

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE OPTIVER COMMODITIES LITIGATION

This Document Relates To: All Actions

Master File No.

08-CV-6842 (LAP)

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR
FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

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I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure and the Court’s January 7, 2015 Order (the “Preliminary Approval Order”),¹ Plaintiffs,² on behalf of themselves and the Settlement Class (defined below), respectfully submit this memorandum in support of their motion for final approval of the Stipulation and Agreement of Settlement executed by Plaintiffs and Defendants (the “Settlement Agreement” or the “Settlement”).³ Plaintiffs respectfully move the Court to grant final approval certifying the Settlement Class and finding the Settlement to be fair, reasonable and adequate and enter the [Proposed] Order Finally Approving Proposed Settlement.

The Settlement Agreement was executed by Plaintiffs and Defendants⁴ on July 24, 2014. The Settlement provides guaranteed all-cash settlement funds of \$16.75 million to the Class. In accordance with the terms of the Settlement Agreement, on January 9, 2015 Defendants transferred \$16.75 million into an escrow account which is currently earning interest for the benefit of the Class. If finally approved by this Court, the Settlement Agreement will resolve all claims in this Action, including Plaintiffs’ claims that Defendants manipulated prices and caused losses in the trading of New York Mercantile Exchange (“NYMEX”) Light Sweet Crude Oil, New York Harbor Heating Oil, and New York Harbor Gasoline futures contracts during the Class Period. ECF No. 49 ¶¶ 1-2.

¹ Order Preliminarily Approving Proposed Settlement, Scheduling Hearing for Final Approval Thereof, and Approving the Proposed Form and Program of Notice to the Class. ECF No. 67.

² “Plaintiffs” refers to Plaintiffs Michael Amdur, Brendan Cody, Charles Hynes and Richard White. Plaintiffs were appointed as representatives of the Settlement Class under the Preliminary Approval Order. *Id.* ¶ 5.

³ A copy of the Settlement Agreement and exhibits attached thereto are submitted as Exhibit A to the Declaration of Bernard Persky, Esq. (“Persky Decl.”). Capitalized terms herein that are defined in the Settlement Agreement have the same meaning as in the Settlement Agreement.

⁴ “Defendants” refers to Defendants Optiver US LLC, Optiver Holding B.V., Optiver VOF, Christopher Dowson, Bastiaan van Kempen, and Randal Meijer.

As demonstrated herein, the Settlement and consideration provided thereunder are manifestly fair, reasonable and adequate in light of the unique complexity and substantial risks in litigating to judgment the merits of this case, in addition to the other pertinent factors under *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) (“*Grinnell*”). Plaintiffs brought this class action against Defendants for manipulation in violation of the Commodity Exchange Act (“CEA”), the Sherman Antitrust Act, NYMEX rules and the common law. CEA manipulation claims have been recognized as exceedingly complex and “notoriously difficult to prove.” *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 395 (S.D.N.Y. 1999) (Pollack, J.) (comparing the level of complexity and risk of CEA manipulation claims to, for example, less risky securities fraud cases). As a result, risks faced by the Plaintiffs are “extremely high.” *Id.* at 398.

In light of the recognized complexity and risks associated with this type of case, the Settlement is an outstanding result for Plaintiffs and the Class. After years of intensive and adversarial settlement negotiations, the Parties were able to reach this excellent Settlement for the benefit of the Class. Even after the Parties reached an agreement in principle, they engaged in a prolonged period of intensive confirmatory discovery, including third-party subpoenas to NYMEX, to test the veracity of Defendants’ defenses. In that regard, Plaintiffs conducted rigorous analysis of the discovery obtained and enlisted a prominent commodity manipulation expert for advice and guidance. The reasonableness of the Settlement is supported by the fact that Plaintiffs’ counsel recovered more in this Settlement for Plaintiffs and the Class than the CFTC obtained as fines in its civil prosecution of Defendants.⁵ Notably, as explained herein in

⁵ *U.S. Commodity Futures Trading Commission v. Optiver US, LLC, Optiver Holding B.V., Optiver VOF, Christopher Dowson, Bastiaan van Kempen, and Randal Meijer*, 08-CV-6560 (LAP) (S.D.N.Y.), D.E. 45; see CFTC Press Release, *Federal Court Orders \$14 Million in Fines and Disgorgement Stemming from CFTC Charges against Optiver and Others for Manipulation of NYMEX Crude Oil, Heating Oil, and Gasoline Futures*

Section III.B.2(f), *infra*, the CFTC's burden to establish CEA manipulation claims is lower than Plaintiffs' burden.

The Settlement has been preliminarily approved by the Court and multiple forms of notice have been provided to the Class, including direct mail notice expected to potentially reach all persons who are members of the Settlement Class. Based on the information contained herein, Plaintiffs now respectfully request that the Court find that the Settlement is fair, reasonable and adequate and, accordingly, grant final approval of the Settlement.

II. STATEMENT OF FACTS

A. Plaintiffs' Allegations Against the Defendants

Plaintiffs allege that each Defendant, between March 2, 2007 and March 26, 2007, inclusive (the "Class Period"), caused and aided and abetted the causation of artificial prices in NYMEX Light Sweet Crude Oil, NYMEX New York Harbor Heating Oil, and NYMEX New York Harbor Gasoline futures contracts, to the extent such contracts were traded or held at any time between March 2, 2007 through March 26, 2007, inclusive (the "Class Contracts"). Plaintiffs allege that Defendants violated the Commodity Exchange Act ("CEA"), 7 U.S.C. §§ 1, *et seq.*, the Sherman Antitrust Act ("Sherman Act"), 15 U.S.C. §§ 1 and 2, NYMEX rules, and the common law by amassing dominant NYMEX Trading at Settlement ("TAS") contract positions and offsetting such positions through NYMEX futures contracts transactions in the opposite direction of the TAS positions during the Closing Period.⁶ *See, e.g.*, ECF No. 49 at ¶¶ 12, 17, 100.

During the Closing Period, Defendants allegedly overpaid to buy and undersold to sell the Class Contracts and thereby caused the Volume Weighted Average Prices ("VWAP") of

Contracts and Making False Statements, Apr. 19, 2012, <http://www.cftc.gov/PressRoom/PressReleases/pr6239-12>.

⁶ The Closing Period is defined in Paragraph 8 of the Complaint.

those contracts to be artificial. During the relevant period, NYMEX rules provided that the settlement price of the spot month futures contract was the VWAP of all outright transactions which occur in that delivery month during the Closing Period.

