APPENDIX A

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09-CVS- 3978

FILED
2009 FEB 17 PM 2:09
MECKLENBURG CO., C.S.C.
BY ________

JAMES CUNNIFF, Derivatively and on Behalf of Bank of America, Corp.

Plaintiff

vs.

KENNETH D. LEWIS, 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., MEREDITH R. SPANGLER, ROBERT L. TILLMAN, and JACKIE M. WARD,

Defendants,

BANK OF AMERICA CORP.
a Delaware Corporation,

Nominal Defendant.

JURY TRIAL DEMANDED

VERIFIED SHAREHOLDER DERIVATIVE COMPLAINT

Comes now James Cunniff ("Plaintiff"), derivatively and on behalf of Nominal Defendant Bank of America Corp. (herinafter referred to as "Bank of America" or the "Company") and for his Verified Shareholder Derivative Complaint against defendants herein alleges the following based upon personal knowledge as to himself and his own acts, and upon information and belief as to all other matters, based upon, *inter alia*, the investigation conducted by and through his attorneys, which investigation included a review of press releases and other

public statements made by nominal defendant, Bank of America, and its officers and agents; filings by the nominal defendant with the United States Securities and Exchange Commission ("SEC"), and publicly available articles and information about nominal defendant and its management in the financial and general press on the Internet.

NATURE OF ACTION AND SUMMARY OF ACTION

1. This present action arises in connection with Defendants' misconduct surrounding their unanimous approval and recommendation to Bank of America shareholders for the issuance of 1.71 billion shares of common stock and 359,000 shares of preferred stock, whereby holders of Merrill Lynch & Co., Inc. ("Merrill Lynch") common stock had the right to receive 0.8595 of a share of Bank of America common stock in exchange for each Merrill Lynch share held. (the "Merger").

2. In a Proxy Statement dated October 31, 2008, and filed with the SEC on November 3, 2008 (the "Proxy"), the terms of the Merger were approved by Bank of America shareholders, and consummated on January 1, 2009.

3. The Proxy contained materially false and misleading statements concerning the Merger, including the Defendants' material misrepresentation that the due diligence performed by Defendants in evaluating the Merger was adequate, and that the Merger was in the best interests of Bank of America shareholders. The Proxy failed to disclose the fact that Merrill Lynch was in dire financial condition with deteriorating assets, and losses that accrued $15.3 billion during the fourth quarter of 2008.

4. On January 16, 2008, Bank of America announced losses of $15.31 billion arising from credit and asset losses absorbed by Merrill Lynch. This announcement also stated that the United States Treasury Department would invest $20 billion in Bank of America preferred stock,

and provide a guarantee against losses of $118 billion in troubled assets to help it digest the losses accumulated by Merrill Lynch.

5. Following the announcement of Merrill Lynch's financial woes, former Merrill Lynch Chief Executive John Thain resigned from Bank of America on January 22, 2008, highlighting the problems that the Company absorbed from Merrill Lynch in the Merger.

6. Defendants knew or should have known of the immense financial troubles at Merrill Lynch and failed to disclose material information that was critical to allow shareholders to make an informed vote on the Merger.

7. Plaintiff James Cunniff brings this action derivatively and on behalf of and for the benefit of Bank of America to redress injuries suffered, and yet to be suffered, by the Company as a direct and proximate result of the breaches of fiduciary duty, negligence, abuse of control, gross mismanagement, waste of corporate assets, and other violations of the law alleged herein. Bank of America is named as a nominal defendant solely in a derivative capacity.

JURISDICTION AND VENUE

8. This Court has jurisdiction over the subject matter of this action pursuant to N. C. Gen. Stat. § 1-75.4.

9. Venue is proper in this county pursuant to N. C. Gen. Stat. § 1-79.

PARTIES

Plaintiff

10. Plaintiff, James Cunniff, was a shareholder of Bank of America at all times relevant to this Complaint and intends to retain shares of Bank of America throughout the duration of this litigation.

Nominal Defendant

11. Nominal Defendant Bank of America is a Delaware corporation, and maintains its

principal offices in Charlotte, North Carolina. Bank of America is a financial holding company and provides financial services to individuals and businesses throughout the United States.

Individual Defendants

12. Defendant Kenneth D. Lewis ("Lewis") is the Chief Executive Officer, President, and Chairman of Bank of America. In this capacity, Defendant Lewis signed the Proxy. Defendant Lewis has served the Company as the Chief Executive Officer since April 2001, President since July 2004, and Chairman since February 2005. Defendant Lewis has been seated on the Company's Board of Directors since 1999 and is a member of the Executive Committee.

13. Defendant William Barnet III ("Barnet") has been a member of the Company's Board of Directors since April 2004 and serves on the Audit Committee.

14. Defendant Frank P. Bramble ("Bramble") has been a member of the Company's Board of Directors since January 2006 and serves on the Asset Quality Committee.

15. Defendant John T. Collins ("Collins") has been a member of the Company's Board of Directors since April 2004 and serves on the Audit Committee.

16. Defendant Gary L. Countryman ("Countryman") has been a member of the Company's Board of Directors since April 2004 and serves on the Executive Committee.

17. Defendant Tommy R. Franks ("Franks") has been a member of the Company's Board of Directors since January 2006 and serves on the Audit Committee.

18. Defendant Charles K. Gifford ("Gifford"), a former Bank of America Chairman, has been a member of the Company's Board of Directors since April 2004 and serves on the Executive Committee.

19. Defendant Monica C. Lozano ("Lozano") has been a member of the Company's Board of Directors since April 2006 and serves on the Asset Quality Committee.

