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 TWO SETTLEMENTS, FINAL APPROVAL OF THE PLAN OF ALLOCATION, AND FOR CERTIFICATION OF THE SETTLEMENT CLASS; AND (2) ATTORNEYS' FEES AND LITIGATION EXPENSES

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PRELIMINARY STATEMENT

Plaintiffs' prior papers demonstrate how the proposed Settlements and the notice plan both meet the applicable standards for approval. *See* ECF Nos. 489 ("Notice Motion"), 561 ("Final Approval Motion"). They also demonstrate how the request for $28,200,000 in attorneys' fees is well *below* awards in comparable cases, and how the requested expenses are of the type for which courts routinely allow reimbursement. *See* ECF No. 565 ("Fee and Expense Motion"). No objections were made to the Settlements or the Fee and Expense Motion. Only five class members seek to be excluded, as compared to more than 81,000 claims that have been filed. The near unanimous support for Plaintiffs' and Co-Lead Counsel's efforts confirms the Settlements should be given final approval, and the Fee and Expense Motion should be granted.

Despite the size of the class, only one objection has been filed to the Plan of Allocation (the "Plan"). ECF No. 578 (the "Objection" or "Obj.", filed by the "Objectors"). But the Objection fails to show the Plan is unreasonable in any respect. The many class members who already filed claims should not be forced to fill out an entirely different form, and see the Settlement Fund drained with the administrative costs of starting from scratch, merely because the Objectors desire a larger share.

First, the Objectors argue that the Plan is unfair because it "excludes" them. *Id.* at 8-16. Not so. The Objectors can file claims even if they engaged in day-trading. Indeed, even the Settlement Administrator's preliminary search indicates many of the Objectors already have filed claims. The dispute, therefore, is over the *relative size* of their claims, not whether they can file claims. The Plan is built around sales volume. But the Plan asks class members to omit positions opened and closed on the same day. If day-traded positions were instead allowed, the high-frequency futures trades could swallow the claims of those who had just as much (or more) at risk, but did so in longer-term investments that turned over less often.

The Objectors are COMEX market makers who, naturally, support such a distorted distribution. But their assertion that the proposed Plan is unreasonable for failing to adopt their preferred distribution approach derives from their belief that recoverable harm is limited only to the specific COMEX trades that straddle a specific act of manipulation. The Objectors were free to opt-out and pursue such a narrow theory of harm. But that is not the theory of *Plaintiffs'* case. Plaintiffs' theory of their own case is that prices were artificial throughout the class period. The Objectors cannot decide to benefit from Settlements forged from a broad case with a broad damages theory, then turn to complain the Plan of Allocation does not limit itself to a narrow view of victims and an even narrower view of damages.

Second, the Objectors argue that "hedgers" should have their claims reduced by no less than 80%. *Id.* at 16-19. The Objectors cite no case where a plan was found unreasonable merely because it did not adopt a defense-friendly view of the relevance of "hedging." Instead, the Objectors merely note that settlement plans in Commodity Exchange Act cases have sometimes included a hedging-related adjustment. But even on the same facts, two different approaches could both be reasonable. More basically, this is primarily an *antitrust* case with a class that extends *well beyond* COMEX traders. It would thus be less appropriate and more complicated to adjust recoveries in anticipation of "hedging" defenses here than in the plans cited by the Objectors.

Third, the Objectors argue the Settlement Administrator should be required to fill out every class member's claims form using data Co-Lead Counsel supposedly already has. *Id.* at 19-22. This argument, however, overlooks that most of the data produced in this case has been anonymized, including the CME data of most interest to the Objectors. Thus, the Settlement Administrator simply does not have the data to fill out the class members' forms for them.

Fourth, the Objectors argue the Plan may turn out to be imprecise because it does not demand all class members immediately provide backup documentation. *Id.* at 22-23. But the Plan requires the submission of numerous datapoints, attestation as to accuracy, and submission to potential audit processes. It was reasonable to anticipate only asking certain class members to submit certain documents, rather than burdening every class member with a demand for every document.

Fifth, the Objectors argue the Plan places an undue burden on class members by requiring them to fill out a form at all. *Id.* at 23-25. But they again fail to cite any case requiring an allocation plan to expressly invite a massive document dump, nor any court forcing the settlement administrator to write customized code to understand the variety of transactional documents that class members may have submitted if class members were not required to get an understanding of the size of their own claim in the first instance.

Finally, the Objectors argue that the Plan should be "volume-based." *Id.* at 25-30. But the Plan is already volume-based; it considers class members' comparative sales volume. This portion of the Objection thus appears to merely be another way of saying that *day-trading* "volume" should be allowed to count in that calculation. As discussed above and further below, it was reasonable for the Plan to instead only consider the Objectors' non-day-trading volume.

I. PLAINTIFFS' MOTION FOR FINAL APPROVAL OF THE SETTLEMENTS SHOULD BE GRANTED

A. The Settlements are Fair, Reasonable, and Adequate

As set forth in the Final Approval Motion (at 3-15), both Settlements amply satisfy the "fair, reasonable, and adequate" standard. The only update is with respect to the reaction of class members. "[T]he favorable reaction of the overwhelming majority of class members to the Settlement is perhaps the most significant factor[.]" *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*,

396 F.3d 96, 119 (2d Cir. 2005). Here, following an expansive notice campaign to sophisticated class members, no objections were filed with respect to the approval of the Settlements, and only five exclusion requests were received. The overwhelmingly positive reaction weighs heavily in favor of approving the Settlements. *See id*. at 118.[1]

