

**VIRGINIA:  
IN THE CIRCUIT COURT FOR FAIRFAX COUNTY**

**COMMONWEALTH OF VIRGINIA,**

*Ex rel.*

**FX ANALYTICS,**

**Plaintiff/Relator,**

**v.**

**THE BANK OF NEW YORK MELLON  
CORPORATION,**

**Defendant.**

**FILED IN CAMERA  
AND UNDER SEAL**

CASE No. CL-2009-15377

**Ex Rel. COMPLAINT FOR  
VIOLATION OF THE VIRGINIA  
FRAUD AGAINST TAXPAYERS  
ACT**

**Va. Code Ann. §8.01-216.1, *et seq.***

**FILED IN CAMERA  
AND UNDER SEAL**

**FIRST AMENDED COMPLAINT**

Plaintiff/Relator (“Relator”), FX Analytics, on behalf of itself as well as on behalf of the Commonwealth of Virginia, amends its Complaint against The Bank of New York Mellon Corporation, its predecessors and subsidiaries (“Defendant(s),” “BNY Mellon,” and/or “Bank”) and alleges as follows.

1. This is an action to recover treble damages, civil penalties, attorney's fees and costs on behalf of The Commonwealth of Virginia for harm suffered by the Commonwealth of Virginia and the Virginia Retirement System Fund, the Fairfax County and the Fairfax

County Retirement System Funds,<sup>1</sup> and the Arlington County and the Arlington County Employees Retirement System Fund ("Commonwealth") arising from false claims and statements made and presented by Defendant, its agents, employees and co-conspirators, in violation of the Virginia Fraud Against Taxpayers Act, (Va. Code Ann. §8.01-216.1, *et seq.* ("VFATA" or the "Act")).

2. At all times relevant to this Complaint, Defendant served as custodian of the Commonwealth's pension funds. This custodial relationship arose by virtue of the contracts between the Commonwealth and Defendant.
3. In the course of performing their contractual and custodial duties for the Commonwealth, Defendant purchased foreign currency on behalf of the Funds.
4. The value of one foreign currency relative to the United States Dollar ("USD") or to another foreign currency is known as the "exchange rate." Exchange rates for all currencies will fluctuate throughout the day; it is possible for a given foreign currency to lose value during the day; it is also possible for a given foreign currency to gain value during the day.
5. Defendant knowingly and intentionally charged the Commonwealth false exchange rates for purchases and sales of foreign currency rather than the exchange rates at which Defendant actually executed the transactions for the Funds.
6. By marking up (for buys) or marking down (for sells) the prices paid by the Commonwealth, the Defendant caused the Commonwealth to pay more than it should have for buys and receive less it should have for sells.

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<sup>1</sup> The Fairfax County Retirement System's Funds includes the Fairfax Uniformed Retirement System, the Fairfax County Police Officers' Retirement System, and the Fairfax County Employees' Retirement System.

7. In order to keep the truth from the Commonwealth, in the periodic accountings which Defendant was obligated to render to the Commonwealth, reported false FX prices that failed to reflect the actual cost of the transaction and concealed the Defendant's markup or markdown that caused the Commonwealth to pay more than it should have or receive less than it should have.
8. Defendant developed this scheme because whenever Defendant purchased a foreign currency at an exchange rate, and then charged the Funds for that currency at a false, less favorable exchange rate, the Defendant would make a profit at the expense of the Funds.
9. Beginning at least in 2000, and continuing through the present day, Defendant used false pricing and reporting in order to profit from, and keep, Commonwealth Funds.
10. At all times, Defendant kept these profits a secret from its custodial client, the Commonwealth.
11. Defendant intentionally made false records and statements in order to keep this foreign exchange profit and this foreign exchange scheme a secret because the Commonwealth would never have so allowed Defendant to profit at the expense of the Commonwealth's funds.
12. Defendant captured and kept the difference between the actual and false (marked-up or marked down, depending on whether the transaction was a 'buy' or 'sell') exchange rates, its actions resulting in a loss to the Commonwealth and in damages to the Commonwealth.
13. It is the regular practice of the Defendant to provide false foreign exchange rates for the exclusive benefit of the Bank.

