, with the assistance of Kenneth R. Feinberg.[5] Class Counsel and counsel and representatives from Barclays participated in three all-day mediation sessions with Mr. Feinberg and overcame an impasse before reaching an agreement in principle to settle the case. Joint Decl. ¶¶ 40, 44. The HSBC Settlement was negotiated over the course of 14 months that included numerous

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[5] Mr. Feinberg has mediated thousands of complex disputes, including antitrust, securities, and intellectual property cases, and has received numerous awards for his dispute resolution services. ECF No. 219.

meetings and conferences, and an all-day mediation with Gary McGowan.[6] CalSTRS general counsel Brian Bartow traveled to New York to attend this mediation and delivered a statement to HSBC's representative, the mediator, and all counsel regarding CalSTRS' view of Defendants' alleged conduct and the importance CalSTRS places on the Action. *See* Bartow Dec. ¶ 14. When the mediation reached an impasse, Mr. McGowan made a mediator's proposal that was accepted by Plaintiffs and HSBC. Joint Decl. ¶¶ 61-62.

The Deutsche Bank Settlement was similarly the result of more than 22 months of arm's-length, non-collusive negotiations by experienced counsel, with the assistance of private mediators, the Honorable Daniel Weinstein (Ret.).[7] Again, CalSTRS' general counsel traveled to New York to attend Plaintiffs' mediation with Deutsche Bank, and delivered a statement Deutsche Bank's representative, the mediator, and all counsel regarding CalSTRS' view of Defendants' alleged conduct and the importance CalSTRS places on the Action. *See* Bartow Dec. ¶ 15. Following a full day of hard-fought mediation, the parties reached a settlement after accepting the mediator's proposal to break an impasse. *See* Joint Decl. ¶ 70. The difficulties experienced in each of the settlement negotiations, and the role of the mediator in reaching a resolution confirm that the Settlements were not collusive.

Given Class Counsel's considerable prior experience in complex class action litigation involving CEA and antitrust claims (among others), their knowledge of the strengths and weaknesses of Plaintiffs' claims, their assessment of the Settlement Class' likely recovery following trial and appeal, and the oversight of experienced mediators with respect to the Settlements (*id.* ¶¶ 40, 61, 69, 104), the Settlements are entitled to a presumption of procedural fairness.

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[6] Mr. McGowan has mediated over 2,700 complex disputes, including antitrust, securities, and intellectual property cases, and has received numerous awards for his dispute resolution services. ECF Nos. 278, 278-1.

[7] Judge Weinstein has mediated over 3,000 complex disputes, including antitrust, securities, and intellectual property cases, and has received numerous awards for his dispute resolution services. ECF Nos. 362, 362-1.

B. The Settlements are substantively fair under the *Grinnell* factors

Courts consider nine factors in deciding whether a settlement is fair, reasonable, and adequate, including:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) ("*Grinnell*"); *abrogated on other grounds by Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000); *see also Maywalt v. Parker & Parsley Petroleum*, 67 F.3d 1072, 1079-80 (2d. Cir. 1995) (holding that fundamental to a determination of whether a settlement is fair, reasonable and adequate "is the need to compare the terms of the compromise with the *likely* rewards of litigation"); *In re Take Two Interactive Sec. Litig.*, No. 06 Civ. 803 (RJS), 2010 U.S. Dist. LEXIS 143837, at *31-32 n.8 (S.D.N.Y. June 29, 2010) ("A court reviewing a settlement for final approval must address the nine factors laid out in" *Grinnell*). The *Grinnell* factors weigh heavily in favor of final approval.

1. The complexity, expense, and likely duration of the litigation

The first *Grinnell* factor is "the complexity, expense and likely duration of the litigation." *Grinnell*, 495 F.2d at 463. "Class actions have a well-deserved reputation as being most complex," *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998) ("*NASDAQ III*"), with antitrust and commodities cases standing out as some of the most "complex, protracted, and bitterly fought." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 670 (S.D.N.Y. 2015); *see also In re Platinum and Palladium Commodities Litig.,* No. 10 Civ. 3617, 2014 WL 3500655, at *12 (S.D.N.Y. July 15, 2014) (noting that commodities cases are "complex and expensive" to litigate); *In re Vitamin C*

Antitrust Litig., No. 06-md-1738 (BMC), 2012 WL 5289514, at *4 (E.D.N.Y. Oct. 23, 2012). This case is no different. The Action involved, *inter alia,* antitrust and CEA claims, complex financial instruments, novel legal questions and an evolving view of those questions by many courts. Even if these Settlements are approved, at least two Defendants remain, discovery is ongoing, and appeals and/or motions for reconsideration are possible. Plaintiffs expect that this case will continue for some time.

