UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

OBJECTION OF AMP CAPITAL INVESTORS LIMITED,
COLONIAL FIRST STATE INVESTMENTS LTD
AND H.E.S.T. AUSTRALIA LTD TO THE SETTLEMENT

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AMP Capital Investors Limited, Colonial First State Investments Ltd and H.E.S.T. Australia Ltd (collectively, "Objectors"), by their undersigned counsel, respectfully submit this Objection to the proposed settlement (the "Settlement") of the consolidated securities action entitled *In re Bank of America Corp. Securities, Derivative and Employee Retirement Income Security Act (ERISA) Litigation*, No. 09 MDL 2058 (PKC) (S.D.N.Y.) (the "Action").[1]

INTRODUCTION

On November 30, 2012, Lead Plaintiffs[2] and Defendants[3] entered into the Settlement of the Action. On December 4, 2012, the Court entered an order preliminarily approving the Settlement (the "Preliminary Approval Order"). On December 24, 2012, Lead Plaintiffs caused notice of the Settlement (the "December 24, 2012 Notice") to be sent to the Class.[4]

As currently structured, the Settlement is unfair, unreasonable and inadequate and should be rejected by the Court.

First, the Settlement forces Class members to accept its terms without accounting for the significant implications of the appeal currently before the Court of Appeals for the Second Circuit in *International Fund Management S.A. v. Citigroup, Inc.*, 822 F. Supp. 2d 368 (S.D.N.Y. 2011), appealed under the caption *International Fund Management S.A. v. Citigroup, Inc.*, No. 12-1903-cv. (2d Cir.). In *International Fund Management*, the question on appeal is whether the rule enunciated in *American Pipe & Constr. Co. v. Utah,* 414 U.S. 538, 94 S. Ct. 756 (1974) tolls the

1 The terms of the Settlement are set forth in the Stipulation and Agreement of Settlement, dated November 30, 2012 (the "Settlement Agreement").

2 Lead Plaintiffs are the State Teachers Retirement System of Ohio; the Ohio Public Employees Retirement System; the Teacher Retirement System of Texas; Stichting Pensioenfonds Zorg en Welzijn, represented by PGGM Vermogensbeheer B.V.; and Fjärde AP-Fonden.

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

4 As certified by the Court on February 6, 2013. *See infra*, at 6.

statute of repose. The answer to that question has a significant impact on the vast majority of Class members, who have claims under Section 14(a) of the Securities Exchange Act of 1934 (the "Exchange Act"). Yet, the Settlement fails to acknowledge, let alone account for, the impact of this appeal.

The impact of *International Fund Management* on Class members derives directly from the fact that, on March 21, 2012, after the Court certified the Class, Lead Plaintiffs disseminated a Notice of Pendency of Class Action (the "March 21, 2012 Notice") to members of the Class. Ostensibly, the March 21, 2012 Notice advised Class members who wished to exclude themselves from the Class to submit a written, letter request for exclusion by May 7, 2012. However, ***Class members with Section 14(a) claims could not in fact opt out in response to the March 21, 2012 Notice because the statute of repose had already run, unless tolled by the rule in American Pipe***. In *Footbridge Limited Trust v. Countrywide Financial Corp.*, 770 F. Supp. 2d 618, 624-27 (S.D.N.Y. 2011), this Court held that the statute of repose is <u>not</u> tolled under *American Pipe*. Therefore, applying *Footbridge*, at the time the March 21, 2012 Notice was disseminated, the three-year statute of repose for a Section 14(a) claim had already expired, and Class members with Section 14(a) claims (the vast majority of the Class) could not opt out because ***they would have forfeited their Section 14(a) claims the instant they excluded themselves from the Class***.

Against this critical background, the unfairness and unreasonableness of the Settlement is readily apparent. Because Class members could not have opted out in response to the March 21, 2012 Notice without forfeiting their Section 14(a) claims, and because the Settlement as currently structured does not provide for any further opportunity to opt out, ***the result will be that the vast majority of Class members will have been denied the opportunity to exercise their right to opt out if the Second Circuit later decides that American Pipe does in fact toll the statute of repose***.

Such a result would contradict the bedrock principle underlying classes certified pursuant to Fed. R. Civ. P. 23(b)(3) – that is, that Rule 23(b)(3) class members be given the opportunity to opt out.

Furthermore, although no longer members of the Class, the Settlement is also unfair to those former members of the Class who did, at risk to their Section 14(a) claims, exclude themselves from the Class in response to the March 21, 2012 Notice. The March 21, 2012 Notice did not explain to Class members the risks associated with *Footbridge*. As a result, ***864 requests for exclusion were submitted***.[5] ***Under the analysis in Footbridge, many of these plaintiffs have unwittingly forfeited their Section 14(a) claims***.

