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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JUDY CALIBUSO, JULIE MOSS, DIANNE GOEDTEL, JEAN EVANS, and MARY DESALVATORE, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

BANK OF AMERICA CORPORATION; MERRILL LYNCH & CO., INC.; and MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Defendants.

No. 10 Civ. 1413 (PKC) (AKT)

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, PROVISIONAL CERTIFICATION OF SETTLEMENT CLASS, APPROVAL AND DISTRIBUTION OF THE NOTICE OF SETTLEMENT, AND APPOINTMENT OF PLAINTIFFS' COUNSEL AS CLASS COUNSEL

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INTRODUCTION

Plaintiffs respectfully seek certification of a settlement class and request that the Court grant preliminary approval of the Settlement Agreement ("Settlement"),[1] attached as Exhibit 1 to the Proposed Order filed herewith. Subject to Court approval, the parties have settled Plaintiffs' and Class Members' compensation discrimination and equal pay claims for significant monetary relief of $39 million plus programmatic relief monitored by a recognized expert in Industrial/Organizational Psychology. The proposed settlement resolves all Class Members' claims.[2] *See* Third Amended Class and Collective Action Compl. ("TAC") ¶¶ 173-250.

The proposed settlement satisfies all of the criteria for preliminary approval. The settlement was negotiated at arms' length and falls well within the range of possible approval. The monetary relief for the Class Members is substantial given the relative small size of the class and types of claims asserted in this lawsuit. In addition, the extensive programmatic relief provided for in the settlement will materially advance the goal of equal employment opportunity for female Financial Advisors ("FAs") at Bank of America. Accordingly, Plaintiffs respectfully request that the Court grant preliminary approval of the proposed Settlement, direct distribution of class notice and a claim form (attached as Exhibits 2 and 3 to the Proposed Order), and appoint Plaintiffs' counsel as Class Counsel. Plaintiffs also request the Court certify settlement classes and subclasses of female FAs under Fed. R. Civ. P. 23 for the Title VII and state-law claims and under 29 U.S.C. § 216(b) for the federal Equal Pay Act ("EPA") claim.

I. Factual and Procedural Background

A. Litigation History

Several of the Named Plaintiffs first contacted plaintiffs' counsel in late 2006 and early

[1] All capitalized terms used herein have the same meaning as set forth in the Settlement Agreement.
[2] As discussed below, the Settlement has a class fund of $38,250,000 and a fund for the Named Plaintiffs of $775,000.

2007. Declaration of Adam T. Klein ("Klein Decl"), ¶5. Plaintiffs' counsel commenced an extensive investigation at that time. *Id.* Plaintiffs filed the original complaint on March 30, 2010 and the operative TAC on October 5, 2011.[3] Plaintiffs' claims arise under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII") (disparate impact and intentional discrimination), the Equal Pay Act, 29 U.S.C. § 206 *et seq.* ("EPA"), and the applicable state anti-discrimination and equal pay laws of the states where the Named Plaintiffs reside: New York (Dianne Goedtel), New Jersey (Mary DeSalvatore), Florida (Judy Calibuso and Julie Moss), and Missouri (Jean Evans).

Plaintiffs conducted an extensive pre-filing investigation and, after the commencement of the Action, both parties conducted broad, extensive, and thorough discovery related to class and collective action certification between 2010 and April 2013. Declaration of Rachel Geman ("Geman Decl."), ¶15. Plaintiffs conducted extensive data analysis of personnel and compensation-related data as well as discovery regarding key policies and practices including, without limitation, account distributions, teaming, leads and referrals, and compensation. Plaintiffs also conducted discovery into Defendants' HR and complaint procedures. *Id*., ¶16.

The written class and collective action certification discovery conducted in this case included four formal sets of document requests (totaling more than 50 distinct categories of documents, and more than 200 separate requests) propounded by Plaintiffs, innumerable discovery-related letters and informal requests, and interrogatories. Geman Decl., ¶17. Defendants propounded requests for production and interrogatories toward each of the five Named Plaintiffs, and three sets of requests for admissions. *Id*. Between the parties, more than 900,000 pages (and over 100,000 documents) of materials were exchanged and reviewed (Defendants produced over 100,000 documents consisting of nearly 890,000 pages of material

[3] Plaintiffs filed an Amended Complaint on August 2, 2010 and a Second Amended Complaint on March 14, 2010.

for Plaintiffs to review) against the backdrop of extensive negotiations over the scope of discovery, including ESI (such as email) discovery. *Id*., ¶18. The production included documents over many years and across the Defendants related to the challenged policies and practices in this Action (including, without limitation, policies and practices relating to compensation, account distributions, teaming and pooling, and leads and referrals), emails, internal complaints, audits, documents related to the Plaintiffs, and other materials. *Id*.

The parties also litigated discovery disputes, including over whether Defendants were required to turn over their human resources, compensation, and account data and, if so, the scope of the production. Following briefing and two rounds of oral arguments, resulting in a telephonic Order on March 4, 2011 requiring the production of data, Defendants began producing data. Due to the complexity of the data, among other reasons, numerous supplemental productions occurred, with the last production in April 2013. Based on extensive work with their data experts, Plaintiffs conducted three formal data depositions and numerous informal interviews of Defendants' employees to understand the data. Geman Decl., ¶19.

