UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE LIBOR-BASED FINANCIAL INSTRUMENTS ANTITRUST LITIGATION	Master File No. 11-md-2262 (NRB)
THIS DOCUMENT RELATES TO:	
METZLER INVESTMENT GmbH, et al., Plaintiffs, v. CREDIT SUISSE GROUP AG, et al., Defendants.	No. 11 Civ. 2613

EXCHANGE-BASED PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT WITH DEFENDANTS CREDIT SUISSE AG, LLOYDS BANK PLC, BANK OF SCOTLAND PLC, NATWEST MARKETS PLC, PORTIGON AG, WESTDEUTSCHE IMMOBILIENBANK AG, ROYAL BANK OF CANADA, RBC CAPITAL MARKETS, LLC, COÖPERATIEVE RABOBANK U.A., THE NORINCHUKIN BANK, MUFG BANK, LTD., AND UBS AG

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Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Exchange-Based Plaintiffs ("Plaintiffs"),[1] through their counsel Kirby McInerney LLP ("Kirby McInerney") and Lovell Stewart Halebian Jacobson LLP ("Lovell Stewart") ("Settlement Class Counsel"), respectfully submit this Memorandum of Law, the accompanying Joint Declaration,[2] and the accompanying Declaration of Jack Ewashko in support of Plaintiffs' motion for an order: granting final approval of the Settlement with the Settling Defendants;[3] certifying the Settlement Class; finding that the notice program to the Settlement Class comported with the requirements of Rule 23 and due process; granting final approval of the Plan of Distribution; appointing Plaintiffs' Counsel as Settlement Class Counsel; and entering the proposed Final Judgment and Order.

I. INTRODUCTION

Subject to this Court's approval, Plaintiffs, on behalf of themselves and the putative Settlement Class, have agreed to settle all claims against the Settling Defendants in exchange for cash payment of $3,450,000. If approved, the proposed Settlement would completely resolve the pending litigation in the Exchange-Based Action. This Settlement brings the total settlement

[1] All capitalized terms in this memorandum have the same meaning as set forth in the Stipulation and Agreement of Settlement ("Stipulation"), dated April 8, 2024, attached as Exhibit 1 to the Declaration of David E. Kovel in Support of the Exchange-Based Plaintiffs' Motion ("Kovel Decl."), ECF No. 4011. Unless otherwise specified, all references to "ECF No." herein refer to documents in the docket of the MDL Action, No. 11 MD 2262 (NRB) (S.D.N.Y.). Unless otherwise noted, all emphasis is added and internal citations are omitted.

[2] "Joint Decl." refers to the Joint Declaration of David E. Kovel and Christopher Lovell in Support of (A) Exchange-Based Plaintiffs' Motion for Final Approval of Class Action Settlement, and (B) Exchange-Based Plaintiffs' Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses, filed contemporaneously herewith.

[3] "Settling Defendants" or "Remaining Settling Defendants" refers to: (i) Credit Suisse AG; (ii) Lloyds Bank plc and Bank of Scotland plc; (iii) NatWest Markets plc (f/k/a The Royal Bank of Scotland plc); (iv) Portigon AG (f/k/a WestLB) and Westdeutsche Immobilienbank AG (n/k/a Westdeutsche Immobilien Servicing AG); (v) Royal Bank of Canada and RBC Capital Markets, LLC; (vi) Coöperatieve Rabobank U.A. (f/k/a Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A.); (vii) The Norinchukin Bank; (viii) MUFG Bank, Ltd. (f/k/a The Bank of Tokyo-Mitsubishi UFJ, Ltd.); and (ix) UBS AG. Credit Suisse AG merged with and into UBG AG and ceases to exist.

amount in the Exchange-Based Action to $190,450,000.[4] Collectively, the Exchange-Based settlements continue to represent the largest recovery for a "futures-only" class asserting claims under the Commodity Exchange Act (the "CEA"). The Settlement, which was negotiated at arm's length by experienced counsel, is reasonable and appropriate and is deserving of final approval by the Court. The Settlement was reached after extended, frank, and hard-fought negotiations. Having litigated this Action for over thirteen (13) years, Settlement Class Counsel, who have extensive experience in class actions of this type, know the risks and potential rewards, and believe that the Settlement is in the best interest of the Settlement Class.

This is a favorable result given the many inherent risks in this Action. While the deadline to file an objection or request for exclusion is August 15, 2024, the initial reaction to the Settlement strongly favors final approval. To date, the Claims Administrator has received no objections and no exclusion requests to this Settlement. *See* Ewashko Decl. ¶¶ 19-20.[5]

As discussed in greater detail below, Plaintiffs' Motion should be granted. First, as the Court previously found in its Order preliminarily approving the Settlement, the Settlement is "fair, reasonable, and adequate." ECF No. 4028, ¶ 1. Second, notice to potential members of the Settlement Class complied with Rule 23 and due process, such that it also warrants final approval. Third, the proposed Settlement Class readily meets the Rule 23 requirements such that the Court should certify it for purposes of the Settlement. Fourth, Plaintiffs' Counsel has diligently prosecuted this complex class action and should be appointed as Settlement Class Counsel. Fifth,

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[4] On September 17, 2020, this Court granted Final Approval of settlements with: (i) Barclays Bank plc; (ii) Citigroup Inc., Citibank, N.A., and Citigroup Global Markets Inc.; (iii) Deutsche Bank AG, Deutsche Bank Securities Inc., and DB Group Services (UK) Ltd.; (iv) HSBC Bank plc; (v) JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A., and Bank of America Corporation and Bank of America, N.A.; and (vi) Société Générale (the "Prior Settlements"). *See* ECF Nos. 3175-80.

