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 IN SUPPORT OF MOTION FOR PRELIMINARY 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") move under Rule 23 of the Federal Rules of Civil Procedure for preliminary approval of a $15,000,000 Settlement with Defendant Tower Research Capital LLC ("Tower").[1] The Settlement Amount is separate from, and in addition to, the victims' compensation available from Tower's settlements with the U.S. Department of Justice ("DOJ") and the U.S. Commodity Futures Trading Commission ("CFTC"), and will completely resolve this Action on terms that ensure *all* eligible Class Members can be compensated for damages caused by Defendants' alleged spoofing of the market for E-Mini Index Futures and Options on E-Mini Index Futures. Class Plaintiffs and Tower reached this Settlement following months of hard-fought, arm's length negotiations supervised by a highly respected mediator, Jed D. Melnick, Esq., significant confirmatory discovery, and months of additional negotiations over the specific terms of the Settlement Agreement. The result of this arduous process is a Settlement that Class Plaintiffs and Lead Counsel, Lowey Dannenberg ("Lowey" or "Lead Counsel") consider to be fair, reasonable, and adequate.

As discussed below, the Settlement fully satisfies the requirements for preliminary approval. First, the Settlement is procedurally fair, as Class Plaintiffs and Lead Counsel are adequate representatives for the Settlement Class, and the Settlement itself resulted from hard-fought arm's length negotiations with Tower. Second, the terms of the Settlement are substantively fair, providing substantial relief for all Class Members—above and beyond the relief that may be available through

[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"), attached as Exhibit 1 to the Declaration of Vincent Briganti ("Briganti Decl."), filed herewith. Unless otherwise noted, internal citations and quotation marks are omitted and ECF citations are to the docket.

the government settlements—and fully resolving the litigation against all Defendants. Finally, as described herein, the Court may certify the Settlement Class under Federal Rules of Civil Procedure 23(a) and (b)(3), and Lead Counsel have prepared a robust notice program that will fully apprise Class Members of their rights and options. The Court should therefore grant Class Plaintiffs' motion and enter an order (the "Preliminary Approval Order") that:

(a) Preliminarily approves the Settlement subject to later, final approval;

(b) Conditionally certifies a Settlement Class with respect to the claims against Tower;

(c) Preliminarily approves the proposed Distribution Plan (Briganti Decl. Ex. 6);

(d) Appoints Class Plaintiffs as representatives of the Settlement Class;

(e) Appoints Lowey as Class Counsel for the Settlement Class;

(f) Appoints Citibank, N.A. ("Citibank") as the Escrow Agent for the Settlement;

(g) Appoints A.B. Data, Ltd. ("A.B. Data") as the Settlement Administrator for the Settlement;

(h) Approves the proposed forms of Class Notice to the Settlement Class (Briganti Decl. Exs. 3-5) and the proposed Class Notice plan (*id.*, Ex. 2);

(i) Sets a schedule leading to the Court's evaluation of whether to finally approve the Settlement, including: (i) the date, time, and place for a hearing to consider the fairness, reasonableness, and adequacy of the Settlement (the "Fairness Hearing"); (ii) the deadline for members of the Settlement Class to exclude themselves (*i.e.*, opt out) from the Settlement; (iii) the deadline for Class Counsel to submit a petition for attorneys' fees and reimbursement of expenses and for Class Plaintiffs to file their application for an Incentive Award; and (iv) the deadline for Class Members to object to the Settlement and any of the related petitions; and

(j) Stays all proceedings in the Action except those relating to approval of the Settlement.

See [Proposed] Preliminary Approval Order filed herewith.

OVERVIEW OF THE LITIGATION

This case was brought against Tower, a proprietary trading firm, and a group of its former futures traders on behalf of a Class (to be certified for settlement purposes) of all persons and entities that purchased or sold any E-Mini Index Futures or Options on E-Mini Index Futures on

the Chicago Mercantile Exchange ("CME") and/or the Chicago Board of Trade ("CBOT") from at least March 1, 2012 through October 31, 2014 (the "Class Period").

The claims stem from October 2018 criminal charges against former Tower employees and co-Defendants Kamaldeep Gandhi ("Gandhi"), Yuchun Mao a/k/a Bruce Mao ("Mao"), and Krishna Mohan ("Mohan"), members of the so-called "Relay Team," for their roles in spoofing the E-Mini Index Futures market. Boutchard filed the initial complaint against Defendants on October 19, 2018 alleging that Defendants violated the Commodity Exchange Act, 7 U.S.C. §§ 1 *et. seq.* ("CEA"), and common law by intentionally manipulating the prices of E-Mini Index Futures and Options on E-Mini Index Futures through a technique called "spoofing." The individual Defendants allegedly placed orders for E-Mini Index Futures and then canceled them prior to execution to send false supply and demand signals to the market. This false pricing information caused the prices of E-Mini Index Futures and Options on E-Mini Index Futures to move in a direction that was favorable to Defendants' trading positions but harmful to other investors, like Class Plaintiffs and the Class.

Boutchard filed the First Amended Complaint on December 21, 2018, and the Second Amended Complaint on March 8, 2019. On April 8, 2019, Mohan and Tower each moved to compel arbitration and to dismiss Class Plaintiffs' Second Amended Complaint; Gandhi joined Mohan's motion on April 12, 2019. Subsequently, the Court granted an unopposed motion to modify the briefing schedule, and Class Plaintiffs filed a third amended class action complaint ("TAC") on June 3, 2019, adding Synova as a plaintiff. On July 1, 2019, Mohan and Tower each again moved to compel arbitration and to dismiss the TAC. Gandhi once again joined Mohan's motion.

On August 1, 2019, Class Plaintiffs filed their opposition to Defendants' motions to compel arbitration and to dismiss the Third Amended Complaint. On August 16, 2019, Mohan and Gandhi

(jointly) and Tower filed reply briefs in response to Class Plaintiffs' opposition to Defendants' motion to dismiss and motion to compel arbitration. On November 26, 2019, after obtaining leave from the Court, Class Plaintiffs filed a sur-reply to the motion to dismiss, and Tower responded on December 17, 2019.

