UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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

Oral Argument Requested

THIS DOCUMENT RELATES TO

The Consolidated Securities Class Action

BOFA'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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Defendants Bank of America Corporation and Banc of America Securities LLC (together, "BofA" or the "Company") submit this memorandum of law in opposition to plaintiffs' motion for partial summary judgment as to the elements of falsity and materiality under Sections 10(b) and 14(a) of the Securities Exchange Act of 1934 with respect to five statements concerning BofA's projections regarding whether the merger with Merrill Lynch & Co., Inc. ("Merrill") would be accretive or dilutive to BofA's earnings in 2009, 2010, and 2011.[1]

PRELIMINARY STATEMENT

Plaintiffs' summary judgment motion hinges on Ken Lewis's supposed "admission" during his deposition that he made a false statement at BofA's December 5, 2008 shareholder meeting about the projected accretive/dilutive impact of BofA's merger with Merrill. That admission, however, exists only in plaintiffs' motion papers. Mr. Lewis made no such admission. At the actual deposition, plaintiffs asked Mr. Lewis to compare two different accretion/dilution projections—one disclosed by BofA in September 2008; the other provided to BofA's Board on December 9, 2008. Mr. Lewis testified, accurately and unremarkably, that the two projections were different, and that, with the benefit of hindsight, the September projection had "changed" as of December 5, the date of the shareholder meeting. Contrary to the premise of plaintiffs' motion, Mr. Lewis did *not* testify (i) that he was aware of the December 9 projections on December 5, (ii) that the Company had completed or adopted the December 9

[1] Plaintiffs' motion attributes the five challenged statements to all of the defendants. (*See* Notice of Lead Plaintiffs' Motion for Partial Summary Judgment (Dkt. No. 589); Lead Plaintiffs' Memorandum of Law in Support of Their Motion for Partial Summary Judgment ("Pls.' Mem.") 1, Dkt. No. 590).) But certain defendants, including Banc of America Securities LLC, did not make any of those statements, and other defendants made only some of those statements. Moreover, plaintiffs have not even asserted claims under Sections 10(b) and 14(a) against Banc of America Securities LLC.

projections as of December 5, or (iii) that he did not genuinely believe the statement he made at the December 5 shareholder meeting about the projections at the time he made the statement.

On this record, summary judgment in favor of plaintiffs would be manifestly inappropriate. The federal securities laws do not permit claims based on forward-looking statements—such as projections about the accretive or dilutive effects of a merger—based on whether the statements later proved wrong. As this Court has held, such statements of opinion are deemed false only if the speaker did not genuinely believe them at the time they were made.

Plaintiffs cannot demonstrate, as is their burden, that there is no genuine dispute of fact as to Mr. Lewis's subjective belief at the time the statement was made. Among the evidence conspicuously absent from plaintiffs' motion is the following:

- Mr. Lewis testified at his deposition in the related Delaware litigation—weeks before he was deposed in this case—that he believed on December 5 that the September accretion/dilution projection was the best projection then available to him; and
- the December 9 accretion/dilution projections were not finalized until after the December 5 shareholder meeting and no preliminary versions of the projections were shown to Mr. Lewis before that meeting.

In all events, Mr. Lewis's statement on December 5 was perfectly appropriate. In response to a shareholder's question whether issuing new BofA shares would be dilutive "not in the future, someday, but this afternoon," Mr. Lewis referred the questioner to what "[w]e have said as I recall in the presentation" in September. That presentation—the only one Mr. Lewis knew of regarding the projected dilutive effect of the Merrill merger—forecast that, based on certain assumptions, the merger would be dilutive in its first year. The September presentation and the proxy expressly cautioned that this accretion/dilution projection was made as of September 14, 2008 and would not be updated. Mr. Lewis's December 5 statement was an accurate reference to what BofA had previously disclosed. And BofA had no duty to update the September projection before the shareholder vote.

Equally without basis is plaintiffs' contention that defendants "admitted" the materiality of the December 9 accretion/dilution forecast. To support this argument, plaintiffs point to a statement in the Company's November 3 proxy statement that the September accretion/dilution forecast was one of thirteen categories of "material" information that BofA's board of directors considered in approving the merger. The proxy, however, expressly stated that the directors did not "quantify, rank or otherwise assign relative weights to the specific factors that it considered in reaching its decision," and that individual directors "may have given different weights to different factors." Moreover, there is no statement in the proxy, in any other document, or in the vast testimonial record that suggests that any later accretion/dilution forecasts, based on different data, would have been material to shareholders voting on the merger almost three months later, when the mix of information concerning the merger (including the amount of consideration that BofA was paying) and the financial markets had changed so dramatically. In these circumstances, assessments of materiality "are peculiarly ones for the trier of fact." *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 451 (1976).

Finally, plaintiffs' motion should be denied because the Complaint does not assert a single claim based on defendants' accretion/dilution projections. It is settled law that plaintiffs cannot obtain judgment, much less summary judgment, on an unpleaded claim. Plaintiffs' belated attempt to inject new claims into this case is particularly inappropriate because this Court expressly warned plaintiffs two years ago that it would not tolerate such gamesmanship. In 2010, in response to plaintiffs' request to defer amending their complaint until "at or shortly before the close of fact discovery," the Court ruled that it was "disinclined to approve any scheduling order which would expressly contemplate such a late-in-the-game motion to amend," and directed plaintiffs to amend the complaint by October 15, 2010 to include all of their claims. (Dkt. No. 317 ("Sept. 16, 2010 Mem. and Order".) This Court reasoned that a last-minute amendment would undermine the PSLRA's strict pleading requirements and "inevitably lead to a request to reopen or extend discovery, which may be well founded." *Id.*

Plaintiffs' summary judgment motion violates this Court's directive. Defendants produced the accretion/dilution forecasts relevant to plaintiffs' purported claims over two years ago, more than eight months before plaintiffs filed the current Complaint. Not only did plaintiffs choose not to assert claims based upon these forecasts in the Complaint, but they have never sought to amend the Complaint since it was filed. Moreover, in response to defendants' January 2012 interrogatories asking plaintiffs to identify all alleged misrepresentations or omissions on which they based their claims, plaintiffs hid the ball by directing defendants to various paragraphs of the Complaint, none of which mentioned the accretion/dilution forecasts. Plaintiffs did not disclose their intention to pursue a claim based on any of the statements that are the subject of this motion until after fact discovery had closed, after the parties had exchanged expert reports and commenced expert depositions, and just three weeks before summary judgment motions were due. In these circumstances, permitting plaintiffs to amend would be grossly unfair to defendants.

For these reasons and others discussed below, plaintiffs' summary judgment motion should be denied.

STATEMENT OF FACTS

A. The September 2008 Accretion/Dilution Forecast

In approving the merger with Merrill, BofA's board of directors considered the potential long-term benefits of the transaction, as well as a multitude of financial metrics and other factors. ¶¶ 12-14, 20.[2] Only one of those factors—projections estimating the impact of the merger on BofA's earnings in future years—is the subject of plaintiffs' motion. ¶¶ 20-23.

Specifically, on September 14, 2008, the Company's financial advisors presented the board with a forecast of the accretive and dilutive nature of the merger after the closing. ¶ 21. A merger is "accretive" if it increases the acquiror's earnings per share following the transaction compared to its projected earnings on a stand-alone basis, and "dilutive" if it decreases such earnings. ¶ 22. An accretion/dilution forecast therefore depends entirely on projected estimates of future earnings *after* the transaction closes.

The financial advisors' presentation to the board projected that, based on certain assumptions, the merger would be 2.5% dilutive to BofA's earnings per share in 2009 and 0.3% accretive to such earnings in 2010 before restructuring charges. ¶ 23. The model used to estimate these accretion/dilution projections did *not* factor in any estimated earnings results for the 2008 period that preceded the closing of the merger, including Merrill's fourth quarter 2008 results. ¶¶ 26-28. Instead, the forecast was based on consensus analysts' earnings estimates obtained from First Call for 2009 and 2010.[3] ¶ 24.

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[2] "¶ __" refers to BofA's Counterstatement of Material Facts, filed herewith ("BofA Counterstatement").

[3] First Call is a service that compiles and analyzes research and earnings estimates from various brokerage firms and analysts and sells forecast data generated from its analysis to the public. ¶ 25.

B. The September 15, 2008 Accretion/Dilution Projection Was Expressly Described as an Estimate That Would Not Be Updated and That Was Subject to Risks

On September 15, 2008, BofA announced the merger with Merrill by issuing a press release and making a presentation to investors and analysts, which discussed a wide array of financial metrics and data about the merger, including the accretion/dilution forecast that the financial advisors had furnished to the Board the day before. ¶¶ 29-30, 33. BofA presented the accretion/dilution forecast as an estimate. ¶¶ 33-35. And the September 15 disclosures expressly stated that the accretion/dilution forecast was based not on BofA or Merrill projections but on First Call's summary of analyst estimates of 2009 and 2010 earnings and certain other assumptions, including expected expense efficiencies from the merger. ¶¶ 36-39.

