

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

**JOSEPH HENRY and MICHAEL  
MALINKY,**

**Plaintiffs,**

**vs.**

**BANK OF AMERICA, NATIONAL  
ASSOCIATION,**

**Defendant.**

**No. 01-CV-1681**

**(DNH/RFT)**

Assigned to  
Magistrate Treece

**NOTICE OF PROPOSED SETTLEMENT OF LITIGATION AND  
SETTLEMENT FAIRNESS HEARING**

**PLEASE READ THIS NOTICE CAREFULLY AND COMPLETELY. IF YOU ARE A CURRENT OR FORMER PARTICIPANT IN THE *ESOP*, THE *SETTLEMENT* MAY AFFECT YOUR RIGHTS. YOU ARE NOT BEING SUED IN THIS MATTER. YOU DO NOT HAVE TO APPEAR IN *COURT*, AND YOU DO NOT HAVE TO HIRE AN ATTORNEY IN THIS CASE. IF YOU ARE IN FAVOR OF THE *SETTLEMENT*, YOU NEED NOT DO ANYTHING. IF YOU DISAPPROVE, YOU MAY OBJECT TO THE *SETTLEMENT* PURSUANT TO THE PROCEDURES DESCRIBED BELOW.**

Your legal rights might be affected if you are a current or former participant in the Champlain Enterprises, Inc. Employee Stock Ownership Plan (the "*ESOP*").

**PLEASE READ THIS NOTICE CAREFULLY. A FEDERAL COURT AUTHORIZED THIS NOTICE. THIS IS NOT A SOLICITATION. YOU HAVE NOT BEEN SUED.**

This notice ("*Notice*") advises you of a proposed settlement (the "*Settlement*") of litigation (referred to herein as the "*Action*") brought by Joseph Henry and Michael Malinky (the "*Plaintiffs*") against Bank of America, N. A. formerly known as U.S. Trust Company of California, N.A. ("*Defendant*"). *Plaintiffs* and *Defendant* are referred to herein collectively as the "*Parties*." In the *Action*, *Plaintiffs* seek to recover losses, which they allege were suffered by the *ESOP* as the result of breaches of fiduciary duty by *Defendant*.

The United States District Court for the Northern District of New York (the "*Court*") has preliminarily approved the *Settlement*, and has scheduled a hearing (the "*Fairness Hearing*") to evaluate the fairness and adequacy of the *Settlement* at which the *Court* will consider: (i) whether to approve the *Settlement* as fair and adequate; (ii) whether to enter a judgment (the "*Judgment*") which will bar you from filing your own lawsuit on issues raised in the *Action* (*see* Question 4 below); (iii) whether to approve the *Plan of Allocation* (*see* Question 5 below); and (iv) whether to award attorneys' fees and expenses to *Plaintiffs' Counsel* and incentive awards to *Plaintiffs* (*see* Question 8 below). The *Fairness Hearing*, before the Hon. Randolph F. Treece, has been scheduled for February 14, 2012, at 9:30 a.m., at the United States District Court for the Northern District of New York, James T. Foley U.S. Courthouse, 445 Broadway, Room 314, Albany, NY 12207. If the Court issues final approval of the *Settlement*, *Defendant* will cause the payment of *Two Million Dollars* (\$2,000,000.00) into an Escrow Account. Following payment of all approved fees, expenses and incentive awards, the *Net Settlement* will be paid to the *ESOP's* current trustee for allocation to *Eligible Participants* who qualify for benefits under the Plan of Allocation.

The terms of the *Settlement* are contained in a Settlement Agreement (the “*Settlement Agreement*”), a copy of which is available at [www.KellerSettlements.com](http://www.KellerSettlements.com) or by contacting *Plaintiffs’ Counsel* identified below. Capitalized and italicized terms used in this *Notice* and not defined herein have the meanings assigned to them in the *Settlement Agreement*.

Any questions regarding the *Settlement* should be directed to *Plaintiffs’ Counsel*: Gary Greenwald, Keller Rohrback P.L.C., 3101 N. Central Avenue, Suite 1400, Phoenix, Arizona 85012, tel: 602-230-6326, Terence Devine, Devine, Markovits & Snyder, LLP, 52 Corporate Circle, Albany, New York 12203, tel: 518-464-0640, or Stanley H. Shayne, Shayne Nichols LLC, Two Miranova Place, Suite 220, Columbus, Ohio 43215 tel: 614-221-2220. *Plaintiffs’ Counsel* has established a toll-free phone number, (800) 315-7082, for your questions or comments. *Plaintiffs’ Counsel* may also be contacted via email ([info@KellerSettlements.com](mailto:info@KellerSettlements.com)). Please do not contact the *Court*, as *Court* personnel will not be able to answer your questions.