On November 6, 2019 Tower entered into a Deferred Prosecution Agreement with the DOJ to resolve charges of commodities fraud. *See* Deferred Prosecution Agreement, *U.S.A. v. Tower Research Capital LLC*, No. 19-cr-819 (S.D. Tex. Nov. 6, 2019) ("DPA"); *see also* Criminal Information, *U.S.A. v. Tower Research Capital LLC*, No. 19-cr-819 (S.D. Tex. Nov. 6, 2019). As part of the DPA, Tower agreed to pay $32 million for victims' compensation into a fund to be administered by the DOJ (the "VCA"). On November 19, 2019, Class Plaintiffs and Tower began discussing the possibility of settlement. On November 22, 2019, the Parties agreed to engage Jed D. Melnick, Esq. of JAMS as a mediator to assist with reaching a resolution and exchanged mediation statements on January 6, 2020. On January 13, 2020, the Parties participated in a day-long mediation session with Mr. Melnick that included robust presentations of the Parties' respective litigation risks—including the existence of the government settlements—and presentations of each Party's damages analysis, followed by questions and critiques from the opposing Party. After more than 10 hours, the in-person mediation session concluded with the Parties unable to agree on the terms of any proposed settlement.

In the three months that followed the in-person mediation session, the Parties continued hard-fought arm's length negotiations through Mr. Melnick. On April 14, 2020, Mr. Melnick presented the Parties with a mediator's proposal for a $15,000,000 settlement with confirmatory discovery overseen by him. Each Party accepted the proposal. On April 20, 2020, Class Plaintiffs and Tower reported to the Court that they had reached an agreement in principle to resolve this Action and requested that the Court stay the case for 90 days.

After months of additional negotiations, on July 27, 2020, Class Plaintiffs and Tower executed a binding settlement term sheet. As part of the term sheet, Tower agreed to provide confirmatory discovery on or before August 26, 2020 to allow Class Plaintiffs to confirm that the proposed settlement amount was reasonably supported. On August 14, 2020, the Parties filed a joint status report to the Court in which they asked the Court to stay all proceedings in this action for 75 days or until October 28, 2020 to allow Class Plaintiffs to perform confirmatory discovery. The Parties later jointly sought, and the Court granted extensions of the stay until January 29, 2021 to provide the Parties time to finalize a formal Settlement Agreement and prepare this motion for preliminary approval of the Settlement under FED. R. CIV. P. 23. The Parties executed the Settlement Agreement on January 22, 2021.

SUMMARY OF KEY SETTLEMENT TERMS

Tower has agreed to pay $15,000,000 to Class Plaintiffs and the Settlement Class. The Settlement Class is defined as:

> All persons and entities that purchased or sold any E-Mini Index Futures or Options on E-Mini Index Futures on the Chicago Mercantile Exchange ("CME") and/or the Chicago Board of Trade ("CBOT") from at least March 1, 2012 through October 31, 2014 (the "Class Period"). Excluded from the Settlement Class are the Defendants and any parent, subsidiary, affiliate or agent of any Defendant or any co-conspirator whether or not named as a Defendant, and the United States Government.

Class Members who do not request exclusion from the Settlement Class and submit a claim will receive a *pro rata* share of the $15,000,000, after any authorized fees, costs and expenses are deducted, based on a calculation of the volume of their transactions adjusted by certain multipliers as described in the accompanying Distribution Plan.[2] In exchange, the Settlement provides that the Releasing Parties will "release and forever discharge and shall be enjoined from prosecuting the Released Claims against the Released Parties" including all Defendants in this Action. As a result, if

[2] The Settlement Agreement is silent regarding whether Tower may seek a reversion of a portion of the Settlement Amount.

approved, this Settlement will completely resolve this Action. The Settlement includes a confidential "blow" provision that permits Tower to unilaterally terminate the Settlement in the event that the volume of E-Mini Index Futures or Options on E-Mini Index Futures transacted by Class Members who timely exercise their right to request exclusion from the Settlement Class exceeds a certain percentage. Lead Counsel intends to seek attorneys' fees of 33% of the common fund created by the Settlement and no more than $250,000 as reimbursement for the costs and expenses incurred in litigating this action. Class Plaintiffs may also seek an Incentive Award in connection with their work as class representatives.

Class Plaintiff and Lead Counsel worked tirelessly to obtain this excellent result for the Settlement Class, above and beyond what was provided by the government settlements. After thoroughly investigating the factual and legal issues in the Action and after reviewing the confirmatory discovery, Class Plaintiffs and Lead Counsel are confident that this Settlement is a highly favorable result and is in the best interests of Class Members. As described below, the Settlement meets the standard for preliminary approval, and notice of the Settlement may be issued.

ARGUMENT

I. The Proposed Settlement Is Likely To Receive Approval Under Rule 23(e)(2)

Settlements are encouraged, particularly in the class action context. *See Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation.") Such class action settlements "minimize[ ] the litigation expenses of both parties and also reduce[ ] the strain such litigation imposes upon already scarce judicial resources." *Armstrong v. Bd. of School Dir. of City of Milwaukee,* 616 F.2d 305, 313 (7th Cir. 1980).

A court may approve a class action settlement "only if it is fair, reasonable and adequate." *Synfuel Techs, Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 652 (7th Cir. 2006). Courts undertake a two-stage evaluation of class settlements, preliminary and final approval. *Armstrong,* 616 F.2d at 314.

At preliminary approval, a court must determine whether notice of the settlement may be given to the settlement class. *Id.*; *see* FED. R. CIV. P. 23(e)(1). Notice may be issued if, after reviewing the information provided about the settlement, the court finds that *it is likely* it will approve the settlement as fair, reasonable, and adequate and certify the settlement class following a hearing. FED. R. CIV. P. 23(e)(1). To preliminarily approve the Settlement, the Court need "not [] conduct a full-fledged inquiry into whether the [S]ettlement meets Rule 23(e)'s standards" but simply needs to decide whether "the proposed [S]ettlement is within the range of possible approval." *Am. Int'l Grp., Inc. v. ACE INA Holdings, Inc.*, No. 07-C-2898, 2011 WL 3290302, at *6 (N.D. Ill. July 26, 2011).

Seventh Circuit law and Rule 23(e)(2) set out a number of factors to guide the Court's analysis of this Settlement. *See* FED. R. CIV. P. 23 committee notes 2018 amendment (stating Rule 23(e)(2) now focuses on the "core concerns of procedure and substance" to be considered when deciding whether to finally approve a settlement and is intended to be complementary to the considerations "each circuit has developed . . . for expressing these concerns"). Rule 23(e)(2)(A) and (B) focus on procedural fairness, *i.e.*, the "conduct of the litigation and of the negotiations leading up to the proposed settlement." FED. R. CIV. P. 23 committee notes 2018 amendment. Rule 23(e)(2)(C) and (D) focus on the substantive fairness of the settlement, which is centrally concerned with the "relief that the settlement is expected to provide to class members" compared with "the cost and risk involved in pursuing a litigated outcome." *Id.* An analysis of the Settlement and the circumstances surrounding its formation confirm that the Court will likely find it procedurally and substantively fair.

