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., AND FRONTPOINT FINANCIAL HORIZONS FUND, L.P., on behalf of themselves and all others similarly situated, Plaintiffs, -against- JPMORGAN CHASE & CO., JPMORGAN CHASE BANK, N.A., JPMORGAN CHASE BANK, N.A. AUSTRALIA BRANCH, BNP PARIBAS, S.A., BNP PARIBAS, AUSTRALIA BRANCH, THE ROYAL BANK OF SCOTLAND GROUP PLC, THE ROYAL BANK OF SCOTLAND PLC, RBS N.V., RBS GROUP (AUSTRALIA) PTY LIMITED, UBS AG, UBS AG, AUSTRALIA BRANCH, AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD., COMMONWEALTH BANK OF AUSTRALIA, NATIONAL AUSTRALIA BANK LIMITED, WESTPAC BANKING CORPORATION, DEUTSCHE BANK AG, DEUTSCHE BANK AG, AUSTRALIA BRANCH, HSBC HOLDINGS PLC, HSBC BANK AUSTRALIA LIMITED, LLOYDS BANKING GROUP PLC, LLOYDS BANK PLC, LLOYDS TSB BANK PLC, AUSTRALIA, MACQUARIE GROUP LTD., MACQUARIE BANK LTD., ROYAL BANK OF CANADA, RBC CAPITAL MARKETS LLC, ROYAL BANK OF CANADA, AUSTRALIA BRANCH, 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 UNOPPOSED MOTION FOR CONDITIONAL CLASS CERTIFICATION FOR PURPOSES OF CLASS ACTION SETTLEMENT WITH JPMORGAN CHASE & CO. AND JPMORGAN CHASE BANK, N.A.**

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INTRODUCTION

Representative Plaintiffs[1] have entered into a Stipulation and Agreement of Settlement with Defendants JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. (collectively, "JPMorgan").[2] This initial, "ice breaker" Settlement requires that JPMorgan pay $7,000,000 and provide potentially valuable documentary and other non-monetary cooperation in order to settle the claims brought against JPMorgan by the Settlement Class. *See* Agreement §§ 3-4; *In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2011 WL 717519, at *10 (E.D. Mich. Feb. 22, 2011) (the first settlement in an antitrust case serves as an "ice breaker," which may also provide substantial benefits in addition to monetary consideration). JPMorgan's documentary cooperation will include what Plaintiffs understand to be millions of pages of documents previously produced by JPMorgan to government investigators, as well as data relating to loans, trades, and other transactions involving the Australian Bank Bill Swap Reference Rate ("BBSW") markets at issue in this Action.

Because of joint and several liability under the antitrust laws and for the conspiracy to manipulate claims at issue in this Action, the proposed Settlement with JPMorgan will not remove damages resulting from JPMorgan's conduct from the liability of the remaining Defendants to the Settlement Class. However, so far, government investigators have charged multiple Defendants with unlawful conduct involving the BBSW market but have not charged JPMorgan with any wrongdoing. ECF No. 63, ¶¶ 3-14, 52, 65-66, 77; Australian Securities and Investments

[1] "Representative Plaintiffs" are 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 Fund Liquidation Holdings, LLC, and any subsequently named plaintiff(s). Unless otherwise noted, ECF citations are to the docket in *Richard Dennis, et al. v. JPMorgan Chase & Co., et al.*, No. 16-cv-06496 (LAK) (S.D.N.Y.) and internal citations and quotation marks are omitted.

[2] The Stipulation and Agreement of Settlement as to Defendants JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. dated November 20, 2018 between Representative Plaintiffs and JPMorgan ("Agreement") is attached as Exhibit 1 to the Joint Declaration of Vincent Briganti and Christopher Lovell dated November 21, 2018 ("Joint Decl."). Unless otherwise defined, capitalized terms herein have the same meaning as in the Agreement. Representative Plaintiffs and JPMorgan are collectively referred to as the "Settling Parties."

Commission ("ASIC") v. Commonwealth Bank of Australia ("CBA") Statement of Claim, dated February 26, 2018, at 15-16 (submitted with the letter to the Court dated March 5, 2018). Moreover, JPMorgan entirely denies any and all wrongdoing in the BBSW market. Plaintiffs have alleged that JPMorgan did participate in the agreement by assisting other Defendants. ECF No. 63, ¶¶ 239-241. In all events, Plaintiffs claim JPMorgan was an active participant in the BBSW markets and is, Plaintiffs believe, in a position to provide documentary cooperation regarding the remaining Defendants.

