

UNITED STATES DISTRICT COURT  
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,

Docket No. 16-cv-06496 (LAK)

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.

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR  
CONDITIONAL CLASS CERTIFICATION FOR PURPOSES OF CLASS ACTION  
SETTLEMENT WITH WESTPAC BANKING CORPORATION, FOR A  
SUPERSEDING ORDER FOR CONDITIONAL CLASS CERTIFICATION FOR  
PURPOSES OF CLASS ACTION SETTLEMENT WITH JPMORGAN CHASE & CO.  
AND JPMORGAN CHASE BANK, N.A., AND FOR AN ORDER ISSUING CLASS  
NOTICE OF PROPOSED SETTLEMENTS WITH WESTPAC AND JPMORGAN**

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## INTRODUCTION

Representative Plaintiffs<sup>1</sup> have entered into a Stipulation and Agreement of Settlement with Defendant Westpac Banking Corporation (“Westpac”).<sup>2</sup> This Settlement requires that Westpac make non-reversionary payments for the benefit of the Settlement Class totaling \$25,000,000 and provide substantial documentary and other non-monetary cooperation to settle the claims brought against Westpac. Representative Plaintiffs understand that Westpac’s documentary cooperation will include millions of pages of documents previously produced by Westpac to the Australian Securities Investments Commission (“ASIC”) as well as, if needed, data relating to submissions of the Australian Bank Bill Swap Reference Rate (“BBSW”) and Prime Bank Bill transactions.

This is the second proposed settlement in this complex antitrust litigation, following Representative Plaintiffs’ November 20, 2018 Stipulation and Agreement of Settlement with JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. (the “JPMorgan Settlement”), to which the Court granted conditional certification on November 28, 2018.<sup>3</sup> *See* ECF No. 229. Following the Settlement with Westpac and pursuant to Section 24 of the JPMorgan Settlement, Representative Plaintiffs entered into an Amendment to the JPMorgan Settlement (the “JPMorgan Amendment”)

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<sup>1</sup>“Representative Plaintiffs” are Richard Dennis, Orange County Employees Retirement System, 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.

<sup>2</sup> The Stipulation and Agreement of Settlement as to Defendant Westpac Banking Corporation dated March 1, 2021 between Representative Plaintiffs and Westpac (“Settlement” or “Westpac Settlement”) is attached as Exhibit 1 to the Joint Declaration of Vincent Briganti and Christopher McGrath dated March 1, 2021 (“Joint Declaration” or “Joint Decl.”). Unless otherwise defined, capitalized terms herein have the same meaning as in the Settlement. Representative Plaintiffs and Westpac are collectively referred to as the “Settling Parties.”

<sup>3</sup> Defendants JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. are collectively referred to as “JPMorgan.” The JPMorgan Settlement provides for payments by JPMorgan totaling \$7,000,000 and documentary and other non-monetary cooperation. *See* ECF No. 225-1.

by which the “Settlement Class” and “Release and Covenant Not to Sue” terms were amended to be coterminous with those in the Westpac Settlement.<sup>4</sup> No monetary or other terms were amended.

The Westpac Settlement will build on the cooperation obtained from JPMorgan and provide additional support for the facts alleged in this case as Representative Plaintiffs continue to litigate their claims against the remaining non-settling Defendants. Plaintiffs’ Counsel believe that Representative Plaintiffs’ case is now even stronger, and that as a result, this Settlement will likely lead to further settlements, a successful class certification and, should the case be heard on the merits, a verdict in favor of Representative Plaintiffs and the Class.

