

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK :  
By ANDREW M. CUOMO, Attorney General of :  
the State of New York, :  
 :  
Plaintiff, : Index No.  
 :  
- against - : **COMPLAINT**  
 :  
BANK OF AMERICA CORPORATION, :  
KENNETH D. LEWIS and JOSEPH L. PRICE, :  
 :  
Defendants. :  
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Plaintiff, the People of the State of New York, by Andrew M. Cuomo, Attorney General of the State of New York (the “Attorney General”), alleges upon information and belief the following against defendants Bank of America Corporation, (“Bank of America,” “BoA” or “Bank”), Kenneth D. Lewis (“Lewis”), and Joseph L. Price (“Price”) (collectively, “Defendants”):

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## SUMMARY

1. In September 2008, Bank of America agreed to merge with Merrill Lynch. This merger has, in many ways, become a classic example of how the modus operandi of our nation's largest financial institutions led to the near collapse of our financial system. In order to complete its deal, Bank of America's management misled its shareholders by not disclosing massive losses that were mounting at Merrill Lynch so that the shareholders would vote to approve the deal. Once the deal was approved, Bank of America's management manipulated the federal government into saving the deal with billions in taxpayer funds by falsely claiming that they intended to back out of the deal through a clause in the Merger Agreement. Ultimately, this was an enormous fraud on taxpayers who ended up paying billions for Bank of America's misdeeds. Throughout this episode, the conduct of Bank of America, through its top management, was motivated by self-interest, greed, hubris, and a palpable sense that the normal rules of fair play did not apply to them. Bank of America's management thought of itself as too big to play by the rules and, just as disturbingly, too big to tell the truth.

2. Bank of America agreed to buy Merrill over the weekend of September 13-14, 2008, and the parties to the merger announced it on Monday, September 15. On November 2, 2008, the Bank sent out a proxy to shareholders recommending that they approve the transaction in a vote that was scheduled for December 5, 2008. By early November, losses at Merrill were mounting, and surpassed \$7.5 billion in pretax losses for October alone.

3. By early December 2008, Bank of America's top management, including its CEO Ken Lewis and CFO Joseph Price, had two choices: they could tell the Bank's shareholders about the huge material losses at Merrill since the merger proxy was filed, or they could hide them. Bank management chose to hide the information. In particular, Bank management failed

to disclose that by December 5, 2008, the day Bank of America shareholders voted to approve the merger with Merrill Lynch, Merrill had incurred actual pretax losses of more than \$16 billion. Bank management also knew at this time that additional losses were forthcoming and that Merrill had become a shadow of the company Bank of America had described in its Proxy Statement and other public statements advocating the merger. The Bank's management thus left the Bank's shareholders in the dark about fundamental changes at Merrill that were obviously important to their voting decision. These disclosure failures violated New York's Martin Act.

4. Shareholders voted to approve the merger on December 5, and it became effective on January 1, 2009. Merrill's fourth quarter actual losses remained undisclosed to the shareholders until mid-January 2009, well after the deal closed.

5. Having obtained shareholder approval for the deal, Lewis then misled federal regulators by telling them that because 50% of Merrill's tangible equity had disappeared, the Bank could not complete the merger without an extraordinary taxpayer bailout. Lewis went on to say how the Bank needed to "fill the hole" left by the unprecedented losses, which contradicted his public statements to the effect that the Bank would not need additional capital. Remarkably, between the time that the shareholders had approved the deal and the time that Lewis sought a taxpayer bailout, Merrill's actual losses had only increased another \$1.4 billion. The Bank's management has not and cannot explain why they did not disclose to the Bank's shareholders losses so great that, absent a historic taxpayer bailout, they threatened the Bank's very existence.

6. From the moment the merger was announced, Merrill was transparent with BoA management about the losses Merrill was incurring. The Bank's management embedded employees at Merrill's offices, and received real-time updates as Merrill's losses compounded.

The Bank's top management received regular updates on Merrill's deteriorating condition. Price in particular was intimately familiar with the losses, and had a practice of reviewing and commenting on real time reports of actual losses from Merrill's internal systems.

7. On November 13, when Price knew of at least approximately \$5 billion in after tax losses, Bank of America's General Counsel, Timothy Mayopoulos, and lawyers from its outside law firm, Wachtell, Lipton, Rosen & Katz, determined the Bank should disclose the losses. The lawyers discussed the date of the disclosure, the manner of the disclosure, who would draft the disclosure, and that Price would approach Merrill CEO John Thain about the disclosure. Shortly thereafter, however, the decision was reversed, Wachtell's role was marginalized, and the Bank made its own decision not to disclose. Outside counsel was never again consulted about disclosure, even after the losses later doubled.

8. By December 3, Price knew that known losses to date exceeded \$8.5 billion after tax and that billions more in losses were coming, because that day he met with executives, including Lewis, to discuss those losses. Lewis was also aware of the disclosure issues, because Price updated him on disclosure and loss issues. Price knew, based on his conversations with Mayopoulos, that crucial to Mayopoulos' disclosure advice was whether Merrill's losses for the entire quarter could exceed what occurred in its prior five quarters, a range between \$2.1 billion and \$9.833 billion after tax. Price only told Mayopoulos about an increase in losses to \$7 billion, as opposed to what he actually knew or should have known: that known losses plus further expected losses would exceed \$10 billion in total after tax losses.

9. Price also led Mayopoulos to believe that the \$7 billion loss represented an estimate for the entire quarter, not known losses to date. Price knew that the information he failed to tell Mayopoulos was crucial to the advice Mayopoulos would provide. Based on the

false and incomplete information provided by Price, Mayopoulos concluded that no disclosure was necessary.

10. On December 4, Price learned that Merrill's actual pretax losses had grown to \$11.769 billion, and knew or should have known of an additional \$2.3 billion in goodwill write-downs that brought the total to over \$14 billion. By December 5, Price knew or was reckless or negligent in not knowing that Merrill's losses had swelled to \$16.2 billion pretax with goodwill (approximately \$10.4 billion after tax), surpassing all thresholds set by Mayopoulos. Price did not tell Mayopoulos any of this information prior to the shareholder vote.

11. Mayopoulos only learned of increased losses at Merrill the following Tuesday, December 9, while attending the Bank's Board of Directors meeting. At the meeting, Mayopoulos heard Price tell the Board of a fourth quarter estimate of \$9 billion post-tax (in fact, contrary to what was told to the Board, Merrill had already suffered \$9 billion in known losses and expected billions more in losses). At the time, Mayopoulos had previously been told about only \$7 billion in losses. (Mayopoulos also knew that on December 1, Price and the Bank's Head of Corporate Development, Gregory Curl, had sought his advice on the material adverse change ("MAC") clause.)

12. Mayopoulos sought out Price to discuss the increased losses, but was told that he was in a closed-door meeting and could not be interrupted. The next morning, before he had a chance to address the increased losses, Mayopoulos was summarily terminated and escorted from the building on the spot. The Bank replaced Mayopoulos with Brian Moynihan, a board favorite who had not practiced law in 15 years, had an inactive bar membership, and held the position for only about six weeks. Moynihan is now the Bank's CEO.

13. With its general counsel in the dark about the true extent of the losses at Merrill, Bank management allowed the vote to proceed on December 5 without any disclosure regarding Merrill's financial condition. Notably, Merrill's auditors, Deloitte & Touche, had advised Merrill that "given the losses through what it looks like will be November when it closes, given the fact that you have another couple of billion of dollars coming down the road in goodwill impairment, we believe it's prudent that you might want to consider filing an 8K to let the shareholders, who are voting on this transaction, know about the size of the losses to date." Similarly, Bank of America's Corporate Treasurer urged Price to make a disclosure to no avail. When Price dismissed the Treasurer's advice, the Treasurer warned, "I didn't want to be talking [about Merrill's losses] through a glass wall over a telephone."

14. Prior to the vote, Merrill's actual fourth quarter losses—not forecasts or estimates but known losses—of which Lewis, Price and the Bank were aware or were reckless or negligent in not having been aware, increased rapidly. By the end of October (the first month of the quarter) pretax losses totaled \$7.5 billion (\$4.5 billion after tax). By December 3, a month after the proxy had been issued, actual pretax losses to date were \$13.3 billion (approximately \$8.5 billion after tax), with at least several more billions of dollars in losses to come. By December 4, actual losses at Merrill totaled \$14 billion pretax (approximately \$9 billion after tax.) By the morning of December 5, the day of the shareholder vote, Merrill's actual losses to date amounted to \$15.3 billion pretax (approximately \$9.8 billion after tax) and Bank management still expected billions more in losses, which would have caused after tax losses to exceed \$10 billion. By the end of the day on December 5, actual losses had reached \$16.2 billion pretax, exceeding \$10 billion after tax.

15. Shortly after the vote, Lewis and Price claimed to the government that, in the week following the shareholder vote, losses at Merrill had increased so fast that they now believed they could not consummate the merger. They claimed they had grounds to invoke the MAC clause on the basis of this increase, and that absent an extraordinary taxpayer bailout, they would exit the merger.

16. In reality, actual losses had only increased by \$1.4 billion since the date of the shareholder vote, a relatively small increase given the amounts concerned. The remainder of the claimed “increase” comprised losses incurred prior to the shareholder vote and already known to the Bank, together with a guess at remaining losses for the quarter, made mid-December by Bank and Merrill executives in a complete departure from the usual rigorous month-end valuation procedures.

17. Thus, Bank management sought taxpayer aid on the basis of actual losses only \$1.4 billion more than losses they had deemed unnecessary to disclose to their shareholders, at a time when the shareholders were deciding whether to buy the company generating those losses. The undisclosed losses were enough to ruin the combined entity, as management demonstrated by going to the government for a taxpayer bailout, and would have done so without that bailout.

18. Having failed in their disclosure obligations, the Bank’s management went on to misrepresent its position to the federal government in negotiations for taxpayer aid. Bank management pretended to the government that it believed it had a viable MAC claim and that it would seek to exit the merger, or that it would try to renegotiate the purchase price.

19. After the fact, in testimony before this Office and elsewhere, Lewis claimed that this position only changed after the government instructed the Bank not to invoke the MAC

clause or renegotiate, but instead to take taxpayer aid in return for completing the merger. Lewis claimed, in effect, that he had been strong-armed by the government.

20. This account is belied by the facts uncovered by this Office. Contrary to Lewis' after-the-fact account, the evidence shows that the Bank never intended either to renegotiate or to terminate the merger using the MAC clause. In fact, the Bank's management knew almost immediately upon conferring with its outside lawyers that renegotiation was impossible, because it meant going back to the shareholders, and public knowledge of the endangered deal would likely destroy Merrill. Likewise, the Bank was informed by its outside lawyers that invoking the MAC clause would likely prove a futile exercise that could destroy the Bank.

21. The evidence further demonstrates that almost immediately upon reviewing the December 12 loss analysis, the Bank planned to seek taxpayer aid to save the merger, and to use the empty threat of a MAC claim as leverage with the government in negotiations.

22. The Bank's plan worked, and it received the taxpayer aid, in an amount exceeding \$20 billion, on top of \$10 billion already committed prior to the December negotiations, for a total of approximately \$30 billion in aid. As a result, the merger closed as planned on January 1.

23. By this date, the cash portion of Merrill bonuses for 2008—\$2.5 billion—had been paid out. These cash bonuses, which with the non-cash portion would eventually total \$3.57 billion, were paid for the worst year in Merrill's history. It was the year, in fact, that would have seen the firm's destruction absent a taxpayer bailout.

24. On top of everything, the Bank failed to tell its shareholders that, in addition to buying a company that would have destroyed the Bank without taxpayer aid, it was going to permit that company to pay the \$3.57 billion in bonuses in a manner and at a time completely

inconsistent with its prior practice. The amount, criteria and timing of the bonus payments were omitted from the proxy.

25. In short, in the process of acquiring Merrill, the Bank's management misled its shareholders, the public, its board and its lawyers by concealing Merrill's disastrous fourth quarter financial results in order to secure the shareholders' uninformed approval of the deal. The Bank's management then salvaged this potentially crippling situation by extracting billions in taxpayer bailouts by misleading the federal government. They did this, in part, by threatening federal officials that they would terminate the Merger Agreement based on a material adverse change—virtually the same material change they failed to disclose to their shareholders prior to the vote. This action seeks redress under New York's Martin Act for this conduct.

### **JURISDICTION AND VENUE**

26. The Attorney General has an interest in the economic health and well-being of investors who reside or transact business within the State of New York. The State of New York, moreover, has an interest in upholding the rule of law generally. Defendants' conduct has injured these interests.

27. The State of New York brings this action pursuant to Executive Law §§ 63(1) and 63(12), General Business Law §§ 352 *et seq.* (the "Martin Act") and the common law of the State of New York.

28. Pursuant to Executive Law § 63(12), the Attorney General is authorized to bring an action for restitution, damages, and other relief in connection with repeated fraudulent or illegal acts in the carrying on of any business.

29. Pursuant to the Martin Act, the Attorney General is authorized to bring an action for restitution of money obtained as the result of any fraudulent practices in connection with the sale of securities.

30. The State seeks restitution, damages, costs, and equitable relief with respect to Defendants' fraudulent and otherwise unlawful conduct.

31. Many of Defendants' actions originated from New York, New York, where Defendants reside and/or conduct business. Moreover, numerous New York investors, as well as the interests of the State of New York, were harmed by Defendants' conduct.

### **PARTIES**

32. Defendant Bank of America is a Delaware corporation with its principal place of business at 100 Tryon Street, Charlotte, North Carolina. It conducts significant business at its New York headquarters located at One Bryant Park, New York, New York.

33. Defendant Kenneth D. Lewis was the Chairman and Chief Executive Officer of Bank of America Corporation during the period relevant to this action.

34. Defendant Joseph L. Price was the Chief Financial Officer of Bank of America Corporation during the period relevant to this action. Price reported directly to Lewis.

### **RELEVANT PERSONS**

35. J. Steele Alphin was Bank of America's Chief Administrative Officer during the period relevant to this action.

36. Richard Alsop was in-house counsel at Merrill Lynch & Co. ("Merrill") during the period relevant to this action.

37. David Belk was Vice President of Bank of America's Corporate Development group during the period relevant to this action. Before that, he worked in Bank of America's Finance group, on forecasting and closing the books.

38. Teresa Brenner was associate general counsel at Bank of America during the period relevant to this action.

39. Jeffrey Brown was Bank of America's Treasurer during the period relevant to this action. He reported directly to Price.

40. Gary Carlin was the Vice President and Corporate Controller at Merrill Lynch and reported to Nelson Chai during the period relevant to this action. Carlin's primary responsibilities as corporate controller included overseeing the process for closing Merrill's books at month-end, overseeing Merrill's corporate and external reporting requirements, and maintaining the general ledger of the books and records. Carlin was also one of the primary individuals overseeing Merrill's goodwill impairment testing and required disclosures associated with such analysis, and in this connection worked with Deloitte & Touche, Merrill's auditors.

41. George Carp was the Business Finance Officer of Bank of America's Global Markets group during the period relevant to this action.

42. Nelson Chai was the Executive Vice President and Chief Financial Officer of Merrill Lynch and reported directly to John Thain in the period prior to the close of the merger.

43. Neil Cotty was Bank of America's Chief Accounting Officer during the period relevant to this action.

44. Gregory Curl was Vice Chairman of Corporate Development at Bank of America during the period relevant to this action. As head of Corporate Development, Curl was primarily responsible for heading the overall business strategy for Bank of America. Directly reporting to

Lewis, Curl was the main architect and strategist for Bank of America during the merger negotiations with Merrill during the weekend of September 13-14.

45. Nicholas Demmo was a corporate partner at Wachtell, Lipton, Rosen and Katz during the period relevant to this action.

46. John Finnegan was Chairman of the Merrill Lynch Compensation Committee during the period relevant to this action.

47. Gregory Fleming was President of Investment Banking and Wealth Management at Merrill Lynch during the period relevant to this action. Prior to the announcement of the merger on September 15, Fleming was the President of Merrill Lynch and in his capacity as President, Fleming ran Merrill's entire investment banking and wealth managements divisions and was also responsible for overseeing the investor relations and human resources divisions. Fleming was the main negotiator for Merrill during merger talks between the two entities during the weekend of September 13-14. Throughout this period, Fleming reported to Thain.

48. Charles K. Gifford is an individual who served as a member of the board of directors of Bank of America during the period relevant to this action.

