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 SETTLEMENT COUNSEL'S MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND SERVICE AWARDS TO PLAINTIFFS

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Lead Settlement Counsel Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser"), Kessler Topaz Meltzer & Check, LLP ("Kessler Topaz"), and McTigue Law LLP ("McTigue Law")[1] respectfully submit this memorandum on behalf of all Plaintiffs' Counsel in support of their application under Federal Rule of Civil Procedure 23(h) for an award of attorneys' fees and reimbursement of Litigation Expenses, as well as Service Awards to 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"), and International Union of Operating Engineers, Stationary Engineers Local 39 Pension Trust Fund ("IUOE Local 39," and with the Ohio Funds and SEPTA, the "Lead Customer Plaintiffs"), and to the six named Plaintiffs in the *Carver* and *Fletcher* actions (the "ERISA Actions").[2] These requests are supported by, in addition to this memorandum, (1) the Declaration of Professor John C. Coffee, Jr. ("Coffee Decl."), who has assessed the quality of Plaintiffs' Counsel's efforts and the risks this Litigation posed, and, drawing on his years of experience and specific expertise in class actions and fee jurisprudence, concludes that the

[1] Unless otherwise indicated, capitalized terms and abbreviations 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. Additionally, unless otherwise indicated, all internal citations and quotation marks have been omitted from this brief, and all emphasis added.

[2] Lieff Cabraser and Kessler Topaz, who served as Interim Co-Lead Customer Class Counsel and as members of the Court-appointed Plaintiffs' Executive Committee, are also referred to collectively as "Co-Lead Customer Counsel." Plaintiffs' Counsel include (in addition to Lieff Cabraser and Kessler Topaz) the Thornton Law Firm ("Thornton Law"), Hausfeld LLP ("Hausfeld"), Hach Rose Schirripa & Cheverrie LLP ("Hach Rose"), Nix Patterson & Roach LLP ("Nix Patterson"), and Murray Murphy Moul + Basil LLP ("Murray Murphy"), who served on the Court-appointed Plaintiffs' Steering Committee, as well as McTigue Law, Beins Axelrod, PC ("Beins Axelrod"), and Keller Rohrback LLP ("Keller Rohrback"), who serve as counsel in the ERISA Actions. The cases brought by the Ohio Funds, SEPTA, and IUOE Local 39 are referred to collectively as the "Customer Class Cases," and, together with the ERISA Actions, as the "Actions." Plaintiffs in the ERISA Actions for whom Lead Settlement Counsel request Service Awards are Joseph F. Deguglielmo (in his capacity as a participant in and representative of the Kodak Retirement Income Plan), LanDOL D. Fletcher (in his capacity as a participant in and representative of the Central States, Southeast and Southwest Areas Pension Plan), Deborah Jean Kenny, Edward C. Day, Lisa Parker, and Frances Greenwell-Harrell.

requested fee is reasonable, fair, and justified; (2) the accompanying Joint Declaration of Sharan Nirmul and Daniel P. Chiplock ("Joint Decl."), which details the extensive efforts that led to the successful prosecution of this Litigation and the pending Settlement; (3) the declarations of other Plaintiffs' Counsel detailing the time and expenses each firm devoted to the successful prosecution of these Actions;[3] and (4) the declarations of representatives of OP&F, SERS, SEPTA, and IUOE Local 39 recounting their contributions to the Litigation and affirming their approval of the proposed Settlement.[4]

PRELIMINARY STATEMENT

Lead Settlement Counsel seek an award of $83.75 million in attorneys' fees to be allocated among Plaintiffs' Counsel, which amounts to 25% of the $335 million achieved in the Customer Class Cases and 16.6% of the $504 million total recovery for the Settlement Class,[5] which Plaintiffs' Counsel played a large role in achieving.[6] Analyzed under the lodestar cross-check methodology, the requested fee also corresponds to a blended 1.61 multiplier of the lodestar (number of hours x customary hourly rate) Plaintiffs' Counsel committed to these Actions on a contingent basis in the four years since the first of the Customer Class Cases was commenced in March 2011.

These requests are justified by Plaintiffs' Counsel's commitment of time and resources in the face of the very real risk of receiving no remuneration. For more than four years, Plaintiffs' Counsel investigated and litigated claims against The Bank of New York Mellon ("BNYM" or

[3] *See* Joint Decl. Exs. 1-10.

[4] *See* Joint Decl. Exs. 11-14.

[5] For convenience, the "Settlement Class" (as defined in the Stipulation) is often also referred to simply as the "Class," and "Settlement Class Members" simply as "Class Members."

[6] By agreement, Plaintiffs' Counsel do not seek fees from the funds of the New York Attorney General's settlement ("NYAG Settlement") or the U.S. Department of Labor's settlement ("DOL Settlement"), which are to be distributed through the proposed Plan of Allocation for this Settlement.

the "Bank") for using its "standing instructions" service for foreign exchange ("SI FX") transactions to, as Plaintiffs' alleged, bilk custodial clients out of more than $1.4 billion over a 13-year period (January 12, 1999 to January 17, 2012, i.e., the "Class Period"). The work of Plaintiffs' Counsel—in particular, Lieff Cabraser and Kessler Topaz, who drove the Litigation and devoted by far the greatest amount of time and money to it—led to the outstanding Settlement before the Court.

Lead Settlement Counsel also request reimbursement for $2,901,734.10 in out-of-pocket expenses Plaintiffs' Counsel incurred to prosecute this Litigation. Additionally, Lead Settlement Counsel request that the Court authorize Service Awards of $25,000 each to Class representatives OP&F, SERS, SEPTA, and IUOE Local 39, as well as Service Awards of $3,000 each to the six ERISA Plaintiffs, to compensate them for their efforts in furtherance of the Class's interests.

The Settlement amounts to approximately 35% of the margins BNYM charged during the Class Period, and if it is approved, Class Members will receive an average net recovery of $400,000. Nearly 100 Class Members will receive a net recovery greater than a million dollars apiece. Further, the facts developed largely by Plaintiffs' Counsel, in coordination with the United States Attorney's Office ("USAO") and the NYAG, have led to admissions of wrongdoing by BNYM, and have caused the Bank to overhaul its FX practices to the ongoing benefit of its custodial clients.[7] This outcome is, by all accounts, a substantial and lasting "win" for the Class.

[7] *See* Stipulation and Order of Settlement and Dismissal, dated April 23, 2015, in *United States v. The Bank of New York Mellon*, No. 11 Civ. 06969 (LAK) ("DOJ Action"), Dkt. No. 150, ¶ 2(c) & (d) (BNYM admitting that: (i) "[c]ontrary to" representations provided to custodial clients, including that BNYM offered "best rates" and "ensure[d] best execution on foreign exchange transactions," the Bank "gave SI clients prices that were at or near the worst interbank rates reported during the trading day or session"; (ii) BNYM "generally did not disclose its SI FX pricing methoDOLogy . . . to its custodial clients or their investment managers"; (iii) BNYM "was aware that

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This successful resolution was, however, by no means predestined: Plaintiffs' Counsel fought for four years—in the face of vigorous opposition by a well-funded adversary and sophisticated, aggressive defense counsel—to meet numerous challenges, including:

- Responding to and overcoming BNYM's attacks on the sufficiency of Lead Plaintiffs' pleadings;
- Responding to BNYM's counterclaims against SEPTA and IUOE Local 39 (and third-party claims against IUOE Local 39's Trustees), as well as absent class members (collectively, the "Counterclaims");
- Obtaining and analyzing more than 29 million pages of documents;
- Taking, defending, or otherwise participating in 128 depositions, 110 of which directly pertained to the Customer Class Cases, including 32 depositions of Lead Customer Plaintiffs and their agents;
- Combating (with some, but not complete, success) BNYM's relentless efforts to obtain overbroad and duplicative third-party discovery from investment managers and absent Class Members;
- Preparing to move for class certification, including (i) researching the laws of numerous states to provide the "extensive analysis" required to support certification of a multistate class or subclasses,[8] and (ii) working with experts to develop a classwide methodology for determining damages, including calculating damages for each Class Member, and to respond to reports submitted by the Bank's six experts; and
- Negotiating a global resolution, achieved after three days of intense mediation, that encompasses (in addition to the Class Cases) the DOJ Action, the NYAG Action, and claims by the DOL and the U.S. Securities and Exchange Commission.

In short, the effective prosecution and resolution of these Actions required Plaintiffs' Counsel to devote a massive amount of time and resources, and entailed significant risk.

