

**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 IN SUPPORT OF
PLAINTIFFS' MOTION FOR DISTRIBUTION OF THE SETTLEMENT FUND**

Plaintiffs respectfully move for an Order authorizing the distribution of the Net Settlement Fund to each member of the Class who submitted a valid claim (“Authorized Claimants”) and granting the payment of fees and expenses to Kroll Settlement Administration LLC (“Kroll”), the Court approved Claims Administrator.

I. BACKGROUND REGARDING THE SETTLEMENTS

Plaintiffs in this class action litigation alleged that defendants conspired to manipulate the prices for gold through collusion relating to how the global benchmark price for gold was determined each day. The litigation was consolidated before this Court by an order of the Judicial Panel on Multidistrict litigation on August 13, 2014. Over the next six years, the parties vigorously litigated the matter. The first two settlements were reached during this period: (i) a \$60 million settlement with Deutsche Bank on August 24, 2016; and (ii) a \$42 million settlement with HSBC on November 10, 2020 (collectively, the “Original Settlements”). *See* ECF Nos. 174-1, 487-1. Almost one year later, the third and final settlement for \$50 million was reached with the remaining defendants on October 19, 2021 (the “Third Settlement Agreement”). *See* ECF No. 607-1. All three settlements, totaling \$152 million, contained functionally equivalent terms.

As part of the process to obtain final approval of the Original Settlements, on October 18, 2021, Plaintiffs proposed a revised plan of allocation that would permit “day-trades” (*i.e.*, trading positions that were opened and closed on the same day) to be included as part of the claims submission process for the Original Settlements. *See* ECF Nos. 598, 610-4. This type of trading activity was not part of the initial claims procedure used with the Original Settlements. A similar provision was incorporated into the plan of allocation for the Third Settlement Agreement when Plaintiffs moved for preliminary approval of that settlement on November 12, 2021. *See* ECF

Nos. 609, 610-3. Because class members had submitted claim forms prior to revising the plan of allocation for the Original Settlements that did not incorporate any day-trade transactions, the notice program for the Third Settlement Agreement informed class members that they could submit revised Claim Forms to account for day-trades. *See* ECF No. 624. The deadline for submitting new or revised Claim Forms was April 19, 2022. *See* ECF No. 623.

The following sections describe in detail the notice and claims administration, the proposed distribution, and a request for an Order for payment of the Claims Administrator's fees and expenses to administer the distribution.

II. CLASS NOTICE AND THE CLAIMS ADMINISTRATION PROCESS

Beginning on March 22, 2021, the Claims Administrator commenced the first notice program to the Class in connection with the Original Settlements. *See* ECF No. 562. It was a robust program that provided notice about the settlements through a variety of methods, including: direct notice to approximately 307,000 Class Members and broker/dealers; publication notice in eight newspapers and trade publications; social media; emails and e-newsletters; press releases; a settlement website; and a toll-free information phone line. *See generally id.*; Declaration of Justin R. Hughes in Support of Plaintiffs' Motion for Distribution of the Settlement Fund, at ¶ 4 (September 25, 2023) (the "Hughes Decl."). Additionally, Rust Consulting was retained by certain defendants to issue notices to approximately 7,000 potential Class Members residing abroad. *See* ECF No. 563; Hughes Decl. ¶ 4. By the August 23, 2021 claims submission deadline for the Original Settlements, the Claims Administrator received more than 82,000 claims. Hughes Decl. ¶ 5.

The second notice program, which provided an opportunity for Class Members to submit revised claims that included day-trade transactions, commenced on February 18, 2022 using the

same methods described above. *See generally* ECF No. 635-1. Also on that date, Rust Consulting issued notice to approximately 6,300 potential Class Members residing abroad. *See generally* ECF No. 635-2. As noted above, the deadline to submit new or revised claims was April 19, 2022. *See* ECF No. 623. This second notice program yielded over 62,000 Claim Forms, a portion of which were revised claim submissions. Hughes Decl. ¶ 8.

Following completion of the second notice program, and accounting for revised claim submissions, Kroll has received 144,352 claims. *See* Hughes Decl. ¶ 9. After a careful and thorough review, the Claims Administrator has determined there are 102,029 valid claims. Hughes Decl. ¶ 34. A discussion of the claims administration process follows.

