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

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTIONS FOR (1) FINAL APPROVAL OF THE THIRD SETTLEMENT AGREEMENT, CERTIFICATION OF THE SETTLEMENT CLASS, AND FINAL APPROVAL OF THE PLANS OF ALLOCATION; AND (2) ATTORNEYS' FEES, LITIGATION EXPENSES, AND INCENTIVE AWARDS

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PRELIMINARY STATEMENT

Plaintiffs' opening papers demonstrate how the proposed Third Settlement Agreement, notice plan, and Plans of Allocation meet the applicable standards for approval. *See* ECF No. 641 ("Final Approval Motion"). They also demonstrate how the request for attorneys' fees, expenses, and incentive awards are fair and reasonable. *See* ECF No. 644 ("Fee, Expense, & Incentive Motion"). Only four class members seek to be excluded, as compared to over 120,000 claimants. Despite the size of the class, only one objection has been filed. ECF No. 647 (the "Objection" or "Obj.", filed by the "Objector"). The near-unanimous support for Plaintiffs' and Co-Lead Counsel's efforts confirms the Third Settlement Agreement should be given final approval, and the Fee, Expense, & Incentive Motion should be granted.

The Objector takes issue with the scope of the release, even though the express terms of the Third Settlement Agreement adopt the same test ("factual predicate") used both in the Second Circuit and in the Objection. The Objector thus does not, and cannot, argue that the Agreement is itself questionable. Rather, the Objector fears that in the future the Bank of Nova Scotia might argue that the release has some impact on the claims alleged in *In re Bank of Nova Scotia Spoofing Litigation*, No. 20-cv-11059 (D.N.J.) ("*BNS Metals Futures Spoofing*" or the "New Jersey" action). But there is no need for an advisory opinion now on how the release may or may not impact the New Jersey action at some future time.

Contrary to the Objection, the COMEX traders were adequately represented here regardless of how the "factual predicate" question is eventually resolved with respect to the New Jersey action. The law is clear that even completely un-litigated claims can be released. Due process cannot possibly require every un-litigated claim to be imagined, documented, valued, and negotiated over independently to do so. Rather, when a release covers an un-litigated claim, due process demands only that there exist an alignment of interests among class members. The

Objector does not, and cannot, dispute that the class here was aligned in pursuing the best overall recovery. And in fact, the named representatives even shared the same interest in maximizing recovery for COMEX traders as the Objector does, because many of the named Plaintiffs in this case were themselves COMEX traders.

Nor is there any need to decide the "factual predicate" issue today in order to conclude that the Third Settlement Agreement is fair and reasonable, including to COMEX traders. There are several reasons for this conclusion, including because: (i) the law allows un-litigated claims to be released; (ii) the law does not demand every claim to be independently negotiated; (iii) the fairness analysis takes into account the riskiness of claims, and (iv) because of the overwhelmingly positive reaction of class members. Over 120,000 class members, including many thousands of COMEX traders, have rationally decided that $50,000,000 in hand is fair, even if the release *might* impact some *part*[1] of what *might* be in the bush. And as this Court recognized, any class member who disagreed could have opted out.

A settlement with such tremendous support should not be threatened merely because one class member has fears about the release's potential impact on a pleading-stage case—a case that the Objector itself asserts is based on a different factual predicate and thus would be outside the scope of the release as already written. Indeed, all class members, including COMEX traders, could be made significantly worse off if the Third Settlement Agreement is rejected. Particularly given developments in the law since the Agreement was reached, it is far from a given that the Newly Settling Defendants would still pay $50,000,000—let alone, pay *more*—if the Agreement is rejected.

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[1] The New Jersey action covers metals other than gold, covers a time period that only partially overlaps with the class here, and seeks to recover on upward "spoofs." *See generally* ECF No. 648-3 (New Jersey complaint) ¶¶ 1, 48.

Co-Lead Counsel take no position on what the proper procedural mechanism is for the Objector and the Bank to eventually work out their differences, if they ever ripen, except to say that an objection to the Third Settlement Agreement is not the right answer.[2] Again, the Agreement is already limited by the factual-predicate doctrine, so the issue will be preserved even if the Agreement is approved. The Court can and should find that the Third Settlement Agreement meets the due process and fairness requirements, even if the application of the release is left for another day. And the application of the release would be better decided if based on a fulsome adversarial process between the Objector and the Bank—not by way of a proxy battle against Co-Lead Counsel triggered by the Bank's mere "reservation of rights."

