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)

REPLY IN FURTHER SUPPORT OF MOTION TO FILE SUR-REPLY

Appellant Charles N. Dornfest ("Dornfest") respectfully submits this reply in further support of his motion, pursuant to Rule 27 of the Federal Rules of Appellate Procedure, requesting permission to file a sur-reply in further opposition to the Bank Defendants'[1] motion to dismiss Dornfest's appeal for a supposed lack of appellate jurisdiction.

In opposition to Dornfest's motion, the Bank Defendants do not dispute that, for the first time in their reply, they argued that the consolidated "Action" dismissed by the Judgment was supposedly defined to include only those specific actions consolidated by the June 30, 2009 Consolidation Order. This new,

[1]All terms not defined herein are used as defined in Dornfest's opposition to the Bank Defendants' motion to dismiss his appeal.

erroneous argument is a sufficient basis, alone, to permit Dornfest the opportunity to respond.

The Bank Defendants also erroneously argue for the first time in their Opposition to Dornfest's motion that Dornfest failed to argue in his merits appeal how he was consolidated into the "Action." (Bank Defendants' Opposition at p. 1) Thus, they claim Dornfest is foreclosed from doing so now. In fact, Dornfest clearly set forth in his merits appeal how he was consolidated into the "Action" dismissed by the Judgment. Specifically, Dornfest stated on page 11 of his merits brief:

> On April 9, 2013, the district court entered a Judgment Approving Class Action Settlement ("Judgment"). (A2009-A2022) The Judgment incorporated by reference a Stipulation of Settlement ("Stipulation"), filed on November 30, 2012 (A1620-A1840), which provided:
>
> …this Stipulation is intended by the Parties hereto to fully, finally and forever compromise, settle, release, resolve, relinquish, waive, discharge and dismiss with prejudice, the above-captioned consolidated securities class action (the "Action") and all claims asserted against all Defendants therein, and all Released Claims (defined below) as against the Releasees (defined below).
>
> (A1621)
>
> Because Dornfest's Complaint was consolidated with and into the [Bank of America] Securities Action, the Judgment dismissing Dornfest's Complaint was with prejudice.

Thus, the Bank Defendants' assertion, that Dornfest's argument that his case was consolidated into the "Action" was not raised previously, is without merit.

Defendants correctly state that the Judgment obtained by class counsel provided no benefit with respect to Dornfest's individual (or alleged class of similarly situated investors who had) BoA option claims. The fact that no benefit was provided to Dornfest for his claims (individual or class) is beside the point. Regardless of whether a benefit was provided, the Judgment, the operative document here that the Bank Defendants themselves defined in their Stipulation of Settlement, dismissed Dornfest's complaint with prejudice and thus provides jurisdiction for this appeal.

The Bank Defendants' remaining arguments are equally meritless. The Bank Defendants erroneously insist (Opposition at p. 2) that the words "and includes" should be read as a term of limitation, and should be read to mean, "includes only". But their notion that "and includes" is a limiting, rather than an illustrative, phrase ignores the words' plain and ordinary meaning. See http://www.adamsdrafting.com/including-without-limitation/:

> **Conclusion**
>
> The everyday meaning of *including* is such that *including without limitation* and *including but not limited to* mean the same thing as *including*. When considered as a whole, more often than not U.S. courts go with the everyday meaning of a word. That's why most courts that have recently considered the meaning of *including* have held that *including* doesn't convey a restrictive meaning. (emphasis in the original).

The Bank Defendants (Opposition at p. 2, Item 1) argue that Dornfest's individual claim was not consolidated but, in support, cannot and do not, cite anything for this invention (Opposition at p. 3, Item 4, and at p. 4, Item 5 B).

The Bank Defendants also argue (Opposition at p. 3, Item 4) that Dornfest objected to consolidation, but cite as authority only their own Reply, which, in turn cites (A813). But their own citation plainly shows that Dornfest did not object to consolidation (See A813-A827). Rather, Dornfest sought to move to certify a class of BoA option investors, but the District Court precluded him from making that motion. Other than to seek to move for class certification of a coordinated class, he never objected to consolidation and, particularly, never objected to having his individual case consolidated.

Dornfest's case was consolidated by the Order of April 9, 2010, but "pursuant to" the June 30, 2009 order (See Opposition at 4, Item 5B), which order appointed the lead counsel who successfully opposed Dornfest's attempt to permit the District Court to consider the certification of a class of BoA option investors.

Finally, the Bank Defendants concede that Dornfest's case was consolidated into the Consolidated Securities Class Action (Opposition at 4-5), which Action was dismissed by the Judgment with prejudice, thus providing appellate jurisdiction for Dornfest's appeal.

CONCLUSION

The Court should grant Dornfest's motion to file a sur-reply in further opposition to the Bank Defendants' motion, and deny the Bank Defendants' motion to dismiss.

Dated: New York, New York
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RESPECTFULLY SUBMITTED,
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