IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

OHIO POLICE & FIRE PENSION FUND
140 East Town Street
Columbus, OH 43215-5125

and

SCHOOL EMPLOYEES RETIREMENT SYSTEM OF OHIO
300 East Broad Street, Suite 100
Columbus, OH 43215-3746

Plaintiffs,

v.

THE BANK OF NEW YORK MELLON CORPORATION
One Wall Street
New York, NY 10286

THE BANK OF NEW YORK MELLON
One Wall Street
New York, NY 10286

THE BANK OF NEW YORK
One Wall Street
New York, NY 10286

and

MELLON BANK, N.A.
1 Mellon Bank Center
Pittsburgh, PA 15258,

Defendants.

Case No. _____

COMPLAINT FOR:

(1) BREACH OF CONTRACT

(2) FRAUD

(3) VIOLATION OF THE OHIO DECEPTIVE TRADE PRACTICES ACT; AND

(4) UNJUST ENRICHMENT

COMPLAINT

I. PARTIES

A. Plaintiffs

1. Plaintiff Ohio Police & Fire Pension Fund ("OP&F"), located at 140 East Town Street, Columbus, OH 43215-5125, is a body corporate and politic created by the Ohio legislature to provide retirement, disability, and other benefits to active and retired police officers and firefighters as well as to their beneficiaries and survivors. See R.C. § 742.02. OP&F's enabling statute: (i) vests the administration and management of OP&F in a board of trustees, the composition of which is defined by statute, see R.C. § 742.03(B); (ii) assigns title to the assets of the system to the OP&F board, see R.C. § 742.11(E); (iii) provides the terms of membership in OP&F, the conditions for receiving benefits, and the formulas for determining the amount of any benefit due, see generally R.C. §§ 742.63(A)(1), 742.37, 742.39; and (iv) designates the manner in which the monies of the system are kept in statutorily designated accounts, see R.C. §§ 742.59, 742.60. OP&F serves more than 56,210 public employees across the State of Ohio. OP&F managed approximately $11.62 billion in assets as of August 31, 2011.

2. Plaintiff School Employees Retirement System of Ohio ("SERS"), located at 300 East Broad Street, Suite 100, Columbus, OH 43215-3746, was established and operates pursuant to Chapter 3309 of the Ohio Revised Code. SERS is authorized by its enabling statute to provide pension benefits and access to post-retirement health care coverage to active and retired non-teaching public school employees. See R.C. § 3309.03. SERS's enabling statute: (i) vests the administration and management of SERS in a board of trustees, the composition of which is defined by statute, see R.C. §§ 3309.04, 3309.05; (ii) assigns title to the assets of the system to the SERS board, see R.C. § 3309.03; (iii) provides the terms of membership in SERS, the conditions for receiving benefits, and the formulas for determining the amount of any benefit

due, see generally R.C. §§ 3309.23-.26, 3309.34-.381; and (iv) designates the manner in which the monies of the system are kept in statutorily designated accounts, see R.C. §§ 3309.60, 3309.61. Established in 1937, SERS serves more than 189,000 public employees across the State of Ohio. SERS managed approximately $10.48 billion in assets as of July 31, 2011.

B. Defendants

3. Defendant The Bank of New York Mellon Corporation ("BNY Mellon Corp.") is a Delaware corporation with headquarters at One Wall Street, New York, New York, 10286. BNY Mellon Corp. is the product of the July 1, 2007 merger (the "Merger") of The Bank of New York Company, Inc. and Mellon Financial Corporation ("Mellon"). BNY Mellon Corp. is the parent of Defendant The Bank of New York Mellon. According to BNY Mellon Corp.'s Form 10-K for the year ended December 31, 2010 (filed with the SEC on February 28, 2011) ("BNY Mellon Corp. 2010 10-K"), BNY Mellon Corp. had "$1.17 trillion in assets under management and $25.0 trillion in assets under custody and administration as of Dec. 31, 2010." BNY Mellon Corp.'s principal assets and sources of income come from its two principal bank subsidiaries, including Defendant The Bank of New York Mellon. *See* BNY Mellon Corp. 2010 10-K at 4, 25.

4. Defendant The Bank of New York Mellon ("BNY Mellon" or the "Bank"), a New York state chartered bank located at One Wall Street, New York, New York 10286, is one of two principal bank subsidiaries of BNY Mellon Corp., and is the successor entity (post-Merger) to The Bank of New York and Mellon Bank, N.A. According to the BNY Mellon Corp. 2010 10-K, BNY Mellon "houses [BNY Mellon Corp.'s] institutional businesses, including Asset Servicing, Issuer Services, Treasury Services, Broker-Dealer and Advisor Services, and the

bank-advised business of Asset Management." *Id.* at 4.[1] BNY Mellon is the principal bank subsidiary of BNY Mellon Corp. responsible, since the Merger, for providing custodial and foreign currency exchange services to institutional investors such as Plaintiffs. There is substantial overlap between BNY Mellon Corp. and BNY Mellon's leadership. According to the BNY Mellon Corp. 2010 10-K (at 30-32), every current executive officer of BNY Mellon Corp. also serves as an officer of BNY Mellon.

5. Prior to the Merger, Defendant The Bank of New York ("BNY") was located at One Wall Street, New York, New York, 10286 and served clients throughout the world in five primary businesses: Securities Servicing and Global Payment Services, Private Client Services and Asset Management, Corporate Banking, Global Market Services, and Retail Banking. *See* The Bank of New York Company, Inc.'s Annual Report on Form 10-K for the year ended December 31, 2003 (filed with the SEC on March 10, 2004) ("BNY 2003 10-K") at 2. As part of these services, BNY provided custodial and foreign currency exchange services to institutional investors such as Plaintiffs.

6. Defendant Mellon Bank, N.A. ("Mellon") provided to SERS, prior to the Merger, the custodial and FX services described herein. Prior to and after the Merger, Mellon was located at One Mellon Center, 500 Grant Street, Pittsburgh, PA 15258-0001. After the Merger, BNY Mellon assumed Mellon's custodial and foreign currency exchange operations and is the current provider of such services to SERS.

II. JURISDICTION AND VENUE

7. A number of the actions of Defendants as described herein have occurred in Franklin County, Ohio, and are in violation of the Ohio Deceptive Trade Practices Act

[1] The second of BNY Mellon Corp.'s two principal banks, BNY Mellon, National Association ("BNY Mellon, N.A."), is described by BNY Mellon Corp. as housing its "Wealth Management business," and is not at issue in this case. *Id.*

("DTPA"), Ohio Rev. Code § 4165.01 et seq., the Ohio Securities Act ("OSA"), Ohio Rev. Code § 1707.01 et seq., and the common law.

8. Jurisdiction over the subject matter of this action lies with this Court pursuant to Ohio Rev. Code § 4165.03, Ohio Rev. Code § 1707.41, the common law, and contracts between and for the benefit of the parties.

9. The Bank of New York and The Huntington National Bank, as subcustodian for the Treasurer of the State of Ohio, as statutory custodian for OP&F, entered into a Global Custody Agreement dated May 1, 2004 ("GCA") (attached as Exhibit A (without attachments)). The GCA is governed by Ohio law, with the parties submitting to the "nonexclusive jurisdiction of the Common Pleas Court of the State of Ohio, County of Franklin, the United States District Court for the Southern District of Ohio, or the Ohio Court of Claims, as the case may be." GCA § 13(d).

10. Mellon and Huntington National Bank entered into a Sub-Custody Agreement dated February 1, 2007, related to custody of international securities for SERS ("2007 SCA") (copy (without exhibits) attached as Exhibit B). A subsequent Sub-Custody Agreement between The Huntington National Bank and The Bank of New York Mellon governed custody of international securities for SERS for the period July 5, 2010 through July 1, 2012 ("2010 SCA") (excerpts attached as Exhibit C). Ohio law governs the 2007 SCA, and "venue for all actions shall be in Franklin County, Ohio." 2007 SCA § 19. The 2010 SCA provides that the "laws of the United States or State of Ohio, as applicable," will govern, with venue for all actions to be in a court of competent jurisdiction in Franklin County, Ohio. 2010 SCA § 10.8.

11. This Court has venue to hear this case pursuant to Civ. R. 3(B)(3) because Defendants' conduct which gave rise to Plaintiffs' prayer for relief occurred in Franklin County,

Ohio. Additionally, as stated above, the contracts between or for the benefit of the parties provide that venue shall lie with this Court.

III. FACTUAL BACKGROUND

12. Plaintiffs OP&F and SERS (together, "Plaintiffs" or the "Funds"), for their complaint against Defendants BNY Mellon Corp., BNY Mellon, BNY, and Mellon (collectively, "Defendants"), allege the following based upon personal knowledge as to themselves and their own acts, and upon information and belief or the investigation of counsel as to all other matters.

13. This is an action to recover Plaintiffs' damages resulting from Defendants' practice of assigning fictitious foreign currency exchange ("FX") rates to Plaintiffs' purchases and sales of foreign securities that were done pursuant to "standing instructions" (as further described below), in violation of Ohio law as well as Defendants' contractual duties to Plaintiffs.

