

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

FRANK PALUMBO and JENNIFER  
PALUMBO as JTWROS and BRAD  
McMORRIS,

Plaintiffs,

v.

BANK OF AMERICA CORPORATION,  
KENNETH D. LEWIS, and JOHN  
THAIN,

Defendants.

**CLASS ACTION COMPLAINT FOR  
VIOLATION OF THE FEDERAL  
SECURITIES LAWS**

**JURY TRIAL DEMANDED**

Plaintiffs, on behalf of themselves and all others similarly situated, by their undersigned counsel, make the following allegations on information and belief based upon the investigation of counsel, except as to the allegations pertaining specifically to Plaintiffs, which are based on personal knowledge. The investigation conducted by Plaintiffs' counsel included, *inter alia*, a review and analysis of (i) publicly available news articles and reports; (ii) public filings, including, but not limited to, filings by Merrill Lynch & Co., Inc. ("Merrill Lynch" or "Merrill") and Bank of America Corporation ("BAC") with the Securities and Exchange Commission ("SEC"); and (iii) press releases issued by Defendants (defined below), news reports and other publicly-available information. Plaintiffs believe that additional substantial evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery.

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U.S. DISTRICT COURT  
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## NATURE OF THE ACTION

1. This is a securities class action filed on behalf of all persons and entities which held BAC common stock on October 10, 2008, and were entitled to vote to approve BAC's acquisition of Merrill (the "Proxy Class"), and/or all persons or entities which purchased or otherwise acquired shares of BAC common stock (the "Purchaser Class") from January 2, 2009 through January 20, 2009 (the "Class Period") which were damaged thereby in connection with the transaction, described more fully below.

2. This action arises out of the dissemination of materially false and misleading information concerning BAC's acquisition of Merrill, including the issuance of a registration statement, joint proxy and other statements that failed to fully and truthfully disclose to investors all material facts relating to the proposed acquisition in violation of §§ 14(a), 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78j(b), 78n(a) 78t(a) and SEC rules 10b-5 and 14a-9 promulgated thereunder.

3. Merrill provided a wide range of financial services, including asset backed securitization. During the housing boom, Merrill purchased billions of dollars worth of subprime loans to be warehoused, repackaged and sold as collateralized debt obligations ("CDOs"). While this strategy earned Merrill profits during the boom, once the subprime mortgage market began to deteriorate and thousands of loans underlying the CDOs defaulted, Merrill was left with billions of dollars of substantially impaired assets.

4. As the value of these CDOs quickly disappeared, Merrill needed to write-down the value of those assets to maintain an accurate and healthy balance sheet. Thus, on October 5, 2007, Merrill disclosed the first of several write-downs that would eventually total over \$46 billion. Indeed, Merrill continued to record billions of dollars of write-downs throughout 2008.

5. As a result of the billions of dollars in write-downs, Merrill's share price fell precipitously. During the second week of September 2008, Merrill's share price was down approximately 36 percent.

6. On the morning of Friday, September 12, 2008, Merrill's board of directors held a conference call to discuss the current market conditions, developments regarding Lehman Brother Holdings Inc.'s ("Lehman Brothers") financial viability and the financial condition of Merrill itself. The board of directors urged senior management to continue to evaluate any potential impact of the market conditions and the possible courses of action Merrill might pursue in the immediate future.

7. When it became apparent that Merrill Lynch had further weakened due to its substantial subprime related losses, Defendant Thain called Defendant Lewis on the morning of Saturday, September 13, to discuss a possible deal. Over the next two days, discussions ensued, due diligence began and ended, and by the end of the weekend a deal had been struck.

8. On September 15, 2008, after 48 hours of negotiations and purported due diligence, Merrill and BAC issued press releases announcing that BAC had agreed to acquire Merrill Lynch in a \$50 billion all stock transaction (the "Deal"). Under the terms of the Deal, Merrill shareholders would receive .8595 shares of BAC common stock in exchange for each Merrill common share. This amounted to 1.8 times the stated book value of Merrill stock at the time. BAC was advised by J.C. Flowers & Co. LLC ("J.C. Flowers"), Fox-Pitt Kelton Cochran Caronia Waller ("FPK") and Bank of America Securities that the Deal was "fair".

9. On October 31, 2009, BAC mailed a materially false and misleading Joint Proxy Statement to stockholders of record as of October 10, 2008, recommending that they vote in

favor of the transaction. On December 5, 2009, the vote occurred, and BAC stockholders voted to approve the Deal.

