UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: BANK OF NEW YORK MELLON CORP. FOREX TRANSACTIONS LITIGATION This Document Relates to: 11-CV-09175	)	**CIVIL ACTION NO.** MASTER FILE 12 MD 2335 (LAK)

MEMORANDUM OF LAW IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

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Court-appointed Lead Counsel, Bernstein Litowitz Berger & Grossmann LLP ("Lead Counsel" or "BLB&G"), respectfully submits this memorandum of law in support of its motion, on behalf of Securities Counsel, for an award of attorneys' fees in the amount of $45 million.[1] Lead Counsel also seeks reimbursement of $1,616,575.69 in litigation expenses that Securities Counsel reasonably and necessarily incurred in prosecuting and resolving the Action.

PRELIMINARY STATEMENT

The proposed $180 million Settlement of this Securities Action was achieved following three-and-a-half years of vigorous litigation. It was reached after the parties had completed fact discovery and class certification expert discovery, filed class certification briefs, were about to serve merits expert reports, and after the Securities Action was litigated for several months following the settlement of the Customer Class Cases and Government Actions.

To achieve the favorable Settlement now before the Court, Securities Counsel had to devote a vast amount of time and resources. Lead Counsel's efforts began on December 13, 2011, when it acted to preserve investors' claims by filing the first (and to this day only) securities class action against BNYM based on allegations that the Bank had wrongfully overcharged its custody clients for standing instruction FX services. ¶¶29-32.

Securities Counsel's efforts continued through a hard-fought and arduous discovery process. As the Court is aware, on June 20, 2012 Lead Counsel was appointed as one of three firms on the Plaintiffs' Executive Committee, which was charged with overseeing the activities of all counsel and discovery in the multiple private actions coordinated before this court. *See*

[1] Lead Counsel are simultaneously submitting the Declaration of John C. Browne in Support of: (A) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation, and (B) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Browne Declaration" or "Browne Decl.") (cited as "¶"). Capitalized terms have the meanings set out in the Browne Declaration and in the Stipulation of Settlement dated June 25, 2013 ("Stipulation").

also id. ¶34, ¶39. Over the next two years, Lead Counsel worked diligently and with notable success alongside the two other members of the Plaintiffs' Executive Committee to ensure that the coordinated litigations were prosecuted efficiently and effectively. ¶¶39, 56-59, 66-67.

As a member of the Plaintiffs' Executive Committee, Lead Counsel shared with the Customer Class Cases the same burdens, costs and risks of developing the factual record necessary to show that BNYM engaged in a wrongful scheme to overcharge its custody clients for standing instruction FX services. Securities Counsel recognized from the outset that building a convincing record of the underlying FX scheme – burdensome though it would be – was the obligatory first step towards achieving a meaningful recovery in the Securities Action. Simply put, Lead Plaintiff's allegations that Defendants violated the federal securities laws by making material misrepresentations about BNYM's FX pricing practices stood little chance of success absent proof that BNYM did, in fact, engage in wrongful FX pricing practices. ¶¶8, 200-203.

To muster that proof, plaintiffs had to obtain, review and analyze nearly 30 million pages of documents produced by BNYM and roughly 300 non-parties. ¶¶12, 60-72. As described in the accompanying Browne Declaration, reviewing and analyzing this mountain of evidence was an enormous task, but one that was critical to the success of these actions. Securities Counsel also took, defended or otherwise participated in 90 depositions, including 54 depositions of BNYM witnesses and 27 depositions of non-parties taken in locations ranging from London, England to Anchorage, Alaska. ¶¶89-95.

In early February 2015, the Customer Class Cases and the Government Actions settled. Over the next three months, Securities Counsel continued to vigorously prosecute the Securities Action, conducting additional fact depositions, preparing for and defending an expert deposition, completing fact discovery and expert discovery relating to class certification, briefing class

certification, drafting and serving approximately 150 pages of detailed interrogatory responses, doing significant work to prepare merits expert reports on issues such as materiality, price impact and loss causation, and filing a successful motion to de-designate documents BNYM had marked as confidential. ¶¶141-159.

These labors and more were undertaken in the face of an unusually aggressive defense strategy that employed BNYM's vast resources to litigate virtually every issue, no matter how small. Moreover, and importantly, Securities Counsel's efforts were done without any compensation and in the face of truly substantial and unique risks.

Securities Counsel are aware of this Court's view that the risk of non-recovery in securities actions is low.[2] Securities Counsel respectfully submit, however, that the risk profile of securities actions has increased sharply in recent years. *See* pages 18-21, *infra*. In any event, regardless of the risk in most cases, this particular securities class action posed very significant and atypical risks.

To begin, establishing the underlying predicate of Lead Plaintiff's securities claims (the standing instruction FX scheme) was a risky and uncertain proposition from the start. BNYM vigorously advanced a host of substantial arguments in defense of its FX pricing practices, some of which have been accepted by other courts in similar circumstances. *See, e.g., Louisiana Mun. Police Emp. Ret. Sys. v. JPMorgan Chase & Co. et al.*, No. 12-cv-06659, 2013 WL 3357173 (S.D.N.Y. July 3, 2013). Securities Counsel thus faced an enormous and very unusual risk that BNYM's many defenses to the underlying alleged FX scheme would prove successful at the

[2] *See In re IndyMac Mortg.-Backed Sec. Litig.,* No. 09-cv-4583 (LAK), --- F. Supp. 3d ----, 2015 WL 1315147, at *2 (S.D.N.Y. Mar. 24, 2015).

class certification stage, summary judgment, or at trial, which, in turn, would have eviscerated the Securities Action.

On top of proving the underlying customer-oriented scheme, Securities Counsel had to establish the further elements of securities fraud, including materiality, scienter, price impact and loss causation. Indeed, even irrefutable proof that BNYM engaged in wrongful FX practices against its *custody clients* would have been insufficient, standing alone, to establish that Defendants had violated the securities laws by making material misrepresentations that damaged *investors*. This point is evidenced most plainly by the fact that BNYM continued to aggressively litigate the Securities Action well after the Customer Class Cases and the Government Actions settled.[3] ¶¶134-140.

While the additional risks unique to the Securities Action are discussed in more detail below, one in particular bears highlighting. For a securities settlement of this magnitude ($180 million), the declines in the price of BNYM common stock following the alleged corrective disclosures are startlingly small, ranging from $0.32 cents to just $0.98 cents per share. Defendants argued with considerable force that most of these declines were not statistically significant. They also argued that even for the few disclosures that *did* cause statistically significant price declines, none revealed any new information concerning the alleged FX scheme, which had been widely reported long before the end of the Class Period. These and other arguments posed significant and unique risk to the Securities Action.

[3] The powerful factual record developed in discovery by Securities Counsel, along with counsel in the Customer Class Cases, the USAO and the NYAG, ultimately forced BNYM into making certain admissions that it had misrepresented its FX pricing practices to some custody clients. *See* Stipulation and Order of Settlement and Dismissal, dated April 23, 2015, in *United States v. The Bank of New York Mellon,* No. 11 Civ. 06969 (LAK) (S.D.N.Y. Apr. 23, 2015), ECF No. 150. BNYM did not admit to violating the federal securities laws and continued to aggressively litigate the Securities Action.

In light of all the risks in this case, Lead Counsel submits that the $180 million cash settlement is an excellent result. The Settlement represents a recovery of approximately 18% of the Class's likely maximum recoverable damages, which greatly exceeds the percentage of recovery achieved in most securities actions. That such a significant settlement was achieved in a complicated and challenging case with unique risks speaks volumes about the quality of Securities Counsel's representation.

