UNITED STATED 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 All Securities and Derivative Actions	

MEMORANDUM OF LAW IN SUPPORT OF THE BANK DEFENDANTS' MOTION FOR CERTIFICATION FOR INTERLOCUTORY APPEAL, OR, IN THE ALTERNATIVE, FOR RECONSIDERATION

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Dated: September 10, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF RELEVANT FACTS 2

1. The Motions to Dismiss 2

2. The August 27 Order 3

ARGUMENT 5

I. THE COURT SHOULD CERTIFY THE AUGUST 27 ORDER FOR IMMEDIATE APPEAL 5

A. The Order Involves At Least Three Controlling Questions Of Law 6

B. There Is Substantial Ground For Difference Of Opinion As To Each Of The Three Controlling Questions of Law 7

1. Was There A Duty Under Section 14(a) To Disclose Merrill's Fourth Quarter Interim Financial Results? 7

2. Can Shareholders Of An Acquiring Corporation Meet The Transaction Causation Element Under Section 14(a)? 12

3. Are Covenants In A Private Merger Agreement Actionable Under The Federal Securities Laws? 15

C. An Immediate Appeal Would Materially Advance The Resolution Of These Actions 21

II. ALTERNATELY, THE COURT SHOULD RECONSIDER THE SPECIFIED RULINGS IN THE AUGUST 27 ORDER 23

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Rules and Statutes

28 U.S.C. § 1292(b) .... passim

Rule 5(a)(3) of the Federal Rules of Appellate Procedure 5

Local Rule 6.3 .... 1, 23

Rule 10b-5 3

Rule 12(b)(6) 4, 7

Rule 14a-9 .... passim

Securities Act of 1933 1

17 C.F.R. §229.601 .... 17, 21

17 C.F.R. § 249.308 .... 17, 21

Cases

Aikman v. County of Westchester,
691 F. Supp. 2d 496 (S.D.N.Y. 2010) 23

All Am. Tel. Co. v. AT&T, Inc.,
No. 07 Civ. 861, 2009 WL 691325 (S.D.N.Y. Mar. 16, 2009) 23

Beck v. Dombrowski,
559 F.3d 680 (7th Cir. 2009) 9

Blum v. Semiconductor Packaging Materials Co. Inc.,
No. C.A. 97-7078, 1998 WL 254035 (E.D. Pa. May 5, 1998) 8

Brown v. Lockwood,
423 N.Y.S.2d 186 (2d Dep't. 1980) 20

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 21

Eisemann v. Greene,
204 F.3d 393 (2d Cir. 2000) 23

Enron Corp. v. Springfield Assocs. L.L.C.,
Nos. 01-16034, 05-01025 7

Glazer Capital Mgmt., L.P. v. Magistri,
549 F.3d 736 (9th Cir. 2008) .... passim

Grace v. Rosenstock,
228 F.3d 40 (2d Cir. 2000).......... 13, 14

Halperin v. eBanker USA.com, Inc.,
295 F.3d 352 (2d Cir. 2002).......... 19

Higginbotham v. Baxter Int'l Inc.,
495 F.3d 753 (7th Cir. 2007) (Easterbrook, J.).......... 7, 8

In re Air Crash off Long Island, N.Y., on July 17, 1996,
27 F. Supp. 2d 431 (S.D.N.Y. 1998).......... 6, 21

In re Burlington Coat Factory Sec. Litig.,
114 F.3d 1410 (3d Cir. 1997) (Alito, J.) 7, 8

In re Canandaigua Sec. Litig.,
944 F. Supp. 1202 (S.D.N.Y. 1996).......... 9

In re Dynex Capital, Inc. Sec. Litig.,
No. 05 Civ. 1897, 2006 WL 1517580 (S.D.N.Y. June 2, 2006).......... 22

In re Focus Media Holding Ltd. Litig.,
701 F. Supp. 2d 534 (S.D.N.Y. 2010).......... 9

In re Lloyd's Am. Trust Fund Litig.,
No. 96 Civ. 1262, 1997 WL 458739 (S.D.N.Y. Aug. 12, 1997) 21

In re Morgan Stanley S'holder Litig.,
592 F.3d 361 (2d Cir. 2010).......... 9

In re N. Telecom Ltd. Sec. Litig.,
116 F.Supp.2d 446 (S.D.N.Y. 2000).......... 8

In re N2K Inc. Sec. Litig.,
82 F. Supp. 2d 204 (S.D.N.Y. 1999), aff'd, 202 F.3d 81 (2d Cir. 2000).......... 9

In re Worlds of Wonder Sec. Litig.,
35 F.3d 1407 (9th Cir. 1994) 8

Kapps v. Torch Offshore, Inc.,
379 F.3d 207 (5th Cir. 2004) 9

Klinghoffer v. S.N.C. Achille Lauro,
921 F.2d 21 (2d Cir. 1990)........ 6, 7

LNC Inv., Inc. v. First Fid. Bank,
No. 92 Civ. 7584, 2000 WL 461612 (S.D.N.Y. Apr. 18, 2000)........ 6

Matsumura v. Benihana Nat'l Corp.,
542 F. Supp. 2d 245 (S.D.N.Y. 2008)........ 20

Mendell v. Greenberg,
927 F.2d 667 (2d Cir. 1990)........ 4, 8, 9

Mills v. Electric Auto-Lite Co.,
396 U.S. 375 (1970)........ 11, 13, 14

MONY Group, Inc. v. Highfields Capital Mgmt., L.P.,
368 F.3d 138 (2d Cir. 2004)........ 10

Murray v. Xerox Corp.,
811 F.2d 118 (2d Cir. 1987)........ 20

New York City Emp. Ret. Sys, v. SEC.,
45 F.3d 7 (2d Cir. 1995) 16

Olkey v. Hyperion 1999 Term Trust, Inc.,
98 F.3d 2 (2d Cir. 1996)........ 19

Oxford Asset Mgmt., Ltd. v. Jaharis,
297 F.3d 1182 (2d Cir. 2002)........ 8

Resnik v. Swartz,
303 F.3d 147 (2d Cir. 2002)........ 9

Rombach v. Chang,
355 F.3d 164 (2d Cir. 2004)........ 20

Schlick v. Penn-Dixie Cement Corp.,
507 F.2d 374 (2d Cir. 1974)........ 14

Seinfeld v. Gray,
404 F.3d 645 (2d Cir. 2005)........ 9

Shaev v. Hampel,
No. 99 Civ. 10578, 2002 WL 31413805 (S.D.N.Y. Oct. 25, 2002) 19

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,
552 U.S. 148 (2008)........ 15

Supra USA Inc. v. Samsung Electronics Co.,
No. 85 Civ. 9696, 1987 WL 19953 (S.D.N.Y. Nov. 10, 1987) 6

Thesling v. Bioenvision, Inc.,
No. 09 Civ. 3487, 2010 WL 1337699 (2d Cir. Apr. 7, 2010).. 9

