

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

IN RE LONDON SILVER FIXING, LTD.
ANTITRUST LITIGATION

This Document Relates to:

ALL ACTIONS

14-MD-02573-VEC

14-MC-02573-VEC

The Honorable Valerie E. Caproni

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE
TO AMEND AND FILE THE PROPOSED THIRD CONSOLIDATED AMENDED
CLASS ACTION COMPLAINT**

TABLE OF CONTENTS

TABLE OF AUTHORITIESii

INTRODUCTION..... 1

ARGUMENT..... 2

I. THE MOTION FOR LEAVE TO AMEND STANDARD..... 2

II. THE PROPOSED AMENDMENTS IN THE PTAC ARE NOT FUTILE..... 3

 A. Plaintiffs plausibly allege that UBS had an agreement with the Fixing Members to manipulate the Fixing and the prices of physical silver and silver financial instruments. 3

 B. The PTAC states Commodity Exchange Act claims against UBS because UBS caused (and intended to cause) the artificial silver prices in question. 7

 1. UBS had the ability to influence silver prices..... 7

 2. UBS specifically intended to manipulate the price of physical silver and silver financial instruments. 8

 3. UBS’s manipulation of silver and silver financial instruments caused silver futures prices to be artificial throughout the Class Period..... 9

 4. UBS is liable under aiding and abetting and principal-agent theories..... 10

 C. Because the PTAC plausibly alleges antitrust and CEA claims against the New Defendants, leave to add these co-conspirators is not futile. 10

 D. Plaintiffs properly seek leave to add factual allegations to support their sustained claims. .14

III. PLAINTIFFS DID NOT DELAY IN BRINGING THEIR MOTION TO AMEND AND ARE ACTING IN THE UTMOST GOOD FAITH..... 14

IV. DEFENDANTS WILL NOT SUFFER ANY UNDUE PREJUDICE IF LEAVE TO AMEND IS GRANTED 15

CONCLUSION..... 16

TABLE OF AUTHORITIES

Cases

Azķour v. Haouzi,
 No. 11-cv-5780, 2012 WL 3667439 (S.D.N.Y. Aug. 27, 2012)14

Blagman v. Apple, Inc.,
 No. 12 Civ. 5453, 2014 WL 2106489 (S.D.N.Y. May 19, 2014) 14, 15

BNP Paribas Mortg. Corp. v. Bank of Am., N.A.,
 866 F. Supp. 2d 257 (S.D.N.Y. 2012).....15

Foman v. Davis,
 371 U.S. 178 (1962)..... 2, 14

Gelboim v. Bank of America Corp.,
 823 F.3d 759 (2d Cir. 2016)7

In re Aluminum Warehousing Antitrust Litig.,
 95 F. Supp. 3d 419 (S.D.N.Y. 2015).....6

In re Amaranth Nat. Gas Commodities Litig.,
 730 F.3d 170 (2d Cir. 2013)7

In re Foreign Exchange Benchmark Rates Antitrust Litig.,
 74 F. Supp. 3d 581 (S.D.N.Y. 2015).....5

In re London Silver Fixing, Ltd., Antitrust Litig.,
 No. 14-md-2573, 2016 WL 5794777 (S.D.N.Y. Oct. 3, 2016).....*passim*

In re Pfizer Inc. Sec. Litig.,
 No. 04 Civ. 9866, 2012 WL 983548 (S.D.N.Y. Mar. 22, 2012)14

In re Winstar Commc'ns,
 No. 01-cv-11522, 2006 WL 473885 (S.D.N.Y. Feb. 27, 2006)..... 2, 14

JPMorgan Chase Bank, N.A. v. IDW Grp., LLC,
 No. 08-cv-9116, 2009 WL 1357946 (S.D.N.Y. May 12, 2009).....15

Matter of Indiana Farm Bureau Cooperative Assoc, Inc.,
 CFTC No. 75-14, 1982 WL 30249 (CFTC Dec. 17, 1982).....8

Mayor & City Council of Baltimore v. Citigroup, Inc.,
 709 F.3d 129 (2d Cir. 2013)6

New York v. Green,
420 F.3d 99 (2d Cir. 2005)2

United States v. Eppolito,
543 F.3d 25 (2d Cir. 2008)6

United States v. Nusraty,
867 F.2d 759 (2d Cir. 1989)6

Uni-World Capital, L.P. v. Preferred Fragrance, Inc.,
No. 13 Civ. 7204, 2014 WL 3610906 (S.D.N.Y. July 21, 2014)15

Williams v. Citigroup Inc.,
659 F.3d 208 (2d Cir. 2011)2

Rules

FED. R. CIV. P. 15(a)..... 1, 2

INTRODUCTION

Pursuant to FED. R. CIV. P. 15(a), Plaintiffs¹ respectfully submit this memorandum of law in accordance with the Court's October 3, 2016 Opinion and Order (ECF No. 151) (the "October 3 Order"),² as amended (ECF No. 153), and in support of their Motion for Leave to Amend and File the Proposed Third Consolidated Amended Class Action Complaint (the "PTAC").³ The PTAC incorporates the substantial cooperation materials produced by the Deutsche Bank Defendants (the "DB Cooperation Materials") as part of their proposed settlement with Plaintiffs.⁴ Based on Plaintiffs' counsel's continuing review of these materials, Plaintiffs are now able to plead with direct, "smoking gun" evidence, including secret electronic chats involving silver traders and submitters across a number of financial institutions, a multi-year, well-coordinated, and wide-ranging conspiracy to rig the prices of silver and silver financial instruments that far surpasses the conspiracy alleged earlier by Plaintiffs when they lacked access to such information.

