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 DEUTSCHE BANK AG, DB GROUP SERVICES (UK) LTD., JPMORGAN CHASE & CO., JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, AND J.P. MORGAN SECURITIES PLC

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INTRODUCTION

Under Rule 23 of the Federal Rules of Civil Procedure ("Federal Rules") and Paragraph 38 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* Action"), ECF No. 796, and S*onterra Capital Master Fund Ltd., et al. v. UBS AG, et al.*, No. 15-cv-5844 (GBD) (S.D.N.Y. Sept. 14, 2017) ("*Sonterra* Action"), ECF No. 355 (the "Superseding Order"), Plaintiffs,[1] through their counsel, Lowey Dannenberg, P.C. ("Class Counsel"), respectfully submit this Memorandum of Law, the accompanying Declaration of Vincent Briganti, Esq. ("Briganti 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 Deutsche Bank[2] and JPMorgan[3] (the "Settlements"), approval of the Plan for Allocation, and certification of the Settlement Class.

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[1] The "Plaintiffs" are Jeffrey Laydon, Sonterra Capital Master Fund, Ltd., Hayman Capital Master Fund, L.P. and Japan Macro Opportunities Master Fund, L.P. (collectively, "Hayman"), and California State Teachers' Retirement System ("CalSTRS"). Unless otherwise noted, ECF citations are to the docket in the *Sonterra* Action, and internal citations and quotation marks are omitted. Unless otherwise defined, capitalized terms herein have the same meaning as in the Deutsche Bank Settlement Agreement and JPMorgan Settlement Agreement. ECF Nos. 338-1; 338-2. Certain defendants in other "IBOR"-related actions pending in this District have challenged whether Sonterra has a capacity to sue under FED. R. CIV. P. 17 because it has dissolved. *See FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A. et al.*, No. 16-cv-5263, ECF No. 243 at 13-16 (S.D.N.Y. Oct. 18, 2017); *Dennis v. JPMorgan Chase & Co. et al.*, no. 16-cv-6496, ECF No. 184 (S.D.N.Y. Oct. 19, 2017). Plaintiffs believe defendants' arguments are without merit because, for among other reasons, Sonterra unconditionally and irrevocably assigned, and transferred certain rights, title, and interests in its assets, including, without limitation, Sonterra's rights to recover any and all amounts payable on such assets, prior to its dissolution and further granted its assignee an irrevocable power of attorney that included, among other powers, the right to take all action in respect to such assets, including, without limitation, the right, power, and authority to participate and commence suit on behalf of Sonterra, and in Sonterra's name, place and stead. In any event, the capacity to sue issue raised in these other actions with respect to Sonterra (but one of the Representative Plaintiffs here) is of no consequence to the Court's ability to grant final approval of the Settlements. *See* ECF Nos. 338-1 ¶ 1(KK); 338-2 ¶ 1(KK) ("In the event that one or more Representative Plaintiff(s) fails to secure court approval to act as a Representative Plaintiff, the validity of this Settlement Agreement as to the remaining Representative Plaintiffs, the Settlement Class, and Interim Lead Counsel shall be unaffected.").

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

[3] "JPMorgan" means JPMorgan Chase & Co., JPMorgan Chase Bank, National Association, and J.P. Morgan Securities plc. Together, JPMorgan and Deutsche Bank are referred to as the "Settling Defendants." The Settling Defendants consent to the instant motion for final approval of their respective settlements with Plaintiffs and without prejudice to any position Settling Defendants may take (including with respect to the issue identified in footnote 1) in any other action, or in these Actions if the Settlements are terminated.

