UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IOWA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, *et al.*, Plaintiffs, v. BANK OF AMERICA CORPORATION, *et al.*, Defendants.	Case No. 17-cv-6221 (KPF) (SLC) Hon. Katherine Polk Failla

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF THE CREDIT SUISSE AND NEW SETTLEMENT AGREEMENTS, CERTIFICATION OF THE SETTLEMENT CLASSES, AND FINAL APPROVAL OF THE PLANS OF ALLOCATION

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PRELIMINARY STATEMENT

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs respectfully request that the Court grant final approval to the Credit Suisse Settlement and the New Settlement Agreements (collectively, "the Settlements"),[1] grant final approval to the Plans of Allocation, and certify the Settlement Classes.

The Settlements—which resolve this antitrust class action litigation with all but one Defendant—were reached after years of hard-fought litigation and extensive arm's-length negotiations between experienced counsel. The Settlements provide an excellent result for the Settlement Classes. The $580,008,750 cash portion of the settlements alone would rank this settlement twelfth amongst all private antitrust class action settlements in the 2009-2022 time period, and it is one of the few large private antitrust class action settlements achieved without the assistance of a parallel government investigation or action.[2] The New Settlement *also* includes forward-looking industry-reforms that Plaintiffs believe will further promote a competitive market for all stock-loan market participants. It is rare that private plaintiffs (as opposed to the government) achieve industry reforms as part of the settlement of a purely civil lawsuit. And the Settling Defendants, as part of the Settlements, also agreed to certain cooperation provisions which will assist Plaintiffs' case against the one remaining Defendant, Bank of America.

The partial Settlements are fair, reasonable, and adequate. They satisfy the requirements of Rule 23(e)(2) as well as each of the applicable factors under *City of Detroit v. Grinnell Corp.*,

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[1] All capitalized terms not otherwise defined herein have the meanings set forth in the Settlement Agreements and the May 8, 2024 Joint Declaration of Daniel L. Brockett and Michael B. Eisenkraft (the "Joint Declaration" or "Joint Decl."), submitted herewith.

[2] *See* Ctr. for Litig. & Courts, Univ. of Cal. San Francisco & Huntington Nat'l Bank, *2022 Antitrust Annual Report* 25-26 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4586022.

495 F.2d 448 (2d Cir. 1974), the Second Circuit's seminal decision on settlement approval standards.

The proposed Plans of Allocation not only have a "reasonable, rational basis," but provide for an equitable and efficient distribution of the Settlement Funds among class members. The Plans of Allocation are rooted in the damages models set forth in support of class certification, designed by world-renowned economists Professors Paul Asquith and Parag Pathak. The Plans are recommended by Co-Lead Counsel who are closely acquainted with the facts of this action and who litigated this case for over six years.

Finally, as this Court recognized when granting preliminary approval, the Settlement Classes meet all requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy—as well as the predominance and superiority requirements of Rule 23(b)(3). The preliminarily certified Settlement Classes should therefore be granted final certification for settlement purposes under Rules 23(a) and 23(b)(3).

SUMMARY OF THE ACTION AND THE SETTLEMENTS

Following a proprietary investigation undertaken without the benefit of any government action, Cohen Milstein Sellers & Toll PLLC and Quinn Emanuel Urquhart & Sullivan, LLP ("Co-Lead Counsel") filed an initial complaint in August of 2017 on behalf of the Iowa Public Employees' Retirement System, the Sonoma County Employees' Retirement Association, and the Orange County Employees Retirement System alleging a conspiracy among major dealers in stock loans to jointly boycott efficient, all-to-all trading platforms and price-transparency. Compl., ECF No. 1. No complaints were filed by other counsel. In November 2017, Co-Lead Counsel filed an amended complaint which expanded the factual allegations with respect to the conspiracy and added the Los Angeles County Employees Retirement Association and Torus

Capital, LLC as additional named plaintiffs and putative class representatives. Am. Compl., ECF No. 73.

In September 2018, after full briefing, the Court denied Defendants' motions to dismiss in their entirety. Op. and Order, ECF No. 123.

Following that ruling, the parties engaged in extensive discovery, reviewing millions of documents, analyzing terabytes of data, and completing nearly 100 depositions of fact witnesses, Plaintiffs, third parties, and experts. The parties also submitted multiple briefs on Plaintiffs' extensive class certification motion, a process that began in February 2021 with the filing of the opening motion. Pls.' Mot. for Class Certification, ECF No. 411. It is still ongoing even today, as in 2024 the Court is considering various objections to Magistrate Judge Cave's Report and Recommendation, in which she recommended certifying nearly all of the requested litigation class after reviewing multiple rounds of briefing and holding a full day hearing.

