

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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IN RE BANK OF AMERICA CORP.  
SECURITIES, DERIVATIVE, AND  
EMPLOYMENT RETIREMENT INCOME  
SECURITY ACT (ERISA) LITIGATION

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Master File No. 09 MDL 2058 (DC)  
ECF CASE

THIS DOCUMENT RELATES TO:

All Securities Actions

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**MEMORANDUM OF LAW IN SUPPORT OF MERRILL LYNCH  
& CO., INC.'S AND MERRILL LYNCH, PIERCE, FENNER &  
SMITH INCORPORATED'S MOTION TO DISMISS THE  
CONSOLIDATED AMENDED CLASS ACTION COMPLAINT**

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Defendants Merrill Lynch & Co., Inc. (“Merrill” or the “Company”) and Merrill Lynch, Pierce, Fenner & Smith Incorporated (“MLPF&S”) respectfully submit this memorandum of law in support of their motion to dismiss plaintiffs’ Consolidated Amended Class Action Complaint (the “Complaint”) pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure.<sup>1</sup>

### **PRELIMINARY STATEMENT**

This putative securities class action is filed by shareholders of BAC and principally involves disclosures concerning BAC’s acquisition of Merrill last year. Plaintiffs’ claims should be dismissed with prejudice as to all defendants for the reasons set forth in the BAC Motion. Merrill joins those arguments and does not repeat them here.<sup>2</sup>

As to Merrill, however, there are additional grounds for dismissal. This is a case filed by *BAC’s* shareholders. Merrill, as a result of the merger, is a wholly-owned subsidiary of BAC. During the period relevant to the Complaint, however, Merrill was an independent public company, with its own fiduciaries and shareholders, that stood at arm’s-length from BAC and its shareholders. Merrill’s shareholders filed their own class action litigation challenging the merger-related disclosures, which was resolved months ago pursuant to a court-approved settlement.<sup>3</sup>

Plaintiffs do not – and cannot – contend that Merrill owed any affirmative duty of disclosure to BAC’s stockholders. The absence of such a duty is critical because plaintiffs base

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<sup>1</sup> Capitalized terms not otherwise defined herein have the meaning ascribed to them in the memorandum of law of Bank of America Corporation (“BAC”) in support of its motion to dismiss the Complaint (“BAC Motion”). Citations to the “Hakki Decl.” are to the Declaration of Adam S. Hakki, dated November 24, 2009, filed herewith.

<sup>2</sup> The only Merrill officer or director named as a defendant in the Complaint is John Thain, who was Merrill’s Chairman and Chief Executive Officer during the relevant time period. The arguments in this memorandum with respect to Merrill apply with equal force to Mr. Thain. Additional arguments with respect to the claims against Mr. Thain are set forth in his separate memorandum of law filed by his counsel.

<sup>3</sup> See Order and Final Judgment, County of York Employees Ret. Plan v. Merrill Lynch & Co, Inc. et al., No. 4066-VCN (Del. Ch. Aug. 31, 2009) (granting final approval to settlement of Delaware derivative litigation brought by Merrill shareholders based on merger disclosures) (Hakki Decl. Ex. A) ; Stipulation and Order, In re Merrill Lynch & Co, Sec., Derivative & “ERISA” Litig., No. 07-cv-9633 (S.D.N.Y. Oct. 20, 2009) (dismissing federal derivative action as a consequence of Delaware settlement) (Hakki Decl. Ex. B).

their case principally upon alleged omissions. Plaintiffs contend that Merrill and other defendants violated Sections 10(b) and 14(a) of the Securities Exchange Act of 1934 (the “Exchange Act”) by failing to disclose before the closing of the merger that (1) BAC had consented to Merrill determining the annual bonus payments to employees up to a cap agreed between BAC and Merrill, and (2) Merrill’s fourth quarter 2008 financial results were trending toward substantial losses.<sup>4</sup> It is well settled that a party is not liable for omissions under the Exchange Act unless it owed a duty to disclose to the plaintiff. Because Merrill owed no duty of disclosure to BAC’s stockholders, there can be no liability for the alleged omissions. Similarly, to the extent plaintiffs base their claims on a purported “duty to update” BAC shareholders with information concerning intra-quarter losses or bonus payments at Merrill, those claims also fail: Merrill plainly had no duty to update shareholders to whom it owed no duty of disclosure in the first place.