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many clients did not fully understand the Bank's pricing methoDOLogy for SI transactions"; and (iv) the Bank "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").

[8] *See In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 71 n.59 (S.D.N.Y. 2002) (Kaplan, J.).

That risk should not be undervalued. Plaintiffs' Counsel are aware of this Court's view, expressed most recently in *IndyMac*, that securities class actions "practically always settle, meaning that the risk of total non-recovery [is] almost non-existent."[9] Regardless of how prevalent settlements are in the securities context, this is not a securities case. These Actions presented unusual breach-of-contract and fiduciary-duty issues in ongoing relationships between the trust department of a major bank and its institutional customers. In particular, class certification—a relatively low-risk proposition in many securities cases, due in part to the presence of federal (rather than state) law and the "fraud-on-the-market" presumption of reliance—served as a central battleground here, with Plaintiffs far from assured of victory. Among other things, Customer Class Plaintiffs faced a meaningful risk that BNYM would successfully challenge their ability to show that common issues predominated over individualized ones, or that a class action was manageable, given that custodial clients did not all receive identical representations regarding the Bank's SI FX services and their claims were governed by multiple states' laws. The parties engaged in extensive fact and expert discovery relating to class certification, and the Settlement was reached just before the deadline for class-certification motions.

Plaintiffs' claims covered more than a decade of conduct at three institutions (The Bank of New York ("BNY"), Mellon Bank, N.A. ("Mellon"), and the merged entity BNYM),[10] and arose from BNYM's representations and practices about a complex and non-transparent area of its business—custodial FX. Further, "the parties did not reduce their [custodial] relationship to a

[9] *See 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), *appeal docketed* Apr. 23, 2015, No. 15-1310 (2d Cir.).

[10] For convenience, references to "BNYM" are intended to include BNY and Mellon.

single writing,"[11] and BNYM's representations to custodial clients were, though materially similar, not identical among all Class Members. Plaintiffs thus had to weave together a coherent narrative, and theory of liability, from multitudinous strands of information gathered through dozens of witnesses and thousands of documents selected from the millions produced. Document discovery accordingly was not a mechanical exercise "consist[ing] of duplicates . . . as well as nearly identical offering documents and other voluminous materials, relatively few of which contained much if anything that mattered to the case," but rather required close analysis by experienced attorneys.[12]

Unlike a more typical financial-practices litigation, such as an antitrust or securities case, Plaintiffs here did not have "the benefit of pre-existing investigations by government authorities."[13] To the contrary, private counsel (including several firms participating in this fee application), with the cooperation of a whistleblower, laid the foundation for this Litigation by filing numerous whistleblower actions under seal. The SEPTA Action and the IUOE Local 39 Action were filed shortly after the first whistleblower action was unsealed in January 2011, and months before the NYAG and the DOJ filed their respective cases. The IUOE Local 39 Action, in particular, was litigated through motions to dismiss and to the brink of class certification, on an expedited schedule before Judge Alsup in the Northern District of California, until these cases were transferred to this Court by the Judicial Panel on Multidistrict Litigation and ultimately coordinated with the government actions. Plaintiffs' Counsel then litigated these Actions

[11] *In re Bank of N.Y. Mellon Corp. Forex Transactions Litig.*, 921 F. Supp. 2d 56, 71 (S.D.N.Y. 2013) ("*SEPTA*").

[12] *See IndyMac*, 2015 U.S. Dist. LEXIS 37052, at *21. By contrasting this Litigation to *IndyMac* and other cases, Lead Settlement Counsel do not mean to disparage the quality of counsel's work there. But Lead Settlement Counsel think it is important to emphasize the distinctions between certain aspects of those cases and these Actions, which Counsel believe, based on this Court's prior decisions, support the requested fee.

[13] *See id.* at *17; Coffee Decl. ¶¶ 5, 30-34.

alongside the government (and with several other plaintiffs), played a critical role in discovery and motion practice, and bore the lion's share of litigation costs.[14]

Faced with the numerous challenges summarized above, and as further detailed in the Joint Declaration and the Coffee Declaration, Plaintiffs' Counsel have achieved an outstanding settlement for the Class. They deserve to be compensated accordingly.

Lead Settlement Counsel also respectfully submit that their Litigation Expenses were reasonable and necessary to the effective prosecution of these Actions, and that a modest Service Award of $25,000 to each of the Lead Customer Plaintiffs is appropriate given their unwavering dedication to this Litigation. These entities took on BNYM, their existing custodian, and persevered through the Bank's relentless discovery demands, and in the face of Counterclaims against SEPTA and IUOE Local 39, which threatened to subject those Plaintiffs (and potentially Class Members) to millions of dollars in liability. Lead Settlement Counsel also request smaller Service Awards of $3,000 to each of the six ERISA Plaintiffs, in recognition of their efforts.

Lead Settlement Counsel respectfully submit that their requests are justified in light of the circumstances of this Litigation, and that their application should therefore be granted in full.

ARGUMENT

I. The Requested Fee Is Reasonable And Should Be Approved.

A. A Fee of Twenty-Five Percent of the Settlement Amount Is Justified in Light of the Size and Complexity of the Litigation, and the Efficiency and Effectiveness with which Plaintiffs' Counsel Prosecuted It.

As this Court is well familiar with the law regarding fee applications, Lead Settlement Counsel do not reiterate it here. This Court has expressed its views about shortcomings with respect to both the lodestar and percentage-of-the-fund methods, concluding that "the Court's

[14] The procedural history of this Litigation is recounted in the Joint Declaration and in Lead Plaintiffs' memorandum in support of final approval of the Settlement ("Final Approval Brief").

determination of what constitutes a reasonable fee rests on its own experience." *IndyMac*, 2015 U.S. Dist. LEXIS 37052, at *7. Lead Settlement Counsel understand the Court to mean that there is no "one-size fits all" fee percentage or lodestar multiplier, and that each fee application must be evaluated based on the facts and circumstances of the case from which it arises. Counsel respectfully submit that the extraordinary factual, legal, and procedural circumstances of this Litigation—addressed below and detailed in the declarations submitted in support of this application—justify the requested fee.

Over more than four years, Plaintiffs' Counsel, consisting of 10 firms, devoted more than 113,000 hours to prosecuting these Actions and achieving an outstanding recovery for the Class.[15] Much of that time was spent mustering the necessary proof to prevail on class certification and at trial and to defeat BNYM's pretrial motions. To that end, Plaintiffs' Counsel obtained and analyzed more than 29 million pages of documents, and prepared for and participated in 128 depositions, including 110 depositions directly relevant to the Customer Class Cases.[16] Given the size and complexity of the Litigation—which has led to a resolution affording Class Members, on average, six-figure recoveries—113,000 hours over four years is reasonable, and compares favorably to other recent complex cases.[17]

[15] Nearly three-quarters of those hours are attributable to Lieff Cabraser and Kessler Topaz, indicating "less duplication and overstaffing." Coffee Decl. ¶ 18.

[16] Lead Settlement Counsel also participated in 18 other depositions relating 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.) ("Securities Action"); *In re Bank of New York Mellon Corp. False Claims Act Foreign Exchange Litigation*, No. 12-cv-03064-LAK (S.D.N.Y.) ("LADWP Action"); 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.) ("LACERA Action"). *See* Joint Decl. ¶ 70.

[17] *See In re IndyMac*, 2015 U.S. Dist. LEXIS 537052, at *16, *21 (15 depositions taken, 55,372 hours recorded); *In re Weatherford Int'l Sec. Litig.*, No. 11 Civ. 1646 (LAK), 2015 U.S. Dist. LEXIS 3370, at *4 (S.D.N.Y. Jan. 5, 2015), & Dkt. No. 254-1 in No. 11 Civ. 1646 (LAK), at 25-26 (30,000 hours, 10 depositions taken, and an additional 10 scheduled and prepared for at time settlement negotiations concluded); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 512 (S.D.N.Y. 2009) (more than one million collective hours, 145 depositions); Coffee Decl. ¶¶ 18-20 (comparing lodestar and deposition numbers in *IndyMac* to this Litigation).

