UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Laydon v. Mizuho Bank, Ltd., et al.	No. 12-cv-3419 (GBD)
Sonterra Capital Master Fund Ltd., et al. v. UBS AG, et al.	No. 15-cv-5844 (GBD)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF THE CLASS ACTION SETTLEMENTS WITH DEFENDANTS HSBC HOLDINGS PLC AND HSBC BANK PLC, CITIBANK, N.A., CITIGROUP INC., CITIBANK JAPAN LTD., CITIGROUP GLOBAL MARKETS JAPAN INC., HSBC HOLDINGS, PLC, HSBC BANK PLC, AND R.P. MARTIN HOLDINGS LIMITED AND MARTIN BROKERS (UK) LTD.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTRODUCTION 1
ARGUMENT..3
I. THE SETTLEMENTS MEET THE REQUIREMENTS FOR FINAL APPROVAL 3
A. The Settlements are Procedurally Fair 4
B. The Settlements are Substantively Fair under the *Grinnell* Factors 7
1. The Complexity, Expense, and Likely Duration of the Litigation 7
2. The Reaction of the Settlement Class..10
3. The Stage of the Proceedings and the Amount of Discovery Completed..................11
4. Plaintiffs Faced Significant Risks Regarding Liability, Damages, Class Certification, and Trial 12
5. The Ability of Defendants to Withstand Greater Judgment..15
6. The Settlements are Reasonable in Light of the Risks and Potential Range of Recovery...15
II. THE APPROVED NOTICE WAS ADEQUATE AND SATISFIED DUE PROCESS 17
III. THE SETTLEMENT CLASS SATISFIES ALL REQUIREMENTS OF RULE 23.........19
IV. THE PROPOSED PLAN OF ALLOCATION SHOULD BE GRANTED FINAL APPROVAL...20
A. The Standard for Final Approval of a Plan of Allocation 20
B. The Proposed Plan of Allocation Here Fully Satisfies the Standards for Final Approval..21
C. Approval of the Proposed Plan of Allocation Should be Considered Separate and Apart from the Other Aspects of the Settlements 22
CONCLUSION...24

TABLE OF AUTHORITIES

Cases

Bano v.Union Carbide Corp.,
273 F.3d 120 (2d Cir. 2001) 3

Beckman v. KeyBank, N.A.,
293 F.R.D. 467 (S.D.N.Y. 2013) 4

City of Detroit v. Grinnell Corp.,
495 F.2d 448 (2d Cir. 1974) .... *passim*

Cotton v. Hinton,
559 F.2d 1326 (9th Cir. 1977)..7

D'Amato v. Deutsche Bank,
236 F.3d 78 (2d Cir. 2001) 4

deMunecas v. Bold Food, LLC,
No. 09 Civ. 00440, 2010 WL 3322580 (S.D.N.Y. Aug. 23, 2010) 5

Goldberger v. Integrated Resources, Inc.,
209 F.3d 43 (2d Cir. 2000) 7

Gottesman v. General Motors Corp.,
436 F.2d 1205 (2d Cir. 1971) 13

In re "Agent Orange" Prod. Liab. Litig.,
597 F. Supp. 740 (E.D.N.Y. 1984) 16

In re "Agent Orange" Prod. Liab. Litig.,
818 F.2d 145 (2d Cir. 1987) 22

In re Air Cargo Shipping Servs. Antitrust Litig.,
No. 06-md-1775 (JG), 2009 WL 3077396 (E.D.N.Y. Sept. 25, 2009) 4

In re AOL Time Warner, Inc. Sec. & ERISA Litig.,
MDL No. 1500, 2006 WL 903236 (S.D.N.Y. Apr. 6, 2006) 11

In re Austrian and German Bank Holocaust Litig.,
80 F. Supp. 2d 164 (S.D.N.Y. 2000) 4

In re Corrugated Container Antitrust Litig.,
MDL No. 310, 1981 WL 2093 (S.D. Tex. June 4, 1981) 16

In re Elec. Books Antitrust Litig.,
No. 11-md-2293 (DLC), 2014 WL 3798764 (S.D.N.Y. Aug. 1, 2014)..5

In re Flonase Antitrust Litig.,
951 F. Supp. 2d 739 (E.D. Pa. 2013)..13

In re Global Crossing Sec. & ERISA Litig.,
225 F.R.D. 439 (S.D.N.Y. 2004) 4, 15

In re Indep. Energy Holdings PLC Sec. Litig.,
No. 00 Civ. 6689, 2003 WL 22244676 (S.D.N.Y. Sept. 29, 2003) 5

