13-1573-cv(L)

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

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,

(Additional Caption on the Following Pages)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS–APPELLEES

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Objectors-Appellants,

and

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 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,

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, 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 CNETER, NEW YORK, NY 10080, BANK OF AMERICA CORPORATION, 100 N. TRYON STREET, CHARLOTTE, NC 28255, JOSEPH L. PRICE, JEREMY FINEBERG, O. TEMPLE SLOAN, JR.,

Defendants-Appellees,

and

PETER KRAUS,

Defendant.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendants-Appellees certify that Bank of America Corporation is a publicly traded corporation that has no parent corporation. No publicly held corporation owns 10% or more of its stock.

Banc of America Securities L.L.C. is indirectly wholly owned by Bank of America Corporation.

Merrill Lynch & Co., Inc. and Merrill Lynch, Pierce, Fenner & Smith Inc. are wholly owned subsidiaries of Bank of America Corporation.

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Defendants-Appellees[1] respectfully submit this brief in response to the appeal by Objectors-Appellants AMP Capital Investors Limited, Colonial First State Investments Ltd and H.E.S.T. Australia Ltd (collectively, "AIMs") of the Decision and Order Approving the Class Action Settlement, dated April 9, 2013 (the "Judgment"). With respect to the appeals filed by the other Objector-Appellants,[2] which have been consolidated with AIMs' appeal, Defendants-Appellees join in the arguments made in the Brief of Lead Plaintiffs, dated November 1, 2013.

PRELIMINARY STATEMENT

The District Court (Castel, J.) did not abuse its discretion when it approved the settlement of the class claims in this case. The settlement resulted in a fund of $2.425 billion and provided that BofA would undertake or maintain various corporate governance reforms. It has been described as the largest settlement of a shareholder claim by a financial services firm since the financial

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[1] Defendants-Appellees include Bank of America Corporation ("BofA"), Banc of America Securities LLC, Merrill Lynch & Co., Inc., Merrill Lynch, Pierce, Fenner & Smith Inc., Neil A. Cotty, Kenneth D. Lewis, Joe L. Price, John A. Thain, William Barnet III, Frank P. Bramble, Sr., 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, O. Temple Sloan, Jr., Meredith R. Spangler, Robert L. Tillman, and Jackie M. Ward.

[2] The other Objectors-Appellants are Leonard Masiowski and MaryAnn Masiowski, Michael J. Rinis and Babette Rinis, Michael J. Rinis, Michael Washenik, Orloff Family Trust DTD 10/3/91, Orloff Family Trust DTD 12/31/01 and St. Stephen, Inc.

crisis of 2008 and 2009 and "the fourth largest securities class action settlement" of all time. (A1012; *see* A663, A961.)[3]

This appeal is from the District Court's denial of AIMs' objection to the settlement. AIMs complained that, as of the opt-out deadline, the three-year statute of repose for claims under Section 14(a) of the Securities Exchange Act of 1934 had run. It urged the District Court to delay its consideration of the settlement until this Court decided the then-pending consolidated appeal in *International Fund Management S.A.* v. *Citigroup Inc.*, 822 F. Supp. 2d 368 (S.D.N.Y. 2011), and *In re IndyMac Mortgage-Backed Securities Litigation*, 793 F. Supp. 2d 637 (S.D.N.Y. 2011). (A822-23, 825, 970.) That appeal was expected to address the question whether the tolling doctrine recognized in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), operates to toll a statute of repose for individual claims by putative class members during the pendency of a class action lawsuit. AIMs argued that, if this Court were to decide that statutes of repose may be tolled by the filing of a class action, then AIMs' Section 14(a) claims would be viable and the District Court should provide a new opportunity for class members to decide whether to opt out of the class and pursue their claims in an individual action. (A825.) If, however, this Court held that *American Pipe*

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[3] Citations to "A__." are to the Joint Appendix. Citations to "SA__." are to the Special Appendix. Citations to "Br.__." are to AIMs' opening brief.

tolling did not apply, AIMs acknowledged that both its claims and its objection to the settlement would be moot, admitting that "[i]f the Second Circuit decision [on the applicability of *American Pipe* tolling to statutes of repose] is adverse [to AIMs], no further opt-out opportunity would be warranted." (A811; *see* A970, Br. 12-13, 22-25.)

The District Court declined to hold the settlement in abeyance or re-open the opt-out period. It held that uncertainty regarding a future development of the law should not be a roadblock to achieving a final settlement. AIMs then filed an appeal. This Court, however, did not rule as AIMs had hoped on the tolling issue. On June 27, 2013, in *Police and Fire Retirement System of the City of Detroit* v. *IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013) ("*IndyMac*"), the Second Circuit held that the tolling doctrine established in *American Pipe* does not toll statutes of repose. As AIMs explained in the District Court, the *IndyMac* ruling mooted the objection that AIMs raised to the settlement.

AIMs, however, did not withdraw its appeal. Instead, AIMs raises a new argument, urging this Court to (a) revisit and overrule *IndyMac* and then (b) find that it would violate AIMs' rights under the Due Process clause of the United States Constitution if the District Court does not allow class members a new opportunity to opt out of the settlement and file their own individual actions.

There is no basis for this relief. *IndyMac* was correctly decided and there is no intervening legal development that supports this panel revisiting that ruling. As this Court explained in *United States* v. *Jass*, 569 F.3d 47, 58 (2d Cir. 2009), panels are "bound by prior decisions of this court unless and until the precedents established therein are reversed *en banc* or by the Supreme Court." There has been no *en banc* or Supreme Court decision reversing *IndyMac*.

