UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:

COMMODITY EXCHANGE, INC., GOLD FUTURES AND OPTIONS TRADING LITIGATION

This Document Relates To All Actions

Case No. 14-MD-2548 (VEC)
14-MC-2548 (VEC)

Hon. Valerie E. Caproni

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF TWO SETTLEMENTS, FINAL APPROVAL OF THE PLAN OF ALLOCATION, AND FOR CERTIFICATION OF THE SETTLEMENT CLASS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

RULES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs respectfully request that the Court give final approval to the Deutsche Bank and HSBC Settlements,[1] give final approval to the Plan of Allocation, and certify the Settlement Class.

The two Settlements were reached after extensive arm's-length negotiations between experienced counsel and are an excellent result for the Settlement Class. The partial Settlements are fair and reasonable, and amply satisfy the requirements of Rule 23(e)(2) as well as each of the applicable factors under *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), the Second Circuit's seminal decision on settlement approval standards.

The proposed Plan of Allocation (the "Plan") described below has a "reasonable, rational basis," and is recommended by Co-Lead Counsel who have been closely acquainted with the facts of this action and have litigated this case for over seven years.

Finally, the Settlement Class meets all requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy—as well as the predominance and superiority requirements of Rule 23(b)(3). The preliminarily certified Settlement Class should therefore be granted final certification for settlement purposes under Rules 23(a) and 23(b)(3).

SUMMARY OF THE ACTION AND THE SETTLEMENTS

Quinn Emanuel began investigating the possibility of gold benchmark manipulation almost eight years ago, in November 2013. Multiple non-testifying expert consultants were then hired, and the investigation resulted in the filing of our first complaint in early 2014. Case No. 14-cv-2213, ECF No. 2. That case was filed jointly with Berger Montague, which had also investigated the claims. Multiple similar cases were filed, and eventually consolidated. ECF No.

[1] All capitalized terms not otherwise defined herein have the meanings set forth in the Stipulations and the Joint Declaration of Daniel L. Brockett and Merrill G. Davidoff (the "Joint Declaration" or "Joint Decl."), submitted herewith.

3. The first consolidated complaint was filed in December 2014. ECF No. 27. After receiving Defendants' motions to dismiss, an amended complaint was filed. ECF No. 41. Papers submitted with the subsequent motions to dismiss spanned 900 pages and included multiple rounds of submissions and supplemental submissions—as well as a joint "tutorial" for the Court performed in late 2015. *See* Joint Decl. Sections I.A.1-4.

In October 2016, the Court granted in part and denied in part Defendants' motions to dismiss the then-operative Second Consolidated Class Action Complaint. ECF No. 158. Plaintiffs sought to file another amended pleading, both to revive claims tied to the earlier period and to state a claim against UBS. *See* Joint Decl. Section I.A.5. In August 2017, Defendants filed their first Answers. ECF Nos. 286-90. Almost five years after our investigations began, in August 2018, the Court ruled on the last motion to dismiss. ECF No. 318.

For the first five years, for various reasons, discovery stays were in place limiting discovery to documents produced elsewhere, and conferring to gather custodial and other information, such as regarding the availability of audio files. It was not until October 2018 that discovery was fully opened. *See* Joint Decl. Section I.B.1. Since that time, document and deposition discovery has continued on, with adjustments for the COVID-19 challenges. The discovery period has also seen extensive negotiations and motion practice, including on Plaintiffs' pre-complaint consultant work. *See id.* Sections I.B.2-4.

Only after almost three years of investigations, pleading, amending, and dismissal briefing which fleshed out the relevant issues did Co-Lead Counsel file, in December 2016, a motion to preliminarily approve the first settlement reached, with Deutsche Bank. ECF Nos. 172-74. Only after *another* four years of amendments, more dismissal briefing, discovery, and consultant work did Co-Lead Counsel file a motion to preliminarily approve the second

settlement reached, with HSBC. ECF No. 489. The Settlements provide for a total payment of $102,000,000. Each of the Settling Defendants have also agreed to certain cooperation obligations. The Court preliminarily approved both Settlements. ECF Nos. 187, 515.

