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 PRELIMINARY APPROVAL OF THE THIRD SETTLEMENT AGREEMENT

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PRELIMINARY STATEMENT

Plaintiffs respectfully submit this memorandum in support of their motion for preliminary approval of a settlement reached between Plaintiffs, on behalf of themselves and the settlement class, and Defendants Barclays Bank PLC, The Bank of Nova Scotia, Société Générale, and The London Gold Market Fixing Limited ("Newly Settling Defendants"). This agreement consists of a $50 million cash payment and, if approved and if the other Settlements before the Court are approved, would completely resolve the pending litigation with a total recovery on behalf of the class of $152 million. *See* Decl. of Michael C. Dell'Angelo, Ex. 1 (the "Third Settlement Agreement" or "TSA").

As with prior agreements, the Third Settlement Agreement was reached after extended arm's-length negotiations between experienced counsel for Plaintiffs and for Newly Settling Defendants. As demonstrated below, the Third Settlement is an excellent result and is fair, reasonable, and adequate under the governing standards in this Circuit. Accordingly, pursuant to Federal Rule of Civil Procedure 23(e), Plaintiffs seek entry of the accompanying proposed Preliminary Approval Order submitted herewith. *See* TSA Ex. A (the "Preliminary Approval Order").

SUMMARY OF THE SETTLEMENT

The Settlement provides for $50 million in monetary relief. *See* TSA § 2(bb). In exchange for this monetary relief, Plaintiffs and members of the proposed Settlement Class that do not exclude themselves will give up their rights to sue Newly Settling Defendants and Released Parties for Released Claims. *See* TSA § 4.[1] The Third Settlement Agreement is

[1] Newly Settling Defendants have denied and continue to deny each and all of the claims and allegations of wrongdoing made by Class Plaintiffs in the Action and all charges of wrongdoing or liability against them arising out of any of the conduct, statements, acts, or omissions alleged, or that could have been alleged, in the Action.

functionally equivalent to the prior two the Court preliminarily approved, in that it uses the same definitions to set forth the Settlement Class and release terms, for example.

Settlement Class Definition. As in the prior two settlements, the Third Settlement Agreement is made on behalf of a proposed Settlement Class defined as:

> All persons or entities who during the period from January 1, 2004 through June 30, 2013, either (A) sold any physical gold or financial or derivative instrument in which gold is the underlying reference asset, including, but not limited to, those who sold (i) gold bullion, gold bullion coins, gold bars, gold ingots or any form of physical gold, (ii) gold futures contracts in transactions conducted in whole or in part on COMEX or any other exchange operated in the United States, (iii) shares in gold exchange-traded funds ("ETFs"), (iv) gold call options in transactions conducted over-the-counter or in whole or in part on COMEX or any other exchange operated in the United States; (v) gold spot, gold forwards or gold swaps over-the-counter; or (B) bought gold put options in transactions conducted over-the-counter or in whole or in part on COMEX or on any other exchange operated in the United States.[2]

See TSA § 3(a).

Settlement Amount. The monetary component of the Settlement is $50 million (the "Settlement Fund"). *See* TSA § 2(bb). Following preliminary approval, the Settlement Fund will be wired into an Escrow Account and invested in interest-bearing United States Treasuries. *See* TSA §§ 5(a), (d). The Settlement Fund (less any taxes due and administrative costs paid) will only be returned to Newly Settling Defendants in the unlikely event that the Third Settlement Agreement is terminated due to certain circumstances. *See* TSA § 10.[3]

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[2] Excluded from the Settlement Class are Defendants, their officers, directors, management, employees, affiliates, parents, subsidiaries, and co-conspirators, whether or not named in the Action (as defined in the Settlement Agreement), and the United States Government, and other governments. Also excluded is the Judge presiding over this action, her law clerks, spouse, and any person within the third degree of relationship living in the Judge's household and the spouse of such a person. TSA § 3(a).

[3] Unlike the prior Agreements, the Third Settlement Agreement does not contain any cooperation provisions. This is for the obvious reasons that fact discovery was completed and the parties reasonably expect the first two settlements to eventually be given final approval—there thus would be no remaining Defendants against which to use any cooperation materials or information.