20. Defendant Walter E. Massey ("Massey") has been a member of the Company's Board of Directors since 1998 and serves on the Audit Committee.

21. Defendant Thomas J. May ("May") has been a member of the Company's Board of Directors since April 2004 and serves as the Chairman of the Audit Committee.

22. Defendant Patricia E. Mitchell ("Mitchell") has been a member of the Company's Board of Directors since 2001 and serves on the Compensation and Benefits Committee and the Corporate Governance Committee.

23. Defendant Thomas M. Ryan ("Ryan") has been a member of the Company's Board of Directors since April 2004 and serves on the Compensation and Benefits Committee, as well as Chairman of the Corporate Governance Committee.

24. Defendant O. Temple Sloan, Jr., ("Sloan") has been a member of the Company's Board of Directors since 1996 and is currently the Lead Director. In his capacity as Lead Director, Defendant Sloan communicates regularly with the Company's Chief Executive, Defendant Lewis, about business strategy and succession planning. Defendant Sloan serves on the Corporate Governance Committee and is the Chairman of both the Compensation and Benefits Committee and Executive Committee.

25. Defendant Meredith R. Spangler ("Spangler") has been a member of the Company's Board of Directors since 1998 and serves on the Compensation and Benefits Committee and the Corporate Governance Committee.

26. Defendant Robert L. Tillman ("Tillman") has been a member of the Company's Board of Directors since April 2005 and serves on the Asset Quality Committee.

27. Defendant Jackie M. Ward ("Ward") has been a member of the Company's Board of Directors since 1994 and serves as the Chairman of the Asset Quality Committee.

28. The Defendants identified in paragraphs 12 through 27 are collectively referred to herein as the "Individual Defendants."

FIDUCIARY DUTIES AND OBLIGATIONS OF THE INDIVIDUAL DEFENDANTS

29. The Individual Defendants, through their positions as directors and/or officers of the Company and their receipt of reports, attendance at meetings and access to all of the Company's books, records and other proprietary information, had responsibility for and therefore were in possession of material, non-public information concerning the Company and its operations, finances and business prospects.

30. By reason of their positions as officers, directors or fiduciaries of Bank of America and because of their ability to control the business and corporate affairs of Bank of America, the Individual Defendants owed Bank of America and its shareholders fiduciary obligations of fidelity, trust, loyalty and due care, were and are required to use their utmost ability to control and manage Bank of America in a fair, just, honest and equitable manner, and were and are required to act in furtherance of the best interests of Bank of America and its shareholders so as to benefit all shareholders equally

31. Each director and officer of Bank of America owes to Bank of America the fiduciary duty to exercise due care and diligence in the administration of the affairs of Bank of America and in the use and preservation of its property and assets, and the highest obligations of good faith and fair dealing.

32. In addition, as officers and/or directors of a publicly held company, the Individual Defendants had a duty to promptly disseminate accurate and truthful information with respect to the Company's operations and to conduct due diligence of Merrill Lynch's operations and

conditions so that the shareholders decision to approve the Merger would be based on truthful and accurate information.

33. The Individual Defendants, because of their positions of control and authority as directors or officers of Bank of America, were able to and did, directly and indirectly, control the wrongful acts complained of herein, as well as the contents of the various public statements issued by the Company.

34. At all material times, each of the Individual Defendants was the agent of each of the other Individual Defendants and of Bank of America, and was at all times acting within the course and scope of said agency.

35. To discharge their duties, the Individual Defendants were required to exercise reasonable and prudent supervision over the management, policies, practices and controls of the financial affairs of Bank of America. By virtue of such duties, the officers and directors of Bank of America were required, among other things, to:

- manage, conduct, supervise and direct the business affairs of Bank of America in accordance with federal and state law and federal rules and regulations and the charter and bylaws of Bank of America;

- neither violate nor permit any officer, director, or employee of Bank of America to violate applicable federal laws, rules and regulations or state law;

- establish and maintain systematic and accurate reports and records of the business and affairs of Bank of America and procedures for the reporting of the business and affairs to the Board of Directors and to periodically investigate, or cause independent investigation to be made of said reports and records;

- exercise reasonable control and supervision over the public statements to the securities markets and trading in Bank of America stock by the officers and employees of Bank of America;

- remain informed as to the status of Bank of America operations, and upon receipt of notice or information of imprudent or unsound practices, to make a reasonable inquiry in connection therewith, and to take steps to correct such conditions or

practices and make such disclosures as are necessary to comply with state and federal securities laws;

- supervise the preparation and filing of any audits, reports or other information required by law from Bank of America and to examine and evaluate any reports of examinations, audits or other financial information concerning the financial affairs of Bank of America and to make full and accurate disclosure of all material facts concerning, *inter alia*, each of the subjects and duties set forth herein;
- prudently protect the Bank of America's assets, including taking all necessary steps, *inter alia*, conducting due diligence of the Merger; and
- Preserve and enhance Bank of America's reputation as befits a public corporation.

DERIVATIVE AND DEMAND FUTILITY ALLEGATIONS

36. Plaintiff brings this action derivatively in the right and for the benefit of Bank of America to redress injuries suffered, and to be suffered, by Bank of America as a direct result of the breaches of fiduciary duty, violations of law, abuse of control, and gross mismanagement by the Defendants. This is not a collusive action to confer jurisdiction of this Court which it would not otherwise have.

37. Plaintiff will adequately and fairly represent the interests of Bank of America and its shareholders in enforcing and prosecuting its rights.

