UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BENJAMIN MICHAEL MERRYMAN, AMY WHITAKER MERRYMAN TRUST, AND B MERRYMAN AND A MERRYMAN 4TH GENERATION REMAINDER TRUST, individually and on behalf of all others similarly situated, Plaintiffs, v. CITIGROUP, INC., CITIBANK, N.A., and CITIGROUP GLOBAL MARKETS INC., Defendants.	Civil Action No. 1:15-cv-09185-CM-KNF

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION

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Benjamin Michael Merryman, Amy Whitaker Merryman Trust, and B Merryman and A Merryman 4th Generation Remainder Trust (collectively, "Named Plaintiffs") along with Chester County Employees Retirement Fund and Stephen Hildreth ("Proposed Intervenors" and, together with Named Plaintiffs, "Plaintiffs") respectfully submit this memorandum of law in support of their motion pursuant to Federal Rule of Civil Procedure ("Rule") 23(e), requesting: (1) final approval of the proposed settlement of the above-captioned action ("Settlement"), (2) approval of the proposed plan for allocating the net proceeds of the Settlement ("Plan of Allocation"), and (3) certification of the Class for purposes of effectuating the Settlement.[1]

I. PRELIMINARY STATEMENT

Subject to this Court's final approval, Plaintiffs, through Lead Counsel, have obtained a Settlement for $14,750,000 in cash plus valuable injunctive relief in exchange for the dismissal of all claims brought in this Litigation and a full release of claims against Citibank, N.A. ("Defendant," "Citi" or the "Depositary").[2] As described herein and in the accompanying Nirmul Declaration, the Settlement is a very favorable result for the Class, providing a substantial and certain recovery while avoiding the significant risks of continued litigation.

Notably, at the time the Settlement was reached, the Parties were awaiting the Court's decision on a critical motion—Proposed Intervenors' Motion to Intervene (ECF No. 112) in the Litigation under Rule 24 for the purpose of renewing class certification—which, if denied, would

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[1] Capitalized terms not defined herein have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated August 20, 2018 (ECF No. 131) ("Stipulation") or in the Declaration of Sharan Nirmul in Support of (1) Plaintiffs' Motion for Final Approval of Proposed Class Action Settlement and Plan of Allocation; and (2) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Nirmul Declaration" or "Nirmul Decl."), filed herewith. Citations to "¶ __" herein refer to paragraphs in the Nirmul Declaration and citations to "Ex. __" herein refer to exhibits to the Nirmul Declaration.

[2] In accordance with the Stipulation, the cash portion of the Settlement ("Settlement Amount") was deposited into an interest-bearing escrow account on September 12, 2018.

have limited the case (and damages) to the three ADRs actually owned by Named Plaintiffs and certified by the Court. By the Settlement, Plaintiffs were able to avoid such a ruling (and the further risks of continued litigation), while obtaining between roughly 21% and 24% of the Damages' Class's potential damages *for twenty-one ADRs* based on the analysis of Plaintiffs' damages expert—a recovery far exceeding the median recovery of investor losses as a percentage of damages in recent, comparably sized securities cases.[3] In addition, Lead Counsel was able to successfully negotiate for additional injunctive relief for the Class, providing, among other things, a twenty basis points limit on the Depositary's charges for conducting foreign exchange ("Conversions") from cash distributions issued by foreign companies and owed to ADR holders. This recovery is particularly noteworthy in light of the real risk that further litigation might result in a substantially smaller recovery for the Class, or no recovery at all.

The Settlement was reached after months of arm's-length negotiations that involved highly experienced counsel on both sides and formal mediation overseen by a well-respected JAMS neutral. ¶¶ 134-137. As detailed in the Nirmul Declaration and summarized herein, Plaintiffs' decision to settle the Litigation was well-informed.[4] Prior to reaching the Settlement, Plaintiffs, through their counsel, had *inter alia*: (i) conducted a significant legal and factual investigation into the Conversions at issue and drafted the detailed operative Complaint; (ii) fought a change of jurisdictional venue; (iii) opposed two motions to dismiss and Citi's subsequent motion seeking

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[3] *See* Stefan Boettrich & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review*, NERA Economic Consulting, Jan. 29, 2019, at 35, https://www.nera.com/content/dam/nera/publications/2019/PUB_Year_End_Trends_012819_Final.pdf, at 35 (finding median settlement between 1996 and 2018 in securities cases with investor losses between $50 million and $99 million recovered 4.7% of investor losses).

[4] The Nirmul Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: the nature of the claims asserted, the procedural history of the Litigation, the negotiations leading to the Settlement, the terms of the Plan of Allocation, and the notice program.

permission to file an interlocutory appeal of this Court's ruling on its motion to dismiss ("MTD Order"); (iv) completed fact discovery, including reviewing and analyzing over 81,000 pages of documents produced by Citi, participating in numerous meet and confers to resolve discovery disputes, deposing ten fact witnesses and defending the deposition of Named Plaintiffs; (v) consulted with an expert to develop a class-wide damages methodology; (vi) completed expert discovery, including exchanging expert reports, opposing Citi's motion to exclude Plaintiffs' expert and participating in three expert depositions; (vii) moved for class certification; (viii) fully briefed a motion to intervene; and (ix) undertook substantial work in preparation for summary judgment. As a result of these efforts, Lead Counsel had a deep understanding of the strengths and weaknesses of the Parties' respective positions at the time the Settlement was reached. ¶¶ 15-119.