Plaintiffs allege that Defendants' large volume of trades during the Closing Period consistently caused a statistically significant, persistent and non-transitory impact on prices for NYMEX Crude Oil, Heating Oil and Gasoline futures contracts. Plaintiffs claim that Defendants' conduct caused Plaintiffs and others similarly situated to transact in an artificial and manipulated market at manipulated and artificial prices during the Class Period. ECF No. 49 at ¶¶ 24-26. Plaintiffs further allege that Plaintiffs and Settlement Class members who held positions in Class Contracts, both at the times that Defendants allegedly manipulated the prices of those contracts and thereafter, liquidated their positions in such contracts at artificial prices and thereby suffered damages (even if such liquidations occurred after the Class Period). *Id.* at ¶ 27. Plaintiffs also allege that Defendants' manipulation constituted a contract, combination or conspiracy in restraint of trade and an attempt to monopolize and monopolization of the market for the Class Contracts. *Id.* at ¶¶ 91, 229-236. Finally, Plaintiffs claim that Defendants manipulated the markets for NYMEX Light Sweet Crude Oil, NYMEX New York Harbor Heating Oil, and NYMEX New York Harbor Gasoline futures contracts. *Id.* at ¶¶ 3-8, 193-194, 237-243.

The claims alleged in Plaintiffs' Consolidated Amended Class Action Complaint (Persky Decl. Ex. B)⁷ (the "Complaint") arise out of the same general set of facts as those in a related action brought against Defendants by the Commodity Futures Trading Commission ("CFTC"). *See U.S. Commodity Futures Trading Commission v. Optiver US, LLC, Optiver Holding B.V.*,

⁷ "Persky Decl." refers to the Declaration of Bernard Persky, Esq. in Support of Motion for Final Approval of Settlement submitted herewith.

Optiver VOF, Christopher Dowson, Bastiaan van Kempen, and Randal Meijer, 08-CV-6560 (LAP) (S.D.N.Y) (the “CFTC Action”). On April 19, 2012, Defendants settled the CFTC Action. In connection with that settlement, the Court entered a Final Consent Order and Permanent Injunction, Civil Monetary Penalty and Other Relief, pursuant to which the CFTC obtained \$14 million in civil penalties and disgorgement from Defendants. Defendants did not admit or deny the allegations against them in the CFTC Action.

While the claims alleged here arise out of the same set of facts as the CFTC’s complaint, Plaintiffs, through years of detailed confirmatory and related discovery, developed an extremely comprehensive 130-page Complaint that far surpassed the level of detail contained in the CFTC’s complaint in terms of specifying the particulars of Defendants’ unlawful conduct. As a review of the extraordinarily detailed Complaint indicates, Plaintiffs set forth the particulars of: (1) Defendants’ intention to manipulate prices; (2) Defendants’ manipulation of the prices; and (3) the resulting intended effects of Defendants’ conduct on the market and harm to Plaintiffs.

B. Procedural History of the Action

A detailed procedural history of the Action is set forth in Section II of the Persky Declaration.

C. The Settlement Has Been Preliminarily Approved

This Court granted preliminary approval of the Settlement on January 7, 2015. ECF No. 67. As recognized by this Court, the Settlement Agreement was entered into after arm’s-length negotiations by experienced counsel. *Id.* ¶ 10.

A final approval hearing before the Court is scheduled for May 19, 2015 to consider the fairness, reasonableness and adequacy of the Settlement Agreement (the “Fairness Hearing”). *Id.* ¶ 7.

D. The Settlement Class Has Been Preliminarily Certified

Under the Preliminary Approval Order, the Court preliminarily certified the Settlement Class for purposes of the Settlement, finding that the applicable provisions of Rule 23 of the Federal Rules of Civil Procedure were satisfied. ECF No. 67 at ¶ 3. The Settlement Class is defined as:

All Persons that purchased, sold or held NYMEX Light Sweet Crude Oil futures contracts, NYMEX New York Harbor Heating Oil futures contracts or NYMEX New York Harbor Gasoline futures contracts at any time from March 2, 2007 through March 26, 2007. Excluded from the Settlement Class are (i) members of the judiciary assigned to this case, including their immediate family members; (ii) Class Counsel and their employees; (iii) Defendants and any parent, subsidiary, affiliate, employee or agent of any Defendant, including Defendants' counsel; and (iv) Opt Outs.

Id.

E. Defendants' Positions During the Settlement Negotiations

A critical issue in this case is whether Defendants' trading strategy was, in fact, manipulative. Defendants argued, and some contemporaneous evidence provided by Defendants in the confirmatory discovery tended to support, that their trading strategy did *not* inject artificial forces of supply or demand into the market, and that Defendants allegedly did not intend to inject such forces into the market. While Plaintiffs sharply dispute that evidence (*see* Section D below), at a minimum, it could be argued that such evidence created a triable issue of fact, the outcome of which could not be predicted with any certainty.

In addition, Defendants' June 12, 2013 letter to Plaintiffs, describing the alleged deficiencies in Plaintiffs' Complaint and provided pursuant to the Court's Order dated March 14, 2013, raised a number of legal arguments in favor of dismissal of the Complaint. Among other things, Defendants argued that Plaintiffs failed to allege facts that plausibly suggest Defendants

intended to manipulate the prices of Class Contracts, a required element of a manipulation claim under the CEA. To the contrary, Defendants contended that their large quantity of futures trading during the Closing Period could be explained by their desire to hedge their TAS positions, a legitimate activity. In addition to this argument, Defendants also attacked the scope of Plaintiffs' alleged damages as well as the plausibility of Plaintiffs' Sherman Act, unjust enrichment and CEA secondary liability claims.

At the time the settlement in principle was reached, Plaintiffs were preparing to amend their Complaint with the strong likelihood that Defendants would ultimately file a motion to dismiss. Assuming Plaintiffs survived the Defendants' motion to dismiss, they would have faced further risks, including class certification and interlocutory appeal thereof, summary judgment, *Daubert* and other *in limine* motions. Even if successful, the Plaintiffs would face the additional risk of a trial and, to the extent successful at trial, post-trial motions and subsequent appeals.

F. Plaintiffs' Position at the Time of the Settlement Agreement

Prior to entering the Settlement Agreement, Class Counsel obtained, reviewed and analyzed all of the documents Defendants had produced to the CFTC as well as the records of the Defendants' relevant transactions recorded in the NYMEX streetbook. Based on such prolonged and extensive discovery and intensive factual investigation, analyses and research, as well as significant experience with CEA manipulation claims, and more than five years of arguments/negotiations with Defendants' counsel about the application of CEA manipulation, antitrust and common law to the facts here, Class Counsel were well informed of the prospective risks, rewards, arguments, and other issues that would be involved with continued prosecution of the claims here.

Class Counsel's position just prior to entering into the Settlement Agreement was that the evidence indicated that Defendants intentionally overpaid to buy and undersold to sell NYMEX

Light Sweet Crude Oil, NYMEX New York Harbor Heating Oil, and NYMEX New York Harbor Gasoline futures contracts during the Closing Period and thereby caused the VWAP of the Class Contracts to be artificial.