Deposition discovery was also extensive. In addition to the data depositions noted above, Plaintiffs took 16 other depositions of corporate designees on a variety of topics such as compensation, partnerships, organizational structure, human resources and complaints, and account distributions (making 19 total depositions by Plaintiffs), and Defendants deposed each of the Named Plaintiffs for two days. Geman Decl., ¶20.

The parties engaged in substantial motion practice relating to Plaintiffs' allegations. Defendants moved to dismiss Plaintiffs' claims and strike Plaintiffs' class and collective action allegations. Specifically, in two motions Defendants argued that: (a) Section 703(h) of Title VII and a parallel provision under the EPA, which expressly permit certain merit-based and

production-based systems, required dismissal of Plaintiffs' Title VII disparate impact and EPA claims that challenged Defendants' production- and merit-based policies, (b) Plaintiffs' class claims could not be sustained in the wake of *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), as well as a range of other authorities and related arguments, and (c) certain of Plaintiffs' claims were untimely and/or beyond the scope of the underlying EEOC charges. Plaintiffs opposed the motions, arguing, inter alia, that Defendants' compensation systems were not merit based or valid production based systems, and that they had validly alleged intentional discrimination. Both parties cited aspects of the then-existing evidentiary record in their papers on this motion. Plaintiffs also argued that their class claims were viable and timely.

After oral argument on January 17, 2012, and numerous supplemental filings, the Court denied all Defendants' motions without prejudice on September 27, 2012, in a memorandum opinion. [Dkt. No. 134.]

B. Settlement Negotiations

The Settlement Agreement was reached after extensive mediation before experienced mediator David A. Rotman. Counsel for the parties are experienced class action lawyers who retained Mr. Rotman for his expertise in mediating many complex class and collective actions. Geman Decl., ¶22. Mr. Rotman conducted four days of mediation in San Francisco, California over a period of four-and-a-half months, including numerous informal discussions with the parties during and following the same time period. *Id*. The Named Plaintiffs participated in the mediation and settlement process (in-person at mediation sessions and/or by providing input to counsel), and Plaintiffs submit that they were actively involved in shaping the monetary and programmatic relief set forth in the Settlement Agreement. *Id.* At all times during this process, the parties' respective counsel bargained vigorously and at arm's-length on behalf of their clients. *Id.*

II. Summary of the Settlement Terms

A. The Settlement Fund

The monetary component of the Settlement is a $39,000,000 Settlement Fund, with a $38.225 million Settlement Sum for the Class and a Named Plaintiffs' Settlement Fund of $775,000. Settlement Agreement, §XI.A. The Settlement Sum will compensate members of the settlement class and subclasses who do not opt out and who timely submit claims, provide service payments (if approved) to Named Plaintiffs who are appointed as class representatives for service they provided on behalf of the class, and pay attorneys' fees, notice costs, and administrative expenses. The Settlement Fund does not include Defendants' separate payments to the Monitor, the Independent Consultant, or the Programmatic Relief (described below) or the employer share of its payroll and Medicare taxes on settlement proceeds.

B. Programmatic Relief

The Settlement provides for meaningful programmatic relief, as overseen by a Monitor, and also involves a study by a separate expert in Organization Psychology. The programmatic relief will last for three years, starting from Effective Approval. The below is a summary of the programmatic relief, the full description of which is in the Settlement Agreement at Sections IX and X.

First, Defendants will engage an Independent Consultant ("IC"), selected by Class Counsel, who has a background and substantial experience in applied Organizational Psychology. The IC will conduct a privileged and confidential internal study of FA teaming and make non -binding confidential recommendations as to ways to facilitate improved teaming arrangements for female FAs. Before beginning the review and evaluation of the teaming and pooling policies and practices, the IC will meet once with Class Counsel and once with counsel for Defendants to discuss the parties' respective perspectives in connection with the teaming

study. The IC will interview various personnel in connection with this study, including representatives of management, female FAs who are current or former members of internal councils to management, female FAs who are current or former members of the Diversity Council, and a Named Plaintiff who is a current employee. In addition, for 30 offices, the IC will receive a listing of new FA pools/teams (excluding situational pool/split arrangements) formed and for each new pool/team, an indication of the gender of each of the members of the pool/team (names will be redacted) and each member's allocation or share of the pool. The IC will also review sample pool/team agreements and any current policies/guidelines or training materials related to FA teaming, and such other information as she deems reasonably necessary for purposes of the study. After conclusion of the review, the IC will meet with Defendants to share the results and make non-binding recommendations.

