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

MEMORANDUM OF LAW IN SUPPORT OF THE BANK OF AMERICA DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

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PRELIMINARY STATEMENT

This memorandum of law is respectfully submitted on behalf of Defendants Bank of America Corporation (the "Bank" or "BofA"), Banc of America Securities LLC and the Bank's individual directors and officers (collectively, the "Bank Defendants") in support of their motion to dismiss the Consolidated Amended Class Action Complaint ("AC" or the "Complaint").

In mid-September 2008, the Bank's Board of Directors (the "Board" or the "Bank Board") made a business decision to act expeditiously to seize a unique opportunity created by unsettled conditions in the global financial markets to acquire Merrill Lynch & Co., Inc. ("Merrill"), one of the world's leading brokerage and investment firms, in a stock-for-stock merger. As was well publicized at the time, Merrill had been suffering multibillion-dollar losses each quarter for more than a year. Notwithstanding Merrill's valuable franchise, the nearly unprecedented turmoil in the financial markets had placed it in a precarious position. As a result, the merger was negotiated over a single weekend. The day the merger was announced, Lehman Brothers filed for bankruptcy, and the turmoil in the financial markets worsened substantially thereafter: AIG was downgraded and suffered an acute liquidity crisis; credit markets worldwide froze; the Dow Jones Industrial Average fell 22% over the eight trading days from October 1 to October 10; credit spreads widened to unprecedented levels; and the price of nearly every class of financial assets tumbled.[1]

Though the claims in the Complaint are cloaked as challenges to the adequacy of the Bank's disclosures, more fundamentally, Plaintiffs second-guess the Board's business judgment that it made sense to take advantage of the tumultuous market to obtain the long-term benefits that

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[1] *See, e.g.*, *Lehman Files for Bankruptcy; Merrill Is Sold*, N.Y. TIMES, Sept. 15, 2008 (Ex. 15); *Size Matters,* ECONOMIST, Sept. 20, 2008 (Ex. 19); *House Rejects Historic Bailout Bill; Dow Plummets Record 778 points; Rank and File Buck Leaders*, WASH. TIMES, Sept. 30, 2008, at A1 (Ex. 20); *Blocked Pipes,* ECONOMIST, Oct. 4, 2008 (Ex. 21); TED Spread: Chart, BLOOMBERG (Ex. 2) (showing volatility in credit markets nearly ***quadrupled*** in the final months of 2008 as measured by the "TED Spread" between LIBOR and T-bills); CBOE SPX Volatility Index: Chart, BLOOMBERG (Ex. 3) (showing volatility in the S&P 500 Index options nearly ***quadrupled*** during the fourth quarter of 2008).

Exhibits ("Ex.") are attached to the Declaration of Jonathan E. Goldin filed herewith. In assessing the securities law claims in the Complaint, this Court may consider "(1) documents attached to or incorporated by reference in the complaint, (2) documents 'integral' to and relied upon in the complaint, even if not attached or incorporated by reference, (3) public disclosure documents required by law to be, and that have been, filed with the SEC, and (4) facts of which judicial notice properly may be taken under Rule 201 of the [Federal Rules of Evidence]." *Campo* v. *Sears Holdings Corp.*, 635 F. Supp. 2d 323, 328-29 (S.D.N.Y. 2009).

acquiring Merrill and its unparalleled brokerage franchise could provide. Plaintiffs contend that the Bank overpaid for Merrill by agreeing to an exchange ratio in which Merrill was acquired for approximately 25% of the stock in the combined company. *See* AC ¶¶ 66, 83, 192-94, 291, 333(f); Proxy at 53 (Ex. 1).

However, these criticisms of the Bank's decision to buy Merrill have been proven wrong. Since the merger closed, Merrill has been one of the Bank's most profitable units, contributing nearly 34% of the Bank's net income for the first nine months of 2009 ($2.2 billion of $6.5 billion). *See* BofA 3Q09 10Q, at 3, 12 (Ex. 61).

The profound and widespread consequences of the recent financial crisis have led to opportunistic, hyperbolic hindsight attacks on the disclosures that the Bank made to investors. Although the Complaint goes on for more than 130 pages, when one strips out Plaintiffs' extraneous statements and gratuitous attacks, they assert only three principal claims:

> (1) that the Merger Agreement and the Proxy Statement filed by the Bank and Merrill (the "Proxy") supposedly misrepresented that "Merrill Lynch would <u>not</u> make any discretionary bonus payments before the merger closed on January 1, 2009" (*e.g.*, AC ¶ 108), and improperly failed to disclose a "cap" (in favor of the Bank) on the total amount of bonuses that Merrill would be permitted to pay for 2008 to a pool of some 40,000 of its employees;
>
> (2) that the Bank, prior to the December 5 shareholder meeting, failed to disclose that Merrill was continuing to incur substantial losses into the fourth quarter of 2008; and
>
> (3) that, after the shareholder vote, when the Bank was advised by Merrill of major deterioration in its financial condition and prospects and consequently gave serious consideration to terminating the Merger Agreement pursuant to the Material Adverse Effect ("MAC") provision, it failed to make public disclosure of these facts.

None of these supposed misrepresentations or omissions state a claim, much less with the particularity required for a securities fraud action to survive a motion to dismiss under the Private Securities Litigation Reform Act of 1995 ("PSLRA") and Fed. R. Civ. P. 9(b). There was no misrepresentation or failure to disclose required facts of any nature whatsoever.

1. <u>Bonuses.</u> Plaintiffs assert that the Proxy and Merger Agreement "affirmatively misrepresented that Merrill Lynch would <u>not</u> make any discretionary bonus payments before the merger closed on January 1, 2009." AC ¶ 108 (emphasis in original); *see also id.* ¶¶ 196, 215, 217. But Plaintiffs' assertion is simply not true. Neither document made any such representation.

Tellingly, Plaintiffs do not allege that anyone — whether a named Plaintiff or even a member of the class — was misled about Merrill's right and intention to pay 2008 bonuses.

First, Plaintiffs' claim is premised on a plain misreading of the Merger Agreement and Proxy. As is frequently the case, the Merger Agreement contained provisions used to allocate the risks between the parties to a corporate transaction, including representations, warranties and covenants. Plaintiffs misread the covenant in Section 5.2(c)(ii) that restricted Merrill's ability to take certain actions between the signing of the Merger Agreement and the consummation of the merger, stating that Merrill had agreed "***with certain exceptions***" or "***except*** with Bank of America's prior written consent" to refrain from "pay[ing] any current or former directors, officers or employees any amounts not required by existing plans or agreements." Proxy at 83-84 (Ex. 1). And the Proxy annexed the Merger Agreement in full, which expressly noted additional exceptions, including those "***set forth in . . . Section 5.2 of the Company Disclosure Schedule***" and other exceptions "***expressly contemplated or permitted by***" the Merger Agreement. *Id.* at A-31 (Ex. 1). In short, the covenant was anything but the blanket bonus prohibition Plaintiffs describe.

Second, the covenant was not a representation of fact to shareholders, but a contractual term allocating risk between the parties to the Merger Agreement. Consistent with typical practices for corporate transactions of this nature, the Forms 8-K that the Bank and Merrill filed annexing the Merger Agreement (which were incorporated into the Proxy) made clear that the representations, warranties and covenants in the Merger Agreement "were made . . . solely for the benefit of the parties" and were "***qualified by confidential disclosures*** made for the purposes of allocating contractual risk between the parties to the Merger Agreement ***instead of establishing these matters as facts***." Merrill 9/18/08 8K, at Item 1.01 (Ex. 18) (emphasis added); *see also* BofA 9/18/08 8K, at Item 1.01 (Ex. 17). Thus, far from conveying that no Merrill bonuses would be paid in 2008, it was evident from the Merger Agreement, Proxy and Forms 8-K filed that Merrill could pay bonuses.

Third, Plaintiffs do not allege that anyone — whether a named Plaintiff or even a member of the class — was misled. Nor could they; not only was nothing misrepresented, but after the announcement of the merger Merrill publicly disclosed its expected compensation expense levels

reflecting its intention to pay multibillion-dollars of bonuses for 2008. These disclosures, which were incorporated by reference into the Proxy, made clear that — notwithstanding Merrill's five consecutive quarters of multibillion-dollar losses — Merrill would pay billions in bonuses for 2008. Specifically, the Proxy incorporated by reference Merrill's quarterly reports for the first three quarters of 2008 that ***publicly disclosed that Merrill was accruing compensation expenses for the year to date of $11.17 billion*** (or roughly $3.7 billion per quarter), *see* Proxy at 123-24 (Ex. 1) and Merrill 3Q08 10Q, at 5 (Ex. 34), amounts consistent with its accruals in 2007 when, as was publicly known, Merrill paid billions of dollars in bonuses despite suffering billions of dollars in losses. Indeed, Merrill's annual proxy (issued in March 2008) had made clear that Merrill's "compensation framework emphasize[d] variable pay," that "base salary normally represent[ed] a small percentage of total compensation," and that — even in 2007 when Merrill suffered large losses — it had been "essential" to "pay many key employees at market levels in order to retain them and avoid long-term damage to the franchise." Merrill March 2008 Proxy, at 28-29 (Ex. 7).

In addition to these accruals and disclosures, a Merrill spokesperson confirmed to *The New York Times* in October 2008 that Merrill indeed intended to pay bonuses, and other media and stock analysts widely reported that Merrill would pay billions of dollars in bonuses for 2008. These reports occurred prior to the shareholder vote on the merger. Plaintiffs fail to allege a single media account or analyst report suggesting that anyone at the time read the negative covenant in the Merger Agreement as a representation to the contrary. Indeed, a principal objective of the merger was for the Bank to seize the opportunity suddenly presented to obtain the benefit of Merrill's strong franchise, including the people who were key to maintaining that franchise. And Merrill had affirmatively covenanted to "use reasonable best efforts to . . . retain the services of its key officers and key employees." Proxy at A-31 (Ex. 1). Thus, it was clear that Merrill, a business whose principal assets are its people, would pay bonuses in 2008 to retain key personnel.

Fourth, the Bank had no legal duty under the applicable SEC regulations to disclose — and there were cogent, valid reasons not to disclose — a nonpublic schedule to the Merger Agreement that included an agreed-upon "cap" in favor of the Bank on the amount of bonuses Merrill could pay without the Bank's consent. As the Complaint itself acknowledges (AC

¶¶ 73, 104), the contractual cap on the bonus component of Merrill's compensation expense was some $2.2 billion higher than the $3.6 billion that Merrill ultimately paid in 2008 bonuses. The cap was simply a limit agreed to by the parties to allocate pre-closing risk — not an estimate of what would be paid. As such, announcing the cap would not have provided material information to investors, and it could have created false expectations among Merrill employees and risked substantial disappointment by them when they learned that the actual bonuses paid were much less than the cap amount. Notably, there is no allegation that the use of a nonpublic schedule covering exceptions to the Merger Agreement covenants or the manner in which the contractual cap on bonuses was handled here departed from accepted practice in corporate transactions. The recent political uproar over Wall Street bonuses cannot be allowed to alter the legal analysis in this case.

In short, Merrill's ability to pay bonuses under any of several exceptions in the Merger Agreement, Merrill's emphasis on variable pay in its compensation practices and Merrill's compensation accruals reflecting anticipated expenses at about the same level as in 2007 (when substantial bonuses were also paid) were all fully disclosed. Nothing more was required to be said, and any statement related to the cap on bonuses risked confusing investors and alienating employees. Consequently, no claim of any kind relating to the bonus cap has any merit, and all such claims against the Bank Defendants should be dismissed. *See* Point I, *infra*.

2. <u>Fourth quarter interim results prior to the shareholder meeting.</u> There was no misrepresentation or improper failure to disclose interim results or forecasts relating to Merrill's or the Bank's fourth quarter performance prior to the December 5, 2008 shareholder meeting. It was no secret that Merrill was losing money. In the five prior fiscal quarters, Merrill had reported pre-tax losses totaling over $38 billion (which, without the benefit of certain one-time gains, would have totaled ***nearly $50 billion in pre-tax losses***). For the fourth quarter of 2007, Merrill had reported a pre-tax loss of $14.9 billion and, adjusting for one-time gains, Merrill incurred a pre-tax loss of $15.4 billion in the third quarter of 2008. *Id.* The Proxy (mailed November 3) referred to and incorporated by reference all of the SEC filings that Merrill and the Bank had made during 2008 (in which Merrill's long string of multibillion-dollar losses was reported) and included a "Recent Developments" section that disclosed Merrill's third quarter losses. Proxy at 35-37 (Ex. 1).

The levels of Merrill's fourth quarter 2008 losses that Plaintiffs allege occurred before the December 5 shareholder vote were not a departure from the multibillion-dollar losses that Merrill had recently disclosed. Rather, they were consistent with the magnitude of losses that Merrill had been reporting for over a year.

In any event, for the purposes of this motion, the Bank was not required to disclose Merrill's interim results or forecasts prior to the shareholder vote. The federal securities laws impose a quarterly, not continual, disclosure system. Under this system, companies have no obligation to disclose interim financial information or forecasts between quarterly reports, no matter how significant such information may be at a particular point in time. Any other system would be unworkable because it is impossible to set a standard that reliably allows an issuer to determine which interim numbers should be disclosed and how often. Even in the context of a proxy solicitation, there is no obligation to disclose interim results or forecasts. Rule 14a-9 is explicit as to a company's obligations regarding disclosure of post-proxy (but pre-meeting) developments, requiring only disclosures "necessary to ***correct*** any statement in any earlier communication . . . which has become false or misleading." 17 C.F.R. § 240 14a-9 (emphasis added). Here, there was nothing to "correct": the Proxy contained no disclosures of interim or forecasted fourth quarter results and specifically warned that "the current and prospective environment in which Merrill Lynch operates, which reflects challenging and uncertain investment banking industry conditions and risks . . . [is] expected to persist, including the volatile valuations and illiquidity of certain financial assets and exposures . . ." Proxy at 52 (Ex. 1). No amount of artful or selective pleading can create a legal duty to disclose interim results or forecasts for a quarter that is still underway. No such duty exists.

Moreover, on November 5 and 6, 2008, just days after the Proxy was mailed out and a month before the shareholder vote, Merrill and the Bank issued their third quarter 10-Qs, which included graphic disclosures that the unprecedented disruption in the financial markets, and the deleterious impact of those market conditions on both companies' results, were expected to continue into the short- and medium-term future:

- On November 5, 2008, Merrill warned investors that "[t]urbulent conditions ***in the short- and medium-term will continue to have an adverse impact***" on its businesses. Merrill 3Q08 10Q, at 83 (Ex. 34) (emphasis added).

- On November 6, 2008, the Bank made explicit that "***[i]n recent weeks***" — *i.e.* including the early *fourth* quarter — "the ***volatility and disruption***" in the capital and credit markets had "***reached unprecedented levels***" and had "adversely affected" its businesses, and that it did "not expect that the difficult conditions in the financial markets are likely to improve in the near future." The Bank warned that, as a result, Merrill's "***future results may continue to be materially impacted by the valuation adjustments***" to its credit market exposures. BofA 3Q08 10Q, at 175-77 (Ex. 35) (emphasis added).

Accordingly, prior to the December 5 vote, shareholders were cautioned that both companies believed that the unprecedented volatility and disruption in the capital markets were having an "adverse impact" on their respective businesses "[i]n recent weeks" (*i.e.* including the early fourth quarter) and that Merrill's future results could continue to be "materially impacted by valuation adjustments." And shareholders were never told otherwise: there was no projection of fourth quarter results in the Proxy and no suggestion that, in the short term, the fourth quarter was expected to improve. In addition, the interim losses and forecasts available to the Bank prior to the vote were in line not only with the warnings in the 10-Qs, but also with Merrill's recent past of multibillion-dollar losses every quarter, which were a matter of public record. The federal securities laws simply did not require the Bank to say any more. Indeed, in light of the volatile conditions and uncertainties that existed in the then ongoing fourth quarter, there was no additional disclosure that could responsibly have been made. Disclosure of interim data or forecasts would have presented its own perils and the risk of misleading investors. Accordingly, no claim of any kind relating to Merrill's fourth quarter interim results prior to the shareholder meeting has any merit, and all such claims against the Bank Defendants should be dismissed. *See* Point II, *infra*.

3. <u>Post-vote losses, MAC consideration and discussions with regulators.</u>

After the December 5, 2008 vote, Merrill's losses as reported to the Bank accelerated. At that time, the Bank began to give serious consideration to whether to declare a MAC and held various discussions with federal regulators. Contrary to Plaintiffs' conclusory assertion, there was simply no obligation to disclose these matters.

As to the accelerating interim losses, the law does not require the disclosure of intra-quarter results or forecasts. Plaintiffs allege that "projected losses" as of December 17 had reached

$17 billion on a pre-tax basis and that "projected losses" had climbed to $21 billion pre-tax by December 21. AC ¶¶ 115, 124. As these very numbers illustrate, interim losses and projections can change drastically in a number of days — particularly in an inherently volatile business like Merrill's and in the turbulent market conditions that then existed — and disclosing such information would have risked misleading investors. Thus, as both a matter of prudence and as a matter of law, no disclosure of the interim or forecasted losses was required.

As to the consideration of invoking the MAC clause, one need look no further than the SEC's Form 8-K current reporting rules to see that Plaintiffs' disclosure claim is totally lacking in merit. Item 1.02 of Form 8-K provides that disclosure is required "[i]f a material definitive agreement . . . ***is terminated*** . . ." and Instruction 1 to that item goes on to explicitly advise that "***[n]o disclosure is required*** solely by reason of this Item 1.02 during negotiations or discussions regarding termination of a material definitive agreement ***unless and until the agreement has been terminated***." 17 C.F.R. § 249.308 (emphasis added). This rule provides clear guidance and avoids second-guessing.

Not only was there no requirement to disclose consideration of invoking a MAC, but there were also good, practical reasons for not making such a premature disclosure here. Announcing that such a step was being considered could well have set off a financial panic; at a minimum, it would have created enormous uncertainty for Merrill and the Bank, particularly in the unsettled climate that existed in late 2008. The concern expressed by government officials about the impact on both the companies and the financial system if a MAC were declared (*e.g.*, AC ¶¶ 116, 126, 140), underscores why it would not have been appropriate to make an announcement — ***not*** required by the securities laws — that consideration was being given to invoking the MAC clause. Moreover, any such announcement would itself have risked misleading shareholders: it is undisputed that the MAC clause was never, in fact, invoked and the Merger Agreement was never terminated. It is wholly absurd to say that Defendants should be held liable for failing to disclose consideration of what was ***not*** done and did ***not*** occur. Here, the merger closed as planned on January 1, 2009, and since that date Merrill has earned billions of dollars of profit for the Bank's shareholders (*see* p.2, *supra*). Making the disclosure Plaintiffs now call for would have been

reckless in the extreme. And, again, the disclosure regime Plaintiffs postulate would be wholly unworkable — under Plaintiffs' regime, the point in the process when disclosure was required of discussion or consideration of termination would be the subject of endless second-guessing.

Similarly, it would have been unwarranted and unwise to disclose the Bank's negotiations with federal regulators that began in mid-December 2008. Item 1.01 of Form 8-K is explicit that disclosure is required only if a company has "***entered into a material definitive agreement***" — not merely because negotiations commence. 17 C.F.R. § 249.308. There are many good reasons why the law does not require companies to disclose negotiations prior to entry into a definitive agreement, including that such negotiations ultimately may not result in an agreement, and those reasons take on particular cogency when one considers the fragile state of the markets that existed at the end of 2008 and beginning of 2009. Erring on the side of caution, as the Bank did here, was not only in all respects fully consistent with the securities laws, but the only sensible course in turbulent times. Therefore, no claim relating to Merrill's losses following the shareholder vote, its consideration of invoking the MAC clause, or its discussions with regulators has any merit, and all such claims against the Bank Defendants should be dismissed. *See* Point III, *infra*.

4. Statements about anticipated merger benefits and the like. Plaintiffs make a host of additional claims related to statements concerning the anticipated merger benefits, the extent of due diligence that the Bank performed and the negotiation of the merger. These are pure makeweight. The statements that Plaintiffs seize upon are the type of generalized statements of corporate optimism and forward-looking statements (such as those made here in press releases, on an analyst call and during a press conference announcing a merger) that courts have repeatedly and for good reason held not to be actionable. For example, the Bank's statements that it believed the merger to be "attractive" and to present "great opportunities" (AC ¶ 191) cannot serve as the basis of securities claims. Not only was there nothing remotely improper about any of the statements that Plaintiffs attempt to contort into disclosure violations, but, as noted (*see* pp.1-2, *supra*), the essential assumption underlying each of these allegations — that the merger should not have been undertaken — simply does not hold. To date in 2009, Merrill has contributed billions of dollars to the Bank's earnings. Consequently, no claim relating to statements concerning the anticipated merger benefits,

the extent of due diligence performed on Merrill or the negotiation of the merger has any merit, and all such claims against the Bank Defendants should be dismissed. *See* Point IV, *infra*.

5. Plaintiffs' scienter allegations. Plaintiffs' claims also fail to plead with particularity a strong inference of scienter. For example, Plaintiffs contend that, prior to the shareholder vote, senior executives and Bank Board members — who in the aggregate held over $1 ***billion*** of Bank stock when the Merrill merger was announced (*see* n.18 and accompanying text, *infra*) — supposedly knew of facts that caused them to question the rationale for proceeding with the transaction (*e.g.*, Merrill's interim fourth quarter losses or the prospect of Merrill paying multibillion-dollar bonuses), yet deliberately concealed that information from the Bank's shareholders to ensure the merger was approved. But that theory is wholly implausible. Why would directors and officers, who themselves held over $1 billion worth of Bank shares, act contrary to their own financial interests and proceed with a transaction if they truly believed it would be detrimental to the Bank? Why, if they were looking for a way out of the merger, would these same directors and officers have concealed facts from shareholders before the vote if they thought the facts were so material that the Bank's shareholders would vote the deal down?

The Supreme Court's *Tellabs* decision requires that competing non-fraudulent inferences be considered in assessing whether allegations give rise to a strong inference of scienter, and here such non-fraudulent inferences are far more compelling than any inference of fraud. There is every reason to infer that, prior to the vote, the Bank's executives and directors continued to believe that the merger made sense and would benefit the Bank and its shareholders, particularly once markets returned to a more normal condition — a point of view now vindicated by Merrill's post-merger performance. And, after the vote, once the worsening of Merrill's interim results and forecasts led executives to present their concerns about the transaction to regulators, the more compelling inference is that Defendants believed (correctly) that there was simply no duty to disclose any interim results or forecasts, or discussions or negotiations with regulators about potential agreements for government assistance. Furthermore, particularly in light of the turbulent market conditions, volunteering disclosures under circumstances where they were neither required nor customary would be imprudent and potentially misleading.

