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 FINAL APPROVAL OF THE THIRD SETTLEMENT AGREEMENT, CERTIFICATION OF THE SETTLEMENT CLASS, AND FINAL APPROVAL OF THE PLANS OF ALLOCATION

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PRELIMINARY STATEMENT

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs respectfully request that the Court give final approval to the Third Settlement Agreement, certify the Settlement Class for the Third Settlement Agreement, and give final approval to the Plans of Allocation for both the Original Settlements and the Third Settlement Agreement.[1]

The Third Settlement Agreement was reached after extensive arm's-length negotiations between experienced counsel, and is an excellent result for the Settlement Class. As with the Original Settlements, the Third Settlement Agreement is fair and reasonable, and amply satisfies the requirements of Rule 23(e)(2) as well as each of the applicable factors under *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974). The Settlement Class, like that for the Original Settlements, also meets all requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy—as well as the predominance and superiority requirements of Rule 23(b)(3).

The Plans of Allocation for all three Settlements should also be given final approval. Though the final number cannot be known until the end of the process (due to the need to audit claims, the possibility of late claims, and other factors), the data currently show that "day-trade" transactions will only receive approximately 15% of the distribution under the Plans. This further confirms those the Plans have a "reasonable, rational basis," in that they balance the uniquely high volume of such trades against potential disputes about their litigation risks.

SUMMARY OF THE ACTION AND THE SETTLEMENT

The history of this Action, and Co-Lead Counsel's efforts in connection thereto, is both long and complicated. We refer the Court and potentially interested parties to the summary of

[1] The "Third Settlement Agreement" is that reached with Barclays Bank PLC, the Bank of Nova Scotia, Société Générale, and the London Gold Market Fixing Limited (the "Newly Settling Defendants"). ECF No. 607-1. The "Original Settlements" are those reached by Deutsche Bank and HSBC (the "Original Settling Defendants"), which have been given final approval. ECF Nos. 636, 637.

this action in our motion to approve the Original Settlements, ECF No. 561, and the then-accompanying Joint Declaration, ECF No. 569 (the "2021 Joint Declaration").

The subsequent history is summarized in a second Joint Declaration being filed concurrently with this motion (the "2022 Joint Declaration"). Co-Lead Counsel would just reiterate here that they have had over seven hard-fought years' worth of experience with this case—including the conclusion of fact discovery—before the Third Settlement Agreement was reached after extended arm's-length negotiations in the latter half of 2021.

Also in late 2021, Co-Lead Counsel proposed a change to the Plan of Allocation for the Original Settlements, allowing "day-trade" positions in, but subject to a 0.25 Litigation Multiplier. *E.g.*, ECF No. 611.

In January 2022, after a hearing where the Court raised questions and provided comments, and after the relevant parties made subsequent adjustments, the Court granted our request to provide a single notice alerting class members of (a) the proposed Third Settlement Agreement and (b) the proposed change to the Plans of Allocation to be used for all Settlements. ECF Nos. 624, 625 (the "Notice Order").

ARGUMENT

I. THE THIRD SETTLEMENT AGREEMENT IS FAIR, REASONABLE, AND ADEQUATE AND MERITS APPROVAL BY THE COURT

A. The Law Favors and Encourages Settlements

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

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

B. Class Action Settlements Are Judicially Approved When They Are Fair, Reasonable, and Adequate

Final approval of a class action settlement is appropriate where the court determines the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Both procedural and substantive fairness are considered. *See Wal-Mart*, 396 F.3d at 116 ("A court determines a settlement's fairness by looking at both the settlement's terms and the negotiating process leading to settlement."). "To determine procedural fairness, courts examine the negotiating process leading to the settlement." *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 618 (S.D.N.Y. 2012). Where a settlement is the "product of arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation," a "presumption of fairness" attaches. *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173-74 (S.D.N.Y. 2000), *aff'd sub nom.*, *D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001).

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

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

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

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

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

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

Grinnell, 495 F.2d at 463. In assessing the fairness of a class action settlement, "[a]ll nine [*Grinnell*] factors need not be satisfied, rather, the court should consider the totality of these factors in light of the particular circumstances." *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003).

The factors described in Rule 23(e)(2) overlap significantly with, and are intended to supplement, the *Grinnell* factors to "focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." *See* Fed. R. Civ. P. 23(e)(2); Advisory Committee's Notes to 2018 Amendments to Rule 23. In preliminarily approving the Third Settlement Agreement, the Court made initial determinations

that the Agreement was fair, reasonable, and adequate, and satisfied the requirements of Rule 23(e). ECF No. 628. As detailed below, there is no reason to disturb those initial findings.

