

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

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|----------------------------------|---|----------------------------|
| IN RE MUTUAL FUNDS |) | MDL No. 1586 |
| INVESTMENT LITIGATION |) | |
| |) | Case No. 04-MD-15862-04 |
| This Document Relates To: |) | (J. Frederick Motz, Judge) |
| <i>Pilgrim Baxter Sub-Track,</i> |) | |
| 04-md-15862-04 |) | |

**DECLARATION OF NICHOLAS E. CHIMICLES IN SUPPORT OF FINAL
APPROVAL OF PROPOSED SETTLEMENTS, PLAN OF ALLOCATION OF
SETTLEMENT PROCEEDS, AND APPLICATION FOR ATTORNEYS' FEES AND
REIMBURSEMENT OF LITIGATION
EXPENSES IN THE PILGRIM BAXTER SUB-TRACK**

I, NICHOLAS E. CHIMICLES, declare as follows:

1. I, Nicholas E. Chimicles, am a partner of the law firm of Chimicles & Tikellis LLP ("Chimicles" or the "Firm"). Chimicles is the court appointed Lead Derivative Counsel in the Pilgrim Baxter sub-track of MDL-1586 - *In re Mutual Funds Investment Litigation* (the "MDL"). I have personal knowledge of the matters set forth herein based on my involvement in the prosecution and settlement of the claims asserted in the Fund Derivative Action. I have been personally involved in all aspects of this Action, including the negotiations resulting in the Settlements. I have also been kept informed of developments in this Action by attorneys working with me and under my direction. I have also coordinated and supervised the work of other Derivative Counsel¹ in the Pilgrim Baxter subtrack in pursuing the consolidated derivative action.

2. I respectfully submit this Declaration in support of (i) the Court's final approval of the proposed derivative settlements (the "Settlements") in the Pilgrim Baxter sub-track, which

¹ In addition to my Firm, a Lead Derivative Counsel, Derivative Counsel in the Pilgrim Baxter Subtrack includes: Wolf Haldenstein Freeman and Herz LLP ("Wolf Haldenstein"), Pomerantz Haudek Grossman & Gross LLP ("Pomerantz"), Faruqi & Faruqi LLP, and the Law Office of Klari Neuwelt.

the Court preliminarily approved by its Preliminary Order for Notice and Hearing in Connection with Settlement Proceedings in the Pilgrim Baxter Sub-Track dated May 19, 2010 (the "Preliminary Approval Order");² (ii) the Court's final approval of the proposed plan of allocation (the "Plan of Allocation") for allocating the settlement proceeds in the Pilgrim Baxter sub-track, totaling \$31,538,600 in cash plus interest earned thereon; and (iii) the application for an award of attorneys' fees and reimbursement of litigation expenses in the Pilgrim Baxter sub-track.

I. OVERVIEW OF THE SETTLEMENTS

3. The Settlements now before the Court for final approval in the Pilgrim Baxter sub-track provide for the total payment of \$31,538,600 (the "Settlement Fund") plus interest earned thereon. The Settlement Fund is comprised of: (i) \$26,500,000 paid on behalf of the PB Advisor Defendants for the benefit of the Settlement Class and the PBHG Successor Funds;³ (ii) \$2,865,000 paid on behalf of the Canary Defendants for the benefit of the Settlement Class and the PBHG Successor Funds; (iii) \$1,232,000 paid on behalf of the Bear Stearns Defendants for the benefit of the Settlement Class; (iv) \$500,000 paid on behalf of the Appalachian Trails Defendants for the benefit of the Settlement Class; and (v) \$441,600⁴ paid on behalf of BAS for the benefit of the Settlement Class and the PBHG Successor Funds. Pursuant to the Stipulations,

² The derivative Settlements in the Pilgrim Baxter sub-track are embodied in the following settlement agreements which were filed with the Court on April 21, 2010 (*See* Docket Nos. 1274-8 to 1274-16): (i) the Stipulation and Agreement of Settlement with the Pilgrim Baxter Advisor Defendants; (ii) the Stipulation and Agreement of Settlement with the Pilgrim Baxter Funds Defendants; (iii) the Pilgrim Baxter/Canary Severed Agreement and Stipulation of Settlement; and (iv) the Pilgrim Baxter/BAS Severed Agreement and Stipulation of Settlement (collectively, the "Stipulations").

³ The PB Advisor Defendants' settlement includes at least \$750,000 and up to \$1,500,000 that will be used to help pay for the costs of providing notice and administering the Settlements. The \$26.5 million settlement payment shown above includes the entire \$1,500,000.

