

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE FOREIGN EXCHANGE
BENCHMARK RATES ANTITRUST
LITIGATION

No. 1:13-cv-07789-LGS

**DECLARATION OF KENNETH R. FEINBERG
IN SUPPORT OF CLASS PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL
OF SETTLEMENT AGREEMENT WITH DEUTSCHE BANK AG**

I, KENNETH R. FEINBERG, pursuant to 28 U.S.C. §1746, declare as follows:

1. I am a person of the full age of majority and, if called to testify, am competent to testify as to the facts set forth herein.

2. I am the agreed-upon Mediator in the above-captioned matter involving Class Plaintiffs Aureus Currency Fund, L.P.; the City of Philadelphia, Board of Pensions and Retirement; Employees' Retirement System of the Government of the Virgin Islands; Employees' Retirement System of Puerto Rico Electric Power Authority; Fresno County Employees' Retirement Association; Haverhill Retirement System; Oklahoma Firefighters Pension and Retirement System; State-Boston Retirement System; Syena Global Emerging Markets Fund, LP; Systrax Corporation; Tiberius OC Fund, Ltd.; United Food and Commercial Workers Union and Participating Food Industry Employers Tri-State Pension Fund; Value Recovery Fund L.L.C. (collectively, "Direct Class Plaintiffs"), J. Paul Antonello, Marc G. Federighi, Thomas Gramatis, Doug Harvey, Izee Trading Company, John Kerstein, Michael Melissinos, Mark Miller, Robert Miller, Richard Preschern d/b/a Preschern Trading, Peter Rives, Michael J. Smith, Jeffrey Sterk, and Kimberly Sterk (collectively, "Exchange-Only Class Plaintiffs" and, together with Direct Class Plaintiffs, "Class Plaintiffs") and Defendant Deutsche Bank AG ("Deutsche Bank"). I

submit this Declaration in connection with the concurrently filed Motion for Preliminary Approval of Settlement Agreement with Deutsche Bank AG.

3. I have acted as an independent, neutral mediator for more than 30 years, retained by private parties and federal and state courts, to design and administer mediation procedures aimed at resolving thousands of complex disputes. I have acted as a mediator in a wide range of disputes, including mass torts, insurance coverage, contracts, and securities and antitrust litigation. In some of these disputes, as in the above-captioned matter, I have been retained by the litigants to act as the neutral mediator. In other disputes, I have been appointed by the court to serve as the mediator. *See, e.g., In Re Agent Orange*, 611 F. Supp. 1396 (1985). And, after the September 11 terrorist attacks, I was appointed by the Attorney General of the United States to act as the Special Master/Administrator of The Federal September 11 Victim Compensation Fund of 2001. *See* 49 U.S.C. §40101; 28 C.P.R. §§104.2, *et seq.* (2003).

4. I have also been appointed by federal and state judges to act as the independent neutral Distribution Agent in administering class action settlements in complex commercial and tort cases, including the allocation and distribution of class settlement proceeds to eligible claimants. *See, e.g., Sec. and Exch. Comm'n v. Maurice R. Greenberg and Howard I. Smith*, 09-Civ.-6939 (S.D.N.Y. 2011) (Preska, J.); *In Re Agent Orange*, 611 F. Supp. 1396 (1985); *United States v. Computer Associates Int'l, Inc.*, 04-cr-837 (E.D.N.Y. 2007); *cf. The Federal September 11 Victim Compensation Fund of 2001*, 49 U.S.C. § 40104; 28 C.P.R. §§ 10-4.2, *et seq.* (2003); The Gulf Coast Claims Facility;¹ GM Ignition Compensation Claims Resolution Facility,

¹ *See* <https://www.whitehouse.gov/blog/2010/06/16/important-step-towards-making-people-gulf-coast-whole-again> (“BP and the Administration agreed to appoint Ken Feinberg, who administered the claims process for victims of 9/11, to run the independent claims process”).

Final Protocol for Compensation of Certain Death and Physical Injury Claims Pertaining to the GM Ignition Switch Recall (June 30, 2014).

5. Incorporated by reference is my curriculum vitae, Exhibit A to my Declaration in support of Class Plaintiffs' original motion for preliminary approval (ECF No. 482).

6. Because this declaration is submitted in support of the Settlement Agreement, it is inadmissible in any subsequent proceedings. In the event the Settlement Agreements does not receive the Court's final approval, this declaration and the statements contained herein are without prejudice to the parties' respective positions on the merits of this Action.

I. THE MEDIATIONS AND RESULTING SETTLEMENTS TO DATE

7. Prior to being retained by counsel for Plaintiffs ("Class Lead Counsel") and counsel for certain of the original defendants named in the action (collectively, "Original Settling Defendants")² with respect to earlier mediations and settlements in this action, I had no knowledge or understanding of the facts of the dispute.