The Objection should be overruled and the pending motions be granted in full.

ARGUMENT

I. PLAINTIFFS' MOTION FOR FINAL APPROVAL OF THE THIRD SETTLEMENT AGREEMENT SHOULD BE GRANTED

Contrary to the Objector's apparent presumption (Obj. at 12-13), the law is clear that class-action settlements may release un-litigated claims—indeed, the ability to grant broad releases is an important tool plaintiffs have to help settle claims. *See, e.g.*, *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 247-48 (2d Cir. 2011) ("Parties often reach broad settlement agreements encompassing claims not presented in the complaint in order to achieve comprehensive settlement of class actions, particularly when a defendant's ability to limit his future liability is an important factor in his willingness to settle."); *Wal-Mart Stores,*

[2] The Third Settlement Agreement provides that the parties submit to this Court's jurisdiction "for any . . . dispute arising out of or relating to this Agreement or the applicability of this Agreement . . . ." ECF No. 607-1 ¶ 13(d). But there is also no reason to doubt that the New Jersey court is capable of applying the law to the facts before it. *See generally Dennis v. JPMorgan Chase & Co.*, 2021 WL 1893988 (S.D.N.Y. May 11, 2021) (discussing "factual predicate" of prior action, handled by another court, in context of motion to dismiss).

Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 107 (2d Cir. 2005) ("We agree with respondents that due process does not require that all class claims be pursued.").

When an un-litigated claim is released, due process is tested by way of the "factual predicate" and "adequacy of representation" requirements. *Id.* at 109. As discussed in Sections I.A and I.B below, these tests are satisfied regardless of what eventually happens with respect to the New Jersey action. And as discussed in Section I.C below, the Court similarly can and should conclude that the Third Settlement Agreement is fair, reasonable, and adequate even without resolving what impact (if any) the release will have on the New Jersey action.[3]

A. Even Without a "Carve-Out," the Release is Proper Because It Is Already Expressly Limited By the "Factual Predicate" Doctrine

The Court need not grant a "carve-out" in order to avoid running afoul of the "factual predicate" requirement. This is for the simple reason that the Third Settlement Agreement already expressly adopts the operative legal test. *Compare* ECF No. 607-1 ¶ 4(d) (release limited to "the same factual predicate of the Action") *with Wal-Mart*, 396 F.3d at 106-07 (ability to release claims is limited by the "factual predicate" doctrine) *and* Obj. at 10 (arguing for application of the "factual predicate" standard). The parties to the Third Settlement Agreement agreed to extend the release to the fullest extent allowed by law. Nothing more, nothing less. The Objector thus cannot establish that the Third Settlement Agreement is facially defective.[4]

Unable to find fault with the Third Settlement Agreement itself, the Objector seeks instead an advisory opinion. The Objector is disappointed that the Bank of Nova Scotia has

[3] For the avoidance of doubt, nothing herein is intended to be indicative of Co-Lead Counsel's views on the "factual predicate" relationship between the two cases.

[4] For this reason, referring to the requested relief as a "carve-out" is a misnomer. The contracting parties had a meeting of the minds that the scope of the release would go to the fullest extent allowed by law, but no further. Thus, any ruling clarifying the scope of the release would be merely interpreting the Third Settlement Agreement as written, not "carving" something out of it.

"decline[d] to provide" an express representation that the Third Settlement Agreement's release will have zero impact on *BNS Metals Futures Spoofing*. *Id.* at 9. The Objector thus fears the following series of events: (1) the parties' reported settlement talks in the New Jersey action fall through;[5] (2) the New Jersey court rules in the Objector's favor on the pending issue of whether the *BNS Metals Futures Spoofing* complaint was timely; (3) the Bank argues that the Third Settlement Agreement's release has some impact on *BNS Metals Futures Spoofing*; (4) the Bank's argument goes beyond the "factual predicate" of this action; (5) the Objector opposes the Bank's argument; but (6) the court considering the issue on a full factual and adversarial record enters an order on the scope of the release with which the Objector disagrees.

