UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM OF LAW IN SUPPORT OF
LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION

Dated: February 19, 2013

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Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Court-appointed Lead Plaintiffs, the State Teachers Retirement System of Ohio; the Ohio Public Employees Retirement System; the Teacher Retirement System of Texas; Stichting Pensioenfonds Zorg en Welzijn, represented by PGGM Vermogensbeheer B.V.; and Fjärde AP-Fonden (collectively, "Lead Plaintiffs"),[1] on behalf of themselves and the Court-certified Class,[2] submit this memorandum in support of final approval of the proposed Settlement that will resolve the claims asserted in this Action on behalf of the Class and approval of the proposed Plan of Allocation.

[1] Unless otherwise indicated herein, capitalized terms shall have those meanings contained in the Stipulation and Agreement of Settlement (the "Stipulation") dated and filed with the Court on November 30, 2012 (ECF No. 767-1).

[2] The Class certified by the Court pursuant to its Memorandum and Order issued on February 6, 2012 (ECF No. 527) consists 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").

Excluded from the Class by definition are: Defendants, present or former executive officers of BoA and Merrill, present or former members of Merrill's and BoA's Board of Directors and their immediate family members (as defined in 17 C.F.R. § 229.404, Instructions). Also excluded from the Class are any Persons who submitted a request for exclusion in connection with the previously mailed Notice of Pendency of Class Action (the "Class Notice"), as set forth on Appendix 1 to the Stipulation, who do not opt-back into the Class.

I. PRELIMINARY STATEMENT

Subject to Court approval, and as described herein, Lead Plaintiffs, on behalf of themselves and the certified Class, have agreed to settle all claims asserted in the Action against the Defendants,[3] in exchange for (i) a payment of $2,425,000,000 in cash (the "Settlement Amount") which has been deposited into interest-bearing escrow accounts and (ii) BoA's agreement to implement or maintain certain significant corporate governance changes, including changes relating to majority voting for directors, minimum stock ownership by executive officers and directors, and amendments to BoA's charter for the Corporate Development Committee providing for additional oversight of senior management (the "Corporate Governance Enhancements").

The Settlement is an outstanding result for the Class. If approved, the Settlement would represent the single largest securities class action settlement ever resolving a Section 14(a) claim – the federal securities law provision designed to protect investors against misstatements in connection with a proxy solicitation. In addition, the Settlement is one of the four largest ever funded by a single corporate defendant for violations of the federal securities laws, and the single largest settlement of a securities class action in which there was neither a financial restatement involved nor a criminal conviction related to the alleged misconduct. The Settlement also dwarfs all prior securities class action settlements related to the subprime financial crisis. As explained below, the Settlement, in addition to providing an

[3] "Defendants" are BoA, Merrill, Banc of America Securities LLC, Merrill Lynch, Pierce, Fenner & Smith Inc., and the Individual Defendants. The "Individual Defendants" are Kenneth D. Lewis, John A. Thain, Joe L. Price, Neil A. Cotty, William Barnet III, Frank P. Bramble, Sr., John T. Collins, Gary L. Countryman, Tommy R. Franks, Charles K. Gifford, Monica C. Lozano, Walter E. Massey, Thomas J. May, Patricia E. Mitchell, Thomas M. Ryan, O. Temple Sloan, Jr., Meredith R. Spangler, Robert L. Tillman, and Jackie M. Ward.

extraordinary recovery for the certified Class, avoids the substantial risks and expense of taking this Action to trial, including the risk of recovering less than the Settlement Amount, or no recovery, after substantial delay.

As detailed in the Joint Declaration of Steven B. Singer, Frederic S. Fox, and David Kessler in Support of (A) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation and (B) Co-Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Joint Declaration" or "Joint Decl."), at the time the agreement to settle was reached Lead Plaintiffs and Co-Lead Counsel had extensively litigated the Action and had a thorough understanding of the strengths and weaknesses of the claims.[4]

Before the Settlement was agreed to, Co-Lead Counsel had engaged in three-and-a-half years of vigorous litigation, which included (i) conducting an extensive investigation into the Class's claims; (ii) drafting two detailed amended complaints; (iii) successfully moving for a partial modification of the discovery stay pursuant to the Private Securities Litigation Reform Act of 1995 (the "PSLRA") to obtain documents from Defendants that they had already produced to government regulators and investigators; (iv) successfully opposing two rounds of Defendants' motions to dismiss; (v) successfully opposing Defendants' efforts to seek certification to the Delaware Supreme Court of the question of whether Lead Plaintiffs could bring their Section 14(a) claim as a direct action; (vi) successfully opposing Defendants' efforts to seek interlocutory appeal of certain issues decided by the Court in

[4] The Joint Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to the Joint Declaration for a detailed description of, *inter alia*: the history of the Action; the nature of the claims asserted in the Action; the negotiations leading to the Settlement; the value of the Settlement to the Class, as compared to the risks and uncertainties of continued litigation; the terms of the Plan of Allocation for the Settlement proceeds; and a description of the services Co-Lead Counsel provided for the benefit of the Class.

