UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE BANK OF AMERICA CORP. SECURITIES, DERIVATIVE, AND EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) LITIGATION	Master File No. 09 MD 2058 (PKC) ECF CASE
THIS DOCUMENT RELATES TO: The Consolidated Securities Action	

STATEMENT OF UNDISPUTED FACTS
PURSUANT TO LOCAL CIVIL RULE 56.1 IN SUPPORT OF
LEAD PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56.1 of the Local Rules of the United States District Court for the Southern District of New York, Court-appointed Lead Plaintiffs the State Teachers Retirement System of Ohio, the Ohio Public Employees Retirement System, the Teacher Retirement System of Texas, Stichting Pensioenfonds Zorg en Welzijn, represented by PGGM Vermogensbeheer B.V., and Fjärde AP-Fonden, and Plaintiff Grant Mitchell, contend that there is no genuine dispute to be tried with respect to the following facts.

I. BoA's Accretion/Dilution Analysis Of The Merger

1. On Saturday, September 13, 2008, John A. Thain ("Thain"), then the Chief Executive Officer ("CEO") of Merrill Lynch & Co., Inc. ("Merrill"), called Kenneth D. Lewis ("Lewis"), then the President, CEO and Chairman of Bank of America Corp. ("BoA"), to discuss the possibility of a strategic transaction between Merrill and BoA. Exhibit 1 to the Declaration of Steven B. Singer ("Singer Decl."), Deposition of John A. Thain dated Mar. 22, 2012 at 48:9-50:5.

2. In connection with a potential transaction between BoA and Merrill, BoA began its due diligence of Merrill on September 13, 2008. Singer Decl. Ex. 2, Deposition of Kenneth D. Lewis dated Mar. 27, 2012 ("Lewis Tr.") at 36:5-37:2.

3. Based on its due diligence of Merrill, BoA reached certain conclusions concerning Merrill's financial performance. First, BoA learned that Merrill expected to report "break-even" results for the fourth quarter 2008, meaning "[n]o profits, no losses." Singer Decl. Ex. 2, Lewis Tr. at 56:13-21; Singer Decl. Ex. 3, Plaintiffs' Exhibit ("PX") 277 at BAC-502-WLRK 00012899.

4. Second, BoA determined that Merrill had adequate capital to support its asset base and did not need to reduce its balance sheet. Singer Decl. Ex. 3, PX 277 at BAC-502-WLRK 00012900.

5. Third, BoA determined that Merrill's liquidity position was in "better shape than the market had been speculating." Singer Decl. Ex. 4, Deposition of Jeffrey Brown dated Feb. 15, 2012 ("Brown Tr.") at 30:6-22.

6. The accretive/dilutive impact of the transaction was one of the factors that BoA considered when negotiating and pricing its acquisition of Merrill. Singer Decl. Ex. 5, Deposition of Gregory M. Curl dated Jan. 22, 2012 ("Curl Tr.") at 63:21-65:13; Singer Decl. Ex. 6, Deposition of David M. Belk dated Jan. 27, 2012 ("Belk Tr.") at 27:17-28:2.

7. Estimated accretion or dilution per share in connection with a business combination "identifies the projected either additive or deductive nature of [] a given transaction on earnings per share." Singer Decl. Ex. 6, Belk Tr. at 25:1-6.

8. Accretion/dilution representations indicate "at a given point in time whether the transaction is projected to be additive or dilutive to a combined company's earnings per share." Singer Decl. Ex. 6, Belk Tr. at 28:3-11.

9. With respect to accretion and dilution in connection with a proposed business combination, Lewis testified:

> Q. Generally when did you want to see a deal be accretive by?
>
> A. You would ideally, and sometimes you would have to weigh the strategic benefits versus the immediate dilution/accretion, ideally you would want it to be at least break-even in the second year and cumulatively accretive in the third year. That would kind of be a really good circumstance.

Singer Decl. Ex. 2, Lewis Tr. at 44:12-21.

10. In response to the question "Why was [accretion/dilution] important to you? I mean, I'm talking about dilution/accretion in general and what you testified as to how it becomes accretive," Lewis testified, "Well, ultimately you get a multiple on your earnings, generally, in

the marketplace, and to the extent you can get more earnings with the transaction than not, then the value of the stock goes up." Singer Decl. Ex. 2, Lewis Tr. at 44:24-45:11.

11. When asked during his deposition "And you are aware in this case – accretion was important to you in doing this deal, right? I think you testified that that was something you were very focused on; is that fair to say," Lewis testified, "Right." Singer Decl. Ex. 2, Lewis Tr. at 170:12-17.

12. On September 14, 2008, Gregory Curl ("Curl"), then BoA's Vice Chairman of Corporate Development, and Gregory J. Fleming ("Fleming"), then the President of Merrill, met to negotiate the terms of the proposed acquisition of Merrill. Singer Decl. Ex. 5, Curl Tr. at 70:14-18; Singer Decl. Ex. 7, Deposition Transcript of Gregory J. Fleming dated Feb. 23, 2012 ("Fleming Tr.) at 32:24-33:5, 73:24-74:17; Singer Decl. Ex. 2, Lewis Tr. at 36:20-37:22.

13. On September 14, 2008, Curl and David Belk ("Belk"), then a member of BoA's Corporate Development group, presented Lewis with a proposed purchase price of $29 per Merrill share, and an accretion/dilution analysis based on the assumption that BoA would purchase Merrill at a price of $29 per share, among other potential price points. Singer Decl. Ex. 2, Lewis Tr. at 37:12-14, 39:4-40:6.

14. The initial accretion/dilution analysis valuing Merrill shares at $29 that Curl and Belk presented to Lewis on September 14, 2008 projected that the transaction would be dilutive in 2009 and 2010. Singer Decl. Ex. 2, Lewis Tr. at 39:4-40:6.

15. Lewis testified that the initial accretion/dilution analysis that Curl and Belk presented to him on September 14, 2008 "didn't fit my general guidelines" and "seemed a little too dilutive." Singer Decl. Ex. 2, Lewis Tr. at 39:4-40:6, 45:12-19.

16. Lewis further testified:

Q. Okay. And when you came to – when Mr. Curl came to you first and said $29 per share, what did you say in response to that?

A. Well, I can't recall the accretion and dilution numbers now, but it seemed a little too – it seemed a little too dilutive and we didn't get the accretion back soon enough. And so I told him that we had to go back and either get a better price or we had to look more carefully at the synergies and the cost reductions, and he did.

Singer Decl. Ex. 2, Lewis Tr. at 39:4-40:6.

17. Lewis testified that Curl and Belk presented Lewis with a revised accretion/dilution analysis later on September 14, 2008 that contained "more expense savings." Singer Decl. Ex. 2, Lewis Tr. at 39:4-40:6.

