IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE LONDON SILVER FIXING, LTD. ANTITRUST LITIGATION	14-MD-02573-VEC 14-MC-02573-VEC
This Document Relates to: ALL ACTIONS	The Honorable Valerie E. Caproni

REPRESENTATIVE PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT WITH DEUTSCHE BANK AG, DEUTSCHE BANK AMERICAS HOLDING CORPORATION, DB U.S. FINANCIAL MARKETS HOLDING CORPORATION, DEUTSCHE BANK SECURITIES, INC., DEUTSCHE BANK TRUST CORPORATION, DEUTSCHE BANK TRUST COMPANY AMERICAS, AND DEUTSCHE BANK AG NEW YORK BRANCH

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INTRODUCTION

Representative Plaintiffs Christopher DePaoli, John Hayes, Laurence Hughes, KPFF Investment, Inc. f/k/a KP Investment, Inc., Kevin Maher, J. Scott Nicholson, and Don Tran ("Representative Plaintiffs") move under Rule 23 of the Federal Rules of Civil Procedure for final approval of the $38,000,000 Settlement with Deutsche Bank.[1] The Settlement is the first in this Action and offers substantial relief to Settlement Class Members. In addition to providing monetary compensation to eligible Settlement Class Members injured by Defendants' alleged manipulation, the Settlement furnished important cooperation materials that assisted Representative Plaintiffs in further prosecuting their case against the remaining non-settling Defendants.

The Court preliminarily approved the Settlement in November 2016. Developments in this Action since then only further demonstrate the fairness, reasonableness and adequacy of the Settlement. The Action has been demanding. Interim Co-Lead Counsel have navigated various rulings, discovery stays, and complex negotiations relating to party and non-party discovery, begun preparing for class certification, and developed a Distribution Plan to fairly and equitably allocate the Settlement proceeds to Settlement Class Members. The Settlement mitigates the risk of the Action (including the risk of non-recovery) while permitting this robust prosecution to proceed unimpeded with respect to the non-settling Defendants.

Since the notice period began on September 4, 2020, Class Notice has been mailed directly to over 35,000 potential Settlement Class Members. In part due to the Settlement Administrator's efforts to disseminate the Class Notice via publications and online outlets, there have been more

[1] Unless otherwise defined herein, capitalized terms have the same meaning as defined in the Stipulation and Agreement of Settlement with Deutsche Bank AG; Deutsche Bank Americas Holding Corporation, DB U.S. Financial Markets Holding Corporation, Deutsche Bank Securities, Inc.; Deutsche Bank Trust Corporation, Deutsche Bank Trust Company Americas; Deutsche Bank AG New York Branch, and their subsidiaries and affiliates (collectively "Deutsche Bank") dated September 6, 2016 ("Settlement Agreement"). *See* ECF No. 156-1. Unless otherwise noted, ECF citations are to the docket in this Action, and internal citations and quotations marks are omitted.

than 16,000 visits to the Settlement website. While there are still a few weeks until the objection and opt-out deadlines, there have been no objections to the Settlement, and only one request for exclusion from an individual. The Settlement is garnering a positive response and provides an excellent resolution. Representative Plaintiffs respectfully request that the Court finally approve the Settlement and certify the Settlement Class, as well as finally approve the Distribution Plan and enter final judgment dismissing with prejudice the claims against Deutsche Bank.

BACKGROUND

Summary of Procedural History[2]

After the Court appointed Lowey Dannenberg P.C. ("Lowey") and Grant & Eisenhofer PA ("Grant & Eisenhofer") as Interim Co-Lead Counsel, Representative Plaintiffs filed the First Consolidated Amended Class Action Complaint ("FAC") on January 26, 2015. Joint Decl. ¶ 19. After the Second Consolidated Amended Class Action Complaint ("SAC") was prepared and filed on April 17, 2015, Deutsche Bank and Defendants UBS AG ("UBS"), The Bank of Nova Scotia ("BNS") and HSBC moved to dismiss the SAC on May 29, 2015. *Id.* ¶¶ 22-23.

In June 2015, the Court asked the parties to present a non-adversarial tutorial on the silver market for the Court's benefit. Following several weeks of preparation, Interim Co-Lead Counsel presented portions of the tutorial to the Court in September 2015. *Id.* ¶ 26. Several weeks after the tutorial and while Defendants' motions to dismiss the SAC remained pending, Deutsche Bank's counsel contacted Interim Co-Lead Counsel to initiate discussions on possible cooperation and settlement. *Id.* ¶ 105. Negotiations between Representative Plaintiffs and Deutsche Bank continued for several months and led to the execution of the settlement term sheet in April 2016. *Id.* ¶ 107. Deutsche Bank immediately notified the Court that it was withdrawing its participation in the

[2] The Joint Declaration of Vincent Briganti and Robert Gerard Eisler dated January 21, 2021 ("Joint Decl.") contains a full description of the procedural history of the Action.

motion to dismiss. *Id.* After several more months of settlement negotiations, Representative Plaintiffs and Deutsche Bank executed the Settlement Agreement on September 6, 2016. *Id.* ¶ 108.

After considering the parties' arguments, on October 3, 2016, the Court issued its opinion denying in part and granting in part BNS and HSBC's motion to dismiss the SAC and granting UBS's motion to dismiss. *Id.* ¶ 30; *In re London Silver Fixing, Ltd., Antitrust Litig.*, 213 F. Supp. 3d 530 (S.D.N.Y. 2016). Representative Plaintiffs filed a motion for preliminary approval of the Deutsche Bank Settlement on October 17, 2016. Joint Decl. ¶ 110. On November 23, 2016, the Court granted preliminary approval of the Deutsche Bank Settlement. *Id.* ¶ 112.

On December 7, 2016, Interim Co-Lead Counsel prepared and filed a motion to amend Representative Plaintiffs' complaint, to which UBS filed an opposition on the same day. *Id.* ¶ 33. On December 22, 2016, Interim Co-Lead Counsel filed a response to UBS's opposition. *Id.* ¶ 34.

