IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SONTERRA CAPITAL MASTER FUND, LTD., HAYMAN CAPITAL MASTER FUND, L.P., JAPAN MACRO OPPORTUNITIES MASTER FUND, L.P., and CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM on behalf of themselves and all others similarly situated,

Plaintiffs,

- against –

UBS AG, UBS SECURITIES JAPAN CO. LTD., MIZUHO BANK, LTD., THE BANK OF TOKYO-MITSUBISHI UFJ, LTD., THE SUMITOMO TRUST AND BANKING CO., LTD., THE NORINCHUKIN BANK, MITSUBISHI UFJ TRUST AND BANKING CORPORATION, SUMITOMO MITSUI BANKING CORPORATION, RESONA BANK, LTD., J.P. MORGAN CHASE & CO., JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, J.P. MORGAN SECURITIES PLC, MIZUHO CORPORATE BANK, LTD., DEUTSCHE BANK AG, DB GROUP SERVICES UK LIMITED, MIZUHO TRUST AND BANKING CO., LTD., THE SHOKO CHUKIN BANK, LTD., SHINKIN CENTRAL BANK, THE BANK OF YOKOHAMA, LTD., SOCIÉTÉ GÉNÉRALE SA, THE ROYAL BANK OF SCOTLAND GROUP PLC, THE ROYAL BANK OF SCOTLAND PLC, RBS SECURITIES JAPAN LIMITED, RBS SECURITIES INC., BARCLAYS BANK PLC, BARCLAYS PLC, BARCLAYS CAPITAL INC., CITIBANK, NA, CITIGROUP, INC., CITIBANK, JAPAN LTD., CITIGROUP GLOBAL MARKETS JAPAN, INC., COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., HSBC HOLDINGS PLC, HSBC BANK PLC, LLOYDS BANKING GROUP PLC, LLOYDS BANK PLC, ICAP PLC, ICAP EUROPE LIMITED, R.P. MARTIN HOLDINGS LIMITED, MARTIN BROKERS (UK) LTD., TULLETT PREBON PLC, BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., MERRILL LYNCH INTERNATIONAL, AND JOHN DOE NOS. 1-50,

Defendants.

Docket No. 15-cv-5844 (GBD) (HBP)

JEFFREY LAYDON, on behalf of himself and all others similarly situated,

Plaintiff,

- against -

THE BANK OF TOKYO-MITSUBISHI UFJ, LTD., THE SUMITOMO TRUST AND BANKING CO., LTD., THE NORINCHUKIN BANK, MITSUBISHI UFJ TRUST AND BANKING CORPORATION, SUMITOMO MITSUI BANKING CORPORATION, J.P. MORGAN CHASE & CO., J.P. MORGAN CHASE BANK, NATIONAL ASSOCIATION, J.P. MORGAN SECURITIES PLC, MIZUHO CORPORATE BANK, LTD., DEUTSCHE BANK AG, THE SHOKO CHUKIN BANK, LTD., SHINKIN CENTRAL BANK, UBS AG, UBS SECURITIES JAPAN CO. LTD., THE BANK OF YOKOHAMA, LTD., SOCIÉTÉ GÉNÉRALE SA, THE ROYAL BANK OF SCOTLAND GROUP PLC, THE ROYAL BANK OF SCOTLAND PLC, RBS SECURITIES JAPAN LIMITED, BARCLAYS BANK PLC, CITIBANK, NA, CITIGROUP, INC., CITIBANK, JAPAN LTD., CITIGROUP GLOBAL MARKETS JAPAN, INC., COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., HSBC HOLDINGS PLC, HSBC BANK PLC, LLOYDS BANKING GROUP PLC, ICAP EUROPE LIMITED, R.P. MARTIN HOLDINGS LIMITED, MARTIN BROKERS (UK) LTD., TULLETT PREBON PLC, AND JOHN DOE NOS. 1-50,

Defendants.

Docket No. 12-cv-3419 (GBD) (HBP)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENTS WITH THE DEUTSCHE BANK AND JPMORGAN DEFENDANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTRODUCTION

On November 10, 2016, the Court granted final approval of Plaintiffs'[1] $58,000,000 in collective settlements with R.P. Martin, Citi, and HSBC, finding, among other things, that Plaintiffs' notice program constituted the best notice practicable and the plan of allocation and proof of claim and release were fair, reasonable, and adequate. ECF No. 298. Plaintiffs now move under Rule 23(e) of the Federal Rules of Civil Procedure for preliminary approval of their settlement with Deutsche Bank[2] and their settlement with JPMorgan[3] (collectively, the "Settlements"), including preliminary approval of the notice program, plan of allocation, and proof of claim and release that are substantially the same as those the Court previously found fair, reasonable, and adequate.

The Settlements provide the Settlement Class with another substantial recovery from the Settling Defendants, consisting of consideration totaling $148,000,000 and valuable cooperation. Deutsche Bank Settlement Agreement ¶¶ 3, 4 ($77,000,000); JPMorgan Settlement Agreement ¶¶ 3, 4 ($71,000,000). The Settlements meet the two essential requirements for preliminary approval—they are procedurally and substantively fair. The Deutsche Bank Settlement was reached after months-long negotiations between experienced counsel, with the assistance of a skilled mediator, the Honorable Daniel Weinstein. Likewise, the JPMorgan Settlement is the product of over a year of negotiations, including multiple telephone calls and in-person meetings, wherein Interim Lead Counsel and counsel for JPMorgan engaged in well-informed, arm's-length negotiations. The Settlements are substantively fair, reasonable, and adequate, providing for the Settling Defendants to

[1] The "Plaintiffs" are Jeffrey Laydon, Sonterra Capital Master Fund, Ltd., Hayman Capital Master Fund, L.P., Japan Macro Opportunities Fund, L.P., and the California State Teachers' Retirement System ("CalSTRS"). The Settlements resolve the claims against Deutsche Bank and JPMorgan in both *Sonterra Capital Master Fund, Ltd. et al. v. UBS AG et al.*, No. 15-cv-5844 (GBD) (S.D.N.Y.) (the "*Sonterra* Action"), and *Laydon v. The Bank of Tokyo Mitsubishi UFJ, Ltd., et al.*, No. 12-cv-3419 (GBD) (HBP) (the "*Laydon* Action"), and this motion for preliminary approval is consequently filed in both actions. Unless otherwise noted, however, ECF citations are to the docket in the *Sonterra* Action, and internal citations and quotation marks are omitted.

