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) **<u>CLASS ACTION</u>**
This Document Relates To: ERISA ACTION	Case No.: 07-CV-10268 (JSR)(DFE)

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

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Lynn L. Sarko and Marc I. Machiz declare pursuant to the penalties of perjury pursuant to 28 U.S.C. § 1746 as follows:

I. INTRODUCTION

1. Lynn L. Sarko is the Managing Partner of Keller Rohrback L.L.P., and head of the firm's Complex Litigation group. Marc I. Machiz is a Partner of Cohen Milstein Sellers & Toll PLLC. They were appointed on March 12, 2008 by the Court as Co-Lead Counsel for the Plaintiffs, have been personally involved in the litigation of this matter, and are responsible for the prosecution of this action.

2. We submit this declaration in support of the Plaintiffs': (a) Motion for Final Approval of Class Action Settlement and Plan of Allocation; and (b) Motion for Award of Attorneys' Fees, Expenses, and Case Contribution Awards. The Parties' [Proposed] Order and Final Judgment is submitted herewith.

3. Under the Stipulation and Agreement of Settlement ERISA Action ("Settlement Stip." or "Stipulation" or "Stip.") (Dkt. No. 92), a copy of which is submitted as Exhibit 1 to the [Proposed] Order and Final Judgment[1] a Settlement Fund of $75 million has been established. The Settlement Fund is invested in interest-bearing instruments. The Settlement represents an excellent result which will provide significant benefits to the Settlement Class, while removing the risk and delay associated with further litigation.

4. As directed by the Court in its Order Preliminarily Approving Settlement, Preliminarily Certifying Settlement Class, Approving Notice Plan, and Setting Fairness Hearing Date (the "Preliminary Approval Order") (Dkt. No. 91), Named Plaintiffs have provided notice to Class members. Notice has resulted in only one objection to date, from David A. Cross, to a

[1] All capitalized terms not otherwise defined in this Joint Declaration have the same meaning given them in the Settlement Stipulation.

"27.5% fee request," which is more than the amount of fees that is now requested. The objection is addressed in more detail in Sections IV(B) and VIII(E) below.

5. The Settlement is the result of hard-fought litigation in the face of a highly complex and risky case, contentious settlement negotiations, and six months of intensive confirmatory discovery. We are pleased to present the Settlement to the Court for its consideration, and believe strongly that it should be approved.

II. PROCEDURAL AND LITIGATION HISTORY

A. Investigation and Preparation of Comprehensive Claims

6. The first ERISA Action challenging the Defendants' conduct in relation to the investment in common stock of Merrill Lynch & Co., Inc. ("Merrill Lynch," "Merrill" or the "Company") by the (1) Merrill Lynch & Co., Inc. 401(k) Savings and Investment Plan; (2) Merrill Lynch & Co., Inc. Retirement Accumulation Plan; and (3) Merrill Lynch & Co., Inc. Employee Stock Ownership Plan (the "Plans") was filed by Plaintiff Elizabeth Estey on November 9, 2007. (Dkt. No. 1). Ten similar complaints were filed between November 2007 and February 2008.

7. 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.

8. On May 21, 2008, Plaintiffs filed their Consolidated Amended Complaint for Violations of the Employee Retirement Income Security Act. (Dkt. No. 41). In the Consolidated Amended Complaint, Plaintiffs 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: (a) failing to prudently and loyally manage the Plans and the Plans' assets; (b) failing to properly monitor the performance of their fiduciary appointees, and remove and replace those whose performance was inadequate; (c) failing to disclose necessary information to co-fiduciaries; (d) 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 (e) breaching their co-fiduciary obligations.

9. 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.[2]

10. 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.

11. After relevant factual 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 2008.

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

12. The initial and subsequent Complaints were the product of Plaintiffs' Counsel's extensive efforts to investigate and analyze reams of factual materials both industry-wide and Merrill-specific. The investigation allowed Plaintiffs to include in the operative Complaint more than 480 paragraphs containing facts bearing on Defendants' alleged fiduciary breaches – including paragraphs relating to the design and operation of the Plans, Defendants' fiduciary status, the prudence of fiduciaries for the three Merrill Plans in permitting the Plans to invest and maintain existing investments in Merrill stock in the face of information suggesting both that Merrill stock was inflated due to undisclosed information and that the stock investment became increasingly and unacceptably risky. *See, e.g.* Complaint ¶¶ 345-360. The Complaint contains allegations that Plan fiduciaries failed in their duty to disclose material information bearing on the value of Merrill stock to the Plans' participants, including facts regarding the risks posed by exposure to subprime mortgages, through subprime originations at First Franklin, continued securitization of CDOs after demand had sharply fallen, retention of illiquid CDO tranches, and unsuccessful efforts to hedge Merrill's CDO positions. *Id.* ¶¶ 361-370. These allegations, in turn, supported Plaintiffs' detailed causation and charging allegations. *Id.* ¶¶ 405-467.

B. The Motions to Dismiss

13. Defendants vigorously contested Plaintiffs' allegations on all fronts.

14. On September 26, 2008, Defendants filed their Motion and Memorandum of Law in Support of Motion to Dismiss the Consolidated Supplemental Complaint. (Dkt. Nos. 66-68). Their motion launched a series of attacks on all aspects of the case, which included, but were not limited to, the following arguments:

a. 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. *See* Memorandum of Law in Support of Defendants' Motion to Dismiss Consolidated Supplemental Complaint (Dkt. No. 67), pp. 18-21, 31-34;

b. Defendants' actions were presumptively prudent. Merrill was a well-run company adversely impacted 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 the merger was announced). The notion that a company worth $50 billion is not viable and is permanently impaired "blinks at reality." *Id.* at pp. 21-26;

c. 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.* at pp. 24-26;

d. 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.* at pp. 14-15;

e. Plaintiffs' claims were nothing more than a disguised diversification claim, specifically carved out of ERISA in employer stock cases. *Id.* at pp. 19-20;

f. 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.* at pp. 30-35, 39-40;

g. Removing Merrill stock as a Plan investment or selling Merrill stock out of the Plans would have violated insider trading laws. *Id.* at pp. 40-41; and

h. 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.* at pp. 52-53.

15. Motions to dismiss are often routine, even perfunctory, but these motions were not. Defendants used their dismissal motions to lay the groundwork for series of attacks on the case, and the briefing was extensive.

16. 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).

17. 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.

C. Discovery

18. Plaintiffs started document discovery at the outset of the case with statutory and informal requests for a variety of ERISA-related materials. 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.

19. Although formal discovery had yet to commence, a key component of the Settlement is Plaintiffs' right to conduct extensive discovery in order to confirm that the Settlement is fair, reasonable, and adequate. Settlement Stip. § 8.1.3. Between January and June 2009, the discovery process has included the following:

a. Extensive negotiation of the production of relevant information and documents in order to ensure full and fair disclosure of ERISA-specific information and documents and information pertaining to the corporate malfeasance alleged in the Complaint. In addition to Plan documents, Defendants' production included materials presented to Merrill's Board of Directors bearing on the riskiness of Merrill stock, and documents, including minutes and presentations, relating to the work of the Committees whose members are named as fiduciaries in the Complaint;

b. 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., et al.*, 08-4066 (Del. Ch.);

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

d. Review and analysis of the millions of pages of documents that the document discovery process yielded;

e. Analysis of transcripts of depositions taken of key witnesses in the merger litigation; and,

f. Seven detailed and lengthy interviews of certain key fiduciary Defendants and current and former high level Merrill executives.

20. 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—and did in fact 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 are substantially different from those required of the plaintiffs in the related cases, coordination was helpful, to be sure, but did not obviate the need for our substantial discovery efforts.

21. Co-Lead Counsel and additional Plaintiffs' Counsel ultimately expended thousands of hours on efforts related to confirmatory discovery.

D. Settlement Negotiations

22. Although the Settlement in this case came at an early stage, Plaintiffs conducted themselves reasonably in negotiating a settlement, and conducted thorough discovery thereafter which has confirmed the adequacy and reasonableness of the Settlement.

23. 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.

24. Co-Lead Counsel learned, on or about December 10, 2008, that Defendants were interested in a potential global settlement of the Securities and ERISA Actions.

25. Plaintiffs insisted that any settlement of the ERISA Action be negotiated independently, including the amount at which it should be settled. Plaintiffs' position was resisted with repeated reminders that Merrill was prepared to settle the Securities Action alone if a satisfactory resolution of the ERISA Action could not be achieved. The ultimate settlements bear out that this was no bluff; the settlement of the Securities Action is not contingent on the final approval of the ERISA Action, but the settlement of the ERISA Action is contingent on the ultimate approval of the Securities Action. Settlement Stip. ¶ 8.1.6. However, to assure that the ERISA claims were fairly valued, Co-Lead Counsel insisted on dealing separately with the Defendants.

