UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

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Court-appointed Lead Plaintiffs, the State Teachers Retirement System of Ohio; the Ohio Public Employees Retirement System; the Teacher Retirement System of Texas; Stichting Pensioenfonds Zorg en Welzijn, represented by PGGM Vermogensbeheer B.V.; and Fjärde AP-Fonden (collectively, "Lead Plaintiffs"), on behalf of themselves and the Court-certified Class (as defined below), have reached a proposed settlement of the above-captioned securities class action lawsuit (the "Action") for a total of $2,425,000,000.00 in cash and certain corporate governance enhancements to be implemented and maintained by Bank of America Corporation ("BoA").[1] If approved, the proposed Settlement will resolve all claims in the Action. Lead Plaintiffs respectfully move the Court for an order preliminarily approving the Settlement, approving the form and manner of providing notice of the Settlement to the Class, and setting a hearing date at which the Court will consider final approval of the Settlement, approval of the proposed Plan of Allocation, and Co-Lead Counsel's motion for an award of attorneys' fees and reimbursement of Litigation Expenses.

I. INTRODUCTION

Subject to Court approval, and as described herein, Lead Plaintiffs, on behalf of themselves and the Class, have agreed to settle all claims asserted in the Action against the Defendants,[2] in exchange for (i) a payment of $2,425,000,000 in cash (the "Settlement Amount")

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[1] All capitalized terms used herein that are not otherwise defined herein shall have the meanings provided in the Stipulation and Agreement of Settlement dated as of November 30, 2012 (the "Stipulation"), which is being filed concurrently herewith.

[2] The "Defendants" are BoA; Merrill Lynch & Co., Inc. ("Merrill"), Banc of America Securities LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, and the Individual Defendants. The "Individual Defendants" are Kenneth D. Lewis, John A. Thain, Joe L. Price, Neil A. Cotty, 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.

to be deposited into an interest-bearing escrow account and (ii) BoA's agreement to implement or maintain certain significant corporate governance changes, including changes relating to majority voting for directors, minimum stock ownership by executive officers and directors, and amendments to BoA's charter for the Corporate Development Committee providing for additional oversight of senior management (the "Corporate Governance Enhancements").

The Settlement, if approved, would represent the single largest securities class action settlement ever resolving a Section 14(a) claim – the federal securities law provision designed to protect investors against misstatements in connection with a proxy solicitation and, according to published figures, would rank among the largest recoveries in securities class action history. In addition, the Settlement is one of the four largest ever funded by a single corporate defendant for violations of the federal securities laws to date, and the single largest settlement of a securities class action in which there was neither a financial restatement involved nor a criminal conviction related to the alleged misconduct.

As set forth in the Stipulation, the Settlement, if approved, will resolve all claims against all Defendants and their related parties. Lead Plaintiffs' principal reason for entering into the Settlement is the very substantial cash benefit provided for the Class combined with the significant Corporate Governance Enhancements to be implemented by BoA considered against the significant risk that a smaller recovery – or, indeed, no recovery – might be achieved after a trial of the Action and the likely appeals that would follow trial, a process that could last many months, or even years.

The Settlement was reached only after extensive litigation and prolonged, arms'-length settlement negotiations – including in-person mediation sessions and additional negotiations – facilitated by Judge Layn Phillips, a former federal district judge in the United States District

Court for the Western District of Oklahoma and an experienced and highly respected mediator. The Settlement was reached less than a month before trial, and after completion of fact and expert discovery, the briefing of summary judgment, *Daubert* motions, *in limine* motions, and the Parties' extensive pre-trial preparations.

During the course of the litigation, Lead Plaintiffs, through Co-Lead Counsel, among other things: (i) conducted an extensive investigation into the Class's claims; (ii) drafted two detailed amended complaints; (iii) successfully moved for a partial modification of the discovery stay pursuant to the Private Securities Litigation Reform Act of 1995 (the "PSLRA") to obtain documents from Defendants; (iv) successfully opposed Defendants' motions to dismiss in two separate rounds of briefing; (v) successfully opposed Defendants' efforts to seek certification to the Delaware Supreme Court of issues decided by the Court in connection with Defendants' first round of motions to dismiss; (vi) successfully briefed Lead Plaintiffs' motion for class certification and opposed Defendants' efforts to seek appellate interlocutory review of the Court's order granting class certification; (vii) engaged in an extensive discovery program, including participating in 60 depositions and reviewing more than 4 million pages of documents; (viii) briefed multiple motions for summary judgment, including Lead Plaintiffs' own motion for partial summary judgment; (ix) prepared for trial, including exchanging with Defendants *Daubert* motions, motions *in limine*, jury verdict forms, jury instructions, voir dire and pre-trial order preparation; and (x) engaged in multiple in-person and telephonic meetings regarding a possible settlement of the Action over the course of the litigation before reaching an agreement in principle to settle just weeks before the trial of this Action, which was scheduled to begin on October 22, 2012. As a result, Lead Plaintiffs and Co-Lead Counsel had a thorough

understanding of the relative strengths and weaknesses of the claims asserted at the time the Settlement was reached.

