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

NAMED PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs 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 (ECF 93), on behalf of themselves and the Settlement Class, by and through their counsel, Ciresi Conlin LLP and McTigue Law LLP, respectfully submit this memorandum of law in support of their motion for final approval of the Stipulation and Agreement of Settlement (ECF 194) resolving all claims asserted in the Action in return for the payment of $12.5 million in cash for the benefit of the Settlement Class, and for approval of the Plan of Allocation of the proceeds of the Settlement.[1]

PRELIMINARY STATEMENT

The Court should grant final approval of the Settlement, an exemplary result in this novel class action achieved after over three years of hard-fought litigation. It creates a non-reversionary Settlement Fund in the amount of $12.5 million, which will be distributed through direct and proportionate payments to Settlement Class Members. The parties have complied with the Court's Order preliminarily approving the Settlement and directing Notice. Potential Settlement Class Entities were reached either by (1) Validation Letters, which were sent via first class mail to those ERISA Entities identified from data or documents produced in discovery; or by (2) Postcard Notices, which were mailed to any other ERISA Entity that filed an Annual Report on Form 5500 with the U.S. Department of Labor based on the most current, complete year for which Form 5500 data sets were available. Potential Settlement Class Entities were also notified via Publication Notice in the national edition of the *Wall Street Journal* and through transmission of the Settlement information on the *PR Newswire* as well as through a Settlement Website designed for this

[1] All capitalized terms used herein that are not otherwise defined herein shall have the same meaning ascribed to them in the Court's Preliminary Approval Order (ECF 196) or the Settlement filed concurrently with Plaintiffs' Preliminary Approval Motion. Additionally, unless otherwise noted, quotation marks, internal citations, and footnotes are omitted and emphasis is added.

litigation.

The response of the Settlement Class to the Settlement has been overwhelmingly positive. Out of the more than 867,000 Settlement Entities directly notified about this Settlement, none filed any objection to the Settlement or the Plan of Allocation. The positive reaction of the Settlement Class is persuasive and objective evidence that the Settlement is fair, reasonable, and adequate. The Court should have no hesitation to grant final approval to the unopposed, preliminarily-approved Settlement. Therefore, for the reasons set forth below and in the papers previously submitted, Named Plaintiffs respectfully request that the Court grant final approval of the Settlement.

FACTUAL BACKGROUND

A. Background and Pre-Settlement Procedural History

Deborah Jean Kenny, Edward C. Day, Carl Carver, Lisa Parker, and 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. (ECF 1.) Specifically, the original Plaintiffs alleged that BNYM, in contravention of its fiduciary duties, obtained illegal profits when exchanging currencies for ERISA Entities[2] by converting cash distributions on BNYM ADRs from foreign currencies to U.S. Dollars. (*Id.*) The Class Action Complaint alleged that BNYM profited by systematically assigning BNYM ADR owners FX exchange rates at or near the worst rates during the applicable 24-hour trading session rather than rates at which BNYM internally

[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."

performed the conversions, and retaining the spread between the two rates for itself. (*Id.*) The Class Action Complaint alleged that BNYM thereby retained millions of dollars from dividends or cash distributions owed 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.*, 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 this 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 as additional named Plaintiffs (together with original plaintiffs, the "Named 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 Named 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 stated in its order that this issue was a "question of first impression." (*Id.* at 9.)

BNYM answered the Consolidated Amended Class Action Complaint on April 21, 2017. (ECF No. 86.) The Named Plaintiffs then filed a First Amended Consolidated Class Action

Complaint on June 8, 2017 adding Dante A. Dano, Jr. as an additional Named Plaintiff. (ECF 93.) BNYM answered the First Amended Consolidated Class Action Complaint on June 22, 2017. (ECF 95.)[3] Thereafter, the parties commenced discovery, which involved significant efforts by both sides. These efforts included: BNYM's production (and Named Plaintiffs' review) of nearly 2.7 million pages of documents; Named Plaintiffs production (and BNYM's review) of over 218,000 pages of documents; 12 depositions, one of each Named Plaintiffs, and eight depositions of BNYM employees, including multiple 30(b)(6) BNYM witnesses.[4] The parties also exchanged lengthy expert reports in support of and opposition to class certification and on the merits of the case and damages and took four expert depositions.

On February 12, 2018, BNYM filed a motion for partial summary judgment on the application of the statute of limitations, arguing the class period should not be tolled on the basis of fraud or concealment under ERISA, which the Named Plaintiffs' opposed. (ECF 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 141.) BNYM opposed the motion on June 5, 2018. (ECF 153.) On August 24, 2018, BNYM moved to exclude Named Plaintiffs' expert witness from testifying, which Named Plaintiffs opposed. (ECF 170, 181.) All of these motions are fully briefed.

