13-1573-cv(L)

13-1677-cv(CON), 13-1798-cv(CON),
13-1830-cv(CON), 13-1853-cv(CON)

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IN RE BANK OF AMERICA CORP. SECURITIES DERIVATIVE, AND EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) LITIGATION

AMP Capital Investors Limited, Colonial First State Investments Ltd, H.E.S.T. Australia Ltd, Michael Washenik, Orloff Family Trust DTD 10/3/91, Orloff Family Trust DTD 12/31/01, St. Stephen, Inc., Leonard Masiowski, MaryAnn Masiowski, Michael J. Rinis, Babette Rinis, Michael J. Rinis, IRA,

Objectors - Appellants,

Charles N. Dornfest,

Plaintiff - Appellant,

v.

Public Pension Funds, The Public Pension Fund Group, Steven J. Sklar, as (IRA Account Beneficiary), on behalf of himself and all others similarly situated, Rhonda Wilson, Alma Alvarez, Michael R. Bahnmaier, Mark Adams, Elizabeth Eagen, Vernon C. Dailey, Richard Adame, Arlene Kahn, Petra Chatman, Stichting

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Appeal from the United States District Court
for the Southern District of New York
Case 1:09-md-02058-PKC

OPENING BRIEF FOR APPELLANTS MICHAEL WASHENIK, LAUREL WASHENIK, LEONARD MASIOWSKI, MARYANN MASIOWSKI, MICHAEL J. RINIS, BABETTE RINIS; AND MICHAEL J. RINIS IRA

(For Continuation of Caption See Next Page)

Pensioenfonds ABP, Grant Mitchell, New York State Teachers' Retirement System, Public Employees' Retirement Association of Colorado, Steve R. Graber, Individually, as assignee of claims of the SRG 2008 Trust, Schwab SP500 Index Fund, Schwab 1000 Index Fund, Schwab Institutional Select SP500 Fund, Schwab Dividend Equity Fund, Schwab Core Equity Fund, Schwab Premier Equity Fund, Schwab Fundamental US Large Company Index Fund, Schwab Total Stock Market Index Fund, Schwab SP500 Index Portfolio, Schwab Markettrack Growth Portfolio, Schwab Markettrack Balanced Portfolio, Schwab Investments, Schwab Capital Trust, Dr. Salomon Melgen, Flor Melgen, SFM Holdings Limited Partnership, International Fund Management S.A., Deka International S.A. Luxemburg, Deka Investment GmbH, DI, Aaron Katz, Joel Katz, Sylvia Weissmann, Parker Family Investments L.L.C., Jeffrey R. Parker, The 1997 Jeffrey R. Parker Family Trust, Drew E. Parker, The 1994 Drew E. Parker Family Trust, Keith D. Parker, Julie M. Sorin, The 1991 Jeffrey R. Parker Family Trust, The 1994 Julie P. Mantell Family Trust, Michael A. Parker, Mark D. Wender, Elliot Wender, Penina Wender, Stanley L. Wender, Razelle M. Wender, Jill W. Goldstein, Jerry E. Finger, Ambassador Life Insurance Company, Select Investors Exchange Fund, L.P., Richard Finger, JEF Family Trust, 1976 Real Estate Trust, Walter Finger, The Jerry E. Finger Family Trust D/T/D 12/28/1989, The Jerry E. Finger Family Trust, Leo R. Jalenak, Peggy E. Jalenak, KERS & Co., Robert Gegnas, 198 Locha Drive, Jupiter, FL 334587752, Steven L. Shapiro, Harvey M. Mitnick, Nathan A. Friedman, Bonnie Friedman, Kenneth A. Ciullo, Joanna Ciullo, Thomas P. DiNapoli, Comptroller of the State of New York, as Administrative Head of The New York State and Local Retirement Systems and as Sole Trustee of The New York State Common Retirement Fund, Schwab Financial Services Fund, O. Temple Sloan, Jr.,

Plaintiffs - Appellees,

v.

Bank of America Corp., Gary A. Carlin, Nelson Chai, Kenneth D. Lewis, John A. Thain, Frank P. Bramble, Sr., William Barnet, III, John T. Collins, Gary L. Countryman, Tommy R. Franks, Charles K. Gifford, Monica C. Lozano, Walter E. Massey, Thomas J. May, Patricia E. Mitchell, Thomas M. Ryan, Meredith R. Spangler, Robert L. Tillman, Jackie M. Ward, Neil A. Cotty, Joe L. Price, Banc of America Securities L.L.C., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Bank of America, J. Steele Alphin, Amy Woods Brinkley, Barbara J. Desoer, Liam E. McGee, Timothy J. Mayopoulos, Brian T. Moynihan, Bruce L. Hammonds,

(For Continuation of Caption See Next Page)

Richard K. Struthers, Bank of America Corporation Corporate Benefits Committee Defendants, Bank of America Compensation and Benefits Committee Defendants, Keith T. Banks, Teresa Brenner, Carol T. Christ, Armando M. Codina, Virgis W. Colbert, Gregory Curl, John D. Finnegan, Gregory Fleming, Fox-Pitt Kelton Cochran Caronia Waller (USA) L.L.C., J.C. Flowers & Co., L.L.C., Judith Mayhew Jonas, Aulana L. Peters, Joseph W. Prueher, Ann N. Reese, Michael Ross, Charles O. Rossotti, Peter Stingi, Thomas K. Montag, Kenneth D. Davis, Martin I. Fineberg, Kenneth A. Lewis, Merrill Lynch & Co., Inc., 4 World Financial Center, New York, NY 10080, Bank of America Corporation, 100 N. Tryon Street, Charlotte, NC 28255, Joseph L. Price, Jeremy Fineberg,

