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)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF PLAN OF DISTRIBUTION FOR SETTLEMENTS WITH DEFENDANTS BARCLAYS, HSBC, AND DEUTSCHE BANK

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I. The Plan Should Be Preliminarily Approved

This Court has preliminarily approved three settlements in this proposed class action:

- Barclays plc, Barclays Bank plc, and Barclays Capital Inc. ("Barclays") (preliminarily approved on December 15, 2015) [ECF No. 234] for **$94,000,000**;
- HSBC Holdings plc and HSBC Bank plc. ("HSBC") (preliminarily approved on January 18, 2017) [ECF No. 279] for **$45,000,000**; and
- Deutsche Bank AG and DB Group Services (UK) Ltd. ("Deutsche Bank") (preliminarily approved on July 6, 2017) [ECF No. 364] for **$170,000,000**.

Pursuant to this Court's Order dated July 6, 2017 (ECF 364), Plaintiffs[1] now respectfully submit this memorandum and the accompanying Declarations[2] to demonstrate that their proposed Plan of Distribution ("Plan") for these three Settlements satisfies the standards for preliminary approval of a method of distribution. The Plan is annexed as Exhibit 1 to the Jacobson Declaration. A proposed form of order preliminarily approving the Plan is annexed to the Notice of Motion.

A. Overview

1. Plaintiffs' Claims

Plaintiffs allege that, in violation of the federal antitrust and other laws, the Settling and other Defendants manipulated an interest rate for the Euro currency known as the Euro Interbank Offered Rate or "Euribor." *See Sullivan v. Barclays PLC*, No. 13-CV-2811 (PKC), 2017 WL

[1] Plaintiffs are California State Teachers' Retirement System, Sonterra Capital Master Fund, Ltd., FrontPoint Australian Opportunities Trust, FrontPoint Partners Trading Fund, L.P., White Oak Fund L.P., and Stephen Sullivan. All references to "ECF No." herein refer to documents in the docket of 13-cv-02811-PKC unless otherwise specified.

[2] "Jacobson Declaration" refers to the Declaration of Gary S. Jacobson, Esq., filed contemporaneously herewith. The "Feinberg Declaration" refers to the Declaration of Kenneth Feinberg, Esq., and is attached as Ex. 2 to the Jacobson Declaration. All references to "Exhibit" or "Ex." are to the Jacobson Declaration unless otherwise noted.

685570, at *1 (S.D.N.Y. Feb. 21, 2017) ("Decision"). Defendants allegedly did so in order to change in their favor the prices and payments of Euribor based derivatives. *Id.* at *1-2. This, in turn, allegedly caused injury to Plaintiffs and Class members on the Euribor based derivatives which they bought, sold, or held. *Id.*

2. The Plan

In this Circuit, a well-recognized measure of trial damages on antitrust and other claims involving the financial markets, is the difference between actual prices and what "fair" prices would have been in the absence of the alleged unlawful conduct. *E.g., Strobl v. New York Mercantile Exchange*, 582 F. Supp. 770, 779 (S.D.N.Y. 1984) *aff'd*, 768 F.2d 22, 23-24 (2d Cir. 1985) (affirming trial damages verdict measured as "the difference between what he received from the sale of those futures and what he would have received in a fair market") ("*Strobl*").

Consistent with *Strobl,* the Plan's core method of distribution of 90% of the Net Settlement Fund is "Euribor Artificiality". Plan ¶¶6-9; *see* "C.2.a" below. Euribor Artificiality "is an estimate of the impact on Euribor of Defendants' alleged unlawful behavior." Plan ¶8. That is, Euribor Artificiality is an estimate of the difference between actual Euribor rates, and what "fair" rates would have been in the absence of the alleged unlawful conduct. Each Qualified Claimant[3] will receive their *pro rata* share of 90% of the Net Settlement Fund based upon the effects of Euribor Artificiality on their transactions. Plan ¶¶2.C, 6; *see* C.2.b below (explaining how this is to be calculated, including with Legal Risk Discounts). A plan of distribution need not be based on a metric consistent with a trial damages method nor make a *pro*