The September 15 disclosures made clear that the forecast was based on information available as of the preceding day and that BofA would not update it in light of subsequent events. Both the press release and investor presentation stated: "Bank of America does not undertake to update forward-looking statements to reflect the impact of circumstances or events that arise after the date the forward-looking statements are made." ¶ 43. Investors also were cautioned that the forward-looking statements bear risks that "may cause actual results in the future to be different from our current expectations" including, among other things, "changes in economic conditions." ¶ 41; *see also* ¶ 42.

C. The November 3, 2008 Proxy Statement Warned that the September Accretion-Dilution Forecast Would Not be Updated and Was Subject to Risks

On November 3, 2008, BofA and Merrill jointly issued their proxy statement providing the time and place of the December 5, 2008 shareholders meeting and soliciting shareholder approval of the merger. (The proxy statement and the other materials distributed with it are referred to hereafter as the "Proxy.") In 124 pages of text, five appendices, and other disclosure documents incorporated by reference therein, the Proxy provided exhaustive details about the potential risks and benefits of the transaction. ¶¶ 44-45. The Proxy disclosed, among other things, background on both companies and their proposed merger, risk factors and warnings about the deal, the potential long-term strategic benefits of the transaction, historical financial data on each company, comparative per share data, and fairness opinions of the financial advisors to both companies. ¶ 45.

The Proxy also contained an historical account of the process by which BofA's board decided to approve the merger at its September 14, 2008 meeting. ¶ 46. It noted that the board "considered a number of factors," including thirteen categories of "material factors" listed in the Proxy, each with subparts. ¶ 47. One of those factors was "that application of . . . potential expense savings and other transaction-related assumptions and adjustments to the combined net income forecasts for Bank of America and Merrill Lynch made by various third-party brokerage firms and published as consensus estimates by First Call would result in the combination being 3.0% dilutive in 2009 and breakeven in 2010." ¶ 48. Plaintiffs do not dispute on this motion that these or any other statements in the Proxy were true when made.

The Proxy disclosed that the accretion/dilution forecast, like the other factors, might not have carried much weight with individual members of BofA's board of directors. ¶ 51. It stated that the board did not "quantify, rank or otherwise assign relative weights to the specific factors that it considered," and that "individual members of the Bank of America board of directors may have given different weights to different factors." ¶ 51.

Like the September 15 statements, the Proxy made clear that the accretion/dilution projections for 2009 and 2010 were estimates based on information as of

September 14, 2008. ¶¶ 50, 53. The Proxy explained that the accretion/dilution forecasts were only "illustrative pro forma analyses of the potential impact of the merger under certain assumptions, including consensus analyst EPS and long-term growth estimates for Bank of America." ¶ 53. It identified more than 20 risk factors that "may cause actual results or earnings to differ materially from" these and other forward-looking statements, including "the extent and duration of continued economic and market disruptions and governmental regulatory proposals to address these disruptions." ¶¶ 54-55. It cautioned that "actual results may differ materially from those expressed or implied by forward-looking statements," and thus that shareholders should not place "undue reliance" on them. ¶ 56. And it emphasized that these cautions applied to "[a]ll subsequent written and oral forward-looking statements concerning the merger or other matters addressed in this document" made by BofA or Merrill. ¶ 63.

Specifically, the Proxy made clear that the accretion/dilution projection would not be updated. ¶¶ 58-63. It expressly advised that the fairness opinion by BofA's advisors that contained the projection was "necessarily . . . based upon market, economic, financial and other conditions as they existed" as of September 14, 2008. ¶ 58. It further warned that "[n]either Merrill Lynch nor Bank of America has obtained updated opinions as of the date of this document from its financial advisors," that neither of the financial advisors "has assumed any responsibility for updating or revising its opinion based on circumstances or events occurring after the date thereof," and that "[n]one of the opinions speaks as of the time the merger will be completed or as of any date other than the date of such opinions." ¶¶ 59-61.

D. Mr. Lewis's Statement at the December 5, 2008 Shareholders' Meeting

On December 5, 2008, pursuant to the notice in the Proxy, BofA held a special meeting for BofA shareholders to vote on four matters, including a proposal to approve the issuance of additional shares of BofA stock needed for the merger with Merrill. ¶¶ 64-66. Shareholders also were asked to consider a proposal to increase the number of authorized shares of common stock from 7.5 billion to 10 billion. ¶ 66.

After discussion of the merger-related proposal had closed, Mr. Lewis asked: "Is there any discussion [of the proposal seeking] approval of an amendment to the Bank of America Corporation amended and restated certificate of incorporation to increase the number of authorized shares of common stock?" ¶ 68. Even though that proposal concerned only the authorization, not the actual issuance, of additional shares, a shareholder asked Mr. Lewis: "Doesn't that dilute the value of our stock when there's more out there?" *Id*. Mr. Lewis answered that BofA's issuance of additional shares to acquire a company would not dilute the value of those shares "if you have commensurate earnings from the acquired company." *Id*. After a further exchange, another shareholder said that Mr. Lewis "didn't respond to the lady's comment," adding: "This will dilute our shares. Will it not? Yes or no; *not in the future*, someday, *but this afternoon*?" ¶ 69.

Mr. Lewis responded by referring to the Company's prior statements that the merger was expected to be dilutive "not in the future" but in the near-term. Mr. Lewis stated: "We have said as I recall in the presentation that we will have dilution in the first year, break-even in the second; and then accretion in the third." *Id*. Mr. Lewis was referring to the forward-looking statements in BofA's investor presentation on September 15, 2008. ¶ 70.

Mr. Lewis's statements were made to a small audience and could not have had any effect on the outcome of the voting. The meeting was not webcast or otherwise open to the public and there is no evidence that Mr. Lewis's comments were publicly reported outside of the meeting, either in the 45 minutes between the time he made the statements and the time the shareholder vote closed or at any other time. ¶¶ 71-75. Only approximately 70 registered or beneficial owners of BofA common and preferred stock attended the meeting, and only 30 of those owners cast their votes in person. *Id*. These owners had the right to vote 461,068 shares, which represented 0.01 percent of the 3.2 billion shares of BofA stock that were voted on the proposal to approve the issuance of shares to effectuate the merger. *Id*. That proposal passed, with approximately 82 percent of BofA's outstanding shares voting in favor. ¶ 74.

E. The Accretion/Dilution Projection Presented at the December 9, 2008 Board Meeting

On December 9, 2008, Mr. Price gave a presentation to the board on a variety of topics concerning BofA's financial state, including its latest fourth quarter forecast, its 2009 plan, the economic factors impacting its results, its acquisitions of Countrywide and Merrill, and its liquidity and capital. ¶ 76. In advance of the meeting, BofA prepared a new accretion/dilution forecast, which was based on internal earnings estimates (not First Call estimates) and which estimated that the merger would be 13.1% dilutive in 2009, 2.8% dilutive in 2010, and 2% accretive in 2011. ¶¶ 77-78.

The accretion/dilution forecast that was used in the December 9 presentation was not finalized until several days after the December 5 shareholder vote, and there is no evidence that Mr. Lewis was aware of the December 9 projections on December 5. ¶¶ 79-86. On December 5, Steve Brown, a member of BofA's finance group, advised Randy Shearer, head of accounting policy, to remember that a draft of Mr. Price's presentation to the board, which contained a different accretion/dilution forecast than was used on December 9, "is preliminary."

¶¶ 81-82.[4] BofA's finance team continued to work on Mr. Price's December 9 presentation to the Board, including the accretion/dilution projection, over the weekend of December 6-7. ¶ 85. None of these drafts was sent to Mr. Lewis, and there is nothing in the record to indicate that he was aware on December 5 of any accretion/dilution forecast other than the one BofA's board of directors had considered in September, much less that BofA's senior management had considered or approved an alternative forecast.[5] ¶¶ 88-94.

F. Mr. Lewis Never Admitted That His Statement at the December 5, 2008 Shareholder Meeting Was False

On March 6, 2012, Mr. Lewis was deposed in a shareholder derivative lawsuit pending in Delaware arising from BofA's merger with Merrill. In that deposition Mr. Lewis testified that he believed the September 2008 accretion/dilution forecast remained the best figures that were available as of the December 5, 2008 shareholder meeting. ¶ 88. In a line of questions concerning the accretion/dilution forecast, the Delaware plaintiffs asked Mr. Lewis whether "the best information [Mr. Lewis] had at the time of the [December 5] stockholders

4 This December 5 draft does not contain the same forecast that was ultimately presented to the Board on December 9. ¶¶ 81-82. Similarly, BofA treasurer Jeff Brown was sent a document on the evening of December 4 that contained several different accretion/dilution projections based on varying earnings assumptions, none of which matched the numbers that ultimately were presented to the Board. ¶ 80.

