UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE BANK OF AMERICA CORP. SECURITIES, DERIVATIVE, AND EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) LITIGATION	Master File No. 09 MD 2058 (PKC) ECF Case
THIS DOCUMENT RELATES TO Consolidated Securities Action	Oral Argument Requested

REPLY MEMORANDUM OF LAW IN SUPPORT OF OUTSIDE DIRECTORS' MOTION FOR SUMMARY JUDGMENT

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Dated: July 17, 2012

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Plaintiffs' opposition ("Pls. Opp.") raises no genuine issue of negligence by the Outside Directors regarding the Merger disclosures. Plaintiffs weakly attempt to manufacture disputes of fact as to what the Outside Directors knew, but there are no real factual disputes. In any event, Plaintiffs' claims rest on the legally unsound notion that the Outside Directors had an obligation to personally perform and second-guess the work of highly trained securities lawyers, and are liable for billions of dollars in alleged damages because they did not. That contention is untenable on the undisputed record, and the Outside Directors are entitled to summary judgment.

ARGUMENT[1]

I. THERE IS NO BASIS FOR LIABILITY UNDER SECTION 11

There is no genuine dispute that after a "reasonable investigation," the Outside Directors had "reasonable grounds for belief" that the offering documents were accurate, establishing their Section 11 statutory defense. *See* Dirs. Br. at 5-13. SEC Rule 176 identifies "relevant circumstances" for determining whether defendants have established their statutory defense. *See id.* at 7-8. Plaintiffs' opposition does not even mention Rule 176, let alone grapple with the relevant circumstances that demonstrate the "reasonableness" of the Outside Directors' conduct.

First, Plaintiffs do not contest that as non-management directors, Pls. Resp. to Defs. 56.1 Stmts. at 139, the Outside Directors are held to a less stringent standard of investigation under Rule 176. *See* Dirs. Br. at 10 (citing SEC Rule 176(e); 17 C.F.R. § 230.176(e)). Plaintiffs' assertion that each Board member was obligated to personally review the September 18, 2008 Form 8-K that was incorporated into the offering documents, including every word of the attached 60-page Merger Agreement (and the schedule that it referenced but did not contain, which had yet to be finalized), *see* Pls. Resp. to Defs. 56.1 Stmt. at 148, grossly overstates the

[1] The Outside Directors do not address every allegation in Plaintiffs' Counterstatement of Facts ("Pls. CS"), many of which are contested but immaterial to this motion. The Outside Directors also join the arguments in BAC's reply in support of its motion for summary judgment.

directors' duty of "reasonable investigation," even for inside directors. No such obligation exists, either generally, *see In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 749 n.424 (Del. Ch. 2005) (board "need not read *in haec verba* every contract or legal document that it approves"), *aff'd*, 906 A.2d 27 (Del. 2006), or under the securities laws, least of all for outside directors, *see* Dirs. Br. at 10.

It is simply incorrect that the Outside Directors did not conduct "*any* investigation," Pls. Opp. at 99, because they reviewed the key terms of the Merger on September 14, Dirs. 56.1 Stmt. ¶¶ 2-4.[2] There was no mention of the Bonus Cap, however, and there is no evidence that the Outside Directors knew or should have known about it or the timing of Merrill's bonuses at any time prior to the October 2008 offering. *Id.* ¶¶ 5-6; Dirs. Br. at 10. The fact that John Thain allegedly regarded the Bonus Cap as a key term, *see* Pls. Resp. to Defs. 56.1 Stmts. at 142, says nothing about when the Outside Directors learned about it. The only other evidence Plaintiffs cite is John Collins's vague recollection that the Board was told at some unspecified time that Merrill expected to pay about $5 billion in 2008 bonuses, and the even vaguer recollection of Charles Gifford. Pls. Opp. at 97-98 & n.67. But Plaintiffs do not even argue that any such discussion took place *before the offering*. *Id.* at 98 n.67 (arguing that discussion "occurred prior to the shareholder vote"). It is therefore entirely irrelevant to the Section 11 claim.

