UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEPHEN SULLIVAN, WHITE OAK FUND LP, CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM, SONTERRA CAPITAL MASTER FUND, LTD., FRONTPOINT PARTNERS TRADING FUND, L.P., AND FRONTPOINT AUSTRALIAN OPPORTUNITIES TRUST on behalf of themselves and all others similarly situated,

Plaintiffs,

– against –

BARCLAYS PLC, BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., BNP PARIBAS S.A., CITIGROUP, INC., CITIBANK, N.A., COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., CRÉDIT AGRICOLE S.A., CRÉDIT AGRICOLE CIB, DEUTSCHE BANK AG, DB GROUP SERVICES UK LIMITED, HSBC HOLDINGS PLC, HSBC BANK PLC, ICAP PLC, ICAP EUROPE LIMITED, J.P. MORGAN CHASE & CO., JPMORGAN CHASE BANK, N.A., THE ROYAL BANK OF SCOTLAND PLC, SOCIÉTÉ GÉNÉRALE SA, UBS AG AND JOHN DOE NOS. 1-50,

Defendants.

Docket No. 13-cv-02811 (PKC)
ECF Case

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT WITH HSBC HOLDINGS PLC AND HSBC BANK PLC

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INTRODUCTION

On December 15, 2015, the Court granted preliminary approval of Plaintiffs'[1] $94 million settlement with the Barclays[2] Defendants. ECF No. 234. Plaintiffs now move under Rule 23(e) of the Federal Rules of Civil Procedure ("Federal Rules") for preliminary approval of the $45 million Settlement with Defendants HSBC Holdings plc and HSBC Bank plc (collectively, "HSBC") (the "HSBC Settlement"), and submit this memorandum of law and accompanying Declarations of Vincent Briganti, Esq. ("Jan. 11, 2017 Briganti Decl."), Christopher Lovell, Esq. ("Jan. 11, 2017 Lovell Decl."), and Gary McGowan, Esq. ("McGowan Decl.") in support of the HSBC Settlement.

Like the Barclays Settlement, the HSBC Settlement provides the Settlement Class with substantial consideration and cooperation. HSBC Settlement ¶¶ 9, 23-27. Most importantly, the HSBC Settlement meets the two essential requirements for preliminary approval—it is procedurally and substantively fair. The HSBC Settlement was reached after months-long negotiations between experienced counsels, with the assistance of a skilled mediator, Gary McGowan. The HSBC Settlement is substantively fair, reasonable, and adequate, providing for HSBC to pay $45 million into a Settlement Fund[3] within fourteen days of the entry of preliminary approval, which will then be distributed to qualifying Settlement Class Members.

Considering HSBC's representation that its affiliate's alleged manipulation of Euribor was limited to one instance, the March 2007 IMM date (March 19, 2007), and Plaintiffs' ability to conduct confirmatory discovery and terminate the HSBC Settlement if this representation is inaccurate (HSBC Settlement ¶ 28), the HSBC Settlement confers substantial value on Plaintiffs and

[1] "Plaintiffs" are Stephen Sullivan, White Oak Fund LP, California State Teachers' Retirement System ("CalSTRS"), Sonterra Capital Master Fund, Ltd., FrontPoint Partners Trading Fund, L.P., and FrontPoint Australian Opportunities Trust. Unless otherwise noted, ECF citations are to the docket in *Sullivan, et al. v. Barclays plc, et al.,* No. 13-cv-02811 (PKC) (S.D.N.Y.).

[2] "Barclays" means Barclays plc, Barclays Bank plc, Barclays Capital Inc. The "Barclays Settlement" means the Settlement Agreement between Plaintiffs and the Barclays Defendants, dated October 7, 2015. ECF No. 218-1.

[3] Unless otherwise noted, capitalized terms used herein have the same meaning as in the HSBC Settlement.

the Settlement Class.

All of the prerequisites under Rule 23 for conditional certification of a Settlement Class on the claims against HSBC are also fully satisfied. *See* Part II, *infra*. Therefore, the Court should enter the proposed order and conditionally certify a Settlement Class for the HSBC Settlement, appoint Lowey Dannenberg Cohen & Hart, P.C. ("Lowey Dannenberg") and Lovell Stewart Halebian Jacobson LLP ("Lovell Stewart") as Class Counsel, and appoint Amalgamated Bank as Escrow Agent for purposes of the Settlement proceeds. *See* Proposed Order annexed to Notice of Motion.