As compensation for their efforts and accomplishments on behalf of the Settlement Class, Lead Counsel seek an award of $45 million in attorneys' fees to be allocated among Securities Counsel, and reimbursement of reasonable litigation expenses. The requested fee amounts to 25% of the Settlement. When analyzed under the lodestar methodology, it results in a fractional lodestar multiplier of 0.96, meaning that no multiplier is sought despite the risks Securities Counsel faced in litigating this case and the enormous amount of effort they expended for several years without receiving any compensation at all. Moreover, as discussed below, Securities Counsel litigated as leanly and efficiently as possible such that the lodestar submitted to the Court reflects a very low blended hourly rate of $394 per hour.

The fee is requested pursuant to an agreement with Lead Plaintiff Oregon reached at the outset of the litigation. Oregon is an institutional investor that has been actively involved in the litigation, has zealously represented the Class, and has reviewed and endorsed the requested fee and expenses as fair and reasonable. *See* Declaration of Frederick M. Boss ("Boss Decl."), attached as Exhibit 1 to the Browne Decl., at ¶10-11. Despite its own efforts on behalf of the Class (including sitting for multiple depositions), Oregon is aware of this Court's view regarding PSLRA service awards, and therefore is not seeking one here.

For all the reasons set forth below, Lead Counsel respectfully submits that the requested fees and expenses are more than justified in light of Securities Counsel's substantial commitment of effort and resources on a contingency basis, as well as the results achieved in this Action.

ARGUMENT

I. THE REQUESTED FEE IS REASONABLE AND SHOULD BE APPROVED

The Supreme Court has emphasized that private securities actions are "an essential supplement to criminal prosecutions and civil enforcement actions" brought by the SEC. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *accord Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (private securities actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'") (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)). Compensating plaintiffs' counsel for bringing these actions is essential, because "[s]uch actions could not be sustained if plaintiffs' counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class." *Hicks v. Morgan Stanley*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005).

A. The Fee Request Is Justified In Light Of The Work Performed, And The Efficiency And Effectiveness Of Securities Counsel's Prosecution

During three-and-a-half years of litigation, Securities Counsel, consisting of just three law firms,[4] devoted enormous efforts to the prosecution of this Securities Action and ultimately

[4] As described in the Browne Declaration, BLB&G and Stoll Berne were the two firms that jointly litigated this case from the time of the filing of the amended complaint through settlement. BLB&G and Stoll Berne also acted as co-counsel to Court-appointed Lead Plaintiff Oregon. In that capacity, these firms focused on prosecuting all aspects of the case on behalf of the Class, dividing responsibilities as appropriate to maximize efficiencies. *See, e.g.,* ¶169. Additional Plaintiffs' Counsel at Saxena White LLP ("Saxena White") were counsel for Named Plaintiffs Pompano Beach General Employees Retirement System ("Pompano") and Local 235 Benefit Fund ("Local 235"), who asserted claims under the Securities Act of 1933 ("Securities Act"), and focused their efforts on that aspect of the litigation.

achieved an outstanding recovery for the Class. To achieve the proposed Settlement, Securities Counsel devoted more than 118,000 hours to prosecuting the case, with a total lodestar of roughly $46,800,000, which reflects a modest blended hourly rate of $394. Moreover, the submitted lodestar figure is understated because it does not include any time for substantial work done after May 21, 2015, when a term sheet was executed regarding the proposed Settlement.[5]

As described below, Securities Counsel litigated this case as leanly as possible given its enormous complexity and many challenges. Throughout the litigation, Lead Counsel – drawing on its considerable experience in large cases – strove to ensure that the case was staffed with no more than the minimum number of attorneys and other professionals needed to adequately represent the Class in this contentious litigation. *See* Section II.A, *infra.* Lead Counsel firmly believes that the substantial work performed by Securities Counsel, as reflected in the submitted lodestar, was absolutely essential to the positive outcome achieved in this litigation. ¶¶235-236.

1. Achieving The Proposed Settlement Required An Enormous Commitment Of Time, Resources, And Effort

Securities Counsel's efforts on behalf of the Class began in 2011 when Lead Counsel acted to protect investors' interests by investigating and filing the first (and only) securities class action relating to these matters. ¶¶27-32. On June 22, 2012, the Court appointed Lead Counsel as one of three firms on the Plaintiffs' Executive Committee charged with overseeing discovery in this action and multiple private customer actions filed against BNYM and coordinated before the Court.[6] ¶¶38-41. From then until the Customer Class Cases and Government Actions settled in early February 2015, Lead Counsel worked diligently in its role as a member of the Plaintiffs'

[5] The time expended after May 21, 2015 includes substantial senior attorney time spent negotiating the final settlement papers, and substantial additional time preparing the plan of allocation and the Settlement notice, responding to Class member inquiries, and preparing and filing settlement approval papers.

[6] The other two member firms were the two primary lead counsel in the Customer Class Cases. ¶8.

Executive Committee to not only prosecute this action, but to coordinate discovery efforts with the Customer Class Cases and the Government Actions. ¶¶39, 56-58, 66-67.

During the litigation of these actions, Securities Counsel worked to obtain, review, and analyze nearly 30 million pages of documents (¶¶3, 12, 261) and took, defended or otherwise participated in 90 depositions. These included 54 depositions of BNYM's fact witnesses, with Lead Counsel taking the lead for all plaintiffs in questioning many of BNYM's most senior officers, including the Bank's former Chief Executive Officer, its current Chief Financial Officer, its former Chief Financial Officer, its current Controller, and an important two-day deposition of the former head of BNYM's FX division. ¶¶91, 93; *see also* ¶¶3, 13, 57, 90-91, 96, 173.

Securities Counsel also had to respond to a truly massive non-party discovery effort instigated by Defendants. Defendants identified hundreds of non-parties as having relevant information to this litigation, they and the USAO issued roughly 300 non-party document subpoenas, and Defendants initially sought to depose up to 150 non-parties (although this eventually was limited by the Court). ¶¶12, 61, 89. As demonstrated by the arguments BNYM raised in opposition to class certification in the Securities Action, Defendants' non-party discovery effort was targeted not only at the Customer Class Cases, but also at the Securities Action. *See* ECF No. 599 at 7 (arguing that discovery of non-parties had revealed that "[n]o fewer than 456 putative class members (collectively holding at least 65.3% of BNYM's outstanding shares), had inquiry notice of BNYM's pricing practices through their direct use of BNYM's SI service."). ¶139.

Defendants' tactics forced Securities Counsel to review and closely analyze 4 million pages of non-party documents, conduct numerous meet-and-confers relating to non-party

discovery, and ultimately brief several motions seeking to limit non-party depositions when it became clear that a reasonable limitation could not be agreed to with Defendants. Securities Counsel then had to prepare for and participate in 27 non-party depositions on a short schedule in locations ranging from Anchorage, Alaska to London, England. ¶¶13, 182.

At the same time the parties were deposing BNYM witnesses and participating in burdensome non-party discovery, Securities Counsel had to prepare for and defend the depositions of nine witnesses associated with plaintiffs, including the depositions of six of Lead Plaintiff Oregon's current and former employees and investment managers and, later, the deposition of Lead Plaintiffs' market efficiency expert. *See* ¶96; *see also* Declaration of Scott Shorr, attached as Exhibit 4B to the Browne Decl., at ¶4. These depositions were conducted in Portland, Oregon; Seattle, Washington; Ft. Lauderdale, Florida; Boston, Massachusetts; and Richmond, Virginia. ¶¶96, 142, 149.

In early February 2015, the Customer Class Cases and the Government Actions reached a settlement and stopped litigating or paying any share of ongoing litigation costs. Despite sincere efforts, the parties in the Securities Action were far apart in their settlement discussions at that time. Accordingly, Securities Counsel continued to vigorously prosecute the Securities Action for three additional months – taking it through the end of fact discovery and the end of class certification expert discovery, conducting a further six depositions, exchanging class certification briefs, drafting and serving nearly 150 pages of extremely detailed interrogatory responses, filing a successful motion to de-designate documents that BNYM had improperly marked confidential, and doing substantial work in the preparation of merits expert reports, which were due to be served in less than two weeks when the Settlement was ultimately reached. ¶¶141-159.