connection with Defendants' motions to dismiss the First Amended Complaint; (vii) successfully briefing Lead Plaintiffs' motion for class certification and opposing Defendants' efforts to seek appellate interlocutory review of the Court's order granting class certification; (viii) engaging in extensive class, fact and expert discovery, including participating in 61 depositions and reviewing more than 4.75 million pages of documents; (ix) opposing Defendants' motions for summary judgment; (x) preparing Lead Plaintiffs' own motion for partial summary judgment; (xi) consulting extensively with experts and consultants in the areas of damages, corporate disclosure requirements, valuation, solvency, and accounting for goodwill; and (xii) preparing for trial, including exchanging *Daubert* motions, motions *in limine*, jury verdict forms, jury instructions, *voir dire* and draft pre-trial orders with Defendants. Joint Decl. ¶ 8.

Moreover, the Settlement was reached only after prolonged, arms'-length settlement discussions over the course of two years, facilitated by Judge Layn Phillips, a former federal district judge in the United States District Court for the Western District of Oklahoma and an experienced and highly respected mediator. These discussions included two in-person mediation sessions and numerous telephonic and in-person follow-up sessions. Joint Decl. ¶¶ 9, 153-162. The Parties were in final trial preparations when the Settlement was reached.

The Settlement is a particularly exceptional result when considered in light of the considerable risks in this Action. As set forth in detail in the Joint Declaration, Lead Plaintiffs faced substantial hurdles in establishing Defendants' liability with respect to both their fraud claims under Section 10(b) and their negligence claims under Section 14(a). For example, Lead Plaintiffs faced the risk that the Court or a jury could find that Defendants did not act recklessly or negligently in failing to disclose Merrill's fourth-quarter 2008 losses and the

bonus agreement; that the alleged omissions were immaterial in light of other information in the market; or that Defendants had no duty to disclose the allegedly omitted information. There were also substantial risks in establishing loss causation and damages. The limited case law establishing the remedies available to Class Members under Section 14(a), including the proper measure of damages, presented significant risks at summary judgment and, upon the inevitable appeal even if Lead Plaintiffs were to prevail at trial. Lead Plaintiffs also faced substantial risks in proving that the series of alleged corrective disclosures in January 2009 had, in fact, revealed the information that Lead Plaintiffs had alleged was previously undisclosed; and that the price declines on the identified corrective disclosure dates were caused by the alleged corrective disclosures. *See* Joint Decl. ¶¶ 124-150 and Section II.B.3 herein.

Lead Plaintiffs, who are all sophisticated institutional investors of the type favored by Congress when passing the PSLRA, have closely monitored and participated in this litigation from the outset, participated in the settlement negotiations, and recommend that the Settlement be approved. *See* Exhibits 2 to 6 to the Joint Declaration. Further, Co-Lead Counsel, who have extensive experience in prosecuting securities class actions, strongly believe that the Settlement is in the best interests of the Class. Joint Decl. ¶¶ 2, 6, 10.

On December 4, 2012, the Court granted preliminary approval to the Settlement and entered the Preliminary Approval Order (ECF No. 771). In accordance with the Preliminary Approval Order, between December 24, 2012 and February 14, 2013, the Claims Administrator disseminated more than 3.2 million copies of the Settlement Notice and Proof

of Claim Form (together, the "Notice Packet") to potential Class Members and nominees.[5] Joint Decl. ¶ 176. As ordered by the Court and stated in the Settlement Notice, any objections to the Settlement, the Plan of Allocation or the request for attorneys' fees and reimbursement of litigation expenses, and any requests to opt-back into the Class, are due to be received no later than March 5, 2013. To date, only one objection to the Settlement has been received and there have been no objections to the proposed Plan of Allocation. As of February 14, 2013, six requests to opt-back into the Class have been received. Cirami Aff. ¶ 10.

Lead Plaintiffs respectfully submit that both the Settlement and the Plan of Allocation are fair, reasonable and adequate and should be approved.

II. THE SETTLEMENT WARRANTS FINAL APPROVAL

Rule 23(e) of the Federal Rules of Civil Procedure provides that a class action settlement must be presented to the Court for approval. The Settlement should be approved if the Court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). As a matter of public policy, courts favor the settlement of disputed claims, particularly in complex class actions. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("*Visa*") ("We are mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context.'") (citation omitted).

In ruling on final approval of class settlements, courts examine both the negotiating process leading to the settlement, and the settlement's substantive terms. *See Visa*, 396 F.3d at 116; *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 188 (S.D.N.Y. 2012); *In re Giant Interactive*

[5] *See* Exhibit 7 to the Joint Declaration, Affidavit of Stephen J. Cirami Regarding (A) Mailing of the Settlement Notice and Proof of Claim Form; (B) Publication of the Summary Notice; and (C) Report on Opt-Ins Received to Date ("Cirami Aff."), ¶¶ 3-6.

