UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT JOHN A. THAIN'S MOTION TO DISMISS THE CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

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Defendant John A. Thain respectfully submits this reply memorandum of law in further support of his motion to dismiss the Consolidated Amended Class Action Complaint pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure.[1]

Preliminary Statement

Lead Plaintiffs' Omnibus Opposition to Defendants' Motions to Dismiss the Consolidated Class Action Complaint ("Opposition" or "Opp.") utterly fails to show why the allegations in the Complaint raise a strong inference that John Thain intended to defraud BAC shareholders. Once one discards Plaintiffs' conclusory accusations of purposeful wrongdoing, it becomes clear that Plaintiffs' effort to plead Thain's scienter is premised on the entirely uncontroversial allegation that Thain, the CEO and Chairman of Merrill, was: (a) aware of the bonus cap; and (b) privy to Merrill's interim fourth quarter 2008 results.[2]

Mere knowledge of undisclosed information, however, is woefully insufficient to establish scienter, especially here where there is nothing fraudulent or improper about the underlying events. Rather, Plaintiffs must adduce some specific evidence creating a strong inference that Thain acted with the intent to purposely deceive BAC shareholders by hiding such information from them. They have not. Indeed, given the specific disclosures at issue here and the acknowledged role of legal counsel in determining the required scope of any disclosures, the most plausible inference here is that, with respect to Merrill's proxy obligations under the federal securities laws, Thain reasonably relied on the firm's in-house and outside professionals and acted, at all times, in good faith. Given the complete

[1] With respect to the numerous other defects in Plaintiffs' Complaint, Thain expressly adopts and incorporates herein the arguments in further support of dismissal set forth in the Reply Memorandum of Law In Support of the Bank of America Defendants' Motion to Dismiss the Consolidated Amended Class Action Complaint (the "BAC Reply Memo.") and the Reply Memorandum of Law In Support of Merrill Lynch & Co., Inc.'s and Merrill, Lynch, Pierce, Fenner & Smith's Motion to Dismiss (the "Merrill Reply Memo.").

[2] Capitalized terms not otherwise defined herein have the meaning ascribed to them in Thain's opening memorandum of law.

absence of any evidence of negligence, let alone conscious wrongdoing giving rise to a strong inference of fraudulent intent, the Complaint as against Thain should be dismissed.[3]

Argument

THE COMPLAINT FAILS TO ALLEGE A STRONG INFERENCE OF THAIN'S SCIENTER

Plaintiff's Opposition falls significantly short of demonstrating that the Complaint supports an inference of Thain's fraudulent intent that is "cogent and at least as compelling" as an inference of non-culpability. *Tellabs, Inc. v. Makor Issues and Rights, Ltd.*, 551 U.S. 308, 314 (2007). Not surprisingly, the Complaint fails to allege that Thain played any substantive role in determining the scope of required proxy disclosures. As CEO and Chairman of Merrill during a period of unprecedented financial volatility, Thain plainly had little time to immerse himself in the complex world of SEC disclosure obligations, but rather reasonably delegated such responsibilities to both in-house and external securities experts and relied on their analyses and determinations. And there is not a single well pled allegation that Thain ever had any reason to question the appropriateness of such advice. [4]

Moreover, any inference of Thain's scienter is belied by the complexity of the SEC's proxy rules as applied to the issues at bar. Plaintiffs conclusorily claim that the need to include *in haec verba* the bonus cap information in the Proxy was "obvious." But in doing so, they essentially ignore the plain words of the Proxy and the Merger Agreement, which disclosed to shareholders that Merrill was obligated to conduct itself in the "ordinary course of business" and to take all reasonable steps to retain key employees. BAC Reply Memo. at 9. It is not surprising, therefore, that Plaintiffs can find no

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[3] Plaintiffs' Section 14(a) claim is premised on allegations of fraud and must therefore give rise to a strong inference of scienter with respect to Thain. But even, assuming, *arguendo*, a negligence standard applies, the Complaint is deficient. BAC Reply Memo. at 20-22.

