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: Consolidated Securities Action	:	

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT JOE L. PRICE'S MOTION FOR SUMMARY JUDGMENT

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Defendant Joe L. Price respectfully submits this Reply Memorandum in further Support of his Motion for Partial Summary Judgment. Mr. Price also joins in the Reply Memorandum in Support of BofA's Motion for Summary Judgment.[1]

ARGUMENT

I. Mr. Price Did Not Solicit A Proxy Under Section 14

The issue with respect to Mr. Price's summary judgment motion on plaintiffs' Section 14(a) claim is whether Mr. Price "actually solicited" a proxy. *See In re Bank of America*, 757 F. Supp. 2d 260, 293 (S.D.N.Y. 2010). This Court correctly held in ruling on motions to dismiss in the Derivative Action that the Joint Proxy was solicited on behalf of Bank of America's Board of Directors. *See id.* As the Court previously noted, SEC regulations contemplate that a proxy is ordinarily solicited by the registrant and its Board of Directors. *See id.* (discussing 17 C.F.R. § 240.14a-101, Item 4(a)(2)).

Plaintiffs nonetheless challenge this Court's decision, erroneously suggesting that any positive public statement, or indeed, any action whatsoever necessary to effect a merger, could be found by a jury to be a "solicitation," and thereby creates a factual issue precluding summary judgment. But this vastly overstates the reach of the term "solicit" in the statute and regulations.[2] Even if the Court is inclined to revisit its prior ruling, and consider at plaintiffs'

[1] This Reply does not address numerous allegations about Mr. Price in plaintiffs' omnibus "Counterstatement of Facts" that are not germane to Mr. Price's current motion, but we note that these allegations are generally hotly disputed. To give but one example, the counterstatement asserts that on a November 20, 2008, phone conference, Mr. Price "reversed counsel's decision to disclose Merrill's $5 billion after-tax loss" even though Mr. Mayopoulos has testified without contradiction that Mr. Price was not told of any conclusion, determination, or decision, preliminary or otherwise, reached by any lawyer until the November 20 phone conference, when Mr. Price was told unanimously that disclosure was not required.

[2] Section 14(a) uses the word "solicit, which means "to approach with a request or plea" or to "strongly urge." *Webster's Third New International Dictionary*. The regulations similarly refer to communications "reasonably calculated to *result in the procurement…of a proxy*." 17 C.F.R.

urging whether Mr. Price can be considered a "participant" in the solicitation, not one of the "facts" to which plaintiffs point creates a genuine dispute on this issue.

(1) Mr. Price's Statements During an Analyst Call on September 15, 2008 —The Second Amended Complaint fails to allege that Mr. Price's September 15 statements give rise to any liability on his part under Section 14. As demonstrated in BofA's memorandum opposing plaintiffs' motion for partial summary judgment, the statements on this call were neither false nor material.[3] Moreover, this Court previously held in the Derivative Action that statements from the September 15, 2008 conference call with analysts "cannot form the basis of a claim under Section 14(a) or Rule 14a-9, which are directed to the contents of a proxy solicitation" because those comments "were made at a press conference, and there is no allegation they were incorporated by reference into the Joint Proxy." *In re Bank of America*, 757 F. Supp. 2d at 317. Plaintiffs take issue with this holding in a footnote, saying that the Court was not presented with the decision in *Long Island Lighting Co. v. Barbash*, 779 F.2d 793, 796 (2d Cir. 1985). *See* Pls.' Opp'n Br. at 75 n.46. However, *Long Island Lighting* is not inconsistent with this Court's decision. As explained in *Capital Real Estate Investors Tax Exempt Fund P'ship v. Schwartzberg*, a case on which plaintiffs otherwise rely, the "*Long Island Lighting* test and SEC

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§ 240.14a–1(l)(iii). Plaintiffs' interpretation would sweep in not only those who "request" or "urge" a shareholder for his proxy, but also others who merely assist those who actually make the request. The Supreme Court recently condemned an analogous approach to the extension of civil liability under the securities laws in *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011), holding that an overly broad interpretation of the verb "make" in the phrase "[t]o make any untrue statement of material fact," would effectively extend securities liability to aiders and abettors, which the Court had rejected in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994).

