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

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)

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT WITH THE BANK OF YOKOHAMA, LTD., SHINKIN CENTRAL BANK, THE SHOKO CHUKIN BANK, LTD., SUMITOMO MITSUI TRUST BANK, LTD., AND RESONA BANK, LTD.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 3

I. The Court should preliminarily approve the Settlement. 3

A. The preliminary approval standard. 3

B. The Settlement is procedurally fair. 4

1. The Settlement releases claims arising from the same factual predicate. 4

2. The Released Claims have been and are adequately represented. 6

3. The Settlement was the product of arm's length negotiations. 9

C. The Settlement is substantively fair. 11

1. The costs, risks, and delay of trial and appeal favor the Settlement. 12

2. The remaining Grinnell factors also support final approval of the Settlement. 14

a. The reaction of the Class to the Settlement. 14

b. The stage of the proceedings and the amount of discovery completed. 15

c. The ability of Settling Defendants to withstand greater judgment. 16

d. The Settlement is reasonable in light of the risks and potential range of recovery. 16

3. The plan of distribution provides an effective method for distributing relief, satisfying Rule 23(e)(2)(c)(ii). 18

4. The requested attorneys' fees are limited to ensure that the Class receives adequate relief. 19

5. There are no unidentified agreements that would impact the adequacy of the relief for the Settlement Class. 20

6. The Settlement treats the Class equitably and does not provide any preferences. 20

II. The Court should conditionally certify the Settlement Class for the purposes of the Settlement. 21

A. The Settlement Class meets the Rule 23(a) requirements. 22

1. Numerosity 22

2. Commonality 22

3. Typicality 23

4. Adequacy 23

a. The Court should appoint Class Counsel under Rule 23(g)(1). 24

B. The proposed Settlement Class satisfies Rule 23(b)(3). 25
1. Predominance....25
2. Superiority....26
III. The Court should appoint Citibank, N.A. as Escrow Agent. 27
IV. The Court should approve the Class Notice plan and forms of notice. 27
CONCLUSION....31

TABLE OF AUTHORITIES

Cases

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 25, 26

Baffa v. Donaldson, Lufkin & Jenrette Secs. Corp.,
222 F.3d 52 (2d Cir. 2000) 23

Beckman v. KeyBank, N.A.,
293 F.R.D. 467 (S.D.N.Y. 2013) 3

Brown v. Kelly,
609 F.3d 467 (2d Cir. 2010) 25

City of Detroit v. Grinnell Corp.,
495 F.2d 448 (2d Cir. 1974) 11, 14

Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.,
502 F.3d 91 (2d Cir. 2007) 26

Erica P. John Fund, Inc. v. Halliburton Co.,
No. 02CV1152, 2018 WL 1942227 (N.D. Tex. Apr. 25, 2018) 20

Goldberger v. Integrated Res., Inc.,
209 F.3d 43 (2d Cir. 2000) 11

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

In re "Agent Orange" Prod. Liab. Litig.,
818 F.2d 145 (2d Cir. 1987) 29

In re Adelphia Commc'ns Corp. Secs. and Derivative Litig.,
272 Fed. App'x 9 (2d Cir. 2008) 6

In re Air Cargo Shipping Servs. Antitrust Litig.,
No. 06-md-1775 (JG)(VVP), 2009 WL 3077396 (E.D.N.Y. Sept. 25, 2009) 9

In re Air Cargo Shipping Servs. Antitrust Litig.,
No. 06-md-1775 (JG)(VVP), 2014 WL 7882100 (E.D.N.Y. Oct. 15, 2014) 25

In re Am. Int'l Grp. Secs. Litig.,
689 F.3d 229 (2d Cir. 2012) 26

In re AOL Time Warner, Inc. Sec. & ERISA Litig.,
MDL No. 1500, 02-civ-5575 (SWK), 2006 WL 903236 (S.D.N.Y. Apr. 6, 2006) 15

In re Austrian and German Bank Holocaust Litig.,
80 F. Supp. 2d 164 (S.D.N.Y. 2000) 9

In re Currency Conversion Fee Antitrust Litig.,
224 F.R.D. 555 (S.D.N.Y. 2004) 27

In re Currency Conversion Fee Antitrust Litig.,
263 F.R.D. 110 (S.D.N.Y. 2009) 9, 14

In re Flag Telecom Holdings, Ltd. Sec. Litig.,
574 F.3d 29 (2d Cir. 2009) 23

In re Gen. Am. Life Ins. Co. Sales Practices Litig.,
357 F.3d 800 (8th Cir. 2004) 21

In re Global Crossing Sec. & ERISA Litig.,
225 F.R.D. 439 (S.D.N.Y. 2004) 16, 24

In re Initial Pub. Offering Sec. Litig.,
260 F.R.D. 81 (S.D.N.Y. 2009) 22

In re Marsh ERISA Litig.,
265 F.R.D. 128 (S.D.N.Y. 2010) 16

In re NASDAQ Mkt.-Makers Antitrust Litig.,
169 F.R.D. 493 (S.D.N.Y. 1996) ("*NASDAQ I*") 26

In re NASDAQ Mkt.-Makers Antitrust Litig.,
176 F.R.D. 99 (S.D.N.Y. 1997) ("*NASDAQ II*") 16, 18, 20

In re NASDAQ Mkt.-Makers Antitrust Litig.,
187 F.R.D. 465 (S.D.N.Y. 1998) ("*NASDAQ III*") 13

In re Nortel Networks Corp. Sec. Litig.,
539 F.3d 129 (2d Cir. 2008) 19

In re Online DVD-Rental Antitrust Litig.,
779 F.3d 934 (9th Cir. 2015) 20

In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.,
330 F.R.D. 11 (E.D.N.Y. 2019) 3, 4, 8, 11, 12, 20

In re Platinum & Palladium Commodities Litig.,
No. 10-cv-3617, 2014 WL 3500655 (S.D.N.Y. July 15, 2014) 4, 18

In re Sony Corp. SXRD Rear Projection TV Mktg.,
No. 09-MD-2102, 2010 WL 1993817 (S.D.N.Y. May 19, 2010) 31

In re Tronox Inc.,
No. 14-cv-5495 (KBF), 2014 WL 5825308 (S.D.N.Y. Nov. 10, 2014) 16

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

In re WorldCom, Inc. Secs. Litig.,
No. 02-cv-3288, 2007 WL 1946685 (S.D.N.Y. July 5, 2007) 6

Laydon v. Mizuho Bank, Ltd.,
No. 12-cv-3419, 2014 WL 1280464 (S.D.N.Y. Mar. 14, 2014) 6

Maley v. Del. Global Tech. Corp.,
186 F. Supp. 2d 358 (S.D.N.Y. 2002) 18

Marisol A. by Forbes v. Giuliani,
126 F.3d 372 (2d Cir. 1997) 23

Meredith Corp. v. SESAC, LLC,
87 F. Supp. 3d 650 (S.D.N.Y. 2015) 13

Messner v. Northshore Univ. HealthSystem,
669 F.3d 802 (7th Cir. 2012) 25

Mullane v. Cent. Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 29

Shapiro v. JPMorgan Chase& Co.,
No. 11 Civ. 8331 (CM) (MHD), 2014 U.S. Dist. LEXIS 37872 (S.D.N.Y. Mar. 24, 2014) 9

