

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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IN RE MUNICIPAL DERIVATIVES  
ANTITRUST LITIGATION  
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: MDL No. 1950  
: 08 Civ. 2516 (VM)(GWG)

**CLASS PLAINTIFFS' REPLY MEMORANDUM**  
**IN SUPPORT OF CLASS PLAINTIFFS' MOTION TO SEEK RELIEF RELATED TO**  
**SELECT STATE ATTORNEY GENERALS'**  
**PROPOSED NOTICE**

**TABLE OF CONTENTS**

A. THE STATE AGS MADE CHANGES TO ALMOST EVERY PARAGRAPH IN THEIR REVISED NOTICE PACKET ..... 3

B. THE REVISED NOTICE PACKET IS NOT LIKELY TO BE UNDERSTOOD BY POTENTIAL CLAIMANTS ..... 3

C. THE REVISED NOTICE PACKET DOES NOT ADEQUATELY DISCLOSE WHAT CLAIMS ARE WAIVED BY ENTERING INTO THE STATE AGREEMENT ..... 5

D. THE STATE AG’s RELIANCE ON FRAUDULENT DATA IS NOT ADEQUATELY DISCLOSED IN THE REVISED NOTICE PACKET ..... 6

E. BOA IS LIABLE FOR COVER BIDS, AND THE REVISED NOTICE DOES NOT ADEQUATELY DISCLOSE THIS FACT ..... 7

F. CLASS NOTICES ARE INAPPLICABLE TO THE NOTICE PROCESS HERE ..... 10

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Erhardt v. Prudential Group, Inc.</i> , 629 F.2d 843 (2d Cir. 1980).....	2
<i>In re Currency Conversion Fee Antitrust Litig.</i> , 361 F.Supp.2d 237 (S.D.N.Y. 2005).....	2
<i>Nelson v. United States</i> , 555 U.S. 350, 129 S.Ct. 890 (2009).....	9
<i>United States v. Heffernan</i> , 43 F.3d 1144 (7th Cir. 1994) .....	10
<b>STATUTES</b>	
Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 665 (2004). (“ACPERA”).....	8
<b>OTHER AUTHORITIES</b>	
150 Cong. Rec. H3657 (June 2, 2004).....	8
150 Cong. Rec. S3614 (Apr. 2, 2004).....	8
150 Cong. Rec. S3615 (Apr. 2, 2004).....	8
Fed. R. Civ. P. 23 .....	10

Bank of America, N.A. (“BoA”) and the State AG’s claim that it is Class Plaintiffs’ “latest salvo” that has resulted in seven months of delaying the issuance of notice to eligible claimants is incorrect.<sup>1</sup> Despite accepting a settlement amount and signing the State Agreement in December 2010 *on behalf of only* those entities that they alleged had been injured by Bank of America (“BoA”), the State AGs admitted to Judge Gorenstein at the May 11, 2011 hearing that BoA and they had not “finished” determining who were those injured entities.<sup>2</sup> And despite promising the list of entities to Class Plaintiffs within approximately one week of that hearing, BoA and the State AGs did not produce this list of entities to Class Plaintiffs until June 1, 2011. The first list was flawed, containing over 40 trade numbers that were not associated with any known entities, and was only corrected because Class Plaintiffs identified the issue. On June 9, 2011, the State AGs advised Class Plaintiffs that they needed to make “adjustments” to the list. However, to date, no such adjustments have been made.

Thus, as of June 30, 2011, almost seven months after the State AGs entered into a settlement amount on behalf of a “subset of putative class members” (AG Opp. at 2), it appears that BoA and they *still* don’t know with specificity who belongs in that subset and which trades were affected. While understandably BoA and the State AGs would want to distance themselves from these circumstances, any “delay” in providing notice to the entities on whose behalf the State AGs settled cannot be blamed on any of Class Plaintiffs’ actions. Absent the instant motion, the State AGs still would not have been prepared to send out notice earlier than June 2011.