26. The Parties participated in settlement conferences during December 2008. Co-Lead Counsel met separately with representatives of Merrill and the Individual Defendants and participated in countless telephone conferences.

27. We also arranged for the production of data necessary to estimate damages under a variety of scenarios as well as key Investment Committee minutes, and conditioned any resolution upon Plaintiffs' satisfaction with subsequent confirmatory discovery. A period of intense negotiation ensued.

28. During this time, as part of the settlement negotiation and confirmatory discovery process, Co-Lead Counsel consulted with experts, obtaining information from them concerning damages and accounting issues, as well as the appropriate blockage discount to use for the Plan of Allocation.

29. Plaintiffs and Co-Lead Counsel independently determined both an initial demand and the Settlement value of the ERISA Action and negotiated intensively, albeit over a

compressed period of time, for the best possible number that could be achieved at this stage of the litigation consistent with their view of the case.

30. Merrill was steadfast in its insistence that an agreement in principle had to be reached before the end of the year and the scheduled closing of the merger with Bank of America, and, if no such agreement could be reached, that Defendants were prepared to go forward with a separate Securities settlement if one could be reached; any ERISA settlement, however, had to be contingent on approval of a Securities settlement.

31. After personal meetings and countless telephone calls, a settlement number was tentatively agreed to at the end of 2008 and the term sheet was agreed to on January 7, 2009 setting out an agreement in principle, and the Court was informed that a settlement had been reached contingent on the Parties' ability to agree to a detailed stipulation of settlement consistent with the term sheet.

32. The Settlement Stipulation, itself the result of extensive negotiations of its detailed provisions, was agreed to on February 27, 2009. On that day, 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.

33. Throughout the Settlement negotiations, Plaintiffs were acutely aware that the lifeline thrown Merrill by Bank of America's September 15, 2008 agreement to buy the Company was a tenuous one. Continuing financial deterioration for Merrill and 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. The very riskiness

of Merrill's balance sheet identified in the Complaint,[3] together with the unprecedented turmoil experienced in the financial system, made continuing the litigation a doubtful gamble on Merrill's future.

34. 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 (according to 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 in January 2009. 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; Grant McCool & Jonathan Stempel , *U.S. Pressured B of A to Complete Merrill Deal*, Reuters, Apr. 23, 2009.

35. Plaintiffs foresaw this weakness. The Complaint lamented the continued riskiness of non-subprime related assets on Merrill's balance sheet and identified the most immediate threat to Merrill's survival as the possibility that the merger with Bank of America might not close. Complaint ¶¶ 339-344. But Merrill's continued existence as a separate subsidiary entity meant that the merger did not end the risk. As a key term of the Settlement, Plaintiffs negotiated the prompt escrow of the settlement consideration to minimize the threat that a Merrill bankruptcy posed to the prospects for a recovery. A decision to delay settling in the hopes of a greater recovery later, whether through settlement or trial, would have been an inappropriately risky bet on Merrill's mid- and long-term survival, one dependent on the shape of future federal strategies to preserve the financial system. Repeatedly, Merrill has shown itself unable to stand

[3] *See, e.g.,* Complaint ¶¶ 122, 125, 142-149.

on its own feet in the face of deteriorating market conditions without support from both Bank of America (whose capital to support Merrill's illiquid assets are far from unlimited) and the federal government. It would be irresponsible for Plaintiffs to assume that such support will necessarily continue throughout the course of continued litigation which, with appeals, could last many years.

36. In sum, after significant investigation and analysis of Plaintiffs' claims and further intense legal analysis of the strength and weaknesses of the case in connection with Plaintiffs' preparation of their opposition to Defendants' motion to dismiss, as well as the settlement negotiations and consultation with experts, Plaintiffs believe they had a strong base from which to properly evaluate the strengths and potential weaknesses of the case and the value of the lawsuit.

E. Terms of the Settlement

37. This is a global settlement resulting in a release of claims against all Defendants that will bring this litigation to a close. The principal terms of the Settlement, which are described in the Settlement Stipulation previously filed with and preliminarily approved by the Court and attached as Exhibit 1 to the [proposed] Final Order and Judgment, are summarized as follows:

1. Settlement Class

38. The Settlement Stipulation contemplates that the Court will certify the following settlement class under Fed. R. Civ. P. 23(b)(1) and (b)(2):

> (a) all current and former participants and beneficiaries of any of the Plans whose individual Plan account(s) included investments in Merrill Lynch stock at any time during the Class Period[4] and (b) as to each Person within the scope of subsection (a) of this Paragraph 1.3, his, her or its beneficiaries, alternate payees

[4] Defined as September 30, 2006 through December 31, 2008.

> (including spouses of deceased Persons who were participants of one or more of the Plans), Representatives and Successors-In-Interest, provided, however, that the Class shall not include any Defendant or any of their Immediate Family, beneficiaries, alternate payees (including spouses of deceased Persons who were Plan participants), Representatives or Successors-In-Interest, except for spouses and immediate family members who themselves are or were participants in any of the Plans, who shall be considered members of the Class with respect to their own Plan accounts.

a. Settlement Amount

39. Under the Settlement, Defendants will pay a Settlement Amount of $75 million. The Settlement Amount was placed in an interest-earning account following the Court's entry of the Preliminary Approval Order and now constitutes what is referred to as the "Settlement Fund." The Settlement Fund, less Court-approved attorneys' fees, expenses and case contribution awards to the Named Plaintiffs, will, if the settlement is finally approved and such approval becomes non-appealable, be distributed to the Plans for allocation to the accounts of Class members. Settlement Stip. ¶¶ 3.1-3.4.

b. Released Claims

40. Plaintiffs release their and the Class's ERISA claims against the Defendants and certain associated entities arising during the Class Period. Settlement Stip. ¶¶ 2.1-2.4.

c. Plan of Allocation

41. The Net Proceeds will be allocated to Plan accounts of Class members pursuant to a detailed Plan of Allocation that is being submitted to the Court for approval. The proceeds of the Settlement are in addition to amounts the Plans might receive pursuant to the settlement of the Securities Action. Settlement Stip. ¶ 2.4 ("[a]mounts paid under the *Settlement* shall not constitute an offset or credit with respect to amounts to be paid in settlement of the Securities Action, nor shall amounts paid in settlement of the Securities Action constitute an offset or credit with respect to amounts payable in the Settlement."). The Plan of Allocation that Plaintiffs

request the Court to adopt is attached to the [Proposed] Order and Final Judgment as Exhibit 2, and it is discussed below in Section VI. In general terms, the Net Proceeds will be allocated to Class members on a pro rata basis such that the amount received by each Class member will depend on his or her calculated loss, relative to the losses of other Settlement Class members, resulting from the Plans' investments in Merrill Lynch stock. In this way, the Plan of Allocation will distribute the Net Proceeds equitably based upon each Class member's estimated loss.

d. Confirmation

42. The Settlement is contingent on Co-Lead Counsel's "written confirmation after completion of … confirmatory discovery … that the confirmatory discovery was adequate and that the Settlement is fair, reasonable and adequate," Settlement Stip. ¶ 8.1.3[5], and is contingent on the final approval of the settlement in the Securities Action. Settlement Stip. ¶ 8.1.6.

III. THE FORMS AND METHODS OF NOTICE EMPLOYED HERE SATISFY RULE 23 AND DUE PROCESS

43. In accordance with the Preliminary Approval Order, the Settlement Class has been provided with ample and sufficient notice of this Settlement, including an appropriate opportunity to voice objections. The notice plan fully informed Settlement Class members of the lawsuit and the proposed Settlement, and enabled them to make informed decisions about their rights.

44. The Parties' notice plan, as approved by the Court and implemented by Co-Lead Counsel, consisted of: (a) mailing of the Class Notice on April 6, 2009 to more than 70,000

[5] Written confirmation that confirmatory discovery was complete and such discovery was adequate and the Settlement is fair, reasonable and adequate was provided to Defense Counsel on June 26, 2009.

class members at their last known addresses provided by Defendants[6]; (b) the Publication Notice appeared in The New York Times and was issued over the Business Wire on April 6, 2009, *See* Keough Decl. ¶¶ 10-11 and Exhibits B and C thereto; and (c) creation of a dedicated website administered by Co-Lead Counsel to provide information to Settlement Class members as well as a toll-free telephone number that Class members may call (and in fact, have called) to obtain information regarding the Settlement.

