UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE BANK OF AMERICA CORP. SECURITIES, DERIVATIVE, AND EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) LITIGATION	)	Master File No. 09 MDL 2058 (PKC) ECF ACTION
This Document Relates To: All Derivative Actions	)	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF DERIVATIVE ACTION SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. THE GOVERNANCE PROVISIONS 2

A. Creation of a Corporate Development Committee 3

B. Changes to Disclosure Committee Charter 5

C. Other Corporate Governance Changes 6

1. Continuing Education 6

2. Enterprise Risk Committee Meeting Attendance 7

D. Four-Year Commitment Period 8

III. THE CASH RECOVERY TO THE COMPANY 8

IV. ARGUMENT 8

A. The Law Favors and Encourages Settlements 8

B. The Proposed Settlement Is the Product of an Adversarial Arm's-Length Negotiation by Experienced Counsel and Supported by Extensive Discovery 10

C. The Settlement Should Be Approved as Fair, Reasonable and Adequate 12

1. The Complexity, Expense and Likely Duration of the Litigation Support the Settlement 13

2. The Reaction of the Shareholders Support the Settlement 16

3. The Stage of the Proceedings and the Amount of Discovery Completed Support the Settlement 17

4. Plaintiffs Faced Considerable Risks to Establishing Liability 18

5. Lead Counsel Faced Considerable Risks to Establishing Damages 25

6. The Risks of Maintaining the Class Action Through Trial Support a Settlement 29

7. The Ability of the Defendants to Withstand a Greater Judgment 29

8. The Reasonableness of the Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation Support the Settlement 29

V. The Notice to BAC Shareholders Was Adequate 40

A. Notice Was Disseminated in Accordance with the Preliminary Approval Order 40

B. The Notice Procedures Fully Satisfied Due Process.. 40

VI. CONCLUSION... 41

TABLE OF AUTHORITIES

Cases

Bell Atl. Corp. v. Bolger,
2 F.3d 1304 (3d Cir. 1993) 41

Brehm v. Eisner,
746 A.2d 244 (Del. 2000) 25

City of Detroit v. Grinnell Corp.,
495 F.2d 448 (2d Cir. 1974), *abrogated on other grounds*,
Goldberger v. Integrated Resources, Inc., 209 F.3d 43 (2d Cir. 2000) .... *passim*

Clark v. Ecolab Inc.,
No. 07 Civ. 8623 (PAC), 2010 WL 1948198 (S.D.N.Y. May 11, 2010) 10

Cohen v. Beneficial Indus. Loan Corp.,
337 U.S. 541 (1949) 15, 25

D'Amato v. Deutsche Bank,
236 F.3d 78 (2d Cir. 2001) 12, 29

Dasho v. Susquehanna Corp.,
461 F.2d 11 (7th Cir. 1972) 27

Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993) 27

Heilweil v. Mount Sinai Hosp.,
32 F.3d 718 (2d Cir. 1994) 23

In re AOL Time Warner S'holder Derivative Litig.,
No. 02 Civ. 6302 (SWK), 2006 WL 2572114 (S.D.N.Y. Sept. 6, 2006) .... *passim*

In re AOL Time Warner, Inc. Sec. & ERISA Litig.,
No. MDL 1500, 02 Civ. 5575 (SWK), 2006 WL 903236 (S.D.N.Y. Apr. 6, 2006) 17

In re "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1396
(E.D.N.Y. 1985), *rev'd in part on other grounds*, 818 F.2d 179 (2d Cir. 1987). 39

In re BankAtlantic Bancorp Sec. Litig.,
No. 07-61542-CIV, 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011),
aff'd, 688 F.3d 713 (11th Cir. 2012) 16

In re Currency Conversion Fee Antitrust Litig.,
No. 01 MDL 1409, M 21-95, 2006 WL 3247396 (S.D.N.Y. Nov. 8, 2006) 12

In re FLAG Telecom Holdings Sec. Litig.,
No. 02 Civ. 3400 (CM) (PED) 2010 WL 4537550 (S.D.N.Y. Nov. 8, 2010) .... *passim*

In re Global Crossing Sec. & ERISA Litig.,
225 F.R.D. 436 (S.D.N.Y. 2004) 13, 16, 30

In re Indep. Energy Holdings PLC Sec. Litig.,
No. 00 Civ. 6689(SAS), 2003 WL 22244676 (S.D.N.Y. Sep. 29, 2003) 26

In re Initial Pub. Offering Sec. Litig.,
226 F.R.D. 186 (S.D.N.Y. 2005) 12

In re Johnson & Johnson Deriv. Litig.,
Nos. 10-2033 (FLW), 11-4993 (FLW),
11-2511 (FLW), 2012 WL 5292963 (D.N.J. Oct. 26, 2012) 28, 29, 30-31, 39

In re Marsh & McLennan Cos. Sec. Litig.,
No. 04 Civ. 8144 (CM), 2009 WL 5178546 (S.D.N.Y. Dec. 23, 2009) 11

In re Metro. Life Deriv. Litig.,,
935 F. Supp. 286 (S.D.N.Y. 1996) 14, 27

In re PaineWebber P'ships Litig.,
171 F.R.D. 104(S.D.N.Y.), *aff'd*, 117 F.3d 721 (2d Cir. 1997) 17, 29

In re Pfizer Inc. S'holder Deriv. Litig.,,
780 F. Supp. 2d 336 (S.D.N.Y. 2011) 13, 36

In re PHLCORP,
No. 88 Civ. 0306 (PNL), 1992 WL 85013 (S.D.N.Y. Apr. 10, 1992) 15

In re Sumitomo Copper Litig.,
189 F.R.D. 274 (S.D.N.Y. 1999) 9

In re Veeco Instruments Inc. Sec. Litig.,
No. 05 MDL 0165 (CM), 2007 WL 4115809 (S.D.N.Y. Nov. 7, 2007) 18, 30

In re Walt Disney Co. Deriv. Litig.,
731 A.2d 342, 356-57 (Del. Ch. 1998), *rev'd in part on other grounds sub nom. Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) 25

In re Warfarin Sodium Antitrust Litig.,
391 F.3d 516 (3d Cir. 2004) 29

In re WorldCom, Inc. Sec. Litig.,
388 F. Supp. 2d 319 (S.D.N.Y. 2005) 13, 28

J.I. Case Co. v. Borak,
377 U.S. 426 (1964) 26

Joel A. v. Giuliani,
218 F.3d 132 (2d Cir. 2000) 9

Maher v. Zapata Corp.,
714 F.2d 436 (5th Cir. 1983) 36

Maldonado v. Flynn,
477 F. Supp. 1007 (S.D.N.Y. 1979) 15-16

Malone v. Brincat,
722 A.2d 5 (Del. 1998) 24

Mathes v. Roberts,
85 F.R.D. 710 (S.D.N.Y. 1980) 8, 13

McReynolds v. Richards-Cantave,
588 F.3d 790 (2d Cir. 2009) 10

Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs., Inc., 854 A.2d 121 (Del. Ch. 2004) 24

Mills v. Elec. Auto-Lite Co.,
396 U.S. 375 (1970) 35

Mizner v. Keegan, No. 97-CV-4077, 1999 WL 33972459
(E.D.N.Y. Jan. 25, 1999), *aff'd*, 218 F.3d 144 (2d Cir. 2000) 21

Mullane v. Cent. Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 41

Newman v. Stein,
464 F.2d 689 (2d Cir. 1972) 9, 30

Prod. Res. Grp., LLC v. NCT Grp., Inc.,
863 A.2d 772 (Del. Ch. 2004) 35

Republic Nat'l Life Ins. Co. v. Beasley,
73 F.R.D. 658 (S.D.N.Y. 1977) 25

Salit v. Stanley Works,
802 F. Supp. 728 (D. Conn. 1992) 21

SEC v. Shanahan,
646 F.3d 536 (8th Cir. 2011) 21, 23

Strougo v. Bassini,

258 F. Supp. 2d 254 (S.D.N.Y. 2003) 9, 10

Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.,
No. 01-CV-11814 (MP), 2004 WL 1087261 (S.D.N.Y. May 14, 2004)............................ 33, 39

Thompson v. Metro. Life Ins. Co.,
216 F.R.D. 55 (S.D.N.Y. 2003)... 13

Velez v. Novartis Pharm., No. 04 Civ. 09194 (CM),
2010 WL 4877852 (S.D.N.Y. Nov. 30, 2010).. 16

Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.,
396 F.3d 96 (2d Cir. 2005) 10, 30

Williams v. First Nat'l Bank,
216 U.S. 582 (1910) 8

Statutes

Securities Exchange Act § 14(a), 15 U.S.C. 78n(a) .... *passim*

8 Del C. § 102(b)(7).. 23

Rules

Fed. R. Civ. P. 23.1 .... *passim*

Other Authorities

Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*,
51 WM. & MARY L. REV. 1749 (Apr. 2010)... 19, 31

Manual for Complex Litigation (Third) § 30.42 (1995) 10

I. INTRODUCTION

After nearly four years of hard-fought litigation, Lead Plaintiffs Hollywood Police Officers' Retirement System and Louisiana Municipal Police Employees Retirement System ("Plaintiffs") have achieved through good-faith, arms'-length negotiations an outstanding Settlement[1] that is in the best interests of Bank of America Corporation ("BAC" or the "Company") and its shareholders. The Settlement provides that BAC will implement a program of extensive corporate-governance reforms described in the Corporate Governance Term Sheet (the "Governance Provisions"), attached as Exhibit A to the Stipulation, that directly address the alleged deficiencies that gave rise to the Derivative Action, and are directly tailored towards avoiding a recurrence of the failures alleged in the complaint. The Settlement also provides a $20 million payment to BAC—a commendable result for shareholder derivative litigation, which rarely results in cash recoveries for the company.