While the motion to amend the complaint was pending, on January 9, 2017, the U.S. Department of Justice ("DOJ") Criminal Division Fraud Section filed under seal a motion to intervene and sought a one-year stay of discovery in this case as to certain documents that previously had been produced to the DOJ. *Id.* ¶ 62. Interim Co-Lead Counsel researched and prepared a proposal to address the DOJ's concerns, which the DOJ rejected. *Id.* In a January 19, 2017 submission (filed under seal), Interim Co-Lead Counsel presented the same proposal to the Court, noting the DOJ's opposition. *Id.* On February 8, 2017, via sealed order, the Court granted the DOJ's requested stay. *Id.*

Based on information revealed by Deutsche Bank's subsequent productions, Interim Co-Lead Counsel prepared and filed certain additional allegations for incorporation into the proposed amended complaint. *Id.* ¶ 35. They also advised the Court that a former Deutsche Bank trader pled guilty of conspiracy to commit wire fraud and spoofing relating to the misconduct alleged in this Action, and the Commodity Futures Trading Commission entered an order instituting proceedings

and imposing remedial sanctions against the trader. *Id.* ¶ 36. On June 8, 2017, the Court granted the motion to amend the complaint. *Id.* ¶ 37; *In re London Silver Fixing, Ltd., Antitrust Litig.*, No. 14-MC-2573 (VEC), 2017 WL 11566841, at *1 (S.D.N.Y. June 8, 2017). The Third Consolidated Amended Class Action Complaint ("TAC") was filed on June 16, 2017. Joint Decl. ¶ 39.

The Court further instructed the parties to confer and to jointly propose a schedule for briefing on the Non-Fixing Bank Defendants' motions to dismiss, as well as to confer on whether discovery should be stayed pending the Court's ruling on those motions. Joint Decl. ¶ 63. On June 23, 2017, Interim Co-Lead Counsel filed a letter brief advising the Court of HSBC and BNS's position that discovery should be stayed and arguing against such a further discovery stay. *Id.* On June 27, 2017, the Court entered an order staying all discovery pending a decision on the Non-Fixing Banks' motions to dismiss.[3] *Id.* On August 24, 2017, Interim Co-Lead Counsel sought, and the Court granted, in light of the DOJ discovery stay, leave to serve a preservation subpoena on a third party, which Interim Co-Lead Counsel issued. *Id.* ¶ 65.

The Non-Fixing Banks filed their motion to dismiss on September 11, 2017. *Id.* ¶ 41. The Court granted the Non-Fixing Banks' motion on July 25, 2018. *Id.* ¶ 51; *In re London Silver Fixing, Ltd., Antitrust Litig.*, 332 F. Supp. 3d 885 (S.D.N.Y. 2018). After the Court issued its opinion granting the Non-Fixing Banks' motion, the stay was lifted and discovery commenced. Joint Decl. ¶ 69. Discovery against BNS and HSBC has been ongoing since the stay was lifted. *Id.* ¶¶ 70-89. Interim Co-Lead Counsel has also been engaged in substantial discovery with numerous third parties. *Id.* ¶ 89.

On June 25, 2020, Interim Co-Lead Counsel filed a motion to approve the Class Notice plan and preliminarily approve the Distribution Plan of the Settlement. *Id.* ¶ 114. The Court held a

[3] "Non-Fixing Banks" means Bank of America Corporation and Merrill Lynch, Pierce, Fenner & Smith, Inc., Barclays Bank plc, Standard Chartered Bank, BNP Paribas Fortis S.A./N.V., UBS and certain affiliated institutions.

hearing on the motion on July 24, 2020. *Id.* After Interim Co-Lead Counsel revised the Class Notice and proposed Preliminary Approval Order in response to the Court's questions, the Court granted the motion on August 5, 2020. *Id.* ¶ 115. Notice of the Settlement was provided to the Settlement Class starting September 4, 2020. *See* Declaration of Steven Straub dated January 21, 2021 ("Straub Decl.") ¶¶ 4-20. To date, there have been no objections and one request for exclusion filed by an individual Settlement Class Member. *Id.* ¶¶ 22-25.

Settlement Terms and Proposed Distribution Plan

The Settlement provides a $38,000,000 Settlement Fund to be distributed to Settlement Class Members, less deductions made for the payments of taxes, settlement administration expenses, attorneys' fees, litigation costs and expenses, incentive awards, and any other charges authorized by the Court. *See* Settlement Agreement, ECF No. 156-1 §§ 1(LL), 8. Should the Settlement be finally approved and not otherwise terminated, there is no reversion of any portion of the Settlement Amount for opt-outs or failures to submit proofs of claim. Settlement Agreement, ECF No. 156-1 §§ 2, 10. In addition, under the Settlement, Deutsche Bank has provided and will provide cooperation, including the production of documents. Settlement Agreement, ECF No. 156-1 § 4. Plaintiff Releasing Parties will release all claims "against the DB Released Parties arising from or relating in any way to conduct alleged in the Action or that could have been alleged in the Action against the DB Released Parties . . ." Settlement Agreement, ECF No. 156-1 § 12.

The Distribution Plan proposes to allocate the Net Settlement Fund *pro rata* based on each Authorized Claimant's share of the total dollar value of silver traded in eligible transactions. *See* Distribution Plan, ECF No. 451-5. Economic and legal adjustments will be applied to each Authorized Claimant's transactions based on factors such as the type, price, and position of Silver Instruments transacted and the period during which the transaction was made. *See* Distribution Plan, ECF No. 451-5.

