

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
SETTLEMENT WITH DEFENDANTS THE BANK OF TOKYO-MITSUBISHI UFJ,
LTD. AND MITSUBISHI UFJ TRUST AND BANKING CORPORATION

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INTRODUCTION

Under Rule 23 of the Federal Rules of Civil Procedure (“Federal Rules”) and Paragraph 38 of the order preliminarily approving the Settlement with Defendants The Bank of Tokyo-Mitsubishi UFJ, Ltd. (now known as MUFG Bank, Ltd.) (“BTMU”) and Mitsubishi UFJ Trust and Banking Corporation (“MUTB”) in *Laydon v. Mizuho Bank, Ltd., et al.*, No. 12-cv-3419 (GBD) (S.D.N.Y.) (“*Laydon* Action”), ECF No. 854 (Mar. 8, 2018), and *Sonterra Capital Master Fund Ltd., et al. v. UBS AG, et al.*, No. 15-cv-5844 (GBD) (S.D.N.Y.) (“*Sonterra* Action”), ECF No. 402 (Mar. 8, 2018) (the “Preliminary Approval Order”), Plaintiffs,¹ through their counsel, Lowey Dannenberg, P.C. (“Class Counsel”), respectfully submit this Memorandum of Law, the accompanying Declaration of Vincent Briganti (“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 settlement with BTMU and MUTB (the “Settlement”), approval of the Plan for Allocation, and certification of the Settlement Class.

Pursuant to the Preliminary Approval Order, the Settlement Administrator executed the Class Notice plan, providing mailed notice to Class Members of BTMU and MUTB’s agreement to pay \$30,000,000, and to cooperate with Plaintiffs in their ongoing prosecution of claims against the non-settling Defendants. *See* Miller Aff. ¶¶ 12-14. The Class Notice plan was set forth at length in Exhibit A to the Affidavit of Linda Young (ECF No. 399-2) submitted in connection with Plaintiffs’ motion for preliminary approval of the Settlement. This motion is being filed before the deadline for objecting to the Settlement. No objections have been received to date. *See* Miller Aff. ¶ 29.

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 BTMU and MUTB Settlement Agreement. *See* ECF Nos. 399-1.

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 Settlement are fair, reasonable, and easily satisfy the criteria for final approval under Rule 23 of the Federal Rules of Civil Procedure. The Settlement was the result of years of hard-fought litigation and months of arm's-length negotiations between highly-sophisticated parties and their experienced counsel. The Settlement terms are substantially the same as those the Court has finally approved in connection with Plaintiffs' settlements with Citi,² HSBC,³ Deutsche Bank,⁴ JPMorgan⁵ and R.P. Martin⁶ totaling \$206,000,000. ECF Nos. 298, 389.

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. ¶ 96; ECF No. 275 (Declaration of Kenneth R. Feinberg) ¶ 3. Class Counsel has litigated the *Laydon* Action and *Sonterra* Action (collectively, the "Actions") for over six 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 Deutsche Bank, JPMorgan, Citi, HSBC, and R.P. Martin settlements (ECF No. 389 ¶ 20; ECF No. 298 ¶ 20), be applied to allocate the BTMU and MUTB Settlement.

Plaintiffs respectfully request that the Court grant Final Approval of the Settlement, in the form of the order annexed hereto, approve application of the Plan of Allocation to the Settlement, and enter Final Judgment dismissing the claims against BTMU and MUTB with prejudice on the

² "Citi" means Citibank, N.A., Citigroup Inc., Citibank Japan Ltd., and Citigroup Global Markets Japan Inc.

³ "HSBC" means HSBC Holdings plc and HSBC Bank plc.

⁴ "Deutsche Bank" means Deutsche Bank AG and DB Group Services (UK) Ltd.

⁵ "JPMorgan" means JPMorgan Chase & Co., JPMorgan Chase Bank, National Association, and J.P. Morgan Securities plc.

⁶ "R.P. Martin" means R.P. Martin Holding Limited and Martin Brokers (UK) Ltd.

merits, in the form of the order annexed hereto, to provide the Settlement Class with the substantial relief that Plaintiffs and Class Counsel worked so diligently to obtain.