14. For more than a decade, it has been the regular practice of Defendants' FX traders and transaction desks, working in conjunction with their custody department, to leverage every possible FX transaction done under "standing instructions" for the exclusive pecuniary benefit of Defendants. Knowing the precise foreign exchange needs of a custody client who has agreed to "standing instructions," Defendants have traded to satisfy the client's obligations on the interbank market, but then have deceptively charged or credited a fictitious price to the client for the trade. The fictitious price given to the client has allowed Defendants to keep a significant unlawful and unfair profit on the trade.

15. Defendants have acquired consistent and unlawful profits at the expense of Plaintiffs by consistently charging them for purchases and sales of a foreign currency (under "standing instructions") using FX rates that incorporate hidden and excessive mark-ups or mark-downs relative to the actual market FX rate applicable at the time of the trade. In so doing, Defendants have reaped consistent windfalls – which can include thousands of dollars on a single

trade – by pocketing the difference between the fictitious and the actual price for the currency obtained or sold for the pension fund client. Clients such as Plaintiffs have remained unaware of this deceptive practice until the recent unsealing of several whistleblower complaints filed by insiders of one or more of Defendants.

16. On information and belief, Defendants' deceptive practices date back at least ten years, affect similarly-situated customers throughout the nation, and may have yielded hundreds of millions of dollars in unlawful profits to Defendants. Defendants' activities are currently the subject of whistleblower lawsuits being pursued by the Commonwealth of Virginia,[2] the State of Florida,[3] the State of New York,[4] and various counties of California,[5] as well as an administrative proceeding by the Securities Division of the Office of the Secretary of the Commonwealth of Massachusetts.[6] In addition, the United States Department of Justice ("DOJ") is pursuing a civil fraud action[7] on behalf of federally insured financial institutions against The Bank of New York Mellon Corp., seeking penalties under the Financial Institutions Reform, Recovery and Enforcement Act, 12 U.S.C. § 1833a ("FIRREA"), as well as injunctive relief under the Fraud Injunction Statute, 18 U.S.C. § 1345 (the "DOJ Action"). The Securities and Exchange Commission ("SEC") is also pursuing its own investigation. The DOJ Action recently resulted in a partial settlement (further described below) under which Defendants are prohibited

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[2] *Commonwealth of Virginia, ex. rel. FX Analytics v. The Bank of New York Mellon Corp.*, No. CL-2009-15377 (Va. Cir. unsealed Jan. 21, 2011).

[3] *State of Florida, ex. rel. FX Analytics v. The Bank of New York Mellon Corp.*, No. 2009-ca-4140 (Fla. Cir. unsealed Feb. 7, 2011).

[4] *People of the State of New York, et al., v. The Bank of New York Mellon Corporation*, Index No. 09/114735 (N.Y. Sup. Ct.) ("NYAG Action").

[5] *Bank of New York Mellon Corp. False Claims Act Foreign Exchange Litigation v. BNY Mellon*, No. 3:11-cv-05683-WHA (N.D. Cal.).

[6] *In the Matter of The Bank of New York Mellon Corporation*, Docket No. 2011-0044 (administrative complaint filed by the Office of the Secretary of the Commonwealth, Securities Division, on Oct. 26, 2011) (the "Massachusetts Action").

[7] *United States v. BNY Mellon Corp.*, No. 1:11-cv-06969-LAK (S.D.N.Y.).

from claiming any longer (as they had to date) that they apply the principles of "best execution" to "standing instructions" trades, or that such trades are "free of charge."

17. Defendants' deceptive, unlawful and unfair practices dating back to at least May 2004 were in breach of their contractual and statutory duties to Plaintiffs, and occurred despite Defendants' repeated representations as to, inter alia, the benefits of their cutting-edge technology, their advanced claims processing procedures, the competitiveness of their FX rates (including that such trades were "free of charge"), and the "best execution practices" that Defendants claimed to follow. Defendants' acts also contravened affirmative representations made to Plaintiffs in Defendants' written FX policies and procedures ("FX Procedures") concerning the terms that Plaintiffs should reasonably expect for FX transactions conducted by Defendants.

18. Plaintiffs could not reasonably have detected Defendants' deceptive, unlawful and unfair practices throughout much of the Relevant Period (May 1, 2004 to the present). Nothing in the FX rates that Defendants actually reported to Plaintiffs indicated that those rates were false and included hidden and unauthorized mark-ups or mark-downs.

19. Plaintiffs' holdings include international assets that require FX transactions. Defendants provided custodial services to Plaintiffs during the Relevant Period, which included executing FX transactions on Plaintiffs' behalf pursuant to "standing instructions." Specifically, OP&F used BNY Mellon and its predecessors from approximately May 1, 2004 to July 5, 2010 for custodial FX services. SERS has used BNY Mellon and its predecessors since approximately February 1, 2007 for custodial FX services, and still does so. At no time did Plaintiffs authorize Defendants to charge Plaintiffs the false FX rates as alleged herein. Plaintiffs estimate that,

together, they have suffered millions of dollars in losses as a result of Defendants' FX price manipulation as alleged herein.

A. Background on Defendants' Relationship with Plaintiffs.

20. Defendants provided custodial services for Plaintiffs during the Relevant Period. A "custodian" is an institution that holds securities on behalf of investors. The responsibilities entrusted to a custodian include the guarding and safekeeping of securities, delivering or accepting traded securities, and collecting principal, interest, and dividend payments on held securities. Custodians are typically used by institutional investors who do not wish to leave securities on deposit with their broker-dealers or investment managers. By separating these duties, the use of custodians – at least in theory – is designed to reduce the risk of fraud or other misconduct. An independent custodian ensures that the investor has unencumbered ownership of the securities other agents represent to have purchased on its behalf.

21. Defendants, either themselves or through their subsidiaries and affiliates, have provided custodial services to a large number of pension funds across the country throughout the Relevant Period. Indeed, Defendant BNY Mellon Corp. touts itself as "the world's largest global custodian," and has $25 trillion in assets under custody.

22. During the past decade, public pension funds such as Plaintiffs have increasingly looked to overseas companies and securities markets in order to diversify their holdings and maximize investment returns. The necessity for pension funds, in particular, to invest in foreign securities in order to properly diversify and meet their funding requirements is well-known to and appreciated by custodial services providers such as Defendants.

23. Because foreign investments are bought and sold in the foreign currencies of the nations in which they are issued, U.S.-based investors necessarily must purchase and sell those foreign currencies in order to complete the transactions. A custodial bank's services accordingly

may include undertaking foreign currency exchange transactions necessary to facilitate a client's purchases or sales of foreign securities.

24. Plaintiffs reposed a high degree of trust in Defendants. Plaintiffs depended upon Defendants to both execute and report FX trades honestly and accurately, and generally to carry out the trades in a manner consistent with their respective custodial services contracts – including the associated fee schedules – and other representations contained in their responses to Requests for Information or Requests for Proposals put out by Plaintiffs.

1. OP&F

25. OP&F used BNY Mellon and its predecessors from May 1, 2004 to July 5, 2010 for custodial FX services. The principal documents concerning OP&F's relationship with BNY Mellon and the provision of FX services include (i) the GCA (defined above), dated May 1, 2004 and (ii) the response by BNY to the State of Ohio Treasurer's Service Level Assessment for International Custody for the Ohio Police & Fire Pension Fund and the State Teachers Retirement System for International Custody, dated September 1, 2006 ("P&F RFI Response") (excerpts attached as Exhibit D).

26. Under GCA § 11, entitled "Responsibility of BNY," BNY promised that it would "use reasonable care with respect to its obligations under this Agreement and the safekeeping of Foreign Assets," and that BNY would be "responsible to the Custodian, the Treasurer ***and the Fund***" (emphasis added) for its actions and the actions of its Subcustodians. The preamble to the GCA additionally makes clear that the GCA is intended to apply "only" to "Fund Assets," meaning OP&F assets, that may qualify as "foreign assets." *See* GCA ("Background Information"). The GCA, further, is replete with references to "the Fund" (OP&F) as an intended beneficiary of the GCA and, in particular, the FX services BNY contracted to provide.

27. GCA § 13(a) deals directly with FX, and provides as follows:

> To facilitate the administration of the Custodian's trading and investment activity, BNY is authorized to enter into spot or forward foreign exchange contracts with itself or an Authorized Person for BNY and may also provide foreign exchange through its subsidiaries, affiliates or Subcustodians. Instructions, including ***standing instructions***, may be issued with respect to such contracts but the BNY may establish rules or limitations concerning any foreign exchange facility made available. In all cases where BNY, its subsidiaries, affiliates or Subcustodians enter into a foreign exchange contract related to Accounts, the terms and conditions of the then current foreign exchange contract of BNY, its subsidiary, affiliate or Subcustodian and, to the extent not inconsistent, this Agreement shall apply to such transaction.

GCA § 13(a) (emphases added).