<b>ACTIONS YOU MAY TAKE IN THE SETTLEMENT</b>	
NO ACTION IS NECESSARY TO RECEIVE PAYMENT.	<p>If the <i>Settlement</i> is approved by the <i>Court</i> and you are a current or former participant who qualifies for an allocation of a portion of the <i>Settlement Fund</i> (see “<i>The Plan of Allocation</i>” below), you do not need to do anything in order to receive an allocation. The portion, if any, of the <i>Settlement Fund</i> to be allocated to your <i>ESOP</i> account or otherwise for your benefit will be calculated by the Independent Fiduciary or <i>ESOP</i>’s record keeper as part of the implementation of the <i>Settlement</i>.</p> <p>If you are a current participant in the <i>ESOP</i>, any share of the <i>Settlement Fund</i> to which you are entitled will be credited to your <i>ESOP</i> account. If you are no longer a participant and are entitled to share in the <i>Settlement Fund</i>, you will be notified by the <i>ESOP</i>’s record keeper or trustee of the procedures for electing to either receive or direct a distribution for your benefit.</p>
YOU CAN OBJECT (IF FILED WITH THE COURT, NO LATER THAN February 9, 2012).	If you wish to object to any part of the <i>Settlement</i> , you can write to the <i>Court</i> and counsel and explain why you do not like the <i>Settlement</i> .
YOU CAN GO TO THE HEARING ON February 14, 2012, at 9:30 a.m.	Whether you support or object to the <i>Settlement</i> , you may attend the fairness hearing. If you have submitted a written objection to the <i>Court</i> and counsel, as explained below, you can ask to speak in <i>Court</i> with respect to the aspect of the <i>Settlement</i> to which you object.
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As described in more detail below, the *Action* concerns allegations that *Defendant* breached fiduciary duties it owed to the *ESOP*. The allegations are set forth in the operative complaints and are described in certain rulings of the *Court* and of the Second Circuit Court of Appeals, which are available at [www.Kellersettlements.com](http://www.Kellersettlements.com).

## SUMMARY OF SETTLEMENT

Under the *Settlement*, \$2.0 million in cash will be paid into a qualified settlement fund (the "*Settlement Fund*"). This amount shall be disbursed as follows:

- (a) *Court* awarded *Plaintiffs' Counsel's* attorneys' fees and expenses, *Plaintiffs'* incentive awards, and reasonable costs of the *Settlement* either approved by the *Court* or previously agreed to by the parties, shall be paid from the *Settlement Fund*.
- (b) The balance in the *Settlement Fund* shall be disbursed to the *ESOP's* current trustee, subject to the *Plan of Allocation (the "Net Settlement")*.

Disbursements will be made as promptly as practicable after the *Court's* approval of the *Settlement* has become *Final*.

## BASIC INFORMATION

### 1. Why did I get this Notice package?

Either you or someone in your family may have been a participant or beneficiary in the *ESOP* at some time on or before January 3, 2001 (all such participants are referred to herein as "*Affected Participants*"). The *Court* has directed that this *Notice* be sent to you because, as such a participant or beneficiary, you may be entitled to share in the proceeds of the *Settlement* and certain claims you may have concerning the *ESOP* will be extinguished if the *Settlement* is finally approved by the *Court*.

This *Notice* explains the *Action*, the *Settlement*, your legal rights, what benefits are available, who is eligible for them, and how you will receive your portion of the benefits. This *Notice* also informs you with respect to the *Fairness Hearing* set by the *Court*.

The issuance of this *Notice* is not an expression of the *Court's* opinion on the merits of any claim in the *Action*, and the *Court* still has to decide whether to approve the *Settlement*.

### 2. Who is entitled to receive benefits from the Settlement?

Any individual who was (a) an employee of Champlain Enterprises, Inc. and an *ESOP* participant on January 3, 2001, or (b) a former employee of Champlain Enterprises, Inc. and an *ESOP* participant having either a vested or partially vested *ESOP* account balance on January 3, 2001, is an "*Eligible Participant*" and entitled to receive benefits from the *Settlement Fund*.

