UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FRANK M. BOORN, Individually, and On Behalf of All Others Similarly Situated, Plaintiff, v. BANK OF AMERICA CORP., KENNETH D. LEWIS, O. TEMPLE SLOAN, JR., WILLIAM BARNET, III, FRANK P. BRAMBLE, SR., JOHN T. COLLINS, GARY L. COUNTRYMAN, TOMMY R. FRANKS, CHARLES K. GIFFORD, MONICA C. LOZANO, WALTER E. MASSEY, THOMAS J. MAY, PATRICIA E. MITCHELL, THOMAS M. RYAN, MEREDITH R. SPANGLER, ROBERT L. TILLMAN, and JACKIE M. WARD, Defendants.	Civil Action No. 1:09-cv-0159

CLASS ACTION COMPLAINT

Plaintiff, Frank M. Boorn, individually and on behalf of all other persons similarly situated, by his undersigned attorneys, alleges as follows, based on information and belief. Plaintiff's information and belief is based, *inter alia*, on

the investigation made by and through counsel, primarily from public filings, statements, and releases made by Defendants.

NATURE OF THE ACTION

1. This is a securities class action on behalf of all persons who held the securities of Bank of America Corporation ("Bank of America" or the "Company") as of October 10, 2008, the record date for the special meeting of stockholders called to approve Bank of America's Merger ("Merger") with Merrill Lynch & Company ("Merrill Lynch").

2. Bank of America, a Delaware corporation with its principle place of business in Charlotte, North Carolina, is a financial holding company which provides a range of banking and nonbanking financial services and products in the United States and internationally.

3. This action involves misleading proxy materials issued by Bank of America and its Board of Directors in connection with Bank of America's Merger with Merrill Lynch, which closed on January 1, 2009. Shareholders of Bank of America were asked to approve the Merger at a special meeting of stockholders on December 5, 2008, based on a materially false and misleading Proxy Statement (the "Proxy").

4. Defendant Bank of America and the members of its Board of Directors, referred to as the "Director Defendants," (collectively, "the Defendants") made materially false and misleading statements for the purpose of securing sufficient proxies to approve the Merger. The Proxy Statement omitted material facts concerning Bank of America's loss exposure due to its Merger with Merrill Lynch.

5. Defendants failed to disclose critical information to shareholders in a timely manner, *inter alia,* that they knew or should have known of excessive losses at Merrill Lynch that should have been disclosed to allow shareholders a well-informed vote on the Merger.

6. Defendants' actions violated Section 14(a) of the Securities Exchange Act of 1934 ("Exchange Act") and the rules promulgated by the Securities Exchange Commission ("SEC") under that statute. This federal class action asserts claims on behalf of all persons who were entitled to vote on the Merger.

JURISDICTION AND VENUE

7. This Court has jurisdiction over the subject matter of this action pursuant to Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa and 28 U.S.C. §1331.

8. The claims asserted herein arise under Section 14(a) of the Exchange Act, 15 U.S.C. §78j(b) and Rule 14a-9 promulgated thereunder by the SEC.

9. Venue is proper in this district pursuant to Section 27 of the Exchange Act and 28 U.S.C. §1391. Many of the acts and events which give rise to the violations of law complained of, including the dissemination of reports, updates and other false and misleading information, occurred in this District.

10. In connection with the wrongful acts, conduct and other wrongs complained of in this Complaint, the Defendants used the means and instrumentalities of interstate commerce.

PARTIES

11. Plaintiff Boorn holds 13,949 shares of Bank of America stock as of January 17, 2009, and continues to hold shares of Bank of America, as set forth in the accompanying certification. Plaintiff Boorn was a shareholder of record of Bank of America on October 10, 2008 and was entitled to vote on the Merger, thus making him a member of the Class.

12. Defendant Bank of America is a Delaware corporation, a bank holding company and a financial holding company. The Company provides banking, investing, asset management and other financial and risk-management products and services to individual consumers and businesses. Bank of America

has more than 6,000 retail banking locations and over 18,000 ATMs, serving clients in the United States and across the world. The principal executive offices of the Company are in Charlotte, North Carolina.