C. The Proposed Settlement Is Procedurally Fair

1. Rule 23(e)(2)(a)—Plaintiffs and Co-Lead Counsel have adequately represented the Settlement Class

Under the first prong of Rule 23(e)(2), the Court must consider that "the class representatives and class counsel have adequately represented the class" prior to approving a proposed class action settlement. Fed. R. Civ. P. 23(e)(2)(A). Rule 23(e)(2) overlaps with the third *Grinnell* factor, which considers "whether the parties had adequate information about their claims such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement." *In re Bear Stearns Cos., Inc. Sec., Derivative and ERISA Litig.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012). Co-Lead Counsel—which are highly experienced in antitrust class action litigation and after over seven years of involvement are very well informed about this case's strengths and weaknesses—strongly endorse the Third Settlement Agreement and believe it represents an excellent recovery on behalf of the Settlement Class.

Plaintiffs and Co-Lead Counsel have adequately represented the Settlement Class as required by Rule 23(e)(2)(A), "developed a comprehensive understanding of the key legal and factual issues in the litigation and, consistent with *Grinnell*, had 'a clear view of the strengths and weaknesses of their case' and of the range of possible outcomes at trial" at the time the Settlement was reached. *City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *7 (S.D.N.Y. May 9, 2014). Plaintiffs and Co-Lead Counsel have diligently prosecuted this action for many years, launching a detailed investigation into the underlying claims and engaging industry and non-testifying expert consultants beginning in 2013, taking the case through

multiple amendment and dismissal rounds that lasted almost four years, and then vigorously pursuing—and defending—discovery matters for many more years. Indeed, the Third Settlement Agreement was reached *after* Co-Lead Counsel was able to review not just all the data, documents, and audio recordings that were available to try this case, but also all the deposition testimony. The Third Settlement Agreement was also reached after Co-Lead Counsel had extensive consultations with their testifying and non-testifying experts regarding the risks and costs associated with trying to push the case through certification and through trial.

Plaintiffs and Co-Lead Counsel at all times advocated for the best interests of the Settlement Class. There are no conflicts between Plaintiffs and members of the Settlement Class concerning this litigation, and Plaintiffs' interest in proving liability and damages is entirely consistent with that of the Settlement Class.

Thus, the requirements of Rule 23(e)(2)(A) are satisfied.

2. Rule 23(e)(2)(B)—The proposed Settlement was negotiated at arm's length through a complex and adversarial process

The proposed Third Settlement Agreement is the result of arm's-length negotiations without any hint of collusion. Rule 23(e)(2)(B) is in harmony with the long-standing Second Circuit rule that "a strong initial presumption of fairness attaches to [a] proposed settlement," when the "integrity of the arm's length negotiation process is preserved." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997); *see* Fed. R. Civ. P. 23(e)(2)(B); *see also Wal-Mart*, 396 F.3d at 116.

The Third Settlement Agreement was also notably reached in a period of uncertainty. The factual record was set, giving Co-Lead Counsel and Plaintiffs' experts a clear view of the full record, as discussed above. But the case was primed to go through a bitterly fought certification battle that would have turned heavily on still further resource-intensive expert work.

And the Original Settlements were not yet finally approved. There thus was the real risk that without settlement the case would end without any recovery for Plaintiffs or class members.

A presumption of fairness is further supported when experienced counsel endorse a proposed settlement, as "'great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation." *PaineWebber*, 171 F.R.D. at 125. Accordingly, the proposed Settlement is entitled to the presumption of procedural fairness under Second Circuit law, as they satisfy Rule 23(e)(2)(B).

D. The Proposed Settlement Is Substantively Fair

At final approval, the Court's role is not to "decide the merits of the case or resolve unsettled legal questions," or "foresee with absolute certainty the outcome of the case," but rather to "assess the risks of litigation against the certainty of recovery under the proposed settlement." *Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666, at *10 (S.D.N.Y. Mar. 24, 2014).

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

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

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

"The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation." *Advanced Battery*, 298 F.R.D. at 174. Numerous courts have recognized that "federal antitrust cases are complicated, lengthy, and bitterly fought." *Wal-Mart*, 396 F.3d at 118; *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *4 (E.D.N.Y. Oct. 23, 2012) ("'Federal antitrust cases are complicated, lengthy . . . bitterly fought' as well as costly.");[2] *see also Advanced Battery*, 298 F.R.D. at 175 ("the complexity, expense, and likely duration of litigation are critical factors in evaluating the reasonableness of a settlement"). This Court is already aware of how complex this case is. It was first filed over eight years ago, the allegations reach back to a time period that is now over 17 years in the past, and Plaintiffs allege the conspiracy impacted a large number of instruments that differ both in their type and when they were entered into.

