UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE BANK OF AMERICA CORP. SECURITIES, DERIVATIVE, AND EMPLOYMENT RETIREMENT INCOME SECURITY ACT (ERISA) LITIGATION	Master File No. 09 MDL 2058 (PKC) ECF CASE
THIS DOCUMENT RELATES TO: The Consolidated Securities Class Action	

BOFA's MEMORANDUM OF LAW IN RESPONSE TO OBJECTIONS TO PROPOSED CLASS ACTION SETTLEMENT

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In response to this Court's Order granting preliminary approval of the parties' proposed $2.425 billion settlement of this class action litigation (*see* Dckt. No. 771), ten class members have filed eight objections. One of those objections – filed by three Australian-headquartered investment managers (AMP Capital Investors Limited, Colonial First State Investments Limited and H.E.S.T. Australia Limited (collectively, the "AIMs") (Dckt. No. 838 ("AIMs' Obj.")))) – opposes the settlement on the grounds that the Court did not allow them a second opportunity to opt out of the class. Defendants Bank of America Corporation and Banc of America Securities LLC (together, "BofA") submit this memorandum of law to explain why that objection should be rejected.[1]

BACKGROUND

In connection with this Court's Order certifying a class in this action, shareholders had until May 7, 2012 to opt out of the class. (*See* Dckt. No. 539-1 ¶ 20.) Class members were warned that if they did not opt out they would be bound to "all past, present and future orders and judgments [in this Class Action], whether favorable or unfavorable" (*id.* at ¶ 18(a)), and that there might not be a second opportunity "to request exclusion from the Class . . . if there is a settlement or judgment in the Action" (*id.*).

Several months later, the parties agreed to settle this action for $2.425 billion. In considering preliminary approval of the settlement this Court requested briefing on whether it should afford shareholders a second opportunity to opt out of the class. (Sept. 28, 2012 Hr'g Tr. at 7:3-12.) The Court "read and considered" (*see* Dckt. No. 771 at 3) lead plaintiffs' submission on this issue (*see* Dckt. No. 768 at 15-21) and then ruled that a second opt-out opportunity was

[1] As to the seven other objections that were timely filed by class members, BofA respectfully submits that they should be overruled for the reasons set forth in Lead Plaintiffs' Memorandum of Law in Response to Objections to Class Action Settlement, dated March 29, 2013, in which BofA joins.

not required. In its Order, dated, December 4, 2012, this Court explained that "[i]n 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," a second opt-out period was not warranted. (*See* Dckt. No. 771 at 10-11.)

This ruling was well supported. Numerous courts, including the Second Circuit, not only have repeatedly held that a second opt-out period is not required, but have observed that offering a second opt-out period often conflicts with the strong policy interests in encouraging settlements. (*See* Dckt. No. 768 at 17-19, 21 (collecting cases).) As an authority the AIMs rely upon 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, cmt. *a*, Reporters' Notes (2010), *cited by* AIMs' Obj. at 16. It is not surprising then that the AIMs do not cite—and BofA has not located—a single Court of Appeals decision reversing a district court for not providing a second opt-out opportunity.

It is in this context that the Court should consider the AIMs' objection.

ARGUMENT

I. The Possibility That The Law Might Change Does Not Require A Second Opt-Out Period

The AIMs contend that they were denied a meaningful opportunity to opt out in this case because the statute of repose pertaining to their claims under Section 14(a) of the Securities Exchange Act of 1934 may have run by the time class members were given notice of the opt-out period in this case. They note that the Second Circuit is hearing an appeal in *International Fund Management S.A.* v. *Citigroup, Inc.*, No. 12-1903-cv. (2d Cir.), which involves whether the pendency of a putative class action lawsuit tolls the statute of repose for

claims under the Securities Act of 1933. They argue that the Court should provide a new opt-out period in this case, one that presumably remains open until the Second Circuit, and possibly the United States Supreme Court, resolves the issue in the *International Fund Management* appeal, which may inform whether the statute of repose is tolled regarding the AIMs' Section 14(a) claims. (*See* Dckt. No. 838 at 17.)

