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 Derivative Action	

INDIVIDUAL DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF FINAL APPROVAL OF SETTLEMENT

DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
(212) 450-4000

Counsel for the Individual Defendants

Dated: November 6, 2012

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The individual defendants ("Defendants") submit this memorandum in support of the final approval of the proposed settlement ("Settlement") of this consolidated derivative action.[1]

PRELIMINARY STATEMENT

In April 2012, after three years of actively litigating this derivative action through the close of fact discovery and virtually to the point of exchanging expert reports, Lead Plaintiffs and Defendants reached agreement, following months of settlement discussions, on terms for compromising this action. Those terms are set forth in the Stipulation and Agreement of Compromise, Settlement and Release, dated June 19, 2012 (the "Stipulation"). They include, in exchange for customary releases, an agreement by Bank of America to adopt extensive new corporate governance measures designed by Lead Plaintiffs to ensure appropriate disclosure by Bank of America in future circumstances similar to those that gave rise to this lawsuit, as well as a substantial $20 million cash recovery by Bank of America from Defendants' insurance carriers. The proposed governance measures include, among other things, the establishment of a new Corporate Development Committee of the Board to exercise increased oversight of management's execution of major acquisitions and the adoption of changes to the charter of the Company's Disclosure Committee to help ensure accurate, complete and timely disclosures that may be required in connection with major acquisitions. *See* Stipulation ¶ 15 & Ex. A.[2]

The proposed resolution of Lead Plaintiffs' derivative claims comprised by the Settlement is fair, reasonable and adequate. The benefits to Bank of America are concrete and

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[1] Defendants, all current and former directors of Bank of America Corporation, are 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, Jackie M. Ward and Kenneth D. Lewis. Mr. Lewis was both a director and the Company's CEO.

[2] The Stipulation is attached as Exhibit A to the Declaration of Lawrence Portnoy in Support of Final Approval of Settlement, dated November 6, 2012, filed herewith ("Portnoy Decl.").

certain, whereas Lead Plaintiffs' ability to obtain a superior result from further litigation is highly uncertain. To prevail on their claims, Lead Plaintiffs would have to succeed in establishing a series of legal and factual contentions that Defendants have vigorously disputed. Lead Plaintiffs' claims rest in part on questionable legal theories, and many of the Complaint's core allegations have been refuted or, at a minimum, put in substantial doubt by the factual record developed in discovery. Were Lead Plaintiffs to fail at any of the numerous hurdles they face – including the risks that the Court would grant summary judgment for Defendants or that Lead Plaintiffs would fail to prove their case at trial, or successfully defend a favorable judgment on appeal – the result might well be no relief or recovery at all.

The Settlement avoids those hurdles and risks. Rather than chance the possibility of total failure, Lead Plaintiffs prudently opted in April 2012 for a compromise that secures meaningful, certain and immediate benefits for Bank of America. These benefits include not only the substantial $20 million cash recovery but also, importantly, the agreed corporate governance changes. Courts have repeatedly recognized that governance changes that are designed to prevent recurrence of the purported problems that gave rise to derivative litigation can be valuable benefits to corporations and have approved settlements providing for such changes on that basis. *See*, *e.g.*, *In re AOL Time Warner S'holder Derivative Litig.*, 2006 WL 2572114, at *4 (S.D.N.Y. Sept. 6, 2006); *In re Pfizer Inc. S'holder Derivative Litig.*, 780 F. Supp. 2d 336, 341-42 (S.D.N.Y. 2011); *cf. Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 396 (1970) (noting that "corporate therapeutics" obtained through private litigation "furnish a benefit to all shareholders" (citation omitted)). Indeed, courts have approved derivative settlements where agreed governance changes were the only benefit obtained for the corporation, without any monetary recovery. *See*, *e.g.*, *Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1206, 1209 (6th Cir.

1992); *In re Schering-Plough Corp. S'holders Derivative Litig.*, 2008 WL 185809, at *4 (D.N.J. Jan. 14, 2008); *Unite Nat'l Ret. Fund v. Watts*, 2005 WL 2877899, at *2 (D.N.J. Oct. 28, 2005). By securing such measures here, Lead Plaintiffs have achieved results through the proposed Settlement that may well be superior to what they could possibly have obtained through continued litigation.

For all these reasons, as explained more fully below, the proposed Settlement is fair, reasonable and adequate. This Court should accordingly approve the Settlement and enter the proposed Order and Final Judgment attached as Exhibit A to Plaintiffs' Motion for Final Approval of Derivative Action Settlement.

BACKGROUND

A. Overview of Plaintiffs' Claims

Beginning in January 2009, various Bank of America shareholders filed numerous lawsuits in federal and state courts asserting claims based on Bank of America's acquisition of Merrill Lynch on January 1, 2009. On June 10, 2009, the Judicial Panel on Multidistrict Litigation centralized all federal court litigation relating to the acquisition in this Court. (Dkt. No. 1.) On June 30, 2009, this Court consolidated the various shareholder derivative actions before the Court and appointed Lead Plaintiffs and their counsel as Lead Counsel. (Dkt. No. 2.) Lead Plaintiffs filed their Amended Consolidated Derivative Complaint (the "Complaint") on June 9, 2010. (Dkt. No. 288.) [3]

The Complaint asserts claims against Defendants – the fifteen outside directors who were serving on Bank of America's Board between September 2008 and January 2009, together with

[3] Several derivative actions filed in the Court of Chancery in Delaware were similarly consolidated, under the caption *In re Bank of America Corp. Stockholder Derivative Litigation*, C.A. No. 4307-CS, and litigated in parallel with this action. The Delaware action was stayed on May 9, 2012 in view of the proposed Settlement in this case. Portnoy Decl. Ex. HH. Another derivative action filed in state court in North Carolina has been stayed in view of the other proceedings. *Id.* Ex. AA.

its Chairman, Ken Lewis, who was also CEO – for alleged violations of Section 14(a) of the Securities Exchange Act of 1934 and breaches of fiduciary duty. Broadly speaking, the claims are based on Bank of America's disclosures relating to Merrill and the Merger and on Defendants' decision to proceed with the Merger in the face of anticipated losses by Merrill in the fourth quarter of 2008. Lead Plaintiffs allege that the proxy that solicited shareholders' votes to approve measures necessary to effectuate the Merger (the "Proxy") did not mention that Bank of America had agreed that Merrill could pay 2008 bonuses up to $5.8 billion and, in addition, that it omitted (and was not later supplemented with) information about Merrill's fourth quarter performance. Lead Plaintiffs also allege that Defendants likewise should have disclosed the Company's negotiations with the Government in late December 2008 about possible financial assistance to Bank of America after the Merger. Lastly, they claim Defendants should have called off the Merger in light of Merrill's fourth quarter performance.

To establish personal liability against Defendants under Section 14(a), Lead Plaintiffs would need to prove that, among other things, (i) the Proxy was false or misleading, or omitted information that was required to be disclosed by an SEC rule or necessary to make other statements in the Proxy not misleading; (ii) that the misstatement or omission was material; (iii) that Defendants' own personal negligence caused the Proxy to be misleading; and (iv) that Bank of America suffered economic harm as a result of the misstatement or omission. On their claims for breach of fiduciary duty, Lead Plaintiffs face an even greater challenge, because Bank of America's certificate of incorporation exculpates the directors from personal liability to the Company for harms resulting from breaches of fiduciary duty, except in cases of bad faith, disloyalty or intentional misconduct. *See* Portnoy Decl. Ex. P ¶ 6.

