

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

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IN RE ING GROEP, N.V.  
ERISA LITIGATION  
\_\_\_\_\_

)  
) **MASTER FILE NO.**  
) **1:09-CV-00400-JEC**  
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) THIS DOCUMENT RELATES TO:  
) All Actions  
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) **STIPULATION AND**  
) **AGREEMENT OF**  
) **SETTLEMENT**  
)

**STIPULATION AND AGREEMENT OF SETTLEMENT**

This stipulation and agreement of settlement (the “Stipulation”), dated November 5, 2012, is entered into, pursuant to Rules 23 and 23.2 of the Federal Rules of Civil Procedure, and subject to the approval of the Court,<sup>1</sup> between and among Named Plaintiffs, on behalf of themselves, all members of the Settlement Class and the Plans, and Defendants.

**1. RECITALS**

1.1 On February 13, 2009, Named Plaintiff Kent Sewright filed a complaint in United States District Court for the Northern District of Georgia. On March 5, 2009, Named Plaintiff Deadre D. Diggs filed a complaint asserting similar claims in the United States District Court for the Southern District of New York, which she

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<sup>1</sup> Capitalized terms not otherwise defined are defined in Section 3.

subsequently withdrew. On April 24, 2009, Named Plaintiff Diggs filed a new complaint in the United States District Court for the Northern District of Georgia. On June 8, 2009, Named Plaintiffs Sewright and Diggs together filed a Consolidated Complaint in the United States District Court for the Northern District of Georgia.

1.2 The Consolidated Complaint alleges that the Defendants were fiduciaries of, and that they breached fiduciary duties owed to, the Plans, and seeks equitable and compensatory relief pursuant to Sections 409 and 502(a)(2) of ERISA, plus attorneys' fees, expenses, and costs pursuant to ERISA § 502(g)(1) and other law.

1.3 Defendants deny each of the claims and allegations of wrongdoing in the Consolidated Complaint.

1.4 On August 7, 2009, Defendants moved for the dismissal of the Consolidated Complaint. On March 31, 2010, the Court issued an order and opinion granting that motion, dismissing the Consolidated Complaint with prejudice and entering final judgment in Defendants' favor.

1.5 Named Plaintiffs appealed to the United States Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit"), which appeal was subsequently fully briefed. During the pendency of the Appeal, the Parties engaged in a series of settlement negotiations at

arm's length and in good faith. In April 2012, the Parties reached an agreement in principle to settle their disputes.

1.6 On October 11, 2011, the Eleventh Circuit issued an order staying the Appeal pending the issuance of the mandate in Raymond Lanfear v. Home Depot, Inc., No. 10-13002-GG (11th Cir. 2010) ("Home Depot"), a matter raising similar issues under ERISA. On May 8, 2012, the Eleventh Circuit issued a decision in Home Depot. On June 7, 2012, the Eleventh Circuit issued its mandate in Home Depot.

1.7 On May 29, 2012, the Parties filed a joint motion to stay the Appeal until the later of August 6, 2012, or 60 days after the issuance of the mandate in Home Depot (the "First Motion to Stay"). On June 7, 2012, the Eleventh Circuit granted the First Motion to Stay, staying the Appeal until August 6, 2012, and directing that oral argument in the Appeal be scheduled on the first available oral argument calendar after August 1, 2012.

1.8 To allow sufficient time for drafting and finalizing the settlement documents, the Parties moved the Eleventh Circuit for an order granting a temporary stay of this appeal to October 6, 2012 (the "Second Motion to Stay"). On August 20, the Eleventh Circuit

granted the Second Motion to Stay, staying the Appeal until October 6, 2012.

## 2. **BASIS FOR SETTLEMENT**

2.1 Based upon their investigation, and after extensive settlement negotiation with Defendants, Named Plaintiffs and their counsel have concluded that the terms and conditions of this Stipulation are fair, reasonable, adequate and in the best interests of Named Plaintiffs, all members of the Settlement Class and the Plans, and have agreed to settle the claims raised in the Action pursuant to the terms and provisions of this Stipulation, after considering: (1) the attendant risks of litigation; (2) the desirability of permitting the Settlement to be consummated as provided by the terms of this Stipulation; and (3) the substantial benefits that Named Plaintiffs, other members of the Settlement Class and the Plans will receive from the Settlement.

2.2 The Parties participated in settlement negotiations presided over by an independent mediator, William Roland of the Kinnard Mediation Center, and, although mediation was unsuccessful, continued thereafter to discuss settlement separate from the mediation process. The settlement negotiations consisted of numerous telephone conferences, emails, letters and eventually the exchange of proposals and counter-proposals, and were at all times vigorous and at arm's

length. The Parties reviewed and considered information regarding their respective positions, including information on the performance of the Plans' investments, ING Stock, the financial status of ING and the amount of ING Stock purchased and held by the Plans since June 1, 2007.

2.3 For purposes of consummating the Settlement described herein, the Parties will jointly seek the Court's approval, pursuant to Rules 23(e) and 23.2 of the Federal Rules of Civil Procedure, of the following terms, which dispose of all potential and actual claims asserted in a representative capacity under ERISA § 409, or that could have been asserted by Named Plaintiffs, any member of the Settlement Class, or the Plans themselves pursuant to ERISA § 502(a)(2), as well as all individual claims asserted or that could have been asserted in the Consolidated Complaint by Named Plaintiffs pursuant to ERISA § 502(a)(3), any other Section of ERISA, or any other applicable law.