As to the critical issue of whether Defendants' trading strategy was manipulative, Plaintiffs argued, and certain email and other evidence indicated, that Defendants calculated the transfer of the supply or demand in a particular market in a way to have a greater impact on prices in the futures market than legitimate trading would have had.

Class Counsel believed that the proof of such unlawful manipulation could support and prove damages under the CEA as well as the antitrust laws, which would be trebled if Plaintiffs were successful in prosecuting their antitrust claims. However, Class Counsel could not disregard or ignore Defendants' substantial legal and factual arguments. This included the risk that many of the allegedly manipulative trades would not be considered to be manipulative because Defendants ostensibly intended their heavy trading during the Closing Period to serve as a hedge to their TAS positions or their trading activity was nothing more than that of a legitimate market-maker.

In the foregoing context, Class Counsel's analysis was, and is, that the all-cash payment of \$16.75 million under the Settlement Agreement will provide fair, reasonable and adequate compensation to claiming Settlement Class members. *See* III.B.2(f), *infra* (elaborating on the settlement recovery compared to other metrics and the likely payout to claiming Settlement Class members based on prior experience with the number of settlement class members who do not file a claim).

G. The Terms of the Settlement Agreement

The material terms of the Settlement Agreement and the exhibits attached thereto are summarized below.

1. The Settlement Will Provide \$16,750,000 in Cash Consideration To The Class

The Settlement will provide \$16,750,000 in cash to the Class. Persky Decl. Ex. A ¶ 3.

2. The Release and Covenant Not to Sue

In exchange for the foregoing consideration, Plaintiffs and the Settlement Class have agreed to release and discharge Defendants from any and all claims against Defendants for losses on their transactions in Class Contracts during the Class Period as fully set forth in Paragraph 8 of the Settlement Agreement. *Id.* Ex. A ¶ 8.

3. The Settlement Class

For purposes of the Settlement Agreement, the Parties have proposed certification of the Settlement Class defined as follows:

All Persons that purchased, sold or held NYMEX Light Sweet Crude Oil futures contracts, NYMEX New York Harbor Heating Oil futures contracts or NYMEX New York Harbor Gasoline futures contracts at any time from March 2, 2007 through March 26, 2007. Excluded from the Settlement Class are (i) members of the judiciary assigned to this case, including their immediate family members; (ii) Class Counsel and their employees; (iii) Defendants and any parent, subsidiary, affiliate, employee or agent of any Defendant, including Defendants' counsel; and (iv) Opt Outs.

Id. Ex. A ¶ 1(kk).

4. Right to Opt-Out

Given the timing of the Settlement Agreement, if, notwithstanding the foregoing, any Settlement Class members do not have the same judgment about the fair compensation provided here as does Class Counsel, then those Settlement Class members have the right to opt out of the Settlement Agreement. *Id.* Ex. A ¶ 10. As of April 17, 2015, three days following the postmark date for opt-outs, no Settlement Class member has opted out. *Id.* ¶ 25.

5. Notice

As recognized by the Court in the Preliminary Approval Order, the Class Notice Plan is comprehensive and calculated to reach – by direct mail alone – potentially all persons who are members of the Settlement Class. In addition, notice was provided by advertisements in The Wall Street Journal, Futures Magazine, and Technical Analysis of Stocks and Commodities Magazine. Notice was also provided by a settlement website that is searchable on the internet. *See* <http://www.nymextassettlement.com/>.

Direct Mail Notice. The Class Notice Plan includes mailing notice of the Settlement, substantially in the form of Exhibit 2 to the Settlement Agreement, by United States first class mail, postage prepaid, to (a) all large traders in Class Contracts whose names have been obtained by Plaintiffs pursuant to a subpoena to the NYMEX; (b) all clearing brokers on the NYMEX whose names have been obtained by Plaintiffs pursuant to a subpoena to the NYMEX, with the direction that such clearing brokers should forward the Mailed Notice to all of their customers who bought, sold or held Class Contracts or should provide the names and addresses of such customers to the Settlement Administrator; and (c) any additional, reasonably identifiable potential Settlement Class members.

Publication Notice. The notice program also included publishing notice of the Settlement as follows: (a) for two consecutive months in Futures Magazine; (b) on the Futures Magazine website for one month; (c) for two consecutive months in Technical Analysis of Stocks and Commodities Magazine; (d) on the Technical Analysis of Stock and Commodities Magazine website for one month; and (e) in two editions of The Wall Street Journal as a quarter page notice. Finally, notice of the Settlement Agreement was also published on a website created by the Settlement Administrator that is searchable on the internet. *See* <http://www.nymextassettlement.com/>.

6. Termination Rights

The Settlement Agreement gives the Parties limited rights to terminate the Settlement prior to entry of final judgment. Persky Decl. Ex. A ¶ 17. In addition, the Settlement Agreement also refers to a confidential supplemental agreement describing terms and conditions pursuant to which Defendants may elect to terminate the Settlement Agreement. That confidential supplemental agreement has been filed with the Court under seal. *Id.* Ex. A ¶ 17(a).

7. No Reversion Rights

There will be no reversion rights to Defendants under the Settlement Agreement.

H. Notice of the Settlement Agreement Was Provided to the Class in a Manner Which the Court has Found to Fully Comply With the Requirements of Rule 23 and Due Process

Notice of the Settlement was provided to the Class in the manner provided for under the Preliminary Approval Order. *See* Section III.C., *infra*. The Court previously found that the approved form and method of notice provided to the Class is the best notice practicable under the circumstances and fully satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure and due process of the law. Preliminary Approval Order, ECF No. 67, ¶ 18.

III. ARGUMENT

A. The Legal Standards for Final Approval of a Class Action Settlement

The settlement of class action claims must be court-approved. Fed. R. Civ. P. 23(e). Approval is contingent upon a district court's finding that the settlement is fair, reasonable and adequate. Fed. R. Civ. P. 23(e)(2); *see also Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000). To make this determination, courts generally consider: (1) procedural fairness (the "negotiating process leading up to the settlement"); and (2) substantive fairness ("the settlement's substantive terms."). *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001).

With regard to procedural fairness, a proposed class action settlement enjoys a strong presumption that it is fair, reasonable, and adequate if it was reached through “‘arm’s-length negotiations between experienced, capable counsel after meaningful discovery.’” *Blessing v. Sirius Xm Radio, Inc.*, 507 Fed. Appx. 1, 3 (2d Cir. 2012) (quoting *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009)). “A proposed settlement is substantively fair if the nine factors outlined in *City of Detroit v. Grinnell Corp.*, weigh in favor of that conclusion.” *Id.* (citing *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 117 (2d Cir. 2005)). It is well established in the Second Circuit that there is a strong public interest in favor of settling litigation, particularly class action litigation. *Bano v. Union Carbide Corp.*, 273 F.3d 120, 129-30 (2d Cir. 2001); *see also In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280 (S.D.N.Y. 1999) (“The arm’s-length compromise of a disputed claim has long been favored by the courts . . . This is particularly true of class actions.”); *see also Newberg on Class Actions*, §11.41, at 87 (4th ed.) (“[t]he compromise of complex litigation is encouraged by courts and favored by public policy”).

