UNITED STATES DISTRICT COURT
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

PLAINTIFFS' NOTICE OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT WITH DEFENDANTS 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

PLEASE TAKE NOTICE that, upon the accompanying memorandum of law, the Declaration of Vincent Briganti and the exhibits attached thereto, including the Settlement Agreement, the Declaration of Robert G. Eisler and the exhibits attached thereto, and the record herein, Plaintiffs, by and through their undersigned counsel, will respectfully move this Court, before the Honorable Valerie Caproni, United States District Judge, at the United States District Court, Southern District of New York, 40 Foley Square, New York, New York on a date and time to be set by the Court, for an order granting Plaintiffs' motion for preliminary approval of the Settlement Agreement between Plaintiffs and 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") and the other relief set forth in the proposed order annexed hereto.

Dated: October 17, 2016
White Plains, New York

LOWEY DANNENBERG COHEN & HART, P.C.

/s/ Vincent Briganti

Vincent Briganti
Barbara J. Hart
Geoffrey M. Horn
Thomas Skelton
Christian Levis
Raymond Girnys
One North Broadway, 5th Floor
White Plains, New York 10601
914-997-0500
vbriganti@lowey.com
bhart@lowey.com
ghorn@lowey.com
tskelton@lowey.com
clevis@lowey.com
rgirnys@lowey.com

Robert Eisler
James J. Sabella
GRANT & EISENHOFER P.A.
485 Lexington Avenue
New York, NY 10017
Tel.: (646) 722-8500
Fax: (646) 722-8501
jsabella@gelaw.com
reisler@gelaw.com

Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
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

[PROPOSED] ORDER PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT AND CONDITIONALLY CERTIFYING A SETTLEMENT CLASS

UPON the Settlement Agreement between Plaintiffs and 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 (collectively, "Deutsche Bank") dated September 6, 2016 (the "Settlement Agreement");

UPON all submissions in connection with Plaintiffs' Motion for Preliminary Approval of Class Action Settlement with Deutsche Bank;

UPON the consent of Deutsche Bank to such motion; and

UPON all prior proceedings herein,

NOW, THEREFORE, pursuant to Federal Rule of Civil Procedure 23, it is hereby ORDERED that:

1. The capitalized terms used herein shall have the meanings set forth in the Settlement Agreement.

2. The Court preliminarily approves the Settlement as set forth in the Settlement Agreement, as being within the range of what may be found to be fair, reasonable, and adequate to

the Settlement Class for the claims against Deutsche Bank. This is subject to the right of any such Settlement Class Member to challenge the fairness, reasonableness, or adequacy of the Settlement Agreement and to show cause, if any exists, why a final judgment dismissing the Action against Deutsche Bank, and ordering the release of the Released Claims against DB Released Parties (as defined in Section 1(J) of the Settlement Agreement), should not be entered after due and adequate notice to such Settlement Class. The procedure for such notice to the Settlement Class shall be established in a later order.

3. The Court finds that the Settlement Agreement was entered into at arm's length by experienced counsel and is sufficiently within the range of reasonableness and that notice of the Settlement Agreement should be given to Settlement Class Members.

4. Solely for purposes of the Settlement of the claims against Deutsche Bank, the Court conditionally certifies the following Settlement Class (set forth herein):

> All persons or entities that transacted in U.S.-Related Transactions in or on any over-the-counter market ("OTC") or exchange in physical silver or in a derivative instrument in which silver is the underlying reference asset (collectively, "Silver Instruments"), at any time from January 1, 1999 through the date of this Settlement Agreement.
>
> "U.S.-Related Transaction" means any transaction in a Silver Instrument (a) by any person or entity domiciled in the U.S. or its territories, or (b) by any person or entity domiciled outside the U.S. or its territories but conducted, in whole or in part, in the U.S. or its territories.

Excluded from the Settlement Class are Defendants, and their officers, directors, management, employees, subsidiaries, or affiliates. Also excluded is the Judge presiding over this action, his or her law clerks, spouse, and any person within the third degree of relationship living in the Judge's household and the spouse of such a person. Also excluded are the DB Released Parties; and any Class Member who files a timely and valid request for exclusion.

5. The Court finds conditional certification of such Settlement Class on Plaintiffs'

claims against Deutsche Bank for purposes of sending notice of the proposed Settlement of the claims against Deutsche Bank warranted in light of the Settlement because: (i) the proposed Settlement Class is so numerous that joinder is impracticable; (ii) Plaintiffs' claims against Deutsche Bank present common issues that are typical of the proposed Settlement Class; (iii) Plaintiffs and Class counsel will fairly and adequately represent the proposed Settlement Class; and (iv) common issues on the claims against Deutsche Bank predominate over any individual issues affecting the proposed Settlement Class Members. The Court further finds that Plaintiffs' interests in the claims against Deutsche Bank are aligned with the interests of all other Settlement Class Members. The Court also finds that resolution of this Action on a class basis for purposes of the Settlement as to Deutsche Bank is superior to other means of resolution.

6. If the Effective Date does not occur with respect to the Settlement, this conditional certification of the Settlement Class shall be deemed null and void without the need for further action by the Court or the Parties (as defined in Section 1(Z) of the Settlement Agreement).

7. The Court appoints Lowey Dannenberg Cohen & Hart, P.C. and Grant & Eisenhofer, P.A. as Class counsel to such Settlement Class for purposes of the Settlement, having determined that the requirements of Rule 23(g) of the Federal Rules of Civil Procedure are fully satisfied by this appointment.

8. The Court appoints Amalgamated Bank as Escrow Agent for purposes of the Settlement proceeds.

9. 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, and any other Person named as a named plaintiff in the Action who was not subsequently withdrawn as a named plaintiff, and any named plaintiff who may be added to the

Action through amended or supplemental pleadings (collectively, "Plaintiffs") will serve as representatives of such Settlement Class for purposes of the Settlement.

10. The timing, plan, and forms of the notice to the Settlement Class and the date of a hearing before this Court to consider any Settlement Class Member objections to final approval of the Settlement shall all be determined by separate order of this Court.

11. Deutsche Bank has denied any liability, fault, or wrongdoing of any kind in connection with the allegations in the Action, and as such neither the Settlement Agreement, nor any of its terms or provisions, nor any of the negotiations, term sheets, or proceedings connected with it, shall be construed as an admission or concession by Deutsche Bank of the truth of any of the allegations in the Action, or of any liability, fault, or wrongdoing of any kind. Neither this Order, the Settlement Agreement, the Settlement contained therein, nor any act performed or document executed pursuant to or in furtherance of the Settlement Agreement or Settlement is or may be used as an admission or evidence (i) of the validity of any claims, alleged wrongdoing, or liability of Deutsche Bank; or (ii) of any fault or omission of Deutsche Bank in any civil, criminal, or administrative proceeding in any court, administrative agency, or other tribunal.

12. Neither this Order, the Settlement Agreement, the Settlement contained therein, nor any act performed or document executed pursuant to or in furtherance of the Agreement or Settlement is or may be used as an admission or evidence that the claims of Plaintiffs lacked merit in any proceeding against anyone other than Deutsche Bank in any court, administrative agency, or other tribunal.

