

02/26/09

IN RE: EXECUTIVE COMPENSATION INVESTIGATION

BANK OF AMERICA - MERRILL LYNCH

EXAMINATION of KENNETH LEE LEWIS,
taken at the State of New York, Office of the
Attorney General, 120 Broadway, New York, New
York, on February 26, 2009 at 4:30 p.m., before
SARA FREUND, a Shorthand Reporter and a Notary
Public of the State of New York.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

Q. When did you first consider doing that?

A. I want to make sure I get the date right. I'm pretty sure it was December the 13th -- if that's a Sunday because I was in New York, and I was about to go home -- and what triggered that was that the losses, the projected losses, at Merrill Lynch had accelerated pretty dramatically over a short period of time, as I recall, about a week or so.

Q. How did you come to learn of that?

A. Joe Price, our CFO, called me.

Q. Take me through what Mr. Price communicated to you on that call.

A. He basically said what I just said: The projected losses have accelerated pretty dramatically. We earlier on had more days in the month, so that it was a possibility that at least some of the marks could come back, but now we had not very many business days because Christmas was coming and all of that. So we became concerned just of the acceleration of the losses.

Q. What did Mr. Price tell you about the extent of the losses, basically?

A. He just talked about the amounts.

K.L. Lewis .

Q. And what were they as of the time you spoke to Mr. Price?

MR. LIMAN: To the extent that you remember.

A. To the extent that I remember, the losses had accumulated to about \$12 billion after tax.

Q. Anything else?

A. That was the whole focus.

MR. LAWSKY: Were you getting a daily P and L at the time?

THE WITNESS: We were getting projections. I was getting a P and L at Bank of America, but we were getting projections. I don't recall getting them every day, but I was either hearing about them and in some cases I saw them.

MR. LAWSKY: Can you explain, when you say a conversation with Price is what got you thinking this way, if you were getting these P and L's over time, what was it about the Price conversation which put you over the edge?

THE WITNESS: Just that that amount --

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

I'm not sure I was getting them every day. I don't recall getting them every day because they were projections, not daily P and L's. So the concern was, we had had a forecast on December 5th, as I recall, of \$9 billion, but \$3 billion pretax was a plod (phonetic) just for conservative reasons; so what you saw was basically a 7 to 12 if you could go through the plod, and then you get to the \$12 billion. So a staggering large percentage of the original amount in a very short period of time.

MR. LAWSKY: Just so the record is clear, I have your calendar in front of you, although you don't -- Counsel produced it. December 14 was on a Sunday. It says "depart to arrive 3:30." You're in New York leaving that day?

THE WITNESS: Yes.

MR. LAWSKY: So is that the day you have the meeting with Price?

THE WITNESS: Not a meeting, a phone call.

MR. LAWSKY: So Sunday, December the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

14th.

THE WITNESS: Correct.

Q. I think you just answered the next question I had, but prior to the 14th the last time you saw a projection was December 9?

A. The last time I focused -- really focused -- I'm not sure if I saw some between that or not, because I was just as concerned about the credit meltdown and all of the things that were happening in the economy at Bank of America.

MR. LAWSKY: I thought you said it was December 5.

THE WITNESS: It was 5.

MR. MARKOWITZ: It was my mistake.

MR. LAWSKY: He's probably got December 9 in his head because on the 9th you have a board meeting, I think. Do you recall that?

THE WITNESS: Yes.

MR. LAWSKY: Does this issue come up at that board meeting?

THE WITNESS: Yes.

MR. LIMAN: What issue is that?

MR. LAWSKY: The issue regarding the deteriorating health of Merrill.

K.L. Lewis

THE WITNESS: We gave the forecast to the board. We also talked about the things that were going on in the economy and in our trading book and in the credit deterioration in general, so it was not just about that.

Q. Did Mr. Price explain to you what his understanding was of what caused this deterioration between the 5th and 14th?

A. I don't recall what he said. I just recall just that staggering amount of deterioration. We had seen the credit marks widening, so I assumed that was part of it. I don't recall what was said about that particular issue.

Q. Your main concern was that that number increased, that the loss increased.

A. The pace of the loss increased so dramatically.

Q. Is there anything else about the December 14th call with Mr. Price that you hadn't already described to us?

A. I told you what I recall.

Q. Now, I believe we've been discussing this in the context of when you started considering

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

Merrill Lynch?