Because Defendants’ alleged conspiracy to manipulate BBSW implicates joint and several liability under United States antitrust laws, the proposed Settlement with Westpac allows Representative Plaintiffs to obtain the certainty of a further recovery for the Settlement Class now without impacting the total possible recovery resulting from a successful trial on the merits against the remaining non-settling Defendants. Representative Plaintiffs have alleged that Westpac did participate in the alleged conspiracy to restrain trade, including by assisting other Defendants. *See* ECF No. 281, ¶¶ 8, 453-56, 480-81. Westpac does not admit any of Representative Plaintiffs’ allegations of misconduct in the BBSW market by entering into this Settlement and continues to deny any and all wrongdoing, including any allegations that it has violated any law. In all events, Representative Plaintiffs claim Westpac was an active participant in the BBSW markets and is, Representative Plaintiffs believe, in a position to provide documentary cooperation that will assist in the prosecution of the case against the remaining non-settling Defendants. Westpac will begin fulfilling its cooperation obligations shortly after the execution of the Settlement. Representative

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<sup>4</sup> Section 24 of the JPMorgan Settlement provides that if certain terms in a later settlement would be more favorable to JPMorgan, the JPMorgan Settlement would be amended. *See* ECF No. 225-1. The Amendment to the Stipulation and Agreement of Settlement with JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. dated March 1, 2021 is attached as Exhibit 2 to Joint Declaration. For the avoidance of doubt, except where specifically mentioned, JPMorgan is **not** included in the term “Settling Parties” as used in this brief.

Plaintiffs will use these materials to assist in prosecuting the claims against other Defendants and developing the proposed Distribution Plan.

The proposed Settlement is the product of extensive, informed, and arm's-length negotiations between experienced counsel, and provides valuable consideration to the Settlement Class. Plaintiffs' Counsel believe it is appropriate to give the Settlement Class notice of this Settlement and the JPMorgan Settlement and to set a fairness hearing for approval of the two proposed agreements. Plaintiffs' Counsel previously selected (and the Court approved the appointment of) A.B. Data, Ltd. ("A.B. Data") as Settlement Administrator. ECF Nos. 329, 332. Plaintiffs' Counsel, in consultation with A.B. Data, developed a Class Notice plan<sup>5</sup> that readily satisfies Rule 23's adequacy requirements and due process. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 113-14 (2d Cir. 2005) ("*Wal-Mart Stores*").

Accordingly, 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 Joint Declaration in support of their motion for an order that: (a) for the purposes of settlement only, conditionally certifies the proposed Settlement Class with respect to the Westpac Settlement pursuant to FED. R. CIV. P. 23(a) and 23(b)(3), subject to later consideration of such Settlement Class at the fairness hearing to be conducted after notice of the Westpac and JPMorgan Settlements have been sent to Settlement Class Members, and Settlement Class Members have had the opportunity to exercise their rights; (b) for the purposes of settlement only, conditionally certifies the proposed Settlement Class with respect to the JPMorgan Settlement pursuant to FED. R. CIV. P. 23(a) and 23(b)(3), subject to later consideration of such Settlement Class at the fairness hearing to be conducted after notice of the Westpac and JPMorgan Settlements have been sent to Settlement

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<sup>5</sup> See Affidavit of Linda V. Young, (describing the methods for distributing Class Notice), and the forms of notice, attached as Exhibits 3-5 to the Joint Decl.

Class Members, and Settlement Class Members have had the opportunity to exercise their rights; (c) 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 with respect to the Westpac Settlement, again subject to further consideration at the fairness hearing; (d) approves the proposed plan and forms of Class Notice for the Westpac and JPMorgan Settlements; (e) appoints A.B. Data as the Settlement Administrator for the Westpac Settlement; (f) directs the Representative Plaintiffs to develop a plan of distribution and a Proof of Claim and Release form for the Westpac and JPMorgan Settlements for later submission to the Court for approval; (g) appoints Citibank, N.A. as the Escrow Agent for the Westpac Settlement; and (h) stays all proceedings against Westpac and JPMorgan until the Court renders a final decision on approval of the Westpac Settlement.

### **BACKGROUND**

Representative Plaintiffs allege that Defendants, including Westpac, 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 Nos. 63 (Amended Class Action Complaint (“AC”)); 281 (Second Amended Class Action Complaint (“SAC”)). 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. Westpac does not admit any of Representative Plaintiffs’ allegations of misconduct in the BBSW market by entering into this Settlement and continues to deny any and all



wrongdoing, including any allegations that it has violated any law. The procedural history of this case is detailed in the Joint Declaration ¶¶ 9-22.

