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' REPLY MEMORANDA OF LAW IN SUPPORT OF THEIR MOTIONS FOR SUMMARY JUDGMENT

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

CLEARY, GOTTLIEB, STEEN &
HAMILTON LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000

WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, NY 10019
(212) 403-1000

Attorneys for Neil A. Cotty

Defendant Neil A. Cotty respectfully joins in the Reply Memorandum in Support of the Motion for Summary Judgment filed by Bank of America Corporation and Banc of America Securities LLC (together, "BofA" or the "Bank") to the extent that the Bank seeks the dismissal of claims under Section 14(a) of the Securities and Exchange Act of 1934 concerning Merrill's pre-vote losses and Section 11 of the Securities Act of the 1933—the only claims for which Mr. Cotty is named as a defendant in the Consolidated Second Amended Class Action Complaint. Mr. Cotty further joins the Reply Memorandum in Support of the Motion for Partial Summary Judgment filed by Joe L. Price, with respect to the portion of that memorandum seeking dismissal of the Section 14(a) claims.

As with Mr. Price, plaintiffs' Section 14(a) claim against Mr. Cotty must fail because plaintiffs uncovered no evidence showing that Mr. Cotty "actually solicited" proxies in favor of the merger with Merrill Lynch. *See In re Bank of America*, 757 F. Supp. 2d 260, 293 (S.D.N.Y. 2010). Mr. Cotty did not sign the joint definitive proxy mailed to shareholders. (Dkt. 587, Statement of Undisputed Material Facts in Support of Defendant Joe L. Price's Motion for Summary Judgment Pursuant to Local Rule 56.1 Stmt. ¶ 2 (citing to relevant pages of the Joint Proxy).) His name appears nowhere in the definitive proxy materials, as this Court has already noted. *In re Bank of America*, 757 F. Supp 2d at 293. Indeed, plaintiffs have failed to put forth any evidence in their opposition brief that Mr. Cotty participated in any communications—press releases, letters, conference calls or otherwise—endorsing the merger transaction. The sole piece of evidence that plaintiffs cite in support of their argument that Mr. Cotty solicited proxies for the merger is his signature on the Form S-4 and its amendments (the "S-4s"),

which BofA filed with the SEC before mailing its definitive proxy to its shareholders. (Dkt. 654, Plaintiffs' Omnibus Opposition to Defendants' Motions For Summary Judgment ("Pls.' Mem.") at 73-76.) As Mr. Cotty pointed out in his joinder to Mr. Price's Memorandum of Law in Support of Mr. Price's Motion for Summary Judgment, the mere act of signing the S-4s is insufficient because Mr. Cotty cannot be subject to liability solely on the basis of his signing documents that were filed with the SEC in his capacity as a duly authorized representative of BofA.

The S-4s did annex drafts of the proxy, but these drafts were only preliminary versions of the proxy, subject to change. Further, the Bank filed the S-4s and the accompanying preliminary proxies with the SEC pursuant to regulations requiring BofA to submit these documents for the Commission's review. *See* 17 C.F.R. § 240.14a–6. Filing a draft proxy with the SEC for its review is not equivalent to soliciting shareholders through a definitive proxy. As one court has held, "[f]iling a Preliminary Proxy Statement is not a solicitation." *Ferro v. Blankenship*, Case No. EP-95-CA-004-DB, 1999 WL 35125518, at *3 (W.D. Tex. Mar. 17, 1999) (granting motion to dismiss); *see also Flannery v. Tesoro Petroleum Corp.*, No. Civ. SA-95-CA-1298, 1999 WL 35125519, at *1 (W.D. Tex. Feb. 2, 1999) ("[A]n actual solicitation must be made before plaintiffs can be accused of making an improper solicitation.").

With only one exception, none of the cases cited by plaintiffs concern S-4s.[1] That case, *In re AOL Time Warner Sec & "ERISA" Litig.*, addresses an S-4, but only

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[1] In fact, the cases cited by plaintiffs address voluntary communications to shareholders, rather than the very different situation of mandatory preliminary filings of drafts with the SEC. (*See* Pls.' Mem. at 72-78, citing *Long Island Lighting Co. v. Barbash*, 779 F.2d 793, 794-96 (2d Cir. 1985) (newspaper and radio advertisements); *SEC v. Okin*, 132 F.2d 784, 786 (2d Cir. 1943) (letter to shareholders); *Winiger v. SI Mgmt. L.P.*, 32 F. Supp. 2d 1144 (N.D. Cal. 1997) (letter to limited partners and press release); *Cap. Real Estate Invs. Tax Exempt Fund Ltd P'ship v. Schwartzberg*, 929 F. Supp. 105, 110 (S.D.N.Y. 1996) (press releases); *Krauth* v. *Executive Telecard, Ltd.*, 870 F. Supp. 543, 547 (S.D.N.Y. 1994) (newsletter

in passing. 381 F. Supp. 2d 192, 232 (S.D.N.Y. 2004). In that case, defendants did not argue, as Mr. Cotty does here, that the S-4 fell short of a solicitation. Instead, defendants there sought dismissal of the Section 14(a) claim lodged against some of the officers and directors "because the officers and directors of one party to a merger cannot, as a matter of law, be deemed to have solicited the proxies of the shareholders of the other party to the merger." *Id*. Noting that the joint proxy accompanying the S-4 included the logos and signatures of representatives from both merger partners, the Court rejected this argument. *Id*. The parties did not argue, and the Court did not decide, whether the S-4 should constitute a solicitation despite the preliminary nature of the draft joint proxy attached to it. Accordingly, this case does not address the argument raised here.

Plaintiffs also point to a disclaimer that exists in the preliminary and definitive proxies and argue that it proves that the preliminary proxies must amount to a solicitation. (Pls.' Mem. at 76.) The plaintiffs stretch the language of the disclaimer too far. The preliminary and definitive proxies each note that the "document does not constitute an offer to sell, or a solicitation of an offer to buy, any securities, or the solicitation of a proxy, in any jurisdiction to or from any person to whom it was unlawful to make any such offer or solicitation in such jurisdiction." The disclaimer does not mean, as plaintiffs argue, that "by definition, the Form S-4 was a 'solicitation of a proxy' in any jurisdiction where it was not unlawful to solicit proxies." (*Id*. (emphasis, in original).) The disclaimer only states under what circumstances the documents may not be considered a solicitation, but it says nothing of the inverse, *i.e.* when the documents could be considered a solicitation.

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mailed to shareholders); *Sargent* v. *Genesco, Inc.*, 492 F.2d 750, 767 (5th Cir. 1974) (letter to shareholders); *In the Matter of Joslyn*, *et al*., 2004 WL 2387455, at *11 (Oct. 26, 2004) (SEC release where shareholders were directly solicited).)

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

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Respectfully submitted,

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP

By: _*s/ Daniel J. Kramer*_______
Brad S. Karp
Theodore V. Wells Jr.
Daniel J. Kramer
Walter Rieman
Marc Falcone
Audra J. Soloway

1285 Avenue of the Americas
New York, NY 10019-6064
(212) 255-1632

and

Mitchell A. Lowenthal
Lewis J. Liman
Jennifer Kennedy Park
CLEARY, GOTTLIEB, STEEN &
HAMILTON LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000

and

Peter C. Hein
Eric M. Roth
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, NY 10019
(212) 403-1000

Attorneys for Neil A. Cotty