38. Plaintiff is and was an owner of the stock of Bank of America during all times relevant to the Defendants' wrongful course of conduct alleged herein.

39. Bank of America's Board of Directors consists of sixteen members named herein as Individual Defendants (the "Board"). Plaintiff has not made any demand on the Board to institute this action because such a demand would be a futile, wasteful and useless act, for the specific reasons outlined below.

40. Each of the directors of Bank of America authorized and/or permitted the false

statements which were disseminated directly to the public and made available and distributed to shareholders, authorized and/or permitted the issuance of various of the false and misleading statements and are principal beneficiaries of the wrongdoing alleged herein. Because each director is interested and not independent, each could not fairly and fully prosecute a suit even if such suit was instituted by the directors.

41. As a result of access to and review of internal corporate documents, communications with corporate officers and attendance at management and Board meetings, each director of Bank of America had actual or constructive knowledge that the Board improperly recommended that Company shareholders approve the Merger. Each director had actual or constructive knowledge that the Board had performed inadequate due diligence of Merrill Lynch and failed to disclose critical information to shareholders, *inter alia*, that they knew or should have known of troubled financial condition and excessive losses of Merrill Lynch.

42. As a director of Bank of America, each Board member owed specific duties to the Company and its shareholders. In breach of these specific duties, each Board member, as more fully detailed herein, participated in, approved and/or permitted the wrongs alleged herein to have occurred and participated in efforts to conceal or disguise those wrongs from Bank of America's stockholders or recklessly and/or negligently disregarded the wrongs complained of herein. Therefore, the Board cannot exercise independent objective judgment in deciding whether to institute or vigorously prosecute this action because each Board member is interested personally in the outcome of such an action, as it is the actions of the Board that have subjected the Company to millions of dollars in liability for potential violations of applicable securities

laws. There is no business judgment justification for failure to comply with the federal securities laws and issue materially misleading financial statements.

43. Furthermore, any suit brought by the Board to remedy these wrongs would likely expose the Individual Defendants to further violations of laws, which would result in civil and criminal actions being filed against one or more of the Individual Defendants and thus they are hopelessly conflicted in making any supposedly independent decision whether to sue themselves.

44. Bank of America has been and will continue to be exposed to significant losses due to the wrongdoing complained of herein, yet the Individual Defendants have not filed any lawsuits against themselves or others who were responsible for wrongful conduct or attempt to recover for Bank of America any part of the damages that the Company suffered and will suffer thereby.

45. If the Individual Defendants were to bring this derivative action against themselves, they would necessarily challenge their own misconduct, which underlies allegations against them contained in potential class action complaints for violations of securities laws, which admissions would impair their defense of such actions and investigations and greatly increase the probability of their personal liability, which amount is likely to exceed any insurance coverage available to the Individual Defendants.

46. If the Individual Defendants are protected by directors' and officers' liability insurance against personal liability for their acts of mismanagement, waste and breach of fiduciary duty alleged in this Complaint, they caused the Company to purchase that insurance for their protection with corporate funds, *i.e.* monies that belong to the stockholders of Bank of America. However, due to certain changes in the language of directors' and officers' liability insurance policies in the past few years, the directors' and officers' liability insurance policies

covering the Individual Defendants in this case contain provisions that eliminate coverage for any action brought directly by Bank of America against the Individual Defendants, known as, *inter alia*, the "insured versus insured exclusion." As a result, if these Individual Defendants were to sue themselves or certain of the officers of Bank of America, there would be no directors' and officers' insurance protection and thus another reason why the Individual Defendants would not bring such a suit. On the other hand, if the suit is brought derivatively, as this action is brought, such insurance coverage exists and will provide a basis for the Company to effectuate recovery. In the absence of liability insurance coverage, as would occur if a similar suit were filed by the Company itself, the Individual Defendants would not cause Bank of America to sue themselves since they will face large uninsured liability.

47. Each member of the Board is, directly or indirectly, the recipient of remuneration paid by the Company, including benefits, stock options and other emoluments by virtue of his or her Board membership and control over the company, the continuation of which is dependent upon their cooperation with the other members of the Board, and the participation and acquiescence in the wrongdoing set forth herein and each is therefore incapable of exercising independent objective judgment in deciding whether to bring this action.

48. Because of their association as directors of the Company and their positions as present or former employees, the directors are dominated and controlled so as not to be capable of exercising independent objective judgment.

SUBSTANTIVE ALLEGATIONS

49. On Monday, September 15, 2008, Bank of America announced that it had agreed to acquire Merrill Lynch in a $50 billion all-stock transaction. Defendant Lewis commented the same day of the announced merger, "[a]cquiring one of the premier wealth management, capital

markets, and advisory companies is a great opportunity for our shareholders ... [t]ogether, our companies are more valuable because of the synergies in our businesses."

50. Less than 48 hours before Bank of America's board approved the Merger, Merrill Lynch Chairman & CEO John Thain contacted Defendant Lewis to discuss the possibility of a merger. According to the Proxy statement, "[e]arly in the morning of Sunday, September 14, 2008, Messrs. Thain and Lewis met . . . [and] discussed the results of the due diligence investigations conducted by their companies' respective representatives." Then, "[f]ollowing approval of each board of directors, the parties and their counsel continued to work to finalize and document the legal terms of the definitive agreements for the transaction, and early in the morning on September 15, 2008, the parties entered into the merger agreement . . . and the transaction was announced in a press release issued by Bank of America."

