UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE FOREIGN EXCHANGE BENCHMARK RATES ANTITRUST LITIGATION	No. No. 1:13-cv-07789-LGS

CLASS PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENTS WITH THE BANK OF TOKYO-MITSUBISHI UFJ, LTD., MORGAN STANLEY, MORGAN STANLEY & CO., LLC, MORGAN STANLEY & CO. INTERNATIONAL PLC, RBC CAPITAL MARKETS, LLC, SOCIÉTÉ GÉNÉRALE, AND STANDARD CHARTERED BANK

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EXPLANATION OF DEFINED TERMS AND CITATION FORMS

The following defined terms are used in this Memorandum.

Parties

- "Class Plaintiffs" are Direct Class Plaintiffs and Exchange-Only Class Plaintiffs.
- "Direct Class Plaintiffs" are Aureus Currency Fund, L.P.; the City of Philadelphia, Board of Pensions and Retirement; Employees' Retirement System of the Government of the Virgin Islands; Employees' Retirement System of Puerto Rico Electric Power Authority; Fresno County Employees' Retirement Association; Haverhill Retirement System; Oklahoma Firefighters Pension and Retirement System; State-Boston Retirement System; Syena Global Emerging Markets Fund, LP; Systrax Corporation; Tiberius OC Fund, Ltd.; United Food and Commercial Workers Union and Participating Food Industry Employers Tri-State Pension Fund; and Value Recovery Fund L.L.C.
- "Exchange-Only Class Plaintiffs" are J. Paul Antonello, Marc G. Federighi, Thomas Gramatis, Doug Harvey, Izee Trading Company, John Kerstein, Michael Melissinos, Mark Miller, Robert Miller, Richard Preschern d/b/a Preschern Trading, Peter Rives, Michael J. Smith, Jeffrey Sterk, and Kimberly Sterk.
- "Bank of America" is Bank of America Corporation, Bank of America, N.A., and Merrill Lynch, Pierce, Fenner & Smith Incorporated.
- "Barclays" is Barclays Bank PLC and Barclays Capital Inc.
- "BNP Paribas" is BNP Paribas Group, BNP Paribas North America Inc., BNP Paribas Securities Corp., and BNP Prime Brokerage, Inc.
- "BTMU" is The Bank of Tokyo-Mitsubishi UFJ, Ltd.
- "Citigroup" is Citigroup Inc., Citibank, N.A., Citicorp, and Citigroup Global Markets Inc.
- "Credit Suisse" is Credit Suisse AG; Credit Suisse Group AG and Credit Suisse Securities (USA) LLC.
- "Deutsche Bank" is Deutsche Bank Securities Inc. and Deutsche Bank AG.
- "Goldman Sachs" is The Goldman Sachs Group, Inc. and Goldman, Sachs & Co.
- "HSBC" is HSBC Holdings PLC, HSBC Bank PLC, HSBC North America Holdings Inc., HSBC Bank USA, N.A., and HSBC Securities (USA) Inc.
- "JPMorgan" is JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A.
- "Morgan Stanley" is Morgan Stanley; Morgan Stanley & Co. LLC; and Morgan Stanley & Co. International PLC.
- "RBC" is RBC Capital Markets LLC.
- "RBS" is The Royal Bank of Scotland Group PLC, The Royal Bank of Scotland PLC, and RBS Securities Inc.

- "Soc Gen" is Société Générale.
- "Standard Chartered" is Standard Chartered Bank.
- "UBS" is UBS AG, UBS Group AG, and UBS Securities LLC.
- "New Settling Defendants" are BTMU, Morgan Stanley, RBC, Soc Gen, and Standard Chartered, and each is individually a "Settling Defendant."
- "Previous Settling Defendants" are Bank of America, Barclays, BNP Paribas, Citigroup, Goldman Sachs, HSBC, JPMorgan, RBS, and UBS.
- "Settling Defendants" are New Settling Defendants and Previous Settling Defendants.
- "Settling Parties" are Class Plaintiffs and Settling Defendants.
- "Non-Settling Defendants" are Credit Suisse and Deutsche Bank.
- "Defendants" are Settling Defendants and Non-Settling Defendants.