28. The GCA is governed by Ohio law, with the parties submitting to the "nonexclusive jurisdiction of the Common Pleas Court of the State of Ohio, County of Franklin, the United States District Court for the Southern District of Ohio, or the Ohio Court of Claims, as the case may be." GCA § 13(d).

29. The P&F RFI Response is responsive to the Service Legal Assessment for Custody Services ("SLA") (attached as Exhibit E) initiated in 2006 by Jennette B. Bradley, then-Treasurer of the State of Ohio. The SLA provided that "[a]ny agreement for ancillary services" (such as services related to foreign exchange transactions) "will be between the Beneficial Owner [*i.e.*, P&F or SERS] and Custodian [*i.e.*, BNY]" directly. SLA § 1.1.

30. In the section of the P&F RFI Response entitled "Ancillary Services: Foreign Exchange," BNY Mellon described its FX services as capable of pricing during a 24-hour window in a manner designed to optimize the custodial client's experience: "[O]ur FX service representatives in seven cities around the world have access to local and regional foreign exchange desks in order to handle any foreign exchange execution requests, toll free and 24 hours a day. Our FX desks operate locally, in seven financial centers, and are staffed with sales professionals who cover various major market participants such as multinational corporations,

insurance companies, fund managers, and central banks. Maintaining such a rich and important client base requires superior service and competitive rates as an FX provider." P&F RFI Response, § 2.16 – Foreign Exchange.

31. In response to the SLA's query concerning how and when it set its FX rates, BNY Mellon stated: "We utilize the Daily Foreign Exchange Rates from WMReuters. Each price is converted back to its base currency based on the FX rate each day. Currently we use a 4:00 p.m. London close for FX rates." *Id.* And in response to the query whether there was any "financial advantage" to transacting in FX through BNY Mellon, BNY Mellon stated: "Since The Bank of New York is one of the largest global custodians, our clients gain the ongoing benefit of aggregation of transactions across our broad customer base; ***accordingly, we price foreign exchange at levels generally reflecting the interbank market at the time the trade is executed by the foreign exchange desk***." *Id.* (emphasis added). "***Best execution***," BNY Mellon continued, "encompasses a variety of services designed to ***maximize the proceeds of each trade***, ***while containing inherent risks and the total cost of processing***." *Id.* (emphasis added).

32. For the reasons further discussed below, the foregoing statements were false and misleading and omitted material facts concerning Defendants' actual practices with respect to FX trades. Rather than using a "4:00 p.m. London close for FX rates," pricing FX trades at levels "generally reflecting the interbank market" at the time of execution, or "maximizing the proceeds of each trade" for the benefit of their clients, Defendants purposefully manipulated the FX rates charged to Plaintiffs on "standing instructions" FX trades so as to allow for undisclosed risk-free profits to Defendants, at the direct expense of Plaintiffs, in breach of Defendants' contractual duties and of Ohio law.

2. SERS

33. SERS has used BNY Mellon and its predecessors since February 1, 2007 for custodial FX services. The relevant documents concerning SERS' relationship with BNY Mellon and the provision of custodial FX services include (i) Mellon's response to the Request for Information: International Custody Services for the School Employees Retirement System, dated September 1, 2006 ("SERS RFI Response") (copy (without exhibits) attached as Exhibit F); (ii) the Sub-Custody Agreement between Huntington National Bank and Mellon, dated February 1, 2007, related to custody of international securities for SERS (defined above as "2007 SCA"); (iii) the Custody Operating Procedures By and Between Treasurer of State of Ohio, School Employees Retirement System of Ohio, Huntington National Bank and Mellon Bank, N.A. for International Assets of the School Employees Retirement System, dated September 18, 2007 ("2007 SOP") (attached as Exhibit G); (iv) the Subcustody Agreement between The Huntington National Bank and The Bank of New York Mellon, for the period July 5, 2010 through July 1, 2012 (defined above as "2010 SCA"); and (v) the Custody Operating Procedures Between Treasurer of State of Ohio, School Employees Retirement System of Ohio, The Huntington National Bank and The Bank of New York Mellon for International Assets of the School Employees Retirement System, dated July 5, 2010 ("2010 SOP") (attached as Exhibit H).

34. Both the 2007 SCA and the 2010 SCA make clear that SERS is an intended third-party beneficiary of the contracts. SERS is defined as the "Beneficial Owner" of the assets governed by the agreements, and is specifically carved out of the "No Third Party Beneficiaries" clause in Section 10.11 of the 2010 SCA (which provides that BNY Mellon "is acting solely on behalf of the Custodian and the Beneficial Owner" [*i.e.*, SERS]).

35. Similar to the P&F RFI Response discussed above, the SERS RFI Response contains a number of statements by Mellon representing or promising accurate and timely

pricing of FX trades, as follows: (i) "Mellon operates full service trading rooms in London, Boston, and Pittsburgh providing 24 hour market access for our clients"; (ii) Mellon has a "***historical commitment to accurate and efficient settlement***[]" of FX trades; (iii) "Mellon provides 24 hour market access for currencies that Mellon deals directly"; (iv) ***"[t]ransactions for forward foreign exchanges and other currency derivatives are entered into the accounting system on a timely basis***"; (v) "***Mellon works closely with the investment manager to ensure that all foreign exchanges and currency derivatives are processed and reported accurately***"; and (vi) "[a]s active market makers in the interbank, institutional and corporate FX markets, Mellon FX traders are acutely aware of current currency prices. ***Prices we offer clients are intended to be competitive with the current market***." SERS RFI Response § 2.16.

36. Section 6 of the 2007 SCA, entitled "Directed Powers of Mellon," provides that "Mellon shall take the following actions . . . pursuant to Authorized Instructions . . . [including those] actions necessary to settle transactions in futures and/or options contracts, short-selling programs, foreign exchange or foreign exchange contracts, swaps and other derivative investments with third parties." Section 7 of the 2007 SCA, meanwhile, provides that Mellon "shall have . . . discretionary authority" to "take all action necessary to pay for, and settle, Authorized Transactions, including exercising the power to borrow or raise monies from Mellon in its corporate capacity or an affiliate and hold any property in the Account as security for advances made to the Account for any such authorized transactions or the purchase or sale of foreign exchange, or of contracts for foreign exchange. Mellon shall be entitled to collect from the Account sufficient cash for reimbursement and, if such cash is insufficient, dispose of the assets of the Account to the extent necessary to obtain reimbursement." 2007 SCA § 7(d).

37. Ohio law governs the 2007 SCA, and "venue for all actions shall be in Franklin County, Ohio." *Id.* § 19. The 2007 SCA specifically incorporates the SERS RFI Response as part of the overall agreement between Mellon and SERS. *Id.* § 23.

38. The 2007 SOP further provides that "Mellon will settle all international trades within industry accepted standards for each applicable market. All trades shall be settled delivery versus payment to the extent permitted in the applicable market. Mellon will adhere to the market accepted principles for international trading." 2007 SOP at 20. "Currency spot contracts," meanwhile, "are considered a delivery vs. payment transaction since SERS will always be receiving one (1) currency in exchange for another currency. Therefore, no TOS [Treasurer's] authorization is required for currency spot contracts." *Id.* at 24.

39. The 2010 SCA (at § 7.4) adds a term entitled "Subcustodian Provides Diverse Financial Services and May Generate Profits as a Result." "For example," the 2010 SCA states, "Subcustodian [BNY Mellon] or its Affiliates may act as a dealer or market maker in the Financial Assets to which the Instructions relate, provide brokerage services to other customers, act . . . in the same transaction as agent for more than one customer, have a material interest in the issue of the Financial Assets or earn profits from any of these activities." 2010 SCA § 7.4. The 2010 SCA further states that "Beneficial Owner [SERS] further acknowledge[s] that [BNY Mellon] may be in possession of information tending to show that the Instructions received may not be in the best interest of . . . [SERS] but that neither [BNY Mellon] nor its Affiliates are under any duty to disclose any such information." *Id.* The foregoing notwithstanding, the 2010 SCA provides that BNY Mellon "***shall treat all transactions with . . . [SERS] as arms-length transactions***." 2010 SCA § 7.4. (emphasis added).

40. The 2010 SCA further provides that the "laws of the United States or State of Ohio, as applicable," will govern, with venue for all actions to be in a court of competent jurisdiction in Franklin County, Ohio. *Id.* at § 10.8.

41. Contrary to their written representations, policies, and Plaintiffs' reasonable expectations, Defendants did not provide "accurate and efficient settlement[]" of FX trades, nor enter them into their accounting system "on a timely basis." Nor did Defendants "ensure that all foreign exchanges and currency derivatives [were] processed and reported accurately," "offer [FX prices] . . . intended to be competitive with the current market," or treat all FX trades as "arms-length transactions." Instead, Defendants purposefully manipulated the FX rates charged to Plaintiffs on "standing instructions" FX trades so as to allow for undisclosed risk-free, non-arms-length profits to Defendants, at the direct expense of Plaintiffs, in breach of Defendants' contractual duties and of Ohio law.