2. Document Discovery Was Enormously Resource Intensive, And Integral To Lead Plaintiffs' Ability To Support Its Claims And Achieve The Proposed Settlement

Among the many litigation challenges Securities Counsel faced during the course of this Action, one of the most daunting was the need to effectively analyze the massive number of documents produced by BNYM and non-parties. The importance of this task, and the burdens associated with it, should not be discounted. As noted, roughly 30 million pages of documents were produced, with 25 million pages coming from BNYM's files and nearly 4 million additional documents from hundreds of non-parties who had used BNYM's standing instruction FX services over the course of many years.

These documents concerned FX markets and pricing practices that were entirely unregulated and highly complex. In a single day, the global FX market could consist of hundreds of thousands or even millions of transactions in dozens of different currencies taking place in private trades negotiated between large financial institutions across the globe. ¶11. Moreover, BNYM provided standing instruction FX services to its clients through a wide variety of contractual arrangements, memorialized through custody agreements, master FX agreements, requests for proposals, FX procedure forms and in other ways that differed greatly across a wide range of custody clients located in many different states (and other countries) and who used standing instruction FX services for different reasons. It was a monumental task to process these documents and identify those that could be used to help establish the Bank's liability.

This task was made harder by the high number of emails contained in the production – more than 670,000 emails with at least 750,000 attachments. These emails – some of which the Court has viewed *in camera* – were critical to developing plaintiffs' claims. Moreover, many documents were spreadsheets, trading data and other "non-traditional" documents relating to intentionally opaque FX practices that BNYM was deliberately trying to conceal. ¶¶60-72.

There was no blueprint for reviewing and analyzing these documents at the outset of the case and plaintiffs had to devise a process to do so in a short timeframe. This was not easy. Each of the documents, including hundreds of thousands of emails, had to be read and understood by attorneys who had sufficient familiarity with the relevant legal and factual issues, could exercise independent judgment as to how a particular document might be used offensively or defensively, and had the willingness to work extremely hard in a compressed period so that Securities Counsel could meet the demanding pre-trial schedule in this case. ¶¶170-179. Ultimately, the Plaintiffs' Executive Committee was successful in constructing an efficient process to identify and digest numerous documents, which proved absolutely critical to achieving the successful resolution of all of these actions. ¶¶66-72.

Important documents, once found, had to be distilled into a coherent narrative to be used effectively in the depositions of BNYM and non-party witnesses. Documents identified as hot during the initial review had to be organized and passed up the chain to the more senior attorneys responsible for taking those depositions. These attorneys, in turn, had to understand how the documents fit into the larger picture of the litigation, how a potential witness was likely to testify when presented with the document, and how the documents could be used in forming lines of direct and cross-examination to help prove Lead Plaintiff's claims. To assist the more senior attorneys, the attorneys responsible for analyzing the documents prepared detailed "witness kits" that often included 200 or more documents relevant to each particular deponent and contained a detailed memorandum explaining the most important documents and suggesting how they might be used at the depositions. The attorneys would then work closely with the senior attorneys in preparing for the deposition. ¶¶173-175.

These efforts were essential in developing useful testimony from BNYM witnesses who were extensively prepped in advance of their depositions and strikingly recalcitrant in their testimony. The careful review and analysis of these documents also allowed Securities Counsel to serve at the end of fact discovery detailed responses to interrogatories propounded by BNYM with the responses citing heavily to documents and deposition testimony. ¶¶85-87, 145-147.

The sheer number of documents and depositions involved, and the complexity of the issues, would have required a substantial investment of time and effort in any case. These burdens were increased here, however, due to a uniquely aggressive defense strategy employed by BNYM. The Bank's full time legal team from Kellogg Huber Hansen Todd Evans & Figel PLLC ("Kellogg Huber") included at least 12 partners (out of 32 at the firm) and an additional 14 associates and counsel. Even this number is understated as these were simply the most visible attorneys acting for BNYM – the Bank obviously had additional attorneys behind the scenes. ¶¶168.[7]

BNYM's large legal team, consisting of multiple senior attorneys expended enormous efforts defending BNYM. Securities Counsel had no choice but to match those efforts step for step. As just one example, BNYM sought (and initially obtained) permission from the Court to take up to 150 non-party depositions, and eventually took 27 non-party depositions. Most of these were crammed into the final four months of fact discovery and were scheduled to take place in far-flung locations at the same time plaintiffs were engaging in class certification expert discovery, trying to review BNYM's massive document production, and deposing the most senior BNYM witnesses. ¶¶13, 106-112.

[7] This stands in marked contrast to the lean staffing employed by Lead Counsel, as described below. *See* Section II.A, *infra*; *see also* ¶¶163-168.

* * *

In short, the substantial work Securities Counsel devoted to this litigation was necessary and reasonable, and directly led to the proposed Settlement.

3. Lead Counsel Worked Hard To Coordinate With The Other Actions To Ensure That The Litigations Were Prosecuted Efficiently

In its role as a member of the Plaintiffs' Executive Committee, Lead Counsel also spent substantial time coordinating with the Customer Class Cases and the Government Actions. Coordination presented many challenges, as there were multiple plaintiff groups with sometimes divergent interests, and the Customer Class Cases, the Government Cases, and the Securities Action all had different elements of proof. The Securities Action in particular faced additional defenses and burdens relating to damages under the federal securities laws. Further, the attorneys prosecuting each of these cases did not always see eye-to-eye on important tactical and strategic decisions, requiring multiple communications to resolve differences.

The Plaintiffs' Executive Committee met these challenges. Indeed, in Lead Counsel's experience, the level of coordination achieved between the Plaintiffs' Executive Committee and the attorneys working for the USAO and NYAG is unprecedented. ¶20. Securities Counsel was in near-daily communication with the extremely able and dedicated team of attorneys at the USAO's office as the parties worked at a frenetic pace in discovery. ¶¶56, 58. Lead Counsel conferred with both the Plaintiffs' Executive Committee and the government attorneys in advance of depositions and Lead Counsel willingly shared its work product, including drafts of briefs, legal research, deposition and witness kits, and drafts of interrogatories with the other MDL plaintiffs and the government – who were very complimentary of this work product on multiple occasions. ¶¶161-162.

The Plaintiffs' Executive Committee also worked hard within the private actions to efficiently coordinate litigation efforts and minimize costs. As detailed in the Browne Declaration, the three firms on the Plaintiffs' Executive Committee negotiated favorable arrangements with vendors and paid equal shares of the costs (until the Customer Class Cases settled and Lead Counsel assumed their share) relating to document hosting services, court reporters and other common expenses. ¶¶40, 66. These firms also assigned responsibility for litigation tasks so that there was no unnecessary duplication of effort, divvying among the firms responsibility for drafting briefs and mediation statements, preparing for and questioning witnesses at depositions, and innumerable other tasks that arose during these litigations. ¶¶56-59, 160-162.

Finally, coordination between counsel in the Securities Action itself was efficient and did not result in unnecessary or duplicative work to the detriment of the Class. In this case there were only three firms working on the Securities Action, so it was not terribly difficult to assign responsibility in an efficient way. Indeed, only two of the firms (BLB&G and Stoll Berne) were engaged in all aspects of the litigation, as the third firm focused its efforts solely on the Securities Act claims. ¶¶3, 169. BLB&G and Stoll Berne forged an extremely effective working relationship, dividing efforts along lines that made the most sense – for instance, Stoll Berne had a large role in preparing for the defense of witnesses from Lead Plaintiff Oregon, and because Stoll Berne is located in Portland, Oregon, it covered many non-party depositions that took place on the West Coast, thus reducing the costs to the Class. ¶¶169, 179; Shorr Decl. ¶4; Boss Decl. ¶5.