Pursuant to the order preliminarily approving the Settlements ("Preliminary Approval Order"), entered on August 3, 2017 (ECF No. 345) and the Superseding Order, the Settlement Administrator executed the Class Notice plan to disseminate Mailed Notice to Class Members informing them, *inter alia*, that Deutsche Bank and JPMorgan agreed to pay an aggregate amount of $148,000,000, in addition to providing cooperation in the ongoing prosecution of claims against the non-settling Defendants. *See* Miller Aff. ¶¶ 4-12. The Class Notice plan was set forth at length in Exhibit A to the Affidavit of Linda Young (ECF No. 338-3) submitted in connection with Plaintiffs' motion for preliminary approval of the Settlements. As Eric J. Miller, the Vice President of Client Services for A.B. Data, describes in his affidavit accompanying this memorandum, the Settlement Administrator implemented the Class Notice plan in accordance with the Superseding Order. *See* Miller Aff.

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

Class Counsel prepared the 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. ¶¶ 72-73; ECF No. 275 (Declaration of Kenneth R. Feinberg) ¶ 3. Class Counsel has litigated the *Laydon* Action and *Sonterra* Action (collectively, the "Actions") for over five-and-a-half years and recommends to the Court that the Plan of Allocation, which is the same Plan of Allocation that the

Court granted final approval to in connection with the Citi, HSBC, and R.P. Martin settlements (ECF No. 298 ¶ 20), be applied to allocate the Deutsche Bank and JPMorgan Settlements.

Plaintiffs respectfully request that the Court grant Final Approval of the Settlements, in the form of the order annexed hereto, approve application of the Plan of Allocation, and enter Final Judgment dismissing the claims against Deutsche Bank and JPMorgan with prejudice on the merits, in the form of the order annexed hereto, 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 procedural histories of the Actions and the terms of the Settlements are discussed in detail in Plaintiffs' preliminary approval motion and the accompanying declaration of Vincent Briganti. *See* ECF Nos. 338, 338-1, 338-2. On July 21, 2017, Plaintiffs moved for preliminary approval of the Deutsche Bank and JPMorgan Settlements. *See* ECF Nos. 336-39 (the "Preliminary Approval Motion"). On August 3, 2017, the Court held the preliminary approval hearing and issued an order preliminarily approving Plaintiffs' motion. ECF No. 345. On Plaintiffs' motion, the Court issued the Superseding Order on September 14, 2017.[4] ECF No. 355. Through these two negotiated Settlements, the Settlement Class will receive a substantial monetary recovery of $148,000,000 (less such fees and expenses as are approved by the Court), in addition to the cooperation Deutsche Bank and JPMorgan have provided and will continue to provide to Plaintiffs to assist in prosecuting claims against the non-settling Defendants. This sum, plus the $58,000,000 already approved from the Citi and HSBC Defendants, provides the Settlement Class with $206,000,000 to date. As

[4] Plaintiffs moved for the Superseding Order to accommodate JPMorgan's request for additional time to produce the contact information of its U.S.-based counterparties to Euroyen-based derivatives transactions for notice purposes.

described more fully below, the Settlements are procedurally and substantively fair, and all 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 the declarations filed with Plaintiffs' Preliminary Approval Motion and this motion, the Settlements were reached after extensive arm's-length, non-collusive negotiations. *See* ECF No. 338 ¶¶ 22-44; Briganti Decl. ¶¶ 76-79. Plaintiffs have been represented by counsel with extensive class action, antitrust, Commodity Exchange Act ("CEA"), and trial experience, which is strong evidence that the Settlements are procedurally fair. *See In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 122 (S.D.N.Y. 2009) (noting the "extensive" experience of counsel in granting final approval of settlement); *see also Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331 (CM) (MHD), 2014 WL 1224666, at *2 (S.D.N.Y. Mar. 24, 2014) (giving "great weight" to experienced class

counsel's opinion that the settlement was fair); ECF No. 338-7 (attaching Class Counsel's firm resume).