Defendants deny any liability under any of Lead Plaintiffs' theories. They reject that the Proxy was false or misleading or that any of the information that Lead Plaintiffs claim should have been disclosed was legally required to be disclosed or material. Defendants also maintain that the evidence, gathered through years of discovery, shows that they appropriately delegated to appropriate members of management responsibility for preparation of the Proxy and making required disclosures, with the expectation – subsequently validated by events – that those officers would, if necessary, consult with and be assisted by legal counsel; that their reliance on those officers and advisors was reasonable and met the standard of care appropriate to their positions as directors and, in the case of Mr. Lewis, as the Company's senior executive officer; and that at all times they acted in complete good faith. Defendants also contend that Bank of America was not harmed by any claimed misstatement or omission, and that there is no evidence that the Company's shareholders would have disapproved the Merger had the additional information been disclosed. And finally, Defendants maintain, based on expert analysis, that Bank of America suffered no injury as a result of the Merger but rather, to the contrary, obtained a substantial benefit by acquiring Merrill on the terms that it paid.

B. Key Terms of the Settlement

As noted above, the Settlement provides, in exchange for a release of claims, for both governance changes and a $20 million monetary recovery to Bank of America.

With regard to governance, the Settlement requires the Board to implement (and maintain for at least four years) certain specific measures designed by Lead Plaintiffs to address the purported problems that they assert as the basis for their claims. In particular, and among other things, these measures are designed by Lead Plaintiffs to promote increased Board oversight of management's execution of major acquisitions, including to assure proper due diligence and disclosure. As agreed in the Stipulation, the particular measures to be adopted are:

Creation of a Corporate Development Committee:

- A new Board-level Corporate Development Committee will oversee certain acquisition-related activities of Bank of America for transactions valued at $2 billion or more in order to ensure that management vets such transactions carefully and performs appropriate due diligence. The committee will also review with management the Company's acquisition strategies, as appropriate.

- Before any transaction falling within the committee's purview is presented to the Board for its approval, the committee – which will be comprised solely of independent directors – will meet at least once with members of senior management to review compliance with applicable policies and procedures related to the Company's consideration of the transaction.

- For transactions ultimately approved by the Board, the committee will also oversee management's activities with respect to post-acquisition integration and business development opportunities and monitor, as appropriate, any material transitional risks related to such transactions.

- The committee will be granted broad authority, including the ability to retain experts and other consultants, and will have substantial resources at its disposal to support its mandate. Among other things, the committee will receive reports from management and/or consultants, meet as necessary in connection with a transaction under its purview (and at least annually) and report to Bank of America's full Board, as appropriate.

Changes to Disclosure Committee Charter:

- Bank of America will amend the charter of its Disclosure Committee to require the committee (1) to review and consider the accuracy, completeness and timeliness of disclosures required in connection with acquisitions within the purview of the Corporate Development Committee and (2) to conduct a semi-annual review to identify for implementation industry-leading oversight practices in connection with the Company's disclosures (including acquisition-related disclosures) and to review progress on such goals.

Other Corporate Governance Changes:

- Bank of America will amend its Corporate Governance Guidelines to provide specifically that the Company's new director orientation program include sessions regarding corporate governance best practices and an overview of director duties. The amended guidelines will also provide that management shall prepare additional periodic educational sessions for directors on matters relevant to the Company and its business, including sessions relating to corporate governance best practices and director duties.

- Bank of America will amend the charter of the Enterprise Risk Committee of the Board to provide that, in the normal course of business, the Bank's Chief Risk Officer or equivalent shall be expected to attend all regular ERC meetings, and the Bank's Chief Compliance Officer shall be expected to attend ERC meetings at least twice per year.

Stipulation Ex. A.

As for the proposed cash recovery, the Settlement provides that Defendants' insurers will pay $20 million to Bank of America within 45 days of entry of the Order and Final Judgment. Stipulation ¶ 15. Unlike many settlements, the timing of the payment is not dependent on the resolution of any appeals following approval. *See id.*

The agreed release comprises all claims that were or could have been brought by or on behalf of the Company relating to the subject matter of this lawsuit (and the parallel derivative actions filed in Delaware and North Carolina). *See id.* ¶ 9. The release does not include certain narrowly defined classes of derivative claims, as described in the Stipulation. *See id.* Nor does it include any of the claims being prosecuted on behalf of shareholders directly, either in the securities class action or the related "opt-out" cases that are also before this Court as part of this consolidated proceeding. *See id.* ¶¶ 9-11, 16-18.

Finally, the Stipulation provides, in the event the Settlement is approved, for payment of attorneys' fees to Lead Counsel in an amount subject to approval by this Court. *See id.* ¶ 26. There is no agreement between Lead Plaintiffs or Lead Counsel and Defendants or Bank of America regarding the amount of an appropriate fee. Portnoy Decl. Ex. B ¶ 3.

C. <u>Preliminary Approval and Notice</u>

This Court issued an order preliminarily approving the Settlement on July 13, 2012. Portnoy Decl. Ex. JJ. In accordance with that order, on October 12, 2012, Bank of America caused the summary notice to be published in *The Wall Street Journal* and *Investor's Business Daily*, *id.* Exs. PP, OO, and Lead Counsel disseminated the summary notice via Marketwire, a

national wire service, *id.* Ex. NN. In addition, the summary notice, full notice and the Stipulation were posted on a dedicated website (www.bankofamericaderivativesettlement.com) and a hotline was activated for shareholders to request copies of the full notice or Stipulation by mail. *Id.* Ex. RR ¶¶ 2-4. In accordance with the preliminary approval order, any shareholders wishing to file written objections to the Settlement must do so by November 27, 2012. *See id.* Ex. JJ ¶ 11.[4]

THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

The Second Circuit has long acknowledged a "strong judicial policy in favor of settlements." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (quoting *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998)). This policy applies to shareholder derivative actions just as to other suits. As this Court recognized in evaluating a proposed settlement in *In re AOL Time Warner Shareholder Derivative Litigation*, in part "because shareholder derivative actions are 'notoriously difficult and unpredictable,'" settlements of derivative actions are "'favored.'" 2006 WL 2572114, at *3 (S.D.N.Y. Sept. 6, 2006) (quoting *Mathes v. Roberts*, 85 F.R.D. 710, 713 (S.D.N.Y. 1980)).

Settlements of derivative actions require court approval. Fed. R. Civ. P. 23.1. In order to approve a settlement, the Court "must be satisfied that the compromise 'fairly and adequately serves the interests of the corporation on whose behalf the derivative action was instituted.'" *AOL*, 2006 WL 2572114, at *2 (quoting *Mathes*, 85 F.R.D. at 713). "[T]he central question is whether the compromise is fair, reasonable and adequate." *In re Pfizer Inc. S'holder Derivative*

[4] The shareholder plaintiff in the parallel derivative proceeding in the Delaware Court of Chancery, Nancy Rothbaum, filed an opposition to preliminary approval by this Court, on July 17, 2012 (Dkt. No. 705), and a motion for reconsideration of the Court's preliminary approval order, on July 27, 2012 (Dkt. No. 716), which this Court denied on August 2, 2012 (Dkt. No. 223). The Court's August 2 Order noted that the order granting preliminary approval "provides for a mechanism for shareholders, such as Ms. Rothbaum, to file an objection before final approval." Portnoy Decl. Ex. KK.

Litig., 780 F. Supp. 2d 336, 340 (S.D.N.Y. 2011) (quoting *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982)). In evaluating this question, the Court should examine both "the negotiating process leading up to the settlement as well as the settlement's substantive terms." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001).

Here, both the negotiating process that culminated in the Settlement and the substantive terms demonstrate that the Settlement is a fair, reasonable and adequate compromise of the Company's claims.