[5] "Ewashko Decl." refers to Declaration of Jack Ewashko on Behalf of A.B. Data, Ltd. Regarding Notice and Claims Administration for Class Action with Settling Defendants, filed contemporaneously herewith.

the Plan of Distribution, which distributes funds on a *pro rata* basis, is a fair, reasonable, and rational method for distributing the Net Settlement Fund to the Settlement Class.

II. RELEVANT BACKGROUND

A. Procedural History

Plaintiffs respectfully refer the Court to the accompanying Joint Declaration concerning the history of the litigation, the claims asserted, and the settlement negotiations. *See, generally* Joint Decl., Sections II and III, ¶¶ 10-73. Here, Plaintiffs and Plaintiffs' Counsel, as proposed Settlement Class Counsel, negotiated the proposed Settlement on behalf of a Settlement Class consisting of all persons, corporations, and other legal entities that transacted in Eurodollar futures and/or options on Eurodollar futures on exchanges, including without limitation, transactions on the Chicago Mercantile Exchange, between January 1, 2003 and May 31, 2011, inclusive. *See* ECF No. 4011-1, Stipulation ¶ 2(A).[6] On April 26, 2024, the Court granted preliminary approval of the Settlement between Exchange-Based Plaintiffs' and Settling Defendants, appointed A.B. Data, Ltd. as the Claims Administrator and Huntington Bank as Escrow Agent, approved the proposed Notice Program, preliminarily approved the Plan of Distribution, and appointed Kirby McInerney and Lovell Stewart as Settlement Class Counsel. *See* ECF No. 4028.

B. Class Notice

As detailed below, notice was provided to potential members of the Settlement Class in compliance with the Court approved Notice Program. Specifically, the Notice Program consisted of two (2) methods: (i) individual, direct postcard notice; and (ii) publication of Summary Notice. *See* Ewashko Decl. ¶¶ 4-12. Additionally, the Claims Administrator updated and maintained the

[6] Excluded from the Settlement Class are: (i) Defendants, their employees, affiliates, parents, subsidiaries, and alleged co-conspirators; (ii) the Releasees (as defined in Section I(LL)); (iii) any Settlement Class Member who files a timely and valid request for exclusion; and (iv) any Persons dismissed from this Action with prejudice. *See* Stipulation ¶ 2(A).

Settlement Website and a Toll-Free Information Line to provide further information to potential members of the Settlement Class and to facilitate the filing of settlement claims. *Id*. ¶¶ 13-18

Postcard Notice. The Claims Administrator mailed by first-class United States mail postage prepaid, in the aggregate, 12,581 postcard notices to all individuals, entities, and institutions previously identified as potential members of the Settlement Class pursuant to the notice program instituted in connection with the Prior Settlements. *Id.* ¶¶ 8-10. Consistent with the Court's order granting preliminary approval, the Claims Administrator completed mailing postcard notices. *Id.*

Summary Notice. Summary Notice was widely disseminated and published once in *The Wall Street Journal* (U.S. audience only) and *Investor's Business Daily*. *Id.* ¶ 12. Additionally, a press release was distributed on May 20, 2024, via *PR Newswire US1* Newsline distribution list, which reaches the news desks of approximately 10,000 newsrooms. *Id.* ¶ 11.

Settlement Website. On April 26, 2024, Plaintiffs updated the Settlement Website, www.USDLiborEurodollarSettlements.com, to provide information regarding the Settlement, key dates, access to important case documents and copies of the long form and summary notices, the Claim Form, and an electronic filing template. *Id.* ¶¶ 13-15.

Toll-Free Information Line. Plaintiffs also maintained a dedicated toll-free telephone number for this Action to be set up, 1-800-918-8964, for potential members of the Settlement Class to call for additional information. *Id.* ¶17. The line is available twenty-four (24) hours a day, seven days a week, with live operators available during business hours. *Id.*

Settlement Class Counsel and the Claims Administrator confirm that the Notice Program was implemented as described in the Court's preliminary approval order.

III. ARGUMENT

A. The Proposed Settlement Warrants Final Approval

Under the Federal Rules of Civil Procedure, class settlements must be "fair, reasonable, and adequate." FED. R. CIV. P. 23(e). In making this determination, the Court should consider both the procedural and substantive fairness of the settlement. FED. R. CIV. P. 23(e). The Second Circuit is "mindful of the strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (acknowledging "the 'strong judicial policy in favor of settlements, particularly in the class action context.'"). "Absent 'fraud or collusion,' [courts] 'should be hesitant to substitute [their judgment] for that of the parties who negotiated that settlement.'" *Christine Asia Co., Ltd. v. Yun Ma*, No. 15 MD 02631 (CM), 2019 WL 5257534, at *8 (S.D.N.Y. Oct. 16, 2019). As detailed below, the Settlement is both substantively and procedurally fair and warrants final approval.

