UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE: BANK OF AMERICA CORP. SECURITIES, DERIVATIVE, AND EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) LITIGATION

Master File No. 09 MD 2058 (PKC)

MEMORANDUM AND ORDER

THIS DOCUMENT RELATES TO:

MICHAEL R. BAHNMAIER,

Plaintiff,

09 Civ. 5411 (PKC)

-against-

BANK OF AMERICA CORP., KENNETH D. LEWIS, JOE L. PRICE and JONATHAN A. THAIN,

Defendants.

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P. KEVIN CASTEL, District Judge:

Defendants move to dismiss the Individual Second Amended Complaint for Violations of Securities Laws (the "Complaint") filed by plaintiff Michael Bahnmaier. The Complaint asserts that defendants violated the Securities Exchange Act of 1934 (the "'34 Act") by omitting or misstating material facts concerning the acquisition of two financial services companies by defendant Bank of America Corp. ("BofA"). Specifically, plaintiff alleges that defendants violated sections 10(b) and 14(a) of '34 Act, as well as their implementing regulations, through misstatements and omissions regarding BofA's acquisition of Countrywide Financial Corporation ("Country") and Merrill Lynch & Co., Inc. ("Merrill").

In a related consolidated securities class action, this Court granted in part and denied in part motions to dismiss certain '34 Act claims directed toward BofA's acquisition of

Merrill. See In re Bank of Am. Corp. Sec., Derivative and Emp't Ret. Income Sec. Act (ERISA) Litig., 757 F. Supp. 2d 260 (S.D.N.Y. 2010); In re Bank of Am. Corp. Sec., Derivative and Emp't Ret. Income Sec. Act (ERISA) Litig., 2011 WL 3211472 (S.D.N.Y. July 29, 2011). As noted by defendants, plaintiff Bahnmaier's allegations concerning the Merrill acquisition "are virtually identical to those made by the Securities class," and plaintiff Bahnmaier "has agreed that those claims should be dismissed in part in accordance with this Court's decisions dismissing in part similar claims in the Securities Class Action." (Def. Mem. at 1; Letter from plaintiff's counsel to Court, Docket # 115, at 2 & n.2.) Familiarity is assumed with the Court's prior decisions in the consolidated shareholder class action.

Defendants' motions and this Memorandum and Order are addressed to claims that are unique to plaintiff Bahnmaier, who alleges that the defendants misrepresented or omitted material information about BofA's acquisition of Countrywide. Separately, defendants move for partial dismissal of plaintiff's claims regarding the Merrill acquisition on grounds that are specific to this plaintiff. Defendant Thain, who has no role in the Countrywide allegations, joins the motion to dismiss insofar as it pertains to the Merrill-based claims. (Docket # 132, 133.)

For the reasons explained, the motions to dismiss are granted.

BACKGROUND

For the purposes of the defendants' motions, all nonconclusory factual allegations are accepted as true. S. Cherry St. LLC v. Hennessee Group LLC, 573 F.3d 98, 100 (2d Cir. 2009); see also Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009). As the non-movants, all reasonable inferences are drawn in favor of the plaintiff. United States v. City of New York, 359 F.3d 83, 91 (2d Cir. 2004).

Plaintiff Bahnmaier asserts that from January 11, 2008 through February 25, 2009 (the "relevant period") the defendants made material misrepresentations and omissions that violated Section 10(b) and Rule 10b-5. (Compl. ¶ 1.) Plaintiff purchased 50,000 shares on April 11, 2008 at a price of $37 per share, and 20,000 shares on November 19, 2008 at a price of $14.50 per share. (Compl. ¶¶ 33, 49.) In total, he purchased 70,000 shares of BofA common stock at a cost of $2,140,000. (Compl. ¶ 33.) During the relevant period, defendant Kenneth D. Lewis was CEO and chairman of BofA, and defendant Joe L. Price was BofA's chief financial officer. (Compl. ¶¶ 34-35.) Defendant Thain was Merrill's CEO and chairman. (Compl. ¶ 36.)

On January 11, 2008, the first day of the relevant period, BofA announced that it had entered into an agreement to acquire Countrywide in an all-stock transaction valued at $4.1 billion. (Compl. ¶ 40.) In an accompanying press release, Lewis praised Countrywide as having "the best domestic mortgage platform," and stated that the acquisition would improve BofA's customer service and profitability. (Compl. ¶ 40.) As characterized in the Complaint, the press release "went on to tout Countrywide's subprime initiatives." (Compl. ¶ 41.)

Lewis also spoke positively about Countrywide in a teleconference of January 11, 2008. (Compl. ¶ 42.) In that teleconference, Price stated that BofA undertook "extensive" due diligence of Countrywide, which included "sixty people on the ground for the better part of the last thirty days . . . ." (Compl. ¶ 43.) When asked about diligence focused on litigation and regulatory risk, Lewis stated that "we had a lot of advice . . . ." (Compl. ¶ 45.)

BofA closed its acquisition of Countrywide on July 1, 2008. (Compl. ¶ 7.) That same day, Lewis issued a press release stating that the acquisition would benefit BofA. (Compl. ¶ 53.)