In February 2022, while Magistrate Judge Cave's Report and Recommendation was still pending, the parties entered into, and the Court preliminarily approved, the Credit Suisse Settlement. Order Prelim. Approving Settlement Agreement, ECF No. 529. In September 2023, after Magistrate Judge Cave issued her Report and Recommendation, but before the Court resolved the parties' objections, the parties entered into and the Court preliminarily approved the New Settlement Agreement. Order Prelim. Approving Settlement Agreement, ECF No. 654.

In March 2024, the Court granted the proposed plan for providing notice to the Settlement Classes. *See* Order Providing Notice to the Settlement Classes, ECF No. 664 (the "Notice Order"). The Settlement Administrator administered the notice plan in accordance with the Notice Order, as discussed in Section II below.

Together, the Settlements provide for $580,008,750 in total payments to the Settlement Funds, as well as substantial and valuable equitable relief. *See* Stip. & Agreement of Settlement with Credit Suisse Group, ECF No. 521-1; Stip. & Agreement of Settlement with Goldman Sachs, Morgan Stanley, JPMorgan, UBS, and Equilend, ECF No. 652-1. The equitable relief implements new antitrust compliance requirements for Defendant EquiLend, designed to prevent and detect the re-emergence of the conspiracy alleged in this case. They include concrete, practical measures such as limitations on EquiLend owners' board membership, term limits for board members, rotation of antitrust compliance counsel, recordkeeping requirements, and limits on the sharing of sensitive information. Dr. Rosa Abrantes-Metz, a Ph.D. economist with deep experience in the study, detection, and prevention of collusion, estimates the value of this relief at an additional $319 million. *See* Joint Decl. Ex. A ("Abrantes-Metz Rept.") ¶¶ 16, 36-79.

Plaintiffs respectfully refer the Court to the accompanying Joint Declaration for a more fulsome discussion of the factual background and procedural history of the action, the extensive efforts undertaken by Plaintiffs and Co-Lead Counsel, the risks of continued litigation, and a discussion of the negotiations leading to the Settlements.

ARGUMENT

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

A. Public Policy Favors and Encourages Settlements of Class Actions

"The compromise of complex litigation is encouraged by the courts and favored by public policy." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005). The Second Circuit acknowledges the "strong judicial policy in favor of settlements, particularly in the class action context." *Id*. (citation omitted); *see also In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 174 (S.D.N.Y. 2014) ("The law favors settlement, particularly in

class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation.").

B. Class Action Settlements Warrant Approval When They Are Fair, Reasonable, and Adequate

Final approval of a class action settlement is appropriate where the court determines the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). "Courts evaluating the fairness, reasonableness, and adequacy of a proposed settlement must consider the four factors outlined in Rule 23(e)(2) holistically . . . [as well as] our traditional *Grinnell* factors, which remain a useful framework for considering the substantive fairness of a settlement." *Moses v. New York Times Co*., 79 F.4th 235, 243 (2d Cir. 2023). Both procedural and substantive fairness are considered in evaluating class action settlements. *See Wal-Mart*, 396 F.3d at 116 ("A court determines a settlement's fairness by looking at both the settlement's terms and the negotiating process leading to settlement.").

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

> (2) *Approval of the Proposal*. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
>
> (A) the class representatives and class counsel have adequately represented the class;
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> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

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

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

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Grinnell, 495 F.2d at 463 (citations omitted). *See Moses*, 79 F.4th at 243 ("the revised Rule 23(e)(2) does not displace our traditional *Grinnell* factors"). In assessing the fairness of a class action settlement, "[a]ll nine [*Grinnell*] factors need not be satisfied, rather, the court should consider the totality of these factors in light of the particular circumstances." *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003).

In preliminarily approving the Settlements, the Court made initial determinations that it would likely be able to conclude that the Settlements were each fair, reasonable, and adequate, and satisfied the requirements of Rule 23(e). As detailed below, there is no reason to backtrack from that initial determination.

C. The Proposed Settlements Are Procedurally Fair

1. Plaintiffs and Co-Lead Counsel have adequately represented the Settlement Classes

Under the first prong of Rule 23(e)(2), the Court must consider that "the class representatives and class counsel have adequately represented the class" prior to approving a proposed class action settlement. Fed. R. Civ. P. 23(e)(2)(A). Rule 23(e)(2) overlaps with the third *Grinnell* factor, which considers "whether the parties had adequate information about their claims such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement." *In re Bear Stearns Cos., Inc. Sec., Derivative and ERISA Litig.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012).

