UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARVER, *et al.*, Plaintiffs, v. BANK OF NEW YORK MELLON, *et al.*, Defendants.	Case. No. 1:15-cv-10180-JPO-JLC

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT

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Hedy L. Anselman, David Baumann, Carl Carver, Dante A. Dano, Jr., Edward C. Day, Landol D. Fletcher, Timothy R. Garrett, Dana Kellen, Deborah Jean Kenny, Lisa Parker, Edwin Scheibel, and Daryl Watkins (collectively "Named Plaintiffs") in their respective capacities as participants, beneficiaries, and/or trustees of one or more of the seven employee benefit plans named in the First Amended Consolidated Class Action Complaint (Dkt. No. 93), on behalf of themselves and the Settlement Class (as defined below) respectfully submit this memorandum of law in support of their motion for:

(i) preliminary approval of the proposed settlement of the above-captioned action ("Settlement") on the terms and conditions set forth in the Stipulation and Agreement of Settlement dated December 14, 2018 ("Stipulation");

(ii) certification of the Class for purposes of effectuating the Settlement;

(iii) approval of the form, content, and manner of providing notice of the Settlement to the Settlement Class; and

(iv) a hearing to consider final approval of the settlement and other related matters ("Final Approval Hearing").[1]

PRELIMINARY STATEMENT

Named Plaintiffs and Defendants The Bank of New York Mellon and BNY Mellon, National Association (collectively "Defendants" or "BNYM") have reached an agreement to settle this Action in exchange for $12.5 million in cash. If approved by the Court, the Settlement will result in a substantial payment to the Settlement Class and will resolve this Action in its entirety. Pursuant to Federal Rule of Civil Procedure 23 ("Rule 23"), Named Plaintiffs seek the Court's preliminary approval of the Settlement so that notice of the Settlement can be disseminated to Settlement Class Members and the Final Approval Hearing scheduled.

[1] All capitalized terms used herein that are not otherwise defined herein shall have the same meaning ascribed to them in the Stipulation filed concurrently herewith. The proposed Preliminary Approval Order is both attached as Exhibit A to the Stipulation and filed as its own document through the ECF system. Additionally, unless otherwise noted, quotation marks, internal citations, and footnotes are omitted and emphasis is added.

The Settlement—reached following almost three years of hard-fought litigation—provides a significant recovery for the Settlement Class. The Settlement follows Lead Plaintiffs' Counsel's extensive factual investigation into the Settlement Class's claims, a motion to dismiss, a fully briefed motion for class certification, a fully briefed motion for partial summary judgment, and a fully briefed motion to exclude the testimony of Plaintiffs' expert, coupled with substantial discovery (including a review of nearly 3 million pages of documents and 20 fact depositions) as well as expert reports and expert depositions. The Settlement is the product of adversarial, arm's length negotiations by the Parties spanning the course of several months and two separate mediation sessions with the Honorable Layn R. Phillips and/or David Murphy of PhillipsADR.

Named Plaintiffs and their counsel are fully aware of the strengths and weaknesses of this case, and have evaluated the risks of continued litigation and the fairness of its resolution at this time. Indeed, by this Settlement, Settlement Class Members stand to receive a recovery that is a substantial percentage of the maximum potential recovery at trial, as calculated by Named Plaintiffs' damages expert during the Action. This result appropriately balances Named Plaintiffs' objective of securing the highest possible recovery for the Settlement Class while accounting for the risk that they could receive a small recovery—or no recovery—if Named Plaintiffs were to fail at the class-certification or summary-judgment stages, or lose at trial. Named Plaintiffs and Lead Plaintiffs' Counsel believe that the Settlement is in the best interest of the Class.

At the Final Approval Hearing, the Court will have before it more extensive motion papers in support of the Settlement and will be asked to make a determination as to whether the Settlement is fair, reasonable, and adequate under all of the circumstances surrounding the Action. At this time, Named Plaintiffs request entry of the proposed Preliminary Approval Order that will begin the final approval process by, among other things:

- Preliminarily approving the terms of the Settlement set forth in the Stipulation as fair, reasonable, and adequate after considering the factors in Rule 23(e)(2);
- Certifying the Settlement Class and appointing Named Plaintiffs as class representatives and Lead Plaintiffs' Counsel as class counsel, for purposes of the Settlement only;

- Approving the retention of Analytics Consulting, LLC as Claims Administrator;
- Approving the form and content of the Notice, Validation Letter, Claim Form, Publication Notice, and Postcard Notice attached as Exhibits A-1 to A-5 to the proposed Preliminary Approval Order;
- Finding the method for disseminating the Notice and Claim Form and publication of the Publication Notice to constitute the best notice practicable under the circumstances and to satisfy the requirements of Rule 23, due process, and all other applicable law; and
- Setting a schedule for: (i) notice to the Settlement Class; (ii) objecting to the Settlement, or any part thereof; (iii) submitting Claims Forms; (iv) submitting papers in support of final approval of the Settlement and related matters; and (v) the Final Approval Hearing.

For the reasons set forth herein, the Settlement warrants the Court's preliminary approval and the Preliminary Approval Order should be entered.

NATURE AND PROCEDURAL BACKGROUND OF THE ACTION

Deborah Jean Kenny, Edward C. Day, Carl Carver, Lisa Parker, Landol D. Fletcher (the "original Plaintiffs") commenced this Action on December 31, 2015, with the filing of a Class Action Complaint that asserted claims against BNYM under Sections 404, 406, and 409 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq. and alleged that BNYM breached fiduciary duties and engaged in prohibited transactions in conducting foreign exchange transactions in connection with BNYM ADRs. Specifically, the original Plaintiffs alleged that BNYM, in contravention of its fiduciary duties, overcharged ERISA Entities[2] when converting cash distributions on BNYM ADRs from foreign currencies to U.S. Dollars. (*Id.*) On top of its contractually agreed conversion fees, the Class Action Complaint alleged that BNYM profited by systematically assigning BNYM ADR owners FX rates at or near the worst interbank rates during the applicable 24-hour trading session rather than rates at which BNYM internally booked the trades, and retaining the spread between the rates for itself. (*Id.*) The

[2] "ERISA Entity" means an ERISA plan and any trust, pooled account, collective investment vehicle, or group insurance arrangement that files a Form 5500 annual return/report as a Direct Filing Entity (DFE) in accordance with the DFE Filing Requirements, such as a group trust, master trust investment account (MTIA), common/collective trust (CCT), pooled separate account (PSA), 103-12 investment entity (102-12 IE), group insurance arrangement (GSA), or collective investment vehicle that held plan assets as defined by the U.S. Department of Labor "Instructions for Form 5500, Annual Return/Report of Employee Benefit Plan."

