



LOWEY DANNENBERG, P.C.

December 17, 2021

VIA ECF

The Honorable Gregory H. Woods
United States District Court
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 2260
New York, NY 10007

**Re: *In re JPMorgan Precious Metals Spoofing Litigation*,
No. 18-cv-10356 (GHW) (S.D.N.Y.)**

Dear Judge Woods:

We write on behalf of the Parties in the above-referenced action. Pursuant to your Honor's request, we submit this joint letter to address the Court's comments during the November 29, 2021 hearing ("Hearing") on Class Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (the "Motion") with JPMorgan Chase & Co. ("JPMorgan").

We first address the two legal questions the Court directed to both Class Plaintiffs and Defendants. After addressing these legal questions, Class Plaintiffs address the Court's remaining questions in the order that they were raised during the Hearing. For the Court's convenience, the November 29, 2021 Hearing Transcript ("Hr'g Tr.") is attached as Exhibit 1.

A. LEGAL ISSUES

1. Jurisdiction Over Absent Class Members

During the Hearing, the Court asked the Parties to provide the legal basis to support the finding in Paragraph 2 of the [Proposed] Preliminary Approval Order ("[Proposed] PAO") that the Court can exercise jurisdiction over all Class Members regardless of their location in the world and their contacts with this jurisdiction (*see* Hr'g Tr. at 4:20-9:13). After independently researching the issue, Class Plaintiffs and Defendants have conferred and jointly agreed that such a finding is not necessary for purposes of preliminary approval of the settlement. Accordingly, the Parties propose deleting this language in the [Revised Proposed] Preliminary Approval Order ("[Revised Proposed] PAO"). *See* Exhibit 2 at ¶ 2.

Notwithstanding this proposed deletion, the Court may exercise jurisdiction over any absent Class Member, provided that the Court finds that Class Plaintiffs' proposed Class Notice plan is reasonable under the circumstances, Class Members are provided an opportunity to be heard by the Court and an opportunity to "opt out" of the Class, and Class Members are adequately represented by Class Plaintiffs. The Supreme Court squarely addressed this issue in *Phillips*

www.lowey.com

44 South Broadway, Suite 1100, White Plains, NY 10601 (p) 914-997-0500 (f) 914-997-0035
Four Tower Bridge, 200 Barr Harbor Drive, Suite 400, West Conshohocken, PA 19428-2977 (p): 610-941-2760 (f): 610-862-9777



LOWEY DANNENBERG

Letter to The Honorable Gregory H. Woods
December 17, 2021
Page 2 of 9

Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985), holding that the exercise of jurisdiction over absent class members requires only that minimum procedural due process protection be provided, *i.e.*, “notice plus an opportunity to be heard and participate in the litigation,” an opportunity to “opt out” of the litigation, and adequate representation. *See also In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 241 (2d Cir. 2016) (Leval, J., concurring) (noting that “[i]n order for a court “to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection [D]ue process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class”) (citing *Shutts*, 472 U.S. at 811-12). As to why only “minimum procedural due process protection” was warranted for absent class members, as opposed to specific personal jurisdiction, the Court explained that “[i]n sharp contrast to the predicament of a defendant haled into an out-of-state forum,” absent class members are “not haled anywhere to defend themselves upon pain of a default judgment.” *Shutts*, 472 U.S. at 808-811.¹

As discussed herein and in the Motion, Class Notice will be mailed directly to Class Members whose locations can reasonably be identified, without regard to geographic boundaries, and supplemental notice will be provided via a print and digital media strategy to reach those Class Members for whom we do not have a mailing address. In accordance with Rule 23(c)(2)(B) and *Shutts*, the Class Notice will advise Class Members of their opportunity to opt out of the Settlement or to appear at the Fairness Hearing. Under *Shutts*, because of these due process protections, the Court can find in the Final Approval Order that it has jurisdiction over absent Class Members.

