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

REPLY MEMORANDUM OF LAW IN SUPPORT OF (A) REPRESENTATIVE PLAINTIFFS' 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; AND (B) INTERIM CO-LEAD COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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INTRODUCTION

Lowey Dannenberg, P.C. ("Lowey") and Grant & Eisenhofer P.A. ("Grant & Eisenhofer" and, collectively with Lowey, "Interim Co-Lead Counsel") respectfully submit this reply brief in support of Representative Plaintiffs'[1] motion for final approval of the Settlement with Deutsche Bank and Interim Co-Lead Counsel's motion for an attorneys' fee award of 30% ($11,400,000) of the $38,000,000 common fund and an award of $953,618.45 (2.51% of the common fund) for their litigation costs and expenses, plus interest on the awards at the same rate earned by the Settlement Fund. The Settlement Administrator, A.B. Data, Ltd., fully implemented the approved Class Notice plan, and Interim Co-Lead Counsel is pleased to report that there are no objections to the Settlement, Distribution Plan, or Interim Co-Lead's Counsel request for attorneys' fees and reimbursement of expenses. In addition, only one Class Member has opted out of the Settlement Class. When these remaining data points are added to the totality of information about the Settlement, including the arguments presented in Representative Plaintiffs' opening memorandum in support of the Settlement, the facts weigh in favor of granting final approval to the Settlement. Further, the positive reaction of the Settlement Class to the Settlement supports awarding Interim Co-Lead Counsel their requested attorneys' fees and reimbursement of expenses.

ARGUMENT

I. The Reaction Of The Settlement Class Confirms The Fairness, Reasonableness and Adequacy Of The Settlement

As described in the Declaration of Steve S. Straub on behalf of A.B. Data, Ltd. dated January 21, 2021 (ECF No. 487) ("January 2021 Straub Decl."), reasonable efforts were taken to notify

[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 the Action, and internal citations and quotations marks are omitted.

potential Settlement Class Members of the Settlement and advise them of their options to participate in, object to, or opt out of this Settlement. An extensive mailed notice program that drew upon information from Deutsche Bank, subpoenaed third parties, and A.B. Data with respect to potential Settlement Class Members resulted in the distribution of almost 36,000 Notice Packets. January 2021 Straub Decl. ¶ 12.[2] Supplementing this effort, A.B. Data implemented a media strategy that involved the placement of advertisements in publications and on websites potential Settlement Class Member may read. *Id.* ¶¶ 13-16. This media effort was augmented by the implementation of an online marketing campaign that used Google Display Networks and LinkedIn to reach additional potential Class Members. *Id.* ¶ 16. As a result, visits to the settlement website, silverfixsettlement.com ("Settlement Website"), increased by more than 54,000, from 16,971 as of January 2021 (*Id.* ¶ 20) to a total of 71,574 by March 1, 2021. Courts routinely hold that notice programs similar to the type used in this Action are consistent with Rule 23 and due process requirements. *See, e.g.*, *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 411 (S.D.N.Y. 2018) ("[Publication notice] along with actual [mailed] notice that was reasonably calculated to achieve the widest possible class-wide distribution, is satisfactory."), *aff'd sub nom. In re Facebook, Inc.*, 822 F. App'x 40 (2d Cir. 2020); FED. R. CIV. P. 23(c)(2)(B) (notice to the class should be "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.").

The notice program drove substantial traffic to the Settlement Website and shared the details of this Settlement directly with thousands of potential Class Members that were identified through the direct mail program. In light of this comprehensive outreach, it is a significant outcome that there was only one opt-out and no objections. The absence of any dissatisfaction among the Settlement Class is indicative of their views on the Settlement. *See Wal-Mart Stores, Inc. v. Visa*

[2] Non-settling Defendants also sent notice to their counterparties through their third party agent. *See* ECF No. 480.

U.S.A., Inc., 396 F.3d 96, 118 (2d Cir. 2005) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement."). Courts in this district routinely interpret the lack of objections and/or opt-outs as a signal from the Settlement Class of its approval of the Settlement. *City of Pontiac Gen. Employees' Ret. Sys. v. Lockheed Martin Corp.*, 954 F. Supp. 2d 276, 279 (S.D.N.Y. 2013) (finding the "reaction of the class" consideration under the *Grinnell* factors weighed in the settlement's favor when "notwithstanding that more than 62,000 notices were mailed and publication of the proposed settlement appeared in national publications, not a single class member objected to the settlement."). The lack of objections and opt-outs is particularly notable given that at least half of the claimants are institutional investors, and not one of those investors determined that an objection or an opt-out was appropriate in this case. *See In re Facebook, Inc.,* 343 F. Supp. 3d at 410 ("That not one sophisticated institutional investor objected to the Proposed Settlement is indicia of its fairness."); *In re Bisys Sec. Litig.*, No. 04-cv-3840 (JSR), 2007 WL 2049726, at *1 (S.D.N.Y. July 16, 2007) (noting that "institutional investors [ ] presumably ha[ve] the means, the motive, and the sophistication to raise objections" if they perceive an issue with any part of a settlement or related fee award).

Certain Settlement Class Members have also demonstrated their approval for the Settlement by filing claims to receive a payment from the Settlement Fund. As of this submission, A.B. Data has processed 1,145 timely-filed claims,[3] which translates to a claims rate of approximately 3.2%.[4] Courts have approved settlements where the claims rate was much less. *See Pollard v. Remington Arms Co.*, 320 F.R.D. 198, 214 (W.D. Mo. 2017) (citing cases nationwide approving of class action

[3] The deadline to file a claim was on March 1, 2021, with the vast majority of claims arriving the week prior to the deadline. A.B. Data anticipates that the total number of claims filed may change as it completes its processing, due in part to third party filers whose submissions may represent multiple claims for various clients. Seventeen additional claims have been filed since the claims deadline.

