UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT JOHN A. THAIN'S MOTION FOR SUMMARY JUDGMENT

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Dated: July 17, 2012

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Defendant John A. Thain respectfully submits this reply memorandum of law in further support of his motion pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment with respect to all claims asserted against him in the Consolidated Second Amended Class Action Complaint. In addition to the arguments set forth below, to the extent applicable, Thain expressly adopts and incorporates as if fully set forth herein the arguments in support of summary judgment set forth in the Reply Memorandum of Law In Support of BofA's Motion For Summary Judgment, dated July 17, 2012, and the Reply Memorandum of Law in Support of Kenneth D. Lewis's Motion for Summary Judgment, dated July 17, 2012 ("Lewis Reply").[1]

Argument

POINT I

PLAINTIFFS CANNOT ESTABLISH THAT THAIN ACTED WITH SCIENTER

In the Memorandum of Law In Support of Defendant John A. Thain's Motion for Summary Judgment (the "Thain Moving Memo."), Thain demonstrated that summary judgment as to the single remaining Section 10(b) claim asserted against him is warranted given Plaintiffs' failure to adduce evidence sufficient to allow a reasonable trier of fact to conclude by a preponderance of the evidence that Thain's conduct with respect to the Proxy's Bonus disclosures constituted an "extreme departure from the standards of ordinary care." *Chill v. General Electric Co.*, 101 F.3d 263, 269 (2d Cir. 1996). In response, Plaintiffs raise a number of arguments, none of which salvage their fraud claim against Thain.

Noting that summary judgment is inappropriate when there exist genuine issues of material fact, Plaintiffs attempt to create factual disputes where none exist. Indeed, nowhere in Plaintiffs' Counterstatement of Facts (the "Counterstatement" or "CS") do they identify a single

[1] Abbreviated and capitalized terms have the meanings ascribed in the Thain Moving Memo.

material historical fact relevant to Thain's scienter in connection with the Proxy's bonus disclosures that is actually in dispute. They attempt to obfuscate the absence of any triable issues of material fact, however, by claiming that the "facts raise an issue of fact whether Thain acted at least recklessly." Plaintiffs' Omnibus Opposition to Defendants' Motions for Summary Judgment, dated June 29, 2012 ("Plaintiffs' Opp.") at 86.[2]

As detailed below, the undisputed facts here do not raise additional issues of fact that preclude summary judgment. With respect to the Proxy disclosures regarding the Bonuses, the only dispute relates solely to the ultimate conclusion to be drawn with respect to the application of the undisputed historical facts to the relevant legal standard, *i.e.*, whether or not a reasonable trier of fact could determine by a preponderance of the evidence that Thain's conduct constituted an "extreme departure from the standards of ordinary care" such as to constitute the conscious recklessness required to establish a Section 10(b) violation. The determination of such an ultimate conclusion is plainly appropriate on this motion for summary judgment. *See, e.g.*, *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (whether a government agent was entitled to qualified immunity could be decided on summary judgment as a matter of law, even though the decision turns on a determination as to whether a reasonable person in the defendant's position could have believed his actions to have been lawful).[3]

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[2] Thain does not, as Plaintiffs claim, "misapprehend[] the applicable legal standards at summary judgment governing the scienter inquiry." Plaintiffs' Opp. at 84. To the contrary, in his Moving Memorandum, Thain acknowledged that *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007), on its face, governs the pleading standard for scienter." Thain Moving Memo. at 13. Nonetheless, the Supreme Court in *Tellabs* "emphasize[d] ... that under [its] construction of the "strong inference" standard [of the PSLRA], a plaintiff is not forced to plead more than she would be required to prove at trial" since "[a]t trial, she must then prove her case by a 'preponderance of the evidence'" (i.e. "that it is *more likely* than not that the defendant acted with scienter"). *Tellabs*, 551 U.S. at 328-29. Accordingly, as courts have found, *Tellabs* is "at least instructive in the summary judgment context." Thain Moving Mem. at 13 n.21 (quoting *Feinberg v. Benton*, No. 05-4847, 2007 WL 4355408, at *6 n.1 (E.D. Pa. Dec. 13, 2007)).

[3] Thain of course recognizes that, in ruling on a motion for summary judgment, the Court "must draw all reasonable inferences in favor of the nonmoving party." Plaintiffs' Opp. at 84 (quoting *Ideal Steel Supply*

(Cont'd . . .)

