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

FRONTPOINT ASIAN EVENT DRIVEN FUND, L.P. et al., Plaintiffs, -against- CITIBANK, N.A. et al., Defendants.	Docket No. 16-cv-05263 (AKH)

PLAINTIFFS' MEMORANDUM
IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENTS WITH DEFENDANTS CITIBANK, N.A., CITIGROUP INC., JPMORGAN CHASE & CO., AND JPMORGAN CHASE BANK, N.A.

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INTRODUCTION

After months of hard-fought negotiations, Representative Plaintiffs[1] have executed settlement agreements with (i) Citibank, N.A. and Citigroup Inc. (collectively, "Citi") and (ii) JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. ("JPMorgan") that will provide the Settlement Class a total of $20,979,000 among other valuable benefits. Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure ("Federal Rules"), Representative Plaintiffs respectfully submit this memorandum of law and the accompanying Declaration of Vincent Briganti, Esq. dated November 15, 2018 ("Briganti Decl.") in support of Representative Plaintiffs' motion for an order that: (a) preliminarily approves Representative Plaintiffs' proposed Settlements with Citi and JPMorgan,[2] subject to later, final approval; (b) conditionally certifies a Settlement Class on the claims against Citi and JPMorgan, subject to later, final approval of such Settlement Class; (c) appoints Lowey Dannenberg, P.C. ("Lowey Dannenberg") as Class Counsel; and (d) appoints Amalgamated Bank as the Escrow Agent under the Settlement Agreements. *See* [Proposed] Order Preliminarily Approving Class Action Settlement with Citibank, N.A., Citigroup Inc., JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. and Conditionally Certifying a Settlement Class (the "[Proposed] Preliminary Approval Order") filed herewith.

Preliminary approval of these Settlements will unlock information that Representative Plaintiffs believe is critical to successfully litigating this case and recovering the damages suffered by

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[1] Representative Plaintiffs are FrontPoint Asian Event Driven Fund, L.P. ("FrontPoint"), Sonterra Capital Master Fund, Ltd. ("Sonterra"), Fund Liquidation Holdings LLC ("FLH"), and any subsequently named plaintiff(s). Unless otherwise noted, ECF citations are to the docket in *FrontPoint Asian Event Driven Fund, L.P., et al. v. Citibank, N.A., et al.*, No. 16-cv-05263 (AKH) (S.D.N.Y.) and internal citations and quotation marks are omitted.

[2] The Stipulation and Agreement of Settlement as to Defendants Citibank, N.A. and Citigroup Inc. dated May 22, 2018 (the "Citi Agreement") and the Stipulation and Agreement of Settlement as to Defendants JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. dated November 14, 2018 (the "JPMorgan Agreement" and collectively with the Citi Agreement, the "Settlement Agreements") are attached as Exhibits 1 and 2 respectively to Briganti Decl. Unless otherwise defined, capitalized terms in this memorandum of law have the same meaning as in the Settlement Agreements. Representative Plaintiffs, Citi and JPMorgan are collectively referred to as the "Settling Parties."

Representative Plaintiffs and the Class. In their respective Settlements, Citi and JPMorgan each agreed to provide certain cooperation materials to Representative Plaintiffs to assist in their prosecution against the remaining non-settling Defendants and assist in developing a plan of allocation, but only upon preliminary approval of the Settlements. Citi Agreement § 4(K); JPMorgan Agreement § 4(K); *see infra* at 4.

These Settlements meet the two requirements for granting preliminary approval: they are procedurally and substantively fair. The Settlements are both products of serious, informed, arm's-length negotiations between experienced counsel. Further, the Settlements are substantively fair, reasonable, and adequate, providing for Citi's payment of $9,990,000, and JPMorgan's payment of $10,989,000 into the Settlement Funds, which will then be distributed to qualifying Settling Class Members. Citi Agreement §§ 1(KK), 3; JPMorgan Agreement §§ 1(KK), 3. Representative Plaintiffs believe that the cooperation materials to be provided upon preliminary approval of these Settlements will appreciably advance this Action and assist Representative Plaintiffs in the prosecution of the case against the remaining Defendants. Because the Settlements with Citi and JPMorgan meet all the requisites for preliminary approval, the Court should grant Representative Plaintiffs' motion.

ARGUMENT

I. The Court should preliminarily approve the Settlements.

The procedural history of this Action is set forth in the Briganti Decl. ¶¶ 11-15.

A. The preliminary approval standard.

There is a "strong judicial policy in favor of settlements, particularly in the class action context." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 116 (2d Cir. 2005) ("The compromise of complex litigation is encouraged by the courts and favored by public policy."); *Bano v. Union*

Carbide Corp., 273 F.3d 120, 129-30 (2d Cir. 2001) (holding that there is an overriding public interest in settling and quieting litigation, particularly class actions).

Proposed settlements of a Rule 23(b)(3) class, like this one, require notice to class members, an opportunity for those class members to object, and final approval by the Court after a hearing at which class members may appear and be heard. *See* FED. R. CIV. P. 23(e) (settlements in class actions require "the court's approval"); *see generally* Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS § 13.41, at 89 (4th ed. 2002). Preliminary approval is a first step, akin to "a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness." *In re Traffic Exec. Assn. E. R.R.*, 627 F.2d 631, 634 (2d Cir. 1980). In this case, the scope of cooperation promised by Citi and JPM and the Settlement Amounts totaling $20,979,000 provide more than sufficient probable cause.

Preliminary approval of a settlement is not expressly mentioned in the Federal Rules of Civil Procedure. Frequently, the judicially-created requirements for preliminary approval have been expressed as follows:

> Where the proposed settlement [1] appears to be the product of serious, informed, non–collusive negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential treatment to class representatives or segments of the class and [4] falls within the range of **possible** approval, preliminary approval is granted.