Plaintiffs and Co-Lead Counsel have adequately represented the Settlement Classes as required by Rule 23(e)(2)(A). As described in more detail in the accompanying Joint Declaration, Co-Lead Counsel, who are highly experienced in antitrust class action litigation, litigated this case fiercely for over six years—completing fact discovery, class expert discovery, and fully briefing and arguing class certification. Co-Lead Counsel thus "developed a comprehensive understanding of the key legal and factual issues in the litigation and, [consistent with *Grinnell*,] . . . had 'a clear view of the strengths and weaknesses of their case' and of the range of possible outcomes at trial" at the time the Settlements were reached. *City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *7 (S.D.N.Y. May 9, 2014). Co-Lead Counsel believe the monetary portions represent an excellent recovery on behalf of the Settlement Classes, and that the industry reforms will provide additional significant value to class members by promoting a competitive market going forward.

Thus, the requirements of Rule 23(e)(2)(A) are satisfied and the third *Grinnell* factor weighs in favor of settlement. *See also Oleniak v. Time Warner Cable Inc.*, 2013 WL 12447094, at *6 (S.D.N.Y. Dec. 17, 2013) (third *Grinnell* factor weighs in favor of final approval when "over the course of more than a year before entering into settlement discussions, Plaintiffs obtained substantial informal and formal discovery, including documentary evidence, deposition testimony, and data on class members' damages").

2. The proposed Settlements were negotiated at arm's length

Rule 23(e)(2)(B) requires that the Settlements be the result of arms-length negotiations. They are. Specifically, the Credit Suisse settlement resulted from a series of negotiations between Lead Counsel and Credit Suisse's Outside Counsel, Herb Washer, a partner at Cahill Gordon & Reindel LLP and the Chair of Cahill's Executive Committee. The New Settlement Agreement took place as a result of a mediation process between Co-Lead Counsel and the remaining Settling Defendants' Outside Counsel—the prominent law firms of Paul, Weiss, Rifkind, Wharton & Garrison LLP; Cleary Gottlieb Steen & Hamilton; Covington & Burling LLP; Cravath, Swaine & Moore LLP; and Katten Muchin Rosenman LLP—and overseen by Judge Layn Phillips (Ret.). *See generally Pearlstein v. BlackBerry Ltd.*, 2022 WL 4554858, at *7 (S.D.N.Y. Sep. 29, 2022) (citing favorably involvement of "highly regarded" mediator Judge Philips); Transcript of Fairness Hearing at 19-20, *In re Wells Fargo & Co. Sec. Litig.*, No. 1:20-cv-04494 (S.D.N.Y. June 11, 2020), ECF No. 211 ("The involvement of an experienced mediator such as Judge Phillips supports a finding that the settlement was negotiated at arm's length.").

D. The Proposed Settlements Are Substantively Fair

At final approval, the Court's role is not to "decide the merits of the case or resolve unsettled legal questions," or "foresee with absolute certainty the outcome of the case," but rather

to "assess the risks of litigation against the certainty of recovery under the proposed settlement." *Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666, at *10 (S.D.N.Y. Mar. 24, 2014).

1. The proposed Settlements are adequate in light of the costs, risk, and delay of trial and appeal

Rule 23(e)(2)(C)(i) codifies many of the *Grinnell* factors, which guide a court's assessment of the fairness of a proposed settlement in light of the attendant risks. Under Rule 23(e)(2)(C)(i), district courts consider "the costs, risks and delay of trial and appeal," while the relevant *Grinnell* factors overlap and address the risks of establishing liability and damages, taking into consideration: the complexity, expense, and likely duration of the litigation (factor 1); the risks of establishing liability (factor 4); establishing damages (factor 5); maintaining the class action through trial (factor 6); the ability of the defendants to withstand a greater judgment (factor 7); and the range of reasonableness of the settlement fund in light of the best possible recovery (factor 8) and in light of all the attendant risks of litigation (factor 9). Fed. R. Civ. P. 23(e)(2)(C)(i); *see Grinell*, 495 F.2d at 463.

(a) The complexity, expense, and likely duration of the litigation (Grinnell factor 1)

"The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation." *Advanced Battery*, 298 F.R.D. at 174. Numerous courts have recognized that "federal antitrust cases are complicated, lengthy, and bitterly fought." *Wal-Mart*, 396 F.3d at 118; *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *4 (E.D.N.Y. Oct. 23, 2012) ("Federal antitrust cases are complicated, lengthy . . . [and] bitterly fought as well as costly.").

