UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 13-1573-cv; 13-1677-cv

Caption [use short title]: In re Bank of America Securities Litigation

Motion for: Dismissal or De-consolidation

Set forth below precise, complete statement of relief sought:

Order dismissing Dornfest's appeal due to lack of appellate jurisdiction, or, in the alternative, order de-consolidating Dornfest's appeal from Docket 13-1573-cv.

MOVING PARTY: Bank of America Corp., et al.

☐ Plaintiff ☑ Defendant

☐ Appellant/Petitioner ☑ Appellee/Respondent

OPPOSING PARTY: Charles N. Dornfest

MOVING ATTORNEY: Mitchell A. Lowenthal

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Court-Judge/Agency appealed from: United States District Court for the SDNY, Honorable P. Kevin Castel

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):

☑ Yes ☐ No (explain):

Opposing counsel's position on motion: See Appendix A

☐ Unopposed ☒ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:

☑ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:
/s/ Mitchell A. Lowenthal **Date:** 8/28/2013

Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: ______________________ By: ______________________

Form T-1080 (rev. 7-12)

APPENDIX A

The Defendants-Appellees make two alternative requests for relief in the attached motion, one of which the Plaintiff-Appellant opposes, and one that he does not. The Plaintiff-Appellant opposes the request for an order dismissing the appeal for lack of appellate jurisdiction, but does not oppose the alternative request that the appeal be de-consolidated from the other appeals with which it is currently consolidated.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMP CAPITAL INVESTORS LIMITED, et al.,

Objectors-Appellants,

CHARLES N. DORNFEST,

Plaintiff-Appellant,

-against-

PUBLIC PENSION FUNDS, et al.,

Plaintiffs-Appellees,

BANK OF AMERICA CORP., et al.,

Defendants-Appellees.

Docket Nos. 13-1573-cv and
13-1677-cv

Appeal from the United States
District Court for the Southern
District of New York

09 Md. 2058 (PKC)
10 Civ. 275 (PKC)

MOTION TO DISMISS THE APPEAL OF PLAINTIFF-APPELLANT CHARLES N. DORNFEST FOR LACK OF APPELLATE JURISDICTION OR, IN THE ALTERNATIVE, TO DE-CONSOLIDATE THIS APPEAL FROM OTHERS

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee Bank of America Corporation discloses that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock. Merrill Lynch & Co., Inc. and Merrill Lynch Pierce Fenner & Smith, Inc. (successor in interest to Banc of America Securities LLC) are wholly owned subsidiaries of Bank of America Corporation.

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The "Bank Defendants"[1] respectfully submit this motion, pursuant to Rule 27 of the Federal Rules of Appellate Procedure, requesting that the Court dismiss the appeal filed by Appellant Charles N. Dornfest ("Dornfest") for lack of jurisdiction, or, in the alternative, de-consolidate Dornfest's appeal from the four associated appeals with which it is currently consolidated.

PRELIMINARY STATEMENT

In his Notice of Appeal, Dornfest asserts that he is appealing "from [1] the Judgment entered on April 9, 2013 . . . insofar as the Judgment dismissed the complaint of Plaintiff Charles N. Dornfest for violations of the Securities Laws; and [2] the ORDER, entered on September 29, 2011 . . . denying Plaintiff Charles N. Dornfest the right to move to certify a class of BoA option investors." J.A. for Pl.-Appellant at A2079-80 (cited hereinafter as "A___").[2]

Dornfest cannot appeal from the April 9, 2013 Judgment ("the Judgment") because he was not a party to it and because it had no impact on him. The Judgment resulted from the approval of a settlement of a consolidated

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[1] The Bank Defendants are Bank of America Corporation ("Bank of America" or "the Bank"), Merrill Lynch & Co., Inc., Banc of America Securities LLC, Kenneth D. Lewis, Joe L. Price, Neil A. Cotty, 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 April 9, 2013 Judgment and the September 29, 2011 Order are appended to the end of this motion.

securities class action ("the Consolidated Securities Class Action") pending before Judge Castel. The settlement was between judicially appointed Lead Plaintiffs, individually and on behalf of a Court-certified class, and the Bank Defendants. The second paragraph of that Judgment explains that the certified class on behalf of which the Consolidated Securities Class Action was brought consisted of owners of Bank of America common stock and January 2011 call options. A2009-10. And, the Judgment makes clear that it has no effect on purchasers, or holders, of Bank of America securities other than those included in the class. A1643.

Dornfest's claims are based on his trading in options other than the January 2011 call options included in the certified class. Dornfest Appeal Brief ("Dornfest Br.") at 12. As such, he is not a member of the class, and by its own terms the Judgment had no impact on Dornfest's own case.

Dornfest also cannot appeal from Judge Castel's September 29, 2011 Order denying his request to assert claims on behalf of a class of options holders (other than the January 2011 call options that are in the certified class). A1492. That Order was issued in an action commenced by Dornfest – an action that Dornfest has failed to prosecute. His complaint in that action asserts claims on an individual and class-wide basis. A619. Even though Dornfest contends that he suffered almost $400,000 in damages, A822; Dornfest Br. at 12, he has made no attempt to pursue relief on his own behalf. Instead, and repeatedly, he has attempted to usurp the appointed Lead Plaintiff's ability to direct the management of the case as a whole, seeking to carve out a niche class which Dornfest and his counsel would lead.

Dornfest has been unsuccessful in his efforts to lead a class. Then-District Judge Chin and Judge Castel, to whom the case was assigned when Judge Chin became a member of this Court, both rejected Dornfest's repeated requests to pursue claims on behalf of a class. But each made clear to Dornfest that he could pursue his individual claims to judgment. Indeed, Judge Castel concluded the September 29, 2011 Order – from which Dornfest now purports to appeal – by stating that Dornfest "remains free to pursue his claims individually." A1492. And, Dornfest previously conceded that this Order is not a "final decision" from which an appeal is available. Dornfest Br. at 2; A1497-98. Thus, neither the September 29, 2011 Order nor any other order (or judgment) in Dornfest's individual action ever extinguished his right to continue to prosecute that action or his claim.

In short, appellate jurisdiction is absent under 28 U.S.C. § 1291 because there is no judgment or order from which Dornfest may now take an appeal. Once there is a final judgment in Dornfest's case resolving his individual claim, Dornfest may then pursue an appeal raising his "right" to assert class claims.

In the alternative, the Bank Defendants ask the Court to de-consolidate Dornfest's appeal from the other pending appeals taken from the Judgment in the Consolidated Securities Class Action. Dornfest consents to this request. Those other appeals challenge the class settlement, including the form of class notice, adequacy of the consideration, and attorney's fee award. Dornfest appeals only whether he can pursue class claims on behalf of a <u>different</u> set of securities holders – claims that the Judgment in the Consolidated Securities Class Action do not affect.

<u>BACKGROUND</u>

A. Proceedings Below

Bank of America common stock holders filed several actions in the Southern District of New York and other Districts, arising out of the Bank's acquisition of Merrill Lynch & Co., Inc. ("Merrill"). Through various means, these were assigned to then-District Judge Chin, who consolidated the actions, appointed Lead Plaintiffs and established case management and other procedures. Dornfest was one of three sets of plaintiffs who, in the months after Judge Chin ordered consolidation, filed actions and sought to assert separate claims on behalf of niche classes of investors in Bank of America options and bonds. A971-72. As Judge Chin explained, these plaintiffs asserted claims "aris[ing] out of the same facts and circumstances relating to [the Bank's] acquisition of Merrill as are at issue in the Consolidated Securities Actions." A973. Indeed, Dornfest's January 13, 2010 complaint is in large part a verbatim copy of the amended complaint filed in the Consolidated Securities Class Action on September 25, 2009. Compare, e.g., A487-546 with A634-94.

B. Dornfest's Efforts to Displace the Appointed Lead Plaintiffs

1. In March 2010 Dornfest moved to be appointed lead plaintiff, and his counsel as lead counsel, for purchasers of the Bank's options. A813-14. The appointed Lead Plaintiffs, A949-65, and the Bank Defendants, A846-52, opposed that request.

On April 9, 2010, Judge Chin ordered the consolidation of the putative class claims Dornfest and the other option and bond plaintiffs sought to pursue into the Consolidated Securities Class Action, holding that under Hevesi v. Citigroup Inc., 366 F.3d 70, 82 n.13 (2d Cir. 2004), "a lead plaintiff is empowered to control the management of the litigation as a whole, and it is within the lead plaintiff's authority to decide what claims to assert on behalf of the class." A973. Judge Chin further held that to permit other plaintiffs to bring additional class actions "would interfere with Lead Plaintiffs' ability and authority to manage the Consolidated Securities Actions," and that while it was the case that Lead Plaintiffs had not at that point asserted claims on behalf of holders of Bank of America debt securities or options, it was the prerogative of Lead Plaintiffs whether or not to do so. A974. Judge Chin concluded that all three sets of niche "option class" and "bond class" plaintiffs were "free to pursue their claims as individual cases – but not as class actions." Id.

2. After all of the Merrill merger-related cases had been re-assigned, Judge Castel ordered Lead Plaintiffs in the Consolidated Securities Class Action to inform the Court whether any Lead Plaintiff invested in Bank of America options, and if so, the amount of such investment. A1003. On May 27, 2010, Lead Plaintiffs represented that, while no Lead Plaintiff invested in Bank of America options during the class period, Court-appointed Lead Counsel had been retained by an options investor, Grant Mitchell, who would serve as a named plaintiff for options holders. A1004. Lead Plaintiffs thereafter served a Second Amended Class Action Complaint (the "SAC") asserting, inter alia, class claims on behalf of investors in Bank of America debt securities and options, adding Grant Mitchell as a Named Plaintiff. A1040. The Bank Defendants moved to dismiss portions of the SAC, including the new claims asserted on behalf of investors in debt securities and options in which no Lead or Named Plaintiff invested. A1203. Dornfest submitted letters to the Court opposing the Bank Defendants' motion to dismiss, and arguing that the consolidation of Dornfest's class claims into the Consolidated Securities Class Action provided Lead Plaintiffs with standing to pursue claims on behalf of options holders. A1191, 1197. In response, counsel to

the Lead Plaintiffs wrote to Judge Castel explaining that "Lead Plaintiffs did not authorize [Dornfest's counsel] to send these letters, and that [Dornfest's lawyers do] not speak for the Lead Plaintiff or the Class in this Action." A1199. On July 29, 2011, the Court granted the Bank Defendants' motions to dismiss these new claims, holding that Lead Plaintiffs did not have standing to pursue class claims on behalf of investors in securities in which Lead or Named Plaintiffs did not invest. A1224.

3. Dornfest thereafter again requested permission to file a motion to certify a class of investors in Bank of America options and to appoint Dornfest as lead plaintiff and his counsel as class counsel. A1227-30. Lead Plaintiffs again opposed Dornfest's request. They further advised the District Court that they had analyzed Dornfest's options transactions, interviewed Dornfest, and had a subsequent conference with Dornfest's counsel. A1233. Lead Plaintiffs determined that to add Dornfest as a named plaintiff would sacrifice their credibility with the District Court. A1261-62.

During a hearing on September 7, 2011, the Court requested letter briefs from the parties on whether Dornfest should be permitted to proceed with his own class action on behalf of other options investors. A1273. Dornfest once again argued that he should be permitted to move to certify a niche class of investors in Bank of America options, A1276-84, which the Lead Plaintiffs and the Bank

Defendants opposed. A1285-92, 1478-80. On September 29, 2011, Judge Castel again denied Dornfest's request, issuing a Memorandum and Order that was captioned in Dornfest's individual action. A1492. Judge Castel confirmed Judge Chin's April 9, 2010 Order, holding that under Hevesi Lead Plaintiffs were authorized to exercise control over the litigation as a whole, that "the PSLRA allows for a mechanism whereby additional class representatives may be proposed by the lead plaintiff to pursue those claims," A1490, and observing that while Lead Plaintiffs determined not to seek leave to add additional class plaintiffs to represent investors in options other than January 2011 call options, "[s]uch tactical decisions are the prerogative of a lead plaintiff," id. Thus, Judge Castel concluded that even though he had determined that the Lead Plaintiffs lacked standing to pursue class claims on behalf of purchasers of options Dornfest bought, that was "not meaningful," and that Dornfest could not assert class claims on behalf of such purchasers, though Dornfest remained free to pursue his claims individually. A1491-92.

4. Dornfest then sought leave to appeal from this Order on an interlocutory basis. On October 13, 2011, he petitioned this Court pursuant to Federal Rule of Civil Procedure 23(f), yet again arguing that he should be permitted to assert class claims. A1493-1513. The caption on his petition makes clear that it was filed in his individual action: "THIS DOCUMENT RELATES TO

CHARLES N. DORNFEST, Plaintiff-Petitioner v. BANK OF AMERICA CORPORATION ET AL. Defendant-Respondent." In his reply, Dornfest also requested mandamus relief. A1564. This Court dismissed his Rule 23(f) petition and denied his request for mandamus relief, holding that Judge Castel's September 29, 2011 Order was not one granting or denying class-action certification, and that Dornfest did not demonstrate that mandamus was warranted. A1571-72.

5. On March 27, 2012, Dornfest again sought leave to appeal from Judge Castel's September 29, 2011 Order on an interlocutory basis, this time under 28 U.S.C. § 1292(b). A1573-96. On April 16, 2012, in a Memorandum and Order again captioned in Dornfest's individual action, Judge Castel denied Dornfest's motion, noting that both he and Judge Chin had "observed that the separate class proposed by Dornfest would interfere with the lead plaintiffs' prerogative to exercise control of the class claims," and that "lead plaintiffs have authority and discretion to choose which claims to pursue." A1614-16. The Court further found that "any lead plaintiff necessarily makes determinations that limit a shareholder class." Id. Judge Castel once again emphasized that "Dornfest remains free to pursue his claims individually." A1617.

C. Dornfest's Prosecution of His Individual Action

Beyond his efforts to represent a class, Dornfest has taken no steps to prosecute the action he filed in the District Court.

D. Dornfest's Asserted Basis for Appellate Jurisdiction

Dornfest claims that Judge Castel's Judgment approving the settlement of the Consolidated Securities Class Action "dismissed [his] complaint." Dornfest Br. at 2. It did no such thing. Dornfest was not a party to the Judgment, and it did not release claims of persons or entities who were not members of the certified class, or any claims arising out of securities not included in the definition of that class. The Judgment applied only to claims arising out of trading in the Bank's common stock or January 2011 call options. Dornfest's claims are based solely on Bank options other than the January 2011 options. Dornfest Br. at 12.