The Court preliminarily approved the Settlement, and provisionally certified the Class for purposes of effectuating the Settlement, by its Preliminary Approval Order dated September 4, 2018. ECF No. 134. By the same Order and the subsequent Notice Modification Order, the Court approved the process by which Class Members would receive notice of the Settlement and submit claims, objections, or requests for exclusion. In accordance with these Orders, the Court-authorized Claims Administrator, KCC, mailed notice via postcard ("Postcard Notice") to 209,815 Registered Holder Damages Class Members and the Court-authorized Publication Notice Plan Administrator, HF Media, effected a modern, comprehensive multimedia notice program—comprised of matching IP addresses to physical addresses for purposes of direct advertisement targeting, publications in various magazines, newspapers, and investment e-newsletters and internet banner ads over a variety of business, news, and investment websites, and social media platforms—to specifically target the Class (particularly Non-Registered Holder Damages Class

Members and Current Holder Class Members).[5] The long-form Notice, Claim Form, and other important documents have also been made available on a dedicated website maintained for the Settlement by KCC. Ex. 1, ¶ 9. The deadline to submit objections or request exclusion from the Class is June 7, 2019. While this deadline has not yet passed, to date—following the mailing of Postcard Notices to 209,815 Registered Holder Damages Class Members and an extensive media notice campaign—not one Class Member has objected to the Settlement or Plan of Allocation (¶¶ 10, 147) and only twenty-five requests for exclusion have been received. Ex. 1, ¶ 14.

For these reasons, Plaintiffs submit that the Settlement readily meets the standards for final approval under Rule 23 and is a fair, reasonable, and adequate result for the Class. Accordingly, Plaintiffs respectfully request that the Court grant final approval of the Settlement. In addition, the Plan of Allocation, which was developed with the assistance of Plaintiffs' damages expert, is a fair and reasonable method for distributing the Net Settlement Fund and should also be approved by the Court. Finally, Plaintiffs respectfully request that the Court certify the Class for purposes of effectuating the Settlement.

II. THE SETTLEMENT WARRANTS APPROVAL

A. The Settlement Meets the Standards for Final Approval Under Rule 23(e)

Rule 23(e) requires judicial approval for any compromise or settlement of class action claims. As here, where the settlement is binding on class members, the Court may approve it "only after a hearing and only on finding that it is fair, reasonable, and adequate[.]" Fed. R. Civ. P.

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[5] *See* Declaration of Justin R. Hughes Regarding (A) Receipt of Registered Holder Data; (B) Mailing of the Postcard Notice; (C) Establishment of the Telephone Hotline; (D) Establishment of the Settlement Website; and (E) Report on Requests for Exclusion Received to Date ("Hughes Declaration" or "Hughes Decl.") attached to the Nirmul Declaration as Exhibit 1, at ¶ 4 and Declaration of Jeanne C. Finegan, APR Concerning Implementation of Notice to Class Members Through Multi-Media Notice Program ("Finegan Declaration" or "Finegan Decl.") attached to the Nirmul Declaration as Exhibit 2, at ¶¶ 15-44.

23(e)(2). This determination entails scrutiny of both the procedural and substantive aspects of the proposed settlement. *See In re Virtus Inv. Partners, Inc. Sec. Litig.*, 2018 WL 6333657, at *1 (S.D.N.Y. Dec. 4, 2018) ("[T]he settlement must be both procedurally and substantively fair.").[6]

Courts strongly favor the settlement of lawsuits. *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d. Cir. 1982). This is particularly true for complex class action litigation. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d. Cir. 2005) ("We are mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context.'"); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) ("It is well established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions."). Moreover, absent fraud or collusion, the Court "should be hesitant to substitute its judgment for that of the parties who negotiated the settlement." *City of Providence v. Aéropostale, Inc.*, 2014 WL 1883494, at *4 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015).

Rule 23(e)(2) provides that the Court should determine whether a proposed settlement is "fair, reasonable, and adequate" after considering whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's-length;
>
> (C) the relief provided for the class is adequate, 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

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[6] Unless otherwise noted, all internal quotation marks and citations are omitted.

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

See Rule 23(e)(2). Consistent with these factors, courts in the Second Circuit have long considered the following factors set forth in *City of Detroit v. Grinnell Corporation* in evaluating a class action settlement:

> (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.

495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000), *see also In re Facebook, Inc., IPO Sec. & Deriv. Litig.*, 343 F. Supp. 3d 394, 409 (S.D.N.Y. 2018) (conducting *Grinnell* analysis in approving settlement).[7]

Below, Plaintiffs will discuss the fairness, reasonableness, and adequacy of the Settlement principally in relation to the four factors set forth in Rule 23(e)(2), and will also discuss the application of the non-duplicative *Grinnell* factors. *See* Fed. R. Civ. P. 23(e)(2) advisory committee note to 2018 amendments (noting that the four Rule 23(e)(2) factors are not intended to "displace" any factor previously adopted by the Court of Appeals, but "rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal."). *See also In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2019 WL 359981, at *13 (E.D.N.Y. Jan. 28, 2019) ("The Court understands the

[7] "[N]ot every factor must weigh in favor of settlement, rather the court should consider the totality of these factors in light of the particular circumstances." *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004).

new Rule 23(e) factors to add to, rather than displace, the *Grinnell* factors."). As demonstrated herein, the Settlement readily satisfies each of the Rule 23(e)(2) and Second Circuit *Grinnell* factors, meets the favored public policy goal of resolving class action claims, and warrants this Court's final approval.

