

**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

**JOINT MEMORANDUM OF LAW OF MERRILL LYNCH & CO., INC., MERRILL
LYNCH, PIERCE, FENNER & SMITH INCORPORATED, AND JOHN A. THAIN IN
OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

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Defendants Merrill Lynch & Co., Inc. (“Merrill”), Merrill Lynch, Pierce, Fenner & Smith Incorporated, and John A. Thain, to the extent applicable, respectfully join in the arguments in opposition to Plaintiffs’ Motion for Partial Summary Judgment (the “Motion”) set forth in Bank of America Corporation’s (“BofA”) and Banc of America Securities LLC’s Memorandum of Law in Opposition to Plaintiffs’ Motion for Partial Summary Judgment, dated June 29, 2012 (the “Opposition”), and hereby adopt BofA’s Counterstatement of Material Facts Pursuant to Local Rule 56.1 and Response to Plaintiffs’ Statement of Undisputed Material Facts. For the reasons stated in the Opposition, and on the additional bases set forth below, Plaintiffs’ Motion should be denied as to Merrill and Mr. Thain.¹

Plaintiffs’ Motion is particularly unfounded as to Merrill and Thain. *First*, Plaintiffs have no claim under Section 10(b) of the Securities Exchange Act (the “Exchange Act”) against Merrill or Thain for any claims other than those related to the payment of year-end 2008 bonuses to Merrill employees. *See In re Bank of America Corp. Sec., Deriv. & ERISA Litig.*, 757 F. Supp. 2d 260, 287-288 (S.D.N.Y. 2010). Accordingly, to the extent the Motion seeks partial summary judgment with respect to Plaintiffs’ Section 10(b) claims (the Motion indiscriminately refers only to “Defendants”), it is not even applicable to Merrill or Thain.

Second, Plaintiffs’ request for partial summary judgment with respect to their claim under Section 14(a) of the Exchange Act also fails as to Merrill and Thain. In addition to the grounds set forth in the Opposition, Plaintiffs have not alleged in the Consolidated Second Amended Class Action Complaint – let alone furnished evidence (their Statement of Undisputed Facts simply ignores the issue) – that Merrill or Thain were even aware of the alleged facts

¹ Defendant Merrill Lynch, Pierce, Fenner and Smith Incorporated (“MLPF&S”) is not sued under Section 10(b) or Section 14(a), which are the only claims as to which Plaintiffs seek partial summary judgment. Accordingly, it is not a party to the Motion. To the extent Plaintiffs purport to move against MLPF&S, it joins in the arguments in the Opposition and those contained herein.

concerning Bank of America's revised accretion-dilution analysis that are the subject of the Motion. This is hardly surprising given that the accretion-dilution analysis was an internal BofA forecast of the potential future impact of the transaction on *BofA*.

Accordingly, under the legal standard set forth in Section I of the Opposition, there is no basis in law (or fact) on which Merrill or Thain could be liable for the purported falsity of any statements relating to BofA's internal accretion-dilution analysis. Nor can Plaintiffs establish that Merrill or Thain had any authority or control over (or even knowledge of) statements made by Kenneth D. Lewis at BoA's December 5, 2008 shareholder meeting such that Merrill or Thain could have any conceivable responsibility for those statements. Plaintiffs' Motion with respect to the Section 14(a) claim must also therefore be denied.

Dated: New York, New York
June 29, 2012

Respectfully submitted,

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