[2] "Deutsche Bank" means Deutsche Bank AG and DB Group Services (UK) Ltd. The Deutsche Bank Settlement Agreement is attached as Ex. 1 to the Declaration of Vincent Briganti, Esq., dated July 21, 2017 ("July 2017 Briganti Decl.").

[3] "JPMorgan" means JPMorgan Chase & Co., JPMorgan Chase Bank, National Association, and J.P. Morgan Securities plc. The JPMorgan Settlement Agreement is attached as Ex. 2 to the July 2017 Briganti Decl. JPMorgan, together with Deutsche Bank, are referred to as the "Settling Defendants." Unless otherwise defined, capitalized terms herein have the same meaning as in the Deutsche Bank Settlement Agreement and JPMorgan Settlement Agreement.

pay $148,000,000 into two Settlement Funds, which will then be distributed to qualifying Settling Class Members.

The Court has already finally approved the plan of allocation, notice program and forms of notice, and settlement administrator, and has appointed Lowey Dannenberg, P.C. ("Lowey Dannenberg") as Class Counsel for the R.P. Martin, Citi, and HSBC settlements. ECF No. 298. Plaintiffs submit this memorandum of law and the accompanying Declarations of Vincent Briganti and Daniel Weinstein ("Weinstein Decl.") to demonstrate that this Court should grant Plaintiffs' motion for an Order that:

(a) preliminarily approves Plaintiffs' proposed Settlements, subject to later, final approval;

(b) conditionally certifies a Settlement Class for the claims against Deutsche Bank and JPMorgan;

(c) appoints Lowey Dannenberg as Class Counsel for the Settlements;

(d) appoints Citibank, N.A. as the Escrow Agent for the Settlements;

(e) appoints A.B. Data, Ltd. ("A.B. Data") as the Settlement Administrator for the Settlements;

(f) approves Plaintiffs' proposed class notice (July 2017 Briganti Decl. Exs. 4, 5) and proposed notice plan for the Settlements (Young Affidavit, attached as Ex. 3 to the July 2017 Briganti Decl.);

(g) approves Plaintiffs' Plan of Allocation for the Settlements (ECF No. 263-5); and

(h) sets a schedule leading to the Court's consideration of final approval of the Settlements, including: (i) the date, time, and place for a hearing to consider the fairness, reasonableness, and adequacy of the Settlements; (ii) the deadline for members of the Settlement Class to exclude themselves (*i.e.*, opt out) from the Settlements; (iii) the deadline for Class Counsel to submit a petition for attorneys' fees and reimbursement of expenses, and any incentive awards for Settlement Class representatives; and (iv) the deadline for members of the Settlement Class to object to the Settlements and any of the related petitions.

See Proposed Superseding Order annexed hereto as Exhibit A.

ARGUMENT

I. The Court has jurisdiction to consider and approve the Settlements.

The Settlements resolve the claims against Deutsche Bank and JPMorgan in both the *Laydon* Action and the *Sonterra* Action. There is of course no question as to the Court's jurisdiction to consider preliminary approval of a settlement in the *Laydon* Action, which has been proceeding against the non-settling Defendants and stayed as to both Deutsche Bank and JPMorgan. The same is true with respect to the *Sonterra* Action, notwithstanding the Court's judgment dismissing that action (ECF No. 315). On May 24, 2017, the Court granted Plaintiffs' motion for an indicative ruling under Rule 62.1 in the *Sonterra* Action, indicating that it intended to "amend the Judgment (ECF No. 315) entered in this action on March 10, 2017, pursuant to Federal Rule of Civil Procedure 60, to exclude Deutsche Bank and JPMorgan from the Judgment, and retain and exercise jurisdiction over Deutsche Bank and JPMorgan in order to consider approval in this action [of] their settlements with Plaintiffs." ECF No. 324, at 2. On June 19, 2017, the Court amended the Judgment to exclude Deutsche Bank and JPMorgan. ECF No. 335, at 2. For the reasons set forth in Plaintiffs' motion (ECF No. 323) and included below, the Court has jurisdiction to consider and approve the Settlements.

At the time the parties entered into these Settlement Agreements, motions to dismiss the *Sonterra* Action on the ground, among others, of lack of Article III jurisdiction were pending. As of that time, there was a live case or controversy between the parties, whose disposition by this Court (let alone any higher court) was unknown. In the face of that uncertainty as to whether the Court would permit the claims to proceed, the parties decided to limit their respective risks by entering into binding Settlements. As the Third Circuit held in *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 596-97 (3d Cir. 2012), when parties execute a binding settlement agreement—including a class settlement—"with the understanding that intervening events could affect their interests in the litigation," including by eliminating entirely the claims on which the action was premised, the Court retains "the ability and the authority to approve the settlement." That is equally the case here.

Indeed, were the law otherwise, parties would never have an incentive to settle any case in which subject matter jurisdiction was contested, in contravention of "the strong presumption in favor of voluntary settlements." *Id.*

Ehrheart involved a class action brought under the Fair and Accurate Credit Transaction Act ("FACTA"). *Id.* at 592. The parties reached a class-wide settlement, which the district court preliminarily approved. *Id.* Before the court finally approved the settlement, however, Congress passed the Credit and Debit Card Receipt Clarification Act ("Clarification Act"), which amended FACTA by eliminating the plaintiffs' underlying cause of action. *Id.*

The *Ehrheart* defendants moved to vacate the preliminary approval order, arguing that the "Court cannot finally approve the proposed settlement because the claims upon which the settlement is based no longer exist." Mot. to Vacate, *Ehrheart v. Verizon Wireless*, No. 07-cv-01165 (W.D. Pa. Jun. 09, 2008), ECF No. 36, at 4. The district court granted the defendants' motion. *See* Opinion and Order of Court, *Ehrheart v. Verizon Wireless*, No. 07-cv-01165 (W.D. Pa. Jun. 13, 2008), ECF No. 38, at 3.

