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

RICHARD DENNIS, SONTERRA CAPITAL MASTER FUND, LTD., FRONTPOINT FINANCIAL SERVICES FUND, L.P., FRONTPOINT ASIAN EVENT DRIVEN FUND, L.P., FRONTPOINT FINANCIAL HORIZONS FUND, L.P., and ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

JPMORGAN CHASE & CO., JPMORGAN CHASE BANK, N.A., BNP PARIBAS, S.A., THE ROYAL BANK OF SCOTLAND GROUP PLC, THE ROYAL BANK OF SCOTLAND PLC, RBS N.V., RBS GROUP (AUSTRALIA) PTY LIMITED, UBS AG, AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD., COMMONWEALTH BANK OF AUSTRALIA, NATIONAL AUSTRALIA BANK LIMITED, WESTPAC BANKING CORPORATION, DEUTSCHE BANK AG, HSBC HOLDINGS PLC, HSBC BANK AUSTRALIA LIMITED, LLOYDS BANKING GROUP PLC, LLOYDS BANK PLC, MACQUARIE GROUP LTD., MACQUARIE BANK LTD., ROYAL BANK OF CANADA, RBC CAPITAL MARKETS LLC, MORGAN STANLEY, MORGAN STANLEY AUSTRALIA LIMITED, CREDIT SUISSE GROUP AG, CREDIT SUISSE AG, ICAP PLC, ICAP AUSTRALIA PTY LTD., TULLETT PREBON PLC, TULLETT PREBON (AUSTRALIA) PTY LTD., AND JOHN DOES NOS. 1-50.

Defendants.

Docket No. 16-cv-06496 (LAK)

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF CONSOLIDATED MOTION FOR CONDITIONAL CLASS CERTIFICATION FOR PURPOSES OF CLASS ACTION SETTLEMENTS WITH MORGAN STANLEY AND MORGAN STANLEY AUSTRALIA LIMITED, AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD., COMMONWEALTH BANK OF AUSTRALIA, AND NATIONAL AUSTRALIA BANK LTD.

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs[1] respectfully submit this memorandum of law in support of their motion seeking conditional certification of the Settlement Class (*see* pp. 5 below) for purposes of Plaintiffs' four proposed class action settlements with Defendants Australia and New Zealand Banking Group Limited ("ANZ"), Commonwealth Bank of Australia ("CBA"), National Australia Bank Limited ("NAB") and Morgan Stanley and Morgan Stanley Australia Limited ("Morgan Stanley"). Proposed conditional certification orders for each of the four settlements are filed herewith.

PRELIMINARY STATEMENT

Plaintiffs have entered into settlement agreements with Defendants ANZ, CBA, NAB and Morgan Stanley (the "Settlement Agreements").[2] Together with Plaintiffs' two prior proposed settlements with Westpac Banking Corporation ("Westpac") and JPMorgan Chase & Co. and JPMorgan Chase Bank ("JPMorgan") (ECF Nos. 225-1, 452-1, 452-2), the six proposed settlements reached to date provide for non-reversionary cash payments totaling **$137,000,000** for the benefit of the Settlement Class, plus substantial additional consideration in the form of settlement cooperation.

The Proposed Settlements. The Settlement Agreements are the product of extensive, informed, and arm's-length negotiations between experienced counsel, and provide valuable consideration to the Settlement Class. Joint Decl. ¶¶ 30-37 (detailing settlement negotiations). Pursuant to the proposed Settlement Agreements, ANZ has agreed to make non-reversionary

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[1] For purposes of this motion "Plaintiffs" means Plaintiffs Richard Dennis ("Dennis") and Orange County Employees Retirement System ("OCERS"). Unless otherwise defined, capitalized terms herein have the same meaning as in the Settlement Agreements.

