UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE BANK OF NEW YORK MELLON CORP. FOREX TRANSACTIONS LITIGATION	No. 12-MD-2335 (LAK) (JLC)
THIS DOCUMENT RELATES TO:	
Southeastern Pennsylvania Transportation Authority v. The Bank of New York Mellon Corporation, et al.	No. 12-CV-3066 (LAK) (JLC)
International Union of Operating Engineers, Stationary Engineers Local 39 Pension Trust Fund v. The Bank of New York Mellon Corporation, et al.	No. 12-CV-3067 (LAK) (JLC)
Ohio Police & Fire Pension Fund, et al. v. The Bank of New York Mellon Corporation, et al.	No. 12-CV-3470 (LAK) (JLC)
Carver, et al. v. The Bank of New York Mellon, et al.	No. 12-CV-9248 (LAK) (JLC)
Fletcher v. The Bank of New York Mellon, et al.	No. 14-CV-5496 (LAK) (JLC)

MEMORANDUM IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF THE SETTLEMENT AND THE PROPOSED PLAN OF ALLOCATION, AS WELL AS CERTIFICATION OF THE SETTLEMENT CLASS

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RULES

Lead Plaintiffs Ohio Police & Fire Pension Fund ("OP&F"), School Employees Retirement System of Ohio ("SERS," and with OP&F, the "Ohio Funds"), Southeastern Pennsylvania Transportation Authority ("SEPTA"), International Union of Operating Engineers, Stationary Engineers Local 39 Pension Trust Fund ("IUOE Local 39"), Joseph F. Deguglielmo (in his capacity as a participant in and representative of the Kodak Retirement Income Plan), and Landol D. Fletcher (in his capacity as a participant in and representative of the Central States, Southeast and Southwest Areas Pension Plan) respectfully submit this memorandum in support of their motion for final approval of the proposed Settlement in the above-referenced actions, in accordance with Federal Rule of Civil Procedure 23.[1] As detailed below and in the other materials submitted in support of the Settlement, this proposed resolution, including the Plan of Allocation, is abundantly fair, reasonable, and adequate, and should be approved under Rule 23(e). Further, the record supports certification of the Settlement Class (as defined in the Stipulation) under Rule 23(a) and 23(b)(3).[2]

In support of this motion, Lead Plaintiffs incorporate Chiplock Declaration, the Declaration of Sharan Nirmul ("Nirmul Decl.") (Dkt. No. 584), and the Declaration of J. Brian McTigue ("McTigue Decl.") (Dkt. No. 585), which were filed contemporaneously with the Notice Motion, as well as the following declarations being filed contemporaneously with this motion: (i) Joint Declaration of Sharan Nirmul and Daniel P. Chiplock in Support of (1) Lead

[1] Unless otherwise indicated, capitalized terms have the same meaning as in the Stipulation and Agreement of Settlement ("Stipulation") attached as Exhibit 1 to the Declaration of Daniel P. Chiplock ("Chiplock Decl.") (Dkt. No. 583) submitted in support of Lead Plaintiffs' Motion for (1) provisional certification of the Settlement Class, (2) appointment of Lead Plaintiffs as Settlement Class representatives, (3) approval of the proposed form and manner of notice, and (4) scheduling of a final approval hearing ("Notice Motion"), or as used in the Notice Motion. The Stipulation was executed on behalf of Lead Plaintiffs as well as plaintiffs Deborah Jean Kenny, Edward C. Day, Lisa Parker, and Frances Greenwell-Harrell (from *Carver v. The Bank of New York Mellon*, No. 12-cv-09248-LAK (S.D.N.Y.)). Those plaintiffs and Lead Plaintiffs are referred to collectively as "Plaintiffs."

[2] For convenience, the "Settlement Class" is often also referred to simply as the "Class," and "Settlement Class Members" simply as "Class Members."

Plaintiffs' Motion for Final Approval of the Settlement and the Proposed Plan of Allocation, as Well as Certification of the Settlement Class, and (2) Lead Settlement Counsel's Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards to Plaintiffs ("Joint Decl."); (ii) Declaration of Professor John C. Coffee in Support of Motion for Final Approval of Settlement and an Award of Attorneys' Fees and Service Awards, and Reimbursement of Litigation Expenses ("Coffee Decl."); (iii) Affidavit of Stephen J. Cirami [of Garden City Group, LLC] Regarding (A) Mailing of the Notice; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusion Received to Date ("Cirami Aff.") (Joint Decl. Ex. 15); and (iv) declarations of representatives of the Lead Customer Plaintiffs in support of final approval of the Settlement as well as the application for attorneys' fees, reimbursement of Litigation Expenses, and Service Awards.[3]

PRELIMINARY STATEMENT

The litigation from which this Settlement arises was, in short, a war. Plaintiffs battled on two fronts: They vigorously pushed to marshal evidence in further support of their allegations—which included reviewing more than 25 million pages of documents produced by The Bank of New York Mellon ("BNYM" or the "Bank") and more than three million pages of documents produced by third-parties; taking, defending, or otherwise participating in 110 depositions of BNYM personnel, Plaintiffs and their agents, and third-party witnesses in locations across the country and abroad, as well as 18 depositions relating to other cases proceeding in the MDL;

[3] *See* Joint Decl. Ex. 12 (Declaration of Mary Beth Foley, Esq. [of OP&F] in Support of Motion for Final Approval of Settlement and Award of Attorneys' Fees and Service Awards and Reimbursement of Litigation Expenses); Ex. 13 (Declaration of Joseph M. Marotta, Esq. [of SERS] in Support of Motion for Final Approval of Settlement and Award of Attorneys' Fees and Service Awards and Reimbursement of Litigation Expenses); Ex. 14 (Declaration of Gino Benedetti, Esq. [of SEPTA] in Support of Motion for Final Approval of Settlement, Award of Attorneys' Fees and Service Awards and Reimbursement of Litigation Expenses); Ex. 11 (Affidavit of Jerry Lee Kalmar [of IUOE Local 39] in Support of Motion for Final Approval of Settlement and Award of Attorneys' Fees and Service Awards, and Reimbursement of Litigation Expenses).

briefing numerous discovery motions; and proffering expert reports on damages and the meaning of "best execution" in the context of standing instruction foreign exchange ("SI FX") transactions. At the same time, Plaintiffs defended against BNYM's relentless efforts to dismiss their claims and strafe them with discovery, an offensive that included: (1) taking *18* depositions of just the Ohio Funds' representatives; and (2) a concerted effort to hold SEPTA, IUOE Local 39, and Class Members individually responsible for the Bank's costs (including attorneys' fees and expenses) in defending not just the customer cases, but also actions brought by government entities. In short, and unlike typical antitrust or securities actions, BNYM—represented by sophisticated, creative, and tenacious counsel—attempted to turn the litigation tables on its customers, specifically those that exposed, and sought to hold the Bank accountable for (what Plaintiffs alleged) were years of hidden self-dealing in connection with SI FX transactions.

The Settlement was thus, in contrast to this Court's observations concerning securities class actions,[4] the farthest thing from preordained.[5] Nearly every aspect of these cases was contested, and the Settlement came after three days of intense, arm's-length negotiations before former United States District Judge Layn Phillips, a seasoned and respected mediator. The proposed resolution provides for two sources of recovery to the Settlement Class: (1) a $335 million payment by or on behalf of Defendants to the Class; and (2) the distribution of an additional $155 million to Class Members in connection with the pending settlement of the New York Attorney General's action against BNYM ("NYAG Settlement") and $14 million for ERISA-plan Class Members under the settlement between the U.S. Department of Labor ("DOL") and BNYM ("DOL Settlement"). Class Members thus stand to receive a total gross

[4] *See, e.g.*, *In re IndyMac Mortg.-Backed Sec. Litig.*, No. 09-cv-4583 (LAK), 2015 U.S. Dist. LEXIS 37052, at *17 (S.D.N.Y. Mar. 24, 2015) ("securities cases like this practically always settle, meaning that the risk of total non-recovery was almost non-existent").
[5] *See, e.g.*, Coffee Decl. ¶¶ 12-17, 40-44.

settlement recovery of approximately 35% of their maximum potential recovery at trial, as calculated by Plaintiffs' damages expert during the Litigation. This is not a small-claims or small-recovery settlement; rather, it equates to a median net recovery (i.e., accounting for the requested attorneys' fee and reimbursement of Litigation Expenses) of $400,000 per Class Member (with nearly 100 Class Members to receive more than a million dollars apiece). This result appropriately balances Lead Plaintiffs' objective of securing the highest possible recovery for Class Members while accounting for the risk of receiving nothing if Plaintiffs were to fail at the class-certification or summary-judgment stages, or lose at trial or on appeal.

