

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 (PKC)
ECF CASE

THIS DOCUMENT RELATES TO

The Consolidated Securities Class Action

**DEFENDANT NEIL A. COTTY'S JOINDER
IN CO-DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT**

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Defendant Neil A. Cotty respectfully submits this joinder in the motion for summary judgment, accompanying memorandum of law, and other accompanying papers filed by defendants Bank of America Corporation and Banc of America Securities LLC (“BofA”) to the extent that BofA seeks dismissal of claims under Section 14(a) of the Securities and Exchange Act of 1934 (the “Exchange Act”) concerning Merrill’s pre-vote losses and Section 11 of the Securities Act of 1933 (the “Securities Act”)—the only claims for which Mr. Cotty is named as a defendant in the Consolidated Second Amended Class Action Complaint (“SAC”). Mr. Cotty further joins in the motion for summary judgment, accompanying memorandum of law, and other accompanying papers filed by defendant Joe L. Price, with respect to the portion of that motion seeking dismissal of the Section 14(a) claim.

As described in Mr. Price’s motion, this Court has previously ruled that the proxy solicitation in this case “was not made on behalf of the BofA Officers” and that “the BofA Officers were not ‘participants’ within the meaning of the SEC’s [governing] regulations.” *In re Bank of America Corp. Sec., Deriv., and ERISA Litig.*, 757 F. Supp. 2d 260, 293 (S.D.N.Y. 2010). Moreover, as Mr. Price shows in his memorandum of law, in order to qualify as a participant under the SEC’s regulations, a party must take an active role in soliciting proxies. *See* Price Mem. at 6-7 (citing sources interpreting 17 CFR § 240.14a-101, Item 4, Instruction 3). Like Mr. Price, Mr. Cotty is not mentioned anywhere in the Joint Proxy. *See In re BofA*, 757 F. Supp. 2d at 293; *see also* Price 56.1 Stmt. ¶¶ 2-3 (citing to relevant pages of the Joint Proxy). Nor do plaintiffs allege that Mr. Cotty played any role in the solicitation of votes beyond his signing various documents as part of his ordinary duties as an officer of BofA. (*See* SAC ¶¶ 41, 342,

348, 350.) To the extent that Mr. Cotty signed documents incorporated by reference in the Joint Proxy, or the Proxy Registration Statement on Form S-4, like Mr. Price, Mr. Cotty signed these documents as a duly authorized representative of BofA. As Mr. Price explains in his motion, such a formality cannot transform an officer into a “participant” within the meaning of the applicable SEC regulations. *See* Price Mem. at 7-8.

For these reasons, as set forth more fully in the memorandum of law filed by Mr. Price, Mr. Cotty respectfully seeks dismissal of the Section 14(a) claim. In addition, for all of the reasons set out in BofA’s memorandum of law, Mr. Cotty seeks dismissal of plaintiffs’ claims against him under Section 14(a) of the Exchange Act and Section 11 of the Securities Act.

Dated: New York, New York
June 3, 2012

Respectfully submitted,

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