3. OP&F and SERS

42. In addition to and beyond the documents described above, Defendants publicly represented their FX services as successful, award-winning, skillful, and offering a cost-saving benefit, pursuant to "best execution standards," to clients such as Plaintiffs. For instance, BNY Mellon Corp.'s website stated the following:

- "The Bank of New York Mellon is a premier foreign exchange provider and one of the largest foreign exchange dealers in the U.S., making markets and carrying positions in over 100 currencies, with a particular expertise in emerging market currencies. We offer a comprehensive array of innovative products, from basic foreign exchange to customized multicurrency hedging and yield-enhancing strategies."

- "Execution: Our global franchise provides you with 24 hour market coverage. Due to our standing as one of the world's leading custodial Banks, we are an active market-maker in the spot, forward and option markets."
- "Standing Instruction [Indirect Foreign Exchange] trading provide[s] a simple, flexible, and complete service solution that automates the capture of all types of custody-related foreign exchange . . . Operationally simple, ***free of charge*** and integrated with the client's activity on the various securities markets, [Foreign Exchange] standing instruction is designed to help clients minimize risks and costs related to the foreign exchange and concentrate on their core business."
- "Standing Instruction Foreign Exchange Clients benefit from: [foreign exchange] execution according to ***best execution standards*** . . ."

(Emphasis added).

43. The duty of "best execution" is commonly understood in the financial industry to require that a broker-dealer seek to obtain for its customers the most favorable terms reasonably available under the circumstances. This understanding was echoed by Defendants' own response to the SLA, as discussed above in paragraph 31, as well as numerous of Defendants' internal communications, as discussed further below. At a minimum, therefore, "best execution standards" required that Defendants execute FX trades in a manner designed to maximize the proceeds for Plaintiffs. Instead, Defendants did the opposite, charging or crediting Plaintiffs the worst rate of the day for each standing instructions FX trade, and pocketing the difference.

44. Additionally, while Defendants' custodian services, including their directed and "standing instructions" FX services, are aimed at and available to any individual, company or fund needing custody services to safeguard their assets, Defendants specifically touted the

strength of their relationship with pension funds, such as Plaintiff, as offering a competitive advantage over other custodial banks. For instance, BNY Mellon Corp.'s website stated the following:

- "A Leading Provider For Government Entities: Public pension plans and other government agencies seek to align themselves with a custodian who is a clear leader, one who has the capabilities and experience to help them meet the numerous challenges facing their organizations today including: Increased regulatory oversight, complex global investing environment, pressure to grow assets while managing with existing or decreasing resources, and corporate governance."

45. These statements, along with those contained in the documents described above, were false or misleading when made, and aided in the accomplishment of Defendants' deceptive, unlawful and unfair FX trade practices. Defendants' "standing instructions" FX trading was not done "free of charge," nor was it done pursuant to "best execution standards."

46. The profits Defendants have realized through their unfair and deceptive practices have been massive, as Defendants have capitalized on the opportunity provided over the past decade by pension funds' increasing need to diversify their investment holdings by investing in foreign securities, thus leading to an increased demand for FX services. In 2008 alone, for instance, BNY Mellon Corp. reported a record $1.5 *billion* in FX and other trading activity revenue – an increase of $676 million (86%) over the previous year. For the years 2002 to 2008, BNY Mellon Corp. and the banks that merged to form it (including BNY) reported more than $5 billion in FX trading revenue. On information and belief, BNY Mellon Corp.'s FX revenue is a cornerstone of the Bank's annual profits, and serves as a cash generator responsible for funding

the annual bonuses of the entire firm. A significant portion of these revenues were acquired at the unknowing and unlawful expense of public pension funds who permitted Defendants to conduct FX trades for their accounts pursuant to "standing instructions."

B. "Standing Instructions"

47. Custodial banks that provide FX services to pension funds generally do so in one of two ways. The first way is through "direct" or "negotiated" sales or purchases of foreign or domestic currency, in which the investment staff or outside investment manager for the custodial client directly negotiates, at arm's length, the sale or purchase of foreign currency with the custodial FX services provider. In this manner, the pension fund's staff (or the pension fund's outside investment manager) is involved, in real-time, with the sale or purchase of the particular foreign currency that is necessary for the transaction in a given foreign security to close. The custodial FX services provider quotes a price for the foreign currency to the custodial client or its representative, which the client or client representative accepts, declines, or negotiates against. "Direct" transactions in foreign currency traditionally yield modest profits to the purchaser or seller of the currency in question; it is typical for custodial FX service providers to earn very modest profits (perhaps up 2 to 3 basis points ("bps") of "spread"), per unit of currency, as compared with the interbank market rate applicable to a foreign currency at the time of a direct transaction. A basis point is equivalent to 1/100 of one percentage point (or .0001). This modest spread may be considered a proxy for the "market rate," since it is the product of an arm's length negotiation.

48. The second way in which a custodial client may purchase or sell foreign currency is pursuant to "standing instructions." Under "standing instructions," also known as the "indirect" method of transacting, a custodial FX services provider acquires foreign or domestic currency on an as-needed basis, whenever a custodial client buys or sells foreign securities or

receives a dividend on a foreign security, without the direct involvement of either the custodial client's investment staff or outside investment managers. "Standing instructions" as originally conceived by Defendants were typically – although not exclusively – used for income item conversions, such as dividend or interest payments on a foreign investment, or "de minimis" FX transactions of less than a certain dollar amount. However, Defendants reserved the ability under the FX Procedures to apply "standing instructions" pricing to FX transactions of an unlimited dollar amount provided that the respective client did not specifically instruct Defendants to do otherwise. In this way, Defendants maximized their opportunities for taking undisclosed and unlawful profits on FX trades of any size.

49. Institutional investors such as Plaintiffs pay a flat fee for custodial FX services that include "standing instructions" FX trade services. Defendants advertised such "standing instructions" FX services as being "free of charge" (apart from whatever the custodial client paid in annual custodial fees).

50. Without directly negotiating the price of an FX transaction, a custodial client has no other information on which to rely for determining whether it received an arm's length market price for its "standing instructions" trades other than a monthly report summarizing such trades provided by the custodian. Plaintiffs received such monthly reports during the Relevant Period.

51. Such monthly reports record the date, amount, and price of an FX transaction, but do not give the times at which such trades were executed. It is accordingly not possible for custodial clients such as Plaintiffs to know whether the FX prices have been manipulated in order to create a windfall in profits for the FX services, particularly when the prices of the FX trades reported by the custodian fall within the range of the day's exchange rates for the currency in question. The custodial client accordingly relies on the custodian's good faith execution of its

services to the client, as well as the custodian's contractual and statutory duties, for its belief that it is not being deceived into paying exchange rates far in excess of market rates for "standing instructions" FX trades. Plaintiffs so relied here.

52. Throughout the Relevant Period, Defendants purposefully manipulated the FX rates charged or credited to Plaintiffs pursuant to "standing instructions." Rather than market rates, Defendants applied FX rates to "standing instructions" trades that resulted in undisclosed profits that were many multiples greater than those typically achieved on an arm's length basis. As further discussed below, analyses of Plaintiffs' FX transactions for the periods during which Defendants provided FX custodial services shows that Plaintiff's FX trades resulted in profits of ***19 bps*** or more, on average, for Defendants, when compared to the daily mid-rate for each relevant currency. These profits have no rational basis, in that they were not paid in exchange for a service of like-value by Defendants. Rather, they were unfairly and unlawfully obtained by Defendants at the direct expense of Plaintiffs, in exchange for no service of like-value, and contrary both to Defendants' contractual obligations and statutory law.

C. How Defendants' FX Scheme Worked

53. Recently unsealed complaints filed in Florida and Virginia under these states' respective *qui tam* (or False Claims Act-analogous) statutes reveal a sophisticated scheme by which Defendants and their successors and affiliates have reaped massive undisclosed profits, over the period of many years, at the direct expense of the custodial clients they have purported to serve. This scheme, according to whistleblowers from inside BNY Mellon, has included deceiving clients into believing that they had received "best execution" on their "standing instructions" trades, and that such trades had been priced at market rates. Defendants have accomplished this scheme through a series of deceptive acts, as follows:

54. Upon receipt of a request for a purchase or sale of a foreign security pursuant to "standing instructions," Defendants execute a trade to fill the request at the FX rate available at or close to that time. Defendants thereafter watch the market fluctuation in FX rates related to the transaction over the course of the day (covering as much as a 24-hour period, beginning a 5:00 p.m., Eastern Time, but certainly no less than the time permitted by the FX Procedures) in order to charge or credit to the client a different, less favorable rate than the one at which Defendants actually settled the FX transaction. Defendants thus falsely claim to have paid or received a different rate than that which was actually required to settle the trade.

55. If the transaction is a "buy" of a foreign currency, Defendants charge the custodial client a higher FX rate available at another time in the day, which causes the custodial client to pay more for the FX transaction than what Defendants actually paid. Defendants will keep for themselves the difference between the true cost of the trade and the fictitious or false FX rate Defendants claimed to have paid and charged to the client.