8. Beginning in late 2014, I was asked by Class Lead Counsel and thereafter by Original Settling Defendants to serve as the sole Mediator in an agreed-upon bilateral, voluntary and confidential mediation process designed to secure a comprehensive settlement in the above-captioned matter between Plaintiffs and the Original Settling Defendants. I agreed to serve as

² "Original Settling Defendants" are Bank of America Corporation, Bank of America, N.A., and Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Bank of America"); Barclays Bank PLC and Barclays Capital Inc. ("Barclays"); the BNP Paribas Group, BNP Paribas North America Inc., BNP Paribas Securities Corp., and BNP Prime Brokerage, Inc. ("BNP Paribas"); Citigroup Inc., Citibank, N.A., Citicorp, and Citigroup Global Markets Inc. ("Citigroup"); The Goldman Sachs Group, Inc. and Goldman, Sachs & Co. ("Goldman Sachs"); HSBC Holdings PLC, HSBC Bank PLC, HSBC North America Holdings Inc., HSBC Bank USA, N.A., and HSBC Securities (USA) Inc. ("HSBC"); JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. ("JPM"); The Royal Bank of Scotland Group PLC, The Royal Bank of Scotland PLC, and RBS Securities Inc. ("RBS"); and UBS AG, UBS Group AG, and UBS Securities LLC ("UBS").

Mediator with the agreement of Class Lead Counsel and counsel for the Original Settling Defendants. Those mediations between Class Lead Counsel and the Original Settling Defendants originally named in the complaint resulted in the execution of nine settlements in 2015.

9. Beginning in early 2016, I was asked by Class Lead Counsel and thereafter by a group of five additional defendants (collectively “New Settling Defendants”)³ to serve as the sole Mediator in an agreed-upon bilateral, voluntary and confidential mediation process designed to secure a comprehensive settlement in the above-captioned matter between Plaintiffs and the New Settling Defendants. I agreed to serve as Mediator with the agreement of Class Lead Counsel and counsel for the New Settling Defendants. Those mediations between Class Lead Counsel and the New Settling Defendants resulted in the execution of five settlements in February and July of 2017.

10. After further progress of the litigation into discovery, beginning in early 2017, I was asked by Class Lead Counsel and by counsel for Deutsche Bank to serve as a mediator for a new mediation. Class Plaintiffs and Deutsche Bank had engaged in two previous mediation sessions in April and September 2015, neither of these mediations had resulted in an agreement as to terms. On July 26, 2017, I oversaw a third mediation between Class Lead Counsel and counsel for Deutsche Bank.

11. During the course of all rounds of mediations, I acted as an independent, neutral mediator encouraging each side separately, and both sides together, to resolve their differences through arm’s-length negotiation. Like the preceding mediations, I supervised the entire process of these mediations and negotiations between Plaintiffs and Deutsche Bank, which resulted in

³ “New Settling Defendants” are Bank of Tokyo-Mitsubishi UFJ, Ltd.; Morgan Stanley, Morgan Stanley & Co., LLC, and Morgan Stanley & Co. International plc; RBC Capital Markets LLC; Société Générale; and Standard Chartered Bank.

Plaintiffs and Deutsche Bank reaching the Stipulation and Agreement of Settlement with Deutsche Bank AG (“Deutsche Bank Stip.” or the “Settlement Agreement”).

12. During the course of each of the past mediations discussed below in paragraphs 14-17, as well as the mediations with Deutsche Bank, I met with representatives of both sides, heard from each side concerning background information about the litigation and its status, as well as each party’s views as to the litigation risks if a mediated settlement were not achieved. Each side also discussed with me in confidence what it saw as the outstanding issues and how those outstanding issues might be resolved.

13. During the course of these mediations, I continuously reiterated that each side confronted substantial risk if the litigation went forward.

14. Class Lead Counsel and counsel for the Original Settling Defendants, with the aid of myself as Mediator, eventually reached settlements on behalf of class members who engaged in foreign exchange (“FX”) transactions directly with Defendants (the “Direct Settlement Class”). Class Lead Counsel and counsel for the Original Settling Defendants, with the aid of myself as Mediator, also reached settlements on behalf of class members who only entered into FX transactions on exchanges (the “Exchange-Only Settlement Class”).

15. In this declaration, I refer to the Direct Settlement Class and Exchange-Only Settlement Class together as the “Settlement Classes.”

