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UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

ASHBY HENDERSON, et al.,

Plaintiffs,

٧.

Case No. 1:15-cv-10599-PBS

BNY MELLON, NATIONAL ASSOCIATION, et al.,

Defendants.

PROVIDING FOR NOTICE

Plaintiffs Ashby Henderson and Thomas Hershenson ("Plaintiffs" or "Class Representatives") have moved, pursuant to Federal Rule of Civil Procedure 23(e), for an order preliminarily approving the settlement of this Action, in accordance with the Class Action Settlement Agreement dated [date of agreement], 2019 (the "Agreement" or "Settlement Agreement"), which, together with the exhibits thereto, sets forth the terms and conditions for a proposed settlement of the Action. The Court having read and considered the Agreement and the exhibits thereto,

IT IS HEREBY ORDERED that:

- 1. Settlement. Plaintiffs Ashby Henderson and Thomas Hershenson, on behalf of themselves and all members of the Class, and Defendant BNY Mellon, N.A. ("BNY Mellon") have negotiated a potential settlement to the Action to avoid the expense, uncertainties, and burden of protracted litigation, and to resolve the Released Claims (as defined in the Agreement) against BNY Mellon and the Released Parties.
- 2. **Definitions.** This Order incorporates by reference the definitions in the Agreement, and all capitalized terms used, but not defined herein, shall have the same meanings as in the Agreement.

- 3. **Jurisdiction.** This Court has jurisdiction over the subject matter of the Action and over all parties to the Action, including all Members of the Class, and venue in this Court is proper.
- 4. Preliminary Approval. The Court hereby preliminarily approves the Settlement Agreement as fair, reasonable, and adequate, subject to further consideration at the Final Approval Hearing described below. The Court finds on a preliminary basis that the Settlement Agreement falls within the range of reasonableness and was the product of informed, good-faith, arm's-length negotiations between the Parties and their counsel, and therefore meets the requirements for preliminary approval.
- 5. Settlement Class. The Court conditionally certifies, for settlement purposes only (and for no other purpose and with no other effect upon the Action, including no effect upon the Action should the Agreement not receive Final Approval or should the Effective Date not occur), a class defined as: from 2008 to the date of Preliminary Approval, all grantors, settlors, cotrustees, and qualified beneficiaries of personal trusts for which:
 - (1) BNY Mellon served or serves as trustee;
 - (2) BNY Mellon charged line-item tax-preparation fees amounting to at least \$400 per year for grantor trusts, at least \$750 per year for revocable and "simple" irrevocable trusts, or at least \$950 per year for "complex" irrevocable trusts for one or more of the covered years;
 - (3) the preparer of the fiduciary return covered by the line item tax-preparation fee was PricewaterhouseCoopers; and
 - (4) the trust's Tax Preparation Fee Claim is not barred by the applicable state statute of repose.
- 6. The Court finds, for settlement purposes only, that class certification under Fed.

 R. Civ. P. 23(b)(3) is appropriate in that, in the settlement context: (a) the Members of the Class are so numerous that joinder of all Settlement Class Members in the class action is impracticable; (b) there are questions of law and fact common to the Settlement Class which predominate over

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any individual question; (c) the claims of the Class Representatives are typical of the claims of the Settlement Class; (d) the Class Representatives and their counsel will fairly and adequately represent and protect the interests of the Settlement Class Members; (e) the Settlement Class is ascertainable; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