B. Plaintiffs and Lead Counsel Have Adequately Represented the Class

In determining whether to approve a class action settlement, the court should consider whether "the class representatives and class counsel have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A); *see generally In re Barrick Gold Sec. Litig.*, 314 F.R.D. 91, 99 (S.D.N.Y. 2016) (noting that "the adequacy requirement entails inquiry as to whether: (1) plaintiffs' interests are antagonistic to the interest of other members of the class and (2) plaintiffs' attorneys are qualified, experienced and able to conduct the litigation").

Here, Plaintiffs have adequately represented the Class. Throughout the Litigation, Named Plaintiffs have monitored and engaged in the prosecution of the Litigation—communicating with Lead Counsel on litigation strategy and case developments and reviewing significant Court filings. In connection with discovery, Named Plaintiffs performed searches for responsive documents, ensured Lead Counsel's access to responsive documents held by financial advisors, provided responses to written interrogatories, and prepared and sat for a deposition in May 2017. ¶ 120. Likewise, Proposed Intervenors reviewed and authorized the filing of their Motion to Intervene, searched their files for documents and facilitated Lead Counsel's access to relevant financial information and documents. ¶ 121. All Plaintiffs conferred with Lead Counsel prior to the February 2018 mediation and during the Parties' settlement discussions. ¶¶ 120-122.

Moreover, Plaintiffs—investors who received cash distributions as a result of their eligible ADRs holdings and suffered damages as a result of the fees Citi deducted for Conversions and who, in some cases, also continue to hold certain of the eligible ADRs—have claims that are

typical of and coexistent with those of other Class Members, and have no interests antagonistic to the interests of other Class Members. On the contrary, Plaintiffs, like the rest of the Class, have an interest in obtaining the largest possible recovery from Defendant. *See In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) ("Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between the class representatives and other class members.").

Lead Counsel also have "adequately represented the class" throughout the Litigation. Lead Counsel is a firm highly qualified and experienced in complex litigation (*see* Ex. 3-C to the Nirmul Declaration). Armed with this experience and the knowledge from three years of extensive litigation efforts here, including a comprehensive investigation and the completion of fact and expert discovery (*see* ¶¶ 15-119), Lead Counsel carefully considered the strengths and weaknesses of the claims asserted and the risks of further litigation when agreeing to resolve the Litigation, and firmly believes the Settlement represents an excellent result for the Class.[8]

C. The Settlement Was Negotiated at Arm's-Length Negotiations with the Assistance of an Experienced Mediator

Rule 23(e)(2)(B) supports final approval because the Settlement was reached only after formal mediation with Michael D. Young, Esq. of JAMS, followed by additional months of hard-fought discussions by the Parties. ¶¶ 134-137. *See Yang v. Focus Media Holding Ltd.*, 2014 WL 4401280, at *5 (S.D.N.Y. Sept. 4, 2014) ("The participation of this highly qualified mediator strongly supports a finding that negotiations were conducted at arm's length and without collusion."); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 160 (S.D.N.Y. 2011)

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[8] *See Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666, at *2 (S.D.N.Y. Mar. 24, 2014) (noting counsel "experience[d] in prosecuting complex class actions, strongly believe the Settlement is in the best interests of the Class, an opinion which is entitled to great weight"); *accord In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998).

(the fact that "settlement was the product of prolonged, arms-length negotiation, including as facilitated by a respected mediator" established that it was "procedurally fair"). Even after agreeing to the material terms of the Settlement, it took the Parties additional weeks to negotiate the specific terms of the Stipulation. ¶ 137. Where, as here, a settlement agreement is the product of non-collusive, arm's-length negotiations, courts have afforded a presumption of fairness. *See Facebook*, 343 F. Supp. 3d at 408 ("When a settlement is the product of arms-length negotiations between experienced, capable counsel after meaningful discovery, it is afforded a presumption of fairness, adequacy, and reasonableness."); *see also D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001).

In short, "[t]he hard-fought and arduous settlement negotiations demonstrate that the Settlement is the result of fair and honest negotiations," and Lead Counsel, "who have extensive experience in the prosecution of complex class action litigation, with particular expertise in commercial and financial litigation, have made a considered judgment that the Settlement is not only fair, reasonable and adequate, but an excellent result for the Settlement Class." *See Shapiro*, 2014 WL 1224666, at *8. The Court can thus take comfort that the Class's interests were protected throughout the negotiations that produced the Settlement.