As is demonstrated below and in the accompanying joint declaration of Vincent Briganti and Christopher Lovell ("Joint Decl."), the proposed Settlement Agreement is the product of extensive, informed, and arm's-length negotiations between experienced counsel, and provides valuable consideration to the Settlement Class. Pursuant to Rule 23 of the Federal Rules of Civil Procedure ("FED. R. CIV. P."), Representative Plaintiffs respectfully submit this memorandum of law and the accompanying declarations in support of their motion for an order that: (a) for the purposes of settlement only, conditionally certifies the proposed Settlement Class pursuant to FED. R. CIV. P. 23(a) and 23(b)(3) **subject to** later consideration of such Settlement Class at the final approval hearing to be conducted after notice of the Settlement has been sent to Settlement Class members and they have had the opportunity to exercise their rights; (b) conditionally appoints Lowey Dannenberg, P.C. ("Lowey Dannenberg") and Lovell Stewart Halebian Jacobson LLP ("Lovell Stewart" and collectively with Lowey Dannenberg, "Plaintiffs' Counsel") as Class Counsel for the Settlement Class, again subject to further consideration at the final approval hearing; (c) directs the Representative Plaintiffs to develop a plan of distribution and a notice plan for later submission to the Court for its approval; (d) appoints Citibank, N.A. as the Escrow Agent; and (e) stays all proceedings against JPMorgan until the Court renders a final decision on approval of the Settlement.

The entry of the order conditionally certifying the Class is the trigger to JPMorgan's obligation to produce its cooperation materials. Plaintiffs will use these materials to assist in prosecuting the claims against other Defendants and in formulating the proposed notice plan, as well as the proposed plan of distribution of the Settlement proceeds to Settlement Class Members. *See, e.g., In re Agent Orange Product Liability Litigation*, 818 F.2d 145, 170 (2d Cir. 1987) (it is unnecessary to have a plan of distribution, even at the final approval stage where the distribution plan does not affect the obligations of the defendants under the settlement).

BACKGROUND

Representative Plaintiffs allege that Defendants, including JPMorgan, conspired to manipulate BBSW and the prices of BBSW-Based Derivatives during the Class Period by, *inter alia*: (1) engaging in manipulative money market transactions during the BBSW Fixing Window; (2) making false BBSW rate submissions that did not reflect actual transaction prices; (3) uneconomically buying or selling money market instruments at a loss to cause artificial derivatives prices; and (4) sharing proprietary information to align interests and avoid conduct that could harm co-conspirators. ECF No. 63 (Amended Class Action Complaint ("AC")). Representative 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.

On August 16, 2016, Representative Plaintiffs commenced this antitrust Action against JPMorgan and 33 other Defendants. ECF No. 1 (Class Action Complaint).[3] On December 19, 2016, pursuant to a stipulation dated November 11, 2016 (ECF No. 9), Representative Plaintiffs filed the AC. The AC asserts claims under Section 1 of the Sherman Act, Sections 6(c), 9, and 22 of the Commodity Exchange Act (CEA), the Racketeer Influenced and Corrupt Organizations Act

[3] On May 31, 2017, Representative Plaintiffs agreed to voluntarily dismiss, without prejudice, Defendants BNP Paribas, Australia Branch, Deutsche Bank AG, Australia Branch, JPMorgan Chase Bank, N.A. Australia Branch, Lloyds TSB Bank PLC, Australia, Royal Bank of Canada, Australia Branch, and UBS AG, Australia Branch. ECF No. 168.

(RICO), and New York common law. AC ¶¶ 316-72. Representative Plaintiffs seek to bring these claims individually and on behalf of a Class of similarly situated investors. *See* Part III, *infra.*

On February 24, 2017, Defendants moved to dismiss for lack of personal jurisdiction under Rule 12(b)(2) (ECF No. 109-31, 133, 137), and for lack of subject matter jurisdiction and failure to state a claim under Rules 12(b)(1) and (6). ECF No. 132, 134-36. Defendants denied all allegations of wrongdoing and maintained that they had no liability. Defendants argued, among other things, that the case should be dismissed because: (1) Plaintiffs failed to plead Article III and antitrust standing; (2) the AC did not allege a plausible antitrust conspiracy; (3) Plaintiffs' claims are impermissibly extraterritorial and barred by the relevant statute of limitations; and (4) the Court lacks personal jurisdiction over certain foreign Defendants.