51. In the Proxy statement, Bank of America's board of directors described the expertise and knowledge of the advisors upon which it relied in the negotiation of the transaction, and the fees paid for their services, as follows:

> Bank of America's board of directors selected FPK [Fox-Pitt] and J.C. Flowers because of their respective expertise, reputation and familiarity with Bank of America and Merrill Lynch, and because their senior professionals have substantial experience in transactions comparable to the merger. As compensation for their services in connection with the merger, Bank of America has agreed to pay FPK and J.C. Flowers fees in an aggregate amount of $20,000,000, of which $5,000,000 was due upon delivery of their respective opinions and the remainder of which is contingent upon the consummation of the merger and related transactions.

52. Fox-Pitt and J.C. Flowers each provided a fairness opinion dated September 14, 2008, the same day on which the negotiations concerning the Merger occurred. Each fairness opinion concluded that that the proposed price of Merrill Lynch was "fair, from a financial point of view, to Bank of America."

53. The quickness with which the Merger was performed and the extent of due diligence performed was explained by Defendant Lewis in his comments accompanying the September 15, 2008 Merger announcement, during which he described Bank of America's financial advisor J.C. Flowers & Co.:

> J.C. Flowers or Chris Flowers is someone we've known for quite some time. We've done several deals with him. We know his form very well, and it was unfortunate that we did because his firm - he and his firm had done quite an amount of due diligence on Merrill Lynch fairly recently, and it was very, very extensive. They had looked at the marks very comprehensively, so this allowed us to have him and [his] team as an adviser, and just update the information they already had. So that was one of the key ingredients to being able to do this as quickly as we did....I will say that Chris [Flowers'] comment was it's night and day from the time we first looked as it to now.' He was very complimentary of what John [Thain] and his team had done in terms of dramatically reducing the marks, in many cases not only - not reducing the marks but getting rid of the assets, which is the bet thing to do, so a much lower risk profile than he'd seen earlier on....We actually thought Merrill Lynch's capital structure was very good and had a lot more of a base of common equity than some others we had seen, so it looks good.

54. Bank of America's Chief Financial Officer Joe Price went into more detail during the September 15, 2008 conference call regarding the Company's knowledge of Merrill Lynch and the due diligence conducted leading up to the Merger:

> We sent in a large team to review areas such as asset valuations, trading positions and the like. We also were joined by a team from J.C. Flowers that had done extensive due diligence over some time in reviewing other potential transactions, so they were familiar with Merrill Lynch's books.
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> * * *
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> Clearly we've had a tremendous amount of historical knowledge both as a competitor with Merrill Lynch but also have reviewed and analyzed the company over the years. As Ken referenced, we did have several advisors, among them J.C. Flowers with pretty extensive knowledge of the company.

While none of us like the market turmoil we've been through in the last year, it has caused us all to be much more attuned to the quality of particular name credits and/or other asset classes. So it's not as if we don't have a very significant knowledge of the markets around the asset classes that are most problematic. In addition, as you would expect we deployed the team that we would ordinarily deploy in these types of situations which had well over 45 people from our team on site as well as others off site, outside counsel and the like. So collectively with that group and quite frankly the progress that Merrill Lynch had made in reducing the risk exposures and analyzing them and having all that laid out given the efforts that the management team has made over the last period made it possible for us.

55. The terms of the Merger were explained in a Proxy Statement that was filed with SEC on November 3, 2008 and mailed to all shareholders of record of Bank of America as of the record date of October 10, 2008. The Proxy Statement solicited proxies from shareholders on behalf of the company and the board to vote in favor of the Merger at a special meeting of shareholders on December 5, 2008. Under the terms of the agreement, Bank of America would exchange .8595 shares of Bank of America common stock for each Merrill Lynch common share. That price was 1.8 times stated tangible book value. The fairness opinions issued by Fox-Pitt and J.C. Flowers were included with the Proxy statement sent to shareholders.

56. After issuing the Proxy Statement, the Defendants never updated or supplemented the materials provided to shareholders in connection with their vote on the Merger.

57. Under the Merger Agreement, Merrill Lynch was obligated to fully cooperate with the Defendants in providing any information necessary in connection with the preparation of the Proxy statement:

6.1 Regulatory Matters. (a) Parent and Company shall promptly prepare and file with the SEC the Form S-4, in which the Joint Proxy Statement will be included as a prospectus. Each of Parent and Company shall use its reasonable beset efforts to have the Form S-4 declared effective under the Securities Act as promptly as practicable after such filing, and Company

shall thereafter mail or deliver the Joint Proxy Statement to its stockholders. Parent shall also use its reasonable best efforts to obtain all necessary state securities law or "Blue Sky" permits and approvals required to carry out the transactions contemplated by this Agreement, and Company shall furnish all information concerning Company and the holders of the Company Common Stock as may be reasonably requested in connection with any such action.

(b) The parties shall cooperate with each other and use their respective reasonable best efforts to promptly prepare and file all necessary documentation, to effect all applications, notices, petitions and filings, to obtain as promptly as practicable all permits, consents, approvals and authorizations of all third parties (including any unions, works councils or other labor organizations) and Governmental Entities that are necessary or advisable to consummate the transactions contemplated by this Agreement (including the Merger), and to comply with the terms and conditions of all such third parties or Governmental Entities. Company and Parent shall have the right to review in advance, and, to the extent practicable, each will consult the other on, in each case subject to applicable laws relating to the confidentiality of information, all the information relating to Company or Parent, as the case may be, and any of their respective Subsidiaries, that appear in any filing made with, or written material submitted to, any third party or any Governmental Entity in connection with the transactions contemplated by this Agreement. In exercising the foregoing right, each of the parties shall act reasonably and as promptly as practicable. The parties shall consult with each other with respect to the obtaining of all permits, consents, approvals and authorizations of all third parties and Governmental Entities necessary or advisable to consummate the transactions contemplated by this Agreement and each party will keep the other apprised of the status of matters relating to completion of the transactions contemplated by this Agreement.