Class Action Complaint alleged that BNYM thereby retained millions of dollars from dividends or cash distributions owed and payable to the Settlement Class. (*Id.*)

On January 12, 2016, Robert E. Hartline filed a separate action against Defendants, captioned *Hartline v. The Bank of New York Mellon, et al.*, Case No. 1:16-cv-00228-JPO. Several days later, Robert E. Hartline and his counsel, Keller Rohrback, moved for appointment of Lead ERISA Plaintiff and Interim Lead Counsel. (ECF No. 11.) On February 9, 2016, the original Plaintiffs and their counsel, Ciresi Conlin LLP and McTigue Law LLP, also moved for appointment of Lead ERISA Plaintiffs and Interim Lead Co-Counsel. (ECF No. 32.) On April 12, 2016, the Court consolidated the *Hartline* action with the Action and designated the original Plaintiffs as Lead ERISA Plaintiffs and Ciresi Conlin LLP and McTigue Law LLP as Interim Co-Lead Counsel for the putative class in the Action. (ECF No. 53.)

A Consolidated Amended Class Action Complaint was filed on May 3, 2016 adding Hedy Anselman, David Baumann, Timothy R. Garrett, Dana Kellen, Daryl Watkins, and Robert E. Hartline[3] as additional named Plaintiffs (together with original plaintiffs, the "*Carver* Plaintiffs"). (ECF No. 54.) On June 2, 2016, BNYM moved to dismiss the Consolidated Amended Class Action Complaint and to strike the jury demand, which the *Carver* Plaintiffs opposed. (ECF No. 61.) On March 17, 2017, the Court heard argument on BNYM's motion to dismiss and, by Opinion and Order, dated March 31, 2017, the Court denied BNYM's motion to dismiss the Consolidated Amended Class Action Complaint and granted BNYM's motion to strike the jury demand. (ECF. No. 81) ("March 31 Order"). In the March 31 Order, the Court found that BNYM may be subject to ERISA's fiduciary duty requirements because "dividends and other cash received by BNYM from foreign issuers [related to ADRs] are [ERISA] plan assets because the Plans have a beneficial ownership interest in them under ordinary notions of property rights." (*Id.* at 11.) The Court noted in its order that this issue was a "question of first impression." (*Id.* at 9.)

[3] Robert E. Hartline passed away during the pendency of this action, and subsequently Edward Scheibel commenced an action, *Scheibel v. The Bank of New York Mellon, et al.*, No. 1:17-cv-10231, which was consolidated with this Action on April 16, 2018. (ECF No. 140.)

BNYM answered the Consolidated Amended Class Action Complaint on April 21, 2017. (ECF No. 86.) *Carver* Plaintiffs and Dante A. Dano, Jr. then filed a First Amended Consolidated Class Action Complaint on June 8, 2017. (ECF No. 93.) BNYM answered the First Amended Consolidated Class Action Complaint on June 22, 2017. (ECF No. 95.) Thereafter, the Parties commenced discovery, which involved significant efforts by both sides. These efforts included BNYM's production (and Plaintiffs' review) of nearly 2.7 million pages of documents, Plaintiffs production (and BNYM's review) of over 218,000 pages of documents, 12 depositions of all Named Plaintiffs, and 8 depositions of BNYM witnesses, including multiple 30(b)(6) witnesses.[4] The parties also exchanged lengthy expert reports in support and opposition to class certification and on the merits of the case and damages and took four expert depositions.

BNYM filed a motion for partial summary judgment on the application of the statute of limitations on February 12, 2018, arguing the class period should not be tolled on the basis of fraud or concealment under ERISA, which the Named Plaintiffs' opposed. (ECF Nos. 114, 124.) On May 15, 2018, Named Plaintiffs moved the Court for certification of the putative class pursuant to Rule 23(b)(1), or in the alternative Rules 23(b)(2) and (b)(3), of the Federal Rules of Civil Procedure. (ECF No. 141.) BNYM opposed the motion on June 5, 2018. (ECF No. 153.) On August 24, 2018, BNYM moved to exclude Named Plaintiffs' expert witness from testifying, which Named Plaintiffs opposed. (ECF No. 170, 181.) All of those motions are fully briefed.

While discovery and motion practice was proceeding, the Parties began discussing the possibility of resolving the Action. On March 22 and 23, 2018, the Parties participated in a two-day mediation session with the Honorable Layn Phillips and David Murphy of PhillipsADR. The parties engaged in a second mediation session with David Murphy of PhillipsADR on September 17, 2018. Following these separate mediation sessions and adversarial, arm's-length negotiations

[4] Magistrate Judge Cott ruled on November 14, 2017 that the depositions of all BNYM's witnesses were to be coordinated with the plaintiffs in the related contract action, *Normand v. BNYM*, No. 16-cv-212-JPO-JLC (hereinafter "Contract Action"), and that the parties were to avoid duplicative questioning. Accordingly, Lead Plaintiffs' Counsel attended at least five other depositions noticed in the Contract Action, but did not separately question the deponents. (ECF. No. 108.)

spanning the course of several months, the Parties reached an agreement-in-principle to settle the Action and thereafter negotiated a term sheet (the "Term Sheet") setting forth the material terms of their agreement. The Term Sheet was executed on September 26, 2018, and the Parties informed the Court of their agreement on September 27, 2018. (ECF No. 187.)

Over the next several months, the Parties negotiated the Stipulation (and exhibits thereto), which sets forth the final and binding agreement to settle the Action. During this time, Named Plaintiffs worked with consulting experts and their proposed Claims Administrator to develop the notices and Plan of Allocation. The Parties executed the Stipulation on December 14, 2018.

