

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

AMP CAPITAL INVESTORS LIMITED, et  
al.,

Objectors-Appellants,

CHARLES N. DORNFEST,

Plaintiff-Appellant,

-against-

PUBLIC PENSION FUNDS, et al.,

Plaintiffs-Appellees,

BANK OF AMERICA CORP., et al.,

Defendants-Appellees.

Docket Nos. 13-1573-cv and  
13-1677-cv

Appeal from the United States  
District Court for the Southern  
District of New York

09 Md. 2058 (PKC)  
10 Civ. 275 (PKC)

**OPPOSITION TO MOTION OF CHARLES N. DORNFEST  
FOR PERMISSION TO FILE SUR-REPLY**

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The Bank Defendants<sup>1</sup> oppose Mr. Dornfest's motion for permission to file a sur-reply in further opposition to the Bank Defendants' motion to dismiss his appeal.

Mr. Dornfest justifies his request for a sur-reply because, he claims, the Bank Defendants improperly raised a new argument in their Reply Brief. They did not. The Bank Defendants' Opening Brief addressed the arguments Mr. Dornfest set forth in his merits appeal brief, and in a meet and confer, as to why there was appellate jurisdiction. For the first time in his Opposition Brief on the motion to dismiss, Mr. Dornfest presented a literal construction of the Judgment that turned on the definition of "Action" which, he contended, had the result of dismissing his case in so far as it asserted individual claims. In his present motion, Mr. Dornfest does not explain how the Bank Defendants should, prior to his Opposition, have understood that to be his argument; it had not been previously articulated, in Mr. Dornfest's merits appeal brief or otherwise.

There is accordingly no justification for Mr. Dornfest's request to submit a sur-reply. Should the Court nevertheless consider Mr. Dornfest's proposed sur-reply, the Bank Defendants ask that it also consider the balance of

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<sup>1</sup> Capitalized terms not otherwise defined herein have the same meaning ascribed to them in the Bank Defendants' Motion to Dismiss the Appeal of Plaintiff-Appellant Charles N. Dornfest for Lack of Appellate Jurisdiction ("Bank Br.") or in the Bank's Reply Brief ("Bank Reply") submitted in support of that motion.

this submission, which explains why the positions advocated in Mr. Dornfest's proposed sur-reply are without merit.

A. The Bank Defendants explained in their Reply why the literal reading of the Judgment advocated by Mr. Dornfest in his Opposition did not yield the result he wanted. Mr. Dornfest now tries to rehabilitate his literal reading by positing that while his case was not explicitly included within the bounds of the term "Action," the definition of that term should be read expansively to encompass not only the actions consolidated into the Consolidated Securities Class Action pursuant to the specified order – the June 30, 2009 Consolidation Order – but also all actions consolidated into the Action under *any* order. To suggest this outcome, Mr. Dornfest's proposed sur-reply begins by truncating the relevant definition and replacing with an ellipses language that dispels the reading he advocates, and then by quoting the full language and bolding the words "and includes."

1. There is no dispute that Judge Chin ordered the consolidation of Mr. Dornfest's case. The issue is whether what remained of his case – the individual claim he asserted – was dismissed pursuant to a Judgment that was obtained by a class of which Mr. Dornfest was not a member, that conferred benefits that Mr. Dornfest did not receive, and that explicitly provided that it did not affect claims with respect to securities on which Mr. Dornfest's claims are based.

2. The Judgment dismissed the Action, a term defined in the Stipulation. The Stipulation defined Action to be “the consolidated securities action in the matter styled In re Bank of America Corp. Securities, Derivative and Employee Retirement Income Security Act (ERISA) Litigation, No. 09 MDL 2058 (PKC) (S.D.N.Y.), and includes all actions consolidated therein pursuant to the Court’s Consolidation Order.” A1633.

3. The Consolidation Order created “the matter styled In re Bank of America Corp. Securities, Derivative and Employee Retirement Income Security Act (ERISA) Litigation,” appointed Lead Plaintiffs to prosecute that matter, and enumerated the securities actions that were consolidated to form that matter. A422. Mr. Dornfest’s case was not among them; it was not even filed until months later. As a result, under the Consolidation Order “the matter [so] styled” did not include Mr. Dornfest’s case.

4. The Consolidation Order (and the subsequent order implementing it) also provided that, absent an objection, later-filed cases would also be consolidated, A463, and the Stipulation – through the use of the language “and includes all actions consolidated therein pursuant to the Court’s Consolidation Order” – included such cases within the definition of “Action.” But Mr. Dornfest *did* object. Bank Reply at 7 n.5. So, Mr. Dornfest’s case was not consolidated into that matter “pursuant to” the Consolidation Order, but through a

different (April 2010) order. Thus, Mr. Dornfest's case was not dismissed by the Judgment because his case was not included within the definition of the "Action." This result was no anomaly, since Mr. Dornfest was not a member of the class, did not receive any consideration from the settlement, and the Judgment (and every order entered in his case) made clear that his right to pursue his individual claim was preserved.

5. By suggesting that his case was nevertheless included within the definition of Action, Mr. Dornfest reads the Judgment and Stipulation to embrace any case consolidated under any order. If so, the "and includes" clause in the Stipulation was sheer surplusage, a result unnatural on its face and inconsistent with the understanding of all parties to the Stipulation that Mr. Dornfest's case was not dismissed by the Judgment. Bank Reply at 2.

B. Mr. Dornfest argues in the alternative that the consolidation effected by Judge Chin's April 9, 2010 Order was "pursuant to" the terms of the Consolidation Order because Judge Chin referenced that order in his April 2010 ruling. But Judge Chin did so solely in his discussion of the history of the case. A970. Because Mr. Dornfest raised an objection to the terms of the Consolidation Order and moved to be appointed Lead Plaintiff, Judge Chin issued a separate opinion addressing those issues. In that April 2010 ruling, Judge Chin directed that Mr. Dornfest's class claims were "hereby consolidated" into the Consolidated

Securities Class Action – i.e., they were consolidated by the April 9, 2010 Order, not by the Consolidation Order referenced in the definition of “Action.”

Dated: New York, New York  
September 20, 2013

Respectfully submitted,

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