In *Stinson v. City of New York*, 256 F. Supp. 3d 283 (S.D.N.Y. June 3, 2017), an objector similarly asserted that "there may be an argument" that the release language covered certain claims. *Id.* at 292. But Judge Sweet of this district recognized that "'[m]ay' is the correct and operative word here: the thrust of these objections is a hypothetical exercise." *Id.* The objection was thus overruled. *Id.* at 292-93. So, too, did Judge Cote of this district overrule an objection calling for the interpretation of a release, instead recognizing that if "an application is made to this Court to enforce the Release, the application will be considered at that time." *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *15 (S.D.N.Y. Apr. 26, 2016). This Court should similarly give final approval to the Third Settlement Agreement despite the Objector's concerns over what the Agreement "may [] release." Obj. at 14.

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[5] The parties referred to ongoing talks in requesting the New Jersey court delay consideration of the pending motion to dismiss. *See, e.g.*, *BNS Metals Futures Spoofing* ECF Nos. 52, 54, 58, 60. The New Jersey litigants' last submission, which did not re-mention settlement talks, requested an extension to July 18, just after the filing of this brief. *See id.* ECF No. 61.

B. Even Without a "Carve-Out," COMEX Futures Traders Were Adequately Represented Under the Alignment-of-Interests Test

The "adequacy of representation" requirement does not require this Court to wade into the New Jersey action. As an initial matter, the Objector's suggestion (at 12) that Plaintiffs somehow dropped the ball in not litigating any and all spoofing claims misses the mark. The regulatory actions on which the New Jersey plaintiffs base their case did not come out until August 2020. *See* ECF No. 648-3 ¶ 3. By then, this case was six years old, the operative complaint was almost three years old, and the Court had long since locked Plaintiffs into a Fixing theory. *See, e.g.*, ECF No. 377 at 8.[6]

More fundamentally, as discussed above, the law allows un-litigated claims to be released. Adequacy-of-representation is thus met "by showing an alignment of interests between class members, not by proving vigorous pursuit of that claim." *Wal-Mart*, 396 F.3d at 106-07. This does not demand identical interests, merely an alignment of interests. *See id.*[7] Here, the class was united in pursuing the claims that would lead to the best overall recovery. But even more dispositive of the Objection, in *Wal-Mart* the Second Circuit found that "the lead plaintiffs are necessarily a part of the [other] classes and their interests are, therefore, aligned with the interests of those classes." *Id.* at 111; *see also In re Patriot Nat'l, Inc. Secs. Litig.*, 828 Fed. Appx. 760, 765 (2d Cir. 2020) (interests aligned where lead plaintiffs were "qualified to assert" the same claims). So too here. Many of the named Plaintiffs here traded COMEX gold futures

[6] The Court's decision followed representations by Co-Lead Counsel about the scope of this action. Co-Lead Counsel took a different path than those in *Silver*, who for instance arguably created risk in pursuing multi-directional all-day theories. *See generally In re London Silver Fixing, Ltd. Antitrust Litig.*, 332 F. Supp. 3d 885, 905 (S.D.N.Y. July 25, 2018) (after amendment to include up-and-down, all-day allegations, noting "critical mass" of new decisions put antitrust claims in renewed danger).

[7] *See also, e.g.*, *Burgess v. Citigroup*, 624 Fed. Appx. 6, 8 (2d Cir 2015) (interests aligned where lead plaintiffs and appellants were both interested in recovering for Citigroup's toxic investments); *In re WorldCom Inc. Sec. Litig.*, 2007 WL 1946685, at *7 (S.D.N.Y. July 5, 2007) (alignment based on recovery for losses from investments in WorldCom securities).

and thus have dual citizenship in this class and the *BNS Metals Futures Spoofing* class. *See* ECF No. 266 (Third Consolidated Amended Complaint) ¶¶ 35-63. In addition to the overall alignment of interest among class members, then, the named-Plaintiff-COMEX traders here had aligned interests with the Objector-COMEX trader.