Release of Claims. As in the prior two settlements, upon the Court's approval, the Action, all claims asserted in the Action, and all Released Claims belonging to Plaintiffs will be dismissed with prejudice as against Newly Settling Defendants, and Plaintiffs and each of the Settlement Class members (and anyone claiming through or on behalf of them) will be permanently barred and enjoined from asserting any of the Released Claims against Newly Settling Defendants and Released Parties in any action or proceeding. *See* TSA § 4. As with the prior two settlements, the release covers those claims "arising from or relating in any way to conduct alleged in the Action or that could have been alleged in the Action, in any event arising from the same factual predicate of the Action, and concerning, relating to, or arising out of any Gold Investment Transaction from January 1, 2004 through March 20, 2015." TSA § 4(d). As with the prior two settlements, the release was negotiated and drafted with the understanding and intent that, in addition to the claims actually alleged in this case, the settlement also releases certain claims that could have been alleged based on the same set of facts. *See, e.g.*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 107 (2d Cir. 2005) ("The law is well established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct.").

As in the prior two settlements, a "Gold Investment Transaction" is defined as follows:

> (A) the sale of any physical gold or financial or derivative instrument in which gold is the underlying reference asset including, but not limited to, sales of (i) gold bullion, gold bullion coins, gold ingots, gold bars, or any form of physical gold, (ii) gold futures contracts in transactions conducted in whole or in part on COMEX or any other exchange operated in the United States, (iii) shares in gold ETFs, (iv) gold call options in transactions conducted over-the-counter or in whole or in part on COMEX or any other exchange operated in the United States, (v) gold put options, which were later exercised, in transactions conducted over-the-counter or in whole or in part on COMEX or any other exchange operated in the United States, or (vi) gold spot, gold forwards or gold swaps traded over-the-

> counter; or (B) the purchase of (i) gold call options, which were later exercised, sold, or held to expiration, in transactions conducted over-the-counter or in whole or in part on COMEX or on any other exchange operated in the United States, or (ii) gold put options in transactions conducted over-the-counter or in whole or in part on COMEX or on any other exchange operated in the United States.

See TSA § 2(q).

Termination Provisions. As in the prior two settlements, termination is only permitted within thirty days of any of the following events: (i) the Court denies, in whole or in part, the motion to certify the Settlement Class; (ii) the Court enters an order declining to enter the Preliminary Approval Order in any material respect; (iii) the Court enters an order refusing to approve the Third Settlement Agreement or any material part of it; or (iv) the Court, a court of appeal or any higher court enters an order declining to enter, reversing, vacating, materially modifying or dismissing, in whole or in part and in any material respect, the Final Judgment and Order of Dismissal. *See* TSA § 10(a).

As in the prior two settlements, Plaintiffs and Newly Settling Defendants have also agreed to a provision that is activated if opt-outs to the Third Settlement Agreement reach an amount that represents a "material portion" of the transactions that would be eligible for compensation under that Agreement. *See* TSA § 10(b). If the provision is activated then Newly Settling Defendants, in their discretion, shall have the right to seek relief as set forth in Exhibit C to the Third Settlement Agreement. *Id.* As multiple Defendants are included in this Third Settlement Agreement, additional terms have been added clarifying how that right is to be exercised. *Id.*

Attorneys' Fees, Expenses, and Service Awards. As in the prior two settlements, the Third Settlement Agreement reserves Plaintiffs' right to request interim attorneys' fees, reimbursement of expenses or charges in connection with prosecuting the Action, and/or class

representative service awards. *See* TSA § 7. The Settlement Class would be given notice of any such application or applications, which, of course, also would be subject to Court approval.

Protective term with respect to LGMF and HSBC. The settlement agreement with HSBC Bank plc has a term protecting that bank from having to pay twice—once directly to Plaintiffs and then again by way of contribution or similar demands by The London Gold Market Fixing Limited. *See* ECF No. 514-1 ¶ 4(h). The Third Settlement Agreement includes a representation that The London Gold Market Fixing Limited will not seek to enforce any rights it may have against HSBC Bank plc in a way that would, in turn, trigger rights as against Plaintiffs. TSA § 4(h).

ARGUMENT

I. THE SETTLEMENT MEETS THE STANDARD FOR PRELIMINARY APPROVAL

Rule 23(e) requires court approval of a proposed class action settlement upon finding that the proposal "is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The preliminary approval process is governed by a "likelihood standard," requiring the Court to assess whether the parties have shown that "the court will *likely* be able to grant final approval and certify the class." *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 330 F.R.D. 11, 28 n.21 (S.D.N.Y. 2019). In conducting a preliminary approval inquiry, a court considers both the "negotiating process leading up to the settlement, *i.e.*, procedural fairness, as well as the settlement's substantive terms, *i.e.*, substantive fairness." *In re Platinum and Palladium Commodities Litig.*, 2014 WL 3500655, at *11 (S.D.N.Y. July 15, 2014).