Soberal-Perez v. Heckler,
717 F.2d 36 (2d Cir. 1983) 28

Sykes v. Mel Harris and Assocs., LLC,
285 F.R.D. 279 (S.D.N.Y. 2012) 23

TBK Partners, Ltd. v. W. Union Corp.,
675 F.2d 456 (2d Cir. 1982) 6

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 22

Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,
396 F.3d 96 (2d Cir. 2005) 3, 4, 6, 7, 21, 27

Weigner v. City of New York,
852 F.2d 646 (2d Cir. 1988) 28

Weinberger v. Kendrick,
698 F.2d 61 (2d Cir. 1982) 7, 21

Rules

FED. R. CIV. P. 23..... 3, 4, 11, 12, 22, 23, 24, 25, 26, 28

Treatises

Wright and Miller, 7AA FED. PRAC. & PROC. CIV. § 1781 (3d ed.).....25

INTRODUCTION

Plaintiff Jeffrey Laydon moves under Rule 23 of the Federal Rules of Civil Procedure for preliminary approval of a $31,750,000 settlement with Defendants The Bank of Yokohama, Ltd. ("The Bank of Yokohama"), Shinkin Central Bank ("Shinkin"), The Shoko Chukin Bank, Ltd. ("Shoko Chukin"), Sumitomo Mitsui Trust Bank, Ltd. ("Sumitomo"),[1] and Resona Bank, Ltd. ("Resona," and collectively with The Bank of Yokohama, Shinkin, Shoko Chukin, and Sumitomo, the "Settling Defendants").[2]

This Court previously approved six settlements with BTMU and MUTB,[3] Deutsche Bank,[4] JPMorgan,[5] HSBC,[6] Citi,[7] and R.P. Martin,[8] respectively, involving the same proposed Settlement Class in *Laydon* and the related *Sonterra Capital* case.[9] These earlier settlements resulted in a collective recovery of $236,000,000 along with substantial cooperation. *See* ECF Nos. 891, 838, 720 (prior final

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[1] Sumitomo Mitsui Trust Bank, Limited was formerly known, and was sued as The Sumitomo Trust and Banking Co., Ltd. ("STB"). The Chuo Mitsui Trust and Banking Company, Limited, which was also sued in the *Laydon* action, merged into STB prior to the action to form Sumitomo Mitsui Trust Bank, Limited.

[2] Unless otherwise noted, capitalized terms used herein have the same meaning as defined in the Amended Stipulation and Agreement of Settlement with The Bank of Yokohama, Shinkin, Shoko Chukin, Sumitomo, and Resona dated September 5, 2019 (the "Settlement Agreement" or "Agreement"), attached as Exhibit 1 to the Declaration of Vincent Briganti, Esq. dated September 6, 2019 ("September 2019 Briganti Decl."). Unless otherwise noted, internal citations and quotation marks are omitted and ECF citations are to the docket in the *Laydon* action.

[3] "BTMU" means The Bank of Tokyo-Mitsubishi UFJ, Ltd., now known as MUFG Bank. "MUTB" means Mitsubishi UFJ Trust and Banking Corporation. The "BTMU/MUTB settlement" refers to the settlement agreement between Representative Plaintiffs, BTMU, and MUTB, dated January 23, 2018. ECF No. 851-1.

[4] "Deutsche Bank" means Deutsche Bank AG and DB Group Services (UK) Ltd. The "Deutsche Bank settlement" means the settlement agreement between Representative Plaintiffs and Deutsche Bank, dated July 21, 2017. ECF No. 775-1.

[5] "JPMorgan" means JPMorgan Chase & Co., JPMorgan Chase Bank, National Association, and J.P. Morgan Securities plc. The "JPMorgan settlement" means the settlement agreement between Representative Plaintiffs and JPMorgan, dated July 21, 2017. ECF No. 775-2.

[6] "HSBC" means HSBC Holdings plc and HSBC Bank plc. The "HSBC settlement" means the settlement agreement between Representative Plaintiffs and HSBC, dated June 16, 2016. ECF No. 656-1.

[7] "Citi" means Citibank, N.A., Citigroup Inc., Citibank Japan Ltd., and Citigroup Global Markets Japan Inc. The "Citi settlement" means the settlement agreement between Representative Plaintiffs and Citi, dated August 11, 2015. ECF No. 567-2.

[8] "R.P. Martin" means R.P. Martin Holding Limited and Martin Brokers (UK) Ltd. The "R.P. Martin settlement" means the settlement agreement between Representative Plaintiffs and R.P. Martin, dated December 3, 2014. ECF No. 567-1.

[9] *Sonterra Capital Master Fund, Ltd. v. UBS AG*., No. 15-cv-5844 (GBD) (S.D.N.Y.).

approval orders). This Settlement is similar to those prior settlements, except that approval with respect to the entire Settlement Class is sought only in the *Laydon* action because the *Sonterra Capital* action is on appeal. The underlying Settlement, however, was entered into between the Settling Defendants, on the one hand, and the Representative Plaintiffs in both the *Laydon* action and the *Sonterra Capital* action, on the other hand. The Settlement is also similar to the settlement Plaintiff reached with Mizuho Bank, Ltd., Mizuho Corporate Bank, Ltd.,[10] and Mizuho Trust & Banking Co., Ltd. (collectively, "Mizuho"), The Norinchukin Bank ("Norinchukin"), and Sumitomo Mitsui Banking Corporation ("SMBC") (hereinafter referred to as the "August 29 Settlement") and submitted to the Court last week in a separate motion for preliminary approval. *See* ECF Nos. 957-960. If the Settlement and the August 29 Settlement are approved, the Settlement Class's total recovery will increase to $307,000,000.

As discussed below, the Settlement fully satisfies the requirements for preliminary approval. *See infra*. The Court therefore should grant Plaintiff's motion and enter the proposed order for the Settlement, which:

(a) preliminarily approves the Settlement, subject to later, final approval;

(b) conditionally certifies a Settlement Class on the claims against the Settling Defendants;

(c) appoints Jeffrey Laydon as a representative of the Settlement Class;

(d) appoints Lowey Dannenberg, P.C. ("Lowey Dannenberg") as Class Counsel for the Settlement Class;

(e) appoints Citibank, N.A. ("Citibank") as Escrow Agent for purposes of the Settlement Fund;

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

[10] On July 1, 2013, Mizuho Bank, Ltd. merged with Mizuho Corporate Bank, Ltd. After the merger, Mizuho Corporate Bank, Ltd. was the surviving entity and Mizuho Bank, Ltd. dissolved. The new entity was renamed Mizuho Bank, Ltd.

(g) approves the proposed forms of Notice to the Settlement Class of the Settlement and the August 29 Settlement with the Settling Defendants, Mizuho, Norinchukin and SMBC (September 2019 Briganti Decl. Exs. 3-5) and the proposed Notice plan (*id.*, Ex. 2);

(h) approves the Distribution Plan (ECF No. 657-5) with respect to the Settlement;

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

(j) stays all proceedings as to the Settling Defendants except with respect to approval of the Settlement.

See [Proposed] Preliminary Approval Order, filed herewith.

ARGUMENT

I. The Court should preliminarily approve the Settlement.

A. The preliminary approval standard.

There is a "strong judicial policy in favor of settlements, particularly in the class action context." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("*Wal-Mart Stores*"). "[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).