This certainly has been true for this matter. Since the case was first filed over six years ago, fact discovery has consumed tens of thousands of hours of attorney time and required nearly 100 depositions, the analysis of terabytes of transaction data, and the handling of over half a

billion pages of documents. The class certification motion and attendant briefing encompassed hundreds of pages of briefing and exhibits, including expert reports by some of the world's foremost economists. As detailed in the accompanying fee brief and supporting materials, this effort has required monumental investments in attorney time and up-front expenses, totaling over $97 million in attorney lodestar at historical rates (more than $146 million at current rates) and nearly $19 million of expenses—almost all of which went to pay economic experts and their data analysis teams and to maintain the case's extraordinary documentary record.

But the Settlements avoid even more time and expense that would otherwise be required. Absent the Settlements, after this Court's decision on class certification, the parties would likely still need to complete merits expert discovery, brief summary judgment, and then go to trial, where, after a verdict was issued, one side would doubtless appeal. This process would inevitably take years and cost tens of millions of dollars more in attorney time and expenses. Though Plaintiffs will continue to pursue the case against the last remaining Defendant, the Settlements simplify the case going forward and provide cash and equitable relief to class members right now, instead of years down the line. Accordingly, the complexity, expense, and likely duration of the litigation (*Grinnell* factor 1), strongly favors approving the Settlements.

(b) The reaction of the class to the settlement (Grinnell factor 2)

Plaintiffs will provide updated information with respect to the reaction of the class to settlement in their reply brief closer to the final approval hearing. At this point, however, no objections to the Settlements or exclusions have been received.[3] *See* May 8, 2024 Declaration of Cameron R. Azari ("Azari May 2024 Decl.") ¶ 25.

[3] As today's papers were being finalized, the settlement administrator received one request for exclusion from an individual who indicated he did not know whether he is a member of the class. If appropriate, further details will be included in reply briefs.

(c) The risk of establishing liability and damages (Grinnell factors 4 and 5)

The Court's role in evaluating the risks of establishing liability and damages is not to evaluate the plaintiffs' likelihood of success, but rather to "balance the benefits afforded the Class, including immediacy and certainty of recovery, against the continuing risks of litigation." *In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 37 (E.D.N.Y. 2019).

Although Plaintiffs and Co-Lead Counsel firmly believe that the claims asserted are meritorious, there are risks that make recovery uncertain. Defendants, throughout this litigation, have repeatedly challenged, among other things, whether any conspiracy existed at all and, even if there was a conspiracy, whether it damaged class members. Specifically, Defendants argue that the Platforms themselves would not have succeeded even if there were no group boycott by Defendants. At class certification, which was still pending before this Court at the time of settlement and as of this filing, Defendants assembled a small army of experts who attacked Plaintiffs' motion for class certification on numerous grounds, including whether Plaintiffs had sufficiently demonstrated classwide impact.

Moreover, it is often said that antitrust cases involve a trial boiling down to a "battle of the experts" on proof of damages. *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998). Further, "the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal." *Id*.

For many reasons, then, continued litigation of even Plaintiffs' strong claims would involve a risk that the litigation would nonetheless fail, or that the scope of the claims would be significantly narrowed, resulting in a smaller recovery, or no recovery, in the absence of the

Settlements. The risks of establishing liability and damages underscore the reasonableness of the Settlements and *Grinnell* factors 4 and 5 weigh strongly in favor of approving the Settlements.

(d) The risks of maintaining the class action through the trial (Grinnell factor 6)

For the reasons set forth in Plaintiffs' motion papers and in their defense of Magistrate Judge Cave's Report and Recommendation, Plaintiffs and Co-Lead Counsel are confident that the Court will certify a litigation class as all of the requirements of Rules 23(a) and 23(b)(3) are satisfied. But the very fact that the certification issue remains pending after three years confirms the risk of proceeding through litigation rather than through settlement. *See Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) ("While plaintiffs might indeed prevail [on a motion for class certification], the risk that the case might be not certified is not illusory and weighs in favor of the Class Settlement."). Even a certified litigation class could be challenged on appeal, or at another stage in the litigation, as Bank of America points out occurred recently in another large case against major banks. *See* Letter, ECF No. 659.

There is thus a risk that the action, or particular claims, might not be maintained as a class action through trial, and that class certification may be re-reviewed at any stage of the litigation. *See* Fed. R. Civ. P. 23(c) (authorizing a court to decertify a class at any time). The risks and uncertainty associated with class certification thus strongly weigh in favor of approving the Settlements.