The Third Circuit reversed, citing the strong judicial policy in favor of settlements, "which is particularly muscular in class action suits," and the district court's "restricted, tightly focused" role under Rule 23(e). *Ehrheart*, 609 F.3d at 595-96. It held that the district court retained "the ability and authority to approve the [class] settlement" separate from its subject matter jurisdiction over the underlying claims. *Id.* Even after the Clarification Act rescinded the statutory basis for plaintiffs' underlying claims, the settling parties "still had a personal stake in the outcome" of the litigation, specifically, their interest in the settlement agreement itself. *Id.* The court noted that the policy in favor of settlement was especially strong in class actions where "[i]t is essential that the parties to class action settlements have complete assurance that a settlement agreement is binding once it is reached." *Id.* at 596; *accord Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("We are mindful of the "strong judicial policy in favor of settlements, particularly in the class action context."). Accordingly, it found that the enactment of the Clarification Act did not affect the

validity of the parties' settlement and did not provide a basis for defendants to rescind their agreement. *Id.* at 594-95.

Other courts have relied on *Ehrheart* to reach the same result. For example, in *Schumacher v. SC Data Center, Inc.*, No. 16-cv-04078, 2016 WL 7007539 (W.D. Mo. Nov. 29, 2016), the court determined that it had jurisdiction to enforce the parties' agreement to settle claims under the Fair Credit Reporting Act ("FCRA") even after the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) arguably stripped plaintiffs of Article III standing. *Schumacher*, 2016 WL 7007539, at *2-3. The court followed *Ehrheart* and concluded that "Schumacher's standing to bring the FCRA claims underlying this settlement is irrelevant to whether she has standing to enforce the parties' settlement agreement" because she "has a personal, concrete interest in whether the settlement agreement is enforced, and thus, the [c]ourt has the authority to review and approve it." *Id.* at *4.

Likewise, in *Kinder v. Northwest Bank*, No. 10-cv-405, 2013 WL 1914519, at *2 (W.D. Mich. Apr. 15, 2013), *report and recommendation adopted*, 2013 WL 1914610 (W.D. Mich. May 8, 2013), the court held that an intervening change in the law—even one that rescinds a cause of action and with it, Article III standing based on the cause of action—was not a sufficient cause to refuse to enforce a settlement agreement. There, plaintiffs brought class actions alleging violations of the Electronic Fund Transfer Act ("EFTA"). *Id.* at *1. The parties reached a settlement and it was preliminarily approved by the district court. Subsequently, Congress amended the EFTA to eliminate the plaintiffs' claims and, with it, plaintiffs' standing under Article III. *Id.* Despite this development, the court upheld its preliminary approval decision and adopted the reasoning in *Ehrheart*, citing (1) the "restricted, tightly focused role" of district courts under Rule 23(e) requiring the court to act as fiduciary for the absent class members, (2) the fact that refusal to enforce a settlement agreement on the basis of a subsequent change in law undermines the strong presumption in favor of voluntary settlements, which is especially strong in class action cases, and (3) the universal rule that "changes in the law after settlement do not affect the validity of the agreement and do not provide a legitimate basis for rescinding the settlement." *Id.* at *3.

The Settling Parties here—like those in *Ehrheart* and its progeny—also have a "personal, concrete interest" in enforcing their binding Settlement Agreements, rather than returning to the risk of continued litigation. This interest supplies the Court with subject matter jurisdiction to review and approve the Settlements, regardless of the Court's conclusion about the validity of the underlying claims against the non-settling Defendants.[4] In this case—as in *Ehrheart*—the parties "bet on the certainty of settlement instead of gambling on the uncertainties of future . . . action." 609 F.3d at 594. Just as the Clarification Act was pending in Congress when the parties in *Ehrheart* chose to settle, the Defendants' motions to dismiss for lack of standing were pending at the time that the Settling Parties agreed to resolve these cases. The entire point of these settlements was to resolve the uncertainty surrounding the pending motions to dismiss, any appeals, and any other possible proceedings in the litigation. If the Court's subsequent ruling on standing could prevent the previously agreed-to settlements from coming into effect, that would vitiate the very bargain that the Settling Parties struck and undermine the "strong presumption in favor of voluntary settlement agreements." *See id.*[5]

Indeed, even after the Court's ruling on standing, there is continued uncertainty because of the possibility that Plaintiffs' claims could be reinstated. Plaintiffs have appealed the dismissal of their claims against the non-settling Defendants to the Second Circuit, and would have brought such

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[4] The Second Circuit has not yet had an occasion to address *Ehrheart* in the context of court approval of a class action settlement after a ruling that the named plaintiffs failed to adequately plead Article III standing. The Second Circuit has previously raised "serious questions" about whether certain class representatives, who were participants in ERISA plans, had personally suffered injury-in-fact such that they had Article III standing to sue—or settle— on behalf of the plans themselves, some of which had objected to the settlements at issue. *See Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 202-03 (2d Cir. 2005). The Second Circuit remanded those questions to the district court, which concluded that the named trustee plaintiff had standing. The Second Circuit affirmed, noting that "only one of the named Plaintiffs is required to establish standing in order to seek relief on behalf of the entire class," and proceeded to consider the district court's approval of the settlement agreement without addressing the standing of the named plan-participant plaintiffs. *See Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 241-43 (2d Cir. 2007). The issues of representative standing under ERISA raised in *Central States*—that is, who may represent a plan, and what kind of injury-in-fact that plan representative must show—are irrelevant here.

[5] Such a rule would particularly discourage plaintiffs from settling with only some defendants in any multi-defendant class action: allowing the non-settling defendants to proceed with the case would run the risk of undermining any such separate peace, because the non-settling defendants might subsequently obtain a favorable ruling on injury-in-fact (whether at a motion to dismiss or a subsequent phase of the litigation).

an appeal against the Settling Defendants had their motion to dismiss not been withdrawn because of the Settlements. The proposed Settlements accordingly dispose of a genuine controversy between the Settling Defendants and the Plaintiffs on behalf of the Settlement Class: they resolve Settling Defendants' risk that the claims against them could be reinstated on appeal, while providing a substantial monetary recovery to members of the Settlement Class.