Grp., Inc. Sec. Litig., 279 F.R.D. 151, 160 (S.D.N.Y. Nov. 2, 2011). The Court may presume that a settlement negotiated at arms'-length by experienced counsel is fair and reasonable.[6]

A. The Settlement Negotiations Demonstrate Procedural Fairness

The Parties here negotiated the Settlement at arms'-length with the assistance of former U.S. District Judge Layn Phillips, *see* Joint Decl. ¶¶ 153-162, which provides strong indicia of the fairness of the Settlement.[7] The negotiation process was long and arduous, including formal in-person mediation sessions, for which detailed mediation statements were prepared and exchanged and presentations were made, and follow-up communications took place, which further included the exchange of questions and answers by the Parties. *Id.* Additionally, Lead Plaintiffs all took an active role in the settlement negotiation process, precisely as the PSLRA intended. *See* Exhibits 2 to 6 to the Joint Decl.[8]

Co-Lead Counsel who negotiated the Settlement have extensive experience prosecuting complex securities class action litigation and were well informed about the

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[6] *See IMAX,* 283 F.R.D. at 189; *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007) ("A proposed class action settlement enjoys a strong presumption that it is fair, reasonable and adequate if, as is the case here, it was the product of arm's-length negotiations conducted by capable counsel, well-experienced in class action litigation arising under the federal securities laws.") (citation omitted).

[7] *See In re Bear Stearns Cos., Inc. Sec. Litig.*, No. 08 MDL 1963, 2012 WL 5465381, at *3 (S.D.N.Y. Nov. 9, 2012) (approving settlement where parties "engaged in extensive arm's length negotiations, which included multiple sessions mediated by retired federal judge Layn R. Phillips, an experienced and well-regarded mediator of complex securities cases"); *Giant Interactive*, 279 F.R.D. at 160 (approving settlement and finding it was entitled to a presumption of fairness where the "settlement was the product of prolonged, arms-length negotiation" facilitated by Judge Phillips, "a respected mediator").

[8] *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004); *In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. MDL 1500, 02 Civ. 5575 (SWK), 2006 WL 903236, at *7 (S.D.N.Y. Apr. 6, 2006) ("Courts in this District have also commented on the procedural safeguards inherent in cases subject to the PSLRA, wherein the lawyers are not 'mere entrepreneurs acting on behalf of purely nominal plaintiffs'"); *Veeco*, 2007 WL 4115809, at *5 ("Moreover, under the PSLRA, a settlement reached ... under the supervision and with the endorsement of a sophisticated institutional investor ... is 'entitled to an even greater presumption of reasonableness .... Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement.'") (citation omitted).

strengths and weaknesses of Lead Plaintiffs' claims having taken the case to mere weeks before trial was scheduled to commence. Co-Lead Counsel did not recommend settlement to Lead Plaintiffs until Co-Lead Counsel believed that the best recovery achievable in settlement had been obtained. The opinion of Co-Lead Counsel is entitled to "great weight." *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998) (Courts have consistently given "'great weight' . . . to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation."); *accord Chatelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 212 (S.D.N.Y. 1992).

B. Application of the *Grinnell* Factors Supports Approval of the Settlement

An analysis of the *Grinnell* factors, which the Second Circuit has held are to be considered when determining if a settlement is fair, reasonable and adequate, demonstrates that the Court should grant final approval. These factors include the following:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) (citations omitted); *see also D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001); *In re AMF Bowling Sec. Litig.*, 334 F. Supp. 2d 462, 464 (S.D.N.Y. 2004).

"In finding that a settlement is fair, not every factor must weigh in favor of settlement, 'rather the court should consider the totality of these factors in light of the particular circumstances.'" *Global Crossing*, 225 F.R.D. at 456 (citation omitted). Additionally, in deciding whether to approve a settlement, a court "should not attempt to approximate a

litigated determination of the merits of the case lest the process of determining whether to approve a settlement simply substitute one complex, time consuming and expensive litigation for another." *White v. First Am. Registry, Inc.*, 2007 WL 703926, at *2 (S.D.N.Y. Mar. 7, 2007).

Here, the Settlement easily satisfies the criteria for approval articulated by the Second Circuit in *Grinnell*.

1. The Complexity, Expense and Duration of the Litigation Support Approval of the Settlement

"[I]n evaluating the settlement of a securities class action, federal courts, including this Court, 'have long recognized that such litigation is notably difficult and notoriously uncertain.'" *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400, 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) (citation omitted). Indeed, courts recognize that "[s]ecurities class actions are generally complex and expensive to prosecute," *In re Gilat Satellite Networks, Ltd.*, No. 02-cv-1510, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007).[9] Accordingly, "[c]lass action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006) (citations omitted); *see also Strube v. Am. Equity Inv. Life Ins. Co.*, 226 F.R.D 688, 698 (M.D. Fla. 2005) (noting the "overriding public interest in favor of settlement" because it is

[9] *See also Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989) (class actions "are notoriously complex, protracted, and bitterly fought"); *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999) ("[I]n evaluating the settlement of a securities class action, federal courts, ... 'have long recognized that such litigation 'is notably difficult and notoriously uncertain."') (citation omitted); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) ("Settlement at this juncture results in a substantial and tangible present recovery, without the attendant risk and delay of trial.").