ARGUMENT

I. THE SETTLEMENT MEETS THE REQUIREMENTS FOR FINAL APPROVAL

The procedural histories of the Actions and the terms of the Settlement are discussed in detail in Plaintiffs' preliminary approval motion and the accompanying declaration of Vincent Briganti. *See* ECF Nos. 399, 399-1; Briganti Decl. On February 9, 2018, Plaintiffs moved for preliminary approval of the Settlement. *See* ECF Nos. 397-99 (the "Preliminary Approval Motion"). On March 8, 2018, the Court held the preliminary approval hearing and issued an order preliminarily approving Plaintiffs' motion. ECF No. 402. Through this negotiated Settlement, the Settlement Class will receive a substantial monetary recovery of \$30,000,000 (less such fees and expenses as are approved by the Court), in addition to the cooperation BTMU and MUTB have provided and will continue to provide to Plaintiffs. This sum, plus the amount already approved from the other settling Defendants, provides the Settlement Class with \$236,000,000 to date. As described more fully below, the Settlement is procedurally and substantively fair, and all the requirements of Rule 23 have been satisfied.

A. The Settlement is 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 Settlement was reached after extensive arm’s-length, non-collusive negotiations. *See* ECF No. 399 ¶¶ 14-21; Briganti Decl. ¶¶ 4-9. Plaintiffs are represented by counsel with extensive class action, antitrust, Commodity Exchange Act (“CEA”), and trial experience, which is 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); ECF No. 399-6 (attaching Class Counsel’s firm resume).

The Settlement was negotiated over the course of seven months, starting in June 2017, during which time the parties and their counsel participated in numerous meetings and conferences. *See* Briganti Decl. ¶¶ 4-9. Counsel for each side at all times engaged in hard-fought negotiations, expressing their views on the strengths and weaknesses of the Actions. After months of bargaining and in-depth discussion, Plaintiffs and BTMU and MUTB reached an agreement. *Id.* ¶¶ 8-9. BTMU and MUTB do not admit to any wrongdoing or liability as part of their Settlement and maintain that they have good and meritorious defenses to the claims brought against them in the Actions.

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 Deutsche Bank, JPMorgan, R.P. Martin, Citi, and HSBC settlements. *See, e.g., id.* ¶ 4. Class Counsel had researched and considered a wide range of relevant legal issues and analyzed the facts uncovered to date. They also drew on their experiences as one of the leading practitioners in prosecuting and settling complex financial litigation cases. *See, e.g.,* Final Approval Order, *Sullivan v. Barclays plc*, No. 13-cv-2811 (PKC) (S.D.N.Y. May 18, 2018), ECF No. 424 (Class Counsel obtained a \$309 million settlement for class members relating to the manipulation of the Euro Interbank Offered Rate (“Euribor”) and prices for Euribor-based derivatives).

Throughout the negotiation and discovery process, Plaintiffs and BTMU and MUTB had numerous opportunities to articulate and refine their positions, and engaged in conference calls to address specific arguments related to liability and damages. Briganti Decl. ¶ 4. The exchange of extensive information facilitated well-informed settlement discussions. *Id.*

Further, Plaintiff CalSTRS took an active role in monitoring the litigation, scrutinizing Class Counsel’s work on behalf the Settlement Class and providing input on legal strategy and settlement. Bartow Decl. ¶¶ 9-14. In another class action case in this District where CalSTRS was a named plaintiff, the court found that CalSTRS’s involvement gave “great comfort to a judge reviewing a proposed settlement, that there is someone separate from the plaintiffs’ counsel and the defendants who is also looking at the fairness of the process.” *See* May 18, 2018 Conf. Tr. at 8:1-5, *Sullivan v. Barclays plc*, no. 13-cv-2811 (PKC) (S.D.N.Y.).

Given CalSTRS's active participation in this litigation and 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, and their assessment of the Settlement Class' likely recovery following trial and appeal, the Settlement is entitled to a presumption of procedural fairness.

B. The Settlement is 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 WL 11613684, at *9 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 IIP*”), 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 Settlement provides for a payment of \$30,000,000 and cooperation. This valuable cooperation includes, for the years 2006 through 2011: (i) reasonably available transaction data pertaining to unsecured and secured borrowing and lending transactions in the Yen-denominated interbank market conducted by BTMU’s and MUTB’s Tokyo branches; and (ii) reasonably available data pertaining to Euroyen-Based Derivative transactions conducted by BTMU’s Tokyo, London, and New York branches and MUTB’s Tokyo branch. ECF No. 339-1 ¶ 4. Additionally, BTMU has 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.* ¶ 11.