[2] The proposed settlement with ANZ dated December 10, 2021 ("ANZ Settlement") is attached as Exhibit 1 to the Joint Declaration of Vincent Briganti and Christopher McGrath dated December 10, 2021 ("Joint Declaration" or "Joint Decl."). The proposed settlement with CBA dated December 10, 2021 ("CBA Settlement") is attached as Exhibit 2 to the Joint Declaration. The proposed settlement with NAB dated December 10, 2021 ("NAB Settlement") is attached as Exhibit 3 to the Joint Declaration. The proposed settlement with Morgan Stanley dated October 1, 2021 ("Morgan Stanley Settlement") is attached as Exhibit 4 to the Joint Declaration.

cash payments totaling **$35,500,000**; CBA has agreed to make non-reversionary cash payments totaling **$35,500,000**; NAB has agreed to make non-reversionary cash payments totaling **$27,000,000**; and Morgan Stanley has agreed to make non-reversionary cash payments totaling **$7,000,000**. In addition to the foregoing cash payments, each of these settling defendants has also agreed to provide substantial documentary and other settlement cooperation as set forth in the Settlement Agreements. Plaintiffs believe that the cooperation will be valuable as Plaintiffs continue to pursue their claims against the six non-settling defendants.[3] None of the Settlement Agreements contains any admission of liability.

The Settlement Class. The proposed Settlement Class for each of the four proposed settlements are substantially similar in all material respects to the settlement classes the Court already conditionally certified for purposes of Plaintiffs' proposed settlements with Westpac and JPMorgan. *Compare* ECF Nos. 459, ¶ 2 and 460, ¶ 2 *with* ANZ Settlement § 1(QQ); CBA Settlement § 1(QQ); NAB Settlement § 1(QQ); Morgan Stanley Settlement § 1(RR). Plaintiffs respectfully submit that the Court should conditionally certify the Settlement Class for settlement purposes for all the same reasons it previously granted conditional certification in connection with the Westpac and JPMorgan settlements.

Proposed Conditional Certification Orders. Accordingly, Plaintiffs respectfully request that the Court enter the accompanying proposed conditional certification orders that, among other things, (a) conditionally certify the proposed Settlement Class for purposes of the proposed settlements with ANZ, CBA, NAB and Morgan Stanley; (b) conditionally appoint Lowey Dannenberg, P.C. ("Lowey Dannenberg") and Lovell Stewart Halebian Jacobson LLP ("Lovell Stewart") as Class Counsel for purposes of Plaintiffs' proposed settlements with ANZ,

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[3] The six non-settling defendants are: BNP Paribas, S.A. ("BNPP"); Credit Suisse AG ("CS"); Deutsche Bank AG ("DB"); Royal Bank of Canada ("RBC"); Royal Bank of Scotland plc ("RBS"); and UBS AG ("UBS").

CBA, NAB and Morgan Stanley; (c) conditionally appoint Dennis and OCERS as representatives of the Settlement Class; (d) appoint Citibank, N.A. as the Escrow Agent for the Settlement Funds; and (e) stay all proceedings against ANZ, CBA, NAB and Morgan Stanley until the Court renders a final decision on approval of the Settlement Agreements.

Settlement Notice and Fairness Hearing. Plaintiffs intend to work together with each of the six settling defendants to date (JPMorgan, Westpac, ANZ, CBA, NAB and Morgan Stanley) to submit a separate motion to the Court that will seek Court approval for (a) a single, consolidated settlement notice to the Settlement Class concerning each of the six proposed settlements, (b) a multi-faceted plan to provide notice of the six proposed settlements to the Settlement Class; and (c) a consolidated schedule leading up to a Fairness Hearing, including deadlines for the sending of the settlement notice and deadlines for Settlement Class Members to be heard. Plaintiffs will use their best efforts to work with the six settling defendants to file the foregoing settlement notice motion by December 22, 2021, which Plaintiffs understand is the start of the Australian holiday period.

BACKGROUND

Plaintiffs' Allegations. Plaintiffs allege that Defendants, including ANZ, CBA, NAB and Morgan Stanley, conspired to manipulate BBSW and the prices of BBSW-Based Derivatives during the Class Period by, *inter alia*: (a) engaging in manipulative money market transactions during the BBSW Fixing Window; (b) making false BBSW rate submissions that did not reflect actual transaction prices; (c) uneconomically buying or selling money market instruments at a loss to cause artificial derivatives prices; and (d) sharing proprietary information to align interests and avoid conduct that could harm co-conspirators. ECF Nos. 63 (Amended Class Action Complaint ("AC")); 281 (Second Amended Class Action Complaint ("SAC")). Plaintiffs claim that as a result of Defendants' price-fixing conspiracy, they paid more or received less than

they should have on their BBSW-Based Derivatives transactions during the Class Period.[4] The procedural history of this case is detailed in the Joint Declaration ¶¶ 7-23.

Settlement Negotiations. The negotiations with each settling defendant were extensive and took several months.