* * *

The extraordinary events in the financial sector during the fourth quarter of 2008 confirm the wisdom of the periodic reporting regime for public companies that Congress and the SEC have put in place. Had the Bank and Merrill engaged in the sort of continuous *ad hoc* reporting that Plaintiffs urge, investors would have been bombarded by conflicting and ever-changing announcements reflecting incomplete and uncertain information about forecasts of potential results (that were frequently superseded), consideration of a merger termination provision (that management never actually invoked) and discussions with government regulators (that were not completed until mid-January). In the world of disclosure urged by Plaintiffs, investors would have been whipsawed by uncertain, qualified and incomplete information, rather than the type of considered, periodically-reported information that the law requires public companies to convey. *See, e.g., Gallagher* v. *Abbott Labs*., 269 F.3d 806, 808 (7th Cir. 2001). During turbulent times, in particular, much could be said on a daily basis about developments at public companies of all kinds. But our legal regime does not require disclosure of such information. Given that all of Plaintiffs' claims are based upon their claims for disclosures that are both not required by the law and, in fact, would have been misleading to investors or otherwise imprudent, the Complaint must be dismissed.

ARGUMENT

I. PLAINTIFFS' CLAIMS REGARDING COMPENSATION TO BE PAID TO MERRILL PERSONNEL DO NOT STATE A CLAIM.

A. There Was No Material Misrepresentation Regarding Compensation To Be Paid To Merrill Personnel.

Plaintiffs repeatedly allege that the Proxy and Merger Agreement affirmatively misrepresented that "Merrill Lynch would not make any discretionary bonus payments before the merger closed on January 1, 2009." AC ¶ 108 (emphasis in original); *see also id.* ¶¶ 196, 215, 217, 331(i), 365, 366. Plaintiffs misstate both documents, which contained no such representation. The Merger Agreement contained some 25 negative covenants that restricted Merrill's ability to take certain actions prior to the consummation of the merger, including a covenant that Merrill would not "pay any amounts to Employees not required by any current plan or agreement (other than base salary in the ordinary course of business)." Proxy at A-31-32 (Ex. 1). But both the Proxy and the

Merger Agreement clearly and expressly disclosed that this negative covenant was subject to several exceptions. The Proxy and SEC filings that it incorporated by reference also informed investors that the negative covenant was qualified by confidential disclosures made for the purpose of allocating contractual risk and that neither the Merger Agreement nor the Proxy's description thereof was intended to "establish matters as facts" or to "provide any other factual information regarding Merrill Lynch." Proxy at 83 (Ex. 1); BofA 9/18/08 8K, at Item 1.01 (Ex. 17); Merrill 9/18/08 8K, at Item 1.01 (Ex. 18). Accordingly, Plaintiffs' claim that the Proxy and the Merger Agreement misrepresented that Merrill would not pay bonuses is meritless.

1. The Bank disclosed that the negative covenant regarding Merrill's payment of bonuses was subject to exceptions. Plaintiffs claim that the Merger Agreement and Proxy "assured BoA shareholders and investors that Merrill would not pay discretionary bonuses before the merger closed." AC ¶ 196; *see also id.* ¶¶ 108, 215. That is false. The Bank and Merrill accurately disclosed and described the negative covenant relating to Merrill's payment of bonuses and the fact that it was subject to exceptions. Section 5.2 of the Merger Agreement stated in part:

> 5.2 Company Forbearances. During the period from the date of this Agreement to the Effective Time, ***except*** as set forth in . . . Section 5.2 of the Company Disclosure Schedule or ***except*** as expressly contemplated or permitted by this Agreement, Company [Merrill] shall not . . . ***without the prior written consent*** of Parent [the Bank]:
> . . . (c) except as required under applicable law or the terms of any Company Benefit Plan existing as of the date hereof, . . . (ii) pay any amounts to Employees not required by any current plan or agreement (other than base salary in the ordinary course of business) . . . . [emphasis added]. *Id.* at A-31-2.

The Merger Agreement itself was publicly filed as an exhibit to Form 8-K filings by both companies on September 18, 2008, and was annexed to the Proxy that was mailed to shareholders on November 3, 2008. *See* BofA 9/18/08 8K, at Ex. 2.1 (Ex. 17); Merrill 9/18/08 8K, at Ex. 2.1 (Ex. 18); Proxy at Appendix A (Ex. 1).

As is apparent from the above quoted language, Section 5.2(c) did ***not*** contain an unqualified covenant against Merrill's payment of discretionary compensation to its employees prior to closing. Rather, by its express terms, that covenant was subject to three clear exceptions:

1. **Exceptions "set forth in . . . Section 5.2 of the Company Disclosure Schedule."** In this regard, the preamble to Article III of the Merger Agreement defines the term "Company Disclosure Schedule" as a schedule that "sets forth, among other things, items the disclosure of which is necessary or appropriate . . . as an exception to . . . one or more of [Merrill's] covenants contained herein." *Id.* at A-7.

2. **Exceptions "contemplated or permitted by [the Merger] Agreement."** In this regard, Section 5.1 of the Merger Agreement contained an affirmative covenant requiring Merrill to "conduct its business in the ordinary course in all material respects" and "use reasonable best efforts to maintain and preserve intact its business organization and advantageous business relationships and retain the services of its key officers and key employees." Merrill had previously disclosed to investors its need to pay discretionary bonuses to key employees in order to retain their services. *See* Merrill March 2008 Proxy at 28-29 (Ex. 7) (stating that it was "essential that [Merrill] pay many key employees at market levels in order to retain them and avoid long-term damage to the franchise"). And in Section 6.5(a) of the Merger Agreement, the Bank agreed to maintain Merrill's "employee benefit plans and compensation opportunities" until December 31, 2009 on terms "substantially comparable" to those provided to Merrill employees immediately prior to the consummation of the merger. Proxy at A-35 (Ex. 1).

3. **Exceptions authorized by the Bank's "prior written consent."** Notably, the Merger Agreement does not specify when the Bank's "prior written consent" had to be given. The Bank had the right to consent to Merrill's payment of bonuses at any time before the merger closed.

In addition to annexing a copy of the Merger Agreement, the Proxy summarized its terms. Consistent with the plain meaning of Section 5.2, the Proxy likewise disclosed that all of the negative covenants in the Merger Agreement — including the covenant relating to Merrill's payment of bonuses — were subject to "certain exceptions" as well as the Bank's "prior written consent." *Id.* at 83. And the Proxy's description of the Merger Agreement's terms was expressly "subject to, and qualified in its entirety by reference to the merger agreement." *Id.* at 76.

No reasonable investor could have read Section 5.2(c) and the Proxy to set forth an unqualified representation that Merrill would not pay any bonuses prior to closing. Because Plaintiffs' allegation that the Bank misrepresented that the Merger Agreement provided that Merrill would not pay bonuses to its employees prior to closing is inconsistent with the text of the Merger Agreement and Proxy, it cannot survive a motion to dismiss. *See In re Optionable Sec. Litig.*, 577 F. Supp. 2d 681, 690 (S.D.N.Y. 2008) (dismissing allegations where they were contradicted by their source); *Phillips* v. *LCI Int'l, Inc.*, 190 F.3d 609, 615-16 (4th Cir. 1999) (no material misrepresentation when the proxy did not indicate what plaintiffs alleged it did).

2. SEC filings made clear that negative covenants were not representations of fact. Not only did the Bank plainly disclose that the negative covenant relating to Merrill's payment of bonuses was subject to exceptions, but also both the Bank and Merrill expressly warned investors that the covenants in the Merger Agreement were contractual allocations of risk (for example, to prevent unilateral action by the company to be acquired prior to closing to the financial detriment of the acquiror), often qualified by confidential disclosure schedules, and thus should not be read as representations of fact.

Merrill's September 18 Form 8-K that annexed a copy of the Merger Agreement stated that the "representations, warranties, and covenants in the Merger Agreement" were made "solely for the benefit of the parties to the Merger Agreement" and "may be subject to limitations agreed upon by the contracting parties, including being ***qualified by confidential disclosures*** made for the purposes of allocating contractual risk between the parties to the Merger Agreement ***instead of establishing these matters as facts***." Merrill 9/18/08 8K, at Item 1.01 (Ex. 18) (emphasis added). On the very same page the negative covenants were described, the Proxy stated: "The merger agreement is described in, and included as an appendix to, this document only to provide you with information regarding its terms and conditions and ***not to provide any other factual information*** regarding Merrill Lynch, Bank of America or their respective businesses." Proxy at 83 (Ex. 1) (emphasis added). The Proxy also directed investors to look for "important information about the companies and their financial condition" in specified public filings that both companies had made with the SEC, which were expressly incorporated by reference into the Proxy. *Id.* at 123. It then

warned investors that the "terms and conditions" of the Merger Agreement were "***not [intended] to provide any other factual information regarding Merrill Lynch***" and, accordingly, "***provisions of the merger agreement should not be read alone***, but should be read in conjunction with the other information . . . incorporated by reference into this document." *Id.* at 125 (emphasis added).

For this reason, too, no reasonable investor could have read Section 5.2(c) or the descriptions thereof in the Proxy as a factual representation that Merrill would not pay bonuses. *See Halperin* v. *eBanker USA.com, Inc.*, 295 F.3d 352, 357 (2d Cir. 2002) (misrepresentations in a stock offering immaterial as a matter of law "because it cannot be said that any reasonable investor could consider them important in light of adequate cautionary language set out in the same offering"). Rather, investors would have understood Section 5.2(c) to be what the Proxy said it was, *i.e.*, a contractual provision designed to protect the Bank against Merrill's having a "blank check" to pay bonuses between signing and closing without the Bank's consent, rather than a factual representation that no bonuses would be paid.[2]

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[2] Plaintiffs may seek to rely on the decision in *Glazer Capital Mgmt., L.P.* v. *Magistri*, 549 F.3d 736 (9th Cir. 2008). In that case, the defendant company announced its entry into a merger agreement in which it represented and warranted to its potential acquiror that it was "in compliance in all material respects with all laws" including the anti-bribery provisions of the Exchange Act. *Id*. at 741. Several months later, the company issued a press release that cast doubt on the merger because of the discovery of potential violations of anti-bribery laws. The Ninth Circuit rejected the argument that "because the statements appeared in the representations and warranties section of a private merger agreement directed solely to [the acquiror], the statements could not reasonably have been interpreted as factual communications *to investors*" such that the statements were "inactionable *as a matter of law*." *Id*. (emphasis in original). *Glazer* is readily distinguishable on several grounds. *First*, the case involved an affirmative representation of fact, as opposed to a contractual covenant. Section 5.2(c) of the Merger Agreement was not a representation that a specific fact is true, but a negative covenant, *i.e.*, a promise not to engage in certain conduct prior to closing. *Second*, the Proxy here accurately stated that Section 5.2(c) was subject to exceptions, such that the Bank could consent — in the Company Disclosure Schedule or otherwise — to permit Merrill to pay bonuses. *Third*, the SEC filings annexing the Merger Agreement expressly warned investors that negative covenants, including Section 5.2(c), were "qualified by confidential disclosures made for the purposes of allocating contractual risk between the parties to the Merger Agreement" and thus should not be read to "establish[] these matters as facts." Merrill 9/18/08 8K, at Item 1.01 (Ex. 18); *see also* BofA 9/18/08 8K, at Item 1.01 (Ex. 17). And, *finally*, unlike the acquired company in *Glazer*, Merrill disclosed facts in its SEC filings that made it apparent that Section 5.2(c) could not be read as an unqualified representation that bonuses would not be paid; as demonstrated below, Merrill publicly disclosed accruals to pay billions in compensation (including bonuses) in its 2008 quarterly reports. *See* Point I.B.1, *infra.*

B. Merrill's Expected Compensation Expense Levels And Intention To Pay Bonuses Were Public, And There Was No Material Misrepresentation Or Omission As A Matter Of Law.

In any event, absolutely no one was deceived as to Merrill's right and intention to pay bonuses. The Proxy incorporated by reference Merrill's quarterly reports for the first three quarters of 2008 — the last of which was filed only two days after the Proxy was mailed to shareholders — disclosing that Merrill had accrued $11.17 billion in compensation expense for the first nine months of 2008. Proxy at 123-24 (Ex. 1) (incorporation by reference); Merrill 3Q08 10Q, at 5 (Ex. 34) (reporting accruals). A Merrill spokeswoman publicly confirmed the company's intention to pay bonuses in an October 27 *New York Times* article, and it was widely reported in the media throughout the fall of 2008 that Merrill indeed intended to pay billions of dollars in bonuses to its employees. *See* Point I.B.2, *infra*.

An omission is material if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Halperin*, 295 F.3d at 357 (citing *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976)). In other words, the alleged misrepresentation must have "significantly altered the 'total mix' of information made available" to investors. *Id*. Here, information available to investors included (a) disclosures, even ***after*** the Merger Agreement was signed, that Merrill expected to pay billions of dollars in compensation in 2008, (b) public confirmation by Merrill that it would pay such bonuses and (c) widespread media reports that Merrill would in fact be paying billions of dollars in bonuses. The investing public well understood that Merrill could — and would — pay bonuses to its employees.

1. Merrill's SEC filings disclosed multibillion-dollar compensation accruals.

In October and November 2008 — even after entering into the Merger Agreement and after disclosing the $29 billion in losses for the first nine months of 2008 (adjusted for one-time gains), *see* Point II.D, *infra* — Merrill publicly disclosed that it was accruing to pay compensation and

benefits at approximately the same level as for 2007, a year for which it was publicly known that Merrill had paid billions in bonuses despite suffering multibillion dollar losses.[3] For example:

- In a press release issued on October 16, 2008 (under the heading "Compensation Expenses"), Merrill announced compensation and benefits expenses of $3.5 billion for the third quarter of 2008. This brought the company's accrued ***compensation and benefits expense for the first nine months of 2008 to $11.170 billion — down only 3% from $11.564 billion for the same period in 2007***. Merrill 10/16/08 8K, Ex. 99.1, at 8 (Ex. 25). The Proxy incorporated this Form 8-K by reference. Proxy at 124 (Ex. 1).
- These accruals were further explained in a conference call that same day, during which Merrill's CFO highlighted the fact that "Compensation Expenses for the quarter . . . were $3.5 billion" and "on the year to date basis comp expense is down slightly from comparable 2007 levels." Merrill 3Q08 Earnings Call Tr., at 5 (Ex. 26).
- Three weeks later, on November 5, Merrill filed its Form 10-Q for the third quarter, which reported the same nine-month compensation accruals as the October 16 earnings release and conference call. Merrill 3Q08 10Q, at 5, 86 (Ex. 34). The Proxy incorporated this Form 10-Q by reference. Proxy at 123-24 (Ex. 1).

These disclosures, which were expressly incorporated by reference into the Proxy, preclude any claim that material facts were withheld from investors regarding Merrill's intention to pay bonuses. *See* Schedule 14A, Item D, 17 C.F.R. § 240.14a-101 (allowing incorporation by reference in proxy statements).[4] Plaintiffs allege that "it was impossible to discern the size of the bonuses from the general compensation and benefits expense in Merrill's financial statements," because the accrual numbers included base salary and other elements of compensation. AC ¶ 159. As an initial matter, the breakdown of compensation-related expenses between base salary and incentive compensation that Plaintiffs seek is simply not required by any SEC rule or regulation,

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[3] *See, e.g.*, Christine Harper, *Goldman, Lehman, Morgan Lift Bonuses; Bear Cuts Them*, BLOOMBERG, Dec. 20, 2007 (Ex. 27) (estimating 2007 Merrill Lynch bonuses would total $7.3 billion).

[4] *See also White* v. *H&R Block, Inc.*, 2004 WL 1698628, at *12 (S.D.N.Y. July 28, 2004) (considering "press releases and SEC filings from [the defendant] itself"); *In re Keyspan Corp. Sec. Litig*., 383 F. Supp. 2d 358, 373-74 & n.6 (E.D.N.Y. 2003) (charging shareholders with knowledge of company's SEC filings, including "documents available on the SEC website").

It would be inconsistent with the SEC's entire integrated disclosure regime *not* to consider other documents publicly filed with the SEC, especially where those documents are incorporated by reference into a proxy statement, the company offers to mail those documents to shareholders, and they are readily and instantaneously available on the SEC's website. *See* Securities Act Release No. 6235, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,649, at 83,484 (Sept. 2, 1980) (adopting incorporation by reference rules for a prospectus); *see also* Securities Act Release No. 6676, 36 SEC Docket 1203 (Nov. 10, 1986) (adopting incorporation by reference rules for proxy statements).

including those specifically applicable in the merger context.[5] Consistent with Merrill's own past practices, Merrill did not distinguish among base salary, incentive compensation, and other benefits and compensation-related expenses, other than for its most senior executive officers. *See* Merrill, 2007 10K, at 32 (Ex. 6). In doing so, Merrill followed not only the SEC rules, but also industry practice; no comparable financial institution provides such a breakdown.[6]

Moreover, Merrill disclosed in its March 2008 Annual Proxy that base salary normally represents a portion of total compensation and that despite "significant losses in one area of our business," industry practice made it "essential" to "pay many key employees at market levels in order to retain them and avoid long-term damage to the franchise." Merrill March 2008 Proxy, at 28-29 (Ex. 7). Thus, Merrill disclosed its intention to pay bonuses to employees in a year in which the company had suffered a $12.8 billion pre-tax loss. The March 2008 Proxy further disclosed that Merrill's "compensation framework emphasize[d] variable pay" and "use[d] substantial stock-based compensation." Merrill March 2008 Proxy at 29 (Ex. 7). Thus, it was apparent to any investor reading the Proxy and the SEC filings it incorporated by reference that "base salary" represented only a portion of the $11.17 billion in compensation expense that Merrill had accrued through the first three quarters of 2008. *Id.*; Merrill 3Q08 10Q at 5 (Ex. 34). Finally, even a rudimentary calculation using the publicly available compensation accruals would have yielded total

[5] The SEC rules required that Merrill describe in the Proxy the compensation that its directors and senior executive officers would derive from the merger itself. *See* Schedule 14A, Item 5, 17 C.F.R. § 240.14a-101. Merrill provided such disclosure. *See* Proxy at 73-75 (Ex. 1). In addition, Item 18 of Form S-4 requires a registrant to disclose compensation paid to a small number of its most senior officials during the previous fiscal year, but a registrant eligible for use of Form S-3 (as Merrill was) is entitled to incorporate by reference its most recent annual report instead of including separate disclosures in the proxy (*see* Form S-4, Item 18(b), 17 C.F.R. § 239.25), which is what Merrill did. *See* Proxy at 124 (Ex. 1); *see also* Merrill 2007 10K, at 170 (Ex. 6) (incorporating by reference this information from the Merrill March 2008 Proxy (at 38 (Ex. 7)), as permitted by Form 10-K at G(2)). Conspicuously absent from the SEC rules is *any* requirement to disclose company-wide compensation payments, much less a breakdown of salary versus incentive compensation.

[6] *See, e.g.*, Goldman Sachs Group Inc. 2008 10K, at 81, 131 (Ex. 46); Morgan Stanley 2008 10K, at 34 (Ex. 47); Citigroup Inc. 2008 10K, at 116 (Ex. 51); JPMorgan Chase & Co. 2008 10K, at 36, 118 (Ex. 52). These documents, like other SEC filings, may be considered on this motion to dismiss. *See In re Aegon N.V. Sec. Litig.*, 2004 WL 1415973, at *9 (S.D.N.Y. June 23, 2004) (considering facts drawn from an SEC filing of a company not party to the instant litigation).

compensation and benefits expenses for 2008 ***within one percent of the actual amount*** ultimately paid by Merrill.[7]

2. The media and marketplace understood that Merrill would pay billions in bonus compensation for 2008. The Court may take judicial notice of the widespread news accounts reporting in the fall of 2008 that, just as it had in 2007, Merrill ***would pay billions in bonuses*** for 2008 despite suffering billions of dollars in losses.[8] These included an October article in *The New York Times* in which a Merrill spokeswoman confirmed that the firm was accruing to pay billions of dollars in bonuses for 2008, and a *Bloomberg* article on the same day including a chart converting compensation accruals into bonus estimates. Thus:

- CNN's *The Situation Room* reported on October 23 that Merrill had set aside $11.2 billion for "salaries and ***bonuses***" through the third quarter. (Ex. 29)

- *The New York Times* and *Bloomberg News* reported on October 27 that Merrill was "***allocating about $6.7 billion to pay bonuses***." These reports included ***confirmation by a Merrill spokeswoman*** that "the firm's accrued ***bonuses*** were not down as much as those at Goldman and Morgan Stanley because Merrill cut expenses last year." These reports added that "[t]he ***bonus figures*** are based on estimates that ***about 60 percent of the compensation and benefits expenses reported by the companies [for the first nine months of the year] will be paid in year-end bonuses, as occurred in past years***." (Exs. 30 & 31) (emphases added).

- The next day, October 28, NBC's *The Today Show* reported that "at Merrill Lynch, *Bloomberg* estimates $6.7 billion [was] set aside for ***bonuses***." (Ex. 32).

- *Bloomberg News* reported on October 30 that Merrill and its competitors Goldman Sachs and Morgan Stanley had "already set aside $20 billion to pay for ***bonuses*** this year." That report noted that "industry veterans" had said that the Wall Street firms "will . . . pay bonuses this year," that bonuses "typically account for about two-thirds of compensation at the biggest Wall Street firms," and that "bonuses are accrued throughout the year." *The Financial Times* similarly so reported the next day. (Exs. 33 and 62).

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7 Annualizing the $11.17 billion in accruals for the first three quarters would result in an estimate of $14.893 billion in compensation and benefits for the year. Ultimately, Merrill paid $14.763 billion in total compensation, Merrill 2008 10K at 52 (Ex. 49), a difference of only 0.87%.

8 *See e.g. GAF Corp.* v. *Heyman*, 724 F.2d 727, 729 (2d Cir. 1983) ("total mix" of information available at time of proxy contest "included the many news stories that the closely watched contest had generated"); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig*., 272 F. Supp. 2d 243, 250-51 (S.D.N.Y. 2003) (relying on newspaper articles to dismiss on the basis that "information regarding the alleged conflict of interest was public knowledge"); *accord DeBenedictis v. Merrill Lynch & Co., Inc*., 492 F.3d 209, 214, 217-18 (3d Cir. 2007) (considering articles from *USA Today*, *Time Magazine* and *The Wall Street Journal*); *Beissinger* v. *Rockwood Computer Corp*., 529 F. Supp. 770, 781 (E.D. Pa. 1981) (granting dismissal based on "widely known" industry knowledge).

- Fox News Channel on its 6 p.m. news show *Fox Special Report with Brit Hume* reported on November 13 on the size of "***bonuses***" that Merrill employees "will . . . receive." (Ex. 37).