## **PARTIES**

14. Relator, a Delaware general partnership, is named FX Analytics and brings this action for violations of VFATA, on behalf of itself and the Commonwealth named herein. The owner of the partnership ("Partner") possesses extensive knowledge and experience regarding the Defendant's bank offices, businesses and personnel, including personal contact with the employees and executives of BNY Mellon who have committed the alleged violations of the Act, as described below. The Partner possesses personal knowledge to support and establish the charges asserted in this Complaint.
15. Pursuant to Section 15-201(a) of the Delaware Revised Uniform Partnership Act, FX Analytics is not distinct from its partner, who has personal knowledge of the aforesaid false claims, statements, concealments, and receipts.
16. Defendant, The Bank of New York Mellon Corporation, is the parent corporation resulting from the July 1, 2007 merger of the Bank of New York Company, Inc. and Mellon Financial Corporation. By July 1, 2008, the Bank had consolidated into two banks and renamed its principal bank and trust companies The Bank of New York Mellon and BNY Mellon, National Association. These entities, along with many others, are primary subsidiaries of the parent corporation, The Bank of New York Corporation. BNY Mellon assumes the liabilities of the corporations merged into it. NY COLS Bank § 602(2). As referred to herein, therefore, general references to BNY Mellon include the merged corporation as well as its constituent, individual predecessor corporations and subsidiaries – unless otherwise noted. BNY Mellon's corporate headquarters is located at One Wall Street, New York, New York, 10286. As of the second quarter of 2009, the BNY Mellon maintained \$20.7 Trillion under custody and administration, with \$926 Billion under management.

17. At all times relevant hereto, Defendant transacted business in the Commonwealth of Virginia by, among other things, entering into contracts in the Commonwealth to serve the public pension funds of the Commonwealth as custodian bank and by controlling property of the Commonwealth, including cash, in the Commonwealth.

**FACTUAL ALLEGATIONS COMMON TO ALL COUNTS**

18. BNY Mellon's main business lines include asset management, asset servicing, wealth management, broker-dealer and advisor services, issuer services, and treasury services.

19. BNY Mellon serves as the custodian bank for a large number of state and subdivision funds across the country.

20. BNY Mellon reports annual foreign exchange revenue in the hundreds of millions of dollars.

21. Until October of 2009, Defendant misleadingly explained the various foreign exchange services that it offered to its custodial clients; such misrepresentations include, but are not limited to, publications such as its websites.

22. Until October of 2009, Defendant described custodial FX trades as being "free of charge" to custodial clients; such misrepresentations include, but are not limited to, publications such as its websites.

23. Until October of 2009, Defendant described "standing instruction" custodial FX trades as being subject to "best execution" standards; until November or December of 2009, Defendant defined "best execution" as "quantitative proof that an agent or trader obtained the best available price in the market." Such misrepresentations include, but are not limited to, publications such as its websites.

24. The FX trades affected by Defendant's actions described herein were known as "standing instruction" and/or "non-negotiated" trades. Affected trades include all FX trades executed by BNYM while custodian for the Commonwealth, including trades arising out of portfolio investments, income and repatriation transactions, and emerging market trades.
25. The Funds utilized BNY Mellon for foreign exchange trades because BNY Mellon misleadingly offered and marketed FX services to the Funds.
26. The Commonwealth Funds' holdings include a significant percentage of international assets that require FX transactions. The custodial contract between the Commonwealth Funds and Defendant does not authorize, and has never authorized, the Defendant to charge the Commonwealth the false FX rates as alleged herein.
27. The Commonwealth was not aware that the costs of the reported FX transactions executed by the Bank were not the actual FX costs incurred by the Defendant.
28. The Commonwealth has never approved the retention by the Defendant of the difference between their actual FX cost and the exaggerated, false FX rates charged by Defendant and thereupon paid by or withheld from the Funds.
29. The Commonwealth never approved Defendant fees or profits from the FX trades they executed, including mark-ups or mark-downs, from, or as a result of, FX trades executed by the Bank while custodian for the Commonwealth Funds.
30. Defendant secretly charged the Commonwealth false FX Rates rather than the actual FX rates incurred in connection with purchases and sales of foreign currencies on behalf of the Funds.

