UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE BANK OF AMERICA CORP. SECURITIES, DERIVATIVE, AND EMPLOYMENT RETIREMENT INCOME SECURITY ACT (ERISA) LITIGATION	:	Master File No. 09 MDL 2058 (PKC)
THIS DOCUMENT RELATES TO All Derivative Actions	:	

LEAD PLAINTIFFS' RESPONSE
TO ORDER TO SHOW CAUSE AND PETITION TO INTERVENE

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Lead Plaintiffs in this action (the "Action"), Hollywood Police Officers' Retirement System ("Hollywood") and Louisiana Municipal Police Employees Retirement System ("LMPERS") (collectively, "Lead Plaintiffs"), respectfully submit this memorandum of law, in opposition to the Petition to Intervene ("Petition") filed by Ann B. Houx and Nancy Rothbaum (the "Delaware Objectors" or the "Objectors") and in response to the Court's Order to Show Cause, dated April 13, 2012.

PRELIMINARY STATEMENT

The Petition constitutes nothing more than a premature objection to a settlement—reached after over three years of substantial litigation and over six months of arm's-length negotiations—between the directors of Bank of America Corporation ("BAC") and two highly-qualified institutional BAC shareholders acting in their roles as Court-appointed Lead Plaintiffs.[1] If approved, the Settlement will resolve derivative claims against the BAC directors arising from the merger with Merrill Lynch pending since 2009—including both federal claims under Section 14(a) of the Securities Exchange Act of 1934 and state law claims under Delaware law.

The Settlement not only obtains a payment of $20 million to BAC, but also achieves very substantial corporate governance changes—including the creation of an entirely new, Board-level committee of independent directors to assess major new transactions and work in conjunction with BAC's existing Disclosure Committee to ensure that such transactions are properly vetted. Corporate governance changes of this type are often approved as a component (or the entirety) of commendable settlements.

[1] The settlement (referred to herein as the "Settlement") has not been finalized into a Stipulation of Settlement. A memorandum of understanding ("MOU") was executed on April 12, 2012 and promptly provided to the Court.

The Delaware Objectors—two individual shareholders of BAC who have been content to pursue their claims in Delaware for the last three years (spurning all efforts to cooperate with Lead Plaintiffs until the eleventh hour)—have criticized the monetary component of the Settlement as too low. However, rather than voice their objections at the proper time, in connection with an orderly approval process after notice to all shareholders, the Delaware Objectors have stormed into Court seeking to "enjoin" the Settlement before it is even finalized.

As with many such premature protests, the Delaware Objectors have spared no effort to cast the Settlement in alarmist terms, including the spurious charge that it is the product of "collusion" and a "reverse auction" process. Ignoring their own obligations to act in the best interests of BAC and not to cast aspersions for which they have no evidentiary basis, the Objectors and their counsel have publicly denigrated the Settlement and impugned the good faith and motivations of Lead Plaintiffs and Lead Counsel—falsely charging them with a failure to litigate, conduct discovery, or assess the strengths and weaknesses of the claims.

As demonstrated below, the record overwhelmingly contradicts the Delaware Objectors' groundless accusations. Lead Plaintiffs and their counsel litigated this Action intensively, prevailed on a hard-fought motion to dismiss, analyzed millions of pages of documents, participated in thirty-one depositions, and reviewed over 100 transcripts from other legal proceedings. The Settlement negotiations spanned over six months, were conducted before one of the nation's most esteemed mediators, and were predicated upon a candid assessment of the claims and the damages recoverable by BAC. In these circumstances and because there is nothing—beyond the sheer label "collusion"—upon which to suppose that BAC's or shareholders' interests are not adequately represented, long-established legal authority bars the Delaware Objectors from being allowed to intervene, or replace Lead Plaintiffs or Lead Counsel,

at this late stage of the litigation. For similar reasons, unsurprisingly, there is no precedent for an order "enjoining" a Settlement that has not even been finalized, let alone presented for approval.

FACTUAL AND PROCEDURAL BACKGROUND

This Action commenced when LMPERS filed the first derivative action arising out of the merger with Merrill Lynch. *Louisiana Police Employees Retirement System v. Lewis, et al.*, No. 09 Civ. 808 (S.D.N.Y. filed Jan. 28, 2009). Three groups of movants sought appointment as lead plaintiffs. The Delaware Objectors did not seek appointment as lead plaintiff at that time, nor did their counsel seek appointment as lead counsel. After full briefing, on June 30, 2009, Judge Chin appointed Hollywood and LMPERS as Lead Plaintiffs and Saxena White P.A. ("Saxena White") and Kahn Swick & Foti, LLC ("KSF") as Lead Counsel ("Lead Counsel") (Dkt. No. 2).

