IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: LIBOR-BASED FINANCIAL INSTRUMENTS ANTITRUST LITIGATION	MDL No. 11-md-2262 (NRB)
THIS DOCUMENT RELATES TO: The OTC Action	No. 11-cv-5450

MEMORANDUM OF LAW IN SUPPORT OF OTC PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT WITH DEFENDANTS MUFG BANK, LTD., THE NORINCHUKIN BANK, AND SOCIÉTÉ GÉNÉRALE

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Pursuant to Federal Rule of Civil Procedure 23(c), (e), and (g), OTC Plaintiffs[1] respectfully submit this memorandum of law in support of their Motion for Final Approval of Settlement with Defendants MUFG Bank, Ltd., The Norinchukin Bank, and Société Générale ("Motion"), which seeks: (1) final approval of the settlement (the "Settlement" or the "Settlement Agreement") with Defendants MUFG Bank, Ltd. ("MUFG"), The Norinchukin Bank ("Norinchukin"), and Société Générale ("SocGen") (together with OTC Plaintiffs, the "Parties"); (2) final approval of the proposed Plan of Distribution to members of the Settlement Class; (3) certification of the Settlement Class; (4) appointment of Hausfeld LLP and Susman Godfrey L.L.P. as Settlement Class Counsel; and (5) a finding that the notice plan, as implemented, comported with Federal Rule of Civil Procedure 23(c)(2) and due process.[2]

I. INTRODUCTION

If approved, the proposed Settlement, which includes a cash payment of $90 million and cooperation in pursuing claims against the remaining non-settling defendants, will resolve this complex case against MUFG, Norinchukin, and SocGen. This represents an excellent result for the Settlement Class and will bring the total settlement amount achieved in the OTC Action to $781 million.[3] To date, there are no objections from Settlement Class Members, reflecting their support for the Settlement.

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[1] OTC Plaintiffs are Mayor and City Council of Baltimore, City of New Britain, Vistra Energy Corp., Yale University, and Jennie Stuart Medical Center, Inc.

[2] Unless otherwise defined herein, all capitalized terms have the meaning ascribed to them in the Settlement Agreement. The Settlement Agreement was filed as an exhibit to Seth Ard's Declaration in Support of OTC Plaintiffs' motion for preliminary approval of the Settlement. ECF No. 3667-1.

[3] On August 1, 2023, the Court preliminarily approved OTC Plaintiffs settlement with Defendants Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A. (n/k/a Cooperatieve Rabobank U.A.) ("Rabobank"), Lloyds Banking Group plc, Lloyds Bank plc, HBOS plc, and Bank of Scotland (together, "Lloyds"), Royal Bank of Canada ("RBC"), and WestLB AG (n/k/a Portigon AG) and Westdeutsche Immobilienbank AG (n/k/a Westdeutsche Immobilien Servicing AG) (together, "Portigon") for $101 million. ECF No. 3710.

Thus, as discussed in more detail below, Plaintiffs' Motion should be granted. First, as the Court previously found in its Order preliminarily approving the Settlement, the Settlement is "fair, reasonable, and adequate to the OTC Class." ECF No. 3668, ¶ 2. Second, the Plan of Distribution, which distributes funds on a *pro rata* basis, is a fair, reasonable, and rational method for distributing the Net Settlement Fund to the Settlement Class. Third, the proposed Settlement Class meets all of the requirements of Rule 23 such that the Court should certify it for purposes of the Settlement. Fourth, Co-Lead Counsel have diligently prosecuted this complex class action and should be appointed as Co-Lead Counsel for the Settlement Class. Finally, notice of the Settlement to potential Settlement Class Members complied with Rule 23 and due process.

II. BACKGROUND

A. Procedural Background[4]

OTC Plaintiffs commenced this litigation in 2011, alleging that the sixteen banks that comprised the U.S. Dollar LIBOR panel unlawfully conspired to suppress LIBOR.[5] Since then, OTC Plaintiffs have defended various iterations of the OTC Complaint—which have included antitrust, unjust enrichment, and breach of the implied covenant of good faith and fair dealing claims—from eight Rule 12(b) motions to dismiss and from two motions in opposition to the OTC Plaintiffs' motions for leave to amend the complaint. These motions have involved complex and sometimes novel legal arguments regarding the plausibility of the alleged conspiracy; pleading requirements for a conspiracy and the sufficiency of Plaintiffs' allegations thereunder; standing

[4] A more extended discussion of the procedural history of this case, including a summary of the claims and the settlement negotiations are set forth in the Declaration of Seth Ard in Support of OTC Plaintiffs' Motion for Preliminary Approval of Settlement with Defendants MUFG Bank, Ltd., The Norinchukin Bank, and Société Générale and the Joint Declaration of William C. Carmody and Michael D. Hausfeld in Support of OTC Plaintiffs' Motion for Attorneys' Fees and Expenses, which OTC Plaintiffs incorporate by reference herein. *See* ECF No. 3667, ¶¶ 8-47; ECF No. 3731.

[5] All references to LIBOR refer to U.S. Dollar LIBOR.

under the antitrust laws; standing and pleading requirements for contractual and quasi-contractual claims; personal jurisdiction for state law and federal antitrust claims; and the application of tolling doctrines to the statute of limitations.

OTC Plaintiffs' primary claim—the antitrust claim—was previously dismissed as to all Defendants, reinstated by the Second Circuit, and dismissed again as to many Defendants, including MUFG, Norinchukin, and SocGen, on personal jurisdiction grounds. On December 30, 2021, the Second Circuit reinstated OTC Plaintiffs' antitrust claims against, *inter alia*, Defendants MUFG, Norinchukin, and SocGen, and remanded the case for further proceedings. *See Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp. PLC*, 22 F.4th 103 (2d Cir. 2021).

In advance of the Settlement, OTC Plaintiffs engaged in extensive class certification and expert discovery, including the analysis of 4.8 million documents produced in discovery, which in turn led to the eyes on review of over 3.5 million documents. OTC Plaintiffs also listened to and analyzed more than 125,000 audio files produced by the Defendants. The Parties also conducted twelve depositions of expert witnesses and seven OTC Plaintiff class representatives.

OTC Plaintiffs have entered into settlements with eight other Defendants totaling $691 million: a $120 million settlement with Barclays was reached in November 2015; a $130 million settlement with Citi in July 2017; a $240 million settlement with Deutsche Bank in February 2018; a $100 million settlement with HSBC in February 2018; and a $101 million settlement with Rabobank, Lloyds, RBC, and Portigon in May 2023 (preliminarily approved).

B. The Settlement Negotiations and Settlement Terms

Counsel for MUFG, Norinchukin, and SocGen and OTC Plaintiffs' Counsel first discussed the possibility of settlement in mid-February 2023. ECF No. 3667, ¶ 49. The Honorable Layn Phillips, a former federal judge, was engaged as a mediator to facilitate settlement. *Id.* Counsel for

MUFG, Norinchukin, and SocGen and OTC Plaintiffs' Counsel engaged in telephonic discussions and negotiations thereafter, including communications facilitated by Judge Phillips. *Id.*

On March 10, 2023, with the assistance of Judge Phillips, the Parties reached an agreement in principle to settle. ECF No. 3667, ¶ 50. Over the next several weeks, the Parties engaged in arm's-length negotiations regarding the final Settlement Agreement, which was executed on May 12, 2023. *Id.* At all times, both sides vigorously negotiated their respective positions. *Id.* ¶ 51. OTC Plaintiffs' Counsel were well-informed of the facts and issues concerning liability and damages and the relative strengths and weaknesses of each side's litigation position. *Id.*

The Settlement is on behalf of a Settlement Class defined as:

> All persons or entities (other than Defendants and their employees, affiliates, parents, and subsidiaries) that purchased in the United States, directly from a Defendant (or a Defendant's subsidiaries or affiliates), a U.S. Dollar LIBOR-Based Instrument and that owned the U.S. Dollar LIBOR-Based Instrument any time during the period August 2007 through May 2010 (the "Class Period").[6]

ECF No. 3667-1, ¶3(a).

