UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Master File No. 09 MD 2058 (PKC)

- -x

THIS DOCUMENT RELATES TO:

All Securities Actions

- -x

LEAD PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS FOR CERTIFICATION FOR INTERLOCUTORY APPEAL, OR, IN THE ALTERNATIVE, FOR RECONSIDERATION

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Lead Plaintiffs respectfully submit this memorandum of law in opposition to the Motion and Memorandum Of Law In Support Of The Bank Defendants' Motion For Certification For Interlocutory Appeal, Or, In The Alternative, For Reconsideration, filed on September 10, 2010 ("Def. Br."), which is joined by Defendants Merrill Lynch & Co., Inc. and John Thain.

I. PRELIMINARY STATEMENT

Interlocutory review under 28 U.S.C. § 1292(b) and reconsideration of a court's order under S.D.N.Y. Local Rule 6.3 are "extraordinary" remedies involving "exceptional circumstances" that are rarely granted. *See In re South African Apartheid Litig.*, 624 F. Supp. 2d 336, 339 (S.D.N.Y. 2009); *see also De Oliveira v. Bessemer Trust Co.*, 2010 WL 2541230, at *1 (S.D.N.Y June 14, 2010) (PKC) ("Reconsideration … is an extraordinary remedy to be employed sparingly"). Neither extraordinary form of relief is meant to provide the moving party with a "second bite at the apple" by allowing it to reargue issues that a court has already addressed and rejected. *See, e.g.*, *Cox v. Nat'l R.R. Passenger Corp.*, 2009 WL 3270863, at *1 (S.D.N.Y. Oct. 6, 2009) (PKC) ("a motion to reconsider is not intended as a vehicle to permit a party to reargue an issue fully considered and decided"). However, that is precisely what Defendants have done here. All of the arguments which Defendants raise in this motion were previously extensively briefed in connection with the motions to dismiss, carefully considered by the Court when it issued its 140-page decision, and correctly rejected by Your Honor. These arguments fail to satisfy the requirements for interlocutory review, and Defendants do not even attempt to address the requirements for reconsideration.

Defendants contend that three distinct legal issues related to the Court's August 27, 2010 Memorandum Opinion and Order warrant interlocutory review or, alternatively, reconsideration: (1) whether there was a duty under Section 14(a) to disclose Merrill's massive fourth quarter losses, which were sufficient to render Merrill insolvent and threaten the solvency of BoA, in

advance of the shareholder vote on the merger; (2) whether shareholders of the acquiring corporation in a merger can demonstrate "transaction causation" under Section 14(a) when their votes are required to approve a merger, but they do not buy, sell, or exchange their shares in the merger itself; and (3) whether a statement in a merger agreement that is publicly filed with the SEC and found to be materially misleading under the Securities Exchange Act of 1934 ("Exchange Act") can also be actionable under the Securities Act of 1933. However, Defendants neither point the Court to any new or controlling authority that conflicts with or otherwise undermines the Court's holdings, nor to any facts or case law that the Court ignored or misconstrued. Instead, Defendants repeat the arguments that this Court has already considered and rejected.

First, Defendants challenge the Court's holding that they possessed a duty to disclose Merrill's staggering fourth quarter losses in advance of the shareholder vote on the merger. In so doing, Defendants make the identical arguments that they made in their motions to dismiss, and cite the exact same case law that they cited in those motions. As Lead Plaintiffs explained in detail in their opposition to the motions to dismiss, these cases are inapposite because they do not address Defendants' disclosure duties in the context of a merger. As the Court correctly recognized, the Second Circuit has unequivocally held that, in the context of a merger, "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.'" *In re Bank of America Corp. Sec., Deriv. and ERISA Litig.*, -- F. Supp. 2d --, 2010 WL 3448194, at *19 (S.D.N.Y. Aug. 27, 2010) (quoting *Mendell v. Greenberg*, 927 F.2d 667, 674 (2d Cir. 1990)). The Court also correctly applied this clear precedent, holding that the Complaint's allegations established that Merrill's "historically large" losses were highly material information necessary to "enable shareholders to make an informed choice." *Id*. at *33, 34. Defendants'

alternative argument – that it should be "left [] to the SEC," rather than the courts, to determine whether there was a duty to disclose Merrill's losses (Def. Br. at 12) – is not only legally incorrect, but ignores the fact that the SEC has determined that Defendants had a duty to disclose Merrill's losses under Section 14(a), and sued BoA in this District for the violation of that duty.

Second, Defendants do not cite *any* authority contravening the Court's well-supported conclusion that shareholders of an acquiring corporation can establish transaction causation under Section 14(a) of the Exchange Act even though they did not buy, sell, or exchange their shares. Indeed, Defendants did not even raise this argument in their motions to dismiss. Instead, as the Court noted, Defendants first raised this argument in a letter to the Court dated June 4, 2010, or more than four months after briefing on the motions was complete. *Bank of America Corp.*, 2010 WL 3448194, at *20 n.3. As Defendants concede, no case has ever held that a shareholder must purchase, sell or exchange shares in order to assert a claim under Section 14(a). To the contrary, the case law interpreting Section 14(a) is clear that transaction causation is adequately pled where the solicitation of proxies constituted "an essential link in the accomplishment of the transaction." *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1111 (1991). Applying this black-letter law, the Court properly found that Plaintiffs established transaction causation by alleging that BoA was required to obtain the approval of its shareholders in order to complete the merger, and that the Proxy solicited BoA shareholders to vote in favor of the transaction.

Finally, although Defendants do not challenge the Court's determination that the Merger Agreement's statements concerning Merrill's bonuses were materially false and misleading under Sections 10(b) and 14(a) of the Exchange Act, they argue that these same misstatements cannot give rise to liability under the Securities Act. According to Defendants, this dichotomy exists because the Merger Agreement may be actionable under the federal securities laws only when it is actually physically attached to the Proxy. This, of course, is not the law. As the Second Circuit

has made clear, the test for determining whether a statement is materially misleading is the same under both the Exchange Act and the Securities Act, and the offering materials specifically incorporated the Merger Agreement by reference. Nothing more is required to establish liability under the Securities Act. Moreover, as the Court correctly held, the "cautionary language" in the Form 8-K and Merger Agreement did not negate Defendants' failure to disclose the secret bonus agreement, or otherwise cure the affirmatively misleading statements included in the Merger Agreement. *Bank of America Corp.*, 2010 WL 3448194, at *26-28 (citing *Caiola v. Citibank, N.A. New York*, 295 F.3d 312 (2d Cir. 2002)).

