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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

BANK OF AMERICA CORPORATION,

Defendant.

No. 10 Civ. _____
ECF Case

**COMPLAINT AND
JURY DEMAND**

Plaintiff Securities and Exchange Commission ("Commission"), for its complaint against defendant Bank of America Corporation ("Bank of America"), alleges as follows:

SUMMARY OF ALLEGATIONS

1. The Commission charges Bank of America with violating the federal proxy rules by failing to disclose extraordinary financial losses at Merrill Lynch & Co., Inc. ("Merrill") prior to the shareholder vote to approve a merger between the two companies.

2. Spurred by Lehman Brothers' collapse and the calamitous repercussions in the financial markets, Bank of America and Merrill negotiated a merger over the weekend of September 13-14 and announced the merger agreement on September 15, 2008. To solicit shareholder votes for approval of the merger, Bank of America and Merrill filed a joint proxy

statement on November 3, scheduling the meetings of their respective shareholders for December 5, 2008. To register the issuance of Bank of America shares to be exchanged in the merger, Bank of America also filed a registration statement on Form S-4 that incorporated the proxy statement as part of the prospectus.

3. Under the rules governing the use of Form S-4, Bank of America was required to disclose material changes to Merrill's affairs that were not reflected in Merrill's quarterly reports or certain other filings. Bank of America did not describe any such material changes in Merrill's affairs in either the proxy or registration statements. Bank of America was also required by law to include in the registration statement an express undertaking to provide an update to shareholders to reflect, prior to the December 5 shareholder meeting, any fundamental changes to the information that had been provided to them. Accordingly, Bank of America represented that it would provide an update to reflect any fundamental change to the information already disclosed.

4. The proxy statement described to shareholders Merrill's financial condition, including its balance sheet and capital position, as of the end of September 2008. By the time of the December 5 shareholder meeting, however, Bank of America had become aware of \$4.5 billion in net losses that Merrill had sustained in October and estimated that Merrill had experienced billions of dollars of additional losses in November — a disastrous performance that represented a fundamental change to the information previously provided to shareholders. Combined, the October results and November estimates constituted approximately one third of the value of the merger at the time of the shareholder vote and more than 60 percent of the aggregate losses that Merrill experienced in the preceding three quarters of the year.

5. Despite its representation that it would update shareholders about fundamental changes to the information previously disclosed, Bank of America kept shareholders in the dark as they were called upon to vote on the proposed merger at the end of a quarter of nearly unprecedented volatility and uncertainty. The absence of any disclosure concerning Merrill's extraordinary losses deprived shareholders of up-to-date information that was essential to their ability to evaluate whether to approve the merger upon the terms presented to them, which had principally been negotiated before Merrill sustained these losses. Bank of America's failure to make any disclosure concerning Merrill's October and November losses violated Bank of America's express undertaking to apprise investors of fundamental changes and rendered its prior disclosures materially false and misleading in violation of the federal securities laws.

6. By virtue of the foregoing conduct, Bank of America, directly or indirectly, violated Section 14(a) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78n(a)] and Rule 14a-9 thereunder [17 C.F.R. § 240.14a-9]. Unless permanently restrained and enjoined, Bank of America will again engage in the acts and transactions set forth in this complaint or in acts and transactions of similar type and object.

JURISDICTION AND VENUE

7. The Commission brings this action pursuant to the authority conferred by Section 21(d) of the Exchange Act [15 U.S.C. § 78u(d)] seeking to restrain and enjoin permanently Bank of America from violating Section 14(a) of the Exchange Act [15 U.S.C. § 78n(a)] and Rule 14a-9 thereunder [17 C.F.R. § 240.14a-9]. The Commission also seeks a final judgment ordering Bank of America to pay a civil money penalty pursuant to Section 21(d)(3) of the Exchange Act

[15 U.S.C. § 78u(d)(3)] and such equitable and other relief that may be appropriate or necessary for the benefit of investors [15 U.S.C. § 78u(d)(5)].