I. The Settlement Was Negotiated on an Informed Basis and at Arm's Length

This Settlement was agreed between the parties against a backdrop of extensive discovery that afforded the parties an unusually well-informed basis to assess the relative strength of Lead Plaintiffs' claims and Defendants' defenses. Moreover, agreement was reached by the parties after a drawn out give-and-take process that spanned several months and required the assistance of a mediation overseen by the Hon. Layn R. Phillips, a former United States Attorney for the Northern District of Oklahoma and a retired federal judge from the Western District of Oklahoma. These circumstances provide sound assurances of the fairness and adequacy of the settlement negotiations.

A. The Extensive Discovery Record in This Action Afforded a Sound Basis for the Parties To Evaluate Their Claims and Defenses

Lead Plaintiffs are sophisticated institutional shareholders, represented by experienced counsel, that were appointed by this Court to pursue the claims in this case on the Company's behalf. *See In re Bank of Am. Corp. Sec., Derivative & ERISA Litig.*, 258 F.R.D. 260, 272-73 (S.D.N.Y. 2009) (noting that one lead plaintiff was "an experienced and active institutional litigant" and that co-lead counsel had "experience handling complex litigation, including shareholder derivative suits" and had shown themselves to be "vigorous" in the prosecution of

their claims). At the time Lead Plaintiffs first invited Defendants to discuss settlement, they had engaged in more than two-and-a-half years of active litigation, including extensive discovery conducted on a coordinated basis with the Consolidated Securities Action. More than 30 depositions were taken in these actions, with many witnesses testifying a second, third or fourth time on the same subjects. Even before discovery in these actions was commenced, Lead Plaintiffs were afforded access to the extensive evidentiary record created by various prior governmental investigations, which included more than 100 transcripts of testimony and over 2.5 million pages of documents. As this Court previously noted, "much ha[d] already been discovered." Order of August 30, 2011, at 2 (Dkt. No. 187). On top of this, Lead Plaintiffs received almost 500,000 pages of additional documents and the transcripts of nearly 50 depositions taken in the Delaware derivative action that was litigated in parallel with this case. *See* Portnoy Decl. Ex. B ¶ 31.

As a result of all this discovery, Lead Plaintiffs had an extensive evidentiary basis on which to evaluate the strength of their claims and to weigh the benefits of the Settlement against the risks of continued litigation. Courts have repeatedly recognized that such thorough investigations by counsel prior to settlement provide a significant assurance that the compromise was struck on reasonable terms. *See*, *e.g.*, *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 465 (2d Cir. 1974) ("[S]ettlement in the case at hand was not negotiated in the early stages of the dispute. Here, all the parties had been able to assess the risks of success after almost four years of litigation."), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); *In re Metro. Life Derivative Litig.*, 935 F. Supp. 286, 294 (S.D.N.Y. 1996) (Chin, J.) (parties' views "entitled to 'considerable weight'" where "experienced" counsel had "thoroughly investigated and evaluated plaintiffs' claims" (quoting *Fielding v. Allen*, 99 F. Supp.

137, 144 (S.D.N.Y. 1951)); *see also In re Marsh & McLennan Cos. Sec. Litig*., 2009 WL 5178546, at *6 (S.D.N.Y. Dec. 23, 2009) ("The advanced stage of the litigation and extensive amount of discovery completed weigh heavily in favor of approval" because the parties could "realistically evaluate the strengths and weaknesses of the claims, and . . . evaluate the fairness of the proposed Settlement."). Indeed, courts not uncommonly approve settlements reached after only limited discovery and, sometimes, absent any formal discovery at all. *See, e.g.*, *Metro. Life*, 935 F. Supp. at 290 (approving settlement after production of only approximately 17,000 pages of documents); *Chan v. Diamond*, 2005 WL 941477, at *3 (S.D.N.Y. Apr. 25, 2005) (approving settlement reached before parties "embark[ed] on formal discovery"). Here, the extensive discovery record provides an important and meaningful assurance that the parties bargained for terms of settlement that were fair in view of the facts that could be proved at trial.

B. The Parties Engaged in Extended Arm's-Length Negotiations Before Agreeing to the Proposed Settlement

The history of the parties' settlement discussions demonstrates that their negotiations were conducted at arm's length and provides a further assurance of the reasonableness of the proposed Settlement. Before reaching agreement, the parties engaged in six months of back-and-forth discussions – with concessions on both sides – and participated in a mediation presided over by Judge Phillips, a preeminent, nationally recognized mediator who has settled hundreds of complex civil disputes and is a Charter Member of the National Academy of Distinguished Neutrals. A brief overview of the parties' discussions shows that they engaged in good faith, active bargaining and that the proposed Settlement reflects a true give-and-take compromise:

- When Lead Plaintiffs first invited Defendants to discuss settlement in the fall of 2011, Defendants maintained that no monetary recovery was warranted. Lead Plaintiffs countered that a monetary recovery would be necessary. Despite this disagreement over a core issue, the parties agreed to discuss possible governance measures as a component of a possible settlement. *See* Portnoy Decl. Ex. B ¶¶ 5-6.

- In October 2011, Lead Plaintiffs proposed certain corporate governance measures but reiterated that they would also require a cash recovery. Defendants stood their ground that no monetary recovery was warranted, but agreed to discuss Plaintiffs' governance proposals. *Id.* ¶¶ 7-9.

- In early 2012, in view of Lead Plaintiffs' continued insistence that the settlement include a monetary recovery, Defendants' insurers authorized Defendants to enter into discussions with Lead Plaintiffs over a possible monetary payment. *Id.* ¶¶ 12-13.

- By mid-February 2012, Lead Plaintiffs and Defendants had largely agreed upon a framework for governance measures. With regard to a cash recovery, however, although Defendants had dropped their opposition to any cash payment, Lead Plaintiffs, Defendants and Defendants' insurers remained far apart. *Id.* ¶ 13.

- Later in February 2012, the parties engaged in a mediation presided over by Judge Phillips in an attempt to close the gap in their positions on the size of a cash recovery. Despite his efforts, at the end of the day, Lead Plaintiffs, Defendants and the insurers had still failed to reach agreement. *Id.* ¶ 18.

- Discussions continued over the next six weeks, including by telephone, with Judge Phillips as intermediator. Eventually, in April 2012, the parties reached agreement in principle on settlement terms including a $20 million cash payment. *Id.* ¶¶ 18, 25.

This record of drawn-out discussions and mutual concessions evidences the arm's-length nature of the parties' negotiations. *See AOL*, 2006 WL 2572114, at *3 ("negotiations between the parties spanned an extended period of time and benefited from multiple proposals passed between the parties throughout this period" (citing *Metro. Life*, 935 F. Supp. at 294)). When, as here, settlement is "reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery," courts have recognized that a "presumption of fairness, adequacy, and reasonableness may attach." *Wal-Mart Stores*, 396 F.3d at 116 (citation omitted).

The fact that the parties achieved agreement with the assistance of Judge Phillips, a well-recognized mediator, "strongly supports" a finding that the negotiations "were conducted at arm's length and without collusion." *See In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576 (S.D.N.Y. 2008); *see also 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.*, 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 CIGNA Corp.*, 2007 WL 2071898, at *3 (E.D. Pa. July 13, 2007) ("[I]t is clear that negotiations for the settlement occurred at arm's length, as the parties were assisted by a retired federal district judge who was privately retained and served as a mediator."); *In re AMF Bowling Sec. Litig.*, 334 F. Supp. 2d 462, 465 (S.D.N.Y. 2004) (Castel, J.). And Judge Phillips has attested that the negotiations were conducted in good faith, at arm's length and were free of collusion, and that he saw no evidence of any kind of "reverse auction." *See* Portnoy Decl. Ex. GG ¶¶ 8-10.