Given that oral argument in *International Fund Management* was heard on December 5, 2012, it makes no sense to force through the Settlement without waiting for the Second Circuit's decision. Instead of ramming through the Settlement, the most fair and reasonable course is to await the Second Circuit's decision in *International Fund Management* and, if the Second Circuit decides that the rule in *American Pipe* does toll the statute of repose, to afford current Class members a fresh opportunity to exclude themselves from the Class, this time without the fear of forfeiting their Section 14(a) claims. If the Second Circuit decision is adverse, no further opt-out opportunity would be warranted, and those former Class members who did opt out in response to the March 21, 2012 Notice can simply opt back in to the Class.[6]

Second, and independently, the Court should reject the Settlement pursuant to Fed. R. Civ. P. 23(e)(4) because the Settlement does not afford Class members a new opportunity to opt out. A new opportunity to opt out is warranted because of the significant developments in the Action since the March 21, 2012 Notice. Apart from the appeal in *International Fund Management*, since

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[5] *See* Appendix 1 to the Settlement Agreement.

[6] The Settlement as currently structured provides for Class members who previously opted out to opt back in. *See* Settlement Agreement, at ¶ 10.

the March 21, 2012 Notice, Lead Plaintiffs have unveiled new, damning facts in a motion for partial summary judgment filed in June 2012, facts which demonstrate beyond question Defendants' liability. Moreover, the announcement of the Settlement itself constitutes significant new information. In particular, when the terms of the Settlement are viewed against the recently uncovered evidence of liability, many Class members may now view the Settlement as inadequate. The Settlement will result in a payment of $2.43 billion to Class members, an amount that pales in comparison to the $50 billion in losses previously asserted by Lead Plaintiffs in the Action, and that will translate into an estimated average recovery for Class members of only $0.43 per share.

Accordingly, for the reasons set forth more fully below, the Court should reject the Settlement as unfair, unreasonable and inadequate.

BACKGROUND AND PROCEDURAL HISTORY

Objectors are Australian-headquartered investment managers who manage the investment, superannuation and retirement monies of individual retirees and investors, corporations and superannuation funds in Australia. Collectively, Objectors owned approximately 2.5 million shares of BoA common stock as of October 10, 2008, the record date for voting on the merger of BoA and Merrill, announced on September 15, 2008 (the "Merger").[7]

This Action concerns the alleged violations by Defendants of the federal securities laws in connection with the Merger. Lead Plaintiffs allege that, prior to the December 5, 2008 shareholder vote approving the Merger, Defendants failed to disclose to BoA's shareholders the critical facts that: Merrill had lost billions of dollars during the fourth quarter of 2008; BoA had agreed to allow Merrill to pay up to $5.8 billion in bonuses to its employees before the Merger closed, notwithstanding those substantial losses; the negotiation of the Merger was affected by inadequate

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[7] Objectors' transactions in the securities of BoA in the period from September 18, 2008 through January 21, 2009 are set forth in the accompanying Declaration of Hung G. Ta in Support of the Objection, dated March 5, 2013.

due diligence and pressure from federal regulators; and BoA's own financial condition was deteriorating.

On August 27, 2010, the Court issued a Memorandum and Order in this Action that granted in part, and denied in part, Defendants' motions to dismiss Lead Plaintiff's First Amended Complaint. *See In re Bank of America Corp. Securities, Derivative, and Employee Retirement Income Security Act (ERISA) Litigation*, 757 F. Supp. 2d 260 (S.D.N.Y. 2010). Among other claims, the Court sustained Lead Plaintiffs' Section 14(a) claim with respect to the failure to disclose Merrill's fourth quarter 2008 losses and with respect to Merrill's payment of bonuses to its employees for fiscal year 2008 prior to the Merger closing. The Court also sustained Lead Plaintiffs' Section 10(b) claims with respect to the failure to disclose Merrill's payment of bonuses, but dismissed Lead Plaintiffs' Section 10(b) claims with respect to Defendants' failure to disclose Merrill's fourth-quarter 2008 losses, based on the Court's ruling that Lead Plaintiffs had failed to adequately allege scienter. *Id.* at 325-26.

On October 22, 2010, after obtaining documents through a partial lifting of the PSLRA discovery stay, Lead Plaintiffs filed a Consolidated Second Amended Class Action Complaint (the "Second Amended Complaint").

On July 29, 2011, the Court issued its Memorandum and Order on Defendants' motion to dismiss the Second Amended Complaint. *In re Bank of America Corp. Securities, Derivative, and Employee Retirement Income Security Act (ERISA) Litigation*, No. 09-MD-2058 (PKC), 2011 WL 3211472 (S.D.N.Y. July 29, 2011). This time, the Court upheld Lead Plaintiffs' Section 10(b) claims with respect to Merrill's 2008 fourth quarter losses, on the basis that the Second Amended Complaint alleged scienter by raising a strong inference of recklessness.