5 Plaintiffs cite a meeting on December 3, 2008 between Mr. Lewis and others at which Merrill's financial condition and projected fourth-quarter losses were discussed, along with Merrill's 2009 profit plan (Pls.' 56.1 Stat. ¶¶ 88-91). Plaintiffs cite no evidence that any accretion/dilution forecasts were discussed at this meeting, and the meeting does not establish that Mr. Lewis was aware that the September 14 accretion/dilution forecast—which was derived from a model that contained a number of inputs outside of Merrill's projected earnings, including BofA's *own* projected earnings—would materially change. Further, with respect to Merrill's 2009 earnings projection, Mr. Lewis has testified that, before the shareholder vote, BofA had only taken a first or second "pass" at Merrill's 2009 profit plan, which was "not credible at that point." ¶ 89.

meeting [was] the information that was included in the proxy statement." *Id.* Mr. Lewis responded that he "would not have known at that point" of any better information. *Id.*

Plaintiffs received the transcript of Mr. Lewis's Delaware deposition eight days before they deposed him in this case on March 27. ¶ 90. Yet, at his deposition in this case, plaintiffs studiously avoided asking Mr. Lewis whether he was aware at the shareholder meeting of any updated analyses of the accretion/dilution projection. They asked Mr. Lewis to compare two different documents they placed in front of him: "the numbers" for accretion and dilution in the September 2008 presentation and "the numbers" in Mr. Price's presentation to the BofA board on December 9, 2008. ¶¶ 91, 93. Mr. Lewis resisted the comparison, explaining that the earlier accretion/dilution projection was based on publicly available First Call consensus analyst estimates, while those in the December 9 presentation were based on internal BofA estimates. ¶ 92. Plaintiffs pressed on, and asked Mr. Lewis if the "numbers set forth in the September 15th presentation regarding accretion and dilution" were accurate as of December 5, 2008. ¶ 93. Comparing the two sets of numbers, Mr. Lewis agreed that the September numbers were "different" and had "changed" as of December 5, 2008. ¶ 93.

Mr. Lewis testified as follows:

> Q. If you take a look at Mr. Price's board presentation, the numbers for -- the numbers are very different for 2009 and 2010; would you agree?
> A. Yeah. But there is one difference.
> Q. Go ahead.
> A. These were First Call estimates. In the document on page 119, those are internal estimates, just different people doing it.
>
> * * * *
>
> Q. Now, as of December 5th, 2008, the numbers set forth in the September 15th presentation regarding accretion and

dilution, they were no longer accurate, correct?
A. They were not these numbers, no.
Q. These numbers -- the numbers set forth on page 16 of Plaintiffs' Exhibit 568 were not accurate, correct?
A. They had changed to this.
Q. And that was as of December 5th, 2008, right?
A. Yes.
Q. And when you say – I'm sorry, when you say it had changed -- they had changed to this, what is the "this" you are referring to? The figures set forth in Mr. Price's December 9th board presentation?
A. Meaning they were different than these, yes.

Enzer Decl. Ex. 9.

Plaintiffs, however, never asked Mr. Lewis the key question, *i.e.*, what information he actually knew on December 5 about the accretion/dilution projection. Based upon Mr. Lewis's Delaware deposition, plaintiffs knew that Mr. Lewis would tell them that he did not know of an updated forecast at that time. ¶¶ 88, 94.

ARGUMENT

Summary judgment is proper only if the moving party demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "An issue of fact is genuine if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Roe* v. *City of Waterbury*, 542 F.3d 31, 35 (2d Cir. 2008) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "It is a settled rule that '[c]redibility assessments, choices between conflicting versions of events, and the weighing of evidence are matters for the jury, not for the court on a motion for summary judgment.'" *McLellan v. Smith*, 439 F.3d 137, 144 (2d Cir. 2006) (brackets in original) (quoting *Fischl v. Armitage*, 128 F.3d 50, 55 (2d Cir. 1997)).

Plaintiffs seek summary judgment as to falsity and materiality on five statements about the projected accretive or dilutive impact of the Merrill transaction: the statements made in a press release, investor presentation and conference call with analysts on September 15, 2008; the statement in the November 3, 2008 Proxy; and the statement made by Mr. Lewis at the December 5, 2008 shareholder meeting referring to the September 15 presentation. Plaintiffs do not contend on this motion that any of the statements made on September 15 or in the Proxy were false when made. Likewise, plaintiffs do not argue that Mr. Lewis inaccurately summarized the September projection on December 5, when he stated that "[w]e have said as I recall in the presentation that we will have dilution in the first year. . . ." Instead, they argue that the projections became inaccurate and that BofA had a duty to update them.[6]

Plaintiffs' motion should be denied. Plaintiffs do not satisfy the stringent standards for summary judgment as to either falsity or materiality. (*See* Points I and II, *infra*.) Moreover, plaintiffs are not entitled to pursue claims based upon any of the statements, let alone to obtain partial summary judgment on such claims, because the Complaint does not assert a claim based upon those statements. (*See* Point III, *infra*.)

I.

SUMMARY JUDGMENT SHOULD BE DENIED AS TO FALSITY

Plaintiffs have not established that they are entitled to summary judgment on falsity. "Generally, whether a public statement is misleading, or whether adverse facts were adequately disclosed is a mixed question to be decided by the trier of fact." *SEC* v. *Todd*, 642

[6] This Court has already held that two of these statements—those in the September 15 presentation and on the investor conference call—are not actionable under Section 14(a) because they were not part of a proxy solicitation. *See In re Bank of Am. Secs., Derivative, and ERISA Litig.*, 757 F. Supp. 2d 260, 318 (S.D.N.Y. 2010).

F.3d 1207, 1220 (9th Cir. 2011) (quotation marks omitted) (reversing summary judgment). That is particularly true here because, as set forth below, in order to prove that defendants' statements about the accretion/dilution forecast were false, plaintiffs must show both that the statements were incorrect when made *and* that defendants did not genuinely believe those statements when they made them. Here, plaintiffs have not shown that Mr. Lewis's statement was incorrect. Mr. Lewis correctly referred to the September projection, which forecast that the merger would be dilutive in its first year. And plaintiffs have not demonstrated that Mr. Lewis lacked a genuine belief in the statement at the time he made it.

A. Statements Of Opinion Are Actionable Only If They Are Not Genuinely Held

As the Court has held in this case, statements of opinion such as forecasts "'cannot be false at all unless the speaker is misstating his truly held opinion.'" *In re Bank of Am. Secs., Derivative, and ERISA Litig.*, 757 F. Supp. 2d 260, 310-11 (S.D.N.Y. 2010) (quoting *Podany* v. *Robertson Stephens, Inc.*, 318 F. Supp. 2d 146, 154 (S.D.N.Y. 2004).) As the Supreme Court has explained, statements of opinion are deemed false only if they misrepresent "the speaker's belief in what he says." *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1091-96 (1991). Similarly, the Second Circuit recently held in *Fait* v. *Regions Financial Corp.*, 655 F.3d 105 (2d Cir. 2011), that a statement of opinion is deemed false "only to the extent that the statement was both objectively false *and* disbelieved at the time it was expressed." *Id.* at 110-13 (emphasis added); *see also City of Omaha, Neb. Civilian Emps.' Ret. Sys.* v. *CBS Corp.*, 679 F.3d 54, 68 (2d Cir. 2012) (per curiam) (applying *Fait* standard to Section 10(b) claim, and affirming dismissal of Section 10(b) claim where plaintiffs did not sufficiently plead that "defendants did not believe in their statements of opinion . . . at the time they made them").

A plaintiff is required to establish that the speaker did not truly hold the opinion expressed to demonstrate both the *falsity* of the challenged statement and scienter. In *Virginia Bankshares*, for example, the Supreme Court addressed "the question . . . whether statements of reasons, opinions, or beliefs are statements 'with respect to . . . material fact[s]'" within the meaning of Rule 14a-9. *Virginia Bankshares,* 501 U.S. at 1091 (brackets and ellipsis in original). The Court reasoned that such statements, in the context of a claim challenging the reasons given by a board for recommending a merger,

> are factual in two senses: as statements that the directors do act for the reasons given or hold the belief stated and as statements about the subject matter of the reason or belief expressed.