31. The Defendant kept the difference of these two rates (i.e., the actual rate at which the Defendant purchased and sold foreign currency) and the false FX Rates charged to the Commonwealth, for itself.
32. The Defendant failed to report or itemize the profits or mark-ups or mark-downs that resulted from the difference in the two FX rates to the Commonwealth.
33. The Defendant failed to report the FX rate at which the Defendant originally transacted the FX trade.
34. The Defendant failed to report to the Commonwealth that the FX rate that was charged to the Commonwealth was not what the Defendant had originally paid for the currency.
35. Under its contracts with the Commonwealth, Defendant had no right to take or retain the foregoing monies as profit or additional charges on these FX transactions.
36. Governmental appropriations to the Funds are required by statute, and these appropriations have been made during the course of Defendant's custodianship of the funds, which amounts to tens of millions of dollars.
37. When funds are wrongly withheld or misappropriated through violations of the Act perpetrated against the Funds, the Commonwealth must pay additional monies to the Funds, which monies otherwise would have been available for essential State services to its citizens.
38. In addition to the marketing statements described above, Defendant offered comprehensive flat-rate fees in order to get clients like the Commonwealth to choose Defendant as the custodial Bank.

39. In addition to suffering harm by paying the false FX rates created by Defendant, as a result of direct losses due to falsely inflated or deflated FX rates, the Commonwealth also suffered an investment loss.
40. The investment returns lost due to BNY Mellon's fraudulent FX scheme is magnified because the money lost to the Defendant's FX scheme is not earning compounded investment returns.
41. As such, each loss FX trade loss caused by Defendant will be magnified because each loss is money and/or property of the Commonwealth that was lost and thus will not increase in value over time.
42. As custodian of the public pension funds of the Commonwealth, and pursuant to the custodial agreements in place between the Commonwealth and the Defendant, Defendant had access to certain property of the Commonwealth, including cash of the Commonwealth.
43. The cash property of the Commonwealth Defendant were entrusted to keep and safeguard includes, but is not limited to, the cash in certain Commonwealth Fund accounts known as cash accounts.
44. At all times relevant to this complaint, Defendant and/or one or more agents under its control, were entrusted with access to and control of those cash accounts, including the ability to debit and credit those cash accounts for the benefit of the Commonwealth in Defendant's capacity as the Commonwealth's custodian bank.
45. Pursuant to the custodial agreements, as well as by operation of common law, Defendant was to collect all money due and owing to the Commonwealth arising out of Defendant's FX activities on behalf of the Commonwealth.

46. Also pursuant to the custodial agreements, as well as by operation of common law, Defendant was to pay all debts incurred on behalf of the Commonwealth as part of Defendant's FX activities on behalf of the Commonwealth.
47. Such credits, when collected by Defendant, would be deposited into the cash accounts of the Commonwealth that the Defendant was entrusted to hold.
48. Such debits, when made by Defendant, were to be made from the cash accounts of the Commonwealth that the Defendant was entrusted to hold.
49. In the cases of credits or debits arising as a result of FX trades executed by Defendant, Defendant debited more than the Commonwealth should have paid for a purchase of FX and credited less than the Commonwealth should have received for a sale of FX.
50. Defendant's fraud, including the process of making a mark-up or mark-down on the Commonwealth's FX trades, extended to each, and every, FX transaction conducted by BNYM as custodian for the Commonwealth funds.
51. The profit made by Defendant on these FX transactions damaged the Commonwealth.

**COUNT ONE—KNOWINGLY PRESENTING, OR CAUSING TO BE  
PRESENTED, TO AN OFFICER OR EMPLOYEE OF THE COMMONWEALTH,  
A FALSE OR FRAUDULENT CLAIM FOR PAYMENT OR APPROVAL IN  
VIOLATION OF VA. CODE § 8.01-216.3(A) (1)**

52. All of the preceding paragraphs are reincorporated and realigned by reference, herein.
53. At all times relevant to this Complaint, Defendant had an obligation to render true and accurate periodic accountings with respect to the property of the Commonwealth held by Defendant.
54. At all times relevant to this Complaint, Defendant did render periodic accountings with respect to the property of the Commonwealth held by Defendant.