#### **A. Settlement Negotiations**

The negotiations with Westpac took several months and were concluded on March 1, 2021 when the Settlement was executed. Joint Decl. ¶¶ 30. Throughout the settlement negotiations, Plaintiffs' Counsel and Westpac shared their views on the perceived strengths and weaknesses of the litigation—including any updated views of the case, as applicable—as well as Westpac's litigation exposure, their perceptions of a fair, reasonable and adequate settlement, and other cooperation that might be available in the settlement. *Id.* ¶ 31. As the discussions progressed, Plaintiffs' Counsel and counsel for Westpac negotiated the material terms of the settlement, including the amount of the settlement consideration, the scope of the cooperation to be provided by Westpac, the scope of the releases, and the circumstances under which the Parties would have the right to terminate the settlement. *Id.*

On October 27, 2020, Plaintiffs' Counsel and counsel for Westpac signed a Memorandum of Understanding (“MOU”) that reflected the terms on which the parties agreed, subject to the preparation of a stipulation, to settle Representative Plaintiffs' claims against Westpac. *Id.* ¶ 32. At the time the MOU 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 March 1, 2021, following months of arm's-length negotiations, consisting of additional discussions and exchanges of draft settlement terms, Plaintiffs' Counsel, on behalf of Representative Plaintiffs, and Westpac's Counsel, on behalf of Westpac, entered into the Settlement. *Id.* ¶ 33.

This Settlement with Westpac is significant as it involves a Defendant that was directly involved in the Australian Securities Investments Commission (“ASIC”) investigation.

Representative Plaintiffs anticipate that the Settlement may be a catalyst for resolutions with other Defendants, in addition to providing evidence and funding that will facilitate the prosecution of the case against the non-settling Defendants.

## **ARGUMENT**

### **I. The Court should conditionally certify the Settlement Class defined in the Westpac Settlement and issue the superseding order conditionally certifying the Settlement Class defined in the JPMorgan Amendment.**

The proposed Settlement Class for the claims against Westpac satisfies the provisions of Rule 23(a) and Rule 23(b)(3) for purposes of conditional certification. Likewise, the proposed Settlement Class for the claims against JPMorgan as set forth in the JPMorgan Amendment—which is the same as the Settlement Class for the claims against Westpac—warrants 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 Settlement provides for the following Settlement Class:

[A]ll Persons (including both natural persons and entities) who purchased, acquired, sold, held, traded, or otherwise had any interest in BBSW-Based Derivatives<sup>6</sup> during

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<sup>6</sup> “BBSW-Based Derivatives” means any financial derivative instrument that is based or priced in whole or in part in any way on the Bank Bill Swap Rate (“BBSW”) or in any way includes BBSW as a component of price (whether priced, benchmarked and/or settled by BBSW), entered into by a U.S. person, or by a person from or through a location within the U.S., including, but not limited to: (i) Australian dollar foreign exchange (“FX”) derivatives, including Australian dollar FX forwards (also known as “outright forwards” or “outrights”), Australian dollar FX swaps (also known as “currency swaps”), Australian dollar currency options, Australian dollar futures contracts (such as the Chicago Mercantile Exchange (“CME”) Australian dollar futures contract) and options on such futures contracts; (ii) BBSW-based interest rate derivatives, including interest rate swaps, swaptions, forward rate agreements (“FRAs”), exchange-traded deliverable swap futures and options on those futures, 90-day bank accepted bill (“BAB”) futures and options on those futures, and other over-the-counter (“OTC”) contracts or publicly traded vehicles that reference BBSW; (iii) Australian dollar cross-currency swaps; and (iv) any other financial derivative instrument or transaction based in whole or in part on BBSW, or that in any way incorporates BBSW as a component of price, or is alleged by Representative Plaintiffs in this Action to be based in whole or in part on BBSW, or to in any way incorporate BBSW as a component of price. For the avoidance of doubt, BBSW-Based Derivatives do not include: (i) any BBSW-based deposits or loans,

the Settlement Class Period . . . . 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.