In re Initial Pub. Offering Sec. Litig.,
243 F.R.D. 79 (S.D.N.Y. 2007) 10

In re Initial Pub. Offering Sec. Litig.,
671 F. Supp. 2d 467 (S.D.N.Y. 2009)..20

In re Lloyd's American Trust Fund Litig.,
No. 96 Civ. 1262, 2002 WL 31663577 (S.D.N.Y. Nov. 26, 2002)..20

In re NASDAQ Market-Makers Antitrust Litig.,
176 F.R.D. 99 (S.D.N.Y. 1997) 14

In re NASDAQ Market-Makers Antitrust Litig.,
187 F.R.D. 465 (S.D.N.Y. 1998) 7, 13, 22

In re NASDAQ Market-Makers Antitrust Litig.,
No. 94 Civ. 3996 (RWS), 2000 WL 37992 (S.D.N.Y. Jan. 18, 2000)..20

In re Oracle Sec. Litig.,
No. C-90-0931-VRW, 1994 WL 502054 (N.D. Cal. Jun. 18, 1994).................................... 20, 21

In re Packaged Ice Antitrust Litig.,
08-MD-01952, 2011 WL 717519 (E.D. Mich. Feb. 22, 2011)..16

In re PaineWebber Ltd. P'ship Litig.,
171 F.R.D. 104 (S.D.N.Y. Mar. 20, 1997) 20

In re Platinum and Palladium Commodities Litig.,
No. 10 CV 3617, 2014 WL 3500655 (S.D.N.Y. July 15, 2014) 7, 12, 21

In re Take Two Interactive Sec. Litig.,
No. 06 Civ. 803 (RJS), 2010 U.S. Dist. LEXIS 143837 (S.D.N.Y. June 29, 2010).....................7

In re Top Tankers, Inc., Sec. Litig.,
No. 06 Civ. 13761 (CM), 2008 WL 2944620 (S.D.N.Y. July 31, 2008)....................................16

In re Tronox Inc.,
No. 14-cv-5495 (KBF), 2014 U.S. Dist. LEXIS 158767 (S.D.N.Y. Nov. 10, 2014) 15

In re Veeco Instruments Inc. Sec. Litig.,
No. 05 MDL. 1695 (CM), 2007 WL 4115809 (S.D.N.Y. Nov. 7, 2007)...................................15

In re Vitamin C Antitrust Litig.,
No. 06-md-1738 (BMC), 2012 WL 5289514 (E.D.N.Y. Oct. 23, 2012).....................................7

In re Warner Commc'ns Sec. Litig.,
618 F. Supp. 735 (S.D.N.Y. 1985) 13

Maley v. Del Global Technologies Corp.,
186 F. Supp. 2d 358 (S.D.N.Y. 2002)...20

MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.,
708 F.2d 1081 (7th Cir. 1983)..13

Meredith Corp. v. SESAC, LLC,
87 F. Supp. 3d 650 (S.D.N.Y. 2015)..7, 10, 14, 16

Mullane v. Cent. Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 18

Shapiro v. JPMorgan Chase& Co.,
No. 11 CIV. 8331 (CM) (MHD), 2014 U.S. Dist. LEXIS 37872 (S.D.N.Y. Mar. 24, 2014) 4

Strobl v. New York Mercantile Exch.,
582 F. Supp. 770 (S.D.N.Y. 1984) 16

U.S. Football League v. Nat'l Football League,
644 F. Supp. 1040 (S.D.N.Y. 1986) 13

Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.,
396 F.3d 96 (2d Cir. 2005) 17

Weigner v. City of New York,
852 F.2d 646 (2d Cir. 1988) 18

Rules

FED. R. CIV. P. 23 17
Southern District ECF Rule 18.3 24

INTRODUCTION

Pursuant to Rule 23 of the Federal Rules of Civil Procedure ("Federal Rules") and Paragraph 37 of the Superseding Order Preliminarily Approving the Settlements in *Laydon v. Mizuho Bank, Ltd., et al.*, No. 12-cv-3419 (GBD) (S.D.N.Y.) ("*Laydon*"), ECF No. 659, and S*onterra Capital Master Fund Ltd., et al. v. UBS AG, et al.*, No. 15-cv-5844 (GBD) (S.D.N.Y.) ("*Sonterra*"), ECF No. 264 (the "Preliminary Approval Order"), Plaintiffs,[1] through their counsel, Lowey Dannenberg Cohen & Hart, P.C. ("Class Counsel"), respectfully submit this Memorandum of Law, the accompanying Declaration of Vincent Briganti, Esq. ("Briganti Decl."), Declaration of Kenneth Feinberg, Esq. ("Feinberg Decl."), Declaration of Brian J. Bartow ("Bartow Decl."), and Affidavit of Eric J. Miller ("Miller Aff.") in support of Plaintiffs' Motion for an Order granting Final Approval of the Settlements with Defendants HSBC,[2] Citi,[3] and R.P. Martin[4] (the "Settlements"), Approval of the Proposed Plan for Allocation, and Certification of the Settlement Class.