(c) *Each of Parent and Company shall, upon request, furnish to the other all information concerning itself, its Subsidiaries, directors, officers, and stockholders and such other matters as may be reasonably necessary* or advisable in connection with the Joint Proxy Statement, the Form S-4 or any other statement, filing, notice or application made by or on behalf of Parent, Company, or any of their respective Subsidiaries to any Governmental Entity in connection with the Merger and the other transactions contemplated by this Agreement.

58. Following the execution of the Merger Agreement on September 15, 2008, Defendants had full and complete access to Merrill Lynch's books and records. The Merger

Agreement, attached to the Proxy Statement as Appendix A, provided as follows in section 6.2 of the agreement:

> 6.2 Access to Information. (a) Upon reasonable notice and subject to applicable laws relating to the confidentiality of information, *each of Company and Parent shall, and shall cause each of its Subsidiaries to, afford tot eh officers, employees, accountants, counsel, advisors, agents and other representatives of the other party, reasonable access, during normal business hours during the period prior to the Effective Time, to all its properties, books, contracts, commitments and records*, and, during such period, such party shall, and shall cause its Subsidiaries to, make available to the other party (i) a copy of each report, schedule, registration statement and other document filed or received by it during such period pursuant to the requirements of federal securities laws or federal or state banking or insurance laws (other than reports or documents that such party is not permitted to disclose under applicable law) and (ii) all other information concerning its business, properties and personnel as the other party may reasonably request (in the case of access or a request by Company, the foregoing rights provided by this Section 6.2(a) shall be limited to information concerning Parent that is reasonably related to the prospective value of Parent Common Stock or to Parent's ability to consummate the transactions contemplated hereby). Neither Company nor Parent, nor any of their Subsidiaries, shall be required to provide access to or to disclose information where such access or disclosure would jeopardize the attorney-client privilege of such party or its Subsidiaries or contravene any law, rule, regulation, order, judgment, decree, fiduciary duty or binding agreement entered into prior to the date of this Agreement. The parties shall make appropriate substitute disclosure arrangements under circumstances in which the restrictions of the preceding sentence apply.

59. In the Proxy filed November 3, 2008, the Individual Defendants recommended the Merger to shareholders as follows:

> **Recommendation of the Bank of America Board of Directors**
>
> The Bank of America board of directors has unanimously approved and adopted the merger agreement and the transactions it contemplates, including the merger. The Bank of America board of directors determined that the merger, merger agreement and the transactions contemplated by the merger agreement are advisable and in the best interests of Bank of America and its stockholders and unanimously recommends that you vote "FOR" approval of the issuance of shares of Bank of America common stock in the merger.

60. The Proxy indicated that the Merger would be "3.0% dilutive in 2009 and breakeven in 2010" based on estimates by other brokers.

61. After the announcement of the Merger, the Company continued to be positive about the deal and its financial position overall, stating that it was well positioned financially to complete the Merger. On a Q3 2008 Earnings Call, an analyst inquired, "The $10 billion you're raising today, should we expect that to be that and then done or look for additional capital once the Merrill deal is closed?" Defendant Bank of America's CFO Price responded, "We have considered the Merrill deal in our intentions here so the numbers we were talking about, as I mentioned in the prepared remarks, covered our anticipated needs from a Merrill standpoint."

62. On October 9, 2008, immediately following the Q3 2008 Earnings Call, Defendant Lewis gave an interview to Leslie Stahl on the CBS television show *60 Minutes*, describing the due diligence performed leading up to the Merger:

> "Everybody thought you were going to buy Lehman Brothers," Stahl recounted to Lewis. "Friday night, that was the buzz. Monday morning, it's not Lehman Brothers, it's Merrill Lynch. What happened between Friday night and Monday morning?"
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> "I had talked to Secretary Paulson that Friday,' Lewis said. "And basically said we didn't think we could do the deal without governmental assistance."
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> "With Lehman?" "With Lehman. That we couldn't do it without some help. And then, at about 10:30, John Thain called."
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> "You always wanted Merrill Lynch," Stahl said.
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> "We've always thought that was the best thing for us," Lewis said.
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> "You were drooling for Merrill Lynch," Stahl said
>
> "We have always felt it was."

> "Some think that we should've waited till Monday and see if they would've gone bankrupt," Lewis said. "Some think we would've gotten it for, you know, dirt cheap. But my point is, you would have a tarnished brand. You would've had chaos. You would've had a court ruling over all the sale of assets. And it was worth it to us to pay a more market price so that we could not have that happen."

63. The extent to which Bank of America was vetted of the financial troubles at Merrill Lynch immediately following the merger announcement was reported by the *New York Times* on February 9, 2009, "individuals inside Merrill note that Bank of America, shortly after the deal was announced, quickly put 200 people at the investment bank, including a large investment team . . . [a] Bank of America executive was sent to New York from Charlotte to act as an interim chief financial officer and had daily access to Merrill's profit-and-loss statements."

64. In a *Wall Street Journal* article dated November 8, 2008, it was reported that Merrill Lynch was "planning to sell roughly $4 billion of distressed debt securities, including mortgages and complex investments, in a bid to cut its exposure to risky assets." This revelation was accompanied by the news that "a growing list of banks, hedge funds and large investors seeking buyers for their hard-to-sell assets as the global economic downturn threatens to further erode the value of debt investments."

