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Re: County of York Employees Retirement Plan v.
Merrill Lynch & Co., Inc., et al.
C.A. No. 4066-VCN
Date Submitted: October 17, 2008

Dear Counsel:

Plaintiff County of York Employees Retirement Plan (the "Plaintiff") has brought this putative class action to challenge the proposed merger (the "Merger") of Defendant Merrill Lynch & Co., Inc. ("Merrill") with Defendant Bank of America Corporation ("BAC"). The Plaintiff has moved for expedited discovery

in anticipation of pursuing a preliminary injunction. The Defendants[1] have moved to stay or dismiss this action in favor of an action pending in the United States District Court for the Southern District of New York.[2]

I. BACKGROUND[3]

Merrill and BAC announced their merger agreement on Monday, September 15, 2008. During the preceding week, apparently as the result of deteriorating market conditions and the credit crisis, including concerns about subprime mortgage-related assets, the price of Merrill's stock had fallen by 36%. At the same time, there was also speculation that Lehman Brothers would (and it subsequently did) collapse; there were fears that other prominent financial institutions would come under great stress. The Merger is a stock-for-stock

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[1] The directors of Merrill are also defendants.

[2] That action is styled as *In re Merrill Lynch & Co., Inc. Securities, Derivative and ERSA Litigation*, Master File No. 07cv9633 (the "Federal Derivative Action"). In addition, at least four complaints alleging breaches of fiduciary duty relating to the Merrill-BAC proposed merger have been filed in the Supreme Court of the State of New York. *See Miller v. Merrill Lynch & Co., Inc., et al.*, Index No. 08/602669 (Sup. Ct. N.Y. County Sept. 15, 2008); *Diamond v. Thain, et al.*, Index No. 08/650341 (Sup. Ct. N.Y. County Sept. 15, 2008); *Pfeiffer v. Thain, et al.*, Index No. 08/650342 (Sup. Ct. N.Y. County Sept. 15, 2008); *Ulisse v. Merrill Lynch & Co, Inc., et al.*, Index No. 08/602810 (Sup. Ct. N.Y. County Sept. 29, 2008). Merrill has also moved to stay these other actions.

[3] The background to the pending motions is drawn primarily from the Verified Amended Class Action Complaint (the "Complaint") filed in this Court and the S-4, or preliminary proxy statement, (Affidavit of Jenness E. Parker ("Parker Aff."), Ex. 10).

transaction pursuant to which Merrill's stockholders would receive 0.8595 shares of BAC stock for each of their shares. The closing price for Merrill's stock on the last trading day before announcement of the Merger was $17.05 per share. At the same time, each share of Merrill, when measured by the conversion rate into BAC shares, would have been valued at $29 per share. The equivalent market value of those shares, with the subsequent and continuing deterioration in the financial markets, has fallen. In substance, if the transaction is consummated, the Merrill shareholders will end up with roughly 25% of the combined company. Regulatory approvals and stockholder vote of both companies remain necessary. A preliminary proxy was filed with the Securities and Exchange Commission on October 1, 2008; an amended preliminary proxy was filed October 22, 2008. No stockholder meeting has yet been scheduled.

The Plaintiff asserts that the merger agreement was reached because directors of Merrill failed to satisfy their fiduciary duties. In addition, the Plaintiff challenges the adequacy of the disclosures set forth in the preliminary proxy. As for its substantive challenge to the Merger, the Plaintiff alleges that the directors hastily negotiated and agreed to the merger agreement over a weekend without adequately informing themselves as to the true value of Merrill or of the feasibility

of securing an alternative transaction.[4] The Plaintiff accuses the directors of failing to conduct proper due diligence, including the failure to perform a pre-agreement market check. Self-dealing claims are also asserted. In particular, the Plaintiff alleges that Defendant John A. Thain, Chairman of Merrill's Board of Directors, has already negotiated a lucrative post-merger position with BAC and points out that the directors will receive change-of-control payments and accelerated long-term benefits. In addition, the Plaintiff challenges the fairness of the consideration; it attacks various terms of the merger agreement, including a provision requiring the directors of Merrill to submit the proposed merger to a shareholder vote even if a superior offer emerges and/or the directors withdraw their support, a so-called "force-the-vote" provision; it criticizes the grant to BAC of an option to purchase 19.9% of Merrill's outstanding shares at a price of $17.09 in the event the Merger is not approved by the shareholders, although the savings that BAC can achieve through this provision is limited to $2 billion, or roughly 4% of the transaction's value.

[4] Compl. ¶ 2.

Among the disclosure claims—all based on allegations of omissions of material information, and not on any assertion of misrepresentation—asserted by the Plaintiff are: its contention that the events leading up to the Merger and causing Merrill's directors to act as they did were not adequately developed; its argument that sufficient information regarding the selection, compensation, and methodology of a Merrill subsidiary as its financial advisor, was not disclosed; and its assertion that disclosures regarding Merrill's chairman's simultaneous negotiation of continuing employment with BAC were not provided.

II. THE MOTION TO STAY OR DISMISS

The Defendants have sought a stay of this action in favor of the Federal Derivative Action, which was filed almost a year ago. Until a recent amendment of its complaint prompted by the Merger, that action was a complex amalgam of claims under the federal securities laws, claims under the Employee Retirement Income Security Act ("ERISA"), and derivative claims that Merrill's directors had breached their fiduciary duties arising out of Delaware law—all with regard to Merrill's underwriting of, and investing in, collateralized debt obligations secured by under-collateralized subprime mortgages. In short, the directors are alleged to have failed in their efforts to monitor and to manage the firm's risk exposure.