### 3. What is the lawsuit about? What has happened so far?

In the *Action*, *Plaintiffs* allege, among other things, that the *Defendant* was a fiduciary of the *ESOP* and violated fiduciary duties under the Employee Retirement Income Security Act of 1974 ("*ERISA*") by approving a purchase of certain company

stock by the *ESOP* in 1994. *Plaintiffs* sought to recover the losses the *ESOP* allegedly suffered due to the fiduciary breaches. *Defendant* denies that it has any liability whatsoever or that it breached any fiduciary duties. If the litigation were to continue, the *Defendant* would continue to raise numerous defenses to liability.

The *Parties* have been involved in the *Action* since 2001. The *Action* was tried in 2004 and twice appealed to the Second Circuit Court of Appeals, which has twice remanded it to this *Court*. A third appeal is now pending. Several opinions of these courts, explaining the nature of the *Action* and deciding various aspects of it, are available at [www.KellerSettlements.com](http://www.KellerSettlements.com).

This *Settlement* is the product of intense, arm's-length negotiations between *Plaintiffs' Counsel* and *Defendant's* counsel. In connection with the *Settlement*, no party is admitting any responsibility or liability.

As part of the *Settlement* the parties agreed to appoint an Independent Fiduciary who would, among other things, have the responsibility to evaluate the *Settlement*, conclude whether the *Settlement* was appropriate under the circumstances as well as in the best interests of the *ESOP's* eligible participants, and develop an appropriate allocation of the net *Settlement* proceeds.

Jonathan Cocks was appointed the Independent Fiduciary. Among other things, Mr. Cocks has evaluated the proposed *Settlement* on behalf of the *ESOP* and the *ESOP's* eligible participants. He has concluded, and will submit a written report to the *ESOP's* Committee stating, the *Settlement* is appropriate under the circumstances and in the best interests of the *ESOP's* eligible participants. Mr. Cocks and *Plaintiff's Counsel* have also jointly proposed the Plan of Allocation discussed below, which has been submitted to the Court for its review and approval.

## **4. Why is there a Settlement?**

At the time of *Settlement*, the third appeal of the *Action* was pending. *Plaintiffs' Counsel* concluded that the *Settlement* was the prudent and advisable course, because it avoided the risks inherent in any litigation, as well as the potential delays associated with a possible re-trial and potential further appeals.

## **5. What does the Settlement provide?**

The material economic terms of the *Settlement* are set forth in this Notice. The *Settlement* also provides for general releases of *Defendant* by *Plaintiffs* and of *Plaintiffs* by *Defendant*. In addition, the *Settlement* provides that the *Eligible Participants* are permanently barred from bringing a similar or related action in the future against the *Defendant*, the *ESOP*, and certain other persons described in the *Settlement Agreement* concerning the matters raised in the *Action*. This means that the *Eligible Participants* and the *ESOP* will not be able to sue *Defendant* in the future concerning the matters raised in the *Action*.

## **6. What will be my share of the Settlement Fund?**

From the gross amount of the *Settlement* in the sum of \$2.0 million, the Court will be asked to approve the following payments: 1) *Plaintiffs' Counsel's* attorney fees not to exceed \$555,619.00 and expenses not to exceed \$333,143.00, 2) incentive awards to Plaintiffs Joseph Henry and Michael Malinky in a sum not to exceed \$40,000 in the aggregate, 3) payment to the *ESOP's* Independent Fiduciary for his agreed-upon fee and necessary expenses in a sum not to exceed \$40,000.00, and 4) reimbursement of administrative expenses in connection with the completion of the *Settlement*, in a sum not to exceed \$7,000. After payment of the above awards and expenses as ordered by the Court, the balance (an amount that will not be less than \$1,024,000) shall represent the net amount of the *Settlement* for payment into the *ESOP* and allocation to *Eligible Participants*. *Plaintiffs' Counsel* and the *ESOP's* Independent Fiduciary, Jonathan Cocks, have jointly submitted to the *Court* a detailed *Plan of Allocation* for approval at or after the *Fairness Hearing*. The *Plan of Allocation*, which may be obtained at [www.KellerSettlements.com](http://www.KellerSettlements.com), or by contacting *Plaintiffs' Counsel*, will describe the manner by which the *Settlement* proceeds paid into the *ESOP* will be allocated. In general terms, the *Plan of Allocation* provides:

The *Settlement Agreement* provides for the Plaintiffs and the *ESOP's* Independent Fiduciary to jointly submit to the Court a proposed *Plan of Allocation* that will provide for the allocation of amounts deposited into the *Settlement Fund* (after payment of Court-approved attorneys' fees, expenses and Plaintiff incentive awards as well as other settlement related costs and expenses including the fee and any expenses of the Independent Fiduciary) to *ESOP* participants and beneficiaries.

Under the *Plan of Allocation*, "Eligible Participants" will be defined to include each individual who was (a) an employee of Champlain Enterprises, Inc. and an *ESOP* participant on January 3, 2001, or (b) a former employee of Champlain Enterprises, Inc. and an *ESOP* participant on January 3, 2001. Allocations will be made

as of the appropriate Allocation Date based upon a formula which allocated to affected Participants' Cash Account a share of the Net Proceeds of settlement in a ratio that the total balance of his Cash Account and his Stock Account on the Allocation Date (reduced by any distributions of Capital Accumulation made before or after the Allocation Date) bears to the sum of such Account Balances for all Eligible Participants as of the Allocation Date.

A detailed Plan of Allocation has been filed with the Court and posted on a website at [www.KellerSettlements.com](http://www.KellerSettlements.com) after the granting of the Motion for Preliminary Approval of Settlement and for a Fairness Hearing and prior to the scheduled Fairness Hearing.

## **7. How can I get my portion of the recovery?**

You do not need to file a claim for recovery. If you are entitled to share in the *Net Settlement* proceeds, your share will be deposited in your *ESOP* account. If you are a former participant, you will be notified with respect to the procedure for electing to receive or direct a distribution of your share, if any, of the *Net Settlement* proceeds.

## **8. When would I receive my portion of the recovery?**

As discussed above under Question 1, payment is conditioned on the *Court's* approval of the *Settlement* and that approval becoming *Final* and no longer subject to any appeals. You could likely expect your portion of the recovery within six months after the *Settlement* becomes *Final*.

## **9. How will Plaintiffs' Counsel be paid?**

*Plaintiffs' Counsel* have applied for an award of attorneys' fees and expenses on behalf of all Plaintiffs' counsel. The application for attorneys' fees will not seek more than 33.3% of the cash deposited in the *Settlement Fund* less the amount of reimbursement to Plaintiffs' counsel for litigation expenses. The application for litigation expense reimbursement will not exceed \$333,143.00. Any award of fees and additional expenses will be paid from the *Settlement Fund* in accordance with the terms of the *Settlement Agreement*, concurrent with disbursements to the *ESOP*. The written application for fees and expenses, together with the application for incentive awards to the *Plaintiffs* (which shall not exceed \$40,000 in the aggregate), was filed on November 4, 2011, and the *Court* will consider this application at the *Fairness Hearing*. A copy of the application is available at [www.KellerSettlements.com](http://www.KellerSettlements.com) or by requesting a copy from *Plaintiffs' Counsel*. To date, *Plaintiffs' Counsel* have received no payment for their services in prosecuting the *Action*, nor have *Plaintiffs' Counsel* been reimbursed for their out-of-pocket expenses.

### **OBJECTIONS**

## **10. How do I tell the *Court* if I don't like the *Settlement*?**

Any *Affected Participant* may object to any aspect of the *Settlement* by filing a written objection with the *Court*. To object, you must send a letter or other written statement saying that you object to the *Settlement*, the attorneys' fee award, and/or the *Plaintiff* incentive awards in *Henry v. Bank of America, National Association* (previously identified as "U.S. Trust Company of California, N.A."), No. 01-CV-1681. Be sure to include your name, address, telephone number, signature, and a full explanation of all reasons you object to the *Settlement*. **Your written objection must be filed with the *Court*, and served upon the counsel listed below, by no later than February 9, 2012:**

#### **File with the Clerk of the Court:**

Clerk of the Court  
United States District Court for the Northern District of New York  
James T. Foley U.S. Courthouse  
445 Broadway  
Albany, NY 12207