Plaintiff asserts that BofA incurred significant losses due to the deteriorating value of Countrywide's mortgage portfolio. (Compl. ¶ 62.) On April 29, 2008, about 18 days after Bahnmaier's 50,000-share purchase, Countrywide announced that it had incurred a quarterly loss of $893 million in the first quarter of 2008, which reflected $3 billion in credit-related charges. (Compl. ¶ 50.) According to the Complaint, on a date not specifically identified, Standard & Poor's downgraded Countrywide's debt, and Countrywide's share price declined by 10%. (Compl. ¶ 50.) At a later point in time also not specified in the Complaint, BofA incurred a $2 billion writedown to goodwill on Countrywide; the Complaint asserts that the profitability of BofA's banking business has since been offset by Countrywide-based losses. (Compl. ¶ 63.) The Complaint asserts that prior to the closing, BofA did not disclose that Countrywide owned "$28.6 billion in high-risk ARM loans," which now "seriously threaten" BofA's capitalization. (Compl. ¶¶ 47-48.) Plaintiff asserts that BofA's home-loan business "lost more than $12 billion in the last two years," and that among BofA's 1.3 million delinquent mortgages, 85% of them originated with Countrywide. (Compl. ¶ 64.)

Plaintiff alleges a failure to perform adequate diligence about litigation and regulatory exposure. According to the plaintiff, numerous state attorneys general were, at the time of the January 11 statements, investigating Countrywide for predatory lending practices. (Compl. ¶ 47.) In June 2008, which was during the relevant period, attorneys general in Illinois and California commenced lawsuits against Countrywide alleging deceptive and unfair business practices; Florida commenced a similar action on July 1, which was the date of the deal's closing. (Compl. ¶ 52.) In August, attorneys general in Connecticut, West Virginia and Indiana each filed suit directed toward Countrywide's lending practices. (Compl. ¶¶ 55-56.) On October 6, 2008, BofA announced a settlement with 11 state regulators. (Compl. ¶ 57.) The next day,

BofA's share price declined by approximately 27 percent. (Compl. ¶ 57.) About a month and a half later, Bahnmaier increased his BofA holdings by 20,000 shares. (Compl. ¶ 33.)

The Complaint recites other legal actions commenced by private parties and government agencies, including the Federal Trade Commission and the Securities Exchange Commission, arising out of Countrywide's lending practices. (Compl. ¶ 58.) The plaintiff asserts that more litigation is likely. (Compl. ¶ 59.) Plaintiff contends that BofA failed to conduct sufficient diligence before acquiring Countrywide, and that in their public statements, the defendants unlawfully misrepresented the scope of diligence. (Compl. ¶ 60.) According to plaintiff, more thorough diligence would have revealed "extremely lax underwriting guidelines," as well as loans that violated internal guidelines and misclassified "prime" loans. (Compl. ¶¶ 60-61.) Plaintiff alleges that as a result of inadequate diligence, BofA "will undoubtedly incur" significant costs to resolve and defendant Countrywide liabilities. (Compl. ¶ 61.)

Count One of the Complaint asserts that the defendants violated Section 14(a) of the '34 Act, 15 U.S.C. § 78n(a)(1), and SEC Rule 14a-9 promulgated thereunder, 17 C.F.R. 240.14a-9(a), due to materially misleading statements and/or omissions in proxy solicitations that preceded the shareholder vote to acquire Merrill.[1] Count Two asserts that defendants violated Section 10(b) of the '34 Act, 15 U.S.C. § 78j(b), and SEC Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, due to materially misleading statements and/or omissions related to BofA's acquisitions of Countrywide and Merrill.[2] Count Three asserts control-person liability under Section 20(a) of the '34 Act, 15 U.S.C. § 78t(a), for the alleged '34 Act violations in the acquisitions of Countrywide and Merrill.

[1] The Court granted in part and denied in part the motions to dismiss a parallel claim in the class action complaint. Plaintiff agrees that the Court's prior decision controls to the extent that the same claim is alleged. I therefore need not revisit the claim here. 757 F. Supp. 2d 260; 2011 WL 3211472.

[2] Similarly, the Court does not revisit the claim as it pertains to the Merrill acquisition.

MOTION TO DISMISS STANDARD UNDER THE PSLRA, RULE 9(b) AND RULE 12(b)(6)

Pursuant to Rule 12(b)(6), Fed. R. Civ. P., "[t]o survive a motion to dismiss, a complaint must plead 'enough facts to state a claim to relief that is plausible on its face.'" ECA, Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co., 553 F.3d 187, 196 (2d Cir. 2009) (quoting Ruotolo v. City of New York, 514 F.3d 184, 188 (2d Cir. 2008)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" Iqbal, 129 S. Ct. at 1949 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

Along with the standards of Rule 12(b)(6), "[a]ny complaint alleging securities fraud must satisfy the heightened pleading requirements of the PSLRA and Fed. R. Civ. P. 9(b) by stating with particularity the circumstances constituting fraud." ECA, Local 134, 553 F.3d at 196 (citing Tellabs Inc. v. Makor Issues & Rights. Ltd., 551 U.S. 308 (2007)).

