

**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
APPROVAL OF DISTRIBUTION PLAN FOR THE NET SETTLEMENT PROCEEDS
AND REQUEST FOR REIMBURSEMENT OF LITIGATION EXPENSE**

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Court-appointed Lead Plaintiffs Southeastern Pennsylvania Transportation Authority, International Union of Operating Engineers, Stationary Engineers Local 39 Pension Trust Fund, Ohio Police & Fire Pension Fund, School Employees' Retirement System of Ohio, 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 for the Central States, Southeast and Southwest Areas Pension Plan) (collectively, "Lead Plaintiffs"), by and through their counsel Loeff Cabraser Heimann & Bernstein, LLP, Kessler Topaz Meltzer & Check, LLP and McTigue Law LLP (together, "Lead Settlement Counsel"), hereby submit this memorandum in support of their motion for an Order pursuant to Federal Rule of Civil Procedure 23(e), that would approve the proposed plan for distributing the Net Settlement Proceeds (as defined below) to the Settlement Class, as set forth in the accompanying Affidavit of Stephen J. Cirami in Support of Motion for Approval of Distribution Plan for the Net Settlement Proceeds (the "Cirami Affidavit") submitted on behalf of Garden City Group, LLC ("GCG"), the Court-approved claims administrator for the settlement obtained in the above-captioned action (the "Litigation").¹ By the same motion, Kessler Topaz Meltzer & Check, LLP ("Kessler Topaz") respectfully requests the Court to approve reimbursement of an incurred Litigation Expense that was not included in counsel's original application for an award of attorneys' fees and Litigation Expenses filed with the Court on August 17, 2015

I. BACKGROUND ON THE SETTLEMENT

Lead Plaintiffs, on behalf of themselves and each Settlement Class Member, and Defendants (as defined below) (collectively, the "Settling Parties") entered into the Stipulation

¹ Unless otherwise defined, all capitalized terms used herein shall have the meanings set forth in the Stipulation and Agreement of Settlement dated as of March 19, 2015 (the "Stipulation") (ECF No. 583-1) previously filed with the Court, and the Cirami Affidavit.

wherein the Settling Parties agreed, in substance, that in exchange for \$335,000,000 in cash (the “Settlement Amount”), there would be a full and complete settlement of all Released Claims against the following defendants: The Bank of New York Mellon Corporation, The Bank of New York Mellon, The Bank of New York Company, Inc., The Bank of New York, Mellon Bank N.A., The Bank of New York Mellon Trust Company, N.A. (formerly known as the Bank of New York Trust Company, N.A.), and BNY Mellon, N.A. (collectively, “BNYM”), and unnamed individuals designated as Does 1-20 in the Second Amended Carver Complaint and the Amended Fletcher Complaint (together with BNYM, the “Defendants”). The Settlement Amount, plus any interest earned thereon, less (i) any Taxes and Tax Expenses; (ii) any Notice and Administration Costs; and (iii) any attorneys’ fees and Litigation Expenses awarded by the Court is referred to herein as the “Net Settlement Fund.”

By its Order (1) Provisionally Certifying the Settlement Class; (2) Appointing Lead Plaintiffs as Settlement Class Representatives, and Appointing Lead Settlement Counsel as Class Counsel; (3) Approving the Proposed Form and Manner of Notice; and (4) Scheduling a Final Approval Hearing dated April 22, 2015 (the “Notice Order”) (ECF No. 591), the Court preliminarily certified, solely for purposes of effectuating the Settlement, a class pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure consisting of all domestic custody customers of BNYM that used BNYM’s Standing Instruction FX Program between January 12, 1999 and January 17, 2012.² By its Notice Order, the Court also directed, among

² The “Settlement Class” does not include any custodial clients of BNYM with or on behalf of which BNYM has previously reached, or reaches before the Settlement becomes final, a negotiated resolution in connection with disputes or potential disputes relating to the Standing Instruction FX Program (whether or not a qui tam action was filed on behalf of such custodial clients) (i.e., Educational Retirement System of Fairfax County; Fairfax County Employees Retirement System; Fairfax County Uniformed Retirement System; Fairfax County Police Officers Retirement System; Massachusetts Pension Reserves Investment Management Board; State Board of Administration of Florida; and Virginia Retirement System). The “Settlement Class” also does not include (a) plaintiffs in *Los Angeles County Employees Retirement*
Footnote continued on next page

other things, that the Notice be mailed to all Settlement Class Members who may be identified through reasonable effort. The mailing of the Notice was conducted in accordance with the Notice Order.³