1. The Settlement is Procedural Fair Under Rule 23(e)(2)(A)-(B)

To determine procedural fairness, the Court evaluates whether "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). Courts recognize a "presumption of fairness, reasonableness, and adequacy as to the settlement where 'a class settlement [is] reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009); *see also In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173-74 (S.D.N.Y. 2000). In such circumstances, "great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation." *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 189 (S.D.N.Y. 2012).

This Court previously found that Plaintiffs' Counsel has the requisite qualifications and experience in class actions to lead this litigation on behalf of the proposed Settlement Class. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262 (NRB), 2011 WL 5980198 (S.D.N.Y. Nov. 29, 2011) [ECF No. 66] (appointing Interim Co-Lead Counsel for the Plaintiffs). Over the thirteen years of this litigation, Plaintiffs' Counsel remained well-informed of all material facts; as such, the proposed Settlement was negotiated by experienced counsel following extensive arm's length, non-collusive negotiations. *See* Joint Decl. ¶¶ 6, 61-68. In recommending final approval of this Settlement, Plaintiffs' Counsel considered the uncertain outcome and risk of further litigation and believes that the Settlement confers significant benefits to the Settlement Class considering the circumstances. Plaintiffs' interests in obtaining the largest possible recovery in this Action are aligned with the interests of the Settlement Class and Plaintiffs have no antagonistic interests. *See In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019) ("[P]laintiffs' interests are aligned with other class members' interests because they suffered the same injuries . . . . Because of these injuries, plaintiffs have an 'interest in vigorously pursuing the claims of the class.'"); *see also In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) ("Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between the class representatives and other class members."). Accordingly, the Settlement enjoys a presumption of fairness.

2. The Settlement is Substantively Fair Under Rule 23(e)(2)(C)-(D)

To assess substantive fairness, courts consider: (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). Courts also consider whether the settlement

"treats class members equitably relative to each other." FED. R. CIV. P. 23(e)(2)(D). Courts in the Second Circuit further consider the nine factors in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974).[7] Similar to the Prior Settlements, the Settlement satisfies the criteria for final approval under Rule 23(e)(2) and the *Grinnell* factors.

a) The Complexity, Expense, and Likely Duration of the Litigation

It is axiomatic that "federal antitrust cases are complicated, lengthy, and bitterly fought, as well as costly." *In re Vitamin C Antitrust Litig.*, No. 06 MD 1738, 2012 WL 5289514, at *4 (E.D.N.Y. Oct. 23, 2012); *see also In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 397 (S.D.N.Y. 1999) ("[G]enerally, price manipulation cases are notoriously risky and are more difficult and risky than securities fraud cases[.]"). This Action is no exception.

As detailed in Section II of the Joint Decl., this Action involved complex antitrust and CEA claims that were extensively litigated before the District and the Second Circuit Court of Appeals, and Plaintiffs' Counsel has been aggressively prosecuting such claims for over thirteen (13) years. Joint Decl. ¶¶ 10-60. Numerous courts have found this *Grinnell* factor satisfied under similar circumstances. *See, e.g.*, *In re Namenda Direct Purchaser Antitrust Litig.*, 462 F.Supp.3d 307, 312 (S.D.N.Y. 2020) ("In general, antitrust trials require the expenditure of significant time and resources by both the parties and the court, and this case would have been no exception."); *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *4 ("[F]ederal antitrust cases are complicated, lengthy, and bitterly fought[,] . . . as well as costly.").

[7] The *Grinnell* factors are: "(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." *Grinnell*, 495 F.2d at 463.

In the absence of this Settlement, this complex litigation would likely continue to consume many more years of the Court's resources. *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 258 (S.D.N.Y. 2003) ("[t]he potential for this litigation to result in great expense and to continue for a long time suggest that settlement is in the best interests of the Class"). The Settlement, which resolves all Exchange-Based Plaintiffs' claims, allows Plaintiffs to avoid the significant expense of continued litigation against the Settling Defendants. The Court previously denied Plaintiffs' motion for class certification as to certain Defendants; more recently, the Court rejected Plaintiffs' request to file a new class certification motion with respect to the Remaining Settling Defendants. *See* Joint Decl. ¶¶ 38, 57. Accordingly, even if Plaintiffs successfully litigated their claims through a trial verdict (and only after additional expert testimony and summary judgment briefing), Plaintiffs still would need to achieve a reversal of the Court's prior class certification rulings. The legal risks associated with that approach cannot be easily understated. In contrast, the $3.45 million Settlement provides an immediate recovery and eliminates all of the risk, delay, and expense of continued litigation. *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."). Accordingly, the first *Grinnell* factor favors final approval.

b) The Reaction of the Class to the Settlement

"It is well settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, No. 05 MD 1720, 2019 WL 6875472, at *16 (E.D.N.Y. Dec. 16, 2019). As detailed above, Settlement Class Members were provided direct and publication notice of the Settlement, which explained, in clear and concise language, the legal options and monetary benefits available to Settlement Class Members. *See* Ewashko Decl. ¶¶ 8, 11-12, Exs.