⁴ The \$441,600 paid on behalf of BAS is comprised of a \$372,000 principal settlement amount and a \$69,600 contribution by BAS towards the costs of notice and administration of the settlement.

these settlement funds have been paid into interest-bearing escrow accounts pending final approval of the Settlements and distribution in accordance with the Plan of Allocation.⁵

4. The proposed derivative Settlements in the Pilgrim Baxter sub-track are the product of hard-fought litigation and protracted, arm's-length settlement negotiations with four separate groups of defendants, each represented by separate, experienced counsel. At the time that each of the proposed Settlements was reached, Lead Derivative Counsel had a thorough understanding of the strengths and weaknesses of the claims and defenses asserted, the significant issues and disputes remaining among the parties involved, and the substantial risks and expense of continued litigation. In light of all of circumstances present in the Fund Derivative Action, Lead Derivative Counsel respectfully submit that the proposed Settlements – which, together, would resolve of all remaining claims in the Pilgrim Baxter sub-track of the MDL – are fair, reasonable and adequate and in the best interests of the Derivative Plaintiffs and the PBHG Funds, and, therefore, warrant final approval by the Court.

5. For achieving the substantial benefits created by the Settlements in the Pilgrim Baxter sub-track, Class Lead Counsel and Lead Derivative Counsel (together, "Plaintiffs' Counsel"), seek a collective fee award equal to 15% of the Gross Settlement Fund (*i.e.*, the Settlement Fund plus all interest earned thereon), plus reimbursement of litigation expenses. The Court-appointed Plaintiffs' Administrative Chair and Liaison Counsel, Tydings & Rosenberg LLP, seeks an additional award of attorneys' fees and expenses equal to 1.25% of the Gross Settlement Fund.

⁵ Pursuant to the proposed Plan of Allocation, the net settlement proceeds will be distributed to eligible members of the Settlement Class who submit valid Claim Forms. After all cost-effective re-distributions of the remaining net settlement proceeds have occurred, the remaining funds shall be distributed to the PBHG Successor Funds.

II. FACTUAL BACKGROUND

A. General Background Regarding Claims Asserted in the Litigation⁶

6. Derivative Plaintiffs alleged unlawful market-timing and late trading in the PBHG Funds, facilitated by the advisers of the Funds, including principals Gary Pilgrim and Harold Baxter. Market-timing is a term used to describe the short-term, “in and out” trading of mutual fund shares, which may be used by a mutual fund trader to capitalize on inefficiencies in the way mutual fund shares are priced. By executing a significant number of these trades quickly, market timers can profit by capitalizing on the differential between the price of the mutual fund itself, and the value of the underlying securities that comprise the mutual fund. Late trading is a variation of market-timing that involves a mutual fund trader placing orders to buy, sell or exchange mutual fund shares in a way that permits the trader to use the prior day’s price to capitalize on information obtained after the close of the market. Derivative Plaintiffs alleged in the litigation that various brokerage firms were engaged by certain of the Pilgrim Baxter fund family defendants to sell the right to participate in market-timing (*i.e.*, “timing capacity”), and facilitated, or “cleared,” timing transactions in return for substantial fees and other compensation. These alleged trading schemes permitted the defendants to reap large profits, the costs of which were borne primarily by the PBHG Funds.

B. Commencement of the Litigation

7. On December 4, 2003, one of the Fund Derivative Plaintiffs filed the first derivative complaint in the United States District Court for the Eastern District of Pennsylvania, alleging unlawful market-timing and late trading in the PBHG mutual funds. Class actions based

⁶ In light of the Court’s familiarity with the claims asserted in this litigation, we will only briefly summarize here the pertinent allegations.

on the same alleged market-timing and late trading practices in the PBHG mutual funds were also filed in the federal courts.

8. In the weeks and months that followed the filing of the initial complaints, numerous related suits were filed in courts throughout the United States. In addition, numerous other mutual fund families identified as being involved in regulatory market-timing and late trading investigations were named in complaints filed across the country.