[3] The Plan defines Qualified Claimants as follows: "Class members must submit a valid proof of claim in order to be eligible to participate in a distribution from the Net Settlement Fund. A Qualified Claimant is a Class member whose proof of claim is deemed adequately supported, and timely." Plan ¶5.

rata distribution. *See* "C.2.a" below. But the Plan's use of these methods is, at the very least, fair and reasonable. *See* "C.2.a" and "C.2.b" below.

The Plan would distribute the remaining ten percent of the Net Settlement Fund based upon each Qualified Claimant's Total Adjusted Volume of transactions. Plan ¶¶10-12; *see* "C.2.c" below (explaining the calculation, including the Legal Risk Discount). Each Qualified Claimant will receive their *pro rata* share of 10% of the Net Settlement Fund based upon their Total Adjusted Volume (subject to a guaranteed minimum payment adjustment). Methods of distribution approved in prior class actions involving antitrust and other claims in the financial markets, have distributed ten percent or a relatively small amount of the settlement funds based upon class members' exposure to injury in the allegedly manipulated market. *Id.*; *see* fn. 9 below. Similar to these prior cases, there are multiple reasons supporting the fairness and reasonableness of the use of this method here. *See* "C.2.c" below. Also, the use of this method ensures that Qualified Claimants, who each transacted in a market that was allegedly non-competitive and riddled by false reports, will receive some payment in consideration for the release and dismissals of their claims that are required by each of the Settlements. *Id.*

Each Qualified Claimant will be entitled to receive the sum of their *pro rata* amount due them from the effects of the Euribor Artificiality, and the *pro rata* amount due them under the Total Adjusted Volume metric subject to a minimum payment adjustment. Plan ¶¶13-14; *See* "C.2.d" below.

Finally, Legal Risk Discounts will be made for certain transactions. *See* "C.2.c" below.

Class Counsel recommend that the Plan be preliminarily approved. As is demonstrated below, the Plan satisfies the standards for preliminary approval.

B. The Standards For Preliminary Approval Of A Distribution Plan

1. The Strong Policy Favoring Approval Of Class Action Settlements Also Applies To Methods Of Distribution

The consideration of whether to approve a method of distribution should be informed "by the strong judicial policy favoring settlements as well as the realization that compromise is the essence of settlement." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 132 (S.D.N.Y.) ("*PaineWebber*"), *aff'd*, 117 F.3d 721 (2d Cir. 1997). Where the method of distribution is concerned, such "compromises" come in at least two general forms. A first, inevitable set of compromises involves the tradeoffs needed to accomplish the "principal goal of a plan of distribution [which] must be the equitable and timely distribution of a settlement fund without burdening the process in a way that will unduly waste the fund." *In re Credit Default Swaps Antitrust Litig.*, No. 13 MD 2476 (DLC), 2016 WL 2731524, at *9 (S.D.N.Y. Apr. 26, 2016) ("*In re CDS*"). A second, potential set of compromises arises from the fact that, usually, some distinctions will have to be made among class members in the distribution metrics. *Charron v. Wiener*, 731 F.3d 241, 253-254 (2d Cir. 2013) ("*Charron*").

2. At The Preliminary Approval Stage, The Proposed Method Of Distribution Must Be Within The Range Of What May Be Found At Final Approval To Be Reasonable And Fair.