- On December 3 — just two days before the shareholder vote — *Bloomberg News* reported yet again that Merrill would be paying billions of dollars in year-end bonuses. This *Bloomberg* report specifically noted that Merrill was "plan[ning] to cut year end bonuses" by "about 50%" compared to the prior year, which would have equated to 2008 year-end incentive compensation payments of over $3 billion. (Ex. 40). *MarketWatch.com* issued a similar report the same day.[9] (Ex. 41).

It is notable that Plaintiffs' 395-paragraph Complaint does not cite a single media account from the fall of 2008 reporting that Merrill would not pay year-end bonuses. In light of the widespread media reports that Merrill would pay bonuses, it is apparent that nobody at the time read the Proxy or the Merger Agreement the way Plaintiffs now claim these documents could be read.

In sum, in light of the SEC filings incorporated by reference into the Proxy and the widespread media accounts in the fall of 2008 regarding Merrill's intention to pay billions of dollars in bonuses, the fact that Merrill would (and could) make such payments to its employees was not a "secret." *See, e.g.,* AC ¶ 110. No one was misled. There was no material misrepresentation or omission as a matter of law. *See, e.g., In re Yukos Oil Co. Sec. Litig.*, 2006 WL 3026024, at *21-22 (S.D.N.Y. Oct. 25, 2006) (taking judicial notice of news reports and dismissing for lack of materiality because alleged omissions were "immaterial in light of the wealth of publicly available information"); *Benzon* v. *Morgan Stanley Distribs., Inc.*, 420 F.3d 598, 603, 608 (6th Cir. 2005) (underlying material data was available in the prospectus and consequently failure to specifically disclose that Morgan Stanley's "broker compensation structure creates more attractive incentives for the sale of Class B shares" was not actionable); *White*, 2004 WL 1698628, at *12 (dismissing complaint where the "truth was all over the market").[10]

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[9] Even the international press picked up this same story line. For example, *The Guardian* reported on October 17 that Merrill had accrued over $11 billion for "salaries and ***bonuses***" through the first nine months of the year, that "[p]ay plans for bankers have been disclosed in recent corporate statements," and that for Merrill the "total accrued in the last quarter grew 76% to $3.49bn." (Ex. 28) (emphasis added).

[10] The Complaint (AC ¶ 175) cites Judge Rakoff's order of September 14 rejecting the settlement in the SEC Action, but that order simply reflected his determination that the settlement proposed by the SEC and the Bank was not fair and reasonable and, accordingly, that that case should proceed to trial. *SEC* v. *Bank of Am.*, --- F. Supp. 2d ----, 2009 WL 2916822, at *2 (S.D.N.Y. Sept. 14, 2009). Judge Rakoff never addressed whether the allegations in the complaint in the SEC Action stated a claim upon which relief can be granted, even in a case brought by the SEC. In addition, the SEC's allegations that the Proxy was misleading with respect to bonus disclosures are not entitled to any weight as they have yet to be adjudicated and, indeed,

C. The Bank Had No Duty To Disclose The "Bonus Cap" And The Existence Of The "Bonus Cap" Was Immaterial As A Matter Of Law.

The Bank simply had no duty under applicable SEC rules to disclose the contractual cap on the amount that Merrill could pay in bonuses prior to the closing. The accruals, which reflected the amounts Merrill actually expected to pay, and not the contractual cap, were the potentially material information — and that information was fully disclosed.

(1) Form 8-K. Plaintiffs acknowledge that the Merger Agreement referred to the Company Disclosure Schedule, but allege that the Bank's "failure to either publicly file the Disclosure Schedule or summarize [its] contents" rendered the Forms 8-K filed on September 18, 2008 with respect to the Merger Agreement "materially false and misleading because they violated Item 601(b)(2) of Regulation S-K." AC ¶ 198.

Plaintiffs are wrong. Item 601 of Regulation S-K — an SEC rule that relates to the filing of "exhibits" — did not require the Bank or Merrill to make any disclosure of the bonus "cap." Indeed, Item 601 is a technical rule that speaks to when companies should affix exhibits to their filings. One category of documents to be filed as exhibits to an 8-K is a "plan of acquisition" — *i.e.*, merger agreement. *See* 17 C.F.R. § 229.601, Exhibit Table. Here, the Merger Agreement itself was filed. Item 601(b)(2), relating to "plan[s] of acquisition," goes on to provide that "[s]chedules (or similar attachments) to [merger agreements] shall ***not*** be filed unless such schedules contain information which is material to an investment decision and which is not otherwise disclosed in the agreement or the disclosure document." 17 C.F.R. § 229.601(b)(2) (emphasis added).[11] Indeed, it is a common practice to use nonpublic disclosure schedules to qualify covenants. *See* n.23, *infra*.

should be struck under Rule 12(f). *See Lipsky* v. *Commonwealth United Corp.*, 551 F.2d 887, 893-94 (2d Cir. 1976); *In re Merrill Lynch & Co., Research Reports Sec. Litig.*, 218 F.R.D. 78, 78-79 (S.D.N.Y. 2003) (granting motion in private securities action to strike references to SEC allegations). The Bank is defending the SEC Action vigorously. That it has answered the Complaint in that action — a case that Judge Rakoff set for early trial and in which the plaintiff is not subject to the pleading strictures the PSLRA imposes on private litigants — has no bearing on the Bank's motion here.

[11] Moreover, as discussed below, there is no line-item requirement in Schedule 14A or Form S-4, the federal proxy rules imposing the disclosure obligations applicable to stock-for-stock mergers that require disclosures regarding company-wide bonus programs. If no substantive disclosure requirement is imposed by the rules that prescribe what must be disclosed, one should not infer such a substantive requirement from Item 601, a provision that, on its face, governs the technical aspects of the filing of exhibits and establishes a general rule of ***non***-disclosure of schedules to a merger agreement unless "material" and "not otherwise disclosed." 17 C.F.R. § 229.601(b)(2) (emphasis added).

The existence of the disclosure schedule setting forth a $5.8 billion upper limit on the amount of bonus compensation that Merrill could pay without the Bank's prior consent was not "material to an investment decision" by anyone. *Id.* The $5.8 billion cap bore no relationship to the amount of incentive compensation that Merrill actually intended to award or to the already disclosed total amount of compensation Merrill would pay to its employees. Indeed, the latter is the only figure that might have mattered to the reasonable investor. As noted, Merrill made such disclosure in its third quarter 2008 10-Q. Merrill 3Q08 10Q, at 5 (Ex. 34). This included amounts representing accrued year-end compensation that Merrill estimated that it would pay for 2008.[12] As the Complaint concedes (AC ¶ 228), Merrill in fact ultimately paid ***$3.6 billion*** in bonuses in 2008 — an amount well below the $5.8 billion cap.[13] Particularly since the compensation accruals were both fully disclosed and the subject of widespread media coverage, the existence of a cap on bonuses at a level well in excess of what Merrill expected to pay (and what it ultimately paid) was not material. *See* Point I.B, *supra*.

(2) **Proxy Rules**. Plaintiffs allege that the Proxy violated Section 14(a) of the Securities Exchange Act of 1934 ("Exchange Act") by omitting disclosure of the bonus cap. AC ¶ 331(a). Again, Plaintiffs are wrong. An omission is actionable under Section 14(a) only if "the SEC regulations specifically require disclosure of the omitted information in a proxy statement, or the omission makes other statements in the proxy statement materially false or misleading." *Resnik* v. *Swartz*, 303 F.3d 147, 151 (2d Cir. 2002).

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[12] The size of the accrual was an indicator of Merrill's intention to pay bonuses (and the amount it expected to pay), whereas the contractual cap was not. Under GAAP standards, incentive compensation accruals are considered current liabilities for accounting purposes and thus the best estimate (or at least the minimum amount in an expected range) must be disclosed. *See GAAP Codification Enhanced* 718-19 (Wiley 2009); SFAS § No. 5 ¶ 11; SFAS § 450-20-30-1 (Fin. Accounting Standards Bd. 2009). Thus, continued accruals for compensation throughout 2008 — and the lack of any reversal or reduction of such accruals after the Merger Agreement was signed — manifested Merrill's belief that it had the right to pay such compensation under the Merger Agreement and its intention to do so.

[13] Though Plaintiffs seek to sensationalize their bonus claims by reference to a "page ripped from a notebook" on which someone from Merrill "scribbled eight-digit [bonus] figures for each of Merrill's top five executives," (AC ¶ 68), as Merrill later disclosed, none of its top five executives received a bonus for 2008. Merrill 12/8/08 Press Release (Ex. 42).

Here the applicable SEC rules did not require that the "bonus cap" be disclosed. The SEC rules required Merrill and the Bank to disclose "any substantial interest" of their directors or senior officers in the merger. *See* Form S-4, Item 18(a)(5)(i), 17 C.F.R. § 239.25; Schedule 14A, Items 5(a), 14(c), 17 C.F.R. § 240.14a-101.[14] But they did ***not*** require disclosure regarding any company-wide compensation program, let alone disclosure of a negotiated ***limit*** on the discretionary component of such compensation. And, nothing in Rule 14a-9 required this disclosure. Disclosure of the bonus cap was not "necessary in order to make the statements [in the Proxy] not misleading" or "to correct any statement in any earlier communication . . . which has become false or misleading." 17 C.F.R. § 240.14a-9. To the contrary, the Proxy accurately disclosed that the negative covenant in Section 5.2(c) was "subject to exceptions," and the Proxy incorporated by reference the 10-Qs reflecting Merrill's accruals to pay compensation expense, which accrual was in line with the amount of aggregate compensation (including bonuses) that Merrill ultimately paid. Proxy at 123-24 (Ex. 1).

Because the Proxy's disclosures relating to compensation complied with the proxy rules, the Section 14(a) claims relating to these disclosures must be dismissed. *See Resnik*, 303 F.3d at 153-54 (affirming dismissal of Section 14(a) claim based on alleged omission where SEC rules did not require disclosure); *In re Marsh & McLennan Cos. Sec. Litig.*, 526 F. Supp. 2d 313, 321 (S.D.N.Y. 2007) (dismissing 14(a) claim where plaintiff did not allege that disclosure of omitted information was "required by the SEC"); *Freedman* v. *Barrow*, 427 F. Supp. 1129, 1141 (S.D.N.Y. 1976) (dismissing 14a-9 claim "primarily because the omission . . . did not make any of the other statements in the proxy materials false or misleading").

D. The March 2008 Annual Proxy Predated The Merger And, In Any Event, Disclosed That Merrill Had Paid Bonuses Despite Losses In 2007.

Plaintiffs allege that statements in Merrill's March 2008 annual meeting Proxy, including that Merrill paid bonuses "in January for performance in the prior fiscal year," and had a "pay for performance" compensation policy whose purpose was to "enhance returns to

[14] The Proxy provided such disclosure. Proxy at 73-75 (Ex. 1).

shareholders," were misleading because Merrill paid billions of dollars in bonuses notwithstanding its fourth quarter losses. AC ¶¶ 219-20, 333(j). This claim is totally without merit.

The March 2008 Proxy predated the execution of the Merger Agreement by over six months and did not purport to relate to the merger. Plaintiffs fail to allege any facts suggesting that the general description of Merrill's compensation philosophy and practices set forth in the March 2008 Proxy was false when made. Nor do Plaintiffs allege any facts to suggest that Merrill represented to the investing public that the general practices on timing of payment referred to in the March 2008 Proxy would continue to apply in the event that Merrill entered into a merger expected to close on January 1, 2009. *See In re Foxhollow Techs., Inc. Sec. Litig.*, 2008 WL 2220600, at *20-21 (N.D. Cal. May 27, 2008) (statement that executive compensation philosophy is to "attract and retain executives" not an ongoing representation that specific employees would be retained); *Goldberger* v. *Baker*, 442 F. Supp. 659, 665 (S.D.N.Y. 1977) (dismissing claims and finding "no reason why every transaction in which a corporation wishes to engage should have to be measured against all statements of company policy previously made"). No reasonable shareholder would have read these general descriptions of Merrill's compensation practices — which predated the Merger Agreement by more than six months — as ongoing representations that, for example, bonuses would invariably be paid in January rather than December.[15]

Furthermore, the March 2008 Proxy did not contain any representation that bonuses would be paid only if the company as a whole was profitable. *See* Point I.B, *supra*. In 2007, Merrill paid billions in bonuses — despite losing $12.8 billion pre-tax. Proxy at 41 (Ex. 1) It was therefore apparent to shareholders that, even in a year in which the company's performance was disappointing, competitive pressures may nevertheless require Merrill to pay bonuses. Indeed, the March 2008 Proxy disclosed that in 2007, although Merrill's "overall performance was disproportionately

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[15] Further, while the March 2008 Proxy disclosed that, with respect to "executive officers," its practice had been to pay bonuses in January (Merrill March 2008 Proxy at 29 (Ex. 7)), it nowhere stated that Merrill would always pay bonuses to all employees after year-end. To the contrary, the March 2008 Proxy said that the company's compensation program, even for executive officers, "can vary significantly year to year" and was "[n]ot formulaic." *Id.* In any event, the timing of bonus payments, in and of itself, can hardly be described as material to a reasonable investor.

affected by significant losses in one area" of its business, Merrill nonetheless concluded that "it was essential that the Company pay many key employees at market levels in order to retain them and avoid long-term damage to the franchise." Merrill March 2008 Proxy, at 28 (Ex. 7).

E. The Complaint Fails To Adequately Allege Scienter, Or Even Negligence, With Respect To The Subject Of Bonuses.

The PSLRA imposes the requirement that any Exchange Act claim, Section 10(b) or 14(a) alike, "specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading," 15 U.S.C., § 78u-4(b)(1), and, in addition, that "with respect to each act or omission alleged to violate this chapter, [the complaint shall] state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Id*. § 78u-4(b)(2). Rule 9(b) imposes the similar requirement that a complaint sounding in fraud "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Rombach* v. *Chang*, 355 F.3d 164, 170 (2d Cir. 2004). Even apart from Rule 9(b) and the PSLRA, to survive a motion to dismiss a claim must be "plausible on its face." *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)).

Notably, these pleading requirements must be met "as to each of the defendants." *Ganino* v. *Citizens Utils. Co*., 228 F.3d 154, 168 (2d Cir. 2000); *see also In re Ceridian Corp. Sec. Litig*., 542 F.3d 240, 246 (8th Cir. 2008) (dismissing claims that failed to make "*specific* allegations in the complaint linking one of the individual defendants to the violation").

1. Scienter And Fraudulent Conduct Are Not Adequately Pled.

The required state of mind for a Section 10(b) claim is "a mental state embracing intent to deceive, manipulate, or defraud." *Tellabs, Inc.* v. *Makor Issues & Rts., Ltd.*, 551 U.S. 308, 319 (2009) (internal citations and quotations omitted). A plaintiff must allege facts (1) showing that each defendant had both motive and opportunity to commit fraud or (2) constituting strong circumstantial evidence of conscious misbehavior or recklessness. *ECA* v. *JP Morgan Chase Co.*, 553 F.3d 187, 198 (2d Cir. 2009); *see also ATSI Commc'ns, Inc.* v. *Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007). The Supreme Court has made clear that the scienter pleading hurdle is high: "[An] inference of scienter must be more than merely plausible or reasonable — it must be cogent

and at least as compelling as any opposing inference of nonfraudulent intent." *Tellabs*, 551 U.S. at 313. This Court must thus "consider plausible nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff" and only allow a complaint to survive a motion to dismiss "if a reasonable person would deem the inference of scienter cogent and at least as compelling as any plausible opposing inference one could draw from the facts alleged." *Id*. at 324. If, after weighing all nonculpable explanations, the inference of scienter is merely "plausible" or "reasonable," the complaint cannot survive. *City of Brockton Ret. Sys.* v. *Shaw Group Inc*., 540 F. Supp. 2d 464, 471 (S.D.N.Y. 2008). Here, the facts pled do not give rise to a cogent inference of scienter, and non-fraudulent inferences are more compelling.

a. Plaintiffs fail to plead particularized facts giving rise to a strong inference of scienter. The Complaint devotes ten pages to allegations of scienter (AC ¶¶ 230-60), but in all of those ten pages, only four paragraphs (*id.* ¶¶ 236, 250, 256-57) relate to the "bonus" issue. None of these allegations plead facts giving rise to a "strong inference" of scienter.

The first of the allegations, ¶ 236, alleges scienter as to all Defendants. This is impermissible "group" pleading of scienter. *See In re AstraZeneca Sec. Litig.*, 559 F. Supp. 2d 453, 472 (S.D.N.Y. 2008), *aff'd State Univ. Ret. Sys. of Ill.* v. *AstraZeneca PLC*, 2009 WL 1796534 (2d Cir. Jun. 25, 2009). The only individual allegations are directed against the Bank's CEO Kenneth Lewis and Merrill's CEO John Thain.[16] Plaintiffs do not even attempt to plead any particularized allegations of scienter related to the "bonus" issue as to Bank Executives Joe Price or Neil Cotty or any of 15 named outside directors of the Bank Board. The scienter-based claims against these 17 defendants fall for this reason alone. *See AstraZeneca*, 559 F. Supp. 2d at 472.

Even as to Lewis and Thain, all that is said in ¶ 236 is that they have "admitted their knowledge of the bonus agreement." But this does not suffice to support an inference of fraudulent conduct. As set forth above, the Proxy (and the 10-Qs incorporated by reference) publicly disclosed that Merrill was accruing compensation expenses at levels consistent with its 2007 compensation accruals (when Merrill had paid billions of dollars in bonuses), and a spokeswoman for Merrill

[16] Thain will be submitting a separate brief addressing the allegations raised against him.

confirmed to *The New York Times* in October 2008 that Merrill was accruing to pay bonuses. *See* Point I.B, *supra*. These disclosures totally undermine any claim that Defendants fraudulently sought to keep investors from knowing that Merrill expected to pay bonuses for 2008. While the disclosure schedule that set forth the agreed-upon cap on bonuses was not made public, as explained above, the SEC's rules did not require the schedule to be made public and shareholders were told that covenants may be "qualified by confidential disclosures." *See* Points I.A.2 and I.C, *supra*.

As to Lewis only, Plaintiffs predicate their scienter allegations in ¶ 250 on so-called "inconsistencies" in his public statements or between Lewis's understanding of events and those of others. These allegations fail to demonstrate scienter on Lewis's part. Several of these purported "inconsistencies" are simply a product of Plaintiffs' mischaracterization of Lewis's statements. For example, Plaintiffs take issue with Lewis's testimony to Congress that his involvement in approving Merrill's bonus awards was "very limited" (as Merrill had a "separate Board [and] compensation committee and [the Bank] had no authority to tell them what to do") because, in Plaintiffs' view, Lewis "specifically authorized Merrill to pay up to $5.8 billion of bonuses."[17] AC ¶ 250. This allegation confuses the Bank's agreement to a cap on bonus compensation with the decision as to how much should actually be paid and to whom — a decision that was, in fact, made by the Merrill Board and not Lewis. See AC ¶ 104 ("Merrill's Compensation Committee approved the accelerated schedule"); *Merrill delivered bonuses before BofA deal*, FIN. TIMES (Jan. 21, 2009) (Ex. 45) (cited at AC ¶ 155) ("Merrill's compensation committee approved the bonuses.").

Plaintiffs have thus failed to plead facts demonstrating "concrete and personal benefit" to Lewis (or any other defendant) that would potentially establish motive and opportunity;

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[17] Plaintiffs' allegation that Lewis testified falsely before Congress — apparently during his testimony on February 11, 2009 — regarding his role in the Merrill bonuses is based upon snippets of testimony shorn of context. *Compare* AC ¶ 250 ("Lewis portrayed his involvement in approving the bonuses as 'very limited,' stating that "Merrill was a public company until the first of the year. . . .") *with* Testimony of Kenneth L. Lewis, *TARP Accountability: Use of Federal Assistance by the First TARP Recipients, Hearing Before the House Comm. on Fin. Servs.*, 111th Cong. 33 (Feb. 11, 2009) (Ex. 63) ("My ***personal involvement*** was very limited, but let me give you ***my general understanding*** of what happened," continuing "I do know that we urged the Merrill Lynch executives who were involved in this compensation issue to reduce the bonuses substantially, particularly at the top."). *Id*. (emphasis added). Read in context, it is clear that by "very limited," Lewis was merely clarifying that specific subsequent statements did not come from direct knowledge, a fact that Plaintiffs do not contest.

nor have plaintiffs pled any facts showing "conscious misbehavior or recklessness" on the part of Lewis (or any other defendant). *ECA*, 553 F.3d at 198.

b. Non-fraudulent inferences are more compelling than any alleged inferences of scienter. Even if the Court were to conclude that the Complaint's bonus claims gave rise to some inference of scienter as to some Defendants, the Court would still be obligated to consider competing non-fraudulent inferences under *Tellabs*. *See* 551 U.S. at 310. Such inferences may be considered with regard to both individual defendants and corporate defendants, and in order to demonstrate that a corporate defendant possessed the requisite scienter, "the pleaded facts must create a strong inference that someone whose intent could be imputed to the corporation acted with the requisite scienter." *Teamsters Local 445 Freight Div. Pension Fund Inc.* v. *Dynex Capital Inc.*, 531 F.3d 190, 195 (2d Cir. 2008). Here, no strong inference of scienter exists as to any individual Defendant, and no recognized grounds for imputing scienter to a corporation creates a strong inference of scienter as to the Bank. *See id.*

Strongly militating against any inference of scienter here is the substantial stock ownership of the individual directors and officers. As of September 15, 2008, Bank directors held shares valued at approximately $1,005,896,770. Lewis alone held shares valued at $118,869,500.[18] These substantial stock holdings aligned the Defendants' interests with those of the Bank's shareholders, such that it was not in Defendants' financial interest to deceive the Bank's shareholders into supporting a merger that Defendants themselves did not support. And there are no allegations in the Complaint that any Defendant was selling shares during the relevant period. The competing inference that these Defendants did not intentionally or recklessly endanger their own portfolios is compelling. *See Cole* v. *Health Mgmt. Assocs.*, 2009 WL 2713178, at *9 (M.D. Fla. July 17, 2009).

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[18] These approximate valuations are based on the number of shares of Board common stock held by the Board (37,886,884), including Lewis (4,477,194), as of December 31, 2007, BofA 3/19/08 Proxy, at 18 (Ex. 8), and the closing price of the Bank's common stock as of September 15, 2008 ($26.55). BLOOMBERG, Bank of America Corp. Comp/Close/Price, Sept. 15, 2008 (Ex. 16). (The members of the Board and Lewis continued to hold similar numbers of shares through the consummation of the Merger, *see* BofA 3/18/09 Proxy, at 18 (Ex. 54).)

In addition, the public disclosures of Merrill's compensation and intent to pay bonuses militates against a strong inference of scienter. If Defendants intended to deceive investors as to Merrill's intentions to pay bonuses for 2008, why did the Proxy incorporate Merrill's disclosure in its third quarter 10-Q that it was accruing to pay $11.17 billion in compensation and benefits for the year? Why did a Merrill spokeswoman confirm to the *New York Times* on October 27 that Merrill intended to pay bonuses? Plaintiffs' scienter theories are "belied by logic." *In re Duane Reade Sec. Litig.*, 2003 WL 22801416, at *9 n.22 (S.D.N.Y. Nov. 25, 2003), *aff'd*, 2004 WL 1842801 (2d Cir. Aug. 17, 2004).