55. As alleged above, in the cases of credits or debits arising as a result of FX transactions, Defendant debited more than the Commonwealth should have paid for a purchase of FX and credited less than the Commonwealth should have received for a sale of FX.
56. In both cases above, Defendant knowingly and intentionally failed to report the true cost of FX trades to the Commonwealth, and instead presented, or caused to be presented, false and/or fraudulent claims regarding the FX costs for each transaction executed on behalf of the Commonwealth.
57. The false and/or fraudulent claims regarding the FX costs were presented to the Commonwealth in the periodic accountings Defendant were required to render pursuant to the custodial agreement in place between the Commonwealth and Defendant.
58. Defendant knowingly and intentionally submitted these false and/or fraudulent claims regarding the FX costs in order to get the claims approved.
59. Had Defendant not submitted these false and/or fraudulent claims, the Commonwealth would not have approved these claims and/or would not have continued to approve these claims.
60. As a result of the knowing and intentional acts of the Defendant, the Commonwealth has been damaged.

**COUNT TWO—KNOWINGLY MAKING OR USING A FALSE RECORD OR  
STATEMENT TO GET A FALSE OR FRAUDULENT CLAIM PAID OR  
APPROVED BY THE COMMONWEALTH IN VIOLATION OF VA. CODE  
§8.01-216.3(A) (2)**

61. All of the preceding paragraphs are reincorporated and realigned by reference, herein.
62. After receipt of the need for an FX transaction on behalf of the Commonwealth, Defendant would execute an FX trade to fill the request.

63. During the course of the day Defendant would note the low and the high exchange rate of the day for the two currencies involved in the FX exchange.
64. At the end of the trading day, Defendant, ignoring the price they paid for the FX, charged the Commonwealth for the FX transaction as if the trade had occurred at either the high or the low of the day (depending on the nature of the transaction, buy or sell), in order to charge the Commonwealth the least favorable rate that occurred that trading day.
65. It was the knowing and willful practice of Defendant to get the Commonwealth to pay at the high or low FX rate of the day for every single trade they executed as custodian for the Commonwealth Funds, including standing instruction or non-negotiated trades as described herein.
66. Therefore, if the transaction was a “buy” of a foreign currency, Defendant would buy the foreign currency at the rate available at one time of the day, but would debit the cash accounts of the Commonwealth at the highest rate of the day (requiring the Commonwealth to purchase more currency than it otherwise would have had to purchase), in the process charging the Commonwealth a higher FX rate than the FX rate Defendant actually paid.
67. Defendant would then keep for itself the difference between the true cost of the trade and the fictitious or false FX rate Defendant claimed to have paid on behalf of the Commonwealth.
68. Defendant would also fail to report the true cost of the transaction or its profit to the Commonwealth.
69. On the other hand, if the transaction was a “sale” of a foreign currency, Defendant would falsely charge the Commonwealth at the lowest FX rate of the day (returning less currency

to the Commonwealth than it otherwise would have received) rather than the FX rate Defendant actually received for the currency.

70. Defendant would then remit to the cash accounts of the Commonwealth an amount less than what Defendant actually received on the behalf of the Funds.
71. Defendant failed to report the true cost of the transaction or their profit to the Commonwealth.
72. In either instance described above, the Defendant knowingly made, used, or caused to be made or used, a false record or statement by submitting false FX rates and false FX costs and then reporting those false FX rates and costs to the Commonwealth.
73. For every FX transaction completed as outlined above, Defendant would report the false FX rates and costs, reflecting the Bank's hidden mark-ups and mark-downs, including the amounts debited or credited to the Commonwealth.
74. Because of the nature of the FX market, the high and low FX rates for all currencies during the course of the day would be, respectively, higher or lower than the rates paid by the Defendant as custodian for the pension, thus enabling the Defendant to profit on virtually every single FX trade it executed for the Commonwealth while custodian bank.
75. Defendant, as part of its contractual duties as custodians of the Commonwealth's cash and property, provided records and/or other reports to the Commonwealth in order to allow officers and agents of the Commonwealth to monitor the Funds' transactions, including FX transactions.
76. Officers and agents of the Commonwealth did monitor the Funds' transactions, including FX transactions. The cost of the FX trades was falsely reported in order to hide the exchange rates at which the transactions were actually made.

77. Defendant falsely reported the cost of the FX trades in order to conceal the true profit made by the Defendant.

78. Defendant intentionally concealed the true cost of the FX transaction because if they had not concealed such information, the Commonwealth would not have approved the claims Defendant were making against the Commonwealth's funds.