Second, Plaintiffs disregard that the alleged falsity appeared in an 8-K report for which the Outside Directors bore no responsibility. Dirs. 56.1 Stmt. ¶¶ 10-11. In Rule 176, the SEC recognized that such lack of responsibility for a filing incorporated by reference into offering

[2] Plaintiffs' argument that the Court must disregard testimony elicited in the Delaware action, Pls. Opp. at 93 n.63, is frivolous. Rule 32(a) governs the use of depositions only "[a]t a hearing or trial." At summary judgment, sworn deposition testimony may be used "regardless of whether the testimony was taken in a separate proceeding." *Gulf USA Corp. v. Fed. Ins. Co.*, 259 F.3d 1049, 1056 (9th Cir. 2001); *see also* John A. Kimpflen et al., 10A Federal Procedure § 26:498 (2012). The parties' agreement that Delaware testimony "will not be admissible" is irrelevant. Evidence proffered on summary judgment need not be admissible; it must merely "set out *facts* that *would be* admissible" at trial. *See* Fed. R. Civ. P. 56(c)(4) (emphasis added); *see also, e.g.*, *Attenborough v. Constr. & Gen. Bldg. Laborers' Local 79*, 691 F. Supp. 2d 372, 383 (S.D.N.Y. 2009).

documents is a basis for excusing defendants for misstatements it may contain. *See* Dirs. Br. at 12-13 (citing 17 C.F.R. § 230.176(h)). Plaintiffs offer no support for their outlandish contention that the Outside Directors were obligated to ensure the accuracy of all statements in every incorporated filing. *See* Pls. Resp. to Defs. 56.1 Stmts. at 146. Likewise, absent some "red flag" to suggest that protocol was ignored, the Outside Directors had no obligation to inquire into whether BAC's Disclosure Committee—composed solely of BAC management—had reviewed, or needed to review, the 8-K filing. *See id.* at 146-47, 148-49.

Finally, Plaintiffs fail to address that the SEC has affirmed that delegation of technical legal matters that it would be unreasonable for the Outside Directors to perform personally can constitute "a full discharge" of a director's Section 11 responsibilities. Dirs. Br. at 8 (citing, *inter alia*, SEC Release No. 6335, 1981 WL 31062, at *14). Plaintiffs make no effort to show why the Outside Directors' delegation to management, with counsel's assistance, to complete the documentation for the Merger and ensure that BAC's related disclosures contained all legally required information did not "full[y] discharge" their responsibilities. *See* Dirs. Br. at 11-12.

Rather, ignoring Rule 176, Plaintiffs ask this Court to adopt a new and untenable standard that would require non-management directors without legal training to second-guess the work of skilled securities lawyers. According to Plaintiffs, Section 11 required each of the Outside Directors: to review the Form 8-K incorporated by reference into the offering documents and conduct a paragraph-by-paragraph review of the Merger Agreement that it attached; to notice references in the Merger Agreement to a confidential schedule and to track down its contents; to perceive the discrepancy Plaintiffs claim between the covenant that Merrill would not pay 2008 bonuses without BAC's consent and the disclosure schedule's terms regarding the Bonus Cap—and then, to determine that counsel had erred in concluding that the schedule did not need to be

disclosed and to overrule that legal judgment.[3] No outside director would ever assume that duty.

Nor do any of the authorities Plaintiffs cite, Pls. Opp. at 99-100, support their impracticable view of outside directors' responsibilities to police the details of complex corporate disclosures. The alleged flaws here were not misstatements about fundamental issues such as the corporation's financial results or business risks, but ancillary contract terms that were not even reviewed with the Board when it approved the Merger. And unlike in *In re WorldCom, Inc. Sec. Litig.*, 2005 WL 638268, at *11-12 (S.D.N.Y. Mar. 21, 2005), it is undisputed that the Outside Directors are not "insiders," and there are no "red flags" that signaled a need for a searching investigation of the Form 8-K. *See* Dirs. Br. at 9. Plaintiffs' remaining authorities—the most recent of which is almost 40 years old—not only pre-date the SEC's integrated disclosure regime and Rule 176, *see* 47 Fed. Reg. 11380-01, but are distinguishable on the facts.[4]