Under the *McWane* analysis, a court, in the exercise of its discretion, may stay an action "when there is a prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same parties and the same issues."[5] If the foreign action is not "first-filed," the Court will pursue an inquiry "akin to a *forum non conveniens* analysis."[6] The complaint in the Federal Derivative Action was amended to include claims specific to the Merger three days before this action was filed. The Federal Derivative Action, however, had been commenced roughly eleven months earlier. If the amended complaint in the Federal Derivative Complaint can be said to "relate back" to the initial filing of that action, then that action would be treated as a "first-filed" action for purposes of a *McWane* analysis. If, on the other hand, it does not "relate back," then both this action and the Federal Derivative Action, with its amended complaint, would be treated as simultaneously-filed because a three-day difference is generally not viewed as sufficient to confer first-filed status.[7] The Court, thus, turns to the question of whether the Federal Derivative Action, with its amended complaint

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[5] *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 284 (Del. 1970).
[6] *Biondi v. Scrushy*, 820 A.2d 1140, 1159 (Del. Ch. 2003).
[7] *See Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409, at *1-5 (Del. Ch. July 14, 2008); *Texas Instruments, Inc. v. Cyrix Corp.*, 1994 WL 96983, at *3-4 (Del. Ch. Mar. 22, 1994).

raising certain challenges to the Merger, should be treated as first-filed.[8] The answer to that inquiry turns on whether the issues in the Federal Derivative Action before the recent post-Merger amendment of the complaint there can fairly be said to be the same (or substantially the same) as the issues framed in this proceeding.

A. *First-Filed*

Actions filed close in time to each other are considered simultaneously filed in order to avoid encouraging a "race to the courthouse."[9] Here the Merger claims were added to the Federal Derivative Action only three days before the filing of this action and should be considered simultaneously filed unless they are sufficiently related to the ongoing federal litigation to justify relying upon the 2007 initial filing date of that action. They are not.

To invoke the first-filed rule courts generally require substantial overlap between the cases.[10] The same reasoning applies to the question of whether a later added claim relates back to the filing of the action for purposes of first to file

[8] The question of whether the Federal Derivative Action should be accorded first-filed status, of course, is crucial. The federal court in New York is absolutely able to provide prompt and complete justice. The only remaining question would be consideration of the significance to be given to the absence of any disclosure claims in the amended complaint in that forum.
[9] *Texas Instruments, Inc.*, 1994 WL 96983, at *3-4.
[10] *See, e.g.*, *Save Power Ltd. v. Syntek Finance Corp.*, 121 F.3d 947, 950 (5th Cir. 1997).

priority.[11] The Defendants are accused in the Federal Derivative Action of responsibility for the losses Merrill suffered as a result of the sub-prime mortgage events and of failing to make appropriate disclosures of those difficulties. Here, the Defendants are called upon to defend breach of fiduciary claims arising out of the Merger. Although those losses may have necessitated a combination with another firm, they cannot be said to present the same (or substantially the same) issues for the purposes of *McWane*'s "same issue" analysis. The motivation for the Merger only provides context for assessing the actions of Merrill's board. Whose fault it was and whether blame can be fairly assessed for the improvident financial commitments are separate and distinct questions from whether the merger process was appropriate and the disclosures adequate. The Merger claims cannot be characterized as a continuation of the claims initially asserted in the Federal Derivative Action. In short, the issues arising out of the Merger and the events of almost a year ago do not share a "[s]ubstantial or functional identity."[12] Thus, it cannot be said that this action and the Federal Derivative Action, as originally

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[11] *See United Phosphorous, Ltd. v. Micro-Flo, LLC*, 808 A.2d 761, 765 (Del. 2002) (focusing on a "continuation of viable claims").

[12] *See AT&T Corp. v. Prime Sec. Distrib., Inc.*, 1996 WL at 633300, at *2 (Del. Ch. Oct. 24, 1996).

filed, substantially overlap and, thereby allow the filing of the federal action to relate back to the initial 2007 filing date.[13] In sum, both actions must be treated as simultaneously filed for these purposes.[14]

B. Forum Non Conveniens *Analysis*

Because the Federal Derivative Action may not be treated as "first-filed" under *McWane*, the Court turns to the *forum non conveniens* analysis which requires consideration and balancing of the following factors:

1. The applicability of Delaware law in the action;
2. The relative ease of access to proof;
3. The availability of compulsory process for witnesses;
4. The pendency or nonpendency of any similar actions in other jurisdictions;
5. The possibility of a need to view the premises; and

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[13] In addition, no disclosure claims have been asserted in the Federal Derivative Action. Thus, while the substantive claims may, with the Federal Derivative Action's amended complaint, overlap with the substantive claims here, there is no overlap with respect to the disclosure claims. The Defendants' argument that disclosure claims might be asserted there answers itself. They have not been asserted and, thus, as to this significant aspect of this litigation, there is no competition.

[14] *Berdell, Inc. v. Berman Real Estate Mgmt., Inc.*, 1995 WL 632030, at *3 (Del. Ch. Oct. 19, 1995), is instructive. There, a Pennsylvania action, was first-filed chronologically. A Delaware action was subsequently filed and thereafter the Pennsylvania complaint was amended to include the Delaware claims. The Delaware action, however, was accorded first-filed status as to the claims first set forth initially in Delaware. The significance is that an amendment adding distinct claims to an earlier filed action does not necessarily confer first-filed status for *McWane* purposes on that action which, from a mere reading of the calendar, was the first-filed.

6. All other practical considerations which would serve to make the trial easy, expeditious and inexpensive.[15]

First, Delaware law governs this action. Although it is well-established that a director's exercise of fiduciary duty is measured in the context of the challenged action, there is limited case law assessing the discharge of those duties in such bleak economic circumstances. In short, this case may not raise "novel" questions of Delaware law, but it does implicate important issues of Delaware corporate governance law in light of the current market conditions.[16] Second, access to proof may be marginally easier in New York, where the events largely transpired and Merrill has its corporate offices. Those circumstances are frequently handled with ease, and, therefore, this factor is entitled to little weight. Third, and similarly, although New York's direct process would make the gathering of evidence marginally more convenient, the process of issuing commissions to take discovery in another state is efficient, effective, and routinely accomplished. Fourth, the pendency of other actions in New York—both the Federal Derivative Action and

[15] *Bear Stearns Cos., Inc. S'holder Litig.*, 2008 WL 95992, at *5 (Del. Ch. Apr. 9, 2008); *see Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681 (Del. 1964). A view of the premises is, of course, not pertinent to this proceeding.