While the Second Circuit has stressed the "small number of objections" in considering the reaction-of-the-class factor, *id.*,[2] the participation rate is also in favor of approval. The Settlement Administrator is still analyzing the data, but it appears that over 81,000 claims were filed. *See* Declaration of Justin R. Hughes, filed concurrently herewith ("Hughes Decl.") ¶ 6. Even if one includes every mailed Notice as a potential class member—which there is some reason to doubt given the way third-party intermediaries may have assembled their distribution lists—this represents a claims rate of 25%. *See* Final Approval Motion at 17-18 (summarizing mailing of approximately 314,000 Notice Packets). Courts have given final approval to settlements with far, far lower rates, recognizing that "many factors affect response rates." *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *14 (E.D. Mich. Dec. 13, 2011) (claims rate below 1% was "not dispositive" because ratio is "frequently less than 5%").[3]

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[1] *See also, e.g.*, *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86-87 (2d Cir. 2001) (presence of only 18 objections and 72 requests for exclusion "weighed in favor of the settlement"); *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 410 (S.D.N.Y. 2018) (that "not one sophisticated investor" objected to settlement was "indicia of its fairness"); *Woburn Ret. Sys. v. Salix Pharms., Ltd.*, 2017 WL 3579892, at *2-3 (S.D.N.Y. Aug. 18, 2017) (favorably noting small number of objections and absence of institutional investor objections).

[2] *See also Stinson v. City of New York*, 256 F. Supp. 3d 283, 290 (S.D.N.Y. 2017) ("it is the absence of significant exclusion[s] or objection[s]" that "courts in this Circuit regularly consider," not a "low response rate").

[3] *See also Poertner v. Gillette Co.*, 618 F. App'x 624, 625-26 (11th Cir. 2015) (approving settlement with claims rate of 0.75%); *In re CenturyLink Sales Practices & Sec. Litig.*, 2020 WL 7133805, at *16 (D. Minn. Dec. 4, 2020) (same, with claims rate of 0.698%); *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1377 (S.D. Fla. 2007) (same, with claims rate of 1%). Indeed, courts in this Circuit have given final approval to large antitrust settlements before the claims deadline has even passed. *See, e.g.*, *In re SSA Bonds Antitrust Litig.*, No. 1:16-cv-3711, ECF Nos. 687-89 (S.D.N.Y. Apr. 2, 2021); *Alaska Elec. Pension Fund v. Bank of Am., N.A.*, No. 1:14-cv-7126, ECF No. 738

For all the above reasons, the Settlements are fair, reasonable, and adequate, and should be given final approval.

B. The Extensive Notice Program Satisfies Rule 23 and Due Process

As set forth in the Final Approval Motion (at 17-19), we mailed over 18,000 Notice Packets to potential members of the Settlement Class as reasonably identified in Defendants' data, and also mailed an additional 1,830 to potential intermediaries. In an abundance of caution, many more Notice Packets were distributed in response to requests by those intermediaries. We also carried out an extensive publication campaign using global print and online outlets. 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).

C. The Proposed Settlement Class Should Be Finally Certified, With the Few Opt-Outs Received Recognized in the Final Judgments

As set forth in the Final Approval Motion (at 20), there have been no changes that would undermine the Court's initial determination that certification of the Settlement Class is appropriate. Again, no objections to such certification have been made.

Those who requested exclusion from the Settlement Class are included in the exhibits to the proposed final judgments filed concurrently herewith. However, we note that some of the opt-out notices were not "received" by "mail" by August 6, as required by the Court's order. ECF No. 516 ¶ 15. For two entities,[4] an e-mail version was timely received, but an internationally mailed version was only received after August 6. For another entity,[5] a physical request bears an international postmark of July 28 but was only received on August 18.

(S.D.N.Y. Nov. 13, 2018); *In re Credit Default Swaps Antitrust Litig.*, No. 1:13-md-2476, ECF Nos. 539-52 (S.D.N.Y. Apri. 18, 2016).

[4] St. Ives Gold Mining Co. Pty. Ltd. and Agnew Gold Mining Co. Ltd.

[5] Wing Fung Precious Metals Limited.

Further details are set forth in the Hughes Declaration. Despite these technical issues occurring in the international mail system during a pandemic, Co-Lead Counsel propose all of those listed in the proposed final judgment exhibits be deemed timely. The Settling Defendants have been made aware of these details, and we expect them to make their position known to the Court, if they wish to take one, at the Fairness Hearing.

II. PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND LITIGATION EXPENSES SHOULD BE GRANTED

Co-Lead Counsel's request for an award of $28,200,000 is reasonable from the perspective of the factors considered by *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000) (Fee and Expense Motion at 7-14), from the perspective of what privately negotiated arm's-length engagements routinely provide for (*id*. at 12-13), from the perspective of the negotiated terms with named Plaintiffs here (*id.* at 18), and from the perspective of the lodestar "cross-check" (*id.* at 15-18). In fact, the request here is modest compared to all of these points of comparison, and Co-Lead Counsel are seeking less than their hourly fees even when calculated using a very conservative methodology. *Id.* at 17. In the words of Prof. Silver, the lodestar multiplier here of just 0.71 is "miniscule" and "nearly unheard of in settlements of this magnitude." *Id.* (citing ECF No. 568 ("Silver Decl.") ¶¶ 88, 93).

The same policy considerations that drive courts to compensate attorneys for taking on large contingency cases also means courts routinely reimburse those attorneys for their reasonable out-of-pocket expenses. Fee and Expense Motion at 18-20. Co-Lead Counsel's motion and supporting materials confirm the reasonableness of their investments in this heavily data-driven, lengthy, and complex case. Indeed, given the incentives involved, "it makes more sense to worry that contingency fee attorneys devote too *few* resources to litigation than to fear they will spend too much." Silver Decl. ¶ 71.

