**UNITED 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

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND LITIGATION EXPENSES**

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## PRELIMINARY STATEMENT

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Co-Lead Counsel respectfully move for an award of attorneys' fees and payment of litigation expenses from the common fund.[1] This case has its roots in Co-Lead Counsel's investigative efforts, working with industry and economic consultants, over seven years ago. The case likely would not exist without the investments and hard work both of counsel and their consultants.

Co-Lead Counsel did not just get the case off the ground, we vigorously litigated the case for almost two-and-half years before securing the first major settlement, and then litigated another four years before securing another settlement. The $102 million fund represents a tremendous result in light of the challenges facing this case. Indeed, the complexity of this case cannot be understated, as aptly demonstrated both by the case's length and the amount we have had to invest in out-of-pocket expenses. Those expenses were driven largely by the need for multiple non-testifying expert consultants to assist in investigating and evaluating the Plaintiffs' legal and economic theories. Such assistance was required at the investigation phase, in opposing the *Daubert*-like motions to dismiss, in amending the pleadings, in rebutting to Defendants' challenges to the statistical analyses, in responding to Defendants' press for discovery into our consultant work, and in prosecuting our requests for data from Defendants and numerous third parties.

As a result of the hard work and skill of Co-Lead Counsel, and our strategic choice to settle at key points in the case—one to lock in a recovery at the dismissal stage, and another prior to summary judgment and class certification—the Settlement Class is in line for substantial monetary recoveries. As the Second Circuit has explained:

[1] All capitalized terms not otherwise defined herein have the meanings set forth in the Stipulations and the Joint Declaration of Daniel L. Brockett and Merrill G. Davidoff ("Joint Declaration"), submitted herewith.

> [O]ne whose labors produce a favorable result deserves adequate recompense. Such a notion is particularly applicable in the area of antitrust class action, which depends heavily on the notion of the private attorney general as the vindicator of the public policy. In the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation.

*Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc*., 481 F.2d 1045, 1050 (2d Cir. 1973).

We respectfully submit that our $28,200,000 request, plus interest, is fair and reasonable to the Settlement Class. This request is supported by this Circuit's standards for evaluating fee applications and by fee schedules adopted by a range of courts in other complex antitrust litigation with comparable recoveries. Professor Charles Silver, whose extensive analyses of attorney-client fee agreements and class-action fee awards has been relied upon by courts and commentators alike, confirms this fee is reasonable and, if anything, *below* the applicable norms.

We also respectfully request that $8,242,755.81 in litigation expenses—all, incurred prior to the execution of the HSBC Settlement—be reimbursed, plus interest. Almost all of these expenses arise out of the work of our non-testifying expert consultants; as this Court is aware, this is a very complex case involving large amounts of data and specialized knowledge. Particularly in light of the risk of non-recovery, Co-Lead Counsel only made such investments because they believed, and still believe, they would benefit Plaintiffs and class members. Courts routinely recognize that class counsel should be reimbursed for their investments.

## STATEMENT OF FACTS

***Co-Lead Counsel's work at the pleading stage is described more fully in the accompanying Joint Declaration, Section I.A.*** Our investigation began in 2013, even before the government investigations or reports had been made public. Purchasing a large amount of data and working with multiple non-testifying expert consultants, a complaint was filed in March 2014. Case No. 14-cv-2213, ECF No. 2. After consolidation and leadership processes were

complete, a consolidated pleading—with a body of 108 pages and 86 pages of supporting appendices, nearly double the size of the initial complaint—was filed in December 2014. ECF No. 27. Another 40 pages were added, many of which again were filled with consultant analyses, in the Second Consolidated Class Action Complaint. ECF No. 44.

Throughout 2015 and into 2016, the parties briefed, held oral argument, and filed supplemental authority papers on Defendants' motions to dismiss. *See, e.g.*, ECF Nos. 72, 74, 76, 77 (motion papers); 82, 83, 84 (opposition papers); 88, 91, 92 (reply papers); 135, 136, 149, 150, 156, 157 (letters regarding supplemental authority and arguments). At the Court's request, Co-Lead Counsel worked with Defendants here, and the parties in the *Silver* action, to provide a "tutorial" to the Court in September 2015. *See, e.g.*, ECF No. 81.

The Court denied in large part the motions to dismiss in October 2016, but did dismiss certain claims. ECF No. 158. Co-Lead Counsel and our non-testifying expert consultants worked to successfully amend the pleading to bring the early-year claims back into the case, and to try unsuccessfully to amend to bring UBS back into the case. *E.g.*, ECF No. 183. In August 2017—almost four years after Co-Lead Counsel's investigations began—Defendants filed their first Answers. ECF Nos. 286-90.