The plain text of the Judgment makes clear that it has no effect on Dornfest's claims. The Judgment approved a settlement between Lead Plaintiffs, individually and on behalf of the Court-certified class, and the Bank Defendants. A2010-11. In its statement of jurisdiction, the Court noted that it had personal jurisdiction over the Lead Plaintiffs, the Bank Defendants, and each of the class members. A2012.

The Judgment defined the Court-certified class:

> (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 Bank of America Corporation ("BoA") common stock as of October 10, 2008, and were entitled to vote on the merger between BoA and Merrill Lynch & Co., Inc. ("Merrill"), and were

> damaged thereby; and (ii) as to claims under Sections l0(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 l0(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.

A2009-10. The options in which Dornfest claims to have traded are not included in this definition; as a trader in those options, Dornfest is not a member of the certified class. Dornfest Br. at 12.

The Judgment also had no impact on Dornfest's claims. The paragraph of the Judgment titled "Final Settlement Approval and Dismissal of Claims" states: "The [Consolidated Securities Class] Action and all of the claims against Defendants by Lead Plaintiffs and the other Class Members are hereby dismissed with prejudice." A2013. The paragraph titled "Binding Effect" states:

> "The terms of the Stipulation and of this Judgment shall be forever <u>binding on the Defendants, Lead Plaintiffs and all other Class Members</u> (regardless

> of whether or not any individual Class Members submits a Proof of Claim Form or seeks or obtains a distribution from the Net Settlement Fund), as well as their respective heirs, executors, administrators, predecessors, successors, affiliates and assigns. The Persons listed on Exhibit 1 hereto are excluded from the Class pursuant to request and are not bound by the terms of the Stipulation or this Judgment."

Id. (emphasis added). And, the paragraph titled "Releases" explains:

> Without any further action by anyone, and subject to paragraphs 8 and 9 below,[3] upon the Effective Date of the Settlement, Lead Plaintiffs, Class Representatives, and each of the other Class Members, on behalf of themselves, their heirs, executors, administrators, predecessors, successors, affiliates and assigns, shall be deemed to have, and by operation of law and of this Judgment shall have, fully, finally and forever compromised, settled, released, resolved, relinquished, waived, discharged and dismissed each and every Released Lead Plaintiffs' Claim against the Defendants and the other Defendants' Releasees and shall forever be enjoined from prosecuting any or all of the Released Lead Plaintiffs' Claims against any of Defendants' Releasees.

A2013-14 (emphasis added).

The definition of "Released Lead Plaintiffs' Claim" was provided in the Stipulation and Agreement of Settlement dated November 30, 2012 (the "Stipulation"), A1620, and expressly incorporated into the "Releases" paragraph of the Judgment, A2010, A2013. That term is defined as all claims that "Lead Plaintiffs or any other member of the Class" asserted or could have asserted against

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[3] Paragraphs 8 and 9 of the Judgment carve out from the scope of the Judgment claims unrelated to Dornfest's.

Defendants that: (1) arise out of the facts relating to the First Amended Complaint or SAC in the Consolidated Securities Class Action; and (2) "that either arise out of or are based upon (a) the purchase or other acquisition of BoA common stock or BoA January 2011 call options during the Class Period, or (b) the holding of BoA common stock that gives rise to a Section 14(a) or 20(a) claim arising out of the vote by record holders of BoA common stock in connection with the Merger." A1641-42. The definition continues: "For the sake of clarity, no claims are being released with respect to securities not covered by the Court-certified Class definition." A1643 (emphasis added).

STANDARD OF REVIEW

Appellate jurisdiction is a question of law that this Court reviews de novo. Even if no party raises the issue, the Court must independently ensure that it has jurisdiction. See Joseph v. Leavitt, 465 F.3d 87, 89 (2d Cir. 2006).

ARGUMENT

I. THERE IS NO JURISDICTION OVER DORNFEST'S APPEAL

Dornfest asserts that he is appealing "from [1] the Judgment . . . insofar as [it] dismissed the complaint of Plaintiff Charles N. Dornfest for violations of the Securities Laws; and [2] the ORDER, entered on September 29, 2011 . . . denying Plaintiff Charles N. Dornfest the right to move to certify a class of BoA option investors." A2079-80. But he was not a party to the Judgment and it did not affect his rights, the September 29, 2011 Order was interlocutory, and there is no final order in his case from which to appeal.

Section 1291 provides this Court with jurisdiction over "final decisions" by the district courts. See 28 U.S.C. § 1291. An order is final for purposes of Section 1291 when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978) (citation omitted).[4] "So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal." Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

The Judgment was not a final order in Dornfest's case. It did not apply to him or to any claims arising out of the securities upon which his claims are based.[5] It is equally uncontestable that the September 29, 2011 Order denying Dornfest's request to assert class claims on behalf of options investors was not a

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4 See also Somoza v. N.Y.C. Dep't of Educ., 538 F.3d 106, 112 (2d Cir. 2008) ("The requisite indicia of finality is that there be some manifestation by the district court that it intends the decision to be its final act in the case." (citation omitted)); O'Bert ex rel Estate of O'Bert v. Vargo, 331 F.3d 29, 40 (2d Cir. 2003) ("[A] final judgment is one that conclusively determines all of the rights of the parties to the litigation.").

5 While the District Court Clerk's Office filed a copy of the Judgment in the docket in Dornfest's individual action, it did so because his case was associated with the multidistrict litigation docket of the Consolidated Securities Class Action, No. 09-MD-2058. Indeed, the Clerk's Office filed the Judgment in the dockets of all such associated cases, including individual actions now being prosecuted in the District Court. A1-2, A206.

final order, much less a final judgment. He acknowledged as much when he sought leave to appeal from this Order on an interlocutory basis, first in this Court under Rule 23(f), and then in the District Court under 28 U.S.C. § 1292(b).

Dornfest's complaint in his individual action asserts claims both individually and on behalf of a putative class of Bank of America options investors. A619. Each time the District Court denied Dornfest's request to prosecute class claims, it expressly ruled that he was free to proceed with his individual claims. A974, 1492. Indeed, Judge Castel's April 16, 2012 Order denying Dornfest's motion under Section 1292(b) – the final District Court order addressing his claims in any way – so stated. A1617. No court order ever abridged or dismissed the individual claims Dornfest asserts in his complaint. Only when there is a final order or judgment in Dornfest's action may he appeal the denial of his requests to bring class claims.[6]

Since the Judgment in the Consolidated Securities Class Action plainly did not dismiss Dornfest's claims (or the claims of other investors who purchased the same Bank securities Dornfest did), if Dornfest's individual action was somehow dismissed – as he contends, Dornfest Br. at 2, 11 – the only orders that could have had that effect are those that consolidated the putative class claims

[6] See Deposit Guar. Nat'l Bank v. Roper, 446 U.S. 326, 336 (1980) ("[T]he denial of class certification [is] a procedural ruling, collateral to the merits of a litigation, that is appealable after the entry of final judgment.").

Dornfest sought to bring with the Consolidated Securities Class Action. But they were issued on April 9, 2010 and September 29, 2011. A970, 1488. Yet Dornfest never filed a timely appeal from either of these orders, other than his unsuccessful appeal under Rule 23(f) from the latter, in which he conceded that he was appealing from an interlocutory, rather than a final, order. A1503. Moreover, the parties made clear in a stipulation, which was so-ordered by Judge Chin, that Dornfest's case would continue even if the class claims were consolidated into the Consolidated Securities Class Action. A807-08. Thus, no final order or judgment has yet been entered in Dornfest's own case; he just has shown no interest in pursuing it.

When conferring with Dornfest's counsel regarding Dornfest's position on the motion, we were advised that Dornfest maintains that the Judgment dismissed his individual action. The evidence that it did not is overwhelming: he was not a party to the Judgment, A2012; by its terms it only impacted claims brought on behalf of the certified class, A2009-14; it expressly carved Dornfest's claims out of its scope, A1643; Dornfest signed a so-ordered stipulation providing that his individual claims would survive any consolidation into the Consolidated Securities Class Action, A807-08; and both Judge Chin and Judge Castel held that the consolidation of Dornfest's class claims did not impact his individual claims, A974, A1492. If, in the face of all this, Dornfest was concerned that the Judgment could result in the dismissal of his individual action – a consequence never mentioned in any of the papers filed in support of or against the entry of the Judgment – he could, and should, have informed the parties and the District Court, and objected to the entry of the Judgment "insofar as [it] dismissed [his] complaint." A2080. Dornfest not being a party to the Judgment or a beneficiary thereof, there was no intent for the Judgment to impact Dornfest's individual case; it would have taken little for Judge Castel to assuage any concerns Dornfest might have had about the impact of the Judgment on his case, and Judge Castel (and the parties to the Judgment) were entitled to the opportunity to correct the Judgment if any correction was needed. See Fed. R. Civ. P. 46 (requiring parties to object to rulings or orders and provide grounds for objection). Dornfest was not free to sit silently and then seek to appeal.[7]

II. IN THE ALTERNATIVE, DORNFEST'S APPEAL SHOULD BE DE-CONSOLIDATED FROM THE OTHER APPEALS FROM THE JUDGMENT

We are advised that this Court's Clerk's Office has consolidated Dornfest's appeal under the lead docket number 13-1573 (Appellants AMP Capital Investors Ltd., Colonial First State Investments Ltd., and H.E.S.T. Australia Ltd.),

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[7] See 9 James Wm. Moore et al., Moore's Federal Practice § 46.2 ("The purpose of the Rule 46 requirement is to allow the court an immediate opportunity to reconsider its action and correct any error. . . . If a party fails to object to an action by the court, appellate review of the trial court conduct at issue is generally precluded."); see also Ginett v. Computer Task Grp., Inc., 11 F.3d 359, 361 (2d Cir. 1993).

along with three other associated cases, docket numbers 13-1798 (Appellant Michael Washenik), 13-1830 (Appellants Orloff Family Trust DTD 10/3/91, Orloff Family Trust DTD 12/31/01, and St. Stephen, Inc.), and 13-1853 (Appellants Leonard Masiowski, MaryAnn Masiowski, Babette Rinis, Michael J. Rinis, and Michael J. Rinis IRA).

Dornfest's appeal should be de-consolidated from those other appeals. He agrees. The issues on which Dornfest seeks appellate review are entirely irrelevant to the other appellants. Similarly, the issues on which those other appellants seek appellate review are entirely irrelevant to Dornfest.

Further, all of the other appellants are members of the certified class, and each made timely objections to the settlement based on the sufficiency of the class notice, the adequacy of the settlement amount, and/or the appropriateness of the amount of attorneys' fees awarded to plaintiffs' counsel, and each seeks (in whole or in part) to overturn the Judgment. By contrast, Dornfest seeks to pursue claims based upon trading in options not included in the certified class, did not file an objection to the settlement, and makes no challenge to the notice or terms of the settlement itself, or indeed to the Judgment. Rather, Dornfest is only appealing the District Court's denial of his own attempts to bring a separate class action.

Consolidation of Dornfest's appeal into the master docket and with the other associated cases achieves none of the efficiency of consolidation, and would create confusion and delay by consolidating appeals that address no common questions.

CONCLUSION

For the foregoing reasons, Dornfest's appeal should be dismissed for lack of jurisdiction. In the alternative, his appeal should be de-consolidated from the associated cases with which it is currently consolidated.

Dated: New York, New York
August 28, 2013

Respectfully submitted,

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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

THIS DOCUMENT RELATES TO:
Consolidated Securities Action

Master File No. 09 MDL 2058 (PKC)

ECF CASE

JUDGMENT APPROVING CLASS ACTION SETTLEMENT

WHEREAS, a consolidated securities action is pending in this Court entitled *In re Bank of America Corp. Securities, Derivative and Employee Retirement Income Security Act (ERISA) Litigation*, No. 09 MDL 2058 (PKC) (S.D.N.Y.) (the "Action");

WHEREAS, by Memorandum and Order dated February 6, 2012, this Court certified the Action to proceed as a class action on behalf of a class of investors consisting of: (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 Bank of America Corporation ("BoA") common stock as of October 10, 2008, and were entitled to vote on the merger between BoA and Merrill Lynch & Co., Inc. ("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");[1]

WHEREAS, unless otherwise defined in this Judgment, the capitalized terms herein shall have the same meaning as they have in the Stipulation and Agreement of Settlement dated November 30, 2012 (the "Stipulation");

WHEREAS, pursuant to this Court's Order dated February 29, 2012, the Notice of Pendency of Class Action (the "Class Notice") was mailed to potential members of the Class to notify them of, among other things: (i) the Action pending against the Defendants; (ii) the certification of the Action by the Court to proceed as a class action on behalf of the Court-certified Class; and (iii) their right to request to be excluded from the Class, the effect of remaining in the Class or requesting exclusion, and the requirements for requesting exclusion;

WHEREAS, 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, individually and on behalf of the Court-certified Class, and defendants BoA, Merrill, Kenneth D. Lewis, John A. Thain, Joe L. Price, Neil A. Cotty, Banc of America Securities LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, William Barnet III, Frank P. Bramble, Sr.,

[1] 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 previously submitted a request for exclusion as set forth on Appendix 1 to the Stipulation and Agreement of Settlement dated November 30, 2012 who have not opted-back into the Class. All Persons excluded from the Class pursuant to request are set forth on Exhibit 1 hereto.

