UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ASHBY HENDERSON and **THOMAS HERSHENSON**, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, v. **BANK OF NEW YORK MELLON, NATIONAL ASSOCIATION,** Defendant.	Case No. 1:15-cv-10599-PBS

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

I. INTRODUCTION

This Settlement is the culmination of nearly three years of litigation, resulting in fee concessions that will provide tens of millions of dollars in benefits to Class Trusts, as well as disclosures that will provide increased transparency as to the delegation of tax preparation work to third parties. BNY Mellon has estimated that the value to the Class Trusts of these fee concessions exceeds $35 million. And Settlement Class Members will automatically receive the benefits without the need to complete or submit a claim form or prove eligibility.[1]

[1] The fully executed Settlement Agreement ("Settlement") is attached hereto as Exhibit A, the Declaration of Class Counsel, Gregory Porter ("Porter Decl."), is attached hereto as Exhibit B, and the Declaration of Derek Howard is attached as Exhibit C. The capitalized terms used in this Memorandum are defined in the Settlement at paragraphs

This litigation, which was commenced on February 27, 2015, alleges, among other things, that the Defendant, BNY Mellon, N.A. (BNY Mellon) breached its fiduciary duties when it invested trust assets in Affiliated Investments, and when it delegated tax return preparation to a third party, PricewaterhouseCoopers, but allegedly charged the trusts more than it paid PwC. BNY Mellon has denied and continues to deny any breaches of its fiduciary duties.

The fee concessions and disclosures will provide meaningful benefits to Settlement Class Members, benefits that are responsive to the allegations raised in the Complaint. The Settlement is the product of extensive arms-length negotiation with the assistance of Judge Diane Welsh (Ret.) of JAMS. The Parties met with Judge Welsh in New York twice. On February 13, 2017, the parties met in New York for an all-day mediation session, but no resolution was reached, and they went back to litigation in full. Each side filed a motion for summary judgment, and Plaintiffs filed a motion for class certification which was fully briefed and argued to this Court. Continuing discussions, however, led the Parties to agree to a second mediation session with Judge Welsh, on November 17, 2017, which ultimately resulted in this Settlement. In light of the litigation risks further prosecution of this action would inevitably entail, Plaintiffs ask the Court to: (1) preliminarily approve the proposed Settlement; (2) approve the proposed form and method of notice to the Class; and (3) schedule a hearing at which the Court will consider final approval of the Settlement.

1.1 – 1.44.

II. THE CLAIMS IN THE CASE

Plaintiffs allege that BNY Mellon is a fiduciary as to the Class Trusts and that it breached its fiduciary duties. In particular, they allege BNY Mellon breached its fiduciary duties by failing to make prudent investment decisions by investing in Affiliated Investments, failing to manage trust assets solely in the interests of the beneficiaries, and charging tax preparation fees that were marked up without disclosing this to the Trusts.

BNY Mellon denies the claims and all liability. It argues, among other things, that (a) the investments selected for the Trusts were prudent and were selected based on an individualized, reasonable process, and that the Trusts made money during the Class Period; and (b) that the tax fees were not "marked up," were adequately disclosed, and were reasonable in light of the services provided.

The Action

This litigation began on February 27, 2015, with the filing of Plaintiff Ashby Henderson's initial Complaint, which named BNY Mellon, N.A., The Bank of New York Mellon Corporation ("the Holding Company"), and The Bank of New York Mellon Trust Company, N.A. ("the Trust Company"), as Defendants. Dkt. No. 1. All Defendants filed Motions to Dismiss on May 15, 2015, on the grounds, *inter alia*, that the Plaintiff's claims as to all Defendants were precluded by the Securities Litigation Uniform Standards Act (SLUSA), and that the Holding Company and the Trust Company as corporate affiliates were not liable to the Plaintiff. On November 23, 2015, after full briefing and oral argument, the Court ruled that the claims were not

preempted by SLUSA. Dkt. No. 72. The Court denied dismissal of BNY Mellon, N.A. and the Trust Company, but granted dismissal of corporate parent the Holding Company. BNY Mellon and the Trust Company answered on December 23, 2015, denying all claims. On March 3, 2016, Ms. Henderson filed a First Amended Class Action Complaint against BNY Mellon and the Trust Company, in which she restated the investment-related claims and added the tax return preparation-related claims. On April 4, 2016, BNY Mellon and the Trust Company answered, again denying all claims. The Parties then began a long and intensive discovery process, including written discovery requests that resulted in production of over 25,000 pages of material by the Defendant.