Settlement Class members were informed that Co-Lead Counsel would seek a fee award of $28,200,000, and an expense award of up to $11 million. *See, e.g.*, ECF No. 490-1 at 8. They were also later informed by our Fee and Expense Motion that our actual request was for far less in expenses, and were informed as to the detailed calculations behind our fee and expense figures. Fee and Expense Motion at 19. Still, no class member objected to either the fee or expense request. As with the other aspects of the Settlements, the lack of objections strongly supports a finding that Co-Lead Counsel's requests are reasonable. *See, e.g.*, *Tiro v. Pub. House Invs., LLC*, 2013 WL 4830949, at *14 (S.D.N.Y. Sept. 10, 2013).

III. PLAINTIFFS' MOTION FOR FINAL APPROVAL OF THE PLAN OF ALLOCATION SHOULD BE GRANTED

A. The Reaction of the Class Supports Approval of the Plan

The only objection filed is explicitly limited to the Plan of Allocation. As an initial matter, *no* Objector timely provided the information required by the Court as to their involvement in objecting to other settlements. *See* ECF No. 516 ¶ 12(6). And only six class members filed signature pages as also required by the Court. *See id.* ¶ 13 ("Any objection . . . must be signed by the member . . . even if . . . represented by counsel."); ECF No. 578-1 (providing only six signature pages). Without waiving any rights, we promptly notified the purported Objectors' counsel of these deficiencies. On August 25, the opt-out history for counsel and just the original six certifying class members was provided. On September 13, Co-Lead Counsel also received a supposedly supplemental batch of "certifications," but all except one were signed after the objection deadline, many names from the Objection Schedule A are still missing certifications, one certification is from someone not listed in Schedule A, and none of the supplemental materials recount the purported additional objectors' settlement-objection history. It is thus questionable whether really "65 individuals . . . hereby object[ed]" on August

4 at all. Obj. at 1. Rather, it appears at most only six actually attempted to timely do so, and even those six failed to meet all of the Court's requirements.[6]

Regardless of how many—if any—class members are deemed to have timely objected, even where there is "vociferous opposition," the district court also has a "fiduciary responsibility to the silent class members." *Grant v. Bethlehem Steel Corp*., 823 F.2d 20, 23 (2d Cir. 1987). Accordingly, that only *one* objection was attempted, despite the size and sophistication of the Settlement Class, and the many claims that were filed, weighs heavily in favor of the Plan. *See In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *8-9 (S.D.N.Y. Apr. 26, 2016) ("Only four objections have been pursued . . . . This sophisticated Class is in an excellent position to swiftly and competently assess whether the Plan [of Allocation], and the model upon which it is based, achieves a fair distribution of this very sizeable Settlement Fund. It has spoken.").

B. The Plan Is "Fair and Reasonable," Despite the Objection

"[T]he adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information." *In re PaineWebber Ltd. Partnerships Litig*., 171 F.R.D. 104, 1133 (S.D.N.Y. 1997). A plan of allocation requires only a "reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *In re WorldCom, Inc. Sec. Litig*., 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005). To this end, courts also recognize that in "a large

[6] As *no* purported Objector provided the required information before the August 6 objection deadline, this is ground to overrule the Objection in its entirety. In the alternative, the Objection should be treated as only being brought by the six people that at least provided their signed certifications before the deadline. *See* ECF No. 516 ¶ 14 (any member that "fails to object *in the manner described* . . . shall be deemed to have waived the right") (emphasis added); ECF No. 512-2 at 2, 7-8 (warning class members of requirements); *In re Equifax Inc. Customer Data Security Breach Litig.*, 2020 WL 256132, at *26 (N.D. Ga. Mar. 17, 2020) (finding requirement that class members actually sign their objections to be a valid requirement to help avoid the filing of mass or unauthorized objections).

class action the apportionment of a settlement can never be tailored to the rights of each plaintiff with mathematical precision," and thus a plan should "strike a reasonable balance between precision and efficiency." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 327 F.R.D. 483, 496 (S.D.N.Y. 2018); *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, 2007 WL 2230177, at *11 (S.D.N.Y. July 27, 2007) ("numerous courts have held . . . [that] a plan of allocation need not be perfect"). Courts therefore generally adhere to the "principal goal" of having an "equitable and timely distribution of a settlement fund without burdening the process in a way that will unduly waste the fund." *In re Credit Default Swaps*, 2016 WL 2731524, at *9.

The Objectors concede that Co-Lead Counsel are "to be given deference" in making these determinations, and that it would be impractical to base a Plan on exact measurements of manipulation. Obj. at 2, 25. Indeed, the Objectors support a trading-volume approach. *Id.* at 26. They just dispute what "volume" should count, and who should do those calculations.

1. There is a reasonable basis to only accept the Objectors' positions that were left open overnight (objection "A")

The Objectors contend they should be allowed to submit *all* their sales volume, rather than submitting only sales volume on positions left open at least a day. Obj. at 2-4, 8-16. As an initial matter, the Objectors repeatedly cast the Plan as having "excluded [them] from a potential recovery." *Id.* at 2. But this is not accurate. The Plan does not disqualify a class member from recovering merely because it opened and closed a position the same day. In fact, no matter how often a class member day-traded, it can submit a claim based on its *other* sales activity. Indeed, even a preliminary analysis finds most traders listed on Schedule A to the Objection have already submitted sizable claims despite the Plan's treatment of day-traded positions.[7] This is thus not a

[7] Those who have not submitted claims may lack standing to object to how the proceeds are divided. *See City of Livonia Employees' Ret. Sys.*, 2013 WL 4399015, at *1 (S.D.N.Y. Aug. 7, 2013).

matter of "exclusion" of the Objectors, but rather a question as to the relative amount of their recovery.