At the final settlement approval stage (the final approval hearing is scheduled for May 18, 2018), the standard for approval of a method of distribution is that it be found to be fair and reasonable. *In re CDS*, 2016 WL 2731524, at *9. At the time of final approval, if the method is supported by competent and qualified counsel, then such method is found to be "fair and reasonable" if it merely has a "**reasonable, rational** basis." *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 497 (S.D.N.Y. 2009) ("*In re IPO*") [emphasis added]; *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) ("*NASDAQ*")("[a]n allocation formula need only have a reasonable,

rational basis, particularly if recommended by 'experienced and competent' Class Counsel.") (citation omitted).[4]

However, we are now at the preliminary approval stage, not the final approval stage. The standard for preliminary approval of the Plan is lower than the above quoted standards for final approval of the Plan. This is because the standard for preliminary approval of a method of distribution is the **same** as that for preliminary approval of a settlement agreement. *E.g., In re Prudential Securities Inc. Limited Partnerships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) (Pollack, J). And the standard for preliminary approval of a settlement **agreement** is **lower** than that for final approval of a settlement agreement. Specifically, at preliminary approval, a settlement agreement need only appear to be the product of serious, informed, non-collusive negotiations, have no obvious deficiencies, not improperly grant preferential treatment to class representatives or segments of the class, and fall within the range of "possible" final approval, so as to warrant sending notice to the class.[5]

Accordingly, the standard for preliminary approval of the Plan is that it must be within the range of what possibly may be found to be fair and reasonable (or to have a "reasonable rational basis") at the final approval hearing so as to warrant sending out notice. *Compare In re Traffic Exec. Assn. E. R.R.s.*, 627 F.2d 631, 634 (2d Cir. 1980) (preliminary approval of a

[4] A*ccord, Yang v. Focus Media Holding Ltd.*, No. 11 Civ. 9051, 2014 WL 4401280, at *9 (S.D.N.Y. Sept. 4, 2014); *City of Providence v. Aeropostale, Inc.*, 11 Civ. 7132 (CM), 2014 WL 1883494, at *10 (S.D.N.Y. May 9, 2014); *see also In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 163 (S.D.N.Y. 2011); *In re Lloyd's American Trust Fund Litig.*, No. 96 Civ. 1262, 2002 WL 31663577, at *18 (S.D.N.Y. Nov. 26, 2002).

[5] *See In re Foreign Exchange Benchmark Rates Antitrust Litig.*, No. 13 Civ. 7789, Slip Op. at 3 (S.D.N.Y. Sept. 8, 2017) [ECF No. 866] (granting preliminary approval of settlement; approving Class Lead Counsel's proposed Plan of Distribution of Settlement Funds as "fall[ing] within the range of possible approval," and approving proposed notice plan to the Settlement Classes); *In re Currency Conversion Fee Antitrust Litig.*, 01 MDL 1409, 2006 WL 3247396, at *5 (S.D.N.Y. Nov. 8, 2006); *PaineWebber,* 171 F.R.D. at 132.

settlement is akin to "a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness.").

3. The Effect Of Approval Of A Method Of Distribution

If a method of distribution of the proceeds of a class action settlement is to be adopted at the time of final approval of a settlement, the plan should reserve the power of the Court to make modifications whenever warranted. *Manual for Complex Litigation,* (4th) ("Manual") § 21.651 at 330 (Fed. Jud. Ctr. 2004) ("Although the court can give some deference to provisions purporting to allocate a settlement fund according to particular theories of recovery, claims or time periods, it should reserve the power to make modifications when warranted."). Here, the Plan specifically provides that the Court may amend the Plan at any time on the Court's own initiative or based on motion. Plan ¶16. Extensive precedent recognizes that courts may amend methods of distribution at any time, including after final judgment.[6]

Thus, preliminary or even final approval of the Plan does not confront this Court with any irrevocable choices regarding the method of distribution. Indeed, in the circumstances here, the adoption of a method or theory of distribution is not required for final approval of a settlement. *See* Manual §21.312 ("Often…the details of allocation and distribution are not established until after the settlement is approved.").[7] On the contrary, "so long as the distribution scheme does