In May 2016, the Plaintiffs took the deposition of the portfolio manager for Ms. Henderson's trust. Shortly thereafter, at the Court's behest, the parties agreed to a full day mediation at JAMS in New York with Judge Diane Welsh. This mediation was ultimately postponed, and the litigation was stayed for approximately four months while a dispute was litigated and resolved. As a result, the Parties returned to litigation, and to discovery.

On October 31, 2016, Ms. Henderson filed a motion to amend to add Thomas Hershenson as a Plaintiff, which was granted. Proceeding on parallel tracks, on February 13, 2017, the Parties engaged in the first, and unsuccessful mediation at the same time as Plaintiffs were finalizing the briefing on their class certification motion. Given the Parties' failure to reach a mediated resolution, on February 20, 2017, Plaintiffs filed their motion for class certification. On June 29, 2017, BNY Mellon filed a motion for

summary judgment as well as its opposition to the class certification motion. On September 15, 2017, Plaintiffs filed their own motion for partial summary judgment. During this time period, the Parties took a total of thirteen depositions, and exchanged multiple expert reports. In addition to its opposition to class certification and its dispositive motion, BNY Mellon filed a motion to strike Ashby Henderson as a class representative, which was ultimately denied. Dkt. No. 319.

The Court heard oral argument on Plaintiffs' motion for class certification on November 1, 2017. Shortly thereafter, the Parties agreed to return to mediation, again with Judge Welsh. After a full day of mediation and subsequent negotiations, the Parties reached the settlement currently before the Court.

III. THE TERMS OF THE PROPOSED SETTLEMENT

To resolve the Action, and in exchange for the Release described in the Settlement Agreement, BNY Mellon will provide the following fee concession benefits to Settlement Class Members (the "Settlement Benefits") through December 31, 2019.

A. FEE CONCESSIONS

(1) For Class Trusts on a fee schedule that excludes the market value of Affiliated Investments when calculating the investment management fee charged to the trusts, BNY Mellon will continue the same exclusion through December 31, 2019, that is, BNY Mellon will continue to exclude the market value of Affiliated Investments when calculating the investment management fee, through December 31, 2019.

(2) For Class Trusts on a fee schedule that provides for fee credits or rebates in connection with the investment of trust assets in Affiliated Investments, BNY Mellon will continue to provide the same fee credits or rebates in connection with the investment of trust assets in Affiliated Investments, as it does as of the date of the Agreement, through December 31, 2019.

(3) For Class Trusts on a fee schedule that provides for a market value

advisory fee (calculated as a percentage of the market value of assets), BNY Mellon will not increase the basis points of the advisory fee through December 31, 2019.

(4) For Class Trusts on a fee schedule that provides for a line-item Tax Fee, BNY Mellon will not increase the line-item Tax Fee, through December 31, 2019.

Exhibit A, Settlement Agreement, ¶ 3.2. BNY Mellon has estimated and represented that the value to the Class Trusts of continuing the agreed upon fee concession is in excess of $35 million, from the time of the filing of the Complaint through December 31, 2019. *Id.*

B. DISCLOSURE OF DELEGATION

In addition, BNY Mellon will also provide the following disclosures regarding tax return work to Settlement Class Members through December 31, 2019:

1. So long as BNY Mellon continues to contract with PwC to perform tax-related services, BNY Mellon agrees to instruct PwC to include the following statement on the Form 1041, Schedule K-1 "Tax Information Letters" sent to beneficiaries for Class Trusts:

   BNY Mellon has partnered with PricewaterhouseCoopers LLP to provide certain tax-related services such as preparing this Form K-1 and preparing and filing the fiduciary tax return(s) for the trust referenced above.

