IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

IN RE MUTUAL FUNDS INVESTMENT LITIGATION This Document Relates To: Scudder Subtrack	MDL 1586 Case No. 04-md-15861-CCB

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENTS, APPROVAL OF PLAN OF ALLOCATION, AND CERTIFICATION OF SETTLEMENT CLASS

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This supplemental memorandum is submitted by Plaintiffs[1], by and through their counsel, in support of their motion for the entry of an order that will, if entered, (i) grant final approval to the Settlements of class and derivative claims pending in the Scudder sub-track of MDL-1586 - *In re Mutual Funds Investment Litigation* (the "MDL Action"); (ii) certify the Class for purposes of settlement (iii) approve the Plan of Allocation of the Settlements to the Class and to the Deutsche/Scudder Settlement Funds; and (iv) enter final judgment.

The Parties have reached agreements to settle the Actions for a total of $13.966 million in cash, plus interest earned thereon, in accordance with the three Stipulations. The Settlements resolve all claims against the Settling Defendants. Plaintiffs and Plaintiffs' Counsel request that this Motion be granted because the Settlements are "fair, reasonable, and adequate" in accordance with Fed. R. Civ. P. 23(e)(2), and the Settlements are in the best interests of the Class and the Deutsche/Scudder Settlement Funds. Accordingly, Plaintiffs respectfully request that the Court grant their motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural History and Description of Plaintiffs' Claims

In order to avoid repetition and in light of the Court's familiarity with these Actions, Plaintiffs' respectfully refer the Court to the description of Plaintiffs' claims and the procedural history of these actions found in the Declaration of Lawrence Deutsch, Esq. in Support of Final Approval of the Settlement, Lead Counsel's Request for

[1] Unless otherwise noted, terms used in this memorandum have the same meanings as those referenced or defined in the proposed Preliminary Approval Order entered by the Court on May 19, 2010.

Attorneys' Fees and Reimbursement of Expenses, and Award to Lead Plaintiffs for Costs and Expenses (the "Deutsch Decl.") and in the Long Notice.

B. Reasons For the Settlements

The proposed Settlements consist of $13,960,000 in cash, comprised of (i) $12,800,000 paid on behalf of the Deutsche/Scudder Defendants, (ii) $850,000 paid on behalf of the UBS Defendants, (iii) $25,000 paid on behalf of the Aurum Defendants, (iv) $276,000 paid on behalf of Bank of America Securities, which amount includes $43,500 for notice and administration costs, and (v) $15,000 paid on behalf of Canary Capital Partners, Inc.

In addition to the Settlement Amounts obtained on behalf of the Class and the Deutsche/Scudder Settlement Funds in these Actions, several regulatory bodies entered into their own market timing and/or late trading settlements with certain defendants in these Actions, including the Deutsche/Scudder Defendants. These regulatory settlements resulted in payments to compensate investors, including certain Class Members, for market timing and/or late trading harm suffered by investors. In total, over $150 million has been, or will be, distributed to investors and the Deutsche/Scudder Funds from these regulatory settlements. The Settlements for which Plaintiffs seek final approval do not duplicate payments to Class Members for alleged market timing harm that has already been, or will be, compensated by the regulatory settlements, but, instead, are wholly additive to the regulatory settlements.

The Settlements are the product of substantial investigation, factual and expert discovery, and extensive arms'-length negotiations between experienced counsel for the Parties. At the time of each of the Settlements, Plaintiffs possessed a full understanding

of the strengths and weaknesses of their claims, the value of their claims, and their likelihood of success if they opted to continue litigating their claims. Plaintiffs balanced these factors along with the substantial costs of pursuing their claims through trial and appeals and significant delay they would experience in receiving payment, if any, on their claims if they did not settle at this time.

In addition to Plaintiffs' deep understanding of their claims as a result of the extensive discovery they conducted, at the time of settlement with the Deutsche/Scudder Defendants, the parties were awaiting the Court's decision on several motions. Among these were Deutsche/Scudder Defendants' motions for summary judgment, their motions to exclude the opinions of Plaintiffs' damages and liability experts, and Lead Plaintiff's motion for class certification. Although Plaintiffs believe that their claims would have been meritorious, an adverse ruling on any of these motions could have negatively impacted Plaintiffs' claims. In fact, prior to Plaintiffs' settlement with the Deutsche/Scudder Defendants, the Honorable J. Frederick Motz granted motions for summary judgment in favor of defendants in the Janus and Putnam subtracks that were similar to the motion filed by Deutsche/Scudder Defendants.