THE WITNESS: I don't recall that issue.

MR. LAWSKY: You don't recall whether you were aware, or you don't --

THE WITNESS: No. I don't recall -- if I had been made aware, I don't recall being made aware.

Q. So on the 17th, what happens with respect to --

MR. LAWSKY: Last question -- we do this a lot, so it's going to be annoying -- looking back on it, do you think you should have been made aware given the type of losses they were having in October and November?

THE WITNESS: In the context of what was going on in the marketplace; what we were seeing; the rumors we were hearing about other investment banks and losses, I don't think alarms bells would have gone off and necessarily somebody would have thought they needed to make me aware. But, again, I may have seen something, I just may not recall it.

Q. On the 17th, you call Secretary Paulson.

K.L. Lewis

Describe that call, please.

A. I told him that we were strongly considering the MAC and thought we actually had one. He said, "We probably should talk," and he said, "Could you be here by 6 o'clock," -- I think it was; give me license on that, I think it was around 6 o'clock -- "on the 17th, and I'll have a meeting arranged with me and the Feds, Ben Bernanke." So we did that.

Q. So when did you call him on the 17th, about what time?

A. I don't remember.

MR. LAWSKY: Let me show you a calendar, if it helps. Does that say "Leave at 3"?

THE WITNESS: Yes.

MR. LAWSKY: And you have "Hurley at noon."

THE WITNESS: My best recollection is that it was mid-morning, but I don't remember talking -- I don't put things like that on my calendar.

MR. LAWSKY: Does that say "Gone to D.C."?

THE WITNESS: Correct. So sometime

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

before then, obviously, and my best
recollection is it was mid-morning. I'm not
sure.

(Exhibit 1 was marked for
identification.)

MR. LIMAN: It would also help to -- and
I apologize we didn't bring copies -- but if
you have copies of the minutes. Those also
mark the sequence of events.

Q. Exhibit 1 is a copy of a calendar which
counsel produced to us today, and you can keep
Exhibit 1 in front of you to help refresh your
memory.

MR. LAWSKY: Is this your handwriting in
the calendar?

THE WITNESS: Let me make sure. Yes.
That's my handwriting.

MR. LAWSKY: Is this the only calendar
you keep? You don't have an electronic
calendar?

THE WITNESS: No. This is the only one
I keep.

MR. LAWSKY: Does a secretary or an
assistant or anyone else keep a calendar for

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

you?

THE WITNESS: Yes. I think her calendar is basically like mine, and she updates it.

MR. LAWSKY: There are days where you have nothing on there, which, I assume, you're doing stuff.

THE WITNESS: During this time, we agreed that we're going to keep our calendars fairly open because we go back and forth so much and there's so much happening. So it's not -- we didn't want a structured environment where we were in meetings all the time and we couldn't get to each other. That's not only about Merrill Lynch; it was about everything going on.

MR. LAWSKY: So this calendar reflects, basically, everything you were doing during this period of time. It's not like there is some other calendar somewhere elsewhere that has more.

THE WITNESS: No.

Q. So at some point earlier in the day you have a conversation with Mr. Paulson. During this call, does Mr. Paulson ask why do you think you

K.L. Lewis

have a MAC?

A. I don't recall him saying that.

Obviously, when we got to the meeting, everybody did, but I recall that as being more of, Let's get together and address this.

Q. Why don't you describe that meeting?

You're talking about the phone call now?

MR. MARKOWITZ: Yes. I want to make sure we have the phone call down, and we'll get to the meeting later in the day.

Q. Was there any discussion about why the MAC on the call with Paulson?

A. I don't recall anything but getting the logistics done and getting up there. We may have, but I don't remember.

Q. Did you say anything along the line of, There's several billion dollars in additional losses?

A. I don't remember. I remember saying, "We think we've got a MAC." That's all I remember of that conversation -- and the fact that he was going to set up the meeting.

Q. Where does the meeting take place?

A. At the Federal Reserve.

1 K.L. Lewis

2 Q. And who attends the meeting?

3 A. Well, the two main players -- excuse
4 me -- Joe Price and Brian Moynihan. And Bernanke
5 was there; Paul sonwas there; Alvarez, his chief
6 counsel, and a cast of a lot of others that I
7 didn't recognize.