In short, the PTAC: (i) easily cures the pleading deficiencies that the Court identified in the October 3 Order as to Defendant UBS; (ii) plausibly states claims for collusive price manipulation against New Defendants⁵ whose identities and involvement in the alleged conspiracy were previously unknown to Plaintiffs until they received and reviewed the DB Cooperation Materials; and (iii) includes new allegations that greatly bolster the sustained claims against the existing

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.

² Unless otherwise noted, all ECF citations are to the docket in *In re: London Silver Fixing, Ltd., Antitrust Litigation*, No. 14-md-2573 (S.D.N.Y.).

³ The PTAC is attached hereto as Exhibit A. Unless otherwise noted, "¶" refers to the PTAC.

⁴ The PTAC also amends the proposed putative class definition to include the "U.S.-Related Transaction" qualifier that is used in the proposed settlement with the Deutsche Bank Defendants.

⁵ The "New Defendants" are Barclays Bank PLC, Barclays Capital Inc., and Barclays Capital Services Ltd. (collectively, "Barclays"), BNP Paribas Fortis S.A./N.V. ("Fortis"), Standard Chartered Bank ("Standard Chartered"), and Bank of America Corporation, Bank of America, N.A., and Merrill Lynch, Pierce, Fenner & Smith Inc. (collectively, "Merrill Lynch").

Defendants, including HSBC and Bank of Nova Scotia.⁶ The PTAC details, using Defendants' own words, how the Defendants rigged the silver market by: (i) coordinating trades in advance of the daily fixing phone call; (ii) manipulating the spot market for silver in a direction that financially benefitted their trading positions; (iii) conspiring to fix the "bid-ask spread" on silver offered to their customers; (iv) implementing manipulative trading strategies that impacted the prices of physical silver and silver financial instruments; (v) sharing proprietary information; (vi) triggering customers' stop-loss orders; and (vii) front running incoming silver orders. For the foregoing reasons, and reasons stated herein, Plaintiffs' motion for leave to amend and file the PTAC should be granted.

ARGUMENT

I. THE MOTION FOR LEAVE TO AMEND STANDARD

Leave to amend should be freely given "when justice so requires." FED. R. CIV. P. 15(a)(2). This permissive standard is consistent with the Second Circuit's "strong preference for resolving disputes on the merits." *Williams v. Citigroup Inc.*, 659 F.3d 208, 212-13 (2d Cir. 2011) (citing *New York v. Green*, 420 F.3d 99, 104 (2d Cir. 2005)) (internal quotations omitted).

Motions to amend should be granted absent a showing of: (i) "undue delay, bad faith or dilatory motive" on the part of the movant; (ii) "undue prejudice to the [non-moving] party"; or (iii) futility. *See In re Winstar Commc'ns*, No. 01-cv-11522, 2006 WL 473885, at *1 (S.D.N.Y. Feb. 27, 2006) ("*Winstar*") (citing *See Foman v. Davis*, 371 U.S. 178, 182 (1962)). The burden is on the Defendants to show prejudice, bad faith, and futility of the amendment—a burden that Defendants here cannot meet. *See Foman*, 371 U.S. at 182.

⁶ "HSBC" means Defendants HSBC Holdings plc, HSBC North America Holdings Inc., HSBC Bank (U.S.A.), N.A., and HSBC USA Inc. "Bank of Nova Scotia" means Defendants The Bank of Nova Scotia, Scotiabanc Inc., Scotia Holdings (US) Inc., Scotia Capital (USA) Inc., and The Bank of Nova Scotia Trust Company of New York.

II. THE PROPOSED AMENDMENTS IN THE PTAC ARE NOT FUTILE

A. Plaintiffs plausibly allege that UBS had an agreement with the Fixing Members to manipulate the Fixing and the prices of physical silver and silver financial instruments.

In the October 3 Order, the Court found that “[w]ith respect to Plaintiffs’ antitrust claims, Plaintiffs fail to allege parallel conduct, circumstantial evidence, or plus factors suggesting that UBS had an agreement with the Fixing Members to manipulate the Fixing. UBS was not a party to the private Fixing calls, and Plaintiffs fail to identify a single communication between UBS and the Fixing Members suggestive of manipulative conduct.” *In re London Silver Fixing, Ltd., Antitrust Litig.*, No. 14-md-2573, 2016 WL 5794777, at *26 (S.D.N.Y. Oct. 3, 2016) (“*Silver Fixing*”). Plaintiffs now cure this deficiency by alleging direct evidence of UBS’s involvement in the conspiracy.