To process the Claim Forms, Kroll took a number of steps, including: (i) conferred with Co-Lead Counsel on appropriate guidelines for processing the claims; (ii) created a unique database to house the Claim Forms and related documentation (the “Settlement Database”); (iii) trained staff necessary to administer the claims; (iv) implemented a system to receive and respond to telephone and email inquires from Class Members; (v) developed software to assist with data entry and claim review; and (vi) developed a proprietary “calculation module” to determine the Transaction Claim Amounts for each claim consistent with the approved plans of allocation. Hughes Decl. ¶ 10.

Class Members submitted their Claim Forms to Kroll in one of three formats: (1) handwritten Claim Forms that were mailed to Kroll (“Paper Claims”); (2) Claim Forms completed electronically via the Settlement Website (“Web Claims”); and (3) claims from institutional investor Class Members who needed to submit a large volume of transaction data electronically to Kroll (“Electronic Claims”). *See* Hughes Decl. ¶¶ 11-18. Information from each of these types of claims was inputted into the Settlement Database and reviewed for accuracy

and completeness. *See generally id.* The Settlement Database was also examined to verify that no excluded individuals or entities, *e.g.*, entities excluded from the Settlement Class definition, had submitted claims. *Id.* ¶ 19.

All the Claim Forms were analyzed for any deficiencies or problems whether relating to the reported transaction information or other information necessary to verify a claim. For example, approximately 11% of the Paper Claims and Web Claims were submitted without any transactional information or Kroll determined that the Claim was duplicative. Hughes Decl. ¶ 20. When Kroll identified a deficiency with a Claim Form or determined it was an ineligible claim, the Claimant received a mailing, or “Deficiency Notice,” from Kroll explaining the nature of the deficiency and the procedure the Claimant needed to follow to cure the deficiency. *See* Hughes Decl. ¶¶ 21-22 & Ex. A. Kroll referred to this procedure as the “Deficiency Process.” *Id.* ¶ 21. It typically involved a series of communications between the Claimant and Kroll for the latter to obtain the information needed for a valid Claim Form. *Id.* The Claimant’s responses to the Deficiency Notices were retained in the Settlement Database. *Id.* ¶ 23. After careful review by Kroll, any corrections or adjustments to the Claim were updated in the Settlement Database. *Id.*

The Electronic Claims required a different approach due to the volume of transaction information included with the Claim Form. Where applicable, Kroll provided the Claimant who submitted an Electronic Claim a Claim Summary that identified specific transactions that were deficient and the reason(s) why the transaction was deficient or ineligible, along with any other necessary information and an explanation of the process the Claimant should use to cure these issues. *See id.* ¶ 24. Like the Deficiency Notices, the Claim Summaries were retained in the Settlement Database. *Id.* ¶ 25. Any deficiencies with the Electronic Claim that were cured through the Claim Summary process were updated in the Settlement Database. *Id.*

In addition to timely filed Claim Forms, Kroll also received 2,801 late filed claims as of July 31, 2023, of which it determined 2,614 were otherwise eligible claims. *Id.* ¶ 26. These claims were processed in the same manner as the timely claims, and Kroll has not rejected any claim based solely on when it was submitted. *Id.* However, to finalize the administration and proceed with the distribution, Kroll will not process any Claim Forms or responses to either Deficiency Notices or Claim Summaries received after July 31, 2023. *Id.* ¶ 27.

While Kroll used personnel tasked with quality assurance responsibilities, *i.e.*, checking the accuracy and completeness of information added to the Settlement Database, throughout the administration process, it also conducted a separate quality assurance review of all Claims prior to preparing the distribution described here. *See id.* ¶¶ 28-33. Kroll used this process to confirm valid Claims, confirm that deficient Claims received notification, test the accuracy of the program used to calculate the total value of each Claim, run tests on the software used with the administration process, check for fraudulent or duplicative Claims, and run checks against databases of known fraudulent claim filers and the Office of Foreign Asset Control list (or “OFAC list”) of individuals identified by the federal government as ineligible to receive settlement funds. *See id.*

After completing the administration of the Claim Forms and identifying valid claims, Kroll has identified 102,029 valid Claims, *i.e.*, the Authorized Claimants. *Id.* ¶ 34. The Authorized Claimants are identified at Exhibits B-1 and B-2 of the Hughes Decl. Invalid claims are identified at Exhibit B-3. All Claimants in Exhibits B-1 to B-3 are identified by a unique Claim number assigned by Kroll to protect the filer’s personal sensitive information. *Id.* ¶ 35. The proposed distribution to the Authorized Claimants is described in the next section.