Therefore, in light of the substantial risks and costs Plaintiffs faced by continuing to litigate these Actions and the significant Settlements that Plaintiffs were able to obtain on behalf of the Class and the Deutsche/Scudder Settlement Funds, the proposed Settlements are fair, adequate and reasonable and warrant final approval by the Court.

II. THE PROPOSED SETTLEMENTS ARE FAIR AND WARRANT THE COURT'S APPROVAL

Courts in the Fourth Circuit analyze four factors when assessing the fairness of a proposed settlement: (i) the posture of the case at the time settlement was proposed; (ii)

the extent of discovery that had been conducted; (iii) the circumstances surrounding the negotiations; and (iv) the experience of counsel. *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155 (4th Cir. 1991) at 158-59; *see generally* Omnibus Memo § I, at pp. 3-8. The foregoing factors strongly support final approval of the proposed Settlements.

A. The Posture of the Actions at the Time Settlements Were Proposed and the Extent of Discovery

Plaintiffs seek approval of Settlements with five groups of Settling Defendants (the Settlements were made through three separate stipulations and agreements of settlement): the Deutsche/Scudder Defendants, the UBS Defendants, the Aurum Defendants, the BAS Defendants, and the Canary Defendants. The posture of the Actions and the extent of discovery at the time of each settlement follows.

Plaintiffs initiated these Actions in 2004 and, after extensive discovery and motion practice, entered into the Deutsche/Scudder Fund Family Stipulation, which included settlement with the Deutsche/Scudder Defendants, the UBS Defendants, and the Aurum Defendants, on February 12, 2010. Prior to reaching their settlement with the Deutsche/Scudder Defendants, Plaintiffs engaged in extensive fact and expert discovery, including reviewing over one million pages of documents and taking or defending 51 depositions. *See* Deutsch Decl. at ¶¶ 43-48. Plaintiffs also retained a damages expert and two liability experts who issued reports of their findings and gave deposition testimony concerning their opinions. *Id.* at ¶¶ 49-50. Plaintiffs also took the deposition testimony of Deutsche/Defendants rebuttal experts on damages and liability. *Id.* at ¶ 51.

In addition, at the time of settlement, the parties had fully briefed and argued before the Court Deutsche/Scudder Defendants' motions for summary judgment, several motions by Deutsche/Scudder Defendants to exclude the opinions of Plaintiffs' damages

and liability experts, and Lead Plaintiff's motion for class certification. During the hearing on Lead Plaintiff's motion for class certification, the Court expressed its concern regarding the manageability of a class action trail on behalf of a class of investors in a large number of funds in the Deutsche/Scudder fund complex. In addition, after the hearing on Deutsche/Scudder Defendants' motions for summary judgment, the Honorable J. Frederick Motz granted motions for summary judgment in favor of defendants in the Janus and Putnam sub-tracks that were similar to the motion filed by Deutsche/Scudder Defendants.

While discovery was ongoing, Class Plaintiffs began to discuss a possible settlement of the claims against both the UBS Defendants and the Aurum Defendants. Following ongoing and extensive discussions and arm's-length negotiations, Class Plaintiffs entered into a Memorandum of Understanding ("MOU") setting forth the principle terms of the settlement with the UBS Defendants on March 27, 2008. After the close of discovery and after the Aurum Defendants filed a motion for summary judgment, Class Plaintiffs entered into and a separate MOU with the Aurum Defendants on September 24, 2008.

Plaintiffs entered into the BAS Stipulation on January 28, 2010 after having entered into and MOU with BAS Defendants on December 29, 2006. At the time Plaintiffs entered into the MOU with BAS, the Parties had already engaged in extensive fact discovery and Plaintiffs had successfully defeated BAS Defendants' motion to dismiss.

Plaintiffs entered into the Canary Stipulation on January 27, 2010 after having entered into and MOU with Canary Defendants on July 19, 2004. At the time Plaintiffs

entered into the MOU with Canary Defendants, Plaintiffs had conducted substantial factual investigation into the claims against Canary Defendants. Although the Parties entered into the Canary MOU prior to engaging in formal discovery, Plaintiffs obtained, in addition to monetary recovery, substantial non-public factual information concerning their claims from Canary Defendants, including interviews and non-public documents that helped Plaintiffs advance their cases against the remaining defendants and prepare stronger amended complaints.