10. On January 1, 2009, the Deal closed according to the terms set forth in the Joint Proxy (defined below). On the same date, BAC issued a press release announcing the completion of the Deal (the “January 1 Press Release”). The January 1 Press Release contained only positive statements about BAC’s acquisition of Merrill. It failed to include any information regarding Merrill’s substantial fourth quarter write-downs that nearly caused BAC to walk away from the Deal prior to closing. Similarly, the January 1 Press Release failed to disclose that BAC was only willing to complete the Deal after the federal government agreed to provide it with a capital infusion to cover the costs associated with Merrill’s losses.

11. However, on January 16, 2009, BAC revealed that it had received an additional \$20 billion of government funds to cover losses that Merrill had sustained in the fourth quarter of 2008. Defendant Lewis admitted that he had actual knowledge of Merrill’s impending fourth quarter loss at some point during December 2008 and had considered terminating the Deal unless BAC received additional government support. BAC further reported that it suffered its first quarterly loss in 17 years.

12. On January 20, 2009, based on the previously undisclosed information, analysts concluded that BAC needed more than \$80 billion to restore adequate capital levels. On this news, BAC stock price plummeted further

13. As described below, in violation of Section 14(a) of the Exchange Act, the Registration Statement and Joint Proxy filed in connection with the Deal contained materially false and misleading statements and omissions regarding Merrill’s true financial condition as well as materially false and misleading statements and omissions concerning the risks to BAC’s

financial results and impairment of its balance sheet if the acquisition was approved. Additionally, in violation of Section 10(b) of the Exchange Act, Defendants deceived investors by knowingly or recklessly making false and misleading statements and omitting material information from the January 1, 2009 press release regarding Merrill's financial condition, the need for further government assistance for the Deal to close and the serious negative financial impact on BAC.

14. Plaintiffs and the members of each class suffered damages as a result of Defendants' materially misleading statements and omissions, and bring this action to recover damages incurred thereby, the costs and expenses of this litigation, and any further relief as may be just and proper.

#### **JURISDICTION AND VENUE**

15. The claims asserted herein arise under and pursuant to §§ 14(a), 10(b) and 20(a) of the Exchange Act and SEC rules 10b-5 and 14a-9 promulgated thereunder.

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

17. Venue is proper in this District pursuant to Section 27 of the Exchange Act and 28 U.S.C. §1391(b). Many of the acts and transactions alleged herein occurred in substantial part in this District. In addition, Merrill Lynch maintains its corporate headquarters in this District and BAC has offices and does business in this District.

18. In connection with the acts, transactions and conduct alleged herein, defendants, directly and indirectly, used the means and instrumentalities of interstate commerce, including

the United States mails, interstate telephone communications and the facilities of the national securities exchanges.

### **PARTIES**

19. Plaintiffs Frank Palumbo and Jennifer Palumbo as JTWROS purchased and held BAC common stock as set forth on the attached Certification, and were damaged thereby.

20. Plaintiff Brad McMorris, purchased BAC common stock as set forth on the attached Certification, and was damaged thereby.

21. Defendant BAC is a Delaware financial holding company. Its principal place of business is located at 100 North Tryon Street, Bank of America Corporate Center, Charlotte, North Carolina. BAC is one of the world's largest financial institutions, serving individual consumers, small and middle market businesses and large corporations with a range of banking, investing, asset management and other financial and risk-management products and services. BAC serves clients in 175 countries.

22. Defendant John Thain ("Thain") was the Chairman of the Board and CEO of Merrill Lynch prior to the Deal's closing. After the Deal closed Thain became the president of global banking, securities and wealth management at BAC.

23. Defendant Kenneth D. Lewis ("Lewis") is the Chairman of the Board and CEO of BAC.

24. The term "Defendants" refers collectively to BAC, Lewis and Thain.

25. Merrill Lynch, is a Delaware holding corporation. Its principal place of business is located at 4 World Financial Center, 250 Vesey Street, New York, NY. Through its subsidiaries, Merrill Lynch is the largest securities broker in the United States. Merrill Lynch

asserts that it is one of the world's leading wealth management, capital markets and advisory companies. It has offices in 40 countries and territories and total client assets of approximately \$1.6 trillion. As an investment bank, it claims to be a leading global trader and underwriter of securities and derivatives across a broad range of asset classes and serves as a strategic advisor to corporations, governments, institutions and individuals worldwide.