(e) Defendants' ability to withstand a greater judgment (Grinnell factor 7)

The financial obligations the Settlements impose on the Settling Defendants are substantial, and are coupled with industry reforms and cooperation obligations. Settling Defendants could presumably withstand a greater monetary judgment than the amount paid in settlement, "'[b]ut a defendant is not required to empty its coffers' before a settlement can be

found adequate." *Shapiro v. JP Morgan Chase & Co.*, 2014 WL 1224666 at *11 (S.D.N.Y. Mar. 24, 2014); *see also Weber v. Gov't Emps. Ins. Co.*, 262 F.R.D. 431, 447 (D.N.J. 2009) ("[I]n any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and, against the weight of the remaining factors, this fact alone does not undermine the reasonableness of the instant settlement."). In addition, "the benefit of obtaining the cooperation of the Settling Defendants tends to offset the fact that they would be able to withstand a larger judgment." *In re Pressure Sensitive Labelstock Antitrust Litig.*, 584 F. Supp. 2d 697, 702 (M.D. Pa. 2008). The collective monetary benefit, coupled with the reforms and the cooperation, weigh in favor of approval.

(f) The proposed Settlement Amount is reasonable in view of the best possible recovery and the risks of litigation (Grinnell factors 8 and 9)

In analyzing the fairness of a proposed settlement, the court must consider whether it falls within a "range of reasonableness"; that is, "[t]he adequacy of the amount offered in settlement must be judged 'not in comparison with the best possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of the plaintiffs' case.'" *In re PaineWebber Ltd. P'ship Litig.*, 171 F.R.D. 104, 130 (S.D.N.Y. 1997) (citation omitted); *see also Wal-Mart*, 396 F.3d at 119. Indeed, because of the riskiness of litigation, "[i]n fact there is no reason . . . why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Grinnell*, 495 F.2d at 455 n.2. Here, the scope of potential damages was variable at the time of settlement. While Plaintiffs' experts estimated damages for the entire proposed class period to be in the billions, Defendants' experts opined that damages for that same class period were zero.

Given this uncertainty, the fact that the proposed partial Settlements offer the opportunity for immediate relief of $580,008,750 now—a historically-sized settlement amount—rather than

speculative relief years down the road, weighs significantly in favor of settlement. *See In re Namenda Direct Purchaser Antitrust Litig.*, 462 F. Supp. 3d 307, 316 (S.D.N.Y. 2020) ("The court has no idea what maximum damages really might be. The settlement is quite large. It is, on its face, reasonable."); *In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 93 (S.D.N.Y. 2007) ("The prospect of an immediate monetary gain may be more preferable to class members than the uncertain prospect of a greater recovery some years hence.").

It is also important to consider the value of the forward-looking relief, which benefits class members and may never have been secured at trial. As noted above, the New Settlement includes significant reforms to EquiLend designed to prevent and detect future collusive behavior of the kind that sparked this case. Dr. Rosa Abrantes-Metz, a highly respected economist specializing in collusion and antitrust compliance, helped design these reforms with an eye toward using the same criteria the government uses when designing compliance programs. *See* Abrantes-Metz Rept. § III.A-B.

Dr. Abrantes-Metz also provides an estimate of the value of this compliance program, using a relatively straightforward formula: the harm that would be caused if the conspiracy were renewed times the estimated reduction in the probability that the cartel will re-emerge attributable to the reforms. *Id.* ¶ 38. Using such inputs as the total value of borrowed stock for each year, the spread reduction estimated by Professors Asquith and Pathak's expert work in this case, and a review of the economic literature, she estimates the annual harm that would be caused by a renewed cartel at $1.828 billion. *Id.* § IV.A(2). Dr. Abrantes-Metz then used a net-present value calculation, as well as estimates as to the reduction in recidivism probability that will be achieved by the reforms. *See id.* ¶¶ 68, 70. Putting this all together, Dr. Abrantes-Metz derives a best-estimate net present value of the EquiLend reforms at $319 million.

The cooperation elements, too, enhance the value of the Settlements.[4]

Finally, all these benefits are in addition to the ability to secure further amounts from the non-settling Bank of America defendants. *See, e.g.*, *In re Domestic Airline Travel Antitrust Litig.*, 378 F. Supp. 3d 10, 21 (D.D.C. 2019).

In light of the complex legal and factual issues present here, the fairness of the proposed Settlements is apparent. Accordingly, Plaintiffs respectfully submit that the settlement terms are well "within the range of reasonableness" in light of the risks of litigation and that *Grinnell* factors 8 and 9 heavily favor approval of the Settlements.