The $90 million Settlement Fund is non-reversionary; if the Court grants final approval of the Settlement, no money will be returned to MUFG, Norinchukin, and SocGen. *Id.* ¶¶ 10(b), 11(j). The Settlement also obligates MUFG, Norinchukin, and SocGen to provide cooperation to OTC

[6] "Specifically excluded from the 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." ECF No. 3667-1, ¶3(b). "Also excluded from the Class are any judicial officers presiding over this action and the members of his/her immediate families and judicial staff, and any juror assigned to the OTC Action." *Id.* And for purposes of this Settlement Class definition, U.S. Dollar LIBOR-Based Instrument means "[a]n instrument that includes any term, provision, obligation or right to be paid by or to receive interest from a Defendant (or its subsidiaries or affiliates) based upon the U.S. Dollar LIBOR rate, including but not limited to asset swaps, bonds/floating rate notes, collateralized debt obligations, credit default swaps, forward rate agreements, inflation swaps, interest rate swaps, total return swaps, options or floating rate notes." *Id.* ¶ 2(uu). "For the avoidance of doubt, U.S. Dollar LIBOR-Based Instrument does not include instruments for which a Defendant (or a Defendant's subsidiaries or affiliates) does not pay interest based upon any U.S. Dollar LIBOR rate, such as corporate or municipal bonds issued by non-Defendants." *Id.* "Nor does it include instruments that include only a term, provision, or obligation requiring the purchaser to pay interest based upon the U.S. Dollar LIBOR rate, such as business, home, student or car loans, or credit cards." *Id.*

Plaintiffs in their ongoing litigation of the OTC Action. *Id.* ¶ 15. The cooperation elements fall into two categories: documents and testimonial evidence. *Id.* As further specified in the Settlement Agreement, this cooperation will come in the form of participation in depositions taken in other actions pending in the U.S. Dollar LIBOR MDL and the provisions of witnesses to testify at trial pursuant to a validly issued notice or subpoena. *Id.* ¶ 15(g)(vi). In addition to the documents already produced to OTC Plaintiffs, the Settling Defendants shall also produce any documents subsequently produced to other parties in the U.S. Dollar LIBOR MDL and shall assist OTC Plaintiffs in authenticating documents that the Settling Defendants produced in the OTC Action. *Id.* ¶ 15(g)(iii), 15(g)(v). Finally, Settling Defendants shall respond to reasonable requests for additional relevant information about OTC Plaintiffs' claims in the OTC Action. *Id.* ¶ 15(g)(vii).

In exchange for MUFG, Norinchukin, and SocGen's consideration, the Released Parties (as defined in the Settlement Agreement) shall be released of any and all manner of claims arising from or relating in any way to any conduct alleged or that could have been alleged in and arising from the factual predicate of the OTC Action with certain specified exclusions, including claims related to transaction in the Exchange-Based Plaintiffs' Action and the Bondholder Action. ECF No. 3667-1, ¶ 2(gg). Also excluded from the release are claims based on U.S. Dollar LIBOR linked instruments that were not issued by a Defendant (or its subsidiaries or affiliates) or which were not directly purchased from a Defendant (or its subsidiaries or affiliates). *Id.* The full text of the release provisions is set forth in the Settlement Agreement. *See id.* ¶¶ 2(gg), 2(ss). Finally, the Settlement Agreement permits MUFG, Norinchukin, and SocGen to terminate the agreement based upon a confidential Supplemental Agreement between the Parties. *See id.* ¶ 14(a)(i).

C. Preliminary Approval and Dissemination of Notice

On May 25, 2023, the Court granted preliminary approval to the Settlement. *See* ECF No.

3668. On June 13, 2023, the Court approved the proposed notice plan for the Settlement, finding that it "satisfies the requirements of Federal Rule of Civil Procedure 23(c)(2)(B) and due process in that it constitutes the best notice practicable under the circumstances." ECF No. 3683. The Court also granted OTC Plaintiffs' request to appoint Angeion Group, LLC ("Angeion") as the Claims Administrator and Huntington Bank as the Escrow Agent. *Id*. Following approval of the notice plan, Angeion provided potential members of the Settlement Class with the Court-approved notice in accord with the approved notice plan. *See generally* Declaration of Steven Weisbrot Regarding Dissemination of the Notice ("Weisbrot Decl.").

Beginning on July 28, 2023, Angeion mailed a total of 228,844 notice packets to Settlement Class Members.[7] Weisbrot Decl., ¶¶ 3-5. Angeion also successfully delivered 5,306 email notices.[8] *Id*., ¶¶ 10-11. Additionally, Angeion caused the print publication notice to be published it in the following media publications: *Wall Street Journal*, *New York Times*, *Financial Times*, *Financial Advisor*, *Investment Advisor*, *Investment News, Pensions & Investments*, *Technical Analysis of Stock & Commodities*, *Bond Buyer*, and *Barron's*. *Id*., ¶ 12.[9] For digital publication notice, Angeion published on the following websites: CFO.com, FA-mag.com, InstitutionalInvestor.com, Bloomberg.com, ThinkAdvisor.com, InvestmentNews.com, PIonline.com, BondBuyer.com,

[7] As of September 7, 2023, 23,055 (10.07%) notice packets were undeliverable, 386 of which had a forwarding address. Weisbrot Decl., ¶ 6. For notices with forwarding addresses, Angeion is re-mailing notice to the new address and the class member database will be updated accordingly. *Id.* ¶ 7. For notices without forwarding addresses, Angeion is performing an address verification search ("skip tracing") utilizing a wide variety of data sources, including public records, real estate records, electronic directory assistance listings, etc., to locate updated addresses. *Id.* ¶ 8. If updated addresses are obtained, notice will be re-mailed. *Id.* ¶ 9.

[8] Angeion initially mailed email notice to 5,491 addresses. Weisbrot Decl., ¶ 10. Of the emailed notices, 312 were not successfully delivered. *Id.* Angeion reviewed the undelivered email addresses and to the extent possible, were corrected for errors. *Id.* Angeion waited 72 hours to allow for the expiration of the rest period of any temporary blocks at the ISP level and re-transmitted a second email notice to 312 initially undelivered emails that were not due to hard bounces. *Id.* The net successfully mailed notice packets is, thus, 5,306 (96.6%). *Id.*

[9] Based on Bloomberg Businessweek's unexpectedly changed policy and refusal to publish any legal notices, Angeion substituted Barron's for Bloomberg Businessweek, which shares similar characteristics such as readership, distribution and cost adhering to the adequacy to the Notice Plan. Weisbrot Decl., ¶ 13.