In any event, the District Court did not err when it declined to delay its ruling on the settlement and re-open the opt-out period. AIMs was not treated unfairly as it had the opportunity to opt out of the class and bring an individual action long before the statute of repose ran on its Section 14(a) claims. Indeed, many class members did just that. And the District Court was not required to bail AIMs out of its decision to stay in the Class. It was not required to delay its ruling on the class action settlement, or extend the opt-out period, while legal issues from a different case that might support an argument that the statute of repose was tolled were litigated in this Court. As this Court repeatedly has held, it is within a district court's discretion to approve a settlement without re-opening the opt-out period as "[n]either due process nor Rule 23(e)(3) [of the Federal Rules of Civil Procedure] requires . . . a second opt-out period." *See Denney* v. *Deutsche Bank AG*, 443 F.3d 253, 271 (2d Cir. 2006).

The fact is that AIMs – sophisticated funds represented by sophisticated counsel – placed its bets long ago when it elected to remain in the class. AIMs did not contend in the District Court that it was not aware of the class action, or of the split among district courts in the Circuit over the applicability of tolling to a statute of repose. Rather than play it safe and opt out before the three-year statute ran, AIMs bided its time, followed the progress of the class action and the *IndyMac* issue, and placed a bet that this Court would come out the other way in the *IndyMac* case. AIMs bet it would be able to wait until the last minute and bring an opt-out claim if it did not like how events unfolded in the class action.

As the District Court noted, "[t]his [was] a situation where there was risk in staying in the class [and] [t]here was risk in opting out of the class." (A978.) AIMs, like all other class members, had a fair opportunity to weigh the risks and make its choice. Like all other class members who failed to opt out of the class, AIMs is bound by its decision.

COUNTERSTATEMENT OF RELEVANT FACTS

On September 15, 2008, BofA and Merrill Lynch & Co., Inc. agreed to merge. (A422.) They issued a joint proxy statement, dated November 3, 2008, which, among other things, recommended that BofA shareholders vote in favor of the issuance of shares necessary to effectuate the merger. (A422; A461.)

Following a shareholder vote on December 5, 2008, the merger closed on January 1, 2009. (A461.)

A. The Shareholder Lawsuits

Shortly after the merger closed, BofA shareholders filed a number of lawsuits, including 12 putative class actions filed in January 2009. (A461.) Plaintiffs in these actions alleged, among other things, that Defendants had violated Sections 10(b) and 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78(a) *et seq.*, by making misstatements and/or omissions in connection with the merger. These putative class actions were consolidated by an order dated June 30, 2009. (A461; A590-91.)

In addition to the consolidated class action (the "Class Action"), beginning in December 2009, individual and institutional shareholders instituted separate claims, filing nine actions asserting Exchange Act claims substantially similar to those asserted by the putative class (the "Individual Actions"). (A868-69.) The Individual Actions were a matter of public record, and were widely reported in the media (A869-70) and disclosed in BofA's SEC filings (A931, 949), which stated that "[s]everal individual plaintiffs have opted to pursue claims apart from [the instant consolidated securities action]." In the District Court, AIMs never claimed that it was unaware of these actions.

Unlike these other shareholders, AIMs chose not to file an individual action against BofA or the other defendants.

B. Certification of the Class Action

On March 1, 2012, the District Court issued an Order certifying a class under Federal Rule of Civil Procedure 23 (the "Class"). (A270-87.) As directed by the District Court, Lead Plaintiffs caused notice to be mailed to potential members of the Class notifying them that the District Court had certified a Class and that each Class member had a right to request exclusion from the Class (the "Class Notice").

The Class Notice advised potential members that their rights would be affected by their decision to remain in or opt out of the Class. It also warned that any Class member who did not opt out of the Class by May 7, 2012, would be bound by all past, present, and future judgments or determinations in the Class Action, whether favorable or unfavorable. (A281-82; A287.)

The Class Notice made clear that Class Members may not have another opportunity to opt out of the Class Action. It stated: "Pursuant to Rule 23(e)(4) of the Federal Rules of Civil Procedure, it is within the Court's discretion as to whether a second opportunity to request exclusion from the Class will be allowed if there is a settlement or judgment in the Action." (A281.)

Plaintiffs sent the Class Notice by first-class mail to more than three million potential class members or their nominees. (A289-90; A310.) A summary of the Class Notice was published in *The Wall Street Journal*, *The New York Times*, and *The Financial Times* on March 29, 2012, and was transmitted over the PR Newswire on that date. (A290-91; A300-001; A303; A305-06; A308.)

C. The Class Action Settlement

On September 28, 2012, less than five months after the May 7 opt-out deadline, Lead Plaintiffs and Defendants announced that they had reached an agreement to settle the Class Action. (A594; A601.) The proposed settlement provided that the Class would receive $2.425 billion and BofA would institute or continue a variety of corporate governance reforms. At the time it was proposed, this settlement represented "the sixth largest settlement in the history of securities litigation" and "the single largest securities class action settlement ever resolving a Section 14(a) claim." (A663; *see* A961, A1012.)

The proposed settlement did not provide a new opportunity for Class members to opt out of the Class, and the District Court *sua sponte* requested briefing on this issue to determine whether another opt-out opportunity was merited. (A929-30.) The District Court reviewed the briefs, determined that a new opt-out period was not warranted, and approved the proposed settlement notice (the "Settlement Notice"). (A613-28.) In its Order, the District Court stated:

> In light of the extensive notice program undertaken in connection with class certification and the ample opportunity provided to Class Members to request exclusion from the Class at that time, the Court is exercising its discretion in accordance with Second Circuit precedent (*see, e.g.*, *Denney* v. *Deutsche Bank AG*, 443 F.3d 253, 271 (2d Cir. 2006) and *Wal-Mart Stores, Inc.* v. *Visa U.S.A., Inc.*, 396 F.3d 96, 114-15 (2d Cir. 2005)) to preclude Class Members from having a second opportunity to exclude themselves from the Class in connection with the Settlement proceedings.