As a result, at the time of each of the Settlements, Plaintiffs had sufficiently developed their cases such that they could appreciate the merits of and evaluate the strength of their claims. *See Muhammad v. Nat'l City Mortg. Inc.*, No. 2:07-0423, 2008 WL 53377783 at *3 (S.D. W. Va. Dec. 19, 2008). Therefore, the posture of the Actions and the extent of discovery at the time of the Settlements strongly supports a finding by the Court that the Settlements are fair and warrants their approval.

B. The Circumstances Surrounding the Settlements and the Experience of Counsel

The Settlements here were negotiated by qualified and experienced counsel for both sides who litigated the Actions vigorously for six years. As discussed above, with the exception of the Canary Settlement, the Settlements were not reached until after extensive discovery and intense briefing on motions to dismiss and/or motions for summary judgment. Furthermore, Plaintiffs and the Deutsche/Scudder Defendants were only able to reach their settlements after the parties conducted a two-day mediation, chaired by Michael D. Young, Esq. of JAMS.

Plaintiffs and the UBS Defendants entered into negotiations on a possible settlement in early 2008, following the Court's denial of the UBS Defendants' motions to

dismiss the claims against them and after the production of documents by the UBS Defendants. As a result of these negotiations, the UBS Defendants agreed to settle the claims against them for $850,000 in cash, along with cooperation in the form of interviews with Defendants Cooper, Yellen, Chung, and Savino. After the close of discovery and after the Aurum Defendants had filed a motion for summary judgment, Plaintiffs entered into settlement discussions with the Aurum Defendants, ultimately agreeing to settle these claims for a $25,000 cash payment, along with cooperation from the Aurum Defendants to assist Class Plaintiffs in prosecuting their claims against the non-settling defendants.[2]

In addition, Lead Counsel and Derivative Counsel are among the premiere law firms specializing in representation of plaintiffs in class action cases, and particularly in securities class actions. *See* Deutsch Decl. at Exs. F and J, Firm Resumes. Additional Class and Derivative Counsel are also nationally recognized plaintiffs' firms. *See* Deutsch Decl. at Exs. H, I, K, L, Firm Resumes. Counsel for Defendants also included some of the preeminent law firms in the country experienced in defending securities actions, including, among others, Morgan, Lewis & Bockius LLP; Ropes & Gray LLP; Paul, Weiss, Rifkind, Wharton & Garrison LLP; Kramer Levin Naftalis & Frankel LLP; and Wachtell, Lipton, Rosen & Katz. Given the experience and skill of counsel for the parties, all of the settlement negotiations were hard fought and involved many contested issues on liability and damages. The Deutsche/Scudder Defendants' counsel, in particular, fought the Actions for more than five years all the way through and including

[2] The negotiations of the BAS Settlement and the Canary Settlement were handled primarily by the chair of Plaintiffs' Steering Committee, with significant oversight and input from Plaintiffs' Counsel.

complete fact and expert discovery, and the filing of motions for summary judgment. In light of the substantial risks and expense of continued litigation, Plaintiffs and the Settling Defendants determined that settling the Actions was in the best interest of their respective constituents.

Because the settlement negotiations were conducted at arms'-length between counsel experienced at litigation these types of action, the Court should give deference to the settlement determinations of counsel and find that the Settlements are fair.

III. THE PROPOSED SETTLEMENTS ARE ADEQUATE AND WARRANT THE COURT'S APPROVAL

In assessing the adequacy of a proposed settlement, courts in the Fourth Circuit consider the following factors: (i) the relative strength of the plaintiffs' case on the merits; (ii) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial; (iii) the anticipated duration and expense of additional litigation; (iv) the solvency of the defendants and the likelihood of recovery on a litigated judgment; and (v) the degree of opposition to the settlement. *Jiffy Lube*, 927 F.2d at 159; *see generally* Omnibus Memo § I, at pp. 4, 8-15. Measured against this standard, the proposed Settlements are adequate and should be finally approved by the Court.