13. In the event that the Settlement Agreement is terminated in accordance with its provisions, or the Effective Date fails to occur for any reason, the Parties shall abide by the Effect of Termination provisions set forth in Section 22 of the Settlement Agreement, and the Parties

shall otherwise be restored to their respective positions in the Action as of the Execution Date, with all of their respective legal claims and defenses preserved as they existed on that date, and the Settlement and all proceedings had in connection therewith shall be null and void, except insofar as expressly provided to the contrary in the Settlement Agreement, and without prejudice to the status quo ante rights of Plaintiffs, Deutsche Bank, and the Settlement Class Members.

14. No later than ten (10) days after the Motion for Preliminary Approval of the Settlement has been filed with the Court, Deutsche Bank will serve the Class Action Fairness Act ("CAFA") Notice on the Attorney General of the United States and the state attorneys general as required by 28 U.S.C. § 1715(b). Thereafter, Deutsche Bank will serve any supplemental CAFA Notice as appropriate.

15. The Court's preliminary certification of the Settlement Class, appointment of Plaintiffs as Class Representatives, and appointment of Class Counsel as provided herein is without prejudice to, or waiver of, the rights of any Defendant to contest any other request by Plaintiffs to certify a class. The Court's findings in this Order shall have no effect on the Court's ruling on any motion to certify any class in this litigation, or appoint Class Representatives, and no party may cite or refer to the Court's approval of the Settlement Class as binding or persuasive authority with respect to any motion to certify such class or appoint Class Representatives.

16. Except as provided in Paragraph 4 of the Settlement Agreement, neither Deutsche Bank nor its counsel shall have any liability, obligation, or responsibility with respect to the procedures for providing notice to the Settlement Class, or the investment, allocation, use, disbursement, administration, or oversight of the Settlement Fund.

17. All proceedings in the Action with respect to Deutsche Bank are stayed until further order of the Court, except as may be necessary to enforce the Settlement set forth in the Settlement

Agreement or comply with the terms thereof. Pending the Court's final determination of whether the Settlement should be finally approved, each Plaintiff and Settlement Class Member shall be enjoined from prosecuting in any forum any Plaintiff Released Claim against any of the DB Released Parties, and agrees and covenants not to sue any of the DB Released Parties on the basis of any Plaintiff Released Claims or to assist any third party in commencing or maintaining any suit against any Released Party related in any way to any DB Released Claims.

ENTERED this _____ day of _____, _____.

_____

Hon. Valerie E. Caproni
United States District Judge

UNITED STATES DISTRICT COURT
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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

INTRODUCTION

Plaintiffs[1] respectfully submit this memorandum of law and the accompanying Declarations of Vincent Briganti, Esq. ("Briganti Decl.") and Robert Eisler ("Eisler Decl.") pursuant to Rule 23(e) of the Federal Rules of Civil Procedure ("Federal Rules"), to demonstrate that the Court should: (a) preliminarily approve Plaintiffs' proposed Settlement[2] with Deutsche Bank,[3] subject to later, final approval; (b) conditionally certify a Settlement Class on the claims against Deutsche Bank; (c) appoint Lowey Dannenberg Cohen & Hart, P.C. ("Lowey") and Grant & Eisenhofer P.A. ("Grant & Eisenhofer") as "Class Counsel"; and (d) appoint Amalgamated Bank ("Amalgamated") as Escrow Agent under the Settlement. *See* Proposed Order annexed to Notice of Motion.

Given the need to analyze transaction data, and consult experts on the appropriate methodologies for distributing the Net Settlement Fund to Settlement Class Members, which process is underway but not yet completed, Class Counsel proposes to file a separate motion for preliminary approval of a proposed plan of allocation, along with a plan for providing notice to the Class. The Settlement Class Members will have ample opportunity to review the notice and proposed plan of allocation before the deadline for opting out or objecting to the Settlement. This procedure has been endorsed in other complex cases. *See* Part I.C.3., *infra.*

A. The Benefits of the Settlement

The monetary consideration, $38,000,000, is substantial. It is also likely that this "ice breaker" settlement will serve as a catalyst for other Defendants to settle. Deutsche Bank has also

---

[1] Plaintiffs are 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, the "Class Plaintiffs")

[2] Capitalized terms here have the same meaning as in the Settlement Agreement. Unless otherwise noted, all ECF citations are to the docket in *In re London Silver Fixing, Ltd. Antitrust Litigation*, No. 14-MC-02573-VEC (S.D.N.Y.).

[3] 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 (collectively, "Deutsche Bank"). The Settlement Agreement is annexed at Briganti Decl., Exhibit 1.

agreed that, if the Settlement is finally approved, there will be **no** reversion of Settlement monies to Deutsche Bank for opt-outs or failures to submit proofs of claim. Settlement Agreement ¶ 10.[4] Thus, unlike other settlements, if the Deutsche Bank Settlement is finally approved by this Court, no part of the $38,000,000 is subject to reversion to Deutsche Bank.

A tremendous benefit to the class is the considerable cooperation Deutsche Bank has agreed to provide to Plaintiffs in prosecuting the claims against the remaining Defendants. For example, as part of its Settlement cooperation, Deutsche Bank provided to Plaintiffs a substantial production of documents which Deutsche Bank provided to regulators. Plaintiffs are reviewing these materials for use against the Non-Settling Defendants, and Deutsche Bank's obligations are ongoing.

The Settlement mitigates risk by providing a monetary recovery and cooperation in the continued litigation against the Non-Settling Defendants. The Settlement Class is no longer placing all of its eggs in the risky basket of continued litigation. *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 642-43 (E.D. Pa. 2003) (court considered the fact that the settlement allows the class to diversify the risk of no recovery with an immediate financial recovery); *see also In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 14-CV-2058 JST, 2015 WL 9266493, at *4 (N.D. Cal. Dec. 17, 2015) ("the Settlement is in the best interest of the class 'because it eliminates the risks of continued litigation, while at the same time creating a substantial cash recovery and obtaining cooperation from [Defendants] in the ongoing litigation.'") (citation omitted).

B. The Settlement is Procedurally and Substantively Fair

The two essentials for preliminary approval are procedural and substantive fairness. The Settlement is procedurally fair because serious, informed, arm's-length negotiations and hard bargaining between experienced counsels took place over the course of several months. *See* Part

[4] *Contrast Boeing Co. v. Van Gemert*, 444 U.S. 472, 479-82 (1980) (in the litigated trial and judgment context, the settlement money due to non-claiming class members reverted to defendants). Under the Deutsche Bank Settlement, the proceeds that would have been paid to those persons who fail to claim will enhance the recovery of Settlement Class Members who do claim.

I.C.1., *infra*. The Settlement is also substantively fair, reasonable and adequate. No preferences have been created. Deutsche Bank's payment of $38,000,000 and its provision of substantial cooperation easily clear the low bar at preliminary approval.

C. The Class Should be Certified for Settlement Purposes

Finally, all Rule 23 requirements for conditional certification of a Settlement Class on the claims against Deutsche Bank are satisfied. *See* Part II, *infra*.