Furthermore, had the Defendants come to the conclusion prior to the December 5 shareholder vote that the $5.8 billion bonus cap was so material that it called into question the Bank's rationale for agreeing to the merger or the fairness of the proposed transaction price, what conceivable motive did they have to deliberately withhold that information from the market? The answer, of course, is ***none***. Indeed, if they believed this information was material, the Bank Defendants would have had a strong financial incentive to disclose these facts to the Bank's shareholders in the hopes that the shareholders would vote down the merger. As a recent *Wall Street Journal* editorial astutely observed, one should be "skeptical that [Bank] managers would risk violating securities laws in order to make sure that ***other*** people could collect large bonuses, or hide ***another*** firm's losses so they could have the privilege of overpaying to acquire [Merrill]" as "it defies explanation why the acquiror would not wish to disclose and use this information, if [it] thought it was truly material." *Banking Scapegoat of America: Ken Lewis Takes the Fall for Bonuses and Bailouts*, WALL ST. J., Sept. 21, 2009, at A18 (Ex. 57) (emphasis in original).[19]

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[19] Moreover, in not disclosing the bonus cap, the Bank was adhering to customary disclosure practices that have developed in connection with corporate transactions and otherwise. As noted above, SEC rules impose no line-item requirement under the federal proxy rules requiring the disclosure of company-wide bonus amounts (*see* Point I.C, *supra*), and it is customary to use nonpublic schedules to a merger agreement to qualify representations, warranties and covenants. *See* n.23 and accompanying text, *infra*. The Bank's adherence to customary disclosure practices undercuts any inference of scienter. *See In re PXRE Group, Ltd., Sec. Litig.*, 600 F. Supp. 2d 510, 540-41 (S.D.N.Y. 2009) (finding no recklessness in relying on industry-wide practices regarding loss estimation).

2. Plaintiffs' Section 14(A) And Securities Act Claims Must Also Be Held To The Heightened Pleading Standard For Pleading Fraud Claims Imposed By Rule 9(B).

Plaintiffs purport, in conclusory fashion, to "disclaim any allegations of fraud" in connection with their claims under Section 14(a) and the Securities Act of 1933 (the "Securities Act") (AC ¶ 327, 362). But where, as here, claims actually "sound in fraud," the federal courts have repeatedly held that Section 14(a) and Securities Act plaintiffs must satisfy Rule 9(b)'s heightened pleading standard.

In its seminal decision in *Rombach* v. *Chang*, 355 F.3d 164 (2d Cir. 2004), the Second Circuit expressly held that a complaint alleging claims under the Securities Act, and employing "wording and imputations" "classically associated with fraud," must be pled in accordance with Rule 9(b), notwithstanding Plaintiffs' assertions that their claims "do[] not sound in fraud." *Id.* at 171-72. This principle has been applied repeatedly to require both Section 14(a) and Securities Act claims to be pled with the particularity required by Rule 9(b).[20]

Despite Plaintiffs' conclusory disclaimer of allegations of fraud, the Complaint repeatedly alleges in the Section 14(a) claims that "[a]ll of the Proxy Solicitations were materially false and misleading" (AC ¶ 329-30) and that "the Proxy Solicitations contained numerous statements which were materially false and misleading." (*Id.* ¶ 333). And the Section 14(a) allegations essentially parallel Section 10(b) allegations elsewhere in the Complaint that are

[20] As to claims under Section 14(a), *see, e.g.*, *CALPERS* v. *Chubb Corp.*, 394 F.3d 126, 144 (3d Cir. 2004); *Police & Fire Ret. Sys.* v. *SafeNet, Inc.*, 2009 WL 2391849, at *9 (S.D.N.Y. Aug. 5, 2009) ("when plaintiffs assert Section 14(a) claims grounded in alleged fraudulent conduct, they are subject to heightened pleading requirements . . . even if they disclaim reliance on a fraud theory") (internal citation and quotation marks omitted); *In re JP Morgan Chase Sec. Litig.*, 363 F. Supp. 2d 595, 636 (S.D.N.Y. 2005) (dismissing Section 14(a) claim resting on allegations of fraudulent conduct notwithstanding plaintiffs' attempt to disclaim reliance on fraud theory).

The same is true as to claims under the Securities Act. *See, e.g., Caiafa* v. *Sea Containers Ltd.*, 2009 WL 1383457, at *2 (2d Cir. May 19, 2009); *Zirkin* v. *Quanta Capital Holdings, Ltd.*, 2009 WL 185940, at *12 (S.D.N.Y. Jan. 23, 2009); *Ladmen Partners, Inc.* v. *Globalstar, Inc.*, 2008 WL 4449280, at *11 n.10 (S.D.N.Y. Sept. 30, 2008) ("It is well established that . . . a boilerplate disclaimer is not enough to make out a claim for negligence"); *In re Axis Capital Holdings Ltd. Sec. Litig.*, 456 F. Supp. 2d 576, 598 (S.D.N.Y. 2006).

premised on scienter.[21] Plaintiffs' Securities Act claims are likewise predicated upon factual allegations that essentially parallel their 10b-5 allegations premised on scienter.[22]

Here, Plaintiffs' 14(a) and Securities Act claims fail to allege scienter with the degree of particularity demanded by Rule 9(b). *See, e.g., Zirkin* v. *Quanta Capital Holdings*, *Ltd.*, 2009 WL 185940, at *11-12 (S.D.N.Y. Jan. 23, 2009) (dismissing Securities Act claims in part because plaintiffs failed to allege scienter with the particularity required by Rule 9(b)); *In re JP Morgan Chase Sec. Litig*., 363 F. Supp. 2d 595, 636 (S.D.N.Y. 2005), *aff'd*, 553 F.3d 187 (2d Cir. 2009); *Police & Fire Ret. Sys.* v. *SafeNet, Inc*., 2009 WL 2391849, at *22 (S.D.N.Y. Aug. 5, 2009) (dismissing 14(a) claims as subject to Rule 9(b)). Plaintiffs do little more than assert that, by virtue of the individual Defendants' positions, they possessed the requisite scienter (*see, e.g.,* AC ¶¶ 230-36). But this is not an adequate substitute for particularized allegations about what each defendant knew, and when he or she knew it. *SafeNet*, 2009 WL 2391849, at *22.

3. <u>Negligence Is Not Adequately Pled.</u>

Even if the Court were to conclude that Plaintiffs are not required to satisfy Rule 9(b) with respect to their Section 14(a) claims or their claims under the Securities Act, to establish civil liability on these claims, a plaintiff must generally plead and prove negligence. *See JP Morgan Chase,* 363 F. Supp. 2d at 636. A failure of due care must be shown. *See* 3 THOMAS LEE HAZEN,

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[21] *See, e.g.*: the alleged failure to disclose that Merrill would not pay bonuses before January 1, 2009 (*compare* AC ¶ 331(j) *with* ¶ 108 (the Proxy "*affirmatively misrepresented*" that Merrill would not pay bonuses before January 1, 2009)); the alleged misstatements that Merrill would not pay bonuses before the merger closed (*compare* AC ¶ 333(i), *with* ¶ 215 (the Proxy "*falsely represented*" that Merrill would not pay discretionary bonuses before the close of merger)); the alleged misstatements regarding an "absence of material adverse changes" (*compare* AC ¶ 333(k), *with* ¶ 212 (the Proxy "*falsely represented*" that Merrill had not suffered a material adverse change in its condition)); the alleged misstatements regarding the capital condition of the combined company (*compare* AC ¶ 333(k) *with* ¶ 213 (the Proxy "*falsely portrayed*" the combined entity "had a strong capital position, funding capabilities, and liquidity") (emphasis added in all)).

[22] *See, e.g.*: the Offering Documents were "misleading" due to the omission of statements regard to "BoA's pre-existing agreement allowing Merrill" to pay bonuses (*compare* AC ¶ 364, *with* AC ¶ 197-98 (merger agreement "false and misleading" due to "secret" agreement allowing bonuses)); and that the Offering Documents omitted material facts by "represent[ing] that Merrill was prohibited from paying discretionary year-end bonuses" (*compare* AC ¶ 366, *with* ¶ 108 (the Proxy "*affirmatively represented*" that Merrill would not make any discretionary bonus payments before January 2009) (emphasis added)).

LAW OF SECURITIES REGULATION § 10.3 n.32 (6th ed. 2009) ("A finding of negligence requires finding a duty to have acted otherwise.").

Since Section 14(a) claims are subject to the PSLRA, a plaintiff must allege specific facts giving rise to a "strong inference" that each defendant has acted at least negligently in misrepresenting or failing to set forth the material facts in the proxy materials. *See, e.g.*, *JP Morgan Chase*, 363 F. Supp. 2d at 636; *Bond Opportunity Fund* v. *Unilab Corp.*, 2003 WL 21058251, at *4 (S.D.N.Y. May 9, 2003), *aff'd*, 2004 WL 249583 (2d Cir. Feb 10, 2004); *In re Elan Corp.*, 2004 WL 1305845, at *16 (S.D.N.Y. May 18, 2004) (report and recommendation). Moreover, PSLRA requirements aside, Plaintiffs' bonus allegations are deficient because Plaintiffs have failed to allege facts to establish negligent conduct on the part of each Defendant that meet *Iqbal*'s plausibility test. 129 S. Ct. at 1949 (claims must be "plausible on [their] face").

Here, as noted above, Plaintiffs' allegations' concerning the bonus cap issue and related disclosures refer to Lewis and Thain, but not to any other individual Defendant. As respects the other individual Defendants, these claims plainly fail, irrespective of the standard applied.

As to Lewis and Thain, Plaintiffs' allegations do not give rise to a "strong inference" of negligence. There are no specific allegations that those Defendants deviated from the standard of care and accepted practice applicable to executives in their positions. Among other things, it is a common practice to use nonpublic disclosure schedules to qualify covenants and to include cautionary language in SEC filings such as that used here and to warn investors that the descriptions of contractual provisions are not representations of fact.[23]

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[23] *See A "Titan"-ic Quandry: Can Contract Terms Disclosure Sink Your Company?*, Foley & Lardner LLP Webinar, at 242 (Mar. 29, 2005), *available at* http://www.foley.com/hope.aspx (Ex. 58 (second "Thoughts and Recommendations" slide)) ("We do not recommend publicly filing the confidential disclosure schedules, as they are not prepared for public disclosure but rather for risk allocation); *see also Merger Agreement Representations Take on a Life of Their Own*, Jones Day Commentary (July 2005) at 3-4 (Ex. 59); *A Repeated Call for Disclaimers When Filing Acquisition Documents on Edgar*, Day Pitney Alert (Mar. 17, 2009) at 2 (Ex. 53). Furthermore, the Bank and Merrill were assisted by multiple financial advisors and inside and outside counsel. *See, e.g.,* AC ¶¶ 179-80; 9/15/08 Press Conf. Tr., at 11 (Ex. 13). There is no allegation that any advisors involved in assisting with disclosures at issue lacked the requisite "professional or expert competence." *In re Cheyenne Software, Inc.*, 1996 WL 652765, at *2 (Del. Ch. Nov. 7, 1996) (Delaware law "provides that directors are protected from a breach of the duty of due care when the directors reasonably believe the information upon which they rely has been presented by an expert 'selected with reasonable care' and is within that person's 'professional or expert competence'") (quoting 8 Del. C. § 141(e)).

Accordingly, all of Plaintiffs' claims against the Bank Defendants relating to compensation paid to Merrill employees should be dismissed.

II. PLAINTIFFS' CLAIMS REGARDING DEFENDANTS' DISCLOSURES OF THE FINANCIAL CONDITION OF MERRILL AND THE BANK PRIOR TO THE SHAREHOLDER VOTE DO NOT STATE A CLAIM.

Plaintiffs allege that Defendants violated the federal securities laws by making "false and misleading misrepresentations and omissions regarding Merrill's and BoA's financial conditions and losses." AC ¶ 289; *see id.* ¶¶ 331(b), (c). Plaintiffs assert that Merrill incurred approximately $7 billion in losses in October (*Id.* ¶ 88) and, relying principally upon a February 5, 2009 *Wall Street Journal* story, that an unspecified "internal document" showed that Merrill had incurred a "pretax loss of $13.3 billion for the previous two months [October and November], and December was looking even worse." *Id.* ¶ 90.[24] Plaintiffs do not squarely allege, however, that the Bank received this "internal document," or that the Bank was otherwise aware of this $13.3 billion loss for October and November at any time prior to the December 5 vote. Plaintiffs elsewhere suggest that, according to a September 2009 letter written by the New York Attorney General, the Bank became aware "'prior to the shareholder vote'" that Merrill "had suffered 'more than $14 billion' of losses" (*id.* ¶ 101), although, as will be shown below, the Attorney General's letter does not state that. In any event, Plaintiffs allege that the Bank had a duty to disclose the October losses when the Proxy was filed on November 3, 2008 (*id.* ¶¶ 107, 290) and a duty to update and/or correct the Proxy thereafter (*id.* ¶ 291), but failed to do so prior to the shareholder vote in violation of Sections 10(b) and 14(a). Plaintiffs also allege that during the fourth quarter the Bank's own financial condition was

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[24] Plaintiffs elsewhere allege that, according to a September 8, 2009 letter from the New York Attorney General's office, in "November 2008, Merrill determined that it would need to take a goodwill charge of approximately $2 billion," and that this goodwill impairment "would be charged against Merrill's income." AC ¶ 91. Plaintiffs do not squarely allege, however, that Merrill actually booked this impairment charge in November 2008, and it is apparent from the New York Attorney General's letter on which this allegation is based that, as of November 2008, Merrill was still treating this as a "potential write-off of goodwill" that was not actually included in Merrill's financials until January 2009. NYAG 9/8/09 Letter, at 4 (Ex. 56). Accordingly, Plaintiffs' allegation that "[i]ncluding this $2 billion goodwill impairment, Merrill's total losses and impairments by the end of November 2008 totaled $15.3 billion" is contradicted by the document on which the allegation is based and should be disregarded. AC ¶ 91. *See In re Optionable*, 577 F. Supp. 2d at 690 (S.D.N.Y. 2008) (allegations may be disregarded where they are "contradicted by [their] alleged source").

deteriorating and that the Bank violated Section 14(a) by failing to disclose interim quarterly losses of $800 million and a projected quarterly loss of $1.4 billion. *Id.* ¶¶ 103, 331(c).

Plaintiffs are wrong. The federal securities laws did not require the disclosure of either company's interim financial results or projections, and actual fourth quarter results were not required to be disclosed at any time before the fourth quarter was closed and earnings were released (here, January 16, 2009). *See* BofA 1/16/09 8K, at Ex. 99.1 (Ex. 44). The securities laws create a system of periodic disclosures in which earnings are reported at specified quarterly intervals — not continuously whenever any new information (even if material) comes to light. The Bank thus had no duty to disclose intra-quarter financial results for Merrill or the Bank in the Proxy. It also had no duty to correct or update the disclosures that were made in the Proxy: neither the Bank nor Merrill issued a statement about their fourth quarter performance (anticipated or actual) that required correcting, and neither company made a forward-looking statement regarding the fourth quarter that required updating because it had become false or misleading. Moreover, the nonpublic information known to Defendants regarding Merrill's interim financial results was not material in light of the "total mix" of information then available to investors relating to the severe dislocations in the securities markets and their impact on Merrill's performance. Furthermore, Plaintiffs' allegations relating to the fourth quarter earnings issue do not satisfy the particularity requirements imposed by Rule 9(b) and the PSLRA. Not only do Plaintiffs fail to specify which Defendants received the allegedly material information that was not disclosed, and when, how and in what report they received it, but their allegations do not give rise to a "strong inference" that Defendants acted with scienter or even with negligence. Accordingly, Plaintiffs' claims relating to disclosure of interim results or forecasts prior to the shareholder vote must be dismissed.

A. Defendants Had No Duty To Disclose Interim Results Or Forecasts.

It is a fundamental principle of federal securities law that "[s]ilence, absent a duty to disclose, is not misleading." *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 239 n.17 (1988). Although Plaintiffs characterize Merrill's losses in October and November 2008 as "highly material" (AC ¶¶ 91-92, 290), this principle of securities law applies irrespective of the materiality of the information at issue. The Second Circuit has made clear that "a corporation is not required to

disclose a fact merely because a reasonable investor would very much like to know that fact." *In re Time Warner Inc. Sec. Litig.,* 9 F.3d 259, 267 (2d Cir. 1993). "Disclosure of an item of information is not required . . . simply because it may be relevant or of interest to a reasonable investor. For an omission to be actionable, the securities laws must impose a duty to disclose the omitted information." *Resnik*, 303 F.3d at 154.

Plaintiffs allege that Defendants had a duty to disclose Merrill's interim financial results for October and November 2008. But the "securities laws create a system of periodic rather than continual disclosures," *Higginbotham* v. *Baxter Int'l Inc*., 495 F.3d 753, 760 (7th Cir. 2007), and under that periodic reporting system, there is no duty to disclose mid-quarter results. Indeed, in *Higginbotham*, a company waited until its Form 10-Q filing to disclose accounting fraud at a foreign subsidiary. The Court dismissed the allegation that the fraud should have been disclosed when first learned, stating, "[W]hat rule of law requires 10-Q reports to be updated on any cycle other than quarterly? That's what the 'Q' means. Firms regularly learn financial information between quarterly reports, and they keep it under their hats until the time arrives for disclosure. Silence is not 'fraud' without a duty to disclose." *Id*; *see also In re Burlington Coat Factory Sec. Litig*., 114 F.3d 1410, 1432 (3d Cir. 1997) (Alito, J.) ("Except for specific periodic reporting requirements (primarily the requirements to file quarterly and annual reports), there is no general duty on the part of a company to provide the public with all material information"; rejecting claim of a "continuous duty to update the public with either forecasts or hard information that would in any way change a reasonable investor's perception"); *In re N. Telecom Ltd. Sec. Litig*., 116 F. Supp. 2d 446, 459 (S.D.N.Y. 2000) (rejecting argument that company was required to disclose, prior to its quarterly report, that it was anticipating a loss in the current quarter; "The rule that there is no obligation to pre-announce results has long been embraced by courts.").[25]

[25] *See also In re Worlds of Wonder Sec. Litig*., 35 F.3d 1407, 1419-20 (9th Cir. 1994) (rejecting argument that issuer should have disclosed fact that its performance in the current quarter would be substantially lower than the first quarter of the preceding year; company "was under no duty to disclose the precise extent of the anticipated revenue drop"); *Blum* v. *Semiconductor Packaging Materials Co. Inc.*, 1998 WL 254035, at *2 (E.D. Pa. May 5, 1998) ("no duty to update the public as to the status of the financial quarter in progress"); *Zucker* v. *Quasha*, 891 F. Supp. 1010, 1015-16 (D.N.J. 1995) (rejecting claim that company had a duty to disclose a negative trend in returns for the quarter that was in progress; "Courts have

It is important to remember that the periodic disclosure system has a statutory basis. In *Gallagher* v. *Abbott Labs.*, 269 F.3d 806, 808 (7th Cir. 2001), the Seventh Circuit rejected the argument that companies have "an absolute duty to disclose all information material to stock prices as soon as news comes into their possession." The Court explained: "We do not have a system of continuous disclosure. Instead firms are entitled to keep silent (about good news as well as bad news) unless positive law creates a duty to disclose." *Id.*. The Court then noted that the periodic disclosure system is embodied in Section 13 of the Exchange Act, 15 U.S.C. § 78m, and observed: "[J]udges have no authority to scoop the political branches and adopt continuous disclosure under the banner of Rule 10b-5. *Especially* not under that banner, for Rule 10b-5 condemns only fraud, and a corporation does not commit fraud by standing on its rights under a periodic-disclosure system." 269 F.3d at 809-10 (emphasis in original).

Plaintiffs also insinuate that Defendants had a duty to disclose Merrill's preliminary forecast for the month of December (AC ¶ 90), but the "federal securities laws do not obligate companies to disclose their internal forecasts." *Burlington Coat Factory*, 114 F.3d at 1427. *See also In re Convergent Techs. Sec. Litig*., 948 F.2d 507, 516 (9th Cir. 1991); *Elkind* v. *Liggett & Myers, Inc*., 635 F.2d 156, 163 (2d Cir. 1980); *N. Telecom*, 116 F. Supp. 2d at 458-59. Courts have refused to impose any duty to disclose forecasts "because of their uncertainty and their potential to mislead investors." *Walker* v. *Action Indus., Inc.*, 802 F.2d 703, 709 (4th Cir. 1986).

Outside of the insider trading context — and notably, there are absolutely *no* allegations relating to insider trading in this case — a duty to disclose arises only when "necessary to make prior statements not misleading" or "when the SEC's rules require disclosure." *Vladimir* v. *Bioenvision Inc.*, 606 F. Supp. 2d 473, 485 (S.D.N.Y. 2009). As will now be shown, neither of these exceptions required the disclosure of any interim results or forecasts here.

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been reluctant . . . to impose liability based upon a corporate official's failure to disclose financial data for a fiscal quarter in progress."), *aff'd*, 82 F.3d 408 (3d Cir. 1996).

B. Neither The Duty To Correct Nor The Duty To Update Required Defendants To Disclose Their Interim Results Or Forecasts.

Plaintiffs allege that Defendants had a duty to disclose Merrill's interim financial results or forecasts because "they were required to update and/or correct their prior misstatements or omissions." AC ¶ 291; *see also id.* ¶¶ 208, 210. But there were no such "prior misstatements or omissions" and Plaintiffs' invocation of these duties is to no avail.

The federal courts have imposed a "duty to correct" under the federal securities laws only "when a company makes a historical statement that, at the time made, the company believed to be true, but as revealed by subsequently discovered information actually was not. The company must then correct the prior statement within a reasonable time." *Stransky* v. *Cummins Engine Co.*, 51 F.3d 1329, 1331 (7th Cir. 1995). *See also In re IBM Corp. Sec. Litig*. (*Kowal* v. *IBM*), 163 F.3d 102, 109 (2d Cir. 1998). Plaintiffs do not allege facts showing that any historical statement made by any of the defendants was later revealed to be false when made, much less that disclosure of interim results or forecasts for Merrill or the Bank was somehow required to correct their previously disclosed historical financial information.[26] There was nothing for the Defendants to "correct."