With the exception of the monetary component, the terms of each Settlement Agreement are substantially identical. In February 2021, after a conference where the Court raised questions and provided comments, and after the relevant parties made subsequent adjustments, the Court granted our request to provide a single notice and a single Settlement Class in order to efficiently administer the funds for the benefit of class members. *See* ECF No. 516 (the "Notice Order"). The Settlement Administrator administered the Notice Plan in accordance with the Notice Order, as discussed in Section II below.

Plaintiffs respectfully refer the Court to the accompanying Joint Declaration for a more fulsome discussion of the factual background and procedural history of the action, the extensive efforts undertaken by Plaintiffs and Co-Lead Counsel, the risks of continued litigation, and a discussion of the negotiations leading to the Settlements.

ARGUMENT

I. THE SETTLEMENTS ARE FAIR, REASONABLE, AND ADEQUATE AND MERIT APPROVAL BY THE COURT

A. The Law Favors and Encourages Settlements

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

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

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

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

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

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

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

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

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

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

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

The factors described in Rule 23(e)(2) overlap significantly with, and are intended to supplement, the *Grinnell* factors to "focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." *See*

Fed. R. Civ. P. 23(e)(2); Advisory Committee's Notes to 2018 Amendments to Rule 23. In preliminarily approving the Settlements, the Court made initial determinations that they were each fair, reasonable, and adequate, and satisfied the requirements of Rule 23(e). As detailed below, there is no reason to disturb those initial findings.

C. The Proposed Settlements Are Procedurally Fair

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

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

Plaintiffs and Co-Lead Counsel have adequately represented the Settlement Class as required by Rule 23(e)(2)(A), "developed a comprehensive understanding of the key legal and factual issues in the litigation and, consistent with *Grinnell*, had 'a clear view of the strengths and weaknesses of their case' and of the range of possible outcomes at trial," at the time the Settlements were reached. *City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *7 (S.D.N.Y. May 9, 2014).

As expounded upon in the Joint Declaration, Plaintiffs and Co-Lead Counsel have diligently prosecuted this action over the course of several years, launching a detailed investigation into the underlying claims and engaging industry and non-testifying expert consultants beginning in 2013, taking the case through multiple amendment and dismissal rounds that lasted almost four years, and then vigorously pursued—and defended—discovery matters for almost another four years (and counting). Plaintiffs and Co-Lead Counsel at all times advocated for the best interests of the Settlement Class. We were actively opposing the initial motion to dismiss when the first settlement agreement was reached, and had reviewed and studied voluminous document productions and listened to numerous audio recordings when the second settlement was reached. We will continue to advocate for class members as the case continues against the non-settling Defendants. There are no conflicts between Plaintiffs and members of the Settlement Class concerning this litigation, and Plaintiffs' interest in proving liability and damages is entirely consistent with that of the Settlement Class. Thus, the requirements of Rule 23(e)(2)(A) are satisfied.

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

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

The negotiations with each Settling Defendant were at arm's length and were hard-fought. And though achieved at different times, both Settlements were reached in periods of

uncertainty. At the time of the Deutsche Bank Settlement, the parties were awaiting the Court's first ruling on the pending motions to dismiss. And even at the time of the HSBC settlement, there remained uncertainty over how the Court would handle many important issues—most notably, summary judgment and class certification issues. Although Plaintiffs and Co-Lead Counsel believe in the merits of this case, there was—and, indeed, still is—the real risk that without settlement the case would end without any recovery for Plaintiffs or class members.

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

D. The Proposed Settlements Are Substantively Fair

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

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

Rule 23(e)(2)(C)(i) codifies many of the *Grinnell* factors, which guide a court's assessment of the fairness of a proposed settlement in light of the attendant risks. Under Rule 23(e)(2)(C)(i), district courts consider "the costs, risks and delay of trial and appeal," while the relevant *Grinnell* factors overlap and address the risks of establishing liability and damages, taking into consideration: the complexity, expense, and likely duration of the litigation (factor 1); the risks of establishing liability (factor 4); establishing damages (factor 5); maintaining the class

action through trial (factor 6); the ability of the defendants to withstand a greater judgment (factor 7); and the range of reasonableness of the settlement fund in light of the best possible recovery (factor 8) and in light of all the attendant risks of litigation (factor 9). Fed. R. Civ. P. 23(e)(2)(C)(i).

