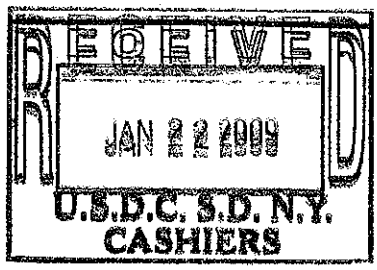
JUDGE DANIELS

09 CIV 00606

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FINGER INTERESTS NUMBER ONE LTD., On Behalf of Itself and All Others Similarly Situated, Plaintiff, - against - BANK OF AMERICA CORPORATION, KENNETH D. LEWIS, JOHN A. THAIN, WILLIAM BARNET, III, FRANK P. BRAMBLE, SR., JOHN T. COLLINS, GARY L. COUNTRYMAN, TOMMY R. FRANKS, CHARLES K. GIFFORD, MONICA C. LOZANO, WALTER E. MASSEY, THOMAS J. MAY, PATRICIA E. MITCHELL, THOMAS M. RYAN, O. TEMPLE SLOAN, JR., ROBERT L. TILLMAN, JACKIE M. WARD, CAROL T. CHRIST, ARMANDO M. CODINA, JUDITH MAYHEW, VIRGIS W. COLBERT, ALBERTO CRIBIORE, AULANA L. PETERS, CHARLES O. ROSSOTTI, JOHN D. FINNEGAN, JOSEPH W. PRUEHER, ANN N. REESE, Defendants.	__ Civ. __ **COMPLAINT FOR VIOLATION OF THE FEDERAL SECURITIES LAWS** **JURY TRIAL DEMANDED**



Plaintiff Finger Interests Number One Ltd., on behalf of itself and all others similarly situated, files this Complaint alleging violations of the federal securities laws by Bank of America Corporation, Kenneth D. Lewis, John A. Thain, and the other individuals named as defendants below. Plaintiff's allegations as to itself and its own actions are based on personal knowledge. All other allegations are based on the investigation made by and through counsel, which included, among other things, a review of the public filings with the Securities and Exchange Commission made by Bank of America and Merrill Lynch, reports and advisories of securities analysts, press releases, media reports, public documents, relevant financial and market data, and discussions with witnesses and consultants.

NATURE OF THE ACTION

1. This action arises out of the stock-for-stock merger transaction between Bank of America Corporation ("BOA") and Merrill Lynch & Co., Inc., ("Merrill"), and the proxy and solicitation materials jointly issued by BOA and Merrill in connection with the required shareholder vote on that merger. The proxy statement and related information provided to shareholders in connection with their vote on the merger by BOA, Merrill, and the Individual Defendants named below was false and misleading in light of material facts concerning Merrill's true financial condition – including the existence of billions of dollars in fourth quarter losses – that defendants unlawfully concealed from shareholders.

2. Plaintiff brings this action for violations of the federal securities laws on behalf of itself and all persons or entities (other than those excluded below) who owned BOA common stock or Series B Preferred Stock in BOA as of October 10, 2008, the record date for voting on the merger, and were eligible to vote on the merger (the "Class Period").

THE PARTIES

3. Plaintiff Finger Interests Number One, Ltd. ("Plaintiff" or "Finger Interests") is a limited partnership organized under the laws of the State of Texas. The general partner and all of the limited partners of Finger Interests are residents of the State of Texas. Finger Interests owns 1,064,711 shares of Bank of America common stock. Finger Interests owned these shares throughout the Class Period, as detailed in the attached certification, and has suffered damages as a result of the violations of the federal securities laws alleged herein.

4. Defendant Bank of America Corporation ("BOA") is a Delaware corporation, a bank holding company, and a financial holding company under U.S. federal law. BOA maintains its principal executive offices at 100 N. Tryon Street, Charlotte, North Carolina 28255.

Bank of America common stock trades on the New York Stock Exchange under the symbol "BAC."

5. Defendant Kenneth D. Lewis ("Lewis") is, and at all relevant times was, the Chairman, Chief Executive Officer, and President of BOA. Lewis signed the Proxy Statement dated October 31, 2008 on BOA's behalf and was responsible for the accuracy of the information contained in the Proxy.

6. Defendant John A. Thain ("Thain") was the Chairman and Chief Executive Officer of Merrill Lynch & Co., Inc., ("Merrill Lynch") until closing of the merger with BOA, in January 2009, when he became BOA's President of Global Banking, Securities, and Wealth Management. Thain signed the Proxy Statement dated October 31, 2008 on Merrill Lynch's behalf and was responsible for the accuracy of the information contained in the Proxy.