56. If the transaction is instead a "sale" of a foreign currency, Defendants will falsely credit the custodial client with an FX rate available at another time in the day that is lower than what Defendants actually received in the currency exchange, and remit to the custodial client an amount less than what Defendants actually received on the client's behalf.

57. After Defendants make the actual FX transactions necessary to cover their "standing instructions" clients' needs, Defendants' FX traders assign falsified FX rates to the transactions, determined by looking back to the start of the trading time period allotted by the FX Procedures. The Defendants' FX Traders assign fictitious FX rates, a process called, "locking the rates," as follows:

A. Higher prices to FX buy orders

B. Lower prices to FX sell orders

58. The Defendants' global FX operations are managed from New York. According to the whistleblowers, although the Merger was effective as of July 1, 2007, Defendants have maintained the FX departments that existed at BNY and Mellon Corp. to serve the clients served by each bank prior to the Merger. Those custodial clients that previously hired BNY to be their custodian still have their trades executed by the legacy BNY FX desk in New York; those custody clients that had previously hired Mellon to be their custodian still have their trades executed by the legacy Mellon FX desk.

59. According to the whistleblowers, since the Merger, a daily "Reconciliation" call between Defendants' New York and Pittsburgh FX trading desks is conducted each day as Defendants begin to choose the FX rates to charge its custodial clients for "standing instructions" FX transactions. The Pittsburgh FX desk (*i.e.*, legacy Mellon) will call the New York FX desk (*i.e.*, legacy BNY) so that they can synchronize their high and low ranges for each currency pair. According to the whistleblowers, these telephone calls are made on a private, direct line, and may have been shielded from Defendants' customary policy of recording transactional conversations. This call, done at approximately 2:30 p.m. Eastern (U.S.) time, is made so that any discrepancies between each transaction desk's operations are avoided, thus making discovery of Defendants' scheme less likely.

60. Each "standing instructions" client with a trade in a particular currency pair for that day accordingly receives the same FX rate, as determined by Defendants' cherry-picked range-of-the-day pricing, regardless of when the client's specific trade request was submitted, the size of the trade, the time the actual FX trade occurred, or the actual FX rate at the time of that trade.

61. The only limitation on this false pricing is that Defendants are careful, with some exceptions, to price the trades within the range of the day. This is done to deceive an audit of the "standing instructions" client's FX transactions, as such audits typically only look to see if an FX transaction is priced within the range of the day on which it occurred.

62. The foregoing notwithstanding, according to the whistleblowers, it has been Defendants' practice to occasionally take a "standing instructions" FX deal in the morning New York time and price it using the range that has been observed in London time. This practice allows a much longer time frame from which to review and take advantage of the volatility of an FX rate, and, as a consequence, take a bigger false FX spread from the "standing instructions" client.

63. According to the whistleblowers, post-trade cash flow analyses are immediately done by Defendants to tabulate the profits from each completed trade (after the falsified FX rate has been assigned to the custodial client). The profit from each transaction represents the difference between the falsely high (or low) price assigned to the custodial client and the price the currency actually traded for and paid (or received) by Defendants.

64. Profit and loss reporting is done by each FX transaction desk by the maintenance of a running Profit/Loss report that can be generated at any time. The FX traders review this document in order to keep track of their personal Profit/Loss as well as Defendants' Profit/Loss. In addition, monthly reports are also generated. Both the monthly and daily reports also show year-to-date reporting.

65. According to the whistleblowers, profits from "standing instructions" FX trades drive Defendants' decision-making processes. When the Bank competes for a custodial client, Defendants' FX departments are consulted and asked to estimate what Defendants' profits will

be when and if they were to execute the prospective client's FX transactions. Defendants look at what amount of international investments the client presently has and how Defendants might price the deals, directly or indirectly.

66. Defendants' FX traders will then give Defendants' custody group a conservative estimate of what the FX profit potential will be with the prospective client. The custody groupthen incorporates this estimate into their pricing structure as they make a flat-fee, all inclusive proposal (including all FX costs and fees) to the prospective custodial client. The FX traders share some of their profits with the custody group because they understand how valuable the stream of "standing instruction" custodial deals, and the profits obtained from unwitting custodial clients, will be to the FX department.

67. Defendants unlawful scheme of executing FX trades and assigning fictitious FX rates for "standing instructions" pension fund clients was deliberately set up to leverage the day's trading volatility in favor of Defendants and against the financial interest of the custodial clients. At the beginning of the trading day, there is a very narrow trading range for stocks and currencies, as compared with the end of the day. If, at the beginning of the day, a BNY Mellon trader knows that he has to purchase 1,000,000 Euros for a pension fund, the trader also knows that he does not have to book that trade into BNY Mellon's system until many hours later. The trader has been incentivized, by his employer, to wait and assign a fictitious FX rate to the "standing instructions" trade.

68. Defendants themselves have noted that volatility in foreign currencies has contributed to an increase in their FX revenues. What they have not disclosed is that this is particularly true because they have taken undue advantage of such volatility. By fixing their FX positions throughout the day at prices advantageous to themselves, Defendants cannot lose on a

"standing instructions" transaction. At worst, Defendants break even. To date, all that Defendants have considered it necessary to do to shield their unlawful and unfair practices from scrutiny by those clients who utilize "standing instructions" FX services has been to price such FX trades within the range of FX rates for the day on which the transaction was effected.

69. End-of-month Client Custody Reports are prepared by the Bank on or before mid-month. These reports list the custodial client's FX trades by date, amount, and price, *i.e.,* the fictitious FX rate (as reported to the custody side of the Bank by its FX traders). These reports never contain time-stamps for the FX trades, and there is nothing on the report that would lead a custodial client to suspect that it had been unfairly charged exorbitant mark-ups (or mark-downs) on its "standing instructions" FX trades that were orders of magnitude larger than under the terms offered to unrelated parties in comparable arm's length FX transactions.

70. By not showing the specific time of day at which the actual, as compared to the feigned, FX trade occurred, Defendants do not have to reveal that a trade they knew about at 11:00 AM Eastern time, and, therefore, could have executed near that time, has instead been assigned a far less favorable (for the client) FX rate that only occurred in the interbank market during mid- or late afternoon. Additionally, according to the whistleblowers, and as alleged and described in more than one of the government actions pending against BNY Mellon, not all "standing instructions" clients were treated identically. Certain high-value "standing instructions" clients quietly had the ability to directly negotiate their FX prices with BNY Mellon traders each afternoon, while otherwise keeping their trades within the "standing instructions" channel. These special clients were known as "opt-out" clients, and thus received better terms on their FX trades while receiving the other benefits of "standing instructions."

71. In a similar vein, a *Boston Globe* article dated January 4, 2012 entitled "Fidelity Moved Trades Away from BNY Mellon" describes how, according to internal emails among BNY Mellon executives, BNY Mellon made efforts in September 2009 to keep a "powerhouse" client by "slashing prices" on the client's "standing instructions" FX trades, then "return[ed] the prices to 'normal' when the effort failed."

72. Meanwhile, according to the NYAG Action, BNY Mellon reached secret agreements with at least 62 clients and investment managers that pressed for greater transparency into "standing instructions" pricing while the FX scheme remained hidden to the bulk of BNY Mellon's FX clients. Rather than answer these high-value clients' questions about how "standing instructions" FX trades were priced, BNY Mellon elected to extend to them a different arrangement that was vastly less profitable to BNY Mellon, known as "benchmark pricing." Under "benchmark pricing," the NYAG alleges, BNY Mellon executed the clients' "standing instructions" trades at a pre-negotiated fixed markup from a public reference price (usually the 4:00 pm London fixing) rather than at the high or the low of the day at which "standing instructions" trades were ordinarily executed (and were executed for the bulk of "standing instructions" clients, including Plaintiff). According to the NYAG's complaint, "benchmark pricing" yielded a margin for BNY Mellon that was substantially less, by more than half, than the margin BNY Mellon typically earned on "standing instructions" FX trades. According to the NYAG's complaint, an internal Global Markets 2007 Strategic Plan noted this margin difference and its negative impact, stating that, "[i]f a Standing Instruction client converts to benchmark pricing, then the pre-negotiated spread may be as low as 1-3 basis points."

73. According to the NYAG Action, one of the high-value clients for whom BNY Mellon offered "benchmark pricing" is BlackRock, who in 2009 had begun raising questions

about transparency in the "standing instructions" space. According to internal emails at BNY Mellon, rather than permit BlackRock to carry out a "full review of the Brussels [i.e., Standing Instruction] book," BNY Mellon extended "benchmark pricing" to BlackRock, under which BlackRock's "standing instructions" FX trades are priced at just 1.5 basis points above the fixing rate at 4 p.m. London time.

74. Each of Defendants' actions described immediately above was designed to placate high-value "standing instructions" FX customers while keeping the bulk of Defendants' client base in the dark about the massive undisclosed spreads Defendants were charging on "standing instructions" FX trades.

75. The following example, taken from one of the whistleblower complaints, illustrates the alleged illicit profit-taking on "standing instructions" FX trades: On one trading day, at 9:30 AM Eastern time, BNY Mellon received notice that its clients would be selling approximately $12,500,000.00 United States Dollars. BNY Mellon would be selling them Canadian Dollars in return, as they were obligated to pay for security transactions that they had already entered into in Canada.