65. On November 17, 2008, the *Wall Street Journal* reported of yet another capital injection for major financial institutions, including Bank of America, "[t]he U.S. Treasury Department on Friday provided $33.56 billion in capital to 21 domestic financial institutions . . . The disbursements bring the total amount of capital provided to financial institutions by Treasury under Troubled Asset Relief Program legislation to $158.56 billion." Furthermore, "[a]n

additional $10 billion in capital has been set aside for Merrill Lynch & Co. in a transaction to be settled after its acquisition by Bank of America."

66. Bank of America received ample warning that Merrill Lynch was in serious financial trouble weeks before Bank of America asked for shareholders to approve the Merger, as reported by the *Wall Street Journal* on February 5, 2008,

> "Doubts began to creep in shortly before Thanksgiving. With more than a month to go until the end of the fourth quarter, the pretax quarterly losses at Merrill were approaching $9 billion, according to people familiar with the figures. By month's end, the figure had exceeded $13 billion, or $9.29 billion after taxes."
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> "At Bank of America, executives debated whether Merrill's losses were so severe that the bank could walk away from the deal, citing 'material adverse effect' clause in its merger agreement . . . The deliberations continued up until a few days before shareholders of Merrill and Bank of America were scheduled to vote, one of these people says. Senior Bank of America executives had 'mixed emotions,' this person says, but 'everyone wanted to see the deal go through.'"

67. The shareholders of Bank of America and Merrill Lynch voted to approve the Merger on December 5, 2008. Nothing was said about the financial woes at Merrill Lynch. "It puts us in a different league," Defendant Lewis said about the deal's completion.

68. However, immediately following shareholder approval, the Defendants continued to have serious doubts that the Merger was in Bank of America's best interest. The *Wall Street Journal* reported on February 9, 2009, "[t]he next day [Dec. 9, 2008], Bank of America Chief Financial Officer Joe Price gave a detailed presentation to the bank's directors about its financial situation and Merrill's fourth-quarter woes, according to a person familiar with the meeting . . . Mr. Lewis told Bank of America directors in a conference call that the bank might abandon the acquisition, which was supposed to close in two weeks."

69. On December 19, 2008, Defendant Lewis and approximately 20 other people

dialed into a conference call that included other Bank of America executives, Messrs. Paulson and Bernake, and other U.S. Treasury and Federal Reserve officials. When asked what Bank of America needed to move ahead with the deal, Defendant Lewis responded that the bank wanted additional capital and protection against the future losses on Merrill Lynch's assets. The Merger proceeded and closed on January 1, 2009.

70. It was later revealed that on December 28, 2008 – only 3 days prior to the Merger closing – Merrill Lynch paid out over $3.6 billion in bonuses. Of the $3.6 billion paid, a combined $121 million was given to the top four bonus recipients. The bonuses were paid one month early so that they could be paid prior to the Merger closing.

71. New York Attorney General, Andrew Cuomo, investigated the timing and amount of bonuses paid by Merrill Lynch. In a letter to U.S. House Financial Services Chairman, Barney Frank dated February 11, 2009, New York Attorney General Cuomo stated, "[i]n a surprising fit of corporate irresponsibility, it appears that, instead of disclosing their bonus plans in a transparent way as requested by my office, Merrill Lynch secretly moved up the planned date to allocate bonuses and richly rewarded their failed executives." In the letter, New York Attorney General Cuomo contends that Bank of America was aware of the decision to award bonuses before Merrill Lynch's fourth-quarter earnings were announced.

72. On January 16, 2008, Bank of America unexpectedly announced fourth-quarter net losses of $1.69 billion and accepted yet another bailout of $10 billion from the United States' government to help the bank absorb Merrill Lynch's troubled loan-backed securities. At the same time, Bank of America disclosed that Merrill had sustained fourth-quarter net losses of $15.31 billion. Up until this point, Bank of America had failed to disclose the true extent of the

losses, even though its management and directors had repeatedly been informed of Merrill's troubled financial condition.

73. On the January 16, 2008 Earnings Call, an analyst asked Defendant Lewis, "what, if anything, was missed in due diligence of Merrill Lynch that brought us to this point?" Defendant Lewis responded as follows:

> Yes, in a nutshell, much much higher deterioration of the assets we had identified than we had expected going into the fourth quarter. So our forecast of losses, Merrill Lynch's forecast of losses - and frankly, I would think almost anybody in the capital markets business would have forecasted a lower loss rate than what we saw.
>
> So it wasn't an issue of not identifying the assets. It was that we did not expect the significant deterioration, which happened in mid to late December that we saw.

74. Defendant Lewis explained further:

> As we saw the anticipated fourth quarter losses accelerating, we did evaluate our rights under the merger agreement. And during that time we spoke to - and were in close coordination with officials from both the Treasury and the Federal Reserve.
>
> The government was firmly of the view that terminating or delaying the closing of the transaction could lead to significant concerns and could result in serious systemic harm. And a re-pricing, assuming it could be agreed, would have required a new stockholder vote both at Bank of America and at Merrill Lynch and therefore we would have been delayed by at least a couple of months. And that would have led to considerable uncertainty and could have well cost more than the re-pricing that we would have saved.
>
> And I think in recognition - the position that Bank of America was in, both the Treasury and the Federal Reserve gave us assurances in December that we should close the deal and that the government would provide the assistance we've been talking about. So particularly ringing - putting a fence around some of the assets that we were most concerned about. And so in view of all of those considerations, and in view that strategically Merrill Lynch remains a sold franchise, we just thought it was in the bets interest of our company and our

stockholders and the country to move forward with the original terms and the timing.

