UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re SSA BONDS ANTITRUST LITIGATION	Civil Action No. 1:16-cv-03711-ER
	CLASS ACTION
This Document Relates To: ALL ACTIONS.	MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF THREE SETTLEMENTS, FINAL APPROVAL OF THE PLAN OF ALLOCATION, AND FOR CERTIFICATION OF THE SETTLEMENT CLASSES

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Plaintiffs Alaska Department of Revenue, Treasury Division, Alaska Permanent Fund Corporation, Iron Workers Pension Plan of Western Pennsylvania, and Sheet Metal Workers Pension Plan of Northern California (collectively "Plaintiffs"), present the Court with three settlements, each of which the Court has previously preliminarily approved. *See* ECF Nos. 428, 431, 580. Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure ("Rule"), Plaintiffs now respectfully submit this Memorandum of Law in support of their Motion for Final Approval of Three Settlements, Final Approval of the Plan of Allocation, and Certification of the Settlement Classes. The terms of the proposed Settlements are set forth in each Stipulation and Agreement of Settlement, which were previously filed with the Court ("Stipulations" or "Settlements"). ECF Nos. 291-1, 291-2, 554-1.[1]

If finally approved, these Settlements would resolve all claims against Settling Defendants in this action (the "Litigation"), in exchange for a total monetary value of $95,500,000 for the benefit of the Settlement Classes and significant cooperation obligations.[2]

PRELIMINARY STATEMENT

The three Settlements at issue were reached after months of arm's-length negotiations between experienced counsel and are an excellent result for the Settlement Classes. The partial Settlements are fair and reasonable, and amply satisfy the requirements of Rule 23(e)(2) as well as each of the applicable factors under *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) ("*Grinnell*"), the Second Circuit's seminal decision on settlement approval standards. The proposed

[1] All capitalized terms not otherwise defined herein have the meanings set forth in the Stipulations and the Joint Declaration of Daniel L. Brockett and David W. Mitchell ("Joint Declaration"), submitted herewith.

[2] "Settling Defendants" means Bank of America Corporation, Bank of America, N.A., Merrill Lynch International, Bank of America Merrill Lynch International Limited, Merrill Lynch, Pierce, Fenner & Smith Incorporated (collectively "Bank of America"), Deutsche Bank AG, Deutsche Bank Securities Inc. (collectively "Deutsche Bank"), HSBC Securities (USA) Inc. and HSBC Bank plc (collectively "HSBC").

Settlements are particularly beneficial to the Settlement Classes when considered in light of the risks posed by the pending appeal of the non-settling defendants' motions to dismiss this case and the delay associated with that appeal, which could ultimately lead to no recovery for harmed members of the Settlement Classes in the absence of settlement.

Further confirming the fairness of the proposed Settlements is the fact that, to date, there has been no objection to the Settlements from class members. The proposed Plan of Allocation (the "Plan") described below has a "reasonable, rational basis," and is recommended by Co-Lead Counsel who have been closely acquainted with the facts of this action and have litigated this case for four years. Finally, the Settlement Classes meet all requirements of Rule 23(a) – numerosity, commonality, typicality, and adequacy – as well as the predominance and superiority requirements of Rule 23(b)(3). The preliminarily certified Settlement Classes should therefore be granted final certification for settlement purposes under Rules 23(a) and 23(b)(3).

SUMMARY OF THE ACTION

The first complaint in this action was filed in May 2016. *See* ECF No. 1 at 1. Thereafter, a total of 14 related individual actions alleging a conspiracy to manipulate the prices of SSA Bonds were consolidated under the caption "In re SSA Bonds Antitrust Litigation." On December 22, 2016, the Court appointed Robbins Geller Rudman & Dowd LLP and Quinn Emanuel Urquhart & Sullivan, LLP as interim Co-Lead Counsel. ECF No. 88 at 1. In early 2017, Plaintiffs secured substantial monetary settlements with Bank of America and Deutsche Bank, with each settlement agreement also contemplating the production of cooperation materials from the Settling Defendants. *See* ECF No. 290 at 4.

With the benefit of the cooperation material, on November 3, 2017, Plaintiffs filed the Consolidated Amended Class Action Complaint. ECF No. 306. Defendants moved to dismiss that

complaint (ECF Nos. 342-352, 354-362, 364-379, 381), and on August 28, 2018, the Court granted Defendants' motions, but also granted Plaintiffs leave to amend the pleadings (ECF No. 495 at 1). Three months later, Plaintiffs filed the Second Consolidated Amended Class Action Complaint (ECF No. 506), alleging that Defendants colluded to manipulate the market for U.S. dollar-denominated SSA bonds in violation of federal antitrust laws. The complaint was supported by over 200 electronic "chat" records obtained from Bank of America and Deutsche Bank as part of their Settlements. Shortly before the non-settling defendants moved to dismiss the Second Consolidated Amended Complaint, Plaintiffs secured an additional Settlement with HSBC. *See* ECF No. 554-1.

In October 2019, the Court granted certain of the non-settling defendants' motions to dismiss for lack of personal jurisdiction and improper venue. *See* ECF No. 627. Several months later, the Court dismissed the action against the non-settling defendants with prejudice for failure to state a claim. *See* ECF No. 638. Plaintiffs thereafter sought entry of judgment against the non-settling defendants (ECF Nos. 639, 643) and timely filed an appeal. *See* ECF No. 649. The appeal is pending.