[16] To reiterate, both the federal court and the state court in New York are quite capable of interpreting and applying Delaware law to the claims asserted by the Plaintiff.

the recent state filings—has generally been addressed earlier in this letter opinion. The disclosure claims brought by the Plaintiff are specific to this action; the substantive challenges have only been raised in the pleadings, without any progress having been achieved toward their resolution; both disclosure aspects and substantive aspects involving the Merger have been squarely raised in this venue. Thus, this factor tends to favor Delaware. Finally, there is the catch-all factor animating the Court's discretion to consider "all other practical considerations which would serve to make the trial easy, expeditious, and inexpensive." There is nothing about adjudicating the claims raised by the Plaintiff that suggests that there is any material difference between litigating the dispute here and in New York.

Although some of the factors may tip in favor of New York and some of the factors may tip in favor of this venue, the balance tends slightly to favor Delaware because Delaware law governs and a full panoply of claims directly challenging the Merger, both substantive and disclosure, have been brought in this venue. The Defendants cannot be expected to encounter "hardship or inconvenience" if they are to litigate in Delaware. In short, nothing in the *forum non conveniens* analysis offers any persuasive reason for rejecting the Plaintiff's choice of forum for the

bringing of its claims.[17] These circumstances certainly do not justify deviating from the practical assessment that "motions to stay litigation on grounds of *forum non conveniens* are rarely granted because Delaware courts generally uphold a claimant's choice of forum."[18]

In addition, the Defendants have also pointed to *Topps*[19] and what they characterize as the unseemly tension between the two potential venues.[20] They assert that a clash of jurisdictions is inevitable in this case as well. The difference, at least at this point, is a simple one: no other court has been confronted with a broad-based challenge to the Merger, *i.e.*, both as a matter of disclosure and as a matter of substantive law, and been presented with a motion to expedite the proceedings.

Finally, the Defendants analogize these circumstances to those presented in *Bear Stearns*. Although superficially similar, this case is materially different. *Bear Stearns* presented factual circumstances that were, in the words of its author,

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[17] In light of this analysis, there is no reason to join in the debate as to whether the party seeking to prevail on *forum non conveniens* grounds must show "overwhelming hardship" or merely persuade the Court that a balance of the factors tips in its favor. *See, e.g.*, *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 4516645, at *2 n.8 (Del. Ch. Oct. 8, 2008).
[18] *Id. See also United Phosphorous*, 808 A.2d at 763.
[19] *In re Topps Co. S'holders Litig.*, 924 A.2d 951, 954 (Del. Ch. 2007).
[20] Tr. of Oral Arg. (Oct. 17, 2008) at 18 (not "the finest hour for those two court systems").

"*sui generis*"[21]—factual circumstances that ultimately tipped the balance in favor of staying the Delaware action and permitting the parties to litigate in New York State court. For example, Bear Stearns, due to liquidity issues arising out of the sub-prime mortgage crisis, was on a rapid downward spiral which would have resulted in insolvency had JP Morgan not stepped in and acquired it. The Bear Stearns crisis became a matter of national concern—the United States Department of the Treasury deemed a Bear Stearns insolvency a threat to the stability of the capital markets. Accordingly, The Federal Reserve, along with the support of the Department of the Treasury, stepped in and provided JP Morgan with financial assistance to acquire Bear. Further, the Court noted that the New York State Court action was well under way, while the Delaware action, on the other hand, had not proceeded past the filing of a complaint and a motion for a stay.

These unique facts caused the Court in *Bear Stearns* to stay the action in favor of the New York forum. The Court did so because *forum non conveniens* factors four and six weighed in favor of a stay. Factor four—the pendency or non-pendency of a similar action or actions in another jurisdiction—weighed in favor

[21] *Bear Stearns*, 2008 WL 959992, at *6.

of staying the Delaware action because in the New York action had progressed further than the Delaware action, and on an expedited basis.[22] Moreover, factor six—all other practical considerations that would make the trial easy, expeditions, and inexpensive—also weighed in favor of staying the action because of the heightened harm inconsistent judgments would have caused on, not just the parties, but also the United States taxpayers due to the federal government's intervention.

None of the "*sui generis*" facts in *Bear Stearns* are present here. In fact, factor four weighs more in favor of keeping the litigation in Delaware because, here, it is in this Court where the litigation may proceed on an expedited basis, to consider both the substantive Merger claims as well as the Merger-related disclosure claims.

Accordingly, Defendants' motion to stay or dismiss is denied.

III. THE MOTION TO EXPEDITE DISCOVERY

A. *The Standard*

"This Court does not set matters for an expedited hearing or permit expedited discovery unless there is a showing of good cause why that is

[22] *Id.* at *7. In the Federal Derivative Action, a schedule has been set for the defendants to respond to the amended complaint, and the plaintiffs have served a request for the production of documents.

necessary."[23] To make the necessary showing, a plaintiff must articulate a sufficiently colorable claim and show a sufficient possibility of a threatened irreparable injury to justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding.[24]

B. *Substantive Claims*

Under Delaware law the stock-for-stock merger between Merrill and BAC is not subject to heightened scrutiny.[25] Instead, it will be evaluated subject to the deferential business judgment rule. Our business judgment rule presumes that a board acts with care and loyalty.[26] Only by showing otherwise may the Plaintiff subject a board's decision to a heightened standard of review.