ARGUMENT

I. The Court should preliminarily approve the HSBC Settlement.

The procedural history of this Action is set forth in the Declaration of Vincent Briganti, Esq., dated October 30, 2015 (ECF No. 220 ¶¶ 2-15), that was submitted in support of the Barclays Settlement, and in the January 11, 2017 Briganti Decl. ¶¶ 6-9.

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. 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 § 11.41, at 89 (4th ed. 2002). Preliminary approval is 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.s.*, 627 F.2d 631, 634 (2d Cir. 1980).

Preliminary approval of a settlement is not expressly mentioned in either the Federal Rules generally or Rule 23 in particular. 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 Mkt.-Makers Antitrust Litig., 176 F.R.D. 99, 102 (S.D.N.Y. 1997) ("*NASDAQ II*") (emphasis and numbers in brackets supplied); *In re Platinum & Palladium Commodities Litig.*, No. 10-cv-3617, 2014 U.S. Dist. LEXIS 96457, at *35-36 (S.D.N.Y. July 15, 2014) ("*Platinum*"). The HSBC Settlement amply satisfies 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 U.S. Dist. LEXIS 96457, at *35-36; *McReynolds v. Richards–Cantave,* 588 F.3d 790, 803-04 (2d Cir. 2009) (same); *see also* ECF No. 234 ¶¶ 2, 3. 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; *see also* Superseding Order Preliminarily Approving Settlements, *Laydon v. Mizuho Bank, Ltd., et al.*, No. 12-cv-3419 (GBD), ECF No. 659 (S.D.N.Y. June 22, 2016) ("Euroyen Order") (preliminarily approving $35 million and $23 million settlements 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")).

B. The HSBC Settlement provides a considerable benefit to the Settlement Class.

The $45 million HSBC Settlement, along with the $94 million Barclays Settlement, will provide the Settlement Class with a financial recovery of $139 million. This sum will also ensure

funding to continue to pursue the litigation against the non-settling Defendants. HSBC also agreed that if the HSBC Settlement is finally approved, the settlement monies will **not** revert to HSBC for opt-outs or failures to submit proofs of claim. HSBC Settlement ¶ 19.3.[4] Given the reality that claim rates often fall below 100%, the non-reversion term of the HSBC Settlement likely will enhance the benefits and the recovery that qualifying claimants will receive.

The monetary amount achieved in the HSBC Settlement is greater than what HSBC recently paid the European Commission in connection with Euribor misconduct ($36,052,800). *See Antitrust: Commission fines Crédit Agricole, HSBC and JPMorgan Chase € 485 million for euro interest rate derivatives cartel*, EUROPEAN COMMISSION (Dec. 7, 2016), available at http://europa.eu/rapid/press-release_IP-16-4304_en.htm. Further, the Settlement Amount is substantial in view of the fact that HSBC has represented that its affiliate's alleged manipulation was limited to one instance, the March 2007 IMM date (March 19, 2007).

Beyond monetary consideration, the HSBC Settlement also obligates HSBC to provide significant cooperation to Plaintiffs and the Class to aid them in pursuing their case against the non-settling Defendants. This cooperation will include, among other things: (i) underlying documents and data HSBC produced to the U.S. Department of Justice, U.S. Commodity Futures Trading Commission, U.K. Financial Services Authority, European Commission, or any other regulatory authority in connection with such regulator's investigation of Euribor-related conduct; (ii) HSBC employee communications; (iii) non-privileged declarations, affidavits, witness statements, or other sworn or unsworn statements of HSBC directors, officers, or employees; (iv) trade data pertaining to

[4] *Compare Boeing Co. v. Van Gemert*, 444 U.S. 472, 479-82 (1980) (in the litigated trial and judgment context, the share of the settlement due to class members who failed to claim reverted to defendants), *with Guerrero v. Wells Fargo Bank, N.A.*, No. C 12-04026, 2014 U.S. Dist. LEXIS 50015, at *6 (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 HSBC Settlement, the proceeds that would have been paid to those persons who fail to claim will be redistributed among, and enhance the recovery of, those Settlement Class Members who do claim.

HSBC's transactions in Euro-denominated interbank money market instruments from 2005 through 2011; (v) trade data for HSBC's transactions in Euribor Products from 2004 through 2011; and (vi) HSBC's submissions to the Federal Reserve Bank of New York, Bank of International Settlement, and OTC Derivatives Supervisors Group relating to their surveys on turnover in foreign exchange and interest rate derivatives markets for Euribor Products for the years 2004, 2007, and 2010. HSBC Settlement ¶¶ 24-26. Equally of value, HSBC will provide Plaintiffs with access to witnesses within HSBC's control with knowledge about the Euribor-related conduct alleged in this Action. *Id.* ¶ 27. Plaintiffs also have a right to terminate the HSBC Settlement if, after conducting confirmatory discovery, Plaintiffs determine that HSBC's representation that its affiliate's alleged Euribor manipulation was limited to one instance is untrue. *Id.* ¶ 28.