Finally, there were no negotiations between the parties regarding an award of attorneys' fees and expenses to Lead Plaintiffs' counsel until after agreement was reached on the terms of the Settlement. *See* Portnoy Decl. Ex. B ¶ 26. And to this day, the parties still have no agreement or understanding regarding the amount of attorneys' fees and expenses to which Lead Counsel are entitled. *See* Portnoy Decl. ¶ 3. The parties' "inability to agree on attorneys' fees without court intervention" is further evidence of good faith and arm's-length dealings. *Chan*, 2005 WL 941477, at *3.

II. <u>The Terms of the Settlement Are Fair, Reasonable and Adequate</u>

In the context of shareholder derivative suits, several factors inform a court's evaluation of "whether a settlement is fair, reasonable, and adequate: (1) the reasonableness of the benefits achieved by the settlement in light of the potential recovery at trial; (2) the likelihood of success in light of the risks posed by continued litigation; (3) the likely duration and cost of continued litigation; and (4) any shareholder objections to the proposed settlement." *AOL*, 2006 WL 2572114, at *3 (citing *Metro. Life*, 935 F. Supp. at 292); *see also Pfizer*, 780 F. Supp. 2d at 340.

Assessed in the context of this case, these factors uniformly indicate that the proposed Settlement is fair, reasonable and adequate.

A. The Settlement Benefits Are Reasonable in Light of the Potential Recovery at Trial

The benefits achieved through the Settlement – the proposed governance measures and the $20 million cash recovery to Bank of America – reflect a fair, reasonable and adequate resolution as compared to the potential recovery at trial.

1. The Proposed New Corporate Governance Measures

The new Board-level governance changes to be implemented under the Settlement will enhance the Company's already robust governance practices, complementing other governance changes implemented in recent years.[5] Courts have often recognized that corporate governance changes of these kinds, even standing by themselves, can compare favorably with any expected recovery after trial. *See, e.g.*, *Unite Nat'l Ret. Fund v. Watts*, 2005 WL 2877899, at *4 (D.N.J. Oct. 28, 2005) (proposed governance changes would provide "immediate and substantial benefits for all parties and represent[] a better option than little or no recovery at all").

At the heart of Lead Plaintiffs' Complaint are allegations that Bank of America's acquisition of Merrill was poorly conceived, evaluated without adequate deliberation and diligence and executed without sufficient attention to what disclosures may have been required.[6] The proposed governance measures specifically address these charges. They are designed by

[5] These measures supplement the extensive governance changes already undertaken by Bank of America's Board following the acquisitions of Merrill and Countrywide, which include modifying the Board's committee structure to ensure that key aspects of risk, capital and liquidity management are specifically overseen by committees having clear mandates, working with management and outside experts to redesign management reports to the Board and enhancing the director orientation process. *See* Portnoy Decl. Ex. DD at 46 (BAC 2009 Form 10-K).

[6] *See* Compl. ¶¶ 104-07 (alleging that approval of Merger followed insufficient due diligence and deliberation); *id.* ¶ 127 (Merger proxy allegedly deficient for omission of bonus agreement); *id.* ¶¶ 157, 175 (same as to Merrill's interim and forecasted fourth quarter losses).

Lead Plaintiffs to strengthen the Board's role in overseeing management's execution of significant acquisitions and, in particular, to ensure that all appropriate disclosures are made. In this way, they seek to prevent the recurrence of the purported problems that Lead Plaintiffs assert as the basis for their claims, and are thus closely aligned with Lead Plaintiffs' objectives in bringing suit.

As discussed above, *see* pp. 5-7, *supra*, the Settlement calls for the creation of a new, Board-level Corporate Development Committee, composed of independent directors, that will be responsible for overseeing management's evaluation of execution of mergers and acquisitions valued at greater than $2 billion. To ensure that the Committee has a true opportunity to exercise oversight of any such transaction that may be proposed, the Committee is to meet at least once with senior management prior to any request from management for Board approval to review compliance with applicable policies and procedures. For transactions ultimately approved by the Board, the Committee will also oversee management's activities with respect to post-acquisition integration and business development opportunities and will monitor, as appropriate, any material transitional risks.

Plaintiffs' claims also challenge the adequacy of the Company's disclosures about the Merger, in particular with regard to its terms governing Merrill's payment of 2008 bonuses, its fourth-quarter performance and the Company's internal deliberations and discussions with the Government in December 2008. To address these allegations, the Settlement's proposed new governance measures would (1) modify the charter of Bank of America's disclosure committee to ensure more systematic oversight of the Company's acquisition-related disclosures; (2) change the Company's corporate governance guidelines for director education; and (3) amend the charter of the Board's Enterprise Risk Committee to require regular attendance at meetings by

the Chief Risk Officer and Chief Compliance Officer. *See* Stipulation Ex. A; pp. 6-7, *supra*. These changes are to be implemented for at least four years, after which the Board can evaluate whether to continue their implementation. Stipulation Ex. A.

Taken together, these governance measures seek to address directly the purported deficiencies claimed by Lead Plaintiffs in the Company's execution of the Merger and its associated disclosures. Courts have repeatedly recognized that such forward-looking structural governance reforms provide real and valuable benefits supporting a finding that a derivative settlement is fair, reasonable and adequate. *See AOL*, 2006 WL 2572114, at *4 ("Even more importantly [than the monetary recovery], the governance and compliance provisions memorialized in the Settlement directly address the failure of internal controls that precipitated the instant lawsuits. The preventative aspect of these provisions is itself a significant benefit of the Settlement."); *Pfizer*, 780 F. Supp. 2d at 342 (proposed "settlement is likely to provide considerable corporate benefits to Pfizer and its shareholders, in the form of a significantly improved institutional structure for detecting and rectifying the types of wrongdoing that have, in recent years, caused extensive harm to the company"); *Unite Nat'l Ret. Fund*, 2005 WL 2877899, at *2 ("[D]espite the difficulties they pose to measurement, non-pecuniary benefits to the corporation may support a settlement. . . . This is particularly true when the relief is intended to prevent future harm." (internal citation omitted)); *see also In re Schering-Plough Corp. S'holders Derivative Litig.*, 2008 WL 185809, at *4 (D.N.J. Jan. 14, 2008) ("These corporate governance changes are substantial non-pecuniary benefits to Schering[.]"); *cf. Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 396 (1970) (noting that, even absent monetary recovery, private

actions that achieve only "corporate therapeutics . . . furnish a benefit to all shareholders" (citation omitted)).[7]

2. The $20 Million Cash Recovery

The other principal benefit of the Settlement, the $20 million cash recovery to be paid by Defendants' insurers, constitutes a reasonable recovery in the context of this action. Settlements of derivative lawsuits, particularly actions brought against personally disinterested directors, frequently contain no monetary component at all. *See, e.g.*, *Ryskamp v. Looney*, 2012 WL 3397362, at *4 (D. Colo. Aug. 14, 2012) ("some derivative action settlements only involve corporate governance reforms, and not any monetary payment"); *see also Maher v. Zapata Corp.*, 714 F.2d 436, 466-67 (5th Cir. 1983) (affirming approval of non-monetary settlement); *Unite Nat'l Ret. Fund*, 2005 WL 2877899, at *2 (corporate governance measures); *Chan*, 2005 WL 941477, at *3 (same); *In re Schering-Plough Corp.*, 2008 WL 185809, at *4 (corporate governance and compliance measures). Here, the $20 million recovery to be paid under the Settlement represents a substantial and fair compromise of the Company's claims.