45. The Class Notice provided detailed information about the Settlement, including: (a) a comprehensive summary of its terms; (b) notice of Co-Lead Counsel's intent to request attorneys' fees, reimbursement of expenses, and case contribution awards for the Named Plaintiffs; and (c) detailed information about the Released Claims. In addition, the Class Notice provided information about the Fairness Hearing date, Settlement Class members' rights to object (and deadlines and procedures for objecting), and the procedure to receive additional information. The Class Notice provided Class members with contact information for Co-Lead Counsel, information on the toll-free phone number and an e-mail address for inquiries, and a website address for further information. The Publication Notice summarized the above information for purposes of publication.

46. The notice forms and methods used here are substantially similar to those successfully used and approved by courts in many other ERISA class settlements and satisfy the requirements of due process and Rule 23.

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[6] The spreadsheet containing the list of class members and their last known addresses was provided by defense counsel to Co-Lead Counsel on March 30, 2009. We, in turn, forwarded that spreadsheet, without revision, to The Garden City Group, for use in preparing the Class Notice mailing. *See* Declaration of Jennifer M. Keough re: Notice Dissemination and Publication ("Keough Decl."), attached as Exhibit A hereto, ¶¶ 3-6.

IV. THE SETTLEMENT WARRANTS THE COURT'S APPROVAL

47. We briefly review the record in support of each of the following nine factors used by the Second Circuit in *Grinnell*[7] in considering the fairness, reasonableness and adequacy of a proposed settlement: (a) the complexity, expense and likely duration of the litigation; (b) the reaction of the class to the settlement; (c) the stage of the proceedings and the amount of discovery completed; (d) the risks of establishing liability; (e) the risks of establishing damages; (f) the risks of maintaining the class action through the trial; (g) the ability of the Defendants to withstand a greater judgment; (h) the range of reasonableness of the settlement fund in light of the best possible recovery; and (i) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

A. The Complexity, Expense, and Likely Duration of the Litigation

48. In addition to involving scores of potential witnesses, more than 70,000 participants in the three Plans, more than 38 million pages of documents produced in confirmatory discovery, this case presented complex factual and legal issues against the backdrop of a fast-developing and hotly disputed area of the law.

49. Given that the law is developing, 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.[8] Co-Lead Counsel believe the claims in this case are solidly grounded in ERISA law, but it is beyond debate that the issues are complex.

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[7] *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974).

[8] Indeed, as of the date of this motion, only four of these cases have been to trial and in each case, the defendants prevailed.

50. Plaintiffs' claims raise a host of contested legal and factual issues under ERISA, which would require extensive expert discovery and testimony to resolve. This was true of both the ERISA issues and the complicated underlying issues surrounding Merrill's exposure to subprime related CDOs, real estate assets, off balance sheet derivatives and guarantees, as well as credit default swaps ("CDSs"), some of which were used as hedges that turned out, at least in hindsight, to have been ineffective due to counterparty default risk.

51. Fundamental to a resolution of this litigation is a determination of whether Merrill's continued exposure to extraordinarily complex instruments, both CDOs and CDSs, are more appropriately viewed as a reasonable but ultimately unsuccessful risk management strategy, as Defendants contend, or more realistically seen as an independent and inadequately disclosed source of risk to Merrill's balance sheet that contributed to making Merrill shares both inflated in price and inappropriately risky.

52. Likewise, determining the degree to which Merrill's balance sheet as a whole contained unacceptable levels of risk promised to be a difficult and hotly contested subject, with Merrill insisting that many of their businesses remained sound, most of their risk was carefully hedged, and that only an unprecedented and unforeseeable collapse of the real estate market that devastated its holdings and counterparties made Merrill appear to be weak.

53. Similarly, 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 meant that Plaintiffs needed to structure their arguments and proofs to present multiple avenues to recovery.

54. Thus, 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.

55. Establishing damages would also require complex assessments and expert testimony. 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 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.

56. Assuming that the case survived Defendants' motion to dismiss, the Parties stood at the very beginning of a long and costly litigation process, with class certification, discovery, motions for summary judgment, trial and appeals all ahead of them.

B. The Class's Reaction to the Settlement

57. The Named Plaintiffs were kept informed of the settlement negotiations with the Defendants throughout the negotiating process. They all support the Settlement without qualification. *See* Declarations of Carl Esposito, Barbara Boland, Alan Maltzman and Mary Gidaro, attached as Exhibits B through E hereto.

58. Between March 31, 2009 and June 24, 2009, Co-Lead Counsel have responded to 229 telephone and 62 email inquiries from 219 Class Members or potential Class Members and the Settlement website has had 1,589 hits.

59. Furthermore, in response to the more than 70,000 Class Notices that were mailed, as well as the Publication Notices, Plaintiffs have received only one objection, from David A. Cross, who does not object to the Settlement, but only to maximum potential attorneys' fees stated in the Class Notice of 27.5%, which is more than Plaintiffs request here. In addition, as discussed in the Memorandum of Law in Support of Plaintiffs' Motion for Award of Attorneys'

Fees, Expenses, and Case Contribution Awards (the "Fee Memo") and in more detail in § VII(E) below, Mr. Cross recognizes that a multiplier of up to 3.0 is appropriate in complex cases such as this one. A copy of Mr. Cross's objection is attached as Exhibit F hereto.

60. Under the provisions of the Preliminary Approval Order and the Class Notice, the deadline for filing and service of objections is July 6, 2009. Co-Lead Counsel will respond to additional objections, if any, that are filed and served before this deadline on or before July 20, 2009, and will post these responses on the Settlement website.

C. The Stage of the Proceedings and Discovery Completed

61. We were mindful of the early stage of the litigation at the time the Settlement was reached. Consequently, the Settlement was made contingent on Co-Lead Counsel's confirmation of the fairness, adequacy, and reasonableness of the Settlement after extensive confirmatory discovery. Settlement Stip. ¶ 8.1.3.

62. That confirmatory discovery has included the production of over 38 million pages of documents, including those produced by Merrill in regulatory investigations, materials presented to Merrill's Board of Directors bearing on the riskiness of Merrill stock, and documents, including minutes and presentations, relating to the work of the Committees whose members are named as fiduciaries in the Complaint.

63. In addition, Co-Lead Counsel participated in a proffer conducted by Merrill's in house counsel setting out Merrill's view of the evidence, and in seven interviews, including of Merrill's CEO, CFO, two Co-Presidents, the Investment Committee member who our document review indicated was the best informed about Merrill's financial condition and subprime/CDO exposure, and the individual who served as Secretary to the Investment Committee, was a member of the Administrative Committee and performed the duties of the Administrative Committee.

64. As a consequence, we developed a comprehensive understanding of the key legal and factual issues in the case, have a clear view of the strengths and weaknesses of this case, and are keenly aware of the range of possible outcomes at trial. While this understanding was partial at the time the Settlement was entered into, it was no longer so when Plaintiffs determined finally to recommend the approval of the Settlement to the Court.

D. The Risk of Establishing Liability

65. In Plaintiffs' view, the Defendants were Plan fiduciaries who, as a result of their inattention, failed to protect the participants from preventable losses. Nonetheless, this case is fraught with risk at every turn.

66. First, ERISA company stock cases involving 401(k) plans are quite new. The first pioneering cases were not filed until the late 1990s. While a substantial body of cases decided on motions to dismiss, as well as cases on class certification have been decided, the results of these cases are decidedly mixed. See ¶ 49 above.

67. Second, Defendants have raised and (if the case continued in litigation) can be expected to raise a host of defenses, any one of which, if successful, might end or severely limit Plaintiffs' case. A brief review of some of Defendants' major contentions, without fully rehearsing Plaintiffs' rebuttal, suffices to illuminate the serious litigation risks faced by the Class:

a. Defendants maintained, with great vigor, that Merrill stock was "hardwired" into Merrill's Plans as a matter of plan design, required to be offered as an investment alternative, and that because the Defendant fiduciaries had no power to remove or restrict it, they could have no liability. While Plaintiffs disagree with the reading of the Plans' documents and argue, with substantial support from the case law, that plan documents cannot relieve fiduciaries of all responsibility for an investment decision, Defendants claim support for their legal position[9];

b. Defendants argued entitlement to a presumption that the investment in Merrill stock was prudent. The presumption calls for use of an abuse of discretion standard in reviewing decisions to continue investing in employer stock where the relevant plan document embodies a settlor's intent that employer stock continue to be held and offered. Plaintiffs contend that the presumption, if it applies, can be overcome by evidence that stock is inflated by misinformation or evidence that the stock is exceptionally risky. Again, while there is significant authority in support of Plaintiffs' position, Defendants claim support for the view that the presumption bars Plaintiffs' claims. The Second Circuit has not yet addressed whether it will adopt the presumption. Elsewhere, there is controversy over scope and application of the presumption, and Defendants reasonably claim to have some support for their position;

c. Defendants contend that the facts pled in the Complaint, particularly as they relate to the contention that Merrill stock was inappropriately risky, even if the price was not inflated, amount to little more than a disguised duty to diversify claim foreclosed by ERISA. Plaintiffs argue that the Plans' fiduciaries, even if not subject to a diversification requirement, violated ERISA's prudence standard by continuing to hold Merrill stock and purchasing additional shares when the stock had become inappropriately risky. Explicit support exists in the case law for the proposition that

