

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

**[PROPOSED] ORDER PRELIMINARILY APPROVING  
SETTLEMENT AND PROVIDING FOR NOTICE**

WHEREAS, a putative class action is pending in this Court captioned *Carver et al. v. Bank of New York Mellon, et al.*, No. 1:15-cv-10180-JPO-JLC (S.D.N.Y.) (the “Action”);

WHEREAS, (a) Hedy L. Anselman, David Baumann in his capacity as Trustee of the Teamsters Employers Local 945 Pension Fund, 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), and (b) The Bank of New York Mellon and BNY Mellon, National Association (collectively, “Defendants” or “BNYM”) have determined to settle the Action with prejudice on the terms and conditions set forth in the Stipulation and Agreement of Settlement dated December 14, 2018 (the “Stipulation” or “Settlement”) subject to approval of this Court;

WHEREAS, Named Plaintiffs have made a motion, pursuant to Rule 23 of the Federal Rules of Civil Procedure, for an order that will, among other things, provisionally certify the Settlement Class solely for the purpose of effectuating the Settlement, preliminarily approve the

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Settlement in accordance with the Stipulation, and direct notice of the Settlement to Settlement Class Members, as more fully described herein;

WHEREAS, Defendants do not oppose Named Plaintiffs' motion;

WHEREAS, the Court has read and considered: (a) Named Plaintiffs' motion for preliminary approval of the Settlement, and the papers filed and arguments made in connection therewith; (b) the Stipulation and the exhibits attached thereto; and (c) the record in the Action, and found good cause for entering the following Order.

NOW THEREFORE, IT IS HEREBY ORDERED:

1. **Incorporation of Definitions** – This Order hereby incorporates by reference the definitions in the Stipulation, and all capitalized terms, unless otherwise defined herein, shall have the same meaning as set forth in the Stipulation.

2. **Preliminary Approval of the Settlement** – The Court hereby preliminarily approves the Settlement, as embodied in the Stipulation, as being fair, reasonable, and adequate to the Settlement Class and finds it will likely be able to approve the Settlement under Rule 23(e)(2) of the Federal Rules of Civil Procedure, subject to further consideration at the Final Approval Hearing to be conducted as described below.

3. **Final Approval Hearing** – The Court will hold a settlement hearing (“Final Approval Hearing”) on \_\_\_\_\_, 201\_ at \_\_:\_\_\_ .m.<sup>1</sup> in Courtroom 706 of the Thurgood Marshall United States Courthouse, 40 Foley Square, New York, NY 10007, for the following purposes: (a) to determine whether the proposed Settlement on the terms and conditions provided for in the Stipulation is fair, reasonable, and adequate to the Settlement Class, and should be approved by the Court; (b) to determine whether an Order and Final Judgment substantially in the form attached as Exhibit B to the Stipulation should be entered dismissing the Action with prejudice against the Defendants; (c) to determine whether the proposed Plan of Allocation for the

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<sup>1</sup> The Parties have respectfully requested that the Court schedule the Final Approval Hearing no earlier than 135 days after the date of entry of this Order, so that, among other things, they may comply with the provisions set forth in the Class Action Fairness Act, 28 U.S.C. § 1715(b).

net proceeds of the Settlement is fair and reasonable and should be approved; (d) to determine whether Lead Plaintiffs' Counsel's motion for an award of attorneys' fees and reimbursement of Litigation Expenses (including Service Awards to Named Plaintiffs) should be approved; and (e) to consider any other matters that properly may be brought before the Court in connection with the Settlement. Notice of the Settlement and the Final Approval Hearing shall be given to Settlement Class members as set forth in ¶ 8 of this Order.

4. The Court may adjourn the Final Approval Hearing without further notice to the Settlement Class, and may approve the proposed Settlement with such modifications as Named Plaintiffs and Defendants may agree to, if appropriate, without further notice to the Settlement Class.