In exchange for these benefits, the Settlement Class Members will release HSBC from any and all claims relating to Euribor or the Euribor Products that were allegedly distorted by HSBC's manipulation of Euribor. *Id.* ¶¶ 14, 15. Plaintiffs' claims against HSBC will also be dismissed on the merits and with prejudice. *Id.* ¶ 7.3, 36.

C. The HSBC Settlement is procedurally fair because it was produced by well-informed, arm's-length negotiations by experienced counsel with the assistance of a mediator.

"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 (2d Cir. 2001); *see also In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280-81 (S.D.N.Y. 1999) (citing MANUAL FOR COMPLEX LITIGATION (THIRD) ¶ 30.42 (1995)) ("a 'presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery.'");

Shapiro v. JPMorgan Chase & Co., No. 11 Civ. 8331 (CM) (MHD), 2014 U.S. Dist. LEXIS 37872, at *6 (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.'").

Here, the process leading up to the HSBC Settlement fully supports preliminary approval. McGowan Decl. *passim*. The HSBC Settlement is the result of more than fourteen months of arm's-length, non-collusive negotiations by experienced counsel with the assistance of an experienced private mediator, Gary McGowan. *See In re Indep. Energy Holdings PLC Sec. Litig.*, No. 00 Civ. 6689, 2003 U.S. Dist. LEXIS 17090, at *13 (S.D.N.Y. Sept. 26, 2003) ("the fact that the Settlement was reached after exhaustive arm's-length negotiations, with the assistance of a private mediator experienced in complex litigation, is further proof that it is fair and reasonable.").[5] Over the past 25 years, Mr. McGowan has mediated over 2,700 matters and arbitrated over 140 disputes in complex matters, serving as the chair of panel or solo arbitrator in 100 of these matters. McGowan Decl. ¶ 3. His assistance during a full-day mediation session on May 2, 2016 led to a consensual resolution. Jan. 11, 2017 Briganti Decl. ¶ 14; Jan. 11, 2017 Lovell Decl. ¶ 13.

The Settlement Class also benefitted from informed advocates. Before beginning negotiations with HSBC in October of 2015, Interim Lead Counsel had the benefit of much of Barclays' ACPERA production and settlement cooperation that provided Plaintiffs with more pertinent information over a few days than is often yielded by years of discovery. Jan. 11, 2017 Briganti Decl. ¶ 4; Jan. 11, 2017 Lovell Decl. ¶¶ 6-7. Although the Barclays proffers related to Barclays' conduct, the conduct involved other Defendants, including HSBC. Prior to negotiating

[5] *See also deMunecas v. Bold Food, LLC,* No. 09 Civ. 00440, 2010 U.S. Dist. LEXIS 87644, at *12 (S.D.N.Y. Aug. 23, 2010) ("Arm's-length negotiations involving counsel and a mediator raise a presumption that the settlement they achieved meets the requirements of due process."); *In re Elec. Books Antitrust Litig.*, No. 11-md-2293 (DLC), 2014 U.S. Dist. LEXIS 106260, at *44 (S.D.N.Y. Aug. 1, 2014) ("The assistance of a well-known mediator . . . reinforces the conclusion that the Settlement Agreement is non-collusive.").

with HSBC, Interim Lead Counsel had researched and considered a wide range of relevant legal issues and analyzed the facts known to date. The HSBC Settlement is the product of hard-fought, extensive negotiations, which involved numerous in-person meetings and/or telephone conferences, and an extensive investigation using available, relevant information. Jan. 11, 2017 Briganti Decl. ¶¶ 11-17; Jan. 11, 2017 Lovell Decl. ¶ 13.

In light of Interim Lead Counsel's considerable prior experience in complex class action litigation involving CEA and antitrust claims (among others), their knowledge of the strengths and weaknesses of Plaintiffs' claims, their assessment of the Settlement Class's likely recovery following trial and appeal, and the oversight of an experienced mediator, the HSBC Settlement is entitled to a presumption of procedural fairness.

Obviously, Interim Lead Counsel have not yet reviewed HSBC's own documents. However, Interim Lead Counsel successfully negotiated to obtain confirmatory discovery for the Settlement Class. Pursuant to this discovery, Interim Lead Counsel will obtain and review HSBC's internal documents. Pursuant to ¶ 28 of the HSBC Settlement, Plaintiffs have the right to withdraw from the Settlement if such documents demonstrate certain facts. For all of the foregoing reasons, Interim Lead Counsel will be more than adequately well informed at the time Plaintiffs are finally committed to the HSBC Settlement.

