

**FUNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

IN RE:

COMMODITY EXCHANGE, INC., GOLD  
FUTURES AND OPTIONS TRADING  
LITIGATION

*This Document Relates To All Actions*

Case No. 14-MD-2548 (VEC)  
14-MC-2548 (VEC)

Hon. Valerie E. Caproni

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN  
ORDER PROVIDING FOR NOTICE TO THE SETTLEMENT CLASS AND  
PRELIMINARILY APPROVING PLAN OF ALLOCATION**

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Plaintiffs<sup>1</sup> respectfully submit this memorandum in support of their Motion for an Order Providing for Notice to the Settlement Class and Preliminarily Approving the Plan of Allocation under Federal Rule of Civil Procedure 23(c) and (e).

### **PRELIMINARY STATEMENT**

Plaintiffs and Defendants Deutsche Bank AG (“Deutsche Bank”) and HSBC Bank plc (“HSBC,” and together, “Settling Defendants”) have reached proposed Settlements in this action that would resolve all claims against Settling Defendants in exchange for cash payments of \$102,000,000 and cooperation for the benefit of the Settlement Class.<sup>2</sup> The Court previously entered an order preliminarily approving the proposed Settlement with Deutsche Bank, certifying the Settlement Class, and appointing Co-Lead Counsel and class representatives. *See* ECF No. 187. Determinations related to notice to members of the Settlement Class and the distribution of settlement funds were deferred. Concurrently with this motion, Plaintiffs also move for preliminary approval of the proposed Settlement with HSBC.

Plaintiffs now propose: (i) a Notice Plan to notify Class Members of both Settlements and provide information regarding the claims process, and (ii) a Plan of Allocation for distributing the combined Net Settlement Fund.

***Notice Plan.*** Co-Lead Counsel and Heffler Claims Group (“Heffler”) have developed an effective Notice Plan that includes direct notice by mail to members of the Settlement Class reasonably identifiable from Settling Defendants’ data, supplemented by publication of summary

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<sup>1</sup> The current class representatives are Michel de Chabert-Ostland, Compañía Minera Dayton, Edward R. Derksen, Frank Flanagan, KPFF Investment, Inc., Duane Lewis, Larry Dean Lewis, Kevin Maher, Robert Marechal, Blanche McKennon, Kelly McKennon, Thomas Moran, J. Scott Nicholson, Richard White, and David Windmiller. Since the time that the Court granted preliminary approval to the Deutsche Bank settlement, and as reflected on the docket, certain class representatives have voluntarily withdrawn from the litigation due to personal reasons.

<sup>2</sup> All capitalized terms not defined herein have the same meaning as in the Stipulations and Agreements of Settlement (“Settlement Agreements”) with Deutsche Bank and HSBC.

notice in prominent and widely distributed national and global news outlets. Heffler also plans to provide robust online notice via online search initiatives targeted to various financial publications and newsletters, social media, and a dedicated settlement website. The proposed mail and publication notices (the “Notices”)—attached as Exhibits 1 (the “Long Form Notice”) and 3 (the “Summary Notice”) to the Declaration of Daniel Brockett, dated December 7, 2020 (“Brockett Declaration”), respectively—explain clearly and concisely the terms of the proposed Settlement, options for members of the Settlement Class, and deadlines for exercising them. The Notices also explain the terms of the proposed Settlement, and provide further resources, including contact information for the Claims Administrator and Co-Lead Counsel, should potential Settlement Class Members have any questions.

***Plan of Allocation.*** Plaintiffs’ proposed Plan of Allocation, attached as Exhibit 4 to the Brockett Declaration, has been drafted by experienced and informed counsel to efficiently and equitably distribute the settlement funds to qualified members of the Settlement Class. The Net Settlement Fund will be distributed *pro rata* based on the total qualifying Transaction Claim Amounts (as defined below and in the Plan of Allocation). As more fully detailed below, similar volume-based plans of distribution in financial services antitrust class actions have been regularly approved in this District. At this time, Plaintiffs seek preliminary approval of the proposed Plan of Allocation, which requires only that the Plan of Allocation be sufficiently reasonable to be sent to members of the Settlement Class for their consideration prior to the Fairness Hearing to be set by the Court. Entry of the Proposed Order (Exhibit 5 to the Brockett Declaration) will permit Plaintiffs to begin the process of providing notice of the Settlements and its terms to persons and entities who are believed to be potential members of the Settlement Class.