[4] Plaintiffs' Opposition disingenuously quotes a September 2009 comment by Thain to Wharton Business School students that: "One take away for you all is that it's really always better to tell the truth." As the full quote in the Complaint (¶177) makes clear, Thain was referring, not to alleged misstatements in the Proxy, but to an inaccurate assertion in January 2009 that he had "secretly accelerated" payment of bonuses.

contemporaneous source who understood anything but that Merrill would pay billions in 2008 bonuses (as it had done in 2007, when it similarly suffered billions in losses). Any BAC shareholder who read the Proxy understood that Merrill could and would have to pay bonuses in order for the merger to make any sense; indeed, the principal asset BAC was buying was Merrill's skilled ranks of professionals. If, as Plaintiffs assert, it truly was so terribly obvious that the Proxy had to say more, the sophisticated lawyers and securities professionals would have so required.[5]

Plaintiffs' theory of why the securities laws required the bonus cap to be included in the Proxy Statement also belies scienter. Plaintiffs argue that, without the relevant Merger Agreement exhibit, the Proxy, which plainly made clear that Merrill could pay bonuses with the consent of BAC, was misleading because such statement allegedly implied that no such consent had previously been provided. Opp. at 25. But, as the Proxy itself makes clear, the negative covenant contained in Section 5.2(c) was expressly subject to other provisions of the Merger Agreement. Indeed, Section 5.1 (which was disclosed to shareholders and summarized in the Proxy) obligated Merrill to conduct itself in the ordinary course and to take all reasonable efforts to retain its professionals -- an obligation that necessarily included the payment of bonuses. *See* BAC Reply Memo. at 9-11.

Particularly given the absence of any allegation of Thain's involvement in drafting the Proxy or making disclosure decisions, Plaintiffs' strained semantic theory of misrepresentation hardly supports the notion of Thain's scienter. The law in this Circuit is clear that a failure to disclose may satisfy a recklessness standard "if and only if defendants had an obvious and absolute duty to disclose such information to its shareholders in the first place." *Kalnit v. Eichler*, 85 F. Supp. 2d 232, 245 (S.D.N.Y.

[5] Plaintiffs do not dispute that BAC and Merrill received legal advice as to their disclosure obligations but argue that reliance on counsel cannot negate scienter at the pleading stage. Opp. at 83. The cases they cite, however, are readily distinguishable. In *Siemers v. Wells Fargo & Co.*, 2006 WL 2355411, at *9 (N.D. Cal. Aug. 14, 2006), the Court found scienter based on the "deliberate half truths" alleged in the complaint and declined to allow an advice of counsel defense to "destroy" such a finding. *SEC v. Martino*, 255 F. Supp. 2d 268, 285 (S.D.N.Y. 2003), involved a determination on a motion for summary judgment that an advice of counsel defense was factually baseless.

1999), *aff'd*, 264 F.3d 131 (2d Cir. 2001). Here, there plainly was no "obvious and absolute duty" of disclosure with respect to the bonus cap.

Moreover, Thain, who received no bonus himself, had no reason to "hide" the bonus cap information. Merrill had already publicly accrued billions of dollars for 2008 bonuses, had paid bonuses at the end of a dismal fiscal year 2007, and was the subject of numerous public reports regarding the firm's intent to pay 2008 bonuses. BAC Memo. at 19-20. Given that backdrop and Thain's responsibility to deal with the imploding financial markets and the integration of the Merrill franchise with BAC, the notion that Thain would have been knee-deep in the arcana of proxy disclosure rules is neither cogent nor plausible.

Scienter is also implausible with respect to the alleged non-disclosure of Merrill's interim fourth quarter results. For the reasons stated in the BAC Reply Memo. (at 30-35) and the Merrill Reply Memo. (at 2-5), Thain had no "obvious and absolute duty" to disclose such information. *Kalnit*, 85 F. Supp. 2d at 245. Indeed, the SEC, after doing a thorough investigation of this matter, publicly concluded that "none [of the individuals involved] had deliberately concealed information from counsel or otherwise acted with scienter or intent to mislead." SEC Lit. Rel. No. 21371 (Jan. 11, 2010).[6]

The paucity of allegations germane to Thain's scienter is further demonstrated by the Opposition's focus on "events post-dating the vote." *See, e.g.*, Opp. at 3, 6, 13, 38, 46, 72-75, 84. While Plaintiffs claim these events demonstrate the Defendants' deceptive state of mind,[7] they do not

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[6] The SEC has commenced a novel non-fraud-based Section 14(a) action against BAC in which it seeks to graft alleged disclosure obligations stemming from a BAC filing on Form S-4 onto Section 14(a). Thain, of course, had nothing to do with any BAC filings, and this strained non-scienter theory refutes the notion that Thain was reckless in relying on the legal advice that interim financial data did not need to be disclosed. Notably, the Complaint here does not even put forth this strained theory of liability.