Westpac Settlement § 1(RR); JPMorgan Amendment ¶ 1. As the Court is aware, the Court conditionally certified substantially the same Settlement Class with respect to the JPMorgan Settlement in 2018. *See* ECF No. 229. As the same bases for conditionally certifying the JPMorgan Settlement at that time apply to the Westpac Settlement and the JPMorgan Amendment, as described below, conditional certification is also warranted here for purposes of this Settlement.<sup>7</sup>

#### **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. ¶ 37; ECF No. 229 ¶ 2. In fact, the Settlement Class definition in the Westpac Settlement includes BBSW-Based Derivatives transactions from January 1, 2003 through August 16, 2016, more than 3.5 years longer than the class period originally proposed in the

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including floating rate notes, deposit-taking facilities, and commercial loans that are priced or call for payments due, in whole or in part, based on BBSW, including Australian dollar deposits and loans (“BBSW-Based Deposits or Loans”); or (ii) any Prime Bank Bills or Prime Bank eligible securities.

<sup>7</sup> Westpac consents to conditional certification of the Settlement Class solely for the purpose of the Settlement and without prejudice to any position it may take with respect to class certification in any other action or in the event that the Settlement is terminated. Settlement § 2.

JPMorgan consents to conditional certification of the Settlement Class solely for the purpose of the Settlement and without prejudice to any position it may take with respect to class certification in any other action or in the event that the Settlement is terminated. JPMorgan Settlement § 2.

JPMorgan Settlement, thereby increasing the likely number of Settlement Class Members.<sup>8</sup> 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) (“*Dukes*”). This criteria 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.

As Representative Plaintiffs described in their motion for conditional certification with respect to the JPMorgan Settlement, there are many common questions of law and fact. *See* ECF No. 224 at 7-8. Questions such as: (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 are just some of the threshold question of overriding importance in this litigation that will be established by common evidence. As with the JPMorgan Settlement, Rule 23(a)(2) is overwhelmingly satisfied for purposes of conditional certification with respect to the Westpac Settlement.

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<sup>8</sup> Pursuant to the JPMorgan Settlement and the Order Granting Conditional Certification For Purposes of Class Action Settlement with JPMorgan, Settlement Class definition in the Westpac Settlement will apply to the JPMorgan Settlement. *See* ECF No. 229 ¶ 1 (providing that “if Representative Plaintiffs expand the Class in any subsequent amended complaint, class motion, or settlement, the defined Class in this Agreement shall be expanded . . .”).

### 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).

The Representative Plaintiffs’ and Settlement Class Members’ claims arise from the same course of conduct involving the alleged false reporting and 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).<sup>9</sup> The same conspiracy and effects therefrom that impacted Representative Plaintiffs’ transactions similarly affected the transaction all absent class members. The typicality requirement is therefore satisfied for purposes of conditional certification.

### 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

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<sup>9</sup> See also Order ¶ 5, *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 (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); Order ¶ 3, *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 (same with respect to Euroyen TIBOR and Yen-LIBOR based derivatives); Order ¶ 4, *Sullivan v. Barclays plc*, No. 13-cv-2811 (PKC) (S.D.N.Y. July 6, 2017), ECF No. 364 (same with respect to Euribor-based derivatives).

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.<sup>10</sup>

**a. Representatives 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) (“*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 between Representative Plaintiffs and the absent class members exists here for purposes of conditional certification.

All Settling Class Members share an overriding interest in obtaining the largest possible monetary recovery from Westpac (and, for that matter, all 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.”). As courts have noted, 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]

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<sup>10</sup> 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).

with settling defendants,” their interests are aligned. *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019).