26. Each of the Defendants participated in the drafting, preparation, or approval of various materially false and misleading statements issued to investors and contained in the Registration Statement, Joint Proxy and January 1 Press Release. Each of the Defendants was responsible for the truth and accuracy of the statements contained in the Registration Statement, Joint Proxy and January 1 Press Release.

27. Each of the Defendants owed to BAC common stock holders, including Plaintiffs and the Classes, the duty to make a reasonable and diligent examination of the statements contained in the Registration Statement, Joint Proxy and January 1 Press Release. This duty included performing an appropriate investigation to ensure that the statements contained therein were true, and that there were no omissions of material fact required to be stated in order to make the statements contained in the Registration Statement, Joint Proxy and January 1 Press Release not misleading.

### **FACTUAL ALLEGATIONS**

28. On Friday, September 12, 2008, the Merrill board of directors held an informational conference call to discuss the financial crisis and Merrill's then current financial situation. The board stressed to management the need for Merrill Lynch to be prepared to act quickly as events unfolded.

29. The next morning Defendant Thain contacted Defendant Lewis to discuss a

possible deal between the banks. In view of the need to move expeditiously in light of the apparent imminent bankruptcy of Lehman Brothers and deteriorating market conditions, the companies arranged management, financial and legal meetings.

30. Early on September 14, 2008, Defendants Thain and Lewis met again to discuss the results of their respective the due diligence investigations. At the conclusion of the meeting they agreed to have representatives of Merrill and BAC and the banks' respective legal advisors negotiate the terms of a transaction to combine the two companies. During these discussions, representatives of Merrill indicated that Merrill would seek a significant premium to its closing price on September 12, 2008 of \$17.05 per common share, as well as an appropriate multiple of book value. Ultimately the parties' agreed to present to their respective boards a proposed transaction having a price of \$29.00 for each share of Merrill Lynch common stock, which equated to an exchange ratio of 0.8595 based on the closing price for shares of BAC common stock on the NYSE on September 12, 2008. These same financial terms governed the transaction when it closed on January 1, 2009.

31. On Sunday afternoon, BAC and Merrill Lynch senior management met with their respective company's financial advisors; BAC with J.C. Flowers and FPK and Merrill with Merrill Lynch, Pierce, Fenner & Smith, Inc. ("MLPFS"). The advisors presented to the respective boards the results of their due diligence investigations for which the financial advisors were paid an aggregate amount of \$20 million. Each financial advisor opined that the merger was "fair" to stockholders and each board of directors voted unanimously to approve the merger agreement.

32. On September 15, 2008, BAC issued a press release announcing that it had agreed to acquire Merrill Lynch in a \$50 billion all stock transaction. The Deal was valued at \$50

billion based on the closing price of BAC's closing price on September 12, 2008 of \$33.74. The price was 1.8 times Merrill's stated tangible book value at that time. According to the press release, BAC expected the Deal to close in the first quarter of 2009. The Deal ultimately closed on January 1, 2009.

33. The press release expressly asserted that the Deal would provide advantages to BAC, including that "Bank of America expects to achieve \$7 billion in pre-tax expense savings, fully realized by 2012[,]" and that "[t]he acquisition is expected to be accretive to earnings by 2010." BAC further emphasized the vast contributions Merrill would provide to BAC, and also acknowledged that the continued success of BAC is largely dependent on the reputation of Merrill's financial advisors and Merrill's assets, including its substantial interest in BlackRock:

The combined company would have leadership positions in retail brokerage and wealth management. By adding Merrill Lynch's more than 16,000 financial advisers, Bank of America would have the largest brokerage in the world with more than 20,000 advisers and \$2.5 trillion in client assets.

The combination brings global scale in investment management, including an approximately 50 percent ownership in BlackRock, which has \$1.4 trillion in assets under management. Bank of America has \$589 billion in assets under management.

Adding Merrill Lynch both enhances current strengths at Bank of America and creates new ones, particularly outside of the United States. Merrill Lynch 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 underwriter of global high yield debt, the third largest underwriter of global equity and the ninth largest adviser on global mergers and acquisitions based on pro forma first half of 2008 results.

34. On October 2, 2008, BAC filed the Registration Statement containing the materially false representations and omissions, described below, in connection with the issuance of BAC common stock to then current Merrill shareholders. The Registration Statement

contained the Joint Proxy Statement (“Joint Proxy”) that constituted a prospectus. The Registration Statement was amended on October 22 and again on October 29. The Registration Statement became effective on January 1, 2009.