ARGUMENT

I. Preliminary Approval of the Settlement is Appropriate

A. The Standard for Preliminary Approval

"Preliminary approval is generally the first step in a two-step process before a class-action settlement is approved." *In re Stock Exchanges Options Trading Antitrust Litig.*, No. 99 Civ. 0962 (RCC), 2005 WL 1635158, at *4 (S.D.N.Y. July 8, 2005) (quoting *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) ("*NASDAQ II*")). "In considering preliminary approval, "the [C]ourt must make a 'preliminary evaluation' as to whether the settlement is fair, reasonable and adequate." *In re Currency Conversion Fee Antitrust Litig.*, MDL No. 1409, 2006 WL 3247396, at *5 (S.D.N.Y. Nov. 8, 2006) (quoting *NASDAQ II,* 176 F.R.D. at 102). "If, after a preliminary evaluation of the proposed settlement, a court finds that it appears to fall *within the range* of possible approval, the court shall order that the class members receive notice of the settlement." *Morris v. Affinity Health Plan, Inc.*, No. 09-cv-1932 (DAB), 2011 WL 6288035, at *2 (S.D.N.Y. Dec. 15, 2011) (quoting *Torres v. Gristede's Oper. Corp.*, No. 04-3316 (PAC), 2010 WL 2572937, at *11 (S.D.N.Y. June 1, 2010)); *see also In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 (NRB), 2014 WL 6851096, at *2 (S.D.N.Y. Dec. 1, 2014) (finding the question is "whether the terms of the Proposed Settlement are at least sufficiently fair, reasonable and adequate to justify notice to those affected and an opportunity to be heard" (internal quotation marks omitted)).

In determining whether to grant preliminary approval, a court considers both the "negotiating process leading up to the settlement, *i.e.*, procedural fairness, as well as the settlement's substantive terms, *i.e.*, substantive fairness." *In re Platinum & Palladium Commodities Litig.*, No. 10-cv-3617, 2014 WL 3500655, at *11 (S.D.N.Y. July 15, 2014) (quoting *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803-4 (2d Cir. 2009)). "Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." *In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007) (quoting *NASDAQ II,* 176 F.R.D. at 102). "The decision to grant or deny such approval lies squarely within the discretion of the trial court, and this discretion should be exercised in light of the general judicial policy favoring settlement." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 124 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997) (internal citation omitted); *see also In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 174 (S.D.N.Y. 2014) ("The law favors settlement, particularly in class actions and other complex cases . . ."). The Court should note the "'strong judicial policy in favor of settlements, particularly in the class action context.'" *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 116 (2d Cir. 2005) (citation omitted).

A court "must give comprehensive consideration to all relevant factors," *Hayes v. Harmony Gold Mining Co.*, 509 F. App'x 21, 23 (2d Cir. 2013) (quoting *City of Detroit v. Grinnell*, 495 F.2d 448, 463 (2d Cir. 1974) (*"Grinnell"*)), but "not every factor must weigh in favor of settlement, rather [a] court should consider the totality of these factors in light of the particular circumstances." *In re IMAX Secs. Litig.*, 283 F.R.D. 178, 189 (S.D.N.Y. 2012) (citation omitted). "[W]hen evaluating a settlement agreement, the court is not to substitute its judgment for that of the parties, nor is it to turn consideration of the adequacy of the settlement 'into a trial or a rehearsal of the trial.'" *In re Sony Corp. SXRD*, 448 F. App'x 85, 87 (2d Cir. 2011) (quoting *Grinnell,* 495 F.2d at 462); *see also Fleisher v.*

Phoenix Life Ins. Co., No. 11-cv-8405 (CM), 2015 WL 10847814, at *5 (S.D.N.Y. Sept. 9, 2015) ("The court should neither substitute its judgment for that of the parties who negotiated the settlement nor conduct a mini-trial on the action's merits.").

Finally, proposed settlements of Rule 23(b)(3) classes require notice to class members, an opportunity for those class members to object, and final approval by the Court after a hearing at which class members may appear and be heard. FED. R. CIV. P. 23(e).

B. The Proposed Settlement Amply Satisfies the *Grinnell* Factors in Your Honor's Individual Rules of Practice

While preliminary approval of a settlement is not expressly mentioned in either Federal Rules generally or Rule 23 in particular, we note that Your Honor's individual rules of practice state:

> **Factors to Address.** Any motion for preliminary approval of a class action settlement must provide sufficient information regarding: (i) the complexity, expense, and likely duration of the litigation; (ii) the litigation risk, including the risks of establishing liability and damages; (iii) the damages class members allegedly suffered; (iv) the range of reasonableness of the settlement in light of the best possible recovery and the attendant risks of litigation; and (v) the rationale for any discount from the "best case" damages calculation, so that the Court can make a preliminary finding as to whether the proposed settlement is procedurally and substantively fair pursuant to Federal Rule of Civil Procedure 23(e). *See Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974).

Individual Practices in Civil Cases § 5(B)(ii). The Settlement amply satisfies each of the foregoing requirements.

1) Grinnell Factor 1—Individual Rules factor (i)—the complexity, expense, and likely duration of the litigation

This case involves complex claims arising out of transactions in physical silver or a silver financial instrument priced, benchmarked, and/or settled to the London Silver Fix over a long period of time. Class Counsel has already expended significant sums on experts and factual investigations to bolster the factual allegations which are contained in the operative complaint.

Discovery will be quite voluminous. The litigation has been, and will continue to be, expensive to prosecute. *See In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 BMC JO, 2012 WL

5289514, at *4 (E.D.N.Y. Oct. 23, 2012) ("Federal antitrust cases are complicated, lengthy, and bitterly fought, as well as costly.") (internal citation omitted); *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 263 (2d Cir. 2001) (noting the "factual complexities of antitrust cases"); *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989) (noting that antitrust class actions "are notoriously complex, protracted, and bitterly fought"). In short, while Class Counsel (and presumably counsel for Defendants) have already expended significant resources litigating this case, "[t]here can be no doubt that this class action would be enormously expensive to continue, extraordinarily complex to try, and ultimately uncertain of result." *In re NASDAQ Mkt.-Makers Antitrust Litig.,* 187 F.R.D. 465, 477 (S.D.N.Y. 1998) ("*NASDAQ III*"). The first *Grinnell* Factor supports preliminary approval.

2) Grinnell Factors 4-5—Individual Rules factor (ii)—the litigation risk, including the risks of establishing liability and damages

This litigation presents the Court, the parties, and eventually, a jury, with the task of understanding extremely complex claims involving an opaque market. This task involves obtaining and proving the meaning and significance of extensive facts and evidence. The evidence of manipulation and collusion will likely raise ambiguities and inferences. This creates many risks in establishing liability in this case. In assessing the proposed Settlement, Class Counsel was mindful of the "benefits afforded the Class including the *immediacy* and *certainty* of the recovery, against the continuing risks of litigation." *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 212 (E.D.N.Y. 2013) (citation omitted) (emphasis in original). As evidenced by the recent decision on the motion to dismiss, in which UBS was dismissed, the Court expressed concerns about various aspects of Plaintiffs' case. *See In re: London Silver Fixing, Ltd., Antitrust Litig.,* No. 14-MD-02573, 2016 WL 5794777, at *12-13, 15 (S.D.N.Y. Oct. 3, 2016).

Moreover, private antitrust plaintiffs, unlike the government, have the burden to prove antitrust impact and damages. *Gottesman v. General Motors Corp.*, 436 F.2d 1205, 1210 (2d Cir. 1971).