Lead Plaintiffs, who are all sophisticated institutional investors of the type favored by Congress when passing the PSLRA, have closely monitored and participated in this litigation from the outset, were aware of, participated in and approved the settlement negotiations, and recommend that the Settlement be approved. Further, Co-Lead Counsel, who have extensive experience in prosecuting securities class actions, strongly believe that the Settlement is in the best interests of the Class.[3]

At the final approval hearing (the "Settlement Hearing"), the Court will have before it more extensive motion papers submitted in support of the Settlement, and will be asked to make

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[3] The proposed Settlement, if approved by the Court, will settle claims of the Class of persons and entities that was certified by the Court pursuant to its Memorandum and Order issued on February 6, 2012:

> (i) As to claims under Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act"), all persons and entities who held BoA common stock as of October 10, 2008, and were entitled to vote on the merger between BoA and Merrill, and were damaged thereby; and (ii) as to claims under Sections 10(b) and 20(a) of the Exchange Act, all persons and entities who purchased or otherwise acquired BoA common stock during the period from September 18, 2008 through January 21, 2009, inclusive, excluding shares of BoA common stock acquired by exchanging stock of Merrill for BoA stock through the merger between the two companies consummated on January 1, 2009, and were damaged thereby; and (iii) as to claims under Sections 10(b) and 20(a) of the Exchange Act, all persons and entities who purchased or otherwise acquired January 2011 call options of BoA from September 18, 2008 through January 21, 2009, inclusive, and were damaged thereby; and (iv) as to claims under Sections 11, 12(a)(2), and 15 of the Securities Act of 1933 (the "Securities Act"), all persons and entities who purchased BoA common stock issued under the Registration Statement and Prospectus for the BoA common stock offering that occurred on or about October 7, 2008, and were damaged thereby (the "Class").

Excluded from the Class by definition are: Defendants, present or former executive officers of BoA and Merrill, present or former members of Merrill's and BoA's Board of Directors and their immediate family members (as defined in 17 C.F.R. § 229.404, Instructions). Also excluded from the Class are any Persons who submitted a request for exclusion in connection with the previously mailed Notice of Pendency of Class Action (the "Class Notice") who do not opt-back into the Class (*see* discussion below).

a determination as to whether the Settlement is fair, reasonable, and adequate under all of the circumstances surrounding the Action. At this juncture, Lead Plaintiffs request only that the Court grant preliminary approval of the Settlement so that notice of the Settlement may be disseminated to the Class and the Settlement Hearing may be scheduled.

Lead Plaintiffs respectfully request that this Court enter the proposed Order Preliminarily Approving Proposed Settlement and Providing for Notice ("Preliminary Approval Order"), which has been agreed upon by the Parties, a copy of which is attached as Exhibit 2 to the accompanying Notice of Motion. The Preliminary Approval Order will, among other things: (i) preliminarily approve the Settlement on the terms set forth in the Stipulation; (ii) approve the form and manner of giving notice to the Class; and (iii) set a date for the Settlement Hearing at which the Court will consider final approval of the Settlement, approval of the Plan of Allocation for distribution of the Net Settlement Fund and Co-Lead Counsel's application for attorneys' fees and expenses.

II. DESCRIPTION OF THE LITIGATION

On September 15, 2008, BoA agreed to acquire Merrill in a stock-for-stock transaction in which one share of Merrill common stock would be exchanged for 0.8595 shares of BoA common stock. BoA and Merrill issued a Definitive Joint Proxy Statement to shareholders on November 3, 2008, and on December 5, 2008, BoA shareholders voted in favor of the issuance of additional shares of BoA stock needed for the Merger and Merrill shareholders voted in favor of the Merger. The Merger was consummated on January 1, 2009.

Beginning in January 2009, numerous putative securities fraud class actions were filed against BoA, Merrill, and certain officers and directors of both companies related to the Merger. By Order dated June 30, 2009, the Court consolidated the federal securities actions and

appointed the Lead Plaintiffs pursuant to the PSLRA. In the same Order, the Court also approved Lead Plaintiffs' selection of Bernstein Litowitz Berger & Grossmann LLP, Kaplan Fox & Kilsheimer LLP, and Kessler Topaz Meltzer & Check, LLP (f/k/a Barroway Topaz Kessler Meltzer & Check, LLP) as Co-Lead Counsel for the Class.

On September 25, 2009, Lead Plaintiffs filed their Consolidated Amended Class Action Complaint (the "First Amended Complaint" or "Complaint"), which alleged violations of Sections 14(a), 10(b), and 20(a) of the Exchange Act, and Sections 11, 12(a)(2) and 15 of the Securities Act based on Defendants' alleged failure to disclose, prior to the shareholder vote approving the issuance of additional shares in connection with the Merger, facts about, among other things: (i) Merrill's billions of dollars in losses during the fourth quarter of 2008; (ii) BoA's agreement to allow Merrill to pay up to $5.8 billion in bonuses to its employees before the Merger closed, notwithstanding those substantial losses; (iii) the circumstances surrounding the negotiation of the Merger (including the inadequacy of due diligence and pressure from federal regulators); (iv) the purported benefits of the Merger; and (v) BoA's own deteriorating financial condition. The First Amended Complaint also alleged that Defendants made materially false and misleading statements about these topics.