Under the December 1, 2018, amendments to Rule 23(e)(2), in weighing preliminary approval, the Court must consider 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 . . . ; and (D) the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2). "Paragraphs (A) and (B) constitute the procedural analysis factors, and examine the conduct of the litigation and of the negotiations leading up to the proposed settlement. Paragraphs (C) and (D) constitute the substantive analysis factors, examine "[t]he relief that the settlement is expected to provide to class members." *Payment Card*, 330 F.R.D. at 29. These "factors add to, rather than displace," the factors traditionally considered in the Second Circuit during the preliminary approval process. *Id*.

As demonstrated below, the Third Settlement Agreement warrants preliminary approval because it is procedurally and substantively fair.

A. The Settlement Is Procedurally Fair

"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," the settlement enjoys a "presumption of fairness." *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 Third Settlement Agreement is the product of intensive settlement negotiations. Over a series of telephone meetings among experienced counsel extending over months, the Parties' counsel exchanged views on the strength and weaknesses of Plaintiffs' case and Newly Settling Defendants' defenses, and engaged in significant back-and-forth on the Settlement Amount.

Co-Lead Counsel believe Plaintiffs' claims have substantial merit but acknowledge the expense and uncertainty of continued litigation against Newly Settling Defendants. In recommending that the Court approve the Settlement, Co-Lead Counsel have taken into account

the uncertain outcome and risks of further litigation and believe the Settlement confers significant benefits on the Settlement Class in light of the circumstances here. Based on these considerations, there is "a strong initial presumption that the compromise is fair and reasonable." *In re Michael Milken and Assocs. Sec. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993); *see also Henry v. Little Mint, Inc.*, 2014 WL 2199427, at *6 (S.D.N.Y. May 23, 2014) ("If the settlement was achieved through experienced counsel's arm's-length negotiations, absent fraud or collusion, courts should be hesitant to substitute their judgment for that of the parties who negotiated the settlement.").

B. The Settlement Is Substantively Fair

In granting preliminary approval, courts must make a preliminary determination that the substantive terms of the proposed settlement are "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Courts in this Circuit have traditionally analyzed the "*Grinnell* factors" in assessing whether a proposed settlement is fair, reasonable, and adequate. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) (listing factors). As noted above, the *Grinnell* factors have not been displaced by the 2018 amendments to Rule 23(e). *See Payment Card*, 330 F.R.D. at 29. Each factor supports preliminary approval.

1. The complexity, expense, and likely duration of the litigation

"Antitrust class actions 'are notoriously complex, protracted, and bitterly fought." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 661 (S.D.N.Y. 2015); *see also Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 263 (2d Cir. 2001) (noting the "factual complexities of antitrust cases"). This case is no different.

The initial complaints in this litigation were filed seven years ago and Defendants' motions to dismiss were extensively briefed and argued. On October 6, 2016, the Court granted in part and denied in part the remaining Fixing Bank Defendants' and LGMF's motions to

dismiss. As the Court noted in its Order appointing Co-Lead Counsel, "given that the putative class is challenging the conduct of five major banking institutions over a period of at least ten years, successful prosecution of this litigation will require a massive commitment of resources[.]" *Moran v. The Bank of Nova Scotia*, No. 14 Civ. 2213, ECF No. 23, at 3 (S.D.N.Y. July 22, 2014). Each stage of this litigation is likely to be just as bitterly fought as the motions to dismiss, including discovery, class certification, summary judgment, and trial.

In sum, "[t]here can be no doubt that this class action would be enormously expensive to continue, extraordinarily complex to try, and ultimately uncertain of result." *In re Nasdaq Market-Makers Antitrust Litig.* ("*Nasdaq III*"), 187 F.R.D. 465, 477 (S.D.N.Y. 1998). This factor weighs in favor of preliminary approval.

2. The reaction of the Class to the Settlement

Because notice has yet to be provided to potential members of the Settlement Class, courts generally do not consider this *Grinnell* factor at the preliminary approval stage. *See Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, 237 F.R.D. 26, 34 (E.D.N.Y. 2006) ("Clearly, some of these [*Grinnell*] factors, particularly the reaction of the class to the settlement, are impossible to weigh prior to notice and a hearing."). In any event, all of the Plaintiffs approve of this Settlement, and should any objections from class members be received prior to the Fairness Hearing, Co-Lead Counsel will address those concerns in the final approval papers.

3. The stage of the proceedings

The "stage of the proceedings" factor ultimately is concerned with "whether the plaintiffs have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement." *In re AOL Time Warner, Inc.*, 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006). Here, the parties have benefitted from multiple court rulings, reviewed millions of pages of documents, and took and defended numerous depositions.