D. There are no obvious or other deficiencies in the HSBC Settlement.

The HSBC Settlement plainly satisfies the next *NASDAQ II* preliminary approval factor, as it involves 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* Jan. 11, 2017 Briganti Decl. ¶ 18. Interim Lead Counsel believes that the closest issue to a departure involves the provisions at ¶ 37 of the HSBC Settlement, which concerns HSBC's right to terminate the Settlement Agreement under certain circumstances.

The Court endorsed an identical clause when it preliminarily approved the Barclays Settlement. *See* ECF No. 234; *see also* Barclays Settlement Agreement, ECF No. 218-1 ¶ 37.

Specifically, in ¶ 37, Plaintiffs agreed that HSBC has a qualified right to terminate the Settlement Agreement before final approval. This qualified right begins with the number and significance of the Class Members, if any, who request to be excluded (or "opt out") of the Settlement Class. Such provisions are common in class action settlements and are included, generally speaking, based on the defendant's desire to quiet the litigation through the class action settlement and not leave open any material exposure. Typically, such rescissory rights are based upon specific numerical factors, such as the absolute number or percentage of class members who opt out.

The difference here is that HSBC has no absolute right to rescind based on any specific number of opt out class members. Rather, HSBC has only the right to apply to the Mediator to terminate the Settlement Agreement based upon a finding that the Class Members who excluded themselves from the Settlement Class would likely have been eligible to receive collectively (but for their exclusion) a material part of the potential distributions from the Settlement Fund. HSBC Settlement ¶ 37.

Plaintiffs have the right to oppose any such application by HSBC. HSBC's arguments and Plaintiffs' counter arguments will be decided, under the Settlement, by the Mediator, Gary McGowan. Given the contentious and intense negotiations on previous issues in this Action and the likelihood that the eventuality of a potentially large number of opt-outs will never be realized, the Settling Parties' negotiation of the foregoing qualified right is reasonable. Their reliance upon a nationally-recognized Mediator who helped overcome the Settling Parties' previous differences expedited the completion of the Memorandum of Understanding. HSBC's qualified, rescissory right is arguably less than what is standard and, in all events, clearly does not constitute an obvious or other deficiency.

Accordingly, the HSBC Settlement amply satisfies the "no obvious deficiency" requirement of *NASDAQ II*.

E. The HSBC Settlement does not favor Plaintiffs or any Settlement Class Members or create any preferences.

The HSBC Settlement does not favor or disfavor any Plaintiffs or Settlement Class Members; nor does it discriminate against, create any limitations, or exclude from payments, any persons or groups within the Settlement Class. *See NASDAQ II*, 176 F.R.D. at 102; HSBC Settlement, *passim*.

Making such distinctions is fully allowable and expected, if there is a rational basis for them, in plans of allocation. Here, Plaintiffs need transactional records from HSBC before beginning the process to formulate the plan of allocation of the Settlement proceeds. HSBC has informed Interim Lead Counsel that HSBC is in the process of isolating and collecting those records for production, as contemplated by ¶ 24.7 of the Settlement Agreement.

As the Court found when preliminarily approving the Barclays Settlement, preliminary approval is routinely granted to settlements before any plan of allocation exists. *See* ECF No. 234; *see also In re Wachovia Equity Secs. Litig.*, No. 08-6171 (RJS), 2012 U.S. Dist. LEXIS 97910, at *4 (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 U.S. Dist. LEXIS 132708, at *2 (S.D.N.Y. Nov. 16, 2011) (same); *In re Giant Interactive Grp. Inc. Secs. Litig.*, 279 F.R.D. 151, 156 (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. *See In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 170 (2d Cir. 1987); *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 Fed. App'x 248, 251, 253-255 (11th Cir. 2009); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.313 at 296; *Newberg on Class Actions* § 12:35 at 342 (4th ed. 2002).

But here, Plaintiffs do fully anticipate sending the proposed plan of allocation with the Notice to Class Members of the HSBC Settlement and Barclays Settlement (and any other settlements that have been preliminarily approved by that time). Thus, the proposed plan of allocation will be available to Settlement Class Members before they have to decide to accept its benefits, opt-out, or object to final approval. Accordingly, after receiving HSBC's transaction records, Plaintiffs will seek to pursue the process for formulating a plan of allocation. Interim Lead Counsel has arranged that this will include, if appropriate, an allocation mediation, with representation as appropriate for any different interests.