1. Self Interested Claims

The Complaint alleges that the Merrill directors breached their duty of loyalty by engaging in self-dealing and anticipating benefits as a result of the transaction that the shareholders would not receive. The Plaintiff alleges that

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[23] *Greenfield v. Caporella*, 1986 WL 13977, at *2 (Del. Ch. Dec. 3, 1986).
[24] *Giammargo v. Snapple Beverage Corp.*, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994).
[25] *See Arnold v. Soc'y of Sav. Bancorp, Inc.*, 650 A.2d 1270, 1290 (Del. 1994).
[26] *Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000).

Merrill's Chairman will assume a lucrative position as an officer of BAC following the Merger, and that this position was negotiated concurrently with the merger agreement.[27] Further, it alleges "certain" other directors stand to receive both substantial change of control payments and accelerated long-term benefits triggered as a result of the Merger.

"[D]irectors can neither appear on both sides of [a] transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally." However, when an entire board acts and approves a transaction a plaintiff must plead facts showing a majority of the board was motivated by self-interest (or lacked independence). The Plaintiff fails to present a colorable claim as to a majority of the board here. Indeed, the Complaint squarely implicates only the Chairman. The remaining members are implicated only in a conclusory, unsupported fashion and it cannot be said that claims against them are colorable.[28]

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[27] Compl. ¶¶ 2, 29. Also, the Plaintiff alleges that the Chairman was motivated by change-in-control payments that would be made to his friends and colleagues. *Id.* at ¶¶ 26-27.

[28] The Plaintiff has not persuaded the Court that the change-in-control benefits accruing to other directors are sufficiently colorable to question their independence and lack of self-interestedness to warrant an expedited discovery schedule.

2. Duty of Care Claims

Plaintiff next alleges that the proposed agreement was entered into in breach of the board's fiduciary duty of care, claiming that the Defendant directors hastily negotiated and agreed to the Merger over a single weekend without "adequately informing themselves" as to the true value of the Company or the feasibility of securing an alternative transaction.[29] It additionally alleges that the directors failed to conduct the proper due diligence for the transaction as a result of the speed with which it was put together and did not conduct a pre-agreement market check.[30]

At their essence, these claims merely attack the speed with which the Merger was negotiated, drawing the conclusion that the Merrill board could not satisfactorily inform itself sufficient to justify business judgment rule protection over the course of a weekend. It is clear that "no single blueprint" exists to satisfy a director's duty of care.[31] While such speed might be suspicious, it is not dispositive. Defendants justify their haste by claiming the existence of severe time-constraints and an impending crisis absent an immediate transaction.[32] They

[29] Compl. ¶ 2.
[30] *Id.* at ¶ 2.
[31] *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989).
[32] Defs.' Brief in Opp. to Pl.'s Mot. for Expedited Disc. at 12.

argue that in light of these circumstances, the board exercised sufficiently informed judgment to dispose of their duty to make an informed decision. Such pressures may have existed, and our case law supports shaping fiduciary obligations to reflect such a reality.[33] However, the contextual contours of the directors' fiduciary obligations are fact driven; and the Court cannot undertake such a nuanced evaluation by way of an informal scheduling motion.

Motions to expedite require something of an almost superficial factual assessment in order to determine whether imposing the burdens resulting from expedition is warranted. The Court's factual basis is not limited merely to the allegations appearing in the Complaint. In this case, there are two general sets of facts that are likely to be the focus of the Court's analysis, and the Defendants have asked the Court to take judicial notice of both.[34] The first set consists of well-known market conditions, such as the subprime mortgage problems, shortcomings in the credit market, and the corollary liquidity shortfall. The Court is not required to exclude broad, national or even international, economic circumstances from its assessment of the need for expedition in this case. On the other hand, the second

[33] *Citron v. Fairchild Camera and Instrument Corp.*, 1988 WL 53322 (Del. Ch. 1988); *In re RJR Nabisco, Inc. S'holders Litig.*, 1989 WL 7036 (Del. Ch. Jan. 31, 1989).
[34] Tr. of Oral Arg. (Oct. 17, 2008) at 47-50.

set of facts involves information specific to the firm: Merrill's financial condition is said to have caused the directors to act as they did. Media reports and the financial information in the preliminary proxy statement are certainly available to the Court, but the Court's ability to consider those sources for the distinct and specific facts informing its decision—facts not part of a verified, judicial record—is more limited. It may well be—and one suspects that it is likely—that the firm's financial conditions provided cause for the directors to act as they did. In the context of a motion to expedite, however, the Court should not reach out and implicitly, if not explicitly, draw factual conclusions with the consequences that may flow from them. The interests of justice are served when such essential and critical facts are properly developed in a manner recognized and accepted for establishing a factual basis for judicial action. Ultimately, it is for this reason that expedited discovery becomes necessary. It may do little more than confirm what some may view as obvious, but judges need to be cautious about drawing important firm-specific facts (and, perhaps more importantly, interpreting such facts) from unorthodox sources.[35]

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[35] *See infra* note 55.

Thus, the Court may take notice of the state of the markets in early September 2008 along with the share price of Merrill stock during that period.[36] The Court should not, however, take notice of the internal affairs of Merrill that drove the board's decision to sell the Company over the course of a single weekend. The need to consummate the deal within a mater of days, or even hours, was a business judgment, entitled to deference only if informed. The Plaintiff claims this judgment was uninformed. At this stage the Court's task is to access whether the Plaintiff raises a colorable claim; Defendants' argument would have the Court reach the merits.

The Court, thus, concludes that the Plaintiff has presented a colorable claim. To hold otherwise would notice as fact the very essence of Defendants' factual argument, and would allow inference and conjecture to serve as a factual record. This the Court should not do, even though such inference and conjecture might be viewed as reasonable.