Second, Defendants will engage a jointly-selected monitor to act as an Independent Settlement Monitor for compliance monitoring. The monitor will meet with a designated representative of the Company on a semi-annual basis for the 3-year period to review compliance with the terms of the Programmatic Relief, and the monitor may request information to ascertain compliance with the terms of the Settlement. *Id.*

Third, Defendants will conduct a quarterly review of account redistributions to track usage and adherence to the Account Distribution Policy ("ADP"), as it may be updated and modified from time to time, and to monitor exceptions and to provide the results to the monitor. If any unusual patterns of exceptions are noted, or if it appears that an office is not adhering to the policy, Defendants will follow-up with office management. Defendants will require written explanations for exceptions to be entered into a drop down list of exceptions maintained in the current or successor system for tracking as per the above. Defendants will provide information to

the monitor to demonstrate compliance with this section, including the quarterly reports/results of quarterly reviews.[4]

Fourth, before approving a team, management will instruct that FAs consider a variety of potential teammates, offer suggestions at an early point in the formation process, and instruct that the decision to team with particular FAs, or not to team with particular FAs, may not be made on the basis of an FA's gender or other legally protected characteristic. Defendants will maintain a policy that "Teams may not be formed solely for the purpose of selecting a successor in anticipation of an FA's retirement or departure." Likewise, pools may not be used to evade the ADP's prohibition against FA to FA transfers. Any pools formed within 60 days of the departure or retirement of an FA will be strictly scrutinized by management.

Fifth, Defendants will make available to all FAs and FA Trainees the option of adding a non-binding mediation process with a third-party neutral to their teaming agreements.

Sixth, Defendants agree to annually provide FAs with information about the process for making internal complaints of gender discrimination, and shall instruct that FAs acknowledge that they have read the complaint procedure. The complaint procedure will include information about a phone number that may be used to make a complaint of gender discrimination. Defendants also agree to promptly investigate (based on circumstances) all complaints of gender discrimination and retaliation and to take appropriate remedial action, and provide the monitor with complaints or complaint entries of gender discrimination (including those concerning account distributions, leads and referrals, teaming and compensation), and the results of the Defendants' investigation and remedial action, if any, taken.

Seventh, Defendants agree to post non-discrimination policies on an internal website accessible to all FAs and FA management accompanied by statements of support by appropriate

[4] Defendants will also maintain published policies relating to distributions of leads and referrals.

management, and to include copies of policies for new FAs upon hire. Defendants will instruct that both FAs and FA management acknowledge that they have read these policies.

Eighth, Defendants will engage in business generation assistance, including: (a) maintenance of a Diverse FA Fund at $1 million per annum, that will be distributed on a first come, first serve basis in accordance with rules established by Defendants (but with at least half available for women); (b) maintenance of a Women's Investors' Fund, available to any FA to penetrate the Women's market, funded at a minimum of $250,000 per annum; (c) sponsorship of a Women in Wealth symposium series; and (d) maintenance of a Women's Employee Network, focusing on events addressing career development, networking, and personal leadership. Finally, the Company will provide ongoing training modules for FAs for business development.

Ninth, Defendants will continue to conduct performance assessments of Complex Directors and Resident Directors that include a distinct diversity and inclusion category designed to evaluate whether the manager was a leader in promoting diversity and inclusion (people, ideas, solutions), including female FAs' inclusion in the allocation of business opportunities and teams, and whether the manager fostered open communications with FAs.

Finally, Defendants will not require female (or other) Financial Advisors within U.S. Wealth Management to arbitrate any employment discrimination claims unless individually negotiated.

Lead Class Counsel will receive semi-annual reports from the monitor that provide information about compliance or potential non-compliance with the settlement provisions for which the monitor is responsible for monitoring. Defendants and Lead Class Counsel will meet at least once every six months, beginning six months after the Effective Date, regarding compliance, and may confer more frequently at their discretion.

C. Release

1. Class Member Release

Class Members who do not opt out of this Settlement will be deemed opted in as collective action Settlement Class Members under the EPA in addition to being Settlement Class Members under federal and state discrimination laws pursuant to Fed. R. Civ. Proc. 23, and will release all claims, known and unknown, existing through the date of preliminary approval, under any federal, state or local legal theory, for gender discrimination against Bank of America, with the exception of any individual, non-class claims Class Member Releasors may have for sexual harassment (such as defined in 29 C.F.R. §1604.11(a)) or retaliation, or individual or class claims for race discrimination such as those brought by the certified class in *McReynolds v. Merrill Lynch*, Case No. 05-C-658, currently pending in the U.S. District Court for the Northern District of Illinois (Eastern Division). Settlement Agreement, §V.A.

2. Individual Claims of Named Plaintiffs

Each Class Representative who is signing a General Release will receive an additional payment for the release of her non-class claims, including non-economic losses that arise from sexual harassment and retaliation, as well as for her agreement not to be re-hired by Bank of America, to be determined by the neutral Claims Administrator.[5] These decisions shall be based upon a review of the factual record and shall be non-appealable. In no event will the total of all such awards exceed $775,000. The Named Plaintiff General Release releases all claims of any nature against Bank of America under federal, state or local laws for any period up through the date each such Named Plaintiff signs her individual release. Settlement Agreement, §V.B.

[5] Judy Calibuso, a current employee, is not releasing her individual retaliation claims against Bank of America and will not receive any portion of the $775,000.

3. Bank of America Mutual Release

Defendant releases the Named Plaintiffs who sign a general release from any pending claims against them and, upon an award of preliminary approval, will dismiss any actions against Named Plaintiffs, subject to the right to re-open if the Effective Date is not reached. Settlement Agreement, §V.C.