Plaintiffs respectfully refer the Court to the accompanying Joint Declaration for a more fulsome discussion of the factual background and procedural history of the Litigation, the extensive efforts undertaken by Plaintiffs and Co-Lead Counsel during the course of the Litigation, the risks of continued litigation, and a discussion of the negotiations leading to the Settlements. For the reasons stated below and in the Joint Declaration, the proposed Settlements and proposed Plan are fair, reasonable, and adequate, and warrant the Court's approval.

SUMMARY OF THE SETTLEMENTS

Plaintiffs and Settling Defendants entered into Settlements providing for a total payment of $95,500,000 to the Settlement Classes. Each of the Settlements also included cooperation provisions

that resulted in the production of electronic chat transcripts from the Settling Defendants to be used in the continued prosecution of this case, and which were incorporated into both the Consolidated Amended Class Action Complaint and the Second Consolidated Amended Class Action Complaint. In addition to the electronic chat transcripts, the Settlements also contemplated the production of the banks' reasonably available transactional data involving SSA Bonds. Together, the chat transcripts and the transactional data have played a vital role in informing Plaintiffs' understanding of the nature of the alleged conspiracy – including the breadth of the alleged collusion, its mechanics, and the effects.

Plaintiffs moved for preliminary approval of each Settlement. ECF Nos. 289, 553. The Court subsequently preliminarily approved all three Settlements, making an initial finding that each was procedurally and substantively fair, and preliminarily certifying each Settlement Class under Rule 23 (the "Preliminary Approval Orders"). ECF Nos. 428, 431, 580.

With the exception of the monetary component, the terms of each Settlement Agreement are substantially identical, which allowed for a single Notice to the Settlement Classes (an efficient approach for members of the Settlement Classes).[3] Accordingly, on July 15, 2020, the Court granted Plaintiffs' motion for an Order Providing for Notice to the Settlement Classes and Preliminarily Approving the Plan of Allocation (the "Notice Order"). ECF No. 652. The Claims Administrator administered the Notice Plan in accordance with the Notice Order. *See* §II, *infra*.

[3] The Bank of America and Deutsche Bank Settlements' Class period is January 1, 2005 to March 1, 2018, and the HSBC Settlement Class period is January 1, 2009 to March 6, 2019. *See* ECF Nos. 291-1, ¶1.38, 291-2, ¶1.38, 554-1, ¶1.38. For efficiency in administration and distribution, Plaintiffs' Plan of Allocation adopted a global settlement class period of January 1, 2005 through March 6, 2019 to encompass all date ranges.

ARGUMENT

I. THE SETTLEMENTS ARE FAIR, REASONABLE, AND ADEQUATE AND MERIT APPROVAL BY THE COURT

A. The Law Favors and Encourages Settlements

"'The compromise of complex litigation is encouraged by the courts and favored by public policy.'" *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005).[4] The Second Circuit acknowledges "the 'strong judicial policy in favor of settlements, particularly in the class action context.'" *Id.*; *see also In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 174 (S.D.N.Y. 2014) ("The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation.").

B. Class Action Settlements Are Judicially Approved When They Are Fair, Reasonable, and Adequate

Final approval of a class action settlement is appropriate where the court determines the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Both procedural and substantive fairness are considered in evaluating class action settlements. *See Wal-Mart*, 396 F.3d at 116 ("A court determines a settlement's fairness by looking at both the settlement's terms and the negotiating process leading to settlement."). "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) (citing *Wal-Mart*, 396 F.3d 96 at 116). Where a settlement is the "product of arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation," a "presumption of fairness" attaches. *In re Austrian and German Bank Holocaust Litig.*,

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

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).

The newly revised Rule 23 articulates a four-pronged test to address the procedural and substantive fairness of a proposed class action settlement. Rule 23(e)(2), provides that:

> (2) *Approval of the Proposal*. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
>
> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). The first two of these prongs (Rule 23(e)(2)(A)-(B)) address the "'procedural'" fairness of the settlement, while the last two prongs (Rule 23(e)(2)(C)-(D)) address the "'substantive'" fairness. *Id.*, Advisory Committee's Notes to 2018 Amendments to Rule 23.

Courts in the Second Circuit have also traditionally considered the "*Grinnell* factors" to assist in weighing final approval and determining whether a settlement is substantively "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.

Grinnell, 495 F.2d at 463. In assessing the fairness of a class action settlement, "[a]ll nine [*Grinnell*] factors need not be satisfied, rather, the court should consider the totality of these factors in light of the particular circumstances." *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003) (citing *D'Amato*, 236 F.3d at 86).

The factors described in Rule 23(e)(2) overlap significantly with, and are intended to supplement, the *Grinnell* factors to "focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." *See* Fed. R. Civ. P. 23(e)(2); Advisory Committee's Notes to 2018 Amendments to Rule 23. As acknowledged by the Preliminary Approval Orders, the Court made initial determinations that the Settlements were each fair, reasonable, and adequate, and satisfied the requirements of Rule 23(e). ECF Nos. 428, 431, 580; *see also generally* ECF Nos. 290, 555. As detailed below, there is no reason to disturb those initial findings.