In re NASDAQ Market-Makers Antitrust Litig., 176 F.R.D. 99, 102 (S.D.N.Y. 1997) ("*NASDAQ II*") (emphasis and numbers in brackets supplied); *see also In re Platinum & Palladium Commodities Litig.,* No. 10CV3617, 2014 WL 3500655, at *13 (S.D.N.Y. July 15, 2014) ("*Platinum*") (defendants in class actions are entitled to settle the claims against them even if a court believes that the claims may be meritless, provided that the class is properly certified and the settlement is fair). The Settlements with Citi and JPMorgan amply satisfy each of these four requirements. *See* Pts. I.B-F, *infra.*

In conducting the preliminary approval inquiry, a court primarily considers the "negotiating process leading up to the settlement, i.e., procedural fairness, as well as the settlement's substantive terms, i.e., substantive fairness." *Platinum,* 2014 WL 3500655, at *11. The question is whether the terms are "at least sufficiently fair, reasonable and adequate to justify notice to those affected and an opportunity to be heard." *NASDAQ II*, 176 F.R.D. at 102.[3]

B. The Settlements provide considerable benefits to the Settlement Class.

The Settlements with Citi and JPMorgan are the initial "ice breaker" settlements in this Action and serve as a potential catalyst for other Defendants to settle. *See In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2011 WL 717519, at *10 (E.D. Mich. Feb. 22, 2011) ("Also of significant value is the fact that the Settlement Agreement with [defendant] can serve as an 'ice-breaker' settlement and includes the promise of cooperation from [the defendant]."). The Settlements will also ensure funding to continue the litigation against the non-settling Defendants.

Upon preliminary approval of the Settlements, Citi and JPMorgan are obligated to provide specified cooperation to Representative Plaintiffs to aid their pursuit of claims against the non-settling Defendants. Subject to proper authentication, this cooperation will include, but is not limited to, the following (to the extent such information may exist and is reasonably accessible): (i) documents and data that Citi and JPMorgan previously provided to any governmental regulatory

[3] *See, e.g., Laydon v. Mizuho Bank, Ltd.*, No. 12-cv-3419 (S.D.N.Y. Jun. 22, 2016), ECF No. 659 ("Euroyen Order I") (preliminarily approving $35 million and $23 million settlements obtained by Lowey Dannenberg in a proposed class action alleging the manipulation of the Tokyo Interbank Offered Rate ("Euroyen TIBOR") and the London Interbank Offered Rate for the Japanese yen ("Yen-LIBOR")); *Laydon v. Mizuho Bank, Ltd.*, No. 12-cv-3419 (S.D.N.Y. Aug. 3, 2017), ECF No. 782 ("Euroyen Order II") (preliminarily approving $77 million and $71 million settlements); *Laydon v. Mizuho Bank, Ltd.*, No. 12-cv-3419 (S.D.N.Y. March 8, 2018), ECF No. 854 (preliminarily approving $30 million settlement) ("Euroyen Order III"); *Sullivan, et al. v. Barclays plc, et al.*, No. 13-cv-2811 (PKC), (S.D.N.Y. Dec. 15, 2015), ECF No. 234 ("Euribor Order I") (preliminarily approving $94 million settlement obtained by Lowey Dannenberg in a proposed class action alleging the manipulation of the Euro Interbank Offered Rate ("Euribor"); *Sullivan v. Barclays plc*, No. 13-cv-2811 (PKC) (S.D.N.Y. Jan. 18, 2017), ECF No. 279 ("Euribor Order II") (preliminarily approving $45 million settlement as within the range of reasonableness, fairness and adequacy); *Sullivan v. Barclays plc*, No. 13-cv-2811 (PKC) (S.D.N.Y. Jul. 6, 2017), ECF No. 364 ("Euribor Order III") (preliminarily approving $170 million settlement as within the range of reasonableness, fairness and adequacy).

authority in connection with such regulator's investigation of conduct related to SIBOR and/or SOR, but without identifying which regulator or regulators received such documents; (ii) documents in Citi's and JPMorgan's possession, concerning (a) possible requests to, from or among other panel banks for SIBOR and SOR submissions to be made at a certain level or in a certain direction, and (b) requests to engage in other conduct to attempt to cause SIBOR and SOR to be set at a certain level or to move in a certain direction; (iii) reasonably available trade data pertaining to Citi's and JPMorgan's transactions in Singapore Dollar-denominated interbank money market instruments; (iv) reasonably available trade data pertaining to Citi's and JPMorgan's transactions in SIBOR- and SOR-Based Derivatives during the Class Period; (v) documents reflecting SIBOR and SOR reporting rules or standards; (vi) reasonably available SIBOR and SOR submissions made by Citi and JPMorgan; and (vii) non-privileged declarations, affidavits, witness statements, or other sworn or unsworn statements of Citi's and JPMorgan's employees. Citi Agreement § 4(G); JPMorgan Agreement § 4(G).

These cooperation materials will give Representative Plaintiffs further visibility into the specifics of Defendants' alleged manipulation that were not previously available. Based on publicly available information, Representative Plaintiffs understand that the Monetary Authority of Singapore ("MAS") imposed penalties upon Defendants without providing significant details of any investigatory findings. *See* ECF No. 308, Ex. E. While it is known that MAS imposed a penalty against banks after finding deficiencies in governance, risk management, internal controls, and surveillance systems concerning benchmark submissions—and discussed the involvement of 133 traders at various Defendants in these deficiencies—few other details have been made public. The cooperation materials provided by Citi and JPMorgan will allow Representative Plaintiffs to further develop the scope and nature of the conspiracy Representative Plaintiffs have alleged, including the

relevant culpability among its participants, and aggressively seek recoveries from the remaining Defendants for the damages allegedly caused by the conduct.