8 Q. The "others" were Treasury and Fed
9 officials?

10 A. Yes.

11 Q. Was there any attendance list taken at
12 the meeting?

13 A. Not to my knowledge, but there could
14 have been.

15 Q. No one passed around a list or something
16 like that?

17 A. No.

18 Q. If you can take me through that meeting.

19 A. Well, we described -- Joe, basically --
20 first of all, I talked a little bit about our
21 current situation with the market deterioration. I
22 told him that we probably would have a loss, which
23 would be the first quarterly loss in 17 years.

24 Q. Let me jump in. You kicked off the
25 meeting yourself?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

A. Yes.

Q. And you started by talking about Bank of America results?

A. Yes.

MR. CORNGOLD: I suggest we take a five-minute break to let us all look at the minutes we got in this afternoon. I think it would be more useful that we do that.

(Recess was taken.)

Q. Before we took the short break we were talking about the meeting, I think that's the meeting that you had at the Fed on the 17th. I believe you started off by talking about Bank of America's position. If you can pick up --

A. Just a quick update on us, and I don't remember if I said much else or not, but then Joe walked through some of the numbers on the acceleration.

Q. So Joe Price is the person who detailed what happened with respect to Merrill and Merrill's worsening financial condition?

A. Yes. I may have said a few things, but my best recollection is that Joe carried that conversation.

K.L. Lewis

Q. And in terms of just to get the full picture, you spoke and then Joe spoke?

A. Yes.

Q. What happened after that?

A. The meetings are going to run together on me. At some point, there was strong advice against the MAC. We had to have talked about -- I don't remember which meeting which, but the main thing we were concerned about was the very large hole that would have been created by that loss.

Q. And what was the hole that was going to be created by the loss?

A. At that point, we thought it was roughly \$12 billion.

Q. And what was that going to do to the combined entity? Did you detail, for example, at the meeting the harm that would cause to Bank of America?

A. I don't know if we got into ratios or not, but we said it was going to hurt our tangible common ratio and it was going to hurt our two-and-one ratio. I don't recall having handouts.

Q. What happened next?

A. Well, there was discussion about MACs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

being very difficult -- and, again, the meetings are running together on me -- I don't know what would be the remedy -- I know at the end we were basically told to stand down, let them go on boards and see what they thought, and we left. It wasn't -- as I recall, it wasn't a two-hour meeting or something. I can't remember how long it was, but it wasn't some marathon.

Q. Who at the meeting was expressing that MACs are tough to qualify for?

A. I can't remember, but somebody did, as I recall.

Q. Would it either have been -- let me put it this way. Who did the speaking for the Treasury and the Fed at the meeting?

A. Mainly Hank and Ben, but I think Alvarez said a few things, too.

Q. By the way, was anyone from Wachtell at the meeting?

A. No.

MR. CORNGOLD: Were you told in that meeting that if you exercise the MAC clause that they would seek to remove you and/or Bank of America's board?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

THE WITNESS: No. That was not then.

They hadn't worked themselves up to that yet.

Q. So you meet with the federal regulators. I didn't quite understand what you said. What were they going to do? They asked you to do something?

A. They said stand down and then let's talk -- they basically said don't do anything by saying "stand down," and then "let's talk again." I don't remember if we arranged anything or not, but, obviously, they needed to put their heads together. And we left.

Q. Did you, at that meeting, agree when you would talk again?

A. I don't remember.

Q. When did you talk again?

A. I don't remember the date. There was a lot of discussions after that with Joe. I do remember a telephonic meeting after that, that we had a number of people together talking about the MAC, and I recall there being strong consensus -- I think at that meeting somebody from New York Fed, the Washington Fed and Richmond Fed was on the line, and then there was somebody -- I think it was a lawyer from the New York Fed -- who strongly

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

Q. Was there anything else of substance discussed on the call that took place that you were discussing that you haven't discussed so far?

A. I don't recollect anything else.

Q. What is the next thing that happened after this conference call?

A. I don't recall the date, but --

Q. Let me interrupt you.

MR. MARKOWITZ: Counsel, do you have anything on your end that helps pinpoint the date any better?

MR. LIMAN: I think if you put the minutes in front of him --

MR. CORNGOLD: There was a board meeting on December 22nd, Monday, at 4 p.m.

MR. LIMAN: But the contents of the minutes go through the sequence of events, so if you put those in front of him it may help refresh his recollection.

A. I think that's the Sunday over that weekend. I think that's the time I talked to Paulson, and we got into the subject you were talking about before.