NYTimes.com, Fortune.com, Forbes.com, Economist.com, FT.com, CNBC.com, WSJ.com, Barrons.com, Marketwatch.com, FNLondon.com, and Mansionglobal.com. Weisbrot Decl., ¶ 14. Angeion delivered a total of 11,289,385 impressions.[10] *Id.*, ¶ 15. Angeion also launched the programmatic display advertising, which is the leading method of buying digital advertisements in the United States, to provide notice of the Settlement to Settlement Class Members. *Id.*, ¶ 16. In addition, Angeion implemented a paid search campaign on Google to help drive Settlement Class Members who are actively searching for information about the Settlement to the dedicated Settlement Website. *Id.*, ¶ 17.

On July 28, 2023, Angeion caused the publication of a social media campaign utilizing X (formerly known as Twitter). Weisbrot Decl., ¶ 18. The social media advertisement ran nationally and coincided with the programmatic display advertisements. *Id.* The social media notice and programmatic display advertising components of the notice plan delivered 4.2 million impressions, which exceeded Angeion's target of 2.1 million impressions. *Id.* Angeion issued a press release publicizing the Settlement that was distributed internationally over Businesswire, translated into nine (9) languages and published in various news outlets across 57 countries. *Id.*, ¶ 19.

Angeion timely launched the settlement website to provide potential members of the Settlement Class with general information about the Settlement, Court documents, online claim submission portal, a downloadable Claim Form, a downloadable and searchable Long-Form Notice, a list of the frequently asked questions and answers, and important dates and deadlines pertinent to this Settlement. *Id.*, ¶ 20. As of September 7, 2023, the Settlement Website had received 3,558 page views. *Id.*, ¶ 21.

[10] Angeion delivered 51,535 (8%) impressions on Bloomberg digital prior to the campaign being unexpectedly terminated. To meet the desired impressions, additional publishing time was distributed among NYtimes.com, Forbes.com, WSJ.com, Barrons.com, FNLondon.com and CNBC.com delivered a net total of 11,289,385 impressions. *Id.*, ¶ 15.

Angeion also established a dedicated toll-free hotline that's accessible 24 hours a day, 7 days a week, to provide Settlement Class Members important dates and deadlines pertaining to the Settlement. Weisbrot Decl., ¶ 22. As of September 7, 2023, the toll-free hotline had received 130 calls. *Id*., ¶ 23.

The dissemination of notice discussed above complied with all aspects of the approved notice plan. The deadline for mailing objections to the Settlement or requests for an exclusion from the Settlement Class is September 29, 2023. *See* ECF 3683, ¶ 9. As of September 7, 2023, one (1) member of the Settlement Class requested exclusion from the Settlement and no objections have been filed. Weisbrot Decl., ¶¶ 24-25.

III. ARGUMENT

A. The Proposed Settlement Warrants Final Approval

At final approval, the Court must assess whether the settlement "is fair, reasonable, and adequate" under the four factors enumerated by Rule 23(e)(2): (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;" and (D) "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2). The first two factors focus on "procedural fairness," while the latter two factors focus on "substantive fairness." *Christine Asia Co. v. Yun Ma*, No. 1:15-md-01631 (CM) (SDA), 2019 WL 5257534, at *9-10 (S.D.N.Y. Oct. 16, 2019).

While "the Court's role in reviewing the proposed settlement "is demanding because the adversariness of litigation is often lost after the agreement to settle,'" *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019) (citation omitted), courts in the Second Circuit recognize that "there is an overriding public interest in settling and quieting litigation, and this is

particularly true in class actions." *Fleisher v. Phoenix Life Ins. Co.*, No. 11-cv-8405 (CM), 2015 WL 10847814, at *4 (S.D.N.Y. Sept. 9, 2015) (citation omitted). Indeed, the Second Circuit is "mindful of the strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116-117 (2d Cir. 2005) (cleaned up) (citations omitted). "Absent 'fraud or collusion,' [courts] 'should be hesitant to substitute [their judgment] for that of the parties who negotiated that settlement.'" *Christine Asia*, 2019 WL 5257534, at *8 (citation omitted). As explained below, the Settlement is both substantively and procedurally fair such that it warrants final approval.

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

a. OTC Plaintiffs and Their Counsel Have Adequately Represented the Class

In assessing the adequacy of the representation under Rule 23(e)(2)(A), the court focuses on whether "'(1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation.'" *In re GSE Bonds*, 414 F. Supp. 3d at 692 (citation omitted). When an experienced class counsel has negotiated an arm's length agreement after "meaningful discovery," a "presumption of fairness, reasonableness, and adequacy" attaches. *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (citation omitted). That presumption also applies "when a settlement is reached with the assistance of a mediator." *Puddu v. 6D Glob. Techs., Inc.*, No. 15-cv-8061 (AJN), 2021 WL 1910656, at *4 (S.D.N.Y. May 12, 2021). Here, the "presumption of fairness, reasonableness, and adequacy" applies.

OTC Plaintiffs' interests are aligned with the remainder of the Settlement Class: each suffered the same injury (monetary losses resulting from receiving interest payments at an interest

rate based on LIBOR) and have the same interest in maximizing recovery from MUFG, Norinchukin, and SocGen. *See In re GSE Bonds*, 414 F. Supp. 3d at 692 ("[P]laintiffs' interests are aligned with other class members' interests because they suffered the same injuries . . . . Because of these injuries, plaintiffs have an 'interest in vigorously pursuing the claims of the class." (citation omitted)); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004) ("There is no conflict between the class representatives and the other class members. All share the common goal of maximizing recovery."); *see also* Section III.B.1.d., *infra*.

OTC Plaintiffs' Counsel are highly qualified, experienced, and well-informed on the strengths and weaknesses of the OTC Action. This Court has previously concluded that OTC Plaintiffs' Counsel have the requisite skills and experience in class action to lead this litigation on behalf of the Settlement Class and have adequately represented other settlement classes and the litigation class. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11-md-2262 (NRB), 2011 WL 5980198, at *3-4 (S.D.N.Y. Nov. 29, 2011); *see also* ECF Nos. 2452, 2655 and 2746. OTC Plaintiffs' Counsels' view as to the fairness of the Settlement is well informed: over eleven years of litigation, they have reviewed and analyzed over 3.5 million documents, listened to and analyzed more than 125,000 audio files, and worked closely with renowned economic experts. ECF No. 3667, ¶ 46; ECF No. 3731, ¶ 18. They have briefed numerous motions before the Court and the Second Circuit, including their class certification motion, which was supported by more than sixty pages of briefing, more than sixty pages of attorney declarations, hundreds of pages of expert reports, and 149 exhibits. ECF No. 3667, ¶¶ 13-17, 25, 33, 41-42, 46. Rule 23(e)(2)(A) weighs in favor of final approval.

b. The Settlement Was the Result of Arm's-Length Negotiations

Rule 23(e)(2)(B) requires procedural fairness. Where the proposed settlement is "reached

through arm's length negotiations between experienced, capable counsel knowledgeable in complex class litigation, 'the Settlement will enjoy a presumption of fairness.'" *In re GSE Bonds*, 414 F. Supp. 3d at 693 (citation omitted); *see also In re Citigroup Inc. Bond Litig.*, 296 F.R.D. 147, 155 (S.D.N.Y. 2013) ("This presumption arises because if the negotiation process is fair "the forces of self-interest and vigorous advocacy will of their own accord produce the best possible result for all sides.'" (citation omitted)). "[G]reat weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation." *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 189 (S.D.N.Y. 2012) (Buchwald, J.) (citation omitted).

