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IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM DILLON COUNTY  
Court of Common Pleas

Harry Easterling, Jr., Special Referee

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Case No. 2015-000985

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**RECEIVED**

AUG 26 2016

SC Court of Appeals

Bank of America, N. A. successor by  
Merger to BAC Home Loans Servicing, LP  
f/k/a Countrywide Home Loan Servicing, LP, Respondent,

v.

Shawn L. Bethea; South Carolina Department of Motor Vehicles, Defendants

Of whom Shawn L. Bethea is the Apellant.

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MOTION TO SUPPLEMENT RECORD ON APPEAL

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Shawn Bethea in pro per  
1317 Gordonville Court  
Dillon, SC 29536  
(843) 230-7849

Trent M. Grissom  
S. C. Bar No. 77718  
MCGUIRE WOODS LLP  
201 North Tryon Street  
Suite 3000  
Charlotte, NC 28202  
Tel: (704) 343-2000  
Fax: (704) 444-8738  
Attorney for Respondent

MEMORANDUM IN SUPPORT

Now comes the Appellant, in pro per, hereby moves that this Honorable Court issue its order granting the Appellant leave to supplement the Record on Appeal.

Appellant recently came in to possession of four documents: (1) an affidavit from Attorney A. Glenn Greene, Jr., sworn to on August 15, 2016; (2) a letter from Attorney Grant B. Smaldone, dated August 18, 2016; (3) a Foreclosure Special Referee Deed, dated June 11, 2015; and (4) the Opinion and Order rendered in Securities and Exchange Commission v. Bank of America Corporation, Case No. 10 Civ. 0215 (JSR) (2010). Appellant believes that these documents are important evidence supporting Appellant's arguments in Appellant's Final Brief. Specifically, these documents supports Appellant's contention that due process was not achieved at the trial level where Appellant was denied the right to present testimony from an important witness with relevant and important information to Appellant's case. Appellant further believes that these documents will greatly assist the Court in evaluating the merits of the arguments before the Court.

WHEREFORE, Appellant respectfully requests that this Honorable Court issue its Order granting Appellant leave to supplement the Record on Appeal to include the four documents attached thereto as exhibits 1-4.

Respectfully submitted

  
Shawn Bethea - Bey

Dillon, SC

August 25, 2016

CERTIFICATE OF SERVICE

The undersigned Motion to Supplement Records on Appeal was served on the parties to this action by depositing a copy thereof in the United States Mail, first class, postage prepaid address to:

McGuireWoods LLP  
Fifth Third Street  
201 North Tryson Street  
Suite 3000  
Charlotte, NC 28202  
Respondent

**RECEIVED**  
AUG 26 2016  
SC Court of Appeals

This is the 25th day of August, 2016

Shawn Bethea-Bey  
Shawn Bethea-Bey

STATE OF SOUTH CAROLINA

COUNTY OF DILLON

AFFIDAVIT

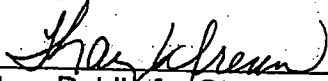
**PERSONALLY** appeared before me the undersigned, who upon being duly sworn, deposes and states as follows:

That I, A. Glenn Greene, Jr., was subpoenaed on two (2) separate occasions to appear before a Special Referee Hearing concerning a mobile home Shawn Bethea was purchasing that was under mortgage foreclosure by Bank of America. That I appeared at the two (2) Special Referee Hearings; however, I was not allowed to testify on behalf of Shawn Bethea.



A. Glenn Greene, Jr.

**SWORN** to and subscribed before me  
This 15th day of August, 2016.



Notary Public for State of South Carolina  
My Commission Expires: 07/26/21

Exhibit 2

C10-2015-000985

# GRANT B. SMALDONE

ATTORNEY AT LAW  
4 CARRIAGE LANE, SUITE 204  
CHARLESTON, SOUTH CAROLINA 29407

LAW OFFICE OF GRANT B. SMALDONE, LLC  
GRANT@GBSLAWFIRM.COM

TEL. (843) 808-2100  
FAX (843) 589-1288

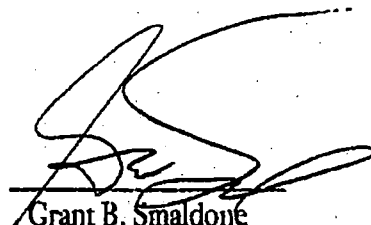
August 18<sup>th</sup>, 2016

Re: Shawn Bethea, Foreclosure Case, Dillon County

PERSONALLY APPEARED BEFORE ME, Grant B. Smaldone, who after being duly sworn, states the following:

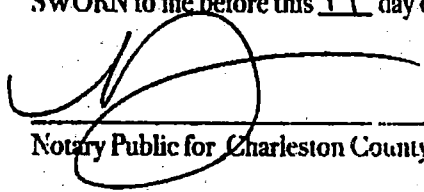
I was present with Shawn Bethea and Glenn Green Jr. at a foreclosure hearing on or about March 19<sup>th</sup>, 2015. The hearing was held at the office of Harry Easterling in Bennettsville, South Carolina. Harry Easterling was the special referee in the the foreclosure action. Although Attorney Glenn Green was present in the lobby, the Special Referee did not permit Mr. Green to access the room where the hearing was held.