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

The Court's role in evaluating the risks of establishing liability and damages is not to evaluate the plaintiffs' likelihood of success, but rather to "balance the benefits afforded the Class, including immediacy and certainty of recovery, against the continuing risks of litigation." *In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 37 (E.D.N.Y. 2019). One arguably need look no further than the Court's first two substantive

[2] Demonstrating how lengthy and complex such cases can be, consider that the scandal in *Vitamin C* allegedly began in 2005. Some settlements were reached in 2013. A jury verdict against the non-settling defendants was reversed by the Second Circuit in 2016, and the Supreme Court intervened in 2018. After remand for further proceedings in district court, a second trip to the Second Circuit in 2021 recently led to the filing of a second petition for writ of certiorai. *See generally In re Vitamin C Antitrust Litig.*, 8 F.4th 136 (2021).

rulings in this case to demonstrate how risky this case was. The Court's rulings—which came years after our investigation began, and after extensive briefing, a full-day "tutorial," and lengthy oral argument—allowed certain claims to proceed into discovery. But the orders expressly previewed the Court's doubts that the case, at least in the full scope it was pled, would survive longer-term scrutiny.

It is often said that antitrust cases boil down to a "battle of the experts." *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998).[3] In this case, this Court began its first substantive ruling by referencing the adage about "lies, damn lies, and statistics." *In re Commodity Exch., Inc.*, 213 F. Supp. 3d 631, 641 (S.D.N.Y. 2016). This presaged Defendants' multi-year discovery focus even on Plaintiffs' *pleading stage* data work. Even as late as June 2021, the fight was ongoing, as Defendants were still seeking to depose our consultants in order to show that the complaint was misleading. *E.g.*, ECF No. 557. While the Court took no position on the merits of Defendants' implicit Rule 11 threat, it noted the time was "ripe" to bring one if they wished. *Id.* at 15-16 & n.12. Co-Lead Counsel strongly deny any such Rule 11 violations occurred. But this confirms that this heavily data-driven case was uniquely at risk of adverse findings in the "battle of the experts" had the case continued.

The Court also denied the motions to dismiss because "some" Plaintiffs plausibly had standing, but made clear it "harbors grave doubts regarding the scope of Plaintiffs' proposed class" due to the difficulty in proving there were non-speculative damages. *In re Commodity*

[3] "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). Further, "the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal." *NASDAQ*, 187 F.R.D. at 476.

Exch., 213 F. Supp. 3d at 659. Co-Lead Counsel continued to monitor developments in this area of the law as part of our continual assessment of the risks of this case. By early 2021, the developing case law reached the point where one court claimed that there was a "growing line" of "benchmark cases" where plaintiffs were found to lack viable antitrust claims due to standing restrictions. *In re Aluminum Warehousing Antitrust Litig.*, 2021 WL 638059, at *1 (S.D.N.Y. Feb 17, 2021). Indeed, Co-Lead Counsel's foresight led to particularly fortunate timing, given the Second Circuit upheld dismissal of antitrust claims in the LIBOR benchmark cases shortly after the Third Settlement Agreement was entered into. *See Schwab Short-Term Bond Market Fund v. Lloyds Banking Group plc*, 22 F.4th 103, 114 (2d Cir. 2021).[4]

The Court's initial motion to dismiss ruling highlights the risks this case faced in many other ways. The Court found it "significant[]" that no government regulator charged any Defendant with colluding to manipulate the price of gold, and that the Department of Justice had closed its investigation. *In re Commodity Exch.*, 213 F. Supp. 3d at 649, 662. Plaintiffs thus learned early-on they would be going alone here. Moreover, the Court declined to treat the structure of the Fixing itself as a "plus factor." *Id.* at 661. Defendants would have continued to argue that much of what Plaintiffs saw as important and damning context that helped show the statistics were the result of malfeasance, would instead be excluded as irrelevant or given little weight. The Court also outright rejected one of the proffered motives for the conspiracy, while deeming the other only "marginally" persuasive. *Id.* at 664. And while the Court found the claims to be timely at the pleading stage, it did not foreclose Defendants' arguments that the

[4] Defendants in the *Silver* action also before this Court have used the *Schwab* decision as a basis to file a motion for judgment on the pleadings. *See In re London Silver Fixing Antitrust & Comm. Litig.*, Case No. 14-md-2573, ECF No. 585 (S.D.N.Y. Feb. 28, 2022).

ability to observe anomalies could eventually be shown to trigger the clock, particularly in light of the "thin" diligence then alleged by the Plaintiffs. *Id.* at 676.

Overall, the Court determined with respect to most Defendants that Plaintiffs "clear the plausibility standard, *albeit barely*." *In re Commodity Exch.*, 213 F. Supp. 3d at 659-60 (emphasis added). Of course, to get to a jury award of many millions of dollars, Plaintiffs would need to do far, far more than "barely" state a "plausible" claim based on their own allegations. The Court previewed the scrutiny it would bring at the evidentiary stage in its review of the "chats" we proffered in trying to keep UBS in the case. Even at the pleading stage, the Court reviewed each and found that none referenced "an agreement . . . to suppress gold prices." *In re Commodity Exch., Inc.*, 328 F. Supp. 3d 217, 222-23, 225-26 (S.D.N.Y. 2018). The Court downplayed the relevance of chats not occurring close in time to the Fixing. *Id.* at 229. The Court also found that additional econometric analyses failed to plausibly plead a claim against UBS. *Id.* at 223, 226-27. This not only spoke to the efficacy of those particular chats and charts, of course, but informed the parties' understanding of what the Court would find relevant and persuasive at future stages of the case. Indeed, the Court would later institute discovery limitations based on when the "chat" took place. ECF No. 377 at 8-9.