49. Thomas Graham was Deloitte's lead partner for Accounting and Financial Reporting on the Merrill Lynch account during the period relevant to this action.

50. Christopher Hayward was Finance Director of Merrill Lynch during the period relevant to this action. Hayward reported directly to Chai and was actively involved in reviewing the reports with respect to Merrill Lynch in the fourth quarter of 2008.

51. Ed Herlihy was a senior corporate partner at the law firm of Wachtell, Lipton, Rosen & Katz during the period relevant to this action. He led the team that advised the Bank on all issues related to the merger, including the questions of disclosure of losses, the viability of a

MAC claim against Merrill Lynch, and negotiations with the federal government for taxpayer aid.

52. Ven Kocaj was a Deloitte supervising partner working on the Merrill Lynch account during the period relevant to this action.

53. Thomas J. May is an individual who served as a member of the board of directors of Bank of America during the period relevant to this action.

54. Timothy Mayopoulos was Bank of America's Vice President and General Counsel during a portion of the period relevant to this action. Among other things, Mayopoulos advised Bank of America management on the disclosure of Merrill Lynch's increasing losses during the fourth quarter 2008, and on the Merger Agreement's MAC clause.

55. Nancy Meloth worked in Merrill's Finance Department as head of Corporate Planning during the period relevant to this action. Directly reporting to Hayward, Meloth tracked Merrill's growing losses and prepared reports about them, which reports were regularly sent to members of Merrill Lynch and Bank of America top management on a timely basis.

56. David Moser was the Chief Accounting Officer and Head of Accounting Policy and Corporate Reporting at Merrill Lynch during the period relevant to this action. Under Carlin's supervision, Moser was responsible for the day-to-day running of the accounting policy and external reporting group. Among his various responsibilities, Moser was responsible for working with Deloitte & Touche, Merrill's disclosure committee, and in-house counsel to ensure that Merrill's public disclosures and filings were in accordance with federal and state regulations.

57. Brian Moynihan was head of Bank of America's Global Corporate Investment Bank through the fall of 2008. Then, he was head of Global Private Equity Operations. On December 10, he became Bank of America's general counsel. On January 20, 2009, he became

head of Bank of America's Global Banking and Global Wealth Management. He is currently CEO of Bank of America.

58. Eric Roth was a litigation partner at Wachtell, Lipton, Rosen and Katz during the period relevant to this action.

59. Andrea Smith was Bank of America's HR executive for the Global Corporate Investment Bank and the CFO division during the period relevant to this action.

60. John. A. Thain was the Chairman and Chief Executive Officer of Merrill Lynch & Co., Inc. until the closing of the merger with Bank of America on January 1, 2009. Mr. Thain was the head of Bank of America's wealth management and Global Corporate Investment Bank from January 1, 2009 until January 22, 2009.

## **FACTUAL ALLEGATIONS**

### **I. BEFORE THE SHAREHOLDER VOTE: BANK MANAGEMENT CONCEALS MERRILL'S MOUNTING DETERIORATION FROM ITS SHAREHOLDERS**

61. Having rushed into the acquisition of Merrill Lynch over a single weekend in September, BoA executives shortly afterward learned of staggering losses at their new purchase.<sup>1</sup>

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<sup>1</sup> The acquisition happened unbelievably fast. Lewis sent a diligence team to Merrill on Saturday, September 14. The Bank finished its due diligence in just 25 hours, at approximately 8:00 p.m. on Sunday, September 15. Thus after barely a day of due diligence, BoA agreed to buy the vast, immensely complex and dangerously weakened Merrill Lynch.

Twenty-five hours was simply not enough time for BoA to understand Merrill's true financial condition. BoA had retained the firm of J.C. Flowers, Inc., to aid with the Merrill due diligence and paid it \$19 million to do so, on the rationale that Flowers had done diligence on Merrill in connection with a prior investment. The prior work, however, was performed during the fourth quarter of 2007, and done for a different purpose. The subsequent collapse of Merrill's assets demonstrates the insufficiency of the diligence.

Even more astonishing, when BoA's directors met Sunday, September 15 to approve the transaction, they thought they were going to buy a completely different company – Lehman Brothers. Director Thomas May expressed "surprise" when he learned, as he went into the approval meeting itself, that Merrill was the acquisition target. Director Chad Gifford later wrote, in a December email that discussed the tough conditions facing the Bank, "it's the way we approved acquisitions that ticks me off the most!!!"

Thain and his subordinates managed to extract an enormous, unwarranted premium for the stricken firm. The parties agreed to a stock-swap transaction at the price of \$29 per share of Merrill stock, which represented a 70 percent premium to the firm's closing price of \$17.05 per share on September 12.

They learned of these losses before the vote at which their shareholders were to decide whether to approve the merger on December 5. By that date, Merrill Lynch's actual pretax losses had reached \$16.2 billion, composed of October, November and December actual losses plus a goodwill write-down (an additional loss) in the amount of \$2.3 billion. BoA management failed to disclose this fundamental change in Merrill Lynch's condition before its shareholders voted to approve the merger on December 5 even though that information was unquestionably material to that vote. While Price sought legal advice on this issue, when doing so he told the Bank's general counsel of \$7 billion in after tax losses when he should have told him of \$10.4 billion in after tax losses, and led him to believe that the inaccurately low \$7 billion represented a forecast for the entire quarter. On December 5, the Bank allowed its shareholders to approve the merger without knowing about Merrill's catastrophic losses. Lewis and Price either knew, or were reckless or negligent in not knowing, of these staggering losses.

62. Top Bank executives, including Price and Curl, realized that Merrill Lynch's unprecedented losses created a disclosure issue for BoA. Price kept Lewis informed of the disclosure issues. On November 13, after consulting with Wachtell attorneys, BoA's general counsel decided to make a disclosure about the losses. Later, following a meeting with Price, Mayopoulos reversed course, and no disclosure was ever made despite the massive losses that engulfed the companies by the end of the year.

**A. Merrill Lynch's Fourth Quarter Financial Reports Tracked Actual Losses**

63. The fourth quarter 2008 reports of Merrill's financial condition on which Lewis, Price and the Bank relied almost entirely reflected real losses to date; they were not forecasts or predictions. By the time the merger was announced in mid-September, Merrill had a process in place whereby it tracked actual losses on a daily basis. Due to Merrill's losses at the start of the financial crisis in late 2007, Merrill stopped forecasting and simply tracked its losses.

64. Merrill's Head of Corporate Planning, Nancy Meloth, who oversaw the process, explained that before the financial crisis her group had put "greater focus on all kinds of things like three-year plans and forward projections," but that after the crisis struck, "the focus became much more on day-to-day results and how we were doing." Thus while the reports contained anachronistic labels like "forecast" and "projection," they in fact tracked actual losses.

65. The reports documenting Merrill's financial condition during the fourth quarter stated these day-to-day losses in columns titled "actual," which reflected month-end numbers that only rarely changed (and even then in immaterial ways) after they were booked.

66. The reports also contained a column for estimates known as BTG (Balance To Go), a reference to days remaining in any given period. But as Meloth testified,

[BTG] could possibly be a budget or an expectation that had been there for how the core businesses should perform in an environment that we weren't in anymore. And for lack of something better than that, we just left it there, but certainly no one would have relied on this for any sort of decision-making purpose, in my opinion.

67. In addition to day-to-day losses, the reports reflected changes in the valuations of securities and trading positions held by Merrill, known as "marks." Typically, marks were not included in the day-to-day losses reflected in the "actual" column until the end of each month. During the fourth quarter of 2008, Corporate Planning finalized marks at the end of each month, adding them to the monthly results to reach the total actual monthly figure. Setting the marks involved financial analysis and conversations between Corporate Planning and business heads, sometimes even rising to senior executive levels. For the past 16 months, Merrill had averaged a loss of least \$3.2 billion in marks each month.

68. Moreover, throughout most of the fourth quarter, the reports lacked an important component of the losses to date. From November 20 forward, BoA executives knew, or were

reckless or negligent in not knowing, of the existence of an additional \$2.3 billion goodwill charge that would have to be added to Merrill's losses. In the third quarter of 2008, Merrill carried a goodwill asset on its books (derived from the excess of purchase price of a company over its fair market value) associated with a unit in its FICC (fixed income) division. On November 20, if not earlier, Moser and Carlin learned that this asset would have to be marked down in the amount of \$2.3 billion. As a standalone entity until the end of the year, Merrill would have to account for this mark-down as a loss in its fourth quarter results. Emails and financial reports demonstrate this understanding with explicit warnings that this material addition to Merrill's losses was not yet included.

69. Lewis and Price knew or were reckless or negligent in not knowing of this major addition to losses, yet never included it when seeking legal advice on whether Merrill's losses had to be disclosed, and never disclosed it to shareholders prior to the shareholder vote on December 5. But on December 16, long after the vote, Bank executives finally added the \$2.3 billion in losses in their bid to obtain taxpayer aid from federal officials.

#### **B. BoA Executives Confront October's Disastrous Results**

70. Merrill Lynch was transparent in providing its financial information to BoA. The function of Merrill's Corporate Planning Department, headed by Meloth, was to provide data on Merrill's financial condition. As Merrill was focusing on day-to-day results by the fourth quarter of 2008, BoA management was intimately aware of the contemporaneous financial condition of Merrill Lynch.

71. On November 4, just two days after the Proxy's issuance, members of Merrill Lynch's financial reporting unit forwarded the company's preliminary October results to Neil Cotty of BoA indicating a loss of \$6.113 billion. The next day, Cotty forwarded Meloth's email to Price, with the comment "[r]ead and weep."

72. Five days later, on November 9, Carlin sent Cotty an email entitled “Oct-08 PL Reports as of 11/7/08.” In the email, Carlin wrote: “Here is where we are after our initial close. Numbers speak for them selves [sic].” The profit and loss showed the month to date pretax loss at \$7.536 billion. Cotty sent the results on to Price two hours later. These losses – in just a single month – exceeded the total loss number for all but one quarter (the last quarter of 2007) in the past two years of quarterly results at Merrill Lynch.

**C. BoA Lawyers Initially Decide to Disclose Merrill Losses to Shareholders but Then Reverse Course**

73. On November 12, 2008, Meloth circulated an updated report for the fourth quarter to Cotty (the “November 12 Report”). The November 12 Report showed a fourth quarter pretax loss of \$8.942 billion. Importantly, the November 12 Report provided *actual* losses of \$7.763 billion, made up of October (\$7.536 billion) plus November losses to date (\$227 million, incurred in the first seven days of the month). The loss exceeded \$5 billion after tax.

74. Based on the November 12 Report, Price requested a review of whether any disclosure of such losses were necessary. Price and Curl began discussing Merrill’s fourth quarter losses with BoA’s then-general counsel Mayopoulos and associate general counsel Teresa Brenner on November 12, meeting to discuss “the subject of the forecasted losses and whether disclosure of those forecasted losses was necessary or appropriate.”

75. Mayopoulos thought the Merrill losses ought to be disclosed: “[m]y reaction was that \$5 billion is a lot of money, and I believe my initial reaction was that a disclosure was likely warranted.”

76. Following this meeting, Mayopoulos went to outside counsel. Mayopoulos “had a conversation with Curl and Herlihy at [the outside counsel firm of] Wachtell Lipton and I asked Teresa Brenner to gather some materials for me.” At Wachtell, corporate partner Nick

Demmo, who worked with Herlihy, relayed the news in a call to litigation partner Eric Roth. Mayopoulos relayed to Wachtell the pretax October loss of \$7 billion that Price had told him, and also told Wachtell that November was flat—*i.e.*, no losses had yet occurred. As Roth put it, “I recall him [Demmo] mentioning the number \$7 billion. I think he also mentioned that November appeared to be flat.” The question for Wachtell was whether to disclose the loss, or as Roth put it, “get the [number] out.”

77. Roth was involved in the disclosure question because he was already handling disclosure litigation against the Bank pending in various courts. The next day, November 13, Roth sent out an email within his firm seeking research on the duty to disclose. He received a call from litigation partner Warren Stern, and had a discussion with him that day, as reflected by Roth’s contemporaneous notes.

78. Roth’s notes show he discussed with Stern a prior situation in which Bank of America failed to mention the possibility of a major loan write-off in a press release providing guidance for the quarter. Stern had advised the Bank in the matter, concluding that a duty to update existed, as Roth’s notes reflect:

Warren did memo –  
concluded there was  
a duty  
not under 10b-5 cases  
better view =  
@ time of vote under federal proxy  
+ Del. Law  
duty to bring to sh. all info  
material to vote –

The memo, which Roth later reviewed, was ten years old. The lawyers then discussed the law under Rule 10b-5 and proxy rules.

79. Roth also performed searches of the LEXIS legal database for disclosure law: “I did an independent Lexis search [...] I found case law that addressed the duty to update and whether or not there was a duty to disclose intra-quarter numbers, forecasts – stuff like that.” The contemporaneous documents show that Roth performed only two searches and retrieved a total of only 12 decisions related to the question of disclosure. Further, Roth was able to provide this Office with only five cases from his files, and of these, only one dealt with a Proxy Statement sent to shareholders asking them to approve a proposed acquisition. In that case, the court held that the defendant directors had given inadequate disclosure.

80. On November 13, 2008, Mayopoulos conducted a conference call with outside counsel Ed Herlihy to discuss “forecasted losses at Merrill Lynch for the fourth quarter of 2008 and whether it was appropriate to make any disclosure about them.” Roth, Demmo, and Brenner also participated in the meeting.

81. Herlihy testified that Mayopoulos told him that October after tax losses were in the \$4 billion to \$5 billion range, and that November results were flat. Herlihy never received any reports from Mayopoulos, only hearing the numbers in discussion.

82. During this meeting, the parties agreed disclosure was the proper course, and they discussed both the disclosure’s content and the date of disclosure. Next steps were agreed: to draft the disclosure and to have Price contact Thain. Contemporaneous notes taken by Roth reflect the decision to disclose:

[...]

[Tim – ] Given ML’s # - rec[ommend] both co report week or so before

our results not fabulous

Ed – write a trend discl.?

Tim – how much detail?

Ed – Not much – like MD&A

Tim – if ML break even for Nov. - \$7 B loss for 2 Mos.

Nick – refer to past trend of losses & say that not abated

[...]

Expect it to be no better than – might be worse

Tim – all agree must be some discl.

Ed – yes but balanced

Tim – not the end of the world

Tim – Joe go to Thain/Fleming?

Don't go to Shearman to draft in 1<sup>st</sup> instance

When put out? 12/1?

11/28 – even better

It's before 12/1 hearing

Week before sh. Meeting

Consensus – 11/28!

Have it written by 11/25 or 11/26

Get Joe to engage ML – Mon/Tues. next week

Get draft done

## **1. Price soft-pedals the disclosure issue with Merrill**

83. Although, as Roth's notes reflect, Price was to "engage" Merrill Lynch, instead he avoided the issue by watering it down to a mere question. On November 14, Price met with Thain, Cotty, Chai and Hayward at Merrill's New York offices to analyze Merrill's assets and

financial condition. Price did not act on Mayopoulos' advice to tell Thain that Bank of America would be disclosing Merrill losses. Rather, he merely asked Thain and Chai if Merrill would be making any disclosures regarding Merrill's fourth quarter losses. Price recalled that he "asked that they assess any potential need to early disclose financial results and we would do the same, it would come back together."

84. Hayward explained that there was only "a very short comment from Joe Price to the effect -- not verbatim, but to the effect -- does Merrill plan to do any intra-quarter disclosure, and John [Thain] responded, No, we don't provide intra-quarter guidance, had not been doing that all year and didn't plan to."

**2. After Price's meeting with Thain, Bank of America reverses course on disclosure of Merrill's losses**

85. Following his conversation with Herlihy on November 13, Mayopoulos testified that he "spent considerable time reviewing materials that I had asked Miss Brenner to gather for me and spent time considering the question [of disclosure] that Mr. Price had asked me for advice on."

86. One of the "significant" factors in his analysis was the range of disclosure:

I wanted to have an understanding of what Merrill Lynch's historical financial performance had been since the financial crisis had started in the third quarter of 2007 so that I could understand whether the projected losses that were now being discussed were consistent or inconsistent with that prior historical experience.

The range he had stood between approximately \$2 billion and \$10 billion:

When I looked at this information, I saw that Merrill Lynch had experienced multi-billion dollar losses for the last five quarters ranging anywhere from \$2 billion to almost \$10 billion, and from my perspective, if Merrill Lynch ultimately ended up reporting a loss of \$5 billion after taxes, that would be well within the range of prior experience at Merrill Lynch, and that investors, based on that, should not be surprised by that result.