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[9] The evidence from confirmatory discovery is generally consistent that the Investment Committee did not understand that considering the Plans' investment in Merrill stock was its responsibility. Defendants claim that this view is consistent with their position that the stock was indeed "hardwired" into the Plans through Plan document provisions.

risk alone is a sufficient reason to forgo an investment in employer stock, but Defendants would be able to cite authority that they claim casts doubt on Plaintiffs' position;

d. Defendants also argue that the red flags identified in the Complaint were not, as Plaintiffs argue, sufficient to trigger an investigation by Plan fiduciaries to determine whether Merrill stock was overvalued. They argue that the red flags involved publicly available information that had been adequately addressed by Merrill in its public disclosures and that the stock price already reflected that information. Plaintiffs argue that the facts alleged in their detailed Complaint are more than sufficient to withstand a motion to dismiss, but the possibility remains that this Court might agree with Defendants at the motion to dismiss stage or a later stage of the proceedings. While Plaintiffs contend that the Complaint clearly sets forth reasons why Defendants should have investigated whether Merrill stock was overvalued, Defendants would claim that clear legal guidance is lacking on when "red flags" are sufficient to trigger an investigation and that the allegations of the Complaint in this regard are insufficient;

e. Defendants argue that Plaintiffs' theory of the case would require them to have traded on inside information to liquidate the Plans' holdings of Merrill stock. While Plaintiffs believe this distorts their position (which would permit Defendants to make any required public disclosure before selling Merrill stock). The potential effect on the price of Merrill stock (and the losses in this case) of any legally required public disclosures is unclear;

f. Defendants argue that neither Merrill nor Defendant O'Neal acted as fiduciaries. While Plaintiffs allege that both O'Neal and Merrill were *de facto* fiduciaries, there is significant risk, that the Court either would determine that the proof is insufficient to establish their fiduciary status or would hold that their fiduciary roles were so limited that they could not be held liable for the violations alleged in the Complaint;

g. Defendants claim that the Plans were participant directed in compliance with ERISA § 404(c), and, consequently, participants, not Defendants, bore responsibility for the losses that occurred. Plaintiffs believe that this defense is not applicable to claims that fiduciaries maintained imprudent Plan investment options and that non-compliance with the specific regulatory requirements of § 404(c) will, in any event, vitiate the defense. However, Defendants would likely cite to recent case law in support of their view that the potential § 404(c) defense is a significant risk to Plaintiffs in this case; and,

h. Defendants claim that Plaintiffs' allegations of improper disclosure to participants, even if proven, support liability only if individual reliance is shown. Again, while Plaintiffs dispute this as a legal matter, Defendants claim that there is support for their position in the case law.

68. In addition to Defendants' legal arguments, many of which are addressed in detail in the motion to dismiss briefing, in the course of discussions with Co-Lead Counsel, Defendants have outlined a spirited factual defense to Plaintiffs' claims. Defendants insist that Merrill's leadership, as well as the most knowledgeable Investment Committee members, had no reason to think that Merrill's subprime related CDO positions posed a meaningful threat to Merrill's financial condition until around September 2007.

69. Defendants assert that Merrill was a well-run company adversely impacted by an unprecedented, and more important, unpredictable collapse in financial markets that affected each of Merrill's peers. They contend that Merrill took significant and appropriate steps to limit its exposure to subprime mortgages during the Class Period including slowing down subprime originations at First Franklin, securitizing Merrill's subprime exposure into CDOs, retaining only the AAA rated tranches of the CDOs, and hedging 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) arguably could have concluded that Merrill was in danger of potential 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.

70. 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 ongoing 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. 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.

71. While Plaintiffs assert that Merrill posed an extraordinary risk throughout the Class Period, Merrill will undoubtedly claim that the risk was particularly acute during a short window leading to its sale to Bank of America, thus suggesting that there was no risk of "imminent collapse" except during that limited time period. Were the case litigated, the Parties would present dueling experts on the question of when the stock became too risky or ceased being too risky to serve appropriately as an investment vehicle. This defense would proceed separately from Defendants' legal argument that risk is simply irrelevant.

72. In addition to the specific issues discussed above, Plaintiffs would, of course, face the host of risks presented in any complex litigation of this type if the case were to go forward.

E. The Risk of Establishing Damages

73. As discussed in Section IV(C)(4)(b) of the Final Approval Memo, ERISA requires breaching fiduciaries to make good to the plan the difference between prudent plan alternatives and the challenged imprudent investment. No company stock ERISA case has been tried to a successful conclusion, however, and, accordingly, no court has definitively applied a damage measure to a case such as this after trial. This void, coupled with the Defendants' vigorous and creative defense of the damage aspects of the case, created risk for the Plaintiffs.

74. Further, damage calculations in ERISA cases like these are computer- and expert-intensive. The proof requires a computer model of the plans, tracking the plans' holdings of company stock, often on a daily basis, and the returns those holdings generate. This data is then compared with the performance of alternative investments on specified breach dates, subject to various additional factors and assumptions, such as the size of the plans' holdings compared to the market as a whole. The expert must create the model, test it, use it, and effectively explain it. In addition, in making these calculations, complex determinations need to be made about the precise period during which the investment in employer stock was imprudent, and the proper investment alternative to use as a comparison.

75. In addition to challenging Plaintiffs' methodology of computation, Defendants' position, more fundamentally, is that there were no damages attributable to them in this case. According to Defendants, the Plans' losses were not attributable to any misconduct on their part, but to the systemic weaknesses of the financial system that were unpredictable in timing and severity and that undermined the stock price of Merrill just as it undermined the stock price of Merrill's peers in the financial services industry.

76. The Defendants also argue that, even if the imprudence of Merrill stock as a Plan investment could be established, the "breach date," or date when the Defendants knew or should have known that they were acting imprudently by offering Company stock as a retirement investment, did not occur until August or September 2007 and that any issue of possible imprudence was resolved by disclosures made by Merrill in October 2007. Consequently, according to Defendants, the damages in the proposed Class Period would be minimal or eliminated altogether.

77. With respect to breaches in 2008, Defendants contend that only during a tiny window of a few days in September 2008 could it plausibly be argued that Merrill's survival was understood to be at risk so that maintenance of employer stock in the Plans could be viewed as imprudent.

78. They further argue that the post-sale rebound in the shares destroys any argument that fiduciary failure to take action in this window caused any loss.

79. Another argument that could significantly reduce damages is the contention that "holder" damages are unavailable. The lion's share of damages sought in this case is for claims that the Plans should not have continued to hold Merrill stock. ERISA defendants often dispute the availability of relief for "holder" losses because, in their view, the securities laws would have prevented them from divesting the plans of the stock without first publicly disclosing the adverse information making the stock imprudent, and had such disclosure been made, the stock price would have dropped, and the plans would have suffered the same loss that occurred when the allegedly improper practices came to light. Plaintiffs strongly disagree with this analysis as it presumes that ERISA (and the securities laws) countenance the Plans' fiduciaries taking no action to protect the Plans where the shares remain inappropriately risky even after disclosure. Nonetheless, Plaintiffs recognize that holder damages are sharply attacked by the defense bar, including Defense Counsel in this case, and that the law is unsettled in this area.

80. Additionally, Plaintiffs face arguments that damages should be measured using an alternative to the *Donovan* best plan alternative measure – one based on the "price inflation" of Merrill stock in the Class Period, which could reduce significantly or eliminate damages. *See* Final Approval Memo § IV(C)(4)(b).

F. The Risk of Maintaining the Class Action Through Trial

81. Defendants would have been expected to mount a vigorous opposition to class certification, challenging not only Plaintiffs' disclosure count but taking an overall position that, in the litigation context, claims for losses to retirement accounts are inherently individual and should not be certified. *See* Final Approval Memo § V.

G. The Ability of Defendants to Withstand a Greater Judgment

82. Because of a buyout by Bank of America and ongoing support from the federal government for both Bank of America and Merrill Lynch, Merrill Lynch (which indemnified the other Defendants in this case) was in a position to make a payment into the Settlement Fund pursuant to the Stipulation.

