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

PLAINTIFFS' MEMORANDUM OF LAW IN RESPONSE TO THE OCTOBER 19 ORDER REGARDING A REVISED PLAN OF ALLOCATION FOR THE DEUTSCHE BANK AND HSBC SETTLEMENTS

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Plaintiffs and Co-Lead Counsel respectfully submit this memorandum in response to the Court's order regarding the Plan of Allocation to be used in connection with the Settlement Agreements with Deutsche Bank and HSBC. ECF No. 599.

PRELIMINARY STATEMENT

As our prior memorandum made clear (ECF No. 587), when proposing an allocation plan, multiple approaches can each represent reasonable ways to balance the competing interests of accuracy, fairness, cost, and finality. Our decision to propose a modification to the Plan of Allocation here to allow consideration of day-trades took into account many factors. These included, among others, our continued research into the law and facts, the finalization of the now-proposed Third Settlement Agreement, and the willingness of the Objectors to reach a compromise that offered the Settlement Class finality on terms we thought were also reasonable. We opted for this approach rather than risk the imposition of alternative terms we thought unfair, or the entire process being delayed indefinitely due to an appeal.

We thus were prepared to discuss at the Fairness Hearing the reasonability of including day-trade positions subject to a 0.25 Litigation Multiplier, and to discuss how to best go about implementing that change. We appreciate, however, the Court's decision to pause the process so we could more formally and fully put forth a proposal to bring this action to a conclusion. Though the Court does have discretion to approve the Plan of Allocation without re-noticing and creating a new objection right, we are not requesting it do so. Instead, as discussed in Section I below, we propose leveraging the opportunity provided by the fortuitously-timed Third Settlement Agreement to provide fulsome notice of the modified Plan of Allocation in a cost-efficient way.

At the same time, we believe that a new Fairness Hearing should be set as soon as possible to bring finality to every other issue concerning the Deutsche Bank and HSBC

settlements. As discussed in Section II below, every issue regarding the first two settlements other than the Plan of Allocation—the terms of the settlements, who timely filed exclusion requests, the work we performed to secure the settlements, and our fees requests and expenses incurred—is ripe, and will not change based on what happens with the Plan of Allocation. The deadline to weigh in on those longstanding issues by way of objections or otherwise passed in August 2021. The right to be heard on all these issues has been waived[1] and there is no reason to further delay their consideration.

Accordingly, while due to the unique timing circumstances at issue here we agree with the Court's inclination to provide new notice with respect to the revised Plan of Allocation, we respectfully request that a hearing be re-scheduled as soon as possible to bring express finality to every other issue.

ARGUMENT

I. CO-LEAD COUNSEL'S PROPOSED PLAN FOR NOTICING AND GIVING A NEW OBJECTION RIGHT REGARDING THE PLAN OF ALLOCATION

In its October 19, 2021, order the Court asked whether, under existing case law, notice and an additional period of time to object must be given when a plan of allocation changes. ECF No. 599. In short, courts have discretion to modify plans of allocation without either new formal notice or a new right to object.[2] In line with this common practice, class members in this case

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[1] *See* ECF No. 516 ¶ 14 ("Any member of the Settlement Class or governmental entity that fails to object in the manner described in paragraphs 12-13 of this Order shall be deemed to have waived the right to object (including any right of appeal) and shall be forever barred from raising such objection in this or any other action or proceeding relating to or arising out of the Settlement.").