Defendants - Appellees,

Peter Kraus,

Defendant.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES. ii

STATEMENT OF JURISDICTION. 1

STATEMENT OF ISSUES. 1

STANDARD OF REVIEW. 2

STATEMENT OF THE CASE. 3

STATEMENT OF FACTS. 10

SUMMARY OF ARGUMENTS.. 13

ARGUMENTS.. 17

I. THE DISTRICT COURT'S AWARD OF $453,000 TO REIMBURSE THE FIVE CLASS REPRESENTATIVES FOR THEIR CLAIMED VALUE OF EMPLOYEE TIME AT HOURLY RATES FROM $40 - $279, VIOLATES THE PSLRA, 15 U.S.C. § 78U-4(A)(4) 17

II. THE NOTICE IS CONSTITUTIONALLY DEFECTIVE BECAUSE IT DOES NOT MEET MINIMUM DUE PROCESS REQUIREMENTS WITH REGARD TO PROVIDING CLASS MEMBERS WITH NOTICE AND AN OPPORTUNITY TO BE HEARD. 23

III. THE RECOVERY OF $2.45 BILLION DOLLARS IS SIMPLY AN ARTIFACT OF THE SIZE OF THE DEFENDING CORPORATION AND THE CONCOMITANT NUMBER OF SHARES OUTSTANDING THAT WERE DAMAGED, THEREFORE THE PERCENTAGE OF THE COMMON FUND PAID TO CLASS COUNSEL AS FEES SHOULD BE 3%. 25

CONCLUSION. 29

CERTIFICATE OF SERVICE. 31

CERTIFICATE OF COMPLIANCE.. 32

TABLE OF AUTHORITIES

CASES

Agent Orange" Production Liability Litigation, 611 F.Supp. 1296 (E.D.N.Y.1985), aff'd in part and rev'd in part by 818 F.2d 226 (2d Cir.1987). 27

In re American Business Fin. Servs. Noteholders Litig., 2008 U.S. Dist. LEXIS 95437. 19

In re American Business Fin. Servs. Noteholders Litig., 2008 U.S. Dist. LEXIS 95437, Fed. Sec. L. Rep. (CCH) P95,015 (E.D. Pa. Nov. 21, 2008). 19

Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany, 522 F.3d 182 (2nd Cir. 2008). 2

Denney v. Jenkens and Gilchrist, 230 F.R.D. 317 (S.D. N.Y. 2005). 19

Devlin v. Scardeletti, 536 U.S. 1 (2002). 1

Electronic Databases Copyright Litigation, 654 F.3d 242 (2nd Cir. 2011). 2

In re GNC Shareholder Litig., 668 F. Supp. 450 (W.D. Pa. 1987).. 22

Goldberger v. Integrated Resources, Incorporated., 209 F.3d 43 (2nd Cir. 2000). 26, 27, 28, 29

McDaniel v. County of Schenectady, 595 F.3d 411 (2nd Cir. 2010). 2

United States v. Meja, 545 F.3d 179 (2nd Cir. 2008). 3

In re Merrill Lynch and Company Research Reports Sec. Litig., 2007 U.S. Dist. LEXIS 9450 (S.D.N.Y. 2007). 19, 20

Nortel Networks Corporation Securities Litigation, 539 F.3d 129 (2nd Cir. 2008). 27

Officers for Justice v. Civil Service Commission of San Francisco, 688 F.2d 615 (9th Cir. 1982).. 23

In re Quantum Health Resources, Incorporated Sec. Litigation, 962 F.Supp. 1254 (C.D.Cal.1997).. 29

Smith v. Dominion Bridge Corp., 2007 U.S. Dist. LEXIS 26903. . . . . 19, 26

Third Circuit Task Force on Court Awarded Attorney Fees, 108 F.R.D. 237 (1985) 28

Troncelliti v. Minolta Corp., 666 F. Supp. 750 (D. Md. 1987).. 22

Wal-Mart Stores, Incorporated v. Visa U.S.A., Incorporated, 396 F.3d 96 (2d Cir. 2005). 27

Weseley v. Spear, Leeds and Kellogg, 711 F. Supp. 713, 1989 U.S. Dist. LEXIS 4092 (E.D.N.Y. 1989). 23

Women's Committee for Equal Employment Opportunity v. National Broadcasting Company, 76 F.R.D. 173 (S.D.N.Y. 1977). 22

STATUTES

15 U.S.C. § 78u-4(a)(6). 2

15 U.S.C. § 78u-4(a)(7)(C). 14, 20, 21, 22

15 U.S.C. §78aa. 1

15 U.S.C. § 78U-4(A)(4). 1, 3, 12, 13, 17,18, 29

28 U.S.C. §1331.. 1

29 U.S.C. §1291.. 1

Fed. R. App. P. 32(a)(5).. 32

Fed. R. App. P. 32(a)(6).. 32

Fed. R. App. P. 32(a)(7)(B). 32

Fed. R. App. P. 32(a)(7)(B)(iii). 32

STATEMENT OF JURISDICTION

The United States District Court for the Southern District of New York exercised jurisdiction under 15 U.S.C. §78aa and 28 U.S.C. §1331. This Court has jurisdiction pursuant to 29 U.S.C. §1291.

The district court entered its Judgment Approving Class Action Settlement on April 9, 2013 (A-697) (Doc. 871) following its Order Awarding Attorneys' Fees and Expenses on April 8, 2013 (A-692) (Doc. 862). Class members Michael and Laurel Washenik timely filed this appeal on May 7, 2013 (A-828) (Doc. 896). This appeal is from a final judgment that disposes of all parties' claims. Class member objectors have standing to appeal a final approval of a class action settlement. *Devlin v. Scardeletti*, 536 U.S. 1 (2002).

