Court File No. CV-16-551067-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

JULIUS DI FILIPPO and DAVID CARON

Plaintiffs

and

THE BANK OF NOVA SCOTIA, SCOTIAMOCATTA, SCOTIA CAPITAL (USA) INC., DEUTSCHE BANK AG, DEUTSCHE BANK SECURITIES LIMITED, DEUTSCHE BANK SECURITIES, INC., HSBC HOLDINGS PLC, HSBC BANK PLC., HSBC BANK CANADA, HSBC SECURITIES (CANADA) INC., HSBC USA INC., HSBC SECURITIES (USA) INC., UBS AG, UBS SECURITIES LLC, UBS BANK (CANADA), and THE LONDON SILVER MARKET FIXING LIMITED

Defendants

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM
(Notice of Action issued April 15, 2016)

CLAIM

1. The plaintiffs claim on behalf of themselves and other members of the proposed Class (as defined in paragraph 14 below):

   (a) A declaration that the Fixing Bank Defendants, as defined below, conspired, agreed and/or arranged with each other to fix, maintain, increase, decrease, control, or unreasonably enhance the price of silver during the Class Period (as defined in paragraph 14 below);

(b) A declaration that some or all of the defendants conspired, agreed and/or arranged with each other to fix, maintain, increase, decrease, control, or unreasonably enhance the quoted bid-ask spreads used by participants in the silver market during the Class Period;

(c) Damages or compensation in an amount not exceeding $1,000,000,000 for:

(i) Loss and damage suffered as a result of conduct contrary to Part VI of the *Competition Act*, RSC 1985, c C-34 ("***Competition Act***");

(ii) Civil conspiracy;

(iii) Unjust enrichment;

(iv) Waiver of tort; and

(v) Breach of contract;

(d) Punitive, exemplary and aggravated damages in the amount of $250,000,000;

(e) An equitable rate of interest on all sums found due and owing to the plaintiffs and other class members or, in the alternative, pre- and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("***Courts of Justice Act***");

(f) Investigative costs pursuant to section 36 of the *Competition Act* and costs of this proceeding on a full-indemnity basis pursuant to section 36 of the *Competition Act* and the *Courts of Justice Act*; and,

(g) Such further and other relief as this Honourable Court deems just.

THE NATURE OF THE ACTION

2. This action arises from conspiracies among the defendants to fix, raise, decrease, maintain, stabilize, control, or enhance unreasonably the price of silver and silver-related investment instruments, which include, without limitation: silver bullion and silver bullion coins, silver futures, shares of silver-focused ETFs, units of silver-focused mutual funds, silver certificates, silver leases, over-the-counter silver spot or forward transactions, and options on any of the foregoing ("**Silver Market Instruments**") and to fix, raise, decrease, maintain, stabilize, control, or enhance unreasonably supra-competitive bid-ask spreads used by market participants in the silver market.

The Fixing

3. Until August 14, 2014, The Bank of Nova Scotia, Deutsche Bank, and HSBC (the "**Fixing Bank Defendants**") met privately on a secure conference call at 12:00 P.M. London time for what is known as the London Silver Fixing (hereafter the "**London Silver Fixing**" or "**Fixing**"). The Fixing produced a benchmark rate for silver, a price often agreed to be used in advance by buyers and sellers of silver (the "**Fix price**"). The Fix price affected the spot market for silver which, in turn, affected the broader market of Silver Market Investments.

4. The Fixing was supposed to start and end with open competition. The process was supposed to begin with the current, supposedly competitive, "spot" price for silver. From that starting point, a competitive auction was to take place, the equilibrium of which would be published as the Fix price. The Fix price is the benchmark price for silver adopted at the Fixing. The Fix price is used directly in contracts for the purchase and sale of silver that adopt the Fix price as the price term for any given day.

5. Beginning at least as early as 1999 and continuing through to August 14, 2014, the defendants conspired with each other to fix, raise, decrease, maintain, stabilize, control, or enhance unreasonably prices in the silver market. This was accomplished through daily conspiratorial communications under the guise of the arcane Fixing process, which provided a veneer of false legitimacy for collusion (the "**Fixing Communications**").

Manipulation of Bid-Ask Spreads and Silver Market Instruments

6. In addition to manipulating the Fixing, some or all of the defendants conspired with each other to fix, raise, decrease, maintain, stabilize, control, or enhance unreasonably bid-ask spreads of Silver Market Instruments in the silver market throughout the trading day. This was also done to enhance the profits of some or all of the defendants at the expense of the Class Members, as defined below.

7. Market makers of Silver Market Instruments generate revenue by buying a particular instrument at a lower price than the price at which they sell it. The difference between the price at which a market maker is willing to buy and subsequently sell a Silver Market Instrument is known as the "bid-ask spread." In order to fix, widen, control, maintain or enhance unreasonably bid-ask spreads, some or all of the defendants would share "order flow information" about large current or incoming trades and the contents of their order books, including trigger prices of client stop-loss orders with the other conspirators. Combined with the Fixing Bank Defendants' advance knowledge of the Fix price, by understanding order flow, it was possible for the defendants to manipulate and fix their bid-ask spreads in the silver market to generate supra-competitive profits.

8. In furtherance of the conspiracy, agreement or arrangement, during the Class Period, senior executives, traders, and employees of the defendants, acting in their capacities as agents for the

defendants: (i) fixed, maintained, increased, decreased, controlled, and unreasonably enhanced the price of physical silver and Silver Market Instruments as well as bid-ask spreads used by participants in the silver market; and (ii) communicated secretly using chat rooms, emails, text messages, telephone, and other means to share confidential customer information and to coordinate trading strategies to control or manipulate the price of silver and maintain supra-competitive bid-ask spreads.

9. Numerous criminal and regulatory investigations are underway concerning the collusion amongst the defendants, including in the United States, Switzerland, and Germany.

10. On August 15, 2014, an independent administrator was put in place to operate and supervise the auctions that result in the determination of the Fix price for silver. As yet, no curative market mechanism has been introduced to address the conduct engaged in by some or all of the defendants to fix, widen, control, maintain or enhance unreasonably bid-ask spreads in the silver market.