[36] D.R.E. 201(b); *In re Lear Corp. S'holder Litig.*, 2008 WL 4053221 (Del. Ch. Sept. 2, 2008) (judicial notice of the state of the markets); *Weiss v. Samsonite Corp.*, 741 A.2d 366, 375 n. 26 (Del. Ch. 1999) (judicial notice of the trading price of a listed stock).

3. Deal Protection Claims

The Plaintiff lastly points to three provisions in the Merrill-BAC merger agreement as demanding scrutiny. First, an equity termination fee, allowing BAC to acquire stock of Merrill at a discount, but capped at $2 billion, constitutes 4% of the total value of the transaction, an amount testing the high-end of the termination fees generally approved.[37] The merger agreement also includes a "force-the-vote" provision; a device expressly authorized by Delaware law and previously approved when used in the merger context.[38] It requires the Merrill board to submit the Merger for shareholder vote even if the directors subsequently withdraw their support for the transaction. Finally, the parties agreed to a "no-talk" provision precluding the Merrill board from seeking other offers post-agreement.[39]

Again, in light of the minimal threshold which the Plaintiff must cross, these claims are colorable. The Defendants argue that each of these provisions has been

[37] *See, e.g.*, *In Re Toys "R" Us, Inc., S'holder Litig.*, 877 A.2d 975 (Del. Ch. 2005) (approving 3.75% fee); *In re MONY Group Inc.*, 852 A.2d 9 (Del. Ch. 2004) (approving 3.3% fee); *McMillan v. Intercargo Corp.*, 768 A.2d 492, 505-06 (Del. Ch. 2000) (3.5% fee); *but see Goodwin v. Live Entm't,* 1999 WL 64265, at *20 (Del. Ch. Jan. 25, 1999) (approving termination fee of 3.125% plus $1 million in expenses for total percentage of 4.167%).

[38] 8 *Del. C.* § 146; s*ee, e.g.*, *Louisiana Municipal Police Employees' Ret. Sys. v. Crawford*, 918 A.2d 1172 (Del. Ch. 2007) (merger with force-the-vote provision not enjoined).

[39] The Plaintiff does not discuss the no-talk provision in the Complaint. It is first addressed in an October 16, 2008, letter from the Plaintiff's counsel to the Court.

approved in other Delaware cases. They are indeed correct. However, deal protection devices must be viewed in the overall context; checking them off in isolation is not the proper methodology. In light of Merrill's choice to eschew a pre-agreement market check, and to conduct a truncated valuation of the Company, these provisions are suspect to an extent, and as such allow the Plaintiff to present colorable claims. It may be that Merrill's factual arguments are correct, and these protections were driven by a justifiable overwhelming urgency to consummate this transaction. Again, however, this requires a finding as to the merits of the allegations instead of a very preliminary assessment of the sufficiency of the allegation. The Court finds the Plaintiff's claims colorable.

4. Irreparable Harm

Before the Court will expedite discovery, it must be satisfied that the plaintiff has not only presented a colorable claim, but also that it will suffer irreparable injury in the absence of expedition.[40] Plaintiff alleges threatened irreparable harm, but only in the most cursory fashion.[41] Irreparable harm is not

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[40] *Giammargo*, 1994 WL 672698.
[41] Pl.'s Mot. for Expedited Disc. at 6.

pled by a mere turn of phrase. A party must plead *facts* suggesting that an award of money damages could not fully and adequately compensate the alleged harms.

Nevertheless, the Court finds a sufficiently pled possibility of irreparable harm here to justify expediting the claims. Whether or not the Plaintiff can demonstrate as much in an injunction hearing is a question for another day. The Defendants would have the Court deny this motion to expedite because money damages are theoretically possible.[42] Damages may be calculable, but the mere theoretical possibility that damages could be awarded does not preclude the Court, as it exercises its equitable discretion and balances the various factors informing its decision, from expediting the proceedings. Where, as here, damages that may be available are difficult to calculate and other uncertainties, such as collectibility exist, a sufficient showing of irreparable harm has been made to warrant expedition.[43]

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[42] The Defendants cites cases distinguishable from the present one in arguing that general money damages give the Plaintiff an adequate remedy at law. They were either post-preliminary injunction hearing or involved corporate waste, or transactions capable of being unwound. *See Wand Equity Portfolio II L.P. v. AMFM Internet Holding Inc.*, 2001 WL 167720 at *3 (Del. Ch. Feb. 7, 2001) (cash-out merger involving compensable waste claims); *Sonet v. Plum Creek Timber Co.*, 1998 WL 749445 (Del. Ch. Sept. 23, 1998) (finding transaction could be "undone"); *Herd v. Major Realty Corp.*, 1989 WL 997170 (Del. Ch. Nov. 8, 1989) (same).

[43] *See, e.g.*, *TCW Tech. P'ship v. Intermedia Comm'cns, Inc.*, 2000 WL 1478537, at *2 (Del. Ch. Oct. 2, 2000).

C. *Disclosure Claims*

Plaintiff alleges that the proxy statement contains a number of material omissions regarding the Merger. These allegations can be divided into three categories: (1) the Proxy gives insufficient detail on the background of the Merger; (2) the Proxy gives insufficient information about the financial advisor, a Merrill wholly-owned subsidiary, that issued a fairness opinion in connection with the Merger; and (3) the Proxy does not provide adequate information about the employment and compensation package Merrill's Chairman negotiated as part of the Merger—a package which includes on-going employment with the combined entity.