Thus appointed, Lead Counsel soon conferred with lead counsel appointed in *In re Bank of America Corp. Stockholder Derivative Litigation*, C.A. No. 4307 (Del. Ch.) ("Delaware Counsel" for the "the Delaware Action"). On August 5, 2009, Lead Counsel had a telephonic conversation with Alexander Schmidt, a partner of Wolf Haldenstein Adler Freeman & Herz, one of the firms appointed lead counsel in the Delaware Action. Counsel discussed their clients' respective claims and allegations, and the desire to avoid overlapping efforts if possible. At that time, Lead Plaintiffs had not yet filed their consolidated amended complaint and Delaware Counsel had just filed their brief in opposition to the BAC Defendants' motion to dismiss. Fruitful discussions regarding coordination failed to materialize. White Decl. ¶3.

On October 9, 2009, Lead Plaintiffs filed a consolidated amended derivative complaint alleging, among other things, violations of Section 14(a) and breaches of fiduciary duty on the part of the BAC Defendants (Dkt. No. 39).[2] Briefing on various motions to dismiss ensued.

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[2] The remaining BAC Defendants are William Barnet, III, Frank P. Bramble, Sr., John T. Collins, Gary L.

On November 16, 2009, the Court partially lifted the presumptive discovery stay imposed by the PSLRA, 15 U.S.C. § 78u-4(b)(3)(B) (Dkt. No. 43). As a result, Lead Counsel received over 2.5 million pages of documents previously produced to several government agencies (including the SEC and the New York Attorney General) which were also conducting investigations into the BAC-Merrill merger, as well as copies of over 100 transcripts of testimony given in connection with those investigations. Throughout the course of discovery, Lead Counsel has participated in thirty-one additional depositions and has received almost 500,000 additional pages of documents. White Decl. ¶5.

On June 25, 2010, the Court entered a Consolidation Order (Dkt. No. 290). That Order delineated the duties of counsel in the various consolidated and individual actions, and ordered that "Lead Counsel in the Consolidated Securities Action, Consolidated Derivative Action and Consolidated ERISA Action shall make efforts to coordinate with each other to realize efficiencies in the discovery process, including the scheduling of witness depositions."

On August 18, 2010, Lead Counsel engaged in a caucus session with the Hon. Layn R. Phillips (Ret.) in Chicago, Illinois, regarding preliminary terms upon which the Consolidated Derivative Actions might be settled and other considerations relating to the settlement of the case. White Decl. ¶7.

On August 27, 2010, the Court granted in part and denied in part the motions to dismiss (Dkt. No. 170). In this Order, the Court also denied the BAC Defendants' motion to stay the Consolidated Derivative Actions in favor of the Delaware Action. Thereafter, Lead Counsel in

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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, Jackie M. Ward and Kenneth D. Lewis.

the Consolidated Securities Action filed a second amended complaint. Briefing on the motions to dismiss ensued, and the discovery stay continued.

The Delaware Objectors
Reject Efforts to Cooperate with Lead Plaintiffs.

In early July 2011, Lead Counsel initiated contact with Delaware Counsel and engaged in a series of communications regarding the respective cases. On a July 8, 2011, conference call, Lead Counsel informed Delaware Counsel, Pamela Tikellis and Robert Kriner, of Chimicles & Tikellis, that they had met with the Judge Phillips to discuss issues relating to the settlement of this Action. In response to an inquiry several days later from Ms. Tikellis, Lead Counsel informed her who had attended the private caucus session with Judge Phillips from each of Lead Counsel's firms. White Decl. ¶9.

Over the course of Lead Counsel's exchanges with Delaware Counsel, Lead Counsel informed Delaware Counsel that, even though Lead Plaintiffs were under a discovery stay, Lead Counsel believed that cooperating by coordinating discovery and other pretrial efforts would allow for the efficient prosecution of the respective actions. Lead Counsel offered several ways in which the two sets of counsel could coordinate discovery efforts, including Lead Plaintiffs moving to modify this Court's June 25, 2010, Consolidation Order, or moving to lift the discovery stay, and Delaware Counsel moving to extend the deadline for completion of fact discovery in their case, which at the time was scheduled for December 22, 2011. White Decl. ¶10.

Delaware Counsel would not agree to an extension of fact discovery in their case, nor would they agree to conduct any depositions under the caption of the Consolidated Derivative Actions. Delaware Counsel also informed Lead Counsel that their claims were stronger, their case was further along procedurally based on their schedule and the PSLRA discovery stay, and

that we would not be able to "catch up" to them. Delaware Counsel requested several days to speak amongst themselves, and said that they would follow up with Lead Counsel to discuss possible plans for cooperation and coordination. White Decl. ¶11. Despite their assurances, Delaware Counsel never contacted Lead Counsel. Over the next several weeks in July, Lead Counsel attempted to reach out to Delaware Counsel to continue to discuss possible coordination. Lead Counsel's phone calls went unanswered and voicemails went unreturned. White Decl. ¶11.