Id. at 1092. The Court further held that defendants' statements were not actionable under Rule 14a-9 unless shown to be false in both senses. *Id.* at 1095-96.

In *Fait*, the Second Circuit applied *Virginia Bankshares* in the context of a challenge to defendants' statements of opinion about goodwill and the adequacy of loan loss reserves. *Fait*, like *Virginia Bankshares*, makes clear that both elements are required to plead and prove falsity; indeed, because the claims at issue in *Fait* arose under Sections 11 and 12, the plaintiff was not obligated to show scienter. 655 F.3d at 109. The court affirmed dismissal of the complaint because it did not "plausibly allege that defendants did not believe the statements regarding goodwill at the time they made them" and did "not plausibly allege subjective falsity" with regard to the statements about loan loss reserves. *Id.* at 112, 113; *see also In re Bank of Am. Secs., Derivative, and ERISA Litig.*, 757 F. Supp. 2d at 319 ("[T]o satisfy the subjective falsity requirement, 'plaintiffs must allege with particularity that defendants did not sincerely believe the opinion they purported to hold.'" (quoting *Podany*, 318 F. Supp. 2d at 154)).

Thus, "[t]he sine qua non of a securities fraud claim based on false opinion is that defendants deliberately misrepresented a truly held opinion." *Podany*, 318 F. Supp. 2d at 153-54; *see also Friedman* v. *Mohasco Corp.*, 929 F.2d 77 (2d Cir. 1991) (statement in prospectus projecting market value of merged company's shares was not actionable where there was no allegation that issuer did not hold that opinion). This is because an alleged "misstatement of *opinion* is by its nature a false statement, not about the objective world, but about the defendant's own belief," and therefore "cannot be false unless the speaker is knowingly misstating his truly held opinion." *Podany*, 318 F. Supp. 2d at 154 (emphasis in original).

Under these standards, as this Court has held, a statement of opinion that the speaker truly believes is not actionable, irrespective of whether the speaker's belief is reasonable. *See In re Bank of Am. Secs., Derivative, and ERISA Litig.*, 757 F. Supp. 2d at 311. As Judge Lynch has stated,"[i]t is not sufficient for these purposes to allege that an opinion was unreasonable, irrational, excessively optimistic, not borne out by subsequent events, or any other characterization that relies on hindsight or falls short of an identifiable gap between the opinion publicly expressed and the opinion truly held." *In re Salomon Analyst Level 3 Litig.*, 350 F. Supp. 2d 477, 489 (S.D.N.Y. 2004). *See also City of Omaha*, 679 F.3d at 68 (holding that allegations that defendants were "aware of facts that *should* have led them" to make other disclosures "would not suffice to state a securities fraud claim after *Fait*") (emphasis in original); *Podany*, 318 F. Supp. 2d at 155-56 (rejecting plaintiffs' argument that defendants' expressed opinions about the future value of stock were actionable because they were unreasonable).

These standards unquestionably apply to the accretion/dilution forecast at issue here. That forecast—as the cautions in the September 15 presentation and in the Proxy made clear—was not a statement of objective fact. Instead, it reflected an inherently subjective estimate of how the merger would affect BofA's future earnings, an estimate that "will vary depending on a variety of predictable and unpredictable circumstances." *Fait*, 655 F.3d at 113.

B. Mr. Lewis's Testimony Does Not Establish That the Statements At Issue Were False or Misleading

Plaintiffs do not suggest that the September accretion/dilution projection was inaccurate when made or when included in the Proxy, and they cannot satisfy their burden of demonstrating that Mr. Lewis "deliberately misrepresented a truly held opinion" about the dilutive effect of the merger. Contrary to plaintiffs' assertions, Mr. Lewis never "admitted" that he did not genuinely believe his statements at the shareholder meeting. He simply testified that the accretion/dilution "numbers" in the September 15 and December 9 presentations "were different." ¶ 93. He also acknowledged, in hindsight and based solely on the two projections put before him, that the numbers contained in the September 15 presentation regarding accretion and dilution "had changed" as of the shareholder meeting on December 5, 2008. *Id.*

But that hindsight testimony does not suggest that Mr. Lewis *did not believe on December 5* that his statement was true. And, under *Virginia Bankshares* and *Fait*, it is Mr. Lewis's belief at the time he expressed the challenged opinion that matters, not a hindsight view as to whether the opinion turned out to be accurate. *See also Salomon Analyst Level 3 Litig.*, 350 F. Supp. 2d at 489; *see also Podany*, 318 F. Supp. 2d at 154 ("A securities fraud action may not rest on allegations that amount to second-guesses of defendants' opinions about the value of issuers' stock—second-guesses made all too easily with the benefit of hindsight.").

The fact is that plaintiffs never asked Mr. Lewis the key question relevant to this motion: whether, on December 5, Mr. Lewis knew whether the September 2008 accretion/dilution projection had been supplanted by an updated forecast, and if so, what that forecast projected. This was not an oversight. Plaintiffs knew from Mr. Lewis's testimony in the Delaware litigation that, if asked, Mr. Lewis would testify that the September forecast reflected the best accretion/dilution forecast available to him as of December 5. So, instead of asking the central question, plaintiffs opted for obfuscation, tiptoeing around the issue of Mr. Lewis's knowledge, and never actually asking Mr. Lewis what he knew on December 5. These tactics do not entitle plaintiffs to summary judgment.[7]

[7] In determining whether Mr. Lewis's statement was false, it is immaterial what other BofA employees may have known or believed. Whether a corporation is liable for an allegedly false statement "requires 'look[ing] to the state of mind of the *individual corporate official or officials who make or issue the statement* … rather than generally to the collective knowledge of all the corporation's officers and employees acquired in the course of their employment.'" *Makor Issues & Rights, Ltd.* v. *Tellabs Inc.*, 513 F.3d 702, 708 (7th Cir. 2008) (Posner, J.) (emphasis added; brackets in original) (quoting *Southland Secs. Corp.* v. *INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 366 (5th Cir. 2004)); *see also In re Int'l Bus. Mach. Corp. Secs. Litig.*, 163 F.3d 102, 109 (2d Cir. 1998) (affirming summary judgment in Section 10(b) case where there was no evidence in the record that the corporate officials who made the challenged statements "did not genuinely believe" them).

For example, in *Employers Teamsters Local Nos. 175 and 505 Pension Trust Fund* v. *Clorox Co.*, 353 F.3d 1125 (9th Cir. 2004), the court affirmed dismissal of a securities fraud claim arising from the CEO's statement that "[w]e expect that the merger will be immediately accretive to earnings per share" on the ground that, while some employees allegedly knew of trade practices by target that would negatively affect earnings, plaintiffs alleged no facts showing that the CEO "knew [at the time of the statement] that the acquisition would not add earnings per share." *See id.* at 1134-35. Likewise, the PSLRA requires plaintiffs to prove that a forward-looking statement made by a natural person "was made with actual knowledge *by that person* that the statement was false or misleading." 15 U.S.C. § 78u-5(c)(1)(B)(i) (emphasis added). This is consistent with the principle, recognized by the Second Circuit, that "[t]o prove liability against a corporation, of course, a plaintiff must prove that an agent of the corporation committed a culpable act with the requisite scienter, and that the act (and accompanying mental state) are attributable to the corporation." *Teamsters Local 445 Freight Div. Pension Fund* v. *Dynex Capital Inc.*, 531 F.3d 190, 195 (2d Cir. 2008) (citing *Makor Issues & Rights, Ltd.*, 513 F.3d at 708).

In any event, plaintiffs have not established that there is no material fact in dispute that any senior BofA executive had formed a view before the December 5, 2008 shareholder vote about whether and how the September accretion/dilution projection should be supplanted, and, if so, what the Bank's revised accretion/dilution projection would be. Several BofA

The cases plaintiffs cite for the proposition that summary judgment may be granted if the defendant "admits" that the statement at issue is false are inapposite. Plaintiffs rely primarily on *In re WorldCom, Inc. Securities Litigation*, 346 F. Supp. 2d 628 (S.D.N.Y. 2004) (Pls.' Mem. at 28, 29 & 33). But summary judgment there turned on the fact that, unlike here, defendants explicitly "concede[d]" falsity and materiality in summary judgment briefing, and the court denied the motion as to statements whose falsity and materiality was not conceded. *Id*. at 660-61.[8] Here, there has been no admission that any of defendants' statements were false.