11. The defendants' longstanding conspiracy reflected a culture of increasing profits at the expense of the Class and the very integrity of the silver market. The defendants' conspiracy to fix prices in the silver market impacted the pricing of Silver Market Instruments, resulting in loss and damage for the Class.

THE PLAINTIFFS AND THE CLASS

12. The plaintiff, Julius Di Filippo ("**Di Filippo**"), is an individual residing in Toronto, Ontario. During the Class Period, as defined below, Di Filippo transacted in several Silver Market Instruments whose price was based on the Fix price and were negatively impacted by the

manipulation of the Fix price and bid-ask spreads by the defendants. These Silver Market Instruments included, but are not limited to: silver bullion, silver bullion coins, the Sprott Silver Bullion Fund and the Sprott Physical Silver Trust.

13. The plaintiff, David Caron ("**Caron**"), is an individual residing in Kelowna, British Colombia. During the Class Period, as defined below, Caron transacted in several Silver Market Instruments whose price was based on the Fix price and were negatively impacted by the manipulation of the Fix price and bid-ask spreads by the defendants. These Silver Market Instruments included, but are not limited to: silver bullion, silver bullion coins, and the Horizons Beta Pro Comex Silver Bull Plus ETF.

14. The plaintiffs seek to represent the following proposed class (the "**Class**" or the "**Class members**"):

> *All persons or entities in Canada who, between January 1, 1999 and August 14, 2014 (the "**Class Period**") transacted in a Silver Market Instrument*[1] *either directly or indirectly through an intermediary, and/or purchased or otherwise participated in an investment or equity fund, mutual fund, hedge fund, pension fund or any other investment vehicle that transacted in a Silver Market Instrument. Excluded from the class are the defendants, their parent companies, subsidiaries, and affiliates.*
>
> > [1] *"Silver Market Instrument" includes but is not limited to: silver bullion or silver bullion coins, silver futures contracts traded on an exchange operated in Canada, shares in silver ETFs, silver call options traded on an exchange operated in Canada, silver put options traded on an exchange operated in Canada, over-the-counter silver spot or forward transactions or silver call options, over-the-counter silver put options, leases for silver.*

THE DEFENDANTS

15. The defendants are jointly and severally liable for the actions of, and damages allocable to, their co-conspirators, including unnamed co-conspirators.

16. Where a particular entity within a corporate family of the defendants engaged in anti-competitive conduct, it did so on behalf of all entities within that corporate family. The individual participants in the conspiratorial meetings and discussions entered into an agreement on behalf of, and reported these meetings and discussions to, their respective corporate families.

17. Various persons, partnerships, sole proprietors, firms, corporations, and individuals not named as defendants in this action, the identities of which are presently unknown, have participated as co-conspirators with the defendants in the unlawful behaviour alleged herein, and have performed acts and made statements in furtherance of the conspiracy or in furtherance of the anti-competitive conduct.

18. The terms "defendant" or "defendants" as used herein includes, in addition to those named specifically below, all of the named defendants' predecessors, including those merged with or acquired by the named defendants and each named defendant's wholly owned or controlled subsidiaries or affiliates that played a material role in the unlawful acts alleged herein.

The Bank of Nova Scotia Defendants

19. The defendant, **The Bank of Nova Scotia**, is a corporation organized and existing under the laws of Canada with its principal place of business in Toronto, Canada. The Bank of Nova Scotia is regulated under the *Bank Act*, S.C. 1991, c. 46 (the "***Bank Act***") as a Schedule I bank.

20. The defendant, **ScotiaMocatta**, is a subsidiary or affiliate of The Bank of Nova Scotia and serves as its precious and base metals division, executing client trades in the physical silver market, in silver derivatives, and in shares of Silver ETFs.

21. The defendant, **Scotia Capital (USA) Inc.**, is a wholly-owned subsidiary of the Bank of Nova Scotia with its principal place of business in New York, New York. It is a registered broker dealer and executes client trades in a variety of Silver Market Instruments.

22. The businesses of each of the defendants The Bank of Nova Scotia, ScotiaMocatta and Scotia Capital (USA) Inc. are inextricably interwoven with that of the other and each is the agent of the other for the purposes of the Conspiratorial Acts described below. The defendants, The Bank of Nova Scotia, ScotiaMocatta and Scotia Capital (USA) Inc., are collectively referred to as "**BNS**".

23. BNS operates a trading platform called Scotia iTRADE ("**iTRADE**") for trading, among other things, commodities. BNS clients can trade silver derivatives and purchase silver certificates and silver bars on the iTRADE system. BNS also conducts proprietary trading in the silver market. During the Class Period, BNS was a member and owner of the London Silver Market Fixing Ltd., a market-making and clearing member of the London Bullion Market Association ("**LBMA**"), and entered directly into silver spot, forward, option and Silver ETF share transactions with members of the Class.

Deutsche Bank Defendants

24. The defendant, **Deutsche Bank AG**, is a corporation organized and existing under the laws of Germany with its principal place of business in Frankfurt, Germany and branches and offices in

Toronto, Ontario. Deutsche Bank AG is regulated in Canada under the *Bank Act* as a Schedule III bank.

25. The defendant, **Deutsche Bank Securities Limited**, is a wholly owned subsidiary of Deutsche Bank AG with its principal place of business in Toronto, Ontario.

26. The defendant, **Deutsche Bank Securities Inc.**, is a wholly owned subsidiary of Deutsche Bank AG with its principal place of business in New York, New York.

27. The businesses of each of the defendants Deutsche Bank AG, Deutsche Bank Securities Limited and Deutsche Bank Securities Inc. are inextricably interwoven with that of the other and each is the agent of the other for the purposes of the Conspiratorial Acts described below. The defendants, Deutsche Bank AG, Deutsche Bank Securities Limited and Deutsche Bank Securities Inc., are collectively referred to as "**Deutsche Bank**".