Lead Settlement Counsel respectfully submit that, to the best of their knowledge—informed by significant auditing of time records in preparing this application—the hours they present to the Court reflect meaningful efforts that contributed to this resolution, not duplicative or otherwise unnecessary "make-work" to drive up lodestar. Indeed, because Plaintiffs' Counsel's time is devoted on a fully contingent basis, and is compensated (if at all) years later, it is the plaintiff lawyer's stock-in-trade, and thus provides a natural disincentive to amass lodestar for its own sake. In overseeing the work of all Plaintiffs' Counsel, moreover, Lead Settlement Counsel took affirmative steps to avoid duplication of efforts in every aspect of the Litigation, particularly during discovery. As detailed in the Joint Declaration, given the aggressive litigation timetable Plaintiffs' Counsel faced, along with the risk of non-payment, they had every reason to work efficiently. In particular, as Professor Coffee observes, counsel in the Customer Class Cases (who are responsible for the vast majority of Plaintiffs' Counsel's collective lodestar) "litigated leanly and without overstaffing."[18]

In all, 67,933 hours were spent on discovery (approximately 60% of the total hours devoted to the Litigation), consisting of 51,048 hours on document review and 16,885.06 hours on drafting witness memoranda or other discovery documents.[19] The facts and circumstances of this Litigation demonstrate that these hours were anything but "needless."[20]

1. Document discovery, which included close analysis of more than 1.4 million e-mails and attachments, was integral to Plaintiffs' ability to support their claims and achieve an outstanding resolution.

This Litigation was extremely document-intensive. Document analysis, sometimes maligned or misunderstood in other cases as low-level work requiring little training and little or

[18] Coffee Decl. ¶ 29.

[19] *See* Joint Decl. ¶ 70.

[20] *Cf. IndyMac*, 2015 U.S. Dist. LEXIS, at *6 (expressing the view that "[f]ocusing on the lodestar encourages investment of needless hours").

no legal judgment, was crucial to the efficient and effective prosecution of these Actions. As noted above, attorneys did not mechanically log "duplicates produced by similarly situated defendants . . . as well as nearly identical offering documents and other voluminous materials, relatively few of which contained much if anything that mattered to the case." *See IndyMac*, 2015 U.S. Dist. LEXIS 37052, at *21. In this litigation, e-mails, in particular, were key to developing Plaintiffs' allegations that BNYM knowingly overcharged its clients for SI FX transactions, a necessary element of certain claims. BNYM's document production contained more than 679,000 e-mails and more than 757,000 e-mail attachments.[21] Plaintiffs' Counsel thus needed to devote significant time to combing through e-mail communications among BNYM personnel to establish the Bank's liability.

Plaintiffs' Counsel were required to analyze materials such as spreadsheets, presentations, voluminous requests for proposals ("RFPs"), business plans, outputs from BNYM databases, and trading data. No formula existed for interpreting those materials, context was essential, and much document discovery required mastery of complex industry jargon and trading concepts.

Co-Lead Customer Counsel developed a rigorous and coordinated process to review the millions of pages of documents BNYM and third-parties produced, a necessary triage through which Plaintiffs' Counsel identified important documents to use in questioning witnesses at depositions, preparing to move for class certification, and developing contract and fiduciary-duty claims. Because BNYM's representations to custodial clients during the 13-year Class Period were not identical and custodial contracts were not form agreements, Plaintiffs' Counsel needed to scrutinize those and related documents to discern the underlying patterns and to identify and

[21] *See* Joint Decl. ¶ 84. The 679,000 figure represents the number of documents containing one or more e-mails (i.e., including chains of e-mails). The number of individual e-mails Counsel reviewed was far greater. *Id.*

highlight the materially similar representations that would demonstrate commonality and predominance under Rule 23.

The attorneys who focused primarily or entirely on document analysis were highly trained and experienced—most had been practicing for at least 10 years.[22] Far from mindlessly clicking through lists of documents, those attorneys played a vital role in obtaining meaningful information and placing the millions of pages BNYM produced into the essential context of recurring patterns.[23] Working under the supervision of counsel from the Court-appointed Plaintiffs' Executive Committee, these lawyers met weekly to discuss and summarize the high-value documents their work had revealed, and produced memoranda for senior attorneys.[24] As deposition discovery began, and particularly as fact discovery neared its close and accelerated to a blistering pace, these analysts prepared detailed witness kits for examining attorneys to use in preparing for depositions.[25] This work required diligence, deep understanding of the facts of these cases, and strategic judgment about how best to distill large amounts of information so that examining attorneys could effectively and efficiently question witnesses under the deposition limits and guidelines of the Federal Rules and the case-management orders in this Litigation.[26]

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[22] *See* Coffee Decl. Ex. B (showing, for each document reviewer/analyst working for Lieff Cabraser or Kessler Topaz, number of years out of law school and number of years with the respective firm).

[23] *See* Coffee Decl. ¶ 28 ("This was neither make-work, nor routine. Rather, it was important work that had to be performed under tight time constraints. It was entrusted primarily to attorneys experienced in document analysis in complex cases, who had proven themselves to [Lieff Cabraser and Kessler Topaz] in other cases.").

[24] *See* Joint Decl. ¶ 90; Coffee Decl. Ex. B.

[25] Those kits were not mere "packets of documents," *see Weatherford*, 2015 U.S. Dist. LEXIS 3370, at *5. They included incisive summaries and analyses of key documents and testimony by other witnesses. *See* Joint Decl. ¶ 113; Coffee Decl. ¶ 25 (observing that witness kits for important witnesses "could consist of 60 or more pages, and usually exceeded 10 or 15 pages, of factual or document analysis tied to key allegations in the case, with 'hyperlinks' to hundreds of documents contained in the online document repository").

[26] That work differed greatly from the mechanical document review recently addressed (outside the fee context) in *Lola v. Skadden, Arps, Slate, Meagher & Flom, LLP*, No. 14-3845-cv, 2015 U.S. App. LEXIS 12755 (2d Cir. July 23, 2015), which included merely "looking at documents to see what search terms, if any, appeared in the documents." *Id.* at *4. There the Second Circuit held that a contract attorney sufficiently alleged that he was entitled to overtime pay because the work he performed was "devoid of legal judgment" and could have been done

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Many of the hours Plaintiffs' Counsel devoted to discovery resulted from the extremely aggressive, and inefficient, strategy BNYM employed with respect to Lead Plaintiffs. Rather than pursuing organizational testimony through Rule 30(b)(6) depositions on particular topics, for example, BNYM predominantly chose to take individual depositions of current and former employees of Lead Plaintiffs and their representatives or agents.[27] This tactic increased the discovery burden on Plaintiffs' Counsel, and accordingly the amount of work required. BNYM's strategic decision to directly countersue SEPTA and IUOE Local 39 as well as Class Members (conditioned on class certification) also required a significant expenditure of time by Co-Lead Customer Counsel.

2. Plaintiffs' Counsel coordinated among themselves, and with the government entities, to ensure the Litigation was prosecuted efficiently.

These Actions were litigated efficiently, especially given the unique challenges to coordinating among multiple plaintiff groups, including government entities. Lead Settlement Counsel—particularly those serving on Plaintiffs' Executive Committee—met those challenges, identifying areas of common interest among the plaintiffs and managing the assignment of tasks to avoid duplication of efforts.

The undersigned include attorneys who have prosecuted securities and other financial-misconduct cases since the 1970s (in Robert Lieff's case, since the 1960s). The collaboration between the Customer Class Plaintiffs and the USAO was, in Co-Lead Customer Counsel's collective experience, unprecedented. As detailed in the Joint Declaration, throughout much of

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"entirely by a machine." *Id.* at *3, *19. The document analysis here, by contrast, entailed legal judgment and contributed significantly to senior attorneys' ability to identify critical information from millions of pages of documents and thus to develop the facts necessary to prove Plaintiffs' claims. *See* Coffee Decl. ¶¶ 25-28; Joint Decl. ¶ 233.

[27] *See* Joint Decl. ¶ 258; Coffee Decl. ¶ 39 ("In few, if any, cases have defendants been able to take the number of depositions (32) of Plaintiffs and their agents that BNYM took in this case.").

fact discovery, the Customer Class Plaintiffs and the USAO communicated regularly—often on a daily basis—to address discovery strategy and logistics.[28] Meet-and-confers with BNYM that affected both the Customer Class Cases and the DOJ Action were coordinated to avoid duplication, and were jointly attended and negotiated by Co-Lead Customer Counsel and the USAO.[29] Further, Co-Lead Customer Counsel and the USAO shared briefing responsibility on key discovery disputes, and shared their work product in connection with analyzing documents, preparing for depositions, and researching important factual and legal issues.[30] Additionally, the damages methodology developed by the Customer Class Plaintiffs and their expert, the data for which was obtained through the Customer Class Plaintiffs' requests for production and interrogatories, became the damages model utilized in the Customer Class Cases, the DOJ Action, and the NYAG Action, as well as with respect to the claims the DOL was investigating.[31] Professor Coffee states it succinctly: "I am not aware of any other case in which private plaintiffs' attorneys have provided decisive assistance on this scale to public enforcement attorneys in a class action."[32]

Co-Lead Customer Counsel likewise coordinated among themselves and with other Plaintiffs' Counsel to ensure the Litigation was prosecuted efficiently.[33] Among other things, Co-Lead Customer Counsel maintained daily control and monitoring of the work performed by all counsel. For example, while partners at Lieff Cabraser and Kessler Topaz personally devoted substantial time to this Litigation, other experienced attorneys at these firms undertook particular

[28] *See* Joint Decl. ¶ 75.