- 7. Designation of Class Representatives and Class Counsel. The Court appoints the Plaintiffs Ashby Henderson and Thomas Hershenson as Class Representatives, and the law firms of Bailey & Glasser LLP and Derek G. Howard Law Firm, Inc., as Class Counsel for the Settlement Class.
- 8. Final Approval Hearing. A hearing (the "Final Approval Hearing") shall be held before this Court, on Stephen 6, 2019, at 2:00 p.m., at the United States
 District Court for the District of Massachusetts, 1 Courthouse Way, Boston, MA 02210 to determine, among other things: (i) whether the proposed Settlement of the Action on the terms and conditions provided for in the Agreement is fair, reasonable, and adequate to the Settlement Class and should be approved by the Court; (ii) whether a Final Judgment as provided in Paragraph 1.17 of the Agreement should be entered; (iii) whether Settlement Class Members should be bound by the Release set forth in the Agreement; and (iv) any amount of fees and expenses that should be awarded to Class Counsel and any award to the Class Representatives for their representation of the Settlement Class. The Parties shall include the date of the Final Approval Hearing in the Class Notice to be mailed to the Settlement Class.
- 9. Class Notice. The Court approves the form, substance and requirements of the proposed Class Notice, attached to the Settlement Agreement as Exhibit A. The Court further finds that the form, content and mailing of the Class Notice meet the requirements of Rule 23 and due process. The Court further finds that this is the best notice practicable under the circumstances and is reasonably calculated, under all the circumstances, to apprise potential Settlement Class Members of the pendency of the Action, to apprise persons who would otherwise fall within the definition of the Settlement Class of their right to exclude themselves

from the proposed Settlement Class, and to apprise Settlement Class Members of their right to object to the proposed Settlement and their right to appear at the Final Approval Hearing. The Court further finds that the Class Notice constitutes valid, due and sufficient notice to all persons entitled to notice.

- 10. **Settlement Administrator.** The Court appoints KCC, LLC ("Settlement Administrator") to supervise and administer the notice procedure as more fully set forth below:
- (a) No later than thirty days from the entry of this Order ("the Notice Date"), the Settlement Administrator shall mail the Class Notice, substantially in the form of Exhibit A to the Agreement (though the Settlement Administrator shall have discretion to format the Class Notice in a reasonable manner to minimize mailing or administration costs), by first class U.S. mail to each individual on the Notice List, along with a Verification Form for any recipients whose trust is a Closed Class Trust;
- (b) No later than the Notice Date, the Settlement Administrator shall establish a website at [website], and shall post on the website the Agreement, the Class Notice, the Verification Form, and the operative Complaint in this Action, as well as contact information for the Settlement Administrator and Class Counsel;
- (c) Following the issuance of the Class Notice, the Settlement Administrator shall provide counsel with written confirmation of the mailing; and
- (d) The Settlement Administrator shall otherwise carry out its duties as set forth in the Agreement.
- may individually, upon request, be excluded or "opt out", from the Settlement Class. Settlement Class Members whose trust is open may validly be excluded only if all of the beneficiaries of their trust also request exclusion. To request exclusion, the Settlement Class Member must mail a notice of intention to opt-out to the Settlement Administrator postmarked on or before the Response Date specified in the Class Notice, which shall be no later than 30 calendar days after the Notice Date. The notice of intention to opt out shall: (i) identify the case name; (ii) set forth

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the Settlement Class Member's full name, current address, and telephone number; (iii) state his or her intention not to participate in the Settlement; (iv) identify the trust(s) as to which he or she is opting out; and (v) be personally signed by the person requesting exclusion. The notice of intention to opt out must be sent to the Settlement Administrator: Henderson, et al. v. BNY Mellon, N.A., Settlement Administrator, [address] and be postmarked on or before the date specified in the Class Notice. All Settlement Class Members who submit a valid and timely notice of intention to opt out in the manner set forth in this paragraph shall have no rights under the Agreement and shall not be bound by the Agreement or any Final Judgment. Mass or class opt outs shall not be allowed. No Settlement Class Member, or any person acting on behalf of or in concert or participation with that Settlement Class Member, may exclude any other class member._A Settlement Class Member who desires to opt out must take timely affirmative written action pursuant to this Order and the Agreement, even if the person desiring to opt out of the Class (a) files or has filed a separate action against any of the Released Parties, or (b) is, or becomes, a putative class member in any other class action filed against any of the Released Parties. Any Settlement Class Member who properly opts out of the Settlement Class shall not: (i) be bound by any orders or judgments relating to the Settlement; (ii) be entitled to relief under, or be affected by, the Agreement; (iii) gain any rights by virtue of the Agreement; or (iv) be entitled to object to any aspect of the Settlement. Notwithstanding the foregoing, a Settlement Class Member shall have the right to revoke a properly and timely submitted request for exclusion, including requests for exclusion submitted following notice of the Court's September 14, 2018 class certification Order, if a notice of the Class Member's election to revoke his or her exclusion is sent to the Settlement Administrator, postmarked on or before the date specified in the Class Notice.