1. Expedited Discovery in Support of Disclosure Claims

Although a plaintiff seeking expedited discovery to aid presentation of disclosure claims must demonstrate a colorable claim,[44] the path to showing irreparable harm is easier than when seeking to expedite substantive claims. If meritorious, disclosure claims, by their very nature, involve irreparable harm because "[t]he right at issue in . . . all disclosure cases is the right to receive fair

[44] *Giammargo*, 1994 WL 672698, at *2.

disclosure of the material facts necessary to cast a fully informed vote, and that right, if infringed, can only be truly remedied by a specific, injunctive order mandating the appropriate disclosure before the shareholders are required to vote."[45]

All of Plaintiff's disclosure claims allege material omissions. Information is material only "if there is a substantial likelihood that a reasonable stockholder would consider it important in deciding how to vote."[46] An omitted fact is not material merely because it might prove helpful;[47] instead, "to be material, it must 'significantly alter the total mix of information made available.'"[48] Normally, plaintiffs bear the burden of establishing materiality of the desired information.[49] At this stage of the litigation, however, the Court's analysis is limited to determining whether *colorable* claims of materially deficient disclosures exist. Accordingly, the Court will not pass on the ultimate likelihood of success of those

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[45] *Wayne County Employees' Ret. Sys. v. Corti*, 954 A.2d 319, 329 (Del. Ch. 2008) (internal quotations omitted).
[46] *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 142 (Del. 1997).
[47] *In re Checkfree Corp. S'holders Litig.*, 2007 WL 3262188, at *2 (Del. Ch. Nov. 1, 2007).
[48] *Id.* (quoting *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 199 (Del. Ch. 2007)).
[49] *In re Siliconix, Inc. S'holders Litig.*, 2001 WL 716787, at *9 (Del. Ch. June 19, 2001).

claims.[50] That analysis must wait for a preliminary injunction hearing, should such a hearing ensue.

In applying the foregoing principles, moreover, this Court follows a tradition of acting "with a certain solicitude towards for plaintiffs in this procedural setting and thus has followed the practice of erring on the side of" expediting discovery.[51]

2. Disclosures Regarding the Events Leading up to the Merger

The proxy states that:

> [m]anagement and the boards of directors of both Bank of America and Merrill Lynch regularly review and consider potential strategic options for their companies in light of their respective performance, business needs and the challenges and opportunities presented by the economic and industry developments. As part of this process, senior management of both companies have met informally from time to time with senior management of other financial institutions, including each other, regarding industry trends and strategic consideration. Among these considerations has been the possibility of a combination of Bank of America and Merrill Lynch.[52]

The Plaintiff argues that this disclosure is materially deficient because it does not adequately inform Merrill shareholders about the key events leading up to the

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[50] Defendants devote much of their analysis regarding the disclosure claims to the merits of those claims. In particular, Defendants argue that the omissions identified by the Plaintiff were not material. Although the Defendants' arguments may prove persuasive (particularly in light of the broader economic crisis in which the transaction took place), its intense merits-based focus is premature.
[51] *Giammargo*, 1994 WL 672698, at *2.
[52] Parker Aff. Ex. I at 44.

Merger. For example, the Plaintiff argues that the disclosure does not describe what (if any) alternative structures to the acquisition were discussed, and which (if any) potential acquirers, aside from BAC, Merrill's board engaged in merger discussion with. Indeed, the proxy states that Merrill's board entered into negations with "two other large financial services companies"[53] but does not identify those companies, nor does it describe the results of the negotiations. It is unclear whether, if disclosed, these facts would have altered the total mix of information. Therefore, even though it cannot be said definitively that the proxy was materially deficient based on the absence of these disclosures, the Plaintiff's claims are colorable.

The Plaintiff also argues that the proxy's description of the economic crisis in which the transaction was hastily negotiated and agreed upon was insufficient, and therefore it omitted material facts. The proxy briefly describes the liquidity problems that led to Lehman Brothers' bankruptcy filing and the federal bailout of American International Group. The proxy did reference Merrill's exposure to the turbulent market conditions, but it did so briefly:

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[53] *Id.*

> The Merrill Lynch board of directors indicated their agreement that representatives of Merrill Lynch and its legal advisors continue negotiating the terms of the proposed merger with Bank of America and its legal advisors with a view to reaching an agreement that could be presented to the Merrill Lynch board of directors that evening, particularly in light of the market uncertainties and related risks Merrill Lynch would be expected to face when the markets opened the next day.[54]

The proxy, however, does not elaborate on the "risks" Merrill faced had it failed to reach an agreement with BAC. Although it may be true that Merrill was facing a liquidity crisis similar to the one Lehman Brothers faced—a crisis which might have resulted in Merrill's filing for bankruptcy had the board of directors waited one more day to consummate the Merrill-BAC transaction—the proxy does not say so.[55] Therefore, the Plaintiff's claim is colorable.

[54] *Id.* at 45.

[55] The Defendants, as noted above, have urged the Court to take judicial notice of the economic crisis facing the country. That, however, would not aid Defendants at this stage. The question is whether Plaintiff has articulated a colorable claim that Defendants' disclosures were materially deficient. Regardless of whether the Court takes judicial notice of economic conditions affecting the broader market, what still remains is whether *Merrill's* liquidity crisis justified an apparently hasty entry into a merger agreement with BAC. The fact that those disclosures were absent from the Proxy does not necessarily mean that the Proxy was materially deficient. But materiality is not the issue presented to the Court today; instead, it is whether Plaintiff's allegations regarding materiality are colorable. Therefore, while discovery may reveal the risks that Merrill would likely have encountered had it not agreed to merge with BAC over the weekend, it is those facts—not broader market conditions—which should not be judicially noticed.

As noted above, the Court's task here is not to pass on the likelihood of ultimate success of the Plaintiff's claims, but merely to ascertain whether the Plaintiff has sufficiently articulated colorable claims. It has. One may harbor serious doubts that the Plaintiff will succeed in persuading the Court that the alleged disclosure violations are material, but that analysis must wait for a preliminary injunction hearing, should such a hearing occur.