Before reaching the Settlement, 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 Deutsche Bank, JPMorgan, R.P. Martin, Citi, and HSBC settlements. *See, e.g.*, Briganti Decl. ¶¶ 4-9. In addition, Class Counsel (a) conducted an extensive investigation into the facts and legal issues in these Actions; (b) engaged in extensive negotiations with BMTU and MUTB; and (c) took many other steps to research and analyze the strengths and weaknesses of the claims. *Id.*

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. 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 Settlement mitigates the risks in this complex, multi-party litigation. The first *Grinnell* factor therefore supports approval of the Settlement. *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 Settlement. We note, however, that as detailed in the Preliminary Approval Motion, all of the named Plaintiffs favor the Settlement. ECF No. 398, at 9; *see also* Bartow Decl. ¶¶ 15-18. Plaintiffs, including CalSTRS, the

largest educator-only retirement fund in the United States with approximately \$224.8 billion in assets (as of April 30, 2018) and 930,000 members and beneficiaries, 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 Settlement. 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 Settlement. Additionally, any class member who does not favor the Settlement may opt out.

Further, in connection with the earlier Deutsche Bank, JPMorgan, Citi, and HSBC settlements, over 6,100 claims were made for compensation from the common fund. Miller Aff. ¶ 3. Only four potential members of the Settlement Class excluded themselves from the Citi, HSBC and R.P. Martin settlements, and there were no objections. ECF No. 298. Similarly, there were no objections and only five exclusion requests in connection with the Deutsche Bank and JPMorgan settlements. ECF No. 389. To date, A.B. Data has received six requests for exclusion and no objections. Miller Aff. ¶¶ 27, 29. 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, 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 Settlement, we have filed this motion in advance of the deadline for objecting, and may supplement this argument to address any objections.

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. ¶ 4. 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 generally Laydon*, Third Amended Class Action Complaint, ECF No. 580. At the time the Settlement was 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. ¶¶ 4-9. Plaintiffs also have the benefit of settlement cooperation produced under the terms of the Deutsche Bank, JPMorgan, HSBC, Citi, and R.P. Martin Settlements and the discovery produced to date. *Id.* The information gathered during this process greatly informed Plaintiffs of the advantages and disadvantages of entering into the Settlement.

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. 398 at 7-9.

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. 1005, 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 law and fact for the Settling Class Members’ claims will be hotly disputed, and Class Counsel will seek to overcome all of the foregoing risks.

(b) Damages Risks

Plaintiffs’ impact and damages theories against BTMU and MUTB 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) (“[T]he jury chose to award plaintiffs only nominal damages, concluding that the USFL had suffered only \$1.00 in damages.”), *aff’d*, 842 F.2d 1335, 1377 (2d Cir. 1988); *MCI Commc’ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1166–69 (7th Cir. 1983) (antitrust judgment was remanded for a new trial and damages).

(c) Class Risks

While Plaintiffs believe they would win a contested motion for class certification, “it is at least possible that variations among the [plaintiffs] or other factors might have complicated plaintiffs’ class-certification bid.” *Meredith Corp.*, 87 F. Supp. 3d at 665. If the Court certified the proposed class, BTMU and MUTB 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. BTMU and MUTB’s 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 Settlement, 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 Settlement provides 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 IP*”).

5. The ability of BTMU and MUTB to withstand greater judgment

The seventh *Grinnell* factor, “the ability to withstand a greater judgment” (*Grinnell*, 495 F.2d at 463), does not weigh against granting final approval in this case. BTMU and MUTB have the ability to withstand a greater judgment than \$30,000,000, but this factor alone does not bear on the appropriateness of the Settlement. *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 BTMU and MUTB 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.” *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 1695 (CM), 2007 WL 4115809, at *11 (S.D.N.Y. Nov. 7, 2007). (internal citation omitted). With all other criteria satisfied, this factor is insignificant. *Cf.* Tr. of Nov. 21, 2014 Final Approval Hearing, *In re Elec. Books Antitrust Litig.*, 11-md-2293 (DLC) (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 Settlement is 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 this Settlement 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 BTMU and MUTB 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 after any appeal, Plaintiffs and the Class could possibly recover billions of dollars. While the monetary compensation BTMU and MUTB provided under the Settlement is a small percentage of the total maximum amount of damages, it is still acceptable under the *Grinnell* factors. *See Grinnell*, 495 F.2d at 455 n.2 ("satisfactory settlement" could be "a thousandth part of a single percent of the potential recovery."). Class Counsel finds the Settlement indispensable in that it provides compensation to the Class and will assist Class Counsel in the continued prosecution of the action against the non-settling Defendants.