The amount of information and evidence required to successfully litigate this Action is significant. In addition to a settlement amount, the Settlements each provide for the production of valuable cooperation materials necessary to prosecute the remaining Defendants. Plaintiffs negotiated for access to, among other things: (i) attorney proffers of fact regarding conduct known to the Settling Defendants; (ii) underlying documents and communications that the Settling Defendants previously provided to regulators; (iii) documents reflecting data underlying the Settling Defendants submissions to the Federal Reserve Bank of New York; (iv) reasonably available transaction data for Euribor-based derivatives and Euro-denominated interbank money market instruments for the years 2004 through 2011; and (v) declarations, affidavits, witness statements, or other sworn or unsworn statements of Settling Defendants' employees. ECF No. 218-1 (Barclays Settlement Agreement) ¶ 24; ECF No. 276-1 (HSBC Settlement Agreement) ¶ 24; ECF No. 360-1 (Deutsche Bank Settlement Agreement) ¶¶ 24, 25. Absent the Settlement, Plaintiffs would have to engage in discovery to obtain these materials, adding to the complexity and duration of the litigation.

Simply reaching the Settlements required substantial time and effort. Class Counsel was well informed regarding the strengths and weaknesses of Plaintiffs' claims, having extensively reviewed and analyzed the documents and information obtained throughout the course of Class Counsel's investigation, including: (i) government settlements, *e.g.*, plea, non-prosecution, and deferred prosecution agreements; (ii) publicly-available information relating to the conduct alleged in

Plaintiffs' complaints; (iii) expert and industry research regarding Euribor and Euribor-based derivatives traded in both the futures and over-the-counter markets; (iv) prior decisions of this Court and others deciding similar issues; and (v) settlement cooperation obtained pursuant to the preliminarily-approved Settlements. *See, e.g.*, Joint Decl. ¶¶ 52, 64, 72. In addition, Class Counsel (a) conducted an extensive investigation into the facts and legal issues in this action; (b) engaged in extensive negotiations with Barclays, Deutsche Bank and HSBC; and (c) took many other steps to research and analyze the strengths and weaknesses of the claims, including ongoing consultations with a leading commodity manipulation expert. Joint Decl. ¶¶ 18, 36, 87. Upon reaching the Settlements, Class Counsel obtained from Barclays, Deutsche Bank and HSBC contact information for their U.S. counterparties in Euribor-based derivatives transactions to facilitate the Settlement Administrator's identification of potential members of the Settlement Class. *See* Miller Aff. ¶¶ 4-6 (ECF No. 384-1).

This litigation has been massive, complex, and expensive to prosecute, and will continue to be. The expert work alone in this case has been and will continue to be costly. This case also presents an inherent level of risk and uncertainty because it involves a financial market unfamiliar to the average juror. *See Meredith Corp.*, 87 F. Supp. 3d at 663 ("The greater the 'complexity, expense and likely duration of the litigation,' the stronger the basis for approving a settlement."). As appellate decisions potentially impacting this case are announced (*see, e.g.*, *Charles Schwab Corp. v. Bank of Am. Corp.*, No. 16-1189-cv, 2018 WL 1022541 (2d Cir. Feb. 23, 2018)), the duration of this Action is likely to be extended further.

Approving the Settlements mitigates risk in this complex, multi-party litigation. The first *Grinnell* factor therefore supports approval of the Settlements. *See In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 93 (S.D.N.Y. 2007) ("The prospect of an immediate monetary gain may be more preferable to class members than the uncertain prospect of a greater recovery some years hence.").