On February 6, 2012, the Court issued a Memorandum and Order certifying the Action to proceed as a class action under Fed. R. Civ. P. 23(b)(3) on behalf of a Class consisting of:

(i) as to claims under Sections 14(a) and 20(a) of the Exchange Act, all persons and entities who held BoA common stock as of October 10, 2008, and were entitled to vote on the merger between BoA and Merrill, and were damaged thereby;

(ii) as to claims under Sections 10(b) and 20(a) of the Exchange Act, all persons and entities who purchased or otherwise acquired BoA common stock during the period from September 18, 2008 through January 21, 2009, inclusive, excluding shares of BoA common stock acquired by exchanging stock of Merrill for BoA stock through the Merger, and were damaged thereby;

(iii) as to claims under Sections 10(b) and 20(a) of the Exchange Act, all persons and entities who purchased or otherwise acquired January 2011 call options of BoA from September 18, 2008 through January 21, 2009, inclusive, and were damaged thereby; and

(iv) as to claims under Sections 11, 12(a)(2), and 15 of the Securities Act of 1933, all persons and entities who purchased BoA common stock issued under the Registration Statement and Prospectus for the BoA common stock offering that occurred on or about October 7, 2008, and were damaged thereby.

See In re Bank of America Corp. Securities, Derivative, and Employee Retirement Income Security Act (ERISA) Litigation, 281 F.R.D. 134 (S.D.N.Y. 2012).

Separately, on March 5, 2012, in *International Fund Management*, Judge Stein entered an order permitting the defendants in that case to seek, pursuant to 28 U.S.C. § 1292(b), an immediate, interlocutory appeal on the question of whether "the tolling rule set forth in *American Pipe & Construction Co. v. Utah,* 424 U.S. 538 (1974), applies to the three-year statute of repose set forth in Section 13 of the Securities Act." Judge Stein cited the "substantial difference of opinion [that] exists as to the aforementioned legal question within the Southern District of New York and elsewhere."

On March 21, 2012, Lead Plaintiffs caused notice to be mailed to potential members of the Class notifying them of, among other things, the Court's certification of the Class, and Class members' right to request to be excluded from the Class. The March 21, 2012 Notice merely advised Class members that if they chose to be excluded, "you will not be bound by any judgment in this Action, nor will you be eligible to share in any recovery that might be obtained in this Action. However, you may be able to retain the right to individually pursue any legal rights that you may have against any Defendants with respect to the claims asserted in the Action."[8] Class members were not advised that, in fact, applying this Court's reasoning in *Footbridge*, the statute of repose for Section 14(a) claims had already expired sometime in October 2011, and that Class members who opted out ran the risk of forfeiting their Section 14(a) claims.

The March 21, 2012 Notice also advised Class members that "[p]ursuant to Rule 23(e)(4) of the Federal Rules of Civil Procedure, it is within the Court's discretion as to whether a second opportunity to request exclusion from the Class will be allowed if there is a settlement or judgment in the Action."[9]

Based on the March 21, 2012 Notice, 864 requests for exclusion were received. The vast majority of these requests were filed by persons who had not already commenced any lawsuits against Defendants, and whose Section 14(a) claims were therefore already barred by the statute of repose.

On May 9, 2012, in *International Fund Management*, the Second Circuit granted the defendants' petition for an interlocutory appeal under 28 U.S.C. § 1292(b).

On June 3, 2012, Lead Plaintiffs filed a motion for partial summary judgment (the "Partial Summary Judgment Motion"). In support of the Partial Summary Judgment Motion, Lead Plaintiffs referenced for the first time numerous BoA documents and information that had been uncovered by Lead Plaintiffs during discovery and that clearly evidenced Defendants' liability

8 March 21, 2012 Notice, at ¶ 18(b).
9 March 21, 2012 Notice, at ¶ 18(a).

under Section 10(b) and 14(a) of the Exchange Act. In summary, Lead Plaintiffs' Partial Summary Judgment Motion revealed that:

- By the date of the shareholder vote on the Merger, Defendants' statements as to whether the Merger would be accretive (increase BoA's earnings per share) or dilutive (decrease earnings per share) – a central justification for the Merger – had become materially false and misleading.

- During his deposition, Defendant Kenneth Lewis admitted that, as of the vote on the Merger, BoA's "accretive/dilutive" calculus had changed "dramatically", and that the figures disclosed in the Proxy "were no longer accurate."

- This "dramatic" change in the accretive/dilutive analysis was caused by Merrill's massive, undisclosed fourth quarter losses, which severely impaired Merrill's and, therefore, the combined company's, ability to generate earnings in future years – the primary driver of the "accretive/dilutive" analysis – in at least two ways.

- First, Lead Plaintiffs' discovery uncovered numerous contemporaneous emails of BoA's most senior executives and memoranda prepared in December 2008 by BoA's counsel, Wachtell, Lipton, Rosen & Katz ("Wachtell"), that reveal Defendants' knowledge that Merrill's fourth quarter losses had decimated the company's capital position prior to the December 5 vote. This in turn forced BoA to order Merrill to shrink its balance sheet, thereby reducing Merrill's earnings capacity in future years. For example, according to the sworn testimony of BoA Treasurer Jeffrey Brown, this dramatic liquidation of Merrill's assets reduced the combined company's future earnings ability by at least $1 billion per year. Similarly, according to a Wachtell memorandum, "The severe impact of these losses on [Merrill]'s financial condition going forward – and the financial condition of the combined company in the event the merger closed – cannot be overstated. … There is no question that [Merrill's] massive capital burn stands to reduce the overall earnings potential of [Merrill] for years to come."