18. The revised analysis that Curl and Belk presented to Lewis on September 14, 2008 projected 2.5% dilution in 2009, 0.3% accretion in 2010 and 3.6% accretion in 2011. Singer Decl. Ex. 8, PX 564 at BAC-ML-CL00487850; Singer Decl. Ex. 2, Lewis Tr. at 47:15-48:6.

19. Lewis testified that the revised accretion/dilution analysis that Curl and Belk presented to him on September 14, 2008 "showed the accretion" of "the deal that [BoA] settled on and that [BoA] announced." Singer Decl. Ex. 2, Lewis Tr. at 46:2-15.

20. Lewis further testified that the expected accretive/dilutive impact of the proposed acquisition of Merrill in the revised analysis that Curl and Belk presented to Lewis on September 14, 2008 "was better, that is less dilution and more accretion." Singer Decl. Ex. 2, Lewis Tr. at 39:25-40:6.

21. Lewis testified that on September 14, 2008, after reviewing the revised accretion/dilution analysis presented by Curl and Belk, he agreed to present the proposed transaction to BoA's board of directors ("BoA Board"), and recommend that they approve it:

Q. So you said to Mr. Curl, okay, the accretion/dilution analysis is fine, and you agreed to $29 a share, correct?

A. Right. Well, I agreed to take that to the board. I mean, I didn't have that power.

Q. Right. You agreed to take that to the board and to recommend that the board do it, right?

A. Correct.

Singer Ex. 2, Lewis Tr. at 48:14-49:7.

22. BoA convened a special meeting of the BoA Board via teleconference beginning at approximately 5 P.M. EST on Sunday, September 14, 2008 (the "September 14 Meeting"). Singer Decl. Ex. 9, PX 51 at UR-BAC-ML-NYAG 00003747.

23. BoA's then-Chief Financial Officer ("CFO"), Joe L. Price ("Price") and representatives of BoA's outside advisors, J.C. Flowers & Co. and Fox-Pitt Kelton Cochran Caronia Waller ("FPK"), and BoA's outside counsel, Wachtell, Lipton, Rosen & Katz ("Wachtell"), also participated in the September 14 Meeting. Singer Decl. Ex. 9, PX 51 at UR-BAC-ML-NYAG 00003747.

24. Charles K. Gifford ("Gifford"), a BoA Board Member, testified that during the September 14 Meeting, Price represented to the BoA Board that the proposed acquisition of Merrill would create "modest dilution in the first year and a little bit of accretion the second year and growing." Singer Decl. Ex. 10, Deposition of Charles K. Gifford dated Dec. 8, 2011 ("Gifford Tr.") at 69:4-22.

25. In opining that the proposed acquisition was fair to BoA's shareholders, J.C. Flowers and FPK jointly presented an accretion/dilution analysis of BoA's proposed merger with Merrill at the September 14 Meeting that projected 2.5% dilution in 2009, 0.3% accretion in

2010, and 3.6% accretion in 2011. Singer Decl. Ex. 11, PX 197 at BAC-ML-NYAG00017739; Singer Decl. Ex. 9, PX 51 at UR-BAC-ML-NYAG00003751, -753.

26. During the September 14 Meeting, members of the BoA Board discussed the financial rationale for buying Merrill, and this discussion included consideration of the accretion/dilution impact of the transaction over time. Singer Decl. Ex. 10, Gifford Tr. at 44:13-19.

27. Gifford testified that the financial rationale of a transaction (which included the accretion/dilution analysis) was one of the "principal four issues" he considered in evaluating a proposed merger. Singer Decl. Ex. 10, Gifford Tr. at 43:14-44:19.

28. Gifford testified that the analysis of the accretive/dilutive impact of the proposed merger presented at the September 14 Meeting was "very satisfactory for a transaction like this." Singer Decl. Ex. 10, Gifford Tr. at 80:12-23.

29. On September 14, 2008, the BoA Board unanimously approved the merger with Merrill (the "Merger"). Singer Decl. Ex. 9, PX 51 at UR-BAC-ML-NYAG00003753, -754.

II. Defendants' Statements Concerning The Accretion/Dilution Analysis

30. On September 15, 2008, BoA and Merrill issued a press release (the "September 15 Press Release") announcing the proposed Merger. Singer Decl. Ex. 12 at BAC-ML-NYAG10069116.

31. Among other things, the September 15 Press Release stated that the "acquisition is expected to be accretive to earnings by 2010." Singer Decl. Ex. 12 at BAC-ML-NYAG10069116.

32. On September 15, 2008, BoA and Merrill issued a slideshow entitled "Creating the Premier Financial Service Company in the World" which stated, among other things, that the

Merger was expected to be 3% dilutive in 2009 and "breakeven" in 2010. Singer Decl. Ex. 13, PX 568 at BAC-SEC-LIT00177216.

33. During a conference call with analysts on September 15, 2008, in order "to help you [analysts and investors] analyze the transaction," Price stated that BoA "estimate[s] the transaction to be 3% dilutive in the first year and breakeven to slightly accretive in the second year before restructuring charges." Singer Decl. Ex. 14, PX 584 at BAC-ML-NYAG00309891.

34. On November 3, 2008, BoA and Merrill filed their Definitive Joint Proxy on Form DEFM14A with the SEC (the "Joint Proxy"). Singer Decl. Ex. 15.

35. In a section of the Joint Proxy titled "Bank of America's Reasons for the Merger; Recommendation of the Bank of America Board of Directors," the Joint Proxy stated as follows:

> In reaching its conclusion to approve the merger agreement, the Bank of America board considered a number of factors, including the following material factors:
>
> …
>
> The fact that application of such potential expense savings and other transaction-related assumptions and adjustments to the combined net income forecasts for Bank of America and Merrill Lynch made by various third-party brokerage firms and published as consensus estimates by First Call would result in the combination being 3.0% dilutive in 2009 and breakeven in 2010[.]
>
> …
>
> The Bank of America board of directors evaluated the factors described above and reached a consensus that the merger was advisable and in the best interests of Bank of America and its stockholders.
>
> …
>
> The Bank of America board of directors determined that the transaction was in the best interests of Bank of America and its stockholders and the board voted unanimously to approve the merger agreement and recommends that Bank of America stockholders vote "FOR" the issuance of Bank of America common stock in the merger.

Singer Decl. Ex. 15, at 54-55.

36. The Joint Proxy incorporated by reference the September 15 Press Release, described above in ¶¶ 30-31. Singer Decl. Ex. 15, at 123.

III. Merrill Suffered Losses Of More Than $7.5 Billion For October 2008 And $5.8 Billion For November 2008

37. Neil A. Cotty ("Cotty") served as BoA's Chief Accounting Officer. Singer Decl. Ex. 16, Deposition of Neil Cotty dated Mar. 15, 2012 ("Cotty Mar. 15 Tr.") at 15:15-24.