A. The Strength of Plaintiffs' Cases and the Potential Difficulties of Proof or Strong Defenses

While Plaintiffs and Plaintiffs' Counsel believe that the claims asserted in the Complaints have merit, and that the evidence acquired through discovery supports the claims, Plaintiffs and Plaintiffs' Counsel recognize the uncertainty and risk of any litigation, especially in complex actions such as these. They also recognize the

difficulties and delays inherent in such litigations. With respect to damages, even if the Court denied the Deutsche/Scudder Defendants' motion to exclude the testimony of Class Plaintiffs' damages expert, the Deutsche/Scudder Defendants intended to present a competing analysis of the damages in this case and it would be impossible to predict which side's arguments would find favor with the jury. As a result, in a trial, the Class and the Deutsche/Scudder Settlement Funds could have recovered nothing or less than the amount of the Settlements.

Plaintiffs' Counsel is also mindful of the inherent problems of proof under, and possible defenses to, the federal securities law violations asserted. In particular, Defendants vigorously contested Plaintiffs' theories concerning liability, most notably whether Class Plaintiffs were capable of demonstrating Defendants' scienter for the violations alleged. Given the novelty of Plaintiffs' claims concerning mutual fund market timing, there is little or no established precedent for applying Plaintiffs' legal theories of liability to the specific factual context of their claims. This lack of precedent as to how or whether these claims would fit into the existing legal framework of the relevant laws created substantial unpredictability as to the ultimate outcome of the case following motions for summary judgment, trial and potential appeals.

Here, the likelihood of recovery was also placed in doubt due to Judge Motz's granting of defendants' motions for summary judgment in two similar cases. Furthermore, even if Class Plaintiffs were able to defeat Deutsche/Scudder Defendants' motion for summary judgment, Deutsche/Scudder Defendants had also vigorously contested class certification and the Court expressed its concern about the manageability

of Class Plaintiffs' then proposed class. If Class Plaintiffs' were unable to certify a class in this Action, the value of the case would have been significantly reduced.

Similarly, Derivative Plaintiffs faced significant legal hurdles, including whether they could prove demand futility, whether they had private rights of action under various sections of the Investment Company Act and the Investment Advisers Act, and the amount of damages recoverable under Section 36(b) of the Investment Company Act.

The proposed Settlements eliminate these risks and create immediate and substantial recoveries for the benefit of the Class and the Deutsche/Scudder Settlement Funds. Plaintiffs and Plaintiffs' Counsel respectfully submit that analysis of the strength of their respective cases and the potential difficulties of proof or strong defenses warrants the Court's final approval of the Settlements.

B. The Anticipated Duration and Expense of Additional Litigation

The anticipated duration and expense of additional litigation further supports approval of the Settlements in these Actions. With respect to the Settlements with the Deutsche/Scudder Defendants and the Aurum Defendants, although the parties had already engaged in extensive discovery at the time of the settlements, had Plaintiffs defeated these Defendants' motions for summary judgment, proceeding to complex trials of these Actions would have been very costly and the outcomes would have been far from certain. Regardless of which parties prevailed, appeals would have been likely which would not only have been costly but also could have taken many additional years to resolve.

The settlements with the UBS Defendants, the BAS Defendants, and the Canary Defendants were made after some investigation and discovery by Plaintiffs' Counsel was

conducted. By proceeding with the claims against these defendants, the parties would have incurred the anticipated costs described above. However, the parties would also have incurred significant additional costs by conducting additional fact and expert discovery related to these defendants.

In sum, given the substantial amount of time devoted to these Actions over the course of the past six years, the parties would have incurred substantial additional costs by continuing litigation and recovery for the Class and the Deutsche/Scudder Settlement Funds could have been delayed for many additional years.

C. The Solvency of Defendants and Likelihood of Recovery of a Litigated Judgment

The solvency of the Settling Defendants was not a significant factor in the Parties' decisions to enter into the Settlements. However, as discussed in the Omnibus Brief, even where defendants' solvency is not in issue and a settling defendant has the ability to pay greater amounts, this fact alone will not weigh against approval of the settlement where other factors support approval of the settlement. *See, e.g., In re Warfarin Sodium Antitrust Litig.,* 391 F.3d 516, 538 (3d Cir. 2004) (affirming district court's conclusion that a defendant's "ability to pay a higher amount was irrelevant to determining the fairness of the settlement"); *In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221 (S.D. W.Va. 2005) at 245 ("Since the remaining factors weigh in favor of finding the Settlement to be adequate, this factor may be given little weight."); *Henley v. FMC Corp.*, 207 F. Supp. 2d 489, 494 (S.D.W. Va. 2002) (same).