5. **Provisional Certification of the Class for Purposes of Settlement** – Pursuant to Rule 23 of the Federal Rules of Civil Procedure, and solely for purposes of effectuating the Settlement, this Court provisionally certifies a Settlement Class defined as all participants, beneficiaries, trustees, and fiduciaries of ERISA Entities that held, directly or indirectly, BNYM ADRs for which Defendants (or their affiliates or predecessors in interest) in their capacity as an ADR depository provided foreign exchange transactional services at any time during the Settlement Class Period (the "Settlement Class" and each a "Settlement Class Member"). "ERISA Entities" mean an ERISA plan and any trust, pooled account, collective investment vehicle, or group insurance arrangement that files a Form 5500 annual 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 other 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." The "Settlement Class Period" is the period from January 1, 1997 through the date of the Preliminary Approval Order. The provisional certification of the Settlement Class shall be vacated if the proposed Settlement is terminated or not approved by the Court, or if for any other reason the Effective Date does not occur.

6. Solely for purposes of effectuating the proposed Settlement, the Court preliminarily finds the prerequisites for class action certification under Rules 23(a) and 23(b)(1) of the Federal Rules of Civil Procedure are satisfied as: (a) the members of the Settlement Class are so numerous that joinder of all Settlement Class Members in the Action is impracticable; (b) there are questions of law and fact common to the Settlement Class; (c) the claims of Named Plaintiffs are typical of the claims of the Settlement Class; (d) the interests of all Settlement Class Members are adequately represented by Named Plaintiffs and Lead Plaintiffs' Counsel; (e) prosecution of separate actions by individual Settlement Class Members would create a risk of inconsistent or varying adjudications or would create a risk of adjudications with respect to individual Settlement Class Members, that, as a practical matter, would be dispositive of the interests of other members not parties to the individual actions. These preliminary findings shall be vacated if the Settlement is terminated or if for any reason the Effective Date does not occur.

7. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, and solely for purposes of effectuating the Settlement, Named Plaintiffs are appointed as representatives for the Settlement Class and Lead Plaintiffs' Counsel are appointed as counsel for the Settlement Class. Solely for the purposes of effectuating the proposed Settlement, Lead Plaintiffs' Counsel are authorized to act on behalf of the Named Plaintiffs and other Settlement Class Members with respect to all acts or consents required by or that may be given pursuant to the Stipulation, including all acts that are reasonably necessary to consummate the Settlement. These designations shall be vacated if the Settlement is terminated or if for any reason the Effective Date does not occur.

8. **Retention of Claims Administrator and Manner of Giving Notice** – Lead Plaintiffs' Counsel is hereby authorized to retain Analytics Consulting, LLC (the "Claims Administrator") to supervise and administer the notice procedure in connection with the proposed Settlement as well as to process Claims as more fully set forth below. Notice of the Settlement and the Final Approval Hearing shall be given by the Claims Administrator, under the supervision of Lead Plaintiffs' Counsel, as follows:

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a. beginning no later than thirty (30) business days after the date of entry of this Order (the “Notice Date”), the Claims Administrator shall cause to be mailed (1) a letter (“Validation Letter”) (substantially in the form attached as Exhibit A-2) to each ERISA Entity identified from structured data produced in discovery or from documents produced concerning the Named Plaintiffs’ plans as holding or having held at least one BNYM ADR in respect of which BNYM performed foreign exchange transactional services during the Settlement Class Period (“Identified Class Entity”), and (2) a postcard notice (“Postcard Notice”) (substantially in the form attached as Exhibit A-5) to any other ERISA Entity that filed a Form 5500 with the U.S. Department of Labor based on the most current complete year of data available (“Potential Class Entity”). The Validation Letter and the Postcard Notice will direct the Identified Class Entity and the Potential Class Entity, respectively, to the Settlement Website, on which the Notice and Plan of Allocation (substantially in the form attached as Exhibit A-1) will be made available. In addition, the Settlement Website will direct Identified Class Entities and Potential Class Entities to a portal through which an authorized representative of any such ERISA Entity may electronically submit a Claim Form (substantially in the form attached as Exhibit A-3) on which the ERISA Entity may identify any BNYM ADRs it held during the Settlement Class Period. For each Identified Class Entity, the Claim Form will be pre-populated with a list of such Identified Class Entity’s known BNYM ADR holdings, which can be reviewed, corrected, and/or supplemented as needed. The Validation Letter will also contain a summary of the Identified Class Entity’s known BNYM ADR holdings.

b. not later than ten (10) business days after the Notice Date, the Claims Administrator shall cause the Publication Notice (substantially in the form attached as Exhibit A-4) to be published once in the national edition of *The Wall Street Journal* and to be transmitted once on the *PR Newswire*; and

c. not later than seven (7) calendar days prior to the Final Approval Hearing, Lead Plaintiffs’ Counsel shall serve on Defendants’ Counsel and file with the Court proof, by affidavit or declaration, of such mailing and publication.

