**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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| 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) |

**REPLY IN FURTHER SUPPORT OF FINAL SETTLEMENT APPROVAL, CLASS CERTIFICATION, SETTLEMENT ALLOCATION, AND APPLICATION FOR ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND SERVICE AWARDS TO PLAINTIFFS**

Lead Plaintiffs and Lead Settlement Counsel respectfully submit this memorandum in further support of (1) Lead Plaintiffs' motion for final approval of the proposed Settlement and the proposed Plan of Allocation, as well as certification of the Settlement Class ("Final Approval Motion"); and (2) Lead Settlement Counsel's application for attorneys' fees, reimbursement of Litigation Expenses, and Service Awards to Plaintiffs ("Fee Request," and with the Final Approval Motion, the "Motions").[1]

## PRELIMINARY STATEMENT

The Settlement Class has unequivocally signaled its approval of this extraordinary resolution. The Court-approved Notice program has been completed, and the deadlines for objections and requests for exclusion have passed. Notice was disseminated directly to the approximately 1,218 Settlement Class Members identified from BNYM's custodial files, most of whom are sophisticated financial entities with experience in evaluating class-action settlements, including determining whether those settlements sufficiently protect those entities' interests. No Class Member has objected to this Settlement or the Fee Request.[2] Further, there are only two requests for exclusion, and those Class Members' collective estimated net recovery represents a tiny portion of the Net Settlement Fund. Class Members' overwhelmingly positive response, considered together with the other factors detailed in Lead Plaintiffs' and Lead Settlement Counsel's previous filings, supports final approval of the Settlement and the Fee Request. The Motions should therefore be granted in their entirety.

[1] Unless otherwise indicated, capitalized terms have the same meanings 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), as well as in the materials previously submitted in support of the Motions, including the memorandum in support of the Final Approval Motion ("Final Approval Br.") (Dkt. No. 617), the memorandum in support of the Fee Request (Dkt. No. 619), and the Joint Declaration of Sharan Nirmul and Daniel P. Chiplock in support of the Final Approval Motion and the Fee Request ("Joint Decl.") (Dkt. No. 622).

[2] For convenience, "Settlement Class Members" are also referred to simply as "Class Members."

## ARGUMENT

### I. Class Members' Near-Unanimous Support For The Settlement And The Fee Request Warrants Approval Of Both.

#### A. The Class, Consisting Largely of Sophisticated Institutional Entities Well Versed in Evaluating Class Settlements, Has Voiced No Objection to the Settlement or the Fee Request.

"A favorable reception by the class constitutes 'strong evidence' of the fairness of a proposed settlement and supports judicial approval." *Bellifemine v. Sanofi-Aventis U.S. LLC*, No. 07 Civ. 2207 (JGK), 2010 U.S. Dist. LEXIS 79679, at *8 (S.D.N.Y. Aug. 5, 2010) (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974)).[3] Following the extensive Notice process coordinated by Lead Customer Counsel with the assistance of the Court-approved claims administrator Garden City Group, LLC ("GCG"),[4] *no* Class Member has objected to any aspect of the Settlement or the Fee Request. The absence of objections strongly favors granting the Motions.[5] Indeed, as Judge McMahon of this District recently highlighted in approving a fee request that amounted to one-third of the cash portion of a settlement and represented a lodestar multiplier of 4.87, the lack of objections to the proposed award "is particularly significant where . . . the Class contains many large and sophisticated investors." *Fleisher v. Phoenix Life Ins. Co.*, No. 11-cv-8405 (CM), 2015 U.S. Dist. LEXIS 121574, at *46 (S.D.N.Y. Sept. 9,

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

[4] *See* Final Approval Br. 21-26; Joint Decl. Ex. 15 (Aff. 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).