Accompanying [Proposed] Order and Settlement Agreement

- "New Settling Defendants Preliminary Approval Order" is the [Proposed] Order Preliminarily Approving Settlement Agreements with The Bank of Tokyo-Mitsubishi UFJ, Ltd., Morgan Stanley, Morgan Stanley & Co., LLC, Morgan Stanley & Co. International PLC, RBC Capital Markets, LLC, Société Générale , and Standard Chartered Bank, Certifying the Settlement Classes, and Appointing Class Counsel and Class Representatives for the Settlement Classes.
- "BTMU Stip." is the Stipulation and Agreement of Settlement with The Bank of Tokyo-Mitsubishi UFJ, Ltd.
- "Morgan Stanley Stip." is the Stipulation and Agreement of Settlement with Morgan Stanley, Morgan Stanley & Co., LLC, and Morgan Stanley & Co. International plc.
- "RBC Stip." is the Stipulation and Agreement of Settlement with RBC Capital Markets, LLC.
- "Soc Gen Stip." is the Stipulation and Agreement of Settlement with Société Générale.
- "Standard Chartered Stip." is the Stipulation and Agreement of Settlement with Standard Chartered Bank.
- "Settlement Agreements" are the BTMU Stip., Morgan Stanley Stip., RBC Stip., Soc Gen Stip., and Standard Chartered Stip.
- "Stips." is the citation form used to cite paragraphs of the Settlement Agreements where the paragraph references in each of the Settlement Agreements is the same. To the extent any paragraph numbers differ between Settlement Agreements, the individual Settlement agreements are cited.
- "Previous Settling Defendants Preliminary Approval Order" is the Order Preliminarily Approving Settlements, Conditionally Certifying the Settlement

Classes, and Appointing Class Counsel and Class Representatives for the Settlement Classes, ECF No. 536.

Other Terms

- Unless otherwise defined herein, all other capitalized terms have the same meaning as set forth in the Settlement Agreements.

PRELIMINARY STATEMENT

After extensive, hard-fought, arm's-length negotiations conducted with the assistance and skill of renowned mediator Kenneth Feinberg, Class Plaintiffs and Defendants BTMU, Morgan Stanley, RBC, Soc Gen, and Standard Chartered ("New Settling Defendants") have entered into proposed Settlement Agreements (the "Settlements"). These proposed Settlement Agreements provide for payments that total $111,200,000 and agreements to provide Class Plaintiffs with valuable cooperation and confirmatory discovery, including transaction data, documents, attorney proffers, and witnesses for interviews, depositions, and trial testimony. The proposed Settlement Agreements with New Settling Defendants are attached to the accompanying Declaration of Christopher M. Burke and Michael D. Hausfeld as Exhibits 1-5 ("Lead Counsel Decl.").

These Settlement Agreements are an excellent result for the Settlement Classes. The Settlements add to a settlement fund that, while partial, already represents the third largest antitrust class action settlement ever. They resolve the Action against five of the remaining seven defendants, including all four of the Defendants subsequently named in the Action based on cooperation achieved under Plaintiffs' first round of settlements. If approved, the settlements will return to class members more than $110 million from defendants representing a small portion of the global FX market – and an even smaller portion of the U.S. FX market – and that have not been fined as part of the ongoing global government investigations into FX-related collusion.

Significantly, even after Class Plaintiffs have secured more than $2.1 billion in settlements, Class Members still retain rights to recover with respect to all of their transactions (subject to a setoff), including those with New Settling Defendants. Under the doctrine of joint and several liability, these transactions would, even after final approval of all Settlements to date, remain in

the case for the purpose of determining damages against Non-Settling Defendants (subject to a set-off).

Class Plaintiffs' settlements with Previous Settling Defendants Bank of America, Barclays, BNP Paribas, Citigroup, Goldman Sachs, HSBC, JPMorgan, RBS, and UBS totaled $2,009,075,000. Thus, with the New Settling Defendants' settlements, 14 of the 16 Defendants named in the Action[1] have agreed to settle for a total of $2,120,275,000. The monetary component of each of the Settlement Agreements is set out below:

DEFENDANT	TOTAL SETTLEMENT AMOUNT
BTMU	$10,500,000
Morgan Stanley	$49,750,000 + $250,000 for Notice and Administration
RBC	$15,500,000
Soc Gen	$18,000,000
Standard Chartered	$17,200,000
TOTAL	**$111,200,000**

For the reasons set forth below, the Settlements with New Settling Defendants, standing alone or in conjunction with the other settlements, are well within the range of fairness, adequacy, and reasonableness. Therefore, Class Plaintiffs respectfully request the Court to enter the Preliminary Approval Order (attached as Exhibit 1 to the accompanying Motion) with respect to the Settlement Agreements.