The Notice advised Settlement Class Members about the Settlement and their rights and options in connection therewith. The Notice also informed Settlement Class Members that, in addition to the \$335,000,000 obtained from Defendants as a result of the Settlement, an additional \$155,000,000 obtained pursuant to a settlement between the New York Attorney General and BNYM (“NYAG Settlement Amount”) and an additional \$14,000,000 obtained pursuant to a settlement between the United States Department of Labor and BNYM (“DOL Settlement Amount”)⁴ would be distributed to Settlement Class Members pursuant to the Plan of Allocation. The Net Settlement Fund, the NYAG Settlement Amount and the DOL Settlement Amount are collectively referred to herein as the “Net Settlement Proceeds.”⁵

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Association, ex rel. FX Analytics v. The Bank of New York Mellon Corp., No. 12-cv-08990-LAK (S.D.N.Y.) and *In re Bank of New York Mellon Corp. False Claims Act Foreign Exchange Litigation*, No. 12-cv-03064-LAK (S.D.N.Y.); or (b) any of the New York City funds named as plaintiffs in the action currently styled *People ex rel. Schneiderman v. The Bank of New York Mellon Corp.*, No. 09/114735 (N.Y. Sup. Ct.), except that the Teachers’ Retirement System of the City of New York Variable Annuity Funds and the New York City Deferred Compensation Plan shall both be included in the “Settlement Class.” The “Settlement Class” also does not include any Defendants, their predecessors and affiliates, or any entity in which any Defendant has a controlling interest, and their officers, directors, legal representatives, heirs, successors, subsidiaries and/or assigns of any such individual or entity. The “Settlement Class” also does not include any Person who submitted a request for exclusion as listed on Exhibit A to the Court’s Order and Final Judgment dated September 24, 2015 (ECF No. 638). For the avoidance of doubt, it is agreed that this definition of the “Settlement Class” is intended to supersede the class definitions in the complaints in the Litigation.

³ See Affidavit of Stephen J. Cirami Regarding (A) Mailing of the Notice; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusion Received to Date filed with the Court on August 17, 2015 (ECF No. 622-15), previously submitted to the Court and attached as Exhibit A to the Cirami Affidavit submitted herewith.

⁴ As set forth in the Plan of Allocation, the DOL Settlement Amount will be distributed only to those Settlement Class Members who are ERISA plans.

⁵ The portion of the Net Settlement Proceeds comprised of the NYAG and DOL Settlement Amounts has not and will not serve as the basis for any award of attorneys’ fee, costs or other deductions apart from

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On September 24, 2015, the Court held a hearing to consider, among other things, whether the proposed Settlement should be approved. By its Order and Final Judgment dated September 24, 2015 (ECF No. 638) and its Order Approving Plan of Allocation dated September 24, 2015 (ECF No. 636), the Court approved the Settlement as fair, reasonable and adequate and in the best interests of the Settlement Class and approved the proposed plan for allocating the settlement proceeds to eligible members of the Settlement Class. In addition, the notice procedures were declared to be proper, and the Litigation was dismissed with prejudice.

Moreover, the Court also approved the retention of GCG to facilitate notice, to administer the Settlement and to effectuate distribution of the settlement proceeds. GCG has consented to the jurisdiction of this Court.

II. THE PLAN OF ALLOCATION

The Plan of Allocation approved by the Court (the “Plan”) is based on transaction data maintained by BNYM for custodial clients who used the standing instructions (“SI”) foreign exchange (“FX”) services at BNY, Mellon, and BNYM. In developing the Plan, Plaintiffs’ damages expert compiled the sales margin data from BNYM’s transaction records for each SI FX transaction BNYM executed with Settlement Class Members during the period from January 12, 1999 through January 17, 2012 (the “Class Period”). BNYM determined its sales margin on SI FX 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 with a Settlement Class Member (“Reference Rate”) and the FX rate BNYM gave Settlement Class Members (“Deal Rate”). For purposes of the Plan, this sales margin is each Settlement Class Member’s “Recognized Claim”

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whatever administration costs may be incurred after those amounts have been deposited into the Settlement Fund Escrow Account.

and each Settlement Class Member's recovery from the Net Settlement Proceeds will be based on its Recognized Claim.