(A622-23.)

The Settlement Notice, which was widely distributed to potential Class members, afforded Class members an opportunity to file objections to the proposed settlement. (A750-51; A764-66; A803-04.) Of the more than three million potential Class members, only eight objections were filed on behalf of 10 objectors. AIMs collectively comprised three of those objecting members, and held less than 0.05 percent of BofA stock as of the record date for voting on BofA's merger with Merrill Lynch. (A812, A949.) This represented the first time that AIMs appeared in any stage of the consolidated Class Action and Individual Actions. And AIMs' objection was the *only* one requesting a new opportunity to request exclusion from the class.

D. The District Court Ruling on AIMs' Objection

The District Court held a hearing, heard argument from AIMs' counsel, and then found the settlement to be fair, reasonable and adequate, and approved the settlement over AIMs' Objection.

AIMs argued that the entire settlement should be stopped in its tracks until after this Court issued its decision in *IndyMac*. The District Court disagreed, finding that it would be unwise and unworkable to require a district court to withhold approval of a settlement any time a legal decision is pending that might bear on the parties' respective positions. (A971-73.) The District Court explained that there is always some risk and uncertainty at the time of settlement, and it was impossible to know whether the Second Circuit would reach the issue of whether a class action lawsuit tolls the statute of repose for claims by individual class members, or when such a ruling would be made. (A982-83.)

The District Court also rejected AIMs' contention that it was required, as a matter of law, to provide another opt-out opportunity after the terms of BofA's settlement with the Class were announced. The District Court explained that it was not required under Rule 23 to offer a second chance to opt out, and noted that the District Court had given due consideration to the issue and had decided that a second opt-out opportunity was not warranted in this case. (A977-78 (concluding that "there [was] not any new circumstance . . . warranting a second opt-out period" and noting that "[t]here was good notice to the class at the time of the original opt-out period").)

Specifically, the District Court ruled that the announcement of settlement terms and other developments in the Class Action did not require the

Court to provide a second opt-out opportunity to class members. The District Court found that none of the "new" facts identified by AIMs were sufficiently important to warrant re-opening the opt-out period, jeopardizing the $2.425 billion class settlement, creating an opportunity for any of the over three million class members to opt out and initiate new actions, and potentially triggering the provision in the settlement that gives BofA the option to terminate the settlement in the event that too many class members decide to opt out of the Class.[4] (*Id.*) Rather, the requirements of Rule 23 were satisfied because AIMs and all other class members received sufficient opportunity to request exclusion from the Class at the class certification stage. (*Id.*) And, as Defendants explained in their response to the AIMs' Objection, the alleged "new facts" AIMs complained about were not new, did not establish the liability of any defendant, and related only to one of many claims involved in the Class Action. (A933-36.)

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[4] AIMs describes this provision, commonly referred to as a "blow out provision," as an "undisclosed, side agreement" (Br. 11), but this agreement is discussed in the Stipulation and Agreement of Settlement that was approved by the District Court and provided to all Class members (A506, A618, A923.) Only the parties' agreement as to the number of shares required to trigger the provision was kept confidential, which is both common and appropriate. *See, e.g.*, Manual for Complex Litigation §21.631 (4th ed. 2004) (discussing such provisions in the settlement context and noting that they may warrant confidential treatment); *see also In re Prudential Sec. Inc. Ltd. P'ship Litig.*, 164 F.R.D. 362, 365-67 (S.D.N.Y. 1996), *aff'd*, No. 95-9209, 1996 WL 739258, at *1-2 (2d Cir. Dec. 27, 1996) (summary order) (approving settlement that included a blow out provision); *In re Citigroup Inc. Sec. Litig.*, No. 09 MD 2070(SHS), 2013 WL 3942951, at *5 (S.D.N.Y. Aug. 1, 2013) (same).

AIMs filed a notice of appeal from the District Court's order on April 23, 2013.

E. This Court's *IndyMac* Decision

On June 27, 2013, while AIMs' appeal was pending, this Court decided *Police and Fire Retirement System of the City of Detroit* v. *IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013). The Court held that the tolling doctrine established in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), does not apply to the three-year statute of repose in Section 13 of the Securities Act of 1933, 15 U.S.C. § 77m, *et seq.*

Specifically, the Second Circuit held that Section 13's statute of repose is not tolled by the filing of a class action complaint. To the extent *American Pipe* tolling is an equitable doctrine, as the appellees argued, then its application to Section 13's repose period is barred by *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), where the Supreme Court held that equitable tolling principles do not apply to that period. *IndyMac*, 721 F.3d at 109. If, however, it is a "legal" tolling rule based on the class action provisions of Rule 23, as the appellants argued, its application to a statute of repose is barred by the Rules Enabling Act, 28 U.S.C. § 2072(b), which prohibits a Federal Rule of Civil Procedure from operating to "abridge, enlarge or modify any substantive right." *Id.* (internal quotation omitted).

AIMs had advised the District Court that an adverse ruling by this Court in *IndyMac* would moot its objection to the settlement. (A811, A970, Br. 12-13, 22-25.) This is because, even if AIMs had a second opportunity to opt out of the class, it would not do so because its claims under Section 14(a) would be time-barred. Notwithstanding this admission, AIMs has continued to prosecute this appeal.