This burden can be very challenging. Thus, for example, even where a criminal guilty plea was obtained, a civil antitrust jury has found no damages. *See* Special Verdict on Indirect Purchases, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI (N.D. Cal., Sept. 3, 2013), ECF No. 8562. This risk factor strongly supports the Settlement, because, as noted by the Court, "none of the regulatory investigations cited by Plaintiffs has advanced to the point of charging any of the Defendants with colluding to manipulate the price of silver, and DOJ's Antitrust Division has closed its investigation without charging anyone." *Silver Fixing,* 2016 WL 5794777, at *16.

One risk is that Defendants have extremely deep pockets and are represented by some of the best law firms in the United States. Absent settlement, Deutsche Bank was most certainly prepared to vigorously contest liability and damages. "Establishing otherwise [would] require considerable additional pre-trial effort and a lengthy trial, the outcome of which is uncertain." *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 199 (S.D.N.Y. 2012), *aff'd sub nom. Charron v. Wiener*, 731 F.3d 241 (2d Cir. 2013). "Liability is never automatic." *Park v. The Thomson Corp.*, No. 05 Civ. 2931 (WHP), 2008 WL 4684232, at *4 (S.D.N.Y. Oct. 22, 2008). And even if Plaintiffs were able to establish Deutsche Bank's liability at trial, "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." *NASDAQ III*, 187 F.R.D. at 476.[5]

"The complexity, expense and likely duration of the litigation going forward weigh in favor of approval of the Settlement . . . . Not only would Plaintiffs spend substantial sums in litigating this case through trial and appeals, it could be years before class members saw any recovery, if at all." *In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06 Civ. 5173(RPP), 2008 WL 1956267,

[5] *See also In re Flonase Antitrust Litig.,* 951 F. Supp. 2d 739, 748 (E.D. Pa. 2013) ("Even if Plaintiffs had succeeded in proving liability at trial, there is no guarantee they would have recovered damages."); *U.S. Football League v. Nat'l Football League*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) ("the jury chose to award plaintiffs only nominal damages, concluding that the USFL had suffered only $1.00 in damages"), *aff'd*, 842 F.2d 1335, 1377 (2d Cir. 1988); *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1166–69 (7th Cir. 1983) (antitrust judgment was remanded for a new trial and damages).

at *6 (S.D.N.Y. May 1, 2008) (quoting *Grinnell*, 495 F.2d at 463); *see also In re Prudential Secs. Inc. Ltd P'ships Litig.*, 163 F.R.D. 200, 210 (S.D.N.Y. 1995) ("[I]t may be preferable to take the bird in the hand instead of the prospective flock in the bush.") (internal quotation marks omitted). "The complexity of Plaintiff's claims *ipso facto* creates uncertainty . . . . A trial on these issues would likely be confusing to a jury." *Park,* 2008 WL 4684232, at *4. These factors "weigh in favor of the Settlement." *Id.*

Here, the monetary consideration alone, $38,000,000, is significantly greater than the amount of maximum potential damages Deutsche Bank would have argued it was liable for had the case proceeded to trial. This Settlement reflects a reasonable compromise of the litigation risks. *Compare Platinum & Palladium*, 2014 WL 3500655, at *12 (stating that the court must compare the terms of the settlement to the "likely rewards of the litigation.") (citation omitted).

Plaintiffs' damages theories inevitably would involve a "battle of the experts." *NASDAQ III,* 187 F.R.D. at 476. "When the success of a party's case turns on winning a so-called 'battle of experts,' victory is by no means assured." *In re Bear Stearns Cos., Inc. Secs., Derivative, and ERISA Litig.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012) (citing *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 426-27 (S.D.N.Y. 2001) (noting that, when damages are subject to a battle of the experts, there is a "possibility that a jury could be swayed by experts for Defendants, who could minimize or eliminate the amount of Plaintiffs' losses.")).

Class Counsel must be wary in describing in detail their proof risks due to the presence of Non-Settling Defendants. *In re Prudential Secs. Ltd. P'ships Litig.*, No. M 21 67 (MP), 1995 WL 798907, at *14 (S.D.N.Y. Nov. 20, 2995) (Pollack, J.) ("*Prudential*"). But the answers to the key common questions of fact and law for all Settlement Class Members' claims will be hotly disputed and Class Counsel will zealously seek to overcome all of the foregoing risks. The Settlement beneficially diversifies risk by giving Class Members a bird in the hand **and** the opportunity to obtain the same

bird in the bush through settlements with or verdicts against the remaining Defendants. Class Counsel's judgment is that the consideration provided by the Settlement, including substantial cooperation, is fair, reasonable, and adequate in light of all the circumstances.

3) Grinnell Factors 8-9—Individual Rules factors (iii), (iv) and (v)—the damages class members allegedly suffered, the range of reasonableness of the settlement in light of the best possible recovery and the attendant risks of litigation, and the rationale for any discount from the "best case" damages calculation[6]

Plaintiffs have not finalized a formal damages study. Class Counsel has consulted experts familiar with the silver market to conduct estimates of the size of the silver market and the potentially recoverable damages, which we preliminarily estimate could be in the billions of dollars.

This Settlement has the potential to "'break the ice' and bring other defendants to the point of serious negotiations." *In re Linerboard*, 292 F. Supp. 2d at 643 (citation omitted); *see also In re Cathode Ray Tube*, 2015 WL 9266493, at *6 ("this settlement provides increased value in another pending class action suit in this case by creating added incentive for the remaining defendants to settle or allowing greater recovery for the Plaintiffs at trial."). Thus, this Settlement could pay further dividends in the form of additional settlements with other Defendants. *See In re High-Tech Employee Antitrust Litig.*, No. 11-CV-2509-LHK, 2013 WL 6328811, at *1 (N.D. Cal. Oct. 30, 2013). As the court in *In re Corrugated Container Antitrust Litigation* explained: "[T]his strategy was designed to achieve a maximum aggregate recovery for the class and the fact that the later settlements were at considerably higher rates tends to show that the strategy was successful." No. MDL 310, 1981 WL 2093, at *23 (S.D. Tex. June 22, 1981); *see also In re Packaged Ice Antitrust Litig.*, 08-MD-01952, 2011 WL 717519, at *10 (E.D. Mich. Feb. 22, 2011) ("Also of significant value is the fact that the Settlement Agreement with Home City can serve as an "ice-breaker" settlement"). The cooperation

[6] In analyzing the *Grinnell* Factors, it is important to recognize the different posture of this case, a settlement with one Defendant, as compared to the global settlement with all defendants in *Grinnell*.

that Deutsche Bank has already provided is expected to bolster the claims against the remaining Defendants, thereby increasing the overall value of the case.

The last two *Grinnell* Factors "recognize[] the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Wal-Mart Stores, Inc.*, 396 F.3d at 119. In applying these factors, "[d]ollar amounts [in class action settlement agreements] are judged not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re Facebook Inc. IPO Secs. and Derivative Litig.*, MDL No. 12–2389, 2015 WL 6971424, at *6 (S.D.N.Y. Nov. 9, 2015) (citation omitted); *see also NASDAQ III*, 187 F.R.D. at 478 ("Ultimately, the exact amount of damages need not be adjudicated for purposes of settlement approval."). As the Fifth Circuit stated, the "essence of a settlement is compromise. A just result is often no more than an arbitrary point between competing notions of reasonableness." *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1322, 1325 (5th Cir. 1981). Consequently, "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." *Grinnell*, 495 F.2d at 455 n.2.