Some federal courts have found a "duty to update" to arise "when a statement, reasonable at the time it is made, becomes misleading because of a subsequent event." *IBM*, 163 F.3d at 109-10. No duty to update arose here because neither the Bank nor Merrill made any public forecast of their fourth quarter results or disclosed any interim results for the quarter. In their third quarter Form 10-Qs, the Bank and Merrill disclosed that "[i]n recent weeks [*i.e.*, during the fourth quarter], the volatility and disruption [had] reached unprecedented levels" and predicted that "turbulent market conditions in the short- and medium-term will continue to have an adverse impact on [Merrill's] core businesses" and that Merrill's "future results may continue to be materially impacted by the valuation adjustments" necessitated by those market conditions. Merrill 3Q08 10Q at 83 (Ex. 34); BofA 3Q08 10Q at 176-7 (Ex. 35). But these trend disclosures were hardly rendered

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[26] The only historical statements Plaintiffs challenge relate to the merger due diligence efforts and negotiations. *See* Points IV.B-C, *infra*. These historical statements "were not misleading when made," and there was thus no duty to correct them. *IBM*, 163 F.3d at 109. But even if these statements were found to be misleading, nothing in the forecasted or interim results for the fourth quarter could "correct" them.

misleading by subsequent events; to the contrary, they turned out to be accurate assessments of the extraordinary market conditions that had arisen in the fourth quarter and the ongoing adverse impact on both companies.

C. The Proxy Rules Did Not Require Disclosure Of Interim Results Or Forecasts.

The proxy rules likewise imposed no obligation on Defendants to disclose interim results or forecasts. None of the applicable "line-items" requires that interim financial results or forecasts be included in a proxy statement. To the contrary, the only financial results required to be disclosed in a merger proxy are historical financial results, including pro forma historical financial statements based on the merging companies' most recent quarterly reports.[27] The Proxy satisfied this requirement. *See* Proxy at 19-21 (Ex. 1).[28]

Item 10 of Form S-4, 17 C.F.R. § 239.25, requires that the registrant "[d]escribe any and all material changes in the registrant's affairs that have occurred since the end of the latest fiscal year for which audited financial statements were included in the latest annual report to security holders and that have not been described in a report on Form 10-Q . . . or Form 8-K." But this is not a "line item" requirement dictating disclosure of forecasts or interim results. It is instead a requirement that a proxy statement simply "describe" the material changes in the affairs of the registrant (here, Merrill or the Bank) since the end of its last fiscal year that have not been reported on Form 10-Q, including "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." *See* Reg. S-K, 17 C.F.R. § 229.303(a)(3)(ii). The Proxy fully

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[27] Item 5 of Form S-4, 17 C.F.R. § 239.25, requires the disclosure of the "Pro Forma Financial Information . . . required by Article 11 of Regulation S-X," — *i.e.*, information showing how the proposed merger "might have affected ***historical financial statements*** if the transaction had been consummated at an earlier time." Reg. S-X, 17 C.F.R. § 210.11-02(a) (emphasis added). And Regulation S-X, in turn, makes clear that the "***historical*** financial statements" to be used for this exercise are the company's most recent quarterly reports. *See* Reg. S-X, 17 C.F.R. § 210.3-01 (emphasis added). The Proxy also incorporates by reference other SEC filings, including those with historical financial statements. Proxy at 123-24 (Ex. 1).

[28] In addition, in accordance with Item 11 of Form S-4, the Proxy incorporated by reference the latest annual reports, quarterly reports and current reports filed by both companies, as well as such reports subsequently filed up to the date of the shareholder meetings. *See* Proxy at 123-24 (Ex. 1).

satisfied Item 10 because the Forms 10-Q filed by Merrill and the Bank in 2008 — including the Forms 10-Q filed only a few days after the Proxy was mailed — laid out in substantial detail the "material changes" in the affairs of both Merrill and the Bank since the end of 2007, including the "known trends and uncertainties" that were having an unfavorable impact on their revenues and income. *See, e.g.*, Merrill 3Q08 10Q, at 4-9, 76-84 (Ex. 34); BofA 3Q08 10Q, at 3-6, 59-70 (Ex. 35); Point II.D, *infra*. Plaintiffs have not alleged that this disclosure in the Forms 10-Q was false or misleading.

Moreover, nothing in Rule 14a-9 required the disclosure of Merrill or the Bank's interim or forecasted results. Prior to the shareholder vote, neither company issued any projections of future performance or disclosed any partial fourth quarter results. As a result, there was no obligation under Rule 14a-9 to correct any prior statement that had become false or misleading by making new disclosures about fourth quarter performance. *See Resnik*, 303 F.3d at 154 ("[N]o duty of disclosure has been established" where "the relevant rule of the Commission. . . does not require disclosure" of the specific information and the "information is not required to make other information presented in the proxy statement not materially false or misleading."). *See also Kahn* v. *Wien*, 842 F. Supp. 667, 676 n.7 (E.D.N.Y. 1994) ("while the courts have recently become more permissive about *allowing* financial projections to be included in proxy solicitations, they have not changed their view that such disclosure is not *required*") (emphasis in original), *aff'd* 41 F.3d 1501 (2d Cir. 1994). Indeed, the federal courts have rejected the concept that a company has a "duty to correct" forecasted results even when a public forecast turns out to be incorrect because "a projection is not rendered false when the world turns out otherwise." *Gallagher*, 269 F.3d at 810. *A fortiori*, there is nothing to "correct" when no forecast was made public in the first place.[29]

[29] Plaintiffs allege that Defendants were "under a continuing duty to update and correct the Proxy," but violated Section 14(a) by issuing two Proxy Supplements — on November 21 and 26 — "without correcting or updating any of their prior false and misleading statements." AC ¶ 221. But just as the interim and forecasted results were not required to be disclosed in the Proxy, they were not required to be disclosed in the Proxy Supplements. As noted, Rule 14a-9 requires that a company supplement its proxy statement only where "necessary to correct any statement in any earlier communication . . . which has become false or misleading." 17 C.F.R. § 240.14a-9. Thus, even if Defendants learned information about the interim or forecasted fourth quarter results for either company as the quarter progressed and, even if this information differed from information known to Defendants as of the mailing of the Proxy on November 3, there was no duty to correct here because the Proxy did not contain any fourth quarter forecasts or partial results or any

D. Merrill's Interim Results And Forecasts Were Immaterial As A Matter Of Law.

Even when the federal securities laws impose a duty to disclose, there is no liability under the federal securities laws absent an "omission of material fact." *IBM*, 163 F.3d at 106. An omitted fact is material "only if there is a 'substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'" *Id*. at 106-07 (quoting *Basic*, 485 U.S. at 231-32). The "total mix" of information here includes matters disclosed by the Bank and Merrill in the Proxy and the SEC filings incorporated therein by reference.[30] It also includes widely disseminated media reports.[31]

Here, the allegedly omitted information relating to Merrill's interim results and forecasts was not material as a matter of law. Thus, even if the Complaint can be read to allege that the Bank was aware prior to the vote that Merrill had incurred $13.3 billion in losses for the months of October and November, (*but see* Point II.E.1, *infra*), disclosure of those losses would not have "significantly altered the total mix" of information available to shareholders in view of (a) Merrill's history of losses of similar magnitude, (b) the disclosures made by both companies in the weeks leading up to the meeting regarding the adverse market environment and its expected impact on profitability, and (c) the widely reported market disclosures.

Merrill's SEC filings for the five prior fiscal quarters since mid-2007 disclosed that the company had lost billions of dollars — a total of ***$38 billion pre-tax*** — largely due to its

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other statements that had become "false or misleading." The mere existence of a supplement does not create a duty to disclose additional information.

[30] *See* n.4, *supra*; *see also In re Browning-Ferris Industries, Inc. S'holder Deriv. Litig.*, 830 F. Supp. 361, 367 n.2 (S.D. Tex. 1993) (claim that proxy statement violated Section 14(a) "precluded as a matter of law by the disclosures in the Annual Reports and Form 10-Ks"), *aff'd sub. nom. Cohen* v. *Ruckelshaus*, 1994 WL 121802 (5th Cir. 1994).

[31] *See, e.g.*, *GAF Corp.* v. *Heyman*, 724 F.2d 727, 729 (2d Cir. 1983) (total mix of information available at time of proxy contest "included the many news stories that the closely watched contest had generated"); *Siebert* v. *Sperry Rand Corp.*, 586 F.2d 949, 952 (2d Cir. 1978) (dismissing Section 14(a) and Rule 14a-9 allegations because alleged omissions in proxy statement "were matters of general public knowledge" and "were reported countrywide in the press and on radio and television, were discussed in Congress, and were analyzed in published administrative and judicial opinions"); *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1115 (9th Cir. 1989) ("failure to disclose. . . information may be excused where that information has been made credibly available to the market by other sources").

exposure to CDOs, mortgage-backed securities and other fixed income exposures. These same SEC filings disclosed that, were it not for several extraordinary one-time gains, Merrill's losses would have been far greater — ***$50 billion pre-tax***.[32] Merrill's losses for this period — both as reported and as adjusted for one-time gains — are set forth in the following chart:

Period	Reported Pre-tax Gains/(Losses) from Continuing Operations	Reported One-time Gains	Adjusted Pre-tax Gains/(Losses) Excluding One-Time Gains
Q3 '07	**($3.6 billion)**	$0.6 billion	**($4.2 billion)**
Q4 '07	**($14.9 billion)**	$1.3 billion	**($16.2 billion)**
Q1 '08	**($3.3 billion)**	$2.1 billion	**($5.4 billion)**
Q2 '08	**($8.1 billion)**	$0.1 billion	**($8.2 billion)**
Q3 '08	**($8.3 billion)**	$7.1 billion	**($15.4 billion)**
TOTAL	**($38.2 billion)**	$11.2 billion	**($49.4 billion)**

Thus, over the five fiscal quarters beginning with the third quarter of 2007, Merrill's average quarterly loss (excluding one-time gains) was ***nearly $10 billion per quarter***. It was readily apparent to investors in the fall of 2008 that the disruption in the credit markets since mid-2007 had resulted in an unbroken string of multibillion-dollar losses at Merrill.

Furthermore, the "total mix of information" available to investors in the fall of 2008 included a steady drumbeat of media reports concerning the deteriorating condition of the credit markets, as well as disclosures by the Bank and Merrill in the weeks leading up to the December 5 shareholder vote that the anticipated impact of these worsening conditions on Merrill's fourth quarter results would be material:

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[32] These one-time gains are properly excluded here as they relate to discrete items that did not reflect the ability of the combined companies to generate earnings going forward. The third quarter 2008 adjustment of $7.1 billion was comprised of a $4.3 billion pre-tax one-time gain from the sale of Merrill's 20% ownership stake in Bloomberg and "[n]et gains of $2.8 billion due to the impact of the widening of Merrill Lynch's credit spreads on the carrying value of certain of [its] long-term debt liabilities," resulting from "severe market movements in September." Merrill 10/16/08 8K, Ex. 99.1, at 1 (Ex. 25). As Merrill explained in its third quarter 2008 Form 10-Q, the gain on the impact of widening of credit spreads reflected the market's perception that Merrill's creditworthiness was declining but, under GAAP, Merrill was required to book the corresponding decline in the fair value of its liabilities to purchasers of its structured notes as a gain. *See* Merrill 3Q08 10Q, at 29, 77 (Ex. 34); SFAS No. 157 ¶¶ 15, 28; SEC Release No. AS-150, 1973 WL 149263, at *1 (Dec. 20, 1973). Adjustments for prior quarters reflect simply the elimination of one-time gains due to the widening of credit spreads. *See, e.g.*, Merrill 10/24/07 8K, at Ex. 99.1 at 3 (Ex. 4); Merrill 1/17/08 8K, at 4 (Ex. 5); Merrill 2007 10K, at 22 (Ex. 6); Merrill 1Q08 10Q, at 26, 67 (Ex. 9); Merrill 2Q08 10Q, at 28, 74 (Ex. 11).

- On a September 15 investor call, Lewis stated that "the financial system is operating under ***almost unprecedented stress***" and "the remainder of this year and all of next year will be a relatively tough time for the financial services industry" and accordingly "revenue opportunities will be tough, and ***high levels of charge-offs will continue***." Thain added in the same September 15 press conference that: "[t]his is probably the ***most difficult environment in the financial markets that I have experienced in my 30 years*** in the business" and that "[i]t is a very, very difficult time and ***it's not going to get better quickly***." 9/15/08 Acquisition Call Tr. at 2 (Ex. 14); 9/15/08 Press Conf. Tr. at 8, 10 (Ex. 13) (all emphasis added).

- In the wake of the Lehman Brothers bankruptcy filing on September 15, the financial crisis entered an acute phase marked by stock price collapses, severe contractions of liquidity and extraordinary efforts by central bankers to restore confidence and inject liquidity into the markets. *See, e.g.*, n.1, *supra*.

- On October 6, the Bank announced disappointing third quarter earnings of $1.18 billion and cut its dividend in half. During an investor conference call, Lewis stated that the Bank's economic outlook now called for a "***weaker economy going into 2009***," as the recession was going to be "deeper than we originally thought." Lewis added that "it is difficult to focus on what is going right at this time" and that "***charge-offs are going to remain high*** for a more extended period of time than we would have thought just since last quarter." BofA 10/6/08 8K; BofA 3Q 2008 Earnings Call Tr., at 2, 9 (Exs. 22 and 23) (emphasis added).

- The November 3 Proxy disclosed that Merrill had entered into the Merger Agreement in light of the imminent collapse of Lehman Brothers and that Merrill's Board had approved the merger in response to the "challenging and uncertain" market environment, which the Bank "***expected to persist***." The Proxy further disclosed Merrill's third quarter losses and noted the "***extremely volatile***" market conditions "[d]uring the past few weeks." Proxy at 52, 38 (Ex. 1) (emphasis added).

- On November 5, Merrill's third quarter 10-Q disclosed that the "adverse market environment intensified towards the end of the [third] quarter," and predicted that "***[t]urbulent market conditions in the short- and medium-term will continue to have an adverse impact*** on [its] core businesses" in light of the "severe" dislocations in the credit markets. Merrill 3Q08 10Q, at 82-83 (Ex. 34) (emphasis added).

- On November 6, the Bank's third quarter 10-Q likewise noted the ongoing "***market turmoil*** and tightening of credit" and that "***[i]n recent weeks*** [*i.e.*, during the fourth quarter], the ***volatility and disruption [had] reached unprecedented levels***." It stated that these difficult conditions could "continue or worsen" and that the Bank did not expect that they would be "likely to improve in the near future," and warned they "***could lead to losses or defaults***." The Bank also predicted that the valuation of Merrill's various exposures to the credit market "***will continue to be impacted by external market factors***," and that ***Merrill's "future results may continue to be materially impacted by valuation adjustments***." BofA 3Q08 10Q, at 175-177 (Ex. 35) (emphasis added).

- At a November 11 financial services conference, Thain stated that the company was "***not going to get better quickly***" and that the "U.S. economy is contracting very rapidly, ***asset prices are falling***, and that is creating a great degree of uncertainty, both in the equity markets and in the debt markets, about the near-term outlook, at least over the next few quarters." Thain added that while he was optimistic, Merrill was "going to be in a ***difficult credit environment in the near term***" and "in a ***very difficult economic environment for a significant period of time***." Merrill 11/11/08 Banking & Fin. Servs. Conf. Tr., at 2-3 (Ex. 36) (emphasis added).

- In days leading up to the December 5 shareholder meeting, the major financial media reported that there existed "growing pressures in financial firms amid a steep and unexpected fall in prices of all kinds of assets" and that "credit spreads [had] widened sharply as gloomy macroeconomic and corporate news fuelled a fresh bout of risk aversion." *Goldman Faces Loss of $2 Billion for Quarter*, WALL ST. J., Dec. 2, 2008 (Ex. 39); *Equities in Retreat as Risk Aversion Returns*, FIN. TIMES, Nov. 13, 2008 (Ex. 38).

- At the December 5 shareholder meeting to approve the issuance of stock in support of the merger, Lewis told the audience: "I mean it is ***extraordinary bad times***" and "I would say we are in the ***worst economic slump since the Great Depression*** and we are Bank of America and reflective of that economy." Transcript of Bank of America Special Shareholder Meeting, December 5, 2008, at 14, 15 (Ex. 64).

In sum, when the extensive media coverage of the distress of the securities and credit markets is coupled with the detailed disclosures made by Merrill and the Bank regarding the ongoing impact of the market environment on their near-term results, only one conclusion is possible — the total mix of information regarding the likely impact of the financial crisis on Merrill's fourth quarter 2008 performance would not have been "significantly altered" by the public disclosure of its interim or forecasted results for the quarter, as they may have appeared to be at a particular point in time. Merrill's history of losses, coupled with the widely-understood and dramatic worsening of the financial and economic environment, gave investors sufficient warning of the distinct possibility of further substantial losses. *See ABC Arbitrage* v. *Tchuruk*, 291 F.3d 336, 360-61 (5th Cir. 2002) (non-disclosure of information concerning defendant's "problems and losses" immaterial as a matter of law); *Yukos*, 2006 WL 3026024, at *21-22 (omission immaterial given "total mix" of information available to investors).[33]

E. Plaintiffs Have Failed To Satisfy The Pleading Requirements Imposed by Rule <u>9(b) and the PSLRA With Respect To Their Interim Losses Or Forecasts Claim.</u>

1. <u>Plaintiffs Have Failed To Plead Fraud With Particularity.</u>

As noted, Plaintiffs are required under the PSLRA and Rule 9(b) to plead their Section 10(b) and Section 14(a) claims with particularity; among other things, the Complaint must

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[33] Merrill's interim results were also immaterial in view of the fact that the losses were principally the result of mark-to-market adjustments, as opposed to cash losses. For example, as credit spreads widened, the value of Merrill's fixed income positions would generally fall. *See, e.g.*, Merrill 10/16/08 8K, Ex. 99.1 (Ex. 25) (attributing $9.9 billion loss for the quarter in Merrill's fixed income business to "credit spreads widening across most asset classes to significantly higher levels at the end of the quarter"). But if spreads were then to narrow, the same positions would increase in value, and, at a time of great market volatility, even a sizable loss mid-quarter would not necessarily mean a large loss at the end of the quarter.

"specify the statements that the plaintiff contends were fraudulent" and "explain why the statements were fraudulent." *ATSI Commc'ns*, 493 F.3d at 99. *See* Point I.E, *supra*.

Here, Plaintiffs fail to particularize which Defendants were apprised of Merrill's interim losses or forecasts prior to the shareholder vote and precisely what they knew. Thus, while the Complaint alleges the existence of an "internal document" showing that Merrill had incurred a $13.3 billion loss for the months of October and November (AC ¶ 90), the Complaint does ***not*** allege that, prior to the shareholder vote, anyone at the Bank had possession of this document or even knew of its contents. Plaintiffs also allege that a letter from the New York Attorney General dated September 8, 2009 states that "'prior to the shareholder vote,' Merrill had suffered 'more than $14 billion' in losses" and that, as a result, "Bank of America officers sought guidance" as to the applicability of the MAC clause of the Merger Agreement. But Plaintiffs fail to specify which Bank officers were aware of this document and fail to identify the report allegedly containing this information. Plaintiffs have thus failed to plead fraud with particularity.[34] *See Dynex*, 531 F.3d at 196 ("Where plaintiffs contend defendants had access to contrary facts, they must specifically identify the reports or statements containing this information.") (quoting *Novak* v. *Kasaks*, 216 F.3d 300, 309 (2d Cir. 2000)); *SafeNet,* 2009 WL 2391849, at *17-18 (dismissing complaint that failed to "distinguish between the mental states of the four individuals" and allege "what they each knew" and "how they knew").

CALPERS v. *Chubb Corp.*, 394 F.3d 126 (3d Cir. 2004), is instructive. Plaintiff shareholders of an insurance company alleged that Chubb and its officers failed to disclose Chubb's disappointing second quarter results while soliciting their approval for a merger between the two

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[34] Plaintiffs also mischaracterize the NY Attorney General's letter. The letter does ***not*** state that "prior to the shareholder vote, Merrill ***had suffered*** more than $14 billion of losses." AC ¶ 101 (emphasis added). The letter instead recites that by December 3, 2008, the Bank had learned that Merrill's "***forecasted losses*** had risen to more than $11 billion, and with the addition of a $3 billion 'contingency' they rose to more than $14 billion." NYAG 9/8/09 Letter, at 3 (Ex. 56) (emphasis added). Indeed, in the series of Congressional hearings that Plaintiffs likewise liberally, but selectively, draw upon, the $3 billion contingency has been explained as being in the nature of a "wild ass guess." *See* Stmt. of Timothy J. Mayopoulos Before the House Comm. on Oversight & Gov't Reform, at 10 (Nov. 17, 2009) (Ex. 60). Plaintiffs thus deliberately conflate historical losses with forecasted losses, and ignore the fact that even the $14 billion forecast included a $3 billion plug. *See In re Optionable*, 577 F. Supp. 2d at 690 (particularity lacking where allegation not supported by its source).

companies. *Id.* at 154. The second quarter had ended 19 days *prior* to the shareholder vote, and Chubb released its disappointing results just eight days after the vote. *Id.* The Third Circuit dismissed plaintiffs' Section 14(a) claims because they failed to plead with particularity facts suggesting that defendants knew Chubb's second quarter results at the time of the vote.