Indeed, fact discovery was closed by the time the Third Settlement Agreement was reached. Due to this work, the depth of Plaintiffs' and Co-Lead Counsel's knowledge of the strengths and potential weaknesses of their claims are more than adequate to support the Settlement.

4. The risks of establishing liability and damages

In assessing this factor, "the Court should balance the benefits afforded the Class, including the *immediacy* and *certainty* of a recovery, against the continuing risks of litigation." *Flores v. Mamma Lombardi's of Holbrook, Inc.*, 104 F. Supp. 3d 290, 303 (E.D.N.Y. 2015). In case any of the pending settlements are not approved and Plaintiffs must resume litigation, Co-Lead Counsel must be circumspect in discussing potential risks in establishing liability, damages, and maintaining a class action through trial, but provide the following analysis for settlement purposes only.

As noted above, Defendants filed motions to dismiss, arguing, among other things, that the SAC: (i) failed to plausibly allege a violation of Section 1 of the Sherman Act; (ii) failed to adequately allege antitrust standing; and (iii) failed to adequately plead claims for violation of the Commodity Exchange Act. *See* ECF No. 71-77. Although, in Co-Lead Counsel's view, these arguments were (rightly) largely rejected, had Newly Settling Defendants not agreed to settle, they were prepared to vigorously contest liability and damages on these and other grounds at class certification, summary judgment, and trial.

Even if liability was established at trial, Plaintiffs would face the complexities inherent in proving damages to the jury. There is no doubt that at trial the issue inevitably would involve a "battle of the experts." *Nasdaq III*, 187 F.R.D. at 476. "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). Thus, there is a risk that a jury might accept one or more of Settling Defendant's damages arguments and award nothing at all or award less than the $50,000,000 that, if approved, would be available to the Settlement Class under this Settlement. "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 III*, 187 F.R.D. at 476.

Put another way, there is no doubt that Newly Settling Defendants, represented by experienced counsel, would present sophisticated arguments to the Court at each step of the litigation and argue that they were not liable for *any* damages. 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; and whether any manipulation would have a measurable impact on instruments traded at other times of day. The proposed settlement confers a significant, immediate, and certain benefit to the Settlement Class. When weighed against the risks of continued litigation against Newly Settling Defendants, this factor weighs in favor of preliminary approval.

5. The risks of maintaining a class action through trial

While Plaintiffs believe that the Court will certify a litigation class, Newly Settling Defendants would zealously oppose the motion. Even if the Court were to certify a litigation class, certification can be reviewed and modified at any time. And it can reasonably be expected that the losing party on class certification would appeal. Thus, there is a risk that the Action, or particular claims, might not be maintained as a class action through trial. *See Frank v. Eastman Kodak Co*., 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (noting that "[w]hile plaintiffs might indeed

prevail [on a motion for class certification], the risk that the case might be not certified is not illusory"). The risks associated with class certification weigh in favor of preliminary approval.

6. The ability of Newly Settling Defendants to withstand a greater judgment

"[I]n any class action against a large corporation, the defendant 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." *Weber v. Gov't Emps. Ins. Co.*, 262 F.R.D. 431, 447 (D.N.J. 2009). Here, the financial obligations the Settlement imposes on Newly Settling Defendants are substantial. This factor weighs in favor of preliminary approval.

7. The reasonableness of the Settlement in light of the best possible recovery and attendant litigation risks

The range-of-reasonableness factor weighs the relief provided in the settlement against the strength of the plaintiff's case, including the likelihood of obtaining a recovery at trial. This factor "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion[.]" *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972). In applying this factor "the Settlement must be judged 'not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case.'" *Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666, at *11 (S.D.N.Y. Mar. 24, 2014) (quoting *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd* 818 F.2d 145 (2d Cir. 1987)).[4] Indeed, as recognized by

[4] *See Richardson v. L'Oreal USA, Inc.*, 951 F. Supp. 2d 104, 107-08 (D.D.C. 2013) (preliminarily approving settlement where valuing monetary damages would be challenging). Even at final approval, "the exact amount of damages need not be adjudicated[.]" *Nasdaq III*, 187 F.R.D. at 478; *see also Wong v. Accretive Health, Inc.*, 773 F.3d 859, 863 (7th Cir. 2014) (affirming district court approval of a settlement without quantifying the expected value of continued litigation where quantifying damages "would have required testimony by a damages expert," and that testimony would have "resulted in a lengthy and expensive battle of the experts,