In these circumstances, the HSBC Settlement wholly avoids any preferences or discriminations. Whether any such preferences or discriminations will even be proposed (and, if so, which ones), will be determined by an appropriate process. Accordingly, this third *NASDAQ II* preliminary approval element is fully satisfied as well.

F. The HSBC Settlement 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 HSBC Settlement provides 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 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 had secured a criminal guilty plea, civil juries have found no damages. *See, e.g.,* Special Verdict on Indirect Purchases, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI (N.D. Cal., Sept. 3, 2013), ECF No. 8562. "Indeed, the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal." *NASDAQ III*, 187 F.R.D. at 476; *see also In re Flonase Antitrust Litig.,* 951 F. Supp. 2d 739, 748 (E.D. Pa. 2013) ("Even if Plaintiffs had succeeded in proving liability at trial, there is no guarantee they would have recovered damages.").

Here, HSBC's monetary consideration alone, $45 million, is significantly greater than the amount of maximum potential damages HSBC would have argued it was liable for had the case proceeded to trial. *Compare Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995) ("*Maywalt*") (maximum "likely" damages is the appropriate test), *with In re Prudential Secs. Ltd. P'ships Litig.*, No. M-21-67 (MP), 1995 U.S. Dist. LEXIS 22103, at *41 (S.D.N.Y. Nov. 20, 1995) ("*Prudential*") (Pollack, J.) (where many non-settling defendants are present, class counsel must be circumspect in stating facts that may aid the non-settling defendants). Because HSBC also represents, and Plaintiffs may terminate the HSBC Settlement if this representation is inaccurate, that its affiliate's alleged manipulation of Euribor was limited to the March 2007 IMM date (March 19, 2007), HSBC would have argued that it was liable for much less if the case went to trial.

One of the biggest risks facing Plaintiffs while negotiating the HSBC Settlement was the uncertainty of the outcome of the Second Circuit's consideration of parallel antitrust theories in *Gelboim v. Bank of America Corp.,* No. 12-3565-cv (L) (2d Cir.). *Gelboim* could have substantially affected Plaintiffs' and Class Members' claims. While Interim Lead Counsel was negotiating the HSBC Settlement, *Gelboim* was fully-briefed before the Second Circuit, and oral argument was held

on November 13, 2015. Interim Lead Counsel accounted for the risks associated with Defendants' pending motions to dismiss the action. Even after *Gelboim's* favorable decision that collusive rate fixing is a *per se* violation of the Sherman Act, Plaintiffs' ability to recover on their antitrust claims would have faced potential obstacles.

Plaintiffs' impact and damages theories against HSBC 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 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 Plaintiffs' 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 involves obtaining and proving the meaning and significance of instant messages, trading patterns, and other facts or evidence. Evidence of manipulation and collusion will likely raise ambiguities and inferences. This creates many risks in establishing liability in this case. Interim Lead Counsel must be wary in describing in detail their proof risks due to the presence of non-settling Defendants. *See Prudential*, 1995 U.S. Dist. LEXIS 22103, at *41. But the answers to the key common questions of fact and law for all Class Members' claims will be hotly disputed and Interim Lead Counsel will zealously seek to overcome all of the foregoing risks.

In view of the many risks of continued prosecution, the HSBC Settlement beneficially diversifies the Settlement Class's position. The HSBC Settlement gives Class Members a bird in the

hand and the opportunity to obtain the same bird in the bush through settlements or verdicts against the remaining Defendants. In assessing the reasonableness and adequacy of benefits obtained in the settlements, Interim Lead 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 Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 212 (E.D.N.Y. 2013). In light of the ostensible risks of litigation, Interim Lead Counsel's considered judgment is that the total consideration that the HSBC Settlement provides, including the substantial cooperation that HSBC will provide to Plaintiffs, is fair, reasonable, and adequate in light of all the circumstances.

Therefore, the consideration offered to the Settlement Class Members in the HSBC Settlement is 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; Jan. 11, 2017 Briganti Decl. ¶ 20.

1. Applying the *Grinnell* "final approval" Factors to the HSBC Settlement is unnecessary at preliminary approval.

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

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

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) ("*Grinnell*"); *see Maywalt*, 67 F.3d at 1079-80 (holding that fundamental to a determination of whether a settlement is fair, reasonable and adequate "'is the need to compare the terms of the compromise with the *likely* rewards of litigation.'"). In the discussion above, Plaintiffs have already addressed *Grinnell* Factors 4-6 and 8-9. These *Grinnell* Factors are the only appropriate considerations for preliminary approval. *In re Take*

Two Interactive Secs. Litig., No. 06 Civ. 803 (RJS), 2010 U.S. Dist. LEXIS 143837, at *32 n.8 (S.D.N.Y. June 29, 2010) ("A court reviewing a settlement for final approval must address the nine factors laid out in" *Grinnell*). Further, the Court did not address these remaining *Grinnell* Factors when it granted preliminary approval of the Barclays Settlement. ECF No. 234. Plaintiffs nonetheless address the remaining *Grinnell* Factors below.