II. THERE IS NO BASIS FOR LIABILITY UNDER SECTION 14(a)

A. The Directors Were Not Negligent As to the Alleged "Bonus" Non-Disclosures

For largely the same reasons as described above, summary judgment is also warranted on Plaintiffs' claim for nondisclosure of the Bonus Cap under Section 14(a). As Plaintiffs concede, only if the Outside Directors "should have been aware of deficiencies" in the Proxy would there be a duty under Section 14(a) to "remedy or inquire about them." *In re Bank of Am. Corp. Sec., Deriv. & ERISA Litig.*, 757 F. Supp. 2d 260, 324 (S.D.N.Y. 2010). As with the offering

[3] Plaintiffs contend that counsel did not formally opine that the Bonus Cap did not need to be disclosed, Pls. Resp. to Defs. 56.1 Stmts. at 151-52, but the Merger Agreement and Form 8-K were indisputably counsel's work product and reflected their considered view that disclosure of the Bonus Cap was not required, Dirs. 56.1 Stmt. ¶ 14.

[4] In *Gould v. American Hawaiian Steamship Co.*, 351 F. Supp. 853, 866-67 (D. Del. 1972), the proxy falsely stated that entities controlled by the directors had agreed to vote for the merger, even though the directors—who were personally interested in the transaction, and in a position to benefit from that statement—*knew* there was no such agreement. In *Feit v. Leasco Data Processing Equipment Corp.*, 332 F. Supp. 544, 576-79, 581 (E.D.N.Y. 1971), defendants were "[i]nside directors with intimate knowledge of corporate affairs and of the particular transactions" who knew that "crucial" information had been omitted from the prospectus. Finally, in *Escott v. BarChris Construction Corp.*, 283 F. Supp. 643, 654-80 (S.D.N.Y. 1968), the prospectus was riddled with affirmatively misstated financials—a situation that bears no resemblance to this case, which rests on an alleged failure to disclose an exception to a negative covenant in a confidential schedule (that "typically" would not be disclosed) from an 8-K incorporated by reference into the prospectus.

documents, there is no basis to conclude on the record here that the Outside Directors knew or should have known that the Proxy's disclosures about Merrill's 2008 bonuses were deficient.

There is no evidence that the Outside Directors learned about the Bonus Cap before the Proxy was filed,[5] or that they learned after the Proxy was filed that it misrepresented the terms of the Merger Agreement and thus needed to be corrected. *See* Dirs. Br. at 14-15. Nor did the standard of care for non-management directors require the Outside Directors to personally repeat the work that they had delegated to management and the highly specialized lawyers who had documented the Merger Agreement and prepared the Proxy—and then to second guess and overrule their expert conclusions. As in *SEC v. Shanahan*, Plaintiffs have developed no "probative evidence," such as expert testimony, regarding the Outside Directors' duties as non-management directors and, thus, a "jury could only speculate as to whether [they] failed to exercise reasonable care in overseeing [the Proxy]." 646 F.3d 536, 547 (8th Cir. 2011). That failure is "fatal to [their] case." *Id.* at 546. Moreover, in *Shanahan*, the Court held that the defendant was not negligent because he did not draft the proxy, believed it was truthful and accurate, did not perceive that it contained any misleading statements and was never made aware of any reason to be concerned that the disclosures were not accurate. *Id.* at 547. The same is true for the Outside Directors here. *See* Dirs. Br. at 15-16.

B. <u>The Directors Were Not Negligent As to the Alleged "Loss" Non-Disclosures</u>

Plaintiffs' opposition likewise fails to show any basis to conclude that the Outside

[5] Messrs. Collins's and Gifford's testimony that Merrill's expected bonuses were discussed at some point in the fourth quarter, Pls. Opp. at 97-98 & n.67, is not evidence that they were discussed *before* the Proxy was filed on November 3, 2008. Plaintiffs argue, based on Mr. Collins's recollection that the bonus pool was about $5 billion, that the discussion must have occurred before November 11, when Merrill reduced the projected pool to $3.8 billion, *id.* at 98 n.67, but that does not mean the discussion took place before the Proxy was filed, as it could have occurred at the Board's November 7 meeting, *see* Ex. 42.

"Ex." refers to the exhibits attached to the Declaration of Brian M. Burnovski filed in support of the Outside Directors' motion, and the Supplemental Declaration of Brian M. Burnovski filed herewith. "Ross Ex." refers to the exhibits attached to the Declaration of Hannah G. Ross, filed in support of Plaintiffs' opposition.