[3] Specifically, Mr. Price on the call described the accretion/dilution projection as an "estimate," and it was clear that this estimate would not be updated and was subject to risks. *See* BofA's Memorandum of Law in Opposition to Plaintiffs' Motion For Partial Summary Judgment (Dkt. 646) and accompanying counterstatement of material facts.

Rule 14a–1, 17 C.F.R. § 240.14a–1, both of which are based on *SEC v. Okin*, 132 F.2d 784, 786 (2d Cir. 1943), *may not be applied uncritically to announcements by issuers of material corporate developments*." 929 F. Supp. 105, 110 (S.D.N.Y. 1996) (emphasis added). This is because companies are under specific obligations to alert the market promptly to material corporate events such as proposed mergers. *Id.* Notably, the court in *Capital Real Estate* held that two of three press releases relating to a proposed merger were *not* solicitations, finding only a press release that specifically "convey[ed] the recommendation of the general partners that the merger be approved" to be a solicitation. *Id*. at 107. Nowhere in the September 15 analyst call did Mr. Price (or anyone else) expressly urge shareholders to approve the transaction, and nothing in plaintiffs' cases undermines this Court's prior holding that the September 15 statements did not constitute "solicitations" as a matter of law. *See also Brown v. Chicago, Rock Island & Pacific R.R. Co.*, 328 F.2d 122, 125 (7th Cir. 1964) (holding communications for bona fide purpose other than securing proxies are not solicitations); *Smallwood v. Pearl Brewing Co*. 489 F.2d 579, 600-01 (5th Cir. 1974) (same).[4]

[4] Plaintiffs' cases, moreover, address the unique circumstances presented by proxy contests, where there is a greater danger of evasion of proxy rules. After *SEC v. Okin*, 132 F.2d 784, 786 (2d Cir. 1943), which involved a proxy contest where a letter sent to shareholders was intended as a step in a "continuous plan" to later solicit a proxy, the SEC amended the definition of "solicitation" by adding a third prong encompassing "communication(s) to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy." Adoption of Amendments to the Proxy Rule, Exchange Act Release No. 34-5276, 1956 WL 7757 (January 17, 1956) (codified as 17 C.F.R. § 240.14a-1(l)(iii)). At the same time the SEC adopted Rule X-14A-11 "Special Provisions Applicable to Election Contests." *Id*. (codified as 17 C.F.R. § 240.14a-12(c)). The release announcing both amendments stated, "The principal purpose of the amendments is to clarify the applicability of [14A] to proxy contests." It further stated that it was not the intention of the Commission to subject "communications containing information and comment concerning the business of the character normally sent to security holders by corporate management during a course of a fiscal year" to the proxy rules. *Id.*

(2) Mr. Price's Signature on the Form S-4 and Amended Forms — Our opening brief erroneously excerpted language from the Form S-4 in arguing that it could not be the solicitation of a proxy. We regret the misplaced reliance on that language. Nonetheless, signing the Form S-4 (and amendments) as an officer of the Bank does not make Mr. Price a solicitor of the proxy, and Mr. Price's counsel's error should not overshadow that critical point.

Whether or not a Form S-4 can ever constitute the solicitation of a proxy is a separate question from whether Mr. Price's signing of the Form S-4 was a solicitation of a proxy in this case. The Form S-4s included drafts of the Joint Proxy. This Court previously held that the final Joint Proxy was solicited on behalf of the Board of Directors, and each draft of the Joint Proxy likewise stated that it was the Board of Directors (not Mr. Price) that recommended that shareholders vote to approve the merger. This Court previously found the language of the Joint Proxy dispositive and should do so again. SEC regulations required Mr. Price, as the CFO, to sign the Form S-4 in order to register securities to be issued to Merrill shareholders under the 1933 Securities Act. By signing the Form S-4, Mr. Price did not recommend that Bank shareholders take any action or otherwise make himself a solicitor of their proxies.

Finally, plaintiffs argue that the Form S-4 was "integral to the merger" (Pls.' Opp'n Br. at 74), but plaintiffs cite no authority for the proposition that performing an act "integral" to the merger renders one a "solicitor" of a proxy for that merger. If it did, hundreds of Bank of America employees who played roles that were "integral" to the merger would be deemed to be "solicitors" for purposes of liability under Section 14.