7. Defendant William Barnet, III ("Barnet") is, and at all relevant times was, a member of BOA's Board of Directors.

8. Defendant Frank P. Bramble, Sr. ("Bramble") is, and at all relevant times was, a member of BOA's Board of Directors.

9. Defendant John T. Collins ("Collins") is, and at all relevant times was, a member of BOA's Board of Directors.

10. Defendant Gary L. Countryman ("Countryman") is, and at all relevant times was, a member of BOA's Board of Directors.

11. Defendant Tommy R. Franks ("Franks") is, and at all relevant times was, a member of BOA's Board of Directors.

12. Defendant Charles K. Gifford ("Gifford") is, and at all relevant times was, a member of BOA's Board of Directors.

13. Defendant Monica C. Lozano ("Lozano") is, and at all relevant times was, a member of BOA's Board of Directors.

14. Defendant Walter E. Massey ("Massey") is, and at all relevant times was, a member of BOA's Board of Directors.

15. Defendant Thomas J. May ("May") is, and at all relevant times was, a member of BOA's Board of Directors.

16. Defendant Patricia E. Mitchell ("Mitchell") is, and at all relevant times was, a member of BOA's Board of Directors.

17. Defendant Thomas M. Ryan ("Ryan") is, and at all relevant times was, a member of BOA's Board of Directors.

18. Defendant O. Temple Sloan, Jr. ("Sloan") is, and at all relevant times was, a member of BOA's Board of Directors.

19. Defendant Robert L. Tillman ("Tillman") is, and at all relevant times was, a member of BOA's Board of Directors.

20. Defendant Jackie M. Ward ("Ward") is, and at all relevant times was, a member of BOA's Board of Directors.

21. Defendant Carol T. Christ ("Christ") was at all relevant times a member of Merrill Lynch's Board of Directors.

22. Defendant Armando M. Codina ("Codina") was at all relevant times a member of Merrill Lynch's Board of Directors.

23. Defendant Judith Mayhew ("Mayhew") was at all relevant times a member of Merrill Lynch's Board of Directors.

24. Defendant Virgis W. Colbert ("Colbert") was at all relevant times a member of Merrill Lynch's Board of Directors.

25. Defendant Alberto Cribiore ("Cribiore") was at all relevant times a member of Merrill Lynch's Board of Directors.

26. Defendant Aulana L. Peters ("Peters") was at all relevant times a member of Merrill Lynch's Board of Directors.

27. Defendant Charles O. Rossotti ("Rossotti") was at all relevant times a member of Merrill Lynch's Board of Directors.

28. Defendant John D. Finnegan ("Finnegan") was at all relevant times a member of Merrill Lynch's Board of Directors.

29. Defendant Joseph W. Prueher ("Prueher") was at all relevant times a member of Merrill Lynch's Board of Directors.

30. Defendant Ann N. Reese ("Reese") was at all relevant times a member of Merrill Lynch's Board of Directors.

31. The defendants named in paragraphs 5-30 are collectively referred to in this Complaint as the "Individual Defendants."

JURISDICTION AND VENUE

32. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337, and Section 27 of the Exchange Act, 15 U.S.C. § 78aa.

33. Venue is proper in the Southern District of New York pursuant to 28 U.S.C. § 1391(b) and (c), because a substantial part of the events or omissions giving rise to the claims asserted occurred in this district, and because defendants reside in this district.

34. In connection with the acts, omissions, transactions, and conduct alleged in this Complaint, defendants used the means and instrumentalities of interstate commerce, including but not limited to the mails, interstate telephone communications, and the facilities of a national securities market.

FACTS

35. On September 15, 2008, BOA and Merrill Lynch announced that they had reached agreement on a merger. The agreement was reached hurriedly over a weekend with a very limited opportunity for BOA to conduct any due diligence on the assets, liabilities, and business of Merrill Lynch. This was the same weekend that Lehman Brothers failed. BOA's agreement to purchase Merrill Lynch was widely viewed as saving Merrill Lynch from the same fate suffered by Lehman Brothers.

36. The proposed merger was a stock-for-stock transaction valued at $50 billion, or $29 per share of Merrill Lynch stock, pursuant to which Merrill Lynch's stockholders would receive 0.8595 shares of BOA stock for each Merrill share. This price represented an approximately 70% premium to the closing price of Merrill's common stock on the last trading day before the merger agreement was executed. In connection with the merger, BOA committed to issue approximately 1.710 billion shares of additional common stock and 359,100 shares of preferred stock.

