

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

BENJAMIN MICHAEL MERRYMAN, AMY  
WHITAKER MERRYMAN TRUST, AND B  
MERRYMAN AND A MERRYMAN 4TH  
GENERATION REMAINDER TRUST,  
individually and on behalf of all others  
similarly situated,

Plaintiffs,

v.

CITIGROUP, INC., CITIBANK, N.A., and  
CITIGROUP GLOBAL MARKETS INC.,

Defendants.

Civil Action No. 1:15-cv-09185-CM-KNF

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF  
(I) PLAINTIFFS' MOTION FOR FINAL APPROVAL OF PROPOSED  
CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION; AND  
(II) LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES  
AND REIMBURSEMENT OF LITIGATION EXPENSES**

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Plaintiffs and Lead Counsel respectfully submit this memorandum of law in further support of (i) Plaintiffs’ Motion for Final Approval of Proposed Class Action Settlement and Plan of Allocation (ECF No. 150), and (ii) Lead Counsel’s Motion for an Award of Attorneys’ Fees and Reimbursement of Litigation Expenses (ECF No. 152) (the “Motions”).<sup>1</sup> As set forth below, both of these Motions are unopposed, and no member of the Class has objected. Accordingly, this memorandum serves to apprise the Court of these facts and the authorities that, in light of them, further support Plaintiffs’ and Lead Counsel’s requested relief.

## **I. PRELIMINARY STATEMENT**

The proposed Settlement provides for a cash payment of \$14,750,000 plus important injunctive relief for the benefit of the Class. Specifically, the injunctive relief provides a twenty basis points limit on the Depository’s charges for conducting foreign exchange from cash distributions (i.e., “Conversions”) issued by foreign companies and owed to ADR holders—as compared to the average spread of over thirty basis points charged during the Class Period—providing an incalculable ongoing monetary benefit to the Class and ADR investors as a whole.

As detailed in Plaintiffs’ and Lead Counsel’s opening papers in support of the Motions (ECF Nos. 150-154) (“Opening Papers”), the Settlement was reached after extensive litigation efforts followed by months of negotiations, including formal mediation overseen by a well-respected neutral from JAMS, and represents a very favorable result for the Class in light of the significant challenges that Lead Plaintiffs would have faced had the Action continued. Indeed, the

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<sup>1</sup> Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated August 20, 2018 (ECF No. 131) (the “Stipulation”) or the Declaration of Sharan Nirmul in Support of (1) Plaintiffs’ Motion for Final Approval of Proposed Class Action Settlement and Plan of Allocation; and (2) Lead Counsel’s Motion for an Award of Attorneys’ Fees and Reimbursement of Litigation Expenses dated May 24, 2019 (ECF No. 154). Unless otherwise noted, all internal citations and quotations are omitted.

Parties' agreement-in-principle to settle the Litigation was reached while awaiting the Court's decision on a critical motion—Proposed Intervenors' Motion to Intervene in the Litigation under Rule 24 for the purpose of renewing class certification. An adverse ruling on this motion would have significantly limited Plaintiffs' case (and damages) to the three ADRs actually owned by Named Plaintiffs and certified by the Court. The Settlement avoids this risk, and others, while securing a substantial monetary recovery representing, on a gross basis, between roughly 21% and 24% of the Damages Class's potential damages for twenty-one ADRs based on the analysis of Plaintiffs' damages expert, as well as the injunctive relief noted above.

Following the extensive Court-approved notice program for the Settlement—including the mailing of over 211,900 Postcard Notices combined with a modern, comprehensive multi-media notice campaign consisting of direct Internet-advertising to certain potential Class Members using Internet Protocol (“IP”) address matching, publications in various magazines, newspapers, and investment e-newsletters as well as banner ads served over a variety of business, news, and investment websites and across social media platforms resulting in over 212 million validated online impressions—*not a single member of the Class has objected to any aspect of the Settlement, the Plan of Allocation, or Lead Counsel's motion for an award of attorneys' fees and reimbursement of Litigation Expenses.* Furthermore, out of the millions of potential Class Members that received notice of the Settlement, *only 34* requests for exclusion from the Class have been received.<sup>2</sup> In the aggregate, these exclusion requests calculate to *less than \$20* in losses under the Plan of Allocation.