"common knowledge that class action suits have a well-deserved reputation as being most complex").

This litigation involved multiple complex legal and factual issues. Lead Plaintiffs encountered, and absent the Settlement would have certainly continued to encounter at trial, significant risks in proving materiality, loss causation, damages and scienter or negligence under Sections 10(b) and 14(a), respectively. The complex issues and obstacles confronted by Lead Plaintiffs, detailed more fully in ¶¶ 124-150 of the Joint Declaration, included, among others, contested issues with respect to Defendants' liability for failing to disclose Merrill's fourth-quarter losses and the bonus agreement, novel questions about the measure of damages available under Section 14(a), and loss causation arguments that would likely have required substantial expert testimony.

If not for the Settlement, the claims would have continued to be vigorously contested by the Defendants, who have demonstrated a commitment to defend through and beyond trial and are represented by well-respected and highly capable counsel. The trial of this Action, which was scheduled to begin just weeks after the Settlement was reached, would have required the presentation of a substantial amount of factual and expert testimony and required the dedication of extensive additional time and resources. If Lead Plaintiffs had prevailed at trial, an appeal would inevitably follow.

The proposed $2,425,000,000 Settlement Amount and Corporate Governance Enhancements provide an outstanding and certain recovery, without the further expense, delay and risk of a smaller recovery or potentially no recovery for the Class presented by continued litigation. In sum, the complexity, expense and delay of continued litigation would be substantial. Accordingly, this factor favors approval of the Settlement.

2. The Advanced Stage of the Proceedings Supports Approval of the Settlement

This factor examines the amount of information available about the claims and defenses to ensure that plaintiffs were able to properly evaluate the case and assess the adequacy of the settlement. *See Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1983); *Chatelain*, 805 F. Supp. at 213-14; *Global Crossing*, 225 F.R.D. at 458 (this requirement "is intended to assure the Court 'that counsel for plaintiffs have weighed their position based on a full consideration of the possibilities facing them"') (citation omitted).

Lead Plaintiffs developed a thorough understanding of the strengths and weaknesses of the Class's claims through the prosecution of the Action. They pursued merits discovery, including party and non-party discovery, engaged in extensive negotiations over the scope and adequacy of Defendants' discovery responses, and engaged in negotiations concerning discovery with non-parties including the Federal Reserve and the United States Treasury. Joint Decl. ¶¶ 79-95. In addition to reviewing more than 4.75 million pages of documents, Lead Plaintiffs conducted thirty-five merits depositions. *Id.* ¶ 95. After the conclusion of fact discovery, the Parties conducted expert discovery, which included the exchange of seventeen opening and rebuttal reports from eleven experts, and the depositions of all of these expert witnesses. *Id.* ¶¶ 93, 95.[10]

The Settlement was reached when the Parties were essentially trial ready, having briefed summary judgment motions, *Daubert* motions and *in limine* motions, and having prepared witness and exhibit lists, deposition designations, a joint pretrial report, jury verdict

[10] Lead Plaintiffs and Co-Lead Counsel also worked with experts and prepared expert reports in connection with the class certification motion (Joint Decl. ¶ 71), which further informed Lead Plaintiffs and Co-Lead Counsel as to the issues that they would continue to face in the Action.

forms, stipulated statements of facts, jury instructions, *voir dire* questions and initial jury remarks. Joint Decl. ¶¶ 96-107.

Accordingly, Lead Plaintiffs through Co-Lead Counsel – who had actively litigated the case for more than three-and-a-half years – had a full understanding of the strengths and weaknesses of the claims as well as the difficulties the Class would face in obtaining a favorable jury verdict after a lengthy and complex trial. Based on the stage of the litigation and the amount of information Lead Plaintiffs and Co-Lead Counsel had obtained by the time the Settlement was reached, they respectfully submit that this factor strongly supports approval of the Settlement.

3. The Risks of Establishing Liability and Damages Support Approval of the Settlement

In assessing this factor, the Court is not required to "decide the merits of the case or resolve unsettled legal questions," *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981), or to "foresee with absolute certainty the outcome of the case." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 177 (S.D.N.Y. 2000). "[R]ather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *Global Crossing*, 225 F.R.D. at 459. While Lead Plaintiffs and Co-Lead Counsel believe that the claims asserted against Defendants have merit, they also recognize that there were considerable risks in pursuing the Action against Defendants through trial and beyond.

While Lead Plaintiffs had prevailed at the motion to dismiss stage on certain of their fraud claims under Section 10(b) and all of their negligence claims under Section 14(a), there was still a substantial risk that the Court could find at summary judgment that Lead Plaintiffs

had failed to establish liability as a matter of law against any of the Defendants or, if the Court permitted claims to proceed to trial, that the jury could find against Lead Plaintiffs.