Additionally, Rule 23's prerequisites are satisfied for purposes of the class certification the parties agree should effectuate the proposed Settlement. As detailed in the Notice Motion and further explained below, the record supports a finding of numerosity, commonality, typicality, predominance, and superiority, in the relevant context of this Settlement. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 619-20, 117 S. Ct. 2231, 2247-48 (1997). Lead Plaintiffs and Lead Settlement Counsel—Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser"), Kessler Topaz Meltzer & Check, LLP ("Kessler Topaz"), and McTigue Law LLP ("McTigue Law")—also have demonstrated their commitment to protecting absent Class Members' interests throughout the Litigation, rendering these firms adequate representatives of the Class.[6] Further, the class notice program, which the Court approved in its order of April 22, 2015 ("Notice Order"), comports with Rule 23(c) and due process.

Lead Plaintiffs therefore respectfully request that the Court enter an order, substantially in the form attached as Exhibit B to the Stipulation, approving the Settlement and the Plan of Allocation, certifying the Settlement Class under Rule 23, and entering judgment.

[6] Lieff Cabraser and Kessler Topaz are referred to collectively as "Co-Lead Customer Counsel."

BACKGROUND OF THE LITIGATION AND SUMMARY OF THE SETTLEMENT TERMS

A. The Parties Actively Litigated These Cases for Nearly Four Years.

The accompanying Joint Declaration details the history of the Litigation, in particular the significant efforts by Co-Lead Customer Counsel and the firms of the Plaintiffs' Steering Committee, who (i) developed the whistleblower claims that led to this Litigation; (ii) filed the first putative class actions before any governmental proceedings against BNYM; (iii) litigated those claims aggressively prior to the transfer of all BNYM FX cases to this Court; (iv) drafted several complaints, including a Master Customer Class Complaint ("Master Complaint") to streamline the Litigation; (v) briefed several motions to dismiss, including in response to BNYM's counterclaims and third-party claims; (vi) orchestrated the efficient and coordinated litigation between all plaintiff entities following the establishment of this MDL; (vii) took, defended, or otherwise participated in 128 depositions;[7] (viii) analyzed more than 29 million pages of documents produced by parties and third-parties; (ix) worked with four experts, each of whom submitted one or more reports, including opening and reply reports by G. William (Bill) Brown, Jr., Esq., of Duke Law School, which presented a model to determine damages resulting from BNYM's practice of overcharging custodial clients for SI FX transactions;[8] (x) worked

[7] The vast majority of those depositions (110) pertained directly to the Customer Class Cases, consisting of 53 depositions of BNYM personnel, 32 depositions of Plaintiffs and their agents, and 25 depositions of third-parties. Eighteen additional depositions related to *People ex rel. Schneiderman v. The Bank of New York Mellon Corp.*, No. 09/114735 (N.Y. Sup. Ct. N.Y. Cnty.) ("New York Action"); *Louisiana Municipal Employees' Retirement System v. The Bank of New York Mellon Corp.*, No. 11-cv-09175-LAK (S.D.N.Y.); *In re Bank of New York Mellon Corp. False Claims Act Foreign Exchange Litigation*, No. 12-cv-03064-LAK (S.D.N.Y.); and *Los Angeles County Employees Retirement Association ex rel. FX Analytics v. The Bank of New York Mellon Corp.*, No. 12-cv-08990-LAK (S.D.N.Y.). *See* Joint Decl. ¶¶ 25, 105-08, 136.

[8] Bill Brown, co-founder of Palmer Labs, LLC and 8 Rivers Capital, LLC, is a former Professor of the Practice of Law at Duke, and currently teaches as a Senior Lecturing Fellow there. After working as a partner at Sidley & Austin, Professor Brown later joined the currency and commodity sales group at Goldman Sachs & Co., where he helped grow the FX business in the asset-management community. In 1996, Professor Brown became global head of sales for currency and fixed income at AIG International; a year later, he was recruited by Morgan Stanley to become U.S. head of FX sales, and ultimately became global co-head of listed derivatives there.

with their experts to respond to reports submitted by BNYM's six experts; and (xi) aggressively negotiated and achieved a global resolution of this Litigation. The Joint Declaration also discusses the factual and legal challenges Plaintiffs faced, including the risk of failing to obtain certification of a nationwide litigation class in the Customer Class Cases and of losing at the summary-judgment stage or trial. Lead Plaintiffs respectfully refer the Court to the Joint Declaration, and incorporate it by reference into this memorandum.

B. The Settlement Affords Class Members Significant Monetary Relief in Exchange for Releasing Their Claims.

This Settlement, if approved, will provide a $504 million gross recovery to Class Members, amounting to approximately 35% of the margins BNYM recorded for SI FX during the proposed Class Period (January 12, 1999 to January 17, 2012).[9] The mean recovery (net of proposed attorneys' fees and reimbursement of Litigation Expenses) for Class Members—approximately 1,218 domestic custodial clients of BNYM and its two predecessor entities, The Bank of New York ("BNY") and Mellon Bank, N.A. ("Mellon")—is more than $400,000, and nearly 100 of them will receive net recoveries of more than a million dollars.[10]

Specifically, Class Members will receive $335 million directly through this Settlement and $155 million pursuant to the NYAG Settlement. Further, $70 million of the $335 Settlement Amount will go to Class Members that are ERISA plans, representing an approximately $12 million premium over the $58 million those entities would have received through an ordinary pro rata distribution using the damages model developed in the Customer Class Cases (as further discussed in Section II below). ERISA-plan Class Members will also receive $14 million from the DOL Settlement. The NYAG Settlement and the DOL Settlement were negotiated

[9] *See* Joint Decl. ¶ 20.

[10] *Id.*

concurrently with this Settlement and are being administered with it.

ARGUMENT

I. The Settlement Is Fair, Reasonable, and Adequate Under Rule 23(e).

To merit final approval, the proposed Settlement must be "fair, reasonable, and adequate" as prescribed by Rule 23. A fairness determination entails scrutiny of both the procedural and substantive aspects of a proposed settlement. *See Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013). The process that led to this Settlement, as well as the Settlement's terms, satisfy the well-established standards in this Circuit.

A. The Settlement Is the Product of Vigorous Negotiations between Well-Informed, Sophisticated Counsel and Overseen by an Experienced Mediator.

The Court must evaluate "the negotiating process leading up to the settlement . . . to ensure that the settlement resulted from an arm's-length, good faith negotiation between experienced and skilled litigators." *Id.* The Court's scrutiny, however, should be informed by "the general policy favoring the settlement of litigation." *In re CitiGroup Inc. Bond Litig.*, 296 F.R.D. 147, 154 (S.D.N.Y. 2013). Absent fraud or collusion, the Court "should be hesitant to substitute its judgment for that of the parties who negotiated the settlement." *City of Providence v. Aéropostale, Inc.*, No. 11 Civ. 7132 (CM) (GWG), 2014 U.S. Dist. LEXIS 64517, at *13 (S.D.N.Y. May 9, 2014), *aff'd sub nom.*, *Arbuthnot v. Pierson*, No. 14-2135, 2015 U.S. App. LEXIS 9889 (2d Cir. June 10, 2015).[11] Nevertheless, because this Settlement was reached before class certification, "it is subject to a higher degree of scrutiny in assessing its fairness." *CitiGroup*, 296 F.R.D. at 155.

An "initial presumption of fairness and adequacy applies" where, as here, a proposed

[11] Unless otherwise indicated, all internal citations and quotation marks have been omitted from this brief, and all emphasis has been added.

settlement "was reached by experienced, fully-informed counsel after arm's-length negotiations and, ultimately, with the assistance of . . . one of the nation's premier mediators in complex, multi-party, high stakes litigation." *Aéropostale*, 2014 U.S. Dist. LEXIS 64517, at *11. This presumption arises "because if the negotiation process is fair the forces of self-interest and vigorous advocacy will of their own accord produce the best possible result for all sides." *CitiGroup*, 296 F.R.D. at 155. Further, that sophisticated institutional investors OP&F, SERS, SEPTA, and IUOE Local 39 have approved of the proposed Settlement entitles it to "an even greater presumption of reasonableness." *Aéropostale*, 2014 U.S. Dist. LEXIS 64517, at *12.