On April 28, 2017, Representative Plaintiffs filed their opposition to Defendants' motions to dismiss [ECF Nos. 153-56], and on May 25, 2017 Defendants filed their replies. ECF Nos. 163-66. On October 31, 2017, after obtaining leave of the Court, Defendants filed a supplemental memorandum in support of their motions to dismiss, arguing that the AC should be dismissed because Plaintiffs FrontPoint and Sonterra[4] lacked the capacity to sue. ECF Nos. 184-87. On November 14, 2017, Representative Plaintiffs filed their opposition to Defendants' supplemental memorandum under seal. On November 21, 2017, Defendants filed their supplemental reply under seal. The Court held oral argument on both motions on January 23, 2018, during which the Court directed Defendants to seek leave via letter to raise any capacity issues as a separate motion. ECF No. 203. Defendants submitted their letter seeking leave to file the separate motion, which Plaintiffs opposed. ECF Nos. 207, 208. The Court granted Defendants' request for leave to file a separate motion to dismiss the AC for lack of capacity to sue. ECF No. 208. The parties fully briefed the

[4] "FrontPoint" refers to FrontPoint Financial Services Fund, L.P., FrontPoint Asian Event Driven Fund, L.P., and FrontPoint Financial Horizons Fund, L.P. "Sonterra" refers to Sonterra Capital Master Fund, Ltd.

second motion to dismiss, which was filed under seal. Defendants' motions remain pending before the Court.

The negotiations with JPMorgan took more than one year, beginning in April 2017 and continuing until the Agreement was executed on November 20, 2018. Joint Decl. ¶ 19. During the initial settlement negotiations on April 12, 2017, Plaintiffs' Counsel and JPMorgan shared their views on the perceived strengths and weaknesses of the litigation as well as JPMorgan's litigation exposure. *Id.* ¶¶ 20, 21. Over the next several months, Plaintiffs' Counsel and counsel for JPMorgan continued their negotiations sharing their updated views of the case, their perceptions of a fair, reasonable and adequate settlement and other cooperation that might be available in the settlement. *Id.* ¶ 20. As the discussions progressed, Plaintiffs' Counsel and counsel for JPMorgan negotiated the material terms of the settlement, including the amount of the settlement consideration, the scope of the cooperation to be provided by JPMorgan, the scope of the releases, and the circumstances under which the Parties would have the right to terminate the settlement. *Id.* ¶ 21.

On June 5, 2018, Plaintiffs' Counsel and counsel for JPMorgan signed a Term Sheet that reflected the terms on which the parties agreed, subject to the preparation of a full Settlement Agreement, to settle Plaintiffs' claims against JPMorgan. *Id.* ¶ 22. At the time the Term Sheet was executed, Plaintiffs' Counsel was well-informed about the legal risks, factual uncertainties, potential damages and other aspects of the strengths and weaknesses asserted in this case. The next day, the Parties reported to the Court and Defendants that a settlement had been reached. *Id.*

On November 20, 2018, following months of arm's-length negotiations, consisting of additional discussions and exchanges of draft settlement terms, Plaintiffs' Counsel, on behalf of Plaintiffs, and JPMorgan entered into the Settlement Agreement. *Id.* ¶ 23.

The Settlement provides important benefits to the Class in the form of an initial, ice breaker settlement in the amount of $7,000,000 in cash, as well as certain non-monetary cooperation,

including what Plaintiffs understand will be millions of pages of documents produced by JPMorgan to government regulators, as well as additional trade, loan, and other data which will be helpful to Plaintiffs in analyzing the activity in the market and otherwise prosecuting this Action.

As the first settlement in this Action, it serves as the "ice breaker" and may be a catalyst for resolutions with other Defendants. *See In re Packaged Ice Antitrust Litig.*, 2011 WL 717519, at *10 ("Also of significant value is the fact that the Settlement Agreement with [defendant] can serve as an 'ice-breaker' settlement and includes the promise of cooperation from [the defendant]."). The Settlement will also provide funding to continue to pursue the litigation against the non-settling Defendants.

