UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GREGORY BOUTCHARD and SYNOVA ASSET MANAGEMENT, LLC, individually and on behalf of all others similarly situated, Plaintiffs, v. KAMALDEEP GANDHI, YUCHUN MAO a/k/a BRUCE MAO, KRISHNA MOHAN, TOWER RESEARCH CAPITAL LLC, and JOHN DOE Nos. 1 – 5, Defendants.	Case No. 1:18-cv-07041 Hon. John J. Tharp, Jr.

CLASS PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT WITH TOWER RESEARCH CAPITAL LLC

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INTRODUCTION

Plaintiffs Gregory Boutchard ("Boutchard") and Synova Asset Management, LLC ("Synova" and, collectively with Boutchard, "Class Plaintiffs") by and through their undersigned counsel, respectfully move for final approval of the $15,000,000 settlement (the "Settlement") with Defendant Tower Research Capital LLC ("Tower") and entry of the Final Order and Judgment filed herewith, pursuant to Rule 23 of the Federal Rules of Civil Procedure.[1]

This Court previously granted preliminary approval of the Settlement, and in doing so found that it will likely be able to approve the Settlement and certify the Settlement Class. ECF No. 132 ¶¶ 3, 5. The factors that supported preliminary approval of the Settlement have only been bolstered by subsequent events. To date, 12,251 Notice Packets have been distributed to Class Members; thus far only two Class Members have chosen to opt out, and no objections have been made. For the reasons articulated below and in Class Plaintiffs' memorandum in support of their motion for preliminary approval of the Settlement (ECF No. 124) (the "Prelim. Approval Mem."),[2] the Settlement is an excellent result for the Class and the Court should grant final approval.

ARGUMENT[3]

I. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

Settlement of class action litigation is favored by federal courts. *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996). "A district court may approve a class action settlement if it finds it to be fair,

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[1] Unless otherwise noted, capitalized terms not defined herein have the same meaning as in the Stipulation and Agreement of Settlement dated January 22, 2021 (the "Agreement" or "Settlement Agreement"). ECF No. 125-1. Unless otherwise noted, internal citations and quotation marks are omitted and ECF citations are to the docket.

[2] Class Plaintiffs incorporate by reference the arguments made in their motion for preliminary approval, which similarly support this motion for final approval.

[3] The Declaration of Vincent Briganti in Support of (A) Class Plaintiffs' Motion for Final Approval of Class Action Settlement with Tower Research Capital LLC; and (B) Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Litigation Expenses, dated May 27, 2021 ("Briganti Decl. I"), filed herewith, describes the procedural history of this Action.

adequate, and reasonable." *Wong v. Accretive Health, Inc.*, 773 F.3d 859, 862 (7th Cir. 2014); *see Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 634 (7th Cir. 2011). The amended Rule 23 sets out the factors to guide the Court's analysis, with Rule 23(e)(2)(A) and (B) focusing on the procedural fairness of a settlement and Rule 23(e)(2)(C) and (D) focusing on substantive fairness. *See* FED. R. CIV. P. 23 committee notes 2018 amendment (stating Rule 23 focuses on the "core concerns of procedure and substance" when deciding whether to finally approve a settlement).

To approve a class action settlement, Rule 23 requires the Court to find in part that, "the class representatives and class counsel have adequately represented the class [and] the proposal was negotiated at arm's length[.]" FED. R. CIV. P. 23(e)(2)(A)-(B); *see Charvat v. Valente,* No. 12-cv-05746, 2019 WL 5576932, at *5 (N.D. Ill. Oct. 28, 2019) (granting final approval where the class representative and class counsel diligently represented the class and the settlement was reached following an adversarial and contentious process that included mediation).

To assess the Settlement's substantive fairness, the Court considers whether, "the relief provided for the class is adequate," accounting for the following factors:

> (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).

FED. R. CIV. P. 23(e)(2)(C). The Court is also required to confirm that the Settlement "treats class members equitably relative to each other." FED. R. CIV. P. 23(e)(2)(D); *see Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2018 WL 6606079, at *2, 5-6 (S.D. Ill. Dec. 16, 2018).