The Objector's alternative approach—asking whether Plaintiffs bargained for "separate consideration," Obj. at 2, 13—was rejected in *Wal-Mart*. Again, the Second Circuit made clear that due process does not turn on the "vigorous pursuit" of any particular claim. 396 F.3d at 106-07. Accordingly, in refusing to allow discovery to supposedly help value particular claims, the Second Circuit held that "Plaintiffs were not required to bargain separately for relief in exchange for" certain claims. *Id.* at 120. The Second Circuit cited favorably the Eighth Circuit's recognition that:

> The release of [a particular category of claims] was one of a series of benefits conferred on the defendant by the class as part of the settlement. On the other side, defendant conferred benefits on the plaintiff class, including a monetary settlement, from which the plaintiff in this [related] case has benefitted . . . No part of the consideration on either side is keyed to any specific part of the consideration of the other. Each side gives up a number of things. *This is the way settlements usually work.* It was the judgment of the class representative that the general class of claims arising out of policy charges, known and unknown, was a proper thing to give up to obtain the benefits offered by [the defendant]. *We do not know the relative value of the modal-billing claims, and we have no way to criticize the judgment of the class representative.* Accordingly, we hold that the representation afforded was adequate, and that the provisions of Fed.R.Civ.P. 23 were fully met.

In re Gen. Am. Life Ins. Co. Sales Practices, 357 F.3d 800, 805 (8th Cir. 2004) (emphasis added).

The Objector's alternative claim-by-claim approach is not just contrary to Second Circuit law, but would also be unworkable. Whenever a claim was not actively litigated, there will always be a comparative lack of information to independently value that "other" claim. It thus would be nigh impossible to get settlements approved if every potential-but-not-litigated claim

had to be separately and expressly imagined, documented, valued, and negotiated over. And class actions would become incredibly inefficient if plaintiffs had to pursue any and all claims, for fear of making it impossible to later get settlements agreed to and approved.

The Objector's contrary position is not saved by citation to *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981). There, the Second Circuit reversed approval of a settlement where "a class member holding one liquidated and one unliquidated contract receives no more than another class member holding only one liquidated contract." *Id.* at 19. This was driven by a concern that named plaintiffs might "endeavor[] to obtain a better settlement by sacrificing the claims of others at no cost to themselves." *Id.* at 19 n.10. But where, as here, the class representatives themselves hold the un-litigated claims, that concern does not apply—any "cost" felt by the Objector was also felt by Plaintiffs as fellow COMEX traders. The Second Circuit thus has recognized that "*Super Spuds* is inapposite" to cases like this one, because "*Super Spuds* hinged on the fact that the class representatives did not possess the [other claims being released]." *Wal-Mart*, 396 F.3d at 111.

The Objector also repeatedly cites *Oladapo v. Smart One Energy, LLC*, 2017 WL 5956907 (S.D.N.Y. Nov. 9, 2017), but that case involved a settlement that failed in just about every way possible.[8] In recounting the many failings, the magistrate judge noted the settlement agreement itself dictated that each class member would get $20 per person, without regard to the

[8] For example, in *Oladapo* there was not "one iota of evidence" as to the size of the class, 2017 WL 5956907, at *9; the court had "no basis" to assume commonality, *id.* at *10; the attorneys got more as class members got paid less, *id.*; the court could not find that the common issues predominated, *id.* at *11; the court could not tell if there was any "procedural fairness" because the case settled without any discovery, *id.*; and the release purported to include future claims, *id.* at *15. Following the magistrate's recommendation to reject the settlement, the plaintiff tried to withdraw the approval motion. Instead, Judge Swain, without relying on any one particular failing, summarily adopted the magistrate's recommendation to reject the settlement outright. 2017 WL 5956770 (S.D.N.Y. Nov. 30, 2017).

differences between them. *Id*. at *15. *Oladapo* cannot justify refusing to give final approval to the Third Settlement Agreement, then, because here all allocation decisions were made in the independent Plan of Allocation.[9] In any event, the Plan of Allocation already allows COMEX claims regardless of when the trade occurred vis-à-vis a Fixing, and "day-trade" transactions were allowed in despite their uniquely high volume and litigation risk. Day-trades alone are estimated to be in line for 15% of the distribution. If anything, the Plan's treatment of COMEX traders confirms the adequacy of their representation in this case.