38. In response to the question of whether "someone from Bank of America [was] tasked with monitoring or keeping track of Merrill Lynch's fourth quarter results," Price testified that he generally received "updates on [Merrill's] fourth quarter results from . . . Neil Cotty." Singer Decl. Ex. 17, Deposition of Joe L. Price dated April 5, 2012 ("Price Apr. 5 Tr.") at 146:23-147:2.

39. On November 4, 2008, Nancy Meloth, then Merrill's Head of Financial Planning and Analysis, sent an email to Cotty, Merrill's Corporate Controller and Chief Accounting Officer Gary Carlin ("Carlin"), and Merrill's Finance Director Chris Hayward ("Hayward"), which stated in part, "Attached is a summary of the estimated October financials." The attached document, titled "Merrill Lynch & Co. October 2008 P&L (estimate)," reflected a pre-tax loss for the month of October 2008 of $6.113 billion. Singer Decl. Ex. 18, PX 235 at BAC-ML-NYAG 10003552, -553.

40. On November 5, 2008, Cotty forwarded Meloth's November 4 email and attachment to Price and wrote: "Read and weep.. talk to you at 11:30." Singer Decl. Ex. 18, PX 235 at BAC-ML-NYAG 10003552, -553.

41. Minutes from a BoA Board November 7, 2008 teleconference reflect that, after Price "discussed market disruption related charges to Merrill Lynch, leveraged loans, long credit

positions and counterparty risk," Lewis commented that "October may have been the worst month in history." Singer Decl. Ex. 19, PX 135 at UR-BAC-ML-DE 00009948, -949.

42. On November 9, 2008, Carlin sent an email to Cotty containing Merrill's "actual[]" October 2008 results, which reflected a pre-tax loss of $7.536 billion for Merrill, or $4.536 billion after-tax. In this e-mail, Carlin stated that the "numbers speak for themselves." Singer Decl. Ex. 20, PX 238 at BAC-ML-NYAG 80088736, -737, -738.

43. Merrill reported net earnings for 2006 of $7.499 billion. Singer Decl. Ex. 21, Merrill 2006 Form 10-K, at 8.

44. For the first quarter of 2008, Merrill reported a $1.962 billion net loss. Singer Decl. Ex. 22, Merrill 1Q08 Form 10-Q, at BAC-ML-NYAG60001993. For the second quarter of 2008, Merrill reported a $4.654 billion net loss. Singer Decl. Ex. 23, Merrill 2Q08 Form 10-Q, at BAC-ML-NYAG00478403.

45. On November 20, 2008, Merrill's then-Head of Accounting Policy, David Moser, sent an email to Merrill's then-CFO Nelson Chai, Hayward, Carlin and Meloth in which he wrote the following, "we have begun the goodwill impairment process with paul wetzel and his team and due to the significant decrease in BAC stock price, we will be taking a significant write-off of the goodwill, almost certain all of ficc [Fixed Income, Currency and Commodities] and ibk [Investment Banking] (approximately $2.2 billion)." Singer Decl. Ex. 24, PX 227 at BAC-ML-NYAG00013122.

46. Merrill's pre-tax loss for the month of November 2008 totaled $5.807 billion. Merrill's November 2008 pre-tax loss of $5.807 billion was set forth in a document titled "Merrill Lynch Comparison of Estimated to Actual Results Month Ended November 28, 2008 As of December 5, 8pm." On December 5, 2008, this document was emailed by Tom Linden of

Merrill's Corporate Reporting Department to Carlin, among others. On December 7, 2008, Carlin forwarded this document to Cotty, with the message, "What a disaster!" Singer Decl. Ex. 25, PX 244 at BAC-ML-NYAG 00435356 and last page.

IV. The Impact Of Merrill's Fourth Quarter 2008 Losses On Its Capital And Future Earnings Ability

47. Brown testified that tangible common equity "is the cleanest form of capital, typically, that exists. So it's equity of the company." Singer Decl. Ex. 4, Brown Tr. at 73:17-74:2.

48. When asked to explain the meaning of the term "cleanest form of capital," Brown testified, "Common equity is – has the highest loss absorption. There are different elements of capital. There's preferred equity, there's common equity. Common would be what regulators consider the best form of capital." Singer Decl. Ex. 4, Brown Tr. at 74:3-74:9.

49. In response to the question of whether tangible common equity was an important measure of a company's ability to absorb losses and remain solvent, Brown further testified, "The – the regulators mandate certain capital ratios, certain capital targets that define a well-capitalized institution. The regulators don't actually use tangible common equity as a form of defining a well-capitalized institution. So it wasn't necessarily a regulatory-defined minimum. But certainly it was a ratio that the market considered, the market focused on." Singer Decl. Ex. 4, Brown Tr. at 74:10-75:2.

50. A prepared script that accompanied a slide presentation that Price delivered to the BoA Board on December 9, 2008 noted that,

> We have included the tangible common equity ratio on this slide because the institutional investors are specifically focused on this as it represents the most highly leveraged measure of capital. While there is no specific required level, as a rule of thumb, they seem to feel 3% is a minimum. Even though we are focused on this in terms of explaining it to investors, we still believe Tier 1 capital is the best measure for evaluating capital adequacy.

Singer Decl. Ex. 26, PX 12 at BAC-ML-NYAG70303451.

51. With respect to Tier 1 capital, the "well-capitalized standard" is a Tier 1 capital ratio of 6.00%. As set forth in a document titled "Appendix – ML Standalone Tier 1," BoA calculated that Merrill's Tier 1 capital ratio was 4.59% when including $10 billion of funds that Merrill had been allotted from the Troubled Asset Relief Program ("TARP"). BoA further calculated that, excluding the $10 billion in TARP funds that Merrill had been allotted, Merrill's Tier 1 capital ratio was 2.01%. Singer Decl. Ex. 27, PX 390 at BAC-502-WLRK 00058434.

52. With respect to tangible common equity, Brian Moynihan, BoA's current CEO and former President of Global Wealth and Investment Management ("Moynihan"), testified that losses reduce an entity's tangible common equity, and, in turn, its tangible common equity ratio:

> Q. So the tangible common equity was [$]25,559?
>
> A. That's what it says on the paper here.
>
> Q. And if they lost $9 billion after-tax that's a reduction of tangible common equity, isn't it?
>
> A. With no other changes than what it says, that would be the math, yes.

Singer Decl. Ex. 28, Deposition of Brian Moynihan dated Mar. 9, 2012 ("Moynihan Tr.") at 88:6-13, 146:13-21.