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[3] On November 29, 2017, in accordance with Rule 25(a), Lead Class Counsel filed a suggestion of death for Robert E. Hartline and requested that Mr. Hartline be withdrawn as a plaintiff in the Action. (ECF 111.) On December 29, 2017, Edwin G. Scheibel filed a separate action against Defendants, captioned *Scheibel v. The Bank of New York Mellon, et al.*, No. 1:17-cv-10231, and designated it as related to the Action. On April 16, 2018, the Court consolidated the *Scheibel* action with the Action and ordered that Interim Co-Lead Counsel remain in that role in the consolidated action. (ECF 140.)

[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. (*See* ECF 108.) Accordingly, Lead Class Counsel attended at least five other depositions noticed in the Contract Action, but did not separately question the deponents.

B. Settlement Negotiations and Mediation

While discovery and motion practice was proceeding, the parties began discussing the possibility of negotiating a resolution of the Action. On March 22 and 23, 2018, the parties participated in a two-day mediation session with the Honorable Layn Phillips (Ret.) and David Murphy of PhillipsADR. The parties were unable to resolve the Action and went on to complete fact and expert discovery. The parties then began discussing again the possibility of resolving the Action in the fall of 2018. They engaged in a second mediation session with David Murphy of PhillipsADR on September 17, 2018. The parties reached an agreement in principle at the mediation to settle the Action based on a mediator's proposal.

Following the second mediation session, the parties engaged in further arm's-length negotiations 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 187.)

The parties then negotiated and drafted the terms of the Settlement (and exhibits thereto), which sets forth the final and binding agreement to settle the Action. During this time, Named Plaintiffs worked with consultants, experts, and their proposed Claims Administrator to develop the Notices and Plan of Allocation. The Notice program and each document comprising the Notice were exhaustively revised, with input from consultants and experts including the Claims Administrator, to make them easier to read and understand. The parties executed the Stipulation on December 14, 2018. (ECF 194.)

C. Preliminary Approval and the Terms of the Settlement

On December 14, 2018, after finalizing the Settlement Agreement, Named Plaintiffs filed an Unopposed Motion for Preliminary Approval of Proposed Class Action. (ECF 192.) The Court entered the order granting preliminary approval on December 20, 2018. (ECF 196.) Pursuant to the Settlement Agreement, the Court preliminarily certified pursuant to Rules 23(a) and 23(b)(1) of the Federal Rules of Civil Procedure the following Settlement Class:

[A]ll participants, beneficiaries, trustees, and fiduciaries of ERISA Entities that

> held, directly or indirectly, ADRs for which Defendants (or their affiliates or predecessors in interest) in their capacity as an ADR depositary provided foreign exchange transactional services at any time during the Settlement Class Period.

(ECF 196 ¶ 5 (the "Preliminary Approval Order").) The Court also preliminarily designated the Named Plaintiffs as Settlement Class Representatives and Ciresi Conlin LLP and McTigue Law LLP as lead counsel for the Settlement Class (*id.* ¶ 7), and approved Named Plaintiffs' proposed plan to provide notice of the Settlement and the Final Approval Hearing to the Settlement Class (the "Notice Plan"). (*Id.* ¶¶ 8–9.)

D. Notice Was Provided Pursuant to the Preliminary Approval Order

On February 5, 2019, the Claims Administrator selected by Named Plaintiffs began mailing Validation Letters and Postcard Notices, consistent with the Settlement Agreement and the Preliminary Approval Order. (Simmons Decl. ¶¶ 17, 21.) Validation Letters were sent 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"). (*Id.*) Additionally, Postcard Notices were sent 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"). (*Id.*) In total, notice via Validation Letter or Postcard Notice was sent to 871,353 Identified and Potential Class Entities. (*Id.*)

The Validation Letters and Postcard Notices sent were substantially in the form approved by this Court in the Preliminary Approval Order and alerted the potential Settlement Class Members not only to the key terms of the Settlement, but also of their right to object.[5] (*Id.* ¶ 20.) In addition, the Claims Administrator published the Publication Notice per the Preliminary Approval Order in the national edition of the *Wall Street Journal* and on the *PR Newswire* on

[5] Out of the 871,353 Postcard Notices and Validation Letters, only 1.8% of all Postcard Notices and 1.7% of all Validation Letters were returned as undeliverable. Of 206 Validation Letters returned, a second mailing was sent to 84 for which a correct address was identified. Of returned Postcard Notices, Lead Class Counsel, their consultant, and the Claims Administrator together were able to identify 137 addresses that were re-sent to the correct addresses. (Simmons Decl. ¶¶ 26–27.)

February 20, 2019. (*Id.* ¶¶ 28–29.) Named Plaintiffs expect that they will have successfully delivered by U.S. Mail direct notice of the Settlement to 98% of the Settlement Entities through its notice program. (*Id.* ¶ 37.)