Another benefit of the Settlements is that neither Citi nor JPMorgan have a right to reversion. If the Settlements are finally approved, the Settlement Amounts will not revert to Citi or JPMorgan in part or in whole because of opt-outs or failures of Class Members to submit a Proof of Claim and Release. Citi Agreement § 3; JPMorgan Agreement § 3.[4] Given the reality that claim rates often fall below 100%, the non-reversion term of the Settlements likely will enhance the benefits and the recovery that qualifying claimants will receive.

In exchange for these benefits, the Releasing Parties will release Citi and JPMorgan from any and all claims relating to SIBOR, SOR, or the SIBOR- and/or SOR-Based Derivatives that were allegedly distorted by alleged manipulation of SIBOR and SOR. Citi Agreement § 12; JPMorgan Agreement § 12. Representative Plaintiffs' claims against Citi and JPMorgan will also be dismissed on the merits with prejudice. Citi Agreement §§ 16, 18; JPMorgan Agreement §§ 16, 18.

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

"To determine procedural fairness, courts examine the negotiating process leading to the settlement." *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 618 (S.D.N.Y. 2012). Where a settlement "is the product of arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation," the settlement enjoys a "presumption of fairness." *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173-74 (S.D.N.Y. 2000), *aff'd sub nom. D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001); *Shapiro v. JPMorgan Chase & Co.*, No. 11

[4] *Guerrero v. Wells Fargo Bank, N.A.*, No. C 12-04026 WHA, 2014 WL 1365462, at *2 (N.D. Cal. Apr. 7, 2014) (finding the lack of reversion to defendant of remaining portions of the net settlement an important benefit to the class). Under the Settlements, the proceeds that would have been paid to those persons who fail to claim will be redistributed among, and enhance the recovery of, those Class Members who do claim.

CIV. 7961 CM, 2014 WL 1224666, at *2 (S.D.N.Y. Mar. 24, 2014) ("Co–Lead Counsel, who have extensive experience in prosecuting complex class actions, strongly believe the Settlement is in the best interests of the Class, an opinion which is entitled to 'great weight.'").

The process leading up to the Settlements fully supports preliminary approval. Briganti Decl. ¶¶ 16-33. The Citi Settlement is the result of more than four months of arm's-length, non-collusive negotiations between experienced counsel. Citi and Representative Plaintiffs began to discuss the possibility of settling the Action in January 2018. *Id.* ¶ 17. In the months that followed, Plaintiffs' Counsel and counsel for Citi had numerous communications, during which counsel for each side expressed their views of the Action and Citi's conduct in relation to the alleged conspiracy. *Id.* ¶¶ 18-19. At all times, counsel for Citi argued that Citi was not liable for the claims asserted against it in the Action. Following months of hard-fought negotiations, Representative Plaintiffs and Citi reached an agreement. *Id.* ¶¶ 20-23. Citi does not admit any wrongdoing or liability as part of its Settlement and maintains that it has good and meritorious defenses to the claims brought against it in the Action. *See* Citi Agreement at 2.

Representative Plaintiffs reached the JPMorgan Settlement after more than a year of arm's-length, non-collusive negotiations among experienced counsel. JPMorgan and Representative Plaintiffs began to discuss the possibility of settling the Action in April 2017. Briganti Decl. ¶ 25. In the months that followed, Plaintiffs' Counsel and counsel for JPMorgan spoke multiple times, each expressing their views as to the arguments supporting and against establishing liability and damages against JPMorgan, and as to the Court's reactions to the claims throughout the motion to dismiss briefing process. After a year of ongoing settlement communications, Representative Plaintiffs and JPMorgan executed a Settlement Term Sheet in June 2018. *Id.* ¶¶ 26-29. After a few additional months of negotiations concerning the scope of the settlement terms, Representative Plaintiffs and

JPMorgan executed the JPMorgan Agreement in November 2018. *Id.* ¶ 31. At all times, JPMorgan argued that it was not liable for the claims asserted against it in the Action. JPMorgan does not admit any wrongdoing or liability as part of its Settlement and maintains that it has good and meritorious defenses to the claims brought against it in the Action. *See* JPMorgan Agreement at 2.

The process of reaching these Settlements benefitted from the involvement of informed advocates. Prior to negotiating with Citi and JPMorgan, Plaintiffs' Counsel had researched and considered a wide range of relevant legal issues and analyzed the facts known to date, including the Court's prior decision on Defendants' first motion to dismiss in this Action and government settlements involving similar or related conduct involving other benchmarks, such as plea, non-prosecution, and deferred prosecution agreements. Plaintiffs' Counsel enhanced their understanding of the alleged manipulation through ongoing consultations with a leading commodity manipulation consulting expert. Briganti Decl. ¶¶ 9-10.

Plaintiffs' Counsel has extensive experience in litigating Sherman Antitrust Act claims and has obtained landmark settlements on behalf of some of the nation's largest pension funds and institutional investors. *Id.* ¶¶ 6-7; *see also* Briganti Decl. Ex. 3 (Lowey Dannenberg Firm Resume). Many of these settlements arose from similar benchmark manipulation cases, including recent cases alleging manipulation of Euribor, Yen-LIBOR, and Euroyen TIBOR. *See, e.g.,* Final Approval Order of Settlements with Barclays plc, Barclays Bank plc, Barclays Capital Inc., Deutsche Bank AG and DB Group Services (UK) Ltd., HSBC Holdings plc and HSBC Bank plc, *Sullivan v. Barclays plc*, No. 13-cv-2811 (PKC) (S.D.N.Y. May 18, 2018), ECF No. 424 (finally approving $309 million in settlements related to manipulation of the Euro Interbank Offered Rate ("Euribor")); *Laydon v. Mizuho Bank, Ltd.*, No. 12-cv-3419 (S.D.N.Y.) ECF Nos. 891, 838, 720 & *Sonterra Capital Master Fund Ltd. et al v. UBS AG et al*, No. 15-cv-5844 (S.D.N.Y.), ECF. Nos. 423, 389, 298 (finally approving a

total of $236 million in settlements to date related to manipulation of Yen-LIBOR and Euroyen TIBOR); *see also Sonterra Capital Master Fund Ltd., et al. v. Credit Suisse AG, et al.*, No. 15-cv-00871(SHS), (August 16, 2017 S.D.N.Y.), ECF No. 159 ("Swiss Order") (preliminarily approving $22 million Swiss franc LIBOR settlement). Plaintiffs' Counsel also have unmatched expertise in developing plans of allocation for complex financial instruments and have access to knowledge and resources to successfully implement settlements. Briganti Decl. ¶ 6.

