UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	
BANK OF NEW YORK MELLON CORP. FOREX TRANSACTIONS LITIGATION	)	12 MD 2335 (LAK)
	)	ECF Case
This Document Relates to:	)	
1:12-cv-03066-LAK, *Southeastern Pennsylvania Transportation Authority v. The Bank of New York Mellon Corporation*; 1:12-cv-03067-LAK *International Union of Operating Engineers, Stationary Engineers Local 39 Pension Trust Fund v. The Bank of New York Mellon Corporation, et al.*; 1:12-cv-03470-LAK, *Ohio Police & Fire Pension Fund, et al. v. The Bank of New York Mellon Corporation, et al.*	)	

MASTER CUSTOMER CLASS COMPLAINT

Plaintiffs Ohio Police & Fire Pension Fund ("OP&F") and School Employees Retirement System of Ohio ("SERS"), Southeastern Pennsylvania Transportation Authority ("SEPTA"), and International Union of Operating Engineers, Stationary Engineers Local 39 Pension Trust Fund ("IUOE Local 39") (collectively, "Plaintiffs") individually and on behalf of all others similarly situated, for this Master Customer Class Complaint against Defendants The Bank of New York Mellon Corporation, The Bank of New York Mellon, The Bank of New York Company, Inc., The Bank of New York, Mellon Bank N.A., and The Bank of New York Mellon Trust Company, National Association (collectively, "Defendants" or "BNYM"), allege the facts contained herein based upon personal knowledge as to themselves and their own acts, and upon information and belief or the investigation of counsel as to all other matters.

This Master Customer Class Complaint serves as a consolidation of the allegations set

forth in *Int'l Union of Operating Engineers, Stationary Engineers Local 39 Pension Trust Fund v. The Bank of New York Mellon Corp., et al.*, No. 12-cv-3067 (LAK); *Southeastern Pennsylvania Transportation Authority v. The Bank of New York Mellon Corp.*, No. 12-cv-3066 (LAK); and *Ohio Police & Fire Pension Fund, et al. v. The Bank of New York Mellon Corp., et al.*, No. 12-cv-3470 (LAK), each of which were transferred to this Court by the Multidistrict Litigation Panel and consolidated for pre-trial proceedings. Plaintiffs intend the Master Customer Class Complaint to be the operative document upon which all further pre-trial proceedings in these customer class actions will be governed, without waiver as to any appellate rights with respect to claims set forth in the preceding complaints that may have been disposed by orders of this Court or any transferor court, or ability to amend these allegations as necessary.

I. INTRODUCTION

1. This is an action to recover damages on behalf of Plaintiffs and members of the proposed class and subclasses defined below (collectively, the "Class"), for harm suffered as a result of BNYM's practice of deceptively assigning fictitious foreign currency exchange ("FX") rates to the Class' purchases and sales of foreign securities that were done pursuant to "standing instructions" (as further described below), in violation of the common law and the laws of New York, California, Ohio, and other states with similar deceptive trade practices statutes.

2. Throughout the Class Period (as defined below), it has been the regular practice of BNYM's FX traders and transaction desks, working in conjunction with their custody department, to leverage every possible FX transaction done under "standing instructions" for the exclusive pecuniary benefit of BNYM, to the detriment of BNYM's custodial customers.

3. Specifically, BNYM has consistently acquired substantial and unlawful profits at the expense of Plaintiffs and the Class by consistently charging Plaintiffs and the Class for purchases and sales of a foreign currency (on an "indirect" basis or under "standing

instructions") using FX rates that incorporate hidden and grossly excessive mark-ups or mark-downs relative to the interbank market FX rate applicable at the time of the trade. In so doing, BNYM has reaped windfalls – which can include thousands of dollars on a single trade – by pocketing the difference between the fictitious price and the actual price for the currency obtained or sold for BNYM's custodial clients. Clients such as Plaintiffs and the Class remained unaware of this deceptive practice until after the unsealing of several whistleblower complaints filed by BNYM insiders and their own investigation.

4. On information and belief, BNYM's deceptive practices date back more than ten years, affect similarly situated customers throughout the nation, and have yielded hundreds of millions of dollars in unlawful profits to BNYM. BNYM's activities are currently the subject of whistleblower lawsuits being pursued by the State of Florida,[1] the State of New York,[2] and various counties of California,[3] as well as an administrative proceeding by the Securities Division of the Office of the Secretary of the Commonwealth of Massachusetts.[4] In addition, the United States Department of Justice ("DOJ") is pursuing a civil fraud action[5] on behalf of federally insured financial institutions against The Bank of New York Mellon Corp., seeking penalties under the Financial Institutions Reform, Recovery and Enforcement Act, 12 U.S.C. § 1833a ("FIRREA"), as well as injunctive relief under the Fraud Injunction Statute, 18 U.S.C. §

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[1] *State of Florida, ex. rel. FX Analytics v. The Bank of New York Mellon Corp.*, No. 2009-ca-4140 (Fla. Cir. unsealed Feb. 7, 2011) ("Florida Action")

[2] *People of the State of New York, et al., v. The Bank of New York Mellon Corporation*, Index No. 09/114735 (N.Y. Sup. Ct.) ("NYAG Action").

[3] *Bank of New York Mellon Corp. False Claims Act Foreign Exchange Litigation v. BNY Mellon*, No. 3:11-cv-05683-WHA (removed to N.D. Cal. on Nov. 28, 2011).

[4] *In the Matter of The Bank of New York Mellon Corporation*, Docket No. 2011-0044 (administrative complaint filed by the Office of the Secretary of the Commonwealth, Securities Division, on Oct. 26, 2011) (the "Massachusetts Action")).

[5] *United States v. BNY Mellon Corp.*, No. 1:11-cv-06969-LAK (S.D.N.Y.) ("DOJ Action").

1345 (the "DOJ Action"). The Securities and Exchange Commission ("SEC") and United States Department of Labor are also pursuing their own investigations.

5. BNYM's deceptive, unlawful and unfair practices throughout the Class Period were in violation of its statutory and common law duties to Plaintiffs and the Class, and contrary to BNYM's repeated representations as to the benefits of its cutting-edge technology, its advanced claims processing procedures, the competitiveness of its FX rates, the aggregation and netting[6] of trades "based on guidelines tailored to client needs," and the "best execution standards" that BNYM claimed to follow. BNYM's acts contravened affirmative representations made to Plaintiffs and the Class in BNYM's written FX policies and procedures, advertising, and other written representations concerning the terms that Plaintiffs and the Class should reasonably expect for FX transactions conducted by BNYM.

6. Plaintiffs and the other Class members could not reasonably have detected BNYM's deceptive, unlawful and unfair practices during the Class Period. Nothing in the FX rates that BNYM actually reported to Plaintiffs and the Class – which BNYM largely placed within (though at the extremes of) the trading range of the day – indicated that those rates were false and included hidden and unauthorized mark-ups or mark-downs.

7. Plaintiffs bring this action as a class action on behalf of all similarly affected public and non-public institutional investors in foreign securities, including but not limited to public and private pension funds, mutual funds, endowment funds, investment manager funds, and employee benefit plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), for which BNYM performed FX trades pursuant to "standing instructions" in order

[6] "Netting," when actually implemented, allows clients that require FX trades to make one transaction instead of two, thereby reducing costs. When the same currency must be bought and sold, the two positions can be "netted," allowing the transaction to be completed in one trade.

to recover the proceeds that BNYM improperly obtained from them through the deceptive, unlawful and unfair FX trading practices alleged herein.

II. JURISDICTION AND VENUE

8. This Court has subject-matter jurisdiction over this action pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2), because this is a class action, including claims asserted on behalf of a nationwide class, filed under Rule 23 of the Federal Rules of Civil Procedure; there are thousands of potential Class members; the aggregate amount in controversy exceeds the jurisdictional amount or $5,000,000.00; and at least two of the three Defendants are citizens of a State different from that of Plaintiffs and the Class. This Court also has subject matter jurisdiction over Plaintiffs' and the proposed Class' claims pursuant to 28 U.S.C. § 1367(a).

9. Venue is proper in this District for pretrial matters by order of the Judicial Panel on Multidistrict Litigation and for all matters pursuant to 28 U.S.C. § 1391(b) and (c).

III. PARTIES

A. Plaintiffs

10. Plaintiff Ohio Police & Fire Pension Fund ("OP&F"), located at 140 East Town Street, Columbus, OH 43215-5125, is a body corporate and politic created by the Ohio legislature to provide retirement, disability, and other benefits to active and retired police officers and firefighters as well as to their beneficiaries and survivors. *See* R.C. § 742.02. OP&F's enabling statute: (i) vests the administration and management of OP&F in a board of trustees, the composition of which is defined by statute, *see* R.C. § 742.03(B); (ii) assigns title to the assets of the system to the OP&F board, *see* R.C. § 742.11(E); (iii) provides the terms of membership in OP&F, the conditions for receiving benefits, and the formulas for determining the amount of any benefit due, *see generally* R.C. §§ 742.63(A)(1), 742.37, 742.39; and (iv)

designates the manner in which the monies of the system are kept in statutorily designated accounts, see R.C. §§ 742.59, 742.60. OP&F serves more than 56,210 public employees across the State of Ohio. OP&F managed approximately $11.62 billion in assets as of August 31, 2011.

11. Plaintiff School Employees Retirement System of Ohio ("SERS"), located at 300 East Broad Street, Suite 100, Columbus, OH 43215-3746, was established and operates pursuant to Chapter 3309 of the Ohio Revised Code. SERS is authorized by its enabling statute to provide pension benefits and access to post-retirement health care coverage to active and retired non-teaching public school employees. See R.C. § 3309.03. SERS's enabling statute: (i) vests the administration and management of SERS in a board of trustees, the composition of which is defined by statute, see R.C. §§ 3309.04, 3309.05; (ii) assigns title to the assets of the system to the SERS board, see R.C. § 3309.03; (iii) provides the terms of membership in SERS, the conditions for receiving benefits, and the formulas for determining the amount of any benefit due, see generally R.C. §§ 3309.23-.26, 3309.34-.381; and (iv) designates the manner in which the monies of the system are kept in statutorily designated accounts, see R.C. §§ 3309.60, 3309.61. Established in 1937, SERS serves more than 189,000 public employees across the State of Ohio. SERS managed approximately $10.48 billion in assets as of July 31, 2011.

12. The holdings of OP&F and SERS (together, the "Ohio Funds") include international assets that require FX transactions. Defendants provided custodial services to the Ohio Funds and the Class during the Class Period, which included executing FX transactions on these Plaintiffs' and the Class' behalf pursuant to "standing instructions." Specifically, OP&F used BNY Mellon (defined below) and one or more of its predecessors from approximately May 1, 2004 to July 5, 2010 for custodial FX services. SERS used BNY Mellon and one or more of its predecessors from approximately February 1, 2007 to at least July 1, 2012 for custodial FX

services. At no time did OP&F or SERS authorize BNYM to charge Plaintiffs the false FX rates as alleged herein. OP&F and SERS estimate that, together, they have suffered millions of dollars in losses as a result of BNYM's FX price manipulation as alleged herein.

13. Plaintiff SEPTA is a regional public transportation authority serving Bucks, Chester, Delaware, Montgomery, and Philadelphia Counties in the State of Pennsylvania. SEPTA's principal offices are located in Philadelphia, PA. BNY Mellon or one or more of its predecessors (including Mellon Bank, N.A.) has provided SEPTA custodial services since at least 1990. During the Class Period, BNY Mellon executed hundreds of FX transactions on SEPTA's behalf pursuant to "standing instructions." At no time did SEPTA authorize BNY Mellon to charge SEPTA the false FX rates as alleged herein.

14. Plaintiff International Union of Operating Engineers Local 39 Stationary Engineers ("IUOE Local 39") is an employee benefit plan covered by ERISA with principal offices at 48 Julian Street, San Francisco, California. IUOE Local 39 provides retirement and survivor benefits to approximately 17,000 members. IUOE Local 39's holdings include international assets that require FX transactions. BNYM provided custodial services to IUOE Local 39 during the Class Period, which included executing FX transactions on IUOE Local 39's behalf pursuant to "standing instructions." At no time did IUOE Local 39 authorize BNYM to charge IUOE Local 39 the false FX rates as alleged herein.

B. Defendants

15. Defendant BNY Mellon Corp. is a Delaware corporation with headquarters at One Wall Street, New York, New York, 10286. BNY Mellon Corp. is the product of the July 1, 2007 merger (the "Merger") of The Bank of New York Company, Inc. and Mellon Financial Corporation ("Mellon Financial"). BNY Mellon Corp. is the parent of Defendant The Bank of New York Mellon. According to BNY Mellon Corp.'s Form 10-K for the year ended December

31, 2010 (filed with the SEC on February 28, 2011) ("BNY Mellon Corp. 2010 10-K"), BNY Mellon Corp. had "$1.17 trillion in assets under management and $25.0 trillion in assets under custody and administration as of Dec. 31, 2010." BNY Mellon Corp.'s principal assets and sources of income come from its two principal bank subsidiaries, including Defendant The Bank of New York Mellon. *See* BNY Mellon Corp. 2010 10-K at 4, 25.

16. Defendant The Bank of New York Mellon ("BNY Mellon"), a New York state chartered bank, is one of two principal bank subsidiaries of BNY Mellon Corp., and is the successor entity (post-Merger) to The Bank of New York. According to the BNY Mellon Corp. 2010 10-K, BNY Mellon "houses [BNY Mellon Corp.'s] institutional businesses, including Asset Servicing, Issuer Services, Treasury Services, Broker-Dealer and Advisor Services, and the bank-advised business of Asset Management." *Id.* at 4.[7] BNY Mellon Corp. identifies BNY Mellon as its largest bank subsidiary. *See* BNY Mellon Corp. 2010 10-K at 6. BNY Mellon is the principal bank subsidiary of BNY Mellon Corp. responsible, since the Merger, for providing custodial and FX services to institutional investors such as Plaintiffs and the Class. According to BNY Mellon's website, "The Bank of New York Mellon offers a comprehensive array of trade execution services designed to support a client's Global Custody activity, including standing instruction services …." There is substantial overlap between BNY Mellon Corp. and BNY Mellon's leadership. According to the BNY Mellon Corp. 2010 10-K (at 30-32), every current executive officer of BNY Mellon Corp. also serves as an officer of BNY Mellon.

17. Defendant Mellon Bank N.A. ("Mellon"), a historical subsidiary of BNY Mellon Corp., originally provided the custodial and FX services at issue in this action to SEPTA, SERS,

[7] The second of BNY Mellon Corp.'s two principal banks, BNY Mellon, National Association ("BNY Mellon, N.A."), is described by BNY Mellon Corp. as housing its "Wealth Management business," and is not at issue in this case. *Id.*

and the Class. In approximately 2007, after the Merger, BNY Mellon assumed Mellon's custodial and FX operations and is the current provider of such services to SEPTA and Class members. Prior to and after the Merger, Mellon was located at One Mellon Center, 500 Grant Street, Pittsburgh, PA 15258-0001.

18. Defendant The Bank of New York Company, Inc., through its Investor & Broker-Dealer Services business segment, provided (prior to the Merger) global custody services, securities lending, and FX trading and execution services to institutional investors including Plaintiffs OP&F, IUOE Local 39 and the Class. *See* The Bank of New York Company, Inc.'s Annual Report on Form 10-K for the year ended December 31, 2006 (filed with the SEC on February 22, 2007) ("BNY 2006 10-K") at 14.

19. Prior to the Merger, the Bank of New York Company, Inc.'s principal subsidiary, Defendant The Bank of New York, served clients throughout the world in five primary businesses: Securities Servicing and Global Payment Services, Private Client Services and Asset Management, Corporate Banking, Global Market Services, and Retail Banking. *See* The Bank of New York Company, Inc.'s Annual Report on Form 10-K for the year ended December 31, 2003 (filed with the SEC on March 10, 2004) ("BNY 2003 10-K") at 2.

20. Defendants The Bank of New York Company, Inc. and The Bank of New York are referred to collectively herein as "BNY," and at all relevant times were headquartered in New York.

21. Defendant The Bank of New York Mellon Trust Company, National Association (the "Bank"), which was known prior to July 1, 2008 as The Bank of New York Trust Company, National Association, is a national bank headquartered at 700 South Flower Street, Suite 200, Los Angeles, California 90017. BNY Mellon Corp. describes the Bank as a "primary

subsidiary" of BNY Mellon Corp. *See* BNY Mellon Corp. 2010 10-K at Exh. 21.1. The Bank is one of two U.S. trust companies of BNY Mellon Corp. that "house trust products and services across the U.S." *Id.* at 4.

IV. FACTUAL ALLEGATIONS

A. Background on Defendants' Relationship with Plaintiffs

22. Defendants provided custodial services for Plaintiffs during the Class Period. A "custodian" is an institution that holds securities on behalf of investors. The responsibilities entrusted to a custodian include the guarding and safekeeping of securities, delivering or accepting traded securities, and collecting principal, interest, and dividend payments on held securities. Custodians are typically used by institutional investors who do not wish to leave securities on deposit with their broker-dealers or investment managers. By separating these duties, the use of custodians – at least in theory – is designed to reduce the risk of fraud or other misconduct. An independent custodian ensures that the investor has unencumbered ownership of the securities other agents represent to have purchased on its behalf.

23. Defendants have provided custodial services to a large number of pension funds and other institutional investors across the country throughout the Class Period. Indeed, BNYM touts itself as "the world's largest global custodian," and has $25 trillion in assets under custody.

24. During the past decade, pension funds such as Plaintiffs and other members of the Class have increasingly looked to overseas companies and securities markets in order to diversify their holdings and maximize investment returns. The necessity for pension funds, in particular, to invest in foreign securities in order to properly diversify and meet their funding requirements is well-known to and appreciated by custodial service providers such as Defendants.

25. Because foreign investments are bought and sold in the foreign currencies of the nations in which they are issued, U.S.-based investors necessarily must purchase and sell those foreign currencies in order to complete the transactions. A custodial bank's services accordingly may include undertaking foreign currency exchange transactions necessary to facilitate a client's purchases or sales of foreign securities, as well as the repatriation of interest, dividend, and other payments that result from these investments.

26. In connection with its custodial services, BNYM provided such FX services to Plaintiffs and the Class during the Class Period. During the Class Period, BNYM specifically touted the experience, expertise, and the performance of its FX Desk, representing that it is "a highly capable provider for foreign exchange sales, trading, e-commerce, and research services."