D. The Class's Reaction to the Settlement

The Class' almost uniformly positive reaction to the Settlements supports final approval. Notices have been mailed to over one million investors. *See* Deutsch Decl. at

¶ 10. To date, no Class member has objected to the Settlements and only thirteen have elected to exclude themselves from the Class. *Id.* This response demonstrates that the Class recognizes the adequacy of the Settlements. The deadline for submission of objections to the Settlements is September 21, 2010. Lead Plaintiff will address any objections that may be filed in a reply brief that will be filed (if necessary) after the objection deadline (on or before October 6, 2010).

E. Other Factors Support Final Approval

1. Recommendation of Plaintiffs' Counsel

Here, Plaintiffs' Counsel, who have substantial experience in securities class action and derivative litigation, and are fully informed of the pertinent factual and legal issues in the case, recommend the proposed settlements. *See In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246 (E.D. Va. 2009) at 255 ("Lead Counsel are highly experienced in the field of securities class action litigation ... Lead Counsel's decision to settle the case is the product of thorough exploration and deliberation and as such, 'their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight.'"); *MicroStrategy*, 148 F. Supp. 2d at 663 (same); *In re Veeco Instruments Secs. Litig.*, 2007 U.S. Dist. LEXIS 85629, at *36 (S.D.N.Y. Nov. 7, 2007) (stating that "courts consider the opinion of experienced counsel with respect to the value of the settlement" and noting that "qualified and experienced counsel for both sides [including Berger & Montague, P.C.]" recommended final approval of the settlement).

2. Recommendations of Lead Plaintiff

The recommendation of Lead Plaintiff, who was appointed under the PSLRA as the most adequate representative of the class, and is a sophisticated institutional investor and representative of investors with substantial financial interests in the outcome of the action, supports approval. *See* Deutsche Decl. at ¶ 11; *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436 (S.D.N.Y. 2004) at 462 (the participation of a sophisticated institutional investor lead plaintiff in the settlement process supported approval of the settlement); *Greebel v. FTP Software, Inc.*, 939 F. Supp. 57, 64 (D. Mass. 1996).

F. The Standards for Judicial Approval of the Derivative Settlement Support Final Approval

Federal Rule of Civil Procedure 23.1 requires judicial approval of a shareholder derivative action settlement or dismissal. In order to approve a proposed settlement, the Court must find that the settlement is "fair, adequate, reasonable and proper, and in the best interests of the class the shareholders." *See United Nat'l Ret. Fund v. Watts,* Civ. Action No. 04-CV3603 (DMC), 2005 U.S. Dist. LEXIS 26246, at *6 (D.N.J. Oct. 28, 2005) (citing *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1317 (3d Cir. 1993)). The principal factor to be considered in determining the fairness of a proposed shareholder derivative settlement is the benefit conferred to the corporation in light of the risks of establishing liability and proving damages if the case is not settled, and the cost of prolonging the litigation. *See Shlensky v. Dorsey*, 574 F.2d 131, 147 (3d Cir. 1978).

Courts must also assure themselves that there is no fraud or collusion between the parties. *See Maher v. Zapata Corp.*, 714 F.2d 436 (5th Cir. 1983) at 455. In addition, even if the settlement consists only of non-monetary relief (which is not the case here), the settlement may be approved. *Zimmerman v. Bell*, 800 F.2d 386 (4th Cir. 1986) at

391. Indeed, "[i]nfluencing the future conduct of management may serve the interests of the corporation as fully as a recovery for past misconduct . . . ." *Id.* [3]

Thus, for all the reasons cited above under the standards for approval of the class settlements, the derivative settlement should also be approved.

IV. THE PLAN OF ALLOCATION SHOULD BE APPROVED

Approval of a plan of allocation is governed by the same standards by which a class action settlement is scrutinized – namely, it must be fair, reasonable and adequate. *See Mills*, 265 F.R.D. at 258; *MicroStrategy*, 148 F. Supp. 2d at 668; *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005); *see generally* Omnibus Memo § III, at pp. 16-18.