2. The claims process is fair and rational, and the proposed method for distributing relief is effective

With respect to Rule 23(e)(2)(C)(ii), Plaintiffs and Co-Lead Counsel have undertaken substantial efforts to ensure that members of the Settlement Classes are notified about the proposed Settlements. As an initial matter, the Plans of Allocation here are distinct from the settlement terms. *See* ECF No. 521-1 ¶ 1.27; ECF No. 652-1 ¶ 1.27. On such facts, courts can approve settlements even without any allocation plan. *See In re Agent Orange Prod. Liab. Litig. MDL 381*, 818 F.2d 145, 170 (2d Cir. 1987) ("The prime function of the district court in holding a hearing on the fairness of the settlement is to determine that the amount paid is commensurate with the value of the case. This can be done before a distribution scheme has been adopted so long as the distribution scheme does not affect the obligations of the defendants under the

[4] *See generally Precision Assocs. v. Panalpina World Transp. (Holding) Ltd.*, 2013 WL 4525323, at *9 (E.D.N.Y. Aug. 27, 2013) ("cooperation adds considerable value to the Settlement and must be factored into an analysis of the overall reasonableness of the agreement").

settlement agreement.").[5] To the extent this factor is nonetheless relevant to the Settlements here, it favors approval.

A "claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." Advisory Committee's Notes to 2018 Amendments to Rule 23. As described in Plaintiffs' memorandum in support of their motion to preliminarily approve the notice and allocation plans (ECF No. 661, the "Notice Motion"), the claims process here allows for hardcopy and electronic submissions to the Settlement Administrator using a simplified Claim form, requiring each member of the Settlement Classes to provide data regarding their qualifying transactions. This must be provided under penalty of perjury, and all claimants must also agree to submit themselves to audit, including the obligation to provide document and other information upon request. Thus, this factor supports final approval. *See also infra* Sections II, III (requesting final approval of notice and allocation plans).

3. The proposed award of attorneys' fees supports final approval

Rule 23(e)(2)(C)(iii) requires courts to examine "the terms of any proposed award of attorneys' fees, including timing of payment" as part of its adequacy assessment. Fed. R. Civ. P. 23e(2)(C)(iii). Again, as an initial matter, here the Settlements expressly provide that binding nature of the agreements do not turn on the approval of any fee request. *See* ECF No. 521-1 ¶

[5] *See also, e.g.*, *In re HealthSouth Corp. Sec. Litig.*, 334 Fed. App'x 248, 251, 253-255 (11th Cir. 2009) (rejecting contention that notice was insufficient for not setting for allocation plan; if class members needed certainty on allocation plan they "could have opted out"); *In re NASDAQ*, 187 F.R.D., at 480; *In re Washington Pub. Power Supply Sys. Secs. Litig.*, 1988 WL 158947, at *3-4 (W.D. Wash. 1988); 2 McLaughlin on Class Actions § 6:23 (18th ed. 2021) ("Because court approval of a settlement as fair, reasonable and adequate is conceptually distinct from the approval of a proposed plan of allocation, however, courts frequently approve them separately."); Annotated Manual for Complex Litig. § 21.312 (4th ed. May 2021 update) ("Often, however, the outcome of objections . . . and the details of allocation and distribution are not established until after the settlement is approved.").

8.4; ECF No. 652-1 ¶ 8.4. Even that aside, Co-Lead Counsel's fee request should not delay approval of the Settlements themselves.

At the preliminary approval stage, and as described in the Notice Plan mailed to potential members of the Settlement Classes, Co-Lead Counsel represented that they would apply for attorneys' fees not to exceed $105,000,000 million, plus interest. As discussed in Co-Lead Counsel's fee brief, Co-Lead Counsel's final request for $102,200,000 plus proportionate interest accrued in the Settlement Fund accounts is both *less* than what was stated in the notice, and reasonable under the circumstances. The requested fee award amount is equivalent to approximately 17.6% of the cash component of the settlement, which is already less than standard even in "mega-fund" cases like this one. And this comparison, of course, does not even take into account the industry reforms achieved here, relief that an expert valued at $319 million. The requested fee is thus really equivalent to only about 11.4% of the total value provided to the class.

The lodestar cross-check further supports the reasonableness of the proposed award of attorneys' fees. While "[c]ourts regularly award lodestar multipliers of 2 to 6 times lodestar," in this Circuit as to compensate counsel for taking on risk, *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *17 (S.D.N.Y. Sept. 9, 2015), the lodestar multiplier here is basically non-existent. Using historic rates it is approximately 1.05, and at current rates it is approximately 0.70.

Thus, Co-Lead Counsel's separate fee request should not hold up approval of the Settlements themselves. If anything, this factor also weighs in favor of approval.