13. Defendant Kenneth D. Lewis is the Chairman, Chief Executive Officer and President of the Company. As such, Defendant Lewis signed the Proxy Statement at issue. Defendant Lewis has been the Company's Chief Executive Officer since April 2001, President since July 2004 and Chairman since February 2005. Defendant Lewis has been on the Board of Directors of the Company since 1999 and currently is a member of the Executive Committee.

14. Defendant O. Temple Sloan, Jr. has been a member of the Company's Board of Directors since 1996 and is currently the Lead Director. As the Lead Director, Defendant Sloan communicates regularly with the Company's Chief Executive Officer Defendant Lewis regarding issues such as business strategy and succession planning. Additionally, Defendant Sloan serves as Chairman of the Compensation and Benefits Committee and the Executive Committee. Defendant Sloan also serves on the Corporate Governance Committee.

15. Defendant William Barnet, III has been a member of the Company's Board of Directors since April 2004 and serves on the Audit Committee.

16. Defendant Frank P. Bramble, Sr. has been a member of the Company's Board of Directors since January 2006 and serves on the Asset Quality Committee.

17. Defendant John T. Collins has been a member of the Company's Board of Directors since April 2004 and serves on the Audit Committee.

18. Defendant Gary L. Countryman has been a member of the Company's Board of Directors since April 2004 and serves on the Executive Committee.

19. Defendant Tommy R. Franks has been a member of the Company's Board of Directors since January 2006 and serves on the Audit Committee.

20. Defendant Charles K. Gifford, Former Chairman of Bank of America Corp., has been a member of the Company's Board of Directors since April 2004 and serves on the Executive Committee.

21. Defendant Monica C. Lozano has been a member of the Company's Board of Directors since April 2006 and serves on the Asset Quality Committee.

22. Defendant Walter E. Massey has been a member of the Company's Board of Directors since 1998 and serves on the Audit Committee.

23. Defendant Thomas J. May has been a member of the Company's Board of Directors since April 2004 and serves as the Chairman of the Audit Committee.

24. Defendant Patricia E. Mitchell has been a member of the Company's Board of Directors since 2001 and serves on the Compensation and Benefits Committee as well as the Corporate Governance Committee.

25. Defendant Thomas M. Ryan has been a member of the Company's Board of Directors since April 2004 and serves on the Compensation and Benefits Committee. Defendant Ryan also is the Chairman of Corporate Governance Committee.

26. Defendant Meredith R. Spangler has been a member of the Company's Board of Directors since 1988 and serves on the Compensation and Benefits Committee as well as the Corporate Governance Committee.

27. Defendant Robert L. Tillman has been a member of the Company's Board of Directors since April 2005 and serves on the Asset Quality Committee.

28. Defendant Jackie M. Ward has been a member of the Company's Board of Directors since 1994 and serves as the Chairman of the Asset Quality Committee.

29. Defendants Lewis, Sloan, Barnett, Bramble, Collins, Countryman, Franks, Gifford, Lozano, Massey, May, Mitchell, Ryan, Spangler, Tillman and Ward are referred to collectively as the "Director Defendants."

30. Because of their positions of control and authority, the Director Defendants were able to, and did, control the contents of the various public statements including, but not limited to, the Proxy Statement, other SEC filings and press releases. As a result, each Defendant is liable as a primary violator in making false and misleading statements and omissions that operated to mislead Bank of America shareholders in exercising their right to vote on the proposals contained in the Proxy Statement.

CLASS ACTION ALLEGATIONS

31. This is a class action pursuant to Rule 23(a), (b)(2) and/or (b)(3) of the Federal Rules of Civil Procedure on behalf of a Class of all persons who were entitled to vote on the Schedule 14A Proxy Statement, pursuant to Section 14(a) of the Securities Exchange Act of 1934, that was filed with the SEC on November 3, 2008 by Defendants as amended or supplemented, who suffered harm as a result of the actions complained of this Complaint.