With respect to Lead Plaintiffs' claims regarding the failure to disclose Merrill's fourth-quarter 2008 losses, while Plaintiffs believe that they would have prevailed, there was a risk that the Court or a jury could find that the Defendants did not act recklessly (as required for establishing a Section 10(b) claim) or negligently (as required for the Section 14(a) claims) in not disclosing Merrill's losses. Joint Decl. ¶¶ 125-134. Specifically, Defendants would present evidence to argue that they were neither reckless nor negligent because in-house and outside counsel were closely involved in the decision not to disclose the losses. While Lead Plaintiffs would have argued in response that neither outside nor in-house counsel knew the full extent of Merrill's losses and their impact on the company, the involvement of counsel created a significant risk that either the Court or a jury could find that the decision not to disclose was made in good faith and had a reasonable basis. *Id*. ¶ 127. Defendants also argued that they did not personally benefit from the non-disclosure of the losses. Indeed, there was no evidence that any Defendant engaged in insider trading during the Class Period or otherwise reaped a concrete, personal financial benefit from the failure to disclose Merrill's losses and the consummation of the Merger. The lack of such evidence heightened the risk that a jury would not find them liable. *Id*. ¶ 128.

Defendants also raised a number of additional arguments that either the Court or a jury could have accepted, including that Merrill's estimated fourth-quarter loss forecasts frequently changed, were only interim in nature, and therefore were too uncertain to be disclosed. The strength of Defendants' defenses rested on the testimony of experts who could

have been found by a jury to be credible witnesses for Defendants. These arguments, if accepted, could also have defeated a finding of recklessness or negligence. Joint Decl. ¶ 129.

Defendants also contended that they had no legal duty to disclose Merrill's losses because they did not make any false statements about Merrill's fourth-quarter performance, and the law typically does not impose a duty to disclose intra-quarter results. Joint Decl. ¶ 130. In addition, Defendants argued that the non-disclosure of the fourth-quarter losses was immaterial as a matter of law in light of the massive losses Merrill reported in previous quarters noting that, in the five quarters preceding the Merger, Merrill lost almost $40 billion pre-tax. Additionally, Defendants cited the detailed risk disclosures in Merrill's and BoA's SEC filings, and further argued that the market understood that Merrill was continuing to report enormous losses in the fourth quarter of 2008. Joint Decl. ¶ 131.

Lead Plaintiffs' bonus disclosure claims confronted similar risks. Foremost, Defendants argued throughout the litigation that the non-disclosure of the bonus agreement in the Proxy was immaterial. Defendants offered newspaper articles and analysis which they contended showed that the market knew that Merrill would be paying some amount of bonuses prior to the close of the Merger, and that certain publications went so far as to speculate as to the amount of such bonuses. While the Court may not have sustained such arguments at summary judgment, there was a risk that these arguments would have been accepted by a jury. Joint Decl. ¶ 132. In addition, Defendants argued that any non-disclosure of the bonus agreement was neither intentional nor reckless and, therefore, was not sufficient to find liability under Section 10(b), nor did it meet the threshold of negligence for a finding of liability under Section 14(a). Specifically, Defendants argued that, at all times, their counsel was aware of the existence of the bonus agreement, and that the decision to disclose

the Disclosure Schedule was left entirely up to BoA's and Merrill's lawyers, thereby mitigating against a finding that Defendants had an intent to deceive shareholders, or even acted negligently. Joint Decl. ¶ 133. While plaintiffs believe that they would have prevailed on this argument, there was a risk that a jury would have accepted this argument, especially given that none of the Defendants in the Action were the recipients of any bonuses that were the subject of the Disclosure Schedule and, thus, lacked a provable motive for fraud. *Id*.

Additionally, Defendants asserted that they were not liable because they had represented to investors that they were entering into the Merger because they believed it would have long-term benefits to BoA, and Defendants argued that the Merger was beneficial to BoA shareholders. Indeed, Defendants argued that Merrill contributed significantly to BoA's earnings since the Merger, and was a principle driver of the profits that BoA reported after the Merger closed. While Lead Plaintiffs disputed Defendants' arguments and would have argued that any "hindsight benefit" was irrelevant under the federal securities laws, there certainly was a risk that Defendants' arguments could have impact on a jury. Joint Decl. ¶ 134.

Lead Plaintiffs also faced substantial risks in establishing loss causation and damages. For example, from the outset of this case, Defendants repeatedly challenged the availability and measure of damages under Section 14(a). Joint Decl. ¶¶ 135-139. At the motion to dismiss stage, class certification and again on summary judgment, Defendants repeatedly raised the question of whether and to what extent Lead Plaintiffs could establish damages under Section 14(a). *Id.* Defendants argued that Lead Plaintiffs had failed to meet their pre-trial burden that the damages sought under Section 14(a) were not overlapping with damages available derivatively. Even if Lead Plaintiffs had prevailed at trial on the question of

damages, the Class faced an inevitable appeal on this and numerous other issues. Joint Decl. ¶ 139. Given that the vast majority of Lead Plaintiffs' claimed damages in this case arose under Section 14(a), this issue posed a particularly significant risk for Lead Plaintiffs and the Class. *Id*.