To begin, the damages allegations in the Complaint are vague, and it is unclear what damages Lead Plaintiffs would be able to prove at trial. The Complaint alleges that the price of the Company's stock declined after the January 2009 announcement of Merrill's fourth quarter results, Compl. ¶ 27, but Defendants maintain that the decline in the Company's stock price

[7] Notably, the SEC sought other governance reforms from Bank of America in settling its civil litigation against the Bank arising from the Merger. *See* Portnoy Decl. Ex. CC at 8 (Brief of Plaintiff, *SEC v. Bank of America Corp.*, 09 Civ. 6829 & 10 Civ. 215 (S.D.N.Y. Feb. 4, 2010) (corporate governance measures contemplated by the proposed settlement "provide an effective means of corporate reform that would help avoid future violations by Bank of America" and "collectively enhance the Bank's disclosure processes," thus "inur[ing] to the long-term benefit of Bank of America's shareholders")). And in the proposed settlement of the Consolidated Securities Action announced on September 28, 2012, lead plaintiffs have sought to build on the governance measures provided for in the Settlement in this action. *See* Portnoy Decl. Ex. LL (Press Release, Bank of America Corporation, Bank of America Reaches Settlement in Merrill Lynch Acquisition-Related Class Action Litigation (Sept. 28, 2012) (announcing agreement in principle providing for, among other things, certain corporate governance measures, including the adoption of policies for a board committee regarding future acquisitions)).

shows only that the market ascribed a lower value to the combined entities, not that the Bank was damaged by the Merger. Defendants' damages expert, Professor Anil Shivdasani, a distinguished academic, former investment banker and current Director of the Wachovia Center for Corporate Finance at the University of North Carolina Kenan-Flagler Business School, was prepared to explain at trial that Bank of America was not harmed by the acquisition, because the value of Merrill exceeded the implied cost of the Merger to Bank of America. *See* Portnoy Decl. Ex. QQ ¶¶ 1-2, 9, 110. Using the valuation methods customarily applied to M&A transactions, Professor Shivdasani concluded that, even taking account of Merrill's forecasted and actual fourth quarter 2008 losses and lowered earnings expectations, the Merger was a value-enhancing transaction for Bank of America, both as of the December 5, 2008 shareholder vote and at the time of closing on January 1, 2009. *Id.* ¶¶ 56-109.[8] A jury could well have credited Professor Shivdasani's testimony over any conflicting testimony asserting that Bank of America was damaged by the Merger.

At a minimum, the jury would have to resolve a "battle of experts," which would mean substantial risk to both sides on this issue. Such risks justify approval of a recovery well below the amounts claimed. As this Court noted in *Strougo v. Bassini*, 258 F. Supp. 2d 254 (S.D.N.Y. 2003), where "expert testimony would be needed to fix not only the amount, but the existence, of actual damages" and the court cannot "predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors such as general market conditions," a settlement

[8] Professor Shivdasani's conclusions are reinforced by Merrill's performance since the Merger, which has significantly benefitted Bank of America. The financial press recently reported that, between January 1, 2009 and June 30, 2012, Bank of America's "wealth management and investment banking units, which owe much of their business to Merrill, generated nearly $160 billion of revenue," i.e., "*43 percent of the bank's overall revenue*." Portnoy Decl. Ex. MM (Martha Graybow & Rick Rothacker, *BofA Pays 2.4 Bln to Settle Claims Over Merrill*, Reuters, Sept. 28, 2012) (emphasis added).

substantially below the amount claimed by plaintiff's expert is fair and reasonable. *Id.* at 259-60; *see also In re Indep. Energy Hldgs. PLC Sec. Litig.*, 2003 WL 22244676, at *3 (S.D.N.Y. Sept. 29, 2003) (proof of damages "is always difficult and invariably requires expert testimony which may, or may not be, accepted by a jury"). The relevant measure is not what could be obtained in a "complete victory," especially where "the possibility of a complete victory is remote." *Metro. Life*, 935 F. Supp. at 293; *see also Grinnell*, 495 F.2d at 455 & n.2 ("The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate," because a settlement "can be inadequate only in light of the strength of the case presented by the plaintiffs."); *Unite Nat'l Ret. Fund*, 2005 WL 2877899, at *4 ("The best possible recovery, while arguably more than the settlement, is tempered by the risks of further litigation."). Weighed against these considerations, and in the context of this case, the $20 million cash recovery to Bank of America is a fair and reasonable benefit in light of the potential recovery at trial.[9]

[9] The handful of derivative cases that have settled for larger amounts sought recovery for large-scale fraud, self-dealing or repeated failures to address "red flags" of criminal wrongdoing, none of which is alleged here. For example, the $90 million and $115 million settlements obtained in AIG derivative litigations were based on claims of "fraudulent schemes" by AIG's officers and directors, including "illegal bid-rigging and kickback[s]" and sham transactions that purportedly benefitted AIG's CEO and other insiders. Portnoy Decl. Ex. EE at 1-3 (Brief of Plaintiffs, *Am. Int'l Group, Inc. Consol. Derivative Litig.*, No. 769-VCS (Del. Ch.)); *id.* Ex. W at 2-6 (Brief of Plaintiff, *Teachers' Ret. Sys. of La. v. Greenberg*, No. 20106-VCS (Del. Ch.)). The $118 million settlement of claims against certain directors of Broadcom rested on claims that they had personally approved and benefitted from a multi-year stock options backdating scheme. *Id.* Ex. BB at 2-4 (Joint Brief, *In re Broadcom Derivative Litig.*, No. 06 Civ. 3252 (C.D. Cal.)). The $75 million settlement of claims against the directors of Pfizer resolved claims that they had "willfully ignored a stream of 'red flags,' including internal healthcare compliance audit reports, whistleblower complaints, and letters from the FDA warning of widespread illegal marketing of Pfizer pharmaceuticals." *Id.* Ex. FF at 2-3 (Brief of Plaintiffs, *In re Pfizer Inc. S'holder Derivative Litig.*, No. 09 Civ. 7822 (S.D.N.Y.)). And in some of these cases involving large figures, the corporation obtained either no actual cash recovery or a cash recovery approximating that contemplated by the proposed Settlement here. The $100 million settlement of claims against the CEO and CFO of Oracle for alleged insider trading consisted of a payment to charity on the company's behalf, without any cash benefit to the corporation. *Id.* Ex. O (Jonathan D. Glater, *Oracle's Chief in Agreement to Settle Insider Trading Lawsuit*, N.Y. Times, Sept. 12, 2005, at C1). The settlement of claims that certain officers and directors of UnitedHealth had personally approved and benefitted from a multi-year stock options backdating scheme involved the return and re-pricing of $900 million of options, and a cash recovery to the corporation of $20.55 million. *Id.* Ex. Y at 2-3 (Brief of Lead Plaintiffs, *In re UnitedHealth Group Inc. S'holder Derivative Litig.*, No. 06 Civ. 1216 (D. Minn.)); *see also id.* Ex. T at Ex. B.

B. A Superior Result After Trial Is Unlikely in View of the Significant Uncertainty Whether Lead Plaintiffs Could Prove Their Claims

A reviewing court must "assess the risks of litigation against the certainty of recovery under the proposed settlement." *AOL*, 2006 WL 2572114, at *5 (quoting *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004)). As explained below, Lead Plaintiffs had good reason to regard their chances of prevailing on their claims as uncertain. Defendants have substantial defenses, both legal and factual, to virtually every element that Lead Plaintiffs must establish to succeed, including liability, causation and damages.

