UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SCOTT CHAMBERS, ET AL.,

Plaintiffs,

-v-

MERRILL LYNCH, ET AL.,

Defendants.

10 Civ. 7109 (AJN)

MEMORANDUM & ORDER

ALISON J. NATHAN, District Judge:

A hearing was held on April 26, 2013, during which time the Court heard the Plaintiffs' Motion for Final Approval of the Class Action Settlement and their Application for Award of Attorneys' Fees and Expenses and Incentive Award for Class Representatives. The Court had, on December 13, 2012, entered an Order of Preliminary Approval appointing Class Counsel, approving notice to the Class, establishing deadlines for objections, setting a date for a final fairness hearing, certifying the Class and preliminarily approving the Second Amended Stipulation of Settlement (the "Settlement"). Having considered the written submissions of the parties and the written objections of Charles Gelineau and Larry N. Parker and having held a final fairness hearing and having considered the arguments offered at the final fairness hearing, it is hereby ORDERED that the Class is finally certified and the Settlement is finally approved as follows:

I. CLASS CERTIFICATION

The Class is defined as:

> those individuals who were employed by Merrill Lynch in the position of Financial Advisor in the United States who: (a) held the position of Financial Advisor at Merrill Lynch on September 15, 2008; (b) participated in the Merrill Lynch Financial Advisor Capital Accumulation Award Plan ("FACAAP"); and/or the Merrill Lynch Growth

> Award Plan for Financial Advisors ("Growth Award"); and/or the Merrill Lynch Wealthbuilder Account Plan ("Wealthbuilder") (collectively, the "Plans"); (c) voluntarily terminated employment (excluding retirements) at Merrill Lynch during the period from September 15, 2008 through and including June 30, 2012 (the "Class Period") while holding the position of Financial Advisor at the time employment was terminated and had unvested awards in one of more of the Plans at the time of their terminations; (d) had 2008 productions credits of $500,000 or less; (3) did not sign and/or accept the original or amended Merrill Lynch Advisor Transition Program; (f) did not before the Notice Mailing Date, enter into a settlement agreement with one or more of the Defendants and/or the Releases in which they released any claim related to an alleged voluntary termination of their employment with Merrill Lynch for "Good Reason" under one or more of the Plans following the Change in Control; and (g) did not adjudicate any claim relating to the alleged voluntary termination of their employment with Merrill Lynch for "Good Reason" under one or more of the Plans following the Change in Control.

For the reasons set forth below, for purposes of this settlement, the Class is certified because it satisfies the requirements of Rule 23(a) and Rule 23(b)(3) of the Federal Rules of Civil Procedure.

A. The Settlement Class Meets the Rule 23(a) Criteria

Rule 23(a) imposes four threshold requirements: (1) numerosity ("the class is so numerous that joinder of all members is impracticable"), (2) commonality ("there are questions of law or fact common to the class"), (3) typicality ("the claims or defenses of the representative parties are typical of the claims or defenses of the class"), and (4) adequacy of representation ("the representative parties will fairly and adequately protect the interests of the class"). Fed.R.Civ.P. 23(a).

Numerosity is satisfied here because the Class encompasses 1,134 members – too many for joinder to be practical. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) ("[N]umerosity is presumed at a level of 40 members.").

The commonality and typicality requirements are also met. Commonality demands that the class's claims "depend upon a common contention . . . capable of classwide resolution" such that "its truth or falsity will resolve an issue that is central to the validity of each one of the

claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

Typicality "requires that the claims of the class representatives be typical of those of the class, and is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (internal quotes and citations omitted).

"The commonality and typicality requirements tend to merge into one another, so that similar considerations animate analysis of Rules 23(a)(2) and (3). The crux of both requirements is to ensure that maintenance of a class action is economical and [that] the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id. See also Sykes v. Mel Harris and Assoc., LLC*, 285 F.R.D. 279, 286-87 (S.D.N.Y. 2012).

Here, the Class's claims all flow from the same course of events: the 2008 merger between Merrill Lynch & Co., Inc. and Bank of America and the attendant changes to the compensation system. Furthermore, the Class's claims all require interpretation of the Plans, particularly whether the merger constitutes a "change of control" and whether the changes to the compensation system constitute "good reason," as those terms are used in the Plans.