The amended Rule 23(e)(2) requirements overlap with the factors that courts in this Circuit consider in approving class action settlements:

> [T]he strength of plaintiffs' case compared to the amount of defendants' settlement offer, an assessment of the likely complexity, length and expense of the litigation, an evaluation of the amount of

> opposition to settlement among affected parties, the opinion of competent counsel, and the stage of the proceedings and the amount of discovery completed at the time of settlement.

Schulte v. Fifth Third Bank, 805 F. Supp. 2d 560, 578 (N.D. Ill. 2011) (quoting *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006)). Both Rule 23(e) and Seventh Circuit precedent support the final approval of this Settlement.

A. The Quality Representation of Class Plaintiffs and Lead Counsel in the Action and the Hard-Fought Negotiations Confirm the Procedural Fairness of the Settlement

As described in the Prelim. Approval Mem., Class Plaintiffs are adequate representatives. Their interests completely align with the interests of the Class, as Defendants' alleged manipulation of E-Mini Index Futures and Options on E-Mini Index Futures similarly impacted Class Plaintiffs and the Class. ECF No. 124 at 8-9; *see In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Injury Litig.*, 332 F.R.D. 202, 215 (N.D. Ill. 2019), *aff'd sub nom. Walker v. Nat'l Collegiate Athletic Ass'n*, No. 19-2638, 2019 WL 8058082 (7th Cir. Oct. 25, 2019).

Lead Counsel's extensive class action and Commodity Exchange Act ("CEA") experience, and their efforts during the Action, further confirm their adequacy to serve on behalf of the Class. *See In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1013 (N.D. Ill. 2000), *aff'd In re Mexico Money Transfer Litig.*, 267 F.3d 743 (7th Cir. 2001); *accord* FED. R. CIV. P. 23(g). Lead Counsel were well-versed in the relevant facts and law, conducted an extensive investigation, formulated the theory of this lawsuit, and thus understood the potential strengths and risks of Class Plaintiffs' claims. Lead Counsel gained additional insights on the strengths and weaknesses of Class Plaintiffs' claims while responding to Defendants' motion to dismiss. ECF Nos. 88, 92-93, 100-01. Later in the litigation, Lead Counsel reviewed public disclosures detailing the findings of an investigation conducted by the U.S. Department of Justice ("DOJ") and the U.S. Commodity Futures Trading Commission ("CFTC"), which further informed Class Plaintiffs' litigation

strategy. Finally, Lead Counsel were assisted by Cafferty Clobes Meriwether & Sprengel LLP ("Cafferty"). Cafferty's experience in complex class actions, and their direct assistance in prosecuting these claims with Lead Counsel reinforces the adequacy of Class Plaintiffs' counsel.

There is a strong presumption that a proposed class action settlement is fair, reasonable, and adequate when the settlement is the result of arm's-length negotiations. *See Goldsmith v. Tech. Solutions Co.*, No. 92 C 4374, 1995 WL 17009594, at *3 n.2 (N.D. Ill. October 10, 1995) ("it may be *presumed* that the agreement is fair and adequate where, as here, a proposed settlement is the product of arm's-length negotiations"). Additionally, highly respected mediator Jed D. Melnick, Esq. assisted the parties in reaching the Settlement (*see* Briganti Decl. I ¶¶ 29-33), providing additional indicia of fairness to the settlement process. *See Wong*, 773 F.3d at 864 (affirming the fairness of settlement that "was proposed by an experienced third-party mediator after an arm's-length negotiation").

After evaluating the representatives involved in achieving this Settlement and the nature of their negotiations, the Court should conclude that the Settlement is a procedurally fair result for the Class that satisfies the requirements of Rule 23 and warrants approval by the Court.

B. The Relief Provided and the Class' Favorable Reaction Thus Far Support the Conclusion That the Settlement Is Substantively Fair

While Lead Counsel believe that Class Plaintiffs' claims would have prevailed had the Action advanced, there was nevertheless considerable risk of a less favorable result (including no recovery at all) if litigation went to trial, post-trial motions and appeal. Given the risks, the Settlement achieves a substantial recovery for the Class and unquestionably satisfies the factors for approval under Rule 23(e)(2)(C)-(D) and Seventh Circuit law.