***Co-Lead Counsel's work during the discovery stage is described more fully in the accompanying Joint Declaration, Section I.B.*** Co-Lead Counsel made numerous attempts to move discovery along early, but various stays were put in place. *See, e.g.*, ECF Nos. 17-18, 270. As a result of the Court's directive at the conference in December 2016, Plaintiffs received certain limited documents, and by conferring throughout much of 2017 we learned background information concerning the identities of key witnesses and the existence of documents and audio

files. However, throughout the discovery process, there have been delays and multiple battles with Defendants over even the simplest of tasks.

For instance, negotiations with Defendants over search terms and protocols required multiple extensions and even then resulted in motion practice. *See, e.g.*, ECF Nos. 341, 343, 345, 375, 377, 399. Disputes over foreign privacy and bank secrecy laws required consultation with foreign-law advisors, and briefing. *See, e.g.*, ECF No. 366. Negotiations over discovery issues has required over 400 formal discovery communications between the parties, as well as countless informal conversations and e-mail communications. *See* Joint Decl. Section I.B.2. By exhaustively conferring, Co-Lead Counsel were able to reach agreements on many issues, saving the Court from having to get directly involved in even more disputes—though often even our extensive efforts failed to secure an agreement, requiring more investment by way of motion practice. *See id.* Section I.B.3.

Defendants alone produced 15 million pages of documents and 8,000 audio files. Even deploying numerous techniques to focus and streamline the review of such materials, understanding such a large effort required massive investments in time and resources. *See id.* Section I.B.4.

***Co-Lead Counsel's work with our non-testifying expert consultants is described more fully in the accompanying Joint Declaration, Sections I.C and III.B***. The operative Third Amended Complaint includes 180 paragraphs regarding statistical analyses of such things as pricing and volume behavior around the PM Fix, comparisons to how volume and prices acted at other times of day or in other markets, the degree to which the PM Fix prices were outliers on trading days, comparisons of price behaviors during the PM Fix and AM Fix, specific days on which manipulation potentially occurred, refutations of alternative explanations for the

abnormalities in the pricing data, analyses showing that Defendants were heavily invested in gold and had economic motives to manipulate the PM Fix based on their futures positions, and analyses showing that the conspiracy was ongoing in 2004 and 2005.

Both through correspondence and then motion practice, Defendants have waged a series of "discovery" battles over their disagreement with the pleading-stage analysis. Over 200 gigabytes of data, and even dozens of non-testifying expert consultant-prepared private memoranda, have been turned over to Defendants in connection with those requests, which also resulted in multiple briefs, letter-briefs, and oral arguments. *See* Joint Decl. Section I.C.2.

Beyond the pleading-stage work, Co-Lead Counsel also worked with non-testifying expert consultants during the discovery process—most particularly, regarding the data produced by Defendants and the CME. *See id.* Section I.C.3. Over 110 million data records, many with over 100 fields of information about each record, have been gathered in this case from Defendants alone—another 491 million records were negotiated for during the relevant period here from third parties, and produced in 2021. Complicating matters is, of course, the fact that the 110 million records were not all produced at once, by one party, in one format. To the contrary, each producing party only produced their own data from its own system—or, often, multiple systems—in whatever format that system happened to produce. Each potentially relevant datasets had to be loaded and analyzed, and then became the subject of extensive conferrals between the relevant parties as to what the produced data was (and was not) and what other data was (or was not) available. Those conferrals often included detailed letters or email exchanges, as well as conferences. Certain answers just led to more questions, or other datasets, forcing the process to start over.

Even once the productions were received, it was a massive project just to get *ready* to use so many records. *See id.* Following standard practices, once the data was understood the "raw" files were combined into a common database format, where, for instance, fields that held identical information would appear together in a single format even if two banks used a different naming convention or numbering conventions. Knowing whether the relevant data is being received and understood also requires at least some understanding of how the data is likely to be used at class certification, summary judgment, and/or trial. That is, it would be hard to know whether the needed data was received, without knowing what the case needs even are—further work requiring coordination between counsel and our consultants.

## ARGUMENT

### I. CO-LEAD COUNSEL'S FEE REQUEST IS FAIR AND REASONABLE

"Attorneys whose work created a common fund for the benefit of a group of plaintiffs' may receive reasonable attorneys' fees from the fund." *See In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *16 (S.D.N.Y. Apr. 26, 2016) ("*CDS*"). Fees can be awarded based on an interim settlement fund. *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *9 (E.D.N.Y. Oct. 23, 2012). Awarding reasonable attorneys' fees from the common fund recognizes and compensates Co-Lead Counsel's efforts in bringing and prosecuting this case, and advances the purpose of the antitrust laws, which rely on private actions like this one to further important public-policy goals. Without "adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation." *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2011 WL 2909162, at *6 (E.D.N.Y. July 15, 2011).

Ultimately, "market rates" are the "ideal proxy" for an attorney's compensation. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). As explained by Prof. Silver

in his declaration filed concurrently herewith (the "Silver Decl."), a "mimic the market" approach recognizes that sophisticated parties bargaining at arm's length yield the best indicia of how to properly align the incentives between counsel and client. Silver Decl. ¶ 17 ("The contingent fee's logic is simple and powerful: The client and lawyer prosper together."); *see also id.* ¶¶ 41-43 (discussing widespread adoption of percentage approach). By contrast, "sophisticated clients never use" a lodestar method. *Id.* ¶ 17.