The DB Cooperation Materials show that UBS, through its traders UBS Trader A and UBS Trader B, communicated directly with Deutsche Bank’s Silver Fix submitters Deutsche Bank Trader B and Deutsche Bank Silver Fix Trader-Submitter A, along with other co-conspirators, and was a major participant in Defendants’ conspiracy to manipulate the Silver Fix and the prices of physical silver and silver financial instruments. The following acts provide direct proof of UBS’s involvement in the conspiracy:

First, UBS engaged in unlawful conduct directly in the silver market, including: (i) “pushing,” “smashing,” “bending,” “hammering,” “blading,” “muscling,” and “ramping” the prices of silver and silver financial instruments (¶¶ 5, 10, 254-59, 308-09, 311-12, 320-21, 358); (ii) triggering customer stop-loss orders (¶¶ 251, 315 (UBS Trader A: “i got stop in silver now 39.50” Deutsche Bank Trader B: “k” UBS Trader A: “in one hour im gonna call reinforcement”); ¶ 315 (UBS Trader

A: “fyi BOC just put in buy stop 50k sil. at 39.47”); (iii) “spoofing”⁷ and “sniping”⁸ (¶¶ 261-64 (Deutsche Bank Silver Fix Trader-Submitter A to UBS Trader B: “i knew u were a seller buy u spoofed it u mother”)); (iv) sharing customer order flow information (¶¶ 278-79 (UBS Trader A: “stay short its gonna be one of those days I bought another 100k xag for chinese”)); and (v) coordinating trades designed to manipulate the price of silver in UBS’s preferred direction (¶ 251 (UBS Trader A: “so we both wwent short” “f*cking hell it just kept going higher” “63, 65, then my guy falls asleep, it goes to 69 paid!” “then finally another reinforcement came in”); ¶ 252 (UBS Trader A: “trying to coordinate moves together here” “ok we both bid at 60”)). The DB Cooperation materials demonstrate that UBS also conspired with other Fixing Members, including HSBC and Bank of Nova Scotia, as well as the New Defendants.⁹ For example, UBS joined a trading “mafia” with Barclays and Deutsche Bank. ¶¶ 13, 250 (UBS Trader A: “we need to grow our mafia a bit” Deutsche Bank Trader B: “calling barx [Barclays]”).

Second, UBS agreed with its horizontal competitors to fix the price of physical silver. *See, e.g.*, ¶ 238 (UBS Trader B: “what did u quote let me check” Deutsche Bank Silver Fix Trader-Submitter A: “44/49”); ¶ 240 (UBS Trader A: “just quote wider if they call me in 1 lac I will quote 7-8 cents”);¹⁰ ¶ 231 (Deutsche Bank Trader B: “how wide u making 1 lac today 5 cents?” UBS Trader A: “silver actually steadier than gold i would make 5-6 cents wide in silver”); ¶ 230 (UBS Trader A:

⁷ “Spoofing” is the practice of submitting bids or offers in the market with the intention to cancel the orders before they are actually executed.

⁸ “Sniping” involved placing a high concentration of spoof bids at a certain price level to create false supply and demand fundamentals that facilitated executing a specific offer.

⁹ UBS was a member of what it labeled the “mother of all chats” with Barclays and HSBC. ¶ 274. Additionally, UBS relayed order flow information to Deutsche Bank that it could have only learned from talking to the Bank of Nova Scotia. ¶ 280 (UBS Trader A: “bough small silver from scotia i mean standard mitsui buying some” Deutsche Bank Trader B: “ok tks”).

¹⁰ A “lac” or “lakh” is a unit in the Indian number system equal to 100,000.

“how wide would u quote 5 lacs silver?” Deutsche Bank Trader B: “10c? u>?”); ¶ 242 (Deutsche Bank Trader B: “how wide u quote for 3 lacs?” UBS Trader A: “10cents”).

Third, to carry out its unlawful agreement to fix prices, UBS exchanged non-public proprietary information with its co-conspirators. ¶¶ 276-80. Absent collusion, there is no legitimate, pro-competitive reason for UBS to share its proprietary trading positions with Deutsche Bank and other co-conspirators. *See In re Foreign Exchange Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d 581, 591 (S.D.N.Y. 2015) (“*Forex*”) (competitors used electronic platforms to share “market-sensitive information with rivals’ including price-information, customer information, and their net trading positions”).¹¹

Fourth, UBS conspired directly with its competitors to manipulate the Fix price. For example, UBS Trader A used the “smash” technique to push the Silver Fix in a direction that would benefit his silver trading positions by entering into manipulative transactions around the start of the Fix. ¶¶ 5, 311 (Deutsche Bank Trader B: “u guys short some funky options” “well you told me too but i told no one u just said you sold on fix” UBS Trader A: “we smashed it good”). As Deutsche Bank Silver Fix Trader-Submitter A noted, UBS’s silver spot market activity in the time leading up to the Silver Fix had a direct impact on the Fix price. ¶ 307 (Deutsche Bank Silver Fix Trader-Submitter A: “UBS BORING THE MKT AGAIN” . . . “JUST LIKE THEM TO BID IT UP BEFORE THE FIX THEN GO IN AS A SELLER . . . THEY SELL TO TRY AND PUSH IT BACK”). UBS profited off of this conduct by, for example, implementing an “11 oclock rule” where both UBS and Deutsche Bank would short silver at 11 A.M. ¶ 253.