UPDATE TO SUMMARY OF THE ACTION

New Settling Defendants, like Previous Settling Defendants, have vigorously disputed Class Plaintiffs' allegations over several years of litigation. In July 2015, Class Plaintiffs filed a Second Consolidated Amended Class Action Complaint, which added four new defendants (BTMU, RBC, Soc Gen, and Standard Chartered) and allegations expanding the breadth of the

[1] Non-Settling Defendants are Credit Suisse and Deutsche Bank.

alleged conspiracy and claims under the Commodity Exchange Act on behalf of an "Exchange Class." Defendants BTMU, Credit Suisse, Deutsche Bank, Morgan Stanley, RBC, Soc Gen, and Standard Chartered filed a motion to dismiss on November 30, 2015. ECF No. 507. On June 3, 2016, Class Plaintiffs filed a Third Amended Complaint ("TAC") to substitute Standard Chartered as a defendant in place of Standard Chartered plc. ECF No. 619. On September 20, 2016, the Court ruled that the TAC adequately pleaded a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and a claim for manipulation under CEA §§ 9(a) and 22(a) for the time period December 1, 2007 through December 31, 2013. ECF No. 661 at 42. However, the Court granted Defendants' motion to dismiss in part with respect to claims arising from transactions executed on foreign exchanges, claims based on transactions between U.S.-domiciled OTC Plaintiffs operating outside the United States and a foreign desk of a defendant, claims based on transactions executed before December 1, 2007, and CEA false reporting claims. ECF No. 661 at 56.

Class Plaintiffs and BTMU, Credit Suisse, Deutsche Bank, Morgan Stanley, RBC, Soc Gen, and Standard Chartered negotiated throughout the final months of 2016 and into early 2017 to present unopposed discovery orders to the Court. Morgan Stanley and Standard Chartered agreed to produce relevant documents that had been produced to U.S. regulators, if any, investigating alleged collusion and wrongdoing in the FX market that related to the allegations in the TAC. ECF Nos. 639, 711 at 3. The other New Settling Defendants were not known to have made productions to U.S. regulators; accordingly, they faced different deadlines to produce documents. On December 23, 2016, the Court entered the Civil Case Management Plan and Scheduling Order, which sets forth the discovery schedule and corresponding litigation deadlines in this case. ECF No. 704. On January 17, 2017, the Court entered the Order Establishing the Protocol for the Production of Documents and Electronically Stored Information ("ESI"). ECF

No. 712. On January 30, 2017, the Court entered the Stipulation and Order Regarding Deposition Protocol. ECF No. 721.

SUMMARY OF SETTLEMENT NEGOTIATIONS

Under the guidance and with the assistance of mediator Kenneth R. Feinberg, Settling Parties engaged in individual mediations dating between April 4, 2016 and February 8, 2017. Lead Counsel Decl. ¶¶ 39, 45, 51, 57, 63; Declaration of Kenneth R. Feinberg ¶¶ 27, 37, 47, 57, 67 ("Feinberg Decl."). Each settlement was the product of hard-fought, arm's-length negotiations by counsel highly experienced in complex litigation and antitrust law. Lead Counsel Decl. ¶ 37; Feinberg Decl. ¶ 8. As a result of these individual mediations and negotiations and, with respect to Morgan Stanley, RBC, Soc Gen, and Standard Chartered, multilateral negotiations, the Stipulations were executed between February 14, 2017 and July 28, 2017.

SUMMARY OF THE SETTLEMENTS

Each of the Settlement Agreements provides for a substantial monetary payment to the Class. The BTMU Stip. provides for a total of $10,500,000; the Morgan Stanley Stip. provides for a total of $50,000,000; the RBC Stip. provides for a total of $15,500,000; the Soc Gen Stip. provides for $18,000,000; and the Standard Chartered Stip. provides for $17,200,000 in monetary relief.