Consistent with these observations, this Court has recognized that "[a]lthough courts award attorneys' fees under either the lodestar method or the percentage-of-the-fund method, the 'trend in this Circuit is toward the percentage method.'" *Melito v. Am. Eagle Outfitters*, 2017 WL 3995619, at * (S.D.N.Y. 2017) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005)). The percentage method provides "appropriate financial incentives" necessary "to attract well-qualified plaintiffs' counsel who are able to take a case to trial," while also "directly align[ing] interests of the class and its counsel" by providing "a powerful incentive for the efficient prosecution and early resolution of litigation." *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355, 359 (S.D.N.Y. 2005).

### A. The Fee Request is Reasonable Under the *Goldberger* Factors

Courts evaluating whether a fee is reasonable consider "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger*, 209 F.3d at 50.

#### *1. Co-lead Counsel invested substantial time and resources*

As discussed in Section II below almost 105,000 hours by Co-Lead Counsel's attorneys and professional support staff, and $8.2 million in expenses, have been invested in connection with the case. Such investments were required because of the complexity of the case, and its

length—it was almost four years from the start of our investigation to when Defendants filed their first answers, and the full end of fact discovery will be almost eight years after the start of our investigation. By contrast, most antitrust cases have reached *full resolution* within *seven* years. Silver Decl. ¶ 64. As in the Statement of Facts above and in the Joint Declaration, every step in that abnormally long history required constant interaction between attorneys and industry and other non-testifying expert consultants. Beyond the value created for the Settlement Class by way of the ongoing litigation, and in helping secure both the initial and second settlements on behalf of an overlapping group of investors, all this work both gave counsel sufficient knowledge to assess what the case was worth, and confirm the requested fee comes nowhere close to creating a "windfall" situation.

*2. The case is incredibly complex*

"[C]lass actions have a well-deserved reputation as being most complex," *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998), with antitrust cases being among the most "complex, protracted, and bitterly fought," *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 669 (S.D.N.Y. 2015). In cases that require more expertise, a larger percentage of the fund should be awarded to the lawyers who can competently prosecute the case. *See In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 379 (S.D.N.Y. 2013) ("The upshot is that the magnitude and complexity of the litigation also weigh in favor of a significant award.").

All the same facts discussed above also demonstrate that this case was a prime example of a complex and risky case. Not only has the case been ongoing for many years, but the conspiracy at issue now goes back seventeen years into the past, and the market for gold-related investments span not just billions of dollars, but many different instrument types. Defendants have and will argue that complicates—in their view, defeats—the alleged motive, means, and

effectiveness of the conspiracy. And as more fully detailed in the Joint Declaration, many issues here devolved into dragged-out battles.

The amount of out-of-pocket expenses incurred to gather, process, understand, and analyze the massive amounts of data in this case also speaks to the case's complexity. *See* Silver Decl. ¶¶ 66, 71.

For all these reasons, a fee award that accounts for the prosecution of litigation that was "extraordinary in both complexity and scope" is appropriate. *In re Holocaust Victim Assets Litig.*, 2007 WL 805768, at *46 (E.D.N.Y. Mar. 15, 2007). *See also NASDAQ*, 187 F.R.D. at 477 ("There can be no doubt that this class action would be enormously expensive to continue, extraordinarily complex to try, and ultimately uncertain of result.").

*3. The case involved—and still involves—substantial risk*

The Second Circuit has "historically labeled the risk of success as 'perhaps the foremost' factor to be considered in determining whether to award an enhancement." *Goldberger*, 209 F.3d at 54. Risk is also recognized by sophisticated clients as bearing on the rates they negotiate in private attorney-client agreements. Silver Decl. ¶ 61.

Many of the same factors demonstrating the complexity of this case also demonstrate its risk, including this case's length and the amount of investment needed to get the case to this point.

It should also be noted that, at the outset of our investigation, Co-Lead Counsel had little to go on but the review of the publicly available data—and by the dismissal stage Defendants were touting letters received about the closing of investigations against them. *See* Apr. 20, 2016 Tr. at 15:13-16:2. Co-Lead Counsel thus was investing resources into this case both before the government was known to be acting, as well as investing even more heavily for *years* after the government's own resources were (purportedly) directed elsewhere. This not only demonstrates

the increased risk of this case, but also the importance of the role of private attorneys general to the nation's antitrust laws. *See* Section I.A.6 below; Silver Decl. ¶¶ 72-76 ("Private law firms . . . can supplement and even take the place of public enforcers because they use the dollars they take in to maintain their capacities."); *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 441 (E.D.N.Y. 2014) (fact plaintiffs "did not piggyback on previous government action" to be in favor of fee award).