9. On February 20, 2004, the Judicial Panel on Multi-District Litigation issued an order centralizing all of these actions in one multi-district docket in the United States District Court for the District of Maryland under the caption *MDL-1586 - In re Mutual Funds Investment Litigation*. By letters to counsel in the MDL dated April 9, 2004 and April 12, 2004, the Court assigned four Judges a separate track of the MDL, with multiple mutual fund families assigned to sub-tracks within each track. The Pilgrim Baxter sub-track was assigned to the Honorable Andre M. Davis.⁷

10. During this early stage of the litigation, Chimicles, along with the two other firms that formed the derivative executive committee, Wolf Haldenstein Freeman Adler & Herz LLP (“Wolf Haldenstein”) and Pomerantz Haudek Grossman & Gross LLP (“Pomerantz”), assumed a lead role in the negotiations, discussions and correspondence with the Court addressing the organizational structure of the MDL. Chimicles’s work in this regard included meeting with all firms who had filed derivative actions to create an organizational structure under the derivative executive committee (“DEC”) in order to effectively coordinate all derivative actions across all tracks in the MDL, eliminate duplicative work efforts, and assist in drafting the proposed case management orders and drafting memoranda concerning the organization structure filed in 2004.

⁷ In September 2009, the Pilgrim Baxter sub-track was reassigned to the Honorable J. Frederick Motz.

11. On May 24, 2004, the Court issued a case management order (the “Case Management Order”), pursuant to which all derivative actions on behalf of Pilgrim Baxter mutual funds were consolidated for pretrial purposes under the caption *In re Alliance, Franklin/Templeton, Bank of America/Nations Funds and Pilgrim Baxter*, Civil No. 04-md-15862. By this same Case Management Order, the Court appointed Chimicles as Lead Derivative Counsel for the Pilgrim Baxter sub-track.

C. Derivative Counsel’s Investigation

12. Immediately upon its appointment as Lead Derivative Counsel, Chimicles, along with the other members of the DEC, began drafting consolidated amended complaints in all of the derivative subtracks. In order to efficiently prosecute the derivative actions, the DEC prepared omnibus complaint sections which were incorporated into all Fund Derivative Complaints in the MDL using a uniform paragraph numbering system. The omnibus paragraphs included all relevant background information on market timing and late trading, as well as paragraphs on claim background, which avoided substantial duplication across the entire MDL. The benefit of a uniform numbering system was obvious at the ease of reference in connection with the subsequent motions to dismiss. In connection with drafting the amended complaint, the DEC also conducted a thorough and extensive investigation into market timing generally, including the damages caused by it and the subsequent consequences to the mutual funds, such as flight damage. Derivative Plaintiffs were the only plaintiffs in the MDL to include allegations concerning flight damages in the initial consolidated amended complaints filed in 2004. My Firm conducted significant investigation into alleged market timing of the PBHG mutual funds in particular, as well as the legal claims and theories that might apply to the facts. That investigation included: (1) extensive investigation into demand futility allegations; (2) consultation with experts in areas relevant to Derivative Plaintiffs’ claims, including damages;

(3) research of the laws applicable to the claims asserted in the Fund Derivative Action and the potential defenses thereto; (4) review and analysis of information concerning the defendants, including information regarding investigations into and other litigations concerning alleged unlawful trading of mutual fund shares in the mutual fund industry generally and in the PBHG Funds specifically; (5) review and analysis of press releases and other public statements issued or made concerning the PBHG Funds; and (6) review and analysis of SEC filings concerning the PBHG Funds.

13. While the investigation into the market timing allegations was ongoing, plaintiffs in the MDL reached an agreement-in-principle for a global settlement of all claims asserted against the Canary Defendants. The settlement agreement with the Canary Defendants was memorialized in a memorandum of understanding executed on July 19, 2004, and was reached only after plaintiffs received and evaluated written representations concerning the Canary Defendants' profits from their allegedly improper trading activities. Pursuant to the settlement with the Canary Defendants, plaintiffs obtained a significant global monetary recovery, as well as substantial non-public factual information concerning their claims, which included multiple, day-long interview sessions with a percipient witness and a wealth of non-public documents, all of which helped Derivative Plaintiffs to advance their case against the remaining defendants in the Pilgrim Baxter sub-track and to file their robust amended complaint. My Firm and other members of the DEC participated in the settlement negotiations and fact gathering meetings with Canary.

D. The Amended Derivative Complaint

14. Based on Lead Derivative Counsel's intensive factual and legal investigation, described above, on September 30, 2004, Derivative Plaintiffs filed their 104-page, 12-count Consolidated Amended Fund Derivative Complaint captioned *Jungalawala v. Pilgrim Baxter &*

Associates, Ltd., et al., (the “Derivative Complaint”). In the Fund Derivative Complaint, Derivative Plaintiffs brought claims under Sections 36(b), 36(a), 47, and 48 of the Investment Company Act of 1940 (“ICA”), Sections 206 and 215 of the Investment Advisers Act, and state law. Derivative Plaintiffs sought, *inter alia*, removal of the Funds trustees, removal of the adviser and rescission of management contracts, and damages.