Were Lead Plaintiffs to fail at any of the numerous hurdles they face – including the risk that the Court would grant summary judgment for Defendants and the possibility Lead Plaintiffs would fail to prove their case at trial, or successfully defend a favorable judgment on appeal – the result might well be no relief or recovery at all. Lead Plaintiffs justifiably concluded that seizing a settlement on the terms that could be negotiated was preferable to risking the range of possible outcomes of further litigation. In view of those risks, and of the certain and substantial benefits presented by the proposed compromise, the Settlement should be approved as fair, reasonable and adequate.

1. Lead Plaintiffs' Ability to Prove Liability Is Highly Uncertain

With discovery completed, there is substantial cause to doubt that Lead Plaintiffs would be able to establish liability against any of the Defendants on any of their theories.[10]

[10] In defending against substantially identical claims in the Consolidated Securities Action and the Delaware Action, Defendants presented substantial arguments that they were entitled to summary judgment. *See, e.g.*, Memorandum of Law in Support of Outside Directors' Motion for Summary Judgment at 13-23 (Dkt. No. 598); Memorandum of Law in Support of Kenneth D. Lewis' Motion for Summary Judgment at 14-22 (Dkt. No. 601); Outside Directors' Reply Memorandum at 4-10 (Dkt. No. 699); Kenneth D. Lewis' Reply Memorandum at 3-8 (Dkt. No. 695); Portnoy Decl. Ex. II at 24-47 (Individual Defendants' Brief in Support of Motion for Summary Judgment, *In re Bank of Am. Corp. S'holder Derivative Litig.*, C.A. No. 4307-CS (Del. Ch.)). Defendants' motions were not decided, given the intervening proposed settlements in the class action and this action. Lead Plaintiffs thus face an open risk that, were this action to proceed, Defendants would similarly seek to move for summary judgment and might prevail.

(a) *The Bonus Claim*

Lead Plaintiffs face substantial hurdles on their claim that the Proxy was misleading because it did not disclose that Merrill could pay 2008 bonuses up to $5.8 billion. These hurdles include establishing that there was any false or misleading statement, that any such statement was material and that Defendants were either negligent or acted in bad faith.

Defendants maintain that the Proxy was not misleading, because it made plain that Merrill could pay bonuses, including in the event that Bank of America agreed. And indeed, there is no evidence that anyone read the Proxy to prevent Merrill from paying bonuses or believed that Merrill would not pay bonuses. To the contrary, it was widely reported that Merrill *would* pay bonuses and had been accruing for bonus expense. *See, e.g.*, Portnoy Decl. Ex. R (Christine Harper & Serena Saitto, *Firms Still Setting Aside Billions for Bonuses*, N.Y. Times, Oct. 27, 2008) (Merrill had "allocat[ed] about $6.7 billion to pay bonuses" for 2008); *id.* Ex. U (Bradley Keoun & Jacqueline Simmons, *Merrill Said to Cut Bonuses by 50% as Revenue Slumps*, Bloomberg, Dec. 3, 2008) (reporting that Merrill's compensation accruals, including bonuses, were only slightly below 2007 levels but that Merrill "plans to cut year-end bonuses in half"). Defendants also dispute that any confusion about Merrill's ability to pay bonuses for 2008 would have been material to a shareholder's vote on the Merger. For example, Defendants would argue that when, beginning in December 2008, the press reported the general magnitude of the bonuses that were paid, there was no significant adverse market reaction.[11]

Lead Plaintiffs also face a substantial challenge in establishing that the Defendants are personally liable for any disclosure failure regarding Merrill's 2008 bonuses. As this Court

[11] In fact, Bank of America's stock price increased on the day that Bloomberg ran the December 3 article reporting that Merrill planned to reduce its 2008 year-end bonuses by about 50 percent as compared to the prior year. *See* Portnoy Decl. Ex. U (reporting that employees would "find out their bonuses . . . later this month"); *id.* Ex. V (Yahoo! Finance printout).

previously explained, the directors are not "guarantors or insurers of the accuracy of proxy statements." *In re Bank of Am. Corp. Sec., Derivative, & ERISA Litig.*, 757 F. Supp. 2d 260, 325 (S.D.N.Y. 2010) (citation omitted). To establish liability against Defendants under Section 14(a), Lead Plaintiffs would need to prove that they "were aware that the Joint Proxy was materially deficient" or "should have been aware of deficiencies but took no steps to remedy or inquire about them." *Id.* at 324. It is highly doubtful that Lead Plaintiffs could meet this standard, much less prove the conscious "bad faith" necessary to prevail on a nondisclosure claim under Delaware law, *see id.* at 336-37. The Outside Directors did not learn of the bonus agreement until after the shareholder vote. *See*, *e.g.*, Portnoy Decl. Ex. G at 273:14-274:6 (Gifford Dep.) (not aware of bonus agreement until January 2009 press reports); *id.* Ex. N at 167:3-6 (Ward DE Dep.); *id.* Ex. D at 242:11-18 (Bramble DE Dep.); *id.* Ex. F at 143:10-25 (Franks DE Dep.).[12] The Board had, moreover, delegated responsibility for preparing and filing the Proxy to appropriate members of the Company's management. Portnoy Decl. Ex. S at 51 (Proxy); *id.* Ex. Q at UR-BAC-ML-NYAG00003752-56; *id.* Ex. J at 72:19-73:6 (May Dep.) (Board "delegates to management the responsibility . . . to prepare – with outside counsel and internal counsel – the appropriate proxy materials and disclosures"). Neither the Outside Directors nor Mr. Lewis had any cause to think that those to whom they delegated responsibility to prepare the Proxy did not appropriately discharge that duty, or that the Proxy omitted bonus information that had to be disclosed. *See, e.g.*, *id.* Ex. I at 195:9-196:16 (Lewis SEC Dep.).

The absence of any evidence of negligence or bad faith by Defendants on the bonus claim presents a substantial question of whether Lead Plaintiffs could even survive a motion by

[12] "Dep." refers to testimony in this Action. "DE Dep." refers to testimony in the parallel derivative action pending in the Delaware Court of Chancery. "SEC Dep." refers to testimony in the action styled *SEC v. Bank of America Corp.*, 09 Civ. 6829 (S.D.N.Y.).

Defendants for summary judgment. *See*, *e.g.*, *SEC v. Shanahan*, 646 F.3d 536, 544, 547 (8th Cir. 2011) (defendant director entitled to judgment as a matter of law on Section 14(a) claim where, as here, uncontroverted evidence demonstrated that he "did not draft the proxy statements, believed the statements were truthful and accurate, did not perceive that [the proxy] might be misleading . . . and was never made aware of any reasons to be concerned that [relevant information] was not fully disclosed"); *Minzer v. Keegan*, 1999 WL 33972459, at *13 (E.D.N.Y. Jan. 25, 1999) (dismissing Section 14(a) claim on grounds that plaintiff failed to allege that outside directors knew information that purportedly was omitted from proxy), *aff'd*, 218 F.3d 144 (2d Cir. 2000). Even if they were somehow able to survive summary judgment, Lead Plaintiffs would still face a very difficult challenge in proving their claim at trial.

(b) *The Fourth-Quarter Loss Claim*

Lead Plaintiffs face similar difficulties proving that Bank of America had a duty to disclose Merrill's interim and forecasted fourth-quarter losses and, if it did, that Defendants were either negligent or acted in conscious bad faith in not requiring the information to be disclosed.

As an initial matter, Defendants have argued that there was no duty to disclose Merrill's interim and forecasted results, because no SEC regulation required such disclosure, nor was any statement in the Proxy misleading without that information. Moreover, this information was by its nature uncertain and "soft," and Defendants would argue at trial that a reasonable investor would not have deemed it material – especially given that the markets were on notice from Bank of America, from Merrill and from the widely reported growing financial crisis that Merrill was likely to sustain sizable fourth-quarter losses.