The proposed Settlement is an outstanding result for the Class and amply satisfies the criteria for final approval.

B. Final Approval Should be Granted Because the Settlement is Fair, Reasonable and Adequate

1. The Settlement Agreement is Procedurally Fair

As previously found by the Court, “the Settlement Agreement was entered into at arm’s-length by experienced counsel.” Preliminary Approval Order, ECF No. 67, ¶ 10. The experienced, capable counsel who negotiated the Settlement include Class Counsel, who have significant experience with complex class action litigation involving CEA and antitrust claims, and Defendants’ counsel, the well-respected law firm of Schiff Hardin LLP.

The Settlement was reached after extensive arguments and negotiations between these experienced counsel for over five years regarding issues such as the application of CEA manipulation, antitrust law and common law to the facts in this case. The arguments and negotiations included numerous telephone conferences, and significant e-mail correspondence between the Parties' counsel.

Moreover, Class Counsel performed rigorous research, extensive confirmatory discovery and intensive factual investigation, including review and analysis of all documents Defendants produced to the CFTC and Defendants' relevant transactions recorded in the NYMEX streetbook (obtained through third-party subpoenas). As a result of the foregoing, Class Counsel were well informed of the prospective risks, rewards, arguments, and other issues involved with making this Settlement now or continuing to prosecute the claims here. Persky Decl. ¶¶ 4, 12, 30.

In light of Class Counsel's considerable prior experience in litigating complex class actions involving CEA and antitrust claims, their knowledge of the strengths and weaknesses of Plaintiffs' claims based on their extensive work, and their assessment of the Settlement Class's likely recovery following class certification, trial and appeal, Class Counsel concluded that the Settlement Agreement is fair, reasonable and adequate and in the best interests of Plaintiffs and the Class. The foregoing creates a strong presumption that the Settlement is fair, reasonable and adequate. *Maley v. Del Global Technologies*, 186 F.Supp.2d 385, 366 (S.D.N.Y. 2002) (citing *In re Paine Webber Ltd. Partnerships. Litig.*, 171 F.R.D. 104, 124 (S.D.N.Y.1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997)) ("great weight" is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation); *see also Chatelain v. Prudential-Bache Securities, Inc.*, 805 F. Supp. 209, 212 (S.D.N.Y. 1992) ("[a] substantial factor

in determining the fairness of the settlement is the opinion of counsel involved in the settlement”).

2. The Settlement is Substantively Fair, Reasonable and Adequate Under Each of the Nine “Grinnell” Factors

Courts determine the substantive fairness of a settlement by comparing “the terms of the compromise with the likely rewards of litigation.” *Mavwalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079-80 (2d Cir. 1995). In making the determination, the settlement agreement must be considered as a whole. *Id.* at 1079. At the final approval stage, courts in the Second Circuit typically consider the following nine “Grinnell” factors:

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

Grinnell, 495 F.2d at 463. “[N]ot every [Grinnell] factor must weigh in favor of settlement, rather the court should consider the totality of these factors in light of the particular circumstances.” *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004). An analysis of each of the nine *Grinnell* factors demonstrates that the Settlement is substantively fair.

a. Factor 1: The Complexity, Expense and Likely Duration of The Litigation If the Claims Were Not Settled Strongly Favors Approval of the Proposed Settlement

The nature of this highly complex CEA manipulation and antitrust class action supports approval of the Settlement Agreement. It is well-recognized that “class action suits in general have a well-deserved reputation as being most complex.” *Sumitomo*, 189 F.R.D. at 281 (internal

quotations omitted). Additionally, “antitrust cases, by their nature, are highly complex.” *Wal-Mart*, 396 F.3d at 122. Likewise, CEA manipulation claims have been recognized as complex and difficult to prove. Jerry W. Markham, Manipulation of Commodity Futures Prices – The Unprosecutable Crime, 8 Yale J. on Reg. 281 (1991); *see also Sumitomo*, 74 F. Supp. 2d at 397 (same).

Proving claims for manipulation of prices and antitrust violations in commodity futures markets is highly complex and challenging. Commodity futures markets have been described as “esoteric.” *See Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 356 (1982) (citation omitted). To recover damages, Plaintiffs face the difficult task of proving the duration and impact of intangible “artificial prices” – what the prices would have been “but for” Defendants’ violations in these esoteric markets. For example, “the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial or on appeal.” *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998).

Proof of causation, impact, and damages in complex antitrust and CEA manipulation actions necessarily involves a “battle of the experts.” In “such a battle, Plaintiffs’ Counsel recognize the possibility that a jury could be swayed by experts for Defendants,” and find that only a fraction of the amount of damages for which Plaintiffs submitted proof are proper. *See In re Am. Bank Note Holographics, Inc., Sec. Litig.*, 127 F. Supp. 2d 418, 426-27 (S.D.N.Y. 2001).

Here, Plaintiffs alleged that Defendants’ conduct—overpaying to buy and underselling to sell the Class Contracts during the Closing Period—had a measurable, artificial impact on prices. Plaintiffs would have had to show that a purchase and a later offsetting sale still had a net

artificial impact on the market. Proving these contentions would have been extremely challenging. Further, the Class includes members who purchased or sold three different types of energy futures contracts, *i.e.*, NYMEX Light Sweet Crude Oil, New York Harbor Heating Oil, and New York Harbor Gasoline futures contracts. The interrelationship and price movements of these three different futures contracts add to the difficulties in proving Plaintiffs' case. Persky Decl. ¶ 21.

Adding to the complexity of CEA manipulation claims is the absence of settled precedent with regard to these claims. CEA commodity futures manipulation class actions are relatively rare, compared to, for example, securities fraud claims (of which more than one hundred are often filed per year).⁸ In the more than thirty years since the private right of action under Section 22 of the CEA was established, the U.S. Supreme Court and the Second Circuit Court of Appeals have not rendered decisions on numerous aspects of the applicable pleading standards. Similarly, in this Court, there have been differing decisions involving the applicable pleading standards under the CEA. As a result, Defendants in CEA manipulation cases—unlike federal securities or antitrust cases—have an “open field” to argue for what Plaintiffs view as restrictive application of the limited precedent. The potential for widely-divergent outcomes creates substantial risk to Plaintiffs and the Class if litigation of this Action continues.

The Second Circuit has repeatedly refused to set aside decisions certifying classes of traders asserting claims of manipulation of commodity futures prices.⁹ And the Second Circuit

⁸ A LEXIS search for commodity manipulation class actions yielded only forty-eight entries, going back to 1974. (The search of the ALLFEDS database specified the following terms: “class /3 action /p commodity! /s manip!”). When duplicate entries, non-commodity cases and non-class actions were culled from the list, only twenty-six cases remained, averaging one commodity manipulation class action filed every two years.