[29] *Id.*

[30] *Id.*

[31] *Id.* ¶¶ 75, 158-64, 237.

[32] Coffee Decl. ¶ 37.

[33] *See* Joint Decl. ¶¶ 232-40.

tasks appropriate to their levels of skills and experience, as did more junior attorneys and paralegals.[34]

Further, the Plaintiffs' Executive Committee worked in parallel and on multiple tracks, dividing labor horizontally across firms according to subject matter, and vertically according to attorneys' respective expertise and experience level.[35] For instance, certain attorneys focused on BNYM's FX trading operations, while others concentrated on identifying commonalities in BNYM's representations to custodial clients through numerous documents disseminated over the 13-year Class Period.[36] Senior attorneys took and defended depositions all over the country, while junior attorneys concentrated on fact-gathering as well as legal research and analysis; mid-level attorneys took the laboring oar in drafting and preparing non-dispositive motions while senior attorneys negotiated settlement.[37] The firms comprising the Plaintiffs' Executive and Steering Committees shared work product, database and deposition vendors (obtained using a bidding process), and experts with each other and with the USAO, and vice versa, which protected against duplicative costs.[38] Thus, despite the significant hours required to litigate these Actions, Plaintiffs' Counsel streamlined their efforts.

The efficiency with which these Actions were prosecuted is particularly notable given BNYM's aggressive—and inefficient—litigation strategy. The Bank, among other things, subjected the Ohio Funds, SEPTA, and IUOE Local 39 to a collective *32* depositions; asserted the Counterclaims, which sought, among other relief, indemnification of the fees and costs

[34] *Id.* ¶ 233.

[35] *Id.* ¶¶ 110, 236-39.

[36] *Id.* ¶ 236.

[37] *Id.*

[38] *Id.* ¶¶ 75, 85-88, 92, 106, 112-14, 234, 237, 248.

BNYM incurred in defending itself not only in these Actions but also in the *DOJ Action*; and contested nearly every aspect of these cases.

The hours Plaintiffs' Counsel devoted to this Litigation thus were necessary and reasonable, and directly led to this Settlement, under which BNYM will pay approximately 35% of the collective damages determined by Plaintiffs' damages expert during the course of the Litigation. Under these circumstances, allocating 25% of the Settlement Fund (an award that actually reflects 16.6% of the total Class recovery) to attorneys' fees is appropriate.

B. The Requested Fee Correlates with a Modest Multiplier.

The requested $83.75 million fee would result in a blended multiplier of 1.61 of the total lodestar contributed by Plaintiffs' Counsel, comfortably within the range of those approved by courts in this Circuit. Further, as discussed above, the hours expended, though significant, are not artificially inflated. The multiplier is thus well-grounded.

The degree of a multiplier should reflect "the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors." *In re Bisys Sec. Litig.*, No. 04 Civ. 3840 (JSR), 2007 U.S. Dist. LEXIS 51087, at *10 (S.D.N.Y. July 11, 2007). Professor Coffee's declaration elaborates on these considerations and further observes that a multiplier is justified by the time value of money as counsel prosecuting litigation on a contingent basis await payment for years of work.[39]

Having considered the nature of these Actions, the particular risks Plaintiffs' Counsel faced, the unrelenting tactics of BNYM and its counsel (including asserting the Counterclaims and seeking extensive third-party discovery), and other factors, Professor Coffee concludes that the blended 1.61 multiplier correlating with Lead Settlement Counsel's request for 25% of the

[39] Coffee Decl. ¶ 11(d).

Settlement Fund is appropriate—indeed, he concludes it "could still justifiably be more."[40] The multiplier is, moreover, modest in light of awards from other large recoveries within this District.[41] Indeed, even were Plaintiffs' Counsel's lodestar three-quarters of the recorded amount, the fee request would correlate to an average multiplier of 2.14, still well within the acceptable range.

Further, Plaintiffs' Counsel's hourly rates reflect "prevailing [rates] in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation,"[42] i.e., the Southern District of New York.[43] Plaintiffs' Counsel's hourly rates range from $450 to $985 for partners, $325 to $525 for associates, and $179 to $350 for paralegals. Rates for attorneys who primarily or entirely performed document analysis, most of whom have practiced for more than 10 years, range from $275 to $425.

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[40] *Id.* ¶ 50.

[41] *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (holding that the 3.5 multiplier awarded by the district court "has been deemed reasonable under analogous circumstances," and citing, *inter alia*, district-court decision observing that "multipliers of between 3 and 4.5 have become common"); *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 374 (S.D.N.Y. 2013) (approving 2.8 multiplier in connection with $590 million settlement); *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, No. 03 MDL 1529 (LMM), 2006 U.S. Dist. LEXIS 84621 (S.D.N.Y. Nov. 16, 2006) (awarding 2.89 multiplier, corresponding with 21.4% of $455 million settlement); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004) ("the requested 2.16 multiplier falls comfortably within the range of lodestar multipliers and implied lodestar multipliers used for cross-check purposes in common fund cases in the Southern District of New York"); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 368-69 (S.D.N.Y. 2002) (awarding 4.65 multiplier); *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262 (RWS), 2002 U.S. Dist. LEXIS 22663, at *80 (S.D.N.Y. Nov. 26, 2002) (a "multiplier of 2.09 is at the lower end of the range of multipliers awarded by courts within the Second Circuit"); 4 *Newberg on Class Actions* § 14-7 (Supp. June 2014), at 166 ("Generally, multipliers from 1-3 are the norm, though higher multipliers are not unusual and may well be warranted in certain circumstances."). While Plaintiffs' Counsel appreciate that comparisons to previous fee awards may be imperfect, they can serve as relevant data points in the Court's holistic analysis.

[42] *See Blum v. Stenson*, 465 U.S. 886, 895 n.11, 104 S. Ct. 1541, 1547 n.11 (1984).

[43] *See Farbotko v. Clinton Cnty.*, 433 F.3d 204, 208 (2d Cir. 2005) (relevant community is "the district in which the court sits"). The determination of a reasonable rate entails "a case-specific inquiry into the prevailing market rates for counsel of similar experience and skill to the fee applicant's counsel," which may include "judicial notice of the rates awarded in prior cases and the court's own familiarity with the rates prevailing in the district." *Id.* at 209.

These rates are comparable to rates this Court has found reasonable,[44] as well as those charged by the counsel BNYM retained for this Litigation.[45] The blended hourly rate for all attorneys and other firm personnel is $459.39, a reasonable figure.[46]

Plaintiffs' Counsel's fee request is, in short, justified, particularly given the tremendous amount of work that went into this Litigation, the serious risk of no recovery, and the threat of reputational and financial harm to Plaintiffs' Counsel were BNYM to secure a favorable judgment.

C. The *Goldberger* Factors Support Counsel's Fee Request.

In determining an application for attorneys' fees, a district court must assess the six factors delineated in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000): "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . .; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Id.* at 50 (ellipsis in original). These considerations (some of which have been introduced above) support this application.

[44] *See IndyMac*, 2015 U.S. Dist. LEXIS 37052, at *20 (finding rates of $210-$420 for associates and $410-$835 for partners reasonable). While $985 falls at the higher end of rates recently approved in this District, only three attorneys (Robert Lieff, Elizabeth Cabraser, and Michael Hausfeld) bill at that rate, and each has approximately 40 years of experience litigating complex class cases. *See In re Platinum & Palladium Commodities Litig.*, No. 10cv3617, 2015 U.S. Dist. LEXIS 98691, at *13 (S.D.N.Y. July 7, 2015) (approving billing rates of $950 and $905 for two partners who "each have nearly 40 years of experience litigating complex anti-trust actions," and referring to a recent *National Law Journal* survey "indicating that the average partner billing rate at the largest New York-based law firms is $982 per hour"). Further, attorneys billing at more than $900 per hour contributed less than 2% of the total number of hours billed by Plaintiffs' Counsel, and served in a largely supervisory capacity. *See* Coffee Decl. ¶ 49 n.27.