Rule 9(b) requires a party to "state with particularity the circumstances constituting fraud or mistake." This pleading threshold gives a defendant notice of the plaintiff's claim, safeguards a defendant's reputation from "improvident" charges and protects against strike suits. See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 99 (2d Cir. 2007). "A securities fraud complaint based on misstatements must (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." Id. at 99 (citing Novak v. Kasaks, 216 F.3d 300, 306 (2d Cir. 2000)). Allegations of fraud may be "too

speculative even on a motion to dismiss," particularly when premised on "'distorted inferences and speculations.'" Id. at 104 (quoting Segal v. Gordon, 467 F.2d 602, 606, 608 (2d Cir. 1972)).

The Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 (the "PSLRA"), for its part, has "imposed heightened pleading requirements and a loss causation requirement upon 'any private action' arising from the Securities Exchange Act." Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 165 (2008) (quoting 15 U.S.C. § 78u–4(b)). It requires a complaint to "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1). Put differently, the PSLRA "insists that securities fraud complaints 'specify' each misleading statement; that they set forth the facts 'on which [a] belief' that a statement is misleading was 'formed'; and that they 'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.'" Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 345 (2005) (quoting 15 U.S.C. § 78u–4(b)(1), (2)). As the Second Circuit has repeatedly required, plaintiffs "must do more than say that the statements . . . were false and misleading; they must demonstrate with specificity why and how that is so." Rombach v. Chang, 355 F.3d 164, 174 (2d Cir. 2004); accord ATSI, 493 F.3d at 99 ("A securities fraud complaint based on misstatements must . . . explain why the statements were fraudulent. Allegations that are conclusory or unsupported by factual assertions are insufficient.") (citations omitted).

The PSLRA also "requires plaintiffs to state with particularity . . . the facts evidencing scienter, i.e., the defendant's intention 'to deceive, manipulate, or defraud.'" Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313 (2007) (quoting Ernst & Ernst v.

Hochfelder, 425 U.S. 185, 194 & n. 12 (1976)). To qualify as "strong," the "inference of scienter must be more than merely plausible or reasonable – it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." Id. at 314.

DISCUSSION

I. Plaintiff Bahnmaier's Claims Directed toward the Countrywide Acquisition Are Dismissed.

A. The Complaint Does Not Identify Actionable Misstatements or Omissions Concerning Countrywide's Litigation or Portfolio.

Plaintiff's securities fraud claim directed toward the Countrywide acquisition cites broad, opinion-based statements, including several that were made in light of then-contingent litigation risks. Under the pleading standards of Rules 9(b), 12(b)(6) and the PSLRA, the plaintiff does not state an actionable claim for violations of Section 10(b) or Rule 10b-5.

1. The Complaint Does Not Allege Material Misstatements Regarding Countrywide Litigation Exposure.

According to the plaintiff, defendants misrepresented the extent and depth of due diligence exercises that BofA undertook prior to its acquisition of Countrywide. (Compl. ¶¶ 2, 42-48.) Plaintiff grounds his claims in a fraud-by-hindsight theory, which is not actionable under Section 10(b) and Rule 10b-5. The Complaint also fails to account for BofA's public statements acknowledging Countrywide's litigation exposure and the role of that exposure in BofA's valuation of Countrywide.

As noted, the text of the PSLRA requires a plaintiff to specify each allegedly misleading statement and to allege "the reason or reasons why the statement is misleading . . . ." 15 U.S.C. § 78u-4(b)(1). The Complaint must state with particularity that defendants' statements "were false when made." Rombach, 355 F.3d at 172 (quotation marks omitted). To be actionable, the misstatement must be "misleading as to a material fact." Basic Inc. v. Levinson,

485 U.S. 224, 238 (1988) (emphasis in original). A misstatement is material if it "significantly altered the 'total mix' of information" available to the market. ECA, Local 134, 553 F.3d at 197. Courts engage in a fact-specific inquiry to determine materiality, and consider "all relevant circumstances" surrounding the alleged misstatement. Id.

Plaintiff directs the Court to several due diligence-related representations that he claims were actionable misstatements. (Opp. Mem. at 19-22.) In the January 11, 2008 teleconference, Lewis stated, "Our extensive due diligence supports our overall valuation and pricing of the transaction." (Compl. ¶ 42.) In that same call, Price stated:

> Now as Ken said, the due diligence on this deal was extensive. We had more than sixty people on the ground for the better part of the last thirty days, with more focus picking up through the holidays. The focus of the due diligence, as you would expect was on the mortgage servicing rights, credit, and legal, as well as accounting and operational areas. The results of our due diligence support our overall valuation and pricing of the transaction.

(Compl. ¶ 43.) One analyst questioned Price about potential litigation exposure, to which Price replied: "Again, our being clearly focused on those areas in due diligence both from a kind of corporate as well as particular product aspect, and incorporated that in the economic evaluation in arriving at our pricing or validating our pricing." (Compl. ¶ 44.) A second analyst questioned Price about the role of litigation risk in determining the appropriate exchange ratio in the all-stock transaction. (Compl. ¶ 44.) Price stated:

> What we did is we did our due diligence, and obviously our exchange ratio was established based on market pricing and all the other attributes that you would consider in that.
>
> What I was meaning is that our due diligence findings were supported or fully encompassed in when we set that exchange ratio, so.
>
> But no, I am not prepared to provide any details specific as to specific estimates on particular items. Obviously, that will change

> up through the date of application of purchase accounting once the deal is approved in the early third quarter period.