Finally, the named plaintiffs – Scott A. Chambers, John C. Burnette, and Eric Schwilk – are adequate representatives of the class because they represent more than one tier of recovery under the Settlement and because they are represented by experienced counsel who have been involved in this action from its inception. *See In re Facebook Inc., IPO Sec. and Derivative Litig.*, 288 F.R.D. 26, 37 (S.D.N.Y. 2012).

B. The Settlement Class Meets the Relevant Rule 23(b)(3) Criteria

In order to meet the requirements of Rule 23(b)(3), the Court must find "that the

questions of law or fact common to class members 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). "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

The Court concludes that Rule 23(b)(3) is satisfied because the Class's claims depend on demonstrating that the changes to the compensation system following the 2008 merger between Merrill Lynch and Bank of America satisfy the "good reason" trigger for accelerated vesting. Thus, for purposes of settlement, the settlement class meets the relevant 23(b)(3) criteria.

II. NOTICE WAS APPROPRIATE

As required by the December 13, 2012 Preliminary Approval Order, the Class was provided with written notice of the terms of the Settlement, the procedures for objecting to the Settlement, and the procedures for opting out of the settlement class. Not only was this information mailed to Class Members, but it was also posted on the Claims Administrator's website. Both the content of the written notice and the measures taken to provide the notice to Class Members were sufficient to satisfy the requirements of due process.

III. SETTLEMENT APPROVAL

A district court's approval of a settlement is contingent on a finding that the settlement is "fair, reasonable, and adequate." Fed.R.Civ.P. 23(e)(2). This entails a review of both procedural and substantive fairness. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). In conducting this review, the Court should be mindful of the "strong judicial policy in favor of settlements, particularly in the class action context." *Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.*,

396 F.3d 96, 116 (2d Cir. 2005) (quoting *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998)). "The compromise of complex litigation is encouraged by the courts and favored by public policy." *Id.* at 117 (quoting 4 Newberg § 11:41, at 87).

A. Procedural Fairness

With respect to procedural fairness, a proposed settlement is presumed fair, reasonable, and adequate if it is "reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *McReynolds v. Richards–Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (quoting *Wal–Mart*, 396 F.3d at 116). This presumption is appropriately applied to the Settlement because it was reached after three years of litigation, which included significant discovery and a detailed motion for class certification, and after more than a year of settlement discussions. Furthermore, as the Court has already indicated, all parties are represented by experienced counsel.

B. Substantive Fairness

In assessing substantive fairness, the Court considers the nine factors detailed by the Second Circuit in *City of Detroit v. Grinnell Corporation*, 495 F.2d 448 (2d Cir. 1974):

> (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; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

495 F.2d at 463. "All nine factors need not be satisfied; rather, a court should look at the totality of these factors in light of the particular circumstances." *In re Top Tankers, Inc. Sec. Litig.*, No. 06 Civ. 13761, 2008 WL 2944620, at *4 (S.D.N.Y. July 31, 2008).

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

This action involves, among other things, complex incentive plans and compensation and benefit packages unique to the financial brokerage industry; defenses that implicate a financial advisor's subjective reason for resigning; and expert compensation and damages models. Furthermore, in the absence of settlement, the duration of the litigation would likely be significant given Defendants' stated intention to actively oppose class certification outside of the settlement context and given that arbitration proceedings involving the same issues as those presented in the instant litigation have been hard fought and have required extensive hearings. The Court therefore concludes that this factor weighs in favor of approving the proposed settlement.

2. The Reaction of the Class To the Settlement

"If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." *Wal-Mart*, 396 F.3d at 118 (quoting 4 Newberg § 11.41, at 108). Here, the Court received only two objections – one from Charles Gelineau and one from Larry N. Parker. (Dkt. #s 132, 133)

Mr. Gelineau and Mr. Parker object to the proposed formula for calculating settlement payments because Class Members who did not previously seek a payout of awards under the Plans, either by filing a legal action or initiating an arbitration, receive less compensation than Class Members who took such affirmative action. Mr. Gelineau and Mr. Parker indicate that although they began to accumulate documentation necessary to file such a law suit, they never filed suit, instead waiting to see if someone else filed a class action. Both objectors state that they did not have notice of the instant action until it was settled and that if they had known of the suit earlier, they would have participated sooner. These objections are overruled.

