

**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

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

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
ARGUMENT	2
I. THE PROPOSED MANNER AND FORMS OF NOTICE SHOULD BE APPROVED	2
A. The Proposed Manner of Notice Should Be Approved	3
B. The Proposed Forms of Notice Should Be Approved	4
II. THE PLAN OF ALLOCATION SHOULD BE GIVEN PRELIMINARILY APPROVAL	6
III. PROPOSED SCHEDULE OF SETTLEMENT EVENTS	8
CONCLUSION.....	9

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>In re Agent Orange Prods. Liab. Litig.</i> , 818 F.2d 145 (2d Cir. 1987).....	2
<i>In re GSE Bonds Antitrust Litig.</i> , 414 F. Supp. 3d 686 (S.D.N.Y. 2019).....	2, 6, 7
<i>Guevoura Fund Ltd. v. Sillerman</i> , 2019 WL 6889901 (S.D.N.Y. Dec. 18, 2019)	4, 6
<i>In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.</i> , 2007 WL 313474 (S.D.N.Y. Feb. 1, 2007).....	3
<i>In re PaineWebber Ltd. P’ships Litig.</i> , 171 F.R.D. 104, 133 (S.D.N.Y. 1997)	7
<i>In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.</i> , 330 F.R.D. 11 (E.D.N.Y. 2019).....	4
<i>Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.</i> , 396 F.3d 96 (2d Cir. 2005).....	4
<i>In re WorldCom, Inc. Sec. Litig.</i> , 388 F. Supp. 2d 319 (S.D.N.Y. 2005).....	7
<i>Yang v. Focus Media Holding Ltd.</i> , 2014 WL 4401280 (S.D.N.Y. Sept. 4, 2014).....	7

Other Authorities

Fed. R. Civ. P. 23	4, 6
Fed. R. Civ. P. 23(c)(2)(B)	2, 5, 6
Fed. R. Civ. P. 23(e)(1)(B)	2
Manual for Complex Litigation §21.311 (4th ed.).....	2, 4

Concurrently with the filing of this motion, Plaintiffs are moving for preliminary approval of a settlement agreement with Defendants Barclays Bank PLC, The Bank of Nova Scotia, Société Générale, and The London Gold Market Fixing Limited (the “Third Settlement Agreement”).¹ Plaintiffs respectfully submit this memorandum of law under Federal Rule of Civil Procedure 23(c) and (e) in support of their Motion for an Order (i) Providing for Notice Regarding the Third Settlement Agreement and (ii) Preliminarily Approving the Plan of Allocation for the Third Settlement Agreement.

PRELIMINARY STATEMENT

Notice Plan. The proposed mail and publication notices (the “Notices”)²—explain clearly and concisely the terms of the proposed Third Settlement Agreement, the options for class members, and the deadlines for class members to exercise their rights. The Notices also explain the relationship of this Third Settlement Agreement to the prior two settlements. For instance, the Notices explain how by default those who filed Claim Forms already will be automatically treated as having submitted the same Claim Form with respect to the Third Settlement Agreement. The Notices go on to explain, however, that those who seek to be excluded from the class with respect to the Third Settlement Agreement will need to affirmatively express an intention to opt-out of that settlement.

The Third Settlement Agreement uses the exact same class definition and the reasonably identifiable class members remain the same as before. Accordingly, Co-Lead Counsel propose to essentially follow the same notice program that we used for the first two settlements.

¹ All capitalized terms not defined herein have the same meaning as in the Third Settlement Agreement.

² The Notices are attached as Exhibits 1 (the “Long Form Notice”) and 2 (the “Summary Notice”) to the November 12, 2021, Declaration of Daniel L. Brockett (“Brockett Declaration”).

Plan of Allocation. The proposed Plan of Allocation for the Third Settlement, attached as Exhibit 3 to the Brockett Declaration, is functionally identical to the Plan now being proposed for the first two settlements. This includes making the same proposed adjustment of a 0.25 cramdown Litigation Multiplier to positions opened and closed the same day.

Schedule. A proposed schedule, along with how the deadlines might fall depending on the timing of a Court order, is included in Section III below.

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).

A. The Proposed Manner of Notice Should Be Approved

Plaintiffs’ notice plan in connection with the first two settlements was incredibly robust, ultimately resulting in the mailing of over 314,000 notice packets, a successful print and online advertising campaign, a constantly updated settlement website, and the maintenance of open channels of communication with class members by both e-mail and telephone. The Settlement Administrator continues to analyze the data, but currently believes that tens of thousands of claims were filed, confirming the effectiveness of the original notice plan.

Co-Lead Counsel propose using the same plan to alert the same people of the new and additional Third Settlement Agreement. That plan is detailed in the December 7, 2020, Declaration of Jeanne C. Finegan. ECF No. 491. In sum, the Defendants’ reasonably identifiable counterparties, potential class members as identified by the CME (a group that would include “day-traders,” who are most likely to trade through the CME’s exchange), and potentially relevant intermediaries would again receive Notice Packets.³ In addition, the Settlement Administrator would undertake a robust ad campaign. The only proposed change from the initial notice campaign is that Newly Settling Defendants have requested the inclusion of two additional publications⁴ to increase coverage in Canada. The Settlement Administrator estimates this will cost an additional \$31,000. Though Co-Lead Counsel are confident in the robustness of their original plan, we do not object to the request for those additions.

³ Due to foreign-privacy or other assertions, the mailing would again take place partly by the Settlement Administrator and partly by an alternative notice provider.

⁴ Specifically, the financial section of the National Post (known as the Financial Post) and The Globe and Mail.

