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)

REPLY MEMORANDUM OF LAW IN FURTHER 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

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Dated: October 13, 2015

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Lead Plaintiff and Lead Counsel respectfully submit this reply brief in further support of their respective motions for (i) final approval of the proposed $180 million settlement (the "Settlement") and approval of the proposed Plan of Allocation, and (ii) an award of attorneys' fees and reimbursement of expenses.[1]

I. PRELIMINARY STATEMENT

The reaction of the Settlement Class confirms that the proposed $180 million Settlement is an excellent result. Following an extensive Court approved notice program – including mailing of Notice to over 957,000 potential Settlement Class members and nominees – not a single institutional investor or large shareholder has objected to any aspect of the Settlement, the Plan of Allocation or the requested fees and expenses. This is truly exceptional given that institutional investors held approximately 80% of BNYM's common stock during the Settlement Class Period.

Lead Plaintiff has received a total of only two objections, both from small shareholders.[2] Only one of the objections was lodged by a member of the Settlement Class who has standing to object and he only objects to the claims administration process, not the merits of the Settlement or the fee or expense request. The other objection was submitted by an individual (Steve

[1] Unless otherwise indicated, all capitalized terms have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated June 23, 2015 (ECF No. 611-1) (the "Stipulation") or 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 (ECF No. 633) (the "Browne Declaration" or "Browne Decl.").

[2] Copies of the objections are attached as Exhibits 2 and 3 to the Supplemental Declaration of John C. Browne ("Supplemental Browne Declaration" or "Suppl. Browne Decl."). Lead Counsel and Defendants' Counsel also received a letter from Patricia DeVesta-Owrutsky, a Notice recipient, which is attached as Exhibit 4 to the Supplemental Browne Declaration. Ms. DeVesta-Owrutzky's letter expresses concerns about being victimized by several parties (none involved in this Action) regarding her finances but she does not object to or criticize the Settlement or even address this Action at all. For privacy reasons, the objections and Ms. DeVesta-Owrutsky's letter have been redacted to remove all individuals' street addresses, phone numbers, social security numbers, financial account numbers, and financial information unrelated to BNYM.

Charnovitz) who purchased 50 shares of BNYM common stock in October 2008 and sold them all six days later for a market *gain* that took place more than two years before the first alleged partial corrective disclosure. Mr. Charnovitz is therefore not a Settlement Class Member and lacks standing to object.[3]

Even if Mr. Charnovitz had standing to object, his arguments lack merit. Mr. Charnovitz contends that the Settlement should be rejected because "[a]t this early stage, this case is not ripe for settlement," that the $20 minimum payment requirement under the Plan of Allocation is unfair, and that the case represents a "strike suit" for which no fees should be awarded or expenses reimbursed. Charnovitz Obj. at 1-2. He is wrong on all fronts. This case settled after the completion of extensive fact discovery including the review of 30 million pages of documents and 90 depositions, several months after the coordinated Customer Class Cases and Government Actions settled, after the close of class expert discovery, in the middle of briefing class certification, and when the parties were on the verge of serving merits expert reports. *See* Browne Decl. ¶¶3-4; 27-190. There simply is no basis for Mr. Charnovitz's contention that the case settled at an "early stage." *See id.* ¶¶27-190 (detailing extensive litigation efforts).

Mr. Charnovitz's objection to the $20 minimum distribution amount also lacks merit. As many courts have recognized, a $20 minimum is fair as it means that the Settlement Fund will not be depleted by the administrative costs associated with *de minimis* payments. Finally, Mr. Charnovitz's assertion that this case is a "strike suit" is obviously mistaken, as the case was

[3] Mr. Charnovitz had a gain of $125 (or $2.50 per share) on his transactions in BNYM common stock. He purchased 50 shares on October 22, 2008 for $27.71 per share ($1,385.50) and sold them on October 28, 2008 for $30.21 per share ($1,510.50).

litigated for three-and-a-half years and settled for $180 million, which represents approximately 18% of reasonably estimated maximum damages.