TSC Indus., Inc. v Northway, Inc.,
426 U.S. 438 (1976).. 7, 8, 10

United Paperworkers Int'l Union v. Int'l Paper Co.,
985 F.2d 1190 (2d Cir. 1993).. 9, 10, 11

Virginia Bankshares, Inc. v. Sandberg,
501 U.S. 1083 (1991).. 9, 15

Williams v. Dow Chem. Co.,
No. 01 Civ. 4307, 2004 U.S. Dist. LEXIS 17046 (S.D.N.Y. Aug. 11, 2004) 23

Wilson v. Great Am. Indus., Inc.,
979 F.2d 924 (2d Cir. 1992)..11, 13, 14, 15

Wilson v. Great Am. Indus., Inc.,
855 F.2d 987 (2d Cir. 1988).. 11, 19

Zucker v. Quasha,
891 F. Supp. 1010 (D.N.J. 1995) 8

Other Authorities

Donald Griffith & Yvette M. VanRiper, A "Titan"-ic Quandary: Can Contract Terms Disclosure Sink Your Company? Foley & Lardner LLP Webinar (Mar. 29, 2005) 21

Klaus Eppler, Preparing the Management's Discussion and Analysis, 1092 PLI/Corp. 265 (1999)... 9

Lyle G. Ganske & James P. Dougherty, Merger Agreement Presentations Take on a Life of Their Own Jones Day Commentary (July 2005)... 21

Marian N. Dawood Azib & Ronald H. Janis, A Repeated Call for Disclaimers When Filing Acquisition Documents on Edgar Day Pitney Alert (Mar. 17, 2009)..................... 21

SEC's Titan Report,
Exchange Act Release No. 51,283, 2005 WL 1074830 (Mar. 1, 2005) .... passim

The Bank Defendants[1] respectfully submit this Memorandum of Law in support of their motion pursuant to 28 U.S.C. § 1292(b) for certification for interlocutory appeal of this Court's Memorandum and Order, entered August 27, 2010, granting in part and denying in part the Bank Defendants' Motions to Dismiss the Consolidated Amended Class Action Securities Complaint and the Consolidated Amended Derivative Complaint (the "August 27 Order" granting in part and denying in part the dismissal of the "Securities Complaint" and the "Derivative Complaint"), or, in the alternative, for reconsideration under Local Rule 6.3 of the United States District Court for the Southern District of New York, of three rulings in the August 27 Order.

PRELIMINARY STATEMENT

The Bank Defendants recognize that the Court's August 27 Order resolved many issues in the Securities and Derivative cases, and reserved for a later day many of the arguments the defendants raised in their motions to dismiss. There are, however, three legal questions decided by the Court that present threshold issues of law whose resolution (if the Bank Defendants are correct) could result in the elimination of substantial claims and significant discovery. They are:

(1) Whether there is a duty under Section 14(a) to disclose in a merger proxy statement a company's intra-quarter financial results absent a rule or regulation requiring such disclosure or a statement contained in the proxy statement that would be materially misleading without the disclosure;

(2) Whether shareholders of the acquiring corporation in a merger can, as a matter of law, demonstrate the transaction causation required to state a claim under Section 14(a) when they did not buy, sell, or exchange their shares as a result of the transaction authorized by the proxy vote in connection with the merger; and

(3) Whether a covenant in a private merger agreement that is publicly filed with the SEC can provide the basis for a claim under the Securities Act of 1933.

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[1] The "Bank Defendants" are Bank of America Corporation (the "Bank" or "BofA"), Banc of America Securities LLC, and the Bank's current and former individual officers and directors.

In this motion, the Bank Defendants ask the Court to certify the August 27 Order to the Second Circuit under 28 U.S.C. § 1292(b) or, in the alternative, to reconsider the August 27 Order's rulings with respect to these issues.

STATEMENT OF RELEVANT FACTS

The Court is, of course, very familiar with the background of these matters and the Bank Defendants' motions to dismiss. That background is therefore only briefly recounted here.

1. The Motions to Dismiss

These lawsuits arise out of the Bank's September 2008 decision to merge with Merrill[2] and certain subsequent public filings and statements made by the Bank in the months between the signing of the Merger Agreement on September 15, 2008 and the closing of the Merger on January 1, 2009. In brief, the Securities Action and the Derivative Action plaintiffs alleged that certain of the Bank Defendants' statements relating to the payment of bonuses at Merrill, Merrill's 2008 fourth quarter losses, the due diligence conducted by the Bank prior to the signing of the Merger Agreement, the Bank's consideration of invoking the material adverse change clause of the Merger Agreement, the Bank's receipt of federal assistance, and the anticipated benefits of the Merger, among others, violated the federal securities laws. The Securities Plaintiffs challenged statements relating to these matters in the companies' public disclosures, including, among others, the proxy statement issued by the Bank and Merrill on November 3, 2008 and the documents the Bank issued for its October 7, 2008 securities offering; the Derivative Plaintiffs solely challenged statements in the Proxy Statement.

[2] Unless otherwise noted, defined terms used in this Memorandum of Law have the same meaning as those in the Bank Defendants' Memorandum of Law in Support of the Motion to Dismiss the Securities Complaint. Unless otherwise noted, all citations to exhibits herein are to the Declaration of Jonathan E. Goldin in Support of the Bank Defendants' Motion to Dismiss the Securities Complaint dated November 24, 2009 and the Supplemental Declaration of Jonathan E. Goldin dated January 26, 2010.

The Bank Defendants filed timely motions to dismiss the Securities Action and the Derivative Action, which motions were supported by memoranda of law and other written submissions (including a submission requested by the Court after the May 19 conference). The Bank Defendants argued that dismissal was required because, among other reasons, (1) the Bank had no duty to disclose Merrill's interim fourth quarter results;[3] (2) the Securities Plaintiffs may not proceed on a direct basis under Section 14(a) because, inter alia, they cannot satisfy the transaction causation element of a Section 14(a) claim;[4] and (3) public filings of the Merger Agreement, which contained negative covenants, could not, in isolation, give rise to any claim under the federal securities laws.[5]

2. The August 27 Order

In its August 27 Order, the Court granted in part and denied in part the motions to dismiss the Securities and Derivative Complaints. The Court allowed the following claims in the Securities Complaint to proceed:

- Section 10(b) and Rule 10b-5 claims against Ken Lewis, John Thain, BofA, and Merrill regarding the disclosure of Merrill's 2008 bonus payments in the Proxy Statement and Merger Agreement;
- Section 14(a) and Rule 14a-9 claims against Lewis, Thain, BofA, the BofA Board of Directors, and Merrill regarding the disclosure (1) in the Proxy Statement and Merger Agreement of Merrill's 2008 bonus payments and (2) in the Proxy Statement of Merrill's fourth quarter losses;
- Section 20(a) claims against Lewis, Thain, Joe Price, and the BofA Board of Directors for control person liability; and
- Securities Act claims against all defendants regarding the Merger Agreement's provisions concerning Merrill's 2008 bonus payments.

