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 (DC) **ECF CASE**
This Document Relates To: All Securities Actions	**Electronically Filed**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT JOHN A. THAIN'S MOTION TO DISMISS THE CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

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Defendant John A. Thain respectfully submits this memorandum of law in support of his motion to dismiss the Consolidated Amended Class Action Complaint ("Complaint" or "Compl.") pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure. To avoid duplicative briefing, Mr. Thain expressly adopts and incorporates herein the arguments in support of dismissal set forth in the Memorandum of Law of Bank of America Corporation in Support Of Its Motion to Dismiss the Consolidated Amended Class Action Complaint (the "BAC Memorandum") and the Memorandum of Law In Support of Merrill Lynch & Co., Inc.'s and Merrill, Lynch, Pierce, Fenner & Smith's Motion to Dismiss (the "Merrill Memorandum").

Preliminary Statement

Beset by unprecedented financial problems, on December 1, 2007, Merrill Lynch & Co., Inc. ("Merrill") hired John Thain to serve as its Chief Executive Officer and the Chairman of its Board of Directors. The year 2008, however, remained difficult for Merrill as the global economic meltdown continued in full force resulting in mounting losses as its legacy positions in CDOs and mortgage-related assets continued to erode. Faced with this unparalleled financial upheaval, Thain began to explore strategic alternatives for Merrill. Such efforts paid off for Merrill shareholders when, on September 15, 2008, Bank of America Corporation ("BAC") agreed to acquire all of the stock of Merrill at a significant premium to the then-market price. As detailed in the BAC Memorandum, the merger of BAC and Merrill has already contributed billions of dollars to the earnings of the combined entity and there is every indication that the long-term benefits to BAC envisioned as a result of the acquisition of Merrill's famed wealth management business and its "Thundering Herd" of investment advisors will indeed be realized.

Without question, Thain's successful efforts to save Merrill and deliver an intact and viable Merrill brokerage franchise to BAC greatly benefited Merrill's shareholders and fulfilled his fiduciary duties to them. In an odd twist, however, he is now under attack from BAC

shareholders, who, apparently unhappy with the deal that BAC management struck, are attempting to hold Thain responsible for the alleged failure of BAC to disclose to them certain information regarding the merger.[1]

As demonstrated in the BAC and Merrill Memoranda, and as further detailed herein, the Section 10(b) claim against Thain is defective as a matter of fact and law. Indeed, the Complaint fails to allege a single misrepresentation or actionable omission by Thain; every statement attributed to him was either factually accurate or non-actionable opinion or puffery. Nor can Thain be liable on an omission theory. Neither Merrill nor Thain owed any duty to BAC shareholders and, given the accuracy and completeness of Merrill's November 3, 2008 Proxy Statement (the "Merrill Proxy Statement"), had no general obligation under the federal securities laws to make any further disclosures in connection with Merrill's interim fourth quarter 2008 financial results or year-end bonuses. Moreover, the Complaint utterly fails to raise a strong inference of Thain's scienter. On each of these bases, Count II as to Thain should be dismissed. See Point I infra.

Plaintiffs' effort to assert a Section 14(a) proxy violation claim against Thain fares no better. As demonstrated in the Merrill Memorandum, the only communication by Merrill that falls within the ambit of Section 14(a) is the Merrill Proxy Statement, and that filing was accurate and complete in all necessary respects. Accordingly, given the non-occurrence of any intervening event material to Merrill shareholders, neither Merrill nor Thain had any obligation to update the proxy or make any further merger-related disclosures prior to the December 5, 2008 Merrill shareholder vote. And, even if any further disclosures to BAC shareholders had

[1] The Complaint as to Thain alleges violations of Section 10(b) (Count II), Section 14(a) (Count V) and Section 20(a) (Counts IV and VI) of the Securities Exchange Act of 1934.

been required (they were not), such disclosures were the exclusive responsibility of BAC, which Plaintiffs concede knew all relevant facts at the same time as Merrill and Thain. On this basis, as well as the Complaint's failure to allege adequately a strong inference of Thain's scienter, the Section 14(a) claim (Count V) should be dismissed. See Point II infra.

Finally, in light of the Complaint's failure to allege adequately against Merrill any primary claim for violation of Section 10(b) and/or Section 14(a), the respective control claims under Section 20(a) (Counts IV and VI) against Thain should also be dismissed. In the alternative, in light of the fact that Thain was no longer a Merrill "control person" after December 31, 2008, to the extent the Section 20(a) claims are premised on conduct occurring after that date, they must be dismissed. See Point III infra.