[7] Plaintiffs distort the record by frequently employing the term "Defendants," rather than the "BoA Defendants," when referencing allegations related to the MAC and TARP, even though they do not dispute that Thain was unaware of these events. *See, e.g.*, Opp. at 6 ("Defendants' principal argument in response to [the Section 10(b) claims] is that they were not required to disclose the taxpayer bailout or the circumstances that required it because Lewis chose not to sign the agreement with the Government before the merger closed . . . "); 46 ("contrary to Defendants'

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and cannot contend that the MAC and TARP discussions have any bearing on Thain, who was indisputably unaware of these discussions. *See* Opp. at 69-75 (referencing conduct only by the "BoA Defendants").[8]

Stripped of all the extraneous allegations regarding the MAC, TARP and BAC's stand-alone financials, Plaintiffs' effort to allege a strong inference of Thain's scienter rests entirely on his mere awareness of the bonus cap and Merrill's interim fourth quarter data. But where, as here, Thain is not alleged to have falsified any information disclosed to the public, an officer's mere knowledge of undisclosed information by itself does not support an inference of scienter. *See, e.g., Fort Worth Employers' Retirement 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, Secs. 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"); *R2 Investments v. Phillips*, 2003 WL 22862762, at *7 (N.D. Tex. Dec. 3, 2003), *aff'd*, 401 F.3d 638 (5th Cir. 2003) ("Every omission entails knowledge of the thing omitted. Allowing mere knowledge to support a strong inference of scienter would therefore eliminate the scienter requirement for Rule 10b-5 omission claims altogether."); *see also Hirsch v. du Pont*, 553 F.2d 750, 759 (2d Cir. 1977).[9]

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representations that there were no 'material adverse changes' to Merrill's financial condition through the date of the shareholder vote, in fact Merrill's losses were so catastrophic that BoA's highest executives had repeatedly internally debated terminating the merger precisely because Merrill had suffered a MAC").

[8] The only apparent exception is BAC's January 1, 2009 press release, which the Opposition seems to argue Thain knew was misleading. Opp. at 75. Such claim is belied by the fact that Thain was not privy to BAC's discussions as to the MAC and TARP. Moreover, the Complaint does not allege that Thain reviewed or was responsible for the release. Indeed, as of January 1, 2009, Merrill ceased to exist as a stand-alone entity and Thain had not yet even reported to work at BAC.

[9] The cases cited by Plaintiffs (Opp. at 77) are inapposite. None was essentially an omission case as is the case here against Thain; rather all involved fraudulent financial statements and misrepresentations made by defendants in specific contravention of what they knew to be true.

Recognizing the Complaint's failure to raise a strong inference of Thain's scienter based on circumstantial evidence of conscious misconduct, Plaintiffs resort to improper "brief pleading" in an effort to conjure up a purported motive for Thain's alleged fraudulent state of mind by arguing (without citation to the Complaint) that, without the consummation of the merger, Merrill would have been "bankrupt." Opp. at 88. Even if this Court credits Plaintiffs' unpleaded assertion (which it should not), Thain's desire to "save" Merrill, standing alone, would not be a cognizable motive sufficient to give rise to a "strong inference" of scienter. *In re Northpoint Commc'ns Group, Inc. Secs. Litig.*, 221 F. Supp. 2d 1090, 1104 (N.D. Cal. 2002) (allegation that defendant was motivated to commit fraud to "save the company he founded" is "weak").[10] In the current economic environment, corporate executives make daily decisions that they hope will allow their businesses to survive. The fact that so much may be on the line does not lead to a strong inference of misconduct, especially here where it is undisputed that Thain, at Merrill for less than a year, was not responsible for the firm's balance sheet woes and could not have been blamed for the causes of the firm's demise.[11]