STANDARD OF REVIEW

The Second Circuit reviews a District Court's approval of a class action settlement under an abuse of discretion standard. *See Wal-Mart Stores, Inc.* v. *Visa U.S.A., Inc.*, 396 F.3d 96, 106 n.12 (2d Cir. 2005); *see also Joel A.* v. *Giuliani*, 218 F.3d 132, 139 (2d Cir. 2000). "Trial courts have discretion in granting or denying approval, but that discretion should be exercised in light of the general policy favoring settlement." *In re Vitamin C Antitrust Litig.*, 06-MD-1738 (BMC)(JO), 2012 WL 5289514, at *3 (E.D.N.Y. Oct. 23, 2012) (quoting *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 509 (E.D.N.Y. 2003)). Accordingly, a district court's approval of a class action settlement should be afforded considerable deference. *See Joel A.*, 218 F.3d at 139; *see also Hayes* v. *Harmony Gold Min. Co. Ltd.*, 509 Fed. App'x 21, 22 (2d Cir. 2013) ("We review the approval of a class action settlement deferentially, identifying error only upon a

clear showing that the District Court has abused its discretion in finding the settlement procedurally and substantively fair.") (internal quotation omitted).

SUMMARY OF ARGUMENT

The District Court did not abuse its discretion in approving the $2.245 billion settlement, which resolves the claims of approximately 3.2 million Class members. The District Court's ruling should be affirmed.

First, AIMs' appeal should be dismissed because, as AIMs admitted in the proceedings below, its objection to the settlement is mooted by this Court's ruling in *IndyMac* that the pendency of a class action does not toll claims subject to a statute of repose. Instead of conceding that its appeal is mooted by *IndyMac*, AIMs now asks this Court to revisit and overturn its recent decision. *IndyMac* is binding precedent absent contrary rulings by the Supreme Court or an *en banc* panel of this Court. Moreover, AIMs presents no argument that was not reviewed and rejected by the *IndyMac* Court.

Second, AIMs' appeal should be dismissed because all Class members, including AIMs, had an opportunity to opt out of the Class Action, consistent with Due Process. AIMs had the option of pursuing its individual claims, apart from the Class Action, within the applicable repose period for those claims. AIMs declined to do so, and the repose period lapsed. But having failed to request exclusion from the Class, AIMs now is bound by the outcome of the

Class Action. AIMs should not be heard to argue now that, despite its failure to request exclusion during the opt-out period, AIMs should be granted a second chance to place its bets and to pursue individual claims in a separate action regardless of any applicable repose period.

Third, AIMs now argues for the first time that it should be permitted to "sever" its claims from the Class Action because, in AIMs' view, it is only a matter of "procedure" whether AIMs' claims are asserted in the Class Action or in a separate action against Defendants. This argument was not presented to the District Court, and it should not be considered on appeal. In any event, AIMs' new argument should be rejected because, as a Class member, its claims were released by the Judgment approving the settlement. To allow AIMs to pursue these claims now in a separate action would be highly prejudicial to Defendants and, as a matter of policy, undermine the strong public interest in encouraging class action settlements. Further, AIMs should not be permitted to end-run the clear import of *IndyMac* by now "severing" its claims from the Class Action and prosecuting them in an individual action.

Finally, AIMs fails to establish that the District Court abused its discretion in approving the settlement without re-opening the opt-out period. The law in this Circuit is clear that a second opt-out opportunity is not required in order for a class action settlement to be approved. The District Court considered this

issue in the proceedings below and determined that there were no new facts or circumstances warranting re-opening the opt-out period after the announcement of the settlement.

ARGUMENT

I.

THIS COURT SHOULD DECLINE AIMS' INVITATION TO REVIEW AND OVERTURN ITS RECENT DECISION IN *INDYMAC*

As AIMs concedes, the viability of this appeal pivots on this Court's decision in *IndyMac*. If, as AIMs argues, an adverse ruling in *IndyMac* prevents AIMs from invoking *American Pipe* tolling and renders its Section 14(a) claims time-barred, then there can be no reason to open a second opt-out period. As AIMs advised the District Court: "If the Second Circuit decision [on the applicability of *American Pipe* tolling to statutes of repose] is adverse [to AIMs], no further opt-out opportunity would be warranted." (A811; *see* A970, Br. 12-13, 22-25.)

AIMs' response to this problem is to argue, repeatedly, that *IndyMac* was "wrongly decided". (*See* Br. 12, 22 & 25.) It urges this Court to overrule *IndyMac* only months after it was decided.

This argument should be rejected. As this Court has repeatedly explained: "[W]e are bound by the decisions of prior panels until such time as they are overruled either by an *en banc* panel of our Court or by the Supreme Court." *United States* v. *Frias*, 521 F.3d 229, 232 n.3 (2d Cir. 2008) (quoting *United States*

v. *Brutus*, 505 F.3d 80, 87 n.5 (2d Cir. 2007)); *see also United States* v. *Jass*, 569 F.3d 47, 58 (2d Cir. 2009) (holding that one panel "is bound by prior decisions of this court unless and until the precedents established therein are reversed *en banc* or by the Supreme Court"). As *IndyMac* has neither been reversed *en banc* nor called into question by the Supreme Court, there is no occasion for this Court to reconsider that ruling.