¹¹ UBS previously argued that unlike *Forex*, 74 F. Supp. 3d at 587, which offered “direct evidence akin to the ‘recorded phone call in which two competitors agreed to fix prices at a certain level[.]’” the Second Amended Complaint (“SAC”) lacked such evidence of a conspiracy. *See* ECF No. 76, at 15 n.11; *see also* ECF 74, at 1 n.1. The PTAC now shows that UBS agreed to fix prices and shared of market-sensitive information such as price, customer, and trading information with the Fixing Members and other Defendants. *See Forex*, 74 F. Supp. 3d at 591.

These communications are the “paradigmatic example of direct proof of a Section 1 violation [of the Sherman Act]” and implicate UBS in the conspiracy to fix silver prices. *See Forex*, 74 F. Supp. 3d at 591. The PTAC’s new allegations overcome the Court’s prior finding that “Plaintiffs have alleged no facts suggesting that UBS was specifically sharing information or conspiring with any of the Fixing Members with respect to silver trades.” *See Silver Fixing*, 2016 WL 5794777, at *16.¹²

The fact that UBS was not a Fixing Member is not determinative of whether Plaintiffs state antitrust claims because UBS entered into an agreement with the Fixing Members to fix silver prices. Not every member of a conspiracy needs to fill the same role or act in the same manner. *In re Aluminum Warehousing Antitrust Litig.*, 95 F. Supp. 3d 419, 452 (S.D.N.Y. 2015) (“The law does not require that all conspirators have the same level of involvement in a conspiracy, nor that they be involved at precisely the same time or for the same duration.”) (citing *United States v. Nusraty*, 867 F.2d 759, 763 (2d Cir. 1989)).¹³ The DB Cooperation Materials now show that UBS was an integral part of the conspiracy to manipulate the Silver Fix and the prices of physical silver and silver financial instruments. Thus, Plaintiffs plausibly state antitrust claims against UBS.

Because Plaintiffs now plead this direct evidence of UBS’s impact on the Silver Fix and the prices of physical silver and silver financial instruments, these facts also cure another deficiency identified in the October 3 Order that “[b]ecause UBS was not a Fixing Member and never

¹² In the October 3 Order, the Court noted that “[i]n the absence of any other circumstantial evidence or plus factors, Plaintiffs’ allegations that UBS quoted prices that were lower than market averages around the Fixing call are simply inadequate to create a plausible inference of unlawful activity.” *Silver Fixing*, 2016 WL 5794777, at *26. Because Plaintiffs now plead direct evidence of an unlawful agreement involving UBS, it is unnecessary to even engage in an analysis of plus factors to suggest an agreement. *See id.* at *14 (“To allege an unlawful agreement, Plaintiffs must assert either direct evidence (such as a recorded phone call or email in which competitors agreed to fix prices) or ‘circumstantial facts supporting the inference that a conspiracy existed.’” (quoting *Mayor & City Council of Baltimore v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013))).

¹³ Under Second Circuit precedent, individual members of a conspiracy do not need to know the identities of the other members of the conspiracy or the full extent of the conspiratorial enterprise. *United States v. Eppolito*, 543 F.3d 25, 47-48 (2d Cir. 2008).

participated in the Silver Fixing, and because Plaintiffs fail to allege that UBS caused Plaintiffs' injuries, whether acting separately or in concert with the Fixing Members, Plaintiffs fail to state a claim against UBS." *See Silver Fixing*, 2016 WL 5794777, at *26. As the Court acknowledged in the October 3 Order, Plaintiffs allege that they sold their silver investments at prices "directly and artificially impacted by the Silver Fix" and that their silver instruments were "priced, benchmarked, and/or settled to the Fix Price." *See id.* at *10 (quoting SAC ¶¶ 3, 230). It follows that because UBS directly impacted the Silver Fix and resulting Fix Price, UBS caused Plaintiffs' injuries when Plaintiffs were forced to buy and sell physical silver and silver financial instruments at artificial prices due to UBS's manipulation. *See Silver Fixing*, 2016 WL 5794777, at *8; *see also Gelboim v. Bank of America Corp.*, 823 F.3d 759, 772-75 (2d Cir. 2016).¹⁴

B. The PTAC states Commodity Exchange Act claims against UBS because UBS caused (and intended to cause) the artificial silver prices in question.

With respect to Plaintiffs' Commodity Exchange Act ("CEA") claims, the Court held that "[b]oth Plaintiffs' price manipulation and manipulative device claims require allegations that UBS caused (and intended to cause) the artificial price in question." *Silver Fixing*, 2016 WL 5794777, at *26 (citing *In re Amaranth Nat. Gas Commodities Litig.*, 730 F.3d 170, 173 (2d Cir. 2013)). The PTAC cures each of these deficiencies.