As described to Class Members in the Long Notice, Class Counsel consulted with its damages expert, Dr. Marc Vellrath, who performed extensive work in the Class Action, to develop the plan of allocation. Dr. Vellrath analyzed the trading data provided by the Deutsche/Scudder Defendants and determined the amount of market timing dilution the Plaintiffs allege occurred in each of the Deutsche/Scudder Settlement Funds for each day during the Class Period. By applying Dr. Vellrath's calculations to the daily listings of shareholders for each of the Deutsche/Scudder Settlement Funds for each day during the Class Period, which Class counsel has obtained or will obtain from the Deutsche/Scudder Defendants and/or Navigant Consulting, Inc., the IDC for the Deutsche/Scudder regulatory settlements, the Claims Administrator will be able to determine the harm Plaintiffs' allege each Class Member suffered. The Claims

[3] According to *Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure*, § 1839 (3d ed. 2010), "cases involving dismissal or compromise under Rule 23(e) of nonderivative class actions also are relevant by analogy."

Administrator will deduct from this calculation any compensation that Class Members have already received through the regulatory settlements. Then the Claims Administrator will be able to distribute to each Class Member their pro rata share of the Settlement Amount. Under this plan of allocation, Class Members will not be required to submit claims forms. After all distributions have been made to Class Members, a final distribution will be made directly to the Deutsche/Scudder Settlement Funds on a pro-rata basis, based on the calculations of Dr. Vellrath.

Class Counsel, through its consultations with Dr. Vellrath, the Claims Administrator, Deutsche/Scudder Defendants, and the IDC for the Deutsche/Scudder regulatory settlements, is satisfied that the plan of allocation is designed to ensure that the Settlement Amount is fairly distributed to the Class. In evaluating a plan of allocation, the opinion of class counsel is "entitled to significant respect." *Mills*, 265 F.R.D. at 258; *see also In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240(CM), 2007 WL 2230177 (S.D.N.Y. July 27, 2007) ("In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel."); *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D.104 (S.D.N.Y. 1997) at 133 ("[T]he adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information."); *Veeco*, 2007 U.S. Dist. LEXIS 85629 at *39 (noting that "an allocation formula need only have a reasonable and rational basis, particularly if recommended by experienced and competent class counsel," and finding that Berger & Montague's "conclusion that the Plan of Allocation [was] fair and reasonable [was] therefore entitled

to great weight."). Accordingly, the Court should find that plan of allocation is fair and reasonable.

V. THE PROPOSED SETTLEMENT CLASS MEETS THE PREREQUISITES FOR CERTIFICATION UNDER RULE 23[4]

As set forth below, all of the requirements of Fed. R. Civ. P. 23(a) and (b)(3) are met in this case and certification of a class for settlement purposes is appropriate.

A. The Requirements of Rule 23(a) are Satisfied

Certification is appropriate under Rule 23(a) when the class is sufficiently numerous, there exist common issues of fact or law, common questions of law or fact, the claims of class representatives are typical of the class, and the class representatives will adequately represent the class. Each of these requirements is met here.

1. The Class is Sufficiently Numerous

Class Plaintiffs propose certification of a Class consisting of all persons that purchased and/or held shares of the Deutsche/Scudder Settlement Funds during the period July 30, 1999, through January 12, 2004, inclusive.[5] Based on records obtained from the Deutsche/Scudder Defendants during the notice process, there are more than one million Class Members. The numerosity requirement is easily satisfied.

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[4] For a discussion of the standards for certifying a settlement class under Rules 23(a) and b(3), see Omnibus Memo at § V, pg. 24.

[5] Excluded from the Class are the Settling Defendants, as well as members of their immediate families and their legal representatives, parents, affiliates, heirs, successors or assigns and any entity in which the Settling Defendants have or had a controlling interest (the "Excluded Persons"). Also excluded are any employees, principals, executives, officers, directors, or trustees of the Excluded Persons, and all trustees and managers of the mutual funds advised by Deutsche/Scudder. Also excluded from the Class are any Persons who timely and validly exclude themselves by filing a request for exclusion from the Class.

2. Common Questions of Law or Fact Exist

The Class' claims arise from the same set of facts and are based on legal theories common to all class members. Questions of law or fact common to the class include, among others, the following: (i) whether the Deutsche/Scudder Defendants violated the securities laws by (a) permitting select investors to engage in market-timing and/or late trading activities pursuant to undisclosed arrangements in order to increase the amount of assets in the Deutsche/Scudder Settlement funds and (b) failing to disclose to investors that market timing was pervasive in the Funds which caused harm to investors, and that the Deutsche/Scudder Defendants were unwilling or unable to stop this market timing; (ii) whether the Settling Defendants violated the securities laws by participating in a scheme to defraud investors by engaging in, or facilitating, market timing and/or late trading in the Deutsche/Scudder Settlement Funds; (iii) whether the Settling Defendants acted with scienter; and (iv) whether the Settling Defendants' alleged wrongful actions damaged the Class. The commonality prerequisite is satisfied.