***Appointment of Claims Administrator.*** Plaintiffs also respectfully request that the Court appoint Heffler as the Claims Administrator in connection with the Settlement. Based on Co-Lead Counsel's extensive knowledge and experience in working with various claims administrators, Co-Lead Counsel has determined that the selection of Heffler is in the best interest of the Settlement Class. Heffler has extensive experience administering claims processes in complex class-action cases such as this one. The details of the proposed notice plan are summarized below and set forth in detail in the accompanying Declaration of Jeanne C. Finegan ("Finegan Declaration"), a class action notice specialist employed by Heffler.

***Proposed Order.*** The Proposed Order (Exhibit 5 to the Brockett Declaration) submitted with this memorandum approves the form and content of the Notices (Exhibits 1 and 3 to the Brockett Declaration, as noted above) and the proposed Proof of Claim and Release Form (the "Claim Form," attached as Exhibit 2 to the Brockett Declaration); and finds that the procedures for distribution of the Notices and Claim Form and publication of the Notice constitute the best notice practicable under the circumstances and comply with the requirements of due process and Federal Rule of Civil Procedure 23. The Proposed Order also sets a schedule and procedures for mailing and publishing the Notices; requesting exclusion from the Settlements; objecting to the Settlements, the proposed Plan of Allocation, and/or Co-Lead Counsel's application for attorneys' fees and expenses; submitting papers in support of final approval of the Settlements and Co-Lead Counsel's application for attorneys' fees and expenses; and the Fairness Hearing. The Proposed Order preliminary approves the proposed Plan of Allocation and appoints Heffler as Claims Administrator.

**ARGUMENT**

**I. THE PROPOSED MANNER AND FORMS OF NOTICE SHOULD BE APPROVED**

Federal Rule of Civil Procedure 23(e)(1) provides “[t]he court must direct notice in a reasonable manner to all class members who would be bound by the [proposed settlement].” Fed. R. Civ. P. 23(e)(1)(B). Where a settlement class has been certified under Rule 23(b)(3), “the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B).

There are no “rigid rules” that apply when determining the adequacy of notice for a class action settlement. Ultimately, the test for proposed notice to class members is reasonableness. *See In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 702 (S.D.N.Y. 2019). Rule 23 “accords considerable discretion to a district court in fashioning notice to a class.” *In re Agent Orange Prods. Liab. Litig.*, 818 F.2d 145, 168 (2d Cir. 1987); *see also Manual for Complex Litigation* §21.311 (4th ed.) (“Determination of whether a given notification is reasonable under the circumstances of the case is discretionary.”). Accordingly, “[n]otice 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.” *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 2007 WL 313474, at \*8 (S.D.N.Y. Feb. 1, 2007).

Plaintiffs respectfully submit that both (A) the proposed manner of notice and (B) the proposed form of notice constitute the best notice that is practicable under the circumstances and should be approved.<sup>3</sup>

**A. The Proposed Manner of Notice Should Be Approved**

Plaintiffs here propose a robust Notice plan that would direct the best notice practicable. Plaintiffs' proposed Notice plan seeks to reach the greatest number of Settlement Class members possible through a wide distribution in a variety of channels, including individual notice to members of the Settlement Class by mail, supplemented by Summary Notice in widely circulated publications and to banks, brokers, and others, as well as targeted online notice to various financial websites and establishment of a dedicated settlement website.

***Mail Notice Procedures.*** The Claims Administrator will distribute the Long Form Notice and Claim Form via United States Postal Service First Class mail, postage prepaid. For certain members of the Settlement Class, a Defendant will effectuate Notice through an alternative method to ensure compliance with foreign bank secrecy laws, data privacy laws, and/or similar confidentiality protections, which may prohibit certain members of the Settlement