16. Class Lead Counsel and counsel for the Original Settling Defendants, through and as result of mediations overseen by me, began entering into settlement agreements in January 2015. These settlements included two (and in some cases, three) monetary components: the Direct Settlement Amount, the Exchange-Only Settlement Amount, and, with respect to Goldman Sachs and JPMorgan, a Notice and Administration Amount. These are referred to in the chart below as

the “Total Settlement Amount.” All nine of these settlement agreements have been preliminarily approved by the Court:

| ORIGINAL SETTLING DEFENDANT | EXECUTION DATE OF SETTLEMENT⁴ | TOTAL SETTLEMENT AMOUNT |
|--|---|--------------------------------|
| Bank of America | 10/1/15 | \$187,500,000 |
| Barclays | 9/30/15 | \$384,000,000 |
| BNP Paribas | 10/1/15 | \$115,000,000 |
| Citigroup | 10/1/15 | \$402,000,000 |
| Goldman Sachs | 10/1/15 | \$135,000,000 ⁵ |
| HSBC | 10/1/15 | \$285,000,000 |
| JPMorgan | 1/5/15, amended 10/1/15 | \$104,500,000 ⁶ |
| RBS | 10/2/15 | \$255,000,000 |
| UBS | 3/6/15, amended 10/5/15 | \$141,075,000 |
| FIRST ROUND TOTAL | | \$2,009,075,000 |

17. Class Lead Counsel and counsel for the New Settling Defendants, through and as a result of mediations overseen by me, began negotiating settlements in April 2016. The first of these settlements was executed in February 2017. Unlike the preceding settlements, these stipulations provide for one Settlement Amount to be allocated to the Settlement Classes in a manner that is consistent with an approved Plan of Distribution, and, in the case of Morgan Stanley,

⁴ Although the settlement amounts were negotiated separately for each respective Settlement Class, the Stipulations of Settlement include each of the Settlement Classes within one document.

⁵ \$500,000 of this amount in the Goldman Sachs Stipulation was paid into a Notice and Administration Fund.

⁶ \$500,000 of this amount in the J.P. Morgan Stipulation was paid into a Notice and Administration Fund.

a Notice and Administration Amount that is included in the Total Settlement Amount below. All five of these settlements have been preliminarily approved by the Court.

| NEW SETTLING DEFENDANT | EXECUTION DATE OF SETTLEMENT | TOTAL SETTLEMENT AMOUNT |
|-------------------------------|-------------------------------------|---|
| BTMU | 2/14/17 | \$10,500,000 |
| Morgan Stanley | 7/28/17 | \$49,750,000 + 250,000 for notice and administration |
| RBC | 7/27/17 | \$15,500,000 |
| Standard Chartered | 7/27/17 | \$17,200,000 |
| Soc Gen | 7/27/17 | \$18,000,000 |
| SECOND ROUND TOTAL | | \$111,200,000 |

18. Class Lead Counsel and counsel for Deutsche Bank, through and as a result of mediations overseen by me, began negotiating a settlement in July 2017. The settlement agreement between Class Plaintiffs and Deutsche Bank was executed on September 29, 2017.

| DEFENDANT | EXECUTION DATE OF SETTLEMENT | TOTAL SETTLEMENT AMOUNT |
|----------------------------|-------------------------------------|--------------------------------|
| Deutsche Bank | 9/29/17 | \$190,000,000 |
| DEUTSCHE BANK TOTAL | | \$190,000,000 |

19. In addition to providing monetary compensation to members of the Settlement Classes, the settlement requires Deutsche Bank to provide cooperation to the Plaintiffs in the above-captioned action. This cooperation is triggered upon execution with respect to attorney proffers, transaction data and documents produced to regulators or already identified as relevant to the allegations. Additional cooperation in the form of, among other things, witness interviews, production of additional documents, and depositions is triggered upon preliminary approval.

Deutsche Bank's cooperation obligations continues until the later of the date of final judgment in the Action with respect to all Defendants or seven years after preliminary approval. The terms of the cooperation were the subject of arm's-length negotiations between sophisticated counsel.

20. The Settlement Agreement excludes claims arising from transactions executed solely outside the United States and arising under foreign law belonging to any Releasing Party or Person that is domiciled outside of the United States, as well as claims arising from what the parties have termed "last look" conduct.

21. In all, the mediations in this action have been among the most successful mediation processes of which I have been a part.

22. The specific facts of the mediation and the resulting settlement are set forth below.

II. THE DEUTSCHE BANK MEDIATION AND SETTLEMENT

23. The mediation between Class Lead Counsel and counsel for Deutsche Bank, overseen by me, has resulted in a settlement of \$190,000,000 on behalf of the Settlement Classes. In addition to the monetary component, Deutsche Bank has agreed to provide the Settlement Classes with cooperation in the above-captioned action.

