UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE MERRILL LYNCH & CO., INC. SECURITIES, DERIVATIVE AND ERISA LITIGATION	:	Master File No.: 07cv9633 (JSR)(DFE) **CLASS ACTION**
This Document Relates To: ERISA ACTION	:	Case No.: 07-CV-10268 (JSR)(DFE)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES, EXPENSES, AND CASE CONTRIBUTION AWARDS

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I. INTRODUCTION

Named Plaintiffs Carl Esposito, Barbara Boland, Alan Maltzman and Mary Gidaro respectfully submit this Memorandum of Law in Support of Plaintiffs' Motion for Award of Attorneys' Fees, Expenses, and Case Contribution Awards. Following the hard-fought litigation of this highly complex and risky ERISA fiduciary breach class case, contentious settlement negotiations, and six months of intensive confirmatory discovery, the Parties[1] have submitted their Settlement to the Court for final approval. The Settlement provides for a cash payment of $75,000,000, to be allocated among the Settlement Class members' accounts in the following three Merrill Lynch retirement plans: (1) the Merrill Lynch & Co., Inc. 401(k) Savings and Investment Plan; (2) the Merrill Lynch & Co., Inc. Retirement Accumulation Plan; and (3) the Merrill Lynch & Co., Inc. Employee Stock Ownership Plan (the "Plans"). This Settlement was achieved through the dedicated efforts of Co-Lead Counsel,[2] working with a diligent group of Named Plaintiffs representing the Plans.

Pursuant to the schedule in the Order Preliminarily Approving Settlement, Preliminarily Certifying Settlement Class, Approving Notice Plan, and Setting Fairness Hearing Date (the "Preliminary Approval Order") (Dkt. No. 91), Co-Lead Counsel are also now filing Plaintiffs' Motion and Memorandum of Law in Support of Motion for Final Approval of Class

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[1] All capitalized terms not otherwise defined in this Memorandum have the same meaning given them in the Stipulation and Agreement of Settlement ERISA Action (Settlement "Stipulation" or "Stip.") filed with the Court on March 19, 2009. (Dkt. No. 92).

[2] On March 12, 2008, the Court entered the Order Regarding: (1) Consolidation of Securities Actions, Appointment of Lead Plaintiff and Approval of Lead Counsel; (2) Consolidation of Derivative Actions and Appointment of Plaintiffs' Executive Committee and Liaison Counsel; (3) Consolidation of ERISA Actions and Appointment of Interim Co-Lead Counsel; and (4) Scheduling of the Filing of Consolidated Amended Complaints in Each of the Actions and Responses Thereto (the "Consolidation Order") (Dkt. No. 37), in which it appointed Keller Rohrback L.L.P. and Cohen Milstein Sellers & Toll PLLC as Interim Co-Lead Counsel ("Co-Lead Counsel"), with responsibility, among other things, to lead and coordinate the prosecution of the case.

Action Settlement and Plan of Allocation ("Final Approval Motion" and "Final Approval Memo") and the Joint Declaration of Lynn L. Sarko and Marc I. Machiz in Support of Motion for Final Approval of Class Action Settlement and Plan of Allocation and Motion for Award of Attorneys' Fees, Expenses, and Case Contribution Awards ("Joint Declaration" or "Joint Decl."). In the Final Approval Memo, we explain why the Settlement is an excellent result for the Class and should be approved. Here, we address Co-Lead Counsel's request for an award of attorneys' fees in the amount of $18.75 million, which represents 25% of the gross settlement amount and a "multiplier" of approximately 2.8, and reimbursement of out-of-pocket litigation expenses of $372,312.94. The award sought is substantially below the 27.5%, or $20,625,000, plus expenses preliminarily approved by the Court as the cap on fees and expenses included in the Class Notice. Plaintiffs seek an award of fees and expenses only on behalf of Co-Lead Counsel and the additional Plaintiffs' Counsel who did work on the case pursuant to direction of Co-Lead Counsel and who followed the time reporting requirements established by Co-Lead Counsel in an effort to avoid duplicative or unproductive activities as set forth in Paragraph 8 of the Consolidation Order. These additional Plaintiffs' Counsel are identified in the Joint Declaration and exhibits thereto. Joint Decl. ¶ 97 and Exhibits M through U thereto. In addition, we seek approval of $5,000 case contribution awards to each of the Named Plaintiffs in recognition of their valuable service to the Class.

As demonstrated below, the record in this case and the case law in the Second Circuit fully support these requests for fees, expenses, and case contribution awards, based on the risks taken and results obtained in this litigation. The fees are addressed in Section II below, the expenses in Section III, and the case contribution awards in Section IV.

II. THE COURT SHOULD APPROVE PLAINTIFFS' REQUEST FOR ATTORNEYS' FEES

A. Brief History of this Litigation

The first of eleven ERISA Actions challenging the Defendants' conduct in relation to the Plans' investment in Merrill Lynch & Co., Inc. ("Merrill Lynch", "Merrill" or the "Company") common stock was filed on November 9, 2007. (Dkt. No. 1). Now, nineteen months later, we are settling all aspects of the ERISA Actions. Between these bookends stand the aggressive prosecution and defense of this case, as well as the voluminous discovery that confirms the fairness and adequacy of the Settlement.

Because the Final Approval Memo and the Joint Declaration contain a detailed discussion of this litigation's progress, risks, and ultimate success, we ask the Court to consider these documents in connection with this request for fees, expenses, and case contribution awards, and here describe only the major features of the litigation:

The Complaints. The eleven complaints against Merrill Lynch and the Plans' other fiduciaries, filed between November 9, 2007 and January 28, 2008, were consolidated by the Consolidation Order. On May 21, 2008, Plaintiffs filed their Consolidated Amended Complaint for Violations of the Employee Retirement Income Security Act. (Dkt. No. 41). The Consolidated Amended Complaint alleged that Defendants violated their fiduciary and co-fiduciary duties under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA") by, *inter alia*: (1) failing to prudently and loyally manage the Plans and the Plans' assets; (2) failing to properly monitor the performance of their fiduciary appointees, and remove and replace those whose performance was inadequate; (3) failing to disclose necessary information to co-fiduciaries; (4) failing to provide participants with complete and accurate

information regarding the Merrill Lynch Stock Fund sufficient to advise participants of the true risks of investing their retirement savings; and (5) breaching their co-fiduciary obligations.