In sum, Defendants have failed to establish any basis for challenging the Court's decision, let alone one that necessitates the extraordinary remedies of interlocutory review or reconsideration. At most, Defendants have established that they disagree with certain aspects of the Court's ruling. Because such a showing is wholly insufficient to warrant immediate review of the Court's Order, Defendants' motion should be denied in its entirety.

II. APPLICABLE LEGAL STANDARDS

As Judge Buchwald recently held in rejecting a request for interlocutory appeal of an order denying in part a motion to dismiss securities law claims, certification should be granted only in "exceptional circumstances," and courts in this Circuit routinely deny requests for interlocutory appeal. *In re Ambac Fin. Group Sec. Litig.*, 693 F. Supp. 2d 241, 282 (S.D.N.Y. 2010). Numerous courts in this District have similarly recognized that "interlocutory appeals are strongly disfavored in federal practice," and movants cannot invoke the appellate process "as a vehicle to provide early review [even] of difficult rulings in hard cases." *In re Adelphia Commc'ns Corp.*, 2008 WL 361082, at *1 (S.D.N.Y. Feb. 7, 2008) (citations omitted). "Specifically, the Second Circuit has held that challenges to the sufficiency of a pleading are not generally the appropriate subjects of interlocutory review, as 'a reversal [on interlocutory appeal] at most could lead only to

a remand for repleading, with possibilities of further interlocutory appeals thereafter.'" *In re Manhattan Inv. Fund Ltd.*, 288 B.R. 52, 56 (S.D.N.Y. 2002) (quoting *Gottesman v. General Motors Corp.*, 268 F.2d 194, 196 (2d Cir. 1959)).

Consistent with the strong judicial policy disfavoring interlocutory appeals, Section 1292(b) provides that an interlocutory order may be appealed only if *all three* strict statutory criteria are met: (1) the order involves a dispute over a "controlling question of law;" (2) "as to which there is a substantial ground for difference of opinion;" and (3) for which an immediate appeal "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *Greenes v. Vijax Fuel Corp.*, 2004 WL 1516804, at *2 (S.D.N.Y. July 7, 2004) (PKC). Indeed, Second Circuit review of securities cases under § 1292(b) is exceedingly rare.[1] While "'the party seeking interlocutory appellate review must, *at a minimum*, satisfy [the] three statutory criteria,' district courts retain 'broad discretion to deny certification even where the statutory criteria are met.'" *Analect LLC v. Fifth Third Bancorp*, 2009 WL 2568540, at *3 (E.D.N.Y. Aug. 19, 2009) (citations omitted) (emphasis added).

Under the first prong of the § 1292(b) test, a question of law is only "controlling" if it is "a pure question of law that the reviewing court could decide quickly and cleanly without having to study the record." *In re Pall Corp.*, 2009 WL 4282081, at *2 (E.D.N.Y. Nov. 24, 2009) (internal quotation marks and citations omitted). Additionally, to be "controlling," a question must be one for which the determination on appeal "would materially affect the outcome of the litigation." *Id.*

[1] Lead Plaintiffs' research revealed only four cases in the last decade in which the Second Circuit has entertained § 1292(b) appeals of federal securities laws issues, and only one of which concerned pleading standards. *See W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche, LLP*, 549 F.3d 100 (2d Cir. 2008) (appeal of an investment adviser's standing to assert claims on behalf of clients); *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc.*, 531 F.3d 190 (2d Cir. 2008) (appeal to resolve a split within the Southern District of New York as to how to plead corporate scienter); *Litzler v. CC Invs., L.D.C.*, 362 F.3d 203 (2d Cir. 2004) (appeal concerning the statute of limitations under Section 16 of the Securities Exchange Act of 1934); *Cal. Pub. Emp. Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86 (2d Cir. 2004) (appeal concerning bankruptcy jurisdiction over generally non-removable claims brought under the Securities Act of 1933).

Under the second prong of the certification analysis, there must be a genuine doubt as to the correct legal standard to be applied giving rise to a "substantial ground for a difference of opinion." *Id*. at *2; *In re WorldCom, Inc.*, 2003 WL 21498904, at *10 (S.D.N.Y. June 30, 2003). "Such a substantial ground may exist when '(1) there is conflicting authority on the issue, or (2) the issue is particularly difficult and of first impression for the Second Circuit.'" *Pall*, 2009 WL 4282081, at *2 (quoting *In re Lloyd's Am. Trust Funds Litig*., 1997 WL 458739, at *5 (S.D.N.Y. Aug. 12, 1997)). The law is clear that a motion for certification must be denied if it amounts to no more than "[a] mere claim that a district court's decision was incorrect" because that "does not suffice to establish substantial ground for a difference of opinion." *Id.* (quoting *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas*, 2005 WL 3440701, at *2 (S.D.N.Y. Dec. 14, 2005) (citations omitted)). Finally, certification is only appropriate where "an immediate appeal from the order may materially advance the ultimate termination of the litigation," as, for example, in orders involving questions of *in personam* or subject matter jurisdiction. *See, e.g.*, *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 23 (2d Cir. 1990); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1330 (2d Cir. 1972).

Likewise, a motion for reconsideration is "an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources" and is granted "only if the moving party can point to some controlling decision or data that might reasonably be expected to alter the conclusion reached by the court." *De Oliveira*, 2010 WL 2541230, at *1 (internal quotation marks and citations omitted). "[A] motion to reconsider should not be granted where the moving party seeks solely to revisit an issue already decided." *Id.* Because the Court clearly did not "overlook" any of the controlling authority – which was briefed extensively by the parties and evaluated by the Court – a motion for reconsideration is plainly unwarranted.

As described more fully below, none of the questions posed by Defendants satisfy the prerequisites for certification under § 1292(b) or for reconsideration. Therefore, Defendants' request for interlocutory appeal and/or reconsideration should be denied.

III. ARGUMENT

A. DEFENDANTS' FIRST QUESTION DOES NOT PRESENT THE "EXCEPTIONAL" CIRCUMSTANCES NECESSARY TO GRANT INTERLOCUTORY APPEAL OR RECONSIDERATION

As the Court is aware, the issue of whether Defendants were required to disclose Merrill's "historically large" losses before the shareholder vote was extensively briefed by the parties in connection with Defendants' motions to dismiss. *Bank of America Corp.*, 2010 WL 3448194, at *33. In those submissions, the BoA Defendants raised the same arguments they do here. Specifically, Defendants contended that they had no duty to disclose that Merrill had suffered more than $15 billion in pre-vote losses – losses which were large enough to render Merrill insolvent and threaten BoA's own solvency if the merger were approved – because: (i) there "is no duty to disclose mid-quarter results;" and (ii) "a duty to disclose arises only when necessary to make prior statements not misleading or when the SEC's rules require disclosure." BoA Defs. Br. in Supp. of Mot. to Dismiss at 33-40; BoA Defs. Reply Br. in Supp. of Mot. to Dismiss at 23-30.

