

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE BANK OF NEW YORK MELLON CORP.
FOREX TRANSACTIONS LITIGATION

No. 12-MD-2335 (LAK) (JLC)

THIS DOCUMENT RELATES TO:

*Southeastern Pennsylvania Transportation Authority v.
The Bank of New York Mellon Corporation, et al.*

No. 12-CV-3066 (LAK) (JLC)

*International Union of Operating Engineers, Stationary
Engineers Local 39 Pension Trust Fund v. The Bank of
New York Mellon Corporation, et al.*

No. 12-CV-3067 (LAK) (JLC)

*Ohio Police & Fire Pension Fund, et al. v. The Bank of
New York Mellon Corporation, et al.*

No. 12-CV-3470 (LAK) (JLC)

Carver, et al. v. The Bank of New York Mellon, et al.

No. 12-CV-9248 (LAK) (JLC)

Fletcher v. The Bank of New York Mellon, et al.

No. 14-CV-5496 (LAK) (JLC)

**DECLARATION OF J. BRIAN MCTIGUE ON BEHALF OF ERISA COUNSEL AND IN
SUPPORT OF LEAD SETTLEMENT COUNSEL'S APPLICATION FOR ATTORNEYS'
FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND SERVICE AWARDS
TO THE LEAD CUSTOMER AND ERISA PLAINTIFFS**

I, J. Brian McTigue, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a partner and the founder of the law firm, McTigue Law LLP, which is one of the Lead Settlement Counsel in this litigation. McTigue Law LLP is also one of the lead counsel that represented the plaintiffs in the two class actions asserting claims under the Employee Retirement Income Security Act of 1974 that are part of this MDL: the *Carver* and *Fletcher* actions (“Actions”) specified in the caption above. I submit this declaration in support of Lead Settlement Counsel’s Lead Settlement Counsel’s Application for Attorneys’ Fees,

Reimbursement of Litigation Expenses, and Service Awards to The Lead Customer and ERISA Plaintiffs. This declaration provides additional details regarding ERISA Counsel's overall contribution to the litigation and settlement of this case. Individual ERISA Counsel are submitting separate declarations detailing the work done by their specific firms.¹

2. Faced with the numerous challenges further detailed in the Joint Declaration and the Coffee Declaration, Plaintiffs' Counsel have achieved an outstanding settlement for the benefit of the ERISA members of the Class. They deserve to be compensated accordingly.

The Contribution of ERISA Plaintiffs to the Litigation

3. Lead Settlement Counsel also respectfully submit that modest Service Awards of \$3,000 to each of the individual Lead ERISA Plaintiffs, Carl Carver, Deborah Jean Kenny, Edward C. Day, Joseph F. Deguglielmo, Lisa Parker, Frances Greenwell-Harrell, and Landol D. Fletcher. Modest Service Awards are appropriate given their dedication and commitment to the Actions. This dedication was unwavering throughout the ERISA Actions.

4. The Individual Lead ERISA Plaintiffs, are layperson participants: three fiberglass plant maintenance and production workers, telephone call center employees, and a labor union official. The uncertainties of participating in class litigation against a money center bank did not deter them. They reposed trust in lawyers who urged that the Court was the place to resolve their claims without fear of retribution. They provided their names, and their ERISA documents, responded to counsel's requests for yet more information, knowing that they were responsible for

¹For purposes of this declaration, "ERISA counsel" refers to the counsel representing the plaintiffs in the *Carver* and *Fletcher* actions, which asserted claims that Defendants' FX practices violated ERISA. It does not encompass the counsel involved in another action that was part of this MDL, and asserted that the fiduciaries running Defendants' retirement plans violated ERISA through offering Defendants' common stock through those Defendant ERISA plans.

representing, not themselves alone, but thousands of other anonymous participants in employee benefits plans.

5. Not one of the hundreds of ERISA Plan fiduciaries of the more than 400 plans in the Class came forward to serve as an Plaintiff in the ERISA Actions, despite the public allegations of serious wrongdoing. Modest service awards would compensate the unselfish service of these seven individuals and would encourage others to participate through the courts to resolve similar claims.

Lead Settlement Counsel respectfully submit that in light of these facts, the ERISA Plaintiffs' application for service awards should be granted in full.