(Compl. ¶ 44.) Lewis, when asked about regulatory and litigation risks due to subprime exposure, stated, "Well, all I can say is we had a lot of advice from both our internal group and also from two other entities that put some parameters around it." (Compl. ¶ 45.)

According to the quotations in the Complaint, during the diligence process, BofA identified potential exposure due to litigation and investigations regarding Countrywide's lending practices, and incorporated this risk into its valuation of Countrywide. Plaintiff does not allege that Price misstated the amount of staffing and time devoted to diligence, or that BofA did not, in truth, incorporate diligence findings into its valuation of the Countrywide acquisition. The Complaint does not allege with particularity that the diligence representations "were false when made," Rombach, 355 F.3d at 172, or why these statements were misleading, 15 U.S.C. § 78u-4(b)(1).

Plaintiff argues that defendants unlawfully represented that the due diligence was "extensive," and assert that proper diligence "would have discovered the rampant, longstanding illegal policies and practices" of Countrywide. (Opp. Mem. at 21-22, citing Compl. ¶¶ 42-45.) As to any generalized assertion concerning "extensive" diligence, this Court reviewed a near-identical allegation in the securities class action regarding Merrill. See In re Bank of America, 757 F. Supp. 2d at 310-12. There, plaintiffs alleged that Lewis and Price uttered material misstatements by characterizing the Merrill diligence as "extensive." Id. at 309. Surveying authority from this District and elsewhere, the Court concluded that to allege actionable fraud for an opinion-based statement, "a plaintiff must allege that the defendant did not actually believe the stated opinion." Id. at 310 (citing, inter alia, Podany v. Robertson Stephens, Inc., 318 F. Supp. 2d 146, 153-54 (S.D.N.Y. 2004) (Lynch, J.) ("The sine qua non of a securities fraud claim

based on false opinion is that defendants deliberately misrepresented a truly held opinion."); Rubke v. Capitol Bancorp Ltd., 551 F.3d 1156, 1162 (9th Cir. 2009)). Here, the plaintiff does not allege with plausibility or particularity that the defendants did not consider the due diligence investigation to have been extensive. Based on the Complaint's allegations, defendants stated that a team of sixty people undertook due diligence work for approximately a month, and that defendants factored litigation exposure into the valuation of Countrywide. (Compl. ¶¶ 42-45.) Such statements do not support an allegation that the defendants did not believe their characterization that due diligence was "extensive."

To the extent that the plaintiff relies on the eventual litigation and regulatory exposure arising out of Countrywide practices, the relevant events occurred in the months and years following the allegedly misleading statements, and, according to the Complaint, are continuing to unfold. (Compl. ¶¶ 48(e), 60.) The Complaint recites an October 6, 2008 settlement with state regulators, and other settlements made from May 2010 to December 2010 as a result of federal and private actions. (Compl. ¶¶ 57-58.) Assuming that these post-closing outcomes were inconsistent with BofA's anticipated outcomes subsumed in the valuation of the acquisition – a proposition that is not self-evident on the face of the Complaint – plaintiff offers only a retrospective critique of BofA's analysis concerning Countrywide's exposure. As stated by the Second Circuit: "[W]e have refused to allow plaintiffs to proceed with allegations of 'fraud by hindsight.' . . . [A]llegations that defendants should have anticipated future events and made certain disclosures earlier than they actually did do not suffice to make out a claim of securities fraud." Novak, 216 F.3d at 309; accord Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1129 (2d Cir. 1994) ("We have rejected the legitimacy of 'alleging fraud by hindsight.'"); Rombach, 355 F.3d at 172 (to be actionable, misstatements must be "false when made.");

Podany, 318 F. Supp. 2d at 154 ("A securities fraud action may not rest on allegations that amount to second-guesses of defendants' opinions about the future value of issuers' stock – second-guesses made all too easy with the benefit of hindsight."); Fadem v. Ford Motor Co., 2003 WL 22227961, at *4 (S.D.N.Y. Sept. 25, 2003) ("It is not the role of the courts to second guess the decisions made in the course of business operations, lest every strategy that goes awry becomes subject to a lawsuit, and corporations are inhibited from following all but the most conservative path."). At most, the allegations would raise an inference that the defendants misjudged the scope of Countrywide's potential litigation exposure.

The Complaint does not plausibly allege a false and misleading statement by any defendant regarding the nature, extent or results of pre-acquisition due diligence in Countrywide's litigation and regulatory exposure.

2. The Complaint Does Not Allege Actionable Omissions Regarding Countrywide.

An omission is actionable "only when the corporation is subject to a duty to disclose the omitted facts." In re Time Warner Inc. Sec. Litig., 9 F.3d 259, 267 (2d Cir. 1993). The disclosure duty may arise based on affirmative obligations required by the SEC, or else to prevent past statements from being rendered misleading. 17 C.F.R. § 240.10b-5(b) (disclosure required for material facts necessary "to make the statements made, in the light of the circumstances under which they were made, not misleading."); see also In re Morgan Stanley Information Fund Sec. Litig., 592 F.3d 347, 361-66 (2d Cir. 2010) (categorizing disclosure obligations).