53. A document titled, "Script for Ken Lewis Phone Call to John Thain," attached to a December 19, 2008 email from Eric Roth ("Roth"), a partner at Wachtell, to Peter C. Hein ("Hein") and other lawyers at Wachtell, including senior partners Edward D. Herlihy and Nicholas G. Demmo, stated that "the reduction in tangible common equity means that MER must reduce the size of its balance sheet, and the reduction in MER's balance sheet means that MER

will not be capable of generating the same level of earnings as the parties anticipated it would when we agreed to merge." Singer Decl. Ex. 29, PX 397 at BAC-502-WLRK 00002133.

54. Lewis testified that Merrill suffered a "large" reduction in its TCE prior to the shareholder vote. Singer Decl. Ex. 2, Lewis Tr. at 146:15-148:12.

55. When asked whether "the problem with Merrill Lynch was that the losses had reduced its capital so much that the tangible common equity ratio had become very – unacceptably low," Lewis testified, "That's true." Singer Decl. Ex. 2, Lewis Tr. at 146:15-23.

56. During his deposition, Moynihan testified that BoA "had to fill the [capital] hole" caused by Merrill's losses: "The concept was, 'You got to fill the hole' – that was Ken's words: 'You got to fill the hole.'" Singer Decl. Ex. 28, Moynihan Tr. at 86:22-88:10.

57. On November 26, 2008, Brown sent an email to Price and Moynihan, copying Cotty, in which he stated, "Spoke with Eric Heaton and Chris Hayward this morning on balance sheet options," regarding, among other things, "Short term ability to get the balance sheet down at year-end (specifically 12.31)." Singer Decl. Ex. 30, PX 274 at BAC-ML-NYAG70144492.

58. In his November 26, 2008 email, Brown wrote to Price and Moynihan that, with respect to Heaton and Hayward, "They estimate 'no pain' balance sheet target could be $800B." Brown wrote further that "I said the $800B did not sound aggressive enough to me given what I see happen[ing] on our businesses in CMAS [Capital Markets and Advisory Services]. They agreed, and will have conversations next week with Thain and Montag." Tom Montag, as of the date of Mr. Brown's email, was Merrill's President of Global Banking and Markets. Singer Decl. Ex. 30, PX 274 at BAC-ML-NYAG70144492.

59. When asked in his deposition what he meant when he wrote "no pain balance sheet target would be $800 billion," Brown testified that "from the spot balance sheet of $850

billion, [Merrill] thought they could get down to $800 billion without it having a material impact on the business." Singer Decl. Ex. 4, Brown Tr. at 49:7-13.

60. Moynihan responded to Brown's November 26 email on the same day stating, "I think a 600 total [balance sheet] should be goal with [risk-weighted assets] of 225 to 250." Singer Decl. Ex. 30, PX 274 at BAC-ML-NYAG70144492.

61. As discussed further below in paragraphs 81-88, on December 3, 2008, Defendants Lewis, Price, Thain and Cotty met to discuss Merrill's fourth quarter losses and 2009 plan. In an email sent at midnight GMT on December 4, 2008 (which was 7:00 P.M. EST on December 3, 2008), Cotty wrote the following to Moynihan and other BoA executives: "Ken [Lewis] and Joe [Price] spent time with John [Thain] to underscore the importance of the tangible capital ratio and get the balance sheet down. Ken's words 'push as hard as you can and only think about stopping when you think you've pushed too far and then … push some more.'" Singer Decl. Ex. 31, PX 543 (ellipsis in original).

62. Merrill decreased the total assets on its balance sheet by more than $200 billion in the fourth quarter 2008, from $876 billion as of the end of the third quarter of 2008, to $667 billion as of the end of the fourth quarter of 2008. Singer Decl. Ex. 32, PX 278 at 6; Singer Decl. Ex. 33, PX 279 at 53.

63. In response to the question of how a reduction in balance sheet would reduce earnings potential in future years, Brown testified, "So, I believe what we're saying is as equity's coming down, to avoid your capital ratio completely getting crushed, you would also reduce assets to help offset some of that equity deterioration or capital deterioration. But as asset levels are lower, there's less yielding assets on the balance sheet to generate your return in future years." Singer Decl. Ex. 4, Brown Tr. at 75:10-76:4.

64. At his deposition, Moynihan testified that: "How you earn money in financial services is your balance sheet, and if your balance sheet is half as big or less than half as big, it is quite clear that would impact its earnings." Singer Decl. Ex. 28, Moynihan Tr. at 85:20-86:9.

65. In a January 26, 2009 memorandum sent to Merrill employees following his termination from BoA, Thain stated: "Our year-end balance sheet target (which we more than met) was given to us by [BoA]." Singer Decl. Ex. 34, PX 351 at BAC-ML-NYAG00799879.

V. The Impact Of Merrill's Losses On Its Liquidity

66. Brown's responsibilities during the fourth quarter of 2008 also included a "primary need to assess Merrill Lynch's liquidity position." Singer Decl. Ex. 4, Brown Tr. at 31:14-23.

67. Brown testified that significant drivers of the deterioration of Merrill's liquidity position during the fourth quarter of 2008 were the losses Merrill was experiencing, and Merrill having to post collateral on financed assets, stating as follows: "I mean, [to] the best of my recollection, you know, again, Merrill Lynch was having to post a decent amount of collateral. That combined with losses they were experiencing were the main drivers. So those – those would be the most significant [factors]." Singer Decl. Ex. 4, Brown Tr. at 122:6-123:2.

68. When asked questions regarding his discussions with Wachtell in mid-December 2008, Brown testified that "a lot of the drivers of [Merrill's] deteriorating liquidity or cash position [were] the exact same drivers of deteriorated earnings. So in my mind, you couldn't really separate the events." Singer Decl. Ex. 4, Brown Tr. at 119:18-123:2.

69. Merrill lost $35 billion in cash during the first 15 business days of the fourth quarter of 2008. Singer Decl. Ex. 35, PX 272 at BAC-ML-NYAG00867191, -192.

70. On October 21, 2008, Heaton sent an email to Fleming in which Heaton stated:

> "[w]e are at wits end in tsy [treasury]. Business putting us in very difficult spot. We are reaching a point in our liquidity position where we do have to take more aggressive action. Both equities and ficc [Fixed Income, Currency and Commodities] need to shrink to generate cash – we have lost 35b of cash in first 15 business days of this qtr …. Our businesses are too big for our cash position and the market environment."

Shortly thereafter that day, Heaton sent this email to Thain and others. Singer Decl. Ex. 35, PX 272 at BAC-ML-NYAG00867191, -192.