2. The Court’s Authority to Issue a Bar Order

With respect to Paragraph 17 of the [Proposed] Final Approval Order (“[Proposed] FAO”), the Court asked the Parties (1) to provide it with the legal basis to grant injunctive relief to bar claims by any Person against the Released Parties for contribution, indemnification, or similar claims relating to any amounts paid or awarded in this Action, and (2) whether it has the authority to issue a bar order in the proposed releases. *See* Hr’g Tr. at 30:20-33:7. Class Plaintiffs and Defendants have conferred and jointly agree to strike Paragraph 17 in the [Revised Proposed] Final Approval Order (“[Revised Proposed] FAO”). *See* Exhibit 3 at ¶ 17.

¹ Moreover, in the circumstances of this case, there is a basis to find “minimum contacts” over absent class members, sufficient for specific personal jurisdiction. *See In re Joint Eastern and Southern District Asbestos Litig.*, 78 F.3d 764, 778 (2d Cir. 1996) (establishing requirements of *Shutts* is unnecessary “where the court has an independent basis for jurisdiction”). The Class is defined as persons or entities that transacted in precious metals futures or options on a U.S.-based exchange, which is the very conduct that forms the basis for the suit. Given that the Commodity Exchange Act authorizes nationwide service of process, 7 U.S.C. §§ 13a-1(e), an absent class member’s case-related contacts in the United States subjects it to specific jurisdiction in this Court. This is distinguishable from a scenario where an out-of-forum defendant has not engaged in any suit-related contacts in the forum. *See Daimler AG v. Bauman*, 571 U.S. 117, 126 (2014).



Letter to The Honorable Gregory H. Woods
December 17, 2021
Page 3 of 9

B. REMAINING ISSUES

1. Amendments to Paragraph 16 of [Proposed] PAO

The Court asked Class Plaintiffs to evaluate the proposed finding in Paragraph 16 of the [Proposed] PAO that the Class Notice plan is the “best notice practicable.” See Hr’g Tr. at 9:16-10:12. This phrase is routinely included in preliminary approval orders in class actions because Rule 23 specifically requires that notice to class members be the “best notice that is practicable under the circumstances.” See Rule 23(c)(2)(B) (“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.”) (emphasis added). The Supreme Court also recognized that “the court is required to direct to class members ‘the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort.’” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Thus, several courts in this District have endorsed class notice plans similar to the one proposed here as the “best practicable” in commodities manipulation class actions involving class members located throughout the world who transacted on U.S. exchanges, including the NYMEX and COMEX. See, e.g., *In re London Silver Fixing Antitrust Litig.*, Case No. 14-MD-2573 (VEC) (S.D.N.Y. Aug. 5, 2020) (“*Silver*”), ECF No. 464 at ¶ 10; *In re: Commodity Exchange, Inc., Gold Futures and Options Trading Litig.*, Case No. 1:14-MD-02548 (VEC) (S.D.N.Y. Feb. 12, 2021) (“*Gold*”), ECF No. 516 at ¶ 10; *In re JPMorgan Treasury Futures Spoofing Litig.*, 20-cv-03515-PAE (S.D.N.Y. Dec. 10, 2021) (“*Treasuries*”), ECF No. 74 at ¶ 16.

The Parties have conferred regarding the strictures of Rule 23 and have concluded that deviating from the explicit language under the Rule, requiring class notice to be the “best practicable notice under the circumstances,” could invite a number of unintended and unnecessary objections to the Settlement from Class Members. Given the comparable notice programs that were preliminarily approved in the above-referenced *Silver*, *Gold* and *Treasuries* cases, the Parties respectfully submit that these authorities should be sufficient to assuage the Court’s concerns about the proposed finding regarding the Notice Program proposed here.

In addition, the [Proposed] PAO as originally drafted asked the Court to find that the Class Notice plan satisfies Rule 23, due process, and “any other applicable rules or laws.” See Hr’g Tr. at 10:16-11:6. Class Plaintiffs propose deleting this latter phrase in the [Revised Proposed] PAO. See Exhibit 2 at ¶ 16. Defendants consent to the modification.