In plaintiff's opposition memorandum, he asserts that any disclosure duty arose "in order to make the Bank Defendants' related assurances not misleading."[3] (Opp. Mem. at 14.) He cites paragraph 47 of the Complaint, which alleges that defendants' diligence-related statements were misleading because nine states were then investigating Countrywide's lending practices. (Opp. Mem. at 14-15.) However, the statements about due diligence reflected that defendants were aware of possible litigation and regulatory developments and incorporated the risk into the Countrywide valuation. (Compl. ¶¶ 43-45.) Price stated, "I am not prepared to provide any details specific as to specific estimates on particular items." (Compl. ¶ 44.) As discussed, the Complaint's omission theory does not identify with particularity any statements that were rendered misleading by the omission of specific, then-unresolved investigations and litigation. Absent such a link to misleading statements, the Complaint does not plausibly allege an actionable omission. See, e.g., In re Canandaigua Sec. Litig., 944 F. Supp. 1202, 1209 (S.D.N.Y. 1996) (Pollack, J.) (complaint does not allege a duty to disclose when "plaintiffs point to no statement of the defendants that could even arguably be rendered misleading by omission of a discounting plan.").

Separately, there was significant public information about investigations and litigation over Countrywide's lending practices in the period prior to plaintiff's April 2008 purchase of BofA stock. This includes a December 13, 2007 New York Times article about Illinois's investigation into Countrywide loan origination practices; a January 9, 2008 Washington Post article citing investigations by attorneys general in New York, California and Illinois, as well as "rumors" that Countrywide was contemplating a bankruptcy filing; a January 29, 2008 Wall Street Journal article citing investigations about Countrywide's lending practices

[3] Plaintiff disclaims reliance on Item 103 of SEC Regulation S-K, 17 C.F.R. § 229.103, which requires disclosure of "any material pending legal proceedings" in filings such as registration statements and annual reports. (Opp. Mem. at 14.)

in California, Illinois and Florida; a January 31, 2008 Wall Street Journal article stating that Countrywide had confirmed receipt a subpoena from the Florida attorney general; a March 6, 2008 press release from the Illinois attorney general announcing subpoena to Countrywide; and a March 7, 2008 Wall Street Journal article about the Illinois subpoenas to Countrywide. (Park Dec. Exs. 4-8.) Prior to plaintiff's April 2008 purchase, media outlets including CNN, National Public Radio, the Associated Press, the Chicago Tribune, the Los Angeles Times, American Banker, The St. Petersburg Times, the Orlando Sentinel and the Austin American-Statesman had reported ongoing investigations launched by California, Illinois, Florida, the SEC, and the FBI, as well as the existence of lawsuits by Countrywide investors and borrowers. (Park Dec. Exs. 9-23.)

A court properly may take judicial notice of such press reports on a motion to dismiss without converting the motion into one for summary judgment. In re Yukos Oil Co. Sec. Litig., 2006 WL 3026024, at *21 n.10 (S.D.N.Y. Oct. 25, 2006). A "truth-on-the-market defense is intensely fact-specific and is rarely an appropriate basis for dismissing a § 10(b) complaint for failure to plead materiality." Ganino v. Citizen Utilities Co., 228 F.3d 154, 167 (2d Cir. 2000). But in this case, the plaintiff has not alleged with particularity the existence of any material information not disseminated to the market. At the time of plaintiff's April 2008 share purchase, numerous press accounts had described specific factual developments about investigations by officials in four states and the SEC, as well as lawsuits brought by Countrywide borrowers and shareholders. (Park Dec. Exs. 4-23.) Such reports went beyond a scattering of press accounts, and were more than speculative articles discussing anticipated future events or inviting cautionary inferences from sophisticated investors. Cf. In re Bank of America, 757 F. Supp. 2d at 300-02 (press accounts of potential future bonus payments, which may have contradicted

defendants' public statements, did not establish truth on the market at the pleading stage). Similarly, this was not a circumstance in which press accounts contradicted statements made by the defendants, thereby requiring the Court to "counter-balance effectively any misleading information created by the alleged misstatements." Ganino, 228 F.3d at 167 (quotation marks omitted). The press reports were specific accounts of concrete, knowable facts that the plaintiff now claims were omitted by defendants. In opposition to the motion, plaintiff argues, ipse dixit, that the articles cited by defendants "do not meet th[e] standard" for establishing truth on the market.[4] (Opp. Mem. at 16.) Plaintiff does not allege with particularity that in addition to the publicly reported investigations and litigations, other undisclosed investigations were of a different nature or magnitude so as to significantly alter the total mix of information available to the market. See ECA, Local 134, 553 F.3d at 197.

The Court concludes that (a) plaintiff has not plausibly alleged an actionable material omission concerning due diligence, and (b) alternatively, that the widely reported new of Countrywide's potentially adverse litigation and regulatory circumstances establishes a truth-on-the-market defense.

3. The Complaint Fails to Allege Actionable Misstatements or Omissions as to the Risk in Countrywide's Lending Portfolio.

According to the plaintiff, the defendants omitted material information about the risks of Countrywide's lending portfolio. Plaintiff highlights $28.6 billion in adjustable rate mortgages, which, plaintiff asserts, have had negative consequences for BofA's operations and capital position subsequent to the closing. (Compl. ¶¶ 2, 27(d), 47, 48, 263(c).)