The parties were represented by experienced, sophisticated counsel,[12] who engaged in three days of intense, arm's-length negotiations before retired federal judge Layn Phillips, a nationally respected mediator with substantial experience in the resolution of complex financial litigation.[13] Further, given the extraordinary amount of discovery the parties conducted before negotiating this Settlement—including approximately 29 million pages of documents, 110 depositions, and 11 expert reports—Lead Plaintiffs were well-informed of the risks and benefits of resolving the Litigation at this stage.[14] In short, "[t]he hard-fought and arduous settlement negotiations demonstrate that the Settlement is the result of fair and honest negotiations," and Lead Settlement Counsel, "who have extensive experience in the prosecution of complex class action litigation, with particular expertise in commercial and financial litigation, have made a considered judgment that the Settlement is not only fair, reasonable and adequate, but an

[12] *See, e.g.*, Chiplock Decl. Ex. 2 (Lieff Cabraser résumé); Nirmul Decl. Ex. 1 (Kessler Topaz résumé); McTigue Decl. Ex. 1 (McTigue Law résumé).

[13] Joint Decl. ¶¶ 170-83; *see also In re Bear Stearns Cos. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 265 (S.D.N.Y. 2012) (settlement was procedurally fair where "[t]he parties, represented by highly experienced and capable counsel, engaged in extensive arm's length negotiations, which included multiple sessions mediated by retired federal judge Layn R. Phillips, an experienced and well-regarded mediator," and the parties had "engaged in substantial and meaningful discovery efforts").

[14] *See* Joint Decl. ¶¶ 13, 32, 68-70, 165-67, 186-97.

excellent result for the Settlement Class." *See Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331 (CM), 2014 U.S. Dist. LEXIS 37872, at *27-28 (S.D.N.Y. Mar. 21, 2014). The Court can thus take comfort that Class Members' interests were protected throughout the negotiations that produced this resolution.

B. The Settlement Is Substantively Fair Under The Applicable *Grinnell* Factors.

The Settlement is also substantively fair. In making this assessment, courts look to the nine factors set forth in *Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974):

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Charron, 731 F.3d at 247 (alteration in original) (quoting *Grinnell*, 495 F.2d at 463). It is not necessary to satisfy all of the *Grinnell* factors; rather, "the Court should look at the totality of these factors in light of the circumstances." *Shapiro*, 2014 U.S. Dist. LEXIS 37872, at *24.

1. The Litigation involved complex issues of fact and law, and resolution of class certification, summary judgment, and trial would have taken many months.

This first *Grinnell* factor "captures the probable costs, in both time and money, of continued litigation." *Id.* at *28. Here, as in *Grinnell*, further litigation "would involve extensive and contested motion practice, and, assuming the success of the Class Plaintiffs at each of these stages, a complex and costly trial, followed by likely appeals," all the while presenting "numerous hurdles to establishing [BNYM]'s liability." *Id.* at *29. Any potential recovery, moreover, "would occur years from now, substantially delaying payment . . . to the Settlement

Class." *Id.*

As detailed further below, the Litigation involved numerous disputed questions of law, which would have required extensive analysis by both sides at four stages: class certification, summary judgment, trial, and appeal. Further, given the complex nature of the alleged misconduct relating to BNYM's charging excessive markups and markdowns on SI FX transactions, expert analysis was critical to establishing the Bank's liability. The parties had begun to engage in expert discovery, with Lead Plaintiffs submitting five expert reports and BNYM submitting six (five directed at the Customer Class Cases and one at the ERISA Actions),[15] and Lead Plaintiffs would have had to expend significant time and resources to prepare for, and lead, depositions of the Bank's experts, as well as to submit any motions to exclude those experts' opinions or testimony.[16] Additionally, determining the appropriate measure of damages would have consumed significant time and resources (beyond the efforts Lead Plaintiffs already had devoted to formulating a Classwide damages methodology).

Class certification also presented particular complexities, which would have entailed a more extensive Rule 23 inquiry—and thus more uncertainty and risk—than cases brought, for example, under the federal securities laws, because the claims in the Customer Class Cases arose under state law. Notably, the custodial agreements between BNYM and Class Members, who reside throughout the United States and in several other countries, provided for the application of the laws of various jurisdictions. While Co-Lead Customer Counsel's review of hundreds of those agreements revealed that the majority of them called for the laws of New York, California,

[15] Joint Decl. ¶¶ 157-69.

[16] Lead Plaintiffs already were contemplating moving to exclude the opinions of BNYM's expert David Sitkoff, who submitted a report purporting to detail dissimilarities among the various states' fiduciary-duty laws, as improperly offering a legal opinion that would invade the province of the factfinder.

Pennsylvania, Massachusetts, and Delaware,[17] even that relatively small group would have presented challenges to certification of a litigation class, and at the very least would have required an extensive analysis, which the Bank no doubt would have contested. Presenting sufficient evidence to demonstrate the manageability of a trial under the laws of several states would have required Lead Plaintiffs to intricately detail the relevant states' laws, including any material differences among them, and to prepare a trial plan.[18] In short, while Lead Plaintiffs believed there was a real basis for granting certification of a multi-state class or subclasses—given the similarities of the states' laws underlying their claims of a common cause of conduct that BNYM violated contracts with its customers—obtaining certification would have been challenging and time-consuming.

The complexities relating to class certification and liability, as well as the sheer volume of evidence, virtually ensured that proceeding with the Litigation would have entailed millions more dollars in lodestar and expenses for Lead Settlement Counsel, with an uncertain outcome. This factor weighs strongly in favor of final approval of the Settlement, which provides significant recoveries to Class Members.

2. The positive reaction of Class Members supports final approval.

Class Members' favorable reaction to the Settlement "constitutes 'strong evidence' of [its] fairness . . . and supports judicial approval." *See Shapiro*, 2014 U.S. Dist. LEXIS 37872, at *31.[19] Claims administrator Garden City Group, LLC ("GCG") mailed 1,365 "Notice Packets,"

[17] Joint Decl. ¶¶ 93-97.

[18] *See, e.g.*, *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 71 n.59 (S.D.N.Y. 2002) (Kaplan, J.) ("Attempts at such extensive analysis often include model jury instructions and verdicts forms, as well as an attempt to group state laws by their relevant differences.").

[19] *See also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 119 (2d Cir. 2005) ("the favorable reaction of the overwhelming majority of class members to the Settlement is perhaps the most significant factor in our *Grinnell* inquiry").

consisting of the Notice and a personalized cover letter, directly to Class Members.[20] GCG also caused the Summary Notice to be published in *The Wall Street Journal* and on *PR Newswire*, in accordance with the Notice Order, and provided additional information to Class Members.[21] Further, the settlement website, which provides information regarding the Settlement and Class Members' anticipated recoveries, had 926 distinct visitors and 1,386 website hits through August 12, 2015.[22] Class Members, who are sophisticated institutions in their own right, have been provided ample information about the Settlement and the specific amount each will receive.

Thus far only two Class Members have requested exclusion from the Class,[23] and no objections to the Settlement have been filed (the deadline to request exclusion is August 17, 2015, and the deadline to object to the Settlement is August 26, 2015). The lack of significant opposition to the Settlement supports final approval.[24]

3. That the Settlement comes at an advanced stage of the Litigation, after a massive amount of discovery, supports final approval.

Courts consider the stage of the proceedings and amount of discovery completed "to ensure that plaintiffs had access to sufficient information to evaluate their case properly and to assess the adequacy of any settlement proposal." *Shapiro*, 2014 U.S. Dist. LEXIS 37872, at *35. The Settlement was reached after four years of litigation, including voluminous discovery, motions to dismiss, and discovery-related disputes and on the cusp of Lead Plaintiffs' motions

[20] Cirami Aff. ¶ 9.

[21] *Id.* ¶¶ 10-13.

[22] *Id.* ¶ 5.

[23] *Id.* ¶ 14. GCG will submit a supplemental affidavit after the August 17, 2015 exclusion deadline that addresses any additional requests for exclusion received. To the extent any objections or additional exclusion requests are timely filed, Lead Plaintiffs will submit reply papers with the Court by September 15, 2015 to address them.

[24] *See, e.g.*, *Shapiro*, 2014 U.S. Dist. LEXIS 37872, at *31-34 (support for settlement was "overwhelming" where nearly 2,800 notices were mailed to class members, resulting in nine valid opt-out requests and one objection).

for class certification.[25] To characterize Plaintiffs as sufficiently informed to assess the merits of the Settlement would be a vast understatement.