The First Amended Complaint further alleged that, following the shareholder vote, but before the Merger closed on January 1, 2009, (i) BoA decided that it had grounds to terminate the Merger because of the magnitude of Merrill's losses; and (ii) in order to consummate the Merger and absorb Merrill's fourth quarter losses, BoA obtained a $138 billion bailout from the Federal Government. The Complaint alleged that these facts were not disclosed to investors until weeks after the Merger closed.

All Defendants moved to dismiss the First Amended Complaint. Defendants also sought certification to the Delaware Supreme Court on the question of whether Lead Plaintiffs' Section 14(a) claim was a derivative or direct claim. The motions were fully briefed, and on August 27, 2010, the Court issued a Memorandum and Order that granted in part, and denied in part, Defendants' motions to dismiss, and denied Defendants' request for certification. In particular, the Court sustained Lead Plaintiffs' Section 14(a) claims with respect to both the undisclosed bonus agreement and the failure to disclose Merrill's massive 2008 fourth quarter losses, while also finding that Lead Plaintiffs could potentially adduce evidence showing that these claims were direct claims, and also sustained Lead Plaintiffs' Section 10(b) and Section 11 claims with respect to the bonus allegations. The Court, however, dismissed Lead Plaintiffs' Section 10(b) claim based on the alleged failure to disclose Merrill's fourth quarter losses, concluding that Plaintiffs had not adequately alleged Defendants' scienter.

On October 22, 2010, Lead Plaintiffs filed the Consolidated Second Amended Class Action Complaint (the "Second Amended Complaint"), the operative complaint in this Action. The Second Amended Complaint added additional allegations concerning the scienter of Defendants BoA, Lewis and Price for their failure to disclose Merrill's 2008 fourth quarter losses. After full briefing on Defendants' motions to dismiss the Second Amended Complaint, by Memorandum and Order dated July 29, 2011, the Court sustained Lead Plaintiffs' Section 10(b) claim against Defendants BoA, Lewis and Price, but rejected Lead Plaintiffs' theory that Lewis's and Price's scienter could be established by allegations that they were motivated to commit fraud in order to obtain a favorable result in the shareholder vote or to ensure that the Merger closed.

Building on discovery that Lead Plaintiffs had obtained earlier in the case by successfully moving to partially lift the PSLRA's discovery stay, the Parties immediately commenced full discovery after the Court's July 29, 2011 decision on the motion to dismiss.

On October 17, 2011, Lead Plaintiffs filed their Motion for Class Certification and Appointment of Class Representatives and Class Counsel. After a full round of briefing, and numerous depositions taken by Defendants, on February 6, 2012, the Court issued a Memorandum and Order granting Lead Plaintiffs' Motion for Class Certification and Appointment of Class Representatives and Class Counsel.

Pursuant to the Court's February 6, 2012 Memorandum and Order, and in accordance with the Court's Order Approving Notice and Summary Notice of Pendency of Class Action, the Class Notice was mailed to potential Class Members to inform them of the pendency of the instant class action, that the Action had been certified by the Court to proceed as a class action on behalf of the certified Class, and of the right of Class Members to request exclusion from the Class and the procedures for doing so. A Summary Notice of Pendency of Class Action ("Summary Class Notice"), which also advised Class Members of their right to exclude themselves from the Class, was published in the *Wall Street Journal, The New York Times, The Financial Times*, and on *PR Newswire*.

On February 21, 2012, Defendants filed with the United States Court of Appeals for the Second Circuit a Petition Pursuant To Fed. R. Civ. P. 23(f) For Leave To Appeal From The District Court's Order Granting Class Certification. After full briefing, on July 23, 2012, the Court of Appeals issued an order denying Defendants' petition.

In parallel with the class certification process, Lead Plaintiffs pursued merits discovery, including party and non- party discovery, numerous negotiations over the scope and adequacy of

Defendants' discovery responses, and negotiations concerning discovery with non-parties including the Federal Reserve and United States Treasury. In addition to reviewing more than four million pages of documents, Lead Plaintiffs conducted over thirty-five merits depositions prior to the close of fact discovery. Then, over a forty-five day period between March 16, 2012 and April 30, 2012, the Parties conducted expert discovery, which included the exchange of seventeen opening and rebuttal expert merits reports from eleven experts, and the depositions of these expert witnesses.

On June 3, 2012, Lead Plaintiffs and Defendants filed cross-motions for summary judgment. Briefing on the Parties' motions was completed on July 17, 2012. The Parties prepared and submitted over 700 pages of briefing, statements of undisputed facts, and counterstatements of facts. These summary judgment motions were pending at the time the Settlement in principle was reached.

A trial of this Action was scheduled to begin on October 22, 2012. Accordingly, the Parties vigorously prepared for trial, exchanging eight *Daubert* motions and 32 motions *in limine*, preliminary witness lists, exhibit lists, preliminary statements of claims and defenses, deposition designations and counter-designations for those witnesses that would be unavailable at trial, a joint pretrial report, jury verdict form, stipulated statement of facts, jury instructions, voir dire questions, and initial jury remarks.

