

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

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

**REPLY 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

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, O. Temple Sloan, Jr.,

Defendants - Appellees,

Peter Kraus,

Defendant.

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I.

THE WASHENIK APPELLANTS ARGUMENT THAT 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) RAISES A STATUTORY CONSTRUCTION ISSUE; NOT AN ABUSE OF DISCRETION ISSUE

In this matter 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). As a result the institutional class representatives were reimbursed for their employees' time at hourly rates ranging from \$40 - \$279. Thus the issue is whether such reimbursement payments violate the regulatory scheme of the PSLRA

Two subsections of the PSLRA govern the issue. 15 USCS § 78u - 4(a)(2)(A)(vi) which provides “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).” And 15 USCS § 78u-4 (a)(4) , entitled “Recovery by plaintiffs” 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.”

Thus, under the PSLRA a class representative is only permitted to recover actual costs or expenses, and their actual lost wages, if any. Conversely, a class representative is not permitted to recover, and can not be reimbursed for: lost opportunity cost, or the value of his time, her time , or his or her employee's time; or their normal business overhead. Lost wages are a measure of damage to an employed person, *see Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 80 S. Ct. 332, 4 L. Ed. 2d 323, 1960 U.S. LEXIS 1957 (U.S. 1960); *Comm'r v. Schleier*, 515 U.S. 323, 115 S. Ct. 2159, 132 L. Ed. 2d 294, 1995 U.S. LEXIS 4044, 63 U.S.L.W. 4557 (U.S. 1995) Thus, by definition the concept of lost wages simply doesn't include wages paid by an employer to an employee.

Furthermore, because paying their employees is a fixed cost to the employer, and because that fixed cost didn't increase because the employer chose to become a named plaintiff, it is clear that the named plaintiffs incurred no additional cost in this matter. Thus, it was error for the district court to award the named plaintiffs \$453,000.00 as costs for reimbursement of wages paid to their employees.

II.
THE WASHENIK APPELLANTS ARGUMENT THAT 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 RAISES A CONSTITUTIONALITY ISSUE; NOT AN ABUSE OF DISCRETION ISSUE

In addition to the named plaintiffs Class Counsel represents all of the unnamed class members. Each and every one of the unnamed class members has a Due process right to be fully informed by class counsel of their litigation position. i.e., individual unnamed class members have the same final say in deciding whether or not to settle their cause of action as any other plaintiff. To that end unnamed class members have three choices. They can stand pat, object or opt out. In order to make a knowing, intelligent and informed decision the unnamed class member needs essential information with regard to the value of the settlement. Thus class counsel's failure to inform the unnamed class members of their estimate of the average damages recoverable per share, if Plaintiffs had prevailed on all of their claims, violates the unnamed class members right to Due Process; because without that information the unnamed class member is flying blind. It is axiomatic that fully informing a client of the pros and cons of their options is a basic duty all attorneys. In a class action that basic duty becomes a due process issue with regard to the unnamed class members who have a property interest at risk in the litigation,

as no person shall be “... deprived of life, liberty, or property, without due process of law ...” U.S. Const. amend. V.

Thus the Constitution requires Class Counsel to include in the Notice to unnamed class members the information regarding potential damages that is necessary to permit class members to effectively evaluate the Settlement. If a unnamed class member is informed that their potential damages are \$1 per share and the proposed settlement is for 8¢ per share they can calculate they are getting 8% of their possible damages, prior to paying class counsels 's attorney fees. Then, and only then can they make a knowing, intelligent and informed choice among their three options.

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.

Respectfully submitted,

<p>Steve A. Miller Co-Counsel for Appellants Steve A. Miller, P.C. 1625 Larimer St., Ste. 2905 Denver, CO 80202 Phone: (303) 892-9933 sampc01@gmail.com</p>	<p><u>/s/ N. Albert Bacharach, Jr.</u> N. Albert Bacharach, Jr. Lead Counsel N. Albert Bacharach, Jr., PA 4128 NW 13th Street Gainesville, FL 32609-1807 Direct: 352-378-9859 Fax: 352-338-1858 N.A.Bacharach@att.net</p>
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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 14th day of November, 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.
N. Albert Bacharach, Jr.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements and Type Style Requirements

This reply brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,152 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 14th day of November, 2013.

/s/ N. Albert Bacharach, Jr.
N. Albert Bacharach, Jr.