**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 this Settlement and the JPMorgan Settlement. As noted in the accompanying Joint Declaration and in Plaintiffs’ previously filed conditional certification motion with respect to the JPMorgan Settlement, the firms have decades of experience litigating complex class actions, including some of most significant class action recoveries under the Sherman Act. Joint Decl., Exs. 6-7 (Firm Resumes); ECF No. 224 at 11-12. Plaintiffs’ Counsel were well-informed about the strengths and weaknesses of the claims against Westpac, having undertaken a significant investigation of the BBSW-Based Derivatives market, defended Plaintiffs’ claims in multiple motions to dismiss, and engaged in arduous negotiations with Westpac. This additional and significant settlement serves 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 Plaintiffs’ Counsel as Class Counsel for the Settlement Class in connection with the JPMorgan Settlement. *See* ECF No. 229 ¶ 4. The achievement of this Settlement only further demonstrates Plaintiffs’ Counsel’s skill and ability to lead this Action. Accordingly, the Court should similarly appoint Lowey Dannenberg and Lovell Stewart as Class Counsel for the Settlement Class with respect to the Westpac Settlement.

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

In addition to satisfying the requirements of Rule 23(a), 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.” *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.*, 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)).

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, all Representative Plaintiffs and Settlement Class Members face and must answer the same common factual and legal questions to establish personal jurisdiction, subject matter jurisdiction, conspiracy, unlawful BBSW manipulation, and the extent of this manipulation, among other matters of proof. 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. 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 229, 242 (2d Cir. 2012).

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 Antitrust Litig.*, 414 F. Supp. 3d at 702. The Court, as it

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

## II. The Court should approve the proposed plan and form of Class Notice for the Westpac Settlement and JPMorgan Settlement

As discussed above, the Settlement Class may be conditionally certified. As Representative Plaintiffs believe that the Westpac Settlement and the JPMorgan Settlement will likely be approved when the Court evaluates the Settlements' fairness, reasonableness and adequacy after a public hearing, the Court should permit notice to be issued to the Settlement Class.<sup>11</sup>

Due process and Rule 23 require that the Settlement Class receive "adequate" notice of a class action settlement. *See Wal-Mart Stores*, 396 F.3d at 113-14. Whether notice is "adequate" depends on whether it is reasonable given the circumstances. *See* FED. R. CIV. P. 23 (e)(1)(B) ("The court must direct notice in a reasonable manner to all class members who would be bound by the proposal . . ."); FED. R. CIV. P. 23(c)(2)(B) (Rule 23(b)(3) class members must be given "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."); *see also Weigner v. City of New York*, 852 F.2d 646, 649

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<sup>11</sup> While the Court's practice is to evaluate a settlement after notice to the class and hearing, Representative Plaintiffs note that, under amended Rule 23(e)(1)(B), Representative Plaintiffs are generally required to show that a settlement is likely to be approved for notice to issue. The same criteria are to be satisfied when considering whether to finally approve a settlement. *See* FED. R. CIV. P. 23(e)(2) (a court may approve a class action settlement if after hearing, it finds a settlement is fair, reasonable, and adequate after considering the adequacy of class representatives and class counsel, whether the settlement was negotiated at arm's length, if the settlement's relief for the class is adequate, and the settlement proposal treats class members equitably). Representative Plaintiffs have already described their and Plaintiffs' Counsel's adequacy. *See* Argument § I.A.4. As to the remaining criteria, the Joint Declaration details the hard-fought settlement discussions and supports a finding that the Westpac Settlement is the product of arm's-length, non-collusive negotiations. *See* Joint Decl. ¶¶ 27-34. The relief provided by the Westpac Settlement further weighs in favor of its approval. As other cases have found, "Federal antitrust cases" particularly involving numerous defendants and complex financial products and markets "are complicated, lengthy and bitterly fought as well as costly." *In re GSE Bonds*, 414 F. Supp. 3d at 693. Representative Plaintiffs bear the risk of establishing liability, proving damages, and maintaining the Action through class certification, summary judgment, trial and appeals. In comparison to the risks, the \$25,000,000 Westpac Settlement provides a substantial hedge against the risks, while permitting Plaintiffs to pursue claims against the remaining Defendants. Further, the Settlement is within the range of reasonableness based on Plaintiffs' Counsel's judgment and prior experience. Finally, the distribution of the Settlement will be designed to treat each Settling Class Member equitably based on data-driven methodology. Representative Plaintiffs will further describe the bases for approving the Westpac Settlement (as well as the JPMorgan Settlement, including the JPMorgan Amendment) when they file their motion for final approval of the settlements.