Under the Plan, recoveries for Settlement Class Members who are ERISA plans will be on a *pro rata* basis relative to other ERISA plan Settlement Class Members. In total, ERISA plans will be allocated \$70 million, on a gross basis, from the Net Settlement Proceeds. Recoveries for Settlement Class Members who are not ERISA plans will be on a *pro rata* basis relative to other non-ERISA plan Settlement Class Members.

Settlement Class Members were not required to submit claim forms in order to be eligible to receive a distribution from the Net Settlement Proceeds. In developing the Plan, Plaintiffs identified each and every custodial client of BNYM, based on BNYM's own records, who entered into an SI FX with the bank during the Class Period. As set forth in the Joint Declaration and the declarations submitted on behalf of GCG, Lead Settlement Counsel and GCG have undertaken extensive outreach efforts in order to locate and confirm correct addresses for Settlement Class Members, confirm claim information for eligible accounts, and obtain accurate payment information and preferred payment methods. Accordingly, Settlement Class Members who have not opted out of the Settlement Class⁶ and who will receive a payment of at least \$0.01 from the Net Settlement Proceeds will receive a check or wire transfer for their eligible accounts. *See* Exhibit B to the Cirami Affidavit (listing Settlement Class Members (by Claim Number) and their corresponding Recognized Claim amounts pursuant to the Plan).

III. FEES AND EXPENSES OF CLAIMS ADMINISTRATOR

In accordance with GCG's agreement with Lead Settlement Counsel to act as the Claims Administrator in connection with the Settlement of the Litigation, GCG was responsible for,

⁶ Those Settlement Class Members who have opted out of the Settlement Class are listed on Exhibit A to the Court's Order and Final Judgment (ECF No. 638).

among other things, mailing and publishing notice to the Settlement Class, creating and maintaining a settlement website and toll-free telephone helpline, and distributing the Net Settlement Proceeds to eligible Settlement Class Members. As set forth in the Cirami Affidavit, GCG's fees and expenses for its work performed and to be performed on behalf of the Settlement Class in connection with the administration of the Settlement and the initial distribution of the Net Settlement Proceeds total \$347,710.57. Cirami Aff. at ¶23; *see also* Exhibits C and D to the Cirami Affidavit (attaching copies of GCG's invoices for its outstanding administration fees and expenses and an estimate of the administration fees and expenses to be incurred through the completion of the initial distribution). To date, GCG has received payments totaling \$212,536.18.⁷ *Id.* at ¶23. Accordingly, there is an outstanding balance due to GCG of \$135,174.39. *Id.* Lead Settlement Counsel respectfully request that Court approve all of GCG's fees and expenses.

IV. REQUEST FOR REIMBURSEMENT OF LITIGATION EXPENSE

Kessler Topaz respectfully requests that the Court approve reimbursement from the Net Settlement Fund of a Litigation Expense that inadvertently was not included in Kessler Topaz's total expenses in which it sought reimbursement for in Lead Settlement Counsel's August 17, 2015 application for attorneys' fees and expenses (the "August 2015 Fee and Expense Application") (ECF Nos. 618-622). This Litigation Expense reflects expenses incurred by D4 Database Management ("D4"), the document and court reporter for the coordinated cases throughout the Litigation, in the amount of \$147,469.55.

⁷ Under the terms of the Stipulation, "[p]rior to the Effective Date, Lead Settlement Counsel may pay from the Settlement Fund Escrow Account actually incurred Notice and Administration Costs without further approval of the Court." *See* Stipulation at ¶18; *see also* Notice Order at ¶6 ("As provided in the Stipulation, Lead Settlement Counsel may pay from the Settlement Fund Escrow Account actually incurred Notice and Administration Costs without further approval from the Court.").