There were, of course, certain tasks that had to be performed by Securities Counsel in the service of their fiduciary duties to the investor Class, and the responsibility for these tasks could

not be divvied out to counsel in the Customer Class Cases who represented different constituents with different claims. For example, Securities Counsel had no control over when or whether the Customer Class Cases or the Government Actions might reach a resolution of their actions. This meant that Securities Counsel could not simply rely on the other plaintiffs to develop the record necessary to prove the underlying FX scheme but instead had to put in the necessary work to develop this knowledge itself. ¶¶8, 59, 163.

These efforts proved wise (and necessary) when the Customer Class Cases and the Government Actions settled before fact discovery was complete. Securities Counsel was able to continue to litigate aggressively, secure in the knowledge that they were fully familiar with the documents, evidence and issues relating to the underlying FX fraud. This greatly benefited the Class in the Securities Action. ¶59.

B. The Requested Fee Results In A Fractional Lodestar Multiplier Based On Modest Hourly Rates

The $45 million fee sought here would result in a fractional multiplier of 0.96 of the total lodestar contributed by Securities Counsel, reimbursing Securities Counsel slightly less than their time expended in the litigation, despite the fact that counsel took this case on a contingency basis, faced many risks, and have not been paid since the litigation was initiated by Lead Counsel nearly four years ago.

The requested 0.96 multiplier is unquestionably below the range of multipliers commonly awarded in securities class actions and other comparable litigation. In cases of this nature, fees representing multiples above the lodestar are awarded by many courts to reflect the contingency fee risk and other relevant factors.[8] Indeed, the average lodestar multiplier awarded in every

[8] *See In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM) (PED), 2010 WL 4537550, at *26 (S.D.N.Y. Nov. 8, 2010) ("a positive multiplier is typically applied to the lodestar in recognition of

securities class action brought since the enactment of the PSLRA that has settled in the range from $130 million to $230 million (plus or minus $50 million from the proposed Settlement in this case) is **2.03** – or more than double the multiplier requested here.[9]

Moreover, the lodestar is based on Securities Counsel's hourly rates as reflected in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. Securities Counsel's rates range from $365 to $975 for partners and counsel, and $280 to $550 for associates. The rates for the attorneys who primarily conducted document analysis (including analysis used in connection with depositions) ranged from $280 to $395.

These rates are below rates that this Court has found reasonable in other cases.[10] They are also consistent with the prevailing market rates for complex securities class action litigation in the Southern District of New York.[11] Notably, the blended hourly rate for all professionals is

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the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors"); *In re Comverse Tech., Inc., Sec. Litig.,* No. 06-1825, 2010 WL 2653354, at *5 (E.D.N.Y. June 23, 2010) ("Where, as here, counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar.").

[9] *See* Browne Decl. Ex. 6; *see also, e.g., In re Merck & Co., Inc. Vytorin/Zetia Sec. Litig.,* No. 08-2177 (DMC)(JAD), 2013 WL 5505744, at *48 (D.N.J. Oct. 1, 2013) (awarding 28% of $215 million settlement fund representing a 1.3 multiplier); *Alaska Elec. Pension Fund v. Pharmacia Corp.,* No. 03-1519 (AET), slip op. at 4 (D.N.J. Jan. 30, 2013), ECF No. 405 (awarding 27.5% of $164 million settlement fund representing a 1.7 multiplier) (Browne Decl. Ex. 7); *Bd. of Trustees of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, No. 09 CIV. 686 SAS, 2012 WL 2064907, at *3 (S.D.N.Y. June 7, 2012) (awarding 25% fee of $150 settlement representing a 2.86 multiplier); *Comverse*, 2010 WL 2653354, at *5 (awarding 25% of $225 million settlement representing a 2.78 multiplier and noting that "[t]his multiplier is well within the range awarded in comparable settlements"); *Cornwell v. Credit Suisse Grp.*, No. 08-cv-03758 (VM), slip op. at 4 (S.D.N.Y. July 18, 2011), ECF No. 117 (awarding fee representing a 4.7 multiplier) (Browne Decl. Ex. 8); *Maley v. Del Global Techs.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (awarding fee equal to a 4.65 multiplier, which was "well within the range awarded by courts in this Circuit and courts throughout the country").

[10] *See IndyMac,* 2015 WL 1315147, at *5 (rates of $210-$420 for associates and $410-$835 for partners reasonable). It bears noting that the partner on these case who billed at a rate of $975 is Max Berger, who has more than 35 years of experience litigating securities class actions and primarily focused his efforts where they were most valuable: mediation and settlement negotiations. ¶165.

[11] *See In re Platinum & Palladium Commodities Litig.,* No. 10CV3617, 2015 WL 4560206, at *4 (S.D.N.Y. July 7, 2015) (approving hourly rates for attorneys and staff ranging from $250 to $950 as

a very low $394, which is eminently fair and reasonable. *See Indymac*, 2015 WL 1315147, at *6 (awarding fee that "result[ed] in a blended hourly rate of $514.29.")

Finally, the rates reflected in Securities Counsel's lodestar compare favorably to the rates charged by BNYM's primary defense counsel in this action, which range from $600 to up to $1,100 for its partners and from $395 to $525 for its associates. Kellogg Huber's rates are taken from a 2014 fee application filed by that firm in a recent antitrust case. *See* Declaration of Geoffrey P. Miller, *Standard Iron Works v. Arcelormittal*, No. 08-CV-5214 (N.D. Ill. October 1, 2014), ECF No. 519-5, at ¶ 48 (Browne Decl. Ex. 9). In that action, the class counsel group that Kellogg Huber was part of received an award of 33% of a $163.9 million recovery, representing a 1.97 multiplier on those attorneys' hourly rates. *See Standard Iron Works v. Arcelormittal*, No. 08-CV-5214, slip op. at 3 (N.D. Ill. October 22, 2014), ECF No. 539 (Browne Decl. Ex. 10).

C. The Requested Fee Is Particularly Reasonable In Light Of The Risks Present In This Action

Securities Counsel are familiar with the Court's view that securities class actions "practically always settle, meaning that the risk of total non-recovery [is] almost non-existent." *IndyMac,* 2015 WL 1315147, at *4. Securities Counsel respectfully submit, however, that settlement in this case was not inevitable at any stage of the litigation, and certainly not at the high level ultimately achieved.

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reasonable in light of "the attorneys' legal experience, and the nature and caliber of the work performed"); *City of Providence v. Aeropostale, Inc.*, No. 11 CIV. 7132 CM GWG, 2014 WL 1883494, at *13 (S.D.N.Y. May 9, 2014) (approving billing rates in 2014 securities class action ranging from "$640 to $875 for partners, $550 to $725 for of counsels, and $335 to $665 for other attorneys"); *aff'd*, 607 F. App'x 73 (2d Cir. 2015); *Comverse*, 2010 WL 2653354, at *4 (finding in 2010, hourly rates of up to $880 were "not extraordinary for top New York law firms").