(3) Mr. Price's Comment at the Shareholder Meeting — Mr. Price's statement at the December 5 shareholder meeting was not pleaded in the Second Amended Complaint, and as previously explained in BofA's opposition to plaintiffs summary judgment motion, any

comments at the shareholder meeting were heard by only a few shareholders, are not material, and cannot form a basis for relief for the named plaintiffs who did not hear the comments—much less for class-wide relief. In any event, Mr. Price did not "solicit" at the meeting. Mr. Lewis began the meeting by stating that "The board recommends a vote for all of the items on the ballot." Ross Decl. Ex. 39 at BAC-ML-NYAG 80003759. Mr. Price, who was there to answer questions in his capacity as an officer of Bank of America, spoke only once and did not urge any particular action by those present.[5]

II. Mr. Price Did Not Sign A Registration Statement Containing A Material Misrepresentation Or Omission

Mr. Price's motion for summary judgment on plaintiffs' Section 11 claim turns on whether Mr. Price can have "signature liability" for alleged misrepresentations in documents he

[5] Mr. Price commented during the discussion of Item 3 on the agenda, concerning authorization "to increase the number of authorized shares of common stock" for future issuance. Ross Decl. Decl. Ex. 39 at BAC-ML-NYAG 80003773. Shareholders had been asking about the immediate dilutive effect of this resolution, *i.e.* whether it meant the issuance of more Bank common stock and thus the dilution of the value of the shareholders' stock. *Id.* at BAC-ML-NYAG 80003773-75. It was in the context of these questions that Mr. Lewis made a reference to the previously announced forecasted accretive/dilutive effect of the transaction. *Id.* at BAC-ML-NYAG 80003774. When the shareholders asking the questions about dilution and Item 3 appeared to remain confused, Mr. Price sought to clarify that, in fact, Item 3 was unrelated to the issuance of shares in the Merrill transaction that Mr. Lewis had mentioned. When read in full context, Mr. Price's comment is easily understandable as such, "I think the resolution is for the authorization of 7.5 million shares….Those will not be issued. That provides us with shares to be issued in the future and actually is not part of the transaction itself….The dilution of the transaction in the shares associated with transaction reflected in the proxy, Mr. Lewis has referred to as shown in the financials there." *Id.* at BAC-ML-NYAG 80003776. In other words, to answer the shareholder's question, Mr. Price noted that Item 3 had no current dilutive effect. He then noted that Mr. Lewis's reference to the accretion/dilution analysis in the Joint Proxy was a different issue, concerning the issuance of shares in connection with the transaction. Even accepting at face value plaintiffs' strained contention that Mr. Lewis was somehow attesting to the present accuracy of the heavily caveated accretion/dilution analysis in the Joint Proxy, Mr. Price was plainly making no comment whatsoever about the past, current, or future accuracy of any particular projections. He was merely noting that the shareholder and Mr. Lewis were talking about two different things, and answering the shareholder's question in the context of the particular resolution specifically being discussed.

did not sign, that were incorporated by reference into other documents he did not sign, solely because he signed the Bank's 2007 Form 10-K in February 2008 — not alleged to contain any misrepresentations — that was incorporated by reference into these documents. Plaintiffs cite no case imposing Section 11 liability with this level of attenuation, and the only case we have found where an officer did not sign the initial shelf registration (a case relegated to a footnote in plaintiffs' opposition) rejected the theory of liability that plaintiffs put forward.

To be clear, Mr. Price does not contend that he could not have Section 11 liability for a material misstatement or omission in a Form 10-K that he signed if incorporated by reference into the Bank's shelf registration and/or its prospectus. The SEC's regulations provide that where a company's annual filings are incorporated by reference into a registration statement (or a prospectus) to satisfy a requirement to provide updated information, that Form 10-K "for purposes of determining any liability under the Securities Act of 1933…shall be deemed to be a new registration statement relating to the securities offered therein…." 17 C.F.R. § 229.512(b); *see also* 17 C.F.R. § 229.512(a)(2). Thus, with respect to the Form 10-K incorporated by reference into the registration statement and prospectus, Mr. Price is considered the signer of a "new" registration statement.

The question, however, is whether the SEC regulations, in saying that a Form 10-K incorporated by reference is "deemed to be a new registration statement," make a signer of that Form 10-K liable for any misstatements or omissions in the *original* registration statement and any other documents incorporated therein, whenever published. This very question was addressed in *In re Lehman Bros. Sec. & ERISA Litig.*, where Judge Kaplan held that the signer of a Form 10-K incorporated into an earlier shelf registration statement can be liable only for misstatements in documents he or she actually signed. 799 F. Supp. 2d 258, 316 (S.D.N.Y.