A-D. Although the deadline to file an objection or request for exclusion is August 15, 2024, the initial reaction to the Settlement favors final approval. *See Wal-Mart*, 396 F.3d at 118 ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement."). To date, the Claims Administrator has received no objections and no exclusion requests to the Settlement. *See* Ewashko Decl. ¶¶ 19-20. The Claims Administrator will submit an updated report following the August 15, 2024 objection and exclusion deadline, and Plaintiffs will address any objections in their August 29, 2024 reply brief.

c) The Stage of the Proceeding and Discovery Completed

Under the third *Grinnell* factor, the inquiry is whether plaintiffs have "obtained sufficient information through discovery to properly evaluate their case and to assess the adequacy of any settlement proposal." *Bellifemine v. Sanofi-Aventis U.S. LLC*, No. 07 Civ. 2207 (JGK), 2010 WL 3119374, at *3 (S.D.N.Y. Aug. 6, 2010). Here, Plaintiffs have "engaged in sufficient investigation of the facts to enable the Court to 'intelligently make…an appraisal' of the settlement." *In re AOL Time Warner, Inc.*, No. 02 Civ. 5575 (SWK), 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006).

The depth of understanding about Plaintiffs' claims lends strong support to final approval. Since commencing this litigation over thirteen (13) years ago, Plaintiffs' Counsel have, among other things, responded to motions to dismiss and other dispositive motions, conducted extensive factual and legal research, reviewed millions of pages of documents and voluminous transaction data, and engaged multiple experts. *See* Joint Decl. ¶ 61. The substantial information gained through the hard-fought litigation has enabled Plaintiffs' Counsel to be well informed about the relative strengths and weaknesses of Plaintiffs' claims and advantages of the Settlement. Accordingly, this factor supports final approval of the proposed Settlement.

d) The Risk of Establishing Liability and Damages

"In assessing the Settlement, the Court should balance the benefits afforded the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation." *In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12 Civ. 8557 (CM), 2014 WL 7323417, at *8 (S.D.N.Y. Dec. 19, 2014). There is no dispute that this Action involves complex issues of antitrust and CEA law, and the subject matter—the intersection between benchmark manipulation and futures trading—can be complex. "The complexity of Plaintiff's claims *ipso facto* creates uncertainty. . . . A trial on these issues would likely be confusing to a jury." *Park v. The Thomson Corp.*, No. 05 Civ. 2931 (WHP), 2008 WL 4684232, at *4 (S.D.N.Y. Oct. 22, 2008).

The Settling Defendants are well-financed and represented by some of the most capable law firms in the world. Had the Settling Defendants not agreed to settle, they were prepared, and had the wherewithal, to vigorously contest liability and damages. "Establishing otherwise [would] require considerable additional pre-trial effort and a lengthy trial, the outcome of which is uncertain." *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 199 (S.D.N.Y. 2012), *aff'd sub nom.*, *Charron v. Wiener*, 731 F.3d 241 (2d Cir. 2013).

Even if Plaintiffs established liability, they would face inherent difficulties and complexities in proving damages to the jury. "As the Second Circuit has noted, '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 GSE Bonds*, 414 F. Supp. 3d at 694 (quoting *Wal-Mart*, 396 F.3d at 118). Plaintiffs' theory of damages would be contested and there is no doubt that, at trial, the issue would inevitably involve a "battle of the experts" on proof of damages, which makes it "difficult to predict with any certainty which testimony would be credited." *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998) ("*NASDAQ III*"). There is a substantial risk that a jury might accept one or more

of Settling Defendants' damages arguments, or award far less than the funds secured by the Settlement, or nothing at all. Even if Plaintiffs "prevail[ed] at trial, post-trial motions and the potential for appeal could prevent the class members from obtaining any recovery for several years, if at all." *In re GSE Bonds*, 414 F. Supp. 3d at 693. Accordingly, these factors weigh in favor of final approval.

e) The Risk of Maintaining the Class Action Through Trial

On February 28, 2018, this Court denied Exchange-Based Plaintiffs' motion for class certification, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430 (S.D.N.Y. 2018), and on November 6, 2018, the Second Circuit denied Exchange-Based Plaintiffs' interlocutory appeal pursuant to FED. R. CIV. P. 23(f). *See* Joint Decl. ¶¶ 38, 44. The Court also denied Plaintiffs' request to file a class certification motion relating to the Remaining Settling Defendants. *Id.* ¶ 57. As such, the proceeds that Plaintiffs' Counsel secured on behalf of the Settlement Class Members through the Settlement are likely the only recovery that Settlement Class Members can hope to receive from Settling Defendants absent Plaintiffs' successful appeal of the Court's denial of class certification. Accordingly, the risks associated with class certification strongly weigh in favor of approving the proposed Settlement.