Contrary to the Objectors' assertions, the exclusion of day-trades has a rational basis. While trading volume is an often-used metric in class settlements, its power as a proxy breaks down when it comes to positions that are opened and then quickly closed. Those who buy-sell-buy-sell-buy-sell throughout the day as market-makers trying to make profits from the "spread" between bid and ask prices are uniquely likely to have trading volumes that dwarf other class members. Indeed, the Objection notes that prior to 2008, "substantially every [COMEX futures] transaction" flowed through them. *Id.* at 8 n.8.

Meanwhile, that huge volume of day-trading activity is potentially uniquely vulnerable as compared to the other types of trades Plaintiffs would have litigated in the case. Plaintiffs must be circumspect about the details of their legal theories and intentions for expert work, given the potential we may still need to fully litigate this case against Defendants. But Defendants will likely argue that a trade is only economically impacted if the level of artificiality of the "buy" is different from the level of artificiality of the "sell." This argument would impact day-trades in a unique way, for the simple reason that most day-trades do not cross a new Fixing at all—let alone the question of whether it crossed a *manipulated* Fixing that could have changed the level of artificiality. At the same time, the Objectors admit it would be a "herculean task if even possible," *id.* at 25, to try to identify those comparatively rare day-trades that were bought just before and sold just after a manipulated Fixing. It was reasonable to refuse the huge volume of day-trading into the Plan, where most would be uniquely vulnerable to attack had the case proceeded, and the rare exceptions are not identifiable absent additional burdens on class members and the Settlement Administrator.

The Objectors deal with none of this. Instead, the Objectors argue that *"if"* the Settlements were driven by the "short-term immediate impact" of specific manipulative acts, *then* claims tied to that subset of day-trades by futures market-makers[8] supposedly form most of what Plaintiffs' case would have been able to recover for. *Id.* at 15-16. But the Objectors are wrong to assert that Plaintiffs' case turns entirely on those sales made in a short window following a newly manipulated Fixing. Rather, as expressly alleged, the "economic evidence" the Objectors rely upon for this argument was included in the complaint in support of the larger belief that prices were "artificially lower *throughout the Class Period*." ECF No. 266 ("TAC") ¶ 392 (emphasis added). That is:

> [T]he harm suffered by plaintiffs is not restricted to those specific days on which the most striking downward price drops occurred during the PM Fixing, but instead extends throughout the Class Period. Repeated interventions on hundreds of occasions throughout the Class Period caused the price of spot gold and related investments to be lower than would have prevailed with free and open competition throughout the Class Period.

Id. ¶ 393.

The Objectors thus miss the forest for the trees by suggesting the complaint presents a case based on a temporary-impact theory that would have limited recovery to just the sales closed in a short window after each Fixing. For instance, the Objectors say pricing patterns "disappear" on certain days. Obj. at 10 (citing TAC ¶ 14 n.5). And the Objectors refer to the use of "normalized" intraday data to determine whether prices had a tendency to move up or down at the same time of day. *Id.* at 12-13 (citing TAC ¶¶ 147-52). These allegations do not, contrary to the Objectors' arguments, indicate Plaintiffs adopted the Objectors' and the Defendants' narrow view as to when prices were artificial. Rather, the allegations the Objectors rely on merely

[8] Even under a temporary-impact-only view of impact, only those day-trades that perfectly straddled a new manipulated Fixing would likely have a different level of "buy" artificiality and a different level of "sell" artificially.

describe how the data can plausibly show *new* acts of manipulation. But that does not mean Plaintiffs believe prices at all other times were *properly set*. In fact, because of the lasting impact manipulations have on prices, again, Plaintiffs allege prices were artificial throughout the class period. The other allegations the Objectors rely upon all similarly fail to show that Plaintiffs were limiting themselves to recovering on sales in a short period around a subset of the Fixings, and thus fail to show that the comparatively rare day-trades that straddled a manipulating fixing would have formed a material amount of Plaintiffs' recoverable damages.[9]

The Objectors similarly assert that the impact on futures prices was "disproportionate." *Id.* at 11, 13. As an initial matter, the Objectors do not explain how this could be the case when the complaint makes clear that prices for gold investments are highly correlated. *E.g.*, TAC ¶ 116. In any event, the Objectors here are erroneously relying on allegations designed to respond to Defendants' dismissal-stage arguments that Defendants had no motive to manipulate. The complaint explains that one of the many ways artificial prices could have benefited Defendants was with respect to "margin" calculations. *Id.* ¶¶ 21, 224-34. That such a motive was alleged to exist does not mean the case is built on the notion futures traders were "likely greater" victims or the "foundation" of the complaint, as the Objectors assert. Obj. at 13, 25. Indeed, this Court found the complaint's allegations about the banks' futures positions to be unpersuasive. ECF No. 158 at 38-39.

[9] *See* TAC ¶¶ 116 (spot and futures prices are correlated), ¶¶ 197-200 (price patterns could not be explained by exogenous market forces because "spikes" in the change of price as measured in 1 or 5-minute intervals did not happen on days with no PM Fix), ¶¶ 162-64 and ¶¶ 252-54 (examples of specific days with a downward spike), ¶ 327 (another "normalized" price chart showing tendency of spikes around PM Fix), ¶ 344 (trend for price movements around PM Fix did not always follow trend for price movements over course of day), ¶ 348 (Defendants' quotes heading into fix lower than other market participants).