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

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

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

The Court's role in evaluating the risks of establishing liability and damages is not to evaluate the plaintiffs' likelihood of success, but rather to "balance the benefits afforded the Class, including immediacy and certainty of recovery, against the continuing risks of litigation." *In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 37 (E.D.N.Y. 2019).

Although Plaintiffs and Co-Lead Counsel firmly believe that the claims asserted are meritorious, there are risks that even now make recovery uncertain. 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. By way of another example, although we believe improper under the antitrust laws, Defendants will likely raise whether class members must "net" any gains (from buying) against losses (from selling).

It is often said that antitrust cases involve a trial boiling down to a "battle of the experts" on proof of damages. *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998). Defendants' multi-year discovery focus even on the consultants used just *at the pleading stage* confirm this will be true here, perhaps even more so than most antitrust cases. "In this 'battle of experts,' it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors . . . ." *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985) *aff'd*, 798 F.2d 35 (2d Cir. 1986). Further, "the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal." *NASDAQ*, 187 F.R.D. at 476.

For many reasons, then, continued litigation lends itself to the risk that this litigation could have been completely defeated, or that the scope of the Settlement Class's claims be significantly narrowed, resulting in a smaller recovery, or no recovery, in the absence of the

Settlements. The risks of establishing liability and damages underscore the reasonableness of the Settlements.

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

Plaintiffs and Co-Lead Counsel are confident that the Court would certify a litigation class as all of the requirements of Rules 23(a) and 23(b)(3) are satisfied. But, class certification in this litigation would be vigorously opposed by Defendants. Many of the same arguments above will surely be re-cast as challenges that the class cannot be certified. For instance, Co-Lead Counsel anticipate that Defendants would argue there is no link between their alleged misconduct and class-wide injury, particularly with respect to instruments not expressly linked to the PM Fix. More generally, Co-Lead Counsel anticipated, and it was later confirmed by way of Defendants' questioning during depositions, that Defendants will argue that the need for individualized class member inquiries regarding their instruments and their "net" positions would overwhelm any common issues. *See Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) ("While plaintiffs might indeed prevail [on a motion for class certification], the risk that the case might be not certified is not illusory and weighs in favor of the Class Settlement."). Even if a litigation class were certified, that certification could be challenged on appeal, or at another stage in the litigation. Thus, there is a risk that the action, or particular claims, might not be maintained as a class action through trial, and that class certification may be re-reviewed at any stage of the litigation. *See* Fed. R. Civ. P. 23(c) (authorizing a court to decertify a class at any time). The risks and uncertainty associated with class certification thus weigh in favor of approving the Settlements.

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

The financial obligations the Settlements impose on the Settling Defendants is substantial, and are coupled with cooperation obligations. While the Settling Defendants could presumably withstand a greater monetary judgment than the amount paid in settlement, "the fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate." *PaineWebber*, 171 F.R.D. at 129; *see also Weber v. Gov't Emps. Ins. Co.*, 262 F.R.D. 431, 447 (D.N.J. 2009) ("[I]n any class action against a large corporation, the defendant 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."). In addition, "the benefit of obtaining the cooperation of the Settling Defendants tends to offset the fact that they would be able to withstand a larger judgment." *In re Pressure Sensitive Labelstock Antitrust Litig.*, 584 F. Supp. 2d 697, 702 (M.D. Pa. 2008). The collective monetary benefit, coupled with the cooperation, weigh in favor of approval.

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

In analyzing the fairness of a proposed settlement, the court must consider whether it falls within a "range of reasonableness"; that is, "[t]he adequacy of the amount offered in settlement must be judged 'not in comparison with the best possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of the plaintiffs' case.'" *PaineWebber*, 171 F.R.D. at 130; *see also Wal-Mart*, 396 F.3d at 119.

The proposed partial Settlements offer the opportunity for immediate relief of $102 million to the Settlement Class, rather than a speculative payment years down the road. *See In re*

Initial Pub. Offering Sec. Litig., 243 F.R.D. 79, 93 (S.D.N.Y. 2007) ("The prospect of an immediate monetary gain may be more preferable to class members than the uncertain prospect of a greater recovery some years hence."). In light of the complex legal and factual issues present here the fairness of the proposed Settlements is apparent. Accordingly, Plaintiffs respectfully submit that the immediate cash benefit of $102,000,000 is well "within the range of reasonableness" in light of the best possible recovery and the risks of litigation. The cooperation elements only enhance the value of the Settlements.[2]