As with the preliminarily-approved settlement agreements of Previous Settling Defendants, the Settlement Agreements obligate the New Settling Defendants to provide valuable cooperation and confirmatory discovery, which will assist Class Plaintiffs in the prosecution of the Action against the Non-Settling Defendants. New Settling Defendants' obligations include, as reasonably necessary and subject to Court orders and applicable law, producing transaction data; providing

information and witnesses to authenticate documents; and providing witnesses for interviews, depositions, and trial testimony relating to the existence, scope, and implementation of the conspiracy. Stips. ¶ 14(b)(ii)-(x). With respect to Morgan Stanley and Standard Chartered, the agreements require them to produce all documents previously turned over to U.S. and European governmental bodies, if any, investigating misconduct in the FX market that relate to the allegations in the TAC and that had not previously been produced in discovery. Morgan Stanley and Standard Chartered Stips. ¶ 14(b)(iv). For those banks (BTMU, RBC, and Soc Gen) that may not have previously produced any documents to regulatory bodies in the United States or Europe, their respective agreements require them to produce documents previously identified as relevant to the TAC and to meet and confer with Class Plaintiffs over the scope of document production. BTMU, RBC, and Soc Gen Stips. ¶ 14(b)(iv). The cooperation obligations of the New Settling Defendants will continue for seven (7) years after the date of preliminary approval or until this Action concludes, whichever is later. Stips. ¶ 14(b)(xi).

The Settlement Agreements are essentially identical to the preliminarily-approved settlement agreements, and to the extent there are differences, these differences are inconsequential to the class action settlement process. Thus, if approved, Plaintiffs believe that all of the pending settlements will efficiently proceed through the settlement approval process, class notice, the claims process, distribution, and other settlement procedures together.

Direct Settlement Class. The Settlement Agreements on behalf of the proposed Direct Settlement Class are identical to the preliminarily approved Direct Settlement Class, defined as:

> All Persons who, between January 1, 2003 and December 15, 2015, entered into an FX Instrument directly with a Defendant, a direct or indirect parent, subsidiary, or division of a Defendant, a Released Party, or co-conspirator where such Persons were either domiciled in the United States or its territories or, if domiciled outside the United States or its territories, transacted FX Instruments in the United States or its territories. Specifically excluded from the Direct Settlement Class are Defendants; Released Parties; co-conspirators; the officers, directors, or employees of any Defendant, Released Party, or co-conspirator; any entity in which any

> Defendant, Released Party, or co-conspirator has a controlling interest; any affiliate, legal representative, heir, or assign of any Defendant, Released Party, or co-conspirator and any person acting on their behalf; provided, however, that Investment Vehicles shall not be excluded from the definition of the Direct Settlement Class. Also excluded from the Direct Settlement Class are any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this Action.

Compare ECF No. 536 ¶ 3, *with* Stips., ¶ 3(a)(i).

Exchange-Only Settlement Class. The Settlement Agreements on behalf of the proposed Exchange-Only Settlement Class are identical to the preliminarily approved Exchange-Only Settlement Class, defined as:

> All Persons who, between January 1, 2003 and December 15, 2015, entered into FX Exchange-Traded Instruments where such Persons were either domiciled in the United States or its territories or, if domiciled outside the United States or its territories, entered into FX Exchange-Traded Instruments on a U.S. exchange. Specifically excluded from the Exchange-Only Settlement Class are Defendants; Released Parties; co-conspirators; the officers, directors, or employees of any Defendant, Released Party, or co-conspirator; any entity in which any Defendant, Released Party, or co-conspirator has a controlling interest; any affiliate, legal representative, heir, or assign of any Defendant, Released Party, or co-conspirator and any person acting on their behalf; provided, however, that Investment Vehicles shall not be excluded from the definition of the Exchange-Only Settlement Class. Also excluded from the Exchange-Only Settlement Class are: (i) any judicial officer presiding over this action and any member of his/her immediate family and judicial staff, and any juror assigned to this Action; and (ii) any Person who, between January 1, 2003 and December 15, 2015, entered into an FX Instrument directly with a Defendant, a direct or indirect parent, subsidiary, or division of a Defendant, a Released Party, or co-conspirator, where such Person was either domiciled in the United States or its territories or, if domiciled outside the United States or its territories, transacted FX Instruments in the United States or its territories.

Compare ECF No. 536 ¶ 3, *with* Stips., ¶3(a)(ii).

Release of Claims. As in the preliminarily-approved settlement agreements, Class Plaintiffs and Class Members who have not excluded themselves will give up their rights to sue New Settling Defendants for Released Claims. Stips. ¶ 8(a)-(f). Also, as with the preliminarily-approved settlement agreements, the Settlement Agreements provide for a release of claims "arising from the factual predicate of the Action." BTMU, Morgan Stanley, and RBC Stips., ¶ 2(ll); Soc Gen and Standard Chartered Stips., ¶ 2(jj).