The Objector also over-reaches by citing to 4 Newberg on Class Actions § 13:60 (5th Ed.) in suggesting the Court should be "wary." Obj. at 17. The Objector quotes from a discussion about "reverse auction" situations, where "the defendant can play the plaintiffs' attorneys off against one another." *Id.* Courts are thus to be "wary" of "suspicious" behavior, such as "a quick settlement, settlement of the least well-developed case, or settlement with the least experienced plaintiffs' counsel." *Id.* But all such factors push strongly in favor of bringing this action to a close even if it may (or may not) impact the New Jersey action: this case was filed many years before the New Jersey action; the Third Settlement Agreement was reached after discovery was fully completed; the New Jersey action is still at the pleading stage; and Co-Lead Counsel are highly experienced class-action litigators. Thus, if anything, the Court should be concerned about a settlement in New Jersey being used to undermine this case, not the other way around.[10]

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[9] *See* ECF No. 607-1 ¶ 5(b) ("Settling Defendants shall have no liability, obligation, or responsibility with respect to the investment, allocation, use, disbursement, administration, or oversight of the Settlement Fund.").

[10] The other authorities the Objector cites do not suggest otherwise. For instance, in *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, 827 F.3d 223 (2d Cir. 2016), the settlement was rejected because "vast numbers" of class members would be "either legally or commercially unable" to obtain any benefit from the agreement. *Id.* at 239.

C. Even Without a "Carve-Out," the Third Settlement Agreement Is Fair, Reasonable, and Adequate

Nor does the "fairness" analysis require the Court to decide how to apply the "factual predicate" limitation today. As set forth in the Final Approval Motion (at 2-17), the Third Settlement Agreement satisfies the "fair, reasonable, and adequate" standard, including under the factors discussed in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974).

If anything, time has confirmed the wisdom of the bargains struck. This is in part because of the increased legal risks given pro-defense developments in the law. *See, e.g.*, Final Approval Motion at 10. It is also because of the incredibly positive response to the proposed settlement, including from COMEX traders. After COMEX traders filed an objection to the original Plan of Allocation—an objection that emphasized special harm "through the use of short-term manipulation tools such as spoofing," ECF No. 578 at 3—the Plans were altered to allow "day-trade" submissions. Over 10,000 were made. This is in addition to claims filed by non-day-traders, who can also submit COMEX trades regardless of what time of day they occurred. Thousands of COMEX traders have thus made the rational decision that $50,000,000 in hand is fair, even if the "factual predicate" release *might* impact some *part* of something that *might* be in the bush, in New Jersey or elsewhere.

The Second Circuit has made clear that the favorable reaction of the class is "perhaps the most significant" factor. *Wal-Mart*, 396 F.3d at 119. And as to those class members that feared the potential impact of the release, they could have opted out, as this Court already recognized. ECF No. 629 (Jan. 4, 2022 Tr.) at 6:8-25 (class members could opt out "if [they] don't like . . .

Here, COMEX traders can fully participate. And in *Literary Works*, there was "no credible justification" for the fact the settlement agreement itself had a "penalty" applicable only to one category of class members. 654 F.3d at 254. Finally, the Court's Individual Practices merely require preliminary approval motions to go through the *Grinnell* factors, which Plaintiffs' motion did here. *See* ECF No. 606.

the way the release is written"). Indeed, "courts frequently overrule objections that can be cured by the objector simply opting out of the class, such as objections about the scope of the proposed release." 2 McLaughlin on Class Actions § 6:10 (18th Ed. 2021).

A later ruling as to the impact of the release on the New Jersey action could not somehow retroactively make the October 2021 Third Settlement Agreement unreasonable on these facts. This is again because the bargain struck in 2021 already protects class members by way of the "factual predicate" term, and by way of the opt-out right.[11] It is also because of the risks facing this action and the risks facing the claims in New Jersey. To avoid unnecessary "friendly fire," Co-Lead Counsel will just note that that the Final Approval Motion (at 8-12) discusses some of the considerable risks Plaintiffs' case here faced. The Objector's New Jersey action likely faces similar risks and others, including because that case is still facing a motion to dismiss on timeliness grounds, and because that case does not have a common pricing mechanism (the Fixing) or direction (downward) to build around. *See BNS Metals Futures Spoofing* ECF No. 43 at 22-23 (in opposing motion to dismiss, New Jersey plaintiffs describing the many data-intensive steps involved in "[t]he only way to detect spoofing," and asserting that without data analysis plaintiffs have "no way of knowing" where spoofs occurred).