Directors were negligent in connection with the nondisclosure of Merrill's interim and forecasted fourth quarter losses. *See* Dirs. Br. at 16-20.

Plaintiffs assert, relying on vague testimony from Joe Price, that there is evidence that the Outside Directors received specific forecasts for Merrill's fourth quarter prior to the stockholder vote. Pls. Opp. at 92-93. Not only does the Complaint allege the opposite—*i.e.*, that the Outside Directors were *not* informed of Merrill's fourth quarter losses prior to the vote, Compl. ¶ 249, a position it suited Plaintiffs to maintain when attempting to plead scienter against members of management—but Mr. Price's testimony creates no genuine issue of fact. There is not a shred of documentary evidence—not in emails, minutes, Mr. Price's files or the Outside Directors' contemporaneous notes—that the Board was given any specific interim results or fourth quarter forecasts for Merrill before the vote. *See* Pls. CS ¶ 208 ("There is no evidence that, [prior to] the shareholder vote," the Outside Directors "reviewed any financial information concerning Merrill's fourth quarter performance."). Nor, in two days of deposing Mr. Price (who was also deposed at least five times in related actions), did Plaintiffs elicit testimony that he provided any particular results or forecasts prior to the vote. *See* Dirs. Br. at 18 n.7. Mr. Price's testimony that he "*generally* would update" the Board about the most current quarterly forecast, Ross Ex. 84 at 177:20-178:2 (Price 10/29/09 NYAG Dep.) (emphasis added), and "*generally* would tell [the Board] . . . *kind of* where things stood on pertinent issues," including "*kind of* where the forecast stood at that point [*i.e.*, on December 5, *after* the vote]," Ross Ex. 42 at 351:9-17 (Price Dep.) (emphasis added), is inadequate to create a genuine issue as to whether the Outside Directors received any interim fourth quarter results or forecasts for Merrill prior to the vote.[6]

[6] Plaintiffs suggest that the Board could have received Merrill's estimated October results as part of a "further discussion" of "market disruption related charges to Merrill" referenced in notes of the November 7 Board call. Pls. Opp. at 94 & n.64; Pls. Resp. to Defs. 56.1 Stmts. at 163-164 (citing Ross Ex. 83). But Plaintiffs' speculation creates no genuine issue of fact, particularly in view of the avalanche of contrary testimony and the absence of any documentary evidence. *See Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 723 (2d Cir. 1994) ("conjecture or surmise" cannot defeat summary judgment). Plaintiffs never asked Mr. Price about the November 7

Nor can the Outside Directors be viewed as negligent for not requesting to see Merrill's interim and forecasted results before the vote. Pls. Opp. at 93-94. Plaintiffs concede that the "Board was constantly being updated on the status of the Merger," Pls. Resp. to Defs. 56.1 Stmts. at 163, and was advised generally about the "impact of the economic downturn on Merrill" and that it "[wa]s facing the same difficulties" as BAC, Pls. CS ¶ 203. Indeed, Merrill's *own* directors apparently never received any fourth quarter loss forecasts (as Mr. Thain deemed them unreliable), Dirs. 56.1 Stmt. ¶ 52, which refutes the notion that BAC's directors were negligent not to request them. The Outside Directors had no reason to believe that Merrill's losses were disproportionate to those being suffered in the fourth quarter by other financial institutions, including BAC, much less that they might require some extraordinary, intra-quarter disclosure.

Plaintiffs make much of Mr. Lewis's report to the Board on November 7 that "October may have been the worst month in history," Pls. Opp. at 94, but his observation, which was true for much of the industry, did not reference Merrill specifically. Plaintiffs never asked Mr. Lewis about the statement, and one director testified that it referenced the "market environment" generally. *See* Ex. 61 at 114:3-10 (Lozano DE Dep.).[7] Plaintiffs argue that even general accounts of Merrill's difficulties should have prompted the Outside Directors to inquire further, because they were contrary to an alleged report on September 14 that Merrill was projected to have a "flat" fourth quarter. Pls. Opp. at 94. But General Franks's testimony, the sole evidence on which Plaintiffs rely, does not support that contention. When asked specifically if there was

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discussion, and General Franks testified specifically that it was merely a "general categorization of issues within Merrill where we were seeing difficulties" in certain asset categories. Ex. 5 at 145:16-21 (Franks DE Dep.). Nor is there any "conflict" between Mr. Price's testimony and the Outside Directors' testimony, which is that they were *generally* kept apprised of Merrill's financial condition, *see, e.g.*, Ross Ex. 34 at 56:20-57:6 (Collins NYAG Dep.); Ross Ex. 12 at 26:22-28:18 (Franks NYAG Dep.).