[45] *See* Dkt. No. 519-5 in *Standard Iron Works v. Arcelormittal, et al.*, No. 08-CV-5214 (N.D. Ill.), ¶ 48 (noting rates of $600-$1,100 for partners, $395-$525 for associates, and $180-$250 for paralegals)).

[46] *See, e.g.*, *IndyMac*, 2015 U.S. Dist. LEXIS 37052, at *22-23 (awarding fee that "result[ed] in a blended hourly rate of $514.29").

1. Plaintiffs' Counsel expended significant, and necessary, time and labor prosecuting these Actions.

As detailed above, Plaintiffs' Counsel invested significant time and money in this Litigation, all on a contingent basis. Further, they had every incentive to, and did, avoid generating duplicative or otherwise unnecessary work.

Each stage of this Litigation, from the negotiation of the protective order to the multi-day mediation that led to the pending Settlement, was hard-fought. Document and deposition discovery, in particular, required extraordinary resources. Even beyond reviewing tens of millions of pages of documents and preparing for and participating in more than a hundred depositions, Plaintiffs' Counsel—for the most part, Co-Lead Customer Counsel—confronted, and managed, important issues nearly every day. Co-Lead Customer Counsel participated in countless meet-and-confers with BNYM, most resulting in compromise but some entailing formal discovery disputes before the Court.[47] Expert discovery, which included 11 separate reports by the parties' experts, was comprehensive and wide-ranging.[48] The development of the factual foundation for Plaintiffs' classwide damages analysis entailed a multi-step process that stretched over much of the fact-discovery period and culminated in the report of G. William Brown, Jr., principal of 8Rivers Capital and Fellow of Duke Law School, where he formerly taught as a Professor of the Practice of Law. Additionally, on the core issue of whether a common understanding of "best execution" existed, Co-Lead Customer Counsel's efforts culminated in the submission of an expert report by David DeRosa, Ph.D., on which all Plaintiffs (including the DOJ and the NYAG) relied.

[47] *See, e.g.*, Joint Decl. ¶¶ 128, 140-56.

[48] *Id.* ¶¶ 157-69.

Given the amount of work to be completed in the limited time provided under the case-management schedule, Plaintiffs' Counsel realized opportunities to promote efficiencies. Among other things, they (i) utilized technology to manage BNYM's document production;[49] (ii) identified areas of common interest among Plaintiffs (such as, for example, confidentiality designations) so that one group of plaintiffs could serve as the primary point of contact for a specific task or issue;[50] (iii) divided up responsibility for depositions and preparation;[51] and (iv) ensured that as few attorneys as possible attended depositions.[52]

Co-Lead Customer Counsel shouldered the bulk of the litigation expenses jointly incurred by them and the government entities, including (i) 48% of the costs for the document repository and court-reporting service for all BNYM depositions (with plaintiffs in the Securities Action ("Securities Plaintiffs") assuming an additional 19% of those costs); (ii) 50% of the costs for the work of Dr. DeRosa, the principal expert on "best execution" (with Securities Plaintiffs assuming an additional 23%); (iii) 100% of the costs for the work of Professor Brown, whose opinions form the basis for the Plan of Allocation that will also be used to distribute funds from the NYAG Settlement and the DOL Settlement; and (iv) 50% of the costs of the mediation (with the Securities Plaintiffs assuming another 23% of those costs).[53] The NYAG bore less than 5% of all joint costs, while the DOJ paid between 10% and 15% of the joint litigation expenses,[54] with counsel for plaintiffs in the ERISA Actions ("ERISA Plaintiffs"), as well as plaintiffs in the

[49] *Id.* ¶¶ 85-88.

[50] *Id.* ¶ 234.

[51] *Id.* ¶¶ 105-15, 234

[52] *Id.* ¶ 114.

[53] *See* Coffee Decl. ¶ 33.

[54] *Id.*

New York Action and the LACERA/LADWP Actions, making up the remainder. The DOL did not pay any costs.

2. The Litigation was of extraordinary magnitude and complexity.

As the Court has observed, "[t]his is a big case," with "[v]ast amounts of money . . . at stake."[55] The Actions were factually and legally complex, and required great dexterity and creativity to manage.

As an initial matter, the alleged misconduct took place over 13 years among three different institutions and included sales and trading practices at desks in Brussels, New York, Pittsburgh, and London. The misconduct involved, moreover, an opaque and technical corner of the financial-services world, requiring Plaintiffs' Counsel to become familiar with the array of systems and protocols BNYM used in handling FX at various times.

Further, because "the parties did not reduce their relationship to a single writing,"[56] Plaintiffs' Counsel had to analyze many custodial contracts and other documents containing the alleged misrepresentations. Additionally, attempting to support its defense based on purported industry understanding of FX markets, FX services, and the representations it (and other custodians) made about various types of FX execution, BNYM pursued discovery from dozens of investment managers, investment consultants, and other third-parties, as well as Plaintiffs themselves.

These Actions also involved thorny legal issues. The Court's decision on BNYM's motion to dismiss SEPTA's complaint addressed, among other things, complicated questions

[55] *See In re Bank of N.Y. Mellon Corp. Forex Transactions Litig.*, No. 12 MD 2335 (LAK), 2014 U.S. Dist. LEXIS 148964, at *73 (S.D.N.Y. Oct. 9, 2014).

[56] *SEPTA*, 921 F. Supp. 2d at 71.

regarding the scope and sources of BNYM's duties to its customers.[57] The Court also rendered opinions on hotly disputed matters concerning discovery of absent class members and application of the common-interest doctrine.[58] Class certification, as discussed further below and in Lead Plaintiffs' Final Approval Brief (at Sections I.B and IV.A), would have entailed, among other things, important and complicated issues of choice-of-law.

Layered on top of these factual and legal complexities, which would have been formidable even had Plaintiffs been litigating alone against BNYM, was the challenge of coordinating between and among the multiple plaintiff-groups, including the DOJ, the NYAG, and the Securities Plaintiffs. As the Court observed, "The coordination of all of these actions has involved significant effort by both counsel and the Court."[59] In particular, Co-Lead Customer Counsel worked on a nearly daily basis with the USAO for most of the discovery period and closely with representatives of the Securities Plaintiffs, as well as (to a more limited extent) the NYAG, toward shared objectives.[60] Coordination between Co-Lead Customer Counsel and the USAO proved especially critical to advancing all actions within the aggressive timetable under which the parties worked.

3. The Litigation posed a serious risk of no recovery.

Plaintiffs faced substantial risk at every stage of this Litigation. The Customer Class Plaintiffs, who asserted claims under common law and various consumer-protection statutes, confronted particular complexities with respect to class certification. Notably, the custodial agreements between BNYM and Class Members, who reside throughout the United States, called

[57] *Id.* at 80-88.

[58] *See Bank of N.Y. Mellon*, 2014 U.S. Dist. LEXIS 148964, at *63-73; *In re Bank of N.Y. Mellon Forex Transactions Litig.*, 66 F. Supp. 3d 406, 408-13 (S.D.N.Y. 2014).

[59] *Bank of N.Y. Mellon*, 2014 U.S. Dist. LEXIS 148964, at *66.

[60] *See, e.g.*, Joint Decl. ¶¶ 67, 75.

for the application of the laws of various jurisdictions.[61] 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, Pennsylvania, Massachusetts, or Delaware,[62] even that relatively small group would have presented hurdles to certification of a litigation class. At the very least, Lead Plaintiffs would have been required to intricately detail the relevant states' laws, including any material differences among them, and to prepare a trial plan—an analysis BNYM no doubt would have contested.[63] In short, while Lead Plaintiffs believed there was a supportable basis for granting certification of a multi-state class or subclasses, there was a meaningful risk—significantly more than in cases brought, for example, under the federal securities laws—that the Court would deny their motion.

Despite an alleged course of common, and undisclosed, misconduct that spanned years, giving rise to common questions of law and fact that could fairly be characterized as predominant, Plaintiffs also faced a challenge to show that common issues predominated, particularly given that Class Members' custodial agreements were negotiated at different times over a 13-year Class Period, involved three separate entities, and did not all contain identical representations. Even the question of what documents constituted the agreements at issue

[61] *See, e.g.*, *Johnson v. Nextel Commc'ns Inc.*, 780 F.3d 128, 148 (2d Cir. 2015) ("Although the specter of having to apply different substantive laws does not necessarily warrant refusing to certify a class, where . . . the variations in state law present insuperable obstacles to determining liability based on common proof, such variations defeat the predominance of common issues and the superiority of trying the case as a class action.").