Finally, although the gravamen of this action relates to alleged omissions, Plaintiffs make a vain effort to demonstrate that certain unrelated statements by Thain were knowingly false when made. They now argue, for example, that the statement that Merrill had "reduce[d] exposures and de-leverage[d] the balance sheet" created the "false impression that Merrill was a far stronger and more stable entity than was actually the case." Opp. at 50. That argument is frivolous on its face. Such generalized statements are hardly material. *See, e.g.*, *In re Australia and New Zealand Banking Group*

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[10] *In re Cabletron Sys.*, 311 F.3d 11, 39 (1st Cir. 2002), does not stand for the proposition that a "desire to save [a] company constitute[s] motive" sufficient by itself to raise a strong inference of scienter. Opp. at 88. In concluding that scienter had been adequately alleged, the *Cabletron* Court relied on a raft of factors not present here, including, "particularized allegations of large-scale fraudulent practices over time," allegations of direct involvement in the fraudulent activity, and insider trading.

[11] With respect to motive, the Opposition also argues that "Thain had secured a $40 million bonus for himself." Opp. at 88. Such statement is contradicted by Plaintiffs' own Complaint, which alleges only that an unidentified Merrill employee "scribbled" some proposed numbers on a notebook page. Compl. ¶68. Nowhere is it alleged that Thain sought, much less "secured," a bonus; indeed, Plaintiffs do not dispute that Thain got no bonus at all. Nor can Plaintiffs allege that Thain sold any Merrill stock during the relevant time period.

Ltd. Secs. Litig., 2009 WL 4823923, at *11-*12 (S.D.N.Y. Dec. 14, 2009). In any event, the statement is accurate and nothing about it reasonably implies clear sailing ahead: Merrill's credit market exposures had been "reduced," not eliminated. *See also* Merrill's 3Q08 10-Q, filed Nov. 3, 2008, at 39-40 (Goldin Decl., Ex. 34) (Docket Entry 113) (detailing Merrill's "sizeable exposure to the mortgage market" and warning of potential "material[] impact[]" to future results). Thus, it is far more plausible than not that Thain's statement was made in good faith in a sincere belief that Merrill had indeed made progress in cleaning up its balance sheet. To allege that the comments were knowingly false when made simply because the firm ultimately remained vulnerable to the ongoing economic upheaval is the rankest of "fraud by hindsight" pleading. *See In re Citigroup Auction Rate Secs. Litig.*, 2009 WL 2914370, at *6 (S.D.N.Y. Sept. 11, 2009).[12]

Plaintiffs also illogically rely on alleged "pressure" on Thain by Secretary Paulson over the weekend of September 13-14 to agree to the Merger. *See, e.g.*, Opp. at 85. But Paulson's comment on its face has nothing to do with the later disclosures. Furthermore, it was obviously intended to highlight the seriousness of the Lehman Brothers situation and make clear to Thain that Merrill did not have the luxury of engaging in a protracted negotiation. Assuming, *arguendo*, Paulson was exerting "pressure," the impact, if any, would have been to reduce Merrill's self-perceived bargaining power, a result that would have *benefited* BAC shareholders.[13]

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[12] Plaintiffs also argue that the fact that, "nine months after the end of the Class Period," the Merger has contributed significant profits to the combined entity is irrelevant to their allegation that statements made in September 2008 about the "strategic sense" of the transaction were false. Opp. at 18 n.7. This is not an "innocence by hindsight" defense, as Plaintiffs contend. Rather, it goes to Thain's good faith. That the merger has proven to be a success demonstrates the reasonableness of Thain's opinion.

[13] Plaintiffs argue they are not required to plead Thain's "culpable participation" in the underlying violations to state a Section 20(a) claim against Thain. Opp. at 19 n.9. This Court has uniformly held otherwise. *See, e.g.*, *Garber* v. *Legg Mason, Inc.*, 537 F. Supp. 2d 597 (S.D.N.Y. 2008) (Chin, J.), *aff'd*, 2009 WL 3109914 (2d Cir. Sept. 30, 2009).

Conclusion

For all of the forgoing reasons, as well as the reasons set forth in the motions to dismiss of the Bank of America Defendants and the Merrill Lynch Defendants, defendant John A. Thain respectfully requests that the Court grant his motion and dismiss the Complaint in its entirety and with prejudice.

Dated: January 26, 2010
New York, New York

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