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 (collectively, the "Defendants" and, together with Lead Plaintiffs, the "Parties") entered into the Stipulation, which was approved by additional named plaintiff Grant Mitchell (together with Lead Plaintiffs, the "Class Representatives"), setting forth the terms and conditions of the Parties' proposed settlement (the "Settlement");

WHEREAS, by Order dated December 4, 2012 (the "Preliminary Approval Order"), this Court (a) preliminarily approved the Settlement; (b) ordered that notice of the proposed Settlement be provided to potential Class Members; (c) provided Class Members with the opportunity to: (i) opt-back into the Class if they previously submitted a request for exclusion from the Class in connection with the Class Notice, or (ii) object to the proposed Settlement; and (d) scheduled a hearing regarding final approval of the Settlement;

WHEREAS, due and adequate notice has been given to the Class;

WHEREAS, the Court conducted a hearing on April 5, 2013 (the "Settlement Hearing") to consider, among other things, (i) whether the terms and conditions of the Settlement are fair, reasonable and adequate, and in the best interests of Lead Plaintiffs and the other Class Members, and should therefore be approved; and (ii) whether a judgment should be entered dismissing the Action with prejudice as against the Defendants; and

WHEREAS, the Court having reviewed and considered the Stipulation, all papers filed and proceedings held herein in connection with the Settlement, all oral and written comments received regarding the Settlement, including the objections filed with respect thereto, and the record in the Action, and good cause appearing therefor;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. **Jurisdiction** - The Court has jurisdiction over the subject matter of the Action, and all matters relating to the Settlement, as well as personal jurisdiction over all of the Parties and each of the Class Members.

2. **Incorporation of Settlement Documents** - This Judgment incorporates and makes a part hereof: (a) the Stipulation filed with the Court on November 30, 2012; and (b) the Settlement Notice and the Summary Notice, both of which were filed with the Court on February 19, 2013.

3. **Settlement Notice** - The Court finds that the dissemination of the Settlement Notice and the publication of the Summary Notice: (i) were implemented in accordance with the Preliminary Approval Order; (ii) constituted the best notice practicable under the circumstances; (iii) constituted notice that was reasonably calculated, under the circumstances, to apprise Class Members (a) of the effect of the Settlement (including the Releases provided for therein), (b) of Co-Lead Counsel's motion for an award of attorneys' fees and reimbursement of Litigation Expenses, (c) of their right to object to any aspect of the Settlement, the Plan of Allocation, and/or Co-Lead Counsel's motion for attorneys' fees and reimbursement of Litigation Expenses, (d) of their right to opt-back into the Class if they previously submitted a request for exclusion in connection with the Class Notice, and (e) of their right to appear at the Settlement Hearing; (iv) constituted due, adequate, and sufficient notice to all persons or entities entitled to receive notice of the proposed Settlement; and (v) satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clause), the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(a)(7), 15 U.S.C. § 77z-1(a)(7), and all other applicable law and rules.

4. **Final Settlement Approval and Dismissal of Claims** - Pursuant to, and in accordance with, Rule 23 of the Federal Rules of Civil Procedure, this Court hereby fully and finally approves the Settlement set forth in the Stipulation in all respects (including, without limitation: the amount of the Settlement; the Releases provided for therein, including the release of the Released Lead Plaintiffs' Claims as against the Defendants' Releasees; and the dismissal with prejudice of claims against Defendants), and finds that the Settlement is, in all respects, fair, reasonable and adequate, and is in the best interests of Lead Plaintiffs and the other Class Members. The Parties are directed to implement, perform and consummate the Settlement in accordance with the terms and provisions contained in the Stipulation.

5. The Action and all of the claims against Defendants by Lead Plaintiffs and the other Class Members are hereby dismissed with prejudice. The Parties shall bear their own costs and expenses, except as otherwise expressly provided in the Stipulation.

6. **Binding Effect** - The terms of the Stipulation and of this Judgment shall be forever binding on the Defendants, Lead Plaintiffs and all other Class Members (regardless of whether or not any individual Class Member submits a Proof of Claim Form or seeks or obtains a distribution from the Net Settlement Fund), as well as their respective heirs, executors, administrators, predecessors, successors, affiliates and assigns. The Persons listed on Exhibit 1 hereto are excluded from the Class pursuant to request and are not bound by the terms of the Stipulation or this Judgment.

7. **Releases** - The releases as set forth in paragraphs 5 and 6 of the Stipulation, together with the definitions contained in paragraph 1 of the Stipulation relating thereto, are expressly incorporated herein in all respects. Accordingly, this Court orders that:

(a) Without further action by anyone, and subject to paragraphs 8 and 9 below, upon the Effective Date of the Settlement, Lead Plaintiffs, Class Representatives, and each of the other Class Members, on behalf of themselves, their heirs, executors, administrators, predecessors, successors, affiliates and assigns, shall be deemed to have, and by operation of law and of this Judgment shall have, fully, finally and forever compromised, settled, released, resolved, relinquished, waived, discharged and dismissed each and every Released Lead Plaintiffs' Claim against the Defendants and the other Defendants' Releasees and shall forever be enjoined from prosecuting any or all of the Released Lead Plaintiffs' Claims against any of Defendants' Releasees. This Release shall not apply to any Person listed on Exhibit 1 hereto.

(b) Without further action by anyone, and subject to paragraphs 8 and 9 below, upon the Effective Date of the Settlement, each of the Defendants and each of the other Defendants' Releasees, on behalf of themselves, their heirs, executors, administrators, predecessors, successors, affiliates and assigns, shall be deemed to have, and by operation of law and of this Judgment shall have, fully, finally and forever compromised, settled, released, resolved, relinquished, waived, discharged and dismissed each and every Released Defendants' Claim against all of the Lead Plaintiffs' Releasees and shall forever be enjoined from prosecuting any or all of the Released Defendants' Claims against any of the Lead Plaintiffs' Releasees. This Release shall not apply to any Person listed on Exhibit 1 hereto.

8. Notwithstanding ¶¶ 7(a) – (b) above, nothing in this Judgment shall bar any action by any of the Parties to enforce or effectuate the terms of the Stipulation or this Judgment.

9. Notwithstanding ¶¶ 7(a) – (b) above, nothing in this Judgment shall release any of the Excluded Claims (as that term is defined within paragraph 1(uu) of the Stipulation).

10. **<u>Corporate Governance Enhancements</u>** – The Corporate Governance Enhancements as set forth in paragraphs 36 and 37 of the Stipulation are expressly incorporated herein in all respects. Accordingly, this Court orders that:

(a) BoA will, within forty-five (45) days following the entry of this Judgment, implement the following Corporate Governance Enhancements, and will maintain such Corporate Governance Enhancements through the later of January 1, 2015 or eighteen (18) months following entry of this Judgment.

(i) BoA will amend Section 3 of its Corporate Governance Guidelines to read, in relevant part, as follows:

"***Majority Voting for Directors***. In an uncontested election, a director who fails to receive the required number of votes for re-election in accordance with the Bylaws shall offer to resign. In addition, a director whose resignation is under consideration shall abstain from participating in any recommendation or decision regarding that resignation. The Corporate Governance Committee shall make a recommendation to the Board as to whether to accept or reject the tendered resignation, or whether other action should be taken. The Corporate Governance Committee and the Board, in making their decisions, may consider any factor or other information that they deem relevant. The Board shall act on the tendered resignation, taking into account the Corporate Governance Committee's recommendation, and shall publicly disclose its decision regarding the resignation and the basis for the decision within ninety (90) days after the results of the election are certified. If the resignation is not accepted, the director will continue to serve until the next annual meeting of stockholders and until the director's successor is elected and qualified. The Board shall not permit the director to stand for election at the next annual meeting."

(ii) BoA will amend Section 8 of its Corporate Governance Guidelines to read, in relevant part, as follows:

"***Minimum Stock Ownership by Executive Officers and Directors***. In order to align the interests of the Company's executive officers and directors with those of the Company's stockholders, the Board has adopted the following minimum stock ownership requirements: (a) the Chief Executive Officer shall hold at least 500,000 shares of the Company's common stock and retain at least 50% of the net after-tax shares from future equity awards until retirement; (b) other executive officers shall hold at least 300,000 shares of the Company's common stock and retain at least 50% of the net after-tax shares from future equity awards until the ownership guideline is achieved; and (c) non-management directors are required to hold and cannot sell the restricted stock they receive as compensation (except as necessary to pay taxes upon vesting) until termination of their service. The Company shall disclose in its annual proxy statement any failure of any director to comply with the stock ownership guidelines. All full value shares and units beneficially owned by executive officers and directors are included in the calculation; performance contingent shares and units are included in the calculation when earned; and stock options are not included. Newly appointed executive officers will have up to five years to achieve compliance."

(iii) In connection with the establishment of the Corporate Development Committee, BoA will amend the charter for the Corporate Development Committee to read, in relevant part, as follows:

"***Committee Authority and Responsibilities***. In carrying out its oversight responsibilities as set forth above, the Committee shall oversee senior management's establishment of policies and guidelines, to be adopted by the Board, establishing appropriate systems (including policies, procedures and/or management committees) to ensure that Applicable Transactions are vetted carefully and that adequate due diligence is performed prior to Board approval of any Applicable Transaction. Among other things, the Committee shall ensure that the Chief Executive Officer and the Board are informed with respect to any bonus or incentive compensation agreements with an actual or estimated aggregate value exceeding 5% of the acquisition price at the time the Applicable Transaction is announced, which agreements have been negotiated in connection with an Applicable Transaction and are based on or otherwise related to such Applicable Transaction. In connection with any Applicable Transaction to be submitted to the Board for approval, the Committee shall meet at least once, telephonically or in person, with members of senior management to review management's compliance with applicable policies and procedures related to the Company's consideration of the Applicable Transaction, prior to its presentation to the Board for approval."

(b) BoA will maintain the following corporate governance reforms (agreed to previously with the SEC) through January 1, 2015:

(i) that all compensation committee members be super-independent;

(ii) that BoA publish on its website the incentive compensation principles and the requirement that it adhere to them;

(iii) that BoA have its Chief Executive and Chief Financial Officers certify that they have reviewed all annual and merger proxy statements;

(iv) that BoA maintain a consultant to the Compensation Committee who would report solely to the Compensation Committee and would be "independent" under all applicable NYSE rules and guidelines concerning compensation consultants; and

(v) that BoA provide shareholders with an annual non-binding "say on pay" with respect to executive compensation.

(c) The Court shall retain jurisdiction until the end-date of the Corporate Governance Enhancements on the later of January 1, 2015 or eighteen (18) months following entry of this Judgment to enforce any of the conditions set forth in this paragraph 10.

11. **Complete Bar Order** -

(a) Any and all Persons are permanently barred, enjoined and restrained, to the fullest extent permitted by applicable law, from commencing, prosecuting or asserting any claim for indemnity or contribution against any Defendants' Releasees (or any other claim against any Defendants' Releasees where the alleged injury to such Person is that Person's actual or threatened liability to the Class or a Class Member in the Action), based upon, arising out of or related to the Released Lead Plaintiffs' Claims, whether arising under state, federal or foreign law, as claims, cross-claims, counterclaims, or third-party claims, whether asserted in the Action, in this Court, in any federal or state court, or in any other court, arbitration proceeding, administrative agency, or other forum in the United States or elsewhere. However, with respect to any judgment that the Class or a Class Member may obtain against such Person based upon, arising out of or relating to any Released Lead Plaintiffs' Claim belonging to the Class or a Class Member, that Person shall be entitled to a credit of the greater of (i) an amount that corresponds to the percentage of responsibility of the Defendants for the loss to the Class or the Class Member or (ii) the amount paid by or on behalf of the Defendants to the Class or the Class Member for common damages.

(b) Except as provided in ¶ 11(d) below, each and every one of Defendants' Releasees is hereby permanently barred, enjoined and restrained, to the fullest extent permitted by applicable law, from commencing, prosecuting or asserting any claim for indemnity or contribution against any Person (or any other claim against any such Person where the alleged injury to such Defendants' Releasee is that Defendants' Releasee's actual or threatened liability to the Class or a Class Member in the Action), based upon, arising out of or related to the Released Lead Plaintiffs' Claims, whether arising under state, federal, or foreign law, as claims, cross-claims, counterclaims, or third-party claims, whether asserted in the Action, in this Court, in any other federal or state court, or in any other court, arbitration proceeding, administrative agency, or other forum in the United States or elsewhere.

(c) Nothing in this Complete Bar Order shall prevent any Person listed on Exhibit 1 hereto from pursuing any Released Lead Plaintiffs' Claim against any Defendants' Releasees. If any such Person pursues any such Released Lead Plaintiffs' Claim against any Defendants' Releasees, nothing in this Complete Bar Order or in the Stipulation shall operate to preclude such Defendants' Releasees from asserting any claim of any kind against such Person, including any Released Defendants' Claims (or seeking contribution or indemnity from any Person, including any co-Defendant in the Action, in respect of the claim of such Class Member who is excluded from the Class pursuant to request as set forth on Exhibit 1 hereto.

(d) Notwithstanding anything in sub-paragraphs 11(a)-(c) above, nothing in the Stipulation or in sub-paragraphs 11(a)-(c) above shall operate to (a) preclude the Defendants' Releasees from asserting any claims against their own insurers; or (b) preclude the Defendants or any other Person from asserting any claims, including claims for contribution or indemnity, against any Person, including any Defendant in this Action, in connection with or arising out of the Excluded Claims (as that term is defined within paragraph 1(uu) of the Stipulation).

12. **Rule 11 Findings** - The Court finds and concludes that the Parties and their respective counsel have complied in all respects with the requirements of Rule 11 of the Federal Rules of Civil Procedure in connection with the commencement, maintenance, prosecution, defense and settlement of the Action.

13. **No Admissions** - Neither this Judgment, nor the Term Sheet, nor the Stipulation (whether or not consummated) nor the negotiation of the Stipulation , nor any proceedings taken pursuant thereto:

(a) shall be offered against any of the Defendants' Releasees as evidence of, or construed as, or deemed to be evidence of any presumption, concession, or admission by any of the Defendants' Releasees with respect to the truth of any fact alleged by Lead Plaintiffs or the validity of any claim that was or could have been asserted or the deficiency of any defense that has been or could have been asserted in this Action or in any litigation, or of any liability, negligence, fault, or other wrongdoing of any kind of any of the Defendants' Releasees;

(b) shall be offered against any of the Lead Plaintiffs' Releasees, as evidence of a presumption, concession or admission with respect to any liability, negligence, fault or wrongdoing of any kind, or in any way referred to for any other reason as against any of the Lead Plaintiffs' Releasees, in any civil, criminal or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of the Stipulation; provided, however, that if the Stipulation is approved by the Court, the Parties and the Releasees and their respective counsel may refer to it to effectuate the protections from liability granted hereunder or otherwise to enforce the terms of the Settlement;

(c) shall be construed against any of the Releasees as an admission, concession, or presumption that the consideration to be given hereunder represents the amount which could be or would have been recovered after trial; or

(d) shall be construed against any of the Lead Plaintiffs' Releasees as an admission, concession, or presumption that any of their claims are without merit, that any of the Defendants' Releasees had meritorious defenses, or that damages recoverable under the Second Amended Complaint would not have exceeded the Settlement Amount.