[62] *See* Joint Decl. ¶ 97.

[63] *See, e.g.*, *Grandalski v. Quest Diagnostics Inc.*, 767 F.3d 175, 183 (3d Cir. 2014) ("plaintiffs face a significant burden to demonstrate that grouping [of similar state laws] is a workable solution"); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1262 (11th Cir. 2004) ("The burden of showing uniformity or the existence of only a small number of applicable standards (that is, 'groupability') among the laws of the fifty states rests squarely with the plaintiffs"); *In re Pharm. Indus. Average Wholesale Price Litig.*, 252 F.R.D. 83, 94 (D. Mass. 2008) ("In proposing to certify a class requiring the application of the laws of numerous jurisdictions, plaintiffs must . . . conduct[] an extensive review of state law variances to demonstrate how grouping would work. If the choice-of-law and subsequent analysis show little relevant difference in the governing law, or that the law of only a few jurisdictions applies, the court might address these differences by creating subclasses or by other appropriate grouping of claims.").

potentially raised issues BNYM likely would have focused on in opposing class certification.[64] Plaintiffs also could have faced other questions bearing on commonality or predominance, including (i) whether BNYM's automated FX practices across scores of currency pairs impacted Class Members similarly, (ii) whether damages could be demonstrated on a classwide basis, and (iii) whether "best execution" had different meanings to different Class Members. There was substantial risk that the Court would resolve one or more of those questions in the Bank's favor.

Plaintiffs would have then faced summary-judgment motions. BNYM likely would contend it was not reasonable, notwithstanding anything the Bank may have said, for customers to believe SI FX trades were no more expensive than other types of FX trades (including those that were directly negotiated). Although Plaintiffs developed contrary evidence, BNYM would have argued that its customers, and the sophisticated asset managers they had retained to handle FX, understood the Bank's SI product was a service with added costs to custodial clients.

A substantial risk also existed that the Court would grant BNYM summary judgment as to the consumer-protection claims on the ground that they did not reach the conduct or parties at issue. Indeed, while this Litigation was pending, Judge Cote of this District dismissed claims against JPMorgan under New York's consumer-protection law, holding that the statute did not apply to contracts between sophisticated financial institutions.[65]

Finally, trial—an inherently risky proposition in any case—would have presented unique challenges here, as Plaintiffs would need to explain not only how the various documents containing alleged misrepresentations were incorporated as part of custodial agreements between Class Members and BNYM, but also how BNYM's complex FX procedures worked, how the

[64] *See SEPTA*, 921 F. Supp. 2d at 71.

[65] *See La. Mun. Police Emples. 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).

Bank's practices differed from what it had promised, and how Class Members were damaged. And even success at trial would not guarantee a recovery to Class Members, as appeals surely would follow.[66]

That BNYM asserted Counterclaims against SEPTA and IUOE Local 39, as well as Class Members, added to the risks of trial.[67] Had BNYM prevailed at trial, those Plaintiffs and Class Members would have risked liability for all of the costs, including attorneys' fees, the Bank had incurred in defending this Litigation *as well as the government actions*.[68]

In sum, victory was far from assured at any stage in this Litigation, and defeat could have rendered Plaintiffs and Class Members responsible for paying tens of millions of dollars to BNYM.

The presence of parallel government investigations did not mitigate the risks Plaintiffs faced. In fact, far from "ha[ving] the benefit of pre-existing investigations by government authorities," which arguably could have "rendered the case less risky than it otherwise might have been,"[69] Plaintiffs filed first and then proceeded in cooperation with the USAO and the NYAG. Rather than gaining the benefit of the government's investigations, Plaintiffs' Counsel (particularly the whistleblower and his counsel) educated the government about the alleged

[66] *See, e.g., In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 65 (S.D.N.Y. 1993) (noting that "[i]t must also be recognized that victory even at the trial stage is not a guarantee of ultimate success," and citing a case where a multimillion-DOLlar judgment was reversed).

[67] 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. Further, the Court's decision left open the possibility that BNYM could reassert its counterclaims against then-absent class members once a class was certified and those entities became parties. *See In re Bank of N.Y. Mellon Corp. Forex Transactions Litig.*, 42 F. Supp. 3d 520, 527 (S.D.N.Y. 2014) ("This Court agrees with those that have held that *non-party putative class members* are not properly considered 'opposing parties' under Rule 13.").

[68] *See id.* at 523 ("BNYM is seeking, at minimum, indemnification for costs and attorneys fees incurred in defending against these actions [i.e., the Customer Class Cases] and, at broadest, indemnification also for costs, attorneys fees, and any liability assessed against it in the related actions, to the extent that those actions arise out of the [Master Trust Agreement] and [Global Custody Agreement].").

[69] *See IndyMac*, 2015 U.S. Dist. LEXIS 37052, at *17.

misconduct and laid the foundation for this Litigation.[70] As Professor Coffee observes: "Often, class actions are filed in the wake of a pre-existing governmental action . . . with the private enforcers essentially free-riding on the governmental action. This case turns that pattern on its head."[71]

Further, as the Court has noted, there were "important differences between the DOJ Case and the private cases."[72] Specifically, the government proceeded "essentially on the theory that the Bank is liable for civil penalties because it violated the mail and wire fraud statutes and thus 'affect[ed] a federally insured financial institution,'" and "[n]either reliance nor injury [wa]s an essential element of its claim."[73] Nor, of course, did the DOJ (or the NYAG) have to satisfy Rule 23. Plaintiffs in these Actions thus bore risks not present in the DOJ Action.

For example, to prove their claims for breach of contract, the Customer Class Plaintiffs needed to tie BNYM's conduct to particular misrepresentations contained in numerous custody agreements of varying form (if not substance), in responses to RFPs, and in FX Procedures forms that Class Members or their investment managers signed. Customer Class Plaintiffs' claims for breach of fiduciary duty also required an exhaustive review of those agreements to establish the nature of the fiduciary relationship between BNYM and Class Members. And, as discussed above, many of the custody agreements contained choice-of-law provisions, which collectively implicated the laws of multiple jurisdictions. Obtaining a good result therefore required that Plaintiffs litigate these Actions vigorously, which they did.

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[70] *See* Joint Decl. ¶¶ 24-27, 42-43.

[71] Coffee Decl. ¶ 3.

[72] *In re Bank of N.Y. Mellon Corp. Forex Transactions Litig.*, No. 12 MD 2335 (LAK), 2014 U.S. Dist. LEXIS 174453, at *65 n.5 (S.D.N.Y. Nov. 6, 2014).

[73] *Id.* at *66 n.5 (alteration in original) (quoting *United States v. Bank of N.Y. Mellon*, 941 F. Supp. 2d 438, 451 (S.D.N.Y. 2013)).

4. Plaintiffs' Counsel's representation of the Class was exemplary.

"[T]he quality of representation is best measured by results." *Goldberger*, 209 F.3d at 55. The results here—a $335 million Settlement Amount and an overall $504 million Settlement Fund that Class Members stand to receive, both of which Plaintiffs' Counsel played a pivotal role in achieving—are outstanding.

The Second Circuit has instructed that "results may be calculated by comparing the extent of possible recovery with the amount of actual verdict or settlement." *Goldberger*, 209 F.3d at 55. By that measure, this Settlement compares exceptionally well to others. The Settlement Amount is not large by virtue of the number of Class Members (approximately 1,218), but because it substantially compensates each Class Member for its losses. The $335 million payment alone equates to nearly 24% of the damages calculated by Plaintiffs' expert, and Class Members' total $504 million recovery equates to approximately 35% of those damages. Further, the damages methodology used in connection with this Settlement was not constructed solely for settlement purposes but rather was offered by Plaintiffs in support of class certification, and was vigorously disputed by BNYM.

By contrast, according to one study of securities class settlements, the median ratio of settlement value to investor losses was 1.8% in 2014, down from 1.9% in 2013.[74] Class Members' total recovery as a percentage of their estimated damages is thus almost *20 times* that of class members in securities cases in recent years. Plaintiffs' Counsel's fee should reflect the exceptional result they achieved for the Class.[75]

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[74] *See Recent Trends in Securities Class Action Litigation: 2014 Full-Year Review*, available at http://www.nera.com/content/dam/nera/publications/2015/PUB_2014_Trends_0115.pdf (last visited on August 17, 2015), at 33.

[75] *See, e.g.*, *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 510 (S.D.N.Y. 2009) ("*IPO*") (granting fee request of one-third of $586 million settlement where investors recouped an estimated *two percent* of losses).