2. Potential Deposition of Objectors

The Court asked Class Plaintiffs to propose alternative language for Paragraph 20 of the [Proposed] PAO concerning the potential deposition of Class Members who may object to the Settlement. See Hr’g Tr. at 12:22-13:25. Class Plaintiffs propose modifying Paragraph 20 in the [Revised Proposed] PAO to advise objectors that they “may, in certain circumstances, be required



LOWEY DANNENBERG

Letter to The Honorable Gregory H. Woods
 December 17, 2021
 Page 4 of 9

to make themselves available to be deposed” rather than stating objectors “shall make themselves available to be deposed.” *See* Exhibit 2 at ¶ 20. This revision will ensure that objectors are on notice about the potential for a deposition in connection their objections, without the potential chilling effect identified by the Court from stating that such objectors will necessarily be deposed. Defendants consent to the modification.

3. Documents From Potential Class Members Seeking To Opt Out

The Court asked Class Plaintiffs to revisit the language of Paragraph 22(c) of the [Proposed] PAO to ensure that it is not unduly burdensome for Class Members to opt out of the Settlement. *See* Hr’g Tr. at 14:1-23:15. As noted during the Hearing, and further clarified in the [Revised Proposed] PAO, the Parties are requesting and not requiring the production of certain information for purposes of opting out. In addition, the [Revised Proposed] PAO clarifies the type of information that would be sufficient to satisfy the request. *See* Exhibit 2 at ¶ 22. Paragraph 22 has been further amended to make clear that any potential Class Member has the option of executing a waiver to allow the Parties to obtain information directly from CME Group (“CME”). *Id.* A draft of the sample waiver that can be provided to Class Members is attached as Exhibit 4. Defendants consent to these proposed modifications.

4. Rule 11 Certifications

The Court also commented on the [Proposed] FAO and said that it would require affidavits or Rule 11 Certifications from counsel before the Court could make a finding of compliance with Rule 11. *See* Hr’g Tr. at 28:18-20. The Parties have conferred regarding this issue. Given that Rule 11 Certifications are necessary only in securities class actions brought after the enactment of the Private Securities Litigation Reform Act of 1995, and not required under the Commodity Exchange Act, Class Plaintiffs will remove this requirement from the [Revised Proposed] Final Approval Order. *See* Exhibit 3 at ¶ 17. Defendants consent to the modification.

5. Class Notice Plan Adequacy For Class Members Based Outside of North America

The Court asked Class Plaintiffs to provide a declaration as to whether the Class Notice plan is sufficiently targeted towards those Class Members who may be located in other parts of the world, or to otherwise modify the Class Notice Plan accordingly. *See* Hr’g Tr. at 33:8-40:1.

As an initial matter, the originally proposed Class Notice plan is substantially similar to other court-approved notice plans used to notify settlement classes that included investors outside of the United States. *See, e.g., In re London Silver Fixing Antitrust Litig.*, Case No. 14-MD-2573 (VEC) (S.D.N.Y. Aug. 5, 2020), ECF No. 464 at ¶ 10; *In re Commodity Exchange, Inc., Gold Futures and Options Trading Litig.*, Case No. 1:14-MD-02548 (VEC) (S.D.N.Y. Feb. 12, 2021), ECF No. 516 at ¶ 10; *In re JPMorgan Treasury Futures Spoofing Litig.*, 20-cv-03515-PAE (S.D.N.Y. Dec. 10, 2021), ECF No. 74 at ¶ 16. Based on prior experience, the majority of Class Members investing on U.S. exchanges tend to be North America-based investors or foreign-based



Letter to The Honorable Gregory H. Woods
December 17, 2021
Page 5 of 9

individuals or institutions transacting through a U.S.-based institution. Based on the available data of the “large traders”² in the Precious Metals Futures market, approximately 60% of those large traders are located in the United States and Canada. In the Precious Metals Futures market, large traders generally comprise over 90% of the total volume of trading in open interests.³