- Second, Merrill's fourth quarter losses caused its liquidity position to become so dire that, as reflected in Wachtell's notes of its discussions with BoA Treasurer Brown, Merrill would be "dead w/in a week" absent the Merger. As a result, BoA was forced to raise $20 billion in debt during the fourth quarter of 2008 solely because of Merrill – including a "mammoth" $9 billion debt offering on December 1, just four days prior to the shareholder vote. The interest and other expenses associated with these debt offerings reduced the combined company's earnings ability by an additional $500 million per year, further impacting the "accretive/dilutive" analysis presented as justification for the Merger.

- As a result of these impacts of Merrill's losses, BoA executives revised the "accretive/dilutive" figures that were first provided to BoA shareholders on September 15, 2008 and in the Proxy, from 3% dilutive in 2009 to more than 13% dilutive, and

> from breakeven in 2010 to 2.8% dilutive. These updated figures were not disclosed to shareholders at the December 5 shareholder vote.

None of this information was available to Class members at the time they were invited, by the March 21, 2012 Notice, to exclude themselves from the Class.

On September 28, 2012, Lead Plaintiffs and Defendants announced the Settlement. Subsequently, on November 30, 2012, Lead Plaintiffs and Defendants signed the Settlement Agreement. Under the Settlement, BoA will pay to the Class a total of $2.43 billion and institute certain corporate governance policies to settle the Class's claims.

Importantly, in agreeing to the Settlement, Lead Plaintiffs and Defendants were conscious of the possibility that members of the Class might be dissatisfied with the terms of the Settlement and might wish to opt out of the Class. However, rather than accommodating this possibility, Lead Plaintiffs and Defendants "agreed to request that the Court not permit a second opportunity for Class Members to request exclusion from the Class."[10] In fact, Lead Plaintiffs and Defendants agreed to terms that incentivized both parties <u>not</u> to give any Class members any further opportunity to opt out. Specifically, paragraph 43 of the Settlement Agreement provides that:

> ***[I]n the event that the Court permits Class Members a second opportunity to exclude themselves from the Class in connection with this Settlement, BoA shall have the option to terminate the Settlement in the event that Class Members requesting exclusion from the Class meet the conditions set forth in its confidential supplemental agreement with Lead Plaintiffs (the "Supplemental Agreement")***, in accordance with the terms of that agreement. ***The Supplemental Agreement, which is being executed concurrently herewith, shall not be filed with the Court and its terms shall not be disclosed in any other manner*** (other than the statements herein and in the Settlement Notice, to the extent necessary, or as otherwise provided in the Supplemental Agreement) unless and until the Court otherwise directs or a dispute arises between Lead Plaintiffs and BoA concerning its interpretation or application. (emphasis added)

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10 Settlement Agreement, at ¶ 3.

In other words, under the terms of the Settlement and the Supplemental Agreement, which has not been disclosed to the Court and the terms of which Class members still remain unaware, Lead Plaintiffs and Defendants bargained away any further opt-out opportunity for the Class.

On November 30, 2012, Lead Plaintiffs filed their motion seeking an order preliminarily approving the Settlement, approving the form and manner of providing notice of the Settlement to the Class, and setting a hearing date (the "Preliminary Approval Motion"). In support of the Preliminary Approval Motion, Lead Plaintiffs attached a draft "[Proposed] Order Preliminarily Approving Proposed Settlement And Providing For Notice" (the "Proposed Order") for consideration by the Court.[11] Consistent with the distorted incentives created by the Settlement and the undisclosed Supplemental Agreement between Lead Plaintiffs and Defendants, paragraph 12 of the draft Proposed Order stated that:

> **No Second Opportunity to Request Exclusion From the Class** – In light of the extensive notice program undertaken in connection with class certification and the ample opportunity provided to Class Members to request exclusion from the Class at that time, the Court is exercising its discretion in accordance with Second Circuit precedent (*see*, *e.g.*, *Denney v. Deutsche Bank AG*, 443 F.3d 253, 271 (2d Cir. 2006) and *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114-15 (2d Cir. 2005)) to preclude Class Members from having a second opportunity to exclude themselves from the Class in connection with the Settlement proceedings.

The Proposed Order as drafted was inaccurate because the Class had not been afforded "ample opportunity" to request exclusion. Because of the ramifications of *Footbridge*, the vast majority of Class members (who have Section 14(a) claims) could not in fact opt out in response to the March 21, 2012 Notice. The Proposed Order also failed to mention that an appeal of *International Fund Management* was pending before the Second Circuit, and that this appeal

[11] Exhibit 2 to Lead Plaintiffs' Notice of Motion for Preliminary Approval of Settlement, dated November 30, 2012 (ECF No. 767).

directly impacted the question of whether Class members could opt out without forfeiting their Section 14(a) claims.