f) The Ability of Settling Defendants to Withstand a Greater Judgment

While there is little doubt that Settling Defendants could withstand a greater judgment than the amount paid in the proposed Settlement, "fairness does not require that the [defendant] empty its coffers before this Court will approve a settlement.'" *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 327 F.R.D. 483, 494 (S.D.N.Y. 2018). Measured against the other *Grinnell* factors, "[t]he mere fact that a defendant 'is able to pay more than it offers in settlement does not, standing alone, indicate the settlement is unreasonable or inadequate.'" *Fleisher v. Phoenix Life Ins. Co.*,

No. 11 Civ 8405 (CM), 2015 WL 10847814, at *9 (S.D.N.Y. Sept. 9, 2015).[8] Given the satisfaction of the other *Grinnell* factors, Plaintiffs submit that this factor is significantly outweighed by those that strongly favor approval.

g) The Recovery is Reasonable in Light of the Best Possible Recovery and Risks of Litigation

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." *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995). The determination of a reasonable settlement is not reducible to a simple mathematical equation yielding a particular sum. Rather, "in any case there is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972). In applying this factor, "the reasonableness of the Settlement must be judged 'not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case.'" *Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 7961 (CM), 2014 WL 1224666, at *12 (S.D.N.Y. Mar. 24, 2014) (quoting *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984)).

Continuing this Action against the Settling Defendants would be time-consuming, expensive, and would involve complex legal and factual issues and vigorously contested motion practice, including summary judgment with no certainty of success. This is particularly true given

[8] *See also In re Sinus Buster Prods. Consumer Litig.*, No. 12 Civ. 2429, 2014 WL 5819921, at *11 (E.D.N.Y. Nov. 10, 2014) ("Courts have recognized that the defendant's ability to pay is much less important than the other factors, especially when the other Grinnell factors weigh heavily in favor of settlement approval.") (quoting *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 339 (E.D.N.Y. 2010)); *see also In re Namenda Direct Purchaser Antitrust Litig.*, 462 F.Supp.3d at 314 ("This factor is typically relevant only when a settlement is less than what it might otherwise be but for the fact that the defendant's financial circumstances do not permit a greater settlement.").

that this Court denied class certification. Unless Plaintiffs are successful in appealing the denial of class certification after entry of final judgment on the merits, the Settlement is likely the only way that Settlement Class Members will receive any additional recovery through this Action. Continued litigation would also involve extensive expert testimony regarding damages. *See NASDAQ III,* 187 F.R.D. at 476. Even after the trial is concluded, there could potentially be one or more lengthy appeals. *See In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 65, 68 (S.D.N.Y. 1993).

In contrast, the Settlement provides Plaintiffs and the Settlement Class significant cash compensation of $3.45 million and represents a recovery that far exceeds the zero-recovery to which Defendants initially argued Plaintiffs were entitled. *See In re Bear Stearns Cos., Inc. Sec., Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 270 (S.D.N.Y. 2012) ("[T]he propriety of a given settlement amount is a function of both (1) the size of the amount relative to the best possible recovery; and (2) the likelihood of non-recovery (or reduced recovery)."). Given the significant risks and costs, the Settlement provides excellent results for the Settlement Class Members. *See Grinnell*, 495 F.2d at 455 n.2 ("there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery."); *In re IMAX Sec. Litig.*, 283 F.R.D. at 192 ("[T]he Second Circuit 'has held that a settlement can be approved even though the benefits amount to a small percentage of the recovery sought.'"). Accordingly, the Rule 23(e)(2) and *Grinnell* factors strongly support approval of the Settlement.

3. Rule 23(e)(2)(C)(ii) – The Claims Process is Fair and Rational

Rule 23(e)(2)(C) requires that the Court consider "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." FED. R. CIV. P. 23(e)(2)(C)(ii). In addition, "[a]n allocation formula need only have a

reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 330 F.R.D 11, at 40 (E.D.N.Y. 2019). Accordingly, the plan of distribution "need not be perfect" to be approved. *In re LIBOR*, 327 F.R.D. at 496 (quoting *Hart v. RCI Hosp. Holdings, Inc.*, No. 09 Civ. 3043 (PAE), 2015 WL 5577713, at *12 (S.D.N.Y. Sept. 22, 2015)).

Here, the Plan of Distribution for the Settlement is substantively identical to the Revised Plan of Distribution that the Court found fair and adequate in approving the Prior Settlements. *See* ECF Nos. 3175-80. The Plan of Distribution was formulated by experienced counsel with the assistance of nationally recognized mediator, Kenneth Feinberg, Esq., and contains the revisions that the Court proposed during the June 18, 2018 conference. *See* ECF No. 2729-3 at 4-5; *see also In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 414 (S.D.N.Y. 2018) ("Plaintiffs' Plan of Allocation was prepared by experienced counsel along with a damages expert – both indicia of reasonableness."); *In re Bear Stearns*, 909 F. Supp. 2d at 270 (finally approving plan of allocation developed by lead counsel with assistance from their damages expert).