27. BNYM provided FX services during the Class Period to its custodial clients in one of two ways. The first way was through "direct" or "negotiated" sales or purchases of foreign or domestic currency, in which the investment staff or outside investment manager for the custodial clients directly negotiated, at arm's length, the sale or purchase of foreign currency with BNYM. In this manner, the clients' staff (or the clients' outside investment manager) was involved, in real-time, with the sale or purchase of the particular foreign currency necessary for the transaction in a given foreign security to close. BNYM quoted a price for the foreign currency to the custodial client or its representative, which the client or client representative accepted, declined, or negotiated against. These negotiations would occur on the phone or electronically.

28. "Direct" transactions in foreign currency traditionally yielded modest profits to BNYM, typically 2 to 3 basis points ("bps") on bid and asked spreads), per unit of currency, as compared with the interbank exchange rate applicable to a foreign currency at the time of a direct

transaction. A basis point is equivalent to 1/100 of one percentage point (or .0001). This modest spread may be considered a proxy for the "market rate," since it was the product of an arm's length negotiation.

29. The second way in which BNYM purchased or sold foreign currency with custodial clients or their representatives during the Class Period was pursuant to "standing instructions." The indirect method, or "standing instructions," involved BNYM, rather than the client, overseeing the trade process from start to completion, thereby requiring the client to trust BNYM to execute the FX trade in a manner consistent with BNYM's representations and duties as a custodian.

30. Under "standing instructions," BNYM acquired foreign or domestic currency on an as-needed basis, whenever a custodial client bought or sold foreign securities or received a dividend on a foreign security, without the direct involvement of either the custodial client's investment staff or its outside investment managers.

31. Plaintiffs and the Class paid BNYM a flat annual fee for custodial FX services that included "standing instructions" FX trade services. BNYM advertised its "standing instructions" FX services as being "free of charge" (apart from whatever the custodial client paid in annual custodial fees).

32. Throughout the Class Period, BNYM advertised its "standing instructions" as benefitting from "best execution standards" and as being "free of charge and integrated with the client's activity on the various securities markets." BNYM made further representations that "FX standing instruction, is designed to help clients minimize . . . costs related to the foreign exchange . . . ." and to "achieve better rates for the benefit of clients." BNYM also promised aggregation and netting of FX trades based upon client needs.

33. The duty of "best execution," as understood throughout the financial services industry and (as described further herein) ***recognized internally as applied to custodial FX services by BNYM during the Class Period***, requires that a service provider seek to obtain for its customers the most favorable terms reasonably available under the circumstances.

34. At a minimum, therefore, "best execution standards" required BNYM to execute FX trades at or near available interbank market rates at the times of the trades. BNYM itself confirmed this in writing to Plaintiffs and Class members during the Class Period, at times describing "best execution standards" as designed to "maximize the proceeds of each trade."

35. Plaintiffs and the Class reposed a high degree of trust in Defendants; they depended on Defendants to both execute and report FX trades honestly and accurately, and generally relied – as set forth in detail below – on Defendants to carry out "standing instruction" FX trades in a manner consistent with Defendants' marketing and advertising, their respective custodial service contracts and related documents (including associated fee schedules), their written FX policies and procedures and other of Defendants' representations, including representations of "best execution" with respect to "standing instruction" FX trades, contained in any of the foregoing as well as in any of Defendants' responses to Requests for Information ("RFIs") or Requests for Proposals ("RFPs")[8] issued by Plaintiffs or other members of the Class.

1. OP&F

36. The Bank of New York and The Huntington National Bank, as subcustodian for the Treasurer of the State of Ohio, as statutory custodian for OP&F, entered into a Global Custody Agreement on May 1, 2004 ("GCA") (attached as Exhibit A (without attachments)).

[8] RFIs and RFPs are interchangeable terms denoting the same thing, *i.e.*, a customer's request for information, and/or a proposal, from BNYM to provide custodial services.

37. OP&F used BNY Mellon and its predecessors from May 1, 2004 to July 5, 2010 for custodial FX services. The principal documents concerning OP&F's relationship with BNY Mellon and the provision of FX services include (i) the GCA and (ii) the response by BNY to the State of Ohio Treasurer's Service Level Assessment for International Custody for the Ohio Police & Fire Pension Fund and the State Teachers Retirement System for International Custody, dated September 1, 2006 ("P&F RFI Response") (excerpts attached as Exhibit B).

38. Under GCA § 11, entitled "Responsibility of BNY," BNY promised that it would "use reasonable care with respect to its obligations under this Agreement and the safekeeping of Foreign Assets," and that BNY would be "responsible to the Custodian, the Treasurer ***and the Fund***"[9] for its actions and the actions of its Subcustodians. The preamble to the GCA additionally makes clear that the GCA is intended to apply "only" to "Fund Assets," meaning OP&F assets, that may qualify as "foreign assets." *See* GCA ("Background Information"). The GCA, further, is replete with references to "the Fund" (OP&F) as an intended beneficiary of the GCA and, in particular, the FX services BNY contracted to provide.

39. GCA § 13(a) deals directly with FX, and provides as follows:

> To facilitate the administration of the Custodian's trading and investment activity, BNY is authorized to enter into spot or forward foreign exchange contracts with itself or an Authorized Person for BNY and may also provide foreign exchange through its subsidiaries, affiliates or Subcustodians. Instructions, including ***standing instructions***, may be issued with respect to such contracts but the ***BNY may establish rules or limitations concerning any foreign exchange facility made available***. In all cases where BNY, its subsidiaries, affiliates or Subcustodians enter into a foreign exchange contract related to Accounts, the terms and conditions of the then current foreign exchange contract of BNY, its subsidiary, affiliate or Subcustodian and, to the extent not inconsistent, this Agreement shall apply to such transaction.

[9] Unless otherwise noted, all emphases in quoted statements are added.

GCA § 13(a).

40. BNY's 2003 written FX Policies & Procedures for ERISA Plans ("BNY's FX Procedures"), which were operative at the time and thus incorporated in the GCA, ostensibly set forth the "rules and limitations" described above, including the method for determining the rates at which FX transactions would be executed under "standing instructions." These included the promise that "[t]he terms of FX Transactions with any Plan," including those executed pursuant to SIs, "***shall not be less favorable*** to the Plan than terms offered by BNY to unrelated parties in a ***comparable arm's length*** FX Transaction." This promise was repeated in BNY's FX Procedures up through the time of the Merger.

41. BNY's FX Procedures further provided that, under standing instructions, "all income item conversions" (*e.*g., dividend repatriations) involving foreign currency for ERISA fund clients would be "bundled" and "executed" each day at 11:00 a.m. New York time "at or within the range of buy/sell rates in effect at 11:00 a.m. New York time." BNY's 2003 FX Procedures (in effect at the time of the GCA) went on to say that this was done "to achieve ***better rates for the benefit of clients.***" *Id.*

42. The P&F RFI Response is responsive to the Service Level Assessment for Custody Services ("SLA") (attached as Exhibit C) initiated in 2006 by Jennette B. Bradley, then-Treasurer of the State of Ohio. The SLA provided that "[a]ny agreement for ancillary services" (such as services related to foreign exchange transactions) "will be between the Beneficial Owner [*i.e.*, P&F or SERS] and Custodian [*i.e.*, BNY]" directly. SLA § 1.1.

43. In the P&F RFI Response, BNY further set out its "rules and limitations" as referenced in the SCA when providing "ancillary services," such as custody FX – none of which

contradicted any of the terms set forth in either the SCA or BNY's FX Procedures. In the section of the P&F RFI Response entitled "Ancillary Services: Foreign Exchange," BNY described its FX services as capable of pricing during a 24-hour window in a manner designed to optimize the custodial client's experience: "[O]ur FX service representatives in seven cities around the world have access to local and regional foreign exchange desks in order to handle any foreign exchange execution requests, toll free and 24 hours a day. Our FX desks operate locally, in seven financial centers, and are staffed with sales professionals who cover various major market participants such as multinational corporations, insurance companies, fund managers, and central banks. Maintaining such a rich and important client base requires superior service and competitive rates as an FX provider." P&F RFI Response, § 2.16 – Foreign Exchange.

44. In response to the SLA's query concerning how and when it set its FX rates, BNY stated: "We utilize the Daily Foreign Exchange Rates from WMReuters. Each price is converted back to its base currency based on the FX rate each day. Currently we use a 4:00 p.m. London close for FX rates." *Id.* And in response to the query whether there was any "financial advantage" to transacting in FX through BNY Mellon, BNY stated: "Since The Bank of New York is one of the largest global custodians, our clients gain the ongoing benefit of aggregation of transactions across our broad customer base; ***accordingly, we price foreign exchange at levels generally reflecting the interbank market at the time the trade is executed by the foreign exchange desk***." *Id.* "***Best execution***," BNY continued, "encompasses a variety of services designed to ***maximize the proceeds of each trade***, ***while containing inherent risks and the total cost of processing***." *Id.*

2. <u>SERS</u>

45. Mellon and Huntington National Bank entered into a Sub-Custody Agreement dated February 1, 2007, related to custody of international securities for SERS ("2007 SCA")

(attached as Exhibit D). A subsequent Sub-Custody Agreement between The Huntington National Bank and The Bank of New York Mellon governed custody of international securities for SERS for the period July 5, 2010 through July 1, 2012 ("2010 SCA") (excerpts attached as Exhibit E).

46. Additional relevant documents concerning SERS' relationship with BNY Mellon and the provision of custodial FX services include (i) Mellon's response to the Request for Information: International Custody Services for the School Employees Retirement System, dated September 1, 2006 ("SERS RFI Response") (copy (without exhibits) attached as Exhibit F); (ii) the Custody Operating Procedures By and Between Treasurer of State of Ohio, School Employees Retirement System of Ohio, Huntington National Bank and Mellon Bank, N.A. for International Assets of the School Employees Retirement System, dated September 18, 2007 ("2007 SOP") (attached as Exhibit G); and (iii) the Custody Operating Procedures Between Treasurer of State of Ohio, School Employees Retirement System of Ohio, The Huntington National Bank and The Bank of New York Mellon for International Assets of the School Employees Retirement System, dated July 5, 2010 ("2010 SOP") (attached as Exhibit H).

47. Both the 2007 SCA and the 2010 SCA make clear that SERS is an intended third-party beneficiary of the contracts. SERS is defined as the "Beneficial Owner" of the assets governed by the agreements, and is specifically carved out of the "No Third Party Beneficiaries" clause in Section 10.11 of the 2010 SCA (which provides that BNY Mellon "is acting solely on behalf of the Custodian and the Beneficial Owner" [*i.e.*, SERS]).

48. Similar to the P&F RFI Response discussed above, the SERS RFI Response contains a number of statements by Mellon representing or promising accurate and timely pricing of FX trades, as follows: (i) "Mellon operates full service trading rooms in London,

Boston, and Pittsburgh providing 24 hour market access for our clients"; (ii) Mellon has a "***historical commitment to accurate and efficient settlement***[]" of FX trades; (iii) "Mellon provides 24 hour market access for currencies that Mellon deals directly"; (iv) ***"[t]ransactions for forward foreign exchanges and other currency derivatives are entered into the accounting system on a timely basis***"; (v) "***Mellon works closely with the investment manager to ensure that all foreign exchanges and currency derivatives are processed and reported accurately***"; and (vi) "[a]s active market makers in the interbank, institutional and corporate FX markets, Mellon FX traders are acutely aware of current currency prices. ***Prices we offer clients are intended to be competitive with the current market***." SERS RFI Response § 2.16.

49. Section 6 of the 2007 SCA, entitled "Directed Powers of Mellon," provides that "Mellon shall take the following actions . . . pursuant to Authorized Instructions . . . [including those] actions necessary to settle transactions in futures and/or options contracts, short-selling programs, foreign exchange or foreign exchange contracts, swaps and other derivative investments with third parties." Section 7 of the 2007 SCA, meanwhile, provides that Mellon "shall have . . . discretionary authority" to "take all action necessary to pay for, and settle, Authorized Transactions, including exercising the power to borrow or raise monies from Mellon in its corporate capacity or an affiliate and hold any property in the Account as security for advances made to the Account for any such authorized transactions or the purchase or sale of foreign exchange, or of contracts for foreign exchange. Mellon shall be entitled to collect from the Account sufficient cash for reimbursement and, if such cash is insufficient, dispose of the assets of the Account to the extent necessary to obtain reimbursement." 2007 SCA § 7(d).

50. The 2007 SCA specifically incorporates the SERS RFI Response as part of the overall agreement between Mellon and SERS. *Id.* § 23.

51. The 2007 SOP further provides that "Mellon will settle all international trades within industry accepted standards for each applicable market. All trades shall be settled delivery versus payment to the extent permitted in the applicable market. Mellon will adhere to the market accepted principles for international trading." 2007 SOP at 20. "Currency spot contracts," meanwhile, "are considered a delivery vs. payment transaction since SERS will always be receiving one (1) currency in exchange for another currency. Therefore, no TOS [Treasurer's] authorization is required for currency spot contracts." *Id.* at 24.

52. The 2010 SCA (at § 7.4) (postdating the unsealing of a *qui tam* lawsuit against a competing custodial bank, State Street Bank & Trust, related to the same kind of FX misconduct alleged here) adds a term entitled "Subcustodian Provides Diverse Financial Services and May Generate Profits as a Result." "For example," the 2010 SCA states, "Subcustodian [BNY Mellon] or its Affiliates may act as a dealer or market maker in the Financial Assets to which the Instructions relate, provide brokerage services to other customers, act . . . in the same transaction as agent for more than one customer, have a material interest in the issue of the Financial Assets or earn profits from any of these activities." 2010 SCA § 7.4. The 2010 SCA further states that "Beneficial Owner [SERS] further acknowledge[s] that [BNY Mellon] may be in possession of information tending to show that the Instructions received may not be in the best interest of . . . [SERS] but that neither [BNY Mellon] nor its Affiliates are under any duty to disclose any such information." *Id.* The foregoing notwithstanding, the 2010 SCA provides that BNY Mellon "***shall treat all transactions with . . . [SERS] as arms-length transactions***." 2010 SCA § 7.4.

53. Contrary to their written representations, policies, and Plaintiffs' reasonable expectations, Defendants did not provide "accurate and efficient settlement[]" of FX trades, nor enter them into their accounting system "on a timely basis." Nor did Defendants "ensure that all

foreign exchanges and currency derivatives [were] processed and reported accurately," "offer [FX prices] . . . intended to be competitive with the current market," or treat all FX trades as "arms-length transactions." Instead, Defendants purposefully manipulated the FX rates charged to Plaintiffs and the Class on "standing instructions" FX trades so as to allow for undisclosed risk-free, non-arms-length profits to Defendants, at the direct expense of Plaintiffs, in breach of Defendants' contractual and statutory duties and the common law.

54. Nothing in Mellon's operative written FX Procedures contradicted the foregoing statements from the SERS RFI Response and the 2007 SCA concerning FX.

3. SEPTA

55. BNY Mellon and its corporate predecessors have provided custodial services to SEPTA for more than two decades. The parties' fiduciary relationship is set forth in a Master Trust Agreement ("MTA"), effective January 1, 1990, which states that Mellon will act as a trustee for a master trust created to hold SEPTA's assets in order to fund and pay benefits under several employee pension benefit plans.[10]

56. Under the MTA, Mellon (subsequently BNY Mellon) expressly acknowledges that it is a fiduciary of SEPTA. *See, e.g.*, MTA § 12.1.

57. In addition to acknowledging Mellon's status as a fiduciary, the MTA:

- allocates investment responsibilities between Mellon and investment managers (*id.* § 5.2);
- confirms that Mellon will continue to act as a custodian of assets once investment managers are appointed (*id.*);
- grants Mellon "any and all discretionary powers not explicitly or implicitly conferred . . . which it may deem necessary or proper for the protection of the

[10] The MTA and the First Amendment to the MTA ("Amended MTA") are attached hereto as Exhibits I and J, respectively.

[trust] property," *specifically including the power to settle FX transactions* (Amended MTA ¶ 31 (amending § 8.1)); and

- sets forth Mellon's compensation for duties conducted under the MTA (MTA § 10).

58. SEPTA and BNY Mellon also entered into a fee agreement for BNY Mellon's services under the MTA. The operative version of the fee agreement (effective January 1, 2008 through December 31, 2013) sets forth BNY Mellon's fees for servicing SEPTA's accounts. Under a category labeled "International Asset Fee," the fee agreement provides for a $25 charge for FX trades not executed through BNY Mellon.

4. IUOE Local 39

59. Plaintiff IUOE Local 39 entered into its Custody Agreement with the Bank on or about February 14, 2006. The Custody Agreement (attached hereto as Exhibit K) provided for FX transaction services to be provided by the Bank, its subsidiaries, or affiliates, including BNY (and, subsequently, BNY Mellon). *See* Custody Agreement, §3(d) – Foreign Exchange Transactions. The Custody Agreement specifically authorized The Bank of New York, described as The Bank of New York Trust Company, National Association's "New York affiliate," to perform or assume any of the duties, obligations or responsibilities of The Bank of New York Trust Company, National Association under the Custody Agreement. *See* Custody Agreement, § 21 – Authorization of The Bank of New York. Among those responsibilities was the provision of foreign exchange services to Plaintiff IUOE Local 39. *Id.*, § 3(d) – Foreign Exchange Transactions.

60. The Custody Agreement appointed the Bank as IUOE Local 39's "Global Custodian," with duties to "maintain one or more accounts…for the custody and safekeeping…of Securities and non-Cash Distributions which shall from time to time be delivered to or received by" Plaintiff IUOE Local 39 or any of its sub-custodians. *See* Custody

Agreement, § 2. The Custody Agreement also required the Bank to exercise "reasonable care" in the performance of its duties. *Id.*, § 6.

61. Plaintiff IUOE Local 39's Custody Agreement further authorized the Bank to "enter into spot or forward foreign exchange contracts ('FX Transactions')" with IUOE Local 39, and provided that "such foreign exchange services" may be provided "through [the Bank's] subsidiaries or affiliates. . ." *See* Custody Agreement, §3(d) – Foreign Exchange Transactions. In addition, the Custody Agreement specifically authorized that "any of [the Bank's] powers, duties, obligations and responsibilities under this Agreement may be performed or assumed . . . by [the Bank's] New York affiliate, The Bank of New York or any successor thereto." *Id.*, §21 – Authorization of The Bank of New York.