A. The Settlement Is Procedurally Fair

Under Rule 23(e), a proposed settlement is procedurally fair if "(A) the class representatives and class counsel have adequately represented the class; and (B) the proposal was negotiated at arm's length." FED. R. CIV. P. 23(e)(2)(A)-(B). The requirement that class action settlements be

procedurally fair is designed to protect class members against collusion among the parties. *See Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 230 (N.D. Ill. 2016) ("The Seventh Circuit recently has emphasized the importance of district judges' vigilance regarding collusion in class action settlements."). The quality of the representation and the circumstances of the negotiations demonstrate that the Settlement is procedurally fair.

1. Class Plaintiffs and Lead Counsel have adequately represented the interest of the Class

Adequate representation under FED. R. CIV. P. 23(e)(2)(A) (and 23(a)(4))[3] requires that class representative's interest be aligned with the interest of the Class. "A class is not fairly and adequately represented if class members have antagonistic or conflicting claims." *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). No such conflict exists between Class Plaintiffs and the Class.

Class Plaintiffs' interests coincide with the interests of the Class. Class Plaintiffs each purchased E-Mini Index Futures during the Class Period. Boutchard transacted in thousands of E-mini S&P 500 Futures and E-mini NASDAQ 100 Futures contracts, while Synova dealt in thousands of E-mini S&P 500 Futures, E-mini Dow Futures, and E-mini NASDAQ 100 Futures contracts, as well as options on E-mini S&P 500 Futures and E-mini NASDAQ 100 Futures contracts. *See* ECF No. 82 ¶¶ 13, 17. Defendants' alleged manipulation of E-Mini Index Futures

[3] Courts analyze the adequacy of representation requirement of FED. R. CIV. P. 23(e)(2)(A) using the same considerations for representative adequacy under FED. R. CIV. P. 23(a)(4). *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 30 n.25 (E.D.N.Y. 2019) ("This adequate representation factor [under Rule 23(e)(2)(A)] is nearly identical to the Rule 23(a)(4) prerequisite of adequate representation in the class certification context. As a result, the Court looks to Rule 23(a)(4) case law to guide its assessment of this factor."); *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 701 (S.D.N.Y. 2019) (applying same criteria to evaluate Rule 23(e)(2)(A) and Rule 23(a)(4)); *O'Connor v. Uber Techs., Inc.*, No. 13-CV-03826-EMC, 2019 WL 1437101, at *6 (N.D. Cal. Mar. 29, 2019) (same).

impacted not just Class Plaintiffs' transactions, but the entire market for E-Mini Index Futures and Options on E-Mini Index Futures. As a result, Class Plaintiffs and the Class seek the same relief for the same injury caused by Defendants' manipulation. *See In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 344 (N.D. Ill. 2010) ("Plaintiffs have claims that are typical of those brought by other class members, and their interests appear to be entirely consistent with those of the other class members because they—like the other class members—seek relief from AT&T's allegedly-unlawful tax collections.").

Adequate representation also requires the Court to consider the adequacy of counsel. "[C]ounsel's work on the case to date, [ ] class action experience, [ ] knowledge of the applicable law, and the resources counsel will commit to the case" are each a consideration the Court should evaluate to determine counsel's adequacy. *Van v. Ford Motor Co.*, 332 F.R.D. 249, 286 (N.D. Ill. 2019); *accord* FED. R. CIV. P. 23(g). In addition, "the Court must have confidence that counsel will prosecute the case in the interest of the class, of which they are fiduciaries." *Van*, 332 F.R.D. at 286. Lowey has served as counsel in this Action from its inception, led the prosecution of the claims, and negotiated the proposed Settlement. As reflected in its resume, Lowey has decades of experience leading some of the most complex class actions, including four of the then-largest CEA class action settlements of their time. *See* Briganti Decl., Ex. 7 (firm resume). Lowey's extensive class action and CEA experience, combined with the firm's extensive efforts in this litigation, provide direct evidence of Lowey's adequacy as counsel.

2. The Settlement is the product of arm's length negotiations

There is a presumption that a proposed settlement is fair and reasonable when it was the result of arm's length negotiations. *See Am. Int'l Grp., Inc. v. ACE INA Holdings, Inc.*, No. 07-cv-2898, 2012 WL 651727, at *10 (N.D. Ill. Feb. 28, 2012) ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between

experienced, capable counsel after meaningful discovery"). That presumption applies in this case where the Settlement was negotiated by skilled and experienced counsel on both sides. Tower, for its part, has been represented by counsel from one of the top law firms in the country, with extensive experience in litigating CEA and class action cases. Briganti Decl. ¶ 26. Prior to negotiating the Settlement, Class Plaintiffs and Lead Counsel were well-informed about the strengths and weaknesses of their claims against Tower and Defendants, including Defendants' arguments in their motions to dismiss. *Id.* ¶¶ 13, 15, 21. Lead Counsel had the benefit of public disclosures describing the government investigation into Defendants' alleged misconduct and economic analysis performed by their experts. *Id.* ¶ 21. In reaching a settlement in principle, Lead Counsel negotiated the right to obtain confirmatory discovery from Tower and preserved Class Plaintiffs' right to terminate the proposed Settlement if Lead Counsel's further investigation uncovered any facts inconsistent with Tower's representations during settlement negotiations. *Id.* ¶¶ 22-24.

The involvement of an experienced and qualified mediator in such settlement negotiations further affirms the fairness of the process. *See Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 410 (E.D. Wis. 2002) (finding that "[a] strong presumption of fairness attaches to a settlement agreement" resulting from a "mediation session with an experienced mediator."); William B. Rubenstein, 4 NEWBERG ON CLASS ACTIONS § 13:50 (5th ed. 2020) ("Evidence of a truly adversarial bargaining process helps assuage this concern [of collusive settlements] and there appears to be no better evidence of such a process than the presence of a neutral third party mediator"). Settlement negotiations began in November 2019 and included an in-person mediation in January 2020 that did not result in a settlement. Briganti Decl. ¶ 16-17. It took several more months of negotiations through Mr. Melnick and a mediator's proposal to achieve an agreement on the basic terms of the Settlement. *Id.* ¶¶ 18-19. Confirmatory discovery and additional weeks of negotiations were necessary to reach agreement on the terms of the formal

Settlement Agreement. *Id.* ¶ 19. The extensive negotiations over every aspect were at every phase informed, hard-fought and non-collusive.

Given the Parties' efforts to reach a settlement, the involvement of a mediator in reaching the settlement in principle, and the experience and knowledge of counsel on both sides, the process of reaching this Settlement was non-collusive and fair.