The Plan of Distribution is fair and reasonable as it distributes the Net Settlement Fund subject to legal risk adjustments based on this Court's prior rulings and other strengths and weaknesses of the claims. *See In re IMAX Sec. Litig.*, 283 F.R.D. at 192 (quoting *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262 (RWS), 2002 WL 31663577, at *18 (S.D.N.Y. Nov. 26, 2002)) ("[c]lass action settlement benefits may be allocated by counsel in any reasonable or rational manner because allocation formulas reflect the comparative strengths and values of different categories of the claim"). In addition, Plaintiffs' Counsel believes that the Plan of Distribution provides a fair and reasonable method to equitably allocate the Net Settlement Funds among members of the Settlement Class, and its opinion is entitled to "considerable weight" by the Court.

See In re Am. Bank Note Holographics, Inc., 127 F. Supp. 2d 418, 430 (S.D.N.Y. 2001) ("As with other aspects of the settlement, the opinion of experienced and informed counsel is entitled to considerable weight.").

If the Court grants final approval, pursuant to the Plan of Distribution, A.B. Data, the Claims Administrator for the Prior Settlements and this Settlement, will (i) process claims under the guidance of Plaintiffs' Counsel, (ii) allow claimants an opportunity to cure any deficiencies in their claims or request the Court to review a denial of their claims, and (iii) mail Authorized Claimants their *pro rata* share of the Net Settlement Fund (per the Plan of Distribution) after Court-approval. Courts routinely approve *pro rata* distributions of this sort. *See, e.g.*, *In re GSE Bonds*, 414 F. Supp. 3d at 694-95 (proposed distribution method effective where "the claimant's pro rata share of the settlement would be obtained by dividing the individual transaction claim amount by the total of all transaction claim amount.").

To date, the Claims Administrator has not received any objections to the Plan of Distribution. *See* Ewashko Decl. ¶ 19. As such, and for the reasons previously described, *see, e.g.*, ECF Nos. 2955, 2956, 4010, the Court should approve the Plan of Distribution for use in distributing proceeds from this Settlement. *See, e.g.*, *Precision Assocs., Inc. v. Panalpina World Transp. (Holding) Ltd.*, No. 08 Civ. 42, 2015 WL 6964973, at *7 (E.D.N.Y. Nov. 10, 2015) (finding plan of allocation "is both fair and reasonable" where the plan was "the same as the one [the court] approved" previously and there was "no reason to reach a different result").

4. Rule 23(e)(2)(C)(iii) – The Proposed Award of Attorneys' Fees Supports Final Approval

The Court also considers "the terms of any proposed award of attorneys' fees, including timing of payment." FED. R. CIV. P. 23(e)(2)(C)(iii). Consistent with the Notice,[9] Settlement Class Counsel seeks 30% of the Settlement Fund after deducting Court-approved expenses to compensate them for the services rendered on behalf of the Settlement Class, and expense reimbursement of $135,349.19, the basis for which is set forth in Exchange-Based Plaintiffs' Motion for Attorneys' Fees and Reimbursement of Litigation Expenses ("Fee and Expense Motion") filed concurrently herewith. For purposes of final approval, the requested fee is firmly within the range of fees typically awarded and therefore weighs in favor of this Court granting final approval. *See In re GSE Bonds*, 414 F. Supp. 3d at 695 ("Courts in this District have approved fees as high as 33.5% from comparable class settlement funds, finding that they are 'well within the applicable range of reasonable percentage fund awards.'"); *see also* Fee and Expense Motion, Section III. A.

5. Rule 23(e)(2)(C)(iv) – The Supplemental Agreement Does Not Weigh Against Final Approval

Rule 23(e)(2)(C)(iv) and 23(e)(3) require that any agreement "made in connection with the proposal" be identified. The Settling Parties have entered into a supplemental confidential agreement which establishes certain conditions under which the Settling Defendants may terminate the Settlement if a material number of Settlement Class Members request exclusion (or "opt out")

[9] The Notice advised potential Settlement Class members that Settlement Class Counsel may apply for fees up to one-third of the settlement fund from the Settlement. *See* Ewashko Decl. Ex A. As such, the requested fee represents a discount to the potential fee request set forth in the Notice.

from the Settlement. This type of agreement is standard in complex class action settlements and has no negative impact on the fairness of the Settlement.[10]

6. Rule 23(e)(2)(D) – The Settlement Treats All Settlement Class Members Equitably

Rule 23(e)(2)(D) requires the Court to assess whether "the proposal treats class members equitably relative to each other." FED. R. CIV. P. 23(e)(2)(D). As detailed in Section III, *supra*, the Plan of Distribution—which is substantively identical to the Plan of Distribution previously approved by this Court in connection with Prior Settlements, *see* ECF Nos. 2973 and 3106—allocates funds among Class Members on a *pro rata* basis and does not provide preferential treatment to any Plaintiffs or Settlement Class Members. Specifically, the Plan of Distribution provides that each Authorized Claimant will receive his, her, or its *pro rata* share of the Net Settlement Fund with distribution of (i) 75% of the Net Settlement Fund on the basis of *pro rata* "Recognized Net Loss" and (ii) 25% on the basis of *pro rata* "Recognized Volume," subject to a guaranteed minimum payment of $20. *See* ECF No. 4012-7. Thus, this factor supports final approval of the proposed Settlement.