The Court may preliminarily approve and direct notice of the proposed Settlement to the Settlement Class if it is likely that the Court, after hearing, will find that the Settlement satisfies FED. R. CIV. P. 23(e)(2) and the Settlement Class may be certified for the Settlement. FED. R. CIV. P. 23(e)(1); *see In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 29 (E.D.N.Y. 2019) ("*Payment Card*") (analyzing the amended Rule 23(e)(2) standards to be applied at preliminary approval). Rule 23(e)(2) sets out a number of factors to guide the Court's analysis of the

Settlement, with the factors in Rule 23(e)(2)(A) and (B) focusing on procedural fairness, *i.e.*, the "negotiating process leading to settlement," and those in Rule 23(e)(2)(C) and (D) focusing on the substantive fairness of the Settlement. *See Payment Card*, 330 F.R.D. at 30 n.25 ; *In re Platinum & Palladium Commodities Litig.*, No. 10-cv-3617, 2014 WL 3500655, at *13 (S.D.N.Y. July 15, 2014) ("*Platinum*").

B. The Settlement is procedurally fair.

To approve a class action settlement, Rule 23 requires the Court to find that, "the class representatives and class counsel have adequately represented the class [and] the proposal was negotiated at arm's length[.]" FED. R. CIV. P. 23(e)(2)(A)-(B). Where, as here, a class representative plaintiff in one class action (*Laydon*) also seeks to settle and release claims asserted in another class action (*Sonterra Capital*), that is permitted as long as (1) the second class action is based on the "identical factual predicate," and (2) the claims in the second class action are adequately represented. *Wal-Mart*, 396 F.3d at 106-07. "Together, these legal constructs allow plaintiffs to release claims that share the same integral facts as settled claims, provided the released claims are adequately represented prior to the settlement." *Id.*

1. The Settlement releases claims arising from the same factual predicate.

The claims asserted in *Laydon* and *Sonterra Capital* arise from the same factual predicate, *i.e.*, an alleged conspiracy among some of the world's largest banks and interdealer brokers, to manipulate Yen-LIBOR, Euroyen TIBOR, and the prices of Euroyen-Based Derivatives[11] from at

[11] Under the Settlement, as in the prior settlements, "Euroyen-Based Derivatives" means: (i) a Euroyen TIBOR futures contract on the Chicago Mercantile Exchange ("CME"); (ii) a Euroyen TIBOR futures contract on the Tokyo Financial Exchange, Inc. ("TFX"), Singapore Exchange ("SGX"), or London International Financial Futures and Options Exchange ("LIFFE") entered into by a U.S. Person, or by a Person from or through a location within the U.S.; (iii) a Japanese Yen currency futures contract on the CME; (iv) a Yen-LIBOR- and/or Euroyen TIBOR-based interest rate swap entered into by a U.S. Person, or by a Person from or through a location within the U.S.; (v) an option on a Yen-LIBOR- and/or a Euroyen TIBOR-based interest rate swap ("swaption") entered into by a U.S. Person, or by a Person from or through a location within the U.S.; (vi) a Japanese Yen currency forward agreement entered into by a U.S. Person, or by a Person from or through a location within the U.S.; and/or (vii) a Yen-LIBOR- and/or Euroyen TIBOR-based forward rate agreement entered into by a U.S. Person, or by a Person from or through a location within the U.S. *See* September 2019 Briganti Decl. Ex. 1 § 1(P).

least as early as January 1, 2006, through June 30, 2011. *Compare* Third Amended Class Action Complaint, ECF No. 580 ("*Laydon* TAC"), at ¶¶ 1-2 *with Sonterra Capital*, Amended Class Action Complaint, ECF No. 121 ("*Sonterra* AC") at ¶¶ 1-2. Several Defendants, including UBS, RBS, Rabobank, Barclays, Deutsche Bank, and Lloyds, admitted to participating in such a conspiracy in their respective settlements with the U.S. Department of Justice. *Compare Laydon* TAC, at ¶¶ 3-14 *with Sonterra* AC, ¶¶ 3-14. Those Defendants (and several others) also reached settlements with government regulators, such as the U.S. Commodity Futures Trading Commission, U.K. Financial Services Authority, and European Commission, that disclosed additional relevant facts. *Compare Laydon* TAC, at ¶¶ 15-22 *with Sonterra* AC, ¶¶ 15-22. The *Laydon* TAC and *Sonterra* AC both rely on the same facts referenced in these government settlements, along with those disclosed in guilty pleas entered by certain Defendants' traders and submitters (*Laydon* TAC, at ¶¶ 4-6, 13, 119; *Sonterra* AC, ¶¶ 4-6, 80, 141), and admitted into evidence during the criminal trials of individuals involved in the misconduct (*compare, e.g.*, *Laydon* TAC, at ¶¶ 35-41, 48-50, 91-94, 191-92, 361-62 *with Sonterra* AC, ¶¶ 36-41, 150-53, 235-36, 382-83). Plaintiffs' reliance on the same facts revealed in these government settlements, guilty pleas, and other evidence to support their claims in both *Laydon* and *Sonterra Capital* establishes that both actions arise from the same "factual predicate." *Wal-Mart*, 396 F.3d at 107 (holding the "identical factual predicate" doctrine is satisfied where facts alleged in another case "have been central to this case from its inception").

It does not matter that there are differences among the claims asserted in the *Laydon* and *Sonterra Capital* complaints. *Compare, e.g.*, *Laydon* TAC ¶¶ 967-981 (including Commodity Exchange Act ("CEA") claims) *with Sonterra* AC ¶¶ 994-1078 (adding claim for bid-ask spread manipulation in over-the-counter market). A class settlement in *Laydon* can resolve and release all claims arising from the factual predicate of *Laydon*, even if those claims were not asserted in *Laydon*. As the Second Circuit explained in *Wal-Mart*: "[w]hen considering the permissibility of a release [in a class

settlement], the overlap between elements of the *claims* is not dispositive. Class actions may release claims, even if not pled, when such claims arise out of the same factual predicate as settled class claims." 396 F.3d at 108 (citations omitted); *see also*, *e.g.*, *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982) ("[I]n order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action.").

Thus, because the "factual predicate" underlying the claims asserted in *Laydon* is identical to that in *Sonterra Capital,* the Court may approve the settlement of all claims arising from that factual predicate in *Laydon*, including the different claims based on that same predicate conduct asserted in *Sonterra Capital.*[12] *See*, *e.g.*, *In re Adelphia Commc'ns Corp. Secs. and Derivative Litig.*, 272 F. App'x 9, 13 (2d Cir. 2008) (class settlement could release claims in second action because "the investment losses suffered by all class members share a common factual predicate, even if the particular losses [asserted in the second action] were the result of reliance on different documents"); *Wal-Mart*, 396 F.3d at 108 (settlement covering two class actions could be approved even though a different kind of damages was asserted in the second class action); *In re WorldCom, Inc. Secs. Litig.*, No. 02-cv-3288, 2007 WL 1946685, at *6 (S.D.N.Y. July 5, 2007) (Cote, J.) (class settlement based on false financial statements of WorldCom properly barred claims based on purchases of WorldCom stock, regardless of whether claim was that the stock was overpriced or was an unsuitable investment).

2. The Released Claims have been and are adequately represented.

The "essential question in determining whether the Settlement complies with the adequate representation doctrine is whether the interests that were served by the Settlement were compatible

[12] Further demonstrating the identical factual predicate here, *Laydon* had previously asserted Sherman Act claims identical to those in *Sonterra Capital* against many of the same Defendants in his Second Amended Complaint. *See* ECF Nos. 150-7 ¶¶ 736-741, 150-8 ¶¶ 741-42. However, the Court dismissed those claims. *See Laydon v. Mizuho Bank, Ltd.*, No. 12-cv-3419 (GBD), 2014 WL 1280464, at *7-12 (S.D.N.Y. Mar. 14, 2014).

with" those of all the settlement class members. *Wal-Mart*, 396 F.3d at 110. "Adequate representation of a particular claim is established mainly by showing an alignment of interests between class members, not by proving vigorous pursuit of that claim." *Id.* at 107. Indeed, for the purpose of settling a class action, the alleged class can be expanded to include additional class members and additional claims, as long as "proper notice and opportunity for opting out are provided" and "the settlement fairly and adequately provides for the new claims." *Weinberger v. Kendrick*, 698 F.2d 61, 77 (2d Cir. 1982).