8. This Court has jurisdiction over this action, and venue lies in this District, pursuant to Sections 21(d) and 27 of the Exchange Act [15 U.S.C. §§ 78u(d) and 78aa]. Bank of America, directly or indirectly, has used the mails and the means and instrumentalities of interstate commerce in connection with the acts and transactions alleged herein, some of which occurred in this District. In addition, Bank of America transacted business and maintained an office in this District throughout the relevant period.

THE DEFENDANT

9. **Bank of America**, a Delaware corporation, is a bank holding company and a financial holding company under the Gramm-Leach-Bliley Act. Bank of America's common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and trades on the New York Stock Exchange ("NYSE"). Bank of America's principal offices are located in Charlotte, North Carolina.

OTHER RELEVANT ENTITY

10. **Merrill**, a Delaware corporation, is a wholly-owned subsidiary of Bank of America. Prior to its acquisition by Bank of America on January 1, 2009, Merrill's common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act and traded on the NYSE, and Merrill met the requirements for use of the Commission's Form S-3 for the registration of securities offered in certain transactions under the Securities Act of 1933.

THE VIOLATIONS

The Merger Transaction and Related Filings

11. In mid-September 2008, in the wake of Lehman Brothers' rumored bankruptcy, senior management at Merrill and Bank of America began negotiating the terms of a possible merger. The principal terms of the transaction were negotiated on September 13 and 14, 2008. On the evening of September 14, 2008, the terms of the proposed merger were presented to the boards of directors of Bank of America and Merrill. Both boards unanimously approved the transaction.

12. The merger agreement was signed in the early hours of September 15, 2008 and publicly announced before the opening of the stock market on that day. Under the terms of the merger agreement, Bank of America agreed to provide Merrill shareholders with 0.8595 shares of Bank of America common stock for each share of Merrill common stock. At the time the merger agreement was signed, this exchange ratio represented a price of \$29 for each Merrill share — a 70 percent premium to Merrill's stock price on the prior trading day — and a total deal value of approximately \$50 billion.

13. In October 2008, to register the issuance of new shares of stock to Merrill shareholders in connection with the merger, Bank of America filed a registration statement on Form S-4 and two amendments on Form S-4/A. The registration statement incorporated a proxy statement jointly prepared by Bank of America and Merrill as part of the prospectus, and became effective on October 30, 2008. In order to solicit the approval of their shareholders for the merger, Bank of America and Merrill also filed the joint proxy statement with the Commission on November 3, 2008, and mailed copies of the proxy statement to their respective shareholders. The shareholder meetings for both firms were scheduled for December 5, 2008.

14. Under the rules governing Form S-4, Bank of America was required to describe in the prospectus “any and all material changes in [Merrill’s] affairs that have occurred since the end of the last fiscal year . . . and that have not been described in a report on Form 10-Q or Form 8-K.” Bank of America did not describe any such material changes in Merrill’s affairs in the registration or proxy statements.

15. In the registration statement, Bank of America also undertook, as it was required by law, to “reflect in the prospectus any facts or events arising after the effective date of the registration statement . . . which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement.” In a section of the proxy statement entitled “WHERE YOU CAN FIND MORE INFORMATION,” Bank of America referred shareholders to the registration statement for additional relevant information that it said was not included in the proxy statement.

16. The proxy statement and registration statement, and the documents incorporated by reference into them, provided information to shareholders concerning the financial condition of the two companies and the details of the proposed merger, among other matters. They described Merrill’s financial condition, including its balance sheet and capital position, as of the end of September 2008. As set forth below, however, by the time of the shareholder vote on December 5, Bank of America had become aware that Merrill had sustained extraordinary losses in October and November 2008. Nevertheless, notwithstanding its representation that it would update shareholders of fundamental changes to the information previously provided to them, Bank of America failed to make any disclosure concerning Merrill’s losses before its shareholders voted to approve the merger. Bank of America’s shareholders, therefore, were left to conclude that no fundamental changes existed following September 2008.