On July 29, 2011, the Court entered an Order on the motions to dismiss the second amended complaint in the Consolidated Securities Action (Dkt. No. 405) On that same day, the Court also issued a Scheduling Order directing the parties in both this Action and the Consolidated Securities Action to meet and confer on a case management plan and to submit a proposed case management order (Dkt. No. 406). The Scheduling Order required that the deadline for the conclusion of fact discovery in any proposed case management order be no later than March 30, 2012.

Apparently in response to the Order and the lifting of the discovery stay, Delaware Counsel called for an August 17, 2011, meeting in New York between Lead Counsel, Lead Securities Counsel and Delaware Counsel. At this meeting, however, Delaware Counsel refused to seek an extension of their deadline for the completion of fact discovery. Accordingly, under the Court's June 25, 2010, Consolidation Order (Dkt No. 290), Lead Counsel and Lead Securities Counsel agreed to consider the possibility of coordinating certain depositions with Delaware Counsel where practicable. White Decl. ¶13.

On August 26, 2011, counsel for Defendants in the Delaware Action moved to extend the deadline for the completion of fact discovery from December 22, 2011 to March 30, 2012. A

hearing was held on this motion in the Court of Chancery on September 6, 2011, in which Chancellor Strine encouraged the parties to coordinate, but denied an extension of the fact discovery deadline.

On September 16, 2011, the Court entered the Case Management Plan and Scheduling Order for the Consolidated Derivative Actions (Dkt. No. 462). That Order provided that the deadline for completion of fact discovery was March 30, 2012, and the deadline for completion of expert discovery was May 18, 2012.

Lead Plaintiffs Commence Settlement
Negotiations with the BAC Defendants in Late 2011

In the fall of 2011, Lead Counsel began exploring with counsel for the BAC Defendants the prospects of mutually agreeable terms upon which the action could be resolved. Over the next several weeks, Lead Counsel had a series of discussions with Defendants' counsel regarding possible settlement terms. White Decl. ¶17.

Beginning on October 24, 2011, Lead Plaintiffs made a formal demand upon the BAC Defendants, and thereafter engaged in several further discussions with counsel for the BAC Defendants, regarding its provisions. The BAC Defendants formally responded on December 16, 2011. After a series of follow up discussions, Lead Plaintiffs formally replied on January 5, 2012, and offered to mediate before Judge Phillips. White Decl. ¶18.

Over the next several weeks, Lead Counsel had numerous discussions with Defendants' counsel regarding the various terms of the Settlement. By mid-February, the parties had finally come to a general agreement on the core corporate governance reforms that would be included in the Settlement. But the parties had made little progress on the issue of a monetary component. White Decl. ¶19.

On February 17, 2012, this Court held a status conference, during which the Court inquired as to the status of any settlement discussions between the parties. The parties informed the Court that there was an agreement on certain core aspects that would form the basis for any settlement.

On February 20, 2012, Lead Counsel again suggested that the parties mediate the monetary component, given the existing agreement on corporate governance reforms, before Judge Phillips. Defendants' Counsel agreed. White Decl. ¶21.

On February 29, 2012, the parties engaged in a formal mediation session in New York, in advance of which, the parties submitted detailed, comprehensive mediation statements. Although the parties made progress at this mediation session, they still could not come to an agreement on a monetary component. Over the next several weeks, Lead Counsel, Defendants' Counsel and Judge Phillips held a series of follow-up discussions. White Decl. ¶22.

The Delaware Objectors Emerge at the Eleventh Hour.

On March 22, 2012—nine months after rejecting Lead Counsel's requests to cooperate – Lead Counsel received a letter from Counsel for the Delaware Objectors. This letter unilaterally proclaimed that "it is now appropriate for the Plaintiffs in both the Delaware and New York derivative actions to jointly make a demand . . . ." This directly contradicted the factual record of the settlement negotiations that had been ongoing for six months and were already substantially completed. White Decl. ¶23.

On March 29, 2012, Lead Counsel agreed to the terms of the Settlement. Over the next two weeks, Lead Counsel negotiated the language of the Memorandum of Understanding ("MOU") with counsel for the parties. Lead Plaintiffs and Defendants jointly submitted the MOU to the Court on April 12, 2012. Throughout the entire negotiating process, and even up

until this date, Lead Counsel has not had a single discussion regarding its fees with counsel for any of the parties. White Decl. ¶24.