35. On October 31, 2008, BAC and Merrill mailed the Joint Proxy to their shareholders outlining the background and terms of the Deal and recommending that stockholders vote to approve the transaction. On November 3, 2008 the final version of the Joint Proxy was filed with the SEC.

36. According to the Joint Proxy, each of the Merrill Lynch board of directors and the Bank of America board of directors had approved the merger agreement according to the following terms:

Each share of Merrill Lynch common stock, par value \$1.331/3 per share, issued and outstanding immediately prior to the completion of the merger, except for specified shares of Merrill Lynch common stock held by Merrill Lynch and Bank of America, will be converted into the right to receive 0.8595 of a share of Bank of America common stock.

\* \* \*

The merger agreement provides that Bank of America may change the structure of the merger. No such change will alter the amount or kind of merger consideration to be provided under the merger agreement, adversely affect the tax treatment of Merrill Lynch’s stockholders as a result of receiving the merger consideration or the tax treatment of the parties to the merger agreement, or impede or delay completion of the merger.

37. According to the Joint Proxy, in light of the fact that Lehman Brothers was on the brink of collapse, equity markets were volatile, and Merrill Lynch’s common stock price declined by approximately 36 percent the prior week, the Deal was negotiated and agreed to over the weekend of September 13, 2008 through September 14, 2008.

38. On December 5, 2008, BAC announced that Merrill Lynch and BAC shareholders voted to approve the Deal.

39. On December 8, 2008, Merrill held its last full board meeting, which mainly discussed Thain's unsuccessful request for a \$10 million bonus. The meeting also purportedly discussed Merrill's continuing losses.

40. In mid-December 2008, Defendant Lewis reportedly learned from the Merrill transition team, not Defendant Thain, that Merrill would record additional write-downs of \$15 to \$20 billion in the fourth quarter of 2008. As a result, Defendant Lewis feared that BAC had insufficient capital to cover such huge losses and contemplated terminating the Deal.

41. Indeed, a Financial Times article dated January 15, 2008 revealed that “[i]n December, Ken Lewis, [BAC] chief executive, dispatched a team of lawyers to New York to determine whether Merrill's situation might constitute a ‘material adverse condition’ that could justify a BofA refusal to complete the deal[.]”

42. On December 17, 2008, Lewis reportedly met with government regulators and informed them that BAC was considering walking away from the Deal because of Merrill's expected enormous write-downs in the fourth quarter. The regulators agreed to provide BAC with another capital infusion<sup>1</sup> and a guarantee of assets belonging to both companies.

43. Without holding another board meeting, or announcing to investors the enormous fourth quarter loss at Merrill, the serious impairment to the balance sheet of Merrill and consequently to BAC, the need for further massive government support to allow the Deal to go forward, and without filing or mailing an amended proxy statement to BAC stockholders providing them an opportunity to vote on the Deal in light of this material information, BAC allowed the Deal to close on January 1, 2009.

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<sup>1</sup> BAC had previously received \$15 billion in 2008 from the government. When it bought Merrill, it received the \$10 billion that was slated to go to the investment bank.

44. On the same day, BAC also issued the January 1 Press Release announcing the completion of the Deal. While the press release made numerous positive assertions regarding the deal, it failed to include any information regarding Merrill Lynch's enormous losses or the additional government bailout.

45. Not until January 16, 2008 was it revealed that Merrill had recorded substantial write-downs in the fourth quarter and that BAC had received an additional \$20 billion from the government to help BAC cover those losses. Indeed, Merrill board members were supposedly "shocked" to learn that Thain did not inform them in December that the deal might be in jeopardy. Nonetheless, Defendants' actions deceived investors by concealing the massive losses at Merrill while allowing Merrill to accelerate the date for payment of \$3-\$4 billion in employee bonuses to precede closing of the Deal.

46. Also on January 16, 2009, BAC announced that it had posted a net quarterly loss of \$1.79 billion, its first quarterly loss in 17 years, and had cut its dividend from \$0.32 to a \$0.01. However, during BAC's fourth quarter conference call, Lewis asserted that he did not miss any problems at Merrill in doing its due diligence before making the deal and that Merrill's estimated \$15.5 billion losses were anticipated.