Kessler Topaz submits that the expenses incurred by D4 were reasonable and necessary expenditures that were appropriately incurred in the prosecution of the Litigation. In addition, reimbursement of this additional amount paid to D4, in addition to the \$2,901,734.10 in Litigation Expenses previously awarded by the Court, pursuant to its September 24, 2015 Order awarding attorneys' fees and reimbursement of Litigation Expenses (ECF No. 637), would result in a total award of \$3,049,203.65, which is still substantially less than the \$5,000,000 maximum amount of Litigation Expenses that Lead Settlement Counsel indicated they would seek in the Notice disseminated to the Settlement Class (*see* Notice pp. 5, 10 (ECF No. 622-15 at pp. 14, 19)) and there were no objections submitted with respect to the expense application or the \$5,000,000 maximum amount of expenses set forth in the Notice. Accordingly, Kessler Topaz respectfully requests that the Court approve reimbursement of \$147,469.55 to Kessler Topaz from the Net Settlement Fund for this Litigation Expense.⁸

V. DISTRIBUTION OF THE NET SETTLEMENT PROCEEDS

The Effective Date for the Settlement has occurred and the Order and Final Judgment is now Final. As set forth in the Cirami Declaration, the Net Settlement Proceeds are ready to be distributed to the Settlement Class. Therefore, Lead Settlement Counsel respectfully move the Court for an Order that will, among other things, approve the proposed plan for distributing the Net Settlement Proceeds to the Settlement Class as set forth in the Cirami Affidavit (the "Distribution Plan").⁹

⁸ *See also* Declaration of Sharan Nirmul in Support of Request for Reimbursement of Litigation Expense submitted herewith.

⁹ Under the terms of the Stipulation, the Defendants and the Released Defendant Parties shall have no liability, obligation, or responsibility whatsoever for the administration of the Settlement or disbursement of the Net Settlement Proceeds. *See* Stipulation at ¶29.

A. Initial Distribution of the Net Settlement Proceeds

Pursuant to the Distribution Plan, GCG will conduct an initial distribution of the Net Settlement Fund (after all Court-approved fees and expenses have been deducted) plus the NYAG and DOL Settlement Amounts to the 1,219 Settlement Class Members listed on Exhibit B to the Cirami Affidavit (the “Initial Distribution”). To this end, GCG will first coordinate with Lead Settlement Counsel to determine the amount of the Net Settlement Proceeds available for distribution, as well as what portion of this amount will be distributed to the ERISA plan Settlement Class Members and what portion of this amount will be distributed to the non-ERISA plan Settlement Class Members. Cirami Aff. at ¶10.

Once the amount of the Net Settlement Proceeds available for distribution is determined, GCG will determine the *pro rata* Distribution Amounts for each eligible Settlement Class Member. Cirami Aff. at ¶13. Specifically, GCG will calculate Distribution Amounts for all Settlement Class Members as if the entire amount of the Net Settlement Proceeds were to be distributed in the Initial Distribution. *Id.* at ¶14(a). Settlement Class Members whose Distribution Amounts calculate to more than \$0.00 but less than \$1,000.00 will be paid their full distribution amount in the Initial Distribution (“Claims Paid in Full”), and these Settlement Class Members will get no additional funds in subsequent distributions. *Id.* at ¶14(b). After deducting the payments to the Claims Paid in Full, GCG will distribute to all other Settlement Class Members on Exhibit B (i.e., Settlement Class Members whose Distribution Amounts calculate to \$1,000.00 or more), 90% of their Distribution Amounts, with the remaining aggregate 10% to be set aside and held in reserve (the “Reserve”) to address any contingencies that may arise. *Id.* at ¶14(c). To the extent the Reserve is not depleted, the remainder will be re-distributed to eligible Settlement Class Members. *Id.* at ¶14(d).

GCG will perform quality assurance reviews prior to finalizing payment amounts. Cirami Aff. at ¶15. Once payment amounts have been finalized, GCG will prepare and send payments by check, or in the event that the Settlement Class Member requested their payments by wire, by wire. *Id.* at ¶16. In order to encourage Settlement Class Members who received their distributions by check to promptly cash their distributions and to avoid or reduce future expenses relating to unpaid distributions, all of the distribution checks will bear a notation “CASH PROMPTLY, VOID AND SUBJECT TO RE-DISTRIBUTION IF NOT CASHED BY [90 DAYS AFTER ISSUE DATE].” *Id.* at ¶17. Settlement Class Members who do not cash their distribution checks within the time allotted will irrevocably forfeit all recovery from the Settlement. The funds allocated to all such stale-dated checks will be available for re-distribution to those Settlement Class Members who cashed their initial distribution checks. *Id.*