The small number of exclusion requests received provides further confirmation that the proposed Settlement is fair and reasonable. Only 35 requests for exclusion from the Settlement Class have been received and not a single one of those came from an institutional investor. The exclusion requests represent an extremely small percentage of the class – approximately 0.001%. In sum, the proposed Settlement Class overwhelmingly approves of the proposed Settlement, the Plan of Allocation and the requested attorney's fees and expenses.

II. THE REACTION OF THE SETTLEMENT CLASS SUPPORTS APPROVAL

Pursuant to the Court's Notice Order (ECF No. 614), the Claims Administrator, Epiq Class Action & Claims Solutions, Inc. ("Epiq"), began mailing copies of the Notice and Claim Form (the "Notice Packet") to potential Settlement Class Members and their nominees on July 29, 2015. *See* Declaration of Stephanie A. Thurin dated September 11, 2015 (ECF No. 633-3) (the "Mailing Decl."), at ¶¶3-5. Through October 12, 2015, 957,465 copies of the Notice Packet have been mailed to potential Settlement Class Members and nominees. *See* Supplemental Declaration of Stephanie A. Thurin ("Suppl. Mailing Decl."), attached as Exhibit 1 to the Supplemental Browne Declaration. On July 29, 2015, the Notice, Claim Form, Stipulation, and Notice Order were made available for downloading from the Settlement website (Mailing Decl. at ¶14), and on August 11, 2015, the Summary Notice, was published in the *Wall Street Journal* and released over the *PR Newswire*. *Id.* at ¶9 and Exhibits B and C.

On September 15, 2015, Lead Plaintiff filed detailed papers in support of the Settlement, the Plan of Allocation, and the fee and expense request. ECF Nos. 629-33. These documents were also placed on the website established for the Settlement. *See* Suppl. Mailing Decl. ¶3.

Although institutional investors owned from 77% to 82% of the publicly traded BNYM common stock during the Settlement Class Period (based on the reports filed pursuant to Section 13(f) of the Securities Exchange Act of 1934), none requested exclusion or filed objections to the Settlement, the Plan of Allocation or the requested attorney's fees and expenses. In response to the extensive notice program, 35 requests for exclusion were received. *See* Suppl. Mailing Decl. ¶5. Of those, 19 were submitted by persons who are not Settlement Class Members because they state either that they did not purchase any BNYM common stock during the Settlement Class Period, or that they sold all of the BNYM stock they purchased during the Settlement Class Period before the first alleged corrective disclosure and, thus, were not damaged. Another six of the requests for exclusion provided no information at all regarding their purchases of BNYM common stock.[4] The requests for exclusion that do provide information on purchases represent, at most, 10,328 shares of BNYM common stock. These shares represent approximately 0.001% of the over 800 million eligible affected shares of BNYM common stock traded during the Settlement Class Period – a miniscule percentage.

A. The Class's Reaction Supports Approval Of The Settlement

The small number of objections and opt-outs received support a finding that the Settlement is fair, reasonable and adequate. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement."); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 457, 458 (S.D.N.Y. 2004) (Lynch, J.) (six objections out of a class of

[4] The Court has discretion to accept requests for exclusion that do not include all of the required information. *See* Notice Order ¶13 ("A request for exclusion shall not be effective unless it provides all the required information . . . *or is otherwise accepted by the Court*.") (emphasis added). Lead Plaintiffs request that all of the requests for exclusion received as of October 12, 2015 (numbered 1 to 35) be accepted and Defendants have consented to that request.

approximately one million was "vanishingly small" and "constitutes a ringing endorsement of the settlement by class members"). Moreover, the fact that no institutional investors – who have the largest economic stake in the litigation – have objected or requested exclusion from the Settlement Class further underscores the reasonableness of the Settlement. *See In re Citigroup Inc. Bond Litig.,* 296 F.R.D. 147, 156 (S.D.N.Y. 2013) ("not one of the objections or requests for exclusion was submitted by an institutional investor"); *In re AOL Time Warner, Inc.*, MDL No. 1500, 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006) (lack of objections from institutional investors supported approval of settlement).[5]