47. On January 20, 2009, based on the previously undisclosed information, analysts concluded that Bank of America would need to raise at least \$80 billion to restore sufficient capital adequacy levels. A feat that seemed nearly impossible given the status of the bank. Indeed, one analyst stated, "[i]t would take over \$80 billion of new common equity to reach even the low end of the range, and we believe Bank of America simply is not generating sufficient capital internally in this environment to put a dent in this size capital hole." On this news, BAC

stock price plummeted to \$5.10 per share, down from a closing price of \$10.20 per share on January 14, 2008, a loss of 50 percent.

**DEFENDANT’S MATERIAL OMISSIONS AND  
FALSE AND MISLEADING STATEMENTS**

Registration Statement and Joint Proxy

48. The Registration Statement and Joint Proxy failed to inform BAC shareholders of material facts concerning Merrill’s true financial condition, business and the financial risks associated with Merrill Lynch’s assets and its losses.

49. Although the Registration Statement and Joint Proxy identified certain “Risk Factors”, none of the factors identified or explained that Merrill Lynch’s assets were so complex and illiquid that it was difficult to value the company with any degree of specificity. Further, the Joint Proxy failed to disclose that the value of Merrill’s assets were substantially less than the stated value.

50. Under the heading “INFORMATION ABOUT THE COMPANIES”, information was provided regarding Merrill’s third quarter results. However, when Defendants became aware of Merrill’s potential staggering losses in the fourth quarter, Defendants failed to update, amend or correct the Joint Proxy to disclose that BAC had become aware of the losses and that it has considered walking away from the Deal as those losses were likely to be considered a material adverse change under the Merger Agreement .

51. The Registration Statement and Joint Proxy also described the “Representations and Warranties” of BAC and Merrill. There, Defendants assured investors that no “material adverse effect” has occurred between the date of the Merger Agreement and the date of the Deal’s closing (emphasis added):

The merger agreement contains customary representations and warranties of Merrill Lynch and Bank of America relating to their respective businesses. With the exception of certain representations that must be true and correct in all material respects (or, in the case of specific representations and warranties regarding the capitalization of Merrill Lynch, true and correct except to a de minimis extent), no representation or warranty will be deemed untrue, inaccurate or incorrect as a consequence of the existence or absence of any fact, circumstance or event unless that fact, circumstance or event, individually or when taken together with all other facts, circumstances or events, has had or would reasonably be expected to have a material adverse effect on the company making the representation.

52. Additionally, BAC and Merrill each stated that it has made representations and warranties to the other regarding, among other things, capitalization, financial statements, internal controls and accounting or auditing practices, and “*the absence of adverse changes.*” Additionally, Merrill made other representations and warranties about itself to Bank of America as to, among other things, investment securities and communities.

January 1, 2009 Press Release

53. The press release announcing the closing of the Deal did not contain any information concerning Merrill’s substantial losses in the fourth quarter, but rather only asserted positive statements regarding BAC’s acquisition:

“We created this 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 Chairman 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 strengths in debt and equity underwriting, sales and trading, and merger and acquisition advice, creating significant opportunities to deepen relationships with corporate and institutional clients around the globe.

Under 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 pre-tax 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.

54. Similarly, the January 1, 2009 press release failed to disclose material facts concerning Merrill's true financial condition, the financial risks to BAC resulting from the transaction and the need for \$20 billion of additional government support to close the Deal.

#### **CLASS ACTION ALLEGATIONS**

55. This is a securities class action filed on behalf of all persons and entities which held BAC common stock on October 10, 2009, and were entitled to vote to approve BAC's acquisition of Merrill (Proxy Class), and/or all persons or entities which purchased or otherwise acquired shares of BAC common stock from January 2, 2009 through January 20, 2009 (Purchaser Class), which were damaged thereby (together the "Classes").

56. Excluded from the Classes are Defendants, members of the immediate families of each of the Defendants, any person, firm, trust, corporation, officer, director or other individual or entity in which any Defendant has a controlling interest or which is related to or affiliated with any of the Defendants, and the legal representatives, agents, affiliates, heirs, successors-in-interest or assigns of any such excluded.

57. The members of the Classes are so numerous that joinder of all members

impracticable.

58. The precise number of members of the Classes is unknown to Plaintiffs at this time but is believed to be to be in the thousands as BAC had 5.02 billion common shares outstanding in the fourth quarter of 2008. In addition, the names and addresses of members of the Classes can be ascertained from the books and records of BAC. Notice can be provided to such record owners by a combination of published notice and first-class mail, using techniques and a form of notice similar to those customarily used in class actions.