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[6] *E.g., In re Worldcom, Inc. Sec. Litig.*, 02 CIV. 3288 (DLC), 2005 WL 3577135, at *1 (S.D.N.Y. Dec. 30, 2005) (supplemental plan of allocation approved, after final judgment, over objections that certain class members would then not share in settlement proceeds); *see also In re Platinum & Palladium Commodities Litig.*, No. 10 Civ. 3617, 2014 WL 3500655, at *3 (S.D.N.Y. July 15, 2014) (Pauley, J.) (preliminarily approving plan of allocation "subject to revision by this court"); *In re Stock Exchange Options Trading Antitrust Litig.*, No. 99 Civ. 0962(RCC), 2005 WL 1635158, at *16-17 (S.D.N.Y. July 8, 2005) (preliminarily approving amended plan of distribution providing for *pro rata* distribution and deferring consideration of distributing remaining excess funds, if any); *accord, Park v. The Thomson Corp.*, No. 05 Civ. 2931(WHP), 2008 WL 4684232, at *5 (S.D.N.Y. Oct. 22, 2008) (approving amended allocation plan enabling payouts to additional reasonably identifiable class members).

[7] *See e.g., In re NASDAQ Market-Makers Antitrust Litig.,* 187 F.R.D. 465, 480 (S.D.N.Y. 1998) ("*NASDAQ*") ("it is appropriate, and often prudent, in massive class actions to follow a two-stage procedure, deferring the

not affect the obligations of the defendants under the settlement agreement," *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d at 170, it may be "prudent" to follow "a two-stage procedure, deferring the plan of allocation until after the final settlement approval." *NASDAQ*, 187 F.R.D. at 480.

The circumstances here are that each of the three Settlement Agreements provides that their approval and the obligations of the Defendant shall be considered separate and apart from any issues related to the method of distribution. *See* Barclays Settlement Agreement ¶¶ 8, 19, 31, 36 [ECF No. 218-1]; Deutsche Bank Settlement Agreement ¶¶ 8, 19, 34, 39 [ECF No. 276-1]; and HSBC Settlement Agreement ¶¶ 8, 19, 31, 36 [ECF No. 360-1]. Settlement contracts determine the settling defendants' obligations and inform the entire settlement approval process.[8] Because the contracts here provide that the method of distribution has no effect on the Settlement or the Settling Defendants' obligations, there is no requirement that a proposed method of distribution be created now.

Plan of Allocation until after final settlement approval") (citing *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 170 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988) ("*Agent Orange*") ("There is . . . no absolute requirement that such a [distribution] plan be formulated prior to notification of the class….The prime function of the district court in holding a hearing on the fairness of the settlement is to determine that the amount paid is commensurate with the value of the case. This can be done before a distribution scheme has been adopted so long as the distribution scheme does not affect the obligations of the defendants under the settlement agreement."); *In re Michael Milken and Assocs. Sec. Litig.*, 150 F.R.D. 57, 67 (S.D.N.Y. 1993) ("Nor is there any impediment to approval of the [settlement] because the actual amounts to [certain class members] will be subject to further allocation procedures.").

[8] Courts have emphasized that settlements and settlement approvals are a matter of contract. "Courts should give proper deference to the private consensual decision of the parties ... [and] should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation ..." *Guippone v. BH S&B Holdings LLC*, 09 Civ. 1029 (CM), 2016 WL 5811888, at *5 (S.D.N.Y. Sept. 23, 2016) (citation omitted); *DeLeon v. Wells Fargo Bank, N.A.*, 12 Civ. 4494, 2015 WL 2255394, at *3 (S.D.N.Y. May 11, 2015) (same); *Clark v. Ecolab*, 07 Civ. 8623, 2010 WL 1948198, at *4 (S.D.N.Y. May 11, 2010) (same); *see also Sullivan v. DB Invs., Inc.,* 667 F.3d 273, 325 n.58 (3d Cir. 2011) (*en banc*) (a settlement agreement is a bi-lateral agreement between the parties who mutually agree that the Defendants will achieve peace to quiet the litigation in consideration for money or other benefits provided to the plaintiffs).