ARGUMENT

I. THE SETTLEMENTS MEET THE STANDARD FOR PRELIMINARY APPROVAL

The Second Circuit has recognized that there is a "strong judicial policy in favor of settlements, particularly in the class action context." *See McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (quoting *Wal-mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2004)). Guided by this policy, the Court must, at this stage, make a "preliminary evaluation of the fairness of the settlement, prior to notice." *In re Nasdaq Mkt.-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) ("*Nasdaq II*").[2]

Preliminary approval is warranted where, as here, the settlement "'is the result of serious, informed, and non-collusive negotiations, where there are no grounds to doubt its fairness and no other obvious deficiencies . . . , and where the settlement appears to fall within the range of possible approval.'" *Menkes v. Stolt-Nielsen S.A.*, 270 F.R.D. 80, 101 (D. Conn. 2010) (ellipsis in original).

A. The Settlements Are Procedurally Fair, Having Been Achieved Through Extensive Arm's Length Negotiation Facilitated by a Respected and Experienced Mediator

In assessing whether settlements are procedurally fair, courts consider the process undertaken to achieve them. Settlements achieved through "arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation" are entitled to 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). As discussed in the Lead Counsel Declaration and the Declaration of Kenneth R. Feinberg, the

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[2] Unless otherwise noted, citations are omitted and emphasis is added.

Settlement Agreements were reached only after extensive arm's-length negotiations between experienced and able counsel. *See* Lead Counsel Decl. ¶ 37; Feinberg Decl. ¶ 8.

The experience and expertise of counsel on both sides of the negotiations provide potent evidence that the Settlement Agreements are procedurally fair. The involvement of Mr. Feinberg, a renowned mediator, only underscores the conclusion that the Settlement Agreements meet the requirements of due process. *See Clark v. Ecolab Inc.*, No. 04-cv4488, 2010 WL 1948198, at *5 (S.D.N.Y. May 11, 2010).

B. The Settlements Are Substantively Fair.

At the preliminary approval stage, the Court "must make 'a preliminary evaluation' as to whether the settlement[s are] fair, reasonable and adequate." *In re Currency Conversion Fee Antitrust Litig.*, 01-MD-1409, 2006 WL 3247396, at *5 (S.D.N.Y. Nov. 8, 2006); *see Melito v. Am. Eagle Outfitters, Inc.*, 14-CV-02440, 2017 WL 366247, at *1 (S.D.N.Y. Jan. 24, 2017). Where, as here, the Settlements are achieved through a fair process and the terms of those Settlements fall within the "range of possible approval," preliminary approval is warranted. *See NASDAQ II*, 176 F.R.D. at 102.

The Settlements return substantial cash payments and non-cash benefits that not only improve the short-term return to Class Members, but also enhance the likelihood of recovery against Non-Settling Defendants. Because liability pursuant to the Sherman Act is joint and several and the transactions with these banks remain within the case, the Settlements do not prejudice the Classes' ability to recover, at trial, their full treble damages caused by the alleged conspiracy.

1. The Complexity, Expense, and Likely Duration of the Litigation

Courts in this Circuit have recognized antitrust class actions are "notoriously complex, protracted, and bitterly fought." *See Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719

(E.D.N.Y. 1989). Similarly, class actions asserting claims of manipulation under the Commodity Exchange Act are known to present particularly complex issues. *See In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999) (noting factual and legal complexities associated with claims of manipulation). Given this complexity and the resources available to New Settling Defendants, there can be little doubt that continuing this litigation against New Settling Defendants would be a lengthy and highly expensive legal battle. This battle would involve exceedingly complex legal and factual issues where motions, including discovery motions, a motion for class certification, and summary judgment motions, would be vigorously contested. Even if the Classes succeeded at every stage through summary judgment, they would then face the uncertainty of a jury trial, which would almost certainly be followed by lengthy and expensive appeals. *Fleisher v. Phoenix Life Ins. Co.*, No. 11-CV-8405 (CM), 2015 WL 10847814, at *9 (S.D.N.Y. Sept. 9, 2015) (citing *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 65 (S.D.N.Y. 1993)).

2. The Reaction of the Class to the Settlements

This factor is best addressed at final approval, once class members have had an opportunity to object to or opt out of the Settlements. *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, 237 F.R.D. 26, 34 (E.D.N.Y. 2006). However, like their predecessors, the Settlements were reached with the approval of Class Plaintiffs in the action. Any objections will be addressed in conjunction with the motion for final approval of the Settlements.