On September 27, 2012, after an extensive mediation process under the auspices of Judge Phillips, the Parties reached an agreement in principle to settle and, on September 28, 2012, the Parties orally requested the adjournment of the trial date, all pre-trial submissions, the final pre-trial conference and the rendering of the Court's decision on summary judgment, which adjournments were granted by the Court.

Based on Lead Plaintiffs' direct oversight of the prosecution of this matter and with the advice of Co-Lead Counsel, each of the Lead Plaintiffs has agreed to settle the claims raised in the Action pursuant to the terms and provisions of the Stipulation, after considering (a) the very substantial financial benefit that Lead Plaintiffs and the other members of the Class will receive under the proposed Settlement, (b) the significant Corporate Governance Enhancements that BoA will implement or maintain as a condition of the proposed Settlement, (c) the significant risks of continued litigation and trial, and (d) the desirability of permitting the Settlement to be consummated as provided by the terms of this Stipulation.

III. THE SETTLEMENT WARRANTS PRELIMINARY APPROVAL

The settlement of complex class action litigation is favored by public policy and strongly encouraged by the courts. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) ("We are mindful of the strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy.") (internal quotation marks and citation omitted); *In re Prudential Sec. Inc. Ltd. P'ships Litig.,* 163 F.R.D. 200, 209 (S.D.N.Y. 1995) (Pollack, J.) ("It is well established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions.").

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval for the compromise of class claims. Judicial review of a proposed class action settlement consists of a two-step process: preliminary approval and a subsequent settlement fairness hearing. At the preliminary approval stage, the standards are more relaxed than those applied upon a motion for final approval. *See Karvaly v. eBay Inc.*, 245 F.R.D. 71, 86 (E.D.N.Y. 2007). The Court's function in the preliminary approval stage is "to ascertain whether there is any reason to notify

the class members of the proposed settlement and to proceed with a fairness hearing." *Prudential,* 163 F.R.D. at 209. "Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." *In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007) (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997)); *accord Cohen v. J.P. Morgan Chase & Co.*, 262 F.R.D. 153, 157 (E.D.N.Y. 2009).

Lead Plaintiffs here request that the Court take the first step in the settlement approval process and grant preliminary approval of the Settlement so that notice of the Settlement can be given to the previously certified Class.[4] As summarized below, and as will be detailed further in a subsequent motion for final approval of the Settlement, a preview of the factors considered by courts in granting final approval of class action settlements demonstrates that the Settlement is well "within the range of possible approval" and that preliminary approval should be granted. *Initial Pub. Offering*, 243 F.R.D. at 87.

A. The Settlement Is The Result Of Good Faith, Arm's-Length Negotiations By Well-Informed And Experienced Counsel

Courts presume that a proposed settlement is fair and reasonable when it is the result of arm's-length negotiations between well-informed counsel. *See Wal-Mart*, 396 F.3d at 116 (noting strong "presumption of fairness" where settlement is product of arm's-length negotiations conducted by experienced, capable counsel after meaningful discovery); *In re Flag*

[4] *See, e.g., Torres v. Gristedes Operating Corp.*, No. 04 Civ 3316, 2010 U.S. Dist. LEXIS 75362, at **12-13 (S.D.N.Y. June 1, 2010).

Telecom Holdings Ltd. Sec. Litig., No. 02-CV-3400, 2010 WL 4537550, at *13 (S.D.N.Y. Nov 8, 2010) (same). The use of a mediator in settlement negotiations further supports this presumption of fairness and the conclusion that the Settlement achieved here was free of collusion. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (noting that a "mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure"); *Flag Telecom*, 2010 WL 4537550, at *14 ("The presumption in favor of the negotiated settlement in this case is strengthened by the fact that settlement was reached in an extended mediation.").[5]

Here, the Settlement was achieved only after protracted arm's-length negotiations – including mediation sessions and numerous telephonic negotiations that took place over the course of three years. These settlement discussions were conducted under the auspices of a highly respected and experienced mediator and included the active participation of the Court-appointed Lead Plaintiffs, including the attendance by their representatives at some of the mediation sessions. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004) (the participation of sophisticated institutional investor lead plaintiffs in the settlement process supports approval of settlement).

Further, given that the Parties litigated the case to the brink of trial, the Court can easily conclude that the Parties and their counsel were well-informed prior to reaching the agreement to settle the case. Moreover, in determining the good faith of this settlement proposal, the Court

[5] *See In re Giant Interactive Corp., Inc. Sec. Litig.*, No. 07 Civ 10588, 2011 WL 5244707, at *4 (S.D.N.Y. Nov. 2, 2011) (parties were entitled to a presumption of fairness where mediator facilitated arms' length negotiations); *In re AOL Time Warner, Inc. Sec. Litig.*, 02 Civ. 5575, 2006 WL 903236, at *7 (S.D.N.Y. April 6, 2006) (noting that involvement of mediator in settlement negotiations helped "ensure that the proceedings were free of collusion and undue pressure").

should consider the judgment of Co-Lead Counsel.[6] The Lead Plaintiffs are some of the largest institutional investors in the world, and Co-Lead Counsel are among the nation's leading securities class action litigation firms. Accordingly, their judgment that the Settlement is in the best interest of the Class should be given considerable weight. Consequently, the Court has ample evidence that the Settlement was negotiated in good faith by well-informed counsel, and was not the product of collusion.