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employees worked on preliminary drafts of revised accretion/dilution projections that were transmitted to Mr. Price prior to the vote. ¶¶ 80-82, 85-86. But plaintiffs cite no evidence showing that Mr. Price—or any other senior BofA executive—analyzed and agreed with those preliminary drafts, much less genuinely believed that they should supplant the September projection, shortly before the vote. Indeed, it is unclear whether Mr. Price even reviewed these early drafts. When plaintiffs asked Mr. Price about one such preliminary draft at his deposition in this matter, Mr. Price testified that the draft "does not look familiar to me" and that "back to this document . . . I don't recognize these numbers, so I don't know that I saw this draft." ¶ 83. Mr. Price also testified that he would not have focused on such drafts until "after they've been, you know, routed a number of times." ¶ 84. The contemporaneous documents reflect that the draft forecasts being circulated on December 4-5 were "preliminary," and that the team focused on revising the forecast during the weekend *after* the vote. ¶¶ 81-85. As a result, there is at least a genuine dispute as to these issues that precludes summary judgment.

8 Plaintiffs' remaining cases are inapposite for similar reasons. *See In re BankAtlantic Bancorp Secs. Litig.*, 2010 WL 6397500, at *30 (S.D. Fla. Aug. 18, 2010) (cited at Pls.' Mem. at 29) (granting summary judgment where defendants "did not dispute … any inferences to be drawn" from testimony and e-mails); *Delchi Carrier SpA* v. *Rotorex Corp.*, 71 F.3d 1024 (2d Cir. 1995) (affirming summary judgment as to whether goods complied with contractual standard where defendants admitted in contemporaneous letters and in their answer to the complaint that the goods did not meet the standard); *DaimlerChrysler Ins. Co., LLC* v. *Pambianchi*, 762 F. Supp. 2d 410 (D. Conn. 2011) (granting summary judgment as to insurer's duty of indemnity where defendant admitted at his deposition that none of the events necessary to his defense ever occurred at all); *Moe* v. *United States*, 668 F. Supp. 2d 497 (W.D.N.Y. 2009) (same as to negligence in traffic accident where defendant admitted that she did not check side mirrors before making turn into plaintiff's motorcycle).

C. BofA Had No Duty to Update Its Forward-Looking Statements About the Projected Accretive or Dilutive Effect of the Merger

There is no dispute that the September 15 presentation, the Proxy, and Mr. Lewis's December 5 statement accurately described the accretion/dilution analysis considered by the board in approving the merger on September 14, 2008. Plaintiffs argue, however, that defendants are liable because the September accretion/dilution projection had allegedly become inaccurate by the date of the shareholder vote and defendants allegedly had a duty to update it. (Pls.' Mem. at 31-33.) Plaintiffs are wrong.

As a matter of law, defendants were under no duty to update the September accretion/dilution forecast in the circumstances here. The Second Circuit has held that "[a] duty to update may exist when a statement, reasonable at the time it is made, becomes misleading because of a subsequent event." *In re Int'l Bus. Mach. Corp. Secs. Litig.*, 163 F.3d 102, 110 (2d Cir. 1998) ("*IBM*"). But under Section 10(b) there is "no need to update when the original statement . . . does not contain some *factual representation* that remains 'alive' in the minds of investors as a continuing representation. . . ." *Id.* (emphasis added; internal citation omitted) (quoting *In re Burlington Coat Factory Secs. Litig.*, 114 F.3d 1410, 1433 (3d Cir. 1997)).[9] Defendants had no duty to update here because (i) as courts have repeatedly held, forecasts are *not* the sort of statements that remain "alive in the minds of investors as a continuing representation" and (ii) given the numerous explicit warnings in both the

[9] Similarly, under Section 14(a) and Rule 14a-9, a duty to update does not arise unless "necessary to correct any statement in any earlier communication with respect to the solicitation for a proxy for the same meeting or subject matter which has become false or misleading." 17 C.F.R. § 240.14a–9.

September 15 presentation and the Proxy that the accretion/dilution forecast spoke only as of September 14, 2008 and would not be updated, that forecast never became false or misleading.

Thus, the "voluntary disclosure of an ordinary earnings forecast does not trigger any duty to update," because these "forecasts contain no more than the implicit representation that the forecasts were made reasonably and in good faith" and do "not contain the implication that the forecast will continue to hold good even as circumstances change." *Burlington Coat Factory*, 114 F.3d at 1433; *see also Winick* v. *Pac. Gateway Exch., Inc.*, 73 Fed. Appx. 250, 254 (9th Cir. Aug. 15, 2003), *withdrawn by settlement*, 80 Fed. Appx. 1 (Oct. 22, 2003); *Stransky* v. *Cummins Engine Co., Inc.*, 51 F.3d 1329, 1332 (7th Cir. 1995); *Hillson Partners Ltd. P'Ship* v. *Adage, Inc.*, 42 F.3d 204, 219 (4th Cir. 1994); *In re Duane Reade Inc. Secs. Litig.*, 2003 WL 22801416, at *7 (S.D.N.Y. Nov. 25, 2003) ("As forward-looking predictions for the next quarter, the statements of which plaintiffs complain constitute immaterial opinions and thus cannot form the basis for a duty to update."), *aff'd* 107 F.App'x. 250 (2d Cir. Aug. 17, 2004).[10] These decisions reflect the practical consideration that, "because of the frequency and volatility of these projections, the imposition of a duty to disclose them would have required virtually constant statements by [the company] in order to not mislead investors," *Hillson Partners Ltd. P'Ship*, 42 F.3d at 219 (quoting *Walker* v. *Action Indus.*, 802 F.2d 703, 710 (4th Cir. 1986)). *See also*

[10] While some cases, such as *Duane Reade*, analyze the duty to update forecasts as an issue of materiality rather than falsity, we address the issue here in response to plaintiffs' argument (Pls.' Mem. at 30-33) that the purported breach of a duty to update entitles them to summary judgment as to falsity.

15 U.S.C. § 78u-5(d) ("Nothing in [the PSLRA safe harbor provision] shall impose upon any person a duty to update a forward-looking statement.").[11]

Apart from the general rule that the issuance of forecasts does not trigger any duty to update them, no such duty arose here in view of the express warnings in the September 15 presentation and the Proxy that the accretion/dilution forecast spoke only as of September 14 and would not be updated. Courts have rejected the imposition of a duty to update forecasts where, as here, the company has repeatedly disclaimed any such obligation. In *Shurkin* v. *Golden State Vintners, Inc*., 2005 WL 1926620 (N.D. Cal. Aug. 10, 2005), for example, the company issued a proxy statement in December 2003 that included the opinion of its financial advisor that the share price in a proposed going-private transaction was fair as of September 2003. Plaintiff alleged that the proxy was misleading because the company's financial condition had improved between September and December. *Id.* at *8. The court dismissed the complaint, emphasizing that the proxy was "explicit" that the fairness opinion "was specific to the September 2003 time period" so that "a reader of the Proxy was aware that the fairness opinion had not been updated to reflect changes, if any, in the Company's outlook." *Id.* at *10.

Here, too, the September 2008 statements and the Proxy made clear that the September accretion/dilution forecast was based upon consensus analysts' earnings estimates

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[11] *Gerstle v. Gamble-Skogmo, Inc*., 478 F.2d 1281, 1297 n.15 (2d Cir. 1973), on which plaintiffs rely (Pls.' Mem. at 31), is inapposite, because that case did not address forecasts or projections. In *Gerstle*, the Second Circuit suggested that an acquiring company may have had an obligation to revise a factual statement that "no negotiations are presently being conducted with respect to the sale of any branch" where, two days before the shareholder vote, a company executive conducted such negotiations. *Id.* But the court found it "unnecessary to rule on this argument" even on the facts of that case. *Id.* Accordingly, *Gerstle* hardly stands for the proposition that an acquiring company has a duty to update a forecast of the accretion/dilution impact of a merger even where the speaker expressly disclaims that duty and cautions that the forecast is made only as of the date it was disclosed.

published by First Call as of September 14, and that BofA undertook no obligation to update that forecast. As noted, both the press release and the investor presentation cautioned investors that "Bank of America does not undertake to update forward-looking statements to reflect the impact of circumstances or events that arise after the date the forward-looking statements are made." ¶ 43. Likewise, the Proxy made clear that BofA's financial advisors made the accretion/dilution projection based solely upon information available as of September 14, 2008, and that "Bank of America and Merrill Lynch undertake no obligation to update these forward-looking statements to reflect events or circumstances after the date of this document or to reflect the occurrence of unanticipated events." ¶¶ 60-62. And, contrary to plaintiffs' assertion that BofA "assure[d] [its] shareholders" that the merger would achieve the forecasted results" (Pls.' Mem. at 31-32), BofA repeatedly emphasized that the forecast was an estimate and that actual results could differ materially. (*See* pp. 6-8, *supra*.)