[4] Elsewhere, the Complaint expressly alleges that the market accounted for third-party assessments of BofA's valuation of Countrywide, asserting that in the first week of May 2008, share prices declined by 11 percent as analysts questioned Countrywide's strength. (Compl. ¶ 51.) The Complaint also alleges that the market for BofA shares "was open, well-developed and efficient at all times." (Compl. ¶ 351.)

Again, plaintiff's theory rests on fraud by hindsight. See Novak, 216 F.3d at 309 ("[A]llegations that defendants should have anticipated future events and made certain disclosures earlier than they actually did do not suffice to make out a claim of securities fraud."). It is premised on events that occurred subsequent to the acquisition's closing, and would require the defendants to have correctly predicted post-closing events. For example, plaintiff alleges that Countrywide's practices "have resulted in extremely high delinquency rates," poor financial results for BofA and numerous legal settlements. (Compl. ¶ 2; see also Compl. ¶ 48 (Countrywide acquisition "would have catastrophic consequences," "would cause the Company to incur significant losses," and BofA "would be exposed" to billions in litigation loss).) As alleged, these events materialized only after plaintiff's April purchase and the acquisition's closing.

There is no allegation that the defendants attempted to conceal or mislead the market concerning Countrywide's portfolio of subprime loans. Indeed, the Complaint recites numerous statements contained in BofA's January 2008 press release that highlighted Countrywide's subprime lending. (Compl. ¶ 41.) The defendants specifically touted Countrywide's subprime expertise, noting, among other things, Countrywide's "commitment" to participate in a subprime adjustable-rate mortgage program sponsored by California's governor and a $16 billion foreclosure-prevention initiative directed to borrowers with adjustable-rate resets in 2008. (Compl. ¶ 41.) As noted by Judge Koeltl, "a statement of relative risk is a statement of opinion," and "there is no obligation for an issuer to identify specifically every type of asset or liability it possesses," provided that disclosures cover broad categories. Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co., 753 F. Supp. 2d 166, 181-82 (S.D.N.Y. 2010). Here, as alleged in the Complaint, BofA expressly emphasized Countrywide's

subprime niche, specifically including adjustable-rate mortgages. (Compl. ¶ 41.) The alleged losses tied to those assets arose after the acquisition's closing and are evident only in hindsight. See Novak, 216 F.3d at 309.

There is no basis in law or in the Complaint's allegations that required defendants to anticipate future negative events arising from Countrywide's holdings. The Complaint fails to allege any actionable misstatements or omissions regarding Countrywide's lending practices or portfolio.

4. The Complaint Fails to Allege Actionable Misstatements or Omissions as to the Acquisition's Benefits.

The Complaint includes certain broad and optimistic statements by BofA about the benefits of the Countrywide acquisition. Among other things, the January 11, 2008 press release described the acquisition as "a rare opportunity" to add "the best domestic mortgage platform at an attractive price and to affirm our position as the nation's premier lender to consumers." (Compl. ¶ 40.) The press release stated that BofA "now will have an opportunity to better serve our customers and to enhance future profitability." (Compl. ¶¶ 40, 285.) As noted, the press release expressly touted Countrywide's work in the subprime mortgage market. (Compl. ¶ 41.) Plaintiff also cites statements made in the January 11 teleconference, including Lewis's statement that the acquisition was "a unique opportunity" with "very compelling valuations," that Countrywide "has product expertise and a sales culture that tops our capabilities," "the best practices of sales capabilities and efficient operations, a "very attractive value." (Compl. ¶ 42.) Lewis also noted that it had been a "tough" year for Countrywide, which was "severely impacted by market liquidity concerns and the ability to fund asset growth." (Compl. ¶ 42.)

Plaintiff has not plausibly alleged facts showing that these statements amounted to material misstatements or omissions. "[E]xpressions of puffery and corporate optimism do not give rise to securities violations." Rombach, 355 F.3d at 174. As the Second Circuit further explained:

> Up to a point, companies must be permitted to operate with a hopeful outlook: "People in charge of an enterprise are not required to take a gloomy, fearful or defeatist view of the future; subject to what current data indicates, they can be expected to be confident about their stewardship and the prospects of the business that they manage." To succeed on this claim, plaintiffs must do more than say that the statements in the press releases were false and misleading; they must demonstrate with specificity why and how that is so.

Id. (quoting Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1129-30 (2d Cir. 1994)). As this Court explained in the related shareholder action, "'generalizations' regarding 'business practices' do not 'amount to a guarantee' to shareholders." 757 F. Supp. 2d at 110 (quoting ECA, Local 134, 553 F.3d at 205-06). Such enthusiastic statements are general puffery, and are distinguished from opinion-based misstatement grounded in misrepresentations of existing fact. Id. (citing Novak, 216 F.3d at 315). Here, the statements cited by plaintiff were enthusiastic but vague, broadly characterizing the acquisition as a "rare" and "unique" opportunity, which arose at a good value in light of Countrywide's personnel and operations. (Compl. ¶¶ 40-42.) The Complaint does not plausibly allege that such generalized statements were false at the time they were made or more than statements of corporate optimism. Rombach, 355 F.3d at 174.

