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

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| IN RE BANK OF AMERICA CORP. SECURITIES, DERIVATIVE, AND EMPLOYMENT RETIREMENT INCOME SECURITY ACT (ERISA) LITIGATION | Master File No. 09 MDL 2058 (DC)<br><br>ECF CASE |
| THIS DOCUMENT RELATES TO:<br><br>All Securities Actions | |

**REPLY MEMORANDUM OF LAW IN SUPPORT OF MERRILL LYNCH & CO., INC.'S AND MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED'S MOTION TO DISMISS THE CONSOLIDATED AMENDED CLASS ACTION COMPLAINT**

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# TABLE OF AUTHORITIES

## CASES

Defendants Merrill Lynch & Co., Inc. ("Merrill") and Merrill Lynch, Pierce, Fenner & Smith Incorporated ("MLPF&S") respectfully submit this reply memorandum of law in further support of their motion to dismiss Plaintiffs' Consolidated Amended Class Action Complaint (the "Complaint") pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure.[1]

## PRELIMINARY STATEMENT

As explained in Merrill's opening brief ("Mem."), Merrill, an independent public company with its own fiduciaries and shareholders that stood at arm's-length from BAC and its shareholders during the relevant period, owed no duty of disclosure to BAC's shareholders. Accordingly, and by definition, Merrill cannot be liable to BAC's shareholders for the conduct at the heart of this case: the alleged failure by defendants to disclose material information relating to Merrill's fourth quarter losses and the 2008 employee bonus cap. Plaintiffs' opposition brief ("Opp.") largely ignores Merrill's arguments, all but conceding that Merrill is not a proper party to this lawsuit. In fact, Plaintiffs cite Merrill's opening brief in only one section of their 95-page opposition brief.[2] With respect to Plaintiffs' Section 10(b) claims, Plaintiffs' brief does not even address Merrill's basic arguments. As for their Section 14(a) claims, Plaintiffs attempt to engraft onto Merrill a disclosure duty by way of a few citations to irrelevant precedent and offer nothing that alters the fundamental fact that Merrill owed no duty of disclosure to BAC's shareholders. Plaintiffs' claims against Merrill should be dismissed with prejudice.[3]

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[1] Capitalized terms not otherwise defined herein have the meaning ascribed to them in the memorandum of law of Bank of America Corporation ("BAC") in support of its motion to dismiss the Complaint ("BAC Motion").

[2] In addition to the reference to Merrill's brief in Section II.F.2 of Plaintiffs' opposition brief, Plaintiffs address Merrill's brief in only three footnotes (of the 79 footnotes in their brief).

[3] The Complaint also includes claims under Section 11 and 12(a)(2) of the Securities Act of 1933 against Banc of America Securities LLC and MLPF&S concerning offering documents associated with BAC's October 7, 2008 offering of common stock. These claims fail as to MLPF&S for the same reasons they fail as to Banc of America

## ARGUMENT

### I. PLAINTIFFS HAVE NOT STATED A SECTION 10(B) CLAIM AGAINST MERRILL

For the reasons articulated in BAC's reply brief, Plaintiffs' Section 10(b) claims fail as to all defendants. But Plaintiffs' Section 10(b) claim fails against Merrill for additional reasons essentially ignored by Plaintiffs' opposition brief.

The guts of Plaintiffs' case is that BAC's shareholders should have been told about the bonus cap and Merrill's intra-quarter losses prior to their approval of the merger. However, as explained in Merrill's opening brief, Merrill cannot be liable to BAC's shareholders for omissions because – as a matter of black letter law – Merrill owed BAC's shareholders no duty of disclosure. See Mem. at 3-7. By failing to even seriously address this fundamental defect in their allegations against Merrill, Plaintiffs effectively concede that their claims against Merrill should be dismissed.

Given the absence of a disclosure duty, the Court need not reach the question whether Plaintiffs have pleaded scienter against Merrill. It should be noted, however, that Plaintiffs' scienter allegations also fail. Plaintiffs appear to have abandoned any attempt to demonstrate "conscious misbehavior or recklessness" or a "motive and opportunity to commit fraud" as required to state a claim against Merrill. Acito v. IMCERA Group, Inc., 47 F.3d 47, 52 (2d Cir. 1995). Instead, Plaintiffs suggest that mere knowledge of allegedly omitted facts is sufficient to plead scienter. Opp. at 81, n.63 ("Merrill obviously knew that it had suffered [a $2 billion goodwill impairment] as of November, which alone establishes its scienter") (emphasis added); id. at 79 ("Merrill . . . possessed detailed facts regarding [its] financial condition

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Securities LLC. The arguments set forth in the BAC Motion and the reply memorandum of law filed by BAC in support of that motion apply equally to MLPF&S and are not repeated here.