The presence of risk means the October 2021 settlement is reasonable, regardless of how big a damages figure might (or might not) be presented to a New Jersey jury years from now, and regardless of whether that hypothetical jury demand might (or might not) be reduced by the

[11] In this regard, the Objection appears to present only downside risk to class members. If the Objector is confident in its reading of the law, then it should not be so concerned with the Bank's "reservation of rights." But if this Court takes up the issue now and *disagrees* with the Objector, COMEX traders could be made significantly worse off. Their hand in New Jersey will be weakened, as any current uncertainty would be replaced by a Bank victory. And in the worst-case-scenario, $50,000,000 might also be taken out of class members' pockets in deference to a case that has not even left the pleading stage yet.

application of the "factual predicate" doctrine. *See Grinnell*, 495 F.3d at 455 n.2 (due to presence of risks "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"). And again, the law is also clear that un-litigated claims can be settled, and that no special allocation need be made as to any particular claim. *Wal-Mart*, 396 F.3d at 120; *Gen. Am. Life*, 357 F.3d at 805. It follows from *Grinnell*, *Wal-Mart*, and *General American Life* that the Third Settlement Agreement can and should be found reasonable.

II. PLAINTIFFS' MOTION FOR FINAL APPROVAL OF THE NOTICE PLAN SHOULD BE GRANTED, INCLUDING BECAUSE CLASS MEMBERS WERE ALERTED AS TO THE TERMS OF THE RELEASE

As set forth in the Final Approval Motion (at 18-22), over 358,000 Notice Packets were mailed to potential class members. An extensive publication campaign using global print and online outlets was also undertaken. The comprehensive notice program was "the best notice . . . practicable under the circumstances," and satisfies Rule 23 and due process. Fed. R. Civ. P. 23(e)(2)(B).

No objection was filed with respect to the notice program generally. Rather, the Objector complains only that the Notice Packets did not discuss the hypothetical impact on the New Jersey action. Obj. at 16-17. But regardless of how the release is eventually applied in New Jersey, the Notice Packets meet Rule 23(e)'s requirement to "fairly apprise the prospective members of the class of the terms of the proposed settlement." *Wal-Mart*, 396 F.3d at 114. This standard is met where the "release [is] quoted in its entirety." *Id.* at 115-16. Doing so is sufficient even if the notice does not mention that the release will impact another case. *Id.*

Here, the Notice Packets followed the *Wal-Mart* path of quoting the release in full, without additional commentary on what other cases may be impacted. Such an approach has been expressly approved by the Second Circuit, and was therefore a reasonable approach to take.

And the impact of the release, if any, is apparently still being debated by the New Jersey litigants. To have referenced *BNS Metals Futures Spoofing* in the notice materials thus could have created more confusion than clarification. This Court thus did not err in concluding that, if class members were uncomfortable with the uncertainty of how the "factual predicate" law might apply, they could have opted out. ECF No. 629 (Jan. 4, 2022 Tr.) at 6:8-25; *Melito v. American Eagle Outfitters, Inc.*, 2017 WL 3995619, at *15 (S.D.N.Y. Sept. 11, 2017) (Carponi, J.) (quoting *Wal-Mart* for fact that due process does not require "further explanation of the effects of the release," and noting that "to the extent that . . . any class member had any questions concerning the release" they could have contacted counsel). The Objector's citations for the general fact that notices must provide "meaningful" information (Obj. at 16-17) cannot trump clear Second Circuit law, or this Court's prior guidance, as to what that means on the specific facts of this case.

III. PLAINTIFFS' MOTION FOR THE FINAL APPROVAL OF THE PLANS OF ALLOCATION SHOULD BE GRANTED, INCLUDING BECAUSE IT IS UNOPPOSED

As set forth in the Final Approval Motion (at 22-25) the Plans of Allocation are fair and adequate, being based on a reasonable, rational basis. Though the Objector mentions the Plan of Allocation for the Third Settlement Agreement in its failed attempt to show the Agreement is unfair, the Objection does not actually request any change to the Plan of Allocation itself. Thus, the Plans of Allocation should be treated as unopposed, and should be approved.