If these Settlements could not be approved, the consequences would be far-reaching. Going forward, none of the remaining non-settling Defendants could now chose to eliminate their ongoing litigation risk by burying the hatchet with the Plaintiffs. Forcing the parties to continue litigating their appeal instead of settling—on the theory that standing does not exist—would be perverse and run roughshod over the judicial policy in favor of settlement. The better, and more accurate, conclusion is that the Settlement Agreements eliminate the potential for reinstatement of these cases on appeal, and therefore dispose of a case or controversy.

II. The Court should preliminarily approve the Settlements.

A. The preliminary approval standard.

Proposed Rule 23(b)(3) settlements require notice to class members, an opportunity for class members to object, and final approval after a hearing at which class members may appear. *See* FED. R. CIV. P. 23(e). The judicially created requirements for preliminary approval are as follows:

> Where the proposed settlement appears to be the product of serious, informed, non–collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted.

In re NASDAQ Mkt.-Makers Antitrust Litig., 176 F.R.D. 99, 102 (S.D.N.Y. 1997) ("*NASDAQ II*").

In conducting the preliminary approval inquiry, a court considers the "negotiating process leading up to the settlement, i.e., procedural fairness, as well as the settlement's substantive terms, i.e., substantive fairness." *In re Platinum & Palladium Commodities Litig.*, No. 10-cv-3617, 2014 WL 3500655, at *11 (S.D.N.Y. July 15, 2014) ("*Platinum*"). The terms must be "at least sufficiently fair, reasonable and adequate to justify notice to those affected and an opportunity to be heard." *NASDAQ II*, 176 F.R.D. at 102; Order Preliminarily Approving Class Action Settlement and

Conditionally Certifying a Settlement Class, *Sullivan v. Barclays plc*, No. 13-cv-2811 (PKC) (S.D.N.Y. Dec. 15, 2015), ECF No. 234 ("Euribor Order I") (preliminarily approving $94 million settlement in a proposed class action alleging the manipulation of the Euro Interbank Offered Rate or Euribor).[6]

B. The Settlements provide a considerable benefit to the Settlement Class.

The $77,000,000 Deutsche Bank Settlement and the $71,000,000 JPMorgan Settlement will provide the Settlement Class with a financial recovery of $148,000,000. This sum, plus the $58,000,000 million already approved from the Citi and HSBC Defendants, provides the Settlement Class with $206,000,000 to date. Deutsche Bank and JPMorgan also agreed that if the Settlements are finally approved, the settlement monies will **not** revert to the Settling Defendants for opt-outs or failures to submit Proofs of Claim and Release. Deutsche Bank Settlement Agreement ¶ 10; JPMorgan Settlement Agreement ¶ 10. Given the reality that claim rates often fall below 100%, the non-reversion term of the Settlements likely will enhance the benefits and the recovery for qualifying claimants.[7]

The Settlements also obligate the Settling Defendants to provide specified cooperation to benefit the Settlement Class. This cooperation will include, 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 substantially the same information as that reflected in submissions to the Federal Reserve Bank of New York relating to certain topics; (iv) reasonably available transaction data for Euroyen-Based Derivatives and Yen-denominated interbank money market instruments for the years 2006 through 2011; and (v) declarations, affidavits, witness statements, or other sworn or unsworn statements of Settling Defendants' employees. Deutsche Bank Settlement Agreement ¶ 4; JPMorgan

[6] *See also* Order Preliminarily Approving Class Action Settlement with HSBC Holdings plc and HSBC Bank plc and Conditionally Certifying a Settlement Class, *Sullivan v. Barclays plc*, No. 13-cv-2811 (PKC) (S.D.N.Y. Jan. 18, 2017), ECF No. 279 ("Euribor Order II") (preliminarily approving $45 million settlement).

[7] While there is no reversion, Deutsche Bank and JPMorgan do have the right, but not the obligation, in their sole discretion, to exercise certain rights, including terminating the Settlements, pursuant to the terms and conditions of a Supplemental Agreement. Deutsche Bank Settlement Agreement ¶ 23; JPMorgan Settlement Agreement ¶ 23.

Settlement Agreement ¶ 4. The Settling Defendants will also provide Plaintiffs with access to certain witnesses within their control for foundational purposes. *Id.*

In exchange for these benefits, the Releasing Parties will release Deutsche Bank and JPMorgan from all claims for the Euroyen-Based Derivatives that were allegedly distorted by the Settling Defendants' alleged manipulation of Yen-LIBOR and Euroyen TIBOR. *Id.* ¶ 12. Plaintiffs' claims against the Settling Defendants will also be dismissed on the merits with prejudice.

C. The Settlements are procedurally fair because they were produced by well-informed, arm's length negotiations by experienced counsel.

"To determine procedural fairness, courts examine the negotiating process leading to the settlement." *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 618 (S.D.N.Y. 2012). 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." *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173-74 (S.D.N.Y. 2000).

Deutsche Bank. The process leading to the Deutsche Bank Settlement supports preliminary approval. The Deutsche Bank Settlement is the result of more than 20 months of arm's-length, non-collusive negotiations by experienced counsel with the assistance of a private mediator, the Honorable Daniel Weinstein. *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) ("the 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, 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."). 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. Weinstein Decl. ¶ 4. His assistance during a full-day mediation session on January 9, 2017 led to a consensual resolution. July 2017 Briganti Decl. ¶ 29. At all times, counsel for Deutsche Bank argued that Deutsche Bank is not liable for the claims

asserted against it in the Actions, and Deutsche Bank does not admit to any wrongdoing or liability as part of its Settlement and maintains that it has good and meritorious defenses to the claims brought against it in the Actions.

JPMorgan. The process leading to the JPMorgan Settlement also supports preliminary approval. Class Counsel began discussions with JPMorgan's counsel in the fall of 2015. *Id.* ¶ 32. In the following months, Class Counsel and JPMorgan's counsel had numerous in-person meetings and telephone calls, during which counsel for each side expressed their views of the Actions and JPMorgan's conduct in relation to in the alleged conspiracy. *Id.* ¶¶ 33-38. At all times, counsel for JPMorgan argued that JPMorgan is not liable for the claims asserted against it in the Actions. Following months of hard-fought negotiations, Plaintiffs and JPMorgan reached an agreement. *Id.* ¶ 38. JPMorgan does not admit to any wrongdoing or liability as part of its Settlement and maintains that it has good and meritorious defenses to the claims brought against it in the Actions.