3. Class Plaintiffs' Claims are Typical of Those of the Class

Class Plaintiffs' claims are typical of the settlement class members because they arise from the same allegedly common scheme and course of conduct by the Settling Defendants and/or from the same allegedly false and misleading statements. Class Plaintiffs' claims are based on the same legal theories as the rest of the Class. All Class Members are seeking to recover the same damages – namely, recovery for the alleged harm caused to their investments by market timing in the Deutsche/Scudder Settlement Funds. Furthermore, the proof that Class Plaintiffs would present to establish their claims also would prove the claims of the rest of the Class. Additionally, Class Plaintiffs

are not subject to any unique defenses that could make them atypical members of the Class. The typicality prerequisite is satisfied.

4. Class Plaintiffs Have Adequately Protected the Interests of the Class

There are no conflicts between Class Plaintiffs and members of the Class. Class Plaintiffs have vigorously prosecuted this case on behalf of the class, through drafting and amending complaints, briefing responses to motions to dismiss, conducting extensive discovery, briefing responses to a motion for summary judgment and to motions to exclude Class Plaintiffs' experts, and participating in mediation and settlement negotiations. Lead Plaintiff retained Berger & Montague to represent the Class as Lead Counsel. Berger & Montague has extensive experience in the litigation of securities class actions. Indeed, this Court previously considered Lead Plaintiff's qualifications and the qualifications of Berger & Montague prior to appointing them as Lead Plaintiff and Lead Counsel, respectively. This prerequisite is satisfied.

B. The Requirements of Rule 23(b) are Satisfied

Certification is appropriate under Rule 23(b) when common questions of law or fact predominate over any individual questions, and a class action is superior to other available means of adjudication. These requirements are met in this case.

1. Common Questions of Law or Fact Predominate

The common issues in this case, as in most class actions brought under the federal securities laws, vastly outweigh any individual issues. There are several common issues in dispute, as discussed above. Those issues, which arise from a common course of conduct, predominate over any individual issues and make certification of the Class appropriate.

2. A Class Action is the Superior Method of Adjudicating the Case

Here, a class action is superior to other available methods of adjudicating the Class' claims because individual Class Members' losses are generally too small to warrant individual litigation. In addition, one of the factors courts look to when evaluating Rule 23(b)(3) is the "likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(D). However, as the Supreme Court noted, "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Thus, any manageability problems that may have existed in this case are eliminated by the proposed Settlements.

In light of the forgoing, all of the requirements of Rule 23(a) and 23(b)(3) are satisfied, and the Court should certify the Class for settlement purposes.

VI. THE NOTICE PROGRAM COMPLIED WITH RULE 23, RULE 23.1 and DUE PROCESS[6]

A. The Form and Manner of Notice to Members of the Class Satisfied All Relevant Standards

As detailed in the Deutsch Declaration filed herewith, the Claims Administrator mailed copies of the Postcard Notice by first-class mail, postage pre-paid, to all reasonably identifiable members of the Class, at their last known address appearing in the records maintained by Deutsche/Scudder Defendants or the claims administrator retained by the IDC for the Deutsche/Scudder regulatory settlements. *See* Deutsch Decl. at Ex. A.

[6] For a general discussion of the required contents and methods of notice for class action and derivative settlements, see Omnibus Memo. at § I, pg. 22-24.

For Class Members who held shares in "street names" through brokerage firms and other nominees, the Claims Administrator provided notice to these nominee owners and directed them to either (a) send a copy of the Post Card Notice to the relevant beneficial owners of the shares or (b) provide the names and addresses of such beneficial owners to the Claims Administrator, who then promptly sent a copy of the Post Card Notice to them. This procedure satisfied the requirement of individual notice to class members and constituted the best notice practicable. *See, e.g., Fidel v. Farley*, 534 F.3d 508, 514 (6th Cir. 2008); *DeJulius v. New England Health Care Employees Pension Fund*, 429 F.3d 935, 946-47(10th Cir. 2005).