4. Risks to class certification and victory on the merits support final approval.

These cases exemplify the long-established understanding that "complex class actions are difficult to litigate," as "[t]he legal and factual issues involved are always numerous and uncertain in outcome." *See Shapiro*, 2014 U.S. Dist. LEXIS 37872, at *36-37.[26] While Plaintiffs were confident in the strength of the evidence adduced through discovery, as well as their arguments supporting certification of a nationwide class or appropriate subclasses, they faced significant risks that (i) the Court would not certify a litigation class for some or all contracts, states, or claims; (ii) BNYM would obtain summary judgment as to all or part of Plaintiffs' claims; (iii) a jury would return a verdict for BNYM; or (iv) a favorable judgment would ultimately be reduced or reversed on appeal.

As the Litigation neared the class-certification and summary-judgment stages, the Customer Class Plaintiffs focused on three central theories of BNYM's liability: breach of contract, breach of fiduciary duty, and violation of state consumer-protection laws.[27] Each claim confronted substantial hurdles with respect to class certification and liability.

As discussed above, the choice-of-law provisions in Class Members' custodial agreements with BNYM called for the application of multiple states' laws, presenting hurdles to certification of a litigation class, and at the very least requiring an extensive state-law analysis.

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[25] *See* Joint Decl. ¶¶ 184-97.

[26] In weighing this factor, the Court "is not required to decide the merits of the case or resolve unsettled legal questions, or to foresee with absolute certainty the outcome of the case." *Id.* at *37. Rather, the Court "need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *Id.*

[27] The Customer Class Plaintiffs also asserted claims for conversion, breach of the implied covenant of good faith and fair dealing, and unjust enrichment.

The Customer Class Plaintiffs would have faced vigorous opposition by the Bank, and the Court might have denied class certification.[28]

Breach of Contract. To prevail on their contract claims, the Customer Class Plaintiffs had to prove that valid contracts existed and that their terms supported Plaintiffs' theory of liability, i.e., that the scope of BNYM's contractual duties included either providing the best rate of the day or, at least, substantially similar rates to those received by non-SI FX (negotiated FX) customers. As the Court has noted, "[t]he challenge in assessing this claim is that the parties did not reduce their relationship to a single writing." *In re Bank of N.Y. Mellon Corp. Forex Transactions Litig.*, 921 F. Supp. 2d 56, 71 (S.D.N.Y. 2013) ("*SEPTA*"). Instead, a series of documents contained BNYM's SI FX pricing obligations. Further, custodial clients did not uniformly update those agreements. Plaintiffs thus faced challenges to proving that a materially common set of contractual terms existed for every Class Member throughout the Class Period. This case presented one of the first, if not the first, litigations involving the emerging practice of ephemeral, piecemeal, or unilaterally amended internet website "agreements."

The Customer Class Plaintiffs faced the additional challenge of convincing the factfinder that terms such as "best execution," "comparable arm's length transactions," or "best rate of the day" had substantially the same meaning with respect to every Class Member, or every transaction with respect to any individual Class Member. BNYM sought to establish, through expert testimony and extensive third-party discovery, that no common understanding or

[28] *See, e.g.*, *Rossi v. P&G*, No. 11-7238 (JLL), 2013 U.S. Dist. LEXIS 143180, at *22 (D.N.J. Oct. 3, 2013) (approving settlement where, *inter alia*, plaintiffs confronted "the risk that the Court would not find this action suitable for certification or not find it suitable for litigation on a multi-state basis"); *Yarington v. Solvay Pharm., Inc.*, 697 F. Supp. 2d 1057, 1062-63 (D. Minn. 2010) ("Given the numerous state laws that would likely be at issue, the Court recognizes that certifying a class would have presented some difficulties. Even if Plaintiffs had obtained class certification, the trial of their claims under multiple state consumer laws would have required substantial preparation and involved the presentation of dozens of witnesses and numerous experts, with no assurance of a favorable outcome.").

application of those terms existed in the FX markets, a defense Plaintiffs contested. Nevertheless, the risk existed that the Court on summary judgment, or ultimately the factfinder at trial, would agree with the Bank. The ERISA Plaintiffs likewise faced this risk.

Breach of Fiduciary Duty. The Customer Class Plaintiffs' fiduciary-duty claim, arising from an agent's fiduciary obligation to provide full disclosure to its beneficiaries, also involved thorny questions of law. Plaintiffs had to prove both that BNYM served as a fiduciary to its custodial clients and that in its fiduciary capacity the Bank had a duty to fully and fairly disclose its SI FX practices to them. Those prerequisites to liability entailed meaningful risk for Plaintiffs and Class Members.

The scarcity of law governing the duties of a "custodian" posed a substantial risk to establishing predominance and to prevailing at summary judgment or trial. While the laws of the relevant states hold that a fiduciary owing a duty of loyalty must fully and fairly disclose material terms governing the parties' relationship, Plaintiffs nonetheless faced challenges arising from the lack of uniform disclosures by BNYM to its clients—here, more than 1,200 Class Members—regarding the scope of the custodial relationship.

Violation of State Consumer-Protection Laws. The Customer Class Plaintiffs faced substantial risk that the Court would rule that consumer-protection statutes, including Section 349 of New York's General Obligations Law ("NY GBL"), did not reach the conduct at issue, and thus grant summary judgment (or judgment as a matter of law at trial) to BNYM. Indeed, while this Litigation was pending, Judge Cote of this District held, in a similar action challenging JPMorgan's automated FX practices, that the NY GBL did not apply to contracts between

sophisticated financial institutions because they were not "consumers."[29]

Beyond the substantial risks of achieving no recovery on their claims, Plaintiffs confronted an additional, extraordinary risk: the prospect of being held liable on counterclaims and third-party claims brought by BNYM. As the Court is aware, when it answered the Master Complaint, BNYM also asserted counterclaims against SEPTA and IUOE Local 39, as well as "conditional" counterclaims against putative class members and third-party claims against IUOE Local 39's Trustees (collectively, the "Counterclaims"). According to BNYM, its custody agreements with those entities and individuals, as well as with numerous Class Members, afforded the Bank the right to indemnification against all losses, including attorneys' fees and costs, in connection with defending the claims brought in the Customer Class Cases. BNYM further alleged that the Customer Class Plaintiffs were required under their custodial contracts to indemnify the Bank for its losses, including attorneys' fees and costs, *in connection with the government actions*. BNYM, through its Counterclaims, thus sought potentially tens of millions of dollars from Plaintiffs and Class Members.

The Court largely denied Plaintiffs' motion to dismiss the Counterclaims. While dismissing the "conditional" counterclaims against absent putative Class Members as premature, the Court upheld the Bank's counterclaims against SEPTA and IUOE Local 39 as well as its third-party claims against IUOE Local 39's Trustees. The Court's decision also left open the possibility that BNYM could reassert its counterclaims against Class Members once a class was certified.

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[29] *See La. Mun. Police Emps. Ret. Sys. v. JPMorgan Chase & Co.*, No. 12-cv-6659, 2013 U.S. Dist. LEXIS 93692, at *50 (S.D.N.Y. July 3, 2013). It is also worth noting, however, that before these Actions were transferred to this Court, Judge Alsup of the Northern District of California denied BNYM's motion to dismiss, *inter alia*, IUOE Local 39's claim under Section 349 of the NY GBL. *See Int'l Union of Operating Eng'rs, Stationary Eng'rs Local 39 Pension Trust Fund v. Bank of N.Y. Mellon Corp.*, No. C 11-03620 WHA, 2012 U.S. Dist. LEXIS 18281, at *18-20 (N.D. Cal. Feb. 14, 2012).

Although the amount of the Settlement and the net recoveries Class Members will receive demonstrate, standing alone, that the Settlement merits final approval, the prospect of having to further defend against the Counterclaims, as well as the possibility of incurring tens of millions of dollars of liability were BNYM successful on those claims at trial, further supports final approval of this Settlement, through which Defendants will release the Counterclaims.[30]

5. The risks to establishing damages further support final approval.

Further contributing to the risks Plaintiffs faced, the appropriate measure of damages (assuming Plaintiffs could establish BNYM's liability) was hotly contested. Lead Plaintiffs' damages expert, Professor Bill Brown, presented a model that, among other things, measured the total margins BNYM earned from SI FX transactions; BNYM, on the other hand, contended those margins did not constitute a proper measure of damages because they did not account for the large costs associated with maintaining the SI FX program and did not reflect the various cost savings custodial clients and their investment managers enjoyed by delegating FX responsibilities to the Bank. The existence and amount of damages would likely have turned on a battle of experts, the outcome of which would be uncertain.[31]

Plaintiffs thus faced significant risk that the damages that now form the basis for Class Members' recoveries through this Settlement could never be proven at trial or would be greatly offset. In light of those risks, Class Members' expected gross recovery of approximately 35% of

[30] *See, e.g.*, *Hester v. Vision Airlines, Inc.*, No. 2:09-cv-00117-RLH-NJK, 2014 U.S. Dist. LEXIS 97172, at *35-36 (D. Nev. July 17, 2014) (granting final approval of settlement where case posed "significant challenges to Class counsel," including "[defendant]'s burdensome counterclaims").