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. Indeed, studies have found that the median full-case antitrust recovery is 19% of single damages.[5] Thus, Co-Lead Counsel would have to establish at trial a recoverable single damages figure of ***$800 million*** before the combined recovery from the three proposed settlements fall behind the pace of a median antitrust 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 provide excellent results for the Settlement Class. *See In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y.) ("'great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation"), *aff'd*, 117 F.3d 721 (2d Cir. 1997).[6]

C. The Rule 23(e)(2) Factors Support Preliminary Approval of the Settlement

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

Plaintiffs each share the same interest as the Settlement Class in prosecuting this Action to ensure the greatest recovery from Defendants. Plaintiffs are part of the Settlement Class and suffered the same injuries as other Settlement Class Members—monetary losses on gold

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with the costs of such a battle borne by the class—exactly the type of litigation the parties were hoping to avoid by settling").

[5] 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).

[6] *See also generally AOL Time Warner*, 2006 WL 903236, at *13 (where settlement fund is in escrow earning interest, "the benefit of the Settlement will . . . be realized far earlier than a hypothetical post-trial recovery").

investments caused by Defendants' manipulation of the price of gold. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348-49 (2011) (class representative "must be part of the class and 'possess the same interest and suffer the same injury' as the class members"). Plaintiffs thus are adequate representatives of the Settlement Class and should be appointed as class representatives for Settlement purposes. In addition, Co-Lead Counsel have demonstrated they are qualified, experienced, and able to conduct the litigation. *See generally* ECF No. 569 (joint declaration summarizing Co-Lead Counsel's work on the Action).

2. Rule 23(e)(2)(B)—the Settlement Agreement was negotiated at arm's length

As discussed above, the Settlement Agreement is the product of intensive, arm's-length negotiations. *See* Section I.A, *supra*.

3. Rule 23(e)(2)(C)—the monetary relief is adequate

Rule 23(e)(2)(C) asks the Court consider whether the relief provided for the proposed Settlement Class is adequate, taking into account four factors:

> (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).

Fed. R. Civ. P. 23(e)(2)(C)(i-iv). Each factor supports preliminary approval.

The costs, risks, and delay of trial and appeal. Plaintiffs discussed this factor above in Sections I.B.1, I.B.3, I.B.4, and I.B.5. The $50 million monetary payment represents a strong recovery, taking into account the potential costs, risk, and delay associated with class certification, trial, and appeal.

Effectiveness of the proposed method of distributing relief to the Settlement Class. This factor requires the Court to consider "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). "A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." *In re GSE Bonds Antitrust Litig*., 414 F. Supp. 3d 686, 694 (S.D.N.Y. 2019).

As set forth in the papers supporting Plaintiffs' motion to preliminarily approve a plan for providing notice in connection with the Third Settlement Agreement, being filed concurrently herewith, Plaintiffs have proposed an effective method of processing the claims of members of the Settlement Class. 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 will be required to provide annual gross transaction amounts for "fix-linked" transactions and other transactions. 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.

The terms of any proposed award of attorneys' fees. As was done with the prior two settlements, the proposed notice informs class members of an upper-limit of what Co-Lead Counsel may request for fees an expenses, and informs class members that "Incentive Awards" may be requested. As was also done with the prior two settlements, class members are ultimately directed to Co-Lead Counsel's future application to learn of the actual amounts requested and the bases for any such requests. In any event, our fee request will be reasonable in comparison to other fees awarded in this District and elsewhere in settlements in complex class actions. *See, e.g.*, *Thornhill v. CVS Pharmacy, Inc.*, 2014 WL 1100135, at *3 (S.D.N.Y. Mar. 20, 2014) ("In this Circuit, courts typically approve attorney's fees that range between 30 and

33⅓%.") (collecting cases); *In re DDAVP Direct Purchaser Antitrust Litig.*, 2011 WL 12627961 (S.D.N.Y. Nov. 28, 2011) (awarding 33 1/3% attorneys' fees); *In re Oxycontin Antitrust Litig.*, No. 04-md-1603, ECF No. 60 (S.D.N.Y. Jan. 25, 2011) (awarding 33 1/3% attorneys' fees); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467 (S.D.N.Y. 2009) (awarding 33.33% of a $510 million fund); *see also In re Urethane Antitrust Litig.*, 2016 WL 4060156, at *8 (D. Kan. July 29, 2016) (awarding 33.33% of $835 million settlement).