More generally, this case has many other important parts beyond COMEX futures sales in a short window of time. This includes, of course, the Fixing process itself, Fixed-linked instruments, and many other types of gold investments. And regardless of the cited allegations' relationship to the case overall, they have little relevance to the Objection. Positions opened and closed the same day are not part of the end-of-day margin or "mark-to-market" calculations, or the monthly "roll" processes, discussed in the cited portions of the complaint.

Finally, the Objectors argue they were likely on the "opposite side" of some manipulative trades. Obj. at 3. But that would mean (a) Defendants were selling at artificially low prices to drive prices down, and thus (b) the Objectors on the "opposite side" of those specific trades would have been *buying* at artificially low prices. The Objectors do not argue that their *purchases* of gold futures should be part of the case.

In sum, if the Objectors wished to be "not included" at all, *id.* at 10, they were free to opt out and file their own case built around a damages theory that prices were only artificial for a few isolated, short periods. But considering Plaintiffs' actual theory of this case, the fact day-trading generates an extremely large volume is unfair to other class members, and thus it was reasonable for the Plan to accept the Objectors' other trades, but not their day-trades.

2. There is a reasonable basis not to adopt the Objectors' proposal of trying to identify and discount "hedge" transactions (objection "B")

The Objectors argue that "hedgers" should have all their claims discounted, as it is possible that any harm they suffered on some positions could have been offset by benefits on others. Obj. at 4-5, 16-19. The Objectors fail to cite a single decision refusing to approve a plan for not treating "hedgers" in this way. Rather, the Objectors merely point to other plans that

purportedly made various adjustments to those registered as COMEX hedgers.[10] But that one choice is supposedly reasonable does not mean a different choice cannot also be reasonable, even on the same exact set of facts. Moreover, the facts of this case are different from those the Objectors point to.

For instance, the Objectors overlook the different legal theories at issue. They stress the existence of alternative forms of plans in "class actions involving the CEA." *Id.* at 4. But this case has at its core *antitrust* violations. This gives Plaintiffs here additional grounds to push back on any defense argument that a "hedge" reduces the ability to recover, beyond the grounds available in CEA-driven, exchange-only cases like those cited by the Objectors.

The Objectors also overlook the different types of transactions at issue in this case. They cite only to plans from cases where the class included *only* exchange-traded instruments.[11] Though the Objectors appear to be focused only on futures, Co-Lead Counsel must also account for the other class members who engaged in a variety of other qualifying gold investments. The Objectors never actually put forth a plan to account for this. They mention the existence of COMEX-registered hedgers, but using only that designation in this case would give rise to

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[10] That the plans the Objectors cite to vary so wildly in their approach confirm that multiple approaches can be reasonable.

[11] *In re Natural Gas Commodity Litig.*, No. 03-cv-6186, ECF No. 618 at 2 (S.D.N.Y. June 7, 2010) (class of those transacting in specific contracts on the New York Mercantile Exchange); *In re: Crude Oil Commodity Futures Litig.*, No. 11-cv-3600, ECF No. 287-2 at 3 (S.D.N.Y. June 3, 2015) (class of those transacting in futures or options on two exchanges); *In re Libor-Based Financial Instruments Antitrust Litig.*, No. 11-MD-2262, ECF No. 2956-1 at 1 (S.D.N.Y. Aug. 12, 2019) (class of those transacting in "Eurodollar futures contracts and/or options on Eurodollar futures on United States exchanges"); *In re: Optiver Commodities Litig.*, No. 08-cv-6842, ECF No. 72-7 at Exs. A-C (S.D.N.Y. Apr. 17, 2015) (class of those transacting in specific futures contracts on the New York Mercantile Exchange); *In re: Platinum and Palladium Commodities Litig.*, No. 10-cv-3617, ECF No. 163-1 at 7 (S.D.N.Y. Mar. 18, 2014) (settlement class of persons transacting in platinum or palladium futures contracts on the New York Mercantile Exchange).

objections that those other class members were being unfairly singled out as amongst all the ways gold investments can be part of a "hedged" portfolio.[12]

Just as it was reasonable to not single out COMEX-registered hedgers, it was also reasonable to not create a broader regime to capture other "hedging" activity. It would greatly increase the burden on class members and the Settlement Administrator to try to define and then police a broader definition of a "hedged" transaction. The Objectors flippantly refer to the existence of accepted principles for what qualifies "as a hedge for financial reporting purposes." *Id.* at 17. But they do not explain why such accounting principles define recoverable damages here. Nor do they explain how an accounting conceptualization of hedging could be applied here in an efficient way that does not burden the Settlement Administrator and class members,[13] particularly given that many class members have already filed their claims.

The Objectors' other arguments repeat their errors described in Section III.B.1 above. For example, the Objectors again emphasize the complaint's reference to public data revealing downward price-spikes during the PM Fixing window. Obj. at 16. But as discussed above, the complaint alleges that prices were artificially depressed during the entire class period. The Objectors also argue that hedgers' recoveries should be discounted because COMEX grants them exemptions from aggregate position limits. *Id.* at 17-18. This logic is flawed. Under the Plan, which considers sales volume, simply *holding* a large position does not present an advantage at all, let alone an unreasonable one. This scenario stands in contrast to that of day-traders, whose

[12] There are many other complications and potential objections that could have arisen if the Plan had tried to turn claim amounts based on a class member's COMEX registration. For example, the registration as a "hedger" does not mean all activities were actually "hedges," and COMEX traders could have had different registrations at different times during the class period.

