

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WEST PALM BEACH FIREFIGHTERS’	:	Civil Action No.
PENSION FUND, Individually and On Behalf	:	
of All Others Similarly Situated,	:	<u>CLASS ACTION</u>
	:	
Plaintiff,	:	COMPLAINT FOR VIOLATION OF THE
	:	FEDERAL SECURITIES LAWS
vs.	:	
	:	
BANK OF AMERICA CORPORATION,	:	
KENNETH D. LEWIS, JOE L. PRICE,	:	
JONATHAN ALEXANDER THAIN, NEIL A.	:	
COTTY, WILLIAM BARNET, III, FRANK P.	:	
BRAMBLE, SR., JOHN T. COLLINS,	:	
TOMMY R. FRANKS, GARY L.	:	
COUNTRYMAN, CHARLES K. GIFFORD,	:	
WALTER E. MASSEY, THOMAS J. MAY,	:	
PATRICIA E. MITCHELL, THOMAS M.	:	
RYAN, O. TEMPLE SLOAN, JR.,	:	
MEREDITH R. SPANGLER, ROBERT L.	:	
TILLMAN, JACKIE M. WARD, BANC OF	:	
AMERICA SECURITIES LLC and MERRILL	:	
LYNCH, PIERCE, FENNER & SMITH	:	
INCORPORATED,	:	
	:	
Defendants.	:	
	:	<u>DEMAND FOR JURY TRIAL</u>

INTRODUCTION

1. This is a securities class action on behalf of all persons who purchased or otherwise acquired the common stock of Bank of America Corporation (“BofA” or the “Company”) between July 21, 2008 and January 20, 2009 (the “Class Period”) and who were damaged thereby, including all persons who acquired the common stock pursuant and/or traceable to a false and misleading registration statement and prospectuses (collectively, the “Registration Statement”) issued in connection with BofA’s October 7, 2008 secondary common stock offering (the “Offering”), and further, including persons who owned BofA stock on October 10, 2008 and were entitled to vote on BofA’s merger with Merrill Lynch, Pierce, Fenner & Smith Incorporated (“Merrill Lynch”), pursuant to a false and misleading proxy statement (the “Merger Proxy”). This action seeks to pursue remedies under the Securities Act of 1933 (the “1933 Act”) and the Securities Exchange Act of 1934 (the “1934 Act”).

2. During the Class Period, defendants issued materially false and misleading statements regarding both the Company’s and Merrill Lynch’s business and financial results. Defendants concealed BofA’s and Merrill Lynch’s failures to properly value their mortgage-related assets. Defendants further concealed BofA’s failure to engage in proper due diligence in determining the fairness of its proposed deal with Merrill Lynch. As a result of defendants’ false statements, BofA’s stock traded at artificially inflated prices during the Class Period, reaching a high of \$38.13 per share on October 1, 2008, and then retaining value in the \$22-\$25 per share range even as the stock market collapsed in early October 2008. It was at this time that BofA sold 455 million shares of its common stock at \$22 per share in the Offering, which raised some \$10 billion.

3. As the real estate and credit markets continued to soften in the first half of 2008, defendants repeatedly assured BofA investors that the Company had taken the appropriate steps to decrease its exposure to subprime mortgages. In June and early July 2008, BofA’s stock price began

to decline in tandem with other companies in the banking industry as investors remained worried that BofA would be forced to take additional significant write-offs related to its subprime exposure.

4. On July 21, 2008, BofA announced better-than-expected second quarter 2008 results, beating analyst estimates. According to defendant Joe L. Price in a conference call held to discuss these results, “we think the worst is behind us on value declines, as evidenced in our results for the quarter.” As a result of the better-than-expected results and defendants’ statements, BofA’s stock began to trade higher.

5. On September 12, 2008, with Lehman Brothers Holdings Inc. on the verge of collapse, investors became increasingly concerned that Merrill Lynch would be the next company to run short of capital. As a result, executives at Merrill Lynch contacted executives at BofA concerning a possible deal between the two companies. Over the course of the next couple of days, a deal was put together whereby BofA would purchase Merrill Lynch in an all stock transaction valued at \$50 billion.

6. On September 15, 2008, BofA announced that it had entered into a Merger Agreement with Merrill Lynch. Investors questioned the hastiness of the deal and the transaction price but defendants assured investors of the fairness of the price, including assuring investors BofA had conducted proper due diligence in determining the fairness of the transaction. Defendants further represented that despite Merrill Lynch’s significant exposure to risky investments, the company had recently taken actions to significantly reduce its risk and the amount of troubled assets on its balance sheets.

7. On October 7, 2008, BofA completed its secondary offering of \$10 billion worth of common stock. Further in October 2008, BofA received a \$25 billion investment from the U.S.

Government (with Merrill Lynch receiving \$10 billion in funding). Nonetheless, BofA insisted that it “did not need and did not seek” the capital injection, especially in light of its recent stock offering.

8. On December 5, 2008, shareholders of both BofA and Merrill Lynch overwhelmingly approved the merger.

9. Unbeknownst to investors, shortly after the shareholder meeting, Merrill Lynch had already suffered monstrous losses for the fourth quarter of 2008. As a result, on December 17, 2008, defendant Kenneth D. Lewis met with government officials and advised the officials that BofA would be unable to complete the deal with Merrill Lynch without substantial assistance from the government. The government urged BofA to complete its acquisition of Merrill Lynch and agreed to provide additional funding and financial guarantees to protect against future potential losses.

10. Without disclosing to investors any of these recent material developments concerning its merger with Merrill Lynch, on January 1, 2009, BofA completed its purchase of Merrill Lynch, instead emphasizing the success of the transaction.

11. On January 14, 2009, investors were stunned to learn that BofA would be the recipient of another multi-billion investment from the U.S. Government due to significant losses suffered by Merrill Lynch in the fourth quarter of 2008.

12. Thereafter, on January 16, 2009, BofA announced its first quarterly loss in 17 years. BofA announced a \$1.8 billion loss for the fourth quarter of 2008, citing deeper trading and loan losses. The Company further slashed its dividend from \$0.32 to a penny a quarter. In addition to its own losses, BofA reported that Merrill Lynch’s preliminary results for the fourth quarter of 2008 indicated a net loss of \$15.3 billion. This loss was separate from the \$1.8 billion loss BofA had sustained in the quarter. BofA further confirmed that it would receive an additional \$20 billion in

assistance from the U.S. Government and that the government had agreed to provide guarantees against further Merrill Lynch losses of \$118 billion, with BofA covering the first \$10 billion.

13. Over the course of the next several days, details began to emerge concerning the truth behind BofA's deal with Merrill Lynch, including the fact that BofA had learned of Merrill Lynch's substantial fourth quarter losses prior to it completing its acquisition of Merrill Lynch. Analysts further questioned whether BofA would need further capital injections.

14. Between January 15 and 20, 2009, as news of BofA's precarious financial position came to light, BofA's stock lost a dramatic 50% of its value. It declined from \$10.20 per share on January 14, 2009 to close at \$5.10 per share on January 20, 2009.

15. Thereafter, on January 22, 2009, defendant Jonathan Alexander Thain, former CEO of Merrill Lynch, was relieved of his duties at BofA. Thain issued a memo upon his departure which was reported in *The Wall Street Journal* on January 26, 2009. The memo provided in part:

It has been an honor to lead this company over the last very difficult year. The decisions that I made were always with the best interests of our shareholders and employees above all. I believe that the decision to sell to Bank of America was the right one for our company and our clients. While the execution has been difficult, I still believe in the strategic rationale of the transaction and I wish you all the best for the future of the combined companies.

I want to address several topics that have been inaccurately reported in the press.

* * *

The second topic is the losses in the fourth quarter, which were very large and unfortunate. However, they were incurred almost entirely on legacy positions and were due to market movements. We were completely transparent with Bank of America. They learned about these losses when we did. The acting CFO of my businesses was Bank of America's former Chief Accounting Officer. They had daily access to our p&l [Deal Journal translator: that means "profit and loss," or the statement of the bank's accounts], our positions and our marks.

Our year end balance sheet target (which we more than met) was given to us by Bank of America's CFO.

16. The true facts, which were known by the defendants but concealed from the investing public during the Class Period, and/or which were omitted from the Registration Statement and/or from the Merger Proxy, were as follows:

(a) The Company was failing to adequately reserve for mortgage-related exposure, causing its balance sheet and financial results to be artificially inflated;

(b) The Company and its advisors had failed to engage in proper due diligence in assessing the fairness of the deal with Merrill Lynch;

(c) The Company's acquisition of Merrill Lynch would have disastrous results on the Company's capital position and overall operations;

(d) Merrill Lynch had not substantially decreased its risk exposure to troubled mortgage-related assets;

(e) Merrill Lynch had failed to adequately reserve for mortgage-related exposure, causing its balance sheet and financial results to be artificially inflated;

(f) The significant deterioration of Merrill Lynch's financial position, including its substantial fourth quarter 2008 loss, were sufficient to trigger termination of the merger;

(g) The Company had to approach the U.S. Government for additional funding and financial guarantees in December 2008 in order to complete its acquisition of Merrill Lynch; and

(h) The Company's capital base was not adequate enough to withstand the significant deterioration in the subprime market and, as a result, BofA would be forced to seek government funding in order to raise significant amounts of additional capital.

17. As a result of defendants' false statements, BofA's stock traded at inflated levels during the Class Period. However, after the above revelations seeped into the market, the

Company's shares were hammered by massive sales, sending them down more than 86% from their price before these disclosures.

JURISDICTION AND VENUE

18. The claims asserted herein arise under and pursuant to §§11, 12(a)(2) and 15 of the 1933 Act, 15 U.S.C. §§77k, 77l(a)(2) and 77o, and under §§10(b), 14(a) and 20(a) of the 1934 Act, 15 U.S.C. §§78j(b), 78n(a) and 78t(a), and SEC Rule 10b-5, 17 C.F.R. §240.10b-5.

19. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §1331, §22 of the 1933 Act and §27 of the 1934 Act.

20. Venue is proper in this District pursuant to 28 U.S.C. §1391(b) and §27 of the 1934 Act. Acts and transactions giving rise to the violations of law complained of herein occurred in this District.

THE PARTIES

21. Plaintiff West Palm Beach Firefighters' Pension Fund purchased BofA common stock as described in the attached certification and was damaged thereby.

22. Defendant BofA is a financial holding company, which provides a range of banking and nonbanking financial services and products in the United States and internationally. BofA is headquartered in Charlotte, North Carolina, and has branch offices throughout the United States, including many in this District.

23. Defendant Kenneth D. Lewis ("Lewis") is Chairman of the Board of Directors, Chief Executive Officer ("CEO") and President of BofA. Lewis participated in the issuance of improper statements, including the preparation of the improper press releases and SEC filings. Lewis signed the false and misleading Registration Statement.

24. Defendant Joe L. Price (“Price”) is Chief Financial Officer (“CFO”) of BofA. Price participated in the issuance of improper statements, including the preparation of the improper press releases and SEC filings.

25. Defendant Jonathan Alexander Thain (“Thain”) was Chairman of the Board and CEO of Merrill Lynch from January 2008 through the time of the merger. Upon completion of the merger, Thain was an officer of BofA until his resignation on January 22, 2009.

26. Defendant Neil A. Cotty (“Cotty”) was Senior Vice President and Chief Accounting Officer of BofA from April 2004 to December 31, 2008. Cotty signed the false and misleading Registration Statement.

27. Defendant William Barnet, III (“Barnet”) has been a director of BofA since 2004. Barnet signed the false and misleading Registration Statement.

28. Defendant Frank P. Bramble, Sr. (“Bramble”) has been a director of BofA since 2006. Bramble signed the false and misleading Registration Statement.

29. Defendant John T. Collins (“Collins”) has been a director of BofA since 2004. Collins signed the false and misleading Registration Statement.

30. Defendant Gary L. Countryman (“Countryman”) has been a director of BofA since 2004. Countryman signed the false and misleading Registration Statement.

31. Defendant Tommy R. Franks (“Franks”) has been a director of BofA since 2006. Franks signed the false and misleading Registration Statement.

32. Defendant Charles K. Gifford (“Gifford”) has been a director of BofA since 2004. Gifford signed the false and misleading Registration Statement.

33. Defendant Walter E. Massey (“Massey”) has been a director of BofA since 1998. Massey signed the false and misleading Registration Statement.

34. Defendant Thomas J. May (“May”) has been a director of BofA since 2004. May signed the false and misleading Registration Statement.

35. Defendant Patricia E. Mitchell (“Mitchell”) has been a director of BofA since 2001. Mitchell signed the false and misleading Registration Statement.

36. Defendant Thomas M. Ryan (“Ryan”) has been a director of BofA since 2004. Ryan signed the false and misleading Registration Statement.

37. Defendant O. Temple Sloan, Jr. (“Sloan”) has been a director of BofA since 1996. Sloan signed the false and misleading Registration Statement.

38. Defendant Meredith R. Spangler (“Spangler”) has been a director of BofA since 1988. Spangler signed the false and misleading Registration Statement.

39. Defendant Robert L. Tillman (“Tillman”) has been a director of BofA since 2005. Tillman signed the false and misleading Registration Statement.

40. Defendant Jackie M. Ward (“Ward”) has been a director of BofA since 1994. Ward signed the false and misleading Registration Statement.

41. The defendants referenced above in ¶¶23-26 are referred to herein as the “Officer Defendants.”

42. The defendants referenced above in ¶¶23 and 27-40 are referred to herein as the “Director Defendants” and are named as defendants solely for violations of the 1933 Act.

43. Defendant Banc of America Securities LLC (“Banc of America”) is the investment banking arm of BoA. Banc of America offers trading and brokerage services; debt and securities underwriting; debt and equity research; and advice on public offerings, leveraged buyouts, and mergers and acquisitions. Banc of America acted as underwriter for the BofA Offering, helping to draft and disseminate the Offering documents.

44. Defendant Merrill Lynch, Pierce, Fenner & Smith Incorporated (“Merrill Lynch”) provides capital markets services, investment banking and advisory services, wealth management, asset management, insurance, banking and related products and services on a global basis. Merrill Lynch acted as an underwriter for the BofA Offering, helping to draft and disseminate the Offering documents.

45. The defendants referenced above in ¶¶43-44 are referred to herein as “Underwriter Defendants.”

46. The Underwriter Defendants are liable for the false and misleading statements in the Registration Statement. The Underwriter Defendants drafted and disseminated the Offering documents and were paid fees in connection therewith. The Underwriter Defendants’ failure to conduct an adequate due diligence investigation was a substantial factor leading to the harm complained of herein.

FRAUDULENT SCHEME AND COURSE OF BUSINESS

47. Defendants are liable for: (i) making false statements; or (ii) failing to disclose adverse facts known to them about BofA. Defendants’ fraudulent scheme and course of business that operated as a fraud or deceit on purchasers of BofA common stock was a success, as it: (i) deceived the investing public regarding BofA’s prospects and business; (ii) artificially inflated the price of BofA common stock; and (iii) caused plaintiff and other members of the Class to purchase BofA common stock at inflated prices.

BACKGROUND

48. BofA, a financial holding company, provides a range of banking and nonbanking financial services and products in the United States and internationally. The Company’s Global Consumer and Small Business Banking segment offers savings accounts, money market savings accounts, certificates of deposit, individual retirement accounts, regular and interest-checking

accounts, and debit cards; consumer real estate products, including mortgage products for home purchase and refinancing, reverse mortgage products, and home equity products; and insurance services. Bank of America's Global Corporate and Investment Banking segment provides commercial and corporate bank loans, indirect consumer loans, real estate lending products, and leasing and asset-based lending products for banking clients, middle market commercial clients, multinational corporate clients, public and private developers, homebuilders, and commercial real estate firms; advisory services, financing, and related products for institutional investor clients in support of their investing and trading activities; debt and equity underwriting, merger-related advisory services, and risk management solutions; and treasury management, trade finance, foreign exchange, short-term credit facilities, and short-term investing options for correspondent banks, commercial real estate firms, and governments. The Company's Global Wealth and Investment Management segment offers investment and brokerage services, estate management, financial planning services, fiduciary management, credit and banking expertise, and diversified asset management products to institutional clients and high-net-worth individuals.

49. On or about May 5, 2006, BofA filed with the SEC a Form S-3ASR Registration Statement and Prospectus using a "shelf" registration or continuous offering process. Under the shelf, BofA would be permitted to sell securities described in the Prospectus in one or more offerings, including up to 7.5 billion shares of common stock. The Prospectus was a part of the Registration Statement. The securities were to be issued by BofA.

50. The Form S-3ASR incorporated by reference subsequently filed prospectuses:

[F]or the purpose of determining any liability under the Securities Act, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof.

51. The Form S-3ASR also included assurances that the registrant would

reflect in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement.

DEFENDANTS' FALSE AND MISLEADING STATEMENTS ISSUED DURING THE CLASS PERIOD

52. On July 21, 2008, BofA reported its second quarter 2008 financial results, in a release which stated in part:

Bank of America Corporation today reported second-quarter 2008 net income of \$3.41 billion, down from a record \$5.76 billion a year earlier. Diluted earnings per share decreased 44 percent to \$0.72 from \$1.28 in the same period in 2007. Net revenue rose to a record \$20.32 billion. Earnings available to common shareholders totaled \$3.22 billion.

Net income in the period rose from \$1.21 billion, or \$0.23 per share, in the first quarter of 2008. Second-quarter net income included pretax merger and restructuring costs of \$212 million.

“We are pleased with these solid results in a difficult financial environment,” said Kenneth D. Lewis, chairman and chief executive officer. “Outside of real estate-related products, our operating results were quite good virtually across all business segments. This performance demonstrates not only the advantages of our company’s diversity and scale, but also the ability of our associates to differentiate Bank of America in the eyes of customers and clients.”

* * *

Second Quarter 2008 Financial Summary

Revenue and Expense

Revenue net of interest expense on a fully taxable-equivalent basis rose 3 percent to a record \$20.63 billion from \$20.02 billion a year earlier and was \$3.33 billion higher than the first quarter of 2008.

* * *

Noninterest income declined 14 percent to \$9.69 billion from \$11.24 billion a year earlier. Service charges, mortgage banking income and investment and brokerage services income increased. These increases were offset by writedowns of \$1.22 billion related to market disruptions, which compared with \$2.81 billion in writedowns during the first quarter, as well as lower equity investment income.

* * *

Credit Quality

Credit quality continued to weaken, particularly in markets that experienced the most significant home price declines. The slowing economy resulted in credit deterioration concentrated in the domestic consumer, small business and homebuilder portfolios. Both net charge-offs and nonperforming assets continued to increase.

Provision expense rose \$4.02 billion from a year ago to \$5.83 billion, reflecting net charge-offs of \$3.62 billion and additions to the allowance for loan and lease losses of \$2.21 billion. The additions were mainly in consumer and commercial portfolios directly tied to housing, including home equity, residential mortgage and homebuilders. The company has added \$7.29 billion to the reserve through increased provision over the past 12 months. Amounts shown below for the quarter ended or as of June 30, 2007 do not include LaSalle.