1. The Strength of Class Plaintiffs' Case Compared to the Amount of the Settlement Supports Approval of the Settlement

This Court has noted that "the most important factor" in determining whether a proposed settlement satisfies Rule 23 is the "strength of plaintiff's case on the merits balanced against the amount offered in the settlement." *Schulte*, 805 F. Supp. 2d at 578. Under this factor, courts consider whether the proposed settlement is reasonable in light of the risks of proceeding with the litigation. *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 959-64 (N.D. Ill. 2011).

Courts typically "quantify[ ] the net expected value of continued litigation to the class," *Schulte*, 805 F.3d at 578, using a "range of possible outcomes and ascrib[ing] a probability to each point on the range" to develop a "ballpark valuation." *Synfuel*, 463 F.3d at 653. This ballpark value is compared to the proposed settlement to measure the adequacy of the proposed settlement. *See Eubank v. Pella Corp.*, 753 F.3d 718, 727 (7th Cir. 2014). As this Court has acknowledged, "valuing hypothetical continued litigation is necessarily speculative and therefore an inexact science." *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 493 (N.D. Ill. 2015). Taking into account Defendants' pending motion to dismiss and potential later decisions, a single adverse ruling could extinguish all claims for the entire Class and result in no recovery. As such, the expected value of continued litigation is low.

In contrast, under the proposed $15,000,000 Settlement, Class Members "will realize a significant value as a result of the Agreement," and therefore the settlement should be viewed favorably. *In re AT&T Mobility Wireless Data*, 789 F. Supp. 2d at 959. Lead Counsel engaged experts to assess the range of damages likely caused by Defendants' alleged misconduct. Tower's settlement cooperation was used by Class Plaintiffs' experts to update their previously estimated range of potential damages. As a result of their experts' analysis, Class Plaintiffs contend the

settlement represents between 12% and 29% of the recoverable damages in the Action, without consideration of any potential restitution award available from the DOJ. *See* Briganti Decl. I ¶ 33.

On its own, the proposed Settlement provides a significant recovery for Class Members that is well within the range of reasonableness. *See Schulte*, 805 F. Supp. 2d at 583-84 (listing cases finding that recoveries of between 5.3% and 25.5% were reasonable and approving settlement that provided approximately 10% of the class' estimated maximum potential recovery); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483 (N.D. Ill. 2015) (approving $11 million settlement, which represented a recovery of 0.24% of the class members' estimated losses); *see also In re Ravisent Techs., Inc. Sec. Litig.*, No. Civ. A.00-CV-1014, 2005 WL 906361, at *9 (E.D. Pa. Apr. 18, 2005) (approving settlement, which amounted to 12.2% of damages, and citing study by Columbia University Law School, which determined that "since 1995, class action settlements have typically recovered between 5.5% and 6.2% of the class members' estimated losses.").

Some Class Members may also be eligible to receive a portion of the $32 million victims' compensation fund administered by the DOJ (the "VCA") (*see* Briganti Decl. I ¶¶ 25, 33); participation in this Settlement does not prevent participation in the VCA. While it is unclear how the DOJ is distributing the VCA, if there is complete overlap in the damages being compensated and the market participants affected, the Class' total recovery would be between 38% and 90% of total estimated damages—an extraordinary recovery. *Id.* ¶ 33. On the other hand, Class Members that are ineligible to receive compensation from the VCA will now receive some measure of recovery.

Even if the total damages caused by Defendants' alleged misconduct are close to the high end of Class Plaintiffs' estimated damages range, this Settlement still provides a significant recovery compared to the net expected value of continued litigation. *See Reynolds v. Beneficial*

Nat'l Bank, 288 F.3d 277, 284 (7th Cir. 2002) ("a dollar today is worth a great deal more than a dollar ten years from now."). If Class Members had to await a trial and inevitable appeal, they would not receive benefits for many years, if at all. *See In re AT&T Mobility Wireless Data*, 789 F. Supp. 2d at 961. Instead, the Settlement would provide immediate relief to Class Members and eliminate the risks of continued litigation.