[2] *See, e.g.*, *Union Asset Management Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 640 (5th Cir. 2012), cert. denied, 568 U.S. 931 (2012) (not abuse of discretion to approve modification of plan); *McDonough v. Toys R Us, Inc.*, 80 F. Supp. 3d 626, 648-49, 649 n.23 (E.D. Pa. 2015) (no notice problem in modifying plan where was clear court had authority to alter plan and where did not affect overall settlement); *In re Worldcom, Inc. Sec. Litig.*, 2005 WL 3577135, at *1-2

were already warned that their payment was not guaranteed to be governed by the *proposed* Plan of Allocation, but rather by the Plan of Allocation "*that the Court approves*." ECF No. 512-2 at 5-6 (emphasis added). They were also warned to continually monitor the Settlement Website for changes. *Id.* at 6.[3] These rules are driven by practicality. If any change to a plan of allocation necessarily triggered a new right to be formally noticed, precious settlement funds could be unduly wasted with costly notice campaigns. And if changes triggered a new objection right, the cycle might never end. A change in one direction could lead to an objection forcing a change in the other direction, triggering a supposed third opportunity to object, and so on.

The Court therefore has discretion to alter the Plan of Allocation without a formal notice campaign and without inviting further objections. That said, we agree to follow the Court's inclination to provide a second notice on the unique facts here. We do so primarily because a formal notice campaign will already be needed to be taken around the same time in connection with the Third Settlement Agreement. Thus, notice can be given here without material marginal costs or without adding to the overall length of the case.[4]

Revised Plan of Allocation. Attached as Exhibits 4 and 5 to the November 12, 2021 Declaration of Daniel L. Brockett ("Brockett Dec.") are clean and redline copies of the Plan of

(S.D.N.Y. Dec. 30, 2005) (rejecting argument that notice program was rendered insufficient by later change to plan of allocation).

[3] "Any change of the Plan of Allocation . . . will be posted on the Settlement Website . . . . It is important that you refer to the Settlement Website often as no other notice may be published of such changes."

[4] We thus do not concede that the process we lay out below—or, indeed, *any* renewed notice or objection process—would be required or appropriate otherwise, let alone on other facts. In the attached draft notice materials, class members are thus still warned that the Plans of Allocation for all three settlements may again change without notice and without a new right to be heard. *See* Brockett Dec. Ex. 1 at 6.

Allocation for the first two settlements.[5] The change is primarily made with a single sentence: "The Litigation Multiplier for positions opened and closed the same day ('Day-Trade Other Transactions') will be .25." Brockett Dec. Ex. 4 at 2.[6]

Revised Claim Form. Attached as Exhibits 6 and 7 to the Brockett Declaration are clean and redline versions of a revised Claim Form, to be used for all three settlements. The most-relevant changes for purposes of the first two settlements is the creation of a new, fourth table, for the provision of information regarding day-trades. Class members are also informed that if they can document that qualifying transactions exist, but they cannot disentangle day-trades from overnight positions, such transactions can also be included in the new table. Brockett Dec. Ex. 6 at 7.

Method for providing notice. Given the need to provide notice of the Third Settlement Agreement, Co-Lead Counsel propose to include information about the potential change to the Plan of Allocation for the first two settlements into the notice campaign for the Third Settlement Agreement. The plan for distributing notice is thus discussed in our concurrently filed motion regarding the notice plan for the Third Settlement Agreement. This would of course be in addition to appropriate updates on the settlement website.

Form of notice. Attached as Exhibits 1 and 2 to the Brockett Declaration are the proposed long-form and summary notices to be used to contact class members. The portions of the notice materials dealing with the Third Settlement Agreement are discussed in our motions

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[5] The Plan of Allocation for the Third Settlement Agreement is technically a different document, Brockett Dec. Ex. 3, but is functionally identical.

[6] As additional ETFs were identified by class members and approved by the Settlement Administrator and Co-Lead Counsel as meeting the Plan's definition, the additional ETF identifiers are also added to the revised Plan of Allocation and the revised Claim Form. It should be noted, however, that as soon as an additional ETF was approved for inclusion, it was immediately updated on the settlement website.

regarding the Third Settlement Agreement. Of relevance here, the proposed documents also make clear that class members' rights are potentially changing with respect to the first two settlements. For instance:

- The first page of the long-form notice makes clear that the document is being sent in connection with multiple related, but distinct issues—the Third Settlement Agreement *and* a proposed change with respect to the Plan of Allocation for the first two settlements. Brockett Dec. Ex. 1 at 1.
- An entire section is devoted to warning class members of the need to act to take advantage of the proposed change to the Plan of Allocation. *Id.* at 11.
- Class members are also informed that they can instead object to the new Plans of Allocation. *Id.* at 6.[7]
- The proposed summary notice similarly conveys that class members are being contacted for two related, but distinct, reasons. Brockett Dec. Ex. 2 at 1 ("[Y]ou may be affected by two recent developments . . .").