This argument should be rejected for the following reasons:

First, to the extent the AIMs face a dilemma, it is one of their own making, as they had ample opportunity to opt out of this class action and pursue their own individual actions asserting Section 14(a) claims before the three-year repose period expired. In fact, by October 2011 (when the AIMs say the statute of repose ran on their Section 14(a) claims), ten putative class actions had been filed in federal courts alleging that BofA's disclosures regarding its merger with Merrill Lynch failed to comply with Section 14(a) (*see* Dckt. No. 2 at n.1 (listing the cases)), and several investors had filed individual actions alleging similar claims.[2] The AIMs do not claim that they were unaware of those individual actions; nor could they, as the individual actions were widely reported in the media,[3] and disclosed to investors in documents BofA filed with the SEC.[4]

Second, we note that the AIMs were in exactly the same position when the Court set the opt-out deadline as they are today, but failed to raise this objection before the opt-out

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[2] The individual actions filed before October 2011 include: *Munoz* v. *Merrill Lynch & Co., Inc.*, No. 09 Civ. 10077 (S.D.N.Y.) (filed Dec. 9, 2009); *Stichting Pensioenfonds ABP* v. *Bank of Am. Corp.*, No. 10 Civ. 2284 (S.D.N.Y.) (filed Mar. 16, 2010); and *DiNapoli* v. *Bank of Am. Corp.*, No. 10 Civ. 5563 (S.D.N.Y.) (filed July 22, 2010).

[3] *See* March 29, 2013 Decl. of Audra J. Soloway Ex. A (Chad Bray, New York Comptroller Sues Bank of America, Wall St. J., July 23, 2010); *id.* Ex. B (New York Sues Bank of America and Merrill Over Merger, N.Y. Times, July 23, 2010); *id.* Ex. C (Chad Bray, Merrill, Former Leaders Paying to Settle Suit, Wall St. J., Jan 13, 2011).

[4] BofA's Form 10-K, filed with the SEC on February 25, 2011 disclosed that "[s]everal individual plaintiffs have opted to pursue claims apart from [this consolidated securities action] and, accordingly, have initiated individual actions relying on substantially the same facts and claims as the Securities Plaintiffs in the U.S. District Court for the Southern District of New York." (*See* Soloway Decl. Ex. D (BofA's 2010 Form 10-K, filed Feb. 25, 2011) at 200.)

deadline passed. Specifically, as of May 7, 2012 (the deadline for opting out in this case), district courts in this Circuit were split on the issue whether the pendency of a putative class action can toll a statute of repose,[5] more than one appeal raising this issue had been filed with the Second Circuit,[6] and one district court had certified an interlocutory appeal on the issue.[7] Having failed to raise their issue in May 2012 the AIMs should not be heard to do so now.

Third, the AIMs' request is unfair to the class because it will delay this settlement for a long time. We do not know when the Second Circuit will issue its decision in the *International Fund Management* case, or whether there will be *en banc* or Supreme Court review. It could be years before the tolling issues the AIMs raise are finally resolved.

Fourth, the AIMs' request is unfair to defendants. The parties entered into this settlement with each side facing risks and uncertainties regarding a multitude of undecided legal issues, and it would be unfair to hold defendants to the bargain they struck while allowing some shareholders to decide whether to participate in the settlement after they know how future court rulings turn out. There will always be factual and legal developments after an opt-out period

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[5] By March 2011, district courts in this Circuit were split on this tolling issue. *Compare, e.g.*, *Footbridge Ltd. Trust* v. *Countrywide Fin. Corp.*, 770 F. Supp. 2d 618, 624-627 (S.D.N.Y. Mar. 16, 2011) (Castel, J.) (tolling not applicable to the statute of repose in Securities Act § 13), *with In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 352 F. Supp. 2d 429, 455 n. 19 (S.D.N.Y. 2005) (Conner, J.) (tolling applies to the statute of repose in Securities Act § 13), *abrogated on other grounds,* 574 F.3d 29 (2d Cir. 2009), and *Int'l Fund Mgmt. S.A.* v. *Citigroup, Inc.*, 822 F. Supp. 2d 368, 379-82 (S.D.N.Y. Sept. 30, 2011) (Stein, J.) (same).

[6] In July 2011, a notice of appeal to the Second Circuit was filed (No. 11-2998-cv (2d Cir.), Dckt. No. 1) from Judge Kaplan's decision on this tolling issue in *In re IndyMac Mortgage-Backed Securities Litigation*, 793 F. Supp. 2d 637, 642-43 (S.D.N.Y. 2011). The *IndyMac* appeal remains pending (*see* No. 11-2998-cv (2d Cir.) and No. 11-3036-cv (2d Cir.)), and was consolidated and argued with the *International Fund Management* appeal (*see* No. 12-1903-cv (2d Cir.), Dckt. No. 4). Two other appeals raising this tolling issue also were filed with the Second Circuit in 2011, but one of them was withdrawn with prejudice on October 13, 2011 (No. 11-1158-cv (2d Cir.), Dckt. No. 107), and the other was stayed on December 7, 2011 pending approval of a class settlement (No. 11-1982-cv (2d Cir.) Dckt. No. 109) before being withdrawn by the parties on September 26, 2012 (*id.* Dckt. No. 147).