To the very limited extent that plaintiffs contend Merrill is liable for making affirmatively misleading statements to BAC’s stockholders, those claims fail as well. As detailed in the BAC Motion, plaintiffs have not identified a single affirmative statement by anyone (let alone by Merrill or its executives) that was rendered misleading by the alleged omissions at issue, nor was Merrill under any obligation to “pre-announce” its fourth quarter 2008 results before the quarter was completed. In the limited instances where the Complaint identifies alleged affirmative misstatements by Merrill or its executives, each of those statements was an accurate statement of historical fact or a mere expression of corporate optimism and thus not actionable. Nor do plaintiffs plead any facts that could support a finding of scienter as to Merrill as required to state a claim under Section 10(b).

The Court should dismiss plaintiffs’ claims against Merrill with prejudice.<sup>5</sup>

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<sup>4</sup> Plaintiffs do not allege that Merrill had any knowledge of or participation in BAC’s alleged internal discussions and discussions with the federal government in December 2008 concerning the potential that BAC might seek to withdraw from the merger on the basis of a material adverse event under the merger agreement between BAC and Merrill (the “Merger Agreement”).

<sup>5</sup> The Complaint also includes claims under Sections 11 and 12(a)(2) of Securities Act of 1933 against BAC and MLPF&S concerning the offering documents associated with BAC’s October 7, 2008 offering of common

## ARGUMENT

### **I. MERRILL IS NOT LIABLE UNDER SECTION 10(b) (COUNT II)**

To state a claim under Section 10(b), a plaintiff must plead that a defendant ““(1) made misstatements or omissions of material fact; (2) with scienter; (3) in connection with the purchase or sale of securities; (4) upon which plaintiffs relied; and (5) that plaintiffs’ reliance was the proximate cause of their injury.”” Lentell v. Merrill Lynch & Co., 396 F.3d 161, 172 (2d Cir. 2005) (quoting In re IBM Sec. Litig., 163 F.3d 102, 106 (2d Cir. 1998)).

#### **A. Plaintiffs Fail To Allege An Actionable Statement Or Omission By Merrill**

A securities fraud complaint must contain well-pleaded factual allegations that identify with particularity what statements were false and why they were false when made. See, e.g., Elliott Assocs., L.P. v. Covance, Inc., 2000 WL 1752848, at \*6 (S.D.N.Y. Nov. 28, 2000). The Private Securities Litigation Reform Act (the “PSLRA”) “requires plaintiffs to ‘specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.’” Xerion Partners I LLC v. Resurgence Asset Mgmt., LLC, 474 F. Supp. 2d 505, 516 (S.D.N.Y. 2007) (Chin, J.) (quoting 15 U.S.C. § 78u-4(b)(1)), aff’d sub nom. Bay Harbour Mgmt. LLC v. Carothers, 282 Fed. Appx. 71 (2d Cir. 2008). The Complaint simply fails to do this as to Merrill.

##### **1. Merrill Owed No Duty of Disclosure to BAC’s Shareholders**

The thrust of plaintiffs’ claims against Merrill rests on the Company’s purported failure to disclose (1) its fourth quarter losses as they were occurring (Compl. ¶ 106), (2) the bonus cap agreement contained in the Company Disclosure Schedule (id. ¶ 8) and (3) the payment of actual bonuses for 2008, which were paid December 31, 2008 (id. ¶ 106).

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stock. MLPF&S is named as a defendant as to these claims in its capacity as an underwriter of the offering. (Compl. ¶¶ 377, 386.) These claims fail as to MLPF&S for the same reasons they fail as to BAC. These arguments are set forth in the BAC Motion and not repeated here. (See BAC Motion at 30-33, 56-70.)



To be held liable for omissions under Section 10(b) and Rule 10b-5, a defendant must owe plaintiff an affirmative duty to disclose which only “arises when one party has information that the other [party] is entitled to know *because of a fiduciary or other similar relation of trust and confidence between them.*” Chiarella v. United States, 445 U.S. 222, 228-29 (1980) (“party charged with failing to disclose market information must be under a duty to disclose it” (citation omitted) (emphasis added)).

The BAC Motion demonstrates that no defendant owed a duty of disclosure as to the alleged omissions at issue, but this is particularly clear in the case of Merrill, which had no connection to BAC’s shareholders. A party to a merger does not owe a duty to disclose its internal information to the counterparty’s shareholders. In re Ivan F. Boesky Sec. Litig., 36 F.3d 255, 261 (2d Cir. 1994). Far from having a fiduciary relationship, Merrill and BAC’s shareholders were at arm’s-length from each other. See Chiarella, 445 U.S. at 239-40 (Brennan, J., concurring) (“As a general rule, neither party to an arm’s-length business transaction has an obligation to disclose information to the other unless the parties stand in some confidential or fiduciary relation.”); see also Del Noce v. Delyar Corp., 1976 WL 813, at \*24 (S.D.N.Y. July 30, 1976) (“As a proposed merger partner, [purchasing company’s interests] were clearly adverse and antagonistic to that of [the target].”).