The discovery material in this case is subject to protective order. ECF No. 208. And Plaintiffs must still be somewhat circumspect in case they need to return to litigating the case. But Defendants through deposition discovery were seen developing numerous points of attack in line with the Court's flagging of perceived case weaknesses, even beyond their years-long campaign to fan the flames of the Court's doubt of the relevance of statistical evidence. Defense deposition themes appeared to include: the witness never saw anyone conspire; the witness did not know what the bank's "overall" position was as to even know what direction manipulation

would hurt or harm the Defendant; there was not even a such thing as an "overall" strategy but rather individual traders could trade as they saw fit, even if in opposite directions; the PM Fix was not an important benchmark economically; the bank only sat on the panel for the prestige and reputation, not to make money; and numerous clients were kept updated about the Fixing process as it unfolded making it impossible to conspire.

Finally, we note that Defendants also intended to have the Court consider "the extraterritoriality of Plaintiffs' claims." *See* ECF No. 570 at 5 n.4. If anything, Plaintiffs' risk heightened during the history of this case with court decisions such as *Prime International Trading Ltd v. BP PLC*, 937 F.3d 94, 103 (2d Cir. 2019), which found that the presumption against extraterritorially had "not been displaced" even with respect to "serious claims premised on manipulation, fraud, and deceit."

In sum, for many reasons, we strongly believe that the Third Settlement Agreement is an incredible result in light of the risk the Court would have not found the actual evidentiary record sufficient to get this case to a jury pursuant to the law as it existed in 2021, even if the Court thought Plaintiffs "barely" crossed the plausibility threshold in 2016.

(c) Maintaining class action status through trial presents a substantial risk (Grinnell factor 6)

Class certification in this litigation would have been vigorously opposed by Defendants. Many of the same arguments above would have surely been re-cast as challenges to the certifiability of a litigation class. For instance, Defendants would likely have argued there is no link between their alleged misconduct and class-wide injury, particularly with respect to instruments not expressly linked to the PM Fix. More generally, Co-Lead Counsel anticipated, and it was later confirmed by way of Defendants' questioning during depositions, that Defendants would have argued that the need for individualized class member inquiries regarding

their instruments and their "net" positions would overwhelm any common issues. *See generally Nypl v. JP Morgan Chase & Co.*, 2022 WL 819771, at *9 (S.D.N.Y. Mar. 18, 2022) (denying class certification in FX benchmarking context including due to "episodic" nature of wrongdoing and need for individualized "net" damage calculations); *In re Aluminum Warehousing Antitrust Litig.*, 336 F.R.D. 5, 44 (S.D.N.Y. 2020) (denying class certification in aluminum benchmark-rigging case based on lack of predominance, where there was a "multi-step causal chain" between the conspiracy and each plaintiff's alleged injury); *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) ("While plaintiffs might indeed prevail [on a motion for class certification], the risk that the case might be not certified is not illusory and weighs in favor of the Class Settlement."). Even if a litigation class would have been certified, that certification could be challenged on appeal, or at another stage in the litigation. Thus, there is a risk that the action, or particular claims, might not be maintained as a class action through trial, and that class certification may be re-reviewed at any stage of the litigation. *See* Fed. R. Civ. P. 23(c) (authorizing a court to decertify a class at any time).[5] The risks and uncertainty associated with class certification thus weigh in favor of approving the Settlement.

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

While the Newly Settling Defendants could presumably withstand a greater monetary judgment than the amount paid in settlement, "the fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate." *PaineWebber*, 171 F.R.D. at 129; *see also Weber v. Gov't Emps. Ins. Co.*, 262 F.R.D. 431, 447 (D.N.J. 2009) ("[I]n any class action against a large corporation, the defendant

[5] *See generally* Dean Seal, *2nd Cir. Will Hear Goldman's 3rd Bite in Class Cert. Battle*, Law360 (Mar. 9, 2022) (recounting case where Second Circuit agreed to hear a third appellate challenge to district court's certification grant).

entity is likely to be able to withstand a more substantial judgment, and, against the weight of the remaining factors, this fact alone does not undermine the reasonableness of the instant settlement."). The collective monetary benefit weighs in favor of approval.

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

In analyzing the fairness of a proposed settlement, the court must consider whether it falls within a "range of reasonableness"; that is, "[t]he adequacy of the amount offered in settlement must be judged 'not in comparison with the best possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of the plaintiffs' case.'" *PaineWebber*, 171 F.R.D. at 130; *see also Wal-Mart*, 396 F.3d at 119. Giving approval to the Third Settlement Agreement offers the opportunity for immediate relief of an additional $50 million—rather than a speculative payment years down the road after substantial additional expert and other costs would have been incurred. *See In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 93 (S.D.N.Y. 2007) ("The prospect of an immediate monetary gain may be more preferable to class members than the uncertain prospect of a greater recovery some years hence.").