***Grinnell* Factor 1.** The factual and legal issues in this Action involve esoteric financial complexities, but the future litigation may be handled pursuant to standard case management procedures. As is always true in cases involving large document productions by defendants, a key component of the duration of the case will be the time that the non-settling Co-Defendants require to produce their documents, and that the parties require to review the different Defendants' documents as well as non-party documents. The litigation is likely to be expensive.

***Grinnell* Factor 2.** *Grinnell* Factor 2 (the reaction of the class to a settlement) is premature. Nonetheless, all of the named Plaintiffs favor the HSBC Settlement. Plaintiffs CalSTRS, the largest U.S. education-only retirement fund, with approximately $192.9 billion in assets (as of November 30, 2016) and close to one million members, is a sophisticated investor with significant financial expertise and is fully capable of assessing the benefits of the HSBC Settlement. Well-versed in the rigorous analysis of financial matters, Plaintiffs' approval is highly probative of the likely reaction by other Settlement Class Members upon similarly reviewing the HSBC Settlement. Any Class Member who does not favor the deal can opt out. After the Settlement Class has been provided Notice of the HSBC Settlement and Barclays Settlement, 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 U.S. Dist. LEXIS 17588, at *36 (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.* at *37.

Plaintiffs conducted extensive factual and legal research and consulted experts to assess the merits of their claims. *See* Jan. 11, 2017 Briganti Decl. ¶ 4; Jan. 11, 2017 Lovell Decl. ¶¶ 6-7. Plaintiffs reviewed publicly-available information, including government pleas, non-prosecution agreements, and deferred prosecution agreements. Plaintiffs also had the benefit of settlement cooperation produced under the terms of the Barclays Settlement. The information gathered during this process greatly informed Plaintiffs of the advantages and disadvantages of entering into the HSBC Settlement. Although Plaintiffs have not received discovery from Defendants, discovery is not required even at final approval. *See Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2d Cir. 1982). The HSBC Settlement also provides Plaintiffs with a right to terminate the agreement if, after reviewing confirmatory discovery, Plaintiffs determine that HSBC's representation that its affiliate's alleged manipulation of Euribor was limited to the March 2007 IMM date (March 19, 2007) is incorrect. HSBC Settlement ¶ 28. The grant of preliminary approval will allow Plaintiffs to review the confirmatory discovery to confirm HSBC's representation. This type of confirmatory discovery weighs in favor of granting approval of the settlement. *See In re Sony Corp. SXRD*, 448 F. App'x 85, 87 (2d Cir. 2011); *see also In re Nissan Radiator*, No. 10 Civ. 7493, 2013 U.S. Dist. LEXIS 116720, at *13-14 (S.D.N.Y. May 30, 2013) ("although settlement was reached before extensive merits discovery, plaintiffs conducted an investigation prior to commencing the action, retained experts, and engaged in confirmatory discovery in support of the proposed settlement.").

***Grinnell* Factor 7.** HSBC certainly has the ability to withstand a greater judgment than $45 million, but this *Grinnell* Factor alone does not bear on the appropriateness of the HSBC Settlement. *See In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 439, 460 (S.D.N.Y. 2004) ("[T]he fact that a

defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate"); *In re Tronox Inc.*, No. 14-cv-5495 (KBF), 2014 U.S. Dist. LEXIS 158767, at *21 (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 claims being settled here is not foreclosed because of the availability of joint and several liability recovery from the remaining Co-Defendants.

A more detailed *Grinnell* analysis is also inappropriate because *Grinnell* involved the payment by all four defendants of $10 million, whereas here, Defendants HSBC and Barclays have settled, but 15 Defendants remain in the litigation. *See Grinnell,* 495 F.2d at 452. Most of the claims here are premised on joint or otherwise 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, 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 HSBC Settlement.