ARGUMENT

I. The Court should conditionally certify the Settlement Class defined in the Settlement Agreement for purposes of the Settlement.

The proposed Settlement Class for the claims against JPMorgan satisfies the provisions of Rule 23(a) and Rule 23(b)(3) for purposes of conditional certification. The Settlement Class excludes persons and entities outside the purview of United States law, but includes those Persons protected by U.S. law who transacted in financial instruments the prices of which were allegedly impacted by Defendants' conduct in the BBSW markets. Specifically, the Agreement provides for the following Settlement Class:

> [A]ll Persons (including both natural persons and entities) who purchased, sold, held, traded, or otherwise had any interest in BBSW-Based Derivatives[5] during the Class Period . . . . Excluded from the Settlement Class are the Defendants . . . and any parent,

[5] "BBSW-Based Derivatives" means (i) a BBSW-based interest rate swap entered into by a U.S. Person, or by a Person from or through a location within the U.S.; (ii) an option on a BBSW-based interest rate swap ("swaption") entered into by a U.S. Person, or by a Person from or through a location within the U.S.; (iii) a BBSW-based forward rate agreement entered into by a U.S. Person, or by a Person from or through a location within the U.S; (iv) an Australian dollar currency forward agreement entered into by a U.S. Person, or by a Person from or through a location within the U.S.; (v) an Australian dollar futures contract on the Chicago Mercantile Exchange ("CME"); (vi) an Australian dollar foreign exchange forward entered into by a U.S. Person, or by a Person from or through a location within the U.S.; and/or (vii) 90-day Bank Accepted Bill futures contracts on the Australian Securities Exchange entered into by a U.S. Person, or by a Person from or through a location within the U.S. Agreement § 1(F).

> subsidiary, affiliate or agent of any Defendant or any co-conspirator whether or not named as a Defendant, and the United States Government.

Agreement § 1(H). Having satisfied the requirements under the Federal Rules, as described below, conditional certification is warranted for purposes of the Settlement.[6]

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

1. Numerosity

Rule 23(a) requires that the class be "so numerous that joinder of all class members is impracticable." FED. R. CIV. P. 23(a). Joinder need not be impossible, it may "merely be difficult or inconvenient, rendering use of a class action the most efficient method to resolve plaintiffs' claims." *In re Initial Pub. Offering Sec. Litig.,* 260 F.R.D. 81, 90 (S.D.N.Y. 2009) ("*IPO*"). "Sufficient numerosity can be presumed at a level of forty members or more." *Id.* There are at least hundreds, if not thousands, of geographically dispersed persons and entities that fall within the Settlement Class definition. *See* Joint Decl. ¶ 27. 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).

Here, there are many common questions of law and fact. Each Class Member would have to address personal jurisdiction, subject matter jurisdiction, the standards for an unlawful agreement,

[6] JPMorgan consents to conditional certification of the Settlement Class solely for the purpose of the Agreement and without prejudice to any position it may take with respect to class certification in any other action or in the event that the Agreement is terminated. Agreement § 22(E).

and other questions raised in Defendants' dispositive motions and affirmative defenses. To do so, each Class Member would have to rely on the same facts uncovered during Plaintiffs' initial investigation and during discovery to argue the same legal points in support of identically situated claims. And every Plaintiff and Class Member must answer—through the same body of common class-wide proof—the same liability and impact questions. For example:

1. Whether Defendants entered a conspiracy to manipulate BBSW and, if so, the members in such conspiracy. *In re Auction Houses Antitrust Litig.,* 193 F.R.D. 162, 166 (S.D.N.Y. 2000) (Kaplan, J) ("[t]he nature, existence and duration of the alleged conspiracy is a question common to the entire class"); *In re Sumitomo Copper Litig.,* 194 F.R.D. 480, 482–83 (S.D.N.Y. 2000) ("All members of the Class have the same interest to prove that there was a conspiracy . . . and that it did impact prices artificially"); *In re Sumitomo Copper Litig.,* 182 F.R.D. 85, 90-91 (S.D.N.Y. 1998) (All class members are "unified" and have to prove the common existence of a conspiracy to manipulate).