There were also significant risks with respect to loss causation. Whether and to what extent the alleged corrective disclosures in this case revealed the information that Lead Plaintiffs alleged was previously undisclosed was vigorously contested. Joint Decl. ¶ 141. Lead Plaintiffs faced risks in proving that the alleged corrective disclosures in January 2009 had, in fact, revealed the alleged undisclosed information; and that the price declines on the identified corrective disclosure dates were caused by the alleged corrective disclosures as opposed to being the result of other adverse information unrelated to the allegations in the Action or other market or industry factors. Joint Decl. ¶¶ 141-145.

Lead Plaintiffs faced these risks in connection with summary judgment, trial and appeals. In their motions for summary judgment, Defendants sought dismissal of all or part of Lead Plaintiffs' Section 10(b) and 14(a) claims on numerous grounds, including immateriality of the non-disclosure of the losses and bonuses, lack of damages, loss causation, and lack of scienter and negligence. Joint Decl. ¶ 149. At the time the Settlement was reached, the Court had not rendered its decision with respect to the summary judgment motions. Success by Defendants, even partially, on their summary judgment motions, would have dramatically eroded the value of the claims left to try to a jury. *Id*.

A trial of this case would also have presented many specific risks in addition to the usual uncertainties inherent in placing complex issues before a jury. All of the key fact witnesses in this Action who Lead Plaintiffs would have used to present evidence at trial were

adverse witnesses, including Defendants Lewis, Price, Cotty, Thain, the BoA Board, current and former BoA and Merrill officers, and Defendants' counsel, such as partners at Wachtell Lipton, who still represented, among other Defendants, BoA. Joint Decl. ¶ 146.

Moreover, at the time the Settlement was reached, *Daubert* motions and motions *in limine* had not yet been decided. While Plaintiffs were hopeful that they would have prevailed on these motions, if Defendants had succeeded through these motions in excluding testimony from certain of Lead Plaintiffs' experts or excluding key evidence, that would have presented substantial obstacles to Lead Plaintiffs' presentation of their claims. Joint Decl. ¶¶ 147-148. Even if Lead Plaintiffs were able to present all of their experts' testimony at trial, Defendants would have presented their own experts with conflicting opinions and there could be no certainty which experts' views would be credited by the jury.[11]

Lastly, even if Lead Plaintiffs were successful in obtaining a jury verdict on all or part of their claims, that verdict would have been appealed. *See In re AMF Bowling*, 334 F. Supp. 2d at 466-67. In sum, the risks involved in continuing to litigate this Action were substantial.

4. The Risks of Maintaining the Class Action Through Trial Support Approval of the Settlement

The Court certified the Class on February 6, 2012. ECF No. 527; Joint Decl. ¶ 76. However, in the class certification order, the Court noted: "This Court will exercise its

[11] *See, e.g., FLAG Telecom*, 2010 WL 4537550, at *18 ("Undoubtedly, in this action, establishing the amount of damages at trial would have resulted in a 'battle of experts.' The jury's verdict with respect to damages would thus depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable."); *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262 RWS, 2002 WL 31663577, at *21 (S.D.N.Y. Nov. 26, 2002) ("The reaction of a jury to such complex expert testimony is highly unpredictable."); *Global Crossing*, 225 F.R.D. at 459; *In re Blech Sec. Litig.*, No. 94 Civ. 7696 (RWS), 2002 WL 31720381, at *1 (S.D.N.Y. Dec. 4, 2002) ("establishing damages from the drop in the relevant stock price, would, Plaintiffs claim, have degenerated into a 'battle of the experts' and thus posed a risk to Plaintiffs").

authority to revisit class certification if so warranted by further developments." (ECF No. 527, at p. 29). Lead Plaintiffs believe they would have been able to maintain certification of the Class. There was, however, a risk – though slight – that the Class could be decertified or modified by the Court, or on appeal after a trial, and these risks, therefore, weigh in favor of approving the Settlement.

5. The Ability of Defendants to Withstand a Greater Judgment

Despite the outstanding recovery obtained here, it is likely Defendants could withstand even a greater judgment against them. "But a defendant is not required to 'empty its coffers' before a settlement can be found adequate." *In re Sony SXRD Rear Projection Television Class Action Litig*., No 06 Civ. 5173 (RPP), 2008 U.S. Dist. LEXIS 36093, at *23 (S.D.N.Y. May 1, 2008) (*quoting McBean v. City of New York*, 233 F.R.D. 377, 388 (S.D.N.Y. 2006)). *See also IMAX*, 283 F.R.D. at 189 (same). Indeed, this factor, standing alone, is not sufficient to preclude a finding of substantive fairness where the other factors weigh heavily in favor of approving a settlement. *See D'Amato*, 236 F.3d at 86.