These results did not come quickly or easily. Plaintiffs persevered, and were able to actively engage Defendants in preliminary discussions on various subjects relating to the proposed corporate governance reforms and a cash payment to BAC. These discussions culminated in a formal, day-long mediation led by the Hon. Layn R. Phillips (Ret.). The mediation, along with months of mediator assisted follow-up negotiations, forced all parties to assess difficult and uncertain outcomes. The reason for the negotiations' success was due to

---

[1] All capitalized terms used in this Memorandum, unless otherwise defined, have the same meaning set forth in the Stipulation and Agreement of Compromise, Settlement and Release, dated June 19, 2012 (the "Stipulation"), filed in this action on July 3, 2012, as Exhibit 1 to the Memorandum of Law in Support of Joint Motion for Preliminary Approval of Settlement, Dkt. No. 662-1. *See also* Joint Declaration of Plaintiffs' Counsel in Support of Final Approval of Derivative Action Settlement, dated Nov. 6, 2012 ("JAD") filed herewith, Exh. A.

many factors, not the least of which was that the parties were fully prepared and serious about reaching a final resolution of this complex and multi-faceted derivative action.

The fruit of these labors is a Settlement that effectuates many improvements in BAC's corporate governance. In their declarations, filed simultaneously with this Memorandum,[2] Plaintiffs' experts explain their professional opinions that the relief achieved under the Settlement empirically provides substantial benefits to BAC and its shareholders. Moreover, the proposed Settlement eliminates the risk of delay or non-recovery, as well as the uncertainty and expense of continued litigation. For these reasons and as more fully demonstrated herein, Plaintiffs respectfully request that the Court grant final approval of the proposed Settlement as fair, reasonable, and adequate to BAC and its shareholders.

II. THE GOVERNANCE PROVISIONS

The Governance Provisions provide for BAC to implement a program of extensive corporate governance reforms essential to improve the Board's engagement and competence in evaluating potential acquisitions and overseeing disclosure to shareholders of all material information involving same, including: (1) the creation of a new board-level committee to oversee major acquisitions; (2) modifications to the charter of BAC's Disclosure Committee to ensure more systematic oversight of the Company's acquisition-related disclosures; (3) changes to BAC's corporate governance guidelines related to director education requirements for the Company's directors; and (4) amendments to the charter of the Enterprise Risk Committee of the BAC board of directors relating to the attendance of certain officers at committee meetings.

---

[2] Plaintiffs file herewith expert reports by Professor Elizabeth A. Nowicki and David Tabak, Ph.D., and the declaration of Professor Dan R. Dalton, Ph.D. As detailed in the JAD, Plaintiffs retained these experts based on their substantial experience and expertise in areas which were the focus of the Derivative Action.

From the beginning, Lead Counsel consulted with a highly-respected corporate governance expert, Professor Dan R. Dalton, the founder and managing director of the Institute for Corporate Governance, University Dean Emeritus, and Poling Chair of Strategic Management, Emeritus, of the Kelley School of Business at Indiana University, for input in negotiating the Governance Provisions. *See* Declaration of Dan R. Dalton, JAD Exh. B ("Dalton") ¶¶ 2, 3, 5. Professor Dalton has stated that in his professional opinion:

> [T]he improvements, reforms, enhancements, reviews, and developments as noted in the Corporate Governance Term Sheet in the Memorandum of Understanding are decidedly warranted and confer substantial benefits on Bank of America. When fully implemented, these rectifications will markedly improve the corporate governance, mergers, acquisitions, and other corporate restructurings, and derivatively the overall risk management processes of Bank of America. Moreover, Bank of America's attention and service to its multiple constituencies (e.g., shareholders, clientele, the institutional investment community, regulators, and the public-at-large) will be enhanced. Also, and critically, these changes, when fully implemented, will facilitate the restoration of Bank of America's reputation, without which its future is compromised, uncertain at the very least.

Id. ¶ 4 (footnote omitted).

Moreover, these reforms relate directly to the claims in this case, which are premised upon allegations of a hasty, ill-advised acquisition of Merrill & Co., Inc. ("Merrill") by BAC, followed by purportedly inadequate and improper disclosures to BAC shareholders concerning bonus arrangements at Merrill, Merrill's accelerating losses in the fourth quarter of 2008, and federal government assistance to BAC to enable it to consummate the transaction.

A. Creation of a Corporate Development Committee

The Governance Provisions begin with the creation of a new board-level Corporate Development Committee ("CDC" or "Committee"), with the responsibility of overseeing certain acquisition-related activities of the Company for transactions valued at $2 billion or more.

Stipulation, Exhibit A. The CDC will provide oversight of transactions within its purview to ensure that management vets such transactions carefully and performs appropriate due diligence. Prior to management's presentation to the Board of a possible acquisition subject to the Committee's oversight, the CDC will meet with members of senior management to review management's compliance with application policies and procedures related to the Company's consideration. *Id.* For transactions ultimately approved by the full BAC board, the CDC will also provide oversight of management's post-transaction integration activities and monitor, as appropriate, any material transitional risks. *Id.* The CDC also will periodically review the Company's acquisition strategies with management, as appropriate. *Id.* The Settlement further provides that the CDC will have the authority to conduct investigations into matters within the Committee's scope of responsibilities, with full access to all books, records, facilities and personnel of the Company. *Id.*

Professor Dalton notes that BAC's agreement to create the CDC is "exceptional," Dalton ¶ 37, placing it in a very "select group" of the largest U.S.-based companies, and largest U.S. banks. Dalton ¶¶ 15-16. According to Professor Dalton, "[t]he existence of a well-qualified, practiced and enabled CDC can avert or ameliorate" many "potential consequences of a failed process, a failed transaction, adverse media attention, or some combination thereof" with respect to major acquisitions. *Id.* ¶ 26. *See also id.* ¶ 25. "Such a committee is an essential element of the overall risk assessment and management responsibility of the board and senior management of a publicly-traded company." *Id.* ¶ 26. Professor Dalton concludes:

> In sum, [BAC's] establishment of the CDC, if properly executed, promises to substantially reduce Bank of America's risk profile. Also, and critically, such a change provides substantial signal value to Bank of America's constituents, including regulators, of its willingness and capacity to adopt, and execute, this

veritable model of corporate governance reform.

Id. ¶ 40. Moreover, as explained by Professor Elizabeth A. Nowicki, Plaintiffs' additional corporate governance expert who was tasked with independently evaluating the corporate governance reforms:

> For empirical and behavioral reasons, the aspects of the Proposed Settlement related to the new CDC and its very specific charge, focus, and scope of detailed responsibilities are well tailored to provide significant value and benefit to the Corporation.

Expert Report of Professor Elizabeth A. Nowicki ("Nowicki"), JAD Exh. C, ¶ 21 (footnote omitted).

The result of intensive negotiation, the draft CDC Charter was carefully vetted by both Lead Counsel and Plaintiffs' corporate governance expert, Professor Dalton. Dalton ¶ 3. The creation of the CDC reflects Plaintiffs' principal goal in the proposed Settlement of obtaining settlement terms that address the core claims in the Derivative Action, and provide a substantial benefit to BAC and its shareholders through governance and board oversight provisions designed to reformulate the Company's processes for evaluating and approving transactions, to ensure that problems evident in the Merger do not recur.

B. Changes to Disclosure Committee Charter

The Settlement also provides that BAC will amend the charter of its Disclosure Committee to provide that the Disclosure Committee shall (i) have responsibility to review and consider the accuracy, completeness and timeliness of disclosures required in connection with any acquisitions that fall within the purview of the CDC; and (ii) 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. Stipulation, Exhibit A. The purpose of these changes to the Disclosure Committee Charter is to improve its oversight with respect to disclosures (including acquisition-related disclosures) and to ensure coordinated functioning with the CDC in connection with acquisitions and other transactions.

In Professor Dalton's words, such changes to the Disclosure Committee is:

> [A] fundamental complement to the efficacy of the CDC. As earlier noted, there are analysts who have been openly outspoken in their criticism of Bank of America's "controversial" acquisitions. With the establishment of the CDC and the now formal, and required, changes in the disclosure committee charter, the promise for informed, well-executed mergers, acquisitions, and related transactions is markedly enhanced. Once again, this combination, too, provides a robust, positive signal to Bank of America's investors, regulators, and its extensive constituencies.

Dalton ¶ 43 (footnote omitted). Professor Nowicki agrees:

> [C]harging the Disclosure Committee with focused responsibility for acquisition disclosure and review of disclosure practices can provide significant value for BAC by resulting in "better" disclosure by BAC. "Better" disclosure (e.g., disclosure that is more clearly in compliance with relevant disclosure obligations or best practices) reduces the likelihood of costly violations of statutes such as Section 14 of the Securities Exchange Act of 1934 . . . or Section 10(b) of the Securities Exchange Act of 1934 . . . .

Nowicki ¶ 27 (footnote omitted).

C. Other Corporate Governance Changes

1. Continuing Education

Pursuant to the Settlement, BAC's Corporate Governance Guidelines will be amended to provide specifically that the Company's orientation program for new directors include sessions regarding corporate governance best practices and an overview of director duties. In addition, the guidelines shall be amended to provide that management shall prepare additional educational sessions for directors, periodically as appropriate, on matters relevant to the Company and its

business, including sessions relating to corporate governance best practices and director duties. Stipulation, Exhibit A.

Professor Nowicki explains the benefits from such changes:

> This education requirement should have far-reaching benefits for BAC and its shareholders. . . . [E]xperts have opined that costly corporate failures can be the product of inattention, ignorance of monitoring and governance best practices, informational deficits, or cognitive biases. Requiring education for BAC directors on matters such as corporate governance obligations (e.g., the requisite level of direct monitoring and oversight) and the business of BAC is valuable to BAC because it mitigates these underlying issues and thereby can be fairly viewed as significantly reducing the chance of costly board failures.