28. Deutsche Bank executes client trades in the physical silver market, on exchanges, in silver derivatives, and in shares of Silver ETFs. Deutsche Bank also conducts proprietary trading in the silver market, and provides an electronic platform named "Autobahn" for trading silver products. During the Class Period, Deutsche Bank was a member and owner of the London Silver Market Fixing Ltd., a market-making and clearing member of the LBMA, and entered directly into silver spot, forward, option and Silver ETF share transactions with members of the Class.

HSBC Defendants

29. The defendant, **HSBC Holdings plc**, is a company organized and existing under the laws of the United Kingdom with its principal place of business in London, England and subsidiaries in Canada.

30. The defendant, **HSBC Bank plc**, is a wholly owned subsidiary of HSBC Holdings plc with its principal place of business in London, England.

31. The defendant, **HSBC Bank Canada**, is regulated in Canada under the *Bank Act* as a Schedule II bank and has its head office in Vancouver, British Columbia.

32. The defendant, **HSBC Securities (Canada) Inc.,** is a wholly owned subsidiary of HSBC Bank Canada headquartered in Toronto, Ontario.

33. The defendant, **HSBC USA Inc.**, is a wholly owned subsidiary of HSBC Bank plc with its principal place of business in New York, New York.

34. The defendant, **HSBC Securities (USA) Inc.,** is a wholly owned subsidiary of HSBC Bank plc with its principal place of business in New York, New York.

35. The businesses of each of the defendants HSBC Holdings plc, HSBC Bank plc, , HSBC Bank Canada, HSBC Securities (Canada) Inc., HSBC USA Inc. and HSBC Securities (USA) Inc. are inextricably interwoven with that of the other and each is the agent of the other for the purposes of the Conspiratorial Acts described below. The defendants, HSBC Holdings plc, HSBC Bank plc, , HSBC Bank Canada, HSBC Securities (Canada) Inc., HSBC USA Inc. and HSBC Securities (USA) Inc., are collectively referred to as "**HSBC**".

36. HSBC executes client trades in the physical silver market, on exchanges, in silver derivatives, and in shares of Silver ETFs. During the Class Period, HSBC was a member and owner of the London Silver Market Fixing Ltd., a market-making and clearing member of the LBMA, and entered directly into silver spot, forward, option and Silver ETF share transactions with members of the Class.

UBS Defendants

37. The defendant, **UBS AG**, is a Swiss company based in Basel and Zurich, Switzerland. UBS AG is regulated in Canada under the *Bank Act* as a Schedule III bank.

38. The defendant **UBS Securities LLC**, a wholly owned subsidiary of UBS AG, is a Delaware company with its principal place of business in Stamford, Connecticut.

39. The defendant, **UBS Bank (Canada)**, is regulated in Canada under the *Bank Act* as a Schedule II bank and has its head office in Toronto, Ontario.

40. The businesses of each of the defendants UBS AG, UBS Securities LLC and UBS Bank (Canada) are inextricably interwoven with that of the other and each is the agent of the other for the purposes of the Conspiratorial Acts described below. The defendants, UBS AG, UBS Securities LLC and UBS Bank (Canada), are collectively referred to as "**UBS**".

41. UBS executes client trades in the physical silver market, on exchanges, in silver derivatives, and in shares of Silver ETFs. UBS operates electronic platforms for trading silver products. UBS also conducts proprietary trading in the silver market and operates, sponsors, manages, and trades shares of Silver ETFs. During the Class Period, UBS was a market-making and clearing member of the LBMA, and entered directly into silver spot, forward, option, and Silver ETF share transactions with members of the Class.

London Silver Market Fixing Limited

42. The defendant, **The London Silver Market Fixing Limited** ("**LSMF**"), is a private company organized and existing under the laws of the United Kingdom with its principal place of business in London, England. LSMF is owned and controlled by BNS, Deutsche Bank and HSBC.

43. At all material times, LSMF was part and parcel of the defendants' conspiracy as the LSMF is a shell for the operation of the Fixing and functioned as a vehicle for the defendants' conspiracy and as an agent for the Fixing Bank Defendants.

FACTUAL BACKGROUND

The London Silver Fixing

44. The Fixing was originally established to determine a daily benchmark price for an ounce of silver at a predetermined time during the London trading day. In the physical silver market there is no central price at any given time. Instead, all of the silver market-making banks, including the Fixing Bank Defendants, and dealers provide competing bid and ask quotes directly to their clients and customers. The Fix price was supposed to provide buyers and sellers an objective benchmark that isolated both parties from the noise of the trading day, or the bias of any one market maker. The Fix price is of utmost importance to the market for Silver Market Instruments because movements in the Fix price are immediately and consistently reflected in movements in the values of Silver Market Instruments.

45. The Fixing Bank Defendants are one type of "market makers" in the silver market, meaning that each stands ready to buy and sell silver on a regular and continuous basis. The Fixing

Bank Defendants at any given time have silver orders on their own behalf (i.e., proprietary trading), their clients' behalf (i.e., brokerage trading), or frequently some of each.

46. Client orders will generally be "limit orders," meaning an order to buy silver at no more than a specific price or to sell silver at no less than a specific price. A buy limit order is executed unless the price is above a pre-set value. A sell limit order is executed unless the price is below a pre-set value.

47. Until August 14, 2014, the contemporary London Silver Fix took place each business day when the three Fixing Bank Defendants met on a secure conference call at 12:00 P.M. London time to fix the price of physical silver. During the Class Period, the Fixing was administered by LSMF, the members of which are the Fixing Bank Defendants, with the exception of Defendant Deutsche Bank, which was a member until resigning its seat in May 2014 after initially trying but failing to sell its seat as a Fixing member. Later, Defendant Deutsche Bank announced its intention to sell its precious metals trading business.

48. During the Class Period, the lead Fixing Bank Defendant (known as the "**Chair**") began the fixing process by proposing a price near the current silver spot price. The Chair position rotated among Fixing Bank Defendants each year. No other silver market participants were allowed to participate in the daily auction.