2. The Complexity, Length, and Expense of Further Litigation Supports Approval of the Settlement

In determining the fairness of a settlement, courts also consider "the likely complexity, length and expense of the litigation." *Isby*, 75 F.3d at 1199; *see also* FED. R. CIV. P. 23(e)(2)(C)(i) (courts are to consider "the costs, risks, and delay of trial and appeal" in determining the adequacy of the settlement relief). Commodity futures manipulation cases are generally regarded as among the most challenging class action cases. *See In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d 838, 847 (N.D. Ill. 2015) (noting that "'[i]t would be difficult to imagine litigation presenting issues of greater subtlety and complexity' than those presented in a large antitrust matter involving commodity futures markets"); *see also In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 395 (S.D.N.Y. 1999) (manipulation cases under the CEA are "complex and difficult").

Another issue attendant in continued litigation is the expense of conducting further discovery. The costs associated with discovery in complex class actions can be significant. *In re AT&T Mobility Wireless Data*, 789 F. Supp. 2d at 964 (citing Nicola F. Sharpe, *Corporate Cooperation through Cost-Sharing*, 16 MICH. TELECOMM. & TECH. L. REV. 109, 110 (2009)) ("Discovery accounts for about 50% of all litigation costs and up to 90% of the costs in the top 5% of the most expensive cases."). Given the highly technical nature of Defendants' alleged spoofing and the data-rich environment relating to futures trading, it is very likely that discovery costs in

this Action would be substantial. Such costs would have been amplified by the involvement of experts to further analyze and explain the data and their relevance to the case.

In addition, although the Court granted Class Plaintiffs' motion for preliminary approval, there is no assurance the Court would certify a litigation class or that the litigation class would be maintained throughout the Action. This is an additional significant risk to the ultimate recovery for the proposed Class. *See Averett v. Metalworking Lubricants*, No. 1:15-CV-01509-JMS, 2017 WL 4284748, at *2, 5 (S.D. Ind. Sept. 27, 2017) (granting final approval and noting that a positive outcome at trial was not a foregone conclusion due to numerous risks, including class certification); *Culver v. City of Milwaukee*, 277 F.3d 908 (7th Cir. 2002) (decertification had the same effect on the members of the class as dismissal of the class action).

At this juncture, the $15 million Settlement results in an immediate, substantial, and tangible recovery for the Class. Consideration of this factor supports approval of the Settlement when compared to the many potential hurdles that would remain if litigation were to continue.

3. The Lack of Opposition to the Settlement Supports Final Approval

To further support approval of a settlement, courts look to the class' reaction to the settlement. *Meyenburg v. Exxon Mobil Corp.*, No. 3:05-CV-15-DGW, 2006 WL 5062697, at *6 (S.D. Ill. June 5, 2006) ("The settlement is strongly supported by class members as evidenced by the fact that so few potential class members sought to opt out or objected."); *see In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d at 1021 (granting final approval of a class action settlement and stating that more than "99.9% of class members have neither opted out nor filed objections . . . is strong circumstantial evidence in favor of the settlement"), *aff'd*, 267 F.3d 743 (7th Cir. 2001). It is important to note that the existence of an objection to a settlement does not by itself prevent the court from approving the agreement. *In re AT&T Mobility Wireless Data*, 789

F. Supp. 2d at 958, 965-66 (finding that objections from a "small subset of Class Members" does not warrant denying approval of settlement); *accord Mangone v. First USA Bank*, 206 F.R.D. 222, 227 (S.D. Ill. 2001). A relatively small number of class member objections, or no objections, is an indication of a settlement's fairness. *Swift v. DirectBuy, Inc.*, 2013 WL 5770633, at *2, 6 (N.D. Ind. Oct. 24, 2013) (the seventeen filed objections were described by the court as "limited opposition" that "favors settlement"). Similarly, a small number of opt outs from the class supports approval of settlement. *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d at 1021 (a low number of opt outs is viewed as "strong circumstantial evidence" in favor of settlement approval).