Nowicki ¶ 30 (footnotes omitted). Professor Dalton agrees, finding the director education requirements to be "a warranted and judicious complement to Bank of America's corporate governance standards." Dalton ¶ 45.

2. Enterprise Risk Committee Meeting Attendance

The charter of the Enterprise Risk Committee ("ERC") of the Board shall be amended to provide that, in the normal course of business and barring exigent circumstances, the Company's Chief Risk Officer or equivalent shall be expected to attend all regular ERC meetings, and the Company's Chief Compliance Officer shall be expected to attend ERC meetings at least twice per year. Stipulation, Exhibit A.

This change—which Professor Dalton also acknowledges as a "warranted and judicious complement to [BAC's] corporate governance standards," Dalton ¶ 45—provides a substantial benefit to the Company. It ensures that, "as a functional matter . . . the BAC Board (by way of its ERC) has mandated direct access to key BAC risk mitigation and management executives (who possess crucial risk-related information), who in turn will then have direct access (by way of the ERC) to the Board." Nowicki ¶ 32.

D. Four-Year Commitment Period

The Company has agreed to maintain its commitment to the effective implementation of the provisions set forth in Stipulation Exhibit A for a four-year period from their adoption (the Settlement Commitment Term). This provision ensures that the Governance Provisions will be mandated for a sufficient period to produce a lasting effect on BAC's corporate governance. *See, e.g.*, Dalton ¶ 51.

III. THE CASH RECOVERY TO THE COMPANY

The Company's directors' and officers' liability ("D&O") insurance carriers have agreed to pay, on behalf of Defendants, the sum of $20 million to BAC. Stipulation, ¶ 15. As discussed below, such a cash recovery significantly exceeds the average recovery for a derivative action and is particularly noteworthy given the litigation risks in this case, the risk that derivative damages would be found to duplicate damages in the related consolidated securities action ("Securities Action"), and the dearth of legal precedent for awarding derivative damages on behalf of an acquiring company. Thus, the financial recovery alone represents an excellent result for BAC.

IV. ARGUMENT

A. The Law Favors and Encourages Settlements

It is well settled that "[c]ompromises of disputed claims are favored by the courts . . . ." *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910) (citation omitted). This is particularly true in a derivative context, where courts have long recognized that "settlements are favored" because "shareholder derivative actions are notoriously difficult and unpredictable." *Mathes v. Roberts*, 85 F.R.D. 710, 713 (S.D.N.Y. 1980) (citation and internal quotation marks omitted).

Rule 23.1(c) provides that a derivative action may only be settled "with the court's approval." Approving a settlement "is left to the sound discretion" of the court, which should be exercised "in light of the strong judicial and public policies that favor settlements." *Strougo v. Bassini*, 258 F. Supp. 2d 254, 257 (S.D.N.Y. 2003). *See also In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280 (S.D.N.Y. 1999) (same).

Before approving a settlement, the court must determine whether the settlement "is fair, adequate, and reasonable, and not a product of collusion." *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000). This evaluation necessarily includes consideration of whether "the compromise fairly and adequately serves the interests of the corporation on whose behalf the derivative action was instituted." *In re AOL Time Warner S'holder Derivative Litig.*, No. 02 Civ. 6302 (SWK), 2006 WL 2572114, at *2 (S.D.N.Y. Sept. 6, 2006) (citation and internal quotation marks omitted). Recognizing that a settlement represents an exercise of judgment by the settling parties, the Second Circuit has cautioned that, while a court should not give "rubber stamp approval" to a proposed settlement, it must "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974), *abrogated on other grounds*, *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). The Second Circuit has explained:

> [T]he role of a court in passing upon the propriety of the settlement of a derivative or other class action is a delicate one. . . . [W]e recognized that since the very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation, the court must not turn the settlement hearing into a trial or a rehearsal of the trial.

Newman v. Stein, 464 F.2d 689, 691-92 (2d Cir. 1972) (citation and internal quotation marks omitted).

"There is a strong initial presumption that a proposed settlement negotiated during the course of litigation is fair and reasonable." *Strougo*, 258 F. Supp. 2d at 257 (citation and internal quotation marks omitted). The Second Circuit has held:

> A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery."

Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 116 (2d Cir. 2005) (*quoting* Manual for Complex Litigation, Third, § 30.42 (1995)). "Absent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *Clark v. Ecolab Inc.*, No. 07 Civ. 8623 (PAC), 2010 WL 1948198, at *4 (S.D.N.Y. May 11, 2010) (citation and internal quotation marks omitted).

B. The Proposed Settlement Is the Product of an Adversarial Arm's-Length Negotiation by Experienced Counsel and Supported by Extensive Discovery

Courts in this Circuit examining a proposed settlement's procedural fairness "pay close attention to the negotiating process, to ensure that the settlement resulted from arm's-length negotiations and that plaintiffs' counsel . . . possessed the [necessary] experience and ability, and have engaged in the discovery, necessary to effective representation of the [absent plaintiffs'] interests." *McReynolds v. Richards-Cantave*, 588 F.3d 790, 804 (2d Cir. 2009) (citation and internal quotation marks omitted; second bracketing added). *See also AOL Time Warner*, 2006 WL 2572114, at *3 (same). Settlements that are reached in "arm's-length negotiations between experienced, capable counsel after meaningful discovery" are presumed to be fair, adequate, and reasonable. *Wal-Mart*, 396 F.3d at 116.

The Derivative Action was intensely litigated by leading practitioners from the shareholder plaintiff and corporate defense bars. The Settlement was reached through

adversarial negotiations between counsel actively representing their clients' interests. Plaintiffs had inspected, reviewed and analyzed three million pages of internal Company documents and other relevant materials, including over 100 transcripts of deposition testimony, and worked closely with corporate governance and damages experts. *See, e.g.*, JAD ¶¶ 9, 11-26, 32-34. Intimately familiar with the strengths and weaknesses of each side's position, Lead Counsel used this knowledge to the advantage of their respective clients. *See In re Marsh & McLennan Cos. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *6 (S.D.N.Y. Dec. 23, 2009) (finding that "[t]he 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").

In addition, the settlement process was neither short nor simple. The negotiations between Plaintiffs' and Defendants' counsel occurred over an extended six-month period, included numerous in-person meetings and telephone discussions, as well as the active exchange and negotiation of written counterproposals, JAD ¶¶ 18-26. *See, e.g.*, *AOL Time Warner,* 2006 WL 2572114, at *3 (negotiations "spanned an extended period of time and benefited from multiple proposals passed between the parties throughout this period"). And it was only after obtaining both the corporate governance reforms and the $20 million cash recovery that Plaintiffs were prepared to settle this hard-fought litigation.

The negotiations were conducted under the auspices of one of the nation's most respected mediators, the Hon. Layn Phillips, a former United States District Judge for the Western District

of Oklahoma.[3] Judge Phillips has previously submitted a Declaration attesting to the fact that the settlement negotiations were conducted at arms' length, in good faith, and free of collusion, and that he saw no evidence of any kind of reverse auction. JAD Exh. Q (Phillips Decl. ¶10). There can be no doubt that this Settlement is the product of good-faith, arms'-length, non-collusive negotiations. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (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, M 21-95, 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.") (citation omitted); *In re Initial Pub. Offering Sec. Litig.*, 226 F.R.D. 186, 194 (S.D.N.Y. 2005) (finding proposed settlement non-collusive negotiations where settlement negotiations were facilitated by a retired United States District Judge). In sum, the process leading to the Settlement was fair to BAC and its shareholders, and supports final approval.

C. The Settlement Should Be Approved as Fair, Reasonable and Adequate

In *Grinnell*, the Second Circuit discussed factors that courts must consider in evaluating whether class action settlements are fair, reasonable and adequate. These factors are:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the

---

[3] 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.html (last visited Oct. 25, 2012).

> trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Grinnell, 495 F.2d at 463 (citations omitted). *See also In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 337 (S.D.N.Y. 2005) (same) (citing *Grinnell*). In evaluating substantive fairness, "not every factor must weigh in favor of settlement[;] 'rather the court should consider the totality of these factors in light of the particular circumstances.'" *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004) (*quoting Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003)). While *Grinnell* was an antitrust class action, courts in this District considering derivative settlements also consider the relevant factors that the Second Circuit laid out in that opinion. *See, e.g., In re Pfizer Inc. S'holder Deriv. Litig.*, 780 F. Supp. 2d 336, 340 (S.D.N.Y. 2011); *AOL Time Warner*, 2006 WL 2572114, at *3. In the present case, consideration of the relevant *Grinnell* factors strongly supports final approval of the proposed Settlement.

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

As noted above, courts in this District generally favor settlements of derivative actions because they are "notoriously difficult and unpredictable." *Mathes*, 85 F.R.D. at 713; *AOL Time Warner*, 2006 WL 2572114, at *3 (same). The Settlement achieved here provides BAC and its shareholders substantial benefits without the risks of continued litigation. To continue these proceedings would also require additional effort and expense by all Parties, including BAC. The Derivative Action has been ongoing for over four years, during which time the Parties have incurred millions of dollars in attorney time and expenses. Litigating through summary

judgment, trial and appeal would surely cause the Parties to incur millions of dollars in additional expenses. This factor favors approval of the Settlement. *See AOL Time Warner*, 2006 WL 2572114, at *5 (noting that "the prosecution of this action would require the Company to incur substantial costs" and that approving the settlement "will allow the Company to direct its full attention to its substantive business"); *In re Metro. Life Deriv. Litig.*, 935 F. Supp. 286, 294 (S.D.N.Y. 1996) ("In 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 . . . .").

