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*Virginia Culbertson, Trustees of the Jacques*  
8 *Cromier and Virginia Culbertson Trust dated 4/7/03*

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO

SI

13 CV 09 0544

14 JACQUES CROMIER AND VIRGINIA )  
15 CULBERTSON, TRUSTEES OF THE )  
16 JACQUES CROMIER AND VIRGINIA )  
17 CULBERTSON TRUST DATED 4/7/03, )  
18 individually and on behalf of all others )  
19 similarly situated, )

Civil Action No. 0544

CLASS ACTION COMPLAINT FOR  
VIOLATIONS OF THE FEDERAL  
SECURITIES LAWS

JURY TRIAL DEMANDED

Plaintiffs,

vs.

20 BANK OF AMERICA CORP., )  
21 KENNETH D. LEWIS, AND )  
22 JOHN A. THAIN, )

Defendants.

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1 Plaintiffs Jacques Cromier and Virginia Culbertson, Trustees of the Jacques Cromier and  
2 Virginia Culbertson Trust dated 4/7/03, bring this action on behalf of themselves and all other  
3 persons similarly situated who owned shares of Bank of America Corporation (“Bank of  
4 America”, “BAC” or the “Company”) on October 10, 2008, who were entitled to vote on the  
5 proposed merger between Bank of America and Merrill Lynch & Co., Inc. (“Merrill Lynch”), as  
6 well as those who purchased Common Stock during the Class Period, October 16, 2008 to  
7 January 20, 2009 (the “Class”).

8 On December 5, 2008, as a result of misrepresentations made by Bank of America  
9 executives and employees and other misconduct by the same people, Bank of America  
10 shareholders approved the merger of Bank of America and Merrill Lynch without being informed  
11 about record financial losses at Merrill Lynch. Plaintiff’s allegations are based upon personal  
12 knowledge, and upon information and belief with respect to all other matters based on the  
13 investigation of plaintiff’s counsel.

14 **I.**

15 **INTRODUCTION**

16 “You only find out who is swimming naked when the tide goes out.”

17 Warren Buffet, February 28, 2002

18 1. As the economy continues to deteriorate, dark secrets are now being revealed  
19 about the manner in which America’s largest corporations were run. This case represents one of  
20 the worst examples of deceit practiced on the public and the resulting theft of public bailout  
21 funds.

22 2. Prior to the close of the merger between Bank of America and Merrill Lynch (the  
23 “Merger”) and prior to the Bank of America shareholder vote on the Merger, Bank of America  
24 knew that Merrill Lynch’s losses were at record high levels. In fact, on January 16, 2009, Bank  
25 of America reported that Merrill Lynch had fourth quarter 2008 losses of approximately **\$15.31**  
26 **billion** during that three month period, a record loss in Merrill Lynch’s 94 year history. These  
27 record losses were reported at the same time news reports emerged that Bank of America had  
28 **authorized** Merrill Lynch’s former CEO, John Thain to hand out over **\$4 billion in**

1 **discretionary bonus** payments to Merrill Lynch executives and employees. Bank of America  
2 knew that it had overpaid to acquire Merrill Lynch but chose to withhold these facts in order to  
3 finalize the merger. The record loss at Merrill Lynch was known to Bank of America and  
4 constituted a material fact that should have been but was not disclosed to Bank of America  
5 shareholders. As set forth in the Proxy Statement filed with the SEC regarding the Merger (the  
6 “Proxy Statement”), and under the terms of the Merger approved by Bank of America  
7 shareholders on December 5, 2008 and consummated on January 1, 2009, each Merrill Lynch  
8 share was exchanged for 0.8595 of a share of Bank of America common stock.

9 3. The Proxy Statement contained material misrepresentations and omitted to  
10 disclose true facts relevant to the Merger, including facts concerning the risk of and actual further  
11 deterioration of Merrill Lynch’s assets and the fact that Merrill Lynch would accrue a massive  
12 \$15.3 billion loss during the fourth quarter of 2008.

13 4. Despite the fact that the Merger vote did not occur until after over two-thirds of  
14 the fourth quarter had passed, Defendants failed to provide any correction, update or amendment  
15 to the Proxy Statement in order to disclose these facts to Bank of America shareholders prior to  
16 the Merger vote.

17 5. The proposed Merger was announced on September 15, 2008 and completed  
18 pursuant to a Proxy Statement that was signed on or about October 31, 2008 and filed with the  
19 SEC on or about November 3, 2008.

20 6. On January 16, 2009, Bank of America announced losses of \$15.31 billion  
21 resulting from credit and other asset losses at Merrill Lynch. The announcement also revealed an  
22 agreement where the U.S. Treasury would invest \$20 billion in Bank of America (in the form of  
23 preferred shares), and provide additional guarantees against losses on approximately \$118 billion  
24 in assets, 75% of which were previously owned by Merrill Lynch. The public shareholders are  
25 now asked to bear the costs of the bonuses.

26 ///

27 ///

28 ///

1 **II.**

2 **JURISDICTION AND VENUE**

3 7. Plaintiffs assert claims under § 10(b) of the Securities Exchange Act, 15  
4 U.S.C. § 10(b) and Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated thereunder, and under §  
5 14(a) of the Securities Exchange Act, 15 U.S.C. § 78n(a), and the SEC regulation 14a-9, 17  
6 C.P.R. 240.14a-9, promulgated thereunder.

7 8. Federal subject matter jurisdiction exists pursuant to § 22(a) of the Securities Act,  
8 15 U.S.C. § 77v(a), § 27 of the Securities Exchange Act, 15 U.S.C. § 78aa, and 28 U.S.C. § 1331  
9 (federal question).

10 9. Venue of this action in this Court is proper. Many of the acts and transactions  
11 giving rise to the violations of law described in this Complaint, including the dissemination of  
12 false proxy materials, occurred within this judicial district.

13 10. Defendants, directly and/or indirectly, used the means and instrumentalities of  
14 interstate commerce, the United States mails, and the facilities or the national securities markets  
15 in connection with the acts, conduct, and other wrongs complained of herein.

16 **III.**

17 **PARTIES**

18 **A. PLAINTIFFS**

19 11. Plaintiffs Jacques Cromier and Virginia Culbertson, Trustees of the Jacques  
20 Cromier and Virginia Culbertson Trust dated 4/7/03, are residents of El Dorado County,  
21 California. As set forth in the certificate attached hereto, Plaintiffs held Bank of America shares  
22 continuously since 2002, including on October 10, 2008, the records date for voting on the  
23 merger, and on December 5, 2008, when the merger was approved. Plaintiff's retain them to the  
24 present day, and as a result, have been damaged.

25 12. Plaintiffs and other Class members held and/or acquired Bank of America shares  
26 in the open market, unaware that Defendants' statements and omissions regarding the Merger  
27 were false and/or misleading, resulting in the price of Merrill Lynch shares being artificially  
28 inflated, as well as the price of Bank of America shares which were used to acquire the Merrill

1 Lynch shares. Plaintiffs and the Class relied upon Defendants' statements and omissions in both  
2 Merrill Lynch's and Bank of America's public reports, press releases, and SEC filings when they  
3 purchased and/or held Bank of America shares and were thus injured by the Defendants' actions.  
4 Plaintiffs and the Class further relied on the integrity of the market for Bank of America and  
5 Merrill Lynch securities and the fact that Bank of America and Merrill Lynch securities were  
6 fairly priced. Believing the Defendants' statements to be true has resulted in injury to the  
7 Plaintiffs and each Class member.

8 **B. DEFENDANTS**

9 **1. Corporate Defendant**

10 13. Defendant **Bank of America Corporation ("Bank of America")** is a Delaware  
11 corporation with its principal offices located in Charlotte, North Carolina. At all relevant times,  
12 Bank of America operated as a bank holding company and financial holding company.

13 **2. Individual Defendants**

14 14. Defendant **Kenneth D. Lewis ("Lewis")** is, and was at all relevant times,  
15 Chairman of the Board, Chief Executive Officer and President of Bank of America.

16 15. Defendant **John A. Thain ("Thain")** was at all relevant times Chairman of the  
17 Board and Chief Executive Officer of Merrill Lynch.

18 16. Defendants listed in paragraphs 13 through 14 are sometimes hereinafter referred  
19 to collectively as the "Individual Defendants."