83. In settling the case, Plaintiffs were mindful that Merrill is an independent subsidiary of Bank of America that as a separate entity can be insolvent even if Bank of America remains an ongoing entity. Consequently, there is a risk that Merrill could fail even if its parent survives. That this is real, as assessed by the market, is illustrated by the sometimes sharply different dividend yields for Merrill preferred stock versus Bank of America preferred stock following the merger (for essentially the same securities with similar terms).[10] Attached hereto as Exhibit G is a chart comparing the different yields, entitled "Yield Differential Post Merger between Merrill Lynch (MER-E_ and BofA (BAC-B) Preferred."

[10] The prospectuses for MER-E and BAC-B show that the two securities have the same capital structure and substantially the same terms; both are callable, have a $25 liquidation amount, pay a fixed dividend on a quarterly basis (3/30, 6/30, 9/30 & 12/30), are cumulative, and are senior to the government's investment.

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

84. The Settlement came in time to avoid the risks posed by a motion to dismiss and provides for the disposition of a 75 million dollar cash settlement fund already paid into escrow.

85. By the standards of this type of litigation, the recovery here is very sizeable: it is only the fifth ERISA company stock case settlement that exceeds $70 million. *See* www.ERISAsettlements.com. Judged by any standard, however, this is a significant achievement in these trying economic times.

86. If the Court were to accept Plaintiffs' proposed breach dates, and accept Plaintiffs' view of recoverable holder damages, thus giving Plaintiffs a total victory on each aspect of damage calculation, damages in this case could have been greater than three billion dollars. If, however, Plaintiffs were unable to establish a breach date until later in the Class Period, if the window for damages was closed in October 2007, and/or if holder damages were disallowed or reduced to reflect the effect of securities-law mandated disclosure, the potential recovery would have dropped dramatically and could have vanished.

V. CLASS CERTIFICATION

A. Class Certification is Warranted Here

87. As explained in Section V of the Final Approval Memo, certification of the following Class under Rule 23(b)(1) and (2) is warranted here:

> (a) all current and former participants and beneficiaries of any of the Plans whose individual Plan account(s) included investments in Merrill Lynch stock at any time between September 30, 2006 and December 31, 2008, inclusive and (b) as to each Person within the scope of subsection (a) of this Paragraph, his, her or its beneficiaries, alternate payees (including spouses of deceased persons who were participants of one or more of the Plans), Representatives and Successors-In-Interest, provided, however, that the Class shall not include any Defendant or any of their Immediate Family, beneficiaries, alternate payees (including spouses of deceased Persons who were Plan participants), Representatives or Successors-In-Interest, except for spouses and immediate family member who themselves are or

were participants in any of the Plans, who shall be considered members of the Class with respect to their own Plan accounts.

B. Co-Lead Counsel Easily Meet the Requirements of Rule 23(g)

88. Co-Lead Counsel have made extensive efforts in successfully prosecuting this case and in achieving this Settlement, and believe we satisfy the dictates of Rule 23(g).

89. We have prepared a detailed and thorough Complaint, extensively briefed the many complex and novel issues in this case, conducted extensive confirmatory discovery, worked closely with experts, and engaged in hard-fought and ultimately successful negotiations with Defendants.

90. Co-Lead Counsel include some of the preeminent ERISA class action attorneys in the country with years of experience in ERISA law and in prosecuting and trying complex actions. Co-Lead Counsel are experienced in ERISA litigation, and have litigated numerous cases involving allegations that investments in employer stock within defined contribution and 401(k) plans were imprudent and inadequately disclosed. *See, e.g.*, § VIII(D), *infra*, and Exhibits H and I hereto. Our experience and skill are demonstrated by the effective prosecution of this action, including the identification, investigation, and prosecution of the claims in this action, and by the substantial Settlement entered into with Defendants.

VI. THE PROPOSED PLAN OF ALLOCATION SHOULD BE APPROVED

91. The proposed Plan of Allocation, attached as Exhibit 2 to the [Proposed] Order and Final Judgment, reflects our informed consideration of the relevant legal and factual matters pertaining to the Class members' claims. It provides recovery to Class members, net of administrative expenses and net of attorneys' fees and expenses that the Court may choose to award. We have prepared similar plans for numerous other cases.

92. Defendants had no role in formulating the Plan of Allocation, nor do funds "revert" to Defendants as a result of it.

93. As stated in the Class Notice, the Net Proceeds will be allocated to Class members on a *pro rata* basis such that the amount received by each Class member will depend on his or her calculated loss, relative to the losses of other Class members, related to the Plans' investments in Merrill stock. In determining the loss for purposes of the Plan of Allocation, it is assumed that all Merrill stock held by the Plans was liquidated at the outset of the Class Period and yielded to the Plans 84% of the aggregate value of that stock based on its public price on the last day before the commencement of the Class Period.[11] It is further assumed that no further purchases of Merrill stock were made during the Class Period. The deemed liquidation amount and the dollar amount of actual Class Period purchases of Merrill stock are then compared to the actual proceeds received by a participant with respect to his or her investment in Merrill stock during the Class Period plus the value of the Merrill stock held immediately after the end of the Class Period, and any shortfall is the calculated loss.

94. Payments will be made by crediting the accounts of active Plan participants with the appropriate amount and by creating or re-creating an account for Class members who are no longer active participants, and then crediting their accounts in the same manner. This is substantially the same methodology used in other company stock ERISA cases, including *Enron*, in which the private litigants were joined by the DOL as a plaintiff. In all those cases, the methodology was employed without objection from the DOL and any independent fiduciary, and was approved by the court.

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[11] 84% is used rather than 100% to reflect the discount that would result from a sale of a large block of Merrill stock such as that held by the Plans and any associated disclosure. Co-Lead Counsel concluded that this discount was reasonable based on consultation with an expert retained to consider the issue.

95. We believe that the proposed Plan of Allocation is fair, reasonable and not unduly complicated or expensive and accordingly urge the Court to adopt and approve it.

VII. TIME AND EFFORT DEDICATED TO THIS CASE

96. Co-Lead Counsel and additional Plaintiffs' Counsel, defined below, devoted more than 18,268 attorney and professional hours to the prosecution of this case.

97. We have gathered and reviewed time and expense reports of our firms, as well as time and expense reports from the following additional Plaintiffs' Counsel: Gainey & McKenna; Harwood Feffer LLP; Law Offices of Curtis V. Trinko, LLP; Lockridge Grindal Nauen P.L.L.P.; Milberg LLP; Shalov Stone Bonner & Rocco LLP; Spector, Roseman Kodroff & Willis PC; Stember Feinstein Doyle & Payne, LLC; and Zimmerman and Reed, PLLP.

98. In the Fee Memo, Plaintiffs seek an award of fees and expenses only on behalf of Co-lead Counsel and the additional Plaintiffs' Counsel listed immediately above, who are the firms that (a) performed work on the case pursuant to direction of or approved by Co-Lead Counsel; and (b) 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.

99. Co-Lead Counsel and additional Plaintiffs' Counsel identified herein 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 herein.

100. Co-Lead Counsel allocated the work in this case to maximize efficiency. We assigned tasks based on a number of considerations, with the goal of minimizing duplication of effort. If Co-Lead Counsel had not been stringent in these efforts, the number of hours devoted to the case would have been much higher. In addition, we carefully assigned work (within our

own firms and to the others involved) to minimize the fees in the case; thus, senior attorneys did not do the work that could be accomplished by more junior attorneys, and attorneys did not do work that could be completed by paralegals. Throughout the litigation, we balanced our resources—within our individual firms and also among all of the firms—and made sure that we litigated the action in the most efficient method.

101. Since the inception of this case, in accordance with their normal business practices, Co-Lead Counsel and additional Plaintiffs' Counsel have and do maintain detailed and contemporaneous records of the time spent by their lawyers, law clerks, paralegals and certain other personnel on this action. Our timekeepers have been and are required to keep daily time-records, both noting amounts of time spent on projects and providing descriptions of that work. These records then are computerized, checked, and maintained in databases. These systems allow us to be confident that the hours reported for this case are accurate.

102. The schedules attached as Exhibits J and K hereto summarize the time spent by Keller Rohrback attorneys and other professional support staff in this litigation and the lodestar calculation based on the firm's current billing rates from the inception of the case though June 19, 2009. For personnel who are no longer employed by the firm, the lodestar calculation is based upon the billing rates for such personnel in his or her final year of employment by Keller Rohrback L.L.P.

103. The schedule attached as Exhibit L is a summary of time spent by Cohen Milstein Sellers & Toll PLLC's attorneys and other professional support staff in this litigation and the lodestar calculation based on the firm's current billing rates from the inception of the case though June 19, 2009. For personnel who are no longer employed by the firm, the lodestar

calculation is based upon the billing rates for such personnel in his or her final year of employment.