14. **Retention of Jurisdiction** - Without affecting the finality of this Judgment in any way, this Court retains continuing and exclusive jurisdiction over: (a) the Parties for purposes of the administration, interpretation, implementation and enforcement of the Settlement; (b) the disposition of the Settlement Fund; (c) any motion for an award of attorneys' fees and/or Litigation Expenses by Co-Lead Counsel in the Action that will be paid from the Settlement Fund; (d) any motion to approve the Plan of Allocation; (e) any motion to approve the Class Distribution Order; and (f) the Class Members for all matters relating to the Action.

15. Separate orders shall be entered regarding approval of a plan of allocation and the motion of Co-Lead Counsel for an award of attorneys' fees and reimbursement of Litigation Expenses. Such orders shall in no way affect or delay the finality of this Judgment and shall not affect or delay the Effective Date of the Settlement.

16. **Modification of the Agreement of Settlement** - Without further approval from the Court, Lead Plaintiffs and Defendants are hereby authorized to agree to and adopt such amendments or modifications of the Stipulation or any exhibits attached thereto to effectuate the Settlement that: (i) are not materially inconsistent with this Judgment; and (ii) do not materially limit the rights of Class Members in connection with the Settlement. Without further order of

the Court, Lead Plaintiffs and Defendants may agree to reasonable extensions of time to carry out any provisions of the Settlement.

17. **Termination** - If the Effective Date does not occur or the Settlement is terminated as provided in the Stipulation, then this Judgment (and any orders of the Court relating to the Settlement) shall be vacated, rendered null and void and be of no further force or effect, except as otherwise provided by the Stipulation. Within fourteen (14) business days after joint written notification of termination is sent by counsel for BoA and Co-Lead Counsel to the Escrow Agent pursuant to the terms of the Escrow Agreement, the Settlement Fund (including accrued interest thereon and any funds received by Co-Lead Counsel consistent with ¶ 19 of the Stipulation), less any expenses and any costs which have either been disbursed or incurred and chargeable to Notice and Administration Costs and less any Taxes paid or due or owing shall be refunded by the Escrow Agent to BoA. In the event that the funds received by Co-Lead Counsel consistent with ¶ 19 of the Stipulation have not been refunded to the Settlement Fund within the fourteen (14) business days specified in this paragraph, those funds shall be refunded by the Escrow Agent to BoA immediately upon their deposit into the Escrow Account consistent with ¶ 19 of the Stipulation.

18. **Entry of Final Judgment** - There is no just reason to delay the entry of this Judgment as a final judgment in this Action. Accordingly, the Clerk of the Court is expressly directed to immediately enter this final judgment in this Action.

SO ORDERED this 8th day of April, 2013.

The Honorable P. Kevin Castel
United States District Judge

686669

EXHIBIT 1

Persons Excluded from the Class Pursuant to Request

1. 1976 Real Estate Trust UTA DTD 12/28/76 FBO Richard Finger
   Houston, TX

2. The 1991 Jeffrey R. Parker Family Trust
   Englewood, NJ

3. The 1994 Drew E. Parker Family Trust
   Englewood, NJ

4. The 1994 Julie P. Mantell Family Trust
   Memphis, TN

5. 2008 SRG Trust
   New York, NY

6. Benjamin and Caroline Abrams Educational Trust
   San Francisco, CA

7. Zachary Abrams
   San Francisco, CA

8. Martha B. Adair Revocable Trust, Barbara A. Roach, Trustee
   Boulder, CO

9. Melvin L. Adams
   Federalsburg, MD

10. John R. Agnew
    Fort Myers, FL

11. Harry J. and Patricia N. Agoff Tr UA 08-APR-97 Harry J. Agoff and Patricia N. Agoff Revocable Trust
    San Mateo, CA

12. Dene Miller Alden, Trustee
    The Dolores E. Miller Trust
    Cincinnati, OH

13. Peter P. Alessandro
    Clifton Park, NY

14. Darlene P. Allen (IRA)
    Clarksburg, MD

15. Srinivasa R. Allu
Quincy, MA

16. Anita L. Altheide TTEE
Charles R. Altheide TTEE
Anita L. Altheide Living Trust
U/A DTD 06/12/97
Hannibal, MO

17. Ambassador Life Insurance
Company
Houston, TX

18. Amundi
c/o DRRT
Miami, FL

19. Ronald R. Anderson
Lincoln, NE

20. Wilma Anderson
Keosauqua, IA

21. Anne Duchess of Westminster's
Charity
Eccleston Chester, England

22. Michel G. Araman &
Adele C. Araman
Buena Park, CA

23. Donald Arkley
Redwood City, CA

24. Robert Arndt
TR UA 07/26/1990
Redington Shores, FL

25. Margaret Arsenault;
Margaret Arsenault &
Edward Arsenault, JT TEN
Stow, MA

26. Anna H. Ashby
Churchville, VA

27. James C. Atkins &
Leola T. Atkins
Richmond, VA

28. Barbara H. Babcock &
Arthur E. Babcock
Carmel Valley, CA

29. Richard J. Babiars
Auburn, NY

30. Robert J. Baldes, Sr.
Albany, NY

31. William Proctor Ball
Grifton, NC

32. Grace Louise Baltusnik
Charlotte, NC

33. Banque Genevoise de Gestion SA
on behalf of its clients
Geneve, Switzerland

34. Barbara Barbaria
San Francisco, CA

35. Brian Barbaria
San Francisco, CA

36. Janet D. Barker
Black Diamond, WA

37. Melvin K. Barneko &
Alice M. Barneko, JT TEN
Valparaiso, IN

38. John Baron and Etta Baron
Newtown, PA

39. Doreen C. Barrows
Leesburg, FL

40. Charles R. Bassett
Newton Highlands, MA

41. Gerald D. Bastin &
Wendy Bastin
Arden, NC

42. Dorothy Anne Bayliss
Charlotte, NC

43. F. James Becher, Jr.
Greensboro, NC

44. Robert Beck
Boothwyn, PA

45. Elizabeth Jeannette Beighau
Temple City, CA

46. Fannie Bond Bellamy
Windsor, NC

47. Merle Bellis
Ellensburg, WA

48. Verna E. Belmer
Citrus Heights, CA

49. Robert Faro Belport & Christine
E. Belport JT TEN
Green Bay, WI

50. Melvin Belsky
Alamo, CA

51. James Thomas Benge &
Elizabeth Benge TR
UA Nov. 18, 1992
The Benge Revocable Trust
Pryor, OK

52. Joyce J. Berdal &
Raymond J. Berdal JT TEN
Madison, WI

53. Janet T. Berrier
Groton, VT

54. Mark L. Bigelow
Mifflintown, PA

55. James K. Biggs, Jr.
Houston, TX

56. Emily Boell
Corona, CA

57. Joan Elaine Boone
Berkeley, CA

58. Joseph Borello
New York, NY

59. Louise M. Botica
Debary, FL

60. Merle Lee Bourn (Roth IRA)
La Grange, IL

61. Thomas David Bourne, MD
Charlottesville, VA

62. Margaret A. Bowden (Roth IRA)
North Providence, RI

63. Thomas H. Bowden
North Providence, RI

64. Donald C. Boyer
Oakville, IA

65. Jeannette Bragg
Enfield, CT

66. Anne M. Braisted, Trustee
Paul W. Braisted Family Trust
Columbia, MO

67. James H. Brammer, Jr.
Lynchburg, VA

68. Preston R. Branksy &
Zena Bransky
Glencoe, IL

69. Sherry Philippet Brewster
Newport, WA

70. Adelina M. Bride
Portland, OR

71. Iva H. Brown
Nashville, TN

72. Katherine Ann Brown
Litchfield Park, AZ

73. Margaret Brown
Montrose, CO

74. Donald Brunell
Walnut Creek, CA

75. Lillian F. Brunell
Livingston, NJ

76. Roy Lewis Bubb
St. Petersburg, FL

77. Charles F. Buckland &
Carol J. Buckland
Alexander, NC

78. Robert W. Buckner
Floral Park, NY

79. D. Landon Buffington
Smyrna, GA

80. Ilya Burlak
Marlboro, NJ

81. George A. Burton, Jr.
Rocky Mount, NC

82. Estate of Robert D. Busch
Sunnyvale, CA

83. John A. Bushong
Arlington, VA

84. Jean Sueanne Butler
Atlanta, GA

85. Martha Butterfield
Chattanooga, TN

86. Michael A. Cahoon
Engelhard, NC

87. Ronald Wayne Campbell
Jackson, MI

88. J. Alex Canepari
Memphis, TN

89. Giuseppe Caprio & Eva Caprio
Bologna, Italy

90. Vincent Carlson
Bloomington, IL

91. The Carnegie Family Trust
U/A DTD 09/02/98
James & Susan Carnegie TTEES
Minden, NV

92. Hilda M. Carter & John M. Carter
(deceased)
Jackson, GA

93. Bill Sweeney Castillo Trust,
Willard S. Sweeney, Trustee
Roscommon, MI

94. Nancy A. Castleberry
Winton, CA

95. Marie G. Catanese
Estero, FL

96. Jane L. Caviglia
Visalia, CA

97. Shirley M. Cawley
Aurora, IL

98. Caroline Chan
Murrieta, CA

99. Carmen Chavez-Lopez
Pico Rivera, CA

100. Andrew Cheesman
Newburgh, NY

101. Frances R. Cherry TTEE
FBO Frances R. Cherry Trust
U/A/D 8/26/91
Spartanburg, SC

102. Chickasaw Foundation
Ada, OK

103. Hetty Chong &
Russell Chong
Oakland, CA

104. Razzakul H. Chowdhury
San Luis Obispo, CA

105. Lenore C. Christel
Manitowoc, WI

106. Josephine Ciufo
Greece, NY

107. Eleanor Clements, Trustee
UA 19-April-95 Eleanor
Clements Living Trust
Norwood, NJ

108. David R. Clinton
Bullhead City, AZ

109. Marguerite S. Cockey Dec'd TR
Marguerite S. Cockey Trust
Barbara C. Thompson, Executor
Modesto, CA

110. Cheryl Coddington
Jupiter, FL

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111. Philip M. Comerford, Trustee
Trust U/A DTD 4/30/1926 by
Percival Smith Hill II
Naples, FL