49. The participants then simulated the result of trading at that price as follows: First, each of the Fixing Bank Defendants looked at its limit orders and determined how many were eligible to trade at that price. They considered how much silver their proprietary trading desk would trade at the same price. The Fixing Bank Defendants then stated a single value, the net amount (in ounces) of silver they wished to buy or sell. Based on these orders, each Fixing Member declared how

many bars of silver (around 1,000 troy ounces each) it was willing to buy or sell at the opening price in 50-bar increments.

50. After each participant placed its orders, the transactions were netted against each other. If the amount of buying interest was equal to the amount of selling interest the Silver Fix was complete. Otherwise, the Chairman would adjust the price upward or downward and the process would be repeated until the total amount of silver bought was within 300 bars of the total amount sold.

51. If for some reason this 300-bar threshold could not be reached, the Chairman could unilaterally fix the price of silver and the Fixing Members would divide the excess supply or demand pro-rata among themselves. For example, if there was one buyer and two sellers and the buyer was willing to purchase 300 bars more than what was being offered, the buyer would reduce its buying interest by 100 bars and each of the sellers would increase its selling interest by 100 bars, collectively absorbing the 300 bar difference. Once this price-setting ritual was completed, the final Fix price was published to the market.

52. At any time, a Fixing Bank Defendant, or their underlying customers, could increase, decrease or withdraw a previously-declared selling or buying order or place a completely new order. In such a circumstance, if the Fixing Bank Defendant required a short pause in order to enable it to recalculate their overall level of interest, then the Fixing Bank Defendant could call "flag," which brought the Fixing to a temporary halt. The Chair could not fix the price while a flag prevailed.

53. The Fixing Bank Defendants were in direct, private communication with each other and other bullion banks concerning the price of silver at least once each day as the Fixing occurred. As

such, the Fixing Bank Defendants were afforded a unique opportunity for daily communications and collusions. In any other setting, a daily meeting between a small group of horizontal competitors would have immediately raised suspicion. But here, due to the anachronism of the longstanding tradition of the Fixing, the Fixing Bank Defendants were able to form the core of a conspiracy, as they could coordinate daily without it seeming out of place. The tradition of the Fixing provided a veneer of legitimacy to what was an unlawful price fixing conspiracy.

54. No communications, meeting minutes, or other records of what occurred during the "auction" – such as how the "bids" played out during the course of the purported auction – were kept as a matter of course.

55. In addition to the illicit activity engaged in by the Fixing Bank Defendants during the Fixing, some or all of the defendants conspired with each other to maintain supra-competitive bid-ask spreads in the silver market throughout the trading day and around the Fix by sharing order flow information with each other in the manner described herein.

56. The Fixing Bank Defendants administered the Fixing themselves until recently through LSMF, with no oversight by any independent organization. Indeed, the Fixing was carried out, quite deliberately, in such a way as to ensure that the "cover" the Fixing provided to defendants' conspiratorial meetings remained hidden.

The London Bullion Market

57. By the late 19th century, London developed as the centre of the global precious metals trade. The silver trade that takes place in London is known as the London Bullion Market. Historically, the participants in this London silver market compiled lists of accredited smelters and assayers whose silver bars they would accept without question, in settlement against transactions

conducted between each other and with other acceptable counterparties. Such bars became known as London Good Delivery, which is the standard for silver used to settle transactions in the London Bullion Market. Today, London Good Delivery silver is traded in troy ounces.

58. The London Bullion Market does not have a central clearing house but instead operates on an over-the-counter basis. This trading activity is the London Bullion Market, which comprises five functions: (1) silver clearing by London Bullion Market Association clearing members (2) silver vaulting including by some of the defendants; (3) the London Good Delivery system and rules; (4) pricing by LBMA market-makers including all of the defendants; and (5) silver accounts held by all of the defendants and others.

59. The Fixing, operated by the Fixing Bank Defendants via LSMF, is an integral part of the London Bullion Market and global silver markets. The LBMA holds out the Fix prices as a benchmark that is "globally accepted" as the basis for pricing a variety of precious metals transactions and used by "clients around the world [who] wish to buy or sell precious metals" and Silver Market Instruments.

The Various Silver Market Instruments

60. ***Spot contracts.*** Some of the international demand for silver is met through spot contracts on the over-the-counter segment of the market for Silver Market Instruments. A spot contract is a contract where a buyer and seller agree to settlement (payment and delivery) on a spot date, which is normally two business days after the trade date. The settlement price is called the spot price. Sales at "spot" are often tied or keyed to the Fix on the day of the sale.

61. ***Silver derivatives.*** There is also a large market consisting of silver derivatives, financial instruments whose value depends on the underlying price of physical silver on the spot market, and which are often pegged to the London Fixing (i.e., settled by reference to the Fix price).

62. Silver derivatives include silver futures, forwards, and options contracts. A silver forward contract is a bilateral agreement for the purchase or sale of an agreed amount of silver at a specified date in the future. A silver futures contract is similar to a futures contract, but with standardized terms and daily mark-to-market cash flow requirements. These types of contract can be traded over-the-counter (a forward) or on an exchange (a future).

63. ***Exchange-traded funds ("ETFs")*** issue securities that track an industry index (e.g., the S&P 500), a commodity (e.g., gold or silver), or a basket of assets in the same way as an index fund, but which are shares that trade on an exchange. Securities issued by ETFs experience price changes throughout the day reflecting supply and demand as they are purchased and sold, where that supply and demand is heavily influenced by supply and demand within the industry, or for the commodity or assets that the ETF tracks. There are ETFs that invest only in silver bullion and whose shares are linked directly to silver bullion prices ('**Silver ETFs**").

64. ***Mutual Funds.*** There are many mutual funds that transact in various Silver Market Instruments based on the investment strategy set by fund managers. Typically, the net asset value of the mutual funds is based on the spot price of silver.

65. ***Silver Certificates.*** These are certificates that are issued to holders of silver and that provide a vehicle to invest in silver without having the physical metal. The value of silver certificates is based on the spot price of silver.