[13] Indeed, entire cases have turned on what constitutes a "hedge" in various contexts. *See, e.g.*, *Day v. United States*, 734 F.2d 375 (8th Cir. 1984) (interpreting "hedge" for purposes of tax code); *In re Ashanti Goldfields Secs. Litig.*, 184 F. Supp. 2d 247 (S.D.N.Y. 2002) (securities fraud claim alleging gold mining company mis-classified trading activity).

high trading frequency drives their transaction amounts to extraordinarily high levels even while they maintain no open positions overnight.

Given the arguable legal irrelevance, particularly in an antitrust case, and definitional problems of what even constitutes a "hedge" in a diverse class, it was reasonable to adopt a simple Plan that allows all class members to include all eligible sales. Other plans of allocation in antitrust cases have been approved without special features addressing the potential for "hedging"—including the *Silver* plan the Objectors often cite.[14]

3. There is a reasonable basis for not using case discovery to pre-fill class members' claim forms (objection "C")

The Objectors argue the Plan should have used case discovery to pre-fill out class members' forms, relieving them of any burden of doing anything other than showing up. Obj. at 5, 19-23. But it is well-established that class members can be required to bear some responsibility for their own claims, even if they may have not kept their own records. *See In re Equifax*, 2020 WL 256132, at *30 (favorably citing Manual for Complex Litigation in upholding requirement for class members to show they meet eligibility requirements); *Friedman v. Guthy-Renker, LLC*, 2017 WL 6527295, at *9 (C.D. Cal. Aug. 21, 2017) (overruling objection that claims process "requires [the objector] to submit documentation that she no longer has," because "any lawsuit would require her to provide such documentation").[15]

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[14] The Objection refers to the use of a "discount." Given the Objectors concede the administrative difficulty of measuring harm at this stage, Obj. at 25-26, we presume it was a typographical error to suggest in a footnote that this "discount" would be applied to the COMEX hedger's "net damage number," *id.* at 18 n.9.

[15] *See also, e.g.*, *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 640 (5th Cir. 2012) (the "alleged burden" on "small investors" of obtaining trading records that were required to verify their claims was "not undue"); *In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, & "ERISA" Litig.*, 4 F. Supp. 3d 94, 106 n.12 (D.D.C. 2013) (rejecting as "meritless" an objection that the requirements "under the Proof of Claim form are too onerous because class members must submit records going back several years").

More basically, the Objectors' request is based on a mistaken logical leap. The Objectors point to Co-Lead Counsel's statements as to the massive amounts of data produced in this case. From this, they mistakenly conclude that the Settlement Administrator could use that data to fill out the forms for all class members. But this overlooks that nearly all of the data in this case—including specifically the CME futures data apparently of most interest to the Objectors[16]—is anonymized. We thus do not have information to fill out the Objectors' forms.

Perhaps anticipating this, the Objectors "on information and belief" assert that Co-Lead Counsel could get the data by way of new subpoenas. Obj. at 19. The Objectors cite no precedent for requiring plaintiffs, counsel, and the administrator to undertake an extensive new discovery campaign merely to fill out claim forms. It would be particularly wasteful to enter such an order here. The data received to date is anonymized because of a phalanx of burden, contractual, privacy, foreign-law, banking, and other objections vigorously asserted by the data-producers. As seen in Defendants' refusal to produce even basic contact information for the notice program,[17] none of those objections would disappear if Co-Lead Counsel were to try to re-open negotiations based on an asserted need "for settlement." Indeed, other class members—including those who chose not to file claims—could well themselves object to their trading data being unmasked merely for the Objectors' convenience. And this is all in addition to the comparative burden that would be placed on the Settlement Administrator to try to turn data

[16] The only (irrelevant) exception with respect to the CME data is that, after months of negotiations and information exchanges, some of the CME data is "unmasked" with respect to Defendant transactions and some named-Plaintiff transactions. That limited unmasking was not done to get an unfair advantage in the settlement process as the Objectors' baselessly assert (Obj. at 23), but rather was done long ago for purposes of the litigation, often at Defendants' request. The notion that the claims of the few named Plaintiffs would be materially advantaged with a "head start" also is mathematically impossible given the size of the class.

[17] *See, e.g.*, Jan. 14, 2021 Tr. at 5:22-24 (Court questioning whether it had power to require *any* cooperation), 7:9-17 (objecting to being ordered to give names to administrator).

from a variety of sources into completed claim forms for every class member, versus the burden for each class member to have an idea of their own claim in the first instance.

Nor should the Court indulge any narrower request for subpoenas to be issued that would benefit just the Objectors. Even when considering requests to allow objectors to undertake *their own* discovery for purposes of assessing the fairness *of the settlement*, courts are extremely cautious: "[W]here the objectors represent only a small percentage of the class, the likelihood of the court granting their discovery requests decreases because the court will give great weight to the interests of the majority of the class members." *Klein v. O'Neal, Inc.*, 2010 WL 234806, at *4 (N.D. Tex. Jan. 21, 2010).[18] The Court should be even more suspect of the request here. It would be unfair to the many class members who dutifully filled out their own forms to have the distribution process halted while time and resources are spent serving new subpoenas, negotiating over their scope, and shuffling between the Objectors and the CME with respect to the complicated process of "unmasking" data.

Finally, the fact that the Settlement Administrator does not have non-anonymized data moots the Objectors' observation that the law requires certain records to be kept for only five years. Obj. at 23. But in any event the CFTC did not require anyone to destroy their records. Class members all were equally situated to decide what to retain or what to discard, including based on the filing of this case and the press it has generated.

[18] *See also* Manual for Complex Litig. § 21.643 (4th ed.) ("Objectors might seek intervention and discovery to demonstrate the inadequacy of the settlement. Discovery should be minimal and conditioned on a showing of need, because it will delay settlement, introduce uncertainty, and might be undertaken primarily to justify an award of attorney fees to the objector's counsel.").