The $77,000,000 Deutsche Bank Settlement was 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.[5] Representatives from CalSTRS and Deutsche Bank, and their respective counsel, participated in a full-day mediation with Judge Weinstein. His assistance was invaluable in reaching a resolution. *See* Briganti Decl. ¶¶ 77, 79; *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 [s]ettlement was reached after exhaustive arm's-length negotiations, with the assistance of a private mediator experienced in complex litigation, is further proof that it is fair and reasonable."); *deMunecas v. Bold Food, LLC,* No. 09 Civ. 00440 (DAB), 2010 WL 3322580, at *4 (S.D.N.Y. Aug. 23, 2010) ("Arm's-length negotiations involving counsel and a mediator raise a presumption that the settlement they achieved meets the requirements of due process."); *In re Elec. Books Antitrust Litig.*, No. 11-md-2293 (DLC), 2014 WL 3798764, at *2 (S.D.N.Y. Aug. 1, 2014) ("The assistance of a well-known mediator . . . reinforces the conclusion that the [s]ettlement [a]greement is non-collusive.").

The JPMorgan Settlement was negotiated over the course of 20 months, starting in November 2015, during which time the parties and their counsel participated in numerous meetings and conferences. *See* Briganti Decl. ¶ 78. Counsel for each side at all times engaged in hard-fought negotiations, expressing their views of the strengths and weaknesses of the Actions. After months of bargaining and in-depth discussion, Plaintiffs and JPMorgan reached an agreement regarding the terms of the JPMorgan Settlement to benefit the Plaintiffs and the Settlement Class. *Id.* ¶¶ 78-79.

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[5] Judge Weinstein has mediated over 3,000 complex disputes, including antitrust, securities, and intellectual property cases, and has received numerous awards for his dispute resolution services. ECF Nos. 339, 339-1.

The Settlement Class 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, document discovery produced to date in the *Laydon* Action, and settlement cooperation obtained pursuant to the already-approved R.P. Martin, Citi, and HSBC settlements. *See, e.g., id.* ¶¶ 2, 7, 10, 12-13, 17-26, 28-32, 34, 37, 39, 42-52, 57-64, 72. Class Counsel had researched and considered a wide range of relevant legal issues and analyzed the facts uncovered to date.

Further, throughout the negotiation and discovery process, Plaintiffs and Settling Defendants had numerous opportunities to articulate and refine their positions, and engaged in conference calls to address specific arguments related to liability and damages. *Id.* ¶¶ 76-79. 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 CEA and antitrust claims (among others), their knowledge of the strengths and weaknesses of Plaintiffs' claims, their assessment of the Settlement Class' likely recovery following trial and appeal, and the oversight of an experienced mediator with respect to the Deutsche Bank Settlement (*id.*), the Settlements are entitled to a presumption of procedural fairness.

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

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

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

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

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

The first Grinnell factor is "the complexity, expense and likely duration of the litigation." *Grinnell*, 495 F.2d at 463. "Class actions have a well-deserved reputation as being most complex," *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998) ("*NASDAQ III*"), with antitrust and commodities cases standing out as some of the most "complex, protracted, and bitterly fought." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 670 (S.D.N.Y. 2015); *see also In re Platinum and Palladium Commodities Litig.,* No. 10 Civ. 3617, 2014 WL 3500655, at *12 (S.D.N.Y. July 15, 2014) (noting that commodities cases are "complex and expensive" to litigate); *In re Vitamin C Antitrust Litig.*, No. 06-md-1738 (BMC), 2012 WL 5289514, at *4 (E.D.N.Y. Oct. 23, 2012). 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, millions of pages of documents produced to Plaintiffs, and discovery remains ongoing.

The Deutsche Bank Settlement provides for a payment of $77,000,000 and cooperation, while the JPMorgan Settlement provides for a payment of $71,000,000 and cooperation. This valuable cooperation includes, 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. ECF No. 338-1 (Deutsche Bank Settlement Agreement) ¶ 4; ECF No. 338-2 (JPMorgan Settlement Agreement) ¶ 4. Additionally, Deutsche Bank and JPMorgan have provided contact information for their U.S.-based Euroyen-Based Derivatives counterparties, facilitating the Settlement Administrator's identification of potential members of the Settlement Class. *See* Miller Aff. ¶ 9.