Plaintiffs sought relief for Defendants' fiduciary breaches on behalf of a Class consisting of all participants or beneficiaries of the Plans whose individual accounts made or maintained investments in Merrill stock during the Class Period.[3]

Plaintiffs allege that Defendants knew or should have known that Merrill stock was not a prudent retirement investment during the Class Period and that the Defendants acted imprudently by allowing further investment in Merrill stock and not liquidating those holdings.

After relevant developments occurred in late July through September 2008, Plaintiffs filed a Consolidated Supplemental Complaint for Violations of the Employee Retirement Income Security Act (the "Complaint") (Dkt. No. 64) on September 23, 2008, which incorporated allegations regarding the Lone Star block sale of $30.6 billion notional value of Merrill's Collateralized Debt Obligation ("CDO") portfolio and Merrill's urgent need to arrange its sale to Bank of America in mid-September.

The Motion to Dismiss. On September 26, 2008, Defendants moved to dismiss the Complaint. (Dkt. No. 66). Their motion launched a series of attacks on all aspects of the case, which included, but were not limited to, the following arguments:

- Merrill stock was hard-wired into the Plans as a matter of plan design, required to be offered as an investment alternative, and that because the Defendants had no power to remove or restrict it, they could have no liability, Joint Decl. ¶ 14;

- Defendants' actions were presumptively prudent. Merrill was a well-run company overwhelmed by an unprecedented and unpredictable credit and liquidity crisis, which impacted and impaired all financial institutions, and could not be said to be itself on the verge of collapse in light of the $50 billion paid by Bank of America (the value based on Bank of America's stock price at the time

[3] The Settlement Class Period is from September 30, 2006 through December 31, 2008.

the merger was announced). The notion that a company worth $50 billion is not viable and is permanently impaired "blinks at reality." *Id.*;

- The events of the week of September 15, 2008, were driven by industry-wide market forces (not anything concealed by Merrill) and do not make an ERISA case, let alone a case invoking a lengthy class period, *id.*;

- A few days of tumult in early September should absolutely not have triggered a panicked shutdown of the Plans, especially given the price paid by Bank of America for Merrill reflected a 70% premium to market for participants, *id.*;

- Plaintiffs' claims were nothing more than a disguised diversification claim, specifically carved out of ERISA in employer stock cases, *id.*;

- Neither Merrill nor the Administrative Committee had discretion over the investment and management of Plans' assets and Defendant O'Neal had no fiduciary discretion or authority whatsoever with regard to the Plans, *id.*;

- Removing Merrill stock as a Plan investment or selling Merrill stock out of the Plans would have violated insider trading laws, *id.*; and

- ERISA § 404(c), 29 U.S.C. § 1104(c), placed the responsibility for the Plans' investments on the individual participants and served as an absolute defense to Plaintiffs' claims, *id.*

Plaintiffs filed their Memorandum of Law in Opposition to the Motion to Dismiss on October 6, 2008. Defendants replied on November 19, 2008. (Dkt. No. 77). Plaintiffs were in the process of preparing for the oral argument on the Motion to Dismiss, which was scheduled for January 16, 2009, at the time the Settlement was reached.

Settlement Negotiations. The Settlement was achieved as a result of hard-fought, arm's-length negotiations occurring between December 2008 and the first few days of 2009. The Parties participated in settlement conferences during December 2008, meeting separately with representatives of Merrill and the Individual Defendants, and in countless telephone conferences. Joint Decl. ¶¶ 23, 26. Plaintiffs maintained that the ERISA Action stood on its own, separate from the Securities Action, and refused to permit the perceived desirability of settling the Securities Action to influence a decision that the ERISA Action should be settled and, more

importantly, the amount at which it should be settled. Co-Lead Counsel insisted on dealing separately with the Defendants, arranged for the production of key Investment Committee minutes and on disclosure of damages data, and conditioned any resolution upon their satisfaction with subsequent confirmatory discovery. *Id.* ¶ 25.

An agreement in principle to settle was reached on December 30, 2008, and a Term Sheet was executed on January 7, 2009. *Id.* ¶ 31.[4] On February 27, 2009, the Parties submitted the signed Settlement Stipulation to the Court and requested an order preliminarily approving the Settlement, certifying a settlement class, approving their notice plan, and setting the date for the fairness hearing. The Court entered the Preliminary Approval Order on March 17, 2009.

Discovery. Co-Lead Counsel started document discovery at the outset of the case with statutory and informal requests for a variety of ERISA-related materials. *Id.* ¶ 18. In response to these requests, Defendants produced the Plan documents, trust agreements, summary plan descriptions and material modifications, 5500s, summary annual reports, and a Plan prospectus, information from which was incorporated into the Complaint and relied upon in opposition to Defendants' motion to dismiss.

Although formal discovery had yet to commence, a key component of the Settlement is Co-Lead Counsel's right to conduct extensive discovery in order to confirm that the Settlement is fair, reasonable, and adequate. *Id.* ¶ 19; Settlement Stip. ¶ 8.1.3. Between January and June 2009, the discovery process has included the following:

- Extensive negotiation of the production of relevant information and documents in order to ensure full and fair disclosure of ERISA-specific information and

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[4] Because the risk to Merrill's continued existence did not end with the merger, as a key term of the Settlement, Co-Lead Counsel negotiated the prompt escrow of the Settlement consideration to minimize the threat that a Merrill bankruptcy posed to the Plans. *See* Joint Decl. ¶ 35; Settlement Stip. ¶ 3.1.

documents and information pertaining to the corporate malfeasance alleged in the Complaint, Joint Decl. ¶ 19;