### **3. DEFINED TERMS**

3.1 “**Action**” means In re ING Groep, N.V. ERISA Litigation, No. 1:09-cv-00400-JEC, which was commenced in the United States District Court for the Northern District of Georgia on June 8, 2009 (and any and all cases consolidated therewith), and which was dismissed on March 31, 2010 and is currently on appeal.

3.2 **“Administrative Expenses”** means the expenses or costs associated with: (i) providing notice to the Settlement Class; (ii) the Claim Administrator’s performance of its calculations under the Plan of Allocation; (iii) implementation of the Plan of Allocation to members of the Settlement Class; (iv) establishing and maintaining the Escrow Account; and (v) administration (including, but not limited to, the establishment, maintenance, regulatory reporting and termination) of the Settlement Fund.

3.3 **“Appeal”** means the pending appeal of the Action in the United States Courts of Appeals for the Eleventh Circuit, Case No. 10-11948-DD.

3.4 **“Attorneys’ Fees and Expenses”** mean the amount of fees, costs, and expenses sought by Plaintiffs’ Counsel and Plaintiffs’ Liaison Counsel, pursuant to Section 9 of this Stipulation, for their services, costs and expenses in connection with their prosecution of this Action.

3.5 **“Claim”** means a claim for payment from the Net Settlement Fund.

3.6 **“Claims Administrator”** means A.B. Data, Ltd., which shall make all notices approved by the Court to potential members of

the Settlement Class and shall administer the Settlement pursuant to the Plan of Allocation.

3.7 “**Consolidated Complaint**” means the Consolidated Class Action Complaint filed in the Action on June 8, 2009.

3.8 “**Court**” means the United States District Court for the Northern District of Georgia.

3.9 “**Defendants**” means ING North America Insurance Corporation, ING Life Insurance and Annuity Company, ING U.S. Pension Committee, David A. Wheat, Darryl Harris, William Delahanty, Kimberly Shattuck, Bryon Scott Burton, Catherine H. Smith, and Tom McInerney.

3.10 “**Defendants’ Counsel**” means the law firms of Cleary Gottlieb Steen & Hamilton LLP and Alston & Bird LLP.

3.11 “**DOL**” means the United States Department of Labor.

3.12 “**Effective Date**” means the date of Final Approval of the Settlement.

3.13 “**ERISA**” means the Employee Retirement Income Security Act of 1974, as amended, codified as 29 U.S.C. § 1000 et seq.

3.14 “**Escrow Account**” means a non-interest bearing escrow account at a financial institution selected by Plaintiffs’ Lead Counsel, subject to the consent of Defendants’ Counsel (which consent shall not

be unreasonably withheld), and approved by the Court.

3.15 **“Escrow Agent”** means a financial institution selected by Plaintiffs’ Lead Counsel, subject to the consent of Defendants’ Counsel (which consent shall not be unreasonably withheld), and approved by the Court, responsible for overseeing, safeguarding and distributing the Escrow Account and acting as agent for the Settlement Class and the Plans.

3.16 **“Final Approval of the Settlement”** means the entry of the Order and Final Judgment.

3.17 **“Independent Fiduciary”** means any fiduciary retained on behalf of the Plans, the cost of which will be borne by Defendants, pursuant to approval of the appropriate fiduciaries of the Plans for purposes of Paragraph 15.2(c) that has no “relationship to” or “interest in” any of the Parties, as those terms are used in Prohibited Transaction Class Exemption, 2003-39, 68 Fed. Reg. 75632-01 (Dec. 31, 2003).

3.18 **“ING”** means ING Groep, N.V.

3.19 **“ING Stock”** means the American Depositary Shares of ING traded on the New York Stock Exchange, each of which represents one ordinary share of ING common stock.

3.20 **“Named Plaintiffs”** means Kent Sewright and Deadre D. Diggs.



3.21 **“Named Plaintiffs’ Incentive Award”** means an incentive award in an amount not to exceed of \$10,000 for each of the Named Plaintiffs.

3.22 **“Net Settlement Fund”** means the Settlement Fund less: (i) any Administrative Expenses; (ii) any Attorneys’ Fees and Expenses awarded by the Court; and (iii) any Named Plaintiffs’ Incentive Award awarded by the Court.

3.23 **“Notice”** means the Notice of Pendency of Litigation, Proposed Settlement and Hearing, substantially in the form attached hereto as Exhibit A.

3.24 **“Order and Final Judgment”** means an order and judgment of the Court, substantially in the form attached hereto as Exhibit D, approving this Stipulation and the Settlement pursuant to Rules 23(e) and 23.2 of the Federal Rules of Civil Procedure, and the full, final, and favorable determination of any appeals, petitions, motions for reconsideration, or any other proceedings for review or, if no such review proceedings are taken, the expiration of the applicable time to appeal or seek review from such order.

3.25 **“Participants”** means all participants in either or both of the Plans during the Relevant Period.