On December 4, 2012, the Court signed the Preliminary Approval Order, which was based on the Proposed Order, and set a date of April 5, 2012 for a hearing of the final approval for the Settlement.

On December 5, 2012, oral argument was conducted before the Second Circuit in *International Fund Management*. The decision on this appeal is pending.

On December 24, 2012, Lead Plaintiffs disseminated the December 24, 2012 Notice notifying Class members of the proposed Settlement and plan of allocation; the settlement fairness hearing; and Lead Plaintiffs' counsel's motion for an award of attorneys' fees and reimbursement of litigation expenses. Importantly, the December 24, 2012 Notice did not provide Class members with any further opportunity to opt out. The December 24, 2012 Notice also failed to mention that the appeal in *International Fund Management* was pending before the Second Circuit, and that oral argument had just been conducted on December 5, 2012.

ARGUMENT

I. THE SETTLEMENT SHOULD BE REJECTED BECAUSE OF THE PENDING SECOND CIRCUIT APPEAL IN *INTERNATIONAL FUND MANAGEMENT*.

The Settlement should be rejected because it fails to take into account the pending decision of the Second Circuit in *International Fund Management*. In particular, if the Second Circuit later decides that the rule in *American Pipe* does toll the statute of repose, the Settlement will effectively result in Class members having been denied the right to opt out with respect to their Section 14(a) claims.

One of the fundamental aspects of a class certified under Rule 23(b)(3) is that class members be afforded the opportunity to opt out. When Rule 23(b)(3) was introduced as part of the 1966 class action amendments to the Federal Rules of Civil Procedure, it was considered "the most adventuresome" innovation. A. Kaplan, Prefatory Note, 10 B.C. Ind. & Com. L. Rev. 497, 497 (1969). That was because, prior to the 1966 amendments, plaintiffs were required to *opt in* to a class. Furthermore, as the Supreme Court explained in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615 (1997), the new Rule 23(b)(3) was "[f]ramed for situations in which 'class-action treatment is not as clearly called for' as it is in Rule 23(b)(1) and (b)(2) situations [but] permits certification where class suit 'may nevertheless be convenient and desirable.'" (*quoting* Advisory Committee Notes, 28 U.S.C. App., at 697).

Because Rule 23(b)(3) would bind *in absentia* class members for *practical* reasons, as opposed to the types of reasons that made classes "mandatory" under Rules 23(b)(1) and 23(b)(2), the Federal Rules provide more stringent protections for Rule 23(b)(3) class members. In particular, the Federal Rules require that Rule 23(b)(3) class members be given "the best notice that is practicable under the circumstances" when a class is certified.[12] The Federal Rules also require that "the court [ ] exclude from the class any member who requests exclusion."[13] *See Amchem*, 521 U.S. at 615 (Rule 23(b)(3) provides for "class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (holding that "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court" where the claim is "wholly or predominately" for money damages); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1488 (2008) ("The Advisory Committee settled on notice and opt-out rights to meet the expressed

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12 Rule 23(c)(2)(B).
13 Rule 23(c)(2)(B)(v).

concern that (b)(3) classes might be used by class counsel, in league with the defendants, to force those with substantial individual claims into group litigation inimical to their interests.").

In this case, if the Settlement is forced through before the Second Circuit decision in *International Fund Management*, the right of Class members to opt out, as envisaged for Rule 23(b)(3) classes, would be eviscerated. Specifically, in this Action, the vast majority of Class members have claims under Section 14(a) of the Exchange Act based upon Defendants' misrepresentations and omissions in connection with the December 5, 2008 BoA shareholder vote on the Merger. *See* Memorandum of Law in support of Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation, filed February 19, 2013, at 16 ("the vast majority of Lead Plaintiffs' claimed damages in this case arose under Section 14(a)") (ECF No. 826). Claims under Section 14(a) are subject to a one-year statute of limitations, and a three-year statute of repose. *Ceres Partners v. GEL Associates*, 918 F.2d 349, 362-63 (2d. Cir. 1990). Accordingly, the statute of repose for Class members' Section 14(a) claims expired in October 2011, unless the commencement of this Action tolled the statute of repose under the rule in *American Pipe*.

In *Footbridge*, this Court held that the rule in *American Pipe* does not toll the statute of repose set forth in Section 13 of the Securities Act. *Footbridge*, 770 F. Supp. 2d at 624-27. The Court held that applying *American Pipe* tolling would violate the plain language of Section 13, and that statutes of repose are not subject to equitable tolling such as *American Pipe* tolling. *Id*.[14] Applying this Court's reasoning in *Footbridge* to the statute of repose governing the Class's

[14] Other courts in the Southern District, however, disagree with the holding in *Footbridge*. *See International Fund Management*, 822 F. Supp. 2d 368, 380 (S.D.N.Y. 2011); *In re Morgan Stanley Mortgage Pass–Through Certificates Litig.*, 810 F. Supp. 2d 650, 667 (S.D.N.Y. 2011); *In re Bear Stearns Mortgage Pass-Through Certificates Litig.*, 851 F. Supp. 2d 746, 767 (S.D.N.Y. 2012); and *In re Smith Barney Transfer Agent Litig.*, 884 F. Supp. 2d 152 (S.D.N.Y. 2012).

