UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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

Plaintiffs Norman Bailey, Robert Ceru, Christopher DePaoli, John Hayes, Laurence Hughes, KPFF Investment, Inc. f/k/a KP Investment, Inc., Kevin Maher, Eric Nalven, J. Scott Nicholson, and Don Tran (collectively "Plaintiffs") respectfully submit this memorandum of law in accordance with the Court's October 27, 2016 Order (ECF No. 158) (the "October 27, 2016 Order") directing Plaintiffs to provide a supplemental submission in support of their motion for preliminary approval. ECF Nos. 154-57.

Issue No. 1: "The basis for the Court to provide even preliminary approval of a settlement class that excludes foreign claimants inasmuch as the proposed putative class as identified in the Second Amended Complaint, Dkt. 11 ¶ 259, appears to include silver traders worldwide." October 27, 2016 Order.

Response: Both the "Settlement Class" in the Settlement Agreement (ECF No. 156-1 at § 1(E)) with Deutsche Bank (the "Settlement") and the proposed putative class definition in the Second Amended Complaint (ECF No. 63 ¶ 259) include claims by foreign claimants only to the extent that they transacted physical silver and/or silver financial instruments in whole or in part in the United States or its territories. To the extent a foreign claimant transacted physical silver and/or silver financial instruments exclusively outside the United States, or to the extent a foreign claimant's claims arise exclusively under foreign law, such foreign-based transactions or claims are excluded from both the "Settlement Class" and the putative class in the Second Amended Complaint.

The Court's inquiry, we believe, was triggered by the fact that the putative class in the Second Amended Complaint does not contain the "U.S.-Related Transaction" qualifier that is present in the Settlement Class. However, it is not, and was not ever, Plaintiffs' intention to assert claims in the Second Amended Complaint for foreign claimants that arise exclusively under foreign law or are based on wholly foreign-based transactions in physical silver or silver financial instruments. Defendants routinely challenge such foreign-based claims under the Foreign Trade

Antitrust Improvements Act and the Supreme Court's holding in *Morrison v. Australia National Bank*, 130 S. Ct. 2869 (2010). The Second Amended Complaint does not include such claims. Instead, the claims for relief in the Second Amended Complaint are for violations of U.S. law, specifically violations of the Sherman Antitrust Act (Claims I-III), Commodity Exchange Act (Claims IV-VII), and for unjust enrichment (Claim VIII). ECF No. 63 at ¶¶ 269-322. And any Notice approved by the Court will make clear that the Settlement includes only "U.S.-Related Transactions."

Notwithstanding, to avoid any perceived differences between the Settlement Class for which preliminary approval is being sought and the proposed litigation class, Plaintiffs have amended the class definition in their proposed Third Amended Complaint by including the "U.S.-Related Transaction" qualifier in the definition of the putative class.

Class definitions that have included similar "U.S.-Related Transaction" qualifiers have been approved for settlement purposes in this District. *See, e.g.*, *Laydon v. Mizuho Bank, Ltd., et al.*, No. 12-cv-3419 (S.D.N.Y. Nov. 14, 2016), ECF No. 721 and 656-1 at §1(N) (granting final approval and certifying a settlement class comprising persons who had an interest in Euroyen-Based Derivatives, defined as financial instruments traded "by a U.S. Person, or by a Person from or through a location within the U.S.").

Issue No. 2: "In light of the Court's Opinion and Order dated October 3, 2016, Dkt. 30, the basis for the Court to provide even preliminary approval of settlement class period that includes sales of silver prior to 2007 or after 2013." October 27, 2016 Order.

Response: Plaintiffs and Deutsche Bank negotiated the Settlement and entered into a binding term sheet before Your Honor dismissed Plaintiffs' claims based on sales of silver prior to 2007 or after 2013 on statute of limitations grounds. The Second Circuit has held that "Defendants in class action suits are entitled to settle claims pending against them on a class-wide basis **even if a court believes that those claims may be meritless** . . . ." *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689

F.3d 229, 243 (2d Cir. 2012) (emphasis added). As such, class action settlements including dismissed claims are not uncommon, and have been approved by courts of this Circuit time and again. *See, e.g.*, *In re Merrill Lynch & Co., Inc. Research Reports Secs. Litig.*, No. 02-1484, 2007 WL 313474, at *2-3, 25 (S.D.N.Y. Feb. 1, 2007) (granting final approval to class action settlement that included dismissed claims); *Laydon v. Mizuho Bank, Ltd., et al.*, No. 12-cv-3419 (S.D.N.Y. Nov. 14, 2016), ECF No. 721 (same); *see also In re Platinum & Palladium Commodities Litig.*, No. 10-cv-3617, 2014 WL 3500655, at *2 (S.D.N.Y. July 15, 2014), *appeal dismissed* (Oct. 6, 2014) (approving settlement and certifying settlement classes that were "significantly broader than the one[s] [plaintiffs] initially sought to certify" and included claims that "may have statute of limitations issues or other problems rendering them meritless.").[1] Moreover, the Second Circuit has approved class action settlements that have included claims that were not even asserted by the plaintiffs in the litigation. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 107 (2d Cir. 2005) ("The law is well established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct.") (citing *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 460 (2d Cir.1982) (class action settlements can properly release claims that were never presented or held by non-parties "in order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action . . . .")).

In approving such settlements, courts have recognized that settling defendants, like Deutsche Bank, have a tangible interest in quieting all claims that were asserted or could have been asserted against them in the litigation, including quieting dismissed claims for which plaintiffs, like here, have a right of appeal. *See, e.g.*, *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-md-1775,

[1] *See also In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M-02-1486, 2013 U.S. Dist. LEXIS 188116, at *220. (N.D. Cal. Jan. 7, 2013) ("[C]ase law has long recognized the ability to settle claims that had been previously dismissed on the merits, whether or not they were the subject of an active appeal").

2009 WL 3077396, at *11 (E.D.N.Y. Sep. 25, 2009) (acknowledging the good public policy achieved by allowing plaintiffs to broadly release claims, which encourages the resolution of cases and promotes a defendants' interest in obtaining a global peace when executing a settlement); *In re Merrill Lynch & Co., Inc.*, 2007 WL 313474, at *2-3, 25 (to advance public policy encouraging settlements, allowing settlement of dismissed claims while an appeal of that dismissal was pending).

For the foregoing reasons, we respectfully request that the Court grant Plaintiffs' motion for preliminarily approval of the Settlement.

Dated: November 18, 2016
White Plains, New York

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