Merrill cannot be held liable for violating a duty that it did not owe. As the Supreme Court stated in Chiarella, “[f]ormulation of such a broad duty, which departs radically from the established doctrine that duty arises from a specific relationship between two parties . . . should not be undertaken absent some explicit evidence of congressional intent.” 445 U.S. at 233. A contrary rule would subject merger parties to potentially inconsistent obligations *vis-à-vis* their own shareholders and those of the counterparty. Requiring Merrill to make affirmative disclosures to BAC’s shareholders which, according to plaintiffs, would have caused BAC’s shareholders to vote against the merger, would have created a conflict of interest and exposed Merrill to liability to its own shareholders. See Paramount Commc’ns Inc. v. QVC Network Inc., 637 A.2d 34, 44 (Del. 1994) (“In the sale of control context, the directors must focus on one

primary objective – to secure the transaction offering the best value reasonably available . . . .”). And, given the absence of any duty to disclose to BAC shareholders, it follows that Merrill had no duty to disclose information concerning fourth quarter losses or bonus payments in the form of an “update” or “correction” because there simply can be no liability for omissions absent a duty. See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 158-59 (2008) (omissions actionable under Section 10(b) only where there exists a duty to disclose); In re IBM Corporate Sec. Litig., 163 F.3d 102, 110 (2d Cir. 1998) (citing San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos., 75 F.3d 801, 811 (2d Cir. 1996)). Because Merrill had no obligation to disclose information to BAC’s shareholders, plaintiffs’ claims under Section 10(b) relating to the alleged omission of material information concerning fourth quarter losses and the bonus cap should be dismissed.<sup>6</sup>

2. Plaintiffs’ Remaining Alleged Misstatements Are Either Accurate Statements Of Historic Fact Or Mere Puffery

The affirmative statements attributed to Merrill with which plaintiffs take issue are either accurate statements of historic fact or puffery and thus not actionable. Merrill’s statement in its earnings announcement for the third quarter of 2008 that “[w]e continue to reduce exposures and de-leverage the balance sheet prior to the closing of the BofA deal” allegedly was false and misleading because Merrill retained large amounts of toxic assets on its balance sheet which caused the fourth quarter losses. (Oct. 16, 2008 Merrill Press Release at 3 (Hakki Decl. Ex. C); Compl. ¶¶ 84, 202, 333(h).) But nothing in that statement is inconsistent with the presence of problematic assets on Merrill’s balance sheet when the statement was made. To the contrary, the use of the word “continuing” makes it clear that the de-leveraging process was not yet complete and would continue during the fourth quarter before the merger closed. Accordingly, the statement was nothing more than an accurate statement about past performance,

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<sup>6</sup> Plaintiffs focus certain of their allegations on their claims that: (1) BAC had determined that a material adverse event had occurred under the Merger Agreement as a result of Merrill’s losses (Compl. ¶¶ 210, 221, 333); (2) this loss information was material to BAC’s shareholders because BAC did not have the capital to absorb them (*id.* ¶¶ 92, 103, 224, 227, 333); and (3) BAC sought government assistance because of the losses (*id.* ¶¶ 305, 333). These allegations fail for the reasons explained in the BAC Motion. Furthermore, they do not apply to Merrill, which is not alleged to have had any knowledge of these events and was still an independent company at the relevant time.

which is not actionable under the securities laws. Nadoff v. Duane Reade, Inc., 2004 WL 1842801, at \*2 (2d Cir. Aug. 17, 2004).

Plaintiffs also challenge John Thain's comments that "the transaction will create an unparalleled global company" (Oct. 16, 2008 Merrill Press Release at 3 (Hakki Decl. Ex. C); Compl. ¶¶ 84, 202), that the merger would make "tremendous strategic sense," "gives us great opportunities" and "be a very attractive transaction" (Sept. 15, 2008 Press Conf. Tr. at 2, 3 (Hakki Decl. Ex. D); Compl. ¶ 191), and that the merger would create "the leading financial institution in the world" (Sept. 15, 2008 Merrill Press Release at 1 (Hakki Decl. Ex. E); Compl. ¶¶ 192, 333, 369). Courts in this Circuit have routinely held that such statements of optimism and puffery are not actionable. ECA & Local 134 IBEW Joint Pension Trust v. JP Morgan Chase Co., 553 F.3d 187, 205-06 (2d Cir. 2009) (optimistic statements that are too general to cause a reasonable investor to rely upon them amount to non-actionable puffery); Faulkner v. Verizon Commc'ns, Inc., 156 F. Supp. 2d 384, 388-89, 397-99 (S.D.N.Y. 2001) (statements about merger's anticipated prospects, including that the merger was a "groundbreaking agreement to fundamentally change the dynamics of the broadband industry" not actionable); In re IAC/InterActiveCorp Sec. Litig., 478 F. Supp. 2d 574, 594 (S.D.N.Y. 2007) (statement that "[w]e are convinced that this merger . . . will enhance the growth prospects for [our acquisition partner]" was not actionable).