2. The reaction of the Settlement Class

The second *Grinnell* factor is "the reaction of the class to the settlement." *Grinnell*, 495 F.2d at 463. This motion is being filed before the deadline for objecting to the Settlements. Plaintiffs will respond to any objections separately. However, as detailed in the Preliminary Approval Motions, all of the named Plaintiffs favor the Settlements. ECF Nos. 217, 275, 359; *see also* Bartow Decl. ¶¶ 13-15. This includes CalSTRS, the largest educator-only retirement fund in the United States with approximately $ 224 billion in assets (as of February 28, 2018). CalSTRS general counsel Brian Bartow has been directly involved in overseeing this Action participating in strategy sessions, settlement negotiations, and mediations, in addition to monitoring Class Counsels time and expenses. *See* Bartow Decl. ¶¶ 9-15, 17. Additionally, all Plaintiffs are sophisticated investors with significant financial expertise and fully capable of assessing the benefits of the Settlements. Their approval is highly probative of the likely reaction of other members of the Settlement Class upon reviewing the Settlements. Any Class member who does not favor the Settlements may opt-out.

In accordance with the Preliminary Approval Order, the Class Notice plan has been carried out as described in the Miller Aff. (ECF No. 384-1). To provide additional information for members of the Settlement Class to evaluate the Settlements, we have filed this motion in advance of the deadline for objecting, and may supplement this argument to address any objections. To date, A.B. Data has received three requests for exclusion and there have been no objections. Joint Decl. ¶ 106.

3. The stage of the proceedings and the amount of discovery completed

The third *Grinnell* factor is "the stage of the proceedings and the amount of discovery completed." *Grinnell*, 495 F.2d at 463. The Court may approve a settlement at any stage of litigation. *See In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, MDL No. 1500, 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006). The Court's primary concern in examining the stage of litigation and the extent of discovery undertaken is to assess whether the settling parties "'have engaged in sufficient

investigation of the facts'" to understand the strengths and weaknesses of their cases, and whether the settlement is adequate given those risks. *Id.*

Plaintiffs conducted extensive factual and legal research and consulted experts to assess the merits of their claims. Joint Decl. ¶¶ 18, 36, 102. Plaintiffs reviewed publicly-available information, including government pleas, non-prosecution and deferred prosecution agreements, trial transcripts, and attended criminal court proceedings concerning the manipulation of Euribor as well as various other global benchmarks. *Id.* ¶¶ 19-20, 33-34; *see also* FAC ¶¶ 5, 411 (ECF No. 174). At the time the Settlements were being negotiated, Plaintiffs had the benefit of these government settlements, including the European Commission findings of a Euribor "cartel." *See generally* Joint Decl. ¶¶ 22. Plaintiffs also had the benefit of Barclays' cooperation materials and proffers pursuant to ACPERA and the terms of the Barclays Settlements. *Id.* ¶ 44. The information gathered during this process greatly informed Plaintiffs of the advantages and disadvantages of entering into the Settlements.

4. Plaintiffs faced significant risks regarding liability, damages, class certification, and trial

Grinnell factors four through six are "(4) the risks of establishing liability; (5) the risks of establishing damages; and (6) the risks of maintaining the class action through the trial . . . ." *Grinnell*, 495 F.2d at 463.

(a) Liability Risks

As described in the Preliminary Approval Motions, Plaintiffs faced numerous risks concerning the viability of their claims, damages, and admissible proof. *See, e.g.*, ECF No. 217 at 15; ECF No. 275 at 11-12; ECF No. 359 at 9-10.

Plaintiffs faced the task of establishing each of the elements of their claims. As recognized in similar contexts, "the complexity of Plaintiffs' claims *ipso facto* creates uncertainty." *Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. at 123. Establishing liability involves obtaining and proving the meaning and significance of instant messages, trading patterns, and other facts or evidence. The

evidence of manipulation and collusion will likely raise ambiguities and inferences, which creates many risks in establishing liability in this case. *See In re Platinum and Palladium Commodities Litig.,* 2014 WL 3500655, at *12 ("[I]n any market manipulation or antitrust case, [p]laintiffs face significant challenges in establishing liability and damages."). Indeed, this Court dismissed claims against certain Defendants on the merits and others for lack of personal jurisdiction. *See* ECF No. 286.