Plaintiffs' Counsel believes that the Settlements reached with Citi and JPMorgan are in the best interests of the Settlement Class. Considering Plaintiffs' Counsel's extensive prior experience in complex class action litigation, their knowledge of the strengths and weaknesses of Representative Plaintiffs' claims, and their assessment of the Settlement Class's likely recovery following trial and appeal, the Settlement is entitled to a presumption of procedural fairness.

D. There are no obvious or other deficiencies in the Settlements.

The Settlements plainly satisfy the next *NASDAQ II* preliminary approval factor, as they involve a structure and terms that are commonly used in class action settlements in this District. *See NASDAQ II*, 176 F.R.D. at 102; *see also* Briganti Decl. ¶ 33. The closest issue to a departure is in § 23 of the Settlement Agreements, which gives Citi and JPMorgan the right, but not the obligation, in their sole discretion, to exercise certain rights, including terminating the Settlement Agreements, pursuant to the terms and conditions of a confidential Supplemental Agreement. These types of qualified rights to terminate, however, are common in class action settlements and are generally included based on the defendant's desire to quiet the litigation through a class-wide settlement, without leaving open any material exposure. *See, e.g.,* Euroyen Order I ¶¶ 10-11; *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 02CV1152, 2018 WL 1942227, at *5 (N.D. Tex. Apr. 25, 2018), *Spann v.*

J.C. Penney Corp., 314 F.R.D. 312, 329-330 (C.D. Cal. 2016), *Resnick v. Frank*, Nos. 12-15705, 12-15889, 12-15957, 12-15996, 12-16010, 12-16038, 2012 WL 4845923, at *41 (9th Cir. Oct. 9, 2012).

E. The Settlements do not favor Representative Plaintiffs nor any Class Members, and do not create any preferences.

The Settlements do not favor or disfavor any Representative Plaintiffs or Class Members; nor do they discriminate against, create any limitations, or exclude from payments any persons or groups within the Settlement Class. *See NASDAQ II*, 176 F.R.D. at 102; *see generally* Settlement Agreements.

Making such distinctions is fully allowable and expected, if there is a rational basis for them, in plans of allocation. The value of the cooperation provisions agreed to in the Settlements is evident here because the transactional data from Citi and JPMorgan are a material part of the process to formulate the plan of allocation in this Action. Citi's and JPMorgan's obligations to produce transaction data start after entry of the [Proposed] Preliminary Approval Order. Citi Agreement § 4(K); JPMorgan Agreement § 4(K). Once Citi and JPMorgan produce their data, Representative Plaintiffs will continue their work to develop a plan of allocation and determine what other data or information may be necessary, including data from non-settling Defendants.

But a finalized plan of allocation is not necessary at this time to advance these Settlements. Preliminary approval is routinely granted to settlements before any plan of allocation exists. *See, e.g.*, Euribor Order I and Euribor Order II, note 3 *supra*; *see also In re Wachovia Equity Sec. Litig.*, No. 08 CIV. 6171 RJS, 2012 WL 2774969, at *5 (S.D.N.Y. June 12, 2012) (approving plan of allocation after preliminary approval of proposed settlement and certification of settlement class); *In re Canadian Sup. Secs. Litig.*, No. 09-10087, 2011 WL 5830110, at *2 (S.D.N.Y. Nov. 16, 2011) (same); *In re Giant Interactive Grp. Inc. Secs. Litig.*, 279 F.R.D. 151, 163 (S.D.N.Y. 2011) (same).

Even final approval of a class action settlement is appropriate prior to the preparation of a plan of allocation, especially in a complex case in which only one or two defendants have settled and sufficient records for determination as to the distribution of the proceeds are not yet available. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 170 (2d Cir. 1987); *see also In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 480 (S.D.N.Y. 1998) ("*NASDAQ III*"); *In re HealthSouth Corp. Sec. Litig.*, 334 F. App'x 248, 251, 253-55 (11th Cir. 2009); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.313 at 296; NEWBERG ON CLASS ACTIONS § 12:35 at 342 (4th ed. 2002).

Here, Representative Plaintiffs fully anticipate sending the proposed plan of allocation with the Class Notice to the Settlement Class (along with notice of any other settlements that have been preliminarily approved by that time). The proposed plan of allocation will be available to Class Members before they have to decide to accept the Settlement's benefits, opt out, or object to final approval. After receiving Citi's and JPMorgan's transaction records, Plaintiffs' Counsel will formulate a plan of allocation that, once completed, will be filed, along with a Class Notice program, the forms of notice, and proposed date for the Fairness Hearing, with the Court for preliminary approval. The Court will also have the opportunity to review Representative Plaintiffs' proposed plan of allocation when considering whether to grant final approval of the Settlement.

In this manner, the Settlements wholly avoid any preferences or discriminations. The Settling Parties will determine whether to propose any preferences or discriminations (and, if so, which ones) among Class Members through an appropriate process during the development of a plan of allocation. Accordingly, the Settlements fully satisfy this third *NASDAQ II* preliminary approval element.

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

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

Private antitrust plaintiffs, unlike the government, have the burden to prove anticompetitive impact and damages. *Gottesman v. General Motors Corp.*, 436 F.2d 1205, 1210 (2d Cir. 1971). Even where the Department of Justice has secured a criminal guilty plea in some cases, civil juries have found no damages. *See, e.g.,* Special Verdict on Indirect Purchases, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-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 [p]laintiffs had succeeded in proving liability at trial, there is no guarantee they would have recovered damages.").