15. Due to the nature of the alleged market timing conduct, the Fund Derivative Complaint asserted claims against numerous defendants. In addition to bringing claims against Pilgrim Baxter & Associates, Ltd. (“Pilgrim Baxter”) (the investment advisor to the PBHG Funds), and certain of its senior executives and affiliated entities, Derivative Plaintiffs asserted claims against various individuals and entities unaffiliated with Pilgrim Baxter, including alleged market-timers and other parties that were alleged to have participated in or facilitated the market timer’s trading of the PBHG Funds. Among other things, Derivative Plaintiffs believe they had strong demand futility allegations against the PBHG Funds trustees, including, for example, the fact that investors had not been permitted to elect their directors since *at least* 1995 (which was the longest that SEC records were available via the EDGAR system) – *nearly a decade*.

E. The Motions to Dismiss

16. On February 25, 2005, three groups of defendants in the MDL – the fund family defendants, the trader defendants, and the broker defendants – each filed an omnibus motion to dismiss the consolidated complaints filed by investor class plaintiffs. In addition, the defendants in the Pilgrim Baxter sub-track filed four separate motions to dismiss the Fund Derivative Complaint.

17. In response to the omnibus motions to dismiss filed by defendants on an MDL-wide basis, the DEC efficiently divided responsibility for briefing various portions. As one of the three DEC firms, my Firm thus assumed a significant role in briefing motions to dismiss in

all of the derivative actions. In addition to that omnibus work, my Firm also filed supplemental briefs related specifically to the Pilgrim Baxter subtrack.

18. On June 16 and 17, 2005, the Court held oral argument on the motions to dismiss in the MDL. My Firm, along with the other DEC firms, took a lead role in oral argument on behalf of Derivative Plaintiffs. On August 25, 2005, Judge Motz issued an Investor Class Opinion in the *Janus* sub-track addressing common issues presented in the MDL. In an April 26, 2006 conference call, Judge Davis stated that he would adopt Judge Motz's *Janus* decision and apply it to the defendants' motions to dismiss in the Pilgrim Baxter sub-track. In May 2006, following further briefing, the parties submitted proposed orders, consistent with the *Janus* opinion, implementing the rulings on the motions to dismiss for the Court's review and entry. With respect to the Fund Derivative Action, Derivative Plaintiffs and defendants engaged in further letter briefing concerning the claims under Section 36(b) in connection with the proposed order.

F. The Settlement Negotiations and Agreements, and Informal Discovery Related Thereto

19. Settlement negotiations were conducted with different groups of defendants at various times throughout the litigation. In connection with the negotiations and deliberations leading to each agreement in principle, Lead Derivative Counsel requested and obtained information sufficient to assess the value of the claims and the benefits of each proposed settlement. This included analysis of fee information and net outflows from publicly available SEC filings, analysis of data reflecting damages under Section 36(b) in PBHG mutual funds, as well as other information necessary for Chimicles to evaluate liability. Among other things, Chimicles participated in meetings and conferences with experts and was able to gain a highly developed understanding of the details and scope of on the conduct at issue as well as the

strengths and weaknesses of the parties' claims and defenses. That understanding included, in connection with each proposed settlement, knowledge regarding the defendants' profits from the alleged wrongdoing and the alleged damages attributable to each defendant group.

20. **Canary Defendants:** The first agreement-in-principle to settle was reached with the Canary Defendants on an MDL-wide basis in July 2004. Pursuant to the settlement with the Canary Defendants, plaintiffs obtained a significant global monetary recovery in the amount of \$15,000,000 in cash, as well as the agreement of the Canary Defendants to provide plaintiffs with a substantial amount of non-public factual information concerning their claims. All of this additional information helped Derivative Plaintiffs to advance their cases against the other defendants in the Pilgrim Baxter sub-track, as well as other subtracks in the MDL, and to file the detailed Fund Derivative Amended Complaint in September 2004.

21. **BAS Defendants:** In December 2006, after months of arms'-length negotiations, plaintiffs reached an agreement-in-principle to settle with Banc of America Securities (BAS) on a global basis (claims were asserted against BAS on a "cross-track" basis in fifteen separate sub-tracks). Once again, plaintiffs requested – and obtained and evaluated – information about the conduct of the BAS defendants, including detailed trading information that would be evaluated and analyzed by the Damages Expert. Pursuant to the Settlement Term Sheet executed by the settling parties, BAS agreed to pay a total of \$18,500,000 in cash (\$3,000,000 of which was paid by BAS specifically to cover the costs of notice and administration of the settlement) to settle the claims asserted against it and related entities in the MDL.