ARGUMENT

Rule 23(e) of the Federal Rules of Civil Procedure governs the standards and procedures courts follow in approving settlements for a class proposed to be certified for purposes of settlement. Rule 23(e)(1) directs courts to determine whether they "will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." These standards are met here.

I. THE PROPOSED SETTLEMENT WARRANTS APPROVAL UNDER RULE 23(e)(2)

Rule 23(e) of the Federal Rules of Civil Procedure, as recently amended, provides that a class action settlement must be presented to the Court for approval, and the settlement should be approved if the Court finds it "fair, reasonable, and adequate," after considering whether: (A) the class representatives and class counsel have adequately represented the Settlement Class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2). Public policy favors settlement of class action litigation. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005).

Judicial review of a proposed class action settlement consists of a two-step process: preliminary approval, followed by the distribution of notice to the class, and final approval. Preliminary approval allows notice to issue to the class and for class members to object to the settlement. *Yuzary v. HSBC Bank USA, N.A.*, 2013 WL 1832181, at *1 (S.D.N.Y. Apr. 30, 2013). The main question raised by a request for preliminary approval is whether there is "probable cause to submit the settlement to class members and hold a full-scale hearing as to its fairness." *Clark v. Ecolab, Inc.*, 2009 WL 661572, at *3 (S.D.N.Y. Nov. 27, 2009). If after considering the Rule 23(e)(2) factors, the proposed settlement "appears to fall within the range of possible approval, the court should order that the class members receive notice of the settlement." *Id.*

In conducting its preliminary inquiry, a court considers both the adequacy of class counsel and the negotiating process leading up to the settlement, "*i.e.*, procedural fairness," as well as the settlement's substantive terms, "*i.e.*, substantive fairness." *In re Platinum & Palladium Commod. Litig.*, 2014 WL 3500655, at *11 (S.D.N.Y. Jul. 15, 2014); *see also* Fed. R. Civ. P. 23(e)(2), cmt. Application of the uniform set of amended Rule 23(e)(2) factors is designed to focus the Court's examination at the preliminary approval stage on both the procedural and substantive fairness of the proposed Settlement. The proposed Settlement here is both procedurally and substantively fair.

A. The Class Representatives and Class Counsel Have Adequately Represented the Settlement Class

The Settlement in this case was achieved after good faith, arm's-length negotiations between well-informed and experienced counsel for the Parties following more than three years of litigation, including a decision on issues of first impression on a motion to dismiss, the completion of both fact and expert discovery, and briefing on summary judgment, class certification, and *Daubert* motions. There can be no doubt that counsel negotiating on behalf of the class had an "adequate information base" prior to reaching their agreement to settle, as contemplated by the Advisory Committee on the new Rule 23(e)(2).

Named Plaintiffs and their counsel, *inter alia*: (1) conducted an extensive investigation prior to filing their initial complaint; (2) fully briefed a motion to dismiss on an issue of first

impression in ERISA law; (3) moved for class certification; (4) fully briefed a motion for partial summary judgment filed by BNYM on the statute of limitations; (5) completed substantial (and highly contested) fact discovery, including reviewing nearly 3 million pages of documents, e-mails, and spreadsheets, defending 12 depositions of Named Plaintiffs, taking 8 depositions of BNYM witnesses; and (6) completed substantial expert discovery, including exchanging class certification and merits expert reports, conducting and defending expert depositions, and opposing BNYM's motion to exclude Named Plaintiffs' expert. Both fact and expert discovery were concluded by the time the proposed settlement was reached. As a result, Named Plaintiffs and Lead Plaintiffs' Counsel had an adequate basis for assessing the strength of the Settlement Class's claims and BNYM's defenses when they entered into the Settlement.

Further, Lead Plaintiffs' Counsel has experience prosecuting complex cases around the country and believes the Settlement is in the best interests of the Class. *See, e.g.*, *Dial Corp. v. News Corp.*, 317 F.R.D. 426, 431 (S.D.N.Y. 2016) ("This Court is mindful of Counsel's ability to assess the potential risks and rewards of litigation."); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998) (Courts have consistently given "'great weight' . . . to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation."); Exs. A-B. These facts strongly support the conclusion that the Settlement is fair. *See Wal-Mart*, 396 F.3d at 116 (settlement may be presumed to be fair where it is "reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery").

Lead Plaintiffs' Counsel's extensive litigation experience and its ERISA expertise, together with the substantial motion practice and discovery in this Action demonstrates that Lead Plaintiffs' Counsel and Named Plaintiffs have adequately represented the Settlement Class.

B. The Settlement Was Negotiated at Arm's-Length by Well-Informed and Experienced Counsel and with Experienced Mediators

The Settlement in this case was achieved after good faith, arm's-length negotiations between experienced counsel for the Parties, with the assistance of highly regarded mediators. As

noted above, the Parties and their counsel were extremely knowledgeable about the strengths and weaknesses of their respective cases prior to reaching their agreement to settle.

In addition, the Parties retained highly regarded neutrals to assist achieving the Settlement. On March 22 and 23, 2018, the Parties participated in a two-day mediation session with the Honorable Layn Phillips and David Murphy of PhillipsADR to explore the possibility of resolving the Action. Unable to reach an agreement at that time, the parties engaged in a second mediation session with David Murphy of PhillipsADR on September 17, 2018 after fact and expert discovery was concluded and Named Plaintiffs' class certification motion had been fully briefed. Following these separate mediation sessions, the Parties continued to engage in adversarial, arm's-length negotiations spanning the course of several months, before finally reaching an agreement-in-principle to settle the Action and executing the Term Sheet. Negotiations over the Stipulation and accompanying exhibits continued over the next several months.

The fact that the Settlement is the product of arm's-length settlement negotiations and was entered into by experienced and well-informed counsel through negotiations with highly regarded neutrals, demonstrates that the process by which the Settlement was reached is procedurally fair. It is, therefore, presumptively fair, reasonable and adequate. *See City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494 at *4 (S.D.N.Y. May 9, 2014) ("This initial presumption of fairness and adequacy applies here because the Settlement was reached by experienced, fully-informed counsel after arms'-length negotiations"), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015); *Silverstein v. AllianceBernstein L.P.*, 2013 WL 7122612, at *4 (S.D.N.Y. Dec. 20, 2013) (Oetken, J.) ("Absent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of parties who negotiated the settlement.").