1. UBS had the ability to influence silver prices.

UBS had the ability to influence the price of silver by virtue of its conspiracy with the Fixing Members and other Defendants. ¶ 274 (Deutsche Bank Trader B added UBS Trader A to a chat

¹⁴ The Court's holdings regarding Plaintiffs' constitutional and antitrust standing are equally applicable to Plaintiffs' claims against UBS. The Court found that Plaintiffs have constitutional standing "[b]ecause Plaintiffs have alleged a concrete injury as a result of Defendants' manipulation (*i.e.*, losses or artificially reduced gains on their silver investments)." *Silver Fixing*, 2016 WL 5794777, at *7. This holding applies to UBS because it conspired to manipulate the price of silver and silver financial instruments along with the Fixing Members, causing Plaintiffs' injuries. The Court also held that Plaintiffs adequately pleaded antitrust injury and that they are efficient enforcers for purposes of antitrust standing. *Id.* at *8-13. This holding also applies to Plaintiffs' claims against UBS because UBS's manipulation of the Fix Price directly injured Plaintiffs when they bought and sold silver and silver financial instruments that were priced, benchmarked, and/or settled based on the artificial Fix price. *See id.*

with HSBC Trader B, which UBS Trader A deemed “the mother of all chats”); ¶ 280 (UBS Trader A shared proprietary information that he could have only learned from communicating with the Bank of Nova Scotia); ¶¶ 14, 252 (UBS Trader A to Deutsche Bank Trader B: “if we are correct and do it together, we screw other people harder”). Moreover, chats show that UBS actually did influence the price of silver through its conduct. ¶¶ 307, 311-12. UBS Trader A acknowledged UBS’s ability to influence the silver market, stating that an “avalanche can be triggered by a pebble if you get the timing right” and “silver still here, u can easily manipulate silver[.]” ¶ 252. Additionally, UBS was the third-largest market maker in the silver spot market and could directly influence the prices of silver financial instruments based on the sheer volume of silver it traded. ¶ 311 (“u guys WERE THE SILVER MKT”). Conspiring with other large market makers, like Deutsche Bank and HSBC, only increased UBS’s ability to influence the market. Given UBS’s position as a large market maker in the silver market, its conspiracy with the Fixing Members and other co-conspirators, and its own employee’s acknowledgement of his ability to influence the market, this element is satisfied.

2. UBS specifically intended to manipulate the price of physical silver and silver financial instruments.

UBS had both the motive and opportunity to manipulate the silver market. Like the Fixing Members, UBS was motivated by profit and traders frequently discussed engaging in manipulative conduct to make more money. ¶ 318 (UBS Trader A: “go make your millions now jedi master . . .”); ¶ 259 (UBS Trader A: “pls write me a check when u aer a billionaire”); ¶ 311 (UBS Trader A: “lai always says [UBS Trader A] u aaaaaaaaaalwasy complain complain but u still up money”); ¶ 318 (UBS Trader A: “i teach u a fun trick with silver” Deutsche Bank Trader B: “show me the money”). One of the ways that UBS profited was by selling silver and silver financial instruments based on its advance knowledge of the Fix price. ¶¶ 5, 311 (Deutsche Bank Trader B: “u guys short some funky options well u told me too but i told no one u just siad u sold on fix”). Chats confirm that UBS also had the opportunity to (and did in fact) manipulate the price of silver through its conspiracy with the

Fixing Members and its role as the third largest market maker in the silver spot market. ¶ 358 (UBS Trader A: “gonna bend this silver lower”; “i will bend it lower told u”; “haha cool its gonna get ugly”); ¶ 257 (UBS Trader A: “use the blade on silver rig tnow it’ll hold it up”; Deutsche Bank Trader B: “yeah”); ¶ 256 (UBS Trader A: “gona blade silver now”). This establishes manipulative intent. *See Silver Fixing*, 2016 WL 5794777, at *21.

Alternatively, based on the totality of the circumstances (*see Matter of Indiana Farm Bureau Cooperative Assoc, Inc.*, CFTC No. 75-14, 1982 WL 30249, at *5 (CFTC Dec. 17, 1982)), the PTAC also alleges strong circumstantial evidence of conscious misbehavior and/or recklessness based on UBS’s direct communications with its co-conspirators, including that UBS: (i) coordinated its spot market quotes around the start of the Silver Fix, with Defendants and other co-conspirators, knowing it would cause artificial silver prices (¶ 253 (UBS Trader A and Deutsche Bank Trader B created an “11 o'clock rule” where UBS and Deutsche Bank would short silver at 11 A.M.)); (ii) fixed the bid-ask spreads it offered in the silver spot market (¶¶ 230-31, 238, 240, 242); (iii) shared private, market-sensitive pricing information with competitors, including Deutsche Bank (¶¶ 276-80); (iv) exchanged customer stop-loss orders (¶¶ 251, 315); (v) concealed its manipulation from regulators and the market (¶ 358 (UBS Trader A: “pls keep all these tricks to yourself”) (UBS Trader A: “btw keep it to yourself . . .”) (UBS Trader A: “ok rule of thumb EVERYTHING here stays here”)); and (vi) constantly communicated in electronic chat rooms to engage in manipulation.