C. The Proposed Settlements Are Procedurally Fair

1. Rule 23(e)(2)(a) – Plaintiffs and Co-Lead Counsel Have Adequately Represented the Settlement Classes

Under the first prong of Rule 23(e)(2), the Court must consider that "the class representatives and class counsel have adequately represented the class" prior to approving a proposed class action settlement. Fed. R. Civ. P. 23(e)(2)(A).

Rule 23(e)(2) overlaps with the third *Grinnell* factor, which considers "'whether the parties had adequate information about their claims such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of

plaintiffs' causes of action for purposes of settlement.'" *In re Bear Stearns Cos., Inc. Sec., Derivative and ERISA Litig.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012). Co-Lead Counsel, which are highly experienced in antitrust class action litigation and are very well informed about the strengths and weaknesses of the case, strongly endorse the Settlements and believe they represent an excellent recovery on behalf of the Settlement Classes. *See generally* Joint Decl.

In appointing Robbins Geller and Quinn Emanuel as interim Co-Lead Counsel, the Court determined that Co-Lead Counsel "possesses the necessary experience handling class actions and complex litigation and has the requisite knowledge of antitrust law to serve effectively on behalf of the putative class," and were best suited to "adequately serve the interests of the putative class" given the depth of their resources and global presence. ECF No. 88 at 4, 5. Co-Lead Counsel have taken that appointment seriously, fiercely advocating on behalf of Plaintiffs and the Settlement Classes over the course of several years to arrive at the substantial Settlement amounts. While negotiating each of the Settlements, Co-Lead Counsel continued to simultaneously investigate and prosecute Plaintiffs' claims so that the case may continue against the non-settling defendants.

Plaintiffs and Co-Lead Counsel have adequately represented the Settlement Classes as required by Rule 23(e)(2)(A), and "developed a comprehensive understanding of the key legal and factual issues in the litigation and, at the time the Settlement was reached, had 'a clear view of the strengths and weaknesses of their case' and of the range of possible outcomes at trial," consistent with *Grinnell*. *City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132(CM)(GWG), 2014 WL 1883494, at *7 (S.D.N.Y. May 9, 2014) (citing *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01-CV-11814(MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004) *aff'd sub nom.*, *Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015). Plaintiffs and Co-Lead Counsel have diligently prosecuted this action over the course of several years, launching a detailed investigation into the underlying

claims and engaging industry and economic experts, and poured millions of dollars into those efforts. Co-Lead Counsel initiated an investigation into possible collusion in the SSA Bond market in October 2015, and spent several months analyzing years' worth of trading data for more than one hundred SSA Bonds before filing the initial complaint. Co-Lead Counsel also interviewed former SSA Bond traders and other confidential sources, and refined economic analyses prior to filing the amended complaint. Prior to the filing of the Consolidated Class Action Complaint, Co-Lead Counsel again scoured the public record for facts probative of collusion and continued their extensive work with experts, and identified and conducted interviews of industry professionals.

While formal discovery had not yet commenced in the Litigation, Plaintiffs and Co-Lead Counsel successfully negotiated for the production of electronic chat transcripts from the Settling Defendants and thus have pored through transcripts and transactional data to support Plaintiffs' claims.[5] Plaintiffs and Co-Lead Counsel have also opposed Defendants' multiple rounds of motions to dismiss and conducted detailed analyses prior to negotiating and arriving at the proposed Settlements. *See* Joint Decl., ¶¶5, 19-21, 25-27. Plaintiffs and Co-Lead Counsel stood ready to, and at all times did, advocate for the best interests of the Settlement Classes, were actively opposing repeated motions to dismiss at the time the Settlements were achieved, and have diligently represented the interests of the Settlement Classes in this Litigation. And we will continue to do so as the case continues against the non-settling defendants through the appeal process. There are no conflicts between Plaintiffs and members of the Settlement Classes concerning this Litigation, and Plaintiffs' interest in proving liability and damages is entirely consistent with that of the Settlement Classes. Thus, the requirements of Rule 23(e)(2)(A) are satisfied.

[5] To satisfy the third *Grinnell* factor, the "parties need not have even engaged in formal or extensive discovery." *City of Providence*, 2014 WL 1883494, at *6.

2. Rule 23(e)(2)(B) – The Proposed Settlements Were Negotiated at Arm's Length Through a Complex and Adversarial Process

The proposed Settlements are the result of arm's-length negotiations without any hint of collusion. Rule 23(e)(2)(B) is in harmony with the long-standing Second Circuit rule that "a strong initial presumption of fairness attaches to [a] proposed settlement," when the "integrity of the arm's length negotiation process is preserved." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997); *see* Fed. R. Civ. P. 23(e)(2)(B); *see also Wal-Mart*, 396 F.3d at 116.

The parties negotiated each proposed Settlement over the course of several months through a complex and highly adversarial process. *See* Joint Decl., ¶¶34-51. The lengthy negotiation processes included telephonic and in-person discussions among experienced counsel related to their respective clients' positions on liability, class certification, and potential damages recoverable in this Litigation.

