

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

**JOSEPH HENRY AND MICHAEL
MALINKY,**

Plaintiffs,

vs.

**BANK OF AMERICA, NATIONAL
ASSOCIATION, aka U.S. TRUST
COMPANY OF CALIFORNIA, N.A.,**

No. 01-cv-1681
(DNH/RFT)

**PLAINTIFFS' NOTICE OF
MOTION AND MOTION FOR
AWARD OF PLAINTIFF
INCENTIVE AWARDS**

Assigned to Magistrate Treece

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiffs Joseph Henry and Michael Malinky move this Court for an Order granting each Plaintiff an incentive award of \$20,000 in recognition of the time and expenses they incurred as well as for their tenaciously persistent efforts in bringing this case to settlement after ten (10) years of litigation, a full trial to the Court, three appeals and two remands. Plaintiffs respectfully request that the Court consider this Motion in conjunction with its consideration of Plaintiffs' Motion for Preliminary and Final Approval of the Proposed Settlement. A Memorandum in support of this Motion and Declarations of Joseph Henry and Michael Malinky are filed herewith.

DATED: November 2, 2011.

KELLER ROHRBACK, PLC

By: /s/ Gary D. Greenwald

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2011, I presented the foregoing to the Clerk of the Court for filing and uploading to the CM/ECF system which will send notification of such filing to the CM/ECF registrants.

/s/ Gary D. Greenwald

**UNITED STATES DISTRICT COURT
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No. 01-cv-1681
(DNH/RFT)

**PLAINTIFFS'
MEMORANDUM IN SUPPORT
OF MOTION FOR AWARD OF
PLAINTIFF INCENTIVE
AWARDS**

Assigned to Magistrate Treece

Plaintiffs Joseph Henry and Michael Malinky (collectively “Plaintiffs”) submit this Memorandum in Support of their Motion for Plaintiff Incentive Awards in connection with the settlement of this complex and lengthy ERISA lawsuit. Plaintiffs seek incentive awards of \$20,000 each in recognition of the time and expenses they incurred as well as for their tenaciously persistent efforts in bringing this case to settlement after ten years of litigation, a full trial to the Court, three appeals, and two remands. The history of this litigation and a complete Statement of the Case are contained in Plaintiffs’ accompanying Memorandum in Support of Motion for Award of Attorneys’ Fees and Expenses and are incorporated herein by reference. This Memorandum is also supported by the Declarations of Joseph Henry and Michael Malinky attached hereto as Exhibit A and B respectively.¹

¹ In this Memorandum, any references to the Henry Declaration shall be cited as “Ex. A at ¶ ____” and any references to the Malinky Declaration shall be cited as “Ex. B at ¶ ____.”

Incentive Awards to Class Representatives

The courts “commonly permit payments to class representatives above those received in settlement by class members generally.” *Smith v. Tower Loan of Miss., Inc.*, 216 F.R.D. 338, 367-68 (S.D. Miss. 2003). Because a named plaintiff is an essential ingredient of any ERISA class action, an incentive award is appropriate if necessary to induce individuals to participate in the suit. *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). This is particularly true in ERISA actions where plaintiff employee-participants may be the subject of employer retaliation and may be subjected to an adverse award of legal fees, expenses and/or costs of suit incurred by defendants if plaintiff is not the prevailing party. These extraordinary risks of serving as a plaintiff representative in an ERISA action require an inducement or incentive for such persons to accept responsibility as a named plaintiff. Absent such incentive, there would be a “chilling effect” upon finding persons willing to assume the risks of such service on behalf of the class.

In addition, the courts have recognized the need for incentive awards to compensate named plaintiffs for the time and effort taken in responding to discovery requests which confer a substantial benefit upon the class. *See, In re Electronic Carbon Products Antitrust Litigation*, 447 F.Supp.2d 389 (D.N.J. 2006). Other reasons recognized for incentive awards include reimbursing class representatives for their costs incurred during the litigation and to reward them for superior service to the class.