Citi's and JPMorgan's monetary consideration alone, $20,979,000 million, is greater than the amount of maximum potential damages these Defendants would have argued they were liable for had the case proceeded to trial. Citi and JPMorgan would have argued—and still maintain—that

they are not liable for any damages on any claims in the Action. The Settlement Amounts are also greater than what they deposited with MAS. As a penalty, MAS temporarily required Citi and JPMorgan to increase their government-held reserve amounts, but later returned the additional funds to Citi and JPM.

Plaintiffs' impact and damages theories against Citi and JPMorgan would have been sharply disputed, including at trial. This inevitably would have involved a "battle of the experts." *See NASDAQ III,* 187 F.R.D. at 476. "In this 'battle of experts,' it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors . . . ." *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985). Before confronting the risks of proving impact and damages, Plaintiffs would have faced the complexities, challenges, and risk of a far-greater task: establishing the other elements of liability. The facts and claims here are intricate. As recognized in similar contexts, "the complexity of [p]laintiff's claims *ipso facto* creates uncertainty." *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 123 (S.D.N.Y. 2009). Establishing liability in the Action will involve obtaining and proving the meaning and significance of instant messages, trading patterns, and other facts or evidence. Trader communications will likely raise ambiguities and require inferences. This creates many risks in establishing liability in this case.[5]

The answers to the key questions of fact and law for all Class Members' claims will be hotly disputed, and Plaintiffs' Counsel will zealously seek to overcome all of the foregoing risks. However, in light of the many risks of continued prosecution, the Settlements beneficially diversifies the Settlement Class's position. The Settlements provide Class Members with an immediate recovery

[5] Plaintiffs' Counsel must be wary in describing in detail its proof risks due to the presence of non-settling Defendants. *See In re Prudential Secs. Inc. Ltd. P'ships Litig.*, No. M-21-67 (MP), 1995 WL 798907, at *15 (S.D.N.Y. Nov. 20, 1995) ("*Prudential*") (Pollack, J.) (where many non-settling defendants are present, class counsel appropriately omitted detailed discussion of all risks to recovery, the reasons for such risks, and their relative seriousness).

and the opportunity to obtain future recoveries through settlements or verdicts against the remaining Defendants. In assessing the reasonableness and adequacy of benefits obtained in the Settlements, Plaintiffs' Counsel was mindful of the "benefits afforded the Class including the immediacy and certainty of the recovery, against the continuing risks of litigation." *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 139 (S.D.N.Y. 2010). Due to the risks of litigation, the total consideration that the Settlements with Citi and JPMorgan provide, including their cooperation to Representative Plaintiffs, is fair, reasonable, and adequate in light of all the circumstances and well within the range of that which may possibly later be found to be fair, reasonable, and adequate at final approval. *NASDAQ II*, 176 F.R.D. at 102; Briganti Decl. ¶ 33.

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

At final approval, the Court considers several factors in deciding whether a settlement is fair, reasonable, and adequate:

> (i) the complexity, expense and likely duration of the litigation; (ii) the reaction of the class to the settlement; (iii) the stage of the proceedings and the amount of discovery completed; (iv) the risks of establishing liability; (v) the risks of establishing damages; (vi) the risks of maintaining the class action through the trial; (vii) the ability of the defendants to withstand a greater judgment; (viii) the range of reasonableness of the settlement fund in light of the best possible recovery; and (ix) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) ("*Grinnell*"); *see also Maywalt v. Parker & Parsley Petroleum Co.*, 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."). Representative Plaintiffs have already addressed *Grinnell* factors 4-6 and 8-9 above, which are the only appropriate considerations

for preliminary approval. *See In re Warner Chilcott Ltd. Sec. Litig.*, No. 06 CIV. 11515 (WHP), 2008 WL 5110904, at *2 (S.D.N.Y. Nov. 20, 2008) ("Although a complete analysis of these factors is required for final approval, at the preliminary approval stage, the Court need only find that the proposed settlement fits within the range of possible approval to proceed."). Representative Plaintiffs nonetheless address the remaining *Grinnell* Factors below.

***Grinnell* Factor 1.** The factual and legal issues in this Action involve esoteric financial instruments and markets, numerous defendants, and complex analyses that will likely require expert testimony. The scope of the documents and data to be produced is unknown, but similar benchmark interest rate cases suggest that such productions may involve millions of pages of documents, thousands of hours of audio recordings, and gigabytes of data. As is always true in cases involving large document productions by multiple defendants, a key component of the duration of the case will be the time that the non-settling Defendants require to produce their documents and that Plaintiffs' Counsel need to review the Defendants' and non-party document productions. The expert work alone will likely be expensive and time consuming. Furthermore, this case presents an inherent level of risk and uncertainty because it involves a market unfamiliar to the average juror. *See Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 663 (S.D.N.Y. 2015).

***Grinnell* Factor 2.** It is premature to attempt to gauge the reaction of the Class to the Settlements. Nonetheless, the Representative Plaintiffs favor the Settlement. Experienced and knowledgeable in similar transactions as those at issue here, Representative Plaintiffs' approval is highly probative of the likely reaction by other Class Members upon similarly reviewing the Settlements with Citi and JPMorgan. Any Class Member who does not favor the deal can opt out. After the Settlement Class has been provided the Class Notice of the Settlements, Representative Plaintiffs will address the Settlement Class's reaction in their motion for final approval.