32. Excluded from the Class are the named Director Defendants, the officers and directors of Defendant Bank of America at all relevant times, members of each Director Defendant's immediate family, any entity in which any Defendant has a controlling interest, and the legal affiliates, representatives, heirs, controlling

persons, successors, and predecessors in interest or assigns of any such excluded party.

33. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members can only be determined through appropriate discovery, Class members number at least in the thousands, and they are geographically dispersed.

34. Plaintiff's claims are typical of the claims of the members of the Class because Plaintiff and all of the Class members sustained damages arising out of Defendants' wrongful conduct.

35. Plaintiff will fairly and adequately protect the interest of all Class members and has retained counsel experienced and competent in class and securities litigation. Plaintiff has no interest contrary to, or in conflict with, the members of the Class that Plaintiff seeks to represent.

36. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy because joinder of all members is impracticable. Additionally, as the damages suffered by individual members may be relatively small, the expense and burden of individual litigation make it impossible for Class members individually to redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

37. Questions of law and fact common to the members of the Class predominate over any questions that may affect only individual members, in that Defendants have acted on grounds generally applicable to the entire Class. Among the questions of law and fact common to the Class are:

a. Whether Defendants violated Section 14(a) of the Exchange Act and Rule 14a-9 promulgated thereunder by Defendants' conduct as asserted in this Complaint;

b. Whether the Proxy, and other documents and/or statements disseminated to class members in connection with the Merger, omitted or misrepresented material facts about the Merger that were required to be disclosed; and

c. Whether the members of the Class have sustained damages and, if so, the proper measure of such damages.

SUBSTANTIVE ALLEGATIONS

38. On September 15, 2008, Bank of America announced an agreement to merge with Merrill Lynch in a $50 billion all-stock transaction. In a press release on that day, Defendant Bank of America Chairman and CEO Lewis stated that "[a]cquiring one of the premier wealth management, capital markets, and advisory

companies is a great opportunity for our shareholders... [t]ogether, our companies are more valuable because of the synergies in our businesses."

39. Discussions between Defendant Lewis and Merrill Lynch began less than 48 hours before the board approved the Merger. On Saturday, September 13, 2008, Merrill Lynch's Chairman and CEO John Thain contacted Defendant Lewis. According to the Proxy Statement, "[e]arly in the morning of Sunday, September 14, 2008, Messrs. Thain and Lewis met . . . [and] discussed the results of the due diligence investigations conducted by their companies' respective representatives." Then, "[f]ollowing approval of each board of directors, the parties and their counsel continued to work to finalize and document the legal terms of the definitive agreements for the transaction, and early in the morning on September 15, 2008, the parties entered into the merger agreement . . . and the transaction was announced in a press release issued by Bank of America."

40. The speed of the deal and the extent of the due diligence was explained by Defendant Lewis in the September 2008 announcement of the deal, in which he described Bank of America's financial adviser, J.C. Flowers & Co.:

> J.C. Flowers or Chris Flowers is someone we've known for quite some time. We've done several deals with him. We know his firm very well, and it was fortunate that we did because his firm—he and his firm had done quite an amount of due diligence on Merrill Lynch fairly recently, and it was very, very extensive. They had looked at the marks very

> comprehensively, so this allowed us to have him and [his] team as an adviser, 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....I will say that Chris [Flowers'] comment was 'it's night and day from the time we first looked at it to now.' He was very complimentary of what John [Thain] 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....We actually thought Merrill Lynch's capital structure was very good and had a lot more of a base of common equity than some others we had seen, so it looks good.

41. Defendant Bank of America's Chief Financial Officer Joe Price went into more detail during the September 15, 2008 conference call regarding the Company's knowledge of Merrill Lynch and the due diligence conducted leading up to the Merger:

> 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.
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> * * *
>
> Clearly we've had a tremendous amount of historical knowledge both as a competitor with Merrill Lynch but also have reviewed and analyzed the company over the years. As Ken referenced, we did have several advisors, among them J.C. Flowers with pretty extensive knowledge of the company.
>
> While none of us like the market turmoil we've been through in the last year, it has caused us all to be much more attuned to the quality of particular name credits and/or other asset classes. So

> it's not as if we don't have a very significant knowledge of the markets around the asset classes that are most problematic. In addition, as you would expect we deployed the team that we would ordinarily deploy in these types of situations which had well over 45 people from our team on site as well as others off site, outside counsel and the like. So collectively with that group and quite frankly the progress that Merrill Lynch had made in reducing the risk exposures 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.