Accordingly, the originally proposed Class Notice plan provided direct mail notice to these large traders, including the 40% located outside North America. The Class Notice will be sent directly to any foreign based Class Member for whom we have contact information. Moreover, the original Class Notice plan supplemented this direct mail notice with a number of features that targeted potential Class Members around the world. A global PR Newswire press release will be issued to 25,000 newsrooms and websites across the United States and to major financial markets in Canada, South America, Europe and Asia. Additionally, the *Financial Times-Global Edition* has a significant circulation in the United Kingdom (approximately 47,000 subscribers), continental Europe, the Middle East and Africa (approximately 22,000 subscribers), and Asia (approximately 11,000 subscribers).

However, to ensure that the Class Notice has a wider reach outside of North America, and after weighing the options available to expand the reach of Class Notice in both print publications and online marketing against the cost and effectiveness of any additional print or online campaigns, the proposed Settlement Administrator, A.B. Data, Ltd., has recommended and Class Plaintiffs propose to add a digital media component that would target potential Class Members outside of North America using Google AdWords and Google Display Network. This enhancement is consistent with the 2018 Amendments to Rule 23, which provide that the notice may be by “electronic means.” FED. R. CIV. P. 23(c)(2)(B). Attached as Exhibit 5 is a Supplemental Declaration of Linda Young with the revised proposed Class Notice plan.

6. Supplementing The Distribution Plan

The Court requested more information on how the “multipliers” were derived for the Distribution Plan. *See Hr’g Tr. at 40:2-42:14*. Attached as Exhibit 6 is the Amended Distribution Plan providing a more technical explanation of the multipliers used in the Distribution Plan. The Distribution Plan uses three multipliers to generate the Instrument Amount: a “Volume Multiplier,” “Instrument Multiplier,” and a “Futures Contract Specification Multiplier.”

The Volume Multiplier is simply a conversion figure, designed to ensure that (1) all relevant futures and options contracts are represented by the same number of units and (2) those units are not so large to make working with the number difficult (thus the division by one million).

² Large traders are defined as those who are required to report under Part 17 of the Commodity Futures Trading Commission’s (CFTC) regulations. Current reporting levels are found in CFTC Regulation 15.03(b).

³ Per the CFTC, large traders usually represent 70 to 90 percent of the total open interest in any given market. *See* <https://www.cftc.gov/MarketReports/CommitmentsofTraders/ExplanatoryNotes/index.htm>.



LOWEY DANNENBERG

Letter to The Honorable Gregory H. Woods
December 17, 2021
Page 6 of 9

Gold, silver, platinum, and palladium each have a particular futures contract unit (troy ounces per futures contract):

Contract	Size of one (1) contract unit⁴
COMEX Gold Futures	100 troy ounces
COMEX Silver Futures	5,000 troy ounces
NYMEX Platinum Futures	50 troy ounces
NYMEX Palladium Futures	100 troy ounces

Because the contract units are not identical, the Volume Multiplier conversion is necessary to compare “apples to apples,” in this case points, where each point is equal to \$1 million:

Volume Multiplier

$$\begin{aligned}
 &= (\# \text{ of contracts traded} \times \text{Futures Price (or Option Premium)} \times \text{Futures Contract Unit}) / \$1 \text{ million} \\
 &= [\# \text{ of contracts traded}] \times [\$/\text{troy ounce}] \times [\text{troy ounces/contract}] \times [\text{point}/\$1 \text{ million}] \\
 &= \text{points}
 \end{aligned}$$

The Instrument Multiplier reflects the impact of any price change between futures and options. Based on our experts’ analysis of the Precious Metals market, a price change on Precious Metals Futures of 1 will have a corresponding change of 0.43 in the price of Options on Precious Metals Futures.

The Futures Contract Specification Multipliers are based on Class Plaintiffs’ experts’ investigation and analysis of JPMorgan’s alleged spoofing activity and frequency.⁵ The application of the Futures Contract Specification Multipliers is intended to facilitate a fair, reasonable, and efficient allocation of the Net Settlement Fund for purposes of this Action, and not intended to be or reflect the total damages that could have been sought had the litigation gone to trial, or the appropriate methodology to apply to determine total damages.