3.26 **“Parties”** means Named Plaintiffs and Defendants.

3.27 **“Person(s)”** means a natural person, a corporation, partnership, association, or any other entity.

3.28 **“Plaintiffs’ Counsel”** means the law firms of Bottini & Bottini, Inc. and Gainey & McKenna.

3.29 **“Plaintiffs’ Lead Counsel”** means the law firm of Bottini & Bottini, Inc.

3.30 **“Plaintiffs’ Liaison Counsel”** means the law firm of Harris Penn Lowry Delcampo, LLP.

3.31 **“Plan of Allocation”** means the plan of the allocation of the Net Settlement Fund among the members of the Settlement Class approved by the Court pursuant to Section 6 of this Stipulation, a proposed form of which is attached hereto as Exhibit E.

3.32 **“Plans”** means the ING Americas Savings Plan and ESOP and the ING 401(k) Plan for ILIAC Agents, collectively, and all predecessor and successor plans, individually and collectively, and any trust created under such Plans.

3.33 **“Preliminary Approval Date”** means the date that the Preliminary Approval Order is entered by the Court.

3.34 **“Preliminary Approval Order”** means an order, substantially in the form attached hereto as Exhibit C, conditionally certifying for settlement purposes the Settlement Class under Rules 23

and 23.2 of the Federal Rules of Civil Procedure, including the adequacy of Named Plaintiffs, Plaintiffs' Counsel and Plaintiffs' Liaison Counsel to serve as representatives of (and counsel to) the Settlement Class and the Plans, preliminarily approving the Settlement, approving the forms and procedure for providing notice to the Settlement Class, establishing a procedure for the Settlement Class to follow in order to object to the Settlement, and setting a date for a hearing on the approval of the Settlement.

3.35 **"Publication Notice"** means the summary notice of settlement for publication, substantially in the form attached as Exhibit B, to be published in a national newswire service.

3.36 **"Released Claims"** means any and all claims, demands, rights, liabilities, and causes of action of every nature or description whatsoever (including claims for any and all losses, damages, unjust enrichment, attorney's fees, disgorgement of fees, litigation costs, injunctive or declaratory relief, contribution, indemnification, or any other type of legal or equitable relief, and Unknown Claims), whether accrued or not, including any claim or right obtained by assignment, brought by way of demand, complaint, cross-claim, counterclaim, third-party claim or otherwise, asserted or that might have been asserted (i) by Named Plaintiffs individually, (ii) by any member of the

Settlement Class, (iii) by Named Plaintiffs, or any other members of the Settlement Class, on behalf of either or both of the Plans, including, but not limited to, under ERISA § 502(a)(2), or (iv) by the Plans themselves, including, but not limited to, under ERISA § 502(a)(2), against any or all of the Defendants and Released Persons based on or arising out of or relating in any way to the investment, acquisition or retention by Named Plaintiffs, or any member of the Settlement Class, by or through the Plans, of ING Stock during the Relevant Period that would be barred by principles of res judicata had the Action been fully litigated and resulted in a final judgment or order, except as otherwise provided in this paragraph. Notwithstanding the foregoing, “Released Claims” do not include, and nothing in this Stipulation shall release, bar, waive or in any other manner affect, any ERISA claim by any Participant in either of the Plans for individual benefits that does not arise out of or relate to the claims asserted in the Consolidated Complaint.

3.37 **“Released Persons”** means each of the Defendants, ING Groep, N.V., Michel J. Tilmant, Jan H.M. Hommen, John C.R. Hele, Eric Boyer de la Giroday, Dick Harryvan, Hans van der Noordaa, Koos Timmermans, Jacques de Vaucleroy, Peter A.F.W. Elverding, Henk Breukink, Claus Dieter Hoffmann, Piet Hoogendoorn, Piet C. Klaver,

Wim Kok, and Karel Vuursteen, and each of his, her or its past, present, and future directors, officers, fiduciaries, employees, partners, principals, agents, members, independent contractors, registered representatives, underwriters, issuers, insurers, co-insurers, reinsurers, controlling shareholders, attorneys, accountants, auditors, investment bankers, advisors, consultants, trustees, investment managers, fiduciaries, committee members, personal representatives, predecessors, service providers, successors, successors-in-interest, parents, subsidiaries, divisions, assigns, spouses, heirs, executors, administrators, associates, related or affiliated entities, and members of their families.

3.38 “**Relevant Period**” means the period between June 1, 2007 and the date of this Stipulation.

3.39 “**Settlement**” means the settlement to be consummated under this Stipulation pursuant to the entry of the Order and Final Judgment.

3.40 “**Settlement Amount**” shall mean cash in the amount of three million, five-hundred thousand dollars (\$3,500,000.00).

3.41 “**Settlement Class**” means all persons (other than Defendants or any of the other persons named as defendants in the Consolidated Complaint), who were participants in or beneficiaries of

the Plans at any time during the Relevant Period, and whose accounts included investments in ING Stock, and each such person's beneficiaries, heirs, agents, executors, administrators, alternate payees (including spouses of deceased persons who were participants of the Plans), and successors-in-interest.

3.42 **"Settlement Fund"** means the Settlement Amount deposited in the Escrow Account, which will thereby be designated as a "Qualified Settlement Fund" within the meaning of Section 468B of the Internal Revenue Code and Treasury regulations promulgated thereunder.