[7] In March 2012, Judge Stein certified an interlocutory appeal to the Second Circuit from his decision on this tolling issue in *International Fund Management S.A.* v. *Citigroup, Inc.*, 822 F. Supp. 2d 368, 379-82 (S.D.N.Y. 2011), noting that "a substantial difference of opinion exists as to the aforementioned legal question within the Southern District," and citing "*In re IndyMac Mortgage-Backed Sec. Litig.*, No. 11-2998 (2d Cir., filed July 21, 2011)." (No. 09 Civ. 8755, Dckt. No. 56 at 1.)

expires, but as the Second Circuit explained in *Denney* v. *Deutsche Bank AG*, 443 F.3d 253, 271-72 (2d Cir. 2006), an "additional opt-out period is not required with every shift in the marginal attractiveness" of a party's position, finding objectors should not be allowed to disrupt "an otherwise fair settlement so that they can place new bets." *Denney*, 443 F.3d at 271-72. *Accord Wal-Mart Stores, Inc.* v. *Visa U.S.A. Inc.*, 396 F.3d 96, 114-15 (2d Cir. 2005) (affirming denial of second opt-out period following settlement where class members had prior opportunity to opt out at the class certification stage). In fact, this is exactly what the Supreme Court was concerned about in *American Pipe & Construction Company* v. *Utah*, when it ruled that class members should not be permitted to engage in "one-way intervention" by waiting to see how events play out before deciding whether to join the class and be bound by the ultimate resolution of its claims. *See* 414 U.S. 538, 545-49 (1974) (internal quotation marks omitted).

Finally, granting the AIMs' objection would be bad policy. As the Second Circuit and other courts have recognized, requiring a second opt-out period makes it more difficult to settle class actions because it reduces defendants' assurance that settling will purchase global peace with the class. *See Denney*, 443 F.3d at 271 ("Requiring a second opt-out period as a blanket rule would disrupt settlement proceedings."); *Officers for Justice* v. *Civil Serv. Comm'n of S.F.*, 688 F.2d 615, 635 (9th Cir. 1982) (same).

II. There Have Not Been "Significant Developments" After The Opt-Out Period That Warrant Giving Class Members An Additional Opt-Out Opportunity

The AIMs note that, after the opt-out period expired, lead plaintiffs filed a motion for partial summary judgment on the elements of falsity and materiality as to their claims concerning defendants' statements about the projected accretiveness (or dilutiveness) of the Merrill Lynch merger to BofA's future earnings. They contend that this motion contained new information that "demonstrate[s] beyond question" defendants' liability with respect to those

challenged accretion/dilution statements, renders the settlement inadequate and warrants holding up the settlement to provide an additional opt-out opportunity. (*See* Dckt. No. 838 at 4; *see id.* at 17-19.)

This is incorrect in many respects. *First*, the AIMs erroneously assume that the accretion/dilution issues were raised for the first time by the class at the end of discovery. In fact, plaintiffs in an individual action filed on March 16, 2010, alleged that BofA's September 15, 2008 press release announcing that "'[t]he acquisition is expected to be accretive to earnings by 2010" (No. 10 Civ. 2284, Dckt. No. 1 at ¶ 184) was "false and misleading" (*id.* at ¶ 185). That is more than two years before the May 7, 2012 opt-out deadline expired in the class action.

Second, the AIMs grossly overstate the import of plaintiffs' accretion/dilution argument. As BofA demonstrated in its summary judgment submissions, there were substantial risks that plaintiffs' claim would fail for at least the following reasons:

- Plaintiffs faced substantial obstacles proving the element of falsity because defendants' accretion/dilution statements were statements of opinion (as opposed to statements of fact), so plaintiffs would bear the burden of proving that the speaker did not in fact believe the statements at the time they were made. (*See* Dckt. No. 646 at 15-18 (citing *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1091-96 (1991), and *Fait* v. *Regions Fin. Corp.*, 655 F.3d 105, 110-13 (2d Cir. 2011)).)

- Plaintiffs faced substantial obstacles proving the element of materiality because BofA gave extensive warnings to investors, cautioning them against relying on statements like the ones plaintiffs challenged, and defendants would have argued that those statements were protected by the Private Securities Litigation Reform Act's safe harbor and the bespeaks caution doctrine. (*See id.* at 27-30.)

- Plaintiffs faced substantial obstacles proving the element of loss causation because they never identified any corrective disclosure addressing the alleged accretion/dilution misstatements, much less proof that BofA's stock price dropped in response to such a corrective disclosure. (*See id.* at 38.)