***Grinnell* Factor 3.** The Court may approve a settlement at any stage of litigation. *See In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, MDL No. 1500, 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.*

Representative Plaintiffs conducted extensive factual and legal research and consulted experts to assess the merits of their claims. Briganti Decl. ¶¶ 9-10. Representative Plaintiffs reviewed publicly-available information, including government pleas, non-prosecution agreements, and deferred prosecution agreements in cases involving other benchmarks. Plaintiffs' Counsel also had the benefit of this Court's earlier decision on Defendants' first motion to dismiss. *Id.* ¶ 9. The information gathered during this process greatly informed Representative Plaintiffs of the advantages and disadvantages of entering into the Settlements with Citi and JPMorgan. Although Representative Plaintiffs have not received discovery from Citi and JPMorgan, discovery is not required even at final approval of a settlement. *See Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2d Cir. 1982); *see also In re AOL Time Warner, Inc.,* 2006 WL 903236, at *10 ("The relevant inquiry for this factor is whether the plaintiffs have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement").

***Grinnell* Factor 7.** Citi and JPMorgan have the ability to withstand a greater judgment than $9.99 million and $10.989 million, respectively, but this *Grinnell* Factor alone does not bear on the appropriateness of the Settlements. *See In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 460 (S.D.N.Y. 2004) ("[T]he fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate"); *In re Tronox*

Inc., No. 14-cv-5495 (KBF), 2014 WL 5825308, at *6 (S.D.N.Y. Nov. 10, 2014) ("The law does not require a defendant to completely empty its pockets before a settlement may be approved—indeed, if it did, it is hard to imagine why a defendant would ever settle a case.").

2. Unlike in *Grinnell*, recovery on many of the claims being settled here is not foreclosed because of the availability of joint and several liability recovery from the remaining Defendants.

A more detailed *Grinnell* analysis is also inappropriate because *Grinnell* involved the payment by all four defendants of $10 million, whereas here, Citi and JPMorgan have settled, but other Defendants remain in the litigation. *See Grinnell,* 495 F.2d at 452. Most of the claims here are premised on joint or otherwise alleged conspiratorial conduct that creates joint and several liability. *See Strobl v. New York Mercantile Exch.*, 582 F. Supp. 770, 778 (S.D.N.Y. 1984) (holding defendants jointly and severally liable on a jury verdict for price fixing and manipulation in violation of the antitrust laws and commodities laws, as well as common law fraud), *aff'd,* 768 F.2d 22 (2d Cir. 1985). The situation here is different from the "entire settlement for all purposes" circumstance under review in *Grinnell*.

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

At this preliminary approval stage, the Settlement Class for the claims against Citi and JPMorgan satisfies the provisions of Rule 23(a) and Rule 23(b)(3). The Settlement Class excludes persons and entities outside the purview of United States law. But it includes those Persons protected by U.S. law who transacted in financial instruments, the prices of which Defendants allegedly distorted or sought to distort by manipulating SIBOR and SOR to profit from their proprietary trading positions. Specifically, the Agreement provides for the following Settlement Class:

> [A]ll Persons (including both natural persons and entities) who purchased, sold, held, traded, or otherwise had any interest in SIBOR

> and/or SOR-Based Derivatives[6] during the Class Period[7] . . . . Excluded from the Settlement Class are the Defendants . . . and any parent, subsidiary, affiliate or agent of any Defendant or any co-conspirator whether or not named as a Defendant, and the United States Government.

Citi Agreement § 1(G); JPMorgan Agreement § 1(F). Thus, the Court should preliminarily certify the Settlement Class defined in the Settlement Agreements for purposes of preliminary approval of the Settlements.[8]

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

1. Numerosity

Rule 23(a) requires that the class be "so numerous that joinder of all class members is impracticable." FED. R. CIV. P. 23(a). Joinder need not be impossible, only "merely be difficult or inconvenient, rendering use of a class action the most efficient method to resolve plaintiffs' claims." *In re Initial Pub. Offering Sec. Litig.,* 260 F.R.D. 81, 90 (S.D.N.Y. 2009) ("*IPO*"). "Sufficient numerosity can be presumed at a level of forty members or more." *Id.* There are at least hundreds, if not thousands, of geographically dispersed persons and entities that fall within the Settlement Class definition. *See* Briganti Decl. ¶ 34. Thus, joinder of all of these individuals and entities would be impracticable.

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[6] "SIBOR- and/or SOR-Based Derivatives" means (i) a SIBOR- and/or SOR-based interest rate swap entered into by a U.S. Person, or by a Person from or through a location within the U.S.; (ii) an option on a SIBOR- and/or a SOR-based interest rate swap ("swaption") entered into by a U.S. Person, or by a Person from or through a location within the U.S.; (iii) a Singapore Dollar currency forward agreement entered into by a U.S. Person, or by a Person from or through a location within the U.S.; (iv) a SIBOR- and/or SOR-based forward rate agreement entered into by a U.S. Person, or by a Person from or through a location within the U.S; and/or (v) a SIBOR- and/or SOR-based foreign exchange swap entered into by a U.S. Person, or by a Person from or through a location within the U.S. Citi Agreement § 1(PP); JPMorgan Agreement § 1(OO).

[7] "Class Period" means the period of January 1, 2007 through December 31, 2011. Citi Agreement § 1(I); JPMorgan Agreement § 1(H).

[8] Citi and JPMorgan each consent to preliminary certification of the Settlement Class solely for the purpose of the Settlements and without prejudice to any position they may take with respect to class certification in any other action or in the event that the Settlements are terminated. Citi Agreement § 22(E); JPMorgan Agreement §22(E).

2. Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). This is a "'low hurdle' easily surmounted." *In re Prudential Sec. Inc. Ltd. Pshps. Litig.*, 163 F.R.D. 200, 206 n.8 (S.D.N.Y. 1995). Commonality requires the presence of only a single question common to the class. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011).

This case presents many common questions of law and fact. Personal jurisdiction, subject matter jurisdiction, the standards for an unlawful agreement, and multiple questions raised by Defendants' motions to dismiss create a core of common questions of fact and law relating to Plaintiffs' claims and Defendants' defenses. All Class Members have the same need to demonstrate facts relative to these questions and argue the identical legal points to establish their claims.