B. The Substantial Benefits For The Class, Weighed Against Litigation Risks, Strongly Support Preliminary Approval

The proposed Settlement creates a very substantial settlement fund of $2,425,000,000.00 in cash and certain corporate governance enhancements to be implemented or maintained by BoA. This recovery—the fourth largest securities class action settlement ever paid by a single corporate defendant—provides an extremely substantial benefit to the Class, especially in light of the risks posed by trial. The benefit of the present proposed Settlement must be compared to the risk that no recovery or a lesser recovery might be achieved after trial and likely appeals, possibly many months, or even years, into the future.

The claims alleged by the Class involve numerous complex legal and factual issues. If the Action were to proceed to trial, Lead Plaintiffs would have to overcome the numerous defenses asserted by multiple defendants. Among other things, the Parties disagree about (i) whether Defendants violated the federal securities laws through their alleged conduct; (ii) whether Defendants had a legal duty under the Exchange Act to disclose the information that

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[6] *See, e.g., In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695, 2007 WL 4115809, at *12 (S.D.N.Y. Nov. 7, 2007) (courts should "consider the opinion of experienced counsel with respect to the value of the settlement"); *In re Painewebber Ltd. P'ships Litig.,* 171 F.R.D. 104, 125 (S.D.N.Y.) ("'Great weight' is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation."), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

was allegedly omitted; (iii) whether the information regarding Merrill's bonuses and losses was material; (iv) whether Defendants acted with scienter, or negligently; (v) whether the price of BoA common stock was artificially inflated by reason of the alleged misrepresentations, omissions, or otherwise; and (vi) whether Lead Plaintiffs and the Class were harmed by the conduct alleged in the Second Amended Complaint. The Parties also disagree on the appropriate methodology for determining damages, if liability were established, particularly under Section 14(a), as Defendants have argued that Class Members seeking recovery under Section 14(a), who did not purchase or otherwise exchange any shares of their BoA common stock in connection with the Merger, failed to adduce evidence of a direct, compensable injury under Section 14(a).

In addition, Lead Plaintiffs are confident that even if they were to prevail on liability and damages at trial, Defendants would appeal the verdict, especially in light of the dispute surrounding damages under Section 14(a). At best, the appeals process would lead to further delays, and at worst, it would lead to a recovery that is less than the Settlement Amount or possibly no recovery at all. This Settlement enables the Class to recover without incurring any additional risks or costs.

C. The Stage Of The Proceedings Supports Preliminary Approval

As will be set forth in further detail prior to the Settlement Hearing and as summarized herein, Lead Plaintiffs' decision to enter into the Settlement was based on their thorough understanding of the strengths and weaknesses of their claims against Defendants after nearly four years of intensive litigation. This understanding is based on the fact that the case was trial ready after full fact and expert discovery and the substantial completion of pretrial preparation, as described herein.

At the time the Settlement was reached, the Lead Plaintiffs and Co-Lead Counsel had a clear view of the strengths and weaknesses of the claims. Additionally, Lead Plaintiffs, as sophisticated institutional investors, directly participated in this case throughout the course of the litigation. In this respect, Defendants took no less than 16 depositions of Lead Plaintiffs and/or their money managers, during class discovery. Thus, the Settlement is the product of serious, informed, non-collusive negotiations, is well within the range of possible approval, and does not have any obvious deficiencies. For these and all of the foregoing reasons, the Court should grant preliminary approval of the Settlement and direct that notice of the Settlement be given to members of the Class.

IV. THE COURT SHOULD NOT REQUIRE A SECOND OPT OUT PERIOD

As the Court is aware, on February 6, 2012, the Court certified the Class in this Action and ordered that notice of the litigation be provided to Class Members. *See In re Bank of Am. Corp. Sec., Deriv. & ERISA Litig.*, 281 F.R.D. 134, 150 (S.D.N.Y. 2012). The Parties promptly negotiated the content of a proposed Class Notice and Summary Class Notice. On February 24, 2012, Lead Plaintiffs filed a motion seeking approval of the Parties' proposed Class Notice and Summary Class Notice, and appointment of The Garden City Group, Inc. ("GCG") as the Notice

Administrator. *See* Dkt. No. 530. On February 29, 2012, the Court approved the proposed Class Notice and Summary Class Notice, specifically finding that they "meet the requirements of Rule 23 and due process," and appointed GCG as the Notice Administrator. *See* Dkt. No. 531 at ¶¶ 2-3. The Class Notice and Summary Class Notice approved by the Court informed Class Members of their right to request exclusion from the Class, stated that it was in the Court's discretion as to whether a second opportunity to request exclusion would be permitted, and explained how to request exclusion from the Class. *See* Dkt. No. 539-1 (Ex. A) at ¶¶ 18-22. The deadline for requesting exclusion from the Class was May 7, 2012. *See* Dkt. No. 539-1 (Ex. A) at ¶ 20; Dkt. No. 539-2 (Ex. B) at 2.