The negotiations with each Settling Defendant were at arm's length and were hard-fought. Importantly, the Settlements were achieved during times of uncertainty in this action. At the time of the Bank of America and Deutsche Bank settlements, Plaintiffs faced potential risks at the pleading stage if they were forced to respond to a series of motions to dismiss based primarily on statistical allegations. That is, without the Settlements, Plaintiffs would have had to survive a motion to dismiss without what Plaintiffs considered concrete evidence of wrongdoing provided by the electronic chat records.

The HSBC settlement was achieved after the Consolidated Amended Class Action Complaint was dismissed with leave to amend. With these considerations in mind, that Co-Lead Counsel were able to achieve nearly $100 million for the benefit of the Settlement Classes in a case that was ultimately dismissed is, we submit, a tremendous achievement. A presumption of fairness is further

supported when experienced counsel endorse a proposed settlement, as "'great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation." *PaineWebber*, 171 F.R.D. at 125. Accordingly, the proposed Settlements are entitled to the presumption of procedural fairness under Second Circuit law, as they satisfy Rule 23(e)(2)(B).

D. The Proposed Settlements Are Substantively Fair

At final approval, the Court's role is not to "'decide the merits of the case or resolve unsettled legal questions,'" or "'foresee with absolute certainty the outcome of the case,'" but rather to "'assess the risks of litigation against the certainty of recovery under the proposed settlement.'" *Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331(CM)(MHD), 2014 WL 1224666, at *10 (S.D.N.Y. Mar. 24, 2014).

1. The Proposed Settlements Are Adequate in Light of the Costs, Risk, and Delay of Trial and Appeal

Rule 23(e)(2)(C)(i) codifies many of the *Grinnell* factors, which guide a court's assessment of the fairness of a proposed settlement in light of the attendant risks. Under Rule 23(e)(2)(C)(i), district courts consider "the costs, risks and delay of trial and appeal," while the relevant *Grinnell* factors overlap and address the risks of establishing liability and damages, taking into consideration: the complexity, expense, and likely duration of the litigation (factor 1); the risks of establishing liability (factor 4); establishing damages (factor 5); maintaining the class action through trial (factor 6); the ability of the defendants to withstand a greater judgment (factor 7); and the range of reasonableness of the settlement fund in light of the best possible recovery (factor 8) and in light of all the attendant risks of litigation (factor 9). Fed. R. Civ. P. 23(e)(2)(C)(i).

a. The Complexity, Expense, and Likely Duration of the Litigation (*Grinnell* Factor 1)

"The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation." *Advanced Battery*, 298 F.R.D. at 174. Numerous courts have recognized that "federal antitrust cases are complicated, lengthy, and bitterly fought." *Wal-Mart*, 396 F.3d at 118; *In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 (BMC)(JO), 2012 WL 5289514, at *4 (E.D.N.Y. Oct. 23, 2012) ("'Federal antitrust cases are complicated, lengthy . . . bitterly fought' as well as costly."); *see also Advanced Battery*, 298 F.R.D. at 175 ("the complexity, expense, and likely duration of litigation are critical factors in evaluating the reasonableness of a settlement").

This case is especially complex given the global nature and size of the SSA Bond market. The complexity of the action lends itself to a lengthy duration of the Litigation. For example, Plaintiffs and Co-Lead Counsel spent over two years investigating what would become the Second Consolidated Amended Class Action Complaint. Between the initial and renewed motions to dismiss, over 1,150 pages of dismissal memoranda were filed by the parties, and hundreds more in supporting declarations. While Co-Lead Counsel continue to believe Plaintiffs' claims have substantial merit, they nonetheless acknowledge the expense and uncertainty of continued litigation against the Settling Defendants, particularly in light of the Court's dismissal of the Litigation with prejudice against the non-settling defendants more than three years after the Litigation began.

Plaintiffs have begun the appeals process for the dismissed claims. Even assuming a favorable decision on appeal some unknown number of months from now, Plaintiffs still face a lengthy and contentious process of resolving any dismissal issues the Second Circuit leaves for this Court to resolve, taking discovery, seeking class certification for the remaining claims, potential summary judgment motions, and an eventual trial, which could add several more years to the

duration of the Litigation or further appeals, and generate enormous costs before ultimately being resolved. Co-Lead Counsel have taken into account the uncertain outcome and risks of further litigation against the Settling Defendants and believe the Settlements confer significant benefits on the Settlement Classes in light of the circumstances.

b. The Risk of Establishing Liability and Damages (*Grinnell* Factors 4 and 5)

The Court's role in evaluating the risks of establishing liability, and the risks of establishing damages is not to evaluate the plaintiffs' likelihood of success, but rather to "balance the benefits afforded the Class, including immediacy and certainty of recovery, against the continuing risks of litigation." *In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 37 (E.D.N.Y. 2019) ("*Payment Card*"). Although Plaintiffs and Co-Lead Counsel firmly believe that the claims asserted in the Litigation are meritorious and that Plaintiffs' claims will be borne out by the evidence, and that they would ultimately prevail at trial, there are risks that made any recovery uncertain. As discussed above, continued litigation lends itself to the risk that this Litigation could have been completely defeated, or that the scope of the Settlement Classes' claims be significantly narrowed, resulting in a smaller recovery, or no recovery, in the absence of the Settlements.