71. Heaton frequently emailed Fleming and other Merrill executives during October 2008 with regard to Merrill's deteriorating liquidity position. Singer Decl. Ex. 36, PX 613 (October 10 Heaton email stating that "[i]t will be another bad cash day – business really needs to slow down / shrink"); Singer Decl. Ex. 37, PX 317 at BAC-ML-NYAG000867185 (October 11 Heaton email stating that "[t]o be blunt – as per my prior message – business needs to shrink and operate defensively – if not, it will be unpleasant"); Singer Decl. Ex. 38, PX 314 (October 17 Heaton email stating that the business "need[s] to work thru the weekend to figure out how to raise cash").

72. BoA measured liquidity in terms of "time to required funding" or "TTF" or "TTRF," which means "how many months [BoA] can continue to meet all funding obligations without raising additional capital." Singer Decl. Ex. 3, PX 277 at BAC-502-WLRK 00012900.

73. Brown testified that TTF was an "important measure" of liquidity. Singer Decl. Ex. 4, Brown Tr. at 88:2-23.

74. A December 19, 2008 Wachtell memorandum titled "Checklist of Potential Issues," which was prepared in connection with Wachtell's analysis of whether Merrill had suffered a material adverse change in its financial condition, stated: "target [Merrill] normally has TTRF of 12 months, now down to about 2 months." Singer Decl. Ex. 3, PX 277 at BAC-502-WLRK 00012900.

75. On December 1, 2008, BoA conducted a public offering of $9 billion in Medium Term Notes, Series L, pursuant to a Prospectus dated May 5, 2006, a Prospectus Supplement dated April 10, 2008, and a Pricing Supplement dated December 1, 2008 (collectively, the "Offering Documents"). This offering was conducted pursuant to the "FDIC's Temporary Liquidity Guarantee Program." Singer Decl. Ex. 39 at BAC-ML-NYAG70142657.

76. A December 2, 2008 email sent by Merrill treasury employee John Thurlow to numerous Merrill executives, including Thain, Fleming and Heaton, stated the following regarding BoA's $9 billion debt offering: "BAC's mammoth FDIC multi-tranche offering, in which BAC raised $9 bn, by far the biggest single FDIC launch to date." Singer Decl. Ex. 40, PX 177 at BAC-ML-NYAG 10007939.

77. On December 4, 2008, Brown sent an email to Belk stating in part:

> The other thing to think about is the following….
>
> BAC standalone. I would not have issued any debt in 4q, 1q, 2q. Due to ML, we raised $9B in debt this week, need to raise another $5B in 1q and $5b in 2q….
>
> How do we think about the cost of this debt…ie) I think you should be including this in the dilution impacts for ML. Their liquidity position at hold-co isn't pretty.

Singer Decl. Ex. 41, PX 13 at BAC-ML-NYAG00899138, -139.

78. In response to this e-mail, Belk asked Brown in a December 4, 2008 email: "This is already reflected in our '09 plan, right?" In response to Belk's question, Brown responded in a December 4, 2008 e-mail that:

> It hurts your #s I know … but this is real … and should be associated with the transaction.

Singer Decl. Ex. 41, PX 13 at BAC-ML-NYAG00899138.

79. The Offering Documents for the December 1, 2008 debt issuance by BoA stated that BoA intended to use the proceeds of the offering for "general corporate purposes." Singer Decl. Ex. 39 at BAC-ML-NYAG70142702.

80. As set forth in a December 19, 2008 email from BoA Treasury employee Brian Rozelle to BoA Treasurer Brown, after the December 5, 2008 shareholder vote and before the Merger closed, BoA issued approximately $10.5 billion in additional debt that was "relate[d] specifically to the Merrill Lynch acquisition." Singer Decl. Ex. 42, PX 282.

VI. The December 3, 2008 Meeting Between Lewis, Price, Thain And Cotty

81. On December 3, Merrill generated a document titled "Merrill Lynch & Co. 2008 4Q Pacing & FY Forecast Scenario," which reflected that Merrill had incurred $10.415 billion in 2008 fourth quarter pre-tax losses to date, and estimated total 2008 fourth quarter pre-tax losses of $11.043 billion and after-tax losses of $7.068 billion. Singer Decl. Ex. 43, PX 566 at BAC-ML-NYAG10016113.

82. Lewis testified that on December 3, 2008, he met with Thain, Cotty and Price to discuss Merrill's "profit plan for 2009" and its "forecast for the fourth quarter," including its "$7 billion after-tax [loss] forecast." Singer Decl. Ex. 2, Lewis Tr. at 111:2-112:18.

83. When asked if he reviewed the December 3, 2008 document titled "Merrill Lynch & Co. 2008 4Q Pacing & FY Forecast Scenario" during the December 3 meeting, Lewis testified: "Yeah, to the best of my knowledge, this is what we looked at, yes." Singer Decl. Ex. 2, Lewis Tr. at 113:14-18.

84. When asked what Lewis's response was to the discussion of Merrill's fourth quarter forecast at the December 3, 2008 meeting, Cotty testified that during the December 3 meeting, Lewis said that Merrill's overall pre-tax fourth quarter loss "has to be increased . . . by

$3 billion" on a pre-tax basis, or $2 billion on an after-tax basis. Singer Decl. Ex. 16, Deposition of Neil A. Cotty dated Mar. 16, 2008 ("Cotty Mar. 16 Tr.") at 333:2-18; *see also* Singer Decl. Ex. 2, Lewis Tr. at 117:13-121:18; Singer Decl. Ex. 44, PX 11.

85. At approximately 6:00 P.M. on December 3, 2008, Merrill generated a revised forecast titled "Merrill Lynch & Co. 2008 4Q Pacing & FY Forecast Scenario 12/3/2008 (Revised 6PM)." Singer Decl. Ex. 44, PX 11 at BAC-ML-NYAG10006608.

86. When asked whether the $3 billion of losses on a pre-tax basis (or $2 billion on an after-tax basis) were formally added to Merrill's loss reports after the meeting that Lewis had with Thain, Cotty, and Price on December 3, Lewis testified: "Yes. To the best of my knowledge, it was actually formally added…." Singer Decl. Ex. 2, Lewis Tr. at 121:4-12.

87. The revised 6:00 P.M. forecast reflected a 2008 fourth quarter estimated pre-tax loss for Merrill of $14.043 billion, or approximately $9 billion after-tax. Singer Decl. Ex. 44, PX 11 at BAC-ML-NYAG10006610.

88. The revised 6:00 P.M. forecast noted that this $14.043 billion pre-tax loss figure included "No goodwill write-off," and thus did not include the $2.2 billion goodwill impairment described in paragraph 45, above. Singer Decl. Ex. 44, PX 11 at BAC-ML-NYAG10006609. Including the goodwill impairment, Merrill's fourth quarter losses were in excess of $16.2 billion pre-tax.