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9. **Approval of Form and Content of Notice** – The Court (a) approves, as to form and content, the Notice, the Validation Letter, the Postcard Notice, the Claim Form, and the Publication Notice, annexed hereto as Exhibits A-1 to A-5, and (b) finds that the mailing and distribution of the Validation Letter and Postcard Notice; the notification and making available of the Notice and Claim Form on the Settlement Website; and the publication of the Publication Notice substantially in the manner and form set forth in ¶ 8 of this Order (i) provides notice in a reasonable and appropriate manner to all Settlement Class Members; (ii) constitutes notice that is reasonably calculated, under the circumstances, to apprise Settlement Class Members of the pendency of the Action, the effect of the proposed Settlement (including the Releases to be provided thereunder), Lead Plaintiffs’ Counsel’s motion for an award of attorneys’ fees and reimbursement of Litigation Expenses (including Service Awards to Named Plaintiffs), their right to object to the Settlement, the Plan of Allocation and/or Lead Plaintiffs’ Counsel’s motion for attorneys’ fees and reimbursement of Litigation Expenses, and their right to appear at the Final Approval Hearing; (iii) constitute due, adequate, and sufficient notice to the Settlement Class entitled to receive notice of the proposed Settlement; and (iv) satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure, the Constitution of the United States (including the Due Process Clause), and all other applicable laws and rules. The date and time of the Final Approval Hearing shall be included in the Postcard Notice, Validation Letter, Notice, and Publication Notice before they are mailed, appear on the Settlement Website, and published, respectively. No Settlement Class Member shall be relieved from the terms of the proposed Settlement, including the Releases provided for therein, based solely upon the contention or proof that such Settlement Class Member failed to receive adequate or actual notice.

10. **Participation in the Settlement** – Identified Class Entities do not have to take any action in order to participate in the Settlement and be eligible to receive a payment from the Net Settlement Fund, although they may choose to have an authorized representative correct or supplement information in the pre-populated Claim Form available on the Settlement Website. However, Potential Class Entities who wish to participate in the Settlement and be eligible to

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receive a payment from the Net Settlement Fund must have an authorized representative complete and submit a Claim Form through the Settlement Website in accordance with the instructions contained in the Notice and on Website. Unless the Court orders otherwise, all Claim Forms must be submitted through the Settlement Website no later than one hundred and thirty (130) calendar days after the Notice Date. Notwithstanding the foregoing, Lead Plaintiffs' Counsel may, at their discretion, accept for processing late Claims provided such acceptance does not delay the distribution of the Net Settlement Fund to Authorized Recipients. By submitting a Claim, an entity shall be deemed to have submitted to the jurisdiction of the Court with respect to its Claim and the subject matter of the Settlement.

11. Each Claim Form submitted must satisfy the following conditions: (a) it must be properly completed, signed, and submitted in a timely manner in accordance with the provisions of the preceding paragraph; (b) it must be accompanied by supporting documentation for the BNYM ADRs held that is sufficient to show the ADR name, CUSIP, the dates held, and the number of shares held, in the form of account statements or such other documentation as is deemed adequate by Lead Plaintiffs' Counsel or the Claims Administrator; and (c) the Claim Form must be completed and signed under penalty of perjury by an authorized representative of the Settlement Entity with current authority to act on its behalf.

12. Any Identified Class Entity that does not correct or supplement the data pertaining to its BNYM ADR holdings included in the Validation Letter and on its pre-populated Claim Form on the Settlement Website shall be deemed to have waived its right to change or supplement that data. In that case, the Claim Amount for the Identified Class Entity will be calculated based on the pre-populated data.

13. Any Potential Class Entity that does not timely and validly submit a Claim Form or whose Claim is not otherwise approved by the Court: (a) shall be deemed to have waived its right to share in the Net Settlement Fund; (b) shall be forever barred from participating in any distributions therefrom; (c) shall be bound by the provisions of the Stipulation and the Settlement and all proceedings, determinations, orders, and judgments in the Action relating thereto,

including, without limitation, the Order and Final Judgment and the Releases provided for therein, whether favorable or unfavorable to the Settlement Class; and (d) will be barred from commencing, maintaining, or prosecuting any of the Released Claims against each and all of the Released Parties, as more fully described in the Stipulation and the Notice. Notwithstanding the foregoing, late Claim Forms may be accepted for processing as set forth in ¶ 10 above.

