Exhibit B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-cv-22782-Cooke/Torres

BENJAMIN FERNANDEZ, GUSTAVO MARTINEZ, OSCAR LUZURIAGA, and DANIEL ARAUJO as trustees of and on behalf of the LAAD RETIREMENT PLAN, and as trustees of and on behalf of the LAAD CORPORATION S.A. MONEY PURCHASE RETIREMENT PLAN, and on behalf of all others similarly situated,

Plaintiffs,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED,

Defendant.

[PROPOSED] ORDER PRELIMINARILY APPROVING SETTLEMENT AND PROVIDING FOR NOTICE

Currently before the Court is the motion of Benjamin Fernandez, Gustavo Martinez and Oscar Luzuriaga, as trustees of and on behalf of the LAAD Retirement Plan, and as trustees of and on behalf of the LAAD Corporation S.A. Money Purchase Retirement Plan ("Plaintiffs") to preliminarily approve the proposed Settlement Agreement and Release of this action ("Settlement Agreement"), to certify the Settlement Class, to approve the form and method of providing notice to the Settlement Class of the proposed Settlement, and to set a date for a fairness hearing on the proposed Settlement.[1]

[1] All terms herein shall have the same meaning as used in the Settlement Agreement.

The Court has reviewed the Settlement Agreement, as well as Plaintiffs' submissions, and orders as follows:

1. A court's approval of a class action settlement proceeds in two steps, the first of which is to determine whether to conditionally certify a settlement class and notify class members of the pending settlement and a right to participate in a final fairness hearing. *See, e.g., Wilson v. Everbank, N.A.*, No. 14-cv-22264, 2015 WL 10857344, at *1 (S.D. Fla. Aug. 31, 2015). In deciding whether to preliminarily approve a settlement, a court evaluates whether the settlement falls within the "range of reasonableness." *In re Checking Account Overdraft Litig.*, 275 F.R.D. 654, 661 (S.D. Fla. 2011) (King, J.) (quoting 4 NEWBERG ON CLASS ACTIONS § 11.26). "Preliminary approval is appropriate where the proposed settlement is the result of the parties' good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason." *Id.* (quoting *Smith v. Wm. Wrigley Jr. Co.*, 2010 WL 2401149, at *2 (S.D. Fla. Jun. 15, 2010) (Cohn, J.).

2. The Court preliminarily finds that the Settlement is capable of being finally approved. This case presents sufficiently disputed factual questions and complex legal issues. The parties engaged in vigorous litigation to date, and had completed merits discovery at the time that the Settlement Agreement was negotiated.

3. The Settlement Agreement appears to be the product of arm's length negotiation by counsel who are experienced in complex class action and financial services industry litigation. And, settlement was achieved with the significant assistance of an experienced private mediator. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (a "mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure").

4. Class Counsel have substantial experience in complex class action litigation and are well-qualified to assess the value of Plaintiffs' claims. Moreover, there are substantial risks, expenses and uncertainty likely in the event that this action is not settled.

5. The Court also approves the Settlement Class, as defined in the Settlement Agreement. "A class may be certified solely for purposes of settlement where a settlement is reached before a litigated determination of the class certification issue." *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1299 (S.D. Fla. 2007). To certify a class for settlement purposes under Rule 23(e), the settlement class must satisfy the requirements of Rules 23(a) and 23(b). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622 (1997); *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1279 (11th Cir. 2000).