Continuing this litigation against Deutsche Bank would necessitate the expenditure of countless hours and dollars over several more years with no guarantee that Plaintiffs would ever be able to establish liability, certify a class, and prove damages. These risks are arguably dispositive for these *Grinnell* Factors. *See Bear Stearns*, 909 F. Supp. 2d at 270 ("[T]he propriety of a given settlement amount is a function of both (1) the size of the amount relative to the best possible recovery; and (2) the likelihood of non-recovery (or reduced recovery)."). The Settlement consideration falls well within the possible range of reasonable consideration at the final approval hearing. *See NASDAQ II,* 176 F.R.D. at 102.

In sum, each of the relevant *Grinnell* Factors weighs in favor of preliminary approval.

4) The Other Grinnell Factors[7]

Your Honor's individual Rules do not require analysis of *Grinnell* Factors 2, 3, 6 or 7 at this stage. We discuss these factors only briefly and will address them more fully on a motion for final approval. *Grinnell* Factor 2 (the reaction of the class to a settlement) is premature as notice has not yet been provided to the Class. Certainly, however, all of the Class Plaintiffs favor the Settlement. Any class member who does not favor the deal can object or opt out.

Grinnell Factor 3 is 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). The Court's primary concern in examining the stage of litigation and the extent of discovery undertaken is to assess whether the settling parties "'have engaged in sufficient investigation of the facts'" to understand the strengths and weaknesses of their cases, and whether the settlement is adequate given those risks. *Id.* (quoting *Plummer v. Chemical Bank*, 668 F.2d 654 (2d Cir. 1982)). There is no litmus test for determining how much work needs to be done for the Court to evaluate a settlement. "Formal discovery is not a prerequisite; the question is whether the parties had adequate information about their claims." *In re Global Crossing Secs & ERISA Litig.*, 225 F.R.D. 436, 458 (S.D.N.Y. 2004) (citations omitted); *see also IMAX*, 283 F.R.D. at 190 ("The threshold necessary to render the decisions of counsel sufficiently well informed, however, is not an overly burdensome one to achieve—indeed, formal discovery need not have necessarily been undertaken yet by the parties."). Although formal discovery has not commenced yet,[8] Plaintiffs have uncovered many facts

---

[7] *See In re Take Two Interactive Secs. Litig.*, No. 06 Civ. 803 (RJS), 2010 U.S. Dist. LEXIS 143837, at *32 n.8 (S.D.N.Y. June 29, 2010) ("A court reviewing a settlement for final approval must address the nine factors laid out in C*ity of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). For preliminary approval purposes, however, we do not need to make such an intensive analysis. To try to do so before the fairness hearing would be premature.").

[8] The Court has ordered the parties to meet and confer regarding a proposed schedule for discovery and class certification, and submit a joint proposal (if possible) or separate proposals (if a joint proposal is not possible) on such matters by December 1, 2016. ECF No. 153.

from their own investigation and from government orders that provide context for the claims asserted. Deutsche Bank has provided information that often takes years to learn in litigation, which will bolster the claims against other Defendants, and increase the value of the case. *See Corrugated Container,* 1981 WL 2093, at *23.

Grinnell Factor 6 is the risk of maintaining the class action through the trial. Plaintiffs believe that a litigation class will be certified, but they also know that the Defendants will vigorously contest any motion for class certification. Assuming the litigation class is certified, the Court could review and modify that grant of certification at any point prior to trial, such that the risk of maintaining the class through trial would never be 100% certain. *See Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) ("[w]hile plaintiffs might indeed prevail [on a motion for class certification], the risk that the case might be not certified is not illusory"); *see also In re AOL Time Warner ERISA Litig.*, 2006 WL 2789862, at *8 ("the Court cannot discount the risk of maintaining the class through trial"). Indeed, the Court here indicated that it has concerns about the scope of the proposed class. *Silver Fixing,* 2016 WL 5794777, at *13. This *Grinnell* Factor weighs in favor of preliminary approval.

Under *Grinnell* Factor 7, the fact that Deutsche Bank has the ability to withstand a greater judgment "does not, standing alone, indicate that the settlement is unreasonable or inadequate." *In re Global Crossing*, 225 F.R.D. at 460 (quoting *PaineWebber*, 171 F.R.D. at 129); *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") (citation omitted).

C. The Proposed Settlement is Procedurally and Substantively Fair

Your Honor's individual rules state that the Court must "make a preliminary finding as to whether the proposed settlement is procedurally and substantively fair pursuant to Federal Rule of

Civil Procedure 23(e)." In *NASDAQ II,* 176 F.R.D. at 102, the Court summarized the procedural and substantive fairness analysis:

> Where the proposed settlement [1] appears to be the product of serious, informed, non–collusive negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential treatment to class representatives or segments of the class and [4] falls within the range of possible approval, preliminary approval is granted.

(numbers in brackets supplied); *see also Platinum & Palladium*, 2014 WL 3500655, at *11. The question is whether the terms are "at least sufficiently fair, reasonable and adequate to justify notice to those affected and an opportunity to be heard." *NASDAQ II*, 176 F.R.D. at 102 (quoting *Baldwin-United Corp.*, 105 F.R.D. 475, 482 (S.D.N.Y. 1984)); *see also* Order Preliminarily Approving Class Action Settlement and Conditionally Certifying a Settlement Class, *Sullivan, et al. v. Barclays plc, et al.*, No. 13-cv-2811 (PKC), (S.D.N.Y. Dec. 15, 2015), ECF No. 234 ("Euribor Order") (preliminarily approving $94 million settlement in a proposed class action alleging the manipulation of the Euro Interbank Offered Rate or Euribor).

1) The Settlement is procedurally fair because it was produced by well-informed, arm's length negotiations by experienced counsel

"To determine procedural fairness, courts examine the negotiating process leading to the settlement." *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 618 (S.D.N.Y. 2012). 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." *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); *see also Wal-Mart*, 396 F.3d at 116 ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in

arm's-length negotiations between experienced, capable counsel after meaningful discovery.") (quoting MANUAL FOR COMPLEX LITIGATION, THIRD, § 30.42 (1995)).[9]

"'Great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation." *In re PaineWebber*, 171 F.R.D. at 125. "A 'presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *Wal-Mart*, 396 F.3d at 116 (citation omitted). That presumption clearly attaches here. *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) ("Co–Lead Counsel, who have extensive experience in prosecuting complex class actions, strongly believe the Settlement is in the best interests of the Class, an opinion which is entitled to 'great weight.'"); *Yuzary v. HSBC Bank USA, N.A.*, No. 12-cv-3693 (PGG), 2013 WL 1832181, at *1 (S.D.N.Y. Apr. 30, 2013) (in exercising its discretion, "courts should give weight to the parties' consensual decision to settle class action cases because they and their counsel are in unique positions to assess potential risks").