Absent the Settlement, Plaintiffs would face a long and uncertain road towards a recovery for BAC. The Settlement was reached just as expert discovery was set to commence in the Derivative Action.[4] Expert discovery is an expensive undertaking for both plaintiffs and defendants. *See In re FLAG Telecom Holdings Sec. Litig.*, No. 02 Civ. 3400 (CM) (PED) 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) ("[e]xpert discovery would be particularly expensive and time-consuming as both sides would require" specialized experts). The expert discovery conducted in the Securities Action (including nine contemplated motions to exclude expert testimony) provides a good indication of just how massive and complex expert discovery in the Derivative Action would have been. In addition (and as explained below), this case presented the unique question of how to apportion the damages for violations of Section 14(a) of the Securities Exchange Act of 1934 between the Derivative Action and the Securities Action. This problem raised particularly thorny and complex issues regarding the entanglement of various experts' damages calculations not just between a plaintiff and a defendant, but between

---

[4] As explained in the September 17, 2012 letter to the Court, after the parties engaged in the February 2012 mediation, they mutually agreed to extend the deadline to exchange expert reports while they continued to negotiate the terms of the Settlement. JAD ¶ 24.

the nominal party in interest BAC, shareholder plaintiffs in the Securities Action, defendant BAC in the Securities Action, and the individual defendants in both the Derivative and Securities Actions.

In parallel with expert discovery, the Parties would have undoubtedly engaged in extensive summary judgment briefing. There is no reason to believe that the summary judgment briefing in the Derivative Action would be any less deep or complex as the summary judgment briefing in the Securities Action. In fact, there is every indication that the briefing in the Derivative Action would have been more complex. In addition to issues arising under the federal securities laws, Plaintiffs would also have been required to address complex issues of Delaware corporate law with respect to the remaining breach of fiduciary duty claims. This would have added another layer of complexity to briefing and exhibits that would already undoubtedly have numbered in the thousands of pages.

Any trial of the derivative claims would be complex, expensive and time consuming. The Court indicated that the Securities Action was to be tried prior to the Derivative Action. As an initial matter, it is not clear to what extent Plaintiffs in the Derivative Action would have been bound by rulings in the trial of the Securities Action. In addition, a trial of a derivative action presents special complexities not found in a regular trial, or even a trial of a class action, as it calls for a shareholder to step into the corporation's shoes. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548 (1949) (explaining nature of derivative suits). It is unclear whether a Section 14(a) claim can be tried to a jury. *Compare In re PHLCORP*, No. 88 Civ. 0306 (PNL), 1992 WL 85013, at *1 (S.D.N.Y. Apr. 10, 1992) (noting previous action in which Section 14(a) claims tried to jury) *with Maldonado v. Flynn*, 477 F. Supp. 1007, 1011 (S.D.N.Y. 1979) (claims

filed under the Exchange Act for proxy violations were essentially equitable in nature and thus plaintiff was not entitled to a jury trial).

Assuming that Plaintiffs prevailed at trial, it would be expected that Defendants would file post-trial motions and appeals, thereby increasing the costs and duration of this litigation and further delaying financial recovery and other relief to the Company. *Global Crossing*, 225 F.R.D. at 456. *See also Velez v. Novartis Pharm.*, No. 04 Civ. 09194 (CM), 2010 WL 4877852, at *13 (S.D.N.Y. Nov. 30, 2010) ("Settlement at this juncture results in a substantial and tangible present recovery, with the attendant risk and delay of post-trial motions and appeals.") (citation and internal quotation marks omitted). Even a verdict is no guarantee that BAC would recover anything. *See, e.g., In re BankAtlantic Bancorp Sec. Litig.*, No. 07-61542-CIV, 2011 WL 1585605, at *1 (S.D. Fla. Apr. 25, 2011) (overturning jury verdict in favor of plaintiff class and granting judgment as a matter of law in favor of defendants), *aff'd*, 688 F.3d 713 (11th Cir. 2012).

In negotiating the proposed Settlement, Plaintiffs, while strongly believing they had powerful arguments to overcome these hurdles, were nonetheless fully aware of the material risks of continuing to litigate the Derivative Action, particularly when weighed against the fact that the proposed Settlement provides substantial benefits to the Company immediately without the risks, complexity, duration, and expense of continuing litigation.

2. The Reaction of Shareholders Supports the Settlement

On July 13, 2012, the Court entered the Preliminary Approval Order. Dkt. No. 690. Pursuant to the Order, BAC shareholders were apprised of all material terms of the Settlement and of the deadline for the submission and filing of any objections. *Id.* ¶¶ 11-12. The deadline

for any BAC shareholders to submit their objections is November 27, 2012. *Id.* ¶ 11. To date, no objections have been received. Plaintiffs, however, are aware that Nancy Rothbaum, a purported BAC shareholder, has indicated a strong and repeated desire to object to the Settlement.[5] Plaintiffs are prepared to fully address any objections that Ms. Rothbaum may submit in accordance with the schedule laid out by the Court in the Preliminary Approval Order.

3. The Stage of the Proceedings and the Amount of Discovery Completed Support the Settlement

The stage of the litigation and the amount of discovery completed when a settlement is reached "is relevant to the parties' knowledge of the strengths and weaknesses of the various claims in the case, and consequently affects the determination of the settlement's fairness." *In re PaineWebber P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y.) (citation omitted), *aff'd*, 117 F.3d 721 (2d Cir. 1997). The relevant inquiry "is whether the plaintiffs have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement." *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. MDL 1500, 02 Civ. 5575 (SWK), 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006). Here, Plaintiffs had a clear view of the strengths and weaknesses of their positions.

Fact discovery, consisting of a document production of approximately three million pages, 31 depositions, and nearly 100 transcripts from other governmental and regulatory proceedings, was completed and expert discovery was about to begin. As the Court has observed, this is "a case in which much has already been discovered." Dkt. No. 424 at 2. In addition, Plaintiffs worked closely with highly respected experts in the fields of finance,

[5] The Parties in the Derivative Action have already litigated a number of issues related to the Settlement raised in the Court by purported objectors from the Delaware Action, *In re Bank of America Corp. Stockholder Derivative Litigation*, No. 4307 (Del. Ch. Ct.).

economics, damages and corporate governance. JAD ¶¶ 32-34. From the outset, Plaintiffs did not propose or agree to any corporate governance reforms without thoroughly analyzing the improvements with their corporate governance expert. Dalton ¶ 3. Plaintiffs' close consultation with their economics and damages expert also strongly informed their decision to enter into the Settlement.

Plaintiffs also fully litigated several substantive motions, including Defendants' motions to dismiss and Defendants' motion for interlocutory appeal. At the time the Settlement was reached, preparation of the motions for summary judgment was well underway. Plaintiffs were also simultaneously preparing for and anticipating expert depositions and other issues relating to expert discovery.

Accordingly, the Settlement was not entered into until after Plaintiffs had prevailed on the sharply contested motion to dismiss and worked tirelessly to develop a strong evidentiary record. Having sufficient information to intelligently evaluate the case, Plaintiffs were "able to settle the litigation on terms highly favorable . . . without the substantial risk, uncertainty, and delay of continued litigation." *FLAG Telecom*, 2010 WL 4537550, at *16 (citations omitted).

4. Plaintiffs Faced Considerable Risks to Establishing Liability

In considering this factor, "the Court is not required to decide the merits of the case or resolve unsettled legal questions, or to foresee with absolute certainty the outcome of the case." *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 0165 (CM), 2007 WL 4115809, at *8 (S.D.N.Y. Nov. 7, 2007) (citations and internal quotation marks omitted). Rather, "the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *Id.* (citation omitted).

Given the unpredictability of derivative actions noted above, it is unsurprising that derivative suits have much higher dismissal rates than general civil litigation. *See* Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 WM. & MARY L. REV. 1749, 1789-90 (Apr. 2010) (approximately 45% of derivative actions in federal court in 2005-2006 were involuntarily dismissed versus 20% for civil litigation in general). Plaintiffs have experienced this harsh reality first hand. The Court dismissed the majority of Plaintiffs' claims in its August 27, 2010 Order, Dkt. No. 303, leaving only claims for alleged breaches of the Director Defendants' fiduciary duties to the extent they were based on events that occurred between the Board's Merger approval and its closing, *id*. at 118-19, and claims for the Director Defendants' alleged violations of Section 14(a) for conduct based on non-disclosure of Merrill's bonus pool and fourth quarter losses, *id.* at 53-54, 60-61. Here, Plaintiffs would have faced formidable hurdles to establishing liability.

Section 14(a) Claims

As the Court explained in its August 27, 2010 Order, directors are not "guarantors or insurers of the accuracy of proxy statements." Dkt No. 303, at 93. Even under the lower negligence standard of a proxy claim, directors are permitted to "rel[y] on expertise of legal or financial counsel in areas pertinent to their respective expertise." *Id*. Thus, Plaintiffs would have to prove that the Director Defendants "were aware that the Joint Proxy was materially deficient" or "should have been aware of the deficiencies" but "took no steps to remedy or inquire about them." *Id*. at 91-92.

Based on their summary judgment briefs in the Securities Action, Defendants would surely argue that there is no evidence in the record suggesting that they negligently excluded

information about Merrill's bonus pool from the Joint Proxy. Their argument would likely be that they familiarized themselves with and evaluated the key terms of the Merger, and reviewed the key terms prior to the September 14, 2008 special Board meeting. At the meeting, they would say that they reviewed and discussed the Merger and its key terms (including the proposed exchange ratio, the expected timing of the Merger, the need for stockholder approvals, and the constitution of the Board of the combined company) with BAC management and their financial and legal advisors. They will say that the subject of Merrill's bonuses was never raised.