⁹ *In re Amaranth Natural Gas Commodities Litig.*, 269 F.R.D. 366 (S.D.N.Y. 2010), *petition for review denied* (2d Cir. Dec. 28, 2010); *In re Natural Gas Commodities Litig.*, 231 F.R.D. 171, 186 (S.D.N.Y. 2005), *petition for review denied* (2d Cir. Aug. 30, 2006); *In re Sumitomo Copper Litig.*, 194 F.R.D. 480 (S.D.N.Y. 2000), *appeal denied*, 262 F.3d 134 (2d Cir. 2001).

has upheld a pre-Section 22(a) civil damages CEA manipulation verdict. *Strobl v. New York Mercantile Exch.*, 582 F. Supp. 770 (S.D.N.Y. 1984), *aff'd*, 768 F.2d 22 (2d Cir. 1985), *cert. denied sub nom.*, *Simplot v. Strobl*, 474 U.S. 1006 (1985). More recently, the Second Circuit upheld an administrative finding of manipulation. *In re Anthony J. DiPlacido*, 364 F.3d Appx. 657, 662 (CFTC Nov. 5, 2008), *aff'd sub nom.*, *DiPlacido v. CFTC*, 364 Fed. Appx. 657 (2d Cir. 2009), *cert. denied*, 130 S.Ct. 1883 (U.S. March 22, 2010). But, so far, there is an absence of controlling precedent with respect to claims under Section 22(a).

As this Court has recognized, “the complexity of Plaintiffs’ claims *ipso facto* creates uncertainty.” *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 123 (S.D.N.Y. 2009), *aff'd sub nom.*, *Priceline.com, Inc. v. Silberman*, 405 F. App’x 532 (2d Cir. 2010). If the Settlement Agreement is finally approved, the Parties can conclude this complex class action now and avoid the aforementioned uncertainty and risk necessarily associated with prosecuting this Action.

Further, Settlement of this complex action will allow the Parties and the Court to avoid wasting significant expenses and judicial resources. In the absence of this Settlement Agreement, it is likely that the litigation of this Action will consume several more years of judicial resources, including dismissal and summary judgment motion practice, trial and appeals. This could lead to “at least hundreds of thousands of dollars of additional costs to prosecute the settled claims to conclusion.” *Sumitomo*, 189 F.R.D. at 281.

The great uncertainty, risk, and potential for protracted litigation proceedings and high costs in this complex action (as compared to other types of actions) demonstrate that the Settlement is in the best interest of the Class and should be approved. *See In re Prudential Sec.*

Inc. Ltd. P'ships Litig., 163 F.R.D. 200, 210 (S.D.N.Y. 1995) (“it may be preferable to take the bird in the hand instead of the prospective flock in the bush”).

b. Factor 2: The Positive Reaction Of The Class To The Settlement Strongly Favors Approval of the Proposed Settlement

So far, the reaction of the Class has been positive because there have not been any objections or opt-outs by any Class member.¹⁰ Persky Decl. ¶¶ 25-27; *see also Currency Conversion*, 263 F.R.D. at 123 (reaction of the class was “extraordinarily positive” where a small fraction of one percent of the class opted out or objected to the settlement). The lack of opt-outs and objections to date indicates that an overwhelming majority of the Class members approve of the proposed Settlement. Accordingly, the absence of objections and opt-outs strongly favors final approval of the Settlement.

c. Factor 3: The Stage Of The Proceedings And The Amount Of Discovery Completed Strongly Favor Approval Of The Proposed Settlement

This factor is designed to assure that “counsel for the plaintiffs have weighed their position based on a full consideration of the possibilities facing them.” *In re Global Crossing Securities and ERISA Litig.*, 255 F.R.D. 436, 458 (S.D.N.Y. 2004). As detailed at length in the Persky Declaration and herein, Plaintiffs conducted prolonged and extensive confirmatory discovery, investigation and analysis of the claims and defenses in this Action before the Settlement Agreement was concluded. Persky Decl. ¶¶ 12-15, 29. Class Counsel reviewed and analyzed all of the documents and materials Defendants previously produced to the CFTC and

¹⁰ Plaintiffs respectfully request leave to supplement this showing based upon the final number of opt-outs and objections from Class members. So far, there have not been any opt-outs or objections received by Class Counsel or filed with the Court. The last date to file an objection is April 27, 2015. The last day for Class members to opt out of the Settlement was April 14, 2015.

the Defendants' relevant transactions recorded in the NYMEX streetbook and also had the benefit of expert advice from a well-known expert in this field.

Therefore, during negotiations and at the time the Settlement was reached, Plaintiffs were well informed of the factual landscape of the Action, and the strengths, weaknesses and uncertainties of their complex claims. *Id.*

d. Factors 4, 5 and 6: The Risks Of Establishing Liability And Damages And Maintaining The Class Action Through Trial Strongly Favor Approval Of The Proposed Settlement

The risks of establishing liability against Defendants on Plaintiffs' CEA manipulation claims and Sherman Act claims are set forth in detail at Paragraphs 31-38 of the Persky Declaration and in Section III.2(a) herein.

While the Complaint sets forth in painstaking detail Plaintiffs' claims against the Defendants, Plaintiffs still face significant risks in: (a) proving the elements of their claims so as to demonstrate that violations of the law occurred; (b) proving that artificial impact occurred; (c) proving the amounts and duration of artificial impact; and (d) proving recoverable damages and other issues at trial.

As stated in Section II.F., *supra*, Defendants have asserted what they believe to be deficiencies in Plaintiffs' Complaint. These alleged deficiencies included, among other things, that Plaintiffs failed to plausibly allege required elements of their CEA manipulation claims, including: (i) whether Defendants *intended to manipulate* prices or engaged in legitimate activity; and (ii) whether Defendants' trading strategy *was manipulative* or did *not* inject artificial forces of supply or demand into the market.

Additionally, Defendants have attacked the scope of Plaintiffs' alleged damages. In fact, Defendants argue that there are no damages or, to the extent there are any, the amount is very

low. As explained in Sub-Section (f) *infra*, Plaintiffs indeed faced great risks in establishing damages.

The aforementioned risks with respect to Plaintiffs' ability to establish liability and damages and maintaining the class action through trial strongly weigh in favor of approving the proposed Settlement.

e. Factor 7: The Ability Of The Defendants To Withstand A Greater Judgment Does Not Weigh Against Approval of the Proposed Settlement

Plaintiffs believe that Defendants could withstand a judgment greater than the \$16.75 million cash consideration they agreed to provide under the Settlement Agreement. This fact does not indicate that the Settlement Agreement is unfair, unreasonable or inadequate. *Global Crossing*, 255 F.R.D. at 460 (“[T]he fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate”).