3. Disclosures Regarding Merrill's Financial Advisor

Merrill retained Merrill, Lynch, Pierce, Fenner & Smith ("MLPFS"), a wholly-owned Merrill subsidiary, to act as its financial advisor in connection with, and evaluate the fairness of, the Merger.[56] The Plaintiff alleges that Merrill omitted material facts from the proxy regarding its relationship with MLPFS. The Court addresses each allegation of a material omission in turn and concludes that none is colorable.

First, the Plaintiff takes issue with Merrill's failure to disclose why it engaged MLPFS in lieu of an independent financial advisor. The preliminary proxy states that "MLPFS is an internationally recognized investment banking firm with substantial experience in transactions similar to the Merger. Merrill Lynch

[56] Parker Aff. Ex. I at 50.

selected MLPFS as its financial advisor because of MLPFS's qualifications, expertise and reputation."[57] The Plaintiff is correct that this explanation did not address the rationale for choosing a subsidiary as opposed to an outside party. Before the filing of the amended proxy, therefore, the Plaintiff's allegations may have been colorable. However, any doubt about the preliminary proxy's disclosures concerning the selection of MLPFS was rendered moot by the amended proxy. In particular, the amended proxy squarely addresses the Plaintiff's quibble over receiving an inadequate explanation as to why MLPFS was chosen over an independent third party. In addition to including the above disclosures contained in the preliminary proxy, the amended proxy now also states in relevant part:

> MLPFS, a wholly owned affiliate of Merrill Lynch, has during the two years preceding the date of its opinion provided financial advisory and investment banking services to Merrill Lynch as its sole financial advisor and principal underwriter of its securities. MLPFS has received customary fees and underwriting commissions for the rendering of such services in the approximate aggregate amount of $875,000,000. MLPFS may continue to provide financial advisory and investment banking services to Merrill Lynch and MLPFS would expect to receive customary fees and underwriting commissions for the rendering of such services.

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[57] *Id.* at 56.

> MLPFS has during the two years preceding the date of its opinion provided investment banking services to Bank of America. MLPFS has received customary underwriting commissions for the rendering of such services in the approximate aggregate amount of $32,500,000. In addition, MLPFS received underwriting commissions in the amount of approximately $163,000,000 in connection with Bank of America's common stock offering that was consummated on October 10, 2008. MLPFS may continue to provide investment banking services to Bank of America and MLPFS would expect to receive customary underwriting commissions for the rendering of such services.[58]

These passages sufficiently disclose the material facts regarding Merrill's selection of MLPFS: It was an entity known to Merrill and BAC, and it had done a substantial amount of financial advisory work for both entities in the past. And Defendants were not required to cast this relationship in a negative light.[59] Therefore, Plaintiff has failed to plead a colorable disclosure violation.

Second, Plaintiff alleges that the proxy does not "adequately disclose the inherent conflicts that MLPFS faced in representing Merrill, its parent company."[60] This claim is insufficient. The Plaintiff does not elaborate on what adequate disclosure of inherent conflicts means. The proxy clearly states that "MLPFS is a

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[58] Letter of Paul J. Lockwood to the Court ("Lockwood Letter") Ex. A, at 61 (Oct. 22, 2008) (the amended proxy statement).

[59] *See, e.g.*, *Loudon*, 700 A.2d at 143 ("[E]ven where material facts must be disclosed, negative inferences or characterizations of misconduct or breach of fiduciary duty need not be articulated.").

[60] Am. Compl. ¶ 36(a).

wholly owned subsidiary of Merrill Lynch. Certain members of management of MLPFS are also members of management of Merrill Lynch and have interests in the Merger that are different from, or in addition to, the interests of stockholders of Merrill Lynch."[61] The proxy then refers the reader to a section titled, "Merrill Lynch's Officers and Directors have Financial Interests in the Merger." That section contains detailed disclosures about which Merrill officers and directors have an interest in the Merger, and what that interest might be. Therefore, Plaintiff's conclusory allegation that Merrill's disclosures about MLPFS's conflict was inadequate is not colorable.

Third, Plaintiff alleges that the failure to disclose the amount of compensation MLPFS will receive constitutes a material omission "because MLPFS, as a wholly-owned subsidiary of Merrill, has a substantial interest in ensuring that that [sic] the Proposed Acquisition closes that could have influenced its ability to provide impartial advice to the Company."[62] This claim is not colorable. It is true that compensation contingent on consummation of the transaction has the potential to influence a financial advisor. However, that fact

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[61] Parker Aff. Ex. I at 56.
[62] Am. Compl. ¶ 36(b).

was disclosed in the proxy: "Merrill Lynch has agreed to pay a fee to MLPFS, a substantial portion of which is contingent upon the merger being consummated."[63] And this Court has held that the precise amount of consideration need not be disclosed, and that simply stating that an advisor's fees are partially contingent on the consummation of a transaction is appropriate.[64] In other words, the Plaintiff has simply not alleged a disclosure violation.[65] Further, the amended proxy discloses the amount of consideration MLPFS is to receive—$25 million.[66] MLPFS's status may be unusual, but, with respect to its compensation, the inherent conflict is not unusual. *Any* financial advisor—subsidiary and independent alike—that is compensated contingent upon closure of a transaction is presented with an identical potential conflict.