14. **Appearance at Final Approval Hearing and Objections** – Any Settlement Class Member may enter an appearance in the Action, at their own expense, individually or through counsel of their own choice, by filing with the Clerk of Court and delivering a notice of appearance to both Lead Plaintiffs’ Counsel and Defendants’ Counsel, at the addresses set forth in ¶ 15 below, such that it is received no later than thirty-five (35) calendar days prior to the Final Approval Hearing, or as the Court may otherwise direct. Any Settlement Class Member who does not enter an appearance will be represented by Lead Plaintiffs’ Counsel.

15. Any Settlement Class Member may file a written objection to the proposed Settlement, the proposed Plan of Allocation, and/or Lead Plaintiffs’ Counsel’s motion for an award of attorneys’ fees and reimbursement of Litigation Expenses (including Service Awards to Plaintiffs) and appear and show cause, if it has any cause, why the proposed Settlement, the proposed Plan of Allocation and/or Lead Plaintiffs’ Counsel’s motion for attorneys’ fees and reimbursement of Litigation Expenses should not be approved; *provided, however*, that no Settlement Class Member shall be heard or entitled to contest the approval of the terms and conditions of the proposed Settlement, the proposed Plan of Allocation, and/or the motion for attorneys’ fees and reimbursement of Litigation Expenses unless that Settlement Class Member has filed written objections with the Court and served copies of such objection on Lead Plaintiffs’ Counsel and Defendants’ Counsel at the addresses set forth below such that they are received no later than thirty-five (35) calendar days prior to the Final Approval Hearing.



Lead Plaintiffs' Counsel	Defendants' Counsel
<p style="text-align: center;">Jan M. Conlin, Esq. Ciresi Conlin LLP 225 South Sixth Street, Suite 4600 Minneapolis, MN 55402 Brian McTigue, Esq. McTigue Law LLP 4530 Wisconsin Avenue, NW, Suite 300 Washington, DC 20016</p>	<p style="text-align: center;">Elizabeth M. Sacksteder Paul, Weiss, Rifkind, Wharton &amp; Garrison LLP 1285 Avenue of the Americas New York, NY 10019-6064</p>

16. Any objections, filings, and other submissions by the objecting Settlement Class Member: (a) must state the name, address, and telephone number of the person or entity objecting and must be signed by the objector; (b) must contain a statement of the Settlement Class Member's objection or objections; and (c) must include documents that identify the BNYM ADRs held by a Settlement Entity with respect to which such objecting Settlement Class Member is a participant, beneficiary, trustee or fiduciary (including the CUSIP, number of shares, and dates held) sufficient to prove membership in the Settlement Class. Objectors who enter an appearance and desire to present evidence at the Final Approval Hearing in support of their objection must include in their written objection or notice of appearance the identity of any witnesses they may call to testify and any exhibits they intend to introduce into evidence at the hearing.

17. Any Settlement Class Member who does not make their objections in the manner provided herein shall be deemed to have waived their right to object to any aspect of the proposed Settlement, the proposed Plan of Allocation, and Lead Plaintiffs' Counsel's motion for an award of attorneys' fees and reimbursement of Litigation Expenses (including Service Awards to Plaintiffs) and shall be forever barred and foreclosed from objecting to the fairness, reasonableness, or adequacy of the Settlement, the Plan of Allocation, or the requested attorneys' fees and Litigation Expenses, or from otherwise being heard concerning the Settlement, the Plan of Allocation or the requested attorneys' fees and Litigation Expenses in this or any other proceeding.

18. **Stay and Temporary Injunction** – Until otherwise ordered by the Court, the Court stays all proceedings in the Action other than proceedings necessary to carry out or enforce the terms and conditions of the Stipulation. Pending final determination of whether the Settlement should be approved, the Court bars and enjoins all Named Plaintiffs and all members of the Settlement Class from prosecuting any and all Released Claims against any of the Released Parties.

19. **Notice and Administration Costs** – All reasonable costs incurred in identifying Settlement Class Members or Settlement Entities and notifying them of the Settlement as well as in administering the Settlement shall be paid as set forth in the Stipulation without further order of the Court.