As set forth in the Second Supplemental Affidavit of Jason Zuena of GCG ("Zuena Aff."), pursuant to the Court's February 29 Order, GCG mailed the Class Notice to approximately 3.2 million potential Class Members or their nominees (*i.e.*, their banks or brokers). *See* Zuena Aff. at ¶ 3. In addition, the Summary Class Notice was published in *The Wall Street Journal*, *The New York Times*, and *The Financial Times*, and was transmitted over the *PR Newswire*. *See id*. at ¶ 2. In response to the widespread dissemination of the Class Notice, GCG has received requests for exclusion from 864 potential Class Members, including institutions and individuals. *See id*. at ¶ 4.

Subsequently, at a September 28, 2012 Court conference, the Parties informed the Court of the proposed settlement of this Action. At the September 28 conference, the Court requested that the Parties address in their preliminary approval papers whether, in light of the fact that Class Members had already received an opportunity to opt out of the Class, a second opportunity to opt out should be provided at the settlement approval stage. As explained further below, the Second Circuit and numerous other courts have repeatedly held that allowing a second opt out

period is both unnecessary and undesirable. Moreover, there are several reasons why allowing a second opt out period is especially unwarranted here, including the extensive notice program undertaken at the class certification stage, the ample opt out opportunity provided at that time, and the extraordinary quality of the Settlement. Accordingly, the Court should not authorize a second opportunity to opt out.

The decision whether to grant a second opt out period pursuant to Rule 23(e)(4) is "confided to the [district] court's discretion," and "the court is under no obligation to do so." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 271 (2d Cir. 2006) (affirming decision to not provide a second opt out period) (internal quotation marks omitted). Further, the Second Circuit has specifically held that it is unnecessary to provide a second opt out period where, as here, the class was originally given an opportunity to opt out following class certification, and will receive notice of the settlement and the opportunity to object at the fairness hearing. In *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96 (2d Cir. 2005), the parties settled a massive antitrust class action on the eve of trial for a payment of approximately $3 billion to the class. *Id*. at 101. A class member objected to the settlement, contending that it "was denied due process because class members were not given the opportunity to opt out after the settlement notice was issued." *Id*. at 114. In rejecting this argument, the Second Circuit held that the requirements of the Due Process Clause and Rule 23 were satisfied because the class "had been given notice of the action, the opportunity to opt out [following class certification], notice of the proposed settlement, and the opportunity to object" – just as the Class is receiving in this Action. *Id*. (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1289 (9th Cir. 1992)). Accordingly, the Second Circuit concluded that the objector "was required to opt out at the class notice stage if it did not wish to be bound by the Settlement." *Id*. at 115.

In accordance with this authority, courts in this Circuit have repeatedly declined to provide second opt out periods in complex securities class actions when notice has previously been provided to the class. For example, in *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319 (S.D.N.Y. 2005), Judge Cote relied on *Visa* to hold that there was "no reason … to permit a second opportunity to opt out" because (as is the case here) class members received a full opportunity to opt out following class certification, and then to object to the settlement at the fairness hearing. As Judge Cote noted in reaching this conclusion, "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." *Id*. at 342 (citing *Visa*, 396 F.3d at 114). Similarly, in *In re Lloyd's American Trust Fund Litigation*, No. 96CV1262, 2002 WL 31663577 (S.D.N.Y. Nov. 26, 2002), Judge Sweet declined to provide "a second opportunity to opt out" at the settlement approval stage, holding that due process required only that class members receive an opportunity to opt out after class certification, followed by "notice of the proposed settlement and an opportunity to be heard at a fairness hearing." *Id*. at *12; *see also In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 345 (E.D.N.Y. 2010) (Weinstein, J.) (relying on *Visa* to hold that "[i]t is not necessary to provide the class members with an opportunity to opt out of the Settlement," and noting that "[i]f any class members wished to control the prosecution or settlement of their own claims, they could have opted out or sought to intervene after notice of pendency was given").[7]

[7] Numerous other courts have held that it is unnecessary to provide a second opportunity to opt out. *See, e.g.*, *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 635 (9th Cir. 1982) ("[W]e have found no authority of any kind suggesting that due process required that members of a Rule 23(b)(3) class be given a second chance to opt out. We think it does not."); *Klein v. O'Neal, Inc.*, 705 F. Supp. 2d 632, 663-64 (N.D. Tex. 2010); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 93CV897, 1996 WL 167347, at **3-4 (N.D. Ill. Apr. 4, 1996).

In this case, there is no reason to depart from standard practice and require a second opt out opportunity. For example, there is no inaccuracy in the information set forth in the Class Notice on which opt out decisions may have been based, and no other unique issue that might warrant a second opt out opportunity. Indeed, for several reasons, a second opt out period would be especially inappropriate here. First, following class certification, Lead Plaintiffs and GCG conducted an extensive notice program that easily satisfies the requirements of Rule 23 and the Due Process Clause, as the Court recognized in its March 1 Order. *See* Dkt. No. 531 at ¶ 2. As noted above, the Class Notice was mailed to approximately 3.2 million potential Class Members or their nominees, and the Summary Class Notice was published in multiple national publications and transmitted over the *PR Newswire*. *See* Zuena Aff. at ¶¶ 2, 3.