ARGUMENT

I. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

The Court may approve a settlement upon a showing that the settlement is "fair, reasonable, and adequate…." FED. R. CIV. P. 23(e)(2). A settlement is fair, reasonable and adequate and should be approved if the settlement is shown to be both procedurally and substantively fair. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 28 (E.D.N.Y. 2019) ("*Payment Card*") (analyzing the amended Rule 23(e)(2) standards to be applied at both preliminary and final approval). The amended Rule 23 sets out a number of factors to guide the Court's analysis, with the factors in Rule 23(e)(2)(A) and (B) focusing on the procedural fairness of a settlement and those in Rule 23(e)(2)(C) and (D) focusing on substantive fairness. FED. R. CIV. P. 23 committee notes 2018 amendment (stating Rule 23 now focuses on the "core concerns of procedure and substance" to be considered when deciding whether to finally approve a settlement). The courts in this Circuit also consider the factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) to assess the fairness of a class settlement. The factors enumerated in amended Rule 23(e) are complementary with those in *Grinnell*, *see Payment Card*, 330 F.R.D. at 28, and the application of both sets of factors to the Settlement here demonstrates final approval of the Settlement is warranted.

A. The Settlement is a product of excellent representation by Representative Plaintiffs and Interim Co-Lead Counsel and hard-fought arm's length negotiations that are the hallmarks of procedural fairness.

To approve a class action settlement, Rule 23 requires the Court to find in part that, "the class representatives and class counsel have adequately represented the class [and] the proposal was negotiated at arm's length[.]" FED. R. CIV. P. 23(e)(2)(A)-(B). Courts presume settlements are procedurally fair when they are "the product of arm's length negotiations between experienced and

able counsel on all sides." *In re Air Cargo Shipping Servs. Antitrust Litig.,* No. 06-md-1775 (JG), 2009 WL 3077396, at *7 (E.D.N.Y. Sept. 25, 2009).

1. *The Settlement Class was well-represented by Representative Plaintiffs and Interim Co-Lead Counsel.*

Each Representative Plaintiff has identical interests to the Settlement Class, which strongly supports finding that they are adequate representatives. The "essential question in determining whether the Settlement complies with the adequate representation doctrine is whether the interests that were served by the Settlement were compatible with" those of all settlement class members. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 110 (2d Cir. 2005). Representative Plaintiffs were injured in the same way as other market participants, having transacted in an allegedly manipulated silver market impacted by an artificial Silver Fix. *See Wal-Mart*, 396 F.3d at 110-11 (class representatives are adequate if their injuries encompass those of the class they seek to represent); *Payment Card*, 330 F.R.D. at 31 (finding "Defendants' imposition of 'supracompetitive interchange and merchant-discount fees on purchases using Visa- and/or Mastercard-Branded cards, and anti-steering and other restraints'" similarly injured class representatives and absent class members).

As a consequence of being impacted by the same alleged misconduct, Representative Plaintiffs and the Settlement Class both paid artificial prices for Silver Instruments. Through that shared harm, "plaintiffs' interests are aligned with other class members' interests because they suffered the same injuries – monetary losses resulting from [manipulated] transactions . . . ." *See In re GSE Bonds Antitrust Litig*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019). Accordingly, Plaintiffs have "an interest in vigorously pursuing the claims of the class." *Id.*

Courts evaluating adequacy of representation also consider the adequacy of plaintiffs' counsel. *Payment Card*, 330 F.R.D. at 30 (considering whether "plaintiff's attorneys are qualified, experienced and able to conduct the litigation."). Interim Co-Lead Counsel's extensive class action, antitrust, Commodity Exchange Act ("CEA") and trial experience provides strong evidence that the

Settlement is procedurally fair. *See In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 122 (S.D.N.Y. 2009) (noting the "extensive" experience of counsel in granting final approval of settlement); *see also Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331 (CM) (MHD), 2014 WL 1224666, at *2 (S.D.N.Y. Mar. 24, 2014) (giving "great weight" to experienced class counsel's opinion that the settlement was fair). In addition to their wealth of experience, Interim Co-Lead Counsel were well-versed in the relevant facts and law as applied to this Action and understood the potential strengths and risks of Representative Plaintiffs' claims. *See* Joint Decl. ¶¶ 105, 107, 109. Interim Co-Lead Counsel conducted an extensive investigation and developed the first-filed complaints that the Court noted "reveal[ed] a particularly outstanding effort due to the thorough and contemporaneous nature of the allegations." ECF No. 45 at 2. Their thorough investigation has continued throughout the case, and litigation events such as the two rounds of motions to dismiss and related Court opinions have further enhanced Interim Co-Lead Counsel's understanding of the Action. Joint Decl. ¶¶ 11-51.

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

Arm's length negotiations can be inferred from the involvement of experienced counsel and the circumstances of the negotiation. *See In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173-74 (S.D.N.Y. 2000), *aff'd sub nom., D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001) (where a settlement is the "product of arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation," the settlement enjoys a "presumption of fairness"). That presumption of fairness applies here where the Settlement was negotiated by knowledgeable counsel with a deep understanding of the risks of the case and benefits of the Settlement.

The critical question is whether "plaintiffs' counsel is sufficiently well informed" to adequately advise and recommend the Settlement to the class representative and Settlement Class. *See In re GSE Bonds,* 414 F. Supp. 3d at 699. In this case, Interim Co-Lead Counsel's expertise and

knowledge of the case supports finding the Settlement Class was adequately represented. Interim Co-Lead Counsel and counsel for Deutsche Bank spent approximately nine months negotiating the terms of the Settlement. Joint Decl. ¶¶ 104. The parties engaged in lengthy negotiations with Deutsche Bank's counsel over the material terms of the settlement, including the amount of the settlement consideration, the scope of the cooperation to be provided by the Deutsche Bank Defendants, the scope of the releases, and the circumstances under which the parties would have the right to terminate the settlement. *Id.* ¶¶ 105-08. After the parties reached an agreement on Settlement in principle but prior to executing the Settlement Agreement, Deutsche Bank provided a proffer that further informed Interim Co-Lead Counsel of the facts and circumstances of the alleged misconduct. *Id.* ¶ 55. The information learned during the settlement negotiations, combined with their extensive investigation, assured that Interim Co-Lead Counsel was fully informed about the facts, risks and challenges of the Action and provided them a sufficient basis on which to recommend entering into the Settlement.

B. The Settlement is a substantively fair resolution of the claims against Deutsche Bank under Rule 23(e)(2)(C)-(D) and the Second Circuit's *Grinnell* factors.