6. The Range of Reasonableness of the Settlement Amount Supports the Settlement

Another *Grinnell* factor is whether the settlement amount is reasonable in light of the possible recovery and the risks of litigation.[12] When weighed against the risks of continued litigation, the proposed Settlement for $2,425,000,000 in cash, along with important Corporate Governance Enhancements is an outstanding result. In light of the unpredictability of a lengthy and complex trial, and the inevitable appellate process that would follow with the

[12] Courts typically collapse into this inquiry the final two *Grinnell* factors, "the range of reasonableness of the settlement fund in light of the best possible recovery" and "the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." 495 F.2d at 463. *Accord Global Crossing*, 225 F.R.D. at 460.

risk of reversal, the Settlement falls squarely within the "range of reasonableness."[13]

Had a jury (or the Court) credited some or all of Defendants' arguments, the potential recoverable damages could have been dramatically reduced, if not eliminated. Even if Lead Plaintiffs overcame the significant risks of establishing liability, there was a real risk, if certain of Defendants' arguments on loss causation and damages had prevailed, that Plaintiffs might not obtain a judgment in excess of the Settlement Amount or that they might obtain a lesser amount. In sum, while Lead Plaintiffs believe that their claims are meritorious and that the Class suffered substantial damages, there were no guarantees that Lead Plaintiffs would recover anything.

The proposed Settlement is an outstanding result for the Class in light of the range of possible recoveries and the risks of continued litigation

7. The Reaction of the Class to Date Supports Approval of the Settlement

Pursuant to the terms of the Preliminary Approval Order, and as set forth in the Settlement Notice, the deadline for Class Members to submit objections to the Settlement, the Plan of Allocation and/or Co-Lead Counsel's request for an award of attorneys' fees and reimbursement of litigation expenses is March 5, 2013. To date, only one objection to the Settlement has been received and that objection was submitted by an individual who has not demonstrated membership in the Class. Joint Decl. ¶ 178.[14] Should any additional objections

[13] *Visa*, 396 F.3d at 119 ("there is a range of reasonableness with respect to a settlement - a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion") (citation omitted).

[14] Co-Lead Counsel will address all objections, including the one objection to the Settlement received to date, in their reply papers to be filed with the Court on March 29, 2013. A copy of the objection, submitted by Dennis Breuel, is attached as Exhibit 8 to the Joint Declaration. Mr. Breuel's objection, which is based on "the shareholders [having] had to approve a sale of Merrill Lynch without material information being presented and could affect the results of the merger" essentially asks the Court to order another vote, and "[i]f the vote decouples the merger, the management should reverse the

be received after the date of this submission, Lead Plaintiffs will address them in their reply papers, which are due to be filed with the Court on March 29, 2013. *Id.*[15]

III. THE PLAN OF ALLOCATION IS FAIR, REASONABLE AND ADEQUATE

A plan for allocating settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable and adequate. *See IMAX*, 283 F.R.D. at 192; *Silberblatt v. Morgan Stanley*, 524 F. Supp. 2d 425, 430 (S.D.N.Y. 2007) ("Exactitude is not required in allocating consideration to the class, provided that the overall result is fair, reasonable and adequate."); *Maley*, 186 F. Supp. 2d at 367; *In re PaineWebber Ltd. P'ships Litig.,* 171 F.R.D. 104, 132 (S.D.N.Y. 1997), *aff'd,* 117 F.3d 721 (2d Cir. 1997). Generally, "a plan of allocation that reimburses class members based on the type and extent of their injuries is reasonable." Plans of allocation, however, need not be tailored to fit each and every class member with "mathematical precision." *Id.* at 133. Rather, broad classifications may be used in order to promote "[e]fficiency, ease of administration and conservation" of the settlement fund. *Id.* at 133-35. A plan of allocation is fair and reasonable as long as it has a "reasonable, rational basis." *Maley,* 186 F. Supp. 2d at 367; *see In re Initial Pub. Offerings Sec. Litig.*, 671 F. Supp. 2d 467, 497 (S.D.N.Y. 2009).

Among the factors that courts have given great weight in determining the fairness, reasonableness and adequacy of a proposed plan of allocation is the opinion of experienced

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integration." *See* Exhibit 8. Counsel is also aware of another potential objection which was served upon defense counsel by Mr. Robert Shattuck in a separate matter and which states that it will also be filed in the ***Bank of America*** matter at the appropriate time. As of this date, however, the objection has yet to be filed in this Action or served upon Co-Lead Counsel in accordance with the Preliminary Approval Order. If filed and served in a timely fashion, Co-Lead Counsel will also address the Shattuck Objection in our reply papers.

[15] The Preliminary Approval Order provides that persons and entities that opted out of the Class in connection with the Class Notice may "opt-back into" to the Class. *See* Preliminary Approval Order at ¶ 10. The deadline for "opt-ins" is also March 5, 2013. To date, six requests to opt-back into the Class have been received. Joint Decl. ¶ 178.

class counsel.[16] Here, Co-Lead Counsel developed the Plan of Allocation in consultation with Lead Plaintiffs' damages expert and believe that the Plan of Allocation provides a fair and reasonable method to equitably distribute the Net Settlement Fund among Class Members.