12. Copies of Opt Out Requests. The Settlement Administrator shall provide Class Counsel and Defense Counsel with a list of all timely notices of intention to opt out within five business days after the opt-out deadline.

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- 13. Entry of Appearance. Any member of the Settlement Class who does not exclude himself or herself may enter an appearance in the Action, at his or her own expense, individually or through counsel of his or her own choice. If he or she does not enter an appearance, he or she will be represented by Class Counsel.
- 14. **Binding Effect on Class.** All Members who do not validly exclude themselves from the Settlement Class by properly and timely submitting an intention to opt out shall be bound by all determinations and judgments in the Action concerning the Settlement, whether favorable or unfavorable to the Settlement Class.
- Objections. Any Settlement Class Member who does not timely and validly opt 15. out of the Settlement Class may object to the proposed Settlement, or any aspect of it including attorneys' fees and expenses, and incentive awards, by filing a written objection with the Clerk of the United States District Court for the District of Massachusetts, 1 Courthouse Way, Boston, Massachusetts 02210, on or before thirty calendar days after the Notice Date. A copy of the objection must also be mailed to Class Counsel and Defense Counsel, so that it is received on or before thirty calendar days after the Notice Date. To be valid, the objection must set forth, in clear and concise terms: (a) the case name and number (Henderson, et al. v. BNY Mellon, N.A., No. 1:15-cv-10599-PBS); (b) the name, address, and telephone number of the objector objecting and, if represented by counsel, of his or her counsel; (c) the complete basis for objection; (d) a statement of whether the objector intends to appear at the Final Approval Hearing, either with or without counsel; (e) a statement of whether the objection applies only to the objector, to a specific subset of the class, or to the entire class, and (f) copies of all supporting documents. Any Settlement Class Member who does not make his or her objection in the manner provided shall be deemed to have waived such objection, shall not be permitted to object to any terms or approval of the Settlement at the Final Approval Hearing, and shall forever be foreclosed from making any objection to the fairness, reasonableness, or adequacy of the proposed Settlement as incorporated in the Agreement, and to the award of attorneys' fees and expenses to Class

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Counsel and the payment of an award to the Class Representatives for their representation of the Class, unless otherwise ordered by the Court.

16. Appearance of Objectors at Final Approval Hearing. Any Settlement Class Member who files and serves a written objection in accordance with Paragraph 15 of this Order may appear, in person or by counsel, at the Final Approval Hearing, to show cause why the proposed Settlement should not be approved as fair, adequate, and reasonable, but only if the objector: (a) files with the Clerk of the Court a notice of intention to appear at the Final Approval Hearing by the objection deadline ("Notice of Intention to Appear"); and (b) serves the Notice of Intention to Appear on Class Counsel and Defense Counsel by the objection deadline.

The Notice of Intention to Appear must include copies of any papers, exhibits, or other evidence that the objector will present to the District Court in connection with the Final Approval Hearing. Any Settlement Class Member who does not file a Notice of Intention to Appear in accordance with the deadlines and other specifications set forth in the Agreement and Class Notice shall be deemed to have waived his or her right to appear.

- that closed on or before the date of this Order who wishes to collect a payment under the terms of the Settlement must submit a completed Verification Form, substantially in the form of Exhibit D to the Agreement (though the Settlement Administrator shall have discretion to format the Verification Form in a reasonable manner to minimize mailing or administration costs), to the Settlement Administrator. Verification Forms must be submitted online or postmarked on or before the date specified in the Class Notice, which shall be no later than thirty calendar days after the Notice Date.
- of the Settlement and Class Counsel's application for attorneys' fees and expenses and Class Representative service awards shall be filed and served no later than fourteen calendar days prior to the Final Approval Hearing and any responsive papers shall be filed and served no later than seven calendar days prior to the Final Approval Hearing.