3. UBS’s manipulation of silver and silver financial instruments caused silver futures prices to be artificial throughout the Class Period.

For the same reasons stated above, Part II.A., *supra*, the PTAC shows that UBS caused the price manipulation at issue (*see Silver Fixing*, 2016 WL 5794777, at *26), demonstrating UBS’s role in manipulating the Silver Fix and the silver spot market through its unlawful trading activity. The Court already found that “Plaintiffs adequately allege that changes in the Fix Price had an immediate effect on pricing in the silver markets.” *Silver Fixing*, 2016 WL 5794777, at *21. Thus, any

manipulation of the Fix price and the silver spot market had a direct impact on the prices of silver futures contracts. ¶¶ 130-31. Viewed along with the PTAC’s scienter and ability to influence allegations, it is evident that UBS’s manipulation of the silver market caused artificial prices¹⁵ that did not reflect supply and demand. *See id.* at *20 (“Plaintiffs’ allegations relative to intent, artificiality, and causation are interrelated”). Based on the limited number of documents Plaintiffs have received to date, UBS’s role in manipulating the prices of silver and silver financial instruments and employing manipulative devices has been sufficiently alleged.

4. UBS is liable under aiding and abetting and principal-agent theories.

The Court held that “because Plaintiffs have not alleged any (non-conclusory) facts suggesting that UBS intentionally associated itself with and participated in the Fixing Members’ scheme, their aiding and abetting and principal-agent claims fail as well.” *Silver Fixing*, 2016 WL 5794777, at *26. As set forth at length above (Parts II.A. and II.B., *supra*), and in the PTAC (*see, e.g.*, ¶¶ 5, 13, 230-31, 276-80, 308, 311-12), Plaintiffs allege direct evidence of UBS’s conduct to intentionally associate itself with the Fixing Members’ scheme.

C. Because the PTAC plausibly alleges antitrust and CEA claims against the New Defendants, leave to add these co-conspirators is not futile.

The PTAC contains plausible allegations against the New Defendants, whose identities and roles in the manipulation of the Silver Fix and the prices of silver and silver financial instruments were not known to Plaintiffs until the DB Cooperation materials were received and reviewed.

Barclays. The DB Cooperation Materials implicate several Barclays traders in Defendants’ conspiracy to manipulate the price of silver and silver financial instruments, including Barclays Trader A and the head of spot gold trading Barclays Trader B. Barclays Trader A and Barclays

¹⁵ In the October 3 Order, the Court held that Plaintiffs sufficiently alleged that prices were artificial during the Class Period. *Silver Fixing*, 2016 WL 5794777, at *20 (“With regard to artificiality, viewing the allegations in the light most favorable to Plaintiffs, the Court finds that Plaintiffs have adequately pleaded the existence of artificial prices around the Silver Fixing.”).

Trader B conspired with Deutsche Bank Trader B and Deutsche Bank Silver Fix Trader-Submitter A, the same traders that were in constant communication with UBS and other New Defendants. Barclays was a member of what UBS Trader A titled the “mother of all chats” (¶ 291), which provided it direct access to Fixing Members Deutsche Bank and HSBC, among other additional unidentified banks.

Barclays engaged in unlawful conduct directly in the silver market, agreeing to “smash” and “push” silver prices for the conspiracy’s collective benefit. ¶¶ 295, 308-09. On one occasion, Deutsche Bank Trader B told Barclays Trader A “today u smash” to which Barclays Trader A replied “yeah” and “10k silver” “i’m short[.]” ¶ 295. Barclays and Deutsche Bank shared and coordinated information so often that Barclays Trader A remarked “we are one team one dream[.]” ¶ 295.¹⁶

Like its co-conspirators, Barclays agreed with Deutsche Bank to fix the spread they charged customers to buy and sell silver. ¶¶ 232-34, 237, 239. In one chat, Deutsche Bank Trader B and Barclays Trader A agreed to quote a “5 cent” spread for 100,000 ounces of silver, known as “1 lac[.]” ¶ 232. In another instance, Barclays Trader A and Deutsche Bank Trader B agreed to a fixed spread of 7 cents for 50,000 ounces of silver and 10 cents for 100,000 ounces. ¶ 233.

Barclays and Deutsche Bank also discussed their trading positions in silver and agreed upon trading strategies to maximize the profit generated by their manipulative conduct. ¶ 291-94. For example, when discussing “how to play today[.]” Deutsche Bank Trader B asked Barclays Trader A whether he should “keep 2k short and juggle the rest” and Barclays Trader A responded, “ya i am short 4k lor[.]” ¶ 291. The two even gave each other advance warning of when they intended to buy or sell silver. ¶ 293 (Deutsche Bank Trader B: “gold silver down 2% will buy some xag”). In another

¹⁶ This language is similar to *Forex*, where the conspiracy labeled one of its chat rooms “One Team, One Dream.” See *Forex*, 74 F. Supp. 3d at 587.

instance, Deutsche Bank Trader B and Barclays Trader A agreed to “stay away” from silver for a week. ¶ 292.