To assess the Settlement's substantive fairness, the Court considers whether, "the relief provided for the class is adequate," accounting for the following factors: "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorneys' fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." FED. R. CIV. P. 23(e)(2)(C). The Court is also required to confirm that the Settlement "treats class members equitably relative to each other." FED. R. CIV. P. 23(e)(2)(D).

Courts in this Circuit have long considered the nine *Grinnell* factors in deciding whether a settlement is substantively fair, reasonable, and adequate:

> (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.

Grinnell, 495 F.2d at 463. The amended Rule 23(e)(2) factors are intended to be complementary to the *Grinnell* factors. *See In re GSE Bonds,*, 414 F. Supp. 3d at 692 ("The Advisory Committee Notes to the 2018 amendments indicate that the four new Rule 23 factors were intended to supplement rather than displace these '*Grinnell*' factors")*; accord Payment Card*, 330 F.R.D. at 29 ("Indeed, there is significant overlap between the *Grinnell* factors and the Rule 23(e)(2)(C-D) factors . . . ."). Here, the factors set forth in Rule 23(e) and *Grinnell* weigh heavily in favor of final approval.

1. *The costs, risks, and delay of trial and appeal favor the Settlement.*

To determine whether a settlement provides adequate relief to the class, the Court must evaluate "the costs, risks, and delay of trial and appeal," FED. R. CIV. P. 23(e)(2)(C)(i), "to forecast the likely range of possible classwide recoveries and the likelihood of success in obtaining such results." *Payment Card*, 330 F.R.D. at 36. Satisfying this factor necessarily "implicates several *Grinnell* factors, including: (i) the complexity, expense, and likely duration of the litigation; (ii) the risks of establishing liability; (iii) the risks of establishing damages; and (iv) the risks of maintaining the class through the trial." *Id.*; *see also In re GSE Bonds,* 414 F. Supp. 3d at 693. Therefore, it is appropriate to address Rule 23(e)(2)(C)(i) in conjunction with these *Grinnell* factors.

The factual and legal issues in this action are complex and expensive to litigate. Antitrust and CEA cases are inherently complicated and risky. *See In re GSE Bonds,* 414 F. Supp. 3d at 693 ("Numerous federal courts have recognized that [f]ederal antitrust cases are complicated, lengthy, and bitterly fought as well as costly"); *In re Platinum and Palladium Commodities Litig.*, No. 10-cv-3617,

2014 WL 3500655, at *12 (S.D.N.Y. July 15, 2014) (commodities cases are "complex and expensive" to litigate). The specifics of this case reflect the complexity of antitrust and CEA cases. To account for numerous regulatory findings and factual discoveries made during the course of their investigation and the litigation, Representative Plaintiffs filed three amended complaints and consequently faced two rounds of motions to dismiss briefings. Joint Decl. ¶¶ 18-51. While the Court held that Representative Plaintiffs' adequately alleged certain antitrust and CEA claims against BNS and HSBC, certain claims were dismissed, as were all claims against the Non-Fixing Banks. *Id.* ¶¶ 30, 51.

Discovery practice has been arduous, involving more than 75 meet and confers over issues such as search terms, custodians and scope of productions of custodial documents, non-custodial documents, audio files and transaction data. *Id.* ¶¶ 71-72, 74-82, 85-89. After more than six years of litigation, fact discovery is expected to continue for at least several more months, which will be followed by expert discovery. Briefing on class certification is not yet scheduled.

The number of defendants and alleged co-conspirators, the nature of the financial products and markets involved, and the time over which the alleged misconduct is alleged to have occurred also factor into the complexity and risk of this case. *See In re Currency Conversion Fee*, 263 F.R.D. at 123 ("the complexity of Plaintiffs' claims *ipso facto* creates uncertainty"). As the Court anticipated in requesting that the parties provide a tutorial regarding the silver market (Joint Decl. ¶ 26), this Action requires a significant baseline understanding of the market to properly contextualize Defendants' alleged market manipulation.

While Representative Plaintiffs are confident in their ability to successfully prosecute this action, there are no guarantees of success in complex litigation. *See In re GSE Bonds*, 414 F. Supp. 3d at 694 ("Given that multiple remaining defendants contend that they can present a strong case against plaintiffs after discovery, there is no guarantee that plaintiffs will be able to prove liability.").

Already, certain of Representative Plaintiffs' claims have been scaled back or dismissed by the Court. After discovery is completed, Representative Plaintiffs bear the risk of certifying and maintaining this case as a class action. Further, if this Court certifies a litigation class, non-settling Defendants may seek an interlocutory appeal that further prolongs the case and adds to the risk of non-recovery. *In re GSE Bonds*, 414 F. Supp. 3d at 694 (the risk of maintaining a class through trial "weighs in favor of settlement where it is likely that defendants would oppose class certification if the case were to be litigated"). This risk of non-recovery increases if non-settling Defendants move for summary judgment and, if claims are tried, Representative Plaintiffs would still need to establish non-settling Defendants' liability for the alleged manipulation.

In addition, Representative Plaintiffs also bear the risk of proving damages. Private civil plaintiffs have the burden to prove not only manipulative or anticompetitive impact but also actual damages. *Gottesman v. General Motors Corp.*, 436 F.2d 1205, 1210 (2d Cir. 1971). "Indeed, the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal." *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998) ("*NASDAQ III*"). Representative Plaintiffs' impact and damages theories will be sharply disputed prior to and at trial, triggering a "battle of the experts." *See NASDAQ III*, 187 F.R.D. at 476. "In this 'battle of experts,' it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors . . . ." *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985).

When viewed in this light, the costs, risks, and delay of trial and appeal combined with risks associated with establishing liability and damages and maintaining a class through trial and the likely appeal favor approval of the Settlement.