More generally, Defendants have throughout made clear their intent to challenge, among other things, whether any conspiracy existed at all; whether the data show prices were suppressed to an artificial degree at all; whether any manipulation would have a measurable impact on instruments not expressly tied to the PM FIX price; whether any manipulation would have a measurable impact on instruments traded at other times of day; and whether class members must "net" any gains (from buying) against losses (from selling). Many of these defense arguments will be raised both as they relate to the merits of the case, as well as the certifiability of the case. *See generally* Silver Decl. ¶¶ 77-80 (discussing risk at certification stage).

It is often said that antitrust cases involve a trial boiling down to a "battle of the experts" on proof of damages. *NASDAQ*, 187 F.R.D. at 476. Defendants' multi-year discovery on the pleading-stage non-testifying consultants further confirms this will be even more true here than in most antitrust cases. "In this 'battle of experts,' it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors . . . ." *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985) *aff'd*, 798 F.2d 35 (2d Cir. 1986). A successful *Daubert* challenge or effective cross-examination at trial could result in a

significantly reduced verdict even if liability is proved. "Indeed, 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." *NASDAQ*, 187 F.R.D. at 476; *see U.S. Football League v. Nat. Football League*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) (jury award of $1.00 in damages), *aff'd,* 842 F.2d 1335, 1377 (2d Cir. 1988).

Co-Lead Counsel took this case on a fully contingent basis. *See* Joint Decl. Section III.A. "Counsel should be rewarded for undertaking [those risks] and for achieving substantial value for the class." *Payment Card*, 991 F. Supp. 2d at 441; *see also Jermyn v. Best Buy Stores, L.P.*, 2012 WL 2505644, at *10 (S.D.N.Y. June 27, 2012) ("[T]he risk of non-payment in cases prosecuted on a contingency basis where claims are not successful . . . can justify higher fees.").

*4.* *Co-Lead Counsel provided high-quality representation*

"[T]he quality of representation . . . may be measured in large part by the results that counsel achieved for the classes." *Payment Card*, 991 F. Supp. 2d at 441. As a general matter, Co-Lead Counsel are among the most experienced and skilled antitrust and class action litigators in the country. Each firm has led several prior mega-fund cases involving the financial markets and have tried class action cases, and the attorneys running the case are highly qualified litigators. *See generally* Brockett Decl. Ex. C & Davidoff Decl. Ex. D (sample summaries of firm and attorney biographies).

Beyond our general qualifications, this factor is again met because of the fact that Co-Lead Counsel obtained $102 million for the benefit of the Settlement Class. A study has found that the median full-case antitrust recovery is 19% of single damages. *See* John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries are Mostly Less Than Single Damages*, 100 Iowa L. Rev. 1997, 2010 (2015). Thus, Co-Lead Counsel would have had to establish at trial a recoverable single-damages figure of $537 million before the current

settlements fall behind the pace of a median *full-case* antitrust recovery rate. And of course, the Settlement Fund is *not* a full-case recovery—Plaintiffs may still recovery from the remaining Defendants. Thus, the above comparison understates the success of the Settlements. That the Settlement Class remains free to pursue all damages on a joint and several basis also speaks to the success of the current Settlements.

Co-Lead Counsel's ability to put the case on such a pace even while facing aggressive, well-funded Defendants represented by top-flight counsel is not just a testament to the merits of the Settlements, but also the skill with which Co-Lead Counsel have prosecuted this case. *See Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *22 (S.D.N.Y. Sept. 9, 2015) ("The quality of opposing counsel is also important in evaluating the quality of [Co] Lead Counsel's work."); *NASDAQ*, 187 F.R.D. at 489 (approving fee award where defense counsel included "the nation's biggest and best defense firms operating on a seemingly unlimited budget over a period of four years").

*5. The effective percentage being requested is below the applicable norms*

Again, "market rates" are the "ideal proxy" for an attorney's compensation. *Goldberger*, 209 F.3d at 50. Rational and sophisticated parties are best positioned to determine what terms beast align the interests between client and attorney. *See* Silver Decl. ¶¶ 31-36. Notably, sophisticated clients do not merely seek out the lowest percent; rather, the proper question is which percent is likely to sufficiently align incentives as to result in the largest total net recovery. *Id.* ¶¶ 27-30. Prof. Silver's declaration provides numerous datapoints as to what sophisticated clients have agreed to pay their attorneys on large contingency-fee cases. Years of study "shows that claimants typically agree to pay contingent fees in the range extending from 33 percent to 40

percent, even when sophisticated clients hire lawyers to handle complex commercial lawsuits with the potential to generate enormous recoveries." *Id.* ¶ 35.[2]

Co-Lead Counsel's $28,200,000 fee request was arrived at using the sliding-scale approach put forth by Judge Gleeson in *In re Payment Card*, 991 F. Supp. 2d at 445. That scale adjusts the percent fee downward as the size of the gross common fund increases. This Court has called this a "creative approach" that "effectively aligns counsel's incentives with those of the putative class." Case No. 14-cv-2213, ECF 23. Co-Lead Counsel's request—for what amounts to 27.6% of the total Settlement Fund Amount—is far below the "proxy" of what a privately negotiated contingency fee would have likely provided for in a case of this size, complexity, and risk.