2. So long as BNY Mellon continues to contract with PwC to perform tax-related services, BNY Mellon will include the following verbiage in trust accountings filed in probate court:

   BNY Mellon may have delegated certain tax-related services, such as the preparation and filing of fiduciary tax returns, to a third-party vendor, including PricewaterhouseCoopers.

Id., ¶¶ 3.3, 3.4.

C. COSTS OF NOTICE AND ADMINISTRATION AND CLASS REPRESENTATIVE'S COMPENSATION

BNY Mellon will pay the reasonable fees of and costs incurred by the Settlement Administrator, relating to notice and administration of the Settlement, as set forth in the

Agreement. *Id.*, ¶ 3.5. BNY Mellon will pay an incentive award of up to $15,000 to Ashby Henderson, subject to Court approval. *Id.*, ¶ 13.5. This amount is well in line with precedent recognizing the value of individuals stepping forward to represent a class — particularly in a case, like the present, where the class representative expended significant time and effort in the litigation of the case. *See In re Celexa and Lexapro Marketing and Sales Practices Litigation*, 2014 WL 4446464, at *9 (D. Mass. 2014) (awarding $10,000 incentive award to class representative who produced documents for discovery, was deposed and participated in settlement discussions; noting that one purpose of such incentive awards is to reimburse the plaintiffs for their effort in pursuing the claims on behalf of the entire class); *Lauture v. A.C. Moore Arts & Crafts, Inc.*, 2017 WL 6460244, at *3 (D. Mass. June 8, 2017) (approving $15,000 incentive payment in FLSA class action); *see also Hashw v. Department Stores National Bank*, 182 F. Supp. 3d 935, 952 (D. Minn. 2016) (approving $15,000 incentive payment in TCPA case).

In lieu of an incentive award, Class Representative Thomas Hershenson and BNY Mellon have agreed to the following in connection with the Hershenson trust: BNY Mellon will waive the trust termination fee; will refund and waive any legal fees incurred by BNY Mellon and surcharged to the Hershenson Trust in connection with the Accounting; will forego assessing the same to the Hershenson Trust; will refund to the Hershenson Trust the amount of $13,710.13; and will distribute the Hershenson Trust assets in accordance with the applicable Decree of Distribution entered by the Court within thirty (30) days after the latter of the entry of the Decree of Distribution and the Effective Date.

D. ATTORNEYS' FEES AND COSTS

Under the Settlement, Class Counsel will request attorneys' fees in the amount of $3.49 million, and if approved, BNY Mellon will pay these fees separately, in addition to the benefits to be provided to the Settlement Class. This amount represents less than 10% of the settlement value obtained for the class in the form of fee concessions and is less than the collective lodestar of Plaintiffs' counsel. And the settlement has value to the Settlement Class beyond the agreed upon fee concessions, in the form of the curative disclosures. All of the benefits obtained should be considered when evaluating an attorneys' fees application. *See In re Online DVD-Rental Antitrust Litig*., 779 F.3d 934, 953 (9th Cir. 2015) (district court did not abuse its discretion in calculating fee award as a percentage of total settlement fund, including notice and administrative costs and litigation expenses). A formal application for attorneys' fees and costs and for the named Plaintiff Ms. Henderson's incentive award will be made by a date established by the Court prior to the deadline for class members to file objections to the Settlement.

IV. ARGUMENT

A. STANDARD AND PROCESS FOR APPROVAL

Federal Rule of Civil Procedure 23(e) requires that the court approve any class action settlement.