62. As with OP&F, incorporated into IUOE Local 39's custody agreements were written BNY's FX Procedures which promised that under "standing instructions," "[t]he terms of FX Transactions" with any customer "shall not be less favorable" than those "offered by BNY to unrelated parties in a comparable arm's length FX Transaction." *See* FX Procedures, rev. 7/23/03 at p. 2 (attached hereto as Exhibit L). BNY's promise of "arm's length" terms to its custodial customers for "standing instructions" FX trades further bolstered customers' reasonable expectation that they would be charged FX rates that were at or close to interbank market rates.

63. Moreover, in its September 2005 response to Plaintiff IUOE Local 39's initial Request for Proposals ("RFP") (attached as Exhibit M hereto), BNY stated, in what appears to be form language, "[w]e look to build strategic partnerships with clients that go beyond the traditional role of custodian and settlement agent. We work to become your partner to affect both your long and short-term business goals. We demonstrate this objective through exceptional client service, expertise and flexibility, all with a specific focus on the Fund's needs." *See* RFP

Executive Summary. In describing its FX transaction procedures, BNY stated: "[o]ur competitive advantage results in improved efficiency providing [IUOE Local 39] complete control of the execution process." *See* RFP at p. 51.

5. Other Common Contractual Documents

64. At the commencement of this litigation, information regarding BNYM's indirect FX program could be found generally in two sources: (1) the FX Procedures/FX Procedures Form; and (2) a webpage detailing BNYM's indirect FX trading program (the "Standing Instructions Page"). *See* https://gm.bankofny.com/FX/TradeExecution/StandingInstruction.aspx (last accessed June 1, 2011). Both sources could be accessed through BNYM's website. *See* https://gm.bankofny.com/FX/ErisaRates.aspx (last accessed June 1, 2011) (the "FX Website").

a. The FX Procedure Form

65. During the Class Period, BNYM required custodial clients such as Plaintiffs (or their respective investment managers) to execute a one-page FX procedure form relating to indirect FX trading (the "FX Procedure Form").

66. At the commencement of this action, the FX Procedure Form had five relevant sections: (1) a preamble acknowledging that the client or investment manager received BNYM's FX Procedures; (2) a section identifying the specific custodial accounts covered by the FX Procedure Form; (3) a "check the box" option if the client or investment manager elects to execute FX trades through BNYM under "standing instructions;" (4) a signature line; and (5) a hyperlink to the FX Website, which posts a daily range of FX prices. The FX Website also linked to the FX Procedures (*see* https://gm.bankofny.com/includes/ErisaPol.pdf (last accessed June 1, 2011)) and provided other information about BNYM's indirect FX trading program.

b. The FX Procedures

67. The version of the FX Procedures current at the commencement of this litigation states, in relevant part:

> - The Bank of New York Mellon will publish a "Daily Schedule" of program FX rates, available prior to 9:00 a.m. eastern time at https://gm.bankofny.com/FX/ErisaRates.aspx
>
> - Unless the manager instructs BNYM otherwise by telephone at 212-804-2170 (or any other number provided to a manager for this purpose) prior to 11:00 a.m. Eastern Time, all FX transaction requests received by the BNYM Foreign Exchange group on a given day will be executed that day with BNYM on a principal basis at rates that will not deviate by more or less than three (3) percent from the relevant Interbank bid or ask rates and will not be less favorable to the account than the corresponding rates indicated on the Daily Schedule for that day.
>
> * * *
>
> - If a manager directs BNYM to execute FX transactions in connection with securities transactions and does not provide other specific instructions, BNYM will understand that the manager has directed BNYM to effect those transactions in accordance with these Procedures. Similarly, unless the manager specifically instructs BNYM otherwise, BNYM will understand that the manager has directed BNYM to convert income and other items on an account in accordance with these Procedures.

68. As described above, prior to the Merger, BNY's FX Procedures provided that the terms of all FX trades, including those done pursuant to "standing instructions," "shall not be less favorable to the Plan [*i.e.*, customer] than terms offered by BNY to unrelated parties in a comparable arm's length FX transaction."

69. With respect to those of Defendants' FX clients who were subject to ERISA, the promise to provide terms on FX transactions to custodial customers that were "not . . . less favorable" than those offered or generally available to "unrelated parties" in comparable arm's length transactions is echoed in Section 408(b)(18) of ERISA, which provides a statutory prohibited transaction exemption for FX transactions. Section 408(b)(18) permits FX

transactions to be performed for an ERISA-covered plan by a party in interest, such as a custodial bank or its affiliate, provided that "[a]t the time the [FX] transaction is entered into, the terms of the transaction are ***not less favorable to the plan than the terms generally available in comparable arm's length foreign exchange transactions between unrelated parties*** or the terms afforded by the bank in comparable arm's length foreign exchange transactions involving unrelated parties." ERISA § 408(b)(18). This statutory exemption, which was enacted as part of the Pension Protection Act of 2006, was preceded by a "class exemption" to the same effect published by the U.S. Department of Labor on November 13, 1998 (known as Prohibited Transaction Exemption 98-54 (or "PTE 98-54")), with relevant portions thereof effective beginning January 12, 1999. This language remains in force today.

70. The point of the ERISA section quoted above, which governed Defendants' provision of FX services to ERISA funds throughout the Class Period, is to protect ERISA funds (in particular) from being taken advantage of. Although Defendants dropped the explicit references to this ERISA requirement in subsequent iterations of their written FX Procedures (including one published in 2008), this language continued to govern Defendants' provision of custodial FX services to ERISA funds, and accordingly was an implied term of the contracts between Defendants' ERISA fund clients and Defendants.

71. In addition, BNY's FX Procedures provided that "all income item conversions" involving foreign currency for BNYM's custodial clients would be "bundled" and "executed" each day at 11:00 a.m. New York time "at or within the range of buy/sell rates in effect at 11:00 a.m. New York time." Mellon's FX Procedures similarly so provided prior to the Merger. BNY's FX Procedures further provided that "[t]he bundling of FX Transactions is done to achieve ***better rates for the benefit of clients***." This language, along with the "comparable arm's

length transaction" promise described above, was echoed in "Welcome Packages" (discussed in further detail below) that Defendants sent to the outside investment managers for Plaintiffs and the Class.

72. Pursuant to BNY's FX Procedures, "standing instructions" were to apply to "income item conversions," such as dividend or interest payments, or "*de minimis*" FX trades of no more than US $300,000 or the equivalent thereof. However, the FX Procedures also provided that FX trades "in excess of $300,000" may be treated as "standing instructions" trades (though they would still be termed "direct trades") provided certain conditions were met.

73. Moreover, these FX Procedures purported to provide "the method for determining the rates at which FX Transactions will be executed under standing instructions." According to the FX Procedures, income item conversions or orders related to purchases and sales of foreign securities were to be "transmitted by the custody/fiduciary area [of BNY] through an internal system, which will identify the transaction to the BNY FX Transaction Desk ... as an 'ERISA transaction.'" Further, the "range of rates" at which the FX Transaction Desk would effect such transactions were to be "posted in BNY's website" several times a day.

74. The FX Procedures also provided that "[o]rders relating to purchases and sales" of foreign securities would be executed "within the range established by such buy/sell rates" in effect at the time of the order or, "[i]f the order is received by the relevant Desk at least one-half hour prior to a fixing," then "at or within the range established by such buy/sell rates next in effect." Thus FX trades "in excess of $300,000"[11] could be executed in the same fashion unless the custodial client or its fiduciary "exercised its option to cancel" that arrangement "within one

[11] At some point after the Merger, Defendants dispensed with the language concerning trades "in excess of $300,000" in their FX Procedures, eliminating the distinction between so-called "de minimis" and larger FX trades.

hour of the respective fixing time."[12] As Defendants had promised that standing instruction FX transactions would be subject to "best execution standards," Plaintiffs had little reason to exercise the foregoing option and instruct Defendants not to execute larger FX trades under "standing instructions" as well.

75. By stating that "standing instructions" FX trades would be priced at or within a range of buy/sell rates posted each day, Defendants implied a connection between the rates at which Defendants would be executing the transactions in the market and the rates that they would then charge the FX client. Otherwise, there would have been no point in publishing a "range" – Defendants could simply have posted one "standing instructions" rate for each currency for each day, which the client could then take or leave. But by instead stating that such FX trades would be priced at or within a range of rates published each day, combined with their promises of "best execution" and that FX services were "free of charge", Defendants lulled clients into using "standing instructions" to complete their FX trades, thus enabling Defendants' deceptive profit-making scheme to continue.

c. <u>The FX Website</u>

76. At the commencement of this litigation, the FX Website included a link to the Standing Instructions Page which sets forth additional obligations to which BNY Mellon is subject when executing FX transactions. *See* https://gm.bankofny.com/FX/TradeExecution/StandingInstruction.aspx (last accessed June 1, 2011).

77. According to the Standing Instructions Page:

> Standing Instructions captures all types of custody-related foreign exchange funding needs and automates the currency execution and settlement. Transaction

[12] For simplicity's sake, such FX transactions in excess of USD $300,000.00 that Defendants executed in this fashion, without a cancellation request by the custodial client or its fiduciary, are included within the definition of "standing instructions" FX trades in this Complaint.

> types include: securities trade settlement, income conversions, corporate actions, tax reclaims, interest postings, and residual balances. ***Standing instructions provides a complete FX solution allowing clients to concentrate on their core businesses***.
>
> ***We consider best execution, as it relates to the Standing Instruction process, as providing a consistent, accurate and efficient means of facilitating pre-trade, trade and post-trade activities.*** These activities include identification of trade requirements, pre-trade administration associated with regulated markets, arranging settlement, reconciling discrepancies, posting cash to accounts and reporting all relevant transaction details to investment accounting systems.

78. The Standing Instructions Page also stated that "[c]lients benefit from: . . . ***FX execution according to best execution standards***." *Id*.

6. Other Misrepresentations Disseminated to the Class

79. Defendants misrepresented their "standing instructions" services in other materials disseminated to Plaintiffs and the Class.

80. Defendants' various but consistent representations to Plaintiffs and the Class were false and misleading as to the manner in which standing instruction FX services were provided.

81. One example is the "Welcome Packages" that Defendants sent to their custodial clients and their investment managers. A generic 2007 Welcome Package issued by BNY (attached as Exhibit N) stated that Defendants' "standing instructions" FX services were "operationally simple, ***free of charge*** and integrated with our mutual client's activity on the various securities markets." *See* Exhibit N (Foreign Exchange subheading FX Standing Instructions).

82. Defendants publicly represented their FX services as successful, award-winning, skillful, and offering a cost-saving benefit, pursuant to "best execution standards," to clients such as Plaintiffs and the Class. For instance, BNYM's website stated the following as late as November of 2009 (*see* Exhibits O and P):

- "Standing Instruction [FX] trading provide[s] a simple, flexible, and complete service solution that automates the capture of all types of custody-related foreign exchange . . . Operationally simple, ***free of charge*** and integrated with the client's activity on the various securities markets, [FX] standing instruction is designed to help clients minimize risks and costs related to the foreign exchange and concentrate on their core business."

- Standing Instruction Foreign Exchange "[c]lients benefit from: . . . [foreign exchange] execution according to ***best execution standards*** . . ."

83. BNYM's website also claimed that BNY Mellon would aggregate and net "standing instructions" FX trades, stating that one of the benefits to clients from using "standing instructions" was the "[a]ggregation and netting of trades based on guidelines tailored to client needs."

84. As of the commencement of this litigation, BNYM continued to assure clients that FX trades executed via "standing instructions" "provide[] a complete FX solution allowing clients to concentrate on their core businesses" and that clients are provided "FX execution according to best execution standards." *See* https://gm.bankofny.com/FX/TradeExecution/StandingInstruction.aspx (last accessed June 1, 2011).

85. Moreover, while Defendants' custodial services, including "standing instructions" FX services, are aimed at and available to any individual, company, or fund needing custody services to safeguard their assets, Defendants specifically touted the strength of their relationship with pension funds, such as Plaintiffs, as offering a competitive advantage over other custodial banks. For instance, BNYM's website stated the following:

> "A Leading Provider For Government Entities: Public pension plans and other government agencies seek to align themselves with a custodian who is a clear leader, one who has the capabilities and experience to help them meet the numerous challenges facing their organizations today including: Increased regulatory oversight, complex

global investing environment, pressure to grow assets while managing with existing or decreasing resources, and corporate governance."

86. In addition to the foregoing, Defendants secured "standing instructions" FX business through a series of material misrepresentations and omissions in response to RFPs from custodial clients.

87. As examples of false and misleading responses to RFPs, Defendants made the following types of statements concerning "standing instructions" FX services:

- that "standing instructions" FX trades were performed at the "best rate of the day" for custodial clients, and that Defendants gave their clients "the most competitive/attractive FX rate available";
- that "standing instructions" FX trades were priced: (i) at levels "reflecting the interbank market at the time the trade is executed"; (ii) "a[t] the prevailing market rates at the time of the client instruction to execute the FX conversion"; or (iii) "based on current foreign exchange rate input";
- that "standing instructions" FX trades were executed "pursuant to best execution";
- that Defendants "actively engage[d] in making markets and taking positions in numerous currencies to obtain the best rates for [their] clients";
- that "standing instructions" clients were given "the same … competitive pricing" that investment advisors who negotiated prices directly with Defendants' trading desks received;
- that Defendants executed FX transactions for restricted currencies with local sub-custodians "to ensure that the best rate is attained for our clients"; and
- that Defendants disclosed to clients any conflict of interest.

88. Attached as Exhibit Q is a "BNY Mellon RFP Misrepresentation Log," which was attached as Exhibit 1 to the "Complaint And Superseded Complaint" (October 4, 2011) filed in the NYAG Action. It summarizes, *inter alia*, false and misleading statements made by Defendants in their responses to RFPs from the Ohio Funds, Plaintiff IUOE Local 39, and other members of the putative Class.

89. Plaintiffs and members of *the* putative Class were misled by Defendants' representations, acts and omissions and relied to their detriment on Defendants' material misstatements and omissions.

90. Defendants knew that their "standing instructions" FX practices were legally improper and their actions after regulators began challenging these types of transactions are indicative of the deceptive nature of their scheme.

91. The reality behind all of Defendants' misrepresentations above was that there was no connection whatsoever between the FX rates at which Defendants executed their clients' "standing instructions" FX trades and the rates that they subsequently credited or debited and ultimately reported to their clients. Defendants simply picked the worst rate they thought they could get away with (usually within the range of the day), reported that rate to the clients and pocketed the difference. The FX Procedures did ***not*** disclose to Plaintiffs or the Class that buy/sell rates for "standing instructions" trades were any different from those they would receive pursuant to "best execution standards" or on a typical arm's length basis. Further, Defendants did not disclose that they would be taking profits on each "standing instructions" FX trade, at the direct expense of Plaintiffs and the Class, that bore no relation to interbank market rates or what Plaintiffs and the Class could expect from "best execution standards."

92. Defendants' description of what "best execution" entailed for FX in its RFI and RFP responses was consistent with BNYM's interpretation both internally and as otherwise conveyed externally to members of the Class during the Class Period. The statements described above comprised Defendants' standard description of the FX services they offered to their clients throughout the Class Period. For the reasons further discussed below, these statements were false and misleading and omitted material facts concerning Defendants' actual practices with respect to FX trades. Rather than using a "4:00 p.m. London close for FX rates," pricing FX trades at levels "generally reflecting the interbank market" at the time of execution, or "maximizing the proceeds of each trade" for the benefit of their clients (just to name a few), Defendants purposefully manipulated the FX rates charged to Plaintiffs and the Class on "standing instructions" FX trades so as to allow for undisclosed risk-free profits to Defendants, at the direct expense of Plaintiffs and the Class, in breach of Defendants' contractual and statutory duties and the common law.

B. Defendants Perpetrated a Fraudulent Scheme to Charge Excessive and Fictitious FX Rates to Plaintiffs and the Class.

93. Plaintiffs and the Class reasonably expected, because BNYM told them as much, that they would benefit from "best execution standards" on "standing instructions" FX trades. This expectation was heightened by BNYM's position as a "global leader" in custodial services and market-maker in foreign currency exchange.

94. Contrary to their written representations and policies, Defendants did not provide Plaintiffs and the Class with "best execution standards" when performing FX transactions pursuant to "standing instructions." Nor were such services "free of charge," or done pursuant to terms as favorable as the terms afforded or generally available to unrelated parties in comparable

arm's length transactions. Nor did Defendants "achieve better rates for the benefit of clients" through their FX practices as related to income item conversions.

95. Instead, BNYM purposefully manipulated the FX rates charged to Plaintiffs and the Class on "standing instructions" FX trades so as to allow for undisclosed risk-free profits to BNYM, at the direct expense of Plaintiffs and the Class, in violation of the common law and the laws of New York, California, Ohio, and states with similar deceptive trade practices statutes.

96. The whistleblower actions revealed for the first time that BNYM, for a period that spanned over ten years, perpetuated a deceptive scheme to charge excessive and fictitious FX rates while its customers believed that they had benefited from "best execution standards" on their "standing instructions" trades.

97. BNYM established an elaborate process to ensure that it profited at the expense of its custodial clients on "standing instructions" and then concealed this process from its clients.

98. When a custodial client, or its representative, requested a purchase or sale of a foreign security pursuant to "standing instructions," BNYM placed the order into an electronic pipeline (known variously as "GSP" (at BNY) or "CMS" (at BNY Mellon)) for its traders to fill the request at the FX rate available at or close to the time the client placed the request. Through CMS, the trade request was routed to Defendants' FX Trading System – known as "Charlie" – which aggregated trades by respective currency pairs.

99. Rather than give the client the best available rate at the time of the trade, BNYM watched the market fluctuation in FX rates related to the transaction over the course of the day (covering as much as a 24-hour period, beginning at 5:00 p.m., Eastern Time, but certainly no less than the time permitted by the FX Procedures) in order to charge or credit to the client a different, less favorable rate than the one at which BNYM actually settled the FX transaction.

100. If the transaction was a "buy" of a foreign currency, BNYM charged the custodial client a higher FX rate available at another time in the day, which caused the custodial client to pay more for the FX transaction than what BNYM actually paid. BNYM kept for itself the difference between the true cost of the trade and the fictitious or false FX rate BNYM claimed to have paid and charged to the client.