Any agreement required to be identified under Rule 23(e)(3). This factor 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.'" *GSE Bonds*, 414 F. Supp. 3d at 696 (quoting Fed. R. Civ. P. 23(e)(2)(C)(iv) and 23(e)(3)). As set forth in Exhibit C to the Settlement Agreement, the Parties have agreed that, in the event that members of the Settlement Class who transacted in a certain amount of Gold Investments during the Settlement Class Period opt out of the Class, the parties will meet and confer, and if unable to reach a resolution, Newly Settling Defendants may present the issue of whether the Materiality Threshold has been met, and if so, seek an appropriate remedy from an independent and neutral mediator to determine the appropriate remedy. No other agreements exist, and thus, this factor weighs in favor of final approval.

4. *Rule 23(e)(2)(D)—the Settlement treats Class members equitably relative to each other*

This Rule 23(e)(2) factor "could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment. As an initial matter, we note that the *Third Settlement Agreement itself* indisputably treats class-members "equitably." The

Settlement Agreement's release treats all members of the Settlement Class equitably relative to one another: 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—at $50 million. Newly Settling Defendants have no responsibility for, or liability from, any Plan of Allocation. On such facts, the Court could approve the Third Settlement Agreement even without a Plan of Allocation fully before it, as discussed in our concurrently filed response to the Court's October 19, 2021, order. *See also In re Agent Orange Prod. Liab. Litig MDL 381*, 818 F.2d 145, 170 (2d Cir. 1987) ("The prime function of the district court in holding a hearing on the fairness of the settlement is to determine that the amount paid is commensurate with the value of the case. This can be done before a distribution scheme has been adopted so long as the distribution scheme does not affect the obligations of the defendants under the settlement agreement."); *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) ("Because court approval of a settlement as fair, reasonable and adequate is conceptually distinct from the approval of a proposed plan of allocation, however, courts frequently approve them separately.").

But even if the Court were to consider the Plan of Allocation a necessary component of decision to approve the Third Settlement Agreement, the record here more than adequately supports preliminary approval of the Agreement. The Plan of Allocation here is identical to that being proposed for use in the prior two settlements. The plan for the prior two settlements was preliminary approved, and the only outstanding issue appears to be the treatment of positions opened and closed the same day. Regardless of how the Court chooses to handle that narrow issue in the context of final approval—an issue being addressed separately in our concurrently

filed response to the Court's October 19 order—such a decision could in no way prevent the *preliminary* determination that the *Third Settlement Agreement* is fair.

II. THE SETTLEMENT CLASS SHOULD BE CERTIFIED

Certification of a settlement class must satisfy the requirements of Rule 23(a), as well as at least one of the provisions of 23(b). *See In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 242 (2d Cir. 2012). When certification of a settlement class is sought, "courts must take a liberal rather than a restrictive approach." *Cohen v. J.P. Morgan Chase & Co.*, 262 F.R.D. 153, 157-58 (E.D.N.Y. 2009). As demonstrated below, the proposed Settlement Class meets these requirements.

A. The Requirements of Rule 23(a) Are Satisfied

Rule 23(a) permits an action to be maintained as a class action if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

1. Numerosity

In cases like this one involving widely traded financial instruments, numerosity is readily satisfied. *See Wallace v. IntraLinks*, 302 F.R.D. 310, 315 (S.D.N.Y. 2014) ("common sense assumptions . . . suffice to demonstrate numerosity"); *see also Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (numerosity presumed if a class has over 40 members). The size of the precious metals markets alone is sufficient to satisfy the numerosity requirement. *See Campbell v. Purdue Pharma, L.P.*, 2004 WL 5840206, at *4 (E.D. Mo. June 25, 2004) (noting that the volume of commerce made it "reasonable to assume that the class defined by Plaintiffs would have such numbers that their joinder would be both impractical and

inconvenient"). Co-Lead Counsel estimate that there are potentially many thousands of members of the proposed Settlement Class.

2. Common Questions of Law or Fact

The commonality requirement is likewise easily met because it is satisfied by a single common question of law or fact. *See Dukes*, 564 U.S. at 359; *see also Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 105 (2d Cir. 2007) ("allegations of the existence of . . . conspiracy are susceptible to common proof"). The nature of antitrust claims brought under Section 1 of the Sherman Act has led courts to routinely, and almost uniformly, find that commonality exists. *See also Richburg v. Palisades Collection LLC*, 247 F.R.D. 457, 462 (E.D. Pa. 2008) ("Antitrust, price-fixing conspiracy cases, by their nature, deal with common legal and factual questions about the existence, scope and effect of the alleged conspiracy.").[7] This case is no different. Proof of Defendants' conspiracy to rig the gold market will be the heart of this case at trial and is crucial to the claims of all members of the Settlement Class. Each member of the Settlement Class has a common interest in proving the existence, scope, effectiveness, and impact of the alleged conspiracy.