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[3] See Bank Defs.' Opening Br. at 34-39, 40-43; Bank Defs.' Reply Br. at 24-28.

[4] See Bank Defs.' Opening Br. at 70-74; Bank Defs.' Reply Br. at 3-7; Letter from Bank Defs. to Hon. Denny Chin (Feb. 9, 2010); Letter from Bank Defs. to Hon. P. Kevin Castel at 2-4 (June 4, 2010).

[5] See Bank Defs.' Opening Br. at 14-15; Bank Defs.' Reply Br. at 11-12.

The Court also dismissed the majority of the claims in the Derivative Complaint, allowing the Derivative Plaintiffs to proceed only on the state law breach of fiduciary duty claims and the Section 14(a) and Rule 14a-9 claims against the BofA Director Defendants (including Lewis) regarding the disclosure in the Proxy Statement of Merrill's 2008 bonus payments and fourth quarter losses.

The Court made a number of rulings that are the subject of the instant motion. First, in assessing the Bank Defendants' motions to dismiss the Section 14(a) claim based on allegations about the disclosure of Merrill Lynch's interim fourth quarter losses, the Court stated that "Section 14(a) is satisfied '[o]nly when the proxy statement fully and fairly furnishes all the objective material facts.'" August 27 Order at 31 (quoting Mendell v. Greenberg, 927 F.2d 667, 674 (2d Cir. 1990)). Thus, the Court held that "intra-quarter updates may be required . . . if intervening events trigger a duty to disclose." Id. at 55. The Court also held that it could not "conclude, as a matter of law at the Rule 12(b)(6) stage, that the broad warnings of the Joint Proxy and the two 10-Q filings 'enabled the shareholders to make an informed choice.'" Id. at 60 (citation omitted).

Second, finding it "possible for both sets of plaintiffs to prevail without double recovery," the Court held that the Section 14(a) claims could go forward both derivatively and directly, id. at 34, and also held that for the direct claims the transaction causation element was satisfied because "[t]he merger with Merrill could have been consummated only with BofA shareholder approval of the transaction." Id. at 34 n.3.

Finally, the Court denied the Bank Defendants' motions to dismiss the Securities Act claims based on the provision regarding Merrill's 2008 bonuses in the Merger Agreement, which was attached to the Bank's September 18, 2008 Form 8-K and incorporated by reference in the

Bank's October 7, 2008 secondary offering documents. Id. at 106-09. In allowing these claims to proceed based solely on the Merger Agreement (as opposed to the summary of the Merger Agreement contained in the Proxy Statement, which had not yet been filed) the Court relied on the SEC's Titan Report, Exchange Act Release No. 51,283, 2005 WL 1074830 (Mar. 1, 2005) ("Titan"), and the Ninth Circuit's opinion in Glazer Capital Management, L.P. v. Magistri, 549 F.3d 736 (9th Cir. 2008), in which the SEC advised and the Ninth Circuit determined that "representations" in a private merger agreement, if material and false, can be actionable. See August 27 Order at 45-48.

ARGUMENT

The Bank Defendants seek appellate review pursuant to 28 U.S.C. § 1292(b) of the three legal issues identified above, which present controlling questions of law about which there are substantial grounds for disagreement and the outcome of which could substantially advance the resolution of these cases. In the alternative, the Bank Defendants respectfully request that the Court reconsider these rulings.

I. THE COURT SHOULD CERTIFY THE AUGUST 27 ORDER FOR IMMEDIATE APPEAL

Section 1292(b) provides that:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b).[6] In order for an order to be certified for interlocutory appeal, it must involve (1) "a controlling question of law" as to which (2) "there is substantial ground for

[6] In addition, Rule 5(a)(3) of the Federal Rules of Appellate Procedure provides as follows:

> (a) Petition for Permission to Appeal . . . (3) If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are

difference of opinion" and (3) "an immediate appeal . . . may materially advance the ultimate termination of the litigation." Id.

A. The Order Involves At Least Three Controlling Questions Of Law

The terms "controlling" question of law and dispositive question of law are not synonymous. "[A]n issue need not necessarily terminate an action in order to be 'controlling.'" Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21, 24 (2d Cir. 1990). "[A]ll that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court." LNC Invs., Inc. v. First Fid. Bank, No. 92 Civ. 7584, 2000 WL 461612, at *3 (S.D.N.Y. Apr. 18, 2000) (citation omitted) (emphasis in original). "Certification under § 1292(b) is also appropriate where . . . the underlying motion raises a purely legal question about which there are no triable issues of fact." In re Air Crash off Long Island, N.Y., on July 17, 1996, 27 F. Supp. 2d 431, 435 (S.D.N.Y. 1998).

The August 27 Order raises three purely legal questions meriting certification. The resolution of any of these questions would materially affect both cases. If the Bank Defendants are correct as to any of them, their resolution by the Circuit would result in the dismissal of a large number of the remaining claims and would substantially narrow discovery. See id. at 435 ("The TWA 800 litigation will proceed, of course, whatever is determined on appeal . . . . However, a ruling on the Opinion will still 'significantly affect the conduct of the action.'" (internal citations omitted)); Supra USA Inc. v. Samsung Elecs. Co., No. 85 Civ. 9696, 1987 WL 19953, at *6 (S.D.N.Y. Nov. 10, 1987) (finding question to be controlling question of law where

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met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order.

holding by Second Circuit "would eliminate one of plaintiff's claims, conceivably affecting the outcome of the litigation").

B. There Is Substantial Ground For Difference Of Opinion As To Each Of The Three Controlling Questions of Law

"[S]ubstantial ground[s] for difference of opinion" may be found where "(1) there is conflicting authority on the issue, or (2) the issue is particularly difficult and of first impression for the Second Circuit." Enron Corp. v. Springfield Assocs. L.L.C., Nos. 01-16034, 05-01025, 07 Civ. 1957 & 06 Civ. 7828, 2007 WL 2780394, at *1 (S.D.N.Y. Sept. 24, 2007); see also Klinghoffer, 921 F.2d at 24. There are substantial grounds for differences of opinion on the three controlling questions of law raised by the Bank Defendants here.