101. Likewise, if the transaction was a "sale" of a foreign currency, BNYM falsely credited the custodial client with an FX rate available at another time in the day that was lower than what BNYM actually received in the currency exchange, and remitted to the custodial client an amount less than what BNYM actually received on the client's behalf.

102. In essence, BNYM simply ignored the price it paid for the FX conversion or the market FX rate at the time the trade was executed, and instead charged its clients for the FX transaction as if the trade occurred at either the high or low of the day (depending on the nature of the transaction, buy or sell), in order to charge the least favorable rate that occurred that trading day.

103. After BNYM made the actual FX transactions necessary to cover its "standing instructions" clients' needs, BNYM's FX traders assigned falsified FX rates to the transactions, determined by looking back to the start of the trading time period allotted by the FX Procedures. The Defendants' FX traders assigned fictitious FX rates, a process called, "locking the rates," as follows:

A. Higher prices to FX buy orders;

B. Lower prices to FX sell orders.

In either scenario, BNYM pocketed the difference between the price it paid for the currency, or the market rate at the time the FX trade was executed, and the amount debited or

credited to clients' accounts. Thus the FX rate charged by BNYM to its custodial clients was simply created by the Company after a trade was executed and was set to maximize BNYM's profits.

104. BNYM's global FX operations are managed from New York. According to the whistleblowers, although the Merger was effective as of July 1, 2007, BNYM has maintained the FX departments that existed at BNY and Mellon to serve the clients served by each bank prior to the Merger. On information and belief, those custodial clients of BNYM who used BNY as their custodian prior to the Merger still have their trades executed by the legacy BNY FX desk in New York; those custody clients that had previously hired Mellon to be their custodian still have their trades executed by the legacy Mellon FX desk.

105. According to the whistleblowers, since the Merger, a daily "Reconciliation" call between Defendants' New York and Pittsburgh FX trading desks is conducted each day as Defendants begin to choose the FX rates to charge their custodial clients for "standing instructions" FX transactions. The Pittsburgh FX desk (*i.e.*, legacy Mellon) will call the New York FX desk (*i.e.*, legacy BNY) so that they can synchronize their high and low ranges for each currency pair. According to the whistleblowers, these telephone calls are made on a private, direct line, and may have been shielded from Defendants' customary policy of recording transactional conversations. This call, done at approximately 2:30 p.m. Eastern (U.S.) time, is made so that any discrepancies between each transaction desk's operations are avoided, thus making discovery of Defendants' scheme less likely.

106. Each "standing instructions" client with a trade in a particular currency pair for that day – except those, as described below, that "ask questions" and then receive more favorable treatment – accordingly receives the same FX rate, as determined by Defendants' cherry-picked

range-of-the-day pricing, regardless of when the client's specific trade request was submitted, the size of the trade, the time the actual FX trade occurred, the actual FX rate at the time of that trade, or whatever "best execution standards" should entail.

107. The only limitation on this false pricing is that Defendants are careful, with some exceptions, to price the trades within the range of the day. This is done to deceive an audit of the "standing instructions" client's FX transactions, as such audits typically only look to see if an FX transaction is priced within the range of the day on which it occurred.

108. The foregoing notwithstanding, according to the whistleblowers, it has been Defendants' practice to occasionally take a "standing instructions" FX deal in the morning New York time and price it using the range that has been observed in London time. This practice allows a much longer time frame from which to review and take advantage of the volatility of an FX rate, and, as a consequence, extract a bigger false FX spread from the "standing instructions" client.

109. According to the whistleblowers, post-trade cash flow analyses are immediately done by Defendants to tabulate the profits from each completed trade (after the falsified FX rate has been assigned to the custodial client). The profit from each transaction represents the difference between the falsely high (or low) price assigned to the custodial client and the price the currency actually traded for and paid (or received) by Defendants.

110. Profit and loss reporting is done by each FX transaction desk by the maintenance of a running Profit/Loss report that can be generated at any time. The FX traders review this document in order to keep track of their personal Profit/Loss as well as Defendants' Profit/Loss. In addition, monthly reports are also generated. Both the monthly and daily reports also show year-to-date reporting.

111. According to the whistleblowers, profits from "standing instructions" FX trades drive Defendants' decision-making processes. When BNYM competes for a custodial client, its FX departments are consulted and asked to estimate what BNYM's profits will be when and if they were to execute the prospective client's FX transactions. BNYM looks at what amount of international investments the client presently has and how BNYM might price the deals, directly or indirectly.

112. The FX traders will then give the custody group a conservative estimate of what the FX profit potential will be with the prospective client. The custody group then incorporates this estimate into their pricing structure as they make a flat-fee, all inclusive proposal (including all FX costs and fees) to the prospective custodial client. The FX department shares some of its profits with the custody group because it understands how valuable the stream of "standing instruction" custodial deals, and the profits obtained from unwitting custodial clients, will be to the FX department.

113. BNYM's unlawful scheme of executing FX trades and assigning fictitious FX rates for "standing instructions" clients was deliberately set up to leverage the day's trading volatility in favor of BNYM and against the financial interest of its custodial clients. At the beginning of the trading day, there is a very narrow trading range for stocks and currencies, as compared with the end of the day. If, at the beginning of the day, a BNYM trader knows that he has to purchase 1,000,000 Euros for a pension fund, the trader also knows that he does not have to book that trade into BNYM's system until many hours later. The trader has been incentivized, *i.e.*, provided a high-paying, stress-free job, by his employer, to wait and assign a fictitious FX rate to the "standing instructions" trade.

114. BNYM itself has noted that volatility in foreign currencies has contributed to an increase in its FX revenues. What it has not disclosed is that this is particularly true because it has taken undue advantage of such volatility. By fixing its FX positions throughout the day at prices advantageous to itself, BNYM cannot lose on a "standing instructions" transaction. At worst, BNYM breaks even. To date, all that BNYM has considered it necessary to do to shield its unlawful and unfair practices from scrutiny by those clients who utilize "standing instructions" FX services has been to price such FX trades, with few exceptions, at or within the range of FX rates for the day on which the transaction was effected.

115. End-of-month Client Custody Reports are prepared by BNYM on or before mid-month. These reports list the custodial client's FX trades by date, amount, and price, *i.e.*, the fictitious FX rate (as reported to the custody side of BNYM by its FX traders). These reports never contain time-stamps for the FX trades, and there is nothing on the report that would lead a custodial client to suspect that it had been unfairly charged exorbitant mark-ups (or mark-downs) on its "standing instructions" FX trades that were orders of magnitude larger than would be reasonably expected under "best execution standards" or on a typical arm's length basis.

116. By not showing the specific time of day at which the actual, as compared to the feigned, FX trade occurred, BNYM does not have to reveal that a trade it knew about at 11:00 AM Eastern time, and, therefore, could (and should) have been executed near that time, has instead been assigned an FX rate that only occurred in the interbank market during mid- or late afternoon.

117. Additionally, according to the whistleblowers, and as alleged and described in more than one of the government actions pending against BNYM, not all "standing instructions" clients were treated identically. Certain high-value "standing instructions" clients quietly had the

ability to directly negotiate their FX prices with BNYM traders each afternoon, while otherwise keeping their trades within the "standing instructions" channel. These special clients were known as "opt-out" clients,[13] and thus received better terms on their FX trades while receiving the other benefits of "standing instructions."

118. In a similar vein, a *Boston Globe* article dated January 4, 2012 entitled "Fidelity Moved Trades Away from BNY Mellon" describes how, according to internal emails among BNYM executives, BNYM made efforts in September 2009 to keep a "powerhouse" client by "slashing prices" on the client's "standing instructions" FX trades, then "return[ed] the prices to 'normal' when the effort failed."

119. Meanwhile, according to the NYAG Action, BNYM reached secret agreements with at least 62 clients and investment managers that pressed for greater transparency into "standing instructions" pricing while the FX scheme remained hidden to the bulk of BNYM's FX clients. Rather than answer these high-value clients' questions about how "standing instructions" FX trades were priced, BNYM elected to extend to them a different arrangement that was vastly less profitable to BNYM, known as "benchmark pricing." Under "benchmark pricing," BNYM executed the clients' "standing instructions" trades at a pre-negotiated fixed markup from a public reference price (usually the 4:00 pm London fixing) rather than at the high or the low of the day at which "standing instructions" trades were ordinarily executed (and were executed for the bulk of "standing instructions" clients, including Plaintiffs). "Benchmark pricing" yielded a margin for BNYM that was substantially less, by more than half, than the margin BNYM typically earned on "standing instructions" FX trades. An internal Global

[13] These "opt-out" clients should not be confused with clients that invoked the 11:00 a.m. "opt-out" provision described in the FX Procedures below. The special terms afforded these clients did not arise out of any terms made public or otherwise published or promulgated by BNYM.

Markets 2007 Strategic Plan noted this margin difference and its negative impact, stating that, "[i]f a Standing Instruction client converts to benchmark pricing, then the pre-negotiated spread may be as low as 1-3 basis points."

120. According to the NYAG Action and the DOJ Action, one of the high-value clients for whom BNYM offered "benchmark pricing" is BlackRock, who in 2009 had begun raising questions about transparency in the "standing instructions" space. According to internal emails at BNYM, rather than permit BlackRock to carry out a "full review of the Brussels [i.e., Standing Instruction] book," BNYM extended "benchmark pricing" to BlackRock, under which BlackRock's "standing instructions" FX trades are priced at just 1.5 basis points above the fixing rate at 4 p.m. London time.

121. Each of BNYM's actions described immediately above was designed to placate high-value "standing instructions" FX customers while keeping the bulk of BNYM's client base in the dark about the massive undisclosed spreads BNYM was charging on "standing instructions" FX trades. Indeed, according to the DOJ Action, A.J. Quitadamo, the head of BNYM Business Development for Global FX Sales, in a "collection of some of the more frequent responses to customer inquiries [that he had] used to date," stated that the standing instruction program "does not lend itself to 'time stamping' or 'benchmark' pricing nor do we promote it as such." This statement flies in the face of BNYM's practice of providing standing instruction benchmark pricing to select clients such as BlackRock.

122. The following example, taken from one of the whistleblower complaints, illustrates the alleged illicit profit-taking on "standing instructions" FX trades: On one trading day, at 9:30 AM Eastern time, BNYM received notice that its clients would be selling approximately $12,500,000.00 United States Dollars. BNYM would be selling them Canadian

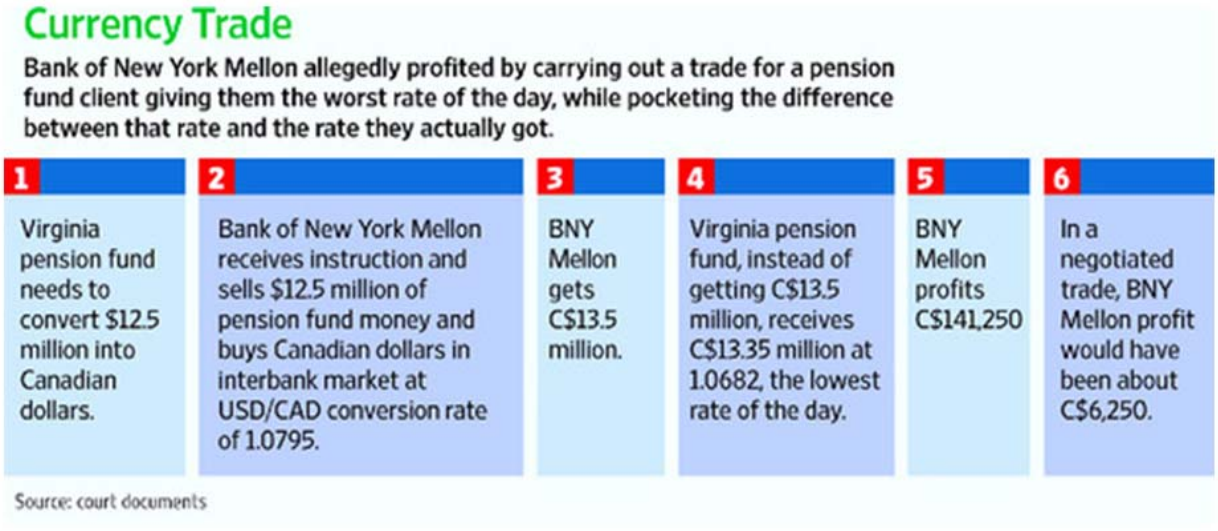
Dollars in return, as they were obligated to pay for security transactions that they had already entered into in Canada.

123. The FX desk accordingly was aware of this net client exposure that would be offset that day by 9:30 AM Eastern time. The USD/CAD exchange rate had opened that morning in New York at 1.0730 (where it would take 1.0730 CAD to equal 1 USD). The currency market fluctuated throughout the day and the USD/CAD traded lower, ultimately making a low exchange rate of 1.0682 CAD to 1 USD. This rate, 1.0682, was the worst possible rate one would have received if selling USD and buying CAD in the New York trading session. From that low point, the market for USD traded higher, ultimately reaching a high of 1.0847 CAD to 1 USD in the afternoon.

124. According to the whistleblowers, the FX desk sold $12,500,000.00 USD to the trader that covered the USD/CAD on the spot desk, who covered the position at an average rate of 1.0795. The rate that the custodial clients that were selling the USD received, however, was the very worst of the day: 1.0682. In other words, this "standing instructions" trade was hyper-priced to the custodial clients at 113 basis points. There was no risk on Defendants' side of this trade. The profit obtained by Defendants from buying $12,500,000 USD/CAD at 1.0682 and selling the USD/CAD at 1.0795 was $130,847.61. Had the deal benefited from "best execution standards" or been afforded no less favorable terms than those available to unrelated parties in comparable arm's length transactions, the expected spread (or market price) may have been 2 to 3 bps, or nearly fifty times less.

125. THE WALL STREET JOURNAL provided another illustration of how BNYM converted funds and then manipulated FX prices, in this instance for a trade on behalf of one

Virginia pension fund (*see* Carrick Mollenkamp, Lingling Wei, and Gregory Zuckerman, *Suit Alleges Mellon Created Fake Trades, Overcharged*, THE WALL STREET JOURNAL, Feb. 4, 2011):



126. The above illustration is consistent with the manner in which BNYM executed "standing instruction" or indirect FX trades for Plaintiffs and the Class.

127. As stated above, Defendants reserved the ability to apply "standing instructions" pricing to FX transactions of an unlimited dollar amount provided that the respective client did not specifically instruct Defendants to do otherwise. In this way, Defendants maximized their opportunities for taking undisclosed and unlawful profits on FX trades of any size. This fact is borne out by the DOJ Action. In 2007, according to the DOJ, a sample of 250 transactions provided by BNYM with the largest sales margins demonstrated that the average size of these transactions exceeded $51 million (or U.S. dollar equivalent). Likewise, in 2008, a sample of 250 transactions provided by BNYM with the largest sales margins also demonstrates that the average size of these transactions exceeded $51 million (or U.S. dollar equivalent). For 2009, a sample of 250 transactions provided by BNYM with the largest sales margins demonstrates that the average size of these transactions exceeded $30 million (or U.S. dollar equivalent). Also, for

2010, a sample of 250 transactions provided by BNYM with the largest sales margins demonstrates that the average size of these transactions exceeded $41 million (or U.S. dollar equivalent).

128. Without directly negotiating the price of an FX transaction, a custodial client had no other information on which to rely for determining whether, on its "standing instructions" trades, it benefited from "best execution," received "standing instructions" FX services "free of charge," or was afforded terms no less favorable than those offered by Defendants or generally available on an arm's length basis to unrelated parties, other than a monthly report, discussed in *infra*, made available to Plaintiffs by the custodian which merely summarized such FX trades without providing the times at which such trades were executed..

129. The profits BNYM has realized through its unfair and deceptive practices have been massive, as BNYM has capitalized on the opportunity provided over the past decade by the increasing need for pension funds, in particular, to diversify their investment holdings by investing in foreign securities, thus leading to an increased demand for FX services. In 2008 alone, BNYM reported a record $1.5 *billion* in FX and other trading activity revenue – an increase of $676 million (86%) over the previous year. For the years 2002 to 2008, BNYM and the banks that merged to form it (including BNY and Mellon) reported more than $5 billion in FX trading revenue.

130. According to its 2010 10-K, BNY Mellon Corp. generated $1.04 billion and $886 million in "foreign exchange and other trading revenue" in 2009 and 2010, respectively. FX revenue is a cornerstone of BNYM's annual profits, with "standing instructions" trades generating upwards of 70% of BNYM's FX income, and serves as a cash generator responsible for funding the annual bonuses of the entire firm. A significant portion of these revenues were

acquired at the unknowing and unlawful expense of Class members who permitted Defendants to conduct FX trades for their accounts pursuant to "standing instructions."

C. Evidence of the FX Scheme Disclosed Subsequent to the Commencement of This Litigation.

131. On October 26, 2011, the Massachusetts Action was commenced, seeking restitution from BNYM for Massachusetts-based public pension fund clients for losses sustained as a result of Defendants' FX practices. Attached as exhibits to the complaint in the Massachusetts Action (the "Administrative Complaint") are numerous documents, including internal emails and correspondence from Defendants, illustrating Defendants' knowledge of the FX scheme and the manner in which it was conceived and executed. In these documents, Defendants unabashedly acknowledge that the lack of transparency under "standing instructions" was key to company profits, and that this lack of transparency needed to be maintained.

132. As shown by the exhibits to the Administrative Complaint, Defendants recognized that "standing instructions" FX transactions were a major profit center for BNYM. A December 11, 2008 internal e-mail to the Company's Global Market Management Committee mentioned how, in 2008, in the teeth of the economic downturn, Defendants' FX transactions had made "bundles of cash." BNY Mellon's 2008 Annual Report indicated that FX transactions and other trading activities revenue, which were reported in the Asset Servicing segment, reached a record $1.5 billion in 2008, an increase of $676 million (or 86%) over 2007. Even though a downturn was experienced in the following two years, BNY Mellon reported $1 billion in revenues from the Asset Servicing Segment in 2009 and $787 million in 2010.