ARGUMENT

I. NO BASIS EXISTS TO ALLOW THE DELAWARE OBJECTORS TO INTERVENE IN THIS ACTION.

A. The Delaware Objectors Have Failed to Comply with the Requirements of Rule 24(c).

Federal Rule of Civil Procedure 24(c) requires that a motion for intervention "be accompanied by a pleading that sets out the claim or defense for which intervention is sought." The Delaware Objectors have submitted no such pleading here.[3]

The requirements of Rule 24(c) are not mere technical or procedural formalities. In *Abramson v. Pennwood Investment Corp.*, 392 F.2d 759 (2d Cir. 1968), the Second Circuit held that a motion to intervene in a federal derivative action must be accompanied by a verified pleading. *Id*. at 761-62. Like the Delaware Objectors, the *Abramson* intervenor sought to intervene based on his belief that the achieved settlement was inadequate. *Id.* at 761.[4] Like the Delaware Objectors, the intervenor did not attach his own pleading to his motion. *Id*. Instead, he referenced the allegations of the complaint already on file. Here, the Delaware Objectors do neither. It is not clear whether they intend to rely on Lead Plaintiffs' complaint or file their own. They do not even explain what they will do if accorded lead plaintiff status, including whether they wish to continue to litigate in this Court or in the Court of Chancery. The Delaware

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[3] The Delaware Objectors have styled their submission as a "Petition." Federal Rule of Civil Procedure 7(a) does not recognize a "petition" as a pleading. In addition, the Delaware Objectors have not complied with Rule 7(b), which requires that requests for court orders "must be made by motion."

[4] A settlement in a parallel derivative action asserting claims for violations of New York law had already been approved by the Supreme Court, New York County and upheld on appeal in the Appellate Division, First Department. *See id.* at 761.

Objectors' failure to comply with Rule 24(c) and supply even this basic information is by itself reason to deny their motion to intervene.[5]

B. The Delaware Objectors Cannot Intervene as of Right.

To intervene under Rule 24(a), a proposed intervenor must: "(1) file a timely motion; (2) show an interest in the litigation; (3) show that its interest may be impaired by the disposition of the action; and (4) show that its interest is not adequately protected by the parties to the action." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001) (affirming denial of motion to intervene based on purported inadequacy of settlement terms and representation). "Denial of the motion to intervene is proper if any of these requirements is not met."[6] *Id.*

1. BAC's Interests Have Been Well-Represented Throughout the Litigation and Will Continue to be Well-Represented Through Settlement.

Because this is a derivative action, both Lead Plaintiffs and Delaware Objectors share an identity of interest, as the true party in interest is BAC. *In re Ambac Fin. Grp., Inc. Deriv. Litig.*, 257 F.R.D. 390, 393 (S.D.N.Y. 2009) (denying motion to intervene). Where there is an identity of interest, "the movant to intervene must rebut the presumption of adequate representation by the party already in the action." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179–80 (2d Cir. 2001) (affirming denial of motion to intervene). In order to rebut this presumption, the Second Circuit has "demanded a more rigorous showing of inadequacy" than is usually applied under Rule 24(a). *Id*. at 179.

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[5] Nor may the Objectors attempt to do so for the first time in a reply brief. *See Ocean Partners, LLC v. N. River Ins. Co.*, 546 F. Supp. 2d 101, 106 (S.D.N.Y. 2008); *Playboy Enters., Inc. v. Dumas*, 960 F. Supp. 710, 720 n. 7 (S.D.N.Y. 1997); *Am. Hotel Int'l Grp., Inc. v. OneBeacon Ins. Co.*, 611 F. Supp. 2d 373, 375 (S.D.N.Y. 2009), *aff'd*, 374 F. App'x 71 (2d Cir. 2010).

[6] The Second Circuit has held that "[s]ubstantially the same factors are considered in determining whether to grant an application for permissive intervention pursuant to Fed. R. Civ. P. 24(b)(2)." *In re Bank of N.Y. Deriv. Litig.*, 320 F.3d 291, 300 n.5 (2d Cir. 2003) (upholding denial of motion to intervene). For the same reasons, the Delaware Objectors should not be allowed to permissively intervene.

The Delaware Objectors have not cited a single piece of evidence suggesting that BAC's interests were not adequately protected, because no such evidence exists. The Objectors' cavil with the Settlement is their belief that the $20 million payment to BAC is too low, and therefore the Bank's interests are not adequately represented. This is not a proper basis for intervention. *See Cohorst v. BRE Props., Inc.*, No. 3:10-CV-266-JM-BGS, 2011 WL 3489781, at *8 (S.D. Cal. Jul. 19, 2011) ("To the extent that Roman is objecting to settlement terms agreed to by *Cohorst* counsel, her objections is not a basis for intervention.").

The proper time to determine whether a settlement is fair, adequate and reasonable is not on a motion to intervene where the parties have only just begun negotiating the terms of a definitive settlement stipulation. The Second Circuit is clear that Rule 23.1 requires that notice be sent and a hearing scheduled before a district court can approve a settlement. *Blatt v. Dean Witter Reynolds InterCapital, Inc.*, 732 F.2d 304, 307 n.1 (2d Cir. 1984). And at the appropriate time under Rule 23.1, upon a full record of their actions throughout the litigation and the Settlement proceedings, Lead Plaintiffs and Lead Counsel will demonstrate that the Settlement represents an outstanding result for BAC.