The proposed Settlement was negotiated at arm's-length by sophisticated counsel. OTC Plaintiffs' Counsel have the requisite skills and experience in class actions to lead this litigation on behalf of the putative Settlement Class, and have experience in negotiating arm's length-settlements in complex class litigation. *See LIBOR*, 2011 WL 5980198, at *3-4; ECF No. 3667, ¶ 48. And MUFG, Norinchukin, and SocGen are likewise represented by reputable and highly experienced counsel. The settlement negotiations between OTC Plaintiffs and MUFG, Norinchukin, and SocGen were vigorous, and involved an accomplished and engaged mediator—the Honorable Layn Phillips. ECF No. 3667, ¶¶ 49-51. The use of a mediator "strengthen[s]" the presumption that the compromise is fair and reasonable. *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-cv-3400 (CM) (PED), 2010 WL 4537550, at *14 (S.D.N.Y. Nov. 8, 2010); *see also Capsolas v. Pasta Res. Inc.*, No. 10-cv-5595 (RLE), 2012 WL 1656920, at *1 (S.D.N.Y. May 9, 2012) ("The assistance of an experienced mediator . . . reinforces that the Settlement Agreement is non-collusive."). That the mediator is a retired judge "further buttresse[s]" the "presumption of correctness." *See In re IMAX Sec. Litig.*, 283 F.R.D. at 189 (citing *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576 (S.D.N.Y. 2008)). These facts demonstrate that the Settlement was negotiated

at arm's length by capable counsel. Rule 23(e)(2)(B) weighs in favor of final approval.

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

a. The Relief Provided for the Class is Adequate

Rule 23(e)(2)(C) enumerates four factors to be considered in assessing whether the relief provided for the class is adequate: (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)."

Before Rule 23(e)(2)(C)'s four factor-framework was codified in December 2018, courts in this Circuit employed the nine-factor framework of *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974).[11] The 2018 amendments to Rule 23 were intended to "add to, rather than displace, the *Grinnell* factors," and there is "significant overlap" under the two frameworks. *In re Payment Card Interchange Fee and Merch. Discount Antitrust Litig.*, 330 F.R.D. 11, 29 (E.D.N.Y. 2019) (citing 2018 Advisory Notes to Fed. R. Civ. P. 23, Subdiv. (e)(2)). Thus, this brief addresses both sets of factors, noting where they overlap.

i. Costs, Risks, and Delay of Trial and Appeal

Rule 23(e)(2)(C)(i) requires courts to consider "the costs, risks, and delay of trial and appeal." This inquiry overlaps with *Grinnell* factors one (the "complexity, expense, and likely duration of the litigation") and factors four, five, and six (the risks of establishing liability and

[11] The *Grinnell* factors are as follows: "(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.

damages and maintaining the class). *See In re GSE Bonds*, 414 F. Supp. 3d at 693-94; *In re Payment Card*, 330 F.R.D. at 36-40. In assessing these risks, the Court need not "decide the merits of the case," "resolve unsettled legal questions," or "foresee with absolute certainty the outcome of the case." *Phoenix*, 2015 WL 10847814, at *8 (cleaned up) (citation omitted). "Rather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *Id.* (quoting *In re Global Crossing*, 225 F.R.D. at 459).

This litigation is highly complex. OTC Plaintiffs can think of no other case that better embodies the challenges faced by plaintiffs in antitrust litigation. Numerous federal courts have recognized that "[f]ederal antitrust cases are complicated, lengthy, and bitterly fought," *Wal-Mart*, 396 F.3d at 118, "as well as costly." *In re Vitamin C Antitrust Litig.*, No. 06-md-1738 (BMC) (JO), 2012 WL 5289514, at *4 (E.D.N.Y. Oct. 23, 2012); *see also Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 263 (2d Cir. 2001) (noting the "factual complexities of antitrust cases"). The OTC Action was initially filed over eleven years ago and has had to survive multiple rounds of motions to dismiss on complex issues of standing and jurisdiction. OTC Plaintiffs' primary claim—their antitrust claim—was previously dismissed as to all Defendants, reinstated by the Second Circuit, and dismissed again as to many Defendants, including MUFG, Norinchukin, and SocGen, on personal jurisdiction grounds. In December 2021, the Second Circuit ruled on the personal jurisdiction issue and reinstated OTC Plaintiffs' antitrust claims against MUFG, Norinchukin, SocGen, and other non-settling Defendants. *See Schwab Short-Term Bond Market Fund*, 22 F.4th 103.

OTC Plaintiffs likely would not have obtained recovery from trial for years. OTC Plaintiffs face the weighty task of maneuvering through a highly contentious discovery process on the alleged suppression of LIBOR and conspiracy to suppress LIBOR. *See* ECF No. 3425 at 1. OTC

Plaintiffs plan to move for class certification against MUFG, Norinchukin, and SocGen, which will require extensive briefing, and the party losing that motion would likely pursue a Rule 23(f) petition. *See Bellifemine v. Sanofi-Aventis U.S. LLC*, No. 07-cv-2207 (JGK), 2010 WL 3119374, at *4 (S.D.N.Y. Aug. 6, 2010) ("There is no assurance of obtaining class certification through trial, because a court can re-evaluate the appropriateness of certification at anytime during the proceedings."); *see also In re IMAX Sec. Litig.*, 283 F.R.D. at 191 (noting that "'if insurmountable management problems were to develop at any point, class certification can be revisited at any time'" (citation omitted)).

MUFG, Norinchukin, and SocGen have already and will continue to vigorously dispute liability. Summary judgment and class certification are scheduled to move forward concurrently in the OTC Action at substantial expense to the parties. *See* ECF No. 3425 at 6-7. At the end of this process, OTC Plaintiffs face significant risks in trying this case, which are amplified by the complexity of the LIBOR market. This litigation presents the Court, the parties, and eventually, a jury, with the task of understanding extremely complex derivative instruments in an opaque market. Should the case proceed to trial, "[t]he complexity of Plaintiff's claims *ipso facto* creates uncertainty. . . . A trial on these issues would likely be confusing to a jury." *Park v. The Thomson Corp.*, No. 05-cv-2931 (WHP), 2008 WL 4684232, at *4 (S.D.N.Y. Oct. 22, 2008); *see* 31 No. 7 Futures & Derivatives L. Rep. 1 ("Derivative instruments, in most cases, are highly complex and difficult to understand for even highly sophisticated and intelligent investors."). This makes proving liability and damages, both of which require the assistance of experts, all the more risky.[12]

Additional risk is created by the fact that MUFG, Norinchukin, and SocGen have

[12] It is a foregone conclusion that this case will require a "battle of the experts." "In this 'battle of experts,' it is difficult 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 of non-actionable factors . . . ." *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744–45 (S.D.N.Y. 1985).

significant litigation resources. Absent settlement, MUFG, Norinchukin, and SocGen were most certainly prepared to vigorously contest their liability and damages. "Establishing otherwise [would] require considerable additional pre-trial effort and a lengthy trial, the outcome of which is uncertain." *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 199 (S.D.N.Y. 2012), *aff'd sub nom., Charron v. Wiener*, 731 F.3d 241 (2d Cir. 2013). Put simply, "[l]iability is never automatic." *Park*, 2008 WL 4684232, at *4. And assuming OTC Plaintiffs would be able to establish liability at trial, "[t]he history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal." *In re NASDAQ Mkt.–Makers Antitrust Litig.* ("*NASDAQ III*"), 187 F.R.D. 465, 476 (S.D.N.Y.1998). In sum, "[t]here is a substantial risk that the plaintiff might not be able to establish liability at all and, even assuming a favorable jury verdict, if the matter is fully litigated and appealed, any recovery would be years away." *Cardiology Assocs., P.C. v. Nat'l Intergroup, Inc.*, No. 85-cv-3048 (JMW), 1987 WL 7030, at *3 (S.D.N.Y. Feb. 13, 1987).