Barclays Trader A realized that his actions were unlawful and needed to be concealed to avoid detection, responding to Deutsche Bank Trader B’s request to “push silver” on one occasion with the statement: “HAHAHA lol dont think this is politically correct leh on chat[.]” ¶ 309. Thus, the chats contained in the DB Cooperation Materials are just the tip of the iceberg, as evidence suggests that Defendants intentionally communicated in undocumented ways to keep their manipulation hidden. *See, e.g.* ¶ 304.

Merrill Lynch. To manipulate the price of silver and silver financial instruments, Merrill Lynch, through its trader Merrill Lynch Trader A, a former Deutsche Bank employee, engaged in the following techniques: (i) fixing the bid-ask spread they offered clients on silver (¶ 295 (Merrill Lynch Trader A: “How wide r u on spot? Id assume 10 cents for a few lacs?” Deutsche Bank Silver Fix Trader-Submitter A: “yes”)); (ii) “sweeping” customer stop-loss orders (¶ 301 (Deutsche Bank Silver Fix Trader-Submitter A: “im getting ntg but stops” . . . Merrill Lynch Trader A: “We had similar” “I sweep them . . . Fuk these guys”)); and (iii) sharing information about silver and silver financial instruments, including price and quantity (¶ 303 (Merrill Lynch Trader A: “Somejackass, . . . sold me 1mm ozs of 1 week 35 silver call at 29 vol yesterday”). In one instance, despite noting that global regulators were looking into manipulation of the foreign exchange market, Merrill Lynch Trader A and Deutsche Bank Silver Fix Trader-Submitter A continued to “sweep” the silver market, remarking “Someone got stopped messily[.]” ¶ 302. At times, to evade detection, Merrill Lynch Trader A and Deutsche Bank Silver Fix Trader-Submitter A also communicated via email and personal cell phone. ¶ 304.

Fortis. Fortis participated in Defendants’ conspiracy through Fortis Bank Trader B who later moved to co-conspirator HSBC, senior trader Fortis Bank Trader A, and other traders

currently unknown to Plaintiffs.¹⁷ Like Barclays and UBS, Fortis shared proprietary information with Deutsche Bank Silver Fix Trader-Submitter A. *See* ¶¶ 16, 297-98 (Deutsche Bank Silver Fix Trader-Submitter A: “SEEMS SOME BUYING PRE SIL FIX IN THE SYSTEMS” Fortis: “WELL SELL 70’S TOGETHER” Deutsche Bank Silver Fix Trader-Submitter A: “AT THIS RATE MATE WE CAN SELL 11.80S”). Fortis also shared its net silver trading positions and incoming silver order flow with Deutsche Bank throughout the day. *See, e.g.*, ¶ 299. In another instance, Fortis Bank Trader B conspired with Deutsche Bank to manipulate silver prices, using what he termed a “bulldozer” on the silver market. ¶ 300.

Standard Chartered. After briefly moving from Fortis to HSBC, Standard Chartered Trader A (formerly, “Fortis Bank Trader B” and “HSBC Trader A”) then moved to Standard Chartered in October 2012, where he continued to conspire to fix silver prices using the same manipulative techniques he had used before. Standard Chartered Trader A shared proprietary information with Deutsche Bank Silver Fix Trader-Submitter A, including when they bought or sold silver and their views on prices. ¶ 287 (Deutsche Bank Silver Fix Trader-Submitter A to Standard Chartered Trader A: “i made a bit of a mess” “bot silver ard 23”). Standard Chartered Trader A and Deutsche Bank Silver Fix Trader-Submitter A also exchanged prices of customer stop-loss orders and their net positions at the end of the Silver Fix. ¶ 288 (Deutsche Bank Silver Fix Trader-Submitter A: “stop lvl 22.65” Standard Chartered Trader A: “yeh” “small long out the fix . . .” “ok so where to sell sivler then?” Deutsche Bank Silver Fix Trader-Submitter A: “23.40 thru that use it as a stop profit and let it runnnnnnnnnnnnnnnnnnn” Standard Chartered Trader A: “were on the same wavelength” “just put 39s in”). Standard Chartered Trader A and Deutsche Bank Silver Fix Trader-Submitter A used this information to coordinate trading strategies. ¶ 290 (Deutsche Bank

¹⁷ Some of the DB Cooperation Materials only identify the Deutsche Bank trader that was involved in a communication, though the communications have a field labeled “To Fortis,” they do not identify the trader at Fortis who was involved.

Silver Fix Trader-Submitter A: “im long silver” . . . “i like both [silver and gold] to get the absolute sht squeezed out of them” “im longer silver than i am gold” Standard Chartered Trader A: “think u only need toris 22.10 on the sil”).

This direct evidence of the New Defendants’ participation in the unlawful agreement to manipulate the Silver Fix and the price of physical silver and silver financial instruments plausibly demonstrates that the New Defendants were members of the conspiracy. For the same reasons stated as to UBS, Plaintiffs’ price fixing and conspiracy in restraint of trade claims against the New Defendants are not futile. *See* Part II.A., *supra*. These allegations are also adequate to sustain CEA claims for price manipulation, manipulative device, aiding and abetting, and principal-agent liability against the New Defendants. *See* Part II.B., *supra*. Thus, an amended pleading to add these New Defendants is appropriate, given that New Defendants will be afforded an opportunity to answer or move to dismiss the PTAC later in the litigation.