Thus, the September forecast "could not have remained 'alive' in the minds of reasonable investors" giving rise to a duty to update. *Winick*, 73 F.App'x at 254 ("The company repeatedly disclaimed any obligation to update its forecasts; thus, the company's predictions regarding its ability to meet its future obligations could not have remained 'alive' in the minds of reasonable investors."); *see also Sonet* v. *Plum Creek Timber Co., L.P.*, 1999 WL 160174, at *9 n.53 (Del. Ch. Mar. 18, 1999) (proxy statement was not misleading for relying on six-month old fairness opinions where the proxy "attache[d] the full text of the fairness opinions, which show[ed] the dates on which they were submitted" and disclosed the assumptions underlying the opinions); *Ince & Co.* v. *Silgan Holdings, Inc.*, 1991 WL 17171, at *6 (Del. Ch. Feb. 7, 1991) (same where proxy "clearly state[ed] when the opinion was rendered" and that the investment bank "was not asked to and was not under an obligation to update" the opinion).[12]

Plaintiffs ignore this legal standard under settled law and misconstrue this Court's prior ruling, arguing instead that the September forecast had to be updated because "Section 14(a) is satisfied '[o]nly when the proxy statement fully and fairly furnishes all the objective material facts' to allow a reasonably prudent investor 'to make an informed investment decision.'" (Pls.' Mem. at 31 (quoting *In re Bank of Am. Secs., Derivative, and ERISA Litig.*, 757 F. Supp. 2d at 313).)[13] That, however, is not what this Court ruled. Consistent with the Second Circuit's holding in *IBM* that only "factual representation[s]" may need to be updated, this Court's ruling addressed only whether there exists a duty to furnish shareholders with "objective material facts" about the transaction. It did not impose any obligation to update forecasts or other forward-looking statements, especially where, as here, the speaker expressly cautioned that such forecasts were made as of a particular date based on certain specific assumptions and disclaimed any intent to update them.

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12 In view of the warnings in the Proxy that the advisors' accretion/dilution forecast was based on information available on September 14, 2008 and would not be updated to reflect any change in circumstances before the vote, this is not a situation in which the Proxy was "rendered incorrect due to a change in circumstances or other subsequent event." (Pls.' Mem. at 31 n.15 (quoting SEC Rel. No. 34-16343, 1979 WL 173161, at *4).) As the decisions in *Winick*, *Shurkin* and the other cases cited in the text above make clear, these warnings were sufficient to alert investors to the fact that the accretion/dilution forecast was specific to market conditions on September 14, 2008 and that, in the event of "continued economic and market disruptions," the merger could appear significantly more dilutive by the time of the vote or thereafter. ¶ 55.

13 While defendants respectfully disagree with the Court's prior ruling, we need not and do not challenge it here.

Finally, plaintiffs have not met their burden of establishing that BofA incurred a duty to update its accretion/dilution projection because they have not shown that BofA had any reliable updated forecast to provide. (*See* pp. 10-11, *supra*.) The securities laws do not require disclosure of earnings information that is incomplete or unreliable. *Shurkin* v. *Golden State Vintners, Inc*., 303 Fed. Appx. 431, 433 (9th Cir. Dec. 11, 2008) (no duty to update proxy based on preliminary financial results); *Grossman* v. *Novell, Inc.*, 120 F.3d 1112, 1125 (10th Cir. 1997) (statement that Novell's acquisition of WordPerfect "wouldn't dilute future earnings" did not give rise to a duty to update before company had final figures for the relevant period).

Accordingly, BofA had no duty to update the September accretion/dilution forecast before the shareholder meeting, and Mr. Lewis's statement at the meeting referring to the prior disclosure was perfectly appropriate.

II.

SUMMARY JUDGMENT SHOULD BE DENIED AS TO MATERIALITY

For purposes of Sections 10(b) and 14(a), "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Indus.*, 426 U.S. at 449. "Put another way, there must be 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. See also Basic Inc.* v. *Levinson*, 485 U.S. 224, 231-32 (1988). The "total mix" of information includes "all information reasonably available to the shareholders. . . ." *Starr ex rel. Estate of Sampson* v. *Georgeson S'holder, Inc.*, 412 F.3d 103, 110 (2d Cir. 2005). These are quintessentially fact-based issues and the issue of materiality thus "generally should be presented to a jury." *Press* v. *Chem. Inv. Serv. Corp.*, 166 F.3d 529, 538 (2d Cir. 1999). "Only if the established omissions are so obviously important to an investor, that reasonable minds cannot differ on the question of materiality is the ultimate issue of materiality appropriately resolved as a matter of law by summary judgment." *TSC Indus.*, 426 U.S. at 451 (quotation marks omitted).

Moreover, as discussed below, under the judicially created "bespeaks caution" doctrine and the PSLRA, forward-looking statements accompanied by sufficient cautionary language are deemed immaterial as a matter of law. For this reason alone, as a matter of law, the purported misstatements are not actionable.

A. The Statements At Issue Are Immaterial As a Matter of Law Under the Bespeaks Caution Doctrine and the PSLRA Safe Harbor

Under the bespeaks caution doctrine, misrepresentations are immaterial as a matter of law where "it cannot be said that any reasonable investor could consider them important in light of adequate cautionary language" that accompanies them. *Halperin* v. *EBanker USA.com, Inc.*, 295 F.3d 352, 357 (2d Cir. 2002). This doctrine "limits fraud liability for forward-looking statements that, while positive, are coupled with sufficient 'cautionary language or risk disclosures' that, taken in context, 'bespeak caution' to the reader." *Salomon Analyst Level 3 Litig.*, 350 F. Supp. 2d at 494 (quoting *Spencer Trask Software* v. *RPost Int'l Ltd.*, 2003 WL 169801, at *22 n.16 (S.D.N.Y. Jan. 24, 2003)).

The PSLRA contains a "counterpart safe-harbor provision," *Rombach* v. *Chang*, 355 F.3d 164, 173 (2d Cir. 2004), that similarly precludes liability for forward-looking statements accompanied by sufficient cautions. The statute provides that an issuer

> shall not be liable with respect to any forward looking statement . . . to the extent that (A) the forward-looking statement is -- (i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement. . . .

15 U.S.C. § 78u-5(c)(1)(A)(i). Under the statute, forward-looking statements accompanied by sufficient cautions are not actionable regardless of the speaker's belief in the accuracy of the statements. *See Slayton* v. *American Express Co.*, 604 F.3d 758, 766 (2d Cir. 2010) (noting that under the statute "a defendant is not liable if the forward-looking statement is identified and accompanied by meaningful cautionary language . . . *or* the plaintiff fails to prove that it was made with actual knowledge that it was false or misleading") (emphasis in original); *Gissin* v. *Endres*, 739 F. Supp. 2d 488, 511 n.144 (S.D.N.Y. 2010) ("Because defendants prevail on the 'meaningful cautionary language' prong of the safe harbor, I need not consider whether they had 'actual knowledge' that their statements were false.") (citing *Slayton*, 604 F.3d at 766).

Applying these standards, courts have held that statements regarding the expected accretive or dilutive effects of a merger are protected under the safe harbor and the bespeaks caution doctrine where, as here, investors were warned of the risks that the transaction might turn out otherwise. In *In re Veeco, Inc. Securities Litigation*, 235 F.R.D. 220 (S.D.N.Y. 2006), for example, plaintiffs challenged the company's statement that it believed that a planned acquisition "will be accretive to Veeco on a cash basis by the second quarter of 2004." *Id.* at 235. The court held that this statement was immaterial as a matter of law under the PSLRA and the bespeaks caution doctrine and dismissed the claim, on the ground that the company had warned that actual results could differ materially from any forward-looking statements. *Id.* at 235-36.

The same is true here. The September 15, 2008 press release and presentation announcing the merger both included robust warnings that they "contain[ed] forward-looking statements, including statements about the . . . earnings outlook of Bank of America Corporation." ¶ 42. Both also listed numerous "[f]actors that may cause actual results or earnings to differ materially from such forward-looking statements," including, among others, that "projected business increases following process changes and other investments are lower than expected"; that "general economic conditions are less favorable than expected"; that "changes in market rates and prices may adversely impact the value of financial products"; and the uncertain effect of "mergers and acquisitions and their integration into the company." *Id.* The November 3 Proxy contained numerous detailed cautions to the same effect. ¶¶ 54-62. In light of these cautions, the accretion/dilution forecast is not actionable as a matter of law.[14]

Mr. Lewis's statement at the shareholder meeting about the accretion/dilution projection is not actionable for the same reasons. His statement explicitly referred back to BofA's September presentation, which cautioned shareholders that events might not unfold as forecast. And the Proxy, which gave notice of the very meeting at which Mr. Lewis made the challenged statements, included similar cautions, and instructed that those cautions applied to any "subsequent written and oral statements" by BofA or Merrill about the merger. ¶ 63.