1. Was There A Duty Under Section 14(a) To Disclose Merrill's Fourth Quarter Interim Financial Results?

The Court recognized that, as a general matter, "SEC regulations do not require intra-quarter financial statements" and that "'[t]he securities laws create a system of periodic rather than continual disclosures.'" August 27 Order at 55 (quoting Higginbotham v. Baxter Int'l Inc., 495 F.3d 753, 760 (7th Cir. 2007) (Easterbrook, J.)). The Court also held that "intra-quarter updates may be required, if intervening events trigger a duty to disclose." Id. (citing Higginbotham, 495 F.3d at 760; In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1432 (3d Cir. 1997) (Alito, J.)). The August 27 Order did not identify any SEC rule or regulation triggering a duty to disclose, but nonetheless held that, based upon the allegations in the complaints, plaintiffs had stated a claim that the Bank Defendants should have disclosed Merrill's losses for October 2008 because allegedly they "were the largest monthly losses in the company's history," August 27 Order at 59, and the Court could not "conclude, as a matter of law at the Rule 12(b)(6) stage, that the broad warnings of the Joint Proxy and the two 10-Q

filings 'enable[d] the shareholders to make an informed choice.'" Id. at 60 (citing TSC Indus., Inc. v Northway, Inc., 426 U.S. 438, 448 (1976)).[7] The Court also noted that "[t]he Joint Proxy's general warnings came to fruition." Id.

There is "substantial ground for difference of opinion" whether the Bank was obligated to disclose Merrill's October 2008 results. As the August 27 Order (at 60) acknowledged, the securities laws create a system of only periodic disclosures, and numerous courts have held that under that periodic reporting system there is no duty to disclose mid-quarter results – whether at "moment[s] of significant 'turbulence' and 'turmoil'" or at moments of tranquility.[8] While the cases cited by the Bank Defendants for the proposition that there is no duty to disclose financial results on an intra-quarterly basis did not arise in the context of a shareholder vote on a merger, id. at 55 n.10, plaintiffs did not identify any SEC regulation or rule that would impose a different duty on an issuer in the merger setting.

The August 27 Order's conclusion that plaintiffs had stated a claim that the Bank owed a duty to disclose seemingly relied on Mendell and TSC Industries. August 27 Order at 30. While

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[7] The Court found that "the Joint Proxy and the third quarter 10-Q statements indeed painted a grim portrait of Merrill's near-term and medium-term prospects," August 27 Order at 58, and that those documents "minced no words about the challenging economic climate and the likelihood that Merrill would continue to incur losses in the near and medium term," Id. at 56.

[8] See Higginbotham, 495 F.3d at 760; In re Burlington Coat Factory, 114 F.3d at 1432; In re N. Telecom Ltd. Sec. Litig., 116 F. Supp. 2d 446, 459 (S.D.N.Y. 2000); In re Worlds of Wonder Sec. Litig., 35 F.3d 1407, 1419-20 (9th Cir. 1994); Blum v. Semiconductor Packaging Materials Co., No. C.A. 97-7078, 1998 WL 254035, at *2 (E.D. Pa. May 5, 1998); Zucker v. Quasha, 891 F. Supp. 1010, 1014 (D.N.J. 1995). There are good reasons for this rule. If the SEC required disclosure of interim figures, companies would continually have to update and report on these numbers every time they changed positively or negatively as a result of an updated forecast or market movements. Such a system of continual reporting would not only be unworkable, but would expose companies to the risk of liability every time their interim projections changed. Moreover, such a disclosure system would not be useful to shareholders, who could be overwhelmed with information and be unable to rely with any certainty on it. See Oxford Asset Mgmt., Ltd. v. Jaharis, 297 F.3d 1182, 1190 (11th Cir. 2002) ("To hold that section 11(a) imposes liability unless the prospectus includes *all* material facts is simply to wholly ignore and render superfluous that section's qualifying language 'required to be stated therein or necessary to make the statements therein not misleading.' This we may not do. Moreover, considering that materiality will usually be an issue for the trier of fact, to require *all* material information to appear in the prospectus would, like setting the threshold for materiality too low, result in registrants burying the 'shareholders in an avalanche of trivial information – a result that is hardly conducive to informed decisionmaking.'" (internal citations omitted)).

the Second Circuit's opinion in Mendell states at one point that "a proxy statement should honestly, openly and candidly state all the material facts," id. at 30, the Mendell court's opinion elsewhere makes clear that a company's possession of material information, in and of itself, does not trigger a duty to disclose: "Liability under Rule 14a-9 requires the omission of a material fact which renders the proxy statement false or misleading." 927 F.2d at 673. Indeed, in a case that the August 27 Order did not cite, the Second Circuit explicitly held that an omission is actionable under Section 14(a) and Rule 14a-9 only if "SEC regulations specifically require disclosure of the omitted fact in a proxy statement, or the omission makes other statements in the proxy statement materially false or misleading." Resnik v. Swartz, 303 F.3d 147, 151, 153 (2d Cir. 2002).[9] Relying on Resnik, in subsequent decisions the Second Circuit has repeatedly held that the failure to disclose a material fact in a proxy statement (or prospectus) is actionable only if there is a duty to disclose, and that a defendant's knowledge of a material fact does not itself give rise to such a duty.[10] This is consistent with the requirement articulated by the Supreme

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[9] See United Paperworkers Int'l Union v. Int'l Paper Co., 985 F.2d 1190, 1198 (2d Cir. 1993); In re Canandaigua Sec. Litig., 944 F. Supp. 1202, 1208 (S.D.N.Y. 1996); see also Beck v. Dombrowski, 559 F.3d 680, 685 (7th Cir. 2009); Kapps v. Torch Offshore, Inc., 379 F.3d 207, 213 (5th Cir. 2004) (holding in the context of Section 11 that "all material information need not be included in the registration statement," but rather "an issuer is not free to make material misrepresentations, or to omit material information that is either required to be disclosed by law or that is necessary to disclose in order to prevent statements made in the registration statement from being misleading"); In re N2K Inc. Sec. Litig., 82 F. Supp. 2d 204, 207 (S.D.N.Y. 1999), aff'd, 202 F.3d 81 (2d Cir. 2000).

Consistent with Resnik and its progeny, the legal community that advises companies regarding their disclosure obligations has been operating under the same understanding that Bank Defendants have regarding the duty to disclose material facts in SEC filings. See Klaus Eppler, Preparing the Management's Discussion and Analysis, 1092 PLI/Corp. 265 (1999) (instructing that "[t]here is no general requirement in the federal securities laws for a registrant to disclose all material information," but rather only where "[a] specific requirement is imposed by law or regulation," "[t]here is insider trading," or "[i]t is necessary to correct disclosures which were incorrect or incomplete when made").

[10] See In re Morgan Stanley S'holder Litig., 592 F.3d 361, 365 (2d Cir. 2010); Thesling v. Bioenvision, Inc., No. 09 Civ. 3487, 2010 WL 1337699, at *1 (2d Cir. Apr. 7, 2010); Seinfeld v. Gray, 404 F.3d 645, 651 (2d Cir. 2005); see also In re Focus Media Holding Ltd. Litig., 701 F. Supp. 2d 534, 539 (S.D.N.Y. 2010) (holding that a material omission or misstatement is actionable under Section 10(b) and Sections 11 and 12(a)(2) "only if the omitted facts were either: (1) required by SEC regulations to be stated in the relevant communication, or (2) necessary to make the disclosures not misleading" (emphasis added)).