The Validation Letters, Postcard Notices, and Publication Notice directed Identified Class Entities and Potential Class Entities to the Settlement Website, www.BNYMADRERISASettlement.com, on which the Notice and Plan of Allocation were made available. (*Id.* ¶¶ 32–34.) In addition, the Settlement Website directed Identified Class Entities and Potential Class Entities to a portal through which an authorized representative of such a Settlement Entity could electronically submit a Claim Form where the Settlement Entity could identify those BNYM ADRs it held during the Settlement Class Period. (*Id.*) For each Identified Settlement Entity, the Claim Form was pre-populated with a list of such Identified Class Entity's known BNYM ADR holdings, which could be reviewed, corrected, and/or supplemented by the Identified Class Entity's authorized representative. (*Id.*) The Settlement Website has been live and available since before February 5, 2019. (*Id.*) All relevant materials and filings related to the Settlement are contained on the Settlement Website. The Settlement Website received over 40,512 hits since it became available online. (Simmons Decl. ¶ 34.) 6,059 Claims or supplemental Claims have been submitted to date. (*Id.* ¶¶ 38–40.) A toll-free telephone number was also established by the Claims Administrator, which received nearly 4,886 calls from potential Settlement Class Members, some of which were elevated internally and to Lead Class Counsel. (*Id.* ¶ 31.) Lead Class Counsel also directly received over 20 calls from potential Settlement Class Members regarding the Settlement.

E. The Settlement Fund and Payments to Settlement Class Members

The Settlement requires BNYM to deposit $12.5 million dollars in cash into an interest-bearing Escrow Account following the entry of the Preliminary Approval Order. (ECF 194 ¶ 7.) BNYM complied with this requirement, and as of April 22, 2019, $48,214.25 of interest has accrued for the benefit of the Class. (*Id.* ¶ 41.)

The objective of the Plan of Allocation is to equitably distribute the Net Settlement Fund among as many Settlement Entities as possible. The Net Settlement Fund will be distributed

pursuant to the proposed Plan of Allocation based on calculating, either through: (1) structured data produced in discovery in the Action; (2) documents related to the Named Plaintiffs' plans produced in discovery in the Action; or (3) data submitted on the Claim Forms by Settlement Entities through the Settlement Website, the amount of gross dividends that each Settlement Entity received from BNYM ADRs during the Settlement Class Period. (ECF 196, Ex. A–1.) Each Authorized Recipient shall be paid the percentage of the Net Settlement Fund that each Authorized Recipient's gross dividend amount bears to the sum of gross dividend amount of all Authorized Recipients—*i.e.*, the Authorized Recipient's *pro rata* share of the Net Settlement Fund (the "Distribution Amount"). (*Id.*) If an Authorized Recipient's Distribution Amount is less than $10.00, it will be considered *de minimis* and will not be included in the calculation, and no distribution will be made to such Authorized Recipient. (*Id.*) Other than *de minimis* amounts, recoveries are *pro rata* and there is no cap on the amount of any Settlement Entity's recovery under the Settlement.

F. Release

As detailed in the Settlement, should the Court grant Final Approval, Named Plaintiffs and Settlement Class Members will discharge BNYM from any claims that: (a) were or could have been asserted in the Action, or in any other forum, that arise out of, are based upon, or related in any way to the allegations set forth in any complaint or pleading filed in the Action; or (b) arise from, are based on, or related in any way to the conversion of foreign currency in connection with any and all ADRs for which BNYM acted as the depositary at any time during the Settlement Class Period, *provided however*, that the Released Claims shall not include any claim for breach of contract asserted by or on behalf of a Settlement Entity in the Contract Action that is within the scope of claims to be released in the Contract Settlement.

ARGUMENT

The Settlement satisfies all applicable criteria for final approval. 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 final 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 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 payments;" 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." Public policy favors settlement of class action litigation. *Wal-Mart Stores, Inc. v. Visa U.S.A.*, 396 F.3d 96, 116–17 (2d Cir. 2005) ("We are mindful of the strong judicial policy in favor of settlements, particularly in the class action context."); *see also In re Advanced Battery Tech. Sec. Litig.*, 298 F.R.D. 171, 174 (S.D.N.Y. 2014) ("The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, costs, and rigor of prolonged litigation.").

I. The Named Plaintiffs and Lead 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 partial summary judgment, class certification, and *Daubert* motions. There should be no doubt that Lead Class 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 and prevailed; (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, and taking eight depositions of BNYM witnesses; and (6) completed substantial expert discovery, including exchanging class certification and merits expert reports, conducting and defending four expert depositions, and opposing BNYM's motion to exclude Named Plaintiffs' expert's testimony. Both fact and expert discovery were concluded by the time the proposed Settlement was reached. As a result, Named Plaintiffs and Lead Class 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 Class Counsel has experience prosecuting complex cases around the country and believes the Settlement is in the best interests of the Settlement 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."). These facts strongly support the conclusion that the Settlement is fair.

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

II. The Settlement Was Negotiated at Arm's-Length by Well-Informed and Experienced Counsel with the Assistance of Experienced Mediators

A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart*, 396 F.3d at 116; *see also* Fed. R. Civ. P. 23(e), Advisory Committee Comm. ("[T]he involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests."); *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 arm's-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."); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576 (S.D.N.Y. 2008) ("[A] strong presumption of fairness attaches to a class action settlement reached in arm's length negotiations among able counsel.").