At the preliminary approval stage, the question for the court is whether the settlement falls well within the "range of possible approval," and is sufficiently fair, reasonable and adequate to warrant dissemination of notice apprising Class Members of the proposed Settlement and to establish procedures for a final settlement hearing

under Rule 23(e). H. Newberg, A. Conte, *Newberg on Class Actions* (5th ed. 2015), §13.13. There is generally a presumption in favor of the settlement "[i]f the parties negotiated at arm's length and conducted sufficient discovery." *In re Pharm. Indus. Average Wholesale Price Litig.,* 588 F.3d 24, 32–33 (1st Cir. 2009), at least where "the proponents of the settlement are experienced in similar litigation." *In re Lupron Mktg. and Sales Practices Litig.,* 345 F. Supp. 2d 135, 137 (D. Mass. 2004). *See also Durrett v. Housing Auth. of City of Providence,* 896 F.2d 600, 604 (1st Cir. 1990) (noting a "clear policy in favor of encouraging settlements").

In determining whether class action settlements should be approved, "[c]ourts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement. [Citation omitted] . . . They do not decide the merits of the case or resolve unsettled legal questions." *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). As one court has observed, "[t]his determination is similar to a determination that there is 'probable cause' to think the settlement is fair and reasonable." *Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 273 (N.D. Cal. 1976). Once the settlement is found to be "within the range of possible approval," a final approval hearing is scheduled and notice is provided to the class. *Id*. Consideration of the relevant factors demonstrates that the proposed Settlement Agreement in this case is in the range of possible approval and supports authorizing dissemination of notice of the settlement to Settlement Class Members.

B. THE PARTIES' NEGOTIATIONS

As set forth above, the Parties, through counsel, have conducted extensive arm's-

length negotiations to resolve this matter, with the able assistance of a highly experienced and well-respected neutral mediator, Judge Diane Welsh (Ret.) of JAMS. During their first full day mediation session in New York City, the Parties made some progress but were ultimately unable to reach a compromise. After nine more months of litigation, including completion of class certification briefing and oral argument, filing of cross motions for summary judgment, and additional fact and expert discovery, the Parties convened again on November 17, 2017. After a full day of discussions and subsequent negotiations, the Parties were ultimately able to reach the Agreement before the Court. Exhibit B, Porter Decl. at ¶ 14.

C. THE PROPOSED SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

1. The Settlement Provides Significant Benefits To The Settlement Class

As described above, the relief provided under the Settlement in the form of fee concessions is valued at more than $35 million overall. These benefits will be provided automatically, without any claims process, and will be provided now. In addition, Settlement Class Members will be provided with new disclosures regarding the delegation of tax work.

If the Action were to proceed through motions and trial, Plaintiffs would have to overcome numerous defenses and arguments asserted by the Defendant. The list of questions Plaintiffs would have to overcome include:

(i) Whether there are any state law differences that affect Plaintiffs' claims or class certification, including, for example, statutes of limitations, or

differences regarding disclosure requirements;

(ii) Whether Plaintiffs can state a class-wide claim for breach of fiduciary duty based on the Affiliated Investment or tax preparation fee claims;

(iii) What the appropriate measure of damages is for the Affiliated Investment claims, whether alleged underperformance can be offset by higher performing investments, thereby reducing or possibly eliminating damages, and whether damages can be assessed on a class-wide basis;

(iv) Whether BNY Mellon performed other tax work that was compensable in the tax preparation fee charged to trusts, and if so, how that work should be valued, if at all, with respect to the Plaintiffs' mark-up claim;

(v) Are tax preparation fees sufficiently uniform so as to allow the Court to calculate damages?

(vi) What is the effect on Plaintiffs' claims of accountings filed in state probate courts for the Class Trusts; do those accountings present estoppel issues for the Class?

Given the benefits obtained, the fact that they will be provided now without further litigation, and the uncertainty and risk posed by continued litigation, the Settlement provides meaningful benefits to the Class justifying approval.