B. The Class's Reaction Supports Approval Of The Fee And Expense Request

The positive reaction of the Settlement Class should also be considered with respect to Lead Counsel's motion for an award of attorneys' fees and reimbursement of expenses. *See In re Bisys Sec. Litig.,* No. 04 Civ. 3840 (JSR), 2007 WL 2049726, at *1 (S.D.N.Y. July 16, 2007) ("not a single class member other than [Mr.] Zorn raised any objection – even though the class included numerous institutional investors who presumably had the means, the motive, and the sophistication to raise objections if they thought the [requested] fee was excessive"); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d. Cir. 2005) ("a significant number of investors in the class were 'sophisticated' institutional investors that had considerable financial incentive to object had they believed the requested fees were excessive" and did not do so).

III. THE OBJECTIONS ARE WITHOUT MERIT AND SHOULD BE REJECTED

A. Mr. Fletcher's Objection To The Claims Filing Process Is Meritless

The objection submitted by Michael R. Fletcher challenges only the claim filing process,

[5] *See also In re BankAmerica Corp. Sec. Litig.*, 210 F.R.D. 694, 702-03 (E.D. Mo. 2002) ("The Court takes particular note of the fact that no objections were filed by any of the 'institutional investors' . . . who will be greatly affected by the outcome of this case").

not the Settlement or fee request. Mr. Fletcher objects to the requirement that claimants submit individual claim forms providing information about their transactions in BNYM stock because he believes that the Claims Administrator should obtain that information directly from class members' brokers. Fletcher Obj. at 2.[6]

Mr. Fletcher's objection is based on a misapprehension of fact. The Claims Administrator does not possess information about individual class members' transactions and holdings in BNYM stock. As in other securities actions, the only information that the Claims Administrator received from brokers and nominees was the names and addresses of beneficial owners who held BNYM common stock during the Class Period. (In fact, some brokers provide no information and forward the Notice directly to their clients.) Due to privacy concerns, brokers do not provide their clients' detailed trading information or other personal financial information to the Claims Administrator and, indeed, they probably could not do so unless their clients had specifically consented to the release of that information.

Accordingly, courts have repeatedly upheld the appropriateness of claim processes in securities class actions that require individual claimants to submit their securities transaction information. *See, e.g.*, *In re Marsh & McLennan Cos. Sec. Litig.*, No. 4 Civ. 8144 (CM), 2009 WL 5178546, at *25 (S.D.N.Y. Dec. 23, 2009) (noting that "[w]ithout that necessary information, the Claims Administrator could not calculate claimants' distributions" and holding that requiring settlement class members to submit this information "comport[ed] with the long-approved procedures for the efficient management of class-action settlement distributions"); *In re WorldCom, Inc. Sec. Litig.*, No. 02 CIV 3288 (DLC), 2004 WL 2591402, at *12 (S.D.N.Y.

[6] Mr. Fletcher purchased only 260 shares of BNYM during the Settlement Class Period. Fletcher Obj. at 3. While he suffered small losses on a few transactions in BNYM stock, he had an overall *net gain* of $486.81 on his transactions during the Settlement Class Period. *Id*.

Nov. 12, 2004) (rejecting objection to the requirement that individual claimants submit transaction information).

Lead Counsel is communicating with Mr. Fletcher to assist him in filing a claim, if he wishes to do so.

B. Mr. Charnovitz's Objections Are Meritless

The objections to the Settlement, Plan of Allocation and motion for fees and expenses submitted by Steve Charnovitz should be rejected because Mr. Charnovitz lacks standing to object and because his objections are substantively without merit.

Mr. Charnovitz Lacks Standing To Object. As an initial matter, Mr. Charnovitz lacks standing to object to the Settlement, Plan of Allocation or the motion for fees and expenses. He purchased 50 shares of BNYM common stock on October 22, 2008 and sold those shares for a market gain of $2.50 per share (a total of $125) six days later on October 28, 2008. Charnovitz Obj. at 5-6. To be a member of the Settlement Class, a person must have purchased BNYM stock during the period from February 28, 2008 through October 4, 2011 and been "damaged thereby." Because Mr. Chanovitz could not have been "damaged" by the alleged misconduct in the Action, he lacks standing to object to any aspect of the Settlement or the Fee and Expense Application. *See Cen. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 244 (2d Cir. 2007) ("Because CareFirst is not a class member, it does not have an affected interest in the class Plaintiffs' claims against Medco so as to be able to assert its objections.").

