UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE: AMARANTH NATURAL GAS COMMODITIES LITIGATION

MASTER FILE
NO. 07-CV-6377 (SAS)

This Document Relates to: ALL ACTIONS

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

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Plaintiffs[1] respectfully submit this memorandum and the accompanying declaration of Christopher Lovell, Esq. in support of their motion pursuant to Rule 23(e) of the Federal Rules of Civil Procedure for preliminary approval of the Stipulation and Agreement of Settlement ("Settlement")[2] executed by Plaintiffs and the Settling Defendants.[3]

I. INTRODUCTION

Plaintiffs entered into the Settlement with the Defendants on December 13, 2011 after four and one-half years of litigation, which involved voluminous fact and expert discovery, a mediation before The Honorable Daniel Weinstein (Ret.) and many months of on-and-off settlement negotiations. See III.A.2 *infra*. Under the Settlement, Defendants have agreed to wire transfer: (a) $72,400,000 into the Escrow Account within ten (10) business days after entry of the Scheduling Order and (b) $4,700,000 into the Escrow Account no more than fifteen (15) business days after entry of the Scheduling Order, all of which will be released to the Class on the Effective Date, in exchange for dismissal and release of the claims of the Plaintiffs and Class against Defendants. See I.C. *infra*.

The Settlement has all the hallmarks of a fair, reasonable and adequate settlement of complex class action litigation. First, the settlement negotiations were in good faith, completely free of collusion, and continued at arm's length between highly experienced counsel for many months. *Id*. These negotiations were based upon the extensive record in this case, including: more than two million pages of document discovery, twenty-five fact depositions, four expert depositions, Plaintiffs' six merits expert reports and other facts and data. *Id*. Second, the most

[1] "Plaintiffs" refers to Roberto Calle Gracey, John Special, Gregory Smith, and Alan Martin.
[2] A copy of the Settlement Agreement and its exhibits are attached hereto to the Declaration of Christopher Lovell, Esq. ("L.Decl.") as Exhibit 1. Capitalized terms herein are defined in the Settlement Agreement.
[3] "Settling Defendants" or "Defendants" refers to Amaranth LLC, Amaranth Advisors L.L.C., Amaranth Advisors (Calgary) ULC, Amaranth Partners LLC, Amaranth Capital Partners LLC, Nicholas M. Maounis, Brian Hunter, and Matthew Donohoe.

solvent Settling Defendant (Amaranth LLC) has remaining assets valued at only $195 million. See II.A.3 *infra*. Thus, under the proposed Settlement of $77.1 million, Amaranth LLC is providing Class members with approximately 40% of its total remaining assets. *Id*. Third, the proposed notice plan is comprehensive and calculated to reach—by direct mail—the 1,069 largest traders in NYMEX natural gas futures contracts during the Class Period and all 45 clearing members of the NYMEX.[4] See II.B.3 *infra*.

Accordingly, Plaintiffs, on behalf of themselves and the proposed Class, now respectfully move the Court to grant preliminary approval of the Settlement and enter the [Proposed] Order Preliminarily Approving Proposed Settlement, Scheduling Hearing For Final Approval Thereof, and Approving the Proposed Form and Program of Notice To The Class ("Scheduling Order") attached as Exhibit 1-A to the Declaration of Christopher Lovell, Esq. that, among other things:

1. finds the Settlement to be sufficiently fair, reasonable, and adequate to warrant dissemination of notice to the Class (L.Decl. Ex. 1-A ¶11);

2. certifies the proposed Class for settlement purposes (*id*. ¶2));

3. appoints Lovell Stewart Halebian Jacobson LLP, Lowey Dannenberg Cohen & Hart, P.C. and Louis F. Burke P.C. (collectively "Lead Counsel") as class counsel for the Class (*id*. ¶3);

4. appoints plaintiffs Roberto E. Calle Gracey, John F. Special, Gregory H. Smith, as representatives of the Class (*id*. ¶4);

5. finds the notice plan to be the best practicable notice under the circumstances (*id*.¶10);

6. approves the forms of and substance of the notice of the Class (*id.*);

7. approves Rust Consulting, Inc.[5] as the Settlement Administrator and Escrow Agent (*id*. ¶20); and;

[4] Everyone who transacted in NYMEX natural gas futures contracts during the Class Period had to do so through a NYMEX clearing member.

[5] Rust Consulting, Inc. is a well-recognized settlement administrator and has administered more than 3,000 class action settlements since 1988. See http://www.rustconsulting.com.

8. sets a schedule leading to the Court's consideration of final approval of the Settlement, including:

    a. the date, time, and place for a hearing to consider the fairness, reasonableness and adequacy of the Settlement ("Fairness Hearing") (*id.*¶5);

    b. the deadline for members of the Class to exclude themselves (*i.e.*, opt out) from the Settlement (*id*. ¶17);

    c. the deadline for Lead Counsel to submit a petition for attorneys' fees, reimbursement of expenses, and incentive awards for Plaintiffs (*id*. ¶14);

    d. the deadline for members of the Class to object to the Settlement and any of the related petitions (*id*. ¶15).

At the Fairness Hearing, Plaintiffs will request the entry of a final order and judgment (substantially in the form of L.Decl. Ex. 1-B) dismissing the action and retaining jurisdiction for the implementation and enforcement of the Settlement.