[5] *See, e.g.*, *Asare v. Change Grp. N.Y., Inc.*, No. 12 Civ. 3371 (CM), 2013 U.S. Dist. LEXIS 165935, at *42 (S.D.N.Y. Nov. 15, 2013) ("[N]ot one potential class member has made an objection, a factor held by courts as supporting approval of an attorneys' fees award."); *Davis v. J.P. Morgan Chase & Co.*, 827 F. Supp. 2d 172, 183 (W.D.N.Y. 2011) (while "the absence of objections to an agreed-upon attorney's fee award does not relieve the Court of its independent obligation to assess the agreement for its overall fairness and reasonableness," it is "a factor that weighs in favor of approval of the award," which "makes a good deal of sense, since one of the primary reasons why courts must evaluate the reasonableness of a fee award is to protect the interests of the class").

2015).[6]

Further, Class Members stand to receive a total gross settlement recovery of approximately 35% of their maximum potential recovery at trial, as calculated by Plaintiffs' damages expert during the Litigation, and the average recovery for Class Members is $400,000, with nearly 100 Class Members to receive more than $1 million apiece. The Settlement thus provides meaningful relief to Class Members, and the $83.75 million requested fee, amounting to 25% of the Settlement Amount and representing a blended lodestar multiplier of 1.61, appropriately balances the twin objectives of protecting Class Members' interests and recognizing "the outstanding results achieved for the Class through the efforts of Class Counsel, and the enormous risks taken and overcome in litigation brought entirely on a contingency fee basis." *Id.* at *44.

### B. <u>There Are Only Two Requests for Exclusion Among the Approximately 1,218 Settlement Class Members.</u>

Class Members' support for the Settlement and the Fee Request is also evidenced by the near absence of opt-outs. Among the approximately 1,218 Class Members, only three requests for exclusion were received,[7] and one entity that had requested exclusion has since decided to

[6] The requested fee in *Fleisher* represented 9.9% of the total gross value of the settlement (i.e., including non-monetary benefits and the amount earmarked for attorneys' fees to be paid by defendant), which the court observed was "*far below* the mainstream of percentage awards in this Circuit." *Id.* at *55 (emphasis in original). The court further noted the fee represented "just 22% of the cash fund that is available for distribution to the Class plus [defendant]'s separate $6 million payment[,] [ ] or 27.8% of the $48.5 million made available for the benefit of the class, or one-third of the entire remaining cash portion of the settlement—all of which falls well within the mainstream of percentage of [sic] award[s] granted by courts in this Circuit." *Id.* (footnote omitted).

[7] One request for exclusion, from TCW Funds, Inc. ("TCW"), addressed managed accounts of the following two entities relating to TCW: (i) Trust Company of the West – TCW; and (ii) Trust Company of the West – TCW – USSS BNY. *See* Supp. Aff. of Stephen J. Cirami Regarding Requests for Exclusion Received (Dkt. No. 627) ("Cirami Supp. Aff.") ¶ 3 & Ex. A. Each of those entities engaged in standing instruction foreign exchange ("SI FX") transactions with BNYM through a number of managed accounts. TCW has requested exclusion with respect to transactions made through all of the managed accounts of Trust Company of the West – TCW, and with respect to some, but not all, of the managed accounts of Trust Company of the West – TCW – USSS BNY. A TCW representative explained to Lead Customer Counsel that TCW requested exclusion for the Trust Company of the West – TCW managed accounts and the several Trust Company of the West – TCW – USSS BNY managed

*Footnote continued on next page*

rescind its request.[8] The collective estimated net recovery of the entities that have maintained their requests for exclusion, as calculated under the proposed Plan of Allocation, is less than $75,000, or less than 0.03% of the $248,227,265.90 that would accrue to Class Members from the $335 million Settlement Amount, assuming the Court grants the Fee Request in its entirety (and without accounting for any interest, administrative costs, escrow fees, or taxes).[9] Both by number and percentage, opt-outs are miniscule, and this high level of support and desire to participate in the Settlement among the Class compares very favorably to other, recently approved settlements within this District. *See, e.g.*, *Fleisher*, 2015 U.S. Dist. LEXIS 121574, at *22-26 (describing the "overwhelming" response of the class where 758 copies of the notice were mailed and three class members requested exclusion); *Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331 (CM) (MHD), 2014 U.S. Dist. LEXIS 37872, at *31-34 (S.D.N.Y. Mar. 21, 2014) (support for settlement was "overwhelming" where nearly 2,800 notices were mailed to

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accounts because those accounts belonged to funds that are now closed or dissolved, rendering distribution of the projected recoveries impracticable. *See* Supp. Decl. of Daniel P. Chiplock in Further Support of Final Settlement Approval, Class Certification, Settlement Allocation, and Application for Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards to Plaintiffs ("Chiplock Supp. Decl.") ¶ 3.