1. General Risks Relating To Securities Class Action Litigation

As a threshold matter, the latest empirical data suggests that the risk profile of securities class actions in general has increased sharply in recent years.[12] Cornerstone Research has published data showing that between 2008 and 2011 a majority of securities class actions were dismissed – and the percentage of dismissals was as high as 59% in 2010 and 58% in 2011. *See* Cornerstone Research, *Securities Class Action Filings, 2014 Year In Review* (2015) at 12; *see also* ¶192. The consulting firm NERA has published similar data showing that, for securities class actions where a motion to dismiss was decided from January 2000 through December 2014, 54% were dismissed.[13]

Nor does surviving a motion to dismiss guarantee that a securities class action will settle, and certainly not when lead counsel are willing to assume the burdens and take the risks of pushing cases deep into discovery and beyond in an effort to obtain the maximum settlement for the Class. For example, class certification recently has been denied in several securities class actions filed in the Southern District of New York.[14] Other seemingly strong securities class

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[12] In *IndyMac* the Court cited the Second Circuit's decision in *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000) for the proposition that securities class actions always settle. *See IndyMac,* 2015 WL 1315147, at *4 n.50. Notably, however, *Goldberger* based that statement on a 1991 law review article, which relied exclusively on pre-PSLRA data that is now 25 years old. *See* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 578 (1991). That law review article, moreover, has been criticized for its methodology and small sample size. *See* Beverly C. Moore, Jr., "*Empirical Study" of Securities Class Action Settlements Lacks Merit*, 14 CLASS ACTION REP. 1 (1991) ("The 'sample' in this 'empirical study' consisted of nine cases, all but one filed in the same district court. . . during the same time frame (the first half of 1983))"; *see also* James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 503 (1997) (asking whether "it is appropriate . . . to draw such a sweeping conclusion from a sample [so] slender").

[13] *See* Dr. Renzo Comolli and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2014 Full-Year Review* (NERA 2015) at 18, Figure 15; *see also* ¶192.

[14] *See, e.g., Gordon v. Sonar Cap. Mgmt. LLC*, 2015 WL 1283636 (S.D.N.Y. Mar. 19, 2015); *Sicav v. James Jun* Wang, 2015 WL 268855 (S.D.N.Y. Jan. 21, 2015); *IBEW Local 90 Pension Fund v. Deutsche Bank AG*, No. 11 CIV. 4209, 2013 WL 5815472 (S.D.N.Y. Oct. 29, 2013); *George v. China Automotive Systems, Inc.*, 2013 WL 3357170 (S.D.N.Y. July 3, 2013).

actions have been dismissed at summary judgment after years of litigation,[15] and even cases that survive summary judgment face genuine dismissal risk prior to trial in connection with *Daubert* motions. In *In re Pfizer Inc. Securities Litigation*, for instance, Judge Swain, after initially denying summary judgment motions, later granted the defendants' motion *in limine* to exclude the testimony of the plaintiffs' damages expert just weeks before trial was set to start. She then dismissed the case for failure to prove loss causation and damages.[16] *See generally* ¶¶193-194.

Even when securities class action plaintiffs are successful in getting a class certified, overcoming summary judgment, surviving *Daubert* motions, and *winning* at trial, there are still very real risks that there will be no recovery. ¶195. In *In re BankAtlantic Bancorp, Inc.* (S.D. Fla. 2010), a jury rendered a verdict in plaintiffs' favor on liability in 2010. The district court subsequently reversed the verdict, granted defendants' motion for judgment as a matter of law and entered judgment in favor of the defendants on all claims. 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011).[17] Another example is found in *Jaffe v. Household Int'l, Inc.* (N.D. Ill. 2009), where a jury returned a verdict for plaintiffs in May 2009. ¶198. In May 2015, however, the Seventh Circuit reversed and ordered a new trial on loss causation and damages. *See Glickenhaus & Co. v. Household Int'l*, *Inc.*, 787 F.3d 408 (7th Cir. 2015).

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[15] *See, e.g., In re Omnicom Grp., Inc. Sec. Litig.* 541 F. Supp. 2d 546, 554-55 (S.D.N.Y. 2008), *aff'd* 597 F.3d 501 (2d Cir. 2010); *see also In re Xerox Corp. Sec. Litig.*, 935 F. Supp. 2d 448 (D. Conn. 2013), *aff'd* 766 F.3d 172 (2d Cir. 2014).

[16] *See In re Pfizer Inc. Sec. Litig.*, No. 4-CV-9866, 2014 WL 3291230 (S.D.N.Y. July 8, 2014); *see also Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse First Boston*, 853 F. Supp. 2d 181 (D. Mass. 2012), *aff'd* 752 F.3d 82 (1st Cir. 2014) (granting summary judgment *sua sponte* after striking plaintiffs' expert and finding that there was no evidence of loss causation).

[17] The Eleventh Circuit affirmed the district court's ruling, finding that there was insufficient evidence to support a finding of loss causation. *See Hubbard v. BankAtlantic Bancorp, Inc.,* 688 F.3d 713, 725 (11th Cir. 2012).

In each of these cases the underlying lawsuits were perceived as strong, the actions were litigated for several years with the investment of significant resources, but investors (and their attorneys) ultimately recovered nothing.

Moreover, an additional risk has crept into securities class actions in recent years – the risk that the governing law could undergo a major shift in the midst of litigation. ¶¶196-197. The Supreme Court has shown an increasing willingness to take up issues relating to securities class actions, and has sometimes ruled in a way that negatively impacted long-pending cases. Perhaps the highest profile example of this is *In re Vivendi Universal, S.A. Securities Litigation* (S.D.N.Y. 2010), where a jury found Vivendi liable for violations of the federal securities laws after a trial in the Southern District of New York in 2010. ¶196. Subsequently, the class was substantially narrowed by the Supreme Court's opinion in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2011) (holding that Section 10(b) does not apply extraterritorially), which eviscerated the plaintiffs' damage claims. Since then, the parties have been arguing over individualized issues of reliance and the apportionment of damages to various class members.

Thus, thirteen years after the action commenced and nearly five years after the jury verdict was delivered for plaintiffs, the litigation remains ongoing without payment. In fact, Judge Scheindlin recently granted summary judgment in favor of Vivendi with respect to claims by a large investor group, ruling that Vivendi had rebutted the presumption of reliance with respect to that asset manager and rejecting the group's $57 million damages claim.[18]

[18] *See In re Vivendi Universal, S.A. Sec. Litig.*, No. 02-cv-05571, 2015 WL 4758869 (S.D.N.Y. Aug. 11, 2015). *Morrison* had a similar impact on a case litigated by Lead Counsel. In *In re Alstom Sa Securities Litigation*, No. 03-cv-6595 (GWG) (S.D.N.Y.), after seven years of litigation, including completing fact discovery, *Morrison* eliminated almost the entire class and led to a settlement of $6.95 million. Lead Counsel there did not seek any fees despite years of attorney time expended.

A final example regarding the risks of changing law, and one with which both this Court and Lead Counsel are familiar, is the Supreme Court's decision in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015), which has impacted several pending cases.[19]

2. Specific Risks To Establishing Liability In This Securities Action

While Securities Counsel believe the foregoing empirical data and examples are relevant to assessing the risk profile of securities class actions in general, each case of course must be judged on its own, and Securities Counsel respectfully submit that the risks present in this Securities Action were uniquely high. ¶¶200-216.

At the outset, it is worth noting that no government entity or regulator has ever asserted a securities claim on behalf of BNYM's investors relating to the Bank's standing instruction FX practices. The government actions that were filed against BNYM related solely to the customer-oriented FX scheme, not to any alleged securities fraud. Thus, while they potentially may have been viewed as bolstering the private claims against BNYM's *custody clients*, they were not understood as providing material support for the notion that BNYM had defrauded its *investors*. Take for instance the disclosure that ends the Class Period: the October 4, 2011 announcement of the Government Actions against BNYM caused the Bank's stock to drop just $0.54 cents, from $18.82 to $18.28 per share. This does not qualify as the type of large price decline that sometimes follows in the wake of a corporate accounting restatement, the firing of a CFO, the

[19] *Compare In re Fairway Grp. Holding Corp. Sec. Litig.*, No. 14 Civ. 0950 (LAK) (AJP), 2015 WL 249508 (S.D.N.Y. Jan. 20, 2015) (report & recommendation largely denying motions to dismiss) *with* 2015 WL 4931357 (S.D.N.Y. Aug. 19, 2015) (report & recommendation granting motions to dismiss after additional briefing was ordered by this Court in light of *Omnicare*)*; see also City of Westland Police & Fire Ret. Sys. v. Metlife, Inc.*, No. 12-cv-00256-LAK, slip op. (S.D.N.Y. Sept. 11, 2015).

withdrawal of an audit opinion, or some other strong indication that a corporation may have committed securities fraud.