FURTHER THE AFFIANT SAYETH NOT!



Grant B. Smaldone

SWORN to me before this 19 day of August, 2016



Notary Public for Charleston County, SC

My Commission Expires 3-15-20



FILED  
GWEN T. HYATT

STATE STAMP

PAID \$ \_\_\_\_\_

COUNTY STAMP

PAID \$ \_\_\_\_\_

EXEMPT # \_\_\_\_\_

STATE OF SOUTH CAROLINA 2015 JUN 24 PM 12:59 FORECLOSURE  
COUNTY OF DILLON SPECIAL REFEREE DEED DOCUMENT AMOUNT  
TOTAL 10.00

A CERTIFIED TRUE COPY  
Dillon County Clerk of Court  
Dillon County

TO ALL TO WHOM THESE PRESENTS SHALL COME OR BE MADE KNOWN:

On whom the same may in anywise concern, Harry R. Easterling, Jr., Special Referee for the County and State aforesaid SENDS GREETING:

WHEREAS, Bank of America, N.A. successor by merger to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP, on or about February 6, 2012, did exhibit its complaint in the Court of Common Pleas in the County and State aforesaid, Case No. 12-CP-17-0060, against Shawn L. Bethea, et al; and

WHEREAS, the Cause, being at issue before Harry R. Easterling, Jr., Special Referee for Dillon County, came on to be heard on March 19, 2015, when the said Harry R. Easterling, Jr., after a full hearing thereof, and mature deliberation in the Premises, Did Order, Adjudge and Decree that the premises hereinafter mentioned and described should be sold at public auction on the terms and for the purposes mentioned in said Decretal Order, as by reference thereto, on file in the said Court will appear; and after having duly advertised the said premises for sale by Public outcry, on June 2, 2015. I, the said Harry R. Easterling, Jr. did then, openly and publicly, and according to the custom of auction, sell and dispose of the said premises below described, unto Bank of America, N.A. successor by merger to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP for \$12,100.00 who thereafter assigned its bid unto the below named Grantee for \$12,100.00 being, at that price, the highest bidder for the same.

KNOW ALL MEN, That I, the said Special Referee in consideration of the premises, and also in consideration of the sum of \$12,100.00 paid me by the below-named Grantee, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these Presents, do grant, bargain, sell and release unto the below named Grantee, its successors and assigns:

Federal National Mortgage Association  
P. O. Box 650043  
Dallas, TX 75265-0043

All that certain piece, parcel or lot of land situate, lying and being in the County of Dillon, State of South Carolina, containing .46 acres and is shown and designated as Lot No. 4 on a map or plat of Gordonville Subdivision prepared by Pittman-Leeson Survey Company, dated November 1, 1997, and recorded April 12, 1999, in the Office of the Clerk of Court for Dillon County in Plat Book 28, at Page 180. Said plat is incorporated in and made a part of this description by reference. Said Lot No. 4 measures and is bounded as follows, to-wit: On the North measuring 108.50 feet, by Gordonville Court; On the West, measuring 180.08 feet, by Lot No. 5 on said map; On the South, measuring 108.88 feet, by land of St. Mark's Baptist Church, Inc.; On the East, measuring 189.29 feet, by Lot No. 3 on said plat. Reference is hereby craved to a survey for Shirley McRae Davis prepared by Phillip B. Culbreth, dated September 2, 2000 and recorded in the Office of the Clerk of Court for Dillon County in Plat Book 29, at Page 194.

This being the same property conveyed to Shawn L. Bethea by virtue of a Deed from LaSalle National Bank, as Indenture Trustee under the Indenture dated as of 10/01/01, Series 2000-3, said Deed dated November 13, 2001 and recorded November 27, 2001, in Deed Book 351 at Page 123, in the Office of the Clerk of Court for Dillon County, South Carolina.