The Class Notice advised Class Members of their right to object to the terms of the Settlement, the Distribution Plan, and Lead Counsel's request for attorneys' fees and reimbursement of expenses and to opt out of the Settlement. *See* Declaration of Steven J. Straub dated May 27, 2021 ("Straub Decl."), Ex. A at 9-10. To date, no Class Member has objected to the Settlement, the Distribution Plan, or Lead Counsel's request for an award of attorneys' fees and reimbursement of expenses, and only two potential Class Members have opted out of the Settlement. *See* Briganti Decl. I ¶ 42; Straub Decl. ¶¶ 22, 24. In *Kolinek v. Walgreen Co.*, 311 F.R.D. 483 (N.D. Ill. 2015), of the 9,053,718 notified class members, twenty individuals (0.0002209%) objected to the settlement, and 151 (0.001668%) opted out. These levels support a finding of the settlement's reasonableness. *See, e.g., In re Sw. Airlines Voucher Litig.*, No. 11 C 8176, 2013 WL 4510197, at *7 (N.D. Ill. Aug. 26, 2013) (finding an opt-out and objection rate of less than 0.01% supportive of the reasonableness of settlement). While Class Members have time to present any objections or to opt out of the Class, the low level of activity thus far supports approval of the proposed Settlement. To the extent any objections are filed, Class Plaintiffs and Lead Counsel will address them in a filing to the Court in advance of the Fairness Hearing.

4. Lead Counsel Endorse the Settlement

The opinion of competent counsel is relevant to the question of whether a settlement is fair, reasonable, and adequate under Rule 23. *Synfuel*, 463 F.3d at 653; *see also In re AT&T Mobility Wireless Data*, 789 F. Supp. 2d at 965. Indeed, courts place "significant weight" on counsel's "unanimously strong endorsement" of the settlement. *Meyenburg,* 2006 WL 5062697, at *5.

This case has been litigated and settled by experienced and competent counsel on both sides. Lead Counsel are well known for their many years of experience and success in complex class action litigation. As reflected in their resume (*see* ECF No. 125-7), Lead Counsel have extensive expertise in litigating commodity and other types of class action cases, which supports the weight of Lead Counsel's recommendation. *See* 5 James Wm. Moore, MOORE'S FEDERAL PRACTICE §23.164[4], at 23-509 (3d ed. 2004) ("The more experience that class counsel possesses, the greater weight a court tends to attach to counsel's opinions on fairness, reasonableness, and adequacy."). Lead Counsel concluded that the Settlement is in the best interest of the Class after weighing the substantial benefits of the Settlement against the obstacles to obtaining a better recovery after continued litigation. Briganti Decl. I ¶ 5. Lead Counsel's decision, therefore, should be given deference by the Court. *See Isby*, 75 F.3d at 1200 (the court placed significant weight on the opinion of plaintiffs' well-respected attorneys); *Armstrong v. Bd. of School Dirs.*, 616 F.2d 305, 325 (7th Cir. 1980) ("While the court . . . should not abdicate its responsibility to review a [class settlement] because counsel support it, the court is entitled to rely heavily on the opinion of competent counsel.").

5. The Stage of the Proceedings and the Amount of Discovery Completed Weigh in Favor of the Settlement's Approval

Courts in the Seventh Circuit consider the stage of the proceedings to ensure that the plaintiff has sufficient information to evaluate both its case and the adequacy of the settlement

proposal. *In re AT&T Mobility Wireless Data*, 789 F. Supp. 2d at 958; *Isby*, 75 F.3d at 1199-1200. A court may approve settlements reached at an early stage of the case where it is "satisfied that the discovery and investigation conducted by class counsel prior to entering into settlement negotiations was extensive and thorough . . . ." *Isby*, 75 F.3d at 1200.