C. The Relief Provided for the Class Is Adequate When Weighed Against Litigation Risks, the Effectiveness of Distributing Relief, and the Terms of a Proposed Fee Award.

In addition to being procedurally fair, the Settlement is also substantively fair. At final approval, Plaintiffs will provide the Court with a full analysis of the factors set forth in *Detroit v.*

Grinnell Corp., 495 F.2d 448 (2d Cir. 1974), *abrogated on other grounds by Goldberg v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000) ("*Grinnell*").[5] A preliminary analysis of these factors support preliminary approval. *See, e.g.*, *In re Warner Chilcott Ltd. Sec. Litig.*, 2008 WL 5110904, at *2 (S.D.N.Y. Nov. 20, 2008) ("Although a complete analysis of [the *Grinnell*] factors is required for final approval, at the preliminary approval stage, the Court need only find that the proposed settlement fits within the range of possible approval to proceed."); *Platinum & Palladium*, 2014 WL 3500655, at *12 ("At preliminary approval, it is not necessary to exhaustively consider the factors applicable to final approval.").

1. The Relief Provided for the Class Is Adequate When Weighed Against Litigation Risks

In assessing a proposed settlement, courts consider the range of reasonableness in light of both the best possible recovery and litigation risks, assessing "not whether the settlement represents the best possible recovery, but how the settlement relates to the strengths and weaknesses of the case." *City of Providence*, 2014 WL 1883494, at *9; *Bellifemine v. Sanofi-Aventis U.S. LLC*, 2010 WL 3119374, at *4 (S.D.N.Y. Aug. 6, 2010) ("In evaluating the proposed [s]ettlement, the Court determines whether it provides a 'substantial recovery' in light of the relevant circumstances and does not compare the terms of the [s]ettlement with a hypothetical . . . measure of a recovery that might be achieved through trial."). To do so, courts "consider and weigh the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Grinnell*, 495 F.2d at 462. The determination of a settlement's fairness "is not susceptible of a mathematical equation yielding a particularized sum," *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 130 (S.D.N.Y. 1997), *aff'd* 117 F.3d 721 (2d Cir. 1997), instead, "in any case there is a range of

[5] The *Grinnell* factors are: "(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *Id.* at 463.

reasonableness." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972). Even "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell*, 495 F.2d at 455; *Sanofi-Aventis*, 2010 WL 3119374, at *4 ("The Court may approve a settlement when it amounts to a small percentage of the recovery sought by the class.").

The proposed Settlement falls well above the threshold required under Second Circuit law. If approved, the Settlement will provide Settlement Class Members $12,500,000 in cash, less reasonable attorneys' fees, litigation expenses (including Service Awards), taxes, and administrative costs. As will be explained in greater detail in advance of the Final Approval Hearing, the monetary amount obtained for the Settlement Class represents a significant portion of the Settlement Class's potential damages. The Class's potential best-case damages based on the analysis of Named Plaintiffs' damages expert is approximately $48 million. In contrast, BNYM's damages expert opined that no classwide damages could be established and that even if the Named Plaintiffs' damages methodology were used, damages would be capped at $6 million in the best-case scenario for the Class. Thus, Named Plaintiffs believe this discount from their expert's "best case" damages calculation is warranted. Moreover, this result must be viewed in light of the risk that a smaller monetary recovery—or no recovery at all—might be achieved after continued costly litigation, including the delay and expense of trial and presumptive appeals.

While Named Plaintiffs believe that their claims would be borne out by the evidence, they also recognize that they faced significant risks to establishing BNYM's liability and their entitlement to monetary relief had the Action continued. For example, BNYM vigorously contested and would have continued to argue that it was not a fiduciary under ERISA and therefore its practice of adding a spread to FX rates did not constitute a breach of their obligations under ERISA. While the Court indicated in its March 31 Order that BNYM was subject to ERISA fiduciary duties, the Court noted that the issue was one of first impression, and BNYM expressed its intention to revisit that question at the summary judgment stage. Even if Named Plaintiffs prevailed at trial, BNYM would very likely appeal. The foregoing would pose substantial risk and

expense to the Settlement Class. *See, e.g.*, *Shapiro v. JP Morgan Chase & Co.*, 2014 WL 1224666, at *8 (S.D.N.Y. Mar. 24, 2014) (further litigation "would involve extensive and contested motion practice, and, assuming the success of the Class Plaintiffs at each of these stages, a complex and costly trial, followed by likely appeals," all the while presenting "numerous hurdles to establishing [defendant]'s liability"). Any potential recovery, moreover, "would occur years from now, substantially delaying payment . . . to the Settlement Class." *Id.* In contrast, the Settlement provides the Settlement Class with an immediate and significant recovery.

In addition, based on BNYM's pending motion for partial summary judgment, Named Plaintiffs faced a risk that the Court could substantially shorten the class period, limiting the Settlement Class's potential monetary relief. Moreover, issues relating to the Settlement Class's potential monetary relief would likely come down to an unpredictable and hotly disputed "battle of the experts," highlighted in BNYM's motion to exclude Named Plaintiffs' expert and the opposition to the motion. *See, e.g., In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 579–80 (S.D.N.Y. 2008) ("[I]n this battle of experts, it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found."). Named Plaintiffs thus faced significant risk that the monetary relief that now forms the basis for Settlement Class Members' recoveries could never be proven at trial or would be greatly reduced.

2. The Claims Process Is Designed to Effectively Distribute the Entirety of the Net Settlement Fund.

Named Plaintiffs have also proposed a substantively fair Notice and Claims process intended to effectively distribute the entirety of the Net Settlement Fund to the Settlement Class. This Settlement is not a claims-made settlement, and there will be no reversion of settlement funds to Defendants if the Settlement becomes Final. Named Plaintiffs have sought appointment of Analytics Consulting, LLC as a Claims Administrator to execute the notice and claims process, under the supervision of Lead Plaintiffs' Counsel. As reflected in Exhibits C and D, Analytics Consulting, LLC is a nationally recognized notice and claims administration firm with extensive experience in settlement administration.