B. Certification of the Settlement Class is Appropriate

In accordance with the Settlement, Plaintiffs respectfully request certification of the following Settlement Class for settlement purposes only:

> All persons, corporations and other legal entities that transacted in Eurodollar futures and/or options on Eurodollar futures on exchanges, including, without limitation, transactions on the Chicago Mercantile Exchange, between January 1, 2003 and May 31, 2011, inclusive; provided that if Exchange-Based Plaintiffs expand the class period in any subsequent amended complaint, motion or

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[10] *See In re Carrier IQ, Inc., Consumer Privacy Litig.*, No. 12 MD 2330, 2016 WL 4474366, at *5, 7 (N.D. Cal. Aug. 25, 2016) (noting that "opt-out deals are not uncommon as they are designed to ensure that an objector cannot try to hijack a settlement in his or her own self-interest," and granting final approval of class action settlement); *see also* MANUAL FOR COMPLEX LITIG. (FOURTH) § 21.631 (2004) ("Knowledge of the specific number of opt outs that will vitiate a settlement might encourage third parties to solicit class members to opt out.").

> settlement, the period in the Settlement Class definition in this Agreement shall be modified so as to include that expanded class period.

See ECF No. 4011-1, Stipulation ¶ 2(A).[11]

When preliminarily approving the Prior Settlements, the Court previously determined that the Settlement Class satisfies the four (4) requirements of Rule 23(a) and at least one subsection of Rule 23(b). *In re LIBOR-based Fin. Instruments Antitrust Litig.*, 11 MD 2262 (NRB), 2020 WL 1059489 (S.D.N.Y. Mar. 2, 2020); *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). When considering certification of a settlement class, "courts must take a liberal rather than restrictive approach." *Cohen v. J.P. Morgan Chase & Co.*, 262 F.R.D. 153, 157-58 (E.D.N.Y. 2009). Here, the definition of the Settlement Class in the Settlement is functionally identical to the Settlement Classes previously certified by this Court. *See* Final Judgment and Order, ECF Nos. 3175-80. For the reasons set forth in Exchange-Based Plaintiffs' prior motion for preliminary approval of the Settlement Class, *see* ECF No. 4010, and the Court's Orders granting final approval of the Prior Settlements, *see* ECF Nos. 3175-80, the proposed Settlement Class satisfies the requirements for certification and should be certified for a settlement class.

C. The Notice Plan Adequately Apprises Settlement Class Members of Their Rights

A notice program must satisfy both FED. R. CIV. P. 23(c)(2)(B) and 23(e)(1). Rule 23(c)(2)(B) requires the "best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort." *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). However, neither individual nor actual notice to each class member is required; rather, "class counsel [need only] act[] reasonably in selecting means likely

[11] The Settling Defendants consent to certification of the Settlement Class solely for the purposes of the Settlement and without prejudice to any position Settling Defendants may take with respect to class certification in any other action and reserve all rights should the Settlement not receive this Court's final approval. *See* Stipulation ¶ 2(A).

to inform the persons affected." *Jermyn v. Best Buy Stores, L.P.*, No. 08 Civ. 214 (CM), 2010 WL 5187746, at *3 (S.D.N.Y. Dec. 6, 2010) (citing *Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir. 1988)); *In re Adelphia Commc'ns Corp. Sec. & Derivatives Litig.*, 271 F.Appx. 41, 44 (2d Cir. 2008) ("It is clear that for due process to be satisfied, not every class member need receive actual notice[.]"). Rule 23(e)(1) requires that notice of a settlement be "reasonable"—*i.e.*, it 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 proceeding." *Wal-Mart*, 396 F.3d at 114.

At preliminary approval, the Court approved and ordered the Notice Program consisting of direct mail, published, and online notice to notify Class Members of the proposed Settlement. The Claims Administrator carried out the notice plan as ordered. *See* Ewashko Decl. ¶¶ 4-18. As detailed below, the approved Notice Program satisfies due process and Rule 23 requirements and should be finally approved.

1. The Notice was the Best Practicable Under the Circumstances

As described above, the Notice Program provided notice to potential members of the Settlement Class in three (3) ways: (i) mailed postcard notice, (ii) published publication notice, and (iii) online notice. Courts routinely approve postcard-like notices programs, such as the Notice Program, as the best practicable notice consistent with Rule 23. *See McLaughlin v. IDT Energy*, No. 14 Civ. 4107, 2018 WL 3642627, at *9 (E.D.N.Y. July 30, 2018) ("authoriz[ing] short-form notice to the proposed settlement class sent as a postcard and a long-form notice distributed via the Internet"); *Ferrick v. Spotify USA Inc.*, No. 16 Civ. 8412 (AJN), 2018 WL 2324076, at *2 (S.D.N.Y. May 22, 2018) (finding that postcard notice along with email and publication notice and a settlement website was sufficient to satisfy Rule 23 and due process). Given the wide-ranging efforts already undertaken in connection with the Prior Settlements, *see* ECF No. 2729-3, Plaintiffs submit that the Notice Program is adequate.