Greatly adding to the common questions of law and fact are the same liability and impact questions that Representative Plaintiffs and Class Members have to answer through the same body of common class-wide proof. For example:

1. What constitutes a false or manipulative submission by a SIBOR or SOR contributor panel bank? This threshold question involves issues of fact that will be of overriding importance in this litigation. As their traders allegedly talked and colluded about the optimal SIBOR or SOR to profit their proprietary positions held in SIBOR- and SOR-Based Derivatives, certain Defendants to the Action allegedly adjusted their SIBOR and SOR submissions in the direction of their financial self-interest. Nonetheless, we expect Defendants to the Action will contend that the communications are ambiguous, that the evidence is otherwise mixed, and/or they had non-manipulative reasons for their SIBOR and SOR submissions.

2. Which of the Defendants conspired to manipulate SIBOR and SOR and during what period(s) were they involved in the same?

3. What would the non-manipulated SIBOR or SOR have been in the "but-for" world for each day of the Class Period?

These common questions involve dozens of common sub-questions of fact and law that are also common to all members of the Settlement Class. Rule 23(a)(2) is overwhelmingly satisfied for purposes of conditional certification.

3. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3). This permissive standard is satisfied when "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009); *see also Bolanos v. Norwegian Cruise Lines Ltd.*, 212 F.R.D. 144, 155 (S.D.N.Y. 2002) ("Since the claims only need to share the same essential characteristics, and need not be identical, the typicality requirement is not highly demanding.").

The Representative Plaintiffs' and Class Members' claims arise from the same course of conduct involving the alleged false reporting and manipulation of SIBOR and SOR by some or all of the Defendants to the Action. Thus, Representative Plaintiffs' claims are typical of the Class Members' claims. *See, e.g., Marisol A. by Forbes v. Giuliani*, 126 F.3d 372, 376-77 (2d Cir. 1997) (finding the named plaintiffs' claims typical of the class's under Rule 23(a)(3) where "each named plaintiff challenges a different aspect of the child welfare system"; "[t]he claimed deficiencies implicate different statutory, constitutional and regulatory schemes"; and "no single plaintiff (named or otherwise) is affected by each and every legal violation alleged . . . and [] no single specific legal claim identified by the plaintiffs affects every member of the class").[9] Typicality is satisfied for purposes of conditional certification.

[9] *See also* Swiss Order ¶ 5 (conditionally certifying settlement class of persons who purchased sold, held, traded, or otherwise had any interest in derivatives products priced, benchmarked and/or settled to Swiss franc LIBOR); Euroyen Order I ¶ 4 (same with respect to Euroyen TIBOR and Yen-LIBOR based derivatives); Euribor Order II ¶ 4 (same with respect to Euribor-based derivatives).

4. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4); *Baffa v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000). Generally, courts consider "whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Id.*

a. Representative Plaintiffs suffer no disabling conflicts with the members of the Settlement Class.

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

First, all Settling Class Members share an overriding interest with Representative Plaintiffs in obtaining the largest possible monetary recovery from Citi and JPMorgan (and, for that matter, all of the remaining non-settling Defendants). *See Global Crossing*, 225 F.R.D. at 453 (certifying a settlement class and finding that "[t]here is no conflict between the class representatives and the other class members. All share the common goal of maximizing recovery."); *see also In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 208 (5th Cir. 1981) (certifying settlement class and holding that "so long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes.").

Second, all Settling Class Members share a common interest in obtaining Citi's and JPMorgan's early cooperation to benefit the Settlement Class.

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

b. Plaintiffs' Counsel is adequate.

Representative Plaintiffs and the Settlement Class are represented by experienced and skilled counsel. Lowey Dannenberg has vigorously represented the Settlement Class in this Action, having negotiated the Settlement Agreements, including the terms providing for valuable cooperation from Citi and JPMorgan. Citi Agreement § 4; JPMorgan Agreement § 4. With over 50 years of experience litigating complex class actions, Lowey Dannenberg has achieved some of the most significant class action recoveries under the Sherman Act, securing almost a billion dollars in recoveries on behalf of Fortune 100 Companies and other sophisticated investors in antitrust and competition-related litigation. Briganti Decl., Ex. 3 (Lowey Dannenberg Firm Resume).[10] Lowey Dannenberg has

[10] *See, e.g.,* Euroyen Order I ¶ 5 (appointing Lowey Dannenberg as settlement class counsel in connection with $58 million settlements with HSBC Holdings plc, HSBC Bank plc, Citi and certain related entities); Euroyen Order II ¶ 5 (same in connection with $148 million settlements with Deutsche Bank AG and a related entity, and JPMorgan and a related entity); Euroyen Order III ¶ 5 (same in connection with $30 million settlement with The Bank of Tokyo-Mitsubishi UFJ, Ltd. (now known as MUFG Bank, Ltd.) and Mitsubishi UFJ Trust and Banking Corporation); Euribor Order I ¶ 6 (same, in connection with $94 million settlement with Barclays plc and related entities); Euribor Order II ¶ 6 (same, in connection with $45 million settlement with HSBC Holdings plc and a related entity); Euribor Order III ¶ 5 (same, in connection with $170 million settlement with Deutsche Bank AG and a related entity); Order Preliminarily Approving Class Action Settlement and Conditionally Certifying a Settlement Class, *In re London Silver Fixing, Ltd.,*

particular expertise in developing plans of allocation involving complex financial benchmarks. *See* Briganti Decl. ¶ 6. With that experience comes the knowledge, skill, and resources to fully effectuate the Settlement, including devising a fair and adequate plan of allocation.

The Rule 23(a)(4) requirements that there be no fundamental conflict and that counsel is adequate are both satisfied for purposes of conditional certification.