II. BACKGROUND

Plaintiffs in this class action seek damages on behalf of themselves and the Class (defined at I.C.1 *infra*) based on allegations that Defendants manipulated certain New York Mercantile Exchange ("NYMEX") natural gas futures contracts causing artificial prices in violation of the Commodity Exchange Act, 7 U.S.C. §1 *et seq*. ("CEA"), aided and abetted such alleged manipulation, or are secondarily liable in connection with such alleged manipulation. See I.A. *infra*. Plaintiffs also filed a related action alleging that certain of the Defendants authorized or were the recipients of transfers made in violation of New York statutory fraudulent conveyance provisions. See I.B. *infra*.

A. The Allegations in Plaintiffs' Complaint

Plaintiffs claim that Defendants, between February 16, 2006 and September 28, 2006 (the "Class Period"), engaged in two separate but related manipulations of NYMEX natural gas futures prices. First, Plaintiffs allege that Defendants held dominant positions in March 2006

through April 2007 NYMEX natural gas contracts ("Class Contracts") during certain parts of the Class Period and used these dominant positions to artificially inflate the "spread" prices between summer 2006 contracts and winter 2006-2007 contracts. Second, Plaintiffs allege that Defendants manipulated NYMEX natural gas futures prices by engaging in so-called "slam the close" trades during the last 30 minutes of trading in the March, April and May 2006 NYMEX natural gas futures contracts for the purpose of driving the price of those contracts lower in order to benefit Defendants' non-NYMEX natural gas positions and further inflate spread prices. Thus, Plaintiffs allege that Defendants' activities in connection with the NYMEX natural gas futures contracts violated the CEA, entitling Plaintiffs to damages. Defendants have denied and continue to deny Plaintiffs' allegations in their entirety.

B. The Procedural History of The Action

On July 12, 2007, Plaintiffs filed an initial class action complaint against Defendants in the United States District Court for the Southern District of New York. Plaintiffs filed a Consolidated Complaint on February 14, 2008. Defendants moved to dismiss the Consolidated Complaint on April 28, 2008. On October 6, 2008, the Court granted in part and denied in part Defendants' motion. *In re Amaranth Natural Gas Commodities Litigation*, 587 F. Supp. 2d 513 (S.D.N.Y. 2008).

Plaintiffs filed their 167-page First Amended Consolidated Complaint ("Amended Complaint") on November 26, 2008. Defendants moved to dismiss the Amended Complaint on January 15, 2009. On April 27, 2009 the Court granted in part and denied in part Defendants' motion. *In re Amaranth Natural Gas Commodities Litigation*, 612 F.Supp. 2d 376 (S.D.N.Y. 2009).

On March 25, 2010, the Amaranth Master Fund Board of Directors approved a distribution to investors and employees of Amaranth of $75 million of the remaining assets it

held. Plaintiffs opposed the transfer and sought pre-judgment attachment of the Master Fund's assets pursuant to Rule 64 of the Federal Rules of Civil Procedure and section 6201 of the New York Civil Practice Law and Rules. The Court granted Plaintiffs' motion on May 3, 2010 finding that Plaintiffs demonstrated both a probability of success on the underlying merits of the case against Amaranth Advisors and a probability of success in demonstrating that Amaranth Advisors was an "official, agent, or other person" acting for the Master Fund. *In re Amaranth Natural Gas Commodities Litigation*, 711 F. Supp. 2d 301 (S.D.N.Y. 2010).

Plaintiffs filed a motion to certify a class and appoint Lead Counsel as class counsel on October 15, 2009. On September 27, 2010, the Court granted Plaintiffs' motion. *In re Amaranth Natural Gas Commodities Litigation*, 269 F.R.D. 366 (S.D.N.Y. 2010). On November 16, 2010, the Second Circuit Court of Appeals denied Defendants' petition seeking interlocutory appeal pursuant to Rule 23(f). See 10-cv-4110 at Docket No. 43 (2d Cir. 2010).

On June 11, 2011, Plaintiffs filed a separate related action against Defendants and others in the Southern District of New York alleging that certain Defendants authorized, or were the recipients of, transfers made in violation of New York statutory fraudulent conveyance provisions (the "Fraudulent Conveyance Action"). See *Calle Gracey, et al. v. Maounis, et al.*, 11-cv-4001 (SAS) (S.D.N.Y.). The Fraudulent Conveyance Action was filed entirely under seal and has been stayed pending approval of this Settlement.

Fact discovery began shortly after the initial Complaint was filed and ended on June 30, 2011. Expert discovery began on or around July 10, 2009 and was scheduled to conclude on November 28, 2011. During discovery Defendants produced (and Plaintiffs reviewed) in excess of two million pages of documents and the parties took twenty-five fact and four expert depositions.

C. The Settlement Agreement

The Settlement Agreement and its exhibits include the following material terms.