3. Voluntary Settlement Of This Class Action Serves The Interests Of The Parties, The Court, And Affected Trust Beneficiaries

There is an overriding public interest in settling class action litigation. *Lazar v. Pierce,* 757 F. 2d 435, 439 (1st Cir. 1985). "By their very nature, because of the

uncertainties of outcome, difficulties of proof, and length of litigation, class action suits lend themselves readily to compromise." *Newberg*, §11.41, *citing, HEW Corp. v. Tandy Corp.*, 1979 WL 1580 (D. Mass. 1979) (settlement appropriate where outcome was uncertain, and litigation would require expensive and lengthy trial).

Similarly, settlement of this particular case is appropriate. Although Plaintiffs believe that they have strong claims under state trust law, they understand that success on the merits is by no means assured. There are significant legal obstacles and defenses which render recovery in this case uncertain, and, if there is a recovery, affect the amount. BNY Mellon denies all of Plaintiffs' allegations, denies that it committed or participated in any fiduciary breaches or other wrongdoing, has vigorously contested Plaintiffs' allegations, and would continue to do so.

Whether BNY Mellon's conduct amounted to a breach of fiduciary duty is not a settled issue in this jurisdiction or other jurisdictions. Even if a breach were found, the claims raise complex and unsettled damages questions that would inevitably lead to battling experts. And, apart from the merits, there is no certainty that Plaintiffs would prevail on certification of all of the claims they raise in their Complaint.

If approved by this Court, Settlement Class Members will receive substantial benefits now, without the delay, burden and risks of further litigation.

3. The Settlement Resulted From Arm's-Length Negotiations And Is Not The Product Of Collusion

The proposed Settlement here is the result of lengthy, contentious and complex arm's-length negotiations between the parties. The requirement that a settlement be fair

is designed to protect against collusion among the parties. Here, counsel on both sides are experienced and thoroughly familiar with the factual and legal issues presented. Class Counsel is very experienced in class action litigation generally and, in particular, class litigation arising from breaches of fiduciary duties. In settlement discussions, the Class was represented by a group of attorneys which combined had decades of experience with class actions, and with litigation involving allegations of breach of fiduciary duties. Class Counsel is intimately familiar with this complex area of law. Porter Decl., ¶¶ 5, 6, 8, 9. It is Class Counsel's opinion that the proposed Settlement is fair and reasonable. *Id*., at ¶ 12; Howard Decl., Exhibit C, at ¶ 13.

The duration of this litigation, the contentiousness of the discovery and motions practice, and the hard-fought, arm's-length negotiations between experienced attorneys for both sides, and the result for the Settlement Class are all testaments to the non-collusive nature of the settlement. *See* Porter Decl., ¶¶ 13-14. And the use of an experienced mediator in settlement negotiations further supports the presumption of fairness and the conclusion that the Settlement achieved was free from collusion. *In re Giant Interactive Group, Inc. Sec. Litig*., No. 07-10588, 2011 WL 5244707, at *4 (S.D.N.Y. Nov. 2, 2011); *In re AOL Time Warner, Inc. Sec. & ERISA Litig*., No 02-5575, 2006 WL 903236, at *7 (S.D.N.Y. Apr. 6, 2006) (noting that involvement of mediator in settlement negotiations help "ensure that the proceedings were free of collusion and undue pressure").

Moreover, in connection with their settlement discussions, the Parties exhaustively discussed the merits, strengths, and weaknesses of the Action, risks of

litigation, and chances of class certification. Based on these discussions, the Parties were able to negotiate a fair settlement that they believe to be in their respective best interests. Because the Settlement is the product of serious, informed, non-collusive negotiations, preliminary approval should be granted.

4. The Factual Record Was Well Developed Through Independent Investigation And Discovery

To make a preliminary determination on the fairness of a proposed settlement agreement, a court must have sufficient information to evaluate it. *Manual for Complex Litig. (Fourth)*, § 22.921. There is no precise formula for what constitutes sufficient evidence to enable the court to analyze intelligently the contested questions of fact, but here there can be no doubt that the Court, and all Parties, are adequately informed about the issues presented by this case. The Court held oral argument on the motion to dismiss, numerous procedural motions, and held an extensive hearing on class certification, which revolved around key evidence in the case developed through discovery. Both Parties filed summary judgment motions, each of which relied on an extensive evidentiary record, as well as multiple expert reports for both sides.