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<sup>3</sup> Plaintiffs have considered the Court's comments at the July 24, 2020 conference and the Court's August 3, 2020 Order with respect to the proposed notice plan in the *Silver* action. See Memo Endorsement, *In re London Silver Fixing, Ltd. Antitrust Litig.*, Nos. 14-MD-2573, 14-MC-2573, ECF No. 459 (S.D.N.Y. Aug. 3, 2020) ("*Silver* Order"). First, Plaintiffs have provided information regarding the frequency of publishing notice of the Settlement in print media and online. See Finegan Decl. ¶¶ 18-25, 29-30; *cf. Silver* Order at 1. Second, Plaintiffs' proposed Long Form Notice includes the language relating to Requests for Exclusion in the Court's August 3, 2020 Order. See Brockett Decl., Ex. 1 at 8; *cf. Silver* Order at 5. Third, the proposed schedule sets the claims filing deadline 40 days before the fairness hearing. See Brockett Decl., Ex. 5 ¶ 26; *cf. Silver* Order at 4. Finally, the proposed Long Form Notice makes clear that opting in or opting out here does not affect any decisions relative to the balance of the case (*i.e.*, if a Settlement Class member opts out of this Settlement, it will not bar them from participating in the rest of the litigation or future settlements). See Brockett Decl., Ex. 1 at 2, 8; *cf. Silver* Order at 2. It also makes clear that Settlement Class members must remain part of the combined Settlement Class, *i.e.*, they cannot choose to benefit from the Deutsche Bank settlement while opting out of the HSBC settlement. Brockett Decl., Ex. 1 at 2-3.

Class or entities being identified to the Claims Administrator or Co-Lead Counsel. *See* Finegan Decl. ¶¶ 13-14. That is, a Defendant will engage an alternative administrator with experience in providing notice in class actions, or another such firm, to distribute the Long Form Notice and Claim Form where foreign privacy laws are at issue. *Id.* The reasonable expenses associated with this will be paid out of the Settlement Fund, just as with any other reasonable notice expense pursuant to paragraph 8(a) of the Settlement Agreements.<sup>4</sup>

The mailing program will use addresses from multiple sources. *First*, addresses will be used from the counterparties for gold-related transactions during the Class Period reasonably identifiable in the Settling Defendants' data. *Second*, Plaintiffs will send the Summary Notice to entities in a proprietary database Heffler maintains for use in antitrust and securities cases, which includes banks, brokers, and others entities (including major actors in the bullion market) likely to trade or hold gold or gold instruments on behalf of themselves and their clients, with instructions to forward the notice to their clients or provide their list of clients to Heffler for the purpose of sending individual notice. Finegan Decl. ¶ 16. Firms that maintain trading records for client accounts, and generate and distribute trading records to clients, are typically a reliable source from which to ascertain the names and addresses of additional potential Settlement Class members in an administratively feasible manner. *Third*, Plaintiffs recently received from the CME Group an aggregated list of addresses for large traders with a reportable position during the Class Period. CME is the world's largest financial derivatives exchange, offering opportunities to trade diverse gold products including COMEX Gold futures (ticker symbol GC). When

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<sup>4</sup> Once a Claim Form is submitted, the claims process for all claimants will proceed along the same track however notice was sent or received. As such, the Claims Administrator will retain responsibility for claims intake, administration, and fulfillment regardless of the location of the claimant or how notice was received.

combined with other forms of notice discussed below, this individual notice constitutes reasonable notice under the circumstances. However, *fourth*, in an abundance of caution as discussed in Section III, Plaintiffs believe they are also close to securing assistance from the non-settling bank Defendants.

In this way, Plaintiffs propose to provide individual notice of the Settlement Agreements to potential members of the Settlement Class “who can be identified through reasonable effort[s]” using Defendants’ data and other information. Fed. R. Civ. P. 23(c)(2)(B).

***Summary Notice in Widely Circulated Media.*** In addition to the mail Notice, the Claims Administrator will publish the Summary Notice in widely circulated newspapers and on widely viewed financial websites of relevance to potential members of the Settlement Class.

Specifically, the Claims Administrator shall cause the Summary Notice, substantially in the form attached as Exhibit 3 to the Brockett Declaration, to be published once in *The Wall Street Journal*, the *Financial Times*, *Investor’s Business Daily*, *Barrons’s*, *Stocks & Commodities*, and *Grant’s Interest Rate Observer*, and other publications. See Finegan Decl. ¶¶ 18-25.

Additionally, online banner notices will be placed on more than a dozen relevant financial focused websites; a press release will be sent over *PR Newswire*; and sponsored internet search listings will be used to direct traffic to the settlement website (discussed below). *Id.* ¶¶ 26, 27, 31. Plaintiffs believe Summary Notice in these publications and through a dedicated website will provide a valuable supplement to the already thorough individual mail Notice plan.