104. Attached as Exhibits M through U are the Declarations of additional Plaintiffs Counsel in support of Plaintiffs' Motion for Award of Attorneys' Fees, Expenses, and Case Contribution Awards, attesting to their hours and expenses in this litigation.

105. The hourly rates charged by Co-Lead Counsel and additional Plaintiffs' Counsel in this case are the rates that have been or could be charged as usual and customary hourly rates for their work performed for non-contingency fee clients and in other class action cases. Counsels' hourly rates have been paid by hourly clients and/or, separately, approved for payment by federal and state courts in other class and derivative litigations, for many years and throughout the time this litigation has been pending.

106. If these hours had been billed on a "straight" hourly basis (*i.e.*, no contingency and no risk of non-payment), the lodestar (hours times current billing rates) for this professional time would be approximately $6.5 million. On a firm-by-firm basis, the lodestar calculations are as follows:

Firm	**Hours**	**Lodestar**
Keller Rohrback L.L.P. & P.L.C.		
Attorneys	5519.55	$2,325,338.20
Professionals	2340.55	$459,252.25
Total	7860.1	$2,784,590.45
Cohen Milstein Sellers & Toll PLLC		
Attorneys	6191.50	$2,495,364.75
Professionals	1462.65	$305,481.5
Total	7654.15	$2,800,845.25
Gainey & McKenna		
Attorneys	309.25	$94,893.75
Professionals	12.85	$2,891.25
Total	322.10	$97,785.00

Firm	Hours	Lodestar
Harwood Feffer LLP		
Attorneys	211.30	$113,340.00
Professionals	75.00	$19,467.50
Total	286.30	$ 132,807.50
Law Offices of Curtis V. Trinko, LLP		
Attorneys	97.80	$53,567.00
Professionals	28.60	$5,148.00
Total	126.40	$58,710.00
Lockridge Grindal Nauen P.L.L.P.		
Attorneys	402.75	$128,143.75
Professionals	.75	$97.50
Total	403.50	$128,241.25
Milberg LLP		
Attorneys	195.00	$97,427.5
Professionals	55.25	$15,288.75
Total	250.25	$112,716.25
Shalov Stone Bonner & Rocco LLP		
Attorneys	94.75	$52,378.75
Professionals	321.75	$56,306.25
Total	416.50	$108,685.00
Spector Roseman Kodroff & Willis PC		
Attorneys	108.00	$61,168.75
Professionals	94.50	$17,482.50
Total	202.50	$78,651.25
Stember Feinstein Doyle & Payne, LLC		
Attorneys	14.50	$6,591.50
Professionals	0	0
Total	14.50	$6,591.50
Zimmerman and Reed, PLLP		
Attorneys	598.00	$212,168.25
Professionals	134.55	$20,903.50
Total	732.55	$233,071.75
TOTAL	18,268.85	$6,542,695.20

107. The lodestar figures are based on each firm's current billing rates and contemporaneous time records. For all firms, expense items are billed separately and such charges are not duplicated in a firm's billing rates.

108. Based on Co-Lead Counsel's and Plaintiffs' Counsel's collective lodestar, the $18,750,000 fee sought by Plaintiffs represents a multiplier of 2.8, which is well within the typical range for cases of this type.

109. Significant additional attorney hours will be necessary after June 19, 2009, the date as of which the above numbers were compiled, to complete the remaining work on this case. In addition to incurring hours in connection with the final approval hearing, 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.[12] 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.

VIII. THE RECORD FULLY SUPPORTS THE AWARD OF REQUESTED ATTORNEYS' FEES

110. Plaintiffs' Counsel seek an award of attorneys' fees in the amount of $6,542,695.20, a "multiplier" of approximately 2.8 and reimbursement of out-of-pocket litigation

[12] 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.

expenses of $372,312.94. In addition, we request that the Court grant case contribution awards of $5,000 each to Named Plaintiffs, Carl Esposito, Barbara Boland, Alan Maltzman, and Mary Gidaro in recognition of their valuable service to the Class.

111. We briefly review the record in support of each of the following six factors used in considering the reasonableness of the proposed fee application:

a. the time and labor expended by counsel;

b. the magnitude and complexities of the litigation;

c. the risk of the litigation;

d. the quality of representation;

e. the requested fee in relation to the settlement; and

f. public policy considerations.

A. The Time and Labor Expended By Counsel

112. Co-Lead Counsel and the additional Plaintiffs' Counsel identified herein have dedicated enormous efforts to this case since it was filed. *See, e.g.*, ¶¶ II(A)-(D) above. Having served in leadership positions in similar cases, we 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. In all, Co-Lead Counsel and the additional Plaintiffs' Counsel identified herein devoted more than 18,268 hours to the successful prosecution of the action, and advanced expenses in the amount of $372,312. *See* §§ VII and IX herein.

113. Co-Lead Counsels' efforts were conducted efficiently and with cost-savings in mind. Work was assigned to lawyers in areas in which they had experience. Where feasible, work was assigned to associates and paralegals with lower billing rates, to provide quality work

at the lowest cost.[13] We took significant precautions to avoid duplication of effort, prevent unauthorized work, and ensure that areas of potential discovery deemed tangential were not pursued. 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.

B. The Magnitude and Complexities of the Litigation

114. As noted above, this case, even more than many other ERISA class action cases, was both enormous in scope and extremely complex and subject to both changing facts and a fast-developing and hotly disputed area of the law.

115. As discussed in Section IV above, 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 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 are 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.

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[13] 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 appears in ¶ 106 above, and is broken out by firm and timekeeper in Exhibits J through U hereto.

116. 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.

C. Risk of the Litigation

117. As noted above, the tangible risks faced by plaintiffs' counsel in ERISA fiduciary breach class actions, including this one, are substantial.

118. As an initial matter, ERISA company stock litigation is relatively undeveloped. 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. *See, e.g.*, ¶ 49 above. 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 increases the risk associated with litigating a complex case such as this one.

119. Turning to the specific risks presented by this litigation, there were many. As described in Sections IV(D)(1) through (3) above, there were risks of establishing liability and damages, and risks of maintaining class certification.

120. Plaintiffs' Counsel accepted this matter on a contingent basis, with the attendant risk that they would receive no fee or expense reimbursement. They therefore should be rewarded for overcoming the risks involved and bringing the case to a successful resolution.

D. The Quality of Representation

121. 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 spearheading company stock and other ERISA and class action cases over the years.

1. Co-Lead Counsel

122. As national leaders in pursuing this type of litigation, Co-Lead Counsel provided the necessary expertise garnered from their experience serving in leadership roles in what is now a total of over forty-three company stock cases in which they have dealt with similar factual and legal issues as those presented in this case.

123. In addition, recovery in this case would not have been possible without expertise in and relevant knowledge of insurance law, securities matters, accounting, and accounting fraud. Co-Lead Counsel possessed and demonstrated expertise in all of these areas in this action.

a. Keller Rohrback L.L.P.

124. Keller Rohrback has played a leading role in the development of this area of law by obtaining favorable landmark decisions and recovering over $900 million dollars on behalf of employees in this type of ERISA case. Keller Rohrback serves or has served in a leadership capacity in numerous prominent ERISA company stock cases filed throughout the country,[14] including several in within this Circuit alone.[15]

[14] The numerous ERISA breach of fiduciary duty class actions for which Keller Rohrback serves as lead or co-lead counsel are provided in the resume of Keller Rohrback's Complex Litigation Department, attached as Exhibit H hereto.

[15] *In re WorldCom, Inc. ERISA Litig.*, No. 02-4816 (S.D.N.Y. Jun. 21, 2002) (J. Cote); *In re Global Crossing ERISA Litig.*, No. 02-7453 (S.D.N.Y. Sept. 16, 2002) (J. Lynch); *In re Polaroid ERISA Litig.*, No. 03-8335 (S.D.N.Y. Oct. 22, 2003) (J. Pauley); *In re Marsh ERISA Litig.*, No. 04-8157 (S.D.N.Y. Oct. 15, 2004) (J. Kram); *In re Pfizer Inc. ERISA Litig.*, No. 04-10071 (S.D.N.Y.) (J. Swain); *In re AIG ERISA Litig.*, No. 04-8141 (S.D.N.Y. Oct. 15, 2004) (J. Sprizzo); *In re Bear Stearns Cos., Inc., Sec., Derivative & ERISA Litig.*, No. 08-1963

125. Keller Rohrback's work as lead counsel in ERISA cases has been widely praised. For example, in the WorldCom ERISA Litigation, in which Keller Rohrback served as Lead Counsel, Judge Cote found that:

> Lead Counsel has performed an important public service in this action and has done so efficiently and with integrity. It has cooperated completely and in novel ways with Lead Counsel for the Securities Litigation and in doing so all of them have worked to reduce legal expenses and maximize recovery for class members. Lead Counsel…has also worked creatively and diligently to obtain a settlement from WorldCom in the context of complex and difficult legal questions…. Lead Counsel should be appropriately rewarded as an incentive for the further protection of employees and their pension plans not only in this litigation but in all ERISA actions.