Moreover, because Mr. Charnovitz sold all of his stock years before the first corrective disclosure, he will not be eligible for any payment from the Settlement under the Plan of Allocation. *See* Notice ¶54(a) ("BNYM common stock purchased from February 28, 2008 through and including February 2, 2011 must have been held through the close of trading on

February 2, 2011 and must have suffered a loss."). It is well established that class members who will not receive any payment from a settlement fund have no standing to challenge the amount of attorneys' fees awarded from that fund. *See Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 957 (7th Cir. 2013) (Easterbrook, J.) (objector "lack[ed] any interest in the amount of fees, since he would not receive a penny from the fund even if counsel's take should be reduced to zero").[7]

Mr. Charnovitz's Objections To The Settlement Are Meritless. Even if Mr. Charnovitz possessed standing, his objections to the Settlement are substantively without merit.

First, Mr. Charnovitz contends that "[a]t this early stage, this case is not ripe for settlement" because there has not yet been any judicial finding as to whether wrongdoing has occurred. Charnovitz Obj. at 1-2. The Court is well aware of the intense effort that went into this case. It was not settled at an "early stage," but only after more than three and half years of litigation, including the completion of fact discovery, the review and analysis of millions of pages of documents, and 90 depositions. Browne Decl. ¶¶3, 12-13; 27-190.

Mr. Charnovitz suggests that a determination of wrongdoing is required before a case can be ripe for settlement. That is not the law. It is well-established that a court need not "adjudicate the disputed issues or decide unsettled questions" before ruling on a class settlement, but need only consider factors such as the amount of information available to the settling parties and assess the risks of the litigation against the benefits of the settlement. *Global Crossing*, 225 F.R.D. at 459; *see generally City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 462-63 (2d Cir.

[7] *See also Rodriguez v. Disner*, 688 F.3d 645, 660 n.11 (9th Cir. 2012) ("objectors who do not participate in a settlement lack standing to challenge class counsel's . . . fee award because, without a stake in the common fund pot, a favorable outcome would not redress their injury"); *City of Livonia Employees' Ret. Sys. v. Wyeth*, No. 07 CIV. 10329 RJS, 2013 WL 4399015, at *1 (S.D.N.Y. Aug. 7, 2013) ("a class member who has no interest in the appropriation of a settlement fund must lack standing to challenge the appropriation of that fund").

1974). Indeed, if Mr. Charnovitz objection were accepted, there could be no pre-trial settlements in private civil litigation at all.[8]

Second, Mr. Charnovitz contends that the Settlement "seems hardly fair nor reasonable for shareholders who were injured by a misrepresentation" and that the "recovery after expenses . . . would be negligible and therefore of no practical value to the shareholder class." Charnovitz Obj. at 2. This objection is also wrong. The proposed $180 million Settlement will provide a substantial benefit to Settlement Class Members. The Settlement represents 18% of the estimated likely maximum recovery damages of $1 billion, which is a level of recovery that is higher than typical recoveries in securities class actions, and is an excellent recovery here in light of the very substantial risks of establishing liability and loss causation in the Action. *See* Browne Decl. ¶¶17-19, 200-217, 240-43.[9]

Mr. Charnovitz further contends that the Settlement "is not in the interest of the public and the markets" because "the process used in this litigation has the appearance of a strike lawsuit where the only purpose of the lawsuit is to gain fees for the defendants' [sic] counsel." Charnovitz Obj. at 2. This objection is utterly lacking in any factual basis. The Action has no resemblance whatsoever to a "strike" suit in which meritless claims are asserted in the hopes that defendants will settle to avoid the costs of litigation. On the contrary, as set forth at length in the Browne Declaration, Securities Counsel dedicated thousands of hours to litigating the case in the face of fierce opposition from Defendants' Counsel. *See* Browne Decl. ¶¶27-190.