***Settlement Website, Phone Contact Information, and Social Media.*** Plaintiffs will also engage the Claims Administrator to establish a website dedicated to the Settlements at [www.GoldFixSettlement.com](http://www.GoldFixSettlement.com). *Id.* ¶ 33. This will enable any potential member of the Settlement Class to easily access information about the proposed Settlements, including the

notices and claims process, and to file claims. All documents related to the notices and claims process, including copies of the Long Form and Summary Notices, along with the Settlement Agreements and key case materials such as Plaintiffs' operative complaint, will also be posted on the Settlement website. *Id.* The Claims Administrator will also establish a toll-free telephone number and email address to answer potential Settlement Class Members' questions. *Id.* ¶ 34. Finally, the Claims Administrator will use social media (*e.g.*, Facebook, Instagram) to target potential members of the Settlement Class. *Id.* ¶ 28.

Courts routinely approve multi-faceted notice programs like the one proposed by Plaintiffs here (including this Court in the *Silver* action), that combine individualized mail notice and summary notice as components of the plan.<sup>5</sup> Plaintiffs therefore respectfully submit the proposed Notice plan summarized above, and further detailed in the Finegan Declaration, satisfies the requirements of Rule 23(e) and 23(c)(2)(B) and should thus be approved by the Court.

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<sup>5</sup> See, *e.g.*, *In re Patriot Nat'l, Inc. Sec. Litig.*, 2019 WL 5882171, at \*1-\*2 (S.D.N.Y. Nov. 6, 2019) (approving notice plan consisting of mail or e-mail notice to 13,530 potential settlement class members coupled with summary notice via publication in *Investor's Business Daily* and *PR Newswire*); *GSE Bonds*, 414 F. Supp. 3d at 702 (approving notice plan consisting of mail and publication notice); *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at \*5 (S.D.N.Y. Apr. 26, 2016) ("Class Counsel mailed notice packets to each of 13,923 identified Class members. . . . The Summary Notice was also published on January 11 in several important business publications . . . [and] the 'Claims Administrator' launched a website for the Settlement which posted the Settlement agreements, notices, court documents, and other information relevant to the Settlement."); *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at \*2 (E.D.N.Y. Oct. 23, 2012) ("Pursuant to this plan, a copy of the settlement notice was mailed to every potential member of the . . . Class whose address was provided by defendants. The notice that was ultimately mailed to 147 members of this class also contained a claim form. Additionally, the class notice was published in eight print publications, as well as on Facebook and on the approximately 800 websites that comprise the 24/7 Network. Finally, the settlement notice, along with other lawsuit and settlement-related information, was made available on a website operated by the settlement administrator.").

**B. The Proposed Forms of Notice Should Be Approved**

“There are no rigid rules to determine whether a settlement notice to the class satisfies 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’” in a manner understandable “by the average class member.” *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005); *Guevoura Fund Ltd. v. Sillerman*, 2019 WL 6889901, at \*12 (S.D.N.Y. Dec. 18, 2019) (“[N]otice is adequate if the average settlement class member understands the terms of the proposed settlement and the options they have.”).<sup>6</sup>

“Settlement notices under Fed. R. Civ. P. 23 do not need to delve into excessive details about the specifics of the settlement and the legal claims of the parties;” rather, settlement notices “should be concise and simple.” *Guevoura*, 2019 WL 6889901, at \*12. Ultimately, the notice must “enable class members to make an informed decision about their participation.” *Manual for Complex Litigation* §21.311 (4th ed.). Notice must state, “in plain, easily understood language,” (1) the nature of the action; (2) the class definition; (3) the claims, issues, or defenses; (4) that a class member may enter an appearance through an attorney if the member so desires; (5) that the court will exclude any member from the class who so requests; (6) the time and manner for requesting exclusion; and (7) the binding effect of a class judgment. Fed. R. Civ. P. 23(c)(2)(B).

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<sup>6</sup> See also *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 58 (E.D.N.Y. 2019) (“Courts in [the Second] Circuit have explained that a Rule 23 Notice will satisfy due process when it ‘describe[s] the terms of the settlement generally,’ ‘inform[s] the class about the allocation of attorneys’ fees, and ‘provide[s] specific information regarding the date, time, and place of the final approval hearing.’”).