throughout the Class Period . . . [t]hese facts alone establish scienter for . . . Merrill . . . .") (emphasis added). But mere allegations of knowledge of undisclosed information do not suffice to plead scienter. See Thain Reply at 5 (citing, e.g., Fort Worth Employers' Ret. Fund v. Biovail Corp., 615 F. Supp. 2d 218, 226 (S.D.N.Y. 2009) ("The mere allegation that Defendants failed to disclose a risk does not in and of itself constitute strong evidence that they did so with scienter."); In re Cable & Wireless, PLC, Sec. Litig., 321 F. Supp. 2d 749, 772 (E.D. Va. 2004) ("Merely pleading that a corporation 'knew' of its business affairs would effectively eliminate the scienter requirement.")). In addition to this fundamental flaw, Plaintiffs also fail to explain how or why Merrill would have known whether the allegedly omitted information would be material to shareholders of BAC – a massive and then-independent financial institution.[4]

## II. PLAINTIFFS HAVE NOT STATED A CLAIM AGAINST MERRILL UNDER SECTION 14(A)

BAC's reply brief demonstrates that Plaintiffs' Section 14(a) arguments fail as to all defendants. Merrill has additional arguments under Section 14(a), but Plaintiffs' brief essentially ignores them.

Plaintiffs cite no authority that supports their argument that Merrill can be held liable for not disclosing to BAC's shareholders information that (according to Plaintiffs'

[4] To the extent Plaintiffs persist in claiming that the few optimistic statements attributed to Merrill in the Complaint are actionable, those allegations fail for the reasons stated in Merrill's opening brief (Mem. at 5-7), BAC's reply brief (BAC Reply at sec. III.B), and Thain's reply brief (Thain Reply at 6-7). Plaintiffs' basic argument as to Merrill's optimistic statements about the merger is that the question whether such statements constituted non-actionable puffery cannot be decided on a motion to dismiss. See Opp. at 47-50. But that is demonstrably wrong. Courts in this Circuit routinely identify puffery and dismiss claims on that ground in deciding a motion to dismiss. See, e.g., ECA v. JP Morgan Chase Co., 553 F.3d 187, 205-06 (2d Cir. 2009) (affirming dismissal of claims based on optimistic statements that were too general to cause a reasonable investor to rely upon them); In re IAC/InterActiveCorp Sec. Litig., 478 F. Supp. 2d 574, 594 (S.D.N.Y. 2007) (granting motion to dismiss because, among other reasons, statement that "[w]e are convinced that this merger . . . will enhance the growth prospects for [our acquisition partner]" was not actionable); Faulkner v. Verizon Commc'ns, Inc., 156 F. Supp. 2d 384, 388-89, 397-99 (S.D.N.Y. 2001) (granting motion to dismiss because statements about merger's anticipated prospects, including that the merger was a "groundbreaking agreement to fundamentally change the dynamics of the broadband industry" were not actionable).

allegations) was known equally to BAC. See Mem. at 15. Such a rule would "end run" the well-established principle that there can be no liability for omissions absent a special relationship giving rise to a duty to disclose. See Chiarella v. United States, 445 U.S. 222, 239-40 (1980) (Brennan, J., concurring) ("As a general rule, neither party to an arm's-length business transaction has an obligation to disclose information to the other unless the parties stand in some confidential or fiduciary relation."); In re Ivan F. Boesky Sec. Litig., 36 F.3d 255, 261 (2d Cir. 1994) (holding that a party to a merger does not owe a duty to disclose its internal information to the counterparty's shareholders). Merrill had no special relationship with BAC's shareholders, and Plaintiffs do not argue otherwise. A rule requiring a corporation to assess materiality of all statements in a joint proxy statement from the perspective of another company's shareholders would be unworkable in practice and anathema to the undivided loyalty and attention that are the core of a corporation's fiduciary obligations to its own shareholders. See Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715, 748 (Del. Ch. 2008) (party to corporate transaction not responsible for its counterparty's observance of its duties to its shareholders).

Plaintiffs' reliance on In re AOL Time Warner, Inc. Sec. & "ERISA" Litig., 381 F. Supp. 2d 192 (S.D.N.Y. 2004), and In re McKesson HBOC, Inc. Sec. Litig., 126 F. Supp. 2d 1248 (N.D. Cal. 2000), is misplaced for the reasons explained in Merrill's initial brief. See Mem. at 14-15. In the interest of brevity, that discussion is not repeated here. Likewise, Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281 (2d. Cir. 1973), does not support Plaintiffs' claims. Gerstle involved the imposition of liability on the acquiring corporation, which was the majority shareholder of the acquired corporation even before the merger in question. Id. at 1284. And, in further contrast to this case, Gerstle did not involve alleged omissions about the health of the

acquired company, but rather allegations about the acquiror's plans for the combined company. Id. at 1288. That is not what is alleged here.

Plaintiffs' Section 14(a) claim against Merrill should be dismissed.

## CONCLUSION

For the foregoing reasons, and for those set forth in Merrill's opening brief, and the briefs of the other defendants, the Complaint should be dismissed with prejudice as against Merrill and MLPF&S.

Dated: New York, New York
January 26, 2010

Respectfully submitted,

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