While OTC Plaintiffs' Counsel and the defendants have already expended significant resources litigating this case, "[t]here can be no doubt that this class action would be enormously expensive to continue, extraordinarily complex to try, and ultimately uncertain of result." *NASDAQ III*, 187 F.R.D. at 477. These many risks and delays weigh in favor of approval.

ii. Effectiveness of the Proposed Method of Distributing Relief

Rule 23(e)(2)(C)(ii) requires that the "proposed method of distributing relief" be "effective." While a distribution plan satisfying the Rule "'must be fair and adequate,' it 'need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel.'" *In re GSE Bonds*, 414 F. Supp. 3d at 694 (citation omitted). Here, OTC Plaintiffs' Counsel, which have extensive experience in class action settlements, prepared the Plan of

Distribution working in consultation with industry and economic consultants.[13] OTC Plaintiffs retained Dr. Bernheim and Bates White to create a model of the but-for world, that is, an estimate of what LIBOR would have been, in each tenor, and for each period during the Class Period, absent its suppression by the US Dollar LIBOR Panel Banks. Dr. Bernheim's report was served in support of OTC Plaintiffs' successful motion for class certification of their antitrust claims.

The Plan of Distribution for the Settlement is materially identical to (i) the Amended Plan of Distribution for the Barclays Settlement, ECF No. 2239-1 (final approval on August 1, 2018, ECF No. 2655); (ii) the Plan of Distribution for the Citi Settlement, ECF No. 2253-1 (final approval on August 1, 2018, ECF No. 2655); and (iii) the Plan of Distribution for the Deutsche Bank and HSBC Settlements, ECF No. 2517-1 (final approval on October 25, 2018, ECF No. 2746). For each qualifying LIBOR instrument(s), the Plan of Distribution calculates the claimant's "overall notional stake" as the sum of the "suppressed daily underpayments" for the instrument, based on the modeling developed by Dr. Bernheim. The suppressed daily underpayments for each instrument are calculated as follows:

> For each day during the Class Period when the Authorized Claimant had the right to be paid or to receive interest based upon the U.S. Dollar LIBOR rate, the suppressed daily underpayment equals: the dollar amount of the LIBOR-based payment that was due to the Authorized Claimant that day (using historical reported LIBOR rates and payment frequency) multiplied by the magnitude of suppression applicable for that day and then divided by the historical reported LIBOR rate for that day.

ECF No. 3667, ¶ 54; ECF No. 3667-2, ¶ 6. There is a clear rational basis for this proposal, as evidenced by the Court approving materially identical plans. *See e.g.*, *Precision Assocs., Inc. v. Panalpina World Transp. (Holding) Ltd.*, No. 08-cv-42 (JG) (VVP), 2015 WL 6964973, at *7 (E.D.N.Y. Nov. 10, 2015) (finding plan of allocation "is both fair and reasonable" where the plan

[13] The Plan of Distribution is Exhibit B to the Ard Declaration submitted in support of preliminary approval. ECF No. 3667-2.

was "the same as the one [the court] approved" previously and there was "no reason to reach a different result").

OTC Plaintiffs propose to distribute the Net Settlement Funds to the Settlement Class Members *pro rata*, in proportion to their notional stakes for each Settlement, based on the foregoing Plan of Distribution. ECF No. 3667, ¶ 55; ECF No. 3667-2.[14] Courts routinely approve *pro rata* distributions of this sort. *See, e.g.*, *In re GSE* Bonds, 414 F. Supp. 3d at 694-95 (proposed distribution method effective where "the claimant's pro rata share of the settlement would be obtained by dividing the individual transaction claim amount by the total of all transaction claim amount"); *Yang v. Focus Media Holding Ltd.*, No. 11-cv-9051 (CM) (GWG), 2014 WL 4401280, at *10 (S.D.N.Y. Sept. 4, 2014) ("'Pro-rata distribution of settlement funds based on investment loss is clearly a reasonable approach.'" (citation omitted)).

This proposal has more than a rational basis. OTC Plaintiffs' Counsel recommends the proposed Plan of Distribution as being in the best interests of the Settlement Class. *See* ECF No. 3667, ¶ 56; *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05-cv-10240 (CM), 2007 WL 2230177, at *11 (S.D.N.Y. July 27, 2007) ("In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel."). This factor also weighs in favor of final approval.

iii. The Terms of the Proposed Award of Attorneys' Fees

The Court also considers "the terms of any proposed award of attorney's fees, including timing of payment." Fed. R. Civ. P. 23(e)(2)(C)(iii). Here, OTC Plaintiffs are seeking an award of

[14] Settlement Class Members that participated in prior settlements will be compensated based on their prior submissions, without the need to submit any further documentation or affirmatively file a claim, unless they elect to opt out of the Settlement or to submit additional or different documentation to support their claim. *See* ECF No. 3677, ¶ 13. Thus, OTC Plaintiffs expect the claims administration process to be less time and resource intensive than for the prior settlements.

attorneys' fees of 25% of the net Settlement Fund.[15] This amount is routinely recognized as falling within an acceptable range of fee awards, and indeed, courts often award as much as a third of the settlement amount in attorneys' fees. *See, e.g., Puddu*, 2021 WL 1910656, at *6 (finding that "33.3% is within the range of fee awards typically awarded" and collecting cases); *In re GSE Bonds*, 414 F. Supp. 3d at 695 ("Courts in this District have approved fees as high as 33.5% from comparable class settlement funds, finding that they are 'well within the applicable range of reasonable percentage fund awards." (citation omitted)); *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 667 (S.D.N.Y. 2015) ("[I]n numerous common fund cases, fees have been awarded that represent one-third of the settlement fund."); *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06-cv-4270 (PAC), 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009) ("Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit"). OTC Plaintiffs' counsel will not receive any funds until the Court has granted their fee request. ECF No. 3667-1, ¶ 9. The Parties have agreed that the Settlement is not conditioned on the Court's approval of a fees and expense requests. *Id.* ¶¶ 9, 13(b).

And, OTC Plaintiffs' Attorneys' Fees Motion also seeks incentive awards not to exceed $100,000 for each named Plaintiff. *See* ECF No. 3730 at pp. 25-26. "Courts consistently approve awards in class action lawsuits to compensate named plaintiffs for the services they provide and burdens they endure during litigation." *Anwar v. Fairfield Greenwich Ltd.*, No. 09-cv-118 (VM), 2012 WL 1981505, at *3 (S.D.N.Y. June 1, 2012). And incentive awards of $100,000 or greater are routinely awarded. *See, e.g.*, *In re Urethane Antitrust Litig.*, No. 04-md-1616, ECF No. 3276, ¶ 5 (D. Kan. July 29, 2016) (granting service awards of $150,000 to $200,000 to class

[15] As explained in OTC Plaintiffs' Motion for Attorneys' Fees and Reimbursement of Litigation Expenses ("Attorneys' Fees Motion") filed concurrently herewith, the requested award is warranted under the applicable law of the Second Circuit. *See* ECF No. 3730.