20 17. The Individual Defendants served as senior officers and/or directors of Bank of  
21 America and/or Merrill Lynch during the Class Period and, because of their positions, were able  
22 to control the contents of the representations made to stockholders and the public, had access to  
23 adverse undisclosed information regarding the companies which contradicted the information  
24 disseminated to the public, and had the authority to prevent or correct the disseminations.  
25 Furthermore, the Individual Defendants each had an affirmative duty to promptly disseminate  
26 accurate and truthful information and/or correct any misleading and untrue information regarding  
27 the financial condition, performance, growth, operations, financial statements, business,  
28 products, markets, management, earnings, and business prospects of Bank of America and

1 Merrill Lynch. Despite this affirmative duty, the Individual Defendants knowingly and  
2 intentionally made misleading statements and omissions in order to artificially inflate the price of  
3 Merrill Lynch stock and the price of Bank of America stock.

4 18. Defendants are liable for the false statements pleaded herein. The statements are  
5 each "group-published" information for which they are responsible.

6 19. Defendants are not protected by any statutory safe harbor for forward-looking  
7 statements because that protection does not extend to the allegedly false statements pleaded in  
8 this complaint. First, many of the specific statements pleaded herein were statements of fact,  
9 primarily assertions regarding the financial health of Merrill Lynch that were simply fictitious.  
10 Second, many of the specific statements pleaded herein were not identified as "forward-looking  
11 statements" when made. Third, to the extent there were any forward-looking statements,  
12 Defendants did not provide meaningful cautionary statements identifying important factors that  
13 could cause actual results to differ materially from those in the purportedly forward-looking  
14 statements pleaded herein. Defendants are liable for those false forward-looking statements  
15 because they knew, at the time each such statement was made, and/or authorized and/or approved  
16 by an executive officer and/or director of Bank of America and/or Merrill Lynch, that those  
17 statements were false.

### 18 3. Aiding and Abetting/Conspiracy

19 20. Defendants, and each of them, are sued as participants and as aiders and abettors  
20 herein alleged. At all relevant times, each defendant was and is the agent of each of the  
21 remaining Defendants, and in doing the acts alleged herein, was acting within the course and  
22 scope of such agency. Each defendant ratified and/or authorized the wrongful acts of each of the  
23 defendants. There is a unity of interest and ownership between the Defendants listed above, such  
24 that the acts of the one are for the benefit and can be imputed as the acts of the other.

### 25 4. Unnamed Participants

26 21. Numerous individuals and entities participated actively during the course of and in  
27 furtherance of the scheme described herein. The individuals and entities acted in concert by joint  
28 ventures and by acting as agents for principals, in order to advance the objectives of the scheme

1 to benefit Defendants and themselves through the purchase and sale of Bank of America  
2 securities to the detriment of Plaintiffs and the Class.

3 **IV.**

4 **CLASS ACTION ALLEGATIONS**

5 22. Plaintiffs brings this action as a class action pursuant to Rule 23 of the Federal  
6 Rules of Civil Procedure, on their own behalf and on behalf of the following class:

7 All persons and entities who owned Bank of America stock on October 10, 2008, the  
8 record date for the vote on approval of the proposed Merger, and were eligible to vote on  
9 the merger and all persons and entities who purchased Bank of America Common Stock  
10 during the Class Period, October 16, 2008 to January 20, 2009.

11 23. Excluded from the Class are defendants herein, members of their immediate  
12 families and their legal representatives, parents, affiliates, heirs, successors or assigns and any  
13 entity in which defendants have or had a controlling interest, officers and directors of Bank of  
14 America and/or Merrill Lynch, and any other person who engaged in the improper conduct  
15 described herein (the "Excluded Persons"). Also excluded are any officers, directors, or trustees  
16 of the Excluded Persons.

17 24. As of October 31, 2008, there were 5,017,579,321 outstanding shares of Bank of  
18 America common stock held by thousands of shareholders. The members of the Class are so  
19 numerous and so widely dispersed throughout the nation that joinder of all of them is  
20 impracticable. While the exact number of Class members is unknown to Plaintiffs at the present  
21 time and can only be ascertained from books and records maintained by defendants and/or their  
22 agents, Plaintiffs believes that the Class members number in the hundreds of thousands.

23 25. Plaintiffs' claims are typical of those of other Class members. Plaintiffs acquired  
24 and/or held Bank of America stock and sustained damages as a result of Defendants' wrongful  
25 conduct complained of herein.

26 26. Plaintiffs will fairly and adequately protect the interests of the members of the  
27 Class. Plaintiffs has retained competent counsel experienced in class action securities litigation.  
28 Plaintiffs has no interests that are adverse or antagonistic to those of the Class.



1           31.     Over the course of the last 18 months, Merrill Lynch has reported net losses  
2 over six consecutive quarters. These losses were directly related to declining values of assets held  
3 by Merrill Lynch as a principal in those transactions. The troubled assets include certain  
4 categories of asset-backed securities, including mortgage-backed securities, collateralized debt  
5 obligations (COOs) and related derivative positions used as either hedges or investments in their  
6 own right. Merrill Lynch, like much of Wall Street achieved record profits during the boom  
7 years by recklessly entering into high risk transactions and acquiring risky assets that would lead  
8 to Merrill Lynch's quick sale to Bank of America.

9           32.     Other investment banks had experienced similar difficulties amidst illiquid market  
10 conditions and declining asset values. Most notably, in March 2008, Bear Stearns became  
11 effectively insolvent and was purchased by J.P. Morgan Chase in a deal arranged and backed by  
12 the U.S. Treasury Department and the Federal Reserve. Bear Stearns, another venerable Wall  
13 Street name was the first to fall.

14           33.     During the week of September 8, 2008, the stock prices of many major financial  
15 services companies declined significantly as reports circulated regarding financial difficulties at  
16 Lehman Brothers Holdings, Inc. ("Lehman").

17           34.     On September 10, 2008, Lehman pre-announced a \$3.9 billion net loss for its third  
18 quarter of 2008, as well as a number of initiatives to bolster its financial viability. Lehman's  
19 troubles were primarily associated with illiquid mortgage and real estate related securities.  
20 Despite Lehman's efforts to prevent insolvency, by September 12, 2008 it became clear that  
21 Lehman was running out of options and would likely file for bankruptcy.

22           35.     On September 12, 2008, the Merrill Lynch Board of Directors held an  
23 informational conference call during which senior management updated directors on recent  
24 market conditions, Lehman's waning financial viability, the status of Merrill Lynch's capital,  
25 liquidity and business results, Merrill Lynch's recent stock performance, and potential rating  
26 agency actions. During that conference call the Merrill Lynch Board of Directors urged  
27 management to continue to evaluate the potential impact of market developments on Merrill  
28

1 Lynch and the possible courses of action Merrill Lynch might pursue in response to various  
2 possible scenarios.

3 36. According to a September 19, 2008 article in the *Wall Street Journal*:

4 [On September 13, 2008,] John Thain, then Chairman and Chief Executive  
5 Officer of Merrill Lynch was busy at the New York Fed working on Lehman's  
6 problems when a sudden realization hit him: If he didn't act fast, his own  
7 brokerage firm, Merrill, might not survive this crisis. It occurred while listening to  
8 Lehman's president, Herbert H. "Bart" McDade III, give a sobering summary of  
9 Lehman's assets and liabilities. "This could be me by Friday," Mr. Thain thought,  
10 according to people who have spoken to him.

11 The stakes were high for Mr. Thain, a Goldman alum and former head of the New  
12 York Stock Exchange who had been Merrill's CEO only since December.

13 Over the past year, Merrill has written down more than \$46 billion due to bad bets  
14 on real estate and other mortgage-related investments. Mr. Thain was brought in to  
15 clean up the mess. Still, Merrill's stock was getting hammered. It had fallen more  
16 than 12% on Friday alone.

17 The 53-year-old Mr. Thain ducked out of his meeting, called Kenneth D. Lewis,  
18 the CEO of Bank of America Corp., and asked him if he'd be interested in buying  
19 Merrill.

20 37. Bank of America CEO Kenneth Lewis didn't hesitate to finalize the deal. Bank  
21 of America was desperate to do a deal amidst the financial troubles in the economy and Mr.  
22 Lewis was especially eager to acquire a storied Wall Street name that would propel Bank of  
23 America, which had long sought to bolster its investment banking arm and pedigree into the  
24 ranks of the Wall Street elite. Merrill Lynch, one of the most recognized Wall Street brokerage  
25 firms provided Bank of America the opportunity it craved. Desperate to finalize the deal, Bank  
26 of America willfully hid the astronomical financial problems at Merrill Lynch in order to push  
27 the deal through. In a marathon 36 hour session from the evening of September 12, 2008 until  
28 the afternoon of September 13, 2008, Mr. Lewis and Mr. Thain had met in New York to  
negotiate a merger between the two companies.