4. The parties have no other agreements in connection with the Settlements

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

P. 23(e)(2)(C)(iv) and 23(e)(3). No agreement outside of the Settlements exists. While it may not be relevant to this factor, as disclosed in moving for preliminary approval, the Settlements include a standard supplemental agreement which provide that in the event that a "material portion" of the eligible transactions opts out, certain relief can be requested by the Settling Defendants. The Settlements also include a judgment-reduction term relevant to the value of claims to be pursued against the non-settling Bank of America Defendants. As no agreements exist outside of the Settlements, this factor strongly weighs in favor of final approval.

5. Class members are treated equitably

The final factor, Rule 23(e)(2)(D), looks at whether members of the Settlement Classes are treated equitably. *See Moses*, 79 F.4th at 245 ("It bears emphasis that Rule 23(e)(2)(D) requires that class members be treated equitably, not identically."). The proposed Settlements are designed to do precisely that.

With respect to the Plans of Allocation, as discussed in Section II below, the Plans treat all class members in a similar manner: everyone who submits a valid and timely Proof of Claim and Release form, and did not exclude himself, herself, or itself from a Settlement Classes, will be subject to a common set of rules for "multipliers" reflective of different litigation risks, and then will receive an adjusted *pro rata* share of the Net Settlement Funds or a standard alternative minimum payment.

To the extent found relevant here, the requested service awards (also known as "incentive awards") are also in line with principles of equitable treatment. As recently recognized by the Second Circuit:

> [T]he equitable-treatment requirement protects the interests of class representatives who play an active role in the litigation—often providing the background information that forms the basis of the lawsuit, engaging in fact discovery, and devoting considerable time and effort into the settlement process—"from having absent class members free ride on their efforts." 5 Newberg and Rubenstein on Class Actions §§ 17:3-4 (explaining that "if

> the class representatives face particular risks in serving the class and/or undertake valuable work on behalf of the class but cannot recover any of the costs of those efforts through an incentive fee award, they have a fair argument that the settlement is not treating them equitably relative to the absent class members").

Moses, 79 F.4th at 245. Here, as described in the fee brief, the proposed service awards, which collectively make up less than one tenth of one percent of the cash portion of the Settlements, are reasonable and promote equity between the named plaintiffs and absent class members.

Thus, this factor also militates in favor of granting final approval of the proposed Settlements.

E. The Reaction of the Settlement Classes Merits Approval

"[A] favorable reception of the settlement" is "strong evidence" that a proposed settlement is fair. *Grinnell Corp.*, 495 F.2d at 462. As noted above, Plaintiffs will update the Court as to any objections or exclusion requests received in their reply papers, but none have been received thus far.

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

At the preliminary approval stage, after a careful review the Court found that the proposed notice plan was the "best notice practicable" and was "reasonably calculated, under the circumstances, to apprise members of the Settlement Classes" of their rights. *See* Notice Order at 3. "There are no rigid rules to determine whether a settlement notice to the class satisfied constitutional or Rule 23(e) requirements; the settlement notice must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Wal-Mart*, 396 F.3d at 114. Actual notice to every class member is not required; rather, counsel need only act "reasonably in selecting means likely to inform the persons affected." *Jermyn v. Best Buy Stores, L.P.*, 2010 WL 5187746, at *3 (S.D.N.Y. Dec. 6, 2010).

Courts in the Second Circuit have held that notice plans are adequate when they combine first-class mail with extensive publication notice. *See Wal-Mart*, 396 F.3d. at 104. Notice is adequate "if the average person understands the terms of the proposed settlement and the options provided to class members thereunder." *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 133 (S.D.N.Y. 2008).

As described first in Plaintiffs' Notice Motion, the notice materials and the method utilized to disseminate the materials to potential members of the Settlement Classes satisfy these standards. The notice materials informed class members of, among other things, (i) the nature of the lawsuit; (ii) the claims involved and the parties' positions; (iii) what it means for the Settlements to have been reached; (iv) a summary of the terms of the Settlements, including the monetary relief, forward-looking relief, scope of the release, and cooperation obligations; (v) the definition of the Settlement Classes; (vi) a description of the Plans of Allocation and where on the Settlement website to find more detailed information about Settlement Fund allocations; (vii) the procedures and deadlines for submitting a Claim Form in order to receive a payment from a Settlement Fund; (viii) the deadlines and procedures for exclusion from the Settlement Classes, objecting to the Settlements, and attending the Fairness Hearing; (ix) that members of the Settlement Classes may, but need not, appear through their own counsel at the Fairness Hearing; (x) the binding effect of participating in the Settlements; (xi) the identity of Co-Lead Counsel; and (xii) Co-Lead Counsel's intention to move for an award of fees, expenses, and incentive awards. The Court, after reviewing the versions of the notice materials, approved the Notice Plan and found the documents to amply apprise members of the Settlement Classes of their rights.