The process leading up to and the timing of the settlement supports preliminary approval. The procedural history of this Action is set forth in the Briganti Decl. at ¶¶ 9-12. The Settlement is the result of arm's length, non-collusive negotiations. *Id.* ¶ 13. Plaintiffs are represented by experienced counsel. *Id.* ¶¶ 3-5; Eisler Decl. ¶¶ 3-4. Before beginning negotiations with Deutsche Bank in December 2015, Class Counsel had researched and considered a wide range of relevant legal and factual issues. Briganti Decl. at ¶ 7; Eisler Decl. ¶ 6. The Settlement is the product of hard-fought extensive negotiations, which involved numerous meetings and/or telephone conferences, and an extensive investigation. Briganti Decl. at ¶¶ 14-21. In light of Class Counsel's considerable

[9] *See also In re Currency Conversion Fee Antitrust Litig.*, MDL No. 1409, 2006 WL 3253037, at *2 (S.D.N.Y. Nov. 8, 2006); MANUAL FOR COMPLEX LITIGATION, THIRD § 21.632 (1995); *NASDAQ III*, 187 F.R.D. at 474 ("So long as the integrity of the arm's length negotiation process is preserved . . . a strong initial presumption of fairness attaches to the proposed settlement").

prior experience in complex class action litigation involving CEA and antitrust claims (among others), Briganti Decl., ¶¶ 3-5, Ex. 2; Eisler Decl., ¶¶ 3-4, Ex. 1, their knowledge of the strengths and weaknesses of Plaintiffs' claims and their assessment of the potential recovery following trial and appeal, the Settlement is entitled to a presumption of procedural fairness.

2) There are no obvious or other deficiencies in the Settlement

The proposed Settlement plainly satisfies the next *NASDAQ II* preliminary approval factor, as it involves a structure and terms that are commonly used in class action settlements in this District. *NASDAQ II*, 176 F.R.D. at 102; *see* Briganti Decl. ¶ 23. Deutsche Bank has the right, but not the obligation, in its sole discretion, to exercise certain rights, including terminating the Settlement Agreement, pursuant to the terms and conditions of a confidential Supplemental Agreement. *See* Settlement Agreement ¶ 21(A)(iv). These types of qualified rights to terminate are common in class action settlements and are generally included based on defendant's desire to quiet the litigation through a class action settlement, without leaving open any material exposure. *See* Superseding Order Preliminarily Approving Proposed Settlements, *Laydon v. Mizuho Bank, Ltd., et al.,* No. 12-cv-3419 (S.D.N.Y. June 22, 2016), ECF No. 659, ¶¶ 10-11.[10]

3) The Settlement does not favor Class Members, nor create preferences

The Settlement does not favor or disfavor any Settlement Class members; nor does it discriminate against, create any limitations, or exclude from payments, any persons or groups within the Class. *NASDAQ II,* 176 F.R.D. at 102. Here, Plaintiffs, with the assistance of their experts, are in the process of developing a plan of allocation to distribute settlement proceeds. Plaintiffs are committed to the Net Settlement Fund being distributed in a reasonable and equitable fashion to members of the Class. Plaintiffs have not yet received sufficient data or expert analysis to formulate a notice plan and plan of allocation. Plaintiffs respectfully propose to file a separate motion for

[10] A copy of the confidential Deutsche Bank Supplemental Agreement will be made available to the Court for *in camera* review upon request.

approval of the plan of allocation and form and manner of notice at a later date. At that time, Class Counsel will recommend a proposed plan of allocation and notice plan (including a claim form), which will be informed by economic consultants.

The notice and claim form will include a description of the case, the terms of the Settlement, and the mechanism and plan of allocation, sufficient for members of the Class to meaningfully participate, object, opt out or comment on the settlement, while avoiding confusion caused by multiple rounds of notice. Other courts have permitted this process in similarly complex cases. The Honorable Lorna G. Schofield preliminarily approved a settlement with a separate nearly identical notice procedure. *See In re Foreign Exchange Benchmark Rates Antitrust Litigation*, Case No. 13-cv-7789 (S.D.N.Y. Dec. 15, 2015), ECF No. 536 ¶¶ 8–9. Similarly, in *Precision Associates, Inc. v. Panalpina World Transport*, Case No. 08-cv-0042 (E.D.N.Y.), the Honorable John J. Gleeson preliminarily approved ten partial settlements before a plan of allocation had been proposed.[11]

A proposed plan of allocation will be made available to Settlement Class Members before they have to decide whether to accept its benefits, opt out, or object to final approval. The Settlement avoids improper preferences. Moreover, whether any such preferences will even be proposed (and, if so, which ones), will be determined by an appropriate process. Accordingly, the third *NASDAQ II* preliminary approval element is fully satisfied.

4) The Settlement consideration is well within the range of what possibly may be found, at final approval, to be fair and reasonable

NASDAQ II factor 4, whether the settlement falls within the range of possible approval, is discussed above at pp. 9-11.

[11] *See also Euribor Order* ¶ 2; *In re Wachovia Equity Secs. Litig.,* No. 08-6171 (RJS), 2012 WL 2774969, at *6 (S.D.N.Y. June 12, 2012) (approving plan of allocation after preliminary approval of proposed settlement and certification of settlement class); *In re Canadian Sup. Secs. Litig.,* No. 09-10087, 2011 WL 5830110, at *1 (S.D.N.Y. Nov. 16, 2011) (same); *In re Giant Interactive Grp. Inc. Secs. Litig.*, 279 F.R.D. 151, 156 (S.D.N.Y. 2011) (same); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 135 (S.D.N.Y. 2010) (same); *In re Qiao Xing Secs. Litig.*, No. 07-cv-7097, 2008 WL 872298, at *2 (S.D.N.Y. Apr. 2, 2008) (same).

II. The Court Should Conditionally Certify the Settlement Class

Your Honor's individual rules state:

> **iii. Certification of a Settlement Class.** Motions for conditional certification of a class action settlement must establish that the requirements of Federal Rule of Civil Procedure 23 are met. The motion must show that the requirements of Rule 23(a) and (b) are satisfied, as well as provide facts that would support a preliminary conclusion that the settlement is procedurally and substantively fair pursuant to Rule 23(e).

Individual Practices in Civil Cases § 5(B)(iii).

A court may certify a settlement class where the proposed settlement class meets the requirements for Rule 23(a) class certification, as well as one of the three subsections of Rule 23(b). *See In re Am. Int'l Grp. Secs. Litig.*, 689 F.3d 229, 238 (2d Cir. 2012). Plaintiffs seek certification under Rule 23(b)(3). Even in the final settlement approval context, courts have reasoned that "[a]s the initial and fundamental principle, it is important to remember that when considering certification in the context of a proposed settlement, 'courts must take a liberal rather than a restrictive approach.'" *Velez v. Novartis Pharm. Corp.,* No. 04 Civ. 09194, 2010 WL 4877852, at *9 (S.D.N.Y. Nov. 30, 2010) (quoting *Cohen v. JPMorgan Chase & Co.*, 262 F.R.D. 153, 157-58 (E.D.N.Y. 2009)).

The Settlement Class satisfies the provisions of Rule 23(a) and Rule 23(b)(3):

"Class" or **"Settlement Class"** means:

> All persons or entities that transacted in U.S.-Related Transactions in or on any over-the-counter market ("OTC") or exchange in physical silver or in a derivative instrument in which silver is the underlying reference asset (collectively, "Silver Instruments"), at any time from January 1, 1999 through the date of the Settlement Agreement.[12]

[12] "U.S.-Related Transaction" means any transaction in a Silver Instrument (a) by any person or entity domiciled in the U.S. or its territories, or (b) by any person or entity domiciled outside the U.S. or its territories but conducted, in whole or in part, in the U.S. or its territories.