2. *The Distribution Plan provides an effective method for distributing relief, satisfying Rule 23(e)(2)(c)(ii).*

The second factor to consider, the effectiveness of any proposed method of distributing relief to the class, requires that the Court analyze the Distribution Plan. "To warrant approval, the plan of allocation must also meet the standards by which the settlement was scrutinized — namely, it must be fair and adequate." *Payment Card*, 330 F.R.D. at 40. That said, distribution plans are not expected or required to be perfect. "An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *Id.* In addition to equitably allocating settlement proceeds, a distribution plan needs to ensure that class members that may be eligible to receive settlement proceeds can meaningfully participate in the claims process. "A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." *In re GSE Bonds,* 414 F. Supp. 3d at 694.

As described in more detail in the Distribution Plan (ECF No. 451-5) and the related moving brief (ECF No. 450 at 6-10), the Distribution Plan represents "a reasonable method of ensuring 'the equitable and timely distribution of a settlement fund without burdening the process in a way that will unduly waste the fund.'" *In re GSE Bonds,* 414 F. Supp. 3d at 695 (quoting *In re Credit Default Swaps Antitrust Litig.*, No. 13-md-2476 (DLC), 2016 WL 2731524, at *4 (S.D.N.Y. Apr. 26, 2016)). The Settlement Administrator will calculate payments from the Net Settlement Fund using a volume-based *pro rata* approach similar to plans of allocations used in other similar cases (*see, e.g., In re GSE Bonds,* 414 F. Supp. 3d at 698-99). In addition, the Distribution Plan relies on the type of information commonly available in the types of trading records maintained by institutional and retail investors. Requiring trading record information further serves as a deterrent to fraudulent filers and ensures Settlement proceeds are directed to those entitled to recover. Lastly, the Distribution Plan implements a minimum payment threshold to ensure that the costs of administering small value claims do not deplete the Net Settlement Fund. *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 695 (approving allocation plan with a minimum payment after "plaintiffs' counsel [ ] represented

that this threshold will be no higher than the bare minimum necessary for the claims administrator to process a simple claim."); *see also In re Gilat Satellite Networks, Ltd.*, No. 02-CV-1510, 2007 WL 1191048, at *9-10 (E.D.N.Y. Apr. 19, 2007) (approving settlement with an allocation plan utilizing a "*de minimis* threshold[]" to "save the settlement fund from being depleted by the administrative costs associated with claims unlikely to exceed those costs"). The Distribution Plan developed for this Action is designed to ensure the Settlement benefits Settlement Class Members. Accordingly, the Court should finally approve the Distribution Plan as a fair and equitable method to allocate the Net Settlement Fund, and also find that such a Distribution Plan weighs in favor of approving the Settlement.

3. *The requested attorneys' fees are limited to ensure that the Settlement Class receives adequate relief.*

The attorneys' fees and expenses that will be sought in connection with the Settlement are reasonable and ensure the Settlement Class is provided with substantial relief in the form of the Net Settlement Fund. Consistent with their representations to the Court in their application for appointment as lead counsel, Interim Co-Lead Counsel seek 30% of the Settlement Funds ($11.4 million), to be paid, if approved by the Court, upon final approval of the Settlement. *See* Straub Decl., Ex. A at 7. An attorneys' fees request of 30% is comparable to the fees awarded in other cases of similar size and complexity. *See Ferrick v. Spotify USA Inc.*, No. 16-cv-8412 (AJN), 2018 WL 2324076, at *10 (S.D.N.Y. May 22, 2018) (awarding 30% of the $43.45 million cash fund as attorneys' fees); *In re DDAVP Direct Purchaser Antitrust Litig.*, No. 05-cv-2237, 2011 WL 12627961, at *4 (S.D.N.Y. Nov. 28, 2011) (awarding fee of 33 $^{1}/_{3}$% from $20.25 million antitrust class settlement); *In re Med. X-Ray Film Antitrust Litig.*, No. 93-cv-5904, 1998 WL 661515, at *7 (E.D.N.Y. Aug. 7, 1998) (awarding one-third of approximately $40 million settlement fund as "well within the range accepted by courts in this circuit."). As more fully described in the accompanying Interim Co-Lead Counsel's Motion for Award of Attorneys' Fees and Reimbursement of Expenses, the

percentage of attorneys' fees requested is reasonable given the range of settlement awards made in similar cases in this District and the amount of work contributed by Plaintiffs' Counsel towards the prosecution.

In addition to the request for attorneys' fees, Interim Co-Lead Counsel seek an award of $953,618.45 (or just 2.51% of the Settlement Fund) for unreimbursed litigation costs and expenses incurred through October 31, 2020. *See Meredith Corp. v. SESAC LLC*, 87 F. Supp. 3d 650, 671 (S.D.N.Y. 2015) (reasonably incurred expenses may be reimbursed from the settlement fund). The expenses are of the type reasonably incurred in class action litigation, with expert expenses and discovery costs comprising 72.6% and 15.4%, respectively, of the total costs.

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

The Settlement fully describes the relief to which Settlement Class Members are entitled and all agreements that may impact the Settlement. This includes disclosing the existence of a Supplemental Agreement that grants Deutsche Bank a qualified right to terminate the Settlement. *See* Settlement Agreement, ECF No. 156-1 § 21(A)(iv). This type of agreement, often referred to as a "blow" provision, is common in class action settlements. *See, e.g.*, *In re GSE Bonds,* 414 F. Supp. 3d at 696 (finding, after review that a similar blow provision "has no bearing on the [settlement] approval analysis"); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 948 (9th Cir. 2015); *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 02CV1152, 2018 WL 1942227, at *5 (N.D. Tex. Apr. 25, 2018).[4]

[4] As discussed in the accompanying Interim Co-Lead Counsel's Motion for Award of Attorneys' Fees and Reimbursement of Expenses, Grant & Eisenhofer has a referral agreement with Greenwich Legal Associates LLC ("GLA") in connection with the joint representation of Representative Plaintiffs DePaoli and Tran that provides GLA will receive 10% of Grant & Eisenhofer's portion of any attorneys' fees awarded by the Court. Additional Plaintiffs' Counsel Nussbaum Law Group ("NLG") and GLA also jointly represent Representative Plaintiff Maher and have an agreement that provides GLA will receive 10% of NLG's portion of any attorneys' fees awarded by the Court. These referral agreements were disclosed and agreed to by Messrs. DePaoli, Tran and Maher respectively. *See* Rules of Professional Conduct (22 N.Y.C.R.R. § 1200.0) Rule 1.5(g). These referral agreements do not impact the attorneys' fees amount being sought or otherwise limit the benefits arising to the Settlement Class from the Settlement. *See In re Chi, Bridge & Iron Co. N.V. Secs. Litig.*, No. 17-cv-1580 (LGS), 2020 WL 1329354, at *10 (S.D.N.Y. Mar. 23, 2020) (finding a fee sharing agreement "unproblematic" where the attorneys for class representative agreed to split the work and awarded fees 50/50). Lowey does not have any fee sharing agreements.