3.43 **"Unknown Claims"** shall mean any and all Released Claims that any Named Plaintiff, any other member of the Settlement Class, or either or both of the Plans, does not know or suspect to exist in his, her or its favor at the time of the release of such claims, which if known by him, her or it might have affected his, her or its decision(s) with respect to the Settlement. With respect to any and all Released Claims, the Parties stipulate and agree that upon the Effective Date, Named Plaintiffs shall expressly waive, and each other member of the Settlement Class and the Plans shall be deemed to have waived, and by operation of the Order and Final Judgment shall have expressly waived, any and all provisions, rights and benefits conferred by any law of any

state or territory of the United States, or principle of common law, which is similar, comparable, or equivalent to Cal. Civ. Code § 1542, which provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

Named Plaintiffs, each member of the Settlement Class, and either or both of the Plans may hereafter discover facts in addition to or different from those which he, she or it now knows or believes to be true with respect to the subject matter of the Released Claims, but each shall have expressly—and upon the Effective Date each shall be deemed to have, and by operation of the Order and Final Judgment shall have—fully, finally and forever settled and released any and all Released Claims, known or unknown, suspected or unsuspected, contingent or non-contingent, whether or not concealed or hidden, which now exist or heretofore have existed, upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct which is negligent, reckless, intentional with or without malice, or a breach of any duty, law or rule, without regard to subsequent discovery or existence of such different or additional facts. Named Plaintiffs, each other member of the Settlement Class, and each of the Plans by operation of law shall be deemed to have acknowledged

that the inclusion of “Unknown Claims” in the definition of Released Claims was separately bargained for and was a key element of the Settlement.

#### **4. SETTLEMENT CONSIDERATION**

4.1 In full and complete settlement of the Action and the Released Claims, and conditioned on Final Approval of the Settlement and subject to the Order and Final Judgment, ING North America Insurance Corporation shall cause the Settlement Amount to be deposited into the Escrow Account within twenty (20) business days after the Preliminary Approval Date.

4.2 Except as provided for in Paragraph 3.17, the Settlement Amount shall be the full and sole monetary obligation of Defendants in connection with the Settlement under this Stipulation. No other fees or amounts are payable by Defendants under this Stipulation.

4.3 In the event that the Court enters a Preliminary Approval Order, but subsequently denies the application for an Order and Final Judgment, or if the Settlement terminates or fails for any reason, Plaintiffs’ Counsel shall take any and all steps necessary to cause the return of the money held in the Escrow Account, together with any interest earned thereon, less any applicable taxes and Administrative



Expenses actually incurred and paid or payable, to ING North America Insurance Corporation within ten (10) business days.

## **5. USE OF SETTLEMENT FUND**

5.1 The Settlement Fund shall be used to pay (i) any Administrative Expenses, (ii) any Attorneys' Fees and Expenses awarded by the Court, and (iii) any Named Plaintiffs' Incentive Award awarded by the Court. The Net Settlement Fund shall be distributed pursuant to the Plan of Allocation.

5.2 Except as provided herein or pursuant to orders of the Court, the Net Settlement Fund shall remain in the Escrow Account prior to the Effective Date. All funds held by the Escrow Agent shall be deemed to be in the custody of the Court and shall remain subject to the jurisdiction of the Court until such time as the funds shall be distributed or returned pursuant to the terms of this Stipulation and/or further order of the Court. The Escrow Agent shall invest the Settlement Fund exclusively in instruments backed by the full faith and credit of the United States Government or fully insured by the United States Government or an agency thereof, including a United States Treasury Money Market Fund or a bank account fully insured by the United States Government Federal Deposit Insurance Corporation

("FDIC") up to the guaranteed FDIC limit. No risk related to the investment of the Settlement Fund shall be borne by the Defendants.

5.3 The Settlement Fund, together with any interest earned thereon, will be designated as a "Qualified Settlement Fund" within the meaning of Section 468B of the Internal Revenue Code and Treasury regulations promulgated thereunder. Plaintiffs' Counsel shall act as the administrator of the Settlement Fund within the meaning of Treasury Regulation Section 1.468B-2(k)(3), and shall be responsible for filing or causing to be filed all information and any tax returns for the Settlement Fund and paying from the Settlement Fund any taxes owed thereon.

5.4 Defendants shall have no responsibility for or liability whatsoever with respect to the maintenance, investment or distribution of the Settlement Fund, the establishment of the Escrow Account, the establishment or administration of the Plan of Allocation, the determination, administration, or calculation of Claims, the payment or withholding of taxes, the disbursement of the Net Settlement Fund, the administration of the Settlement, or any losses incurred in connection with such matters.

5.5 The payment of the Settlement Amount, which will be allocated to members of the Settlement Class according to the Plan of

Allocation, shall be treated for all purposes as a restorative payment consistent with IRS Revenue Ruling 2002-45. Defendants shall have no responsibility for any taxes due on the Settlement Amount or on any funds that Named Plaintiffs, members of the Settlement Class, or the Plans receive from the Settlement Fund.