It does not affect the analysis that Mr. Lewis did not repeat the same cautions verbatim, because "cautionary information need not be in the same document that contains the forward-looking statement, but must instead be reasonably available to investors and affect the total mix of information." *Kemp* v. *Universal Am. Fin. Corp.*, 05 Civ. 9883, 2007 WL 86942, at *11 (S.D.N.Y. Jan. 10, 2007). For example, in *Grossman*, the Tenth Circuit rejected the argument that an executive's oral statement that a merger "wouldn't dilute future earnings" was not protected by the bespeaks caution doctrine because the executive did not repeat cautionary

[14] There can be no dispute that the accretion/dilution forecast at issue on this motion was a "forward-looking statement" within the meaning of the PSLRA. The statute defines such statements as "statement[s] containing a projection of revenues, income (including income loss), earnings (including earnings loss) per share," "statement[s] of future economic performance," and the "assumptions underlying or relating" to such statements. 15 U.S.C. §§ 78u-5(i)(1)(A), (C), (D). *See In re Veeco*, 235 F.R.D. at 235.

language provided in the company's registration statement. The court reasoned that the "cautionary statements in the registration statement may fairly be considered as limiting the forward-looking predictions made in subsequent discussions of the same transaction." *Grossman*, 120 F.3d at 1122-23. *See also P. Stolz Family P'Ship L.P.* v. *Daum*, 355 F.3d 92 (2d Cir. 2004) (affirming dismissal under bespeaks caution doctrine of claim premised on oral misrepresentations on basis of cautionary language in written prospectus); *Asher v. Baxter Int'l Inc.*, 377 F.3d 727, 732 (7th Cir. 2004) (Easterbrook, J.) (cautionary language in written filings "must be treated as if attached to every one of [a company's] oral and written statements").

B. Plaintiffs Have Not Met Their Burden of Demonstrating That Revised Accretion/Dilution Projections Would Have Altered the "Total Mix of Information"

At the very least, there is a genuine factual dispute about whether revised accretion/dilution projections would have altered the "total mix of information," which precludes summary judgment on materiality. To establish a purported material omission, plaintiffs rely on evidence concerning the decision by BofA's Board to approve the merger in September 2008, not evidence showing that a different accretion/dilution forecast would have been material to shareholders in the very different circumstances prevailing at the time of the shareholder vote more than two months later. Thus, plaintiffs cite (1) a statement in the proxy that the September accretion/dilution forecast was one of thirteen "material factors" that BofA directors considered in approving the merger on September 14, 2008; (2) testimony of Mr. Lewis and director Charles K. Gifford about the role of the accretion/dilution forecast as a factor in their decision-making with respect to the merger; (3) evidence that BofA's financial advisors considered the September accretion/dilution forecast together with a range of other factors in issuing their fairness opinion; and (4) the fact that Mr. Price, on the September 15 conference call, reviewed some of the assumptions underlying the accretion/dilution forecast "to help [the analysts on the call] analyze the transaction." (Pls.' Mem. at 33-34.)

This evidence falls far short of establishing that there is no genuine dispute that revised forecasts at or before the December shareholder meeting would have been material.

First, plaintiffs cannot establish that there is no genuine dispute of material fact whether disclosure of different accretion/dilution forecasts (forecasts that, as of December 5, were in preliminary form and did not represent the considered judgment of BofA management) would have significantly altered the "total mix" of information available to BofA shareholders. The "total mix" included, among many other data points, extensive information showing that the merger would greatly enhance the value of BofA shares in the long term for strategic reasons unrelated to short- or medium-term earnings, and a deluge of information and news coverage about a volatile financial system in the midst of an unprecedented crisis. Investors also had been told repeatedly that the accretion/dilution forecast was based on analysts' consensus earnings estimates as of September 14, that BofA undertook no duty to update this forecast, and that actual results could well differ from projections in light of market developments. And, because BofA's stock had declined in price since the merger was approved by the board of directors in September, and the merger was structured as an exchange of stock at a fixed-exchange ratio, the cost of the merger to BofA in the intervening period had declined by more than 50%. ¶ 19. In these circumstances, evidence that BofA's Board considered an accretion/dilution forecast in approving the merger in September does not establish that different forecasts would have been material to shareholders in December.

Likewise, plaintiffs' suggestion that Mr. Lewis focused on accretion/dilution projections in discussions in September about setting the price for the deal does not mean that alternative accretion/dilution forecasts in December—after the price that BofA was paying had declined significantly—were material as a matter of law. To the contrary, Mr. Lewis testified that in evaluating the importance of accretion/dilution, "you would have to weigh the strategic benefits" of the deal. Resp. to Pls.' Rule 56.1 Stat. No. 9. Mr. Lewis's testimony and contemporaneous statements show that he considered a variety of factors in recommending the merger, including its compelling long-term strategic benefits. *Id*. No. 21. On this record, whether additional accretion/dilution projections would have been material to shareholders turns on "delicate assessments of the inferences a 'reasonable shareholder' would draw" that are "peculiarly ones for the trier of fact." *TSC Indus.*, 426 U.S. at 450.

Second, plaintiffs are wrong that defendants have "admitted" materiality. (Pls.' Mem. at 33.) The Proxy stated only that the September accretion/dilution forecast, based on analyst consensus earnings estimates, was one of thirteen "material" categories of factors that members of the BofA board considered in approving the merger in September 2008, in the context of a proposed transaction in which Merrill was being valued at $50 billion. The Proxy emphasized that the board approved the merger after considering all thirteen categories of factors "as a whole," that it did not "quantify, rank or otherwise assign relative weights to the specific factors that it considered," and that "individual [board] members . . . may have given different weights to different factors." ¶ 51.[15] Nothing in the Proxy or any other statement by defendants

[15] Although plaintiffs rely on mischaracterized testimony by Mr. Gifford to support their position on materiality, they ignore his testimony in the related Delaware action in which he stated specifically that the December accretion/dilution forecast "d[id] not change my feeling that this was a good deal for stockholders." ¶ 87; *see also id.* (BofA director May testifying in his Delaware deposition that December accretion/dilution estimates did not "change[] anything with respect to our recommendation of why this transaction is good," noting that it was only "one line item of 15 things that we considered and based our recommendation on").

suggests that it would have been material to reasonable shareholders to learn of accretion/dilution projections in December based on a different methodology, and when the value exchanged for Merrill had declined by more than 50%. The only decision plaintiffs cite for that proposition is *WorldCom*, which turned on the fact that, unlike here, defendants explicitly conceded materiality. 346 F. Supp. 2d at 660-61. There is no such concession here.

III.

PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON UNPLEADED CLAIMS AND SHOULD NOT BE GIVEN LEAVE TO AMEND

Although plaintiffs have amended their Complaint numerous times since bringing this lawsuit more than three years ago, no version of plaintiffs' Complaint has ever identified, or sought any relief based upon, any of the accretion/dilution forecasts that now are the basis of this motion. Nowhere in the Complaint do plaintiffs mention any accretion/dilution forecast, allege that defendants made any of the statements at issue on this motion, or even use the words "accretion" or "dilution" in the context of the Merrill transaction. The first time plaintiffs identified any statements relating to BofA's accretion/dilution projections as a basis for their claims was in a supplemental interrogatory response served on May 14, 2012—18 months *after* the court-imposed deadline for asserting new claims, after the close of fact discovery and the exchange of expert reports, and only three weeks before they filed this motion. This is improper and unfair to defendants, and provides an independent basis for denying plaintiffs' motion.

Parties may not assert an unpleaded claim as the basis for seeking summary judgment. *See*, *e.g.*, *Evans-Gadsden* v. *Bernstein Litowitz Berger & Grossman, LLP*, 491

In light of this testimony, even if Mr. Lewis's testimony were to the contrary (which it is not), there would be a disputed issue of fact precluding summary judgment.

F. Supp. 2d 386, 402 (S.D.N.Y. 2007) (denying plaintiff's motion for summary judgment on a fraud claim raised for the first time in the motion as "an end-run around the most basic pleading requirements"); *Coram Healthcare Corp.* v. *Cigna*, 2002 WL 32910044, at *11 (S.D.N.Y. July 24, 2002) (denying plaintiff's cross-motion for summary judgment on misrepresentation and other claims raised for the first time in the motion because "plaintiff's failure to assert a cause of action until the last minute will inevitably prejudice the defendant") (quotation marks omitted); *Cline* v. 1-*888-PLUMBING Grp., Inc.*, 146 F. Supp. 2d 351, 358 n.1 (S.D.N.Y. 2001) (court would "not address [plaintiff's] claim that appeared, for the first time, in her memorandum in support of her summary judgment motion"). On that basis alone, this motion should be denied.