38. In light of the imminent bankruptcy of Lehman Brothers and rapidly  
deteriorating market conditions, both Merrill Lynch and Bank of America moved quickly. By  
Sunday, September 14, 2008, only one day after the process began, Merrill Lynch and Bank of  
America had agreed on the principal terms of the Merger, providing for a stock-for-stock  
acquisition of Merrill Lynch at an exchange ratio of 0.895 shares of Bank of America for each

1 Merrill Lynch share. In connection with the Merger, Bank of America committed to issue  
2 approximately 1.71 billion shares of additional common stock and 359,100 shares of preferred  
3 stock to finance the transaction. The exchange ratio valued Merrill Lynch shares approximately  
4 \$29 per share. Merrill Lynch shares had closed the Friday before at \$12.26 per share. This  
5 equates to an approximately 70% premium on the market price of Merrill Lynch shares. The  
6 agreement between Mr. Lewis and Mr. Thain would have Merrill Lynch shareholders owning  
7 approximately 23% of the combined company.

8 39. Based on market capitalization on the last trade day before the merger agreement  
9 between Bank of America and Merrill Lynch was executed, the cost of the Merrill Lynch  
10 acquisition was 27.4% of Bank of America's market capitalization. The acquisition of Merrill  
11 Lynch, with its strong brand name, but troubled and unclear financial condition, Bank of  
12 America knew that it had a duty to keep its shareholders updated on the financial health of  
13 Merrill Lynch and the status of the Merger. Due to the size of the acquisition, this transaction  
14 would have a long-term and significant on Bank of America for years to come. As such,  
15 accuracy of information regarding Bank of America's valuations of Merrill Lynch and decision-  
16 making process regarding Merrill Lynch were crucial to shareholders and investors of Bank of  
17 America.

18 40. On September 15, 2008, Bank of America announced that it had agreed to  
19 acquire Merrill Lynch & Co., Inc. in a \$50 billion all-stock transaction that, according to Bank of  
20 America, "creates a company unrivaled in its breadth of financial services and global reach."  
21 According to the Bank of America press release:

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

26 "Acquiring one of the premier wealth management, capital  
27 markets, and advisory companies is a great opportunity for our  
28 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."

1           41.     Since the date of the announcement of the \$50 billion Merger, Merrill Lynch had  
2 already announced losses and write downs equal to over 50% of the value of the Merger. Over  
3 the past six quarters, including the \$15.31 billion fourth quarter 2008 loss, Merrill Lynch has  
4 reported total losses equaling approximately \$39.1 billion. There is every indication that there  
5 are significant further losses still to be reported. In other words, Bank of America spent \$50  
6 billion to acquire \$39.1 billion in losses. In order to finalize the deal, Bank of America  
7 intentionally misled its shareholders into supporting this flawed Merger by not disclosing critical  
8 and material information regarding Merrill Lynch's financial condition.

9           42.     During a conference call on September 15, 2008, Joe L. Price, Bank of America's  
10 CFO stated, "[t]he price represents roughly 1.8x stated tangible book value. It's roughly 12x  
11 Merrill Lynch's 2009 projected earnings based on First Call consensus estimates ...we used First  
12 Call consensus estimates as a base for modeling the transaction."

13           43.     Analysts on the call questioned the rationale for the deal price and suggested that  
14 Bank of America may be overpaying for Merrill. Matthew O'Connor, an analyst at UBS, pointed  
15 out "there's a lot of near-term uncertainty and I think a lot of people would view Merrill's stock as  
16 selling off today and this week if the deal hadn't been announced. I guess the question is why pay  
17 \$29 at this point?"

18           44.     Defendant Mr. Lewis defended his decision to purchase Merrill Lynch at \$29 per  
19 share by stating that "the long term benefits were so overwhelming, it was such a strategic  
20 opportunity . . . we thought we had a compelling situation for the shareholders over the long-  
21 term."

22           45.     When another analyst asked about the necessary write-downs on Merrill Lynch's  
23 assets and if the numbers presented with the announcement include any mark-to-market write-  
24 downs, Defendant Lewis answered "The numbers that we presented today we have considered  
25 marks on the assets. . . I would tell you that, again, going back to the point of things such as  
26 CDOs, we have very similar methodology valuations and we have very similar marks to  
27 structures. We are dealing with the same counterparties on things so again, we're pretty familiar  
28 with the types of assets and feel pretty good about the progress that Merrill Lynch has made."

1           46.     Analysts who studied the transaction also predicted the fact that Merrill Lynch  
2 could experience further asset write-downs and losses that would impair the value of the Merger.  
3 A Deutsche Bank analyst report, dated September 16, 2008, identified the potential risk of further  
4 write-downs at Merrill Lynch:

5           The big question surrounding capital market businesses is, "how much more in  
6 write-downs are likely ahead?" In particular, a new weakness at AIG has the  
7 potential to hurt Merrill's capital via any potential insurance on its ABS CDO.  
8 Alternatively, additional selling of risky commercial or residential real estate  
9 assets could impact Merrill's commercial real estate securities (\$18B), other  
10 risky mortgage assets (\$31B; includes \$10B all-A, subprime and non-US  
11 residential), and leveraged finance (\$8B), notwithstanding declines in these  
12 amounts since the end of 2Q08. In addition to the "risky" assets, Merrill also has  
13 \$33.7B in US prime mortgages on balance sheet ... Moreover, it seems as though  
14 ***BAC had only 36 hours of due diligence, which does not give extra comfort in  
15 an environment when loss estimates seem to increase quarter after quarter.***  
16 Indeed, several details were not included in the presentation, such as pro forma  
17 management, location, timeline (besides deal close in early 1Q09 and  
18 conversions sometime in 2010), etc. This by itself is less the issue (we have  
19 confidence that BAC can work this out in a reasonable manner given proven  
20 success in previous integrations) vs. the bigger issues of comfort with the level  
21 of marks on MER's books. One way to think about the margin of safety for  
22 BAC is that its purchase price seems to give it room to incur \$12 bil. of  
23 additional marks before the price is above MER's adjusted book value."  
24 (Emphasis added).

15           47.     In light of all the foregoing, in preparing the Proxy Statement, and the materials  
16 incorporated therein by reference, the Defendants were well aware of the severe, acute risks  
17 associated with the types of illiquid and toxic assets accumulated by investment banks generally,  
18 and Merrill Lynch in particular. In light of the tumultuous economy at the time of the Merger,  
19 Bank of America knew that investors and shareholders were principally focused on obtaining  
20 information from Bank of America regarding asset writedowns and valuations and other losses at  
21 Merrill Lynch. With the speed in which assets were collapsing in value, Bank of America **knew**  
22 that investors were not merely interested in obtaining information regarding losses and  
23 writedowns, they needed to obtain that information in a quick and timely manner in order to  
24 make informed investing decisions. Bank of America had a due diligence obligation to ensure  
25 that disclosures to Bank of America shareholders with respect to Merrill Lynch's financial  
26 condition were accurate, complete and timely. Considering the speed in which the deal was  
27 negotiated, the fact that asset values were losing value at an unprecedented pace and the  
28

1 importance of the December 5, 2008 shareholder vote, Bank of America knew it had an  
2 obligation to its shareholders to provide them full transparency regarding the decision-making  
3 regarding not only the acquisition of Merrill Lynch but the acquisition price.

4 **B. DEFENDANTS' MATERIALLY FALSE AND MISLEADING**  
5 **STATEMENTS AND OMISSIONS CONCERNING THE MERGER**

6 **1. Merrill Lynch's October 16, 2008 Press Release Announcing Third Quarter**  
7 **2008 Financial Results**

8 48. On October 16, 2008, Merrill Lynch issued a press release announcing its results  
9 for the third quarter of 2008 and a preliminary unaudited earnings summary for the third quarter.  
10 The press release stated that Merrill Lynch reported:

11 [A] net loss from continuing operations for the third quarter of 2008 of \$5.1  
12 billion, or \$5.56 per diluted share, compared with a net loss from continuing  
13 operations of \$2.4 billion, or \$2.99 per diluted share, for the third quarter of  
14 2007. Merrill Lynch's net loss for the third quarter of 2008 was \$5.2 billion, or  
15 \$5.58 per diluted share, compared with a net loss of \$2.2 billion, or \$2.82 per  
16 diluted share, for the year-ago quarter.

17 49. In its financial results, Merrill Lynch breaks out its revenue among several  
18 categories, including "principal transactions." According to Merrill Lynch, principal transaction  
19 revenues include both realized and unrealized gains and losses on trading assets and trading  
20 liabilities, investment securities classified as trading investments and fair value changes  
21 associated with structured debt. These instruments are recorded at fair value. Fair value is the  
22 price that would be received to sell an asset or paid to transfer a liability in an orderly transaction  
23 between marketplace participants. Gains and losses are recognized on a trade date basis.