Even if Plaintiffs are ultimately successful on appeal, in order for the Settlement Classes to be successful, Plaintiffs must be able to succeed on each of the challenges Settling Defendants would raise at class certification, summary judgment, and ultimately trial. At trial, Plaintiffs would face the challenge of proving class damages to a jury. There is no doubt that at trial the issue inevitably would involve a "'battle of the experts'" on proof of damages. *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998). "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) *aff'd*, 798 F.2d 35 (2d Cir. 1986). Thus, there is a substantial risk that a jury might accept Settling Defendants' damages arguments and award nothing at all or award less than the $95,500,000 that, if approved, would be available to the Settlement Classes under the Settlements. "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*, 187 F.R.D. at 476. The risks of establishing liability and damages underscore the reasonableness of the Settlements.

c. Maintaining Class Action Status Through Trial Presents a Substantial Risk (*Grinnell* Factor 6)

Plaintiffs and Co-Lead Counsel are confident that, should the case proceed following appeal, the Court would certify a litigation class as all of the requirements of Rules 23(a) and 23(b)(3) are satisfied. But, class certification in this Litigation would be vigorously opposed by Defendants. Plaintiffs and Co-Lead Counsel anticipate that Settling Defendants would argue there is no link between their alleged misconduct and class-wide injury, and that the need for individualized class member inquiries would overwhelm any common issues, or that the alleged collusive conduct affected the prices of all SSA Bonds during the class period. *See Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) ("While plaintiffs might indeed prevail [on a motion for class certification], the risk that the case might be not certified is not illusory and weighs in favor of the Class Settlement."). Even if a litigation class were certified, that certification could be challenged on appeal, or at another stage in the litigation. Thus, there is a risk that the action, or particular claims, might not be maintained as a class action through trial, and that class certification may be re-reviewed at any stage of the litigation. *See* Fed. R. Civ. P. 23(c) (authorizing a court to decertify a

class at any time). The risks and uncertainty associated with class certification thus weigh in favor of approving the Settlements.

d. Defendants' Ability to Withstand a Greater Judgment (*Grinnell* Factor 7)

The financial obligations the Settlements impose on the Settling Defendants is substantial, as are the cooperation obligations Plaintiffs and Co-Lead Counsel were able to negotiate. While the Settling Defendants could presumably withstand a greater monetary judgment than the amount paid in settlement, "the 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." *PaineWebber*, 171 F.R.D. at 129; *see also Weber v. Gov't Emps. Ins. Co.*, 262 F.R.D. 431, 447 (D.N.J. 2009) ("[I]n any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and, against the weight of the remaining factors, this fact alone does not undermine the reasonableness of the instant settlement."). In addition, "the benefit of obtaining the cooperation of the Settling Defendants tends to offset the fact that they would be able to withstand a larger judgment." *In re Pressure Sensitive Labelstock Antitrust Litig.*, 584 F. Supp. 2d 697, 702 (M.D. Pa. 2008). The collective monetary benefit, coupled with the cooperation materials that have been used, and can continue to be used, during the continued prosecution of this case weigh in favor of approval.[6]

[6] *See, e.g.*, *Precision Assocs. v. Panalpina World Transp. (Holding) Ltd.*, No. 08-cv-42 (JG)(VVP), 2013 WL 4525323, at *9 (E.D.N.Y. Aug. 27, 2013) ("cooperation adds considerable value to the Settlement and must be factored into an analysis of the overall reasonableness of the agreement"); *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003) ("The provision of such assistance is a substantial benefit to the classes and strongly militates toward approval of the Settlement Agreement."); *In re Mid-Atl. Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1386 (D. Md. 1983) (a defendant's agreement to cooperate with plaintiffs "is an appropriate factor for a court to consider in approving a settlement"); *In re Corrugated Container Antitrust Litig.*, MDL No. 310, 1981 WL 2093, at *16 (S.D. Tex. June 22, 1981) ("The cooperation clauses constituted a substantial benefit to the class.") *aff'd*, 659 F.2d 1322 (5th Cir. 1981).

e. The Proposed Settlement Amount Is Reasonable in View of the Best Possible Recovery and the Risks of Litigation (*Grinnell* Factors 8 and 9)

In analyzing the fairness of a proposed settlement, the court must consider whether it falls within a "range of reasonableness"; that is, "[t]he adequacy of the amount offered in settlement must be judged 'not in comparison with the best possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of the plaintiffs' case.'" *PaineWebber*, 171 F.R.D. at 130; *see also Wal-Mart*, 396 F.3d at 119.

The proposed partial Settlements offer the opportunity for immediate relief of $95.5 million to the Settlement Classes, rather than a speculative payment years down the road. *See In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 93 (S.D.N.Y. 2007) ("The prospect of an immediate monetary gain may be more preferable to class members than the uncertain prospect of a greater recovery some years hence."). That in itself is a remarkable recovery considering the case was fully dismissed shortly thereafter. But even putting that aside, and ignoring the substantial value created by the cooperation agreements, it should also be considered that these are only partial settlements. The non-settling Defendants remain jointly and severally liable for ***all*** damages. *See, e.g.*, *In re Domestic Airline Travel Antitrust Litig.*, 378 F. Supp. 3d 10, 21 (D.D.C. 2019) (noting partial settlements preserve plaintiffs' ability to seek joint and several liability and the full damage trebled from non-settling defendants, thereby increasing the total funds available to potential class members).