Rather than focusing on providing more information for putative claimants of the State Agreement, the State AG Opposition avers that the State Agreement with BoA is not subject to

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<sup>1</sup> See Docket No. 1507, Memorandum In Opposition to Class Plaintiffs’ Motion to Seek Relief Related to Select State Attorney Generals’ Proposed Notice (“AG Opp.”) at 1, 2.

<sup>2</sup> Neither BoA nor the State AGs provided the Court with an explanation as to how they signed the State Agreement allegedly constituting “full restitution” for injured parties in December 2010, when in fact, the injured parties still had not been completely identified six months later.

approval by this Court. AG Opp. at 4. BoA focuses on the fact that this Court has, to date, declined to inquire into the fairness of the State Agreement thereby making Class Plaintiffs' suggested language unnecessary. *See* Docket No. 1514 at 3.<sup>3</sup> However, "approval" and/or "fairness" is not what is currently at issue: BoA, a defendant, is seeking to send notice to the Class that would extinguish liabilities in this case. In this Circuit, this Court "is unquestionably tasked with the duty to ensure that communications *with class members* are not misleading." *Erhardt v. Prudential Group, Inc.*, 629 F.2d 843, 846 (2d Cir. 1980) (emphasis added); *In re Currency Conversion Fee Antitrust Litig.*, 361 F.Supp.2d 237, 252 (S.D.N.Y. 2005) (explaining the importance of material omissions from such communications). Given that the Revised Notice Packet will be distributed to putative opt in claimants of the State Agreement, who are also undisputedly members of the federal class action here, this Court is "unquestionably tasked" with ensuring that communications -- with the class members it was selected to oversee by the Judicial Panel of Multidistrict Litigation -- are not misleading. *Erhardt*, 629 F.2d at 846.

Even with the most recent revisions, material omissions remain in the Revised Notice Packet. The notice does not inform claimants of the economic basis for the settlement, the specific allocation formulas for each class member, or that Class Counsel recommend against an opt-in decision. A notice that omits or declares material information is being omitted itself demonstrates that the notice program is misleading to class members. As such, this Court should not permit the Notice Packet to be distributed at this time. The State Agreement aims to extinguish claims against BoA arising from over a billion dollars of municipal deals for cities and private entities across the U.S. For several reasons, Class Plaintiffs respectfully submit that permitting discovery to inform what should be contained in the Notice Packet is amply justified and should be ordered

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<sup>3</sup> Memorandum of Bank of America, N.A. in Response to the Motions of Class and Oakland Plaintiffs Seeking Relief Related to Bank of America's December 7, 2010 Settlement with Twenty-Eight State Attorneys General ("BoA Opp.")

here. Most notably, the time granted for limited discovery could also simultaneously be used by the parties to cure material defects in the Revised Notice Packet.

**A. THE STATE AGS MADE CHANGES TO ALMOST EVERY PARAGRAPH IN THEIR REVISED NOTICE PACKET**

On June 21, 2011, BoA and the State AGs submitted a newly revised Notice Packet to this Court. Docket No. 1508-2. It included new language in almost *every paragraph*, most of which Class Plaintiffs contend is not neutral or concise, and in many circumstances is potentially misleading. Exhibit A hereto (a table listing the objectionable new language). The Revised Notice Packet was not circulated to any plaintiffs prior to submission to this Court. Thus, Class Plaintiffs had no opportunity to review or brief the consequences of this new language in our opening Motion, and only received the right to reply by requesting it from Judge Gorenstein. However, Class Plaintiffs were encouraged to see *some* of our proposed language was adopted in this latest draft notice. *See e.g.*, Docket No. 1508-2 at Question 4, p.2 (much of the new language describing BoA's wrongful conduct to putative claimants was proposed by Class Plaintiffs).