This fact, along with the overall high risk profile and heavy burdens inherent in this Action, most likely explains why no securities actions were filed relating to these matters until Lead Counsel filed the first and only securities fraud complaint in December 2011. ¶¶25-32.

Indeed, the burdens and risks to this Securities Action were many. ¶¶200-216. It was obvious from the outset of this case that establishing the underlying predicate to Lead Plaintiff's securities claims (the standing instruction FX scheme) was fraught with risk and uncertainty. BNYM raised a host of substantial arguments in defense of its FX pricing practices, including that it was entitled to earn a spread on its standing instruction FX services, that the vast majority of its custodial contracts did not prohibit it from doing so, and there was nothing improper or wrongful about the FX revenue the Bank earned during the Class Period. ¶204. Further, BNYM asserted throughout the litigation, including in its opposition to class certification in the Securities Action, that its custody clients and their sophisticated investment managers were well aware that the bank was charging spreads on its standing instruction FX services but continued to use those services because of the convenience and quality they provided.[20]

Thus, Defendants had substantial arguments in defense of their standing instruction FX pricing practices. Indeed, some of these same arguments had been accepted by other courts in similar circumstances. *See, e.g., Louisiana Mun. Police Emp. Ret. Sys. v. JPMorgan Chase*, 2013 WL 3357173. Securities Counsel thus faced a very unusual risk that BNYM's many

[20] ¶¶61, 204; *see also* ECF No. 599 at 7 (arguing that "[n]o fewer than 456 putative class members (collectively holding at least 65.3% of BNYM's outstanding shares), had inquiry notice of BNYM's pricing practices through their direct use of BNYM's SI service.")

defenses to the underlying alleged FX scheme would prove successful, for example, at summary judgment or at trial, which would have eviscerated the Securities Action. ¶205.

On top of proving the underlying customer-oriented scheme, Securities Counsel bore additional risks in establishing the elements of securities fraud. ¶¶206-216. Defendants argued vigorously that, even if Lead Plaintiff successfully established that certain custodial contracts prohibited the charging of a mark-up, the revenue generated under those contracts was an immaterial amount. ¶206. In support of this argument, BNYM pointed to the Bank's yearly revenues of $13.9 billion, its $1.17 trillion in assets under management and its $25 trillion in assets under custody and administration. In the face of these vast sums, the Bank had a serious argument that even a widespread customer fraud (if proven) was immaterial to investors because it amounted at most to a few hundred million dollars over multiple years. These arguments posed a real risk that the Court would find as a matter of law that this was immaterial to investors.

Lead Plaintiff also faced risks in establishing that Defendants acted with *scienter* – *i.e.*, that they intentionally or recklessly misled BNYM investors (as opposed to its custody clients). ¶207. Defendants argued that they had no intention to deceive BNYM's investors, they barely made any statements in their public filings about the Bank's standing instruction practices, and to the extent it could be said any misstatements were made, they were made with a good faith belief in their truth and were at worst negligent.

Finally, Lead Plaintiff was required to establish the applicability of the "fraud on the market" theory of reliance, including by demonstrating "price impact" by showing that the alleged misrepresentations on BNYM's website and elsewhere impacted the price of BNYM common stock. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2417-18

(2014). In particular, Defendants had amassed powerful arguments that statements on its customer-facing corporate website, even if misleading, could not have been reasonably relied upon – or even seen – by investors purchasing BNYM stock. ¶208. In this regard, Defendants pointed out that the website was difficult to access (at certain points in the Class Period they claimed it was password protected), was completely separate from the investor relations portion of the Bank's website, and it was never mentioned in analyst reports or news articles about BNYM. When combined with the already noted small stock price declines at issue in this case, establishing price impact presented real challenges to Lead Plaintiff. *Id.*

Indeed, in the exchange of rebuttal expert reports that took place on April 27, 2015, BNYM designated no less than five experts to give testimony on the issues of price impact and materiality. ¶209. Thus, at a minimum establishing price impact would have been a risky and expensive battle of experts with no certain outcome.

3. Specific Risks To Establishing Loss Causation In This Action

Even if Lead Plaintiff had been able to establish liability, there were serious risks to establishing damages. ¶¶210-216. As noted, the declines in the price of BNYM common stock following each of the corrective disclosures alleged in the complaint were small, ranging from $0.32 cents to just $0.98 cents per share. ¶213. These small stock price declines gave Defendants unique and particularly potent arguments that Lead Plaintiff would not be able to carry its burden of proving loss causation.

By way of background, the Complaint alleged that Defendants' fraudulent FX scheme was gradually revealed to the investing public through a series of nine partial allegedly corrective disclosures beginning in January 2011 when it was revealed that certain Virginia pension funds had filed a FX-related *qui tam* lawsuit against BNYM. ¶212. Lead Plaintiff alleged that there were subsequent additional disclosures, including news reports discussing the alleged FX scheme

and additional private lawsuits filed, with the truth being finally revealed to the market on October 4, 2011 upon the filing of the Government Actions.

Defendants had multiple lines of attack on Lead Plaintiff's loss causation allegations. As an initial matter, Defendants would have argued that the declines in the prices of BNYM common stock that followed each alleged corrective disclosure were small, and that many of the alleged "corrective" disclosure dates did not involve stock price declines that were statistically significant in light of broader market movements.[21]

Defendants further contended that none of the alleged corrective disclosures involved the revelation of any new information concerning the alleged FX fraud. ¶214. Indeed, Defendants argued with considerable force that the market was aware of the possibility that the Bank was potentially defrauding its custodial clients no later than January 28, 2011 (when the Virginia suit was revealed and BNYM's stock price did not suffer a statistically significant decline). The remaining "corrective" disclosures essentially repeated the same or similar information without adding any new details. These were very substantial arguments and presented enormous risk to the Securities Action. ¶¶214-215.

At a minimum, these arguments would have involved a hotly contested battle of experts – as noted Defendants identified five separate experts who were going to file reports on these issues – and Lead Plaintiffs had no guarantee of success. If Defendants were successful in these arguments, they would have eliminated the Class's claim to compensable damages.

[21] *See City of Westland Police and Fire Retirement Sys. v. Metlife, Inc.*, 928 F. Supp. 2d 705, 715 (S.D.N.Y. 2013) (Kaplan, J.) (granting motion to dismiss for failure to plead loss causation because "MetLife stock opened on August 5 at $.59 higher than its August 4 closing price and then closed only $.55 below. Plaintiff does not provide any basis for suggesting that the market considered these investigations to be material or the cause of the price drop.")

II. OTHER FACTORS CONSIDERED BY COURTS IN THE SECOND CIRCUIT CONFIRM THAT THE REQUESTED FEE IS FAIR AND REASONABLE

The Second Circuit in *Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43, 50 (2d Cir. 2000) set forth the following criteria that courts should consider when reviewing a request for attorneys' fees in a common fund case: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. Consideration of these factors, together with the analyses above, demonstrates that the fee requested by Lead Counsel is reasonable.

A. The Time and Labor Expended Support the Requested Fee

As discussed above, the substantial time and effort invested by Securities Counsel provides further support for the fee request. This is particularly so given that counsel took care to litigate as leanly and efficiently as possible under the circumstances. ¶¶234-239; *see generally* ¶¶22-190.