Indeed, in *Steed Finance LDC v. Nomura Securities International, Inc.*, 148 F. App'x 66, 69 (2d Cir. 2005) (a decision cited several times in Thain's Moving Memorandum (at 14, 21) but studiously ignored by Plaintiffs in their Opposition), the Court of Appeals for the Second Circuit recognized that summary judgment is indeed appropriate if a plaintiff is unable to "provide sufficient evidence that would enable a jury to conclude that [defendant] had the scienter required for such a claim." *Id.* Thus, despite Plaintiffs' *ipse dixit* assertion that the Court is precluded from weighing evidence of scienter on a motion for summary judgment (Plaintiffs' Opp. at 84), the Court of Appeals, as well as this Court, have plainly endorsed the propriety of the relief sought here by Thain. *See In re Winstar Commc'ns Sec. Litig.*, No. 01 CV 3014, 01 CV 11522, 2010 WL 3910322 (S.D.N.Y. Sept. 29, 2010) (granting summary judgment for defendant on scienter); *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 592 F. Supp. 2d 608 (S.D.N.Y. 2009) (same); *In re Northern Telecom Sec. Litig.*, 116 F. Supp. 2d 446, 465 (S.D.N.Y. 2000) (same).[4]

Plaintiffs next argue that the facts adduced during discovery as to Thain's conduct with respect to the Proxy's bonus-related disclosures are adequate to support a finding of scienter, claiming that discovery has confirmed Thain's involvement in the bonus negotiations "and much more." Plaintiffs' Opp. at 85. One searches in vain, however, in Plaintiffs' Counterstatement for anything new and notable with respect to Thain.

Corp. v. Anza, 652 F.3d 310, 326 (2d Cir. 2011)). He is simply requesting that the Court determine, as a matter of law, whether, given the undisputed facts, a reasonable trier of fact could find by a preponderance of the evidence that Thain acted with scienter.

[4] Plaintiffs argue that *Winstar* and *Pension Committee* are "mistakenly" relied upon by Thain because *Winstar* dealt with the recklessness standard for a "non-fiduciary accountant" and *Pension Committee* involved a fund administrator that did not have a duty to verify the value of securities. Plaintiffs' Opp. at 87 n.57. In attempting to distinguish these cases on their facts, Plaintiffs miss the point completely. The decisions are notable, not for their factual similarities, but because they are prime examples of recent decisions of this Court granting summary judgment for a defendant on a Section 10(b) claim given the plaintiff's failure to adduce adequate evidence of scienter.

Indeed, apart from confirming that Thain was aware of the Bonus Agreement, the primary "new" evidence touted by Plaintiffs is that Thain "continued to play an integral role in [the Bonus Agreement] implementation" by "handpicking Peter Kraus . . . to oversee the bonus process" and approving the amount of the bonus pool and the payout date of the Bonuses. Plaintiffs' Opp. at 86. On this unremarkable basis, they argue that they have "raise[d] an issue of fact whether Thain acted at least recklessly" in connection with the earlier filing of the Proxy. *Id.* The fact that Thain continued to be involved in the bonus process at Merrill, however, has no bearing on whether he acted with scienter in connection with the making of an "arguably misleading" statement as to the contingent nature of the Bonuses in the Proxy. As previously demonstrated (*see* Thain Moving Memo. at 19), mere knowledge of an undisclosed fact does not establish scienter. Rather, it is the "danger of misleading buyers [that] must be actually known or so obvious that any reasonable man would be legally bound as knowing." *Sunstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977).[5]

Plaintiffs further argue that "Thain took no meaningful steps to ensure that the Bonus Agreement was disclosed to investors." Plaintiffs' Opp. at 87. They are confused, however, as to what remains of their Section 10(b) claim against Thain since this Court has already held that Thain cannot be liable for the Proxy's alleged failure to disclose the Bonus Agreement. *In re Bank of Am. Corp. Sec., Derivative & Emp. Ret. Income Sec. Act (ERISA) Litig.*, 757 F. Supp. 2d

[5] Plaintiffs erroneously rely on *Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000), which they claim holds that "the recklessness requirement is met where facts demonstrate 'that defendants failed to review or check information that they had a duty to monitor.'" Plaintiffs' Opp. at 86. In fact, the Court of Appeals emphasized that its statement applied only "[u]nder certain circumstances" not present here. *Id.* at 308 (citing *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47-48 (2d Cir. 1978) (defendant broker "consistently reassured the plaintiff that the investment advisor responsible for the plaintiff's portfolio 'knew what he was doing' but never actually investigated the advisor's decisions to determine 'whether there was a basis for the [defendant's] assertions.'"), and *SEC v. McNulty*, 137 F.3d 732, 741 (2d Cir.1998) (defendant "included false statements in SEC filings notwithstanding the obviously evasive and suspicious statements made to him" by the corporate officials upon whom he was relying for this information and despite outside counsel's recommendation that these statements not be included).