2. Did the Defendants' conduct pursuant to their agreement artificially impact BBSW? If so, on what dates and, approximately, in what amounts?

3. Did that artificial impact on BBSW cause changes in the prices and payments of BBSW derivatives? If so, what is a reasonable estimate of what would have been the prices and payments made or received by Settlement Class members if BBSW had been a fair and unmanipulated number, *i.e.*, but for the conspiracy?

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

These common questions involve dozens of common sub-questions of fact and law that are also common to all members of the Settlement Class. Rule 23(a)(2) is overwhelmingly satisfied for

purposes of conditional certification.

3. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3). This permissive standard is satisfied when "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009) (internal quotation marks and citations omitted); *see also Bolanos v. Norwegian Cruise Lines Ltd.*, 212 F.R.D. 144, 155 (S.D.N.Y. 2002) ("Since the claims only need to share the same essential characteristics, and need not be identical, the typicality requirement is not highly demanding." (quoting 5 Moore's Federal Practice § 23.24[4])).

The Representative Plaintiffs' and Class Members' claims arise from the same course of conduct involving the alleged false reporting and manipulation of BBSW by Defendants. Thus, Representative Plaintiffs' claims are typical of the Class Members' claims. *Cf. Marisol A. by Forbes v. Giuliani*, 126 F.3d 372, 376-77 (2d Cir. 1997) (finding the named Representative Plaintiffs' claims typical of the class's under Rule 23(a)(3) where "each named plaintiff challenges a different aspect of the child welfare system"; "[t]he claimed deficiencies implicate different statutory, constitutional and regulatory schemes"; and "no single plaintiff (named or otherwise) is affected by each and every legal violation alleged . . . and [] no single specific legal claim identified by the Representative Plaintiffs affects every member of the class").[7] Typicality is satisfied for purposes of conditional certification.

[7] *See also Sonterra Capital Master Fund Ltd., et al. v. Credit Suisse AG, et al.*, No. 15-cv-00871(SHS), (August 16, 2017 S.D.N.Y.), ECF No. 159 ¶ 5 (conditionally certifying settlement class of persons who purchased sold, held, traded, or otherwise had any interest in derivatives products priced, benchmarked and/or settled to Swiss franc LIBOR); *Sonterra Capital Master Fund Ltd. et al v. UBS AG et al*, No. 15-cv-5844 (S.D.N.Y. Mar. 8, 2018), ECF. No. 402 ¶ 3 (same with respect to Euroyen TIBOR and Yen-LIBOR based derivatives); *Sullivan v. Barclays plc*, No. 13-cv-2811 (PKC) (S.D.N.Y. July 6, 2017), ECF No. 364 ¶ 4 (same with respect to Euribor-based derivatives).

4. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4); *Baffa v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 222 F.3d 52, 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.

a. Representative Plaintiffs suffer no disabling conflicts with the members of the Settlement 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) (*"NASDAQ I"*) (to warrant denial of class certification, "it must be shown that any asserted 'conflict' is so palpable as to outweigh the substantial interest of every class member in proceeding with the litigation."). No such fundamental conflict exists here for purposes of conditional certification.

First, all Settling Class Members share an overriding interest in obtaining the largest possible monetary recovery from JPMorgan (and, for that matter, all of the remaining non-settling Defendants). *See In re Global 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.").

Second, all Settling Class Members share a common interest in obtaining JPMorgan's early cooperation to benefit the Settlement Class. JPMorgan has agreed to provide (to the extent such information may exist and is reasonably accessible) documents and data previously provided to any governmental authority investigating conduct relating to BBSW and BBSW-Based Derivatives, but without identifying which authority may have received such documents. In addition, JPMorgan will provide (to the extent such information may exist and is reasonably accessible) important trade data related to its transactions in the Australian dollar-denominated inter-bank money market and the BBSW-Based Derivatives market, BBSW submissions data, and certain non-privileged declarations, affidavits, or other sworn or unsworn written statements concerning the allegations, and other material. Each of these materials will help advance Representative Plaintiffs' and the Class's efforts to demonstrate Defendants' liability and prove damages caused by the misconduct.