The PSLRA also provides a safe harbor for forward-looking statements accompanied by "meaningful cautionary statements." 15 U.S.C. §§ 78u-5(c)(1)(A)(i). A plaintiff must plausibly allege that forward-looking statements were made with knowledge that the statement was false or misleading. 15 U.S.C. § 78u-5(c)(1)(B)(i). Here, the press release

stated that investors were "cautioned not to place undue reliance on forward-looking statements," noting that they could be affected by adverse economic conditions or litigation liabilities. (Park Dec. Ex. 28.) Cautionary language also was used in the investor teleconference. (Park Dec. Ex. 25 at 1.) In opposition, the plaintiff merely asserts that the cautionary language was boilerplate and not worthy of the safe-harbor provision. To the limited extent that the plaintiff has cited forward-looking statements (e.g., Compl. ¶¶ 40, 285), as opposed to generalized statements of puffery and corporate optimism, they fall within the PSLRA's safe-harbor provision.

The Complaint does not plausibly allege a material misstatement or omission by any defendant concerning the benefits of acquiring Countrywide.

B. The Complaint Does Not Adequately Allege Scienter as to the Countrywide Acquisition.

In addition to the Complaint's failure to allege actionable misstatements or omissions regarding Countrywide, it fails to allege either scienter or recklessness on the part of the defendants.

The PSLRA requires a plaintiff to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). In scrutinizing scienter allegations, a court is to consider "whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." Tellabs, 551 U.S. at 322-23 (emphasis in original). A court also "must take into account plausible opposing inferences." Id. at 323. This requires close and comparative scrutiny: "[T]he inference of scienter must be more than merely 'reasonable' or 'permissible' – it must be cogent and compelling, thus strong in light of other explanations." Id. at 324.

In satisfying the scienter pleading threshold, "[a] complaint will survive . . . only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." Id. at 324. A plaintiff may demonstrate this by alleging facts "(1) showing that the defendants had both motive and opportunity to commit the fraud or (2) constituting strong circumstantial evidence of conscious misbehavior or recklessness." ATSI, 493 F.3d at 99. Motives that are common to corporate officers – for instance, "the desire for the corporation to appear profitable and the desire to keep stock prices high to increase officer compensation" – do not rise to the level of scienter. ECA, Local 134, 553 F.3d at 198. "Rather, the 'motive' showing is generally met when corporate insiders allegedly make a misrepresentation in order to sell their own shares at a profit." Id. When the defendant is a corporate entity, "the pleaded facts must create a strong inference that someone whose intent could be imputed to the corporation acted with the requisite scienter." Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc., 531 F.3d 190, 195 (2d Cir. 2008).

Alternatively, a plaintiff who cannot make a scienter showing through motive and opportunity can still "raise a strong inference of scienter under the strong circumstantial evidence prong, though the strength of the circumstantial allegations must be correspondingly greater if there is no motive." ECA, Local 134, 553 F.3d at 198-99 (quotation marks omitted). The Second Circuit has stated that "securities fraud claims typically have sufficed to state a claim based on recklessness when they have specifically alleged defendants' knowledge of facts or access to information contradicting their public statements. Under such circumstances, defendants knew or, more importantly, should have known that they were misrepresenting material facts related to the corporation." Novak, 216 F.3d at 308. Recklessness also may be

successfully pleaded "where plaintiffs alleged facts demonstrating that defendants failed to review or check information that they had a duty to monitor, or ignored obvious signs of fraud." Id.

According to the plaintiff, the defendants "clearly knew or had access to information suggestion their statements were materially misleading." (Opp. Mem. at 23.) The Complaint contains two paragraphs of scienter allegations concerning Countrywide. (Compl. ¶¶ 285-86.) Paragraph 285 largely reiterates the Complaint's substantive allegations about diligence, noting that if diligence had been adequate, defendants would have discovered "widespread unlawful practices" at Countrywide. (Compl. ¶ 285.) It also asserts that Lewis's description of Countrywide having the "best mortgage platform in the business" was either reckless or a knowing misrepresentation. (Compl. ¶ 285.) Separately, the Complaint alleges that the acquisition occurred "purely to feed the ego of Lewis," citing an article on CNNMoney.com in which "[o]ne investment banker" was quoted as saying, "Ken Lewis, when he covets a target, cannot say no." (Compl. ¶ 286.)

In plaintiff's scienter allegations concerning Lewis, one paragraph merely reiterates substantive allegations concerning the adequacy of diligence and the strength of Countrywide's mortgage platform. (Compl. ¶ 285.) The second paragraph contends that Lewis sought to acquire Countrywide "purely to feed [his] ego . . . ." (Compl. ¶ 286.) These allegations are insufficient to raise a cogent and compelling inference of scienter. Tellabs, 551 U.S. at 324. There is no allegation that Lewis was personally enriched by the acquisition of Countrywide, and that he thereby had a motive to deceive the market as to Countrywide's value or business practices. The remark quoted in the press concerning Lewis's "ego" similarly does not raise an inference of scienter. A vague claim that a business executive's ego gratification

motivated a transaction does not allege a motive adverse to a company's business goals, and does not support an inference of scienter, absent additional allegations of intent and recklessness.