**And, by the same date, serve copies of all such papers by mail and/or fax to each of the following:**

**PLAINTIFFS' COUNSEL:**

Gary D. Greenwald  
Ron Kilgard  
KELLER ROHRBACK P.L.C.  
3101 N. Central Avenue  
Suite 1400  
Phoenix, AZ 85012  
Fax: (602) 248-2822

**INDEPENDENT FIDUCIARY  
FOR THE ESOP:**

Jonathan Cocks  
3205 Walker Drive  
Richardson, Texas 75082  
Fax: (972) 690-3552

**COUNSEL FOR DEFENDANT:**

Edward A. Scallet  
GROOM LAW GROUP, CHARTERED  
1701 Pennsylvania Ave., N.W.  
Washington, D.C. 20006  
Fax: (202) 659-4503

The objection must state all supporting bases and reasons for the objection, set forth proof of your participation in the *ESOP*, clearly identify any and all witnesses, documents and other evidence of any kind that are to be presented at the *Fairness Hearing* in connection with such objections, and further describe the substance of any testimony to be given by you as well as by any supporting witnesses.

**UNLESS OTHERWISE ORDERED BY THE COURT, ANYONE WHO DOES NOT OBJECT IN THE MANNER DESCRIBED HEREIN WILL BE DEEMED TO HAVE WAIVED ANY OBJECTION, WILL NOT BE PERMITTED TO SPEAK AT THE FAIRNESS HEARING AND SHALL BE FOREVER FORECLOSED FROM MAKING ANY OBJECTION TO THE PROPOSED SETTLEMENT AND THE APPLICATION FOR ATTORNEYS' FEES AND EXPENSES AND PLAINTIFF INCENTIVE AWARDS.**

**11. Can I exclude myself from the Settlement?**

Breach of fiduciary duty claims must be brought by participants on behalf of the *ESOP*, and any judgment or resolution necessarily applies to all affected *ESOP* participants or beneficiaries. **Therefore, you will be bound by any judgment or orders that are entered in this Action, and, if the Settlement is approved, you will be deemed to have released the Defendant from any and all claims that were or could have been asserted in this case on your behalf or on behalf of the ESOP or otherwise included in the release in the Settlement, and any and all claims relating to the Plan of Allocation, other than your right to obtain the relief provided to you, if any, by the Settlement.**

**THE COURT'S FAIRNESS HEARING**

**12. Do I have to come to the hearing?**

*Plaintiffs' Counsel* will answer questions Judge Treece may have at the *Fairness Hearing*. You are welcome to come at your own expense. If you send an objection, you do not have to come to *Court* to talk about it. As long as you filed your written objection on time, it will be before the *Court* when the *Court* considers whether to approve the *Settlement* as fair, reasonable and adequate. You may also have your own lawyer (at your own expense) attend the *Fairness Hearing* at your expense, but such attendance is not mandatory.

**13. May I speak at the hearing?**

If you have filed a timely objection and are a current *ESOP* participant or a former participant in the *ESOP* who would be subject to the *Judgment*, if you wish to speak, present evidence or present testimony at the *Fairness Hearing*, you must state in

your objection your intention to do so, and must identify any witnesses you intend to call or evidence you intend to present.

The *Fairness Hearing* may be rescheduled by the *Court* without further notice to *Affected Participants*. If you wish to attend the *Fairness Hearing*, you should confirm the date and time with *Plaintiffs' Counsel*.

## IF YOU DO NOTHING

### 14. What happens if I do nothing at all?

If you do nothing and you are entitled to participate in the *Net Settlement* proceeds, you will participate in those proceeds as described above in this Notice if the *Settlement* is approved, and you will be subject to the *Judgment*.

## GETTING MORE INFORMATION

### 15. How do I get more information?

This Notice summarizes the proposed *Settlement*. Full details of the *Settlement* are set forth in the *Settlement Agreement*. You may obtain a copy of the *Settlement Agreement* by making a written request to a member of *Plaintiffs' Counsel* listed on page 5. Copies of the *Settlement Agreement* may also be viewed at [www.KellerSettlements.com](http://www.KellerSettlements.com). *Plaintiffs' Counsel* have established a toll-free phone number to receive your comments and questions, (800) 315-7082, and may also be contacted via email at [info@Kellersettlements.com](mailto:info@Kellersettlements.com).

DATED: DECEMBER 20, 2011.

BY ORDER OF THE COURT