75. To the contrary, Defendants were made cognizant of the financial woes at Merrill Lynch – specifically, that fourth-quarter losses were accumulating at an alarming rate – prior to the time they solicited proxies from shareholders to approve the Merger. Further, the Defendants failed to adequately disclose material information, and concealed Merrill's true financial condition until after the Merger had closed. By doing so, the Defendants acted contrary to the interests of Bank of America shareholders.

FIRST CAUSE OF ACTION

Against the Individual Defendants for Breach of Fiduciary Duty

76. Plaintiff incorporates by reference and allege each and every allegation contained above, as though fully set forth herein.

77. As alleged herein the Individual Defendants owed and owe Bank of America fiduciary duties. By reason of their fiduciary relationships, the Individual Defendants owed and owe Bank of America the highest obligations of fidelity, trust, loyalty and due care. Additionally, each Individual Defendant owed and owes Bank of America a duty to ensure that the Company operates in a diligent, fair, honest and equitable manner and complied with all applicable federal and state laws, rules and regulations.

78. Each of the Individual Defendants knew, should have known, or recklessly disregarded that the Individual Defendants violated and breached their fiduciary duties of care, good faith, loyalty, reasonable inquiry, oversight and supervision.

79. Each of the Individual Defendants had actual or constructive knowledge that he or she had caused the Company to issue a materially false and misleading Proxy. The Individual Defendants recommended that the Company enter into a Merger that they knew or should have know was not in the best interest of its shareholders, and failed to disclose critical information to allow shareholders to make a well-informed vote on the Merger. These actions could not have been in a good faith exercise of prudent business judgment to protect and promote the Company's corporate interests.

80. As a direct and proximate result of the Individual Defendants' failure to perform their fiduciary duties the Company has suffered significant damages.

81. As a direct and proximate result of the misconduct alleged herein, the Individual Defendants are liable to the Company.

SECOND CAUSE OF ACTION

Against All Individual Defendants for Gross Mismanagement

82. Plaintiffs incorporate by reference and allege each and every allegation contained above, as though fully set forth herein.

83. By their actions and/or inaction alleged herein, the Individual Defendants, directly, indirectly, knowingly, willfully and/or intentionally through aiding and abetting, abandoned and abdicated their responsibilities and fiduciary obligations with regard to the prudent management of Bank of America in a manner consistent with the operations of a public company.

84. As a direct and proximate result of the Individual Defendants' gross mismanagement and breaches of fiduciary duty alleged herein, the Company has suffered significant damages.

85. As a direct and proximate result of the misconduct and breaches of fiduciary duty alleged herein, the Individual Defendants are liable to the Company.

THIRD CAUSE OF ACTION

Against All Individual Defendants for Abuse of Control

86. Plaintiffs incorporate by reference and allege each and every allegation contained above, as though fully set forth herein.

87. The Individual Defendants' misconduct alleged herein constituted an abuse of their ability to control and influence Bank of America, for which they are legally responsible.

88. As a result of the Individual Defendants' abuse of control, the Company has sustained significant damages.

89. As a direct and proximate result of the misconduct alleged herein, the Individual Defendants are liable to the Company.

FOURTH CAUSE OF ACTION

Against All Individual Defendants for Waste of Corporate Assets

90. Plaintiff incorporates by reference and alleges each and every allegation contained above, as though fully set forth herein.

91. As a result of the Individual Defendants' foregoing conduct, the Individual Defendants have caused Bank of America to waste valuable assets and have subjected the

Company to potential material liability for securities fraud, possibly reaching hundreds of millions of dollars in damages, as well as significant legal defense fees.

92. As a direct and proximate result of the Individual Defendants' waste of corporate assets the Company has sustained significant damages.

93. As a direct and proximate result of the misconduct alleged herein, the Individual Defendants are liable to the Company.

WHEREFORE, Plaintiffs demand judgment as follows:

A. Declaring that the Individual Defendants, and each of them, have committed breaches of their fiduciary duties to Bank of America;

B. Requiring the Individual Defendants to pay Bank of America the amounts by which the Company has been damaged by reason of the conduct complained herein;

C. Awarding Plaintiffs the costs and disbursements of this action, including reasonable attorneys' and experts' fees;

D. Granting extraordinary equitable and/or injunctive relief as permitted by law or equity for the Defendants' breaches of fiduciary duties; and

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

JURY DEMAND

Plaintiff demands a trial by jury.

Dated: February 17th, 2009

Respectfully submitted,

Gary W. Jackson (NC State Bar No. 13976)
Sam McGee (NC State Bar No. 25343)
JACKSON & MCGEE, LLP
521 East Boulevard
Charlotte, NC 28203
Tel: (704) 377-6680
Fax: (704) 377-6690
Email: *gjackson@ncadvocates.com*
smcgee@ncadvocates.com

CAULEY BOWMAN CARNEY & WILLIAMS, PLLC
Randall K. Pulliam
James L. Kauffman
11311 Arcade Dr., Suite 200
Little Rock, AR 72211
Phone: (501) 312-8500
Fax: (501) 312-8505

Attorneys for Plaintiffs

VERIFICATION

I am the plaintiff in this shareholder derivative action, and I was a Bank of America shareholder at the time that the events alleged to have taken place in this Complaint occurred. Also, I continue to hold my shares. I believe the factual allegations in the Complaint to be true based upon my personal knowledge and my counsel's investigation. Having received a copy of this Complaint, having reviewed it with my counsel, I hereby authorize its filing.