## **6. PLAN OF ALLOCATION**

6.1 The distribution of the Net Settlement Fund to the Settlement Class shall be made in accordance with the plan of allocation to be proposed by Named Plaintiffs and approved by the Court, with such modifications (if any) approved by the Court. Plaintiffs' Counsel shall be responsible for preparing the plan of allocation, a draft of which is annexed hereto as Exhibit E, which plan shall comply with all applicable law, all applicable provisions of the Plans, and any other rules applicable to tax-qualified plans.

6.2 No Defendant or any other Released Person shall have any liability, obligation or responsibility whatsoever to any Person, including, but not limited to, Named Plaintiffs, the Claims Administrator, members of the Settlement Class, the Plans, Plaintiffs' Counsel or Plaintiffs' Liaison Counsel, for or in connection with the establishment and administration of the Plan of Allocation or disbursement of the Net Settlement Fund, but Defendants will have the

right to review the proposed plan of allocation for feasibility, cost of implementation and compliance with the applicable provisions of the Plans.

6.3 The Claims Administrator shall be responsible for gathering all necessary information and calculating the amounts payable to members of the Settlement Class pursuant to the Plan of Allocation. The Claims Administrator will provide the final results of its calculations to the Plans.

6.4 The Plan of Allocation shall be sufficiently specific to allow the Claims Administrator to perform the calculations called for in the Plan of Allocation.

6.5 Plaintiffs' Lead Counsel shall be responsible for supervising the administration of the Settlement and disbursement of the Net Settlement Fund.

6.6 Within ten (10) business days after the Effective Date, Plaintiffs' Lead Counsel shall direct the Escrow Agent to disburse the Net Settlement Fund to the Trustee of the Plans. As promptly as reasonably possible after receipt of the Net Settlement Fund from the Escrow Agent, the Trustee of the Plans shall distribute the Net Settlement Fund to the members of the Settlement Class pursuant to the Plan of Allocation. Plaintiffs' Counsel and the Claims Administrator

shall cooperate with the Plans regarding the disbursement of amounts allocated under the Plan of Allocation.

6.7 The Plan of Allocation is a matter separate and apart from the proposed Settlement between Defendants and Named Plaintiffs, and it is not a condition of this Stipulation, the Settlement, or the releases provided herein that any particular plan of allocation be approved by the Court. Named Plaintiffs may not cancel or terminate the Stipulation or the Settlement based on the Court's or any appellate court's ruling with respect to any particular plan of allocation in this Action. Any decision by the Court or any appeal relating to the allocation of the Net Settlement Fund, the administration of the Settlement or the claims process will not affect the validity and finality of the Settlement, the Order and Final Judgment, or the releases provided herein.

6.8 All members of the Settlement Class, whether or not they receive any distribution from the Net Settlement Fund pursuant to the Plan of Allocation, will be bound by all the terms of this Stipulation and the Settlement, including the terms of the Order and Final Judgment to be entered in the Action and the releases provided for herein, and will be permanently barred and enjoined from bringing any

action, claim or other proceeding of any kind against any and all Released Persons concerning any and all of the Released Claims.

**7. NOTICE TO MEMBERS OF THE SETTLEMENT CLASS**

7.1 Within five (5) business days of the entry of the Preliminary Approval Order, ING North America Insurance Corporation shall provide the Claims Administrator with a list of Participants in the Plans (the “Plan Participant List”), as well as their last known address. The Claims Administrator shall, within thirty (30) days of the Preliminary Approval Order, mail the Notice to members of the Settlement Class at the addresses identified on the Plan Participant List. Additionally, Plaintiffs’ Counsel will cause to be published the Publication Notice pursuant to the terms of the Preliminary Order or whatever other form or manner might be ordered by the Court. The costs and expenses associated with the Notice and Publication Notice shall be Administrative Expenses.

**8. ADMINISTRATIVE EXPENSES**

8.1 Administrative Expenses shall be paid from the Settlement Fund.

**9. ATTORNEYS’ FEES AND EXPENSES**

9.1 Plaintiffs’ Counsel and Plaintiffs’ Liaison Counsel may apply to the Court for an award of Attorneys’ Fees and Expenses,

which shall not include Administrative Expenses. Plaintiffs' Lead Counsel shall be solely responsible for allocating any Attorneys' Fees and Expenses awarded by the Court among Plaintiffs' Counsel and Plaintiffs' Liaison Counsel. Defendants shall bear no responsibility for any such allocation. Nor will Defendants object to an amount sought in the application that the Court deems to be reasonable and fair.

9.2 Any Attorneys' Fees and Expenses awarded by the Court will be paid from the Settlement Fund.

9.3 The disposition of the application of Plaintiffs' Counsel and Plaintiffs' Liaison Counsel for an award of Attorneys' Fees and Expenses is not a material term of this Stipulation, and it is not a condition of this Stipulation that such application be granted. Any disapproval or modification of the application for an award of Attorneys' Fees and Expenses by the Court shall not affect the enforceability of the Stipulation, provide any of the Parties with the right to terminate the Settlement, or impose an obligation on Defendants to increase the compensation paid in connection with the Settlement.