By permitting time for the limited discovery requested in our opening Motion, the process that this Court initially intended for the Notice Packet –arriving at language through a meet and confer process, rather than by submitting briefs to the Court -- could be carried out during the same time frame as discovery. This Court should not be forced to resolve differences in the Revised Notice Packet that the parties themselves have not yet discussed.<sup>4</sup>

**B. THE REVISED NOTICE PACKET IS NOT LIKELY TO BE UNDERSTOOD BY POTENTIAL CLAIMANTS**

Class Plaintiffs' notice expert opined that the original Notice Packet was "not written in plain language and could be misunderstood by many recipients," partly because it "failed

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<sup>4</sup> Similarly, if the BoA and the State AGs have not yet finalized the list of injured parties (*see* Docket No. 1494, ¶11, Ex. 9), it is premature for this Court to approve any notice. Such future changes may raise new and novel challenges to the Court of which potential claimants should be advised of in the notice.

readability tests.” See Docket No. 1493-6, Declaration of Shannon R. Wheatman, Ph.D., at ¶9.

Neither the State AGs nor BoA submitted *any* evidence refuting these claims. Nor did the multiple changes made to the Revised Notice Packet use plain language or improve the readability of the notice. See Supplemental Declaration of Shannon Wheatman at ¶¶ 5(b), 7(b) attached hereto as Exhibit B (noting that the difficulty of the readability actually increased, making claimants likely to “stop reading” the Revised Notice Packet). Releases should not be granted from claimants who are not receiving sufficient information to understand the strength and amount of their claims. The Third Circuit has discussed the dangers of providing inadequate information in an analogous context:

With early settlement, both parties have less information<sup>5</sup> on the merits. That is, they have less information on the membership of the class, on the size of potential claims, on whether the settlement purports to resolve class or individual claims, on the strengths and weaknesses of the case, and on how class members will benefit from the settlement. . . . Turning to the question of due process rights, we note that class members may, as a result of *these information deficiencies*, not be in a fair position at this early stage to evaluate whether or not the settlement represents a superior alternative to litigating.

*In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 789 (3rd Cir. 1995). Here, claimants will not receive information sufficient to enable them to determine whether they are better off granting the release in exchange for the settlement or litigating.

Thus, there is unrefuted evidence that the Revised Notice Packet, as drafted, cannot “fully disclose” in “clear” or “concise” terms the consequences of entering into the State Agreement to potential claimants, and as such, does not comply with this Court’s March 1, 2011 Order. See Docket No. 1253. Therefore, the Revised Notice Packet should not be approved by this Court at

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<sup>5</sup> BoA attempts to refute the fact that claimants have little access to the underlying evidence in this case by stating that an Eligible Counterparty can seek information from the AG in the state in which it resides, the AG working group, or through the help of its own legal counsel. BoA Opp. at 17-18. However, *none* of these lawyers can grant access to third parties to tapes or confidential documents under the operative protective orders in this case. Moreover, despite being sent Class Plaintiffs’ challenges to the confidentiality designations of certain audio tapes on June 6, 2011, BoA has yet to respond to Class Plaintiffs’ request as to when we can expect a response.

this time. Again, during the same time permitted for the limited discovery requested in Class Plaintiffs' Motion, the Revised Notice Packet could be revised to increase its use of plain language as well as lower its readability score (making it more accessible to potential claimants).

**C. THE REVISED NOTICE PACKET DOES NOT ADEQUATELY DISCLOSE WHAT CLAIMS ARE WAIVED BY ENTERING INTO THE STATE AGREEMENT**

For the first time, BoA and the State AGs have disclosed that many transactions by Eligible Counterparties between January 1, 1998 and December 31, 2003 will not be compensated and that the Revised Notice Packet will not list these non-compensated transactions. BoA Opp. at 5; AG Opp. at 8-9. BoA now contends that each of the thousands of "sophisticated" Eligible Counterparties "know[] what products it purchased from BoA." BoA Opp. at 6.