III. THE PROPOSED DISTRIBUTION

Under the applicable allocation plans, each Authorized Claimant will receive a *pro rata* share of the Net Settlement Fund (after adjusting for the outstanding claims administration fees and expenses described in Part IV below). ECF Nos. 610-3, 610-4. The allocation plans also provide that Claimants can receive a minimum distribution amount that is based on the participation rate of the Class Members in the settlements. *See id.* Co-Lead Counsel, in consultation with the Claims Administrator, have determined that a reasonable minimum distribution amount to an Authorized Claimant is \$50.00 (the “Alternative Minimum Payment”). Hughes Decl. ¶ 36.

To determine the distribution payments to Authorized Claimants, Kroll first calculated the *pro rata* share for all such claimants measured against the entire Net Settlement Fund. *Id.* ¶ 38(a)(i). Next, Kroll deducted from the Net Settlement Amount the amount to be distributed to Authorized Claimants receiving the Alternative Minimum Payment. Hughes Decl. ¶ 38(a)(iv). From the remaining balance, Kroll used 90% of that amount to determine the *pro rata* share for each Authorized Claimant receiving a distribution amount above the Alternative Minimum Payment. *Id.* The last 10% of the Net Settlement Fund is withheld as a reserve (the “Reserve”) to address any unforeseen contingencies that may arise. *Id.* Following the period when all the distribution checks are void, Kroll will make a second distribution to those Authorized Claimants who cashed their checks and received a distribution amount above the Alternative Minimum Payment. *Id.* ¶¶ 38(a)(iv) & 38(b). This second distribution will provide these claimants a *pro rata* share of the remainder of the Net Settlement Fund (*i.e.*, the Reserve, funds from uncashed checks, unused funds set aside for administrative costs, and interest earned less taxes and other costs). *See id.*

Kroll will mail checks for the corresponding distribution amount to each Authorized Claimant. *Id.* Each check will have the following notation warning the Authorized Claimant to timely deposit the check before the void period runs: “DEPOSIT PROMPTLY, VOID AND SUBJECT TO RE-DISTRIBUTION IF NOT NEGOTIATED WITHIN 60 DAYS OF DISTRIBUTION.” *Id.* ¶ 38(b)(v). Any Authorized Claimant who fails to cash their check in the time allotted will irrevocably forfeit a right to recovery from the Settlements absent a Court order. *Id.* ¶ 38(a)(vi).

To promote as broad a distribution as possible, Kroll will take steps to encourage Authorized Claimants to cash their distribution checks. *Id.* ¶ 38(vi) & n.3. These efforts will include: follow up investigations on uncashed checks to determine if they were undeliverable; researching the United States Post Office National Change of Address database for undelivered checks to determine if a more current address was recently added to the database; contacting Authorized Claimants directly by phone or email to remind them to cash the checks; and issuing replacement checks for lost or damaged checks. *See id.*

Should funds remain in the Net Settlement Fund after the period when all issued (including reissued checks) are void, Co-Lead Counsel and the Claims Administrator will assess whether it is feasible to make an additional distribution. *See* ECF Nos. 610-3, 610-4; Hughes Decl. ¶ 38(c). If it is feasible, a proposal for another distribution will be submitted for the Court’s approval. *See id.* If an additional distribution is not feasible (or potentially as part of a final distribution), Co-Lead Counsel will propose a *cy pres* distribution to an appropriate 501(c)(3) non-profit organization to be approved by the Court. *See* ECF Nos. 610-3, 610-4.

IV. REQUEST FOR PAYMENT OF THE CLAIMS ADMINISTRATOR’S FEES AND EXPENSES FOR THE DISTRIBUTION

In the course of conducting its administration of the Claims, Kroll has incurred \$85,319.82 fees and expenses that are outstanding. Hughes Decl. ¶ 37 & Exhibit C. Additionally, Kroll anticipates that the costs to administer the distribution—which include the Claims Administrator’s fees and expenses, as well as costs associated with issuing, mailing and cashing checks, among others—will be \$131,645.37. *See id.* The total of these outstanding and anticipated fees and expenses for the upcoming distribution is \$216,965.19. *See id.*

Co-Lead Counsel, therefore, respectfully request that the Court authorize payment in the amount of \$216,965.19 to Kroll for these fees and expenses. If the amount Kroll determined would be needed to cover future fees and expenses for the distribution exceeds the actual amount of those costs, that difference will be returned to the Net Settlement Fund to be used for any subsequent distributions. Hughes Decl. ¶ 37 n.2.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court authorize the distribution of the Net Settlement Fund and grant payment in the amount of \$216,965.19 to the Claims Administrator for its fees and expenses as set forth herein.

Dated: September 15, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 15, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Michael Dell'Angelo

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