To put the rate of recovery secured in the Settlement Agreements in that context, using comparative market shares Co-Lead Counsel projected what a total-case recovery would be if Plaintiffs recovered at the same rate against the non-settling Defendants. If Plaintiffs recovered against all Defendants at the same rate (adjusted for market share), such a total case recovery would

be $245 million. Joint Decl., ¶53. Co-Lead Counsel believe that this would represent between 11% and 24% of the non-trebled damages that would have been recoverable at trial on USD SSA bond transactions. *Id.*, ¶54. Legal scholar Brian T. Fitzpatrick of Vanderbilt University School of Law, whose extensive research on attorneys' fees in class action settlements has been widely cited by federal courts, finds that this "compares well to the typical case," particularly if one considers the value of the cooperation secured here. *See* Fitzpatrick Decl., ¶20 (noting that median full-case recovery in cartel cases is 19% of single damages).

In light of the complex legal and factual issues present here – including, of course, the complete dismissal of the action as against the other Defendants – the fairness of the proposed Settlements is apparent. Accordingly, Plaintiffs respectfully submit that the immediate cash benefit of $95,500,000 and supplemental cooperation material for these partial Settlements are well "within the range of reasonableness" in light of the best possible recovery and the risks of litigation. *See Precision Assocs.*, 2013 WL 4525323, at *9 ("cooperation adds considerable value to the Settlement and must be factored into an analysis of the overall reasonableness of the agreement").

2. The Claims Process Is Fair and Rational, and the Proposed Method for Distributing Relief Is Effective

With respect to Rule 23(e)(2)(C)(ii), Plaintiffs and Co-Lead Counsel have taken substantial efforts to ensure that the Settlement Classes are notified about the proposed Settlements. Rule 23(e)(2)(C)(ii) requires courts to examine "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C)(ii). Further, a "claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." Advisory Committee's Notes to 2018 Amendments to Rule 23. As described in Plaintiffs' Memorandum of Law in Support of Motion for an Order Providing for Notice to the Settlement Classes and

Preliminarily Approving Plan of Allocation ("Plaintiffs' Notice Motion") (ECF No. 646), the claims process here allows for hardcopy and electronic submissions to the Claims Administrator using a simplified Claim form, and allocates payments based upon the Plan of Allocation (described more fully below), which was crafted based on the knowledge and experience of Co-Lead Counsel following consultation with leading industry experts. Members of the Settlement Classes have until February 1, 2021 to object to the proposed Settlements. While that date has not yet passed, to date, there have been no objections to the proposed Settlements. Thus, this factor supports final approval for the same reason that it supported preliminary approval.

3. The Proposed Award of Attorneys' Fees Supports Final Approval

Rule 23(e)(2)(C)(iii) requires courts to examine "the terms of any proposed award of attorneys' fees, including timing of payment" as part of its adequacy assessment. Fed. R. Civ. P. 23e(2)(C)(iii). At the preliminary approval stage, and as described in the Notice plan mailed to potential members of the Settlement Classes, Co-Lead Counsel represented that they would apply for attorneys' fees not to exceed 33% of the Settlement Fund. As discussed in Co-Lead Counsel's fee brief, Co-Lead Counsel seeks an award of attorneys' fees in an amount equal to 25% of the total amount of the Settlements, plus interest accrued at the same rate as accrued for the Settlement Fund. As explained in Co-Lead Counsel's fee brief, this request is reasonable under the circumstances.

The Settlement Classes were fully apprised of the terms of the proposed award of attorneys' fees, which merits a finding that this factor supports the proposed Settlements.

4. The Parties Have No Other Agreements in Connection with the Settlements Other than the Materiality Threshold

Rule 23(e)(2)(C)(iv) requires courts to consider "any agreement required to be identified by Rule 23(e)(3)" that is, "any agreement made in connection with the proposal." Fed. R. Civ.

P. 23(e)(2)(C)(iv) and 23(e)(3). As disclosed in moving for preliminary approval, the parties have entered into standard supplemental agreements which provide that in the event that members of the Settlement Classes who transacted in a certain amount of SSA Bonds during the relevant Settlement Class Period opt out of the Settlement Classes, the parties will meet and confer, and if unable to reach a resolution, Settling Defendant may present the issue of whether the Materiality Threshold has been met, and if so, seek an appropriate remedy from an independent and neutral mediator to determine the appropriate remedy. To date, no request for exclusion from the Settlement Classes has been received. No other agreements exist, and thus, this factor weighs in favor of final approval.

5. Class Members Are Treated Equitably

The final factor, Rule 23(e)(2)(D), looks at whether members of the Settlement Classes are treated equitably. The proposed Settlements are designed to do precisely that. As discussed *infra* at §II, the Plan treats all class members in a similar manner: everyone who submits a valid and timely Proof of Claim and Release form, and did not exclude himself, herself, or itself from a Settlement Class, will receive a *pro rata* share of the Net Settlement Fund in the proportion that the Authorized Claimant's claim bears to the total of the claims of all Authorized Claimants in the same Pool.[7] For this reason, this factor also militates in favor of granting final approval of the proposed Settlements. Thus, Plaintiffs and Co-Lead Counsel respectfully submit that each factor identified under Rule 23(e)(2) supports granting final approval of the proposed Settlement.