Court that a plaintiff prove both "deceptiveness" and materiality to prevail on a Section 14(a) claim.[11]

The August 27 Order (at 59-60) also relied on TSC Industries in support of the holding that plaintiffs had stated a claim that the Bank had a duty to disclose Merrill's October 2008 results. But there the Supreme Court only analyzed the standard for determining whether omitted information could be considered material. TSC Indus., 426 U.S. at 444-65. The Supreme Court did not purport to address under what circumstances a duty to disclose arises pursuant to Section 14(a) and Rule 14a-9 and, as the above-cited cases show, the issues of duty to disclose and materially are analytically distinct. The Bank Defendants do not dispute that, in the event there was a statement in the Proxy Statement that had been rendered misleading by the omission of the interim results, the analysis of whether such statement was materially misleading would be controlled by the standard prescribed in TSC Industries. In this case, however, the Bank Defendants made no affirmative statement that was rendered misleading by the failure to disclose Merrill's interim results. Indeed, as the August 27 Order (at 58) found, the Proxy Statement's disclosures about the state of the financial markets and their ongoing impact on Merrill's financial performance was "grim."[12] In the absence of any statement that was rendered

[11] See Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1105 (1991).

[12] Moreover, the disclosures were in the present tense and Merrill and the Bank made clear that market conditions had an adverse impact on Merrill's performance in the early portion of the fourth quarter (i.e., October) and that this was expected to continue for at least the remainder of the quarter. See Proxy Statement (Ex. 1) at 38 (noting the "extremely volatile" market conditions "[d]uring the past few weeks"); Bank of America Corp., Quarterly Report (Form 10-Q) (Ex. 35), at 176 (Nov. 6, 2008) ("In recent weeks, the volatility and disruption has reached unprecedented levels." (emphasis added)); Merrill Lynch & Co., Inc., Quarterly Report (Form 10-Q) (Ex. 34) at 83 (Nov. 5, 2008) ("Turbulent market conditions in the short and medium-term will continue to have an adverse impact on [Merrill's] core businesses.").

false or misleading by the omission of Merrill's interim results, whether the omission could be considered "material" is irrelevant.[13]

The August 27 Order creates the potential for confusion among companies (and their advisors) with publicly registered securities considering their disclosure obligations. Heretofore, Section 14(a) has been understood to give rise to a duty to disclose only where SEC proxy rules and regulations require it or where the omission would render a statement in a proxy statement materially misleading.[14] These SEC rules dictate the specific information that is deemed necessary for shareholders to exercise an informed choice on a corporate transaction, and there is no claim that the Bank omitted information specifically required by those SEC rules. Under the August 27 Order, however, a corporate issuer would be at risk of a securities law violation any time a court might conclude – on its own and without regard to those regulations – the omitted information would be necessary for shareholders to exercise an informed choice. It so happens that plaintiffs alleged in this case that the Bank knew Merrill's October results and that they were

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[13] The remaining cases cited by the August 27 Order are also distinguishable. In MONY Group, Inc. v. Highfields Capital Management, L.P., 368 F.3d 138 (2d Cir. 2004), the court considered whether a transaction that is influenced by noncompliance with the disclosure provisions of federal securities law could constitute irreparable harm. Id. at 147. In ruling that it could, the MONY court noted that the rules promulgated under Section 14(a) are intended to "level somewhat the playing field for proxy contestants and to force disclosures that promote informed shareholder voting," but did not address what information those shareholders were as a matter of law entitled to under Section 14(a). Id. In United Paperworkers, the court specifically held that the proxy statement standing alone was misleading because the company had painted a rosy picture of its environmental record when, in fact, that record was abysmal. 985 F.2d at 1198 (noting that Rule 14a-9 "prohibits the inclusion in a proxy statement of 'any statement . . . which omits to state any material fact necessary in order to make the statements therein not false or misleading'"). The court then went on to separately find that the omitted facts were material. Id. at 1201-02. The situation here is, quite obviously, far different with the Bank having painted a "grim" picture that was in fact borne out.. In Mills, plaintiffs alleged that the proxy statement was affirmatively misleading because it represented to the target company shareholders that the target company's board had recommended approval of the merger and stated the basis for that recommendation while omitting to inform shareholders that all of the directors were nominees of the acquiring company, the potential true basis for the recommendation. 396 U.S. at 378. Similarly, in Wilson v. Great American Industries, Inc., a case in which the issuer made an affirmative statement that a subsidiary had reduced its losses when, in fact, the losses were greater on a year over year basis, the Second Circuit held that the misrepresentations and omissions alleged rendered misleading the valuations provided in the proxy statement and the exchange ratio set forth therein. See Wilson, 979 F.2d 924, 926 (2d Cir. 1992); Wilson, 855 F.2d 987, 991-95 (2d Cir. 1988).

[14] See *supra* n. 9.

the worst in Merrill's history. It also happens, as the Court observed, that "[t]he Joint Proxy's general warnings came to fruition." August 27 Order at 60. But the August 27 Order admits of no ready limiting principle that would provide ready guidance to proxy drafters in the future.

Corporations regularly receive interim results of operations – sometimes on a daily basis, sometimes weekly, and sometimes monthly. Sometimes those results are good; sometimes they are bad. Based on selecting the right metric (daily, weekly, monthly), a plaintiff would be able to allege the results were the worst in the company's history, or the second worst, or the worst in a decade, or the like. If the Bank had an obligation here to disclose Merrill's October 2008 results because they are alleged to be the worst in Merrill's history and potentially necessary for the exercise of an informed vote, what about the next case in which plaintiffs allege that the <u>acquiring</u> corporation in a stock-for-stock transaction omitted interim information about favorable monthly results or in which plaintiffs allege that a particular month's results for the <u>acquired</u> corporation were, for example, the third worst in its history? Congress, in Section 14(a), wisely left it to the SEC to prescribe the information a company must disclose in order for its shareholders to vote in a sufficiently informed way and the SEC has not imposed (in its proxy rules or otherwise) any requirement to disclose interim financial results. If the law now rejects this view in favor of the view that materiality alone is sufficient to state a claim, it should be the case for all corporations subject to suit here as a result of a binding Circuit ruling.

2. Can Shareholders Of An Acquiring Corporation Meet The Transaction Causation Element Under Section 14(a)?

The Second Circuit has not yet addressed whether shareholders who did not buy, sell or exchange their shares pursuant to a merger can satisfy Section 14(a)'s transaction causation requirement. The authority that does exist on this issue – which establishes that the allegedly misleading proxy must have been an essential link in a transaction <u>engaged in by the plaintiff</u>

(i.e., in which the plaintiff bought, sold or exchanged her shares as a result) – indicates that transaction causation cannot be satisfied by plaintiffs here. Accordingly, there are substantial grounds for difference of opinion, and this issue is appropriate for certification under Section 1292(b).