42. In the Proxy, Defendants described the expertise and knowledge of the advisors upon which it relied, as well as the fee for their services in the negotiation of the transaction, as follows:

> Bank of America's board of directors selected FPK and J.C. Flowers because of their respective expertise, reputation and familiarity with Bank of America and Merrill Lynch, and because their senior professionals have substantial experience in transactions comparable to the merger. As compensation for their services in connection with the merger, Bank of America has agreed to pay FPK and J.C. Flowers fees in an aggregate amount of $20,000,000, of which $5,000,000 was due upon delivery of their respective opinions and the remainder of which is contingent upon the consummation of the merger and related transactions.

43. The terms of the Merger were set forth in a Proxy Statement that was filed with SEC on November 3, 2008 and mailed to all shareholders of record of Bank of America (and Merrill Lynch) as of the record date of October 10, 2008. The Proxy Statement solicited proxies from shareholders on behalf of the company and the board to vote in favor of the Merger at a special meeting of shareholders on

December 5, 2008. Under the terms of the agreement, Bank of America would exchange .8595 shares of Bank of America common stock for each Merrill Lynch common share. That price was 1.8 times stated tangible book value.

44. J.C. Flowers and Fox-Pitt each provided a fairness opinion dated September 14, 2008, the day on which the negotiations concerning the Merger occurred, concluding that the proposed price of Merrill Lynch was "fair, from a financial point of view, to Bank of America." Their opinions were included in the Proxy Statement sent to shareholders.

45. After issuing the Proxy Statement, Defendants never updated or supplemented the materials provided to shareholders in connection with their vote on the Merger.

46. Under the Merger agreement, Merrill Lynch was obligated to fully cooperate with the Defendants in providing any information necessary in connection with the preparation of the Proxy Statement:

> 6.1 Regulatory Matters. (a) Parent and Company shall promptly prepare and file with the SEC the Form S-4, in which the Joint Proxy Statement will be included as a prospectus. Each of Parent and Company shall use its reasonable best efforts to have the Form S-4 declared effective under the Securities Act as promptly as practicable after such filing, and Company shall thereafter mail or deliver the Joint Proxy Statement to its stockholders. Parent shall also use its reasonable best efforts to obtain all necessary state securities law or "Blue Sky" permits and approvals required to carry out

the transactions contemplated by this Agreement, and Company shall furnish all information concerning Company and the holders of Company Common Stock as may be reasonably requested in connection with any such action.

(b) The parties shall cooperate with each other and use their respective reasonable best efforts to promptly prepare and file all necessary documentation, to effect all applications, notices, petitions and filings, to obtain as promptly as practicable all permits, consents, approvals and authorizations of all third parties (including any unions, works councils or other labor organizations) and Governmental Entities that are necessary or advisable to consummate the transactions contemplated by this Agreement (including the Merger), and to comply with the terms and conditions of all such permits, consents, approvals and authorizations of all such third parties or Governmental Entities. Company and Parent shall have the right to review in advance, and, to the extent practicable, each will consult the other on, in each case subject to applicable laws relating to the confidentiality of information, all the information relating to Company or Parent, as the case may be, and any of their respective Subsidiaries, that appear in any filing made with, or written materials submitted to, any third party or any Governmental Entity in connection with the transactions contemplated by this Agreement. In exercising the foregoing right, each of the parties shall act reasonably and as promptly as practicable. The parties shall consult with each other with respect to the obtaining of all permits, consents, approvals and authorizations of all third parties and Governmental Entities necessary or advisable to consummate the transactions contemplated by this Agreement and each party will keep the other apprised of the status of matters relating to completion of the transactions contemplated by this Agreement.