The Class Notice and Summary Class Notice clearly explained the nature of the Action and informed potential Class Members of their right to request exclusion from the Class, how and when to do so, and the consequences of their decision of whether to do so. *See* Dkt. No. 539-1 (Ex. A) at ¶¶ 18-22. Significantly, the Class Notice and Summary Class Notice made clear that there might not be a second chance to opt out, stating that "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." *See* Dkt. No. 539-1 (Ex. A) at ¶ 18(a); Dkt. No. 539-2 (Ex. B) at 2. The Class Notice and Summary Class Notice further stated that investors who elect to remain members of the Class "will be bound by all past, present and future orders and judgments in the Action, whether favorable or unfavorable." *See* Dkt. No. 539-1 (Ex. A) at ¶ 18(a); Dkt. No. 539-2 (Ex. B) at 2. Thus, Class Members were provided full information concerning their opt out rights and ample opportunity to exercise those rights.

Second, the response to this widespread notice program demonstrates that it was effective. In response to the Class Notice, 864 potential Class Members have requested exclusion from the Class. *See* Zuena Aff. at ¶ 4. Those who have requested exclusion range from large institutional investors, some of whom who have brought their own actions, such as the New York State Common Retirement Fund, to individual investors who held as few as two shares during the Class Period. *See, e.g.*, *DiNapoli, et al. v. Bank of Am. Corp, et al.*; No. 10 Civ. 5563, *Graber v. Bank of Am. Corp., et al.*, No. 11 Civ. 7070. Although the number of opt outs is extremely small when compared to the size of the Class, the fact that both individuals and sophisticated institutions have exercised their right to exclude themselves from the class action and, in some instances, pursue their own actions demonstrates the thoroughness and adequacy of the previous notice to Class Members. Notwithstanding that these Class Members have already requested exclusion, the Parties have agreed to allow them the opportunity to "opt-back in" to the Class so that they can share in the exceptional recovery obtained in this Action. *See* Ex. A-1 to Stipulation, at ¶ 109. To the extent that any Class Members did not request exclusion but do not want to participate in the recovery, such Class Members can decline to submit a claim form.

Third, the new developments that have occurred since Class Members made their decision of whether to opt out – namely, vigorous litigation that culminated in a proposed settlement of historic proportions – provide a clear benefit to the Class and negate any potential prejudice from disallowing a second opt out. Here, far from warranting a second opt out period, the size of the proposed Settlement, and the fact that it was reached after extensive litigation, provides Class Members with compelling reasons to participate in the Class recovery (and to opt-back in if they have requested exclusion).

Finally, the Class has benefitted from the assumption, based on the authority set forth above, that there likely would not be a second opt out period in this case. As the Second Circuit and other courts have recognized, the absence of a second opt out period increases the parties' ability to settle because defendants are able to obtain "global peace" with the class as certified – adding an important measure of certainty to the settlement process that does not exist when the composition of the class is subject to change after the terms of the settlement are announced. *See, e.g.*, *Denney*, 443 F.3d at 271 (allowing a second opt out period "would disrupt settlement proceedings because no certification would be final until after the final settlement terms had been reached"); *Officers for Justice*, 688 F.2d at 635 (allowing "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"). Given that the Class has benefitted from the Parties' ability to resolve all Class Members' claims, it is appropriate to preserve the Class as presently constituted, *i.e.*, excluding only those who requested exclusion in connection with the Class Notice, subject to the ability of such Class Members to opt back into the Class as discussed below.

In sum, for the reasons set forth above, the Court should not require a second opt out period.

V. CO-LEAD COUNSEL PROPOSE ALLOWING CLASS MEMBERS WHO PREVIOUSLY OPTED-OUT TO OPT-BACK INTO THE CLASS

Lead Plaintiffs and Co-Lead Counsel also propose allowing Class Members who previously submitted a request for exclusion, to elect to opt-back into the Class and be eligible to receive a payment from the Settlement. As set forth in the proposed Settlement Notice, in order to opt-back into the Class, a person or entity that previously submitted a request for exclusion must submit, individually or through counsel, a written Request to Opt-Back Into the Class. The Request to Opt-Back Into the Class must be timely and (a) state the name, address and telephone

number of the person or entity requesting to opt-back into the Class; (b) state that such person or entity "requests to opt-back into the Class in the *In re Bank of America Corp. Securities Litigation*, Master File No. 09 MD 2058 (PKC)"; and (c) be signed by the person or entity requesting to opt-back into the Class or an authorized representative.

Any person or entity who or which previously submitted a request for exclusion from the Class in connection with the Class Notice and who does not opt-back into the Class in accordance with the requirements set forth in the Settlement Notice, remains excluded from the Class and shall not be a Class Member, shall not be bound by the terms of the Settlement or the Stipulation, or of any other orders or judgments in the Action, and shall have no right to receive any payment out of the Net Settlement Fund.[8] Lead Plaintiffs and Co-Lead Counsel respectfully request the Court's approval to allow investors who previously requested exclusion to opt back into the Class in accordance with the steps set forth in the proposed Preliminary Approval Order and Settlement Notice.