STATEMENT OF ISSUES

1. Whether the district court's award of $453,000 to reimburse the five class representatives for their claimed value of employee time at hourly rates from $40 - $279, violates the PSLRA, 15 U.S.C. § 78u-4(A)(4).
2. Whether the notice is constitutionally defective because it does not meet minimum Due Process requirements with regard to providing class members with notice and an opportunity to be heard.
3. Whether the recovery of $2.45 billion dollars is simply an artifact of the size of the defending corporation and the concomitant number of shares outstanding that were damaged, therefore the percentage of the common fund paid to class counsel as fees should be 3%.

STANDARD OF REVIEW

This Court reviews the district court's decision to approve a class action

settlement for abuse of discretion, which occurs when the district court's decision rests on an error of law or clearly erroneous factual finding or its decision cannot be located within the range of permissible decisions. *In re Literary Works In Electronic Databases Copyright Litigation*, 654 F.3d 242, 249 (2nd Cir. 2011). The same standard of review applies to the district court's award of attorneys' fees. *McDaniel v. County of Schenectady*, 595 F.3d 411, 416 (2nd Cir. 2010). In this regard, this Court requires that the district court step into the shoes of a reasonable paying client who wishes to pay the least amount necessary to litigate the case effectively. *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany*, 522 F.3d 182, 184 (2nd Cir. 2008). Similarly, Congress has mandated in securities class actions that total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class. 15 U.S.C. § 78u-4(a)(6) [PSLRA].

This Court reviews questions of law de novo. *United States v. Meja*, 545 F.3d 179, 198-99 (2nd Cir. 2008). In this regard, the PSLRA expressly limits the share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class to be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class plus reasonable costs and expenses (including lost wages) directly relating to the representation of the class. 15 U.S.C. § 78u-4(a)(4).

STATEMENT OF THE CASE

The underlying class action against defendant Bank of America Corp. ("BoA") for violations of federal securities laws, including Sections 10(b), 14(a) and 20(a) of the Securities Exchange Act of 1934, and SEC Rule 10b-5, arose out

of BoA's failure to disclose, or update, prior to the December 8, 2008 shareholder vote approving issuance of addition shares of BoA stock in connection with acquisition of Merrill Lynch.

Specifically, on Saturday, September 13, 2008, Defendant John A. Thain ("Thain"), Merrill's Chief Executive Officer, called Defendant Kenneth D. Lewis ("Lewis"), BoA's Chief Executive Officer, to propose a strategic arrangement between the two companies. Lewis immediately traveled to New York City to meet with Thain. While Thain proposed that BoA purchase a 10% stake in Merrill Lynch, Lewis insisted that BoA wanted to acquire the entirety of Merrill Lynch outright. By the following afternoon BoA had agreed to acquire Merrill Lynch in one of the largest mergers in Wall Street history. In a span of less than 48 hours, BoA and Merrill Lynch had negotiated and memorialized the terms of the Merger in an Agreement and Plan of Merger which was executed in the early morning hours of Monday, September 15, 2008 (the "Merger Agreement"). The Merger Agreement called for BoA to acquire Merrill Lynch for $29 per share, which placed a value on the transaction at $50 billion. This was a 70% premium over Merrill Lynch's closing price the previous Friday. One of the three main topics of the weekend negotiations between BoA and Merrill Lynch was the timing and payment of Merrill Lynch's 2008 bonus compensation. The result of these negotiations was that BoA agreed to allow Merrill Lynch to pay up to $5.8 billion in discretionary year-end bonuses to its executives and employees prior to the close of the Merger. This bonus agreement, which was memorialized in a separate document called a Disclosure Schedule, modified the terms of the Merger Agreement, which stated that Merrill Lynch would not pay bonuses prior to the Merger closing without explicit consent from BoA. On September 15, 2008, Defendants publicly announced the Merger. In a presentation to analysts, press

release, and conference call, Defendants represented that the Merger was expected to be "3% dilutive in 2009" and "breakeven in 2010." On September 18, 2008, BoA publicly filed the Merger Agreement, but not the Disclosure Schedule.

Shortly after the Merger was announced, BoA transferred 200 employees, including a large financial team, to Merrill Lynch's offices in order to monitor Merrill Lynch's financial condition. Almost immediately after the Merger was announced, the internal projections for Merrill Lynch's 2008 fourth quarter were dire and Merrill Lynch's actual losses for October, the first month of the fourth quarter of 2008, were $7.5 billion, the second largest monthly loss in Merrill Lynch's history. Merrill Lynch's growing fourth-quarter 2008 losses were communicated directly to BoA's senior officers in November 2008 through the high-level BoA personnel installed at Merrill Lynch following the announcement of the Merger. For example, on November 5, 2008, one week before Merrill Lynch finalized its October results, Defendant Neil A. Cotty ("Cotty"), BoA's Chief Accounting Officer and Merrill Lynch's acting Chief Financial Officer, provided Defendant Joe L. Price ("Price") with a preliminary report on Merrill Lynch's October results that reflected an estimated $6.1 billion pre-tax loss. Lewis was also informed of Merrill Lynch's October losses, and acknowledged during a November 7, 2008 BoA Board of Director's meeting that "October may have been the worst month in history." On November 3, 2008, BoA and Merrill Lynch filed with the U.S. Securities and Exchange Commission ("SEC") a Joint Definitive Proxy Statement (the "Proxy") soliciting approval of the Merger from both BoA and Merrill Lynch shareholders. The Proxy did not disclose Merrill Lynch's October losses or the Disclosure Schedule related to the bonus agreement. In addition, the Proxy attached a copy of the Merger Agreement, and repeated Defendants' September 15, 2008 representation that the Merger was expected to be