Class Counsel must be wary of describing in detail their liability risks due to the presence of non-settling Defendants. *See In re Prudential Sec. Inc. Ltd. P'ships Litig.*, MDL No. 105, M-21-67 (MP), 1995 WL 798907, at *14 (S.D.N.Y. Nov. 20, 1995). But the answers to the key common questions of fact and law for all Settling Class members' claims will be hotly disputed and Class Counsel will seek to overcome all of the foregoing risks.

(b) <u>Damages Risks</u>

Plaintiffs' impact and damages theories against Barclays, Deutsche Bank and HSBC would have been sharply disputed, including at trial. This inevitably would have involved a "battle of the experts." *NASDAQ III*, 187 F.R.D. at 476. "In this 'battle of experts,' it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors . . . ." *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985).

Private antitrust plaintiffs, unlike the government, have the burden to prove antitrust impact and damages. *Gottesman v. General Motors Corp.*, 436 F.2d 1205, 1210 (2d Cir. 1971). Even where the Department of Justice has secured criminal guilty pleas, civil juries have found no damages. *See, e.g.*, Special Verdict on Indirect Purchases, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI (N.D. Cal. Sept. 3, 2013), ECF No. 8562. "Indeed, the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal." *NASDAQ III*, 187 F.R.D. at 476; *see also In re Flonase*

Antitrust Litig., 951 F. Supp. 2d 739, 748 (E.D. Pa. 2013) ("Even if Plaintiffs had succeeded in proving liability at trial, there is no guarantee they would have recovered damages."); *U.S. Football League v. Nat'l Football League*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) ("the jury chose to award plaintiffs only nominal damages, concluding that the USFL had suffered only $1.00 in damages"), *aff'd*, 842 F.2d 1335, 1377 (2d Cir. 1988); *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1166–69 (7th Cir. 1983) (antitrust judgment was remanded for a new trial and damages); *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 127 (N.D. Ill. 1990) ("The 'best' case can be lost and the 'worst' case can be won, and juries may find liability but no damages. None of these risks should be underestimated.").

(c) Class Risks

While Plaintiffs believe they would win a contested motion for class certification, "it is at least possible that variations among the [plaintiffs] or other factors might have complicated plaintiffs' class-certification bid." *See Meredith Corp.*, 87 F. Supp. 3d at 665. If the Court certified the proposed class, Settling Defendants would almost certainly seek interlocutory appeal pursuant to FED. R. CIV. P. 23(f), which could delay the resolution of this action substantially. *See id.* Thus, the inherent "uncertainty of maintaining a class through trial" weighs in favor of settlement. *Id.* Having noted these potential risks, Plaintiffs have more than carried their burden of demonstrating that each of the Rule 23 elements has been met.

(d) Trial Risks

The risk and uncertainty of a jury trial were and are very real. Litigation of these factual issues would consume substantial resources. While Plaintiffs believe their claims would be borne out by the evidence, they also recognize the difficulties of proving liability at trial. Settling Defendants' defenses to Plaintiffs' allegations ultimately may have been accepted by the jury.

(e) Weighing the Risks

In light of the ostensible risks of litigation, Class Counsel's considered judgment is that the total consideration provided by the Settlements, together with the substantial cooperation that Plaintiffs have received and will continue to receive, is fair, reasonable, and adequate in light of all of the circumstances. Therefore, the consideration that the Settlements provide is well within the range of consideration held to be "fair, reasonable, and adequate" at final approval. *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) ("*NASDAQ II*").