The mail Notice—consisting of the Long Form Notice and Claim Form—provides members of the Settlement Class with clear, concise, and comprehensive information about the proposed Settlements. The mail Notice describes, 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 Settlement, including the monetary relief, scope of the release, and cooperation obligations; (v) the definition of the Settlement Class; (vi) a description of the Plan of Allocation and where on the Settlement website to find more detailed information about Settlement Fund allocation; (vii) the procedures and deadlines for submitting a Claim Form in order to receive a payment from the Settlement Fund; (viii) the deadlines and procedures for exclusion from the Settlement Class, objecting to the Settlement, and attending the Fairness Hearing; (ix) that members of the Settlement Class 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.

Similarly, the Summary Notice communicates to potential members of the Settlement Class, in clear and concise language, the information required to reach an informed decision. This includes Defendants’ alleged misconduct; the scope of the Settlement Class; the amount of the Settlements; the rights of the members of the Settlement Class to opt out or object to the Settlements; and the date and location of the Fairness Hearing to be set by the Court. The Summary Notice also directs members of the Settlement Class to the designated Settlement website referenced above, where the Long Form Notice and other Settlement-related documents are available, and provides contact information for the Claims Administrator and Co-Lead

Counsel. Like the language in the mail Notice, the Summary Notice’s language is designed to be readily understood by Settlement Class Members.

Plaintiffs submit that the proposed Long Form Notice, Summary Notice, and Claim Form meet the requirements of Rule 23(e) and 23(c)(2)(B) and, thus, should be approved by the Court.

## **II. THE PLAN OF ALLOCATION SHOULD BE PRELIMINARILY APPROVED**

“[W]hile the plan of allocation ‘must be fair and adequate,’ it ‘need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel.’” *GSE Bonds*, 414 F. Supp. 3d at 694; *Guevoura*, 2019 WL 6889901, at \*11 (“[C]ourts give great weight to the opinion of experienced and informed counsel when assessing a proposed plan of allocation as part of a settlement agreement.”).<sup>7</sup>

“A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding.” *GSE Bonds*, 414 F. Supp. 3d at 694. A principal goal of the plan of distribution must be “the equitable and timely distribution of a settlement fund without burdening the process in a way that will unduly waste the fund.” *Id.* at 695; *see also In re PaineWebber Ltd. P’ships Litig.*, 171 F.R.D. 104, 135 (S.D.N.Y. 1997) (“Efficiency, ease of administration and conservation of public and private resources are highly relevant to the reasonableness of a settlement, particularly where, as here, the issues are complex, the outcome of the litigation unclear, and the class large.”). Similar to

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<sup>7</sup> *See also Yang v. Focus Media Holding Ltd.*, 2014 WL 4401280, at \*9 (S.D.N.Y. Sept. 4, 2014) (in evaluating a proposed plan of distribution, courts accord substantial weight to the opinions of experienced counsel); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005) (“An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel.”); *In re PaineWebber Ltd. P’ships Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y. 1997) (“[W]hen real and cognizable differences exist between the likelihood of ultimate success for different plaintiffs, it is appropriate to weigh distribution of the settlement in favor of plaintiffs whose claims comprise the set that was more likely to succeed.”), *aff’d* 117 F.3d 721 (2d Cir. 1997).

the requirements for notice, whether a plan of distribution is fair and reasonable is “squarely within the discretion of the district court.” *Id.* at 132.

Plaintiffs’ proposed Plan of Allocation was crafted based on the knowledge and experience of Co-Lead Counsel. The proposed Plan of Allocation is summarized below. The mail Notice advises members of the Settlement Class to visit the Settlement Website for updates about the Plan of Allocation.

