

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'
MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

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Defendant Neil A. Cotty respectfully joins in the arguments asserted in the Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment, and the accompanying Counterstatement of Material Facts Pursuant to Rule 56.1 and Response to Plaintiffs' Statement of Undisputed Material Facts, dated June 29, 2012, submitted by Bank of America Corporation and Banc of America Securities LLC (together, "BofA").

To the extent that plaintiffs' motion for partial summary judgment applies to Mr. Cotty, it must be denied as to him for the reasons stated in BofA's Memorandum and because Mr. Cotty did not make any of the five purported misstatements raised in the motion. As this Court has previously ruled, the proxy solicitation in this case "was not made on behalf of the BofA Officers" and "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). Therefore, Mr. Cotty is not liable under Section 14(a) of the Securities Exchange Act of 1934.

Furthermore, under the applicable legal standards described in BofA's Memorandum for proving the falsity of opinions, plaintiffs must show that Mr. Cotty did not genuinely believe the statements about the forecasted accretive or dilutive effect of the merger. *See Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1091-96 (1991). However, plaintiffs have made no attempt to show that Mr. Cotty was *aware* of any accretion/dilution forecasts, much less that he knew any of the statements about them to be false.

For the foregoing reasons, and those set forth in BofA's Memorandum of Law, Mr. Cotty respectfully submits that plaintiffs' motion for partial summary judgment should be denied.

Dated: New York, New York
June 29, 2012

Respectfully submitted,

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