Pursuant to the Notice Order, the Court-approved Settlement Administrator timely sent more than 150,000 notice packets to potential members of the Settlement Classes based on name and address information that was primarily obtained from the Defendants' business records. Using its proprietary, curated database, the Settlement Administrator also sent notice materials directly to nearly 1,000 financial institutions so that those institutions could provide them directly to potential members of the Settlement Classes. *See* Azari May 2024 Decl. ¶¶ 8-13.[6]

In addition to the direct notice by mail, publication notice was also disseminated through placement of advertisements in several national and global print publications. *See id.* ¶¶ 14-15. Online ads were placed on pre-vetted websites, and on search engines based on relevant keyword searching, generating around 28 million impressions by the target audience of potential class members. *Id.* ¶¶ 16-19. A press release was also disseminated. *Id.* ¶ 20-21.

A dedicated settlement website, telephone line, and email address were also established for potential members of the Settlement Classes to easily and efficiently obtain information relating to the Settlements, access important documents, ask questions, and to submit electronic proof of claim and release forms. *Id.* ¶¶ 22-24.

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

[6] When notice materials were returned as undeliverable, reasonable efforts were made to find alternative addresses so that the Notice Packet could be re-sent. *See* Azari May 2024 Decl. ¶ 12.

III. THE PLANS OF ALLOCATION ARE FAIR AND ADEQUATE

Though the Plans of Allocation here are separate from the Settlements themselves, the standard for approving a plan of allocation is the same used to evaluate whether to approve a settlement—that is, the Plans must merely be fair and adequate. *See, e.g.*, *In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, 2019 WL 6875472, at *20 (E.D.N.Y. Dec. 16, 2019).

The Plans of Allocation, which were described in the notice materials and made available in full on the settlement website, were crafted based on the knowledge and experience of Co-Lead Counsel, including by taking into account the expert opinions generated during the course of this litigation. For the reasons set forth in the Notice Motion, the plans are a fair method to apportion the Net Settlement Fund among Authorized Claimants based on, and consistent with, the claims alleged and their relative strengths and weaknesses. *See In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 WL 7323417, at *10 (S.D.N.Y. Dec. 19, 2014) ("A reasonable plan may consider the relative strength and values of different categories of claims."). The Net Settlement Funds will be distributed to Authorized Claimants, *i.e.*, members of the Settlement Classes who submit timely and valid Proofs of Claim and Release that are approved for payment from a Net Settlement Fund pursuant to the relevant Plan.

Co-Lead Counsel believe that the Plans are fair and reasonable and respectfully submit that they should be approved by the Court.

IV. THE PROPOSED SETTLEMENT CLASSES SHOULD BE FINALLY CERTIFIED

The Court's preliminary approval orders preliminarily certified the Settlement Classes. *See* ECF Nos. 529, 654. There have been no changes that would undermine the Court's initial determinations that certification of the Settlement Classes is appropriate under Rules 23(a) and

23(b). *See Bear Stearns*, 909 F. Supp. 2d. at 264 (finally approving settlement where there "have been no material changes to alter the proprietary of [the court's] findings" at the preliminary approval stage); *see also In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Pracs. & Prods. Liab. Litig.*, 2019 WL 2554232, at *1 (N.D. Cal. May 3, 2019) ("The Court analyzed these factors in its Preliminary Approval Order and finds no reason to disturb its earlier conclusions. The requirements of Rule 23(a) and Rule 23(b)(3) were satisfied then and they remain so now."). For all of the reasons detailed in preliminary approval papers and in the Court's preliminary approval orders, the proposed Settlement Classes satisfies all requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy—as well as the predominance and superiority requirements of Rule 23(b)(3). The preliminarily certified Settlement Classes should therefore be granted final certification for settlement purposes under Rules 23(a) and 23(b)(3).

CONCLUSION

Based on the foregoing, Plaintiffs request that the Court certify the Settlement Classes; find the proposed Settlements to be fair, reasonable and adequate; approve the Settlements; and enter the relevant Final Judgments. Plaintiffs also request that the Court find that the proposed Plans of Allocation are fair, reasonable and adequate, and enter orders approving the Plans of Allocation, which will govern distribution of the proceeds from each Settlement. Co-Lead Counsel will submit proposed orders and judgments in connection with their reply papers.

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Respectfully submitted,

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