D. Eligible Employees

The Settlement Class of eligible employees includes all women employed as FAs or FA trainees in the United States, Puerto Rico, or the U.S. Territories (1) from March 16, 2006 for Legacy Bank of America Class Members and (2) from August 2, 2007 for all other Class Members.[6] Settlement Agreement, §II.A.

E. Allocation Formula

Settlement Class Members who submit a simple and user-friendly Claim Form will be eligible to receive a monetary award, to be calculated by the Claims Administrator based on the assignment of points to each Claimant. Points will be assigned based on: (1) the Claimant's length of tenure (*e.g.*, weeks worked) during the Class Period as an FA or FA trainee and (2) information (if supplied by the Claimant) regarding whether any alleged purported compensation discrimination, in the view of the Claimant, caused the actual or constructive termination of her employment with Defendants. Settlement Agreement, §XI.D.

The Claims Administrator shall calculate a total award for each Settlement Class Member who submits a valid Claim Form, with each Claimant receiving at least a minimum payment of $500. The Claims Administrator's determination shall be final and not subject to review by, or appeal to, any court, mediator, arbitrator or other judicial body. *Id.*

[6] There are four Settlement Subclasses, defined in §II.A. of the Settlement Agreement: a New York Settlement Subclass, a Florida Settlement Subclass, a Missouri Settlement Subclass, and a New Jersey Settlement Subclass.

F. Attorneys' Fees and Litigation Costs

Class Counsel shall be entitled to apply to the Court for an award of Plaintiffs' Counsel's attorneys' fees in a total amount not to exceed 30% of the portion of the Settlement for the Settlement Sum (the class fund), *i.e.*, $11,467,500, plus their litigation expenses. The Parties agree that Class Counsel will hold back $100,000 per year of their awarded fees for each of the three years of the term of the Programmatic Relief for their work in monitoring the Programmatic Relief. The Claims Administrator will maintain this portion of the Court-awarded attorneys' fees in escrow. Settlement Agreement, §XII.A.

Bank of America and its attorneys do not to oppose these applications for attorneys' fees, costs or expenses by Plaintiffs' counsel as set forth above. Settlement Agreement, §XII.B.

G. Service Award & Individual Awards

Plaintiffs' counsel will seek, and Bank of America will not oppose, Court approval for Service Awards in the amount of $35,000 for the Named Plaintiffs who are appointed as Class Representatives for their participation in the prosecution and settlement of this case. This participation included each Plaintiff preparing for and then being deposed for ten hours each, participating in responding to discovery requests, assisting counsel in developing strategy, and providing input into settlement discussions and the ultimate Settlement Agreement (including, in some cases, attendance at mediation in San Francisco). The proposed Service Awards will be in addition to Settlement Class benefits available to the Named Plaintiffs under the Agreement and are subject to Court approval. Settlement Agreement, §XII.D.

H. Settlement Claims Administrator

The parties have jointly selected Rust Consulting, Inc. as the Settlement Claims Administrator. Settlement Agreement, § III.A.5. The administrator's fees will be paid from the Fund. Settlement Agreement, §XI.A.

CLASS ACTION SETTLEMENT PROCEDURE

Courts have established a defined procedure and specific criteria for settlement approval in class action settlements that include three distinct steps:

1. Preliminary approval of the proposed settlement after submission to the Court of a written motion for preliminary approval and certification of the settlement class;

2. Dissemination of mailed and/or published notice of settlement to all affected Class Members; and

3. A final settlement approval hearing at which Class Members may be heard regarding the settlement, and at which argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented.

See Fed. R. Civ. P. 23(e); *see also* Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* ("*Newberg*") §§11.22 *et seq.* (4th ed. 2002); *Reyes v. Buddha-Bar NYC,* No. 08-02494, 2009 WL 5841177, at *1-2 (S.D.N.Y. May 28, 2009). This process safeguards Class Members' procedural due process rights and enables the Court to fulfill its role as the guardian of class interests. With this motion, Plaintiffs request that the Court take the first step – granting preliminary approval of the Settlement Agreement, conditionally certifying the Settlement Class, appointing Plaintiffs' counsel as Class Counsel, and approving the proposed Notice and Claim Form and authorizing the settlement administrator to send it.

ARGUMENT

I. Preliminary Approval of the Settlement Is Appropriate

The law favors compromise and settlement of class action suits. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc*., 396 F.3d 96, 116-17 (2d Cir. 2005) (noting the "strong judicial policy in favor of settlements, particularly in the class action context") (internal quotation marks omitted); *Newberg* §11.25 ("The compromise of complex litigation is encouraged by the courts and favored by public policy.") The approval of a proposed class action settlement is a matter of

discretion for the trial court. *Maywalt v. Parker & Parsley Petroleum Co*., 67 F.3d 1072, 1079 (2d Cir. 1998).