Using complementary Precious Metals Futures datasets provided by JPMorgan and the CME containing over 10 million transaction entries, the experts built spoofing detection models. The models involved screening for order-cancellation pairs to find transactions that resemble the definition of spoofs. For purposes of this model and developing this proposed plan of distribution, the order-cancellation pairs that satisfy at least one of the following conditions were considered as potential spoofs: (a) a potential genuine trade by the same trader occurred on the opposing side of the market; and (b) the cancellation is larger than 15 contracts for COMEX Silver Futures, 20 contracts for NYMEX Platinum Futures and NYMEX Palladium Futures, or 30 contracts for

⁴ The contract specifications, including the contract unit, are available at www.cmegroup.com.

⁵ For the avoidance of doubt, Defendants do not endorse the assumptions, methodology, or results of Class Plaintiffs’ experts’ investigation and analysis, and reserve all rights with respect to said analysis.



LOWEY DANNENBERG

Letter to The Honorable Gregory H. Woods
 December 17, 2021
 Page 7 of 9

COMEX Gold Futures. Multiple spoofs detected at the same time were grouped under a single spoofing identifier.

Additional filtering criteria were then applied to the alleged spoofs identified to control for the potential for false positives. The spoofing detection models were tested against the spoofs identified from the regulatory investigation and were found to identify more than 85% of those spoofs, including 100% of the spoofs that the regulatory settlements provided sufficient information through which to match the corresponding transactions in the datasets. The spoofing detection models were then used to detect other spoofs that had not been previously identified to calculate the number of spoofs per relevant contract and in total.

The Futures Contract Specification Multiplier for each contract was then derived by taking the number of alleged spoofs impacting the instrument and contract expiry, dividing by the total number of spoofs across all contracts, multiplying the resulting proportion by 10,000, and rounding the number to the nearest integer.

Lead Counsel recommends the use of this Distribution Plan as it is fair and reasonable and is designed to efficiently administer the Settlement. Plans of allocation similar to this Distribution Plan, including the use of similarly structured multipliers, have been approved in other spoofing cases. *See, e.g., In re JPMorgan Treasury Futures Spoofing Litig.*, 20-cv-03515-PAE (S.D.N.Y. Dec. 10, 2021), ECF No. 74 at ¶ 9; *Boutchard v. Gandhi*, 18-cv-07041 (N.D. Ill. Jul. 30, 2021), ECF No. 153 at ¶ 15.

7. Blanks In The Proposed Mailed Class Notice

The Court noted that it found some blanks in the proposed mailed Class Notice relating, in particular, to Lead Counsel's anticipated legal fees and reimbursement of expenses. *See Hr'g Tr.* at 42:17-23. Class Plaintiffs believe that the Court may have reviewed the version of the Class Notice that was attached to the Settlement Agreement at the time of its execution on September 1, 2021. *See* ECF No. 79-1 Ex. C. The final proposed mailed Class Notice was submitted to the Court on November 19, 2021 as a separate standalone exhibit (Exhibit 3) to the Briganti Declaration and it does detail of the anticipated attorneys' fees and reimbursement of expenses. The mailed Class Notice advises that Lead Counsel may seek no more than one-third of the Settlement Fund as attorneys' fees and up to \$750,000 for litigation costs and expenses. *See* ECF Nos. 79-3 at ¶ 27 and Exhibit 7 at ¶ 27.