76. The FX desk accordingly was aware of this net client exposure that would be offset that day by 9:30 AM Eastern time. The USD/CAD exchange rate had opened that morning in New York at 1.0730 (where it would take 1.0730 CAD to equal 1 USD). The currency market fluctuated throughout the day and the USD/CAD traded lower, ultimately making a low exchange rate of 1.0682 CAD to 1 USD. This rate, 1.0682, was the worst possible rate one would have received if selling USD and buying CAD in the New York trading session. From that low point, the market for USD traded higher, ultimately reaching a high of 1.0847 CAD to 1 USD in the afternoon.

77. According to the whistleblowers, the FX desk sold $12,500,000.00 USD to the trader that covered the USD/CAD on the spot desk, who covered the position at an average rate of 1.0795. The rate that the custodial clients that were selling the USD received, however, was the very worst of the day: 1.0682. In other words, this "standing instructions" trade was hyper-priced to the custodial clients at 113 basis points. There was no risk on Defendants' side of this trade. The profit obtained by Defendants from buying $12,500,000 USD/CAD at 1.0682 and selling the USD/CAD at 1.0795 was $134,937.50. Had the deal been negotiated between unrelated parties in a comparable arm's length transaction, the expected spread (or market price) may have been 2 to 3 bps, or nearly fifty times less.

78. Plaintiffs never agreed that their master custodial agreements entitled Defendants to any fees above those specified therein. Nonetheless, Defendants falsely reported fictitious FX rates on "standing instructions" FX trades to Plaintiffs, and pocketed the difference from the FX rates that were actually paid or received by Defendants.

79. Plaintiffs paid hundreds of thousands of dollars in custodial fees to Defendants during the Relevant Period. During that time, Defendants deceptively, unlawfully and unfairly generated millions of dollars in additional risk-free revenue. Plaintiffs have struggled to meet funding requirements in the face of major losses in value attributable to the economic downturn of the last three years. Money lost due to Defendants' deceptive, unlawful and unfair practices is money that will not earn compounded investment returns for Plaintiffs over the thirty-plus year time horizon that applies to most pension plans, and each such loss will triple each decade.

D. An Analysis Of Plaintiffs' FX Trades

80. Analyses of Plaintiffs' FX trades illustrates the extent of the unlawful and undisclosed profits acquired by Defendants, as a result of their unlawful practices, at the expense of custodial clients such as Plaintiffs.

81. In the wake of the unsealing of the whistleblower actions described above, Plaintiffs analyzed the rates recorded on its FX trades, conducted by Defendants, in five major global currencies (Euros, Japanese Yen, British Pounds, Swiss Francs, and Australian Dollars) for the Relevant Period. With respect to each trade, Plaintiffs compared the FX rate reported by Defendants with the mid-rate of the day for the currency in question. Plaintiffs adopted the mid-rate of the day as one possible substitute for the actual FX rate that was in effect at the time of each transaction, since the latter information is exclusively available only to Defendants (who, as alleged above, do not provide time-stamps for each FX transaction to custodial clients on their monthly FX reports).

82. Plaintiffs discovered that the analyzed FX deals were assigned FX rates by Defendants that were more expensive to Plaintiff than the mid-rate of the day by an average of **19 bps** (as compared to the 2 to 3 bps of "spread" that a client may expect to be charged in arm's length FX trades).

83. The difference in "spreads" charged to Plaintiffs' "standing instructions" FX trades (approximately 19 bps) and those reasonably expected in arm's length or "direct" deals illustrates the extent to which pension funds such as Plaintiffs were overcharged for "standing instructions" deals in comparison to those negotiated at arm's length, notwithstanding Defendants' written representations.

84. The approximate overcharge to Plaintiffs for the "standing instructions" deals analyzed for the Relevant Period and the major currencies described above, using the mid-rate of the day, exceeds $16 million.

E. Recently Disclosed Evidence Of The FX Scheme And Defendants' Knowledge Of Same.

85. On October 26, 2011, the Massachusetts Action was commenced, seeking restitution from Defendants for Massachusetts-based public pension fund clients for losses sustained as a result of Defendants' FX practices. Attached as exhibits to the complaint in the Massachusetts Action (the "Administrative Complaint") are numerous documents, including internal emails and correspondence from Defendants, illustrating Defendants' knowledge of the FX scheme and the manner in which it was conceived and executed. In these documents, Defendants unabashedly acknowledge that the lack of transparency under "standing instructions" was key to company profits, and that this lack of transparency needed to be maintained.

86. As shown by the exhibits to the Administrative Complaint, Defendants recognized that "standing instructions" FX transactions were a major profit center for BNY Mellon Corp. A December 11, 2008 internal e-mail to the Company's Global Market Management Committee mentioned how, in 2008, in the teeth of the economic downturn, Defendants' FX transactions had made "bundles of cash." BNY Mellon's 2008 Annual Report indicated that FX transactions and other trading activities revenue, which were reported in the Asset Servicing segment, reached a record $1.5 billion in 2008, an increase of $676 million (or 86%) over 2007. Even though a downturn was experienced in the following two years, BNY Mellon reported $1 billion in revenues from the Asset Servicing Segment in 2009 and $787 million in 2010.

87. In order to maintain maximum profits, Defendants wished for clients to continue using "standing instructions" rather than migrate to negotiated FX transactions. Jorge Rodriguez ("Rodriguez"), Managing Director of BNY Mellon, wrote to Richard Mahoney ("Mahoney"),

Chairman of BNY Mellon's United States Foreign Exchange Committee and head of BNY Mellon's Global Markets and Capital Markets Groups in an e-mail dated February 1, 2008:

> As we all know, Standing Instruction FX is the most profitable form of business. ***It offers the traders a free intra-day option to time its currency execution in the marketplace knowing it does not have to get back to the customer immediately with the deal price. Business of this type also allows us to take advantage of increased market volatility and wide intra-day trading ranges***. All these pricing advantages disappear when a client trades via an e-commerce platform and full transparency is achieved. Based on our actual records, in 2007, non-negotiated business generated an average profit of 9 basis points. (Emphases added).

88. BNY Mellon's own records indicate that it earned 10-20 times more on FX trades subject to its "standing instructions" than on negotiated FX trades. When a customer migrated to an e-commerce platform, it could comparison shop among banks for the best rate. As Rodriguez went on to explain:

> Our experience has demonstrated that when a non-negotiated (ultra-friendly) client converts to a multi-bank e-commerce platform (competitive price shopper) ***margins greatly decline as the free intra-day option feature previously enjoyed disappears***, the competitive pressure of going up against as many as 10 banks at a time, ***and the client's ability to carefully monitor each and every trade at the time of execution reduces margins dramatically***. (Emphases added)

89. Rodriguez noted that "FX is a pure commodity" and it was up to BNY Mellon's sales team to proactively manage clients to ensure a "fair return" for the bank; "the problem is that in these [negotiated] cases, a fair return is only a fraction of what it could be if the business were awarded to BNY Mellon in a non-negotiated capacity." As Rodriguez subsequently noted in an October 2009 e-mail, "***at the end of the day, it is all about profits***." (Emphases added)

90. On the same day, Mahoney repackaged Rodriguez's e-mail and transmitted this information in an e-mail of his own to Bob Kelly, the CEO of BNY Mellon Corp. at the time.

91. Beginning in 2008, BNY Mellon gave consideration to whether it should be more "transparent" (*i.e.*, honest) with its customers who permitted it to perform "standing instructions" FX transactions. It created a "Revenue/Fee Disclosure Team" to consider the topic. On April 11, 2008, Antonio Garcia-Meitin ("Garcia-Meitin") of BNY Mellon's Asset Servicing Global Management department sent an e-mail to the members of that team entitled "Transparency." In that e-mail, Garcia-Meitin explained:

> ***In general transparency adversely impacts our revenue stream and any product to distribute fee information would hurt us many times over in reduced revenue. Nothing like a rock and a hard place.*** (Emphases added).

92. An attachment to this e-mail discussed BNY Mellon's problems, including: "increased demands" from clients for "detailed fee information"; clients trying to obtain more "understanding how we generate revenue from their accounts"; and clients increasingly asking for a "detailed breakdown" of the fee level associated with various services. BNY Mellon's proposed responses included having its sales force "generate more business to attain [the] same fee level," and communicating with clients on the "value of services rendered beyond price."

93. A 2009 e-mail from one BNY Mellon officer commenting on a proposal for transparency that was quoted in the DOJ Action conveyed the attitude of many in BNY Mellon's management: "***I do NOT like it. Once pricing spreads are disclosed it will be a race to how quickly clients work it down to zero***." (Emphases added). This statement, like many of Defendants' statements contained in the exhibits to the Administrative Complaint in the Massachusetts Action, is completely at odds with "best execution standards," as further described below.