The Contribution of ERISA Counsel to the Litigation

6. As is further detailed in their firm resumes, the ERISA Counsel in this MDL have almost two decades of experience in prosecuting ERISA class actions. ERISA Counsel represented a putative class of participants and beneficiaries in more than 400 ERISA plans ("ERISA Plans" or "ERISA Plaintiffs") that hold and invest assets dedicated to providing pension and health insurance benefits to millions of current and former U.S. employees. ERISA Counsel were the only counsel who asserted claims based on foreign exchange trading in this multi-district litigation ("MDL") under ERISA, the federal statute governing all U.S. tax-qualified private sector pension and health insurance plans. These unique claims are distinct from the Customer Class claims and place different burdens of proof and the establishment of overlapping but distinct facts from those sought by the Customer Class plaintiffs. Further, as

Defendants recognized,² ERISA’s broad preemption clause arguably preempts the state law claims also asserted on behalf of the ERISA Plans in this MDL. *See* ERISA, 29 U.S.C. §1144(a) (“this title...shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...”). Thus, ERISA Counsel strengthened the settlement position of ERISA class members by asserting non-preempted ERISA statutory claims on their behalf. These claims included claims of breach of ERISA fiduciary duties, 29 U.S.C. §1104, which courts have recognized as being broader than state law fiduciary duties,³ as well as claims that Defendants violated ERISA’s special statutory prohibitions on certain types of self-dealing transactions, for which there is *per se* liability and no state law equivalent. 29 U.S.C. §1106(b).⁴ ERISA provides a uniform federal statutory law, and ERISA claims are generally easy to certify as claims in nationwide class actions, such as the one being settled here.

7. Adding to the difficulty of the Actions is that they were among the first in which ERISA issues related to foreign exchange trading have been litigated.⁵ Litigating these issues involved analysis of, *inter alia*, two sets of complex regulations applicable to such transactions. Before August 2006, Prohibited Transaction Exemption 98-54, 63 Fed. Reg. 63,503 (1998), promulgated by the Department of Labor (“DOL”), applied to standing instruction foreign

² See June 26, 2013 letter from defense counsel Reid M. Figel to the Court in this action in which Defendants made clear that it was their position “that ‘[a]ll claims on behalf of employee benefit plans covered by ERISA are preempted by the provisions of ERISA’.” In addition, they noted that they had asserted that position as an affirmative defense to the state law claims asserted against them. (This letter was circulated to all counsel, but does not appear to have been filed on the docket).

³ *Mertens v. Hewitt Assoc’s*, 508 U.S. 248, 262 (1993) (“ERISA...defines ‘fiduciary’ not in terms of formal trusteeship [as does the common law], but in *functional* terms of control and authority over the plan..., thus expanding the universe of persons subject to fiduciary duties...”).

⁴ See also *Lowen v. Tower Asset Mgt.*, 829 F.2d 1209, 1213 (2d Cir. 1987); *Reich v. Valley Nat. Bank of Arizona*, 837 F.Supp. 1259, 1281 (S.D.N.Y.1993).

⁵ The first such foreign currency manipulation ERISA action was filed against State Street Bank & Trust Company in October 2014 by ERISA Class Counsel McTigue Law, LLP and Beins Axelrod, PC., in the United States District Court for the District of Massachusetts.

exchange transactions (“SIFX”) conducted by a custodial bank for its ERISA Plan custody customers. After 2006, ERISA § 408(b)(18), 29 U.S.C. § 1108(b)(18), provided the applicable exemption for SIFX. In addition, ERISA Counsel litigated issues of fiduciary status specific to ERISA. After an extensive period of special jurisdictional discovery, ERISA Counsel amended their complaint and fully briefed oppositions to multiple motions to dismiss in both the *Carver* and *Fletcher* cases.

8. ERISA Counsel aggressively litigated the novel ERISA issues in this case on behalf of the ERISA Plans. Though this action was settled before this Court decided the then-outstanding motions to dismiss in the ERISA Actions, the briefing was nevertheless quite beneficial to the position of the ERISA Plaintiffs. For instance, while Defendants initially moved to dismiss the ERISA claims in their entirety, contending that they were not ERISA fiduciaries, their last motions to dismiss dropped that position. Instead, Defendants’ last motions primarily attacked the standing of some but not all of the named ERISA Plaintiffs. Hence, even if the Court had ruled in favor of Defendants on their last motions to dismiss, the ERISA claims would have gone forward to the summary judgment stage. This fact enhanced the settlement position of the ERISA Plaintiffs in the mediation that led to the settlement.

9. As is further detailed in the individual declarations of ERISA Counsel, ERISA Counsel performed extensive document review and participated in numerous depositions to gather the necessary facts to support their claims that Defendants breached their ERISA fiduciary duties as well as violated the specifics of the applicable ERISA regulations.