- Coordination with counsel for the Defendants and counsel in the Bond and Securities actions of the establishment and maintenance of electronic, case-specific document depositories to facilitate the efficient review, coding and management of documents produced by the Defendants, including more than *38 million pages of documents* produced by the Defendants not only to Plaintiffs, but also to the SEC, the New York Attorney General, and/or in connection with the Merrill Lynch merger litigation, *County of York Employees Retirement Plan v. Merrill Lynch & Co., Inc.,* No. 08-4066 (Del. Ch.), *id.;*

- Development of a highly efficient document organization, coding and management program designed to maximize quality of information obtained in the document review process, *id.*;

- Review and analysis of the millions of pages of documents that the document discovery process yielded, *id.*;

- Analysis of transcripts of depositions taken of key witnesses in the merger litigation, *id.*; and

- Seven detailed and lengthy interviews of certain key fiduciary Defendants and current and former high level Merrill executives, *id.*

Throughout discovery, Co-Lead Counsel sought to avoid replicating certain discovery previously conducted in connection with this or related litigation. For example, rather than commencing document discovery from scratch, we negotiated with Defendants' document vendor to gain access to defense documents without the tremendous cost and delay inherent to the download, production, and establishment of an entirely new document hosting platform. We likewise attempted to coordinate with plaintiffs' counsel in the related actions in an effort to minimize the amount of duplication that occurred in preparation for the interviews. However, because many of the elements of the ERISA claims were substantially different from those required of the plaintiffs in the related cases, or the perspective of Defendants, coordination was helpful, to be sure, but did not obviate the need for our substantial discovery efforts. *Id.* ¶ 20.

Counsel's Investment of Time and Money in the Case. The amount of time and money Plaintiffs' Counsel have expended on a contingent basis in the foregoing activities was substantial. Through June 19, 2009, Plaintiffs' Counsel have devoted more than 18,268 professional hours to this case, representing $6,542,695.20 in dollars-times-hours "lodestar," and have incurred $372,312.94 in out-of-pocket expenses. *Id.* ¶¶ 106, 155 and Exhibits J through X thereto.

And of course, work on the case has not ended, nor will it end anytime soon. We will continue to incur additional hours in connection with the Settlement approval in general, including in connection with the final approval hearing. Beyond that, past experience teaches that we will spend a substantial amount of additional time over the next year or more following final approval responding to inquiries from Class members, interacting with bank personnel with respect to technical matters concerning the Qualified Settlement Fund, and generally shepherding implementation of a settlement affecting the three qualified retirement plans and more than 70,000 participants.[5] It is Plaintiffs' intent to submit to the Court in advance of the July 27, 2009 Fairness Hearing a supplemental declaration providing updated fee and expense information in further support of the award requested herein.

B. The Legal Standard Governing Awards of Attorneys' Fees in ERISA Fiduciary Breach Class Actions

Just as in other class actions, attorneys who create a settlement fund for the common benefit of class members are entitled to "a reasonable fee – set by the court – to be taken from the fund." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000) (citing *Boeing Co.*

[5] In the *Enron* ERISA case, *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, No. 01-3913 (S.D. Tex.), for example, in which one of the co-lead counsel in this case was co-lead counsel, we are still responding to occasional inquiries from class members, advising the district court of our views on various implementation matters, and monitoring the docket, even though the court gave final approval to the settlement in 2007. Joint Decl. ¶ 109.

v. Van Gemert, 444 U.S. 472, 478 (1980)). "The rationale for the doctrine is an equitable one: it prevents unjust enrichment of those benefiting from a lawsuit without contributing to its cost." *Goldberger*, 209 F.3d at 47. Common fund fee awards are thus a commonplace feature of class litigation. Here, Co-Lead Counsel and additional Plaintiffs' Counsel successfully created a common fund of $75 million plus interest, and accordingly are entitled to a reasonable share of that fund as a fee, to be awarded to and equitably distributed by Co-Lead Counsel to the Plaintiffs' Counsel identified in the Joint Declaration. Joint Decl. ¶ 99 and Exhibits M through U thereto.

The Second Circuit approves of two ways to determine a reasonable attorney's fee in common fund cases: the "percentage-of-recovery" method and the "lodestar" method. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005); *Goldberger*, 209 F.3d at 50; *In re Bisys Sec. Litig.*, No. 04-3840, 2007 WL 2049726, at *2 (S.D.N.Y. July 16, 2007) (Memorandum Order) (Rakoff, J.). The Court has discretion to choose whichever method is most appropriate, depending on the circumstances of a particular case. *Wal-Mart*, 396 F.3d at 121. Both approaches have the same basic goal, however: to provide fair and reasonable compensation to class counsel in light of the risks they have run, the work they have done, and the results they have achieved for their clients. *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1326-27 (2d Cir. 1990). Regardless of the method used, several factors identified in *Goldberger*, which we discuss below in more detail, ultimately determine what is a reasonable fee. *Masters v. Wilhelmina Modeling Agency, Inc.,* 473 F.3d 423, 436 (2d Cir. 2007).

Under the "lodestar" method, the court determines the lodestar, that is, the number of hours expended on the case multiplied by the appropriate hourly rates, based on submissions from counsel regarding the work they performed. This lodestar is then adjusted, usually upward

(a "multiplier"), to take into account a number of factors, including most importantly, the risks assumed by the lawyers and the extent of their success. 4 William B. Rubenstein, Alba Conte & Herbert B. Newberg, NEWBERG ON CLASS ACTIONS § 14:5 (4th ed. 2002 & Supp. 2009). Under the percentage-of-recovery method, the fee is calculated simply as a percentage of the amount obtained in the litigation. *Id.* § 14:6 at 550; *In re WorldCom, Inc. ERISA Litig.,* No. 02-4816, 2004 WL 2338151, at *10-11 (S.D.N.Y. Oct. 18, 2004).

Each method has its pros and cons, and in certain cases the district court's selection of the appropriate methodology may have a significant impact on the amount of the fee. Here, however, both approaches support the fee requested. Both the multiplier on our lodestar (approximately 2.8) and the percentage fee (25%) are reasonable under the circumstances of this particularly risky case; consistent with the *Goldberger* factors; below the 30% that is commonly approved and, indeed, below even the 27.5% cap set forth the Class Notice; and in line with guidance provided by courts that have addressed fee requests in similar cases.