[7] Plaintiffs misleadingly reverse two quotes from the November 7 meeting notes to create a misimpression that the discussion of Merrill's market-disruption charges occurred in the context of discussing October results. *See* Pls. Opp. at 94 & n.64. But regardless, Plaintiffs' manufactured "factual dispute" is irrelevant, because there is no evidence that anyone believed that the information discussed on November 7 might require additional disclosure.

any discussion of the "flat fourth-quarter model" on September 14, General Franks responded, "I don't reflect it in my notes and I don't recall it." Ross Ex. 12 at 148:14-18 (Franks 10/7/09 NYAG Dep.).[8] As there is no evidence that the Outside Directors knew or should have known of Merrill's interim results or forecasts before the stockholder vote, they cannot have been negligent for not requiring that such information be disclosed. *See* Dirs. Br. at 16-17, 19.

Even if there were some issue as to what the Outside Directors knew or should have known, there would still be no basis to find them negligent. *See* Dirs. Br. at 19-20. It is undisputed that management never expressed any concerns about the Proxy, *see* Pls. Resp. to Defs. 56.1 Stmts. at 168-69, and that disclosure of Merrill's intra-quarter forecasts would have been highly unusual, *id.* at 169. The Proxy and incorporated documents already had conveyed a "grim portrait," and no "red flags" signaled the need for additional disclosures. Dirs. Br. at 19.

Plaintiffs argue that the Outside Directors nevertheless had a duty to "investigate" whether developments after the Proxy was filed had to be disclosed. Pls. Opp. at 94-95. But the only case they cite is *WorldCom*, Pls. Opp. at 95, which as noted above addressed directors' obligations under Section 11, and denied summary judgment to a director whose "insider" status was disputed and who had been confronted with numerous "red flags" of a massive, ongoing accounting fraud. *See* p. 4, *supra*; Dirs. Br. at 9. *WorldCom* says nothing about outside directors' responsibility to investigate whether proxy disclosures should be updated.

In any event, management and counsel *had* investigated whether additional disclosures were warranted and had determined, prior to the Board's November 21 meeting—its last before the vote—that they were not. *See* Dirs. Br. at 20; Dirs. 56.1 Stmt. ¶¶ 36-43. Plaintiffs argue that this fact is irrelevant, because the Outside Directors did not *themselves* conduct the analysis, nor

[8] Ms. Lozano recalled that the Board received an estimate of Merrill's expected *third* quarter results on September 14, Ex. 61 at 34:23-35:8 (Lozano DE Dep.) (expected "Q3" loss of $7 billion), but no fourth quarter estimate, *id.* at 37:22-25, as is corroborated by her contemporaneous notes, Ex. 63 at UR-BAC-DIR-DE00002562.

were they told what had been determined. Pls. Opp. at 96; *see also, e.g.*, Pls. Resp. to Defs. 56.1 Stmts. at 179. But outside directors with no legal background are not required to conduct their own legal analysis of a complex proxy disclosure issue when they have delegated such matters to management and counsel and, as here, had no reason to doubt that those experienced individuals were properly discharging that directive. Dirs. 56.1 Stmt. ¶¶ 7-8; *see also id.* ¶ 45 (Mayopoulos did not raise issue with Board because "there was nothing for the board to do").[9] Moreover, it is not enough for Plaintiffs to argue that the Outside Directors were negligent because they "should have asked" for more information. Rather, Plaintiffs must come forward with evidence that would support a verdict that an "act or omission of the [Outside Directors] caused the loss for which [Plaintiffs] seek[] to recover damages." 15 U.S.C. § 78u-4(b)(4). To do so, Plaintiffs need to prove that a non-negligent director would have *overruled* management's and counsel's judgment *and required disclosure*, but Plaintiffs have developed no evidence that would permit a jury to so decide. Plaintiffs' argument that the Outside Directors "should have asked" does not begin to show that they *caused* any loss. *See Shanahan*, 646 F.3d at 547.