10. ERISA Counsel McTigue Law LLP hired its own consultant to analyze the SIFX trading data provided by Defendants so as to identify the class’s putative losses and remedies provided under ERISA for Defendants’ allegedly illegal SIFX trading scheme. McTigue Law

LLP's consultant determined the damages not only for "range of the day" SIFX, but the "benchmarking" SIFX, which increased loss estimates and added to the ERISA Counsel's negotiating position.

11. ERISA Counsel developed interrogatories and follow-up interrogatories during the jurisdictional discovery period addressing the unique ERISA claims (served July 8, 2013 and July 19, 2013). ERISA Counsel further crafted requests for admission and interrogatories (served on the Defendants December 17, 2014) seeking critical facts supporting the unique ERISA claims. These latter discovery requests relied on the analysis of Defendant's trade data by McTigue Law LLP's expert on behalf of the ERISA Plaintiffs, ERISA Counsel's document review, and the unique ERISA claims. Defendants did not answer the 2014 discovery requests, assumedly due to the announced settlement.

12. The strength of the ERISA claims brought by ERISA Counsel is also reflected in the fact that shortly before the settlement was reached, Defendants added additional defense counsel firm to their team, a firm which specialized in ERISA litigation. Specifically, a partner in the well-known national ERISA firm, Groom Law Group, entered an appearance on behalf of Defendants. (*See* MDL Dkt. No. 552, approving *pro hac vice* application of Lars C. Golumbic of Groom Law Group Chartered).

13. To the extent they were able, given severe confidentiality constraints negotiated before ERISA Counsel filed their complaint, ERISA Counsel responded to communications from the United States Department of Labor ("DOL"), which is charged with regulating and enforcing ERISA on behalf of private sector pension and welfare funds. ERISA Counsel's aggressive and public litigation of ERISA issues provided an important foundation for the DOL's participation in latter stages of settlement negotiations in this case. Though the DOL never itself participated

in the litigation, it was able to secure, using the good offices of ERISA Counsel, additional compensation for ERISA class members, as is noted in the settlement briefs.

14. In sum, by asserting and aggressively litigating ERISA claims on behalf of the ERISA class members, ERISA Counsel overcame the Defendant's asserted and likely preemption of state law claims with respect to ERISA plans, and helped to achieve a beneficial result for ERISA class members.

**ERISA Counsel's Participation in the MDL and their Fee Agreement
with Other MDL Class Counsel**

15. ERISA counsel filed their first action, the *Carver* action, shortly after the Court entered its order appointing the Plaintiffs' Executive and Steering Committees. Rather than occupy the Court and expend resources with additional motion practice seeking to become part of the leadership structure representing ERISA Plans, ERISA counsel informed the existing leadership that they wished to work informally with it to prosecute the action and assert the interests of their ERISA Plan clients. As the ERISA claims raised unique legal and factual issues, ERISA counsel largely worked in parallel with non-ERISA Plaintiffs' counsel, while at the same time conferring with the Plaintiffs' Executive Committee regarding discovery and the major actions in the case.

16. As is noted in the brief in support of the fee petition, last year, before the agreement among the parties to settle this action, ERISA counsel and Customer Class Plaintiffs also entered into an informal agreement to divide any award of attorney's fees to Plaintiffs' class counsel. The agreement, later memorialized in writing, was to split attorney's fees "[a]bsent any contrary order by the Court" as follows: 7.25 percent to ERISA class counsel, and 92.75 percent to non-ERISA class counsel. ERISA counsel entered the agreement in order to avoid disputes, wasted resources and lost focus on the true purpose of litigation, representation of our clients,

which would result from arguing and possibly litigating attorney's fees issues. After settlement between Plaintiffs and Defendants was reached, a settlement under which ERISA Plans will share 24 percent of the settlement fund including the DOL's \$14 million, and 20 percent without it, in which ERISA Counsel provided 12 percent of the lodestar fees, the fee-split agreement with its 92.75 percent non-ERISA-7.25 percent ERISA split, at the request of Interim Lead Counsel, was formalized in writing and executed. However, the fee-splitting agreement, as negotiated and as written, recognizes the Court has the ultimate authority to determine any fee award.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 17th day of August, 2015 in Washington, D.C.



J. Brian McTigue

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, the foregoing was filed electronically with the Court and served by operation of the Court's ECF notification system upon all counsel of record.

Washington, DC
August 17, 2015

\s\ J. Brian McTigue

J. Brian McTigue