Although not required, preliminary approval of the Plan is, in the judgment of Class Counsel, appropriate, fair and reasonable. If preliminary approval is granted, the Plan will be posted on the Settlement Website. It will provide Class members with the methods, Legal Risk Discounts, and other information as set forth in the Plan.

C. The Plan Satisfies The Standards For Preliminary Approval.

1. Because Class Counsel Are Experienced In This Case And Similar Litigations, The Plan Need Only Have A "Reasonable, Rational Basis" To Be Found To Be Fair And Reasonable.

Class Counsel have litigated this case for the past four years. They have reviewed extensive documents and participated in six mediation sessions involving multiple Defendants. *E.g.*, ECF No. 217 at pp. 1-2, 7-9, ECF No. 275 at pp. 1, 5-7, ECF No. 359 at pp. 1, 5-6. In addition to Class Counsel's extensive experience with this case, they have previously handled antitrust claims in the financial market context for many decades. *See* ECF Nos. 218-2 (Lovell Stewart Halebian Jacobson LLP Resume), and 220-1 (Lowey Dannenberg, P.C. Resume). Because Class Counsel are competent, qualified, and support the proposed Plan, the standard for determining whether the Plan is fair and reasonable, is that it have a "reasonable, rational" basis. *In re IPO*, 671 F.Supp.2d at 497; *NASDAQ*, 2000 WL 37992, at *2.

2. The Plan Has A Reasonable, Rational Basis

A method of distribution, formulated as part of a class action settlement, is presented in a context in which the parties and Court are avoiding all the work that would go into a full trial. *In re Gilat Satellite Networks, Ltd.*, 20 CV 1510(CPS), 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007). Accordingly, the method need not distribute monies through the formal standards of a trial-admissible damages method. *In re CDS*, 2016 WL 2731524, at *9; *In re IPO*, 671 F.Supp.2d at 497-98.

a. ***Pro Rata* Distribution Of Ninety Percent Of The Net Settlement Fund Based Upon Euribor Artificiality Is Fair And Reasonable**

The Plan has a "reasonable, rational basis" because it seeks to distribute 90% of the Net Settlement Fund to Class members *pro rata* based upon Plaintiffs' contentions of the difference between the *actual* Euribor rates and what "fair" rates would have been in the absence of the alleged unlawful conduct. *E.g.*, *Strobl*, 768 F.2d at 23-24; *see* Plan ¶¶ 6-8; *see also* "C.2.c" below (explaining the calculations and the Legal Risk Discounts). The difference between these rates is referred to in the Plan as the "Euribor Artificiality." Plan ¶ 8.

It is rare that two cases are exactly alike. Adjustments may be made in implementation to fit the circumstances. Here, the basis for the Plan's distribution of 90% of the Net Settlement Fund is Euribor Artificiality. This corresponds to one of the core inquiries involved in proving damages at trial. Though certainly not required, the use of Euribor Artificiality as the core metric is at least reasonable and fair. *See Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir. 1983) ("we do not expect the district judges to convert settlement hearings into mini-trials on the merits"). *Per force*, such method is within the possible range of what may be found to have a "reasonable, rational basis" at the final approval hearing. *NASDAQ*, 2000 WL 37992, at *2.