94. The efforts of BNY Mellon's sales force to assuage custodial clients' concerns were successful. An e-mail from Rodriguez dated July 21, 2010 stated: "FX Sales volumes from

the FX Sales force for the first half of 2010 vers[u]s the same period last year are up over $1 trillion, an amazing 24% growth over the same period last year." In the same exhibit, Robert Near, Managing Director of BNY Mellon Global Markets, in an e-mail to Rodriguez sent on the same day, attributed this success to BNY Mellon being less transparent than its competitors.

> While difficult to quantify, and only having a 'couple' of data points, I think BNYM has been more successful in maintaining spreads in the SI [Standing Instruction] space compared to these peers [State Street and Northern Trust]. ***Another way to say this is BNYM is 'late' to the transparency space.*** We are hearing from our clients that our competitors are offering time stamping and fixed spreads across all currencies. (Emphases added).

95. Defendants' deceptive conduct extended to virtually all of their clients who used "standing instructions" for FX transactions, according to a March 29, 2011 letter from a BNY Mellon employee to the Florida Attorney General. A redacted copy of this letter was very recently obtained through an open records act request by the *Wall Street Journal* and made public in an article published on December 28, 2011. The author, who worked closely with Rodriguez and Mahoney, said

> I was also trained in committing fraud using various strategies [] to the bank's corporate foreign exchange clients....***I can tell you firsthand and without any hesitation that the fraud is prevalent throughout BNY Mellon's Foreign Exchange Group.*** I can also share with you that top management was aware of the fraud the entire time....BNY Mellon's foreign exchange group was very small. I was only 1 of 3 people in the entire bank who focused exclusively on the corporate client segment. ***We used the same systems and fraudulent strategies on the corporate clients as was used on the pension fund clients.*** (Emphases added).

96. As described above, Defendants secured "standing instructions" FX business through a series of material misrepresentations and omissions designed to attract new clients and keep existing clients. These included: (a) material misrepresentations and omissions in response to RFPs from custodial clients; (b) material misrepresentations and omissions on Defendants'

websites relating to "standing instruction" FX transactions; (c) false statements in custodial contracts; and (d) concealment of material information to clients concerning the pricing and execution of "standing instruction" FX transactions.

97. As discussed above, BNY Mellon stated falsely that "standing instructions" FX trades were "executed according to best execution standards." This statement was untrue, and Defendants knew it to be untrue. Indeed, in its amended complaint filed on February 16, 2012, the DOJ cited numerous specific internal communications wherein Defendants' employees described "best execution" in the FX context as the maximization for the client of the proceeds of each trade.

98. For example, according to the DOJ Action, Defendants developed "Question and Answer" documents to guide employees in answering client inquiries about standing instruction pricing. For example, an August 2005 Question and Answer document providing a response to client inquiries about best execution states that BNY "ensure[d] best execution" by offering the "best rates for our clients":

> The Bank of New York ensures best execution on foreign exchange transactions through the following mechanisms: As a major market participant, the Bank is actively engaged in making markets and taking position in numerous currencies so that we can provide the ***best rates for our clients***. (emphasis added).
>
> In response to a question addressing competitiveness and

timeliness of BNYM's foreign current trading in this same document, BNYM also referenced the price provided as the "best rate of the day." These statements were knowingly false.

99. A June 2006 Question and Answer document offered the following sample false information:

> How do you ensure custody clients consistently receive fair prices

> for their trades?
>
> Clients benefit from our attractive rates because we aggregate all client income in any given currency to obtain the 'best rate of the day.' That 'best rate of the day' is applied to all of the income conversions that we execute for that day, regardless of the amount."

These statements were knowingly false. As explained above, Defendants did not provide clients the "best rate of the day." Quite the opposite: standing instruction clients received the worst or close to the worst rate of the day. In April 2006, David Nichols, a Managing Director of BNY and head of Product Management, circulated this false language to other of Defendants' employees as Defendants' "RFP boilerplate."

100. According to the DOJ Action, Nichols drafted Defendants' definition of best execution, and listed as an accomplishment in his Employee Self Assessment his drafting of a "working definition" of "best execution for our standing instruction activity," as well as providing "marketing content" for Defendants' website. By September 2005, Defendants settled on a working definition describing how Defendants assist "plan sponsors and their fund managers in achieving Best Execution in foreign exchange" that was intended for client dissemination, including through RFP responses. Specifically, Defendants explained that "[b]est execution encompasses a variety of services designed to maximize the proceeds of each trade," and that Defendants recognized the "goal of maximizing the value of the client portfolio under the particular circumstances at the time." This document was described by BNY Mellon employee Jerome Descamps in a November 25, 2008 email as how the Bank "define[s] best execution." Nichols described this document in 2007 as the Bank's "'standard' comment regarding how we approach best execution," and confirmed in November 2008 that this document "still stands as our statement on the subject." As described in the DOJ Action, this

document explicitly and falsely stated that BNY Mellon would maximize the proceeds of its clients' trades.

101. Nichols explained in this definition of best execution that the Bank's "goal" was "maximizing the value of the client portfolio under the particular circumstances at the time," which was taken from the "industry standard definition[] of 'best execution.'" In drafting Defendants' definition of best execution in May 2005, Nichols also invoked the SEC's statement that "best execution is trading 'in such a manner that the client's total cost or proceeds in each transaction is the most favorable under the circumstances,'" as well as the Association for Investment Management and Research's definition of best execution as "well informed trade execution decisions made with the intent of maximising [sic] the value of the client portfolio under the particular circumstances at the time." Accordingly, according to the DOJ Action, Nichols and Defendants knew that the industry definition of best execution required maximizing the proceeds and value for clients.

102. Defendants and Nichols also falsely represented in the "working definition" of best execution that they were assisting investment managers in discharging their fiduciary obligations to their clients by maximizing the proceeds of each trade: "Understanding the fiduciary role of the fund manager, it is our goal to provide best execution for all foreign exchange executed in support of our clients' transactions." Defendants were in fact doing precisely the opposite – obtaining the best available prices for the Bank, and assigning less favorable prices for its clients.

103. According to the DOJ Action, Defendants and their officers knew that actually providing "best execution" would lower the Banks' sales margins on trades, in contrast to the Bank's actual practice of pricing at the worst rates of the day. For example, in November 2008,

the Bank prepared a document analyzing the "channel mix" of foreign currency transactions. The channel mix referred to the different modes of foreign currency trading conducted by the Bank, including standing instruction trades, trades conducted over the phone, and trades conducted through an ecommerce platform. The Bank observed that "[m]argins have declined across all channels of distribution," due to among other reasons, "[e]fforts to achieve 'best execution," as well as "[g]eneral demands for price transparency." In order to generate and maintain standing instruction revenues, the Bank and its officers lied to the Bank's clients about providing "best execution" and the "best rate of the day."

104. Defendants did not execute, or attempt to execute, "standing instructions" FX trades in a manner that would maximize Plaintiffs' portfolio value. Instead, eschewing the prices that were available in the market at the time they executed the order, Defendants executed "standing instructions" FX trades for Plaintiffs at the worst price at which the currency had traded during the preceding 24 hour trading day.

105. According to the complaint in the NYAG Action, BNY Mellon's head of Business Development for Global FX Sales ultimately admitted that Defendants did *not* execute "standing instructions" FX trades in accordance with "best execution standards":

> My understanding is that the Bank of New York Mellon does not practice best execution . . . . BNY Mellon acts as a counterparty to these trades, not as a fiduciary, and my understanding is that as a counterparty it does not have best execution responsibilities.
>
> * * * *
>
> Q. If I understand what you're saying, it's that Bank of New York Mellon does not do best execution with respect to Standing Instruction trades because it is a counterparty?
>
> A: My understanding is that Bank of New York Mellon does not have a role in providing best execution.

106. In addition to misrepresenting throughout the Relevant Period that Plaintiffs would receive best execution when they utilized "standing instructions," BNY Mellon's website also misrepresented that BNY Mellon would aggregate and net "standing instructions" FX trades, stating that one of the benefits to clients from using "standing instructions" was the "[a]ggregation and netting of trades based on guidelines tailored to client needs."

107. According to Defendants, when a client gave both buy and sell orders for a particular currency on a given day, Defendants would net the orders and only execute a single buy or a sell order for the net amount. In truth, however, Defendants often did not net client trades. Instead, when a client submitted both buy and sell orders, they were executed separately and Defendants applied a markup to both transactions. At other times, Defendants would apply arbitrary spreads to each of the trades that unsuspecting clients believed were not being subject to any trading margin at all.

108. As mentioned above, BNY Mellon's website and other marketing materials also falsely stated that "standing instructions" FX trades were "free of charge." Defendants in fact charged clients the difference between the market price at the time of execution and the least favorable (to the client) market price at which the currency had traded in the interbank market during the trading day, and pocketed the difference. As David Nichols, a Managing Director of BNY Mellon, noted in an e-mail: "[w]e charge a premium for our services (*i.e.*, we have the audacity to think we are entitled to a spread on every trade. How 1990's is that?)"

109. Plaintiffs were misled by Defendants' representations, acts and omissions and relied to their detriment on Defendants' material misstatements and omissions.