In re WorldCom, Inc. ERISA Litig., No. 02-4816, 2004 WL 2338151, at *10 (S.D.N.Y. Oct. 18, 2004).

126. Keller Rohrback's Complex Litigation and ERISA team is led by the firm's Managing Partner, Declarant Lynn Lincoln Sarko. Mr. Sarko received both his M.B.A. degree in accounting and law degree from the University of Wisconsin, where he served as Editor-in-Chief of the *Wisconsin Law Review* and was selected by faculty as the outstanding graduate of his class. He is a former Assistant United States Attorney and Ninth Circuit judicial law clerk (Hon. Jerome Farris). He has actively engaged in the prosecution of complex litigation for two decades. Mr. Sarko has served as lead or co-lead counsel in several leading ERISA cases, including the largest and most complex – the *Enron, WorldCom*, and *Global Crossing* cases – and numerous other cases. In these ERISA cases, Mr. Sarko has worked closely with the U.S. Department of Labor ("DOL") on numerous issues, has established relationships with many of the key experts in the field, and has worked extensively with counsel in parallel securities and derivative cases, and developed systems for effectively coordinating the discovery in these cases.

(S.D.N.Y Dec. 29, 2008) (J. Sweet); and *In re Xerox Corp. ERISA Litig.*, No. 02-01138 (D. Conn. Oct. 16, 2002).

127. In addition to his work as lead or co-lead counsel in these prominent ERISA cases, Mr. Sarko has prosecuted a variety of class actions involving high profile matters including the Exxon Valdez Oil Spill, the Microsoft civil antitrust case, the Vitamins price-fixing cases, the *MDL Fen/Phen Diet Drug Litigation*, as well as notable public service lawsuits such as *Erickson v. Bartell Drug Co.*, establishing a woman's right to prescription contraceptive health coverage. Aided in part by his M.B.A. in accounting, Mr. Sarko has also litigated numerous complex cases involving financial and accounting fraud, including actions against several of the nation's largest accounting and investment firms.

128. Mr. Sarko is a recipient of Trial Lawyer of the Year by the Trial Lawyers for Public Justice Foundation and for the last seven years was named a "Super Lawyer" among civil litigators by *Washington Law and Politics* magazine in its annual review of the State's legal profession. Mr. Sarko is a frequent commentator on ERISA litigation. He regularly speaks at national ERISA conferences. Most recently, Mr. Sarko spoke at the DOL Speaks: 2008 Los Angeles Benefits Conference, the 2008 Western Benefits Conference, as well as the Employee Benefits Conference, the American Bar Association's Employee Benefits Committee Meeting and the Glasser Annual ERISA Litigation Conference. Mr. Sarko is considered one of the leading experts on ERISA class action cases.

129. Gary Gotto is a member of Keller Rohrback P.L.C., based in Phoenix, Arizona. Mr. Gotto has served in leadership positions in various ERISA class action litigation including the following: *Enron ERISA Litigation, CMS Energy Corp. ERISA Litigation, Dynegy ERISA Litigation, Global Crossing ERISA Litigation, and the WorldCom ERISA Litigation*. In addition to his ERISA class action expertise, Mr. Gotto has expertise in complex Chapter 11 bankruptcy litigation and issues, which has proved invaluable in cases in which defendants in ERISA

litigation are also debtors in bankruptcy. He chaired the Arizona State Bar Subcommittee on Revising the Limited Partnership Act and co-authored Arizona Legal Forms: Limited Liability Companies and Partnerships. Mr. Gotto speaks and teaches regularly on a number of topics, including an annual real estate bankruptcy case study presented at Harvard Law School. He earned his J.D. from Arizona State University summa cum laude, where he was a member of the Order of the Coif. and the Special Projects Editor of the Arizona State Law Journal. Mr. Gotto received his B.A. from the University of Pennsylvania cum laude. He is admitted to practice in the State of Arizona.

130. The Keller Rohrback Complex Litigation and ERISA team is also highly accomplished, and includes numerous lawyers whose practices focus primarily on ERISA class action cases, including partners Elizabeth Leland and Derek Loeser, and associate Erin M. Riley.

b. Cohen Milstein Sellers & Toll PLLC

131. Cohen Milstein brought extensive class action experience to this case. Since its senior partners opened the Washington D.C. office in 1969, the firm's emphasis has been the representation of individuals, small businesses, investors and employees in class actions brought for violation of antitrust, securities, environmental, consumer protection, discrimination, ERISA and human rights laws. As shown in the Firm's resume, it has served as sole lead counsel, co-lead counsel or on an executive committee in many dozens of class actions.

132. The firm's special knowledge of and experience in ERISA work is also very extensive, and Cohen Milstein has achieved many notable successes in ERISA cases, including *In re Dynegy,* No. 02-3076, slip op. (S.D. Tex. Dec. 10, 2004) (settlement of employer stock case co-lead with Keller Rohrback); *In re Williams Cos. ERISA Litigation,* No. 02- 153, slip op. (N.D. Okla. Nov. 16, 2005) (settlement of employer stock case court appointed Associate Counsel to Keller Rohrback); *Hargrave v. TXU,* No. 02-2573, slip op. (N.D. Tex. Mar. 25, 2008) (settled

employer stock case as Class Counsel); *Wagener, et. al., v. SBC Pension Benefit Plan Non-Bargained Program*, No. 03-769 (D.D.C. Jan. 23, 2009) (as one of Class Counsel, settled benefit calculation dispute on behalf of early retirees); *Mehling v. New York Life Ins. Co.*, No. 99- 5417, 248 F.R.D. 455 (E.D. Pa. Mar. 4, 2008) (settled excessive service provider fee case as Co-Lead counsel; *Banyai v. Mazur*, U.S. Dist. LEXIS 93595 (S.D.N.Y. Nov. 18, 2008) (as one of Class Counsel, settled a case involving alleged misappropriation of plan assets); *Zhu v. The Fujitsu Group 401(k) Plan*, 2005 U.S. Dist. LEXIS 5134 (N.D. Cal. Mar. 18, 2005) (as Class Counsel with Keller Rohrback, settled a case involving vesting violations); *Simpson v. Fireman's Fund Insurance Company*, No. C05-00225 CW (N.D. Cal. Mar. 19, 2008) (as one of Class Counsel settled ERISA Section 510 case alleging employer interference with benefits); *Stoffels v. SBC Commc'n, Inc.*, 555 F. Supp. 2d 754 (W.D. Tex. 2008) (as Class Counsel, prevailed in phase one trial on the merits establishing pensions plan status of telephone concession); *Beam v. HSBC Bank USA*, slip op. No. 02- 0682E (W.D.N.Y. Nov. 21, 2005) (settled ESOP stock valuation case as Class Counsel). Finally, Cohen Milstein negotiated the terms of a $1 billion dollar settlement for a class of 30,000 retirees and dependents. *Redington et al. v. The Goodyear Tire and Rubber Company*, 2008 U.S. Dist. LEXIS 64639 (N.D. Ohio Aug. 22, 2008) (case challenging cut-backs in retiree health benefits.

133. In addition, the Cohen Milstein currently occupies a leadership role in numerous ERISA class actions, including two significant ongoing suits involving employer stock investments in 40l(k) plans. *Walsh v. Marsh & McLennan*, No. 01- 8157 (S.D.N.Y.); *In Re Merck & Co., Inc. Securities, Deriviative & "ERISA" Litigation*, No. 3:05-01151-SRC (D.N.J.)

134. Cohen Milstein also frequently represents Fiduciary Counselors, Inc., a professional independent fiduciary, in its capacity as a fiduciary for employee benefit plans in

evaluating the fairness of both securities and ERISA class action settlements. This work is undertaken on an hourly fee for service basis at the firm's posted hourly rates.

135. Mr. Machiz joined the Plan Benefits Security Division of the U.S. Office of the Solicitor of Labor as a trial attorney in 1978, and (but for a two-year hiatus) practiced there until 2000, ending his career as Associate Solicitor, heading the Division. As Associate Solicitor, Mr. Machiz was the DOL's chief ERISA lawyer charged with responsibility for all enforcement litigation brought by the Secretary of Labor under ERISA and was responsible for all legal advice under the statute provided to the Pension & Welfare Benefits Administration, which administers Title I of ERISA. Among his other initiatives, Mr. Machiz worked to institute the Department's innovative amicus program, which aggressively advocated the Department's views throughout the judicial system on a wide range of ERISA issues including the need to limit ERISA preemption of state worker and consumer protection laws and the need to strengthen participants' rights and remedies under the Act.