As recognized by the Second Circuit, because of the riskiness of litigation, "[i]n fact there is no reason . . . why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Grinnell*, 495 F.2d at 455 n.2. The Third Settlement Agreement does far more than that. Studies have found that the median full-case antitrust recovery is 19% of single damages.[6] Thus, Co-Lead Counsel would have had

[6] *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) (finding the weighted average of recoveries—the authors' preferred measure—to be 19% of single damages for cartel cases between 1990 to 2014).

to survive until trial and then establish a recoverable single-damages figure of $800 million before the case recovery Plaintiffs and Co-Lead Counsel managed to secure by settlements would be behind the median recovery rate. Considering the risks and costs of continued litigation, both the combined result of all three settlements and this Third Settlement Agreement even when viewed in isolation fall well within the range of reasonableness.

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

Rule 23(e)(2)(C)(ii) requires courts to examine "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C)(ii). As an initial matter, the Plans of Allocation here are distinct from the settlement terms; on such facts, courts can approve settlements even without *any* allocation plan. *See* ECF No. 611 at 6-7 (gathering authorities). To the extent this factor is nonetheless relevant, it favors approval of the Third Settlement Agreement.

As described in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for an Order Providing for Notice Regarding the Third Settlement Agreement and Preliminarily Approving the Plan of Allocation for the Third Settlement Agreement (ECF No. 609), the same methods of ensuring that members of the Original Settlement Class were again used to notify the same people of the Third Settlement Agreement. As also described therein and in the Plan of Allocation and related Claim Form (*see* ECF Nos. 610-3, 610-6), each member of the Settlement Class wishing to receive proceeds from the Net Settlement Fund must submit a Claim Form that is signed under penalty of perjury. Claimants also must describe the supporting documents or data used to calculate the gross transactions amount. Claimants also agree to provide documentation and other information upon request as part of potential audits of their claims. These methods are reasonable and effective in deterring or defeating unjustified claims. Thus,

this factor supports final approval for the same reason that it supported preliminary approval. *See also* Sections II, IV *infra* (requesting final approval of notice and allocation plans).

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

Rule 23(e)(2)(C)(iii) requires courts to examine "the terms of any proposed award of attorneys' fees, including timing of payment" as part of its adequacy assessment. Fed. R. Civ. P. 23e(2)(C)(iii). In the instance case, however, the fee and expense awards are separate from the terms of settlement. As with the allocation plan, this makes this factor less relevant here than in other contexts. In any event, at the preliminary approval stage, and as described in the Notice Plan mailed to potential members of the Settlement Class, Co-Lead Counsel represented that they would apply for attorneys' fees not to exceed $16,640,000, an amount that would bring fees in the action to 29.5% of the total case recoveries. As discussed in Co-Lead Counsel's second fee application being filed concurrently herewith, Co-Lead Counsel seeks an award of attorneys' fees in that amount. As explained in Co-Lead Counsel's fee brief, this request is reasonable under the circumstances. Potential members of the Settlement Class were fully apprised of the terms of the proposed award of attorneys' fees, which merits a finding that this factor supports the proposed Settlement.

4. The parties have no other agreements in connection with the Settlement other than the materiality threshold

Rule 23(e)(2)(C)(iv) requires courts to consider "any agreement required to be identified by Rule 23(e)(3)" that is, "any agreement made in connection with the proposal." Fed. R. Civ. P. 23(e)(2)(C)(iv) and 23(e)(3). As disclosed in moving for preliminary approval, the parties have entered into standard supplemental agreement which provide that in the event that a "material portion" of the eligible transactions opts-out, certain relief can be requested by the

Settling Defendants. ECF No. 174-1 Ex. C; 514-1 Ex. C. No other such agreements exist, and thus, this factor weighs in favor of final approval.[7]

5. Class members are treated equitably

The final factor, Rule 23(e)(2)(D), looks at whether members of the Settlement Class are treated equitably. In fact, the Third Settlement Agreement indisputably treats class members equitably. Subject to Court approval, all members of the Settlement Class will be giving Newly Settling Defendants an identical release. And importantly, Newly Settling Defendants' obligations are fixed. Newly Settling Defendants have no responsibility for, or liability from, any Plan of Allocation. On such facts, Rule 23(e)(2)(D) is met and the Third Settlement Agreement should be approved, regardless of what the Court does on the distinct question of whether to approve the Plan of Allocation.[8]

But even if the Court were to consider the Plan of Allocation a necessary component of whether to approve the Third Settlement Agreement itself—which it should not—the Third Settlement Agreement should still be given final approval because the Plan of Allocation itself is also fair and reasonable as discussed in Section IV below.