This also includes a mobile/manufactured home: 2001 Pioneer VIN#: PH1124GA17807AB

Dillon County Tax Assessor's Office  
Map 69 Block \_\_\_\_\_ Parcel 139  
Sworn to before me this 25 Day  
of June, 2015  
Pamela Bailey

BOOK 568 PAGE 010

15262-1800

1137

STATE OF SOUTH CAROLINA

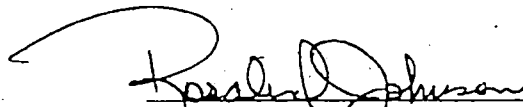
ACKNOWLEDGMENT

S.C. Code §30-5-30

COUNTY OF DILLON

I, Rosalind Johnson, a Notary Public for the State of South Carolina, do hereby certify that Harry R. Easterling, Jr., Special Referee for Dillon County, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

WITNESS our hands and seals on this 11<sup>th</sup> day of June, 2015.

  
\_\_\_\_\_  
Notary Public for South Carolina  
My commission expires: 7/29/2024

Index by: Harry R. Easterling, Jr., Special Referee for Dillon County

Titleholders(s) at filing of Lis Pendens: Shawn L. Bethea

Prepared by:

Rogers Townsend & Thomas, PC (jms/015262-01800)  
P.O. Box 100200  
Columbia, SC 29202-3200

*Dist 8C*

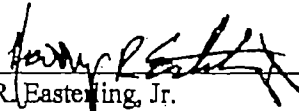
TMS# 69-00-00-139

TOGETHER with all and singular the rights, members, hereditaments and appurtenances whatsoever, to the said premises belonging, or in anywise appertaining, and the reversions and remainders, rents, issues and profits thereof; and also all the estate, right, title, interest, possession, property, benefit, claim and demand whatsoever, both at law and in equity, of the said Shawn L. Bethea and of all the parties to the said suit and of all other persons rightfully claiming or to claim the same, or any part thereof, by, from or under them, or either of them.

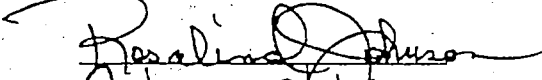
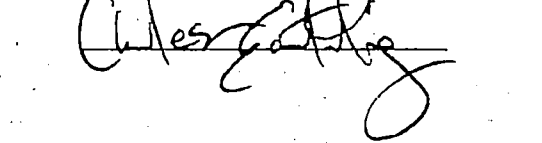
Subject to assessments, taxes, easements, conditions and restrictions of record and otherwise affecting the property.

TO HAVE AND TO HOLD, the said premises with its hereditaments, privileges and appurtenances unto the said Grantee, its successors and assigns, forever.

IN WITNESS WHEREOF, I, the said Harry R. Easterling, Jr. under and by virtue of the said Decree, have hereunto set my Hand and Seal at Dillon, South Carolina this 11th day of June, 2015

  
\_\_\_\_\_  
Harry R. Easterling, Jr.  
Special Referee for Dillon County

Sealed and Delivered in  
the Presence of:

STATE OF SOUTH CAROLINA

AFFIDAVIT

COUNTY OF LEXINGTON

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. Deed to property located at 1317 Gordonville Court, Dillon, SC 29536-7782, TMS# 69-00-00-139, was executed by Harry R. Easterling, Jr., Special Referee, to Federal National Mortgage Association on

June 11, 2015

The above transaction is exempt, or partially exempt, from the recording fee as set forth in S.C. code Ann. Section 12-24-10 et. seq. because the deed is:

**#3. Otherwise exempted under the laws and Constitution of this State or of the United States.**

I further understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year or both.

Transfer fee exemption #3, 12-24-40(3), 12 USCS 1717, and 12 USCA 1723a

Rogers Townsend & Thomas, PC  
ATTORNEYS FOR PLAINTIFF

Robert P. Davis (SC Bar #74030) Andrew W. Montgomery (SC Bar #79893)  
H. Guyton Murrell (SC Bar # 064134) John J. Hearn (SC Bar # 6635)  
~~Kevin T. Brown (SC Bar # 064236)~~ Nikole Haltiwanger (SC Bar # 70491)  
Jason D. Wyman (SC Bar # 100271)  
Ashley M. Wheeling-Goodson (SC Bar # 101423)

220 Executive Center Drive  
Columbia, SC 29210

Post Office Box 100200 (29202)  
(803) 744-4444

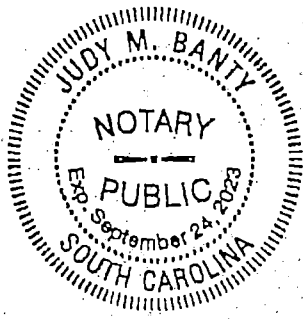
Sworn to before me this 22 day of June, 2015.