87. Price was aware that this range was important to the analysis. On November 19, he, Curl and Mayopoulos received an email from Curl subordinate David Belk attaching a report showing Merrill's after tax results for the past six quarters. The report showed a low end of \$2.1 billion in losses to common shareholders (in the first quarter of 2008) and a high end of \$9.833 billion in after tax losses to common shareholders (in the fourth quarter of 2007). Mayopoulos also testified that he discussed this range at a meeting on November 20, as well as on December 3; and Price himself testified that he knew the range was part of Mayopoulos' analysis.

88. Just a day before, on November 18, 2008, Price, Cotty, Mayopoulos and others attended a further meeting regarding disclosure of Merrill's fourth quarter losses, to discuss "the forecasted losses at Merrill Lynch in the fourth quarter of 2008 and issues related to possible disclosure of losses."

89. That afternoon, at a second meeting with Price and other financial executives to discuss Merrill's financial condition, Mayopoulos noted to himself, "what happens if neg shh. [sic] vote."

90. At a third meeting, Mayopoulos called Herlihy regarding disclosure. Curl was at this meeting, in person at Wachtell's offices. He had flown up to New York from Charlotte earlier in the day, and claimed in testimony that he only happened to be present for the meeting and was in New York for "other reasons." He stated that "there was a call that came into the conference room where I was visiting with a couple of Wachtell lawyers, and there was really a conversation between them. I can't recall precisely who was on the phone in Charlotte. I think Joe Price – I don't know if anybody else was – in regard – I don't recall the specifics of it; I was not really a part of the discussion – about disclosure."

91. Curl made this claim to bolster his denial of any involvement in disclosure issues, even though Belk sent him an email with peer estimates for discussion in the disclosure meeting.

92. Significantly, Wachtell played a limited role on the question by this time. After their original conclusion was disregarded, Wachtell lawyers took themselves out of the equation, doing no substantive work, and in fact simply agreeing with Mayopoulos. They issued no memoranda or work product and they did no further research. Herlihy testified that Mayopoulos “had done a lot of homework and thought it through and so had come to some conclusion with respect to the disclosure.”

93. Neither Wachtell nor the Bank ever consulted Roth again on the question. Roth was the lawyer closest to the issues involved in disclosure. He was the lawyer most involved in the analysis of the question, as the only one who had done any research in the area or talked to other lawyers about the litigation of such questions. He was left to think that disclosure would be made:

Question: So what was your understanding of what was going to happen on November 13, 2008 when that conversation ended?

Roth: My sense was that as of the close of that meeting the view was that some kind of trend disclosure would be made -- or at least that was the recommendation that was being made to the business people. I have no reason to believe the business people wouldn't agree with the lawyers' advice -- and that Price would go talk to the senior executives of Merrill about the concept.

But after November 13, he was no longer involved, except to hear that the trend disclosure was never made:

Question: What is the next thing that happened with respect to the disclosure of the Merrill Lynch loss issue after November 13, 2008?

Roth: In terms of what I did [on disclosure], I had no involvement in the consideration or discussion of this issue after November 13 and

prior to January 15 with the client. [...] I believe that at some point prior to January 16 I had a conversation with Ed Herlihy where I inquired after the trend disclosure and what had happened. [...]

Question: What did Mr. Herlihy say?

Roth: He told me [...] that the client had decided that it was not necessary for the companies to make that disclosure.

Nor did Roth realize that any further steps or discussions were being taken on the question.

94. Thus in effect, Mayopoulos answered the question the second time on his own. This time, his conclusion was not to disclose. On November 20, 2008, Price and Mayopoulos met in person, with Herlihy and Demmo attending by phone. Mayopoulos recalled that “Joe kind of introduced the topic, Joe Price. I recall that I spoke for some period of time. I recall other people participating in the discussion, including Ed Herlihy and Nick Demmo.” Price recalled that “[a]s a result of this meeting and deliberations, we reached the conclusion that no disclosure was necessary.”<sup>2</sup>

95. The losses discussed on November 20 were merely the October after tax losses. Herlihy recalled that the number he heard from Mayopoulos was between \$4-5 billion, and that November was expected to be flat, that is, a break-even result. According to Herlihy, Wachtell never actually received any report or other documentation of Merrill’s financial condition at that time.

96. In other words, what Wachtell believed was an estimate for the entire quarter was in fact the actual losses for only the first month of the quarter—already 90% of the last quarter’s (three entire months) losses.

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<sup>2</sup> In analyzing the problem, Mayopoulos did not consult any cases; nor did he consult any rules or perform any legal research. He merely looked at the existing disclosures to date and a range of Merrill’s losses for the prior five quarters, considering in that context whether the Merrill loss number he was told, \$5 billion, should be disclosed.

97. On November 21, 2008, Price – now knowing that BoA would not be disclosing Merrill Lynch’s losses – returned to talk to Thain. He asked Thain whether he had come to a conclusion on disclosure of the losses: “I recollect we had a number of items, one of which was to confirm that they still felt no disclosure was necessary, which he did.”

**D. Bank Management Becomes Aware of More Than \$2 Billion In Further Losses Attributable to a Goodwill Impairment**

98. By November 13, Price knew that a significant reduction in the goodwill asset of Merrill’s FICC division would have to be taken. That day Price met with Cotty, Hayward, Carlin, and Moser, among others, where Moser made a presentation regarding the impending goodwill charge and raised the issue of whether it should be disclosed.

99. In fact, by the start of the fourth quarter it was also very clear to Merrill’s auditors that it would be forced to take an impairment charge in the fourth quarter of 2008. Thomas Kaylor, Deloitte’s valuation specialist specifically charged with analyzing the goodwill write-down, testified that he believed as early as the start of the fourth quarter 2008 that Merrill would be taking an impairment charge in the fourth quarter. He said that “there was enough bad news that I don’t think there was any question as to what was going to happen given how close it was in the third quarter and how bad it got in the fourth quarter.” Deloitte auditor Thomas Graham also testified that it was apparent the charge would have to be taken before the shareholder vote.

100. Graham had sent Moser and others at Merrill an abbreviated analysis on November 13, indicating that a charge was likely. According to Moser, he “had a pretty good feeling . . . probably around November 20th, that we would be taking some kind of charge.” In addition, Carlin also acknowledged that FICC was experiencing “pretty material” losses during November 2008.

101. By November 20, Moser had identified the amount. On that day, he wrote to Chai and others that “[w]e have begun the goodwill impairment process ... we will be taking a significant write-off of the goodwill, almost certain all of ficc and ibk (approximately 2.2 billion.)” The amount eventually written down was \$2.3 billion.

102. At this point, Meloth also began warning the readers of her reports that goodwill was not included. She did so first in a November 20 email attaching a November 19 report, explaining that it “[d]oes NOT include potential goodwill impairment discussed earlier this afternoon.” By at least December 2, the reports themselves warned of the exclusion of goodwill: “FY08 forecast does not include 4Q expenses for potential goodwill impairment.” This warning, however, was empty. The Bank and Merrill both knew that the charge would have to be taken; it was the number itself that should have been added.

103. Despite these developments, at no time prior to the shareholder vote did Price or Cotty ever request that the charge be accounted for in the Merrill performance reports. Had they done so, an extra \$2.3 billion loss would have been reflected in Merrill’s financials as early as mid-November, well before the shareholder vote. In fact, the charge was left out until it was convenient to support the Bank’s claim for aid from the federal government, as discussed below.

**E. Merrill’s Auditors Advise that Disclosure of the Losses was Warranted, but the Warning is Not Relayed to Counsel**

104. During this time, the team at Deloitte, Merrill’s auditors, was so concerned that they confronted at least one Merrill executive, Moser, about whether the company planned to make any disclosures about its losses, as well as whether the company would make any disclosure of the goodwill impairment charge it was certain to recognize in the fourth quarter.

105. Deloitte partner Thomas Graham testified that “a few days prior to the vote,” he and his supervisor Ven Kocaj personally met with Moser to convey their concerns about

disclosure and advised that it would be prudent for Merrill to seek legal counsel on these issues, saying,

given the losses through what it looks like will be November when it closes, given the fact that you have another couple of billion of dollars coming down the road in goodwill impairment, we believe it's prudent that you might want to consider filing an 8K to let the shareholders, who are voting on this transaction, know about the size of the losses to date,

and adding that “[the losses] were sizable enough [to] probably warrant disclosure. They were material subsequent events to what occurred at the end of September that would be relevant for parties that were voting ....”

106. However, prior to briefly raising the question of disclosure with Merrill's in-house counsel, Moser did not take any steps to notify anyone else about Deloitte's concerns regarding the potential disclosure obligation, recalling that “I don't believe I had any follow-up conversations ....”

107. Moser sought legal advice on disclosure from in-house counsel Richard Alsop, but never alerted Alsop that the company's outside auditors were concerned about the question and had recommended an inquiry, despite the obvious importance of this fact.

#### **F. December 1: Price and Curl Seek Legal Advice About the MAC**

108. As November continued, Merrill Lynch's financial condition further deteriorated. Despite this, BoA did not disclose to shareholders that Merrill Lynch was experiencing severe financial distress.

109. At the end of November, Price and Curl sought legal advice from Mayopoulos regarding the MAC clause. In addition, Curl—concerned about disclosure of Merrill Lynch's losses—approached Price about whether disclosure may be necessary.

110. On December 1, Price, Curl and Mayopoulos met to discuss the grounds for invoking the MAC clause in the party's Merger Agreement. Mayopoulos testified:

I don't remember how I came to learn that this meeting was going to occur or that this was going to be the topic, but I believe I knew that this was going to be the topic because I recall reviewing the material adverse change provisions before I went to the meeting. So I was prepared to have this conversation when I got to the meeting.

111. Mayopoulos advised Price and Curl that BoA could not successfully invoke the MAC clause against Merrill Lynch:

When I got to the meeting, they [Price and Curl] said that they wanted me to review with them what the terms were in the material adverse change clause and how one would go about interpreting it. So I had the provision with me and I walked them through it, highlighting the relevant portions of it. We discussed the fact that one of the key aspects of it was that for there to be a material adverse change, there needed to be a disproportionate impact on the affected party as compared to other companies in the same industry. So, for example, if some economic event had occurred, that would not constitute a material adverse change unless the impact on Bank of America or Merrill Lynch, depending on which party you were talking about, was disproportionate to that party in relation to its peers in the industry. So we discussed that. We discussed the fact that based on the events that had occurred -- let me go back. We discussed the fact that, from my perspective, that if a court were going to look at whether there had been a disproportionate impact, let's say, on Merrill Lynch with respect to some set of circumstances, that while the clause said that one should look to other companies in the industry, the place they would likely start with was with Bank of America as the two parties in the Merger Agreement. And that if it looked as though the circumstances that were giving rise to an impact at Merrill Lynch were the same or roughly the same as the impact they were having on Bank of America, I thought that it was highly unlikely that the court would say that a material adverse change had occurred. We reviewed some of the events that had occurred to Bank of America in the periods since the merger had been announced, including significant declining stock price, which in terms of percentage was not dissimilar to Merrill Lynch's; a substantial cut to Bank of America's dividend; a significant increase in the bank's credit provisions and diminished earnings. I don't recall whether there were other factors that we discussed or not, but based on all that, I gave them my advice that based on what I knew at that time I did not believe there was a material adverse change in existence.

Mayopoulos was firm that he advised on the Bank's chances of calling a successful MAC:

"[y]es. I meant that I didn't think Bank of America can call a material adverse change under the provisions."

112. Despite Mayopoulos' contemporaneous notes and elaborate recollection and the obvious significance of the conversation, Price failed to recall ever discussing the MAC clause with Curl or Mayopoulos before mid-December. This was so even though the meeting was entered on his calendar. Only nine months after the conversation, Price testified:

Question: On Monday, December 1st there is an entry for 2:00 with Tim Mayopoulos and Greg Curl. Do you recall that conversation looking at your calendar of that meeting?

Price: I do not recall the specifics of that one.

Question: Do you know if it related to Merrill Lynch?

Price: I don't recall.

Question: Do you know if disclosure issues regarding Merrill Lynch came up at that meeting with Mr. Curl and Mr. Mayopoulos?

Price: I don't recollect the meeting.

Later, he testified again that he could not recall the meeting:

Question: On December 1st, did you have any conversations regarding the MAC clause?

Price: Not to my recollection.

Question: Did you have a conversation with Tim Mayopoulos regarding the MAC clause at some point in early December?

Price: I do not recollect having one.

113. Before the New York Attorney General's Office knew about any such conversation, Curl failed to mention such meeting with Mayopoulos and Price during his first testimony, which occurred prior to the Bank's waiver of the attorney-client privilege regarding topics including the MAC clause. Rather, at that time, Curl testified that after the merger weekend, he never discussed the MAC clause until mid-December, after the shareholder vote:

Question: And anything regarding the Mack [sic] Clause?

Curl: Mack [sic] Clause in that time period?

Question: Let's go little more general. [When did] the Mack [sic] Clause reappear in your life?

Curl: The Mack [sic] Clause reappeared in my life on Friday the 12th of December.

114. It was not until after the Bank waived its attorney-client privilege that Curl admitted that he had discussed the MAC clause on December 1. However, incredibly, Curl claimed that the sole reason he discussed the MAC clause with Mayopoulos was to ask him whether Merrill had grounds to invoke it against Bank of America.

Curl: So I had a conversation -- as I said, if I had a calendar, I think it was right after Thanksgiving -- with Tim about Fleming's coming for lunch. I don't know whether he's going to raise the issue of the new stock issue, the dilution, whether he'll talk about a MAC because of the financial performance. And, as I recall, I had a conversation about that somewhere along either the day of or the day before when Fleming came.

Question: You thought of these concerns independently?

Curl: Yes. As I recall, yes.

115. The idea that Merrill Lynch would invoke the MAC clause against BoA is incredible. When asked if Merrill ever considered invoking the MAC, Thain responded "You realize, of course, that that question doesn't make any sense, but, no, we did not." Thain added the obvious, saying that "it would not have been in Merrill Lynch's shareholders best interest for Merrill Lynch to think about exercising the material adverse clause, nor under its terms would it, at least in my opinion as a non-lawyer, have been triggered."

**G. December 1: Price Knows that Merrill's Actual Losses to Date Are About \$13.3 Billion with Goodwill, and that These Losses Will Increase Further When the Marks Are Accounted For**

116. On the evening of December 1, Cotty emailed Price Merrill Lynch's pretax losses for the quarter, \$13.694 billion. Of this amount, Cotty reported an actual loss-to-date figure of \$10.994 billion. This number comprised October actual losses of \$7.536 billion and November's known losses to date of \$3.458 billion. With the goodwill loss of \$2.3 billion, actual losses had reached \$13.3 billion. The remainder of the \$13.694 billion comprised November marks yet to be confirmed by Merrill personnel, together with December losses.

**H. December 3: Thain, Price, Lewis and Others Discuss Merrill's Staggering Losses, Which Are Confirmed to Exceed \$14 Billion Pretax to Date**

117. On December 3, two days prior to the shareholder vote, BoA and Merrill senior executives Thain, Lewis, Price and Cotty met by telephone to discuss Merrill's fourth quarter results and the 2009 plan. To prepare for the meeting, Thain met with Cotty and Chai to discuss Merrill's losses.

118. Also prior to the meeting, Cotty emailed Thain the results to be discussed at the meeting. In the email, which he forwarded to Price within the next half-hour, Cotty advised:

With regard to the forecast....

I believe you have been involved in the discussion on CVA and [in] particular the mark on MBIA. In addition, my understanding is the correlation books have some negative marks coming our way (BTW: BACs [sic] correlation books also have taken some hits based on totem [sic] marks---if others are trashing the qtr it may manifest itself in the quotes). The team is still sizing the marks, but I believe there could be another \$1B in downside to Novembers [sic] numbers.

Further, December may take some further hits....Turning a profit in December may prove to be challenging....

119. The report, which was also sent to Price, showed total fourth quarter actual pretax losses to date of \$11.043 billion. This number comprised actual losses to date of \$10.414 billion

(the October loss of \$7.536 billion plus November-to-date losses of \$2.878 billion), plus a \$629 million loss for the December BTG. The report also warned that it did not include a goodwill write-off. With goodwill, this actual loss reached \$13.3 billion. The report did not yet include marks related to Merrill's correlation book or CVA. Consistent with his standard business practice, Price made extensive handwritten notes on the report he received.