A settlement has been found to fail to meet these criteria if it: (1) included "class members who had not yet manifested injury" and did not provide for their "future claims" separate from "claims involving current injury," *Wal-Mart*, 396 F.3d at 110 (citing *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 252-52, 258 (2d Cir. 2001)), or (2) "impermissibly sacrificed the interests of current class claims in exchange for settlement." *Id.* (citing *Nat'l Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9, 11 (2d Cir. 1981)). Neither concern is present here.

First, the Settlement Class does not include any future claimants that have not yet manifested injury. The *Laydon* and *Sonterra Capital* complaints both assert claims arising out of Defendants' misconduct during the same Class Period—January 1, 2006 through June 30, 2011. *Compare Laydon* TAC ¶ 937 *with Sonterra* AC ¶ 956. The Settlement Class accordingly is limited to investors that transacted a Euroyen-Based Derivative within the Class Period (*see* September 2019 Briganti Decl. Ex. 1 § 1(F)), thereby eliminating the possibility of a release of "future claims."

Second, the *Sonterra Capital* plaintiffs' involvement in the negotiation of the Settlement removes any concern that Laydon impermissibly sacrificed the interests of the Settlement Class. Here, as in the prior class settlements approved by this Court in *Laydon* and *Sonterra Capital*, the Settlement Class consists of "all Persons who purchased, sold, held, traded, or otherwise had any interest in Euroyen-Based Derivatives during the Class Period" of January 1, 2006 to June 30, 2011,

except for the Defendants in *Laydon* and *Sonterra Capital* and the U.S. Government. *Id.* The interests of those Settlement Class Members are aligned and are fairly served by the distribution of settlement proceeds to all Class Members with notice and opt-out rights (*see* Parts I.C.3 and I.C.6 *infra*), as this Court previously recognized in approving the prior settlements with the same settlement class.

The only difference here is that Laydon is the only class representative plaintiff for settlement purposes, because the *Sonterra Capital* plaintiffs' action is still on appeal. But that raises no concern because the *Sonterra Capital* plaintiffs participated in the negotiation of the Settlement. September 2019 Briganti Decl. ¶ 20. As with the last four settlements approved in this action, the California State Teachers' Retirement System ("CalSTRS")—the largest educator-only pension fund in the world and the second largest pension fund in the United States—was directly involved in negotiating the Settlement with Defendants. *Id.* CalSTRS' role in this process as a named plaintiff in the *Sonterra Capital* action and a member of the putative class in that case ensures that all Settlement Class Members' interests were adequately represented. In fact, Judge Castel recently recognized the significance of CalSTRS' participation in the settlement process when granting final approval to a $309 million settlement in an action alleging the manipulation of the Euro Interbank Offered Rate with some of the same Defendants as in this case. *See* Transcript of Hearing at 8:25, *Sullivan v. Barclays PLC*, No. 13-cv-2811, (S.D.N.Y. May 18, 2018), ECF No. 434. ("I might add that this gives great comfort to a judge reviewing a proposed settlement, that there is someone separate from plaintiffs' counsel and the defendants who is also looking at the fairness of the process."). The Court can place great reliance on the fact that not only Laydon but also the *Sonterra Capital* plaintiffs unanimously support approval of the Settlement here.

Finally, courts evaluating adequacy of representation also consider the adequacy of plaintiff's counsel. *Payment Card*, 330 F.R.D. at 30. (considering whether "plaintiff's attorneys are qualified, experienced and able to conduct the litigation."). Here, Lowey Dannenberg serves as Laydon's

counsel and has led the prosecution of this action and the related *Sonterra Capital* action from the start of both cases. Its extensive class action, antitrust, CEA, and trial experience presents strong evidence that the Settlement is 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); September 2019 Briganti Decl. Ex. 6 (firm resume). In addition to negotiating the earlier settlements in this action and *Sonterra Capital*, Lowey Dannenberg has negotiated numerous settlements that have been preliminarily or finally approved in other cases involving the manipulation of global financial benchmark interest rates, and is therefore eminently qualified in assessing the fairness, reasonableness and adequacy of the Settlement. *Id.*

3. The Settlement was the product of arm's length negotiations.

In addition, there is a presumption of procedural fairness where a settlement is "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) (same). Lowey Dannenberg was well informed about the strengths and weaknesses of the claims against the Settling Defendants in both this case and *Sonterra Capital*. Before and during negotiations with the Settling Defendants, Lowey Dannenberg had the benefit of the cooperation materials produced as part of the earlier settlements and discovery from Settling Defendants and non-Settling Defendants. September 2019 Briganti Decl. ¶ 9. So far, Lowey Dannenberg has reviewed 2.1 million documents totaling 7.9 million pages and 1,100 gigabytes. In addition, Lowey Dannenberg reviewed and analyzed documents and information obtained throughout the course of Class Counsel's extensive

investigation, including: (i) government settlements, *e.g.*, plea, non-prosecution, and deferred prosecution agreements involving other Defendants; (ii) publicly available information relating to the conduct alleged in Representative Plaintiffs' complaints; (iii) expert and industry research regarding Yen-LIBOR, Euroyen TIBOR, and Euroyen-Based Derivatives traded in the futures and over-the-counter markets; (iv) expert discovery; (v) legal research and prior decisions of this Court and others deciding similar issues.

Settling Defendants were also well-represented by some of the leading law firms in the United States. Their attorneys have decades of experience and are some of the leading defense practitioners in commercial, antitrust, securities, CEA, and class action litigation cases. September 2019 Briganti Decl. ¶ 19.

The process leading up to the Settlement fully supports preliminary approval. *See* September 2019 Briganti Decl. ¶¶ 21-23. The Settlement with The Bank of Yokohama, Shinkin, Shoko Chukin, Sumitomo, and Resona is the result of arm's length negotiations over a period of years, with discussions beginning in December 2014. The initial settlement discussions did not advance, and settlement was not discussed again until May 2017, after the Court issued an order denying certain Defendants' request for revision and relief from its earlier personal jurisdiction decision. Lowey Dannenberg met with counsel for some of these banks in July 2017, but those settlement discussions also did not progress further. In fall 2018, the *Laydon* and *Sonterra Capital* plaintiffs and The Bank of Yokohama, Shinkin, Shoko Chukin, Sumitomo, and Resona agreed to revisit whether a settlement could be reached. These discussions proved to be successful, culminating with the execution of a settlement agreement in March 2019 and an amended settlement agreement in September 2019. *Id.*

Given Lowey Dannenberg's considerable prior experience in complex class action litigation involving CEA claims (among others), its knowledge of the strengths and weaknesses of Laydon's

claims and the claims asserted in *Sonterra Capital*, its assessment of the Settlement Class's likely recovery following trial and appeal, and its experience negotiating with Settling Defendants, the Settlement is entitled to a presumption of procedural fairness.