Third, all Settling Class Members share the same overriding interests to overcome the procedural dismissal motions, develop the enormous fact record during discovery, overcome the ambiguities and competing explanations, and establish the collusive, successful manipulation of BBSW and BBSW-Based Derivatives. Further, all Settling Class Members share the interest to successfully show that such manipulation of BBSW and BBSW-Based Derivatives was sufficient to cause injury and to quantify the impact of such manipulation on BBSW and the prices of BBSW-Based Derivatives.

b. Plaintiffs' Counsel are adequate.

Representative 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, having negotiated the Settlement. They will obtain valuable cooperation from JPMorgan. Agreement § 4.

With over 50 years of experience litigating complex class actions, Lowey Dannenberg has achieved some of the most significant class action recoveries under the Sherman Act, securing almost a billion dollars in recoveries on behalf of Fortune 100 Companies and other sophisticated investors in antitrust and competition-related litigation. Joint Decl., Ex. 2 (Lowey Dannenberg Firm Resume). Lowey Dannenberg has particular expertise in developing plans of allocation involving complex financial benchmarks. *See* Joint Decl. ¶ 7. With that experience comes the knowledge, skill, and resources to fully effectuate the Settlement, including devising a fair and adequate plan of allocation.

Lovell Stewart and its predecessors ("the Firm") have obtained as Court appointed Lead Counsel or Co-Lead Counsel, what were at the times the largest class action recoveries under three federal statutes, two of which (the antitrust laws and commodity laws) are the primary statutes at issue here. *See* Joint Decl., Ex. 3 (Lovell Stewart Firm Resume). The Firm has successfully tried antitrust and derivatives claims, and recovered billions of dollars for the benefit of its clients or class members during the Firm's 38 year history. *Id.*

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).

Rule 23(g)(1) provides that "a court that certifies a class must appoint class counsel." FED. R. CIV. P. 23(g)(1). For over two years, Plaintiffs' Counsel litigated this matter, solely bearing all of the risks. Joint Decl. ¶¶ 12-17. As a result, Plaintiffs' Counsel are intimately familiar with the strengths and weaknesses of the claims at issue, and is uniquely situated to represent the Settlement Class. Lowey Dannenberg and Lovell Stewart have also handled all factual investigation and settlement discussions to date, successfully negotiating the Agreement with JPMorgan. *Id.* ¶¶ 10, 18-

28. For these reasons, and those described above, Lowey Dannenberg and Lovell Stewart are adequate and should be conditionally appointed as Class Counsel for the Settlement Class.

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

Once Rule 23(a) has been satisfied, Representative 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." *Brown*, 609 F.3d at 483 (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.*, MDL No. 1775, 2014 WL 7882100, at *35 (E.D.N.Y. Oct. 15, 2014); *see also Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (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)).

"Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws[,]" as opposed to mass tort cases in which the "individual stakes are

high and disparities among class members are great." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). Predominance can be established in antitrust cases because the elements of the claims lend themselves to common proof. *See, e.g.,* 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). Antitrust claims are particularly well suited for class treatment because liability focuses on the defendants' alleged unlawful actions, not the actions of individual plaintiffs. *Compare Amchem,* 521 U.S. at 624, *with Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012).

The "predominance inquiry will sometimes be easier to satisfy in the settlement context." *In re Am. Int'l Grp. Secs. Litig.,* 689 F.3d 229, 240 (2d Cir. 2012). Unlike class certification for litigation purposes, a settlement class presents no management difficulties for the court as settlement, not trial, is proposed. *Amchem*, 521 U.S. at 620; *see also NASDAQ I*, 169 F.R.D. at 517 (stating that the predominance test standard is met "unless it is clear that individual issues will overwhelm the common questions and render the class action valueless").

If the claims against JPMorgan had not been settled, dozens of common questions would have predominated over individual questions in the prosecution of the claims against JPMorgan. The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *IPO*, 260 F.R.D. at 92. Here, all Representative Plaintiffs and Class Members face and must answer the same common factual and legal questions to establish personal jurisdiction, subject matter jurisdiction, conspiracy, unlawful BBSW manipulation, the extent of this manipulation, and many additional matters of proof. These common questions predominate over individual questions for purposes of conditional certification. *See Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 105 (2d Cir. 2007) (in price-fixing case, "allegations of the existence of a price-fixing conspiracy are susceptible to common proof"); *see also In re Visa*

Check/MasterMoney Antitrust Litig., 280 F.3d 124, 139 (2d Cir. 2001), *overruled on other grounds by, In re Initial Public Offering Sec. Litig.*, 471 F. 3d 24, 42 (2d Cir. 2006) ("Common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues.").