representatives); *In re High-Tech Emp. Antitrust Litig.*, No. 11-cv-2509 (LHK), 2015 WL 5158730, at *17-18 (N.D. Cal. Sept. 2, 2015) (awarding between $100,000 to $140,000 to each of five class representatives); *In re Neurontin Antitrust Litig.*, No. 02-cv-2731, ECF No. 105, ¶ 31 (D.N.J. Aug. 6, 2014) (granting service awards of $100,000 to each class representative); *In re Titanium Dioxide Antitrust Litig.*, No. 10-cv-318 (RDB), 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) (awarding $125,000 to lead class representative); *Ivax Corp. v. Aztec Peroxides, LLC*, No. 02-cv-00593, ECF No. 78 at 2 (D.D.C. Aug. 24, 2005) (granting service awards of $100,000 to each class representative in an antitrust price-fixing class action).

iv. Agreements Identifiable Under Rule 23(e)(3)

Rule 23(e)(2)(C)(iv) and 23(e)(3) require that any agreement "made in connection with the proposal" be identified. OTC Plaintiffs and MUFG, Norinchukin, and SocGen have entered into one such agreement, under which MUFG, Norinchukin, and SocGen may terminate the Settlement Agreement within five (5) business days following receipt of a list of all persons opting out of the Settlement Class. ECF No. 3667, ¶ 14(a)(i). If OTC Plaintiffs elect to challenge Settling Defendants' termination, then the Mediator shall determine whether termination is appropriate pursuant to the agreement. *Id.* This factor is neutral and does not undermine final approval.

Additionally, MUFG, Norinchukin, and SocGen have entered into a confidential agreement among themselves regarding the amount of the Settlement Amount for which MUFG, Norinchukin, and SocGen shall each be responsible. ECF No. 3667, ¶ 14(a)(ii).

b. The Settlement Treats Class Members Equitably

Rule 23(e)(2)(D) requires the Court to assess whether "the proposal treats class members equitably relative to each other." Here, the proposed plan of allocation treats all Settlement Class Members equitably by distributing damages on a *pro rata* basis using each Settlement Class

Members' share of the total damages, following the plans of distribution previously approved by the Court. *See supra* Section III.A.2.a.ii. Such a *pro rata* distribution is fair and equitable because it compensates Settlement Class Members based on their relative harm suffered.

Since the 2018 amendment of Rule 23(e) expressly required this consideration, courts have consistently found *pro rata* distribution is equitable to settlement classes. *See, e.g., In re Namenda Direct Purchaser Antitrust Litigation*, 462 F. Supp. 3d 307, 316 (S.D.N.Y. 2020) (in antitrust action, finding courts uniformly approve plans of allocation distributing funds on a *pro rata* basis as equitable under Rule 23(e)(2)(D)); *In re GSE Bonds*, 414 F. Supp. 3d at 698-99 ("[C]laimants will be treated equitably by receiving a *pro rata* share of the recovery based on the estimated price impact of defendants' conduct . . . ."); *Perks v. Activehours, Inc.*, No. 19-cv-5543, 2021 WL 1146038, at *6 (N.D. Cal. Mar. 25, 2021) (*pro rata* distribution is "inherently equitable" because it allocates settlement proceeds based on the amount of each member's potential damages); *Cisneros v. EP Wrap-It Insulation, LLC*, No. 19-cv-500 (GBW/GJF), 2021 WL 2953117, at *10 (D.N.M. July 14, 2021) (finding *pro rata* allocation provides equitable treatment). Even prior to the 2018 amendments, courts considered this factor and routinely found *pro rata* distribution of settlement funds in antitrust actions to be fair and reasonable. *See, e.g.*, *In re Vitamins Antitrust Litig.*, No. 99-cv-197, 2000 WL 1737867, at *6 (D.D.C. Mar. 31, 2000) (*pro rata* distribution has "repeatedly been deemed fair and reasonable").[16]

c. Other Factors Reflect the Reasonableness of the Settlement

i. The Reaction of the Class to the Settlement

"It is well-settled that the reaction of the class to the settlement is perhaps the most

[16] *See also, e.g.*, *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 328 (3d Cir. 2011) ("Courts generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable."); *In re Citric Acid Antitrust Litig.*, 145 F. Supp. 2d 1152, 1154 (N.D. Cal. 2001) (allocation plan based on the type and extent of their injuries is generally reasonable).

significant factor to be weighed in considering its adequacy." *Lowe v. NBT Bank, N.A.*, No. 19-cv-1400 (MAD/ML), 2022 WL 4621433, *7 (N.D.N.Y. Sept. 30, 2022) (quoting *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002)). "The lack of class member objections 'may itself be taken as evidencing the fairness of a settlement.'" *Id.* To date, no objections have been filed and only one exclusion request has been received. Weisbrot Decl. ¶¶ 24-25. *See id.* (citing *Wright v. Stern*, 553 F. Supp. 2d 337, 344-45 (S.D.N.Y. 2008) ("The fact that the vast majority of class members neither objected nor opted out is a strong indication" of fairness).

ii. The Stage of the Proceedings

Courts also consider the third *Grinnell* factor, "the stage of the proceedings and the amount of discovery completed." *Grinnell*, 495 F.2d at 463. "The relevant inquiry for this factor is whether the plaintiffs have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement." *In re AOL Time Warner, Inc.*, No. MDL 1500, 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006). Discovery need not be fully complete before a settlement can be approved. *See In re IMAX Sec. Litig.*, 283 F.R.D. at 190 ("The threshold necessary to render the decisions of counsel sufficiently well informed, however, is not an overly burdensome one to achieve—indeed, formal discovery need not have necessarily been undertaken yet by the parties."). It is enough for the parties to have "engaged in sufficient investigation of the facts to enable the Court to 'intelligently make . . . an appraisal' of the Settlement." *In re AOL Time Warner, Inc.*, 2006 WL 903236, at *10 (citation omitted).

Numerous facts demonstrate that this *Grinnell* factor supports final approval. First, the Parties have been litigating this action for over eleven years and have received at least eight lengthy rulings from the Court on the viability of their claims. *See* ECF Nos. 286; 389; 568; 1164; 1234; 1676; 2452; 2837; *see also In re IMAX Sec. Litig.*, 283 F.R.D. at 190 (noting that the case had

"been pending for almost six years"). Second, the Parties have briefed and argued the viability of the antitrust claim on numerous occasions both in the Second Circuit and before this Court. Third, OTC Plaintiffs obtained from MUFG, Norinchukin, SocGen and other Defendants millions of documents and audio files previously provided to regulators as well as voluminous transaction data. Fourth, the OTC Plaintiffs have undertaken extensive legal analysis of the OTC Plaintiffs' claims and the reasonable value of the case. Fifth, OTC Plaintiffs' Counsel engaged consulting experts to better understand the LIBOR market and the magnitude of harm inflicted on the Settlement Class. Sixth, OTC Plaintiffs' Counsel learned additional facts through cooperation from the earlier settling defendants. Seventh, the Parties conducted mediator-assisted settlement negotiations over the course of several weeks; these negotiations, which were extremely hard-fought, were accompanied by an honest and frank discussion on the relative strengths and weaknesses of the parties' claims and defenses. ECF No. 3667, ¶¶ 48–51. The information gained through these various means have provided OTC Plaintiffs' Counsel with a comprehensive understanding of the relative strengths and weaknesses of the case that has enabled them to negotiate a settlement believed to be an excellent result for the Settlement Class. *Id.* ¶ 51. The Court should thus conclude this third *Grinnell* factor supports final approval.

iii. The Ability of Defendants MUFG, Norinchukin, and SocGen to Withstand a Greater Judgment