Having considered these matters, Defendants would then say that they concluded that it was in the best interests of BAC to move quickly to acquire Merrill, and that they reasonably delegated to BAC management the responsibility for preparing and finalizing the Merger Agreement and making all necessary disclosures and filings. Defendants would argue they had no reason to question management's ability to exercise this responsibility, especially given that they understood the management team to have substantial M&A experience and would be assisted by highly respected legal and financial advisors. Indeed, one of the many obstacles that Plaintiffs face is arguing that anyone was negligent in relying on the advice of highly prestigious and respected firms like Wachtell Lipton, J.C. Flowers & Co., and Fox-Pitt Kelton Cochran Caronia Waller in rendering legal and financial advice regarding the merger.[6]

Given these facts, it is questionable whether Plaintiffs would have prevailed on the merits

---

[6] Further, Defendants would surely argue that there is no evidence that any BAC shareholder believed that Merrill would not pay bonuses for 2008. Based on their summary judgment briefs filed in the Securities Action, they would rely on the October 27, 2008, *New York Times* article reporting that "[f]ive straight quarters of losses and a 70 percent slide in its stock this year have not stopped Merrill Lynch from allocating about $6.7 billion to pay bonuses" for 2008. They would also likely rely on the December 3, 2008, Bloomberg.com article reporting that Merrill "plans to cut year-end bonuses in half after more than $20 billion of losses that forced the U.S. securities firm to sell itself to [Bank of America]." This article went on to note that Merrill's compensation accruals for the first three quarters of 2008 (which included estimated amounts for bonuses) were down only three percent from 2007 levels.

of their Section 14(a) claim based on the bonus pool. *See, e.g., SEC v. Shanahan*, 646 F.3d 536, 544-47 (8th Cir. 2011) (outside director entitled to judgment as a matter of law where he "did not draft the proxy statements, believed that the statements were truthful and accurate, did not perceive that [the proxy] might be misleading . . . and was never made aware of any reason to be concerned that [the relevant information] was not fully disclosed"); *Mizner v. Keegan*, No. 97-CV-4077, 1999 WL 33972459, at *13 (E.D.N.Y. Jan. 25, 1999) (dismissing Section 14(a) claim on basis that "the plaintiffs do not plead that the Outside Directors knew the omitted facts"), *aff'd*, 218 F.3d 144 (2d Cir. 2000); *Salit v. Stanley Works*, 802 F. Supp. 728, 733 (D. Conn. 1992) ("Where plaintiffs have not pled that the individual defendants knew of the facts allegedly omitted from the proxy statement (and, not being alleged to have been personally involved in its issuance, therefore, had no duty to see that they were included in the statement), plaintiffs have insufficiently pled a negligence claim.").

It is undisputed that the Directors met nine times between approving the Merger on September 14, 2008 and the December 5, 2008 shareholder vote. These included both formal meetings and voluntary calls instituted by BAC CEO Kenneth Lewis in direct response to the Directors' desires. Defendants would argue that these meetings included in-depth discussions of the state of the economy and issues relating to the Merger, including management integration, talent planning and retention, the effect of the Merger on BAC's capital planning, Merrill's third quarter results, and various plans to review risk oversight for the Merrill transition. But Defendants would also argue that the evidence shows that none of the outside directors recalled any specific forecast for Merrill's fourth quarter results until the Board's regularly scheduled December 9 meeting, which occurred four days after the shareholder vote. For the reasons

described above, Defendants would argue that they cannot be negligent for not requiring information that they did not know about to be disclosed.

The Court has noted that the Proxy Statement and the companies' third quarter Forms 10-Q "painted a grim portrait of Merrill's near-term and medium-term prospects . . . ." Against this background, Defendants would argue that they were not told that anything they regarded as alarming or overly significant about Merrill. The outside directors would maintain that there was no indication in their discussion with BAC management prior to the December 5 shareholder vote that Merrill was incurring losses that would need to have been disclosed in the context of the widely-publicized difficulties affecting the banking and financial services industries generally. They would point to the fact that BAC management, through CFO Joe Price, discussed the issue of Merrill's fourth quarter losses twice with CEO Lewis (who was also a Board member).[7] Both times, based upon advice from counsel (including in-house counsel and/or outside counsel), it was determined that no additional disclosure was required. While Defendants would surely recall being disappointed to learn of Merrill's projected fourth quarter losses, they would still maintain that they had no reason to question whether fourth quarter developments warranted more dire disclosures than the "grim portrait" that had been already been presented to the market.

---

[7] The first instance occurred after a November 20 call among BAC executives, in-house lawyers, and lawyers from Wachtell Lipton, during which they discussed the first five weeks of Merrill's fourth quarter results. Price told Lewis afterward that everyone on the call had concurred that no additional disclosure was required. This determination was not discussed with the Board at its November 21 meeting. The second instance occurred on or about December 3, after BAC received a revised set of fourth quarter projections. Price assured Lewis that he had discussed the issue with counsel, reporting that he had gone "through the same process," and was told that the losses were not required to be disclosed.

Plaintiffs faced an uphill battle in proving that the Defendants acted negligently in not disclosing Merrill's fourth quarter losses, especially given that counsel twice advised management that they did not need to be disclosed. Mere speculation that Defendants should have known is not enough to present a triable issue of fact. *See, e.g., Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 723 (2d Cir. 1994) ("conjecture or surmise" cannot defeat a motion for summary judgment); *Shanahan*, 646 F.3d at 547 (affirming district court's decision that negligence cannot be proven as a matter of law where "jury could only speculate" that a director had "failed to exercise reasonable care in overseeing [a company's] proxy communications").

Breach of Fiduciary Duty Claims

BAC's certificate of incorporation provides that, "[t]o the fullest extent permitted [under Delaware law,] a director of the Corporation shall not be personally liable to the Corporation . . . for monetary damage for breach of his duty as a director." *See* Dkt. No. 303 at 114. To succeed on the breach of fiduciary duty claims based on Delaware law, therefore, Plaintiffs would have to prove that Defendants acted in bad faith in deciding to continue with the Merger. 8 Del C. § 102(b)(7).

As an initial matter, if Plaintiffs could not satisfy the lower negligence standard of a Section 14(a) claim, then it is questionable whether they could meet the higher standard of proving conscious bad faith for their breach of fiduciary duty claims, when the claims arise out of the same set of facts.[8] The Court dismissed all of Plaintiffs' breach of fiduciary duty claims arising from conduct allegedly occurring prior to and including the Merger. Dkt. No. 303 at 114-

[8] Thus, to the extent that the breach of fiduciary duty claims are based on the alleged failure to disclose Merrill's bonuses and fourth quarter losses, Plaintiffs would encounter difficulties proving these claims for the same reasons as described in the Section 14(a) context above. This section will focus on the alleged failure to disclose the discussions regarding the MAC clause and government intervention.

16. It is uncertain whether a finder of fact would determine that the Defendants acted in good faith up to and including September 14, but on September 15 immediately began acting in bad faith.[9]

As a matter of law, the directors of a Delaware corporation, "[i]n the absence of a request for stockholder action," are not required "to provide shareholders with information concerning the finances or affairs of the corporation." *Malone v. Brincat*, 722 A.2d 5, 11 (Del. 1998). *See also Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs., Inc.*, 854 A.2d 121, 153 (Del. Ch. 2004) ("First, Metro suggests that the mere possession of material facts gives rise to a duty to disclose those facts. That is an inaccurate statement of the law. Even fiduciaries have no distinctive state law duty to disclose material developments with respect to the company's business . . . .") (internal quotation marks omitted).

As a result, it would be difficult for Plaintiffs to argue that Defendants had an affirmative duty to disclose the existence of MAC clause discussions or possible governmental intervention, both of which arose after the December 5, 2008, shareholder vote. Making Plaintiffs' challenge even more daunting, the Court observed that:

> Internal discussions about invoking a MAC clause, and seeking legal advice regarding the same, do not, in themselves, render misleading a statement that there has not been and will not be a material adverse effect. As stated above, the SEC does not require disclosure of negotiations and discussion regarding termination unless the agreement actually has been terminated. Item 1.02 of Form 8-K, Instruction No. 1. If the mere consideration of invoking a MAC clause required disclosure of such consideration, there would be a powerful disincentive to entertain the discussion. In some cases, this would work to the detriment of the company.

---

[9] Defendants did not move to dismiss the breach of fiduciary duty claims for conduct allegedly occurring after the Merger was approved. Dkt. No. 303 at 118-19.

Dkt. No. 303 at 64. The same logic holds true with respect to discussing governmental intervention, especially at the height of the financial crisis.

Further complicating Plaintiffs' ability to prove bad faith are the Defendants' substantial personal holdings of BAC stock. For example, according to BAC's 2009 Annual Proxy Statement, Defendant Gifford held over 325,000 BAC shares, Defendant Lewis held almost 4.7 million BAC shares, and Defendant Spangler held over 32 million BAC shares. Proxy at 18. The finder of fact would have to accept that the Defendants acted against their own pecuniary self-interests in going through with the Merger. This is a doubtful proposition, to say the least. *See Republic Nat'l Life Ins. Co. v. Beasley*, 73 F.R.D. 658, 668 (S.D.N.Y. 1977) ("[d]ue consideration" must be given to fact that jury could find that defendants' stock holdings "might furnish them with a powerful trial argument that they had no incentive to breach their fiduciary duty"); *In re Walt Disney Co. Deriv. Litig.*, 731 A.2d 342, 356-57 (Del. Ch. 1998) ("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).