Even if Bank of America had been required to disclose such information, Lead Plaintiffs would face a very difficult challenge in proving that the Defendants were personally negligent or acted in conscious bad faith. There is no evidence that the Outside Directors knew or should

have known about Merrill's interim results or forecasts until after the December 5, 2008 shareholder vote. The Outside Directors have uniformly testified that they were not given any particular interim results or forecasts for Merrill's fourth quarter until December 9, 2008. *See, e.g.*, Portnoy Decl. Ex. C at 167:3-15 (Barnet DE Dep.) (December 9 meeting was "the first time [the Board] had an estimate for the fourth quarter"). But more importantly, none of the Defendants had reason to think that disclosure of this information was necessary. As the Court previously noted, the Proxy and the companies' third quarter Forms 10-Q "painted a grim portrait of Merrill's near-term and medium-term prospects," *In re Bank of Am.*, 757 F. Supp. 2d at 305, and Defendants were never told that additional disclosures beyond this "grim portrait" might be required, *see, e.g.*, Portnoy Decl. Ex. D at 349:17-22 (Bramble DE Dep.) (never brought to his attention that "there were any issues or problems with respect to the disclosures that had been made"). To the contrary, Mr. Lewis discussed with Joe Price, the Company's CFO, whether additional disclosure was necessary, and was assured that Price had discussed the issue with Bank of America's general counsel and outside lawyers and that they had collectively agreed that no additional disclosure was necessary. *Id.* Ex. I at 263:20-265:3 (Lewis SEC Dep.); *see also id.* Ex. H at 206:15-207:5 (Lewis DE Dep.) (no further disclosure required in view of November forecast); *id.* at 226:12-15 (same in view of December 3 forecast). Mr. Lewis had no reason to second-guess that conclusion.

Here again, given the lack of any evidence that would support a finding of negligence or conscious bad faith, it is questionable whether Lead Plaintiffs' claims could survive a motion for summary judgment. But even if they did, Lead Plaintiffs would still face significant uncertainty in actually proving their claims of negligence or bad faith at trial.

(c) *The Claims Regarding the MAC Clause and Discussions of Possible Governmental Assistance*

Lead Plaintiffs face more daunting challenges in proving their state law claims that Defendants breached their fiduciary duties in late December 2008, after the shareholder vote, by not terminating the Merger, Compl. ¶ 314, and by not disclosing the Board's consideration of whether to terminate the Merger and the Company's discussions with the Federal Government about possible financial assistance, *id.* ¶¶ 188, 196, 205-06.[13]

The decision not to terminate the Merger was a classic business judgment of the Board, and because Bank of America's certificate of incorporation exculpates the Company's directors from personal liability for breaches of the duty of care, *see* Portnoy Decl. Ex. P ¶ 6, as permitted under Section 102(b)(7) of the Delaware Corporation Law, 8 *Del. C.* § 102(b)(7), Lead Plaintiffs would have to prove that Defendants decided to continue with the Merger in conscious bad faith, in breach of the duty of loyalty. It is highly unlikely that Lead Plaintiffs could do so. There were myriad valid reasons to proceed with the Merger: Invocation of the MAC clause would likely have led to litigation that Bank of America could not be assured of winning and that, if it lost, could ultimately result in its being required to purchase Merrill, which would have been further weakened in the interim by defections of valued customers and employees over uncertainty about the Merger. *See, e.g.*, Portnoy Decl. Ex. K at 169:10-21, 171:3-172:18 (Roth DE Dep.). The Treasury Department and Federal Reserve had warned that calling a MAC would put the national financial system at risk, a consequence that would negatively affect Bank of

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[13] This Court previously rejected Lead Plaintiffs' claim under Section 14(a) of the Exchange Act based on purported nondisclosures of these events that occurred after the shareholder vote. *See In re Bank of Am.*, 757 F. Supp. 2d at 309 (holding that Bank of America had no obligation under Section 14(a) to supplement the Proxy once the vote had occurred). Lead Plaintiffs accordingly are left with only their nondisclosure claims under state law. As explained below, however, Delaware law similarly imposes no obligation to disclose post-vote developments and, in any event, to prevail on any of their state law claims, Lead Plaintiffs would need to prove that Defendants acted in conscious bad faith.

America. *See, e.g.*, *id.* Ex. X at BAC-ML-NYAG-502-00001126; *id.* Ex. E at 212:4-11 (Countryman DE Dep.) ("The federal government was worried about [systemic risk]. We were worried about it, because we were part of that system and what was good for the American system was going to be good for the Bank of America."); *id.* Ex. L at 242:15-19 (Ryan DE Dep.) ("[I]f it's [a] disaster for the financial services industry . . . it's going to be problematic for us."). And the Government had given assurances that it would provide financial assistance to address Bank of America's near-term capital concerns while preserving the Merger's long-term strategic benefits. *See id.* Ex. M at 190:24-191:3 (Sloan DE Dep.) ("[O]nce the government agreed to step in, then I think everybody agreed it was [in] the best interest of the country, the bank, the financial system . . . for the merger to go through."). The Complaint alleges that Defendants acted out of fear that, if they terminated the Merger, they would be removed from the Board by the Government, but it is doubtful that Lead Plaintiffs could prevail in that claim given the overwhelming evidence of sound business reasons for the Board's decision.[14]

Lead Plaintiffs are similarly unlikely to prevail on their state law claim that Defendants breached a fiduciary duty by not disclosing their consideration of terminating the Merger or the discussions with the Government about possible financial assistance. Both these circumstances arose only after the shareholder vote had already occurred, and accordingly, as a matter of Delaware law, Defendants had no affirmative obligation to make any additional disclosures, *see*

[14] Defendants have uniformly rejected the assertion that any personal concern for their positions motivated their decision-making. *See, e.g.*, Portnoy Decl. Ex. F at 199:1-14 (Franks DE Dep.) ("absolute fact" that the threat did not persuade or influence the Board); Ex. E at 180:11-22 (Countryman DE Dep.) (threat "was not . . . going to be driving the [B]oard"); Ex. D at 308:24-25 (Bramble DE Dep.) ("comment didn't impact me at all"). Moreover, Defendants' substantial personal holdings of BAC stock make it implausible that they would consciously act contrary to the Company's interests. For a substantial majority of Defendants, including Mr. Lewis, the value of their personal stock holdings in December 2008 greatly exceeded the compensation they received from BAC. *Cf. In re Walt Disney Co. Derivative Litig.*, 731 A.2d 342, 356 (Del. Ch. 1998) (noting that an "economically rational individual whose priority is to protect the value of his . . . shares" would not "intentionally risk his own and his family's interests in order to placate" some other party), *rev'd in part on other grounds sub nom. Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). As for Mr. Lewis, his BAC stock holdings were worth more than $60 million, *see* Portnoy Decl. Ex. Z at 18 (BAC 2009 Annual Proxy), far outweighing his $1.5 million in salary in 2008, *id.* at 24.

Malone v. Brincat, 722 A.2d 5, 11 (Del. 1998) ("In the absence of a request for shareholder action" directors are "not require[d] . . . to provide shareholders with information concerning the finances or affairs of the corporation."), just as they had no obligation under Section 14(a) to update the Proxy after the shareholder vote, *see In re Bank of Am.*, 757 F. Supp. 2d at 309.