D. The Relief that the Settlement Provides for the Class Is Adequate, Taking into Account the Costs, Risks, and Delay of Further Litigation and Other Relevant Factors

1. The Complexity, Expense, and Likely Duration of the Litigation

Rule 23(e)(2)(C)(i) and the first *Grinnell* factor support final approval of the Settlement, as courts consistently recognize that the expense, complexity, and possible duration of the litigation are key factors in evaluating the reasonableness of a settlement. *See In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006) ("Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome,

and the typical length of the litigation."); *In re Citigroup Inc. Bond Litig.*, 296 F.R.D. 147, 155 (S.D.N.Y. 2013) ("[T]he more complex, expensive, and time consuming the future litigation, the more beneficial settlement becomes as a matter of efficiency to the parties and to the Court."). "Generally, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015).

"[C]lass action suits in general have a well-deserved reputation as being most complex." *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999). This Litigation—involving Conversions for thirty-five ADRs and a highly contested damages methodology—is no exception. In addition to the risk posed by the Motion to Intervene pending at the time of settlement, summary judgment posed significant risks to the survival of Plaintiffs' claims and could have resulted in the case being dismissed outright or a material reduction in potential damages. ¶ 125. And, if Plaintiffs' claims survived summary judgment, litigating this case through trial and post-trial appeals would have required significant time and expense and, any potential recovery "would occur years from now, substantially delaying payment . . . to the Settlement Class." *Shapiro*, 2014 WL 1224666, at *8; *see also generally In re Amgen Inc. Sec. Litig.*, 2016 WL 10571773, at *3 (C.D. Cal. Oct. 25, 2016) ("A trial of a complex, fact-intensive case like this could have taken weeks, and the likely appeals of rulings on summary judgment and at trial could have added years to the litigation."). In contrast, the Settlement avoids the risk, expense, and delay of continued litigation while providing an immediate and substantial recovery for the Class—between roughly 21% and 24% of the Damages Class's potential damages and important injunctive relief.

2. The Risks of Continued Litigation

In assessing the fairness, reasonableness, and adequacy of a settlement, courts should also consider the "risks of establishing liability," "the risks of establishing damages," and "the risks of

maintaining the class action through the trial." *Grinnell*, 495 F.2d at 463. In this assessment, "the Court [is not required] to adjudicate the disputed issues or decide unsettled questions; rather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *Payment Card Interchange*, 2019 WL 359981, at *21. Here, even if the Court ruled in Plaintiffs' favor on the pending Motion to Intervene, Plaintiffs faced significant risks to achieving a better result for the Class through continued litigation. *See generally Global Crossing*, 225 F.R.D. at 459 ("Courts approve settlements where plaintiffs would have faced significant legal and factual obstacles to proving their case.").

(a) Risks to Establishing Fraudulent Concealment

Had the Litigation proceeded, establishing fraudulent concealment—so as to toll the applicable statute of limitations—would be risky. ¶¶ 127-128. Plaintiffs would have needed to show:

> (1) that the defendant concealed from him the existence of his cause of action, (2) that he remained in ignorance of that cause of action until some point within [the applicable limitations period] of his action, and (3) that his continuing ignorance was not attributable to lack of diligence on his part.

State of N.Y. v. Hendrickson Bros., 840 F.2d 1065, 1083 (2d Cir. 1988). Throughout the Litigation, Citi vigorously asserted that Plaintiffs would be unable to meet this standard, arguing that all of the information Plaintiffs needed to discern the rates at which Citi converted foreign currency to U.S. dollars was publicly available (*i.e.*, nothing was concealed).[9] Had Citi prevailed on this argument at summary judgment or trial, the class period in this Litigation would have been dramatically reduced—from more than fifteen years to at most six years. ¶ 128.

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[9] Notably, Judge Caproni accepted a nearly identical argument in connection with the motion to dismiss in the analogous case *Merryman v. JPMorgan Chase Bank, N.A.*, 2016 WL 5477776, at *11 (S.D.N.Y. Sept. 29, 2016). In its MTD Order, this Court suggested that this issue was more appropriately decided later, at summary judgment or trial.

(b) Risks to Establishing Liability

Although this Court sustained Plaintiffs' breach of contract claims at the pleading stage, it also noted, in its MTD Order, several open questions with respect to these claims. In particular, the Court stated that "it might be industry custom to use an FX rate spread as a proxy for recovering expenses that are actually incurred but cannot be precisely determined . . . . Of course, it is far from clear whether using the spread as a proxy for expenses is permissible under the terms of this particular contract, even if doing so conforms to industry practice." The Court also noted that "it is not altogether plain whether the contract is sufficiently clear so that it can be construed by the court." ¶ 129. Further, Citi, its fact witnesses, and its industry expert all maintained that the spread it retained was an acceptable (and commercially reasonable) means of compensating it for conducting Conversions. *Id*. Additionally, apart from the risk from contractual interpretation of the Deposit Agreements, Citi also asserted that it was insulated from liability in cases where a third party (and not the Bank) performed Conversions on the Bank's behalf. ¶ 130. Citi would have relied on these arguments, and others, had the Litigation continued.