Though it risks deviating from the "ideal proxy" of privately negotiated agreements, courts of course do often also want to often know what other courts are doing. *See* Silver Decl. ¶ 82. A 2017 study found that the mean and median awards in the Second Circuit are 28 percent and 30 percent, respectfully. *Id.* ¶ 83. This is true even though the mean recovery of the studied cases was $113 million, a similar amount at issue here. *Id.*

Surveys by courts themselves have reached similar results. *See Thornhill v. CVS Pharmacy, Inc.*, 2014 WL 1100135, at *3 (S.D.N.Y. Mar. 20, 2014) (collecting cases, noting: "In this Circuit, courts typically approve attorneys' fees that range between 30 and 33⅓%."); *Sanz v. Johny Utah 51 LLC*, 2015 WL 1808935, at *1 (S.D.N.Y. Apr. 20, 2015) (same). Courts

[2] *See also* Silver Decl. ¶¶ 20-24 (33% in large pharmaceutical cases), 47 ("broad agreement that in most types of plaintiff representations contingent fees range from 30 percent to 40 percent of the recovery," with higher percentages in cases where "costs and risks" are great), 50-52 (survey of patent cases), 53-58 (survey of other large complex actions), 59 (named plaintiffs).

recognize that large, complex antitrust cases present considerable risk and require extensive work. As a result, courts often award fees at or even above the percentage requested here.[3]

In sum, when viewed as against the "ideal proxy" of privately negotiated contracts, Co-Lead Counsel's request is far below the norm. Even when viewed against what other courts have awarded, Prof. Silver "can confidently report that [Co-Lead Counsel's] request . . . falls within the range that courts typically award." Silver Decl. ¶ 83.

*6. Public policy supports approval of the fee request*

Public policy also strongly supports the requested fee award. Although the PM Fix's existence was known, without private counsel taking on the risk of this lawsuit, and having the skill and resources to use consultants and other sources to uncover and then pursue the claims vigorously, the Settlement Class would have recovered nothing, and important public interests would not have been vindicated. *See CDS*, 2016 WL 2731524, at *18 ("It is important to encourage top-tier litigators to pursue challenging antitrust cases . . . . Our antitrust laws address issues that go to the heart of our economy.").

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[3] *See In re Urethane Antitrust Litig.*, 2016 WL 4060156, at *8 (D. Kan. July 29, 2016) (awarding 33.33% of $835 million settlement); *Klein v. Bain Capital Partners, LLC*, No.1:07-cv-12388, slip op. (D. Mass. Feb. 2, 2015) (ECF No. 1095) (awarding 33% of $590.5 million antitrust settlement); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 WL 1365900, at *20 (N.D. Cal. Apr. 3, 2013) (awarding 28.6% of $1.08 billion settlement); *In re Checking Acct. Overdraft Litig.*, 830 F. Supp. 2d 1330, 1358 (S.D. Fla. 2011) (awarding 30% of $410 million settlement); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding 33.3% of $510 million settlement); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1241 (S.D. Fla. 2006) (awarding 31.33% of $1.06 billion settlement); *In re Vitamins Antitrust Litig.*, 2001 WL 34312839, at *10 (D.D.C. July 16, 2001) (awarding 34.06% of $365 million settlement); *see also In re Oxford Health Plans, Inc. Sec. Litig.*, 2003 U.S. Dist. LEXIS 26795, at *13-*14 (S.D.N.Y. June 12, 2003) (awarding 28% of $300 million settlement); *Standard Iron Works v. Arcelormittal, et al.*, No. 1:08-cv-05214, slip op. at 5 (N.D. Ill. Oct. 22, 2014) (ECF No. 539) (awarding 33% of $164 million settlement); *In re Polyurethane Foam Antitrust Litig.*, 2015 WL 1639269, at *7 (N.D. Ohio Feb. 26, 2015) (awarding 30% of $147.8 million settlement); *In re CRT Antitrust Litig.*, 2016 WL 183285, at *2-*3 (N.D. Cal. Jan. 14, 2016) (awarding 30% of $127.5 million settlement); *In re Municipal Derivatives Antitrust Litig.*, No. 1:08-cv-02516, slip op. at 1 (S.D.N.Y. July 8, 2016) (ECF No. 2029) (awarding 33.33%).