In deciding whether an incentive award is warranted, relevant factors include the actions of the plaintiff taken to protect the interests of the class, the degree to which the class has benefitted from those actions, the amount of time and effort expended by plaintiff in the litigation, the risk to the class representative in commencing the action, the personal

difficulties encountered by the plaintiff, the duration of the litigation, and the personal benefit or lack thereof, enjoyed as a result of the litigation. *Cook v. Niedert*, 142 F.3d at 1016; *Trujillo v. City of Ontario*, 2009 WL 2632723 (C.D. Cal. Aug. 24, 2009). Applying these factors, courts have made incentive awards to class representatives in similar cases for similar amounts. *See, McReynolds v. Richards-Cantave*, 588 F.3d 790, 797 (2d Cir. 2009) (finding reasonable \$15,000 to each of three named plaintiffs and \$10,000 each to four other named plaintiffs). *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 430, 433 (2d Cir. 2007) (approving incentive awards of \$20,000 for each of two named plaintiffs who were deposed and \$15,000 for each of two trial witnesses and eight class representatives); *Pelletz v. Weyerhausen Co.*, 592 F. Supp. 2d 1322, 1330 (W.D. Wash. 2009) (awarding \$30,000 to four plaintiffs); *Razilov v. Nationwide Mut. Ins. Co.*, 2006 WL 3312024, **3-4 (D. Or. Nov. 13, 2006) (approving \$10,000 award to each class representative); *In re Xcel Energy Inc., Sec., Derivative, and ERISA Litig.*, 364 F. Supp. 2d 980, 1000 (D. Minn. 2005) (awarding \$100,000 collectively to a group of eight lead plaintiffs). In *Linney v. Cellular Alaska Partnership*, the court awarded \$25,000 to two class representatives in a case involving a \$6 million settlement, explained that “[i]ncentive fees for class representatives serve much the same function as attorneys’ fees do in the class action context: they provide the economic incentive necessary to ensure that meritorious actions are prosecuted.” 1997 WL 450064, *7 (N.D. Cal. Jul 18, 1997).

Plaintiffs’ Performance As ESOP Representatives In This Litigation

Plaintiffs’ performance throughout this hotly contested and lengthy litigation was extraordinary and worthy of incentive awards. Plaintiffs were the only two ESOP participants out of more than 600 who were willing to step forward and serve as a named plaintiff. From

the outset of the litigation, Plaintiffs understood that they could be the subject of employer retaliation which could cost them their jobs and which could follow them as a negative mark in all future employment throughout their careers as pilots. After filing the lawsuit, supervisors at Champlain Enterprises, Inc. warned them of that. Notwithstanding, they persisted in bringing and maintaining the action for over ten years. (Ex. A at ¶¶ 3-5 and Ex. B at ¶¶ 3-5.)

At the outset of the litigation, it was also explained to them by counsel that in ERISA actions the prevailing party is entitled to recover fees, expenses and costs of suit from the non-prevailing party. Thus, Plaintiffs understood that if they were to lose the case, they as Plaintiffs could be assessed all of Defendants' fees, expenses and costs of suit. This of course became a very real threat after the first appeal and after each subsequent decision by the District Court on remand. Despite full knowledge of this threat to their financial security from day one, Plaintiffs persisted in seeking justice for the ESOP and conferred a very real benefit upon the Plan and all of its participants. (Ex. A at ¶¶ 6-7 and Ex. B at ¶¶ 6-7.)

Plaintiffs also conferred a substantial benefit upon the class of participants by providing the time and effort taken in responding to discovery requests and in testifying at trial. Both Plaintiffs were required to respond to document requests and interrogatories and to testify at deposition. Furthermore, Plaintiff Joseph Henry became a critical witness for Plaintiffs at trial and testified in Plaintiffs' case in chief and under cross-examination. Furthermore, both Plaintiffs were deeply involved with counsel in all strategy decisions and all settlement/mediation conferences. Plaintiffs' involvement in this litigation involved a significant time commitment which conferred a substantial benefit upon the class of participants. (Ex. A at ¶¶ 8-10 and Ex. B at ¶¶ 8-10.)

Plaintiffs also incurred substantial expenses during the litigation for which they have never been reimbursed. This includes Mr. Henry's costs for appearance at mediation in Washington, D.C. in 2003, and Plaintiffs' joint costs for hotel and related expenses associated with attendance throughout the trial of this case in Utica, New York during six days in February 2004 and five days in April 2004. (Ex. A at ¶ 11 and Ex. B at ¶ 11.)

However, Plaintiffs' greatest contribution to the ESOP lies in their action during the appeal process. At two different points in the appeal proceedings (following the Decisions of the District Court on remand dated January 5, 2007, and May 21, 2010), counsel for Plaintiffs indicated their reluctance to proceed with further appeals. Plaintiffs rejected counsels' concerns, refused to take "no" for an answer, and demanded that the appeal proceed. As a result, counsel went forward with the third appeal, won the important Decision in the Second Circuit dated June 19, 2009, and ultimately settled this case. (Ex. A at ¶ 9 and Ex. B at ¶ 9.) It would be a gross understatement to suggest that Plaintiffs had a limited role in this favorable outcome.