(c) Risks to Establishing Damages

Even if Plaintiffs prevailed in establishing liability, they would have faced substantial challenges to establishing damages. Unlike a typical securities case, where damages are subject to a "commonly accepted" damages methodology, there was no template for Plaintiffs' damages expert, G. William Brown of 8 Rivers Capital, to follow in this Litigation. ¶ 131. While Plaintiffs sought to establish damages as the spread that Citi charged ADR holders for Conversions, Citi claimed that at least part of this spread constituted a recoverable expense for conducting the transaction. ¶¶ 94-96. Whether and to what extent the fact finder agreed with Citi's arguments would have significantly impacted the available damages to Citi under Dr. Brown's analysis. Moreover, unavailability of certain data required Dr. Brown to make certain assumptions about

the spreads charged by Citi, and these assumptions were highly contested. Indeed, Citi had already sought to exclude Professor Brown's opinions at the class certification stage, which the Court denied without prejudice; however, it is likely that Citi would have continued to challenge Professor Brown's opinions at later stages. ¶¶ 131-132. Ultimately, the issue of damages would have come down to a battle of the experts at trial and, as Courts have long recognized, the substantial uncertainty as to which side's experts' view might be credited by the jury presents a substantial litigation risk. *See Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 665 (S.D.N.Y. 2015) ("On the issue of damages, a trial would likely have turned heavily on a 'battle of the experts' between the parties' respective economists. It is impossible to predict which party's model of damages—if either—the jury would credit."); *In re Bear Stearns Cos., Inc. Sec., Deriv. and ERISA Litig.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012) ("When the success of a party's case turns on winning a so-called 'battle of experts,' victory is by no means assured.").

(d) Risks to Maintaining the Class Action Through Trial

Finally, the Court already certified a class consisting of the three ADRs personally owned by Named Plaintiffs. If the Court granted Proposed Intervenors' Motion to Intervene, Plaintiffs would have renewed their motion for certification of a class comprised of holders of the twenty-one ADRs owned by Plaintiffs along with an injunctive class under Rule 23(b)(2). Although Plaintiffs believe they would have succeeded in obtaining certification of the broader class, that result was far from certain. This Settlement removes any uncertainty with respect to certification and it eliminates the risk that any certified class—whether the currently certified class or a broader one—might have been decertified either before or during trial. *See* Fed. R. Civ. P. 23(c)(1)(C); *Annunziato v. Collecto, Inc.*, 293 F.R.D. 329, 340 (E.D.N.Y. 2013) ("[U]nder rule 23, district courts have the power to amend class definitions or decertify classes as necessary . . . .")

(alterations in original); *Shapiro*, 2014 WL 1224666, at *11 ("The possibility of decertification . . . favors settlement.").

3. The Reaction of the Class to Date

The class's reaction to a proposed settlement is an important factor to be weighed in considering its fairness and adequacy. *See, e.g.*, *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) ("It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy."); *Grinnell*, 495 F.2d at 462-63. In accordance with the Notice Modification Order, KCC has mailed Postcard Notices to 209,815 Registered Holder Damages Class Members, and HF Media has conducted an extensive media campaign specifically targeting the Class. Ex. 1, ¶¶ 4 & Ex. 2. In addition, information regarding the Settlement is available at www.CitibankADRSettlement.com, as well as on the general informational website, www.ADRFXSettlement.com. Ex. 1, ¶¶ 8-12. Although the deadline for Class Members to object to any aspect of the Settlement, or request exclusion from the Class, has not yet passed, to date, there have been no objections (¶ 10), and only twenty-five requests for exclusion from the Class. Ex. 1, ¶ 14.[10]

4. Stage of the Proceedings and Amount of Discovery Completed

The third *Grinnell* factor considers "the stage of the proceedings and the amount of discovery completed" in determining the fairness, reasonableness, and adequacy of a settlement. *Grinnell*, 495 F.2d at 463. For this factor, "the question is 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'

[10] Any objections or additional requests for exclusion received after this submission will be addressed in Plaintiffs' reply papers to be filed with the Court on July 5, 2019.

causes of action for purposes of settlement." *In re Facebook, Inc. IPO Sec. & Deriv. Litig.*, 2015 WL 6971424, at *4 (S.D.N.Y. Nov. 9, 2015), *aff'd*, 674 F. App'x 37 (2d Cir. Dec. 27, 2016).

After extensive litigation efforts, the Parties have gained a thorough understanding of the strengths and weaknesses of the claims and the obstacles to success. The Settlement was reached only after a significant amount of work by Plaintiffs and their counsel, including: (i) conducting a comprehensive factual and legal investigation into the claims asserted; (ii) opposing a jurisdictional transfer; (iii) opposing two motions to dismiss; (iv) drafting the detailed Complaint; (v) engaging in extensive (and hotly-contested) discovery efforts, including the review of more than 81,000 pages of documents, participation in numerous meet and confers, and depositions of ten fact witnesses and Named Plaintiffs; (vi) exchanging expert reports and participating in expert depositions; (vii) moving for class certification; (viii) briefing the Motion to Intervene; and (ix) engaging in settlement negotiations, including formal mediation with Michael D. Young, Esq. of JAMS. ¶¶ 15-120, 134-137.

The Parties had sufficient familiarity with the issues in the case, and were able to evaluate its merits and agree on a settlement that was acceptable to Citi and fair, reasonable, and adequate to the Class. Moreover, Plaintiffs and Lead Counsel had the requisite information to make an informed decision about the relative benefits of litigating or settling the Litigation and "developed an informed basis from which to negotiate a reasonable compromise." *Global Crossing*, 225 F.R.D. at 459; *see also Facebook*, 343 F. Supp. 3d at 412 (finding support for settlement where plaintiffs and their counsel had a "sufficient understanding of the case to gauge the strengths and weaknesses of their claims as well as the adequacy of the settlement").