This statement, however, should be compared with the conduct of most of the Defendants in this case. Half of the Defendants, who clearly qualify as sophisticated entities, could not produce even a full list of the *addresses* of their municipal derivative customers they had during the time period with "reasonable effort." *See* Docket No. 1511, Class Plaintiffs' Memorandum of Law in Support of Motion for Approval of Notice Program and Forms Related to Settlement with Defendant Morgan Stanley, at 8 (7 of the 14 Defendants in this case did not produce all of their customer addresses, including BoA); *see also* Letter of Thomas C. Rice to Judge Marrero dated May 3, 2011 (explaining to Court why some defendants could not produce addresses). Yet BoA is sanguine about towns and entities' ability to conjure up 100% of their municipal deals that they entered into from 1998 to 2007 – despite elected official turnover, record issues, etc.– when BoA itself<sup>6</sup> could not produce mere addresses of its own customers. *See* Docket No. 1493-5, Affidavit

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<sup>6</sup> Despite its June 7, 2011 letter to this Court stating that it had produced addresses to Class Plaintiffs, BoA actually produced lists of customers, both with and *without addresses*, stating in its letter to Class Plaintiffs that "[i]f an entry contains no address, that means that a search by Bank of America of its derivatives customers and issuer database did not reflect any address information."

of Petru S. Stoianovici, at Ex. 4 (illustrating that some claimants may waive more claims than they are compensated for).

The problem cannot be fixed by simply including a notice of omitted information. As discussed above, a notice that discloses that it has material omissions is misleading. Moreover, the State AGs refuse to let their list of compensated deals be filed publicly in connection with this briefing. *See* Docket No. 1493 at 4, n.4; Docket No. 1494, Declaration of Megan E. Jones at ¶ 11, Ex. 9. Therefore, if any notice is to be disseminated at this time, Class Plaintiffs' proposed language about such omissions must be included. *See* Docket No. 1493, Exhibit C, ¶¶ 5-6 (Class Plaintiffs' Redlines to States' Proposed Notice).

**D. THE STATE AG'S RELIANCE ON FRAUDULENT DATA IS NOT ADEQUATELY DISCLOSED IN THE REVISED NOTICE PACKET**

BoA asserts that the disclosures by its former employee Brian Zwerner in his guilty plea that he "cooked the books" of the Bank's municipal derivatives transactions is of no concern to Eligible Counterparties and, in any event, his plea encompassed both understating and overstating profits on transactions.<sup>7</sup> However, if the settlement numbers are based on falsified data, that is certainly a fact that an Eligible Counterparty deciding whether or not to opt in to the State Settlement would want full disclosure about. Yet the Revised Notice Packet still does not include any disclosure that for at least three years (1999 to May 2002) of the period for which compensation is being paid by BoA (1998 to 2003), Brian Zwerner submitted falsified data upon which the State AGs relied.

Closer examination of its May 2011 explanation on how the State Agreement "handled" the Zwerner falsification of data (which BoA disclosed in settlement talks in 2009) is enlightening:

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<sup>7</sup> Class Plaintiffs challenge BoA to state on the record precisely how much of the profits on municipal derivative transactions were overstated; its failure to do so to date speaks volumes.

*To the extent practicable* in an effort to ensure that each eligible counterparty's share under the States's settlement best accounts for Mr. Zwerner's false marketing profit entries, the States *are working* with their economic expert to use the information available to us through the investigation, including information contained in the Marketing Adjustment page, *to correct* the estimated marketing profit for affected transactions.

The description above . . . is therefore sufficient to apprise you of *the manner in which the States intend* to (1) *identify specific transactions where the estimated marketing profit was over or understated* in order to (2) take Mr. Zwerner's conduct into account in estimating each eligible counterparty's share of the \$62.5 million settlement.