[4] This claims rate assumes that every Person that received a Notice Packet was a Class Member. The Class Notice plan was designed to be over-inclusive.

settlements with claims rates of less than 1%), *aff'd* 896 F.3d 900 (8th Cir. 2018); *In re Online DVD–Rental Antitrust Litig.*, 779 F.3d 934, 944-45 (9th Cir. 2015) (approving a less than four percent claims rate); *Poertner v. Gillette Co.*, 618 F. App'x 624, 625-26 (11th Cir. 2015) (approving a claims rate of roughly 0.75%); *In re CenturyLink Sales Practices & Sec. Litig.*, No. CV 17-2832, 2020 WL 7133805, at *16 (D. Minn. Dec. 4, 2020) (affirming settlement with 0.698% claims rate). *See also In re Initial Pub. Offering Sec. Litig.*, No. 21-MC-92 (SAS), 2010 WL 2834894, at *1 (S.D.N.Y. July 7, 2010) (acknowledging testimony from settlement administrator that claims rates "vary greatly depending on a variety of factors" and reporting claims ranges from less than five percent to more than twenty percent.). Moreover, while the claims rate is a helpful metric, it is not intended to be determinative of the adequacy of a settlement. *See Stinson v. City of New York*, 256 F. Supp. 3d 283, 290 (S.D.N.Y. 2017) ("While only a small percentage of Class members have made claims . . . it is the absence of significant exclusion[s] or objection[s] that courts in this Circuit regularly consider, not low response rates.").

In this case, the absence of any complaints (much less a single formal objection) and the reasonable Settlement Class Member participation percentage should further confirm the Settlement Class' approval of the Settlement and provide the Court an additional basis on which to grant final approval of the Settlement. *See Wal-Mart Stores, Inc.*, 396 F.3d at 119 ("Indeed, the favorable reaction of the overwhelming majority of class members to the Settlement is perhaps the most significant factor in our *Grinnell* inquiry.").

II. The Reaction Of The Settlement Class Also Supports Awarding Interim Co-Lead Counsel's Requested Awards for Attorneys' Fees and Reimbursement of Expenses

The complete absence of objections to Interim Co-Lead Counsel's request for attorneys' fees and reimbursement of litigation expenses provides the Court an additional basis on which to grant their request. *In re Veeco Instruments Inc. Sec. Litig.*, No. 05-md-1695 (CM), 2007 WL 4115808, at *1 (S.D.N.Y. Nov. 7, 2007). The reaction provides additional information by which the Court can

assess the quality of Interim Co-Lead Counsel's representation and the public policy considerations that favor granting Interim Co-Lead Counsel's request. *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) (noting that courts should consider "in determining a reasonable common fund fee, . . . (4) the quality of representation; . . .; and (6) public policy considerations.").

Settlement Class Members had sufficient materials from which to make an informed decision about whether to object to the requested awards. The Class Notice advised Settlement Class Members that Interim Co-Lead Counsel would seek reimbursement of their expenses and no more than 30% of the Settlement Fund as attorneys' fees, and described Settlement Class Members' rights, including their right to object to Interim Co-Lead Counsel's requests. ECF No. 487, Ex. A at 4-8. Interim Co-Lead Counsel ultimately requested an attorneys' fees award of 30% of the Settlement Fund and $953,618.45 in expenses, much of that for expert-related costs. ECF No. 485 at 1, 23-24. With this and other information about the Action, Settlement Class Members, including institutional investors, still chose not to object, and in the process expressed their confidence in Interim Co-Lead Counsel's prosecution of the case and the quality of their representation. *See Tiro v. Pub. House Invs., LLC*, No. 11-cv-7679 (CM), 2013 WL 4830949, at *14 (S.D.N.Y. Sept. 10, 2013) (finding that the lack of objections to the requested attorneys' fee was a significant indicia of the quality of counsel's representation and weighed in favor of granting the requested fees.).

From a public policy standpoint, the lack of class member objections or opt outs greatly mitigates the public policy concerns of whether the attorneys' fee is excessive. *See Bryant v. Potbelly Sandwich Works, LLC*, No. 17-cv-7638 (CM)(HBP), 2020 WL 563804, at *7 (S.D.N.Y. Feb. 4, 2020) (explaining that "[p]ublic policy supports the requested fee award [where] the award properly balances the policy goal of encouraging counsel to pursue meritorious actions while protecting against excessive fees."). Given the number of sophisticated institutional investors that are likely among the Settlement Class, the fact that no Settlement Class Member objected to the requested

attorneys' fee for being excessive provides strong evidence that the requested fee award strikes that proper balance between adequately compensating counsel for taking on this complex matter on contingency without creating a windfall. *See In re AOL Time Warner, Inc. Sec.*, No. 02-cv-5575 (SWK), 2006 WL 3057232, at *17 (S.D.N.Y. Oct. 25, 2006) ("The competing poles of public policy consideration are the encouragement of counsel to accept worthy engagements and the discouragement of excessive lawyer compensation. These two objectives can be reconciled."). Accordingly, the Court has a sufficient basis on which to grant Interim Co-Lead Counsel's requested attorneys' fee award of 30% of the Settlement Fund ($11,400,000) and reimbursement of $953,618.45 for their litigation costs and expenses, plus interest on the awards at the same rate that has been earned by the Settlement Fund.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the opening memoranda, we respectfully request that the Court grant final approval of the Settlement and the proposed Distribution Plan and approve Interim Co-Lead Counsel's motion for an award of attorneys' fees and reimbursement of expenses in the amounts set forth above.

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