6. The Court finds that the Rule 23(a) and (b)(1) requirements are satisfied:

a. Rule 23(a)(1) requires that the Class be so numerous that individual joinder of all plaintiffs is impracticable. Fed. R. Civ. P. 23(a)(1). The numerosity requirement is met here because there are tens of thousands of Settlement Class Members.

b. Rule 23(a) further requires a showing that there are questions of fact or law common to the class. Fed. R. Civ. P. 23(a)(2). Commonality "is generally satisfied [where] defendants have engaged in a standardized course of conduct that affects all class members" and there is "a common question capable of common resolution." *Sanchez-Knutson v. Ford Motor Co.*, 310 F.R.D. 529, 536 (S.D. Fla. 2015) (Dimitrouleas, J.). Common questions of fact and law exist here. The common questions of law presented include whether Defendant had a fiduciary duty to Plaintiffs and the Settlement Class under ERISA and whether Defendant breached that fiduciary duty. In addition, there are

common questions relating to the amount of damages suffered by Settlement Class Members, including whether Defendant repaid the full amount of the excess sales charges imposed upon the plans with appropriate interest; and the amount of profits Defendant received in the form of compensation and other payments derived from the excess sales charges that Defendant caused Plaintiffs and Settlement Class Members to pay. Each is capable of common resolution and is sufficient to meet the commonality requirement.

c. Rule 23(a)(3) mandates that the claims of the putative class representatives are typical of the claims of the broader class. Fed. R. Civ. P. 23(a)(3). Typicality assures "that the named representatives' interests are aligned with those of the class" and focuses on "whether named representatives' claims have the same essential characteristics as the claims of the class at large." *Singer v. AT&T Corp.*, 185 F.R.D. 681, 689 (S.D. Fla. 1998). Here, Plaintiffs and the Settlement Class Members purportedly experienced breaches of the same fiduciary duty by Defendant. Plaintiffs and the Settlement Class Members' claims arise from Defendant's alleged failure to apply sales charge waivers to certain eligible retirement plans that purchased shares of mutual funds. Thus, Plaintiffs' claims are typical of the larger Settlement Class.

d. The final Rule 23(a) prerequisite demands a showing that the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). "[T]he class representative must adequately prosecute the action; and there must not be any substantial conflict of interest existing between the representatives and the class." *Diakos v. HSS Sys., LLC*, 137 F. Supp. 3d 1300, 1309 (S.D. Fla. 2015). Here, Plaintiffs pursued this litigation vigorously in an effort to obtain the maximum recovery, both for themselves and for other Settlement Class Members. Plaintiffs

actively investigated and uncovered potential overcharges to their accounts, sought counsel, participated in and monitored the lawsuit, sat for depositions and otherwise responded to discovery about their own Plans and participated in mediation. Further, Plaintiffs (like all Settlement Class Members) are retirement plan trustees who owe fiduciary obligations to their retirement plan beneficiaries. Plaintiffs' interests align with the Settlement Class Members' interests. In addition, Class Counsel are experienced in complex class action litigation and FINRA issues, and have successfully prosecuted numerous cases in courts throughout the country and in this District. For these reasons, the Court finds that Plaintiffs and Class Counsel meet the adequate representative requirement of Rule 23(a)(4).

e. Finally, Plaintiffs seek certification of their claims for settlement purposes under Rule 23(b)(1), which provides for certification where "the prosecution of separate actions by . . . individual members of the class would create a risk of (A) inconsistent or varying adjudications . . . which would establish incompatible standards for the party opposing the class, or (B) adjudications with respect to the individual members of the class which would be dispositive of the interest of the other members not parties to the adjudications." Fed. R. Civ. P. 23(b)(1). The Court concludes that the Rule 23(b)(1) requirements are satisfied here. Plaintiffs have sought, and the Settlement Agreement provides for, the complete recovery of losses to the plans. The Settlement also provides substantial disgorgement of profits. The civil enforcement mechanism under which Plaintiffs bring their claims, 29 U.S.C. §1132(a)(2), provides the avenue for pursuing such recovery and is a "paradigmatic example[] of claims appropriate for certification as a Rule 23(b)(1) class." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d