Mr. Gelineau and Mr. Parker are correct that the amount of compensation a Class Member receives from the Settlement depends in part on whether and when a Class Member made a claim for awards under the Plans. This is meant to approximate the strength of a Class Member's claim – Class Members who, prior to settlement, took affirmative steps to recover such payments have more credible "good cause" claims than those who did not.

Mr. Gelineau's and Mr. Parker's objections do not undermine the appropriateness of this strength-of-claim proxy. They have not, for example, suggested that Class Members were prevented from filing suit, initiating an arbitration or making a demand to Merrill Lynch or Bank of America prior to the instant settlement. Instead, they admit that they chose not to proceed on their own in hopes of simply joining someone else's lawsuit.

The Court also notes that the fairness of the proposed formula for calculating settlement payments is bolstered by the fact that Eric Schwilk, a class representative, falls within one of the lowest tiers of recovery under the Settlement.

Finally, Mr. Gelineau and Mr. Parker, like all Class Members, were not entitled to any earlier notice of this action than the notice that they received. Rule 23(c) does not direct notice to potential class members until the class is certified, and no class was certified in this action, conditionally or otherwise, until the parties submitted their proposed settlement to the Court.

In sum, the absence of persuasive objections to the settlement weighs heavily in favor of its approval.

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

While the parties need not have engaged in extensive discovery, the plaintiffs should have "obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement." *In re AOL Time Warner, Inc.*, No. 02 Civ.

5575, 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006). Here, the parties have engaged in three year of litigation, which included significant discovery culminating in a detailed motion for class certification. They also conducted settlement discussions for over a year. This is sufficient to permit realistic appraisal of the reasonableness of the settlement and weighs in favor of approval.

4. The Risks Establishing Liability and Damages

In considering these factors, the Court need not adjudicate the disputed issues or decide unsettled questions; rather, "the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004).

Establishing liability and damages in this action not only requires interpretation of complex incentive plans and damages models, but it also depends on the plaintiffs' subjective motivations for voluntarily terminating their employment with Merrill Lynch/Bank of America – something that is inherently difficult to prove.

Furthermore, absent settlement, Merrill Lynch/Bank of America would vigorously contest the assertion that Class Members terminated their employment because of the compensation changes rather than for some other reason. This is clear from the manner in which Merrill Lynch/Bank of America has defended comparable FINRA actions, very few of which have reached conclusion and even fewer of which have resulted in significant payouts to former analysts.

These risks weigh in favor of approving the proposed settlement.

5. The Risks of Maintaining the Class Action Through the Trial

This factor is largely neutral. Although Plaintiffs believed, after conducting discovery, that they would be able to obtain class certification, Defendants intended to vigorously oppose

certification up until a settlement was reached. And while the Court believes that certification of the settlement class is warranted for the reasons detailed *supra* § I, it also notes that certification is never assured and that the Court can reevaluate the appropriateness of certification at anytime.

6. The Ability of Defendants to Withstand a Greater Judgment

While Defendants could likely withstand a greater judgment, this does not, standing alone, suggest that the settlement is unfair. *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 178 n.9 (S.D.N.Y. 2000).

7. The Reasonableness of the Settlement in light of the Best Possible Recovery and the Attendant Risks of Litigation

"The determination whether a settlement is reasonable does not involve the use of a mathematical equation yielding a particularized sum." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (internal quotes and citation omitted). "[I]n any case there is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion – and the judge will not be reversed if the appellate court concludes that the settlement lies within that range." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972). *See also Maley v. Del Global Tech. Corp.*, 186 F. Supp. 2d 358, 364 (S.D.N.Y.2002) ("In assessing the Settlement, the Court should balance the benefits afforded to members of the Class and the immediacy and certainty of a substantial recovery for them against the continuing risks of litigation.").