Transaction causation is an essential element of a Section 14(a) claim.[15] Relying on Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), the Court held that plaintiffs had sufficiently alleged transaction causation for the Merger, because it would not have occurred without the Bank shareholders' vote. August 27 Order at 34 n.3. Mills was a traditional Section 14(a) claim brought by shareholders of the target company, who – as a result of the merger – exchanged their shares in the target company for consideration paid by the acquiring company. Mills states – in that context – that there is a "sufficient showing of relationship" if the shareholder alleges that a defect in the proxy materials "was an essential link in the accomplishment of the transaction." Id. at 385 (cited in August 27 Order at 34 n.3).

However, because in Mills the plaintiff shareholders unquestionably exchanged their shares in the target corporation as a result of the merger, the Court did not there address the boundaries of Section 14(a)'s transaction causation requirement or consider the question presented here – whether plaintiffs must allege transaction causation for some transaction entered into by plaintiffs. The Second Circuit has, since Mills, provided guidance on that subject. In Wilson, 979 F.2d 924, the Circuit addressed whether a target company's shareholders' loss of appraisal rights satisfied Section 14(a)'s transaction causation requirement. The issue was presented because the plaintiffs represented only a minority of the target company's shareholders and their vote was not necessary for approval of the merger. Id. at 926.

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[15] See Grace v. Rosenstock, 228 F.3d 40, 46 (2d Cir. 2000); Wilson, 979 F.2d at 931.

While the Circuit agreed that the class of minority shareholders of the target company had been deprived in the proxy statement of material facts required to be disclosed under Section 14(a), the Court held that this alone was insufficient to plead the transaction causation required to state a Section 14(a) claim. Rather, the transaction causation requirement was satisfied only because the proxy statement had misled the plaintiffs into voting in favor of the merger and thereby forfeiting the pursuit of their state law appraisal rights: "[t]he deceptive proxy plainly constitutes an 'essential link' in accomplishing the forfeiture of this state right." Id. at 931. In other words, as the Circuit stressed, to state a claim under Section 14(a), there must be "proof that the misrepresentations induced plaintiffs to engage in the subject transaction, that is, transaction causation." Id. (emphasis added). And the "transaction" that satisfied this required element in Wilson was the failure of the minority shareholders to preserve their right to an appraisal by agreeing to exchange their target company shares in the merger:

> And transaction causation may be shown when a proxy statement, because of material misrepresentations, causes a shareholder to forfeit his appraisal rights by voting in favor of the proposed corporate merger.

Id. See also Grace v. Rosenstock, 228 F.3d 40, 49 (2d Cir. 2000) (quoting Wilson, 979 F.2d at 931)); Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 380 (2d Cir. 1974) ("In a misrepresentation case, to show transaction causation a plaintiff must demonstrate that he relied on the misrepresentations in question when he entered into the transaction which caused him harm." (emphasis added)).

Unlike in Mills and Wilson, plaintiffs here did not buy, sell or exchange their Bank shares as a result of the Merger. They did not themselves engage in a transaction authorized by the proxy vote, and, unlike those in Wilson, plaintiffs here were not deceived into failing to exercise any state law right that they otherwise possessed – apart from their right to cast an

informed vote, which, Wilson made clear, was not enough to satisfy transaction causation for a direct shareholder claim under Section 14(a). Here, the only parties that engaged in a transaction as a result of the Merger were the Bank and Merrill's shareholders, not plaintiffs (the Bank's shareholders).

The Second Circuit has never addressed whether (or, if so, how) the transaction causation element of Section 14(a) can be satisfied when the claim is pursued – as here – by shareholders of the acquiring corporation, but its reasoning in Wilson shows that such shareholders cannot do so because they have not exchanged or forfeited anything in the transaction.[16]

3. Are Covenants In A Private Merger Agreement Actionable Under The Federal Securities Laws?

In addition to sustaining potions of the Section 10(b) and 14(a) claims based upon the Proxy Statement, the August 27 Order (at 109) also sustained the Section 11 and 12(a)(2) clams. Those claims were not based on the Proxy Statement (which had not yet been filed), but solely on the Bank's October 7, 2008 secondary offering documents, which incorporated by reference Bank of America's Form 8-K, dated September 18, 2008, attaching the Merger Agreement. The Court held that the Merger Agreement "allegedly misstated and omitted material information concerning Merrill's employee bonuses." Id. at 107. Relying on the Ninth Circuit's decision in Glazer, and the SEC Exchange Act Release in the Titan Matter (the Titan Report), id. at 45-47, the Court held that "[a] reasonable investor would have understood the Merger Agreement to constitute a statement of fact," id. at 45, and "[t]he disclosure of the Merger Agreement's

[16] The August 27 Order, therefore, could potentially greatly expand the circumstances under which plaintiffs are entitled to assert a private right of action under Section 14(a). Such an expansion runs counter to the view expressed by a number of courts, including the Supreme Court, that private rights of action under Section 14(a) should be limited because they are the product of judicial creation. See Virginia Bankshares, 501 U.S. at 1085 (holding that "the breadth of the right once recognized should not, as a general matter, grow beyond the scope congressionally intended"); see also Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 165 (2008) ("Concerns with the judicial creation of a private cause of action caution against its expansion.").

covenant that Merrill 'shall not . . . pay any amounts to Employees not required by any current plan or agreement (other than base salary in the ordinary course of business) . . .' was an affirmative statement that was arguably misleading in view of the undisclosed agreement on pre-closing bonus payments." Id. at 48.

There is a substantial ground for difference of opinion as to whether the Second Circuit would agree with Glazer[17] and, even if it would, there is a substantial ground for difference of opinion as to whether the reasoning in Glazer – which involved disclosure concerning a contractual representation – can logically be extended to a contractual covenant particularly where (as here) that disclosure was accompanied by a disclaimer that the Merger Agreement was note intended to provide investors with facts about the contracting parties.

The facts relevant to this issue of first impression within the Second Circuit are the following:

First, the Merger Agreement and the schedule it explicitly incorporated by reference set forth several affirmative and negative covenants. For example, Section 5.1 of the Merger Agreement provided that each of Merrill and the Bank was required, in the time period between signing and closing, to "(a) conduct its business in the ordinary course in all material respects, (b) use reasonable best efforts to maintain and preserve intact its business organization and advantageous business relationships and retain the services of its key officers and key employees and (c) take no action that would reasonably be expected to adversely affect or materially delay the ability of [Merrill or the Bank] . . . to perform its covenants and agreements under this Agreement." Section 5.2 of the Merger Agreement, entitled "Company Forbearances," contained a series of negative covenants, i.e., restrictions on Merrill's ability to operate its

[17] As this Court recognized, the SEC's Titan Report is entitled to little deference. See August 27 Order at 45 n.7 (citing New York City Emp. Ret. Sys. v. S.E.C., 45 F.3d 7, 12-13 (2d Cir. 1995)).

business during the period from signing until closing. Among the negative covenants was the covenant by Merrill not to – except (1) as set forth in the disclosure schedule, or (2) as permitted or contemplated by other provisions of the Merger Agreement, or (3) without the prior consent of Bank of America – "pay any amounts to Employees not required by any current plan or agreement." The schedule was referenced by the public Merger Agreement but was not publicly disclosed.