The Post Card Notice was specifically designed to contain all the information required by Rule 23 and applicable law[7] in plain language and in an easy-to-follow format for Class Members. The Post Card Notice was carefully prepared by Class

[7] The Private Securities Litigation Reform Act of 1995 (the "PSLRA") imposes certain requirements for notices private securities class action settlements. In order to comply with the PSLRA, the notice must state: (i) the amount of the settlement proposed to be distributed to the parties to the action, determined in the aggregate and on an average per-share basis; (ii) if the parties do not agree on the average amount of damages per share that would be recoverable in the event plaintiff prevailed, a statement from each settling party concerning the issue(s) on which the parties disagree; (iii) a statement indicating which parties or counsel intend to make an application for an award of attorneys' fees and costs, the amount of fees and costs that will be sought (including the amount of such fees and costs determined on an average per share basis), and a brief explanation supporting the fees and costs sought; (iv) the name, telephone number, and address of one or more representatives of counsel for the plaintiff class who will be reasonably available to answer questions concerning any matter contained in the notice of settlement published or otherwise disseminated to the class; (v) a brief statement explaining the reasons why the parties are proposing the settlement; and (vi) such other information as may be required by the Court. *See* 15 U.S.C.A. §78u-4(a)(7)(A)-(F). The proposed Notice contained all of the information specifically required under the PSLRA and Rule 23.

Counsel, in consultation with the highly experienced Claims Administrator, and reviewed and commented on by counsel for the Settling Defendants.

In addition, Plaintiffs used the efficiencies of and wide access to the Internet to facilitate notice to the Class and minimize unnecessary costs and delay. Specifically, the Claims Administrator posted a copy of various documents on a centralized settlement website that Plaintiffs established for the Scudder Sub-track, including the Post Card Notice (which was mailed to Class members) and the Long Notice (which is referenced in the Post Card Notice and provides members of the Class with additional details regarding the Settlements). *See* Deutsch Decl. at Ex. A. The website also published the Court's Preliminary Approval Order and copies of all of the Stipulations. Finally, a Summary Notice was published in various widely circulated newspapers and magazines and over the PR newswire (to both its US and Financial Markets newslines), and additional efforts were undertaken to disseminate the Summary Notice through the use of targeted web-based "banner ads." *See* Deutsch Decl. at Ex. B.

The notice program fulfilled the requirements of Rule 23, due process and the PSLRA. The Post Card Notice alerted and informed those members of the Class who could be identified through reasonable efforts of the proposed Settlements, and directed all recipients of the Post Card Notice to a website for additional information concerning the Settlements. In addition, the Summary Notice provided an abbreviated but informative description of the proposed settlements in the MDL Action, and also explained how to obtain the more detailed settlement notices in connection with each mutual fund sub-track. Courts routinely find that comparable notice programs meet the requirements of due process and Rule 23. *See generally* Omnibus Memo § IV, at pp. 19-

20; *see also In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 669-70 (E.D. Va. 2001); *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, No. 3:08-MD-01998, 2009 WL 5184352, at *12-*13 (W.D. Ky. Dec. 22, 2009) (approving plan of notice to a large class of mortgage holders certified under Rule 23(b)(3) that, *inter alia*, involved a summary notice mailed to class members and a more "detailed notice that [was] available upon request and on the website"); *Browning v. Yahoo! Inc.*, No. C04-01463 HRL, 2006 WL 3826714, at *9 (N.D. Cal. Dec. 27, 2006) (approving notice plan in a consumer class action certified under Rule 23(b)(3) that combined sending of short email notices (or mailed notice) to class members that referred them a more comprehensive long-form notice posted on a settlement website).

B. The Form and Manner of Notice to Current Shareholders Satisfied All Relevant Standards for the Derivative Action

Rule 23.1(c) governs notice in a derivative action, and requires that "[n]otice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders." Derivative Counsel provided notice of the proposed settlements of the derivative litigation to current shareholders of the Deutsche/Scudder Settlement Funds through the global publication notice program described above. The global publication notice, among other things, explained how to obtain more detailed information regarding the settlements reached in each mutual fund sub-track. This notice program satisfied the flexible notice requirements of Rule 23.1.

VII. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this Court (i) grant final approval to the Settlements; (ii) certify the proposed Class for purposes of settlement; (iii) approve the Plan of Allocation to the Class and the Deutsche/Scudder Settlement Funds; and (iv) enter final judgment.

Dated: September 14, 2010

Respectfully submitted,

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