In its December 15, 2015 Order (ECF No. 234 ¶ 4), the Court preliminarily certified a settlement class against the Barclays Defendants pursuant to Rule 23 of the Federal Rules. The HSBC Settlement contains the same class definition, defining the Settlement Class as:

> All persons who purchased, sold, held, traded or otherwise had any interest in Euribor Products[6] from June 1, 2005 through and including March 31, 2011, who were either domiciled in the United States or its territories or, if domiciled outside the United States or its territories, transacted Euribor Products in the United States or its

[6] "Euribor Products" means any and all interest rate swaps, forward rate agreements, futures, options, structured products, and any other instrument or transaction related in any way to Euribor, including but not limited to, NYSE LIFFE Euribor futures contracts and options, CME Euro currency futures contracts and options, Euro currency forward agreements, Euribor-based swaps, Euribor-based forward rate agreements and/or any other financial instruments that reference Euribor.

> territories from June 1, 2005 through and including March 31, 2011, including, but not limited to, all persons who traded CME Euro currency futures contracts, all persons who transacted in NYSE LIFFE Euribor futures and options from a location within the United States, and all persons who traded any other Euribor Product from a location within the United States.

HSBC Settlement ¶ 4. As the Court has already found, this Settlement Class definition meets the requisites of Rule 23(a) and Rule 23(b)(3) for preliminary approval. ECF No. 234 ¶ 4. Therefore, the Settlement Class should be preliminarily certified for the claims against HSBC.

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.*; *see also* ECF No. 234 ¶ 5. There are at least hundreds, if not thousands, of geographically dispersed persons and entities that fall within the Settlement Class definition. *See* Jan. 11, 2017 Briganti Decl. ¶ 21. Thus, joinder of all these individuals and entities would be impracticable.

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) (quoting *Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 185 (N.D. Ill. 1992)). 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 scores of common questions of fact and law. 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' affirmative defenses. All class members have the equal need to demonstrate facts relative to these questions and argue the same legal points to establish their claims.

Greatly adding to the common questions of law and fact are the same liability and impact questions that every Plaintiff and Class Member has to answer through the same body of common class-wide proof. For example:

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

2. Which of the Defendants were engaged in conspiratorial conduct in Euribor, and for what period(s) were they involved in the same?

3. What would the non-manipulated Euribor be 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 Class Members. Rule 23(a)(2) is overwhelmingly satisfied.

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) (internal quotation omitted); *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.").

Here, Plaintiffs' and Class Members' claims arise from the same course of conduct involving Defendants' alleged false reporting and manipulation of Euribor and the prices of Euribor Products. Thus, 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 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"); *see also* Euroyen Order ¶ 4 (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 Euroyen TIBOR and Yen-LIBOR). Typicality is satisfied for purposes of conditional certification.

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.* at 61.

a. The Plaintiffs suffer no disabling conflicts with the Settlement Class Members.

"'[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) (quoting 7 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 1768, at 639 (1972)); *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.

First, all Settlement Class Members share an overriding interest in obtaining the largest possible monetary recovery from HSBC (and, for that matter, the remaining Co-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."); *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 Settlement Class Members share a common interest in obtaining HSBC's early and substantial cooperation to prosecute the claims against the non-settling Co-Defendants.

Third, all Settlement Class Members share the same overriding interests 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 Euribor and Euribor Products. Further, all Settlement Class Members share the interest to successfully show that such manipulation of Euribor was sufficient to cause injury and to quantify the impact of such manipulation on Euribor and the prices of Euribor Products.

b. Interim Lead Counsel is adequate.

Plaintiffs and the Settlement Class are represented by experienced and skilled counsel. Class Counsel, Lowey Dannenberg and Lovell Stewart, has prosecuted this litigation for nearly four years. This Court has already authorized and appointed Lowey Dannenberg and Lovell Stewart as Class Counsel in the Barclays Settlement, having found counsel's experience sufficient and relevant. ECF No. 234 ¶ 6.

Lowey Dannenberg has vigorously represented the Settlement Class in the Action, having negotiated the HSBC Settlement. Lowey Dannenberg has obtained and will obtain valuable information provided by HSBC. With over 50 years of experience litigating complex class actions, Lowey Dannenberg has achieved some of the most significant class action recoveries under the CEA and has secured almost a billion dollars in recoveries on behalf of Fortune 100 Companies and other sophisticated investors in antitrust and competition-related litigation. Jan. 11, 2017 Briganti Decl., Ex. 2 (Lowey Firm Resume); *see also* Euroyen Order ¶ 5 (appointing Lowey Dannenberg as settlement class counsel in $58 million settlements with HSBC and Citibank).

Lovell Stewart has successfully tried antitrust and commodities claims, and also has obtained as Lead Counsel or Co-Lead Counsel what were at the times the largest class action recoveries under three federal statutes, two of which (the antitrust laws and commodity laws) are the primary statutes at issue here. *See* Jan. 11, 2017 Lovell Decl., Ex. 1 (Lovell Stewart Firm Resume).