In its 140-page Opinion, the Court thoroughly analyzed these arguments, and correctly rejected them in light of clear Supreme Court and Second Circuit authority establishing that Defendants were required to disclose Merrill's catastrophic losses under Section 14(a) and Rule 14a-9. As the Court explained, contrary to the narrow standard advocated by Defendants, the Supreme Court has repeatedly emphasized that "the broad remedial purpose" of Section 14(a) and Rule 14a-9 is to "ensure disclosures by corporate management in order to enable the shareholders to make an informed choice" and to "prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation." *Bank*

of America Corp., 2010 WL 3448194, at *18 (emphasis added) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448 (1976) and *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964)). *See also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 381 (1970) ("As we stressed in *Borak*, section 14(a) stemmed from a congressional belief that fair corporate suffrage is an important right" and thus "ensure[s] that proxies would be solicited with explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought.").

Consistent with this authority, and as the Court recognized, the leading Second Circuit decision on disclosure duties in a merger proxy, *Mendell v. Greenberg*, 927 F.2d 667, 674 (2d Cir. 1990), holds that "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.'" *Bank of America Corp.*, 2010 WL 3448194, at *19. The Court also recognized that the Supreme Court's decision in *TSC* sets forth the controlling materiality standard: "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Id*. (quoting *TSC*, 426 U.S. at 449).

Applying this precedent to the facts alleged in the Complaint, the Court properly determined that Merrill's staggering pre-vote losses were material, stating that the $7 billion of "undisclosed losses of October 2008 were the largest monthly losses in the company's history," and "in November, [the additional losses] amounted to $1 billion per week." *Bank of America Corp.*, 2010 WL 3448194, at *34. Indeed, as set forth in the Complaint, in the two months before the vote, Merrill had suffered more than $15 billion of losses – losses that were large enough to bankrupt Merrill and bring BoA to the brink of collapse if the merger were approved. Complaint ¶ 91. As the Court held, the Complaint adequately alleged that "[t]he losses were a known fact to company insiders, yet were not disclosed to BofA's shareholders." *Bank of America Corp.*, 2010

WL 3448194, at *33. Accepting these facts as true, the Court held that Defendants were obligated to disclose this information before the December 5, 2008 vote so that shareholders could make "an informed choice" on the merger. *Id*. at *34 (quoting *TSC Indus.*, 426 U.S. at 448). Thus, the Court sustained Lead Plaintiffs' Section 14(a) claims "premised on a failure to disclose Merrill's losses of October and November 2008" as to "all defendants." *Id*. at *34, 74.[2]

Citing no new authority or facts, and simply repeating the same arguments the Court already considered and rejected, Defendants now ask this Court to take the extraordinary step of either certifying its decision for interlocutory appeal to the Second Circuit, or reversing its own holding on reconsideration. As set forth below, Defendants' motions should be denied.

1. The Law Is Clear That Defendants Were Required To Disclose Merrill's Massive Pre-Vote Losses Under Section 14(a) And Rule 14a-9

Contrary to Defendants' claim that there is a "substantial ground for difference of opinion" on whether they were required to disclose the $15 billion of losses Merrill had suffered before the vote, the Second Circuit held in *Mendell* that Section 14(a) imposes a duty to disclose in a merger proxy "all the objective material facts relating to the transaction." *Mendell*, 927 F.2d at 674. Accordingly, Defendants' contention that disclosure of material facts is required only when an SEC regulation requires disclosure, or when disclosure is necessary to render a statement not misleading, is incorrect.

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[2] Defendants wrongly assert that the Court sustained the Section 14(a) claim relating to Merrill's fourth quarter losses only as to Defendants Lewis, Thain, BoA, Merrill, and the BoA Board. *See* Def. Br. at 3. As the Court explicitly held, this claim was sustained as to "all Defendants," including Defendants Price and Cotty. *Bank of America Corp.*, 2010 WL 3448194, at *74. While the Court dismissed the Section 14(a) claim relating to the bonus agreement as to Price and Cotty because the Complaint failed to allege their knowledge of the bonus agreement, the Court held that the Complaint adequately alleged Price and Cotty's knowledge of Merrill's losses. *See id*. at *54. Although the Court dismissed the derivative Section 14(a) claims against Price and Cotty on the ground that the derivative complaint failed to allege that Price and Cotty solicited proxies (*see id*. at *21-23), Price and Cotty did not move to dismiss the Securities Complaint on that ground and, unlike the derivative complaint, the Securities Complaint alleges that Price and Cotty solicited Proxies by signing the Proxy Registration Statement, which attached a copy of the merger agreement, contained a preliminary version of the Proxy that was identical in all material respects to the definitive Proxy, and registered the shares necessary to effect the transaction (*see* Complaint ¶¶ 35-37).

In *Mendell*, the plaintiff alleged, *inter alia*, that the merger proxy violated Section 14(a) because it "failed to inform the shareholders of the [majority shareholder's] large estate tax liability," a fact from which shareholders "could reasonably have inferred … that [the company] was being sold because the [majority shareholder] needed to raise cash rather than because it was in the shareholders' best interests." *Id.* at 671. Significantly, in *Mendell*, there was no SEC regulation that required disclosure of this tax liability, nor was there any statement in the proxy that was allegedly rendered misleading by the omission of this information.

Nonetheless, the Second Circuit held that the defendant had an independent duty to disclose this information under Section 14(a), and that its omission thus violated the statute. In so concluding, the Second Circuit held in unmistakable terms that "what is required to be disclosed is <u>all material objective facts relating to the transaction</u>." *Id.* at 675 (emphasis added). As the Second Circuit elaborated, "Only when the proxy statement fully and fairly furnishes all the objective material facts as to enable a reasonably prudent stockholder to make an informed investment decision is the federal purpose in the securities laws served." *Id.* at 674. Accordingly:

> A proxy statement should honestly, openly and candidly state all the material facts, making no concealment of the purposes for the proposals it advocates. Unlike poker, where a player must conceal his unexposed cards, the object of a proxy statement is to put all one's cards on the table face-up.

Id. at 670. Thus, Defendants' contention that *Mendell* merely "states at one point" that a proxy must disclose all material facts is wrong. Def. Br. at 9. Because the Second Circuit has squarely decided this issue against Defendants, there can be no "substantial ground for difference of opinion," and Defendants' motion must be denied.