59. Plaintiffs will fairly and adequately represent and protect the interests of the members of the Classes. Plaintiffs have retained competent counsel experienced in class action litigation to further ensure such protection and to prosecute this action vigorously.

60. Plaintiffs' claims are typical of the claims of the other members of the Classes, because Plaintiffs and all of the Class members' damages arise from and were caused by the same materially inaccurate representations and omissions made by or chargeable to Defendants. Plaintiffs do not have any interests antagonistic to, or in conflict with any member of either of the Classes.

61. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Since the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it virtually impossible for the them to seek redress for the wrongful conduct alleged. Plaintiffs know of no difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a class action.

62. Common questions of law and fact exist as to all members of the Classes and predominate over any questions affecting solely individual members of the Classes. Among the

questions of law and fact common to the Classes are:

- (a) Whether the Defendants' acts as alleged herein violated the Exchange Act;
- (b) Whether the Registration Statement, Joint Proxy and January 1 Press Release issued by Defendants to the investing public, contained materially false and misleading statements and omitted material facts about the Merrill's true financial condition, and its subsequent impact on the financial condition of BAC and the Deal; and
- (c) The extent of injuries sustained by the Class and the appropriate measure of damages.

**COUNT I**  
**(Violation of Section 14(a) of the Exchange Act and SEC Rule 14a-9)**

63. Plaintiffs repeat and reiterate each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

64. This claim is brought by Plaintiffs on behalf of the Proxy Class against Defendants for violations of § 14(a) of the Exchange Act and SEC Rule 14a-9 promulgated thereunder.

65. Defendants prepared and disseminated the false and misleading Joint Proxy which failed to disclose material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

66. In particular, as described herein, the Joint Proxy contained material misrepresentations and failed to disclose facts necessary to make the disclosures true. Specifically, Defendants failed to timely inform BAC shareholders of material facts concerning Merrill's true financial condition, business and the financial risks to BAC associated with Merrill Lynch's assets.

67. As a result of Defendants' failure to issue a true and correct Joint Proxy, or to

update, amend or correct the Joint Proxy to disclose among other things, Merrill Lynch's financial condition, the proper value of its assets, its fourth quarter losses and the need for further government support for the Deal to close, BAC stockholders were provided with materially misleading information in the Joint Proxy in connection with soliciting their vote approving the Deal. Accordingly, Defendants made untrue statements of material facts and omitted to state material facts necessary to make the statements that were made not misleading in violation of §14(a) of the Exchange Act and SEC Rule 14a-9 promulgated thereunder.

68. The written communications made by Defendants described herein constitute violations of Rule 14a-9 and §14(a) because such communications are materially misleading and were provided in at least a negligent manner.

69. As a result of Defendants' preparation, review and dissemination of the Joint Proxy, which was material to the vote of Plaintiffs and other members of the Proxy Class, BAC shareholders have suffered substantial harm. By reason of such misconduct, Defendants are liable pursuant to §14(a) of the Exchange Act and SEC Rule 14a-9 promulgated thereunder.

## **COUNT II**

### **(VIOLATION OF SECTION 10(b) OF THE EXCHANGE ACT AND RULE 10b-5)**

70. Plaintiffs repeat and reiterate each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

71. During the Class Period, Defendants directly engaged in a common plan, scheme, and unlawful course of conduct, pursuant to which it knowingly or recklessly engaged in acts, transactions, practices, and courses of business that operated as a fraud and deceit upon Plaintiffs and the other members of the Purchaser Class, and omitted to state material facts concerning the condition of Merrill Lynch that mislead Plaintiffs and the other members of the Purchaser Class.

72. In particular, as described herein, the January 1, 2009 press release contained material misrepresentations and failed to disclose facts necessary to make the disclosures true. Specifically, Defendants' misrepresentations and omissions include the failure to disclose the true financial condition of Merrill Lynch, the risk or existence of Merrill Lynch's fourth quarter losses, prior to the January 1, 2009 closing of the Deal, the impact of Merrill Lynch's losses on BAC, and the need for \$20 billion of government support for the transaction to close.

73. Accordingly, Defendants made untrue statements of material facts and omitted to state material facts necessary to make the statements that were made not misleading in violation of §10(b) of the Exchange Act and SEC Rule 10b-5 promulgated thereunder.