24 50. In its third quarter 2008 press release Merrill Lynch reported negative \$6.5  
25 billion in principal transactions revenue, indicating a net loss due to realized or unrealized losses  
26 (either asset impairment write-downs or declines in mark-to-market valuations) in the securities  
27 held on its balance sheet.

28 51. Among the "significant items" driving third quarter revenues identified in the  
October 16, 2008 press release were write-downs and asset losses totaling \$12.1 billion:

Net write-downs of \$5.7 billion resulting from the previously announced sale of  
U.S. super-senior ABS CDOs(1) and the termination and potential settlement of  
related hedges with monoline guarantor counterparties.

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Net write-downs of \$3.8 billion, principally from severe market dislocations in September, including real estate-related asset write-downs and losses related to certain government-sponsored entities and major U.S. broker-dealers, as well as the default of a U.S. broker-dealer.

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Net losses of \$2.6 billion, resulting primarily from completed and planned asset sales across residential and commercial mortgage exposures.

68. In conjunction with its third quarter 2008 release, Merrill Lynch noted "Third Quarter and First Nine Months of 2008 Highlights," including, among others:

Significant progress in balance sheet and risk reduction; RWA declined by approximately 15 percent over the quarter; and

Reductions of 98 percent of U.S. Alt-A residential mortgage net exposures. Including planned sales, reductions of 56 percent in non-U.S. residential mortgages and 25 percent in commercial real estate, excluding First Republic Bank and the U.S. Banks Investment Securities Portfolio.

69. The October 16, 2008 Merrill Lynch press release included a quote from Defendant Thain where he stated that, "[w]e continue to reduce exposures and de-leverage the balance sheet prior to the closing of the Bank of America deal. As the landscape for financial services firms continues to change and our transition teams make good progress, we believe even more that the transaction will create an unparalleled global company with pre-eminent scale, earnings power and breadth."

**2. Merrill Lynch's Third Quarter 2008 Form 10-Q**

70. On November 6, 2008, Merrill Lynch filed its quarterly report on Form 10-Q for the third quarter of 2008 (ended September 26, 2008) with the SEC. This document was filed five days after Bank of America issued the Proxy Statement. Merrill Lynch's filing on Form 10-Q for the third quarter ending September 30, 2008 reiterated the financial results contained in Bank of America's earlier press release issued on October 16, 2008, including its report of large losses for the third quarter of 2008.

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1           **3.     The October 31, 2008 Joint Proxy Statement**

2           71.     In addition to those statements detailed above, which were  
3 explicitly incorporated by reference into the Proxy Statement, on or about October 31, 2008 the  
4 parties jointly issued the Proxy Statement. The Proxy Statement was filed with the SEC on  
5 November 3, 2008. As detailed below, the Proxy Statement misrepresented and failed to inform  
6 Bank of America shareholders of material facts concerning Merrill Lynch's business, true  
7 financial condition and the substantial risks associated with Merrill Lynch's assets. That Proxy  
8 Statement did not disclose the serious concerns Bank of America had with the valuation of  
9 Merrill Lynch's assets, did not disclose Bank of America's concerns regarding its ability to cover  
10 the staggering losses at Merrill Lynch, did not disclose the necessity of seeking taxpayer-funded  
11 assistance to complete the Merger, and did not disclose Bank of America's approval of \$4 billion  
12 in discretionary bonus payments to Merrill Lynch executives at a time when the propriety of the  
13 Merger itself was in doubt. The cover letter enclosing the Proxy Statement was signed by  
14 Defendants Thain and Lewis.

15           72.     The Proxy Statement identified twelve distinct "Risk Factors" and stated that  
16 "stockholders should consider the matters described below in determining whether to adopt the  
17 merger agreement." None of the Risk Factors identified provided disclosure concerning the  
18 specific risk that Merrill Lynch's assets were too complex and illiquid to value with any degree of  
19 specificity and that there was a substantial risk that the true value of those assets were  
20 substantially less than the stated value, impairing the value of the Merger to Bank of America  
21 shareholders. Nor did they disclose the fact that the scope of the losses at Merrill Lynch could  
22 and likely would exceed the value of the deal in total.

23           73.     Under the heading "Recent Developments" the Proxy Statement disclosed that  
24 Bank of America had agreed to sell \$15 billion in preferred stock to the U.S. Treasury pursuant  
25 to the Capital Purchase Program ("CPP") that was effectuated after Congress passed the  
26 Emergency Economic Stabilization Act of 2008. That section of the Proxy Statement did not  
27 disclose the fact that Bank of America had serious concerns about covering the billions of dollars  
28 in losses suffered by Merrill Lynch and did not disclose that Bank of America would need

1 significant taxpayer money, including billions of dollar in federal guarantees for bad obligations,  
2 in order to finalize a deal in which Bank of America had overpaid for a heavily indebted  
3 company.

4 74. The Proxy Statement contained statements from both companies  
5 highlighting the potential benefits of the Merger. Bank of America articulated numerous  
6 "Reasons for the Merger" and included the "Recommendation of the Bank of America Board of  
7 Directors", which stated the following:

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

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

- 15 • its understanding of Bank of America's business, operations, financial condition,  
16 earnings and prospects and of Merrill Lynch's business, operations, financial  
17 condition, earnings  
18 and prospects;
- 19 • the fact that application of such potential expense savings and other transaction-  
20 related assumptions and adjustments to the combined net income forecasts for  
21 Bank of America and Merrill Lynch made by various third-party brokerage firms  
22 and published as consensus estimates by First Call would result in the  
23 combination being 3.0% dilutive in 2009 and breakeven in 2010;
- 24 • the reports of Bank of America management and the financial presentation by  
25 J.C. Flowers and FPK to Bank of America's board of directors concerning the  
26 operations, financial condition and prospects of Merrill Lynch and the expected  
27 financial impact of the merger on the combined company;
- 28 • 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;

75. The Defendant directors of Bank of America are liable for recommending the  
Merger without conducting appropriate due diligence of both the propriety of acquiring Merrill  
Lynch and the propriety of paying such a huge premium to acquire Merrill Lynch.

1           76.     In the Representations and Warranties section of the Proxy Statement, Merrill  
2     Lynch and Bank of America, the Proxy Statement assured investors that these included  
3     determinations that no “material adverse effect” has occurred between the date of the Merger  
4     Agreement and the date of the closing of the Merger:

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

18           77.     The Merger Agreement, annexed to the Proxy Statement, included the following  
19    language in paragraph 3.8, the definition of “Material Adverse Effect,” the occurrence of which  
20    would allow for the termination of the Merger:

21           3.8     Absence of Certain Changes or Events. (a) Since June 27, 2008, no event or  
22    events have occurred that have had or would reasonably be expected to have, either  
23    individually or in the aggregate, a Material Adverse Effect on Company. As used in this  
24    Agreement, the term “Material Adverse Effect” means, with respect to Parent or  
25    Company, as the case may be, a material adverse effect on (i) **the financial condition,  
26    results of operations or business of such party and its Subsidiaries taken as a whole**  
27    (provided, however, that, with respect to clause (i), a “Material Adverse Effect” shall not  
28    be deemed to include effects to the extent resulting from (A) changes, after the date  
29    hereof, in GAAP or regulatory accounting requirements applicable generally to companies  
30    in the industries in which such party and its Subsidiaries operate, (B) changes, after the  
31    date hereof, in laws, rules, regulations or the interpretation of laws, rules or regulations by  
32    Governmental Authorities of general applicability to companies in the industries in which  
33    such party and its Subsidiaries operate, (C) actions or omissions taken with the prior  
34    written consent of the other party or expressly required by this Agreement, (D) changes in  
35    global, national or regional political conditions (including acts of terrorism or war) or  
36    general business, economic or market conditions, including changes generally in  
37    prevailing interest rates, currency exchange rates, credit markets and price levels or  
38    trading volumes in the United States or foreign securities markets, in each case generally  
39    affecting the industries in which such party or its Subsidiaries operate and including  
40    changes to any previously correctly applied asset marks resulting therefrom, (E) the  
41    execution of this Agreement or the public disclosure of this Agreement or the transactions  
42    contemplated hereby, including acts of competitors or losses of employees to the extent  
43    resulting therefrom, (F) failure, in and of itself, to meet earnings projections, but not  
44    including any underlying causes thereof or (G) changes in the trading price of a party's  
45    common stock, in and of itself, but not including any underlying causes, except, with  
46    respect to clauses (A), (B) and (D), to the extent that the effects of such change are  
47    disproportionately adverse to the financial condition, results of operations or business of

1 such party and its Subsidiaries, taken as a whole, as compared to other companies in the  
2 industry in which such party and its Subsidiaries operate) or (ii) the ability of such party  
to timely consummate the transactions contemplated by this Agreement.