Moreover, AIMs has not offered any compelling reason to overturn or distinguish the *IndyMac* ruling. Instead, AIMs merely reiterates the arguments that a prior panel of this Court fully addressed and correctly rejected in *IndyMac*. In particular, AIMs argues that this Court applied the Rules Enabling Act in contravention of *American Pipe* by mistakenly concluding that "the limitations period implicated in [*American Pipe*] was 'procedural', and not 'substantive' – precisely the test that the Supreme Court rejected in *American Pipe.*" (Br. 23.) But this is not a new argument. It is an argument that this Court considered and addressed in *IndyMac,* finding that the Securities Act statute of repose creates a substantive right in litigants to be free from liability after a specified period, and therefore is distinct from the Clayton Act limitations period at issue in *American Pipe*. *IndyMac,* 721 F.3d at 109 n.17.

AIMs may disagree with this Court's ruling in *IndyMac*, but it does not—and cannot—offer any rationale that would justify a reversal of that four-month-old decision. This alone is dispositive of AIMs' appeal.

II.

CLASS MEMBERS WERE AFFORDED A MEANINGFUL OPPORTUNITY TO OPT OUT, CONSISTENT WITH DUE PROCESS

Alternatively, AIMs' appeal must be dismissed because class members, including AIMs, were afforded a meaningful opportunity to request exclusion from the Class, consistent with Due Process.

A. AIMs Does Not Have a Due Process Right to Pursue a Claim Under Section 14

AIMs argues that its due process rights were violated because it was denied a meaningful opportunity to opt out of the Class. This is based on the fact that, by the time of the May 7, 2012 opt-out deadline, the three-year statute of repose applicable to its Section 14(a) claims had run. (Br. 12-14.)

This conflates the actual requirement that a class member receive an opportunity to request exclusion from a Class—which AIMs received—with some purported right to bring individual claims in a separate action regardless of any applicable statute of repose. There is no such right. Indeed, AIMs does not cite any decision by any court holding that Rule 23 or the Due Process clause confers a

"right" on a Class member to bring his own lawsuit, as opposed to a right to seek exclusion from the Class.[5]

The fact is that, regardless of the date to which the opt-out deadline was extended, after three years AIMs and all other Class members lost their right to bring a claim under Section 14(a). This is because a statute of repose is a feature of the underlying cause of action, and the cause of action itself ceases to exist after the repose period has run. As this Court recently held, "statutes of repose affect the underlying right, not just the remedy." *See Federal Housing Finance Agency* v. *UBS Americas Inc.*, 712 F.3d 136, 140 (2d Cir. 2013). A statute of repose may even extinguish a cause of action before it accrues, leaving a plaintiff without any recourse at all. *Id.* (explaining, therefore, that statutes of repose "run without interruption once the necessary triggering event has occurred,

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[5] It is telling that the only case AIMs offers as support for its argument that its Due Process rights were violated and that the settlement is "void" is one in which members of a class were given no notice of class certification. (*See* Br. 26 (citing *Gert* v. *Elgin Nat. Indus., Inc.*, 773 F.2d 154 (7th Cir. 1985)); *see also id.* at 12, 13, 14.) In *Gert*, a district court certified a class of shareholders asserting Section 10(b) claims, but no notice was provided to absent class members. *Id.* at 159. The district court then granted summary judgment to defendants. The Seventh Circuit affirmed the district court's grant of summary judgment, but it set the order aside as void to the extent it purported to apply to absent class members that did not receive notice and an opportunity to opt out, and over whom the district court did not have jurisdiction. *Id.* at 159-60. *Gert* is inapplicable because AIMs does not, and cannot, contend that the District Court failed to provide notice and the opportunity to opt out, or improperly exercised jurisdiction over absent putative class members. (*See* Br. 9.)

even if equitable considerations would warrant tolling or even if the plaintiff has not yet, or could not yet have, discovered that she has a cause of action") (internal quotation omitted); *see P. Stolz Family P'ship L.P.* v. *Daum*, 355 F.3d 92, 103 (2d Cir. 2004) ("[A] repose period can run to completion even before injury has occurred to a potential plaintiff, extinguishing a cause of action before it even accrues . . . . [A] potential plaintiff might, through no lack of diligence on her part, find herself without any recourse for an injury that, if it had occurred earlier, would have been remediable. Such a possibility, however, may not be inconsistent with the purpose of a statute of repose.").[6] This Court's recent ruling in *IndyMac* clarifies that the pendency of a related class action has no effect on the running of the repose period for an individual's claim. 721 F.3d at 109; *see supra* p. 12. Therefore, the expiration of the repose period can extinguish a plaintiff's claim whether the plaintiff receives notice of the pendency of a related class action before or after the expiration date.

Citing *American Pipe*, AIMs argues that a Class member is not required to take any steps to protect its right to seek exclusion from the Class prior

[6] Many class members asserted other claims, including claims under the common law and Section 10(b) of the Exchange Act. Those Section 10(b) claims are governed by different limitations periods, *see* 28 U.S.C. § 1658(b) (establishing two-year statute of limitations and five-year statute of repose for Section 10(b) claims), and AIMs does not contend that it (or any other Class member) was unable to bring those claims as of May 7, 2012, assuming it timely opted out by that deadline.

to receiving the notice of class certification. (Br. 17-18.) AIMs overstates the holding of that case. The *American Pipe* Court held: "Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it *in order to profit from the eventual outcome of the case.*" 414 U.S. at 552 (emphasis added). This proposition is true, and it applies here: even though AIMs did nothing prior to the class certification stage, AIMs still stands to "profit from" the outcome of the Class Action, as do all class members who did not elect to opt out of the Class and stand to recover their share of the settlement.