136. Mr. Machiz's expertise in ERISA has been recognized by his colleagues in the ERISA bar, who made him a Charter Fellow of the American College of Employee Benefits Counsel. Mr. Machiz is a frequent speaker on ERISA issues for the ABA, ALI-ABAPLI, and private seminars, and has served as plaintiffs' co-chair of a subcommittee of the Employees Benefits Committee of the ABA's Labor Section. He is also a member of the *BNA Pension and Benefits Reporter* Advisory Board and has authored several articles including: *Understanding DOL's New Class Exemption for the Release of Claims and Extensions of Credit in Connection with Litigation*, Pension & Benefits Reporter, Vol. 31, No. 2, Jan., 2004; and *ESOPS, ERISA, and Employer Stock: A Litigator's Approach*, ATLA Commercial Litigation Section Newsletter, Volume 7, Number 3 (Spring/Summer 2001).

137. Karen Handorf served as an attorney at the Office of the Solicitor, DOL, for more than thirty years until 2007 when she joined Cohen Milstein. In her appointed positions of Counsel for Decentralized and Special Litigation, and then as Deputy Associate Solicitor of the Plan Benefits Security Division, she was responsible for the Department's amicus program; supervision of the Department's ERISA appellate litigation, district court litigation brought by regional offices of the Solicitor of Labor, and administrative litigation involving the civil penalty provisions of ERISA; and oversight for all ERISA litigation brought by the Secretary of Labor nationwide. She was instrumental in developing the Department's position in amicus briefs on many of the complex issues surrounding employer stock cases. She is a member of the American College of Employee Benefit Counsel and a frequent speaker at ERISA conferences.

138. Michelle Yau is an associate at Cohen Milstein and has been involved in this litigation from its outset. Prior to joining Cohen Milstein, she was an attorney in the Solicitor's Office; she started with the DOL in the Honors Program where she was involved in several litigation matters, including the Department's *Enron* litigation. Quite applicable to and valuable for this litigation, before she attended law school, Ms. Yau worked as a financial analyst at Goldman, Sachs & Co. in the Financial Institutions Group of the Investment Banking Division.

2. Additional Plaintiffs' Counsel

139. The additional Plaintiffs' Counsel who have performed work and reported time at Co-Lead Counsel's request and whose fee declarations are submitted herewith contributed greatly to the successful results achieved.

140. It is also important to note the large number and extraordinarily high quality of the Defense Counsel opposing Plaintiffs' and their Counsel's efforts, which bears further witness to the caliber of representation that was necessary to achieve a $75 million settlement. 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.

141. 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. Co-Lead Counsel possessed and effectively utilized the requisite skill to provide excellent legal services for the Class.

E. The Requested Fee in Relation to the Settlement

142. 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 under both a "lodestar" and "percentage of the fund" analysis.

143. **Lodestar/Multiplier Analysis.** 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 Co-Lead Counsel and additional Plaintiffs' Counsel in the ordinary course of business.

144. The hourly rates charged by Co-Lead Counsel and additional 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.

145. The requested fee represents a multiplier on Co-Lead Counsel and additional 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.

146. Even 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. *See* Exhibit F.

147. **Percentage of Fund Analysis.** The requested fee award represents 25% of the recovery, is well-warranted, and well within the range of awards made by district courts in the Second Circuit.

148. Many courts in the Second Circuit and elsewhere, in non-ERISA cases, have awarded a higher percentage of fees than that requested here.

149. 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 effect, this metric combines the other two. If the lodestar is a small percentage of the common fund, a higher multiplier may be warranted. Conversely, if the lawyers' lodestar is a higher percentage of the recovery, a lower multiplier may be appropriate.

150. In this case the lodestar is approximately 8.7% of the recovery. This reflects the amount of work that was necessary to achieve the result, and indicates that a percentage award of well over that amount is appropriate, otherwise the lawyers are not fairly compensated for their risk.

151. Whatever the rubric, lodestar multiplier, fees as percentage of recovery, or lodestar as percentage of recovery, the fee requested here is very reasonable.

F. Public Policy

152. Public policy considerations also favor encouraging skilled attorneys to bring ERISA suits such as this one. ERISA was passed by Congress as a means of promoting an important and essential public policy - protecting and preserving the retirement savings of American workers. Private enforcement of ERISA is specifically encouraged in the statute itself.

See, e.g., ERISA § 502(a), 29 U.S.C. § 1132(a) (specifically empowering participants and beneficiaries to bring civil actions to redress violations and/or enforce provisions of ERISA).

153. Without the efforts of Plaintiffs' Counsel, the participants in Merrill's three ERISA Plans likely would not have obtained relief anywhere close to this magnitude. Plaintiffs' Counsel clearly have 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.

IX. PLAINTIFFS' COUNSEL SHOULD BE REIMBURSED FOR THEIR REASONABLE THE EXPENSES ADVANCED IN THE LITIGATION

154. Each of Plaintiffs' Counsel's firms – and Co-Lead Counsel in particular – advanced significant unreimbursed expenses of the litigation. The expenses incurred in this action are commercially reasonable and are reflected on the books and records of each firm. These books and records are prepared from expense vouchers, check records and other source materials and represent an accurate recordation of the expenses incurred. The expenses include necessary travel, expert witnesses and copying, as well as telephone, fax, and computer aided research and document database storage and maintenance. Summaries of each firms' expenses are attached hereto as Exhibits M through X.

155. On a firm-by-firm basis, the expenses are as follows:

Firm	**Expenses**
Keller Rohrback L.L.P. & P.L.C.	$181,435.33
Cohen Milstein Sellers & Toll PLLC	$173,393.53
Gainey & McKenna	$ 819.96
Harwood Feffer LLP	$ 2,532.41
Law Offices of Curtis V. Trinko, LLP	$ 809.74

Firm	Expenses
Lockridge Grindal Nauen P.L.L.P.	$ 21.47
Milberg LLP	$ 4,344.39
Shalov Stone Bonner & Rocco LLP	$ 1,169.72
Spector Roseman Kodroff & Willis PC	$ 3,374.88
Stember Feinstein Doyle & Payne, LLC	$ 124.26
Zimmerman and Reed, PLLP	$ 4,287.25
TOTAL	$372,312.94

156. Co-Lead Counsel also incurred expenses for mailing and publishing the Class Notice as detailed in the accompanying Keough Declaration, attached as Exhibit A hereto. The Court has already approved payment of these expenses from the Settlement Fund, however, so we do not include those expenses in our request for reimbursement.

157. Plaintiffs' Counsel are entitled to reimbursement for their reasonable expenses advanced in class litigation.

158. Because the expenses incurred here were incurred with no guarantee of recovery, Plaintiffs' Counsel had a strong incentive to keep them at a reasonable level, and did so. We made a concerted effort to avoid unnecessary expenditures and economized whenever possible. The expenses were essential to the successful development and prosecution of the case, and amount to less than 0.5% of the Class' recovery.

X. NAMED PLAINTIFFS SHOULD BE GRANTED A CASE CONTRIBUTION AWARD

159. Last but by no means least, we wish to note the considerable efforts made by Named Plaintiffs Carl Esposito, Barbara Boland, Alan Maltzman, and Mary Gidaro. 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 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* Exhibits B through E. Each of these individuals devoted considerable to help the Class prevail on behalf of the Plans and we ask the Court to recognize their efforts by awarding each of them a case contribution award in the amount of $5,000.

160. The Class Notice disclosed that the Named Plaintiffs would seek awards of $5,000 each for their initiative and efforts in the litigation. No objection to the proposed award has been received to date.

161. We therefore, believe that payment of modest case contribution awards to Named Plaintiffs Carl Esposito, Barbara Boland, Alan Maltzman, and Mary Gidaro is well deserved and wholly appropriate given the effort these individuals devoted to this case.

XI. CONCLUSION

162. For the reasons discussed herein, the Settlement is a fair, adequate, and reasonable resolution of the claims in this complex and hard-fought ERISA class action. The requested fees, expenses and case contribution awards are well warranted. Thus, Plaintiffs and Plaintiffs' Counsel respectfully request that the Court grant their motions in their entirety.

We declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED this 26th day of June, 2009, at Santa Barbara, California.

Lynn Lincoln Sarko

DATED this 26th day of June, 2009, at Saratoga Springs, New York.

Marc I. Machiz

We declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED this 26th day of June, 2009, at Santa Barbara, California.

Lynn Lincoln Sarko

DATED this 26th day of June, 2009, at Saratoga Springs, New York.

Marc I. Machiz

Marc I. Machiz