Argument

POINT I

THE SECTION 10(b) CLAIM AGAINST THAIN SHOULD BE DISMISSED

As detailed in the Merrill Memorandum, Plaintiffs' Section 10(b) claim is subject to the heightened pleading requirements of the Private Securities Litigation Reform Act of 1995. Accordingly, to state a cognizable claim, the complaint must "specify each statement alleged to have been misleading, [and] the reason or reasons why the statement is misleading" and plead "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)(1)-(2); see also Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 321 (2007). Plaintiffs' Complaint has not and cannot meet these basic requirements as to Thain.

A. The Complaint Fails To Plead Any Misrepresentation By Thain

First, the Complaint fails to allege any cognizable basis for holding Thain liable to BAC shareholders for alleged misrepresentations in connection with the Merrill-BAC merger. Indeed, as detailed in the BAC and Merrill Memoranda, each and every statement alleged to have been made by Merrill or Thain was either an accurate statement of historical fact or a non-actionable expression of opinion or optimism. See BAC Memo. at 12-25, 37-44, 48-50, 57-66; Merrill Memo. at 7.

Notably, the Complaint alleges only a total of three direct statements by Mr. Thain that Plaintiffs allege were false and/or misleading: (1) a statement at a September 15, 2008 press conference that he believed that the merger made strategic sense and was an attractive transaction from a shareholder perspective (Compl. ¶ 191); (2) a statement in a September 15, 2008 press release -- "Merrill Lynch is a great global franchise and I look forward to working with Ken Lewis and our senior management to create what will be the leading financial institution in the world with the combination of these two firms" (Compl. ¶ 192); and (3) statements in an October 16, 2008 press release that Merrill (a) "continued to reduce exposures and de-leverage the balance sheet prior to the closing of the Bank of America deal," and (b) "believe[d] even more that the transaction will create an unparalleled global company with pre-eminent…earnings power." (Compl. ¶ 84.)

On their face, none of these comments are actionable as a matter of law. Each of the statements regarding the strategic merit of the transaction was a forward-looking statement of optimism and puffery that courts have routinely concluded fails to state a claim under Section 10(b). See Merrill Memo. at 6 (citing, e.g., ECA & Local 134 IBEW Joint Pension Trust of Chi. v. JPMorgan Chase Co., 553 F.3d 187, 205-06 (2d Cir. 2009)). And the statement regarding

Merrill's efforts to "continue[] to reduce exposures and de-leverage the balance sheet" was factually accurate in all respects. (Compl. ¶ 84.) Nothing in such statement in any way implies that Merrill's balance sheet might not continue to suffer additional writedowns; to the contrary, the statement makes clear that the effort to steady Merrill was a work-in-progress. See Merrill Memo. at 5.

B. The Complaint Fails to Allege Any Actionable Omission By Thain

Stripped of the baseless allegation that Thain made misrepresentations, the remainder of the Section 10(b) claim against Thain hinges entirely on purported omissions. Specifically, the Complaint alleges that Thain is responsible for BAC's alleged failure to disclose to its shareholders: (a) Merrill's fourth quarter losses as they were occurring (Compl. ¶106); (b) the bonus cap agreement contained in the Disclosure Schedule to the merger agreement (Compl. ¶8); and (c) the payment by Merrill on December 31, 2008 of the cash component of the 2008 bonuses. (Compl. ¶106.)

As detailed in the Merrill Memorandum, however, neither Merrill nor Thain had any duty to disclose or update BAC shareholders as to any of these matters. See Merrill Memo. at 3-5 (citing Chiarella v. United States, 445 U.S. 222, 228 (1980) (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." (quotation omitted)).

Plaintiffs' attempt to impose an obligation on Merrill and Thain to make further disclosures beyond the Merrill Proxy Statement makes no sense. Thain, as the CEO of BAC's counterparty, was adverse to BAC shareholders and certainly did not owe BAC shareholders any

fiduciary duty. See Merrill Memo. at 4. Rather, he owed a fiduciary duty to Merrill shareholders to look out for their financial well-being and to ensure that the transaction properly closed. Notably, this is not a situation in which a target was privy to negative information with respect to its financial condition that was unknown to the acquiror. To the contrary, the Complaint acknowledges that Merrill was "open kimono" with BAC with respect to both ongoing fourth quarter financial results and year-end bonuses. See, e.g., Compl. ¶ 93. Accordingly, the duty to update BAC shareholders, if any, would fall solely on the shoulders of BAC.[2]