120. According to Cotty, Lewis asked him what he thought about the results, and he responded that "the management team has not closed the books yet and there could be more downside." He elaborated, referencing the email he previously sent to Price dated December 1, 2008 (*see* ¶ 116 above), saying that his December "plug" of \$1 billion was not now going to be enough: "Joe, I put \$1 billion in the note I sent you a few days ago, and I can see where it could go another \$2 billion, so \$3 billion in total pretax."

121. Cotty's \$3 billion plug was adopted by Thain and Lewis at the December 3 meeting. Accordingly, senior executives at BoA were keenly aware that Merrill's losses would be at least \$14 billion for the quarter. They were also aware, or were reckless or negligent in not being aware, of the pending goodwill charge of \$2.3 billion that would have to be added to the losses. Later that evening, the report was updated to reflect the new figure. Now, the pretax loss, including Cotty's estimate, stood at \$14.043 billion, without goodwill. Price also received this report, which also warned of the exclusion of the goodwill impairment. As was his standard business practice, Price made extensive handwritten notes on the report.

**I. Price Speaks with Mayopoulos on December 3 but Does Not Tell Him that Losses Have Almost Reached His \$10 Billion Disclosure Threshold**

122. At this point, Lewis and Price knew or were reckless or negligent in not knowing of more than \$13.3 billion in actual pretax losses: the pretax loss of \$11.043 billion mentioned above, plus the goodwill loss of \$2.3 billion discussed above. (¶120.) With the \$3 billion

placeholder for further expected losses added by Cotty, this figure reached approximately \$16.3 billion in pretax losses for the quarter (approximately \$10.4 billion after tax).

123. Knowledge of this increased loss amount was critical to Mayopoulos, because in his November disclosure analyses, he had considered whether the losses for the fourth quarter were in line with a range of losses experienced by Merrill over the previous five quarters. That range lay between \$2.139 billion and \$9.833 billion. As he put it,

I told [Price] that given all the factors that we had discussed on November 20th, including my view that I didn't think there was a duty to update; that prior disclosures incorporated in the Proxy Statement had clear cautionary statements in them to investors; *that earnings of Merrill Lynch during this prior four quarters were running anywhere from \$2 billion and \$10 billion in losses*, and, obviously, the challenging market conditions reflected by the failures of lots of credit financial institutions and other events, that I didn't think a move from \$5 billion to \$7 billion for the quarter changed my view. I think there was some discussion – I don't remember whether he raised it or I raised it – about trying to reach Wachtell Lipton about this. I don't recall this being a particularly long discussion, and I think that was the gist of it.

(Emphasis added.)

124. For Mayopoulos, any number near \$10 billion made the case for disclosing much more compelling:

I guess I didn't have a view as to a particular dollar amount or something like that. *It certainly seemed to me that the closer you got to \$10 billion, which would have been the upper end of the range that Merrill had experienced in the prior fourth quarter, that the issue of whether to make a disclosure became more compelling – the case for making a disclosure became more compelling.*

(Emphasis added.)

125. According to Mayopoulos, on “approximately December the 3rd [...] Mr. Price brought to my attention that the forecast losses had increased. He asked for advice with respect to possible disclosure of those forecasted losses.” Mayopoulos further testified that Price told

him that the reported loss was “approximately \$7 billion dollars after tax [\$11 billion pretax].”

He said,

[b]ut at 7, and given what *the impression I had was that the forecast that had been prepared both at 5 and 7 were estimates as to which there was not a great deal of precision or reliability*, I didn’t think that 7 was a number that required a rethinking of the analysis.

(Emphasis added.)

126. This testimony demonstrates that Mayopoulos lacked two pieces of information critical to any accurate disclosure analysis. First, he lacked the increased loss number of approximately \$10.4 billion after tax. Second, he was led to believe that the \$7 billion figure he was told was merely an estimate without “a great deal of precision or reliability,” and thought he was seeing a “forecast” for the entire quarter. In fact, he was seeing actual numbers incurred for the quarter to date, and did not realize that a further \$3 billion in expected pretax losses had been added, to exceed his \$9.833 billion threshold by nearly \$600 million.

127. Thus the losses were now significantly beyond Mayopoulos’ comfort level, but he was kept in the dark about it. Nor was Wachtell, which had previously reviewed the losses, made aware of the true facts about the losses (the firm was never advised of any losses in excess of \$5 billion until after the vote). Thus Bank management failed to provide any of their lawyers with accurate information about the losses which the disclosure issue concerned.

**J. December 3: Curl Claims, Then Denies, a Call to Counsel about Disclosure**

128. In sworn testimony in April 2009, Curl unequivocally described a call he had placed to Herlihy on or about December 3, to obtain legal advice concerning the decision whether to publicly disclose Merrill Lynch’s fourth quarter-to-date losses.

Question: I was going to start with the subject of the Wachtell conversation [...]

Curl: The subject of the Wachtell conversation was disclosure.

[...]

Question: You're not going to answer if the disclosure was related to the financial condition of Merrill Lynch in the fourth quarter?

Counsel for the witness: I'm going to instruct him not to answer.

Question: Mr. Curl, are you not going to answer that question?

Curl: Correct.

Question: Why are you not going to answer my question?

Curl: Advice of counsel.

Question: When was this conversation with Wachtell?

Curl: As I recall, it was around the 3rd of December -- 3rd of December.

Question: December 3rd?

Curl: Around there. I recall somewhere around there. The 3rd. Yes.

Question: And who at Wachtell did you have that conversation with?

Counsel for the witness: You could answer the question.

Curl: Ed Herlihy.

Question: Was there anyone else other than Ed?

Curl: Not that I remember. No.

Question: And this was a telephone conversation?

Curl: Yes.

Question: Was there anyone on the call with you from Bank of America, or was it just yourself?

Curl: No. Not that I recall.

Question: Did you contact Ed, or did Ed contact you?

Curl: I called Ed.

Question: About the disclosure you were calling him about?

Curl: About disclosure. Yes.

129. When Curl testified in April 2009, he believed that he would not have to describe the substance of this purported conversation (in which only he and Herlihy participated) because of the company's assertion of the attorney-client privilege. Curl was also aware that the very fact of the conversation's occurrence would be important to the Bank and its management in supporting the contention that they relied upon their lawyers in making the disclosure decisions.

130. However, when Curl testified a second time, in November 2009, he insistently asserted that he had no recollection of the December 3 telephone call. Importantly, by the time of his second sworn testimony, Bank of America had waived the attorney-client privilege.

Herlihy, who also testified before this Office, stated that no such call had occurred.

Question: Did you have any other conversations regarding disclosure issues with Wachtell?

Curl: Not that I recall. No.

Question: Did you have any conversations regarding disclosure issues with Ed Herlihy?

Curl: Not that I recall. No.

Question: Mr. Curl, on April 10, 2009, did you testify before this office?

Curl: I recall testifying in April, but I don't know the exact date.

Question: Were you in this room?

Curl: As I recall, yes.

Question: Were you here with Mr. Liman?

Curl: As I recall, yes.

Question: And Miss Lawson?

Curl: As I recall, yes.

Question: And you were under oath?

Curl: Yes.

Question: And you told the truth to the best of your ability at that time?

Curl: Yes.

Question: Isn't it true that in your prior testimony you testified that you, in fact, discussed disclosure with Wachtell on December 3, 2008?

Curl: I don't recall that. No.

[...]

Question: How is it that in April you testified that you had a specific conversation with Mr. Herlihy about disclosure, and today you testified about none?

Curl: I don't recall that conversation about disclosure.

Question: Earlier today, on the topic of disclosure, you said, "That's not part of my world," correct?

Curl: Correct.

Question: How was it part of your world on April 10, 2008, when you testified about it?

Curl: I don't recall the conversation on December 3rd. I may have been mistaken. I don't recall that conversation on the 3rd.

**K. December 4: On the Eve of the Shareholder Vote, Price Learns of Pretax Losses With Goodwill of Over \$14 Billion**

131. By the afternoon of December 4, Price knew or was reckless or negligent in not knowing of over \$14 billion in losses at Merrill. That morning, Cotty had requested that an updated report be generated in time for him to review it for a call with Price at noon that day. Hayward relayed this request to Meloth.

132. At 11:47 a.m., Meloth sent the requested update to Cotty and Hayward, amended for newly finalized items. As Meloth put it “Only change is for known e2a [estimate to actual] as follows vs last night version.” In particular, the report reflected that already, the \$2 billion placeholder inserted for November was substantially eroded by an \$810 million loss in Merrill’s correlation trading book. As Meloth put it, “[c]hange in marks is due to 2 bil placeholder last night vs 810 in correlation plus 1.2 placeholder now.” Cotty forwarded the new report, which warned of the exclusion of the goodwill impairment, to Price in time for the noon meeting, and Price took copious notes on the document itself.

133. The report now showed Merrill’s total fourth quarter pretax losses at \$13.969 billion. Of this amount, the report showed known pretax losses incurred to date of \$11.769 billion. This figure comprised actual October losses (\$7.536 billion), actual November losses (\$3.604 billion—total November losses less the \$1.2 billion placeholder as noted by Meloth) and actual December losses of \$629 million (total estimated losses for December of \$1.629 billion less Cotty’s \$1 billion estimate).

134. But the total known pretax losses in fact stood at \$14.069 billion, because of the known goodwill loss of \$2.3 billion not yet added to the report. This amounted to approximately \$9 billion in known after tax losses to date. Price did not inform Mayopoulos of these increased losses, or correct the misimpressions Mayopoulos had about the certainty of the numbers he had seen or their status as estimates for the entire quarter.

**L. December 5: Bank Management Learns of Additional Losses Before the Shareholder Vote**

135. On December 5, 2008, the Bank held a special meeting of its shareholders to vote on the Merger. The morning of the vote, Cotty, Price and Lewis knew or were reckless or negligent in not knowing of losses even greater than those of the day before. The morning

shareholders were to vote on the merger, they knew or were reckless or negligent in not knowing of approximately \$15.322 billion in actual pretax losses to date at Merrill.

136. At 7:59 a.m. that morning, Cotty was alerted by Carlin that November actual results were nearly complete. Cotty congratulated the Merrill team on their speedy closing work and urged them to find an approach to get the marks “moved up.” By this time there was only one outstanding item on the November results: a CVA mark. As Hayward testified, “When this e-mail was sent, I believe the CVA was the only outstanding item.” As shown below, at the end of the day, total known pretax losses to date stood at \$16.2 billion inclusive of the goodwill loss and the CVA of \$950 million. In the morning, therefore, actual pretax losses without the CVA stood at approximately \$15.322 billion.

**M. The Bank’s Corporate Treasurer’s Plea for Disclosure of the Losses Is Dismissed**

137. Corporate treasurer Jeffrey Brown became concerned about the mounting losses at Merrill and the devastating effect they would have on the Bank of America shares he and others held. As he put it,

Associates are shareholders, as well. We had paid a lot for Merrill Lynch, and we were also watching before our eyes their financial condition deteriorate. You knew that there was likely to be adverse impacts to the share price, and that wasn’t necessarily a good thing as a shareholder.

138. Brown voiced this concern to Price before the shareholder vote, saying that he believed the losses ought to be disclosed to shareholders. Brown told Price that “I felt that we should disclose; that the losses were meaningful enough.” He explained that “at this point it’s about a \$9 billion after tax number. That’s a fairly significant loss for a corporation to experience in one quarter, and withholding that could potentially result in items like we’re discussing today.” After Price dismissed Brown’s concerns, Brown offered an unforgettable

warning: “I stated to Mr. Price that I didn’t want to be talking through a glass wall over a telephone.”

139. Astonishingly, Price seemed to have forgotten this dramatic exchange:

Question: As you sit here today, are you aware of other colleagues or former colleagues from Bank of America who have the view or had the view that disclosure should have taken place?

Price: Not that I’m aware of.

**N. Known Losses to Date at Merrill Top \$16 Billion by the End of the Day**

140. By the end of the day on December 5, 2008, Price and the Bank knew or were reckless or negligent in not knowing that Merrill’s actual losses had reached at least \$16.2 billion. These losses comprised the actual results for October and November, losses to date in December, and the goodwill loss.

141. This certainty was due in part to an initiative by Bank of America, following the Merger Agreement’s signature, to bring Merrill’s book-closing practices into line with its own. Merrill called the project “Accelerate the Close” and Bank of America called it “Legal Day One.”

142. Specifically, Bank of America wanted Merrill to be able to close its books as fast as Bank of America did, so that by the first day of the combined entity the practices would be uniform. Each month leading up to the end of the year, Bank of America pressured Merrill to make the decisions necessary to finalize results faster. November was the dress rehearsal for Legal Day 1. As Cotty said: “[November] was certainly used as a test run to eventually get to Legal Day 1. So, I mean, the way it works is each month you try to cut as much time off as you possibly can.”

143. The result of the initiative’s effort in November was that by the date of the shareholder vote on December 5, virtually all of November’s profit-and-loss results were in, with

the exception of decisions regarding marks. As Carlin put it in an email to Cotty and the team working on the project in the early morning of December 5, “[t]his has gone amazingly well. Other tha[n] the mark issues, which are still outstanding, the acceleration of the P&L went as smoothly as possible.”

144. At 5:28 p.m. on December 5, Hayward advised Cotty that “in addition to the official close process that Gary will run, the only potential material mark change to this schedule would be on the CVA.” Cotty responded minutes later by asking for Hayward’s “best guess” on the CVA. At 6 p.m., Hayward advised him that the CVA was to be a loss of \$950 million, and that the ongoing close process was not turning up “anything material.” Cotty responded by asking to what the \$1.2 billion was allocated, and Hayward explained that it was there to account for potential CVA, which was now known to be \$950 million. In response, at 7:25 p.m., Cotty acknowledged this: “so the 1.2 b is all cva ....” Thus, by the end of the day on December 5, Cotty and the Bank knew all the November results, including the marks determined by the closing process.

145. By 8:05 p.m., the official results for November were complete, with the exception of tax-adjustment revisions. The final pretax number comprised October’s pretax loss of \$7.536 billion and November’s pretax loss of \$5.807 billion. Together with December’s loss to date of \$629 million as reported in the December 4 report described above (*see* ¶¶ 131-134), losses had reached \$13.972 billion. With the goodwill loss of \$2.3 billion, Merrill’s known pretax losses to date stood at \$16.272 billion (approximately \$10.4 billion after tax), not including results for the day of December 5 itself.

146. The following table summarizes the above description of the losses in this period:<sup>3</sup>

Date	Actual Losses	Goodwill Loss	Total Known	Approximate After Tax Actual Losses	Forecasted	Total Known and Forecasted	Approximate After Tax Known and Forecasted Losses
12/1/2008	10.994	2.3	13.294	8.5	2.7	15.994	10.396
12/3/2008 pm	11.043	2.3	13.343	8.5		13.343	8.540
12/3/2008 eve	11.043	2.3	13.343	8.5	3	16.343	10.460
12/4/2008	11.769	2.3	14.069	9	2.2	16.269	10.412
12/5/2008 am	13.022	2.3	15.322	9.8	2.2	17.522	11.214
12/5/08 pm	13.972	2.3	16.272	10.4	2.2	18.472	11.822

**O. December 6-10: Final November Results and the Second December Board Meeting**

147. The day after the vote, Saturday, December 6, Meloth re-sent an email to Cotty (she had sent it to him the night before but it was returned because she had misspelled his email address), in order to update him on the increase in the CVA loss: “the CVA mark is estimated at 1.2 bil for Nov but believe it came in at 2 bil last night.”

148. The next day, Sunday, December 7, Cotty received the conclusive results for November. Carlin forwarded to Cotty the November reports Carlin had received from a member of Merrill’s Corporate Reporting department on Friday evening. As explained above (*see* ¶ 145), these reports contained the past two months’ actual pretax losses of \$13.343 billion (October’s pretax loss of \$7.536 billion and November’s pretax loss of \$5.807 billion). In summing up this bleak result, Carlin wrote simply: “What a disaster!” Also clear was the fact that the “disaster” occurred prior to the shareholder vote.