Section 14(a) claims*,* the Section 14(a) claims would already have been time-barred when the March 21, 2012 Notice was disseminated. In other words, as a result of *Footbridge*, Class members could not opt out in response to the March 21, 2012 Notice because they would have immediately forfeited their Section 14(a) claims if they had done so.

Given that Class members with Section 14(a) claims would have been dissuaded from exercising their opt-out rights in response to the March 21, 2012 Notice, and given that the Settlement does not provide for a further opportunity to opt out, the unfairness of the Settlement becomes manifest. If the Settlement is approved and the Second Circuit later decides that the rule in *American Pipe* does toll the statute of repose, ***Class members will effectively have been denied any opportunity to exercise their right to opt out***. Such a result would repudiate a fundamental protection that the Federal Rules intended to afford Rule 23(b)(3) classes, by granting them the right to seek exclusion. This unfair and unreasonable result would be avoided if the Settlement were simply to allow Class members to wait for the Second Circuit's decision and, assuming the decision was favorable, to opt out.

Parenthetically, although they are no longer Class members, forcing through the Settlement before the Second Circuit decision would also be unfair for those 864 plaintiffs who opted out in response to the March 21, 2012 Notice and who may thus have unwittingly opted out of their Section 14(a) claims. As the Settlement currently stands, these 864 opt-out plaintiffs have the choice of either *opting back in to the Class by <u>March 5, 2013</u>*, or moving forward with their individual opt-out actions, with the risk that they may have already forfeited their Section 14(a) claims. Requiring the 864 opt-out plaintiffs to make such a choice by March 5, 2013 is manifestly unfair, unreasonable and unnecessary given that the Second Circuit has already heard oral argument and may soon render a decision that will clarify the law with respect to *American Pipe* tolling. Such unfairness would be avoided if these 864 plaintiffs were simply afforded the opportunity to wait and learn the Second Circuit's decision.

In summary, by failing to take into account the pending decision of the Second Circuit in *International Fund Management* and its significant ramifications for Class members with Section 14(a) claims, the Settlement is unfair, unreasonable and inadequate, and should be rejected.

II. THE SETTLEMENT SHOULD BE REJECTED PURSUANT TO FED. R. CIV. P. 23(e)(4) FOR FAILING TO PROVIDE A "SECOND" OPPORTUNITY TO OPT OUT.

As an additional and independent ground, the Court should reject the Settlement under Fed. R. Civ. P. 23(e)(4). That rule provides that "[i]f the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so."

As set forth above, the right to opt out is fundamental to Rule 23(b)(3) classes. Indeed, this right to opt out is so fundamental that Rule 23 was amended in 2003 to add the present Rule 23(e)(4) and provide for a ***further*** opportunity to opt out after a settlement has been announced. As the Advisory Committee notes to the 2003 amendment explained, the amendment was designed to encourage the provision of a second opt-out opportunity where "there are changes in the information available to class members since expiration of the first opportunity to request exclusion."[15] The Advisory Committee notes explained that the new provision is desirable because "[a] decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known."[16]

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[15] Advisory Committee notes to 2003 amendments to Rule 23(e)(3). (When enacted, what is now Rule 23(e)(4) was then Rule 23(e)(3).)

[16] *Id.*

Consistent with the underlying purpose of Rule 23(e)(4), courts in this and other districts have either refused to approve settlements for failing to provide a second opt-out opportunity, or specifically noted the importance of such an opportunity when approving settlements. *See Nilsen v. York County*, 228 F.R.D. 60, 61-2 (D. Me. 2005) (noting problems with over-breadth of the settlement and the settlement allocation, and stating that "I will therefore refuse to approve the settlement (and will not direct class-wide notice) unless the settlement agreement affords a new opportunity for exclusion as provided for in Rule 23(e)[(4)]."); *In re AMF Bowling Securities Litigation*, 334 F. Supp. 2d 462, 466 (S.D.N.Y. 2004) (Castel, J.) (giving final approval of a settlement because it provided, among other things, that "Class members who had not exercised their right to opt out of the class when it was originally certified were afforded the opportunity of a back-end exclusion, *i.e.* the opportunity to exclude oneself from the class once the terms of a settlement are known. Rule 23(e)[(4)]."). *See also Natchitoches Parish Hosp. Service Dist. v. Tyco Intern., Ltd.*, 247 F.R.D. 253, 269 (D. Mass. 2008) (overruling defendant's objections to class certification based on alleged conflicts, because if these conflicts materialized, "in the event of a settlement, the Court can offer a new opportunity for class members to request exclusion pursuant to Fed. R. Civ. P. 23(e)(4)."); AMERICAN LAW INSTITUTE, *Principles of the Law of Aggregate Litigation*, § 3.11 (2010) (endorsing a second opt-out opportunity where the terms of a settlement agreement are not revealed until after the initial opt-out period has expired, unless there are special circumstances making a second opt-out opportunity inequitable).