C. The Settlement is substantively fair.

To assess the substantive fairness of the Settlement, the Court must consider whether, "the relief provided for the class is adequate," and account for the following factors: "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." FED. R. CIV. P. 23(e)(2)(C). The Court is also required to confirm that the Settlement "treats class members equitably relative to each other." FED. R. CIV. P. 23(e)(2)(D).

Courts in this Circuit have long considered the nine *Grinnell* factors in deciding whether a settlement is substantively fair, reasonable, and adequate:

> (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 Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). The amended Rule 23(e)(2) factors are intended to be complementary to the *Grinnell* factors. *See Payment Card*, 330 F.R.D. at 29 ("Indeed, there is significant overlap between the *Grinnell* factors and the Rule 23(e)(2)(C-D) factors . . . ."); FED. R. CIV. P. 23 committee notes 2018 amendment (stating Rule 23 now focuses on the "core

concerns of procedure and substance" to be considered when deciding whether to finally approve a settlement). Here, the factors set forth in Rule 23(e) and *Grinnell* weigh heavily in favor of final approval being entered after notice is given to the Settlement Class and the fairness hearing is held, and certainly support preliminary approval.

1. The costs, risks, and delay of trial and appeal favor the Settlement.

To determine whether a settlement provides adequate relief to the class, the Court must evaluate "the costs, risks, and delay of trial and appeal," FED. R. CIV. P. 23(e)(2)(C)(i), "to forecast the likely range of possible classwide recoveries and the likelihood of success in obtaining such results." *Payment Card*, 330 F.R.D. at 36 (internal quotation marks and citations omitted). Satisfying this factor necessarily "implicates several *Grinnell* factors, including: (i) the complexity, expense, and likely duration of the litigation; (ii) the risks of establishing liability; (iii) the risks of establishing damages; and (iv) the risks of maintaining the class through the trial." *Id.* Therefore, it is appropriate to address Rule 23(e)(2)(C)(i) in conjunction with these *Grinnell* factors.

The factual and legal issues in this action are complex and expensive to litigate. They involve esoteric financial products, sophisticated damages models, and years' worth of documents and data. As is always true in cases involving large complex financial markets, the duration of the case depends in significant part on the time that the non-settling Defendants require to produce their documents, the time required to review the Defendants' and non-party documents, and the time required to use those documents to depose witnesses, conduct expert analyses, and otherwise prepare for trial. In this case, discovery has been costly, resulting so far in the production of over 2.8 million pages of documents, 135,000 data files, and 112,000 audio files that have been or will be reviewed. Laydon has retained experts to provide econometric and industry analysis, adding to the cost of litigating.

The risks of continued litigation against the Settling Defendants were substantial. The Settling Defendants have not been accused by any regulator of manipulating Yen-LIBOR or Euroyen TIBOR, and to Representative Plaintiffs' knowledge, none of the Settling Defendants' current or former employees has faced related criminal or civil charges. This case also presents an inherent level of risk and uncertainty because it involves a market unfamiliar to the average juror. *See Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 663 (S.D.N.Y. 2015).

Another risk consideration is that private civil plaintiffs, unlike the government, have the burden to prove not only manipulative or anticompetitive impact but also actual damages. *Gottesman v. General Motors Corp.*, 436 F.2d 1205, 1210 (2d Cir. 1971). Even where the DOJ has 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, $31,750,000, is greater than the maximum potential damages for which the Settling Defendants would have argued they could be liable had the case proceeded to trial and Laydon was able to prove liability on their part. Laydon's impact and damages theories would have been sharply disputed prior to and at trial, triggering a "battle of the experts." *See 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).

In addition to the challenge of proving impact and damages at trial, Laydon (before the Settlement) faced the far greater task of establishing the other elements of liability. The facts and claims here are intricate. *See In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 123 (S.D.N.Y. 2009) ("the complexity of Plaintiffs' claims *ipso facto* creates uncertainty."). Establishing liability as to the Settling Defendants would involve obtaining and proving the meaning and significance of instant messages, trading patterns, and other facts. Any evidence of manipulation or collusion likely would raise ambiguities and require the factfinder to make reasonable inferences. This creates significant risks in establishing liability.

2. The remaining Grinnell factors also support final approval of the Settlement.

The *Grinnell* factors not expressly encompassed in Rule 23(e)(2)(c)(i) also guide the Court in assessing whether the relief provided to the class is adequate; they include: "(2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; . . . (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." *Grinnell*, 495 F.2d at 463.

a. <u>The reaction of the Class to the Settlement.</u>

Consideration of this *Grinnell* factor is premature prior to the Settlement Class receiving notice of the Settlement. Notwithstanding, Laydon's approval of the Settlement is a positive indication of the Settlement's adequacy. In addition, although the *Sonterra Capital* case is on appeal and not currently in this Court's jurisdiction, the named plaintiffs in that action were directly involved in negotiating the Settlement (*see* Part I.B.2, above), and fully support approval of the Settlement herein, which results in the release of their claims against the Settling Defendants upon Final Approval and occurrence of the Effective Date. Class Members overwhelmingly supported

the earlier settlements approved by the Court, as reflected by the low number of opt-outs and lack of any objections compared to the thousands of claims that were filed. *See* ECF Nos. 720 ¶¶ 6-7, 838 ¶¶ 6-7, 891 ¶¶ 6-7. As this Settlement and the earlier settlements share the same structure, a comparable favorable reaction by the Class is likely. Moreover, any Class Member who does not favor the Settlement can opt out.

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

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 task 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 case, and whether the settlement is adequate given those risks. *Id.*

Lowey Dannenberg has conducted extensive factual and legal research and consulted experts to assess the merits of Representative Plaintiffs' claims. *See* September 2019 Briganti Decl. ¶ 9. Attorneys reviewed public information, including government pleas, non-prosecution agreements, and deferred prosecution agreements. Lowey Dannenberg also had the benefit of settlement cooperation materials produced under the BTMU, MUTB, Deutsche Bank, JPMorgan, Citi, HSBC, and R.P. Martin settlements, and discovery produced by Settling Defendants and non-settling Defendants. Discovery in this action has resulted in the collection of 2.8 million documents and 118 gigabytes of data that have been and will continue to be thoroughly analyzed. In conjunction with leading economics and industry experts, Laydon has served his class certification expert reports, defended his experts' depositions, and has deposed non-settling Defendants' expert witnesses. In short, Laydon and Lowey Dannenberg are more than adequately informed of the strengths and weaknesses of the claims being settled, and the advantages and disadvantages of the Settlement.

c. The ability of Settling Defendants to withstand greater judgment.

The Settling Defendants can withstand a greater judgment than $31,750,000, but this *Grinnell* Factor alone does not determine whether the Settlement is reasonable. *See In re Global Crossing Sec. & 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"); *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.").

d. The Settlement is reasonable in light of the risks and potential range of recovery.

For the Settlement Class, the Settlement represents a reasonable, favorable hedge against the risks of pursuing the claims against the Settling Defendants to trial. It provides "the immediacy and certainty of a recovery, against the continuing risks of litigation." *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 139 (S.D.N.Y. 2010). The Settlement's terms are substantively fair and easily "fall[] within the range of possible approval." *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) ("*NASDAQ II*").

If approved, this Settlement, along with the August 29 Settlement and the earlier settlements in this matter, will provide the Settlement Class with a total financial recovery of $307,000,000. As with the earlier settlements, Lowey Dannenberg successfully negotiated with counsel for the Settling Defendants to provide that, if the Settlement is finally approved, then none of the Settlement Amounts will revert to the Settling Defendants regardless of how many Class members submit proofs of claim. September 2019 Briganti Decl. Ex. 1 § 10. Because claim rates typically fall below 100%, the non-reversion terms of the Settlement will substantially enhance the recovery that Authorized Claimants will receive.