The Settlement in this case was achieved after good faith, arm's-length negotiations between experienced counsel for the parties, with the assistance of experienced, highly regarded mediators. As noted above, the parties and their counsel were very knowledgeable about the strengths and weaknesses of their respective cases prior to reaching their agreement to settle.

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 (Ret.) and David Murphy of PhillipsADR to explore the possibility of resolving the Action. Unable to reach an agreement at that time, the parties continued with fact and expert discovery and motion practice. The parties engaged in a second mediation session with David Murphy of PhillipsADR (who was present and assisted Judge Phillips (Ret.) in the first mediation session) on September 17, 2018—after fact and expert discovery were concluded and Named Plaintiffs' class certification motion and BNYM's *Daubert* motion had been fully briefed. During the second mediation, Mr. Murphy made a mediator's proposal that the Action be settled for $12.5 million, which the parties accepted.

Following this mediation session, the parties continued to engage in adversarial, arm's-length negotiations before finally reaching an agreement-in-principle to settle the Action and executing the Term Sheet. Negotiations over the Settlement and accompanying exhibits continued and definitive documentation was drafted over the next several months.

The outstanding result for the Settlement Class was thus the product of hard-fought negotiations. *See, e.g.*, *In re Bear Stearns Cos., Inc. Sec. Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 265 (S.D.N.Y. 2012) (finding a settlement fair where the parties engaged in "arm's-length

negotiations," including mediation before "retired federal judge Layn R. Phillips, an experienced and well regarded mediator"); *In re Giant Interactive Grp, Inc. Secs. Litig.*, 279 F.R.D. 151, 157, 160 (S.D.N.Y. 2011) (settlement was entitled to a presumption of fairness where it was the product of "arms-length negotiations" facilitated by Judge Phillips, "a respected mediator"); *In re Citigroup Inc. Secs. Litig.*, 965 F. Supp. 2d 369, 381 (S.D.N.Y. 2013) ("[T]he history of the negotiations and the role of the mediator suggest that the parties actually dealt with one another at arm's length—going so far as accepting the mediator's [Judge Phillips] proposed dollar amount."); *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 618 (S.D.N.Y. 2012) ("The involvement of . . . an experienced and well-known . . . class action mediator, is also a strong presumption of procedural fairness.").

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 the assistance of highly regarded neutrals and ultimate acceptance of a mediator's proposal, demonstrates that the process by which the Settlement was reached is fair and reasonable. The Settlement is thus presumptively fair and reasonable and should be granted final approval.

III. Application of the *Grinnell* Factors and the New Rule 23(e)(2)(C) Factors Demonstrate that the Settlement Is Fair, Reasonable, and Adequate

All of the factors considered in the final approval stage in the Second Circuit as well as under the new Rule 23(e)(2)(C) weigh in favor of finding that the Settlement is fair, reasonable, and adequate. In *City of Detroit v. Grinnell Corporation*, the Second Circuit identified nine factors that courts should consider when determining whether to grant final approval for a class action settlement:

> (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 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 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; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). "[N]ot every factor must weigh in favor of settlement[;] rather [a] court should consider the totality of these factors in light of the particular circumstances." *In re IMAX Secs. Litig.*, 283 F.R.D. 178, 190 (S.D.N.Y. 2012).

Additionally, Rule 23(e)(2)(C) was recently amended to ensure courts consider the following factors when determining whether to grant final certification:

> [T]he 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 payments; and (iv) any agreement required to be identified under Rule 23(e)(3).

Given the overlap in the *Grinnell* and Rule 23(e)(2)(C) factors, Named Plaintiffs analyze these factors together below. In this case, each of the factors discussed above weighs in favor of granting final approval of the Settlement.

1. The Relief Provided for the Settlement Class Is Adequate When Weighed Against Litigation Risks (Rule 23(e)(2)(C)(i) and *Grinnell* Factors 1, 8 and 9)

In assessing a 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); rather, "in any case there is a range of 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."). Indeed, "[m]ost class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd sub. nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001). The Court thus need only determine whether the Settlement falls within a range of reasonableness—a range that recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Pantelyat v. Bank of Am.*, 2019 WL 402854, at *7 (S.D.N.Y. Jan. 31, 2019).

The Settlement falls well above the threshold required under Second Circuit law and new Rule 23(e)(2)(C). If approved, the Settlement will provide Settlement Class Members, through the Settlement Entities, with $12,500,000 in cash, less reasonable attorneys' fees, litigation expenses (including Service Awards), taxes, and administrative costs. The monetary amount obtained for the Settlement Class represents a significant portion of the Settlement Class's potential damages. The Settlement 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 class-wide 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. 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 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 its 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 summary judgment. Even if Named Plaintiffs prevailed at summary judgment and 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.*; *see also City of Providence*, 2014 WL 1883494, at *5 (finding that "[e]ven if the Class could recover a judgment at trial, the additional delay through trial, post-trial motions, and the appellate process could prevent the Class from obtaining any recovery for years."); *In re AOL Time Warner Inc.*, 2006 WL 903236, at *13 (S.D.N.Y. Apr. 6, 2006) ("[T]he benefit of the Settlement will . . . be realized far earlier than a hypothetical post-trial recovery."). In contrast, the Settlement provides the Settlement Class with a speedy 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—just as BNYM's vigorous opposition to class certification posed a risk that this action could not proceed on a class basis at all. Moreover, issues relating to the Settlement Class' 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) ("In 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' recoveries could never be proven at trial or would be greatly reduced.