The Settlement Class benefitted from informed advocates in negotiating each of the Settlements. Before beginning negotiations with Deutsche Bank and JPMorgan, Class Counsel had the guidance of several of this Court's decisions concerning the claims and allegations in these Actions, government orders and settlements with certain Defendants, discovery produced to date in *Laydon v. Mizuho Bank, Ltd. et al.*, No. 12-cv-3419 (S.D.N.Y.) (GBD) ("*Laydon*"), and settlement cooperation obtained pursuant to the already-approved R.P. Martin, Citi, and HSBC settlements. July 2017 Briganti Decl. ¶ 10. The Settlements are the product of hard-fought, extensive negotiations, which involved numerous in-person meetings and/or telephone conferences, and an in-depth investigation using available, relevant information. *Id.* ¶¶ 23-40.

Considering Class Counsel's significant 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' claims, their assessment of the Settlement Class's likely recovery following trial and appeal, and the oversight of an experienced mediator with respect to the Deutsche Bank Settlement, the Settlements are entitled to a presumption of procedural fairness.

D. The Settlements do not contain any deficiencies.

The Settlements satisfy the next *NASDAQ II* preliminary approval factor because they involve a structure and terms that are commonly used in class action settlements in this District. *NASDAQ II*, 176 F.R.D. at 102. Further, the Settlements contain similar terms to the Citi and HSBC settlement agreements, which the Court has already finally approved. ECF No. 298 ¶ 9.

E. The Settlements do not favor any Plaintiffs or Class Members or create any preferences.

The Settlements do not favor or disfavor any Plaintiffs or Class Members; nor do they discriminate against, create any limitations, or exclude from payments, any persons or groups within the Settlement Class. *See NASDAQ II*, 176 F.R.D. at 102. Plaintiffs, with the assistance of their expert, Dr. Craig Pirrong, developed a Plan of Allocation that this Court has already approved as fair, reasonable, and adequate. ECF No. 298 ¶ 20. This same Plan of Allocation will now be used to distribute the Deutsche Bank and JPMorgan Settlement Funds. Dr. Pirrong's daily artificiality matrix is available on the Settlement Website to inform Class Members of how valid and timely submitted claims will be compensated. The artificiality matrix may be adjusted following the receipt of the two Settling Defendants' cooperation materials and any changes will be immediately posted on the Settlement Website. Because the Settlements wholly avoid any improper preferences or discriminations, the Settlements satisfy the third *NASDAQ II* preliminary approval factor.

F. The consideration provided in the Settlements is well within the range of what possibly may be found to be fair and reasonable at final approval.

The sizeable consideration that the Settlements provide falls well within the possible range of reasonable consideration at the Fairness Hearing. *See NASDAQ II*, 176 F.R.D. at 102. The range of reasonableness "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion . . . ." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972). In applying this factor, "[d]ollar amounts [in class action settlement agreements] are judged not 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." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

Private antitrust plaintiffs, unlike the government, have the burden to prove anticompetitive impact and damages. *Gottesman v. General Motors Corp.*, 436 F.2d 1205, 1210 (2d Cir. 1971). Even where the Department of Justice had secured a criminal guilty plea, 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." *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998) ("*NASDAQ III*").

The Settling Defendants' monetary consideration alone, $148,000,000, is greater than the amount of maximum potential damages the Settling Defendants would have argued they were liable for had the cases proceeded to trial. *Compare Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995) ("*Maywalt*") (maximum "likely" damages are the appropriate test), *with In re Prudential Secs. Ltd P'ships Litig.*, No. M-21-67 (MP), 1995 WL 798907, at *15 (S.D.N.Y. Nov. 20, 1995) ("*Prudential*") (Pollack, J.) (where many non-settling defendants are present, class counsel must be circumspect in stating facts that may aid the non-settling defendants). Settling Defendants would have argued that they were not liable for any damages on any claims in the Actions.

Plaintiffs' impact and damages theories against the Settling Defendants 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).

Before confronting the risks of proving impact and damages, Plaintiffs faced the complexities, challenges, and risk of a far-greater task: establishing the other elements of liability. The facts and claims here are intricate. As recognized in similar contexts, "the complexity of [p]laintiff's claims *ipso facto* creates uncertainty." *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 123 (S.D.N.Y. 2009). Establishing liability involves obtaining and proving the meaning and

significance of instant messages, trading patterns, and other facts or evidence. Proving manipulation and collusion could raise ambiguities and require inferences.

In assessing the reasonableness and adequacy of the Settlements, Class Counsel was mindful of the "benefits afforded the Class including the immediacy and certainty of the recovery, against the continuing risks of litigation." *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 139 (S.D.N.Y. 2010). Due to the risks of litigation, Class Counsel's considered judgment is that the total consideration that the Settlements provide, including the cooperation that Settling Defendants will provide to Plaintiffs, is well within the range of that which may possibly later be found to be fair, reasonable, and adequate at final approval. *NASDAQ II*, 176 F.R.D. at 102; July 2017 Briganti Decl. ¶ 43.

1. Applying the *Grinnell* "final approval" factors to the Settlements is unnecessary at preliminary approval.

At final approval, the Court considers several factors, 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*"); *see Maywalt*, 67 F.3d at 1079-80 (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 the discussion above, Plaintiffs have already addressed *Grinnell* Factors 4-6 and 8-9. These *Grinnell* Factors are the only appropriate considerations for preliminary approval. *See In re Warner Chilcott Ltd. Secs. Litig.*, No. 06 Civ. 11515, 2008 WL 5110904, at *2 (S.D.N.Y. Nov. 20, 2008) ("Although a complete analysis of [the *Grinnell*] factors is required for final approval, at the preliminary approval stage, the [c]ourt need only find that the proposed settlement fits within the range of possible approval to proceed."). Plaintiffs nonetheless address the remaining *Grinnell* Factors below.