Moreover, statements concerning future events, even if they turn out to be inaccurate in hindsight, are protected by the "safe harbor" for forward-looking statements under the PSLRA because the Complaint does not adequately allege that the makers of the statements had actual knowledge that they were false. 15 U.S.C. § 78u-5(c)(1)(B); see also In re IAC/InterActiveCorp, 478 F. Supp. 2d at 586-87 (dismissing Section 10(b) claim because language that "bespeaks caution" is not actionable under the securities laws). The statements concerning future events that plaintiffs challenge all were accompanied by language warning that the forward-looking statements involve "certain risks and uncertainties." (Oct. 16, 2008 Merrill

Press Release at 12 (Hakki Decl. Ex. C); Sept. 15, 2008 Press Conf. Tr. at 8 (Hakki Decl. Ex. D); Sept. 15, 2008 Merrill Press Release at 2 (Hakki Decl. Ex. E).<sup>7</sup>

**B. The Complaint Fails To Allege A “Strong Inference” Of Scienter As To Merrill**

Under the PSLRA, a plaintiff alleging securities fraud must “state *with particularity* facts giving rise to a *strong inference* that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2) (emphasis added). A “strong inference” is “more than merely plausible or reasonable – it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.” Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 314 (2007). A Court must therefore “consider plausible non-culpable explanations for the defendant’s conduct, as well as inferences favoring the plaintiff.” Id. at 310. Only “if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged” can the complaint be sustained. Id. at 324.

A plaintiff can establish a strong inference of scienter either (1) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness, or (2) by alleging facts to show that the defendant had both motive and opportunity to commit fraud. Acito v. IMCERA Group, Inc., 47 F.3d 47, 52 (2d Cir. 1995). The Complaint is entirely silent as to any possible motive by Merrill to artificially inflate BAC’s stock. Where, as here, no motive is pled and plaintiffs seek to establish scienter through circumstantial evidence of conscious misbehavior or recklessness, “the strength of the circumstantial allegations must be correspondingly greater.” Kalnit v. Eichler, 264 F.3d 131, 142 (2d Cir. 2001). And where, as

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<sup>7</sup> In alleging that the Definitive Joint Proxy filed by BAC on November 3, 2008 (“Proxy” or “Proxy Statement”) was false and misleading, plaintiffs note that the Proxy incorporated Merrill’s unrelated March 14, 2008 proxy statement, which plaintiffs allege misrepresented the details of Merrill’s annual bonus program. (See Compl. ¶¶ 219-20.) According to plaintiffs, these details were false because they were different from the bonus program ultimately agreed to by Merrill and BAC six months later. But there is no allegation that the March 2008 proxy was false when written – only an allegation that subsequent events made the details included in that document out of date. San Leandro, 75 F.3d 811 (failure to disclose alternative policy not misleading where company’s prior statements regarding its traditional marketing strategy “simply reflected company policy at the time” and “were not promises to maintain that policy in the future”).

here, plaintiffs' claims are based on an alleged failure to disclose, such failure satisfies the 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. 1999) (emphasis added), aff'd, 264 F.3d 131, 143 (2d Cir. 2001). Plaintiffs' scienter allegations rest primarily on the reiteration of their claims of wrongdoing; that is, that Merrill knew, but failed to disclose, its fourth quarter losses and the bonus cap agreement. (Compl. ¶¶ 231, 236.) As discussed more fully in the BAC Motion (see BAC Motion at 21-23, 33-39), plaintiffs do not allege a duty to disclose those issues, let alone an obvious and absolute one. Indeed, as noted above, Merrill owed no general duty of disclosure to BAC's shareholders. See supra at 3-5.

These fundamental failures to plead scienter against Merrill require dismissal of the Section 10(b) claims. As shown below, when one considers scienter as applied to each category of alleged misstatement or omission, plaintiffs' failure to plead scienter is even more pronounced.