2. The Delaware Objectors' Motion to Intervene is Untimely.

The determination of whether a motion to intervene is timely is within the sound discretion of the district court. *D'Amato*, 236 F.3d at 84. Courts will consider "(1) how long the applicant had notice of the interest before [he] made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness." *Id.* (citations omitted). A consideration of each of these factors supports a determination that the Delaware Objectors' Petition is untimely.

The Delaware Objectors have had notice of their interest in this action since February 25, 2009, when Judge Chin established a deadline of March 23, 2009 by which to seek lead plaintiff and lead counsel status. The Delaware Objectors chose not to do so, unlike the three groups of institutional investors and large individual shareholders who did. In addition, the Delaware Objectors have also known since early July 2011 that Lead Counsel had discussed settlement with Judge Phillips, thus rendering false any claims of "secret" settlement meetings. White Decl. ¶9. But in response they did nothing for many months, only seeking to join the Settlement discussions once they were all but complete. *See U.S. v. Pitney Bowes, Inc.*, 25 F.3d 66, 71 (2d Cir. 1994) (finding motion to intervene untimely where intervenor "had constructive knowledge of its interest in the underlying action for at least 15 months, and actual knowledge for eight months before filing its motion to intervene").

Lead Plaintiffs and the BAC Defendants will be prejudiced by allowing the Delaware Objectors to intervene because they would not be permitted to continue to negotiate the terms of a definitive settlement stipulation. The parties would be further prejudiced because the Delaware Objectors have not explained what they would do if appointed lead plaintiffs.

In contrast, there will be no prejudice to the Delaware Objectors if they are not allowed to intervene because under Rule 23.1, the Court must approve any settlement. Finally, there are no unusual circumstances present that would otherwise militate in favor of permitting the Delaware Objectors to intervene, and they cite none. The Objectors have failed to establish any grounds for intervention under Rule 24(a) or 24(b). Their Petition should be denied.

II. NO BASIS EXISTS TO REPLACE LEAD PLAINTIFFS OR LEAD COUNSEL.

In its June 30, 2009 Order (Dkt. No. 2), the Court appointed Hollywood and LMPERS as Lead Plaintiffs, and Saxena White and KSF as Lead Counsel, after a vigorously contested process in which three different groups of plaintiffs, represented by three different groups of

counsel, sought lead plaintiff status. In doing so, the Court noted that Saxena White and KSF were "experienced and qualified to serve as interim lead counsel," "ha[d] experience handling complex litigation," and had demonstrated themselves to be "vigorous" in their prosecution of the case. Order at 20. The Court also found that Hollywood and LMPERS, as institutional shareholders, were particularly "well-suited" to act as Lead Plaintiffs. *Id*. at 21.

The Petition furnishes no basis upon which to revisit the Lead Plaintiff Order. The Settlement was not collusive. Nor was it the process of a reverse auction. The record shows that settlement negotiations between Lead Plaintiffs and BAC Defendants were hard fought and conducted at all times at arms' length. The Delaware Objectors have cited absolutely no evidence of any collusive conduct, because no such evidence exists.

A. The Settlement is Not a Product of "Collusion" or of a "Reverse Auction."

1. The Settlement Negotiations Were Conducted Before a Distinguished Mediator.

The Settlement was reached with the guidance of one of the nation's most respected mediators, the Hon. Layn R. Phillips (Ret.), a former United States District Judge for the Western District of Oklahoma.[7] Judge Phillips has submitted a Declaration attesting to the fact that the settlement negotiations were conducted at arms' length, in good faith, free of collusion and did not involve any discussions of attorneys' fees. Judge Phillips saw no evidence of a "reverse auction." Judge Phillips' Declaration is attached as Exhibit A to the White Declaration. Judge Phillips' participation further evidences that the settlement process was free of collusion.

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[7] Prior to being appointed as a U.S. District Judge for the Western District of Oklahoma, Judge Phillips had served with distinction as a United States Attorney in that District. While on the bench, Judge Phillips presided over more than 140 trials, and also sat by designation on the United States Court of Appeals for the Tenth Circuit. Judge Phillips has successfully mediated numerous complex cases, including dozens of securities class actions. Judge Phillips has been nationally recognized by the International Institute for Conflict Prevention and Resolution ("IICPR"), and serves on the IICPR's National Panel of Distinguished Neutrals. *See* http://www.irell.com/professionals-52.htm (last visited Apr. 27, 2012).