In fact, here, Named Plaintiffs recovered over 26% of their maximum potential damages in the Settlement. Courts routinely approve lower rates of recovery in comparable cases. *See, e.g.*, *City of Providence*, 2014 WL 1883494, a *9 (approving $15 million settlement that represented "a recovery in the range of 9.2% to 21% of estimated damages"); *In re Giant Interactive*, 279 F.R.D. at 163 ("[T]he average settlement in securities class actions ranges from 3% to 7% of the class' total estimated losses."); *see also Grinnell*, 495 F.2d at 455 n.2 ("In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery."); *Trombley v. Nat'l City Bank*, 826 F. Supp. 2d 179, 198 (D.D.C. 2011) (granting final approval to a class action settlement and stating that a "recovery range of approximately 12% to 30%[,] seems to be within the realm of reasonableness"); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 583 (N.D. Ill. 2011) (approving class action settlement where the recovery represented "approximately 10%" of the "class's maximum potential recovery").

2. The Notice Plan Is Working Effectively and Will Result in Equitable Distribution of the Entirety of the Net Settlement Fund to Settlement Class Members (Rule 23(e)(2)(C)(ii))

The Named Plaintiffs and Lead Class Counsel, along with the Claims Administrator, have been implementing the Notice Plan approved by the Court in its Preliminary Approval Order. The Notice Plan is working as expected to identify Settlement Entities entitled to a distribution from the Net Settlement Fund and will result in the distribution of the entirety of the Net Settlement Fund to the Settlement Class Members through the Settlement Entities. This Settlement is not a claims-made settlement, and there will be no reversion of Settlement funds to BNYM if the Settlement becomes final.

As set forth in the Preliminary Approval Order, Settlement, and Notice, the Claims Administrator mailed a Validation Letter to the Settlement Entities that they were able to identify

through structured financial data produced in discovery or information from the Named Plaintiffs' Plans produced in discovery as having held at least one ADR for which BNYM was the depositary and for which BNYM performed a foreign exchange conversion for the ADR held on the Record Date. Each Validation Letter contained a schedule of that Identified Class Entity's BNYM ADR holdings. The Validation Letter also directed the Identified Class Entity to the Notice and Claim Form available on the Settlement Website and informed each Identified Class Entity that it may use the Settlement Website to correct or update the information on its ADR holdings on the Settlement Website. An Identified Class Entity is not required to verify the data in the Validation Letter and on the Settlement Website or submit a Claim Form in order to receive a distribution from the Net Settlement Fund. If they do nothing, they will still receive a distribution based on the data available to Named Plaintiffs. There are 4,057 Identified Class Members which have received Validation Letters; three of them have to date supplemented the information provided in the Validation Letters. (Simmons Decl. ¶ 38.)

Postcard Notices were also mailed by the Claims Administrator to all ERISA Entities that filed an Annual Report on Form 5500 based on the most current, complete year for which data sets are available. Each employee benefit plan subject to ERISA is required to file an Annual Report on Form 5500 with the Department of Labor once a year. It is likely that most Potential Class Entities who received a Postcard Notice will not be Settlement Entities because they most likely did not own ADRs issued by BNYM in the Class Period. But because the parties could not identify all of BNYM's ERISA entity clients, notice was provided to every recent ERISA filer of a 5500, to reach as many Settlement Entities as possible. The Postcard Notice directed each Potential Class Entity to the Settlement Website where it may complete and submit a Claim Form identifying the BNYM ADRs it held during the Settlement Class Period. The Postcard Notice provided each ERISA Entity with a unique Claim Number and Password for this purpose.

Additionally, potential Settlement Class Members were notified via Publication Notice published in the national edition of the *Wall Street Journal* and through transmission of the Settlement information on the *PR Newswire* of the terms of the Settlement. This intensive Notice

Plan has not only successfully reached 98% of the Settlement Entities (Simmons Decl. ¶ 37), but has yielded the information about the Settlement Entities' ADR holdings necessary to implement an equitable Plan of Allocation.

To deter and defeat unjustified Claims, each Potential Class Entity is 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 Class Counsel, in a uniform manner for all Authorized Recipients. To date, 6,059 ERISA Entities that received Postcard Notice have submitted Claim Forms. (Simmons Decl. ¶ 40.)

The Net Settlement Fund will be distributed pursuant to the Plan of Allocation based on calculating the amount of gross dividends that each Settlement Entity received from the BNYM ADRs during the Settlement Class Period. (ECF 196, Ex. A–1.) Each Authorized Recipient will be paid the percentage of the Net Settlement Fund that each Authorized Recipient's gross dividend amount bears to the sum of gross dividend amount of all Authorized Recipients—*i.e.*, the Authorized Recipient's *pro rata* share of the Net Settlement Fund (the "Distribution Amount"). (*Id.*) Accordingly, the Class Identification Process and Plan of Allocation have been designed to effectively and equitably distribute the Net Settlement Fund among as many Settlement Entities as can be identified as possible and should be approved by the Court.