***Administrative Procedures.*** Each Class Member wishing to receive proceeds from the Net Settlement Fund must submit a Claim Form, which, *inter alia*, releases all Released Claims against all Released Parties (as defined in the Settlement Agreements) and is signed under penalty of perjury by an authorized Person. *See* Brockett Decl. Ex. 2 at 5. Pursuant to Part II of the Claim Form, Claimants will be required to provide annual Gross Transaction Amounts separately for Fix-Linked Transactions and Other Transactions as part of the Claim Form. *See id.* at 3-4. Also pursuant to Part II of the Claim Form, Claimants must describe the supporting documents and/or data used by the Claimant to calculate the Gross Transactions Amount. *See id.*

***Pro Rata Allocation.*** The proposed Plan of Allocation will allocate the Net Settlement Fund equitably among Authorized Claimants. On receipt and processing of Claimants’ data and records, the Claims Administrator will determine if a Claim Deficiency Notice is required for any transaction, and calculate the Claimant’s Transaction Claim Amount.<sup>8</sup> *See* Brockett Decl., Ex. 4 at 6. The Transaction Claim Amount is the Gross Transactions Amount multiplied by the applicable Litigation Multiplier for that year. *See id.* at 7. The Litigation Multiplier accounts for

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<sup>8</sup> The Plan of Allocation considers ETF claims as “Other Transactions” because the prices of ETF shares transacted in by investors are not expressly tied to the Fix. *See* ECF No. 158 at 32 (finding ETF shareholder claims to be derivative in nature). It should also be noted that the Plan of Allocation only accepts ETF transactions for GLD and IAU, which are the largest gold ETFs and the only ETFs Co-Lead Counsel are aware of that are valued in relation to the PM Fix.

differing statute of limitations risk. Specifically, for Fix-Linked Transactions or Other Transactions executed between January 1, 2004, and December 31, 2009, the notional amount will be multiplied by a multiplier of 0.5 to arrive at the Transaction Claim Amount. *See id.* at 2. This discount multiplier accounts for the likelihood that, were it to proceed to trial, this case, and thus recoveries, would focus on the years 2010 through 2013. The discount multiplier thus accounts for the relative strength of each claim against others for the purpose of equitably and efficiently distributing the settlement proceeds in a manner consistent with damage calculations that would be used at trial. *See In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 WL 7323417, at \*10 (S.D.N.Y. Dec. 19, 2014) (“Because they tend to mirror the complaint’s allegations, ‘plans [of allocation] that allocate money depending on the timing of purchases and sales of the securities at issue are common.’”).

After the Claims Administrator calculates the Transaction Claim Amounts, distributions will be calculated on a *pro-rata* basis based on the total qualifying Transaction Claim Amounts. *See* Brockett Decl., Ex. 4 at 7-8. This means that distributions will be made proportionally to each Settlement Class Member based on its shares of the total notional transaction amounts, without respect to the specific type (*i.e.*, Fix-Linked Transactions versus Other Transactions) traded. *Id.* Similar volume-based plans of distribution in financial services antitrust class actions have been regularly approved in this District. *See In re London Silver Fixing, Ltd. Antitrust Litig.*, No. 14-MD-2573, ECF No. 464 (S.D.N.Y. Aug. 5, 2020); *GSE Bonds*, 414 F. Supp. 3d at 698-99 (finding that under volume-based plan of distribution, “claimants will be treated

equitably”); *CDS Antitrust*, 2016 WL 2731524, at \*9 (holding that a similar allocation scheme “achieves a fair distribution” of the settlement fund).<sup>9</sup>

Finally, where it is reasonably determined that the cost of administering a claim would exceed the value of the claim under the Plan of Allocation, Co-Lead Counsel will direct the Claims Administrator to preserve the value of the Settlement Fund and make an alternative minimum payment to the Authorized Claimant to satisfy such claims. *See* Brockett Decl., Ex. 4 at 8. The alternative minimum payment will be a set amount for all such Authorized Claimants in each Pool, and will be based on the participation rate of the class in the Settlements. *Id.* Courts routinely approve plans that provide for flat *de minimis* allocations. *See, e.g., In re Gilat Satellite Networks, Ltd.*, 2007 WL 1191048, at \*9-\*10 (E.D.N.Y. Apr. 19, 2007) (*de minimis* threshold would “save the settlement fund from being depleted by the administrative costs associated with claims unlikely to exceed those costs”); *In re Glob. Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 463 (S.D.N.Y. 2004) (approving a *de minimis* threshold because “[c]lass counsel are entitled to use their discretion . . . to avoid excessive expense to the class as a whole”).<sup>10</sup> Further details regarding the Plan of Allocation will be posted on the Settlement website.<sup>11</sup>

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<sup>9</sup> However, if the aforementioned *pro rata* distribution would result in less than 20% of the Net Settlement Fund being distributed in relation to Fix-Linked Transactions, then the following process will be used instead: In this event, 20% of the Net Settlement Fund would be distributed *pro rata* by Transaction Claim Amounts associated only with Fix-Linked Transactions as compared to other Fix-Linked Transactions, while 80% of the Net Settlement Fund would be distributed *pro rata* by Transaction Claim Amounts associated only with Other Transactions as compared to Other Transactions. *See* Brockett Decl., Ex. 4 at 7-8.