- Provision for credit losses was \$5.83 billion, down from \$6.01 billion in the first quarter but up from \$1.81 billion in the second quarter of 2007.
- Net charge-offs were \$3.62 billion, or 1.67 percent of total average loans and leases compared with \$2.72 billion, or 1.25 percent, in the first quarter and \$1.50 billion, or 0.81 percent, in the second quarter of 2007.
- Total managed net losses were \$5.27 billion, or 2.15 percent, of total average managed loans and leases compared with \$4.14 billion, or 1.69 percent, in the first quarter and \$2.77 billion, or 1.31 percent, in the second quarter of 2007.
- Nonperforming assets were \$9.75 billion or 1.13 percent of total loans, leases and foreclosed properties, compared with \$7.83 billion, or 0.90 percent, at March 31 and \$2.39 billion, or 0.32 percent, at June 30, 2007.
- The allowance for loan and lease losses was \$17.13 billion, or 1.98 percent of loans and leases measured at historical cost compared with \$14.89 billion, or 1.71 percent, at March 31, 2008 and \$9.06 billion, or 1.20 percent, at June 30, 2007.

Capital Management

Total shareholders' equity was \$162.69 billion at June 30. Period-end assets were \$1.72 trillion. The Tier 1 capital ratio was 8.25 percent, up from 7.51 percent at March 31, 2008 after the company raised about \$7 billion in capital through the issuance of preferred stock. The Tier 1 ratio was 8.52 percent a year earlier.

Bank of America paid a cash dividend of \$0.64 per share in the quarter. The company also issued about 137,000 common shares mostly related to employee stock options and ownership plans and did not repurchase any shares. Period-end common

shares issued and outstanding were 4.45 billion for the first and second quarters of 2008 and 4.44 billion in the year ago quarter.

53. On July 21, 2008, BofA held a conference call for analysts, media representatives and investors, during which defendants represented the following:

[Lewis:] Good morning. Before we get into the analysis, I would like to say a few things. It is clear to me, at least, that many investors see the economy getting substantially worse than it is today, causing major problems for consumer, commercial businesses and consequently, bank earnings. Although we too are sensitive about the health of the economy and monitor it closely, we do not yet see the economy slipping into prolonged negative growth. While we could be wrong, our analysis indicates continued economic sluggishness through the rest of 2008 resulting in some further deterioration in credit quality. But we see eventual stabilization later this year and a start of recovery in the first half of 2009, albeit at a slow pace.

In addition, I think the market has painted our industry with a broad brush. It seems to me there's a big difference between those banks that are diversified and those banks with concentration or funding issues.

Here are things to consider about Bank of America. First, most of our businesses are performing very well even with the current state of the economy and the problems with housing. We believe our revenue streams are sustainable both net interest income as you can see in our results today as well as noninterest income, which is driven by our attractive market share in several businesses. However as I said, we are not in denial. Credit losses are still going up, but given what we see today, they are manageable.

Second, the fact that we can absorb \$3.6 billion in credit losses, take \$1.2 billion in additional write downs, add \$2.2 billion to our loss for credit losses and still earn \$3.4 billion should tell investors something about the extent and consistency of our earnings power. Third, our allowance for loan losses of \$17 billion, our tier 1 capital ratio of 8.25% and our liquidity strength at the parent provide us with additional strength to weather the issues we see ahead of us. Finally, there's been a lot reported about our Countrywide transaction, much of which has been exaggerated and in some cases untrue. We will cover the details later in the call but the essential message is that Countrywide is on track and adding to the profits of Bank of America as we speak.

* * *

[Price:] Now, with respect to overall disruption exposure, not just predisruption exposure, not just the CDO related, we remain subject to market price fluctuations, but we think ***the worst is behind us on value declines, as evidenced in our results for the quarter.*** This thinking is driven more by the size of our exposure,

that being it is lower and the remaining collateral content, than a comment about future market volatility.

54. Upon this positive news, BofA's stock closed up \$1.07 per share to close at \$28.56 per share on July 21, 2008.

55. On August 7, 2008, BofA filed its Form 10-Q for the second quarter of 2008, which included the same financial results previously reported on July 21, 2008.

56. On September 15, 2008, BofA issued a press release entitled "Bank of America Buys Merrill Lynch Creating Unique Financial Services Firm; Combines leading global wealth management, capital markets and advisory company with largest consumer and corporate bank in U.S.," which stated in part:

Bank of America Corporation today announced it has agreed to acquire Merrill Lynch & Co., Inc. in a \$50 billion all-stock transaction that creates a company unrivalled in its breadth of financial services and global reach.

"Acquiring one of the premier wealth management, capital markets, and advisory companies is a great opportunity for our shareholders," Bank of America Chairman and Chief Executive Officer Ken Lewis said. "Together, our companies are more valuable because of the synergies in our businesses."

"Merrill Lynch is a great global franchise and I look forward to working with Ken Lewis and our senior management teams to create what will be the leading financial institution in the world with the combination of these two firms," said John Thain, chairman and CEO of Merrill Lynch.

Under terms of the transaction, Bank of America would exchange .8595 shares of Bank of America common stock for each Merrill Lynch common share. The price is 1.8 times stated tangible book value.

Bank of America expects to achieve \$7 billion in pre-tax expense savings, fully realized by 2012. The acquisition is expected to be accretive to earnings by 2010.

The transaction is expected to close in the first quarter of 2009. It has been approved by directors of both companies and is subject to shareholder votes at both companies and standard regulatory approvals.

Under the agreement, three directors of Merrill Lynch will join the Bank of America Board of Directors.

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.

57. On September 15, 2008, BofA held a conference call for analysts, media representatives and investors, during which defendants represented the following:

[Price:] Thanks, John. Let me take you through the transaction terms. First of all, it's an all stock deal. We will exchange 0.8595 shares of Bank of America's stock for each Merrill Lynch share. This equates to a little more than \$50 billion in total consideration based on Friday's closing price. As a result, we will issue just over 1.5 billion shares after considering stock options, restricted stock and convertible securities. ***The price represents roughly 1.8 times stated tangible book value. It's roughly 12 times Merrill Lynch's 2009 projected earnings based on the First Call consensus estimates.***

Now while the price paid reflects a 70% premium to the deflated price of last Friday's close, it's a 29% premium to the average of the last five days, which we think is a much better indicator. Obviously, Merrill Lynch's stock was much higher prior to the current market turmoil.

Now the transaction requires approval by shareholders of both companies and the appropriate regulators. Both boards have approved the transaction. And we expect to close by the end of the first quarter of 2009, if not earlier.

Now let me go through some of the assumptions we considered to help you analyze the transaction. ***We used the First Call consensus estimates as a base for modeling the transaction and we assumed an early first-quarter 2009 close, so you should include Merrill's results as part of our numbers for that entire year. We expect cost savings of approximately \$7 billion pre-tax fully realized by 2012.*** These savings represent roughly 10% of the expense base for the combined

company. The savings in year one represent just over 20% being realized accelerating to become fully realized in the fourth year.

Now, the savings would be centered in the areas you would expect, with head count reductions across both platforms, including overlap in back office and support functions and processes, as well as vendor leverage. We will also be optimizing much of the real estate of the two companies.

Now also included in our assumptions are amortization costs or expenses of roughly \$450 million for deposit and other intangibles created in the deal. We estimate the restructuring charges will be around \$2 billion after tax and have excluded the impact of those charges from our modeling for EPS accretion. Some of this will go through the income statement and some will only impact the balance sheet.

Now taking all these factors into consideration, we estimate the transaction to be 3% dilutive in the first year and breakeven to slightly accretive in the second year before restructuring charges.

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

We also were joined by a team from JC 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. In terms of capital, the transaction creates roughly \$23 billion in goodwill and \$6 billion in other intangibles. We estimate the impact of Tier 1 capital at 20 to 25 basis points.

Now you may remember that we ended the second quarter at 8.25% for our Tier 1 capital ratio and then said the impact of the Countrywide deal that closed on July 1 would be 60 to 65 basis points. So as you can see, we remain well above the well capitalized minimums, but below our stated target. We will continue to work back towards the 8% target, considering both capital options and reductions in our risk-weighted assets.

Now one last thing, Merrill Lynch had about \$100 billion in deposits -- or has about \$100 billion in deposits at the end of the second quarter. None of these count towards the deposit cap limit, as thrift and ILC deposits are excluded from that computation.

As both Ken and John said, this transaction moves the ball forward many yards in our wealth management and investment banking businesses on both a domestic and global front. The advantage a company like Bank of America has is that with our strength, diversity and scale, we can continue to manage through today's tough environment and still be positioned to take advantage of rare

opportunities to expand our franchise for the long-term benefit of shareholders. I thank you for your attention and will now be happy to field any questions.

* * *

[Analyst:] Longer-term it seems like this deal has the opportunity to be a home run, but obviously there's a lot of near-term uncertainty. I think a lot of people would view Merrill stock as selling off today and this week if the deal had not been announced. So I guess the question is why pay \$29 at this point?

[Lewis:] It's an obvious good question. You can think of several scenarios. One, probably the more likely is that Merrill had the liquidity and capacity to see this through. It's not necessarily easy because of just the times. But more likely than not, they would have seen this through and come out on the other side.

Secondly, there's always the possibility of investment in Merrill Lynch by others and so then others would have that opportunity.

And then finally, we could have rolled the dice and possibly could have got it at a cheaper price. We thought the long-term benefits were so overwhelming, it was such a strategic opportunity that we elected not to roll the dice and to go ahead and do it at this time.

Again, and also, I don't know anybody who is perfect at picking the absolute bottom and we thought we had a compelling situation for the shareholders over the long term at the time we did.

[Analyst:] Okay. And maybe you could just provide a little more color on some of the due diligence that was done. Obviously, there is a lot of speculation that you were also doing some work with respect to Lehman. And just wondering how much work you could have done with respect to Merrill. And then I guess also, what kind of protection do you have if say six months from now, the environment proves that much worse than we are right now?