The same bases justifying the Court's appointment of Lowey Dannenberg and Lovell Stewart as Class Counsel for the Barclays Settlement applies to Lowey Dannenberg's and Lovell Stewart's ability and adequacy to serve as Class Counsel for the Settlement Class for the HSBC Settlement. Therefore, upon certifying the Settlement Class, the Court should also appoint Lowey Dannenberg and Lovell Stewart as Class Counsel. The Rule 23(a)(4) requirements that there be no fundamental conflict and that counsel is adequate are both satisfied.

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). Where, as here, only one application is made seeking appointment as class counsel, "the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4)." FED. R. CIV. P. 23(g)(2). For the reasons described above, Lowey Dannenberg and Lovell Stewart are 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, 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, without sacrificing procedural fairness or bringing about other undesirable results.'" *Brown v. Kelly*, 609 F.3d 467, 483 (2d Cir. 2010) (quoting FED. R. CIV. P. 23(b)(3) Adv. Comm. Note. to 1966 amend.). 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. "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 U.S. Dist. LEXIS 180914, at *194 (E.D.N.Y. Oct. 15, 2014); *see also Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045-49 (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 . . . .'") (citation omitted).

Predominance is a "test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust law," unlike mass tort cases in which the "individual stakes are high and disparities among class members are great." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997); *see also In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,* 148 F.3d 283, 315 (3d Cir. 1998)

("the complexity of a case alleging physical injury . . . differs greatly from a case alleging economic injury"). Predominance is often readily established in antitrust cases because the elements of the claims lend themselves to common proof. Most 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, 815 (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").[7]

If the claims against HSBC had not been settled, dozens of common questions would have predominated over individual questions in the prosecution of the claims against HSBC. The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *IPO*, 260 F.R.D. at 92. Here, all Plaintiffs and Class Members face and must answer the same common factual and legal questions to establish personal jurisdiction, subject matter jurisdiction, conspiracy, unlawful Euribor manipulation, the amount of such Euribor manipulation, and many additional matters of proof. These common questions

[7] The presence of Settlement Class Members' right to opt out further favors preliminary certification of this Settlement Class. Even if some individual differences did exist among Settlement Class Members, those class members who "believe they may do better on their own are permitted to opt out." *See Interchange*, 986 F. Supp. 2d at 239 n.20. As to potential individual issues among class members who stay in the settlement class, "the fact of the settlement is 'relevant'" to the certification question, "since [the settlement] creates a single method and procedure for recovering monetary claims that might be otherwise complex and individualized." *Id.* (citing *Amchem*, 521 U.S. at 619); *see also In re Diet Drugs*, MDL Dkt No. 1203, 2000 U.S. Dist. LEXIS 12275, at *130 (E.D. Pa. Aug. 28, 2000) (certifying a settlement class, stating any "individual issues relating to causation, injury and damage . . . disappear because the settlement's objective criteria provide for an objective scheme of compensation").

predominate over individual questions. *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"). "Common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 139 (2d Cir. 2001), *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.

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

Second, the majority of class members have neither the incentive nor the means to litigate these claims. The damages most of the individual Settlement Class Members suffered are likely to be small compared to the very considerable expense and burden of individual litigation. This makes it uneconomic 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. v.*

SESAC, LLC, 87 F. Supp. 3d 650, 661 (S.D.N.Y. 2015). A class action allows claimants to "pool claims which would be uneconomical to litigate individually," as "no individual may have recoverable damages in an amount that would induce him to commence litigation on his own behalf." *Currency Conversion*, 224 F.R.D. at 566. "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 Settlement Class Members would impose heavy burdens upon the Court. It would create a risk of inconsistent or varying adjudications of the questions of law and fact common to the Settlement Class. Thus, both prongs of Rule 23(b)(3) are satisfied.

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

Paragraph 1.12 of the HSBC Settlement requires Interim Lead Counsel and HSBC to jointly designate an Escrow Agent to maintain the Settlement Fund. Interim Lead Counsel and HSBC have jointly designated Amalgamated Bank to serve as Escrow Agent. Amalgamated Bank currently serves as Escrow Agent for the Barclays Settlement and has agreed to provide its services as Escrow Agent at market rates.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court enter the accompanying proposed order that, among other things: (1) grants preliminary approval of the proposed HSBC Settlement; (2) conditionally certifies the Settlement Class for purposes of sending Notice to the Class; (3) appoints Lowey Dannenberg and Lovell Stewart as Class Counsel; and (4) appoints Amalgamated Bank as Escrow Agent.

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White Plains, New York

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