<sup>10</sup> Determinations as to the *de minimis* threshold will be made after the claim deadline. *See* Manual for Complex Litigation §21.312 (4th ed.) (“Often . . . the details of allocation and distribution are not established until after the settlement is approved.”).

<sup>11</sup> Plans of allocation are commonly described in a summary fashion in the notice, subject to additional information being made available to settlement class members before, during, or even after the notice process. *See, e.g., Sonterra Capital Master Fund Ltd. et al v. UBS AG, et al.*, No.

Plaintiffs respectfully submit that the proposed Plan of Allocation has a reasonable, rational basis, treats Settlement Class Members equitably, and should be preliminarily approved by the Court.

**III. PLAINTIFFS REQUEST A DEADLINE FOR DEFENDANTS' PROVISION OF ASSISTANCE WITH THE NOTICE PLAN**

As discussed above, Plaintiffs' proposed Notice plan uses, among other things, name and address information for Settling Defendants' customers during the relevant period. While Settling Defendant Deutsche Bank has provided its reasonably available information to Plaintiffs, Settling Defendant HSBC is still working to provide its reasonably available contact information or to be ready to provide notice through alternative means.

The non-settling bank Defendants have also agreed to provide reasonably available contact information, or to provide for notice through alternative means, if certain foreign privacy law issues can be resolved.

The parties have been conferring regularly, and Plaintiffs understand the remaining issues are close to being resolved. To ensure the issues are brought to a timely close, Plaintiffs respectfully request the Court require HSBC and the non-settling bank Defendants to provide their reasonably identifiable class contact information to Plaintiffs or certify the readiness of an alternative administrator to provide notice within 7 days of the Court's order. Plaintiffs propose

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15-cv-05844 (S.D.N.Y.) (ECF Nos. 221, 223, 261, 263-5, 264) (granting preliminary approval where plan of distribution was described in summary form with "artificiality tables" to be published on settlement website 30 days before opt out deadline); *see also Agent Orange*, 818 F.2d at 170 ("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 settlement agreement. The formulation of the plan in a case such as this is a difficult, time-consuming process."); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 480 (S.D.N.Y. 1998) (noting that "it is appropriate, and often prudent, in massive class actions" to defer consideration of the plan of distribution).

that this deadline may be extended by mutual agreement or further Court order. After reviewing the data or alternative-means proposals, Plaintiffs will promptly certify to the Court they are ready to proceed with the notice program as described herein.

#### **IV. PROPOSED SCHEDULE OF SETTLEMENT EVENTS**

Finally, Plaintiffs respectfully propose the following schedule for remaining events and submissions related to the Settlements.

<b>EVENT</b>	<b>PROPOSED DATE</b>
Commencement of mail Notice to potential members of the Settlement Class, and launch of Settlement website (the “Notice Date”)	Absent further Court order, 7 days after Plaintiffs’ certification of readiness; notice to be completed within 30 days thereafter
Publish Summary Notice	Within 10 days after the Notice Date
File papers in support of final approval and application for fees, expenses, and incentive awards	60 days after Notice Date
Last day to mail Request for Exclusion Last day to object to final approval and application for fees, expenses, and incentive awards	95 days after Notice Date (the “Objection Deadline”)
Deadline to submit Claim Forms	40 days before Fairness Hearing
Reply papers in support of final approval and application for fees, expenses, and incentive awards (including responses to any objections to final approval and application for fees, expenses, and incentive awards)	14 days after Objection Deadline
Fairness Hearing	21 days after filing of reply papers

#### **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request the Court enter the Proposed Order approving notice to the Settlement Class and preliminarily approving the Plan of Allocation.

DATED: December 7, 2020

Respectfully submitted,

/s/ Merrill G. Davidoff

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 7, 2020, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

/s/ Daniel L. Brockett

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