If approved, the Plan of Allocation will govern how the Net Settlement Fund will be distributed among Class Members who submit Proof of Claim Forms that are approved for payment ("Authorized Claimants"). The Plan of Allocation provides for separate calculations under Section 10(b) (for both BoA common stock and January 2011 call options) and Section 14(a). Joint Decl. ¶ 170. In developing the Plan of Allocation, Lead Plaintiffs' damages expert calculated the amount of estimated alleged artificial inflation in the per share closing prices of BoA common stock as well as January 2011 call options throughout the Class Period that allegedly was proximately caused by Defendants' alleged misrepresentations and material omissions. The damages expert's analysis entailed studying the price declines in BoA common stock and January 2011 call options in reaction to certain public announcements regarding BoA in which alleged misrepresentations and material omissions were alleged to have been finally revealed to the market (*i.e.*, "corrective disclosures"), adjusted to eliminate the effects attributable to general market and/or industry conditions. In this respect, artificial inflation tables were created and presented as part of the Settlement Notice for every trading day of the Class Period for both BoA common stock and January 2011 call options. These

[16] *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 145 (S.D.N.Y. 2010) ("In determining whether a plan of allocation is fair, courts give substantial weight to the opinions of experienced counsel."); *Am. Bank Note Holographics*, 127 F. Supp. 2d at 429-430 ("An allocation formula need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' class counsel .... As with other aspects of settlement, the opinion of experienced and informed counsel is entitled to considerable weight.").

tables will be utilized in calculating each claimant's Recognized Loss and/or Gain Amounts, and ultimately a claimant's overall Recognized Claim. Joint Decl. ¶¶ 170-171.[17]

In sum, the proposed Plan of Allocation was designed to fairly and rationally allocate the Net Settlement Fund among Authorized Claimants based on the amount of alleged artificial inflation present in BoA's common stock and January 2011 call options that was allegedly caused by Defendants' alleged misstatements and omissions relating to the Merger throughout the Class Period.[18] Joint Decl. ¶ 172. Accordingly, Co-Lead Counsel respectfully submit that the proposed Plan of Allocation is fair and reasonable and should be approved.

IV. NOTICE TO THE CLASS SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

Notice to class members of a settlement satisfies Rule 23(e) and due process where it fairly apprises "members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Visa*, 396 F.3d at 114; *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 164 F.R.D. 362, 368 (S.D.N.Y. 1996) (citation omitted). Notice need not be perfect or received by every class member, but instead be reasonable under the circumstances. *See* Fed. R. Civ. P 23(e)(1) ("The court must direct notice in a reasonable manner to all class members who would be bound by the [settlement] proposal."); *Visa*, 396 F.3d at 114. Notice is adequate if the average class member understands the terms of the proposed settlement and the options he, she or it has. *See In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156, 166 (S.D.N.Y. 2007).

[17] With respect to the Section 10(b) calculation for BoA common stock, Recognized Loss Amounts are reduced to an appropriate extent by taking into account the closing prices of BoA common stock during the 90-day-look-back period as set forth pursuant to Section 21D(e)(1) of the PSLRA.

[18] To date, there have been no objections to the proposed Plan of Allocation. Joint Decl. ¶ 178.

As noted above, in accordance with the Preliminary Approval Order, between December 24, 2012 and February 14, 2013, GCG disseminated more than 3.2 million copies of the Notice Packet to potential Class Members and nominees. Cirami Aff. ¶¶ 4-6. To disseminate the Notice Packet, GCG mailed the notice to all the names and addresses to which it disseminated the notice of class certification having obtained the names and addresses of potential Class Members from listings provided by BoA and its transfer agent and from banks, brokers and other nominees. *Id*. ¶¶ 3-4. On January 3, 2013, GCG caused the publication of the Summary Notice in *The Wall Street Journal*, *The New York Times*, the *Financial Times*, and over the *PR Newswire*. *Id*. ¶ 7. GCG also established a toll-free informational telephone line and caused information regarding the Settlement to be posted on the website specifically established for the Action, www.boasecuritieslitigation.com, which provides access to, among other documents, downloadable copies of the Settlement Notice and Proof of Claim Form. *Id*. ¶¶ 8-9.

The Settlement Notice summarizes in plain language the terms of the Settlement and Class Members' rights in connection with the Settlement. Among other information, the Settlement Notice contains a thorough description of the Settlement, the Plan of Allocation and Class Members' rights to: (i) participate in the Settlement; (ii) object to the Settlement, Plan of Allocation or request for attorneys' fees and reimbursement of expenses; or (iii) opt-back into the Class. The combination of individual first-class mail to all Class Members who could be identified with reasonable effort, supplemented by publication notice in several widely-circulated publications, was the best notice practicable under the circumstances. *See, e.g.*, *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at

*12-*13 (S.D.N.Y. Dec. 23, 2009); *Global Crossing*, 225 F.R.D. at 448-49. Accordingly, the notice program here was reasonable.

V. CONCLUSION

For the reasons set forth above, Lead Plaintiffs respectfully request that the Court approve the proposed Settlement and Plan of Allocation as fair, reasonable and adequate.

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