As set forth in the proposed Preliminary Approval Order, Settlement Agreement, and Notice filed herewith, the Claims Administrator will mail Postcard Notice and notice of the Notice and Claim Form available on the Settlement Website to all ERISA Entities that filed a Form 5500 based on the U.S. Department of Labor's most recent database of Form 5500s ("Potential Class Entities"). Although not all of these Potential Class Entities will be Settlement Entities, notice is being provided broadly, so as to reach as many Settlement Entities as possible. The Postcard Notice will direct each Potential Class Entity to the Settlement Website where it may complete and submit a Claim Form[6] identifying the BNYM ADRs it held during the Settlement Class Period. Fiduciaries for ERISA Entities are sophisticated and experienced in class action settlements and are thus more likely than individual investors to complete and submit a Claim Form.

To deter or defeat unjustified Claims, each Potential Class Entity will be required to complete the Claim Form in its entirety and attach supporting documentation, including proof of their BNYM ADR holdings. On the other hand, to avoid an unduly demanding process, the Potential Class Entity need only identify the BNYM ADR, CUSIP, dates held, and shares held, not the amount of gross dividends received with respect to the BNYM ADR. That amount will be determined by the Claims Administrator, with assistance from Lead Plaintiffs' Counsel, in the same manner for all Authorized Recipients.

To further effectuate a successful distribution of the Net Settlement Fund, Named Plaintiffs intend to separately mail a Validation Letter (rather than a Postcard Notice) to the Settlement Entities that they have been able to identify through structured financial data produced in discovery in the Action ("Identified Class Entities.") The Validation Letter will contain a summary of the Identified Class Entity's BNYM ADR holdings of which Named Plaintiffs are aware and direct the Identified Class Entity to the Notice and Claim Form available on the Settlement Website to correct or update the information provided, if necessary. An Identified Class Entity need not verify

[6] A proposed Claim Form is attached as Exhibit A-3 to the Stipulation. Part III entitled "Schedule of ADRs and Dividend Record Dates" provides merely a sample of the actual, electronic Claim Form. Given the thousands of BNYM ADRs at issue, it was not feasible to print and file with the Court a Schedule containing all ADRs and Dividend Record Dates.

the data in the Validation Letter or submit a Claim Form in order to receive a distribution from the Net Settlement Fund. Thus, even if they do nothing, they will still receive a distribution.

Further information about the Notice and Claims process is including in the Settlement Agreement and Notice and Plan of Allocation filed herewith, including a process for equitably distributing unclaimed funds.

3. The Proposed Attorney's Fee Award Is Reasonable.

As set forth in the Notice, Lead Plaintiffs' Counsel will apply for attorneys' fees not to exceed 33 1/3% of the Settlement Fund plus reimbursement of Litigation Expenses not to exceed $ 1.8 million incurred in connection with the prosecution and resolution of this Litigation, which amount may include a request for Service Awards to Plaintiffs up to an aggregate amount of $120,000. This is a reasonable request. *See Silverstein*, 2013 WL 7122612, at *9-10 ("Class Counsel's request for 33 1/3% of the settlement fund is reasonable and consistent with the norms of class litigation in this circuit . . . [and] Courts typically allow counsel to recover their reasonable out-of-pocket expenses."). There is no other agreement between the Parties on attorneys' fees other than what is in the Settlement Agreement, filed herewith.

D. The Settlement Treats Settlement Class Members Equitably Relative to Each Other.

Named Plaintiffs propose to allocate the Net Settlement Fund according to the Plan of Allocation attached as Exhibit A-1 to the Preliminary Approval Order, or other plan of allocation approved by the Court. The proposed Plan of Allocation provides that the Claims Administrator, in consultation with Lead Plaintiffs' Counsel, will distribute the Net Settlement Fund to Authorized Recipients on a *pro rata* basis based on the relative size of their gross dividends. Specifically, a "Distribution Amount" will be calculated for each Authorized Recipient, which shall be the Authorized Recipient's gross amount of dividends divided by the total gross amount of dividends, multiplied by the total amount in the Net Settlement Fund. This ensures that the Net Settlement Fund is distributed equitably among Settlement Entities relative to each other. For more information, see Exhibit A-1.

In sum, Named Plaintiffs still face substantial hurdles of obtaining class certification, defeating summary judgment, trial and likely appeals—a process which could possibly extend for years. In light of these litigation risks, Named Plaintiffs and Lead Plaintiffs' Counsel believe—based on their thorough understanding of the strengths and weaknesses of their claims against BNYM—that the proposed $12.5 million Settlement provides a solid recovery for the Class. Moreover, Named Plaintiffs and Lead Plaintiffs' counsel have devised a Notice and Claims Process designed to maximize the distribution of the Net Settlement Fund and a plan by which the Net Settlement Fund will be distributed equitably to the Settlement Entities. Accordingly, the Settlement warrants preliminary approval.

II. CERTIFICATION OF THE CLASS FOR SETTLEMENT PURPOSES IS APPROPRIATE

In granting preliminary approval and directing notice under Rule 23(e)(1), the Court should also consider whether it will likely be able to certify the Class for purposes of the Settlement under Rules 23(a) and 23(b). The proposed Class, which has been stipulated to by the Parties solely for purposes of effectuating the Settlement, consists of:

> All participants, beneficiaries, trustees, and fiduciaries of ERISA Entities that held, directly or indirectly, ADRs for which Defendants (or their affiliates or predecessors in interest) acted as the depositary, and for which Defendants (or their affiliates or predecessors in interest) in their capacity as ADR depositary provided foreign exchange transactional services at any time during the Settlement Class Period.

"ERISA Entity" means an ERISA plan and any trust, pooled account, collective investment vehicle, or group insurance arrangement that files a Form 5500 annual return/report as a Direct Filing Entity (DFE) in accordance with the DFE Filing Requirements, such as a group trust, master trust investment account (MTIA), common/collective trust (CCT), pooled separate account (PSA), 103-12 investment entity (102-12 IE), group insurance arrangement (GSA), or collective investment vehicle that held plan assets as defined by the U.S. Department of Labor "Instructions for Form 5500, Annual Return/Report of Employee Benefit Plan." (Stipulation ¶ 1(r).) The

"Settlement Class Period" is the period from January 1, 1997 through the date of the Preliminary Approval Order. (Stipulation ¶ 1(uu).)