Merrill's Third Quarter Results

17. On October 16, 2008, two weeks before the proxy statement was mailed to shareholders, Merrill released its results for the third quarter of the year. These results were subsequently reported on Form 10-Q, which Merrill filed with the Commission on November 5, 2008 and which was prospectively incorporated by reference into the proxy statement. The third quarter results were the most up-to-date information about Merrill's financial condition that was available to shareholders before the December 5 vote on the merger.

18. In its October 16 release, Merrill announced a net loss of \$5.2 billion in the third quarter. That loss reflected a \$5.7 billion write-down from the sale of collateralized debt obligations ("CDOs") that were backed by subprime and other non-prime residential mortgages, and the termination and settlement of guarantees on those securities. In prior quarters, Merrill's CDOs were responsible for multi-billion dollar losses and their sale in the third quarter was touted by Merrill's management as a significant step in "de-leverag[ing] the balance sheet." Earlier in the third quarter of 2008, Merrill's management had described the expected sale of the CDOs as a "significant milestone in our risk reduction efforts" that "will materially enhance the company's capital position and financial flexibility going forward."

19. After Merrill released its third quarter results, the price of its publicly-traded stock rose — reflecting the market's assessment that Merrill's financial prospects had improved. In addition, analysts who covered Merrill forecasted that Merrill's net income in the fourth quarter of 2008 would range from a gain of \$1 billion to a loss of \$1.8 billion — echoing the market's view that Merrill's fourth quarter performance would be a substantial improvement over its \$5.2 billion loss in the third quarter.

20. Consistent with the market's reaction to Merrill's third quarter results, senior management at Bank of America similarly expected that Merrill would break even in the fourth quarter of 2008 and would finally put an end to a series of losses that it had sustained since the third quarter of 2007. Nevertheless, when Bank of America learned of staggering losses at Merrill in October and November that were inconsistent with its own management's expectations, it did not attempt to correct in any way, prior to the shareholder vote on December 5, the prevailing view that Merrill's performance would recover in the fourth quarter.

Merrill's Losses Preceding the Shareholder Vote

21. After the announcement of the merger, and consistent with its rights to information under the merger agreement, Bank of America was regularly kept apprised of Merrill's financial performance. By the second week of November, Bank of America was advised that Merrill had closed its books for the month of October with a net loss of \$4.5 billion, an enormous monthly loss for the firm. The October loss almost equaled the losses that Merrill had sustained in the entire third quarter and represented more than one-third of all losses sustained by Merrill in the first nine months of 2008.

22. In the weeks following the closing of the books for October, Bank of America received additional reports and forecasts from Merrill indicating that Merrill was continuing to sustain massive additional losses in November.

23. On November 12, 2008, Merrill provided Bank of America with an internal report that forecasted a fourth quarter net loss of approximately \$5.4 billion. As Bank of America was aware, the forecast did not include either present valuations or forward-looking projections for some of Merrill's most troubled assets, such as Merrill's distressed correlation trading book and

credit valuation adjustments (“CVA”). Earlier in 2008, Merrill’s management had concluded that, because of the turmoil in the financial markets, such valuations could only be made with sufficient integrity during the month-end closing process. After receiving the forecast, Bank of America’s management made certain revisions to the forecast to account for estimated losses from Merrill’s distressed correlation book and CVA, as well as an expected tax benefit, resulting in a projected quarterly loss of approximately \$5 billion.

24. Based on the revised forecast, Bank of America’s management sought advice from the company’s in-house counsel on its disclosure obligations with respect to Merrill’s performance. In addition, a senior Bank of America executive approached senior executives of Merrill to alert them that a disclosure may be required. The Merrill executives dismissed the suggestion on the ground that Merrill ordinarily did not preannounce results or otherwise provide shareholders with intra-quarter results.