> Plaintiffs fail to allege with any particularity . . . that Defendants knew of the final second quarter 1999 results at the time the merger vote took place. The conclusory assertion that "O'Hare and the other defendants had access to these financial results far in advance of when they were announced, and before the Executive Risk shareholders voted" is patently insufficient, as is the speculation that "[i]f defendants were paying any attention . . . any serious problems in the second quarter should have been glaringly apparent to them by the time of the July 19 shareholder vote." *Id.*

2. Plaintiffs Have Failed To Satisfy The PSLRA's Strong Inference Of Scienter Standard.

Plaintiffs' pleading also fails to meet the "strong inference" of scienter standard (*see* Point I.E, *supra*), with respect to their claim that Defendants failed to disclose either company's interim results or forecasts. ***First***, the Complaint fails to demonstrate a "concrete and personal benefit" that any Defendant stood to receive by withholding disclosure of interim results or forecasts for the fourth quarter. *See ECA*, 553 F.3d at 198; Point I.E.1, *supra*.[35]

Second, Plaintiffs have also failed to plead any facts showing Defendants' "strong circumstantial evidence of conscious behavior or recklessness" with respect to the failure to disclose interim losses or forecasts prior to the shareholder vote. Plaintiffs conclusorily allege that senior

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[35] Plaintiffs' allegations that Lewis had a "motive" to commit fraud demonstrate no such thing. For example, Plaintiffs allege that Lewis was motivated to conceal material facts "because he knew that if these facts were disclosed prior to the close of the merger he would be terminated." AC ¶ 241. But the Complaint fails to set forth any facts to substantiate that allegation. The Complaint alleges that Secretary Paulson advised Lewis that the Federal Reserve "would remove BoA's Board and management if it tried to ***terminate the transaction***." *Id.* ¶ 126 (emphasis added). The alleged statement by Secretary Paulson post-dated the shareholder vote. Moreover, the Complaint nowhere alleges facts to support the allegation that Lewis believed he would lose his job ***if any particular facts were publicly disclosed***. Plaintiffs further allege that Lewis was motivated to conceal facts because he knew that "if investors learned the truth about Merrill's financial condition" it would reveal that the statements Lewis previously made regarding the purported benefits of the merger were false and lead investors to question his competence. *Id.* ¶ 242. This allegation falls far short of a showing that Lewis "benefited in some concrete and personal way from the purported fraud." *ECA*, 553 F.3d at 198. *See Xerion Partners, I LLC* v. *Resurgence Asset Mgmt., LLC*, 474 F. Supp. 2d 505, 519 (S.D.N.Y. 2007) (scienter allegations that defendants "wished to conceal prior [allegedly] illegal activity" deemed insufficient and dismissed), *aff'd sub nom.*, *Bay Harbors Mgmt, LLC* v. *Carothers*, 282 F. App'x. 71 (2d Cir. 2008).

executives of the Bank "possessed direct knowledge of Merrill's losses" (AC ¶ 231), but Plaintiffs have failed to allege facts sufficient to support an inference that any of the Defendants knew or believed that disclosure of Merrill's interim results or forecasts was required. *See ECA*, 533 F.3d at 202 (affirming dismissal where plaintiff failed to allege facts supporting inference that defendants knew that GAAP required disclosure of related-party transaction). Indeed, as is apparent in the New York Attorney General's September 8, 2009 letter (on which Plaintiffs rely) prior to the shareholder vote, senior officials at the Bank conferred with legal counsel as to whether disclosure of Merrill's interim results was required. This conduct is plainly inconsistent with any intent to defraud.[36] Thus, even without considering any potential competing inferences, the allegations of the Complaint do not give rise to the "strong inference" of fraudulent intent required under the PSLRA.

But, of course, the Supreme Court's decision in *Tellabs* makes clear that "any opposing inference of nonfraudulent intent" must be considered. 551 U.S. at 309; *see* Point I.E.1, *supra*. Here, the competing inferences of non-fraudulent intent are more compelling. ***First***, as noted (Point I.E.1.b, *supra*), Defendants' substantial stock holdings aligned their interests with those of the Bank's shareholders, such that it was not in Defendants' financial interest to deceive the Bank's shareholders into supporting a merger that Defendants themselves did not support. The

[36] Plaintiffs' other scienter allegations with respect to the individual Defendants are similarly deficient. The Complaint alleges that Lewis admitted during congressional testimony that "Merrill's losses," were facts "'of enormous consequences to the company and the shareholders.'" AC ¶ 243. Plaintiffs then assert that Lewis made a "conscious decision" not to disclose them. *Id.* The only support offered for this allegation is Lewis's December 22 e-mail to the Bank Board that, the Complaint elsewhere acknowledges, pertained to the ***Government's*** obligation to make a public disclosure if it reached a definitive agreement to provide TARP funding to the Bank. *Id.* ¶ 134. This allegation thus falls far short of showing that ***Lewis*** intended to defraud the Bank's shareholders by failing to disclose material information that the Bank had a duty to disclose at the time. Plaintiffs also repeatedly suggest that alleged inconsistencies in statements made by Lewis in the context of government investigations support an inference of scienter. *Id.* ¶¶ 244-50. But Plaintiffs do not (and cannot) contrast any of the statements they attribute to Lewis with inconsistent statements made by Lewis himself. Rather, Plaintiffs can only contrast his statements with claims made by others who may have differing recollections or motives, or whose understanding of the underlying events is at best second-hand. *See, e.g.*, *id.* ¶¶ 245-46, 250 (after-the-fact commentary by other witnesses), ¶¶ 244, 247, 249, 251 (commentary by regulators), ¶ 248 (commentary by a member of Congress). Such commentary, where it is based on governmental investigations where no "official findings of fact or legal conclusions have issued" are not probative of Lewis's own state of mind and therefore cannot establish the factual basis necessary for a strong inference of scienter. *See In re BearingPoint, Inc. Sec. Litig.*, 525 F. Supp. 2d 759, 777 (E.D. Va. 2007) (references to government investigations constitute an "end-run around the stringent pleading requirements of the PSLRA"), *rev'd in part on other grounds sub nom. Matrix Capital Mgmt. Fund LP* v. *BearingPoint, Inc.*, 576 F.3d 172 (4th Cir. 2009).

inference that these Defendants did not intentionally or recklessly endanger their own portfolios is compelling. *See Cole* v. *Health Mgmt. Assocs.*, 2009 WL 2713178, at *9 (M.D. Fla. July 17, 2009).

Second, if Defendants intended to deceive investors as to the companies' fourth quarter performance, why did they issue third quarter 10-Qs disclosing the "turbulent market conditions" and their anticipated effect on Merrill's "short- and medium-term" results?

Third, had the Defendants come to the conclusion prior to the December 5 shareholder vote that Merrill's interim fourth quarter losses were so material that they called into question the Bank's rationale for the merger, what conceivable motive did they have to deliberately withhold that information from the market? If they believed this information was material, the Bank Defendants would have had a strong financial incentive to disclose these facts to the Bank's shareholders in the hope that they would vote down the merger. It simply makes no sense (as Plaintiffs would have the Court believe) that the Bank Defendants willfully suppressed information they believed they were required to disclose with the intention of later asserting a MAC claim — as to which Delaware law imposes a stringent legal standard — when they had available to them before the vote the far less risky route of disclosing the allegedly material facts to the Bank's shareholders who had the power to simply vote the deal down. The opposing inference of non-fraudulent intent — that the Bank Defendants did not disclose these matters to the shareholders before the vote because they did not believe that they had a duty to do so or because these matters were not material — is far more compelling than any inference of scienter.[37]

Consequently, all of Plaintiffs' claims against the Bank Defendants relating to Merrill's fourth quarter interim results prior to the shareholder meeting should be dismissed.

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[37] Plaintiffs have likewise failed to allege facts giving rise to a strong inference that Defendants were even negligent in failing to disclose interim results or forecasts. Not only did the Bank consult with counsel on the disclosure issue, but in deciding not to disclose Merrill's intra-quarter losses, the Bank was adhering to customary disclosure practices that have developed in connection with corporate mergers and otherwise. As noted above, the SEC imposed a quarterly reporting system; there is no general duty to disclose intra-quarter results. *See* Point II.A, *infra*. The Bank's adherence to customary disclosure practices undercuts any inference of recklessness, much less negligence. *See In re PXRE Group,* 600 F. Supp. 2d at 540-41.

III. PLAINTIFFS' CLAIMS REGARDING POST-VOTE DISCLOSURE OF FOURTH QUARTER 2008 INTERIM RESULTS AND FORECASTS, DISCUSSIONS WITH REGULATORS, OR CONSIDERATION OF ASSERTING A "MATERIAL ADVERSE EFFECT" DO NOT STATE A CLAIM.

A. There Was No Material Misrepresentation Or Omission Post-Vote Regarding Fourth Quarter 2008 Interim Results And Forecasts.

Plaintiffs allege that, after the December 5, 2008 shareholder vote and before the close of the merger on January 1, 2009, the Bank failed to disclose escalating estimates of losses at Merrill, discussions with government regulators concerning the possibility of invoking the MAC clause and a taxpayer "bailout," as well as the Bank's own loss of $1.8 billion for the fourth quarter of 2008. AC ¶ 228. Plaintiffs do not incorporate allegations regarding events that occurred after the shareholder vote into their Section 14(a) claims, apparently conceding that once the shareholder vote occurred any obligations under the proxy rules ceased. *Id.* ¶¶ 327-35. Only liability under Rule 10b-5 is alleged with respect to these post-vote events.

1. Defendants Had No Duty To Disclose Interim Results Or Forecasts.

There is no requirement whatsoever that firms disclose their financial results before regular quarterly filings. *See* Points II.A-C, *supra*. That is true regardless of how material the results might be deemed to be. Thus, Plaintiffs' argument that there was a duty to disclose fourth quarter results because they were "highly material" (AC ¶ 292) simply misses the mark. The Complaint points to no factor that would give rise to a duty to pre-announce earnings. Since there is no dispute that the Bank's (and Merrill's) results were announced in timely fashion in January 2009, that ends the matter.

2. The January 1, 2009 Press Release Was Not Misleading Because It Did Not Include Any Statement Regarding Fourth Quarter Earnings For Merrill Or The Bank.

Plaintiffs point to only one actual statement by the Bank during the post-vote period that they claim was misleading: the January 1, 2009 press release announcing the completion of the merger. AC ¶ 229. The press release says nothing about earnings for the fourth quarter of 2008, and it is simply nonsense to assert that a brief announcement of the closing of the merger is somehow misleading for failing to include a pre-announcement of the latest quarter's results for both the merged entities. Furthermore, the Complaint is devoid of allegations concerning when the Bank's

own fourth quarter 2008 results became available — by itself a fatal defect that warrants dismissal of this claim.

3. Neither The Duty To Correct Nor The Duty To Update Required Defendants To Disclose Merrill's Interim Results Or Forecasts.

Plaintiffs' allegation that Defendants had a duty to disclose Merrill's interim financial results or forecasts "to correct and/or update" prior statements made on September 15, 2008 and in the Proxy (AC ¶ 292) is also unavailing. As to the duty to update, the "vague statements of optimism or expressions of opinion" regarding the merger that Plaintiffs point to in the September 15, 2008 statements and in the Proxy cannot trigger a duty to update. *IBM*, 163 F.3d at 110. And there were no predictions or guidance in the September 15 statements or in the Proxy regarding fourth quarter 2008 income for either the Bank or Merrill, and the Bank's other statements (as well as press reports) included numerous warnings as to the difficult conditions being encountered during the quarter. *See* Point IV.A, *infra*.

A "duty to correct" could apply only when an earlier statement is found subsequently to have been false when made. *See* Point II.B, *supra*. Plaintiffs point to nothing of that sort here.

4. Merrill's Interim Results And Forecasts Were Immaterial As A Matter Of Law.

Even if, contrary to fact, there was somehow a duty to disclose fourth quarter financial results after the December 5, 2008 shareholder vote, those results were not material, given the "total mix" of negative information that was available to investors. Here, that "total mix" included: Merrill's heavy losses — nearly $10 billion per quarter when one-time gains are excluded — in each of the preceding five fiscal quarters since mid-2007; a virtual avalanche of negative media reports detailing the deteriorating conditions in the credit markets in which Merrill operated, as well as the devastating (indeed fatal) impact of those conditions on other investment banks; and extensive disclosures by Merrill and the Bank about the potential impact of these conditions on Merrill's fourth quarter results. *See* Point II.D, *supra*.

5. No Strong Inference Of Scienter Is Pled With Respect To Disclosing Fourth Quarter Results After The December 5 Shareholder Vote.

The PSLRA requires that a complaint's allegations give rise to a "strong inference" of scienter — one that is "at least as compelling" as any non-fraudulent inference that can be drawn. *See* Point I.E, *supra*. Plaintiffs' allegations with respect to the post-shareholder vote period do not suffice. What did Defendants gain, or hope to gain, from not pre-announcing results in December 2008, when all of them knew that results would have to be announced in mid-January 2009? Indeed, the fact that the Bank announced its earnings and Merrill's on January 16, 2009 — well in advance of the date their respective 10-Ks were due — negates any inference of scienter, as the Second Circuit has held. *See Rombach,* 355 F.3d at 176-77. Far from giving rise to any inference of fraud, let alone a strong inference, the facts give rise to an overwhelming inference that, given the massive uncertainty that surrounded all of the events of December, Defendants complied with their normal, proper practice of announcing their results a few weeks after the quarter's close.

B. There Was No Material Misrepresentation Or Omission Regarding Consideration Of Asserting A "Material Adverse Effect" Or Discussions With Regulators.

Plaintiffs allege that, prior to the shareholder vote, unnamed senior executives of the Bank "debated whether Merrill's losses were so severe that the Bank could walk away from the deal, citing the 'material adverse effect' clause in the merger agreement." AC ¶ 100. *See also id.* ¶ 101. Plaintiffs assert that the Bank violated Section 14(a) by failing to disclose this alleged internal "debate" before December 5. *Id.* ¶ 331(d).

The Complaint further alleges that, on December 17, with Merrill then projecting losses for the quarter of $18 billion pre-tax, Lewis and Price met with federal regulators in Washington and stated that the Bank "had concluded that a material adverse change had occurred." *Id.* ¶ 115. In a December 19 conversation with the regulators, Lewis reported that Merrill was now projected to have fourth quarter losses of $21 billion, and stated that the Bank "would likely invoke the MAC." *Id.* ¶ 124. On December 21, in response to Secretary Paulson's warning that "it would be unthinkable for [the Bank] to take this destructive action," (*id.* ¶ 126), Lewis decided to proceed with the merger instead in reliance upon oral assurances from the regulators regarding government assistance. *Id.* ¶¶ 128, 133. The merger closed on January 1, but the terms of the government

assistance were not finalized until January 16. *Id.* ¶¶ 139, 143-44. Plaintiffs allege that, following the shareholder vote and before the merger closed, the Bank was required to disclose its consideration of invoking the MAC, its discussions with regulators regarding the potential assertion of a MAC claim, and its negotiations with the government. *Id.* ¶¶ 134, 136-37, 228. These claims lack merit.

1. There Was No Duty To Disclose The Bank's Consideration Of Asserting A "Material Adverse Effect."

The Bank had no duty to disclose its consideration of the possibility of invoking the MAC clause — either before or after the shareholder vote. Form 8-K, Item 1.02 — entitled "Termination of a Material Definitive Agreement" — requires the disclosure of certain information "[i]f a material definitive agreement which was not made in the ordinary cause of business . . . is terminated, . . . and such termination is material." 17 C.F.R. § 249.308. But Instruction No. 1 to that Item expressly states: "***No disclosure is required*** solely by reason of this Item 1.02 during negotiations or discussions regarding termination of a material definitive agreement ***unless and until the agreement has been terminated***." *Id.* (emphasis added). Thus, the SEC rule that directly pertains to the disclosure of termination of contracts provides that — until termination occurs — a company need not disclose its participation in negotiations or discussions regarding the possibility of termination.

Plaintiffs concede, as they must, that the Bank never terminated the Merger Agreement. *See* AC ¶ 139. Plaintiffs allege only that, prior to the shareholder vote, unnamed senior executives of the Bank "debated" and "discussed" whether to do so (*id.* ¶¶ 100-01) and that, thereafter, the Bank told its regulators on December 19 that it "would likely invoke" the MAC clause (*id.* ¶ 124), but relented on December 21. *Id.* ¶ 126. None of these alleged events triggered a duty to disclose for the Bank under Form 8-K, Item 1.02 or otherwise. *See DeCicco* v. *United Rentals, Inc.*, 602 F. Supp. 2d 325, 345 (D. Conn. 2009) (no duty to disclose "party's change in attitude or position with respect to a transaction" unless change is "sufficiently significant as to render prior or subsequent public disclosures materially misleading"); *Evanoski* v. *BankWorcester*

Corp., 788 F. Supp. 611, 614-15 (D. Mass. 1991) (no disclosure duty even though merger renegotiation discussions lasted over five weeks).[38]

Common sense dictates that the law could not be otherwise. It would be nonsensical to require companies to disclose their participations in discussions or negotiations about the potential termination of a material definitive agreement before any decision to terminate has been made. Imposing such a requirement would deprive companies of the ability to consider their legal options in confidence and would result in the potentially misleading disclosure of preliminary strategic considerations. And it would be particularly absurd to say that the Bank had a duty to disclose any consideration that was being given to invoking the MAC clause where, as Plaintiffs must concede, the clause was never invoked and the Merger Agreement was never terminated.

In tacit recognition that Defendants had no affirmative duty to disclose their consideration of invoking the MAC clause in the Merger Agreement, Plaintiffs have contrived a claim for misrepresentation by alleging that the Proxy and the Merger Agreement misrepresented that there was an "absence of material adverse changes" in the financial condition of Merrill and the Bank. AC ¶¶ 211-12. This claim, too, lacks merit.

Neither the Merger Agreement nor the Proxy represented to investors that no material adverse change had occurred at Merrill or the Bank. Rather, the Proxy accurately disclosed that in the Merger Agreement each company represented and warranted to the other that, since the end of its second quarter, it had not suffered a "Material Adverse Effect" to its financial condition. Proxy at 82-83 (Ex. 1). As noted above, the Proxy and the SEC filings it incorporated by reference cautioned investors that the parties' representations and warranties in the Merger Agreement were "subject to important qualifications and limitations agreed to between the parties" and were "included in the agreement for the purpose of allocating risk between the parties rather than to establish matters as facts." *Id.* at 125; *see also* BofA 9/18/08 8K, at Item 1.01 (Ex. 17); Merrill 9/18/08 8K, at Item 1.01

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[38] Section 14(a) and Rule 14a-9 imposed no such duty either. There is no line item in Form S-4 that requires any such disclosure, and no statement in the Proxy is alleged to have been rendered false and misleading by virtue of any internal "debate" over the MAC issue such that Rule 14a-9 required it to be "corrected."

(Ex. 18). Accordingly, no reasonable investor would have relied on the Proxy's description of the MAC clause in the Merger Agreement as a factual representation as to the financial condition of either company. Indeed, MAC clauses appear in virtually every merger agreement (as well as in other transactional agreements) and to accept Plaintiffs' argument would perforce impose a requirement that whenever an acquirer was considering invoking a MAC clause, it would be obligated to disclose that consideration even before making a decision or providing notice to the company to be acquired.[39]

As to Plaintiffs' allegations that there was "debate" before the December 5, 2008 shareholder vote over whether the Bank could walk away from the merger (AC ¶¶ 7, 100-01, 232, 247), if those allegations are meant to suggest that anyone within the Bank desired to terminate the merger at that time, they are implausible. Before the shareholder vote, all that would have been required to extricate the Bank from the Merger was for the Bank Board to withdraw its recommendation to vote for the merger and for the shareholders to vote the merger down. There would be no need to go the far more difficult route of trying to invoke the MAC clause. In short, the allegations would fail to meet the "plausible on [their] face" test of *Iqbal*, 129 S. Ct. at 1949.[40]

2. <u>There Was No Duty To Disclose The Bank's Discussions With Regulators.</u>

There is no duty to disclose a company's participation in negotiations over a potential business transaction, no matter how material it may be. SEC rules, set forth in Form 8-K, require disclosure of "material definitive agreement[s] not made in the ordinary course of business." Form 8-K, at Item 1.01(a). Unless and until there is a definitive agreement, there are "no specific SEC

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[39] Further, to the extent that any investor nonetheless read this description of the Merger Agreement as a factual representation regarding each company's financial condition, the total mix of information available regarding the difficult market conditions in the fourth quarter and their anticipated impact on both companies' financial results in the short- and medium-term rendered the alleged misrepresentation immaterial as a matter of law. See Point II.D, supra. *See also ABC Arbitrage*, 291 F.3d at 360-61 & n.118.

[40] Moreover, Plaintiffs' claim that the NY Attorney General's September 8, 2009 letter refers to "three separate occasions," to wit November 20, December 1, and December 3, 2008, on which Bank executives discussed "whether Bank of America had a MAC" (AC ¶¶ 7, 101, 232, 247) is not accurate. In fact, the letter claims only that the MAC clause was discussed at a December 1 meeting; the November 20 and December 3 meetings are claimed to have involved a discussion of Merrill's losses but not the MAC clause. NYAG 9/8/09 Letter, at 3 (Ex. 56). Nor does the February 5, 2009 *Wall Street Journal* article cited by Plaintiffs support their claim that discussions of a MAC occurred "shortly before Thanksgiving." *Id.* ¶ 100.

rules that would have required [defendants] to disclose . . . negotiations." *Vladimir*, 606 F. Supp. 2d at 486. Moreover, the Second Circuit has made clear that "the mere fact that exploration of . . . possibilities may have reached a stage where that information may be considered material does not, of itself, mean that the companies have a duty to disclose." *Glazer* v. *Formica Corp.*, 964 F.2d 149, 157 (2d Cir. 1992). While insiders would be required to abstain or disclose confidential material they may be privy to in the trading context, in these circumstances, where no trading violation is alleged, no broader duty to disclose such sensitive and strategic matters exists.

Plaintiffs do not allege that any material agreement was reached with the government prior to the execution of the final agreement in mid-January 2009. Plaintiffs allege only the existence of a "verbal commitment of the Fed and Treasury" (AC ¶ 133) and "detailed oral assurances from the federal regulators" (*id.* ¶ 135) prior to that date. But such informal assurances by government agencies do not create any binding contractual obligation.[41]

There are many good reasons why disclosure of negotiations prior to entry into a definitive agreement is not required. Among others, the negotiations may never yield a definitive agreement; negotiations may evolve, adding and deleting points continually; negotiating positions need not be statements of fact and may mislead investors relying on them as such; and competitively sensitive information may be discussed in negotiations, which would be harmful to the parties to disclose. Those reasons were particularly cogent in the volatile market environment that existed in the fourth quarter of 2008. Indeed, had the Bank disclosed its discussions at one point or another in the course of the back-and-forth of negotiations, there undoubtedly would have been lawsuits premised on such statements.

3. <u>The January 1, 2009 Press Release Was Not Misleading.</u>

Plaintiffs' claim (AC ¶ 229) that the January 1, 2009 press release announcing the closing of the merger was misleading because it did not disclose that the Bank considered, but

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[41] *See 1st Home Liquidating Trust* v. *United States*, 581 F.3d 1350, 1357 (Fed. Cir. 2009) (finding "mere encouragement of a merger does not amount to a governmental promise"); *Teachers Ins. & Annuity Ass'n of Am.* v. *Tribune Co.*, 670 F. Supp. 491, 499 (S.D.N.Y. 1987) (noting the "strong presumption against finding binding obligation[s] in agreements which include open terms . . . and expressly anticipate future preparation and execution of contract documents").

ultimately decided against, invoking the Merger Agreement's MAC clause, or discussions with regulators in December 2008, is far-fetched. There is simply nothing in the press release that addresses in any way any internal consideration leading up to the closing of the merger, or whether the Bank would seek additional capital from regulators. Moreover, as shown above, there was no requirement to disclose any discussions with regulators regarding a capital infusion before agreement had been reached on the matter.

As to the press release's statement that the acquisition would create a "premier" financial services franchise "with significantly enhanced wealth management, investment banking and international capabilities," the Complaint is devoid of any showing that this statement was false or misleading in any way (or that any Defendant believed it to be false). *See* BofA 1/2/09 8K, at Ex. 99.1 (Ex. 43). The addition of Merrill, with its premier network of brokers, its extensive investment banking business, and its international reach, absolutely enhanced the Bank's capabilities in each of these areas. The Complaint lacks any allegations, not to mention the particularized allegations that are required under the PSLRA and Rule 9(b), demonstrating the contrary. This claim must be dismissed for that reason alone.