E. The Reaction of the Settlement Class Merits Approval

"A favorable reception of the settlement" is "strong evidence" that a proposed settlement is fair. *Grinnell Corp.*, 495 F.2d at 462. Following an expansive notice campaign to sophisticated class members, there were only four exclusion requests received in connection with the Third Settlement Agreement.

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[7] In an abundance of caution we note a compromise was previously made in connection with Plan of Allocations' treatment of day-trades. *See, e.g.*, ECF No. 624 ¶ 3. To be clear, however, we do not think it falls within the Rule, and the Plans of Allocation are distinct from the Third Settlement Agreement itself.

[8] *See In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 170 (2d Cir. 1987); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 480 (S.D.N.Y. 1998); 2 McLaughlin on Class Actions § 6:23 (17th ed. 2020).

While the Second Circuit has stressed the "small number of objections" in considering the reaction-of-the-class factor, *Wal-Mart*, 396 F.3d at 118,[9] the participation rate here also favors approval. Approximately 120,000 claim forms have been filed.[10] Even if one includes every mailed Notice as a potential class member—which there is some reason to doubt given the way third-party intermediaries may have assembled their distribution lists—this represents a claims rate of over 33%. *See* Section II *infra* (summarizing mailing of over 358,000 notice packets). Courts have given final approval to settlements with far, far lower rates, recognizing that "many factors affect response rates." *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *14 (E.D. Mich. Dec. 13, 2011) (claims rate below 1% was "not dispositive" because ratio is "frequently less than 5%").[11]

That so many sophisticated class members want to participate in these Settlements, and so few would instead wish to exclude themselves, is already a strong indication that this factor, too, supports approval of the Third Settlement Agreement. By way of our reply papers, Plaintiffs and Co-Lead Counsel will update the Court, of course, with respect to any objections received.

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

"There are no rigid rules to determine whether a settlement notice to the class satisfied constitutional or Rule 23(e) requirements; the settlement notice must 'fairly apprise the

[9] Indeed, courts in this Circuit have given final approval to large antitrust settlements before the claims deadline has even passed. *See, e.g.*, *In re SSA Bonds Antitrust Litig.*, No. 1:16-cv-3711, ECF Nos. 687-89 (S.D.N.Y. Apr. 2, 2021); *Alaska Elec. Pension Fund v. Bank of Am., N.A.*, No. 1:14-cv-7126, ECF No. 738 (S.D.N.Y. Nov. 13, 2018); *In re Credit Default Swaps Antitrust Litig.*, No. 1:13-md-2476, ECF Nos. 539-52 (S.D.N.Y. Apri. 18, 2016).

[10] To be clear, the 120,000 claims-filed figure excludes the number of blank/placeholder forms that were also filed, and excludes the claim forms that have since been withdrawn or replaced.

[11] *See also Poertner v. Gillette Co.*, 618 F. App'x 624, 625-26 (11th Cir. 2015) (approving settlement with claims rate of 0.75%); *In re CenturyLink Sales Practices & Sec. Litig.*, 2020 WL 7133805, at *16 (D. Minn. Dec. 4, 2020) (same, with rate of 0.698%); *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1377 (S.D. Fla. 2007) (same, with rate of 1%).

prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Wal-Mart*, 396 F.3d at 114. Actual notice to every class member is not required; rather, counsel need only act "reasonably in selecting means likely to inform the persons affected." *Jermyn v. Best Buy Stores, L.P.*, 2010 WL 5187746, at *3 (S.D.N.Y. Dec. 6, 2010). Courts in the Second Circuit have held that notice plans are adequate when they combine first-class mail with extensive publication notice. *See Wal-Mart*, 396 F.3d. at 104. Notice is adequate "if the average person understands the terms of the proposed settlement and the options provided to class members thereunder." *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 133 (S.D.N.Y. 2008). This Court not only preliminarily approved the proposed notice plan as being "reasonable and rational" (Notice Order at 1), but gave final approval to the Original Settlements after the use of the same notice plan (*see, e.g.*, ECF Nos. 636 and 637 at ¶ 14).

There is no reason to depart from those prior rulings. The Court, after reviewing the versions of the Notice and Proof of Claim and Release (the "Notice Packet") revised following the Court's comments, found the documents to amply apprise members of the Settlement Class, *inter alia*: (1) the nature of the litigation and the Settlement Class's claims; (2) the essential terms of the proposed Settlement; (3) the proposed Plan; (4) class members' rights to object to the proposed Settlement, the Plan, and the requested attorneys' fees or expenses; (5) the binding effect of a judgment on members of the Settlement Class; and (6) information regarding Co-Lead Counsel's motion for an award of attorneys' fees and expenses. The Notice also provides specific information regarding the date, time, and place of the Fairness Hearing, and sets forth the procedures and deadlines for submitting a Proof of Claim and Release and objecting to any

aspect of the proposed Settlements, including the proposed Plan and the request for attorneys' fees and expenses.