Second, on September 18, 2008, as SEC rules required, the Bank made the Merger Agreement publicly available by filing it with the SEC on Form 8-K. Form 8-K, 17 C.F.R. § 249.308 (items 1.01, 9.01); Regulation S-K, 17 C.F.R. § 229.601 (item 601(b)(2)). The Bank's September 18, 2008 Form 8-K informed shareholders that the Merger Agreement was "made solely for the benefit of the" parties and was "not to provide investors with any other factual information regarding the parties or their respective businesses." Bank of America Corp., Current Report (Form 8-K) (Ex. 66), at 2 (Sept. 18, 2008). It also cautioned shareholders that certain of its provisions were "qualified by confidential disclosures made to the other party," which "may have been included in the Merger Agreement for the purpose of allocating risk between [the parties] rather than establishing matters as facts." Id.

Third, the Form 8-K was incorporated by reference – as SEC rules require[18] – into the registration statement for the Bank's October 2008 secondary offering of securities. The registration statement for that offering of securities did not incorporate by reference the Proxy Statement – which would not be published until November 3, a full month later. Nor did the Form 8-K contain the language upon which the Court focused in connection with the Proxy Statement that "any compensation increases or payments not required by a pre-existing plan or

[18] See Form S-3, Part I, Item 12(a)(2), (b).

agreement would constitute 'extraordinary actions.'" August 27 Order at 43 (citing Joint Proxy at 83-84).

These facts presented the Court with an issue of first impression within the Second Circuit: whether a disclosure of the terms of a private merger agreement can form the basis for a federal securities claim. Whether the incorporation by reference of this Form 8-K, vel non, could support a Securities Act claim also raises a question about which there is substantial ground for difference of opinion. The Merger Agreement was intended – as most merger agreements are – to allocate risk privately between the two contracting parties, BofA and Merrill. It did not, by its terms, make a representation about whether Merrill would pay bonuses or even whether the Bank had consented or would consent to the payment of bonuses. Merrill simply promised that it would not take any number of actions except to the extent they were contemplated by the Merger Agreement or the Bank had consented or would consent to them.

In addition the very structure of the Merger Agreement (in which the provisions upon which plaintiffs focus were included in Article V "Covenants" and not Articles III or IV "Representations"), the accompanying Form 8-K also purposely and directly addressed the SEC's Titan Report. That language made clear that the Merger Agreement was "made solely for the benefit of the" parties and that shareholders should not understand that any section of the Merger Agreement was intended "to provide investors with any other factual information regarding the parties or their respective businesses." Bank of America Corp., Current Report (Form 8-K) (Ex. 66), at 2 (Sept. 18, 2008).

The August 27 Order relied upon the Ninth Circuit's decision in Glazer, which held that a reasonable shareholder could understand the representation to an acquiror in a merger agreement that the acquired company was in compliance "with all laws" to be a representation of historical

fact that such corporation had complied with all laws. August 27 Order at 47 (quoting Glazer, 549 F.3d at 741). Glazer altered long-standing, established disclosure practices without considering the effect of doing so on issuers, and created an unfair predicament for issuers by allowing investors to assert a disclosure claim even when subsequent public disclosures (in a company's proxy statement and other merger-related filings, for example) modify the alleged misrepresentations or omissions, and even when investors are being explicitly warned not to rely on the provisions as factual communications to them. In this regard, therefore, Glazer's holding is at best questionable; indeed, apart from the August 27 Order, no court anywhere has cited Glazer on this point.

There is also substantial reason to believe that Glazer's reasoning is not consistent with this Circuit's approach to disclosure obligations under the federal securities laws.[19] In the Second Circuit, a company's representations must be taken "together and in context." Olkey v. Hyperion 1999 Term Trust, Inc., 98 F.3d 2, 5 (2d Cir. 1996); see also Shaev v. Hampel, No. 99 Civ. 10578, 2002 WL 31413805, at *8 (S.D.N.Y. Oct. 25, 2002). It is also clear in this Circuit that alleged misrepresentations are not actionable when accompanied by adequate cautionary language. See Halperin v. eBanker USA.com, Inc., 295 F.3d 352, 357 (2d Cir. 2002) ("Certain alleged misrepresentations in a stock offering are immaterial as a matter of law because it cannot be said that any reasonable investor could consider them important in light of adequate cautionary language set out in the same offering."). In holding that plaintiffs could state a claim under the federal securities laws challenging representations in a merger agreement, the Glazer court specifically discounted the context of the statements at issue in that case, which included

[19] Although the August 27 Order stated (at 48) that Glazer's "reasoning is consistent with the Second Circuit's approach to disclosure obligations under Section 14(a) and Rule 14a-9," the case cited in support of this statement, Wilson, 855 F.2d at 991, concerned disclosures made in a proxy statement, not provisions of a private contract drafted solely to consummate a transaction between parties and specifically qualified as such to shareholders.

significant cautionary language that accompanied the filing of the merger agreement. 549 F.3d at 741. Accordingly, Glazer appears inconsistent with Second Circuit precedent.

Finally, Glazer's circumstances are, importantly, distinguishable from the facts presented here. Glazer involved a contractual representation of fact about the company's compliance with the Foreign Corrupt Practices Act. 549 F.3d at 741-42. In contrast, here Articles III and IV of the Merger Agreement contained all the "representations"; Article V – captioned "Covenants Relating to Conduct of Business" – included the affirmative covenant in Section 5.1 relating to the conduct of business prior to the effective date of the Merger and the negative covenants in Section 5.2. Courts in this Circuit have repeatedly recognized the distinction between a promise (including a contractual promise) and a factual representation, and have held that the former does not ordinarily support a misrepresentation claim.[20] Indeed, even the Titan Report recognized this difference in cautioning that issuers could face potential liability only where a reasonable shareholder "could conclude that the statements made in the representation describe the actual state of affairs." Titan, 2005 WL 1074830, at *2 (emphasis added).[21] The August 27 Order extends Glazer to hold that a contractual promise from one corporate party to a merger agreement to another can give rise to affirmative representations actionable at the behest of shareholders of the acquiror even despite warnings to those shareholders not to construe the parties' contractual promises in that fashion.