[8] *See* Cirami Supp. Aff. ¶ 3; Chiplock Supp. Decl. ¶ 5 & Ex. 1 (E-mail from Arnaldo J. Ovalles of Boys Town to Daniel P. Chiplock dated Sept. 9, 2015). Lead Settlement Counsel calculate that the estimated net recovery of that Class Member, Father Flanagan's Boys' Home ("Boys' Home"), is less than $1,000. *See* Chiplock Supp. Decl. ¶ 6. Permitting the Boys' Home to participate in the Settlement thus will not materially affect other Class Members' net recoveries. Further, it cannot be said that in electing to remain in the Class, other Class Members detrimentally relied on the Boys' Home's initial decision to opt out. Lead Plaintiffs respectfully request that the Court allow the Boys' Home to rescind its request for exclusion and participate in the Settlement as a Class Member. *See, e.g.*, *In re Tremont Sec. Law, State Law, & Ins. Litig.*, No. 08-cv-1117, 2015 U.S. Dist. LEXIS 73501, at *22-23 (S.D.N.Y. June 5, 2015) ("Lead counsel observes that members of the Settlement Class never detrimentally relied on the decision of the Opt-Out Plaintiffs to opt out. Numerous courts have permitted opt-outs to rejoin a class under similar circumstances.") (citing cases); *In re Elec. Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 397 (D.N.J. 2006) (explaining, *inter alia*, that "[i]t cannot be said that any class member relied, to its detriment, on the [opt-outs'] original decision to opt out, since that development was contemporaneous with all other decisions and could not have been a factor in the decision of any particular class member to participate," and "no special advantage is conferred upon the [opt-outs] through this procedural development of opting out and then opting back in").

[9] Indeed, TCW has not requested exclusion with respect to other TCW entities/managed accounts. The total estimated net recovery for the TCW entities/managed accounts that will be excluded—less than $70,000—is far less than the total estimated net recovery for the TCW entities/managed accounts that are remaining in the Class. *See* Chiplock Supp. Decl. ¶ 4.

class members, resulting in nine valid opt-outs and one objection); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 475 (S.D.N.Y. 2013) ("No Class Member objected to the Settlement, and only eight of the 1,735 Rule 23 Class Members opted out. This favorable response demonstrates that the class approves of the Settlement and supports final approval.").[10]

The nearly unanimous determination by Class Members to participate in the Settlement, together with the lack of objections, strongly supports final approval of the Settlement and the Fee Request.

## II. Lead Customer Counsel Have Provided The Additional Information Requested By Crowell & Moring LLP With Respect To Certain Settlement Class Members.

As the Court is aware, on August 26, 2015, Crowell & Moring LLP submitted a letter notifying the Court of its clients' purported "reservation of rights . . . and, to the extent necessary, objection to the Claims Administrator's determination of the Recognized Loss amount" for those entities.[11] Crowell & Moring expressly noted its clients do *not* object to the Settlement or the Fee Request.[12] Rather, they requested that GCG or Class Counsel "provide to them all underlying information and records used to calculate Recognized Loss for Claimants."[13] As Lead Customer Counsel advised the Court, only 18 of the 46 entities identified as "Claimants" in the Crowell & Moring Letter are actually Settlement Class Members (or have

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[10] *See also D'Amato v. Deutsche Bank*, 236 F.3d 78, 86-87 (2d Cir. 2001) (where 27,883 notices were sent, 72 class members requested exclusion, and 18 written objections and comments were received, district court "properly concluded that this small number of objections weighed in favor of the settlement").