The Notice Packet includes the long-form Notice and the Proof of Claim and Release Form, both of which were preliminarily approved by the Court. *See* ECF No. 625. As reported to the Court in connection with the May 2022 status report, the Settlement Administrator initially sent 228,626 Notice Packets. *See* ECF No. 635-1 ("May 2022 Hughes Decl.") ¶ 3. This was larger than the initial mailing associated with the Original Settlements, because the Settlement Administrator used name and address information both from the Defendants' business records and from requests made by brokers and other third-parties in connection with the Original Settlements. Class members, brokers, and other third-parties requested the mailing or delivery of an additional 124,214 Notice Packets. *Id.* ¶ 4. Due to the assertion of foreign privacy or other confidentiality concerns, Rust Consulting, Inc., mailed another 6,289 Notice Packets pursuant to the Notice Order, based on name and address information from other Defendants' business records. *See* ECF No. 635-2 ("May 2022 Rabe Decl.") ¶ 5.[12] Thus, in total, excluding those that were returned and could not be re-addressed, 358,644 Notice Packets were delivered to potential class members.[13]

In addition to the direct notice by mail, publication notice was also disseminated through placement of advertisements in several national and global print publications. *See* May 2022

[12] Where the Original Settlement notice packets were returned as undeliverable and an updated address could not be identified, that address was not used in connection with the Third Settlement Agreement. May 2022 Rabe Decl. ¶ 2 n.2. This accounts for the slight difference between the number of Rust mailings between the two notice programs.

[13] When Notice Packets were returned as undeliverable, reasonable efforts were made to find alternative addresses so that the Notice Packet could be re-sent. *See* May 2022 Hughes Decl. ¶ 5; May 2022 Rabe Decl. ¶¶ 11-12.

Hughes Decl. ¶¶ 8-16.[14] Online ads were placed on pre-vetted websites, and on search engines based on relevant keyword searching, generating 44 million impressions by the target audience of potential class members. *Id.* ¶¶ 17-18. A program using Facebook and Instagram was also deployed, targeting users who had liked or followed potentially relevant finance pages. *Id.* ¶ 19. Notices were also included in e-newsletters sent to various subscriber bases, *id.* ¶ 20, e-mail blasts, *id.* ¶ 21, and a press release that in turn generated approximately 300 mentions in other news outlets, *id.* ¶ 22.

The dedicated Settlement Website (www.goldfixsettlement.com), telephone line, and email address used for the Original Settlements was maintained and expanded for potential members of the Settlement Class to easily and efficiently obtain information relating to the Third Settlement Agreement also, including to access important documents, ask questions, and to submit electronic proof of claim and release forms.

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

[14] In an abundance of caution, we note that the Settlement Administrator followed a print publication plan identical to that the Court approved for use in connection with the Original Settlements. *See* ECF No. 636 ¶ 14. That means the Administrator inadvertently did not *also* run advertisements in two *additional* (Canadian) newspapers as mentioned in our request to preliminarily approve the Third Settlement Agreement. Co-Lead Counsel submit that the oversight is unfortunate, but immaterial. As the Court found the notice plan was sufficient for the Original Settlements without two more newspapers, it follows the additional newspapers were unnecessary to provide reasonable notice to the same exact class regarding the Third Settlement Agreement.

III. THE PROPOSED SETTLEMENT CLASS SHOULD BE FINALLY CERTIFIED

The Court not only preliminarily certified the Settlement Class for the Third Settlement Agreement, ECF No. 628 ¶¶ 3-4, but entered final certification to an identical Settlement Class in connection with the Original Settlements, ECF Nos. 636, 637. There have been no changes that would undermine the Court's determinations that certification of the Settlement Class is appropriate under Rules 23(a) and 23(b).[15] For all of the reasons detailed in our prior papers, the proposed Settlement Class satisfies all requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy—as well as the predominance and superiority requirements of Rule 23(b)(3). *See, e.g.*, ECF No. 606 at 17-20. The preliminarily certified Settlement Class should therefore be granted final certification for settlement purposes under Rules 23(a) and 23(b)(3).

IV. THE PLANS OF ALLOCATION FOR ALL THREE SETTLEMENTS ARE FAIR AND ADEQUATE

The standard for approval of an allocation plan is the same as the standard for approving a related settlement. Specifically, a plan of allocation "must be fair and adequate," but it "need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, 2019 WL 6875472, at *20 (E.D.N.Y. Dec. 16, 2019). "When formulated by competent and experienced class counsel, a plan for allocation of net settlement proceeds need have only a reasonable, rational basis." *Advanced Battery*, 298 F.R.D. at 180.

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[15] *See Bear Stearns*, 909 F. Supp. 2d. at 264 (finally approving settlement where there "have been no material changes to alter the proprietary of [the court's] findings" at the preliminary approval stage); *see also In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Pracs. & Prods. Liab. Litig.*, 2019 WL 2554232, at *1 (N.D. Cal. May 3, 2019) ("The Court analyzed these factors in its Preliminary Approval Order and finds no reason to disturb its earlier conclusions. The requirements of Rule 23(a) and Rule 23(b)(3) were satisfied then and they remain so now.").