5. The Settlement treats the Settlement Class equitably and does not provide any preferences.

The Settlement does not favor or disfavor any Class Members, nor does it discriminate against, create any limitations, or exclude from payments any persons or groups within the Settlement Class. *See In re NASDAQ Mkt.-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) ("*NASDAQ II*"). The Distribution Plan provides for a *pro rata* distribution of the Net Settlement Funds among Authorized Claimants, a method courts in this Circuit have previously approved as fair, reasonable, and adequate. *See, e.g.*, *Payment Card*, 330 F.R.D. at 47 (finding that "*pro rata* distribution scheme is sufficiently equitable"); *In re GSE Bonds,* 414 F. Supp. 3d at 698. All Class Members would similarly release Settling Defendants for claims based on the same factual predicate of this Action.

Further, any potential inequity is avoided through the use of an adequate notice program that advises Settlement Class Members of their rights, including the impact of the release. Where class members have received sufficient notice of the impact of the settlement, courts have enforced the bar on prosecuting released claims so long as they were based on the identical factual predicate and the class members were adequately represented. *See In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d 800 (8th Cir. 2004) (affirming injunction against prosecution of claim released by a related class action where adequate notice of the release was given, and the class was adequately represented); *Wal-Mart Stores*, 396 F.3d 96 at 112-13 (adopting the analysis of *In re Gen. Am. Life*); *Weinberger v. Kendrick*, 698 F.2d 61, 77 (2d Cir. 1982). Thus, should a Settlement Class Member wish not to be bound by the release, that Settlement Class Member may elect to opt out of the Settlement. The notice program will provide Settlement Class Members with information about opting out of the Settlement should they wish. Absent opting out, each Settlement Class Member would be bound by the release.

Because the Settlement's release and the Distribution Plan wholly avoid any improper preferences or discriminations, the Court should find that the Settlement satisfies this *Grinnell* factor.

6. The remaining Grinnell *factors also support final approval of the Settlement.*

The *Grinnell* factors not expressly encompassed in Rule 23(e)(2)(c) also guide the Court in assessing whether the relief provided to the class is adequate; they include: "(2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; . . . (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." *Grinnell*, 495 F.2d at 463.

a. The reaction of the Settlement Class to the Settlement.

Consideration of this *Grinnell* factor is premature as the claims filing, objection and opt out deadlines remain several weeks away. However, thus far, four months after notice was issued, there are no objections and only one opt out, suggesting that the early reaction of the Settlement Class is positive. *See Wal-Mart,* 396 F.3d at 118 ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement."). Further, Representative Plaintiffs' support is highly probative of the likely reaction of other Settlement Class Members. The Settlement Administrator will submit an opt out report following the February 11, 2021 deadline, and Representative Plaintiffs will file a reply memorandum by March 9, 2021 to respond to objections (if any) and report on the claims rate.

b. The stage of the proceedings and the amount of discovery completed.

The Court may approve a settlement at any stage of litigation. *See In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, MDL No. 1500, 02-civ-5575 (SWK), 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006). Although the law does not require cases to reach a certain stage or undertake a certain

amount of investigation before a settlement can be considered fair, reasonable and adequate, these factors are nonetheless important considerations as they provide information on whether the settling parties "have engaged in sufficient investigation of the facts" to understand the strengths and weaknesses of their case, and whether the settlement is adequate given those risks. *Id.*

Interim Co-Lead Counsel undertook an extensive investigation and had access to sufficient information prior to and while negotiating the Settlement with Deutsche Bank. The experts hired by Interim Co-Lead Counsel analyzed billions of silver market data points (including bids, offers, and transaction prices in the COMEX silver futures market) to develop economic models that supported the underlying claims in the Action. Joint Decl. ¶ 11. Interim Co-Lead Counsel developed a deep understanding of the silver market, through interviews with industry experts and a highly placed market practitioner. As a result of their investigation, Representative Plaintiffs' filed the SAC detailing the developing knowledge regarding the scope and nature of the alleged manipulation of the Silver Fix. *Id.* ¶ 22. In connection with settlement discussion, Interim Co-Lead Counsel received proffers from Deutsche Bank's counsel that further served to inform their understanding of the facts of this case. *Id.* ¶ 55.

At that same time, Interim Co-Lead Counsel were acutely aware of the challenges and risks to the litigation, highlighted in the arguments Defendants raised on their motions to dismiss. *Id.* ¶ 23. When Representative Plaintiffs and Deutsche Bank reached agreement on the term sheet and then on the Settlement, Interim Co-Lead Counsel had a wealth of information upon which to base their recommendation to enter into the Settlement with Deutsche Bank.

c. The ability of Settling Defendants to withstand greater judgment.