5. Ability of Defendant to Withstand a Greater Judgment

Without a doubt, Citi could withstand a greater judgment than the monetary amount it will pay for this Settlement, but "a defendant is not required to empty its coffers before a settlement

can be found adequate." *Shapiro*, 2014 WL 1224666, at *11. Further, Citi's financial wherewithal "do[es] not ameliorate the force of the other *Grinnell* factors, which lead to the conclusion that the settlement is fair, reasonable and adequate." *Id*.[11]

6. The Range of Reasonableness of the Settlement Amount in Light of the Best Possible Recovery and the Risks of Litigation

The final two *Grinnell* factors—the reasonableness of the settlement in light of the best possible recovery and the risks of litigation—also weigh in favor of approval of the Settlement. As the Second Circuit has explained, there is "a range of reasonableness with respect to a settlement" that "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972); *Payment Card Interchange*, 2019 WL 359981, at *33 (in considering a settlement's reasonableness, "a court must compare the terms of the compromise with the likely rewards of litigation"); *Shapiro*, 2014 WL 1224666, at *11 (recognizing "that the very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes"). A fairness determination turns not on a "mathematical equation yielding a particularized sum . . . . but rather . . . [on] the strengths and weaknesses of the plaintiffs' case." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 130 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997). The Settlement—$14.75 million in cash along with additional injunctive relief—meets this threshold.

With respect to the cash portion of the Settlement, Class Members stand to recover, on a gross basis, between roughly 21% and 24% of the Damages' Class's potential damages for the

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[11] *See also Cavalieri v. Gen. Elec. Co.*, 2009 WL 2426001, at *2 (N.D.N.Y. Aug. 6, 2009) ("The court also notes that although neither party contends that defendants are incapable of withstanding greater judgment, that does not indicate that the settlement is unreasonable or inadequate.").

twenty-one ADRs held by Plaintiffs based on the analysis of Plaintiffs' damages expert (*i.e.*, approximately $61.9 million to $68.8 million). As noted above, this result far exceeds the median securities class action recovery as a percentage of damages, which was 4.7% for years 1996 through 2018 in securities cases with investor losses between $50 million and $99 million. *See supra* n.3; *see also In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (approving settlement representing approximately 6.25% of estimated damages and noting recovery was at the "higher end of the range of reasonableness of recovery in class actions securities litigations"). Additionally, for Current Holder Class Members, the Settlement provides important injunctive relief limiting the charges for Conversions. Citi's agreement to cap its charges to twenty basis points on *all* ADR conversions, not just the twenty-one ADRs at issue in this Litigation, is an outstanding benefit to the Class given the average spread of over thirty basis points that Citi charged during the Class Period. The cap provides an incalculable ongoing monetary benefit to the Class and ADR investors as a whole.

In comparison, if the Litigation had continued, Plaintiffs and the Class would have faced numerous risks to obtaining a recovery providing greater benefits than the Settlement, or any recovery at all.

E. The Other Rule 23(e)(2) Factors Support Final Approval of the Settlement

Rule 23(e)(2), as amended, also considers: (i) "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;" (ii) "the terms of any proposed award of attorney's fees, including timing of payment;" (iii) any agreement made in connection with the proposed settlement; and (iv) the equitable treatment of class members. *See* Rule 23(e)(2)(C)(ii), (iii), and (iv); Rule 23(e)(2)(D). These additional considerations weigh in favor of the Settlement.

First, the cash portion of the Settlement will be allocated to (i) Registered Holder Damages Class Members and (ii) Non-Registered Holder Damages Class Members who submit valid Claim Forms. KCC will review and process all claims received, provide claimants with an opportunity to cure any deficiency in their claim or request judicial review of the denial of their claim, and will ultimately mail or wire claimants their *pro rata* share of the Net Settlement Fund as calculated under the Plan of Allocation, upon approval of the Court. This type of claims processing and method for distributing settlement proceeds is standard in securities and other class actions and is routinely found to be effective. Further, given the data negotiated for by Lead Counsel and provided by Citi's transfer agent, Registered Holder Damages Class Members do not need to file a claim in order to be eligible to receive a distribution from the Settlement—an additional benefit of the Settlement. And, none of the settlement funds will revert to Citi.[12]

Second, the relief provided for the Class in the Settlement is also adequate when considering the terms of the proposed award of attorneys' fees. As discussed in the accompanying Fee Memorandum, the requested attorneys' fees of 33⅓% of the Settlement Fund, to be paid upon approval by the Court, are reasonable in light of the efforts of Plaintiffs' Counsel and the risks in this Litigation. Of particular note, the approval of attorneys' fees is entirely separate from approval of the Settlement, and neither Plaintiffs nor Lead Counsel may terminate the Settlement based on this Court's or any appellate court's ruling with respect to attorneys' fees. *See* Stipulation ¶ 36.