4. There is a reasonable basis for not requiring the immediate submission of backup documentation by all class members (objection "C")

As discussed in Section III.B.3 above, the Objectors complain that the Plan is unfair because class members may not have kept their documents. But the Objectors then contradict themselves by also complaining that distributions may be imprecise because the claim form does not require class members to immediately submit documents. Obj. at 22-23. The Plan requires class members to provide annual breakdowns, to describe what supporting materials were used for each calculation, and to attest to the accuracy of the information under penalty of perjury. ECF No. 512-4. The Settlement Administrator will work with Co-Lead Counsel to deploy standard techniques to perform quality-control and audit processes, which will likely often require requesting copies of the documents class members describe in their claim forms. Class members have agreed to assist in such processes in the event they are chosen for such a quality-control review. *Id.* at 6 ¶ 8 ("[I] agree to furnish additional information . . . such as additional documentation . . . and acknowledge the failure to do so may result in a denial of my [] claim."). At the same time, class members not selected for such a review are relieved of the burden of having to submit documents that the Settlement Administrator does not actually need.

Courts have repeatedly found similar plans reasonably balance the competing concerns of accuracy versus the burdens placed on the settlement administrator and on class members themselves. *See In re Ins. Brokerage Antitrust Litig.*, 2007 WL 542227, at *10 (D.N.J. Feb. 16, 2007) (overruling objection that information in the claims form would not be adequately "checked for accuracy," because the forms required certification under penalty of perjury and notified claimants that "documentation necessary to verify" the information may be requested).[19]

[19] *See also, e.g.*, *In re SSA Bonds Antitrust Litig.*, No. 16-cv-3711, ECF. No. 686 (S.D.N.Y. Apr. 2, 2021) (approving settlement's plan of allocation, whose claim form required only attestation under penalty of perjury but advised of possible audits); *In re GSE Bonds*

The Objectors cite to no case holding such a process to be unreasonable. Instead, the Objectors merely assert "on information and belief" that other processes have also been sometimes used. Obj. at 22 n.14. Even if true, again, that one allocation choice is reasonable does not mean all other allocation choices are *un*reasonable, particularly on different facts.

5. There is a reasonable basis for not inviting class members to merely dump all their documents on the Settlement Administrator (objection "D")

The Objectors argue that the Plan is too burdensome because it requires class members to fill out a form standardizing the format in which data is submitted. Obj. at 6-7, 23-24. But they fail to cite a single case where a plan was rejected because it asked the class members to fill out a form first. Again, the mere fact that other plans on other facts supposedly allowed documentary submissions, *id*. at 24, does not mean it was *un*reasonable to require claim forms first here.

The Objectors also overstate their examples. For instance, nothing in either the *Silver* or *In re In re Platinum and Palladium* claim forms indicates the requests for backup documentation relieve the class members of *also* providing the information in a specified tabular format.[20] And both *In re Platinum and Palladium* and *In re Amaranth* dealt exclusively with futures traded over a single exchange, and so are even more unavailing with respect to the Plan here, which must cover more transaction types.

Inviting class members to skip the form and dump documents on the administrator would have likely led to an avalanche of documents, as many class members who would otherwise have been able to fill out the forms themselves would choose to outsource the costs onto the

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Antitrust Litig., 2020 WL 3250593, at *3 (S.D.N.Y. June 16, 2020) (same); *Alaska Elec. Pension Fund v. Bank of Am., N.A.*, 2018 WL 8581152, at *3 (S.D.N.Y. Nov. 13, 2018) (same).

[20] *See* ECF No. 578-9 at 5 (*Silver* claim form; "Please list each U.S.-related Transaction in Physical Silver"); *In re Platinum and Palladium*, Proof of Claim and Release, http://www.platinumpalladiumfutureslitigation.com/FileDownload.aspx?FileID=2741 (class members "must provide the information set forth" in a specific table).

Settlement Administrator. In this case, which involves transactions far beyond the standardized COMEX futures, such would have been particularly problematic. The Objectors suggest the Settlement Administrator should "hire computer programmers" in order to "create software" to pre-populate claim forms based on the scanning of raw materials. Obj. at 24. This gives shockingly little consideration for the burden it would create to force a single actor to intake all the variety of documents that could be used track the different types of gold investments in the class definition. It was reasonable for the Plan to instead ask each class member to first get an understanding of its own claim size.

The burden of doing so is not undue. The Plan in no way requires class members to "rewrite by hand each trade." *Id.* at 24-25. Rather, class members must state 30 numbers at most—10 annualized figures for each of three transaction types. ECF No. 512-4 at 3. This is facially reasonable. Indeed, the approved plan in the "ISDAfix" case did not draw a single objection despite requiring class members to provide over 175 different figures going back eight years. *See Alaska Elec. Pension Fund v. Bank of Am., N.A.*, No. 1:14-cv-7126, ECF No. 665-3 (S.D.N.Y. June 22, 2018). *See also In re Marsh & McLennan Companies, Inc. Sec. Litig.*, 2009 WL 5178546, at *25 (S.D.N.Y. Dec. 23, 2009) (rejecting "[t]he single objector's claim that the lawyers should fill out the Proof of Claim form and that potential Class members should simply verify the information" on the basis that such an objection "does not comport with the long-approved procedures for the efficient management of class-action settlement[s]").