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<sup>2</sup> The 34 exclusion requests represent approximately 0.016% of the more than 211,900 Postcard Notices mailed, and an even tinier percentage of the millions of Class Members reached via the multi-media notice campaign.

Plaintiffs and Lead Counsel respectfully submit that the reaction of the Class is a testament to the fairness, adequacy, and reasonableness of the Settlement, the Plan of Allocation, and the fee and expense requests, and provides strong support for the Court's approval of both Motions.

## II. ARGUMENT

Plaintiffs and Lead Counsel respectfully submit that their Opening Papers demonstrate why approval of the Motions is warranted. Now that the time for objecting to the Settlement or requesting exclusion from the Class has passed, the lack of any objections and only minimal requests for exclusion from Class Members provide significant additional support for approval of the Motions. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 119 (2d Cir. 2005) (finding that “the favorable reaction of the overwhelming majority of class members to the Settlement is perhaps the most significant factor in [the] Grinnell inquiry”); *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at \*16 (S.D.N.Y. Nov. 8, 2010) (“The absence of objections to the Settlement supports the inference that it is fair, reasonable and adequate.”).

Pursuant to the Court's September 4, 2018 Preliminary Approval Order (ECF No. 134) and subsequent February 14, 2019 Order Approving Modifications to Notice Plan and Schedule for Approval of Settlement (ECF No. 145), the Court-authorized Claims Administrator, Kurtzman Carson Consultants LLC (“KCC”), mailed more than 211,900 Postcard Notices to Registered Holder Damages Class Members (i.e., Class Members who received cash distributions from the Depository-sponsored ADRs listed in Appendix 1 to the Stipulation from January 1, 2006 to September 4, 2018, inclusive, and who were damaged thereby).<sup>3</sup> In addition, the Court-authorized

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<sup>3</sup> See Supplemental Declaration of Justin R. Hughes Regarding (A) Mailing of the Postcard Notice; (B) Outreach to Third-Party Filers; (C) Update on Telephone Hotline and Settlement Websites; and (D) Report on Requests for Exclusion Received (the “Supp. Hughes Decl.”), attached hereto as Exhibit 1, at ¶ 2.

Publication Notice Plan Administrator, HF Media, LLC (“HF Media”), completed a successful 82-day multi-media notice program targeting Class Members (in particular, Non-Registered Holder Damages Class Members and Current Holder Class Members), utilizing publications in magazines, newspapers, and investment e-newsletters, along with banner ads served over a variety of business, news, and investment websites, and across social media platforms.<sup>4</sup> HF Media also used cutting-edge technology to match a large portion of the physical mailing addresses provided in response to KCC’s initial nominee outreach efforts to IP addresses in order to directly serve ads on Class Members on multiple occasions. *See* Finegan Decl. ¶¶ 36-37.<sup>5</sup> Additionally, the Postcard Notice and publications provided Class Members with general information regarding the Settlement, and directed them to the long-form Notice found on the Settlement Website, [www.CitibankADRSettlement.com](http://www.CitibankADRSettlement.com), for additional information.<sup>6</sup>

The long-form Notice informed Class Members of the terms of the Settlement and Plan of Allocation, and that Lead Counsel would be applying, on behalf of all plaintiffs’ counsel, for an award of attorneys’ fees in an amount not to exceed 33⅓% of the Settlement Fund, as well as reimbursement of Litigation Expenses (including Service Awards to Plaintiffs) in an amount not to exceed \$800,000, plus interest. The various forms of notice also apprised Class Members of

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<sup>4</sup> A full description of the multi-media notice campaign is contained in the previously-filed Declaration of Jeanne C. Finegan dated May 24, 2019 (ECF No. 154-2) (“Finegan Decl.”).

<sup>5</sup> As noted in the Advisory Committee Notes to the 2018 amendments to Rule 23, “Instead of preferring any one means of notice, . . . the amended rule relies on courts and counsel to focus on the means or combination of means most likely to be effective in the case before the court.” As further noted, “[Rule 23 (c)(2)(B)] does not specify any particular means as preferred.”