The Plans of Allocation were crafted based on the knowledge and experience of Co-Lead Counsel and input from non-testifying expert consultants. At a high level, including because, amongst other reasons, the data produced in the case was anonymized, class members were to fill out a form indicating the amount of qualifying sales for four categories—or, if they did not wish to break the data down, they could put it all into the final category. It is well-established that class members can be required to bear responsibility for their own claims, even if they may not have kept their own records. This is both because class members would need proof of their transactions to file their own case, and because of the inefficiency and costs of burdening the administrator with the task of doing all the work.[16] That 120,000 claims were filed also confirms the claims process used here was not unduly burdensome. *See In re WorldCom, Inc. Secs. Litig.*, 2004 WL 2591402, at *12 (S.D.N.Y. 2004) (citing number of claims filed in overruling objection that process was too burdensome).

Based on the class-member submissions—subject to appropriate quality-control and potential audits of course—the Plans provide for *pro rata* distributions after adjusting transactional amounts for differences between the litigation risks. This is also reasonable and rational. *See In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 WL 7323417, at *10 (S.D.N.Y. Dec. 19, 2014) ("A reasonable plan may consider the relative strength and values of different categories of claims."). Based on expectations of volume and other factors, transactions opened

[16] *See* ECF No. 587 at 16 (gathering cases); *see also, e.g.*, *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 640 (5th Cir. 2012) (rejecting objection that settlement was "biased towards large investors" by form-submission requirement; large and small investors alike had to submit claims, the burden of which was "not undue"); *Saccoccio v. JP Morgan Chase Bank, N.A.*, 294 F.R.D. 683 (S.D. Fla. 2014) (overruling objection based on claimed inability to fill out claim form because "nothing inherently suspect" in requiring class members to make a submission, and because it would burden the administrator to force it to do "file-by-file" review); *Magone v. First USA Bank*, 206 F.R.D. 222, 234 (S.D. Ill. 2001) (argument that class counsel should bear the burden of establishing claims for absent class members "ignore[s] the rule that a plaintiff in a civil lawsuit bears the burden of proving liability and damages").

and closed the same day were initially excluded. After receiving an objection and after further consideration, consultation, and conferrals, a revised Plan of Allocation was proposed that would allow in such transactional amounts, but subject to a 0.25 Litigation Multiplier. A functionally identical Plan was also proposed for the Third Settlement Agreement. ECF Nos. ECF No. 610-3 (Plan for Third Settlement Agreement) and 610-4 (Revised Plan for Original Settlements) at 3.[17]

Co-Lead Counsel forwent seeking final approval of the Plan of Allocation for the Original Settlements so that class members and the Court could assess whether the 0.25 Litigation Multiplier was reasonable—specifically, whether there was still a risk day-trades would "dwarf" those of other categories. *See, e.g.*, ECF No. 611 (Memorandum in Response to the October 19 Order). Though the final number cannot be known until the end of the process, the data currently show that "day-trade" transactions will only receive approximately 15% of the distribution under the Plans after the Fixed-linked transactions get their guaranteed 20% and after the Litigation Multipliers are applied to all categories.[18]

Courts recognize that in "a large class action the apportionment of a settlement can never be tailored to the rights of each plaintiff with mathematical precision," and thus a plan should "strike a reasonable balance between precision and efficiency." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 327 F.R.D. 483, 496 (S.D.N.Y. 2018); *In re EVCI Career Colleges*

[17] Because the underlying settlements are on different tracks, technically there are two Plans of Allocation to be approved.

[18] The data also show ETF claims will get approximately 6% and the "other" category claims will get approximately 59%. The exact allocation could be impacted by, among other things: continued claims analysis and the eventual auditing processes; the filing of revised claim forms, including by claims processors who file placeholder (blank) forms in bulk to try to preserve their clients' rights regardless of whether they are actually known to be class members; and whether late claims are filed and accepted. *See* ECF No. 610-4 ¶ 2 (granting discretion to accept late claims in some circumstances). Given how many claims have been analyzed it seems unlikely that the needle will be moved very far in either direction by subsequent events. But to be clear, our support for the Plans is not based on the notion that any one number is necessarily the perfect figure. As discussed below, the law recognizes there is no such thing.

Holding Corp. Sec. Litig., 2007 WL 2230177, at *11 (S.D.N.Y. July 27, 2007) ("numerous courts have held . . . [that] a plan of allocation need not be perfect"). Courts therefore generally adhere to the "principal goal" of having an "equitable and timely distribution of a settlement fund without burdening the process in a way that will unduly waste the fund." *In re Credit Default Swaps*, 2016 WL 2731524, at *9. As day-trades are not "dwarfing" other claims as we feared might occur, the Plans of Allocation should be given final approval as well.

CONCLUSION

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

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Respectfully submitted,

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