Any assessment of the percentage recovery this Settlement represents must, moreover, account not only for litigation uncertainties detailed above—including with respect to class certification, summary judgment, trial, and any appeals—but also the *certainty* of *delay* as Plaintiffs would attempt to clear each of those hurdles. In other words, "[a] very large bird in the hand in this litigation is surely worth more than whatever birds are lurking in the bushes." *See In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 838 (W.D. Pa. 1995).

Additionally, "[t]he quality of the opposition should be taken into consideration in assessing the quality of the plaintiffs' counsel's performance." *In re Metlife Demutualization Litig.*, 689 F. Supp. 2d 297, 362 (E.D.N.Y. 2010). Plaintiffs' Counsel faced defense counsel at the top of their profession, who were able to draw on BNYM's vast resources.[76] "The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement." *See Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010).

5. The requested fee is reasonable in relation to the Settlement.

The requested fee represents 25% of the $335 million Settlement Amount. Courts both within and outside the Second Circuit have, in appropriate circumstances, awarded comparable percentages.[77]

[76] *See* Coffee Decl. ¶ 46; Joint Decl. ¶ 242.

[77] *See, e.g.*, *IPO*, 671 F. Supp. 2d at 516 (one-third of $586 million settlement); *In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 173 (D. Mass. 2014) (28% of $325 million settlement and 3.32 average multiplier); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1367 (S.D. Fla. 2011) (30% of $410 million settlement); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1210 (S.D. Fla. 2006) (31.33% of $1.075 billion settlement); *In re Vitamins Antitrust Litig.*, No. 99-197, 2001 U.S. Dist. LEXIS 25067, at *72-73 (D.D.C. July 16, 2001) (34.6% of $365 million settlement). None of these decisions appear to be "lawyer-authored boilerplate." *See IndyMac*, 2015 U.S. Dist. LEXIS 37052, at *9. Further, while Lead Settlement Counsel appreciate the Court's expressed skepticism that a non-random sample of several fee awards "amounts to no more than looking out over a crowd and picking out one's friends, *id.* at *10, Counsel cite these decisions not to argue for a broad-based rule supporting certain fee percentages, but rather simply to further illustrate that courts have awarded substantial percentages of settlement funds where the particular circumstances of those cases warranted them. Counsel respectfully submit that the circumstances of this Litigation justify the requested fee.

Studies of recent class settlements also support the proposed fee. One recent study surveying all class settlements during 2006-2007 found that the mean and median percentages awarded for settlements between $250 million and $500 million were 17.8% and 19.5%, respectively, with a standard deviation of 7.9%. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Award*, 7 J. EMPIRICAL LEGAL STUD. 811, 839 (Dec. 2010). Other well-known commentators have opined that "fee requests falling within one standard deviation above or below the mean should be viewed as generally reasonable and approved by the court unless reasons are shown to question the fee." Theodore Eisenberg and Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUDIES 27, 74 (2004). The 25% fee requested here is within one standard deviation of the mean shown in the Fitzpatrick study.[78] Further, comparing Plaintiffs' Counsel's requested fee to the total Class recovery, similar to the analysis performed in those studies, would bring the fee requested here to 16.6%, well under the mean and medium stated in the Fitzpatrick study.

More to the point, though, the percentages here are justified in light of the immense amount of work and extraordinary risk Plaintiffs' Counsel undertook to prosecute these Actions. Those are, in the final analysis, the factors that matter. Plaintiffs' Counsel are confident their fee request reflects an appropriate balancing of those factors with Counsel's (and the Court's) duty to protect Class Members' interests.

6. Public policy considerations support the proposed fee.

The requested fee furthers the policy goal of "providing lawyers with sufficient incentive to bring common fund cases that serve the public interest." *See Goldberger*, 209 F.3d at 51. The

[78] *See also* Coffee Decl. ¶ 51.

fee would compensate Plaintiffs' Counsel at a level commensurate with the benefits they have conferred on the Class, the substantial investment of time and money they devoted to litigating these Actions and bringing about the Settlement, and the contingent nature of their representation.

Further, the successful and efficient prosecution of this Litigation should serve as a model of cooperation between private and government attorneys. Not only did the numerous attorneys take care not to work at cross-purposes, they also joined forces to efficiently and effectively advance each case, leading to the exposure and remedy of serious misconduct. This cooperation extended not only through discovery, but also to settlement negotiations, when all Plaintiffs brought this Litigation to a global resolution that furthers Class Members' interests in receiving compensation for their injuries as well as the government's interest in punishing and deterring wrongdoing.

D. The Class' Reaction to the Settlement and Fee Request supports granting this application.

Although not a formal *Goldberger* factor, the Class's reaction to the requested fee also supports Counsel's application.[79] The Class Members here are primarily sophisticated entities, many of whom regularly participate in litigation and negotiate fees. They all directly received the Court-approved Notice, which explained that Lead Settlement Counsel intended to apply for attorneys' fees of no more than 25% of the $335 million Settlement Amount. Class Members also had the unusual opportunity to log on to the settlement website and view what their

[79] *See Maley*, 186 F. Supp. 2d at 374.

estimated recovery will be, expressly stated as net of the proposed fee and expenses. To date, no Class Member has objected to the Settlement or the fee request.[80]

E. Lead Settlement Counsel Should Be Permitted to Determine the Appropriate Allocation of the Fee Among Plaintiffs' Counsel.

The Settlement provides that, absent Court order to the contrary, Lead Settlement Counsel may allocate the attorneys' fee awarded by the Court according to their assessment of each firm's contribution to the Litigation. Given their daily familiarity with the nature, scope, and amount of work each Plaintiffs' Counsel performed, Lead Settlement Counsel's proposed allocation, set forth below, should be "afforded substantial deference." *See In re Initial Pub. Offering Sec. Litig.*, No. 21 MC 92 (SAS), 2011 U.S. Dist. LEXIS 76067, at *25 (S.D.N.Y. July 8, 2011).[81]

The allocation is otherwise based solely on individual firms' final lodestar figures, as audited by Co-Lead Customer Counsel, and does not include any time spent on preparing the fee application.[82] As illustrated below, Lead Settlement Counsel propose that Lieff Cabraser and Kessler Topaz—who took the laboring oar and assumed the greatest risk—each receive an allocation corresponding to 1.686 times its lodestar, and that each other member of the Plaintiffs' Steering Committee receive an allocation amounting to 1.491 times its lodestar, except for Thornton Law, who would receive a 2.89 lodestar multiplier (Lead Settlement Counsel believe

[80] The deadline for Class Members to object is August 26, 2015; Lead Settlement Counsel will respond by September 15, 2015 to any objections.

[81] *See also Victor v. Argent Classic Convertible Arbitrage Fund L.P.*, 623 F.3d 82, 90 (2d Cir. 2010) (rejecting challenge to fee allocation and explaining that because "lead counsel is typically well-positioned to weigh the relative merit of other counsel's contributions, it is neither unusual nor inappropriate for courts to consider lead counsel's proposed allocation of attorneys fees"); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 8:10ML 02151 JVS (FMOx), 2013 U.S. Dist. LEXIS 123298, at *316 (C.D. Cal. July 24, 2013) (approving plan for class counsel to allocate fees "in a manner that they believe, in good faith, reflects the contributions of counsel to the prosecution and settlement of the claims," as "class counsel are the most familiar with the amount of work actually contributed by each of the 31 firms").

[82] *See* Joint Decl. ¶ 230.

the higher multiplier appropriately reflects the important role Thornton Law, who represented the whistleblower, played in laying the foundation for this Litigation).[83]

Firm	**Lodestar**	**Allocation (and correlating approximate multiplier)**[84]
Lieff Cabraser	$20,256,579.50	$34,157,764 (1.686x)
Kessler Topaz	$15,435,388.15	$26,027,124 (1.686x)
Thornton Law	$1,600,683.00	$4,625,974 (2.89x)
Hach Rose	$2,989,868.75	$4,458,776 (1.491x)
Hausfeld	$2,578,086.50	$3,844,687 (1.491x)
Murray Murphy	$2,115,135.50	$3,154,291 (1.491x)
Nix Patterson	$732,600.00	$1,092,523 (1.491x)
ERISA Counsel (McTigue Law; Beins Axelrod; Keller Rohrback)	$6,388,860.66	$6,388,861 (1.0x)[85]
Total	**$52,097,202.06**	**$83,750,000.00 (blended multiplier of 1.61)**

II. Plaintiffs' Counsel Should Be Reimbursed For Their Reasonable Expenses In Prosecuting These Actions.

"Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course." *Meredith Corp. v. SESAC, LLC*, No. 09 Civ. 9177 (PAE), 2015 U.S. Dist. LEXIS 20055, at *48 (S.D.N.Y. Feb. 19, 2015). Plaintiffs' Counsel's request for reimbursement of Litigation Expenses is reasonable.