66. ***Silver Leases.*** These are transactions that typically occur between bullion banks and central banks whereby the central bank will loan silver to the bullion bank at a certain rate of interest. The bullion banks will then sell the silver on the open market and buy treasuries in return. Since at some point the bullion banks must return the leased silver to the central bank, they are exposed to the risk that if prices in the silver market rise, they will have to buy back the silver they leased at a higher price than that at which they sold it. As such, in order to hedge the risk of this occurring, bullion banks will buy silver futures.

The Fixing Impacts the Prices of Silver Market Instruments

67. Manipulating the Fixing directly impacts the price the defendants would pay for silver, and directly impacts the cash flows for Fix price-linked derivatives. Because of the prominence of the Fix price as a measure of silver prices generally, such manipulation presented the opportunity to profit on other Silver Market Instruments as well. Foreknowledge as to an upcoming movement in the price of silver would create numerous opportunities to profit in many different outlets for Silver Market Instruments. This is because Silver Market Instruments often move together with the Fix price.

68. The Fix price also impacts the price of silver futures and options on these futures contracts. This is because the price of derivatives and the spot silver prices closely correlate to each other. Changes in the price in one will be almost immediately reflected in the other.

69. Because the futures price is essentially an expectation of what the spot price will be for the underlying futures contract at maturity, silver futures and physical prices are very closely correlated.

Maintaining Supra-Competitive Bid-Ask Spreads affects the price of Silver Market Instrument

70. The defendants conspired to fix bid-ask spreads in the silver market. Maintaining supra competitive bid-ask spreads impacts the price of Silver Market Instruments whose price is based on the spot price of silver. Combined with the Fixing Bank Defendants' advance knowledge of the Fix price, by understanding order flow, the defendants manipulated and fixed their bid-ask spreads in the silver market to generate supra-competitive profits.

71. The defendants' traders "front run" on customer information when they receive customer orders that could move the silver market and then trade their own firm's proprietary positions prior to executing their customers' market-moving trades. Such orders give traders information about the direction in which the silver market will move. The traders use this information to take positions that benefit the defendants to the detriment of the Class.

72. Absent collusion, a defendant "front running" the silver market would still face the risk that another defendant with a larger position could trade in the opposite direction at the same time. If this were to happen, the defendant's strategy would backfire, and the defendant would, in industry jargon, get "run over".

73. To avoid the risk of getting run over, the defendants agreed to "front run" together by sharing aggregate customer orders and agreeing to coordinate the sequencing of their own trades to their advantage and to the detriment of the Class.

THE CONSPIRACY

Defendants Conspired to Control and Fix Prices and Supply of Silver and Silver Market Instruments

74. The acts alleged in the following paragraphs are collectively referred to as the "**Conspiratorial Acts**."

75. Beginning at least as early as January 1, 1999 and continuing until at least August 14, 2014, the defendants manipulated the Fixing so that the Fix price was at artificial levels compared to what competitive market forces would have dictated. This not only caused artificial prices in the spot market, but also artificial prices for both futures and options, for Silver ETFs, and for other Silver Market Instruments.

76. The defendants' manipulation of the silver benchmark was intended to and did directly affect the price of physical silver, silver futures, Silver ETF shares and other Silver Market Instruments, causing the Class losses and damage.

77. The defendants were also large participants in the market for physical silver. Advance knowledge of downward movements at the Fixing allowed the defendants to buy silver cheaper than they would have been able to absent collusion, thereby profiting at the expense of members of the Class when the price of silver rose.

78. The defendants were also large participants in the market for Fix price-denominated derivatives. These contracts, like those for physical sales of silver, directly incorporate the Fix price in order to determine the cash flows between the parties. Suppressing the Fix price during the Fixing would thus make one participant profit at the expense of the other. The defendants can and did profit from their collusion in this way at the expense of members of the Class.

79. The defendants were also large participants in the market for such contracts as "digital options," and have contracts that have similar market-based triggers such as "stop loss" orders[1] and "margin" calls.[2] These contracts in various forms require the defendants to act, or not act, based on whether the price of silver crosses a specific threshold. By accepting these orders, the banks agreed to transact with the client at a specified price if the silver benchmark reached that price. By manipulating the Fixing, the defendants frequently were able to trigger (or avoid triggering) such orders, avoiding much of the risk in such obligations. The defendants were also able to make margin calls that otherwise would not have been made. The defendants can and did profit from their collusion in this way, at the expense of members of the Class.

80. The defendants all acted as market makers in the silver market during the Class Period. As such, the defendants had unique access to "order flow" information related to client orders and other sensitive non-public market information. This information was shared among some or all of the defendants throughout the trading day, including around the Fix, in order to create and maintain supra-competitive bid-ask spreads in the silver market. The purpose of this was to enhance their profits at the expense of the Class.

The Conspiratorial Communications

81. The Fixing Bank Defendants met (later, by conference call) once a day via the LSMF. The discussions by their nature involved the sharing of information, but the standing meeting also presented the further opportunity for daily collusion under the cover of this anachronistic process.

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[1] A "**stop-loss order**" is a specified level at which a financial product (or commodity) should be sold to limit potential losses. Clients place stop-loss orders with entities such as the defendants to help manage the risk arising from movements in silver prices.

[2] A "**margin call**" is a demand from a broker to an investor to deposit additional funds or securities so that the investor's margin account is raised to a certain level. Margin calls are made when the funds or securities in an investor's margin account need to be raised because they have fallen below a certain level calculated by the broker as being necessary to cover potential losses.

The call was unregulated, unrecorded and no records of the communications during the calls were kept.

82. Various electronic communication platforms were employed by the defendants' senior level traders to give effect to the conspiracy and to provide a means by which confidential information concerning customer orders could be improperly shared among the defendants. These electronic communication platforms include chat rooms, instant messages, proprietary trading venues and platforms, and emails. The use of electronic communication platforms allowed the defendants to simultaneously communicate with numerous other defendants on a global basis. The defendants used code words to avoid detection from authorities. The defendants formed these chat rooms with the specific intent to collude with each other to control or manipulate the price of silver and Silver Market Instruments and to maintain supra-competitive bid-ask spreads throughout the trading day. The defendants also used their proprietary trading platforms to signal desired price levels for silver by placing sequential identical quotes that constitute outliers when considered against prevailing market prices at the time. These outliers acted as signalling mechanisms whereby defendants and co-conspirators indicated the price to which they intended to manipulate the Fixing.