260, 287-88 (S.D.N.Y. 2010) (ruling that Merrill and Thain cannot be liable under Section 10(b) for omissions).[6] Hence, the fact that Thain did not himself consider whether Merrill should disclose the timing of bonus payments or "ask[] any lawyers, colleagues, or Merrill board members for their views or advice on whether the Bonus Agreement should be disclosed to investors" (Plaintiffs' Opp. at 87) is not germane to the pertinent scienter analysis.[7] In any event, Thain properly took comfort in the fact that the Proxy had been drafted by highly sophisticated and experienced securities lawyers. *Howard v. SEC*, 376 F.3d 1136, 1148-50 (D.C. Cir. 2004). The fact that he did not ask colleagues and board members whether they disagreed with any of Wachtell's and Shearman's considered legal judgments about a legal filing certainly does not support a finding by a preponderance of the evidence that Thain's conduct constituted an "extreme departure from the standards of ordinary care . . . to the extent that the danger was

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[6] Plaintiffs claim the fact that Thain did not know until after his termination by BAC in January 2009 that the schedule containing the Bonus Agreement had not been publicly disclosed supports a finding that he acted recklessly. Plaintiffs' Opp. at 87. To the contrary, Thain's belief (which Plaintiffs do not dispute) that the document had been included in the filing belies scienter as it *negates* any allegation that he acted to conceal the Bonus Agreement. They also point to Thain's testimony that he did not "read the entirety of the Proxy or the filed Merger Agreement that he signed." Plaintiffs' Opp. at 87. That a busy CEO beset by a world financial crisis did not read every word of a 201-page Proxy and 60-page Merger Agreement, however, is not indicative of an "extreme departure from the standards of ordinary care."

[7] Plaintiffs' Opposition egregiously mischaracterizes the actual facts set forth in their Counterstatement. For example, Plaintiffs' Counterstatement (at ¶31) does not support the contention that Thain "never considered or discussed whether the Bonus Agreement should be disclosed to investors." Plaintiffs' Opp. at 87. The referenced testimony addressed only "disclosing the *timing* of payments of the bonuses." CS ¶31 (quoting Thain NYAG Tr. at 148:16-149:5) (emphasis added). In addition, in their Opposition, Plaintiffs state that "Thain made [bonus] determinations over the *protests* of BoA and Defendant Lewis . . ." Plaintiffs' Opp. at 86 (emphasis added). But CS ¶¶ 185-86, which Plaintiffs cite in support for this statement, makes no reference whatsoever to any "protests" by BAC or Lewis with respect to Bonuses or any rejection of a "protest" by Thain. Similarly unsupported is Plaintiffs' claim that, in November 2008, Thain "permitted Merrill to affirmatively misrepresent to Congress . . . that Merrill would make its 2008 bonus decisions 'at year-end' and that 'decisions for 2008 have not yet been made.'" Plaintiffs' Opp. at 87. Indeed, the Counterstatement acknowledges that the amount of the VICP pool was not finalized until December 8, 2008 and does not dispute that individual bonus amounts were finalized thereafter. CS ¶¶ 179-80.

either known to the defendant or so obvious that the defendant must have been aware of it." *Chill*, 570 F.2d at 269.[8]

Finally, Plaintiffs' effort to distinguish *In re REMEC Inc. Securities Litigation*, 702 F. Supp. 2d 1202 (S.D. Cal. 2010), in which the court granted the CEO summary judgment as to scienter, falls flat. Plaintiffs argue that Thain's reliance is "misplaced" because the CEO in *REMEC* "exercise[d] a degree of oversight or monitoring of the accounting professionals," but "here, there was no monitoring or oversight by Thain." Plaintiffs' Opp. at 89 n.60. This purported distinction is both inaccurate and irrelevant. In holding that the plaintiffs could not, as a matter of law, establish that the CEO acted with conscious recklessness, the *REMEC* court gave no indication that its determination was in any way supported by the defendant's "oversight or monitoring." To the contrary, in *REMEC*, it was the plaintiffs, in an effort to *establish* scienter, who argued that the defendant had played a supervisory role with respect to the goodwill accounting at issue. *Id.* at 1240-41. Accordingly, like the CEO in *REMEC*, the fact that Thain "relied in good faith" on the "competence and expertise" of the company's internal and external professionals precludes a reasonable trier of fact from concluding by a preponderance of the evidence that he acted with scienter. *REMEC*, 702 F. Supp. 2d at 1240-41.[9]