Schedule for moving forward. As this proposal leverages the notice program for the Third Settlement Agreement, the fulsome schedule is set forth in our Third Settlement Agreement motion papers, being filed concurrently. It merits mention that we are proposing Co-Lead Counsel's opening briefs on finalizing the Plan of Allocation come after the deadline for submitting new or revised Claim Forms. This will allow us hopefully to provide class members preliminary information on the impact of a 0.25 day-trade Litigation Multiplier, based on the actual claims filed rather than the parties' predictions.

II. CO-LEAD COUNSEL REQUEST A RESCHEDULED FAIRNESS HEARING TO OTHERWISE BRING FINALITY TO THE FIRST TWO SETTLEMENT AGREEMENTS

Regardless of whether the Court allows no objections, limited objections, or even fulsome objections to the Plan of Allocation, Plaintiffs and Co-Lead Counsel respectfully request

[7] The materials are drafted, however, to make clear that under our proposal there would be no other right to object to issues regarding the first two settlements. *E.g.*, *id.* at 2 ("The Original Settlements have been given final approval.").

a rescheduled Fairness Hearing so that the other aspects of our pending motions on the first two settlements can be resolved. Not a single objection was filed concerning terms of those agreements, and tens of thousands of claims were filed. *See, e.g.*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 119 (2d Cir. 2005) ("[T]he favorable reaction of the overwhelming majority of class members to the Settlement is perhaps the most significant factor[.]"). If there is an issue with the Plan of Allocation, the remedy is merely to adjust the Plan of Allocation. But that is no reason to hold up approve of the settlements themselves. There is no realistic scenario in which the Plan of Allocation could impact the fairness of Defendants' obligations under the Settlement Agreements.

That is, the Settling Defendants' obligations are fixed, meaning the *Settlement Agreements themselves* treat class-members equitably, allowing for approval under Rule 23.[8] On such facts, the Court can approve the Settlement Agreements even without a finalized plan for distributing the proceeds. *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."). *See also In re HealthSouth Corp. Sec. Litig.*, 334 Fed. App'x 248, 251, 253-255 (11th Cir. 2009) (rejecting contention that class notice was insufficient because it did not include even a

[8] *See also* ECF No. 174-1 (Deutsche Bank Agreement) ¶ 6(c) ("At *or after* the Fairness Hearing, Co-Lead Counsel also shall request the Court approve the proposed plan of distribution . . . ."") (emphasis added), ¶ 8(d) ("Neither Settling Defendant nor the Released Parties shall have any role in, or responsibility or liability to any person for, the solicitation, review, or evaluation of proofs of claim by Class Plaintiffs, Co-Lead Counsel, or their designated representatives or agents.").

preliminary allocation plan and stating that if class members "needed to obtain the Plan of Allocation before agreeing to participate in the settlement, then [they] could have opted out"); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 480 (S.D.N.Y. 1998); *In re Washington Pub. Power Supply Sys. Secs. Litig.*, 1988 WL 158947, at *3-4 (W.D. Wash. 1988) ("deferral of allocation decisions is routinely followed in partial settlements where the appropriate allocation among class members can best be determined when further settlements have been achieved or the litigation is completely resolved"); 2 McLaughlin on Class Actions § 6:23 (18th ed. 2021) ("Because court approval of a settlement as fair, reasonable and adequate is conceptually distinct from the approval of a proposed plan of allocation, however, courts frequently approve them separately."); Annotated Manual for Complex Litig. § 21.312 (4th ed. May 2021 update) ("Often, however, the outcome of objections . . . and the details of allocation and distribution are not established until after the settlement is approved.").