133. In order to maintain maximum profits, BNYM wished for clients to continue using "standing instructions" rather than migrate to negotiated FX transactions. Jorge Rodriguez ("Rodriguez"), Managing Director of BNY Mellon, wrote to Richard Mahoney ("Mahoney"),

Chairman of BNY Mellon's United States Foreign Exchange Committee and head of BNY Mellon's Global Markets and Capital Markets Groups (who had the nickname of "Rambo" because of his military background and hard-line tactics), in an e-mail dated February 1, 2008:

> As we all know, Standing Instruction FX is the most profitable form of business. ***It offers the traders a free intra-day option to time its currency execution in the marketplace knowing it does not have to get back to the customer immediately with the deal price***. ***Business of this type also allows us to take advantage of increased market volatility and wide intra-day trading ranges. All these pricing advantages disappear when a client trades via an e-commerce platform and full transparency is achieved***. Based on our actual records, in 2007, non-negotiated business generated an average profit of 9 basis points.

BNY Mellon's own records indicate that it earned 10-20 times more on FX trades subject to its "standing instructions" than on negotiated FX trades.

134. When a customer migrated to an e-commerce platform, it could comparison shop among banks for the best rate. As Rodriguez went on to explain:

> Our experience has demonstrated that when a non-negotiated (ultra-friendly) client converts to a multi-bank e-commerce platform (competitive price shopper) ***margins greatly decline as the free intra-day option feature previously enjoyed disappears***, the competitive pressure of going up against as many as 10 banks at a time, ***and the client's ability to carefully monitor each and every trade at the time of execution reduces margins dramatically***.

135. Rodriguez noted that "FX is a pure commodity" and it was up to BNY Mellon's sales team to proactively manage clients to ensure a "fair return" for the bank; "the problem is that in these [negotiated] cases, a fair return is only a fraction of what it could be if the business were awarded to BNY Mellon in a non-negotiated capacity." As Rodriguez subsequently noted in an October 2009 e-mail, "***at the end of the day, it is all about profits***."

136. On the same day, Mahoney repackaged Rodriguez's e-mail and transmitted this information in an e-mail of his own to Bob Kelly, the CEO of BNYM at the time.

137. Beginning in 2008, BNY Mellon gave consideration to whether it should be more "transparent" (*i.e.*, honest) with its customers who permitted it to perform "standing instructions" FX transactions. It created a "Revenue/Fee Disclosure Team" to consider the topic. On April 11, 2008, Antonio Garcia-Meitin ("Garcia-Meitin") of BNY Mellon's Asset Servicing Global Management department sent an e-mail to the members of that team entitled "Transparency." In that e-mail, Garcia-Meitin explained:

> ***In general transparency adversely impacts our revenue stream and any product to distribute fee information would hurt us many times over in reduced revenue. Nothing like a rock and a hard place.***

138. An attachment to this e-mail discussed BNYM's problems, including: "increased demands" from clients for "detailed fee information"; clients trying to obtain more "understanding how we generate revenue from their accounts"; and clients increasingly asking for a "detailed breakdown" of the fee level associated with various services. BNYM's proposed responses included having its sales force "generate more business to attain [the] same fee level," and communicating with clients on the "value of services rendered beyond price."

139. A 2009 e-mail from one BNY Mellon officer commenting on a proposal for transparency that was quoted in the DOJ Action conveyed the attitude of many in BNY Mellon's management: "***I do NOT like it. Once pricing spreads are disclosed it will be a race to how quickly clients work it down to zero***." This statement, like many of Defendants' statements contained in the exhibits to the Administrative Complaint in the Massachusetts Action, is completely at odds with "best execution standards."

140. The efforts of BNY Mellon's sales force to assuage custodial clients' concerns were successful. An e-mail from Rodriguez dated July 21, 2010 stated: "FX Sales volumes from the FX Sales force for the first half of 2010 vers[u]s the same period last year are up over $1 Trillion, an amazing 24% growth over the same period last year." In the same exhibit, Robert Near, Managing Director of BNY Mellon Global Markets, in an e-mail to Rodriguez sent on the same day, attributed this success to BNY Mellon being less transparent than its competitors:

> While difficult to quantify, and only having a 'couple' of data points, I think BNYM has been more successful in maintaining spreads in the SI [Standing Instruction] space compared to these peers [State Street and Northern Trust]. ***Another way to say this is BNYM is 'late' to the transparency space.*** We are hearing from our clients that our competitors are offering time stamping and fixed spreads across all currencies.

141. BNYM's deceptive conduct extended to virtually all of its clients who used "standing instructions" for FX transactions, according to a March 29, 2011 letter from a BNY Mellon employee to the Florida Attorney General. A redacted copy of this letter was obtained through an open records act request by the *Wall Street Journal* and made public in an article published on December 28, 2011. The author, who worked closely with Rodriguez and Mahoney, said

> I was also trained in committing fraud using various strategies [] to the bank's corporate foreign exchange clients....***I can tell you firsthand and without any hesitation that the fraud is prevalent throughout BNY Mellon's Foreign Exchange Group.*** I can also share with you that top management was aware of the fraud the entire time....BNY Mellon's foreign exchange group was very small. I was only 1 of 3 people in the entire bank who focused exclusively on the corporate client segment. ***We used the same systems and fraudulent strategies on the corporate clients as was used on the pension fund clients.***

142. As discussed above, BNY Mellon stated falsely that "standing instructions" FX trades were "executed according to best execution standards." This statement was untrue, and

Defendants knew it to be untrue. Indeed, numerous specific internal BNYM communications have been publicized wherein Defendants' employees described "best execution" in the FX context as the maximization for the client of the proceeds of each trade.

143. For example, as related in the DOJ Action, Defendants developed "Question and Answer" documents to guide employees in answering client inquiries about standing instruction pricing. For example, an August 2005 Question and Answer document providing a response to client inquiries about best execution states that BNY "ensure[d] best execution" by offering the "best rates for our clients":

> The Bank of New York ensures best execution on foreign exchange transactions through the following mechanisms: As a major market participant, the Bank is actively engaged in making markets and taking position in numerous currencies so that we can provide the ***best rates for our clients***.

144. In response to a question addressing competitiveness and timeliness of BNYM's foreign current trading in this same document, BNYM also referenced the price provided as the "best rate of the day." These statements were knowingly false.

145. A June 2006 Question and Answer document offered the following sample false information:

> Q: How do you ensure custody clients consistently receive fair prices for their trades?
>
> A: Clients benefit from our attractive rates because we aggregate all client income in any given currency to obtain the 'best rate of the day.' That 'best rate of the day' is applied to all of the income conversions that we execute for that day, regardless of the amount."

These statements were knowingly false. As explained above, Defendants did not provide clients the "best rate of the day." Quite the opposite: standing instruction clients received the worst or close to the worst rate of the day.

146. According to the DOJ Action, Nichols drafted Defendants' definition of best execution, and listed as an accomplishment in his Employee Self Assessment his drafting of a "working definition" of "best execution for our standing instruction activity," as well as providing "marketing content" for Defendants' website. By September 2005, Defendants had settled on a working definition describing how Defendants assist "plan sponsors and their fund managers in achieving Best Execution in foreign exchange" that was intended for client dissemination, including through RFP responses. Specifically, Defendants explained that "[b]est execution encompasses a variety of services designed to maximize the proceeds of each trade," and that Defendants recognized the "goal of maximizing the value of the client portfolio under the particular circumstances at the time."

147. A document entitled "How does The Bank of New York Mellon assist plan sponsors and their fund managers in achieving Best Execution in foreign exchange?" was described by BNY Mellon employee Jerome Descamps in a November 25, 2008 email as how BNYM "define[s] best execution," and that the definition had been "worked out. . . for an RFP some time ago." Nichols described the language in this document in 2007 as BNYM's "'standard' comment regarding how we approach best execution," and confirmed in November 2008 that it "still stands as our statement on the subject." As described in the DOJ Action, this "standard" language explicitly and falsely stated that BNY Mellon would maximize the proceeds of its clients' trades, and made the following false statements: "[u]nderstanding the fiduciary role of the fund manager, it is our goal to provide ***best execution*** for all foreign exchange executed in support of our clients' transactions"; "we price foreign exchange at levels ***generally reflecting the interbank market at the time the trade is executed*** by the foreign exchange desk"; "[b]est execution encompasses a variety of services designed to ***maximize the proceeds of each***

trade"; "[w]e also support post-trade analysis . . . to assist the fund manager in demonstrating that the execution of each trade was consistent with the goal of ***maximizing the value of the client portfolio.***"

148. Nichols explained in this definition of best execution that BNYM's "goal" was "maximizing the value of the client portfolio under the particular circumstances at the time," which was taken from the "industry standard definition[] of 'best execution.'" In drafting Defendants' definition of best execution in May 2005, Nichols also invoked the SEC's statement that "best execution is trading 'in such a manner that the client's total cost or proceeds in each transaction is the most favorable under the circumstances,'" as well as the Association for Investment Management and Research's definition of best execution as "well informed trade execution decisions made with the intent of maximising [sic] the value of the client portfolio under the particular circumstances at the time." Accordingly, according to the DOJ Action, Nichols and Defendants knew that the industry definition of best execution required maximizing the proceeds and value for clients.

149. Defendants and Nichols also falsely represented in the "working definition" of best execution that they were assisting investment managers in discharging their fiduciary obligations to their clients by maximizing the proceeds of each trade: "Understanding the fiduciary role of the fund manager, it is our goal to provide best execution for all foreign exchange executed in support of our clients' transactions." Defendants were in fact doing precisely the opposite – obtaining the best available prices for themselves, and assigning less favorable prices for their clients.

150. According to the DOJ Action, Defendants and their officers knew that actually providing "best execution" would lower their sales margins on trades, in contrast to their actual

practice of pricing at the worst rates of the day. For example, in November 2008, BNYM prepared a document analyzing the "channel mix" of foreign currency transactions. The channel mix referred to the different modes of foreign currency trading conducted by BNYM, including standing instruction trades, trades conducted over the phone, and trades conducted through an ecommerce platform. BNYM observed that "[m]argins have declined across all channels of distribution," due to among other reasons, "[e]fforts to achieve 'best execution," as well as "[g]eneral demands for price transparency." In order to generate and maintain standing instruction revenues, BNYM and its officers lied to BNYM's clients about providing "best execution" and the "best rate of the day."

151. As discussed above, BNYM stated falsely that "standing instructions" FX trades were "executed according to best execution standards." This statement was untrue, and Defendants knew it to be untrue. In a document Defendants generated in or about September 2005 and quoted in the DOJ Action, BNYM acknowledged that "best execution encompasses a variety of services designed to maximize the proceeds of each trade." BNYM likewise recognized therein the "goal of maximizing the value of the client portfolio under [the] particular circumstances of the time." BNYM repeated these same representations in a document generated in or around February 2009.

152. Defendants did not execute, or attempt to execute, "standing instructions" FX trades in a manner that would maximize the client's portfolio value. Instead, eschewing the prices that were available in the market at the time they executed the order, Defendants executed "standing instructions" FX trades for their clients at the worst price at which the currency had traded during the preceding 24 hour trading day.

153. According to the complaint in the NYAG Action, BNY Mellon's head of Business Development for Global FX Sales ultimately admitted that Defendants did *not* execute "standing instructions" FX trades in accordance with "best execution standards":

> My understanding is that the Bank of New York Mellon does not practice best execution . . . . BNY Mellon acts as a counterparty to these trades, not as a fiduciary, and my understanding is that as a counterparty it does not have best execution responsibilities.
>
> * * * *
>
> Q. If I understand what you're saying, it's that Bank of New York Mellon does not do best execution with respect to Standing Instruction trades because it is a counterparty?
>
> A: My understanding is that Bank of New York Mellon does not have a role in providing best execution.

E. <u>The FX Investigations, and BNYM's Response.</u>

154. On October 29, 2009, the California State Attorney General brought a civil fraud action against State Street Bank & Trust ("State Street"), a major BNYM custody competitor, challenging its "standing instructions" FX services. BNY Mellon's Director of FX Trading in New York e-mailed a Reuters dispatch about this lawsuit to all of BNYM's FX sales employees with the heading "***Oh No***."

155. Soon thereafter, BNY Mellon began receiving subpoenas from state and federal regulatory authorities concerning its FX transactions; by May of 2010, it had received 16 of them. Upon hearing of this investigation, Susan Pfister, a veteran at BNY Mellon's Pittsburgh FX trading desk, remarked: "***It's over, it's all over***."

156. Shortly after the investigation of State Street came to light, in late November or early December of 2009, BNY Mellon revised its web page on FX Standing Instructions (portions of which were quoted above) to eliminate any "free of charge" language and to (for the

first time) define "best execution" as something other than (a) what it is commonly understood in the financial industry to mean and (b) what Defendants themselves recognized and claimed it meant in numerous RFP and RFI responses to its custodial clients.

157. In response to inquiries from customers about its own "standing instructions" FX practices in the wake of the State Street action, however, BNYM continued not to disclose its deceptive conduct. Mahoney said internally that BNY Mellon's FX Department "owns" how to respond to such inquiries, that "we do not have to tell anyone how much money we make on our dealings" and that customers making inquiries should be told to "go pound sand."

158. Notwithstanding this tough opening stance, BNYM sought to quell certain unhappy clients. According to the most recent complaint filed by the DOJ, in February 2011, Prudential Financial approached BNYM concerning BNYM's pricing of Prudential's standing instruction transactions. Subsequently, BNYM and Prudential engaged in several discussions regarding the disadvantageous pricing of Prudential's standing instruction transactions. On August 19, 2011, in BNYM's answers to requests for information submitted by Prudential, BNYM admitted to generating over $28 million in imputed revenue from Prudential's standing instruction transactions during the period January 2006 through June 2011. In September 2011, representatives of Prudential expressed dissatisfaction with the way Prudential's standing instruction transactions had been priced. BNYM relationship manager Nancy Walcott responded that Prudential's message had been heard "loud and clear." In April 2012, Prudential and BNYM entered into a settlement agreement to resolve issues regarding the disadvantageous standing instruction pricing provided to Prudential. Pursuant to the settlement, BNYM repaid more than half of the revenues it generated from Prudential's standing instruction transactions.

159. Upon information and belief, on May 2, 2011, weeks after the *qui tam* actions were unsealed and after the first of the customer class actions against BNYM was filed, Defendants emailed some of their clients a document entitled "Overview of BNY Mellon's Foreign Exchange Services" (the "FX Overview"). The FX Overview purports to provide clients with "additional information about [BNYM's] FX services," while stopping short of admitting the breadth of Defendants' deception.

160. The FX Overview states, in relevant part:

- "BNY Mellon . . . offers various services that are ancillary to and independent of the basic custodial relationship. Among those ancillary services – which are not provided as part of the custody agreement – are foreign exchange (FX) services, including our 'standing instruction' FX service."

- "Clients and investment managers who elect to use our FX services, including our 'standing instruction' program, receive those services separately from the custodial relationship, and the terms of service are explained in various materials provided to our clients and their investment managers."

- "In all FX transactions executed with our clients, BNY Mellon acts as a 'principal' or 'counterparty,' buying currency from or selling currency to our clients or their investment managers. We do not enter the FX market to trade on behalf of or for the benefit of clients – as an investment manager would. Rather, BNY Mellon enters into a transaction directly with the client, taking the currency position into its own trading book where it is aggregated with all of BNY Mellon's other foreign currency positions. As a result, we assume the risk of price movements in the currency, including possible losses."

- "Because of our role as a principal, the fiduciary obligation and decision-making for these FX transactions – including decisions to participate in the 'standing instruction' program – rests with our clients and their investment managers, and we act only at their direction, as required by our custody agreements. Of course, there are other parts of BNY Mellon's custody business where we do assume fiduciary responsibility, and we take those fiduciary obligations extremely seriously."

161. In the FX Overview, BNYM also stated for the first time that it "tend[s] to purchase currencies" for its ***"clients towards the low end of the interbank range and sell towards the high end. . . ."***

162. BNYM did not provide the information contained in the FX Overview to Plaintiffs and the Class at any earlier time during the Class Period. Even so, BNYM continued not to admit that its promises of "best execution" were false; nor did BNYM admit that certain of its preferred custodial clients had benefited from "benchmarking" or other preferred programs in order to continue to keep its deceptive FX practices under wraps.

163. The release of the FX Overview did not stem the tide of adverse news revealing additional facts about the Company's undisclosed Class Period FX practices. On May 23, 2011, THE WALL STREET Journal published a story analyzing 9,400 FX trades executed by BNY Mellon on behalf of the Los Angeles County Employees Retirement Association ("LACERA"), a custodial client of BNY Mellon. *See* Carrick Mollenkamp and Tom McGinty, *Inside a Battle Over Forex*, THE WALL STREET JOURNAL, MAY 23, 2011. The JOURNAL's analysis, similar to the results for Plaintiffs described above, concluded that "BNY Mellon priced 58% of the currency trades within the 10% of each day's trading range that was ***least favorable*** to" LACERA. *Id.* According to the article:

> A BNY Mellon spokesman confirmed the accuracy of the data and said the bank's employees "tend" to price foreign-exchange trades at one end of each day's "interbank" trading range—the rates at which major banks like BNY Mellon buy and sell foreign currencies. But the bank said there was nothing improper about the practice. It said clients like the Los Angeles pension fund knew—or should have known—that the bank doesn't act in their interests when pricing the trades.
>
> The Los Angeles fund disagrees. It said in a letter to BNY Mellon in January that the bank was its fiduciary, so it should have looked out for the fund's interests and offered it "best execution," or the best possible price. It alleged BNY Mellon had used a "hidden mark-up" in currency trades and had a duty "not to make undisclosed profits" at the fund's expense.
>
> *Id*.

164. The JOURNAL's analysis also found that BNY Mellon's skewed FX rates applied even to FX trades above $1 million. *See id*. Specifically, "[the] Journal's analysis showed that

BNY Mellon's pricing for the fund on bigger trades above $1 million also was skewed toward the least-favorable rate. More than 54% of those 287 large trades were priced in the worst 10% of the range between the days' highs and lows, the data shows." *Id.*

165. On May 24, 2011, the JOURNAL reported that the SEC was launching an investigation into BNY Mellon's disclosure of its FX trading practices to custodial clients. *See* Carrick Mollenkamp and Jean Eaglesham, *SEC Deepens Probe of Forex Trading*, WALL STREET JOURNAL, May 24, 2011. According to the JOURNAL:

> Federal securities regulators are taking a deeper look at the role of big banks in executing currency trades for clients.
>
> The Securities and Exchange Commission is examining ***whether two major banks made proper representations to pension-fund clients about how their currency trades would be handled and priced***, according to a person familiar with the matter.
>
> At issue is whether "custody" banks—which handle securities and back-office tasks for institutional investors—are overcharging public pension funds for trading in the $4 trillion-a-day foreign-exchange market.
>
> ***The SEC probe, which is examining the currency-trading activities of Bank of New York Mellon Corp***. and State Street Corp., marks a new level of scrutiny by authorities. It comes on the heels of previously publicized probes by the Justice Department and three state attorneys general into whether the banks fairly charged clients for currencies.
>
> It hadn't been previously known that the SEC was examining BNY Mellon's activities. And the nature of the SEC investigation hadn't been made public.