C. The Requested Fees Are Reasonable Under the *Goldberger* Factors

The *Goldberger* factors referred to above are:

1. the time and labor expended by counsel;
2. the magnitude and complexities of the litigation;
3. the risk of the litigation;
4. the quality of representation;
5. the requested fee in relation to the settlement; and
6. public policy considerations.

Goldberger, 209 F.3d at 50 (citation omitted); *see also In re WorldCom, Inc. ERISA Litig.*, No. 02-4816, 2005 WL 3116188, at *7 (S.D.N.Y. Nov. 22, 2005) (citing *Wal-Mart*, 396 F.3d at 121). Each of the factors militates strongly in favor of the requested fee.

1. Time and Labor

Co-Lead Counsel and additional Plaintiffs' Counsel have dedicated enormous efforts to this case since it was filed. We summarized that work above, and the details are described in the Joint Declaration. Having served in leadership positions in similar cases, Co-Lead Counsel were aware at the outset of the case that considerable time and resources would likely be necessary to prosecute it, and that proved to be so. Joint Decl. ¶ 112. As detailed above, in all, Plaintiffs' Counsel devoted more than 18,268 hours to the successful prosecution of the action, and advanced expenses in the amount of $372,312.94. *Id.*

Plaintiffs' Counsels' efforts were conducted efficiently and with cost-savings in mind. *Id.* ¶ 113. Work was assigned to lawyers in areas in which they had experience. *Id.* Where feasible, work was assigned to associates and paralegals with lower billing rates, to provide quality work at the lowest cost.[6] Co-Lead Counsel took significant precautions to avoid duplication of effort, prevent unauthorized work, and ensure that areas of potential discovery deemed tangential were not pursued. *Id.* While document coding work was often assigned out to non-Co-Lead Counsel firms, key functions such as interview preparation and questioning were handled mainly by a small core cadre of attorneys who were knowledgeable about the entire case. As set forth above, and more fully in the Joint Declaration, this *Goldberger* factor – the time and labor expended by counsel – clearly supports the requested fee award.

2. Magnitude and Complexities

This case, even more than many other ERISA class action cases, was both enormous in scope and extremely complex. In addition to involving scores of potential witnesses, more than

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[6] Co-Lead Counsel and additional Plaintiffs' Counsel maintained daily time records throughout this litigation. A detailed compilation of their activity and time will be submitted *in camera* upon request. A summary of such time is attached to the Joint Declaration as Exhibits J through U.

70,000 Plan participants, and more than 38 million pages of documents in confirmatory discovery alone, it presented complex factual issues against the backdrop of a fast-developing and hotly disputed area of the law.

As set forth in more detail in the Final Approval Memo and the Joint Declaration, Plaintiffs' claims raise a host of contested legal and factual issues, each of which would require extensive lay and esoteric expert discovery and testimony to resolve. This was true of both the ERISA issues and the complicated underlying issues concerning Merrill's exposure to subprime-related CDOs, other real estate assets, off balance sheet derivatives and guarantees, and credit default swaps ("CDS"), some of which were used as hedges that were ineffective due to counterparty default risk. Fundamental to resolution of this litigation is a determination of whether Merrill's continued exposure to extraordinarily complex financial instruments are more appropriately viewed as a reasonable but ultimately unsuccessful risk management strategy, as Defendants contend, or is seen as an independent and inadequately disclosed source of risk to Merrill's balance sheet, which contributed to inflating the price of Merrill stock and rendering it an inappropriately risky retirement investment, as alleged by Plaintiffs.

This litigation presented a host of other challenging issues, including:

- **Complicated and innovative legal theories.** ERISA is a highly-specialized and complex area of the law, and the type of claims brought here – involving alleged breaches of duty by the Plans' fiduciaries – are especially so. As mentioned above, the law is developing, and there are significant conflicts between the approaches adopted by different trial and appellate courts. The length and number of issues raised in the Parties' briefs on the dismissal motions bear witness to the complexity and evolving nature of ERISA jurisprudence. Plaintiffs believe the claims in this case are solidly grounded in ERISA law, but it is beyond debate that the issues are complex.

- **Lack of established case values.** ERISA company stock cases are a relatively new genre of litigation, and as of the date of this motion, only four of these cases have gone to trial. *Landgraff v. Columbia/HCA Healthcare Corp.*, No. 3-98-0090, 2000 WL 33726564, at*2 (M.D. Tenn. May 24, 2000), *aff'd* 30 Fed. Appx.

366 (6th Cir. 2002); *DiFelice v. U.S. Airways, Inc.*, 436 F. Supp. 2d 756, 757 (E.D. Va. 2006), *aff'd*, 497 F.3d 410 (4th Cir. 2007); *Nelson v. Hodowal (IPALCO)*, 512 F.3d 347, 349 (7th Cir. 2008); *Brieger v. Tellabs, Inc.*, No. 06-1882, —- F. Supp. 2d —-, 2009 WL 1565203, at *1 (N.D. Ill. June 1, 2009). In each of these cases, defendants prevailed. There was no "track record" to guide Co-Lead Counsel's risk evaluation, or to provide any assurance that the case would result in a victory for the Class.

- **Complexity of establishing liability and losses.** A finding of liability would require careful presentation and analysis of lengthy and detailed Plan documents, complex corporate financial and accounting matters, and sophisticated judgments about the investment decisions the Defendants made. In addition, damage assessments by the finder of fact often result in a battle of experts. In this case, the Defendants argued that even if the imprudence of Merrill stock as a Plan investment could be established, that did not occur until so late in the proposed class period that Plaintiffs' damages would be minimal. One of the principal challenges Plaintiffs faced was showing that Merrill was an imprudent Plan investment early in the Class Period.

- **Risk of an unforeseen change in the law.** ERISA jurisprudence presents an ever changing legal landscape, and there is a constant risk that the law will change before judgment. While many recent decisions have upheld claims similar to those asserted here, there was no assurance a change in the law would not have affected, or negated, the claims in this lawsuit. The possibility that the law might materially and adversely change during the course of the litigation – as Defendants argued it did with *inter alia*, the Third Circuit's decision in *Edgar v. Avaya*, *Inc.*, 503 F.3d 340, 349 & n.14 (3d Cir. 2007)[7] – meant that Plaintiffs needed to structure their arguments and proofs to present multiple avenues to recovery.