Finally, the Outside Directors cannot be negligent for not requiring disclosure of interim results or forecasts that were created *after* November 21, 2008, when the Board last met before the stockholder vote. Plaintiffs baldly assert that the Board should have called a special meeting between November 21 and the December 5 vote, *see* Pls. Resp. to Defs. 56.1 Stmts. at 180, but point to nothing that would have compelled any reasonable directors to convene such a meeting.

C. The Directors Were Not Negligent As to the Alleged "MAC" and "Accretion/Dilution" Non-Disclosures

Plaintiffs raise no genuine issue regarding their purported "MAC" or "accretion/dilution"

[9] Plaintiffs contend that Mr. Mayopoulos received "inaccurate and incomplete information about Merrill's losses," Pls. Resp. to Defs. 56.1 Stmts. at 173-74, 175-76, but the purported facts they identify all arose *after* November 21, *see id.* at 179. Plaintiffs also assert that Wachtell gave no "opinion" regarding disclosure, *id.* at 173, 174-75, but Wachtell's attorneys testified that they "agreed" with "the analysis, the logic and the conclusions that Mr. Mayopoulos set forth" on November 20. Dirs. 56.1 Stmt. ¶ 41; Ex. 62 at 50:18-23 (Herlihy NYAG Dep.).

claim. They fail to explain how these unpled claims are properly asserted. *See* Dirs. Br. at 21 & n.10; *see also* BAC Opp. to Pls. Mot. for Partial SJ (Docket No. 646) at 33-39. And even if they were, Plaintiffs raise no genuine issue that would preclude summary judgment. There is no evidence that anyone believed before the vote that there were grounds for a MAC claim,[10] let alone that any Outside Director knew or should have known of such a belief. Dirs. Br. at 21-22. And Plaintiffs concede the directors did not know of any new accretion/dilution estimate prior to the vote. Pls. Resp. to Defs. 56.1 Stmts. at 196-97; *see also* Dirs. Br. at 22-23. The bare assertion that the Outside Directors had an obligation to inquire into these issues and demand disclosure is unsupported and legally incorrect. *See* pp. 5, 8, *supra*.[11]

III. THERE IS NO BASIS FOR "CONTROLLING PERSON" LIABILITY

For the reasons set forth above and in the Outside Directors' opening brief, they are also entitled to summary judgment on Plaintiffs' Section 15 and Section 20 claims. The Outside Directors "had no knowledge of or reasonable ground to believe in the existence of" the Bonus Cap, as required under Section 15. 15 U.S.C. § 77o(a). *See* pp. 2, 5, *supra*; Dirs. Br. at 9-13, 23-25. Nor is there evidence that they were in a "meaningful sense, a culpable participant" in the alleged disclosure violations, *see* pp. 4-10, *supra*; *see also* Dirs. Br. at 10-11, 15-18, 23-25, or that they failed to act "in good faith," as required under Section 20(a). 15 U.S.C. § 78t(a).

CONCLUSION

For the foregoing reasons, summary judgment should be granted in favor of the Outside Directors on all claims in the Complaint, and the action should be dismissed with prejudice.

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[10] BAC Treasurer Jeffrey Brown's testimony that Merrill could reduce its balance sheet to $800 billion "without having a material impact on the business," Declaration of Steven B. Singer, dated June 29, 2012 (Docket No. 593), Ex. 4 at 49:7-17 (Brown Dep.), does not "confirm" that by November 26, 2008, "Merrill had suffered a 'material impact' on its business," Pls. Opp. at 95 n.65. Mr. Brown did not testify that anyone contemplated a reduction that would give rise to a MAC under the Merger Agreement.

[11] Summary judgment on the accretion/dilution claim is also warranted because disclosure of the new forecast was not legally required. *See* Dirs. Br. at 21-22; *see also* BAC Opp. to Pls. Mot. for Partial SJ at 14-33.

Dated: New York, New York
July 17, 2012

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