2011). While plaintiffs contend that this conclusion is somehow not supported by Section 11, nothing could be further from the truth. Section 11 imposes liability on a "person who *signed* the registration statement." 15 U.S.C. § 77k(a)(1)(emphasis added). The language focuses on the act of signing, and in this case what Mr. Price signed was the 2007 Form 10-K. [6] There is no unfairness in holding an individual liable for material misstatements or omissions only in documents he in fact signed, or where the documents he signed expressly incorporated future documents.

III. Plaintiffs Have A Complete Failure Of Proof On The Culpable Participation Element of Their Section 20 Bonus Claims And Applicability Of Mr. Price's Affirmative Defense to Their Section 15 Bonus Claim Is Undisputed

Second Circuit law is clear that, to prevail on their Section 20(a) control person claim against Mr. Price, plaintiffs must prove that he was a "culpable participant" in the alleged primary violation. *Boguslavsky v. Kaplan*, 159 F.3d 715, 720 (2d Cir. 1998). For a defendant to be a "culpable participant," the defendant must have engaged in "conscious misbehavior or recklessness." *Kalin v. Xanboo, Inc.*, 526 F. Supp. 2d 392, 406 (S.D.N.Y. 2007).[7] Significantly,

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[6] Indeed, the definitions provision of the 1933 Securities Act expressly recognizes that the term "Registration Statement" may not mean exactly the same thing in every context. It states that:

> When used in this subchapter, unless the context otherwise requires–
> . . .
> (8) The term "registration statement" means the statement provided for in section 77f of this title, and includes any amendment thereto and any report, document, or memorandum filed as part of such statement or incorporated therein by reference.

15 U.S.C. § 77b(a)(8). This definition can easily be read to mean that each of these enumerated items, in itself, is a "registration statement," which is supported by the decision in *Lehman Bros.* applying the SEC's regulations.

[7] *In re WorldCom, Inc. Sec. Litig*, No. 02 Civ. 3288DLC, 2005 WL 638268 (S.D.N.Y. Mar. 21, 2005), cited by plaintiffs for the proposition that a culpable state of mind is not an element of their prima facie case under Section 20(a), reflects what may at one time have been an open question, but "[t]he weight of well-reasoned authority" is now to the contrary. *See, e.g., Plumbers and Pipefitters Local Union No. 630 Pension-Annuity Trust Fund v. Arbitron Inc*., 741

plaintiffs cite no case adopting a lower standard of culpable participation where the underlying violation involves a Section 14 claim.[8]

Rule 56(c) requires entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Here, plaintiffs have a complete failure of proof concerning their Section 20(a) bonus claims against Mr. Price. Further, Mr. Price's declaration establishes that he was unaware of facts critical to plaintiffs' bonus claim, and plaintiffs have cited to no contrary evidence creating a genuine dispute of fact on that issue.

Plaintiffs object to the submission of Mr. Price's declaration because it was submitted after his deposition in this case. This objection is utterly unfounded. Plaintiffs received in discovery the transcript of Mr. Price's testimony taken by the New York Attorney General, in which Mr. Price similarly testified to his lack of knowledge as to the bonus cap and the timing of Merrill's payment of VICP bonuses.[9] *See* Armstrong Supp. Decl. Ex. 1 at 41:3-25; 162:24-163:25. Plaintiffs thus had every opportunity to cross examine Mr. Price as to these issues at his deposition. They did not do so, despite full knowledge that this Court had

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F. Supp. 2d 474, 492 (S.D.N.Y. 2010); *Edison Fund v. Cogent Inv. Strategies Fund, Ltd.*, 551 F. Supp. 2d 210, 231 (S.D.N.Y. 2008); *see also Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 427 (S.D.N.Y. 2010).

[8] *In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d 611, 662 (S.D.N.Y. 2007), cited by plaintiffs, does not address the culpable participation standard for control person liability for an underlying Section 14(a) claim. *See* Pls.' Opp'n Br. at 70 n. 41.