But AIMs seeks to extend this proposition of *American Pipe* far beyond its reach. AIMs argues that before a class is certified class members are not required to take any action *to preserve any individual claim they might wish to bring, regardless of applicable time bars*. No part of *American Pipe* supports AIMs' argument. Although class members are not required to seek exclusion from the class until after class certification, it does not follow that waiting until a class is certified is without consequence. It does not follow that class members may neglect to file their own claims irrespective of any applicable statutes of repose. This should not come as a surprise to AIMs. That was the import of Judge Castel's ruling in *Footbridge Ltd. Trust* v. *Countrywide Financial Corp.*, 770 F. Supp. 2d

618 (S.D.N.Y. 2011), which was issued long before the Class was certified in this case and long before the statute of repose expired for AIMs' Section 14(a) claims. And, as discussed *supra* p. 12, it is the clear import of this Court's ruling in *IndyMac*.

Further, the policy implications of the argument advanced by AIMs are far-reaching and unworkable. Under AIMs' reading of Rule 23 and *American Pipe*, every class would have to be certified, and notice and an opportunity to opt out provided, prior to the expiration of the repose period for any claim held by any individual member. (*See* Br. 19 (stating that it would "eviscerat[e] due process" if "the statute of repose expires before class members are even notified of their right to request exclusion").) According to AIMs, then, it would be the responsibility of the district courts to determine the date on which any applicable repose period would run for every absent class member and for every possible claim arising from the underlying events. No reasonable reading of Rule 23 or *American Pipe* or any other authority compels the conclusion that this burden should be imposed on district courts.

AIMs complains that it faced a dilemma because, if it opted out of the Class and brought an individual action, its claims under Section 14 would have been dismissed as time-barred. To the extent this is a "dilemma," it is one of AIMs' own making. AIMs could have filed claims under Section 14(a) at any time

before the three-year repose period ran. In fact, by October 2011 (when AIMs says the statute of repose ran on its Section 14(a) claims), 10 putative class actions already had been filed in federal courts alleging that BofA's merger-related disclosures failed to comply with Section 14(a). (A461.) Other shareholders had filed the Individual Actions alleging similar claims. (A868-69.) AIMs did not claim in the District Court that it was unaware of these shareholder lawsuits, nor could it have done so convincingly. These lawsuits were a matter of public record (*id.*), were widely reported in the media (A869-70), and were disclosed in BofA's SEC filings (A931; A949).

And, as noted above, AIMs did not, and cannot, claim that it was surprised that the pendency of the Class Action failed to toll its claim. By the May 7 opt-out deadline, district courts in this Circuit were split on whether the pendency of a putative class action can toll a statute of repose, including Judge Castel, who had ruled there was no tolling. (*See* A932 at n.5.) More than one appeal raising this issue had been filed with the Second Circuit (*id.* at n.6), and one district court had certified an interlocutory appeal on the issue (*id.* at n.7).

The fact is that AIMs could have opted out before the statute of repose ran on its claim. Or it could have opted out by the May 7 deadline—just as 864

other class members did.[7] (A612.) If, as of that date, AIMs wished to litigate the applicability of *American Pipe* tolling to the Section 14(a) repose period, AIMs could have opted out, brought its own action, and litigated. What AIMs cannot do is ignore the repose period, sit on its hands for years, and then seek to opt out at the last minute and demand that the repose period for its claim be ignored.

Finally, simply because the state of the law was uncertain does not excuse AIMs' failure to act or require the District Court to decline to rule on a settlement or extend the opt-out date until the law is clarified. As the District Court correctly noted, such a rule would be unworkable. (A971-73.) Judge Castel explained that uncertainties in the law will always exist and changes could be anticipated "in so many different areas under Section 14(a), the elements of a claim, damages, causation. There are, over the history of both the '33 and '34 Act[s], evolving judicial interpretations of these statutes. The law has not been static. There have always been conflicts between and among district judges." (A972-73.) As this Court explained in *Denney* v. *Deutsche Bank AG*, 443 F.3d

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[7] AIMs acknowledges that it – like every other Class member – was provided an opportunity to opt out, but argues that this opportunity was not meaningful or effective because its individual claims were already time barred. (*See* Br. 9-10, 12.) Class members opt out, however, for a variety of reasons, and not solely for the purpose of bringing an individual action. In fact, here, 864 Class members exercised this right, and most did so without filing their own actions. This demonstrates that there is meaning in the right to opt out beyond allowing the class member to pursue separate litigation.

253 (2d Cir. 2006), even where objectors "believe that they lost the gamble" by not opting out when they had the chance, they should not be allowed to disrupt "an otherwise fair settlement so that they can place new bets." 443 F.3d at 271.

B. AIMs Cannot "Sever" Its Claims From the Class Action

In an effort to excuse its failure to file its own timely individual action within the repose period, AIMs now argues that, because all Class members are deemed parties, it should be permitted to "sever" its claims from the Class Action and bring an individual action at this late stage in the proceedings. (Br. 21-22.) As AIMs describes it, such an action would not be "new" because it "would still be asserting the same claims against the same defendants before the same judge in the same court," and the severance of its claims would "be only a difference of *procedure*." (*Id.* (emphasis in original).)

There are several problems with this argument. First, it should not be considered on appeal because it was not presented to the District Court. "[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." *Schnabel* v. *Trilegiant Corp.*, 697 F.3d 110, 130 (2d Cir. 2012) (quoting *Greene* v. *U.S.*, 13 F.3d 577, 586 (2d Cir. 1994)). This Court "may consider a forfeited argument [only] if there is a risk that 'manifest injustice' would otherwise result." *Id.* (quoting *Katel Ltd.* v. *AT & T Corp.*, 607 F.3d 60, 68 (2d Cir. 2010)). AIMs does not, and cannot, show that "manifest

injustice" will result if it is precluded from raising this argument now. To the contrary, it would be highly prejudicial to Defendants should AIMs be permitted to "sever" its claims from the Class Action, in which BofA paid $2.425 billion to resolve the claims of all Class members, including AIMs.