Preliminary approval requires an "initial evaluation" of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties. *Newberg* § 11.25. The Court need only find that there is "'probable cause' to submit the [settlement] to Class Members and hold a full-scale hearing as to its fairness." *In re Traffic Exec. Ass'n*, 627 F.2d 631, 634 (2d Cir. 1980); *see Newberg* §11.25 ("If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness . . . and appears to fall within the range of possible approval," the court should permit notice of the settlement to be sent to Class Members); *Danieli v. IBM*, No. 08 Civ. 3688, 2009 WL 6583144, at *4 (S.D.N.Y. Nov. 16, 2009) (granting preliminary approval where the settlement "ha[d] no obvious defects" and the proposed allocation plan was "rationally related to the relative strengths and weaknesses of the respective claims asserted").

"Fairness is determined upon review of both the terms of the settlement agreement and the negotiating process that led to such agreement." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184 (W.D.N.Y. 2005). "A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores*, 396 F.3d at 116 (internal quotation marks omitted). "'Absent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement.'" *Willix v. Healthfirst, Inc.*, No. 07-1143, 2011 U.S. Dist. LEXIS 21101, at *6 (E.D.N.Y. Feb. 18, 2011) (quoting *In re EVCI Career Colls. Holding Corp. Sec. Litig*., No. 05 Civ. 10240, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007)).

The first step in the settlement process simply allows notice to issue to the class and for Class Members to object, comment on, or opt out of the settlement. After the notice period, the Court will be able to evaluate the settlement with the benefit of the Class Members' input.

A. The Settlement Is Fair, Reasonable and Adequate

In evaluating a class action settlement, courts in the Second Circuit consider the nine factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). Although the Court need not evaluate the *Grinnell* factors in order to conduct its initial evaluation of the settlement, it may be useful for the Court to consider the criteria on which it will ultimately judge the settlement.

The *Grinnell* factors are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Grinnell*, 495 F.2d at 463. All of the *Grinnell* factors applicable now weigh in favor of preliminary approval of the Settlement Agreement.[7]

[7] Obviously, Plaintiffs have not yet heard the reaction of the Class, rendering premature a discussion of the second *Grinnell* factor. With respect to the seventh factor, while Plaintiffs have every reason to believe that Bank of America would remain handily able to satisfy even larger judgments, a "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Frank*, 228 F.R.D. at 186 (quoting *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164 n.9) (S.D.N.Y. 2000). Here, no later than ten business days after the effective date of this Settlement, Defendant will submit the settlement sum to the Claims Administrator. Settlement Agreement, §XI.A.

1. Litigation Through Trial Would Be Complex, Costly, and Long

By reaching a favorable settlement prior to summary judgment motions or trial, and before class certification, Plaintiffs avoid significant expense and delay and ensure a risk-free recovery for the class. "Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd sub. nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001). This case is no exception, with approximately 4,800 Class Members and claims under federal and state law. Geman Decl., ¶15.

The parties have completed extensive discovery (although some discovery remains) and the next step would be for a formal round of expert discovery and motion practice on class certification, followed by motion practice on dispositive motions. Preparing such motions would be timely and costly as they would require the parties to review dozens of deposition transcripts and thousands of documents and finalize supporting affidavits from Class Members (and undergo Class Member depositions as well). In addition, any judgment related to the class certification and summary judgment motions may be appealed, extending the duration of the litigation. The settlement, on the other hand, makes monetary and programmatic relief available to Class Members in a prompt and efficient manner.

2. Discovery Has Advanced Far Enough to Allow the Parties to Resolve the Case Responsibly

As described above, the parties have completed extensive motion practice and protracted discovery and are well prepared to recommend settlement. The proper question is "whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004) (internal quotation marks omitted). The parties' discovery here meets this standard. As discussed above, the parties

engaged in significant discovery, taking and defending approximately 24 depositions, including those of the Named Plaintiffs and Defendant's designees and executives, and substantial document and data discovery. Geman Decl., ¶¶16-20. Based on these circumstances, the parties were well equipped to evaluate the strengths and weaknesses of the case.

3. Plaintiffs Would Face Real Risks if the Case Proceeded

Although Plaintiffs believe their claims have merit, and are suitable for class and collective action treatment, they also recognize that they would face significant legal, factual, and procedural obstacles to recovering damages on their claims. Indeed, "if settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *In re Ira Haupt & Co.,* 304 F. Supp. 917, 934 (S.D.N.Y. 1969); *see also Velez v. Majik Cleaning Serv., Inc.,* No. 03 Civ. 8698, 2007 U.S. Dist. LEXIS 46223, at *19 (S.D.N.Y. June 25, 2007) ("The proposed settlement benefits each plaintiff in that he or she will recover a monetary award immediately, without having to risk that an outcome unfavorable to the plaintiffs will emerge from a trial."). Bank of America denies that its treatment of its female FAs is unlawful or discriminatory, and contests the propriety of class certification here. Bank of America would challenge Plaintiffs' claims at every stage of the litigation, including at summary judgment and trial. Notwithstanding these arguments, the overall settlement commits Bank of America to pay $38.225 million to compensate the class — a substantial amount ensuring that the recoveries by potentially thousands of individual Class Members will be meaningful. In light of the strengths and weaknesses of the case, the settlement achieves significant benefits for the class in a case where failure at trial is certainly possible.