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; (v) documents produced to date in the *Laydon* Action; and (vi) settlement cooperation obtained pursuant to the already-approved R.P. Martin, Citi, and HSBC settlements. *See*, *e.g.*, Briganti Decl. ¶ 76. In addition, Class Counsel (a) conducted an extensive investigation into the facts and legal issues in this action; (b) engaged in extensive negotiations with Deutsche Bank and JPMorgan; 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. *Id.* ¶¶ 4, 72, 76-78.

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."). Further, in the *Sonterra* Action, Plaintiffs have appealed the dismissal of their claims against the non-settling Defendants to the Second Circuit. The appeal is likely to take a considerable amount of time, be costly and may ultimately result in additional motion practice or appeals.

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 Motion, all of the named Plaintiffs favor the Settlements. ECF No. 337, at 14; *see also* Bartow Decl. ¶¶ 13-15. Plaintiffs, including CalSTRS, the largest educator-only retirement fund in the United States with approximately $213.5 billion in assets (as of July 31, 2017) 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 members of the Settlement Class upon reviewing the Settlements. Additionally, any class member who does not favor the Settlements may opt-out.

Further, in connection with the previous settlements with Citi and HSBC, over 25,000 claims were made for compensation from the common fund; only four potential members of the Settlement Class excluded themselves, and there were no objections. ECF No. 289-1; Tr. of Aug. 3, 2017 Preliminary Approval Hearing at 4. Given the level of participation in the previous settlements, we anticipate a similar reaction by the Settlement Class.

In accordance with the Preliminary Approval Order, Superseding Order, the Class Notice plan was and is being carried out as described in the Miller Aff. To provide additional time and information for members of the Settlement Class to evaluate the Settlements, we have filed this motion in advance of the deadline for objecting, and may supplement this argument to address any objections. To date, A.B. Data has received three requests for exclusion and no objections. Miller Aff. ¶¶ 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.*

Plaintiffs conducted extensive factual and legal research and consulted experts to assess the merits of their claims. Briganti Decl. ¶¶ 2-4, 10-14, 18, 21, 34, 37, 64. 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.* At the time the Settlements were being negotiated, 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 generally* Briganti Decl. ¶¶ 17-32, 42-48. Plaintiffs also have the benefit of settlement cooperation produced under the terms of the HSBC, Citi, and R.P. Martin Settlements and the discovery produced to date. *Id.* ¶¶ 65-69. 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 Motion, Plaintiffs faced numerous risks concerning the viability of their claims, damages, and admissible proof. *See, e.g.*, ECF No. 337 at 11-13.

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."). In fact, the Court dismissed the *Sonterra* Action

finding that Plaintiffs lacked standing. This issue has been appealed to the Second Circuit and adds further risk to establishing liability.

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. Ltd. P'ships Litig.*, MDL No. 105, M-21-67 (MP), 1995 WL 798907, at *14 (S.D.N.Y. Nov. 20, 1995). But the answers to the key common questions of fact and law for all Settling Class Members' claims will be hotly disputed and Class Counsel will seek to overcome all of the foregoing risks.

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

Plaintiffs' impact and damages theories against Deutsche Bank and JPMorgan 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." *See Meredith Corp.*, 87 F. Supp. 3d at 665. If the Court certified the proposed class, Settling Defendants would almost certainly seek interlocutory appeal pursuant to FED. R. CIV. P. 23(f), which 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.* Having noted these potential risks, Plaintiffs have more than carried their burden of demonstrating that each of the Rule 23 elements has been met.