3 78. Merrill Lynch's undisclosed losses of \$15.31 billion for the three months ending  
4 December 31, 2008 and the necessity of seeking billions of dollars of not only direct taxpayer  
5 dollars in federal assistance but also over a hundred billion in financial guarantees due to the  
6 staggering and unprecedented losses at Merrill Lynch constitutes a Material Adverse Effect that  
7 should have been disclosed to Bank of America shareholders.

8 **4. November 12, 2008 Form 8-K**

9 79. On November 12, 2008, Bank of America issued a Form 8-K with combined  
10 historical balance sheet and income statement information for both Bank of America and Merrill  
11 Lynch as of September 26, 2008. Bank of America did not update the Proxy Statement and did  
12 not disclose any of the problems at Merrill Lynch that Bank of America was aware of, nor did it  
13 disclose the necessity of obtaining billions in federal aid in order to finalize the deal.

14 **5. Bank of America Shareholders Vote on Merger**

15 80. During a special meeting on December 5, 2008, Bank of America Corporation  
16 shareholders approved the acquisition of Merrill Lynch by authorizing the issuance of Bank of  
17 America common stock that would be used to fund the acquisition of the Merrill Lynch shares as  
18 part of the Merger.

19 81. The Bank of America shareholder vote on the Merger did not occur until  
20 December 5, 2008. Bank of America and Merrill Lynch had over two months to analyze and  
21 study the financial results of Merrill Lynch during that time. According to Defendant Thain,  
22 Merrill Lynch's former CEO, Bank of America had full access to Merrill Lynch's financial  
23 information, including its "p&l" (profit and loss) books. Knowing full well the importance to  
24 investors and shareholders that Bank of America and Merrill Lynch provide up-to-date real time  
25 information regarding financial losses, writedowns and asset valuations, Bank of America was  
26 under an obligation to update its filings with the SEC and provide updated information to its  
27 shareholders and investors, especially in the immediate lead up to the Bank of America vote on  
28 the Merger. Bank of America shareholders did not vote on the Merger until December 5, 2008.

1           82.       The Proxy Statement was filed on November 3, 2008 with the SEC. This  
2 document was never updated, corrected, amended or supplemented with any information  
3 concerning the actual losses incurred by Merrill Lynch during the fourth quarter of 2008, or the  
4 risk that such losses could occur and would materially effect the value of Bank of America if the  
5 Merger was consummated, given the nature of the assets and the inability of Bank of America to  
6 do adequate due diligence regarding the valuation of Merrill Lynch's assets. Nor was the Proxy  
7 Statement updated or corrected to reflect that due to losses incurred by Merrill Lynch during the  
8 fourth quarter of 2008, Bank of America would be required to seek additional funding from the  
9 United States Treasury Department.

10           83.       The foregoing statements in the Proxy Statement: (a) misrepresented Merrill  
11 Lynch's financial results and financial position, including by overstating the assets recorded on  
12 Merrill Lynch's balance sheet as of the third quarter of 2008; (b) misrepresented the benefits of  
13 the Merger, including the value of the assets to be acquired from Merrill Lynch; (c)  
14 misrepresented, that Merrill Lynch continued to "reduce exposures and de-leverage the balance  
15 sheet," in contradiction to the assertions made by Defendant Thain in Merrill Lynch's October  
16 16, 2008 press release; (d) omitted to disclose that Merrill Lynch's financial results, and losses on  
17 principal transactions during the fourth quarter of 2008, were sufficient to trigger the termination  
18 of the Merger due to the occurrence of a material adverse effect; (e) omitted information about  
19 the magnitude and impact of losses incurred by Merrill Lynch during the fourth quarter of 2008;  
20 and (f) misrepresented and omitted to disclose information concerning the potential risks of  
21 acquiring Merrill Lynch and the potential for further material write-downs, impairments and  
22 losses on assets held by Merrill Lynch.

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1 **C. THE TRUTH IS REVEALED**

2 84. Events and disclosures that occurred after the December 5, 2008 voting on the  
3 Merger have revealed the following, none of which was disclosed to Bank of America  
4 shareholders:

- 5 a. Merrill Lynch would record a massive \$15 billion loss in the fourth  
6 quarter of 2008, its largest loss in any of the past six quarters of  
7 consecutive losses, attributable mostly to losses incurred on assets held  
8 for trading and recorded as negative revenue under "principal  
9 transactions";
- 10 b. Defendants have admitted that this loss may have been sufficient to  
11 trigger the "material adverse effect" clause in the Merger Agreement,  
12 allowing Bank of America to terminate the Merger; and
- 13 c. That the Defendants knew of these facts and pursued additional funding  
14 under the CPP in order to complete the Merger.

15 85. Despite his knowledge of Merrill Lynch's staggering losses, and without  
16 revealing them to shareholders, Defendant Lewis pushed ahead to finalize the deal. On January  
17 1, 2009, Bank of America completed its purchase of Merrill Lynch. Defendant Lewis was still  
18 positive on the closing of the merger, stating, "[w]e are now uniquely positioned to win market  
19 share and expand our leadership position in new markets around the world." Defendant  
20 Lewis made this statement with full knowledge that Merrill Lynch would suffer approximately  
21 \$15.31 billion in losses during the three month period ending December 31, 2008, and transform  
22 Bank of America's \$50 billion acquisition into an acquisition of approximately \$39.1 billion in  
23 losses.

24 86. As reported in *The Wall Street Journal*, three days after the shareholder vote, on  
25 December 8, 2008, Defendant Thain addressed a meeting of Merrill Lynch's Board of Directors.  
26 Defendant Thain reported that Merrill Lynch suffered significant losses in November, which  
27 Defendant Thain described as one of the worst months in Wall Street history. Despite the size of  
28 these losses, Defendant Thain told Merrill Lynch's Board of Directors that the losses were *in line*  
*with Bank of America's estimates*. Neither Bank of America nor Merrill Lynch, nor any of the  
Individual Defendants, ever disclosed any such estimate (or any other information about Bank of  
America's expectations regarding Merrill Lynch's losses) to their shareholders in the Proxy

1 Statement or in any other public statement. Likewise, no loss estimate was ever disclosed to  
2 Bank of America's shareholders.

3 87. In a January 15, 2009 *New York Times* article, it was confirmed that Defendant  
4 Lewis had early knowledge of the massive losses at Merrill Lynch and scheduled a December 17,  
5 2008 meeting with government officials to discuss the impact to Bank of America of Merrill  
6 Lynch's losses. The article also reported that prior to that December 17, 2008 meeting with  
7 Treasury officials, Defendant Lewis had a telephone call with Federal Reserve Chairman  
8 Bernanke to discuss Merrill Lynch's fourth quarter losses. The *New York Times* reported that at  
9 the December 17, 2008 meeting Defendant Lewis demanded additional funds from the  
10 government and told Treasury officials that Merrill Lynch's fourth quarter losses put the Merger  
11 in "jeopardy":

12 The preparations for further support come after Bank of America's chief executive,  
13 Kenneth D. Lewis, told regulators in mid-December that the shotgun deal it signed just  
two months earlier with Merrill Lynch was in jeopardy.

14 Billions of dollars in write-downs on mortgages, commercial real estate and other credit  
15 assets at the brokerage firm climbed into double-digit territory in the fourth quarter,  
16 pushing Merrill into a substantial loss, said a person who spoke anonymously because  
they were not authorized to disclose the information. Fearing their own capital base could  
17 not support Merrill's flagging assets, executives at Bank of America told regulators they  
would need assistance in order to close the deal by their target date of Jan. 1.

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19 As Mr. Lewis was learning at the time, Merrill was suffering losses in the fourth quarter  
20 on a host of credit-related products, say people familiar with the company's results. While  
21 Merrill Lynch Chief Executive John Thain and Tom Montag, the firm's global head of  
sales and trading, positioned these losses as significant in various meetings with  
management, they described the losses as "market related" and not out of step with the  
rest of Wall Street, according to attendees at these meetings.

22 Mr. Thain often stressed the losses were from so-called legacy positions and not new ones  
23 taken on by Mr. Montag, according to these people. Total Merrill losses could total in  
excess of \$10 billion, say people familiar with the matter.

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25 By Dec. 17, Mr. Lewis went to Washington to discuss what he had already disclosed to  
26 Mr. Bernanke in an earlier phone call --that his bank was having trouble digesting  
Merrill's losses. Mr. Lewis described the losses as monstrous, according to a person  
27 familiar with the matter.