Second, AIMs' severance argument is meritless. While AIMs contends that severance would merely be "procedural," it ignores the fact that all Class members' Exchange Act claims relating to the BofA-Merrill merger were released by the Judgment. (SPA5-6; A472-73; A476-87.) Having chosen not to opt out and to remain in the Class, AIMs cannot now assert claims separate and apart from the Class Action (time-barred or not) unless the Judgment (and its releases) were to be reversed. *See, e.g.*, *Wal-Mart Stores, Inc.* v. *Visa U.S.A., Inc.*, 396 F.3d 96, 115 (2d Cir. 2005) (stating that a class member "was required to opt out at the class notice stage if it did not wish to be bound by the Settlement"). This is not merely "procedural."

Moreover, if AIMs' "severed" claims were deemed to relate back to the Class Action filing date for statute of repose purposes—as AIMs advocates—it would completely undermine this Court's holding in *IndyMac* that the claims of absent class members are not tolled as to the statute of repose by the pendency of a class action. *IndyMac*, 721 F.3d at 109 ("[O]ur conclusion is straightforward: *American Pipe*'s tolling rule, whether grounded in equitable authority or on Rule

23 [of the Federal Rules of Civil Procedure], does not extend to the statute of repose in Section 13 [of the Securities Act of 1933].").[8]

Finally, AIMs is wrong when it argues that severing its claim from the class action would cause no prejudice to BofA and the other defendants. (Br. 21-22.) If AIMs' claims were now severed, Defendants would be faced with the additional exposure to those claims. And, more broadly, if courts were to allow class members to "sever" their claims from the class at any point in the proceedings up to the moment of final judgment, it would undermine the strong policy in favor of settlements and encourage free-riding and one-way intervention. Settlements would be more difficult to achieve because defendants in a class action would not know how much of the case it was resolving—they would not know which potential class members were in the class and which were not—even after the opt-out deadline has passed. Moreover, the model that AIMs proposes would be inefficient and wasteful of the resources of the courts.

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[8] AIMs argues that "the rule in *American Pipe* . . . treat[s] the claims of all class members as being interposed upon the timely filing of the class action complaint." (Br. 20.) But the Court in *American Pipe* held only that "the filing of a timely class action complaint commences *the action* for all members of the class as subsequently determined." *American Pipe*, 414 U.S. at 550 (emphasis added). It is the class action – and only the class action – that is timely filed for all class members under the rule in *American Pipe.* Nothing in *American Pipe* suggests that any individual actions are deemed filed at the time the class action complaint is filed.

III.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO PROVIDE A NEW OPT-OUT PERIOD

Before this Court decided *IndyMac*, AIMs argued that the District Court should delay its approval of the settlement, and re-open the opt-out period after this Court rules. Now that *IndyMac* has been decided—and held that the pendency of a class action lawsuit does not toll claims subject to a statute of repose—AIMs' demand that the opt-out period be re-opened is moot.

In any event, it is clear that the District Court did not abuse its discretion in declining to re-open the opt-out period. It is well established in this Circuit that a second opt-out period is not required in order for a settlement in a class action to be fair, reasonable, and adequate. Rule 23(e)(4) of the Federal Rules of Civil Procedure provides that "the [district] court *may* refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so." Fed. R. Civ. P. 23(e)(4) (emphasis added). It does not provide that the district court *must* do so.

As this Court has previously held, a district court "is under no obligation" to refuse to approve a settlement that does not provide a second opportunity to opt out, and "[t]he decision whether to approve a settlement that does not allow a new opportunity to elect exclusion is confided to the court's

discretion." *Denney* v. *Deutsche Bank AG*, 443 F.3d 253, 271 (2d Cir. 2006) (quoting Fed. R. Civ. P. 23(e)); *Wal-Mart Stores, Inc.* v. *Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005) (holding that a settlement need not provide an additional opportunity for class members to opt out);[9] *see also In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 342 (S.D.N.Y. 2005) ("[T]he Second Circuit has explicitly rejected the contention that Class Members must be given a second opportunity to opt out after the terms of a settlement are announced.") (citing *Wal-Mart*, 396 F.3d at 114); *Hicks* v. *Stanley*, No. 01 Civ. 10071(RJH), 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) (rejecting an objector's request for a second opt-out period after the proposal of a settlement and finding that "an additional opt-out opportunity is not appropriate under Fed. R. Civ. P. 23(e)(3)"); *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262(RWS), 2002 WL 31663577, at *11-12 (S.D.N.Y. Nov. 26, 2002) ("Due process requires only that Class Members have notice of the proposed settlement and an opportunity to be heard at a fairness hearing. If the proposed settlement is fair, adequate and reasonable, due process does not afford Class Members a second opportunity to opt out.").

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[9] *See also Officers for Justice* v. *Civil Serv. Comm'n of the City and County of San Francisco*, 688 F.2d 615, 635 (9th Cir. 1982) ("[T]o hold that due process requires a second opportunity to opt out after the terms of the settlement have been disclosed to the class would impede the settlement process so favored in the law.").

AIMs has not cited a single case in which an appellate court has found that a district court's failure to provide a second opt-out opportunity constituted an abuse of discretion. And Defendants are not aware of any such case.

Indeed, the authorities AIMs cites confirm that the District Court has wide discretion to determine whether to re-open the period for opting out. As one of the authorities cited by AIMs (at Br. 28 n.50) candidly acknowledges, "few courts have ordered a second opt-out"; there is a "paucity of second opt-outs"; and there exist only "rare examples of cases granting a second opt-out right." American Law Institute, *Principles of the Law of Aggregate Litigation* § 3.11 (2010).