Also, the Plan distributes monies after a **settlement** (rather than after a successful trial). Accordingly, the Plan appropriately distributes the amounts produced by the artificiality metric on a *pro rata* basis. Plan ¶6. This also is very reasonable and fair. *E.g.*, *Yang*, 2014 WL 4401280, at *10 ("Pro-rata distribution of settlement funds based on investment loss is clearly a reasonable approach." (citation omitted)); *see City of Providence*, 2014 WL 1883494, at *10 (finally approving plan of allocation providing for distribution on a *pro rata* basis based upon amounts of alleged artificial inflation in the share prices).

b. The Plan Makes Fair And Reasonable Adjustments To Take Account Of Differing Legal Risks

In the settlement context, a method of distribution may make reasonable adjustments in the payment based upon legal risks faced by differently situated class members. *See In re Hi-Crush Partners L.P. Sec. Litig*., No. 12 Civ. 8557 (CM), 2014 WL 7323417, at *10 (S.D.N.Y. Dec. 19, 2014) ("A reasonable plan may consider the relative strength and values of different categories of claims."); *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262 (RWS), 2002 WL 31663577, at *18 (S.D.N.Y. Nov. 26, 2002) ("[c]lass action settlement benefits may be allocated by counsel in any reasonable or rational manner because allocation formulas reflect the comparative strengths and values of different categories of the claim"); *compare In re Gulf Oil/Cities Serv. Tender Offer Litig*., 142 F.R.D. 588, 595-96 (S.D.N.Y. 1992) (plan of allocation that distributes greater part of settlement proceeds to those most injured is reasonable).

Here, the Plan reasonably adjusts the amount of payment based upon legal risks. Specifically, on the one hand, two Settlements were made prior to the Court's Decision on the motion to dismiss. *Compare* Preliminary Approval Order for Barclays, dated December 15, 2015, ECF No. 234 *and* Preliminary Approval Order for HSBC, dated January 18, 2017, ECF No. 279 *with* Decision *passim*. Also, the negotiations for the Deutsche Bank settlement reached an agreement in principle prior to the Court's Decision, but continued well after the Decision until an agreement was finally executed. Preliminary Approval Order for Deutsche Bank, dated July 6, 2017, ECF No. 364.

On the other hand, the Court dismissed the antitrust claims on behalf of over-the-counter ("OTC") transactions with persons other than Defendants ("Non-Defendants"). Decision, 2017 WL 685570 at *21, 25-31. Also, the Court dismissed the claims for Futures Transactions (which include options on futures contracts) against all but two Defendants, each of which was

dismissed on personal jurisdiction grounds. *Id.*, Decision, 2017 WL 685570 at *29-31, 50. The Court sustained the antitrust claims on behalf of OTC transactions made with Defendants. *Id.* at *50.

In the circumstances, Class Counsel determined that it was not necessary but was advisable that separate Allocation Counsel represent differently situated transactions. Such groups of Class members clearly did not have any fundamental conflicts going to the heart of the litigation. *See Charron*, 731 F.3d at 254. Specifically, the independent representation by separate Allocation Counsel for the respective interests was as follows:

Interest	**Firm**
OTC transaction directly with Defendants	Berman Tabacco
Futures Transactions	Kirby McInerney LLP
OTC transactions with Non-Defendants	Cafferty Clobes Meriwether & Sprengel LLP

See Feinberg Decl. ¶13; Jacobson Decl. Exs. 3-5 (resumes of each Allocation Counsel).

Further, Class Counsel retained the services of a nationally recognized mediator, Kenneth R. Feinberg, Esq., (who also has prior experience with this case). Feinberg Decl. ¶¶2-3, 4-10, 11. The use of allocation counsel has been approved in connection with the distribution of settlement proceeds in prior class actions. *E.g.*, *In re Black Farmers Discrimination Litig*., 856 F. Supp. 2d 1, 22, 38 (D.D.C. 2011); *In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403, 424-25 (S.D. Tex. 1999).

There were serious disagreements among the Allocation Counsel at the outset of the allocation mediation process. *See* Feinberg Decl. ¶¶16, 19. Allocation Counsel did, under the Mediator's supervision, ultimately reach unanimous agreement on the following Legal Risk Discounts. For OTC transactions with Defendants, there will be no Legal Risk Discount. Feinberg Decl. ¶17. For Futures Transactions (which, again, include options on futures), there

will be a Legal Risk Discount of 15%. *Id.* And, finally, for OTC Transactions with Non-Defendants, there will be a Legal Risk Discount of 20%. *Id.*; *see* Plan ¶ 7 "B"; *see also* ¶ 7 "E" – "F".