But even if plaintiffs' motion were construed as a request to make an untimely motion for leave to amend their Complaint or to pursue unpleaded claims, such a request should be denied. In its order dated September 16, 2010, in response to plaintiffs' request to defer amending the Complaint until "at or shortly before the close of fact discovery," this Court declined "to approve any scheduling order which would expressly contemplate such a late-in-the-game motion to amend," explaining that such an amendment would undermine the PSLRA's pleading requirements and potentially lead to reopening discovery. The Court directed plaintiffs to file any amendment by October 15, 2010. (Sept. 16, 2010 Mem. and Order.) Plaintiffs thus seek to do what the Court told them more than eighteen months ago they could not—amend the Complaint after fact discovery had closed.

Plaintiffs' motion for summary judgment should also be denied because plaintiffs cannot show diligence and because permitting new claims to be asserted at this stage of the litigation would prejudice defendants. Under Fed. R. Civ. P. 16(b)(4), a scheduling order may be modified "only for good cause," a standard that "depends on the diligence of the moving party."

Parker v. *Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir. 2000); *see also Oppenheimer & Co. Inc.* v. *Metal Mgmt., Inc.*, 2009 WL 2432729, at *4 (S.D.N.Y. July 31, 2009) (a lack of diligence by plaintiffs precludes leave to amend even without a showing of prejudice), *objections overruled by* 2010 WL 743793 (S.D.N.Y. Mar. 2, 2010). Likewise, under Rule 15, "motions to amend should generally be denied in instances of . . . undue delay . . . or undue prejudice to the opposing party." *Burch v. Pioneer Credit Recovery, Inc.*, 551 F.3d 122, 126 (2d Cir. 2008).

The record here shows a complete lack of diligence by plaintiffs. Plaintiffs have had the documents pertaining to the claims at issue on this motion since February 2010, including the materials from BofA's December 9, 2008 board of directors' meeting showing an accretion/dilution projection that purportedly differed from the one the Company publicly disclosed on September 15. (Decl. of Samson A. Enzer, Vol. I ("Enzer Decl.") at ¶ 33.) When BofA served interrogatories asking plaintiffs to identify each statement or omission that formed a basis for their claims (Enzer Decl. Ex. 79), plaintiffs objected on the purported ground that the interrogatories were "premature," and instead referred BofA to their prior pleadings, which said nothing about accretion or dilution forecasts (Enzer Decl. Ex. 80). Only on May 14, 2012—two years after receiving the relevant documents in discovery; seventeen months after the date by which the Court directed them to amend; more than a month after the close of fact discovery and the exchange of opening expert reports; after all expert rebuttal reports were submitted; and approximately two weeks before summary judgment motions were due—did plaintiffs first disclose their intent to assert claims based upon the statements at issue on this motion (Enzer Dec. Ex. 87). This record shows the opposite of the diligence by plaintiffs required to establish "good cause."

Permitting plaintiffs to amend at this late stage would also prejudice defendants by preventing them from obtaining relevant fact and expert discovery or having their experts address plaintiffs' new claims. As the Second Circuit has emphasized, "permitting [a] proposed amendment would [be] especially prejudicial" where, as here, "discovery ha[s] already been completed and [the defendant] has already filed a motion for summary judgment." *Ansam Assocs., Inc.* v. *Cola Petroleum, Ltd.*, 760 F.2d 442, 446 (2d Cir. 1985) (affirming district court's decision to deny the plaintiff leave to amend to plead new alleged material omissions after close of fact discovery). This Court expressed the same concern in denying plaintiffs' request to delay amending until the close of fact discovery. (Sept. 16, 2010 Mem. and Order at 1.)

Defendants have not had the opportunity to "conduct discovery to fairly defend themselves against these new claims." *In re Bristol-Myers Squibb Secs. Litig.*, 228 F.R.D. 221, 229 (D.N.J. 2005) (denying leave to amend to add additional alleged misstatements after discovery had closed, expert reports had been exchanged, and summary judgment motion had been filed). For example, Greg Curl, a key witness on the inputs to the accretion-dilution model, and Jeff Brown, a key witness on the BofA debt offering, were deposed before plaintiffs gave notice of the claims as to which they now seek summary judgment. Neither witness is currently employed by BofA, and both reside outside of the jurisdiction. [16]

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[16] This prejudice is not negated merely because plaintiffs asked some deposition witnesses about BofA's accretion/dilution forecasts. *See Sharkey IRO/IRA v. Franklin Res.*, 263 F.R.D. 298, 302 (D. Md. 2009) (that "defendants' own witnesses were questioned at length in depositions" about newly raised alleged omissions did "not by itself mean that [they] should have known that Plaintiff was planning to use" the omissions "as a basis for a claim") (denying leave to amend). To the contrary, these facts demonstrate only that plaintiffs were aware of these issues and thus underscore their lack of diligence in seeking leave to amend.

Defendants also have not had the opportunity to develop expert evidence about key issues bearing on plaintiffs' newly developed claims. Plaintiffs' expert on those subjects, Chad Coffman, does not mention the challenged accretion/dilution statements in any of his three merits reports, let alone explain how they caused a loss to plaintiffs or quantify any alleged loss. And, because plaintiffs did not plead any claims relating to accretion/dilution forecasts, defendants had no reason to develop expert evidence concerning, among other things, (i) the impact, if any, on the accretion/dilution forecasts of Merrill's fourth-quarter losses, the reduction in its balance sheet, and BofA's issuance of new debt; (ii) the materiality of any changes in forecasted accretion/dilution to shareholders as of December 5, taking account of reduced merger consideration, other changed circumstances since September, and other information available to shareholders; (iii) whether Mr. Lewis's nonpublic statement at the shareholder meeting affected the price of BofA stock; and (iv) whether a failure to provide shareholders with updated accretion/dilution forecasts caused shareholders any losses, and if so the amount of such losses.

Permitting amendment at this late date also "would allow [plaintiffs] to make an end run around the requirements of the PSLRA," by permitting them to assert claims that have not been tested under the Act's strict pleading rules. *Bristol-Myers Squibb*, 228 F.R.D. at 229-30 (quotation marks omitted); (*see also* Sept. 16, 2010 Mem. and Order at 1). Here, the Court has not had the opportunity to address several fundamental deficiencies in the claims plaintiffs now seek to assert, including that the forward-looking statements that are the basis of plaintiffs' motion are not actionable under the PSLRA safe harbor and bespeaks caution doctrine because they were accompanied by meaningful cautionary language (as discussed at pp. 27-30*, supra*), and that plaintiffs cannot plead or prove that the statements were made with "actual knowledge" that they were false, 15 U.S.C. § 78u-5(c)(i)(1)(B).

Plaintiffs also cannot establish loss causation. Plaintiffs' loss causation theory rests on purported corrective disclosures in January 2009 about Merrill's losses in the fourth quarter of 2008. Even if this theory was legally valid (which it is not), the January 2009 disclosures would have no relevance to the September accretion/dilution forecast at issue here, because, as noted above (p. 10, *supra*), the forecast was not based on Merrill's earnings during 2008. Accordingly, plaintiffs err when they argue that actions BofA took to address Merrill's mounting fourth-quarter losses (namely issuing debt and directing Merrill to reduce the size of its balance sheet, that purportedly decreased the earnings potential of the combined entity going forward) must have impacted the accretion/dilution forecast. (Pls.' Mem. at 10-20.)[17]

Finally, because plaintiffs did not identify any claim based upon Mr. Lewis's December 5 statement until *after* this Court issued its class certification order, this Court has not been able to consider whether the new allegations plaintiffs raise are appropriate for class certification. Plaintiffs have not shown that Mr. Lewis's statement at the shareholder meeting became public or that any class representative attended the shareholder meeting. And defendants have not been able to challenge lead plaintiffs' standing to assert claims based upon Mr. Lewis's statement if they never heard it; whether plaintiffs are entitled to the presumption of class-wide reliance where, as here, the statement was not communicated to the public; and whether, if that presumption does not apply, class treatment is proper in the first place. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 159 (2008) (presumption of reliance did not apply where "deceptive acts were not communicated to the public"); *In re Initial Public*

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[17] As shown in BofA's Counterstatement, these assertions also are unsupported by the record, and are based on patent mischaracterizations of the documents and testimony. ¶¶ 95-130.

Offerings Secs. Litig., 471 F.3d 24, 43 (2d Cir. 2006) ("Without the *Basic* presumption, individual questions of reliance would predominate over common questions.").

For all of these reasons, plaintiffs' eleventh-hour assertion of claims based upon BofA's accretion/dilution forecasts should not be countenanced.

CONCLUSION

For the foregoing reasons, plaintiffs' motion should be denied.

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Respectfully submitted,

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