The Second Circuit has long acknowledged the propriety of certifying a class for purposes of settlement. *See, e.g.*, *Weinberger v. Kendrick*, 698 F.2d 61, 72 (2d Cir. 1982) ("The hallmark of Rule 23 is the flexibility it affords to the courts to utilize the class device in a particular case to best serve the ends of justice for the affected parties and to promote judicial efficiencies."). Certification of a settlement class "has long been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants." *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 186 (S.D.N.Y. 2012). Nonetheless, a settlement class, like other certified classes, must satisfy all the requirements of Rules 23(a) and (b). As demonstrated below, the proposed Settlement Class satisfies these requirements.

A. The Settlement Class Satisfies the Requirements of Rule 23(a)

To certify a class, the court must find that the action satisfies the four requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy.

1. The Proposed Settlement Class is Sufficiently Numerous

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." "[N]umerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). The Settlement Class here consists of trustees and fiduciaries of thousands of ERISA Entities covering many thousands of participants and beneficiaries. With a class of this size, joinder is not only impractical, but likely impossible. Accordingly, the Settlement Class is sufficiently numerous that Rule 23(a)(1) is satisfied.

2. Common Questions of Law and Fact Bind the Settlement Class

Rule 23(a)(2) requires that a proposed class action raise "questions of law or fact common to the class." The Rule does not require that all questions of law or fact be common; indeed, the commonality requirement poses a "low hurdle," *In re Nat. Gas Commodities Litig.*, 231 F.R.D. 171, 180 (S.D.N.Y. 2005), such that "even a single common question will do," *Wal-Mart Stores*, 564 U.S. at 359. The common question must lend itself to "classwide resolution" such that

"determination of its truth or falsity will resolve an issue that is central to [Plaintiffs'] claims in one stroke." *Id.* at 350. The commonality requirement is virtually always satisfied in the context of ERISA fiduciary breach actions, where "the question of defendants' liability for ERISA violations is common to all class members because a breach of fiduciary duty affects all participants and beneficiaries." *Banyai v. Mazur*, 205 F.R.D. 160, 163 (S.D.N.Y. 2002).

Here, Settlement Class Members share the following legal and/or factual questions:

- Whether BNYM exercised discretion or control in making ADR FX conversions pursuant to a uniform pricing policy, rendering it a fiduciary;
- Whether BNYM owed and/or breached ERISA fiduciary duties of prudence and loyalty in connection with its pricing of ADR FX;
- Whether BNYM profited from alleged breaches of fiduciary duty;
- Whether BNYM, as a fiduciary, transacted with ERISA Entities in conducting ADR FX conversions and knew or should have known that ERISA Entities invested in ADRs;
- Whether BNYM made ADR FX transactions for its own interest and its own account; and
- Whether BNYM profited from prohibited transactions under ERISA.

A finding that BNYM was an ERISA fiduciary and failed to act in the best interests of ERISA Entities in pricing ADR-FX conversions would establish that BNYM breached its fiduciary duties owed to Named Plaintiffs and the Settlement Class and would establish liability to all the Settlement Class Members. Similarly, a finding that BNYM engaged in prohibited transactions under ERISA would establish liability to Named Plaintiffs and the Settlement Class. These are common questions subject to "classwide resolution."

3. Named Plaintiffs' Claims Are Typical of Those of the Settlement Class

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." "Typicality" requires a showing that "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *In re Flag Telecom Holdings Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009). For typicality, courts "look not at the plaintiffs' behavior, but rather [at] the defendant's

actions." *Tsereteli v. Res. Asset Securitization Trust 2006-A8*, 283 F.R.D. 199, 208 (S.D.N.Y. 2012). "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux v. Celani*, 987 F.2d 931, 936–37 (2d. Cir. 1993).[7]

Here, the claims of Named Plaintiffs and each other Settlement Class Member arise from the same course of conduct allegedly engaged in by BNYM: (a) pricing FX ADR conversions pursuant to a policy under which BNYM gave ERISA Entities an unfavorable Deal Rate to profit from a spread over and above an internally calculated FX "Cover Rate"; (b) failing to price FX ADR conversions in the best interests of the ERISA Entities; and (c) allegedly engaging in self-dealing at the ERISA Entities' expense. Named Plaintiffs do not assert any claims in addition to or different from those of the Settlement Class. Further, Named Plaintiffs and the Settlement Class advance the same legal arguments, and the alleged illegal conduct was directed at ERISA Entities as a whole rather than at individual participants thereof. Courts readily find typicality exists under similar circumstances. *See e.g., In re Citigroup Pension Plan ERISA Litig.*, 241 F.R.D. 172, 178 (S.D.N.Y. 2006) (finding typicality despite differences in the degree of harm suffered by class members because claims arose from the "same course of events" and the "same legal arguments").

4. Named Plaintiffs and Lead Plaintiffs' Counsel are Adequate Representatives of the Settlement Class

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class. Determining adequacy "entails inquiry as to whether: 1) plaintiffs' interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000). The standard for adequacy, particularly in complex cases, is modest. An adequate named plaintiff need only have a rudimentary understanding of the

[7] *See In re Elec. Books Antitrust Litig.*, 2014 WL 1282293, at *12 (S.D.N.Y. Mar. 28, 2014) ("Commonality and typicality tend to merge into one another, so that similar considerations animate analysis of both.").

case, knowledge about her role, and participate in the case. *See In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 287 (S.D.N.Y. 2003). In complex class actions, "a great deal of reliance on the expertise of counsel is to be expected." *In re Monster Worldwide, Inc. Sec. Litig.*, 251 F.R.D. 132, 135 (S.D.N.Y. 2008).

The adequacy standard is easily met here. First, Named Plaintiffs' interests are not antagonistic to those of the Settlement Class. Like the rest of the Settlement Class, Named Plaintiffs received ADR-related cash distributions on which the FX rates received were allegedly worse than BNYM's internally reported rates. Like all Settlement Class Members, the Named Plaintiffs alleged losses as a result. *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 158 (S.D.N.Y. 2008) ("The fact that plaintiffs' claims are typical of the class is strong evidence that their interests are not antagonistic to those of the class; the same strategies that will vindicate plaintiffs' claims will vindicate those of the class."). Both Named Plaintiffs and the Settlement Class will rely on the same evidence and analysis to show BNYM breached its fiduciary duties and engaged in prohibited transactions under ERISA. Moreover, the monetary relief for all Settlement Class Members may be proved through a common methodology. Thus, the claims of the Settlement Class would "prevail or fail in unison," and the common objective of maximizing their recovery from BNYM aligns the interests of Named Plaintiffs with those of all members of the Settlement Class. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460 (2013).