(c) *Each of Parent and Company shall, upon request, furnish to the other all information concerning itself, its Subsidiaries, directors, officers and stockholders and such other matters as may be reasonably necessary* or advisable in connection with

the Joint Proxy Statement, the Form S-4 or any other statement, filing, notice or application made by or on behalf of Parent, Company or any of their respective Subsidiaries to any Governmental Entity in connection with the Merger and the other transactions contemplated by this Agreement.

47. Following the execution of the Merger agreement on September 15, 2008, Defendants had full and complete access to Merrill Lynch's books and records. The Merger agreement, attached to the Proxy Statement as Appendix A, provided as follows in section 6.2 of the agreement:

> 6.2 Access to Information. (a) Upon reasonable notice and subject to applicable laws relating to the confidentiality of information, *each of Company and Parent shall, and shall cause each of its Subsidiaries to, afford to the officers, employees, accountants, counsel, advisors, agents and other representatives of the other party, reasonable access, during normal business hours during the period prior to the Effective Time, to all its properties, books, contracts, commitments and records*, and, during such period, such party shall, and shall cause its Subsidiaries to, make available to the other party (i) a copy of each report, schedule, registration statement and other document filed or received by it during such period pursuant to the requirements of federal securities laws or federal or state banking or insurance laws (other than reports or documents that such party is not permitted to disclose under applicable law) and (ii) all other information concerning its business, properties and personnel as the other party may reasonably request (in the case of access or a request by Company, the foregoing rights provided by this Section 6.2(a) shall be limited to information concerning Parent that is reasonably related to the prospective value of Parent Common Stock or to Parent's ability to consummate the transactions contemplated hereby). Neither Company nor Parent, nor any of their Subsidiaries, shall be required to provide access to or to disclose information where

> such access or disclosure would jeopardize the attorney-client privilege of such party or its Subsidiaries or contravene any law, rule, regulation, order, judgment, decree, fiduciary duty or binding agreement entered into prior to the date of this Agreement. The parties shall make appropriate substitute disclosure arrangements under circumstances in which the restrictions of the preceding sentence apply.

48. In the Proxy filed November 3, 2008, Defendant Bank of America's Board of Directors recommended the Merger as follows:

> **Recommendation of the Bank of America Board of Directors**
>
> The Bank of America board of directors has unanimously approved and adopted the merger agreement and the transactions it contemplates, including the merger. The Bank of America board of directors determined that the merger, merger agreement and the transactions contemplated by the merger agreement are advisable and in the best interests of Bank of America and its stockholders and unanimously recommends that you vote "FOR" approval of the issuance of shares of Bank of America common stock in the merger.

49. The Proxy indicated that the Merger would be "3.0% dilutive in 2009 and breakeven in 2010" based on estimates by other brokers.

50. After the announcement of the Merger, the Company was positive about the deal and its financial position overall, stating that it was well positioned to follow through with the Merger. On a Q3 2008 Earnings Call, an analyst inquired, "The $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?"

Defendant Bank of America's CFO Price responded, "We have considered the Merrill deal in our intentions here so the numbers we were talking about, as I mentioned in the prepared remarks, covered our anticipated needs from a Merrill standpoint."

51. Just after the Q3 2008 Earning Call, on October 9, 2008, Defendant Lewis gave an interview on the CBS television show 60 Minutes, stating that Bank of America didn't *need* the $25 billion given to the Company by the federal government as part of the $125 billion given to nine largest US banks. Further, Defendant Lewis gave government assistance as the reason Bank of America pursued a merger with Merrill Lynch over Lehman Brothers:

> "Everybody thought you were going to buy Lehman Brothers," Stahl recounted to Lewis. "Friday night, that was the buzz. Monday morning, it's not Lehman Brothers, it's Merrill Lynch. What happened between Friday night and Monday morning?" "I had talked to Secretary Paulson that Friday,' Lewis said. "And basically said we didn't think we could do the deal without government assistance." "With Lehman?" "With Lehman. That we couldn't do it without some help."