Further, the rule for which *Mendell* stands has been long established in this and other circuits across the country. *See Data Probe Acquisition Corp. v. Datatab, Inc.*, 722 F.2d 1, 6 (2d Cir. 1983) ("What is required is the disclosure of material objective factual matters."); *SEC v.*

Parklane Hosiery Co., Inc., 558 F.2d 1083, 1086 (2d Cir. 1977) (holding that proxy violated Section 14(a) where it failed to disclose majority shareholder's debts, even though no SEC regulation required disclosure and no statement was rendered misleading by omission); *Lessler v. Little*, 857 F.2d 866, 875 (1st Cir. 1988) (proxy must "fully and fairly set[] out such relevant and material facts as would enable a reasonably prudent stockholder to make an intelligent decision"); *Golub v. PPD Corp.*, 576 F.2d 759, 764 (8th Cir. 1978) ("As far as proxy statements are concerned, … the federal purpose is served if the statement fully and fairly sets out such relevant and material facts as would enable a reasonably prudent stockholder to make an intelligent decision[.]").

In response to this authority, Defendants rehash *Resnik v. Swartz*, 303 F.3d 147 (2d Cir. 2002), a decision Defendants relied on heavily in support of their motions to dismiss, but which was so inapposite that it did not merit citation in the 140-page Opinion. *See* BoA Defs. Br. in Supp. of Mot. to Dismiss at 22, 35, 39; BoA Defs. Reply Br. in Supp. of Mot. to Dismiss at 13, 14, 14, n.9. *Resnik* remains irrelevant, as it did not concern a merger and did not address the disclosure duties applicable in that context.[3] Moreover, in *Resnik*, unlike here, the defendants fully disclosed all material facts in the proxy about the stock option plan for which it solicited approval. The proxy correctly "summarized the key terms of the Plan," "was accompanied by an Annex containing the full terms of the Plan," prominently disclosed the number of stock options to be awarded, and described in detail the manner in which the exercise price for the options would be determined. *Id.* at 149 (emphasis added). While the plaintiff claimed that the proxy nonetheless violated Section 14(a) because it failed to also give an estimated "grant-date present value of the options" (*id.* at 150), the Second Circuit held that because of the proxy's extensive

[3] Indeed, indicative of its irrelevance in this context, *Resnik* does not even cite *Mendell*, let alone purport to overrule it. If *Resnik* meant to alter the Second Circuit's long-established approach to disclosure duties in the context of a merger, it surely would have discussed the Second Circuit's seminal decision on this subject.

disclosures, "a reasonable shareholder would understand that stock options at the time of their grant have value" (*id*. at 154). *Resnik* is therefore a far cry from this case, where Defendants failed to disclose the objective fact that, in the two months before the shareholder vote, Merrill had suffered losses so large that they threatened to bankrupt Merrill and render BoA insolvent – a fact that no reasonable shareholder could understand without specific disclosure.[4]

Defendants' recycled argument that the securities laws generally "create a system of only periodic disclosures" is irrelevant. *See* Def. Br. at 8 & n.8. As the Court already held, because Section 14(a) imposes specific disclosure obligations in the context of a merger, requiring disclosure of Merrill's "historically large" losses before the vote is "not, as the defendants assert, tantamount to an obligation that a company issue continuous updates of its financial condition." *Bank of America Corp.*, 2010 WL 3448194, at *34. Rather, "it is instead a recognition that Section 14(a) and Rule 14a-9 apply even in a moment of significant 'turbulence' and 'turmoil.'" *Id.* The cases that Defendants have cited in support of their argument – all of which were

[4] The other authorities relied on by Defendants in support of their position are inapposite because they either did not involve a merger, did not concern a Section 14(a) claim, or did not address the omission of a material fact. *See* Def. Br. at 9, nn.9-10. For example, *United Paperworkers Int'l Union v. Int'l Paper Co.*, 985 F.2d 1190, 1198 (2d Cir. 1993), which sustained a direct Section 14(a) claim, did not involve a merger and, as the Court recognized, actually supports the Court's holding that disclosure of material facts is required (*see Bank of America Corp.*, 2010 WL 3448194, at *34). *Seinfeld v. Gray*, 404 F.3d 645, 651 (2d Cir. 2005), also did not involve a merger and, as in *Resnik*, the proxy in *Seinfeld* fully disclosed all material facts. *Id*. at 650 ("The language of the proxy statement is clear."). Similarly, the following cases did not involve a Section 14(a) claim. *See In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 361, 365 (2d Cir. 2010) (Section 11 claim); *Thesling v. Bioenvision, Inc.*, 2010 WL 1337699, at *1 (2d Cir. Apr. 7, 2010) (Section 10(b) claim); *Kapps v. Torch Offshore, Inc.*, 379 F.3d 207, 213 (5th Cir. 2004) (Section 11 claim); *In re Focus Media Holding Ltd. Litig.*, 701 F. Supp. 2d 534, 539 (S.D.N.Y. 2010) (Section 11 claim); *In re N2K, Inc. Sec. Litig.*, 82 F. Supp. 2d 204, 207 (S.D.N.Y. 2000) (Section 11 claim); *In re Canandaigua Sec. Litig.*, 944 F. Supp. 1202, 1208 (S.D.N.Y. 1996) (Section 10(b) claim). *Beck v. Dobrowski*, 559 F.3d 680 (7th Cir. 2009), the only case that Defendants have cited which actually concerned a Section 14(a) claim brought in connection with a merger, did not discuss the duty to disclose. In *Beck*, the "main argument" for why the proxy was misleading was because it "was mailed too soon" to the vote – an allegation that "paradoxically, [had] nothing to do with [the proxy's] content." *Id*. at 685. The remaining allegedly omitted facts, such as unspecified "backup information" about the transaction, were "too feeble to allow the suit to proceed" because "there is no evidence of … materiality." *Id*.

previously considered and rejected by the Court – provide no basis to depart from this well-reasoned holding.[5]

Defendants also argue that the Court incorrectly "relied on *TSC Industries*" to hold that a duty to disclose Merrill's losses existed because "the issues of duty to disclose and materiality are analytically distinct," and, according to Defendants, the *TSC* Court "only analyzed the standard for determining whether omitted information could be considered material." Def. Br. at 10. Defendants are wrong. As the Court correctly recognized, *TSC* makes clear that materiality is the touchstone of the duty to disclose under Section 14(a). In defining materiality, the *TSC* Court noted that its decision would delineate the disclosure duty under Section 14(a), and carefully calibrated the materiality standard to match the scope of the disclosure duty that it desired to impose on issuers of proxy statements. 426 U.S. at 448. Underscoring this point, the Court stated that "if the standard of materiality is unnecessarily low," an issuer would be required to disclose "an avalanche of trivial information." *Id.* at 448-49. Thus, the Supreme Court adopted a standard of materiality that it felt ensured an appropriate "limit" on "the disclosure policy embodied in the proxy regulations." *Id.* at 448. As the Supreme Court's analysis establishes, under Section 14(a), the concepts of materiality and duty to disclose are coterminous.[6]

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[5] As the Court concluded in the Opinion, none of these cases "arose in a situation in which shareholders were asked to vote on a merger" and, moreover, these cases actually recognize that "intra-quarter updates may be required, if intervening events trigger a duty to disclose" – precisely as occurred here. *Bank of America Corp.*, 2010 WL 3448194, at *32 & n.10. *See, e.g.*, *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1433-1434 (3d Cir. 1997); *Blum v. Semiconductor Packaging Materials Co.*, 1998 WL 254035, at *2 (E.D. Pa. May 5, 1998).