[31] *See, e.g.*, *In re Am. Bank Note Holographics, Inc., Sec. Litig.*, 127 F. Supp. 2d 418, 426-27 (S.D.N.Y. 2001) (final approval was warranted where, *inter alia*, "the damage assessments of Plaintiffs' and Defendants' experts who would be called at trial were sure to vary substantially, thus precipitating a 'battle of the experts,'" raising the possibility that "a jury could be swayed by experts for Defendants, who could minimize or eliminate the amount of Plaintiffs' losses").

the margins BNYM earned from SI FX during the Class Period is an excellent result.[32]

6. Plaintiffs also faced the risk that a certified class could not be maintained through trial or appeal.

Even were Plaintiffs to obtain class certification, the class might have been decertified either before or during trial.[33] The risk of decertification is a real one where, as here, the Court could be expected to continue to assess the manageability of a trial involving the laws of at least several states. The Settlement, then, "permits the parties to ensure that class status will not be lost." *See Shapiro*, 2014 U.S. Dist. LEXIS 37872, at *39.

7. BNYM's ability to withstand a greater judgment does not counsel against final approval.

BNYM no doubt could withstand a greater judgment than the amount it will pay for this Settlement, but "a defendant is not required to empty its coffers before a settlement can be found adequate." *Id.* at *42. BNYM's financial wherewithal "do[es] not ameliorate the force of the other *Grinnell* factors, which lead to the conclusion that the settlement is fair, reasonable and adequate." *Id.*

8. The Settlement is reasonable in light of the best possible recovery and the attendant risks of litigation.

The last *Grinnell* factor—the reasonableness of the Settlement in light of the best possible recovery and the attendant risks of litigation—further supports final approval. Notably, the Settlement's reasonableness "must be judged not in comparison with the possible recovery in

[32] *See, e.g.*, *In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12-Civ-8557 (CM), 2014 U.S. Dist. LEXIS 177175, at *25-26 (S.D.N.Y. Dec. 19, 2014) (settlement amount reflecting "over 36% of the estimated class-wide damages" represented "a fine result").

[33] *See, e.g.*, *Shapiro*, 2014 U.S. Dist. LEXIS 37872, at *40 ("The possibility of decertification . . . favors settlement."); *In re Sinus Buster Prods. Consumer Litig.*, No. 12-CV-2429 (ADS) (AKT), 2014 U.S. Dist. LEXIS158415, at *25 (E.D.N.Y. Nov. 10, 2014) ("Were the Court to reject the settlement, the parties would likely contest certification, which would present a possibility of decertification. A settlement therefore avoids the risk of decertification and thus weighs in favor of approval.").

the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *Id.* at *40. A court assessing reasonableness must therefore recognize "that the very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes." *Id.* at *40-41. The Second Circuit, in *Grinnell*, instructed that "the fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." 495 F.2d at 455. Indeed, the Court observed, "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Id.* at 455 n.2.

This Settlement falls well above that threshold. Class Members stand to recover, on a gross basis, approximately 35% of the maximum damages as calculated by Plaintiffs' expert, with a mean net recovery of $400,000 (and nearly 100 Class Members to receive recoveries of more than a million dollars each). This is a truly outstanding result, and one that adequately reflects the strengths and challenges of Plaintiffs' cases, as discussed above.[34]

Further, the settlements entered into between BNYM and the NYAG, the DOL, and the U.S. Department of Justice ("DOJ") are all contingent on final approval of this Settlement.[35] The Court's determination with respect to this Settlement therefore will have direct and significant implications on those entities' combined $349 million recovery for misconduct BNYM has now (at least in part) admitted.

II. The Plan Of Allocation Among Class Members Is Fair And Adequate.

To merit approval, a plan of allocation "must also meet the standards by which the

[34] *See also* Joint Decl. ¶¶ 20, 184-97.

[35] *See, e.g.*, Stipulation and Order of Settlement and Dismissal (Dkt. No. 150 in No. 11 Civ. 06969 (S.D.N.Y.)) ("DOJ Stipulation and Dismissal Order") ¶ 10 (providing that in the event of, *inter alia*, denial of final approval of this Settlement, the stipulation between the DOJ and BNYM "shall be deemed rescinded and vacated").

settlement was scrutinized—namely, it must be fair and adequate." *Meredith Corp. v. SESAC, LLC*, No. 09 Civ. 9177 (PAE), 2015 U.S. Dist. LEXIS 20055, at *37 (S.D.N.Y. Feb. 19, 2015). A plan of allocation "need not be perfect"; rather, an allocation formula "need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *Id.* at *38. Accordingly, in assessing a plan of allocation, "courts look primarily to the opinion of counsel." *Id.* The Plan of Allocation for this Settlement reflects the considered judgment of Lead Settlement Counsel, aided by their damages expert, and has been reviewed and approved by the NYAG and the DOL. It is fair and adequate, and should be approved.

The Plan of Allocation is based on transaction data maintained by BNYM with respect to custodial clients who used the SI FX services offered by BNY, Mellon, and ultimately the combined Bank entity. The Settlement Fund will consist of the net amount of the $335 million Settlement Amount (i.e., after attorneys' fees and expenses), as well as the $155 million NYAG Settlement Amount (Lead Settlement Counsel are not seeking attorneys' fees from the NYAG Settlement Amount). In helping develop the Plan of Allocation, Professor Brown compiled the sales-margin data from BNYM's transaction records for each SI FX transaction the Bank executed with Class Members during the Class Period. BNYM determined its sales margin on such transactions by calculating the difference between a proxy for the interbank FX rate at the time BNYM determined the price to assign to an SI transaction (the "Reference Rate") and the FX rate the Bank actually gave to each Class Member (the "Deal Rate"). For purposes of the Plan of Allocation, this sales margin is deemed to be each Class Member's "Recognized Claim," and each Class Member's recovery will be based on its Recognized Claim.

Further, under the Plan of Allocation, ERISA-plan Class Members will be allocated $70 million, on a gross basis, from the Settlement Fund. Recoveries for ERISA plans will be on a

pro rata basis relative to other Class Members who are ERISA plans, and recoveries for non-ERISA-plan Class Members will be on a pro rata basis relative to other non-ERISA- plan Class Members. Additionally, at the DOL's request, the $14 million DOL Settlement Amount—which is allocated entirely to ERISA-plan Class Members—has been added to the Settlement Fund and will be distributed on a pro rata basis among those entities.

Recognized Claims will vary depending on, *inter alia*, (i) the volume of SI FX transactions a Class Member executed, (ii) the currency pairs involved in the Class Member's SI FX transactions, (iii) the applicable Deal Rates and Reference Rates used on any given trading day, and (iv) volatility in the FX markets when the Class Member's transactions were executed. While the Recognized Claims under the Plan of Allocation do not precisely correlate to provable damages, they provide a fair and adequate methodology to determine each Class Member's relative stake in the Settlement.

As noted above, Class Members are not required to submit claims. In developing the Plan of Allocation, Lead Plaintiffs identified every custodial client of BNYM, based on the Bank's records, who entered into an SI FX transaction with the Bank during the Class Period. The Plan of Allocation determines a Recognized Loss, if any, for each of those Class Members. Upon final approval of the Settlement, each Class Member that does not opt out simply will receive a check or wire transfer in the amount of the Class Member's net recovery.

The Plan of Allocation thus has a "reasonable, rational basis," and is the product of extensive consideration by Lead Settlement Counsel, who are experienced and sophisticated in managing and resolving complex class actions, and their damages expert. The Plan of Allocation, like the Settlement itself, should be approved.

III. Notice To Settlement Class Members Comported With Rule 23 And Due Process.

The form and manner of Notice, which the Court approved in the Notice Order, satisfy

Rule 23(c) and due process. Indeed, Lead Settlement Counsel and GCG have gone to great lengths to apprise Class Members of the details of this Settlement and their rights.