22. **Pilgrim Baxter Defendants:** Lead Class Counsel began settlement negotiations with the Pilgrim Baxter fund family defendants in late 2004. After an earlier agreement between the Class Plaintiffs and certain PB Advisor Defendants was abandoned, in late 2005, my Firm

became actively involved in joint settlement discussions, along with Lead Class Counsel, to negotiate a global settlement with the PB Advisor Defendants. In December 2005, my Firm prepared and circulated to all Plaintiffs' counsel in the MDL a comprehensive memorandum discussing liability and damages theories under Section 36(b) of the ICA. In January 2006, my Firm prepared a detailed analysis of damages under Section 36(b) specific to the Pilgrim Baxter subtrack based on fee and outflow data from SEC filings and other sources.

23. In connection with the lengthy settlement discussions between the PB Advisor Defendants and Plaintiffs, Plaintiffs requested and obtained significant information to aid in their assessment of the adequacy of the settlement. For example, certain of the PB Advisor Defendants produced significant discovery in the nature of trading data to Class Lead Plaintiff during late 2004 and early 2005, which was reviewed and analyzed by Lead Class Plaintiffs' damages expert. The PB Advisor Defendants also produced to Plaintiffs a large quantity of documents that it had previously produced to the SEC through informal discovery. In early 2006, counsel for the plaintiffs, including attorneys from my Firm, and the PB Advisor Defendants met to discuss their views on damages issues, which included a meeting of the parties' respective damages experts.

24. In 2006, much of the relief which Derivative Plaintiffs were requesting in their consolidated amended complaint came to fruition. New management contracts with a new manager, Old Mutual Capital, as adviser and reduced fees were submitted to the shareholders for approval. The former adviser, Pilgrim Baxter & Associates (which had by then changed its name to Liberty Ridge Capital Inc. in order to distance itself from its former principals), was largely displaced as the adviser to the Funds and, instead, maintained a position merely as sub-

adviser to only a few of the Funds. Further, the trustees of the Funds stood for shareholder reelection for the first time in over a decade.

25. In late 2007, Plaintiffs and the Pilgrim Baxter fund family defendants reached an agreement-in-principle to settle, pursuant to which the PB Advisor Defendants agreed to pay \$26,500,000 in cash to settle all claims.⁸

26. After agreements-in-principle were reached with the settling defendants, the Parties participated in extensive arm's-length settlement negotiations to finalize the terms of their respective Settlements. The process of finalizing the Stipulations and the relevant settlement documents was complicated and protracted. In particular, in connection each of the "cross-track" settlements, the parties were faced with the challenges of presenting these settlements for approval across multiple MDL sub-tracks. In order to meet these challenges, my Firm, on behalf of all derivative plaintiffs in the MDL-Action, actively assisted Bernstein Litowitz Berger & Grossman LLP in preparing for each cross track settlement, a "master cross-track settlement agreement" that incorporates a series of separate "severable" settlement agreements between the plaintiffs and relevant cross-track defendant in each separate fund family sub-track. Under this structure, once all settlements were finalized in a particular sub-track, each severed agreement was capable of being noticed and approved as part of the settlement approval process within that sub-track. Due to the nature of coordinating, on an MDL-wide basis, the settlements reached with BAS and Canary with the numerous other settlements that were reached with the fund family defendants (and others), the parties grappled with and resolved a number of complex and unprecedented issues as they strove to finalize the cross-track settlement documentation. My Firm actively assisted in resolving those issues on behalf of Derivative Plaintiffs.

⁸ The PB Advisor Defendants' settlement provides for a settlement payment of \$25,000,000 plus an additional amount of at least \$750,000 and up to \$1,500,000 that will be used to help pay for the costs of providing notice and administering the Settlements.

27. Additionally, although each set of defendants negotiated and executed its own separate settlement agreements (while at all times attempting to utilize uniform terminology throughout the agreements), there was only one proposed preliminary approval order and one set of notice documents (*i.e.*, the Notice, Long-Form Notice, Proof of Claim and Publication Notice) for all Settlements in the Pilgrim Baxter sub-track, which required approval from all settling parties. Again, my Firm assisted in preparing those documents. During this same time, Class Lead Plaintiff engaged its damages expert to examine the trading records of the PBHG mutual funds, leveraging on the work it had done to assess damages, to determine a fair, reasonable and adequate methodology for allocating the settlement proceeds among the Settlement Class Members.