112. John Consolo
Hawthorne, NJ

113. Frank B. Contratto
Aurora, IL

114. Glen Dale Conway &
Elvira Conway
St. Louis, MO

115. Robert P. Cook, Jr.
Lafayette, CA

116. Bruce Cook
Westwood, MA

117. Charlotte C. Cook (deceased)
Lafayette, CA

118. Vergie Cooper
Wilmington, DE

119. Wheirda M. Cooper
Magnolia, AR

120. J. Robert Corson
Cottonwood, AZ

121. Harold D. Cox &
Marilyn E. Fisher
Hubbard, OR

122. Charles K. Craig
Charlotte, NC

123. Ann Elizabeth Craven
North Wilkesboro, NC

124. Cyril E. Crawley
Glocester, RI

125. Ann Crossland
Pasadena, CA

126. Robert E. Crowder &
Dorothy A. Crowder
TR UA 5/29/91
Crowder Family Trust
Carson City, NV

127. Oscar E. Cruz
Pinole, CA

128. Thomas L. Curth
Indio, CA

129. Dade T. Curtis
Dunlap, IL

130. Deanna M. Dack
Oakley, CA

131. Marion E. Dalbey
Grover Beach, CA

132. Robert Daniel
Huntington Beach, CA

133. Darrow Family Bypass Trust
Elk Grove, CA

134. Leslie Lamont Darrow (deceased) & H. Marie Darrow (deceased) & their survivors
Elk Grove, CA

135. Brian L. Daves
Charlotte, NC

136. Gloria M. Davies
Bryans Road, MD

137. Dorothy M. Davis
Nanjemoy, MD

138. Kenneth J. Davis
San Diego, CA

139. Martha Ann Davis
Fresno, CA

140. Patricia R. Davis
Manchester, NH

141. Thomas Lee Davis
Seal Beach, CA

142. Bruck Dawit
Annandale, VA

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143. Roy E. Day
Decatur, GA

144. Joyce Kathleen Debusk
Glade Spring, VA

145. Anita Degreef
Sint-Pieters-Leeuw, Belgium

146. Deka International Luxemburg S.A.
Luxembourg

147. Deka Investment GmbH
Frankfurt, Germany

148. Robert L. Deleeuw
Kalamazoo, MI

149. Estate of Mamie A. Delzell
Pawleys Island, SC

150. Frances A. White DeSear
Brandon, FL

151. Peter R. Disciascio & Joyce M. Disciascio, JT WROS
Ocean City, NJ

152. Thelma D. Domenicone
San Fernando, CA

153. Betty P. Donohoe
Fairfax, VA

154. Taso E. Dontchos
Centennial, CO

155. Gertrude M. Doody
Arlington, MA

156. Kathleen L. Dooley Maley
Indian Trail, NC

157. William S. Dorsey
Owings Mills, MD

158. Laura Dawn Doscher
Rockville, MD

159. Helen M. Douglas
Fairport, NY

160. Dan C. Doyle
Torrance, CA

161. Donie B. Driver
Commerce, GA

162. Estate of Adeline A. Duecker
Madison, WI

163. Dorothy A. Duffy
Irmo, SC

164. Dorothy Dufner
Sun Lakes, AZ

165. Walter Dufner
Sun Lakes, AZ

166. Burl Duncan
Linville, NC

167. Jason Dupuis
Berlin, MD

168. John F. Duran, Jr. &
Ruth M. Duran, JT TEN
Woburn, MA

169. Elizabeth L. Dyer, TTEE
Elizabeth L. Dyer Rev Trust
UAD 4/27/07
St. Paul, MO

170. Lisa F. Dylan & Gary F. David,
Trustees, David Revocable
Intervivos Trust
Fred David (deceased)
Sacramento, CA

171. Virgie L. Earl
Sun City Center, FL

172. Alireza Ebrahim (aka Ali R.
Ebrahimi) & Tahereh Jamshidi
Falls Church, VA

173. Mary L. Edmonds
Union City, CA

174. Robert Elkins
New Glarus, WI

175. Wayne Ellithorpe, TTEE &
Annette Marie Ellithorpe, TTEE
Prescott, AZ

176. Marlyn S. Eltanal
TR UA 07-OCT-82
Eltanal Family Residual Trust
Scottsdale, AZ

177. Joyce Empson
Scio, NY

178. EOSCO (nominee partnership),
by Margaret K. Gutmann,
General Partner
Middletown, CT

179. Irmgard Erickson
Arlington, VA

180. Frances P. Eriksen
Sun City West, AZ

181. Susan F. Evans &
Nancy F. Henderek, Trustees
Weston P. Figgins Trust
U/A DTD 2/9/1989
Peabody, MA

182. James L. Faircloth &
MaeLynn Faircloth
Statesville, NC

183. Estate of Lillian H. Falk
Camp Hill, PA

184. Ernest Farmer &
Caroline W. Farmer
Silver Springs, FL

185. Alvin J. Faulkner
Corinth, TX

186. Lorraine Ferrall
Simi Valley, CA

187. Ann S. Ficatier
Poissy, France

188. Jeremy Fineberg
Cedarhurst, NY

189. Martin Fineberg
Teaneck, NJ

190. Finger Interests Number One,
Ltd.
Houston, TX

191. Richard B. Finger
Houston, TX

192. Marie M. Fiorella
Glen Rock, NJ

193. Walter C. Fisch & Ann G. Fisch, Joint Acct with Rights of Survivorship
Savannah, GA

194. Estate of Louis H. Flanders
East Amherst, NY

195. Angela M. Flanery
Louisville, KY

196. Robert E. Fletcher, Ramona I. Fletcher
Dixon, CA

197. Barbara C. Flowers
Wilson, NC

198. Lonnie L. Floyd, Jr. (deceased)
Forest, VA

199. Judith M. Flynn
Corvallis, OR

200. Viola Fogg
North Berwick, ME

201. Dan B. Foland
Wilmington, OH

202. Bruce Forsberg
Escondido, CA

203. Robert L. Freeman
Allentown, NJ

204. Catherine French
Moorestown, NJ

205. Bonnie Friedman
Cherry Hill, NJ

206. Harvey M. Mitnick, as Executor of the Estate of Nathan A. Friedman; Nathan A. Friedman (Rollover IRA)
Haddonfield, NJ

207. Nicholas Fung
New York, NY

208. Linda Gaddini, Custodian for
Gregory A. Gaddini
San Francisco, CA

209. John M. Garrett
Atlanta, GA

210. Estate of Mary Ann Gates
Atlanta, GA

211. Mary H. Gault, Trustee
Richard H. & Mary H. Gault
Trust
Vassar, MI

212. Medric Gay
St. Charles, MO

213. Margaret L. Gear
Sunnyvale, CA

214. Megan Gebhardt
Lake Ozark, MO

215. Virginia L. Geck,
St. Georgen, Germany

216. Elizabeth Geers Tr.
Revocable Trust UA 12/21/01
Concord, NH

217. Robert Gegnas
Jupiter, FL

218. Garit Gemeinhardt
Waxhaw, NC

219. Dean Gentry
St. Maries, ID

220. J. B. George
Granbury, TX

221. Nancy Gerard
Minooka, IL

222. Karen Gerstein
Quebec, Canada

223. Bernard R. Gervais &
Margaret E. Gervais, Trustees
Yorktown, VA

224. Mary M. Gibbs
Cohasset, MA

225. Kenneth W. Gibson
Gretna, VA

226. Shirley S. Gibson
Gretna, VA

227. Deborah Hitchcock Gilbert
Merrimac, MA

228. Marvel S. Gill Revocable Trust
Marvel S. Gill, Trustee
Meredith Frenette, Secondary
Trustee
Essex, CT

229. Anita Giovannoni
Walnut Grove, CA

230. William A. Glenn &
Linda D. Glenn
Carlinville, IL

231. Patricia Glisson
Riverview, FL

232. Eugenia C. Glow
San Diego, CA

233. Jill Wender Goldstein
Suffern, NY

234. Antone R. Gonsalves
New Bedford, MA

235. Robert J. Goodwin
Rochester, NY

236. Government of Singapore
Investment Corporation Pte Ltd.
c/o DRRT
Miami, FL

237. Constance C. Govi, Trustee
Govi Residual Trust UA 9-8-06
San Rafael, CA

238. Constance C. Govi, Trustee
Govi Survivor Trust UA 9-8-06
San Rafael, CA

239. Steve Graber
New York, NY

240. Beverly Ann Gracia &
Elsie Souza JT TEN
New Bedford, MA

241. Charles R. Grady
Raleigh, NC

242. Lloyd D. Graham
Knob Knob Noster, MO

243. William L. Graham
Davie, FL

244. Deanna L. Gratrix
Palmer, AK

245. John Green
Littleton, CO

246. Frank V. Grimaldi
Belmont, MA

247. Kristin I. Grimes &
Daniel E. Grimes
Las Vegas, NV

248. Jess Edward Grissom &
Betty Ann Grissom, JTWROS
Texarkana, TX

249. Louie Grob, Jr.
Williams, CA

250. Richard J. Groleau &
Rosa Lee M. Groleau, Trustees
Richard J. Groleau & Rosa Lee
M. Groleau Revocable Living
Trust Sallisaw, OK

251. Robin Poston Growley
Charlotte, NC

252. Charles J. Guenther
Egg Harbor City, NJ

253. Susan Jane Gustafson &
Paul Ellis Gustafson JT TEN
Mesa, AZ

254. Barbara T. Guthneck
Dallas, TX

255. Dian Gutierrez
Lake Villa, IL

256. Betty S. Hair
Chapin, SC

257. The Hamer Living Trust
Robert C. Hamer, TTEE
Lucerne S. Hamer, TTEE
Carpinteria, CA

258. Carl A. Hamill
Moon Township, PA

259. Jenny Hann
Hillsboro, OR

260. Helen S. Hansen
Pasadena, CA

261. Gary Joseph Hardegger
Salem, OR

262. Claudia J. Harewood
Mattapan, MA

263. Melvin A. Harkins
Bend, OR

264. Marcella Harris
Glendale, CA

265. George E. Harrison
Crossville, TN

266. Alice C. Harwick
Fort Worth, TX

267. Eugene H. Hasenberg & Ruth E. Hasenberg Trust
Palm Harbor, FL

268. Tanya M. Hassell
Fort Worth, TX

269. Winfred K. Hassell
Farmersville, TX

270. Janice Hawkins &
Norman Hawkins
Sherman, TX

271. Norma Louise Hayden Family Trust UA 22-NOV-88
Norma Louise Hayden, Trustee
Yorba Linda, CA

272. Alice E. Haynes
Medford, MA

273. Steven J. Hays
Kennewick, WA

274. Steven J. Hays TR. UA 05/01/92 Georgia Phillips Hays Irrevocable Trust
Kennewick, WA

275. Ernest Headrick
Mira Loma, CA

276. Linda Sue Headstream
Katy, TX

277. Gloria Jean Helms
Chickasha, OK

278. Harriette H. Hendrix
Thomaston, GA

279. Roy D. Henrichson & Helen M. Henrichson, Trustees
Henrichson Trust
Franklin, TX

280. Kelly Dyan Hill (Roth IRA)
Concord, NC

281. Gwen F. Hintzen, aka Gwendolyn Hintzen
Stockton, CA

282. Leo Wesley Hoag (deceased)
Salinas, CA

283. Lyle A. Hoefer & Joan M. Hoefer, JTWROS
Littleton, CO

284. Lyle A. Hoefer TOD Joan M. Hoefer
Littleton, CO

285. Wayne Hoelscher
Keller, TX

286. Darlene M. Holben
Highlands Ranch, CO

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287. Estate of Harlan H. Holben
Highlands Ranch, CO

288. Nells S. Hoogendam
New Bern, NC

289. Louis Gordon Hooper
Tahoe City, CA

290. R. Hopewell
Riverdale, GA

291. Katherine A. Horvath
Hancock, MI

292. Patrick J. Gillbride, Trustee of the
Mildred Mae Howell Trust
Burlingame, CA

293. Marcella T. Hoyt
Pennington, NJ

294. Doris Hrinda
Gwynedd Valley, PA

295. HSBC Trinkaus Investment
Managers S.A.
c/o DRRT
Miami, FL

296. HSBC Trustee (Singapore)
Limited, as trustee for OPC
Executive
(FUS) Scheme
Singapore

297. Sarah Hudson
Tyringham, MA

298. Chase D. Hughes &
Cathy A. Hughes
Staunton, VA

299. Marmion Duane Hull
Pacific Palisades, CA

300. Jose Icasiano, Jr.
Vallejo, CA

301. Hiromu Iida
Burbank, CA

302. International Fund Management
S.A.
Luxembourg

303. Internationale
Kapitalanlagegesellschaft mbH
c/o DRRT
Miami, FL

304. Laura A. Iremonger
Pittsburg, CA

305. Shinichi Ishikawa & Myrna E.
Ishikawa JT TEN
Camden, AR

306. E. George Iversen (deceased)
Houston, TX

307. Roman & Tracey Iwanczuk
TTEE Iwanczuk Family Trust
dated 10/29/1999
Cradley, United Kingdom

308. George T. Jackson &
Mildred V. Jackson, Trustees
TR UA March '98
The George and Mildred Jackson
Family Trust DTD 3/18/98
Spring Valley, CA

309. Jalenak Holdings Partnership
Memphis, TN

310. Leo R. Jalenak, Jr.
Memphis, TN

311. Peggy E. Jalenak
Memphis, TN

312. Preston and Beverley James
TTEES
Davis, CA

313. Vivian L. Jamison
Yoe, PA

314. Jax II Inc.
Brooksville, FL

315. Richard Jazwin & Jan Jazwin
Phoenix, AZ

316. William H. Jeffress, Jr.
Washington, DC

317. Estate of Rebecca M. Jenkins
Rehoboth, DE

318. Peggy M. Jennings, TTEE
UA DTD 7/20/01
The Jennings Living Trust
Pollock Pines, CA

319. Norman Jernberg (deceased) &
Kayette C. Jernberg
Carson City, NV

320. Willy H. Jeromin (IRA)
New London, NH

321. Jerry E. Finger 1976 Childrens
Trust, FBO Walter G. Finger
Houston, TX

322. Jerry E. Finger Family Trust
DTD 12/22/89
FBO Walter G. Finger
Houston, TX

323. Jerry E. Finger Family Trust
UTA DTD 12/22/89
FBO Richard Finger
Houston, TX

324. Kenneth Alan Jewett, Trustee
Bruce Willits King Family Trust
Nevada City, CA

325. Clarence F. Johnson, Jr.
Harvest, AL

326. Averill Ann Johnson Walters
Corpus Christi, TX

327. Alphonse I. Johnson &
Veronica E. Johnson
Newark, IL

328. Lawrence W. Johnson, TTEE
UA DTD 2/5/03
Johnson Family Trust
Rocklin, CA

329. Michael D. Johnson
Leo, IN

330. Robert B. Johnson &
Portia J. Johnson
Wernersville, PA

331. Roy O. Johnson
Keene, NH

332. Cora M. Jones
Coeburn, VA

333. Cora M. Jones &
Herbert Donald Jones (deceased)
Coeburn, VA

334. Elise U. Jones
Mt. Pleasant, SC

335. Rotha J. Jones
Green Bay, VA

336. Leland D. Jungmeyer &
Betty M. Jungmeyer JT TEN
Lohman, MO

337. Carolyn Kachmann
Hilton Head, SC

338. Norman R. Kahant (deceased)
Lake Worth, FL

339. Patricia A. Karsten (Roth IRA)
Boerne, TX

340. Aaron Katz
New York, NY

341. Joel R. Katz, individually and as
Trustee for Margolin Family
Trust A, Margolin Family Trust
B, and Joel R. Katz Family Trust
New York, NY