MR. LIMAN: If you give him the minutes

K.L. Lewis

it might trigger some recollection.

A. I think I got it now. I remember, for some reason, we wanted to follow up and see if any progress -- as I recall, we, actually, had not agreed not to call a MAC after the conversation that we had, and so I tried to get in touch with Hank, and, as I recall, I got a number that was somebody at the Treasury kind of guard-like thing. He had a number for Hank, and Hank was out, I think, on his bike, and he -- this is vague; I won't get the words exactly right -- and he said, "I'm going to be very blunt, we're very supportive of Bank of America and we want to be of help, but" -- I recall him saying "the government," but that may or may not be the case -- "does not feel it's in your best interest for you to call a MAC, and that we feel so strongly," -- I can't recall if he said "we would remove the board and management if you called it" or if he said "we would do it if you intended to." I don't remember which one it was, before or after, and I said, "Hank, let's deescalate this for a while. Let me talk to our board." And the board's reaction was one of "That threat, okay, do it. That would be systemic risk."

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

MR. CORNGOLD: You said the board's reaction to that. Did you have conversations with the board, so you knew what their reaction was?

THE WITNESS: Is that Monday?

MR. CORNGOLD: December 22 is a Monday.

THE WITNESS: Yes. So that would be that day. I told them of the conversation.

MR. CORNGOLD: We're now talking about that conversation.

THE WITNESS: Correct.

MR. CORNGOLD: So in that conversation, did you say what the board's reaction is?

THE WITNESS: I'm sorry. I had a conversation with Hank, and then I had the conversation with the board.

MR. CORNGOLD: And then you had another conversation?

THE WITNESS: Yes.

Q. The conversation with Hank on the bike, that's also on Monday?

A. No. That was on Sunday -- I'm pretty sure that was Sunday. I just recall it wasn't a weekday, and that he was out of pocket.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

Q. So I think you said, "Let's deescalate this." How does he respond to that?

A. He said, "Good." I think I recall him saying -- I'm not positive about this -- I think he said, "I'll call Ben and tell him that."

MR. CORNGOLD: Before we do that, did you have an understanding of what powers the Treasury Department had to remove the board and/or the management of the bank?

THE WITNESS: It was my understanding he said it -- that's why I said I think he said the government. I think -- my impression is, that was the language the Fed used to use in Texas, basically saying, Don't do something.

MR. CORNGOLD: You had an understanding that the Fed could remove the board and/or the management of a bank that it regulated if it found certain things.

THE WITNESS: Yes.

MR. LAWSKY: Do you know what it has to find?

THE WITNESS: They had been so strong about the fact that they strongly advised us not to do it that it would cause harm to the

K.L. Lewis

bank and the system, and the system wouldn't be good for us, either -- that it would damage the system. That's kind of how it was being portrayed.

MR. CORNGOLD: Was this the first you heard about the government -- to use your term -- was considering that threat?

THE WITNESS: Yes. I don't know when they were going to play that, and that kind of forced it by calling him out.

Q. Did you ask him, "By the way, what do you mean by that" -- I'm sorry, the comment about the removal?

A. No. It was pretty clear.

Q. And at that time, did you sort of have that preexisting understanding of the Texas Fed way of communicating?

A. I had heard that at some point. I don't know why that's in my mind, but I've heard of that before that that's a way of telling you not to do something.

Q. Have you heard any kind of communication like that from a federal official to you before?

A. No.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

Q. And did you view it at as a threat?

A. I viewed it -- actually, I viewed it as just how strongly they felt about the issue. I also viewed it that it wasn't just about us; that he wouldn't say something that strong if he didn't feel like it was a systemic risk, as well.

MR. CORNGOLD: But if you played it out, it meant that Bank of America could not invoke the MAC clause; is that correct?

THE WITNESS: That's where I'm a little fuzzy on. I don't recall the wording was if "Before you did it we would," or "If you did it we would."

MR. CORNGOLD: But if you had done it -- to play out the hypothetical -- and they removed the board and placed in a board, it could have undone whatever it is that you had done.

MR. LIMAN: I guess that presupposes a whole bunch of stuff.

THE WITNESS: They said management and the board.

MR. LAWSKY: At this point, had you received TARP funds?