A. The Settlement Class Meets the Rule 23(a) Requirements

1) Numerosity

Rule 23(a) requires that the class be "so numerous that joinder of all class members is impracticable." FED. R. CIV. P. 23(a). Joinder need not be impossible; only "merely be difficult or inconvenient, rendering use of a class action the most efficient method to resolve plaintiffs' claims." *In re Initial Pub. Offering Sec. Litig.*, 260 F.R.D. 81, 90 (S.D.N.Y. 2009) (hereinafter "*IPO*"). "Sufficient numerosity can be presumed at a level of forty members or more." *Id.* at 90-91. "While a precise quantification of the class is not required, some evidence or a reasonable estimate of the number of class members must be provided." *Bourlas v. Davis Law Assocs.*, 237 F.R.D. 345, 350-51 (E.D.N.Y. 2006). In making this determination, "the court may make some common sense assumptions and rely on reasonable inferences drawn from the available facts." *Id.* at 351 (citations omitted).

The Silver Fix price, which Defendants are alleged to have manipulated, directly impacted the roughly $30 billion in silver and silver financial instruments traded each year. ECF No. 63, ¶ 3. *See Campbell v. Purdue Pharma, L.P.*, No. 02-cv-163, 2004 WL 5840206, at *4 (E.D. Mo. June 25, 2004) (the volume of commerce made it "reasonable to assume that the class defined by [p]laintiffs would have such numbers that their joinder would be both impractical and inconvenient") (citing cases). Class Counsel estimates that there are at least hundreds, if not thousands, of Settlement Class Members. *See* Briganti Decl. ¶ 24. Joinder would therefore be impracticable.

2) Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). This is a "'low hurdle' easily surmounted." *In re Prudential Sec. Inc. Ltd. P'shps. Litig.*, 163 F.R.D. at 206 n.8 (quoting *Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 185 (N.D. Ill. 1992)). Commonality requires the presence of only a single question common to the class. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 369 (2011). This case presents numerous common questions

of fact and law: (a) whether Defendants unreasonably restrained trade in violation of federal antitrust laws; (b) whether Defendants manipulated the price of silver and financial instruments tied to the price of physical silver, such as silver futures, options and other silver financial instruments; (c) the length of the alleged conspiracy; and (d) the damages suffered by Plaintiffs and members of the Class. These common questions involve dozens of sub-questions of fact and law that are also common to all Class Members. Rule 23(a)(2) is overwhelmingly satisfied.

3) Typicality

Rule 23(a)(3) requires that "the claims . . . of the representative parties are typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3). This permissive standard is satisfied when "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." *Toney-Dick v. Doar*, No. 12 Civ. 9162, 2013 WL 5295221, at *7 (S.D.N.Y. Sept. 16, 2013) (citing *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009)); *see also Bolanos v. Norwegian Cruise Lines Ltd.*, 212 F.R.D. 144, 155 (S.D.N.Y. 2002) ("Since the claims only need to share the same essential characteristics, and need not be identical, the typicality requirement is not highly demanding.") (internal quotation omitted).

Here, all class members' claims arise from the same course of conduct involving Defendants' alleged manipulation of silver prices and the prices of silver financial instruments during the Class Period. Therefore, Plaintiffs' claims are typical of these class members' claims. *See e.g.*, Euribor Order ¶ 4 (conditionally certifying settlement class of persons who purchased sold, held, traded, or otherwise had any interest in derivatives products priced, benchmarked, and/or settled to Euribor). Courts have found typicality to be satisfied in cases involving allegations of a price-fixing conspiracy. *See, e.g.*, *In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 111 (S.D.N.Y. 2010); *see also In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 185 (D.N.J. 2003) (plaintiffs met the typicality requirement solely based on the fact that plaintiffs' main claim -- that they were harmed by an illegal

price-fixing conspiracy -- was the same for all class members); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 480 (W.D. Pa. 1999) (defendants' alleged price-fixing conspiracy was an appropriate basis for a finding of typicality). Typicality is satisfied for purposes of conditional certification.

4) Adequacy

Rule 23(a)(4) adequacy requires that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4); *Baffa v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000). Generally, courts consider "whether (1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Id.*; *see also Toney-Dick v. Doar*, 2013 WL 5295221, at *8; Euribor Order ¶ 5.

a. The Class Representatives suffer no disabling conflicts with the members of the settlement class

Class 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—have vigorously and competently represented the interests of the proposed Settlement Class. "The focus is on uncovering 'conflicts of interest between named parties and the class they seek to represent.'" *Currency Conversion*, 264 F.R.D. at 112 (citations omitted). However, "to defeat a motion for certification, the conflict must be fundamental." *Id.* "'Only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status.'" *Dziennik v. Sealift, Inc.*, No. 05-CV-4659 (DLI), 2007 WL 1580080, at *6 (E.D.N.Y. May 29, 2007). No such fundamental conflict exists here.

First, all Settlement Class Members share an interest in obtaining the largest possible recovery. *See Global Crossing*, 225 F.R.D. at 453 (certifying settlement class and finding that "[t]here is no conflict between the class representatives and the other class members. All share the common goal of maximizing recovery."); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 208 (5th Cir.

1981) (certifying settlement class and holding that "so long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes"). *Second*, all settlement class members share a common interest in obtaining Deutsche Bank's early and substantial cooperation to prosecute the claims against the Non-Settling Defendants. *Third*, all Settlement Class Members share the same overriding interests to develop the discovery record, and establish the manipulation of silver prices and the prices of silver financial instruments during the Class Period. All Settlement Class Members share the interest to successfully show that such manipulation was sufficient to cause injury, and to quantify the impact of such manipulation on silver prices and the prices of silver financial instruments. There are no conflicts; the interests of Class Plaintiffs (as proposed class representatives) in proving liability and damages are aligned with all Settlement Class Members.

b. Class Counsel is adequate

Plaintiffs and the Settlement Class are represented by experienced and skilled counsel. This Court has already appointed Lowey and Grant & Eisenhofer as Interim Co-Lead Counsel, having found counsel's experience sufficient and relevant. ECF No. 17. The same reasoning applies to find that this part of the adequacy prong is satisfied as well. Lowey and Grant & Eisenhofer have vigorously represented the Settlement Class in this Action, having negotiated the Settlement, which includes obtaining valuable information from Deutsche Bank. Settlement Agreement ¶ 4. With decades of experience litigating complex class actions, Lowey has achieved some of the most significant class action recoveries under the CEA and has secured almost a billion dollars in recoveries on behalf of Fortune 100 Companies and other sophisticated investors in antitrust and competition-related litigation. Briganti Decl., Ex. 2 (Lowey Firm Resume); *see also* Euribor Order ¶ 6 (appointing Lowey as Settlement Class Counsel in $94 million settlement with Barclays). Grant & Eisenhofer focuses on representing plaintiffs in high-stakes litigation, has been lead counsel in many

of the largest class action recoveries in U.S. history, including a $3.2 billion recovery against Tyco International. Its attorneys have successfully practiced in the antitrust field for many years, such as in the *In re Buspirone Antitrust Litigation* ($90 million in which Judge Koeltl stated that the plaintiffs' attorneys had done "a stupendous job"). *See* Eisler Decl., Ex. 1 (Grant & Eisenhofer Resume).