3. The Proposed Attorneys' Fee Award Is Reasonable (Rule 23(e)(2)(C)(iii))

As set forth in the Preliminary Approval Order and Notice, Lead Class 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 will include a request for Service Awards to Named Plaintiffs up to an aggregate amount of $120,000. This is a reasonable request. *See AllianceBernstein*, 2013 WL 7122612, at *9–10 (Oetken, J.) ("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* Named Plaintiffs' Motion for Reasonable Fees and Costs Filed Concurrently with this Motion. There is no other agreement between the parties on attorneys' fees other than what is in the Settlement.

4. The Reaction of the Class is Overwhelmingly Positive (*Grinnell* Factor 2)

The reaction of the class to a proposed settlement is a significant factor to be weighed in considering its fairness and adequacy. *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *4–5 (E.D.N.Y. Oct. 23, 2012). This factor weighs heavily in favor of final approval.

Here, the reaction of the Settlement Class Members to the Settlement has been overwhelmingly positive. Notice has been provided to potential Settlement Class Members in accordance with the requirements of Rule 23(c)(2)(A) and the Preliminary Approval Order. Because this is a Rule 23(b)(1) class, Settlement Class Members are not afforded the opportunity to request exclusion from the Settlement, nor have any Settlement Class Member requested such exclusion. Additionally, no objections have been filed regarding the Settlement. As a result, there is no question that Settlement Class Members view the Settlement favorably, which weighs heavily in favor of final approval. *See, e.g.*, *Massiah v. MetroPlus Health Plan, Inc.*, 2012 WL 5874655, at *4 (E.D.N.Y. Nov. 20, 2012) ("'The fact that the vast majority of class members neither objected nor opted out is a strong indication' of fairness.") (quoting *Wright v. Stern*, 553 F. Supp. 2d 337, 344–45 (S.D.N.Y. 2008)).

5. The Completion of Fact and Expert Discovery Supports Approval (*Grinnell* Factor 3)

In determining whether to grant final approval, the Court should consider "whether counsel had an adequate appreciation of the merits of the case before negotiating." *Torres v. Gristede's Operating Corp.*, 2010 WL 5507892, at *5 (S.D.N.Y. Dec. 21, 2010). The "pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement . . ., but an aggressive effort to ferret out facts helpful to the prosecution of the suit." *In re Austrian & German Bank*, 80 F. Supp. 2d at 176; *see also In re Bear Sterns*, 909 F. Supp. 2d at 267 (finding

the parties had requisite knowledge to "gauge the strengths and weaknesses of their claims and adequacy of settlement" when they "conducted extensive investigations, obtained and reviewed millions of pages of documents, and briefed and litigated a number of significant legal issues").

As discussed above, the parties completed fact and expert discovery, which involved significant efforts by both sides, before the Settlement was reached. These efforts included BNYM's production (and Named Plaintiffs' review) of nearly 2.7 million pages of documents, Named Plaintiffs production (and BNYM's review) of over 218,000 pages of documents, 12 depositions of all Named Plaintiffs, and eight depositions of BNYM witnesses, including multiple 30(b)(6) witnesses. 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. Lead Class Counsel's experience in similar matters, as well as the efforts made by counsel on both sides confirm that they are sufficiently well apprised of the facts of this action, and the strengths and weaknesses of the case, to make an intelligent analysis of the Settlement. Indeed, the information accumulated through Lead Class Counsel's investigation and discovery efforts allowed them to vigorously negotiate on behalf of the Settlement Class with BNYM and ultimately achieve the Settlement.

6. The Risks of Establishing Liability, Damages, and Maintaining a Class Action Through Trial Support Approval (*Grinnell* Factors 4–6)

"The fourth, fifth, and sixth *Grinnell* factors all relate to continued litigation risks," *i.e.*, the risks of establishing liability, damages, and maintaining the class action through trial. *In re Vitamin C*, 2012 WL 5289514, at *5. Courts routinely approve settlements where plaintiffs would have faced significant legal and factual obstacles to establishing liability. *Thompson v. Metro. Life Ins. Co*, 216 F.R.D. 55, 63 (S.D.N.Y. 2003). Indeed, "[l]itigation inherently involves risks.'" *Willix v. Healthfirst*, 2011WL 754862, at *4 (E.D.N.Y. Feb. 18, 2011) (quoting *In re PaineWebber*, 171 F.R.D. at 126)). "One purpose of a settlement is to avoid the uncertainty of a trial on the merits." *Id.* (quoting *In re Hapt & Co.*, 304 F. Supp. 917, 934 (S.D.N.Y. 1969).)