(d) Trial Risks

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

(e) Weighing the Risks

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

5. The ability of Settling Defendants to withstand greater judgment

The seventh *Grinnell* factor, "the ability to withstand a greater judgment" (*Grinnell*, 495 F.2d at 463), does not militate against granting final approval. Deutsche Bank and JPMorgan have the ability to withstand a greater judgment than $77,000,000 and $71,000,000, respectively, but this factor alone does not bear on the appropriateness of the Settlements. *See In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. at 460 ("'[T]he fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate.'"); *In re Tronox Inc.*, No. 14-cv-5495 (KBF), 2014 WL 5825308, at *6 (S.D.N.Y. Nov. 10, 2014) ("The law does not require a defendant to completely empty its pockets before a settlement may be approved– indeed, if it did, it is hard to imagine why a defendant would ever settle a case."). While Deutsche Bank and JPMorgan could survive a higher judgment, courts routinely observe that "'this determination in itself does not carry much weight in evaluating the fairness of the Settlement.'" *See In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL. 1695 (CM), 2007 WL 4115809, at *11 (S.D.N.Y. Nov. 7, 2007). With all other criteria satisfied, this factor is insignificant. *Cf.* Tr. of Nov. 21, 2014 Final Approval Hearing, *In re Elec. Books Antitrust Litig.*, 11-md-2293 (DLC) (S.D.N.Y. Nov. 21, 2014), ECF No. 686 at 13:22-24 (granting final approval where defendant's ability to withstand greater judgment was not "in dispute").

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

Grinnell factors eight and nine are "(8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *Grinnell*, 495 F.2d at 463. The recovery in these Settlements is substantial. This is particularly true in light of (a) the cooperation Plaintiffs have received and will continue to receive; (b) the number of defendants yet to settle; (c) the risks involved in not settling, as described *supra,* at I.B.4; and (d) this Court's March 10, 2017

Order dismissing the *Sonterra* Action. The monetary relief that Deutsche Bank and JPMorgan have paid and the cooperation that they have agreed to provide is very significant considering 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).

"The adequacy of the amount achieved in settlement is not to be judged 'in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case.'" *Meredith Corp.*, 87 F. Supp. 3d at 665-66; *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989) (same). "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.) (holding settlements of 3.8% of plaintiffs' estimated damages to be within the range of reasonableness, and recovery of 6.25% of estimated damages to be "at the higher end of the range of reasonableness of recovery in class action securities litigations.").

The range of possible recoveries here is broad. 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' alleged manipulation of Yen-LIBOR and Euroyen TIBOR caused artificiality in Euroyen-Based Derivatives. Plaintiffs would then have to demonstrate the amount of harm suffered due to 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 and the Class could possibly recover billions of dollars. While the monetary compensation Deutsche Bank and JPMorgan provided under the Settlements 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 in that they 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 CLASS NOTICE WAS ADEQUATE AND SATISFIED DUE PROCESS

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

The Court previously approved the Class Notice plan, as set forth in the Preliminary Approval Motion. ECF No. 337. The Class Notice plan has been carried out in accordance with the Preliminary Approval Order and Superseding Order. *See* Miller Aff. Information regarding the Settlements, including downloadable copies of the Settlement Agreements, Mailed Notice, Proof of Claim and Release form, Preliminary Approval Order, and other relevant documents (as well as a toll-free telephone number to answer members of the Settlement Class's questions and facilitate filing of claims) were also posted on a dedicated website created and maintained by the Settlement Administrator at www.EuroyenSettlement.com. Miller Aff. ¶¶ 19-23.

The Class Notice plan, as well as the mailed notice and published notice, satisfy due process. The mailed notice and published notice are written in clear and concise language, which "'may be understood by the average class member.'" *See Wal-Mart*, 396 F.3d at 114. Members of the Settlement Class were provided with a full and fair opportunity to consider the proposed Settlements and to respond and/or appear in Court. The Supreme Court has consistently found that mailed notice satisfies the requirements of due process. *See, e.g., Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950). In addition to an extensive mailed notice program, Plaintiffs' Class Notice plan consists of published and online notice—which easily satisfies the Rule 23(c)(2)(B) factors and due process. *See Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir. 1988) (due process does not require actual notice to every class member as long as class counsel "acted reasonably in selecting means likely to inform persons affected."). Because Plaintiffs' Class Notice plan is the best under the circumstances, the Court should finally approve the forms and methods of notice as implemented.