37. Based on market capitalization on the last trading day before the merger agreement was executed, the cost of the Merrill acquisition was 27.4% of BOA's market capitalization. Given its size, the outcome of the Merrill acquisition would have a significant impact on BOA's common stock for years to come.

38. The merger was contingent upon shareholder approval. A shareholder's meeting of both companies was set for December 5, 2008 to consider the merger.

39. On November 3, 2008, BOA and Merrill jointly issued a Proxy Statement to their respective shareholders describing the terms of the proposed merger and merger-related transactions. The Proxy Statement was dated October 31, 2008.

40. Merrill filed its Form 10-Q for the period ending September 30, 2008 on November 5, 2008, just five days after the date of the Proxy Statement. During the third quarter of 2008, Merrill reported that it lost approximately $7.4 billion.

41. The Proxy Statement contained recommendations from the BOA and Merrill boards of directors. Both boards unanimously recommended that their respective shareholders vote in favor of the proposals necessary to carry out the merger.

42. The Proxy Statement contained combined historical balance sheet information for BOA and Merrill Lynch as of June 2008.

43. The Proxy Statement also incorporated and discussed two financial opinions dated September 14, 2008 issued by BOA's financial advisory firms, J.C. Flowers & Co., LLC and Fox-Pitton Kelton Cochran Caronia Waller (USA) LLC, each of which opined that the exchange ratio was fair from a financial point of view to BOA's shareholders. Similarly, the Proxy Statement incorporated and discussed the financial opinion dated September 14, 2008 of Merrill's financial advisory firm, Merrill Lynch, Piercer, Fenner & Smith Incorporated, that the exchange ratio was fair from a financial point of view to Merrill's stockholders.

44. On November 12, 2008, BOA issued a Form 8-K with combined historical balance sheet information and income statement for BOA and Merrill as of September 26, 2008. BOA did not reissue the Proxy Statement.

45. The Proxy Statement was updated on November 21, 2008 to provide certain disclosures with respect to, among other things, litigation in Delaware challenging the merger.

46. A special meeting of BOA's shareholders was held on December 5, 2008, to consider and vote on the proposed merger with Merrill. BOA's shareholders voted to approve the merger. Merrill's shareholders voted for the merger the same day.

47. Unbeknownst to BOA's shareholders, Merrill Lynch had suffered significant unreported losses during November 2008.

48. As reported in *The Wall Street Journal*, just three days after shareholders voted to approve the merger, on December 8, 2008, Merrill's CEO John Thain addressed a meeting of Merrill's Board of Directors. Thain reported that Merrill suffered significant losses in November, which Thain described as one of the worst months in Wall Street history. Despite the size of these losses, Thain told Merrill's Board the losses were *in line with BOA's estimates.* Neither BOA nor Merrill, nor any of the Individual Defendants, ever disclosed any such estimates (or other information about the expected Merrill losses) to their shareholders in the Proxy Statement. Likewise, no loss estimates were disclosed in any subsequent filings.

49. On December 17, 2008 – only 12 days after shareholders voted to approve the merger – BOA's CEO Kenneth Lewis met in Washington, D.C., with Federal Reserve Chairman Benjamin Bernanke and Treasury Secretary Henry Paulson. By this point, Lewis was so concerned about the extent of Merrill's losses that he threatened to terminate the merger and invoke BOA's rights under the "Material Adverse Change" provisions of the merger agreement. Lewis also considered trying to renegotiate the merger price to reflect Merrill's losses. Instead of renegotiating or terminating the merger in order to protect BOA's shareholders, Lewis stated

publically that, in completing the merger, "we did think we were doing the right thing for the country."

50. Ultimately, Lewis told the government during this December 17, 2008 meeting that, as a result of Merrill's losses, BOA needed additional government assistance to ensure the merger would survive, despite the fact that this was not in the best interests of BOA shareholders. The government later agreed to provide BOA with $20 billion in further capital injections, and to provide approximately $118 billion in guarantees for bad debt. The government capital injections are senior to the common stockholders in their ranking in BOA's capital structure, and therefore have subordinated the interests of BOA's common stockholders.

51. Despite reporting these very substantial Merrill losses to the government, BOA did not update its Proxy Statement or otherwise disclose these material Merrill losses to its shareholders before they voted on the merger. Nor did BOA disclose these Merrill losses to its shareholders after the vote but before the merger closed on January 1, 2009.