Finally, because a real plaintiff in interest in a derivative action is the corporation, *see Cohen*, 337 U.S. at 548, the risk exists that a jury would not find BAC to be a sympathetic plaintiff, especially in the current economic climate. A jury's potential response cannot be ignored in evaluating the possibility and probability of establishing liability.

5. Lead Counsel Faced Considerable Risks to Establishing Damages

If Plaintiffs were to surmount all of these substantial hurdles and establish liability, they would still have to prove that BAC was damaged. Proving damages, especially for violations of

the federal securities laws, "is always difficult and invariably requires expert testimony which may, or may not be, accepted by a jury." *In re Indep. Energy Holdings PLC Sec. Litig.*, No. 00 Civ. 6689(SAS), 2003 WL 22244676, at *3 (S.D.N.Y. Sep. 29, 2003). Ultimately, the jury's determination of the amount of damages would "depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable." *FLAG Telecom*, 2010 WL 4537550, at *18.

This case presented especially complicated issues with respect to establishing damages. As the Court observed in its August 27, 2010 Order, it was uncertain whether the majority of damages were direct or derivative—if any—and the extent of the overlap between the two. Dkt. No. 303 at 33-35. Plaintiffs' damages expert David Tabak, Ph.D., finds that even assuming derivative damages to BAC were proven and found to be non-zero by the finder of fact, they would nevertheless overlap with damages to shareholders in the Securities Action and be non-recoverable, in whole or in part, explaining that:

> While it is true that the recipients are not the same, it is also true that they are not wholly different. A recovery by BofA in the derivative action would benefit all of its current shareholders, including those who purchased before the alleged corrective disclosure and therefore would be part of the class in the securities action. Thus, some shareholders would receive two benefits based on the same events and potentially based on versions of the same calculation (i.e., calculations related to the decline in BofA's stock price on January 16, 2009).

Expert Report of David Tabak, Ph.D. ("Tabak"), JAD Exh. D, ¶ 13.[10] Given this overlap, at some point, it is likely that the damages models in the Derivative Action and the Securities

---

[10] In the August 27, 2010 Order, the Court quoted the Supreme Court's opinion in *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964), which observed in dicta that "injury which a stockholder suffers from corporate action pursuant to a deceptive proxy solicitation ordinarily flows from the damage done to a corporation." *Borak* went on to expressly note, however, that "[w]e are concerned here only with a determination that federal jurisdiction for this purpose does exist. Whatever remedy is necessary must await the trial on the merits." *Id*. at 435.

Action would have to have been compared against each other in order to avoid a double recovery. The Court would have been required to determine whether Plaintiffs' and Defendants' damages models are admissible under *Daubert*. This would have been difficult for all parties because of the lack of authority on how derivative Section 14(a) damages can be calculated.

In response to this Court's request at the May 19, 2010 conference, Plaintiffs submitted a letter brief arguing that certain damages arose from BAC's overpayment for Merrill, as well as the injury to BAC's reputation and certain legal fees. Dkt. No. 303 at 33-34. Defendants may argue that the decision to approve the merger, including approval of the share-for-share exchange rate, is subject to the business judgment rule—a high hurdle for Plaintiffs to overcome. And courts have recognized that damages arising from injuries to goodwill and reputation are "usually difficult to prove." *Metro. Life*, 935 F. Supp. at 293 (in derivative case, loss of goodwill and future sales are difficult to prove).

Defendants would likely argue that Plaintiffs would have to show that either BAC would have been better off without the Merger, or that with additional disclosures shareholders would have voted down the Merger, or a material term in the Merger Agreement would have changed. *See Dasho v. Susquehanna Corp.*, 461 F.2d 11, 31 (7th Cir. 1972) (Stevens, J.) ("But that approval caused [the company] monetary injury only if (a) [the company] would have been better off with no merger at all; or (b) a more favorable exchange ratio would have been available if there had been full disclosure."). This is a difficult hurdle, especially given that various Defendants testified that BAC had been eyeing a potential merger with Merrill for at least a decade. Defendants would also likely rely on the Expert Report of Professor Anil Shivdasani, who concludes that the Merger was value-enhancing for BAC. Shivdasani Rep. ¶ 9

(Dkt. No. 653-146). Shivdasani's conclusions are buttressed by a September 28, 2012 Reuters article, entitled *BofA pays 2.4 bln to settle claims over Merrill*, which reported that between January 1, 2009 and June 30, 2012, "BAC's wealth management and investment banking units, which owe much of their business to Merrill, generated nearly $160 billion of revenue," comprising "43% of the bank's overall revenue."

Because the Defendants delegated responsibility to members of BAC management, they could argue that it was those individuals who were at fault, not they. *See WorldCom*, 388 F. Supp. 2d at 338 (risk that outside directors would argue their proportionate share of responsibility was minimal compared to insiders who perpetrated the fraudulent conduct). This argument might find some traction given that BAC's CEO and CFO twice discussed disclosure issues—and were twice told that counsel determined that no disclosure need be made. Predicting how the fact finder would apportion the liability among the Defendants and any other individuals is difficult, if not impossible. Finally, even if Defendants could satisfy a significant damages award, it is highly unlikely that such an award would have made a material impact on BAC, with a market capitalization of over $106 billion. *See In re Johnson & Johnson Deriv. Litig.*, Nos. 10-2033 (FLW), 11-4993 (FLW), 11-2511 (FLW), 2012 WL 5292963, at *15 (D.N.J. Oct. 26, 2012) ("[E]ven if the amount was sizeable, it would likely have little monetary effect on a company of J & J's size—with a market capitalization exceeding $190 billion.").

While Plaintiffs believe that reliable and convincing expert testimony can be provided on the damages issues, this is by no means assured. It is possible that in the unavoidable "battle of the experts" that a jury might disagree with the Plaintiffs' expert, find Defendants' expert more persuasive, or agree with the Plaintiffs' expert but award a reduced amount of damages. *See*

PaineWebber, 171 F.R.D. at 129 ("The issue would undoubtedly devolve into a battle of experts whose outcome cannot be accurately ascertained in advance."). A consideration of this factor also weighs in favor of approving the Settlement.

6. The Risks of Maintaining the Class Action Through Trial

This factor is inapplicable to derivative actions and is therefore not considered. *Johnson & Johnson*, 2012 WL 5292963, at *16.

7. The Ability of the Defendants to Withstand a Greater Judgment

The court may also consider the defendants' ability to withstand a judgment greater than that secured by settlement. *Grinnell,* 495 F.2d at 463. The fact that Defendants could have paid more money does not render the Settlement unreasonable. *See FLAG Telecom*, 2010 WL 4537550, at *19 ("[T]he mere ability to withstand a greater judgment does not suggest the settlement is unfair."); *In re Warfarin Sodium Antitrust Litig.,* 391 F.3d 516, 538 (3d Cir. 2004) ("[T]he fact that [the defendant] could afford to pay more does not mean that it is obligated to pay any more than what the . . . class members are entitled to under the theories of liability that existed at the time the settlement was reached."). Where, as here, the other *Grinnell* factors weigh in favor of approval, this factor alone does not suggest the settlement is unfair. *D'Amato*, 236 F.3d at 86 (no abuse of discretion to approve settlement where, despite defendants' ability to withstand higher judgment, settlement was fair in light of other *Grinnell* factors).

8. The Reasonableness of the Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation Support the Settlement

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 . . . ." *Wal-Mart*, 396 F.3d at 119 (quoting *Newman*, 464 F.2d at 693). *See also Global Crossing*, 225 F.R.D. at 461 ("settlement amount has to be judged in th[e] context of the legal and practical obstacles to obtaining a large recovery"). In determining what is reasonable, "[t]he proposed settlement cannot be judged without reference to the strength of plaintiffs' claims." *Grinnell*, 495 F.2d at 455. *See also Global Crossing*, 225 F.R.D. at 461 ("[T]he certainty of [the] settlement amount has to be judged in [the] context of the legal and practical obstacles to obtaining a large recovery."). Additionally, the determination of what constitutes a "reasonable settlement is not susceptible of a mathematical equation yielding a particularized sum." *FLAG Telecom*, 2010 WL 4537550, at *20. A court must be careful "not to compare the terms of the Settlement with a hypothetical or speculative measure of a recovery that might be achieved by prosecution of the litigation to a successful conclusion." *Veeco*, 2007 WL 4115809, at *11. "There is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth of a single percent of the potential recovery." *Grinnell*, 495 F.2d at 455 n.2. The $20 million cash payment to BAC, combined with the Governance Provisions, constitute an outstanding result for BAC, especially in light of the significant hurdles to proving liability detailed above.[11]

<u>$20 Million Cash Component</u>

The $20 million cash payment represents an outstanding recovery in a derivative case, and is an excellent recovery for BAC, especially given that "shareholder derivative suits are far less likely to involve a monetary component than typical class action suits." *Johnson &*

---

[11] Even then-Vice Chancellor Strine weighed in on the difficulty of proving monetary damages against the Defendants, describing it as "exceedingly difficult." *In re Bank of America Corp. Stockholder Deriv. Litig.*, C.A. No. 4307, 10/12/09 Tr. 114:17-23, JAD Exh. H.

Johnson, 2012 WL 5292963, at *11. This observation has a solid empirical foundation: of 141 total derivative lawsuits filed in federal courts in 2005-2006, only 22 were resolved by a settlement that included a cash component, and the plaintiff corporation received a cash payment in only 13 of those settlements. *See* Erickson, *supra*, at 1798. A total of 12 of those 13 cases, however, were stock option cases or cases in which defendants had allegedly backdated stock options, and therefore not analogous to the facts of this case. *Id*. at 1799.