342. David Hersholt Kauffman &
Ruth Kauffman, Trustees
Kauffman Family Trust
Dated July 20, 1994
Los Angeles, CA

343. Ellaneita Keenum TTEE
Bypass Trust w/ Keenum Family
Living Trust
Farmers Branch, TX

344. Gary Keierleber &
Beverly Keierleber
Camano Island, WA

345. Frederick C. Kemmerley
Elloree, SC

346. Peter J. Kennedy (deceased) &
Ethel V. Kennedy JT TEN
Sea Girt, NJ

347. Helen M. Kerbavaz
Richmons, CA

348. George A. Keyser
Ramona, CA

349. Dr. William J. Kinnard, Jr.
Baltimore, MD

350. James R. Klaus
Bristol, PA

351. Lisa Kleback (as beneficiary of
Ruth A. Nagy)
Gainesville, VA

352. Edward F. Kline, Jr.
La Mesa, CA

353. Anne P. Knecht
Emmaus, PA

354. Ken Koch &
Luretta Koch
Lawrenceburg, TN

355. Rebecca Koraska &
John T. Koraska (deceased)
Tyler, TX

356. Yolanda B. Korth
Cypress, TX

357. Andrew J. Kosinski & Margaret
A. Kosinski
TR UA 5/18/1998
Kosinski Trust
Winter Springs, FL

358. Loretta M. Kuhn
San Diego, CA

359. Michael Kurnitz Irrevocable
Living Trust
Harold Kurnitz, Trustee
New York, NY

360. Ruth Kurnitz Irrevocable Living
Trust, Harold Kurnitz, Trustee
New York, NY

361. Pamela Kyu
San Francisco, CA

362. Gloria C. Ladore
Laconia, NH

363. Mary Margaret Lamberson
Monett, MO

364. Silas B. Langfitt III TTEE
Silas B. Langfitt III
Revocable Trust DTD January
27, 2000
Thomasville, NC

365. Lansdowne Developed Markets
Fund Ltd.
c/o DRRT
Miami, FL

366. Lansdowne Developed Markets
Fund, L.P.
c/o DRRT
Miami, FL

367. Lansdowne Global Financials
Fund Limited
c/o DRRT
Miami, FL

368. Lansdowne Global Financials
Fund, L.P.
c/o DRRT
Miami, FL

369. Linda M. LaPointe
Washington, UT

370. Robert H. Largey &
Marguerita Quinn Largey
Union, NJ

371. Charlotte L. Larrick
TR UA 2/25/1990 Charlotte Lee
Larrick Trust
Columbia, MO

372. John Laubach &
Marilyn Laubach
Shelton, WA

373. Jean K. Lauder &
W. B. Lauder, Jr. (deceased)
Weslaco, TX

374. Robert Jay Lee
Flushing, NY

375. The JK and MD Lehman Family
Trust, Jack Kiehl Lehman, TTEE
Lacey, WA

376. Derick Harry Leonard
Jacksonville, FL

377. Robert B. Leonard
Ontario, CA

378. Christine Levandusky
West Warwick, RI

379. Diane Lewis & Gregory W.
Lewis (deceased) IRA
Calabash, NC

380. Evelyn Ligon
New York, NY

381. F.A. Lingl, M.D.
Chagrin Falls, OH

382. Friedrich A. Lingl, Trustee
Friedrich A. Lingl Trust
Chagrin Falls, OH

383. Mildred S. Litt
Albuquerque, NM

384. Frances DeJuan Littell
Hugoton, KS

385. Elaine F. Lizzio &
Elaine F. Lizzio, Trustee
U/A DTD 04/10/02
Elaine F. Lizzio Trust
Pompano Beach, FL

386. Wallace M. Lodine
Medina, WA

387. Elizabeth R. Lohman &
Verne D. Lohman
Springfield, OR

388. Emilio M. Lontok
Las Vegas, NV

389. Lotte G. Lopez
TOD Carmen L. Bright
Melbourne, FL

390. Estate of Elsie E. Lore
State College, PA

391. Lynn Margaret Lovie
The Villages, FL

392. Robert John Lovie
The Villages, FL

393. Judith A. Lowe
Quebec, Canada

394. Alfred H. Lowen & Gertrude E.
Lowen JT TEN (both deceased)
Boca Raton, FL

395. Gloria J. Loyola
Antioch, CA

396. Ida Lu
Rohnert Park, CA

397. Louis Lubrano (Roth IRA)
Fairview, NJ

398. Ruth S. Lugar &
Nancy J. Dixon (both deceased)
JT TEN
Frederick, MD

399. Ruth S. Lugar (deceased) & Linda M. Lugar JT TEN
Frederick, MD

400. Sylvia Luton
Hausville, WA

401. Virginia M. Lyons
Littleton, CO

402. Danois G. Madrid
Daly City, CA

403. Ray C. Magee and Barbara J. Magee JT TEN
Shelburne, VT

404. Evan Magruder
New York, NY

405. Rima Manookian
Northridge, CA

406. Donna Marchetti
Alameda, CA

407. Yanier Marrero & Circe Martinez
Las Vegas, NV

408. John G. Marshall & Wanda M. Marshall
La Habra, CA

409. David L. Martin & Lillian M. Martin JT TEN
Concord, VA

410. Ralph B. Martin, Jr.
Hanover, PA

411. Sebastien Masclet
Zellwood, FL

412. Laura Harris Mason
Pittsboro, NC

413. Patricia A. Mason & H. Leslie Mason JT TEN
Bradenton, FL

414. John P. Mathews and Florence M. Mathews, TTEES
The John and Florence Mathews Family Trust
Tiffin, OH

415. Lottie E. Mathews TTEE
Carthage, MO

416. Melvin F. Matsumoto &
Lynne Reiko Matsumoto
(deceased), Trustees
Lynne Reiko & Melvin F.
Matsumoto Family Trust
U/A DTD 6/12/2001
San Jose, CA

417. Dorothy Mauro
Fremont, CA

418. Elizabeth A. May
Belen, NM

419. Elizabeth A. May, TTEE
U/A DTD 5/01/01
May Family Trust
Belen, NM

420. Nancy C. May, TTEE
The May Family Trust
Arcadia, CA

421. Patricia Ann Mayer
Grove City, OH

422. Marie Mazzaferro &
Frank Mazzaferro
Rome, NY

423. Marjorie B. McCann
Jericho, VT

424. Wilson C. McCarthy
Vienna, VA

425. Edward P. McCool &
Barbara J. McCool, Trustees
McCool Rev Living Trust
UA 3/7/96
Wakefield, RI

426. Anne B. McCormick &
John Christopher Speakman
Corvallis, OR

427. Mary A. McCormick, Trustee
Mary A. McCormick
Revocable Trust
Raleigh, NC

428. Ramphan T. McCray
St. Paul, MN

429. Mary J. McCrindle
West Park, NY

430. Joy A. McElroy Tr.
UA 24-Mar-88
The McElroy Living Trust
Glendora, CA

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431. Alice M. McFadden
Buford, GA

432. McGrew Family Revocable Trust, U/A DTD 8/19/03, James A. McGrew &
Mary L. McGrew, Trustees
Palatine, IL

433. Catherine Rae McHaffey
Colorado Springs, CO

434. Dale J. McKee
Greenwood, MS

435. Robert M. McKenzie &
Elaine S. McKenzie JT TEN
Joppatowne, MD

436. Audrey McQuay
Pacific Palisades, CA

437. The MD Lehman Irrevocable Trust, Jack Kiehl Lehman, TTEE
Lacey, WA

438. Kathleen D. Mello
New Bedford, MA

439. Maria H. Mendes
Boston, MA

440. Joseph W. Mengel
Chapel Hill, NC

441. George C. Mertel, decendent
Estate of George C. Mertel,
James G. Mertel, Personal Rep.,
& James G. Mertel, as remaining Joint Tenant
Baltimore, MD

442. Neil Mesick
Willimantic, CT

443. Jean G. Mesropian
Scottsdale, AZ

444. Beatrice J. Michaels
Manorville, NY

445. William D. Michaely TTEE
Michaely Living Trust
U/A 9/22/04
Reno, NV

446. Joan Letitia Miller Living Trust,
Catherine M. Gray TTEE
UA DTD 7/14/1998
Marion, NC

447. Marie B. Miller
Tucson, AZ

448. Phyllis Milleville
Orchard Park, NY

449. Ada Minneci &
Charlene Guarino TTEE
Ada Minneci LVG TR
U/A/D 3-10-04
Rockford, IL

450. Karen K. Mizusaki
Las Vegas, NV

451. Laureen K. Mohn
Detroit, MI

452. MONTANCO (nominee
partnership),
by Margaret K. Gutmann,
General Partner
Middletown, CT

453. Estate of Elizabeth F. Moore
Pennington, NJ

454. Ozella M. Moore
St. Louis, MO

455. James K. Moorman &
Joan M. Moorman
Batesville, IN

456. Michael J. Moravan
Fort Collins, CO

457. Kenneth M. Morrison
Needham Heights, MA

458. Margaret Jane Mugisch
Wyckoff, NJ

459. Joel Munoz
Encinitas, CA

460. Susan L. Murray
South Pasadena, CA

461. Richard L. Muth
Richard L. Muth Family Trust
Mission Viejo, CA

462. Maharaj Muthusamy
St. Louis, MO

463. David Nagy (as beneficiary of
Ruth A. Nagy)
Leesburg, VA

464. Ruth A. Nagy
Haymarket, VA

465. Edith Naiser
Houston, TX

466. Shirley Nakagawa & Richard M.
Nakagawa (deceased)
Fresno, CA

467. Donald M. Nash & Geraldine G.
LaBarbera
Tampa, FL

468. Albert C. Nassan
Vermontville, NY

469. Paul J. Nau
Pisgah Forest, NC

470. Vilma Nau
Pisgah Forest, NC

471. Mirna M. Neda
New York, NY

472. Catherine A. Nelson
Ballwin, MO

473. Kathy J. Nelson
Plainsboro, NJ

474. Tom E. Nelson III
Austin, TX

475. Elvira R. Neuendorf
Jacksonville, FL

476. Kristin E. Neufeld
Auburn, NY

477. New York State Common
Retirement Fund
Albany, NY

478. New York State Teachers'
Retirement System
Albany, NY

479. Angelin N. Newton (IRA)
Dothan, AL

480. Hoang N. Nguyen
Las Vegas, NV

481. Father Martin Nikodem
Trumbull, CT

482. Janet S. Nishimura
TR UA 29-Dec-92
Janet Shizue Nishimura
Revocable Trust
Honolulu, HI

483. Janet S. Nishimura
TR UA 29-Dec-92
Masayoshi Nishimura Revocable
Trust
Honolulu, HI

484. Elaine Noreck &
Bernard E. Noreck JT TEN
Shelby Township, MI

485. Mary Louise Novak
Seaford, DE

486. George A. Nurisso
Avon, CT

487. George A. Nurisso (Roth IRA)
Avon, CT

488. George A. Nurisso (Traditional
IRA)
Avon, CT

489. George A. Nurisso, Custodian for
George C. Nurisso, UTMA
Avon, CT

490. Beverly J. Obedzinski
Crystal River, FL

491. Eileen O'Brien TR
UA 5/06/98
Eileen O'Brien Revocable Trust
Homer Glen, IL

492. Estate of Evelyn Odlivak,
Barbara DeRosa (beneficiary)
New York, NY

493. William R. Oeding &
Barbara P. Oeding
Destin, FL

494. Susan J. Omlor
Sandusky, OH

495. Estate of John R. Orrick
Towson, MD

496. Ann M. O'Shaughnessy
Naples, FL

497. Ann M. O'Shaughnessy &
Joseph F. O'Shaughnessy
Naples, FL

498. Joseph F. O'Shaughnessy
Naples, FL

499. Alyce M. Othot
Nashua, NH

500. David R. Overfield
Independence, KS

501. Phyllis A. Overmier
Upper Sandusky, OH

502. Jeanne M. Overton &
Annette Papin
Anitoch, CA

503. William Owen, Jr. & Charity E.
Owen Family Trust
Charity E. Owen, Sole Trustee
William Brian Owen, POA
Yuba City, CA