In fact, AIMs has identified only one case in which a district court exercised its discretion to reject a settlement on the basis that class members were not afforded a second opt-out opportunity. (Br. 28.) In *Nilsen* v. *York County*, 228 F.R.D. 60 (D. Me. 2005), plaintiffs brought civil rights claims directed at strip searches of arrestees in a Maine county jail. *Id.* at 61. The court held that a second opt-out period was warranted in light of certain features in the terms of the proposed settlement, which were announced after the opt-out period had expired. *Id.* Those settlement terms included an expansion of the breadth of the release, provided for disparate settlement treatment of class members based on their gender, and allocated equal recovery to class members irrespective of the number

of times the individual was searched. *Id.* AIMs has not explained how *Nilsen*'s rationale would apply in the context of this securities class action settlement, much less how it establishes an abuse of discretion by the District Court here.[10]

AIMs also claims that the District Court abused its discretion by not re-opening the opt-out period because Lead Plaintiffs' summary judgment motion, filed in June 2012, purportedly "demonstrated beyond question" that Defendants had made false statements in "accretion/dilution" forecasts issued in connection with the merger. (Br. 13, 31-35.) AIMs contends, among other things, that BofA's former Chief Executive Officer admitted the falsity of his prior statements at his deposition. (*Id*. at 31, 34-35.) AIMs further contends that the settlement itself was new information meriting a second opt-out period, particularly since the $2.425 billion settlement was "a tiny fraction" of the alleged market capitalization loss. (*Id.* at 35.)

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[10] AIMs notes that Judge Castel, in approving the settlement in *In re AMF Bowling*, 334 F. Supp. 2d 462 (S.D.N.Y 2004), emphasized the importance of providing a second opt-out opportunity. (Br. 28-29.) But nothing in that decision suggested that the *AMF* settlement would *not* have been approved had the second opt-out period not been provided. If anything, the *AMF* decision shows that the District Court was well aware of its discretionary authority to require a second opt-out period when warranted. Indeed, in approving the settlement here, Judge Castel acknowledged his prior *In re AMF Bowling* decision while explaining his view that the circumstances of the case here did not warrant a second opt-out period. (A977.)

While AIMs places great emphasis on the purportedly false accretion/dilution forecast, it ignores the fact that this allegation was *not* one of Lead Plaintiffs' principal claims. Rather, the Exchange Act claims focused largely on whether Defendants had made false or misleading statements about Merrill Lynch's payments of 2008 bonuses to its employees, and whether Defendants had an obligation to disclose interim estimates and projections of Merrill Lynch's 2008 fourth quarter losses in advance of the December 5, 2008 shareholder vote. (A190-91, 217-34.) While Lead Plaintiffs sought *partial* summary judgment of the claim concerning the alleged falsity of the accretion/dilution projection for 2009-2011, it was not a principal claim in the Class Action.

Moreover, Lead Plaintiffs faced substantial obstacles proving that the accretion/dilution forecasts were false. These forecasts, which constituted statements of opinion, were accurate when made, were not subject to any duty to update, and reflected the honestly held beliefs of the speakers at the time the statements were made. As Defendants demonstrated in their papers opposing summary judgment, Lead Plaintiffs faced substantial obstacles proving that the forecasts were false because the forecasts were statements of opinion, which would require Lead Plaintiffs to prove that the speaker did not in fact believe the statements at the time they were made. (A417-18, A430-36.) Further, Lead Plaintiffs faced substantial obstacles proving that the forecasts were actionable,

especially given warnings that cautioned investors against relying on such statements, which would provide a basis for affording the forecasts protection under the Private Securities Litigation Reform Act's safe harbor and the bespeaks caution doctrine. (*See* A422-24 A445, A934.) Lead Plaintiffs also faced substantial obstacles proving loss causation, as they never identified any corrective disclosure addressing the forecasts and did not provide proof that BofA's stock price dropped in response to such a corrective disclosure. (*See* A388-405, A454, A934.)

Similarly, AIMs is wrong in arguing that the $2.425 billion settlement was patently insufficient merely because BofA was to have sustained $50 billion in lost market capitalization. Lost market capitalization is not the same as damages. Lead Plaintiffs were required to connect their recoverable damages to losses that Defendants actually caused, and Class plaintiffs faced substantial obstacles in seeking "stock drop" damages under Section 14(a) on behalf of shareholders who did not buy stock at prices that were allegedly inflated by the forecasts, did not sell stock at deflated prices after an alleged corrective disclosure, and did not suffer any out-of-pocket damages. (A373-82, A934-35.)

The District Court correctly rejected AIMs' arguments. It found that both sides faced risks and uncertainties, and that the settlement was fair to the Class. The District Court specifically found that there was "risk in establishing

liability [and] damages," that "[t]here would have been arguments about reliance on counsel," and that "there would have been a substantial question as to the overlap between [Section] 14(a) damages in the derivative action and the class action." (A982-83 (noting that "[t]he area of Section 14(a) causation and damages is not a well-plowed area").) Contrary to AIMs' argument that the new information "demonstrated beyond question Defendants' liability" (Br. 13), the District Court's statements make clear that Lead Plaintiffs would have faced considerable difficulty in proving their claims and that the settlement was fair, adequate, and reasonable. The District Court thus did not abuse its discretion by approving the settlement without providing an additional opt-out opportunity.

CONCLUSION

For the reasons set forth above, Defendants-Appellees respectfully request that this Court affirm the Judgment.

Dated: New York, New York
November 1, 2013

Respectfully submitted,

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