Pursuant to the Preliminary Approval Order, on August 8, 2016, the Settlement Administrator executed the Notice Plan to disseminate Mailed Notice to Settlement Class Members informing them, *inter alia*, that HSBC, Citi, and R.P. Martin agreed to pay an aggregate amount of $58,000,000, in addition to providing cooperation in the ongoing prosecution of claims against the non-settling defendants. *See* Miller Aff. ¶¶ 10-12. The Notice Plan was set forth at length in Exhibit A to the Affidavit of Linda Young (*Laydon,* ECF No. 591-2 & *Sonterra,* ECF No. 222-2) submitted in connection with Plaintiffs' motions for preliminary approval of the Settlements. As Eric J. Miller,

---

[1] Plaintiffs are Jeffrey Laydon, Sonterra Capital Master Fund, Ltd., Hayman Capital Master Fund, L.P., Japan Macro Opportunities Master Fund, L.P., and California State Teachers' Retirement System ("CalSTRS"). Unless otherwise defined herein, all capitalized terms used have the meanings set forth in the Settlements.

[2] "HSBC" means HSBC Holdings plc and HSBC Bank plc, and their subsidiaries and affiliates.

[3] "Citi" means Citigroup Inc., Citibank, N.A., Citibank Japan Ltd., and Citigroup Global Markets Japan Inc., and their subsidiaries and affiliates.

[4] "R.P. Martin" means R.P. Martin Holdings Limited and Martin Brokers (UK) Ltd., and their subsidiaries and affiliates.

the Vice President of Client Services for A.B. Data, describes in his affidavit accompanying this memorandum, the Settlement Administrator implemented the Notice Plan in accordance with the Preliminary Approval Order. *See* Miller Aff. ¶¶ 4-22.

This motion is being filed before the deadline for objecting to the Settlements. No objections have been received to date. *See* Miller Aff. ¶ 28. Accordingly, 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 and reasonable and amply satisfy the criteria for final approval under Rule 23 of the Federal Rules. The Settlements were the result of 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 Allocation, with the assistance, knowledge, and opinions of several experts, including Dr. Craig Pirrong, and it has a "reasonable, rational basis." *See* Briganti Decl. ¶ 63; Feinberg Decl. ¶ 19. Class Counsel has litigated *Laydon* and *Sonterra* (collectively, the "Actions") for over four-and-a-half years and recommends to the Court that the Proposed Plan of Allocation be approved. *See* Briganti Decl. ¶ 4.

Plaintiffs respectfully request that the Court grant Final Approval of the Settlements, in the form of order annexed hereto, approve the Proposed Plan of Allocation, and enter Final Judgment, in the form of order annexed hereto, dismissing the claims against Citi, HSBC, and R.P. Martin with prejudice on the merits, to provide the Settlement Class with the substantial relief that Plaintiffs and their counsel worked so diligently to obtain.

ARGUMENT

I. THE SETTLEMENTS MEET THE REQUIREMENTS FOR FINAL APPROVAL

The Settlements between Plaintiffs and HSBC, Citi, and R.P. Martin satisfy the requirements for final approval because they are both procedurally and substantively fair and all of the requirements of Rule 23 have been met. The procedural histories of the Actions and the terms of the Settlements are discussed in detail in Plaintiffs' Preliminary Approval Motions. *See* Mem. of Law in Support of Citi and R.P. Martin Settlements, *Laydon,* ECF No. 566 & *Sonterra,* ECF No. 188; Supp. Mem. of Law in Support of Class Action Settlements, *Laydon,* ECF No. 590 & *Sonterra,* ECF No. 221; Mem. of Law in Support of HSBC Settlement, *Laydon,* ECF No. 655 & *Sonterra,* ECF No. 261 (collectively, the "Preliminary Approval Motions").