52. BOA issued a press release on January 1, 2009, announcing the closing of the merger. No public disclosure was made about the Merrill losses.

53. It was not until January 16, 2009, when BOA announced its fourth quarter earnings, that shareholders began to learn the truth about Merrill. BOA announced that it took its first quarterly loss in 17 years and disclosed to shareholders that Merrill's fourth quarter loss was a staggering $15.5 billion.

54. For the first three quarters of 2008, Merrill lost approximately $14 billion; BOA's disclosure on January 16, 2009 was that Merrill lost an additional $15.5 billion during the fourth quarter alone.

55. Defendants knew or in the exercise of reasonable care should have known about the existence of these massive Merrill losses at least by December 5, 2008, if not before. As quoted by *The Wall Street Journal*, BOA claims that "Beginning in the second week of December, and progressively over the remainder of the month, market conditions deteriorated substantially relative to market conditions prior to the December 5 shareholder meeting." Yet general market conditions, and the mark-to-market nature of these losses, do not support this story that the Merrill asset losses somehow materialized in a single week following the shareholder vote. BOA also cannot blame the losses on impairments to a particular asset class, because BOA's supplemental fourth quarter earnings information reflects that the Merrill losses were spread across a variety of asset classes. Plus, BOA has not identified any particular asset class that decreased in value so substantially between the shareholder vote and the following two weeks when BOA acknowledges it knew about the losses.

56. The amount of Merrill's fourth quarter losses would have been material to BOA shareholders in voting on the proposed merger and to the exchange ratio governing the BOA/Merrill stock-for-stock transaction.

57. Since the revelation of these Merrill losses, BOA's market capitalization has dropped more than 45%, eliminating an amount greater than the value of the BOA/Merrill merger transaction itself.

58. Had defendants even disclosed the losses in mid to late December, BOA shareholders could have taken legal action to stop the merger at that point.

CLASS ACTION ALLEGATIONS

59. Plaintiff brings this action pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure on behalf of itself and a Class consisting of all persons and entities

(other than those excluded in ¶ 60 below) who owned BOA common stock or Series B Preferred Stock in BOA as of October 10, 2008, the record date for voting on the merger, and were eligible to vote on the merger (the "Class Period").

60. Excluded from the Class are the defendants, members of their immediate families, any officers and directors of BOA and Merrill not named as a defendant, any entity in which any excluded person has a controlling interest, and the legal representatives, heirs, successors, and assigns of any excluded person.

61. This action is properly maintainable as a class action. The Class is so numerous that joinder of all members is impracticable. BOA's common stock was traded on the New York Stock Exchange, which is an efficient market. While the exact number of Class members is unknown to plaintiff at this time and can be ascertained only though appropriate discovery, plaintiff believes that Class members number in at least the thousands.

62. There are questions of law and fact common to all members of the Class. These common questions of law and fact predominate over questions that affect only individual Class members and include, but are not limited to, the following:

a. Whether defendants' acts and omissions as alleged violated the federal securities laws;

b. Whether defendants omitted material information from, or made materially false statements in, the filings, documents, and reports issued in connection with the merger, including the Proxy Statement;

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

63. Plaintiff's claims are typical of those of all members of the Class because all members of the Class have been similarly affected by defendants' actionable conduct in violation of the federal securities laws, and the damages sustained by all members of the Class arise from the same actionable conduct by defendants.

64. Plaintiff is an adequate representative of the Class, and will fairly and adequately protect the interests of the Class. Plaintiff's interests do not conflict with, and are not antagonistic to, the Class that plaintiff seeks to represent. Plaintiff is committed to the vigorous prosecution of this action and has retained competent counsel with substantial experience in securities and class action litigation.

65. A class action is superior to other available methods for the fair and efficient adjudication of the claims asserted in this Complaint because joinder of all members is impracticable given their number and their geographical diversity. Further, because the damages suffered by individual members of the Class may be relatively small, the expense and burden of individual litigation make it impracticable for Class members individually to seek redress for the wrongs done to them.

66. Plaintiff does not anticipate difficulty in the management of this litigation as a class action.

67. Notice can be provided to Class members through a combination of published notice and first class mail using techniques and a form of notice similar to those customarily used in federal securities class actions.

