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VIA ECF

The Honorable Valerie E. Caproni
United States District Court
Southern District of New York
40 Foley Square, Courtroom 443
New York, New York 10007-1312

MEMO ENDORSED

Re: *In re London Silver Fixing, Ltd., Antitrust Litig.*,
Nos. 14-MD-2573 (VEC), 14-MC-2573 (VEC) (S.D.N.Y.)

Dear Judge Caproni:

As Interim Co-Lead Counsel, we write to answer Your Honor’s questions raised during the July 24, 2020 telephonic hearing concerning Plaintiffs’ proposed Notice Plan and related documents in connection with Plaintiffs’ motion filed on June 25, 2020 (ECF No. 449) relating to the settlement with Deutsche Bank.

(i) Frequency of publishing notice of the Settlement. Pursuant to the proposed Notice Plan, A.B. Data anticipates the summary notice will be published twice (approximately seven to ten days apart) in each of the following journals: Financial Times, The Wall Street Journal, Investor’s Business Daily, and Barron’s. The summary notice will be printed three times in Global Capital and Grant’s Interest Rate Observer. We will also publish the summary notice once each in PR Newswire, Hedge Fund Alert, Stocks & Commodities, MJSA (Manufacturing Jewelers & Suppliers of America), Modern Metals, and FF Journal.

The banner ad will run for one month on the websites for Zacks.com, Stocks & Commodities (Traders.com), Hedge Fund Alert, Global Investor, Global Capital, National Jeweler, Kitco.com, Modern Metals, and FF Journal. The ad will also run for a month in the daily e-newsletter published by Barchart, once in the e-newsletters of Global Investors, Stocks & Commodities, and Zacks.com, and once via custom e-mail blasts by Stocks & Commodities and Zacks.com.

(ii) Amendments to the mailed notice. As directed by the Court, we have attached clean and redline versions of a revised mailed notice (Exhibits A and B, respectively) with the following changes:

a. In the third paragraph of the Procedural History (Section I.B), the tenth sentence has been revised to read:

On October 3, 2016, the Court granted UBS’s motion to dismiss and granted the Fixing Defendants’ motion to dismiss in part, but held that Plaintiffs’ antitrust claims for price fixing and unlawful restraint of trade, and Plaintiffs’ Commodity Exchange Act claims

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for price manipulation, manipulation by false reporting and fraud and deceit, aiding and abetting, and principal-agent liability could proceed.

b. On pages 1 and 5, we added the following sentence further advising Class Members of their rights:

Your decision to participate in or exclude yourself from this Settlement does not impact your ability to participate or exclude yourself from the ongoing Action, future settlements or future judgments.

(iii) Amendments to the Proposed Order. Attached as Exhibit C and D are the clean and redline versions of the revised Proposed Order.

a. Regarding the Court's concern about the documentation requirement in Paragraph 17(e) of the Proposed Order, we have not found any cases in this Circuit directly addressing the amount of transactional detail that may be requested of a class member who wishes to opt out of the settlement. However, the Second Circuit recently examined opt-out requirements in the context of a settlement that mandated third party administrators who represented certain health plans class members to supply individualized proofs of authority in order to opt out their client health plans. *See In re Aggrenox Antitrust Litig.*, Nos. 18-2474(L), 18-2578 (Con), 2020 WL 2146901, at *2 (2d Cir. May 5, 2020) (summary order). Among other findings, the Second Circuit held that the district court did not abuse its discretion in applying the opt-out procedures, explaining that "[t]he requirements the court established provided certainty about class membership, thus preserving the rights of absent class members and protecting the Defendants from duplicative liability. The opt-out procedures approved by the district court fell well within its broad discretion to supervise class actions." *Id.* at *2.

We submit that the same interest in providing certainty about class membership applies to the opt-out requirements described in the Proposed Order. The transaction data requested in Paragraph 17(e) is essential in determining whether a person or entity submitting the Request for Exclusion is in fact a Class Member. Without some documentary evidence of transactions that would be eligible for participation in the Settlement, Interim Co-Lead Counsel and Deutsche Bank would have no independent basis for determining whether the opt-outs are Class Members.