Even if the Objector were allowed to belatedly change its requested relief to target the Plan of Allocation for the Third Settlement Agreement,[12] that relief, too, should be denied. The Plan of Allocation for the Third Settlement Agreement is reasonable with respect to its treatment of COMEX traders regardless of how the "factual predicate" issue plays out in New Jersey. This

[12] *But see* ECF No. 625 ¶ 12 (objections not timely made are "forever barred").

is because COMEX trades can already be submitted here regardless of their relationship to a Fixing, and because "day-trade" transactions were allowed in despite their uniquely high volume and litigation risk. Contrary to the Objector's suggestion (Obj. at 3 n.5), there thus are literally no "uncompensated" COMEX trades.

IV. PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, LITIGATION EXPENSES, AND INCENTIVE AWARDS SHOULD BE GRANTED, INCLUDING BECAUSE IT IS UNOPPOSED

Co-Lead Counsel's request for an award of $16,640,000 is reasonable from the perspective of the factors considered by *Golberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000) (Fee, Expense, & Incentive Motion at 5-11), from the perspective of the negotiated terms with named Plaintiffs here (*id.* at 14), and from the perspective of the Lodestar "cross-check" (*id.* at 12-14). Indeed, Co-Lead Counsel's request, even if granted in full, would still leave us receiving less than our already-discounted hourly rates—which is the opposite of the incentive courts awards strive for in awarding fees. *Id.* at 12, 15-17.[13]

The same policy considerations that drive courts to compensate attorneys for taking on large contingency cases also leads courts to routinely reimburse reasonable out-of-pocket expenses. *Id.* at 21-22. Co-Lead Counsel's motion and supporting materials confirm the reasonableness of their investments in this heavily data-driven, lengthy, and complex case.

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[13] Co-Lead Counsel previously cited *In re Optical Disk Drive Products Antitrust Litigation*, 2021 WL 3502506 (N.D. Cal. July 2, 2021), which granted an award 20% larger than what was in the attorneys' leadership application. *Id.* at *7. *See* Fee, Expense, & Incentive Motion at 18 n.14. The Ninth Circuit recently confirmed *at least* a 20% upward adjustment was proper, though the case was remanded to determine the final number given a dispute over what the baseline fee was. 2022 WL 1955672, at *4 (9th Cir. Jun. 6, 2022). Here, there is no dispute that Co-Lead Counsel's request represents only a 17.4% increase over the amount "envision[ed]" in the 2014 leadership application.

Co-Lead Counsel's motion also established that the incentive awards being requested were, if anything, below federal norms, particularly considering the abnormally long history of this case. *Id.* at 22-25.

No class member has objected to any portion of Co-Lead Counsel's Fee, Expense, & Incentive Motion. This weighs strongly in favor of it being granted in full. *See, e.g.*, *Tiro v. Pub. House Invs., LLC*, 2013 WL 4830949, at *14 (S.D.N.Y. Sept. 10, 2013).

CONCLUSION

Plaintiffs request that their Final Approval Motion be granted with respect to the Third Settlement Agreement, the certification of the related Settlement Class, and the notice plan. Submitted concurrently herewith is a proposed final judgment based on the form agreed to during negotiations with the Newly Settling Defendants, modified primarily to account for the filing of the Objection.

Plaintiffs request that their Final Approval Motion also be granted with respect to the Plans of Allocation for the Original Settlements and the Third Settlement Agreement. Proposed orders are submitted concurrently herewith.

Co-Lead Counsel request that their Fee, Expense, & Incentive Motion be granted. Proposed orders are submitted concurrently herewith.[14]

DATED: July 15, 2022 Respectfully submitted,

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Merrill G. Davidoff Martin I. Twersky Michael C. Dell'Angelo Candice J. Enders	Daniel L. Brockett Sami H. Rashid Alexee Deep Conroy Christopher M. Seck

[14] The expense figure in the accompanying proposed order is about $17,000 less than what was referred to in the Fee, Expense, & Incentive Motion and the supporting declarations. This is because a vendor has issued revised invoices.

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