3. Typicality

The typicality standard is satisfied when "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir.

[7] *See also In re Vitamin C Antitrust Litig.*, 279 F.R.D. 90, 99 (E.D.N.Y. 2012) (commonality satisfied based on common question of whether defendants' price-fixing agreement caused an artificial increase in the market price of vitamin C); *In re Carbon Black Antitrust Litig.*, 2005 WL 102966, at *11 (D. Mass. Jan. 18, 2005) (collecting antitrust cases satisfying commonality requirement based on the existence and scope of conspiracies); *In re Nasdaq Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 510 (S.D.N.Y. 1996) (commonality satisfied based on common questions as to the existence, scope, effectiveness, and impact of conspiracy and the appropriate injunctive and monetary relief).

2009); *Tsereteli v. Residential Asset Securitization Trust 2006-A8*, 283 F.R.D. 199, 208 (S.D.N.Y. 2012) (typicality requirement "not demanding").

Here, Plaintiffs' claims are typical because they arise from the same events or course of conduct that gives rise to the claims of the Settlement Class—namely, Defendants' alleged participation in an unlawful conspiracy to rig the PM Fixing. *See In re Air Cargo Shipping Servs. Antitrust Litig.*, 2014 WL 7882100, at *31 (E.D.N.Y. Oct. 15, 2014) ("Because the representative plaintiffs will seek to prove that they were harmed by the same overall course of conduct and in the same way as the remainder of the class, their claims are by all appearances typical of the class."). All members of the Settlement Class seek redress for the impact the PM Fixing's manipulation had on their Gold Investment Transactions.[8] Because these are the same elements that both Plaintiffs and other members of the Settlement Class would have to prove separately if they brought individual actions, the typicality requirement is satisfied.

4. *Adequacy*

Adequacy is met if the class representatives do not have interests that are antagonistic to those of the class and their chosen counsel is qualified, experienced, and able to conduct the litigation. *See In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 111-12 (S.D.N.Y. 2010). Importantly, "[o]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 259 (S.D.N.Y. 1998); *see also In re Nasdaq*, 169 F.R.D. at 514-15 (holding that to deny class certification on adequacy grounds, "it must be shown that any asserted 'conflict' is so palpable as to outweigh the substantial interest of every class member in proceeding with the litigation").

[8] *See* Third Amended Complaint, ECF No. 266 ¶ 29 & n.16 (defining Gold Investments).

Plaintiffs are adequate representatives of the Settlement Class and should be appointed as class representatives, solely for settlement purposes. There are no conflicts between Plaintiffs and members of the Settlement Class concerning the subject matter of this litigation. All Plaintiffs engaged in Gold Investment Transactions affected by Defendants' conduct. The same is true of the other members of the Settlement Class. Thus, Plaintiffs' interest in proving liability and damages is entirely aligned with that of the Settlement Class.

Co-Lead Counsel appointed by the Court are experienced in class and antitrust litigation and have served in leadership roles in numerous major antitrust and other class actions in courts throughout the United States. *See also Moran v. The Bank of Nova Scotia*, No. 14 Civ. 2213, ECF Nos. 17-20, 23 (S.D.N.Y. July 22, 2014) (discussing Co-Lead Counsel's qualifications). Co-Lead Counsel have diligently represented the interests of the Settlement Class in this litigation and will continue to do so. *See generally* ECF No. 569 (joint declaration summarizing Co-Lead Counsel's work on the Action).

Accordingly, the requirements of Rule 23(a)(4), as well as the requirements of Rule 23(g) relating to the qualifications of Co-Lead Counsel, are satisfied.

B. The Requirements of Rule 23(b)(3) Are Satisfied

If the proposed class satisfies Rule 23(a), a class should be certified under Rule 23(b)(3) if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Here, questions of law or fact common to the Settlement Class predominate over any individualized questions, and a class action is manifestly the superior method of adjudicating the controversy.

Predominance exists where the questions that are capable of common proof are "more substantial than the issues subject only to individualized proof." *Roach v. T.L. Cannon Corp.*,

778 F.3d 401, 405 (2d Cir. 2015). Predominance is a "test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997).[9] Here, proof of an unlawful agreement will consist of class-wide, common evidence that will "focus on [Defendants'] conduct, not on the actions of putative class members." *Dial Corp. v. News Corp.*, 2015 WL 4104624, at *5 (S.D.N.Y. June 18, 2015). In addition, predominance is demonstrated, as in this case, where the impact of the asserted antitrust violation, as well as the damages arising out of the misconduct, can be shown on a class-wide basis. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 338 (3d Cir. 2011) ("All plaintiffs here claim injury that by reason of defendants' conduct . . . has caused a common and measurable form of economic damage. . . . All claims arise out of the same course of defendants' conduct; all share a common nucleus of operative fact, supplying the necessary cohesion."). The predominance element is satisfied in this case.