149. Bank of America scheduled another meeting of its board for Tuesday, December 9. In preparation, Cotty, along with Jeffrey Brown, Steve Brown, and other members of Price’s

<sup>3</sup> After tax numbers are taken from Merrill financial reports where they were included. Where they are not included, the after tax figures are derived by applying the tax rate stated on the reports, most frequently 36%.

finance team worked to prepare Price's financial data presentation to the board. A December 8 email from Cotty updating Thain on the presentation illustrates the dismal prospects in store for the board:

John,

Joe made the decision to show more to the board rather than less with regard to ML. Over the weekend and this morning we put the following slides together related to ML from input from the ML team.

I think by now u saw that they closed the books out at a pretax loss of \$5.8 billion. This was \$1.0 billion higher than what we discussed with Ken last week. At the time we had a \$2.0 billion placeholder...but again it was far surpassed (\$1.0b), I believe one of the drivers was the MBIA piece. My understanding is you were briefed.

[...]

150. Losses did not deter the bonus payments, however. A "Daily Net Revenue Report 12.8.08 (5:15 Flash.))" showed that for the month of December to date (a mere six business days), Merrill's Global Markets & Investment Banking division had lost \$137.4 million. Cotty's laconic comment to Hayward was "[a]nother ugly day." *The very same "ugly" day, December 8, 2008, and as known to the Bank almost a month before, Merrill's compensation committee voted to allocate a total of about \$3.6 billion for bonus payments and to pay out the cash portion of these bonuses at the end of December.*

151. On December 9, 2008, Bank of America held a Board of Directors meeting. According to the minutes, Price "reported on Merrill Lynch's projected income for fourth quarter, noting the forecast of a net loss of \$9 billion and the factors to which such loss is attributed."

152. Price gave the board numbers “consistent with the forecast we had, the second forecast on the 3rd.” He used these numbers because “my presentation was focused on the quarter and the best view of the quarter, which is what I continued to look at.”

153. Price did not tell the Board what had happened since the “projection” on December 3—that actual losses, independent of any estimate or projection, in reality stood at \$16.2 billion (approximately \$10.4 billion after tax) by the end of the day on Friday, December 5. (*See* ¶ 145.)

**P. December 10: Lewis Summarily Fires his General Counsel**

154. Because the last loss figure Price had told him was \$7 billion, Mayopoulos was surprised by the \$9 billion figure, and wanted to find out its basis: “[m]y reaction was that was a bigger number than the number I had recalled discussing with Mr. Price.” He said further that “I had a reaction that I wanted to understand what had happened and that I wanted to talk to Mr. Price about it.”

155. Mayopoulos tried to reach Price:

Following the board meeting, I swung around Mr. Price’s office. I believe I learned from his assistant that he was in a meeting for the rest of the afternoon. I had an appointment outside of the office earlier that evening and decided that I would talk to him the next day about the issue, December 10<sup>th</sup>.

Mayopoulos “want[ed] to talk to him about what’s changed; why it’s changed; what does it mean with respect to whether we should make a disclosure or not.”

156. Thus on the evening of December 9, Mayopoulos knew too much: first, that he had been approached before the shareholder meeting about the MAC; second, that on December 3, prior to the shareholder vote, he was told losses were only \$7 billion after tax, and third, he now knew that by that time the losses had been at least \$9 billion.

157. The next day, December 10, without any warning, Mayopoulos was told his employment had been terminated, and he was immediately escorted from the premises by an HR executive. He was not permitted to remove any belongings, even personal effects.

158. Mayopoulos was replaced by Brian Moynihan, a former FleetBoston Financial executive who came to Bank of America when it acquired Fleet in 2003. At the time he replaced Mayopoulos, Moynihan was not practicing law. Instead, he was head of Bank of America's Global Corporate Investment Bank.

159. Moynihan had long since stopped practicing law, and had not done so for fifteen years. In fact, Moynihan's bar membership was inactive at the time he replaced Mayopoulos. While he joined FleetBoston Financial as deputy general counsel in 1993, he worked in wholly business capacities beginning in 1994 and for the rest of his career at Fleet and BoA, until stepping in to Mayopoulos' post.

160. Moynihan acted as general counsel of BoA for approximately six weeks, a key portion of which period was taken up with the Bank's efforts to secure government assistance by threatening to invoke the MAC.

161. Bank of America thus fired its General Counsel in the middle of a historic financial crisis, and in the course of the most significant acquisition in its corporate life. As Mayopoulos recalled in his congressional testimony,

I was stunned. I had never been fired from any job, and I had never heard of the general counsel of a major company being summarily dismissed for no apparent reason and with no explanation.

[...]

Finally, I could not understand why I was dismissed so abruptly. I was surprised that I was given no opportunity to say goodbye to my colleagues and staff, and why there was no orderly transition of my work to Mr. Moynihan. No one, including Mr. Moynihan, ever contacted me to discuss what I had been working

on. Nearly a year later, I still do not know why I was terminated, who was involved in the decision to do so, or what their reasons or motivations were.

**II. AFTER THE SHAREHOLDER VOTE: ON LOSSES ONLY SLIGHTLY HIGHER THAN THOSE KNOWN TO IT BEFORE THE VOTE, BANK OF AMERICA FORCES THE GOVERNMENT TO SAVE THE DISASTROUS MERGER WITH TAXPAYER ASSISTANCE**

162. A week after BoA’s shareholders voted to approve the Merrill acquisition, Bank management began an effort to obtain a taxpayer bailout from the government, on the basis of losses that were not materially different from those known and existing on December 5.

163. Lewis claimed in testimony before this Office that his reason for going to the government for taxpayer aid was an analysis showing that pretax losses had increased by \$7 billion in just over one week commencing on December 5—after the shareholder vote—with the “acceleration” in losses as the decisive factor.

164. Lewis said the same thing before Congress when he attempted to explain the reason shareholders were left in the dark about the mounting Merrill losses prior to the vote:

Question: [...] what was the motivating force behind your decision to put forward this MAC?

Lewis: [...] We grew more and more convinced that – that there – that there was a distinct possibility that we had a MAC as a result of the accelerated losses.

Question: You didn’t disclose that to your shareholders, though.

Lewis: But the acceleration really took place about a week after. That’s when you saw massive acceleration, not necessarily those days, but as a result of the forecast increasing. And so, there was – this was not some bluff. We thought we had a real possibility of a MAC.

[...]

Question: And in your testimony you stated that nine days after the shareholders’ vote approving the merger, you became aware of significant accelerating losses, the MAC at Merrill Lynch, raising concerns that the Bank of America might want to avoid finalizing the deal due to the revelation of

MAC. ... Were any of the 200 Bank of America employees responsible for analyzing Merrill Lynch aware of the potential for the \$12 billion loss before you allegedly discovered it in mid-December?

Lewis: [...] We could see that was happening, and – and there were rumors on the street that that was happening across financial institutions. And we saw evidence of that after the fourth quarter close, because we saw almost everybody had losses. The thing that caused us to be concerned with the acceleration what we saw when we got those – when we got those numbers that we did on – on the 14th.

Question: So you are saying that you really weren't aware of the substantial loss before the shareholders [sic] meeting on December 5th?

Lewis: No ma'am. We saw losses, but they seemed consistent with what we were hearing about in the marketplace and consistent with what we were seeing at our company. It was only when they – when we saw the acceleration that – when we got the reports when we did – that caused the alarm.

165. Curl also testified before this Office that the losses that prompted the MAC discussions conveniently surfaced on December 12, developing only a “few” days before:

On Friday, December 12, as best as I recall, some time between five and six p.m., I got a call from Joe Price who was quite agitated and said, you need you [sic] get upstairs. [...] He said, um, Merrill forecast is showing significant deterioration, significant losses. And he was quite concerned about it. *That this had just happened over the passed [sic] few days.* [...] And once again, as I remember, there are two issues here. [...] Obviously number one, the size of the loss. But more than importantly [...] the rate at which based on these forecasts was accelerating [...].

166. These accounts are simply false and misleading. While the Bank claimed surprise at a post-vote “acceleration” of \$7 billion, in fact actual losses only increased by \$1.4 billion after the shareholder vote. To inflate this real increase to \$7 billion, the Bank added in: 1) \$2.92 billion in actual losses incurred prior to the shareholder vote that it already knew about; 2) \$1 billion in estimates for December marks made by Cotty prior to the shareholder vote; and 3) a reckless guess at markdowns made by Cotty in consultation with Hayward on December 12 of \$1.7 billion. The December 12 guess was made in a fashion totally inconsistent with Merrill

practice, in which marks were set at month-end after analysis and discussion between corporate planning and business unit heads. Lewis and Price knew, or were reckless and negligent in not knowing, about these distortions.

167. Thus, only the remaining \$1.4 billion represented losses incurred after the shareholder vote but prior to December 12. *In other words, BoA management sought taxpayer aid to save the Bank on a figure that was in reality only \$1.4 billion worse than the losses they concealed from shareholders voting on the Merrill acquisition.* Their action demonstrates, perhaps more clearly than any other fact, the materiality of the pre-vote losses, and BoA management's obligation to disclose them.

168. But Lewis attempted after the fact to blame the federal government for the Bank's disclosure and corporate failures. He stated in testimony before this Office that upon reviewing the loss acceleration, the Bank's and his intention was to invoke the MAC clause, and that they only refrained from doing so because of the federal government's concern for the larger economy. This was inaccurate.

169. Lewis also testified that he did not try to renegotiate the price of the transaction with Merrill, or disclose the existence of government assistance, because of instructions from senior government officials. This too was false.

170. The facts set out below show that actually, the Bank knew right away that the MAC claim was unavailing and that renegotiation with Merrill was impossible. The Bank's general counsel, who was fired shortly after the vote, advised that no MAC claim was available prior to the shareholder vote. Outside counsel also advised against invoking the MAC clause. Thus in fact, the Bank began negotiations with the federal government fully aware that taxpayer aid was its goal, and used the MAC as a bargaining chip to secure that aid.

171. Similarly, the Bank determined on its own that price renegotiation was not an option. Thus Lewis attempted to place the responsibility for his mistakes and subsequent conduct on the government.

**A. December 12-15: Bank Management Manufactures an “Acceleration” in Losses at Merrill**

172. Between the shareholder vote and Friday, December 12, Merrill in fact incurred an additional \$1.4 billion in actual pretax losses. BoA executives, however, constructed an analysis that inaccurately showed \$7 billion in additional pretax losses between December 3 and December 12. They accomplished this by adding in: 1) \$2.92 billion in actual losses incurred prior to the shareholder vote that it already knew about; 2) \$1 billion in estimates for December made by Cotty on December 3 (prior to the shareholder vote); and 3) reckless guesses at markdowns made by Cotty in consultation with Hayward and others on December 12 of approximately \$1.7 billion. This last guess was made in a fashion totally inconsistent with Merrill practice, which usually set marks at the end of the month after analysis and discussion between corporate planning and business unit heads. Shortly thereafter, the Bank would make these losses appear even worse by finally adding the goodwill charge it had known about since at least November 20.

**B. A December 11 Report Is Issued Showing \$1 Billion in December Marks**

173. At 6:17 p.m. on December 11, 2008, Meloth sent a “Revenue Daily Pacing” report to Cotty and Hayward. This report reflected developments in revenue (it did not include expenses) since the December 5 report. It still contained the \$1 billion placeholder for December: “Left 1 bil in marks in Dec which we will update.” There were no additional marks in the report for December, save in FVA (Fair Value Adjustment), which showed a net gain of

\$225 million, which reduced the negative \$1 billion to a placeholder of negative \$775 in expected marks.

**C. Cotty and Hayward Revise the December 11 Report to Show a Q4 \$18.106 Billion Pretax Loss Inflated with Hurried Estimates**

174. The marks were inflated by Cotty and Hayward with hurried, and ultimately inaccurate, guesses at what further write-downs might occur. At 12:30 p.m. on Friday, December 12, less than a day later, Meloth sent Cotty another report. This version contained radically different marks from the previous one. December pretax losses now stood at \$4.762 billion. This amount now contained a total of \$2.8 billion in estimated write-downs. The write-downs were distributed as follows: \$1.1 billion as “Total Marks,” \$1.2 billion as “One-Time Items (Non-Marks),” and \$500 million as fair value adjustments. The report acknowledged these figures as estimates: “[n]ote: December marks are very rough placeholders clearly subject to market movements.”

175. These write-downs were simply hasty—and ultimately inaccurate—guesses. Cotty and Hayward had inserted an additional approximately \$1.8 billion worth of placeholders into the new version, in consultation with other Merrill executives, bringing the total placeholders to \$2.8 billion. Cotty recalled that “he might have tried to instill some of it on Chris Hayward and some of his people, but it may have come from me; I wouldn’t be surprised.” Hayward recalled that “I discussed some of these [marks] with Mr. Cotty, but he also received it but [sic] from others for some of these line items.”

176. Hayward testified that the additional \$1.8 billion in placeholders were exceedingly preliminary:

We certainly made it clear and that these were early estimates and that they were preliminary and, if you will, the [error] bar could be greater around them just by the fact they were put on a page earlier in the month. You hadn’t lived the month, so you didn’t know the back half of the month, the market behavior and what they

might come out to, so we made that clear. I think that was -- everybody knew that if you are going to do line item estimates that early in the month, there could be there were [re]visions to them.

177. Putting in these numbers took less than three hours. This process was not at all what was normally used at the end of each month, when marks were finalized. As Hayward explained, it was not “the normal month-end process with its checks and balances, and price verification testing taken into account the market behavior of these asset classes....”

178. Ultimately, these estimates proved to be materially inaccurate. When the marks were finalized during the normal, rigorous month-end process, the \$2.8 billion estimate approved by Cotty on December 11 shrank by January 6, 2009 to \$1.476 billion.<sup>4</sup>

179. The increase in actual losses confronting Price, Curl and Cotty on December 12 was therefore not in fact \$7 billion, but really only \$1.4 billion. Thus the Bank effectively made the judgment that an increase of \$1.4 billion was enough to go to the federal government for taxpayer aid, even though losses of the same order of magnitude did not warrant disclosure to shareholders deciding whether to buy Merrill. Lewis and Price knew or were reckless or negligent in not knowing about the distortions in the analysis of Merrill’s losses.

#### **D. Bank Management Considers the MAC**

180. Cotty delivered the figures to Price, after which Price contacted Curl at approximately 5:00 p.m. to discuss them. Upon receipt of this revised estimate, Curl thought it was “becoming a contractual issue” and that it “looked like a Mack [sic].” With Lewis’ agreement, Curl then requested that Wachtell conduct an analysis of whether or not Bank of America had grounds to invoke the MAC clause, which could permit the Bank to terminate the

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<sup>4</sup> The changes between Cotty’s and Hayward’s guesses on December 12 and the final figures on January 6 are massive: the initial CVA mark of (\$600 million) became \$146 million, a change of \$746 million. FVA shrank from (\$500 million) to \$454 million, a change of nearly \$1 billion. “Other market dislocations,” at (\$700 million), shrank to zero.

deal. Wachtell conducted that analysis and quickly determined that invoking the MAC clause was not in the Bank's interest, but that it could be used as a bargaining chip in getting additional taxpayer assistance.

181. Lewis, Moynihan, Price and Curl engaged in conversations over the course of the next several days with Wachtell partners Demmo, Roth and Herlihy, concerning whether or not Bank of America could invoke the MAC clause.

182. Wachtell concluded right away that invoking the MAC clause would likely fail, and worse, could put the Bank at huge risk of being forced to purchase a bankrupted Merrill Lynch. On December 14, Roth took notes of a conversation with Demmo in which he noted "If we call the MAC company = bankrupt damage = huge," which he testified meant that "given the state of the financial markets, just the assertion that Merrill had suffered a MAC would probably result in counterparties refusing to deal with Merrill, and, as we saw with Lehman, it may not survive a day." The notes also reflect that the initial thinking included government aid: "Go to gov't to share pain? Get addl cap." Roth testified that this note reflected Demmo's thinking "that one possible course of action to consider would be the prospect of going to the government and getting some form of assistance." Moynihan likewise testified that going into the meetings with the federal officials, a potential solution to the situation was obtaining government aid.

183. On December 15, Demmo, Herlihy and Roth met with Curl and Price to discuss the MAC issues. As early as December 16, Roth, Demmo, Herlihy and another Wachtell litigator met internally to discuss next steps in the project. Roth noted that the lawyers should "impress upon them – high hurdle [...] speak to Joe P. this afternoon[;] give him primer."

184. Their conclusion was evidenced in some of the written advice the firm provided to Bank of America. For example, the firm drafted talking points for Lewis, finalized on

December 19, which stated that under the standard governing MAC clauses, “no Delaware court has ever found that a MAC occurred permitting an acquirer to terminate a Merger Agreement.”