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- 19. Fees, Expenses, and Awards. Neither BNY Mellon nor the Released Parties shall have any responsibility for any application for attorneys' fees and expenses submitted by Class Counsel, and such matters will be considered separately from the fairness, reasonableness, and adequacy of the Settlement. At or after the Final Approval Hearing, the Court shall determine whether any application for attorneys' fees and expenses, and any award to the Class Representatives for their representation of the Settlement Class, should be approved.
- 20. Releases. If the Settlement is finally approved, the Releasors shall release the Released Parties from all Released Claims and all Settlement Class Members will be bound by the Final Approval Order.
- 21. Use of Order. Neither this Order, the fact that a settlement was reached and filed, the Agreement, nor any related negotiations, statements, or proceedings shall be construed as, offered as, admitted as, received as, used as, or deemed to be an admission or concession of liability or wrongdoing whatsoever or breach of any duty on the part of BNY Mellon. This Order is not a finding of the validity or invalidity of any of the claims asserted or defenses raised in the Action. In no event shall this Order, the fact that a settlement was reached, the Agreement, or any of its provisions or any negotiations, statements, or proceedings relating to it in any way be used, offered, admitted, or referred to in the Action, in any other action, or in any judicial, administrative, regulatory, arbitration, or other proceeding, by any person or entity, except by the Parties and only the Parties in a proceeding to enforce the Agreement.
- 22. Continuance of Final Approval Hearing. The Court reserves the right to continue the date of the Final Approval Hearing without further notice to Settlement Class Members, and retains jurisdiction to consider all further applications arising out of or connected with the proposed Settlement. The Court may approve the Settlement, with such modifications as may be agreed to by the Parties, if appropriate, without further notice to the Settlement Class.
- 23. Stay of Proceedings. All proceedings in this Action are stayed until further Order of this Court, except as may be necessary to implement the Settlement or comply with the terms of the Agreement.

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- 24. **Preliminary Injunction.** Pending final determination of whether the Settlement should be approved, and upon expiration of the opt-out deadline, all Settlement Class Members who do not timely and validly exclude themselves, and anyone who purports to act on their behalf, are preliminarily enjoined from directly or indirectly maintaining, commencing, prosecuting, or pursuing directly, representatively, or in any other capacity, any Released Claim subsumed and covered by the Release in the Agreement, including in any court or arbitration forum.
- 25. **Termination of Settlement.** If the Agreement is terminated as provided in section 12 of the Agreement, or any specified material term or condition of the Settlement as set forth in the Agreement is not satisfied as provided in section 12 of the Agreement, then this Order may not be introduced as evidence or referred to in any actions or proceedings by any person or entity and shall be treated as vacated, *nunc pro tunc* (except paragraph 21 of this Order shall remain in effect), and each party shall be restored to his, her, or its respective position in this Action as it existed prior to the execution of the Agreement. By three business days after such termination or disapproval, the Cash Settlement Amount shall be returned by the Settlement Administrator to BNY Mellon; provided, however, that the interest accrued in the Cash Settlement Fund shall first be used to pay settlement administration costs already incurred by the Settlement Administrator pursuant to the Agreement, and, if any interest money remains, it too shall be returned to BNY Mellon.
- 26. **No Merits Determination.** By entering this Order, the Court does not make any determination as to the merits of this case.
- 27. **Authority.** The Court hereby authorizes the Parties to take such further steps as necessary and appropriate to establish the means necessary to implement the terms of the Agreement.
- 28. **Jurisdiction.** This Court retains jurisdiction over the Action to consider all further matters arising out of or connected with the Agreement and the Settlement.

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IT IS SO ORDERED.

DATED: 6/3/17

THE HONORABLE PATTI B. SARIS UNITED STATES DISTRICT JUDGE