5. The ability of Settling Defendants to withstand greater judgment

The seventh *Grinnell* factor, "the ability to withstand a greater judgment" (*Grinnell*, 495 F.2d at 463), does not weigh against granting final approval. Barclays, Deutsche Bank and HSBC have the ability to withstand a greater judgment than $94,000,000, $170,000,000, and $45,000,000, respectively, but this factor alone does not bear on the appropriateness of the Settlements. *See In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. at 460 ("'[T]he fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate.'"); *In re Tronox Inc.*, No. 14-cv-5495 (KBF), 2014 WL 5825308, at *6 (S.D.N.Y. Nov. 10, 2014) ("The law does not require a defendant to completely empty its pockets before a settlement may be approved–indeed, if it did, it is hard to imagine why a defendant would ever settle a case."). While Settling Defendants could survive a higher judgment, courts routinely observe that "'this determination in itself does not carry much weight in evaluating the fairness of the Settlement.'" *See In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL. 1695 (CM), 2007 WL 4115809, at *11 (S.D.N.Y. Nov. 7, 2007). With all other criteria satisfied, this factor is insignificant. *Cf.* Tr. of Nov. 21, 2014 Final Approval Hearing, *In re Elec. Books Antitrust Litig.*, 11-md-2293 (DLC) (S.D.N.Y. Nov. 21, 2014), ECF No. 686 at 13:22-24 (granting final approval where defendant's ability to withstand greater judgment was not "in dispute").

6. The Settlements are reasonable in light of the risks and potential range of recovery

Grinnell factors eight and nine are "(8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *Grinnell*, 495 F.2d at 463. The recovery in these Settlements is substantial. This is particularly true in light of (a) the cooperation Plaintiffs received and will continue to receive; (b) the number of defendants yet to settle; (c) the number of defendants dismissed from the Action on personal jurisdiction grounds; and (d) the risks involved in not settling, as described *supra,* at I.B.4. The monetary relief that Barclays, Deutsche Bank and HSBC have paid and the cooperation that they have agreed to provide is very substantial considering Defendants Citibank[8] and JPMorgan[9] have not settled. Courts routinely approve of such partial settlements when the case remains ongoing against other Defendants, recognizing that "this strategy was designed to achieve a maximum aggregate recovery for the class." *In re Corrugated Container Antitrust Litigation*, MDL No. 310, 1981 WL 2093, at *23 (S.D. Tex. June 4, 1981).

"The adequacy of the amount achieved in settlement is not to be judged 'in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case.'" *Meredith Corp.*, 87 F. Supp. 3d at 665-66; *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989) (same). These are multi-million dollar Settlements that were achieved prior to the Court's decision on Defendants' motion to dismiss, in which each Settling Defendant could have relied on personal jurisdiction defenses. "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved."

[8] "Citibank" means Citigroup Inc. and Citibank, N.A.

[9] "JPMorgan" means JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A.

Grinnell, 495 F.2d at 455; *In re Top Tankers, Inc.*, *Sec. Litig.*, No. 06 Civ. 13761 (CM), 2008 WL 2944620, at *6 (S.D.N.Y. July 31, 2008) (McMahon, J.) (holding settlements of 3.8% of plaintiffs' estimated damages to be within the range of reasonableness, and recovery of 6.25% of estimated damages to be "at the higher end of the range of reasonableness of recovery in class action securities litigations.").

The range of possible recoveries here is broad. Some Defendants have avoided liability thus far by arguing that the Court lacks personal jurisdiction over them. Citibank and JPMorgan could potentially defeat liability as to one or more of the claims for relief. Even if Plaintiffs established liability, numerous variables would remain that could substantially affect the amount of recoverable damages. Plaintiffs would need to prove that Defendants' alleged manipulation of Euribor affected the prices of Euribor-based derivatives. Plaintiffs would then have to demonstrate the amount of harm suffered due to transacting in these price-fixed financial products.

Based on Class Counsel's preliminary damages estimates, if Plaintiffs were to prevail at trial, and the Court upheld the Class Period that Plaintiffs allege at class certification and through appeals, Plaintiffs and the Class could possibly recover billions of dollars. While the monetary compensation Barclays, Deutsche Bank and HSBC provided under the Settlements is a small percentage of the potential maximum amount of damages, it is still acceptable under the *Grinnell* factors. *See Grinnell*, 495 F.2d at 455 n.2 ("satisfactory settlement" could be "a thousandth part of a single percent of the potential recovery."). The Settlements here are indispensable in that they provide both monetary compensation to the Class as well as non-monetary compensation to assist Class Counsel in the continued prosecution of the non-settling Defendants.

Based on all of the foregoing factors, including all of the risks that Plaintiffs face, the Settlements should be finally approved.