Finally, as numerous courts have held, a class action is a superior method of adjudicating claims in cases like this one.[10] Consequently, courts have consistently certified class actions in such cases. Accordingly, the requirements of Rule 23(b)(3), like those of Rule 23(a), are satisfied, and certification of the Settlement Class for purposes of settlement is appropriate.

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[9] *See*, *e.g.*, *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 108 (D.N.J. 2012) ("Given that antitrust class action suits are particularly likely to contain common questions of fact and law, it is not surprising that these types of class actions are also generally found to meet the predominance requirement."); *Vitamin C*, 279 F.R.D. at 109 (stating that in horizontal price-fixing cases, "courts have frequently held that the predominance requirement is satisfied because the existence and effect of the conspiracy are the prime issues in the case and are common across the class"); *Brown v. Pro Football, Inc.*, 146 F.R.D. 1, 4 (D.D.C. 1992) ("the framers of Rule 23 seemed to target cases such as this [antitrust action] as appropriate for class determination").

[10] *See*, *e.g.*, *In re Currency Conversion Fee Antitrust Litig.*, 224 F.R.D. 555, 566 (S.D.N.Y. 2004); *In re Nat. Gas Commodities Litig.*, 231 F.R.D. 171, 185 (S.D.N.Y. 2005); *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 279, 284 (S.D.N.Y. 1999).

III. APPOINTMENT OF ESCROW AGENT, SETTLEMENT ADMINISTRATOR, AND RELATED RELIEF

As part of the proposed Preliminary Approval Order, Plaintiffs also seek the Court's preliminary approval of (i) The Huntington National Bank[11] as the Escrow Agent, and (ii) the Settlement Fund as Qualified Settlement Funds pursuant to Internal Revenue Code § 468B and related Treasury Regulations. *See* Preliminary Approval Order ¶¶ 14, 15. These requests are identical to the requests the Court preliminarily approved in connection with prior two settlements.

Plaintiffs and Settling Defendant have agreed that the Escrow Agent may make the following disbursements from the Settlement Fund for purposes of paying costs (other than attorney's fees) incurred in preparing and providing the Settlement Class Notice and paying other administrative expenses, including notice and administration expenses of and incurred by the Settlement Administrator: (i) up to $1.5 million prior to the entry of the Final Judgment and Order of Dismissal, unless Court approval is obtained to exceed that amount; and (ii) up to $2.5 million after entry of the Final Judgment and Order of Dismissal but prior to the Effective Date, unless Court approval is obtained to exceed that amount. *See* TSA § 8(a). Such funds are not recoverable if the Settlement is terminated or does not become final. *Id.* As part of the Preliminary Approval Order, Plaintiffs seek the Court's approval to pay these administrative expenses up to the agreed amounts. *See* Preliminary Approval Order ¶ 16. Again, this request is

[11] The Huntington National Bank is part of Huntington Bancshares, Inc., which is one of the large bank holding companies that is a component of the S&P 500. The Huntington National Bank's National Settlement Team is one of the leading settlement account programs in the country and has handled escrow accounts in countless class action settlements. *See* Huntington Bancshares, Inc. Website, Settlement Funds Services, https://www.huntington.com/Commercial/industries/settlement-funds-services.

identical to the request the Court preliminarily approved in connection with the prior two settlements.

Finally, Plaintiffs also seek the Court's preliminary approval of Plaintiffs' designation of Kroll Settlement Administration (formerly known as Heffler Claims Group) as the Settlement Administrator[12] in connection with the Third Settlement Agreement. *See* Preliminary Approval Order ¶ 13. This is the same Settlement Administrator being used for the first two settlements.

CONCLUSION

On the basis of the foregoing, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Preliminary Approval of the Third Settlement Agreement and enter the Preliminary Approval Order.

DATED: November 12, 2021

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[12] As to ensure the three agreements are identical as much as possible, the Third Settlement Agreement and exhibits thereto still use the term "Claims Administrator" as in the prior settlements. But consistent with later practice and the term approved by the Court for use in notice sent to class members, our other filings adopt the term "Settlement Administrator" term. They are intended to mean the same thing.

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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.

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