Joint Decl. ¶¶ 49-55.

Despite the complexity and uncertainty in the law and the vigorous defense the Defendants mounted at every juncture, Co-Lead Counsel navigated this case to a successful conclusion. Thus, this *Goldberger* factor also supports the requested fee award.

3. Risk

In approving the settlements in *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436 (S.D.N.Y. 2004), Judge Lynch observed that "the Second Circuit [in *Goldberger*] has

[7] Joint Decl. ¶ 49; Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss Consolidated Supplemental Complaint at 14. (Dkt. No. 75).

identified the risk of success as perhaps the foremost factor to be considered in determining a reasonable award of attorneys' fees." 225 F.R.D. at 467 (internal quotations omitted). The tangible risks faced by plaintiffs' counsel in ERISA fiduciary breach class actions, including this one, are substantial for several reasons. ERISA company stock litigation is relatively undeveloped.[8] The first pioneering cases in this area were filed in the late 1990s. The case law is exceptionally thin in comparison with securities and antitrust jurisprudence, with only a few appellate decisions on most issues. There have been some substantial settlements, but nothing to rival the larger ones in the securities field (where the classes are much larger). The lack of a mature body of law and practice in this field, and the resulting potential for significant changes as the law evolves, greatly enhances the risk associated with litigating a complex case such as this one.

Certain unsettled issues in the law are particularly germane here. For example, where ERISA plans require that employer stock be an available plan investment (which Defendants assert is the case here), many courts have increasingly applied a presumption that fiduciaries act reasonably by following these plan provisions. Other cases call into question Plaintiffs' contention that even with appropriate disclosure, employer stock may be an imprudent

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[8] ERISA was enacted in 1974 and 401(k) plans were first provided for in 1981. Employee Retirement Income Security Act of 1974, 88 Stat. 829 (Sept. 2, 1974); Revenue Act of 1978, 92 Stat. 2763 (Nov. 6, 1978) (creating deferral arrangements that ultimately led to 401(k) plans); Certain Cash or Deferred Arrangements Under Employee Plans, 46 Fed. Reg. 55,544 (Nov. 10, 1981) (first proposed regulations to authorize 401(k) plans). The securities laws, by contrast, have been a central part of federal law for over 75 years, Securities Act of 1933, 48 Stat. 74 (May 27, 1933); Securities Exchange Act of 1934, 48 Stat. 881 (June 6, 1934); Investment Company Act of 1940, 54 Stat. 789 (Aug. 22, 1940), and securities fraud class actions have been litigated at least since early 1940s, *e.g., Deckert v. Independence Shares Corp.*, 39 F. Supp. 592 (E.D. Pa. 1941), *rev'd sub nom. Pa. Co. for Insurances on Lives and Granting Annuities v. Deckert*, 123 F.2d 979 (3d Cir. 1941). The securities fraud "infrastructure," so to speak, is enormous. The same can be said of antitrust litigation, where the price fixing statute and the case law date back over a hundred years. Sherman Anti-Trust Act, 26 Stat. 209 (July 2, 1890).

investment even when properly priced; Defendants deride this contention as a disguised diversification claim, and such claims are specifically carved out of ERISA in employer stock cases. Court decisions also lend support to Defendants' argument that even assuming that Plaintiffs could prevail on liability, damages would be severely limited or eliminated by consideration of the effect on the value of the stock held by the Plan of public disclosures that Defendants assert would have been legally required for the Plans to have liquidated their Merrill stock. Other decisions support Defendants' claim that ERISA § 404(c), 29 U.S.C. § 1104(c), which places investment responsibility on the participants under certain circumstances, is a potential absolute defense. Joint Decl. ¶ 67. The paucity of appellate court guidance in the Second Circuit and elsewhere on these and other key issues underscores the risk for Plaintiffs of this litigation.

Plaintiffs faced substantial risks in proving the factual predicates of their claims as well. Defendants assert that Merrill was a well-run company overwhelmed by an unprecedented, and more important, unpredictable credit and liquidity crisis that threatened the existence of every major financial institution, eliminated some, and would quite possibly have led to the collapse of our financial system absent repeated and massive government intervention. They contend that Merrill was aware of the risks posed by exposure to subprime mortgages from the start of the Class Period and took significant steps to limit that exposure, including slowing down subprime originations at First Franklin, securitizing Merrill's subprime exposure into CDOs and retaining only the AAA rated tranches of the CDOs, and hedging its CDO positions. Defendants believe that if those steps were insufficient, it was because of the extraordinary collapse in the markets, which overwhelmed what appeared to be responsible risk management techniques at the time. As to the argument that Merrill stock was unacceptably risky, Defendants insist that, at most,

there was a window of only a few days prior to the agreement to sell Merrill to Bank of America, reached on September 15, 2008, in which a responsible Merrill executive (let alone Plan fiduciary) would have concluded that Merrill was in danger of collapse. According to Defendants, because the sale averted this collapse, no losses can be associated with a failure to take action during this narrow window, even if such action had been both practical and legally required. *Id.* ¶ 69.

Even assuming success on the legal and factual issues, Merrill's financial condition injects yet another substantial risk here. Plaintiffs were acutely aware throughout the negotiations that there was a risk that the merger would not close and Plaintiffs highlighted this fact in their Complaint. Even after the merger closed, the risk of insolvency for Merrill continued because it is an independent subsidiary of Bank of America. Merrill's continuing financial deterioration and/or a waning determination by the federal government and Bank of America to provide Merrill the liquidity necessary to avoid bankruptcy could easily wipe out the financial value of Plaintiffs' claims against Merrill and the Company's ability to indemnify Committee members. *Id.* ¶ 70. The riskiness of Merrill's balance sheet, together with the unprecedented turmoil experienced in the financial system, made continuing the litigation a doubtful gamble on Merrill's future. Indeed, revelations that began appearing shortly after the term sheet was executed on January 7, 2009 showed that Merrill teetered on extinction even as the Settlement was being negotiated. Without pressure from the federal government (as reported by Bank of America) and a new commitment of enormous federal resources to stand behind Merrill, the Bank of America merger would not have closed and Merrill would likely not have survived January. Dan Fitzpatrick, Susanne Craig & Carrick Mollenkamp, *Thain Ousted in Clash at Bank of America: Surprise Losses at Merrill Unit Led to Former Chief's Fall; Pressure*

Is Seen Mounting on CEO Lewis Over Soured Deals, WSJ, Jan. 23, 2009, at A1; Grant McCool & Jonathan Stempel, *U.S. pressured B of A to complete Merrill deal*, Reuters, Apr. 23, 2009.