79. By making these false records and/or statements, the Defendant did not show the actual cost at which the transactions occurred.

80. BNY Mellon's system of executing FX trades and assigning false FX Rates for the Commonwealth was deliberately set up to leverage the day's trading volatility in favor of the Bank and against the interest of its custodial client, the Commonwealth.

**COUNT THREE—HAVING POSSESSION, CUSTODY OR CONTROL OF PROPERTY OR MONEY USED OR TO BE USED BY THE COMMONWEALTH AND WILLFULLY CONCEALING PROPERTY USED OR TO BE USED BY THE COMMONWEALTH  
VIRGINIA CODE § 8.01-216.3(A) (4)**

81. All of the preceding paragraphs are realleged and reincorporated by reference, herein.

82. In their official capacity as custodians the Commonwealth's cash and property Defendant had possession, custody or control of property to be used by the Commonwealth.

83. Such possession, custody or control includes but is not limited to the cash accounts of the Commonwealth described herein.

84. At all times relevant to this Complaint, Defendant received a certificate or receipt entitling them to act as the Commonwealth's custodian bank and to conduct transactions on behalf of the Commonwealth.

85. Also at all times relevant to this Complaint, Defendant received a certificate or receipt each time the Commonwealth deposited cash into, or withdrew cash from, its cash accounts.

86. At all times relevant to this Complaint, Defendant had an obligation to render true and accurate periodic accountings with respect to the property of the Commonwealth held by Defendant.
87. At all times relevant to this Complaint, Defendant did render periodic accountings with respect to the property of the Commonwealth held by Defendant.
88. As alleged above, in the cases of credits or debits arising as a result of FX transactions, Defendant debited more than the Commonwealth should have paid for a purchase of FX and credited less than the Commonwealth should have received for a sale of FX.
89. In both cases, Defendant failed to report the true cost of FX purchases and FX sales to the Commonwealth, in order to conceal its actions from Defendant.
90. Defendant kept for itself the difference between the true cost of the trade and the fictitious or false FX rate.
91. As such, Defendant delivered, or caused to be delivered, less property than the amount for which Defendant received a receipt.
92. Defendant knowingly concealed these profits from the Commonwealth, thereby damaging the Commonwealth.

**COUNT FOUR—KNOWINGLY MAKING, USING, OR CAUSING A FALSE  
RECORD OR STATEMENT TO BE MADE OR USED TO CONCEAL, AVOID  
OR DECREASE AN OBLIGATION TO PAY OR TRANSMIT MONEY TO THE  
COMMONWEALTH VIRGINIA CODE §8.01-216.3(A)(7)**

93. All of the preceding paragraphs are realleged and reincorporated by reference, herein.
94. As alleged above, at all times relevant to this Complaint, Defendant had a custodial relationship with the Commonwealth, to include serving as custodian for property of the Commonwealth, including certain cash accounts of the Commonwealth.

95. At all times relevant to this Complaint, Defendant had an obligation to render periodic accountings with respect to the property of the Commonwealth held by Defendant or one of their subsidiaries.
96. At all times relevant to this Complaint, Defendant did render periodic accountings with respect to the property of the Commonwealth held by Defendant or one of their subsidiaries.
97. As alleged above, in the cases of credits or debits arising as a result of FX transactions, Defendant debited more than the Commonwealth should have paid for a purchase of FX and credited less than the Commonwealth should have received for a sale of FX.
98. Defendant would then keep for itself the difference between the true cost of the trade and the fictitious or false FX rate.
99. Defendant knowingly failed to report the true cost of the FX transactions to the Commonwealth.
100. This knowing failure to report the true cost of the FX transactions includes, but is not limited to, the periodic accountings rendered by Defendant.
101. Because the periodic accountings knowingly failed to disclose the true costs of FX transactions to the Commonwealth, those periodic accountings were false.
102. Defendant knowingly made, used, or caused to be made or used, false records to avoid reporting the true cost of the transactions to the Commonwealth.
103. Defendant knowingly failed to inform the Commonwealth of the true profit made by Defendant on FX transactions made on behalf of the Commonwealth.
104. Defendant knowingly made, used, or caused to be made or used, false records to avoid reporting the true profits made by Defendant on FX transactions.