89. Affirming testimony that Brown had previously provided to the New York Attorney General, Brown testified that, after the December 3 meeting, he told Price "that we should disclose. That the losses were meaningful enough." Singer Decl. Ex. 4, Brown Tr. at 146:13-23; *see generally* Brown Tr. at 144:8-150:4.

90. Brown also affirmed his prior testimony before the New York Attorney General that Price stated in response "that counsel did not deem it to be an event of required disclosure." Singer Decl. Ex. 4, Brown Tr. at 147:14-17; *see generally* Brown Tr. at 144:8-150:4.

91. Brown further affirmed his prior testimony before the New York Attorney General that he told Price that he did not want to be "talking through a glass wall over a telephone" to Price if no disclosure was made. Singer Decl. Ex. 4, Brown Tr. at 147:11-148:2; *see generally* Brown Tr. at 144:8-150:4.

VII. Lewis Reiterated The Previously Disclosed Accretion/Dilution Analysis At The Shareholder Vote

92. On December 5, 2008, BoA held a special meeting for BoA shareholders in connection with the vote on the Merger. Singer Decl. Ex. 45, PX 567 at BAC-ML-NYAG 80003755.

93. The transcript of the December 5 shareholder meeting reflects that the following exchange occurred:

> **PARTICIPANT**: You didn't respond to the lady's comment. This will dilute our shares. Will it not? Yes or no; not in the future, someday, but this afternoon?
>
> **MR. LEWIS**: We have said as I recall in the presentation that we will have dilution in the first year, break-even in the second; and then accretion in the third.
>
> **PARTICIPANT**: Oh good, okay….

Singer Decl. Ex. 45, PX 567 at BAC-ML-NYAG 80003774.

VIII. Lewis Testified That The Accretion/Dilution Analysis Had Significantly Changed By The Date Of The Vote

94. At his deposition, Lewis testified:

Q. Now, as of December 5th, 2008, the numbers set forth in the September 15 presentation regarding accretion and dilution, they were no longer accurate, correct?

A. They were not these numbers, no.

Q. These numbers – the numbers set forth on page 16 of Plaintiffs' Exhibit 568 were not accurate, correct?

A. They had changed to this.

Q. And that was as of December 5th, 2008, right?

A. Yes.

Q. And when you say – I'm sorry, when you say it had changed – they had changed to this, what is the "this" you are referring to? The figures set forth in Mr. Price's December 9th board presentation?

A. Meaning they were different than these, yes.

Singer Decl. Ex. 2, Lewis Tr. at 185:5-186:2.

95. With respect to accretion and dilution, page 16 of PX 568 referenced in the above paragraph sets forth the following: "3% dilutive in 2009" and "Breakeven in 2010." Singer Decl. Ex. 13, PX 568 at BAC-SEC-LIT00177216; Singer Decl. Ex. 2, Lewis Tr. at 185:5-186:2.

96. In contrast, "[t]he figures set forth in Mr. Price's December 9th board presentation," as referenced in Lewis's testimony in ¶ 94, are the following: 13.1% dilution for 2009 and 2.8% dilution for 2010. Singer Decl. Ex. 2, Lewis Tr. at 168:9-169:14, 185:5-186:2; Singer Decl. Ex. 26, PX 12 at BAC-ML-NYAG70303438.

97. Lewis further testified as follows:

Q. That's a significant change in the dilution and accretion analysis, would you agree with that?

A. Yes.

Singer Decl. Ex. 2, Lewis Tr. at 170:8-11.

98. When asked whether it was "fair to say" that the accretion/dilution numbers "have changed dramatically," Lewis testified: "Right." Singer Decl. Ex. 2, Lewis Tr. at 176:4-8.

99. On December 5, 2008, BoA issued a press release announcing that BoA's shareholders voted in favor of the Merger. Singer Decl. Ex. 46 at BofA Securities Lit. FITCH00000262.

IX. The December 9, 2008 BoA Board Meeting

100. On December 9, 2008, the BoA Board met ("December 9 Meeting"). Singer Decl. Ex. 26, PX 12; Singer Decl. Ex. 17, Deposition of Joe L. Price dated April 6, 2012 ("Price Apr. 6 Tr.") at 148:6-10.

101. Price made a presentation to the BoA Board at the December 9 Meeting, during which he told the BoA Board that Merrill was forecasted to have a $14 billion pre-tax and $9 billion after-tax loss for the fourth quarter of 2008. The $14 billion loss figure Price reported to the BoA Board at the December 9 Meeting did not include the $2.2 billion goodwill impairment described in paragraph 45, above. Singer Decl. Ex. 26, PX 12 at BAC-ML-NYAG70303414; Singer Decl. Ex. 47, PX 75 at BAC-502-WLRK 00000972; Singer Decl. 17, Price Apr. 6 Tr. at 148:6-19.

102. Written remarks prepared by Price for the December 9 Meeting include the statement that "due to the relative size of the Merrill Lynch exposures, the magnitude of the losses is quite significant. . . ." Singer Decl. Ex. 26, PX 12 at BAC-ML-NYAG70303414; PX 75 at BAC-502-WLRK 00000982.

103. During the December 9 Meeting, Price also informed the Board that BoA "anticipate[d] that the [Merger] will be about 13.1% dilutive next year [2009], 2.8% dilutive in 2010 and 2.0% accretive in 2011." Singer Decl. Ex. 26, PX 12 at BAC-ML-NYAG70303438.

104. Price presented this updated loss and accretion/dilution information to the BoA Board through both an oral presentation and a deck of slides. Singer Decl. Ex. 26, PX 12 at BAC-ML-NYAG70303414, -437, -438; Singer Decl. Ex. 47, PX 75 at BAC-502-WLRK 00000972, -982.

105. The deck of slides provided to the Board by Price reflected an estimated $14 billion in pre-tax and $9 billion in after-tax losses at Merrill during the fourth quarter of 2008, and stated that the Merger would be 13.1% dilutive in 2009, 2.8% dilutive in 2010, and 2.0% accretive in 2011. Singer Decl. Ex. 26, PX 12 at BAC-ML-NYAG70303414, -437, -438; Singer Decl. Ex. 47, PX 75 at BAC-502-WLRK 00000972, -982.

106. BoA's then-General Counsel Timothy Mayopoulos ("Mayopoulos") attended the December 9 Meeting. In response to a question as to whether he was "surprised to learn about this $14 billion pretax loss and $9 billion after-tax loss," Mayopoulos testified: "Yes." Singer Decl. Ex. 48, Deposition of Timothy Mayopoulos dated Mar. 30, 2012 ("Mayopoulos Tr.") at 115:2-6.

107. When asked whether, prior to December 9, he was "informed [] that Bank of America had changed the[] projected accretion/dilution projections," Mayopoulos testified: "No, I was not advised of that." Singer Decl. Ex. 48, Mayopoulos Tr. at 109:5-11.