1. The Bonuses

At all relevant times, including between the signing and closing of the merger with BAC, Merrill consistently disclosed its intention to pay incentive compensation of multi-billion dollars, as it had in years prior. It accrued compensation and benefits expenses through the third quarter of \$11.2 billion, which were at levels only slightly below those in 2007.<sup>8</sup> (See Oct. 16, 2008 Merrill Press Release at 8 (Hakki Decl. Ex. C).)<sup>9</sup> And the market expected that such bonuses would be paid due to the critical role of incentive compensation in retaining key

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<sup>8</sup> The existence of these accruals, which were consistent with the bonuses ultimately paid, completely nullifies plaintiffs' assertion that "paying billions of dollars in bonuses before the merger closed meant that BoA shareholders would receive an asset worth billions of dollars less than contemplated." (Compl. ¶ 77.)

<sup>9</sup> Following SEC disclosure rules, Merrill's accrued compensation expenses did not distinguish among base salary, incentive compensation and other benefits and compensation-related expenses, other than for its most senior executive officers. However, Merrill had previously disclosed in its March 14, 2008 proxy statement (incorporated as part of the Proxy) that a large part of its compensation was in the form of year-end incentive compensation. (See Merrill Schedule 14A at 29 (Mar. 14, 2008) (Hakki Decl. Ex. F).)

employees in the financial services sector.<sup>10</sup> As Merrill disclosed in its March 14, 2008 proxy, competitive compensation for key employees, even when the company is negatively impacted by various economic factors, is “essential . . . to retain them and avoid long-term damage to the franchise.”<sup>11</sup> (Merrill Schedule 14A at 28 (Mar. 14, 2008) (Hakki Decl. Ex. F).) Indeed, the Merger Agreement itself recognized the competitive landscape and required Merrill to “use reasonable best efforts to . . . retain the services of its key officers and key employees” during the period prior to the closing date. (Proxy at A-31 (Merger Agr. § 5.1(b)) (Hakki Decl. Ex. I).)<sup>12</sup>

The information in the market about the anticipated bonus payments negates any inference that Merrill sought to hide its plan to pay bonuses. As such, plaintiffs instead suggest that the nondisclosure of the Company Disclosure Schedule referenced in the Merger Agreement denotes nefarious conduct. (Compl. ¶¶ 198-99, 331, 368.) A review of the cited documents, however, again invalidates plaintiffs’ assertions.

Section 5.2 of the Merger Agreement contained a series of negative covenants limiting Merrill’s ability to take certain actions prior to the closing, including “increas[ing] in any manner the compensation or benefits of any of the current or former directors, officers or employees of Company or its Subsidiaries (collectively, ‘Employees’), [or] pay[ing] any amounts to Employees not required by any current plan or agreement (other than base salary in the ordinary course of business).” (Compl. ¶ 196 (citing Proxy at A-31-32 (Merger Agr. § 5.2))

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<sup>10</sup> See, e.g., Dana Cimilluca, Deutsche Bank’s Hiring Spree, The Wall St. J., Mar. 4, 2009 (Hakki Decl. Ex. G) (Deutsche Bank “hired 25 senior bankers from weakened rivals in the past six months,” including 12 from BAC); see also Chris Blackhurst, Eat What You Kill: Why Bonuses Never Went Away, Evening Standard, June 26, 2009 (Hakki Decl. Ex. H) (“Bonuses have been inflated by a poaching war as firms that have survived in good shape, such as Barclays, Credit Suisse and Deutsche Bank, snaffle top talent.”).

<sup>11</sup> Had Merrill not paid the bonuses, an argument might be made that Merrill had breached its (publicly disclosed) obligation under the Merger Agreement to “use reasonable best efforts to . . . retain the services of its key officers and key employees” during the period prior to the closing date of the merger. (Proxy at A-31 (Merger Agr. § 5.1(b)) (Hakki Decl. Ex. I).)

<sup>12</sup> The Complaint makes much of the “pay for performance” language in the March 14, 2008 proxy to support plaintiffs’ position that the VICP bonuses were strictly performance-based. (Compl. ¶ 70.) But plaintiffs omit the very next sentence, which states that “[t]he long-term success of the Company depends on its ability to attract and retain high-performing employees; therefore, the emphasis on annual performance has to be balanced against the Company’s recruiting and retention objectives.” (Merrill Schedule 14A at 28 (Mar. 14, 2008) (Hakki Decl. Ex. F).)