[7] As described in Plaintiffs' Notice Motion, the Notice, and in consultation with Co-Lead Counsel, the Claims Administrator will implement an Alternative Minimum Payment so that all valid claims would receive at least the minimum distribution if the Authorized Claimant's total distribution falls below the cost of administering the claim. Courts routinely approve plans that provide for flat *de minimis* allocations in these circumstances. *See, e.g.*, *In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510, 2007 WL 1191048, at *9-*10 (E.D.N.Y. Apr. 19, 2007); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, No. 94 Civ. 3996 RWS, 2000 WL 37992, at *2 (S.D.N.Y. Jan. 18, 2000); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 497-98 (S.D.N.Y. 2009).

E. The Reaction of the Settlement Classes Merits Approval

"A favorable reception of the settlement" is "strong evidence" that a proposed settlement is fair. *Grinnell Corp.*, 495 F.2d at 462. "'[T]he reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy. In fact, the lack of objections may well evidence the fairness of the Settlement.'" *In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (MKB)(JO), 2019 WL 6875472, at *16 (E.D.N.Y. Dec. 16, 2019). Though the fairness period is ongoing, the initial reaction to the Settlements warrants approval. *Wal-Mart*, 396 F.3d at 118 ("'If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.'"). To date, no objections have been filed, and no exclusion requests have been received.[8] The lack of formal objections and any exclusion requests warrant approval and signal a positive reaction of the members of the Settlement Classes and supports approval of the Settlements.

II. THE NOTICE PLAN ADEQUATELY APPRISED MEMBERS OF THE SETTLEMENT CLASSES OF THEIR RIGHTS

At the Preliminary Approval stage, the Court found that the proposed "Notice and the publication of the Summary Notice" was the "best notice practicable under the circumstances," and satisfied both Rule 23 and due process requirements. *See* Notice Order at 2. "There are no rigid rules to determine whether a settlement notice to the class satisfied constitutional or Rule 23(e) requirements; the settlement notice must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Wal-Mart*, 396 F.3d at 114. Actual notice to every class member is not required; rather, counsel need only act "reasonably in selecting means likely to inform the persons affected."

[8] Plaintiffs will update the Court as to any objections or exclusion requests received in their reply papers.

Jermyn v. Best Buy Stores, L.P., No. 08 Civ. 00214(CM), 2010 WL 5187746, at *3 (S.D.N.Y. Dec. 6, 2010). Courts in the Second Circuit have held that notice plans are adequate when they combine first-class mail with extensive publication notice. *See Wal-Mart*, 396 F.3d. at 104. Notice is adequate "if the average person understands the terms of the proposed settlement and the options provided to class members thereunder." *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 133 (S.D.N.Y. 2008) (citing *Wal-Mart*, 396 F.3d at 114).

As described first in Plaintiffs' Notice Motion, the Notice and the method utilized to disseminate it to potential members of the Settlement Classes satisfies these standards. The Court-approved Notice and Proof of Claim and Release (the "Notice Packet") amply apprise members of the Settlement Classes, *inter alia*: (1) the nature of the Litigation and the Settlement Classes' claims; (2) the essential terms of the proposed Settlements; (3) the proposed Plan; (4) class members' rights to object to the proposed Settlements, the Plan, or the requested attorneys' fees or expenses; (5) the binding effect of a judgment on members of the Settlement Classes; and (6) information regarding Co-Lead Counsel's motion for an award of attorneys' fees and expenses. The Notice also provides specific information regarding the date, time, and place of the Fairness Hearing, and sets forth the procedures and deadlines for: (1) submitting a Proof of Claim and Release; and (2) objecting to any aspect of the proposed Settlements, including the proposed Plan and the request for attorneys' fees and expenses.

Pursuant to the Notice Order, Angeion Group, LLC ("Angeion"), the Court-approved Claims Administrator, sent over 26,200 copies of the Notice to potential members of the Settlement Classes and nominees beginning on October 29, 2020, based on name and address information that was primarily obtained from the Settling Defendants' business records. *See* Declaration of Markham Sherwood Regarding Dissemination of Notice for Three Settlements ("Sherwood Decl."), ¶¶5-10.

The 15-page Notice Packet included the Notice of Proposed Settlements of Class Action (the "Notice"), and the Proof of Claim and Release Form, both of which were preliminarily approved by the Court. *See* ECF 652. Prior to mailing the Notice Packet, Angeion ran the domestic addresses contained on the Class List through the United States Postal Service's ("USPS") National Change of Address database, which provides updated addresses for all individuals who have moved during the previous four years and filed a change of address form with the USPS. Sherwood Decl., ¶6. The Claims Administrator also sent Notice Packets directly to 2,918 financial institutions so that those institutions could provide them directly to potential members of the Settlement Classes. Co-Lead Counsel also worked with Bank of America to oversee the distribution of notice by Rust Consulting ("Rust") to certain counterparties of Merrill Lynch International. Rust, as an agent of Bank of America, directly provided the Notice Packet to 667 potential members of the Settlement Classes that required special handling due to foreign privacy law concerns. *See* Declaration of Jason Rabe Regarding Mailing of Notice of Proposed Settlements of Class Action and Proof of Claim and Release Form; *see also* Notice Order, ¶14.