Studies have found that the median full-case antitrust recovery is 19% of single damages.[3] Thus, Co-Lead Counsel would have to establish at trial a recoverable single damages figure of ***$537 million*** before the current settlements fall behind the pace of a median antitrust recovery rate. But of course, these are only partial settlements. Additional recoveries from the remaining Defendants would alter this calculation; that the Settlement Class remains free to pursue all damages on a joint and several basis thus also speaks to the success of the current Settlements. *See, e.g.*, *In re Domestic Airline Travel Antitrust Litig.*, 378 F. Supp. 3d 10, 21 (D.D.C. 2019) (noting partial settlements preserve plaintiffs' ability to seek joint and several liability and the full damage trebled from non-settling defendants, thereby increasing the total funds available to potential class members).

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[2] *See generally Precision Assocs. v. Panalpina World Transp. (Holding) Ltd.*, 2013 WL 4525323, at *9 (E.D.N.Y. Aug. 27, 2013) ("cooperation adds considerable value to the Settlement and must be factored into an analysis of the overall reasonableness of the agreement").

[3] *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).

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

With respect to Rule 23(e)(2)(C)(ii), Plaintiffs and Co-Lead Counsel have taken substantial efforts to ensure that members of the Settlement Class are notified about the proposed Settlements. Rule 23(e)(2)(C)(ii) requires courts to examine "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C)(ii). Further, a "claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." Advisory Committee's Notes to 2018 Amendments to Rule 23. As described in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for an Order Providing for Notice to the Settlement Class and Preliminarily Approving Plan of Allocation ("Plaintiffs' Notice Motion") (ECF No. 489), the claims process here allows for hardcopy and electronic submissions to the Settlement Administrator using a simplified Claim form, and allocates payments based upon the Plan of Allocation (described more fully below), which was crafted based on the knowledge and experience of Co-Lead Counsel following consultation with non-testifying expert consultants, and modified after initial review and comments provided by the Court. Thus, this factor supports final approval for the same reason that it supported preliminary approval.

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

Rule 23(e)(2)(C)(iii) requires courts to examine "the terms of any proposed award of attorneys' fees, including timing of payment" as part of its adequacy assessment. Fed. R. Civ. P. 23e(2)(C)(iii). At the preliminary approval stage, and as described in the Notice Plan mailed to potential members of the Settlement Class, Co-Lead Counsel represented that they would apply for attorneys' fees not to exceed $28.2 million of the Settlement Fund, plus interest. As

discussed in Co-Lead Counsel's fee brief, Co-Lead Counsel seeks an award of attorneys' fees in that amount. As explained in Co-Lead Counsel's fee brief, this request is reasonable under the circumstances. Potential members of the Settlement Class were fully apprised of the terms of the proposed award of attorneys' fees, which merits a finding that this factor supports the proposed Settlements.

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

Rule 23(e)(2)(C)(iv) requires courts to consider "any agreement required to be identified by Rule 23(e)(3)" that is, "any agreement made in connection with the proposal." Fed. R. Civ. P. 23(e)(2)(C)(iv) and 23(e)(3). As disclosed in moving for preliminary approval, the parties have entered into standard supplemental agreement which provide that in the event that a "material portion" of the eligible transactions opts-out, certain relief can be requested by the Settling Defendants. ECF 174-1 Ex. C; 514-1 Ex. C. No other such agreements exist, and thus, this factor weighs in favor of final approval.

5. Class members are treated equitably

The final factor, Rule 23(e)(2)(D), looks at whether members of the Settlement Class are treated equitably. The proposed Settlements are designed to do precisely that. As discussed in Section II below, the Plan treats all class members in a similar manner: everyone who submits a valid and timely Proof of Claim and Release form, and did not exclude himself, herself, or itself from a Settlement Class, will be subject to a common set of rules for "multipliers" reflective of different litigation risks, and then will receive an adjusted *pro rata* share of the Net Settlement Fund.[4] For this reason, this factor also militates in favor of granting final approval of the

[4] As described in Plaintiffs' Notice Motion and in the Notice, in consultation with Co-Lead Counsel the Claims Administrator will implement an Alternative Minimum Payment so that all valid claims would receive at least the minimum distribution if the Authorized Claimant's

proposed Settlements. Thus, Plaintiffs and Co-Lead Counsel respectfully submit that each factor identified under Rule 23(e)(2) supports granting final approval of the proposed Settlement.