On February 1, 2016, Plaintiffs moved for preliminary approval of the Citi and R.P. Martin Settlements. *See* Briganti Decl. ¶ 61. On April 6, 2016, Plaintiffs submitted their supplemental memorandum of law to their preliminary approval motion, outlining the Proposed Notice Program and Proposed Plan of Allocation. *Id.* On April 7, 2016, the Court issued an order preliminarily approving the Citi and R.P. Martin Settlements. *Id.* On June 17, 2016, Plaintiffs moved for preliminary approval of the HSBC Settlement and sought to combine the Citi, R.P. Martin, and HSBC Settlements for purposes of Class Notice and distribution to the Settlement Class pursuant to Rule 23. *Id.* On June 22, 2016, the Court issued a superseding order preliminarily approving the Settlements under Rule 23(e). *Id.*

Plaintiffs now seek final approval of the Settlements. Through these three negotiated Settlements, the Settlement Class will receive a substantial monetary recovery of $58,000,000 (less such fees and expenses as are approved by the Court), in addition to the cooperation HSBC, Citi, and R.P. Martin have provided and will continue to provide to Plaintiffs to assist in prosecuting

claims against the non-settling defendants. As described more fully below, the Settlements are procedurally and substantively fair, and all of the requirements of Rule 23 have been satisfied.

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 Plaintiffs' Preliminary Approval Motions and the declarations filed in connection therewith, the Settlements were reached after extensive arm's-length, non-collusive negotiations. *See* Briganti Decl. ¶¶ 56-60. Plaintiffs have been represented by counsel with extensive class action, antitrust, and trial experience, which is strong evidence 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); *Laydon,* ECF No. 567, Ex. 5 & *Sonterra,* ECF No. 189, Ex. 5 (attaching Class Counsel's firm resume).

The $35,000,000 HSBC Settlement was the result of more than eight months of arm's-length, non-collusive negotiations by experienced counsel, with the assistance of a private mediator, Gary McGowan.[5] Representatives from CalSTRS and HSBC, and their respective counsel, participated in a full-day mediation with Mr. McGowan. His assistance was invaluable in reaching a resolution. *See* Briganti Decl. ¶ 60; *see also 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 Settlement 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."); *see also 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) ("[t]he assistance of a well-known mediator . . . reinforces the conclusion that the Settlement Agreement is non-collusive.").

The Citi Settlement was negotiated over the course of several months in 2015, during which time numerous meetings and conference calls took place between the parties and their counsel. *See* Briganti Decl. ¶ 59. The result was an "ice breaker" settlement that provides for a payment of $23,000,000, plus substantial cooperation which has assisted and will continue to assist in the prosecution of the claims against the non-settling defendants.

---

[5] Over the past 25 years, Mr. McGowan arbitrated and mediated over 130 disputes in complex matters, serving as the panel chair or sole arbitrator in 95 of these matters.

The R.P. Martin Settlement was negotiated for months with the company's CEO just prior to R.P. Martin's going out of business. *Id.* at ¶ 56.[6] The R.P. Martin Settlement provided for substantial cooperation, including emails, instant messages, and recordings of phone calls between R.P. Martin brokers and traders from various other defendants. Briganti Decl. ¶ 56. This cooperation has assisted and will continue to assist the ongoing prosecutions against the remaining non-settling defendants. *Id.* at ¶ 62.

The Settlement Class also benefitted from being represented by Class Counsel who was well informed about the strengths and weaknesses of the claims and defenses presented. Class Counsel had the benefit of numerous Court decisions in these Actions, government orders and settlements with certain defendants, and document discovery produced to date in *Laydon*. *Id.* at ¶¶ 10, 12, 18-19, 34, 37, 53. Class Counsel had researched and considered a wide range of relevant legal issues and analyzed the facts uncovered to date. The HSBC, Citi, and R.P. Martin Settlements are the product of hard-fought negotiations, which involved numerous in-person meetings and/or telephone conferences, and an extensive investigation using available, relevant information. *Id.* at ¶¶ 56-60.

Further, throughout the negotiation and discovery process, the parties had numerous opportunities to articulate and refine their positions, and engaged in conference calls to address specific arguments related to liability and damages. *Id.* The exchange of extensive information facilitated well-informed settlement discussions. *Id.* In addition, given Class Counsel's considerable prior experience in complex class action litigation involving Commodity Exchange Act ("CEA") and antitrust claims (among others), their knowledge of the strengths and weaknesses of Plaintiffs'

---

[6] Due to insolvency, R.P. Martin went into administration under British law (similar to bankruptcy under U.S. law). It lacked the resources to pay any monetary compensation and instead agreed to significant cooperation obligations. To confirm its inability to pay any settlement amount, Class Counsel obtained information from R.P. Martin about its financial condition. *See* R.P. Martin Settlement, *Laydon,* ECF No. 567-1 at 2 & *Sonterra,* ECF No. 189-1 at 2; *Laydon,* ECF No. 567 ¶ 30 & *Sonterra,* ECF No. 189 ¶ 30. R.P. Martin's inability to pay regulatory fines further confirmed its inability to afford a settlement payment. *Id.*

claims, their assessment of the Settlement Class' likely recovery following trial and appeal, and the oversight of an experienced mediator with respect to the HSBC Settlement, the Settlements are entitled to a presumption of procedural fairness. *Id.* at ¶ 60.