"3% dilutive in 2009" and "breakeven in 2010." The Proxy did not make any representation or forecast about Merrill Lynch's fourth-quarter results. In light of Merrill Lynch's October losses, BoA executives sought the advice of BoA's in-house and outside counsel as to whether Merrill Lynch's 2008 fourth-quarter losses should be disclosed to shareholders in advance of the December 5, 2008 shareholder vote. BoA's attorneys initially agreed that some disclosure of the losses was required, but reversed course and concluded on November 20, 2008, that no disclosure was warranted. Among other things, BoA's attorneys reasoned that, because Merrill Lynch's anticipated fourth-quarter losses were within the range of losses that Merrill Lynch had suffered over the previous five quarters, they did not need to be disclosed. At a December 3, 2008 meeting, as alleged in this Action, Defendants Lewis, Cotty, Price and Thain determined that Merrill Lynch's then-current $11.043 billion fourth-quarter loss forecast had to be adjusted upward by $3 billion, bringing Merrill Lynch's total expected fourth-quarter loss to $14.043 billion before taxes. Although Merrill Lynch's updated loss figures, which did not yet include an expected $2 billion goodwill impairment charge, now exceeded the range of losses suffered by Merrill Lynch over the previous five quarters, BoA's attorneys were not informed of Merrill Lynch's updated loss forecast prior to the December 5, 2008 shareholder vote. Just prior to the shareholder vote, as alleged in this Action, in an effort to offset the impact that Merrill Lynch's losses were having on its capital position, BoA executives demanded that Merrill Lynch reduce its balance sheet by billions of dollars. In addition, because Merrill Lynch's losses were also affecting its liquidity, BoA raised approximately $20 billion in December 2008, including a $9 billion debt offering on December 1, 2008, just days before the shareholder vote. Neither of these actions were disclosed to the shareholders voting on the Merger. Merrill

Lynch's balance sheet reduction, and the costs associated with BoA's Merger-related debt offerings, reduced the combined company's future earnings ability. As a result BoA executives revised the accretion/dilution figures that were first provided to BoA shareholders on September 15, 2008, and in the Proxy, and now expected the deal to be more than 13% dilutive in 2009 (not 3% dilutive) and 2.8% dilutive in 2010 (not breakeven). At the December 5, 2008 shareholder meeting, during which BoA shareholders voted to approve the Merger, Lewis did not disclose the updated accretion/dilution figures, but instead reaffirmed the accuracy of the accretion/dilution figures that had been previously provided to shareholders when asked a question related to the accretive/dilutive nature of the deal. In addition, Merrill Lynch's 2008 fourth-quarter losses were not disclosed to BoA shareholders during the December 5, 2008 shareholder meeting. On the same date, BoA shareholders approved the Merger. The closing date for the Merger was set for January 1, 2009. At a December 9, 2008 BoA Board of Director's meeting, BoA's general counsel, Timothy Mayopoulos ("Mayopoulos"), who had previously provided advice to BoA that disclosure of the interim fourth-quarter results was not required, learned that Merrill Lynch's pre-tax loss forecast had now ballooned to $14 billion for the quarter. Mayopoulos sought to confront Defendant Price about the updated loss figures, but was terminated before he could speak with Price. Approximately two weeks after the shareholder vote on the Merger, BoA's executives determined that BoA could not proceed with the Merger due to Merrill Lynch's losses and informed senior officials from the U.S. Department of the Treasury (the "Treasury") and the U.S. Federal Reserve System (the "Federal Reserve") of their intent to invoke the "material adverse effect" clause in the Merger Agreement (the "MAC") and terminate the deal. BoA decided not to invoke the MAC and to proceed with the Merger only after securing a $20 billion

taxpayer bailout from the federal government, along with a $118 billion asset-guarantee to cover future losses on Merrill Lynch's high-risk assets. In mid-January 2009, after the Merger closed, it was revealed to the market that Merrill Lynch's fourth-quarter 2008 losses had actually exceeded $21 billion pre-tax and BoA had agreed to allow Merrill Lynch to award $3.6 billion in bonuses to its employees for 2008 on an accelerated basis before the Merger closed. Specifically, on January 11, 2009, Citigroup issued an analyst report estimating that Merrill Lynch would record a net loss for the fourth quarter of $6 billion, or $3.75 per share. By January 13, 2009, news that BoA would require a taxpayer bailout in order to absorb Merrill Lynch's losses leaked to the market through various sources. The Wall Street Journal confirmed this news on January 15, 2009, reporting that "[t]he U.S. government is close to finalizing a deal that would give billions in additional aid to Bank of America Corp. to help it close its acquisition of Merrill Lynch & Co." On the following day, January 16, 2009, BoA accelerated its earnings announcement when it publicly disclosed the taxpayer bailout, and further announced that Merrill Lynch had suffered $21.5 billion in pre-tax losses during the 2008 fourth quarter. Finally, on January 21, 2009, the Financial Times reported that Merrill Lynch had taken the "unusual step" of accelerating $3 to $4 billion in bonus payments to its employees before the Merger closed. The price of BoA common stock fell by more than 50% when Merrill Lynch's fourth-quarter losses and bonus payments were belatedly revealed to the market.

Counsel for the class and defendant BoA reached a Stipulation and Agreement of Settlement on or about November 30, 2012 (A-346) (Doc. 767-1), which was preliminarily approved by District Judge Castel on December 4, 2012 (A-650) (Doc. 771).

Objectors/Appellant Michael Washenik, Laurel Washenik, Leonard Masiowski, Maryann Masiowski, Michael J. Rinis, Babette Rinis; and Michael J. Rinis IRA timely filed their written objections to the proposed settlement (A-674) (Doc. 836), (A-682) (Doc 843).

After a fairness hearing on April 5, 2013 (A-762) (Doc. 878), the settlement (which achieves a net recovery for class members of approximately $0.40 per share ($0.43 per share before deduction of attorneys' fees, costs and expenses which are approximately $0.03 per share). (A-567) (Doc. 767-2) was approved by the district court and judgment was entered on April 9, 2013 (A-697) (Doc. 871).