Instead, a weighing of all the *Grinnell* factors in the context of this Action strongly demonstrates that final approval of the Settlement is appropriate. *See* Sections III.B.2(a)-(d), (f) herein; *see also Global Crossing*, 255 F.R.D. at 460 (“[N]ot every factor must weigh in favor of settlement, rather, the court should consider the totality of these factors in light of the particular circumstances.”).

f. Factors 8 and 9: The Range Of Reasonableness Of The Settlement Fund In Light Of The Best Possible Recovery And All The Attendant Risks Of Litigation Support Final Approval Of The Proposed Settlement

The eighth and ninth factors under *Grinnell* are:

(8) the range of reasonableness of the settlement fund in light of the best possible recovery; and

(9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Grinnell, 495 F.2d at 463. “In any case, there is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and concomitant risks and costs necessarily inherent in taking any litigation to completion.” *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972), *cert. denied sub nom.*, 409 U.S. 1039 (1972).

Regarding Factor 8, future “recovery” to class members involves at least three components: (1) collection of (2) a damages¹¹ judgment which (3) is then paid to or “recovered” by individual class members.

The Settlement Agreement provides two substantial benefits to Settlement Class members relating to all three components of the recovery. First, total cash compensation in the amount of \$16,750,000 was placed in an escrow fund by Defendant Optiver US LLC (on behalf of all Defendants) for the benefit of Plaintiffs and the Class. Thus, the collection component and a portion of the damages component have been satisfied. Second, as an additional benefit, Plaintiffs have obtained the waiver by Defendants of any potential post-trial reversionary rights. Thus, shares of these monies due to Settlement Class members who fail to submit a claim will not revert to Defendants. Instead, these monies will be added to and included in the calculation of the payment to the Settlement Class members who do submit claims. As a result, the “recovery” by Settlement Class members who do submit proofs of claim will be enhanced compared to a post-trial recovery. This is because *all* monies that would otherwise have been due to Settlement Class members who do not claim will be included in the distributions to those Settlement Class members who *do* claim. This is an important benefit to the Class because, if the claims went forward and Plaintiffs prevailed at trial, then Defendants could argue that the

¹¹ Damages, as used in this section, refers to actual damages, not the trebled damages available under antitrust law.

claims of those Class members who did not submit claims should instead revert to Defendants.

See Boeing Co. v. Van Gemert, 444 U.S. 472, 488 (1980).

Moreover, frequently, in class actions, the percentage of total class members who submit proofs of claims is less than 50% and, indeed, reportedly is less than 30% among even sophisticated class members (including those who arguably have fiduciary duties to submit claims).¹² Thus, a smaller amount in a settlement in which the defendant has provided the benefit of waiving any claim to reversion rights may amount to the same or a larger “recovery” to claiming Settlement Class members as a larger judgment after trial would produce for such claiming class members subject to reversion.

Best Possible Damages. Plaintiffs’ expert economist currently estimates that, using his full artificiality numbers (rather than the much lesser artificiality numbers asserted by Defendants), the highest possible amount of damages the class could prove at trial is a statistical maximum of approximately \$330 million and a statistical minimum of approximately \$72 million, depending upon the different possible combinations of potential trading profiles within the market. Further, the foregoing damages estimates do not deduct the offsets in artificiality and damages that Defendants contend would have reduced the total damages due to the Settlement Class because certain Settlement Class members ostensibly benefited from artificiality in a different commodity futures contract than the ones in which the Settlement Class Member suffered artificiality. Plaintiffs’ expert has no incontrovertible way to estimate the magnitude of

¹² The percentage of claims submitted in opt-out class action settlements varies from below ten percent to less than thirty percent. John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 Colum. L. Rev. 288, 335, n. 10 (Mar. 2010) (citing discussions on claim participation rates with professional claims administrators, including the largest of these, Garden City Group, Inc., and referring to advice received that “participation rates are highly variable, often falling below ten percent, but can reach much higher percentages when individual class members will receive a cash payment of several hundred dollars or more.”); James D. Cox & Randall S. Thomas, *Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements*, 58 Stan. L. Rev. 411, 415 (2005) (“[L]ess than thirty percent of institutional investors with provable losses perfect their claims in [securities class action]

this possible discount. It could, in fact, be significant. Plaintiffs' expert has estimated, through the statistical minimum listed above, deductions for gains in artificiality from the *same* commodity futures contract. That is, Plaintiffs' expert's maximum and minimum damages estimates take into account gains from artificiality that each trader in, for example, gasoline futures contracts experienced with respect to the artificiality that the Settlement Class Member suffered in NYMEX gasoline futures contracts. But the estimates cannot take into account offsets to artificiality suffered in NYMEX gasoline futures contracts from gains in artificiality experienced in NYMEX crude oil or heating oil futures contracts.

Typically, as estimated damages increase, settlement amounts as a percentage of the amount of estimated damages decreases. *See* Cornerstone Research, *Securities Class Action Settlements, 2011 Review and Analysis* at 7.¹³ Indeed, the average settlement recovery for class action settlements during the years 1996 through 2010 involving estimated damages (as here) between \$250 million and \$499 million was about 2.5 cents on the dollar. *Id.* Using the midpoint between the statistical minimum (\$72 million) and statistical maximum (\$330 million) produces a best-possible damages estimate of \$201 million. Here, the \$16,750,000 cash consideration under the Settlement constitutes 8.3% of the midpoint of best-possible damages. 8.3% is well within the range of reasonableness of class action recoveries that have been recognized and approved by courts.¹⁴ *See In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 483-85 (S.D.N.Y. 2009) (finding a settlement of 2% of the aggregate expected recovery reasonable in light of the expected recovery and attendant risks); *Lazy Oil Co. v. Witco Corp.*, 95

settlements.”).

¹³ http://securities.stanford.edu/Settlements/REVIEW_1995-2011/Settlements_Through_12_2011.pdf.

¹⁴ As already recognized by the Court in the Preliminary Approval Order, the Settlement is “sufficiently within the range of reasonableness” to support the issuance of notice to the Class. ECF No. 67 ¶ 10.

F. Supp. 2d 290, 319 (W.D. Pa. 1997) (finding reasonable a settlement of 5.35% estimated damages in an antitrust class action alleging a conspiracy to fix the prices of crude oil).

Further, the 8.3% does not take into account the reversion waiver benefit to the Settlement Class members who file claims, which undoubtedly would result in a higher percentage of best possible damages being obtained by those Class members who file claims.

Finally, through litigation, years would likely pass between the time of the alleged wrongdoing (*i.e.*, March 2007) and the time of any judgment on the merits herein. Accordingly, it is very likely that fewer Class members would be in a position to file claims in the future after an eventual trial and appeals than are able to do so today.