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[8] The holding of *SEC v. Enterprises Solutions, Inc.*, 142 F. Supp. 2d 561 (S.D.N.Y. 2001), is not to the contrary. That case centered on an egregiously fraudulent effort by the CEO and a "consultant" to conceal the fact that the consultant, who had numerous criminal convictions for tax evasion and fraud and had previously been barred by the SEC from the securities industry, actually controlled the company. Secondary to that fraud, the CEO also failed to ensure that the company's registration statement disclosed that the company that had previously employed him as CEO had filed a bankruptcy petition during his tenure. *Id.* at 567, 576.

[9] Plaintiffs argue that Thain "did not rely on the advice of counsel in making a disclosure decision" as "he never sought or received any legal advice on the issue of whether the Bonus Agreement should be disclosed." Plaintiffs' Opp. at 89. This is yet another straw man argument. Thain is not asserting an affirmative defense of advice of counsel. He is merely arguing that the delegation to counsel of the drafting of the Proxy belies any reasonable inference of scienter with regard to the alleged affirmative misrepresentation therein. *See* Thain Moving Memo. at 17 n.25. In *Steed Finance,* the Court of Appeals in granting summary

(Cont'd . . .)

POINT II

PLAINTIFFS CANNOT ESTABLISH LOSS CAUSATION WITH RESPECT TO THE SECTION 10(b) CLAIM AGAINST THAIN

In his Moving Memorandum, Thain explained that the only basis for the remaining Section 10(b) count against him – Plaintiffs' claim that the Proxy misleadingly implied that the Bonuses were "contingent" – fails as a matter of law given Plaintiffs' inability to identify any stock drop attributable to a disclosure correcting such alleged misstatement. Thain Moving Memo., Point II. In response, Plaintiffs argue (a) that "[t]he Court never held that the statements in the Proxy were false and misleading only because they created the 'implication that the Bonuses were contingent,'" and (b) that they [Plaintiffs] "have never concede[d] that, by the time the *FT* Article was published, the market was already aware that Merrill had paid Bonuses." Plaintiffs' Opp. at 91. As detailed below, they are wrong on both scores.

As to the former, Plaintiffs again confuse the Court's findings with respect to Thain, who owed no fiduciary duty to BAC shareholders and can therefore, as a matter of law, only be potentially liable under Section 10(b) for *actual misrepresentations* in the Proxy (*In re Bank of Am. Corp. Secs., Derivative & Emp. Ret. Income Sec. Act (ERISA) Litig.*, 757 F. Supp. 2d at 287-88), with the Court's more general finding that the Complaint could state a claim against BAC based on alleged omissions in the Proxy. In light of this crucial distinction, Plaintiffs' citation to the Court's finding that "the statements in the Proxy were 'misleading in view of the *undisclosed* agreement on pre-closing bonus payments" (Plaintiffs' Opp. at 91 (emphasis added)) proves Thain's point since the Court has already found that Thain cannot be liable for the Proxy's alleged failure to disclose the Bonus Agreement. Stripped of its allegations of actionable

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judgment for the defendant explicitly recognized that reliance on the involvement of counsel may undercut scienter. 148 F. App'x at 69.

omissions, the Section 10(b) claim against Thain thus stands solely on the "arguably misleading" implication in the Proxy that the Bonuses had not yet been approved by BAC and therefore remained "contingent." *In re Bank of Am. Corp. Sec., Derivative & Emp. Ret. Income Sec. Act (ERISA) Litig.*, 757 F. Supp. 2d at 300.