1. The Class

The Court previously certified a class in the action. See *In re Amaranth Natural Gas Commodities Litigation*, 269 F.R.D. 366 (S.D.N.Y. 2010). However, for purposes of the Settlement, the parties have clarified and amended the definition of the previously certified class, creating a proposed settlement Class as follows: All persons (other than Defendants, their employees, affiliates and co-conspirators), who satisfy any one of the following conditions:

> (1) Purchased, between February 16, 2006 and September 28, 2006 ("Class Period"), New York Mercantile Exchange ("NYMEX") natural gas futures contracts[6] for December 2006, January 2007, February 2007, or March 2007 either (i) to liquidate prior to September 1, 2006, a short[7] position in the contract, or (ii) as a long[8] position in such contract which was not liquidated until after May 10, 2006;
>
> (2) Purchased, during the Class Period, a NYMEX natural gas futures contract for March 2006, April 2006, May 2006, June 2006, July 2006, August 2006, September 2006, October 2006, or November 2006 ("the 2006 Contracts") or April 2007 as a long position in such contract, and liquidated such position after May 10, 2006;
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> (3) Purchased a 2006 Contract as a long position in such contract, held such a position as of the start of or acquired such a position during any of the following time periods, and sold all or a portion of such position during or after the end of such time period and on or prior to September 28, 2006. *Time Periods*: (i) 2:00 p.m.-2:30 p.m. on February 24; (ii) 2:00 p.m.-2:30 p.m. on March 29; or (iii) 2:00 p.m.-2:30 p.m. on April 26, 2006.

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[6] In this class definition, the terms "NYMEX natural gas futures contracts" or "natural gas futures contracts" include the miNY Henry Hub natural gas futures contracts.

[7] As used in this class definition, a short position in a given contract expiration (*e.g.*, March 2006) means a position in which the class member's open sales of that expiration exceed the class member's open purchases of that expiration. This is so regardless of whether the short position is a standalone position or is part of a spread with a long position in a different contract expiration.

[8] As used in this class definition, a long position in a given expiration (*e.g.*, April 2006) means a position in which the class member's open purchases of that expiration exceed the class member's open sales of that contract expiration. This is so regardless of whether the long position is a standalone position or is part of a spread with a short position in a different contract expiration (*e.g.*, March 2006).

L.Decl. Ex. 1 at ¶2.

2. The Consideration to Plaintiffs and The Class

Pursuant to the terms of the Settlement Agreement, Amaranth LLC has agreed to pay and shall pay by wire transfer into the Escrow Account the Initial Payment sum of $72,400,000 within ten business days after the Scheduling Order is entered. Settlement Section 3. The Settlement contemplates that this payment will be made from funds currently subject to orders of attachment entered by this Court. See Settlement Section 14(f). Accordingly, the Scheduling Order provides for the lifting of those orders. See Scheduling Order at ¶17. In addition to the Initial Payment, Amaranth LLC shall pay, by wire transfer into the Escrow Account within fifteen business days after the Scheduling Order is entered, the Additional Payment amount of $4,700,000. Settlement Section 3.

3. The Release and Covenant Not To Sue

In exchange for the foregoing consideration, Plaintiffs and the Class have agreed to release and discharge the Defendants from any and all claims against Defendants in any way related to their transactions in Class Contracts during the Class Period as set forth in Section 10 of the Settlement. Settlement Section 10.

Also, within five business days following the Effective Date of the Settlement, Plaintiffs will, under Rule 41(a) of the Federal Rules of Civil Procedure, voluntarily dismiss the Fraudulent Conveyance Action by filing a notice of dismissal. Settlement Section 18. That notice of dismissal will dismiss the Fraudulent Conveyance Action with prejudice and without costs. *Id*.

4. The Proposed Plan of Allocation

The Proposed Plan of Allocation is as follows:

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1. Except for the terms defined herein, the Plan of Allocation adopts and incorporates the definitions in the Stipulation and Agreement of Settlement, dated December 13, 2011, to which this Plan of Allocation is attached as an exhibit.

2. A Class Member's Allowed Claim Amount shall equal that Class Member's "Net Adverse Impact" (as defined in Section 5 of this Plan of Allocation) as calculated below in Sections 3 through 6. Section 7 sets forth how the Net Settlement Fund shall be distributed among Class Members.

3. A Class Member's "Adverse Impact" shall be equal to the sum of their "Artificiality Paid" on each purchase of a Class Contract minus the sum of their "Artificiality Received" on each sale of a Class Contract. For the avoidance of doubt, "sale" means either closing a long position or opening a short position and "purchase" means either closing a short position or opening a long position.

4. The amounts of "Artificiality Paid" and "Artificiality Received" for each Class Member shall be determined on a position-by-position basis for each Class Contract. For each purchase or sale of all or a portion of a position in a Class Contract by a Class Member, the Class Member's "Artificiality Paid" or "Artificiality Received" shall be calculated based on either (a) the Daily Artificiality Estimates or (b) the Slam The Close Artificiality Estimates, whichever produces a higher Allowed Claim Amount for the Class Member. See www.amaranthcommoditieslitigation.com (listing the artificiality estimates) [9]

5. "Net Adverse Impact" shall mean the Adverse Impact minus the Hedging Deduction.