3. The Stage of the Proceedings

In assessing the fairness of a settlement at preliminary approval, the Court inquires as to "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." *In re AOL Time Warner, Inc.*, No. 02 CIV. 5575 (SWK), 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006); *see also In re Glob.*

Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 458 (S.D.N.Y. 2004) ("[T]he question is whether the parties had adequate information about their claims.").

Here, the depth of understanding about Class Plaintiffs' claims lends strong support to preliminary approval. While at the time of the previous round of settlements, Plaintiffs already had gained a substantial understanding of the case, the extensive settlement cooperation and discovery that has occurred since has only underscored their depth of knowledge about the claims and facts at issue in the case. Class Plaintiffs have conducted extensive discovery into the Action, as well as having received substantial cooperation from Previous Settling Defendants. To date, Plaintiffs' counsel have reviewed millions of pages of documents, worked extensively with industry experts, worked with economists to analyze transactional data, and benefited from attorney proffers made by previous settling defendants. Lead Counsel Decl., ¶ 16. Class Plaintiffs have responded to three motions to dismiss and largely prevailed. ECF No. 242; ECF No. 582; ECF No. 661. This has more than enabled Plaintiffs to enter into an informed settlement of the action.

4. The Risks of Establishing Liability and Damages Complexity, Expense, and Likely Duration of the Litigation

Plaintiffs have compiled, through settlement cooperation and discovery, a substantial liability case against all remaining Defendants in the case. Nonetheless, like in any complex case, liability remains uncertain. *NASDAQ III*, 187 F.R.D. at 475 ("It is known from past experience that no matter how confident one may be in the outcome of litigation, such confidence is often misplaced.") (quoting *State of West Virginia v. Chas. Pfizer & Co.*, 314 F.Supp. 710, 743–44 (S.D.N.Y.1970), *aff'd*, 440 F.2d 1079 (2d Cir.1971)). This uncertainty is compounded with respect to New Settling Defendants because none of the New Settling Defendants paid regulatory fines for FX-related collusion or misconduct, and three of the five New Settling Defendants

(BTMU, RBC, and Soc Gen) are not known to have made productions to United States or European regulators as a result of FX investigations. Lead Counsel Decl. at ¶ 74 n. 15; *Cf. In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. at 475 (noting liability risks associated with action where government proceeding was resolved through consent decree the day it was brought). Moreover, unlike the Previous Settling Defendants, none of the New Settling Defendants has been publicly revealed to have disciplined, fired, or suspended traders as a result of internal investigations into FX misconduct. While there are other civil enforcement and criminal proceedings that have been brought with respect to other Defendants, there would remain a risk that such Defendants' conduct would not be found to sufficiently implicate New Settling Defendants.

As discussed in Plaintiffs' prior memorandum in support of preliminary approval, the risks associated with litigating *any* case with respect to the immense foreign exchange market – no matter how compelling the evidence – are substantial. *See* ECF No. 480 at 14. These risks would be exacerbated as to these New Settling Defendants, which did not pay regulatory fines or discipline employees for misconduct.

5. The Risks of Maintaining the Class Action Through Trial

While Class Plaintiffs believe that they will be able to demonstrate the appropriateness of litigation classes, they are aware that New Settling Defendants would have advanced substantial arguments in opposition. Thus, there is always a risk that this litigation, or particular claims, might not be maintained as a class through trial. *See Frank v. Eastman Kodak Co*., 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (noting that "[w]hile plaintiffs might indeed prevail [on a motion for class certification], the risk that the case might be not certified is not illusory"); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) (reversing class certification in antitrust case). Even upon certification, it could be anticipated that Defendants could seek an appeal under Federal Rule of

Civil Procedure 23(f) and substantially prolong the litigation and delay any recovery for the Class. The risks associated with class certification weigh in favor of approving the Settlement Agreements.

6. The Ability of Defendants to Withstand a Greater Judgment

This factor is more relevant when the settling defendant is not well capitalized. Therefore, that each of the New Settling Defendants could, ultimately, withstand a greater judgment, does not undermine the reasonableness of the amounts secured or suggest that a settlement is unfair. *See, e.g., Hall v. ProSource Techs., LLC*, No. 14-CV-2502 (SIL), 2016 WL 1555128, at *8 (E.D.N.Y. Apr. 11, 2016); *Weber v. Gov't Emps. Ins. Co.*, 262 F.R.D. 431, 447 (D.N.J. 2009). Moreover, where, as here, the settlement involves cooperation, this "tends to offset the fact that [New Settling Defendants] would be able to withstand a larger judgment." *In re Pressure Sensitive Labelstock Antitrust Litig.*, 584 F. Supp. 697, 702 (M.D. Pa. 2008). Given the value of securing New Settling Defendants' cooperation as the litigation moves toward class certification and trial, Class Plaintiffs believe this factor weighs in favor of approval of the Settlements.