Again, at the outset of our investigation, Co-Lead Counsel had little to go on but the review of the publicly available data—and by the dismissal stage Defendants were touting letters received about the closing of investigations against them. *See* Apr. 20, 2016 Tr. at 15:13-16:2. Co-Lead Counsel's efforts—which including probing the Fixing rules, the way the Fixing was actually carried out, and even analyzing many hours of audio files—are the only way allegedly injured investors will receive any compensation. This case is thus a prime example of why public policy favors enforcement of the antitrust laws through suits by private attorneys general.[4] *See* Silver Decl. ¶¶ 72-76 (discussing importance of private enforcement and Co-Lead Counsel's investments here). Awarding a reasonable percentage of the common fund properly motivates zealous enforcement of the antitrust laws and incentivizes skilled counsel to bring meritorious cases even where, at the outset, the prospect of any recovery is uncertain. *Cf. WorldCom*, 388 F. Supp. 2d at 359 ("In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives."). Accordingly, public policy supports Co-Lead Counsel's requested fee.

### B. The Fee Request is Reasonable Under the Lodestar Cross-Check

The lodestar fee calculation method has "fallen out of favor particularly because it encourages bill-padding and discourages early settlements." *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 353 (S.D.N.Y. 2014). Accordingly, the lodestar method is used in this Circuit only "as a sanity check to ensure that an otherwise reasonable percentage fee would not lead to a windfall." *Id. See also* Silver Decl. ¶¶ 85-88 (arguing against use of lodestar method,

[4] *See F.T.C. v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013) (noting the "fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws"); *Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983) (emphasizing "the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws").

and noting it is not used in privately negotiated engagements). "[W]here used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50.

The cross-check in this case makes clear there is no windfall. To the contrary, the figures strongly support Co-Lead Counsel's fee request, as they confirm, as discussed above, the complexity and risk factors present here. A large survey has found that the mean multiplier for awards in the Second Circuit was 1.93, while the mean multiplier for awards for antitrust cases was 1.61. Silver Decl. ¶ 93. These awards over the attorneys' normal hourly rates are necessary to encourage attorneys to take cases on contingency, despite the risks—and to avoid incentivizing attorneys to settle cheaply early-on in the case. *E.g.*, *id.* ¶ 94. That is, courts recognize providing fee awards beyond standard hourly rates is necessary to incentivize attorneys to take cases despite the risks inherent in contingency-fee arrangements. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974) ("No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success."), *abrogated on other grounds by Goldberger*, 209 F.3d 43. *See also In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (appropriate to take this contingent fee risk "into account in determining the appropriate fee to award").

Here, however, as demonstrated in the supporting declarations, Co-Lead Counsel's attorneys and professional support staff collectively spent over 105,000 hours on this matter before the HSBC Settlement was executed. Co-Lead Counsel turned this into a fees-equivalent using a very conservative methodology that included, for instance, a three-year rate freeze for

both firms, and a 20% discount on Quinn Emanuel's standard rates,[5] as described in Co-Lead Counsel's individual declarations. This all means the "rates" being used are below market, if anything. *See generally* Silver Decl. ¶¶ 90-92 (discussing datapoints as to hourly rates, finding rates used here to be "clearly reasonable"). We also calculate the lodestar based entirely on Co-Lead Counsel's work.[6] Using this conservative methodology, Co-Lead Counsel had invested the equivalent of approximately $39,722,235 by the time the HSBC Settlement was executed in attorney and staff hours. *See* Joint Decl. Section III.A.

This translates to a lodestar "multiplier" of only .71. In other words, Co-Lead Counsel are asking for *less* than their lodestar, even when calculated using very conservative methodologies.[7] This is, clearly, not a windfall situation. Given the request equates to a *below-1* multiplier, it should be unsurprising that Prof. Silver confirms that the multiplier is "easily justified" on the facts here, and that "judges presiding over antitrust cases with mega-fund settlements . . . have often awarded multipliers far larger than the one sought here." Silver Decl. ¶¶ 95. Indeed, Prof. Silver says the multiplier "by ordinary standards is minuscule," *id.* ¶ 88, and "[m]ultipliers this small are nearly unheard of in settlements of this magnitude," *id.* ¶ 93.

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[5] The potential for a "discount" and other aspects of these calculations were first raised in our initial leadership application. *See* Case No. 14-cv-2213, ECF 17. Berger Montague did not represent in the leadership application it would discount its fees, in large part because the default Berger Montague rate schedule was similar to Quinn Emanuel's discounted schedule. As set forth in the supporting declarations, we are including hours from vendor-provided attorneys in our lodestar calculations using modest hourly rates.

[6] No commitments have been made, but we may provide a portion of any fee award to certain firms who provided assistance at the request of Co-Lead Counsel. As we are not relying on the work of any other firm for the lodestar analysis at this time, only Co-Lead Counsel have filed supporting declarations.

[7] Co-Lead Counsel are providing the conservative methodology discussed herein to remove all doubt as to the absence of a "windfall" situation here. However, Co-Lead Counsel reserve the right to present alternative calculations in support of this or future applications.