In this case, the Court should reject the Settlement under Rule 23(e)(4) because it fails to afford Class members a new opportunity to opt out. Since the March 21, 2012 Notice, there have been several significant "changes to the information available to class members" that warrant a second opt-out opportunity to <u>all</u> Class members, regardless of their claims.

A. Since the March 21, 2012 Notice, The Question Of Whether The Rule In *American Pipe* Tolls The Statute Of Repose Has Been Appealed To The Second Circuit

As set forth above, the vast majority of Class members have Section 14(a) claims and have effectively been denied any previous opportunity to opt out because, when they received the March 21, 2012 Notice, this Court's ruling in *Footbridge* precluded them from opting out. Since the March 21, 2012 Notice, the question of *American Pipe* tolling has been appealed to the Second Circuit, and oral argument has been heard. If the Second Circuit were to decide that, contrary to *Footbridge*, the rule in *American Pipe* does toll the statute of repose, that will constitute a significant new item of information that would alter the rights of the vast majority of Class members. Class members would then know with certainty they can opt out of the Class without running the risk of forfeiting their Section 14(a) claims, knowledge that they did not have at the time of the March 21, 2012 Notice. Under these circumstances, the only fair and reasonable course is to await the Second Circuit's decision and, if it is favorable, to afford all Class members a new opportunity to opt out, as envisaged by Rule 23(e)(4).

B. Since the March 21, 2012 Notice, Lead Plaintiffs Have Filed A Partial Summary Judgment Motion That Has Revealed New Evidence Underscoring Defendants' Liability

On June 3, 2012, Lead Plaintiffs filed their Partial Summary Judgment Motion which attached numerous, previously non-public documents that evidenced the extent of Defendants' liability. As set forth *supra*, at 8-9, Lead Plaintiffs' Partial Summary Judgment Motion revealed, for the first time, that Defendants' many statements explaining the "accretive/dilutive" justification for the Merger were patently false, and that Defendants *knew* the statements were false. The Partial Summary Judgment Motion revealed that Defendants were acutely aware that, by the time of the Merger, the devastating fourth quarter Merrill losses would result in a drastic balance sheet reduction by Merrill as well as force BoA to undertake emergency debt raisings, both of which "dramatically" and negatively impacted the "accretive/dilutive" analysis underlying the decision to proceed with the Merger.

Lead Plaintiffs' counsel themselves have conceded the significance of the information that they uncovered during discovery and that was revealed to the Class only in the Partial Summary Judgment Motion, filed several months after the March 21, 2012 Notice:[17]

> 97. ***As set forth in Lead Plaintiffs' summary judgment papers, Lead Plaintiffs uncovered significant facts concerning the impact of Merrill's losses on its financial condition that were not alleged by any regulator.*** In particular, Lead Plaintiffs obtained evidence that, before the vote, Merrill's losses (i) triggered a liquidity crisis at Merrill, requiring BoA to issue billions of dollars in debt; (ii) severely eroded Merrill's capital, requiring BoA to order Merrill to reduce its balance sheet by hundreds of billions of dollars; and (iii) significantly reduced Merrill's earnings ability in future years. Based on this evidence, Lead Plaintiffs were able to advance compelling arguments that, before the vote, Merrill's losses had a highly material, negative impact on Merrill and the combined company.
>
> 98. ***Lead Plaintiffs also developed unique evidence concerning BoA's statements regarding the accretive/dilutive impact of the Merger. Specifically, during Defendant Lewis's deposition, Lead Plaintiffs obtained testimony that, as of the time of the vote, the Proxy's representations concerning the accretive/dilutive impact of the Merger were no longer true***. As Lewis testified, while the Proxy represented that the Merger would be 3% dilutive in 2009 and breakeven in 2010, BoA had determined, as of the vote, that the deal would be more than 13% dilutive in 2009 and 2.8% dilutive in 2010. (emphasis added)

The significance of the new information cannot be understated. The Partial Summary Judgment Motion attaches and refers to numerous documents which now conclusively demonstrate Defendants' scienter, information that was not available to the Class at the time of the March 21,

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[17] *See* Joint Declaration Of Steven B. Singer, Frederic S. Fox, And David Kessler In Support Of (A) Lead Plaintiffs' Motion For Final Approval Of Class Action Settlement And Plan Of Allocation And (B) Co-Lead Counsel's Motion For An Award Of Attorneys' Fees And Reimbursement Of Litigation Expenses, filed February 19, 2013.

2012 Notice. As Lead Plaintiffs argued in their Partial Summary Judgment Motion, "Lewis's sworn admissions leave no genuine dispute that his statement at the December 5 shareholder meeting reiterating the Bank's prior accretion and dilution calculations was materially false when made."[18] The *New York Times* also reported as follows on the significance of the revelations contained in the June 3 Partial Summary Judgment Motion:

> What Bank of America's top executives, including its chief executive then, Kenneth D. Lewis, knew about Merrill's vast mortgage losses and when they knew it emerged in court documents filed Sunday evening in a shareholder lawsuit being heard in Federal District Court in Manhattan.
>
> The disclosure, coming to light in private litigation, is likely to reignite concerns that federal regulators and prosecutors have not worked hard enough to hold key executives accountable for their actions during the financial crisis.