(Hakki Decl. Ex. I).) That covenant was expressly qualified by Section 5.2(c)(ii) of the Merger Agreement, which prohibited Merrill from taking such actions “except as set forth in . . . Section 5.2 of the Company Disclosure Schedule or . . . without the prior written consent of [BAC].” (See Compl. ¶ 196; Proxy at A-32 (Merger Agr. § 5.2(c)(ii)) (Hakki Decl. Ex. I).) Section 5.2 of the Company Disclosure Schedule permitted up to \$5.8 billion in bonuses. (Compl. ¶ 72.)

The Company Disclosure Schedule was anything but a “secret” side agreement. (Compl. ¶ 110.) The document was referenced at least eight times in the Merger Agreement, (see Proxy at A-8, A-13, A-14, A-15, A-17, A-24, A-31, A-35 (Merger Agr. ¶¶ 3.2, 3.7, 3.8(c), 3.11, 3.13, 3.22, 5.2, 6.6) (Hakki Decl. Ex. I)) and at least five of those references contained clauses along the lines of “other than as set forth in section [x] of the Company Disclosure Schedule” or “except as set forth . . .” (Id. ¶¶ 3.2, 3.7, 3.8(c), 3.13, 3.22, 5.2.) Indeed, the Merger Agreement expressly defines the Company Disclosure Schedule as a schedule that was to be delivered by Merrill to BAC containing “items[,] the disclosure of which is necessary or appropriate either in response to an express disclosure requirement contained in a provision hereof or as an exception to . . . one or more of the Company’s covenants contained herein.” (Id. art. III.) Had Merrill (or BAC) sought to conceal the existence of the Company Disclosure Schedule and its contents, it is implausible that it would be referenced repeatedly in the Merger Agreement or defined as clearly providing exceptions to that agreement.

## 2. The Fourth Quarter Losses

Even if a duty to disclose intra-quarter loss figures existed (which it did not), plaintiffs have not alleged that Merrill acted with the requisite scienter when it did not make that disclosure. There is no allegation that Merrill knew – or was in a position to know – whether the purported intra-quarter loss figures would be material to *BAC’s* shareholders. Similarly, most of plaintiffs’ alleged support for its claim that the losses should have been disclosed revolves around the alleged discussions and statements internally within BAC or between BAC and U.S.

Treasury officials. But there is no allegation that Merrill knew that BAC was considering invoking the MAC, or that BAC had discussions with the government regarding the MAC.<sup>13</sup>

Plaintiffs have fallen far short of alleging facts with particularity that lead to an inference of scienter on the part of Merrill that is “cogent and at least as compelling as any plausible opposing inference one could draw from the facts alleged.” Tellabs, 551 U.S. at 310. Plaintiffs’ Section 10(b) claim should therefore be dismissed as against Merrill. Xerion Partners, 474 F. Supp. 2d at 520 (“failure to properly plead scienter provides an independent basis for dismissing plaintiffs’ fraud claims”).

## **II. MERRILL IS NOT LIABLE UNDER SECTION 14(a) OF THE EXCHANGE ACT OR RULE 14a-9 (COUNT V)<sup>14</sup>**

Plaintiffs allege that Merrill violated Section 14(a) of the Exchange Act and Rule 14a-9 promulgated thereunder by making false and misleading statements with respect to material facts, and omitting material facts, from the Proxy and related materials and public statements. (See Compl. ¶¶ 327-34.) To state a claim under Section 14(a) and Rule 14a-9, a plaintiff must show that “(1) a proxy statement contained a material misstatement or omission, which (2) caused plaintiff’s injury, and (3) that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an ‘essential link’ in the accomplishment of the transaction.” Bond Opportunity Fund v. Unilab Corp., 2003 WL 21058251, at \*3 (S.D.N.Y. May 9, 2003), aff’d, 87 Fed. Appx. 772 (2d Cir. 2004).

### **A. Plaintiffs Mischaracterize Certain Communications As Solicitations Under The Proxy Rules**

Plaintiffs summarily label the September 15, 2008 press release, investor call and press conference, the September 18, 2009 Form 8-K and the October 16, 2008 press release as

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<sup>13</sup> Plaintiffs allege that “BoA’s and Merrill’s senior executives also knew of the \$2 billion goodwill impairment by November 2008 – yet represented to regulators that it arose suddenly after the shareholder vote.” (Compl. ¶ 233.) But the Complaint does not identify a single conversation by anyone at Merrill with a government official in December 2008 concerning these matters. Accordingly, the allegation has no application to Merrill.

<sup>14</sup> In its memorandum of law, BAC demonstrates the many flaws in plaintiffs’ allegations relating to their Section 14(a) claims, all of which apply with equal force to Merrill and are not restated at length here. (See BAC Motion at 22-47.)