504. Violet M. Oyama
Honolulu, HI

505. Richard J. Palicka
Lisle, IL

506. Donald M. Papa &
Cleo E. Papa, Trustees
Donald M. Papa & Cleo E. Papa
Trust TR UA 02-04-1993
Cypress, TX

507. The Parker Family
Investments LLC
Englewood, NJ

508. Drew E. Parker
Englewood, NJ

509. Jeffrey R. Parker
Englewood, NJ

510. Keith Parker
Memphis, TN

511. Michael A. Parker
Englewood, NJ

512. Carolynn P. Parr
Concord, NC

513. Charles E. Parramore, Jr.
Camilla, GA

514. Julius Passalacqua & Cecilia M. Passalacqua, Trustees
UA 10/29/97
The Passalacqua Trust
Willoughby, OH

515. Frances Pastan
Silver Spring, MD

516. Anna Pateka
Baltimore, MD

517. Walter G. Paul &
Ruth E. Paul
Hines, OR

518. T. Jay Paxton &
Doris M. Paxton, TTEES
T. Jay and Doris Paxton Trust
Jackson, MI

519. Dolores A. Pechette TR
UA 3-31-10 Dolores A. Pechette
Revocable Trust
Portland, OR

520. Rosemarie A. Pekarek
Toms River, NJ

521. Lester A. Pelkey
Essex, VT

522. Joady Boulware Perrett, Trustee
Joe Boulware Trust
U/T/A DTD 1/21/1987
Hendersonville, NC

523. Erik P. Perrin
Daphne, AL

524. Richard Petersen &
Mary Alice Petersen TTEE
2002 Petersen Family Trust
Castro Valley, CA

525. Nancy Beth Peterson
Egg Harbor, NJ

526. Ruth B. Phelps
Alhambra, CA

527. Clifford L. Phillips &
Frances Phillips JT WROS
Carbondale, IL

528. The Piccioni Family 2003 Trust,
UA 10/17/03, Mario Anthony
Piccioni & Marian Louise
Piccioni TTEES
Riverside, CA

529. Ingeborg Pierce &
Ingeborg Pierce (IRA)
Hallandale, FL

530. Leroy E. Pietzsch
Roscoe, TX

531. Bernard E. Pile
Tucson, AZ

532. Nadia Piskaty
Mountain View, CA

533. James & Elaine Pitenis
Daytona Beach, FL

534. Priscilla C. Piva & George Piva
New Bedford, MA

535. Vincent Plotner
Fayetteville, PA

536. Clyde M. Polichetti &
Jo R. Polichetti
Torrance, CA

537. Norman Portello Trust B,
Jean G. Portello TTEE
Lafayette, CA

538. Charles Porten, custodian for
Mia Gussen
Weston, CT

539. Charles Porten, custodian for
Hanna Porten
Weston, CT

540. Anna Posch Trust, John Posch,
Jo Ann Posch & James H. Posch,
Successor Trustees
Morton Grove, IL

541. Susan Povak
Brighton, MA

542. Barry S. Preis
Ellensburg, WA

543. Mildred L. Priest
Quitman, AR

544. Profitable Investment Club, by
Charlotte J. Burge, Treasurer
Lorain, OH

545. Public Employees' Retirement
Association of Colorado
Denver, CO

546. Donald D. Puett
Overland Park, KS

547. Arnold F. Punt, Sr. &
Johanna Punt TTEES
Arnold F. Punt Sr. Living Trust
UA 01-08-1999
Sioux Center, IA

548. Diana Pyeatt
Carrollton, TX

549. Robert L. Queener &
Darlene M. Queener
TR UA 02-Feb-00
Robert L. Queener Revocable
Living Trust
Port Charlotte, FL

550. Dorothy Rabb TR
UA 6/21/99 Dorothy Rabb
Revocable Living Trust
Winter Haven, FL

551. Saroja B. Rajasekhara
Rajasekhara Family Trust
U/D/T DTD 9/1/2000
Glenwood, MD

552. Irene A. Randle
TR UA 24-APR-96
The Irene A. Randle Family Trust
Sacramento, CA

553. Branko Rapo (deceased)
Matulji, Croatia

554. Michael G. Rebar (deceased)
Des Moines, WA

555. Beverly Redgwick
Pacific Grove, CA

556. Fay Reece
Pampa, TX

557. Alice J. Reed
Holt, FL

558. John R. Reed
Holt, FL

559. Barbara J. Reel
Ankeny, IA

560. O. Gene Reising &
Mary L. Reising JTWROS
Evansville, IN

561. Monte D. & Loa I. Reynolds
Sun City, AZ

562. Joseph C. Ridenhour, TTEE
Joseph Ridenhour Revocable
Trust
UA DTD 5-27-2008
Ft. Lauderdale, FL

563. Edwin H. Rider, Jr. TTEE
Gertrude A. Rider TTEE
FBO Rider Living Trust
Vancouver, WA

564. Flora Rigotti
Portland, OR

565. David L. Riley, Sr. &
Martina D. Riley
Sacramento, CA

566. Joseph G. Robert
East Providence, RI

567. Saleeta A. Roberts
Thomaston, GA

568. Paul W. Robey
Casey, IL

569. Clair A. Robison &
Grace Darlene Robison
San Jose, CA

570. Robert W. Robisch
Mt. Airy, MD

571. Michael S. Rodriguez
Tehachapi, CA

572. Wilbert G. Rohlfsen
Windom, MN

573. Janet Romanowicz
Avon, CT

574. Janet Romanowicz (Roth IRA)
Avon, CT

575. Janet Romanowicz
(Traditional IRA)
Avon, CT

576. Elizabeth Cleland Ross
(deceased)
Eugene, OR

577. Betty Rowell
Liberty, TX

578. Sandra Diane Royal
Washington, DC

579. Louis Ruffini &
Barbara H. Ruffini as TTEES,
92 Louis & Barbara Ruffini REV
TR UA DTD 4/30/92
Rocklin, CA

580. Eugene M. Salute
Encino, CA

581. Emilia B. Salvi & Alberto Salvi
San Francisco, CA

582. Mariann Sandberg
Addison, TX

583. Muriel Adams Sanford
Orono, ME

584. Jack J. Sapia &
Donna J. Sapia, JT TEN
Miami, FL

585. Sue Ann Sapiega
Clearwater, FL

586. Lisa B. Sapperstein
Washington, DC

587. Tim Sass
Wayne, PA

588. Edward J. Saylor & Lorraine M.
Saylor (deceased)
Puyallup, WA

589. Nancy H. Scharber
Winchester, TN

590. Ethel Maxine Scher
Enumclaw, WA

591. Ronald R. Schlemer
Denton, MD

592. Gary Schlierf
San Diego, CA

593. Anna L. Schoenly & Richard D. Schoenly
Potomac, MD

594. William A. Schultes & Patricia D. Schultes
Kerrville, TX

595. Lois G. Schumann
Maquoketa, IA

596. Schwab 1000 Index Fund
San Francisco, CA

597. Schwab Capital Trust
San Francisco, CA

598. Schwab Core Equity Fund
San Francisco, CA

599. Schwab Dividend Equity Fund
San Francisco, CA

600. Schwab Financial Services Fund
San Francisco, CA

601. Schwab Fundamental US Large Company Index Fund
San Francisco, CA

602. Schwab Institutional Select S&P 500 Fund
San Francisco, CA

603. Schwab Investments
San Francisco, CA

604. Schwab MarketTrack Balanced Portfolio
San Francisco, CA

605. Schwab MarketTrack Growth Portfolio
San Francisco, CA

606. Schwab Premier Equity Fund
San Francisco, CA

607. Schwab S&P 500 Index Fund
San Francisco, CA

608. Schwab S&P 500 Index Portfolio
San Francisco, CA

609. Schwab Total Stock Market Index Fund
San Francisco, CA

610. Larry E. Scott & Laurelee M. Scott
Goodyear, AZ

611. Otis T. Scott
Fort Myers, FL

612. Jean L. Scovell
York, PA

613. Dorothy C. Seaton
Dublin, GA

614. Estate of Richard Seidenberg
Cherry Hill, NJ

615. Helen E. Seim
Walnut Creek, CA

616. Select Investors Exchange Fund, L.P.
Houston, TX

617. Michael Serko, Jr. & Agnes Serko, JT TEN
Endwell, NY

618. Mary Jane Seth
Baltimore, MD

619. William Doyle Shaffer
Fremont, OH

620. Steven L. Shapiro as Custodian for Stacy Shapiro UGMA and Marci Shapiro UGMA
Cherry Hill, NJ

621. Thomas J. Sharkey, Jr.
Watchung, NJ

622. Robert J. Shaw
Montreat, NC

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623. Mary L. Shay Revocable Living Trust UAD 11/21/02
Mary L. Shay, TTEE
Bradenton, FL

624. Elizabeth Shuck
Bridgeport, CT

625. Ramon E. Shultz
Bullhead City, AZ

626. Carolyn H. Shumway
Lighthouse Point, FL

627. Harry D. Sigler (deceased)
Mission Hills, CA

628. Harry D. Sigler (deceased) &
Bonnie L. Sigler JT TEN
Mission Hills, CA

629. Rita B. Sigman
Tequesta, FL

630. Patricia C. Simi TR
UA 23-Dec-00
Simi Exemption Trust
Roseburg, OR

631. Philip J. Sinrich
Deborah A. Sinrich JTWROS
Stoughton, MA

632. Linda D. Sinz
Elk Grove, CA

633. Anthony A. Sirco
Albuquerque, NM

634. Robert K. Skelding &
Patricia A. Skelding, TTEE
Skelding Family Trust
Cadillac, MI

635. Nicholas A. Skinner
Stowe, VT

636. Leigh Skipper
Willow Grove, PA

637. RuthAnn Harper Skowronek
Weed, CA

638. Roger L. Slakey &
Mari-Ellen Slakey
Roger L.B. Slakey Rev. Trust
McLean, VA

639. Elaine W. S. Smith
C. Bradford Smothers JT WROS
Hot Springs, AR

640. Elwin R. Smith
Jacksonville, FL

641. Joe J. Smith (deceased) &
Teresa Smith JT TEN
Belle Fourche, SD

642. Leonard Smith
Mt. Vernon, IL

643. Soreu Soe
San Jose, CA

644. Samuel M. Sokoloff
Long Beach, NY

645. Christian Solms-Baruth (IRA)
Leonardtown, MD

646. Melissa Solms-Baruth (IRA)
Leonardtown, MD

647. Julie Parker Sorin
Memphis, TN

648. Luka Sosic
Irvine, CA

649. Raymond A. Sozio &
Annette M. Sozio
Ft. Lauderdale, FL

650. Billie H. Spencer (Trust & IRA)
Laguna Woods, CA

651. Robert E. Spencer
Raleigh, NC

652. Marie J. Spirito
Providence, RI

653. N. Lavonne Spray
Moses Lake, WA

654. Nathaniel David Springer
Stillwater, OK

655. Philip Stadtler, Jr.
Hilmar, CA

656. Philip Alan Steed, TTEE
Natalie E. Steed Trust
San Diego, CA

657. Douglas W. Steele
Chapel Hill, NC

658. Dorothy M. Stenstrom
Medford, OR

659. B.V. Stephenson 06 Intervivos
Trust, UA Dated 11/1/06, Redfern
C. English, TTEE
Moraga, CA

660. Marvin F. Stevenson &
Lucille P. Stevenson (deceased)
McDonough, GA

661. Genevieve E. Stewart
Wayne, NY

662. Stichting Pensioenfonds ABP
Amsterdam, Netherlands

663. Howard Stinson
Aztec, NM

664. Earl J. Stitley (deceased)
Hanover, PA

665. Paul H. Stofer &
Carol A. Stofer
Climax, MI

666. Gloria C. Stone
Pompton Plains, NJ

667. Palmer L. Stone & Lu Ann R.
Stone (deceased) TIC
Fort Myers, FL

668. Stratim Capital, LLC
San Francisco, CA

669. Stratim Partners, LLC
San Francisco, CA

670. Frank G. Straub
Fishkill, NY

671. Scott A. Strauss
Charlotte, NC

672. Cora M. Streit TTEE
Cora M. Streit Trust
U/A DTD Dec. 16, 1992
DeSoto, TX

673. Norma C. Struthers
Orange, CA

674. Wanda H. Swanson
Evans, GA

675. Kenneth D. Swartz &
Fran A. Swartz
Upper Sandusky, OH

676. Roger H. Swartz
Palatine Bridge, NY

677. Charlene R. Swiney
Lancaster, CA

678. Janet Pomeroy Swingler
Dayton, WA

679. Swiss & Global Asset
Management (Luxembourg) S.A.
c/o DRRT
Miami, FL

680. Swiss & Global Asset
Management Ltd.
c/o DRRT
Miami, FL

681. Swisscanto Asset Management
AG c/o DRRT
Miami, FL

682. Edwin Szumachowski
York, PA

683. Suzanne Talbott
Marietta, CA

684. Andrew Edward Tarling
Erith, United Kingdom

685. Carter Cover Taylor
Tacoma, WA

686. Cherry Taylor
Eugene, OR

687. Joan M. Taylor, Trustee
UA 5/26/98
The Joan M. Taylor Trust
Spring Hill, FL

688. Larry G. Taylor
Branson, MO

689. Nancy K. Taylor
Cedar Key, FL

690. Nancy Tempesta
East Hanover, NJ

691. Winnie Thein
Monterey Park, CA

692. Jeanne E. Thompson
Fair Oaks, CA

693. Ames B. Tillar &
Sudie D. Brothers JT TEN
Emporia, VA

694. Doris Myrl Tillis
Laguna Woods, CA

695. Catherine V. Toole
Mandeville, LA

696. Margarida L. Torchiana
Beverly Farms, MA

697. TOTAL S.A.
Courbevoie, France

698. Jana Lee Trebels Trust,
Dated January 19, 1998, Linda
Lee Trebels Fahey, Successor
Trustee Glenview, IL

699. Susan E. Trippet
Bloomington, IN

700. Leonard G. Trotter
Rockaway Beach, OR

701. David Tull
New Port Richey, FL

702. Fern Key Ulmer
Lodge, SC

703. T. Edward Umphres &
Lillian G. Umphres
St. Louis, MO

704. Matsuko Uyeda &
Wallace Ida (deceased)
Kapaa, Kauai, HI

705. Helen Valkosky
Wintersville, OH

706. Christopher C. Van Collie TTEE
FBO Ruth A. Van Collie Trust
U/A/D 12-09-1996
Bradenton, FL

707. Mary S. VanderLinde (including
TOD Scott. H. VanderLinde,
TOD Martha J. Hart,
TOD Kristin K. McKay)
Holland, MI

708. W. C. Vandiver, Jr.
Savannah, GA

709. Emilio A. Vazquez &
Migdalia Vazquez &
Emilio A. Vasquez, Jr. JT TEN
Miami, FL

710. Anna Vilkaitis &
Agnes Scott Foundation, Inc.
Avon Park, FL

711. Frederick Conrad Vonvoigt &
Frances Vonvoigt Tr.
UA 23-OCT-98,
The Vonvoigt Family Trust
Temecula, CA

712. Mary N. Wade, GP
Johnson Investors, LP
Franklin, TN

713. Leonard & Mildred
Walker Family Trust
U/A DTD 11/01/2005
Petersburg, MI

714. Robert D. Walker
Fulton, MS

715. Dale E. Wallace
Wichita, KS

716. Richard B. Wallace TTEE
Scottsdale, AZ

717. Barbara L. Walsh
Narragansett, RI

718. Lawrence J. Warns
Watsonville, CA

719. Paul Watkins
Wellesley, MA

720. Larry L. Watson (IRA)
Hagerstown, MD

721. Patricia A. Watson
South Windsor, CT

722. Lorraine S. Way
Charlotte, NC

723. Elizabeth Weekley, TTEE
Independence, MO

724. Don Weining
Newark, DE

725. Cornelius F. Weinrich
Ventura, CA

726. Jack Weiss & Barbara Weiss
Yonkers, NY

727. Sylvia Weissman
Teaneck, NJ

728. Elliot Wender
Memphis, TN

729. Mark D. Wender; individually and as custodian for Brian Wender and Rebecca Wender
Memphis, TN

730. Penina Wender
Memphis, TN

731. Razelle Wender
Memphis, TN

732. Stanley L. Wender
Memphis, TN

733. Joseph P. White & Joseph P. White Sharetrust
Fredericksburg, VA

734. Rosalie A. Whitehead
Peekskill, NY

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735. Michael Whitney
Boynton Beach, FL