II. THE APPROVED CLASS NOTICE WAS ADEQUATE AND SATISFIED DUE PROCESS

Rule 23(e)(1) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the [settlement]." FED. R. CIV. P. 23(e)(1). For actions certified under Rule 23(b)(3), "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." FED. R. CIV. P. 23(c)(2)(B). The standard for the adequacy of notice to the class is one of reasonableness. "There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 114 (2d Cir. 2005). The Settlement Class members have or will have received adequate notice and will have been given sufficient opportunity to weigh in on or exclude themselves from the Settlements.

The Class Notice plan has been carried out in accordance with the Preliminary Approval Order and Superseding Order. *See* Miller Aff. (ECF No. 384-1). Information regarding the Settlements, including downloadable copies of the Settlement Agreements, Mailed Notice, Proof of Claim and Release form, Preliminary Approval Order, and other relevant documents (as well as a toll-free telephone number to answer members of the Settlement Class's questions and facilitate filing of claims) were also posted on a dedicated website created and maintained by the Settlement Administrator at www.EuriborSettlement.com. Miller Aff. ¶¶ 3, 19.

The Class Notice plan, as well as the mailed notice and published notice, satisfy due process. The mailed notice and published notice are written in clear and concise language, which "'may be understood by the average class member.'" *See Wal-Mart*, 396 F.3d at 114. Members of the Settlement Class were provided with a full and fair opportunity to consider the proposed

Settlements and to respond and/or appear in Court. The Supreme Court has consistently found that mailed notice satisfies the requirements of due process. *See, e.g., Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950). In addition to an extensive mailed notice program, Plaintiffs' Class Notice plan consists of published and online notice—which easily satisfies the Rule 23(c)(2)(B) factors and due process. *See Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir. 1988) (due process does not require actual notice to every class member as long as class counsel "acted reasonably in selecting means likely to inform persons affected."). Because Plaintiffs' Class Notice plan is the best under the circumstances, the Court should finally approve the forms and methods of notice as implemented.

III. THE SETTLEMENT CLASS SATISFIES ALL REQUIREMENTS OF RULE 23

For all of the reasons detailed in the Preliminary Approval Motions and as held most recently in the Court's Preliminary Approval Order, the Settlement Class satisfies all requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy—as well as the predominance and superiority requirements of Rule 23(b)(3). The preliminarily certified Settlement Class should therefore be granted final certification for settlement purposes.[10]

There are at least hundreds, if not thousands, of geographically dispersed persons and entities that fall within the Settlement Class definition. *See* ECF No. 220 ¶ 19; ECF No.276 ¶ 21; ECF No. 360 ¶ 38. Commonality is easily satisfied here where there are numerous common questions of law and fact and where each Plaintiff and Settlement Class member will have to answer the same liability and impact questions through the same body of common class-wide proof. *See*, *e.g.,* ECF No. 359, at 13.

[10] The Settling Defendants consent to certification of the Settlement Class solely for the purposes of the Settlements and without prejudice to any position Settling Defendants may take with respect to class certification in any other action or in these Actions if the Settlements are terminated. ECF No. 218-1 (Barclays Settlement Agreement) ¶ 4; ECF No. 360-1 (Deutsche Bank Settlement Agreement) ¶ 4; ECF No. 276-1 (HSBC Settlement Agreement) ¶ 4.

Plaintiffs' claims are typical of those of the entire Settlement Class because Plaintiffs' and Class members' claims all arise from the same course of conduct involving Defendants' alleged false reporting and manipulation of Euribor and the prices of Euribor Products.

The named Plaintiffs in this action are adequate representatives because they share the same overriding interest (1) in obtaining the largest financial recovery possible; (2) in securing the invaluable cooperation from Barclays, Deutsche Bank and HSBC; and (3) in prosecuting claims against the remaining non-settling defendants.[11] In addition, Class Counsel are highly experienced attorneys who have litigated these and other complex class actions for decades.

Lastly, common questions predominate and a class action is the superior method for resolving this case. Predominance exists because the question of whether defendants engaged in the false reporting and manipulation of Euribor and the prices of Euribor Products is common across the Settlement Class. A class action is superior because Settlement Class members have no substantial interest in proceeding individually given the complexity and expense of the litigation.