The Settlement provides Class Members with 30%-70% of their Plan Values for awards prior to 2008 and 12%-50% of their Plan Values awarded in 2009. This is a significant recovery, particularly in light of the challenges detailed *supra* § III.B.4. It is also noteworthy that even Class Members who *never* demanded payouts before notice of this settlement will receive a

sizeable award. The Court therefore concludes that these factors weigh in favor of approving the proposed settlement.

* * *

For the forgoing reasons, the Court finds the Settlement to be fair, reasonable and adequate.

IV. ATTORNEYS FEES AND EXPENSES

Class Counsel seek an award of attorneys' fees in the amount of $5,065,160.37 and an award of expenses in the amount of $85,498.48.

Although litigants are generally expected to pay their own expenses, including their own attorneys' fees, attorneys who create "a common fund from which members of a class are compensated for a common injury inflicted on the class . . . are entitled to a reasonable fee – set by the court – to be taken from the fund." *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 47 (2d Cir. 2000).

Courts may use either of two methods to determine what is a reasonable award of attorneys' fees. *Id.* "The first is the lodestar, under which the district court scrutinizes the fee petition to ascertain the number of hours reasonably billed to the class and then multiplies that figure by an appropriate hourly rate." *Id.* "Once that initial computation has been made, the district court may, in its discretion, increase the lodestar by applying a multiplier" based on factors such as the risk of the litigation and the performance of the attorneys. *Id.*

Under the second method – referred to as the percentage method – the district court simply sets a percentage of the recovery as a fee. *Id.* In setting the percentage, courts look to the same factors that are used to determine the multiplier for the lodestar. *Id.*

Here, the fees requested by class counsel are reasonable under either method given the

complexity of the case; the risks involved in the litigation; the extensive efforts of Class Counsel; and the favorable result achieved on behalf of the Class. The requested fee amounts to less than 25% of the total relief paid to Class Members and is within the range of awards typically approved for settlements of similar size. *See In re Telik, Inc. Sec. Litig.*, 576 F.Supp.2d 570, 587–88 (S.D.N.Y. 2008) (collecting cases). Furthermore, applying a lodestar "cross-check," Class Counsel requests a multiplier of 1.06, which is within a range of reasonableness for other awards that have been approved. *See, e.g.*, *Hernandez v. Merrill Lynch & Co., Inc.*, No. 11 Civ. 8472, 2013 WL 1209563, at *9 (S.D.N.Y. Mar. 21, 2013) (citing cases).

"It is [also] well-established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses." *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 150 (S.D.N.Y. 2010). To date, Class Counsel has incurred expenses including the costs of filing fees, depositions, experts, photocopies, mailing and travel. The requested costs of $85,498.48 are reasonable and should be reimbursed.

V. INCENTIVE PAYMENTS TO CLASS REPRESENTATIVES

In the Second Circuit, "the courts have, with some frequency, held that a successful class action plaintiff, may, in addition to his or her allocable share of the ultimate recovery, apply for and, in the discretion of the Court, receive an additional award, termed an incentive award." *Roberts v. Texaco, Inc.*, 979 F.Supp. 185, 200 (S.D.N.Y. 1997). *See also Spann v. AOL Time Warner*, No., 2005 WL 1330937, at *9 (S.D.N.Y. June 7, 2005). Class Representatives Scott A. Chambers, John C. Burnette, and Eric Schwilk each seek such an award. In light of the efforts expended by these individuals for the benefit of the lawsuit and the Class, awards of $20,000 to Mr. Chambers, $20,000 to Mr. Burnette, and $10,000 to Mr. Schwilk are appropriate.

VI. CONCLUSION

For the reasons articulated herein, the Settlement is determined to be fair, reasonable and adequate. Accordingly, Plaintiffs' Motion for Final Approval of the Class Action Settlement is GRANTED; Plaintiffs' Application for Award of Attorneys' Fees and Expenses is GRANTED; and the Class Representatives' Application for Incentive Awards is GRANTED.

The Court will separately enter a final judgment and order of dismissal.

SO ORDERED.

Dated: April 26, 2013
New York, New York

ALISON J. NATHAN
United States District Judge