1 K.L. Lewis

2 THE WITNESS: We had. Yes. That was in
3 September when we called Washington.

4 MR. LAWSKY: That was the initial
5 tranche that you got.

6 THE WITNESS: Yes.

7 Q. Did you connect the receipt of the TARP
8 funds to the statement that if you invoked the MAC
9 that your board would be removed?

10 A. No. I did not take any connection to
11 that at all. I took this as, actually, in good
12 faith that that's what they felt.

13 MR. LAWSKY: At the initial meeting with
14 Paulson when you flew there in the evening of
15 the 17th, does the fact that you're a TARP
16 recipient come up in the meeting at all?

17 THE WITNESS: I don't recall that ever
18 coming up. Remember, at that point, we had
19 not sought any funds. We were taking 15 at
20 the request of Hank and others.

21 MR. CORNGOLD: By the way, the TARP
22 funds had an effect on the shareholders; is
23 that correct? The process of the transaction
24 by which you received TARP funds had -- did
25 they have a dilutive effect on the

K.L. Lewis

shareholders' equity?

THE WITNESS: They had a dilutive effect in the sense that you had preferred dividends that took away from comp equity -- and took away from net income available to shareholders. Yes.

MR. CORNGOLD: At this point, did you want to invoke the MAC, if you could?

THE WITNESS: Yes. I think that's why I got the strong reaction from Hank because we left the other meeting that I mentioned not having resolved it.

MR. CORNGOLD: Did you contemplate using the threat of invoking the MAC clause as a way to get something of value from the federal government, at this time?

THE WITNESS: You mean --

MR. CORNGOLD: What I mean to say is, had you contemplated the negotiation position that it put you in vis-a-vis the federal government, knowing that the federal government did not want you to invoke the MAC clause?

THE WITNESS: I can't remember my state

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

of mind. Until we had that heated -- I guess you would call it -- from Paulson, we were still in the mode that the MAC was the best --

MR. CORNGOLD: Before the call with Paulson on Sunday, had you said to anyone or had anyone said to you in words or substance, Maybe we can get something out of the government?

THE WITNESS: I think everybody agreed with -- I guess, I don't know if we said this, or it was subconscious or whatever, we knew that it would be very dangerous to do that deal without some help, and so I think that was the mindset.

MR. LIMAN: That's to the system, as well, right?

THE WITNESS: Yes.

MR. CORNGOLD: And you said that in your conversations to members of the federal government, including the Feds.

THE WITNESS: I'm not sure when the conversations began, but, at some point, the conversations began around what could we do

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

to help you with this. But I can't time it.

MR. CORNGOLD: And had you considered prior up to this Sunday conversation using the potential invocation of the MAC clause as a way to extract some changes from Merrill, whether it be price changes or conduct changes?

THE WITNESS: This was about just a sheer magnitude of loss, and either you do it or you don't. Behavioral changes, or whatever, wouldn't fill that hole what we thought was \$12 billion, which turned out to be \$15 billion.

Q. Did Paulson ever say to you during this time period -- or Bernanke, or people who work with them -- "Have you told Thain or Merrill what's going on here?"

A. I think, at some point -- Thain used to work for Hank. I vaguely recall he asked me if he knew, and I said "No." I said, "We had not talked to Merrill."

MR. LAWSKY: Did you have a view, at this time, about what invoking the MAC and backing out of the deal would do to Merrill?

K.L. Lewis

took place with either Hank or other officials from the Treasury or Fed?

A. I don't remember any, but that doesn't mean that there weren't any.

Q. Were you the primary contact from Bank of America with the Fed and Treasury during this time period?

A. I was the primary contact, but Joe was involved, as well.

Q. Besides you and Joe, anyone else from Bank of America that participated?

A. Brian Moynihan had conversations.

Q. That would be it, the three of you?

A. As best as I can recollect, those were the three.

Q. Fourth, "The Fed and Treasury stated that the investment and asset protection promised could not be provided or completed by the scheduled closing date of the merger, January 1, 2009. That the merger should close as scheduled, and that the corporation can rely on the Fed and Treasury to complete and deliver the promise by January 20." I think that's what we were just talking about. But you, basically, had to go on faith that the Fed and

1 K.L. Lewis

2 Treasury were going to deliver.

3 A. Correct.

4 Q. Did you ask for any agreement from them?

5 A. There was a point after that that the
6 board brought up the fact that we're relying on
7 words that obviously has some very prominent people
8 and honorable people, but, boy, what if they don't
9 come through? So I called Bernanke -- I don't know
10 why I called him versus Hank -- and said, "Would
11 you be willing to put something in writing?" And
12 he said, "Let me think about it." As I recall, he
13 didn't call me back, but Hank called me back. And
14 Hank said two things: He said, "First, it would be
15 so watered down, it wouldn't be as strong as what
16 we were going to say to you verbally, and secondly,
17 this would be a disclosable event and we do not
18 want a disclosable event."