<sup>6</sup> The banner ads directed potential Class Members to the ADR FX settlement landing page, [www.ADRFXSettlement.com](http://www.ADRFXSettlement.com), which provides a direct link to the Settlement website, [www.CitibankADRSettlement.com](http://www.CitibankADRSettlement.com), as well as links to the websites for the settlements obtained in the related ADR FX cases *Merryman et al. v. JPMorgan Chase Bank, N.A.*, No. 1:15-cv-09188-VEC (S.D.N.Y.) and *In re: The Bank of New York Mellon ADR FX Litigation*, Civil Action No. 16-CV-00212-JPO-JLC (S.D.N.Y.) *See* Supp. Hughes Decl. ¶¶ 5-6.



their right to object to the Settlement, the Plan of Allocation, and/or the motion for attorneys' fees and reimbursement of Litigation Expenses, their right to exclude themselves from the Class, and the June 7, 2019 deadline for filing objections and requesting exclusion.

On May 24, 2019, pursuant to the schedule approved by the Court in the Preliminary Approval Order, Plaintiffs and Lead Counsel filed their Opening Papers in support of the Settlement, the Plan of Allocation, and the fee and expense motion. The Motions are supported by, among other things, declarations of Lead Counsel and the Administrators. These papers are available on the public docket (*see* ECF Nos. 150-154) and on the Settlement Website. *See* Supp. Hughes Decl. ¶ 5.

As noted above, in response to the notice program and the Motions, there have been no objections to the Settlement and only 34 requests for exclusion (out of the many millions of potential Class Members receiving notice of the Settlement). *See* Supp. Hughes Decl. ¶¶ 8-10.<sup>7</sup> Additionally, based on the information provided with the exclusion requests, the exclusions represent extremely minimal losses of *less than \$20* in the aggregate. Here, the absence of any objections from Class Members—combined with the minimal requests for exclusion—strongly supports a finding that the Settlement is fair, reasonable, and adequate. *In re Virtus Inv. Partners, Inc. Sec. Litig.*, 2018 WL 6333657, at \*2 (S.D.N.Y. Dec. 4, 2018) (“the absence of objections by the class is extraordinarily positive and weighs in favor of settlement”); *Godson v. Eltman, Eltman, & Cooper, P.C.*, 328 F.R.D. 35, 55 (W.D.N.Y. 2018) (“Courts have found [the reaction of the class to the settlement] to weigh in favor of approval where the majority of class members have not

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<sup>7</sup> Of the 34 requests for exclusion received, 33 requests were submitted timely (i.e., on or before the June 7, 2019 deadline) and 1 request was submitted late (i.e., after the June 7, 2019 deadline). *See* Supp. Hughes Decl. ¶ 10. All 34 requests for exclusion have been included on Exhibit 1 to the [Proposed] Order and Final Judgment attached hereto as Exhibit 2.

objected to or opted out of a settlement.”); *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 176 (S.D.N.Y. 2014) (“The absence of . . . objections and minimal investors electing to opt out of the Settlement provides evidence of Class members’ approval of the terms of the Settlement.”).

Moreover, the absence of objections from institutional investors with ample means and incentive to object to the Settlement if they deemed it unsatisfactory is further evidence of the Settlement’s fairness. *See, e.g., In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 410 (S.D.N.Y. 2018) (“That not one sophisticated institutional investor objected to the Proposed Settlement is indicia of its fairness.”); *In re AOL Time Warner, Inc. Sec. & “ERISA” Litig.*, 2006 WL 903236, at \*10 (S.D.N.Y. Apr. 6, 2006) (the lack of objections from institutional investors supported approval of settlement); *In re AT&T Corp. Sec. Litig.*, 2005 WL 6716404, at \*4 (D.N.J. Apr. 25, 2005) (approving settlement where “no objections were filed by any institutional investors who had great financial incentive to object”).