[83] *See id.* ¶¶ 24-27.

[84] Multipliers are rounded, where necessary, to the nearest thousandth.

[85] The proposed allocation reflects an agreement among counsel to cap the fee for counsel in the ERISA Actions (the "ERISA Fee") at 7.25% of the overall fee award, which would have resulted in a 0.95 multiplier of their lodestar. This agreement furthers the oft-stated judicial preference that "[i]deally, allocation of the fee award is a private matter to be handled among class counsel." *See In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 262 (D. Del. 2002). Rather than request a negative multiplier for ERISA Counsel, however, Lead Settlement Counsel propose that they be allocated a fee that is equivalent to their lodestar. The Settlement provides that, absent Court order to the contrary, ERISA Counsel may handle the allocation of the ERISA Fee amongst their three firms.

Plaintiffs' Counsel spent slightly more than $2.9 million in out-of-pocket costs to prosecute these Actions. The Joint Declaration sets forth the breakdown of these expenses, none of which have yet been reimbursed,[86] as well as the many ways Plaintiffs' Counsel sought to achieve efficiencies and minimize expenses, even as they confronted an adversary with virtually unlimited resources. Further, Lead Settlement Counsel—in particular, Co-Lead Customer Counsel—assumed the vast majority of those expenses.[87] Lead Settlement Counsel respectfully submit that this request for reimbursement of Litigation Expenses should be granted in full.

III. Service Awards To Plaintiffs Are Appropriate.

Lead Settlement Counsel ask that the Court approve modest Service Awards of $25,000 each to OP&F, SERS, SEPTA, and IUOE Local 39, as well as Service Awards of $3,000 to each of the six ERISA Plaintiffs, in recognition of their exemplary service to the Class. Courts within this Circuit "have, with some frequency, held that a successful Class action plaintiff, may, in addition to his or her allocable share of the ultimate recovery, apply for and, in the discretion of the Court, receive an additional award, termed an incentive award." *Bellifemine v. Sanofi-Aventis, U.S. LLC*, No. 07-CV-2207, 2010 U.S. Dist. LEXIS 79679, at *20 (S.D.N.Y. Aug. 6, 2010).[88] Incentive awards are completely within the discretion of the Court, and have been approved as an important means of "reimbursing class representatives who take on a variety of risks and tasks when they commence representative actions, such as complying with discovery requests and often must appear as witnesses in the action." *Marsh*, 265 F.R.D. at 150.

[86] Joint Decl. ¶¶ 247-52.

[87] *See, e.g.*, *id.* ¶ 248.

[88] *See also, e.g.*, *Bd. of Trs. of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, No. 09 Civ. 686 (SAS), 2012 U.S. Dist. LEXIS 79418, at *8-9 (S.D.N.Y. June 7, 2012) (granting contribution awards of $50,000 to each of the three named plaintiffs).

Lead Settlement Counsel respectfully submit that Service Awards are justified in light of the exceptional circumstances of this Litigation. As detailed in the Joint Declaration and the Coffee Declaration, BNYM mounted an all-out war to defend its highly lucrative SI FX business. The Bank reserved its most robust attacks for the Ohio Funds, SEPTA, and IUOE Local 39, which endured an onslaught of time-consuming and cumulative discovery demands while also facing the prospect of millions of dollars in potential liability had the Bank prevailed on its Counterclaims. Lead Plaintiffs were served with eight sets of document requests (two on the Ohio Funds, two on SEPTA, and four on IUOE Local 39), three sets of interrogatories (including 17 contention interrogatories), and a set of 24 requests for admission,[89] and they collectively produced more than 550,000 documents totaling more than six million pages.[90] In responding to BNYM's demands, Lead Customer Plaintiffs deployed substantial time and resources to conduct electronic searches, review archival records for relevant documents, and coordinate with Co-Lead Customer Counsel.

Defendants also took *32 depositions* of these Plaintiffs or their agents, consisting of 18 witnesses from the Ohio Funds, five from SEPTA, and nine affiliated with IUOE Local 39.[91] Much of that testimony was cumulative and could have been accomplished through Rule 30(b)(6) depositions. Inexplicably, near the close of fact discovery (and after those 32 depositions had been taken), BNYM served each of the Lead Customer Plaintiffs with a Rule 30(b)(6) deposition notice that essentially mirrored the topics covered in each of the individual-witness depositions.[92]

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[89] Joint Decl. ¶¶ 131-35,

[90] *Id.* ¶ 257.

[91] *Id.* ¶ 258.

[92] *Id.* ¶ 259.

Lead Customer Plaintiffs also agreed to serve as percipient fact witnesses in the DOJ Action and travel to New York for any potential trial in that matter.[93] Those Plaintiffs' cooperation enabled the USAO to forgo separate time-consuming depositions of them, allowing the USAO to concentrate on other aspects of the case.

Even more remarkable, SEPTA and IUOE Local 39 faced Counterclaims by BNYM for indemnification of the Bank's attorneys' fees and expenses incurred in defending not only this Litigation but also the government actions. For taking up the cause on behalf of the Class, these Plaintiffs were singled out for financial liability far in excess of what they could have recovered in this Litigation.

Through its Counterclaims and relentless discovery demands, the Bank was attempting to "punish" Lead Customer Plaintiffs for bringing suit and discourage others from bringing claims in the future (whether based on FX or other practices). Without those Plaintiffs' commitment in the face of intimidation, this Settlement would not have been possible.[94] Further, the Notice informed Class Members that Lead Customer Plaintiffs might seek Service Awards of up to $25,000 each from the Settlement Fund and that the ERISA Plaintiffs might seek Service Awards of up to $3,000 each from the Fund; no objection has been received.[95]

In light of the foregoing, Service Awards are justified.[96] Lead Settlement Counsel therefore request a modest Service Award of $25,000 for each Lead Customer Plaintiff, as well

[93] *Id.* ¶ 260.

[94] Representatives of OP&F, SERS, SEPTA, and IUOE Local 39 have submitted declarations in support of final approval of the Settlement, approval of attorneys' fees and reimbursement of Litigation Expenses, and Service Awards. *See* Joint Decl. Exs. 11-14.

[95] *See* Joint Decl. ¶ 261.

[96] *See*, *e.g.*, *In re Am. Int'l Grp. Sec. Litig.*, No. 04 Civ. 8141 (DAB), 2010 U.S. Dist. LEXIS 129196, at *19-20 (S.D.N.Y. Dec. 2, 2010) (awarding $30,000 to lead plaintiffs "to compensate them for the time and effort they devoted on behalf of the class," including "meetings with counsel, time devoted to responding to extensive document requests and interrogatories and producing more than 260,000 pages of documents, preparation for and attendance at ten class discovery-depositions, review of court filings, and correspondence and telephone

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as a smaller service Award of $3,000 for each ERISA Plaintiff—a total award of $118,000, representing 0.0352% of the $335 million Settlement Amount—to defray the time and expenses incurred in connection with representing the Class over the course of this four-year Litigation, and, in particular, to recognize Lead Customer Plaintiffs' extraordinary efforts to protect the Class's interests.

CONCLUSION

Lead Settlement Counsel respectfully submit that their application for fees, reimbursement of Litigation Expenses, and Service Awards to Plaintiffs "reasonably balances the interests of the [C]lass—which the Court must guard jealously—with the goal of adequately compensating counsel for their work." *See IndyMac*, 2015 U.S. Dist. LEXIS 37052, at *23. Counsel therefore request that the Court grant attorneys' fees of $83.75 million, reimbursement of $2,901,734.10 in Litigation Expenses, Service Awards of $25,000 each to OP&F, SERS, SEPTA, and IUOE Local 39, and Service Awards of $3,000 each to the six ERISA Plaintiffs.

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conversations with counsel"); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM) (PED), 2010 U.S. Dist. LEXIS 119702, at *88-92 (S.D.N.Y. Nov. 5, 2010) (awarding $100,000 to one lead plaintiff and $5,000 to another); *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 U.S. Dist. LEXIS 120953, at *60-62 (S.D.N.Y. Dec. 23, 2009) (awarding over $200,000 to lead plaintiffs that "actively and effectively fulfilled their obligations as representatives of the Class").

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Respectfully submitted,

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