Second, Plaintiffs have retained (and the Court has appointed) experienced counsel to represent them in this Litigation. Ciresi Conlin LLP and McTigue Law LLP have extensive experience in complex litigation, and have acted vigorously to develop and prosecute the claims on behalf of the Settlement Class. *See* Resumes for Ciresi Conlin LLP and McTigue Law LLP attached hereto as Exhibits A and B, respectively. Accordingly, Rule 23(a)(4) is satisfied here.

B. The Class Satisfies the Requirements of Rule 23(b)(1)

"Most ERISA class action cases are certified under Rule 23(b)(1)." *Moreno v. Deutsche Bank Am. Holding Corp.*, 2017 WL 3868803, *8 (S.D.N.Y. Sept. 5, 2017). Courts repeatedly recognize that "the distinctive representative capacity aspect of ERISA participant and beneficiary

suits makes litigation of this kind a paradigmatic example of a 23(b)(1) class." *See, e.g., In re Beacon Assocs. Litig.*, 282 F.R.D. 315, 342 (S.D.N.Y. 2012).

1. The Class Satisfies the Requirements of Rule 23(b)(1)(A)

Rule 23(b)(1)(A) authorizes certification where "prosecuting separate actions by or against individual class members would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." The "language of subdivision (b)(1)(A), addressing the risk of 'inconsistent adjudications,' speaks directly to ERISA suits, because the defendants have a statutory obligation, as well as a fiduciary responsibility, to 'treat the members of the class alike.'" *In re Citigroup Pension Plan ERISA Litig.*, 241 F.R.D. at 179.

Here, if each ERISA Entity, through its participants, beneficiaries, or trustees, was required to sue BNYM separately as to the same alleged acts, there would likely be inconsistent adjudications imposing incompatible standards of fiduciary conduct for BNYM. BNYM, as an alleged fiduciary, should not be held to differing standards for its ADR-FX conversions. This case presents a clear example of a class that should be certified under 23(b)(1)(A). *See, e.g., Caufield v. Colgate-Palmolive Co.*, 2017 WL 3206339, *6 (S.D.N.Y. July 27, 2017) (certifying Rule 23(b)(1)(A) ERISA class because "[i]f two courts came to different conclusions as to how the proposed class members' [] benefits must be calculated, Defendants would face a conflict between treating Plan participants alike and complying with each separate court order."); *Rozo v. Principal Life Ins. Co.*, 2017 WL 2292834, *5 (S.D. Iowa May 12, 2017) ("[i]f the class is not certified, and adjudication proceeds on an individualized basis, there is a very real risk of inconsistent judgments regarding [defendant]'s fiduciary status and its compliance with ERISA.").

2. The Class Also Satisfies the Requirements of Rule 23(b)(1)(B)

Rule 23(b)(1)(B) permits class certification if the prosecution of separate actions "would create a risk of . . . adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests."

"Most courts that have certified ERISA class actions alleging breaches of fiduciary duty have done so under Rule 23(b)(1)(B)." *Leber v. Citigroup 401(k) Plan Inv. Comm.*, 323 F.R.D. 145, 165 (S.D.N.Y. 2017). This is because in ERISA breach of fiduciary duty cases, like the present case, the plaintiffs must seek relief on behalf of the Plans as a whole, necessarily creating a situation where "prosecution of separate actions by individual members would create a risk of adjudications which would be dispositive of the interests of the other members not parties to such adjudications." *See, e.g.*, *Koch v. Dwyer*, 2001 WL 289972, *5 (S.D.N.Y. Mar. 23, 2001) (certifying class under 23(b)(1)(B) in ERISA action seeking to recover losses or ill-gotten gains from alleged fiduciary breaches). "This is true with respect to suits involving participants and representatives of one plan. It is equally true of suits involving participants and beneficiaries of multiple plans." *In re Beacon Assocs.*, 282 F.R.D. at 342. In fact, the Advisory Committee for the Federal Rules of Civil Procedure expressly intended that Rule 23(b)(1)(B) apply to "an action which charges a breach of trust by a[] . . . fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust." *See* Fed. R. Civ. P. 23(b)(1)(B), cmt. Courts routinely follow the Advisory's Committee guidance in certifying ERISA class actions under (b)(1)(B). *See e.g.*, *Banyai*, 205 F.R.D. at 165; *Koch*, 2001 WL 289972, at *5; *Douglin v. GreatBanc Tr. Co.*, 115 F. Supp. 3d 404, 412 (S.D.N.Y. 2015); *see also Caufield*, 2017 WL 3206339, at *6; *In re Beacon Assocs.*, 282 F.R.D. at 342.

Here, certification of a Settlement Class under Rule 23(b)(1)(B) is appropriate because the case involves issues dispositive to the interests of other Settlement Class Members—i.e., whether BNYM allegedly breached its fiduciary duties and engaged in prohibited transactions under ERISA when performing ADR-FX transactions. There is a significant risk that separate prosecutions would be dispositive of the interests of other participants of such plans.

III. THE COURT SHOULD APPROVE THE FORM, CONTENT, AND METHOD FOR DISSEMINATING NOTICE TO THE CLASS.

Plaintiffs request that the Court approve the form and content of the proposed Notice, Validation Letter, Publication Notice, and Postcard Notice,[8] as well as the proposed manner for providing notice of the Settlement to the Settlement Class Members as set forth in the Preliminary Approval Order. In connection with approval of the notice of Settlement, Named Plaintiffs also seek the Court's authorization to retain Analytics Consulting, LLC as the Claims Administrator to supervise and administer the notice procedure in connection with the proposed Settlement and to process Claims. As reflected in Exhibits C and D, Analytics Consulting, LLC is a nationally recognized notice and claims administration firm. Analytics Consulting, LLC will adequately fulfill its duties in this case.