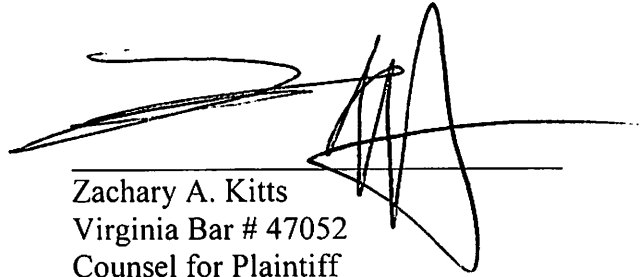
105. Defendant made these false periodic accountings in order to conceal, avoid, and decrease an obligation to pay or transmit money and property to the cash accounts of the Commonwealth.

106. As a result the Commonwealth has been damaged.

107. WHEREFORE, relator asks for judgment in favor of the Commonwealth in the amount of \$150,000,000 (one hundred fifty million dollars) which amount represents (a) Three times the damages sustained by the Commonwealth because of the false claims and fraud alleged in this Amended Complaint; and (b) the maximum civil penalty of \$11,000 for each of the false claims complained of herein;

In addition, relator demands (c) an award of pre-and post-judgment interest on the amount of the judgment, together with (d) the reasonable attorneys' fees, costs, and expenses incurred by the relator in prosecuting this case; relator further demands an award of the maximum percentage of the government's recovery pursuant to the Virginia Fraud Against Taxpayers Act; and relator requests any additional or alternative relief appropriate.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Zachary A. Kitts', written over a horizontal line.

Zachary A. Kitts  
Virginia Bar # 47052  
Counsel for Plaintiff  
Cook Kitts & Francuzenko, PLLC  
3554 Chain Bridge Road, Suite 402  
Fairfax, Virginia 22030  
Phone: 703-865-7480  
Fax: 703-434-3510  
Email: [zkitts@cookkitts.com](mailto:zkitts@cookkitts.com)

Michael A. Lesser, Esq.  
(Not Admitted in Va.)  
Thornton & Naumes LLP  
100 Summer Street, 30th Fl.  
Boston, MA 02110  
Telephone: (617) 720-1333  
Facsimile: (617) 720-2445  
[mlesser@tenlaw.com](mailto:mlesser@tenlaw.com)

Philip R. Michael, Esq.  
(Not Admitted in Va.)  
(N.Y. Reg. No. 1438118)  
Michael Law Group  
The Chrysler Building  
405 Lexington Avenue  
New York, N.Y. 10174  
Telephone: (917) 689-1734  
Facsimile: (718) 601-4052  
[phil.michael.law.group@gmail.com](mailto:phil.michael.law.group@gmail.com)

## CERTIFICATE OF SERVICE

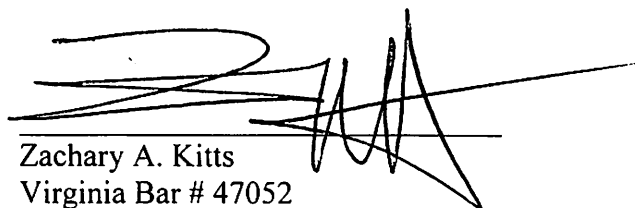
This is to certify that I served a copy of this Amended Complaint on the Attorney General for the Commonwealth of Virginia on this 19th day of January, 2011 via regular mail at the following address:

Hon. Ken Cuccineli  
General Kenneth T. Cuccinelli, Esq.  
Attorney General of the Commonwealth of Virginia  
900 East Main Street  
Richmond, VA 23219

and via email and regular mail to the following

Sydney E. Rab, Esq.  
Sr. Assistant Attorney General  
900 East Main Street, Room 2041  
Richmond, VA 23219  
SRab@oag.state.va.us

Respectfully Submitted,



Zachary A. Kitts  
Virginia Bar # 47052  
Counsel for Plaintiff  
Cook Kitts & Francuzenko, PLLC  
3554 Chain Bridge Road, Suite 402  
Fairfax, Virginia 22030  
Phone: 703-865-7480  
Fax: 703-434-3510  
Email: zkitts@cookkitts.com