For any class certified under Rule 23(b)(3), "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). Additionally, Rule 23 requires that the court "direct notice in a reasonable manner to all class members who would be bound by the proposal" (Fed. R. Civ. P. 23(e)(1)), and that notice of class counsel's motion for attorneys' fees and expenses be provided to class members (Fed. R. Civ. P. 23(h)).[36]

The Notice includes all of the information Rule 23 prescribes. It concisely states, in plain, easily understood language:

(1) the nature of the lawsuit;

(2) the definition of the Settlement Class;

(3) Class Members' claims and BNYM's asserted defenses;

(4) that a Class Member may enter an appearance through an attorney if it so desires;

(5) that the Court will exclude from the Class any Class Member that timely and validly requests exclusion;

(6) the time and manner for requesting exclusion;

(7) a description of the terms of the Settlement, including information about Class Members' right to obtain a copy of the Stipulation;

(8) the right of any Class Member to object to any aspect of the Settlement;

(9) the binding effect of the Settlement on Class Members that do not elect to be excluded; and

[36] *See also Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950) (notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

(10) the date and time of the Final Approval Hearing.[37]

The Notice also advises Class Members that Lead Settlement Counsel will apply to the Court for an award of up to 25% of the $335 million Settlement Amount as well as reimbursement of Litigation Expenses, and may also request Service Awards to Plaintiffs for the time, expense, and effort they spent in connection with the Litigation. The Notice thus contains "information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class." *See Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 338 (2d Cir. 2006).

Further, this Settlement does not require Class Members to do anything to receive their share of the recovery, so long as their address and payment information are current. Each Class Member that does not opt out *will* receive a recovery, based on transaction data furnished by BNYM and analyzed by Lead Plaintiffs' damages expert, who had submitted opening and reply reports providing a Classwide damages methodology in anticipation of Plaintiffs' motions for class certification. Upon final approval of the Settlement, the Net Settlement Fund will be distributed to each Class Member based on its recognized loss under the Plan of Allocation, which incorporates that damages methodology. The notice process has therefore primarily entailed apprising the approximately 1,218 Class Members of this Settlement, which has enabled them to see their estimated recoveries, and clearly advising them of their right to opt out. As set forth below, the notice campaign conducted by Court-appointed claims administrator GCG, under Lead Settlement Counsel's direction, satisfies due process.

As an initial matter, the notice process benefitted from Lead Settlement Counsel's efforts

[37] *See* Fed. R. Civ. P. 23(c)(2)(B). The Notice also comports with the "Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide" (2010) included on the Federal Judicial Center's website. *See* http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf.

during the Litigation, in developing the record for class certification, to identify all the BNYM custodial clients who would comprise the Class. Counsel have identified more than 1,200 clients—all institutions, including public pension funds, mutual funds, unions, charities, non-profit organizations, and corporations—who collectively correlate with more than 11,000 custodial accounts maintained by BNYM. After the parties reached agreement to settle these cases, Lead Settlement Counsel coordinated with the Bank to obtain addresses for each of those entities, many of whom are no longer BNYM clients.

On March 27, 2015, having worked with their damages expert, Lead Settlement Counsel provided to GCG all of the information Counsel had collected to identify Class Members, consisting of addresses and allocation amounts for each Class Member's custodial accounts. Working with GCG, Lead Settlement Counsel continued to research mailing addresses for Class Members whose information (as received from BNYM) appeared outdated or incomplete. Those efforts included coordinating with BNYM to obtain missing addresses and with GCG to find information on Class Members as to whom BNYM had no additional contact information. As noted above and detailed in the Cirami Affidavit, since May 7, 2015, GCG, under Lead Settlement Counsel's direction, has mailed 1,385 Notice Packets to Class Members and caused the Summary Notice to be published in *The Wall Street Journal* and on *PR Newswire*.

Further, GCG, under Lead Settlement Counsel's direction, established a settlement website (www.bnymellonforexsettlement.com). The website contains notices, court documents, and contact information relating to the Settlement, and provides access to a portal through which Class Members can review each of their accounts and personalized information relating to their anticipated recovery. The website and portal are updated as needed to inform Class Members of the status of the Settlement and of any changes to their respective recoveries. In addition to

viewing allocation data specific to its recovery, a Class Member visiting the website is encouraged to confirm its address and provide a point of contact for correspondence regarding the Settlement, a further safeguard to ensure that checks and wires of recoveries are sent to the correct addresses or individual representatives of Class Members.

GCG also maintains a toll-free telephone number (1-877-940-1504)—accessible 24 hours a day, seven days a week—to accommodate Class Members who have questions about the Settlement and to provide a convenient venue for requesting copies of the Notice Packet. As of August 12, 2015, GCG received 173 calls to that number.[38] Lead Settlement Counsel have also fielded numerous calls from Class Members regarding the Settlement.

Further, in the months since the Notice was disseminated, Lead Settlement Counsel have been working with GCG to apprise every Class Member of the Settlement. In response to Class Members' requests for additional information to identify their accounts, Lead Settlement Counsel coordinated with BNYM, which maintains an internal customer number for each of its clients (different from the account numbers provided to clients), to match client account numbers with BNYM's internal reference numbers. GCG then disseminated a Supplemental Letter providing that additional information to Class Members and reminding them to log on to their client portal and confirm their mailing addresses.

GCG also conducted a call campaign to ensure that Class Members received the Notice Packet and Supplemental Letter. GCG performed research to obtain telephone numbers and, where possible, appropriate contact people for Class Members. With respect to Class Members for whom no contact person could be identified through preliminary research, GCG obtained contact information for the Class Member's legal, financial, or investment offices whenever

[38] *See* Cirami Aff. ¶ 6.

possible. GCG ultimately obtained telephone numbers for 686 Class Members who had not confirmed their addresses through the settlement website.[39] Beginning on July 13, 2015, GCG called those Class Members to confirm they received the Notice Packet and were aware of the additional information available.[40] If GCG was unable to reach a Class Member's representative, GCG left messages, performed additional research, and made follow-up calls.[41] Due to those outreach efforts, GCG was able to confirm or correct the mailing information for 239 Class Members, and an additional 63 Class Members registered on the settlement website.[42]

The notice campaign was thus comprehensive (to say the least), and evidences the care and effort Lead Settlement Counsel and GCG have expended to ensure that Class Members' rights adoptions are protected. Those efforts have also facilitated Lead Settlement Counsel's ability to expeditiously distribute the settlement funds upon final approval by the Court. Rule 23's requirements and due process are well satisfied.[43]

IV. The Proposed Settlement Class Should Be Certified For Purposes Of Final Settlement Approval.

Before approving the Settlement, the Court "must first determine whether the requirements for class certification in Rule 23(a) and (b) have been satisfied." *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 238 (2d Cir. 2012) ("*AIG*"). In issuing the Notice Order, the Court provisionally certified the Settlement Class, appointed Lead Plaintiffs as Settlement Class representatives, and appointed Lead Settlement Counsel as Class Counsel. The Court should now formally grant class certification for settlement purposes.

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[39] *Id.* ¶ 13. Counsel requested that those 686 Class Members be targeted for outreach because they had not logged on to the portal on the website and had estimated net recovery amounts of $1,000 or more. *Id.* ¶ 13 n.4.

[40] *Id.* ¶ 13.

[41] *Id.*

[42] *Id.*

[43] *See, e.g.*, *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 448-49 (S.D.N.Y. 2004) (Lynch, J.) (similar efforts by GCG satisfied Rule 23 and due process).

As detailed in the Notice Motion, the record before the Court suffices to demonstrate, in the necessary context of a class settlement rather than a class trial, *see Amchem*, 521 U.S. at 620, that Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy are met, and Rule 23(b)(3), common questions of law or fact predominance and superiority criteria are satisfied, for purposes of approving a class action settlement under Rule 23(e).[44] Here, the Class of approximately 1,200 members clearly meets the numerosity requirement of Rule 23(a) (1). The existence of significant common questions satisfying Rule 23(a)(2) is demonstrated in Section IV.B below, which establishes that such common questions also predominate over those affecting only individual class members: the facts and law(s) at issue here relate either to the class as a whole, or, to address variations, to ascertainable subclasses. Similarly, the claims of the Class representatives are typical of those of the Class, as Rule 23(a)(3) requires: all were subjected to the same general course of conduct and as a result have the same types of claims for the same type of damage. The Class representatives and their counsel respectfully submit that their prosecution and proposed resolution of these claims meets the adequacy of representation requirement of Rule 23(a)(4).[45]

A. Common Questions Predominate Over Any Individual Ones.

Common questions of law or fact predominate "if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *IndyMac*, 286 F.R.D. at 235-36. Rule 23(b)(3) "does *not* require a plaintiff seeking class certification to prove that each elemen[t] of [her] claim [is]

[44] *See* Notice Motion at 10-25.