24. It is my belief that the settlement reached with Deutsche Bank as a result of the mediation is fair, reasonable, and adequate. I base this opinion both on my previous extensive experience in mediating similar complex civil disputes and my careful evaluation and analysis of the proposed settlement terms and conditions in this matter.

25. In my opinion, the settlement reached on behalf of the Settlement Classes is appropriate. The settlement reached was the product of prolonged, hard-fought negotiations at arm's-length. Both sides of the negotiations were represented by experienced counsel, who were informed in the negotiations by a full understanding of the documentary evidence available to each

party, as well as sophisticated economic analyses and assessments of relative market share, prepared by financial experts.

26. The settlement also returns cooperation to the Settlement Classes in the form of attorney proffers, transaction data, document production, witness interviews, depositions, and trial testimony. The Settlement Classes are entitled to this cooperation until the later of the date of final judgment in the Action with respect to all Defendants or seven years after preliminary approval.

27. In early 2015, I was asked by both Class Lead Counsel and counsel for Deutsche Bank if I would agree to serve as a sole Mediator in an agreed-upon voluntary and confidential mediation process designed to secure a comprehensive settlement in the above-captioned matter between Plaintiffs and Deutsche Bank. I agreed to do so with the consent of both sides.

28. Mediation sessions occurred between Class Plaintiffs and Deutsche Bank on April 6, 2015 and September 30, 2015, with both occurring in New York, NY. At each of these mediations, I urged resolution of various issues. Financial terms were also discussed, but no final agreement was reached as to any of the outstanding issues. After each of these mediation sessions, I engaged in frequent telephone conversations, face-to-face meetings, and emails with the mediation participants, separately and together, in an effort to help the parties reach a successful mediated settlement.

29. In early 2017, I was asked by both Class Lead Counsel and counsel for Deutsche Bank if I would agree to again serve as a sole Mediator in an agreed-upon voluntary and confidential mediation process designed to secure a comprehensive settlement in the above-captioned matter between Plaintiffs and Deutsche Bank. I agreed to do so with the consent of both sides.

30. Before mediation began, I spoke with representatives from each of the parties. Each party provided me with background information about the litigation and its status, as well as each party's views as to the litigation risks if a mediated settlement were not achieved. Each side also discussed with me in confidence what it saw as the outstanding issues and how those outstanding issues might be resolved.

31. Another joint mediation session between Class Lead Counsel and counsel for Deutsche Bank occurred on July 26, 2017 in Washington, DC. During this session, I urged resolution of various issues. Financial terms were also discussed, but no final agreement was reached as to any of the outstanding issues. After this mediation session, I engaged in frequent telephone conversations, face-to-face meetings, and emails with the mediation participants, separately and together, in an effort to help the parties reach a successful mediated settlement. As a result of these discussions, the parties reached an agreement in principle on the financial terms of the settlement by telephone on August 18, 2017.

32. Over the subsequent days, the mediation participants negotiated the final stipulation that would encompass the settlement. All outstanding disagreements were eventually resolved.

33. The settlement discussions were vigorous and at arm's-length, involving highly experienced counsel representing both sides.

34. On September 29, 2017, Class Lead Counsel and counsel for Deutsche Bank executed the Deutsche Bank Stipulation to resolve the above-captioned litigation on behalf of the Settlement Classes and Deutsche Bank.

III. CONCLUSION

35. To date, I have served as Mediator in the above-described mediations and negotiations between Plaintiffs and Deutsche Bank. Through these mediations and negotiations, the Plaintiffs and Deutsche Bank have reached a settlement totaling \$190,000,000 on behalf of the Settlement Classes, including notice and administration costs. These amounts are in addition to the settlements with Original Settling Defendants and New Settling Defendants that have been preliminarily approved in this matter, which totaled \$2,120,275,000, including notice and administration costs.

36. The success of this mediation and negotiation, in my opinion, was driven in large part by the highly-skilled counsel representing both Plaintiffs and Deutsche Bank. During the course of the mediations and negotiations, counsel for both parties demonstrated considerable tenacity, efficiency, and flexibility in steering a prolonged negotiation toward a satisfactory compromise.

37. Based on my extensive experience in designing, implementing, and administering settlement compensation programs, it is my opinion that the language and nature of the Release in this settlement is appropriate and the result of vigorous arm's-length negotiation between and among Plaintiffs and Deutsche Bank.

38. Finally, I note that the Release excludes claims based on transactions executed solely outside the United States arising under foreign laws belonging to any Releasing Party or Person that is domiciled outside the United States as well as claims related to "last look" practices that may have been used with respect to electronic trading.

I declare under penalty of perjury that the foregoing is a true and correct statement of my opinions. Executed on September 29, 2017 at Washington, DC.


Kenneth R. Feinberg