19 MR. CORNGOLD: When was that
20 conversation?

21 THE WITNESS: I think we can find it
22 through the minutes, but it was after this
23 and it was getting toward the end of the
24 year.

25 MR. CORNGOLD: When you say "disclosable

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

event," he means a disclosable event for the corporation.

THE WITNESS: Correct -- well, yes.

MR. CORNGOLD: Did he mean that? What did he mean?

THE WITNESS: I think he meant they would have to disclose it. That was my impression, that the government would have to disclose it.

MR. CORNGOLD: That if they put it in writing, they had a governmental obligation to disclose it.

THE WITNESS: That was my impression.

MR. CORNGOLD: Did you consider when he said that, whether if it was in writing you had an obligation to disclose it?

THE WITNESS: We hadn't gotten that far yet because at the end we didn't get it, and the premise was you wanted to have everything done in place so that you didn't set off alarms in a tragic economy.

MR. CORNGOLD: Who is the "you" here?

THE WITNESS: They did not want, and they didn't think it was in our best

K.L. Lewis

interest, to have anything announced until you can announce the whole thing, and the promise was to get it announced before or during that earnings.

MR. CORNGOLD: They didn't think it was in the best interest if you announced to your shareholders what you were negotiating?

THE WITNESS: No. They thought it was in our best interest for the deal to be completed and to be able to say "This is what we have," as opposed to prospectively.

MR. LIMAN: I think you also said that they thought it was in the country's best interest.

THE WITNESS: It's kind of a circular because it's kind of systemic.

MR. CORNGOLD: But it's your obligation, do you agree, to consider what's in your shareholders' best interest; is that true?

THE WITNESS: Yes.

MR. CORNGOLD: And that's your board's obligation, too.

THE WITNESS: Yes. And sometimes, because of who we are, they intertwine.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

MR. CORNGOLD: Do they sometimes, because of who you are, do they contradict?

THE WITNESS: I don't know what you mean.

MR. CORNGOLD: Is it always the case that what's in the country's best interest is in Bank of America's shareholders' best interest?

MR. LIMAN: You mean ever in history?

MR. CORNGOLD: You made the point that sometimes they intertwine. Pregnant in that is, sometimes they don't intertwine. That's why I'm asking you if that's what you meant, or do you mean that they always intertwine.

THE WITNESS: I mean that in this particular case they intertwine -- is a better way of saying it.

Q. At the point in time of this board meeting, though, you were relating to the board that you felt you had a commitment from the Fed and the Treasury to make good on whatever harm is caused by the increased losses at Merrill Lynch; is that right?

A. I had verbal commitments from Ben

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

Bernanke and Hank Paulson that they were going to see this through, to fill that hole, and have the market perceive this as a good deal.

MR. CORNGOLD: Isn't the only way to fill that hole, though, to give you money, not to give you money that you would have to pay back at some interest rate with some potential equity interest, too?

THE WITNESS: No. I think you have to separate the fact that, yes, there is still some short-term paying -- it's more short-term paying now than we would have had had all this not happened, but longer term we still see a strategic benefit. So we saw it as a short term versus a long term impact on the company.

MR. CORNGOLD: When you entered into the initial contract with Merrill Lynch did you get a fairness opinion about the transaction?

THE WITNESS: Yes.

MR. CORNGOLD: From whom?

THE WITNESS: Chris Flowers something.

MR. CORNGOLD: And did you get a fairness opinion from anyone about the

K.L. Lewis

transaction that you entered into with the federal government and the Fed?

THE WITNESS: No.

MR. CORNGOLD: Did you consider whether you had a legal obligation to do that?

THE WITNESS: I would rely on the advice of the general counsel for that.

MR. CORNGOLD: But when you say that, does that mean that you asked and got advice, or that you didn't ask but relied --

THE WITNESS: I would rely on somebody bringing that question forth, and nobody did.