Although Named Plaintiffs' case is strong, class certification, summary judgment, trial,

and appeals would nonetheless pose a substantial risk of non-recovery. The defenses BNYM has raised, including those addressed above, could have resulted in a substantially diminished or zero recovery. Without a settlement, BNYM would litigate the case vigorously, forcing Named Plaintiffs to overcome dispositive motions, win a contested certification motion, and prevail on BNYM's motion to exclude its expert's testimony, all before trial and any subsequent appeal. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004). Moreover, if Named Plaintiffs prevailed and a class were certified, BNYM likely would continue their challenge to certification through a Rule 23(f) application, and could move to decertify the class, forcing additional rounds of briefing. This process would be lengthy, expensive, and risky. *See Sanofi-Aventis*, 2010 WL 3119374, at *4 (noting that there "is no assurance of obtaining class certification through trial, because a court can reevaluate the appropriateness of certification at any time during the proceedings"); *In re NASDAQ Mkt.–Makers Antitrust Litig.*, 187 F.R.D. at 476–77 (S.D.N.Y. 1998) (risk of class being decertified at trial or risk of class certification being reversed on appeal supported approval of settlement).

The Court "must only weigh the likelihood of success by the plaintiff class against the relief offered by the settlement." *In re Austrian & German Bank*, 80 F. Supp. 2d at 177; *see also Park v. The Thomson Corp.*, 2008 WL 4684232, at *4 (S.D.N.Y. Oct. 22, 2008) ("The complexity of Plaintiff's claims *ipso facto* creates uncertainty."). Here, Named Plaintiffs and the Settlement Class face the risk that they would be unable to overcome BNYM's partial motion for summary judgment, opposition to class certification, motion to exclude Named Plaintiff's expert testimony, and likely additional summary judgment motions (in addition to other pretrial motions, including to exclude key documentary evidence that is central to Named Plaintiffs' claims) before even getting to trial. While Named Plaintiffs are confident that they could certify a class and prevail on the merits of their case, they also recognize that there is no guarantee of success or that any judgment in their favor would be upheld on appeal. Accordingly, absent the Settlement, the Settlement Class would face real risks of recovering nothing, or an amount significantly less than the total Settlement Amount. The proposed Settlement eliminates risk, expense, and delay of

continued litigation and weighs in favor of final approval.

7. The Ability of BNYM to Withstand a Greater Judgment Does Not Weigh Against Approval (*Grinnell* Factor 7)

A court may also consider a defendant's ability to withstand a judgment greater than that secured by settlement, although it is generally not one of the determining factors. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 538 (3d Cir. 2004) (affirming district court's finding that defendant's ability to pay more was irrelevant to assessment of settlement). While the *inability* of a defendant to withstand greater judgment may weigh in favor of approval of a settlement, the *ability* of a defendant to withstand greater judgment does not necessarily weigh against approval of the settlement. Indeed, courts generally do not find the ability of a defendant to withstand a greater judgment to be an impediment to settlement when the other factors favor the settlement, and the ability of defendants to pay more money does not render a settlement unreasonable. *See, e.g.*, *D'Amato*, 236 F.3d at 86; *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 660 (S.D.N.Y. 2012) ("[A] defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair"); *see also Davis v. J.P. Morgan Chase & Co.*, 827 F. Supp. 2d 172, 178 (S.D.N.Y. 2011) (assigning "relatively little weight" to this factor and instead focusing on "the judgment in light of plaintiffs' claims and other factors that the Court has discussed"); *McBean v. City of New York*, 233 F.R.D. 377, 388 (S.D.N.Y. 2006) ("[T]he ability of defendants to pay more, on its own, does not render the settlement unfair, especially when the other *Grinnell* factors favor approval."); *In re IMAX*, 283 F.R.D. at 191 (holding "[a] defendant is not required to empty its coffers before a settlement can be found adequate"). Accordingly, this factor, by itself, does not weigh against final approval of the Settlement.

IV. The Plan of Allocation Is Fair and Reasonable and Should be Approved

A plan for allocating settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable, and adequate. *See In re IMAX*, 283 F.R.D. at 192; *Bear Sterns*, 909 F. Supp. 2d at 270. A plan of allocation is fair and reasonable as long as it has a "rational basis." *FLAG Telecom*, 2010 WL 4537550, at *21 (S.D.N.Y. Nov. 8, 2010); *In re Initial Pub. Offering Sec.*

Litig., 671 F. Supp. 2d 467, 497 (S.D.N.Y. 2009). Generally, a plan of allocation that reimburses class members based on the value of their claims is reasonable. *See In re IMAX*, 283 F.R.D. at 192. Plans of allocation, however, need not be tailored to fit each and every class member with "mathematical precision." *PaineWebber*, 171 F.R.D. at 133. In determining whether a plan of allocation is fair and reasonable, courts give great weight to the opinion of experienced counsel. *See Giant Interactive*, 279 F.R.D. at 163 ("[I]n determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel."); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 145 (S.D.N.Y. 2010) (same).