4. Maintaining the Class Through Trial Would Not Be Simple

The risk of obtaining class certification pursuant to Fed. R. Civ. P. 23(b)(3) and maintaining it through trial militates in favor of settlement. The Court has not yet certified a class

and such a determination would likely be reached only after extensive briefing by both parties. Defendant may argue that individual questions preclude class certification, including whether the relevant policies and procedures were consistently applied company-wide. Should the Court certify a class, Defendant may later challenge certification and move to decertify, requiring another round of briefing. Defendant may also seek permission to file an interlocutory appeal under Fed. R. Civ. P. 23(f). Risk, expense, and delay permeate such a process. Settlement eliminates this risk, expense, and delay.

5. Defendant's Ability to Withstand a Greater Judgment Is Not Clear

Accordingly, this factor also favors preliminary approval.

6. The Settlement Fund Is Substantial, Even in Light of the Best Possible Recovery and the Attendant Risks of Litigation

The $38.225 million dollar settlement represents a good value given the risks of litigation. In addition, this Settlement implements comprehensive, valuable programmatic relief to the entire class and addresses the compensation claims at issue in this action. For example, the Independent Consultant (selected by Plaintiffs) and the jointly-selected Monitor will have informed monitoring responsibilities and/or authority to propose practice changes relating to the key policies Plaintiffs challenge that negatively impact female FAs: pooling and teaming, the generation of business opportunities (including account distributions), the cumulative effect of past practices, and the response to women who complaint about these issues.

Weighing the benefits of the settlement against the risks associated with proceeding in the litigation, the settlement is more than reasonable. "[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Grinnell*, 495 F.2d at 455 n.2. "It is well settled that a cash settlement amounting to only a fraction of the potential recovery will not *per se* render the

settlement inadequate or unfair." *Officers for Justice v. Civil Serv. Comm'n of City and Cty. of San Francisco*, 688 F.2d 615, 628 (E.D. Tex. 1982); *see also Cagan v. Anchor Sav. Bank FSB*, No. 88 Civ. 3024, 1990 U.S. Dist. LEXIS 11450, at *34-35 (E.D.N.Y. May 22, 1990) (approving $2.3 million class settlement over objections that the "best possible recovery would be approximately $121 million"). Plaintiffs assert that this settlement far exceeds the minimum standard for approval.

II. Conditional Certification of the Settlement Class and Subclasses Is Appropriate[8]

To grant preliminary approval of this class action settlement, this Court should also make a determination that the proposed settlement class and subclasses satisfy Rule 23(a)'s requirements of numerosity, commonality, typicality and adequacy of representation, and Rule 23(b)(3). *See Newberg* § 11.27 (citing *In re General Motors Corp. Pick-up Truck Fuel Tank Prod. Liab. Litig.,* 55 F.3d 768 (3rd Cir 1995)). As discussed below, all the requirements of certification for settlement purposes are met for these proposed settlement class and subclasses.

A. Numerosity

Numerosity is satisfied when the class is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "[N]umerosity is presumed at a level of 40 members . . . ." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); *see Duling v. Gristede's Operating Corp.*, 267 F.R.D. 86 (S.D.N.Y. 2010) (numerosity satisfied by a class of 668). Here, there are approximately 4,800 Class Members. Geman Decl., ¶15.

B. Commonality

The proposed class also satisfies the commonality requirement, the purpose of which is to test "whether the named plaintiff's claim and the class claims are so interrelated that the interests

[8] Some of the state-law subclass anti-discrimination claims extend back longer than the nationwide Title VII class, but the discussion below of the satisfaction of the Rule 23 elements applies equally to both the class and the subclasses.

of the Class Members will be fairly and adequately protected in their absence." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). Although the claims need not be identical, they must share common questions of fact or law, such that "a classwide proceeding [can] generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (emphasis in original).

This case involves numerous common issues of fact, including (1) uniform personnel and management structures across branch offices; (2) Bank of America's extensive corporate oversight of branch operations; (3) company-wide policies governing pay decisions; (4) company-wide policies governing teams, partnerships, and account distributions; and (5) consistent gender-related compensation disparities. Here, all Class Members were subjected to the same company-wide compensation, partnership, teaming and account distribution processes, crafted and imposed company wide. Common evidence — including allegations of senior management's knowledge of barriers to equal compensation for women, anecdotal evidence from plaintiffs and Class Members, and statistical expert analysis — all establish common questions of fact, "the truth or falsity [of which] will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes,* 131 S. Ct. at 2551. Common legal theories and relief also establish commonality.[9] In the absence of class certification and settlement, each individual settlement Class Member would be forced to litigate core common issues of law and fact.

C. Typicality

Typicality is also satisfied. The "commonality and typicality requirements of Rule 23(a) tend to merge." *General Tel. Co. of S.W.*, 457 U.S. at 157, n.13 (1982) (cited with approval in

[9] Common legal issues include whether Defendants violated the Equal Pay Act, intentionally discriminated against female FAs in compensation, business opportunities, and terms and conditions of employment in violation of Title VII or state law, or whether their policies caused an adverse impact against female FAs.