The lack of objections by Class Members also supports approval of the Plan of Allocation. *See, e.g., In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 240 (E.D.N.Y. 2013) (conclusion that the proposed plan of allocation was fair and reasonable was “buttressed by the relatively small number of opt-outs and absence of objections from class members”); *Woburn Ret. Sys. v. Salix Pharm., Ltd.*, 2017 WL 3579892, at \*4 (S.D.N.Y. Aug. 18, 2017) (approving proposed plan of allocation where “[t]here have been no objections to the Plan”).

Finally, the uniformly positive reaction of the Class should also be considered with respect to Lead Counsel’s application for attorneys’ fees and reimbursement of Litigation Expenses. The absence of any objections to the requested fees and expenses supports a finding that the request is fair and reasonable. *See, e.g., In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at \*10

(S.D.N.Y. Nov. 7, 2007) (the reaction of class members to a fee and expense request “is entitled to great weight by the Court” and the absence of any objection “suggests that the fee request is fair and reasonable”); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 374 (S.D.N.Y. 2002) (the lack of any objection to the fee request supported its approval). In particular, the lack of objections by institutional investors supports approval of the fee request. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) (the fact that “a significant number of investors in the class were ‘sophisticated’ institutional investors that had considerable financial incentive to object had they believed the requested fees were excessive” and did not do so, supported approval of the fee request); *In re Bisys Sec. Litig.*, 2007 WL 2049726, at \*1 (S.D.N.Y. July 16, 2007) (lack of objections from institutional investors supported the approval of fee request because “the class included numerous institutional investors who presumably had the means, the motive, and the sophistication to raise objections if they thought the [requested] fee was excessive”).

\* \* \*

In sum, the uniformly positive reaction of the Class is strong evidence that the Settlement achieved is fair, reasonable, and adequate, and in the best interests of the Settlement Class, that the Plan of Allocation is fair and equitable, and that Lead Counsel’s fee and expense application (including their request for Service Awards to Plaintiffs) is reasonable.

### III. CONCLUSION

For the foregoing reasons and the reasons set forth in their Opening Papers in support of the Motions, Plaintiffs and Lead Counsel respectfully request that the Court approve the Settlement, the Plan of Allocation, and Lead Counsel’s application for attorneys’ fees and reimbursement of Litigation Expenses, including Services Awards to Plaintiffs. Copies of the (i) [Proposed] Order and Final Judgment; (ii) [Proposed] Order Approving Plan of Allocation of Net

Settlement Fund; and (iii) [Proposed] Order Awarding Attorneys' Fees and Reimbursement of Litigation Expenses are attached hereto as Exhibits 2, 3, and 4, respectively.

Dated: July 3, 2019

Respectfully Submitted,

**KESSLER TOPAZ MELTZER  
& CHECK, LLP**

*s/ Sharan Nirmul*

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*Counsel for Plaintiffs and the Class*

# **EXHIBIT 1**

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

BENJAMIN MICHAEL MERRYMAN,  
AMY WHITAKER MERRYMAN TRUST,  
AND B MERRYMAN AND A  
MERRYMAN 4TH GENERATION  
REMAINDER TRUST, individually and on  
behalf of all others similarly situated,

Plaintiffs,

v.

CITIGROUP, INC., CITIBANK, N.A., and  
CITIGROUP GLOBAL MARKETS INC.,

Defendants.

**Civil Action No. 1:15-cv-09185-CM-KNF**

**SUPPLEMENTAL DECLARATION OF JUSTIN R. HUGHES REGARDING  
(A) MAILING OF THE POSTCARD NOTICE; (B) OUTREACH TO THIRD-PARTY  
FILERS; (C) UPDATE ON TELEPHONE HOTLINE AND SETTLEMENT WEBSITES;  
AND (D) REPORT ON REQUESTS FOR EXCLUSION RECEIVED**

I, Justin R. Hughes, declare and state as follows:

1. I am a Vice President of Class Actions at Kurtzman Carson Consultants LLC (“KCC”). KCC is headquartered at 3301 Kerner Boulevard, San Rafael, California 94901. Pursuant to the Court’s September 4, 2018 Order Preliminarily Approving Settlement and Providing for Notice (ECF No. 134) (the “Preliminary Approval Order”), Lead Counsel was authorized to retain KCC as the Claims Administrator in connection with the proposed Settlement of the above-captioned Litigation.<sup>1</sup> I submit this declaration as a supplement to my previously filed declaration, the Declaration of Justin R. Hughes Regarding (A) Receipt of Registered Holder Data; (B) Mailing of the Postcard Notice; (C) Establishment of the Telephone

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<sup>1</sup> All terms with initial capitalization not otherwise defined herein shall have the meanings ascribed to them in the Stipulation and Agreement of Settlement, dated August 20, 2018 (ECF No. 131) (the “Stipulation”).