[Lewis:] Joe, you want to go over it again in terms of – and the JC Flowers piece is key because they were renewing an effort that had already gone on and had been very, very expensive, but – .

[Price:] Mat, to kind of reiterate, but maybe give you a little bit more clearly, *we have 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 an advisor several among them, JC Flowers with pretty extensive knowledge of the company. And while none of us like the market turmoil we have 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 such, and analyzing them and having all of that laid out, given the efforts that the management team has made over the last period, made it possible for us.

* * *

[Analyst:] If you look at Merrill's balance sheet as of today, the resi real estate assets are like \$40 billion, almost \$44 billion; commercial real estate assets are just over \$17 billion; and then there's a little bit left of CDO. I'm curious what your assumptions are for the marks that are likely – that you are likely going to need to take on those and [are] marks on those assets included in any of the numbers that you guys presented today? Thanks.

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

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

[Thain:] *Yes, let me just add. As you know, we have been consistently reducing the risky assets on our balance sheet. The biggest single transaction was the sale of the 30 billion notional amount of CDOs. But subsequent to the end of the second quarter and subsequent to that sale, we have continued to sell risky assets, and so you will see when we report our third-quarter balance sheet, you will see a further reduction in those risky assets, most of which has already been completed.*

58. Subsequently, on September 15, 2008, BofA held a press conference for analysts, media representatives and investors, during which defendants represented the following:

[Audience Member:] People are calling this a 70% premium. Clearly, Merrill stock is at was at \$[26] a week earlier, so it's not really accurate to say that. Having said that, you could have probably bought the firm at a cheaper price if you waited

until the end of, say, today, even with what's going on with Lehman Brothers. Was there any pressure on the part of regulators, or why did you pay this price?

[Lewis:] Yes, it's a great question. First of all, there was no pressure from regulators. I'm sure, after the fact, that having this not be an issue is obviously very positive to them, but absolutely no pressure.

The first question, though, we've thought about your question. Why not just wait? But as we looked at the strategic opportunity – again, as I said, nobody pushes back on the Fed and how much it makes sense. We don't think many people, if any, can ever call the bottom. We do not think that – we do think Merrill Lynch would have seen this through if they had been independent. It has been rough obviously, over this week probably, and then they could have gone somewhere else. There's also the way they could've just continued on their own.

Secondly, there's always the possibility of someone else making a strategic investment and us not being included. So, as we weighed everything, we said it is better to seize on this opportunity as we see it at the moment, as opposed to trying to catch the very bottom and possibly not catching it at all.

* * *

[Analyst:] What was the role of J.C. Flowers in the transaction? Did they at all consider investing in Bank of America, or what was their role as the advisor?

[Lewis:] Yes, we didn't ask them to invest. 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 team as an advisor, and just update the information they already had. So that was one of the key ingredients to being able to do this as quickly as we did.

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

59. On October 3, 2008, the Company filed an 8-K with the SEC. The 8-K contained Merrill Lynch's historical financial statements, including its financial results for year ending December 28, 2007 and for the quarter ending June 27, 2008. The 8-K further contained preliminary

pro forma combined financial data reflecting the impact of the merger on BofA's and Merrill Lynch's respective historical financial positions and results of operations.

60. On October 6, 2008, BofA reported its third quarter 2008 financial results, in a release which stated in part:

Bank of America Corporation today reported third quarter 2008 net income of \$1.18 billion, or \$0.15 per share, down from \$3.70 billion, or \$0.82 per share, a year earlier.

The company also announced two initiatives to raise capital, targeting an 8 percent Tier 1 capital ratio. *The company intends to sell common stock with a target of raising \$10 billion. In addition, the Board of Directors has declared a quarterly dividend on common stock of \$0.32 to be paid on December 26, 2008 to shareholders of record on December 5, 2008. Assuming the current number of issued and outstanding shares, the reduction from \$0.64 paid in recent quarters would add more than \$1.4 billion to capital each quarter.*

"These are the most difficult times for financial institutions that I have experienced in my 39 years in banking," said Kenneth D. Lewis, chairman and chief executive officer. "We believe it is prudent to raise capital to very substantial levels in this uncertain environment. Both economic and financial market conditions have changed significantly in the last two months. We were willing to operate at capital levels over the short-term that were good, but not at our targeted levels, given projections two months ago. We now believe it is important to be at or near our 8 percent Tier 1 capital ratio target given the recessionary conditions and outlook for still weaker economic performance which we expect to drive higher credit losses and depress earnings. We believe that achieving higher capital levels today will position our company to provide credit to those consumers and businesses that are attracted to our strength and stability.

"We know many investors in our stock are quite disappointed with a dividend reduction," Lewis continued. "It is not a decision we made lightly. However, we cannot pay out what we have not earned. Our goal is to resume dividend increases from the new level as soon as our earnings performance warrants.

"All that said, our company continues to be profitable, and we have been able in the last year to make a number of moves that should significantly enhance our earnings when economic and financial market conditions improve. Our diversity and scale give us strength to deal with the current issues that few competitors can match. I have never been more optimistic about the long-term prospects of Bank of America."

Lower earnings in the third quarter compared with a year earlier were driven by a significant increase in provision expense, as credit costs continued to rise, partially offset by advances in various income categories largely as a result of the acquisition of Countrywide Financial Corporation on July 1, 2008 and LaSalle Bank. Countrywide results were not included in prior period results.

Bank of America is clearly benefiting from consumer and business flight to safety, as shown by year-over-year increases in loans and especially deposits. While consumer credit costs continued to increase in line with economic conditions, the company continued to increase the number of customer accounts and make progress in such categories as investment banking.

* * *

Third Quarter 2008 Financial Summary

Revenue and Expense

Revenue net of interest expense on a fully taxable-equivalent basis rose 21 percent to \$19.90 billion from \$16.47 billion a year earlier.

* * *

Noninterest income increased 7 percent to \$7.98 billion from \$7.48 billion a year earlier. The company booked a \$630 million charge for providing support to cash funds and losses of \$313 million related to auction-rate securities. Noninterest income was adversely impacted by Global Corporate and Investment Banking's \$1.8 billion in writedowns and charges associated with market disruptions, which included its portion of the losses associated with auction-rate securities. Service charges income rose due in part to the increase in deposits. Mortgage banking income and insurance income also rose due to the acquisition of Countrywide.

* * *

Credit Quality

Credit quality continued to weaken during the quarter with more rapid deterioration noted recently. The economy has moved to a recessionary environment and the risk of a prolonged recession has increased. Consumers are experiencing higher levels of stress from depreciating home prices, rising unemployment and tighter credit conditions. Higher levels of bankruptcies are occurring and delinquencies and losses have increased in all consumer portfolios.

Increased loss and delinquency trends first experienced in the home equity and homebuilder portfolios have now spread into the first mortgage, unsecured consumer lending and credit card portfolios. Deterioration has been more pronounced in California and Florida, which have been hit harder by home price depreciation and rising unemployment than in other markets. Commercial losses in

sectors other than real estate and small business also increased, but remain below normalized ranges.

The company added almost \$2 billion to the allowance for loan and lease losses during the quarter through provision. The additions were mainly for consumer loans, including the unsecured consumer lending, credit card and residential mortgage portfolios. The current coverage ratios and amounts shown below include the addition of Countrywide.

Provision for credit losses was \$6.45 billion, up from \$5.83 billion in the second quarter and from \$2.03 billion in the third quarter of 2007.

Net charge-offs were \$4.36 billion, or 1.84 percent of total average loans and leases compared with \$3.62 billion, or 1.67 percent, in the second quarter and \$1.57 billion, or 0.80 percent, in the third quarter of 2007.

Total managed net losses were \$6.11 billion, or 2.32 percent, of total average managed loans and leases compared with \$5.26 billion, or 2.16 percent, in the second quarter and \$2.83 billion, or 1.27 percent, in the third quarter of 2007.

Nonperforming assets were \$13.36 billion or 1.42 percent of total loans, leases and foreclosed properties, compared with \$9.75 billion, or 1.13 percent, at June 30, 2008 and \$3.37 billion, or 0.43 percent, at September 30, 2007.

The allowance for loan and lease losses was \$20.35 billion, or 2.17 percent of loans and leases measured at historical cost compared with \$17.13 billion, or 1.98 percent, at June 30, 2008 and \$9.54 billion, or 1.21 percent, at September 30, 2007.

Capital Management

Total shareholders' equity was \$161.04 billion at September 30. Period-end assets were \$1.83 trillion. The Tier 1 capital ratio estimate is 7.50 percent, down from 8.25 percent at June 30, 2008. The ratio was 8.22 percent a year earlier.

Bank of America paid a cash dividend of \$0.64 per share in the quarter. The company also issued about 109 million common shares, including 107 million shares for the acquisition of Countrywide and 2 million shares related to employee stock options and ownership plans. No shares were repurchased during the quarter. Period-end common shares issued and outstanding were 4.56 billion for the third quarter, up from 4.45 billion for the second quarter of 2008 and 4.44 billion in the year ago quarter.

61. Upon this partial disclosure, BofA's stock declined from \$32.22 per share on October 6, 2008 to \$23.77 per share on October 7, 2008, a decline of 26% on high volume.

62. On October 7, 2008, BofA announced the pricing of its common stock, in a released which stated in part:

Bank of America Corporation today announced the pricing of its offering of \$10 billion, or 455 million shares, of common stock. The transaction includes an option to the underwriters to purchase up to 68.25 million additional shares of common stock. Bank of America expects to deliver the shares of common stock on October 10, 2008.

Banc of America Securities LLC and Merrill Lynch & Co. are serving as joint bookrunners. The offering is being made under Bank of America's existing shelf registration statement filed with the Securities and Exchange Commission (Reg. No. 333-133852).