***Grinnell* Factor 1.** These Actions 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 remains ongoing. The litigations have been, and will continue to be, massive, complex, and expensive to prosecute. The expert work alone in these cases have been and will continue to be costly. Furthermore, these cases present an inherent level of risk and uncertainty because they involve a financial market unfamiliar to the average juror. *See Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 663 (S.D.N.Y. 2015) ("The greater the complexity, expense and likely duration of the litigation, the stronger the basis for approving a settlement.").

***Grinnell* Factor 2.** *Grinnell* Factor 2 (the reaction of the class to a settlement) is premature. Nonetheless, all of the named Plaintiffs favor the Settlements. Plaintiffs, including CalSTRS, the largest U.S. teachers' retirement fund, with approximately $208.7 billion in assets under management (as of June 30, 2017) and close to one million members, is a sophisticated investor with significant financial expertise and is 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 by other Class Members upon similarly reviewing the Settlements. Any Class Member who does not favor the deals can opt out. After the Settlement Class has been provided notice of the Settlements, Plaintiffs will address the Settlement Class's reaction in their motion for final approval. Notably, there were no objections filed to the R.P. Martin, Citi, and HSBC settlements. ECF No. 298 ¶ 7.

***Grinnell* Factor 3.** The Court may approve a settlement at any stage of litigation. *See In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, MDL No. 1500, 02-civ-5575 (SWK), 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006). The Court's primary concern 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.* at *37.

Plaintiffs conducted extensive factual and legal research and consulted experts to assess the merits of their claims. July 2017 Briganti Decl. ¶ 10. 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. Further, at the time Plaintiffs were negotiating the Settlements, 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 *Laydon*. Plaintiffs also had the benefit of settlement cooperation produced under the terms of the R.P. Martin, Citi, and HSBC settlements and discovery produced to date in *Laydon*. *Id.* The information gathered during this process greatly informed Plaintiffs of the advantages and disadvantages of entering the Settlements.

***Grinnell* Factor 7.** Deutsche Bank and JPMorgan can withstand a greater judgment than $77,000,000 and $71,000,000, respectively, but this *Grinnell* Factor alone does not bear on the appropriateness of the Settlements. *See In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 439, 460 (S.D.N.Y. 2004) ("[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").

III. The Court should certify the Settlement Class defined in the Settlements.

As the Court already found when granting final approval to the R.P. Martin, Citibank, and HSBC settlements, the Settlement Class meets the requisites of Rule 23(a) and Rule 23(b)(3) for preliminary and final approval. *Compare* ECF Nos. 264 ¶ 4, 298 ¶ 2, *with* Deutsche Bank Settlement Agreement ¶ 1(E); JPMorgan Settlement Agreement ¶ 1(E). Therefore, the Settlement Class should be preliminarily certified for the claims against the Settling Defendants.[8]

A. The Settlement Class meets the Rule 23(a) requirements.

Numerosity. Rule 23(a) requires that the class be "so numerous that joinder of all class members is impracticable." FED. R. CIV. P. 23(a). Joinder need not be impossible, "joinder may merely be difficult or inconvenient, rendering use of a class action the most efficient method to resolve plaintiffs' claims." *In re Initial Pub. Offering Sec. Litig.*, 260 F.R.D. 81, 90 (S.D.N.Y. 2009)

[8] The Settling Defendants consent to preliminary 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. Deutsche Bank Settlement Agreement ¶ 2(E); JPMorgan Settlement Agreement ¶ 22(E).

("*IPO*"). "Sufficient numerosity can be presumed at a level of forty members or more." *Id.* There are at least hundreds, if not thousands, of geographically dispersed persons and entities that fall within the Settlement Class definition, making joinder impracticable. *See* July 2017 Briganti Decl. ¶ 44.

Commonality. Commonality requires the presence of only a single question of law or fact common to the class. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011); *see also* FED. R. CIV. P. 23(a)(2). These cases present scores of common questions of law and fact, including personal jurisdiction, subject matter jurisdiction, the standards for an unlawful agreement, and multiple questions that were raised in various motions to dismiss. Adding to the common questions of law and fact are the same liability and impact questions that every Plaintiff and Class Member must answer through the same body of common class-wide proof. For example:

1. What constitutes a false or manipulative submission by a Yen-LIBOR or Euroyen TIBOR contributor panel bank?

2. Which of the Defendants were engaged in conspiratorial conduct in Yen-LIBOR and Euroyen TIBOR, and for what period(s) were they involved in the same?

3. What would the non-manipulated Yen-LIBOR and Euroyen TIBOR be in the "but-for" world for each day of the Class Period?

These common questions involve common sub-questions of fact and law that are also common to all Class Members. Rule 23(a)(2) is overwhelmingly satisfied.

Typicality. Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3). Typicality is satisfied if "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009). Plaintiffs' and Class Members' claims 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. Thus, Plaintiffs' claims are typical of the Class Members' claims. *See, e.g.*, *Marisol A. by Forbes v. Giuliani*, 126 F.3d 372, 376-77 (2d Cir. 1997).

Adequacy. Rule 23(a)(4) adequacy requires that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4); *Baffa v. Donaldson, Lufkin &*

Jenrette Secs. Corp., 222 F.3d 52, 60 (2d Cir. 2000). Generally, courts consider "whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Id.* at 61; *see also* Euribor Order I ¶ 5.

1. The Representative Plaintiffs suffer no disabling conflicts.

"[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." *Martens v. Smith Barney Inc.*, 181 F.R.D. 243, 259 (S.D.N.Y. 1998); *see also In re NASDAQ Mkt.-Makers Antitrust Litig.*, 169 F.R.D. 493, 514-15 (S.D.N.Y. 1996) ("*NASDAQ I*") (finding that to warrant denial of class certification, "it must be shown that any asserted 'conflict' is so palpable as to outweigh the substantial interest of every class member in proceeding with the litigation"). No such fundamental conflict exists here.

First, all Class Members share an overriding interest in obtaining the largest possible monetary recovery from the Settling Defendants (and the remaining non-settling Defendants). *See Global Crossing*, 225 F.R.D. at 453 (certifying settlement class and finding that "[t]here is no conflict between the class representatives and the other class members. All share the common goal of maximizing recovery."); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 208 (5th Cir. 1981).

Second, all Class Members share a common interest in obtaining Settling Defendants' cooperation to prosecute the claims against the non-settling Defendants.