Class counsel were awarded attorneys' fees of $152,414,235 (A-692) (Doc. 862) and the five class representatives, all of which are retirement/pension funds, were collectively awarded $453,000 for costs and expenses, including the value of employee time as "lost wages." (A-692) (Doc. 862).

STATEMENT OF FACTS

The long form Notice to class members (hereinafter the Notice) states in paragraph 4 on page 2, in the section entitled Statement of Average Amount of Damages Per Share: "The Parties do not agree on the average amount of damages per share that would be recoverable if Lead Plaintiffs were to prevail in the Action. Among other things, Defendants deny that any proxy solicitations contained materially false or misleading statements or omitted material information or that they had any duty to update these solicitation materials during the pendency of the 2008 fourth quarter. Defendants also assert that they were prepared to establish that the price of BoA common stock declined in value for reasons not related to the disclosure of any allegedly false or misleading statements.

The Parties also disagree on the appropriate methodology for determining

damages, if liability were established, particularly under Section 14(a), as Defendants have argued that Class Members seeking recovery under Section 14(a), who did not purchase or otherwise exchange any shares of their BoA common stock in connection with the Merger, failed to adduce evidence of a direct, compensable injury under Section 14(a). In sum, Defendants do not agree with the assertion that they engaged in any actionable misconduct under the federal securities laws or that any damages were suffered by any members of the Class as a result of their conduct. On its face the "Statement of Average Amount of Damages Per Share" provides no information to class members regarding their potential damages per share either as an average or otherwise, even though footnote 15 on page 13 of the Notice states: "$4.74 represents the total amount of decline in the price of BoA common stock calculated by Lead Plaintiffs' damages expert as being related to the disclosure of the alleged misrepresentations and omissions."

The Notice is silent as to Lead Plaintiffs' being awarded costs and expenses in the amount of $453,003.04 reimbursed in full as PSLRA awards, although at paragraph 5 starting on page 2 the Notice says: "Co-Lead Counsel also will apply for the reimbursement of Litigation Expenses paid or incurred in connection with the prosecution and resolution of the Action, in an amount not to exceed $17.5 million, which may include the reasonable costs and expenses of Class Representatives (as defined in ¶9 below) directly related to their representation of the Class.

The district court awarded the five class representative retirement/pension funds collectively $453,000 under the PSLRA as reasonable costs and expenses directly related to representing the class (A-692) (Doc. 862). In so doing, the district court relied on the declarations of general counsel or similar ranking officials of the representative retirement/pension funds. (A-666-668-670-672)

(Doc. 829-2, pg. 5-6; 829-3, pg. 5-6; 829-4, pg. 6-7; 829-5, pg. 7-8). In all cases, these class representatives sought and received reimbursement for employee time at hourly rates ranging from $40 - $279. *id.* The district court found that these requests for employee time reimbursement were not bonus or differential payments prohibited under the PSLRA, but rather reasonable costs and expenses directly relating the representation of the class (A-822) (Doc. 878, pg. 61).

Objectors Michael and Laurel Washenik informed the District Court that the class representatives' request for $453,000 in reimbursement of the claimed value of employee time is not disclosed in the Notice of Proposed Class Settlement mailed to class members. (A-676) (Doc. 836, pg. 3). Moreover, the class representative retirement/pension funds make no claim for any actual out-of-pocket costs or expenses advanced in pursuit of this litigation as these expenses were advanced by class counsel who were awarded $8,069,985 in reimbursement of Litigation Expenses. (A-693-798-825) (Doc. 862, pg. 2; 878, pg. 37, 64).

SUMMARY OF ARGUMENTS

A. The PSLRA eliminates incentive awards to named plaintiffs 15 USCS § 78u-4 (a)(2)(A)(vi) "plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4)". Thus the District Court's award of $453,000 to reimburse the five class representatives for their claimed value of employee time at hourly rates from $40 - $279, violates the PSLRA, 15 U.S.C. § 78u-4(a)(4) which provides

> "The share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal on a per share basis to the portion of the final judgment or settlement awarded to

all other members of the class. Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class."

The $453,000 in question is in addition to the $8,069,985 in litigation costs and expenses requested by, and recovered by, class counsel. The $453,000 represents the alleged value of the Named plaintiffs' employees' time calculated at an hourly rate. As such the $453,000 is not a recoverable reasonable cost, or expense (including lost wages) directly relating to the representation of the class under the PSLRA.

Additionally, the district court should not have entertained the class representatives' request for a "PSLRA award" of $453,000 for the claimed value of employee time as this information was not disclosed in the Notice mailed to class members. The failure to disclose violates 15 U.S.C. § 78u-4(a)(7)(C) which provides:

"If any of the settling parties or their counsel intend to apply to the court for an award of attorneys' fees or costs from any fund established as part of the settlement, a statement indicating which parties or counsel intend to make such an application, the amount of fees and costs that will be sought…shall be clearly summarized on the cover page of any notice to a party of any proposed or final settlement agreement."

B. The Notice itself is defective because it does not meet minimum constitutional due process requirements with regard to providing class members with notice and an opportunity to be heard. On its face the Notice, in its "Statement of Average Amount of Damages Per Share" provides no information to class members regarding their potential damages per share either as an average or

otherwise. This is true even though Class Counsel knew that the class members potential damages per share were approximately $4.74. The information in paragraph 3 on page 2 of the Notice reads: "Lead Plaintiffs' damages expert estimates that, if valid claims for all damaged shares are submitted, the average recovery per damaged share of BoA common stock will be approximately $0.43 per share before deduction of attorneys' fees, costs and expenses awarded by the Court and the costs of providing notice and administering the Settlement." Thus it can be seen that the paragraph 3 information coupled with the plaintiffs' expert's damage calculation of an average of $4.74 per share would have let class members know that they were asked to approve a settlement that would gross them about 9¢ on the dollar. i.e., $0.43 divided by $4.74 equals 9.07 percent. The lack of transparency in the Notice deprives class members of Due Process because the class member is not provided with sufficient information to make a determination as to whether to support or oppose the purposed settlement.