63. On or about October 9, 2008, the Company filed its Prospectus for the Offering, which forms part of the Registration Statement and which became effective on October 7, 2008. At least 455 million shares of BofA common stock were sold to the public at \$22.00 per share in the secondary offering, raising over \$10 billion.

64. The Prospectus incorporated by reference BofA's Form 10-K for the year ending December 31, 2007 and its Form 10-Q for the three months and six months ending June 30, 2008. The Prospectus further incorporated by reference certain of the Company's Form 8-Ks filed with the SEC, including the Company's 8-K filed on September 15, 2008, which contained BofA's September 15, 2008 press release, the Company's 8-K filed on October 3, 2008, and the Company's 8-K filed on October 6, 2008, which contained BofA's October 6, 2008 press release and additional risk factors facing the Company.

65. The Prospectus omitted important information about BofA's exposure to the credit markets and how the changes in the market were affecting BofA by the time of the Offering, including omitting information about how this exposure could affect the Company's capital base. The Prospectus further misstated the effect that the Merrill Lynch acquisition would have on the Company's capital position and overall operations.

66. The Registration Statement/Prospectus contained untrue statements of material fact or omitted to state other facts necessary to make the statements made therein not misleading and was not prepared in accordance with applicable SEC rules and regulations.

67. The statements above were false and/or misleading because the dislocation in the financial markets was then having an increasingly severe impact on both BofA's and Merrill Lynch's business, which significantly increased the risk level of the Offering.

68. October 10, 2008 was the record date for determining the holders of the Company's common stock entitled to vote on the merger.

69. On October 30, 2008, BofA filed a Form 8-K with the SEC, which stated in part:

On October 26, 2008, Bank of America Corporation (the "Registrant") entered into a Letter Agreement (the "Purchase Agreement") with the United States Department of the Treasury ("Treasury"), pursuant to which the Registrant agreed to issue and sell (i) 600,000 shares of the Registrant's Fixed Rate Cumulative Perpetual Preferred Stock, Series N (the "Series N Preferred Stock") and (ii) a warrant (the "Warrant") to purchase 73,075,674 shares of the Registrant's common stock, par value \$0.01 per share (the "Common Stock"), for an aggregate purchase price of \$15,000,000,000 in cash.

* * *

Simultaneously with the Registrant's entry into the Purchase Agreement, Merrill Lynch & Co., Inc. ("Merrill Lynch") entered into an agreement with Treasury (the "Merrill Agreement") which allows Merrill Lynch to sell preferred stock and warrants to Treasury for a purchase price of \$10,000,000,000 prior to January 31, 2009 under certain circumstances. Treasury has agreed with the Registrant that if the closing of the transactions contemplated by the Agreement and Plan of Merger dated as of September 15, 2008 by and between Merrill Lynch and the Registrant occurs prior to the closing of the issuance and sale of Merrill Lynch preferred stock and warrants to Treasury as contemplated by the Merrill Agreement, Treasury will purchase and the Registrant will issue (i) 400,000 additional shares of the Series N Preferred Stock (or such other series of the Registrant's preferred stock with substantially identical terms) and (ii) a warrant to purchase 48,717,116 additional shares of Common Stock with an exercise price of \$30.79 and substantially identical terms to the Warrant, for an aggregate purchase price of \$10,000,000,000.

70. On November 3, 2008, BofA filed its Merger Proxy, dated October 31, 2008, with the SEC. The Merger Proxy contained the following statements:

Bank of America's Reasons for the Merger; Recommendation of the Bank of America Board of Directors

The Bank of America board of directors consulted with Bank of America management as well as financial and legal advisors and determined that the merger is in the best interests of Bank of America and Bank of America stockholders. In reaching its conclusion to approve the merger agreement, the Bank of America board considered a number of factors, including the following material factors:

- its understanding of Bank of America's business, operations, financial condition, earnings and prospects and of Merrill Lynch's business, operations, financial condition, earnings and prospects;
- its understanding of the current and prospective environment in which Bank of America and Merrill Lynch operate, including economic and market conditions, the competitive environment and the likely impact of these factors on Bank of America and Merrill Lynch;
- the review by the Bank of America board of directors with its legal advisors of the structure of the merger and the financial and other terms of the merger and stock option agreement, including the review by the Bank of America board of directors with its financial advisors of the exchange ratio, and the expectation of Bank of America's legal advisors that the merger will qualify as a transaction of a type that is generally tax-free for U.S. federal income tax purposes;
- the fact that the complementary nature of the respective customer bases, business products and skills of Bank of America and Merrill Lynch is expected to result in substantial opportunities to distribute products and services to a broader customer base and across businesses and to enhance the capabilities of both companies;
- the potential expense saving opportunities, as a result of overlapping business and infrastructure, corporate staff functions, occupancy and other cost savings from miscellaneous items, currently estimated by Bank of America's management to be approximately \$7 billion per year on a pre-tax basis when fully realized, as well as potential incremental revenue opportunities;
- the challenges of successfully integrating Merrill Lynch's businesses, operations and workforce with those of Bank of America and the costs of combining the two companies and achieving the anticipated cost savings, including an anticipated restructuring charge of \$3 billion on a pre-tax basis and assumed amortization expense of \$450 million per-annum on a pre-tax basis;
- the fact that application of such potential expense savings and other transaction-related assumptions and adjustments to the combined net income forecasts for Bank of America and Merrill Lynch made by various third-party brokerage firms and published as consensus

estimates by First Call would result in the combination being 3.0% dilutive in 2009 and breakeven in 2010;

- the reports of Bank of America management and the financial presentation by J.C. Flowers and FPK to Bank of America's board of directors concerning the operations, financial condition and prospects of Merrill Lynch and the expected financial impact of the merger on the combined company;
- the likelihood that the regulatory and stockholder approvals needed to complete the transaction will be obtained in a timely manner and that the regulatory approvals will be obtained without the imposition of adverse conditions;
- the historical and current market prices of Bank of America common stock and Merrill Lynch common stock, as well as the financial analyses prepared by J.C. Flowers and FPK;
- the opinions delivered to the Bank of America board of directors by each of J.C. Flowers and FPK to the effect that, as of the date of the opinion and based upon and subject to the assumptions made, methodologies used, factors considered and limitations upon its review described in its opinion and such other matters as J.C. Flowers and FPK considered relevant, the exchange ratio to be paid by Bank of America was fair, from a financial point of view, to Bank of America;
- the potential impact of the transaction on the capital levels and credit rating of Bank of America; and
- the need and ability to retain key Merrill Lynch personnel.

The Bank of America board of directors considered all of these factors as a whole and, on balance, concluded that they supported a favorable determination to enter into the merger agreement.

The foregoing discussion of the information and factors considered by the Bank of America board of directors is not exhaustive, but includes all material factors considered by the Bank of America board of directors. In view of the wide variety of factors considered by the Bank of America board of directors in connection with its evaluation of the merger and the complexity of these matters, the Bank of America board of directors did not consider it practical to, nor did it attempt to, quantify, rank or otherwise assign relative weights to the specific factors that it considered in reaching its decision. The Bank of America board of directors evaluated the factors described above and reached a consensus that the merger was advisable and in the best interests of Bank of America and its stockholders. In considering the factors described above, individual members of the Bank of America board of directors may have given different weights to different factors.

The Bank of America board of directors determined that the transaction was in the best interests of Bank of America and its stockholders, and the board voted

unanimously to approve the merger agreement and recommends that Bank of America stockholders vote “FOR” the issuance of Bank of America common stock in the merger.

71. The Merger Proxy incorporated by reference BofA’s Form 10-K for the year ending December 31, 2007 and its Form 10-Qs for the quarters ending March 30, 2008 and June 30, 2008, and Merrill Lynch’s Form 10-K for the year ending December 28, 2007 and its Form 10-Qs for the quarters ending March 28, 2008 and June 27, 2008. Additionally, the Merger Proxy incorporated by reference certain of the Company’s Form 8-Ks filed with the SEC, including the Company’s 8-Ks filed on July 21, 2008, July 23, 2008, July 25, 2008, September 15, 2008 (2 filings), October 2, 2008, October 3, 2008, October 6, 2008, October 7, 2008 and October 26, 2008.

72. On November 6, 2008, BofA filed its Form 10-Q for the third quarter of 2008, which included the same financial results previously reported on October 6, 2008.

73. On November 26, 2008, BofA filed a Form 425, which contained a letter by defendant Lewis, which stated in part:

To my teammates:

I usually don’t comment on our stock price – it is investors’ job to price our stock based on their appraisal of our performance and our prospects, and my job to lead the company. But in this environment, I think it is important to share my perspective with associates regarding our stock’s volatility, and how Bank of America is positioned to ride out this severe economic storm.

Investors have deep concerns about how long and deep the recession will be, how high unemployment will go, when housing prices will stabilize and what will be the catalyst to bring us out of the recession. On banks in particular, they are concerned, among other things, about whether financial institutions have enough capital. These factors are putting tremendous pressure on the markets in general, and financial stocks in particular.

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

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

I have gotten questions from associates and investors in recent weeks on two specific topics: the government capital injections into banks, and our decision to increase our investment in China Construction Bank (CCB).

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

In the meantime, we are managing the company, and making decisions about strategic investments and other matters in the best interests of shareholders and the company, just as we would have given the economic environment and our competitive position.

Our decision to invest in China Construction Bank is a good example. We have known since we made our initial investment in CCB several years ago that we would have an opportunity to increase our stake at attractive terms. We made the decision based on our judgment about the prospective return for shareholders, as we always do.

While we cannot directly control or predict our stock price, there are some things we all can do to help push our business, the broader economy and, in an indirect sense, our stock price, in the right direction.