Courts also weigh the seventh *Grinnell* factor, "the ability of the defendants to withstand a greater judgment." *Grinnell Corp.*, 495 F.2d at 463; *see also In re GSE Bonds*, 414 F. Supp. 3d at 696. Here, even if MUFG, Norinchukin, and SocGen could withstand a greater judgment, this does not undermine the fairness of the Settlement. *In re IMAX Sec. Litig.*, 283 F.R.D. at 191 ("[T]his factor, standing alone, is not sufficient to preclude a finding of substantive fairness where the other factors weigh heavily in favor of approving a settlement."). In any event, a $90 million settlement

is significant and application of the other relevant factors weighs so strongly in favor of final approval that consideration of this factor alone does not militate against granting final approval. *In re Citigroup Inc. Bond Litig.*, 296 F.R.D. at 157 (approving settlement with Citigroup Inc., one of the settling defendants, though "Citigroup could likely withstand a greater judgment"); *In re IMAX Sec. Litig.*, 283 F.R.D. at 191 ("But a defendant is not required to 'empty its coffers' before a settlement can be found adequate." (citation omitted)).

iv. The Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation

The last two *Grinnell* factors "'recognize[] the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" *Wal-Mart Stores*, 396 F.3d at 119 (citation omitted). In applying these factors, "'[t]he adequacy of the amount achieved in settlement may not be judged in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case.'" *In re IMAX Sec. Litig.*, 283 F.R.D. at 191 (citation omitted); *see also NASDAQ III*, 187 F.R.D. at 478 ("Ultimately, the exact amount of damages need not be adjudicated for purposes of settlement approval."). Consequently, "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Grinnell*, 495 F.2d at 455 n.2; *see also In re IMAX Sec. Litig.*, 283 F.R.D. at 191 ("[T]he Second Circuit 'has held that a settlement can be approved even though the benefits amount to a small percentage of the recovery sought.'" (citation omitted)).

Continuing this litigation against MUFG, Norinchukin, and SocGen would, as outlined above, necessitate the expenditure of countless hours and dollars over several more years with no guarantee that OTC Plaintiffs would ultimately prevail at trial or following probable appellate

review. These risks are arguably dispositive for these *Grinnell* factors. *See In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 270 (S.D.N.Y. 2012) ("[T]he propriety of a given settlement amount is a function of both (1) the size of the amount relative to the best possible recovery; and (2) the likelihood of non-recovery (or reduced recovery).").

In comparison to the antecedent risks of continuing litigation against MUFG, Norinchukin, and SocGen, this fifth settlement provides OTC Plaintiffs and the Settlement Class both significant cash compensation ($90 million) and cooperation. ECF 3667-1, ¶¶ 10(b), 15. That OTC Plaintiffs and the Settlement Class will receive compensation now rather than years from now, if at all, weighs strongly in favor of final approval. *See In re AOL Time Warner*, 2006 WL 903236, at *13 ("[T]he benefit of the Settlement will . . . be realized far earlier than a hypothetical post-trial recovery . . . ."). As to the cooperation discussed above, *see supra* Section II.B., though this is not quantifiable in "dollars and cents," the value of MUFG, Norinchukin, and SocGen's cooperation to the Settlement Class is arguably invaluable. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11-md-2262 (NRB), 2016 WL 7625708, at *2 (S.D.N.Y. Dec. 21, 2016) (noting "the intangible benefit of cooperation against the non-settling defendants").

B. Certification of the Settlement Class Is Appropriate

This Court must also determine whether it "will likely be able to . . . certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(E)(1)(B)(ii). In accordance with the Settlement, OTC Plaintiffs respectfully request that the Court certify the following class (the "Settlement Class" or "OTC Class") for settlement purposes:

> All persons or entities (other than Defendants and their employees, affiliates, parents, and subsidiaries) that purchased in the United States, directly from a Defendant (or a Defendant's subsidiaries or affiliates), a U.S. Dollar LIBOR-Based Instrument and that owned the U.S. Dollar LIBOR-Based Instrument any time during the period August 2007 through May 2010 (the "Class Period").

ECF No. 3667-1, ¶ 3(a).

Certification of a settlement class is appropriate where that class meets all of the requirements of Rule 23(a) as well as one of the requirements of Rule 23(b). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). When certification of a settlement class is sought, "courts must take a liberal rather than a restrictive approach." *Cohen v. J.P. Morgan Chase & Co.*, 262 F.R.D. 153, 157–58 (E.D.N.Y. 2009) (citation omitted). This Court certified a litigation class with respect to OTC Plaintiffs' antitrust claims, which demonstrates that the relaxed standard applicable in the context of settlement class certification is easily satisfied. *In re LIBOR-Based Fin. Instruments Antitrust Litig.* ("*LIBOR VII*"), 299 F. Supp. 3d 430, 584–607 (S.D.N.Y. 2018). For the reasons stated in the Court's certification opinion and set forth below, the proposed Settlement Class more than satisfies the requirements for certification of a settlement class.

1. The Settlement Class Meets the Rule 23(a) Requirements

a. Rule 23(a)(1) – Numerosity

Numerosity is presumed in the Second Circuit where a class consists of forty (40) or more members. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); *In re Initial Pub. Offering Sec. Litig.*, 260 F.R.D. 81, 90 (S.D.N.Y. 2009). Here, there are thousands of members of the Settlement Class. Accordingly, the numerosity requirement is easily met here.

b. Rule 23(a)(2) – Commonality

"'The commonality requirement is met if plaintiffs' grievances share a common question of law or fact.'" *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229, 245 (2d Cir. 2007) (citation omitted). "'Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question.'" *Johnson v. Nextel Commc'ns Inc.*, 780 F.3d 128, 137–38 (2d Cir. 2015) (citation omitted). It thus "is not the law" that "a common question must be common to *every* class

member." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11-md-2262 (NRB), 2016 WL 2851333, at *1 (S.D.N.Y. May 13, 2016) (citing *Johnson*, 780 F.3d at 137) (emphasis in original). OTC Plaintiffs' claims present numerous common issues of law and fact, including whether the panel banks suppressed LIBOR during the Class Period; whether panel banks conspired to suppress LIBOR; whether the panel banks' conduct violates the Sherman Act; and the appropriate measure of damages for the harm sustained by OTC Plaintiffs and members of the class. Accordingly, the commonality requirement is satisfied.

c. Rule 23(a)(3) – Typicality

"'The typicality threshold is satisfied where the claims arise from the same conduct from which the other class members' claims and injuries arise.'" *Atwood v. Intercept Pharm., Inc.*, 299 F.R.D. 414, 416 (S.D.N.Y. 2014) (Buchwald, J.) (citation omitted). Small differences do not defeat typicality. "Rather, a plaintiff fails to meet Rule 23(a)'s typicality requirement if its claims are 'subject to unique defenses which threaten to become the focus of the litigation.'" *In re IMAX Sec. Litig.*, 272 F.R.D. 138, 147 (S.D.N.Y. 2010) (Buchwald, J.) (citation omitted). In this case, the class representatives and class members all assert claims that arise from the panel banks' alleged unlawful suppression of LIBOR, and their injuries result from that conduct. Thus, the typicality requirement is satisfied.

d. Rule 23(a)(4) – Adequacy

"'The adequacy requirement is satisfied where: (1) there is no conflict between the proposed lead plaintiff and the members of the class; (2) the proposed lead plaintiff has a sufficient interest in the outcome of the case to ensure vigorous advocacy; and (3) class counsel is qualified, experienced, and generally able to conduct the litigation.'" *Atwood*, 299 F.R.D. at 416–17 (citation omitted). "[A] conflict of interest will not destroy adequacy under Rule 23 unless the conflict is 'fundamental' and concrete." *In re Vitamin C Antitrust Litig.*, 279 F.R.D. 90, 102 (E.D.N.Y. 2012)

(citing *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 145 (2d Cir. 2001) (overruled on other grounds by *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006))). No "fundamental" conflict exists between the class representatives and members of the class. The class representatives hold claims potentially worth millions of dollars, assuring their vigorous advocacy. And the Court has found that OTC Plaintiffs' Counsel have the qualifications, experience, and ability to prosecute the claims. *LIBOR*, 2011 WL 5980198, at *3–4. OTC Plaintiffs have satisfied the adequacy of representation prerequisite.