A number of courts in this District have approved of opt-out requirements that include submission of transaction data. For example, in *In re Sunedison*, the court-approved notice required class members seeking exclusion to provide, among other things, documentary proof "(i) of each purchase and, if applicable, sale transaction of Global common stock and (ii) [] your status as a beneficial owner of the Global common stock." *In re Sunedison, Inc. Sec. Litig.*, No. 16-md-2742 (PKC), 2018 WL 2356663, at *1 (S.D.N.Y. May 1, 2018). The court in *In re LIBOR-Based Financial Instruments Antitrust Litig.* also approved of opt-out requirements that included:

Proof of membership in the Settlement Classes[, specifically] a description of and documentation evidencing that the Settlement Class Member's transactions fall within the Settlement Classes (including, for each transaction, the identity of the broker (if any), the date of the transaction, the type of transaction, the counterparty

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(if any), the exchange on which the transaction occurred, any transaction identification numbers, the rate, and the notional amount of the transactions);

Order at 13-14, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11-md-2262 (NRB) (S.D.N.Y. Mar. 2, 2020), ECF No. 3038. *See also* Order at 8-9, *Sullivan v. Barclays plc*, No. 13-cv-2811 (PKC) (S.D.N.Y. Dec. 19, 2018), ECF No. 454 (requiring similar documentary evidence of class membership to opt out of settlement relating to alleged manipulation of Euribor); Order at 8-9, *Laydon v. Mizuho Bank, Ltd.*, No. 12-cv-3419 (GBD) (S.D.N.Y. Sept. 11, 2019), ECF No. 971 (requiring same relating to settlement of claims based on manipulation of Yen-LIBOR and Euroyen TIBOR benchmark rates).

Our own experience has demonstrated that people and entities do at times assume without confirming that they entered into transactions that are included in a settlement, and only upon reviewing the transaction data does it become clear that such people and entities are not even class members. *See, e.g.*, May 18, 2018 Fairness Hearing Tr. at 16:4-22:1, *Sullivan v. Barclays plc*, No. 13-cv-2811 (PKC) (S.D.N.Y. June 5, 2018), ECF No. 434. For example, at the end of a fairness hearing relating to the defendants' settlements for alleged manipulation of Euribor (the Euro Interbank Offered Rate) and Euribor-based products, an attorney attempted to seek leave to file a late opt-out on behalf of clients who purportedly received the notice late and invested in products based on a different benchmark, Euro LIBOR (the London Interbank Offered Rate for the Euro). *Id.* Review of the documentation provided by the attorney after the hearing confirmed that the clients were not class members.

Typically, class members seeking to opt out of a settlement are willing to comply with similar opt-out requirements as contained in the Proposed Order. In the event a situation arises in which a class member seeks to opt out but refuses to provide the requested information, it would nevertheless be within the Court's discretion to accept such an opt-out request. *See* 7AA Charles Alan Wright & Arthur R. Miller, *FED. PRAC. & PROC. CIV.* § 1787 (3d ed.) (April 2020 update) (Courts have "considerable flexibility . . . in determining what constitutes an effective expression of a class member's desire to be excluded."). Accordingly, we respectfully submit that Paragraph 17(e) of the Proposed Order should remain as proposed. As reflected below, Paragraph 18 has been revised to account for the fact that the Court has the discretion to accept a Request for Exclusion that does not comply with all of the requirements in the Proposed Order.

Finally, correctly identifying the legitimacy and volume of opt-outs directly impacts whether Deutsche Bank may exercise its contractual right to terminate the Settlement. Without the trading information, the parties will simply be guessing about the significance of the opt-outs and whether the Settlement will achieve a substantial resolution of the relevant claims against Deutsche Bank.

b. As the Court requested, Paragraph 18 has been revised to provide that parties must seek leave of the Court prior to seeking discovery from a Class Member who has opted out of the Settlement:

Unless the Court determines otherwise, a Request for Exclusion shall not be effective unless it provides all of the required information listed in paragraph 17 of this Order, complies with this paragraph 18, and is received by the Exclusion Bar Date, as set forth

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in the Class Notice. The Parties may request leave of the Court to seek discovery from any member of the Settlement Class who submits any Request for Exclusion.

c. We have considered the Court's interest in having access to claims rate information by which it can evaluate the effectiveness of the Notice Plan. In light of this interest, we have adjusted the schedule in the Proposed Order to move the claims filing deadline to 40 days before the proposed Fairness Hearing date. To give Class Members sufficient time to review their records and file a claim, we propose moving the Fairness Hearing date from at least 141 days to at least 216 days following entry of the Proposed Order. Other deadlines have been adjusted to account for the enlarged schedule.