C. The Complaint Fails Adequately To Allege Thain's Scienter

The Section 10(b) claim against Thain should also be dismissed for failure to allege particularized facts that create a "strong inference" that he acted with scienter. See 15 U.S.C. § 78u-4(b)(2). Given the undisputed facts here -- after negotiating the merger for Merrill's shareholders, Thain lost his job as CEO and gave up any bonus for 2008 -- an inference of "nonfraudulent intent" is far more compelling that an inference of scienter. Tellabs, 551 U.S. at 314. Moreover, Plaintiffs' burden here is especially stringent in light of the Section 10(b) claim's dependence upon omissions. See Merrill Memo. at 8 (citing Kalnit v. Eichler, 85 F. Supp. 2d 232, 245 (S.D.N.Y. 1999), aff'd, 264 F.3d 131, 143 (2d Cir. 2001)).

A brief review of what the Complaint labels as "additional evidence of Thain's scienter" proves the point. See Compl. ¶255 (Thain was aware of Merrill's finances); ¶ 256 (Thain was

[2] Notably, the Complaint does not even allege that Thain was aware of many of the items that Plaintiffs claim should have been disclosed. Specifically, Plaintiffs have not and, given the well-publicized facts here, cannot allege that Thain knew anything about: (a) BAC's discussions in November and December 2008 regarding invoking the merger's material adverse change provision (the "MAC"), (b) the effect of Merrill's fourth quarter results on BAC's financial condition, or (c) BAC's discussions with the United States Treasury and Federal Reserve with respect to the MAC and TARP assistance. Plainly, Thain cannot be liable for failing to disclose information to which he was not privy.

aware of the "secret bonus agreement" between Merrill and BAC), ¶ 257 (Thain was involved in the issuance and timing of Merrill bonuses), ¶ 258 (Thain believed that, without a merger, Merrill would become "'effectively insolvent' beginning Monday morning" [September 15, 2008]). Neither individually nor collectively do these referenced allegations constitute strong circumstantial evidence of conscious misbehavior or recklessness. For example, Thain's awareness of Merrill's mounting daily losses in the fourth quarter is irrelevant. It is BAC's alleged failure to disclose that it did not have the capital to absorb Merrill's losses that Plaintiffs claim constituted a fraud (Compl. ¶103), and there is no allegation that Thain was privy to BAC's financial condition. See Merrill Memo. at 13-15. Likewise, the Complaint's allegations regarding BAC's discussions of the MAC and TARP funding have no bearing on Thain's scienter since Plaintiffs have not alleged, and cannot allege, that Thain was aware of such discussions.

The allegations with respect to the bonuses and Merrill's liquidity fare no better. Given, inter alia, Merrill's public disclosures with respect to compensation, the negative covenants contained in the merger agreement, the actual amount of bonuses paid and the unlikelihood a CEO would determine what exhibits to include in a proxy statement, the allegation that Thain fraudulently intended to hide the largely irrelevant Merrill bonus cap by omitting the Disclosure Schedule from the proxy is simply not credible. A far more compelling explanation is the likelihood that Thain simply had nothing to do with the decisions with respect to bonus disclosures.

Lastly, Thain's alleged concern with respect to Merrill's liquidity in the wake of a potential Lehman Brothers bankruptcy is irrelevant to the scienter analysis. The Complaint does not allege that Merrill or Thain failed to provide full financial disclosure to BAC during the

course of BAC's due diligence. Moreover, Plaintiffs have disingenuously twisted Mr. Thain's words. The source of the allegation is his testimony before the New York Attorney General and that transcript (which is in part a public document) makes no mention whatsoever of a Merrill "insolvency"; Mr. Thain merely stated that, in the event of a bankruptcy filing by Lehman Brothers, Merrill "would likely have very serious funding problems beginning Monday morning." See Exhibit A to the Declaration of David S. Hoffner, dated November 24, 2009 ("Hoffner Decl."). That statement is in no way inconsistent with Thain's statement that BAC's acquisition of Merrill and its unequalled wealth management business made long-term strategic sense.[3]

POINT II

THE SECTION 14(a) CLAIM AGAINST THAIN SHOULD BE DISMISSED

In light of Plaintiffs' allegations of fraudulent conduct in connection with the Proxy Statement, the Section 14(a) claim related thereto is subject to the same heightened pleading obligations as the Section 10(b) claim. Merrill Memo. at 13. Accordingly, for the reasons stated in Point I supra, as well as the additional arguments set forth in the Merrill Memorandum, the Section 14(a) claim against Thain should be dismissed for failure to allege a strong inference of scienter.