As discussed herein and in their motion for preliminary approval, while this Action resolved at an early stage, that resolution occurred after Class Plaintiffs and Lead Counsel had engaged in substantial investigation and analyses that were then used to evaluate the merits of the settlement in light of the challenges of the Action. *See* Briganti Decl. I ¶¶ 11-13, 36, 38; ECF No. 124 at 15-16. Before executing the Stipulation, Lead Counsel analyzed over 150,000 documents produced in confirmatory discovery by Tower, including over 100,000 chat and email messages and trading data for the entirety of the relevant time period. Briganti Decl. I ¶ 36. The confirmatory discovery added to information Lead Counsel had already developed during their investigation, the settlement mediation, and provided further context for evaluating the adequacy of the Settlement for Class Members. *Id.* ¶¶ 36, 38. This factor therefore also weighs strongly in favor of the Court's approval of the Settlement.

6. The Settlement Equitably Distributes Relief Among Class Members and Provides for a Reasonable Attorneys' Fee Award, Satisfying the Remaining Rule 23(e)(2) Factors for Approval

In approving a settlement, Rule 23(e)(2) also requires courts to evaluate the effectiveness of distributing relief to Class Members (including whether Class Members are treated equitably in the process), the proposed attorney's fee award, and if applicable any other agreements that are related to the Settlement. FED. R. CIV. P. 23(e)(2)(C)(ii)-(iv); 23(e)(2)(D). As discussed in the Prelim. Approval Mem., the Distribution Plan uses readily accessible information about E-Mini Index Futures and Options on E-Mini Index Futures transactions to allocate *pro rata* the Net Settlement Fund to Authorized Claimants based on an estimate of the impact of Defendants'

alleged manipulation. *See* ECF No. 124 at 16-19. A reasonable minimum payment will be determined to ensure that the administrative costs of issuing small *pro rata* payments do not become a cost burden on the Net Settlement Fund. The Distribution Plan created by Lead Counsel ensures that every Class Member who submits a valid claim will receive a portion of the settlement fund, ensuring that the fairness test is met. *City of Greenville v. Syngenta*, 904 F. Supp. 2d 902, 911 n.8 (S.D. Ill. 2012) (finding proposed allocation plan to be fair where it ensured that every class member who submitted a valid claim would receive a portion of the settlement fund). Accordingly, the effectiveness of the Distribution Plan and the equitable manner in which it treats Class Members should weigh in favor of approval of the Distribution Plan and the Settlement.

Lead Counsel seek attorneys' fees of 33% (or $4,950,000) of the Settlement Fund and reimbursement of $203,060.89 for litigation costs and expenses. As further described in Lead Counsel's Fee and Expense Application, filed herewith, the requested award is consistent with awards granted in similarly complex and risky class actions, and is warranted in this action. Similarly, Class Plaintiffs' request for an incentive award is comparable to awards issued in other class actions. Absent the efforts of Class Plaintiffs and Lead Counsel, the Class would likely not have obtained this enhanced recovery, and the issuances of these awards from the Settlement is appropriate and in the interests of the Class.

Lastly, as previously noted, the only additional agreement related to this Settlement is a supplemental agreement that provides Tower a qualified right to terminate the Settlement under certain circumstances. *See* ECF No. 124 at 20-21. Such an agreement is common in class action settlements, and consequently does not impact the substantive fairness of the Settlement.

For the foregoing reasons, the Settlement is in all respects fair, reasonable and adequate, and should be approved.

II. THE PROPOSED CLASS SHOULD BE CERTIFIED FOR FINAL APPROVAL OF THE PROPOSED SETTLEMENT

The Court preliminarily certified the Class for purposes of the proposed Settlement, finding that the Rule 23(a) and 23(b)(3) prerequisites were satisfied for settlement purposes. ECF No. 132. For the same reason as argued in the Prelim. Approval Mem. (*see* ECF No. 124 at 21-25), the Court should grant final certification of the Class for purposes of the Settlement.