We believe that the above answers and attached documents address the concerns raised during the July 24 hearing. We are available at your convenience to answer any further questions that Your Honor may have.

Respectfully submitted,

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cc: All Counsel of Record (*via ECF*)

The Court agrees that a general requirement that transaction data be disclosed is appropriate if accompanied by a clear advisement that, with good cause shown, a class member may request exclusion from the class without disclosing such information. Courts have generally held that “[a]ny reasonable indication of a desire to opt out should suffice.” *Plummer v. Chem. Bank*, 668 F.2d 654, 657 n.2 (2d Cir. 1982). As set forth in the Advisory Committee Notes for Rule 23, “[t]he proposed method should be as convenient as possible, while protecting against unauthorized opt-out notices.” Fed. R. Civ. P. 23, Advisory Committee Notes, 2018 Amendments.

Absent a valid objection from the parties, the Court intends to modify paragraph 18 of the proposed order as follows (Note: the notary language is being stricken because it is not in the proposed notice):

18. Unless the Court determines otherwise, a Request for Exclusion shall not be effective unless it provides all of the information listed in paragraph 17 of this Order, complies with this paragraph 18, and is received by the Exclusion Bar Date, as set forth in the Class Notice. If a member of the Settlement Class is unable or unwilling to disclose transaction information or other information required in paragraph 17(e), the Request for Exclusion must include a concise statement explaining why that member is unable or unwilling to do so and explain why that member should nonetheless be excluded; the Court will determine the effectiveness of such a Request for Exclusion on an individual basis. Any Request for Exclusion from the Settlement submitted by a member of the Settlement Class pursuant to paragraph 17 of this Order must be signed by the member of the Settlement Class (or his, her, or its legally authorized representative) ~~and notarized, even if the member of the Settlement Class is represented by counsel.~~ The right to be excluded from the proposed Settlement must be exercised individually by a member of the Settlement Class or his, her, or its attorney, and not as a member of a group, class, or subclass, except that a Request for Exclusion may be submitted by a member of the Settlement Class’s legally authorized representative. The Parties may request leave of the Court to seek discovery from any member of the Settlement Class who submits any Request for Exclusion.

Absent a valid objection from the parties, the Court further intends to add the following sentence to the end of the first paragraph of Part III.C. of the proposed class notice: "If you are unwilling or unable to provide a description of the Silver Instruments transactions, your Request for Exclusion must contain a short explanation as to why you are unwilling or unable to do so. The Court will decide on a case-by-case basis, depending on the strength of your explanation, whether your Request for Exclusion is effective despite the lack of disclosure." (Note: counsel is also advised to check for a missing, closing parenthesis in clause (e) of the third sentence of the first paragraph in Part III.C.).

The Court also intends to modify the second paragraph of Part III.C. as follows:

A Request for Exclusion that does not include all of the foregoing information (or an explanation as to undisclosed transaction information), that does not contain the proper signature, that is sent to an address other than the one designated below, or that is not sent within the time specified shall be invalid and the person(s) filing such an invalid request shall be a Settlement Class Member and shall be bound by the Settlement, if approved.

The parties must file a joint letter with any objections, no later than **August 5, 2020**. If there are no objections, the parties must make the above changes and re-file. The fairness hearing is hereby set for **April 8, 2021, at 10:00 A.M.** Revised submissions should populate the hearing date and all interim dates as appropriate.

SO ORDERED.

Date: 08/03/2020



HON. VALERIE CAPRONI
UNITED STATES DISTRICT JUDGE