[9] *Humane Soc'y of the U.S. v. HVFG, LLC*, No. 06 CV 6829, 2010 WL 1837785, at *7 (S.D.N.Y. May 18, 2010), cited by plaintiffs in support of their objection, is inapposite because Mr. Price's prior testimony is not at odds with the declaration he submitted. Further, the Federal Rules clearly permit a party to submit affidavits in support of a motion for summary judgment. Fed. R. Civ. P. 56(c)(1)(A),(c)(4).

previously held that they had failed to allege even negligence by Mr. Price with respect to the bonus issue. It was not Mr. Price's counsel's burden to elicit his deposition testimony on an issue on which plaintiffs bear the burden of proof.

In response to Mr. Price's declaration, plaintiffs point to only two pieces of evidence, both of which are plainly insufficient to create any dispute of fact as to whether Mr. Price was a "culpable participant" with respect to plaintiffs' bonus claims.[10]

(1) The Form S-4 — Plaintiffs argue that Mr. Price's signing of the Form S-4 is evidence from which a jury could find that Mr. Price "knew of, or at a minimum recklessly ignored, the undisclosed Bonus Agreement." Pls.' Opp'n Br. at 81. This Court has already rejected a nearly identical argument. In response to Mr. Price's motion to dismiss their first amended complaint, plaintiffs argued that their allegations that Mr. Price signed the S-4, which included a copy of the merger agreement (*see* Consolidated Amended Class Action Complaint ¶¶ 35, 36), sufficed to show that Mr. Price was negligent with respect to the alleged bonus misrepresentations. This Court held, however, that these allegations were "too thin to ascribe even negligence to Price" and dismissed plaintiffs' Section 14(a) bonus claim against him. *In re Bank of America*, 757 F. Supp at 323.[11] *A fortiori*, these same allegations are insufficient to show Mr. Price's "culpable participation" with respect to the bonus claim.

[10] Plaintiffs attempt to confuse the bonus issue by referring to Mr. Price's testimony concerning bonuses to Merrill financial advisors. Mr. Price's deposition testimony — completely consistent with his declaration — was that he recalled some discussions around the financial advisor retention bonuses, not around the incentive compensation bonuses (VICP) that are at issue in this lawsuit. The financial advisor bonuses have nothing to do with this action, and Mr. Price's recollection of discussion around them is in no way inconsistent with his lack of knowledge about the bonus cap and the timing of the VICP bonuses.

[11] The Court specifically rejected plaintiffs' arguments that their allegation that Mr. Price signed the Form S-4 made it "neither plausible nor credible" that Mr. Price was unaware of the bonus arrangement. *In re Bank of America*, 757 F. Supp. 2d. at 323 (quoting plaintiffs' memorandum in opposition to motion to dismiss).

(2) The Qutub Email — The only other evidentiary support plaintiffs offer on their bonus claim against Mr. Price is a single email that Mr. Qutub of Bank of America sent Mr. Price on November 12, 2008, well after Mr. Price signed the Form S-4 and its amendments. The email states in full "Comments below on falling incentives . . . " and attaches some additional emails discussing the likely amount of Merrill Lynch's VICP awards for calendar year 2008. Ross Decl. Ex. 65. Neither the Qutub email nor its attachments address the timing of the bonuses or the existence of a bonus cap; they thus fail to create a dispute of material fact.

Accordingly, plaintiffs have not come forward with any evidence of Mr. Price's culpable participation to support their Section 20(a) bonus claims, and by virtue of his declaration, Mr. Price has established his affirmative defense to plaintiffs' Section 15 claim that he "had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist." 15 U.S.C. § 77o(a). Summary judgment should therefore be granted on all control person claims against Mr. Price relating to the bonus issue.

CONCLUSION

For the foregoing reasons, as well as those in Mr. Price's opening brief and BofA's Reply in Support of its Motion for Summary Judgment, this Court should grant partial summary judgment for Mr. Price.

Dated: July 17, 2012

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of July 2012, a true and correct copy of the aforementioned document, **REPLY BRIEF IN SUPPORT OF DEFENDANT JOE L. PRICE'S MOTION FOR SUMMARY JUDGMENT, and SUPPLEMENTAL DECLARATION OF MELISSA ARMSTRONG IN SUPPORT OF DEFENDANT JOE L. PRICE'S MOTION FOR SUMMARY JUDGMENT AND EXHIBIT THERETO,** was filed with the Clerk of the Court, Southern District of New York, and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Melissa Armstrong
Melissa Armstrong