2. The Settlement Class Meets the Rule 23(b) Requirements

a. Predominance

"The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (citation omitted). "When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" *Id*. (citation omitted); *Johnson*, 780 F.3d at 138 ("Common issues—such as liability—may be certified, consistent with Rule 23, even where other issues—such as damages—do not lend themselves to classwide proof." (citation omitted)). "[T]he question for certifying a Rule 23(b)(3) class is whether 'resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof' and whether 'these particular issues are more substantial than the issues subject only to individualized proof.'" *Johnson*, 780 F.3d at 139 (citation omitted).

The Court previously found "common questions predominate as to OTC plaintiffs' antitrust claims." *LIBOR VII*, 299 F. Supp. 3d at 591-95; *see also Amchem*, 521 U.S. at 625

("Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 169 F.R.D. 493, 518 (S.D.N.Y. 1996) ("Since a single conspiracy is alleged, the relevant proof of this will not vary among class members, and clearly presents a common question fundamental to all class members."). Accordingly, the predominance requirement is satisfied.

b. Superiority

Rule 23(b)(3) identifies four factors to be considered in determining whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy":

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed R. Civ. P. 23(b)(3). Importantly, courts considering motions to certify settlement classes need not consider the fourth factor. *See Amchem*, 521 U.S. at 620. Here, certification of a settlement class "will achieve economies of scale, conserve judicial resources, preserve public confidence in the integrity of the judicial system by avoiding the waste and delay of repetitive proceedings, and prevent inconsistent adjudications of similar claims." *Chhab v. Darden Rests., Inc.*, No. 11-cv-8345 (NRB), 2016 WL 3004511, at *3 (S.D.N.Y. May 20, 2016). Accordingly, the superiority requirement is satisfied.

c. Hausfeld LLP and Susman Godfrey L.L.P. Should Be Appointed Settlement Class Counsel

Under Rule 23(g), a court that certifies a class must appoint class counsel, who is charged with fairly and adequately representing the interests of the class. *See* Fed. R. Civ. P. 23(g)(1). In determining class counsel, the Court must consider (1) the work undertaken by counsel in identifying or investigating the potential claims; (2) counsel's experience in handling class actions,

other complex litigation, and similar claims; (3) counsel's knowledge of the applicable law; and (4) the resources that counsel will commit to representing the class. *See* Fed. R. Civ. P. 23(g)(1)(A). OTC Plaintiffs' Counsel readily meet these requirements and should be appointed as counsel for the Settlement Class, for the reasons set forth in the prior briefing and declarations on this issue describing counsel's efforts. *See, e.g.*, ECF Nos. 1337, 1338, 2351, 2388, 2706.

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

"For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Long v. HSBC USA Inc.*, No. 14 CIV. 6233 HBP, 2015 WL 5444651, at *10 (S.D.N.Y. Sept. 11, 2015). However, neither individual nor actual notice to each class member is required; rather, "class counsel [need only] act[] reasonably in selecting means likely to inform the persons affected." *Jermyn v. Best Buy Stores, L.P.*, No. 08 CIV. 00214 CM, 2010 WL 5187746, at *3 (S.D.N.Y. Dec. 6, 2010) (citing *Weigner v. City of N.Y.*, 852 F.2d 646, 649 (2d Cir. 1988)); *In re Adelphia Commc'ns Corp. Sec. & Derivatives Litig.*, 271 F. App'x 41, 44 (2d Cir. 2008) ("It is clear that for due process to be satisfied, not every class member need receive actual notice[.]"). In evaluating the reasonableness of a proposed notice program, the "'district court has virtually complete discretion.'" *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 345 (E.D.N.Y. 2010) (quoting *Handschu v. Special Servs. Div.*, 787 F.2d 828, 833 (2d Cir. 1986)).

Here, the notice plan was approved by the Court at preliminary approval and implemented by Settlement Class Counsel and Angeion as approved. *See* Weisbrot Decl. ¶¶ 3-27. As discussed in more detail above and in the Weisbrot Declaration, the notice plan included a combination of direct mail and email notice as well as extensive publication notice through print and digital media.

Weisbrot Decl. ¶¶ 3-15. The Notice Plan also utilized Programmatic Display Advertising, a paid search campaign on Google, a social media campaign utilizing Twitter, and a global press release distributed through Businesswire to help drive Settlement Class Members to the dedicated Settlement Website. *See* Weisbrot Decl. ¶¶ 16-19.

Moreover, the contents of the two notices (long form and publication form) were prepared with the aid of Steven Weisbrot, a recognized expert in the form and content of class action notice. *See* ECF No. 3677, ¶¶ 1-10, 40; ECF No. 3677-2 and 3677-3. Both the long form and publication form clearly and effectively communicate information about the Settlement. *See* Weisbrot Decl. ¶ 27. The proposed Proof of Claim is also simple to understand and submit—it can be submitted online or in paper, at Class Members' election, which will increase claims rates—while eliciting sufficient information for the Claims Administrator and Class Counsel to assess Class Members' claims and evaluate any potentially fraudulent or errant submissions. *See* ECF No. 3677-4.

Courts routinely approve notice programs, like this one, that combine direct notice and publication notice. *See, e.g.*, *Rodriguez v. CPI Aerostructures, Inc.,* No. 20-cv-982 (ENV) (CLP), 2023 WL 2184496, at *9 (E.D.N.Y. Feb. 16, 2023) ("A.D. Data mailed 11,065 Notice packets directly to Class Members and nominees, and published a copy of the Summary Notice in Investor's Business Daily and PR Newswire, as well as posting a copy of the Notice on the website . . . Notice here was the 'best notice practicable under the circumstances.' Fed. R. Civ. P. 23(c)(2)(B)"); *In re Foreign Exchange Benchmark Antitrust Litig.*, Case No. 1:13-cv-07789, ECF No. 1110, ¶ 7 (Aug. 6, 2018) ("The Court finds that the dissemination of the Mail Notice and Publication Notice: . . . (d) constitutes due, adequate, and sufficient notice to all persons and entities entitled to receive notice of the Settlement Agreements.") *Vitamin C*, 2012 WL 5289514, at *8 ("The notice was also distributed widely, through the internet, print publications, and targeted

mailings. The Court concludes that the distribution of the class notice was adequate."); *In re CertainTeed Corp. Roofing Shingle Prods. Liab. Litig.*, 269 F.R.D. 468, 482–84 (E.D. Pa. 2010) (notice plan that included direct mailing, use of the Internet, and substantively detailed notices satisfied Rule 23 requirements). Thus, OTC Plaintiffs' proposed Notice Plan is the best notice practicable under the circumstances and comports with Rule 23 and due process.

IV. CONCLUSION

For the foregoing reasons, OTC Plaintiffs respectfully request the Court grant OTC Plaintiffs' Motion.

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