Collection. Class Counsel believe that \$72,000,000 would very likely be recoverable from Defendants. The midpoint of \$201,000,000 in potential damages would likely be collectable in whole or substantial part. However, recovering the \$330,000,000 maximum potential damages, while clearly possible, is, in Class Counsel's judgment, much more questionable.

Recovery. As stated above, each claiming Settlement Class Member's actual recovery from their proof of claim will be significantly enhanced by the absence of any reversion with respect to Settlement Class members who opt out or Settlement Class members who fail to submit proofs of claim. Class Counsel expect that, in view of all the circumstances in this type of case, it is likely that the inevitable recovery enhancement resulting from the Defendants' reversion waiver will be at least two, and likely three or more times as much as in the absence of the reversion waiver. Using the midpoint percentage recovery, Class Counsel's best estimate is that the benefits from this Settlement to the Settlement Class members will translate into a

recovery by claiming Settlement Class members of *at least* twice as much as the 8.3% midpoint (*i.e.*, 16.6%).

The intricacies of what can and cannot be proved based on the law today are pertinent to the “likely” recovery standard under *Maywalt*, 67 F.3d at 1079; *see Grinnell*, 495 F.2d at 455 & n. 2 (in theory, even a recovery of only a fraction of one percent of the overall damages could be a reasonable and fair settlement).

Grinnell Factor 9. Under *Grinnell* Factor 9, it is Class Counsel’s best judgment that there are significant risks of establishing liability and proving damages on Plaintiffs’ claims. In addition, individual Settlement Class members face the risks of collecting their damages and recovering their share of damages as described, *supra*.

Liability. Litigation is inherently risky and even a meritorious case can be lost at trial. *See, e.g., In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486 CW (EDL), 2007 WL 4788556, at *1 (N.D. Cal. Nov. 27, 2007) (after a lengthy trial, jury returned a verdict against plaintiffs and the action was dismissed). Even a successful jury verdict does not eliminate litigation risks to a class. *See, e.g., Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1449 (11th Cir. 1997) (reversing \$81 million jury verdict); *Anixter v. Home-Stake Prod Co.*, 77 F.3d 1215, 1233 (10th Cir. 1996) (overturning plaintiffs’ verdict following two decades of litigation); *In re Apple Computer Sec. Litig.*, No. C-84-20148(A)-JW, 1991 U.S. Dist. LEXIS 15608, at *4 (N.D. Cal. Sept. 6, 1991) (\$100 million jury verdict vacated on post-trial motions).

Despite these risks, Class Counsel believe that Plaintiffs have more than sufficient evidence to ultimately establish Defendants’ violation of the manipulation provisions of the CEA.¹⁵ For example, Plaintiffs believe that Defendants’ contemporaneous statements combined

¹⁵ The four elements of a claim for CEA manipulation are: “(1) that the accused had the ability to influence market prices; (2) that [she] specifically intended to do so; (3) that artificial prices existed; and (4) that the accused caused

with other evidence and Plaintiffs' expert evidence would establish or permit the Court to find that all of the elements of a CEA manipulation claim were met. On the other hand, Defendants certainly have countervailing evidence that Class Counsel would have sought to overcome. Thus, proof of liability on the CEA claims was by no means assured.

It is also Class Counsel's judgment that the evidence supports Plaintiffs' antitrust claims under both Sections 1 and 2 of the Sherman Act. Defendants, however, asserted a very substantial defense to Plaintiffs' Section 1 claim, *i.e.*, the *Copperweld Corp. v. Independence Tube Corporation*, 467 U.S. 752 (1984), intracorporate conspiracy doctrine. This defense, and others, would make it substantially risky to establish Plaintiffs' claims under Section 1. Although claims for monopolization in violation of Section 2 of the Sherman Act are, in certain circumstances, more difficult to prove than Section 1 claims, it is Class Counsel's judgment that the evidence supports establishing Defendants' violations of Section 2. Defendants, however, again had significant potential defenses, including challenging whether Plaintiffs could successfully prove a relevant market, barriers to entry, market share, and other aspects of the Section 2 claim that, according to Defendants' assertion, Plaintiffs were required to establish. The aforementioned antitrust defenses would not have been available to Defendants on the CEA manipulation claims. Nonetheless, it is Class Counsel's best judgment that Plaintiffs would have been able to establish their antitrust claims.

Damages. With respect to antitrust and CEA manipulation claims, Plaintiffs have a greater burden than the CFTC. The government is not required to establish the amount of damages. Nor is the government required to establish impact and damages with respect to antitrust claims. Plaintiffs, however, *do* have the burden of establishing the foregoing elements.

the artificial prices.” *DiPlacido v. CFTC*, 364 Fed. App’x 657, 661 (2d Cir. 2009) (citations omitted).

See In re Crude Oil Commodity Futures Litig., 913 F.Supp.2d 41, 61 (S.D.N.Y. 2012) (Pauley, J.) (“While Plaintiffs may have a difficult time proving ‘actual damages,’ that is a fact-intensive inquiry for another day.”). Furthermore, as stated in Section III.B.2(a), *supra*, should this litigation proceed, Plaintiffs would be faced with the onerous task of proving an intangible – what the prices would have been “but for” Defendants’ alleged violations.

In light of these substantial litigation risks, Class Counsel’s best judgment is that the \$16.75 million cash and non-reversion benefits from this Settlement are fair, reasonable, and adequate compared to the risks of continued prosecution, proof of liability at trial, collection of any damages proved, and recovery by each Settlement Class Member of any such collected damages. Notably, the Settlement amount here, even before accounting for non-reversion benefits, is ***greater*** than the fine the CFTC (which had a lower burden in proving damages) imposed on Defendants. And, more importantly, the benefits of the Settlement will flow to those ***directly harmed*** by Defendants’ alleged violations of the law.

Thus, *Grinnell* factors 8 and 9, analyzed in conjunction, demonstrate that the Settlement should be approved.

In conclusion, the Settlement is procedurally and substantively fair, reasonable and adequate and, thus, merits final approval.

C. The Class Notice Plan

Before a class action settlement can be finally approved, “[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal.” Fed. R. Civ. P. 23(e)(1). When, as here, a class is 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).

Notice regarding a proposed settlement is adequate under both Rule 23 and the Due Process Clause if it “fairly apprise[s] the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings” and it can “be understood by the average class member.” *Wal-Mart*, 396 F.3d at 114-15.

As recognized by the Court in the Preliminary Approval Order, the Class Notice Plan is comprehensive and calculated to reach – by direct mail alone – potentially all persons who are members of the Settlement Class. In addition, notice was provided by advertisements in *The Wall Street Journal*, *Futures Magazine*, and *Technical Analysis of Stocks and Commodities Magazine*. Notice was also provided by a settlement website that is searchable on the internet. *See* <http://www.nymextassettlement.com/>. Pursuant to the Preliminary Approval Order, the Settlement Administrator will be submitting a sworn statement on or before May 12, 2015 attesting to compliance with the Class Notice Plan as set forth in the Order. ECF No. 67 ¶ 19.