Indeed, the current situation presents a particularly strong case for proceeding to approve the Settlements first. No objections have been made to the Settlements. Only one objection was made to the Plan of Allocation. Nothing that may happen in the future to resolve the only issue left will change any of the facts material to the fairness of the Settlements. There is thus an ample record before the Court to enable it to sufficiently find that these Settlements meet the requirements of Rule 23, even if on other facts courts may choose to deal with other settlements and other allocation issues simultaneously. The Settling Defendants and Plaintiffs have all waited long enough to bring true finality to these claims. No purpose would be served by making them wait longer. Indeed, failing to issue final orders could be interpreted as an implicit invitation to belated attacks, either directly or by way of collateral attacks done under the guise of responding to the Third Settlement Agreement. Even if procedurally and substantively

meritless, the parties and the Court would have to waste resources dealing with belated attempts to attack the Settlement Agreements—and even a meritless appeal on a procedurally defective objection could delay the ability to distribute funds to class members.

The pending motion for litigation fees and expenses is also ripe for resolution regardless of how the Court decides to proceed on the Plan of Allocation. *See In re NASDAQ*, 187 F.R.D. at 479-80 (rejecting objection to provision allowing payment of fees prior to resolution of plan of allocation as being "directly contrary to the law in this Circuit"). There are no objections to our motion. The relevant facts—the work we performed, the results we achieved, everything—are set and unchanged. Indeed, we even had already cut off our lodestar calculations as-of the HSBC settlement. *See* ECF No. 565 at 16. It would dis-incentivize class counsel to reach compromise if the timing of those agreements (with other Defendants, or objectors) parlays into further-delayed payments on complex, long-running cases. If nothing is finalized until the very end, Co-Lead Counsel would also be at risk for objectors trying to "poisoning the well" against our current fee application under the guise of responding to the Third Settlement Agreement, effectively circumventing the now-passed objection deadline.

Tangentially, we note the recent receipt of an additional request to be excluded from the Settlement Class. Co-Lead Counsel do not object to it being recognized, pursuant to the Court's discretion. *See* ECF No. 516 ¶ 16 (noting that procedurally defective requests will not be recognized "unless the Court determines otherwise"). As with the other "late" exclusion requests, *see* ECF No. 587 at 6, the Settling Defendants have been made aware of this request, and we expect them to make their position known to the Court, if they wish to take one, at the Fairness Hearing.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court approve our plan to provide notice to the class regarding the proposed change to the Plan of Allocation. Attached as Exhibit 9 to Brockett Declaration is a proposed order preliminarily approving the revised Plan of Allocation for the first two settlements and providing a notice plan with respect to the change. This would replace ECF No. 590 as our proposal for dealing with the Plan of Allocation for the first two settlements.

Plaintiffs also respectfully request the Court reschedule the Fairness Hearing as soon as is feasible so that all other issues regarding the Third Settlement Agreements can be finalized. This would include our pending motion to give final approval to the first two settlements, ECF Nos. 561 and 587, and our pending motion for attorneys fees and expenses in connection with the first two settlements, ECF Nos. 565 and 587.

To account for the new request for exclusion discussed above, attached as Brockett Declaration Exhibits 10 and 11 are revised proposed final judgments. The text of the judgments remains the same as was previously submitted. The only change is that the list of recognized opt-outs has one more name on it than before. These materials replace ECF Nos. 588 (Deutsche Bank final judgment) and 589 (HSBC final judgment).

We do not believe modifications are necessary to the previously proposed orders regarding our fee and expense application. *See* ECF Nos. 591 (fee application), 592 (expense application).

DATED: November 12, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2021, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

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