Under *Charron*, Class Counsel may themselves make distinctions in the distribution without the assistance of separate allocation counsel.

> [W]e find that a fundamental conflict did not exist between the members of the class, and that the Class Counsel's representation was adequate under Rule 23(a)(4). It was therefore not necessary to divide the class into subclasses with separate representation.

Charron, 731 F.3d at 254. So too, no fundamental conflict existed here. Class Counsel's judgment is that the outcomes reached by the Allocation Counsel and Mediator are reasonable in light of all the circumstances. These circumstances include, but are not limited to, the following: (1) the timing of the settlements, (2) the rulings in the Decision, (3) the fact that these legal discounts apply **only** to the distribution from the proceeds of these three Settlements, and (4) the overall terms of the Plan.

c. **The Method Of Applying The Legal Risk Discounts Is Fair And Reasonable**

The Plan reasonably and fairly makes the Legal Risk Discounts for the differently situated transactions. The Settlement Administrator will sum each Qualified Claimant's total impact from Futures Transactions, and make the appropriate Legal Risk Discount. Plan ¶11 "C". For each transaction, the impact of Euribor Artificiality may be favorable or adverse. The favorable impacts will be subtracted from the adverse impacts within each category. If the total impact for Futures Transactions is adverse impact or favorable impact, the Settlement Administrator will apply the 15% Legal Risk Discount to that amount. Plan ¶7 "B" - "E".

The Settlement Administrator will sum each Qualified Claimant's total impact from OTC Transactions with Non-Defendants. Plan ¶7 "G". Whether this impact is adverse or favorable, the Settlement Administrator will then apply the 20% Legal Risk Discount. Plan ¶11 "B". The Settlement Administrator then will sum the total impact from the Futures Transactions and the total impact from the OTC Transactions with Non-Defendants. This will produce the Qualified Claimant's total impact from Discounted Transactions. *Id.* ¶7.

If the Qualified Claimant had total adverse impact from Discounted Transactions, then the amount of that adverse impact will be added to the Qualified Claimant's total adverse impact, if any, from OTC Transactions made with Defendants. *Id.* ¶7 "D" - "G". The sum of the foregoing numbers will be the Total Adverse Impact (if any) for each Qualified Claimant from Euribor Artificiality. *Id.* ¶7 "F" - "G". If a Qualified Claimant had total favorable impact from Discounted Transactions, then that favorable impact will not enter into the calculation of Total Adverse Impact. Similarly, if a Qualified Claimant had total favorable impact from OTC Transactions with Defendants, then that favorable impact will not enter into the calculation of Total Adverse Impact. *Id.*

Ninety percent of the Net Settlement Fund will be distributed to Qualified Claimants based upon each Qualified Claimant's *pro rata* share of the Total Adverse Impact of all Qualified Claimants. *Id.* ¶¶6-7. In Class Counsel's judgment, the foregoing calculations constitute a fair and reasonable method to determine each Qualified Claimant's adverse impact from Euribor Artificiality in the circumstances of these Settlements. Such method is, at least, within the possible range of what may be found to be reasonable and fair, or to have a reasonable, rational basis at the final approval stage.

d. The Method Of Distribution Of Ten Percent Of The Net Settlement Fund Based On Total Adjusted Volume Is Fair And Reasonable

The Plan would distribute ten percent of the Net Settlement Fund to Qualified Claimants based upon the Total Adjusted Volume of their transactions. Plan ¶¶10-14. An appropriate Legal Risk Discount would be deducted from Futures Transactions as well as OTC Transactions with Non-Defendants. *Id.*