Cir. 2009); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833-34 (1999) (noting that Rule 23 Advisory Committee acknowledged that "an action which charges a breach of trust [by a] fiduciary similarly affecting the members of a large class of . . . beneficiaries" calls for certification under Rule 23(b)(1)). The risk of establishing inconsistent standards here is particularly acute because the crux of Plaintiffs' claims involves the determination of whether Defendant had a fiduciary duty to obtain sales charge waivers for certain customers and breached that duty by failing to do so. If Defendant had a fiduciary duty in this content, then it is common to all Settlement Class Members. Consequently, there is a risk that, if class members were required to bring separate actions against Defendant for the same act, inconsistent adjudications could result that would establish incompatible standards of conduct for Defendant and Defendant could be subject to numerous inconsistent rulings. *See Rogers v. Baxter Int'l, Inc.*, 2006 WL 794734, at *10 (N.D. Ill. March 22, 2006); *Westman v. Textron, Inc.*, 151 F.R.D. 229, 231 (D. Conn. 1993).

7. Thus, the Court hereby certifies the Settlement Class under Rule 23(b)(1). The Settlement Agreement appears on its face to be fair to the unnamed Settlement Class Members and they receive relief commensurate with the relief obtained against Defendant by the named Plaintiffs.

8. For the reasons discussed above, the Court hereby preliminarily approves the Settlement Agreement subject to notice and a fairness hearing.

9. The Court hereby also approves the form of the Settlement Class notice submitted to the Court ("Settlement Notice") and directs that the Settlement Notice be provided to the Settlement Class Members pursuant to Fed. R. Civ. P. 23(e)(1). Within twenty (20) days of the

entry of this Order, the Settlement Notice will be sent to Settlement Class Members by email (when available) or first class mail to the Settlement Class Member's last known address. Within that time, the Settlement Administrator will establish a website containing the Settlement Agreement and Settlement Notice and a toll-free telephone number to which Settlement Class Members can direct questions. The mailing and emailing of the Settlement Notice to Settlement Class Members provides due and sufficient notice of the proceedings, of the proposed settlement, and of the settlement approval procedure, thus satisfying the requirements of Fed. R. Cir. P. 23 and due process. The Court finds that such notice is the best notice practicable under the circumstances and will effectuate actual notice to the Settlement Class of the settlement.

10. A hearing will be conducted before this Court on [date] at [time] to finally determine the fairness, reasonableness, and adequacy of the terms and conditions of the settlement set forth in the Settlement Agreement and the Fee and Expense Application submitted by Class Counsel. Any Settlement Class Member may appear personally or by counsel at the hearing and may object or express his or her view regarding the Settlement Agreement and Fee and Expense Application. However, a Settlement Class Member will not be heard, nor be entitled to contest the approval by this Court of the Settlement Agreement or Fee and Expense Application, unless on or before [date], he or she files with the Clerk of this Court written objections, together with any Notice of Intention to Appear and any papers he or she proposed to submit to this Court at the hearing, and on or before that date serves all such objections and other papers on all of the following individuals: (a) Donald Havermann, Morgan, Lewis & Bockius, LLP, 1111 Pennsylvania Ave., N.W., Washington, DC 20004; (b) Jason Kellogg, Levine Kellogg Lehman Schneider + Grossman LLP, 201 South Biscayne Boulevard, 22nd Floor,

Miami, Florida 33131; and (c) Frank Rodriguez, Rodriguez Tramont & Núñez, P.A., 255 Alhambra Circle, Suite 1150, Coral Gables, Florida 33134.

11. Any Settlement Class Member who does not file and serve his or her objection in this manner will be deemed to have waived his or her objections and will be forever precluded from making any objections to the fairness or adequacy of the proposed Settlement Agreement.

12. The parties may submit briefs in response to any objection(s) and in support of final approval of the Settlement on or before [date]. Plaintiffs may file Class Counsel's Fee and Expense Application on or before [date].

13. The fairness hearing may be continued or adjourned by order of this Court, from time to time, and without further notice to the Settlement Class, except that notice will be provided to any Settlement Class Member who has timely filed an objection.

DONE AND ORDERED in Miami, Florida this ___ day of ________, 2017.

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HON. MARCIA G. COOKE
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record