The Settlement Administrator estimates that the Class Notice Plan resulted in sending notice of the Settlement to approximately 1,245 potential Class members, of which over 900 were sent via direct mail to Class members and/or their clearing brokers. Persky Decl. ¶ 26.

D. The Class Has Been Preliminarily Certified and Satisfies the Prerequisites of Rule 23(a) and Rule 23(b)(3) Such That It Should Be Certified For Purposes of Final Approval

Rule 23(e) allows only for the settlement of “a certified class.” Fed. R. Civ. P. 23(e); *Global Crossing*, 225 F.R.D. at 451 (“[t]he Second Circuit has acknowledged the propriety of certifying a class solely for settlement purposes”). A district court may grant certification for settlement purposes where the proposed settlement class satisfies the four prerequisites of Rule 23(a) (*i.e.*, numerosity, commonality, typicality and adequacy), as well as one of the three subsections of Rule 23(b). *Id.*

Under the January 7, 2015 Preliminary Approval Order, the Court preliminarily certified the Settlement Class (defined in Section II.D., *supra*) for purposes of the Settlement, finding that the applicable provisions of Rule 23 of the Federal Rules of Civil Procedure were satisfied. ECF No. 67 at ¶ 3.

The Court also reaffirmed its appointment of Lovell Stewart Halebian Jacobson LLP, Lowey Dannenberg Cohen & Hart, P.C. and Robins Kaplan LLP¹⁶ as class counsel for the Class, finding that the requirements of Rule 23(g) of the Federal Rules of Civil Procedure were fully satisfied by this appointment. *Id.* ¶ 4. As a result, the Settlement Class should be certified for purposes of final approval.

E. The Proposed Plan of Allocation Has A Reasonable and Rational Basis And Should Be Approved

In the Second Circuit, the standard for approval of a plan of allocation is the same as the standard for approval of a settlement – “namely, it must be fair and adequate.” *Maley*, 186 F. Supp. 2d at 367. In that regard, a plan of allocation “need only have 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).

In this Action, Plaintiffs were prepared to prove damages based on the economic calculations performed by a leading expert on energy market manipulation, showing the artificial impact that Defendants’ activities allegedly had on the prices of Class Contracts for each trading day during the Class Period. *See* Jury Verdict at 70-95, *Jaffe v. Household, et al.*, 02-cv-05893 (RAG) (N.D. Ill. May 7, 2009), ECF No. 1611 (jury’s answers to interrogatories specifying amounts of artificiality for each of the 780 trading days during the class period). Thus, as in

¹⁶ The Preliminary Approval Order refers to Robins, Kaplan, Miller & Ciresi L.L.P., which changed its name to Robins Kaplan LLP in January 2015.

Jaffe and in other CEA manipulation class settlements (*see* n.18, *infra*), the proposed Plan of Allocation here (Persky Decl. Ex. A-6) contains tables of the daily amounts of artificiality for each trading day between March 2, 2007 and March 26, 2007, inclusive, for NYMEX Light Sweet Crude Oil, NYMEX New York Harbor Heating Oil, and NYMEX New York Harbor Gasoline futures contracts.

These figures are Plaintiffs' expert's artificiality numbers (which Defendants contended were much too high). As described below, the Plan of Allocation effectively determines each Settlement Class Member's claim as the amount by which the Settlement Class Member was harmed or adversely affected by the alleged manipulation minus the benefits, if any, such Settlement Class Member received from the alleged manipulation.

Specifically, the Plan of Allocation¹⁷ provides that each Settlement Class Member's Allowed Claim (as defined in ¶ 2 of the Plan of Allocation) shall be based on the Adverse Impact such Settlement Class Member suffered less any applicable Hedging Reduction and/or the Swaps Dealer Reduction (as defined in ¶ 6 of the Plan of Allocation). Persky Decl. Ex. A-6 ¶ 2. The Adverse Impact suffered by each claiming Settlement Class Member is defined as the amount by which the sum of the Artificiality Paid (as defined in ¶ 4(a) of the Plan of Allocation) by a Settlement Class Member on all transactions in Class Contracts exceeds the sum of the Artificiality Received (as defined in ¶ 4 of the Plan of Allocation) by that Settlement Class Member on all transactions in Class Contracts. *Id.* ¶ 3.

¹⁷ The Net Settlement Fund (as defined in ¶ 1(u) of the Settlement Agreement) shall be distributed as follows: Each Settlement Class Member who executes the required release and covenant not to sue and submits adequate documentation, all as determined by the Settlement Administrator, shall be entitled to receive an amount computed by multiplying the Net Settlement Fund by a fraction, (i) the numerator of which is the Settlement Class Member's Allowed Claim and (ii) the denominator of which is the sum of the Allowed Claims of all claiming Settlement Class members who executed the required release and covenant not to sue, all as determined by the Settlement Administrator. Proposed Plan of Allocation, Persky Decl. Ex. A-6 ¶ 7.

Courts have routinely approved plans of allocation in CEA manipulation cases similar to the instant Plan that includes calculations based on sums artificially paid and received and price artificiality tables.¹⁸ Moreover, the Plan of Allocation is a product of arm's-length negotiations between counsel for the Parties. Therefore, the proposed Plan of Allocation should be finally approved.

¹⁸ Compare, e.g., <http://www.amaranthcommoditieslitigation.com/ArtificialityTablesandCalculationExamples.aspx> and <http://www.naturalgascase.com/naturalgas/welcome.htm> to www.nymextassettlement.com/FileDownload.aspx?FileID=%202834.

IV. CONCLUSION

Plaintiffs respectfully request that the Court grant final approval of the Settlement.

Dated: New York, New York

April 17, 2015

**LOVELL STEWART HALEBIAN
JACOBSON LLP**

/s/ Christopher Lovell

By: Christopher Lovell, Esq.

Ian T. Stoll, Esq.

61 Broadway, Suite 501

New York, New York 10006

(212) 608-1900

**LOWEY DANNENBERG COHEN &
HART, P.C.**

Vincent Briganti, Esq.

Geoffrey Horn, Esq.

One North Broadway,

White Plains Plaza, 5th Floor

White Plains, New York 10601

(914) 997-0500

ROBINS KAPLAN LLP

Hollis Salzman, Esq.

Bernard Persky, Esq.

William V. Reiss, Esq.

601 Lexington Ave., Ste. 3400

New York, New York 10022

(212) 980-7400

*Counsel for Plaintiffs and the Settlement
Class*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Plaintiffs' Memorandum in Support of Motion for Final Approval of Class Action Settlement* was filed electronically with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record on this 17th day of April 2014.

/s/ Bernard Persky
Bernard Persky