20. **Settlement Fund** – The contents of the Settlement Fund held by Alerus Financial, N.A. (which the Court approves as the Escrow Agent), shall be deemed and considered to be *in custodia legis* of the Court, and shall remain subject to the jurisdiction of the Court, until such time as they shall be distributed pursuant to the Stipulation and/or further order(s) of the Court.

21. **Taxes** – Lead Plaintiffs' Counsel is authorized and directed to prepare any tax returns and any other tax reporting from for or in respect to the Settlement Fund, to pay from the Settlement Fund any Taxes and Tax Expenses owed with respect to the Settlement Fund, and to otherwise perform all obligations with respect to Taxes and any reporting or filings in respect thereof without further order of the Court in a manner consistent with the provisions of the Settlement.

22. **Termination of Settlement** – If the Settlement is terminated as provided in the Stipulation, the Settlement is not approved, or the Effective Date of the Settlement otherwise fails to occur, this Order shall be vacated, rendered null and void and be of no further force and effect, except as otherwise provided by the Stipulation, and this Order shall be without prejudice to the rights of Named Plaintiffs, the Settlement Class Members, and Defendants, and Named Plaintiffs and Defendants shall have deemed to have reverted *nunc pro tunc* to their respective status in the Action immediately prior to the execution of the Term Sheet on September 26, 2018, as provided in the Stipulation. Except as otherwise provided in the Stipulation, in the event the Settlement is

terminated in its entirety of if the Effective Date fails to occur for any reason, the balance of the Settlement Fund including interest accrued therein, less any Notice and Administration Costs paid, shall be refunded to Defendants (or such other Persons as Defendants may direct) in accordance with the Stipulation.

23. **Use of this Order** – Neither this Order, the Stipulation (whether or not consummated), nor any negotiations, proceedings, or agreements relating to the Stipulation, the Settlement, and any matters arising in connection with the settlement negotiations, proceedings, or agreements, shall be offered or received against any or all of the Parties or Released Parties for any purpose, and in particular:

a. do not constitute, and shall not be offered or received against Defendants or the other Released Parties as evidence of, or construed as, or deemed to be evidence of any presumption, concession, or admission by Defendants or the Released Parties with respect to the truth of any fact alleged by Named Plaintiffs or any other Settlement Class Member or the validity of any claim that has been or could have been asserted in the Action or in any litigation or other proceeding, including but not limited to the Released Claims, or of any liability, damages, negligence, fault, or wrongdoing of Defendants or the other Released Parties;

b. do not constitute, and shall not be offered or received against Defendants or the other Released Parties as evidence of, a presumption, concession, or admission of any fault, misstatement, or omission with respect to any statement or written document approved or made by Defendants or the Released Parties, or against Defendants, the Released Parties, or Named Plaintiffs, or any other Settlement Class Member as evidence of any infirmity in the claims or defenses that have been or could have been asserted in the Action;

c. do not constitute, and shall not be offered or received against Defendants or the other Released Parties as evidence of, a presumption, concession, or admission with respect to any liability, damages, negligence, fault, infirmity, or wrongdoing, or in any way referred to for any other reason against Defendants or the Released Parties, in any other civil, criminal, or administrative action or proceeding, other than such proceeding as may be necessary to effectuate

the provisions of the Stipulation;

d. do not constitute, and shall not be construed against Defendants or the other Released Parties, as an admission or concession that the consideration to be given hereunder represents the amount which could be or would have been recovered after trial; and

e. do not constitute, and shall not be construed as or received in evidence as, an admission, concession, or presumption against Named Plaintiffs or any other Settlement Class Member that any of their claims are without merit or infirm, that a class should not be certified, or that damages recoverable under the complaints filed in the Action would not have exceed the Settlement Amount.

24. **Supporting Papers** – Lead Plaintiffs’ Counsel shall file and serve the opening papers in support of the proposed Settlement, the Plan of Allocation, and Lead Plaintiffs’ Counsel’s motion for an award of attorneys’ fees and reimbursement of Litigation Expenses (including Service Awards to Plaintiffs) no later than thirty (30) calendar days prior to the Final Approval Hearing; and reply papers, if any, shall be filed and served no later than seven (7) calendar days prior to the Final Approval Hearing.

25. The Court retains exclusive jurisdiction over the Action to consider all further matters arising out of or connected with the Settlement.

SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2018

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The Honorable J. Paul Oetken  
United States District Judge