Here, the Plan of Allocation provides a fair and reasonable method to allocate the Net Settlement Fund among the Identified Class Entities that received Validation Letters and those other Settlement Entities that submitted valid Claims. As discussed above, under the Plan of Allocation, the Net Settlement Fund will be distributed based on calculating the amount of gross dividends that each Settlement Entity received from the BNYM ADRs during the Settlement Class Period. (ECF 196, Ex. A–1.) If that Settlement Entity's calculated *pro rata* distribution is above $10 threshold, the entity will be considered an Authorized Recipient. Each Authorized Recipient will be paid the percentage of the Net Settlement Fund that each Authorized Recipient's gross dividend amount bears to the sum of gross dividend amount of all Authorized Recipients—*i.e.*, the Authorized Recipient's *pro rata* share of the Net Settlement Fund (the "Distribution Amount"). (*Id.*) Lead Class Counsel believes that the Plan of Allocation provides a fair and reasonable method to equitably allocate the Net Settlement Fund among Class Members who suffered losses as a result of the conduct alleged in the Action. Moreover, as noted above, the Notice, which contains the Plan of Allocation, and advises Settlement Class Members of their right to object to proposed Plan of Allocation, have been sent to all or nearly all existing ERISA Entities and published in national periodicals. No objections to the Plan of Allocation have been received.

V. Notice to the Settlement Class Satisfied the Requirements of Rule 23 and Due Process

The Notice Plan approved in the Preliminary Approval Order pursuant to Rule 23(e)(1)(A) and implemented by Lead Class Counsel and the Claims Administrator here amply meets the

requirements for notice of a class settlement under Rule 23(b)(1). Indeed, notice is not required at all for classes certified under Rule 23(b)(1), but courts may, in their discretion, "direct appropriate notice to the class" that "facilitates the opportunity to participate," as the Court has directed in this case. *Nunez v. City of New York*, 2013 WL 765132, at *1 (S.D.N.Y. Feb. 28, 2013). Where notice has been directed, it is "reasonable" if it "fairly apprise[s] the prospective members of the class of the terms of the proposed settlement and the options that are open to them in connection with the proceedings." *Wal-Mart Stores*, 396 F.3d at 114; *see also Cranston v. Hardin*, 504 F.2d 566, 576 (2d Cir. 1974) ("[I]t is sufficient if the notice is reasonably calculated to apprise the members of the pendency of the action").

Both the substance of the Notice provided and the method of its dissemination to potential Settlement Class Members amply satisfied this standard. The Court-approved notices included: (i) an explanation of the nature of the Action and the claims asserted; (ii) the definition of the Settlement Class; (iii) the amount of the Settlement; (iv) a description of the Plan of Allocation; (v) an explanation of the reasons why the Parties are proposing the Settlement; (vi) a statement indicating the attorneys' fees and costs that will be sought; (vii) a description of the Settlement Class Members right to object to the Settlement, the Plan of Allocation, or the requested attorneys' fees and expenses; and (viii) notice of the binding effect of a judgment on the Settlement Class Members.

As noted above, in accordance with the Court's Preliminary Approval Order, beginning on February 5, 2019, the Claims Administrator sent (1) Validation Letters to Identified Class Entities and (2) Postcard Notices to all Potential Class Entities, which amounted to over 867,000 Settlement Entities that received direct notice of the Settlement.[6] Additionally, as an added measure, potential Settlement Class Members were notified via Publication Notice published in the national edition of the *Wall Street Journal* and through transmission of the Settlement

[6] Class Counsel believes this includes nearly every recent Annual Report on Form 5500 for an employee benefit plan filed with the U.S. Department of Labor. This includes nearly all existing ERISA Entities.

information on the *PR Newswire*. All information was also provided on the settlement website.

This combination of Validation Letters, Postcard Notices, Publication Notice, and notice on the website was not only appropriate and consistent with the Notice Plan approved by the Court, but extraordinarily robust in the context of a settlement under Rule 23(b)(1). Named Plaintiff and the Claims Administrator expects that they successfully delivered Notice of the Settlement to almost 98% of the Settlement Entities. (Simmons Decl. ¶ 37); *see also* Fed. Judicial Center Guide (stating "[t]he lynchpin in an objective determination of the adequacy of a proposed notice effort is whether all the notice efforts together will reach a high percentage of the class. It is reasonable to reach between 70–95%.").

VI. Final Certification of the Settlement Class

The Court's Preliminary Approval Order preliminarily certified the Settlement Class for Settlement Purposes under Rule 23(a) and (b)(1). (ECF 196 ¶¶ 5–7.) Nothing has changed since then to alter the propriety of class certification for Settlement purposes and, for all the reasons stated in Named Plaintiffs' Motion for Class Certification, (ECF 141–144; 158–161.) Named Plaintiffs' Preliminary Approval Brief, (ECF 193), and in the Court's Preliminary Approval Order. (ECF 196.) Named Plaintiffs respectfully requests that the Court grant final certification of the Settlement Class under Rule 23(a) and (b)(1).

CONCLUSION

Based on the foregoing, Named Plaintiffs respectfully request that the Court grant final approval to the Settlement and enter the Final Approval Order and Judgment Proposed by the parties and concurrently submitted as exhibits to the Notice of this Motion.

April 23, 2019

Respectfully Submitted,

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