ANZ and CBA. Negotiations with ANZ and CBA began in November 2020. After numerous discussions concerning each side's strengths and weaknesses in the litigation, Plaintiffs and ANZ and CBA reached agreement on binding term sheets on March 20, 2021. Joint Decl. ¶ 32. Several more months of negotiations were necessary to reach agreement on the scope of cooperation obligations detailed in the ANZ and CBA Settlements. After more than eight months of back and forth, hard fought and difficult negotiations, Plaintiffs and ANZ executed the ANZ Settlement on December 10, 2021. Plaintiffs and CBA executed the CBA Settlement on December 10, 2021. *Id.*

NAB. Following preliminary discussions at earlier points in the litigation, Plaintiffs and NAB began settlement discussions in May 2021 that were both hard fought and fast paced. *Id.* ¶ 34. Those negotiations resulted in a settlement term sheet that the parties executed on June 17, 2021. *Id*. The parties executed the NAB Settlement on December 10, 2021. *Id*.

Morgan Stanley. Morgan Stanley and Plaintiffs began discussing a potential settlement in December 2020. *Id.* ¶ 33. These negotiations were also hard fought, involving significant discussion of each side's positions and applicable risks to the case. Plaintiffs and Morgan Stanley reached agreement on a term sheet on February 19, 2021. *Id.* After several more months

[4] ANZ, CBA, NAB and Morgan Stanley do not admit any of Plaintiffs' allegations of misconduct in the BBSW market by entering into the Settlements and continue to deny any and all wrongdoing, including any allegations that they violated any law.

of negotiations over the specific terms of the final settlement agreement, Morgan Stanley and Plaintiffs executed the Morgan Stanley Settlement on October 1, 2021. *Id.*

ARGUMENT

I. The Court should conditionally certify the Settlement Class defined in the Settlement Agreements.

The proposed Settlement Class as defined in the settlements with ANZ, CBA, NAB and Morgan Stanley satisfies the provisions of Rule 23(a) and Rule 23(b)(3) for purposes of conditional certification. The Settlement Class is defined as follows:

> All Persons (including both natural persons and entities) who purchased, acquired, sold, held, traded, or otherwise had any interest in, BBSW-Based Derivatives during the Settlement Class Period[5], provided that, if Representative Plaintiffs expand the putative or certified class in this Action in or through any subsequent amended complaint, class motion, or Other Settlement, the defined Settlement Class in this Settlement Agreement shall be expanded so as to be coterminous with such expansion. Excluded from the Settlement Class are the Defendants and any parent, subsidiary, affiliate or agent of any Defendant or any co-conspirator whether or not named as a Defendant, and the United States Government.

Morgan Stanley Settlement § 1(RR); ANZ Settlement §1(QQ); CBA Settlement §1(QQ); NAB Settlement §1(QQ).

The Court conditionally certified substantially the same Settlement Class in connection with the Westpac and JPMorgan settlements. ECF Nos. 459, ¶ 2 and 460, ¶ 2. As detailed below, conditional certification is appropriate here for all the same reasons.

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

1. Numerosity

Rule 23(a) requires that the class be "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). Joinder need not be impossible; it may "merely be

[5] "Settlement Class Period" is defined as January 1, 2003 through August 16, 2016, both dates inclusive.

difficult or inconvenient, rendering use of a class action the most efficient method to resolve plaintiffs' claims." *In re Initial Pub. Offering Sec. Litig.,* 260 F.R.D. 81, 90 (S.D.N.Y. 2009). "Sufficient numerosity can be presumed at a level of forty members or more." *Id.* There are at least hundreds, if not thousands, of geographically dispersed persons and entities that fall within the Settlement Class definition. *See* Joint Decl. ¶ 38; ECF No. 229 ¶ 2. Thus, joinder of all of these individuals and entities would be impracticable.

2. Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). This is a "'low hurdle' easily surmounted." *In re Prudential Sec. Inc. Ltd. Pshps. Litig.*, 163 F.R.D. 200, 206 n.8 (S.D.N.Y. 1995) (internal quotation marks and citations omitted). Commonality requires the presence of only a single question common to the class. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011). This criterion is met where the question(s) at issue in the case is "capable of classwide resolution–which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350.

Common questions of law and fact include: (a) whether Defendants entered a conspiracy to manipulate BBSW; (b) the identities of the members of such conspiracy; (c) what constitutes a false or manipulative submission by a BBSW contributor panel bank; and (d) whether Defendants' conduct pursuant to their agreement artificially impacted BBSW.

3. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3). To meet this requirement "claims only need to share the same essential characteristics and need not be identical." *Bolanos*

v. Norwegian Cruise Lines Ltd., 212 F.R.D. 144, 155 (S.D.N.Y. 2002) (quoting 5 MOORE'S FEDERAL PRACTICE § 23.24[4]). This permissive standard is satisfied when "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009) (internal quotation marks and citations omitted).

Plaintiffs' and Settlement Class Members' claims arise from the same common course of conduct involving the alleged manipulation of BBSW by Defendants. Where plaintiffs "must prove a conspiracy, its effectuation, and damages therefrom," their claims are typical as they are "precisely what the absent class members must prove to recover." *In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 111 (S.D.N.Y. 2010). The same conspiracy and effects therefrom that impacted Plaintiffs' transactions similarly affected the transactions of all Settlement Class Members. *See In re Amaranth Nat. Gas Commodities Litig.*, 269 F.R.D. 366, 379 (S.D.N.Y. 2010) (finding typicality where plaintiffs and the class "transacted in the same contracts, in the same centralized marketplace, [and] were allegedly negatively impacted by the same common course of manipulative conduct for which the same group of defendants is alleged to be legally responsible for the damages"); *Ploss as Tr. for Harry Ploss Tr. DTD 8/16/1993 v. Kraft Foods Grp., Inc.*, 431 F. Supp. 3d 1003, 1011 (N.D. Ill. 2020) ("A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and is based on the same legal theory.").

4. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4); *see Baffa v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 222 F.3d 52, 61 (2d Cir. 2000). Generally, courts consider "whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys

are qualified, experienced and able to conduct the litigation." *Id.* at 60.[6]

a. Plaintiffs are adequate representatives for the Class.

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

All Settlement Class Members share an overriding interest in establishing each element of each claim and obtaining the largest possible monetary recovery from defendants. *See In re Glob. Crossing Secs. and ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004) (certifying a settlement class and finding that "[t]here is no conflict between the class representatives and the other class members. All share the common goal of maximizing recovery."); *see also In re Corrugated Container Antitrust Litig*., 643 F.2d 195, 208 (5th Cir. 1981) (certifying settlement class and holding that "so long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes."). Where the class representatives are seeking to recover damages for themselves and absent class members that "suffered the same injuries--monetary losses resulting from [manipulated transactions] with settling defendants," their interests are aligned. *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019).

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[6] Under FED. R. CIV. P. 23(e), as amended in 2018, the adequacy of class representatives class counsel is a factor to be considered in determining whether to direct notice. While it is this Court's practice not to evaluate the fairness and adequacy of a settlement until after notice has been provided to the Class, we note that the adequacy analysis for class certification would also support issuance of the Class Notice under the amended Rule 23(e)(1).

b. Plaintiffs' Counsel are adequate.

Plaintiffs and the Settlement Class are represented by experienced and skilled counsel. Lowey Dannenberg and Lovell Stewart have vigorously represented the Settlement Class in this Action. The firms have decades of experience litigating complex class actions, including some of the most significant class action recoveries under the Commodity Exchange Act and Sherman Antitrust Act. *See* ECF Nos. 452-6, 452-7 (Firm Resumes). Plaintiffs' Counsel were well-informed about the strengths and weaknesses of the claims against ANZ, CBA, NAB and Morgan Stanley, having undertaken a significant investigation of the BBSW-Based Derivatives market, defended Plaintiffs' claims in multiple motions to dismiss, and engaged in arduous, arms-length, months-long negotiations with these settling defendants. These additional and significant settlements serve as further evidence of Plaintiffs' Counsel's adequacy. Consequently, the Rule 23(a)(4) requirements that there be no fundamental conflict and that counsel is adequate are both satisfied for purposes of conditional certification.

c. The Court should conditionally appoint Lowey Dannenberg and Lovell Stewart as Class Counsel under Rule 23(g)(1).

The Court previously appointed Lowey Dannenberg and Lovell Stewart as Class Counsel for the Settlement Class in connection with the JPMorgan Settlement and Westpac Settlement. *See* ECF No. 229 ¶ 4 and ECF No. 459 ¶ 5. For all the same reasons, and those set forth in "b" above, the Court should similarly appoint Lowey Dannenberg and Lovell Stewart as Class Counsel for the Settlement Class with respect to the proposed settlements with ANZ, CBA, NAB and Morgan Stanley.