We can continue to work hard to serve customers, attract new relationships and expand existing ones. We can keep our focus on providing the highest quality service and flawless execution, giving customers and clients every reason to choose Bank of America in today's tough environment, and in better days to come. We can be the people who help customers think beyond the anxiety in today's markets, and see the opportunities we all have to build financial strength for the future.

If we do these things, I am confident that after this storm passes, investors will see the value in our franchise, the power of our brand, and especially, our associates' ability to create broad, deep and long-lasting financial relationships. Thank you again for all you are doing every day for our customers and our company.

74. Subsequently, on November 26, 2008, BofA issued a press release entitled "Bank of America Receives Federal Reserve Approval of Merrill Lynch Purchase," which stated in part:

Bank of America Corporation today received approval from the Board of Governors of the Federal Reserve System of the company's purchase of Merrill Lynch & Co., Inc. Bank of America aims to close the transaction by the end of the year pending shareholder and other regulatory approvals.

Merrill Lynch is expected to enhance Bank of America's current strengths by creating a company with the leading position in wealth management as well as in global debt underwriting, global equities and global merger and acquisition advice. Once the purchase is complete, Bank of America will have the largest wealth management business in the world with nearly 20,000 financial advisors and approximately \$2.5 trillion in client assets.

"Combining the leading global wealth management, capital markets and advisory firm with largest consumer and corporate bank in the U.S. creates the world's premier financial services company with unrivalled breadth and global reach," said Bank of America Chairman and Chief Executive Officer Kenneth D. Lewis. "This presents a compelling opportunity for our customers and shareholders."

75. On December 5, 2008, BofA issued a press release entitled "Bank of America Shareholders Approve Merrill Lynch Purchase," which stated in part:

Bank of America Corporation shareholders during a special meeting today approved the acquisition of Merrill Lynch & Co., Inc. by authorizing the shares of common stock to be issued in the merger.

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

Bank of America will have the largest wealth management business in the world with nearly 20,000 financial advisors and approximately \$2.5 trillion in client assets. Global investment management capabilities will include approximately 50 percent ownership in BlackRock Inc., which had \$1.26 trillion in assets under management at September 30. Bank of America had \$564 billion in assets under management at September 30.

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

Proposals to approve the issuance of shares of Bank of America common stock for the purposes of the transaction; to approve an amendment to the 2003 Key Associate Stock Plan, as amended and restated; to adopt an amendment to the Bank of America amended and restated certificate of incorporation to increase the number of authorized shares of Bank of America common stock; and to adjourn the meeting, were approved at the special meeting. The acquisition is expected to close by the end of the year, pending the satisfaction of customary approvals and closing conditions.

76. On January 1, 2009, BofA issued a press release entitled “Bank of America Completes Merrill Lynch Purchase,” which stated in part:

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

“We created 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.

77. On January 15, 2009, *The Wall Street Journal* published an article entitled “Bank of America to Get Billions in U.S. Aid,” which stated in part:

The U.S. government is close to finalizing a deal that would give billions in additional aid to Bank of America Corp. to help it close its acquisition of Merrill Lynch & Co., according to people familiar with the situation.

Discussions over these funds began in mid-December when Bank of America approached the Treasury Department. The bank, already the recipient of \$25 billion in committed federal rescue funds, said that it was unlikely to complete its Jan. 1 purchase of the ailing Wall Street securities firm because of Merrill's larger-than-expected losses in the fourth quarter, according to a person familiar with the talks.

Treasury, concerned the deal's failure could affect the stability of U.S. financial markets, agreed to work with the Charlotte, N.C., lender on the "formulation of a plan" that includes new capital from the \$700 billion Troubled Asset Relief Program, according to the person familiar with the talks. The amount and terms are still being finalized, this person said. Details are expected to be announced with Bank of America's fourth-quarter earnings, due out Tuesday.

Any possible arrangement might protect Bank of America from losses on Merrill's bad assets. There would be a cap on the amount of losses the bank would have to absorb, with the federal government being on the hook for the remainder, said one person familiar with the matter.

78. On January 16, 2009, BofA issued its fourth quarter 2008 financial results, which included its full year 2008 results, in a release which stated in part:

Bank of America Corporation today reported full-year 2008 profit of \$4.01 billion compared with net income of \$14.98 billion a year earlier.

Earnings after preferred dividends and available to common shareholders were \$2.56 billion, or \$0.55 per diluted share, down from \$14.80 billion, or \$3.30 per share.

In the fourth quarter of 2008, the company had a net loss of \$1.79 billion compared with net income of \$268 million a year earlier. The net loss applicable to common shareholders was \$2.39 billion, or \$0.48 per diluted share, down from net income of \$215 million, or \$0.05 per share, in the same period in 2007. Results include Countrywide Financial, which Bank of America purchased on July 1, but not Merrill Lynch & Co., Inc., which was acquired on January 1, 2009.

Fourth quarter results were driven by escalating credit costs, including additions to reserves, and significant writedowns and trading losses in the capital markets businesses. These actions reflect the deepening economic recession and extremely challenging financial environment, both of which significantly intensified in the last three months of 2008.

Global Consumer and Small Business Banking and Global Wealth and Investment Management were profitable, paced by Bank of America's successful and

expanding deposit business. Negative results in Capital Markets and Advisory Services masked the profitability in Business Lending and Treasury Services within Global Corporate and Investment Banking.

Bank of America ended 2008 with a Tier 1 capital ratio of 9.15 percent.

Merrill Lynch preliminary results indicate a fourth-quarter net loss of \$15.31 billion, or \$9.62 per diluted share, driven by severe capital markets dislocations. . . .

In view of the continuing severe conditions in the markets and economy, the U.S. government agreed to assist in the Merrill acquisition by making a further investment in Bank of America of \$20 billion in preferred stock carrying an 8 percent dividend rate.

In addition, the government has agreed to provide protection against further losses on \$118 billion in selected capital markets exposure, primarily from the former Merrill Lynch portfolio. Under the agreement, Bank of America would cover the first \$10 billion in losses and the government would cover 90 percent of any subsequent losses. Bank of America would pay a premium of 3.4 percent of those assets for this program.

On a pro forma basis, this additional capital would boost the company's Tier 1 capital ratio to approximately 10.70 percent.

In light of continuing severe economic and financial market conditions, the Bank of America Board of Directors has declared a first-quarter dividend of \$.01 per share payable March 27, 2009 to shareholders of record as of March 6, 2009.

Combined, these actions strengthen Bank of America and will allow the company to continue business levels that both support the U.S. economy and create future value for shareholders.

* * *

Fourth Quarter 2008 Financial Summary

Revenue and Expense

Revenue net of interest expense on a fully taxable-equivalent basis rose 19 percent to \$15.98 billion from \$13.45 billion a year earlier.

* * *

Noninterest income declined 29 percent to \$2.57 billion from \$3.64 billion a year earlier. Mortgage banking income, gains on sales of debt securities, insurance premiums and service charges increased. The increases were more than offset by sales and trading losses in the Capital Markets and Advisory Services business.

* * *

Credit Quality

Credit quality deteriorated further during the quarter as the recession worsened. Consumers continued to experience high levels of stress from declining home prices, rising unemployment and tighter credit conditions. These factors led to higher losses and an increase in delinquencies in all consumer portfolios.

Declining home values, a slowdown in consumer spending and continued turmoil in the global financial markets negatively impacted the commercial portfolios. Commercial losses increased during the quarter driven by higher broad-based losses in the non-real estate domestic portfolios, the homebuilder portfolio, and several large defaults by foreign financial services borrowers.

Nonperforming assets were \$18.23 billion or 1.96 percent of total loans, leases and foreclosed properties, compared with \$13.58 billion, or 1.45 percent, at September 30 and \$5.95 billion, or 0.68 percent, at December 31, 2007.

Total managed net losses were \$7.40 billion, or 2.84 percent, of total average managed loans and leases compared with \$6.11 billion, or 2.32 percent, in the third quarter and \$3.28 billion, or 1.34 percent, in the fourth quarter of 2007.

Net charge-offs were \$5.54 billion, or 2.36 percent of total average loans and leases compared with \$4.36 billion, or 1.84 percent, in the third quarter and \$1.99 billion, or 0.91 percent, in the fourth quarter of 2007.

The provision for credit losses was \$8.54 billion, up from \$6.45 billion in the third quarter and \$3.31 billion in the fourth quarter of 2007. The company added \$2.99 billion to the allowance for loan and lease losses during the quarter. The additions were across most consumer portfolios reflecting economic stress on consumers. Reserves were also increased on commercial portfolios.

Capital Management

Total shareholders' equity was \$177.05 billion at December 31. Period-end assets were \$1.82 trillion. The Tier 1 capital ratio was 9.15 percent, up from 7.55 percent at September 30, 2008. The Tier 1 ratio was 6.87 percent a year earlier.

Bank of America issued 455 million common shares for \$9.88 billion, \$15 billion of preferred stock issued to the U.S. Department of the Treasury and did not repurchase any shares in the period. Period-end common shares issued and outstanding were 5.02 billion for the fourth quarter of 2008, 4.56 billion for the third quarter of 2008 and 4.44 billion in the year-ago quarter. The company paid a cash dividend of \$0.32 per common share and recorded \$472 million in preferred dividends during the quarter. An additional \$131 million of preferred dividends were deducted in the calculation of net income applicable to common shareholders.

In January 2009, an additional \$10 billion of preferred stock (part of the original \$25 billion assigned to Bank of America and Merrill Lynch) was issued to the U.S. Department of the Treasury as part of the Troubled Asset Relief Program (TARP). The company also issued approximately 1.4 billion shares of common stock associated with the acquisition of Merrill Lynch.