The litigation has been ongoing for almost three years and extensive discovery has been conducted. Each party submitted to the other and each in turn answered Interrogatories and Requests for Documents. More than 25,000 pages of documents have been produced. Thirteen depositions have been taken. In addition, BNY Mellon has provided supplemental information in the course of the settlement discussions.

5. The Proposed Notice To Class Members Is Adequate

Under Rule 23(c)(2), class members are entitled to notice of any proposed settlement and an opportunity to object or opt out before it is finally approved by the Court. *Manual for Complex Litig. (Fourth),* § 21.31. Notice is adequate if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974), *quoting, Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

The proposed Notices, Exhibits 2 and 4 to the Settlement Agreement, are clear and straightforward, providing Class Members with enough information to evaluate whether to participate in the Settlement, as well as directions on how to seek further information. The Individual Notice will be mailed to the last known address of all Class Members by first class mail and marked address correction requested. If a mailed Notice is returned to the Settlement Administrator by the United States Postal Service with a forwarding address, the Settlement Administrator will re-mail the notice to that address. The Publication Notice will be published in USA Today in a 1/8th page advertisement.

This proposed method of providing notice is adequate under Rule 23(c)(2). *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985) (individual mailed notice which clearly describes the case and class members' rights meets due process requirements).

V. THE CLASS IS APPROPRIATELY CERTIFIED

For settlement purposes, the Class meets all of the requirements of Fed. R. Civ. P.

23(a) and 23(b)(3).

A. RULE 23(A)

1. Numerosity

The Class as defined easily meets Rule 23(a)'s numerosity requirement. BNY Mellon has represented that the Class encompasses approximately 15,000 trust accounts, many of which have multiple beneficiaries. This number of Class Members demonstrates that joinder is simply a logistical impossibility. *See, e.g., Gorsey v. I.M. Simon & Co.*, 121 F.R.D. 135, 138 (D. Mass. 1988) (800 to 900 member class made joinder impracticable). Indeed, "[no] minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Garcia–Rubiera v. Calderon,* 570 F.3d 443, 460 (1st Cir. 2009).

2. Commonality

To meet the commonality requirement, the representative plaintiff is required to demonstrate that the proposed class members "have suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). In other words, commonality requires that the claims of the class "depend upon a common contention…of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. Even so, "commonality is a low hurdle." *Southern States Police Benevolent Ass'n v. First Choice Armor & Equip., Inc.,* 241 F.R.D. 85, 87 (D. Mass. 2007). The questions of law and fact in

this litigation are substantially identical among Class Members, namely, whether BNY Mellon's practices with respect to assessing tax preparation fees and its process for investing trust assets in Affiliated Investments constitute breaches of its fiduciary duties. *See, e.g.*, *Duhaime v. John Hancock Mutual Life Ins. Co.*, 177 F.R.D. 54, 63 (D. Mass. 1997) (each class member treated in similar manner); *Kaminiski v. Shawmut Credit Union*, 416 F. Supp. 1119, 1122-1123 (D. Mass. 1976) (same).

3. Typicality

Plaintiffs' claims are typical of those of Class Members and therefore meet Rule 23(a)'s typicality requirement. Like the claims of all Class Members, Plaintiffs' claims arise from the allegations that BNY Mellon assessed tax preparation fees that are more than the amount it was charged by PwC (as to both Plaintiffs) and that it imprudently invested trust assets in Affiliated Investments (as to Ms. Henderson). "Generally speaking, typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class," and the "plaintiff's interests are 'aligned with those of the represented group.'" *Newberg* (5th ed.), §3.29, at pp. 264-65. For virtually the identical reasons discussed in the preceding section, this element is also met. To be typical within the meaning of the rule simply requires that the claims of named plaintiffs have the same characteristics as class members' claims. *Barry v. Moran,* 2008 WL 7526753, at *11 (D. Mass. Apr. 7, 2008).