6. The Hedging Deduction, for Class Members who are determined to be hedgers, shall equal 25% of the Adverse Impact.

7. For the distribution among Class Members *inter se*, (i) if the sum of each and every claiming Class Member's Allowed Claim Amount is less than or equal to the Net Settlement Fund, each Class Member who executes the required release and covenant not to sue and submits adequate documentation, all as determined by the Settlement Administrator (or the Mediator in the event of an unresolved dispute), shall be entitled to receive an amount equal to that Class Member's Allowed Claim Amount; and (ii) if the sum of each and every claiming Class Member's Allowed Claim Amount is greater than the Net Settlement Fund, each Class Member who executes the required release and covenant not to sue and submits adequate documentation, all as determined by the Settlement Administrator (or the Mediator in the event of an unresolved dispute), shall be entitled to receive an amount

[9] The "Daily Artificiality Estimates" (as estimated by Plaintiffs' expert Dr. Christopher Gilbert) and the "Slam The Close Artificiality Estimates" (as estimated by Plaintiffs' expert Dr. Craig Pirrong) will be posted on the Settlement website for review by Class members before notice of the Settlement is disseminated to the Class. Plaintiffs are prepared to provide these artificiality estimates to the Court in the event that the Court wishes to review such estimates.

computed by multiplying the Net Settlement Fund by a fraction, (1) the numerator of which is the Class Member's Allowed Claim Amount and (2) the denominator of which is the sum of each and every claiming Class Member's Allowed Claim Amount. For the avoidance of doubt, no Class Member shall receive any distribution from the Net Settlement Fund in excess of that Class Member's Allowed Claim Amount.

8. All determinations under this Plan of Allocation shall be made by the Settlement Administrator subject to review by Class Counsel and the Court.

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L.Decl. Exhibit 1-G.

In this Action, Plaintiffs proposed to prove damages based on economic calculations of artificial impact that the Defendants' activities allegedly had on Class Contracts for each trading day during the Class Period. See *Jaffe vs. Household, et al.*, 02-cv-05893, (RAG) (N.D. Ill.) Docket No. 1611 at pp. 70-95 (jury's answers to interrogatories specifying amounts of artificiality for each of the 780 trading days during the class period).

With respect to the Hedging Deduction, "the CEA limits a plaintiff's recovery to damages to assets that are part of a futures market." See *Transnor (Bermuda) Ltd. v. BP North America Petroleum*, 736 F.Supp. 511, 522-23 & n. 15 (S.D.N.Y. 1990) (review of legislative history of Section 22 shows that "actual damages" provision was intended "to limit a plaintiff's recovery to damages to assets which are traded on a commodities market," and not allow recovery for damages of persons "who did not participate in the market and claimed to be injured in their commercial transactions by declines in commodities prices").

Plaintiffs would have vigorously argued that, symmetrically, gains made on non-NYMEX instruments should not be deducted from the actual damages incurred on the Class Contracts. However, Plaintiffs recognize that this argument may not have been successful and that Defendants urged a contrary position during the litigation. Therefore, for purposes of the distribution of the Net Settlement Fund among Class Members *inter se*, Plaintiffs have, consistent

with previous plans of allocation in commodity futures manipulation cases, proposed a hedging deduction of 25%. See, *e.g.*, *In re Natural Gas Commodity Litig.*, 03-CV-6186 (S.D.N.Y.), Modified Plan of Allocation, Docket Entry No. 618, filed Jun. 7, 2010; *In re Sumitomo Copper Litig.*, 96-CV-4584 (S.D.N.Y.), Order Establishing Plan of Allocation, Docket Entry No. 349, filed May 1, 2002) and *In re Soybeans Futures Litig*., 89 C 7009 (N.D. Ill.), Order for Partial Distribution of Net Settlement Fund, filed Oct. 10, 1997.

D. The Proposed Notice Plan

The proposed notice plan includes mailing notice of the Settlement, substantially in the form of Exhibit C to the Settlement, by United States first class mail, postage prepaid, to (a) all 1,069 large traders in NYMEX natural gas futures contracts during the Class Period whose names and addresses have been obtained by Plaintiffs pursuant to a subpoena to the NYMEX earlier in the litigation; (b) all 45 clearing members on the NYMEX during the Class Period whose names and addresses have been obtained by Plaintiffs pursuant to a subpoena to the NYMEX earlier in the litigation (who should forward the Class Notice to their customers who transacted in NYMEX natural gas futures contracts during the Class Period or provide the names and addresses of such customers to Lead Counsel); and (c) any additional reasonably identifiable Members of the Class. See Scheduling Order at ¶7.

The proposed notice program also includes publishing notice of the Settlement, substantially in the form of Exhibit F to 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 Stock and Commodities Magazine; and (d) on the Stock and Commodities Magazine website for one month. *Id* ¶8. Finally, notice of the Settlement will also be published on a website created by the Settlement Administrator. *Id* ¶9.

III. ARGUMENT

A. Preliminary Approval Should Be Granted Because The Proposed Settlement Is Fair, Reasonable, Adequate And Falls Well Within "The Range Of Possible Approval"

1. The Legal Standards Governing Preliminary Approval

The settlement of a class action requires court approval. *Compare* Fed. R. Civ. P. 23(e) (settlements in class actions require "…the court's approval") *with Bano v. Union Carbide Corp*, 273 F.3d 120, 129-30 (2d Cir. 2001) (there is an overriding public interest in settling and quieting litigation, particularly class actions).