VI. PROPOSED SCHEDULE

As outlined in the proposed Preliminary Approval Order submitted herewith, no later than twenty one (21) calendar days after entry of the Preliminary Approval Order (the "Notice Date"), GCG, the Claims Administrator, will notify Class Members of the Settlement by mailing a copy of the Settlement Notice and the Proof of Claim Form, substantially in the forms attached as Exhibits A-1 and A-2 to the Stipulation, respectively (the "Settlement Notice Packet"), to each

[8] Opt-outs may not opt-back into the Class for the purpose of objecting to any aspect of the Settlement, Plan of Allocation, or Co-Lead Counsel's request for attorneys' fees and reimbursement of Litigation Expenses.

Person identified in connection with the dissemination of the Class Notice, or who otherwise may be identified through further reasonable effort.

The proposed Preliminary Approval Order further requires, not later than ten (10) calendar days after the Notice Date, that Co-Lead Counsel cause the Summary Notice to be published once in the national editions of *The Wall Street Journal* and *The New York Times* and once in the *Financial Times*, to be transmitted once over the *PR Newswire* and to be posted on the website established for the Action, www.boasecuritieslitigation.com.

Co-Lead Counsel believe that, because the Notice and Summary Notice fairly apprise Class Members of their rights with respect to the Settlement, they represent the best notice practicable under the circumstances and should be approved by the Court.[9] The manner of providing notice, which includes individual notice by mail to all Class Members who can be reasonably identified and additional publication notice, represents the best notice practicable under the circumstances and satisfies the requirements of due process and Rule 23. *See Dorn v. Eddington Sec., Inc.*, No 08 Civ. 10271 (LTS), 2011 WL 382200, at *4 (S.D.N.Y. Jan. 21, 2011); *In re Warner Chilcott Ltd. Sec. Litig.*, No. 06 Civ. 11515 (WHP), 2008 WL 5110904, at *3 (S.D.N.Y. Nov. 20, 2008); *Global Crossing*, 225 F.R.D. at 448-49.

In connection with preliminary approval of the Settlement, the Court must set a final approval hearing date, dates for mailing and publication of the Notice and Summary Notice, and

[9] The Settlement Notice advises Class Members of the essential terms of the Settlement, of information regarding Co-Lead Counsel's fee application, and of the proposed plan for allocating proceeds of the Settlement among Class Members. It also will set forth the procedure for objecting to the Settlement, Plan of Allocation or the request for an award of attorneys' fees and reimbursement of litigation expenses, and opting-back in the Class, and will provide specifics on the date, time and place of the Settlement Hearing. *See, e.g. In re Michael Milken & Assoc. Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (notice need only describe the terms of the settlement generally).

deadlines for submitting claims or for objecting to the Settlement.[10] The Parties respectfully propose the following schedule for the Court's consideration, as agreed to by the Parties and set forth in the proposed Preliminary Approval Order:

Event	Time for Compliance
Deadline for mailing the Settlement Notice and Claim Form to the Class ("Notice Date")	21 calendar days after entry of the Preliminary Approval Order
Deadline for publishing Summary Notice	10 calendar days after the Notice Date
Filing of briefs in support of final approval of Settlement, Plan of Allocation, and Co-Lead Counsel's fee and expense request	45 calendar days before the Settlement Hearing
Receipt deadline for objections and requests to opt back into the Class	31 calendar days before the Settlement Hearing
Filing of reply memoranda in support of final approval of Settlement, Plan of Allocation, and Co-Lead Counsel's fee and expense request	7 calendar days before the Settlement Hearing
Settlement Hearing	The week of March 11, 2013, or at the Court's earliest convenience starting the week of April 1, 2013[11]
Deadline for submitting Claim Forms	120 calendar days after the Notice Date

VII. CONCLUSION

For all the foregoing reasons, Lead Plaintiffs respectfully request that the Court grant preliminary approval of the proposed Settlement and enter the accompanying proposed Preliminary Approval Order.

Dated: November 30, 2012
New York, New York

[10] The blanks for certain deadlines currently contained in the agreed-upon form of Notice will be filled in once the Court sets those dates and prior to mailing to Class Members.

[11] Due to previous commitments, Lead Counsel are not available during the weeks of March 18 and March 25, 2013.

KAPLAN FOX & KILSHEIMER LLP

By: */s/ Frederic S. Fox*
Robert N. Kaplan
Frederic S. Fox
850 Third Avenue, 14th Floor
New York, NY 10022
Tel: (212) 687-1980
Fax: (212) 687-7714

Co-Lead Counsel

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

By: */s/ Steven B. Singer*
Max W. Berger
Steven B. Singer
1285 Avenue of the Americas
New York, NY 10019
Tel: (212) 554-1400
Fax: (212) 554-1444

Co-Lead Counsel

KESSLER TOPAZ MELTZER & CHECK, LLP

By: */s/ David Kessler*
David Kessler
Gregory M. Castaldo
280 King of Prussia Road
Radnor, PA 19087
Tel: (610) 667-7706
Fax: (610) 667-7056

Co-Lead Counsel

#687871