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.'") (citations omitted); *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*")

(citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (9th Cir. 1977)), 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) (citation omitted); *see also In re Platinum and Palladium Commodities Litig.,* No. 10 CV 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). These Actions, concerning, *inter alia,* CEA and antitrust claims, involve complex financial instruments and legal questions. In addition, there are dozens of defendants, numerous third parties, and millions of pages of documents produced to Plaintiffs, and discovery is far from complete.

Given R.P. Martin's dire financial situation, Plaintiffs entered into a cooperation settlement, providing that R.P. Martin would make a substantial production of documents to Plaintiffs, which occurred on a rolling basis starting in December 2014. *See* Briganti Decl. ¶ 58. The production was embargoed from review until the stay of discovery was lifted on May 15, 2015. *Id.* R.P. Martin's settlement cooperation has provided a wealth of information previously unavailable to Plaintiffs. *Id.* at ¶ 62. For example, R.P. Martin produced files compiled as part of its internal investigation into the manipulation of Yen-LIBOR, Euroyen TIBOR, and the prices of Euroyen-Based Derivatives. These internal investigation files included interview notes with former brokers, which provide details on how R.P. Martin and other defendants manipulated Yen-LIBOR, the identities of R.P. Martin's principal co-conspirators, and specific examples of instances in which R.P. Martin and other defendants manipulated Yen-LIBOR. *See* Declaration of Vincent Briganti, dated February 1, 2016 ("Feb. 1 Briganti Decl."), *Laydon* ECF No. 567, ¶¶ 32-34 & *Sonterra*, ECF No. 189, ¶¶ 32-34. R.P. Martin also provided the underlying documents and audio files that it produced directly to global regulators. *Id.* These materials have helped identify the names of Yen traders and submitters that other defendants employed who were active participants in the manipulation, providing additional

examples of Yen-LIBOR manipulation. *Id.* R.P. Martin also produced its entire transaction database which included millions of transactions and has helped Plaintiffs analyze the artificiality caused by defendants' manipulation in the market on a daily basis. *See* Briganti Decl. ¶¶ 58, 62. This market data helped build the Proposed Plan of Allocation.

The Citi Settlement provides for a payment of $23,000,000, as well as substantial cooperation. As part of its settlement cooperation, Citi provided the documents and audio files that it produced directly to global regulators in the course of the regulators' investigations into Yen-LIBOR and Euroyen TIBOR manipulation. Citi's cooperation also includes extensive market data productions. This data was not only helpful in formulating the proposed Plan of Allocation but also valuable in supporting the merits of Plaintiffs' claims. *See* Briganti Decl. ¶ 61. Additionally, Citi provided contact information for its Euroyen-Based Derivatives counterparties, which assisted the Settlement Administrator in identifying potential Settlement Class Members. *See* Miller Aff. ¶ 5.

At the time Plaintiffs and HSBC signed their term sheet, Plaintiffs had received and were reviewing productions of over two million documents (including emails and instant messages) and audio files (of phone calls between and among various defendants). *See* Briganti Decl. ¶ 53; *see also Laydon*, ECF No. 655, at 12 & *Sonterra*, ECF No. 261, at 12. HSBC's cooperation to date has been similar in scope to Citi's cooperation.

Before reaching the Settlements, 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 Yen-LIBOR, Euroyen TIBOR, and Euroyen-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) documents produced to date in *Laydon*. In addition, Class Counsel (a) conducted an extensive investigation into the facts and legal issues in this action; (b) engaged in extensive negotiations with HSBC, Citi, and R.P. Martin; 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. *See*, *e.g.*, Briganti Decl. ¶¶ 10, 12, 18-19, 34, 37, 53.

This litigation has been, and will continue to be, massive, complex, and expensive to prosecute. The expert work alone in this case has been and will continue to be costly. Furthermore, this case 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.") (citations omitted).