Third, all Class Members share the same overriding interests to overcome the procedural dismissal motions, develop the enormous fact record during discovery, overcome the ambiguities and competing explanations, and establish the collusive, successful manipulation of Yen-LIBOR, Euroyen TIBOR, and the prices of Euroyen-Based Derivatives. Further, all Class Members share the interest to successfully show that such manipulation was sufficient to cause injury and to quantify the impact of such manipulation.

2. Plaintiffs' Counsel is adequate.

Plaintiffs and the Settlement Class are represented by experienced and skilled counsel. Class Counsel, Lowey Dannenberg, has prosecuted these litigations for five years. Lowey Dannenberg investigated and brought the *Laydon* case prior to any government settlements in April 2012. This

Court has already authorized and appointed Lowey Dannenberg as Interim Lead Counsel in *Laydon*, having found counsel's experience sufficient and relevant (*Laydon*, ECF No. 99), and as Class Counsel for the R.P. Martin, Citi, and HSBC settlements. ECF No. 264 ¶ 5. The Court has also found that Class Counsel has adequately represented the interests of the settlement class with respect to the R.P. Martin, Citi, and HSBC settlements. ECF No. 298 ¶ 3.

Lowey Dannenberg has vigorously represented the Settlement Class in both Actions, having negotiated the Settlements. Lowey Dannenberg has obtained and will obtain valuable information provided by the Settling Defendants. Deutsche Bank Settlement Agreement ¶ 4; JPMorgan Settlement Agreement ¶ 4. With over 50 years of experience litigating complex class actions, Lowey Dannenberg has achieved some of the most significant class action recoveries under the CEA and has secured almost a billion dollars in recoveries on behalf of Fortune 100 Companies and other sophisticated investors in antitrust and competition-related litigation. July 2017 Briganti Decl., Ex. 7 (Lowey Firm Resume); *see also* Euribor Order I ¶ 6 (appointing Lowey Dannenberg as settlement class counsel in $94 million settlement with Barclays); Euribor Order II ¶ 6 (appointing Lowey Dannenberg as settlement class counsel in $45 million settlement with HSBC).

The same bases justifying the Court's appointment of Lowey Dannenberg as Interim Lead Counsel and as Class Counsel for the R.P. Martin, Citi, and HSBC settlements apply to Lowey Dannenberg's ability and adequacy to serve as class counsel for the Settlement Class for the Deutsche Bank and JPMorgan Settlements. Therefore, upon certifying the Settlement Class, the Court should also appoint Lowey Dannenberg as Class Counsel. The Rule 23(a)(4) requirements that there be no fundamental conflict and adequate counsel are both satisfied.

3. The Court should appoint Class Counsel under Rule 23(g)(1).

Rule 23(g)(1) provides that "a court that certifies a class must appoint class counsel." FED. R. CIV. P. 23(g)(1). Where, as here, only one application is made seeking appointment as class counsel, "the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4)." FED. R. CIV. P. 23(g)(2). For the reasons described above, Lowey Dannenberg is adequate and should be appointed as Class Counsel for the Settlement Class.

B. The proposed Settlement Class satisfies Rule 23(b)(3).

Once Rule 23(a) has been satisfied, Plaintiffs must also conditionally establish (1) "that the questions of law or fact common to class members predominate over any questions affecting only individual members"; and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

Predominance. Certification is proper under Rule 23(b)(3) where "a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Brown v. Kelly*, 609 F.3d 467, 483 (2d Cir. 2010). A plaintiff must show "that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof." *Id.* (ellipses in original). "If the most substantial issues in controversy will be resolved by reliance primarily upon common proof, class certification will generally achieve the economies of litigation that Rule 23(b)(3) envisions." *In re Air Cargo Shipping Servs. Antitrust Litig.*, MDL No. 1775, 2014 WL 180914, at *35 (E.D.N.Y. Oct. 15, 2014).

"Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws[,]" unlike mass tort cases in which the "individual stakes are high and disparities among class members are great." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997); Alba Conte & Herbert Newberg, Newberg on Class Actions §§ 18:28 & 18:29 (4th ed. 2002) (noting that allegations of antitrust conspiracies generally establish predominance of common questions). Many antitrust claims are well suited for class treatment because liability focuses on the defendants' alleged unlawful actions, not the actions of individual plaintiffs. *Compare Amchem*, 521 U.S. at 624, *with Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012).

The "predominance inquiry will sometimes be easier to satisfy in the settlement context." *In re Am. Int'l Grp. Secs. Litig.*, 689 F.3d 229, 240 (2d Cir. 2012). Unlike class certification for litigation purposes, a settlement class presents no management difficulties for the court as settlement, not trial, is proposed. *Amchem*, 521 U.S. at 620; *see also NASDAQ I*, 169 F.R.D. at 517 (stating that the

predominance test is met "unless it is clear that individual issues will overwhelm the common questions and render the class action valueless").

If the claims against the Settling Defendants had not been settled, common questions would have predominated over individual questions in the prosecution of the claims against the Settling Defendants. The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *IPO*, 260 F.R.D. at 92. All Plaintiffs and Class Members must answer the same common factual and legal questions to establish personal jurisdiction, subject matter jurisdiction, the standards for an unlawful agreement, and multiple questions that were raised in various motions to dismiss. These common questions predominate over individual questions. *See Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 105 (2d Cir. 2007) (in price-fixing case, "allegations of the existence of a price-fixing conspiracy are susceptible to common proof").

Superiority. Rule 23(b)(3)'s "superiority" requirement requires a plaintiff to show that a class action is superior to other methods for "fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b). The Court balances the advantages of a class action against alternative available methods of adjudication. *See* FED. R. CIV. P. 23(b)(3)(A)-(D) (listing four non-exclusive factors relevant to this determination). The superiority requirement is applied leniently in the settlement context because the court "need not inquire whether the case, if tried, would present intractable management problems." *Amchem*, 521 U.S. at 620; *Am. Int'l Group*, 689 F.3d at 239-40.

A class action is the superior method for the fair and efficient adjudication of the Actions. *First*, members of the Settlement Class are significant in number and geographically disbursed, making a "class action the superior method for the fair and efficient adjudication of the controversy." *See In re Currency Conversion Fee Antitrust Litig.*, 224 F.R.D. 555, 566 (S.D.N.Y. 2004).