4. Adequacy Of Representation

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Plaintiffs have no interests that are antagonistic to or

in conflict with the Class. *See Amchem Products v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 2251, 138 L.Ed. 2d 689 (1997) (courts look simply at whether the representatives' interests are in any way antagonistic to or in conflict with those of the class members). To be disqualifying, any conflict must involve the subject matter of the suit and may not be merely minor or collateral. *Berman v. Narragansett Racing Ass'n, Inc.*, 414 F.2d 311, 317 (1st Cir. 1969), *cert. denied* 369 U.S. 1037; *Blackie v. Barrack*, 524 F.2d 891, 908-910 (9th Cir. 1975). Where the injuries suffered by the named plaintiff are the same as those that the class is alleged to have suffered, the adequacy requirement is usually satisfied. *Duhaime v. John Hancock Mutual Life Ins. Co.,* 177 F.R.D. 54, 63 (D. Mass. 1997).

Ms. Henderson has loyally and vigorously represented the class, and in fact this Court has already denied BNY Mellon's motion to strike her. Dkt. No. 370. Thomas Hershenson has similarly been an active and diligent class representative, sitting for a deposition, providing extensive documents in response to discovery and participating in settlement discussions.

In addition, proposed class counsel are well-qualified. They are active practitioners whose experience in class actions and trust law is demonstrated by the affidavits attached to this memorandum. *See* Counsel Affidavits and Firm Resumes, attached.

B. RULE 23(B)(3)

Rule 23(b)(3) requires that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action be superior to other available methods for the fair and efficient

resolution of the controversy."

1. Predominance

The requirement of predominance under Rule 23(b)(3) is met. The courts have routinely found predominance of common questions where the claims relate to a common course of conduct. *See, e.g., Waste Mgt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000) (predominance requirement satisfied by "sufficient constellation of common issues [that] bind class members together" and "cannot be reduced to a mechanical, single-issue test"); *Duhaime*, 177 F.R.D. 54, 64 (D. Mass. 1997) (requirement is "readily met in cases alleging consumer . . . fraud" where claim alleges single course of conduct, *quoting Amchem*, 521 U.S. at 625, 117 S.Ct. at 2250). The predominance element has been met here because the claims of the Class Members and the circumstances under which these claims arise are substantially the same.

2. Superiority

Rule 23(b)(3) contains four factors a court must analyze in determining whether a class action is superior to individual litigation: whether individuals have a strong interest in controlling potentially separate actions; a class action's effect on competing litigation involving members of the class; whether resolution of the case in a single forum is desirable; and the potential difficulties that management of a class action presents. A class action is the superior method of resolving large scale claims if it will "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem*, 521 U.S. at 615, 117 S.Ct. at 2246. One reason

that a class action is the superior method of proceeding in a case of this type is that it allows the plaintiffs "to pool claims which would be uneconomical to litigate individually." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). Here, while each Class Member's claim is not insignificant, these claims are complicated and expensive to litigate, given the necessity for expert testimony, making it uneconomic for individuals to pursue these claims on their own, and therefore unlikely they will do so. *See Grace v. Perception Technology, Inc.*, 128 F.R.D. 165, 171 (D. Mass. 1989); *Randle v. SpecTran*, 129 F.R.D. 386, 393 (D. Mass. 1988).

Finally, any possible difficulties of managing a class action are vitiated by the fact of this Settlement Agreement. When "confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620, 117 S.Ct. at 2248.

VI. Conclusion

The proposed class action Settlement Agreement is fair, reasonable, and adequate. For the foregoing reasons, the Plaintiffs request that this Court approve the Settlement Agreement on a preliminary basis so that Notice may be sent, schedule appropriate deadlines for various settlement requirements as reflected in the accompanying motion, and schedule a hearing for final approval of the Settlement.

Dated: March 4, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic File (NEF) on March 4, 2018.

/s/ Elizabeth Ryan
Elizabeth Ryan