1 At that 6 p.m. meeting, Mr. Bernanke and Mr. Paulson both told Mr. Lewis that failing to  
2 complete the Merrill acquisition would be disastrous. The policy makers said abandoning  
3 the deal would further destabilize markets, and would hurt the bank, potentially setting off  
4 a ripple effect that would exacerbate a fragile situation.

5 Messrs. Bernanke and Paulson also urged Mr. Lewis to finish the deal and not invoke a  
6 material-adverse change clause, saying it was in his interest to finish the deal. If they  
7 walked away; it would reflect poorly on the bank and suggest it hadn't done its due  
8 diligence and wasn't following through on its commitments.

9 The policy makers told Mr. Lewis that if conditions were really as bad as he believed,  
10 then the government could step in with a rescue similar to that used for Citigroup Inc. in  
11 November. In such an arrangement, the government would provide cash and guarantee  
12 against part of the firm's losses.

13 In addition to a capital injection from the Treasury, the Fed, Treasury and FDIC are  
14 working on an asset-guarantee plan modeled after the Citi rescue. The government may  
15 backstop a figure of \$115 billion to \$120 billion in Bank of America assets, with BofA  
16 agreeing to take a portion of first losses, the Treasury and FDIC taking second losses, and  
17 the Fed backstopping a large chunk of the rest.

18 The Treasury rescue deal could be announced alongside the bank's earnings, which have  
19 been moved up to a Friday release.

20 "Bank of America didn't do proper due diligence," said Bradley Dorman, managing  
21 partner at Whale Rock Point Partners, a Providence, R.I., investment adviser with  
22 315,000 shares in the bank. He said Mr. Lewis "probably jumped the gun."

23 "There was a tremendous lack of transparency," added John Moore Sr., who controls  
24 18,000 shares and lives in Charlotte, where he is chairman of commercial real-estate firm  
25 Moore Cos. "As a shareholder, without disclosure and transparency it is extremely  
26 difficult to make a reasonable investment decision."

27 88. On January 15, 2009, *The Wall Street Journal* reported that Bank of America  
28 would receive additional funding under the CPP and that such funding was sought earlier in  
December by Defendant Lewis. The article also reported that the massive fourth quarter losses at  
Merrill Lynch necessitated this additional funding:

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

1 Program, according to the person familiar with the talks. The amount and terms  
2 are still being finalized, this person said. Details are expected to be announced  
with Bank of America's fourth-quarter earnings, due *out* Tuesday.

3 Any possible arrangement might protect Bank of America from losses on  
4 Merrill's bad assets. There would be a cap on the amount of losses the bank  
5 would have to absorb, with the federal government being on the hook for the  
6 remainder, said one person familiar with the matter. Both the Federal Reserve  
and the Federal Deposit Insurance Corp., alongside the Treasury, are involved in  
the negotiations, say people familiar with them.

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8 Bank of America is expected by some analysts to report a loss for the fourth  
9 quarter, or at least a smaller profit than expected. It is not known exactly how  
much Merrill lost in the same time period. Merrill's problems largely stem from  
the deterioration of assets on its books and trading losses, said a person familiar  
with the matter.

10 \*\*\*

11 The deal between Bank of America and Merrill was forged during the hectic  
12 weekend last September that saw Lehman Brothers Holdings Inc. collapse and  
13 giant insurer American International Group Inc. start to unravel. Merrill Chief  
Executive John Thain, worried his firm would be next, pressed for a quick deal.

14 In the aftermath of Bank of America's acquisition of Merrill – valued at \$50  
15 billion when it was announced and worth \$19.36 billion when it closed – its  
16 chief executive, Kenneth D. Lewis, was viewed as a savior of the financial-  
services industry, having rescued both Merrill and Countrywide without  
government assistance.

17 89. The *New York Times* also reported, on January 15, 2009, that Defendant Lewis  
18 sent lawyers to New York in December to explore Bank of America's ability to terminate the  
19 Merger since Merrill Lynch's losses during the fourth quarter of 2008 constituted a material  
20 adverse effect.

21 90. Following the reports of the need to obtain additional CPP funding in light of  
22 losses at Merrill Lynch, Bank of America shares declined by \$1.88 each, or 18.4%, to close on  
23 January 15, 2009, at \$8.32.

24 91. News reports on January 16, 2009 continued to demonstrate the rapid  
25 deterioration of Merrill Lynch's financial condition. On January 16, 2009, *The Wall Street*  
26 *Journal* reported that the U.S. government had agreed to provide Bank of America with a \$20  
27 billion investment in preferred stock and guarantees on approximately \$118 billion in assets.  
28 The article also noted that the current market value of the combined Bank of America/Merrill

1 Lynch was less than Bank of America's stand alone market value prior to the announcement of  
2 the Merger, implying that the market viewed Merrill Lynch as having negative value:

3 Reeling from previously undisclosed losses from its Merrill Lynch & Co.  
4 acquisition, Bank of America Corp. is expected to receive an emergency capital  
5 injection of \$20 billion from the Treasury, which will also backstop as much as  
6 \$120 billion of assets at the bank, said people familiar with the plan.

7 Reports of the unexpected Merrill losses sent Bank of America shares to their  
8 lowest levels since 1991, and set off a new round of debate in Congress about  
9 the scope and mission of the Treasury's financial-system bailouts.

10 Thursday's 18% stock-market drop gives the Charlotte, N.C., bank a market  
11 value of \$41.8 billion, a sum below the \$46 billion in shares it originally offered  
12 for Merrill. Its shares have lost over 40% of their value in the past seven trading  
13 sessions.

14 The developments angered some Bank of America shareholders, who began to  
15 question why Chief Executive Kenneth Lewis didn't discover the problems prior  
16 to the Sept. 15 deal announcement. Many also wanted to know why he didn't  
17 disclose the losses prior to their vote on the Merrill deal on Dec. 5, or before  
18 closing the deal on Jan. 1.

19 92. In addition to the article above, the "Heard on the Street" column in the January  
20 16, 2009 *The Wall Street Journal* includes the following commentary on the Merger:

21 Bank of America shareholders who voted for the Merrill Lynch purchase must  
22 be feeling a *mix* of emotions right now. Among them: anger.

23 On Dec. 5, holders voted for the deal, which was initially announced during  
24 September's Lehman Brothers crisis.

25 On the day of the vote, Chief Executive Kenneth Lewis said BofA would have  
26 "the premier financial-services franchise."

27 When the deal closed Jan. 1, Mr. Lewis was still positive, saying: "We are now  
28 uniquely positioned to win market share and expand our leadership position in  
markets around the world."

What shareholders weren't told: From mid-December, BofA executives were  
discussing with the Treasury possible extra aid to support the Merrill deal.

Since Merrill was going to be a big part of BofA, and since government aid  
often hurts the interests of common shareholders, investors can feel aggrieved  
that they weren't told what was going on behind the scenes.

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BofA's acquisition of Merrill looked over-priced from the start. And Mr. Lewis  
has said he wasn't pressured by the government into acquiring Merrill or  
Countrywide. While institutions were bailed out for mistakes made before the  
credit crunch hit, BofA looks set to be rescued from overambitious deals once it  
was in full-swing.



- 1           95.     Significant negative fourth-quarter items for Merrill Lynch include:
- 2           •     Credit valuation adjustments related to monoline financial guarantor
- 3           exposures of \$3.22 billion.
- 4           •     Goodwill impairments of \$2.31 billion. – Leveraged loan writedowns of
- 5           \$1.92 billion.
- 6           •     \$1.16 billion in the U.S. Bank Investment Securities Portfolio writedowns.
- 7           •     Commercial real estate writedowns of \$1.13 billion.

8           96.     In reporting the fourth quarter results for 2008, Bank of America disclosed that

9           during that three month period, Merrill Lynch had net negative revenue attributable to “principal

10           transactions” of \$13.1 billion and an additional \$3.4 billion in net losses under “Other” which

11           included “losses on investment securities, private equity investments, loans and other

12           miscellaneous items.”

13           97.     Following Bank of America's January 16, 2009 announcement, the price per

14           share of Bank of America's common stock dropped further from its prior close of \$8.32 per

15           share, to close on January 16, 2009 at \$7.18 per share - a decline of 14%. The cumulative decline

16           on both January 15 and January 16, 2009, from the January 14, 2009 closing price of \$10.20 per

17           share, totals \$3.02, or 31%.

18           98.     The extent of the losses incurred at Merrill Lynch during the fourth quarter are

19           staggering. Total losses over six consecutive quarters was equal to approximately \$39.1 billion

20           for a company that was acquired by Bank of America for \$50 billion. In essence, Bank of

21           America had spent nearly \$50 billion to acquire a company that **negatively** impacted Bank of

22           America. It was reported that the combined company was worth less than Bank of America

23           alone due to the size of the losses at Merrill Lynch. This led Bank of America to seek significant

24           government assistance due to Bank of America’s fear that it would not be able to absorb the

25           roughly \$40 billion in losses already reported by Merrill Lynch, an amount that likely will grow

26           in the future, resulting in a bad merger becoming even worse for Bank of America shareholders.