D'Amato, 236 F.3d at 85 (a "mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure"); *In re Currency Conversion Fee Antitrust Litig.*, No. 01-MDL-1409, 2006 WL 3247396, at *5 (S.D.N.Y. Nov. 8, 2006) ("Judge Infante's participation in the negotiations substantiates the parties' claim that the negotiations took place at arm's length."); *In re Initial Pub. Offering Sec. Litig.*, 226 F.R.D. 186, 194 (S.D.N.Y. 2005) (finding proposed settlement was not collusive where negotiations were facilitated by a retired United States District Judge acting as a mediator).

2. The Delaware Objectors' Unsupported Allegations Furnish No Evidence of "Collusion" or of a "Reverse Auction."

A plaintiff who leads a shareholders' derivative suit occupies a position "of a fiduciary character" in which "[t]he interests of all in the redress of the wrongs are taken into his hands, dependent upon his diligence, wisdom and integrity." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949). Allegations of "collusion" or a "reverse auction" process against current Lead Plaintiffs are therefore an extremely serious charge that is not to be made lightly.

a. There was no "Collusion."

There are four possible indicia of a "collusive" settlement: (1) a lack of significant discovery, (2) an extremely expedited settlement, (3) of questionable value, (4) accompanied by an enormous legal fee. *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 94 (D. Mass. 2005) (finding no collusive conduct and approving settlement). None of these four indicia are present here. To the contrary:

1) Before reaching Settlement, Lead Plaintiffs engaged in voluminous discovery, including approximately 3 million pages of documents, 100 depositions from other governmental proceedings, and 31 depositions in which Lead Counsel participated. White Decl. ¶5. As the Court has observed, this is "a case in which much has already been discovered." August 30, 2011 Order (Dkt. No. 424).

2) The Settlement was reached on April 12, 2012, after this Action had been litigated for over three years, following repeated settlement negotiations from 2010 forward (including a final intensive push from the fall of 2011 forward). White Decl. ¶¶17-24.

3) As will be more fully explained at the appropriate time under Rule 23.1, the extensive corporate governance reforms and the $20 million payment to BAC represent an outstanding settlement.

4) The parties have not had any discussions regarding attorneys' fees. White Decl. ¶24.

Courts routinely reject allegations of collusion that are devoid of any evidentiary basis. *In re Sony Corp. SXRD Rear Projection Television Mktg., Sales Practices & Prods. Liab. Litig.*, No. 09-MD-2102, 2010 WL 1993817, at *3 (S.D.N.Y. May 19, 2010) ("While the counsel for the *Meserole* plaintiffs have made many insinuations and statements about the inadequacy or inappropriateness of counsel for plaintiff Cardenas, they have pointed to no evidence or documentation showing that the negotiations between the Defendants and counsel for plaintiff Cardenas were collusive.").

b. There was no "Reverse Auction."

The Settlement is also not the product of a reverse auction. Courts are especially critical of charges of "reverse auction" premised on entirely conclusory allegations such as the Delaware Objectors' allegations here. As one court held, in condemning an equally casual charge of impropriety:

> The accusation of a "reverse auction" has no place in this case, where the Settlement represents one of the lofty purposes of class actions. The use of the term is an illustration of the sound and fury that has plagued these cases, in those instances where the inter-firm battle eclipsed the duty of service to clients and the profession. Such language, by implication, defames honorable attorneys who, on behalf of the Class and Defendants, spent months in arm's-length negotiations to settle this case and achieve important rights for the Class. . . . The term "reverse auction" shall never again be used to deride the good work of many good lawyers who worked on this case.

Drazin v. Horizon Blue Cross Blue Shield of N.J., Inc., No. 06-CV-6219, 2011 WL 6825733, at *4 n.11 (D.N.J. Dec. 28, 2011) (emphasis added).[8]

In a reverse auction, different sets of plaintiffs compete to secure a settlement, typically by undercutting one other. The Delaware Objectors admit, however, that they never made a settlement demand of their own. *See* Paradis Aff. ¶¶ 22-26. Further, the Delaware Objectors fail to acknowledge that Lead Counsel reached out to them in early July 2011 in an effort to cooperate and coordinate their respective actions. White Decl. ¶¶9-10. It was the Delaware Objectors who refused to respond, spurning Lead Counsels' efforts to coordinate cooperatively from the start—not the other way around. *Id.* ¶11.[9]

The Delaware Objectors' primary complaint appears to be simply that this action settled before the Delaware Action. But the mere "fact that a [representative] action has settled while a parallel [representative] action is pending in of itself is insufficient to support a conclusion that a reverse auction took place." *Cohorst*, 2011 WL 3489781, at *8 (citing *Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1099–100 (9th Cir. 2008)). Accepting the Delaware Objectors' baseless accusations "would lead to the conclusion that no settlement could ever occur in the circumstances of parallel or multiple class actions—none of the competing cases could settle without being accused by another of participating in a 'collusive reverse auction.'" *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1189 (10th Cir. 2002).