B. The Settlement Is Substantively Fair

To evaluate the substantive fairness of a settlement, courts in the Seventh Circuit have historically considered "(1) the strength of the plaintiffs' case compared against the amount of the defendants' settlement offer; (2) the complexity, length, and expense of continued litigation; (3) the amount of opposition to the settlement; (4) the opinion of experienced counsel; and (5) the stage of the proceedings and the amount of discovery completed." *Charvat v. Valente*, No. 12-cv-05746, 2019 WL 5576932, at *5 (N.D. Ill. Oct. 28, 2019). These concerns overlap with Rule 23(e)(2)(C), which focuses on 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 attorneys' 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).

1. The strength of Class Plaintiffs' case compared to the proposed Settlement favors the Settlement

In the Seventh Circuit, 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 v. Fifth Third Bank*, 805 F. Supp. 2d 560, 579 (N.D. Ill. 2011). This analysis is concerned in part with whether factors such as a defendant's defenses could

reasonably serve as a barrier to a plaintiff's success on the merits. *See In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 789 F. Supp. 2d 935, 961 (N.D. Ill. 2011). If not for the Settlement, Class Plaintiffs would immediately be faced with the potential for an adverse ruling on Defendants' pending motions to dismiss. Defendants argued that Boutchard, as a member of the CME from 2007 through 2014, was required to arbitrate his claims individually and moved to compel arbitration. *See, e.g.*, ECF No. 88 at 5, 6-9. Defendants asserted that Class Plaintiffs did not suffer any injury and thus lacked Article III standing, and further failed to state a CEA or unjust enrichment claim. *Id.* at 9-23. Finally, Defendants raised a statute of limitations defense against all of Class Plaintiffs' claims. *Id.* at 24-26. Any of these arguments has the possibility of terminating the case and triggering an appeal. While Class Plaintiffs believe they would have prevailed on Defendants' motions to dismiss, it would be just the first of a number of potential hurdles to prevailing on the merits. Defendants would still raise challenges relating to class certification, summary judgment, motions *in limine* (including *Daubert* motions), and at trial and post-trial appeals. In addition, it is uncertain whether Tower's settlements with the DOJ and CFTC could have limited the amount of damages recovered for the Settlement Class at trial. Achieving total success on the merits and the full amount of Class Plaintiffs' asserted damages was by no means guaranteed.

In this light, the $15,000,000 Settlement is an appropriate balance against the strength of Class Plaintiffs' case. A court "must estimate the likely outcome of a trial in assessing whether a settlement adequately disposes of the case." *Charvat*, 2019 WL 5576932, at *6. To do so, courts analyze "the net expected value of continued litigation to the class" by "estimat[ing] the 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. As the Seventh Circuit noted, "[a] high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 285 (7th Cir. 2002). Therefore, if

the court's analysis "reveals that the Class Members will realize a significant value as a result of the Agreement," the settlement should be viewed favorably. *In re AT&T Mobility Wireless Data*, 789 F. Supp. 2d at 959.

Given that the risk of non-recovery would persist as the litigation continued, the Settlement Class receives a substantial benefit from receiving this recovery now, which supports the approval of the Settlement. *Schulte*, 805 F. Supp. 2d at 583 ("It must also be remembered that a dollar today is worth a great deal more than a dollar ten years from now . . . and a major benefit of the settlement is that Class Members may obtain these benefits much more quickly than had the parties not settled.").

2. Under Seventh Circuit law and Rule 23(e)(2)(C)(i), the complexity, length, and expense of continued litigation favor the settlement of this Action

The question under Rule 23(e)(2)(C)(i) of whether the cost, risk, and delay of continued litigation weigh in favor of approving a settlement is closely related to the Seventh Circuit's traditional inquiry about the strength of the case. *See Armstrong*, 616 F.2d at 322. As noted above, the Action is at an early stage, with Defendants' motions to dismiss pending at the time this Settlement was reached. If Class Plaintiffs prevailed on the motion, the case would be far from over, and likely would have taken years to resolve. The Parties would have incurred significant costs conducting fact and expert discovery. *See In re AT&T Mobility Wireless Data*, 789 F. Supp. 2d at 964 ("The costs associated with discovery in complex class actions can be significant."). As is typical in complex class actions "class certification . . . would likely be hotly-contested and followed by an inevitable appeal" by whichever party lost on the motion. *Schulte*, 805 F. Supp. 2d at 586. If Class Plaintiffs' claims survived summary judgment, even more time and effort would be expended on motions *in limine*, proving a merits and damages case, and litigating any post-trial appeals. *See id.* Given the complexity of the allegations and the alleged misconduct, this Action would necessarily focus in large part on a battle of experts. *See Heekin v. Anthem, Inc.*, No. 1:05-CV-01908-TWP, 2012 WL 5472087, at *5 (S.D. Ind. Nov. 9, 2012) ("the [damages] issue would be both complex and hotly contested, requiring

expert testimony on sophisticated methodologies with uncertain results"); *accord Wong v. Accretive Health, Inc.*, 773 F.3d 859, 863 (7th Cir. 2014) (describing expert battles as "lengthy and expensive . . . with the costs of such a battle[s] borne by the class"). The proposed Settlement, if approved, exchanges those extensive costs and a lengthy litigation timeline with financial recovery and certainty for the Class, finality as to the Parties, and the preservation of Court time and resources that can be redirected elsewhere. This factor further supports approval of the Settlement.

3. It is premature to consider the amount of potential opposition to the Settlement

Given the present posture of the Action, it is too early to evaluate whether there is any opposition to the Settlement. If the Court grants preliminary approval of this Settlement, Class Notice (as described *infra*) will be issued to those individuals and entities that may be a member of the Class, and it will advise Class Members of their right to voice opposition to the Settlement. Further, to the extent Class Members do not want to participate in the Settlement, they will have an opportunity to exclude themselves from the Settlement. It is worthwhile noting that Class Plaintiffs support the Settlement. As Class Plaintiffs' interests are wholly aligned with the interest of the Class, Lead Counsel anticipates that the Class will strongly support the Settlement.

4. Lead Counsel strongly supports this Settlement

Courts in this Circuit "are entitled to rely heavily on the opinion of competent counsel" when evaluating the fairness, reasonableness, and adequacy of a settlement. *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2018 WL 6606079, at *7 (S.D. Ill. Dec. 16, 2018) (quoting *Gautreaux v. Pierce*, 690 F.2d 616, 634 (7th Cir. 1982)). In determining the weight of counsel's opinion, a court will consider counsel's experience litigating similar claims, their efforts, and their depth of knowledge and observations about the claims and issues in the action at bar. *Id.*; *see also Isby*, 75 F.3d at 1200. Lead Counsel strongly supports the approval of this Settlement as fair, reasonable and adequate and in the best interest of the Class. As described in I.A.1, *supra*, and in their

accompanying resume, Lead Counsel have extensive experience litigating and settling class actions, including complex CEA actions. Moreover, Lead Counsel were well-informed about the strengths and weaknesses of the case through their investigation and review of confirmatory discovery, described *infra*.