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1           100. Similarly, a January 17, 2009 article in *The Wall Street Journal* questioned the  
2 scope of the disclosures related to the Merger:

3           Executives at both Bank of America and Merrill have indicated the losses at  
4 Merrill ballooned in mid December, leading to a meeting between Mr. Lewis  
5 and Treasury Secretary Henry Paulson on Dec. 17. However, the market for  
6 various credit-related products began to deteriorate in mid-November, leaving  
7 many Merrill Lynch insiders to ask what Merrill CEO John Thain knew, and  
8 when.

9           Merrill lost \$15.3 billion during the period, and the run-up in losses was  
10 concentrated in the firm's sales and trading department, run by Tom Montag,  
11 who was hired by Mr. Thain in 2008 to run that division. The two frequently  
12 told the firm's other top managers that the losses, while significant, were largely  
13 connected to so-called legacy positions at Merrill and the losses were "market-  
14 related" and not out of step with the rest of Wall Street, according to attendees at  
15 these meetings.

16           Friday, some top executives and members of Merrill's board questioned  
17 privately why they weren't told about the magnitude of the losses or that the deal  
18 was possibly in jeopardy. Mr. Thain declined to comment on whether he knew  
19 about the Dec. 17 meeting between Messrs. Paulson and Lewis.

20           Merrill incurred large losses during the fourth quarter from derivative trades  
21 with thinly capitalized bond-insurance companies whose financial health  
22 deteriorated considerably last year. Many of the derivative contracts were  
23 written to cover periods of more than 20 years, which meant the bond insurers  
24 wouldn't be on the hook for significant cash payouts for years.

25           101. On January 22, 2009, Defendant Thain, Merrill Lynch's former CEO was fired  
26 by Bank of America. After the Merger, John Thain was supposed to serve in the combined  
27 company as President of Global Banking, Securities and Wealth Management. However on  
28 January 16, 2009, the news leaked that Merrill Lynch had suffered \$15.31 billion in losses for the  
fourth quarter ending December 31, 2008.

1           102. Shortly afterwards, news leaked that Defendant Thain, with the knowledge and  
2 approval of Bank of America paid out approximately \$4 billion in discretionary bonuses to  
3 Merrill Lynch executives and employees, the same executives and employees who had operated  
4 Merrill Lynch during the worst financial times during the 94 year history of Merrill Lynch.  
5 Initially, Bank of America sought to distance itself from Merrill Lynch's massive fourth quarter  
6 losses and Defendant Thain's payment of the discretionary bonuses.

1           103.   However, on January 25, 2009, Defendant Thain drafted a memo and sent it to  
2 Bank of America stating that he had acted with complete transparency and that Bank of America  
3 knew about the massive losses at Merrill Lynch, had full access to Merrill Lynch's financial  
4 records, were in communication with the U.S. government about assistance to finalize the  
5 Merger and were fully aware that despite these problems, Defendant Thain was paying \$4 billion  
6 in bonuses to Merrill Lynch executives and employees.

7           104.   The memo, attached hereto as Exhibit A, reads:

8           To my Merrill Lynch colleagues

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

15          I want to address several topics that have been inaccurately reported in the press.  
16          The first issue is our year end bonus payments. Our 2008 discretionary bonus  
17          pool was 41% lower than 2007. The size of the pool, its composition (cash and  
18          stock mix), and the timing of the payments for both the cash and stock were all  
19          determined together with Bank of America and approved by our Management  
20          Development and Compensation Committee and our Board. The total bonus  
21          pool was also substantially less than the amount allowed under our merger  
22          agreement.

23          The second topic is the losses in the fourth quarter, which were very large and  
24          unfortunate. However, they were incurred almost entirely on legacy positions  
25          and were due to market movements. ***We were completely transparent with  
26          Bank of America. They learned about these losses when we did.*** The acting  
27          CFO of my businesses was Bank of America's former Chief Accounting Officer.  
28          ***They had daily access to our p&l, 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.

          The final topic is the expenses related to my office. The \$1.2 million reported in  
the press was for the renovation of my office, two conference rooms and a  
reception area. The expenses were incurred over a year ago in a very different  
environment. Nonetheless, they were a mistake in the light of the world we live  
in today. I will therefore reimburse the company for all of the costs incurred.

          I thank all of you for your hard work and your support over the past year. I wish  
you all success in the future.

          105.   Bank of America knew all along the losses suffered by Merrill Lynch, which led  
Bank of America to seek financial assistance from the United States government in order to  
finalize the deal. Despite this knowledge, Bank of America went forward with the Merger and

1 agreed to pay a **significant** premium in order to acquire the over \$40 billion in losses suffered by  
2 Merrill Lynch. The Merger has done nothing but damage Bank of America's only financial  
3 health. Regardless, the health of the company that Bank of America seeks to acquire is clearly a  
4 material fact that should have been disclosed to the shareholders of Bank of America so that they  
5 could make an informed decision regarding Bank of America.

6 106. On January 27, 2009, it was announced that Andrew Cuomo, New York's  
7 Attorney General had subpoenaed former Merrill Lynch CEO John Thain to testify about  
8 bonuses paid to Merrill Lynch executives a few days before the brokerage firm's takeover by  
9 Bank of America. According to a person familiar with the situation, Mr. Cuomo is also  
10 examining the timing and adequacy of disclosures by Bank of America about Merrill Lynch's  
11 mounting losses. Mr. Cuomo's office also indicated he had subpoenaed Bank of America's  
12 Chief Administrative Officer J. Steele Alphin regarding the \$4 billion in last minute bonuses to  
13 Merrill Lynch executives.

14 107. Mr. Cuomo said in a statement: "The fact that Merrill Lynch appears to have  
15 moved up the timetable to pay bonuses before its merger with Bank of America is troubling to  
16 say the least."

17 108. Defendant Thain, in television interviews defended his actions regarding both  
18 Merrill Lynch's mounting and unprecedented losses and the bonuses paid to Merrill Lynch  
19 executives and employees. Defendant Thain stated that Bank of America was "completely  
20 plugged into" the bonus process, directed how much was to be awarded in cash and stock, and  
21 agreed that Defendant Lewis' bonus would exceed his own.

## 22 VI.

### 23 FRAUD-ON-THE MARKET DOCTRINE

24 109. At all relevant times, the market for Bank of America and Merrill Lynch stock  
25 was an efficient market for the following reasons, among others: Bank of America and Merrill  
26 Lynch were both public corporations that traded their shares on the NYSE, a highly efficient  
27 market:

1 • As a regulated issuer of securities in the United States, both Bank of America and  
2 Merrill Lynch filed their quarterly and annual financial statements with the SEC, as well as filing  
3 any material announcements regarding the companies. These reports were publicly available and  
4 could be and were reviewed by the investing public,

5 • Bank of America and Merrill Lynch stock was followed by securities analysts  
6 employed by major brokerage firms who wrote reports which were distributed to the sales force  
7 and certain customers of their respective brokerage firms. Each of these reports were publicly  
8 available and entered the public marketplace,

9 • Bank of America and Merrill Lynch regularly issued press releases that were  
10 carried by national newswires. Each of these releases was publicly available and entered the  
11 public marketplace,

12 • As a result, the market for Bank of America and Merrill Lynch securities  
13 promptly digested current information with respect to Bank of America and Merrill Lynch from  
14 all publicly-available sources and reflected such information in the stock prices of Bank of  
15 America and Merrill Lynch. The price of Bank of America and Merrill Lynch stock moved in  
16 direct response to information regarding the company that was put out in the public marketplace.  
17 For example, the share price of Bank of America responded immediately to the report that  
18 Merrill Lynch had \$15.31 billion in losses during the three month period ending December 31,  
19 2008 and that this information had not been disclosed. Under these circumstances, all purchasers  
20 and/or holders of Bank of America stock during the Class Period, including Plaintiffs, relied on  
21 the market price of Bank of America and Merrill Lynch and suffered similar injury through their  
22 acquisition or holding of Bank of America stock and voting to acquire Merrill Lynch.

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VII.

**CAUSES OF ACTION**

**FIRST CAUSE OF ACTION**

**VIOLATION OF SECTION 14 OF THE EXCHANGE ACT**

**(Against All Defendants)**

110. Plaintiffs repeat and reallege every allegation in the paragraphs above, except those sounding in fraud, or alleging knowing or reckless misconduct. Plaintiffs disclaim any reference to or reliance upon allegations of fraud in these non-fraud claims.