The Defendants Shared Confidential Customer Order Information to Control the Fixes

83. Through electronic means, the defendants shared their confidential customer orders for silver with one another. Each defendant aggregated its customers' orders to determine what its individual net position was going to be during the Fixings. The Fixing Bank Defendants then shared this information with one another to determine their aggregate net position. By sharing and aggregating their confidential customer order flows, the Fixing Bank Defendants had access to substantial information that was not otherwise available to the investing public. As a result, the

Fixing Bank Defendants could predict the movement of the price of silver more accurately than would have been possible absent collusion.

Methods of Controlling the Fixes

84. To execute their conspiracy, the defendants employed a number of tactics to control or manipulate the Fixings. These controlling or manipulative tactics included what is known as "netting off," "building," "giving the ammo," and "taking the ammo." The defendants undertook these trading strategies together in order to minimize their risk and maximize the impact of their scheme.

85. Each of these controlling or manipulative strategies was accomplished through the sharing of confidential customer information and trading positions. By sharing their confidential individual trading positions, the defendants gained an understanding of the overall order flows across the silver market.

Netting Off

86. Silver traders in the chat rooms with net orders in the ***opposite*** direction to the desired movement at the time of the Fixings would seek before the Fixing to transact or "net off" their orders with third parties outside the chat room rather than with silver traders in the chat room. This maintained the volume of orders in the desired direction held by the traders for the Fixing Bank Defendants and avoided orders being transacted in the opposite direction during the Fixings. This process has also been referred to as "*taking out the filth*" or "*clearing the decks*."

Building

87. Silver traders in the chat room with net orders in the ***same*** direction as the desired movement at the time of the Fixings would seek to transact with other conspirators. That way, one of the defendants could more easily control the process of ensuring the trades had the maximum effect at just the right time. This process was referred to as "building" or "*giving you the ammo*." This practice increased the influence of the traders at the Fixings by allowing them to control a larger proportion of the overall volume than they would otherwise have or to adopt particular trading strategies.

Painting the Screen

88. If the defendants did not have enough "ammo" to move the market, they would invent it. The process, called "*painting the screen*," involves placing orders to give the illusion of activity that would impact the Fixing with the intention that these orders would be cancelled after the Fixing had been closed.

Rigging the Auction

89. Additionally, the defendants had a direct means of affecting the Fixing by controlling the "auction" itself. The defendants coordinated trading activities prior to the Fixing window so as to cause the price to move in the desired direction, thereby making it easier to achieve the desired result during the "auction."

90. The Fixing Bank Defendants had an additional mechanism at their disposal. Acting on behalf of all members of the conspiracy, a Fixing Bank Defendant placed "auction" bids and quotes at prices during the Fixings regardless of what their true aggregate demands were that had

been funneled to them or were on their order books. Rather than participating in good faith, the Fixing Bank Defendants could simply submit aggregate “auction” “bids” that understated or overstated demand, particularly when doing so benefitted each defendants’ own proprietary positions even as it harmed the bank’s clients.

The Defendants’ Conspiracy Resulted in Artificial Prices for Silver Market Instruments

91. The prices of Silver Market Instruments are highly correlated with the Fix price.

92. The Fixings were supposed to be, and were understood by market participants as being, a reliable benchmark price for silver, including the market for Silver Market Instruments, because they reflected actual market supply and demand. This was not the case for at least two reasons.

93. First, the Chair of the Fixings was supposed to commence the auction process used in the Fixing by announcing (and then soliciting supply or demand levels from defendants in response) a figure that was the then-prevailing spot price for silver. In other words, the *starting point* for each day’s Fixing was held out to be the spot price of silver. The spot price for silver is the price for delivered physical silver, and thus the price upon which all silver-based or silver-derived investments are based.

94. Second, the auction that followed the Chair’s announcement of the prevailing spot price was supposed to be a *genuine* and *competitive* auction, based on *actual market supply and demand* for silver. The Fixing Bank Defendants were supposed to announce whether they were buyers or sellers at the Chair’s price based on net supply/demand for spot silver from their order books. This supply and demand was supposed to consist of orders from customers – market participants free to place orders with any Fixing Bank Defendant if one defendant’s prices were not sufficiently

competitive – and orders from defendants themselves, where defendants were engaging in proprietary trading, acting as direct market participants.

95. The Fixing Bank Defendants' manipulative conduct caused either: (1) the price at which the Chair commenced the Fixing to be artificial, or (2) the levels of market supply and demand that moved the Fixing price to the level at which it was ultimately fixed to be artificial.

96. By setting the price of the Fixing at a level different from what would have resulted absent collusion, the Fixing Bank Defendants manipulated the spot market for silver and thereby affected the broader market for Silver Market Instruments as the price for each of the Silver Market Instruments implicitly and expressly followed the Fixing prices.

97. As a result, Class Members who engaged in transactions for Silver Market Instruments suffered damages and loss. Where the Class Member engaged in transactions on behalf of another Class Member (including as part of managing the risks in an equity fund, mutual fund, pension plan or other investment vehicle), at least part of the artificial prices were passed-on to the holder of the investment vehicle either as a result of deflated value of the investment vehicle or through increased management fees imposed as a percentage of assets under management. As a result, the Class suffered losses in respect of both upward and downward price movements.

Concealment of the Conspiracy

98. During the Class Period, the defendants and their employees and agents, took active steps to, and did, conceal the unlawful conspiracy from Class Members.

99. The defendants fraudulently concealed their anti-competitive activities by, among other things, engaging in secret communications in furtherance of their conspiracy, agreement or

arrangement. These communications occurred within non-public chat rooms, instant messages, and through email, none of which was transparent to the plaintiffs or other Class Members.