As to recklessness, the scienter allegations do not "specifically allege[ ] defendants' knowledge of facts or access to information contradicting [his] public statements." Novak, 216 F.3d at 308. As previously discussed, the Complaint does not allege actionable misstatements or omissions concerning Countrywide diligence or Lewis's characterization that Countrywide had the "best mortgage platform in the business." (Compl. ¶ 285.)

Separately, plaintiff's scienter allegations are silent as to Price's actions in the Countrywide acquisition. For this reason alone, the Complaint's Countrywide allegations fail to state a claim against Price under Section 10(b) and Rule 10b-5.

The Court concludes that the plaintiff has not alleged facts that amount to strong circumstantial evidence of conscious misbehavior or recklessness, or, alternatively, a motive and opportunity to commit fraud. Because the Complaint does not adequately allege scienter, plaintiff's claims against all defendants concerning the Countrywide acquisition are dismissed.

II. Plaintiff Bahnmaier's Claims Directed toward the Merrill Acquisition Are Dismissed in Part, in Accordance with the Court's Prior Decisions and the Date of Certain Share Purchases.[5]

Plaintiff acknowledges that in this action, the Court's prior decisions in the securities class action concerning BofA's acquisition of Merrill control his parallel claims. (09 Civ. 8411, Docket # 115 at 2 & n.2; Def. Mem. at 22.) Moreover, the plaintiff has agreed that his Section 10(b) and Rule 10b-5 claim concerning Merrill should be dismissed to the extent that it relies on alleged misstatements or omissions that occurred after his purchase of BofA stock on November 19, 2008, and that his Section 14(a) and Rule 14a-9 claims should be dismissed as to

[5] As noted, defendant Thain joins in the BofA defendants' motion to the extent that it is directed to BofA's acquisition of Merrill. (09 Civ. 8411, Docket # 131, 132.)

any alleged misstatements or omissions after December 5, 2008. (09 Civ. 8411, Docket # 115, at 2.) Consistent with the parties' submissions, such portions of plaintiff's claims directed toward BofA's acquisition of Merrill are dismissed in part, for the reasons previously discussed in this Court's decisions in the shareholder class action. See 757 F. Supp. 2d 260; 2011 WL 3211472. Claims directed to the Merrill acquisition that were upheld in the securities class action will stand as to plaintiff Bahnmaier.

Defendants separately move to limit the plaintiff's Section 14(a) and Rule 14a-9 claim to the extent that it encompasses the 20,000 shares that he purchased on November 19, 2008. (Def. Mem. at 23.) October 10, 2008 was the record date for shareholder votes on the Merrill acquisition. (Park Dec. Ex. 31.) Therefore, plaintiff had no voting right in the 20,000 shares that he purchased in November. The plaintiff, of course, is correct that the timing of this purchase does not implicate Article III standing, but his contention that the issue need not be raised until a damages phase is meritless. (Opp. Mem. at 25.) Section 14(a) protects shareholder rights only for those who are entitled to participate in the proxy solicitation process. See, e.g., United Paperworkers Int'l Union v. Int'l Paper Co., 985 F.2d 1190, 1197-98 (2d Cir. 1993) (SEC "promulgated Rule 14a–9 with the goal of preserving for all shareholders who are entitled to vote . . . the right to make decisions based on information that is not false or misleading."). Because the plaintiff was not entitled to vote on the 20,000 shares he purchased after the record date, his Section 14(a) and Rule 14a-9 claim is dismissed in part. Consistent with this Court's prior decisions, he has a viable Section 14(a) and Rule 14a-9 claim for the 50,000 BofA shares that he purchased in April 2008.

III. Plaintiff Bahnmaier's Request for Leave to Amend is Denied.

By way of a footnote and a fleeting assertion in the concluding sentence of his opposition memorandum, plaintiff seeks leave to amend the Complaint in the event that the Court deems any of his allegations insufficient. (Opp. Mem. at 25 & n. 12.) The application is denied. Plaintiff filed his initial complaint on February 27, 2009 and an amended complaint on October 9, 2009. (09 Civ. 8411, Docket # 10.) Defendants filed a motion to dismiss on December 8, 2009. (09 Civ. 8411, Docket # 28.) After this action was reassigned to the undersigned from then-District Judge Chin, defendants withdrew the motion. Plaintiff filed a Second Amended Complaint on February 14, 2011. (09 Civ. 8411, Docket # 114.) In a February 24, 2011 letter to the Court, the plaintiff summarized his understanding of the defendants' anticipated motion and the basis for his belief that the motion was meritless. (09 Civ. 8411, Docket # 115.)

The plaintiff has now twice availed himself of opportunities to amend. In February 2011, he elected to stand on his pleadings. Plaintiff has not set forth an adequate basis for granting leave to amend yet again, and the application is denied.

CONCLUSION

For the reasons explained, the defendants' motions to dismiss are GRANTED. (09 Civ. 8411, Docket # 127, 131.) The Clerk is directed to terminate the motions. Plaintiff's claims regarding the Merrill acquisition that parallel those that stated a claim for relief in the securities class action remain pending in this action.

Plaintiff's application for leave to replead is denied.

SO ORDERED.

P. Kevin Castel
United States District Judge

Dated: New York, New York
April 12, 2012