74. The purpose and effect of the scheme, plan, and unlawful course of conduct was, among other things, to deceive the investing public, including Plaintiffs and the other members of the Purchaser Class, and to induce Plaintiffs and the other members of the Purchaser Class to purchase BAC common stock at artificially inflated prices.

75. As a result of Defendants' misleading statements and failure to disclose material facts as set forth above, the market price of the shares was artificially inflated during the Class Period. Unaware of the deceptive and manipulative devices and contrivances employed by Defendants, Plaintiffs and the other members of the Purchaser Class relied, to their detriment, on the integrity of the market price in purchasing the BAC common stock. Had Plaintiffs and the other members of the Purchaser Class known the truth, they would not have purchased shares at the inflated prices that they did.

#### **LOSS CAUSATION/ECONOMIC LOSS**

76. During the Class Period, Defendants engaged in a course of conduct that artificially inflated the price of BAC common stock and operated as a fraud or deceit on

purchasers of the securities. The price decline of the securities occurred immediately after the misrepresentations made to the market, and/or the information alleged herein to have been concealed from the market, and/or the effects thereof, were revealed beginning on January 16, 2009. As a result, Plaintiffs and other members of the Purchaser Class suffered damages.

77. As described above, in response to the disclosures and news of January 16, 2009, the price of BAC common stock dropped from \$10.20 to \$5.10 or 50 percent.

### **FRAUD ON THE MARKET**

78. The market for BAC's common stock was open, well-developed and efficient at all relevant times. As a result of the materially false and misleading statements and failures to disclose, set forth above, BAC's common stock traded at artificially inflated prices during the Class Period. Plaintiff and other members of the Purchaser Class purchased or otherwise acquired BAC's common stock relying upon the integrity of the market price of BAC's common stock and market information relating to BAC, and have been damaged thereby.

79. During the Class Period, Defendants materially misled the investing public, thereby inflating the price of BAC common stock, by publicly issuing false and misleading statements and omitting to disclose material facts necessary to make Defendants' statements, as set forth herein, not false and misleading. These statements and omissions were materially false and misleading in that they failed to disclose material adverse information and misrepresented the truth about BAC, its business and operations.

80. At all relevant times, the material misrepresentations and omissions particularized in this Complaint directly or proximately caused or were a substantial contributing cause of the damages sustained by Plaintiff and other members of the Purchaser Class.

81. As described herein, during the Class Period, Defendants made or caused to be made a series of materially false or misleading statements about BAC's business, and financial condition. These material misstatements and omissions had the cause and effect of creating in the market an unrealistically positive assessment of BAC and its business and operations, thus causing its common stock to be overvalued and artificially inflated at all relevant times.

82. Defendants' materially false and misleading statements during the Class Period resulted in Plaintiff and other members of the Purchaser Class purchasing BAC's common stock at artificially inflated prices, thus causing the damages complained of herein.

### **ADDITIONAL SCIENTER ALLEGATIONS**

83. The facts alleged herein, compel a strong inference that the Defendants acted with scienter in their failure to disclose and misrepresentation of material information to the investing public concerning the financial condition of Merrill Lynch prior to and after the Deal. No later than mid-December 2008, both the Merrill Lynch transition team and Defendant Lewis had actual knowledge of the disastrous write-downs which would be booked by Merrill Lynch and the need for an additional \$20 billion of government support for the Deal to close. Defendants knowingly and substantially participated or acquiesced in the suppression and misrepresentation of such information as primary violators of the federal securities laws.

84. Plaintiffs and the other members of the Purchaser Class have suffered damages as a result of the wrongs herein alleged in an amount to be proved at trial.

85. By reason the foregoing, defendants have violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder and are liable to Plaintiffs and the other members of the Purchaser Class for damages that they suffered in connection with their purchases of the BAC common shares during the Class Period.

### **COUNT III**

#### **(Violation of §20(a) of the Exchange Act Against the Individual Defendants)**

86. Plaintiffs repeat and reiterate each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

87. The Individual Defendants acted as controlling persons of BAC within the meaning of §20(a) of the Exchange Act. By reason of their positions as officers of BAC and Merrill, and their ownership of Company stock, these defendants had the power and authority to cause, and did in fact cause, BAC and Merrill to engage in the wrongful conduct complained of herein.