Lastly, amended Rule 23 asks the court to consider the fairness of the proposed settlement in light of "any agreements required to be identified under Rule 23(e)(3)." *See* Fed. R. Civ. P. 23(e)(2)(C)(iv). Here, the only such agreement (other than the Stipulation itself) is the Parties'

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[12] The Settlement is not a claims-made settlement. If the Settlement is approved, Citi will have no right to the return of any portion of the Settlement proceeds based on the number or value of Claims submitted. *See* Stipulation ¶ 12.

confidential Supplemental Agreement, which sets forth certain conditions under which Citi may terminate the Settlement if potential Damages Class Members who meet certain criteria exclude themselves from the Class. *See* Stipulation ¶ 35. This type of agreement is standard in securities class actions and has no negative impact on the fairness of the Settlement.[13]

F. The Settlement Treats Class Members Equitably Relative to Each Other

The proposed Settlement treats members of the Class equitably relative to one another. As discussed below in Section III, pursuant to the Plan of Allocation, all Authorized Recipients will receive their *pro rata* share of the recovery based on the eligible ADRs they held and the cash distributions they received in connection with such holdings during the relevant time period. Additionally, members of the Current Holder Class will benefit in the same manner from the negotiated limits placed on the fees charged by Citi in connection with Conversions.

III. THE PLAN OF ALLOCATION WARRANTS APPROVAL

To merit approval, a plan of allocation "must also meet the standards by which the settlement was scrutinized—namely, it must be fair and adequate." *Meredith Corp.*, 87 F. Supp. 3d at 667; *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012). A plan of allocation "need not be perfect"; rather, an allocation formula "need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *Meredith Corp.*, 87 F. Supp. 3d at 667. Accordingly, in determining whether a plan of allocation is fair, courts look largely to the opinion of counsel. *Facebook*, 343 F. Supp. 3d at 414; *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 2000 WL 37992, at *2 (S.D.N.Y. Jan. 18, 2000).

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[13] *See, e.g.*, *Hefler v. Wells Fargo & Co.*, 2018 WL 4207245, at *11 (N.D. Cal. Sept. 4, 2018) ("The existence of a termination option triggered by the number of class members who opt out of the Settlement does not by itself render the Settlement unfair.").

The proposed Plan of Allocation ("Plan") is designed to achieve an equitable distribution of the Net Settlement Fund among as many Damages Class Members as possible.[14] In developing the Plan, Lead Counsel worked with Plaintiffs' damages expert to calculate the average margin per year for each of the eligible ADRs (identified in the Appendix to the Notice), utilizing data produced by Citi concerning Conversion rates, volumes and payable dates for cash distributions for the eligible ADRs, and the amount (if any) it retained during the relevant period. ¶ 142.

The Plan will calculate a "Recognized Loss Amount Per ADR Per Year" for each eligible ADR that was held by a Damages Class Member during the relevant time period (January 1, 2006 to September 4, 2018, inclusive) and for which they received a cash distribution by multiplying the gross amount of the cash distribution received by the Damages Class Member for the eligible ADR for that year by the Average Margin Per Year for the eligible ADR as set forth in Table 1 of the Plan. The sum of each Damages Class Member's Recognized Loss Amounts Per ADR Per Year will be their "Recognized Claim," and the Net Settlement Fund will be distributed to Authorized Recipients on a *pro rata* basis based on the size of their Recognized Claim in comparison to the total Recognized Claims. ¶ 144. *See generally In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 581 (S.D.N.Y. 2008) ("Pro-rata distribution of settlement funds based on investment loss is clearly a reasonable approach.").[15] Once KCC has processed all claims and provided Non-Registered Holder Damages Class Members the opportunity to cure any deficiencies

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[14] As noted above, Registered Holder Damages Class Members do not need to file a Claim Form in order to be eligible to receive a distribution from the Settlement. KCC will use the holding and distribution information provided by Citi's transfer agent to calculate their claims.

[15] As set forth in the Plan, in no case shall the Plan result in the payment of more than 100% of a Damages Class Member's alleged damages (inclusive of alleged interest), as calculated by Professor Brown in his expert report dated June 30, 2017 ("Calculated Damages"). To the extent the Plan would result in the payment of more than 100% of a Damages Class Member's Calculated Damages, any amount in excess of 100% of the Calculated Damages shall be reallocated to other Authorized Recipients.

in their claims or challenge the rejection of their claims, Lead Counsel will seek authorization from the Court to distribute the Net Settlement Fund to Authorized Recipients. ¶ 145.

Here, the Plan has a "reasonable, rational basis," and is the product of careful consideration by Lead Counsel, who are experienced and sophisticated in managing and resolving complex class actions, and their expert. Thus, the Plan should be approved.

IV. THE NOTICE OF SETTLEMENT SATISFIES DUE PROCESS REQUIREMENTS AND IS REASONABLE

Plaintiffs have provided the Class with notice of the Settlement that satisfies all the requirements of Rule 23(e) and due process, which require that notice of a settlement be "reasonable"—*i.e.*, it 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." *Visa*, 396 F.3d at 114 (noting "[t]here are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements"); *see also In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156, 166 (S.D.N.Y. 2007) ("Notice need not be perfect, but need be only the best notice practicable under the circumstances, and each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members."). Both the substance of the notice and the method of its dissemination to the Class satisfied these standards.