Specifically, the Settlement Administrator will add the recognized volume for Futures Transactions in one category. It will make the appropriate 15% Legal Risk Discount in order to determine the adjusted volume for Futures Transactions. Plan ¶7 "B". The Settlement Administrator will add the recognized volume for OTC Transactions with Non-Defendants in a separate category. Plan ¶11 "B". It will make the appropriate 20% Legal Risk Discount to determine the adjusted volume for transactions in this category. Plan ¶7 "B". Finally, the Settlement Administrator will add the recognized volume for OTC Transactions with Defendants. *Id.* ¶11 – 11.C. This total will be the adjusted volume for this category, because no Legal Risk Discounts apply to this category. *Id.*

The Settlement Administrator will sum the adjusted volumes from each of the three categories to produce each Qualified Claimant's Total Adjusted Volume. *Id.* ¶11.D. The payout will be *pro rata*. If a Qualified Claimant's Total Adjusted Volume is 1/10 of 1% of the sum of the Total Adjusted Volume of all Qualified Claimants, then that Qualified Claimant will receive 1/10 of 1% of 10% of the Net Settlement Fund. This is subject to adjustment for the guaranteed payment. Plan ¶¶13-14.

The Settlement Administrator will add each Qualified Claimant's entitlement (if any) to a payment under Euribor Artificiality to that Qualified Claimant's entitlement to a payment under the Total Adjusted Volume metric. Plan ¶13. That sum will be the amount due to the Qualified Claimant, unless that sum is less than $30.00. *Id.* ¶14. To the extent that that sum is less than

$30.00, then it will be increased by an amount sufficient to provide such Qualified Claimant with a minimum payment amount of $30.00. *Id.* ¶¶12-14.

The Plan's foregoing combination of provisions is, at least, within the range of what may possibly be found to be fair and reasonable at the final approval stage. First, this combination is similar to precedent approving plans of distribution in prior settlements arising out of class action settlements in the financial markets.[9] Second, this combination acknowledges the following arguments: various injuries may be suffered yet will not be captured by an artificiality metric. Here, Class members transacted in an allegedly non-competitive, manipulated market riddled by repeated false price signals. *Compare* Decision, 2017 WL 685570, at *12-13 *with* Complaint ¶¶426, 435. In these circumstances, it is fair and reasonable to compensate Qualified Claimants based on their Euribor Artificiality entitlement (if any) plus their Total Adjusted Volume entitlement.

Third, the minimum payment will confer benefits not only upon the Qualified Claimants who would otherwise receive less than the minimum payment. *See* Plan fn. 2. Such minimum payment arguably also benefits all other Qualified Claimants. This is because the minimum payment ensures that each Qualified Claimant is being compensated for its release. Thereby, the minimum payment eliminates potential "failure of consideration" objections to the scope of the mandatory release required by each Settlement.

The combination of the volume and minimum payment provisions are within the range of what may possibly be found to be fair and reasonable at final approval.

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[9] *E.g., In re Crude Oil Commodity Futures Litig.*, 11 Civ. 3600 (S.D.N.Y. Jan. 21, 2016) (Forrest, J.) (ECF Nos. 399 at ¶ 22; 287-5 at ¶¶ 5-6] (Jacobson Decl., Ex. 6) (Court-approved plan of distribution allocated 90% of net settlement monies based upon artificiality and allocated 10% of settlement monies based upon another metric for capturing injury in the market); *In re Platinum & Palladium Commodities Litig.*, 10 Civ. 3617 (S.D.N.Y. Feb. 27, 2015) (Pauley, J.) [ECF Nos. 293 at ¶ 22; 141-1 at 102 of 118, ¶¶ 2-3] (Jacobson Decl. Ex. 7) (Court approved plan of distribution allocated 90% of net settlement monies based upon amounts of artificiality and 10% based upon other metrics).

D. Conclusion

The Court should preliminarily approve the Plan.

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