IV. THE [PROPOSED] PLAN OF DISTRIBUTION SHOULD BE GRANTED FINAL APPROVAL

A. The standard for final approval of a Plan of Distribution

A plan of distribution that is supported by competent and qualified counsel is reviewed only to determine whether it has a "reasonable, rational basis." *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 497 (S.D.N.Y. 2009); *see also In re NASDAQ Market Makers Antitrust Litig.*, No. 94 Civ. 3996 (RWS), 2000 WL 37992, at *2 (S.D.N.Y. Jan. 18, 2000) ("[a]n allocation formula need only

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[11] Certain defendants in other "IBOR" actions have challenged Sonterra's and certain FrontPoint plaintiffs' capacity to sue under FED. R. CIV. P. 17. *See FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A. et al.*, No. 16-cv-5263, ECF No. 243 at 13-16 (S.D.N.Y. Oct. 18, 2017); *Dennis v. JPMorgan Chase & Co. et al.*, No. 16-cv-6496, ECF No. 184 (S.D.N.Y. Oct. 19, 2017). Such arguments are meritless because Sonterra's and FrontPoint's claims are brought in its name pursuant to a valid assignment and power of attorney. In any event, the capacity to sue issue raised in these other actions with respect to Sonterra and FrontPoint (which are only some of the Representative Plaintiffs here) do not impact the Court's ability to grant final approval of the Settlements.

have a reasonable, rational basis, particularly if recommended by 'experienced and competent' Class Counsel.") (citation omitted).[12] Class Counsel, who have litigated this Action for the past five years and are highly experienced in litigation, including antitrust and commodities manipulation class actions, recommend the [Proposed] Plan of Distribution. *See, generally*, Joint Decl.; *see also* Declaration of Geoffrey M. Horn (attaching Lowey's firm resumes); Declaration of Christopher M. McGrath (attaching Lovell's firm resume).

Courts have stated that, under Rule 23, "'[t]o warrant approval, the plan of allocation must also meet the standards by which the settlement was scrutinized—namely, it must be fair and adequate.'" *Maley v. Del Global Technologies Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002); *see also In re Oracle Sec. Litig.*, No. C-90-0931-VRW, 1994 WL 502054, at *1 (N.D. Cal. Jun. 18, 1994) ("A plan of allocation that reimburses class members based on the type and extent of their injuries is generally reasonable."); *Maley,* 186 F. Supp. 2d at 367. Here, the Plan of Distribution complies fully with these standards.

B. The [Proposed] Plan of Distribution here fully satisfies the standards for final approval

Class Counsel has given notice of the [Proposed] Plan of Distribution to the Settlement Class as preliminarily approved by this Court. *See* ECF No. 392.[13] The [Proposed] Plan of Distribution includes (1) a *pro rata* payment, subject to guaranteed minimum, to each Authorized Claimant (referred to as "Qualified Claimant" in the [Proposed] Plan of Distribution) from ten percent (10%) of the Net Settlement Fund relating to their Total Adjusted Volume of transactions in specified transactions; and a *pro rata* payment from ninety percent (90%) of the Net Settlement Fund to each Authorized Claimant with Total Adverse Impact to qualifying transactions caused by

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[12] *See also In re PaineWebber Ltd. P'ship Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y. Mar. 20, 1997); *In re Lloyd's American Trust Fund Litig.*, No. 96 Civ. 1262, 2002 WL 31663577, at *18 (S.D.N.Y. Nov. 26, 2002).

[13] *See also* http://www.EuriborSettlement.com.

Euribor Artificiality. The [Proposed] Plan of Distribution contains no exclusion to participation by any portion of the Settlement Class. The [Proposed] Plan of Distribution is built upon an estimation of the amounts of artificiality that resulted from Defendants' alleged conduct and could be proved at trial. "A plan of allocation that reimburses Class Members based on the type and extent of their injuries is generally reasonable." *In re Oracle Sec. Litig.*, No. C-90-0931-VRW, 1994 WL 502054, at *1 (N.D. Cal. Jun. 18, 1994) (citation omitted).