111. The Defendants named herein solicited proxies from the members of the Class by means of the Proxy Statement, and all materials incorporated therein by reference, that contained material misrepresentations and omitted to disclose material facts necessary in order to make the statements therein, and incorporated therein, not false or misleading.

112. As a result, the members of the Class were denied the opportunity to make an informed decision in voting on the Merger. As the Merger is now complete, Plaintiffs and the members of the Class are unable to escape financial injury resulting from their uninformed approval of the proposed Merger and the dilution and decline in value of Bank of America stock that resulted therefrom.

113. Class members have suffered and will suffer significant financial damages as a result of the materially false and misleading Proxy Statement and the omissions from that Proxy Statement.

**SECOND CAUSE OF ACTION**

**VIOLATION OF SECTION 10(b) OF THE EXCHANGE ACT**

**(Against Defendants Bank of America and Lewis)**

114. Plaintiffs hereby incorporate by reference all of the allegations set forth above as though fully set forth hereafter.

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1           115. During the Class Period, Defendants Bank of America and Lewis carried out a  
2 plan, scheme and course of conduct which was intended to and, throughout the Class Period, did  
3 deceive the investing public, including the Class members, as alleged herein and caused members  
4 of the Class to acquire Bank of America securities at inflated prices.

5           116. Defendants: (i) employed devices, schemes, and artifices to defraud; (ii) made  
6 untrue statements of material fact and/or omitted to state material facts necessary to make the  
7 statements not misleading; and (iii) engaged in acts, practices, and a course of business which  
8 operated as a fraud and deceit upon the members of the Class, in an effort to artificially inflate  
9 the purported financial health and value of a Bank of America and Merrill Lynch combination, in  
10 violation of Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder.  
11 Defendants are sued as primary participants in the wrongful and illegal conduct and scheme  
12 charged herein.

13           117. Defendants, individually and in concert, directly and indirectly, by the use, means  
14 or instrumentalities of interstate commerce and/or of the mails, engaged and participated in a  
15 continuous course of conduct to conceal adverse material information about the financial health  
16 and viability of Bank of America and Merrill Lynch, both as separate companies and as a  
17 combined company, as specified herein.

18           118. Defendants employed devices, schemes and artifices to defraud and a course of  
19 conduct and scheme as alleged herein to improperly manipulate and profit and thereby engaged  
20 in transactions, practices and a course of business which operated as a fraud and deceit upon  
21 members of the Class.

22           119. Defendants had actual knowledge of the misrepresentations and omissions of  
23 material facts set forth herein, or acted with reckless disregard for the truth in that they failed to  
24 ascertain and to disclose such facts, even though such facts were available to them. Defendants'  
25 material misrepresentations and/or omissions were done knowingly or recklessly and for the  
26 purpose and effect of concealing the truth.

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125. Defendant Lewis by virtue of his stock ownership, high-level position and participation in and/or awareness of Bank of America's operations, had the power to influence and control and did influence and control, directly or indirectly, the decision-making of Bank of America, including the content and dissemination of the various statements that Plaintiffs contend are false and misleading. Lewis was provided with or had unlimited access to copies of the reports, press releases, public filings and other statements of Bank of America that are alleged by Plaintiffs to be misleading prior to and/or shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause the statements to be corrected.

126. As set forth above, Lewis violated Section 10(b) and Rule 10b-5 by his acts and omissions as alleged in this Complaint. By virtue of his positions as controlling persons. He is liable pursuant to Section 20(a) of the Exchange Act. As a direct and proximate result of Defendants' wrongful conduct, members of the Class suffered damages in connection with the losses suffered when the value of their shares fell after the truth became known, representing the causal connection between Defendants' fraud and the damages suffered by the Class.

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**PRAYER FOR RELIEF**

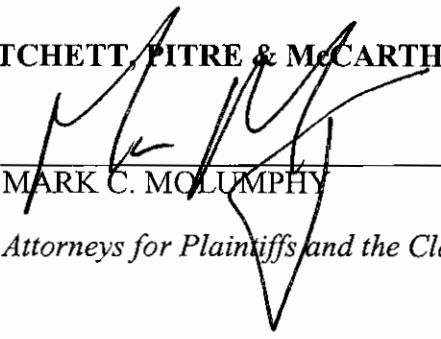
WHEREFORE, Plaintiffs, on behalf of themselves and the Class, prays for judgment as follows:

1. Declaring this action to be a proper class action pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure on behalf of the Class defined herein;
2. Awarding Plaintiffs and all members of the Class damages against the Defendants, jointly and severally, in an amount to be proven at trial;
3. Awarding Plaintiffs and members of the Class appropriate equitable relief;
4. Awarding Plaintiffs and members of the Class pre-judgment interest, as well as reasonable attorneys' fees and other costs;
5. Awarding such other relief as this Court may deem just and proper.

**JURY TRIAL DEMAND**

Plaintiffs, pursuant to Federal Rule of Civil Procedure 38, individually and on behalf of all others similarly situated, demand a trial by jury of all issues which are subject to adjudication by a trier of fact.

Dated: February 6, 2009

**COTCHETT, PITRE & McCARTHY**  
By:   
MARK C. MOLUMPBY  
*Attorneys for Plaintiffs and the Class*

1 PLAINTIFFS' CERTIFICATE

2 The undersigned ("Plaintiffs") declare, as to the claims asserted under the federal securities  
3 laws, that:

4 1. Plaintiffs have reviewed the complaint against Bank of America Corp. (" B of A ") and  
5 certain other defendants.

6 2. Plaintiffs did not acquire the security that is the subject of this action at the direction of  
7 Plaintiffs' counsel or in order to participate in this private action or any other litigation under the  
8 federal securities laws.

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

11 4. Plaintiffs will not accept any payment for serving as a representative party on behalf of  
12 the class beyond the Plaintiffs' pro rata share of any recovery, except such reasonable costs and  
13 expenses (including lost wages) directly relating to the representation of the class as approved by  
14 the court.

15 5. Plaintiffs held 298 common shares of Bank of America as of December 5, 2008, when B  
16 of A shareholders voted on the acquisition of Merrill Lynch, and continue to hold such shares  
17 today. Plaintiffs did not sell Bank of America shares during the Class Period.

18 6. During the three years prior to the date of this Certification, Plaintiffs have not sought to  
19 serve or served as a representative party for a class in an action filed under the federal securities  
20 laws.

21 7. We declare under penalty of perjury that the information above is accurate. Executed  
22 this 5<sup>TH</sup> day of February in <sup>2009</sup> EL DORADO HILLS California.

23   
24 JACQUES CROMIER

25   
26 VIRGINIA CULBERTSON

**EXHIBIT A**

January 26, 2009, 8:45 am

## John Thain Memo: Bank of America Knew Everything

Posted by Heidi N. Moore

Last week, Merrill Lynch chief executive John Thain was relieved of his duties by Bank of America CEO Ken Lewis. In Thain's goodbye memo, he seeks to set the record straight on his expenditures and maintains that Bank of America knew everything about Merrill's \$21.5 billion pre-tax loss. He goes out, in short, with both guns blazing.

Deal Journal brings you the full memo below.

### Memo from John Thain

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.



Getty Images

I want to address several topics that have been inaccurately reported in the press. The first issue is our year end bonus payments. Our 2008 discretionary bonus pool was 41% lower than 2007. The size of the pool, its composition (cash and stock mix), and the timing of the payments for both the cash and stock were all determined together with Bank of America and approved by our Management Development and Compensation Committee and our Board.

The total bonus pool was also substantially less than the amount allowed under our merger agreement.

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. The final topic is the expenses related to my office. The \$1.2 million reported in the press was for the renovation of my office, two conference rooms and a reception area.

The expenses were incurred over a year ago in a very different environment.

Nonetheless, they were a mistake in the light of the world we live in today. I will therefore reimburse the company for all of the costs incurred.

I thank all of you for your hard work and your support over the past year. I wish you all success in the future.

Court: Oneida District Court, 4009  
Division:  
Account Number: 340100000000  
Ledger ID: 000000  
Transaction Date: 02/20/2009  
Payment Method: cash on hand (not for use)

CIVIL FILING FEE  
For: Jacques Cronier  
Case No: 1:08-cv-00004-001  
Amount: \$250.00

REC:  
Check Money Order Num: 42861  
Amt Tended: \$250.00

Total Due: \$250.00  
Total Tended: \$250.00  
Change Amt: \$0.00

ST

Checks and drafts are accepted  
subject to collections. Full  
credit will only be given when the  
check or draft has been collected by  
the financial institution to which  
it was made.