G. Formal Discovery Is Pursued With Certain Parties

28. Whenever necessary, Chimicles also assisted in pursuing formal discovery.⁹

29. On July 16, 2007, the parties filed their initial disclosure statements pursuant to Rule 26(a) and the Court's Order Governing Pre-Trial Schedule and Cross-Track Discovery.

30. Derivative Plaintiffs also responded to discovery requests from the PB Advisor Defendants, including responding to documents requests and scheduling the deposition of the lead Derivative Plaintiff.¹⁰

H. Defendants' Motions to Dismiss for Lack of Standing

31. On July 3, 2007, certain defendants in the MDL – including the PB Advisor Defendants – filed motion to dismiss for lack of standing. On August 10, 2007, Chimicles and

⁹ A proposed omnibus order regarding confidentiality of discovery material, that Chimicles had a substantial role in drafting and negotiating, was filed with the Court in August 2005 and was approved by the Court on October 5, 2005. The Court did not explicitly authorize the commencement of formal discovery in this sub-track until January 2007.

¹⁰ The deposition was canceled when the agreement in principle to settle was reached.

the DEC filed an omnibus opposition. Oral argument on the motion was held on October 5, 2007, during which my Firm participated by representing Derivative Plaintiffs in this and other subtracks.

I. The Risks Inherent In Continued Litigation

32. The Settlements were informed by Lead Derivative Counsel's analysis and understanding of the risks inherent in continuing to litigate this matter. The primary risks are outlined below.

33. *Risks of Establishing Liability.* Although Derivative Plaintiffs believe that they could have established a violation of Section 36(b) at trial, the standards for violation of Section 36(b) were subject to varying interpretation at the time of the Settlement with the PB Advisor Defendants. Similarly, while Derivative Plaintiffs believe they had a strong chance on appeal with respect to establishing demand futility, Derivative Plaintiffs' claims against Canary and BAS hinged largely on a successful appeal as to demand futility, entailing significant risk.

34. *Risks of Establishing Damages.* In addition to the substantial risks of establishing liability against the settling defendants, the Derivative Action presented significant risks in connection with proof of damages. There would have been substantial dispute as to whether, and to what extent, the alleged market timing and late trading activity of the settling defendants damaged the PBHG Funds. Further, as the Court's summary judgment decision in the Janus subtrack demonstrates, Derivative Plaintiffs faced substantial risk in being able to establish significant damages under Section 36(b) of the ICA.

35. Defendants would also have argued that, to the extent that the Funds had suffered damages at all, the payments made by certain of the defendants to the SEC and other government regulators and subsequently distributed to investors in certain of the PBHG Funds should offset any damages recovered at trial. This argument was far from groundless or merely speculative;

rather, this Court's summary judgment decisions in other sub-tracks approved of such an offset. *See, e.g., In re Mut. Funds Inv. Litig.*, 590 F. Supp. 2d 741, 751-52 (D. Md. 2008); *In re Mut. Funds Inv. Litig.*, 608 F. Supp. 2d 677 (D. Md. 2009).

36. Many of the defendants in Pilgrim Baxter sub-track have paid significant amounts in disgorgement and civil penalties that were (or will be) distributed to investors and the PBHG Funds themselves and could be used to offset damages. In light of the uncertainties about the amount of damages that could be established at trial, the very significant size of the restitution payments made by these key defendants that have been or will be distributed to investors in the PBHG Funds and the Funds themselves, and given the Court's previous decisions on this matter, Derivative Plaintiffs faced a very real risk – even if Derivative Plaintiffs were successful in establishing liability – that all or a substantial portion of the damages proven would have been offset by the distributions from these regulatory settlements.

III. THE NOTICE PROGRAM

37. As set forth in more fully in the BLB&G Declaration, Plaintiffs undertook a comprehensive notice campaign including direct mail notice, publication notice, website notice, and other forms of notice intended to reach Class Members as well as current shareholders of the successors to the PBHG Funds. Fund Derivative Plaintiffs respectfully submit that the notice campaign satisfied the requirements of Rule 23.1 and due process with respect to the derivative Settlements.