88. As a direct and proximate result of the Defendants wrongful conduct, Plaintiffs and the other members of the Classes suffered damages in connection with the tendering of their shares in an amount to be determined at trial. By reason of such conduct, the Individual Defendants are liable pursuant to § 20(a) of the 1934 Act.

### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs pray for relief and judgment, as follows:

A. Determining that this action is a proper class action, certifying Plaintiffs as representatives of the Classes under Rule 23 of the Federal Rules of Civil Procedure and Plaintiffs' counsel as counsel for the Classes;

B. Awarding Plaintiffs and the Classes compensatory damages against all Defendants, jointly and severally, for all damages sustained as a result of Defendants' wrongful conduct in an amount to be proven at trial;

C. Awarding Plaintiffs and the Classes pre-judgment interest;

D. Awarding Plaintiffs and the Classes their reasonable costs and expenses incurred

in this action, including counsel fees and expert fees; and

E. Granting such other and further relief as the Court may deem just and proper.

**JURY TRIAL DEMANDED**

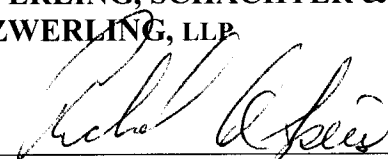
Plaintiffs hereby demand a trial by jury.

Dated: January 26, 2009

Respectfully submitted,

**ZWERLING, SCHACHTER &  
ZWERLING, LLP**

By: \_\_\_\_\_

  
Richard A. Speirs (RS 8872)

Stephanie E. Kirwan  
41 Madison Avenue  
New York, NY 10010  
(212) 223-3900

**CRIDEN & LOVE, P.A.**  
Michael E. Criden  
7301 S.W. 57th Court, Suite 515  
South Miami, FL 33143  
(305) 357-9000

*Attorneys for Plaintiffs*

**CERTIFICATION OF FRANK PALUMBO AND JENNIFER PALUMBO**

We hereby certify that:

1. We have reviewed the complaint in *Palumbo, et al. v. Bank of America, et al.* and authorize the filing of the lead plaintiff motion on our behalf.

2. We did not purchase or acquire the security that is the subject of this action at the direction of plaintiff's counsel or in order to participate in any private action under the federal securities laws.

3. We are willing to serve as a representative party on behalf of the class, including providing testimony at deposition and trial, if necessary.

4. Our transactions in Bank of America common stock that is the subject of this action during the class period are as follows:

**TRANSACTIONS**

<b>BUY</b>	<b>SELL</b>	<b>TRADE DATE</b>	<b>PRICE</b>	<b>TOTAL</b>
50 shares		10/10/08	\$21.00	\$1050.00
50 shares		11//11/08	\$18.63	\$931.50
50 shares		11/13/08	\$16.21	\$810.50
50 shares		12/18/08	\$14.40	\$720.00
Held 50 shares		As of 10/10/08		

5. During the three years preceding the date of this certification, we have not sought to serve or served as a representative party on behalf of a class.

6. We will not accept any payment for serving as a representative party on behalf of a class, except to receive my *pro rata* share of any recovery or as ordered or approved by the Court, including the award to a representative of reasonable costs and expenses (including lost wages) relating to the representation of the class.

We hereby certify that the foregoing is true and correct.

Dated: January 23, 2009



Frank Palumbo



Jennifer Palumbo

**PLAINTIFF'S CERTIFICATION OF SECURITIES  
FRAUD CLASS ACTION COMPLAINT**

I, Brad McMorris, certify that the following is true and correct to the best of my knowledge, information and belief;

1. I have reviewed the complaint filed herewith in the captioned action (the "Complaint"), and have authorized the filing thereof.

2. I am willing to serve as a representative party on behalf of the class (the "Class") as defined in the Complaint, including providing testimony at deposition and trial, if necessary.

3. I purchased 703 shares of the common stock of Bank of America on January 9, 2009 at \$13.02 per share.

4. I still own all of the shares.

5. I did not purchase these securities at the direction of my counsel, or in order to participate in any private action arising under the Securities Exchange Act of 1934.

6. During the three year period preceding the date of my signing the Certification, I have not served as a representative in any action arising under the Securities Exchange Act of 1934.

7. I will not accept any payment for serving as a representative party on behalf of the Class beyond my pro rata of any possible recovery, except for an award, as ordered or approved by the court, for reasonable costs and expenses (including lost wages) directly relating to my representation of the Class.

Signed under the penalties of perjury this 22 day of January, 2009.

  
\_\_\_\_\_  
Brad McMorris