**10. NAMED PLAINTIFFS' INCENTIVE AWARDS**

10.1 Subject to the Court's approval and upon the Effective Date, Kent Sewright and Deadre D. Diggs may each receive an award

of no more than ten thousand dollars (\$10,000) in recognition of their assistance in the prosecution of this Action (defined above as the “Named Plaintiffs’ Incentive Awards”). Defendants will not object to the Named Plaintiffs’ Incentive Awards.

10.2 Any Named Plaintiffs’ Incentive Award approved by the Court will be paid from the Settlement Fund.

10.3 The disposition of any application for a Named Plaintiffs’ Incentive Award is not a material term of this Stipulation, and it is not a condition of this Stipulation that an application for any such award be granted. Any disapproval or modification of the application for a Named Plaintiffs’ Incentive Award by the Court shall not affect the enforceability of the Stipulation, provide any of the Parties with the right to terminate the Settlement, or impose an obligation on Defendants to increase the compensation paid in connection with the Settlement.

## **11. SUBMISSION TO JURISDICTION OF COURT**

11.1 With respect to the Settlement and its enforcement, each and every member of the Settlement Class submits to the jurisdiction of the Court, and shall be bound by the terms of this Stipulation, including, without limitation, any and all releases, conditioned on the Final Approval of the Settlement and subject to their right to object, as



well as any other order of the Court including, without limitation, the Order and Final Judgment.

## **12. CERTIFICATION OF THE SETTLEMENT CLASS**

12.1 Solely for the purposes of the Stipulation and Settlement, the Parties stipulate and agree to: (a) certification of the Action as a class action, pursuant to Rules 23(a), 23(b)(1) and 23.2 of the Federal Rules of Civil Procedure, on behalf of the Settlement Class and the Plans; (b) appointment of Kent Sewright and Deadre D. Diggs as representatives of the Settlement Class and the Plans; and (c) appointment of Bottini & Bottini, Inc. as class counsel pursuant to Rule 23(g) of the Federal Rules of Civil Procedure. Named Plaintiffs will move for entry of the Preliminary Approval Order, which will certify the Action to proceed as a class action for settlement purposes only.

12.2 If the Settlement is not approved by the Court in complete accordance with the terms of this Stipulation and does not become subject to an Order and Final Judgment, no class will be deemed certified by or as a result of this Stipulation, and any order certifying a settlement class will be void for all purposes. In such event, Defendants will not be deemed to have consented to certification of any class.

### **13. PROCEDURE FOR APPROVAL OF SETTLEMENT**

13.1 As soon as practicable following the execution of this Stipulation by the Parties, but in no event later than November 30, 2012, the Parties shall file a joint motion with the Court pursuant to Rule 62.1 of the Federal Rules of Civil Procedure seeking an indicative ruling from the Court that it intends to grant Named Plaintiffs' motion for entry of the Preliminary Approval Order once the Eleventh Circuit remands the Action to the Court for such entry (the "Motion for Indicative Ruling").

13.2 The Preliminary Approval Order shall:

- a. Provide preliminary approval to the proposed Settlement;
- b. Conditionally certify the Settlement Class (for settlement purposes only) pursuant to Rules 23(a), 23(b)(1) and 23.2 of the Federal Rules of Civil Procedure and appoint class counsel for the Settlement Class and the Plans (for settlement purposes only) pursuant to Rule 23(g);
- c. Approve the form of the Notice and Publication Notice, and direct the Claims Administrator to cause the Notice to be mailed to each member of the

Settlement Class at the addresses identified on the Plan Participant List within thirty (30) days of the Preliminary Approval Date;

- d. Set a briefing schedule and a date and time for a hearing to determine whether the proposed Settlement is fair, reasonable, and adequate to the Settlement Class and the Plans, and to consider whether the Court should enter the Order and Final Judgment;
- e. Set a deadline by which all objections to the Settlement must be made; and
- f. Determine pursuant to Rules 23(c)(2) and 23(e) of the Federal Rules of Civil Procedure that the Notice and Publication Notice collectively constitute the best notice practicable under the circumstances and due and sufficient notice of the hearing and the rights of the Settlement Class and all other Persons entitled to such notice.

13.3 Within fourteen (14) days of filing the Motion for Indicative Ruling, the Parties shall file a joint motion with the Eleventh Circuit pursuant to Eleventh Circuit Rule 12.1-1(a) to stay the Appeal

until the Court rules on the motion for entry of the Preliminary Approval Order.

- a. If the Eleventh Circuit stays the Appeal, Plaintiffs' Lead Counsel shall file written status reports at 30-day intervals from the stay order as required under Eleventh Circuit Rule 12.1-1(a), informing the Eleventh Circuit of the status of the proceedings in the Court and whether the stay should continue. Plaintiffs' Lead Counsel shall prepare each status report, subject to the review and approval of Defendants' Counsel before it is filed;
- b. If the Court grants the Motion for Indicative Ruling and enters an order stating it intends to grant Named Plaintiffs' motion for entry of the Preliminary Approval Order, the Parties shall promptly notify the Eleventh Circuit of that order pursuant to Eleventh Circuit Rule 12.1-1(e), and shall not file any objection to the Eleventh Circuit's remand of jurisdiction to the Court pursuant to Eleventh Circuit Rule 12.1-1(c)(ii) for purposes of granting the Named Plaintiffs' motion for entry of the

Preliminary Approval Order and for purposes of taking all actions necessary to approve and effectuate the provisions of the Settlement;

- c. If the Court denies the Motion for Indicative Ruling, which denial is not appealed or is affirmed on appeal, and the Parties do not reach a further agreement to resolve the Action, the Parties shall be restored to their current litigation positions as if they had never entered into this Stipulation.