Based on all of the foregoing factors, including all of the risks that Plaintiffs face, the Settlement 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 Settlement.

The Court previously approved the Class Notice plan, as set forth in the Preliminary Approval Motion. ECF No. 402 ¶ 18. The Class Notice plan has been carried out in accordance with the Preliminary Approval Order. *See* Miller Aff. ¶¶ 4-25. Information regarding the Settlement, including downloadable copies of the Settlement Agreement, 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. ¶¶ 21-23.

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 have been provided with a full and fair opportunity to consider the proposed Settlement 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 (ECF No. 398) and as held in the Court’s Preliminary Approval Order (ECF No. 402), 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.⁷

There are at least hundreds, if not thousands, of geographically dispersed persons and entities that fall within the Settlement Class definition. *See* ECF No. 399 ¶ 24. 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. 398, at 11.

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 these Actions 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 BTMU and MUTB; and (3) in prosecuting claims against the remaining

⁷ BTMU and MUTB consent to preliminary certification of the Settlement Class solely for the purposes of the Settlements and without prejudice to any position they may take with respect to class certification in any other action or in these Actions if the Settlement is terminated. ECF No. 399-1 (BTMU and MUTB Settlement Agreement) ¶ 22(E).

non-settling defendants.⁸ In addition, Class Counsel are highly experienced attorneys who have litigated these and other types of complex class actions for decades.

Lastly, common questions predominate and a class action is the superior method for resolving this case. Predominance exists because the question of whether Defendants engaged in the false reporting and manipulation of Yen-LIBOR, Euroyen TIBOR, and the prices of Euroyen-Based Derivatives is common across the 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.

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

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).⁹

Courts have stated that, under Rule 23, “[t]o warrant approval, the plan of allocation must also meet the standards by which the settlement was scrutinized—namely, it must be fair and

⁸ Certain defendants in other “IBOR”-related actions pending in this District have challenged Sonterra’s capacity to sue under Fed. R. Civ. P. 17. *See, e.g., 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). Such arguments are meritless because Sonterra’s claims are brought in its name pursuant to a valid assignment and power of attorney. In any event, the capacity to sue issue raised in these other actions with respect to Sonterra (which is only one of the Representative Plaintiffs here) does not impact the Court’s ability to grant final approval of the Settlement. *See* ECF Nos. 399-1 ¶ 1(LL); (“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.”).

⁹ *See also In re PaineWebber Ltd. P’ship Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y. Mar. 20, 1997); *In re Lloyd’s American Trust Fund Litig.*, No. 96 Civ. 1262, 2002 WL 31663577, at *18 (S.D.N.Y. Nov. 26, 2002).

adequate.” *Maley v. Del Global Technologies Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002); *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 fully complies 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 underlying the Plan of Allocation, as set forth at length in the Declaration of Dr. Craig Pirrong in Support of Preliminary Approval of Class Action Settlement, dated June 16, 2016 (“Pirrong Decl.”) (ECF 263-1), and Class Counsel’s previous submissions to this Court for approval of the Deutsche Bank, JPMorgan, Citi and HSBC settlements (ECF Nos. 188-89, 221-22, 261-63, 274, 279), this Court previously approved the Plan of Allocation as fair, reasonable and adequate. ECF No. 298 ¶ 20; ECF No. 390. Class Counsel, who have litigated these Actions for the past six 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. 399-6 (attaching Class Counsel’s firm resume). The Court should once again approve the Plan of Allocation to apply to the Settlement.

C. Approval of the Plan of Allocation should be considered separate and apart from the other aspects of the Settlement

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”); Order, *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 Settlement contemplates that the Court consider the Settlement separate and apart from the plan of allocation. ECF No. 399-1, ¶ 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 Settlement, and Final Approval of the Settlement can proceed even if the Court does not extend the previously-approved Plan of Allocation to apply to the BTMU and MUTB Settlement.

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 BTMU and MUTB 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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White Plains, New York

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