This litigation was fiercely contested and Lead Counsel respectfully submit that it was only through the substantial efforts detailed above and in the Browne Declaration that the proposed Settlement was achieved. During an intense discovery period, Securities Counsel were involved in multiple depositions, court filings, meet-and-confers, document production issues and mediation efforts. When the Customer Class Cases and the Government Actions settled, Securities Counsel continued to vigorously prosecute the claims of the investor class, pushing the case through fact discovery, additional depositions, and class certification discovery, preparing merits expert reports, serving detailed interrogatory responses, filing a successful motion to unseal documents, and litigating hard until the parties ultimately accepted a mediators' recommendation. *Id.*

Lead Counsel took care throughout to control staffing and use only those resources necessary for the successful prosecution of the Securities Action, balancing their fiduciary duty to Lead Plaintiff and the Class with the demands of a fast-paced and complex litigation. In total only four partners at Lead Counsel's firm billed time on the case, and a small core team of counsel and associates devoted substantial amounts of their time to the case, becoming highly familiar with the issues, which also increased efficiency. ¶¶163-167.

To review and analyze the millions of pages of documents produced in this litigation and to prepare for the dozens of depositions as efficiently as possible, Lead Counsel employed a team of experienced staff attorneys. ¶¶170-179. The work of these attorneys was highly substantive and crucial to the development and prosecution of the claims against Defendants in this Securities Action. *See* Browne Decl. Ex. 4A-3. Many of these attorneys are graduates of top law schools such as Harvard, Columbia, NYU, Georgetown and Virginia, have years of relevant experience and have worked at BLB&G for many years, including on other cases with the senior attorneys litigating this Action. *Id.* Lead Counsel firmly believes that their work was essential to the outcome achieved here and that by conducting the substantive review and analysis of millions of documents, assisting in the preparation of depositions, and assembling the evidence to provide hundreds of pages of interrogatory answers detailing support for each element of Lead Plaintiff's claims, documents, the attorneys were performing work equivalent at least to junior associates at a large law firm (who would be billed at higher rates). *Id.*

As noted above, Securities Counsel's significant efforts to litigate this case efficiently resulted in an extremely reasonable blended hourly rate of just $394 per hour (¶234), further demonstrating the reasonableness of the lodestar and requested fee.

Finally, Lead Counsel also shouldered its fair share of the substantial litigation costs in these actions. As detailed in the Browne Declaration, Lead Counsel, in its role as one of three firms on the Plaintiffs' Executive Committee, paid an equal share of costs with the two other member firms, including: (i) approximately 20% of the costs for the document repository and court-reporting service for all BNYM depositions (¶40); (ii) 23% of the costs of an expert to put in a report regarding "best execution" (¶126); and (iii) 23% of the costs of the initial joint mediation sessions (¶184). After the Customer Class Cases and the Government Action settled, Lead Counsel assumed nearly all of the costs relating to the ongoing litigation.

B. The Magnitude and Complexity of the Action Support the Requested Fee

The magnitude and complexity of the Securities Action also support the requested fee. As noted above and in the Browne Declaration, the litigation raised myriad complex questions involved with proving the underlying FX scheme, establishing the additional elements of liability for securities fraud, and proving loss causation. ¶¶8-14, 17-19, 60, 200-216.

This Action had unique complexities and imposed unique burdens by virtue of the fact that Securities Counsel had to prove a complicated underlying FX scheme directed at BNYM's custody *clients* as just the *first step* to establishing its securities claims on behalf of investors. The FX scheme itself was a multifaceted, complicated scheme grounded in a deliberately opaque area of BNYM's business – the FX markets. There were a whole host of complicated industry protocols, jargon, and practices that had to be learned by Securities Counsel in order to effectively prosecute the case. ¶¶11, 60. Moreover, BNYM made hundreds of different representations to thousands of different custody clients and investment managers over the course of many years. ¶¶11, 17-19. These complexities are set forth in more detail in the Browne Declaration.

Layered on top of those difficulties were the additional burdens of coordinating, as a member of the Plaintiffs' Executive Committee, with multiple private and governmental actions. *See, e.g.,* ¶¶7, 39, 56-59, 112, 161-162. Thanks to significant efforts by all involved, this coordination was successful, but there can be no denying that it imposed substantial additional work and responsibilities on Lead Counsel.

In short, as the Court itself stated, "this is a big case." *See In re Bank of N.Y. Mellon Corp. Forex Transaction Litig.*, No. 12 MD 2335 (LAK), 2014 WL 5392465, at *3 (S.D.N.Y. Oct. 9, 2014). It required great effort and skill to litigate.

C. The Risks of the Litigation Support the Requested Fee

The many risks in this litigation are detailed above and in the Browne Declaration. ¶¶191-217. It bears reiterating, however, that there was no parallel government or regulatory investigation into BNYM regarding a claim for the violation of the securities laws or for making misrepresentations to investors in BNYM stock (as opposed to making misrepresentations to its custody clients). *See supra* Section I.C.2. Nor was there a corporate restatement, withdrawal of an audit opinion, resignation of a CFO, or other type of admission or quasi-admission that misrepresentations had been made to investors. *Compare, e.g., IndyMac*, 2015 WL 1315147, at *4 & n.51; *In re Weatherford Int'l Sec. Litig.*, No. 11 CIV. 1646 LAK JCF, 2013 WL 2355451, at *1 (S.D.N.Y. May 28, 2013). As noted, the Government Actions, while being viewed as potentially bolstering the customer fraud claims fraud by certain private litigants, did not seek a recovery for securities fraud and no securities fraud class actions were filed until more than two months after disclosure of the Government Actions (and that case was filed by Lead Counsel after an extensive investigation). ¶¶202-203.

Of course, in March 2015 BNYM did make certain admissions about its standing instruction FX practices in connection with settling the Government Actions. ¶¶133-140. While

Lead Plaintiff welcomed those admissions, for several reasons they did not eliminate the risks of this Securities Class Action. *First*, they came after nearly three-and one-half-years of litigation and obviously did not mitigate the risks that Securities Counsel assumed (on contingency) at the start of this case. *See Goldberger,* 209 F.3d at 55 ("Litigation risk must be measured as of when the case is filed.") To the contrary, they were not achieved until the very end of fact discovery and after Securities Counsel had expended a huge amount of resources in litigation. ¶133.

Second, Securities Counsel themselves deserve a share of the credit for extracting the admissions. ¶¶133, 140. For years BNYM had vehemently denied any wrongdoing, including before this Court, but that at least partially changed in the face of the powerful discovery record assembled by the Plaintiffs' Executive Committee, including Lead Counsel with the help of Securities Counsel, and the Government Actions. There can be no dispute that Securities Counsel's intensive efforts in discovery to help develop this record were instrumental in ultimately extracting those admissions from BNYM.

Third, the admissions were narrowly constricted and carefully crafted to avoid admitting any aspect of a securities fraud. ¶¶134-140. No Defendant admitted to making any material misstatements to investors, and none of the admissions prejudiced the loss causation and materiality arguments Defendants were advancing against the Securities Action. ¶139. The admissions did not even prevent BNYM from arguing in its opposition to class certification that – far from investors (¶135) or the vast majority of custody clients being misled by misrepresentations regarding BNYM's FX practices – the overwhelming majority (65%) of potential Class members actually knew how BNYM priced its standing instruction FX services throughout the Class Period. *See* ECF No. 599 at 7. Indeed, nothing in the March 2015 admissions discouraged Defendants from continuing to aggressively litigate the Securities Action

well after the admissions were public – demonstrating that the Securities Action continued to face significant risk after the other cases settled. ¶¶131-159; 200-216.

D. The Quality of Lead Counsel's Representation Supports the Requested Fee

The quality of the representation by Lead Counsel is another factor that supports the reasonableness of the requested fee. ¶¶240-243. Lead Counsel submits that the quality of its representation is evidenced not only by the work performed, but also by the result achieved: a $180 million cash recovery representing 18% of likely maximum recoverable damages. This is nearly 20 times the recovery in most securities class actions with damages of this size, even those that have substantially less risk and take substantially less effort to litigate. ¶243.