52. Meanwhile, in a *Wall Street Journal* article on November 8, 2008, it was revealed that Merrill Lynch was "planning to sell roughly $4 billion of distressed debt securities, including mortgages and complex investments, in a bid to cut its exposure to risky assets." This news came out against the backdrop of "a growing list of banks, hedge funds and large investors seeking buyers for their

hard-to-sell assets as the global economic downturn threatens to further erode the value of debt investments."

53. As reported in a November 17, 2008 *Wall Street Journal* article, the deterioration of the market was illustrated by the "U.S. Treasury Department on Friday provid[ing] $33.56 billion in capital to 21 domestic financial institutions. . . The disbursements bring the total amount of capital provided to financial institutions by Treasury under Troubled Asset Relief Program legislation to $158.56 billion." Furthermore, "[a]n additional $10 billion in capital has been set aside for Merrill Lynch & Co. in a transaction to be settled after its acquisition by Bank of America."

54. As the month of November continued, the market became increasingly concerned "about Merrill Lynch's potential exposure to commercial mortgage-backed securities. The value of such has plummeted since the disclosure last week that the US bailout plan wouldn't be used to buy toxic assets, including commercial mortgage-backed securities." Neither the Proxy Statement, nor any supplements to the Proxy Statement, disclosed the dramatic decreases in the value of Merrill Lynch's assets or the potential for increasing losses in the 4th quarter as a result of such decreases.

55. In December, almost immediately after the shareholder vote that approved the Merger, Defendant Lewis sought additional federal assistance, based on Merrill Lynch's substantially deteriorated financial condition, the true extent of which was not disclosed to Shareholders in the Proxy material. The Merger proceeded and closed on January 1, 2009.

56. On January 16, 2008, Bank of America unexpectedly announced a fourth-quarter loss and accepted an additional $20 billion in aid from the United States' government to help it absorb Merrill Lynch's troubled loan-backed securities. In this fourth-quarter, the Company posted a devastating net loss of $1.70 billion, or 48 cents a share.

57. The market reacted strongly to this news, and shareholders were surprised to learn of the steep and unexpected losses at Merrill Lynch and that Bank of America chose not to reveal the extent of loses until now, even though it had been evaluating its options since the announcement of the Merger in September, 2008.

58. On the January 16, 2008 Earnings Call, an analyst asked Defendant Lewis, "what, if anything, was missed in due diligence of Merrill Lynch that brought us to this point." Defendant Lewis responded as follows:

> Yes, in a nutshell, much much higher deterioration of the assets we had identified than we had expected going into the fourth

quarter. So our forecast of losses, Merrill Lynch's forecast of losses – and frankly, I would think almost anybody in the capital markets business would have forecasted a lower loss rate than what we saw.

So it wasn't an issue of not identifying the assets. It was that we did not expect the significant deterioration, which happened in mid to late December that we saw.

59. Defendant Lewis explained further:

As we saw the anticipated fourth quarter losses accelerating, we did evaluate our rights under the merger agreement. And during that time we spoke to – and were in close coordination with officials from both the Treasury and the Federal Reserve.

The government was firmly of the view that terminating or delaying the closing of the transaction could lead to significant concerns and could result in serious systemic harm. And a re-pricing, assuming it could be agreed, would have required a new stockholder vote both at Bank of America and at Merrill Lynch and therefore we would have been delayed by at least a couple of months. And that would have led to considerable uncertainty and could have well cost more than the re-pricing that we would have saved.

And I think in recognition – the position that Bank of America was in, both the Treasury and the Federal Reserve gave us assurances in December that we should close the deal and that the government would provide the assistance we've been talking about. So particularly ringing - putting a fence around some of the assets that we were most concerned about. And so in view of all of those considerations, and in view that strategically Merrill Lynch remains a sold franchise, we just thought it was in the best interest of our company and our stockholders and the country to move forward with the original terms and the timing.

60. Nonetheless, Defendants were aware, by virtue of their access to information about Merrill Lynch pursuant to the Merger agreement, that the fourth quarter losses were accelerating at the time that they solicited proxies to approve the Merger, and Defendants failed to adequately and fully disclose this information. Further, Defendants failed to inform Plaintiff and the Class of the subsequent substantial deterioration in Merrill Lynch's financial condition, and the shareholders approved the Merger without being fully informed of all facts material to their decision.