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

In addition to satisfying the requirements of Rule 23(a), Plaintiffs must also conditionally establish: (1) "that the questions of law or fact common to class members predominate over any

questions affecting only individual members"; and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

1. Predominance

Certification is proper under Rule 23(b)(3) where "a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Brown v. Kelly*, 609 F.3d 467, 483 (2d Cir. 2010). To satisfy the predominance requirement, a plaintiff must show "that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole . . . predominate over those issues that are subject only to individualized proof." *Id.* (ellipses in original). "If the most substantial issues in controversy will be resolved by reliance primarily upon common proof, class certification will generally achieve the economies of litigation that Rule 23(b)(3) envisions." *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06–MD–1175, 2014 WL 7882100, at *35 (E.D.N.Y. Oct. 15, 2014); *see also Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) ("When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately. . . ." (internal quotations omitted)).

Courts regularly find that predominance is met in antitrust cases. *See In re GSE Bonds*, 414 F. Supp. 3d at 701 ("The predominance test is likely met here because plaintiffs' antitrust claims predominate and would be proven through common evidence."); *accord Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). Predominance can be established in antitrust cases because the elements of the claims lend themselves to common

proof. *In re GSE Bonds*, 414 F. Supp. 3d at 701 ("Proof is not likely to vary among the class members because allegations of price-fixing relate to the defendants' conduct, not plaintiffs'") (emphasis in original); *see also,* Conte, A. & Newberg, H.B., NEWBERG ON CLASS ACTIONS §§ 18:28 & 18:29 (4th ed. 2002) (noting that allegations of antitrust conspiracies generally establish predominance of common questions).

Here, Plaintiffs and Settlement Class Members face and must answer the same common factual and legal questions to establish the elements of each of their claims, including whether Defendants conspired to manipulate BBSW and if so the level of impact. These common questions predominate over individual questions for purposes of conditional certification and satisfy this prong of Rule 23(b)(3).

2. Superiority

Rule 23(b)(3) "superiority" requires a plaintiff to show that a class action is superior to other methods available for "fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). The Court balances the advantages of class action treatment against alternative available methods of adjudication. *See* FED. R. CIV. P. 23(b)(3)(A)-(D) (listing four non-exclusive factors relevant to this determination). The superiority requirement is applied leniently in the settlement context because the court "need not inquire whether the case, if tried, would present intractable management problems." *Amchem*, 521 U.S. at 620.

Notably, in cases similar to this one, where the class is large, the cost of individually litigating a claim may exceed the potential individual recovery, and class members are geographically disbursed, courts find that a "class action [is] the superior method for the fair and efficient adjudication of the controversy." *In re Currency Conversion Fee Antitrust Litig.*, 224 F.R.D. 555, 566 (S.D.N.Y. 2004); *see also In re GSE Bonds*, 414 F. Supp. 3d at 702. The Court,

as it previously found in this Action with respect to the JPMorgan and Westpac Settlements, should find that a class action is a superior method to adjudicate the claims of Settlement Class Members.

II. The Court should appoint Citibank, N.A. as Escrow Agent.

Each Settlement Agreement requires Plaintiffs' Counsel, with consent from the respective settling defendant, to designate an Escrow Agent to maintain the Settlement Funds. Plaintiffs' Counsel have designated Citibank, N.A. to serve as Escrow Agent for the Settlement Funds. The Court previously appointed Citibank as Escrow Agent for the JPMorgan Settlement and Westpac Settlement. ECF No. 229 and ECF No. 459. Citibank has experience serving as an escrow agent and has agreed to serve as Escrow Agent at market rates.

CONCLUSION

Plaintiffs respectfully request that the Court enter the accompanying four proposed conditional certification orders that, among other things: (a) conditionally certify the Settlement Class for purposes of the proposed settlements with ANZ, CBA, NAB and Morgan Stanley; (b) conditionally appoint Lowey Dannenberg and Lovell Stewart as Class Counsel for the Settlement Class; (c) conditionally appoint Richard Dennis and OCERS as representatives of the Settlement Class; (d) appoint Citibank, N.A. as the Escrow Agent for the Settlement Funds; and (e) stay all proceedings against ANZ, CBA, NAB and Morgan Stanley until the Court renders a final decision on approval of the proposed settlements.

Dated: December 10, 2021
White Plains, New York

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