D. Plaintiffs properly seek leave to add factual allegations to support their sustained claims.

The DB Cooperation Materials include substantial evidence that clarifies and enhances the allegations previously asserted against Defendants HSBC and Bank of Nova Scotia. *See, e.g.*, ¶¶ 4, 234, 263, 280-85, 305, 310. The Court has already sustained antitrust and CEA claims against these Defendants. Amending to include additional factual support for sustained claims is not futile.

III. PLAINTIFFS DID NOT DELAY IN BRINGING THEIR MOTION TO AMEND AND ARE ACTING IN THE UTMOST GOOD FAITH

Defendants also cannot satisfy their burden of demonstrating that Plaintiffs’ motion to amend is untimely or made in bad faith.

First, Plaintiffs did not delay in bringing their motion, as it is timely filed in accordance with the schedule set forth in the October 3 Order, as amended (ECF No. 153). *See, e.g., In re Pfizer Inc. Sec. Litig.*, No. 04 Civ. 9866, 2012 WL 983548, at *2 (S.D.N.Y. Mar. 22, 2012) (motion to amend was

“timely, having been made within the time limit previously established by the Court”). *Second*, after carefully reviewing DB Cooperation Materials and drafting allegations to cure the deficiencies that the Court identified, Plaintiffs now seek to amend their Complaint to ensure a full and fair adjudication of the pertinent issues and parties in this action. Therefore, Plaintiffs are acting in good faith and for a proper purpose. *See Azkour v. Haouzi*, No. 11-cv-5780, 2012 WL 3667439, at *2 (S.D.N.Y. Aug. 27, 2012) (“[b]ad faith exists when a party attempts to amend its pleading for an improper purpose”); *see also Winstar*, 2006 WL 473885, at *2 (granting leave to amend where “[t]here is no indication that plaintiffs are acting in bad faith or with a dilatory motive”).

Given the absence of undue delay, bad faith, or a repeated failure to cure deficiencies, leave to amend and file the PTAC should be granted. *See Foman*, 371 U.S. at 182.

IV. DEFENDANTS WILL NOT SUFFER ANY UNDUE PREJUDICE IF LEAVE TO AMEND IS GRANTED

To establish undue prejudice, Defendants bear the burden of demonstrating that amendment would ““(i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial [or] (ii) significantly delay the resolution of the dispute.”” *Pfizer Inc.*, 2012 WL 983548, at *3 (alteration in original) (citation omitted); *see also Blagman v. Apple, Inc.*, No. 12 Civ. 5453, 2014 WL 2106489, at *3 (S.D.N.Y. May 19, 2014) (“prior notice of a claim” and “whether the new claim arises from the same transaction as the claims in the original pleading” are central to the analysis of prejudice). Defendants cannot satisfy their burden here.

Defendants will have a full and fair opportunity to develop defenses to the claims asserted against them and, in any event, will have ample opportunity in ongoing discovery to further investigate the factual bases underlying Plaintiffs’ allegations and prepare a defense. *See Uni-World Capital, L.P. v. Preferred Fragrance, Inc.*, No. 13 Civ. 7204, 2014 WL 3610906, at *13 (S.D.N.Y. July 21, 2014) (granting leave to amend where two months of discovery remained). Granting the motion to amend will not significantly delay the resolution of this dispute. This case is in its infancy. Other

than the DB Cooperation Materials, not one document has been produced to date and no depositions have been scheduled by any party. *See BNP Paribas Mortg. Corp. v. Bank of Am., N.A.*, 866 F. Supp. 2d 257, 273 (S.D.N.Y. 2012) (finding no prejudice where the impact would not affect the scope of discovery and no depositions had been scheduled and therefore granting leave to amend); *see also JPMorgan Chase Bank, N.A. v. IDW Grp., LLC*, No. 08-cv-9116, 2009 WL 1357946, at *4-5 (S.D.N.Y. May 12, 2009) (granting motion to amend in the absence of pending dispositive motions or trial date).

In sum, Defendants cannot meet their burden “of demonstrating that substantial prejudice would result were the proposed amendment to be granted.” *See Blagman*, 2014 WL 2106489, at *3.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs leave to amend and file their Third Amended Complaint.

Dated: December 7, 2016
White Plains, New York

LOWEY DANNENBERG COHEN & HART, P.C.

By: /s/ Vincent Briganti
Vincent Briganti
Barbara Hart
Thomas Skelton
Christian Levis
Michelle E. Conston
One North Broadway
White Plains, New York 10601
Tel.: (914) 997-0500
Fax: (914) 997-0035
vbriganti@lowey.com
bhart@lowey.com
tskelton@lowey.com
clevis@lowey.com
mconston@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

reisler@gelaw.com

jsabella@gelaw.com

Interim Class Co-Counsel