“proxy solicitations” under Section 14(a) and Rule 14a-9. (See Compl. ¶ 329.) Courts, however, routinely hold that communications that merely describe the merger and inform the public of its terms and conditions, without encouraging or requesting shareholder approval, do not constitute proxy solicitations subject to Section 14(a) and Rule 14a-9. See, e.g., Capital Real Estate Investors Tax Exempt Fund Ltd. P’ ship v. Schwartzberg, 929 F. Supp. 105, 114 (S.D.N.Y. 1996) (press release that described terms of transaction, noted conditions to be satisfied and quoted facts was held not to be solicitation); Smallwood v. Pearl Brewing Co., 489 F.2d 579 (5th Cir. 1974) (press release announcing the basic terms of proposed merger accompanied by letter indicating board’s belief that merger would be beneficial and recommending its approval did not constitute solicitations).

Merrill’s communications during the week of September 15, 2008 provided nothing more than the facts and circumstances surrounding the merger and its various conditions, and expressed to the general public the belief that the merger was a positive development from the perspective of both BAC and Merrill. The Form 8-K issued by Merrill on September 18, 2008 was required to describe the general terms and conditions of the merger because it constituted a material definitive agreement outside the ordinary course of business. (See Merrill Form 8-K, Item 1.01 (Sept. 18, 2008) (Hakki Decl. Ex. J).) Plaintiffs do not (and cannot) allege that any one of these communications either directly or indirectly encouraged, recommended or influenced (let alone solicited) shareholders’ approval in connection with the merger. At most, these statements were designed only to “inform and motivate the public,” which is not enough to qualify as a proxy solicitation. Brown v. Chicago, Rock Island & Pac. R.R. Co., 328 F.2d 122, 125 (7th Cir. 1964); see also Capital Real Estate Investors Tax Exempt Fund Ltd. P’ ship v. Schwartzberg, 917 F. Supp. 1050, 1059 (S.D.N.Y. 1996).<sup>15</sup> Thus, plaintiffs cannot base their Section 14 claim against Merrill on documents other than the Proxy Statement itself.

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<sup>15</sup> Plaintiffs’ attempt to bring the October 16, 2008 third quarter earnings announcement within the proxy rules similarly fails. The sole purpose of the 11-page document was to announce earnings. It contains all of two very general sentences that relate to the merger. It, therefore, does not constitute a proxy solicitation.

**B. Plaintiffs Have Not Pled The Required State Of Mind**

Where a Section 14(a) claim is grounded in allegedly fraudulent conduct, as here, it is subject to the same heightened pleading requirements as Section 10(b) claims – even if a plaintiff expressly disclaims reliance on a fraud theory, as plaintiffs do (see Compl. ¶ 327). See In re JP Morgan Chase Sec. Litig., 363 F. Supp. 2d 595, 636 (S.D.N.Y. 2005) (dismissing Section 14(a) claim for failure to satisfy heightened pleading requirements for fraud, where Section 14(a) claim was based on same underlying fraudulent conduct as Section 10(b) claim); see also Rombach v. Chang, 355 F.3d 164, 170 (2d Cir. 2004) (holding that heightened pleading requirements for fraud apply beyond Section 10(b) to claims based on same fraudulent conduct). Here, plaintiffs’ Section 14(a) claim rests on the same allegations of misrepresentations and omission as the Section 10(b) claims, and thus suffers from the same flaws. (Compare Compl. ¶¶ 331-33, enumerating statements and omissions forming the basis of Section 14(a) claim, with id. ¶¶ 306(i)-(v), enumerating the same statements and omissions forming the basis of Section 10(b) claim.) As demonstrated above, plaintiffs have failed to plead a strong inference of scienter on the part of Merrill in connection with any material misrepresentations or omissions. Plaintiffs have therefore failed to satisfy the pleading requirements for the alleged conduct under Section 14(a). (See also BAC Motion at 30-33.)

**C. Merrill Is Not Responsible To BAC’s Shareholders For BAC’s Statements Or Omissions Or Information Uniquely Within BAC’s Knowledge**

An omission from a proxy statement is actionable under Section 14(a) only if it renders an affirmative statement therein misleading. See 15 U.S.C. § 78n(e); 17 C.F.R. § 240.14a-9; (BAC Motion at 22). With respect to the fourth quarter losses, plaintiffs nowhere identify an affirmative statement in the Proxy that was rendered misleading by any alleged omission. To the extent they seem to be complaining about an affirmative statement that was rendered misleading, it is BAC’s recommendation to *its* shareholders to proceed with the transaction. (See, e.g., Compl. ¶¶ 107, 111, 225, 227, 229, 291, 305, 333.) The Proxy states clearly that this was BAC’s recommendation. (See Proxy at 4, 6, 14, 28, 58, 67, 110-12 (Hakki