79. On January 16, 2009, *The Wall Street Journal* published an article entitled “Do Angered BofA Investors Have a Claim Over the Merrill Deal?” The article stated in part:

Today, the Journal reports that BofA swung to a fourth-quarter loss after accepting \$20 billion in aid from the U.S. government to help it digest the toxic assets of its latest purchase, Merrill Lynch. This comes after yesterday’s Journal report that BofA was seeking billions from the U.S. Treasury in order to remain well-capitalized enough to buy Merrill. “Discussions over these funds began in mid-December when Bank of America approached the Treasury Department,” wrote the Journal. “The bank, already the recipient of \$25 billion in committed federal rescue funds, said that it was unlikely to complete its Jan. 1 purchase of the ailing Wall Street securities firm because of Merrill’s larger-than-expected losses in the fourth quarter, according to a person familiar with the talks.”

Some believe that, when BofA shareholders voted on the deal on December 5, they might’ve appreciated knowing about Merrill’s larger-than-expected fourth quarter losses and, perhaps, that BofA CEO Ken Lewis would need to return to the bailout trough.

Yet, Lewis has been all reassurances. On the day of the vote, he said BofA would have “the premier financial-services franchise.” Even when the deal closed on Jan. 1, Lewis remained positive, saying: “We are now uniquely positioned to win market share and expand our leadership position in markets around the world.” . . .

This morning, in a conference call, Lewis rejected the suggestion that he and his team did not conduct enough due diligence before buying Merrill, saying forecasts did not suggest Merrill’s assets would drop so suddenly in value. “We did not expect the significant deterioration in mid to late December that we saw,” he said on the analyst call.

The Law Blog spoke to Gordon Smith, a securities law prof at BYU Law School. The legal standard, he told us, is whether they lied to their shareholders or failed to tell them anything that, if left out, makes what they said false or misleading.

“These things are always really fact specific,” said Smith. “It comes to down to what they knew when they knew it. To the extent they knew Merrill was in worse shape than they thought, then they have to tell shareholders that. Based on news reports, I think it’s clear that what they didn’t say is that the numbers coming out of Merrill were more negative than originally thought, which is what prompted Lewis to

go back to D.C. If they realized this before the vote, it seems like something they should have told the shareholders.”

80. On January 17, 2009, *The New York Times* published an article entitled “Bank of America Posts Loss as It Gets New U.S. Aid,” which stated in part:

Hours after receiving another government lifeline, Bank of America posted a fourth-quarter loss of \$1.79 billion on Friday, down from net income of \$268 million a year earlier, in a reversal caused largely by growing consumer loan losses.

And bigger troubles came from Merrill Lynch, which Bank of America hastily snapped up in September for \$50 billion. A fresh round of write-downs at Merrill pushed that firm into a \$15.3 billion loss for the fourth quarter. That was the firm’s sixth troubled quarter since the credit crisis began. Merrill was among the most aggressive – and most harmed – by mortgage investments.

Merrill’s results for the fourth quarter are not a part of Bank of America’s. The merger of the two banks closed on Jan. 1.

In a conference call Friday morning, analysts asked Kenneth D. Lewis, the bank’s chairman, whether he had regrets that he had agreed to purchase Merrill.

Mr. Lewis said that as Merrill’s fourth-quarter losses mounted, he did re-evaluate whether he should close the deal and whether he could renegotiate the price for Merrill. But, he said, regulators implored him to complete the transaction and said they would provide support.

“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 significant systemic concerns,” Mr. Lewis said. “We did think we were doing the right thing for the country.”

* * *

In the conference call, Bank of America executives also discussed the government assistance that was announced overnight to help them complete the merger with Merrill.

Two weeks after closing its purchase of Merrill Lynch at the urging of federal regulators, the government cemented a deal at midnight Thursday to supply Bank of America with a fresh \$20 billion capital injection and absorb as much as \$98.2 billion in losses on toxic assets, according to people involved in the transaction.

The bank had been pressing the government for help after it was surprised to learn that Merrill would be taking a fourth-quarter write-down of \$15 billion to \$20 billion, according to two people who have been briefed on the situation, in addition to Bank of America’s rising consumer loan losses.

The second lifeline brings the government's total stake in Bank of America to \$45 billion and makes it the bank's largest shareholder, with a stake of about 6 percent.

The program is modeled after a larger one engineered to stabilize Citigroup as its stock price plummeted in late November, but it appears to have had limited success. Under the terms, Bank of America will be responsible for the first \$10 billion in losses on a pool of \$118 billion in illiquid assets, including residential and commercial real estate and corporate loans, and that will remain on its balance sheet.

The Treasury Department and the Federal Deposit Insurance Corporation will take on the next \$10 billion in losses. The Fed will absorb 90 percent of any additional losses, with Bank of America responsible for the rest.

In exchange for the new support, Bank of America will give the government an additional \$4 billion stake in preferred stock. It has also agreed to cut its quarterly dividend to a penny, from 32 cents, and accept more stringent restrictions on executive pay.

* * *

Even before the most recent deal with Merrill closed, troubles began to surface. At the time, shareholders liked the strategic fit of adding Merrill Lynch, the nation's biggest brokerage firm, to the nation's biggest bank. Still, they worried that Mr. Lewis had paid a hefty premium – or underestimated Merrill's losses – in the merger stitched together over the mid-September weekend that Lehman Brothers filed for bankruptcy.

When the deal was announced, Mr. Lewis said that he had considered buying Merrill months earlier but was not comfortable with its mortgage exposure. John A. Thain, the chief executive of Merrill Lynch, said he had cleaned up many of his company's problems. "We have been consistently cleaning up the balance sheet, repairing the damage that was done over the last few years," Mr. Thain said.

Mr. Lewis praised Mr. Thain for decreasing risks at the firm and said that Merrill's capital levels were in good shape.

As it turned out, more problems were lurking. In December, when executives at Merrill began tallying losses on its mortgage investments, they were found to exceed previous estimates. When Bank of America was informed of the gaping write-downs, the bank became fearful it would not have the capital to cover them. The revelations, which came just weeks before the merger was expected to close, prompted Bank of America to ask the government for additional help.

After Bank of America told regulators in December that it might walk away from Merrill because of mounting losses at the brokerage, government officials said they decided they needed to take immediate action to avert a systemic risk.

Still, the Merrill deal has not been any easy deal for Mr. Lewis to digest. “He made a bet,” said Brad Hintz, an analyst with Sanford C. Bernstein & Company. “He bought the retail broker operation, and in a normal environment that’s a gold mine. The challenge that Bank of America has is, can they keep their hands off of the retail brokerage operation, because their history in terms of acquisitions isn’t really perfect.”

81. On January 20, 2009, *Bloomberg* published an article entitled “Bank of America Slides as FBR Sees \$80 Billion in Capital Needs,” which stated in part:

Bank of America Corp., the biggest U.S. lender by assets, dropped as much as 21 percent on concern the company needs at least \$80 billion to restore capital to minimum levels required by regulators.

Tangible common equity “is just too low in our opinion, particularly for a company with questionable near-term profitability and credit costs,” said Friedman, Billings, Ramsey Group Inc. analyst Paul Miller in a report to clients today. Miller cut his price target on the Charlotte, North Carolina- based company to \$5 a share. It sold for \$6.01 at 10:26 a.m. in New York.

82. Between January 15 and 20, 2009, as news of BofA’s precarious financial position came to light, BofA’s stock lost a dramatic 50% of its value. It declined from \$10.20 per share on January 14, 2009 to close at \$5.10 per share on January 20, 2009.

83. The true facts, which were known by the defendants but concealed from the investing public during the Class Period, and/or which were omitted from the Registration Statement and/or from the Merger Proxy, were as follows:

(a) The Company was failing to adequately reserve for mortgage-related exposure, causing its balance sheet and financial results to be artificially inflated;

(b) The Company and its advisors had failed to engage in proper due diligence in assessing the fairness of the deal with Merrill Lynch;

(c) The Company’s acquisition of Merrill Lynch would have disastrous results on the Company’s capital position and overall operations;

(d) Merrill Lynch had not substantially decreased its risk exposure to troubled mortgage-related assets;

(e) Merrill Lynch had failed to adequately reserve for mortgage-related exposure, causing its balance sheet and financial results to be artificially inflated;

(f) The significant deterioration of Merrill Lynch's financial position, including its substantial fourth quarter 2008 loss, were sufficient to trigger termination of the merger;

(g) The Company had to approach the U.S. Government for additional funding and financial guarantees in December 2008 in order to complete its acquisition of Merrill Lynch; and

(h) The Company's capital base was not adequate enough to withstand the significant deterioration in the subprime market and, as a result, BofA would be forced to seek government funding in order to raise significant amounts of additional capital.

84. As a result of defendants' false statements, BofA's stock traded at inflated levels during the Class Period. However, after the above revelations seeped into the market, the Company's shares were hammered by massive sales, sending them down more than 86% from their price before these disclosures.

LOSS CAUSATION/ECONOMIC LOSS

85. By misrepresenting BofA's and Merrill Lynch's financial positions, the defendants presented a misleading picture of the Company's businesses and prospects, including BofA's business and prospects if it were able to consummate its merger with Merrill Lynch. Thus, instead of truthfully disclosing during the Class Period that BofA's and Merrill Lynch's businesses were not as healthy as represented, BofA falsely concealed the extent of its exposure to risky real estate investments and further concealed the extent of the problems at Merrill Lynch.

86. These claims of profitability caused and maintained the artificial inflation in BofA's stock price throughout the Class Period and until the truth about its future earnings was revealed to the market.

87. Defendants' false and misleading statements had the intended effect and caused BofA's stock to trade at artificially inflated levels throughout the Class Period, reaching as high as \$38.13 per share in early October 2008.

88. As a result of defendants' false statements, BofA's stock traded at inflated levels during the Class Period. However, after the above revelations seeped into the market, the Company's shares were hammered by massive sales, sending them down more than 86% from their price before these disclosures.