[6] Defendants also attempt to relitigate their contention that their "general" statements and warnings concerning current economic conditions rendered their omission of Merrill's losses immaterial. *Bank of America Corp.*, 2010 WL 3448194, at *34; *see* Def. Br. at 10, n.12. In previously rejecting this argument, the Court determined that these warnings were insufficient to allow "shareholders to make an informed choice" because "[b]y the time the Joint Proxy issued, the stormy forecast for the fourth quarter was not merely a projection: the storm had arrived." *Bank of America Corp.*, 2010 WL 3448194, at *33-34. In addition, Defendant Lewis himself admitted that the "magnitude of the loss … at Merrill Lynch really stunned people," reflecting that Defendants' "general" statements were insufficient disclosures. Complaint ¶ 149. Defendants offer no new facts or law that might provide any basis for certifying or reconsidering this well-reasoned conclusion.

For these reasons, Defendants' contention that only "SEC rules dictate the specific information … necessary for shareholders to exercise an informed choice," and that the Court is prohibited from making this decision "on its own," is wrong. Def. Br. at 11. In *Maldonado v. Flynn*, 597 F.2d 789, 796 & n.9 (2d Cir. 1979), the Second Circuit rejected the notion that SEC regulations exclusively "dictate" what information must be disclosed under Section 14(a). In sustaining a Section 14(a) claim alleging that a proxy omitted material facts concerning the compensation of officers and directors, the Second Circuit held that, while "Schedule 14A sets minimum disclosure standards" for compensation disclosure, "[c]ompliance with this schedule does not necessarily guarantee that a proxy statement satisfies Rule 14a-9." *Id.* (emphasis added).[7]

In addition, Defendants' argument that Congress "left it to the SEC" to determine the adequacy of proxy disclosures conveniently ignores the fact that the SEC has determined that BoA's proxy violated Section 14(a) and Rule 14a-9 by failing to disclose Merrill's losses, and has sued BoA in this Court for the same conduct alleged in this Action. Moreover, in its guidance on what information must be disclosed to investors in advance of a shareholder vote, the SEC has repeatedly made clear that "material changes" such as Merrill's unprecedented losses must be disclosed, regardless of whether these events arise before or after a proxy's issuance.[8] *See* Proxy

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[7] Moreover, although the existence of an SEC regulation requiring disclosure is not required to trigger a duty to disclose, as set forth in Lead Plaintiffs' brief in opposition to Defendants' motions to dismiss, Defendants were independently required to disclose Merrill's losses by Schedule 14A and Item 303 of Regulation S-K, which required disclosure of "known trends" that have a material impact on "liquidity," "capital resources," or "income." 17 C.F.R. § 229.303. *See* Lead Pls. Br. in Opp. to Defs. Mot. to Dismiss at 41-42; *see also In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 70-72 (2d Cir. 2001) (violation of Item 303 actionable under the Exchange Act). While Defendants asserted that Schedule 14A did not apply, they conceded that the requirements of Form S-4, which also incorporate the disclosure requirements of Item 303, did apply. *See* BoA Defs. Reply Br. in Supp. of Mot. to Dismiss at 25 & n.22.

[8] In their motion, Defendants focus exclusively on Merrill's October losses, and ignore the losses Merrill incurred in November. However, as Lead Plaintiffs alleged, and the Court held, it is Second Circuit law that Defendants had a duty to disclose Merrill's November losses and ensure that the Proxy accurately disclosed all material facts as of the date of the shareholder vote. *See, e.g.*, *Parklane*, 558 F.2d at 1089, n.3 ("This court has construed the rule to encompass the omission of significant facts subsequent to the original dissemination of the proxy statement.") (quoting *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1297, n.15 (2d Cir. 1973)). Indeed, as the Court held, the "losses were well known to BofA's executives and, in November, amounted to $1 billion per week," and were thus required to be disclosed. *Bank of America Corp.*, 2010 WL 3448194, at *34. Accordingly, the Court sustained Lead

Rule-Comprehensive Review, Exchange Act Release No. 34-23789, 1986 WL 722059, at *5 (Nov. 10, 1986) ("When there have been material changes in the proxy soliciting material or material subsequent events . . . , an additional proxy card, along with revised or additional proxy solicitation material, should be furnished to security holders."); SEC Staff Report on Proxy Solicitations, Exchange Act Release No. 34-16343, 1979 WL 173161, at *5 (Nov. 15, 1979) ("It is of overriding importance . . . that shareholders be given timely and accurate information of material changes" under Rules 14a-1 and 14a-9). By Defendants' own standard, the SEC's conclusion that BoA violated Section 14(a) by failing to disclose Merrill's losses, coupled with the agency's longstanding guidance that such "material changes" must be disclosed, is powerful confirmation that the Court's Opinion sustaining Lead Plaintiffs' Section 14(a) claim was correct.

Finally, Defendants' various arguments that the Court's Opinion "creates the potential for confusion" are without merit. *See* Def. Br. at 11-12. First, Defendants' assertions that the Opinion departs from the prevailing understanding of disclosure duties under Section 14(a) and "admits of no ready limiting principle" is wrong. Def. Br. at 12. The Court's Opinion stands for the narrow proposition that a defendant violates Section 14(a) when it solicits shareholder approval of a merger without disclosing that the target company has suffered losses that were not only highly material, but so "historically large" that they caused the acquiring company to debate terminating the merger and rendered the target company insolvent and bankrupt. *Bank of America Corp.*, 2010 WL 3448194, at *33. Rather than departing from accepted standards, as set forth above, the Court's narrow holding scrupulously adheres to longstanding Supreme Court and Second Circuit precedent making clear that disclosure of all material facts was required. *See TSC*, 426 U.S. at 448; *Mendell*, 927 F.2d at 674-75.

Plaintiffs' Section 14(a) claim for Defendants' "failure to disclose Merrill's losses of October and November 2008." *Id.* (emphasis added).