110. Defendants knew that their "standing instructions" FX practices were legally improper and their actions after regulators began challenging these types of transactions are indicative of the deceptive nature of their scheme.

111. On October 29, 2009, the California State Attorney General brought a civil fraud action against State Street Bank & Trust ("State Street"), challenging its "standing instructions" FX services. BNY Mellon's Director of FX Trading in New York e-mailed a Reuters dispatch about this lawsuit to all of BNY Mellon's FX sales employees with the heading "***Oh No***."

112. Soon thereafter, BNY Mellon began receiving subpoenas from state and federal regulatory authorities concerning its FX transactions; by May of 2010, it had received 16 of them. Upon hearing of this investigation, Susan Pfister, a veteran at BNY Mellon's Pittsburgh FX trading desk, remarked: "It's over, it's all over."

113. In late November or early December of 2009, BNY Mellon revised its web page on FX Standing Instructions (portions of which were quoted above) to eliminate any "free of charge" language and to (for the first time) define "best execution" as something other than (a) what it is commonly understood in the financial industry to mean and (b) what Defendants themselves recognized and claimed it meant in numerous RFP responses to its custodial clients, including Plaintiffs.

114. In response to inquiries from customers about its own "standing instructions" FX practices in the wake of the State Street action, BNY Mellon did not disclose its deceptive and fraudulent conduct. Mahoney said internally that BNY Mellon's FX Department "owns" how to respond to such inquiries, that "we do not have to tell anyone how much money we make on our dealings" and that customers making inquiries should be told to "go pound sand."

115. Notwithstanding this tough opening stance, Defendants recently admitted, in a partial consent decree in the DOJ Action, that their subsidiaries and affiliates assign prices to "standing instructions" FX trades that are "at or near the high end of the range of prices reported in the interbank market for currency sales for the relevant pricing cycle, and at or near the low end of the range of prices reported in the interbank market for currency sales for the relevant pricing cycle," and that the "pricing of Standing Instruction Service transactions is generally less favorable to clients than directly negotiated trades." *See* Dkt. No. 17 (Jan. 17, 2012) in *United States v. The Bank of N.Y. Mellon Corp*., No. 11 Civ. 6969 LAK (S.D.N.Y.). Defendants agreed as part of that consent decree to stop representing that "standing instructions" FX trades meet "best execution" standards, are "free of charge," or that Defendants offer "netting" of transactions (unless certain criteria are satisfied). *Id.* Defendants have also agreed to fully disclose Defendants' pricing of "standing instructions" FX transactions and to provide custodial clients with a mechanism to compare the average pricing of "standing instructions" transactions with trades for non-restricted currency pairs at a particular point in time. *Id.* at 3-4. Additionally, Defendants cannot "represent or suggest that all Standing Instruction Service clients receive the same pricing." *Id.* at 5. Defendants have not agreed to make any restitution to defrauded clients or to disgorge the profits they obtained through their unlawful scheme.

IV. TOLLING OF STATUTES OF LIMITATION

116. The applicable statutes of limitation for each of the claims for relief asserted herein have been tolled by Defendants' acts of fraud, concealment, and intentional misrepresentation as described herein. Plaintiffs reasonably relied on Defendants' misrepresentations concerning their custodial FX practices, and could not have discovered, exercising reasonable diligence, any of the claims for relief pleaded herein against Defendants prior to the unsealing of the first whistleblower complaint against one or more of Defendants on

January 21, 2011. Plaintiffs in fact did not discover any of the claims for relief pleaded herein until after such time, and after conducting the empirical analyses of their FX trading data as described above.

COUNT ONE
(Breach of Contract)

117. Plaintiffs incorporate each and every preceding paragraph stated above, inclusive, as though the same were fully set forth hereafter.

118. This claim for relief for breach of contract is asserted against Defendants BNY, Mellon, and BNY Mellon.

119. Plaintiffs entered into or were intended third-party beneficiaries of contracts with Defendants for Defendants to provide global custodial FX services. These contracts allow for the provision of global custodial FX services, including the execution of FX trades pursuant to "standing instructions."

120. The contracts required Defendants to exercise "reasonable care" in the performance of their duties.

121. Defendants have breached their contracts with Plaintiffs by selecting fictitious FX rates to report and charge or credit to Plaintiffs for "standing instructions" FX trades, against the reasonable expectations of Plaintiffs, in order to unfairly and unlawfully increase their profits at the expense of Plaintiffs.

122. Meanwhile, Plaintiffs have performed all, or substantially all, of the obligations imposed on them under their contracts with Defendants.

123. Plaintiffs have been damaged as a result of Defendants' breaches of contract by paying falsely inflated prices, or being paid falsely deflated prices, for "standing instructions" FX trades. These false charges and falsely deflated prices constitute costs that Plaintiffs

otherwise would not have incurred, for which Plaintiffs seek damages in an amount to be established at trial, but not less than $16 million.

COUNT TWO
(Fraud)

124. Plaintiffs incorporate each and every preceding paragraph stated above, inclusive, as though the same were fully set forth hereafter.

125. This claim for relief for fraud is asserted against all Defendants.

126. Defendants made representations concerning the manner in which they priced custodial FX trades that were false, and concealed facts concerning the same notwithstanding their duty to so disclose.

127. Defendants' representations and concealment of material facts were material to the FX transactions done on Plaintiffs' behalf. Plaintiffs would not have entrusted Defendants to conduct custodial FX trades pursuant to standing instructions on Plaintiffs' behalf had they known of the falsity of Defendants' representations.

128. Defendants knew, or recklessly disregarded, that their representations concerning custodial FX services were false, and that their concealment of material facts was materially misleading to Plaintiffs, and made those representations (and concealed material facts) in order to induce Plaintiffs to contract with, use, and/or rely on Defendants to provide custodial FX services.

129. Plaintiffs justifiably relied on Defendants' representations concerning FX custodial services. Plaintiffs had no way of knowing, given Defendants' practice of pricing FX trades within the range of the day, of the activities alleged herein prior to the unsealing of the whistleblower complaints.

130. Plaintiffs have been injured as a direct and proximate result of their reliance on Defendants' representations, for which Plaintiffs seek damages in an amount to be established at trial, but not less than $16 million.

COUNT THREE
(Violation of the Ohio Deceptive Trade Practices Act, O.R.C. § 4165.01 et seq.)

131. Plaintiffs repeat and incorporate each and every preceding paragraph stated above, inclusive, as though the same were fully set forth hereafter.

132. This claim for relief is asserted against all Defendants.

133. Defendants' actions constitute unfair, unconscionable and/or deceptive trade practices in the course of their business and in the conduct of trade or commerce, in violation of the Ohio Deceptive Trade Practices Act, O.R.C. § 4165.01 et seq. In that regard, Defendants' actions have caused and will continue to cause financial harm to Plaintiffs.

134. Specifically, Defendants represented that their custodial FX services had "characteristics" or "benefits" that "they do not have" and "[a]dvertise[d] goods or services with intent not to sell them as advertised." O.R.C. §§ 4165.02(A)(7), (11).

135. Defendants' conduct has caused, and continues to cause, harm to the public. The harm to the public includes overcharging, or under-crediting, custody clients, including pension funds such as Plaintiffs, on their "standing instructions" FX transactions for a period spanning over a decade. The number of affected employee-beneficiaries of pension funds in the state of Ohio is in the tens, if not hundreds, of thousands. The number of affected FX transactions during the Relevant Period is in the thousands. The amount of the unlawful profits obtained by Defendants as a result of their practices during the Relevant Period from Plaintiffs alone is in the millions.

136. Defendants' conduct as alleged herein has damaged and will continue to injure Plaintiffs, for which injury Plaintiffs seek damages in an amount to be established at trial, but not less than $16 million.

COUNT FOUR
(Unjust enrichment)

137. Plaintiffs repeat and incorporate each and every preceding paragraph stated above, inclusive, as though the same were fully set forth hereafter.

138. This claim for relief is asserted against all Defendants.

139. As a result of the conduct described above, Defendants have been unjustly enriched to the detriment of Plaintiffs for which claim Plaintiffs seek damages in an amount to be established at trial, but not less than $16 million.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief as follows:

1. An award of actual damages, in accordance with proof;

2. Punitive or exemplary damages to the extent permitted by law;

3. Restitution to the Plaintiffs of the overcharges BNY Mellon unjustly received and retained from FX transactions conducted on Plaintiffs' behalf pursuant to standing instructions, in accordance with proof;

4. Disgorgement of Defendants' revenues or profits attributable to their conduct as to Plaintiffs;

5. Prejudgment and postjudgment interest at the maximum legal rate;

6. Reasonable costs and attorney fees, as allowed by law; and

7. Such other and further relief as the Court deems just and appropriate.

Respectfully submitted,

Dated: March 12, 2012

MIKE DEWINE
OHIO ATTORNEY GENERAL

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JURY TRIAL DEMAND

Plaintiffs hereby demand a jury trial for all individual claims so triable.

Respectfully submitted,

Dated: March 12, 2012

By: **/s/ Brian K. Murphy**

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