E. The Reaction of the Settlement Class Merits Approval

"A favorable reception of the settlement" is "strong evidence" that a proposed settlement is fair. *Grinnell Corp.*, 495 F.2d at 462. Plaintiffs will update the Court as to any objections or exclusion requests received in their reply papers.

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

At the Preliminary Approval stage, after a careful review the Court found that the proposed Notice Plan was the "best notice practicable" and was "reasonably calculated, under the circumstances, to apprise members of the Settlement Class" of their rights. *See* Notice Order at 2. "There are no rigid rules to determine whether a settlement notice to the class satisfied constitutional or Rule 23(e) requirements; the settlement notice must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Wal-Mart*, 396 F.3d at 114. Actual notice to every class member is not required; rather, counsel need only act "reasonably in selecting means likely to inform the persons affected." *Jermyn v. Best Buy Stores, L.P.*, 2010 WL 5187746, at *3 (S.D.N.Y. Dec. 6, 2010). Courts in the Second Circuit have held that notice plans are adequate when they combine first-class mail with extensive publication notice. *See Wal-Mart*, 396 F.3d. at 104. Notice is adequate "if the average person understands the terms of

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total distribution falls below the cost of administering the claim. Courts routinely approve plans that provide for flat *de minimis* allocations in these circumstances. *See, e.g.*, *In re Gilat Satellite Networks, Ltd.*, 2007 WL 1191048, at *9-10 (E.D.N.Y. Apr. 19, 2007); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 2000 WL 37992, at *2 (S.D.N.Y. Jan. 18, 2000); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 497-98 (S.D.N.Y. 2009).

the proposed settlement and the options provided to class members thereunder." *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 133 (S.D.N.Y. 2008).

As described first in Plaintiffs' Notice Motion, the Notice and the method utilized to disseminate it to potential members of the Settlement Class satisfies these standards. The Court, after reviewing the versions of the Notice and Proof of Claim and Release (the "Notice Packet") revised following the Court's comments, approved the Plan and found the documents to amply apprise members of the Settlement Class, *inter alia*: (1) the nature of the litigation and the Settlement Class's claims; (2) the essential terms of the proposed Settlements; (3) the proposed Plan; (4) class members' rights to object to the proposed Settlements, the Plan, and the requested attorneys' fees or expenses; (5) the binding effect of a judgment on members of the Settlement Class; and (6) information regarding Co-Lead Counsel's motion for an award of attorneys' fees and expenses. The Notice also provides specific information regarding the date, time, and place of the Fairness Hearing, and sets forth the procedures and deadlines for submitting a Proof of Claim and Release and objecting to any aspect of the proposed Settlements, including the proposed Plan and the request for attorneys' fees and expenses.

The Notice Packet included the Notice of Proposed Settlements of Class Action (the "Notice"), and the Proof of Claim and Release Form, both of which were preliminarily approved by the Court. *See* ECF No. 516. Pursuant to the Notice Order, Kroll Notice Media Solutions—the Court-approved Settlement Administrator[5]—sent 11,668 Notice Packets to potential members of the Settlement Class and nominees in March 2021, based on name and address information that was primarily obtained from the Defendants' business records. *See* July 6, 2021 Declaration of Jeanne C. Finegan Regarding Dissemination of Notice ("Finegan Decl.") ¶ 9.

[5] The Notice also refers to the role as that of "Claims Administrator." Kroll Notice Media Solutions was formerly known as Heffler Claims Group LLC.

Due to the assertion of foreign privacy or other confidentiality concerns, Rust Consulting, Inc., mailed another 6,995 Notice Packets pursuant to the Notice Order, based on name and address information from other Defendants' business records. *See* July 6, 2021 Declaration of Jason Rabe Regarding Mailing of Notice and Proof of Claim and Release Form ("Rabe Decl.") ¶ 9. Prior to mailing the Notice Packet, Kroll and Rust ran the address lists they were each respectively provided through the National Change of Address service for address updates and standardization. Finegan Decl. ¶ 8; Rabe Decl. ¶ 4.