Upon a showing that the court will likely be able to certify the Class for purposes of Settlement under Rules 23(a) and 23(b), the court "must direct notice in a reasonable manner to all class members who will be bound by the proposal." Fed. R. Civ. P. 23(e)(1)(B). For Rule 23(b)(1) and 23(b)(2) classes, the Court must determine that the notice is "appropriate notice to the class." Fed. R. Civ. P. 23(c)(2)(A). Class notice "need only describe the terms of the settlement generally." *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993)

In clear, concise, and plain language, the proposed Notice here will "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings," and provide all information required by the more rigorous standard for Rule 23(c)(2)(B) notice and S.D.N.Y. Local Rule 23.1 *Wal-Mart*, 396 F.3d at 114. The Notice will apprise recipients of, among other things, the nature of the Action, the definition of the Class, the essential terms of the Settlement (including the claims to be released), the binding effect of the judgment, and information regarding Lead Plaintiffs' Counsel's motion for attorneys' fees and reimbursement of expenses. Specifically, as set forth in the Notice, Lead Plaintiffs' Counsel will apply for attorneys' fees not to exceed 33 1/3% of the Settlement

[8] *See* Exs. A-1 to A-5 to the Stipulation.

Fund plus reimbursement of Litigation Expenses not to exceed $ 1.8 million incurred in connection with the prosecution and resolution of this Litigation, which amount may include a request for Service Awards to Plaintiffs up to an aggregate amount of $120,000. *See Silverstein*, 2013 WL 7122612, at *9-10 ("Class Counsel's request for 33 1/3% of the settlement fund is reasonable and consistent with the norms of class litigation in this circuit . . . [and] Courts typically allow counsel to recover their reasonable out-of-pocket expenses."); *see also Yuzary*, 2013 WL 5492998, at *12 ("[s]ervice awards are common in class action cases and serve to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiff[s].").

The Notice also provides specifics on the date, time, and place of the Final Approval Hearing and the procedures, as well as deadlines, for: (i) entering an appearance; (ii) objecting to the Settlement, the Plan of Allocation, and/or the motion for attorneys' fees and reimbursement of expenses; and (iii) submitting documentation demonstrating that an ERISA Entity is a Settlement Entity and member of the Settlement Class. Likewise, the Publication Notice and Postcard Notice provides a summary of the foregoing information and advises potential Settlement Class Members on how to obtain the more-detailed Notice on the Settlement Website.

In addition, Named Plaintiffs' proposed method of dissemination provides notice "in a reasonable manner to all class members who would be bound by the proposal." Specifically, the Claims Administrator shall cause to be mailed (1) a Validation Letter to each Identified Class Entity containing a summary of the Identified Class Entity's known BNYM ADR holdings and (2) a Postcard Notice to any "Potential Class Entity." Both the Validation Letter and the Postcard Notice will direct the Identified Class Entity and the Potential Class Entity to the Settlement Website, on which the Notice and Plan of Allocation and other Settlement documents will be made available. In addition, the Settlement Website will direct Settlement Entities to a portal through which an authorized representative of any such Settlement Entity may electronically submit a Claim Form on which the Settlement Entity may identify the BNYM ADRs it held during the

Settlement Class Period. For Identified Class Entities, the Claim Form will be pre-populated with a list of known BNYM ADR holdings, which can be corrected or supplemented as needed.

The Claims Administrator will also publish the Publication Notice once in the national edition of *The Wall Street Journal* and transmit it over *PR Newswire*. In addition, copies of the Notice and Claims Form, along with other documents and information relevant to the Settlement, will be posted on the Settlement Website, www.BNYMERISAADRSettlement.com. This manner of providing notice, which includes letter notice by first-class mail to Settlement Class Members who can be reasonably identified and postcard notice to every potential Settlement Class Member, supplemented by publication and internet notice, represents "appropriate notice to the class" and satisfies the requirements of Rule 23, due process, and all other applicable law and rules. *See, e.g.*, *City of Providence*, 2014 WL 1883494, at *2; *In re Warner Chilcott Ltd. Sec. Litig.*, 2008 WL 5110904, at *3 (S.D.N.Y. Nov. 20, 2008).

Accordingly, Plaintiffs respectfully submit that the proposed notice program is adequate and should be approved by the Court.

IV. THE COURT SHOULD ADOPT THE PROPOSED SCHEDULE

In connection with preliminary approval of the Settlement, Lead Plaintiffs' Counsel respectfully propose the schedule set forth below for Settlement-related events. The proposed schedule revolves around the date the Court enters the Preliminary Approval Order and the date of the Final Approval Hearing—which Named Plaintiffs request to be no earlier than 135 calendar days from the date of entry of the Preliminary Approval Order, or at the Court's earliest convenience thereafter.

EVENT	PROPOSED TIMING
Mailing the Validation Letter to Identified Class Entities and Postcard Notice to Potential Class Entities (Preliminary Approval Order, ¶ __)	Beginning no later than 30 business days after the date of the entry of the Preliminary Approval Order (the "Notice Date")
Publishing the Publication Notice (Preliminary Approval Order, ¶ __)	No later than 10 business days after the Notice Date

Filing opening briefs in support of final approval of Settlement, Plan of Allocation, and Lead Plaintiffs' Counsel's application for attorneys' fees and reimbursement of Litigation Expenses, including Service Awards (Preliminary Approval Order, ¶ __)	No later than 30 calendar days prior to the Final Approval Hearing
Objecting to the Settlement, Plan of Allocation and/or Lead Plaintiffs' Counsel's application for attorneys' fees and reimbursement of Litigation Expenses, including Service Awards (Preliminary Approval Order, ¶ __)	No later than 35 calendar days prior to the Final Approval Hearing
Filing of reply briefs (Preliminary Approval Order, ¶ __)	No later than 7 calendar days prior to the Final Approval Hearing
Final Approval Hearing (Preliminary Approval Order, ¶ __)	No earlier than 135 calendar days from the date of entry of the Preliminary Approval Order, or at the Court's earliest convenience thereafter
Submitting Claim Forms (Preliminary Approval Order, ¶ __)	130 calendar days after the Notice Date

V. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court enter the proposed Preliminary Approval Order submitted herewith.

December 14, 2018

Respectfully Submitted,

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