Id.

166. Finally, BNYM admitted last year, in a partial consent decree in the DOJ Action, that its subsidiaries and affiliates assigned prices to "standing instructions" FX trades "at or near the high end of the range of prices reported in the interbank market for currency sales for the relevant pricing cycle, and at or near the low end of the range of prices reported in the interbank

market for currency sales for the relevant pricing cycle," and that the "pricing of Standing Instruction Service transactions is generally less favorable to clients than directly negotiated trades." *See* Dkt. No. 17 (Jan. 17, 2012) in *United States v. The Bank of N.Y. Mellon Corp*., No. 11 Civ. 6969 LAK (S.D.N.Y.). BNYM finally agreed, as part of that consent decree, to stop representing that "standing instructions" FX trades meet "best execution" standards, were "free of charge," or that Defendants offered "netting" of transactions (unless certain criteria are satisfied). *Id.* BNYM also agreed to fully disclose its pricing of "standing instructions" FX transactions and to provide custodial clients with a mechanism to compare the average pricing of "standing instructions" transactions with trades for non-restricted currency pairs at a particular point in time. *Id.* at 3-4. Additionally, BNYM cannot "represent or suggest that all Standing Instruction Service clients receive the same pricing." *Id.* at 5. Apart from certain select exceptions (such as affiliates of Prudential Financial ("Prudential") (described below)), BNYM has not agreed to make any restitution to defrauded clients or to disgorge the profits obtained through its unlawful scheme.

F. Analysis of Plaintiffs' FX Trades Underscores BNYM's FX Scheme.

167. Analyses of samples of "standing instruction" FX trades executed by Defendants on behalf of Plaintiffs illustrate the extent of the unlawful and undisclosed profits acquired by Defendants at the expense of their custodial clients as a result of their unlawful practices.

168. For example, in the wake of the unsealing of the whistleblower actions described above, the Ohio Funds analyzed the rates recorded on their FX trades conducted by Defendants after the unsealing of the whistleblower actions in five major global currencies (Euros, Japanese Yen, British Pounds, Swiss Francs, and Australian Dollars) for the Class Period. With respect to each trade, the Ohio Funds compared the FX rate reported by Defendants with the mid-rate of the day for the currency in question.

169. The Ohio Funds discovered that the analyzed FX deals were assigned FX rates by Defendants that were more expensive to the Ohio Funds than the mid-rate of the day by an average of **19 bps** (as compared to the 2 to 3 bps of "spread" that a client may expect to be charged in arm's length FX trades).

170. The difference in "spreads" charged to the Ohio Funds' "standing instructions" FX trades (approximately 19 bps) and those reasonably expected in arm's length or "direct" deals illustrates the extent to which pension funds such as the Ohio Funds were overcharged for "standing instructions" FX trades in comparison to those negotiated at arm's length, notwithstanding Defendants' written representations.

171. The approximate overcharge to the Ohio Funds for the "standing instructions" FX trades analyzed for the Class Period and the major currencies described above, using the mid-rate of the day, exceeds $16 million.

172. Plaintiff IUOE Local 39 similarly analyzed the rates recorded on its FX trades, conducted by Defendants, in five major global currencies (Euros, Japanese Yen, British Pounds, Swiss Francs, and Australian Dollars) for the period from June 2008 through December 2008.[14] Like the Ohio Funds, with respect to each trade, Plaintiff IUOE Local 39 compared the FX rate reported by Defendants with (i) the mid-rate of the day for the currency in question and (ii) the actual market FX rates in effect at 11 a.m. Eastern time on the day of the trade.

173. For the first analysis, Plaintiff IUOE Local 39 adopted the mid-rate of the day as one possible substitute for the actual FX rate that was in effect at the time of each transaction, since the latter information is exclusively available only to Defendants (who, as alleged above,

[14] This represents only a sample of the FX trades performed by Defendants for IUOE Local 39.

do not provide time-stamps for each FX transaction to custodial clients on their monthly FX reports).

174. For its second analysis, Plaintiff IUOE Local 39 adopted the interbank rates in effect at 11 a.m. New York time on the day of each trade as a comparison, based on the FX Procedures' representation, as discussed *infra*, that income item conversions (one variety of standing instructions FX trades) would be executed at 11 a.m. New York time each day.

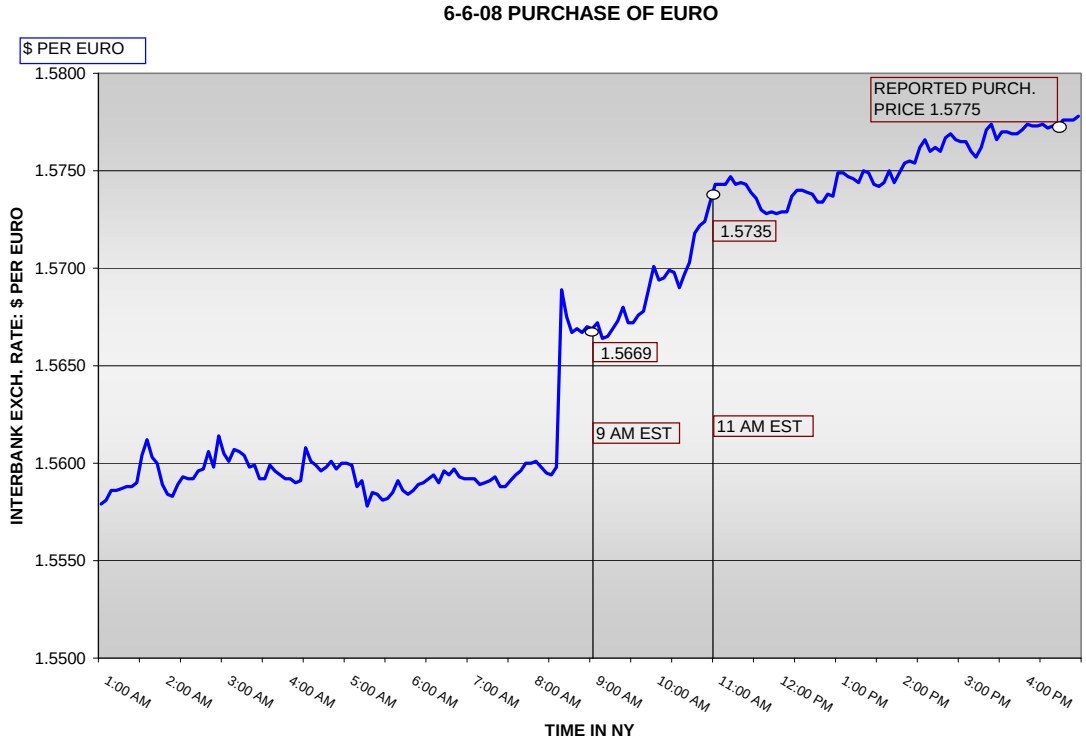
175. Plaintiff IUOE Local 39 discovered that the analyzed FX deals were assigned FX rates by Defendants that were more expensive to IUOE Local 39 than the mid-rate of the day by an average of **65 bps** (as compared to the 2 to 3 bps of "spread" that a client may expect to be charged pursuant to "best execution standards" or on a typical arm's length basis). Using the prevailing interbank rates at 11 a.m. New York time, rather than the mid-rate, as the measuring tool reveals that Plaintiff IUOE Local 39's FX trades were assigned FX rates by Defendants that were more expensive than the 11 a.m. New York time rates by an average of nearly **60 bps**.

176. These sizeable "spreads" notwithstanding, almost none of the FX trades that Plaintiff IUOE Local 39 analyzed was assigned an FX rate by Defendants that fell outside the range of the day for the applicable FX rate on the day the trade was executed. Accordingly, IUOE Local 39 would have had little reason to believe, prior to the unsealing of the whistleblower complaints, that it had been deceptively charged fictitious FX rates on its "standing instructions" FX trades.

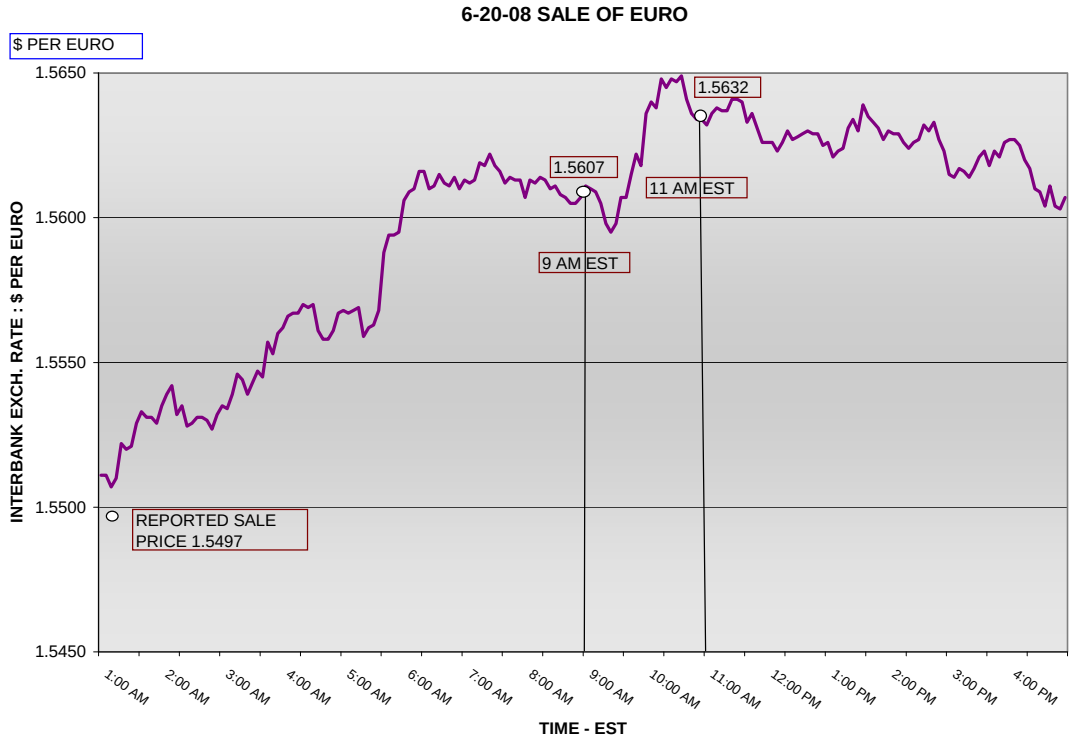
177. The difference in "spreads" charged to Plaintiff IUOE Local 39's "standing instructions" FX trades (from 60 to 65 bps) and those that would be reasonably expected under "best execution standards" illustrates the extent to which funds such as Plaintiffs and the Class were deceptively overcharged for "standing instructions" deals.

178. The approximate overcharge to Plaintiff IUOE Local 39 for the "standing instructions" deals analyzed for just the 6-month period and five major currencies described above, using either the mid-rate of the day or the 11 a.m. New York interbank prevailing FX rate as a guide, exceeds $150,000. An analysis of all of Plaintiff IUOE Local 39's FX trades would cover more than five years of transactions, involving more than five currencies. Accordingly, Plaintiff IUOE Local 39's estimated losses from unfair and unlawful FX overcharges for the duration of Defendants' custodial engagement are substantial.

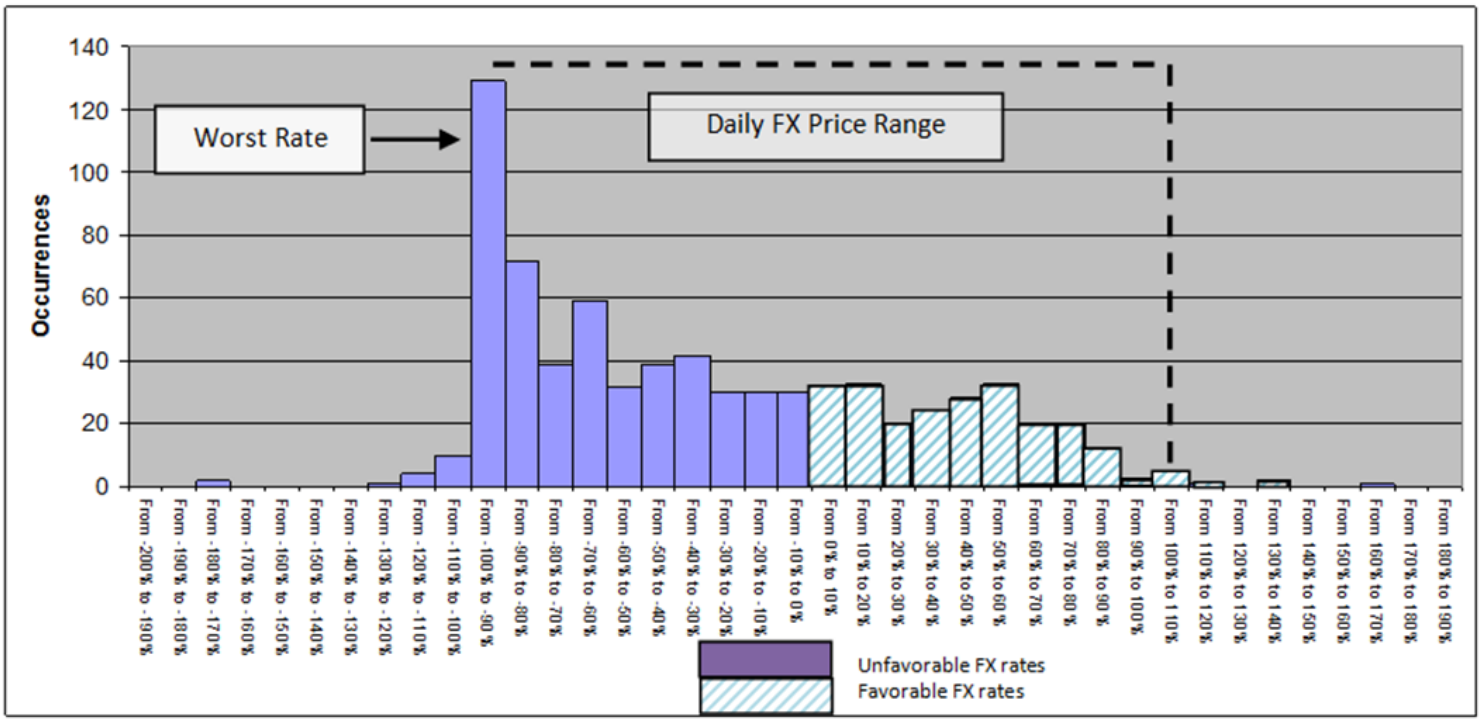
179. Additional examples from Plaintiff IUOE Local 39's own trading data further illustrate the manner in which custodial FX clients were gouged by Defendants' deceptive and unfair "standing instructions" FX practices. On June 6, 2008, in 20 trades, Defendants purchased approximately 4,463,907 Euros for Plaintiff IUOE Local 39 at a rate of 1.5775 US Dollars per Euro, paying $7,042,084 for the transaction. All of these trades were conducted at the same FX rate. Had the trades been executed and charged using the FX rate prevailing in the interbank market at 11 a.m. New York time, Plaintiff IUOE Local 39 would have received a lower and more beneficial FX rate of 1.5735 US Dollars per Euro. This would have cost Plaintiff Local IUOE 39 $6,997,174, or $44,909 less than what it was actually charged by Defendants – a more than **63 bps** difference. Further, on this particular day, the US Dollar/Euro exchange rate of 1.5775 did not occur in the interbank market until approximately 3:30 p.m. New York time, and was barely under the high (or least favorable) rate of 1.5778 that occurred in the last minutes of the trading day. The foregoing is illustrated in Chart A below:



180. Similarly, on June 20, 2008, Defendants sold 122,464 Euros for Plaintiff IUOE Local 39 at a rate of 1.5497 US Dollars per Euro, receiving $189,783 for the transaction. Had the trade been executed and charged using the FX rate prevailing in the interbank market at 11 a.m. New York time, Plaintiff IUOE Local 39 would have received a higher and more beneficial FX rate of 1.5630 US Dollars per Euro. Plaintiff IUOE Local 39 would have received $191,411, or $1,629 more than what it was actually paid by Defendants – a more than **85 bps** difference. Further, on this particular day, the US Dollar/Euro exchange rate of 1.5497 did not even occur in the market during New York trading hours. The foregoing is illustrated in Chart B below:



181. Similarly, an analysis of a sample of "standing instruction" FX trades executed by Defendants on SEPTA's behalf illustrates that SEPTA was also a victim of BNYM's secret manipulation of "standing instruction" FX trades. The following graph (Chart C) plots a random sample of SEPTA's FX trades executed by BNYM on an indirect basis for the past several years:



The percentages on the x-axis of Chart C plot the best and worst daily FX rates for any given trading day. Trades at 100% were executed at the most favorable FX rate within a trading day, whereas trades at -100% were executed at the worst possible FX rate within a trading day. Trades below -100% were priced at less than the worst possible FX rate. In a normal distribution, the largest spike should be near 0%.

182. As illustrated in Chart C above, the sample FX transaction data analyzed for SEPTA shows a clear spike in trades at the -100% to -90% range. Based on the spike, 17% of the sample trades were priced at the absolute worst FX rate for the sample period and more than two-thirds of SEPTA's sample trades were priced below 0%. Had BNYM charged SEPTA market rates for trades, the sample would spike near the 0% mark on Chart C rather than spiking at the worst rate of the trading day. Thus the results set forth in Chart C are entirely consistent with the analysis of Plaintiff IUOE Local 39's and the Ohio Funds' FX transaction data and with the details pled in the DOJ and other governmental or regulatory actions.

183. Plaintiffs and the Class paid millions of dollars in custodial fees to Defendants during the Class Period. During that time, Defendants deceptively, unlawfully and unfairly generated millions of dollars in additional risk-free revenue. Plaintiffs and the Class have struggled to meet funding requirements in the face of major losses in value attributable to the economic downturn following the 2008 financial crisis. Money lost due to Defendants' deceptive, unlawful and unfair practices is money that will not earn compounded investment returns for Plaintiffs and the Class over the thirty-plus year time horizon that applies to most pension plans, and each such loss will triple each decade.