Kroll also sent Notice Packets directly to 1,830 financial institutions so that those institutions could provide them directly to potential members of the Settlement Class. Finegan Decl. ¶ 9.[6]

The Settlement Administrator received requests from brokers or third-party claims processors requesting copies of the Notice Packet be sent out to their own client lists. In order to maximize distribution of notice in an abundance of caution, to provide notice in a timely fashion, and to not burden the third-parties, Notice Packets were generally provided or sent to third-party client lists upon request, even though Co-Lead Counsel believe the client lists were very likely overbroad. In total, in an abundance of caution, almost 300,000 Notice Packets were distributed in response to these requests. *Id.* ¶ 11.

In addition to the direct notice by mail, publication notice was also disseminated through placement of advertisements in several national and global print publications. *See id.* ¶¶ 14-22. Online ads were placed on pre-vetted websites, and on search engines based on relevant keyword searching, generating 40 million impressions by the target audience of potential class members.

[6] When Notice Packets were returned as undeliverable, reasonable efforts were made to find alternative addresses so that the Notice Packet could be re-sent. *See* Finegan Decl. ¶ 13; Rabe Decl. ¶¶ 10-12.

Id. ¶¶ 23-24. A program using Facebook and Instagram was also deployed, targeting users who had liked or followed potentially relevant finance pages. *Id.* ¶ 25. Notices were also included in e-newsletters sent to various subscriber bases, *id.* ¶ 26, e-mail blasts, *id.* ¶ 27, and a press release that in turn generated approximately 100 mentions in other news outlets, *id.* ¶ 28.

A dedicated Settlement Website (www.goldfixsettlement.com), telephone line, and email address were also established for potential members of the Settlement Class to easily and efficiently obtain information relating to the Settlements, access important documents, ask questions, and to submit electronic proof of claim and release forms. *Id.* ¶¶ 29-30.

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

III. THE PLAN OF ALLOCATION IS FAIR AND ADEQUATE

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

The Plan, which is set forth in Plaintiffs' Notice Motion and the Notice, was crafted based on the knowledge and experience of Co-Lead Counsel and input from non-testifying expert consultants. For the reasons set forth in the Notice Motion and in Co-Lead Counsel's

supplemental submission following the Court's feedback on the initial proposal, ECF No. 512, it is a fair method to apportion the Net Settlement Fund among Authorized Claimants based on, and consistent with, the claims alleged and their relative strengths and weaknesses. *See In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 WL 7323417, at *10 (S.D.N.Y. Dec. 19, 2014) ("A reasonable plan may consider the relative strength and values of different categories of claims."). The Net Settlement Fund will be distributed to Authorized Claimants, *i.e.*, members of the Settlement Class who submit timely and valid Proofs of Claim and Release that are approved for payment from the Net Settlement Fund pursuant to the Plan. Co-Lead Counsel believe that the Plan is fair and reasonable and respectfully submit that it should be approved by the Court.

IV. THE PROPOSED SETTLEMENT CLASS SHOULD BE FINALLY CERTIFIED

The Court's Preliminary Approval Orders preliminarily certified the Settlement Class. ECF Nos. 187 ¶ 3-4; 515 ¶ 3-4. There have been no changes that would undermine the Court's initial determination that certification of the Settlement Class is appropriate under Rules 23(a) and 23(b). *See Bear Stearns*, 909 F. Supp. 2d. at 264 (finally approving settlement where there "have been no material changes to alter the proprietary of [the court's] findings" at the preliminary approval stage); *see also In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Pracs. & Prods. Liab. Litig.*, 2019 WL 2554232, at *1 (N.D. Cal. May 3, 2019) ("The Court analyzed these factors in its Preliminary Approval Order and finds no reason to disturb its earlier conclusions. The requirements of Rule 23(a) and Rule 23(b)(3) were satisfied then and they remain so now."). For all of the reasons detailed in preliminary approval papers and in the Court's preliminary approval orders the proposed Settlement Class satisfies all requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy—as well as the predominance and superiority requirements of Rule 23(b)(3). *See, e.g.*, ECF No. 173 at 19-23; ECF No. 187 ¶¶ 3-4; ECF No. 486 at 19-23; ECF No. 515 ¶¶ 3-4. The preliminarily certified Settlement Class

should therefore be granted final certification for settlement purposes under Rules 23(a) and 23(b)(3).

CONCLUSION

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

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Respectfully submitted,

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