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[8] *See also D'Amato*, 236 F.3d at 85-86 (rejecting would-be intervenor's objection that counsel propounding settlement of Holocaust survivor claims with Austrian Banks was involved in negotiations with German banks in similar litigation; "[t]hese conclusory allegations, based on speculation and documents outside the record, are insufficient to warrant disturbing the District Court's approval of the settlement").

[9] A reverse auction also usually involves a settlement which is reached early, in a parallel case which is substantially weaker or less vigorously litigated than another case. But as set forth above, the Delaware Objectors cannot plausibly argue that the Settlement was reached early, or in the absence of vigorous litigation. Further, because this Action includes the same Delaware fiduciary duty claims that the Objectors are litigating, they would be hard pressed to describe such claims as weaker than theirs.

Contrary to the assertions of the Delaware Objectors, *Reynolds v. Beneficial National Bank*, 288 F.3d 277 (7th Cir. 2002), does not support a finding of a "reverse auction" here. In *Reynolds*, three attorneys began settlement discussions over six months before filing a complaint. *Id*. at 280-81. When the settlement discussions began, one attorney did not have a client and the record was unclear if the other two also lacked clients. *Id*. The court also took issue with the fact that the application for attorneys' fees was submitted *in camera*. *Id*. at 286. Attempts to shoehorn cases into the *Reynolds* mold are routinely rejected by courts. As one court held:

> In [*Reynolds*], the Seventh Circuit concluded that the settlement process was likely collusive where three lawyers, none of whom had pending suits or even clients, lunched with defense counsel discussed settlement and apparently made a tentative agreement as to the monetary value of such a settlement, before "buying" a client from another lawyer, bringing suit against Defendants, and settling for the agreed upon figure. None of those facts—or any other facts suggesting a "reverse auction" or other collusion—is present here.

In re Sony Corp. SXRD Rear Projection Television Mktg., Sales Practices & Prods. Liab. Litig., No. 09-MD-2102, 2010 WL 3422722, at *5 n.1 (S.D.N.Y. Aug. 24, 2010) (internal citation omitted).

B. The Delaware Objectors Should Not Be Appointed as Lead Plaintiffs and Their Counsel Should Not Be Appointed as Lead Counsel.

In the event that the Court grants the Delaware Objectors' motion to intervene—which for the reasons described above it should not—they nevertheless should not be appointed lead plaintiffs, and their counsel should not be appointed lead counsel.

1. The Delaware Objectors' Request is Untimely.

On February 25, 2009, then-District Judge Chin ordered that "[a]ny motion for consolidation and for appointment of lead plaintiff and/or lead counsel in the . . . derivative actions . . . shall be filed on or before March 23, 2009." Three different groups of plaintiffs sought lead derivative plaintiff status, represented by three different groups of counsel. *See In re*

Bank of Am. Corp. Sec., Deriv. & ERISA Litig., 258 F.R.D. 260, 272 (S.D.N.Y. 2009) (Chin, J.). The Delaware Objectors did not file a complaint and did not seek to be appointed lead plaintiff in the Derivative Actions, and their counsel did not seek to be appointed as lead counsel in the Derivative Actions. For three years, the Delaware Objectors have chosen to avail themselves of a different jurisdiction. They should not be permitted to reconsider their choice now.[10]

2. The Delaware Objectors Do Not Establish That They Should Replace Hollywood or LMPERS as Lead Plaintiff.

Judge Chin found that, as institutional investors, Hollywood and LMPERS "are well-suited" to act as Lead Plaintiffs. *Bank of America*, 258 F.R.D. at 272. Since the inception of this litigation, they have carefully exercised their fiduciary duties as Lead Plaintiffs. *See Cohen*, 337 U.S. at 549. And each have held BAC common stock continually since at least 2005. Collectively, Lead Plaintiffs currently own 277,466 shares. White Decl. ¶2.

In seeking to replace Hollywood and LMPERS as Lead Plaintiffs, the Delaware Objectors cite no legal authority for why this extraordinary substitution should be permitted. *See* Petition at 20-21. Moreover, with their allegations revealed to be entirely meritless, there is no basis to replace two highly-qualified institutional shareholders with two individual shareholders based on their identically-worded declarations and who for three years have been complete strangers to this Action.