"Preliminary approval of a proposed settlement is the first in a two-step process required before a class action may be settled." *In re NASDAQ Mkt. Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) ("*NASDAQ*"); *see also Manual for Complex Litigation* (Fourth) §21.63 (2004). When a court considers preliminary approval of a class action settlement, it must "…make a preliminary evaluation of the fairness of the settlement…" prior to ordering notice of the settlement be sent to the class. *NASDAQ*, 176 F.R.D. at 102. A court should grant preliminary approval where:

> …the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval.

Id.

In conducting the foregoing inquiry, courts generally consider two types of evidence: (1) the negotiating process leading up to the settlement and (2) the settlement's substantive terms. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). After preliminary approval has been granted, notice is then sent to members of the class, including notice of a "fairness hearing" where class members and the parties to the settlement may be heard before the court grants final approval of the settlement. *NASDAQ*, 176 F.R.D. at 102.

2. The Settlement Was Achieved In Good Faith And Was The Result of Arm's Length Bargaining Between Highly Experienced And Capable Counsel

A class action settlement is entitled to a presumption of fairness, adequacy and reasonableness when "…there were arm's length negotiations between experienced counsel after meaningful discovery." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) *cert. denied*, 544 U.S. 1044 (2005) ("*Wal-Mart*").

The Settlement negotiations were strictly at arm's length and free of collusion. L.Decl. ¶3. There is no doubt that the parties here have been represented by highly experienced and capable counsel. The proposed Settlement is the product of hard-fought negotiations over a period of many months, which involved a mediation session before The Honorable Daniel Weinstein (Ret.), several in-person meetings, dozens of telephone conferences and scores of e-mail correspondence between counsel.

Lead Counsel engaged in extensive fact discovery and fact-finding, which had been completed before the proposed Settlement was reached. Lead Counsel reviewed more than two million pages of documentary evidence and took or defended twenty-nine fact and expert depositions. In order to be fully informed, Lead Counsel also had numerous and lengthy discussions with experts before the Settlement was reached.

In light of their considerable prior experience in complex class actions litigation involving CEA claims, their knowledge of the strengths and weaknesses of Plaintiffs' claims, the risks associated with Defendants' ability to satisfy a judgment, the expert analyses they received, and their assessment of the Class's likely recovery following trial and appeal, Lead Counsel concluded that the Settlement is fair, reasonable, adequate, and in the best interests of Plaintiffs and the Class. *Compare 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*") with In re Amaranth Natural Gas Commodities Litig.*, 269 F.R.D. at 386 ("I [] find plaintiffs' counsel to be 'qualified, experienced and able to conduct the litigation.'").

3. The Proposed Settlement Achieves An Excellent Result For The Class

In evaluating a proposed settlement's substantive terms at the preliminary approval stage, courts often consider the following "*Grinnell* factors" even though at least one of these factors (*i.e.*, the reaction of the class to the settlement) was clearly designed with final approval in mind:

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

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974).

As set forth below, each of the applicable *Grinnell* factors strongly merit preliminary approval of the Settlement.

a. ***Grinnell* Factor 1: The Complexity, Expense And Likely Duration Of The Litigation**

The complexity of this commodity futures manipulation class action is reflected in the many fully-briefed motions and numerous opinions in the four and one-half years since the original complaint was filed. See I.B. *supra* (citing numerous motions and decisions in the Action). Indeed, there is a consensus that claims for manipulation in violation of the CEA are notably complex and difficult to prove. *Compare* Jerry W. Markham, *Manipulation of Commodity*

Futures Prices – The Unprosecutable Crime, 8 Yale J. on Reg. 281 (1991) *with In re Sumitomo Copper Litigation*, 74 F.Supp.2d 393, 397 (S.D.N.Y. 1999) (Pollack, J.) (same).

In the absence of this Settlement, the litigation of this complex case would likely have consumed many more years of Court resources. The Settlement also allows the Class to avoid the significant expenses of continued litigation. The costs of experts, the costs of preparing the voluminous pre-trial order, the costs of summary judgment motion practice as well as trial and appeals would have been substantial. Further, appeals of any summary judgment decision or final judgment (which, given the size and nature of Plaintiffs' claims were almost guaranteed) all but ensured that this litigation would have dragged on without resolution or relief for many years in the absence of settlement.

The proposed Settlement eliminates the foregoing complexities, substantial expenses, the potential for additional years of continued litigation and provides a prompt recovery to the Class. Thus, the first *Grinnell* factor favors preliminary approval of the Settlement.

b. *Grinnell* Factor 2: The Reaction Of The Class To The Settlement

After the Class has received notice of the Settlement, Plaintiffs will address the Class's reaction in their motion seeking final approval.

c. *Grinnell* Factor 3: The Stage Of The Proceedings And The Amount Of Discovery Completed

This *Grinnell* factor is designed to "assure the Court 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).

At the time the Settlement was reached, the stage of the proceedings was extremely advanced. Almost four years of extensive fact discovery had come to a close (see I.B. above), twenty-nine depositions had occurred (*id*), over two million documents had been reviewed (*id*),

Plaintiffs had served six merits expert reports, Defendants had begun to depose Plaintiffs' six experts, and the Court had scheduled a conference in order to, among other things, set a summary judgment briefing schedule. *Id*.

d. *Grinnell* Factors 4, 5 and 6: The Risks Of Establishing Liability, Damages And Maintaining The Class Action Through Trial

Continuing this complex litigation against Defendants would entail a lengthy and highly expensive legal battle involving complex legal and factual issues. Defendants had significant defenses which created real risk that Plaintiffs would not establish liability and, even if they did, would not establish an entitlement to the damages they sought. Plaintiffs acknowledge that if these risks materialized their impact would have been substantial, and perhaps dispositive.