### C. The Fee Request is Below That Negotiated for by the Named Plaintiffs

As discussed in Section I.A above, the "ideal proxy" for a reasonable fee, *Goldberger*, 209 F.3d at 50, are market rates. As discussed in Section I.A.5 above, the request here is far below prevailing rates. Another fact supporting Co-Lead Counsel's request is that the effective 27.6% request is also below the terms negotiated for by our own sophisticated clients. None bargained to limit our fees to a lower percent of the recoveries, with many instead allowing a 33 1/3% request. *See* Joint Decl. ¶ 149. Fees negotiated specific to a case can be seen as "the best indication of the actual market value of counsel's services." *In re Comverse Tech., Inc. Sec. Litig.*, 2010 WL 2653354, at *4 (E.D.N.Y. June 24, 2010) (negotiated fee "is the best indication of the actual market value of counsel's services"); *see also CDS*, 2016 WL 2731524, at *17 (citing approvingly pre-negotiated fee schedule even where court would otherwise have found it to be "generous" given it resulted in a lodestar multiplier of over 6).

### D. The Fee Request is Reasonable Even Considering the Time Gap Between the Deutsche Bank and HSBC Settlements

The HSBC and Deutsche Bank agreements benefit the *same people*. *Compare* ECF 174-1 ¶ 3(a) *with* 514-1 ¶ 3(a). There is thus no need to divide the fee being requested or the work performed into separate buckets, because all work was done for the benefit of the single Settlement Class. Indeed, assessing each fee application as a function of *all* fees requested and *all* lodestar ensures that the final end-result is fair and reasonable, rather than fluctuating based on attempts to strategically time, group, or disaggregate the calculations.

### E. The Reaction of the Class

The Notice stated that Co-Lead Counsel may seek a fee of up to $28,200,000. Co-Lead Counsel will update the Court on the reaction of the class in our reply papers.

## II. CO-LEAD COUNSEL'S REQUEST FOR AN AWARD OF THEIR LITIGATION EXPENSES IS REASONABLE

"Counsel are entitled to be reimbursed for the reasonable expenses advanced in class litigation." *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 469 (S.D.N.Y. 2004); *see also Vitamin C*, 2012 WL 5289514, at *11 ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course."). The Notice informed members of the Settlement Class that Co-Lead Counsel would move for an award of litigation costs of up to $11 million. We respectfully request an expense award of $8,242,755.81, plus interest thereon. As detailed in the individual declarations of Mr. Brockett and Mr. Davidoff, almost all of these expenses were incurred by Co-Lead Counsel, with only a small amount incurred by other firms working with us. All expenses were incurred prior to November 10, 2020, when the HSBC Settlement was executed. *See* Joint Decl. Section III.B (summarizing individual declarations and summing figures).

For the reasons discussed above, "substantial expenses were necessary in this complex antitrust case." *Meredith*, 87 F. Supp. 3d at 671. Most of these expenses are for Plaintiffs' non-testifying expert consultants who were instrumental in getting this case off the ground, through the dismissal stage, and into a massive discovery effort. *See CDS*, 2016 WL 2731524, at *18 (reimbursing over $10 million in expenses incurred even pre-certification of the class, and noting that "[m]ost of these expenses were incurred in connection with retention of experts" and that this "expert work was essential to the litigation and invaluable to the Class"). A more-detailed breakdown of the tasks the consultants worked on appears in Section III.B of the Joint Declaration.

Analysis of economic and other data formed a large part of the pleadings, and critiques and defenses of the statistical analyses was the main focus of Defendants' dismissal papers,

Plaintiffs' opposition, and the Court's orders. *See* Joint Decl. Sections I.C.1, I.C.2, and III.B. Non-testifying expert consultants were also needed at this stage to assist with oral argument and the Court "tutorial," and later to respond to Defendants' "discovery" battles over the accuracy and completeness of their work and productions. *See id.* Section I.C.2.

As discussed in the Joint Declaration, Sections I.C.3 and III.B, Co-Lead Counsel also had to work with our non-testifying expert consultants with respect to discovery in this case. For instance, much work was required in requesting, receiving, loading, scrubbing, consolidating and analyzing the ***110 million*** Defendant transactional records, many of which are associated with over 100 different "fields." This includes, among many other tasks: converting the raw data into a common format; reviewing the data to ensure completeness as to time, products, and fields; reconciling and matching data when the same transaction was included in productions coming out of different systems-such as information on Defendants' trades in Defendants' systems and in data produced by the CME; analyzing and driving conferrals regarding whether Defendants' data was sufficiently distinguishing between their own trades versus those done on behalf of their customers; scrubbing the data for outliers and errors, such as where prices were far outside the expected range; analyzing ways to identify links to the Fix; and analyzing publicly available data, and potential third-party subpoena targets, to fill data needs not left open by Defendants' productions. *See id.* ¶ 157.

Aside from the consulting and similar fees, the balance of the requested expenses are composed of industry-standard charges such as online legal research, document imaging and copying, travel expenses, and other litigation support services. These expenses are being submitted on a "at cost" basis, without any markup or profit component to our firms. These expenses have been reviewed by Co-Lead Counsel and were found to be reasonable.