13.4 The Order and Final Judgment shall:

- a. Approve the proposed Settlement as a fair, reasonable, and adequate settlement, pursuant to Rules 23(e) and 23.2 of the Federal Rules of Civil Procedure;
- b. Confirm certification of the Settlement Class pursuant to Rules 23(a), 23(b)(1) and 23.2 of the Federal Rules of Civil Procedure solely for purposes of the Stipulation and Settlement, and find that each element for certification of the Settlement Class is met, for these limited purposes;

- c. Dismiss the Consolidated Complaint and the Action against each of the Defendants with prejudice on the merits;
- d. Except as otherwise provided in this Stipulation, direct that each Party shall bear its own costs;
- e. Reserve jurisdiction over this Action and over any and all further proceedings concerning the administration and consummation of the Settlement; and
- f. Permanently bar and enjoin Named Plaintiffs, all members of the Settlement Class, and the Plans from the institution and prosecution, either directly or indirectly, of any other action in any court asserting any Released Claim against any Released Persons.

#### **14. RELEASE OF CLAIMS**

14.1 Upon Final Approval of the Settlement, Named Plaintiffs and all members of the Settlement Class shall be deemed to have, and by operation of the Order and Final Judgment shall have, fully, finally, and forever released, and are forever barred from the prosecution of,

any and all Released Claims against any and all of the Released Persons.

14.2 Upon Final Approval of the Settlement, the Plans shall be deemed to have, and by operation of the Order and Final Judgment shall have, fully, finally, and forever released, and are forever barred from the prosecution of, any and all Released Claims against any and all of the Released Persons.

14.3 Upon Final Approval of the Settlement, the Released Persons shall be deemed to have, and by operation of the Order and Final Judgment shall have, fully, finally and forever released, relinquished and discharged each and all of the Named Plaintiffs, Settlement Class members, Plaintiffs' Counsel and Plaintiffs' Liaison Counsel from all claims, known or unknown, arising out of, relating to, or in connection with the institution, prosecution, assertion, settlement or resolution of the Action, the Appeal or the Released Claims.

14.4 The release of Released Claims shall have no impact whatsoever on the obligations set forth in and required by the Stipulation.

14.5 This Stipulation shall in no event be construed or be deemed evidence of an admission or a concession on the part of any of the Parties with respect to any claim, fault, liability, or damage

whatsoever. The Defendants deny any and all wrongdoing of any kind whatsoever, and do not concede any infirmity in the defenses to the Action that the Defendants have asserted or could have asserted. The Defendants enter into this Stipulation in order to avoid further expense, inconvenience, risk, and delay, and to dispose of expensive, burdensome, and potentially protracted litigation. The Named Plaintiffs and members of the Settlement Class also do not concede any infirmity in any of their claims against Defendants and enter into this Stipulation in order to provide a fair and reasonable settlement to the Settlement Class and the Plans, and to avoid further expense, inconvenience, risk, and delay.

14.6 This Stipulation, whether or not consummated, and any proceedings taken pursuant to this Stipulation, shall not be construed as, or deemed to be evidence of, any presumption, concession, or admission by either of the Parties of: (a) the truth of any fact alleged by Named Plaintiffs or denial alleged by Defendants; (b) the validity of any claim or defense that has been or could have been asserted in any litigation; (c) the existence or non-existence of any liability, breach of duty, prohibited transaction, violation of law, fault, wrongdoing, or other wrongful act of any of the Defendants; or (d) evidence, a



presumption, a concession, or an admission of any infirmity in any claim or defense of the Parties.

14.7 This Stipulation shall not be construed as an admission or concession that the Settlement Amount represents the relief that could or would have been recovered after trial.

## **15. RIGHT TO WITHDRAW FROM THE SETTLEMENT**

15.1 Except as otherwise noted in the Stipulation, the Parties shall each have the right to terminate this Stipulation by providing written notice of their election to do so in the event that: (a) the Court declines to enter the Preliminary Approval Order or some other form of order consistent with the material terms contained in Exhibit C; (b) the Court enters an order denying the motion for entry of the Order and Final Judgment or some other form of order consistent with the material terms contained in Exhibit D; or (c) the Order and Final Judgment approving the Stipulation is altered in any material respect on appeal, reconsideration, or rehearing. The Parties agree that they will cooperate in good faith to preserve this Stipulation, including, but not limited to, changing non-material terms of the Stipulation, prior to exercising their rights of termination under this paragraph.

15.2 Except as otherwise noted in the Stipulation, the Parties shall have the right to terminate this Stipulation by providing written

notice of their election to do so in the event that: (a) before the Order and Final Judgment is entered, the DOL or the Internal Revenue Service files any objection to the Stipulation in any court, brings a claim against any Released Person relating to the Released Claims, or notifies any Released Person that it intends to file such a claim; or (b) any report prepared by an Independent Fiduciary and submitted to the Parties in writing before the Order and Final Judgment is entered does not approve in all material respects the terms of this Stipulation or concludes that the releases fail to meet the requirements of Prohibited Transaction Class Exemption, 2003-39, 68 Fed. Reg. 75632-01 (Dec. 31, 2003).