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. We note, however, that as detailed in the Preliminary Approval Motions, all of the named Plaintiffs favor the Settlements. *Laydon,* ECF No. 655, at 12-13 & *Sonterra,* ECF No. 261, at 12-13; *see also* Bartow Decl. ¶¶ 13-15. Plaintiffs, including CalSTRS, the largest educator-only retirement fund in the United States, with approximately $193.4 billion in assets (as of July 31, 2016) and close to one million members, and Hayman, a substantial hedge fund, among others, are sophisticated investors with significant financial expertise and are fully capable of

assessing the benefits of the Settlements. Well-versed in the rigorous analysis of financial matters, Plaintiffs' approval is highly probative of the likely reaction of other Settlement Class Members upon reviewing the Settlements. Additionally, any class member who does not favor the Settlements may opt-out.

In accordance with the Preliminary Approval Order, the Notice Plan was carried out as described in the Miller Aff. ¶¶ 4-22. As noted, to provide additional time and information for Class Members 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 four requests for exclusion and no objections. *Id.* at ¶¶ 26, 28.

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.* (citations omitted).

Plaintiffs conducted extensive factual and legal research and consulted experts to assess the merits of their claims. Briganti Decl. ¶¶ 10-20, 23, 34, 37. 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 Yen-LIBOR and Euroyen TIBOR as well as various other global benchmarks. *Id.*; *see also Laydon*, Third Amended Class Action Complaint, ECF No. 580, *passim* & *Sonterra*, Amended Class Action Complaint, ECF No. 121, *passim.* Further, Plaintiffs had the benefit of this Court's evaluation of the

strengths of Plaintiffs' claims and Defendants' defenses through orders granting and denying in part Defendants' motions to dismiss in the *Laydon* action. *See* Briganti Decl. ¶¶ 19, 28. Plaintiffs also have the benefit of settlement cooperation produced under the terms of the Citi and R.P. Martin Settlements and the discovery produced to date. *Id.* at ¶¶ 56, 60. 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.*, *Laydon,* ECF No. 566 at 10-13; *Laydon*, ECF No. 655 at 8-11 & *Sonterra,* ECF No. 188 at 10-13; *Sonterra*, ECF No. 261 at 8-11. For example, while negotiating the Settlements, uncertainty existed concerning the outcome of the Second Circuit's consideration of parallel antitrust theories in *Gelboim v. Bank of America Corp.,* No. 12-3565-cv (L) (2d Cir.). *Gelboim* could have substantially impacted Plaintiffs' and Class Members' claims. Plaintiffs also had the added risks associated with the pending motions to dismiss the *Sonterra* action.

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.").

Class Counsel must be wary in describing in detail their liability risks due to the presence of non-settling defendants. *See In re Prudential Sec. Inc.*, 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 Class Members' claims will be hotly disputed and Class Counsel will seek to overcome all of the foregoing risks.

(b) Damages Risks

Plaintiffs' impact and damages theories against HSBC, Citi, and R.P. Martin 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).

(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." *Meredith Corp.*, 87 F. Supp. 3d at 665. If the Court certified the proposed class, Defendants would almost certainly seek interlocutory appeal pursuant to FED. R. CIV. P. 23(f), which would have the potential to 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.*

(d) Trial Risks

The risk and uncertainty of a jury trial was very real. Litigation of these factual issues would consume substantial resources. While Plaintiffs believe that their claims would be borne out by the evidence, they also recognize the difficulties of proving liability at trial. 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 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*"); *see also* Briganti Decl. ¶¶ 56-60.

5. The Ability of Defendants to Withstand Greater Judgment

The seventh *Grinnell* factor, "the ability to withstand a greater judgment," (*Grinnell*, 495 F.2d at 463), does not militate against granting Final Approval. HSBC and Citi have the ability to withstand a greater judgment than $35,000,000 and $23,000,000, 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.'") (citation omitted); *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 HSBC and Citi 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) (citation omitted). 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), 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 have received and will continue to receive; (b) the number of defendants yet to settle; (c) the fact that the Settlements were entered into prior to the Second Circuit's decision in *Gelboim*; and (d) the risks involved in not settling, as described *supra,* at 12-14. The monetary relief that HSBC and Citi have paid and the cooperation that they (and R.P. Martin) have agreed to provide is very significant in light of the fact that there are numerous remaining defendants that have not settled. As the court in *In re Corrugated Container Antitrust Litigation* explained: "this strategy was designed to achieve a maximum aggregate recovery for the class and the fact that the later settlements were at considerably higher rates tends to show that the strategy was successful." MDL No. 310, 1981 WL 2093, at *23 (S.D. Tex. June 4, 1981); *see also In re Packaged Ice Antitrust Litig.*, 08-MD-01952, 2011 WL 717519, at *10 (E.D. Mich. Feb. 22, 2011) ("Also of significant value is the fact that the Settlement Agreement with Home City can serve as an 'ice-breaker' settlement").[7]