Second, Defendants' suggestion that the Court's Opinion could be construed to require disclosure of "favorable monthly results" or "results of operations … on a daily basis" is incorrect. Def. Br. at 12. This is not a case about the omission of "favorable" information or the provision of mundane daily updates. This is a case about a Company that failed to disclose that, in the two months before the shareholder vote on one of the largest mergers in Wall Street history, the target company had suffered losses immense enough to render one of the biggest banks in the world insolvent. Defendants' speculative attempts to misconstrue the Court's clear holding defy reality and provide no basis for granting certification or reconsideration.

2. Whether Defendants Were Required To Disclose Merrill's Losses Involves Issues Of Fact Not Appropriate For Certification

As noted above, *Mendell* makes clear that Defendants were required to disclose all material facts relating to the merger. In turn, as the Court held, both *TSC* and *Mendell* establish that the determination of materiality "requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact." *Bank of America Corp.*, 2010 WL 3448194, at *19. As Judge Buchwald recently held in denying a motion to certify a similar question for interlocutory appeal, determining the materiality of omitted information requires the resolution of factual matters reserved for the jury, and thus does not present a controlling question of law that may be certified to the Second Circuit. *See Ambac*, 693 F. Supp. 2d at 285 ("materiality of Ambac's nondisclosure … is a mixed question of law and fact, rendering it inappropriate for interlocutory review").

3. Certification Will Not Materially Advance The Litigation

As set forth above, the Second Circuit has <u>already held</u> that, in a merger proxy, Defendants are under a duty to disclose all material facts relating to the transaction. Defendants have cited no

controlling authority to the contrary. Consequently, it is virtually inconceivable that Defendants could prevail on appeal. Therefore, rather than advancing this litigation, the certification of such an unsuccessful appeal would only materially delay this litigation. *See, e.g.*, *E.E.O.C. v. Maggies Paratransit Corp.*, 351 F. Supp. 2d 51, 53, 54 (E.D.N.Y. 2005) (given "meager likelihood of success should [defendant] be allowed to appeal, such an appeal cannot be viewed as materially advancing the litigation").

B. DEFENDANTS' SECOND QUESTION DOES NOT PROVIDE A BASIS FOR INTERLOCUTORY APPEAL

Defendants' second proposed question, whether shareholders of the acquiring corporation in a merger can demonstrate transaction causation under Section 14(a) when they did not buy, sell, or exchange their shares, does not constitute an issue as to which there is any ground for difference of opinion. Notably, although Defendants now seek certification or reconsideration of this issue, they did not even move to dismiss the Complaint on this ground – indeed, the phrase "transaction causation" does not appear once in their motion to dismiss briefs. In any event, Defendants do not cite a single authority supporting their argument that it is of any legal significance whether plaintiffs bought, sold, or exchanged their shares in the merger, and the language of Section 14(a) as well as the unambiguous jurisprudence on the issue establishes that it is not.

As the Court recognized, the Supreme Court has held that transaction causation is adequately pled where a shareholder alleges that the proxy solicitation "was an essential link in the accomplishment of the transaction." *Va. Bankshares*, 501 U.S. at 1111; *Mills*, 396 U.S. at 385. A proxy solicitation is an "essential link" in the transaction where it "links a directors' proposal with the votes legally required to authorize the action proposed." *Va. Bankshares*, 501 U.S. at 1102. Thus, the Second Circuit has held that "[i]t has long been clear that a plaintiff alleges sufficient causation when the plaintiff points to a material violation of the proxy rules in a situation where

shareholder approval was necessary for a company to complete an allegedly unfavorable transaction." *Koppel v. 4987 Corp.*, 167 F.3d 125, 137 (2d Cir. 1999) (emphasis added).

The Court properly applied this standard in upholding Lead Plaintiffs' Section 14(a) claim. In order to complete the merger, BoA had to obtain shareholder approval for the issuance of additional shares. *See* Proxy at 88 (listing BoA stockholders' "approval of the issuance of shares of common stock of Bank of America" as a condition necessary to complete the merger). The Proxy expressly solicited BoA shareholders to "vote 'FOR' approval of the issuance of shares of Bank of America common stock in the merger." *Id.* at 24. Thus, the Court found that "the Joint Proxy was an essential link in the transaction because the acquisition could not have occurred without the shareholder vote." *Bank of America Corp.*, 2010 WL 3448194, at *20 n.3. Given the clear Supreme Court and Second Circuit decisions noted above, as well as the undisputed fact that shareholder approval was necessary to effect the merger, Defendants' motion to certify the Court's holding on transaction causation is meritless.

Furthermore, no case has ever held that a shareholder must buy, sell, or exchange shares in order to assert a Section 14(a) claim, and the plain language of the statute makes clear that it prohibits misleading solicitations to shareholders who vote on "any" corporate action, not just those actions which entail such an exchange. *See* 15 U.S.C. § 78n(a) (prohibiting misleading statements "to solicit any proxy or consent or authorization"). Indeed, the suggestion that shareholders cannot maintain Section 14(a) claims where they have not "exchanged or forfeited anything" ignores the extensive authority sustaining Section 14(a) claims in connection with votes that did not require any purchase, sale, or exchange of shares. *See, e.g.*, *N.Y.C. Emps.' Ret. Sys. v. Jobs* 593 F.3d 1018, 1021-23 (9th Cir. 2010) (upholding Section 14(a) claims for alleged misrepresentations in connection with voting on a stock option plan); *Weisberg v. Coastal States Gas Corp.*, 609 F.2d 650, 654 (2d Cir. 1979) (upholding 14(a) claims where "the challenged

'transaction' is the election of the directors, and we have no doubt that the 'proxy solicitation itself . . . was an essential link in the accomplishment' of that transaction"); *Bender v. Jordan*, 439 F. Supp. 2d 139, 170 (D.D.C. 2006) (upholding 14(a) claims alleging false statements in a proxy soliciting votes to re-elect directors because the shareholders' votes "were necessary to elect the management slate, and the solicitations were an essential link in securing those votes"). As these authorities establish, there is no colorable issue as to whether a plaintiff needs to exchange his shares to establish transaction causation under Section 14(a).[9]

C. DEFENDANTS' THIRD QUESTION DOES NOT MEET THE STANDARD FOR INTERLOCUTORY APPEAL

1. There Is No Substantial Ground For Disagreement With The Court's Opinion

In their proposed third question, Defendants seek certification of the Court's finding that the material misstatements and omissions in the Merger Agreement are actionable under the Securities Act. *See* Def. Br. at 15-21. Significantly, Defendants do not challenge the Court's conclusion that these same misstatements and omissions are actionable under Section 10(b) and 14(a) of the Exchange Act. Instead, Defendants contend only that the identical misstatements are not actionable under the "Securities Act of 1933." Def. Br. at 1. Defendants are wrong.