Given the unique characteristics of the Class here, Lead Counsel retained two administrators to ensure that notice of the Settlement was sufficiently provided to Class Members. In accordance with the Notice Modification Order, KCC mailed Postcard Notices via first-class mail to all Registered Holder Damages Class Members identified by Computershare. KCC also posted the long-form Notice, Claim Form, and other relevant documents on a website developed for the Settlement (www.CitibankADRSettlement.com), and manages a call center to respond to

Class Member inquiries. Ex. 1, ¶¶ 2-12. Likewise, HF Media coordinated an extensive media and Internet-based notice campaign in which, over an eighty-two day duration, the Summary Notice was published in seven magazines, three newspapers, and investment e-newsletters, as well as transmitted over *PR Newswire*, and banner ads were served over a variety of business, news and investment websites, and across social media platforms. Ex. 2, ¶¶ 15-44. Additionally, utilizing cutting-edge technology, HF Media was able to match a large portion of the physical mailing addresses provided in response to KCC's initial nominee outreach efforts to IP addresses in order to directly serve ads on Class Members on multiple occasions. Ex. 2, ¶¶ 36-37.[16]

The Postcard Notice, Summary Notice, and banner ads directed recipients to the websites and the long-form Notice for additional information. These various methods of notice, in combination with the long-form Notice, provide all of the necessary information for Class Members to make an informed decision regarding the Settlement. Specifically, the Notice informs Class Members of, among other things: (1) the nature of the Litigation; (2) the definition of the Class; (3) the claims and defenses asserted; (4) the right of a Class Member to enter an appearance through an attorney if it so desires; (5) the right of a Class Member to be excluded from the Class; (6) the right of a Class Member to object to any aspect of the Settlement; (7) the time and manner for requesting exclusion or objecting; (8) a description of the terms of the Settlement; (9) the binding effect of the Settlement on Class Members that do not elect to be excluded; and (10) the date and time of the Final Approval Hearing. *See* Fed. R. Civ. P. 23(c)(2)(B). The Notice also

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[16] As noted in the Advisory Committee Notes to the 2018 amendments to Rule 23, "Instead of preferring any one means of notice, . . . the amended rule relies on courts and counsel to focus on the means or combination of means most likely to be effective in the case before the court." As further noted, "[Rule 23 (c)(2)(B)] does not specify any particular means as preferred."

advises that Lead Counsel will apply for attorneys' fees in an amount not to exceed 33⅓% of the Settlement Fund as well as Litigation Expenses, including Service Awards to Plaintiffs.

This combination of individual first-class mail to those Class Members who could be identified with reasonable effort (*i.e.*, the Registered Holder Damages Class Member) combined with an extensive media and Internet-based campaign was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g.*, *Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118, 123–24 (S.D.N.Y. 2001) (approving notice plan and concluding that "reasonable efforts were taken to notify all members of the class" where part of the class received direct mail notice and part of the class was covered by publication notice).[17]

V. THE COURT SHOULD CERTIFY THE CLASS

In presenting the Settlement to the Court for preliminary approval, Plaintiffs requested provisional certification of the Class for settlement purposes so that notice of the Settlement, the Final Approval Hearing, and the rights of Class Members to request exclusion, object or submit Claim Forms could be issued. In its Preliminary Approval Order, the Court provisionally certified the Class for settlement purposes. *See* ECF No. 134, ¶¶ 6-8 (analyzing how the Litigation satisfies each element for class certification). Nothing has changed to alter the propriety of the Court's provisional certification and, for all the reasons stated in the Memorandum of Law in Support of Plaintiff's Unopposed Motion for Preliminary Approval of Proposed Class Action Settlement

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[17] *See also Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 330 (C.D. Cal. 2016) (approving notice program that "utilizes a combination of individual notice to known class members in the form of Email Notices and Post–Card Notices and a schedule of publication notices in English and Spanish in magazines, on certain internet networks, on Facebook, and in a press release" and for which, according to notice expert, "the notices will reach 75% of targeted potential class members, on average, 2.3 times"); *In re Platinum & Palladium Commodities Litig.*, 2014 WL 3500655, at *14 (S.D.N.Y. July 15, 2014) (approving publication notice as "best practicable notice plan under the circumstances" where a "direct notice program is not feasible" for part of the settlement class).

(ECF No. 130) incorporated herein by reference, Plaintiffs respectfully request that the Court finally certify the Class for purposes of effectuating the Settlement.

VI. CONCLUSION

For the reasons stated herein and in the Nirmul Declaration, Plaintiffs respectfully request that the Court grant final approval of the proposed Settlement, approve the Plan of Allocation, and certify the Class for purposes of settlement.

Dated: May 24, 2019

Respectfully Submitted,

KESSLER TOPAZ MELTZER & CHECK, LLP

s/Sharan Nirmul
Joseph H. Meltzer
Sharan Nirmul
Ethan J. Barlieb
Jonathan F. Neumann
280 King of Prussia Road
Radnor, PA 19087
Telephone: (610) 667-7706
Facsimile: (610) 667-7056
jmeltzer@ktmc.com
snirmul@ktmc.com
ebarlieb@ktmc.com
jneumann@ktmc.com

Counsel for Plaintiffs and the Class