Under the Settlement, the Settling Defendants also will provide cooperation to aid in the pursuit of the claims against the non-settling Defendants. This cooperation generally includes reasonably available: (i) borrowing and lending transaction data pertaining to the Settling Defendants' transactions in (a) unsecured borrowing and lending transactions in the interbank market, involving Yen-denominated loans (placing), deposits (taking), and certificates of deposit and (b) secured repurchase transactions in the interbank market, each having maturities of 1-year or less for the period of January 1, 2006 through June 30, 2011;[13] and (ii) transaction data pertaining to the Settling Defendants' Euroyen-Based Derivatives transactions for the period of January 1, 2006 through June 30, 2011. *Id.*, Ex. 1 § 4(G). The Settling Defendants also will provide reasonably available information necessary to authenticate or otherwise make usable at trial the cooperation materials and other documents and data previously produced. *Id.*, Ex. 1 § 4(H).

In exchange for these benefits, the Releasing Parties will release the Released Parties from claims arising from or relating to conduct that was alleged, or could have been alleged, in *Laydon* or *Sonterra*, concerning any Euroyen-Based Derivatives or any similar financial instruments priced, benchmarked, settled to or otherwise affected by Yen-LIBOR or Euroyen TIBOR purchased, sold, held, traded, and/or transacted by the Settlement Class Members. *Id.*, Ex. 1 § 12. The claims asserted against the Settling Defendants in the *Laydon* action will be dismissed with prejudice on the merits, and any other related claims will be barred by the Settlement's release, including claims against the Settling Defendants in the related *Sonterra Capital* action.[14] Accordingly, if the Second Circuit remands the *Sonterra Capital* action to this Court, Plaintiffs in that action will move to dismiss the Settling Defendants with prejudice.

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[13] The Bank of Yokohama will produce data starting from April 2, 2008, when it joined the Euroyen TIBOR panel.

[14] The Settlement provides that if the Second Circuit reverses this Court's decision dismissing the *Sonterra Capital* claims against the Settling Defendants and remands that action to this Court before final approval of the Settlement is granted, the *Sonterra Capital* plaintiffs will separately move the Court for entry of the Final Approval Order and Final Judgment. September 2019 Briganti Decl., Ex. 1 § 16.

The Settlement's consideration of $31,750,000 and substantial cooperation is well within the range of that which may later be found to be fair, reasonable, and adequate at final approval. *NASDAQ II*, 176 F.R.D. at 102; September 2019 Briganti Decl. ¶ 25.

3. The plan of distribution provides an effective method for distributing relief, satisfying Rule 23(e)(2)(c)(ii).

This Court has previously approved the Distribution Plan as fair and adequate in approving prior settlements in *Laydon* and *Sonterra Capital*. *See, e.g.*, ECF No. 891 ¶ 20; *see also Maley v. Del. Global Tech. 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.") (citation omitted). As previously described (ECF No. 590, at 9-10), Dr. Craig Pirrong created an "artificiality matrix" for Yen-LIBOR and Euroyen TIBOR, which is posted on the Settlement Website. The Net Settlement Fund will be distributed by multiplying the Net Settlement Fund by the Pro Rata Fraction. The denominator of the Pro Rata Fraction is the sum total of the Net Artificiality Paid by all Class Members who have positive Net Artificiality Paid, and the numerator of the Pro Rata Fraction is each Class Member's Net Artificiality Paid. For example, if the Class Member's Net Artificiality Paid constitutes 1% of the Net Artificiality Paid of all Class Members with positive Net Artificiality Paid, then that Class Member will receive 1% of the Net Settlement Fund. So, if the Net Settlement Fund is $15 million and a Class Member's Pro Rata Share is 1%, that Class Member will receive $150,000. This method will be used to determine the amount to be paid to each Class Member.

This method of allocating settlement proceeds based on the amounts of provable artificial impact has been approved as a fair, reasonable, and adequate method of allocating settlement funds not only by this Court but repeatedly by courts in other antitrust and CEA manipulation class action settlements as well. *See, e.g.*, *Platinum*, 2014 WL 3500655, at *3 (allocations based on net artificiality on each trading day); Order at ¶ 6, *In re Amaranth Natural Gas Commodities Litig.*, No. 07 Civ. 6377,

(S.D.N.Y. May 23, 2012), ECF No. 413 (modifying final judgment to reflect plan of allocation). The Court should once again approve the Distribution Plan for use in allocating settlement proceeds from the Settlement.

4. The requested attorneys' fees are limited to ensure that the Class receives adequate relief.

Class Counsel will limit their attorneys' fee request to no more than 23% of this Settlement Fund ($7,302,500), which may be paid upon final approval. September 2019 Briganti Decl., Ex. 1 § 5(E)-(F). This fee percentage is based on the retainer between Lowey Dannenberg, Berman Tabacco, and CalSTRS, one of the world's largest educator-only pension funds. After learning of the *Laydon* action and recognizing the potential impact of Defendants' alleged actions on its investment portfolio, CalSTRS retained Lowey Dannenberg to pursue claims against Defendants relating to the alleged manipulation of Yen-LIBOR, Euroyen TIBOR, and the prices of Euroyen-Based Derivatives. After arm's length negotiations, Lowey Dannenberg, Berman Tabacco, and CalSTRS executed a retainer that contains a graduated contingent fee structure based on the total amounts recovered to date. *See* ECF No. 872 (Declaration of Brian J. Bartow) ¶¶ 5-7.[15]

The scope of the retainer includes the claims and facts at issue in this action. Accordingly, it is an appropriate fee schedule to use here and is entitled to deference. *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008) ("In many cases, the agreed-upon fee will offer the best indication of a market rate."). The requested attorneys' fee percentage is the same as the percentage requested in connection with approval of the BTMU/MUTB settlement and is comparable to percentage fee awards in similarly-sized cases in this District. *See, e.g.*, Order, *Alaska Electric Pension Fund v. Bank of America Corp.*, No. 14-cv-7126 (JMF)(OTW) (S.D.N.Y. Nov. 30, 2018), ECF No. 742 ("ISDAFix") (awarding 26% of common fund in $504.5 million settlement as attorneys' fees).

[15] CalSTRS initially requested leave to join this action, which the Court denied. ECF No. 525. The Court instead permitted CalSTRS to join the then recently-filed, related *Sonterra Capital* action as a named plaintiff. ECF No. 529, Tr. at 7-10.

In addition to the request for attorneys' fees, Class Counsel will ask for an award from this Settlement and the August 29 Settlement totaling no more than $1.75 million for unreimbursed litigation costs and expenses, and an award from this Settlement and the August 29 Settlement totaling no more than $750,000 to replenish the litigation expense fund previously established in this case. *See* ECF Nos. 724 ¶ 3, 892 ¶ 3. Laydon will not seek an incentive award at this time.

5. There are no unidentified agreements that would impact the adequacy of the relief for the Settlement Class.

Rule 23(c)(3) requires that "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the proposal." Here, all agreements that could potentially impact the Settlement have been disclosed in the Settlement.