Additionally, "the quality of the opposition should be taken into consideration in assessing the quality of the plaintiffs' counsel's performance." *See, e.g., In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, No. 03 MDL 1529 LMM, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006) ("The fact that the settlements were obtained from defendants represented by 'formidable opposing counsel from some of the best defense firms in the country' also evidences the high quality of lead counsels' work") (citation omitted), *aff'd*, 272 F. App'x 9 (2d Cir. 2008). Here, Defendants were represented by Kellogg Huber, a well-known firm which aggressively represented its clients throughout this Securities Action. ¶¶168, 246-247. The Kellogg Huber firm devoted at least 12 partners and 14 counsel/associates to the front lines of the litigation. Each of these attorneys was highly credentialed with at least one Circuit Court or Supreme Court clerkship for all but one.

Moreover, the law firm of Paul Weiss Wharton Rifkind and Garrison LLP ("Paul Weiss") also acted as counsel to Defendants in this action. ¶247. Paul Weiss is one of the largest and most respected law firms in the world, filled with litigators who are highly experienced in securities class actions. In Lead Counsel's view, Paul Weiss consistently provides clients with

the highest quality representation in complex litigations. In short, Securities Counsel faced very high quality opposition in this case, which further supports the requested fee.

E. The Requested Fee in Relation to the Settlement

Courts have interpreted this factor as requiring the review of the fee requested in terms of the percentage it represents of the total recovery. "When determining whether a fee request is reasonable in relation to a settlement amount, 'the court compares the fee application to fees awarded in similar securities class-action settlements of comparable value.'" *Comverse*, 2010 WL 2653354, at *3 (citation omitted).

The fee request here represents 25% of the $180 million settlement, which is within the range of percentages that have been awarded by courts in the Second Circuit and elsewhere in securities class actions with comparable recoveries. *See, e.g., Merck*, 2013 WL 5505744, at *3, *46 (awarding 28% of $215 million settlement fund); *AFTRA*, 2012 WL 2064907, at *2 (awarding 25% of $150 million settlement fund); *Silverman v. Motorola, Inc.,* No. 07 C 4507, 2012 WL 1597388, at *4 (N.D. Ill. May 7, 2012) (awarding 27.5% of $200 million settlement fund), *aff'd*, 739 F.3d 956, 958-59 (7th Cir. 2013); *Comverse*, 2010 WL 2653354, at *6 (awarding 25% of $225 million settlement fund); *In re Schering-Plough Corp. Sec. Litig.*, No. 01-CV-0829 (KSH/MF), 2009 WL 5218066, at *5-*6 (D.N.J. Dec. 31, 2009) (awarding 23% of $165 million settlement fund); *In re Deutsche Telekom AG Sec. Litig.*, No. 00-CV-9475 (NRB), 2005 U.S. Dist. LEXIS 45798, at *12-*13 (S.D.N.Y. June 9, 2005) (awarding 28% of $120 million settlement fund).[22]

[22] *See also Alaska Elec. Pension Fund v. Pharmacia Corp.*, slip op. at 4 (awarding 27.5% of $164 million settlement fund) (Browne Decl. Ex. 7); *In re Brocade Sec. Litig.*, No. 05-CV-2042-CRB, slip op. at 13 (N.D. Cal. Jan. 26, 2009) (awarding 25% of $160 million settlement fund, net of expenses) (Browne Decl. Ex. 11); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 246 F.R.D. 156, 178 (S.D.N.Y. 2007) (awarding 24% of $133 million settlement fund); *In re Broadcom Corp. Sec. Litig.,* No. 01-275, 2005

Further, the requested fee of 25% of the recovery is made pursuant to a pre-litigation fee agreement between Lead Plaintiff and Lead Counsel. ¶254. Lead Plaintiff, after considering the extensive time and effort dedicated to the case by Securities Counsel and the considerable risks of the litigation, has endorsed the requested fee as fair and reasonable. *See* Boss Decl. (Browne Decl. Ex. 1), at ¶10; *see also* ¶¶253-254.

While the fee agreement is not binding on the Court, it does reflect the parties' *ex ante* assessment of the risks associated with this litigation and Lead Counsel respectfully submits that it should be given substantial weight when evaluating the reasonableness of Lead Counsel's fee request – particularly given that in this case it caps the fee at an amount that is less than Securities Counsel's total lodestar. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 282 (3d Cir. 2001) (*ex ante* fee agreements in securities class actions enjoy "a presumption of reasonableness"); *In re Marsh & McLennan Co. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *15 (S.D.N.Y. Dec. 23, 2009) ("Since the passage of the PSLRA, courts have found such an agreement between fully informed lead plaintiffs and their counsel to be presumptively reasonable").

Finally, the most important consideration in support of the reasonableness of the requested fee is that it is justified in light of the amount of work Securities Counsel did, the risks

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U.S. Dist. LEXIS 41993, at *14 (C.D. Cal. Sept. 14, 2005) (awarding 25% of $150 million settlement fund); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 590 (E.D. Pa. 2005) (reaffirming award of 25% of $126.6 million settlement fund); *In re DaimlerChrysler AG Sec. Litig.*, No. 00-0993 (KAJ), slip op. at 1-2 (D. Del. Feb. 5, 2004) (awarding 22.5% of $300 million settlement fund, net of expenses) (Browne Decl. Ex. 12); *In re Computer Assocs. Class Action Sec. Litig.*, Nos. 98 Civ. 4839 (TCP), 02-CV-1226 (TCP), 2003 WL 25770761, at *4 (E.D.N.Y. Dec. 8, 2003) (awarding 25.3% of approximately $133.5 million in settlement shares); *In re Oxford Health Plans, Inc. Sec. Litig.*, MDL Dkt. No. 1222 (CLB), 2003 U.S. Dist. LEXIS 26795, at *13 (S.D.N.Y. June 12, 2003) (awarding 28% of $300 million settlement fund); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 734-36 (E.D. Pa. 2001) (awarding 25% of $193 million settlement fund).

they faced, and the result achieved.

F. Public Policy Considerations Support the Requested Fee

Public policy favors rewarding firms for bringing successful securities litigation. *See Flag Telecom*, 2010 WL 4537550, at *29 (if the "important public policy [of enforcing the securities laws] is to be carried out, the courts should award fees which will adequately compensate Lead Counsel for the value of their efforts, taking into account the enormous risks they undertook"). Public policy favors granting Lead Counsel's application here.

G. The Reaction of the Settlement Class to Date Support the Requested Fee

The deadline for Settlement Class Members to file objections to the Settlement, the Plan of Allocation and/or the Fee and Expense Allocation or to request exclusion from the Settlement Class is September 29, 2015. To date, 23 requests for exclusion have been received; and only one objection to Lead Counsel's Fee and Expense Application has been received. Securities Counsel believe the objection is without merit. However, pursuant to the schedule ordered by the Court, on October 13, 2015, Lead Counsel will address all objections that may be received.

III. SECURITIES COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED

Securities Counsel spent approximately $1,616,575.69 in out-of-pocket costs to prosecute these Actions. The Browne Declaration sets forth the breakdown of these expenses, which were largely assumed by Lead Counsel and, at least in part, were incurred in connection with the enormous joint litigation efforts in the coordinated cases. *See* Browne Decl. Ex. 4; *see also id.* ¶¶257-267.

CONCLUSION

For the foregoing reasons, Lead Counsel respectfully requests that the Court grant Lead Counsel's motion for an award of attorneys' fees and reimbursement of the litigation expenses incurred in connection with the prosecution of the Action.

Dated: September 15, 2015

Respectfully submitted,

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