Plaintiffs expected that Defendants would move for summary judgment. Even if Plaintiffs survived summary judgment, they would have faced further risks at trial and, to the extent successful at trial, on post-trial motions and then appeal. Lead Counsel would have tried to overcome all the risks of continued litigation, including those risks set forth above. However, in Lead Counsel's judgment, the amount to be paid to claiming Class Members from the Net Settlement Fund represents fair and adequate consideration for claiming Class Members.

e. *Grinnell* Factor 7: The Ability Of The Defendants To Withstand A Greater Judgment

Plaintiffs believe that the $77.1 million Settlement Fund represents a substantial portion of the remaining recoverable assets of the Defendants such that this *Grinnell* factor weighs heavily in favor of preliminary approval.

With respect to the Amaranth group of Defendants (*i.e.*, Amaranth LLC, Amaranth Advisors L.L.C., Amaranth Advisors (Calgary) ULC, Amaranth Partners LLC, and Amaranth

Capital Partners LLC) Plaintiffs believe that only Amaranth LLC (which actually held the allegedly manipulative positions) has considerable assets that could satisfy a judgment. Between the time that Amaranth collapsed in September 2006 and the time Plaintiffs filed their initial complaint herein, Amaranth LLC transferred approximately 92% of its remaining funds to its investors. When Amaranth LLC attempted to transfer $75 million of its remaining assets in or around April 2010, Plaintiffs sought (and this Court ordered) pre-judgment attachment of $72.4 million of such assets. See *In re Amaranth Natural Gas Commodities Litigation*, 711 F. Supp. 2d 301 (S.D.N.Y. 2010).

With respect to the individual defendants (*i.e.*, Nicholas M. Maounis, Brian Hunter, and Matthew Donohoe), Plaintiffs believe that only Defendant Maounis is likely to have considerable assets that could be used to satisfy a judgment. However, the remaining claim against Defendant Maounis is for aiding and abetting the alleged manipulation and not as a principal manipulator. See *In re Amaranth Natural Gas Commodities Litigation*, 612 F.Supp. 2d 376, 387-390 (S.D.N.Y. 2009) (dismissing primary CEA claims against Defendant Maounis and sustaining claims for aiding and abetting the alleged manipulation). It is possible that Defendant Hunter has considerable assets, but any such assets are likely located in a foreign jurisdiction (*e.g.*, Canada where Defendant Hunter resides). Because of the foregoing complications, it would be difficult for Plaintiffs to obtain and recover a considerable judgment against these individual defendants.

Thus, due to Amaranth LLC's limited remaining assets (approximately $195 million) and the difficulties in obtaining a recoverable judgment over the individual defendants who may have substantial assets, Plaintiffs believe that it is likely that Defendants have a very limited ability to withstand a judgment that is considerably greater than the $77.1 million Settlement Fund. *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.").

f. *Grinnell* 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

The $77.1 million Settlement Fund (from which attorney's fees and expenses that may be awarded will be deducted) represents a 2.2% payout to all Class members based on Plaintiffs' expert Dr. Gilbert's $3.5 billion Class-wide damages estimate. *Compare City of Detroit v. Grinnell Corp.*, 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).

However, the "best possible recovery" here must take into account the fact that the most solvent Settling Defendant's remaining assets are only valued at approximately $195 million. See "5" above. Accordingly, the proposed Settlement of $77.1 million is providing Class members with approximately 40% of what may likely be the "best possible recovery." Even if the other Defendants have assets equal to the size of Amaranth LLC's assets, the $77.1 million settlement would still represent approximately 20% of the total funds available to satisfy a judgment. Moreover, if the litigation were to continue, Amaranth LLC's limited remaining assets would continue to be depleted by substantial litigation costs, thereby further reducing the amount of funds potentially available to be recovered by the Class.

An important additional term of the Settlement is that there will be no reversion to Defendants in respect of Class members who fail to claim and fail to take other action until Class members receive 100% of their Allowed Claim. See Settlement Section 11(b). Typically, in opt-out class action settlements like this one, some class members do not file proofs of claim.[10]

[10] 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. (ed.), *Litigation Governance: Taking Accountability Seriously*, 110 Colum. L. Rev. 288, 335, n. 150 (Mar. 2010) (Citing discussions on 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,

Accordingly, this prohibition on reversions until claiming Class members receive 100% of their Allowed Claims means that claiming Class members will likely receive significantly in excess of 2.2% of their full damages claim.

In light of the attendant risks of the litigation described in "4" above and Defendants' limited ability to withstand a greater judgment described in "5" above, the $77.1 million Settlement Fund here is extremely reasonable.

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In sum, the proposed Settlement is procedurally and substantively fair, reasonable, adequate and justifies sending notice of the Settlement to the members of the Class.

B. The Notice Plan Should Be Approved Because It Provides "The Best Notice Practicable Under The Circumstances"

1. The Legal Standards Governing Notice

After a class action settlement has been preliminarily 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 a class is certified for settlement purposes 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). In particular, the notice must:

> …clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an

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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] settlements.").

> attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c).

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.

2. The Proposed Notice Includes All the Requirements of Rule 23(c)(2)(B) and Comports With Due Process

The proposed notice includes, *inter alia*, each of the requirements of Rule 23(c)(2)(B): (i) a description of the action (L.Decl. Ex. 1-C pp. 2-4); (ii) a definition of the Class (*id*. pp. 4-5); (iii) a description of the class claims, issues and defenses (*id*. pp. 2-4); (iv) a statement that a class member may enter an appearance through an attorney if the member so desires (*id*. p. 10); (v) a statement that the Court will exclude from the class any member who requests exclusion (*id*. pp. 2, 11); (vi) the time and manner for requesting exclusion (*id*.); and (vii) a statement concerning the binding effect of a class judgment on class members (*id*. pp. 6-7). *Compare* L.Decl. Ex. 1-C *with* Fed. R. Civ. P. 23(c)(2)(B).

The proposed notice also comports with due process. It is well organized, written in plain concise language such that it could easily be understood by the average Class member and it fairly apprises the Class of the existence of the Settlement, their options under the Settlement, the material terms of the Settlement and how they may obtain a copy of same. *Compare* L.Decl. Ex. 1-C *with Wal-Mart*, 396 F.3d at 114-115.

3. The Proposed Notice Plan Is The Best Practicable Under The

Circumstances

Here, Plaintiffs propose essentially the same program of notice that was recently approved in a prior CEA manipulation class action settlement. See *Hershey, et al., v. Pacific Investment Management Company LLC, et al.*, 05-cv-04681, Docket No. 562 at ¶¶2-4 (RAG) (N.D. Ill.).

First, Plaintiffs propose to send individual mail notice to the 1,069 largest traders in the Class (whose names and addresses have been obtained by subpoena from the NYMEX). According to a March 2005 NYMEX report, 85%-90% of the open interest in natural gas is held by large traders. See NYMEX – A Review of Recent Hedge Fund Participation in NYMEX Natural Gas and Crude Oil Futures Markets – March 1, 2005.[11]

Second, everyone who transacted in a NYMEX natural gas futures contract had to do so through a NYMEX clearing member. Thus, Plaintiffs also propose that mail notice be given to all 45 clearing members of the NYMEX, and that such notice request that the NYMEX clearing members forward the notice to their customers who transacted in Class Contracts (or provide the names and addresses of such customers to Plaintiffs). This should effect mail notice to all Class members, and provide overlapping notice to the Class members who had the largest positions in NYMEX natural gas futures contracts.

Third, Plaintiffs propose substantial notice by publication. This publication notice includes publishing the short form notice as follows: (a) for two consecutive months in Futures Magazine (which reportedly has 60,000 subscribers and many additional readers who trade commodity futures); (b) on the Futures Magazine website (which reportedly has 13,000 unique visits per month) for one month; (c) for two consecutive months in Stock and Commodities Magazine (which reportedly has 47,000 subscribers); and (d) on the Stock and Commodities Magazine

[11] The March 2005 NYMEX report is available at http://www.cftc.gov/files/opa/press05/oparlevinwrittenmaterials.pdf

website for one month. Any members of the Class that do not receive notice through direct mail are likely to receive notice through the foregoing publications or through word of mouth.

Fourth, Plaintiffs propose to provide notice through the creation of the website www.amaranthcommoditieslitigation.com. This website will allow Class members who search the web to learn of the action, obtain their proof of claim and learn of other pertinent matters (including the date of the Fairness Hearing).

This four-pronged program of notice is reasonably calculated to reach all Class members and to reach **more than once** the largest traders in NYMEX natural gas futures contracts during the Class Period. Accordingly, the proposed notice plan meets each of the requirements under Rule 23(c)(2)(B), comports with due process and is the best notice practicable under the circumstances.

C. The Class Should Be Certified For Settlement Purposes Because It Satisfies The Four Requirements of Rule 23(a) and The Two Prongs of Rule 23(b)(3)

Rule 23(e) allows only for the settlement "of a certified class." *Compare* Fed. R. Civ. P. 23(e) *with In re Global Crossing Securities and ERISA Litig.*, 255 F.R.D. 436, 451 (S.D.N.Y. 2004) ("[t]he Second Circuit has acknowledged the propriety of certifying a class solely for settlement purposes…"). A 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*. As demonstrated below, the Class meets all the requirements of Rule 23(a) as well as the two prongs of Rule 23(b)(3).

The Court previously certified a substantially similar class and found that the foregoing requirements of Rule 23 had been satisfied. See *In re Amaranth Natural Gas Commodities Litig.*, 269 F.R.D. 366 (S.D.N.Y. 2010). Accordingly, the Court should similarly find that the

same requirements of Rule 23 are also satisfied with respect to the clarified and amended proposed Class for purposes of the Settlement.