"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 (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984)); *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989) (same). "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." *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.) (settlements of 3.8% of plaintiffs' estimated damages to be within the

[7] Notably, *Grinnell* involved the payment by all defendants of $10 million. *Grinnell,* 495 F.2d at 452. Here, three defendants—HSBC, Citi, and R.P. Martin—have settled, but numerous defendants remain in the litigation. Most of the claims here are premised on joint or otherwise conspiratorial conduct that creates joint and several liability. *See Strobl v. New York Mercantile Exch.*, 582 F. Supp. 770, 778 (S.D.N.Y. 1984) (defendants jointly and severally liable on a jury verdict for price fixing, manipulation in violation of the antitrust laws and commodities laws, as well as common law fraud). The situation here is different from the "entire settlement for all purposes" circumstance under review in *Grinnell.*

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. Defendants 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' manipulation of Yen-LIBOR and Euroyen TIBOR caused artificiality in Euroyen-Based Derivatives. Plaintiffs would then have to demonstrate the amount of harm suffered as a result of transacting in these infected derivatives.

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 could possibly recover billions of dollars. While the monetary compensation Citi and HSBC provided under the Settlement is a small percentage of the total 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."). Class Counsel finds the settlements indispensable as they are "ice-breaker" settlements that both provide compensation to the Class and 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 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) (citation omitted). The Settlement Class members have received adequate notice and have been given sufficient opportunity to weigh in on or exclude themselves from the Settlements.

The Court previously approved the Notice Plan, as set forth in the Preliminary Approval Motions. *Laydon,* ECF No. 659 & *Sonterra*, ECF No. 264. The Notice Plan has been carried out in accordance with the Preliminary Approval Order. *See* Miller Aff. ¶¶ 4-22. Information regarding the Settlements, including downloadable copies of the Settlement Agreements, Mailed Notice, Proof of Claim, Preliminary Approval Orders, and other relevant documents (as well as a toll-free telephone number to answer Settlement Class Members' questions and facilitate filing of claims) were also posted on a dedicated website created and maintained by the Settlement Administrator at www.EuroyenSettlement.com. *Id.* at ¶¶ 19-22.

The Notice Program, 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 (citation omitted). Settlement Class Members are 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' notice program 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' Notice Program is the best under the circumstances, the Court should finally approve the proposed 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 in the Court's Preliminary Approval Order (*Laydon,* ECF No. 659 & *Sonterra*, ECF No. 264), 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.

There are at least hundreds, if not thousands, of geographically dispersed persons and entities that fall within the Settlement Class definition. *See* Feb. 1 Briganti Decl. ¶ 43. 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 Laydon*, ECF No. 655, at 16-17 & *Sonterra,* ECF No. 261, at 16-17.

The claims of the of the Representative Plaintiffs are typical of those of the entire Settlement Class because the Representative Plaintiffs' and class members' claims all arise from the same course of conduct involving defendants' alleged false reporting and manipulation of Yen-LIBOR, Euroyen TIBOR, and the prices of Euroyen-Based Derivatives.

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 Citi, HSBC, and R.P. Martin; and (3) in defeating the remaining non-settling defendants' motions to dismiss. In addition, Class Counsel are highly experienced attorneys who have litigated these and other types of 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 Yen-LIBOR, Euroyen TIBOR, and the prices of Euroyen-Based Derivatives is common across the class. A class action is superior because class members have no substantial interest in proceeding individually given the complexity and expense of the litigation.

IV. THE PROPOSED PLAN OF ALLOCATION SHOULD BE GRANTED FINAL APPROVAL

A. The Standard for Final Approval of a Plan of Allocation

A plan of allocation 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 have a reasonable, rational basis, particularly if recommended by 'experienced and competent' Class Counsel.") (citation omitted).[8] Class Counsel, who have litigated these Actions for the past four-and-a-half years and are highly experienced in litigation, including antitrust and commodities manipulation class actions, recommend the Proposed Plan of Allocation. *See*, *generally*, Briganti Decl.; *see also Laydon* ECF No. 567 Ex. 5 & *Sonterra* ECF No. 189, Ex. 5 (attaching Class Counsel'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

[8] *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).

adequate.'" *Maley v. Del Global Technologies Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002) (citations omitted); *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 (citation omitted). Here, the Proposed Plan of Allocation complies fully with these standards.