Q. Did you ask anyone to look into whether the oral, verbal commitments from the Fed and Treasury were enforceable?

A. No. I was going on the word of two very respected individuals high up in the American government.

Q. Wasn't Mr. Paulson, by his instruction, really asking Bank of America shareholders to take a good part of the hit of the Merrill losses?

A. What he was doing was trying to stem a financial disaster in the financial markets, from his perspective.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

Q. From your perspective, wasn't that one of the effects of what he was doing?

A. Over the short term, yes, but we still thought we had an entity that filled two big strategic holes for us and over long term would still be an interest to the shareholders.

Q. What do you mean by "short term"?

A. Two to three years.

Q. So isn't that something that any shareholder at Bank of America who had less than a three-year time horizon would want to know?

A. The situation was that everyone felt like the deal needed to be completed and to be able to say that, or that they would impose a big risk to the financial system if it would not.

MR. LAWSKY: When you say "everyone," what do you mean?

THE WITNESS: The people that I was talking to, Bernanke and Paulson.

MR. LAWSKY: Had it been up to you would you made the disclosure?

THE WITNESS: It wasn't up to me.

MR. LAWSKY: Had it been up to you.

THE WITNESS: It wasn't.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

MR. CORNGOLD: Why do you say it wasn't up to you? Were you instructed not to tell your shareholders what the transaction was going to be?

THE WITNESS: I was instructed that "We do not want a public disclosure."

MR. CORNGOLD: Who said that to you?

THE WITNESS: Paulson.

MR. CORNGOLD: When did he say that to you?

THE WITNESS: Sometime after I asked Ben Bernanke for something in writing.

Q. When did that occur?

A. Which one?

Q. When did Mr. Paulson state that he did not want a public disclosure?

A. It was sometime late in the year. I think it's actually in the minutes.

MR. LIMAN: If you have the next set of minutes it might help the witness.

Q. What's your best recollection of what Mr. Paulson said to you on that point?

A. That was the conversation that I mentioned that I went to Bernanke to ask the

K.L. Lewis

question, and he didn't call me back but Hank did. The request was for a letter stating what they would do, and he had those two elements in there. But the thing that we're talking about is that he said "We do not want a public disclosure."

Q. A public disclosure of what?

A. Of what they were going to be doing for us until it was completed.

Q. How about of Merrill fourth-quarter losses?

A. That wasn't an issue that was being exchanged.

Q. Did anyone consider that the oral agreement was a commitment for financing, so under SEC rules there had to be a disclosure?

A. I did not. That's all I can tell you.

MR. CORNGOLD: Between December 12 and the 1st of the year, did you have any conversations with anyone at Bank of America or representing Bank of America, concerning whether Bank of America had an obligation to make any disclosure?

THE WITNESS: I do not recall having any.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

MR. CORNGOLD: Were you aware of other people having those conversations?

THE WITNESS: I don't recall the conversation.

Q. Did you consider the issue?

A. Of disclosure?

MR. LIMAN: Of the oral statements of Bernanke and Paulson.

MR. CORNGOLD: There were a number of -- nothing was disclosed, but of either the losses that you learned about at Merrill Lynch -- let's do it one at a time. Have you had conversations, or were you aware of any conversations, between December 12 and the end of the year?

THE WITNESS: I was not aware of any conversations, but that's not to say there weren't. It's just I was not.

MR. CORNGOLD: Are you aware of any conversations between December 12 and the end of the year about whether there was an obligation to disclose anything about your negotiations with the Fed and/or the Treasury Department?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

THE WITNESS: I was not aware -- I don't recall any and don't recall being aware of any.

Q. So when you're havin your conversations with the Fed and the Treasury, at any point, do you say, "I need an adjustment on the purchase price; just give me that"?

A. We were told that the deal needed to close on time under the deal that had been made.

MR. CORNGOLD: You're using passive voice; I want to know active voice, who told you?

THE WITNESS: I don't remember which one, but it was either Bernanke or Paulson.

MR. CORNGOLD: Was that in response to a question about whether the terms of the transaction could be changed?

THE WITNESS: No. Actually, I don't remember exactly, but it could have been when he had made the strong statement about management and stuff. I don't remember that, but it was a pretty strong statement --

MR. CORNGOLD: You're doing this transaction at the time you were supposed to

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

government wanted to happen.