736. Mary Jane Whitty &
Roxane Egan
Schroon Lake, NY

737. Harry A. Wicht &
Joyce A. Wicht
Culpeper, VA

738. Carolyn R. Wiedemeier
St. Louis, MO

739. Linda Wilburn &
Richard Wilburn, JT
Long Creek, OR

740. Evangeline A. Wilcox
Johnstown, NY

741. Cleo J. Wiley
Bend, OR

742. Timothy J. Willard
Fallbrook, CA

743. The William J. McGinnis,
Residuary Trust UA 2/23/08
Wilmington, DE

744. R. Joseph Williams, Jr.
(Roth IRA)
High Ridge, MO

745. Williamson Family Trust,
Robert P. and Madeline M.
Williamson, Trustees
Rancho Mirage, CA

746. Steven P. Williamson
Temecula, CA

747. Jane R. Wilson
Carmel Valley, CA

748. Thomas J. Wilson &
Beth A. Wilson JT TEN
Wentzville, MO

749. Carolyn K. Winter Tr.
UA 6/23/05
Winter Family Trust
Coarsegold, CA

750. Justin D. Wolf
Charlotte, NC

751. Jane B. Wollaston
La Jolla, CA

752. Women of the Uniontown
Presbyterian Church
Faunsdale, AL

753. The Women of the Uniontown
Presbyterian Church, First
Presbyterian Church
Faunsdale, AL

754. Margaret C. Wood
Lilburn, GA

755. Donni K. Woods &
Phillip J. Woods
Wichita, KS

756. Donald B. Workman
La Crescenta, CA

757. Hazel P. Wright (fka Hazel L.
Pugh) & Roy L. Pugh, JTWROS
Jacksonville, FL

758. Peter C. Wyatt
Newburyport, MA

759. David P. Yaffe
Los Angeles, CA

760. Wanda L. Young
West Milton, OH

761. Arthur L. Youngblood &
Elizabeth E. Youngblood
Mobile, AL

762. Owen R. Zachritz
Faulkton, SD

763. Nancy A. Zidle &
Gerald S. Zidle JTWROS
Hooksett, NH

764. Judith A. Ziegert
Mason, OH

765. Doris A. Zimmer TTEE
Lionel N. Zimmer TTEE
The Doris A. Zimmer Rev Trust
U/A DTD 7/7/92
Richmond, VA

766. Roger H. Zion, TTEE
Otto Knauss Trust
FBO Marjorie Zion
UAD 12/29/1976
Evansville, IN

767. James E. Zlibin & Susan C.
Zlibin TTEE, Zlibin Living Trust
Minden, NV

768. Cornelia Zoon
Federal Way, WA

769. Phillip Bayarena
Ridgecrest, CA

770. Donna J. Baynes
(Roth IRA)
Belmont, CA

771. Donna T. Brimhall
Ogden, UT

772. Patricia P. Brown
Thomasville, GA

773. Jane Burr
Southport, CT

774. Julian R. Denison
Oldwick, NJ

775. Joseph F. Ferguson &
Agnes M. Ferguson
Gibsonia, PA

776. Beverly Gaines
Dallas, TX

777. Harry R. Gould
Nutley, NJ

778. Virginia Higgins & Drexel Scott
Warren, OH

779. Julia A. Hoyle (deceased)
Sanford, NC

780. John D. Pruett and Penny Coull
TTEEs of John & Lucille Pruett
Intervivos Trust
Norristown, PA

781. Rodney J. Ross,
Brenda M. Ross, &
The Ross Family Trust
Gilbert, AZ

782. Mildred E. Ruff
Cupertino, CA

783. William J. Skeats &
Claire T. Skeats
Commack, NY

784. Leland S. Swanson &
Luella M. Swanson
Puyallup, WA

785. Charles E. Van Over
Montrose, CO

786. Benny M. Wade
Reno, NV

787. Melissa Abich-Espinoza
San Gabriel, CA

788. Susan C. Bauer
Garland, TX

789. Michael Evan Eldridge
Spring Lake, MI

790. James A. Gibbs
Carson City, Nevada

791. Jerry Hackett
Macomb, MI

792. Fay Helmon
Issaquah, WA

793. Clarice Hogan Jones
Charlotte, NC

794. James H. & Mary V.
Nieuwenhuis Trust,
UA 23-Jun-86
Mary V. Nieuwenhuis, Trustee
San Diego, CA

795. Marjorie M. Kelley
Westwood, MA

796. Elizabeth A. King TTEE
FBO King Family Trust
UA 07 27 92
Fullerton, CA

797. Estate of Julius H. Linkkila
Brooklyn, CT

798. Liane Lion
London, England

799. Thomas Loffland
Fort Worth, TX

800. Joe E. Maxwell
Nashville, TN

801. Thelma McClain (deceased)
Riverside, CA

802. Mosko Irrevocable Trust
UA 3 22 91
Frank Thomas Mosko, Trustee
Bayfield, CO

803. Geena J. Oh
Los Angeles, CA

804. Michael F. Sands
Tustin, CA

805. George N. Scheller
Tucson, AZ

806. Francis R. Slattery IRA
Norristown, PA

807. Francis R. Slattery &
Philomena C. Slattery JT TEN
Norristown, PA

808. Philomena C. Slattery &
Francis R. Slattery JT TEN
Norristown, PA

809. Karen Glover Wilmoth, TRS
FBO Wilmoth JT Grantors Trust
Dallas, TX

810. Channa Weeratunge
Kinwood, TX

811. Rotondo Family Trust
Redmond, WA

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

Date:

In Re:

-v-

Case #: ( )

Dear Litigant,

Enclosed is a copy of the judgment entered in your case.

Your attention is directed to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, which requires that if you wish to appeal the judgment in your case, you must file a notice of appeal within 30 days of the date of entry of the judgment (60 days if the United States or an officer or agency of the United States is a party).

If you wish to appeal the judgment but for any reason you are unable to file your notice of appeal within the required time, you may make a motion for an extension of time in accordance with the provision of Fed. R. App. P. 4(a)(5). That rule requires you to show "excusable neglect" or "good cause" for your failure to file your notice of appeal within the time allowed. Any such motion must first be served upon the other parties and then filed with the Pro Se Office no later than 60 days from the date of entry of the judgment (90 days if the United States or an officer or agency of the United States is a party).

The enclosed Forms 1, 2 and 3 cover some common situations, and you may choose to use one of them if appropriate to your circumstances.

The Filing fee for a notice of appeal is $5.00 and the appellate docketing fee is $450.00 payable to the "Clerk of the Court, USDC, SDNY" by certified check, money order or cash. **No personal checks are accepted.**

Ruby J. Krajick, Clerk of Court

by: ______________________

, Deputy Clerk

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

---X

-V-

---X

NOTICE OF APPEAL

civ. ( )

Notice is hereby given that ______________________________
(party)

hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment [describe it]

entered in this action on the ________ day of ______________ , __________ .
(day) (month) (year)

____
(Signature)

____
(Address)

____
(City, State and Zip Code)

Date: ______________

( ) ________ - ____________
(Telephone Number)

<u>Note</u>: You may use this form to take an appeal provided that it is <u>received</u> by the office of the Clerk of the District Court within 30 days of the date on which the judgment was entered (60 days if the United States or an officer or agency of the United States is a party).

FORM 1

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

--X

-V-

--X

MOTION FOR EXTENSION OF TIME TO FILE A NOTICE OF APPEAL

civ. ( )

Pursuant to Fed. R. App. P. 4(a)(5), ______________________ respectfully
(party)
requests leave to file the within notice of appeal out of time. ______________________
(party)
desires to appeal the judgment in this action entered on ______________ but failed to file a
(day)
notice of appeal within the required number of days because:

[Explain here the "excusable neglect" or "good cause" which led to your failure to file a notice of appeal within the required number of days.]

____
(Signature)

____
(Address)

____
(City, State and Zip Code)

Date: ______________________ ( ) ________-____________
(Telephone Number)

Note: You may use this form, together with a copy of Form 1, if you are seeking to appeal a judgment and did not file a copy of Form 1 within the required time. If you follow this procedure, these forms must be received in the office of the Clerk of the District Court no later than 60 days of the date which the judgment was entered (90 days if the United States or an officer or agency of the United States is a party).

District Court will receive it within the 30 days of the date on which the judgment was entered (60 days if ~~the United States or an officer or agency of the United States is a party).~~

FORM 3

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

---X

-V-

---X

AFFIRMATION OF SERVICE

civ. ( )

I, ______________________________, declare under penalty of perjury that I have

served a copy of the attached ______________________________

____

upon ______________________________

____

whose address is: ______________________________

____

Date: ____________________
New York, New York

____
(Signature)

____
(Address)

____
(City, State and Zip Code)

FORM 4

FORM 2

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

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-V-

---X

NOTICE OF APPEAL
AND
MOTION FOR EXTENSION OF TIME

civ. ( )

1. Notice is hereby given that ______________________________ hereby appeals to
(party)
the United States Court of Appeals for the Second Circuit from the judgment entered on __________.
[Give a description of the judgment]

2. In the event that this form was not received in the Clerk's office within the required time
__________________________ respectfully requests the court to grant an extension of time in
(party)
accordance with Fed. R. App. P. 4(a)(5).

a. In support of this request, ______________________________ states that
(party)
this Court's judgment was received on __________________ and that this form was mailed to the
(date)
court on ________________ .
(date)

____
(Signature)

____
(Address)

____
(City, State and Zip Code)

Date: ______________ ( ) ________- ______________
(Telephone Number)

Note: You may use this form if you are mailing your notice of appeal and are not sure the Clerk of the

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE: BANK OF AMERICA CORP. SECURITIES, DERIVATIVE, AND EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) LITIGATION

Master File No. 09 MD 2058 (PKC)

MEMORANDUM AND ORDER

THIS DOCUMENT RELATES TO:

CHARLES N. DORNFEST,

Plaintiff,

10 Civ. 275 (PKC)

-against-

BANK OF AMERICA CORPORATION, et al.,

Defendants.

---x

P. KEVIN CASTEL, District Judge:

The Court previously dismissed all but one claim purportedly brought on behalf of purchasers of call options and sellers of put options on the grounds that the named, class plaintiffs in the consolidated action were without Article III standing to pursue claims directed to stock options. In re Bank of America Corp. Sec., Derivative, and Emp. Ret. Income Sec. Act (ERISA) Litig., 2011 WL 3211472, at *12-14 (S.D.N.Y. July 29, 2011). Plaintiff Charles Dornfest, an options holder, has brought a securities fraud action against defendant Bank of America Corporation ("BofA").

Dornfest also seeks to represent a class of investors who held Bank of America options during the class period of September 15, 2008 through January 22, 2009. (Dornfest Compl. ¶ 1.) The lead plaintiffs oppose his effort to bring these claims as a class action. Dornfest argues that because the lead plaintiffs no longer assert claims on behalf of options holders, and because none of the named, class plaintiffs have standing to pursue such claims, Dornfest may properly bring claims on behalf of options holders as a separate class action.

The Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(a)(3)(B)(i) (the "PSLRA"), provides that a court "shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members (hereafter in this paragraph referred to as the 'most adequate plaintiff') . . . ." Under the PSLRA, "the most adequate plaintiff" acts "as lead plaintiff for the consolidated actions." Id. § 78u-4(a)(3)(B)(ii). "The theory of these provisions was that if an investor with a large financial stake in the litigation was made lead plaintiff, such a plaintiff – frequently a large institution or otherwise sophisticated investor – would be motivated to act like a 'real' client, carefully choosing counsel and monitoring counsel's performance to make sure that adequate representation was delivered at a reasonable price." In re Razorfish, Inc. Sec. Litig., 143 F. Supp. 2d 304, 307 (S.D.N.Y. 2001); ; accord In re Donnkenny Inc. Sec. Litig., 171 F.R.D. 156, 157 (S.D.N.Y. 1997) (Cedarbaum, J.) (the PSLRA's lead plaintiff provision "was intended to ensure that institutional plaintiffs with expertise in the securities market and real financial interests in the integrity of the market would control the litigation, not lawyers.").[1]

In Hevesi v. Citigroup Inc., 366 F.3d 70, 82 n.13 (2d Cir. 2004), Judge Cabranes, writing for the panel, observed that the PSLRA's lead plaintiff provision "empower[s] one or several investors with a major stake in the litigation to exercise control over the litigation as a whole." As noted by Hevesi, the PSLRA does not require the selection of lead plaintiffs

[1] In this case, then-District Judge Chin, to whom this action was previously assigned, concluded that the State Teachers Retirement System of Ohio, the Ohio Public Employees Retirement System, the Teachers Retirement System of Texas, Stichting Pensioenfonds Zorg en Wilzijn and Fjarde AP-Fonden would serve as lead plaintiffs. (Docket # 2, at 10-17.)

"with standing to sue on every available cause of action," and permits "the addition of named plaintiffs to aid the lead plaintiff in representing a class." Id. at 83. Thus, where a lead plaintiff is without standing to sue on a given claim, the PSLRA allows for a mechanism whereby additional class representatives may be proposed by the lead plaintiff to pursue those claims.

In April 2010, then-District Judge Chin concluded that the lead plaintiffs had authority to decide what claims to assert against which defendants, and held that Dornfest could not commence a separate class action on behalf of options holders. (Docket # 240, at 3-6.) Judge Chin noted, among other things, that a lead plaintiff has "authority to decide what claims to assert on behalf of securities holders," and that "[p]ermitting other plaintiffs to bring additional class actions now, with additional lead plaintiffs and additional counsel, would interfere with Lead Plaintiffs' ability and authority to manage the Consolidated Securities Action." (Docket # 240, at 4-5.) He stated that "the plaintiffs in . . . Dornfest . . . are free to pursue their claims as individual cases – but not as class actions." (Docket # 240, at 5.)

As previously noted, since Judge Chin's order, this Court has held that the named, class plaintiffs have standing to bring claims only on behalf of holders of January 2011 call options, and dismissed all other claims on behalf of options holders. 2011 WL 3211472, at *12-14. The lead plaintiffs have not sought leave to add additional class plaintiffs or otherwise attempted to amend the complaint to revive their claims on behalf of options holders. Such tactical decisions are the prerogative of a lead plaintiff. Counsel to lead plaintiffs has stated, both on the record in open court and via letter brief, that they evaluated adding Dornfest as a class representative, and concluded that he was not well suited for that role. (Sept. 21 letter at 2; Sept. 7 Tr. at 24-26.) Such a decision is within the lead plaintiffs' prerogative "to exercise control over the litigation as a whole." Hevesi, 366 F.3d at 82, n.13.

Indeed, counsel to Dornfest acknowledge that the lead plaintiffs have the authority and discretion to determine which claims to pursue:

> There is no dispute that lead plaintiffs for a class of common shareholders can determine, for example, whether that class should bring a Section 11 claim; whether or not to assert that a certain corporate disclosure was actionable; or whether the class should bring claims against a particular individual. . . . Similarly, if Lead Plaintiffs decide upon a particular date range for the common shareholder class, no other shareholder can bring a class action with respect to different time periods.

(Sept. 14 Letter at 4.) In each of those instances, a lead plaintiff necessarily makes determinations that limit the class of shareholders. Inevitably, any class definition establishes boundaries as to who may recover. Individuals excluded from the class may pursue individual claims, as Judge Chin recognized in his order of April 2010. (Docket # 240, at 5.)

Dornfest contends that because claims on behalf of options holders were dismissed on standing grounds, options holders should be evaluated differently than shareholders who fall outside of the class period or do not have a given disclosure claim brought on their behalf. For the purposes of a securities fraud class action brought under the PSLRA, this distinction is not meaningful. As Judge Cabranes noted in Hevesi, a lead plaintiff may seek to incorporate additional named class plaintiffs in order to resolve any standing concerns. 366 F.3d at 83. In the framework proposed by Dornfest, any consolidated securities fraud class action might then carry with it a corresponding ecosystem of separate class actions seeking relief on behalf of securities holders whose claims vary from the lead plaintiffs. Dornfest's approach invites the type of lawyer-driven litigation that the PSLRA seeks to avoid, and would likely promote near-endless skirmishes about securities holders who fall outside a class definition and the degree to which their exclusion implicates matters of standing.

Therefore, consistent with Judge Chin's ruling of April 2010 and Hevesi, this Court concludes that Dornfest may not assert claims on behalf of a class of options holders. He remains free to pursue his claims individually.

SO ORDERED.

P. Kevin Castel
United States District Judge

Dated: New York, New York
September 29, 2011