Dukes, 131 S. Ct. at 2551 n.5). "Like the commonality requirement, typicality does not require the representative party's claims to be identical to those of all Class Members." *Frank*, 228 F.R.D. at 182. "Minor variations in the fact patterns underlying individual claims" do not defeat typicality when the defendant directs "the same unlawful conduct" at the named plaintiffs and the class. *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993).

Here, the Named Plaintiffs are members of the classes they seek to represent. They each worked for Bank of America as FAs. The claims of all Class Members flow from the same factual, legal and remedial theories. *See Duling*, 267 F.R.D. at 97-98. They were each subjected to Bank of America's compensation and account distribution policies. They allege that they, and the Class Members, suffered adverse treatment with respect to compensation and business opportunities. Accordingly, the typicality requirement is satisfied.

D. Adequacy of the Named Plaintiffs

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The adequacy requirement exists to ensure that the named representatives will have an interest in vigorously pursuing the claims of the class, and . . . have no interests antagonistic to the interests of other Class Members." *Toure v. Cent. Parking Sys. of N.Y.*, No. 05 Civ. 5237, 2007 U.S. Dist. LEXIS 74056, at *18-19 (S.D.N.Y. Sept. 28, 2007) (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006)) (internal quotation marks omitted). Here, the interests of the Class Members and the interests of the Named Plaintiffs are the same – the elimination of sex discrimination against female FAs at Bank of America. The Named Plaintiffs have all affirmed their willingness to undertake the responsibilities of serving as class representatives.

E. Certification Is Proper Under Rule 23(b)(3)

Rule 23 requires that, in addition to the Rule 23(a) prerequisites, a proposed class must

also meet the definition of one of the Rule 23(b) categories. Here, Plaintiffs move for certification under Rule 23(b)(3).

1. Certification of the Class is Proper Under Rule 23(b)(3)

Rule 23(b)(3) requires that the common questions of law or fact "predominate over any questions affecting only individual members and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3) . This inquiry examines "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (1997). Satisfaction of Rule 23(a) "goes a long way toward satisfying the Rule 23(b)(3) requirement of commonality." *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986).

a. Common Questions Predominate

Predominance requires that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001) (internal quotation marks omitted), *abrogated on other grounds by Miles v. Merrill Lynch & Co.* (*In re Initial Pub. Offering Sec. Litig.*), 471 F.3d 24 (2d Cir. 2006). The essential inquiry is whether "liability can be determined on a class-wide basis, even when there are some individualized damage issues." *In re Visa Check*, 280 F.3d at 139. Where plaintiffs are "unified by a common legal theory" and by common facts, the predominance requirement is satisfied. *McBean v. City of N.Y.*, 228 F.R.D. 487, 502 (S.D.N.Y. 2005).

Here, all members of the class are unified by common factual allegations – that all Class Members were subjected to the same discriminatory policies based on their gender. They are also unified by a common legal theory – that these policies violated Title VII and various state anti-discrimination laws. These common issues predominate over any issues affecting only individual

Class Members. *See Easterling v. Conn. Dep't of Corr.*, 278 F.R.D. 41, 45 (D. Conn. 2011) (holding that individual questions regarding Class Member status, qualifications, and mitigation were less substantial than the issues that were subject to generalized proof, including whether the challenged physical fitness test had a disparate impact on female applicants; whether that impact was justified by business necessity; the total amount of back pay, the rate at which those women would have been paid; the total number of priority hiring slots that should be awarded, if any; and the total amount of front pay); *United States v. City of N.Y.*, 276 F.R.D. 22, 48-49 (E.D.N.Y. 2011) (finding that common issues, including the aggregate amount of relief available and the criteria used to establish who is eligible to receive retroactive seniority and priority hiring relief, predominated in a disparate impact case challenging a written entrance examination, despite individual questions regarding claimants' mitigation efforts).[10]

b. A Class Action Is a Superior Mechanism

Rule 23(b)(3)'s second provision analyzes whether "the class action device [is] superior to other methods available for a fair and efficient adjudication of the controversy." *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968). Rule 23(b)(3) sets forth a non-exclusive list of relevant factors, including whether individual Class Members wish to bring, or have already brought, individual actions; and the desirability of concentrating the litigation of the claims in the particular forum. Fed. R. Civ. P. 23(b)(3).[11]

[10] In a number of other cases alleging gender discrimination against FAs at other banks, and involving similar compensation systems, Courts have certified settlement classes under Rule 23(b)(3). *See* Geman Decl., Ex. 6 (*Augst-Johnson v. Morgan Stanley & Co., Inc.*, No. 06-1142 RWR (D.D.C. Oct. 26, 2007); *Id.,* Ex. 7 (*Carter v. Wells Fargo Advisors, LLC*, No. 09-01752 (E.D.N.Y. June 8, 2011)); *Id*., Ex. 8 (*Curtis-Bauer v. Morgan Stanley & Co., Inc.*, No. C 06-3903, 2008 WL 4667090 (N.D. Cal. Oct. 22, 2008)).

11 The manageability of a class action at trial is not a factor in determining whether to certify a settlement class. *See Amchem*, 521 U.S. at 620 ("[c]onfronted with a request for settlement-only class certification, a [trial] court need not inquire whether the case, if tried, would present intractable management problems, . . . for the proposal is that there be no trial") (internal citation omitted).