15.3 In the event this Stipulation is terminated pursuant to Paragraphs 15.1 or 15.2, it shall become null and void and of no further force and effect, the Parties shall be deemed to have reverted to their respective status and positions as of the date immediately before the date of the execution hereof, and the Parties shall proceed in all respects as if this Stipulation had not been executed.

**16. COOPERATION OF THE PARTIES AND THEIR COUNSEL**

16.1 The Parties and their counsel agree to cooperate fully with one another to request Court approval of this Stipulation, and to use their best efforts to effect and consummate the terms of this Stipulation.

## **17. CONFIDENTIALITY**

17.1 The Parties shall use any information provided by each other or their counsel in connection with resolving the Action solely for the purpose of evaluating the Settlement and will not disclose or disseminate, or cause to be disclosed or disseminated any such information, except as may be required by a court order.

## **18. MISCELLANEOUS PROVISIONS**

18.1 This Stipulation incorporates by reference the attached Exhibits A through E.

18.2 This Stipulation and the attached Exhibits A through E constitute the entire agreement of the Parties and may not be modified or amended except by a writing signed on behalf of both Named Plaintiffs and Defendants.

18.3 This Stipulation supersedes any prior agreement or understanding between the Parties; any such agreement or understanding shall have no continuing force or effect.

18.4 The parties to this Stipulation may execute this Stipulation in any number of counterparts and on separate counterparts, each of which shall constitute an original, but all counterparts together shall constitute one and the same document.

18.5 The provisions of this Stipulation are not severable.

18.6 A waiver by any Party of any breach of this Stipulation shall not be construed as a waiver of any other breach of this Stipulation, whether prior, subsequent, or contemporaneous.

18.7 The headings herein are used for the purpose of convenience only and are not meant to have legal effect.

18.8 Except insofar as federal law is controlling, this Stipulation and all documents necessary to effect this Stipulation shall be governed by and construed in accordance with the laws of the State of Georgia.

18.9 This Stipulation is the result of arm's length negotiations between the Parties, and all Parties have contributed substantially and materially to the preparation of this Stipulation. Thus, this Stipulation shall not be construed more strictly against one Party than another merely by virtue of the fact that one Party may have prepared it, or any part of it.

18.10 The Parties intend the Settlement to be a final and complete resolution of all disputes asserted or which could be asserted by the Settlement Class and the Plans against the Released Persons with respect to the Released Claims. The Parties agree that the Settlement Amount and the other terms of the Settlement were negotiated at arm's length and in good faith by the Parties, and reflect a

settlement that was reached voluntarily based upon adequate information and after consultation with experienced legal counsel.

18.11 This Stipulation, upon becoming operative, shall be binding upon and inure to the benefit of the Parties, the Plans, the members of the Settlement Class, and their respective successors, assigns, heirs, estates, executors, attorneys, representatives, and administrators and upon any corporation, partnership, or entity into or with which any party may merge or consolidate. In addition, the Parties expressly acknowledge and agree that ING Groep, N.V., Michel J. Tilmant, Jan H.M. Hommen, John C.R. Hele, Eric Boyer de la Giroday, Dick Harryvan, Hans van der Noordaa, Koos Timmermans, Jacques de Vaucleroy, Peter A.F.W. Elverding, Henk Breukink, Claus Dieter Hoffmann, Piet Hoogendoorn, Piet C. Klaver, Wim Kok, and Karel Vuursteen are third party beneficiaries of this Stipulation, and shall be entitled to enforce the terms of this Stipulation as if they were a party hereto.

18.12 Named Plaintiffs represent and warrant that they have not assigned, transferred, or otherwise disposed of the claims that are the subject of this Stipulation.

18.13 Any notice, request, information or other document required or desired to be given under this Stipulation to either Party by

the other (not including the Notice or Publication Notice) shall be delivered by a common carrier that guarantees next-day delivery, transmitted by facsimile, transmitted by email if in an Adobe Acrobat PDF file or sent by registered or certified mail, postage prepaid, at the following addresses:

If to Named Plaintiffs or Plaintiffs' Counsel:

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Albert Y. Chang, Esq.  
Bottini & Bottini, Inc.  
7817 Ivanhoe Avenue  
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Email: [TJMcKenna@gaineyandmckenna.com](mailto:TJMcKenna@gaineyandmckenna.com)

If to Defendants or Defendants' Counsel:

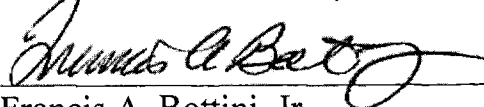
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Email: pat.dicarlo@alston.com

18.14 All counsel and any other persons executing this Stipulation and any of the exhibits hereto, or any related Settlement documents, warrant and represent that they have full authority to do so and that they have the authority to take appropriate action required or permitted to be taken pursuant to this Stipulation to effectuate its terms.

DATED: November 5, 2012

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