In addition to the foregoing risks pertaining to ERISA cases in general and company stock cases in particular, there were a host of what might be termed the "usual" risks inherent in any contingent litigation. These include, among others, the risk that witnesses will testify in unexpected ways that documents may turn out not to mean what they appear to say, the risk of an adverse change in the law, and the risk that the court may apply the law differently than Plaintiffs envision. In addition to the pending Motion to Dismiss, one cannot overlook the risks posed by summary judgment, trial, post-trial motions, appeals, and even a petition for a writ of *certiorari*, or the risks inherent in the delays such proceedings would have occasioned.

Plaintiffs' Counsel accepted this matter on a contingent basis, with the attendant risk that they would receive no fee or expense reimbursement. Courts uniformly hold that when recovery is contingent, a higher fee must be awarded than when counsel undertake no risk of non-payment. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 902 (1984) (Brennan, J., concurring) ("the risk of not prevailing, and therefore the risk of not recovering any attorney's fees, is a proper basis on which a district court may award an upward adjustment to an otherwise compensatory fee"); *Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) ("Because they shift part of the risk of loss from client to lawyer, contingent-fee contracts usually yield a larger fee in a successful case than an hourly fee would."). *Goldberger*, 209 F.3d at 52, points out that there may not be "a substantial contingency risk in every common fund case." In this case, however, there was, and Plaintiffs' Counsel should be rewarded for having borne and successfully overcome it.

4. Quality of Representation

This demanding case presented difficult factual, procedural, and legal issues. It involved large amounts of money, scores of potential witnesses and millions of pages of documents.

Successfully marshalling the evidence and applying the law to it required a high degree of expertise in complex ERISA and class action matters. Co-Lead Counsel, national leaders in pursuing this type of litigation, provided the high quality of services this case required, employing the expertise they have garnered from many years of spearheading company stock and other ERISA and class action cases, and providing excellent services to the Class. *See* Joint Decl. ¶¶ 90, 121-138.

The large number and extraordinarily high quality of the defense counsel opposing Plaintiffs' efforts bears further witness to the caliber of representation that was necessary to achieve a $75 million settlement. *Global Crossing*, 225 F.R.D. at 467 (quoting *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986)). Defendants were represented by Skadden, Arps, Slate, Meagher & Flom LLP; Shearman & Sterling, LLP; and Simpson Thacher & Bartlett LLP, all nationally recognized for their ERISA litigation expertise. In all, it is hard to imagine a more experienced and capable defense team.

Plaintiffs' Counsel's ability to obtain a favorable settlement for the Class in the face of such formidable legal opposition confirms the quality of their representation. Thus, this *Goldberger* factor also supports the fee award requested.

5. Fee in Relation to the Settlement

The requested fee of $18.75 million – a 2.8 lodestar multiplier and 25% of the recovery – is fair and reasonable in relation to the recovery and compares favorably to fee awards in other risky common fund cases in the Second Circuit and elsewhere. The requested fee is well within the customary range of awards in cases like this one.

Lodestar/Multiplier Analysis. In the Second Circuit, lodestar may be an independent method of fee calculation or used as a "cross-check" on percentage of fund method, which is

discussed immediately below. *Goldberger*, 209 F.3d at 50. Under the lodestar method, the court examines the fee petition to determine the number of hours reasonably billed to the litigation and multiplies that figure by appropriate hourly rates. *See Savoie v. Merchants Bank*, 166 F.3d 456, 460 (2d Cir. 1999). After that, the court usually increases the lodestar by applying a multiplier based on factors similar to those set forth in *Goldberger*, such as the risk of the litigation, the quality of the work done, and the results obtained. *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 912 F. Supp. 97, 102 (S.D.N.Y. 1996). The lodestar fee awarded should be based on hourly rates that are in line with the rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum*, 465 U.S. at 895 n.11.

As detailed in the Joint Declaration, the total lodestar required by this case as of June 19, 2009 is approximately $6,542,695. This figure was calculated using the customary rates of the attorneys who have worked on this case, and was based on contemporaneous, daily time records, regularly prepared and maintained by Plaintiffs' Counsel in the ordinary course of business. The Joint Declaration sets forth: (a) the names of the lawyers and paraprofessionals who worked on the case for Plaintiffs; (b) the hours expended by each; (c) their hourly rates and corresponding lodestar figures; and (d) lodestar totals by firm and in the aggregate.

The hourly rates charged by Plaintiffs' Counsel in this case are prevailing rates in each of their communities, have been approved in many judicial settlement hearings, and are consistent with rates approved in this Circuit and others in many recent class action cases. For example, more than a year ago, the Court in *Gilat* approved attorney rates ranging from $325 for associates up to $725 for certain partners. *In re Gilat Satellite Networks, Ltd.*, No. 02-1510, 2007 WL 2743675, at *17-18 (E.D.N.Y. Sept. 18, 2007). Similarly, in *In Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02-1484, 2007 WL 313474, at *22 (S.D.N.Y. Feb. 1,

2007), the Court two years ago approved billing rates ranging from $550 for associates to $850 for certain partners as comparable to rates charged by top tier New York law firms.