Q. Did you feel like you had a choice in the matter?

A. No.

Q. Were you angry about that -- or some other emotion? I don't want to put words in your mouth.

A. Yes. I think I was a little shocked. Everything got back to the fact that I was shocked at how strongly they felt about the consequences, and so it was more that a little anger. I think they were doing it in good faith. They thought everything they said was true.

MR. CORNGOLD: But you understood -- tell me if this is a fair presentation of your testimony -- what they were telling you to do was not in the one-to-three year interest of your shareholders.

THE WITNESS: I thought about in terms of it was in the best interest long term, and it was the only way to go under the circumstances.

MR. CORNGOLD: Well, there were other ways to go, weren't there? You could have

K.L. Lewis

said no, couldn't you?

THE WITNESS: I did not -- at that time, or sometime, I became convinced that they were right and that --

MR. CORNGOLD: They were right -- I'm sorry for interrupting.

THE WITNESS: -- they were right in the sense that it was not in the best interest of Bank of America, and they had strongly advised us of that, and their intensity with which they said it and the things around that convinced me that they were sincere in saying that.

MR. CORNGOLD: But you could have said no and resigned, correct?

THE WITNESS: I could have said no and resigned. Yes.

MR. CORNGOLD: Did you ever consider that from December 12 to December 31st?

THE WITNESS: No, I didn't. I thought it was in the best interest to go forward as had been instructed and --

Q. During the board meeting that took place on the 22nd -- or, for that matter, any time

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

leading up to that meeting -- did any of the board members say anything along the lines or in substance, Hey, our shareholders are getting hurt by this?

A. I don't recall the exact words, but we knew that we had put off the timetable that should get you a normal incretion, etc. because of the preferred.

Q. Did any of the board members say, Hey, we need to do something about this?

A. Well, we were going to call the MAC.

Q. Right. Did they say, In lieu of calling the MAC is there anything we should do?

A. No. It went from calling the MAC to strong admonition that we shouldn't.

Q. And, at that point, is there any discussion about disclosure to shareholders?

A. I don't recall it.

Q. Did any board member suggest that the answer to Mr. Paulson -- well, not the answer -- that Bank of America should go ahead and invoke the MAC?

A. No, not at that point. I think everybody -- I can't speak for the board, but there

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

was some -- my impression was that most people thought that the severity of the reaction meant that they firmly believed it was systemic risk.

Q. So on the 22nd the board gives the go-ahead to continue with the Merrill Lynch transaction.

A. Yes.

Q. Can you describe what happens between the 22nd and the end of the year in terms of that process?

MR. LIMAN: You just said the board decides to go ahead with the transaction. I just want to make sure about what the board decided.

THE WITNESS: Yes. Not to exercise the MAC and pursue it.

Q. Go forward with the deal as scheduled on the 22nd. And between the 22nd and the end of the year, if you can take me through what happened at that point.

A. Still a lot of intensity with Joe and others about the amounts and the forms of the TARP money and the wrap, so just a lot of that. Then, as I mentioned, I had -- I don't know if many, it

K.L. Lewis

couple of months. That would have led to considerable uncertainty." Do you see that?

MR. LIMAN: And it goes on "it could well have cost more than the repricing would have saved."

MR. MARKOWITZ: Yes.

Q. And in answering this question, did you consider whether you should also put in the response about Mr. Paulson's communication to you that if you did invoke the MAC he would replace the management and the board?

A. No. Because that 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.

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

A. The seriousness of the statement more than the threat itself.

MR. LIMAN: What do you mean by "the seriousness of the statement"?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

K.L. Lewis

THE WITNESS: The fact that somebody would say that to the CEO of Bank of America at a time that it was in good standing just showed to me that they had a deep belief that we should not call the MAC.

MR. LAWSKY: I'm going to jump back to the bonuses again. If Merrill Lynch had waited and not paid the bonuses out early, could you tell us how that would have worked? Would it have been Bank of America's Comp Committee, and, let's say, in January it would have paid out those bonuses?

THE WITNESS: Legally, I don't know. I would presume. I don't know what legal rights you would have to override what was done by a public company's compensation committee.

MR. LAWSKY: You testified earlier, I believe, that Steele Alphin and Andrea Smith were urging Thain to wait on awarding bonuses till the new year.

THE WITNESS: Right.

MR. LAWSKY: Had they done that -- so no Comp Committee action by Merrill, is it your