To analyze whether Defendants conspired, the trier of fact must consider the totality of the circumstances. *United States v. Apple, Inc.*, 791 F. 3d 290, 319 (2d Cir. 2015) ("In antitrust cases, the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole"); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (evidence of antitrust conspiracy must be considered as a whole). Here, the most time-consuming issue in the litigation will be the development of circumstances to show the existence *vel non* of a conspiracy. Plaintiffs have alleged a high degree of interfirm communications between and among the supposed horizontal competitor banks. These include but are by no means limited to, numerous real time quotations of Defendants' statements to one another in which they share proprietary trading positions and their intentions to manipulate the BBSW rate or evince knowledge that one another is going to manipulate the BBSW rate and need "ammunition" in the form of prime bank bills or other instruments which they may buy and sell to one another so that the manipulating Defendant has the ability to move prices during the fixing window. AC ¶¶224-236, 248-258, 271.

In addition to this long-term *quid pro quo* sharing of proprietary information and manipulative communications, Plaintiffs will take extensive discovery of Defendants' horizontal competitor organization "market governance committee" conduct. This committee was allegedly packed with the self-same traders who allegedly were manipulating BBSW, and who jointly caused the committee to fail in their duties to prevent the manipulation of BBSW. AC ¶¶169-170, 180, 201, 259-262.

The Settlement Class fully satisfies Rule 23(b)(3) as common issues predominate over individual issues for purposes of conditional certification.

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. Numerous "manageability concerns do not stand in the way of certifying a settlement class." *In re Am. Int'l Grp. Secs. Litig.,* 689 F.3d at 242.

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

Second, most Class Members have neither the incentive nor the means to litigate these claims. Their damages are likely small compared to the very considerable expense and burden of individual litigation, making it uneconomical for an individual to protect his/her rights through an individual suit. And it is why no Class Member "has displayed any interest in bringing an individual lawsuit." *See Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 661 (S.D.N.Y. 2015). A class action allows claimants to "pool claims which would be uneconomical to litigate individually," as "no individual may have recoverable damages in an amount that would induce him to commence litigation on his own behalf." *Currency Conversion*, 224 F.R.D. at 566. "Under such circumstances, a class action is efficient and serves the interest of justice." *Id.*

Third, the prosecution of separate actions by hundreds (or thousands) of individual Class Members would impose heavy burdens upon the Court. It would also create a risk of inconsistent or varying adjudications of the questions of law and fact common to the Settlement Class. Thus, both prongs of Rule 23(b)(3) are satisfied for purposes of conditional certification.

II. Representative Plaintiffs will return to the Court for approval of the Distribution Plan and Class Notice following receipt of Cooperation Materials.

In this case, it is appropriate for the Court to conditionally certify the Class for settlement purposes and to defer approval of the form of the Class Notice and the Distribution Plan. Plaintiffs expect to submit a proposed Class Notice and plan of distribution for approval together, within a reasonable time after conditional certification. The Class Notice will clearly apprise Class Members of all the relevant information, including the facts of the case, key settlement terms, and the Distribution Plan. It will allow the Class Members to make an informed decision about whether to participate, object, opt-out or comment on the Agreement. Permitting conditional class certification before approving a Distribution Plan and form of Class Notice will also allow Representative Plaintiffs to more effectively pursue their claims against the Non-Settling Defendants, as conditional certification triggers JPMorgan's cooperation obligation under the Agreement. *See* Agreement § 4(K).

The Court has "considerable discretion . . . in fashioning notice to a class" including the timing and content of such notice. *See In re Agent Orange*, 818 F.2d at 168 (class notice should be provided in a manner that gives class members an opportunity to heard or object to the proposed agreement); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005) (explaining that the purpose of the notice of settlement to class members is to "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.") (internal quotation and citation omitted). Rule 23(e)

does not require the Court to approve Class Notice before conditionally certifying the Class for settlement purposes. *See* Fed. R. Civ. P. 23(e) (requiring the court to "direct notice in a reasonable manner to all class members who would be bound by the [settlement] proposal.").