CLASS ACTION ALLEGATIONS

89. Plaintiff brings this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of a class consisting of (a) all persons or entities who purchased or otherwise acquired BofA common stock during the Class Period; (b) all persons or entities who acquired shares of BofA common stock traceable to the false and misleading Prospectus for the Offering; or (c) all persons or entities who held BofA common stock on the record date for the Merger Proxy and who were damaged thereby (the "Class"). Excluded from the Class are defendants, the officers and directors of the Company, at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which defendants have or had a controlling interest.

90. The members of the Class are so numerous that joinder of all members is impracticable. The disposition of their claims in a class action will provide substantial benefits to the parties and the Court. BofA has over 5 billion shares of common stock outstanding, owned by hundreds if not thousands of persons.

91. There is a well-defined community of interest in the questions of law and fact involved in this case. Questions of law and fact common to the members of the Class which predominate over questions which may affect individual Class members include:

- (a) whether the 1933 Act was violated by defendants' acts as alleged herein;
- (b) whether the 1934 Act was violated by defendants' acts as alleged herein;
- (c) whether statements made by defendants to the investing public in the Registration Statement and Prospectus omitted and/or misrepresented material facts about the business, operations and management of BofA and Merrill Lynch;
- (d) whether statements made by defendants to the investing public in the Merger Proxy omitted and/or misrepresented material facts about the business, operations and management of BofA and Merrill Lynch;
- (e) whether statements made by defendants to the investing public during the Class Period omitted and/or misrepresented material facts about the business, operations and management of BofA and Merrill Lynch;
- (f) whether the price of BofA common stock was artificially inflated; and
- (g) to what extent the members of the Class have sustained damages and the appropriate measure of damages.

92. Plaintiff's claims are typical of those of the Class because plaintiff and the Class sustained damages from defendants' wrongful conduct.

93. Plaintiff will adequately protect the interests of the Class and has retained counsel who are experienced in class action securities litigation. Plaintiff has no interests which conflict with those of the Class.

94. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

COUNT I

For Violation of §10(b) of the 1934 Act and Rule 10b-5 Against Defendant BofA and the Officer Defendants

95. Plaintiff incorporates ¶¶1-94 by reference.

96. During the Class Period, defendants disseminated or approved the false statements specified above, which they knew or deliberately disregarded were misleading in that they contained misrepresentations and 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.

97. Defendants violated §10(b) of the 1934 Act and Rule 10b-5 in that they:

- (a) employed devices, schemes and artifices to defraud;
- (b) made untrue statements of material facts or omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
- (c) engaged in acts, practices and a course of business that operated as a fraud or deceit upon plaintiff and others similarly situated in connection with their purchases of BofA common stock during the Class Period.

98. Plaintiff and the Class have suffered damages in that, in reliance on the integrity of the market, they paid artificially inflated prices for BofA common stock. Plaintiff and the Class would not have purchased BofA common stock at the prices they paid, or at all, if they had been aware that the market prices had been artificially and falsely inflated by defendants' misleading statements.

COUNT II

For Violation of §20(a) of the 1934 Act Against Defendant BofA and the Officer Defendants

99. Plaintiff incorporates ¶¶1-98 by reference.

100. The Officer Defendants acted as controlling persons of BofA within the meaning of §20(a) of the 1934 Act. By reason of their positions with the Company, and their ownership of BofA stock, the Officer Defendants had the power and authority to cause BofA to engage in the wrongful conduct complained of herein. BofA controlled the Officer Defendants and all of its employees. By reason of such conduct, defendants are liable pursuant to §20(a) of the 1934 Act.

COUNT III

Violation of §11 of the 1933 Act Against Defendants BofA and Lewis, the Director Defendants and the Underwriter Defendants

101. Plaintiff repeats and realleges each and every allegation contained above.

102. This Count is brought pursuant to §11 of the 1933 Act, 15 U.S.C. §77k, on behalf of the Class, against defendants BofA and Lewis, the Director Defendants and the Underwriter Defendants.

103. This Count does not sound in fraud. All of the preceding allegations of fraud or fraudulent conduct and/or motive are specifically excluded from this Count. Plaintiff does not allege that defendants BofA, Lewis, the Director Defendants or the Underwriter Defendants had scienter or fraudulent intent, which are not elements of a §11 claim.

104. The Registration Statement for the Offering was inaccurate and misleading, contained untrue statements of material facts, omitted to state other facts necessary to make the statements made not misleading, and omitted to state material facts required to be stated therein.

105. BofA is the registrant for the Offering. The defendants named herein were responsible for the contents and dissemination of the Registration Statement.

106. As issuer of the shares, BofA, is strictly liable to plaintiff and the Class for the misstatements and omissions.

107. None of the defendants named herein made a reasonable investigation or possessed reasonable grounds for the belief that the statements contained in the Registration Statement were true and without omissions of any material facts and were not misleading.

108. By reason of the conduct herein alleged, each defendant violated, and/or controlled a person who violated, §11 of the 1933 Act.

109. Plaintiff acquired BofA shares of common stock pursuant and/or traceable to the Registration Statement for the Offering.

110. Plaintiff and the Class have sustained damages. The value of BofA shares of common stock has declined substantially subsequent to and due to defendants' violations.

111. At the time of their purchases of BofA shares, plaintiff and other members of the Class were without knowledge of the facts concerning the wrongful conduct alleged herein and could not have reasonably discovered those facts prior to January 2009. Less than one year has elapsed from the time that plaintiff discovered or reasonably could have discovered the facts upon which this complaint is based to the time that plaintiff filed this complaint. Less than three years elapsed between the time that the securities upon which this Count is brought were offered to the public and the time plaintiff filed this complaint.

COUNT IV

Violation of §12(a)(2) of the 1933 Act Against Defendants BofA and Lewis, the Director Defendants and the Underwriter Defendants

112. Plaintiff repeats and realleges each and every allegation contained above.

113. This Count is brought pursuant to §12(a)(2) of the 1933 Act on behalf of the Class, against defendants BofA, Lewis, the Director Defendants and the Underwriter Defendants.

114. This Count does not sound in fraud. All of the preceding allegations of fraud or fraudulent conduct and/or motive are specifically excluded from this Count. Plaintiff does not allege that the defendants named in this Count or the other defendants had scienter or fraudulent intent, which are not elements of a §12 claim.

115. The Prospectus contained untrue statements of material fact, and concealed and failed to disclose material facts, as detailed above. Defendants owed plaintiff and the other members of the Class who purchased BofA shares of common stock pursuant to the Prospectus the duty to make a reasonable and diligent investigation of the statements contained in the Propsectus to ensure that such statements were true and that there was no omission to state a material fact required to be stated in order to make the statements contained therein not misleading. Defendants, in the exercise of reasonable care, should have known of the misstatements and omissions contained in the Prospectus as set forth above.

116. Plaintiff did not know, nor in the exercise of reasonable diligence could have known, of the untruths and omissions contained in the Prospectus at the time plaintiff acquired the Company's shares.

117. By reason of the conduct alleged herein, defendants violated §12(a)(2) of the 1933 Act. As a direct and proximate result of such violations, plaintiff and the other members of the Class who purchased BofA common stock pursuant to the Prospectus sustained substantial damages in connection with their purchases of BofA common stock. Accordingly, plaintiff and the other members of the Class who hold such common stock have the right to rescind and recover the consideration paid for their shares, and hereby tender their shares to the defendants sued herein.

Class members who have sold their shares of common stock seek damages to the extent permitted by law.

COUNT V

Violation of §15 of the 1933 Act Against Defendant BofA and the Director Defendants

118. Plaintiff repeats and realleges each and every allegation contained above.

119. This Count is brought pursuant to §15 of the 1933 Act against defendant BofA and the Director Defendants.

120. The Director Defendants each were control persons of BofA by virtue of their positions as directors and/or senior officers of BofA. The Director Defendants each had a series of direct and/or indirect business and/or personal relationships with other directors and/or officers and/or major shareholders of BofA. The Company controlled the Director Defendants and all of BofA's employees.

121. The Director Defendants each were culpable participants in the violations of §11 of the 1933 Act alleged in the Count above, based on their having signed or authorized the signing of the Registration Statement and having otherwise participated in the process which allowed the Offering to be successfully completed.

COUNT VI

Violation of §14(a) of the 1934 Act Against Defendant BofA and the Officer Defendants

122. Plaintiff incorporates by reference and realleges each and every allegation set forth above, as though fully set forth herein.

123. Rule 14a-9, promulgated pursuant to §14(a) of the 1934 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 with respect to any material fact, or which omits to state any

material fact necessary in order to make the statements therein not false or misleading.” 17 C.F.R. §240.14a-9.

124. The Merger Proxy violated §14(a) and Rule 14a-9 because of material misrepresentations and omissions concerning the business operations and financial outlook of BofA and Merrill Lynch.

125. In the exercise of reasonable care, defendants should have known that the Merger Proxy was materially false and misleading.

126. The misrepresentations and omissions in the Merger Proxy were material to plaintiff in voting on the merger. The Merger Proxy was an essential link in the accomplishment of the merger, as revelations of the truth would have caused BofA shareholders to not approve the Company’s merger with Merrill Lynch.

127. The Company was damaged as a result of the material misrepresentations and omissions in the Merger Proxy.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for judgment as follows:

- A. Declaring this action to be a proper class action pursuant to Fed. R. Civ. P. 23;
- B. Awarding plaintiff and the members of the Class damages, including interest;
- C. Awarding plaintiff’s reasonable costs and attorneys’ fees;
- D. Awarding rescission or a rescissory measure of damages; and
- E. Awarding such equitable/injunctive or other relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff demands a trial by jury.

DATED: February __, 2009

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