If specific class members nonetheless truly had difficulties filling out the form, the Settlement Administrator and Co-Lead Counsel stood ready to respond to reasonable inquiries and requests for individual assistance. This further confirms the Plan did not place an undue burden on class members. *See, e.g.*, *Loomis v. Slendertone Distribution, Inc.*, 2021 WL 873340,

at *7 (S.D. Cal. Mar. 9, 2021) ("any subjective burden by a Class Member would be sufficiently mitigated by the toll-free helpline and settlement website to provide assistance"). We are not aware the Objectors ever even asked for such help before seeking to overturn the Plan wholesale.

Finally, Co-Lead Counsel strongly deny the accusation that the Plan was "designed" to discourage class participation. Obj. at 23. Not only do the Objectors fail to present any facts supporting the accusation, but their theory makes no sense. As the settlement here creates a "non-reversionary settlement fund" whereby the amount Defendants will pay does not change based on the participation rate, the "contention the parties designed the claims process to discourage class members from making claims is a hard one to sell." *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 499 (N.D. Ill. 2015). *See also* Newberg on Class Actions § 13:53 (5th ed.) (where a "sum certain" is going to be paid, "the parties have absolutely no reason to want a needlessly burdensome claims process, and class counsel has no incentive to agree to one").

6. There is a reasonable basis to perform the pro-rata calculations using the dollar volume of the transactions (objection "E")

The Objectors argue for a "volume-based calculation." Obj. at 7-8, 25-28. It is unclear what it is the Objectors are proposing. Indeed, the Plan *is* "volume-based," as class members must provide the volume of their sales activity, translated into United States dollars so that a *pro rata* calculation can be done across the numerous types of gold investments that are within the class definition.

The Objectors assert a volume-based approach is required because the "elimination of day-trades excludes the very Class members most harmed." *Id.* at 26. To the extent the request for a "volume-based" plan of allocation is thus merely a repetition of the Objectors' request for *day-trading* volume to also count, then the "volume" Objection fails for the reasons set forth above in Section III.B.1.

The Objectors assert a volume-based approach is required because Co-Lead Counsel has received trading data from CME and others already as to allow for a "volume-based" plan. Obj. at 27. To the extent the request for a "volume-based" plan of allocation is thus merely a repetition of the Objectors' request for the Settlement Administrator to fill out the Objectors' claim forms for them, then the "volume" Objection fails for the reasons set forth above in Section III.B.3.

The Objectors assert that "the number of transactions executed" should be considered. Obj. at 26. To the extent the request for a "volume-based" plan of allocation is thus an assertion that class members should add up transaction *count* regardless of size, then Objectors improperly ignore that the class includes gold transactions other than standardized futures contracts. That is, one "transaction" or "contract" in the class here could be much bigger or much smaller than the next. It was thus reasonable for the Plan here to create more of an apples-to-apples comparison across transaction types by considering the dollar value of the class members' sales.

The Objectors also assert that a volume-based approach would "simplify" the process and make the resolution of this matter "quick[er]." *Id.* at 29. Whatever it is that the Objectors mean to propose that is different from the current Plan, it could in no way represent a simplification or hastening over the status quo. That is, even if the Objectors are right it *would have* been less burdensome to do something else, the Objectors ignore that many class members *already* submitted their claims. It would only complicate and delay things to require the Settlement Administrator to chase claimants until they each fill a completely redesigned claim form.

Finally, it should be noted that while the Objectors concede the administrative challenges of basing a plan on specific acts of manipulation, *id.* at 25, in a single sentence the Objection also seems to assert, without explanation, that Co-Lead Counsel can use CME data to identify *specific*

Defendant trades that caused harm to *specific class-member trades. Id.* at 27. As an initial matter, forcing the Settlement Administrator to try to match specific class member trades to specific Defendant acts of manipulation ignores the standards governing plans of allocation. Plans need not be tailored "with mathematical precision" but must balance "precision and efficiency." *In re LIBOR-Based Fin. Instruments*, 327 F.R.D. at 496. *See In re Credit Default Swaps*, 2016 WL 2731524, at *9 (warning against "burdening the process in a way that will unduly waste the fund").

The apparent alternative request for the Settlement Administrator to match Defendants' trades with class member trades also shares many of the same flaws that run through the Objection. It yet again ignores that this case, and this class, extend far beyond COMEX trades. Under the Objectors' approach, most all transaction types in the class (including Fixed-linked instruments, and all transactions with non-Defendants) would not count. Only, supposedly, specific COMEX trades occurring at a specific time of day. More generally, the implied presumption that Plaintiffs can simply look at the massive record in this case and count up how many times each class member was on the opposite side of a manipulative COMEX trade not only ignores the complexity of the factual and legal issues in play, but again fundamentally misunderstands Plaintiffs' damages theory and the type of data that has been produced in discovery. *See* Sections III.B.1, III.B.3 *supra*.

CONCLUSION

Plaintiffs request that their Final Approval Motion be granted with respect to the Settlements, the notice plan, and the certification of the Settlement Class. Submitted concurrently herewith are proposed final judgments based on the forms agreed to during negotiations with each Settling Defendant.

Co-Lead Counsel request that their Fee and Expense Motion be granted. Submitted concurrently are proposed orders doing so.

Finally, Plaintiffs also request that their Final Approval Motion be granted with respect to the Plan of Allocation. Given there was an objection filed, this issue has been broken out from the final judgments and placed into a separate proposed order also being submitted concurrently.[21]

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Respectfully submitted,

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[21] Though Plaintiffs believe the Court should also approve the Plan of Allocation at this time, notably the Settlements, and the Fee and Expense Motion, can be given final approval regardless. *See 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) (noting that "it is appropriate, and often prudent, in massive class actions to follow a two-stage procedure, deferring the Plan of Allocation until after final settlement approval").

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