Gretchen Morgenson, NEW YORK TIMES, *Merrill Losses Were Withheld Before Bank Of America Deal* (June 3, 2012).

The importance of this new evidence as to Defendants' scienter is heightened by the fact that the Court initially dismissed Lead Plaintiffs' Section 10(b) claims with respect to Merrill's 2008 fourth quarter losses for failure to allege scienter, and upheld those claims when repled by Lead Plaintiffs in the Second Amended Complaint, but only on the basis that Lead Plaintiffs had alleged recklessness. The new evidence now demonstrates Defendants' *actual knowledge of falsity* that goes beyond mere recklessness.

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[18] Lead Plaintiffs' Memorandum of Law in Support of Their Motion for Partial Summary Judgment, dated June 3, 2012, at 4-5.

C. The Announcement Of The $2.43 Billion Settlement Itself Constitutes New Information Material To The Decision By Class Members Whether Or Not To Remain In The Class.

As the Advisory Committee notes reflect, Rule 23(e)(4) was intended to "authorize[] the court to refuse to approve a settlement unless the settlement affords class members a new opportunity to request exclusion from a class certified under Rule 23(b)(3) ***after settlement terms are known***." (emphasis added). In this case, Class members should be given a new opportunity to opt out because, now that the terms of the Settlement are known, many Class members may view the $2.43 billion payment under the Settlement (representing an estimated average recovery of only 43 cents per share) to be inadequate, especially given what they have previously been told by Lead Plaintiffs.

Before the announcement of the Settlement, Class members were told by Lead Plaintiffs that Defendants' misconduct caused damage to Class members in an amount much greater than $2.43 billion. Specifically, Class members were told that, between January 9, 2009 and January 20, 2009, as the full extent of Defendants' fraud was being revealed, BoA stock lost more than half of its value, falling from $12.99 to $5.10, for a loss in market capitalization of approximately *$50 billion*.[19]

In addition, Class members have learned that, in late January 2009, the New York Attorney General ("NYAG") initiated an investigation into Merrill's accelerated bonus payments. On September 8, 2009, the NYAG released a letter in which it stated that its ongoing investigation had "found at least four instances in the fourth quarter of 2008 where Bank of America and its senior officers failed to disclose material non-public information to its shareholders" – including Merrill's accumulating losses, the accelerated bonus payments, the undisclosed goodwill write-

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[19] Consolidated Second Amended Class Action Complaint, ¶ 19.

down, and the decision to invoke the material adverse change clause – and that "the facts of Bank of America's senior executives' knowledge of these events are straightforward." On February 4, 2010, the NYAG commenced a lawsuit charging Defendants BoA, Lewis, and Price with four counts of securities fraud under New York's Martin Act. The NYAG action is still pending.

Further, in August 2009, the SEC itself sued BoA for violations of Section 14(a) of the Exchange Act and Rule 14a-9 promulgated thereunder, alleging that "Bank of America's failure to disclose the fact that it had agreed to allow Merrill to pay up to $5.8 billion in discretionary bonuses before the merger closed" violated the federal securities laws because "this omission made statements in Bank of America's proxy materials materially false and misleading." At the same time that it filed its complaint, the SEC announced that BoA had agreed to settle the claims asserted in the complaint by paying a $33 million fine. On September 14, 2009, however, Judge Rakoff of the Southern District *rejected* that settlement, holding that the proposed settlement was "neither fair, nor reasonable, nor adequate." *S.E.C. v. Bank of America Corp.*, 653 F. Supp. 2d 507, 509 (S.D.N.Y. 2009).

On January 12, 2010, the SEC commenced a second action against BoA, which asserted that BoA violated Section 14(a) by failing to disclose the "extraordinary" losses Merrill suffered prior to the shareholder vote. Ultimately, BoA agreed to a revised settlement of both actions, pursuant to which BoA paid a $150 million civil penalty and instituted certain corporate governance reforms. This time, Judge Rakoff accepted the settlement, albeit reluctantly, finding that it was "***clear***" that BoA had made material misrepresentations and omissions to shareholders regarding the secret bonus agreement and Merrill's fourth quarter losses. *S.E.C. v. Bank of America Corp.*, Nos. 09-6829, 10-0215 (JSR), 2010 WL 624581, at *1 (S.D.N.Y. Feb. 22, 2010) (emphasis added).

Against this background, the recently-announced Settlement and its terms represent important, new information for many Class members. In particular, many Class members may now assess the $2.43 billion Settlement payment to be inadequate given Defendants' apparently clear-cut liability. As such, a second opportunity to opt out is warranted for all Class members under Rule 23(e)(4).

CONCLUSION

For the foregoing reasons, Objectors request that the Court reject the Settlement as unfair, unreasonable and inadequate.

Dated: March 5, 2013
New York, New York

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