In addition, nothing requires the Court approve a Distribution Plan before conditional class certification. Courts routinely approve settlements before any plan of allocation exists. *See In re Holocaust Victim Assets Litig.,* 105 F. Supp. 2d 139, 149-51 (E.D.N.Y. 2000) (deferring development and approval of the plan of allocation and distribution and granting final approval of a class settlement); *see also In re Agent Orange*, 818 F.2d at 170 (holding that there is "no absolute requirement that such a [distribution] plan be formulated prior to notification of the class."); *In re Wachovia Equity Secs. Litig.*, No. 08-cv-6171 (RJS), 2012 WL 2774969, at *1 (S.D.N.Y. June 12, 2012) (approving plan of allocation after preliminary approval of proposed settlement and certification of settlement class); *In re Canadian Sup. Secs. Litig.,* No. 09-cv-10087 (SAS), 2011 WL 5830110, at *2 (S.D.N.Y. Nov. 16, 2011) (same); *In re Giant Interactive Grp. Inc. Secs. Litig.*, 279 F.R.D. 151, 156-57 (S.D.N.Y. 2011) (same); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 135 (S.D.N.Y. 2010) (same); *In re Qiao Xing Secs. Litig.*, No. 07-cv-7097, 2008 WL 872298, at *2 (S.D.N.Y. Apr. 2, 2008) (same); *Precision Assocs. v. Panalpina World Transp., Ltd.*, No. 08-cv-0042 (JG)(VVP), 2013 WL 4525323, at *13 (E.D.N.Y. Aug. 27, 2013) (simultaneously entering final approval of settlement and approving plan of allocation).

This Action is complex, dealing with sophisticated damages analyses involving a global benchmark. To properly evaluate the extent of artificiality created by the alleged conduct, access to relevant transaction data from JPMorgan and others is necessary to build a model that can fairly and adequately distribute the Settlement Fund to qualifying Settlement Class Members. Plaintiffs continue to receive input from economic experts, industry professionals, and others that is being used to develop a Distribution Plan. The data-driven nature of the analyses in this Action will require some time to implement, and is the reason Representative Plaintiffs' request to defer their

submission of the Distribution Plan and Class Notice for later review by the Court, after conditional class certification. *See In re Foreign Exchange Benchmark Rates Antitrust Litig.*, No. 13-cv-7789 (LGS), Order Preliminarily Approving Settlements, Conditionally Certifying the Settlement Classes, and Appointing Class Counsel and Class Representatives for the Settlement Classes (ECF. No. 536) at 7-9 (S.D.N.Y. Dec. 15, 2015) (preliminarily approving settlement agreements and deferring approval of plan of distribution and notice plan to a later date); *Sullivan v. Barclays plc*, No. 13-cv-2811 (PKC), Order Preliminarily Approving Class Action Settlement and Conditionally Certifying a Settlement Class (ECF No. 234) ¶ 9 (same).

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

The Settlement Agreement requires Plaintiffs' Counsel, with JPMorgan's consent, to designate an Escrow Agent to maintain the Settlement Fund. Plaintiffs' Counsel have designated Citibank, N.A. to serve as Escrow Agent. Citi has experience serving as Escrow Agent and currently serves as Escrow Agent for cases including, among others, *Laydon v. Mizuho Bank, Ltd.*, No. 12-cv-3419 (S.D.N.Y.) relating to Yen-LIBOR, Euroyen TIBOR, and Euroyen-based derivatives. Citi has agreed to serve as Escrow Agent at market rates.

CONCLUSION

For the above reasons, Representative Plaintiffs respectfully request that the Court enter the accompanying proposed order that, among other things: (a) conditionally certifies the Class for settlement pursuant to FED. R. CIV. P. 23(a) and 23(b)(3) subject to later, final approval of such Class; (b) conditionally appoints Lowey Dannenberg and Lovell Stewart as Class Counsel for the Settlement Class; (c) grants leave to Representative Plaintiffs to develop a Plan of Allocation and Notice Program for later approval by the Court; (d) appoints Citibank, N.A. as the Escrow Agent; and (e) stays all proceedings against JPMorgan until the Court renders a final decision on approval of the Settlement.

Dated: November 21, 2018
White Plains, New York

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