There is little authority on the issue of measuring damages in a case like this, where shareholders of an acquiring corporation assert derivative claims on behalf of that corporation against its board of directors for allegedly false statements in a proxy for a stock-for-stock merger. The Corrected Expert Report of Professor Anthony Saunders, JAD Exh. I ("Saunders"), submitted by Ms. Rothbaum in further support of her motion to intervene, purports to estimate that BAC was damaged on the order of $5.89 billion. Saunders at 50. This unlikely moonshot damages estimate represents the most that Ms. Rothbaum could hope to achieve, and for illustrative purposes, Plaintiffs will demonstrate that even utilizing Saunders' flawed model, this Settlement is within the reasonable range of recovery.

As a starting point, Professor Saunders does not take into account the overlap with the damages directly suffered by BAC's shareholders as alleged in the Securities Action. In the August 27, 2010 Order, the Court warned that "[i]t is important to distinguish the injury to shareholders *qua* shareholders from any injury to the corporation." Dkt. No. 303 at 33. Dr. Tabak finds that, since damages in both the Derivative Action and the Securities Action are based (directly or indirectly) on the change in value of BAC, the damages "will overlap unless and until adjustments are made to remove the overlap." Tabak ¶ 11. Professor Saunders also

does not take into account that the Court dismissed the vast majority of Plaintiffs' derivative claims in the August 27, 2010 Order.

Professor Saunders estimates damages purportedly incurred by BAC based on analysis of the median of three valuations as of December 31, 2008: (i) a discounted cash flow ("DCF") analysis, (ii) a comparable companies analysis, and (iii) a comparable transactions analysis. Saunders at 26-27. Taking the mean of these valuations (the DCF analysis), Saunders estimates that BAC was damaged by approximately $4.554 billion. Saunders at 46. In performing the DCF analysis, however, Professor Saunders improperly removes synergistic gains from his valuation of Merrill, failing to recognize that BAC still received the value of those synergies, and thus understates the value of the acquisition to BAC. Tabak ¶¶ 27-30. Accounting for merely a fraction of those synergies would result in $0 of damages to BAC under a DCF analysis. *Id.* ¶ 31. The incorporation of these synergies into the DCF valuation, however, means that the DCF valuation no longer forms the median valuation under Saunders' damages model. *Id.* ¶ 32. The new median becomes the comparable transactions valuation. *Id.* ¶ 32. Replacing the DCF valuation with the comparable transactions valuation alone reduces Professor Saunders' damages estimate to $2.6 billion. *Id.*

But even Professor Saunders' comparable transactions analysis is deficient. He uses four transactions to obtain a discount of 61.67% to Merrill's market capitalization. Assuming that the finder of fact accepted all of Professor Saunders' comparable transactions, along with the transaction identified by BAC's financial advisors with the smallest premium, Professor Saunders' 61.67% discount would fall to just 45.7%—an increase in value of over 41%. Tabak ¶ 34. This increase would also result in $0 of damages to BAC under the comparable

transactions analysis. *Id.*

Based upon an event study he conducted covering the period from September 15, 2008 to January 16, 2009, Professor Saunders purports to find that BAC sustained approximately $3.884 billion in damages. *Id.* ¶ 19. Professor Saunders makes several significant errors in arriving at this estimate, including relying on a fundamental misunderstanding of the efficient market theory and attributing *all* of BAC's January 16, 2009, stock price decline to the Merrill acquisition and *none* to legacy BAC, Tabak ¶¶ 20, 22-25. Dr. Tabak explains how a reasonable finder of fact could instantly cut this figure to $3.1 billion—and even this figure may have to be adjusted downward if the entire amount of Merrill's "unexpected" fourth quarter losses should not be included in the damages estimate. *Id.* ¶ 25.

As can be seen, BAC's estimated damages range from $0 to $3.1 billion, with any number of intermediary stops along the way. But what is immediately apparent is the significant cluster of estimates, using reasonably adjusted and well-founded assumptions to the Saunders Report, that result in $0 of damages to BAC. Using similar analyses, Defendants' expert Professor Shivdasani also has concluded that the Merger was value-enhancing to BAC, and therefore, it has not sustained damages. Shivdasani Decl. ¶ 9(a)-(e) (Dkt. No. 653-146).

Even assuming that damages to BAC were not zero, they must be severely discounted due to the substantial hurdles Plaintiffs faced in establishing liability, as detailed above. *See Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01-CV-11814 (MP), 2004 WL 1087261, at *5 (S.D.N.Y. May 14, 2004) ("In order to calculate the 'best possible' recovery, the Court must assume complete victory on both liability and damages as to all class members on every claim asserted against each defendant in the Action."). Chief among these hurdles are that Plaintiffs'

remaining breach of fiduciary duty claims—dependent as they are on proof of bad faith or conscious disregard of duties—are tenuous in light of discovery tending to show that the defendant directors either did not receive precise projections concerning Merrill's 4Q08 losses or bonus arrangements or delegated disclosure decisions concerning these issues to financial and legal professionals (facts which would also render proof of negligence necessary to a Section 14(a) claim exceedingly difficult).

The $20 million cash component exceeds the cash component paid in more recent derivative settlements. For example, according to insurance industry data provider Advisen, in 2010, the average cash component of a derivative settlement was $11 million. Tabak ¶ 53. While the average cash component increased to $40.1 million in 2011, this was an outlier year driven by a single settlement. *Id.* Settlements returned to normal for the first two quarters of 2012, with the average cash component of derivative settlements amounting to approximately $4.2 million. *Id.* All of these figures are themselves somewhat misleading, as they only include those few derivative settlements that included a cash component. *Id.* Further, these figures account for the total amount paid, not just the amount paid to the plaintiff corporation. *Id.* n.30.

The $20 million payment is also likely one of the largest settlements arising out of an acquiring corporation's claims against its directors for conduct in connection with a merger. In fact, Lead Counsel are aware of no other settlement of a derivative Section 14(a) claim involving a cash payment to the acquiring corporation. There are some derivative settlements with larger nominal recoveries, but many of these involved stock options backdating allegations.[12] Others

---

[12] In *In re UnitedHealth Group Inc. Shareholder Derivative Litigation*, No. 06-cv-1216 (D. Minn.), plaintiffs' recovery of approximately $900 million in connection with an options backdating scheme consisted of the return and repricing of options and a $20 million cash benefit to the company. *See* JAD Exh. J (Decl. in Support ¶ 18). In

involved sham transactions, self-dealing, and other allegedly illegal practices.[13] Importantly, the $20 million being paid to BAC is to be used as BAC sees fit. No part of the cash component is a paper benefit such as the re-pricing of options. And there is no risk that, due to BAC's exculpatory clause in its Articles of Incorporation, *see* Dkt. No. 303 at 114, Plaintiffs might have ultimately proved their claims, only to see the Defendants exculpated. *See, e.g., Prod. Res. Grp., LLC v. NCT Grp., Inc.*, 863 A.2d 772, 299 (Del. Ch. 2004).

<u>*Corporate Governance Reforms*</u>

Courts have long recognized that in derivative cases, non-monetary benefits such as material changes in corporate management or policies provide real and substantial benefits and warrant approval. *See, e.g.*, *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 395 (1970) (recognizing that non-pecuniary relief as the result of a derivative action can provide a substantial benefit to a corporation). As the Fifth Circuit cogently observed:

> [W]here, as here, the derivative suit is largely an attack on past corporate management practices, as well as on some present officers and directors, the dollar amount of a possible judgment, which is essentially the sole goal in the class action damage suit, is not the sole, and may well not be the most important, matter to be considered, for the effects of the suit on the functioning of the

---

In re Oracle, No. 4180 (Cal. Sup. Ct.), plaintiffs' recovery of $121 million in connection with an insider trading scheme included a $100 million payment to charity and did not result in any cash benefit to the company. *See* JAD Exh. K (Stipulation ¶ 2.2). In *In re Broadcom Corp. Derivative Litigation*, No. 06-cv-3252 (C.D. Cal.), the $118 million settlement also rested on claims that the defendants personally approved and benefitted from a stock options backdating scheme. *See* JAD Exh. L (Mem. at 3-4).

[13] There have been two AIG derivative actions. In *In re AIG, Inc. Consolidated Derivative Litigation*, No. 769-VCS (Del. Ch.), plaintiffs recovered $90 million based on allegations of sham transactions, bid-rigging and illegal kickbacks; $60 million was also paid to two individuals to reimburse defense costs. *See* JAD Exh. M (Mem. at 3-4, 9). In *Teachers' Retirement System of Louisiana. v. Greenberg*, No. 20106-VCS (Del. Ch.), plaintiffs recovered $115 million (the largest settlement ever in the Delaware Court of Chancery) upon allegations of series of accusations of self-dealing. *See* JAD Exh. N (Mem. at 3-4). In the *Freddie Mac* derivative actions, plaintiffs recovered approximately $107 million in connection with sham transactions intended to offset the effects certain GAAP provisions and in part to increase their own financial benefits. *See* JAD Exh. O (Decl. in Support ¶¶ 8-12). In *In re Pfizer Inc. Shareholder Derivative Litigation*, No. 09-cv-7822 (S.D.N.Y.), the $75 million settlement resolved claims based on allegations that defendants willfully ignored red flags, including FDA warning letters of widespread illegal marketing of Pfizer pharmaceuticals. *See* JAD Exh. P (Decl. in Support ¶¶ 19-27).

> corporation may have a substantially greater economic impact on it, both long- and short-term, than the dollar amount of any likely judgment in its favor in the particular action.

Maher v. Zapata Corp., 714 F.2d 436, 461 (5th Cir. 1983). Here, the corporate governance reforms substantially benefit BAC because they were formulated to directly address the alleged deficiencies that lead to this action in the first place. *See Pfizer*, 780 F. Supp. 2d at 342 ("[T]he 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.").