Decl. Ex. I.) Correspondingly, Merrill's only recommendation was made to *its* stockholders. (See Proxy at 4, 12, 28, 73, 105-10 (Hakki Decl. Ex. I.)) Plaintiffs do not and cannot argue that Merrill's recommendation to its own stockholders became misleading to BAC shareholders after the Proxy was issued, or that it was even directed to them in the first place. To the contrary, the allegedly omitted information would have, if anything, made the reasons for Merrill's shareholders to proceed with the transaction even more compelling, as Merrill was going to experience these losses with or without the transaction.

Naturally, statements or omissions made by a wholly separate entity or individual not under Merrill's control cannot be imputed to Merrill. Tracinda Corp. v. DaimlerChrysler AG, 364 F. Supp. 2d 362, 395 (D. Del. 2005), aff'd, 502 F.3d 212 (3d Cir. 2007). And in those few cases where shareholders of one pre-merger entity ("Company A") were permitted to proceed against the other entity ("Company B") or its directors or officers for statements in a joint proxy, the statements at issue were either unique to Company B, or were false at the time they were made. See, e.g., In re McKesson HBOC, Inc. Sec. Litig., 126 F. Supp. 2d 1248, 1263, 1266 (N.D. Cal. 2000) (shareholders of acquiror could pursue Section 14(a) claims against directors of target for false statements in joint proxy concerning target's financial data where "misrepresentations by directors of the target company . . . almost certainly induced reliance by shareholders of the acquiring company"); Dasho v. Susquehanna Corp., 461 F.2d 11, 19-20 (7th Cir. 1972) (shareholders of acquiror could proceed against target under Section 14(a) on the basis of target's misstatements in joint proxy); In re AOL Time Warner, Inc. Sec. & "ERISA" Litig., 381 F. Supp. 2d 192, 232 (S.D.N.Y. 2004) (plaintiffs who held pre-merger shares of both AOL and Time Warner could bring Section 14(a) claim based on AOL's pre-merger fraudulent financial statements). Those circumstances are noticeably absent here.<sup>16</sup> The alleged defects in

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<sup>16</sup> Likewise, any attempt by plaintiffs to attribute statements outside of the Proxy by non-Merrill employees to Merrill similarly fail. In Tracinda, plaintiff attempted to hold defendants (including merged company and one party to the merger) liable for statements outside of the proxy made by the other party to the merger. The court held that "[a] defendant cannot be held liable for the independent representations of a third party, even where those representations are attributed to the defendant, unless the defendant exercised the kind of control over the third party's statements that would render it liable for those statements." 364 F. Supp. 2d at 396 (internal quotation marks)

the Proxy that plaintiffs (Company A's shareholders) seek to attribute to Merrill (Company B) are a subset of those alleged against BAC (Company A). As discussed above, placing a duty on Merrill to disclose information to BAC's shareholders that is equally known to BAC would create an irreconcilable tension with the duty that Merrill owed to its own shareholders in connection with the merger. See supra at 3-5. Moreover, since the significance of the information to BAC's shareholders is more appropriately ascertained by BAC, it would be untenable to obligate Merrill to disclose such information to BAC's shareholders. Not surprisingly, there appear to be no cases imposing such an affirmative duty on a merger party vis-à-vis the counterparty's shareholders.

Similarly, Merrill cannot be responsible for statements or omissions, the substance of which is not even alleged to be within its knowledge. For instance, plaintiffs allege that the Proxy contained material misstatements by BAC or Lewis, including the extent of due diligence of Merrill (Compl. ¶ 333(a)); the pressure from the U.S. government to close the deal (id. ¶ 333(d)); that Merrill was "dramatically reducing the marks" (id. ¶ 180); and the benefits of the merger to BAC's shareholders (id. ¶ 333(f)). To allow claims based on these statements to proceed against Merrill, who is not even alleged to have knowledge of such information (let alone control over its disclosure), would extend the scope of Section 14(a) far beyond its intended limits. See Chiarella, 445 U.S. at 234 ("[T]he 1934 Act cannot be read 'more broadly than its language and the statutory scheme reasonably permit.'") (quoting Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979)).

## **CONCLUSION**

The Complaint should be dismissed with prejudice as against Merrill and MLPF&S.

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and citations omitted). Plaintiffs here do not, and could not, allege that Merrill had such control over BAC or its executives. As such, Merrill is not liable under Section 14(a) for statements made outside of the Proxy by BAC.

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Respectfully submitted,

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