In addition to the direct notice by mail, publication notice was also disseminated through the use of banner advertisements and through publication in several national and global print and online editions of well-known outlets beginning on October 29, 2020. *See* Sherwood Decl., ¶¶11-12. A summary of the publication dates is below:

PUBLICATION	RUN DATE(S)
Wall Street Journal (National edition)	November 6, 2020
Wall Street Journal (Europe & Asia - Digital Banners)	October 29, 2020 through November 9, 2020
Financial Times (Global Edition)	November 6, 2020
New York Times (National Edition)	November 6, 2020

PUBLICATION	RUN DATE(S)
The Economist (Global Edition)	November 7, 2020
Bloomberg Businessweek (Global Edition)	November 6, 2020
Bloomberg Businessweek (Global)	November 1, 2020 through November 9, 2020
Bond Buyer (National Edition)	November 5, 2020
EuroMoney (Global Edition)	November edition, released November 13, 2020

A dedicated Settlement Website (www.SSABondsAntitrustSettlement.com), telephone line, and email address were also established for potential members of the Settlement Classes to easily and efficiently obtain information relating to the Settlements, access important documents, ask questions, and to submit electronic proof of claim and release forms. Sherwood Decl., ¶¶13-14.

This combination of individual First-Class Mail to all members of the Settlement Classes who could be identified with reasonable effort through Settling Defendants' transactional data, supplemented by mailed notice to brokers and nominees and publication of the Summary Notice in a relevant, widely-circulated publications, was "the best notice . . . practicable under the circumstances," and satisfies Rule 23 and due process. Fed. R. Civ. P. 23(e)(2)(B).

III. THE PLAN OF ALLOCATION IS FAIR AND ADEQUATE

The standard for approval of the Plan is the same as the standard for approving the proposed Settlements as a whole. Specifically, a plan of allocation "'must be fair and adequate,'" but "it 'need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel.'" *In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (MKB)(JO), 2019 WL 6875472, at *20 (E.D.N.Y. Dec. 16, 2019). "'When formulated by competent and experienced class counsel,' a plan for allocation of net settlement proceeds 'need have only a reasonable, rational basis.'" *Advanced Battery*, 298 F.R.D. at 180.

The Plan, which is set forth in Plaintiffs' Notice Motion, the Notice, and in the Declaration of Dr. Rosa Abrantes-Metz in Support of the Plan of Allocation (ECF No. 647), was crafted based on the knowledge and experience of Co-Lead Counsel and input from leading experts in the industry. It is a fair method to apportion the Net Settlement Fund among Authorized Claimants based on, and consistent with, the claims alleged and their relative strengths and weaknesses. *See In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12-Civ-8557(CM), 2014 WL 7323417, at *10 (S.D.N.Y. Dec. 19, 2014) ("'A reasonable plan may consider the relative strength and values of different categories of claims.'"). The Net Settlement Fund will be distributed to Authorized Claimants, *i.e.*, members of the Settlement Classes who submit timely and valid Proofs of Claim and Release that are approved for payment from the Net Settlement Fund pursuant to the Plan. Co-Lead Counsel believe that the Plan is fair and reasonable and respectfully submit that it should be approved by the Court.

IV. THE PROPOSED SETTLEMENT CLASSES SHOULD BE FINALLY CERTIFIED

The Court's Preliminary Approval Orders preliminarily certified the Settlement Classes. *See* ECF Nos. 428, 431, 580. Since the entry of the Preliminary Approval Orders, there have been no changes that would undermine the Court's initial determination that certification of the Settlement Classes is appropriate under Rules 23(a) and 23(b). *See In re Chrysler-Dodge-Jeep Ecodiesel® Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 17-md-02777-EMC, 2019 WL 2554232, at *1 (N.D. Cal. May 3, 2019) ("The Court analyzed these factors in its Preliminary Approval Order and finds no reason to disturb its earlier conclusions. The requirements of Rule 23(a) and Rule 23(b)(3) were satisfied then and they remain so now."); *see also Bear Stearns*, 909 F. Supp. 2d. at 264 (finally approving settlement where there "have been no material changes to alter the proprietary of [the court's] findings" at the preliminary approval stage). For all of the reasons detailed in Plaintiffs' Preliminary Approval Motions and supporting memoranda (*see* ECF Nos. 289-290, 553, 555) and

the Court's Preliminary Approval Orders (*see* ECF Nos. 428, 431, 580), the proposed Settlement Classes satisfy all requirements of Rule 23(a) – numerosity, commonality, typicality, and adequacy – as well as the predominance and superiority requirements of Rule 23(b)(3). The preliminarily certified Settlement Classes should therefore be granted final certification for settlement purposes under Rules 23(a) and 23(b)(3).

CONCLUSION

Based on the foregoing, Plaintiffs request that the Court certify the Settlement Classes, find the proposed Settlements to be fair, reasonable and adequate, and enter the proposed Order and Final Judgment (which Plaintiffs will submit with their reply brief) approving the proposed Settlements. Plaintiffs also request that the Court find that the proposed Plan of Allocation is fair, reasonable and adequate, and enter an order approving the Plan of Allocation, which will govern distribution of the proposed Settlement proceeds.

DATED: December 28, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on December 28, 2020, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

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