B. Additional Distribution(s) of the Net Settlement Proceeds

After GCG has made reasonable and diligent efforts to have Settlement Class Members cash their Initial Distribution checks, any portion of the Net Settlement Proceeds remaining six (6) months following the Initial Distribution (including from the Reserve and the funds for all void stale-dated checks), after deducting GCG’s estimated costs of conducting such re-distribution, any taxes owed, the costs of preparing appropriate tax returns, and any escrow fees, will be redistributed to Settlement Class Members who (i) were not Claims Paid in Full; and (ii) cashed their Initial Distribution check (the “Second Distribution”). Cirami Aff. at ¶18.

After the Second Distribution, and after GCG has made reasonable and diligent efforts to have Settlement Class Members cash their Second Distribution checks, to the extent funds remain in the Net Settlement Proceeds (whether by reason of uncashed checks, return funds, or otherwise), GCG will conduct a further distribution of the Net Settlement Proceeds if it is determined by GCG and Lead Settlement Counsel that a further distribution of the Net

Settlement Proceeds is cost effective. *Id.* at ¶19. Additional redistributions, after deduction of GCG's costs, any taxes owed, the costs of preparing appropriate tax returns, and any escrow fees, may occur thereafter until Lead Settlement Counsel, in consultation with GCG, determine that a further redistribution is not cost effective. *Id.*

Once Lead Settlement Counsel determine that further re-distribution of any balance remaining is no longer cost-effective or efficient, Lead Settlement Counsel shall seek an order from the Court: (i) approving the recommendation that any further re-distribution is not cost-effective or efficient; and (ii) ordering the contribution of the balance of the Net Settlement Proceeds to one or more nonsectarian, not-for-profit, 501(c)(3) organizations that are independent of Lead Settlement Counsel so that Lead Settlement Counsel do not derive a direct or indirect benefit from the selection of such organization as of the recipient of a charitable contribution. *Cirami Aff.* at ¶20; *see also* Stipulation at ¶16.

VI. RELEASE OF CLAIMS

Lead Plaintiffs respectfully request this Court to release and discharge all Persons who are involved in the review, verification, calculation, tabulation, or any other aspect of the Recognized Claims and payment amounts to Settlement Class Members, or who are otherwise involved in the administration or taxation of the Settlement Fund or the Net Settlement Fund from any and all claims arising out of such involvement, and, pursuant to the release terms of the Settlement, bar all Settlement Class Members, whether or not they are to receive payment from the Net Settlement Proceeds, from making any further claim against the Net Settlement Proceeds or the parties released pursuant to the Settlement beyond the amount allocated to them by the Settlement as approved by the Court.

VII. CONCLUSION

Based on the foregoing, Lead Plaintiffs respectfully request that the Court approve their Motion for Approval of Distribution Plan for the Net Settlement Proceeds and Request for Reimbursement of Litigation Expense and enter the [Proposed] Order Approving Distribution Plan for the Net Settlement Proceeds and Request for Reimbursement of Litigation Expense submitted herewith.

Dated: January 13, 2016

Respectfully submitted,

**KESSLER TOPAZ MELTZER
& CHECK, LLP**

By: /s/Sharan Nirmul

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CERTIFICATE OF SERVICE

I hereby declare that on January 13, 2016, true and correct copies of the following documents were served via ECF on all counsel of record:

- Notice of Lead Plaintiffs' Motion for Approval of Distribution Plan for the Net Settlement Proceeds and Request for Reimbursement of Litigation Expense;
- [Proposed] Order Approving Distribution Plan for the Net Settlement Proceeds and Request for Reimbursement of Litigation Expense;
- Memorandum in Support of Lead Plaintiffs' Motion for Approval of Distribution Plan for the Net Settlement Proceeds and Request for Reimbursement of Litigation Expense;
- Affidavit of Stephen J. Cirami in Support of Motion for Approval of Distribution Plan for the Net settlement Proceeds; and
- Declaration of Sharan Nirmul in Support of Request for Reimbursement of Litigation Expense

/s/Sharan Nirmul

Sharan Nirmul