4. No "Strong Inference" Of Scienter Is Pled With Respect To Consideration Of Invoking The MAC Clause, Discussions With Regulators Or The January 1, 2009 Press Release.

With respect to the consideration of invoking the MAC clause and discussions with regulators, there are several non-fraudulent inferences more cogent and compelling than any inference of fraud, particularly since Plaintiffs point to absolutely nothing that Defendants stood to gain from the supposed "fraud" in this instance. As the Complaint acknowledges, the regulators made clear to the Bank that attempting to terminate the transaction would be viewed as "destructive action," and the Bank decided not to do so as a result. *See* AC ¶¶ 126-27. And the Complaint also admits that while the regulators gave the Bank oral assurances that they would provide assistance to the Bank if it closed on the transaction, the regulators simultaneously advised the Bank that they would not put those assurances in writing because, among other things, doing so would require the Government to publicly disclose those assurances. *Id.* ¶¶ 133-34. Compelling non-fraudulent explanations for the Bank's conduct after December 5 include: (a) the Bank believed no disclosure

of the Bank's consideration of invoking the MAC clause or its discussions with the regulators was legally required; and (b) the Bank believed that disclosing its discussions with regulators before a binding agreement with the government was reached would create a substantial risk of harm to both companies and the financial system as a whole. These inferences, moreover, are far more compelling under the circumstances than any fraudulent inference suggested by Plaintiffs. With respect to the alleged consideration of the MAC clause before the shareholder vote, had senior officials at the Bank believed prior to December 5 that Merrill had been materially impaired so that they were looking for a way out of the deal, they would have been highly motivated to disclose that information in the hope that the Bank's shareholders might reject the share issuance necessary to complete the transaction. *See* Merger Agreement § 8.1(h); Proxy at Ex. A-42 (Ex. 1). "Where a plaintiff's theory of motive is 'belied by logic,' it must be rejected." *Duane Reade*, 2003 WL 22801416, at *9 n.22.

Accordingly, all of Plaintiffs' claims against the Bank Defendants relating to Merrill's losses following the shareholder vote, the consideration of invoking the MAC clause, or discussions with regulators should be dismissed.

IV. PLAINTIFFS' CLAIMS RELATING TO ANTICIPATED MERGER BENEFITS, THE EXTENT OF DUE DILIGENCE AND THE MERGER NEGOTIATIONS SHOULD BE DISMISSED.

Plaintiffs challenge a litany of statements made on September 15, 2008 in a press release, at a press conference and on an investor call relating to (1) the expected merger benefits, (2) the extent of due diligence performed by the Bank, and (3) the negotiation of the merger, *see* AC ¶¶ 179-80, 185, 187, 189, 191-92, as well as later statements on the same subjects in the Bank's October 7, 2008 offering prospectus, the Proxy and the January 1, 2009 press release.[42] All of these statements are generalized expressions of corporate optimism, forward-looking statements

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[42] Plaintiffs challenge all of these statements in their Rule 10b-5 claims. A number of statements made by Bank executives on September 15 and October 6 are also challenged under Section 14(a). These include: Defendants' statements regarding the anticipated benefits of the merger (AC ¶¶ 333(b), (f)); the adequacy of the Bank's due diligence (*id.* ¶¶ 333(a), (c)); the role of the regulators and John Thain in the merger negotiations (*id.* ¶¶ 333(d), (e)); and the perceived adequacy of the Bank's capital after the October 7 secondary offering (*id.* ¶ 333(h)). Additionally, Plaintiffs' claims under Sections 11 and 12(2) of the Securities Act include claims related to statements made in the September 15, 2008 press release. *Id.* ¶ 369.

accompanied by meaningful cautionary language, or statements protected under the "bespeaks caution" doctrine.[43]

A. The Statements Regarding Anticipated Merger Benefits Are Not Actionable.

Plaintiffs' allegations of misstatements on September 15 related to the anticipated benefits of the merger (*id.* ¶¶ 191-92) fail to state a claim because they are (a) non-actionable statements of corporate optimism and (b) protected by the PSLRA safe harbor for forward-looking statements and/or the "bespeaks caution" doctrine.

1. Statements of corporate optimism on September 15 are not actionable.

Plaintiffs challenge optimistic characterizations of the merger, including that it was a "great opportunity" and an "attractive transaction" with which the Bank was "very, very pleased," and other similar statements made in the September 15 press release, press conference and investor call announcing the merger. *Id.* ¶¶ 191-92. The Second Circuit has "consistently" held, as a matter of law, that such generalized statements of corporate optimism or "puffery" cannot give rise to a securities claim. For example, in *Lasker* v. *N.Y. State Elec. & Gas Corp.*, 85 F.3d 55-56, 59 (2d Cir. 1996), the Court affirmed the dismissal of a complaint based on a corporation's statements that a newly-formed, start-up venture would "help augment future earnings and dividend growth," without any "compromise [of] financial integrity." The Court held that this was "precisely the type of 'puffery' that this and other circuits have consistently held to be inactionable." *Id.* at 59 (citations omitted).[44] In particular, statements concerning anticipated future benefits from a merger are, by

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[43] These doctrines are fully applicable to Section 14(a) claims. *See, e.g., Shaev* v. *Hampel*, 2002 WL 31413805, at *6-7 (S.D.N.Y. Oct. 25, 2002) (dismissing 14(a) claims pursuant to bespeaks caution doctrine); *Fisher* v. *Kanas*, 467 F. Supp. 2d 275, 282 (E.D.N.Y. 2006) (dismissing 14(a) claims based on "inactionable puffery"); *Fanni* v. *Northrup Grumman Corp.*, 2000 U.S. Dist. LEXIS 21626, at *31-32 (C.D. Cal. Apr. 10, 2000) (dismissing 14(a) claim based on PSLRA safe harbor for forward-looking statements); *see also* 15 U.S.C. § 78u-5(c)(1). These doctrines are also applicable to Securities Act claims. *See also* 15 U.S.C. § 77z-2(a), (c) (PSLRA's safe-harbor amendment to the Securities Act); *Rombach*, 355 F.3d at 173 (claims challenged under the Securities Act protected by the PSLRA safe-harbor and the bespeaks caution doctrine); *Rubin* v. *MF Global, Ltd.*, 634 F. Supp. 2d 459, 472-73 (S.D.N.Y. 2009) (dismissing Securities Act claims).

[44] *See also San Leandro Emergency Med. Group Profit Sharing Plan* v. *Philip Morris Co., Inc.*, 75 F.3d 801, 807, 811 (2d Cir. 1996) (finding "expressions of opinion and not guarantees" not actionable); *Harborview Master Fund, LP* v. *LightPath Techs., Inc.*, 601 F. Supp. 2d 537, 549 (S.D.N.Y. 2009) ("[O]ptimism about current and future economic growth" not actionable); *In re Bristol-Meyers Squibb Sec. Litig.*, 312 F. Supp. 2d 549, 557-58 (S.D.N.Y. 2009) (statement that "this is a tremendous strategic opportunity" not actionable); *Rombach* v. *Chang*, 2002 WL 1396986, at *5 (E.D.N.Y. June 7, 2002)

their nature, the type of expressions of opinion that are not actionable. *See Grossman* v. *Novell, Inc.*, 120 F.3d 1112, 1121-22 (10th Cir. 1997) (statement that merger offered a "compelling set of opportunities" was exactly the "sort of soft, puffing statements, incapable of objective verification, that courts routinely dismiss as vague statements of corporate optimism"); *Kane* v. *Madge Networks N.V.*, 2000 WL 33208116, at *2-3 (N.D. Cal. May 26, 2000) (positive statements about merger immaterial because "it is to be expected that [an] acquiring company will characterize [its] acquisition[s] in a positive light").

2. <u>Forward-looking statements on September 15 are not actionable.</u> The Bank's statements concerning the anticipated future benefits of the merger — for example, that it would "creat[e] more value for shareholders" or "create what will be the leading financial institution in the world" (AC ¶¶ 191-92) — are also protected by the "bespeaks caution" doctrine and the PSLRA "safe harbor" for forward-looking statements. The PSLRA safe harbor applies to protect such forward-looking statements when accompanied by "meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement" ***or*** upon a plaintiff's failure to plead with particularity that such statements were made with "actual knowledge" that they were false or misleading. 15 U.S.C. § 78u-5(c)(1). *See Rombach* v. *Chang*, 355 F.3d 164, 174 (2d Cir. 2004). Similarly, under the "bespeaks caution" doctrine, misrepresentations are "immaterial as a matter of law [if] it cannot be said that any reasonable investor could consider them important in light of adequate cautionary language." *Id.* at 173. *See Halperin* v. *eBanker USA.com, Inc.*, 295 F.3d 352, 360 (2d Cir. 2002).

Plaintiffs' conclusory allegation that "[n]one of the statements complained of herein were forward-looking statements" (AC ¶ 276) is simply wrong. The statements challenged here concerning the anticipated benefits of the merger use the future tense and comment on yet-unrealized opportunities and value. *See, e.g.*, *id.* ¶ 191 ("I think this is going to be . . . ."); *id.* ¶ 192 ("I look forward to . . . ."); *see also* 15 U.S.C. § 78u-5(i)(1) (forward-looking statements include "projection[s] of revenues, income" or "loss[es]," "other financial items," "plans and objectives of

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(statement that company was "very pleased" with quarterly results deemed mere puffery), *aff'd*, 355 F.3d 164 (2d Cir. 2004).

management," "statement[s] of future economic performance," "assumptions underlying or relating to any of the foregoing," and other "projection[s] or estimate[s]"). For example, in *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 440-41 (S.D.N.Y. 2001), the Court found that statements that defendant remained a "viable company financially" and had "greater potential than ever before" were forward-looking because they were "statements 'about the state of a company whose truth or falsity [are] discernible only after [they are] made [and] necessarily refer[] only to future performance.'" (quoting *Haris* v. *Ivax Corp.*, 82 F.3d 799, 805 11th Cir. 1999)). *See also In re Aegon N.V. Sec. Litig.*, 2004 WL 1415973, at *12 (S.D.N.Y. June 23, 2004) ("Forward-looking statements . . . include management's plans and objectives for future operations, statements of future economic performance and assumptions underlying either."). This case, where the statements at issue referred to a merger that was yet to occur, is *a fortiori*.

Plaintiffs' allegation that the forward-looking statements they challenge were not accompanied by sufficiently "meaningful cautionary language" required to come within the safe harbor (AC ¶ 277) is without merit. The September 15 statements regarding the future benefits of the merger were accompanied by specific cautionary statements, including warnings that the extremely difficult market conditions then prevailing could result in the anticipated benefits of the merger not being realized. The press release announcing the merger specifically warned investors about the "risks and uncertainties" inherent in any "forward-looking statements" and "cautioned [investors] not to place undue reliance on forward-looking statements" because various factors "may cause actual results or earnings to differ materially from such forward-looking statements," including if "investments are lower than expected," "changes in market rates and prices . . . adversely impact the value of financial products" or "economic conditions are less favorable." 9/15/08 Press Release, at 3 (Ex. 12). Similar cautionary statements were made on the investor conference call announcing the merger. *See* 9/15/08 Acquisition Call Tr. at 1 (Ex. 14) (advising investors that "forward-looking statements regarding both our financial condition and financial results . . . involve certain risks that may cause actual results in the future to be different from [the Bank's] current expectations," including "changes in economic conditions" and other factors noted

in the Bank's press release and SEC filings).[45] And the October 7, 2008 Prospectus Supplement likewise contained pages of Risk Factors and other cautionary language, such as:

- there could be "significant fluctuations due to a change in sentiment in the market regarding [the Bank's] operations or business prospects, the Merrill Lynch merger and [the Bank's] potential assumption of Merrill's debt securities";
- "stock markets, in general, have experienced over the year, and continue to experience, significant price and volume volatility"; and
- "[i]ncreased volatility could result in a decline in the market price of our common stock."

10/9/08 Prospectus Supplement, at S-7 (Ex. 24). The Prospectus Supplement also expressly referenced the Bank's SEC filings, which provided detailed risk factors and cautionary statements. *See id.* at S-4; *see also* Point II.D, *supra*.

These warnings were sufficient to bring the September 15 and October 6 statements within the PSLRA safe harbor. *See Fort Worth Employers' Ret. Fund* v. *Biovail Corp.*, 615 F. Supp. 2d 218, 232-33 (S.D.N.Y. 2009) (warning not to place "undue reliance" on forward-looking statements because they "involve risk and uncertainties" held to be meaningful cautionary language); *Duane Reade*, 2003 WL 22801416, at *2 nn.5-6 (warning that "economic conditions" could "adversely affect[]" "revenues and profitability" held to be meaningful cautionary language).

Plaintiffs' alternative theory that the safe harbor is unavailable despite the cautionary language employed because the alleged misrepresentations were "knowingly" made by Defendants (AC ¶ 278) misreads the PSLRA. The safe harbor provisions are written in the disjunctive, protecting a forward-looking statement if it is accompanied by meaningful cautionary language "***or***" if a plaintiff fails to prove that the statement was made with "actual knowledge" of falsity. *See* 15 U.S.C. § 78u-5(c); *Rombach*, 355 F.3d at 173 (quoting 15 U.S.C. § 77z-2(a), (c)(1)). Thus, in the presence of cautionary language sufficient to bring the safe harbor into play, allegations regarding defendants' state of mind are irrelevant. *In re Gilat Satellite Networks Ltd. Sec. Litig.*, 2005 WL 2277476, at *12 (E.D.N.Y. Sept. 19, 2005) ("Once a court determines that a forward-looking statement is accompanied by cautionary language sufficiently meaningful as to render it incapable of

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[45] Other SEC filings, including the companies' annual and quarterly reports, contained graphic risk disclosures and may be considered as well. *See* Point I.B.1, *supra.*

being reasonably relied upon, it is immaterial as a matter of law and the court need not consider the defendants' state of mind.").

3. **Statements in connection with the secondary offering regarding the benefits of the merger are not actionable.** Plaintiffs allege that statements made in early October 2008 in connection with the Bank's stock offering (the "Offering Documents") were false. Specifically, Plaintiffs allege that the Bank's CFO Joe Price misled investors on a conference call on October 6, 2008 when he said that the Bank had "considered the Merrill deal" in evaluating its capital position and that the Bank believed the offering "covered our anticipated needs from a Merrill standpoint." AC ¶ 199 (referring to the conference call); *see also id.* ¶ 294.

This allegation is insufficient. First, there are no particularized allegations showing that this statement was untrue when made or even that, as of the October 7 date of the prospectus supplement, the Bank believed that it would need to raise more than $10 billion in capital as a result of the Merrill acquisition. Second, at the outset of the October 6 investor call, a Bank of America spokesperson gave investors a "forward-looking statements" warning. 10/16/08 BofA 3Q08 Earnings Call Tr., at 1 (Ex. 23). Accordingly, Price's statements regarding anticipated capital sufficiency are protected under the PSLRA safe harbor and the "bespeaks caution" doctrine. *See* Point IV.A.2, *supra*.

4. **Statements in the Proxy regarding the benefits of the merger are not actionable.** Plaintiffs allege that the statement in the Proxy that one of Merrill's principal reasons for the merger was its belief that the combined company would have a "strong capital position, funding capabilities and liquidity" was false. AC ¶¶ 212-13. However, these optimistic expressions of opinion are not actionable. *Leykin* v. *AT&T Corp.*, 423 F. Supp. 2d 229, 247 (S.D.N.Y. 2006) (statement that "business is strong" found not actionable).[46]

Moreover, the statement at issue is forward-looking in nature and protected under the PSLRA safe harbor and the "bespeaks caution" doctrine because, as discussed in Point IV.A.2,

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[46] *See also Pollio* v. *MF Global, Ltd.*, 608 F. Supp. 2d 564, 571 (S.D.N.Y. 2009) ("transaction will provide our stakeholders certainty around our capital structure" and produce a "stronger company than ever before" not actionable despite claims that capital would not be sufficient absent additional infusions); *Rosenzweig* v. *Azurix Corp.*, 332 F.3d 854, 869 (5th Cir. 2003) ("Our fundamentals are strong" was "obviously immaterial puffery").

supra, it was accompanied by "meaningful cautionary language." *See, e.g.*, *Rombach*, 355 F.3d at 173. The Proxy "cautioned [investors] not to place undue reliance" on forward-looking statements because (i) "forward-looking statements are subject to assumptions and uncertainties," (ii) "actual results may differ materially from those expressed or implied by these forward-looking statements," and (iii) "the integration of Merrill Lynch's business and operations with those of Bank of America may take longer than anticipated, may be more costly than anticipated and may have unanticipated adverse results relating to Merrill Lynch's or Bank of America's existing businesses." Proxy at 22 (Ex. 1). The Proxy specifically reminded shareholders of what everyone already knew — market conditions had continued to worsen since the announcement of the merger:

> During the past few weeks, ***market conditions have been extremely volatile*** and a number of significant events have occurred including actions taken by the federal government. ***These items may have a significant impact on a number of items (e.g., whole loans held-for-sale, mortgage-backed and other securities, etc.), which will affect the actual purchase price allocation that will be recorded upon completion of the merger.***

Id. at 38 (emphasis added).[47] The Proxy also incorporated by reference the extensive and graphic cautionary language in the companies' annual and quarterly reports. *Id.* at 123-24 (incorporation by reference); Point II.D, *supra* (risk disclosures). Thus, for the same reasons discussed above, *see* Points IV.A.1-2, *supra*, the statements in the Proxy regarding the benefits of the merger are not actionable.

B. The Statements Regarding Due Diligence Are Not Actionable.

Here, Plaintiffs do not plead any facts demonstrating that any statement about due diligence was misleading. Indeed, Plaintiffs do not even address the underlying factual disclosures that were made. Notably, the Bank's stated opinions regarding the scope of its due diligence were

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[47] *See also* Proxy at 49 (Ex. 1) (referencing "extremely distressed conditions in the financial services industry generally and the investment banking industry in particular" and an "unprecedented market environment that had triggered significant dislocations"); *id.* at 52 (stating "the current and prospective environment in which Merrill Lynch operates, which reflects challenging and uncertain investment banking industry conditions and risks . . . [is] expected to persist, including: the volatile valuations and illiquidity of certain financial assets and exposures . . . [and] . . . generally uncertain national and international economic conditions," and citing "the risk of Merrill Lynch's credit ratings being further downgraded and the potential effect such actions would have on certain of Merrill Lynch's businesses and its liquidity position and funding capabilities").

accompanied by disclosures of specific facts that permitted investors to put those opinions in context. The Bank made clear that:

- Due diligence was conducted over a single weekend by a team of the Bank's reviewers and financial advisors. AC ¶ 179; *see also* 9/15/08 Press Conf. Tr., at 3 (Ex. 13).
- The financial advisors who worked on the diligence effort had previously analyzed Merrill's positions in connection with another matter. AC ¶¶ 179-80; 9/15/08 Press Conf. Tr., at 9-10 (Ex. 13).
- Merrill had reduced (but not eliminated) its high risk assets. AC ¶ 180; Merrill 7/29/08 8K, Ex. 99.1, at 2 (Ex. 10) (reporting sale of over $30 billion in CDOs and billions in residual exposure).

In light of these disclosures, the notion that investors were misled about the scope of the Bank's due diligence is untenable. *See Olkey* v. *Hyperion 1999 Term Trust, Inc.*, 98 F.3d 2, 5 (2d Cir. 1996) (disclosure at issue must be "[r]ead as a whole" and "taken together and in context").

The challenged statements made on September 15 regarding due diligence — including that the process was "extensive" (AC ¶ 179), involved looking at Merrill's marks "comprehensively" (*id.* ¶ 180) and resulted in the Bank concluding that Merrill had a "much lower risk profile" (*id.* ¶ 180) and "had the liquidity and capacity to see this through" on its own (*id.* ¶ 185) — are also all "too general to cause a reasonable investor to rely upon them." *ECA,* 553 F.3d at 206. *See also San Leandro*, 75 F.3d at 808, 811 (dismissing allegations based on statements that were "plainly expressions of opinion").

In its recent decision in *ECA*, the Second Circuit explained that "generalizations" regarding "business practices" that do not "amount to a guarantee" are precisely the type of statements that "this and other circuits have consistently held to be inactionable." *ECA*, 553 F.3d at 205-06. The statements at issue in *ECA* related to JP Morgan Chase's risk management practices and included representations that such practices were "highly disciplined" and "set the standard for best practices in risk management techniques." *Id*. The Court of Appeals held that there was no material misstatement because each of the misrepresentations was "so general that a reasonable investor would not depend on it as a guarantee." *Id.* at 206.

The statements made by the Bank regarding its due diligence efforts were, if anything, even more "general" than the statements at issue in *ECA*. *See* 9/15/08 Press Conf. Tr., at

10 (Ex. 13). No reasonable investor would have viewed the Bank's statements that it had engaged in "extensive" due diligence or "comprehensively" reviewed Merrill's marks as any form of guarantee that Merrill had reduced its risk in such a manner that no future losses could or would arise. *See San Leandro*, 75 F.3d at 807, 811 (statements that are "expressions of opinion and not guarantees" are not actionable). This is particularly true given the volatility of Merrill's trading operations and the unsettled state of the markets when the Merger Agreement was signed.[48]

Plaintiffs also fail to allege with particularity how or why the Bank's stated opinion of the extent of its due diligence efforts was misleading. *See Podany* v. *Robertson Stephens, Inc*., 318 F. Supp. 2d 146, 154 (S.D.N.Y. 2004) ("Plaintiffs who charge that a statement of opinion . . . is materially misleading, must allege with particularity provable facts to demonstrate that the statement of opinion is both objectively and subjectively false."). Thus, Plaintiffs allege that the Bank must have conducted inadequate due diligence, in view of the magnitude of Merrill's losses that materialized ***after*** the Merger Agreement was signed. *See* AC ¶¶ 182-84. But the law is clear that a plaintiff cannot plead "fraud by hindsight." *See Tellabs,* 551 U.S. at 320 (quoting *Denny* v. *Barber*, 576 F.2d 465, 470 (2d Cir. 1978)).[49] Similarly, Plaintiffs' allegations that assertions by federal banking regulators — made ***months after*** the merger agreement was signed — that there were "substantial deficiencies in the due diligence carried out in advance of and subsequent to the acquisition" (AC ¶ 182) and that the Bank had become "very thinly capitalized" (*id.* ¶¶ 234-35) hardly show that the Bank ***itself*** believed on September 15 that its due diligence was anything less than "extensive" and "comprehensive" (given the publicly-disclosed circumstances or that the Bank did not believe that its capital position was adequate on September 15 before market conditions worsened). *See Rosenzweig* v. *Azurix Corp.,* 332 F.3d 854, 867-68 & n.8 (5th Cir. 2003) (rejecting sufficiency of scienter allegation directed at defendants' statement that company "fundamentals are strong" based on a report issued "well after the alleged misrepresentations and omissions;" report

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[48] *See Lentell* v. *Merrill Lynch & Co.*, 396 F.3d 161, 176 (2d Cir. 2005) (considering "the price-volatility risk inherent in the stocks [plaintiffs] chose to buy" in affirming dismissal of securities law claims).