In addition, to the extent the Section 14(a) claim is premised on an alleged failure to update the Merrill Proxy Statement to provide, for example, interim financial information with respect to Merrill's ongoing fourth quarter, it should be dismissed as a matter of law. Merrill and

[3] Thain's views on the severity of the financial crisis in the fall of 2008 were well-publicized. Indeed, at a November 11, 2008 Merrill analyst conference, Thain likened the current economic meltdown to "the 1929 period." Transcript of Nov. 11, 2008 Merrill Lynch Banking & Financial Services Conference at 3 (Hoffner Decl., Ex. B). Such comments belie any fraudulent intent to hide Merrill's financial difficulties.

BAC each filed their own proxy statements with respect to each's separate shareholder vote.[4] Accordingly, any duty to BAC shareholders to update the BAC proxy to provide additional information regarding the merger was the sole responsibility of BAC.

As explained in the Merrill Memorandum, the few decisions allowing a Section 14(a) claim against an acquired corporation to be brought by a shareholder of an acquiring corporation are inapposite. None, to our knowledge, has upheld a Section 14(a) failure to update claim brought by shareholders of an acquiror against the acquired corporation (much less its officers) where, as here, the target provided the acquiring entity with contemporaneous access to the allegedly material information. Merrill Memo. at 14-15. Given such a level playing field of information, whether or not new information should be disclosed prior to a shareholder vote is an assessment uniquely appropriate to the company whose shareholders are voting.

POINT III

THE SECTION 20(a) CLAIMS AGAINST THAIN SHOULD BE DISMISSED

To establish a Section 20(a) claim, a plaintiff must show: "(1) a primary violation by a controlled person; (2) control of the primary violator by the defendant; and (3) 'that the controlling person was in some meaningful sense a culpable participant' in the primary violation." Boguslavsky v. Kaplan, 159 F.3d 715, 720 (2d Cir. 1998) (quoting S.E.C. v. First Jersey Secs., Inc., 101 F.3d 1450, 1472 (2d Cir. 1996)); see also, Klock v. Lehman Bros. Kuhn Loeb Inc., 584 F. Supp. 210, 216 (S.D.N.Y. 1984). The Section 20(a) claims against Thain

[4] The solicitation with respect to the merger is often referred to as a "joint proxy statement" of BAC and Merrill. In actuality, each corporation made its own separate filing on Schedule 14A with the United States Securities and Exchange Commission. For example, the BAC proxy contained a Notice of Special Meeting of Stockholders with respect to a vote by BAC shareholders on the merger to be held in Charlotte, North Carolina, whereas the Merrill Proxy Statement (which was not signed by Thain) provided notice of a Merrill shareholder vote in New York. Compare excerpt of Merrill Proxy Statement (Hoffner Decl., Ex. C) with excerpt of BAC Proxy Statement (Hoffner Decl., Ex. D).

premised on alleged violations by Merrill of Sections 10(b) and 14(a) (Counts IV and VI, respectively) fail on several of these grounds. As an initial matter, Plaintiffs have failed to allege adequately a primary violation by Merrill of either Section 10(b) or Section 14(a). See Merrill Memo. Accordingly, the Section 20(a) claims against Mr. Thain are also deficient and must be dismissed. See In re Pfizer, Inc. Secs. Litig., 538 F. Supp. 2d 621, 637 (S.D.N.Y. 2008).

Furthermore, even if the Court concludes that a primary violation has been sufficiently alleged, the Section 20(a) claims against Thain must be dismissed. First, as demonstrated above, Plaintiffs have not pleaded that Thain was a "culpable participant." First Jersey Secs., 101 F.3d at 1472 (2d Cir. 1996). Moreover, dismissal is also warranted to the extent that these claims are premised on conduct that occurred after December 31, 2008 -- the date Plaintiffs concede (see Compl. ¶38) marked the end of Thain's employment by Merrill. See, e.g., In re Philip Services Corp. Secs. Litig., 383 F. Supp. 2d 463, 487 (S.D.N.Y. 2004).

Conclusion

For all of the forgoing reasons, as well as the reasons set forth in the motions to dismiss of Bank of America Corporation and Merrill Lynch & Co., Inc., Defendant John A. Thain respectfully requests that the Court grant his motion and dismiss the Complaint in its entirety and with prejudice.

Dated: November 24, 2009
New York, New York

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