The talking points went on to point out in detail that even an attempt to invoke the MAC clause could destroy Merrill’s business, and at the same time result in a court order to buy Merrill anyway in “specific performance” of the Merger Agreement, a ruinous result:

the potential danger here is that, if we declare a MAC and MERs [sic] business loses even more value as a result because, for example, retail customers pull their funds out, and then we litigate the MAC issue and lose, we could be required to close on a deal where MER is worth even less than it is today.

The firm also generated a legal memorandum discussing the high standard for invoking MAC clauses.

**E. Bank Management Knew Before Approaching the Government That Renegotiation with Merrill Was Impossible**

185. Lewis claimed that renegotiation of the deal was impossible because “after the instructions by [Secretary] Paulson, etc., no, I didn’t have a chance [to renegotiate price].”

Lewis claimed he would have tried to renegotiate if Secretary Paulson had not told him he should not do so.

186. This was inaccurate. In fact, the Bank had decided that renegotiation with Merrill was not a viable option prior to beginning discussions with the government. In a December 15 meeting between Curl, Price, and Wachtell lawyers Herlihy, Roth and Demmo, Herlihy listed options for the bank. According to Roth’s contemporaneous notes, these included “rengo. + go back to stock[holders].” Curl observed in response that Merrill would “never make it to 3/31” if they had to renegotiate.

**F. Bank Management Meets with Federal Officials and Makes the Empty Threat to Terminate the Merger**

187. At this point, Bank executives understood that invoking the MAC would be costly, destructive and in the end unsuccessful, and knew that it had only one option: seeking additional taxpayer aid. Lewis and his lieutenants Moynihan and Price calculated that if they threatened to call a MAC to get out of the deal, the federal government would counter with more taxpayer funds out of a concern for the greater economy.

188. In a meeting with Wachtell lawyers, Lewis and Price on December 17, Herlihy voiced further skepticism on the MAC claim, as Roth's notes reflect, but also showed that the plan was to "convince regulators" they had a MAC claim, despite the "tough case legally" that they faced:

12/17/08	
Ed, Kim, Demmo, Wolinsky, Guest Ken Lewis, Price	
<hr/>	
Ed – serious issues – tough case legally 1 <sup>st</sup> step – must convince regulators	
Have done script for Thain call – will likely go ballistic.	
Need to predict compelling case → Why an MEA Impact on cap ratio	
Need reg[ulators] <u>first</u>	

189. Following his deliberations with counsel, Lewis informed Secretary Paulson that Bank of America was considering invoking the MAC clause due to Merrill Lynch's fourth quarter losses. Paulson requested that Lewis come to Washington to discuss the matter.

190. Despite having known of the goodwill loss since November 20, the Bank did not include it in Merrill's losses until they wanted taxpayer aid. Prior to the December 17 meeting, Cotty emailed Meloth, instructing her to "update for the late Pace as of COB Wednesday ..... latest Pl .. tell Jeff [Hayward] to get it in there...goodwill,....a good tax rate....the litigation reserve..."

191. The goodwill charge's existence was so well-known that Cotty expressed frustration upon being told that a Merrill tax expert had not yet accounted for its effect on Merrill's tax rate by December 16. Cotty wrote, "Why would he not [have done so] ... we all knew it was out there."

192. The meeting on the evening of December 17 in Washington included Lewis, Price, Moynihan, Secretary Paulson, Federal Reserve Chairman Ben Bernanke, and other federal officials. The participants discussed Merrill Lynch's financial condition and the invocation of the MAC clause. During this meeting, both Secretary Paulson and Chairman Bernanke advised Bank of America that it would be inappropriate for Bank of America to terminate the transaction.

193. Lewis advised federal officials that if Bank of America proceeded with the transaction it was looking for financial assistance in the form of a "Citi guarantee" to "cap [Merrill Lynch's] losses." At the conclusion of this meeting, federal officials asked the Bank not to invoke the MAC clause until after further consultation, and requested information concerning Merrill Lynch's financial condition.

**G. Bank Management Discusses Merrill Lynch’s Fourth Quarter Losses in Dire Terms with Federal Officials**

194. During the meeting on December 17 and the days immediately following the meeting, Bank of America provided financial data concerning Merrill Lynch’s fourth quarter losses to Chairman Bernanke, Secretary Paulson and other federal officials. Bank of America initially provided a financial report for Merrill as of December 10, which indicated that Merrill Lynch had \$18 billion in total fourth quarter pretax losses, as well as a listing of Merrill Lynch’s assets that “drove the predominance of the loss[es].”

195. Shortly after the December 17 meeting, Price advised the federal officials that Merrill Lynch updated its report on December 16 to include the long-anticipated goodwill impairment charge of \$2.3 billion. Because Merrill Lynch’s fourth quarter losses, with the inclusion of the goodwill impairment charge, along with the losses and Cotty’s December 12 placeholder, were now expected to be in excess of \$21 billion pretax, Price described Merrill Lynch’s financial condition in the direst terms to federal officials.

**H. Bank Management Continues Its Discussions with the Federal Government, Emphasizing the MAC**

196. In the days following their initial meeting, federal officials and Bank of America’s senior management continued to discuss Merrill Lynch’s financial condition and Bank of America’s exercise of the MAC clause.

197. During the two days following the meeting with federal officials in Washington, *e.g.* December 18 and December 19, Price had further discussions with federal officials concerning Bank of America’s desire to terminate the transaction and Merrill Lynch’s financial condition. Specifically, Price continued to provide information pertaining to Merrill Lynch’s financial condition to federal officials, including members of the Federal Reserve Bank of Richmond. Price “generally update[ed] [Lewis] on all [his] conversations” during this process.

198. During a December 19 conversation with federal officials including Secretary Paulson and Chairman Bernanke, Lewis reiterated Bank of America's concern about the staggering losses facing Merrill Lynch. Specifically, Lewis said that Merrill Lynch's fourth quarter losses had been updated to include a goodwill impairment charge amounting to \$2.3 billion pretax (\$1.7 billion after tax). Lewis advised that due to the goodwill impairment and certain other items, the expected fourth quarter losses had escalated from \$18.1 billion to \$21.4 billion.

199. During this conversation, Lewis, reiterating that the Bank was contemplating invoking the MAC clause, again requested that the Bank receive additional TARP funding to counter Merrill's losses if it were to proceed with the merger. Lewis advised that the Bank would need approximately \$13 billion in TARP funding, in addition to the \$10 billion it had already received, to counter those losses.

200. The very lawyers who concluded that a MAC claim would be futile and disastrous argued forcefully to federal officials that a MAC case would be successful. Brenner described the December 19 meeting to Moynihan as follows:

Eric [Roth] made a very strong case as to why there is a MAC. All questions (other than one) came from Tom Baxter at the NY Fed and focused on the case law around MAC. Since Eric or Peter [Hein] were involved in each case Tom cited, no line of questioning evolved very well for Tom. Tom observed there had never been a successful MAC case before, and Eric responded that all cases are factually based, and this one essentially could be the first due to magnitude and duration of future lost earnings.

In other words, even though it knew a MAC claim was out of the question, the Bank threatened federal officials that it would make one anyway, in order to get taxpayer aid.

201. In a script written for Lewis that described a later call between Lewis and Secretary Paulson on December 21, Lewis' and the Bank's plan to obtain taxpayer funds was clearly described:

In those conversations, I relayed that while we still believed a MAC has occurred that we would be willing to not declare the MAC, and complete the transaction if the Fed and Treasury and related entities put together a package that would consist of \$23B of preferred stock (including the \$10B of the TARP preferred we were already scheduled to receive), and a loss sharing on about \$150B of assets, including about \$100B of cash assets and the rest derivatives.”

The script indicates that Lewis said the same to Chairman Bernanke later that day:

Again I stated that we believe we had a MAC, but that Bank of America would be willing to go forward in the transaction on the condition that we get an infusion of capital and loss sharing on Merrill assets.

202. Incredibly, also on December 19 Merrill informed its employees of what they would receive in 2008 bonus compensation. Billions of dollars of bonuses were to be paid to thousands of Merrill employees, including 149 recipients who each were awarded \$3 million or more – sometimes significantly more – for performance year 2008. Thirty-two of these individuals received \$6 million or more; 14 bonus recipients received \$10 million or more. In other words, BoA let Merrill dole out billions when it knew that, absent a taxpayer bailout, Merrill's losses could cause the failure of the combined entity.

**I. The Federal Reserve Concludes That Merrill Losses Occurred Earlier than Represented by Bank Management**

203. After reviewing this data, however, the federal authorities concluded that Lewis' claims of surprise were “not credible.” Further, Federal Reserve senior advisor Tim Clark stated the general belief that BoA had long known of the losses it characterized as “surprising” when it confronted the Fed:

General consensus forming among many of us working on this is that given market performance over past several months and the clear signs in the data we have that the deterioration at [Merrill] has been observably under way over the

entire quarter – albeit picking up significant[ly] around mid-November and carrying into December – Ken Lewis’ claim that they were surprised by the rapid growth of the losses seems somewhat suspect. At a minimum it calls into question the adequacy of the due diligence process [BoA] has been doing in preparation for the takeover.

204. Other fed officials agreed that the due diligence was insufficient. Deborah Bailey, deputy director of the Banking Supervision and Regulation Division at the Federal Reserve, sent an email stating that “I always had my doubts about the quality of the due diligence they did on the [Merrill] deal. Don’t forget they paid a premium. How do you pay a premium and now ask for help? This will not go over well at all.”

205. Likewise, an internal Federal Reserve memorandum titled “Analysis of Bank of America & Merrill Lynch Merger” stated:

[w]hile the extent of the market disruptions that have occurred since mid-September were not necessarily predictable, [BoA] management’s contention that the severity of [Merrill’s] losses only came to light in recent days is problematic and implies substantial deficiencies in the due diligence carried out in advance of and subsequent to the acquisition.

206. The Fed concluded that BoA did not properly take account of Merrill’s risk positions:

Staff at the Federal Reserve has been aware of the firms’ potentially large losses stemming from exposures to financial guarantors, which is the single largest area of risk exposure and driver of recent losses that have been identified by management. These were clearly shown in Merrill Lynch’s internal risk management reports that BAC reviewed during their due diligence.

The potential for losses from other risk exposures cited by management [...] should also have been reasonably well understood, particularly as BAC itself is also active in both these products.

207. The analysis further noted that

[i]n the merger Proxy Statement and investor presentations the firm explicitly asserts that it has an understanding of [Merrill’s] business activities, financial condition and prospects as well as an understanding of the outlook for the firm based on prospective economic and market conditions.

208. Finally, in a December 23 email, Federal Reserve Senior Vice President Mac Alfriend stated that Lewis “is worried about stockholder lawsuits; knows they did not do a good job of due diligence and the issues facing the company are finally hitting home and he [Lewis] is worried about his own job after cutting loose lots of very good people.”

209. As the Federal Reserve realized, Lewis knew or was reckless or negligent in not knowing about most of the losses on or before December 5.

**J. Secretary Paulson Threatens Removal of the Bank Board and Management, Creating a Conflict of Interest for Lewis and Price, and the Government Assures the Bank of Billions in Taxpayer Aid**

210. During a telephone conversation on December 21, Secretary Paulson bluntly advised Lewis that Bank of America’s management and Board could be replaced if Bank of America invoked the MAC clause. Federal officials had by this time expressed doubt that Bank of America could invoke the MAC clause and, in fact, correctly viewed Bank of America’s “threat to use the MAC [as] a bargaining chip.”

211. In his testimony before this Office, however, Lewis claimed that he believed a MAC claim could be successful, and that only after being threatened by the government did he abandon the MAC option and try to save the deal with government assistance.

Question: After you have that conversation [in which Paulson threatened Lewis and the board with removal], what do you do?

Lewis: What day was that?

Question: Sunday, the 21st.

Lewis: *First of all, until that point, we were going MAC; it felt like we had some chance. But now, basically being forced to do it, we began to discuss what we needed to fill that hole and make it work, and we also said that we needed to get something done before year end, before the deal was done. There were a lot of discussions with Joe and others. We were talking about different amounts at different times; we were talking about different instruments at different*

times; we were talking about possibly some preferred convertible, not just the TARP preferred -- because the tangible equity got hit -- if we did the deal. The Fed and the Treasury, both, were very cooperative in wanting to meet our needs -- whatever they were -- at least in conversation. And so those conversations went on for quite sometime.

(Emphasis added.)

212. Lewis claimed that, were it not for the “severity” of the threat by the federal government to remove management and the Board, Bank of America would have invoked the MAC clause or attempted to renegotiate the transaction price:

Lewis: [The threat] was not the reason that we went ahead with the deal. As I said, the threat wasn't as meaningful to us or to me and the board as the severity of it. Meaning, that if they felt that strongly, that that should be a strong consideration for us to take into account.

Question: So the communication that Mr. Paulson made was, in fact, the turning point for you in terms of your decision-making?

Lewis: The seriousness of the statement more than the threat itself.

But as shown by the facts set out above, this claim was simply false.

213. In addition, after receiving the threat from Secretary Paulson, Lewis and Price were operating under a conflict of interest prohibited by the Bank’s Code of Ethics. The Code states that conflicts occur when “personal interests or activities compete or interfere – or even appear to compete or interfere – with ... obligations to the corporation, its shareholders or customers.”

214. Despite this rule, the Bank, Lewis and Price failed to disclose to the Bank’s shareholders that management was compromised and faced a conflict of interest as a result of the threat from the senior-most levels of government that they would or could be replaced if they invoked the MAC. Lewis and Price, as part of management, had personal interests in

maintaining their positions, which conflicted with their duties to the shareholders, because their knowledge of the threat compromised their ability to make business decisions independently and effectively on behalf of their shareholders. Thus the shareholders were unaware of this conflict of interest and were deprived of a leadership team unencumbered by motivations of personal gain.

215. Following Secretary Paulson's call with Lewis, Chairman Bernanke told Lewis that the federal government would work to protect Bank of America from any further financial losses for proceeding with the transaction. During the conversation with Chairman Bernanke and other federal officials, an agreement "in principle" was reached that Bank of America would receive financial assistance from the federal government to proceed with the transaction.

**K. Bank of America Proceeds with the Merger Based on the Government's Commitment to a Taxpayer Bailout, and Keeps it Quiet**

216. Lewis testified that the decision to proceed with the merger was premised on the federal government's commitment to finance it, saying that "I think everybody agreed with ... we knew that it would be very dangerous to do that deal without some help, and so I think that was the mindset." Price testified similarly, stating that "[a]fter Ken had those follow up calls, we concluded to go forward with the transaction realizing we are relying on them to work toward a solution." Lewis tried to obtain written confirmation from federal officials outlining the additional federal commitment to finance the completion of the merger, but could not.

217. Lewis advised the Board that he was striving to ensure that the public would not learn about Merrill Lynch's fourth quarter losses until the federal government's commitment to finance the merger was disclosed.

218. Lewis again failed to alert shareholders of the planned taxpayer aid, and blamed this failure on the government's instruction not to disclose the aid, stating in testimony that "I was instructed [by Paulson] that 'We do not want a public disclosure.'"

219. But a contemporaneous email shows that Lewis himself did not want to have to tell shareholders. He wrote, "I just talked with Hank Paulson. He said that there was no way the Federal Reserve and the Treasury could send us a letter of any substance without public disclosure *which, of course, we do not want.*" (Emphasis added.) Lewis later testified that he believed the government's and Bank's interests were "intertwined" on this issue.

220. Nor did Lewis ever consider whether such disclosure was obligatory, testifying that "I was not aware [of discussions about disclosing the taxpayer aid commitment] -- I don't recall any and don't recall being aware of any." Also, despite the fact that the federal government's financial assistance would have a dilutive effect on shareholder's equity, Price noted that Bank of America never discussed whether to make a public disclosure of the federal government's commitment to finance the completion of the merger.

221. Lewis nonetheless knew the potential consequences of the Bank's failures to disclose. Chairman Bernanke wrote a December 22 email to the Federal Reserve's General Counsel Alvarez, stating that Lewis "fears lawsuits from shareholders for NOT invoking the MAC, given the deterioration at [Merrill]." Thus, Lewis in fact not only considered the issues, but asked senior government officers if they would provide a defense for his disclosure failures: Chairman Bernanke wrote that Lewis had asked "whether he could use as a defense that the [Government] ordered him to proceed for systemic reasons. I said no."