Hotline; (D) Establishment of the Settlement Website; and (E) Report on Requests for Exclusion Received to Date, dated May 23, 2019 (ECF No. 154-1) (the “Initial Mailing Declaration”). I have personal knowledge of the matters stated herein and, if called upon, could and would testify thereto.

### **MAILING OF THE POSTCARD NOTICE**

2. As reported in the Initial Mailing Declaration, as of May 22, 2019, KCC had mailed a total of 211,964 Postcard Notices to Registered Holder Damages Class Members, which figure included a total of 2,149 Postcard Notices that were initially returned as undeliverable by the United States Postal Service (“USPS”), but were re-mailed based on updated addresses provided by the USPS or obtained through a third-party vendor to which KCC subscribes. Since the execution of the Initial Mailing Declaration, KCC has re-mailed an additional 6 Postcard Notices. As a result, as of June 28, 2019, KCC has mailed a total of 211,970 Postcard Notices.

### **OUTREACH TO THIRD-PARTY FILERS**

3. KCC maintains a proprietary database with the names and email addresses of the largest and most common third-party filers<sup>2</sup> (the “Third-Party Filer Email Database”). Due to the particularly unique Class definition and information that must be provided to make a claim, on May 9, 2019, KCC, in coordination with Lead Counsel, sent an email to the 662 email addresses contained in KCC’s Third-Party Filer Email Database. The email encouraged third-party filers to begin working on their claim submissions, and also provided general information such as the claim filing deadline and links to the Settlement websites, *i.e.*, the website for this Settlement, [www.CitibankADRSettlement.com](http://www.CitibankADRSettlement.com) (“the Settlement Website”), as well as the ADR FX website, [www.ADRFXSettlement.com](http://www.ADRFXSettlement.com), providing general information for this Settlement in

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<sup>2</sup> “Third-party filers” are companies and/or financial institutions that file claims on behalf of clients who employ them to handle such filings on their behalf in actions of this nature.

addition to the settlements obtained in similar cases against two other depository banks, *In Re: BNYM ADR FX Litig.*, No. 16-CV-00212-JPO-JLC (S.D.N.Y.) and *Merryman et al. v. JPMorgan Chase Bank, N.A.*, No. 1:15-cv-09188-VEC (S.D.N.Y.).

**UPDATE ON TELEPHONE HOTLINE AND SETTLEMENT WEBSITES**

4. KCC continues to maintain the toll-free telephone number (1-866-680-6138) for Class Members to call and obtain information about the Settlement. Through June 28, 2019, KCC has received a total of 5,892 calls to the telephone hotline, of which 2,227 calls were handled by a live operator during regular business hours.

5. KCC also continues to maintain the Settlement Website, [www.CitibankADRSettlement.com](http://www.CitibankADRSettlement.com), to assist Class Members. On May 28, 2019, KCC posted to this website copies of the papers filed in support of Lead Counsel's motion for final approval of the Settlement and Plan of Allocation and Lead Counsel's motion for an award of attorneys' fees and Litigation Expenses. Through June 28, 2019, the Settlement Website has received 67,239 hits.

6. In addition, KCC currently maintains the general ADR FX website, [www.ADRFXSettlement.com](http://www.ADRFXSettlement.com), which serves as a landing page for this Settlement as well as the settlements obtained in the related ADR FX cases. Through June 28, 2019, this website has received 100,814 hits.

7. KCC will continue operating, maintaining and, as appropriate, updating the Settlement websites and toll-free telephone hotline with relevant case information and court documents until the conclusion of the administration.