3. The Delaware Objectors Furnish No Evidence that Saxena White or KSF Should be Replaced as Lead Counsel.

For the last three years, Lead Counsel has vigorously prosecuted the case on behalf of BAC. We have built, rebuilt and analyzed in painstaking detail the facts from what is one of the

[10] The Delaware Objectors are two of the six plaintiffs who were named in the consolidated amended complaint filed in the Delaware Action. They do not explain why the four other plaintiffs do not seek to intervene in the Consolidated Derivative Actions.

most scrutinized corporate mergers in a generation. Within weeks after the Amended Complaint was filed in early October 2009, Lead Counsel received and began reviewing and analyzing over 2.5 million pages of documents previously produced to several government agencies (including the SEC, the New York Attorney General, and the North Carolina Attorney General), which were also conducting investigations into the BAC-Merrill merger—as well as copies of over 100 transcripts of testimony given in connection with those investigations. White Decl. ¶5. These documents bore directly on the issues confronting Lead Counsel in this action. Through formal discovery in this Action, Lead Counsel has received almost 500,000 additional pages of documents from BAC, Defendants, and numerous relevant third parties, which were also reviewed and analyzed. BAC waived the attorney-client privilege for many of the documents it produced, and produced documents under the *Garner* doctrine, allowing Lead Counsel to gain an unprecedented understanding of what transpired that is simply not available in other cases.

Lead Counsel participated in thirty-one depositions of Defendants and other fact witnesses in this Action. Lead Counsel first synthesized all prior witness testimony and all relevant documents bearing on that witness. We then evaluated these documents and transcripts to determine what was already established and what remained to be explored. Lead Counsel assembled this information into a comprehensive memorandum, which they then shared with the examiner prior to each deposition. By engaging in this preparation, analysis and guidance, Lead Counsel gained an extremely thorough knowledge and understanding of the issues and facts informing its decision to settle.[11]

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[11] The Delaware Objectors criticize Lead Counsel for supposedly allowing Lead Securities Counsel to coordinate discovery, but they ignore that Lead Counsel was complying with the Court's June 25, 2010 Order. (Dkt. No. 290). This Order gave primary responsibility for conducting and coordinating all discovery efforts among counsel to Lead Securities Counsel. The Delaware Objectors cannot in good faith contend that Lead Counsel could violate that Order.

But simply deposing large numbers of witnesses does not necessarily advance discovery, as this Court observed in its August 30, 2011 Order (Dkt. No. 424), and may actually be inimical to the interests of BAC. The number of depositions is a red herring. The Delaware Objectors have tried desperately to find some difference between the two cases, but the only thing to which they can point is that they took more depositions. There is no evidence to suggest these depositions yielded any benefit, and the real inquiry is whether the settlement is fair based on the strengths and weaknesses of the claims. Moreover, the Delaware Objectors' argument ignores the hundreds of settlements that have been approved without a single deposition ever having been conducted.[12]

Any allegation that Lead Counsel or Lead Plaintiffs have not conducted sufficient discovery to fully "evaluate the strengths and weaknesses" of the claims is therefore without merit. As the Court has remarked, this is "a case in which much has already been discovered." Order of August 30, 2011 (Dkt. No. 424). With the benefits of such extensive discovery, Lead Counsel was able to confidently and thoroughly assess the strengths and weaknesses of the claims.

III. NO BASIS EXISTS TO "ENJOIN" THE SETTLEMENT BEFORE IT IS PRESENTED TO THE COURT FOR APPROVAL.

The MOU was submitted to the Court only two weeks ago. However, no record has been submitted by which the Court could properly consider whether to approve the Settlement, and the parties have just begun to negotiate the terms of a definitive Stipulation of Settlement. The Second Circuit is clear:

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[12] Nor do the Objectors explain what their motion to compel—which they admit has not yet been decided, and may not be given that Defendants in the Delaware Action recently moved to stay pending Settlement approval in this Court and also moved for summary judgment—will uncover.

> Under Fed. R. Civ. P. 23.1, once the parties to a shareholder's derivative action reach an agreement to settle the action, that agreement must be submitted to the court for its approval. The court then must schedule a hearing and notify all shareholders of their right to object to the terms of the proposed settlement. Once the shareholders have had the opportunity to present their objections at such a hearing, the decision whether to accept or reject the proposed settlement is left to the district court . . . .

Blatt, 732 F.2d at 307 (emphasis added).

The Delaware Objectors' argument is premature because the Court does not yet have a proper record before it to consider the factors laid out in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974). *See, e.g.*, *In re Pfizer Inc. S'holder Deriv. Litig.*, 780 F. Supp. 2d 336 (S.D.N.Y. 2011) (analyzing *Grinnell* factors and approving derivative settlement). For example, the Delaware Objectors focus on the $20 million monetary component, but provide no basis for their bald assertion that damages could be $5 billion. And they overlook the extensive corporate governance reforms, including the creation of a Board-level committee comprised of independent directors designed to oversee significant mergers and acquisitions. The Delaware Objectors' allegations constitute nothing more than objections to the tentative Settlement itself—which the Court can and should hear in due course.

CONCLUSION

For these reasons, the Petition should be denied in its entirety.

Dated: April 27, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 27, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all registered users. I further caused a copy of the foregoing to be email to Paul O. Paradis, pparadis@hhplawny.com.

/s/ Christopher S. Jones
Christopher S. Jones