- Plaintiffs faced substantial obstacles proving the element of damages because their Section 14(a) claims sought "stock drop" damages for shareholders who merely held BofA stock during the relevant period; those shareholders did not buy stock at prices that were artificially inflated by defendants' statements, did not sell stock at deflated prices after a corrective disclosure and did not suffer any out-of-pocket damages. (*See* Dckt. No. 609 at 8-23.) In

> commenting on this novel theory, this Court has stated that "[d]amages under the securities laws, particularly under Section 14(a), are really not well-traveled territory," and the measure of any such damages would have involved "considerable uncertainty." (Jan. 11, 2013 Hr'g Tr. at 41:5-9.)

In short, it is a vast overstatement for the AIMs to argue that plaintiffs' success on these claims is "demonstrate[d] beyond question." (*See* Dckt. No. 838 at 4.) It also strains credulity for the AIMs to represent that "many Class members may now view the Settlement as inadequate" when "the terms of the [s]ettlement are viewed against the recently uncovered evidence of liability." (*Id.*) The fact is that only ten members out of the nearly 3.2 million member class have objected to the settlement, and only seven of those objectors have described the settlement as unfair.

The AIMs also state that the tolling issue that purportedly prevented them from opting out was first appealed to the Second Circuit after the opt-out date, and argue that the pendency of the appeal is another "development" calling for a second opt-out period. (*See id.* at 17.) This also is wrong. There were three appeals to the Second Circuit raising that very issue long before the opt-out deadline, one of which was consolidated and argued with the appeal the AIMs cite. (*Supra*, at p. 4 & nn. 5-7.)

Finally, the AIMs are incorrect when they argue that the settlement of the class action is itself a development that requires the Court to provide a second opt-out period. In class action lawsuits where class members were given an opportunity to opt out of the class before a proposed settlement was reached, courts routinely reject the argument that an additional opt-out period must be allowed after the settlement is announced. *See, e.g.*, *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 345-46 (E.D.N.Y. 2010) (denying additional opt-out period following proposed settlement); *Hicks* v. *Stanley*, No. 01 Civ. 10071, 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) (same); *In re Lloyd's Am. Trust Fund Litig.*, No. 96

Civ. 1262, 2002 WL 31663577, at *11-12 (S.D.N.Y. Nov. 26, 2002) (same); *see also Class Plaintiffs* v. *City of Seattle*, 955 F.2d 1268, 1289-1290 (9th Cir. 1992) (same); *Officers for Justice*, 688 F.2d at 635 (same).

The fact is that the AIMs do not cite a single decision where a court declined to approve a securities class action settlement on the grounds that it failed to allow for a second opt-out period.[8] This is because, as Judge Cote noted in *In re WorldCom, Inc. Securities Litigation*, "the 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." 388 F. Supp. 2d 319, 342-343 (S.D.N.Y. 2005) (citing *Visa*, 396 F.3d at 114).

[8] The only case the AIMs cite where a court conditioned approval of a proposed class action settlement on the provision of a second opt-out opportunity is *Nilsen* v. *York County*, 228 F.R.D. 60 (D. Me. 2005), a civil rights class action concerning strip searches. In *Nilsen* the court provided a second opt-out period because it had concerns about the scope and fairness of the parties' proposed settlement which would have released a broad array of claims, awarded female class members twice as much as male class members, and provided no extra recovery for class members who were strip-searched more than once. *Id.* at 61. The court was driven by these concerns to give class members an opportunity to walk away from the proposed settlement. *Id.* at 61-62. The concerns articulated by the court in *Nilsen* are not applicable in this securities class action.

The AIMs also cite *In re AMF Bowling Securities Litigation*, 334 F. Supp. 2d 462 (S.D.N.Y. 2004) (Castel, J.), and *Natchitoches Parish Hospital Service District* v. *Tyco International, Ltd.*, 247 F.R.D. 253 (D. Mass. 2008). Both cases are inapposite. Though this Court approved a settlement that included a second opt-out period in *In re AMG Bowling*, the Court did not suggest that the settlement would have been rejected if the settlement had not done so, and there is no indication that the availability of a second opt-out period was contested and litigated in that case. *See* 334 F. Supp. 2d at 465-66. The court in *Natchitoches* merely suggested that providing a second opt-out period could be one way to address "a fundamental conflict" between groups of class members (247 F.R.D. at 269), but no such conflict exists here, and in any event, the court in *Natchitoches* ultimately approved a settlement without granting a second opt-out period, concluding "there is no need for an additional opt-out period". (*See* No. 05 Civ. 12024, Dckt. No. 393 at 2.)

CONCLUSION

For all the reasons set forth above, the AIMs' objection to the proposed settlement of this class action should be rejected, and the proposed settlement should be approved.

Dated: New York, New York
March 29, 2013

Respectfully submitted,

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