(2d Cir. 1988) (due process does not require actual notice to every class member, as long as class counsel “acted reasonably in selecting means likely to inform persons affected. Accordingly, courts are afforded “considerable discretion” in fashioning a notice plan. *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 145, 168 (2d Cir. 1987) .

The proposed Class Notice program will be facilitated by the Settlement Administrator. Plaintiffs’ Counsel requests that the Court appoint A.B. Data as Settlement Administrator with respect to the Westpac Settlement. The Court previously approved A.B. Data as Settlement Administrator of the JPMorgan Settlement (ECF No. 332). Plaintiffs’ Counsel’s recommendation that A.B. Data also serve as Settlement Administrator for the Westpac Settlement is similarly based upon A.B. Data’s anticipated charges, general knowledge, and specific experience with the administration of complex class actions.

Representative Plaintiffs’ proposed Class Notice program consists of the use of direct mail, publications, and online notice, and easily satisfies the requirements of Rule 23(c)(2)(B) and due process.<sup>12</sup> The direct mail component<sup>13</sup> involves sending the mailed notice (Joint Decl., Ex. 4) via First-Class Mail, postage prepaid to Settlement Class Members including, among others: (i) Westpac’s and JPMorgan’s known counterparties for BBSW-Based Derivatives during the Class Period based on transactional and other data provided by Westpac and JPMorgan; (ii) non-settling Defendants known counterparties for BBSW-Based Derivatives, to the extent they are identified during the course of discovery and prior to the completion of the Class Notice plan;

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<sup>12</sup> The Federal Rules require only that the notice include: “(i) the nature of the action; (ii) the definition of the [settlement] class certified; (iii) the class claims, issues, or defenses; (iv) [a directive] that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who [timely] requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members [of the settlement class] under Rule 23(c)(3).” *See* FED. R. CIV. P. 23(c)(2)(B). As described herein, both the mailed notice, Joint Decl. Ex. 4, and the publication notice, Joint Decl. Ex. 5 satisfy the Rule 23(c)(2)(B).

<sup>13</sup> The Supreme Court has consistently found that mailed notice satisfies the requirements of due process. *See, e.g., Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950).

(iii) counterparties in BBSW-Based Derivatives that were identified by market participants, including banks, brokers and futures commission merchants, pursuant to subpoenas issued by Plaintiffs' Counsel; and (iv) A.B. Data's proprietary list of banks, brokers, and other nominees, which are likely to trade or hold BBSW-Based Derivatives on behalf of themselves and their clients. *Id.*, Ex. 3 ¶ 5. If applicable, certain categories of recipients will be asked to forward the mailed notice to their clients or provide their list of clients to A.B. Data for the purpose of sending individual notice. By mailing individual notice to these various persons and entities, notice is reasonably calculated to reach all Settlement Class Members that traded BBSW-Based Derivatives. The database of these recipients will be continually updated to capture any address changes, including any changes to the counterparty information made available to A.B. Data.

The mailed notice carefully details the nature of the Action, identifies in clear and concise terms the make-up of the putative Settlement Class, and includes an ample "Background of the Litigation," which provides Settlement Class Members with an overview of the procedural history of the case, describes the claims, issues, and/or defenses presented in the Action, and explains that, upon approval of the Westpac and JPMorgan Settlements and entry of the Court's Final Judgment, the releases will be binding on all Settlement Class Members that do not opt out of the Settlements, and thus remain in the Settlement Class. Joint Decl., Ex. 4, at 2-8. The proposed mailed notice also explains that Settling Class Members will release the Released Parties described in the Westpac and JPMorgan Settlements from claims arising from the conduct alleged in the Action. *Id.*, Ex. 4 at 6-8. The mailed notice will allow Settlement Class Members to fully consider the details of the proposed Settlements and understand the range of options available to them, including their right to object to

or opt out of the Settlements, appear in court concerning the adequacy of the Settlements, or participate in the Settlements. *Id.*, Ex. 4 at 8-10.