5. The stage of the proceedings and the amount of discovery completed confirm that the Settlement is appropriate

Although the law does not require an action to reach a certain stage or undertake a certain amount of investigation before a settlement can be considered fair, reasonable and adequate, these factors are nonetheless important considerations as they provide information on "how fully the district court and counsel are able to evaluate the merits of plaintiffs' claims." *Charvat*, 2019 WL 5576932, at *8. 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. In this Action, while Defendants' motions to dismiss the pleading were pending and formal discovery had not yet commenced before settlement, Lead Counsel had undertaken a tremendous amount of investigation and had available to them significant information relating to Defendants' alleged conduct. First, the government investigation and public filings by the DOJ and CFTC provided details of Tower's and its former employees' conduct, which gave plaintiffs a solid foundation to evaluate the conduct at issue. Next, Lead Counsel conducted a pre-filing investigation comprised of fact research and consultation with industry and economic experts. Lead Counsel continued to work with economic and industry consultants throughout the course of the litigation to build proprietary market analysis tools that allowed them to identify potential manipulative events in the E-Mini Index Futures markets and look for patterns consistent with those in the government filing.

Further, in negotiating the settlement in principle, Lead Counsel secured the ability to conduct confirmatory discovery to cross-check their own work against Tower's proprietary data and

test representations Tower made during settlement negotiations. Tower produced over 150,000 documents to Class Plaintiffs, including over 100,000 chat and email messages and trading data for the entirety of the relevant time period. Briganti Decl. *Id.* ¶ 23. Lead Counsel were able to use the emails and chats to evaluate Tower's disclosures regarding the events revealed in the government settlements and the scope of the alleged misconduct. Additionally, Tower's trade data allowed Lead Counsel to examine Tower's representations about the number and impact of the alleged manipulative events and assess the relationship, if any, between public disclosures made regarding the government's investigation and Class Plaintiffs' claims. *Id.* ¶ 24. Lead Counsel and Class Plaintiffs had the benefit of sufficient information on which to evaluate the fairness of the Settlement.

6. The Distribution Plan proposed for this Settlement provides an effective method for distributing relief and treats class members equitably, thereby satisfying FED. R. CIV. P. 23(e)(2)(C)(ii) and (e)(2)(D)

Approval of the Settlement also requires the Court to assess "whether the allocation of funds among class members is reasonable and equitable." *Lucas v. Vee Pak, Inc.*, No. 12-cv-09672, 2017 WL 6733688, at *13 (N.D. Ill. Dec. 20, 2017). "When formulated by competent and experienced counsel, a plan for allocation of net settlement proceeds need have only a reasonable, rational basis in order to be fair and reasonable." *Shah v. Zimmer Biomet Holdings, Inc.*, No. 3:16-cv-815-PPS-MGG, 2020 WL 5627171, at *6 (N.D. Ind. Sept. 18, 2020)(quoting *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012)). Allocation programs that distribute settlement proceeds according to an estimate of each class member's harm are generally considered reasonable. *Id.*; *see Lucas*, 2017 WL 6733688, at *13 (citing cases).

Lowey consulted with industry and economic consultants to develop the proposed Distribution Plan. *See* Briganti Decl. ¶ 31, Ex. 6. Procedurally, it is structured to be efficient to administer and simple for Class Members, thus incentivizing participation. *See* William B.

Rubenstein, 4 NEWBERG ON CLASS ACTIONS § 13:53 (5th ed. 2020) ("the goal of any distribution method is to get as much of the available damages remedy to class members as possible and in as simple and expedient a manner as possible").

To receive a portion of the Net Settlement Fund, Class Members will be required to submit a Proof of Claim and Release form ("Claim Form"). The Claim Form is straight-forward and simple, only requiring a claimant to provide certain background information and readily accessible information about their E-Mini Index Futures and Options on E-Mini Index Futures transactions, including the contract traded, trade date, volume, trade price, the option type, strike price, and premium (if applicable). *See* Briganti Decl., Ex. 5. This information is typical of what courts have permitted in other futures cases. *See* Proof of Claim and Release, *In re Rough Rice Commodity Litig.*, No. 11-cv-618, ECF No. 164-6 (N.D. Ill. Mar. 4, 2015) (claim form requiring submission of, *inter alia*, trade date, contract traded, number of contracts and transaction price for claims process involving futures contracts); *see also Hale*, 2018 WL 6606079, at *5 (approving of a distribution plan that was "claimant-friendly, efficient, cost-effective, proportional and reasonable under the particular circumstance of this case").

Substantively, the Distribution Plan allocates the Net Settlement Fund *pro rata* to Authorized Claimants based on an estimate of the impact of Defendants' alleged spoofing on market transactions. If all other factors are held constant, claimants with a higher trading volume can expect a proportionally larger allocation. While volume is a core part of the distribution framework, the Distribution Plan also incorporates the impact of Defendants' alleged spoofing during the Class Period.

To account for the differing impact, the Settlement Administrator will calculate an "Instrument Amount" for each futures and option transaction. The Instrument Amount is determined by multiplying together three metrics: the "Volume Multiplier;" "Product Multiplier;"

and "Futures Contract Specification Multiplier." Briganti Decl., Ex. 6 ¶ 8. The Volume Multiplier reflects the notional value of each transaction, which is the product of the number of contracts purchased or sold, the futures contract price denominated in index points, and the "Notional Dollar Value per Index Point", which is the dollar value of each index point. *Id.*, Ex. 6 ¶ 10. The Product Multiplier accounts for the difference between the direct damages suffered on futures prices versus the effects on options prices. *Id.*, Ex. 6 ¶ 11. Finally, the Futures Contract Specification recognizes Defendants' spoofing directed at a particular E-Mini Index Futures contract will have an impact on the damages suffered by a Class Member trading in the same contract. *Id.*, Ex. 6 ¶ 12. A higher multiplier is applied to contracts traded during a period in which, based on Class Plaintiffs' analysis, Defendants engaged in more numerous attempts to spoof the market.

The Instrument Amounts for each transaction will be added together and represent the claimant's Transaction Claim Amount. Under the Distribution Plan, the Net Settlement Fund will be allocated *pro rata* based on the Transaction Claim Amount. *Id.*, Ex. 6 ¶ 15; *see Shah*, 2020 WL 5627171, at *6 (approving distribution plan in which "the settlement proceeds are not disbursed purely on a pro rata basis" and that accounts for the "different times and [ ] different prices" at which a security traded "over the course of many months.").