8. Proposed Date Of The Fairness Hearing – At Least 150 Days From The Notice Date

During the Hearing, the Court requested Lead Counsel to confirm the total number of days Class Members would have to object to the Settlement under the proposed Class Notice plan. *See Hr'g Tr.* at 11:7-24. Lead Counsel stated that Class Member would have 105 days to object to the Settlement. *Id.* In Appendix A to Class Plaintiffs' Memorandum of Law in Support of Motion for



LOWEY DANNENBERG

Letter to The Honorable Gregory H. Woods
 December 17, 2021
 Page 8 of 9

Preliminary Approval, we requested that the Court set the Fairness Hearing to be at least 150 days after the “Notice Date.” *See* ECF No. 78 at 27.⁶ Thus, as long as the Court sets the Fairness Hearing at least **195 days** (150 days, plus 45 days for the notice period) from entry of the Preliminary Approval Order, the objector deadline will be sufficiently in advance of the Fairness Hearing and will provide Class Members with at least 105 days to review the Class Notice.

9. Coordination for Remote Final Fairness Hearing

Finally, as discussed during the Hearing and based on the ongoing pandemic, the Court will conduct the Fairness Hearing telephonically and requested that Class Plaintiffs make arrangements for a hosted audio conference call for the Fairness Hearing. *See* Hr’g Tr. at 43:2-44:18. Class Plaintiffs have arranged the hosted conference call with a third-party telecommunications vendor and have obtained the following toll-free phone number: 1-888-567-1602 (if calling from outside the United States or Canada, 1-862-298-0702). These phone numbers can be used by participants to join the call on the designated date and time of the Fairness Hearing. This call will be hosted by an operator who will organize all the speakers and participants before and during the call. We have also amended the proposed mailed Class Notice and proposed Publication Notice to reflect that the Fairness Hearing will be conducted telephonically using these phone numbers (*see* Exhibit 7 at ¶¶ 28-30; Exhibit 8 at p.3).

Respectfully submitted,

SULLIVAN & CROMWELL LLP

LOWEY DANNENBERG, P.C.

/s/ Amanda Davidoff (w/ consent)

/s/ Vincent Briganti

Robert A. Sacks
 1888 Century Park East
 Los Angeles, CA 90067-1725
 Tel: (310) 712-6600

Vincent Briganti
 Raymond P. Girnys
 Sitso W. Bediako
 44 South Broadway, Suite 1100
 White Plains, NY 10601
 Tel.: (914) 997-0500

Amanda F. Davidoff
 1700 New York Avenue, N.W., Suite 700
 Washington, DC 20006
 Tel.: (202) 956-7500

Lead Counsel for Class Plaintiffs

Counsel for Defendant JPMorgan Chase & Co.

⁶ For clarification, in Section IV of Class Plaintiffs’ Memorandum of Law In Support of the Motion for Preliminary Approval, we incorrectly indicated that the proposed Fairness Hearing should be set for 150 days “after entry of the Preliminary Approval Order.” ECF No. 78 at 25.



Letter to The Honorable Gregory H. Woods
December 17, 2021
Page 9 of 9

**SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP**

/s/ Scott Musoff (w/ consent)
Scott Musoff
One Manhattan West
New York, NY 10001-8602
Tel: (212) 735-7852

Counsel for Defendant Michael Nowak

LATHAM & WATKINS, LLP

/s/ Jeff Hammel (w/ consent)
Jeff Hammel
1271 Avenue of the Americas
New York, NY 10020
Tel: (212) 906-1200

Counsel for Defendant Robert Gottlieb

SETH GINSBERG, ATTORNEY AT LAW

/s/ Seth Ginsberg (w/ consent)
Seth Ginsberg
299 Broadway, Suite 1405
New York, NY 10007
Tel.: (212) 227-6655

Counsel for Defendant John Edmonds

Encls: Exhibit 1 - November 29, 2021 Hearing Transcript
Exhibit 2 - [Revised Proposed] Preliminary Approval Order (redlined and clean versions)
Exhibit 3 - [Revised Proposed] Final Approval Order (redlined and clean versions)
Exhibit 4 - Sample CME Waiver
Exhibit 5 - Supplemental Declaration of Linda V. Young
Exhibit 6 - Amended Distribution Plan
Exhibit 7 - Revised Mailed Class Notice (redlined and clean versions)
Exhibit 8 - Revised Publication Notice (redlined and clean versions)

cc: All Counsel of Record (via ECF)