The Settlement Administrator will publish the publication notice (*id.*, Ex. 5) in *The Wall Street Journal*, *Investor's Business Daily*, *The Financial Times*, *Stocks & Commodities*, *Global Capital*, *Hedge Fund Alert*, and *Grant's Interest Rate Observer*, and on websites *Zacks.com*, *Traders.com*, *GlobalInvestorGroup.com*, and *GlobalCapital.com*. In addition, the Settlement Administrator will publish the notice in e-newsletters from Global Investor Group, *Stocks & Commodities*, *Zacks.com*, and *Barchart.com*, as well as in email "blasts" to subscribers of *Stocks & Commodities* and *Zacks.com*. The Settlement Administrator also will disseminate a news release via PR Newswire's US1 Newswire distribution list to announce the Settlement, which will be distributed to the news desks of approximately 10,000 newsrooms, including print, broadcast, and digital websites across the United States. Any Settlement Class Members that do not receive the Class Notice via direct mail likely will receive it through one of the foregoing publications or by word of mouth.

Finally, the Settlement Administrator will continue to maintain the Settlement Website, [www.BBSWSettlement.com](http://www.BBSWSettlement.com), that will serve as a source for Settlement Class Members to obtain necessary information regarding the Settlement. From the Settlement Website, Settlement Class Members can review and obtain: (i) a blank Proof of Claim and Release form for the Settlement (when available); (ii) the full-length mailed and publication notices; (iii) the proposed Distribution Plan (when available); (iv) the Westpac Settlement; (iv) the JPMorgan Settlement; and (v) key pleadings and Court orders. This resource will be supplemented by a toll-free telephone number and email address, which Settlement Class Members can use to contact the Settlement Administrator

with questions and to facilitate the filing of claims. Of course, Plaintiffs' Counsel will also remain available to answer questions and assist Settlement Class Members as needed.

This type of multi-faceted notice program, which combines individual mailed notice and publication notice, has routinely been approved by federal courts in complex class actions, including those prosecuted in this Circuit. *See, e.g., Wal-Mart Stores*, 396 F.3d at 105 (affirming “notice plan that required mailing the settlement notice to class members and publishing a condensed version of the settlement notice in numerous widely-distributed publications.”). The Class Notice plan A.B. Data proposes in this case is similar to notice plans that have been approved for use in other complex class actions in this district.<sup>14</sup> Thus, Representative Plaintiffs respectfully request that the Court approve the proposed Class Notice plan and appoint A.B. Data as Settlement Administrator with respect to the Westpac Settlement.

**III. Representative Plaintiffs will return to the Court for approval of the Distribution Plan and Proof of Claim and Release Form following receipt of Cooperation Materials and Discovery from Non-Settling Defendants.**

In this case, it is appropriate for the Court to conditionally certify the Class for settlement purposes and approve the issuance of Class Notice without first approving the Distribution Plan. Representative Plaintiffs expect to submit a proposed Distribution Plan and Proof of Claim and Release form at least 90 days prior to the fairness hearing.

The Court is not required to approve the Distribution Plan before conditionally certifying the settlement class. Courts routinely approve settlements before any plan of allocation exists. *See Order Preliminarily Approving Proposed Settlement with Deutsche Bank AG and DB Group Services (UK) Ltd., Scheduling Hearing for Final Approval of Proposed Settlements with Barclays*

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<sup>14</sup> *See, e.g., Laydon v. Mizubo Bank, Ltd.*, No. 12-cv-3419 (S.D.N.Y.) and *Sonterra Capital Master Fund, Ltd. v. UBS AG*, No. 15-cv-5844 (S.D.N.Y.) (Euroyen-based derivatives); *Sullivan v. Barclays plc*, No. 13-cv-2811 (S.D.N.Y.) (Euribor products); *In re Libor-Based Fin. Instruments Antitrust Litig.*, No. 11-md-2262 (NRB) (exchange-based products); *In re Crude Oil Commodity Futures Litig.*, No. 11-cv-3600 (S.D.N.Y.) (exchange-traded products).