The same bases justifying the appointment of Lowey and Grant & Eisenhofer as Interim Co-Lead Counsel apply to Lowey's and Grant & Eisenhofer's ability and adequacy to serve as Class Counsel for the Settlement Class. Upon certifying the Settlement Class, the Court should also appoint Lowey and Grant & Eisenhofer as Class Counsel.

Because no fundamental conflicts exist, the Settlement Class is appropriately represented by Lowey and Grant & Eisenhofer. The Rule 23(a)(4) requirements that there be no fundamental conflict and adequate class counsel are both satisfied.

c. The Court should appoint Class Counsel under Rule 23(g)(1)

Rule 23(g)(1) provides that "a court that certifies a class must appoint class counsel." FED. R. CIV. P. 23(g)(1). Where, as here, only one application is made seeking appointment as class counsel, "the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4)." FED. R. CIV. P. 23(g)(2). For the reasons described above, Lowey and Grant & Eisenhofer are adequate and should be appointed as Class Counsel for the Settlement Class.

B. The Proposed Settlement Class Satisfies Rule 23(b)(3)

Once the requirements of Rule 23(a) have been satisfied, Plaintiffs must also conditionally establish: (1) "that the questions of law or fact common to class members predominate over any questions affecting only individual members"; and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

1) Predominance

Certification is proper under Rule 23(b)(3) where "'a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Brown v. Kelly*, 609 F.3d 467, 483 (2d Cir. 2010) (quoting FED. R. CIV. P. 23(b)(3) Adv. Comm. Note. to 1966 amend.). A plaintiff must show "that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole . . . predominate over those issues that are subject only to individualized proof." *Id.* at 483. "If the most substantial issues in controversy will be resolved by reliance primarily upon common proof, class certification will generally achieve the economies of litigation that Rule 23(b)(3) envisions." *In re Air Cargo Shipping Servs. Antitrust Litig.*, MDL No. 1775 (JG) (VVP), 2014 WL 7882100, at *35 (E.D.N.Y. Oct. 15, 2014).

Predominance is a "test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust law." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). In antitrust cases, predominance is often readily established because the elements of the claims lend themselves to common proof. *See In re Buspirone Patent & Antitrust Litig.*, 210 F.R.D. 43, 58 (S.D.N.Y. 2002) (common issues "clearly predominate . . . [because] [p]roof of the allegedly monopolistic and anti-competitive conduct at the core of the alleged liability is common to the claims of all the plaintiffs"); *In re Ins. Brokerage Antitrust Litig.,* 282 F.R.D. 92, 108 (D.N.J. 2012) ("Given that antitrust class action suits are particularly likely to contain common questions of fact and law, it is not surprising that these types of class actions are also generally found to meet the predominance requirement"). Liability focuses on defendants' alleged unlawful actions, not the actions of plaintiffs, making most antitrust claims particularly well suited for class treatment. *Id.*

The "predominance inquiry will sometimes be easier to satisfy in the settlement context." *Am. Int'l Grp.,* 689 F.3d at 240. Unlike class certification for litigation purposes, a settlement class

presents no management difficulties for the court as settlement, not trial, is proposed. *See Amchem*, 521 U.S. at 620; *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 169 F.R.D. 493, 517 (S.D.N.Y. 1996) (predominance test is met "unless it is clear that individual issues will overwhelm the common questions and render the class action valueless").[13]

The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *IPO*, 260 F.R.D. at 92. Here, all class members face common questions to establish unlawful manipulation of silver prices and the prices of silver financial instruments, the amount of such manipulation and additional matters of proof. *See* Part II.A.2., *supra*. These common questions predominate over individual questions. *See 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").

Rule 23(b)(3) is satisfied, as common issues predominate over individual issues.

2) Superiority

Rule 23(b)(3)'s "superiority" requirement requires a plaintiff to show that a class action is superior to other methods available for "fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b). The Court balances the advantages of class action treatment against alternative available methods of adjudication. *See* FED. R. CIV. P. 23(b)(3)(A)-(D) (listing four non-exclusive factors relevant to this determination). The superiority requirement is applied leniently in the settlement context because the Court "need not inquire whether the case, if tried, would present intractable management problems." *Amchem*, 521 U.S. at 620; *Am. Int'l Group*, 689 F.3d at 239, 240.

First, Class Members are significant in number and geographically disbursed, making a "class action the superior method for the fair and efficient adjudication of the controversy." *In re Currency*

[13] The right of Class Members to opt out further favors conditional certification of the Settlement Class. Settlement Class Members who "believe they may do better on their own are permitted to opt out." *See Interchange*, 986 F. Supp. 2d at 239 n.20.

Conversion Fee Antitrust Litig., 224 F.R.D. 555, 566 (S.D.N.Y. 2004). *Second*, the majority of Class Members have neither the incentive nor the means to litigate these claims. The damages suffered by most Class Members are likely to be small compared to the very considerable expense and burden of individual litigation. *See In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 209 F.R.D. 323, 350 (S.D.N.Y. 2002) (the "most compelling rationale for finding superiority in a class action [is] the existence of a . . . true negative value claim such as those seen in antitrust cases"). This makes it uneconomic to sue individually. That is why no Class member "has displayed any interest in bringing an individual lawsuit." *See Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 661 (S.D.N.Y. 2015). A class action allows claimants to "pool claims which would be uneconomical to litigate individually," as "no individual may have recoverable damages in an amount that would induce him to commence litigation on his own behalf." *Currency Conversion*, 224 F.R.D. at 566. *Third*, the prosecution of separate actions by numerous individual Class Members would impose heavy burdens upon the Court, and create a risk of inconsistent or varying adjudications.

III. The Court Should Appoint Amalgamated as Escrow Agent

Plaintiffs propose that the Court approve Amalgamated as Escrow Agent. Amalgamated has served as an escrow agent in a number of significant class action matters, has delivered reliable and accurate service in the past, and is well-qualified to serve in these roles in this action. Class Counsel has negotiated with Amalgamated to provide its services as Escrow Agent at market rates.

CONCLUSION

Plaintiffs respectfully request that the Court enter the accompanying proposed Order: (1) granting preliminary approval of the proposed Settlement with Deutsche Bank; (2) conditionally certifying the Settlement Class for purposes of sending notice to the Class; (3) appointing Class Plaintiffs as Class Representatives; (4) appointing Lowey and Grant & Eisenhofer as Class Counsel; and (5) appointing Amalgamated as Escrow Agent.

Dated: October 17, 2016
White Plains, New York

LOWEY DANNENBERG COHEN & HART, P.C.

/s/ Vincent Briganti

Vincent Briganti
Barbara J. Hart
Geoffrey M. Horn
Thomas Skelton
Christian Levis
One North Broadway, 5th Floor
White Plains, New York 10601
914-997-0500
vbriganti@lowey.com
ghorn@lowey.com
bhart@lowey.com
tskelton@lowey.com
clevis@lowey.com
rgirnys@lowey.com

Robert Eisler
James J. Sabella
GRANT & EISENHOFER P.A.
485 Lexington Avenue
New York, NY 10017
Tel.: (646) 722-8500
Fax: (646) 722-8501
jsabella@gelaw.com
reisler@gelaw.com

Counsel for Plaintiffs