II. CLASS ACTION ALLEGATIONS

184. This action is brought and may properly be maintained as a class action pursuant to Rules 23(a), 23(b)(2) and/or 23(b)(3) of the Federal Rules of Civil Procedure. This action is brought pursuant to Rule 23(b)(2) for injunctive or declaratory relief and/or Rule 23(b)(3) for money damages.

185. This suit is a class action brought on behalf of the following Class and Subclasses:[15]

- Plaintiffs bring claims for breach of fiduciary duty, conversion, breach of contract, breach of the covenant of good faith and fair dealing, and/or unjust enrichment, on behalf of the following Class: All public and non-public institutional investors in foreign securities, including but not limited to pension funds, mutual funds, endowment funds, investment manager funds, and employee benefit plans covered by ERISA, wherever situated, for which Defendants or any

[15] Plaintiffs reserve the right to refine these class and subclass definitions after discovery and upon moving for class certification. The connective "and/or" in any class or subclass definition below indicates that certain claims are pleaded in the alternative.

of their predecessors, successors or affiliates provided custodial FX services and executed FX transactions on an "indirect" basis (or based on "standing instructions) during the period January 12, 1999 to the present (the "Class Period");

- Plaintiffs bring claims for violation of New York General Business Law § 349 on behalf of the following subclass (the "New York Subclass"): All public and non-public institutional investors in foreign securities, including but not limited to pension funds, mutual funds, endowment funds, investment manager funds, and employee benefit plans covered by ERISA, wherever situated, whose FX transactions, including those executed pursuant to "standing instructions," were executed in New York by Defendants' New York FX desks during the Class Period;
- Plaintiffs bring claims for violation of Cal. Bus. & Prof. Code § 17200 and § 17500 on behalf of the following subclass (the "California Subclass"): All California-based institutional investors in foreign securities, including, but not limited to, pension funds, mutual funds, endowment funds, investment manager funds, and employee benefit plans covered by ERISA, for which Defendants or any of their predecessors, successors or affiliates provided custodial FX services, including executing FX transactions pursuant to "standing instructions," during the Class Period;
- Plaintiffs bring claims for violation of the Ohio Deceptive Trade Practices Act and all similar deceptive trade statutes on behalf of the following subclass (the "DTPA Subclass"): All institutional investors in foreign securities, including, but

not limited to, pension funds, mutual funds, endowment funds, investment manager funds, and employee benefit plans covered by ERISA, based in Ohio and/or in states with deceptive trade practices acts substantially similar to that of Ohio, for which Defendants or any of their predecessors, successors or affiliates provided custodial FX services, including executing FX transactions pursuant to "standing instructions," during the Class Period.

186. References herein to the "Class" encompass the Class and members of any subclasses, except where otherwise stated.

187. Excluded from the Class and any subclass are Defendants, any entity in which any Defendant has a controlling interest, and the officers, directors, legal representatives, heirs, successors, subsidiaries and/or assigns of any such individual or entity, as well as any public funds (i) on whose behalf any independent *qui tam* actions were filed and subsequently unsealed either prior to or during the pendency of this action or (ii) are currently seeking similar relief through individual litigation in this MDL proceeding for the wrongful acts alleged herein.

188. The members of the Class are so numerous that joinder of all members individually, in one action or otherwise, is impracticable. Plaintiffs believe that there are thousands of proposed Class members.

189. There are numerous questions of law and fact common to Plaintiffs and the Class, including:

a. whether Defendants owed fiduciary duties to their custodial clients;

b. whether Defendants breached fiduciary obligations owed to their custodial clients by retaining, without proper disclosures, the margin between the actual (or market) FX

rate when executing an indirect or "standing instructions" FX transaction for a custodial client and the rate actually charged to the client;

c. whether Defendants failed to apply best execution standards when engaging in indirect or "standing instructions" FX transactions for their custodial clients;

d. whether Defendants owed contractual duties to their custodial clients;

e. whether Defendants violated the contractual obligations owed to their custodial clients by charging FX rates that bore little or no relation to interbank market rates at the time the clients' "standing instructions" FX trades were executed;

f. whether Defendants breached contractual obligations by retaining, without proper disclosure, the margin between the actual (or market) FX rate when executing an indirect or "standing instructions" FX transaction for a custodial client and the rate it actually charged the client;

g. whether Defendants collectively, or any of them separately, violated Cal. Bus. & Prof. Code § 17200, *et seq.*, Cal. Bus. & Prof. Code § 17500, *et seq.*, New York's General Business Law § 349, and/or the Ohio Deceptive Trade Practices Act and similar laws by charging, and retaining the margin from, FX rates that did not reflect interbank market rates or "best execution standards" at the time the clients' "standing instructions" FX trades were executed, without disclosure of same;

h. whether Defendants collectively, or any of them separately, violated state statutory or common law by charging, and retaining the margin from, FX rates that did not reflect interbank market rates or "best execution standards" at the time the clients' "standing instructions" FX trades were executed, without disclosure of same;

i. whether Defendants collectively, or any of them separately, violated the duties of good faith and fair dealing owed to their clients by charging FX rates that bore little or no relation to interbank market rates at the time the clients' "standing instructions" FX trades were executed, and by retaining, without proper disclosure, the margin between the actual (or market) FX rate when executing a "standing instructions" FX transaction for a custodial client and the rate actually charged to the client;

j. whether Defendants were unjustly enriched by the conduct set forth herein;

k. whether Plaintiffs and the Class suffered monetary damages as a result of the Defendants' deceptive, unlawful and unfair actions and, if so, the proper measure of those damages; and

l. whether the Class is entitled to injunctive relief.

190. Plaintiffs' claims are typical of the claims of the members of the Class, and they are members of the Class described herein.

191. Plaintiffs are willing and prepared to serve the proposed Class in a representative capacity with all of the obligations and duties material thereto. Plaintiffs will fairly and adequately protect the interests of the Class and have no interests adverse to, or which conflict with, the interests of other members of the Class.

192. Plaintiffs' interests are co-extensive with and not antagonistic to those of the absent Class members. Plaintiffs will undertake to represent and protect the interests of absent Class members.

193. Plaintiffs have engaged the services of the undersigned counsel. Counsel is experienced in complex class action litigation, will adequately prosecute this action, and will assert and protect the rights of, and otherwise represent, Plaintiffs and absent Class members.

194. The questions of law and fact common to the Class, as summarized above, predominate over any questions affecting only individual members, in satisfaction of Rule 23(b)(3), and each such common question warrants class certification under Rule 23(c)(4).

195. A class action is superior to other available methods for the adjudication of this controversy. Individualized litigation increases the delay and expense to all parties and the court system given the complex legal and factual issues of the case, and judicial determination of the common legal and factual issues essential to this case would be far more fair, efficient, and economical as a class action maintained in this forum than in piecemeal individual determinations.

196. Plaintiffs know of no difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a class action. Compared to individualized actions, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

197. Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final and injunctive relief with respect to the Class.

III. TOLLING OF STATUTES OF LIMITATION

198. The applicable statutes of limitation for each of the claims for relief asserted herein have been tolled by Defendants' acts of fraud, concealment, and intentional misrepresentation as described herein. Plaintiffs reasonably relied on Defendants' misrepresentations concerning their "standing instructions" custodial FX practices, and could not

have discovered, exercising reasonable diligence, any of the claims for relief pleaded herein against Defendants prior to the unsealing of the first whistleblower complaint against one or more of Defendants on January 21, 2011. Plaintiffs in fact did not discover any of the claims for relief pleaded herein until after such time, and after conducting the empirical analyses of its FX trading data as described above.

199. In order to conceal its actions and reap secret profits at its custodial clients' expense during the Class Period, BNYM's account statements generally reported FX conversion rates that fell within (or close to) the high and low range for each day's FX rates but failed to provide time stamped execution prices. The combination effectively precluded custodial clients from discovering that the FX rates they were being charged were manipulated by BNYM.

200. Throughout the Class Period, BNYM gained the trust of its clients and their investment managers by executing FX transactions while serving as a custodian or fiduciary and representing that it would utilize best execution standards. Based on BNYM's custodial or fiduciary status and its representations regarding the use of best execution standards, Plaintiffs and the Class reasonably understood that BNYM would not manipulate FX trades to extract illicit profits at their expense.

201. FX transactions are part of BNYM's custodial responsibilities and are subject to the same fiduciary standards as other services BNYM provides to its custodial clients.

202. BNYM is in sole possession of records accurately detailing the manipulated FX transactions and the rates it actually incurred when executing FX transactions for its clients.

203. BNYM's manipulation of FX rates was a company-wide operation that "used a foreign-exchange system called 'Charlie' to create fake trades and overcharge [its clients]." Carrick Mollenkamp, Lingling Wei, and Gregory Zuckerman, *Suit Alleges Mellon Created Fake*

Trades, Overcharged, THE WALL STREET JOURNAL, Feb. 4, 2011. Upon information and belief, the scheme required coordination between BNYM's trading desks in Pittsburgh and New York in order to avoid detection. *See Florida* Compl. ¶¶ 45-61.

204. BNYM did not provide Plaintiffs with time stamped FX trades. Because the account statements provided by BNYM identified FX rates that were generally within the daily range of FX rates and were executed by a fiduciary that purportedly utilized best execution standards, Plaintiffs were not put on notice of BNYM's misconduct prior to the whistleblower actions becoming unsealed.

205. Specifically, Plaintiffs were not aware, and BNYM did not disclose, that:

- the costs of the reported FX transactions executed by BNYM were not the actual FX costs it incurred and were not consistent with the actual market FX rates at the time Plaintiffs' trades were executed;
- BNYM would and did retain the difference between the actual FX rates it incurred to execute a trade and the manipulated FX rates it charged Plaintiffs; or
- BNYM would take hidden fees or profits from the FX transactions it executed, including mark-ups or mark-downs, when executing FX trades on Plaintiffs' behalf.

206. The FX Overview, circulated to some custodial clients on or about May 2, 2011, included certain disclosures concerning BNYM's indirect FX trading practices, including but not limited to BNYM's tendency to purchase currencies for its "clients towards the low end of the interbank range and sell towards the high end. . . ." These disclosures were not previously made to custodial clients during the Class Period, and still did not admit that BNYM's prior claims of "best execution" were false.

207. BNYM's practices affected all of custodial clients whose FX transactions BNYM indirectly executed during the Class Period.

CLAIMS FOR RELIEF[16]

FIRST CLAIM FOR RELIEF
Breach of Fiduciary Duty
(Against BNY Mellon, BNY and Mellon)

208. Plaintiffs SEPTA and OP&F restate and incorporate the allegations contained in each paragraph above as though fully set forth herein. This claim for relief for breach of fiduciary duty is asserted by SEPTA and OP&F on behalf of themselves and the Class against Defendants BNY Mellon, BNY and Mellon, collectively referred to in this Count as the "Fiduciary Defendants."

209. The Fiduciary Defendants acted as fiduciaries for Plaintiffs and the Class.

210. Through the custodial relationship, Plaintiffs and the Class ceded a certain amount of control over their assets to the Fiduciary Defendants, including with respect to any indirect or "standing instructions" FX transactions the Fiduciary Defendants transacted on behalf of Plaintiffs and the Class.

211. The Fiduciary Defendants' status as a custodian for Plaintiffs and the Class, as well as the nature of the Fiduciary Defendants indirect "standing instructions" FX transactions, made Plaintiffs and the Class fully dependent upon the Fiduciary Defendants to execute such transactions in an honest manner without taking secret profits at Plaintiffs' and the Class's expense. Plaintiffs and the Class reposed trust and confidence in the integrity and fidelity of the Fiduciary Defendants, and this dependence on the Fiduciary Defendants for information, coupled with the Fiduciary Defendants' control over the timing and conversion rate for each indirect FX

[16] The Court has dismissed certain of Plaintiff SEPTA's claims. (*See* Dkt. No. 188.) While this Master Complaint sets forth only those claims that have previously survived Rule 12(b)(6) motions or have not otherwise been dismissed either by this Court or one of the MDL transferor courts, SEPTA does not waive any rights to appeal the Court's dismissal of any of its previously alleged claims.

transaction, gave rise to a fiduciary duty, and in particular a duty of care and loyalty, on the part of the Fiduciary Defendants to Plaintiffs and the Class as follows:

a. The Fiduciary Defendants occupied a superior position over Plaintiffs and the Class with respect to the execution of indirect or "standing instructions" FX transactions, and had superior access to confidential information about prevailing market FX rates at the time Plaintiffs' and Class members' FX transactions were actually executed.

b. The Fiduciary Defendants' superior position and status as fiduciaries led Plaintiffs and the Class to repose their complete trust and confidence in the Fiduciary Defendants, who acted as their custodians and fiduciaries, to fulfill their duties and to properly execute FX transactions at the prevailing market rate at the time of the transaction. Plaintiffs and the Class did so place their complete trust and confidence in the Fiduciary Defendants by executing indirect or "standing instructions" FX transactions through the Fiduciary Defendants.

c. The Fiduciary Defendants, which held themselves out as providers of superior custodial and FX trading services, understood that they were fiduciaries of Plaintiffs and the Class. The Fiduciary Defendants represented that indirect FX trades would be subject to best execution standards. Plaintiffs and the Class reasonably and foreseeably relied upon such representations and trusted in the Fiduciary Defendants' purported skill, expertise, and experience by executing indirect or "standing instructions" FX transactions through the Fiduciary Defendants.

212. As fiduciaries, the Fiduciary Defendants were required, among other things, to discharge their obligations with respect to Plaintiffs and the Class (a) solely in the interest of Plaintiffs and the Class, (b) for the exclusive purpose of providing benefits to Plaintiffs and the Class, (c) with the care, skill, prudence, and diligence under the circumstances then prevailing

that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, and (d) in accordance with the applicable documents and instruments.

213. It follows that the Fiduciary Defendants, which sought to profit in a principal capacity in matters sufficiently related to the fiduciary duties they owed pursuant to their custodial relationship with Plaintiffs and the Class, could do so only if they fully and fairly disclosed the nature of their relationship and duties owed as it related to their provision of custodial FX services.

214. The Fiduciary Defendants breached their fiduciary obligations to Plaintiffs and the Class by failing to disclose – and actively concealing from Plaintiffs and the Class – the manner in which the Fiduciary Defendants were profiting at the expense of Plaintiffs and the Class.

215. The Fiduciary Defendants breached their fiduciary obligations to Plaintiffs and the Class by failing to disclose to their custodial clients – and actively concealing from them – that they were charging clients FX rates that were inconsistent with the rates paid by the Fiduciary Defendants, or with the prevailing rates at the time the FX trade was executed, and then pocketing the difference between the actual FX rates incurred by the Fiduciary Defendants (or market rate at the time a trade was executed) and the false FX rates charged to Plaintiffs and the Class.

216. Plaintiffs and the Class have been damaged as a direct and proximate result of these breaches of fiduciary duties and are entitled to damages, and appropriate equitable relief, including accounting and imposition of a constructive trust.

SECOND CLAIM FOR RELIEF
Breach of Contract (Against Defendants The Bank of New York Mellon Trust Company, National Association, BNY Mellon, Mellon and BNY)

217. Plaintiffs repeat and incorporate by reference each of the foregoing allegations of this Complaint. This claim for relief for breach of contract is asserted by all Plaintiffs on behalf of themselves and the Class against Defendants The Bank of New York Mellon Trust Company, National Association, BNY Mellon, Mellon and BNY (the "Contract/Fair Dealing Defendants").

218. Plaintiffs entered into or were intended third-party beneficiaries of contracts with the Contract/Fair Dealing Defendants for these Defendants to provide global custodial FX services, including the execution of FX trades pursuant to "standing instructions."

219. In addition to any global custodial or master trust agreements, the FX Procedure Form, the FX Procedures and the Standing Instructions Page (collectively, the "FX Procedure Documents") created a contract between the Contract/Fair Dealing Defendants and their custodial clients and, as such, the Contract/Fair Dealing Defendants were obligated to execute FX trades in a manner consistent with the terms of the FX Procedure Documents.

220. The FX Procedure Documents were uniform across all Class members at any given time during the Class Period. Class members were and are intended beneficiaries of any rights and obligations created by the FX Procedure Documents.

221. The FX Procedure Documents set forth the process the Contract/Fair Dealing Defendants were to use when executing FX trades under "standing instructions." The Standing Instructions Page, which is a part of the FX Procedure Documents, states that "[c]lients benefit from: . . . FX execution ***according to best execution standards***." *Id.*

222. The FX Procedure Documents allowed for the provision of global custodial FX services, including the execution of FX trades pursuant to "standing instructions" where the amounts concerned fall below USD $300,000.00 or its equivalent, or where the client did not

exercise its option to cancel the pricing of an FX trade for an amount exceeding USD $300,000.00 along the same lines as "standing instructions" trades.

223. Throughout much of the Class Period, the FX Procedures, which were incorporated by the contracts and were "the exclusive means by which" the Contract/Fair Dealing Defendants could "enter into an FX Transaction" on behalf of a client, promised that "[t]he terms of FX Transactions with any Plan shall not be less favorable to the Plan than terms offered by BNY to unrelated parties in a comparable arm's length FX Transaction." This language closely tracked Section 408(b)(18) of ERISA, which provides a statutory prohibited transaction exemption for FX transactions, permitting FX transactions to be performed for an ERISA-covered plan by a party in interest, such as a custodial bank or its affiliate, provided that "[a]t the time the [FX] transaction is entered into, the terms of the transaction are ***not less favorable to the plan than the terms generally available in comparable arm's length foreign exchange transactions between unrelated parties*** or the terms afforded by the bank in comparable arm's length foreign exchange transactions involving unrelated parties." ERISA § 408(b)(18). This statutory exemption, which was enacted as part of the Pension Protection Act of 2006, was preceded by a "class exemption" to the same effect published by the U.S. Department of Labor on November 13, 1998 (known as Prohibited Transaction Exemption 98-54 (or "PTE 98-54")), with relevant portions thereof effective beginning January 12, 1999. This language remains in force today.