Moreover, as this Court previously explained, mere deliberations and discussions are in any event not material circumstances of a kind that need to be disclosed. "If the mere consideration of invoking a MAC clause required disclosure of such consideration, there would be a powerful disincentive to entertain the discussions," which could "work to the detriment of the company." *In re Bank of Am.*, 757 F. Supp. 2d at 308.[15] The same is true for the discussions with the Government. And finally, it is hard to see how Lead Plaintiffs could possibly meet the necessary standard of proving conscious bad faith, because there is no evidence that any Defendant was advised or had any reason to believe that Bank of America was required to disclose its consideration of terminating the Merger or the discussions with the Government.

2. Plaintiffs Face Significant Challenges in Proving Causation and Damages

Even if they could prove an actionable breach by Defendants, to prevail on their claims, Lead Plaintiffs would still have to prove causation and damages. The significant uncertainty that they would be able to do so casts further doubt on their chances of ultimate success and thus is another reason to conclude that the Settlement is fair and reasonable. *See In re Indep. Energy*, 2003 WL 22244676, at *3 (noting "significant risks" in plaintiffs' ability to establish causation

[15] Item 1.02 of Form 8-K – entitled "Termination of a Material Definitive Agreement" – requires the disclosure of certain information "[i]f a material definitive agreement which was not made in the ordinary course of business . . . is terminated . . . and such termination . . . is material." 69 Fed. Reg. 15594, 15620 (Mar. 25, 2004). But Instruction No. 1 to that Item expressly states: "No disclosure is required solely by reason of this Item 1.02 during negotiations or discussions regarding termination of a material definitive agreement *unless and until the agreement has been terminated*." *Id.* (emphasis added).

and damages as factor in approving settlement); *Metro. Life*, 935 F. Supp. at 293 (fairness of settlement supported by difficulty in proving recoverable damages and causation).

First, with regard to causation, Defendants would argue that, as a matter of law, to recover damages on behalf of Bank of America for the alleged disclosure violations, Lead Plaintiffs would need to establish a causal connection between the alleged nondisclosures and the purported damages sustained by the Company. It is Defendants' position that Lead Plaintiffs would thus need to prove that, had the additional disclosures been made, the "shareholders would have voted down the merger," *In re JPMorgan Chase & Co. Sec. Litig.*, 2009 WL 537062, at *5-6 (N.D. Ill. Mar. 3, 2009), and either "a more favorable exchange ratio would have been available" or the Company "would have been better off with no merger at all," *Dasho v. Susquehanna Corp.*, 461 F.2d 11, 31 (7th Cir. 1972) (Stevens, J.); *see also id.* ("[I]f it were plain from the record that Gypsum's shareholders would not in any event have approved a merger on terms which required surrender of more than 1.9 of their shares for each Susquehanna share, then approval of those terms, even if unlawfully obtained, did not harm Susquehanna."). Absent such proof, Lead Plaintiffs will have failed to establish a causal connection to any claimed injury.

It is hard to see how Plaintiffs could possibly satisfy this requirement. There is no evidence in the extensive record that the shareholders would have voted down the Merger if Bank of America had described the bonus agreement as Lead Plaintiffs claim was required, or had disclosed Merrill's interim loss for October 2008 and the fourth-quarter projections existing as of the shareholder vote. Nor is there any evidence that Bank of America, had it disclosed this information, would have obtained a more favorable exchange ratio for the Merger. Perhaps Lead Plaintiffs would argue that Bank of America would have been better off with no Merger at all, but as discussed above, Professor Shivdasani is prepared to testify for Defendants that the

Merger was value-enhancing for Bank of America. At best, the question would be decided by a "battle of the experts," with substantial risk to both sides.

C. Settlement Will Avoid Significant Additional Litigation Expense

Absent the Settlement, the parties will face a long and costly road to the conclusion of this litigation. They would need to incur the substantial expense of completing expert discovery and contesting motions for summary judgment. Should any claims survive, there would likely be very substantial pretrial motions. In the Consolidated Securities Action, where many of the same issues were presented, the parties had contemplated filing motions in limine directed to more than forty different topics, including nine motions to exclude expert testimony. Trial would be lengthy and expensive. The parties to the Consolidated Securities Action had estimated a trial of at least six to eight weeks, with testimony from approximately seventy-five potential witnesses (including several of the sixteen individual defendants) and more than 2,000 potential exhibits. Something comparable could very well be required here. Finally, in the event of a verdict, there would almost certainly be post-trial motions and, following judgment, an appeal.

Litigating this matter to conclusion would thus impose substantial additional burdens of time and expense on the parties, including the Company itself, without any assurance of a superior recovery at the end of the day. The proposed Settlement avoids these costs, as well as the costs of further litigation in the parallel Delaware action, which has been stayed pending this Court's disposition of the Settlement but which would resume if final approval is withheld. A resolution would, moreover, allow the Company to focus on its core commercial activities for the benefit of its shareholders. Courts have repeatedly recognized these considerations as supporting approval of settlements where the benefits are otherwise fair and reasonable. *See Metro. Life*, 935 F. Supp. at 293-94 ("Continued litigation of this case would put a strain on all of the parties," and "[i]n view of the effort and expense that would be required to take this case to and through trial,

settlement would undoubtedly be in the best interest of all the parties[.]"); *Strougo*, 258 F. Supp. 2d at 261 ("[E]ven if a shareholder or class member was willing to assume all of the risks of pursuing the actions through further litigation and trial, the passage of time would introduce yet more risks in terms of appeals and possible changes in the law and would, in light of the time value of money, make future recoveries less valuable than this current recovery."); *see also AOL*, 2006 WL 2572114, at *3, 5 (Settlement "'obviat[es] the expenditure of any future time and expense in connection with this action,' and will allow the Company to direct its full attention to its substantive business." (quoting *Mathes*, 85 F.R.D. at 714)).

* * *

The question for the Court in evaluating the Settlement is not what outcome would obtain if a trial were held. Rather, when considering the benefits of settlement, "courts must keep in mind that '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.'" *AOL*, 2006 WL 2572114, at *4 (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)). Balanced against the considerable risks confronting Lead Plaintiffs, the proposed Settlement provides certain and substantial benefits to the Company: Corporate governance measures designed by Lead Plaintiffs to address the shortcomings they perceived in the Company's internal processes relating to the Merger; an immediate $20 million cash recovery funded by Defendants' insurers; and an end to costly and distracting litigation. The combination of these factors supports approval. *See*, *e.g.*, *AOL*, 2006 WL 2572114, at *4 (holding that settlement benefits including governance and compliance provisions that "directly address[ed] the failure of internal controls that precipitated the . . . lawsuits" were "reasonable in light of the substantial difficulties that would frustrate a potential trial recovery"); *id.* at *5 ("The tangible benefits of the Settlement are

put into stark relief by the considerable barriers to any potential recovery at trial."); *see also* *Strougo*, 258 F. Supp. 2d at 258 ("In the circumstances here it is proper 'to take the bird in the hand instead of the prospective flock in the bush.'" (citation omitted)).

The proposed Settlement falls squarely within the range of reasonableness. As in *Pfizer*, the "benefits achieved by plaintiffs in the proposed settlement loom large when compared with the substantial possibilities that plaintiffs would have lost their case altogether, either at trial or on appeal." 780 F. Supp. 2d at 343. The Settlement is fair, reasonable and adequate and should be approved.

CONCLUSION

For the foregoing reasons, the Court should grant final approval of the Settlement.

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DAVIS POLK & WARDWELL LLP

/s Lawrence Portnoy

Lawrence Portnoy (lawrence.portnoy@davispolk.com)
Charles S. Duggan (charles.duggan@davispolk.com)
Brian M. Burnovski (brian.burnovski@davispolk.com)
450 Lexington Avenue
New York, NY 10017
Telephone: 212-450-4000
Fax: 212-701-5800

Counsel for the Individual Defendants