Deutsche Bank can withstand a greater judgment than $38,000,000, but this *Grinnell* factor alone does not determine whether the Settlement is reasonable. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 439, 460 (S.D.N.Y. 2004) ("[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"); *In re Tronox Inc.*, No. 14-cv-5495 (KBF), 2014 WL 5825308, at *6 (S.D.N.Y. Nov. 10, 2014) ("The law does not require a defendant to completely empty its pockets before a settlement may be approved—indeed, if it did, it is hard to imagine why a defendant would ever settle a case."). Further, cooperation "tends to offset the fact that they would be able to withstand a larger judgment." *In re Pressure Sensitive Labelstock Antitrust Litig.*, 584 F. Supp. 2d 697, 702 (M.D. Pa. 2008). Deutsche Bank provided a trove of documents and data that facilitated the amendment of the TAC. Joint Decl. ¶¶ 39, 55, 83. The Deutsche Bank cooperation added to the Settlement's overall value and further supports approving the Settlement. *See In re GSE Bonds Antitrust Litig.*, No. 19-cv-1704 (JSR), 2019 WL 6842332, at *3 (S.D.N.Y. Dec. 16, 2019) ("[Settling defendant] has provided some cooperation already, thus mitigating [its] ability to withstand a greater judgment to a minor degree"). Even if this factor weighs against the Settlement, courts recognize that "this factor, standing alone is not enough to require disapproval of the [ ] settlement . . . ." *In re GSE Bonds,* 414 F. Supp. 3d at 696.

d. The Settlement is reasonable in light of the risks and potential range of recovery.

For the Settlement Class, the Settlement represents a reasonable, favorable hedge against the risks of pursuing the claims against Deutsche Bank (as well as BNS and HSBC) to trial. It provides "the immediacy and certainty of a recovery, against the continuing risks of litigation." *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 139 (S.D.N.Y. 2010). The Settlement's terms are substantively fair and easily "fall[] within the range of possible approval." *NASDAQ II* 176 F.R.D. at 102.

The Deutsche Bank Settlement was achieved at an early stage and has provided vital assistance in maintaining this action. As a result, even if the "proposed settlement may only amount to a fraction of the potential recovery[, it] does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell*, 495 F.2d at 455 n.2 (further

stating that "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery"). Interim Co-Lead Counsel estimate, based on the size of the market and the estimated duration of the alleged manipulation, that potentially billions of dollars of damages may have been caused by Defendants in this Action. However, as set forth above, there are a number of hurdles to achieving a total recovery. The Court has already dismissed certain Defendants from the case on motions to dismiss. In the case against BNS and HSBC, class certification and summary judgment still remain. To achieve the full measure of damages at trial, Representative Plaintiffs' liability and damages arguments would need to be accepted in full, and if so successful, would likely be subject to lengthy appeals. At each of those stages, the Court could issue a decision that limits or prevents Representative Plaintiffs from recovering part or all of the estimated damages. This Settlement brings a measure of certainty to the Settlement Class.

Further, the Settlement Amount of $38,000,000 is on par with the range of recovery achieved in similar antitrust and CEA litigation. In this District alone, there have been a number of approved settlements resolving claims related to manipulation of benchmark rates similar to the manipulation alleged in this Actions. *See*, *e.g.*, *Laydon v. Mizuho Bank, Ltd. et al.*, No. 12-cv-3419 (GBD) (S.D.N.Y) and *Sonterra Capital Master Fund, Ltd. v. UBS AG et al.*, 15-cv-5844 (GBD) (S.D.N.Y) (alleging manipulation of the London Interbank Offered Rate for the Japanese Yen ("Yen-LIBOR") and the Euroyen Tokyo Interbank Offered Rate ("Euroyen TIBOR")); *Sullivan v. Barclays plc et al.*, 13-cv-2811 (PKC) (S.D.N.Y) (alleging manipulation of the Euro Interbank Offered Rate ("Euribor")); *Alaska Electrical Pension Fund v. Bank of America, N.A.*, No.: 14-cv-7126 (JMF) (alleging manipulation of the U.S. Dollar "ISDAfix" global benchmark reference rate); *In re LIBOR-based Fin. Instruments Antitrust Litig.*, No. 11md-2262 (NRB) (S.D.N.Y.) (alleging manipulation of the U.S. Dollar LIBOR rate). Settlements with individual defendants in these cases have ranged from

simply providing cooperation (*see, e.g.*, *Laydon*, No. 12-cv-3419 (GBD), ECF No. 567-1 (S.D.N.Y. Feb. 1, 2016) (settlement agreement providing cooperation only); ECF No. 720 (S.D.N.Y. Nov. 10, 2016)(finally approving cooperation-only settlement)) to recoveries of $100 million or more. *See* Settlement Agreement and Order, *In re LIBOR*, No. 11md-2262 (NRB), ECF No. 2450-1 (S.D.N.Y. Feb. 27, 2018) (settlement agreement providing a settlement fund of $240 million); ECF No. 2746 (S.D.N.Y Oct. 25, 2018) (approving $240 million settlement). Many of the settlements in these cases fall with the range of $10 million to $80 million. By comparison, the Deutsche Bank Settlement, the first in this Action, is well within the range of recovery in light of the risks mentioned above and the stage of the litigation.

II. THE COURT SHOULD GRANT FINAL CERTIFICATION OF THE SETTLEMENT CLASS

In granting preliminary approval of the Settlement, the Court conditionally certified the Settlement Class under FED. R. CIV. P. 23(a) and (b)(3). ECF No. 166 ¶¶ 4-5. The same bases that supported conditional certification for the purpose of issuing notice apply with equal or more force with respect to final certification of the Settlement Class.

The proposed Settlement Class is sufficiently numerous under FED. R. CIV. P. 23(a)(1). *See In re Initial Pub. Offering Sec. Litig.*, 260 F.R.D. 81, 90 (S.D.N.Y. 2009) ("*IPO*") ("Sufficient numerosity can be presumed at a level of forty members or more."). The Silver Fix impacts the approximately $30 billion in Silver Instruments traded each year, and is used by myriad market participants, from miners and jewelers, to traders, financial professionals and central banks, to price silver market transactions. TAC, ECF No. 258 ¶ 125. Pursuant to the Class Notice plan, 35,903 mailed notices have been sent to potential Settlement Class Members to date. Straub Decl. ¶ 12.