The Settlement does not favor or disfavor any Class Members; nor does it discriminate against, create any limitations, or exclude from payments any persons or groups within the Settlement Class. *Schulte*, 805 F. Supp. 2d at 589 (concluding that a settlement that allocated benefits according to "the facts and law at issue in the case . . . is fair, reasonable and adequate"); *see also Kaufman v. Am. Exp. Travel Related Servs. Co.*, 264 F.R.D. 438, 447 (N.D. Ill. 2009) ("Also relevant to whether a proposed settlement should be preliminarily approved is whether it has no obvious deficiencies [and] does not improperly grant preferential treatment to class representatives or segments of the class."). In consultation with Lead Counsel, the Settlement Administrator will

implement a reasonable minimum payment to ensure that the administrative costs of issuing small payments do not burden the Net Settlement Fund while not diverting a substantial portion of the Net Settlement Fund. *See* Joseph M. McLaughlin, 2 MCLAUGHLIN ON CLASS ACTIONS § 6:23 (17th ed. 2020) ("minimum payment thresholds for payable claims benefit the class as a whole because they protect the settlement fund from being depleted by the administrative costs associated with claims unlikely to exceed those costs"); *see also In re Global Crossing Secs. and ERISA Litig.*, 225 F.R.D. 436, 463 (S.D.N.Y. 2004) (finding $10 *de minimis* threshold for securities allocation plan reasonable). In addition to providing for a *pro rata* distribution of the Net Settlement Fund among Authorized Claimants, the Settlement provides that all Class Members would similarly release the Released Parties for claims based on the same factual predicate of this Action.

Any potential inequity in the Settlement is avoided through the use of an adequate notice program that advises Class Members of their rights, including the impact of the releases. Where class members have received sufficient notice of the impact of the settlement, courts have enforced the bar on prosecuting released claims so long as they were based on the identical factual predicate and the class members were adequately represented. *See In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d 800, 803 (8th Cir. 2004) (affirming injunction against prosecution of claim released by a related class action where adequate notice of the release was given, and the class was adequately represented). Thus, should a Class Member wish not to be bound by the release, that Class Member may elect to opt out of the Settlements. The notice program will provide Class Members with information about opting out of the Settlements should they wish. But absent opting out, each Settlement Class Member would be bound by the release.

Because the Distribution Plan and the Settlement's release wholly avoid any improper preferences, these factors weigh in favor of preliminary approval of the Settlement. Further, the Court should preliminarily approve the Distribution Plan proposed for this Settlement.

7. The requested attorneys' fees and other awards are limited to ensure that the Settlement Class receives adequate relief

Lead Counsel will limit their attorneys' fee request to no more than 33% of the Settlement Fund ($4.95 million), which may be paid upon final approval. Briganti Decl., Ex. 3 at 15. An attorneys' fees request of 33% is comparable to the fees awarded in other cases of similar size and complexity. *See*, *e.g.*, *Heekin v. Anthem, Inc.*, No. 1:05-cv-01908-TWP-TAB, 2012 WL 5878032, at *5 (S.D. Ind. Nov. 20, 2012) (granting 33.3% attorneys' fee award from a $90 million settlement); *Schulte*, 805 F. Supp. 2d at 597 (granting fee award of 33.3% of $9.5 million settlement fund); *see also In re Optiver Commodities Litig.*, No. 08-cv-06842, ECF No. 93 (S.D.N.Y. Jun. 22, 2015) (awarding 30% of $16.75 million common fund as attorneys' fees). In addition to the request for attorneys' fees, Lead Counsel will ask for an award of no more than $250,000 for unreimbursed litigation costs and expenses.

8. There are no unidentified agreements that impact adequacy of relief for the Settlement Class

Rule 23(c)(3) requires that "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the proposal." Here, all agreements that could potentially impact the Settlement have been disclosed in the Settlement.[4] The Settlement contains a structure and terms that are commonly used in class action settlements. *See* Briganti Decl. ¶ 28; *see also Am. Int'l Grp.*, 2011 WL 3290302, at *1-2, 4 (describing financial terms, termination provisions, and global mutual releases features of the settlement). This includes a supplemental agreement that provides Tower a qualified right to terminate the Settlement Agreement under certain circumstances before final approval. Briganti Decl. ¶ 28; Ex. 1 § 19(D). This "blow" provision is common in class action settlements. *See Am. Int'l Grp.*, 2011 WL 3290302, at *1 (describing termination provision

[4] Tower advises that it may seek leave of the Court to obtain a reversion of part of the Settlement Fund depending on the level of participation in the Settlement. The Settlement Agreement is silent as to any reversion rights, and Class Plaintiffs have not agreed that a reversion is appropriate.

based on opt out volume); *see also In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 948 (9th Cir. 2015); *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 02CV1152, 2018 WL 1942227, at *5 (N.D. Tex. Apr. 25, 2018).

II. The Court Should Conditionally Certify The Proposed Settlement Class

At the preliminary approval stage, the Court must also determine if the proposed Settlement Class should be certified for settlement purposes. Under Rule 23, class actions can be certified for settlement purposes only. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). For a settlement class to be certified, it must satisfy each requirement delineated in Rule 23(a), as well as at least one of the separate divisions of Rule 23(b). *Id.* at 613-614. As described below, the Settlement Class meets the requirements of Rule 23(a) and Rule 23(b)(3) for preliminary and final approval. The Court should conditionally certify the Settlement Class as to the claims against Tower.

A. The Proposed Class Meets The Requirements Of Rule 23(a)

1. Rule 23(a)(1) – Numerosity

Rule 23(a)(1) requires that the class be so numerous as to make joinder of its members "impracticable." No magic number satisfies the numerosity requirement, however, "a class of more than 40 members is generally believed to be sufficiently numerous for Rule 23 purposes." *Schmidt v. Smith & Wollensky LLC*, 268 F.R.D. 323, 326 (N.D. Ill. 2010). The proposed Settlement Class consists of all persons and entities that purchased or sold any E-Mini Index Futures or Options on E-Mini Index Futures on the CME and/or the CBOT from at least March 1, 2012 through October 31, 2014. Based on Class Plaintiffs' investigation, there are at least hundreds of people and entities that transacted in E-Mini Index Futures or Options on E-Mini Index Futures during the Class Period. Joinder would be impracticable and Rule 23 (a)(1) is satisfied.