Fourth, Plaintiff alleges that the failure to disclose the rationale behind MLPFS's decision to utilize a particular method of financial analysis over another

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[63] Parker Aff. Ex. I at 56.
[64] *See Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *13 (Del. Ch. Nov. 30, 2007).
[65] *See id.* ("Without a well-pled allegation of exorbitant or otherwise improper fees, there is no basis to conclude the additional datum of [the financial advisor's] actual compensation, *per se*, would significantly alter the total mix of information available to stockholders.").
[66] Lockwood Letter Ex. A, at 60.

constitutes a material omission.[67] This claim is not colorable because "a complaint about the accuracy or methodology of a financial advisor's report is not a disclosure claim."[68]

Finally, Plaintiff alleges material deficiencies in the Proxy's discussion about the MLPFS financial analysis exist based on a failure to include a rationale as to the source of, and reasons why, MLPFS used certain underlying financial estimates. In particular, Plaintiff alleges material deficiency in Merrill's failure to disclose: (1) the source of the consensus analyst estimates MLPFS used to perform its analysis; (2) the manner in which Merrill's and BAC's respective financial advisors derived the discount rates that they used in their analyses; (3) all financial projections considered by Merrill's and BAC's respective advisors; and (4) the reason why all of the financial advisors examined all of the same companies except

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[67] The proxy informs the reader that Merrill's board did not pursue the Merger based on its assessment of long-term financial projections. Thus, the proxy discloses the board's perspective that it was reacting to an unusual coalescence of adverse factors. Its decision, as discussed in the proxy, was not driven by the more typical cash flow projections that might be realized, say, five years from now. The decision to merge, for better or worse, was motivated by the Board's perception, accurate or not, of the need for immediate action. If the firm will not survive for, again say, five years, five-year projections are of lesser importance to the shareholders. Such projections, to be of significant value to the shareholders, require a reasonable expectation that the firm will still be around to meet those expectations.

[68] *In re The MONY Group*, 852 A.2d at 28 n.52.

for one in their respective analyses of comparable companies. Each will be addressed in turn.

- (1)—This claim is not colorable. The preliminary proxy states the source of the consensus analyst estimates: it defines "consensus estimates" as "the mean publiely [sic] available analyst estimates."[69] Further, the amended proxy fine-tuned this definition, defining "consensus estimates" as "the mean publicly available consensus analyst estimates *from Reuters* (accessed via Factset)."[70]
- (2)—This claim is not colorable. "Delaware courts have repeatedly held that a board need not disclose specific details of the analysis underlying a financial advisor's opinion."[71] Therefore, Merrill committed no disclosure violation by failing to include the manner in which MLPFS derived the discount rate it used in its analysis.

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[69] Parker Aff. Ex. I at 52.
[70] Lockwood Letter Ex. A, at 57.
[71] *In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1073 (Del. Ch. 2001).

- (3)—This claim is not colorable because, pursuant to Delaware law, Merrill was not required to disclose all financial projections considered by MLPFS.[72] Therefore, there is no disclosure violation.
- (4)—This claim is not colorable for the same reasons (2) above is not colorable.

4. Disclosures Regarding the Chairman's Compensation and Employment

Plaintiff alleges that "[r]ecent news reports indicate that [the Chairman] was negotiating his future at BAC while he was participating in negotiations concerning the Proposed Acquisition," but "[t]he Proxy does not adequately disclose . . . what the nature and substance of those discussions were, whether and how those discussions impacted negotiations with BAC concerning the proposed Acquisition, or whether the negotiations caused [the Chairman] to refrain from soliciting interest from other potential acquirors."[73] Absent from the Plaintiff's allegations, however, is the fact that the proxy clearly discloses the Chairman's financial interest in the transaction. In a section titled "Interests Of Certain

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[72] *See McMillan v. Intercargo Corp.*, 1999 WL 288128, at *6 (Del. Ch. May 3, 1999) ("There is no *per se* duty to disclose financial projections furnished to and relied upon by an investment banker.").
[73] Am. Compl. ¶ 37(b).

Persons in the Merger – Merrill Lynch's Officers and Directors Have Financial Interests in the Merger," the proxy discloses the details of the Chairman's (and other key individuals') compensation package(s).

The amended proxy, moreover, renders the Plaintiff's concerns essentially moot. It states in relevant part:

> In connection with entering into the merger agreement, Bank of America agreed that it would work together in good faith with respect to the treatment of certain outstanding equity based awards of certain executive officers of Merrill Lynch, including Mr. Thain. This agreement was in furtherance of discussion held earlier in the day about which the Merrill Lynch board of directors was informed. In connection therewith, Bank of America has engaged in discussions with . . . Thain . . . concerning the terms of [his] employment following completion of the merger and has discussed certain compensatory arrangements with . . . [him]. These proposed arrangements seek to ensure continued service and align . . . [Thain's] interests with the combined company after consummation of the merger. The parties have not entered into any definitive agreements, and there can be no assurance that agreement will be reached with any of the four executives. Any agreements that are entered into prior to completion of the merger will not become effective unless and until the merger is completed.[74]

The material facts regarding the Chairman's compensation package and on-going employment have all been disclosed.

[74] Lockwood Letter Ex. A, at 74.

That the proxy does not discuss the Plaintiff's hypothetical scenarios regarding what impact the negotiations concerning the Chairman's employment and compensation might have had on the merger negotiations is of no moment. The Plaintiff's allegations of disclosure violations amount to nothing more than quibbles over the absence of self-flagellating commentary accompanying the compensation and employment disclosures. But, as discussed, the disclosures in the proxy and amended proxy sufficiently inform the shareholders of the Chairman's interest in the transaction. It is well-established Delaware law "that to comport with its fiduciary duty to disclose all relevant material facts, a board is not required to engage in 'self-flagellation' and draw legal conclusions implicating itself in a breach of fiduciary duty from surrounding facts and circumstances prior to a formal adjudication of the matter."[75] Therefore, the Plaintiff has simply failed to assert a colorable disclosure violation as to this set of claims.

Thus, the Plaintiff's motion for expedited discovery will be granted in part. Discovery, of course, will be limited to those claims deemed colorable.

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[75] *Stroud v. Grace*, 606 A.2d 75, 84 n.1 (Del. 1992).

IV. CONCLUSION

Accordingly, for the foregoing reasons, Defendants' Motion to Stay or Dismiss is denied, and the Plaintiff's Motion for Expedited Discovery is granted, subject to the limitations set forth above. Counsel are requested to confer upon a schedule to pursue the expedited discovery authorized in this letter opinion.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K