See Docket No. 1491-5, Ex. D to Declaration of Eric B. Fastiff (emphasis added).<sup>8</sup> Thus, it seems clear from the above that the impact of Mr. Zwerner's conduct on each Eligible Counterparty's settlement share has not yet been identified by the State AGs or BoA. Yet again, despite entering into a Settlement Agreement six months ago that they alleged constituted "full restitution," the BoA and the State AGs are – "to the extent practicable" only now "working" to "correct" the estimated marketing profit for affected transactions "using the information available." *Id.* What work has happened since 2009? And why would anyone enter a settlement agreement in December 2010 *before* such work was concluded? Clearly, discovery on the extent of Zwerner's conduct, as well as the State AG's future methodology of accounting for it, should take place before any notice is issued. Otherwise, Class Plaintiffs' unambiguous language should be inserted into any notice issued. If potential claimants "share" has been adversely affected by this conduct, they should know about it before signing the State Agreement Release.

**E. BOA IS LIABLE FOR COVER BIDS, AND THE REVISED NOTICE DOES NOT ADEQUATELY DISCLOSE THIS FACT**

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<sup>8</sup> Mr. Cole, of the CT State Attorney General's office, only emailed his letter to Oakland et al plaintiffs' counsel, Joseph Saveri, at 10:05AM on May 15, 2011, stating he "would appreciate it if you could confirm your receipt and forward this letter to all other defense counsel." Thus, Mr. Cole never circulated his letter to all counsel of record, and did not send it to Class Counsel (despite the notation that it was sent to "all counsel of record"). See Docket No. 1493, Mem. at 18 (noting the non-response of the AGs' office).

BoA argues that the class in MDL No. 1950 could not recover for cover bids based on (a) the language of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 665 (2004). (“ACPERA”), (b) the language of the Confidentiality Agreement between cities and class counsel in MDL No. 1950, and (c) the language of the Antitrust Sentencing guidelines. BoA. Opp. at 6-11. None of these arguments pass muster.

With respect to ACPERA, BoA makes much of the fact that it has provided restitution under the United States Department of Justice’s *criminal* Corporate Leniency Program. Such restitution (even assuming that it was calculated accurately by the Bank), however, does not extinguish its *civil* monetary exposure in this class action. Focusing on collusively bid municipal derivatives transactions, BoA faced exposure in three possible scenarios: (1) where it was a successful bidder, (2) where it submitted a collusive courtesy bid and did not win, and (3) bidding situations where BoA’s coconspirators bid and it did not, but where it would be jointly and severally liable for their acts. As an amnesty applicant, BoA was entitled to the benefits of ACPERA, which states at Section 213(a) that the “amount of damages recovered by or on behalf of a claimant from an antitrust leniency applicant . . . shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation.”<sup>9</sup> The legislative history indicates that this language meant that the applicant would “only be liable for actual damages attributable to its own conduct”. 150 Cong. Rec. at S3614 (Apr. 2, 2004).<sup>10</sup> As a result, BoA’s potential liability in the third scenario described above is extinguished under ACPERA. Damages “attributable” to BoA’s

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<sup>9</sup> Pursuant to Section 212(4) of ACPERA, a “claimant” is defined to include a class. It does not include states or their subdivisions, although the Settling States have essentially waived this limitation in the State Agreement just as Class Counsel have stipulated in the Confidentiality Agreement with BoA (Docket No. 1212-3) that any settlement with respect to the Bank would be on a detrebled basis.

<sup>10</sup> See 150 Cong. Rec. at H3657 (June 2, 2004) (“a cooperating party would be liable only damages attributable to that party’s conduct”); 150 Cong. Rec. at S3615 (Apr. 2, 2004) (“a party that receives leniency would only be liable for the portion of the damages actually *caused by its own actions*”) (emphasis added).

“own conduct” or its “own actions”, however, would include the other two scenarios where it submitted winning or courtesy bids. The State Agreement by its terms does not apply to such courtesy bids, defining a “Covered Derivative” as one where BoA won the bid and was the provider. *See* Docket No. 1212-7, State Agreement, Ex. G at Attach. A, p. 26, ¶A.1.