108. Concerning the December 9, 2008 meeting, Mayopoulos testified that he "tried to meet with Mr. Price after this board meeting, but he wasn't available. Then I had planned to meet with him the next day, but the next day I was fired, so I never had a conversation with Mr. Price about it." Singer Decl. Ex. 48, Mayopoulos Tr. at 115:7-14.

109. Mayopoulos also testified that he tried to speak with Price because Mayopoulos wanted to talk about the $9 billion after-tax loss, which was higher than the $7 billion after-tax

loss of which Mayopoulos had been informed the prior week. Singer Decl. Ex. 48, Mayopoulos Tr. at 164:3-165:24, 115:2-14.

110. Although Lewis had informed Mayopoulos that he would be General Counsel of the combined company after the Merger closed, Mayopoulos testified that on the morning of December 10, 2008, Amy Brinkley, BoA's Chief Risk Officer, informed him that "effective immediately I was being terminated as general counsel, that my employment with the company was being terminated . . . and that I needed to leave the premises immediately and not take anything with me." Singer Decl. Ex. 48, Mayopoulos Tr. at 120:25-122:19; Singer Decl. Ex. 49, PX 96 at 12.

111. Mayopoulos testified that after meeting with Brinkley, he was asked to leave and was not permitted to take any personal belongings with him, but that "I kept in my desk drawer a birthstone ring that my grandfather had given me, and I wanted to make sure that I didn't lose that. So I took that with me." Singer Decl. Ex. 48, Mayopoulos Tr. at 125:16-126:11; *see generally* Mayopoulos Tr. at 120:25-126:11.

X. BoA's Communications With Wachtell Concerning The MAC

112. Nicholas Demmo ("Demmo"), a partner at Wachtell, testified that on December 12, 2008, Curl contacted Wachtell and asked if "we [Wachtell] will get them out of the [Merger] contract" by invoking the material adverse effect clause of the merger agreement (the "MAC") because of Merrill's losses. Singer Decl. Ex. 50, Deposition of Nicholas Demmo dated Mar. 5, 2012 at 151:6-154:2.

113. A memorandum prepared by Wachtell, which Roth emailed to Moynihan on December 18, 2008, stated that to invoke the MAC, BoA would "need[] to show that 'unknown events' have occurred that 'substantially threaten the overall earnings potential of the target' in

what the courts call a 'durationally significant manner.'" Singer Decl. Ex. 51, PX 388 at BAC-502-WLRK 00001413.

114. Roth testified that he and Hein analyzed Merrill's current financial condition and its long-term impact on the combined company to determine whether BoA could invoke the MAC. Singer Decl. Ex. 52, Deposition of Eric Roth dated Feb. 16, 2012 ("Roth Tr.") at 205:2-206:11, 220:24-228:14, 266:20-267:3.

115. Garrett Moritz, then an associate at Wachtell, testified that Wachtell reviewed internal BoA and Merrill documents, including emails and analyses of Merrill's fourth quarter 2008 losses and the impact of those losses on Merrill's capital and liquidity. Singer Decl. Ex. 53, Deposition of Garrett Moritz dated Mar. 16, 2012 ("Moritz Tr.") at 21:5-22:7.

116. Roth testified that on December 18, 2008, he and Hein began conducting interviews of BoA personnel in connection with the MAC analysis. Singer Decl. Ex. 52, Roth Tr. at 266:20-267:3.

117. Price's typed notes from a December 17, 2008 meeting with Wachtell reflect that BoA's senior executives told lawyers at Wachtell that Merrill's losses were "disproportionate in size to [its] peers." Singer Decl. Ex. 54, PX 599 at BAC-ML-NYAG-502-00001116.

118. Roth's handwritten notes from a December 16, 2008 meeting reflect that BoA senior executives also told lawyers at Wachtell that "we know that MER disprop. Worse than GS [Goldman Sachs], MS [Morgan Stanley] this Q [quarter]." Singer Decl. Ex. 55, PX 121 at BAC-502-WLRK 00005346.

119. As reflected in the typed version of Roth's notes of a December 18, 2008 meeting with Belk, Cotty and others, Roth wrote the following:

> burned 1/2 [half] of their capital →
>
> $12.5B
>
> now ½ of [t]hat
>
> THIS IS BIG ISSUE.
>
> now @ 1.63%

Singer Decl. Ex. 56, PX 276 at WLRKa00000791.

120. The December 19, 2008 memorandum prepared by Wachtell summarizing discussions with BoA and titled "Checklist of Potential Issues" stated as follows:

> Losses in Q4 have substantially reduced Target's capital. At time of due diligence, Target had tangible common equity of approx. $26b; now has tangible common equity of only $12.6b – a 50% reduction (even after TARP). … Reduction in capital necessitates reduction in balance sheet, which will reduce earnings potential in future years.

Singer Decl. Ex. 3, PX 277 at BAC-502-WLRK 00012900.

121. The same December 19 Wachtell memorandum also states: "Target's need to reduce assets was not known or anticipated at [time of] signing; has become necessary and identified just before Thanksgiving as a necessary step to deal with increasing losses that were not anticipated at time of signing." Singer Decl. Ex. 3, PX 277 at BAC-502-WLRK 00012900.

122. The same December 19 Wachtell memorandum also states that BoA executives informed lawyers at Wachtell that the asset reduction caused a "[l]oss of potential for earning" at a spread of "50 basis points" (or 0.5%) on the assets that Merrill was forced to liquidate. Singer Decl. Ex. 3, PX 277 at BAC-502-WLRK 00012900.

123. In his notes from a December 19, 2008 call with Brown and others, Roth recorded the following:

> Jeff [Brown] - we think we can earn 200
> bp on all

> based on how they
> operate – <u>50bp</u>
> <u>TRADING PLATFORM →</u>
> <u>THINNER SPREAD</u>
>
> if 50 bp on average conservatively –
> giving up <u>$650 mm pre-tax</u> annually

Singer Decl. Ex. 56, PX 276 at WLRKa00000816 (emphasis in original).

124. Brown testified that applying this 0.5% spread that BoA believed it could earn on Merrill's assets, the $200 billion reduction in total assets from Merrill's balance sheet during the fourth quarter of 2008 decreased Merrill's future income by $1 billion per year. Singer Decl. Ex. 4, Brown Tr. at 80:19-81:13, 82:3-82:11.

125. Moynihan testified as follows:

> Q. And since Bank of America was purchasing Merrill Lynch, it would obviously affect Bank of America's earnings streams?
>
> A. Our shareholders were not getting the benefit they were supposed to get. We were giving them a portion of a company to get back earnings gain [and] capital and neither of those were going to be present.