plc, Barclays Bank plc, Barclays Capital Inc., HSBC Holding plc, HSBC Bank plc, Deutsche Bank AG and DB Group Services (UK) Ltd., and Approving the Proposed Form and Program of Notice to the Class ¶ 23, *Sullivan v. Barclays plc et al.*, No. 13-cv-2811 (PKC) (S.D.N.Y. Jul. 6, 2017), ECF No. 364 (deferring submission and consideration of the distribution plan to a later date); Order Preliminarily Approving Settlements, Conditionally Certifying the Settlement Classes, and Appointing Class Counsel and Class Representatives for the Settlement Classes ¶ 8, *In re Foreign Exchange Benchmark Rates Antitrust Litig.*, No. 13-cv-7789 (LGS) (S.D.N.Y. Dec. 15, 2015), ECF No. 536 (same); *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.”); *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). Once the Distribution Plan and Proof of Claim and Release form are prepared and submitted to the Court for approval, they will be provided on the Settlement Website for Class Member to review prior to the deadline to file objections or opt out of the Settlements. The Class Notice will advise Settlement Class Members to check the Settlement Website for the Distribution Plan and Proof of Claim and Release form. *See* Joint Decl. Ex. 4 at 6, 10.

This Action is complex, as Representative Plaintiffs allege that the manipulation of BBSW had an impact on a number of financial products over an extended period of time. To determine a fair and equitable method to distribute the Net Settlement Fund, Representative Plaintiffs will further engage economic experts, industry professionals, and others to comprehensively analyze the cooperation received from JPMorgan and Westpac, as well as transaction and other data from other sources. These various sources will provide further information about the impact of the alleged manipulation. Only then will Representative Plaintiffs’ experts be able to build a data-driven allocation model that will distribute the settlement proceeds in a cost-efficient and effective manner

to qualifying Settlement Class Members. 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 for later review by the Court, after conditional class certification.

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

The Settlement requires Plaintiffs' Counsel, with Westpac's consent, to designate an Escrow Agent to maintain the Settlement Fund. Plaintiffs' Counsel have designated Citibank, N.A. to serve as Escrow Agent for the Westpac Settlement. Citibank 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. The Court previously appointed Citibank as Escrow Agent for the JPMorgan Settlement. ECF No. 229. 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 Settlement Class for the Westpac Settlement pursuant to FED. R. CIV. P. 23(a) and 23(b)(3) subject to later, final approval of such Settlement Class; (b) conditionally certifies the Settlement Class for the JPMorgan Settlement pursuant to FED. R. CIV. P. 23(a) and 23(b)(3) subject to later, final approval of such Settlement Class; (c) conditionally appoints Lowey Dannenberg and Lovell Stewart as Class Counsel for the Settlement Class; (d) approves the proposed plan and forms of the Class Notice for the Westpac and JPMorgan Settlements; (e) appoints A.B. Data as the Settlement Administrator for the Westpac Settlement; (f) directs Representative Plaintiffs to develop a Distribution Plan and Proof of Claim and Release form for the Westpac and JPMorgan Settlement for later approval by the Court; (g) appoints Citibank, N.A. as the Escrow Agent for the Westpac Settlement; and (g) stays all



proceedings against Westpac and JPMorgan until the Court renders a final decision on approval of the Settlement.

Accordingly, Representative Plaintiffs respectfully request that the Court enter (1) the [Proposed] Order Granting Conditional Class Certification for Purposes of Class Action Settlement with Westpac Banking Corporation and (2) the enclosed [Proposed] Superseding Order Granting Conditional Class Certification for Purposes of Class Action Settlement with JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A., filed herewith.

Dated: March 1, 2021  
White Plains, New York

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