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[20] See, e.g., Rombach v. Chang, 355 F.3d 164, 173 (2d Cir. 2004) (holding that "optimistic statements" about future performance are "protected by the 'bespeaks caution' doctrine and the PSLRA's safe harbor"); Murray v. Xerox Corp., 811 F.2d 118, 123 (2d Cir. 1987) ("Promises of future conduct are not actionable as negligent misrepresentations."); Matsumura v. Benihana Nat'l Corp., 542 F. Supp. 2d 245, 253 (S.D.N.Y. 2008) ("Though misrepresentations of present or past fact have the potential to create liability for the speaker, '[m]ere unfulfilled promissory statements as to what will be done in the future are not actionable' as such." (quoting Brown v. Lockwood, 432 N.Y.S.2d 186, 194 (2d Dep't 1980))).

[21] Titan also involved an affirmative representation of the company's compliance with the Foreign Corrupt Practices Act and is thus similarly distinguishable. 2005 WL 1074830, at *1.

The Court's decision has potentially sweeping implications for draftsmen of merger agreements and related public disclosures. Merger agreements are private contracts that memorialize an intent to engage in a business combination and provide for the operation of the businesses during the period of time prior to the consummation of the merger. They are not intended independently to inform shareholders of material facts relating to the contracting parties. Nevertheless, parties entering into a business combination are required by SEC rules to file a Form 8-K attaching a merger agreement as an exhibit.[22] To address the concern that the filing of a merger agreement with a Form 8-K could expose the filers to liability, it has become the common practice to include cautionary language in the filing, as was included in the Bank's September 18 Form 8-K, that informs readers that they should not rely on the provisions of the merger agreement as statements of fact.[23] This practice has now been placed into jeopardy.

C. An Immediate Appeal Would Materially Advance The Resolution Of These Actions

Section 1292(b) certification is intended to promote judicial efficiency by avoiding unnecessary expense and delay in reaching the ultimate termination of litigation. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). For this reason, complex commercial litigations, which, if not resolved (or limited) at the pleading stage, often involve prolonged, expensive discovery and class certification proceedings, are particularly well suited for interlocutory appeal:

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[22] Form 8-K, 17 C.F.R. § 249.308 (items 1.01, 9.01); Regulation S-K, 17 C.F.R. §229.601 (item 601(b)(2)).

[23] See, e.g., Donald Griffith & Yvette M. VanRiper, A "Titan"-ic Quandary: Can Contract Terms Disclosure Sink Your Company?, Foley & Lardner LLP Webinar (Mar. 29, 2005), available at http://www.foley.com/home.aspx (last visited Sept. 2, 2010); Lyle G. Ganske & James P. Dougherty, Merger Agreement Presentations Take on a Life of Their Own, Jones Day Commentary (July 2005); Marian N. Dawood Azib & Ronald H. Janis, A Repeated Call for Disclaimers When Filing Acquisition Documents on Edgar, Day Pitney Alert (Mar. 17, 2009).

> The institutional efficiency of the federal court system is among the chief concerns underlying § 1292(b). Because the district court's efficiency concerns are greatest in large, complex cases, certification may be more freely granted in so-called "big" cases.

In re Air Crash, 27 F. Supp. 2d at 436 (quoting In re Lloyd's Am. Trust Fund Litig., No. 96 Civ. 1262, 1997 WL 458739, at *3 (S.D.N.Y. Aug. 12, 1997)).

If the Bank did not have a duty to disclose Merrill's interim results, then discovery will be substantially narrowed to the allegations regarding bonuses. If the Circuit confirms that the Bank's shareholders cannot, as a matter of law, establish transaction causation, the Securities Plaintiffs' Section 14(a) claims (along with most of the individual actions, which solely allege Section 14(a) claims) will be dismissed. Finally, if the Circuit does not adopt or limits the application of Glazer and Titan, plaintiffs' Securities Act claims will be resolved.[24] If the August 27 Order is not certified for interlocutory appeal and the claims are later dismissed (on summary judgment or at trial) or if the August 27 Order is reversed after the conclusion of the trial, the parties will have spent considerable resources on discovery, motion practice, and class certifications that would have been unnecessary.[25] Thus, the Court should allow an interlocutory appeal because it would serve the interest of judicial economy and materially advance the resolution of this litigation.

Resolution of these actions would also be advanced if the Second Circuit affirmed the August 27 Order. Doing so would reduce uncertainty concerning these legal issues that could

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[24] The Circuit's rejection of Glazer and Titan could also substantially affect plaintiffs' Section 10(b) and 14(a) claims relating to the bonus disclosures in the Proxy Statement because while the Proxy contained a summary of the attached Merger Agreement, it also specifically referred shareholders to the entirety of the document and contained similar cautionary language to that in the September 18, 2008 Form 8-K. Proxy Statement (Ex. 1) at 76, 83, 125.

[25] See In re Dynex Capital, Inc. Sec. Litig., No. 05 Civ. 1897, 2006 WL 1517580, at *3 (S.D.N.Y. June 2, 2006) ("My denial of Dynex's motion to dismiss turned on this question, and substantial resources may be expended in vain both by the parties and this Court if my initial conclusion proves incorrect. Therefore, Dynex has satisfied the requirements of 28 U.S.C § 1292(b).").

otherwise impede the parties' efforts to make targeted discovery demands and strategic decisions.

Accordingly, the Bank Defendants respectfully request that the Court amend the August 27 Order to include the requisite findings of 28 U.S.C. § 1292(b) to enable the Bank Defendants to seek an immediate appeal.

II. ALTERNATIVELY, THE COURT SHOULD RECONSIDER THE SPECIFIED RULINGS IN THE AUGUST 27 ORDER

In the alternative, the Bank Defendants respectfully request that the Court reconsider its rulings set forth above. Local Rule 6.3 permits a party to move the court to reconsider an order determining a motion. Although the standard for granting a motion for reconsideration pursuant to Local Rule 6.3 is strict, it is nevertheless merited if a party can demonstrate that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion, and that might reasonably be expected to alter the conclusion reached by the court.[26] The decision to grant or deny a motion for reconsideration is within the discretion of the district court.[27] The Bank Defendants submit that the three issues discussed herein are appropriate for reconsideration under this standard.

CONCLUSION

For the foregoing reasons, the Bank Defendants respectfully request that the Court certify the August 27 Order for immediate appellate review pursuant to 28 U.S.C. § 1292(b) or, in the alternative, reconsider its rulings in the August 27 Order on these issues.

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[26] See, e.g., Eisemann v. Greene, 204 F.3d 393, 395 n.2 (2d Cir. 2000); Aikman v. County of Westchester, 691 F. Supp. 2d 496, 497-98 (S.D.N.Y. 2010); Williams v. Dow Chem. Co., No. 01 Civ. 4307, 2004 U.S. Dist. LEXIS 17046, at *1-2 (S.D.N.Y. Aug. 11, 2004).

[27] See, e.g., All Am. Tel. Co. v. AT&T, Inc., No. 07 Civ. 861, 2009 WL 691325, at *2 (S.D.N.Y. Mar. 16, 2009).

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Dated: New York, New York
September 10, 2010