Singer Decl. Ex. 28, Moynihan Tr. at 86:10-21.

126. BoA's pre-tax income for all of 2008 was slightly more than $4 billion, as reported in BoA's 2008 Form 10-K filed with the SEC. Singer Decl. Ex. 57 at BofA Securities Lit. FITCH00000788.

127. According to Roth's handwritten notes from the December 19, 2008 call, Brown discussed with Wachtell the fact that Merrill's liquidity position indicated that Merrill would have been "dead [within] a week" if the Merger did not close. Singer Ex. 56, PX 276 at WLRKa00000815; Singer Decl. Ex. 52, Roth Tr. at 277:16-278:7.

128. Roth's notes also reflect that during the December 19, 2008 call, Brown stated that he "need[ed] to lock up term funding – regulators would be all over me if didn't show adequate liquidity." Singer Ex. 56, PX 276 at WLRKa00000804.

129. Additionally, the December 19, 2008 Wachtell memorandum stated that, as of December 19, 2008, the BoA debt raises due to Merrill totaled $16 billion and would cost $525 million per year, or $1.5 billion in the aggregate over the lifetime of the financing. Singer Ex. 3, PX 277 at BAC-502-WLRK 00012900; Singer Decl. Ex. 4, Brown Tr. at 104:12-107:8.

130. In December 2008, Wachtell also drafted a document titled "Script For Ken Lewis Phone Call To John Thain." That document stated the following:

> The severe impact of these losses on MER's financial condition going forward – and the financial condition of the combined company in the event the merger closed – cannot be overstated. At the time we entered into the Merger Agreement, MER had tangible common equity of approximately $25.6 billion. As a result of MER's anticipated losses and goodwill write-downs this quarter, however, it has managed to burn some $13 billion of capital – or more than half its tangible common equity – in a little over three months.
>
> . . .
>
> There is no question that [Merrill's] massive capital burn stands to reduce the overall earnings potential of MER for years to come: the reduction in tangible common equity means that MER must reduce the size of its balance sheet, and the reduction in MER's balance sheet means that MER will not be capable of generating the same level of earnings as the parties anticipated it would when we agreed to merge.
>
> . . .
>
> We are not blind to the fact that other major investment banks – such as Goldman Sachs and Morgan Stanley – have recently announced Q4 losses. But the losses at Goldman Sachs and Morgan Stanley – each of whom reported about $2 billion in losses on asset bases of $887 billion and $658 billion respectively – pale by comparison to the … losses that MER will sustain this quarter.

> It is clear that the current market dislocations have had a disproportionately adverse effect on MER as compared to other major investment banks.
>
> Under the circumstances, BAC's Board of Directors has serious concerns as to whether it can go forward with the proposed merger consistent with its fiduciary duty to BAC stockholders.

Singer Decl. Ex. 29, PX 397 at BAC-502-WLRK 00002132-33.

XI. BoA's Communications With The Federal Government

131. Lewis testified that on December 17, 2008, he, Price and Moynihan met with U.S. Treasury Secretary Henry Paulson ("Secretary Paulson") and the Chairman of Federal Reserve, Ben Bernanke ("Chairman Bernanke"), in Washington, D.C. Singer Decl. Ex. 2, Lewis Tr. at 233:10-234:17.

132. Lewis testified that during the December 17, 2008 face-to-face meeting with Secretary Paulson and Chairman Bernanke, Lewis "said we were considering a MAC, and I think I said [we] think we have one." Singer Decl. Ex. 2, Lewis Tr. at 235:6-14, 238:6-12.

133. Federal Reserve General Counsel Scott Alvarez ("Alvarez") took handwritten notes of the December 17, 2008 meeting that Lewis, Price and Moynihan had with Secretary Paulson and Chairman Bernanke. Singer Decl. Ex. 58, PX 438 at BOG-BAC-ML-COGR000172.

134. Alvarez's notes of the December 17, 2008 meeting reflect that Lewis explained to Secretary Paulson and Chairman Bernanke, among others, that there had been a "<u>material adverse change</u>" in Merrill's financial condition because, while BoA had "orig[inally] forecast breakeven 4Q" for Merrill, Merrill's fourth quarter losses had consumed "50% [of its] tangible equity" and "destroyed some ability to earn" income in the future. Singer Decl. Ex. 58, PX 438 at BOG-BAC-ML-COGR000172 (emphasis in original).

135. Alvarez's notes of the December 17, 2008 meeting further reflect that Lewis told Secretary Paulson and Chairman Bernanke that, while BoA was "inclin[ed] to call [the] <u>MAC clause</u>" to terminate the merger, Lewis raised the prospect of BoA consummating the merger on the condition that BoA received a taxpayer-funded "guarantee" to "cap [the] losses" that BoA was exposed to from Merrill. Singer Decl. Ex. 58, PX 438 at BOG-BAC-ML-COGR000172, -174 (emphasis in original).

136. In a December 19, 2008 email, BoA associate general counsel Teresa Brenner wrote to Moynihan that, during a separate December 19 call between Wachtell and regulators, Eric Roth "made a very strong case as to why there is a MAC … due to magnitude and duration of future lost earnings." Singer Decl. Ex. 59, PX 104 at BAC-ML-NYAG-502-00000938.

137. According to Alvarez's handwritten notes of a January 9, 2009 meeting between Secretary Paulson, Chairman Bernanke and others during which Merrill's losses were discussed, Paulson stated that the "magnitude of losses breath-taking," that the "losses to be announced so far beyond expectations," and that "losses of ML size will shake [the] market." Singer Decl. Ex. 60, PX 447 at BOG-BAC-ML-COGR00094, -096, -098.

138. On January 16, 2009, BoA filed a Form 8-K with the SEC which attached a press release announcing its fourth quarter and full year 2008 financial results, among other things. Singer Decl. Ex. 61 at 1.

139. The press release attached to the January 16, 2009 Form 8-K stated:

> In view of the continuing severe conditions in the markets and economy, the U.S. government agreed to assist in the Merrill acquisition by making a further investment in Bank of America of $20 billion in preferred stock carrying an 8 percent dividend rate.
>
> In addition, the government has agreed to provide protection against further losses on $118 billion in selected capital markets exposure, primarily from the former Merrill Lynch portfolio. Under the agreement,

> Bank of America would cover the first $10 billion in losses and the government would cover 90 percent of any subsequent losses. Bank of America would pay a premium of 3.4 percent of those assets for this program.

Singer Decl. Ex. 61 at 2.

140. During an interview for the PBS documentary titled "Breaking the Bank," Lewis stated that "the magnitude of the loss . . . at Merrill Lynch really stunned people." Singer Decl. Ex. 62 at 16.

Dated: June 3, 2012
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