It is clear that the Plaintiffs provided extraordinary service to the class of participants, took critical actions to protect and benefit the class of participants, devoted substantial time and effort to benefit the class, assumed extraordinary risks to fulfill their duty as class representatives, persevered for over ten years throughout the long history of this litigation, and achieved a substantial benefit for the class despite overwhelming odds. Such a performance is well deserving of an incentive award for these Plaintiffs and to induce other individuals to step forward and bring ERISA class actions.

Plaintiffs Should Be Awarded \$20,000 Each As Their Incentive Award

Plaintiffs' efforts as class representatives more than satisfy the criteria for incentive awards. *Cook v. Niedert*, 142 F.3d at 1016; *Trujillo v. City of Ontario*, 2009 WL 2632723 at *5. Plaintiffs played an active and important role in this litigation and made possible the recovery only through their perseverance.

While other recoveries for an ERISA class of participants may have involved a greater net recovery by settlement, this unique case resulted in an 11 day trial with a \$16 million judgment for Plaintiffs, a reversal and remand for Defendants in the Second Circuit, a judgment on remand for Defendants, a reversal and remand by Plaintiffs by the Second Circuit Court of Appeals, a second judgment on remand for Defendants, an appeal by Plaintiffs to the Second Circuit, and a settlement pending appeal resulting in a \$2 million recovery for the ESOP class of participants. All of these extraordinary events happened over a ten year period of complex and highly contested litigation. Plaintiffs should be rewarded for this favorable outcome.

An award of \$20,000 per class representative plaintiff is appropriate and consistent with incentive awards in similar ERISA cases. *See, Godshall v. Franklin Mint Co.*, 2004 WL 2745890, **5-6 (E.D. Pa. Dec. 1, 2004) (approving an incentive fee of \$20,000 for each class representative plaintiff); *Kanawi v. Bechtel Corp.* 2011 WL 782244, *3 (N.D. Cal. Mar. 1, 2011) (approving a \$25,000 incentive award for each plaintiff); *Will v. General Dynamics Corp.*, 2010 WL 4818174, *2 (S.D. Ill. Nov. 22, 2010) (approving an incentive award of \$25,000 for each class representative); *Presley v. Carter Hawley Hale Profit Sharing Plan*, 2000 WL 16437, *2 (N.D. Cal. Jan. 7, 2000) (approving an incentive fee of \$25,000 for each class representative). The proposed incentive award for Plaintiffs Joseph Henry and Michael

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2011, I presented the foregoing to the Clerk of the Court for filing and uploading to the CM/ECF system which will send notification of such filing to the CM/ECF registrants.

/s/ Gary D. Greenwald

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOSEPH HENRY AND MICHAEL
MALINKY,

Plaintiffs,

vs.

BANK OF AMERICA, NATIONAL
ASSOCIATION fka U.S. TRUST COMPANY
OF CALIFORNIA, N.A.,

Defendant.

No. 01-cv-1681
(DNH/RFT)

DECLARATION OF JOSEPH
HENRY

I, Joseph Henry, declare as follows.

1. I am one of the Plaintiffs in the case titled *Joseph Henry, et al. v. Bank of America, National Association, et al.*, filed in the Northern District of New York, No. 01-cv-1681 (hereinafter referred to as the "ESOP Litigation").
2. I am submitting this Declaration in support of the Motion requesting an order granting incentive awards to Plaintiffs in the ESOP Litigation.
3. Out of more than 600 ESOP participants in or about 2001, I was one of two persons willing to serve as a named Plaintiff in this action.
4. From the outset, based on information provided to me by my counsel and communications with my supervisors at Champlain Enterprises, Inc., I was aware and understood that I could be the subject of employer retaliation as a result of my participation in the ESOP Litigation, which could result in my losing my job and/or receiving a negative mark on my career and future employment as an airline pilot.