[45] BNYM has agreed not to oppose class certification for purposes of this Settlement. Lead Plaintiffs' arguments here in favor of class certification would be subject to BNYM's opposition were class certification to be tested in an adversary context, because BNYM has reserved its right to do so.

susceptible to classwide proof." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013) (emphasis and alterations in original). Further, "[p]laintiffs who have shown the existence of common questions are not obliged to prove the non-existence of possible individual issues—in the absence of any significant evidence of such issues—in order to obtain certification." *In re Lehman Bros. Sec. & ERISA Litig.*, No. 08 Civ. 5523 (LAK), 2013 U.S. Dist. LEXIS 13999, at *26 (S.D.N.Y. Jan. 23, 2013) (Kaplan, J.).[46] As the Supreme Court and the Second Circuit have further instructed, in the settlement context, the court must determine whether "'the legal or factual questions that qualify each class member's case as a genuine controversy' are sufficiently similar to yield a cohesive class." *AIG*, 689 F.3d at 240 (quoting *Amchem*, 521 U.S. at 623). Further, predominance derives not from the label affixed to a specific claim (state laws may vary) but whether common conduct by the defendant "has caused a common and measurable form of economic damage." *Id.* That is precisely the case here.

Class Members' claims turn largely on whether BNYM's admitted SI FX pricing practice—which the Bank applied consistently to all non-"benchmark" custodial clients[47]—was improper, either because in doing so the Bank breached its contracts with Class Members or their agents, or otherwise violated state common law or statutes, or ERISA. That common contention is, moreover, "capable of classwide resolution," as "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2545 (2011).

Emanating from that central question are numerous legal and factual questions common

[46] Additionally, merits questions "may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 133 S. Ct. at 1195.

[47] *See* DOJ Settlement and Dismissal Order ¶ 2. As alleged, under "benchmark pricing," BNYM executed certain clients' SI trades at pre-negotiated fixed markups from a public reference price, rather than at the high or low end of the daily range. Master Customer Class Compl. ¶ 119.

to Class Members' claims:

- Was BNYM's admitted practice with respect to SI FX transactions contrary to its representation to custodial clients, including ERISA plans, that its pricing would be "not less favorable to the [client] than terms offered by [the Bank] to unrelated parties in a comparable arm's length FX Transaction"?

- Was BNYM's admitted practice with respect to SI FX trades contrary to the Bank's statements on its website, in responses to Requests for Proposals ("RFPs"), and in other communications with its custodial clients or their agents, that the Bank provided "best execution," "the best rate," the "best possible rate," or "the best rate of the day" when conducting SI FX trades, or that those services were "free of charge," "designed to help clients minimize the risks and costs related to [FX]," and "reflect[ed] the interbank market at the time the trade[s] [were] executed"?

- If the custodial agreements did not expressly preclude the Bank's SI FX practice, did the practice nonetheless violate the covenant of good faith and fair dealing implied in those contracts?

- Did BNYM owe to Class Members fiduciary duties of loyalty or care that obligated the Bank to inform them or their agents of its SI pricing practice?

- If so, did the Bank's use of the SI pricing practice breach one or both of those duties?

- Did BNYM, through its SI pricing practice, unlawfully assume and exercise ownership over funds to which Class Members were entitled and would have received absent that practice, thus rendering the Bank liable for conversion?

- Was BNYM, by employing its SI pricing practice, unjustly enriched at Class Members' expense?

- Did BNYM's SI pricing practice constitute an unlawful, unfair, or deceptive practice under the consumer-protection laws of New York, California, Pennsylvania, Massachusetts, Delaware, and other states?

Plaintiffs contend that the above questions are common to Class Members' ability to prove BNYM's liability under the several causes of action Plaintiffs assert on behalf of themselves and those Class Members. Importantly, each of Plaintiffs' claims turns largely on *the*

Bank's actions, not on what custodial clients thought or did.[48] Further, the elements of those claims are governed largely by *objective* standards, which are susceptible of Classwide proof.[49]

Lead Plaintiffs submit that BNYM's recent admissions since the Court granted their Notice Motion further demonstrate that the Bank engaged in a consistent practice of overcharging its custodial clients for SI FX transactions, which impacted Class Members similarly. BNYM has admitted that, "[c]ontrary to . . . representations" that, among other things, it "ensure[d] best execution on foreign exchange transactions," the Bank (i) "gave SI clients prices that were at or near the worst interbank rates reported during the trading day or session"; (ii) generally did not disclose its SI FX pricing methodology . . . to its custodial clients or their investment managers"; (iii) "was aware that many clients did not fully understand the Bank's pricing methodology for SI transactions"; and (iv) "was aware that many market participants equated 'best execution' with best price or considered best price to be one of the most important factors in determining best execution."[50] Lead Plaintiffs submit that those admissions are consistent with—and were compelled by—the evidence adduced during discovery (in which Lead Settlement Counsel played a key role), which Plaintiffs would have presented in seeking class certification, and (if a class was certified and the case withstood a motion for summary

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[48] *See, e.g.*, *In re Bank of N.Y. Mellon Corp. Forex Transactions Litig.*, No. 12 MD 2335 (LAK), 2014 U.S. Dist. LEXIS 148964, at *71 (S.D.N.Y. Oct. 9, 2014) ("The Bank's intent depends on what the Bank thought, not on what [absent class members] thought. It is, of course, the Bank that is in the best position to produce evidence as to its understanding [of the term 'best execution'] and the basis for it.").

[49] *See, e.g.*, *Amgen*, 133 S. Ct. 1184, 1195-96 (because materiality could "be proved through evidence common to the class," it constituted a "common question") (alteration omitted); *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020 (9th Cir. 2011) ("'relief under the [California] UCL is available without individualized proof of deception, reliance, and injury'") (quoting *In re Tobacco II Cases*, 207 P.3d 20, 35 (Cal. 2009)), *cert. denied*, 132 S. Ct. 1970 (2012); *In re Scotts EZ Seed Litig.*, No. 12 CV 4727 (VB), 2015 U.S. Dist. LEXIS 9116, at *20-24 (S.D.N.Y. Jan. 26, 2015) (certifying, *inter alia*, classes under N.Y. GBL § 349 and California's UCL); *Aspinall v. Philip Morris Cos.*, 813 N.E.2d 476, 486 (Mass. 2004) ("Whether conduct is deceptive [under Massachusetts' consumer-protection statute] is initially a question of fact, to be answered on an objective basis and not by the subjective measure argued by the defendants.").

[50] DOJ Stipulation and Dismissal Order ¶ 2.

judgment) at trial.

The treatment of BNYM's customers as a Settlement Class is appropriate because, in an adversarial context, Plaintiffs and Class Members would rely on common evidence to establish BNYM's liability, in several respects:

First, Plaintiffs would attempt to show that BNYM represented—on its website, in responses to RFPs, and in other direct communications with its clients or their agents—that, among other things, (1) the Bank would, and did, conduct SI FX trades according to "best execution" standards or to obtain "the best rate," the "best possible rate," or "the best rate of the day"; (2) the Bank was providing those services "free of charge," and they were "designed to help clients minimize the risks and costs related to [FX]"; and (3) its pricing "reflect[ed] the interbank market at the time the trade [wa]s executed." Plaintiffs would refer to, among other things, custodial agreements, RFPs, and other documents produced in discovery.

Second, Plaintiffs would rely primarily on internal BNYM documents to attempt to demonstrate that BNYM and its predecessors engaged in a deceptive or otherwise unlawful practice to induce custody clients and their investment managers to utilize the SI service, through which the Bank reaped significant revenues by deliberately pricing clients' SI FX trades at or near the high end of the daily interbank range, for purchases, and at or near the low end of the daily interbank range, for sales. That evidence would be used to support all Class Members' claims.

Third, Plaintiffs would rely primarily on internal BNYM documents and testimony by Bank personnel to attempt to demonstrate that BNYM's FX executives understood that the Bank did not offer "best execution" or "best rates" to clients.

Fourth, Plaintiffs would attempt to show, mostly through BNYM documents and

testimony, that the Bank generated significant revenues from its SI FX practice, which outweighed any benefits custodial clients received.

Fifth, Plaintiffs would attempt to show, also mostly through BNYM documents and testimony, that the Bank provided superior pricing on transactions comparable to SI FX transactions executed on behalf of Class Members, and the Bank was capable of extending such terms to all Class Members.

That Plaintiffs would use common proof in pursuing the claims of all Class Members renders class settlement appropriate. Additionally, damages are calculable on a Classwide basis through a uniform methodology using the Bank's own data for FX SI transactions during the Class Period, in accordance with *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).[51] Lead Plaintiffs' damages expert employed several measures to identify the difference between the prices custodial clients actually received on their SI FX trades and the prices they should have received had the Bank not priced them at or near the least favorable rate (for the clients) of the applicable trading range. That suffices under *Comcast*.[52]

Common questions thus abound with respect to both liability and damages. Class proceedings therefore have the capacity "to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart*, 131 S. Ct. at 2551 (emphasis in original).