Second, many Class Members have neither the incentive nor the means to litigate these claims. The damages most of the individual Class Members suffered are likely small compared to the very considerable expense and burden of individual litigation, making it uneconomic for an individual to protect his/her rights through an individual suit. That is why no Class Member "has displayed any

interest in bringing an individual lawsuit." *See Meredith Corp.*, 87 F. Supp. 3d at 661. A class action allows claimants to "pool claims which would be uneconomical to litigate individually," as "no individual may have recoverable damages in an amount that would induce him to commence litigation on his own behalf." *Currency Conversion*, 224 F.R.D. at 566.

Third, the prosecution of separate actions by hundreds (or thousands) of individual members of the Settlement Class would impose heavy burdens upon the Court. It would create a risk of inconsistent or varying adjudications of the questions of law and fact common to the Settlement Class. Thus, both prongs of Rule 23(b)(3) are satisfied.

IV. The Court should appoint Citibank, N.A. as Escrow Agent.

Plaintiffs propose that the Court approve Citibank, N.A. as Escrow Agent. Citibank, N.A. currently serves as Escrow Agent for the HSBC settlement and has agreed to provide its services as Escrow Agent at market rates.

V. The Court should approve the Class Notice plan, forms of notice, and Proposed Plan of Allocation.

Plaintiffs intend to use the same notice program that was successfully used for the R.P. Martin, Citi, and HSBC settlements.[9] This notice plan was approved by the Court (ECF No. 223) and resulted in the submission of hundreds of claim forms for transactions worth trillions of Yen in notional value. By building the current notice program onto the prior notice plan, claimants from the last settlements will receive notice of their ability to enhance their recovery and collect from the two Settling Defendants. Claimants in the initial settlements will not have to file a new Proof of Claim and Release if they wish to participate in the Settlements.

The direct-mailing notice program entails mailing the long form notice (July 2017 Briganti Decl., Ex. 4) to the following recipients, among others: (i) large traders on the CME; (ii) clearing brokers on the CME, TFX, SGX, and LIFFE; (iii) the Settling Defendants' counterparties for Euroyen-Based Derivatives during the Class Period, as well as Citi's and HSBC's counterparties; (iv)

[9] Plaintiffs incorporate by reference their Supplemental Memorandum in Support of Motion for Preliminary Approval of Class Action Settlements seeking preliminary approval of the Citi and R.P. Martin Settlements. ECF No. 221.

members of the International Swaps and Derivatives Association ("ISDA"), a global trade association for over-the-counter ("OTC") derivatives responsible for maintaining the standardized ISDA Master Agreement used in OTC Euroyen-based Derivatives transactions; (v) senior executives at hedge funds, investment banks, and real estate companies—the commercial end-users of OTC Euroyen-Based Derivatives; (vi) financial executives, including pension fund managers and derivatives traders, responsible for managing Yen exposure; (vii) a commercially available list of banks, brokers, and other investors; and (viii) the thirty largest foreign exchange and interest rate derivatives dealers in the United States from the Federal Reserve Bank of New York's triennial survey. Young Aff. Ex. A, at 3, attached to the July 2017 Briganti Decl., Ex. 3.

In addition to the far-reaching mailed notice program, Plaintiffs propose providing notice to members of the Settlement Class by publishing the publication notice (July 2017 Briganti Decl., Ex. 5) and continuing to operate the Settlement Website, www.EuroyenSettlement.com, and toll-free telephone number. Young Aff. ¶¶ 8-10, attached to the July 2017 Briganti Decl., Ex. 3. The publication notice will be published in The Wall Street Journal, Investor's Business Daily, the Financial Times, Modern Trader, Stocks & Commodities, Global Capital, Hedge Fund Alert, Grant's Interest Rate Observer, and on various websites, news releases, and in email "blasts" to subscribers to certain publications. These are the same publications that the R.P. Martin, Citi, and HSBC settlements were published in. Further, the Settlement Website is live and, to date, has been visited over 21,000 times for information pertaining to the prior settlements in the Actions. Class Members can call the dedicated toll-free telephone number to ask questions regarding the Settlements. Together, the direct-mailing notice program, Settlement Website, publication notice, and toll-free telephone number amply satisfy 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, if class counsel "acted reasonably in selecting means likely to inform persons affected.").

Moreover, Plaintiffs' Plan of Allocation is fair and adequate. *See Maley v. Del. Global Technologies Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002) ("To warrant approval, the plan of allocation must also meet the standards by which the settlement was scrutinized -- namely, it must

be fair and adequate."). As Plaintiffs previously described (ECF No. 221, at 8-10), Dr. Craig Pirrong created an "artificiality matrix" for Yen-LIBOR and Euroyen TIBOR, which is posted on the Settlement Website. The Net Settlement Funds will be distributed to Settling Class Members by multiplying the Net Artificiality Paid by each Settling Class Member by the Pro Rata Fraction, *i.e.*, the Net Settlement Funds divided by total Net Artificiality Paid by all Settling Class Members who have positive Net Artificiality Paid. For example, if the Net Settlement Funds are $15 million and the sum of the Net Artificiality Paid for all Settling Class Members who have positive Net Artificiality Paid is $150 million, then the Pro Rata Fraction will be 10%. This will determine the amount to be paid to each Settling Class Member.

CONCLUSION

Plaintiffs respectfully request that the Court enter the accompanying proposed Order: (1) granting preliminary approval of the proposed settlements with Deutsche Bank and JPMorgan; (2) conditionally certifying the Settlement Class for the claims against Deutsche Bank and JPMorgan for purposes of sending notice to the Class; (3) appointing Lowey Dannenberg as Class Counsel; (4) appointing Citibank, N.A. as the Escrow Agent for the Deutsche Bank Settlement and JPMorgan Settlement; (5) appointing A.B. Data, Ltd. as Settlement Administrator; (6) approving Plaintiffs' proposed Class notices and proposed notice plan; (7) approving Plaintiffs' Plan of Allocation for the Settlements; and (8) setting a schedule leading to the Court's consideration of final approval of the Settlement Agreements.

Dated: July 21, 2017
White Plains, New York

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