The Settlement contains a structure and terms that are commonly used in class action settlements in this District. *See NASDAQ II*, 176 F.R.D. at 102; *see also* September 2019 Briganti Decl. ¶ 24. This includes a supplemental agreement that provides the Settling Defendants a qualified right to terminate the Settlement Agreement under certain circumstances before final approval. September 2019 Briganti Decl. Ex. 1 § 24. This agreement, referred to as a "blow" provision, is common in class action settlements. *See, e.g.*, *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 948 (9th Cir. 2015); *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 02CV1152, 2018 WL 1942227, at *5 (N.D. Tex. Apr. 25, 2018).

6. The Settlement treats the Class equitably and does not provide any preferences.

The Settlement does not favor or disfavor any Settlement Class Members; nor does it 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. The Distribution Plan provides for a *pro rata* distribution of the Net Settlement Fund among eligible claimants, a method this Court has already approved as fair, reasonable, and adequate. *See, e.g.*, ECF No. 891 ¶ 20; *see also Payment Card*, 330 F.R.D. at 32 (finding that "*pro rata* distribution scheme is sufficiently equitable"). The daily Yen-

LIBOR and Euroyen TIBOR artificiality matrix that will be used to determine the compensation for valid and timely submitted claims is available to Class Members on the Settlement Website. To the extent new information requires, the artificiality matrix may be adjusted, and any changes will be immediately posted on the Settlement Website.

Further, any potential inequity is avoided through the use of an adequate notice program that advises Settlement Class Members of their rights, including the impact of the releases. Where class members have received sufficient notice of the impact of the settlement, courts have enforced the bar on prosecuting released claims—even where such claims arose in a different action—so long as they were based on the identical factual predicate and the class members were adequately represented. *See In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d 800 (8th Cir. 2004) (affirming injunction against prosecution of claim released by a related class action where adequate notice of the release was given, and the class was adequately represented); *Wal-Mart Stores*, 396 F.3d 96 at 112-13 (adopting the analysis of *In re Gen. Am. Life*); *Weinberger*, 698 F.2d at 77. As explained above, the claims in *Laydon* and *Sonterra Capital* both arise out of the same alleged "factual predicate"—a conspiracy to manipulate Yen-LIBOR, Euroyen TIBOR, and Euroyen-Based Derivatives prices. *See* Part I.B.1, above. Thus, should a Settlement Class Member wish not to be bound by the release, the remedy is to opt out of the Settlement. The notice program will provide Settlement Class Members with information about opting out of the Settlement should they wish. But absent opting out, each Settlement Class Member would be bound by the release.

Because the Settlement's release and the Distribution Plan wholly avoid any improper preferences or discriminations, the Court should find that the Settlement satisfies this factor.

II. The Court should conditionally certify the Settlement Class for the purposes of the Settlement.

As the Court previously found in the earlier settlements, the Settlement Class meets the requirements of Rule 23(a) and Rule 23(b)(3) for preliminary and final approval. *Compare* September

2019 Briganti Decl., Ex. 1 § (F) *with* ECF No. 854 ¶ 3; 891 ¶¶ 2-3. Thus, the Court should conditionally certify the Settlement Class as to the claims against the Settling Defendants.[16]

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

1. 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, "merely [] 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) ("*IPO*"). "Sufficient numerosity can be presumed at a level of forty members or more." *Id.* Here, there are at least hundreds, if not thousands, of geographically dispersed persons and entities that fall within the Settlement Class definition. *See* September 2019 Briganti Decl. ¶ 26. Thus, joinder of all these individuals and entities would be impracticable.

2. Commonality

Commonality only requires the presence of a single question of law or fact common to the class capable of class-wide proof. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) ("*Dukes*"); *see also* FED. R. CIV. P. 23(a)(2). This case presents scores of common questions of law and fact, including personal and subject matter jurisdiction, the standards for an unlawful agreement, and multiple questions that Defendants raised in their motions to dismiss. For example:

1. What constitutes a false or manipulative submission by a Yen-LIBOR or Euroyen TIBOR contributor panel bank? This threshold question involves issues of fact that will be of overriding importance in this litigation.

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

[16] The Settling Defendants consent to preliminary certification of the Settlement Class solely for the purposes of the Settlement and without prejudice to any position the Settling Defendants may take with respect to class certification in any other action or in this action if the Settlement is terminated. September 2019 Briganti Decl. Ex. 1 §§22(C), 23(B).

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 dozens of common sub-questions of law and fact that are also common to all Class Members. The Settlement easily satisfies Rule 23(a)(2).

3. 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). A proposed class action meets this standard when "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). Here, Laydon's and other Settlement 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. Further, this alleged manipulation impacts Laydon and the Settlement Class in the same way, by causing a pricing component of their Euroyen-Based Derivatives to be skewed. Laydon's 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) (finding typicality where harm arises from a "unitary course of conduct"); *Sykes v. Mel Harris and Assocs., LLC*, 285 F.R.D. 279, 291-92 (S.D.N.Y. 2012) (finding that factual differences underlying individual claims and evidence that part of the scheme may not have been carried out against named representatives did not defeat typicality).

4. Adequacy

Rule 23(a)(4) 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).

As discussed above, Laydon does not have any disabling conflicts with the Settlement Class Members, whose interests were adequately represented not only by Laydon himself but by the

participation of CalSTRS and the other *Sonterra Capital* plaintiffs throughout the settlement process. *See* Part I.B.2. Laydon's claims arise out of the same "factual predicate"—the alleged manipulation of Yen-LIBOR and Euroyen TIBOR—that injured all Settlement Class Members. *See* Part I.B.1. He shares with them an overriding interest in obtaining the largest possible monetary recovery from the Settling Defendants, an interest reflected in the $31,750,000 in total monetary compensation achieved in the Settlement. *See Global Crossing*, 225 F.R.D. at 453 ("There is no conflict between the class representatives and the other class members. All share the common goal of maximizing recovery."). The cooperation obtained in the Settlement furthers Laydon's and the Settlement Class's common interest in prosecuting the claims against the non-settling Defendants. Settlement Class Members, including Laydon, all share the same interest in overcoming adverse dispositive motions, developing the enormous factual record, overcoming the ambiguities and competing explanations for Defendants' conduct, and establishing liability and compensable damages.

Lowey Dannenberg has represented the interests of the Settlement Class for seven years and has vigorously prosecuted this Action. With over 50 years of experience litigating complex class actions, Lowey Dannenberg has achieved historic class action settlements under the both the CEA and the Sherman Act. *See* September 2019 Briganti Decl. Ex. 6. Because Lowey Dannenberg and Laydon are both adequate representatives, Rule 23(a)(4) has been satisfied.

a. 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).

To satisfy Rule 23(b)(3), Laydon must 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).

1. 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.* (ellipsis 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 7882100, at *35 (E.D.N.Y. Oct. 15, 2014), *adopted* 2015 WL 5093503 (E.D.N.Y. July 10, 2015).

"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); Wright and Miller, 7AA FED. PRAC. & PROC. CIV. § 1781 (3d ed. 2017) (noting that allegations of antitrust conspiracies generally establish predominance of common questions). Many CEA and 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). Additionally, 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 In re NASDAQ Mkt.-Makers Antitrust Litig.*, 169 F.R.D. 493, 517 (S.D.N.Y. 1996) ("*NASDAQ I*") (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").

Here, if the claims against the Settling Defendants were not settled, common questions would have predominated over individual ones. Laydon and the Class Members must answer the same questions regarding allegations of personal jurisdiction, conspiracy, unlawful Yen-LIBOR and Euroyen TIBOR manipulation, and the amount of such alleged manipulation. *See Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 105 (2d Cir. 2007) ("allegations of the existence of a price-fixing conspiracy are susceptible to common proof"). Therefore, the Settlement Class satisfies Rule 23(b)(3).