[49] *See also In re JPMorgan Chase Sec. Litig.*, 363 F. Supp. 2d 595, 630 (S.D.N.Y. 2005) ("[P]laintiffs have only alleged poor prognostication, which cannot support a claim for securities fraud."), *aff'd*, 553 F.3d 187 (2d Cir. 2009).

was "plainly a *hindsight* assessment" and did not support the inference that "management knew of the problems all along") (emphasis in original). And the conclusion reached by a Federal Reserve official on December 23 that Lewis "knows [the Bank] did not do a good job of due diligence" (AC ¶¶ 122, 251) likewise does not give rise to any inference that Lewis did not in fact believe on September 15 that the Bank's due diligence had been "extensive."

Plaintiffs also challenge the oral statements (made in response to analysts' questions at the September 15 conference call announcing the merger) that Merrill had "dramatically reduc[ed] [its] marks" and thus had a "much lower risk profile." AC ¶ 180. For the reasons set forth above, *see* Points IV.A.1 and IV.A.4, *supra*, these statements of corporate optimism are too general to give rise to securities law claims. *See ECA*, 553 F.3d at 206; *Malin* v. *XL Capital Ltd.*, 499 F. Supp. 2d 117, 144 (D. Conn. 2007) (statement that "we think we've turned a corner" not actionable (emphasis omitted)). Furthermore, Plaintiffs allege no particularized facts challenging the truth of Merrill's disclosure early in the third quarter of 2008 that it had sold $30.6 billion of troubled assets (U.S. Super Senior ABS CDOs), but still maintained substantial exposure to such assets on its balance sheet. *See* Merrill 7/29/08 8K, at 2 (Ex. 10); *see also* Merrill 3Q08 10Q, at 90 (Ex. 34) (reporting more than a billion dollars in remaining ABS CDO net exposure). No representation was made then or thereafter that the sale of these assets had eliminated the potential for future marks to Merrill's balance sheet or that the company's remaining trading positions would be risk-free. To the contrary, as Merrill later disclosed in its third quarter Form 10-Q: "The challenging market conditions that have existed since the second half of 2007, particularly those relating to the credit markets, continued through the third quarter of 2008. Although the greatest impact to date had been on U.S. ABS CDOs and the U.S. sub-prime residential mortgage products, the adverse conditions in the credit markets have also affected other products . . . . At September 26, 2008, we maintained exposures to these markets through securities, derivatives, loans and loan commitments." Merrill 3Q08 10Q, at 88, 90 (Ex. 34). In fact, during Merrill's analyst call reporting its third quarter results on October 16, 2008, its CFO made clear that the company would "continue over the fourth quarter [to] continue to find opportunities to de-risk the balance sheet." Merrill 3Q08 Earnings Call Tr., at 6

(Ex. 26). Far from a guarantee that Merrill would have no further losses, the disclosures to shareholders suggested that losses likely would continue into the fourth quarter.

Plaintiffs also challenge Lewis's oral response to a reporter's question at the September 15 press conference that "probably . . . Merrill had the liquidity and capacity to see this through" and "more likely than not, they would have seen this through and come out on the other side." AC ¶ 185. This entirely hypothetical and speculative statement of opinion cannot be the subject of a securities law claim, because a statement about what might have happened if things were different is incapable of being true or false when made. The statement is also forward-looking and is protected by the PSLRA safe harbor and the "bespeaks caution" doctrine. *See* Points IV.A.1-2, *supra*. It is also not actionable because Plaintiffs fail to plead particularized facts sufficient to support an inference of fraudulent intent: Plaintiffs allege that ***Lewis's*** opinion was false and misleading because ***Thain*** testified months later that, in his view, Merrill would have become effectively insolvent on September 15 had the merger not been agreed to (AC ¶ 186), but this allegation does not support the inference that when Lewis offered this opinion on September 15, he did not actually believe that Merrill would have had sufficient "liquidity and capacity" to survive absent a merger. *See Time Warner,* 9 F.3d at 266 (affirming dismissal of claims based on opinion where complaint "contains no allegations to support the inference that the defendants either did not have these favorable opinions on future prospects when they made the statements or that the favorable opinions were without a basis in fact").

C. The Statements Regarding Merger Negotiations Are Not Actionable.

Plaintiffs also challenge two statements made in the September 15 press conference Q&A session regarding the merger negotiations — *i.e.*, that "there was no pressure from regulators" to enter into the Merger Agreement (AC ¶ 187) and that the merger negotiations were "never about [Thain]; it was always about the deal" (*id.* ¶ 189). *See* 9/15/08 Press Conf. Tr., at 3 (Ex. 13).

In response to a question from a reporter concerning why the Bank decided to pay the price it did to acquire Merrill, Lewis stated that "there was no pressure from regulators" (AC ¶ 81) to enter into the merger. 9/15/08 Press Conf. Tr., at 3 (Ex. 13). Plaintiffs challenge Lewis's statement as false and misleading, but they fail to set forth particularized facts to support that assertion.

Instead of alleging facts demonstrating that ***Lewis or the Bank*** was in fact under regulatory pressure to enter into the merger or pay the price agreed, Plaintiffs rely upon an excerpt from an interview of ***Merrill's CEO John Thain*** broadcast as part of a television documentary that aired a year after the Merger Agreement was signed. In one clip of that program, Thain said that he recalled Treasury Secretary Paulson having told him "John, you'd better make sure this happens." AC ¶ 65. But Plaintiffs nowhere allege facts demonstrating that Lewis was aware of the statement made to Thain by Secretary Paulson, much less facts suggesting that Lewis understood whatever Secretary Paulson said to Thain was "pressure" from the government on Merrill (as opposed to, *e.g.*, the Secretary's opinion that a merger was in the best interests of Merrill and its shareholders). In any event, whether there was government pressure on ***Thain or Merrill*** is in no way related to whether the government exerted pressure on ***the Bank or Lewis***, especially since the Bank and Merrill were dealing at arm's length at the time.

Lewis's statement moments later at the September 15 press conference that the focus of the merger negotiations was "always about the deal" and "never about him" (referring to Thain) (AC ¶ 189; 9/15/08 Press Conf. Tr., at 3 (Ex. 13)) is likewise a vague statement of opinion that conveys so little information that it cannot give rise to a securities claim. *See* Point IV.A.1, *supra.* Plaintiffs allege that Lewis's statement was false because, one year later, Thain reportedly stated that one of the "main things" the parties negotiated on the night of September 14 was the bonuses to be paid to Merrill employees (AC ¶¶ 67, 190). But it is apparent from a transcript of the September 15 press conference that Lewis's statement was not about bonuses. 9/15/08 Press Conf. Tr., at 3 (Ex. 13). After Thain answered a reporter's question concerning his future role in the combined company, Lewis interjected by (accurately) stating that that issue was not raised in the negotiations because Thain's focus was "about the deal" and "not about him." *Id.* Thus, Thain's September 2009 statement about the negotiation of bonuses simply does not demonstrate that Lewis's September 2008 statement about Thain's future role in the combined company was false.

D. Plaintiffs Fail To Plead Actual Knowledge Of Falsity With Respect To Forward-Looking Statements And Statements Of Opinion.

Under the PSLRA, a forward-looking statement is not actionable unless the plaintiff proves that it was "made with actual knowledge . . . that the statement was false or misleading." 15 U.S.C. §§ 78u-5(c)(1)(B)(i) (applicable to claims under the Exchange Act); 77z-2(a), (c) (applicable to claims under the Securities Act). These provisions of the PSLRA apply to all of Plaintiffs' claims, whether under Section 10(b) or Section 14(a) of the Exchange Act, or under Section 11 or Section 12 of the Securities Act, despite Plaintiffs' disclaimers that their Section 14(a), Section 11 and Section 12 claims "are not based on any knowing or reckless conduct by or on behalf of Defendants." AC ¶¶ 327, 362. Thus to the extent that Plaintiffs' claims are predicated on "forward-looking statements," it is incumbent on Plaintiffs to plead particularized facts demonstrating that Defendants had "actual knowledge" that the statements were false when made. *Aegon*, 2004 WL 1415973, at *12 ("Because the statements at issue are forward-looking, they are immunized unless the Plaintiffs plead that the statements were made with 'actual knowledge by [the speaker] that the statement was false or misleading.'") (quoting 15 U.S.C. § 78u-5(c)(1)(B)(ii)).

Plaintiffs have utterly failed to sustain this burden. The Complaint contains no allegation whatsoever demonstrating that any forward-looking statements were made with actual knowledge of falsity. Indeed, with respect to their Section 14(a) and Securities Act claims, Plaintiffs not only fail to allege facts that would establish that Defendants' forward-looking statements were made with "actual knowledge" that they were false, but indeed, Plaintiffs affirmatively disclaim any such allegations. *See, e.g.*, AC ¶ 327 (alleging that "[t]he Proxy Claims are based solely on negligence. They are not based on any knowing or reckless conduct"); ¶ 362 (alleging that "[t]he Securities Act claims . . . are not based on any knowing or reckless conduct[.]"). Plaintiffs here have failed to allege particularized facts in support of their conclusory allegation that Defendants' forward-looking statements were made with "actual knowledge" that they were false, and for this reason alone the safe harbor is available. *See In re GeoPharma, Inc. Sec. Litig.*, 399 F. Supp. 2d 432, 448 n.122 (S.D.N.Y. 2005).

In addition, many of Plaintiffs' claims challenge what are plainly statements of opinion or belief. Statements of opinion or belief are actionable only to the extent Defendants did

not actually or reasonably believe the statements at the time they were made. To satisfy this burden, Plaintiffs "must 'allege with particularity' 'provable facts' to demonstrate that the statement of opinion is both objectively and subjectively false." *Bond Opportunity Fund*, 2003 WL 21058251, at *5.[50] Here, Plaintiffs have failed to allege any "provable facts" demonstrating that the opinions expressed by Defendants in connection with their solicitation of proxies were either objectively or subjectively false at the time they were made.

For the reasons described above, all of Plaintiffs' claims against the Bank Defendants concerning the anticipated merger benefits, the extent of due diligence performed on Merrill or the negotiation of the merger should be dismissed.

E. Plaintiffs Fail To Plead Facts That Give Rise To A Strong Inference Of Scienter.

As set forth above, *all* of Plaintiffs' claims require Plaintiffs to plead facts giving rise to a strong inference of scienter, because all are premised on claims of fraud — the Complaint's disclaimers of any intent to rely on allegations of scienter with respect to its Section 14(a) and Securities Act claims notwithstanding. *See* Point I.E., *supra*. Plaintiffs have utterly failed to plead any facts that would give rise to the required "strong inference" of scienter. Indeed, to the contrary, the Complaint's allegations of scienter with respect to the statements at issue here are wholly illogical. Nothing in the Complaint answers the questions: Why would Defendants enter into a merger with Merrill if they did not believe that it offered the strategic and other benefits referred to in the September 15 statements? Why would they do an offering that they knew to be inadequate to meet the Bank's capital needs? Why would they do due diligence that they themselves believed to be inadequate? To the contrary, the only logical inference that can be drawn from the facts in the Complaint is that Defendants believed what they said about the benefits of the merger and their own due diligence.

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[50] *See also Shields* v. *Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1131 (2d Cir. 1994) ("A statement of reasons, opinion or belief by [a director] when recommending a course of action to stockholders can be actionable under the securities laws if the speaker knows the statement to be false."); *JP Morgan*, 363 F. Supp. 2d at 625 ("When . . . as here, information contrary to the alleged misrepresentations is alleged to have been known by defendants at the time the misrepresentations were made, the falsity and scienter requirements are essentially combined.") (internal quotation marks omitted; ellipsis in original).

F. Plaintiffs' Securities Act Claims Regarding The September 15 Press Release Are Not Pled With The Requisite Particularity.

Plaintiffs' Securities Act claims, on their face, disclaim any intent to incorporate by reference or rely upon factual allegations made elsewhere in the Complaint. *See* AC ¶¶ 362, 372, 383, 391. Thus, even if the grounds for dismissal discussed above — non-actionability as statements of corporate optimism or forward-looking statements — were not wholly dispositive, whether the statements complained of were materially misleading would turn on the allegations of Paragraphs 370 and 371 of the Complaint, which are conclusory and insufficient. Plaintiffs' alleged grounds for why the statements in the September 15, 2008 press release were untrue or omitted to disclose material facts are fundamentally premised on events that occurred after the October 7 offering (*e.g.*, the loss incurred in October 2008 or Merrill's fourth quarter losses) or vague, general references to after-the-fact observations by Thain and vague allusions to a Federal Reserve "analysis," none of which directly contradict the generalized statements of corporate optimism or forward-looking statements complained of (*e.g.*, the fact that Merrill had "large risk exposures" or "vulnerability" is not inconsistent with the statements about the potential benefits of the merger to the Bank). And, in any event, no material misrepresentation is pled in light of the total mix of information in the market regarding Merrill, the Bank and the potential adverse impact of the then-difficult market conditions. *See Rombach*, 355 F.3d at 173; *see also* Point II.D, *supra*.

For the reasons described above, all of Plaintiffs' claims against the Bank Defendants concerning the anticipated merger benefits, the extent of due diligence performed on Merrill or the negotiation of the merger should be dismissed.

V. THE BANK'S SHAREHOLDERS — WHO DID NOT BUY, SELL OR EXCHANGE THEIR SHARES — SIMPLY DO NOT HAVE ANY DIRECT SECTION 14(a) CLAIM.

Plaintiffs' allegations under Section 14(a) of the Exchange Act are not cognizable as direct claims. In *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 431 (1964), the Supreme Court held that shareholders have a private right of action under Section 14(a) of the Exchange Act, and that this right of action extends "to both derivative and direct causes." Explaining the need to imply a private right of action for derivative causes, the Court pointed out that shareholders cannot sue directly in

most cases because the damage from a deceptive proxy solicitation is usually not suffered by the shareholders:

> The injury which a stockholder suffers from corporate action pursuant to a deceptive proxy solicitation ordinarily flows from the damage done the corporation, rather than from the damage inflicted directly upon the stockholder. The damage suffered results not from the deceit practiced on him alone but rather from the deceit practiced on the stockholders as a group. To hold that derivative actions are not within the sweep of the section would therefore be tantamount to a denial of private relief. *Id.* at 432.

The Supreme Court's recognition that Section 14(a) cases "ordinarily" involve damage to the corporation, not directly to shareholders is directly applicable here.

To determine whether a shareholder can sue directly, a federal court applies the law of the defendant corporation's state of incorporation. *Kamen* v. *Kemper Fin. Servs. Inc.,* 500 U.S. 90, 99 (1991) (holding that courts should look to state law to "fill the interstices of federal remedial schemes"); *Vogel* v. *Jobs*, 2007 WL 3461163, at *2 (N.D. Cal. Nov. 14, 2007) ("The proper characterization of a [14(a)] claim as direct or derivative is governed by the law of the state of incorporation."); *see also Strougo* v. *Bassini*, 282 F.3d 162, 167-69 (2d Cir. 2002) (looking to state law to determine whether Investment Company Act claim was direct or derivative). Since the Bank is a Delaware corporation (AC ¶ 33), that State's law applies here.

Under Delaware law, Plaintiffs' characterization of their claims as direct is irrelevant. *See Lipton* v. *News Int'l,* 514 A.2d 1075, 1079-80 (Del. 1986). The determination of whether a shareholder can sue directly is instead "based solely on the following questions: Who suffered the alleged harm — the corporation or the suing shareholder individually — and who would receive the benefit of the recovery or other remedy?" *Tooley* v. *Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004). To assert a direct claim, a "stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation." *Id.*

Shareholders cannot sue directly unless their injuries are "independent of any alleged injur[ies] to the corporation" and can be shown "without showing an injury to the corporation." *In re Syncor Int'l Corp. S'holders Litig.*, 857 A.2d 994, 997 (Del. Ch. 2004). *See In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 817 (Del. Ch. 2005) (dismissing claims as derivative

and noting that to show direct injury under *Tooley*, plaintiff must show "that he or she can prevail without showing an injury to the corporation"), *aff'd*, 906 A.2d 766 (Del. 2006). As the Delaware Supreme Court stated in *Feldman* v. *Cutaia*, 951 A.2d 727, 733 (Del. 2008), "[t]he mere fact that the alleged harm is ultimately suffered by, or the recovery would ultimately inure to the benefit of, the stockholders does not make a claim direct under *Tooley*. In order to state a direct claim, the plaintiff must have suffered some individualized harm not suffered by all of the stockholders at large."

The inability of Plaintiffs to sue directly in this case is crystal clear under Delaware law, in light of the decision of the Delaware Supreme Court in *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766 (Del. 2006). In that case, JP Morgan Chase ("JPMC") shareholders alleged that they had been misled into approving a merger whereby JPMC acquired Bank One because the proxy materials failed to disclose that Bank One had stated a willingness to be acquired in a no-premium deal. The Delaware Supreme Court rejected the claim that the plaintiffs had a cognizable direct disclosure claim separate and apart from the derivative claim that the defendant directors had breached state law fiduciary duties by causing JPMC to overpay in the merger:

> To the extent the plaintiffs' claim is that the compensatory damages worth $7 billion flow from the disclosure violation, that damages claim is derivative, not direct. Even if it were assumed that improper proxy disclosures induced JPMC's shareholders to approve the merger (including the $7 billion overpayment), the harm resulting from the overpayment was to JPMC. Therefore, any damages recovery would flow only to JPMC, not to the shareholder class. *Id.* at 772.

The Court specifically rejected the claim that "where a disclosure violation arises from a corporate transaction in which the shareholders suffer a dilution of the economic and voting power of their shares, the shareholders automatically become entitled to recover the identical damages on their disclosure claim, that the corporation would be entitled to recover on its underlying (derivative) claim." *Id.* at 772-73.[51]

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[51] Indeed, even before *J.P. Morgan*, the Delaware Supreme Court had repeatedly made clear that there is no direct cause of action for shareholder dilution where the harm alleged impacts all shareholders equally (on a per share basis), because such harm is not independent of harm to the company. *Gentile* v. *Rossette*, 906 A.2d 91, 99-100 (Del. 2006) (citing cases). And since *J.P. Morgan*, the Delaware courts have reaffirmed that principle. *See Feldman*, 951 A.2d at 732; *Langford* v. *Barnholt,* 2009 Del. Ch. LEXIS 37, at *2 (Del. Ch. Mar. 17, 2009) ("[I]n the absence of a controlling shareholder, a claim for equity dilution must be pleaded as a derivative claim.").

The same logic compels the conclusion that no direct Section 14(a) claims can be brought here. Any damages resulting from alleged overpayment or undue dilution in the merger would accrue to the Bank itself, which issued shares in the merger to acquire Merrill, not to individual Bank shareholders. *See J.P. Morgan*, 906 A.2d at 772-73. *See also Kelley* v. *Rambus, Inc.*, 2008 WL 5170598 (N.D. Cal. Dec. 9, 2008) (expressing skepticism "that Plaintiffs could show that their § 14 claim [was] direct" because equity dilution "does not generally constitute a direct harm, but a derivative one").

The fact that the Complaint references the very same damages for its Section 14(a) claim as for its Section 10(b) claims (*i.e.*, damages measured by the decline in the price of Bank stock in January 2009) and studiously avoids any mention of the Merrill merger or its effects on the Bank, in no way makes the Section 14(a) claim direct under the relevant Delaware law test, discussed above.[52] Plaintiffs have not shown that the corporate action for which proxies were solicited here — the acquisition of Merrill — caused any change in their economic or voting rights as shareholders. To the contrary, the outcome of the vote had no direct impact for the Bank's shareholders, who retained exactly the same Bank shares that they had before the merger. In other words, the Bank engaged in a transaction as a result of the Proxy Statement; the Bank's shareholders did not.

Even assuming *arguendo* that the January 2009 decline in the Bank's stock price resulted from the factors Plaintiffs allege, that would only reflect the market's perception of the diminished value of the Bank after the merger, and would thus not reflect harm to shareholders that is *independent* of injury to the corporation, as Delaware law requires. *See Tooley*, 845 A.2d at 1035. In any case where there is harm to the corporation, that harm may be expected to result in a lower

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[52] Paragraph 334 of the Complaint states: "The false statements and omissions as set forth above proximately caused foreseeable losses to Lead Plaintiffs and members of the Class, as the risks concealed by these false and misleading statements and omissions materialized through a series of partial disclosures, causing the Bank's stock to fall from $12.99 on January 9, 2009 to a Class Period low of $5.10 on January 20, and to fall again on January 22, 2009, as set forth more fully above at ¶¶ 261-271." Paragraphs 261-71, the loss causation allegations underlying Plaintiffs' Section 10(b) claims, in turn allege generally that the Bank's stock price was "inflated" during the class period and that some or all of the "inflation" left the stock price lower as a result of a series of what Plaintiffs term "corrective disclosures."

stock price, but this does not mean that shareholders have standing to sue directly. Shareholders cannot make their claims direct simply by artful pleading that references declines in stock price while omitting reference to the underlying harm to the corporation.[53]

VI. PLAINTIFFS' SECTION 15 AND 20 CLAIMS MUST BE DISMISSED.

Without a primary violation, Plaintiffs' Section 15 and Section 20 claims must also be dismissed. *See Rombach*, 355 F.3d at 169, 177-78.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed with prejudice.

[53] A stock price decline not caused by the Merrill merger would also not be actionable under Section 14(a). Section 14(a) requires that the plaintiff "establish a causal nexus between the [] alleged injury and some corporate transaction authorized (or defeated) as a result of the allegedly false and misleading proxy statements." *Royal Bus. Group, Inc.* v. *Realist, Inc.*, 933 F.2d 1056, 1063 (1st Cir. 1991). *See Rediker* v. *Geon Indus., Inc.*, 464 F. Supp. 73, 81 (S.D.N.Y. 1978) ("damage claim under Section 14(a) must arise out of corporate action taken pursuant to a proxy statement"); *In re Penn Cent. Sec. Litig.*, 347 F. Supp. 1327, 1342 (E.D. Pa. 1972) ("plaintiff can only establish a § 14(a) claim based on a purchase or sale of securities if the purchase or sale was the result of a corporate transaction whose approval was obtained by a misleading proxy statement, *e.g.*, a traditional merger"). Thus, in this case, Section 14(a) damages are limited to those caused by the Merrill transaction that was the subject of the relevant solicitation. As set forth above, claims for those damages are derivative because if (contrary to fact) the Bank undertook a misguided acquisition or overpaid for Merrill, the harm is to the Bank. The viability of any such derivative claims can, and will, be addressed in the separate, related actions in which such claims are alleged.

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