B. The Proposed Plan of Allocation Here Fully Satisfies the Standards for Final Approval

Class Counsel has given notice of the Proposed Plan of Allocation to the Settlement Class. *See* http://www.EuroyenSettlement.com. Plaintiffs' economic consultant estimated the daily amounts of manipulative, artificial impact allegedly caused by defendants. Briganti Decl. ¶ 63. The specific methodologies and basis for the Proposed Plan of Allocation is set forth at length in the Declaration of Dr. Craig Pirrong in Support of Preliminary Approval of Class Action Settlement, dated June 16, 2016 ("Pirrong Decl."), *Laydon* ECF 657-1, ¶¶ 32-40 & *Sonterra* ECF 263-1, ¶¶ 32-40.

The Proposed Plan of Allocation (1) contains no guaranteed payments to any portion of the Settlement Class; and (2) contains no exclusions to participation by any portion of the Settlement Class. To the contrary, the Proposed Plan of Allocation 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. *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.,* 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 allocation approved in such prior cases. Here, Class Counsel developed and strongly recommends the Proposed Plan of Allocation.

Also, as in certain prior antitrust and CEA class actions, out of an abundance of caution, Class Counsel created a process of safeguards in order to consider litigation risk discounts. Through this process, independent allocation counsel for each type of contract, and a nationally-recognized mediator, Kenneth Feinberg, Esq., fully considered whether litigation discounts are appropriate in the circumstances here. Briganti Decl. ¶ 64; Feinberg Decl. ¶¶ 2-3. The substantive and procedural safeguards involved in this process included (a) the representation of different types of contracts by separate, independent and sophisticated allocation counsel arguing in favor of each such type of contract; and (b) the experience, participation, supervision, and ultimate recommendation of one of the most well recognized mediators in the United States. Feinberg Decl. ¶¶ 4-21. After such vigorous independent representation and arm's-length negotiations, the independent allocation counsel and nationally-recognized mediator all unanimously recommended as follows: "Class Counsel have determined to make one adjustment in the calculations that are based on the 'artificiality' numbers. That calculation adjustment involves a 25% reduction in the weighting of CME Yen Currency Futures Contract Transactions within the Proposed Plan." http://www.EuroyenSettlement.com/; *see also* Feinberg Decl. ¶ 19.

C. Approval of the Proposed Plan of Allocation 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 allocation has been adopted. *See e.g., NASDAQ III,* 187 F.R.D. at 480 ("it 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") (citing *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 170 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988) ("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.")). 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, ECF No. 413 ¶ 6 (S.D.N.Y. May 23, 2012) (modifying final judgment to reflect plan of allocation).

Here, as is common in complex class actions, the Citi and HSBC Settlement Agreements contemplate that the approval of each Settlement should be considered separate and apart from the consideration of the plan of allocation. Citi Settlement Agreement ¶ 16(B); HSBC Settlement Agreement ¶ 16(B).

For all the reasons set forth above, the Proposed Plan of Allocation fully satisfies the standards for final approval. Any concerns that the Court may have regarding the Proposed Plan of Allocation should be considered separately from any other aspects of the Settlements and Final Approval of the Settlements can proceed even if the Court does not approve the Proposed Plan of Allocation.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court: (i) grant Final Approval; (ii) approve the Proposed Plan of Allocation; (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 three settling Defendants and a Proposed Final Approval Order have been submitted to the Orders and Judgments Clerk pursuant to Southern District ECF Rule 18.3.

Dated: September 27, 2016
White Plains, New York

LOWEY DANNENBERG COHEN & HART, P.C.

By: */s/ Vincent Briganti*

Vincent Briganti
Geoffrey M. Horn
Peter D. St. Phillip
One North Broadway, 5th Floor
White Plains, New York 10601
914-997-0500
vbriganti@lowey.com
ghorn@lowey.com
pstphillip@lowey.com

Class Counsel

Joseph J. Tabacco, Jr.
Todd A. Seaver
BERMAN DEVALERIO
One California Street, Suite 900
San Francisco, CA 94111
Telephone: (415) 433-3200
Facsimile: (415) 433-6282
jtabacco@bermandevalerio.com
tseaver@bermandevalerio.com

Patrick T. Egan
Daryl DeValerio Andrews
BERMAN DEVALERIO
One Liberty Square
Boston, MA 02109
Telephone: (617) 542-8300
Facsimile: (617) 542-1194
pegan@bermandevalerio.com
dandrews@bermandevalerio.com

LOVELL STEWART HALEBIAN JACOBSON LLP

Christopher Lovell
Gary S. Jacobson
61 Broadway, Suite 501
New York, NY 10006
Tel.: 212-608-1900
Fax: 212-719-4677

Additional Counsel for Plaintiffs