The CDC (which has not been adopted by any of BAC's bank peers) has the authority to establish appropriate systems to ensure that acquisitions are vetted carefully and that adequate due diligence is performed prior to Board approval. Dalton ¶¶ 15-16. It also has the authority to oversee management's activities with respect to post-acquisition integration and business development opportunities and monitor any material transitional risks related to the acquisition. *Id.* ¶ 24. This authority is not toothless, as the CDC also has the ability to retain and pay outside advisors (including legal counsel and financial advisors) and to define the scope of such advisors' activities. *Id.* ¶ 39. In short, the establishment of the CDC:

> [P]romises to substantially reduce Bank of America's risk profile. Also, and critically, such a change provides substantial signal value to Bank of America's constituents, including regulators, of its willingness and capacity to adopt, and execute, this veritable model of corporate governance reform.

Id. ¶ 4. Empirically, the establishment of the CDC, along with its stated mission and authority, provides significant value to BAC:

> One key reason is related to the behavioral relationship between accountability and performance as confirmed by empirical research: increased actor accountability directly correlates with better performance. To the extent that a

> specifically-identified person (or, in this case, CDC made up of few members) is aware that it is being specifically tasked with an important responsibility, and will be called upon at a definitive time to perform that responsibility . . . . [T]he behavioral research suggests that the resulting performance will be better than if such accountability is not present.

Nowicki ¶¶ 22 (footnote omitted).

The reforms to the Disclosure Committee Charter complement the creation of the CDC. Under the revisions, the Disclosure Committee will have the responsibility to review and consider the accuracy, completeness and timeliness of any disclosures required in connection with acquisitions that fall within the purview of the CDC, and conduct a semi-annual review to identify industry-leading oversight practices in connection with the Company's disclosures for implementation. *See* Stipulation, Exhibit A. These changes both assist the CDC in its duties, but also respond to various analyst criticisms of BAC's controversial acquisitions. Dalton ¶ 17-18. With the establishment of the CDC and the now formal, and required, changes in the Disclosure Committee Charter, the promise for informed, well executed mergers, acquisitions, and related transactions is markedly enhanced over what it was at the time of the Merger. *Id*. This enhancement also provides a robust, positive signal to BAC's investors, regulators, and its extensive constituencies. *Id*. Professor Nowicki explains:

> Equally important is the signaling function served by the amendments to the duties of the Disclosure Committee. While increasing the targeted responsibilities and oversight of the Disclosure Committee will increase accountability, which will enhance Board performance with respect to BAC's disclosure, and thereby decrease the chances of a costly Section 14(a) or Section 10(b) violations by BAC (thereby saving BAC the cost of any related SEC penalties or private lawsuit judgments), increasing such oversight can also serve as a deterring signal to those who might otherwise view BAC as a potential target for easy securities litigation, such that BAC can have substantial cost savings by avoiding nuisance lawsuits.

Nowicki ¶ 28 (footnote omitted).

The continuing education requirement and mandatory attendance of the Chief Risk Officer ("CRO") and Chief Compliance Officer ("CCO") at ERC meetings are also intended to remedy variously perceived "controversial" acquisitions that provided a "very high risk to shareholders." Dalton ¶¶ 43, 47. Requiring continuing education for BAC directors on various corporate governance issues will mitigate underlying issues regarding "inattention"-based governance failure, especially those related to ignorance of monitoring and best governance practices. Nowicki ¶ 30. Amending the charter of the ERC to require meeting attendance of the CRO and the CCO "can ensure that the BAC Board (by way of its ERC) has mandated direct access to key BAC risk mitigation and management executives (who possess crucial risk-related information), who in turn will then have direct access (by way of the ERC) to the Board." *Id.* ¶ 32. As Professor Dalton states, "the most prevalent response by directors to the question, 'What keeps you up at night?' was risk management." Dalton ¶ 49. Together, these reforms are a "judicious complement" to BAC's already-existing corporate governance practices. *Id.* ¶ 45.

As a whole, these corporate governance reforms are "decidedly warranted and confer substantial benefits on Bank of America" Dalton ¶ 4. When fully implemented, these reforms "will markedly improve the corporate governance of Bank of America and, derivatively, its risk management and thus reduce the dire consequences of failures in this space which, as noted, would grievously erode Bank of America's commitment to improving its corporate governance." *Id.* After having conducted an independent review and analysis of the reforms, Professor Nowicki explains:

> [T]hese Reforms can be anticipated to reduce the possibility of future wrongful conduct, both of the type alleged in the Derivative Action and other types of wrongful conduct that is well-accepted as being at risk when a Board is not providing appropriate oversight, actively engaged, or facing meaningful

> accountability. Because of the goodwill, entity, regulatory, financial, and other risks to BAC from future misconduct of the type alleged in the Derivative Action, the fact that the Reforms are targeted to aggressively reduce the possibility that such risks will come to fruition provides significant value to BAC and its shareholders, likely in excess of hundreds of millions of dollars.

Nowicki ¶ 9. These wide-ranging and substantial corporate governance changes are alone reason enough to approve the Settlement. *See Johnson & Johnson*, 2012 WL 5292963, at *4 (approving settlement consisting only of corporate governance reforms); *AOL Time Warner*, 2006 WL 2572114, at *4 (corporate governance reforms "are substantial enough to merit approval of the Settlement" without even considering monetary component).

As described above, the proposed Settlement should be approved because the corporate governance reforms, as well as the $20 million cash payment to the Company, provide substantial benefits to BAC and its shareholders that directly remedy the core claims asserted by Plaintiffs. Plaintiffs also doubt that the benefits of the Settlement could have been achieved even if they were completely victorious at all stages of the litigation. It is unclear, for example, whether following a verdict in favor of Plaintiffs, the Court could have ordered Defendants to implement the corporate governance reforms achieved by the Settlement. The amount of any recovery at trial was also uncertain. Indeed, against these risks, it is the certainty of a $20 million recovery that is an important factor favoring the Settlement. *Teachers' Ret. Sys. of La.*, 2004 WL 1087261, at *5 ("Above all, the proposed Settlement provides for payment to Class members now, not some speculative payment of a hypothetically larger amount years down the road."); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396, 1405 (E.D.N.Y. 1985) ("much of the value of a settlement lies in the ability to make funds available promptly"), *rev'd in part on other grounds*, 818 F.2d 179 (2d Cir. 1987).

* * *

As detailed above, all relevant factors strongly favor approval of this Settlement.

V. The Notice to BAC Shareholders Was Adequate

A. Notice Was Disseminated in Accordance with the Preliminary Approval Order

As directed by the Court, the Notice was published by the Parties in accordance with the Preliminary Approval Order. The Preliminary Approval Order provided for a three-pronged notice. At least 90 days prior to the Settlement Hearing: (1) BAC was required to publish a Summary Notice, in the form of Exhibit D to the Stipulation, as a quarter-page advertisement in the national and local editions of the *Wall Street Journal* and *Investor Business Daily*; (2) Lead Counsel was required to publish the same or substantially the same Summary Notice via a national wire service; and (3) BAC was required to make the Stipulation and the Notice, in the form of Exhibit C to the Stipulation, to be made electronically available at a website to be identified in the Summary Notice created specifically for the purpose of disseminating notice, and to be sent by U.S. Mail to persons who request such Notice by calling a hotline number to be identified in the Summary Notice. The Parties complied with the publication requirements ordered by the Court in the Preliminary Approval Order. *See* JAD, Exhibits E, F & G.

B. The Notice Procedures Fully Satisfied Due Process

Fed. R. Civ. P. 23.1 requires notice to be given to shareholders in a derivative action "in such manner as the court directs." The notice process detailed herein satisfies the requirements set forth by Rule 23.1, as well as the terms of the Court's Order, and otherwise fulfills the due process rights of BAC shareholders in that adequate notice was received, since it informed shareholders of the Settlement's terms, "the availability of further information from the court,

and the right . . . to object and be heard." *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1317 (3d Cir. 1993). Moreover, the notice was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the [settlement] and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950).

VI. CONCLUSION

For the reasons set forth herein, the detailed provisions of the proposed Settlement provide substantial benefits to BAC. Plaintiffs respectfully request that the Court find the proposed Settlement to be fair, reasonable and adequate to BAC and its shareholders, and approve the Settlement in its entirety.

Dated: November 6, 2012

Respectfully submitted,

KAHN SWICK & FOTI, LLC

/s/ Albert M. Myers
Lewis S. Kahn
Michael A. Swick
Albert M. Myers
Melinda Nicholson
lewis.kahn@ksfcounsel.com
michael.swick@ksfcounsel.com
albert.myers@ksfcounsel.com
melinda.nicholson@ksfcounsel.com
206 Covington Street
Madisonville, Louisiana 70447
Tel.: (504) 455-1400
Fax: (504) 455-1498

SAXENA WHITE P.A.

Maya Saxena
Joseph E. White, III
Lester R. Hooker
Brandon T. Grzandziel
msaxena@saxenawhite.com
jwhite@saxenawhite.com
lhooker@saxenawhite.com
bgrzandziel@saxenawhite.com

2424 North Federal Hwy. Suite 257
Boca Raton, Florida 33431
Tel.: (561) 394-3399
Fax: (561) 394-3082

Interim Lead Counsel for Interim Lead Plaintiffs

LAW OFFICES OF CURTIS V. TRINKO, LLP

Curtis V. Trinko
Jennifer Traystman
ctrinko@trinko.com
jtraystman@trinko.com
16 West 46th Street, 7th Floor
New York, NY 10036
Tel.: (212) 490-9550
Fax: (212) 986-0158

Liaison Counsel for Lead Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 6, 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.

/s/ Albert M. Myers
Albert M. Myers