In sum, there is thus "no reason to depart from the common practice in this circuit of granting expense requests." *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 525 (E.D.N.Y. 2003) (granting $18.7 million expense request where bulk of expenses were "experts and consultants, litigation and trial support services, document imaging and copying, deposition costs, online legal research, and travel expenses"), *aff'd sub nom.*, *Wal-Mart*, 396 F.3d at 96.

## III. THE REQUEST IS CONSISTENT WITH CO-LEAD COUNSEL'S 2014 ESTIMATES AND REPRESENTATIONS, WITH ANY DEPARTURES PERFORMED IN THE BEST INTEREST OF THE CLASS

In our 2014 application to be appointed Co-Lead Counsel, we provided certain representations and estimations. *See* Case No. 14-cv-2213, ECF 17. We have reviewed this application to ensure it is consistent with our prior papers, and to be forthright with the Court where there have been necessary departures.

We represented in 2014 we would limit our fee request to that based on the *Payment Card* sliding scale. *See* Case No. 14-cv-2213, ECF 17 at 21. That is exactly the scale used to calculate the current fee request, even though it has resulted in a lodestar multiplier well below 1.0 given our substantial investments into the case.

We represented in 2014 that our firms would calculate lodestar in certain ways, such as by using a rate "freeze," and that Quinn Emanuel would provide a "discount" off our standard rates. *Id.* at 18-19. Not only did we use those discounts and rate-freezes in calculating our lodestar, but we did so in the most conservative way possible. For instance, for purposes of this application, we treated the freeze as even barring increases by way of a person becoming more senior—we did not in this period allow for "class promotion" increases, nor did we even change rates if someone elevated from associate to of-counsel or partner during that period. Such details were not fleshed out in our application, but where we saw ambiguity we tried to resolve it in the most conservative way possible in this application to demonstrate the lack of a "windfall" here.

We anticipated in 2014 we would provide hosting services in-house. But, in the interest of full disclosure, we highlight that some of our expenses are for third-party document vendors. This is because our analyses of what would be in the best interest of the class shifted over the long course of this case. For instance, third-party vendors could offer services that our in-house systems could not offer at the time discovery was ramping up. These features, including the ability to automatically transcribe audio files as well as perform continuous learning to speed the document review, meant that we determined the overall case would operate more efficiently, on the facts specific to this case and at the time we had to make the decision for this case, through the use of third-party vendors. *See* Joint Decl. Section III.B.

We estimated in 2014 what it would cost to get this case through trial. As an initial matter, the 2014 estimate is outdated for a myriad of reasons. It is unlikely anyone would have predicted the case would require multiple amendments and briefs, a full-day tutorial process, and four years to get Defendants to file Answers. Nor could anyone have anticipated the case would still be in discovery seven years after our investigation began. Nor could not have been known the exact scale of discovery in this case, or the exhaustive conferring that would be required over issues small and large. But our 2014 estimates are irrelevant for additional reasons.

For instance, as for expenses, Co-Lead Counsel have gone significantly out of pocket for the seven-year history of the case, with no guarantee we would ever have our incurred expenses recouped. We thus naturally were already incentivized to keep them under control, and to incur the costs only if we believed they were a wise investment to further the case. *See* Silver Decl. ¶ 71 ("Rationally, [the attorneys'] incentive is to incur only expenses that increase class members' expected recoveries by several multiples of the cost. It makes more sense to worry that contingent fee lawyers may devote too few resources to litigation than to fear that they will

spend too much."). As expounded in Section II above and in Sections I.C and III.B of the Joint Declaration, litigating this type of case in a way that forces Defendants to take it seriously requires significant investments. There is no cheap way of demanding, assembling, scrubbing, understanding, and analyzing 110 million transactional records, for example.

As for fees, our prior estimates are, we respectfully submit, even less relevant. We are not getting paid on an hourly basis. As discussed above, a percentage-based approach aligns the incentives of counsel and class. It is again worth noting here that even after, for example, Co-Lead Counsel's rate "freeze" and Quinn Emanuel's 20% discount and the other conservative adjustments, Co-Lead Counsel's lodestar is only .71, and would be even lower if a more traditional approach to calculating lodestar was used. Reducing our recoveries even further below our investments, merely because we did not accurately predict the multi-year history of this case, would only disincentivize attorneys from investing in complex cases requiring going toe-to-toe against multiple defendants and their nearly limitless legal defense budgets.

## CONCLUSION

For the foregoing reasons, Co-Lead Counsel respectfully requests that the Court approve Co-Lead Counsel's application for the payment of attorneys' fees and expenses in the amounts set forth above, plus interest thereon. Co-Lead Counsel will submit a proposed order in connection with our reply papers.[8]

[8] Though the Notice referred to the potential request for incentive awards and expense reimbursements for named Plaintiffs, they are not at that this time making such a request, but reserve the right to do so in the event of a future recovery.

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Respectfully submitted,

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