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[8] Moreover, Securities Counsel's efforts in discovery did in fact contribute to BNYM making certain admissions in connection with its settlement of the related Government Actions. Browne Decl. ¶133.

[9] The estimated average recovery of 22 cents discussed by Mr. Charnovitz, *see* Charnovitz Obj. at 2, is an estimated *per share* recovery, which assumes that all eligible shares participate in the Settlement. *See* Notice ¶2. While Mr. Charnovitz claims that "[n]o estimate is given for the recovery after expenses," the Notice clearly sets forth the estimated average costs of 6 cents per affected share if Lead Counsel's fee and expense application is approved. *See* Notice ¶5.

Mr. Charnovitz's Objection To The Plan Of Allocation Fails. Mr. Charnovitz also objects to the provision of the proposed Plan of Allocation that provides that payments will only be made to claimants whose distribution amount would be $20 or more. *See* Charnovitz Obj. at 2; *see also* Notice ¶¶58, 61. He asserts that "[t]his is another example of how securities litigation often leads to outcomes that are unfair to the average investor." Charnovitz Obj. at 2. He is wrong. The minimum payment threshold of $20 will benefit the Settlement Class as a whole because it will reduce the costs associated with administering relatively small claims and printing and mailing checks for *de minimis* amounts. *See* 2 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 6:23 (11th ed. Westlaw 2014) ("Courts have recognized that minimum payment thresholds for payable claims benefit the class as a whole because they protect the settlement fund from being depleted by the administrative costs associated with claims unlikely to exceed those costs."); *Global Crossing,* 225 F.R.D. at 463 ("[c]lass counsel are entitled to use their discretion to conclude that, at some point, the need to avoid excessive expense to the class as a whole outweighs the minimal loss to the claimants who are not receiving their *de minimis* amounts of relief").[10] Courts in this District regularly approve minimum distribution thresholds such as that contemplated here. *See, e.g.*, *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 4526593, at *12 (S.D.N.Y Dec. 20, 2007) (approving a $50 minimum distribution amount).[11]

[10] *See also Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 328 (3d Cir. 2011) ("As other courts have observed, '*de minimis* thresholds for payable claims are beneficial to the class as a whole since they save the settlement fund from being depleted by the administrative costs associated with claims unlikely to exceed those costs and courts have frequently approved such thresholds'").

[11] *See also, e.g., Citigroup Bond,* 296 F.R.D. at 158 (approving Plan of Allocation with $20 minimum distribution threshold); *In re Bank of America Corp. Sec., Derivative & ERISA Litig.*, No. 09-MD-2058 (PKC), ECF No. 829-7 at Ex. A, p. 14; ECF No. 868 (S.D.N.Y. April 9, 2013) (same).

Mr. Charnovitz's Cursory Objection To The Fees Is Meritless. In a final sentence at the end of his letter, Mr. Charnovitz also objects to Lead Counsel's motion for fees and expenses "[f]or the same reasons" that he objects to the Settlement and states that, in his "opinion, the Court should not approve any payment to the attorneys and should not provide any reimbursement for expenses." Charnovitz Obj. at 2. Mr. Charnovitz does not provide any legal or factual basis for his position that no fee award should be granted and the objection should be rejected for that reason alone. *See In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 264 n.3 (S.D.N.Y. 2012) (rejecting objection to proposed attorneys' fees as "excessive" for being "conclusory and bereft of factual or legal support"). Moreover, as demonstrated in their opening papers, Lead Counsel's fee request is fully supported by the extensive efforts of Securities Counsel in litigating this case for three and half years without any payment and in the face of significant risks; by the approval of the fee by a sophisticated institutional investor Lead Plaintiff which played an active role in the litigation; and by the fact that the fee requested is less than the value of Securities Counsel's lodestar in the case.

IV. CONCLUSION

For the foregoing reasons and the reasons set forth in their opening papers, Lead Plaintiff and Lead Counsel respectfully request that the Court approve the proposed Settlement, the proposed Plan of Allocation, and the request for attorneys' fees and reimbursement of Litigation Expenses.

Dated: October 13, 2015

Respectfully submitted,

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