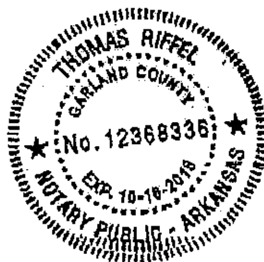
James Cunniff

FEB. 17, 2009
Date

STATE OF ARKANSAS)
) ss
COUNTY OF Garland)

Subscribed and Sworn to me by James Cunniff on this 17 day of February, 2009.

Notary Public



STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

FILED 2009 MAR 31 PM 2:57 C.S.C.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09-CVS-3978

JAMES CUNNIFF, Derivatively and on Behalf of Bank of America, Corp.,

Plaintiff,

v.

KENNETH D. LEWIS, et al.,

Defendants,

and

BANK OF AMERICA CORP.,

Nominal Defendant.

STIPULATION AND ORDER

STIPULATION AND ORDER ADJOURNING THE TIME FOR DEFENDANTS TO ANSWER, MOVE TO DISMISS OR OTHERWISE RESPOND TO THE COMPLAINT

WHEREAS the undersigned counsel for Plaintiff and counsel for Defendants in the above-captioned derivative action enter into this stipulation. The counsel are: (1) Jackson & McGee, LLP on behalf of Plaintiff; (2) McGuireWoods LLP and Davis Polk & Wardwell on behalf of defendants Kenneth D. Lewis, 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., Meredith R. Spangler, Robert L. Tillman, and Jackie M. Ward; and (3) Moore & Van Allen PLLC and Wachtell, Lipton, Rosen & Katz on behalf of nominal defendant Bank of America Corporation.

NOW, THEREFORE, IT IS HEREBY STIPULATED by and between the undersigned counsel, that the time for all Defendants to answer, move to dismiss or otherwise respond to the Complaint shall be extended and deferred until June 12, 2009.

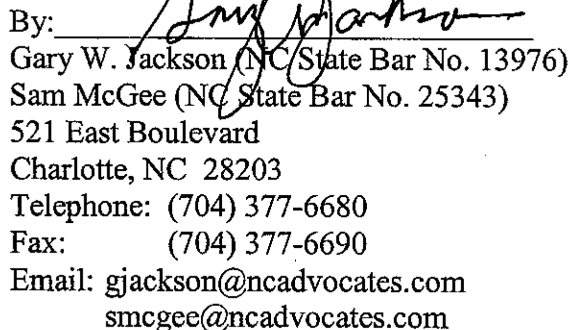
DEFENDANTS SHALL ACKNOWLEDGE, without waiver of any arguments or defenses, including defenses related to personal jurisdiction, receipt of a copy of the Complaint in this action as of the date the Court "so orders" and enters this Stipulation, and thus agree to save the cost of service of a summons and an additional copy of the Complaint in this lawsuit by not requiring service of judicial process in the manner provided for in Rule 4 of the North Carolina Rule of Civil Procedure.

IT IS FURTHER STIPULATED AND AGREED THAT nothing herein shall be deemed to constitute a waiver of, and Defendants do not waive and expressly preserve, all arguments and defenses in the above-captioned action, including defenses related to personal jurisdiction and objections to the appropriateness of this suit proceeding in North Carolina courts.

Dated: March 26th, 2009

Respectfully submitted,

JACKSON & MCGEE, LLP



By: ______________________
Gary W. Jackson (NC State Bar No. 13976)
Sam McGee (NC State Bar No. 25343)
521 East Boulevard
Charlotte, NC 28203
Telephone: (704) 377-6680
Fax: (704) 377-6690
Email: gjackson@ncadvocates.com
smcgee@ncadvocates.com

Attorneys for Plaintiff

CHAR2\1166246v1

MCGUIREWOODS LLP

By: [signature]
Peter J. Covington (NC State Bar No. 9175)
Bradley R. Kutrow (NC State Bar No. 13851)
Bank of America Corporate Center
100 North Tryon Street, Suite 2900
Charlotte, North Carolina 28202-4011
Telephone: (704) 343-2074
Fax: (704) 353-6264
E-mail: pcovington@mcguirewoods.com
bkutrow@mcguirewoods.com

Lawrence Portnoy
Charles S. Duggan
Douglas K. Yatter
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
Fax: (212) 450-3800
E-mail: lawrence.portnoy@dpw.com
charles.duggan@dpw.com
douglas.yatter@dpw.com

Attorneys for individual Defendants

MOORE & VAN ALLEN PLLC

By: [signature]
Valecia M. McDowell (NC State Bar No. 25341)
John A. Fagg, Jr. (NC State Bar No. 28516)
Bank of America Corporate Center
100 North Tryon Street, Suite 4700
Charlotte, North Carolina 28202-4003
Telephone: (704) 331-1000
Fax: (704) 378-1988
E-mail: valeciamcdowell@mvalaw.com
johnfagg@mvalaw.com

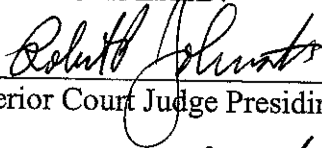
Peter C. Hein
Eric M. Roth
Andrew C. Houston
Jonathan E. Goldin
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, NY 10019
Telephone: (212) 403-1148
Fax: (212) 403-2148
Email: pchein@wlrk.com
emrothr@wlrk.com
achoustonr@wlrk.com
jgoldin@wlrk.com

Attorneys for nominal Defendant Bank of America Corporation

* * *

ORDER

The above stipulation having been considered, and good cause appearing therefore,
IT IS SO ORDERED:



Superior Court Judge Presiding

Dated: 31 March 2009