COUNT ONE – AGAINST DEFENDANTS FOR VIOLATIONS OF SECTION 14(a) OF THE EXCHANGE ACT AND RULE 14a-9 THEREUNDER

61. Plaintiff repeats and realleges the allegations above as if fully set forth herein.

62. This Count is asserted under Section 14(a) of the Exchange Act and Rule 14a-9 promulgated thereunder on behalf of the Class against Defendant Bank of America and the Director Defendants.

63. Section 14(a) of the Exchange Act, 15 U.S.C. §78n(a), provides that "[it] shall be unlawful for any person, by the use of the mails or by any means of instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the

Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title [15 U.S.C. §781]." Rule 14a-9, promulgated pursuant to §14(a) of the Exchange Act, provides that no Proxy Statement shall contain "any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading." 17 C.F.R. §240. 14a-9(a).

64. In the Proxy, the shareholder Class members were solicited to vote to approve the Merger between Bank of America and Merrill Lynch. A shareholder vote was required to approve this proposal. Thus, the Proxy was an essential link to the accomplishment of this proposal.

65. Defendants provided information which was contained in the Proxy, allowed their names to be used in connection with the Proxy and solicitation of votes, had a substantial financial interest in the outcome of the votes being sought by the Proxy, would have a continuing material relationship with Bank of America following the votes on the Merger and other issues presented in the Proxy, solicited votes under the Proxy, and caused the Proxy to be disseminated to the Class through the use of the United States mails and the means and instrumentalities of

interstate commerce. Section 14(a) of the Exchange Act, 15 U.S.C. §78n(a), prohibits any person soliciting a proxy from doing so "in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

66. SEC Rule 14a-9, 17 C.F.R. §240.14a-9, promulgated pursuant to Section 14(a), prohibits the issuance of any proxy statement "which, at the time and in light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading."

67. Defendants solicited proxies from the Plaintiff and other Class members by means of a Proxy Statement which contained false and misleading statements concerning, *inter alia*, the Merger and its benefits to shareholders, and omitted to state material facts which were necessary to make their statements contained therein not false and misleading.

68. The misrepresented or omitted facts are material because under all the circumstances, there is a substantial likelihood a reasonable shareholder would

consider the false and misleading statements or omitted facts important in deciding how to vote on the Proxy or a material part of the mix of information available to the Class members in deciding how to exercise their voting rights.

69. The members of the Class were denied the opportunity to make an informed decision in voting on the Merger.

70. None of the materially false and misleading statements contained in the Proxy, or material matters omitted from the Proxy, as described above, were known to the Plaintiff or the Class at the time they voted on the matters presented to them in the Proxy.

71. The members of the Class have suffered damages as a result of the Merger which was approved through the use of a proxy in violation of Section 14(a) of the Exchange Act and Rule 14a-9 promulgated thereunder.

72. Defendants violated §14(a) of the Exchange Act and Rule 14a-9 by issuing a false and misleading Proxy to solicit and obtain the votes of Bank of America shareholders to approve the Bank of America/Merrill Lynch Merger. In the Proxy, Defendants made what they knew or should have known were untrue statements of material fact and/or omitted material facts necessary to make the statements made not misleading.

73. As a consequence of the foregoing, Class members have been damaged.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment as follows:

A. An order certifying the Class as set forth in this Complaint and designating Plaintiff as the Class representative;

B. A judgment declaring the Proxy to be materially false and misleading in violation of Section 14(a) of the Securities Exchange Act of 1934;

C. A judgment declaring the conduct of the Defendants to be in violation of the law as set forth herein;

D. Awarding the Plaintiff and members of the Class compensation for the damages which they have sustained as a result of Defendants' unlawful conduct;

E. Awarding the Plaintiff reasonable attorneys' fees, experts' fees, interest and cost of suit; and

F. Such other and further relief as this Court may deem just.

PLAINTIFF DEMANDS A JURY TRIAL

Dated: January 21, 2009

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