IV. THE REACTION OF CURRENT SHAREHOLDERS TO THE SETTLEMENTS

38. The deadline for filing objections to the derivative Settlements is September 21, 2010. Only 2 objections to the derivative Settlements have been received thus far, *see* Dkt. Nos. 1309 and 1316.¹¹

V. THE PROPOSED PLAN OF ALLOCATION

39. Pursuant to the Preliminary Approval Order, and as set forth in the Notice, subject to Court approval, the “Net Settlement Fund” (*i.e.*, the Gross Settlement less all appropriate taxes, notice and administration costs, attorneys’ fees, and reimbursement of litigation expenses) will be distributed to eligible Settlement Class members who submit valid Proofs of Claim (“Authorized Claimants”) and, at any such time as it is determined that the re-distribution of funds remaining in the Net Settlement Fund is not cost-effective, the remaining balance of the Net Settlement Fund shall be distributed to the PBHG Successor Funds in proportion to the alleged dilution losses found by Class Lead Plaintiff’s Damages Expert, subject to Court approval.¹²

40. The Plan of Allocation, which was developed by Plaintiffs’ Counsel in consultation with Class Lead Plaintiff’s Damages Expert, is designed to achieve an equitable and rational distribution of the Net Settlement Fund. Lead Derivative Counsel believes that the Plan of Allocation provides a fair and reasonable method to equitably distribute the Net Settlement Fund based on the damages allegedly suffered by members of the Settlement Class and the PBHG Funds as a result of market timing and late trading in the PBHG Funds, as opposed to

¹¹ As is customary, once the September 21, 2010 deadline for submitting objections has passed – and any additional objections are received and evaluated – Plaintiffs may provide responses to the objections received to date and to any later-filed objections in their October 6, 2010 filing, as necessary and appropriate.

¹² As set forth in the proposed Plan of Allocation, the \$2,190,000 (plus interest) obtained by the Office of the New York Attorney General in a settlement with the Canary Defendants will also be distributed to Authorized Claimants pursuant to the Plan of Allocation.

market or other factors. Lead Derivative Counsel respectfully submit that the Plan of Allocation is fair and reasonable and should be approved by the Court.

VI. THE FEE APPLICATION

41. Plaintiffs' Counsel are making a collective application for a fee award of 15% of the Gross Settlement Fund. As discussed fully in the BLBG Declaration, this total fee request represents a negative multiplier of Class Counsel's and Derivative Counsels' collective lodestar. Derivative Counsel also request reimbursement of their expenses incurred in connection with the prosecution of the Fund Derivative Action in the amount of \$26,438.08.

The Work And Experience Of Counsel

42. Attached to the Affidavit of Nicholas E. Chimicles In Support of Joint Petition for Attorneys' Fees and Reimbursement of Expenses ("Chimicles Affidavit"), filed contemporaneously herewith, are the affidavits of Derivative Counsel in the Pilgrim Baxter subtrack who assisted in the prosecution of this Action, summarizing each firm's lodestar and expenses related to the Pilgrim Baxter subtrack. The affidavits indicate the amount of time spent by each attorney and paraprofessional employed by the respective firms, and the lodestar calculations based on their current billing rates.

43. As set forth in the Chimicles Affidavit and the accompanying exhibits thereto, Derivative Counsel has expended 2,734.94 hours in the prosecution and investigation of the Fund Derivative Action. The resulting lodestar is \$1,223,384.94.

44. Lead Derivative Counsel and the other Derivative Counsel are experienced in prosecuting derivative actions, and worked diligently and efficiently in prosecuting the Derivative Action. Chimicles, as demonstrated by the firm resume attached to the Chimicles Affidavit, is among the most experienced and skilled firms in the securities litigation field, and has a long and successful track record in such cases.

B. Standing And Caliber Of Defense Counsel

45. The quality of the work performed by Derivative Counsel in attaining the Settlement should also be evaluated in light of the quality of the opposition. Defendants were represented by some of the country's most prestigious law firms: Shearman & Sterling LLP; Wachtell, Lipton, Rosen & Katz; Kramer Levin Naftalis & Frankel LLP; and Stradley Ronon Stevens & Young, LLP. These firms spared no effort in the defense of their clients. In the face of this experienced, formidable, and well-financed opposition, Lead Derivative Counsel was nonetheless able to develop a case that was sufficiently strong to persuade the Settling Defendants to settle the claims asserted against them on terms that are highly favorable.

C. The Risks Of Litigation And The Need To Ensure The Availability Of Competent Counsel In High-Risk Contingent Securities Cases

46. This prosecution was undertaken by Derivative Counsel entirely on a contingent-fee basis. The risks assumed by Derivative Counsel in bringing these claims to a successful conclusion are described above. Those risks are also relevant to an award of attorneys' fees. Here, the risks assumed by Derivative Counsel, and the time and expenses incurred without any payment, were extensive, and are described in detail above.