C. An award of attorneys' fees of 6.56 percent of the $2.425 billion gross Settlement Fund in this matter is $145.5 million. While it goes without question that the attorneys who created this $2.425 billion common fund need to be justly compensated, it is also true that the compensation should be proportionately commensurate with the damages received by class members and not a windfall to Class Counsel.

ARGUMENTS

I
THE DISTRICT COURT'S AWARD OF $453,000 TO REIMBURSE THE FIVE CLASS REPRESENTATIVES FOR THEIR CLAIMED VALUE OF EMPLOYEE TIME AT HOURLY RATES FROM $40 - $279, VIOLATES THE PSLRA, 15 U.S.C. § 78U-4(A)(4)

It is clear that one of the intentions of Congress in passing the PSLRA was, in Congress' words the "Elimination of Abusive Practices in Securities Litigation Removing the Incentives to Participate in Abusive Class Action Litigation." *Private Securities Litigation Reform Act of 1995*, S. REP- 104-98, S- Rep- No. 98,104TH Cong-, 1ST Sess. 1995,1995 U.S.C.C.A.N. 679,1995 WL 372783 (Leg.Hist.)

The abuse involving class actions that Congress found and corrected included the use of professional plaintiffs who were motivated by the payment of a "bonus" far in excess of their share of any recovery. Congress believed that lead plaintiffs are not entitled to a bounty for their service, and that the lead plaintiffs' share of any final judgment of any settlement should be calculated in the same manner as the shares of the other class members: "plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4)." 15 USCS § 78u-4 (a)(2)(A)(vi) Congress also recognized that service as the lead plaintiff may require court appearances or other duties involving time away from work, and granted courts the discretion to award the lead plaintiff reimbursement for "reasonable costs and expenses" (including lost wages) **directly relating to representation of the class**.

It should be seen in light of the legislative history, that the PSLRA eliminates incentive awards to named plaintiffs 15 USCS § 78u-4 (a)(2)(A)(vi)

"plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4)". Thus the District Court's award of $453,000 to reimburse the five class representatives for their claimed value of employee time at hourly rates from $40 - $279, violates the PSLRA, 15 U.S.C. § 78u-4(a)(4) which provides

> "The share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal on a per share basis to the portion of the final judgment or settlement awarded to all other members of the class. Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class."

The $453,000 in question is in addition to the $8,069,985 in litigation costs and expenses request by, and recovered by, class counsel. The $453,000 represents the alleged value of the Named plaintiffs' employees' time calculated at an hourly rate. As such the $453,000 is not a recoverable reasonable cost, or expense (including lost wages) directly relating to the representation of the class under the PSLRA. Costs and expenses must be justified with evidence of actual expenses incurred, lost wages, lost vocation time or lost business opportunities. *Smith v. Dominion Bridge Corp*., 2007 U.S. Dist. LEXIS 26903, 2007 WL 1101272 (E.D. Pa. 2007)

As Judge O'Neill noted in *In re Am. Bus. Fin. Servs. Noteholders Litig*., 2008 U.S. Dist. LEXIS 95437, Fed. Sec. L. Rep. (CCH) P95,015 (E.D. Pa. Nov. 21, 2008)"Incentive awards are permitted for lead plaintiffs in RICO and civil rights cases where plaintiffs justifiably fear retribution or are in danger because of

their willingness to step forward. *See e.g. Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 355 (S.D. N.Y. 2005). There is no such danger associated with serving as the lead plaintiff in securities litigation."

In *In re Merrill Lynch & Co. Research Reports Sec. Litig*., 2007 U.S. Dist. LEXIS 9450 (S.D.N.Y. 2007), Ruth Manton, lead plaintiff sought an award under the PSLRA of $8,000 for having spent 16 hours of her time as lead plaintiff which she valued at $500 per hour as a CEO of a products licensing company in Manhattan. Manton argued that she spent the 16 hours in connection with her duties as lead plaintiff during her regular business day and that those hours comprised time she was unable to spend in her capacity as CEO of her company.

Judge Keenan denied Manton's request in its entirety and explained that, "to recover an award under the PSLRA a lead plaintiff must show some actual expense or loss incurred as a result of acting as a class representative." Judge Keenan found that Manton had failed to identify any out-of-pocket expense, lost wages, lost work time, lost commissions or lost business opportunities she incurred. Id.

Similarly, the Lead plaintiffs in this matter cannot recover for the claimed hourly rates of their employees who may have spent company time in connection with this class action. i.e., in and of itself, the time a lead plaintiff employees devote to pursuing its class action litigation is not recoverable under the PSLRA; only costs and expenses incurred (including lost wages) are recoverable.

In this matter, all litigation costs and expenses were advanced by, and reimbursed to, class counsel. Lead Plaintiffs have no costs or expenses.

Additionally, the district court should not have entertained the class representatives' request for a "PSLRA award" of $453,000 for the claimed value of their employees' time as this information was not disclosed in the Notice mailed to class members. The failure to disclose violates 15 U.S.C. § 78u-4(a)(7)(C) which

provides:

> "If any of the settling parties or their counsel intend to apply to the court for an award of attorneys' fees or costs from any fund established as part of the settlement, a statement indicating which parties or counsel intend to make such an application, the amount of fees and costs that will be sought…shall be clearly summarized on the cover page of any notice to a party of any proposed or final settlement agreement."

However, despite the clear language of 15 U.S.C. § 78u-4(a)(7)(C), the Notice is silent as to Lead Plaintiffs' being awarded costs and expenses in the amount of $453,003.04 as PSLRA awards. Although at paragraph 5 starting on page 2 the Notice says: "Co-Lead Counsel also will apply for the reimbursement of Litigation Expenses paid or incurred in connection with the prosecution and resolution of the Action, in an amount not to exceed $17.5 million, which may include the reasonable costs and expenses of Class Representatives (as defined in ¶9 below) directly related to their representation of the Class"; clearly the amount of fees and costs that would be sought were not clearly summarized on the cover page of the notice; or anywhere.