222. Alvarez agreed, responding that such formal advice was not "appropriate," but noted that Lewis indeed had a problem:

Management may be exposed if it doesn't properly disclose information that is material to investors. There are also Sarbanes-Oxley requirements that the management certify the accuracy of various financial reports. [...] His potential liability here will be whether he knew (or reasonably should have known) the magnitude of the [Merrill] losses when [BoA] made its disclosures to get the shareholder vote on the [Merrill] deal in early December.

223. Alvarez shortly thereafter acknowledged that the Fed's take on Lewis' knowledge would be a further problem for him:

once we're in the litigation, all our documents become subject to discovery and [...] some of our analysis suggests that Lewis should have been aware of the problems at [Merrill] earlier (perhaps as early as mid-November) and not caught by surprise. That could cause other problems for him around the disclosures [BoA] made for the shareholder vote.

#### **L. January 1: The Merger Closes**

224. On January 1, 2009, BoA completed the merger with Merrill. On January 16, 2009, BoA issued a press release reporting that for the fiscal quarter ended December 31, BoA had a net loss of \$1.79 billion and diluted loss per common share of \$0.48, with \$15.31 billion in after tax losses attributable to the reported results of Merrill for the quarter. Merrill's losses were reportedly "driven by severe capital markets dislocations." As a result of these reported losses, BoA disclosed that it would be cutting its quarterly dividend to a nominal amount of one penny per share. The press release also reported that:

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.

225. Significant negative fourth quarter items for Merrill Lynch were reported in the January 16, 2009 press release, including: (1) credit valuation adjustments related to monoline financial guarantor exposures of \$3.22 billion; (2) goodwill impairment of \$2.31 billion; (3) leveraged loan write down of \$1.92 billion; (4) \$1.16 billion in the U.S. Bank Investment Securities Portfolio write downs; and (5) commercial real estate write down of \$1.13 billion.

226. In the Board meeting held to discuss the disclosures prior to their release, two directors, Thomas May and Chad Gifford, exchanged emails on the disaster belatedly being disclosed to BoA's owners. Gifford wrote "[u]nfortunately it's screw the shareholders!!" May wrote back to admonish his colleague about embarrassing emails: "[n]o trail." Gifford tried to excuse himself by responding "[o]nly stated in the context of a horrible economy!!! Will effect [sic] everyone...." May gave a cynical response: "[g]ood comeback. Holy shit on the people." Gifford responded with a single word: "[a]maaazing."

227. The market result of this unexpected shock was predictable: Both Moody's and Fitch downgraded BoA's credit ratings. Moody's changed its rating due to "the disclosure of substantial losses at Merrill Lynch," while Fitch downgraded Merrill's rating to "F" due to its "massive losses" and "Fitch's view that this entity would likely not have survived absent assistance provided by the U.S. Treasury." At the same time, BoA's stock price reportedly "slumped nearly 30%."

### **III. BANK MANAGEMENT FAILED TO DISCLOSE THE TIMING, AMOUNT AND NEW CRITERIA FOR MERRILL'S 2008 BONUS PAYMENTS**

228. Merrill paid approximately \$3.6 billion in bonuses to its executives for the year 2008. They paid these bonuses despite the historic losses facing the bank, on grounds that they had to meet market bonus levels. This was a change from Merrill's historic practice of

performance-based bonuses. In a second major change from historical practice, Merrill paid the cash portions of these “2008” bonuses before the year had even ended.

229. BoA knew that Merrill would take these steps, and acquiesced in them. But despite the obvious and critical importance of these facts to BoA shareholders, BoA did not disclose them until after the merger had closed. The Bank never told shareholders, first, that the agreed cap on Merrill bonuses was \$5.8 billion for the year, even though this was agreed when the merger contract was signed in September. Nor did the Bank tell its shareholders that Merrill decided to pay bonuses within the 2008 calendar year, even though that decision was made as early as November 11, weeks before the shareholder vote. Lastly, the Bank did not tell its shareholders that Merrill had switched from a performance-based to a market-based compensation scheme, though it knew of this change as well.

**A. Bank Management Did Not Disclose Bonus Criteria and Amounts**

230. Merrill paid a total of about \$3.6 billion in 2008 bonuses to its executives. This pool, paid out to thousands of Merrill employees, included 149 recipients who each were awarded \$3 million or more – sometimes significantly more – for performance year 2008 (32 of these individuals received \$6 million or more; 14 bonus recipients received \$10 million or more.) But none of these facts were disclosed to shareholders, or to the public, until well after the payments had been made and the merger had been consummated.

231. Merrill’s 2008 bonus pool ended up totaling eight percent of the \$45 billion total TARP money the Bank received, and eighteen percent of the \$20 billion additional TARP assistance the Bank negotiated in December.

232. Obviously, Merrill’s performance could not justify continued exorbitant bonus payments on a pay-for-profit model, so Merrill simply changed its criteria. Thus, Merrill’s Compensation Committee chairman, John Finnegan, explained, instead of setting its bonus pool

based on performance of the company as a whole, Merrill paid bonuses at market levels. In other words, Merrill changed from a “pay for performance” emphasis to one where, in Finnegan’s own words, the “primary driver was the industry market data.”

233. By doing so, Merrill was deviating from its past approach to bonus-setting and disregarding the approach it set forth in its annual Proxy Statement. In Merrill’s Definitive 2008 Proxy Statement dated March 14, 2008, Merrill describes its compensation model as one that places an “emphasis on pay for performance,” that weighted heavily, among other considerations, “the performance of the Company as a whole.” The annual report states that:

The goal of our compensation programs is to provide an integral link between pay and performance and to fully align the interests of employees with those of shareholders. The emphasis on pay for performance can mean fluctuations in pay year over year depending on the performance of the Company as a whole as well as the individual businesses that comprise the Company’s operations.

234. While the annual report also discusses the importance of paying out bonuses at competitive levels for purposes of retaining top talent, the annual report’s disclosure concerning compensation practices remains focused on a performance-based pay model. Taken as a whole, the annual report upholds the principle that Merrill paid for performance, and that poor financial performance of the company as a whole would have negative repercussions on bonus determinations. But Merrill did not follow this model in 2008, when it needed extraordinary taxpayer support to survive.

**B. Bank Management Did Not Disclose the Changed Bonus Timing**

235. Merrill’s Compensation Committee began planning for a pre-year-end bonus payout as early as October. On November 11, the committee decided to pay out bonuses prior to year-end, thus paying bonuses before the company’s year-end results were determined. This decision departed from Merrill’s past compensation practices as described in its annual reports.

As Finnegan testified that prior to 2008, Merrill “would make the final determination at a board meeting in the middle of January and pay out sometime thereafter.”

236. According to Finnegan, Thain proposed that the bonuses be paid out prior to the end of the year during a telephone meeting of the Committee on November 11. The committee agreed with Thain’s proposal. Also at that meeting, the Committee agreed to finalize bonus numbers at its subsequent December 8 meeting—three days after the shareholder vote.

237. Lewis learned from Steele Alphin that Merrill would pay out its 2008 bonuses before the end of the year. But Lewis never discussed Merrill’s plans with Thain. Instead, he left the discussions with Thain and indeed with Merrill over the timing of Merrill’s bonus payments to Alphin and Andrea Smith.

238. BoA had a right of consultation concerning Merrill’s bonus payments, but did not use it in this instance. This failure to act contrasted with the Bank’s strong opposition to Thain’s proposal that he receive a bonus of approximately \$40 million. Eventually, when Lewis told him that he could never hope to succeed Lewis as head of the combined entity if he persisted with such a demand, Thain was convinced to abandon the proposal.

239. Similarly, BoA played an active role in determinations about other individual bonus awards, in some cases providing input as to the final bonus pool figure and as to individuals’ compensation figures. As Thain testified regarding BoA’s involvement, “they were an integral part of the process of determining both what the ultimate pool size was and what individuals got.” But BoA simply let Merrill alter the timing of the payouts.

240. More egregiously, Lewis failed to stop a \$3.6 billion outflow in bonuses for an institution that without BoA would have ceased operations altogether, and after learning of loss “acceleration” at Merrill that was so bad that federal aid was necessary to save the combined

entity. Lewis, when asked whether he revisited the question of the amount of Merrill's bonuses in view of these losses, said "no."

241. When asked whether any member of Merrill's Compensation Committee asked whether "maybe we should postpone the decision on the bonuses until we have more information on December 2008 and the losses," that committee's chairman testified, "No. I don't think anyone said that." Nor was there any discussion following the December 8 committee meeting regarding whether further review of the bonus pool should be conducted.

242. Neither Merrill nor BoA disclosed these bonus payment irregularities in the proxy materials sent to shareholders before the shareholder vote on the merger; nor were subsequent disclosures made prior to the vote on December 5 regarding the decision to pay out over \$3.6 billion in bonuses and to accelerate these payments as well. The complete failure to make any such disclosure prior to the vote – and, for that matter, prior to the consummation of the merger – was misleading.

243. Even more troubling, Merrill represented in letters to the New York Attorney General on November 5 and to the United States House Committee on Oversight and Government Reform on November 24 that it planned to make incentive compensation decisions at year-end. Presumably, by making these decisions at year-end, Merrill would be required to wait until after year-end actually to pay any bonuses. Merrill's representations on this subject in its letter to the Congressional committee were particularly disingenuous:

Merrill Lynch operates on a calendar-year basis. The Management Development and Compensation Committee of the Board of Directors makes incentive compensation decisions at year-end. Consistent with this calendar year-end process, incentive compensation decisions for 2008 have not yet been made.

The letter failed to acknowledge that Merrill's Compensation Committee had, in fact, agreed to an accelerated timetable nearly two weeks before this letter was written, which involved setting a

December 8 date for allocating over \$3.6 billion in bonus payments. The letter's failure to disclose these facts was misleading.

244. Merrill's employees were informed of what they would receive in bonuses for 2008 by December 19 – two days after BoA went to the United States Treasury and the Federal Reserve and threatened to invoke the MAC. Knowing that Merrill would not have survived as a stand-alone company and needed the merger to be consummated simply to avoid bankruptcy, BoA tacitly approved Merrill payouts of exorbitant bonuses.

245. Naturally, shareholders were also not aware that BoA had sat back and permitted Merrill to reward its employees with over \$3.6 billion in bonuses in its worst year of financial performance on record, one in which its losses exceeded \$27 billion after taxes.

#### **IV. DEFENDANTS' ADDITIONAL MISSTATEMENTS TO SHAREHOLDERS**

246. Many of the statements made by Lewis and Price in the period from the merger's announcement to its closing were false, misleading, or became so in light of the events described above. Those statements are detailed in the following paragraphs.

##### **A. Bank Management Made Misleading Statements About Its Due Diligence**

247. On Monday, September 15, Bank of America and Merrill Lynch publicly announced the acquisition. The day's events included a press conference, press releases from Bank of America and Merrill, and a Bank of America investor conference call. Due diligence was a subject of discussion at these events.

##### **1. The press conference**

248. At the press conference, Lewis characterized the deal as "the strategic opportunity of a lifetime .... So we are very, very pleased with this [merger announcement] ... [A]s we take

care of our customers, they will take care of our shareholders ...” Lewis also called the deal “just a major grand slam home run.”

249. He characterized the round-the-clock, day-and-a-half due diligence process as “very, very ex[t]ensive” and otherwise comprehensive, thanks to the help of a consultant, Christopher Flowers:

[H]e and his firm [Chris Flowers and J.C. Flowers] had done quite an amount of due diligence on Merrill Lynch fairly recently, and it was very, very ex[t]ensive. They had looked at the marks very comprehensively, so this allowed us to have him and [his] team as an advisor, and just update the information they already had. So that was one of the key ingredients to being able to do this as quickly as we did.

250. But “fairly recently” was a misleading description. Flowers—and through it, the Bank—was relying on diligence Flowers had done on Merrill in late 2007 in connection with another potential investment, never completed.

251. Lewis also went out of his way to emphasize the improvement in value of the Merrill assets:

I will say that Chris’s comment was it’s night and day from the time we first looked at it to now. He was very complimentary of what John and his team had done in terms of dramatically reducing the marks, in many cases not only – not reducing the marks but getting rid of the assets, which is the best thing to do, so a much lower risk profile than he’d seen earlier on.

## **2. The investor call**

252. Later that day, Bank of America held a conference call for investors. On the call, Lewis and Price sought to reassure the investing public that BoA had done sufficient due diligence to understand the risks and the quality of Merrill’s assets. As Price said on the call,

[j]ust to touch on a few other things of importance in the transaction before taking questions, from a risk or due diligence perspective, as you heard Ken say, we competed against Merrill Lynch and have known them well for years in addition to discussing business opportunities several times. We sent in a large team to review areas such as asset valuations, trading positions, and the like.

We also were joined by a team from J.C. Flowers that had done extensive due diligence over some time in reviewing other potential transactions, so they were very familiar with Merrill Lynch's books.

253. Following Price's comments above, Lewis added: "[o]ne reference was that in comparing it to a previous review that it was night and day, that John and his team had made incredible progress since the first time they had looked at it."

254. In response to a request for "a little more color on some of the due diligence," Lewis described the "Flowers piece" as "key because they were renewing an effort that had already gone on and had been very, very ex[t]ensive." Price followed up, saying that "quite frankly, the progress that Merrill Lynch had made in reducing the risk exposure such [sic], and analyzing them and having all that laid out, given the efforts that the management team has made over the last period made it possible for us."

255. Lewis likewise assured BoA shareholders that BoA was very familiar with Merrill's risk profile:

The numbers that we presented today, we have considered marks on the assets as well as planned actions that Merrill Lynch has either executed or had in the works during the quarter as they continued to make progress in risk reduction. So those have been done.

I would tell you that again, going back to the point on things such as CDOs, we have very similar methodology valuations and we have very similar marks. The structures – we're dealing with the same counterparties on things. So again, back to the earlier point, we're pretty familiar with the types of assets and feel pretty good about the progress that Merrill Lynch had made itself.

256. Lewis also misrepresented Merrill's financial condition in answer to a question about why he paid so much for the company, discussing "several scenarios:" "One, probably the more likely is that Merrill had the liquidity and capacity to see this through. It's not necessarily

easy because of just the times. But more likely than not, they would have seen this through and come out on the other side.”

**B. The Market Was Misled**

257. The market believed Price’s and Lewis’ misstatements concerning the quality of the deal and their due diligence, presumably reasoning with respect to the latter that no deal of such significance would have resulted from such hurried due diligence. Ladenburg Thalmann reasoned on September 15 that “the fact that Bank of America paid a high premium for Merrill and would not buy Lehman indicates that the due diligence done on both companies suggests that Merrill may be in stronger condition than thought.” An investment publication reported one analyst as concluding, “[d]on’t let them fool you into thinking they haven’t been looking at each other for a long time. [...] This was not a deal that was drummed up in the shower on Saturday morning and completed on Sunday night. These two firms are very familiar with each other.”

**C. October 2008: BoA Touted the Merger While Merrill Suffered Possibly the Worst Single Month in Its History**

258. In October, the Bank further bragged about the merger, even though losses at Merrill were ballooning. To finance the deal, BoA conducted a secondary offering on October 7 with the goal of raising \$9.9 billion. Discussing that offering, Lewis again emphasized BoA’s “strength and stability” and stated, in an obvious reference to the merger, that “we have been able in the last year to make a number of moves that should significantly enhance our earnings when economic and financial market conditions improve.”

259. Likewise, on a conference call related to the same offering, Lewis stated that “[i]n light of our outlook for the rest of this year and 2009, the dividend and capital actions better insulate us from problems that may occur.” In particular, Price was asked “[t]he \$10 billion you’re raising today, should we expect that to be that and then done or look for additional capital

once the Merrill deal is closed?” He replied that the offering “covered our anticipated needs from a Merrill standpoint.” Lewis echoed this with the statement that “[g]iven the dividend reduction and capital raise, we believe that Tier 1 levels including Merrill Lynch on a pro forma basis will be around our target.” These statements became false when the Bank needed taxpayer aid to save the combined entity.

**D. The Merger Parties Issued a Misleading Proxy**

260. On November 2, BoA and Merrill each filed a Proxy Statement dated October 31, which sought approval of the merger from their respective shareholders. Among other things, the documents described Merrill Lynch’s financial condition and provided unaudited interim earnings up to June 27. Additionally, the proxies incorporated various SEC filings, including Form 10-Qs for the third quarter of 2008, which were filed three days after issuance of the Proxy Statement. There it was stated that Merrill had incurred pretax losses of \$8.251 billion (\$5.12 billion after tax) during the third quarter of 2008. But the disastrous month of October had finally come to an end, and the results were being tallied as the proxies were issued.