5. Despite the potential personal, professional or economic harm that my participation in the ESOP Litigation could cause, I continued to actively participate in the litigation for over ten years.
6. At the outset of the ESOP Litigation, my counsel explained to me that in ERISA actions, the prevailing party is entitled to recover legal fees, expenses and costs of suit from the non-prevailing party. I was made to understand that this would mean that if we were to lose the case, I personally could be found liable for the Defendants' legal fees, expenses and additional costs of defending the ESOP Litigation. I was particularly aware of this after the first appeal and each subsequent decision by the District Court on remand.
7. Despite the potential personal, professional or economic harm I could incur if I was assessed Defendants' costs of defending the ESOP Litigation, I continued to actively participate in the litigation for over ten years.
8. I spent a great deal of time and effort in working with my counsel to respond to various discovery requests and in preparing for and testifying at my deposition and later at trial.
9. I was closely involved in all case strategy and litigation decisions, including my active participation in the settlement and mediation conferences that were conducted during the life of the ESOP Litigation. Specifically, I recall that at on at least two separate occasions following adverse decisions by the District Court, that my counsel expressed their reluctance to proceed with additional appeals. I distinctly remember Mr. Malinky and I demanding that my counsel proceed with the appeal process. To

the credit of my counsel, they did proceed and were able to reach a settlement in this hard fought case.

10. I believed that the time and effort I expended in the litigation, over the last ten years, has benefitted the class of participants and that without my involvement in the ESOP Litigation we would not have achieved the success that we have.

11. In addition to expending time, I have also incurred substantial cost during this litigation for which I have never been reimbursed. For example, I paid for my travel expenses to the mediation in Washington D.C. in 2003, the six day trial in Utica, New York in February 2004, and the subsequent five day trial in New York in April 2004.

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

This Declaration executed this 27 day of October, 2011, at 1123 EST

By: _____

Joseph Henry

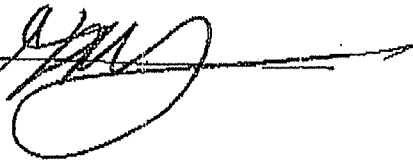


EXHIBIT B

UNITED STATES DISTRICT COURT
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OF CALIFORNIA, N.A.,

Defendant.

No. 01-cv-1681
(DNH/RFT)

DECLARATION OF
MICHAEL MALINKY

I, Michael Malinky, declare as follows.

1. I am one of the Plaintiffs in the case titled *Joseph Henry, et al. v. Bank of America, National Association, et al.*, filed in the Northern District of New York, No. 01-cv-1681 (hereinafter referred to as the "ESOP Litigation").
2. I am submitting this Declaration in support of the Motion requesting an order granting incentive awards to Plaintiffs in the ESOP Litigation.
3. Out of more than 600 ESOP participants in or about 2001, I was one of two persons willing to serve as a named Plaintiff in this action.
4. From the outset, based on information provided to me by my counsel and communications with my supervisors at Champlain Enterprises, Inc., I was aware and understood that I could be the subject of employer retaliation as a result of my participation in the ESOP Litigation, which could result in my losing my job and/or receiving a negative mark on my career and future employment as an airline pilot. In 2001, I was told by the Director of Training for Champlain Enterprises that

participating in the ESOP Litigation could jeopardize my employment with the Company; in 2007, the Director of Operations made negative remarks about me to Champlain management as a result of my participation in the litigation.

5. Despite the potential personal, professional or economic harm that my participation in the ESOP Litigation could cause, I continued to actively participate in the litigation for over ten years.
6. At the outset of the ESOP Litigation, my counsel explained to me that in ERISA actions, the prevailing party is entitled to recover legal fees, expenses and costs of suit from the non-prevailing party. I was made to understand that this would mean that if we were to lose the case, I personally could be found liable for the Defendants' legal fees, expenses and additional costs of defending the ESOP Litigation. I was particularly aware of this after the first appeal and each subsequent decision by the District Court on remand.
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expressed their reluctance to proceed with additional appeals. I distinctly remember Mr. Henry and I demanding that my counsel proceed with the appeal process. To the credit of my counsel, they did proceed and were able to reach a settlement in this hard fought case.

10. I believed that the time and effort I expended in the litigation, over the last ten years, has benefitted the class of participants and that without my involvement in the ESOP Litigation we would not have achieved the success that we have.
11. In addition to expending time, I have also incurred substantial cost during this litigation for which I have never been reimbursed. For example, I paid for my travel expenses to the mediation in Washington D.C. in 2003, the six day trial in Utica, New York in February 2004, and the subsequent five day trial in New York in April 2004. In addition, I paid for my expenses to travel from my home in Waterboro, Maine, to Washington, D.C., for my deposition.

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

This Declaration executed this 26 day of October, 2011, at 0630 PST.

By: Michael R. Malinky
Michael Malinky