The requested fee represents a multiplier on Plaintiffs' Counsel's lodestar of 2.8. In a risky and complex case such as this one, in which a substantial recovery was obtained, a multiplier in this range is well justified. *See In re Household Int'l Inc. ERISA Litig.*, No. 02-7921 (N.D. Ill. Nov. 22, 2004) (Minute Order) (4.8 multiplier); *In re Dynegy ERISA Litig.*, No. 02-3076 (S.D. Tex. Nov. 24, 2004) (Final Order) (4.4 multiplier); *In re Bristol Myers Squibb Co, ERISA Litig.*, No. 02-10129 (S.D.N.Y. Oct. 12, 2005) (Order) (3.9 multiplier); *In re Honeywell Int'l ERISA Litig.*, No. 03-1214 (D.N.J. July 20, 2005) (Order) (3.7 multiplier); and *In re Royal Dutch/Shell Transport ERISA Litig.*, No. 04-1398 (D.N.J. Aug. 30, 2005) (Order Approving Settlement) (3.3 multiplier). Indeed, the one objector to date, David A. Cross, recognizes that a multiplier of up to 3.0 is appropriate in complex cases such as this one. Joint Decl. ¶ 146 and Exhibit F. In sum, a lodestar analysis of similar cases confirms the reasonableness of the fee requested here.

Percentage of Fund Analysis. Fee awards in common fund cases in this Circuit can also be computed as a percentage of the recovered fund. *Goldberger*, 209 F.3d at 50; *Wal-Mart*, 396 F.3d at 121. The fee requested by Plaintiffs' Counsel in this case is well-warranted, and well within the range of awards made by district courts in the Second Circuit. *Bisys*, 2007 WL 2049725, at *2 (recognizing that the award of the requested 30% fee was "consistent with fees awarded in . . . class action settlements in the Second Circuit.") (quoting *Hicks v. Morgan Stanley & Co.*, No. 01-10071, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005)). In *Central States Southeast and Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 249 (2d Cir. 2007), the Second Circuit itself recently approved a 30% fee

in an ERISA common fund case. *See also In re Xerox Corp. ERISA Litig.,* No. 02-1138 (D. Conn. Apr. 14, 2009) (Order and Final Judgment) (29.9%); *In re AIG ERISA Litig.*, No. 04-9387 (S.D.N.Y. Oct. 7, 2008) (Order) (30%).[9]

The reasonableness of the requested fee, under both the lodestar/multiplier and percentage of recovery analyses, is further bolstered by another metric: the lodestar as a percentage of the common fund. In this case the lodestar is approximately 8.7% of the recovery. Where, like here, the lodestar is a low percentage of the total recovery, a substantial multiplier is warranted (and the converse would also be true: were lodestar higher, a lower multiplier would be warranted unless reasons for the higher lodestar could be explained). This reflects the amount of work that was necessary to achieve this result, and indicates that a percentage award of well over that amount is appropriate, otherwise the lawyers are not fairly compensated for their risk.

Thus, whatever the rubric — lodestar multiplier, fees as percentage of recovery, or lodestar as percentage of recovery — the fee requested here is reasonable, below the 30% that is

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[9] Numerous non-ERISA cases in this Circuit award a higher percentage recovery. *See, e.g., Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 188-89 (W.D.N.Y. 2005) (awarding 38.26% of monetary recovery); *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003) (awarding 33-1/3%); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) (awarding 33-1/3%); *Becher v. Long Island Lighting Co.*, 64 F. Supp. 2d 174, 182 (E.D.N.Y. 1999) (awarding 33-1/3%); *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320, 326 (E.D.N.Y. 1993) (awarding 33.8%); *In re Allstar Inns Sec. Litig.*, No. 88-9282, 1991 WL352491, at *3 (S.D.N.Y. Nov. 20, 1991) (awarding 35%). Many ERISA company stock decisions from other Circuits award higher percentages as well. *See, e.g.,*; *In re Household Int'l Inc. ERISA Litig.*, No. 02-7921 (N.D. Ill. Nov. 22, 2004) (Minute Entry Order) (30%); *Kling v. Fidelity Mgmt Trust Co.*, No. 01-11939 (D. Mass. June 29, 2006) (Order) (30%); *Kolar v. Rite-Aid Corp.*, No. 01-1229, 2003 WL 1257272, at *5 (E.D. Pa. Mar. 11, 2003) (49%); *In re Westar Energy ERISA Litig.*, No. 03-4032 (D. Kan. July 27, 2006) (Order and Final Judgment) (30%); *In re Sears, Roebuck & Co. ERISA Litig.*, No. 02-8324 (N.D. Ill. June 26, 2007) (Order Awarding Fees) (30%); *In re EDS ERISA Litig.*, No. 03-126 (E.D. Tex. Aug. 6, 2008) (Order) (33%); *Blyler v. Agee*, No. 97-0332 (D. Id. Aug. 25, 2004) (Order and Judgment) (30%); *Koch v. Dwyer*, No. 98-5519 (S.D.N.Y. May 7, 2002) (Order and Final Judgment) (30%).

commonly awarded, reflecting the substantial risk presented by the case, but tempered by the relatively early stage at which it settled.

6. Public Policy

This nation has a public policy of encouraging skilled attorneys to bring meritorious ERISA suits such as this one. Congress passed ERISA to promote the important goal of protecting and preserving the retirement savings of American workers. ERISA's "most important purpose" was to "assure American workers that they may look forward with anticipation to a retirement with financial security and dignity, without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society." *Stewart v. Thorpe Holding Co. Profit Sharing Plan*, 207 F.3d 1143, 1148 (9th Cir. 2000) (citation omitted).

The ERISA statute itself specifically encourages private enforcement. *See, e.g.,* ERISA § 502(a), 29 U.S.C. § 1132(a). The Supreme Court has noted that private actions provide "'a most effective weapon in the enforcement'" of federal statutes that provide for both governmental and private rights of action. *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964), *abrogated on other grounds by Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979)) (discussing private actions in the context of securities class actions).

"To make certain that the public [interest] is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding." *Eltman v. Grandma Lee's Inc.*, No. 82-1912, 1986 WL 53400, at *9 (E.D.N.Y. May 28, 1986) (citation and internal quotation omitted); *see also Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 373 (S.D.N.Y. 2002) ("Courts have recognized the importance that fair and reasonable fee awards have in encouraging private attorneys to prosecute class actions on a contingent basis . . . on behalf of those who

otherwise could not afford to prosecute."); *Spann v. AOL Time Warner*, No. 02-8238, 2005 WL 1330937, at *8 (S.D.N.Y. June 7, 2005) (awarding 33-1/3% fee, noting that lawsuits such as this create incentives for fiduciaries to comply with ERISA).