100. The defendants actively and jointly concealed their collusive conduct. The defendants agreed among themselves not to publicly discuss or otherwise reveal the nature and substance of the acts and communications in furtherance of the agreements and arrangements alleged herein. The defendants also used code words and deliberately misspelled words to evade detection.

101. The Fixings occured during a secret and archaic process from which no records were kept. The defendants’ trades and trading strategies related to the Fix were not public information.

Summary

102. During the Class Period, the defendants and unnamed co-conspirators conspired, combined, agreed, and/or arranged with each other to fix, maintain, increase, control and unreasonably enhance the spot price of silver determined at the Fix, Silver Market Instruments as well as the bid-ask spreads in the silver market.

103. In furtherance of such conspiracy, arrangement or agreement, during the Class Period, senior executives, traders, and employees of the defendants, acting in their capacities as agents for the defendants, engaged in communications, conversations, and attended meetings with each other at times and places, some of which are unknown to the plaintiff. As a result of the communications and meetings, the defendants and unnamed co-conspirators unlawfully conspired, agreed and/or arranged to:

(a) fix, maintain, increase, decrease and control unreasonably the Fix price of silver and Silver Market Instruments; and

(b) monitor and enforce adherence to agreed-upon trading strategies to effect the conspiracy.

GOVERNMENT INVESTIGATIONS

104. Numerous criminal and regulatory investigations are underway concerning the collusion amongst the defendants, including in the United States, Switzerland, and Germany.

105. The law enforcement and regulatory authorities include:

(a) United States:

(i) the Department of Justice ("**DOJ**")

(ii) the Commodity Futures Trading Commission ("**CFTC**")

(b) Switzerland:

(i) the Swiss financial regulator ("**FINMA**")

(ii) The Swiss competition commission ("**WEKO**")

(c) Germany:

(i) the Federal Financial Supervisory Authority ("**BaFin**")

106. Switzerland's financial regulator FINMA found similar problems at UBS. It found "serious misconduct" by UBS in precious metal trading. FINMA's chief executive officer recently stated that the regulator has "seen clear attempts to manipulate fixes in the precious metals markets."

107. Specifically, FINMA found that UBS's precious metals traders had engaged in: (i) sharing information on order books with third parties (*e.g.*, stop loss orders); (ii) sharing so-called "flow information" with third parties on large current or imminent orders; (iii) sharing client names with third parties; (iv) front running; and (v) triggering stop loss orders. FINMA concluded that UBS's "compliance function in foreign exchange and precious metals trading was insufficient."

108. FINMA also noted problems with proprietary or "back book" trading at UBS. FINMA noted that such proprietary trading leads to conflicts of interest with UBS's clients especially because traders' compensation was set in part based on the success of the proprietary trading. FINMA noted that, "A substantial element of the conspicuous conduct in [precious metals] trading was the repeated front running (especially in the back book) of silver fix orders of one client. FINMA noted that with those particular episodes, "Owing to the frequency and obviousness of front running in the back book, the desk supervisors saw themselves forced – after some time of passive inactivity – to prohibit front running in the back book, but did not sanction the traders who engaged in it."

109. FINMA found that this conduct was tolerated or even engaged in by managers with responsibility for overseeing precious metals traders.

INDEPENDENT ADMINISTRATOR NOW RESPONSIBLE FOR THE FIXING

110. On August 15, 2014, CME Group and Thomson Reuters launched what is referred to as a new "**London Silver Price**" mechanism in partnership with LBMA. The new London Silver Price mechanism was promoted as providing "the over-the-counter spot silver market with a new transaction-based price setting mechanism for LMBA Silver Price that is IOSCO-compliant and fully electronic."

111. CME Group provides the electronic auction platform on which the prices are calculated, Thomson Reuters is responsible for administration and governance and the LBMA accredits price participants.

112. The London Silver Price keeps some of the main features of the Fixing, namely the auction-style process used to calculate the reference price. Thomson Reuters publishes the volumes of silver bars traded daily and the prices.

CAUSES OF ACTION

Breach of the Competition Act

113. The Conspiratorial Acts constitute offences under Part VI of the *Competition Act*, in particular, sections 45(1), 46(1) and 47(2) of the *Competition Act*. The plaintiffs claim on behalf of themselves and other Class Members loss and damage under section 36(1) of the *Competition Act* in respect of such unlawful conduct.

Breach of Foreign Law

114. The defendants and their unnamed co-conspirators' conduct, particularized in this statement of claim, took place in, among other places, the United States, the United Kingdom, various countries in Asia and various countries in Europe where such conduct was illegal and contrary to the competition laws of those jurisdictions.

Civil Conspiracy

115. The defendants and their co-conspirators voluntarily entered into agreements with each other to use unlawful means which resulted in loss and damage to Class Members. The unlawful means included the following:

(a) entering into the Conspiratorial Acts in contravention of section 45(1) and 47(2) of the *Competition Act*;

(b) the Canadian-based defendants giving effect to a foreign directive in contravention of section 46(1) of the *Competition Act*; and

(c) aiding, abetting and counselling the commission of the above offences, contrary to sections 21 and 22 of the *Criminal Code*, RSC 1985, c C-46.

116. In furtherance of the conspiracy, the defendants, their employees, agents and co-conspirators, carried out the Conspiratorial Acts described above.

117. The defendants and their co-conspirators were motivated to conspire. Their predominant purposes and concerns were to harm the Class.

118. The defendants and their co-conspirators intended to cause economic loss to the Class. In the alternative, the defendants and their co-conspirators knew in the circumstances that their unlawful acts would likely cause injury to the Class.

Unjust Enrichment

119. The defendants have been unjustly enriched as a result of the conduct alleged above. The Class Members have suffered a corresponding deprivation in the amount of the difference between

the prices actually paid by or on behalf of Class Members for physical silver or Silver Market Instruments and the prices which would have been paid in the absence of the Conspiratorial Acts.

120. Since the difference in price received by the defendants from the Class Members resulted from the defendants' wrongful and unlawful acts, there is and can be no juridical reason justifying the defendants retaining any part of it.