261. Two days later, in an email dated November 4, Meloth sent the initial October results to Cotty, Carlin and Hayward. These indicated a pretax loss of \$6.113 billion. The day after that, November 5, Cotty forwarded Meloth’s email to Price, with the comment “[r]ead and weep.”

262. As detailed above, the month of October proved to be among the worst in Merrill’s history, ending with a pretax loss totaling \$7.536 billion. But BoA management did not tell their shareholders of this staggering loss until January 16, 2009, two and one-half months after it was incurred and one and one-half months after they voted to buy the company which incurred it.

## **1. The BoA Proxy Concealed Merrill's True Financial Condition**

263. Instead, the BoA Proxy Statement urged all BoA shareholders to vote in favor of the Merger and recommended the Merger as being fair and in the best interests of BoA shareholders:

The Bank of America board of directors believes that the merger is in the best interests of Bank of America and its stockholders and has unanimously approved the merger and the Merger Agreement. The Bank of America board of directors unanimously recommends that Bank of America stockholders vote "FOR" the proposal to issue shares of Bank of America common stock in the merger.

264. The Proxy Statement contained material misstatements and omissions because it failed to disclose material facts to BoA shareholders necessary for them to cast fully informed votes with respect to the merger. The Proxy Statement significantly overvalued Merrill Lynch's assets and otherwise did not accurately disclose Merrill's financial condition to Bank of America shareholders. The Proxy Statement did not inform BoA shareholders of the significant risks and liabilities that BoA and its shareholders would be acquiring in the event the merger closed. The Proxy Statement did not reveal that BoA and its advisors had conducted inadequate due diligence on Merrill Lynch and the recommendation in the Proxy Statement in favor of the vote and the other positive statements concerning the vote were made without an adequate basis.

265. Nor did the Proxy Statement alert shareholders that Merrill had lost \$7.536 billion in the first month of the fourth quarter alone—nearly the equal of the entire third quarter's losses.

266. Instead, the Proxy Statement touted Bank of America's "strong capital position" as setting up the combined company optimally among the "business advantages" considered by the Merrill board in deciding to approve the merger. The Proxy Statement also described the appended Merger Agreement as containing the representation that there had been no "material adverse changes" in Merrill's condition as of the signing of the agreement.

## **2. The Proxy Disregarded a Goodwill Impairment of \$2.3 Billion that Merrill Knew Would Have to be Taken**

267. The Proxy Statement also failed to mention a pending write-down, or impairment, of goodwill on a Merrill business unit, FICC, that had the effect of increasing losses by \$2.3 billion. Merrill's third quarter 10-Q, incorporated by reference into the Proxy Statement, notes that "[a]t September 26, 2008, Merrill conducted an annual goodwill impairment test [...] Based on this analysis, Merrill Lynch determined that there was no impairment of goodwill."

268. The 10-Q noted that while no impairment was found at quarter-end based on its analysis of goodwill, nonetheless, "given the continued challenging conditions in the financial markets and the related impact on the market value of financial institutions, we will perform an interim impairment test for goodwill in the fourth quarter of 2008, which could result in an impairment charge." While Merrill added this broad language about its testing, it did not disclose any specific impairment figure.

269. The charge was so obviously necessary that Merrill's auditors doubted that the impairment should have been pushed off from the third quarter, pressing Merrill on whether it should be taken in that quarter. And by November 20, Merrill and BoA personnel knew that the goodwill impairment would have to be taken, and it was included in the Merrill financial reports in December as detailed above. Nonetheless, the statements in the third quarter 10-Q were never updated.

## **3. The Proxy Omitted the Companies' Irregular Bonus Arrangements**

270. Nor did the Proxy Statement reveal the companies' actual bonus arrangements. In particular, the Merger Agreement, appended to the Proxy Statement, stated in a section titled "Company Forbearances" that, "except as set forth in Section 5.2 of the Company Disclosure Schedule or except as expressly contemplated or permitted by this Agreement," from September

15 through January 1, 2009, Merrill “[...] shall not, and shall not permit any of its Subsidiaries to, without the prior written consent of [BoA] [...],” undertake any of 18 enumerated actions, including: “increase in any manner the compensation or benefits of any of the current or former directors, officers or employees of Company or its Subsidiaries (collectively, ‘Employees’), [or] pay any amounts to Employees not required by any current plan or agreement (other than base salary in the ordinary course of business).”

271. The Merger Agreement was made publicly available except for certain disclosure schedules (“Company Disclosure Schedule”), which remained undisclosed to the public. That undisclosed schedule provided in relevant part that Merrill could award bonuses of up to a maximum amount of \$5.8 billion to its employees for the 2008 calendar year while giving BoA a right of consultation with respect to the “allocation of the [bonuses] among eligible employees [...]” and the “form [...] and terms and conditions of the long-term incentive awards [...].”

272. The information contained in this schedule was not publicly disclosed prior to the shareholder meetings held on December 5, 2008, when shareholders of both Merrill and BoA voted to approve the merger. Not only was this material information kept from investors and the public at large, but instead, the disclosure that BoA and Merrill actually provided was affirmatively misleading because of the forbearance language regarding employee compensation quoted above.

273. Notwithstanding the reference to a “Company Disclosure Schedule” in the body of the Merger Agreement and the possibility of exceptions referred to in an undisclosed schedule, there was no disclosure whatsoever of any of the contents of that “disclosure” schedule, including any possible exceptions to the prohibition set forth in Section 5.2 of the body of the Merger Agreement. In short, any reasonable investor would have believed that the Merger

Agreement disclosed that Merrill would not pay out bonuses to its employees without prior written consent from BoA. Such consent was never publicly disclosed. BoA's failure to make such disclosure was materially false and misleading.

**E. Late November: BoA Filed A Misleading Proxy Supplement**

274. Against this backdrop, BoA filed two proxy supplements, on November 21 and 26. Neither updated shareholders on what had become, by that time, truly monstrous losses at Merrill that far exceeded its losses for the three previous quarters. In fact, in the November 26 supplement, Lewis wrote a letter to shareholders entitled "Despite Stock Price Volatility, Bank of America Remains Strong." In it he addressed investor concerns about bank capitalization generally, and enlarged at length on BoA's strength:

I usually don't comment on our stock price. [...] But in this environment, I think it is important to share my perspective with associates regarding our stock's volatility, and how Bank of America is positioned to ride out this severe economic storm.

[...]

Bank of America continues to be a strong, active player in the financial markets. We are generating strong deposit growth and attracting new customer and client relationships throughout our company. We continue to make loans to consumers and businesses to boost shareholder value and to do what we can to support economic activity.

*We are one of the most liquid banks in the world. We successfully raised capital in October and now have Tier I capital that exceeds both regulatory requirements and our own target. In short, we believe we are one of the strongest and most stable major banks in the world.*

Regarding the federal capital injection, these were funds that we did not need and did not seek. At the time the government asked the major banks to accept the injections, we had just completed our own \$10 billion capital raise in the market and, as I mentioned above, had more than adequate capital. We accepted the funds from the government as part of a broad plan to stabilize the financial markets generally [...]

(Emphasis added.)

275. This was false because none of these disclosures addressed the mounting losses at Merrill Lynch, or alternatively became false when the Bank came to need a taxpayer bailout to survive the merger.

**F. The Shareholder Vote**

276. At the shareholder meeting, Lewis again supported the merger, stating that the acquisition of Merrill “puts us in a completely different league.”

277. Eighty-two percent of BoA’s shareholders voted to approve the merger and the related issuance of additional shares by BoA necessary for its consummation.

278. Immediately following the shareholder vote, BoA issued another press release stating the following:

When the transaction closes, Bank of America will have the premier financial services franchise anchored by the cornerstone relationship products and services of deposits, credit and debit cards, mortgages and wealth management. With Merrill Lynch, we also will significantly add to our global footprint in several businesses, including investment banking and sales and trading, enabling us to deepen existing client relationships and create greater opportunity to establish new ones.

The combination also adds strengths in global debt underwriting, global equities and global merger and acquisition advice. After the acquisition, Bank of America would be the number one global debt underwriter, the top underwriter of global equity and the fourth-largest adviser on announced global mergers and acquisitions based on pro forma 2008 results through November 30.

**G. The Merger Closing Press Release**

279. In connection with the completion of the Merger, the Bank issued a press release on January 1, 2009, entitled “Bank of America Completes Merrill Lynch Purchase.”

Bank of America Corporation today completed its purchase of Merrill Lynch & Co., Inc. creating a premier financial services franchise with significantly enhanced wealth management, investment banking, and international capabilities.

“We created a new organization because we believe that wealth management and corporate and investment banking represent significant growth opportunities, especially when combined with our leading capabilities in consumer and

commercial banking,” said Bank of America Chairmen and Chief Executive Officer Ken Lewis. “We are now uniquely positioned to win market share and expand our leadership position in markets around the world.”

Bank of America will have the largest wealth management business in the world with approximately 20,000 financial advisors and more than \$2 trillion in client assets. Global investment management capabilities will include approximately 50 percent ownership in BlackRock Inc., which at September 30 had \$1.26 trillion in assets under management. Bank of America had \$564 billion in assets under management in the same period.

The combination also adds strength in debt and equity underwriting, sales and trading, and mergers and acquisition advice, creating significant opportunities to deepen relationships with corporate and institutional clients around the globe.

Under the terms of the agreement, shareholders of Merrill Lynch received .8595 shares of Bank of America common stock for each common share of Merrill Lynch.

As previously announced, Bank of America expects to achieve \$7 billion in pretax expense savings, fully realized by 2012. Cost reductions will come from a range of sources, including the elimination of positions announced on December 11, and the reduction of overlapping technology, vendor and marketing expenses. In addition, the company is expected to benefit by leveraging its broad product set to deepen relationships with existing Merrill Lynch customers.

280. The statements set forth in the January 1, 2009 press release were materially false and misleading because they did not reveal the true facts concerning Merrill’s deteriorating financial condition, did not reveal that BoA considered withdrawing from the merger as a result of the financial condition of Merrill, and did not disclose that BoA was only willing to complete the transaction because the federal government had undertaken to assist BoA to absorb the merger of Merrill by, among other things, engaging in a highly dilutive purchase of additional shares of BoA.

281. The Fed agreed. Before BoA released its year-end results, market analysts had believed that BoA would independently report earnings of \$0.08 per share for the fourth quarter of 2008. A January 10, 2009 internal Federal Reserve memo entitled “Considerations regarding

invoking the systemic risk exception for Bank of America Corporation” pointed out the gulf between the market’s understanding and the actual facts: “The earning’s [sic] guidance provided by the firm to the investor community does not infer that 4Q performance at either organization will be as negative as we have been told. Further, a survey of equity analysts suggests that the investor community have [sic] significantly more positive expectations regarding fourth quarter performance.”

## CLAIMS

### **FIRST CAUSE OF ACTION**

(Securities Fraud – General Business Law §§ 352 and 353)

(As to all Defendants)

282. The Attorney General repeats and re-alleges paragraphs 1 through 281 herein.

283. The acts and practices of the Defendants alleged herein violated Article 23-A of the General Business Law, in that they constituted fraudulent practices as defined in General Business Law § 352.

### **SECOND CAUSE OF ACTION**

(Securities Fraud – General Business Law § 352-c(1)(a))

(As to all Defendants)

284. The Attorney General repeats and re-alleges paragraphs 1 through 283 herein.

285. The acts and practices of the Defendants alleged herein violated Article 23-A of the General Business Law, in that they involved the use or employment of a fraud, deception, concealment, suppression, or false pretense, where said uses or employments were engaged in to induce or promote the issuance, distribution, exchange, sale, negotiation, or purchase within or from this state of securities.

### **THIRD CAUSE OF ACTION**

(Securities Fraud – General Business Law § 352-c(1)(c))

(As to all Defendants)

286. The Attorney General repeats and re-alleges paragraphs 1 through 285 herein.

287. The acts and practices of the Defendants alleged herein violated Article 23-A of the General Business Law, in that Defendants made, or caused to be made, representations or statements which were false, where (i) they knew the truth, or (ii) with reasonable efforts could

have known the truth, or (iii) made no reasonable effort to ascertain the truth, or (iv) did not have knowledge concerning the representations or statements made, where said representations or statements were engaged in to induce or promote the issuance, distribution, exchange, sale, negotiation, or purchase within or from this state of securities.

#### **FOURTH CAUSE OF ACTION**

(Persistent Fraud or Illegality – Executive Law § 63(12))  
(As to all Defendants)

288. The Attorney General repeats and re-alleges paragraphs 1 through 287 herein.

289. The acts and practices alleged herein constitute conduct proscribed by § 63(12) of the Executive Law, in that Defendants engaged in repeated fraudulent or illegal acts or otherwise demonstrated persistent fraud or illegality in the carrying on, conducting or transaction of business.

#### **FIFTH CAUSE OF ACTION**

(Securities Fraud – General Business Law § 352-c(1)(c))  
(As to all Defendants)

290. The Attorney General repeats and re-alleges paragraphs 1 through 289 herein.

291. The acts and practices of Defendants the Bank, Price and Lewis alleged herein violated Article 23-A of the General Business Law or aided and abetted such violation, in that Defendants made, or caused to be made, or aided and abetted in the making of, representations or statements which were false, where (i) they knew the truth, or (ii) with reasonable efforts could have known the truth, or (iii) made no reasonable effort to ascertain the truth, or (iv) did not have knowledge concerning the representations or statements made, where said representations or statements were engaged in to induce or promote the issuance, distribution, exchange, sale, negotiation, or purchase within or from this state of securities.

292. Under the Federal Form 8-K disclosure requirements, any amendment to a company's code of ethics or grant of waiver, implicit or explicit, of a company's code of ethics, which applies to the principal executive officers (among others), requires disclosure.

293. Bank of America's Code of Ethics prohibits conflicts of interest. The Code identifies that conflicts occur when "personal interests or activities compete or interfere – or even appear to compete or interfere – with [...] obligations to the corporation, its shareholders or customers." Lewis and Price failed to act after they learned of a conflict between their own personal interests and shareholder interests.

294. When federal officials threatened to remove Price and Lewis from the company, a conflict of interest arose, which compromised Lewis and Price. Lewis and Price, as part of management, had personal interests in maintaining their positions. Lewis's and Price's knowledge that federal officials had threatened to remove them from their positions at Bank of America compromised their ability to make business decisions independently on behalf of their shareholders. Price and Lewis remained silent and failed to recommend disclosure of the conflict they knew of. They did so to protect their own positions in the company, which continued to provide them with monetary and other compensatory rewards. Shareholders were unaware of this conflict of interest and were deprived of a leadership team unencumbered by motivations of personal gain.

295. The Bank failed to disclose to its shareholders this conflict between their interests and management's personal interests. Lewis and Price were each aware of the conflict. Lewis and Price each substantially aided this failure to disclose the conflict by failing to cause the Bank to disclose and/or otherwise aided and abetted a failure to disclose such conflict.

WHEREFORE, Plaintiff demands judgment against the Defendants as follows:

A. Enjoining and restraining Defendants, their affiliates, assignees, subsidiaries, successors and transferees, their officers, directors, partners, agents and employees, and all other persons acting or claiming to act on their behalf or in concert with them, from engaging in any conduct, conspiracy, contract, or agreement, and from adopting or following any practice, plan, program, scheme, artifice or device similar to, or having a purpose and effect similar to, the conduct complained of above;

B. Directing that Defendants, pursuant to Article 23-A of the General Business Law and Section 63(12) of the Executive Law and the common law of the State of New York, disgorge all gains, pay all penalties and pay all restitution and damages caused, directly or indirectly, by the fraudulent and deceptive acts complained of herein;

C. Directing that Defendants pay Plaintiff's costs, including attorneys' fees as provided by law;

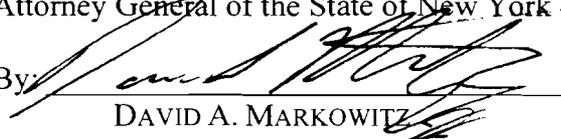
D. Directing such other equitable relief as may be necessary to redress Defendants' violations of New York law; and

E. Granting such other and further relief as may be just and proper.

Dated: February 4, 2010  
New York, New York

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