III. THE SETTLEMENT CLASS SATISFIES ALL REQUIREMENTS OF RULE 23

For all of the reasons detailed in the Preliminary Approval Motion and as held in

the Court's Superseding Order (ECF No. 355), 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.[6]

There are at least hundreds, if not thousands, of geographically dispersed persons and entities that fall within the Settlement Class definition. *See* ECF No. 338 ¶ 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* ECF No. 337, at 16.

Plaintiffs' claims are typical of those of the entire Settlement Class because the 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 Deutsche Bank and JPMorgan; and (3) in prosecuting claims against the remaining non-settling defendants. 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

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[6] 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. ECF No. 338-1 (Deutsche Bank Settlement Agreement) ¶ 2(E); ECF No. 338-2 (JPMorgan Settlement Agreement) ¶ 22(E).

Derivatives is common across the Settlement Class. A class action is superior because Settlement Class members have no substantial interest in proceeding individually given the complexity and expense of the litigation. ECF No. 338-7

IV. THE PREVIOUSLY APPROVED PLAN OF ALLOCATION WILL APPLY TO THE SETTLEMENTS

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).[7]

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

B. The Court previously approved the Plan of Allocation

Class Counsel has given notice of the Plan of Allocation to the Settlement Class. *See* http://www.EuroyenSettlement.com. Based on the specific methodologies and basis for the Plan of Allocation set forth at length in the Declaration of Dr. Craig Pirrong in Support of Preliminary

[7] *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).

Approval of Class Action Settlement, dated June 16, 2016 ("Pirrong Decl.") (ECF 263-1), the procedural safeguards implemented to consider litigation risk discounts supervised by nationally-recognized mediator, Kenneth Feinberg, Esq. (Briganti Decl. ¶ 73; ECF No. 287) and Class Counsel's previous submissions to this Court for approval of the Citi and HSBC settlements (ECF Nos. 188-89, 221-22, 261-63, 274, 279), this court approved the Plan of Allocation as fair, reasonable and adequate. ECF No. 298 ¶ 20. Class Counsel, who have litigated these Actions for the past five-and-a-half years and are highly experienced in litigation, including antitrust and commodities manipulation class actions, continue to recommend the Plan of Allocation. *See generally* Briganti Decl.; *see also* ECF No. 338-7 (attaching Class Counsel's firm resume). The Court should once again approve the Plan of Allocation to apply to the Deutsche Bank and JPMorgan Settlements.

C. Approval of the 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"). Further, courts have repeatedly recognized that the equitable power to determine, amend, or supplement a fair method of allocation may be exercised after final judgment has been entered. *See In re Platinum and Palladium Commodities Litig.*, 2014 WL 3500655, at *3 (stating that the plan of allocation was "subject to revision by this court"); *In re Amaranth Natural Gas Commodities Litig.*, No. 07 Civ. 6377 (S.D.N.Y. May 23, 2012), ECF No. 413 ¶ 6 (modifying final judgment to reflect plan of allocation).

Here, as is common in complex class actions, the Deutsche Bank and JPMorgan Settlements contemplate that the approval of each Settlement should be considered separate and apart from the consideration of the plan of allocation. ECF No. 338-1, ¶ 16(B); ECF No. 338-2, ¶ 16(B).

For all the reasons set forth above, the Plan of Allocation fully satisfies the standards for final approval. Any concerns that the Court may have regarding the 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 application of the previously-approved Plan of Allocation to the Deutsche Bank and JPMorgan Settlements.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court: (i) grant Final Approval; (ii) approve the application of the previously-approved 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 two Settling Defendants and a Proposed Final Approval Order have been submitted to the Orders and Judgments Clerk pursuant to Southern District ECF Rule 18.2.

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