The Court's determination that the Merger Agreement was materially false and misleading under the Exchange Act – a determination which Defendants do not contest – should end any debate as to whether the Merger Agreement is also actionable under the Securities Act. Liability under the Securities Act attaches whenever: (i) "any … untrue statement of a material fact" is (ii)

[9] Even if the law was unclear as to whether an exchange of shares was a necessary prerequisite to maintaining a Section 14(a) claim – which it is not – the alternative urged by Defendants would create the absurd result that an acquiring corporation could fraudulently procure the votes required to take an action which harms its shareholders so long as the transaction is structured in such a way as to avoid an exchange of shares. Such a rule would fly in the face of the purpose of Section 14(a) as construed by the Supreme Court. *See Borak*, 377 U.S. at 431 ("The purpose of [Section] 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation"); *Mills*, 396 U.S. at 381-85 (Congress enacted Section 14(a) so that shareholders would be "able to make an informed choice when they are consulted on corporate transactions.").

made in a registration statement or prospectus ("Offering Documents"). 15 U.S.C. § 77k. As to the first prong, the Second Circuit has made clear that "[t]he test for whether a statement is materially misleading under Section 10(b) [of the Exchange Act] and Section 11" of the Securities Act is the same and, thus, "[t]he same course of conduct" is actionable under both statutes. *Rombach v. Chang*, 355 F.3d 164, 171, 172 n.7 (2d Cir. 2004). Likewise, the Supreme Court has held that the Exchange Act and the Securities Act provide "cumulative" causes of action for the same misstatements, that this "overlap is neither unusual nor unfortunate," and has been "ratified" by Congress. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 384 (1983).

As to the second prong – the presence of the misleading statement in Offering Documents – it is undisputed that the misleading Merger Agreement was incorporated by reference into the Offering Documents for BoA's $10 billion offering of common stock on October 7, 2008. *See Bank of America Corp.*, 2010 WL 3448194, at *60. It is black-letter law that where a misleading statement is incorporated by reference into Offering Documents, as the Merger Agreement was here, that statement is actionable under the Securities Act. *See, e.g.*, *Ambac*, 693 F. Supp. 2d at 277 (where SEC filing containing a "material omission" was "incorporated by reference into the [] Registration Statement," liability under the Securities Act was established); *SEC v. Standard*, 2009 WL 196023, at *26 (S.D.N.Y. Jan. 27, 2009) (violations of the Securities Act established where Offering Documents "incorporated by reference one or more of the false statements at issue"). Accordingly, the fact that the Merger Agreement is materially misleading under the Exchange Act establishes that it is materially misleading under the Securities Act as well.

In an attempt to distinguish between the Exchange Act and Securities Act claims, Defendants make the argument that the Merger Agreement was false only because it was attached to the Proxy, which forms a part of the Exchange Act claims but not the Securities Act claims. *See* Def. Br. at 15-18. Defendants then set forth several arguments attempting to explain why the

Merger Agreement ceases to be actionable under the securities laws when it is considered apart from the Proxy. Each of these arguments is without merit. Indeed, they have all been previously considered and found lacking by the Court.

First, Defendants argue that the Merger Agreement is not actionable as a statement of fact because it was "intended … to allocate risk privately," and the September 18, 2008 Form 8-K to which the Merger Agreement was attached cautioned investors that the agreement was "made solely for the benefit of the parties." Def. Br. at 18. Defendants made this same argument in their motions to dismiss. *See* BoA Defs. Br. in Supp. of Mot. to Dismiss at 3, 14-15; BoA Defs. Reply Br. in Supp. of Mot. to Dismiss at 11-12. The contention that the Merger Agreement, which Defendants were required to disclose to their shareholders and investors, is a "private" document "solely for the benefit of the parties" defies reason. The Merger Agreement was publicly filed on two separate occasions. SEC regulations required that the Merger Agreement be publicly filed precisely because merger terms are not private, and because companies must make full and truthful public disclosure to their investors of all "material definitive agreements." As the Court recognized, when a company makes such public statements, the securities laws require that it "speak truthfully about material issues" – which Defendants did not do. *Bank of America Corp.*, 2010 WL 3448194, at *24 (quoting *Caiola*, 295 F.3d at 331).

Thus, as the Court properly concluded in finding Defendants' argument "unavailing" under the "Second Circuit's approach to disclosure obligations," a defendant "cannot avoid [its] disclosure obligation simply because the information published was contained in an agreement," and the fact "that the merger agreement was a private document … would not, as a matter of law, prevent a reasonable investor from relying on its terms" once it is publicly filed. *Bank of America Corp.*, 2010 WL 3448194, at *26-28 (quoting *Glazer Capital Mgmt., L.P. v. Magistri*, 549 F.3d 736, 741 (9th Cir. 2008) and SEC Titan Report, Exchange Act Release No. 51,283, 2005 WL

1074830 (Mar. 1, 2005)). Defendants have not cited a Second Circuit case – or any case, for that matter – concluding otherwise. Defendants' continued, unsupported disagreement with the Court's conclusion falls far short of establishing the "exceptional" circumstances necessary to grant certification or reconsideration.[10]

Second, Defendants' suggestion that there is "reason to believe" that the Ninth Circuit's decision in *Glazer* "appears inconsistent with Second Circuit precedent" because *Glazer* "discounted the context of the statements at issue in that case" similarly fails. Def. Br. at 19-20. In its Opinion, the Court considered and properly rejected this argument, holding that *Glazer's* reasoning is "consistent with the Second Circuit's approach to disclosure obligations" as set forth in *Wilson v. Great Am. Inds., Inc.*, 855 F.2d 987, 992 (2d Cir. 1988).[11] *Bank of America Corp.*, 2010 WL 3448194, at *28 (emphasis added). This Court also analyzed the "context" of Defendants' statements with great care over the course of 13 pages in the Opinion, cataloguing numerous provisions in the Merger Agreement, explaining their significance to a reasonable investor, and combing through multiple other SEC filings, newspaper articles, and analyst reports that Defendants claimed provided "context" for the misstatements at issue. *Id.* at *18-30. Moreover, the contention that *Glazer* discounted the context in which the statements in that case were made is incorrect. *Glazer* specifically notes that the "context" of the statements in that case – namely, that the company chose to communicate the details of the merger by attaching the merger

[10] Defendants briefly contend that the Court improperly "focused" on the separate language of the Proxy in concluding that the Merger Agreement was misleading. Def. Br. at 17. This is not so. In concluding that the Merger Agreement was misleading, the Court focused closely on the language of the Merger Agreement itself, repeatedly quoting portions of it verbatim and concluding that it "was an affirmative statement that was arguably misleading in view of the undisclosed agreement on pre-closing bonus payments." 2010 WL 3448194, at *28 (analyzing quoted language of Merger Agreement); *see also id.* at *25 (quoting verbatim text of Merger Agreement).