This methodology of allocating settlement proceeds in accordance with what is anticipated to be the amounts of provable artificial impact has repeatedly been approved as a fair, reasonable, and adequate method of allocating settlement funds in antitrust and CEA manipulation class action settlements. *See, e.g.*, *In re Platinum and Palladium Commodities Litig.*, 2014 WL 3500655, at *3 (allocations based on net artificiality on each trading day); *In re Amaranth Natural Gas Commodities Litig.*, No. 07 Civ. 6377, ECF No. 413 ¶ 6 (S.D.N.Y. May 23, 2012) (modifying final judgment to reflect plan of allocation); *In re Natural Gas Commodities Litig.*, No. 03 Civ. 6186, ECF Nos. 615, 618 (S.D.N.Y. June 4 and 7, 2010) (modifying plan of allocation to reflect net artificial impact at various times). Class Counsel here developed and participated in the development of the plans of distribution approved in such prior cases. Here, Class Counsel developed and strongly recommends the [Proposed] Plan of Distribution.

As has been done in some previous antitrust and CEA class actions and out of an abundance of caution, Class Counsel created a process of safeguards to consider litigation risk discounts. Independent allocation counsel for three types of interests, supervised by nationally-recognized mediator, Kenneth R. Feinberg, Esq., fully considered whether litigation discounts are appropriate for this Action. *See* Joint Decl. ¶ 104; Feinberg Decl. (ECF No. 382-2). The substantive and procedural safeguards involved in this process included (a) the representation of the different types of interests by separate, independent and sophisticated allocation counsel arguing in favor of each

such type of interest; and (b) the experience, participation, supervision, and ultimate recommendation of one of the most well-recognized mediators in the United States. Feinberg Decl. ¶¶ 16, 18-19. After such vigorous independent representation and arm's-length negotiations, the independent allocation counsel and nationally-recognized mediator all unanimously recommended that the appropriate legal risk discounts were as follows: (i) persons who made OTC transactions directly from Defendants – no legal risk discounts; (ii) future traders – 15% legal risk discount; and (iii) persons who made OTC transactions with non-Defendants – 20% legal risk discount. S*ee* Feinberg Decl. ¶ 17.

C. Approval of the [Proposed] Plan of Distribution should be considered separate and apart from the other aspects of the Settlements

Settlements of class action claims can be approved and final judgment entered before a plan of distribution has been adopted. *See, e.g., NASDAQ III,* 187 F.R.D. at 480 ("[I]t is appropriate, and often prudent, in massive class actions to follow a two-stage procedure, deferring the Plan of Allocation until after final settlement approval."). Further, courts have repeatedly recognized that the equitable power to determine, amend, or supplement a fair method of allocation may be exercised after final judgment has been entered. *See In re Platinum and Palladium Commodities Litig*., 2014 WL 3500655, at *3 (stating that the plan of allocation was "subject to revision by this court"); *In re Amaranth Natural Gas Commodities Litig*., No. 07 Civ. 6377 (S.D.N.Y. May 23, 2012), ECF No. 413 ¶ 6 (modifying final judgment to reflect plan of allocation).

Here, as is common in complex class actions, the Barclays, Deutsche Bank, and HSBC Settlements contemplate that the approval of each Settlement should be considered separate and apart from the consideration of the plan of allocation. *See* ECF No. 218-1, ¶ 31; ECF No. 276-1, ¶ 31; ECF No. 360-1, ¶ 34.

For all the reasons set forth above, the [Proposed] Plan of Distribution fully satisfies the standards for final approval. Any concerns that the Court may have regarding the [Proposed] Plan of

Distribution should be considered separately from any other aspects of the Settlements, and Final Approval of the Settlements can proceed even in the (unlikely) event that the [Proposed] Plan of Distribution is not approved for the to the Deutsche Bank and JPMorgan Settlements.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court: (i) grant Final Approval; (ii) approve the Proposed Plan of Distribution; (iii) certify the Settlement Class; and (iv) overrule the objections, if any are received. A Proposed Final Judgment and Order of Dismissal for each of the Settling Defendants and a Proposed Final Approval Order have been submitted to the Orders and Judgments Clerk pursuant to Southern District ECF Rule 18.2.

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White Plains, New York

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