The district court awarded the five class representative retirement/pension funds collectively $453,000 under the PSLRA as reasonable costs and expenses directly related to representing the class . (A-692) (Doc. 862). In so doing, the district court relied on the declarations of general counsel or similar ranking officials of the representative retirement/pension funds. (A-666-668-670-672) (Doc. 829-2, pg. 5-6; 829-3, pg. 5-6; 829-4, pg. 6-7; 829-5, pg. 7-8). In all cases, these class representatives sought and received reimbursement for their employees' time at hourly rates ranging from $40 - $279. id. The district court found that these requests for their employees' time reimbursement were not bonus or

differential payments prohibited under the PSLRA, but rather reasonable costs and expenses directly relating the representation of the class. (A-822) (Doc. 878, pg. 61). This was error. The value of their employees' time is not "lost wages" nor is it a reasonable cost or expense under the PSLRA. As Judge Keenan noted above, an individual class representative is not permitted to claim the value of his or her time devoted to class representation as a reasonable cost or expense or as lost wages.

Furthermore, a "class representative is a fiduciary to the class. If class representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard. See *Women's Committee for Equal Employment Opportunity v. National Broadcasting Co.*, 76 F.R.D. 173, 180 (S.D.N.Y. 1977) ("When representative plaintiffs make what amounts to a separate peace with defendants, grave problems of collusion are raised."). But see Golden, supra, at 90,954 ($ 5,000 special award); *In re GNC Shareholder Litig.*, 668 F. Supp. 450, 451 (W.D. Pa. 1987) ($ 3,000 "incentive award" made to each of three class representatives); *Troncelliti v. Minolta Corp.*, 666 F. Supp. 750, 752 (D. Md. 1987) ($ 2,000 special award in antitrust action)." *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 1989 U.S. Dist. LEXIS 4092 (E.D.N.Y. 1989)

Generally, when a person "join[s] in bringing [an] action as a class action . . . he has disclaimed any right to a preferred position in the settlement." *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 632 (9th Cir. 1982). Were that not the case, there would be considerable danger of named plaintiffs bringing cases as class actions to increase their own leverage to attain a more remunerative settlement for themselves. Under the PSLRA a class representative

is only permitted to recover actual costs or expenses, unrelated to the lost opportunity cost value of his or her time, and their actual lost wages, if any. They are not entitled to substitute their lost opportunity cost for lost wages. Accordingly, Lead Plaintiffs' $453,000 in PSLRA awards in this matter are both excessive and improper.

II.
THE NOTICE IS CONSTITUTIONALLY DEFECTIVE BECAUSE IT DOES NOT MEET MINIMUM DUE PROCESS REQUIREMENTS WITH REGARD TO PROVIDING CLASS MEMBERS WITH NOTICE AND AN OPPORTUNITY TO BE HEARD

On its face, the Notice, in its “Statement of Average Amount of Damages Per Share”, provides no information to class members regarding their potential damages per share either as an average or otherwise. This is true even though Class Counsel knew that the class members potential damages per share were approximately $4.74. The information in paragraph 3 on page 2 of the Notice reads: “Lead Plaintiffs’ damages expert estimates that, if valid claims for all damaged shares are submitted, the average recovery per damaged share of BoA common stock will be approximately $0.43 per share before deduction of attorneys’ fees, costs and expenses awarded by the Court and the costs of providing notice and administering the Settlement.” Thus it can be seen that the paragraph 3 information coupled with the plaintiffs' expert's damage calculation of an average of $4.74 per share would have let class members know that they were asked to approve a settlement that would gross them about 9¢ on the dollar. i.e., $0.43 divided by $4.74 equals 9.07 percent. The lack of transparency in the Notice deprives class members of Due Process because the class member is not provided with sufficient information to make a determination as to whether to support or

oppose the purposed settlement.

Class Counsel's failure to inform the Class of their estimate of the average damages recoverable per share if Plaintiffs had prevailed on all of their claims violates the class members right to Constitutional Due Process. One of the main purposes of giving class members notice of a proposed settlement is to provide the unnamed class members with Due Process, thereby allowing them to evaluate whether to opt out, object and attend the Fairness Hearing, or just stand pat. To that end, the notice must provide enough information to permit class members to effectively evaluate the settlement. Thus by failing to give the class a basis to evaluate the Settlement, Class Counsel both breached their fiduciary duty to absent class members and the class members Due Process rights. The Constitution requires Class Counsel to include in the Notice the information necessary to permitt class members to effectively evaluate the Settlement. A class member doesn't need to be a sophisticated investor to understand that if their damages are $4.74 a share and the proposed settlement is for 43¢ a share they are getting less then 10% of the possible damages. In any event the Due Process notice requirements applicable to class actions requires Class Counsel to provide sufficient information to absent class members to enable them to effectively evaluate the proposed settlement.