[11] Defendants' attempt to distinguish *Wilson* in a footnote on the ground that it "concerned disclosures made in a proxy statement, not provisions of a private contract" (Def. Br. at 19, n.19) is of no moment. The Merger Agreement was publicly filed and incorporated into the registration statement for a public offering. As the Second Circuit and this Court have held, "upon choosing to speak, one must speak truthfully about material issues" – and this duty applies whether the statement appears in a publicly-filed merger agreement or a publicly-filed proxy. *Caiola*, 295 F.3d at 331.

agreement "to [a] publicly-filed Form 10-K, as opposed to in the body of the [Form 10-K] itself" – was "certainly relevant to the issue of scienter," but that this context simply could not "render these statements inactionable as a matter of law." 549 F.3d at 741 (first emphasis added).[12] *Glazer's* rejection of such a "per se bar to securities liability" (*id.*) is entirely consistent with Second Circuit case law and the Court's careful approach to the context at issue in this case.

Third, Defendants repeat their argument that *Glazer* and the Titan Report are distinguishable from the instant case because they concerned "representations of fact," whereas the Merger Agreement constitutes an inactionable "promise" since the relevant statement was contained in a section labeled "Covenants Relating to Conduct of Business." Def. Br. at 20. This argument, which Defendants made in connection with the motion to dismiss, is no more persuasive the second time around and fundamentally misconstrues the gravamen of the Court's holding. As the Court concluded – regardless of which section or page of the Merger Agreement the statement appeared on – it was actionable as a statement of fact because it portrayed "Merrill's bonus scheme [] merely as a contingent event, when, in fact, the negotiations resulted in an agreement as to both the amount and timing of the bonus payment." *Bank of America Corp.*, 2010 WL 3448194, at *28. In other words, the statement in the Merger Agreement was not an abstract "promise," as Defendants contend, but rather an "affirmative statement" of the present fact of what the actual merger terms were with respect to Merrill's bonus payments, which "was arguably

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[12] None of the cases that Defendants contend are incompatible with *Glazer* contradict *Glazer's* holding that including a statement in an attachment to a 10-K does not erect a "per se" bar to liability. Moreover, these cases are inapposite because they did not address the actionability of statements in a merger agreement. *See Olkey v. Hyperion 1999 Term Trust, Inc.*, 98 F.3d 2, 5 (2d Cir. 1996) (confirming that, consistent with the Court's holding, "a prospectus will violate federal securities law if it does not disclose material objective factual matters … or treats them cavalierly," but concluding, unlike here, that allegedly omitted facts were disclosed); *Halperin v. eBankerUSA.com, Inc.*, 295 F.3d 352, 360 (2d Cir. 2002) (holding that "neither offering memorandum was misleading" because, unlike here, allegedly omitted facts were disclosed); *Shaev v. Hampel*, 2002 WL 31413805, at *8 (S.D.N.Y. Oct. 25, 2002) (concluding, in context of Section 14(a), that alleged omissions were immaterial, unlike here).

misleading in view of the undisclosed agreement on pre-closing bonus payments."[13] *Id*. Defendants' continued disagreement with this conclusion provides no basis for certifying a piecemeal appeal to the Second Circuit. *See, e.g.*, *South African Apartheid Litig.*, 624 F. Supp. 2d at 339 ("leave to appeal is warranted only when the movant demonstrates the existence of 'exceptional circumstances' sufficient to overcome the 'general aversion to piecemeal litigation') (quoting *In re AroChem Corp.*, 176 F.3d 610, 619 (2d Cir. 1999)).

Finally, Defendants contend that the Court's Opinion "placed … in jeopardy" the allegedly common practice of including "cautionary language" in a Form 8-K attaching a merger agreement warning the reader not to rely "on the provisions of the merger agreement as statements of fact." Def. Br. at 21. According to Defendants, this creates "an unfair predicament for issuers" by "alter[ing] … established disclosure practices" to which they purportedly have become accustomed. Def. Br. at 19. Yet, even the self-serving client alerts which Defendants cite in support of this proposition caution against precisely what Defendants did in this case, *i.e.*, hide material information in undisclosed "disclosure" schedules which render the disclosed contractual terms materially misleading (*id*. at 21, n.23):

> Information material to an investor's investment decision contained in a disclosure schedule should be disclosed to investors. Rather than filing the disclosure schedules, the practical way to shield an issuer from claims of misleading or inadequate disclosure is to file excerpts or summaries of those schedules containing material information that should be disclosed. Issuers and practitioners should carefully review and analyze the disclosure schedules to ensure that investors are provided all material information relevant to making an investment decision.

[13] For this reason, Defendants' contention that courts in this Circuit "recognize[] the distinction between a promise … and a factual representation" and hold that such promises do "not ordinarily support a misrepresentation claim," is irrelevant. Def. Br. at 20. Further, because the Court concluded that Section 5.2 misrepresented the present fact of what the actual agreement was with respect to Merrill's bonus payments, Defendants' cited authorities in footnote 20 of their brief (none of which involve either covenants or a merger agreement) are likewise irrelevant. *See Rombach v. Chang*, 355 F.3d 164, 173 (2d Cir. 2004) (forward looking statement as to future financial performance protected under the bespeaks caution doctrine and the PSLRA safe harbor); *Murray v. Xerox Corp.*, 811 F.2d 118, 121 (2d Cir. 1987) (under New York state misrepresentation law, promises actionable only where speaker acts with fraudulent intent); *Matsumara v. Benihana Nat'l Corp.*, 542 F. Supp. 2d 245, 253 (S.D.N.Y. 2008) (same).

See Lyle G. Ganske & James P. Dougherty, Merger Agreement Presentations Take on a Life of Their Own, Jones Day Commentary (July 2005) (emphasis added). Accordingly, even the practice manuals on which Defendants rely – to the extent that they are relevant at all – confirm that the Court correctly held that Section 5.2 in the Merger Agreement was materially misleading for the purpose of the Securities Act and the Exchange Act.

2. Certification Will Not Materially Advance The Litigation

Further, certification of this issue will not materially advance the litigation. This is because, regardless of whether the Court certifies this issue under the Securities Act, Lead Plaintiffs' claims under the Exchange Act relating to the identical misstatements in the Merger Agreement – which Defendants have not challenged on this motion – will proceed. Accordingly, certification will neither narrow the issues in discovery nor the scope of actionable misstatements at issue in this case.

IV. CONCLUSION

For the reasons set forth above, Defendants' motion should be denied.

Dated: September 24, 2010

Respectfully submitted,

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