Waiver of Tort

121. In the alternative to damages, the plaintiffs plead an entitlement to "waive the tort" of civil conspiracy and claim an accounting, or other such restitutionary remedy, for disgorgement of the revenues generated by the defendants and their co-conspirators from their unlawful conspiracy.

122. It would be unconscionable for the defendants to retain the unlawful overcharge obtained as a result of the Conspiratorial Acts.

Breach of Contract

123. When certain of the defendants acted as market makers throughout the trading day, certain Class Members contracted with them directly when entering into contracts for the purchase or sale of Silver Market Instruments. These contracts included, without limitation, spot, futures and options contracts related to silver.

124. It was an implied term of the contracts between the Class Members and the defendants that when the defendants were acting as market makers, they would not manipulate the bid-ask spreads of Silver Market Instruments or other aspects of the silver market for their own benefit and at the Class Members' expense. To the extent that they manipulated the bid-ask spreads when acting as

market makers and other aspects of the silver market, the defendants breached their contracts with the Class Members and the Class Members have suffered damages as a result.

125. The defendant, BNS, operates an online trading platform called iTRADE.Caron used iTRADE to transact in Silver Market Instruments during the Class Period. It was the reasonable expectation of Caron that when using a trading service operated by BNS, such as iTRADE, that BNS would not engage in illicit activity in the silver market which would negatively affect the transactions Caron engaged in. During the Class Period BNS engaged in illicit activity in the silver market and breached its contract with Caron and other Class members who contracted with BNS or one of its affiliated entities.

Discovery of Losses

126. The plaintiffs did not discover, and could not have discovered through the exercise of reasonable diligence, the existence of the claims which are the basis of this action until recently.

127. The defendants and their co-conspirators actively, intentionally and fraudulently concealed the existence of the combination and conspiracy from the public, including the Class Members. The affirmative acts of the defendants alleged herein, including acts in furtherance of the conspiracy, were fraudulently concealed and carried out in a manner that precluded detection.

128. The defendants' and their co-conspirators' anti-competitive conspiracy was self-concealing. The defendants took active, deliberate and wrongful steps to conceal their participation in the alleged conspiracy.

129. Because the defendants' agreements, understandings and conspiracies were kept secret, the Class Members were unaware of the defendants' unlawful conduct during the Class Period, and

did not know that the silver prices they were paying (or were being paid on their behalf) had been unlawfully fixed, maintained, increased, decreased, controlled, and unreasonably enhanced.

REMEDIES

Damages

130. As a result of the Conspiratorial Acts:

(a) the prices of physical silver and Silver Market Instruments have been, directly or indirectly, fixed, maintained, increased, decreased controlled, and unreasonably enhanced at artificial and non-competitive levels; and

(b) competition in the silver market has been unduly restrained.

131. The defendants' Conspiratorial Acts caused prices to be set at artificial levels, rather than if set by free and open competition, throughout the Class Period. The collusion necessarily injures participants in the silver market and the Class suffered loss and damage as a result of the defendants' Conspiratorial Acts.

132. During the Class Period, the plaintiffs and other Class Members transacted in the silver market. By reason of the alleged violations of the *Competition Act* and the common law, the plaintiffs and other Class Members were deprived of a competitive marketplace and exposed to artificial volatility.

133. Absent collusion, the defendants would have had incentives to avoid the abusive trading practices described above. Through collusion, Class Members were deprived of the benefits of a

competitive marketplace which would have given rise to narrower bid-ask spreads on Silver Market Instruments.

134. The defendants' anticompetitive conduct had severe adverse consequences on competition in that the defendants artificially ensured advantageous market movements in price of silver and Silver Market Instruments by exchanging confidential customer information and agreeing to collusive trading strategies. Under the facts alleged herein, the Class Members could not escape such conduct because of the dominant positions occupied by the defendants in the silver market.

135. No sole Fixing Bank Defendant could accomplish systemic and continuing control or manipulation of the Fixings without coordinating with the other defendants. Absent the Fixing Bank Defendants' knowledge of one another's confidential customer information, the conduct alleged herein would be a risky strategy. The Fixing Bank Defendants benefited from coordinating their market activities.

136. The direct, foreseeable and proximate result of the defendants' Conspiratorial Acts was to cause the plaintiffs and Class damages and loss.

137. The damage is capable of being quantified on an aggregate basis as the difference between the prices actually paid by (or on behalf of) Class Members for physical silver or Silver Market Instruments and the prices which would have been paid in the absence of the unlawful conspiracy.

138. All amounts payable to the class on account of damages and disgorgement should be calculated on an aggregate basis pursuant to section 24 of the *Class Proceedings Act*, or otherwise.

139. In addition, the defendants are jointly and severally liable to pay costs of investigation and prosecution of this action pursuant to section 36 of the *Competition Act.*

Punitive, Aggravated and Exemplary Damages

140. The defendants used their market dominance, illegality and deception in furtherance of a conspiracy to illegally profit from transactions in the silver market and related Silver Market Instruments. They were, at all times, aware that their actions would have a significant adverse impact on Class Members. The conduct of the defendants and their co-conspirators was high-handed, reckless, without care, deliberate, and in disregard of the Class member's rights.

141. Accordingly, the plaintiffs request substantial punitive, exemplary and aggravated damages.

SERVICE OUTSIDE OF ONTARIO

142. The plaintiffs are entitled to serve this statement of claim outside Ontario without a court order pursuant to the following rules of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 because the claim:

(a) is in respect of a tort committed in Ontario (Rule 17.02(g)); and

(b) is against a person carrying on business in Ontario (Rule 17.02(p)).

RELEVANT LEGISLATION

143. The plaintiffs plead and rely on the *Bank Act*, S.C. 1991, c. 46, as amended; *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended; the *Class Proceeding Act, 1992*, S.O. 1992, c. 6, as amended; the *Competition Act*, R.S.C. 1985, c.34, as amended; and the *Criminal Code*, R.S.C. 1985, c C-46.

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-and-

THE BANK OF NOVA SCOTIA et al.
Defendants

Court File No. CV-16-551067-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM
(Notice of Action issued April 15, 2016)

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