2. 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 Grp.*, 689 F.3d at 239-40.

Here, 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).

Many Settlement Class Members have neither the incentive nor the means to litigate these claims. The damages most of the individual Settlement 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 Settlement 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.

Further, 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.

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

Lowey Dannenberg has designated Citibank, N.A. ("Citibank") to serve as Escrow Agent, to which the Settling Defendants have consented. Citibank currently serves as Escrow Agent for settlements in this action and the related *Sonterra Capital* action. Citibank has agreed to provide its services as Escrow Agent at market rates. The Court should again appoint Citibank to serve here.

IV. The Court should approve the Class Notice plan and forms of notice.

Due process and the Rule 23 require that the class receive adequate notice of a class action settlement. *Wal-Mart Stores*, 396 F.3d at 114. The adequacy of a settlement notice is measured by

reasonableness. *See Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2d Cir. 1983); *see also* FED. R. CIV. P. 23 (e)(1) ("The court must direct notice in a reasonable manner to all class members who would be bound by the proposal."); *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.").

The proposed notice program—consisting of mailed, published, and online notice—is substantially the same as the program previously approved and successfully used for the earlier settlements. *See, e.g.,* ECF Nos. 851-2 through 851-5 (describing the notice program), 854 ¶ 18 (approving the notice program). The notice program previously resulted in the submission of thousands of claims. *See* ECF No. 873 ¶ 3 (affidavit of settlement administrator regarding notice and claim administration). By using a similar notice program, claimants from the last settlements will receive notice of their ability to enhance their recovery and collect from the Settling Defendants. Claimants in any of the prior settlements will not have to file a new Proof of Claim and Release if they wish to participate in the Settlement. The proposed notice program will provide notice of both this Settlement and the August 29 Settlement, reducing the cost that would otherwise be incurred by operating two separate notice programs and thereby maximizing the amount of the settlement available for distribution.

Rule 23(c)(2) requires only that Rule 23(b)(3) class members be given "the best notice 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). Notice must clearly state: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under

Rule 23(c)(3). *Id.* Courts are afforded "considerable discretion" in fashioning class notice. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 168 (2d Cir. 1987).

The proposed Notice itself comports with Rule 23(c)(2)(B) and due process. It carefully details the nature of the Actions and the Settlement Class of U.S. investors that are included in the Settlement (and the August 29 Settlement), provides an ample "Background of the Litigation," which describes the claims, issues, and/or defenses presented in the Actions, and advises that the Court's Final Judgment and the releases will be binding on all Class Members that remain in the Settlement Class. September 2019 Briganti Decl., Ex. 3 at 2-5. The proposed Notice will also explain that the Settlement Class Members will release the Settling Defendants from claims with the same factual predicate, including those claims in the related *Sonterra Capital* action as well as the *Laydon* action. *Id.*, Ex. 3 at 5-6. Settlement Class Members also will be advised that should the Second Circuit reverse the dismissal of the claims against the Settling Defendants in the *Sonterra Capital* action and remand that action prior to final approval of the Settlement, the *Sonterra Capital* plaintiffs will ask the Court to enter final approval of the Settlement and final judgment in *Sonterra Capital*, without further notice to the Settlement Class. *Id.*, Ex. 3 at 6. In that event, the Court's final approval of the Settlement in *Sonterra Capital* would also dismiss the *Sonterra Capital* plaintiffs' claims and the claims of the Settlement Class Members against the Settling Defendants with prejudice on the merits through a Final Judgment to be entered in that action. *Id.*, Ex. 3 at 6. The proposed Notice will provide Settlement Class Members with a full and fair opportunity to consider the proposed Settlement and to respond, opt out 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). The direct-mailing notice component of the notice program will involve sending the Mailed Notice (September 2019 Briganti Decl. Ex. 3) and the Proof of Claim and Release form (*id.*, Ex. 5) via First-Class Mail,

postage prepaid to potential Settlement Class Members including, among others: (i) large traders of Chicago Mercantile Exchange ("CME") Yen currency futures contracts; (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 Mizuho's, Norinchukin's, SMBC's, BTMU's, MUTB's, Citi's, HSBC's, R.P. Martin's, Deutsche Bank's, and JPMorgan's counterparties; (iv) International Swaps and Derivatives Association ("ISDA") members; (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. September 2019 Briganti Decl., Ex. 2.

By mailing individual notice to these various persons and entities, notice is reasonably calculated to reach all Settlement Class Members that traded Euroyen-Based Derivatives. This list is several times larger than the anticipated number of OTC Euroyen-Based Derivative market participants and should effectively reach a large percentage of the Class. The database of these recipients was compiled in connection with the earlier settlements, and will be updated to capture any address changes to the extent possible.

The Settlement Administrator also will publish the Publication Notice (September 2019 Briganti Decl., Ex. 4) in The Wall Street Journal, Investor's Business Daily, The Financial Times, Barron's, Global Capital, Hedge Fund Alert, Grant's Interest Rate Observer, and on the following websites: (i) Zacks.com; (ii) traders.com; (iii) HFAlert.com; (iv) GlobalInvestorGroup.com; and (v) GlobalCapital.com. In addition, the Settlement Administrator will publish the summary notice in e-newsletters from Global Investor Group, Stocks & Commodities, Zacks.com, and Barchart.com, as

well as in email "blasts" to subscribers of Stocks & Commodities and Zacks.com. *See, e.g.*, *In re Sony Corp. SXRD Rear Projection TV Mktg.*, No. 09-MD-2102, 2010 WL 1993817, at *5 (S.D.N.Y. May 19, 2010) (approving notice by direct mail and email to class members). These are substantially the same publications used to publicize the earlier settlements. The Settlement Administrator also will disseminate a news release via PR Newswire's US1 Newsline distribution list to announce the Settlement, which will be distributed to the news desks of approximately 10,000 newsrooms, including print, broadcast, and digital websites across the United States. Any Settlement Class Members that do not receive Notice via direct mail likely will receive Notice through the foregoing publications or word of mouth.

The existing settlement Website, www.EuroyenSettlement.com, will continue to serve as a source for Class Members to obtain necessary information regarding the Settlement. Settlement Class Members can review and obtain: (i) a blank Proof of Claim and Release form for the Settlement; (ii) the full and summary notices; (iii) the proposed Distribution Plan; (iv) the Settlement Agreement with the Settling Defendants; and (v) key pleadings and Court orders. Further, the Settlement Website is live and, to date, has been visited over 105,000 times for information pertaining to the prior settlements in the Actions. The Settlement Administrator will also continue operating a toll-free telephone number to answer Settlement Class Members' questions and facilitate the filing of claims.

CONCLUSION

Laydon respectfully requests that the Court enter the accompanying proposed order that, among other things: (1) preliminarily approves the Settlement, subject to later, final approval; (2) conditionally certifies a Settlement Class on the claims against the Settling Defendants; (3) appoints Laydon as representative of the Settlement Class; (4) appoints Lowey Dannenberg as Class Counsel; (5) appoints Citibank as the Escrow Agent for purposes of the Settlement Fund;

(6) appoints A.B. Data, Ltd. as Settlement Administrator under the Settlement; (7) approves the proposed forms of Class Notices and the Notice plan; (8) approves the Distribution Plan with respect to the Settlement; (9) sets a schedule leading to the Court's consideration of final approval of the Settlement; and (10) stays all proceedings as to the Settling Defendants except with respect to approval of the Settlement.

Dated: September 6, 2019
White Plains, New York

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