Without the efforts of Plaintiffs' Counsel, the participants in Merrill's three ERISA Plans would likely not have obtained relief anywhere close to this magnitude. Plaintiffs' Counsel have clearly promoted the public interest by vindicating the rights of the aggrieved Plan participants, and it is in the public interest for them to be paid a reasonable attorney's fee.

In short, the *Goldberg* analysis strongly supports the fee requested here.

III. THE COURT SHOULD ALLOW COUNSEL'S REQUEST FOR REIMBURSEMENT OF EXPENSES

Litigating complex contingent cases such as this one requires counsel to incur significant expenses. The need to defray these expenses on an ongoing basis places significant demands on counsel and increases their overall level of litigation risk. Plaintiffs' Counsel have advanced $372,312.94, and they are entitled to reimbursement of these expenses. *See Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients" …).

Awarding expenses and costs of litigation to counsel who create a common fund is necessary and commonplace. *See In re Veeco Invs. Inc. Sec. Litig.*, No. 05-1695, 2007 WL 4115808, at *10 (S.D.N.Y. Nov. 7, 2007) ("It is well established that counsel who create a common fund are entitled to the reimbursement of expenses that they advance to a class."); *Reichman v. Bonsignore, Brignati & Mazzotta P.C.*, 818 F.2d 278, 283 (2d Cir. 1987) (courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course). The expenses that may be reimbursed from the common fund are not limited to those taxed in a judgment against an opponent but, instead, encompass "all reasonable" litigation-related

expenses. *Internal Imp. Fund Trustees v. Greenough*, 105 U.S. 527, 533 (1881), abrogated on other grounds by *Goldberger v. Integrated Res. Inc.,* 209 F. 3d 43 (2d Cir. 2000).

Because the expenses incurred here were incurred with no guarantee of recovery, Co-Lead Counsel had a strong incentive to keep them at a reasonable level, and did so. They made a concerted effort to avoid unnecessary expenditures and economized whenever possible. These expenses were largely attributable to ordinary and necessary items such as computer-assisted document organization, expert fees, travel, and copying, and are itemized in detail in Exhibits M though X hereto. They were essential to the successful development and prosecution of the case, and then the settlement process, and amount to less than 0.5% of the Class' recovery.

IV. CASE CONTRIBUTION AWARDS FOR THE NAMED PLAINTIFFS ARE WELL DESERVED

The notice sent to Class members disclosed that Named Plaintiffs Carl Esposito, Barbara Boland, Alan Maltzman and Mary Gidaro would seek awards of $5,000 each for their initiative and efforts in the litigation.

These Plaintiffs have been active, hands-on participants in this litigation, expending significant amounts of their own time to benefit the Class. They came forward to initiate this action, and thereafter remained in contact with Plaintiffs' Counsel. They provided documents and information; had agreed to respond to document requests and interrogatories and sit for their depositions; reviewed and approved pleadings; and participated in the settlement process by consulting with Plaintiffs' Counsel on the adequacy of Defendants' settlement proposals. *See* Joint Decl. ¶ 159 and Exhibits B through E thereto. These individuals should be rewarded for their willingness to step forward, and then participate in this case, to ensure that the interests of the Class were vindicated. *See McBean v. City of New York*, 233 F.R.D. 377, 391-92 (S.D.N.Y. 2006) (stating incentive awards are generally awarded in a variety of class actions and that

awards of $25,000-$30,000 are "solidly in the middle of the range"); *Sheppard v. Consol. Edison Co. of N.Y., Inc.*, No. 94-403, 2002 WL 2003206, at *6 (E.D.N.Y. Aug. 1, 2002) (Gleeson, J.) (collecting cases with incentive awards in various circuits, many higher than $10,000). Indeed, courts in this and other Circuits routinely grant such awards as a class action expense. *Spann*, 2005 WL 1330937, at *9 (awarding class representatives $10,000 each); *Koch v. Dwyer*, No. 98-5519 (S.D.N.Y. May 7, 2002) (awarding each class representative $10,000); *Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118, 124-25 (S.D.N.Y. 2001) (reviewing case law supporting awards from $2,500 to $85,000).

V. CONCLUSION

The attorneys' fees and reimbursement of expenses that Plaintiffs request will reasonably compensate Plaintiffs' Counsel for the risks they assumed, and the time and resources they committed over eighteen months to obtain the excellent result achieved here. Plaintiffs respectfully request that the Court: (1) award attorneys' fees in the amount of $18.75 million from the Settlement Fund; (2) order reimbursement of $372,312.94 in expenses advanced by Plaintiffs' Counsel; and (3) award $5,000 each to Named Plaintiffs Carl Esposito, Barbara Boland, Alan Maltzman and Mary Gidaro in recognition of their efforts on behalf of the Class in this case. The [Proposed] Order and Final Judgment granting this relief is filed as Exhibit A to the Final Approval Motion.

DATED this 29th day of June, 2009.

Respectfully submitted,

/s/ Lynn Lincoln Sarko
KELLER ROHRBACK L.L.P.
Lynn Lincoln Sarko
Gary A. Gotto
1201 Third Avenue, Suite 3200
Seattle, WA 98101
Telephone: (206) 623-1900
Facsimile: (206) 623-3384
lsarko@kellerrohrback.com
ggotto@kellerrohback.com

Co-Lead Counsel

COHEN MILSTEIN, SELLERS & TOLL, PLLC
Marc I. Machiz
255 S. 17th Street, Suite 1307
Philadelphia, PA 19103
Telephone: (267) 773-4680
Facsimile: (267) 773-4690
mmachiz@cohenmilstein.com

Michelle C. Yau
1100 New York Avenue, N.W.
Suite 500, West Tower
Washington, DC 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699
myau@cohenmilstein.com

Co-Lead Counsel