**REPORT ON REQUESTS FOR EXCLUSION RECEIVED**

8. The Postcard Notice, Notice, Summary Notice and Settlement Website informed Class Members that requests for exclusion from the Class must be received no later



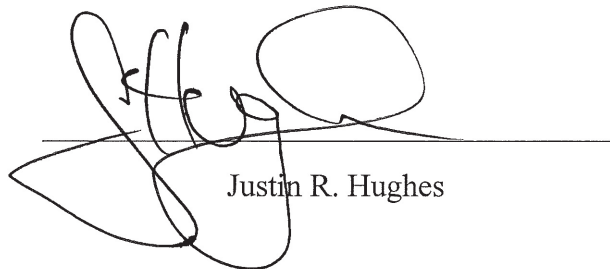
than June 7, 2019. The Notice provided that requests for exclusion were to be mailed to *Citibank ADR Settlement*, EXCLUSIONS, c/o KCC Class Action Services, 3301 Kerner Boulevard, San Rafael, CA 94901 and also set forth the information that was required to be included in each request.

9. As reported in the Initial Mailing Declaration, as of May 22, 2019, KCC had received 23 requests for exclusion from the Class. Since the execution of the Initial Mailing Declaration, KCC has received an additional 11 requests for exclusion – of which 10 requests were timely (*i.e.*, received on or before the June 7, 2019 deadline) and 1 request was late (*i.e.*, received after the June 7, 2019 deadline).

10. In total, as of June 28, 2019, KCC has received a total of 34 requests for exclusion from the Class – 33 timely requests and 1 late request. Attached hereto as Exhibit A is a list of all requests for exclusion received.

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

Executed in San Rafael, California on July 1, 2019.

  
Justin R. Hughes

# Exhibit A

### Timely Exclusion Requests

1. Mary Ann Black  
New Orleans, LA
2. Joseph N. & Lois Jeanne Carinci  
Damascus, MD
3. James A. Davenport  
Midlothian, VA
4. Colemon O. Easom  
Lake, MS
5. Carole B. Embry  
Atlanta, GA
6. Erin Colleen Flanagan  
East Dennis, MA
7. James A. Flanagan  
East Dennis, MA
8. Ana C. Florez  
Sunnyvale, CA
9. Marilyn M. & Ernest C. Francis  
Treadwell, NY
10. William C. Franklin  
Iowa Park, TX
11. Bruce J. & Joyce F. Genrich  
Marinette, WI
12. Diane H. Halasz  
Easton, PA
13. Jane A. & Paul A. Jesus  
Jane A. Jesus Tr UA 26-Sep-02  
Hayward, CA
14. Constance Lenore & Richard Allen  
Johnson  
Port Republic, NJ
15. Ethel Mae & Jesse O. Kinkade  
Eugene, OR
16. Richard Knudsen,  
Richard Knudsen Living Trust  
Oak Lawn, IL
17. Michele Konert Goggans & Sarah K.  
Konert  
Fort Smith, AR
18. Paul S. Kring  
Point Blank, TX
19. Geraldine Lagoon  
Camano Island, WA
20. Carlton & Joan Leach  
Westbrook, ME
21. Peter W. Legere  
Sullivan, ME
22. Martha R. McKnight  
South Fulton, TN
23. Bettie B. Miller, Trust UA  
Bettie B. Miller Trust 12-22-94  
Redding, CA

24. Brian R. & Catherine N. Pabst  
Baldwin, MD

25. Janet L. & Steven W. Smith  
Dayton, VA

26. Janet L. Smith  
Dayton, VA

27. Steven W. Smith  
Dayton, VA

28. Robert C. Stewart  
Astatula, FL

29. Frank J. Sticha & George J. Sticha  
Maywood, IL

30. Richard E. & Rona ES Von Mering  
Pine Bush, NY

31. James W. & Ruth E. Wainwright  
Webster Groves, MO

32. John Charles Watson  
Parkersburg, WV

33. Alex H. Yoo  
New York, NY

**Late Exclusion Requests**

1. Myer Heicklen  
Raleigh, NC