47. From the outset, Derivative Counsel understood that they were embarking on a complex, expensive and lengthy litigation with no guarantee of ever being compensated for the substantial investment of time and money the case would require. In undertaking that responsibility, Derivative Counsel were obligated to ensure that sufficient resources were dedicated to the prosecution of the Derivative Action, and that funds were available to compensate staff and to cover the considerable out-of-pocket costs that a case such as this requires. With an average lag time of several years for these cases to conclude, the financial burden on contingent-fee counsel is far greater than on a firm that is paid on an ongoing basis.

Indeed, Derivative Counsel have received no compensation during the course of the Derivative Action and have incurred \$ 26,438.08 in out-of-pocket-expenses in prosecuting the Derivative Action.

48. Derivative Counsel also bore the risk that no recovery would be achieved. As discussed herein, from the outset, this case presented a number of risks and uncertainties that could have prevented any recovery whatsoever. Despite the most vigorous and competent of efforts, success in contingent-fee litigation, such as this, is never assured.

49. Derivative Counsel knows from experience that the commencement of a class or derivative action does not guarantee a settlement. To the contrary, it takes hard work and diligence by skilled counsel to develop the facts and theories that are needed to sustain a complaint or win at trial, or to induce sophisticated defendants to engage in serious settlement negotiations at meaningful levels. Indeed, in this case, most of the claims asserted by Derivative Plaintiffs were dismissed at the motion to dismiss stage.

50. Moreover, courts have repeatedly recognized that it is in the public interest to have experienced and able counsel enforce the securities laws and regulations pertaining to the duties of officers and directors of public companies. If this important public policy is to be carried out, the courts should award fees that adequately compensate plaintiffs' counsel, taking into account the risks undertaken in prosecuting a securities class action.

51. Counsels' extensive and persistent efforts in the face of substantial risks and uncertainties have resulted in a significant recovery. In circumstances such as these, and in consideration of the hard work and the extraordinary result achieved, the requested fee of 15% of the Gross Settlement Fund -- which represents a collective request among Settlement Class and Fund Derivative counsel -- is reasonable and should be approved.

VII. THE REQUEST FOR REIMBURSEMENT OF LITIGATION EXPENSES

52. Derivative Counsel seeks reimbursement of \$ 26,438.08 in litigation expenses reasonably and actually incurred by Derivative Counsel in connection with commencing and prosecuting the claims against the defendants.

53. From the beginning of the case, Derivative Counsel was aware that it might not recover any of its expenses, and, at the very least, would not recover anything until the action was successfully resolved. Derivative Counsel also understood that, even assuming that the case was ultimately successful, reimbursement for expenses would not compensate them for the lost use of the funds advanced by them to prosecute this action. Thus, Derivative Counsel was motivated to, and did, take significant steps to minimize expenses whenever practicable without jeopardizing the vigorous and efficient prosecution of the case.

54. As set forth in the Chimicles Affidavit, Derivative Counsel have incurred a total of \$26,438.08 in unreimbursed litigation expenses in connection with the prosecution of the Derivative Action. These expenses are reflected on the books and records maintained by each firm. These books and records are prepared from expense vouchers, check records and other source materials, and are an accurate record of the expenses incurred. These expense items are billed separately by Derivative Counsel, and such charges are not duplicated in my Firm's billing rates.

55. The expenses for which Derivative Counsel seek reimbursement are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed by the hour, such as charges for photocopying of documents, on-line research, messenger services, postage, express mail and next day delivery, transportation, meals, travel and other expenses directly related to the prosecution of the Class Action.

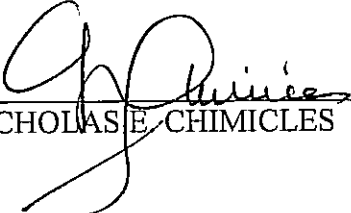
56. In view of the complex nature of the action, the expenses incurred were reasonable and necessary. Accordingly, Lead Derivative Counsel respectfully submits that the expenses incurred by Derivative Counsel should be reimbursed in full.

VIII. CONCLUSION

57. In view of the substantial benefits created by the Settlements, the very substantial risks of this litigation, the substantial efforts of Derivative Counsel, the quality of work performed, the contingent nature of the fee, the complexity of the case and the standing and experience of Derivative Counsel, Lead Derivative Counsel respectfully submits that the Settlements are in the interests of the PBHG Funds and should be approved as fair, reasonable and adequate; that the Plan of Allocation should be approved as fair and reasonable; and that the application for an award of attorneys' fees and reimbursement of litigation expenses in the Pilgrim Baxter sub-track should be granted in full.

I declare, under penalty of perjury, that the foregoing facts are true and correct.

Executed on September 14, 2010.



NICHOLAS E. CHIMICLES