BoA, however, contends that parties represented by Class Counsel contracted away the right to pursue damages for cover bid situations in paragraph 12 of the Confidentiality Agreement. That is incorrect. Class Counsel merely agreed that damages sought would be limited to those “attributable to commerce done by BoA in the municipal derivatives business affected by the alleged anticompetitive activity....” This language is quite different from the express limitation in the State Agreement. The “commerce” referred to would include both collusive winning bids and courtesy bids, *i.e.*, all situations where collusive commercial offers were tendered by the Bank. Thus, even assuming that BoA has provided adequate restitution (which Class Counsel do not concede), it still faces substantial exposure for its antitrust violations. BoA’s contrary argument turns the plain meaning of the Confidentiality Agreement on its head saying “commerce done” means “commerce won.” This is nonsensical. One can do commerce by submitting rigged bids and be held responsible for the collusive outcome even if one did not win the bid.

As for the Sentencing Guidelines, those involve *criminal* sentencing and have no application here. Moreover, even assuming that they were applicable, BoA has cited no authority to demonstrate that they control the interpretation of a private agreement between a defendant and class counsel in civil litigation. In addition, as BoA inexplicably fails to note, the Sentencing Guidelines are *no longer mandatory* with respect to the exercise of discretion by federal judges. As the United States Supreme Court said in *Nelson v. United States*, 555 U.S. 350, 129 S.Ct. 890, 892 (2009) (*per curiam*), “[o]ur cases do not allow a sentencing court to presume that a sentence

within the applicable Guidelines range is reasonable,” and “[t]he Guidelines are not only not mandatory on sentencing courts; they are also not to be presumed reasonable.” Finally, application note 6 to Section 2R1.1 (the guideline on bid-rigging offenses) is relevant here:

Application Note 6 further explains that ‘understatement of seriousness is especially likely in cases involving complementary bids.’ It gives as an example a defendant who agrees not to submit a bid, or to submit an unreasonably high bid, on one occasion, in exchange for his being the designated low bidder on another occasion. If he doesn't get the second bid, he will not have any ‘volume of commerce’; and even if he does get the second bid, his volume of commerce will understate the volume affected by his participation in the bidding scheme. The court should consider sentences *near the top of the guideline range* in such cases.

*United States v. Heffernan*, 43 F.3d 1144, 1147 (7th Cir. 1994) (emphasis added). Thus, none of BoA’s arguments for leaving out Class Plaintiffs’ suggested language regarding cover bids are colorable.<sup>11</sup> They should not be adopted by this Court, or deprive potential claimants of notice of the attendant consequences of entering into the State Agreement.

#### **F. CLASS NOTICES ARE INAPPLICABLE TO THE NOTICE PROCESS HERE**

Comparison to class notices are inapplicable to the instant situation. BoA Opp. at 13-14. Any class notice that has been publicly issued (*Eggs, Marine Hose*, etc.) has previously undergone a fairness evaluation by a district court: including public briefing and a hearing where the value of the settlement is thoroughly evaluated, the arms’ length relationship of the involved counsel is tested, and other parties’ objections have been heard. *See* Fed. R. Civ. P. 23. Those procedures provide a safety net for such class notices, because a court has pre-approved that the underlying settlement itself is reasonable and fair. To compare a class action notice that issued *after* such a fairness process to the Revised Notice Packet is not applicable. No procedural safeguards have taken place here, making the inclusion of all necessary information for independent evaluation by claimants even more important in a non-class notice.

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<sup>11</sup> Nor should BoA’s contention of what its employees meant when they used the word “cover” (BoA Opp. at 7, n. 9; Sullivan Decl. at ¶ 6) be construed as “neutral.” Clearly, minds can differ over the plain meaning of such language.

Dated: June 30, 2011

Respectfully submitted,

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