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

Rule 23(g)(1) provides that "a court that certifies a class must appoint class counsel." FED. R. CIV. P. 23(g)(1). For two years, Lowey Dannenberg litigated this matter sole lead counsel. Briganti Decl. ¶ 35. As a result, Lowey Dannenberg is intimately familiar with the strengths and weaknesses of the claims at issue and is uniquely situated to represent the Settlement Class. Lowey Dannenberg has also handled all factual investigation and settlement discussions to date, successfully negotiating the Settlement Agreements with Citi and JPMorgan. *Id.* For these reasons, and those described above, Lowey Dannenberg is adequate and should be appointed as Class Counsel for the Settlement Class.

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

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

1. Predominance

Certification is proper under Rule 23(b)(3) where "a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated,

Antitrust Litig., No. 14-MD-02573-VEC (S.D.N.Y. Nov. 23, 2016), ECF No. 166 ¶ 7 (same, in connection with $38 million settlement with Deutsche Bank AG and related entities).

without sacrificing procedural fairness or bringing about other undesirable results." *Brown v. Kelly*, 609 F.3d 467, 483 (2d Cir. 2010). To satisfy the predominance requirement, a plaintiff must show "that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole . . . predominate over those issues that are subject only to individualized proof." *Brown*, 609 F.3d at 483 (ellipses in original). "If the most substantial issues in controversy will be resolved by reliance primarily upon common proof, class certification will generally achieve the economies of litigation that Rule 23(b)(3) envisions." *In re Air Cargo Shipping Servs. Antitrust Litig.*, MDL No. 1775, 2014 WL 7882100, at *35 (E.D.N.Y. Oct. 15, 2014); *see also Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) ("When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately.") (internal quotations omitted).

"Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws[,]" as opposed to mass tort cases in which the "individual stakes are high and disparities among class members are great." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). Predominance can be established in antitrust cases because the elements of the claims lend themselves to common proof. *See, e.g.,* NEWBERG ON CLASS ACTIONS §§ 18:28 & 18:29 (4th ed. 2002) (noting that allegations of antitrust conspiracies generally establish predominance of common questions). Antitrust claims are particularly well suited for class treatment because liability focuses on defendants' alleged unlawful actions, not the actions of individual plaintiffs. *Compare Amchem,* 521 U.S. at 624, *with Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802 (7th Cir. 2012).

The "predominance inquiry will sometimes be easier to satisfy in the settlement context." *In re Am. Int'l Grp. Secs. Litig.,* 689 F.3d 229, 240 (2d Cir. 2012). Unlike class certification for litigation

purposes, a settlement class presents no management difficulties for the court as settlement, not trial, is proposed. *Amchem*, 521 U.S. at 620; *see also NASDAQ I*, 169 F.R.D. at 517 (stating that the predominance test standard is met "unless it is clear that individual issues will overwhelm the common questions and render the class action valueless").

If the claims against Citi and JPMorgan had not been settled, dozens of common questions would have predominated over individual questions in the prosecution of the claims against them. The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *IPO*, 260 F.R.D. at 92. Here, all Representative Plaintiffs and Class Members face and must answer the same common factual and legal questions to establish personal jurisdiction, subject matter jurisdiction, conspiracy, unlawful SIBOR and SOR manipulation, the extent of this manipulation, and many additional matters of proof. These common questions predominate over individual questions for purposes of conditional certification. *See Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 105 (2d Cir. 2007) (in price-fixing case, "allegations of the existence of a price-fixing conspiracy are susceptible to common proof"); *see also In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 139 (2d Cir. 2001) ("Common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues."), *overruled on other grounds by, In re Initial Public Offering Sec. Litig.*, 471 F. 3d 24, 42 (2d Cir. 2006). The Settlement Class satisfies Rule 23(b)(3) as common issues predominate over individual issues for purposes of conditional certification.

2. Superiority

Rule 23(b)(3)'s "superiority" requirement obliges a plaintiff to show that a class action is superior to other methods available for "fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). The Court balances the advantages of class action treatment against alternative

available methods of adjudication. *See* FED. R. CIV. P. 23(b)(3)(A)-(D) (listing four non-exclusive factors relevant to this determination). The superiority requirement is applied leniently in the settlement context because the court "need not inquire whether the case, if tried, would present intractable management problems." *Amchem*, 521 U.S. at 620.

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

Second, the majority of Class Members have neither the incentive nor the means to litigate these claims. The damages most of the individual Class Members suffered are likely to be small compared to the very considerable expense and burden of individual litigation. This makes it uneconomical for an individual to protect his/her rights through an individual suit. That is why no Class Member "has displayed any interest in bringing an individual lawsuit." *See Meredith Corp.,* 87 F. Supp. 3d at 661. A class action allows claimants to "pool claims which would be uneconomical to litigate individually." *Currency Conversion*, 224 F.R.D. at 566. "Under such circumstances, a class action is efficient and serves the interest of justice." *Id.*

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

III. The Court should appoint Amalgamated Bank as Escrow Agent.

The Settlement Agreements require Plaintiffs' Counsel, with Citi's and JPMorgan's consent, to designate an Escrow Agent to maintain the Settlement Funds. Plaintiffs' Counsel have designated

Amalgamated ("Amalgamated") to serve as Escrow Agent. Amalgamated has experience serving as Escrow Agent and currently serves as Escrow Agent for cases including, among others, *Sullivan v. Barclays plc*, No. 13-cv-2811 (S.D.N.Y.) relating to Euribor, and Euribor-based derivatives. Amalgamated has agreed to serve as Escrow Agent at market rates.

CONCLUSION

For the reasons stated above, Representative Plaintiffs respectfully request that the Court enter the accompanying proposed order that, among other things: (1) grants preliminary approval of the proposed Settlements with Citi and JPMorgan; (2) conditionally certifies the Settlement Class on the claims against Citi and JPMorgan for purposes of sending Class Notice; (3) appoints Lowey Dannenberg as Class Counsel; and (4) appoints Amalgamated Bank as Escrow Agent under the Agreement.

Dated: November 15, 2018
White Plains, New York

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