1. The Class Satisfies The Four Requirements of Rule 23(a)

Rule 23(a) permits an action to be maintained as a class action if:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

a. Rule 23(a)(1)—The Members of The Class Are So Numerous That Joinder Of All Members Is Impracticable

Rule 23(a)(1)'s numerosity requirement does not mean that joinder must be impossible, but rather "…merely be difficult or inconvenient, rendering use of a class action the most efficient method to resolve plaintiffs' claims." *In re Initial Public Offering Securities Litig.*, 260 F.R.D. 81, 90 (S.D.N.Y. 2009) ("*IPO*"). In fact, numeroisty can be presumed at a level of forty class members or more. *Id citing Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995).

Here, the proposed Class consists of persons and entities throughout the United States who purchased NYMEX natural gas futures contracts between February 16, 2006 and September 28, 2006. For example, documents produced in this action by the NYMEX reflect that there were approximately 1,069 large traders during the Class Period. Clearly, joinder of the numerous and geographically dispersed members of the Class is impracticable. Thus, Rule 23(a)(1) is satisfied.

b. Rule 23(a)(2)—There Are Numerous Questions of Law and Fact Common To The Class

Rule 23(a)(2) commonality requires that common issues of fact or law affect all class

members. *IPO*, 260 F.R.D. at 91. Here, there are numerous legal and factual issues common to members of the Class. These common issues include, among others:

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

Plaintiffs' overarching allegation is that Defendants manipulated certain standardized NYMEX natural gas futures contracts causing artificial prices which affected all members of the Class in the same manner. The proof required to establish Defendants' alleged unlawful conduct is common to all members of the Class. Thus, Rule 23(a)(2) is satisfied.

c. Rule 23(a)(3)—The Claims and Defenses of The Class Representatives Are Typical of The Claims and Defenses of The Class

Typicality may be satisfied under Rule 23(a)(3) where "injuries derive from a unitary course of conduct by a single system." *IPO*, 260 F.R.D. at 91. 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 certain NYMEX natural gas futures contracts. Thus, Rule 23(a)(3) is satisfied.

d. Rule 23(a)(4)—The Class Representatives Will Fairly And Adequately Protect The Interests of The Class

Rule 23(a)(4) adequacy requires that "the representative parties will fairly and adequately protect the interests of the class." *Baffa v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000). Generally, courts will consider "whether (1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Id*. at 61.

First, each of the proposed Class representatives transacted NYMEX natural gas

contracts during the Class Period and were thereby all impacted by Defendants' conduct. The same is true of all members of the Class. Thus, the proposed class representatives' interests in proving liability and damages are entirely aligned with that of members of the Class. Second, the class representatives are represented by experienced counsel thoroughly familiar with complex class action and commodities litigation. See *e.g., In re Amaranth Natural Gas Commodities Litig.*, 269 F.R.D. at 386 (finding that Class Counsel have substantial experience in commodity futures manipulation class actions). Thus, Rule 23(a)(4) is satisfied.

2. The Class Satisfies The Two Prongs of Rule 23(b)(3)

In addition to establishing that the proposed Class satisfies Rule 23(a)'s requirements, plaintiffs must also show that one of three alterative categories under Rule 23(b) has been established. *IPO*, 260 F.R.D. at 92. Plaintiffs move pursuant to Rule 23(b)(3) and therefore must 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).

a. Common Questions of Law and Fact Predominate

The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *IPO*, 260 F.R.D. at 92. Here, Plaintiffs allege that Defendants manipulated certain NYMEX natural gas contracts causing artificial prices that affected all members of the Class. Thus, issues common to the members of the Class predominate over any individual questions.

b. A Class Action Is The Superior Method To Adjudicate These Claims

Rule 23(b)(3)'s "superiority" requirement requires a plaintiff to show that a class action is superior to other methods available for "fairly and efficiently adjudicating the controversy." See

Fed. R. Civ. P. 23(b)(3)(A)-(D) (listing four non-exhaustive factors to consider).

The damages suffered by many of the individual members of the Class are likely to be relatively small such that the expense and burden of individual litigation make it virtually impossible for them to protect their rights. Moreover, the prosecution of separate actions by thousands of individual members of the Class would impose heavy burdens upon the Court and would create a risk of inconsistent or varying adjudications of the questions of law and fact common to the Class. For these and other reasons, a class action is superior to other available methods for fairly and efficiently adjudicating this controversy. Thus, both prongs of Rule 23(b)(3) are satisfied.

D. The Court Should Appoint Lead Counsel As Class Counsel Because The Court Has Previously Found That They Satisfy the Requirements of Rule 23(g)

Federal Rule of Civil Procedure 23(g)(1) provides that "…a court that certifies a class must appoint class counsel." Rule 23(g)(1). Rule 23(g)(2) provides that where, as here, only one application is made seeking appointment as class counsel, "…the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4)." Rule 23(g)(2).

The Court previously found that Lead Counsel satisfied the requirements of Rule 23(g) and appointed Lead Counsel as class counsel for the previously certified class. *In re Amaranth Natural Gas Commodities Litig.*, 269 F.R.D. at 386. For all the same reasons that led to the Court's previous appointment of Lead Counsel, the Court should now appoint Lead Counsel as act as class counsel for the clarified and amended Class for purposes of the Settlement.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court grant preliminary approval of the Settlement and enter the [Proposed] Scheduling Order attached as Exhibit 1-A to the Declaration of Christopher Lovell, Esq.

Dated: New York, New York
December 13, 2011

Respectfully submitted,

/s/ Christopher Lovell

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