7. The Reasonableness of the Settlement Agreements in Light of the Best Possible Recovery and the Attendant Risks of Litigation

Finally, the $111,200,000 recovered under the five new settlements are more than reasonable when weighed against the best possible recovery, in light of the risks associated with continuing litigation against New Settling Defendants.

In recommending that the Court preliminarily approve the settlements, Class Lead Counsel have taken into account a range of outcomes and have considered both the strengths and weaknesses associated with continuing litigation against New Settling Defendants. Class Lead Counsel believe the Settlement Agreements confer significant benefits on the Class Plaintiffs while

eliminating risks to the Classes attendant to continued litigation against well-financed and well-represented parties like New Settling Defendants.

Many of these litigation risks facing Class Plaintiffs are common between the Previous Settling Defendants and New Settling Defendants, such as the difficulties of proving liability, causation, and damages under the Sherman and Clayton Acts in a case involving complex legal and factual issues and an immense financial market. See ECF No. 480 at 16. Class Plaintiffs also face several unique litigation risks with respect to the New Settling Defendants. For example, as noted above, unlike eight of the nine Previous Settling Defendants, New Settling Defendants have not been convicted of antitrust violations or paid fines relating to FX misconduct. Moreover, unlike the agreements with the Previous Settling Defendants, the new settlements were agreed upon following the Court's ruling on a motion to dismiss, which narrowed the temporal and geographic scope of Class Plaintiffs' claims, thereby reducing the value of those claims.[3]

In addition, the New Settling Defendants' global market shares are only a small fraction of the Previous Settling Defendants' global market shares; moreover the Previous Settling Defendants' U.S. operations dwarf those of the New Settling Defendants.

The total new settlement amount of $111,200,000 represents a recovery of approximately $17,055,215 per point of global market share[4] across the five new settlements; this places the five

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[3] In addition, unlike eight of the nine Previous Settling Defendants, none of the New Settling Defendants has been publicly revealed to have disciplined, fired, or suspended traders as a result of internal investigations into FX misconduct.

[4] *See* Lead Counsel Decl., ¶21. Class Plaintiffs' estimated market shares are ***global*** volume-weighted estimates based on the period from 2003-13; however, the Settlement Agreements' release provisions explicitly carve out claims based on transactions executed solely outside the United States and arising under foreign laws belonging to any Persons domiciled outside the

new Settlements as a group in between the JPMorgan and UBS settlements by dollars per point of global market share metric.[5] These recoveries surpass settlement recoveries approved in other price-fixing cases. *See, e.g.*, *NASDAQ II*, 176 F.R.D. at 102 ($4.375 million and $8.25 million per percentage point of market share), *final approval granted NASDAQ III*, 187 F.R.D. 465 (S.D.N.Y. Nov. 9, 1998).

The Settlements bring the aggregate amount of settlement funds to $2,120,275,000, which represents a 21% to 27% recovery measured against Class Plaintiffs' estimated range of aggregate damages of $8 to $10 billion before trebling. As such, these settlements fall well within a range of reasonableness that would warrant approval. *See Nasdaq III*, 187 F.R.D. at 473, 478 (granting final approval to settlements totaling $1.03 billion that concluded litigation where plaintiffs' estimated damages were between $2.48 and $3.1 billion before trebling). And importantly, the Settlements do not prejudice the Settlement Classes' ability to recover treble damages with respect to the entire conspiracy from Non-Settling Defendants.

United States. BTMU, Morgan Stanley, and RBC Stips., ¶ 2(nn); Standard Chartered and Soc Gen Stips., ¶ 2(ll).