Likewise, the commonality, typicality and adequacy requirements are satisfied. Commonality requires only the presence of a single question of law or fact common to the class capable of class-

wide proof. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) ("*Dukes*"); *see also* FED. R. CIV. P. 23(a)(2). Among the questions common to the class include whether Defendants' conduct constituted violations of antitrust or CEA law and the impact of such alleged manipulation of the Silver Fix on Representative Plaintiffs and the Settlement Class. The claims of Representative Plaintiffs are typical of those of the Settlement Class because they rely on the same set of events and conduct undertaken by Defendants. *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009) (typicality satisfied where "each class member's claim arises from the same course of events[,] and each class member makes similar legal arguments to prove the defendant's liability."). As described in Part I.A.1 *supra*, Representative Plaintiffs and Interim Co-Lead Counsel are adequate representatives.[5] Interim Co-Lead Counsel's adequacy as a representative also warrants that they be appointed Class Counsel for the Settlement Class pursuant to FED. R. CIV. P. 23(g).

Finally, as required under Rule 23(b)(3), the Settlement Class satisfies the requirements of predominance and superiority. Predominance exists because the common question (among others) of whether Defendants manipulated the Silver Fix would have been the central inquiry for each Settlement Class Member's claim. Further, courts regularly recognize that antitrust claims are well-suited for class treatment. *See, e.g.*, *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 105 (2d Cir. 2007) ("allegations of the existence of a price-fixing conspiracy are susceptible to common proof"). The superiority requirement is applied more leniently in the settlement context. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997) (the court "need not inquire whether the case, if tried, would present intractable management problems."). Nevertheless, given the potential size of

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

the Settlement Class and the likelihood that the damages for many Settlement Class Members would be relatively small, pursuing these claims outside of a class action would be uneconomic and likely present a tremendous burden on courts in terms of resources, efficiency, and potentially inconsistent adjudication if pursued individually. *See In re Currency Conversion Fee Antitrust Litig.*, 224 F.R.D. 555, 566 (S.D.N.Y. 2004).

III. THE NOTICE PROGRAM REASONABLY AND ADEQUATELY ADVISED THE SETTLEMENT CLASS OF THE SETTLEMENT AND SATISFIED DUE PROCESS

Rule 23(e)(1) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the [settlement]." FED. R. CIV. P. 23(e)(1). For actions certified under Rule 23(b)(3), "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." FED. R. CIV. P. 23(c)(2)(B). The standard for the adequacy of notice to the class is reasonableness. "There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must 'fairly apprise 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.'" *Wal-Mart*, 396 F.3d at 114. The Settlement Class Members have received adequate notice and have been given sufficient opportunity to weigh in on or exclude themselves from the Settlement.

The Class Notice Plan has been fully implemented. *See generally* Straub Decl. The mailed notice was distributed to over 35,000 potential Settlement Class Members based on counterparty information provided by Deutsche Bank and third parties. *Id.* ¶ 12. BNS and HSBC are in the process of sending notice to their counterparties using a third party agent. *See* ECF No. 480. Due to response rate from brokers and nominees, A.B. Data, in consultation with Interim Co-Lead Counsel, supplemented its mailing list to include additional parties likely to have transacted in Silver

Instruments, including institutions involved in the mining, manufacturing or processing of precious metals and investing-related entities such as commodity contract pool operations and commodity contract trading companies. Straub Decl. ¶ 11. The publication notice was distributed to twelve outlets, and banner advertisements on at least seven online websites further directed potential Settlement Class Members to the Settlement website, www. SilverFixSettlement.com and the mailed notice. *Id.* ¶¶ 15-18. To ensure that the Class Notice Plan had the widest reach possible, A.B. Data, in consultation with Interim Co-Lead Counsel, also developed an online marketing campaign using LinkedIn and Google Display Networks to further direct information about the Settlement to potential Settlement Class Members. As a result of these efforts, the Settlement website has been visited more than 16,000 times. *Id.* ¶¶ 16, 20.

The Class Notice plan, as well as the mailed notice and published notice, satisfy due process. The mailed notice and published notice are written in clear and concise language, which "'may be understood by the average class member.'" *See Wal-Mart*, 396 F.3d at 114. Class Members have been advised on the nature of the action, including the relevant claims, issues and defenses. Straub Decl. Ex. A. Settlement Class Members were afforded a full and fair opportunity to consider the proposed Settlement, exclude themselves from the Settlement, and to respond and/or appear in Court. Further, the Class Notice fully advised Class Members of the binding effect of the judgment on them. *Id.*, Ex. A.

The Supreme Court has consistently found that mailed notice satisfies the requirements of due process. *See, e.g.*, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950). The Class Notice plan for this Settlement combined mailed notice with published and online notice to further reach out to potential Settlement Class Members, and therefore satisfies the Rule 23(c)(2)(B) factors and due process. *See Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir. 1988) (due process does not require actual notice to every class member as long as class counsel "acted reasonably in

selecting means likely to inform persons affected"). The Court should find that the Class Notice plan is the best under the circumstances.

CONCLUSION

For the foregoing reasons, Representative Plaintiffs respectfully request that the Court: (i) grant Final Approval of the Settlement; (ii) certify the Settlement Class; (iii) approve the application of the Distribution Plan to the Settlement; and (iv) enter Final Judgment. A [Proposed] Final Approval Order and [Proposed] Final Judgment and Order of Dismissal for Deutsche Bank will be filed pursuant to Southern District ECF Rule 13.18 in connection with Representative Plaintiffs' reply memorandum on this motion.

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White Plains, New York

LOWEY DANNENBERG, P.C.

By: /s/ Vincent Briganti
Vincent Briganti
Geoffrey M. Horn
Thomas Skelton
Christian Levis
44 South Broadway, Suite 1100
White Plains, New York 10601
Tel.: 914-997-0500
Fax: 914- 997-0035
vbriganti@lowey.com
ghorn@lowey.com
tskelton@lowey.com
clevis@lowey.com

Robert Eisler
Deborah A. Elman
GRANT & EISENHOFER P.A.
485 Lexington Avenue, 29th Floor
New York, NY 10017
Tel.: 646-722-8500
Fax: 646-722-8501
reisler@gelaw.com
delman@gelaw.com

Interim Co-Lead Counsel