2. The Individual Notice, Summary Notice, and Proof of Claim Form Comply with Rule 23(c)(2)(B) and Due Process

A class-action settlement notice must: (i) "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"; and (ii) be written so as to "be understood by the average class member." *Wal-Mart Stores*, 396 F.3d at 114; *see also* Alba Conte & Herbert B. Newberg, NEWBERG ON CLASS ACTIONS § 11:53, at 167 (4th ed. 2002).[12]

Here, the Notices—which are substantively similar to the previously approved Notices—explain, in clear and concise language, the legal options and monetary benefits available to Settlement Class Members under the Settlement. The mailed postcard notice—which A.B. Data mailed to all individuals, entities, and institutions previously identified as potential members of the Settlement Class pursuant to the notice program instituted in connection with the Prior Settlements—noted in plain, easily understood language that a claim for this Settlement will be generated for all previously submitted valid claims, unless the claimant requests exclusion from this Settlement.

The Long Form Notice uses a question and answer format that provides a simple step-by-step explanation of critical issues related to the Action and the proposed Settlement and describes in plain, easily understood language the information required by Rule 23(c)(2)(B), including: (i) the nature of the Action; (ii) the fraud and civil conspiracy claim pleaded; (iii) the scope of the release in the Settlement Agreement; (iv) the definition of the Settlement Class; (v) the monetary

[12] Factors that courts typically consider include whether: (i) there is "a succinct description of the substance of the action and the parties' positions"; (ii) "the parties, class counsel, and class representatives have been identified"; (iii) "the relief sought has been indicated"; (iv) "the risks of being a class member, including the risk of being bound by the judgment have been explained"; (v) "the procedures and deadlines for opting out have been clearly explained"; and (vi) "class members have been informed of their right to appear in the action through counsel." *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *8 (citing *In re Payment Interchange Fee & Merch. Discount Antitrust Litig.*, No. 05 MD 1720, 2008 WL 115104 (E.D.N.Y. Jan. 8, 2008)).

benefits available to the Settlement Class Members, including the Plan of Distribution, (vi) Plaintiffs' Counsel's intention to move for an award of fees and expenses and the maximum size of those awards (as well as the timing of that motion); (vii) the deadline and procedure for submitting a claim; (viii) the deadlines and procedures for excluding oneself from the Settlement Class, objecting to the Settlement, and attending the fairness hearing; (ix) that Settlement Class Members may, but need not, appear through their own counsel at the fairness hearing; (x) the binding effect of the Judgments under Rule 23(c); and (xi) the identity of Plaintiffs' Counsel. *See* Ewashko Decl. Ex. A. The Long Form Notice also prominently features contact information for the Claims Administrator and Plaintiffs' Counsel, which Class Members can utilize to obtain additional information.

The Summary Notice directed Settlement Class Members to the Settlement Website, where the Long Form Notice and other settlement-related documents are available. *See id.* Exs. B-D. The Proof of Claim Form—which is substantively similar to the form that this Court approved in connection with the Prior Settlements, *see* ECF No. 3038 at ¶ 8—is simple to understand and was designed to permit submission either electronically or on paper, at the Settlement Class Members' election. *See* Ewashko Decl. Ex. A. Furthermore, the Settlement Website and the toll-free information line provided means by which potential members of the Settlement Classes could obtain additional information regarding the Settlement, including key dates, access to important case documents, answers to their questions, and a Claim Form and an electronic filing template. *See* Ewashko Decl. ¶¶ 13-15, 17. For the reasons stated above, the Notice Program "provided sufficient information for Class Members to understand the Settlement[s] and their options" and comport with due process. *Sykes v. Harris*, 09 Civ. 8486 (DC), 2016 WL 3030156, at *10 (S.D.N.Y. May 24, 2016).

D. Kirby McInerney and Lovell Stewart Should Be Appointed as Settlement Class Counsel

A court that certifies a class must appoint class counsel, who is charged with fairly and adequately representing the interests of the class. FED. R. CIV. P. 23(g)(1). In determining class counsel, the Court must consider: (i) the work undertaken by counsel in identifying or investigating the potential claims; (ii) counsel's experience in handling class actions, other complex litigation, and similar claims; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. FED. R. CIV. P. 23(g)(1)(A).

The Court has previously acknowledged the qualifications of proposed class counsel—Kirby McInerney and Lovell Stewart—when it appointed these two (2) firms as Interim Co-Lead Counsel for the Plaintiff class. *See In re LIBOR*, 2011 WL 5980198 [ECF No. 66]; *see also* Pre-Trial Order No. 1 [ECF No. 90] ¶ 18. For the reasons set forth in prior briefing on the issue, Plaintiffs respectfully request that the Court appoint the law firms of Kirby McInerney LLP and Lovell Stewart Halebian Jacobson LLP as Settlement Class Counsel. *See, e.g.*, ECF Nos. 3023-2, 3142, and 4010.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant final approval of the Settlement with the Settling Defendants; certify the Settlement Class; find that the notice program to the Settlement Class comported with the requirements of Rule 23 and due process; grant final approval of the Plan of Distribution; appoint Plaintiffs' Counsel as Settlement Class Counsel; and enter the proposed Final Judgment and Order.

Dated: August 1, 2024

Respectfully submitted,

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