Class adjudication of this case is superior to individual adjudication because it will conserve judicial resources and is more efficient for Class Members, particularly those who lack the resources to bring their claims individually. *See Capsolas v. Pasta Res., Inc.*, No. 10-5595, 2012 WL 1656920, at *2 (S.D.N.Y. May 9, 2012). Here, Plaintiffs and Class Members have limited financial resources with which to prosecute individual actions. Concentrating the litigation in this Court is desirable because much of the allegedly wrongful conduct occurred within its jurisdiction. Employing the class device here will achieve economies of scale for putative Class Members, conserve judicial resources, and preserve public confidence in the system by avoiding repetitive proceedings and preventing inconsistent adjudications.

F. The Nationwide EPA Class Satisfies 29 U.S.C. § 216(b)

The Federal Equal Pay Act ("EPA") class is appropriate for certification under Section 16(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b). Under the FLSA, an action may be maintained by an employee or employees on behalf of others who are "similarly situated." 29 U.S.C. § 216(b).

Because Plaintiffs satisfy commonality under Rule 23, they also are "similarly situated" to members of the class under the less onerous requirements applicable to EPA collective action claims. *See Mazur v. Olek Lejbzon & Co.*, No. 05 Civ. 2194, 2005 U.S. Dist. LEXIS 30321, at *6 n.1 (S.D.N.Y. Nov. 30, 2005) (internal quotation marks omitted) (standard for approval of a collective action "far more lenient, and indeed, materially different, than the standard for granting class certification" under Fed. R. Civ. P. 23). In the initial, "conditional" certification phase, the "similarly situated" standard is more permissive than Rule 23 and requires only that the named plaintiff make a "modest factual showing sufficient to demonstrate that [he] and potential plaintiffs together were victims of a common policy or plan that violated the law." *Scholtisek v. Eldre Corp.*, 229 F.R.D. 381, 387 (W.D.N.Y. 2005).

III. Plaintiffs' Counsel Should Be Appointed as Class Counsel

Rule 23(g) sets forth four criteria courts must consider in evaluating the adequacy of proposed counsel: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions and claims of the type asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A).

Plaintiffs request that the Court appoint Lieff, Cabraser, Heimann & Bernstein, LLP ("LCHB") and Outten & Golden LLP ("O&G") as Class Counsel. They did substantial work identifying, investigating, prosecuting, and settling the claims; are well-versed and experienced in Title VII and class action law; and are well-qualified to represent the interests of the Class. Geman Decl., ¶¶ 10-14; Klein Decl., ¶¶ 1-4. Courts have repeatedly found both firms to be adequate class counsel in Title VII and other class cases. *See*, *e.g.*, *Easterling v. Conn., Dept. of Corr.,* 265 F.R.D. 45, 51 n.2 (D. Conn. 2010) (finding O&G to "be qualified, experienced, and generally able to conduct the proposed litigation" in a Title VII disparate impact class action), *modified sub nom.*, *Easterling v. Conn. Dept. of Corr.,* 278 F.R.D. 241 (D. Conn. 2011); *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 545 (2012) (finding that LCHB had "experience in handling complex litigation and have done extensive work prosecuting the claims in this action"); *see also* Geman Decl., ¶13; Klein Decl., ¶4.

IV. The Proposed Notice and Claim Form Is Appropriate

The content of the proposed Notice of Class Action Settlement, which is attached to the proposed preliminary approval order as Exhibit 2, fully complies with due process and Fed. R. Civ. P. 23(c)(2)(B). The notice must provide the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

The Notice proposed here satisfies the requirements of Rule 23(c)(2)(B). The Notice

describes the terms of the settlement, informs the class about the attorneys' fees terms of the agreement, and provides specific information regarding the date, time, and place of the final approval hearing. Accordingly, the detailed information in the proposed Notice is more than adequate to put Class Members on notice of the proposed settlement and is well within the requirements of Rule 23(c)(2)(B) .

The settlement agreement provides that notice will be mailed individually by the settlement administrator to the last known address of each Class Member within twelve (12) days of preliminary approval. Settlement Agreement, § III.C.2. To ensure a complete and accurate mailing, Bank of America will provide the settlement administrator with names and contact information of potential settlement Class Members within five (5) days of preliminary approval, and that list will be updated with any information available through the National Change of Address system. *Id*., § III.C.1. The settlement administrator will trace all returned undeliverable notices and re-send to the most recent addresses available. *See id*.

The Notice to the class will contain information about how to exclude oneself, object to the settlement, and/or file a claim. Class members will have forty-five (45) days from the date of mailing to submit opt-out requests or to comment on or object to the settlement. Settlement Agreement, § IV.C.7-8. This is sufficient time to give settlement Class Member a fair opportunity to respond. *Cf. Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993) (approving notice sent 31 days before the deadline for objections). Class members will have 120 days from the mailing of Notice to submit a claim form. Once claims are received, the settlement administrator will send payments as soon as practicable.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court issue the proposed Preliminary Approval Order.

Dated: September 6, 2013
New York, New York

Respectfully submitted,

By: /s/ Cara E. Greene

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