2. Rule 23(a)(2) – Commonality

FED. R. CIV. P. 23(a)(2) requires that there be "questions of law or fact common to the class." Class Plaintiffs must show that resolution of an issue of fact or law "is central to the validity of each" class member's claim and "[e]ven a single [common] question will" satisfy the commonality requirement. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 359 (2011).

A central allegation in the Complaint is that Defendants used spoofing to alter the perception of supply and demand and manipulate the prices of E-Mini Index Futures. Proof of this distortion will be common to all Class members. *See, e.g., Premium Plus Partners, L.P. v. Davis*, No. 04-C-1851, 2008 WL 3978340, at *4 (N.D. Ill. Aug. 22, 2008) (finding commonality where Plaintiffs contended Defendants violated the CEA by artificially inflating the 30–Year Treasury Futures market), *aff'd sub nom. Premium Plus Partners, L.P. v. Goldman, Sachs & Co.*, 648 F.3d 533 (7th Cir. 2011). There are additional legal and factual issues common to members of the Class, including:

- whether the Defendants' conduct violated the CEA;
- the operative time periods of Defendants' alleged violations of the CEA; and
- the appropriate measure of the amount of damages suffered by the Class.

The proof required to establish Defendants' alleged unlawful conduct is common to all members of the Class and, therefore, Rule 23(a)(2) is satisfied.

3. Rule 23(a)(3) – Typicality

FED. R. CIV. P. 23(a)(3) requires that the class representatives' claims be "typical" of class members' claims. "[T]ypicality is closely related to commonality and should be liberally construed." *Saltzman v. Pella Corp.*, 257 F.R.D. 471, 479 (N.D. Ill. 2009) (citations omitted). Typicality is a "low hurdle," requiring "neither complete coextensivity nor even substantial identity of claims." *Owner-Operator Indep. Drivers' Ass'n v. Allied Van Lines, Inc.*, 231 F.R.D. 280, 282 (N.D. Ill. 2005). "A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives

rise to the claims of other class members and is based on the same legal theory." *Ploss v. Kraft Foods Grp., Inc.*, 431 F. Supp. 3d 1003, 1011 (N.D. Ill. 2020)

Courts generally find typicality in cases alleging a theory of manipulative conduct that affects all class members in the same fashion. *Id.* (finding typicality where named representative and class members bought and lost money on wheat futures due to defendants' alleged scheme to create artificial prices); *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 244 F.R.D. 469, 477-78 (N.D. Ill. 2007), *aff'd*, 571 F.3d 672 (7th Cir. 2009) (finding typicality despite the fact that class members may need to rely on historical evidence from different dates to support allegations of price manipulation). The injuries of the proposed class representatives are typical of the injuries of the members of the Class because they arise from the same unitary course of Defendants' alleged manipulative conduct in connection with E-Mini futures contracts. Thus, Rule 23(a)(3) is satisfied.

4. Rule 23(a)(4) – Adequacy of Representation

Rule 23(a)(4) requires that, for a case to proceed as a class action, the court must find that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23; *see Kohen v. Pac. Inv. Mgmt.*, 571 F.3d 672, 679 (7th Cir. 2009). As described in Part I.A.1, *supra*, Class Plaintiffs and Lowey are adequate. Accordingly, under Rule 23(g), it is appropriate for the Court to appoint Lowey as Class Counsel.

B. The Class May Be Properly Certified Under Rule 23(b)(3)

To satisfy Rule 23(b)(3), Class Plaintiffs must conditionally establish: (1) "that the questions of law or fact common to class members predominate over any questions affecting only individual members;" and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). As detailed below, the Class satisfies these requirements.

With regard to predominance, "[c]onsiderable overlap exists between the court's determination of commonality and a finding of predominance. A finding of commonality will likely satisfy a finding of predominance because, like commonality, predominance is found where there exists a common nucleus of operative facts." *Saltzman*, 257 F.R.D. at 484.

In CEA manipulation cases such as this one, courts consistently find that common issues of the existence and scope of the alleged manipulation predominate over individual issues. *See Ploss*, 431 F. Supp. 3d at 1014 ("Courts have found that common questions do predominate over individual questions in cases alleging price manipulation under the Commodity Exchange Act"); *accord Kohen*, 244 F.R.D. at 480 (citing cases). This follows from the central nature of the manipulation in such cases. The same proof required to establish Defendants' liability and to demonstrate Class Plaintiffs' injury would be used by all other Class Members to establish their injury and damages. Here, the timing, nature and impact of Defendants' alleged spoofing serve as that common nucleus of facts that links together each Class Member's claim. As a result, the predominance requirement is satisfied.

Class Plaintiffs must also show that a class action is superior to individual actions, which is evaluated by four considerations:

> (A) the interest of the members of the class in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
>
> (D) the difficulties likely to be encountered in the management of the class action.

FED. R. CIV. P. 23(b)(3). Here, any Class member's interest in individually controlling the prosecution of a separate claim is likely low given that the cost of litigating a claim individually would likely exceed the potential individual recovery. *Kohen*, 244 F.R.D. at 481 (N.D. Ill. 2007)

(finding superiority was satisfied in CEA case where individual claims would likely "cost more to prosecute than may be recovered in damages"). Furthermore, hundreds of individuals and entities traded E-Mini Index Futures during the Class Period; settling these claims in the context of a class action conserves both judicial and private resources and hastens Class Members' recovery. In addition, while Class Plaintiffs see no management difficulties in this case, this consideration is not pertinent to approving a settlement class. *See Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.").

As to whether any existing litigation impacts the superiority of this litigation, as mentioned *supra*, Defendants were subject to government prosecutions and settlements that involved at least in part, the factual predicate of this Action. As part of the resolution of the government investigations, Tower agreed to fund the VCA in the amount of $32 million. While some Class Members may be eligible to receive proceeds from the VCA established by the DOJ, it is unclear to Class Plaintiffs if all Class Members may be eligible to recover. Further, assuming all Class Members were eligible, the VCA only recovered a portion of what Class Plaintiffs estimate to be the damages caused by Defendants' conduct. The Settlement provides a significant enhancement to Class Members, providing recovery for those who might not be eligible to receive money from the VCA, and increasing the total percentage of damages recovered for the Class.

III. The Court Should Approve The Proposed Class Notice Plan And A.B. Data, Ltd. As Settlement Administrator

If the Court preliminarily approves the Settlement, it must separately consider whether the proposed notice is appropriate. Class Members "are entitled to the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Mangone v. First USA Bank*, 206 F.R.D. 222, 231 (S.D. Ill. 2001). But neither Rule 23 nor due

process require "actual notice to all class members," which sometimes "might be *impossible*." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 665 (7th Cir. 2015) (emphasis in original).