For the same reasons the Court approved the proposed notice plan in connection with the first two settlements, ECF No. 489, Co-Lead Counsel request that the proposed plan here be preliminarily approved for use in connection with the Third Settlement Agreement.

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.”).⁵

“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

⁵ 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.’”).

manner for requesting exclusion; and (7) the binding effect of a class judgment. Fed. R. Civ. P. 23(c)(2)(B).

As with the notice used in connection with the first two settlements, the Long Form Notice and Claim Form provide members of the Settlement Class with clear, concise, and comprehensive information about the proposed Third Settlement Agreement. The proposed notice again describes, among other things: (i) the nature of the lawsuit; (ii) the claims involved and the parties' positions; (iii) what it means for the Third Settlement Agreement to have been reached; (iv) a summary of the terms of the Third Settlement Agreement, including the monetary relief, scope of the release, and cooperation obligations; (v) the definition of the Settlement Class for the Third Settlement Agreement; (vi) a description of the Plan of Allocation and how a class member can find more detailed information about Settlement Fund allocation on the settlement website; (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 requesting exclusion from the Settlement Class, objecting to the Settlement, and attending the Fairness Hearing; (ix) the right of class members to appear through their own counsel at the Fairness Hearing; (x) the binding effect of participating in the Settlement; (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.

While keeping the same what is the same, the proposed notice forms also adjust for the now-changed circumstances.⁶ For instance:

⁶ Certain parts of the notice materials will need to make representations about the then-current status of the motions regarding the first two settlements. In such areas, the language being

- Class members are put on notice that this is a *new, third* agreement. *See* Brockett Ex. 1 at 1.
- Class members are informed that if they submitted a Claim Form in connection with the first two settlements, their information will be carried over by default to be used in connection with the Third Settlement Agreement. *See id.* at 7-8.
- Class members are warned, however, that they will need to file an exclusion request specific to the Third Settlement Agreement, even if they previously requested to be excluded from the first two settlements.⁷ *See id.* at 9.
- Class members are given an update with respect to the Plan of Allocation, including their right to object to the Plans in connection with all three settlements. *See id.* at 6, 11.
- The proposed Claim Form includes a new table for class members to list their positions that were opened and closed the same day. It also instructs class members that they can include in the new table otherwise qualifying positions that cannot be identified as having been held open overnight. *See* Brockett Dec. Ex. 6 at 7.

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 GIVEN PRELIMINARILY APPROVAL

“[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

proposed is, of course, merely a placeholder and would be adjusted based on the Court’s actual resolution of the pending motions.

⁷ The proposed final judgments submitted in connection with the pending motion to finalize the first two settlements bars class members from “any other settlement being jointly administered with this Settlement Agreement.” ECF No. 588 ¶ 10. While that tied HSBC and Deutsche Bank opt-outs together, to be clear, that language was not intended to, and should not be read to apply to, the current situation of an agreement whose approval process is starting a year later. Those who filed exclusion requests for the Deutsche Bank and HSBC settlements could not have reasonably understood that they were thereby also opting out of an agreement that did not even exist yet. Moreover, the opt-out and objection deadlines for the first two settlements have passed, and should not be re-opened merely because an additional settlement has been reached.

give great weight to the opinion of experienced and informed counsel when assessing a proposed plan of allocation as part of a settlement agreement.”⁸

“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 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.

The proposed Plan of Allocation for the Third Settlement Agreement tracks the revised plan being proposed for the first two settlements. *See* Brockett Dec. Ex. 3. For the reasons set forth in our concurrently filed memorandum in response to the Court’s October 19 order, and in our prior memoranda,⁹ we respectfully submit that the proposed Plan of Allocation has a

⁸ *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).

⁹ *See* ECF No. 489 at 11-15 (preliminary approval request for first two settlements; summarizing plan and gathering authorities with respect to its reasonability); ECF No. 587 (response to objection).

reasonable, rational basis, treats Settlement Class Members equitably, and should be preliminarily approved.

III. PROPOSED SCHEDULE OF SETTLEMENT EVENTS

Plaintiffs propose the following schedule for remaining events and submissions related to the Third Settlement Agreement and the Plan of Allocation for all three settlements.

EVENT	PROPOSED DATE
Last day to commence mail of notice to potential members of the Settlement Class, to update Settlement website, and to commence publication campaign (the "Notice Date")	45 days after Court order preliminary approving Third Settlement Agreement and the proposed notice and allocation plans (Presuming the relevant Court orders are issued in early December, approximately January 15, 2022)
Last day to submit new or revised Claim Forms (all three settlements) Last day to submit Requests for Exclusion (Third Settlement Agreement only)	60 days after Notice Date (Approx. March 16, 2022)
Last day to file papers in support of (i) final approval of Third Settlement Agreement, (ii) final approval of Plans of Allocation (all three settlements), and (iii) a second application for fees, expenses, and incentive awards	45 days after claims deadline (Approx. April 30, 2022)
Last day to file objections to motions for (i) final approval of Third Settlement Agreement, (ii) final approval of Plans of Allocation (all three settlements), and (iii) a second application for fees, expenses, and incentive awards	21 days after filing of motions for final approval (Approx. May 21, 2022)
Last day to file reply papers	21 days after objection deadline (Approx. June 11, 2022)
Fairness Hearing for (i) final approval of Third Settlement Agreement, (ii) final approval of Plans of Allocation (all three settlements), and (iii) a second application for fees, expenses, and incentive awards	To be determined by the Court

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 to be used in connection with the Third Settlement Agreement.

DATED: November 12, 2021

Respectfully submitted,

/s/ Michael Dell'Angelo

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2021, 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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