Bolstering Class Plaintiffs' earlier arguments in support of certification of settlement class is the fact that over 12,000 Notice Packets have been issued to potential Class Members. As described in the Straub Decl., Class Notice was sent to, among others, 12,251 market participants identified through their E-Mini Index Futures or Options on E-Mini Index Futures transactions or clearing activity on the Chicago Mercantile Exchange and Chicago Board of Trade. Straub Decl. ¶ 12. The size of the notice program further confirms that the numerosity requirement under Rule 23(a) is satisfied. *Murray v. E*Trade Fin. Corp.*, 240 F.R.D. 392, 396 (N.D. Ill. 2006) (as few as forty members can render joinder impractical).

In the same vein, the size of the Class confirms that certifying a settlement class is a superior option for resolving this Action. *Carnegie v. Household International, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The more claimants there are, the more likely a class action is to yield substantial economies in litigation."). It is worth noting that despite the size of the class, which includes a number of institutional investors, no other class member has commenced an individual action. *See Curry v. Kraft Foods Glob., Inc.*, No. 10 C 1288, 2011 WL 4036129, at *7 (N.D. Ill. Sept. 12, 2011) (superiority satisfied where there was a large class whose individual recoveries would be "relatively small recovery—at least relative to the costs of individually litigating the case" such that many individual class members would be unlikely to bring their claims); *accord In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d at 1013-14 (where individual claims would

"average approximately $25 per transaction," finding superiority is met because the "individual claims would allow for a far less efficient and fair resolution of the class members' claims."). Therefore, Class Plaintiffs' request that the Action finally be certified as a class action, pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure.

III. THE PROPOSED NOTICE PROGRAM SATISFIES RULE 23 AND DUE PROCESS BY PROVIDING CLASS MEMBERS WITH ADEQUATE NOTICE OF SETTLEMENT

Rule 23(e)(1) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the [settlement]." FED. R. CIV. P. 23(e)(1). In addition, "[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." FED. R. CIV. P. 23(c)(2)(B). The Class Notice plan meets these requirements. *See generally* Straub Decl. More than 12,000 mailed notices were distributed to Class Members based on information obtained from the CME concerning traders in E-Mini Index Futures and Options on E-Mini Index Futures, as well as additional outreach to institutions that may have transacted in these products. *Id.* ¶¶ 4-9, 12. The Supreme Court has consistently found that mailed notice satisfies the requirements of due process. *See, e.g.*, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950). The Class Notice plan combined mailed notice with published and online notice to inform potential Class Members that may not have been individually identified. *See Mullins v. Direct Digital, LLC*, 795 F.3d 654, 665 (7th Cir. 2015) (discussing that actual notice to all class members is not a requirement because it may be impossible to identify some class members). The Publication Notice was printed in at least seven publications, and banner advertisements on at least six websites directed potential Class Members to the Settlement website, eminifuturesclassactionsettlement.com. Straub Decl. ¶¶ 15-17. As a result of these efforts, the Settlement Website has been visited more than 5,000 times. *Id.* ¶ 18.

In addition to directing notice in a reasonable manner, the contents of the notice were sufficient, as they informed Class Members of the important aspects of the Settlement. *See In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 351 (N.D. Ill. 2010). Class Members have been advised on the nature of the action, including the relevant claims, issues and defenses. Straub Decl. Ex. A at 4-5. Class Members have been afforded a full and fair opportunity to consider the proposed Settlement, exclude themselves from the Settlement, and to respond and/or appear in Court. Further, the Class Notice fully advised Class Members of the binding effect of the judgment on them. *Id.*, Ex. A at 8. The Mailed Notice and Publication Notice were written in clear and concise language, which reasonably conveyed the necessary information to the average class member. *See F.C.V., Inc. v. Sterling Nat'l Bank*, 652 F. Supp. 2d 928, 943 (N.D. Ill. 2009).

The Court should find that the Class Notice plan as implemented was reasonable and satisfied due process.

CONCLUSION

For the foregoing reasons, Class Plaintiffs respectfully request that the Court enter the proposed Final Order and Judgment, filed herewith (i) granting Final Approval of the Settlement; (ii) certifying the Settlement Class; (iii) approving the application of the Distribution Plan to the Settlement; and (iv) providing other such relief required to effectuate the Settlement.

Dated: May 27, 2021
White Plains, New York

LOWEY DANNENBERG, P.C.

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