III.
THE RECOVERY OF $2.45 BILLION DOLLARS IS SIMPLY AN ARTIFACT OF THE SIZE OF THE DEFENDING CORPORATION AND THE CONCOMITANT NUMBER OF SHARES OUTSTANDING THAT WERE DAMAGED, THEREFORE THE PERCENTAGE OF THE COMMON FUND PAID TO CLASS COUNSEL AS FEES SHOULD BE 3%

An award of attorneys' fees of 6.56 % of the $2.425 billion Settlement Fund in this matter is $145.5 million. While it goes without question that the attorneys

who created this $2.425 billion common fund need to be justly compensated, it is also true that the compensation should be proportionately commensurate with the damages received by class members and not a windfall to Class Counsel. In this matter the district court abused its discretion in awarding excessive attorneys' fees. In this Circuit, the district court is to act as a fiduciary who must serve as a guardian of the rights of absent class members and must approach attorneys' fee awards with an eye to moderation. *Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43, 52-53 (2nd Cir. 2000). ". . . [A] fee award should be assessed based on scrutiny of the unique circumstances of each case, and 'a jealous regard to the rights of those who are interested in the fund.' *Grinnell I*, 495 F.2d at 469 (internal quotation marks omitted); *see Grinnell II*, 560 F.2d at 1098-99." *Id.* at 53. The *Goldberger* court awarded $2.1 million in fees based on a lodestar analysis on a $54 million settlement, which amounted to a fee award of approximately 4%. *Id.* at 45.

Faced with the potential loss of $25 billion in damages, BoA agreed to settle this matter for about 9.07% of its potential loss.

Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit has written that class counsel should settle for the percentage of estimated damages that equals their estimate of their chance of prevailing at trial. Applying that in this matter class counsel's estimate of their chance of prevailing at trial would be 9%. Only in a class action such as this one, where the economy of scale is huge, can class counsel earn $145.5 million by agreeing to settle the class claims for more or less 9¢ on the dollar.

This Circuit has found that courts have traditionally awarded fees in common fund cases in the lower range of what is reasonable, because economies of scale can cause windfalls in such cases. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*,

396 F.3d 96, 122 (2d Cir. 2005), *citing Goldberger*, 209 F.3d at 52; *In re Indep. Energy Holdings PLC*, 2003 WL 22244676, at *6 (S.D.N.Y. Sept. 29, 2003) ("[T]he percentage used in calculating any given fee award must follow a sliding scale and must bear an inverse relationship to the amount of the settlement. Otherwise, those law firms who obtain huge settlements, whether by happenstance or skill, will be over-compensated to the detriment of the class members they represent.").

Fees in the range of 6-10% and even lower are common in the context of megafund settlements such as this one. *See, e.g.*, *In re: Nortel Networks Corp. Securities Litigation*, 539 F.3d 129, 131, 134 (2nd Cir. 2008) (approving reduction from requested 8.5% fee to 3% where the $1.138 billion settlement consisted of over $438 million cash recovery and over 314 million shares of Nortel common stock valued in excess of $700 million); *In re "Agent Orange" Prod. Liability Litig.*, 611 F.Supp. 1296, 1394–95 (E.D.N.Y.1985), *aff'd in part and rev'd in part by* 818 F.2d 226 (2d Cir.1987) ($180 million class recovery, 5.5% fees awarded); *In re Baldwin–United Corp. Litig.*, 1986 WL 12195, at *3–5 (S.D.N.Y. June 27, 1986) ($183.8 million class recovery, 4.1% fees awarded out of 5% requested)

"Where extraordinarily large class recoveries of $75–$200 million and more are recovered, courts most stringently weigh the economics of scale inherent in class actions in fixing an appropriate per cent recovery for reasonable fees." Herbert P. Newberg, Attorney Fee Awards § 2.09 (1986)

"Absent unusual circumstances the percentage will decrease as the size of the fund increases." Third Circuit Task Force on Court Awarded Attorney Fees, 108 F.R.D. 237, 239 (1985).

Thus, in a $2.425 billion megafund settlement such as this one, attorneys' fees should max out at the 3% level this court approved in *In re: Nortel Networks*

Corp. Securities Litigation.

This Circuit has identified the "risk of success as 'perhaps the foremost' factor to be considered in determining" a reasonable award of attorneys' fees. *Goldberger*, 209 F.3d at 54. "Risk falls along a spectrum, and should be accounted for accordingly." *Id.* In this matter the risk was low because in securities class actions the contingency risk "is generally low." "At least one empirical study has concluded that "there appears to be no appreciable risk of non-recovery" in securities class actions, because "virtually all cases are settled." Janet Cooper Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions, 43 Stan. L.Rev. 497, 578 (1991)." *Goldberger*, 209 F.3d at 52. In fact, partners in the old Milberg Weiss firm stated that losses in securities cases are "few and far between," and that we achieve "a significant settlement although not always a big legal fee, in 90% of the cases we file." *In re Quantum Health Resources, Inc. Sec. Litig.*, 962 F.Supp. 1254, 1258 (C.D.Cal.1997). The court in *In re Quantum* found that "there is no inherent risk of attorneys fee non-recovery in securities class action suits." *Id.*

CONCLUSION

This Court should find: the District Court's award of $453,000 to reimburse the five class representatives for their claimed value of their employees' time at hourly rates from $40 - $279, violates the PSLRA, 15 U.S.C. § 78U-4(A)(4); that the Notice, which omits the damage information regarding damages, required by the Due Process clause of the Constitution, is fatally defective; and that Class Counsel's fees, which equal 6.56 % of this $2.425 billion megafund settlement are excessive and unwarranted, especially given the relative lack of risk in this case due to the nature of securities class actions.

As a result this Court should reverse and remand with directions: that the class be re-noticed and provided with the information regarding damages required

by the Due Process clause of the Constitution, so that each class members can make an informed decision regarding opting out, objecting or standing pat with regard to the settlement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original APPELLANTS' OPENING BRIEF and six paper copies of this brief were put in the United States Mail to the Clerk of the Court on the 20th day of August, 2013, and an Adobe Acrobat PDF file electronic version was filed with the Clerk of the Court using the CM/ECF filing system and that the Attorneys of Record will automatically be notified by the CM/ECF electronic mail system.

/s/ N. Albert Bacharach, Jr.
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,270 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); complies with typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a 14 point font, proportionally spaced typeface using Times New Roman in WordPerfect X6.

Dated this 20th day of August, 2013.

/s/ N. Albert Bacharach, Jr.
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