[11] Letter from Daniel A. Sasse and Randa Adra of Crowell & Moring LLP to the Court dated Aug. 26, 2015 ("Crowell & Moring Letter") (Dkt. No. 623) at 1.

[12] *See id.* ("Claimants do not object to the Settlement of the Litigation as embodied in the Stipulation ('Settlement'). Nor do they object to the approval of the total Settlement as fair, reasonable or adequate. Further, Claimants do not object, in whole or in part, to the award of the attorney's fees, expenses of Plaintiffs and Plaintiffs' Counsel, or Service Awards to Plaintiffs.").

[13] *Id.*

domestic affiliates or predecessor/successor entities who are Class Members).[14]

From the time Crowell & Moring first contacted them (on August 25, 2015), Lead Customer Counsel have responded quickly and appropriately to the request for additional information—including seeking and obtaining permission from The Bank of New York Mellon ("BNYM") to share with Crowell & Moring the requested SI FX transaction data, which BNYM had designated as confidential under the Confidentiality Order—and have provided or received permission to provide all of the requested information with respect to the Crowell & Moring Class Members.[15]

## III. Given The Lack Of Objections, Lead Settlement Counsel Expect The Net Settlement Fund Will Be Distributed Expeditiously To Class Members Once The Settlement Becomes Final.

As there are no objections to the Settlement, Lead Settlement Counsel anticipate that once the Court enters the Order and Final Judgment, they will file a motion for distribution of the Net Settlement Fund. Lead Settlement Counsel will ask the Court to direct that distribution of the settlement proceeds commence on the day after the Settlement becomes final (30 days after the Court enters the Order and Final Judgment, *see* Chiplock Decl. Ex. 1 (Stipulation) ¶ 1(n)), i.e., on the 31st day after entry of the Order and Final Judgment. Actual distribution of settlement funds to Class Members will occur immediately after the Court enters a Distribution Order.

## CONCLUSION

For the foregoing reasons, as well as those detailed in the materials previously submitted in support of final approval of the proposed Settlement and approval of the Fee Request,

[14] *See* Letter from Daniel P. Chiplock to the Court dated Aug. 27, 2015 (Dkt. No. 625) at 1. Those Class Members are referred to in this reply as the "Crowell & Moring Class Members."

[15] *See* Chiplock Supp. Decl. ¶ 7.

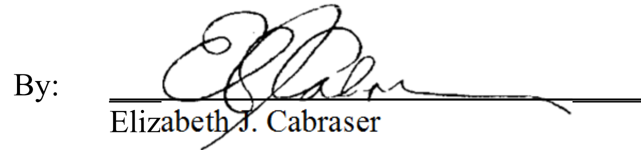
(1) Lead Plaintiffs respectfully request that the Court (i) find that the proposed Settlement is fair, reasonable, and adequate; (ii) approve the Plan of Allocation; (iii) find that the Notice comported with Rule 23 and due process; (iv) certify the Settlement Class, appoint Lead Plaintiffs as Settlement Class representatives, and appoint Lead Settlement Counsel as Class Counsel; and (v) retain ongoing jurisdiction over the administration and effectuation of the Settlement for the benefit of Class Members; and (2) Lead Settlement Counsel respectfully 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 Lead Plaintiffs Ohio Police & Fire Pension Fund, School Employees Retirement System of Ohio, Southeastern Pennsylvania Transportation Authority, and International Union of Operating Engineers, Stationary Engineers Local 39 Pension Trust Fund, and Service Awards of $3,000 to each of the seven individual ERISA Plaintiffs.[16]

[16] The Memorandum in Support of Lead Settlement Counsel's Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards to Plaintiffs (Dkt. No. 619) inadvertently referenced 6 rather than 7 individual ERISA Plaintiffs who were seeking service awards of $3,000. Lead Plaintiffs apologize for the error. The correct number is 7(including Plaintiff Carl Carver), and all such individual ERISA Plaintiffs were identified in the Notice as potentially seeking such Service Awards.

Dated: September 15, 2015

Respectfully submitted,

**LIEFF CABRASER HEIMANN & BERNSTEIN, LLP**

By: 
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