Adjudged against the proper standard, Plaintiffs' inability to show any loss causation with respect to a corrective disclosure regarding this one alleged affirmative misrepresentation is fatal to their claim. The primary argument they make in this regard is that they "have never *conceded* that, by the time the *FT* Article was published, the market was already aware that Merrill had paid Bonuses." Plaintiffs' Opp. at 91 (emphasis added). They do not, however, *deny* that such a conclusion is the obvious implication of the position set forth in the reports of their expert, Chad Coffman. *See, e.g.*, Expert Report of Chad Coffman, CFA, dated March 16, 2012, ¶ 109 (Halavais Decl., Ex. 56) (arguing only that the *FT* Article was the first public disclosure that (a) Merrill paid Bonuses in December 2008, (b) in an amount totaling between $3 and $4 billion, and (c) despite incurring large losses in the fourth quarter, but *not* contending that it was the first public disclosure of the fact that Merrill had paid Bonuses).

In any event, whether or not Plaintiffs have "conceded" this point is not determinative. As detailed in Thain's Moving Memo., press reports demonstrate unequivocally that, prior to the publication of the *FT* Article on January 21, 2009, the market was well aware of the fact that Merrill had paid Bonuses. *See* Thain Moving Memo. at 23 n.31. For example, five days earlier, the *Financial Times* published an article stating: "Excluding the top five managers, Merrill *paid* bonuses to many of its executives and employees *last month* . . . ." Greg Farrell, *Merrill's troubles anger BofA executives*, Financial Times, January 16, 2009, at 2 (emphasis added) (Halavais Decl., Ex. 45).

Plaintiffs' only response to the January 16, 2009 *Financial Times* article is to argue that it "contains no quantification of the bonus pool and no confirmation from BoA of its involvement in the bonus payout." Plaintiffs' Opp. at 49. Notably, they do not (and cannot) deny that it disclosed the fact that Merrill had *already paid* the Bonuses, which is the only corrective disclosure relevant to Thain. As a result, they have failed to demonstrate any loss causation and, on this basis alone, summary judgment for Thain on Count II is warranted. *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 511-13 (2d Cir. 2010).

POINT III

SUMMARY JUDGMENT FOR THAIN ON THE SECTION 20(a) CLAIMS SHOULD BE GRANTED

In response to Thain's motion for summary judgment with respect to the Complaint's Section 20(a) claims (Counts IV and VI), Plaintiffs assert that "there are numerous issues of fact concerning whether Thain acted with knowledge or negligence regarding the Proxy's disclosures." Plaintiffs' Opp. at 91. To the contrary, as detailed above and in the Lewis Reply, the undisputed facts of this case compel the conclusion that Plaintiffs have not and cannot demonstrate by a preponderance of the evidence that Thain acted with fraudulent intent or without the requisite degree of care in connection with the Proxy's disclosures. *See* Point I *supra*; Lewis Reply at 3-8.[10]

In addition, Plaintiffs erroneously state that Thain does not contest that a primary violation underlying the Section 20(a) claims occurred. Plaintiffs' Opp. at 91. To the contrary,

[10] Plaintiffs contend that "Section 20(a) does not require Plaintiffs to prove Thain's state of mind in order to satisfy the culpable participation element." Plaintiffs' Opp. at 91 n.62 (citing *Worldcom*, 2005 WL 638268, at *13 (S.D.N.Y. 2005)). *Worldcom*, however, is (as the opinion acknowledges) at odds with other decisions of this Court holding that scienter is indeed an element of a Section 20(a) claim. *See, e.g., In re MBIA, Inc. Sec. Litig.*, 700 F. Supp. 2d 566, 598 (S.D.N.Y. 2010) ("to withstand a motion to dismiss, a § 20(a) claim must allege, at a minimum, particularized facts of the controlling person's conscious misbehavior or recklessness"); *In re Take-Two Interactive Sec. Litig.*, 551 F. Supp. 2d 247, 307-08 (S.D.N.Y. 2008) (same).

for the very reasons that Thain contends that summary judgment is appropriate with respect to the Section 10(b) and Section 14(a) claims against him, summary judgment is also appropriate as to the claims against Merrill since Thain is the only Merrill officer or director named as a defendant and the Plaintiffs' claims against the company are premised on the same thin evidence. Accordingly, given that the underlying Section 10(b) and 14(a) claims against Merrill and Thain cannot withstand summary judgment, the Section 20(a) claims against Thain must be dismissed on this basis as well. *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 108 (2d Cir. 2007).

Conclusion

For all of the foregoing reasons, as well as the reasons set forth in the Reply Memorandum of Law In Support of BofA's Motion For Summary Judgment and the Reply Memorandum of Law in Support of Kenneth D. Lewis's Motion for Summary Judgment, defendant John A. Thain respectfully requests that summary judgment be entered in his favor as to all claims.

Dated: July 17, 2012
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