[5] The BTMU Stip. provides for a payment of $10,500,000, representing approximately $25,000,000 per point of estimated global market share. Lead Counsel Decl. ¶ 21. The Morgan Stanley Stip. provides for a payment of $49,750,000, which when combined with the Notice and Administration Amount of $250,000, represents approximately $17,361,111 per point of estimated global market share. Lead Counsel Decl. ¶ 21. The RBC Stip. provides for a payment of $15,500,000, representing approximately $19,375,000 per point of estimated global market share. Lead Counsel Decl. ¶ 21. The Standard Chartered Stip. provides for a payment of $17,200,000, representing approximately $18,901,099 per point of estimated global market share. Lead Counsel Decl. __. The Soc Gen Stip. provides for a payment of $18,000,000, representing approximately $11,920,530 per point of estimated global market share. Lead Counsel Decl. ¶ 21.

In addition to this monetary relief, the Classes' abilities to recover against Non-Settling Defendants will be substantially improved through settlement cooperation. The cooperation includes: attorney proffers describing known facts relevant to conduct relating to Released Claims, production of transactional data, production of documents not already produced in discovery, witness interviews, declarations and affidavits, depositions, and trial testimony. These cooperation obligations are equivalent to those reached in the preliminarily-approved settlements and, like those cooperation obligations, will continue until the later of the date of final judgment against all Defendants in the case or seven years after preliminary approval.

In light of the substantial size of the monetary recovery, the relative immediacy of return to the Classes, and the significant risks associated with proceeding further in any litigation, the Settlements with New Settling Defendants fall within the range of reasonableness and should be preliminarily approved.

II. THE PROPOSED SETTLEMENT CLASSES SHOULD BE CERTIFIED

As explained in Class Plaintiffs' prior submission in support of the preliminarily-approved settlements (ECF No. 480), the proposed Classes should be certified because they meet the requirements of Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure:

1. **Numerosity** – The Classes consists of hundreds of thousands of traders and involves widely traded instruments; therefore, numerosity is readily satisfied. *See Wallace v. IntraLinks*, 302 F.R.D. 310, 315 (S.D.N.Y. 2014) ("[C]ommon sense assumptions . . . suffice to demonstrate numerosity").
2. **Commonality –** Numerous common issues of fact and law exist that affect all or a substantial number of Class Members on the issue of liability, impact, and damages. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011); *see also Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc*., 502 F.3d 91, 105 (2d Cir. 2007) ("[A]llegations of the existence of . . . conspiracy are susceptible to common proof").
3. **Typicality** – Class Plaintiffs' claims are typical of Class Members because Class Plaintiffs allege the same unlawful course of conduct that harmed all Class Members. *See In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1175(JG)(VVP), 2014 WL 7882100, at *31 (E.D.N.Y. Oct. 15, 2014) ("Because

the representative plaintiffs will seek to prove that they were harmed by the same overall course of conduct and in the same way as the remainder of the class, their claims are by all appearances typical of the class.").

4. **Adequacy** – Class Plaintiffs will fairly and adequately protect the interests of the Classes because their interests do not conflict with absent Class members, and they are represented by Class Lead Counsel who are experienced in class and antitrust litigation and have diligently represented the interests of the Class Plaintiffs in this litigation and will continue to do so. *See In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 111-12 (S.D.N.Y. 2010).

5. **Predominance** – The questions of law or fact that are capable of common proof are more substantial than the issues subject only to individualized proof. *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015); *Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997) (Predominance is a "test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws.").

6. **Superiority** – A class action is a superior method of adjudicating claims in cases like this one, as numerous courts have held. *See*, *e.g.*, *In re Currency Conversion Fee Antitrust Litig.*, 224 F.R.D. 555, 566 (S.D.N.Y. 2004); *In re Nat'l Gas Commodities Litig.*, 231 F.R.D. 171, 185 (S.D.N.Y. 2005); *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 279, 284 (S.D.N.Y. 1999).

The Classes proposed for the New Settlements are defined to be identical to those that the Court has already certified for settlement purposes. Accordingly, the requirements of Rule 23(a) and 23(b)(3) are satisfied, and certification of the Settlement Classes for purposes of settlement is appropriate.

CONCLUSION

On the basis of the foregoing, Class Plaintiffs respectfully request that the Court grant Class Plaintiffs' Notice of Motion and Motion for Preliminary Approval of Settlement Agreements with The Bank of Tokyo-Mitsubishi UFJ, Ltd., Morgan Stanley, Morgan Stanley & Co., LLC, Morgan Stanley & Co. International plc, RBC Capital Markets, LLC, Société Générale, and Standard Chartered Bank, and enter the New Settling Defendants Preliminary Approval Order.

DATED: July 28, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2017, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List, and I hereby certify that I caused the foregoing document or paper to be mailed via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 28, 2017

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