The proposed Class Notice plan and related forms of notice (*see* Briganti Decl. Exs. 2-5) are "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). The direct-mailing notice component of the notice program will involve sending the mailed notice (Briganti Decl. Ex. 3) and the Proof of Claim and Release form (*id.*, Ex. 5) via First-Class Mail, postage prepaid to potential Class Members. *See* Declaration of Linda Young attached as Briganti Decl., Ex. 2. The Supreme Court has consistently found that mailed notice satisfies the requirements of due process. *See, e.g., Mullane*, 339 U.S. at 319.

The Settlement Administrator also will publish the publication notice in various periodicals, industry publications, and on websites. *See* Briganti Decl., Ex. 4. Any Settlement Class Members that do not receive the Class Notice via direct mail likely will receive the Class Notice through the foregoing publications or word of mouth.

The Settlement Website, www.eminifuturesclassactionsettlement.com, will serve as an information source regarding the Settlement. Settlement Class Members can review and obtain: (i) a blank Proof of Claim and Release form for the Settlement; (ii) the mailed and publication notices; (iii) the proposed Distribution Plan; (iv) the Settlement Agreement with Tower; and (v) key pleadings and Court orders. The Settlement Administrator will also operate a toll-free telephone number to answer Class Members' questions and facilitate claims filing.

Lead Counsel recommends that A.B. Data, Ltd. ("A.B. Data") be appointed as Settlement Administrator. A.B Data developed the Class Notice plan and has experience in administering class

action settlements involving securities in over-the-counter and exchange markets, including in cases involving futures and options.[5]

IV. The Court Should Appoint Citibank, N.A. As Escrow Agent

Lowey has designated Citibank, N.A. ("Citibank") to serve as Escrow Agent, to which Tower has consented. Citibank has served as escrow agent in a number of settlements, including *Laydon v. Mizuho Bank, Ltd.*, No. 12-cv-3419 (GBD) (S.D.N.Y) and *Sonterra Capital Master Fund, Ltd. v. UBS AG*, No. 15-cv-5844 (GBD). Citibank has agreed to provide its services at market rates.

V. Proposed Schedule Of Events

In connection with preliminary approval of the Settlement, the Court must set a Fairness Hearing date, set dates for initial mailing of the mailed notice and distribution of the publication notice, and set deadlines for requesting exclusion from the Class, objecting to the Settlement, and filing claims. In addition to considering final approval of the Settlement and the Distribution Plan,

[5] *See*, *e.g.*, *Laydon v. Mizuho Bank, Ltd.*, No. 12-cv-3419 (GBD) (S.D.N.Y) and *Sonterra Capital Master Fund, Ltd. v. UBS AG*, No. 15-cv-5844 (GBD) (S.D.N.Y.) (administering settlements covering a class period of January 1, 2006 through June 30, 2011 and including futures contracts price-based on the Tokyo Interbank Offered Rate for the Japanese Yen ("Euroyen TIBOR"), interest rate swaps and swaptions, forward rate agreements, and Yen currency futures contracts and forward agreements price based on the London Interbank Offered Rate for the Japanese Yen ("Yen-LIBOR")); *Sullivan v. Barclays plc*, No. 13-cv-2811 (PKC) (S.D.N.Y.) (involving settlements of claims relating to the alleged manipulation of the Euro Interbank Offered Rate ("Euribor") and the prices of Euribor-based interest rate swaps, forward rate agreements, forwards, futures, and options); *In re Libor-Based Fin. Instruments Antitrust Litig.*, No. 11-md-2262 (NRB) (covering a class period of August 1, 2007 through May 31, 2010 and concerning the alleged manipulation of exchange-based financial products price-based upon U.S. Dollar LIBOR); *In re Crude Oil Commodity Futures Litig.*, No. 11-cv-3600 (S.D.N.Y.) (covering a class period of January 1, 2008 through May 15, 2008 and including West Texas Intermediate crude oil futures contracts and option contracts traded on the New York Mercantile Exchange and Intercontinental Exchange); *In re GSE Bonds Antitrust Litigation*, No. 19-cv-1704 (JSR) (S.D.N.Y) (settlements relating to the alleged manipulation of unsecured government-sponsored enterprise bonds traded over-the-counter during the period of January 1, 2009 through January 1, 2019); *State Street Indirect FX Class Actions*, 11-cv-10230 (MLW) (S.D.N.Y.) (administering settlement covering a class period of January 2, 1998 through December 31, 2009 and including over-the-counter foreign currency transactions).

Lead Counsel will also file a motion for fees and expenses, and Class Plaintiffs may file an application for an Incentive Award. Class Plaintiffs propose the following schedule:

Begin distribution of mailed notice to Class	No later than 28 days after entry of the Notice Order ("Notice Date")
Commencement of the distribution of the publication notice; launch of Settlement Website	No later than the Notice Date
Complete initial distribution of mailed and publication notices	49 days after the Notice Date
Deadline to file motions for final approval of the Settlement, an award of attorneys' fees and expenses, and incentive awards.	14 days prior to the deadline for objections
Deadline to object to the Settlement, Distribution Plan for settlement proceeds, request for an award of attorneys' fees and expenses, or application for incentive awards	70 days after the Notice Date
Deadline to request exclusion from the Settlement Class	70 days after the Notice Date
Deadline to file reply papers in support of final approval of the Settlement, request for an award of attorneys' fees and expenses, and request for incentive awards.	7 days prior to the Fairness Hearing
Fairness Hearing	At the Court's convenience, but no earlier than 105 days after the Notice Date
Last day for submitting Proof of Claim and Release forms	133 days after the Notice Date or such other time as set by the Court

CONCLUSION

For the foregoing reasons, the proposed Settlement warrants the Court's preliminary approval. Class Plaintiffs respectfully request that the Court enter the accompanying proposed orders that among other things: (a) preliminarily approves the Settlement, subject to later, final

approval; (b) conditionally certifies a Settlement Class on the claims against Tower; (c) approves the Distribution Plan with respect to the Settlement; (d) appoints Class Plaintiffs as representatives of the Settlement Class; (e) appoints Lowey as Class Counsel for the Settlement Class; (f) appoints Citibank as Escrow Agent for purposes of the Settlement Funds; (g) appoints A.B. Data as the Settlement Administrator for the Settlement; (h) approves the proposed forms of Notice to the Settlement Class of the Settlement and the proposed Notice plan; (i) sets a schedule leading to the Court's consideration of final approval of the Settlement; and (j) stays all proceedings as to Tower except with respect to approval of the Settlement.

Dated: January 29, 2021
White Plains, New York

LOWEY DANNENBERG, P.C.

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