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[51] *See, e.g.*, *In re US Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 123 (2d Cir. 2013) (where "customers [we]re entitled to the difference between the amount they paid on fraudulently inflated cost-plus invoices and the amount they should have been billed," plaintiffs' proposed measure of damages was "directly linked with their underlying theory of classwide liability (that the misrepresentations on the invoices caused overpayments)," and thus accorded with *Comcast*), *cert. denied sub nom.*, *US Foods, Inc. v. Catholic Healthcare W.*, 134 S. Ct. 1938 (2014).

[52] Indeed, the Second Circuit recently explained that *Comcast* "did not hold" that a class cannot be certified even where "damages cannot be measured on a classwide basis." *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 407 (2d Cir. 2015). *Comcast* requires only that "a model for determining classwide damages relied upon to certify a class under Rule 23(b)(3) must actually measure damages that result from the class's asserted theory of injury." *Id.* Plaintiffs' ability to demonstrate Classwide damages therefore well *exceeds Comcast*'s threshold.

The common issues and evidence that bind Class Members are far stronger than any individualized issues BNYM might have introduced in an effort to atomize them. In particular, the existence of certain variations among the laws governing Class Members' state-law claims does not undermine predominance, because the elements of the claims under the laws of New York, California, Pennsylvania, Massachusetts, and Delaware—which apply to the vast majority of Class Members—are substantially similar.[53] This is especially so with respect to claims for breach of contract/implied-covenant, breach of fiduciary duty based on misstatements or omissions, and unjust enrichment.[54] And the law applicable to the ERISA claims of ERISA-plan Class Members is uniform.[55]

The applicable law and the facts adduced during discovery thus support a finding of predominance.

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[53] *See Rodriguez v. It's Just Lunch, Int'l*, 300 F.R.D. 125, 135 (S.D.N.Y. 2014), ("[D]espite the possible existence of state law variations among plaintiffs' fraud and unjust enrichment claims, those claims can implicate common issues . . . so long as the elements of the claim[s] . . . are substantially similar.") (alterations and ellipsis in original).

[54] *See, e.g.*, *US Foodservice*, 729 F.3d at 127 ("state contract law defines breach consistently such that the question will usually be the same in all jurisdictions"); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1263 (11th Cir. 2004) ("A breach is a breach is a breach, whether you are on the sunny shores of California or enjoying a sweet autumn breeze in New Jersey."); *Rodriguez*, 300 F.R.D. at 136 (observing that "a universal thread throughout all common law causes of action for unjust enrichment is a focus on the gains of the defendants," and concluding there was "a question [c]ommon to all class members and provable on a class-wide basis as to whether [d]efendants unjustly profited by making [mis]representations") (first and second alterations in original). As noted above, in partially denying BNYM's motion to dismiss the SEPTA Action, the Court held that SEPTA stated a fiduciary-duty claim under Pennsylvania law to the extent it was based on BNYM's alleged failure to disclose relevant information regarding its SI FX practices. *SEPTA*, 921 F. Supp. 2d at 88; *see also id.* at 71 n.82 (noting the parties agreed that Pennsylvania law applied to SEPTA's claims). California, Delaware, Massachusetts, and New York likewise recognize such a claim. *See, e.g.*, *Grumman Allied Indus., Inc. v. Rohr Indus., Inc.*, 748 F.2d 729, 738-39 (2d Cir. 1984) ("under New York law, a duty to disclose material facts is triggered . . . where the parties enjoy a fiduciary relationship"); *Passatempo v. McMenimen*, 960 N.E.2d 275, 289 (Mass. 2012) ("a fiduciary owes a duty of full disclosure to his or her principal"); *Jones v. Conocophillips Co.*, 130 Cal. Rptr. 3d 571, 580 (Cal. Ct. App. 2011) ("typically, a duty to disclose arises when a defendant owes a fiduciary duty to a plaintiff"); *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 156 (Del. Ch. 2004) ("When the fiduciaries communicate with the beneficiaries in the context of asking the beneficiary to make a discretionary decision . . . the fiduciary has the duty to disclose all material facts bearing on the decision at issue.").

[55] *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 142-43 (S.D.N.Y. 2010) ("By their very nature, ERISA actions often present common questions of law and fact, and are therefore frequently certified as class actions.").

B. A Class Action Is Superior to Other Available Methods for the Fair and Efficient Determination of This Controversy Through the Proposed Settlement.

Finally, resolving the Litigation through the class mechanism is superior to other available methods, i.e., litigation by individual Class Members, for fairly and efficiently adjudicating this controversy. In the settlement context, this consideration focuses on:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; [and] (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum.

Fed. R. Civ. P. 23(b)(3).[56]

The alternative to certifying the Settlement Class—potentially 1,200 or more individual actions—would demand significant expenditures of resources by the parties and the judiciary, and would threaten to produce inconsistent rulings or judgments.[57] Further, only a few BNYM custodial clients have filed individual actions,[58] and only two Class Members have opted out of the Settlement, indicating that custodial clients are satisfied with litigation of their claims through the class mechanism. It is also desirable to maintain Class Members' claims in this Court, which has presided over these cases for more than three years, following the determination by the Judicial Panel on Multidistrict Litigation that this Court is an appropriate forum to conduct pretrial proceedings arising from BNYM's allegedly improper FX practices.

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[56] The Second Circuit recently instructed that "while these factors, structurally, apply to both predominance and superiority, they more clearly implicate the superiority inquiry." *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 82 (2d Cir. 2015).

[57] That Class Members are institutions does not alter the analysis. *See, e.g.*, *IndyMac*, 286 F.R.D. at 243 (that some class members were "sophisticated and/or institutional investors" did not undermine superiority); *Bd. of Trs. of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, 269 F.R.D. 340, 355 (S.D.N.Y. 2010) ("[T]he existence of large individual claims that are sufficient for individual suits is no bar to a class when the advantages of unitary adjudication exist to determine the defendant's liability.") (alteration in original).

[58] Those entities are expressly not included as members of the Settlement Class. *See* Stipulation ¶ 1(yy).

Of particular importance, the Court "need not inquire whether the case, if tried, would present intractable management problems"—a prerequisite to certification of a litigation class—"for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620, 117 S. Ct. at 2248. Accordingly, any variations among the laws of the states that might apply to Class Members' claims "are largely irrelevant" to certification of the Settlement Class. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 304 (3d Cir. 2011) (en banc); *accord Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 335 (S.D.N.Y. 2005) ("Because this is a settlement-only class, the Court need not be concerned with the feasibility of managing the trial of a class action involving many different states' laws."), *aff'd in relevant part sub nom.*, *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006).[59]

In sum, a class action is the superior means for resolving Class Members' claims. Further, the Settlement, if ultimately approved, will afford Class Members substantial relief while eliminating their risk of obtaining no recovery at trial.

CONCLUSION

For the foregoing reasons, Lead Plaintiffs respectfully request that the Court (1) find that the proposed Settlement is fair, reasonable, and adequate; (2) approve the Plan of Allocation; (3) find that the Notice comported with Rule 23 and due process; (4) certify the Settlement Class, appoint Lead Plaintiffs as Settlement Class representatives, and appoint Lead Settlement Counsel as Class Counsel; and (5) retain ongoing jurisdiction over the administration and effectuation of the Settlement for the benefit of Class Members.

[59] *See also In re Mex. Money Transfer Litig.*, 267 F.3d 743, 747 (7th Cir. 2001) ("Given the settlement, no one need draw fine lines among state-law theories of relief."); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019-28 (9th Cir. 1998) (analyzing and affirming nationwide state-law class certification and settlement approval under *Amchem* requirements); *In re Pool Prods. Distribution Mkt. Antitrust Litig.*, MDL No. 2328 Section: R(2), 2014 U.S. Dist. LEXIS 178989, at *27 (E.D. La. Dec. 31, 2014) (state-law variations "creat[e] primarily manageability concerns," which the court "need not consider in the settlement context").

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Respectfully submitted,

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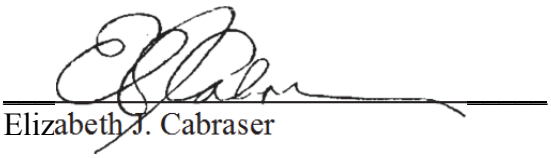
By: 
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