224. The point of the ERISA section quoted above, which governed the Contract/Fair Dealing Defendants' provision of FX services to ERISA funds throughout the Class Period (and still does), is to protect ERISA funds from being taken advantage of. Although the Contract/Fair Dealing Defendants dropped the explicit references to this ERISA requirement in subsequent

iterations of their written FX Procedures (including one published in 2008), this language continued to govern the Contract/Fair Dealing Defendants' provision of custodial FX services to ERISA funds, and accordingly was an implied term of the contracts between the Contract/Fair Dealing Defendants' ERISA fund clients (including Plaintiff IUOE Local 39) and the Contract/Fair Dealing Defendants. Additionally, the language incorporated in the FX Procedures did not apply exclusively to ERISA plans.

225. The contracts also required the Contract/Fair Dealing Defendants to exercise "reasonable care" in the performance of their duties.

226. The Contract/Fair Dealing Defendants breached the contractual duties imposed by the FX Procedure Documents by not applying best execution standards to all indirect FX trades executed for Plaintiffs and the Class. As detailed herein, rather than applying best execution to the Class's indirect FX trades, the Contract/Fair Dealing Defendants charged Plaintiffs and the Class post-execution FX rates that were designed to extract substantial profits for these Defendants at the Class's expense. The Contract/Fair Dealing Defendants' failure to apply best execution standards to Plaintiffs' and the Class's FX trades breached the terms of the FX Procedure Documents.

227. The Contract/Fair Dealing Defendants have breached their contracts with Plaintiffs and the Class by selecting fictitious FX rates to report and charge or credit to Plaintiffs and the Class for "standing instructions" FX trades, against the reasonable expectations of Plaintiffs and the Class, in order to unfairly and unlawfully increase their profits at the expense of Plaintiffs and the Class. In so doing, the Contract/Fair Dealing Defendants failed to offer terms to Plaintiffs and the Class, on their "standing instructions" FX trades, that were not less favorable to Plaintiffs and the Class than the terms offered by the Contract/Fair Dealing

Defendants or generally available to unrelated parties in comparable arm's length FX transactions, including (but not limited to) those special "opt-out" or "benchmark pricing" clients that received more favorable terms on their "standing instructions" FX trades.

228. Additionally, where a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise such discretion in good faith and in accordance with fair dealing. Here, the Contract/Fair Dealing Defendants' contracts with Plaintiffs and the Class conferred discretionary power to these Defendants for executing FX trades pursuant to "standing instructions" under specified circumstances, including (but not limited to) where the amounts concerned fell below USD $300,000.00 or its equivalent, or (with respect to amounts above USD $300,000.00) where the fund client did not exercise its option to cancel the pricing of its FX trade along the same lines as "standing instructions" trades. However, the Contract/Fair Dealing Defendants exercised this discretion in bad faith, as they have selected fictitious FX rates to report and charge or credit to Plaintiffs and the Class for "standing instructions" FX trades, against the reasonable expectations of Plaintiffs and the Class, in order to unfairly and unlawfully increase their profits at the expense of Plaintiffs and the Class.

229. Plaintiffs and the Class have performed all, or substantially all, of the obligations imposed on them under their contracts with the Contract/Fair Dealing Defendants.

230. Plaintiffs and the Class have been damaged as a direct and proximate result of the Contract/Fair Dealing Defendants' breaches of contract and bad faith by paying falsely inflated prices, or being paid falsely deflated prices, for "standing instructions" FX trades. These false charges and falsely deflated prices constitute costs that Plaintiffs and the Class otherwise would

not have incurred, for which Plaintiffs and the Class seek damages in an amount to be established at trial.

THIRD CLAIM FOR RELIEF
Breach of Implied Covenant of Good Faith and Fair Dealing
(Against the Contract/Fair Dealing Defendants)

231. Plaintiffs repeat and incorporate by reference each of the foregoing allegations of this Complaint. This claim for relief for breach of the implied covenant of good faith and fair dealing is asserted separately and in the alternative by Plaintiffs against the Contract/Fair Dealing Defendants on behalf of those members of the Class who reside in states (such as California and Delaware, among others) in which the claim for breach of the implied covenant of good faith and fair dealing is recognized as a separately cognizable claim (rather than simply a species of breach of contract).

232. Where a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise such discretion in good faith and in accordance with fair dealing. Here, the Contract/Fair Dealing Defendants' contracts with Plaintiffs and the Class conferred discretionary power to the Contract/Fair Dealing Defendants for executing FX trades pursuant to "standing instructions" under specified circumstances, including (but not limited to) where the amounts concerned fell below USD $300,000.00 or its equivalent, or (with respect to amounts above USD $300,000.00) where the fund client did not exercise its option to cancel the pricing of its FX trade along the same lines as "standing instructions" trades. However, the Contract/Fair Dealing Defendants exercised this discretion in bad faith, as they have selected fictitious FX rates to report and charge or credit to Plaintiffs and the Class for "standing instructions" FX trades, against the reasonable expectations of Plaintiffs and the Class, in order to unfairly and unlawfully increase their profits at the expense of Plaintiffs and the Class.

233. Meanwhile, Plaintiffs and the Class have performed all, or substantially all, of the obligations imposed on them under their contracts with the Contract/Fair Dealing Defendants. Plaintiffs and the members of the Class have been damaged as a result of the Contract/Fair Dealing Defendants' breaches of the implied covenant of good faith and fair dealing by paying falsely inflated prices, or being paid falsely deflated prices, for "standing instructions" FX trades. These false charges and falsely deflated prices constitute damages to Plaintiffs and the Class that they otherwise would not have incurred, for which Plaintiffs and the Class seek relief as prayed below.

FOURTH CLAIM FOR RELIEF
Conversion (Against All Defendants)

234. Plaintiffs repeat and incorporate each and every preceding paragraph stated above, inclusive, as though the same were fully set forth hereafter.

235. This claim for relief is asserted in the alternative by Plaintiffs on behalf of the Class against all Defendants.

236. As custodial clients of Defendants, Plaintiffs and the Class entrusted specific and identifiable funds to Defendants for the specific purpose of, among other things, conducting custodial FX trades.

237. Plaintiffs and the Class had ownership or the superior right to possession of the specific and identifiable funds they entrusted to Defendants as custodial clients of Defendants.

238. By taking undisclosed spreads on Plaintiffs' indirect or "standing instructions" FX trades and pocketing funds otherwise belonging to Plaintiffs, Defendants exercised wrongful control, dominion over, and/or deprivation of Plaintiffs' funds in derogation and/or denial of Plaintiffs' and the Class's rights, without the consent of Plaintiffs or the Class and without lawful justification.

239. Defendants' wrongful acts and conduct constituted a conversion of Plaintiffs' and the Class's property.

240. Plaintiffs and the Class have been damaged as a result of Defendants' conduct and are entitled to recover their damages from Defendants in an amount to be established at trial.

FIFTH CLAIM FOR RELIEF
Unjust Enrichment (Against All Defendants)

241. The Ohio Funds and IUOE Local 39 repeat and incorporate each and every preceding paragraph stated above, inclusive, as though the same were fully set forth hereafter.

242. This claim for relief is asserted in the alternative by the Ohio Funds and IUOE Local 39 on behalf of themselves and the Class against all Defendants.

243. Defendants benefited from the unlawful acts and omissions to Plaintiffs and the Class as described herein. These unlawful acts and omissions caused Plaintiffs and the Class to suffer injury and monetary loss.

244. It is unjust and inequitable for Defendants to enrich themselves through the manipulation of indirect or "standing instructions" FX transactions as described herein.

245. Equity and good conscience require that Defendants disgorge all such unjust gains and that Defendants should pay the amounts by which they were unjustly enriched to Plaintiffs and the Class in an amount to be determined at trial.

246. Plaintiffs and the Class seek restitution from Defendants, and seek an order of this Court disgorging all profits, benefits, and other such compensation obtained by Defendants through their wrongful conduct.

247. Plaintiffs and the Class are entitled to the establishment of a constructive trust impressed upon the benefits derived by Defendants from their unjust enrichment and inequitable conduct.

SIXTH CLAIM FOR RELIEF
Violation of N.Y. General Business Law § 349, et seq.
(Against Defendants BNY Mellon Corp., BNY Mellon, and BNY on behalf of the New York Subclass)

248. Plaintiffs repeat and incorporate by reference each of the foregoing allegations of this Complaint. This claim for relief for violation of N.Y. General Business Law § 349, *et seq.* is asserted against Defendants BNY Mellon Corp., BNY Mellon, and BNY (the "New York Defendants") on behalf of the New York Subclass.

249. The New York Defendants' actions constitute unfair, unconscionable and/or deceptive trade practices in the course of their business and in the conduct of trade or commerce, in violation of the New York Deceptive Trade Practices Act, N.Y. Gen. Bus. L. § 349, *et seq.* In that regard, the New York Defendants' actions have caused and will continue to cause financial harm to Plaintiffs and the New York Subclass.

250. The New York Defendants' conduct has caused, and continues to cause, harm to the public. The harm to the public includes overcharging, or under-crediting, custody clients on their "standing instructions" FX transactions for a period spanning over a decade. The number of affected employee beneficiaries of affected funds, nationwide, is in the millions. The number of affected FX transactions during the Class Period is likely in the hundreds of thousands, if not millions. The amount of the unlawful profits obtained by the New York Defendants as a result of their practices, during the Class Period, is likely in the hundreds of millions of dollars. This is money directly taken from the coffers of pension funds, which have struggled during the years following the 2008 financial crisis to meet their funding obligations.

251. The New York Defendants' conduct as alleged herein has damaged and will continue to damage Plaintiffs and the New York Subclass in an amount that is unknown at the present time.

SEVENTH CLAIM FOR RELIEF
Violation of Cal. Bus. & Prof. Code § 17200, et seq. - Unlawful, Fraudulent, and Unfair Business Acts and Practices
(Against All Defendants on behalf of the California Subclass)

252. Plaintiffs repeat and incorporate by reference each of the foregoing allegations of this Complaint. This claim for relief for violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.*, is asserted against all Defendants on behalf of the California Subclass.

253. Defendants' conduct alleged herein constitutes unfair and deceptive business acts and practices in violation of Cal. Bus. & Prof. Code § 17200, *et seq*. Such conduct includes, but is not limited to, (a) misrepresenting to Plaintiffs and the California Subclass the true costs of "standing instructions" FX trading services; (b) assigning and reporting fictitious FX rates to "standing instructions" FX trades executed for Plaintiffs and the California Subclass; and (c) pocketing the difference between the actual FX rates at which Plaintiffs' and the California Subclass' "standing instructions" FX trades were completed and the fictitious FX rates that were reported to Plaintiffs and the California Subclass, to the direct financial detriment of Plaintiffs and the California Subclass.

254. Further, the conduct alleged herein also constitutes fraud, intentional misrepresentation, breach of contract, breach of the implied covenant of good faith and fair dealing, is violative of ERISA (as to ERISA plans), and violates Cal. Bus. & Prof. Code § 17500, *et seq.*, as set forth below.

255. The conduct herein is "unfair" because it offends established public policy and/or is immoral, unethical, oppressive, unscrupulous, and/or substantially injurious to custodial customers.

256. Defendants' unfair, unlawful, and deceptive acts and practices alleged herein were "fraudulent" and have deceived and/or are likely to deceive Plaintiffs and the California Subclass and other reasonable consumers.

257. Defendants' unfair, unlawful, and deceptive acts and practices alleged herein were specifically designed to induce Plaintiffs and the California Subclass to permit their FX trades to be executed pursuant to "standing instructions."

258. Defendants' misrepresentations and omissions alleged herein were material in that a reasonable person would attach importance to such information and would be induced to act upon such information in making decisions concerning purchases of FX custodial services.

259. Defendants' misrepresentations and omissions alleged herein are objectively material to the reasonable consumer, and therefore reliance upon such misrepresentations may be presumed as a matter of law.

260. Plaintiffs and the California Subclass relied to their detriment on Defendants' misrepresentations and omissions in conducting FX trades pursuant to "standing instructions."

261. Plaintiffs and each member of the California Subclass have lost money and been damaged as a result of Defendants' unfair, unlawful, and deceptive conduct alleged herein. They are accordingly entitled to injunctive relief and restitution, in an amount to be proven at trial.

EIGHTH CLAIM FOR RELIEF
Violation of Cal. Bus. & Prof. Code § 17500, et seq. – False Advertising
(Against All Defendants on behalf of the California Subclass)

262. Plaintiffs repeat and incorporate by reference each of the foregoing allegations of this Complaint. This claim for relief for violation of Cal. Bus. & Prof. Code § 17500, *et seq.*, is asserted against all Defendants on behalf of the California Subclass.

263. Defendants have committed acts of untrue and misleading advertising, as defined by Cal. Bus. & Prof Code § 17500, *et. seq.*, by, *inter alia*: (a) falsely advertising, in their written FX Procedures, on their respective websites, and elsewhere that "[t]he terms of FX Transactions with any Plan shall not be less favorable to the Plan than terms offered by BNY to unrelated parties in a comparable arm's length FX Transaction," that such Plaintiffs and the California Subclass would receive the benefits of "best execution standards" by Defendants when Defendants executed FX trades pursuant to "standing instructions," and that such services were "free of charge"; (b) concealing material information about the actual costs to Plaintiffs and the California Subclass for permitting Defendants to execute FX trades for them pursuant to "standing instructions"; and (c) concealing the manner in which FX rates were derived and charged to custodial customers such as Plaintiffs and the California Subclass for FX trades done pursuant to "standing instructions."

264. Defendants knew, or through the exercise of reasonable care should have known, that their statements or omissions were materially misleading or omitted material facts which made them misleading.

265. Defendants' misrepresentations and omissions alleged herein deceive or have the tendency to deceive the general public regarding the benefits of FX custodial services and "standing instructions" FX trades in particular, and did deceive and mislead Plaintiffs and the members of the proposed California Subclass.

266. Defendants' misrepresentations and omissions alleged herein were the type of misrepresentations and omission that are material—*i.e.*, a reasonable person would attach importance to them and would be induced to act on the information in paying for custodial FX

services and "standing instructions" FX trades in particular. Defendants knew that their omissions and misrepresentations were material when they made them.

267. Defendants' misrepresentations and omissions alleged herein are objectively material to the reasonable consumer, and therefore reliance upon such misrepresentations may be presumed as a matter of law.

268. Defendants' false advertising is ongoing. Unless restrained by this Court, Defendants could continue to engage in untrue and misleading advertising, as alleged above, in violation of Cal. Bus. & Prof Code § 17500, *et. seq.*

269. As a result of the foregoing, Plaintiffs and each member of the California Subclass have been injured and have lost money or property, and are entitled to restitution and injunctive relief.

NINTH CLAIM FOR RELIEF
Violation of the Ohio Deceptive Trade Practices Act, O.R.C. § 4165.01 et seq. and substantially similar Deceptive Trade Practices Acts (Against All Defendants)

270. Plaintiffs repeat and incorporate each and every preceding paragraph stated above, inclusive, as though the same were fully set forth hereafter.

271. This claim for relief is asserted against all Defendants on behalf of the Ohio Funds and the DTPA Subclass.

272. Defendants' actions constitute unfair, unconscionable and/or deceptive trade practices in the course of their business and in the conduct of trade or commerce, in violation of the Ohio Deceptive Trade Practices Act, O.R.C. § 4165.01 et seq. ("ODTPA"). Specifically, Defendants represented that their custodial FX services had "characteristics" or "benefits" that "they do not have" and "[a]dvertise[d] goods or services with intent not to sell them as advertised." O.R.C. §§ 4165.02(A)(7), (11).

273. The ODTPA is substantially similar to the federal Lanham Act, and generally regulates trademarks, unfair competition, and false advertising. *Cesare v. Work*, 36 Ohio App.3d 26, 520 N.E.2d 586 (1987). Numerous other states have substantially similar statutes (referred to herein as "DTPAs") regulating substantially similar conduct. In that regard, Defendants' actions have caused and will continue to cause financial harm to Plaintiffs and the DTPA Subclass.

274. Defendants' conduct has caused, and continues to cause, harm to the public. The harm to the public includes overcharging, or under-crediting, custody FX clients, including pension funds such as Plaintiffs and other members of the DTPA Subclass, on their "standing instructions" FX transactions for a period spanning over a decade, contrary to Defendants' representations regarding their FX services. The number of affected employee-beneficiaries of pension funds in the state of Ohio alone is in the tens, if not hundreds, of thousands. The number of affected FX transactions during the Class Period is in the thousands. The amount of the unlawful profits obtained by Defendants as a result of their practices during the Class Period from Plaintiffs alone is in the millions.

275. Defendants' conduct as alleged herein has damaged and will continue to injure Plaintiffs and the DTPA Subclass, for which injury Plaintiffs and the DTPA Subclass seek damages in an amount to be established at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants, and request as follows:

1. That the Court certify this action as a class action, proper and maintainable pursuant to Rule 23 of the Federal Rules of Civil Procedure, and declare that Plaintiffs are proper Class representatives;

2. That the Court grant such preliminary and permanent equitable relief, including imposition of a constructive trust, as is appropriate to preserve the assets wrongfully taken from Plaintiffs and the Class;

3. That the Court award compensatory, consequential, and general damages in an amount to be determined at trial;

4. That the Court order disgorgement and restitution of all earnings, profits, compensation and benefits received by Defendants as a result of their unlawful acts, omissions, and practices;

5. That the Court award punitive or exemplary damages to the extent permitted by law;

6. That the unlawful acts alleged in this Complaint be adjudged and decreed to be unfair and deceptive business acts and practices in violation of Cal. Bus. & Prof. Code § 17200, *et seq*. and the Ohio Deceptive Trade Practices Act;

7. That the unlawful acts alleged in this Complaint be adjudged and decreed to be untrue and misleading advertising in violation of Cal. Bus. & Prof. Code § 17500, *et seq*.;

8. That the unlawful acts alleged in this Complaint be adjudged and decreed to be unfair, unconscionable and/or deceptive trade practices in violation of the New York Deceptive Trade Practices Act, N.Y. Gen. Bus. L. § 349, *et seq.;*

9. That the Court award to Plaintiffs the costs and disbursements of the action, along with reasonable attorneys' fees;

10. That the Court award pre- and post-judgment interest at the maximum legal rate; and

11. That Court award reasonable costs and attorney fees, as allowed by law; and

12. That the Court grant all such other relief as it deems just and proper.

JURY TRIAL DEMAND

Plaintiffs hereby demand a jury trial.

Dated: July 1, 2013

Respectfully submitted,

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