25. Between November 12 and November 20, Bank of America’s in-house and outside counsel conferred on whether a disclosure had to be made in light of the forecasted \$5 billion quarterly loss at Merrill. On November 20, the lawyers erroneously and negligently concluded that no disclosure was necessary because the projected quarterly loss was within the range of losses that Merrill had sustained in the preceding five quarters. In addition, the lawyers concluded that the proxy statement and incorporated filings, which described the challenging market environment and the adverse impact that Merrill could experience as a result, provided adequate warning to shareholders. Although Bank of America and its attorneys determined that disclosing Merrill’s forecasted quarterly performance would be risky and speculative, they did not consider disclosing solely the enormous \$4.5 billion monthly loss that Merrill had sustained

in October, which was known. Nor did Bank of America or its attorneys seek any additional financial data from Merrill to better ascertain the extent of known, as opposed to merely projected, losses as of mid-November, or to learn of any updates as of November 20 (the day they determined that no disclosure was necessary) to the forecasted net loss of \$5 billion.

26. On December 3, two days before the shareholder vote, Bank of America received an updated report reflecting an estimated net loss of \$6.4 billion at Merrill for October and November, and forecasting a quarterly net loss of over \$7 billion. After receiving the forecast, Bank of America's management revised the forecast to add a \$2 billion "placeholder" to the November results, on a pre-tax basis, to reflect additional estimated losses from marks on Merrill's distressed correlation book and CVA based upon Merrill's representation that substantial losses associated with these marks should be expected. In addition to the November placeholder, Bank of America added \$1 billion to the quarterly forecast for anticipated losses in December, resulting in a projected quarterly loss of approximately \$8.9 billion. After receiving the December 3 report, Bank of America's management again consulted the company's in-house counsel and was erroneously and negligently advised that no disclosure was necessary because the forecasted quarterly loss, though larger than before, was still within the range of losses that Merrill had sustained in prior quarters.

27. The following day, December 4, Bank of America was informed that approximately \$800 million of the \$2 billion November placeholder had been recorded in losses on Merrill's distressed correlation book. Although Merrill's books for November were not yet finally closed, this update (which included certain other additional losses) substantially increased the estimated net loss for the month, leaving \$1.2 billion in the placeholder for additional losses

in CVA in November. With this update, the known October net losses and estimated November net losses exceeded \$7.5 billion. Yet Bank of America did not consider whether the update warranted disclosure or otherwise affected Bank of America's prior conclusion that no disclosure was necessary.

28. Bank of America held its shareholder meeting on December 5, 2008. Contrary to its representation that it would update the registration statement to reflect a fundamental change in the information previously provided, Bank of America failed to supplement the registration statement with any information concerning Merrill's massive losses in October and November and the diminution in value to Merrill's assets caused by these losses. Unaware of the diminished value of Merrill, Bank of America's shareholders voted to approve the merger on the terms originally negotiated in September, prior to the time the losses were incurred. The merger closed on January 1, 2009.

29. Several days after the December 5 shareholder meeting, Bank of America received an updated report reflecting a forecasted net loss of over \$12 billion at Merrill for the fourth quarter of 2008. After receiving this forecast, Bank of America's management considered terminating the merger agreement with Merrill on the ground that a material change in Merrill's financial condition had occurred.

30. On January 16, 2009, nearly six weeks after the shareholder vote and two weeks after the merger had closed, Bank of America finally disclosed Merrill's performance in the fourth quarter. It issued a release reporting that Merrill had sustained a net loss of \$15.3 billion for the fourth quarter of 2008 and that Bank of America had obtained \$20 billion in funds under the Treasury Department's Troubled Asset Relief Program to assist in the acquisition. On the next trading day, Bank of America's stock price dropped by nearly 30 percent.

CLAIM FOR RELIEF

Violation of Section 14(a) of the Exchange Act and Rule 14a-9

31. The Commission realleges and incorporates by reference herein each and every allegation contained in paragraphs 1 through 30.