FIRST CLAIM FOR RELIEF

(Violations of Section 14(a) of the Exchange Act and SEC Rule 14(a)-9(a) Against All Defendants)

68. Plaintiff repeats and incorporates by reference each allegation made above.

69. This claim for relief is brought pursuant to Section 14(a) of the Exchange Act, 15 U.S.C. § 78n(a), and Rule 14a-9(a) promulgated thereunder.

70. The Proxy Statement dated October 31, 2008 jointly issued by BOA and Merrill Lynch and the supplemental filings and disseminations made by defendants in connection with that Proxy Statement were false and materially misleading as of at least December 5, 2008, in light of the true financial condition of Merrill, and the combined BOA/Merrill, including in particular the existence of the substantial Merrill losses disclosed by BOA on January 16, 2009. Defendants knew or in the exercise of reasonable care should have known the truth about Merrill's financial condition and these losses by at least December 5, 2008, but defendants failed to disclose such information (by supplementing the Proxy Statement or otherwise) before the shareholder vote.

71. These omissions were material because there is a substantial likelihood that a reasonable shareholder would have considered the concealed information important in deciding how to vote on the merger, and because there is a substantial likelihood a reasonable investor would have viewed full and accurate disclosure as having significantly altered the "total mix" of information made available in the Proxy Statement and in other information reasonably available to shareholders in connection with the proposed merger.

72. But for the material omissions and false and inaccurate statements made in the Proxy Statement, BOA's shareholders would not have approved the merger or would not have approved the merger on the exchange ratio proposed.

73. As a direct and proximate result of defendants' wrongful conduct, Plaintiff and other members of the Class suffered damages.

SECOND CLAIM FOR RELIEF

(Violations of Section 14(a) of the Exchange Act and SEC Rule 14(a)-9(a) Against All Defendants)

74. Plaintiff repeats and incorporates each allegation made above.

75. Alternatively, Plaintiff alleges that to the extent defendants did not know, or cannot reasonably have been expected to know, of the Merrill losses described above by December 5, 2008, defendants nevertheless are liable for violations of Section 14(a) of the Exchange Act and SEC Rule 14(a)-9(a). BOA has publically admitted that it knew about the Merrill losses by mid-December 2008, before the effective date of the merger. Yet BOA did not disclose such losses until January 16, 2009, more than two weeks after the merger closed.

76. By failing timely to disclose this material information, defendants improperly prevented plaintiff and other members of the Class from exercising their rights to seek to rescind or have declared void the shareholder vote or otherwise seek to prevent the merger from closing.

77. Accordingly, as a direct and proximate result defendants' wrongful conduct, plaintiff and other members of the Class suffered damages.

THIRD CLAIM FOR RELIEF

(Violations of Section 20(a) of the Exchange Act Against The Individual Defendants)

78. Plaintiff repeats and incorporates each allegation made above.

79. This claim for relief is brought pursuant to § 20 of the Exchange Act, 15 U.S.C. § 78t, against each of the Individual Defendants.

80. Each of the Individual Defendants was a controlling person of BOA or Merrill Lynch by virtue his or her high-level positions, management and control, as well as his or her participation in or intimate knowledge of BOA and Merrill's business, internal financial condition, assets, and operations.

81. Each of the Individual Defendants had the power to influence and control, and did influence and control, directly or indirectly, the decision-making of BOA and Merrill, including the content and dissemination of the proxy materials and other merger-related information provided to shareholders in connection with the proposed merger, and the decisions not to make the disclosures giving rise to the securities violations alleged herein.

82. As set forth above, BOA and Merrill violated § 14(a) and Rule 14(a)-9(a) by their acts and omissions as alleged in this Complaint. As a consequence of their positions as controlling persons, the Individual Defendants are liable pursuant to § 20(a) of the Exchange Act for such violations.

83. As a direct and proximate result of the Individual Defendants' wrongful conduct, Plaintiff and other members of the Class suffered damages.

JURY DEMAND

84. Plaintiff demands a trial by jury on all issues so triable.

PRAYER FOR RELIEF

85. Plaintiff respectfully prays for relief and judgment as follows:

a. Determining that this action is a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, and certifying plaintiff as class representative;

b. Awarding plaintiff and the Class damages for the full extent of the loss caused by defendants' actionable conduct, in an amount to be proven at trial;

c. Awarding plaintiff and the Class pre-judgment and post-judgment interest, reasonable attorneys' fees, expert fees, and other costs;

d. Awarding plaintiff and the Class such other relief to which they justly are entitled.

Dated: January 21, 2009

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