32. As set forth more fully above, to register the issuance of new shares of stock to Merrill shareholders in connection with the merger, in October 2008 Bank of America filed a registration statement on Form S-4 and two amendments on Form S-4/A. The registration statement incorporated the joint proxy statement as part of the prospectus and became effective on October 30, 2008.

33. Under the rules governing Form S-4, Bank of America was required to describe “any and all material changes in [Merrill’s] affairs that have occurred since the end of the latest fiscal year ... and that have not been described in a report on Form 10-Q or Form 8-K.” In addition, as required by the rules, Bank of America included in the registration statement an undertaking that it would “reflect in the prospectus any facts or events arising after the effective date of the registration statement . . . which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement.” This undertaking required Bank of America to update the registration statement, of which the proxy statement was part, to include any fundamental change in Merrill’s financial condition that occurred after the registration statement was effective and the proxy statement was originally distributed to shareholders and before the December 5 shareholder vote.

34. The losses that Merrill was known to have suffered in October and November 2008, combined with the very substantial additional losses that Bank of America estimated that

Merrill had suffered prior to the shareholder vote, constituted a fundamental change to the information previously provided about Merrill's condition and a material change in its affairs since September 2008. Merrill's known losses in this two-month period represented nearly a third of the total value of the merger transaction as of the time of the vote, and nearly 60 percent of Merrill's total losses for the first nine months of the year. In addition, as of the time of the shareholder vote, Bank of America estimated that by the time Merrill closed its books for the month of November, Merrill would have incurred over \$1 billion in additional losses. This undisclosed information was highly material to shareholders' evaluation of whether to approve the merger with Merrill on the terms negotiated more than eleven weeks earlier.

35. Despite the magnitude of the losses at Merrill, Bank of America failed to update the registration statement and proxy statement to reflect this information, thereby violating its express undertaking to update shareholders with regard to fundamental changes to the information previously disclosed and rendering its prior disclosures materially false and misleading.

36. Through these acts, Bank of America, directly or indirectly, by use of the means or instrumentalities of interstate commerce or of the mails, or the facilities of a national securities exchange, solicited or permitted the use of its name to solicit proxies, consents or authorizations in respect of non-exempt securities registered with the Commission pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l] by means of a proxy statement, form of proxy statement, notice of meeting and other communications that contained statements which, at the time and in the light of the circumstances under which they were made, were false and

misleading with respect to material facts or which omitted to state material facts necessary in order to make the statements made therein not false or misleading or necessary to correct statements in earlier communications with respect to the solicitation of a proxy for the same meeting or subject matter which became false or misleading, in violation of Section 14(a) of the Exchange Act [15 U.S.C. § 78n(a)] and Rule 14a-9 thereunder [17 C.F.R. § 240.14a-9].

37. By reason of the foregoing, Bank of America violated and, unless enjoined, will again violate Section 14(a) of the Exchange Act [15 U.S.C. § 78n(a)] and Rule 14a-9 thereunder [17 C.F.R. § 240.14a-9].

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that this Court enter a final judgment:

I.

Permanently enjoining and restraining Bank of America, its agents, servants, employees and attorneys and all persons in active concert or participation with Bank of America who receive actual notice of the injunction by personal service or otherwise, from violating, directly or indirectly, Section 14(a) of the Exchange Act [15 U.S.C. § 78n(a)] and Rule 14a-9 thereunder [17 C.F.R. § 240.14a-9].

II.

Ordering Bank of America to pay a civil monetary penalty pursuant to Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)].

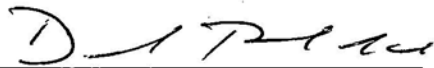
III.

Granting such other and further relief as the Court deems just and proper, including such equitable relief that may be appropriate or necessary for the benefit of investors.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, the Commission demands trial by jury in this action of all issues so triable.

Dated: January 12, 2010
New York, New York

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