\_\_\_\_\_  
(Signature)

Judy M Banty  
\_\_\_\_\_  
(Printed Name)

Notary Public for South Carolina  
My Commission Expires: 9-24-23

(015262-01800)



STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF DILLON

DOCKET NO. 12-CP-17-0060

Federal National Mortgage Association,  
Movant,

In Re:

WRIT OF ASSISTANCE

Bank of America, N.A. successor by merger to  
BAC Home Loans Servicing, LP f/k/a Countrywide  
Home Loans Servicing, LP,

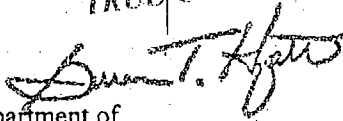
Plaintiff,

v.

Shawn L. Bethea; South Carolina Department of  
Motor Vehicles;

Defendant(s).

A CERTIFIED  
TRUE COPY



CLERK OF COURT  
DILLON COUNTY

CLERK OF COURT  
DILLON COUNTY

2015 NOV 18 AM 10:29

FILED  
GWENTHYAN

(714580-02270)

**THIS WRIT OF ASSISTANCE APPLIES TO ALL OCCUPANTS AND OTHERS (Including their possessions) WITH RESPECT TO THE PROPERTY DESCRIBED BELOW.**

This matter came before me upon a Motion for Writ of Assistance by the Movant directing the Sheriff of Dillon County, South Carolina to remove, peaceably or forcibly, the said Occupants and all of their personal property located within or on the subject property described in the Motion of the Movant.

The undersigned has jurisdiction over this matter pursuant to that certain Judgment filed herein and more fully described in the Movant's Motion.

Upon examining the Motion of the above named Movant, it appears that the Movant was the grantee of the foreclosure deed pursuant to the public sale of the subject property on June 2, 2015 and is entitled to possession of the subject property.

Upon Motion of Attorney for the Movant,

IT IS ORDERED that the Movant is entitled to recover possession of the below described property:

All that certain piece, parcel or lot of land situate, lying and being in the County of Dillon, State of South Carolina, containing .46 acres and is shown and designated as Lot No. 4 on a map or plat of Gordonville Subdivision prepared by Pittman-Leeson Survey Company, dated November 1, 1997, and recorded April 12, 1999, in the Office of the Clerk of Court for Dillon County in Plat Book 28, at Page 180. Said plat is incorporated in and made a part of this description by reference. Said Lot No. 4 measures and is bounded as follows, to-wit: On the North measuring 108.50 feet, by Gordonville Court; On the West, measuring

SR # 2012 CP 17 - 0060

180.08 feet, by Lot No. 5 on said map; On the South, measuring 108.88 feet, by land of St. Mark's Baptist Church, Inc.; On the East, measuring 189.29 feet, by Lot No. 3 on said plat. Reference is hereby craved to a survey for Shirley McRae Davis prepared by Phillip B. Culbreth, dated September 2, 2000 and recorded in the Office of the Clerk of Court for Dillon County in Plat Book 29, at Page 194. Also includes the following mobile/manufactured home:

Year: 2001  
Make/Model: Pioneer  
Vin: PH1124GA17807AB

Property Address: 1317 Gordonville Court  
Dillon, SC 29536-7782

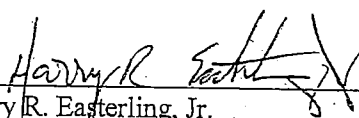
TMS# 69-00-00-139

IT IS FURTHER ORDERED that, upon service of a copy of this Writ, the Sheriff of Dillon County, South Carolina or his authorized deputies be and are hereby directed and authorized to enter upon the *service hereof* ~~afore~~described property, by force if the same be necessary, on the 10th day of *after* ~~the~~ *H.R.* ~~month~~, 2015, at \_\_\_\_\_ o'clock \_\_\_\_\_ m. or as soon thereafter as practical, and seize the said property and to remove therefrom any and all such persons including the Occupants who may be occupying the same, together with all their possessions, and to put the Movant in full, peaceful and quiet possession of the property without delay, and thereafter make immediate Return to the undersigned showing how this Order has been executed.

Service of this Writ Of Assistance shall be accomplished by personal service on an Occupant or by posting this document upon the door of the dwelling or some other prominent place on the property by the Sheriff.

If personal service cannot be reasonably achieved, then service of this Writ of Assistance may be accomplished by personal service on Occupants or by posting this document upon the door of the dwelling or some other prominent place on the property by the Sheriff.

AND IT IS SO ORDERED.

  
\_\_\_\_\_  
Harry R. Easterling, Jr.  
Special Referee

Dillon, South Carolina

Dated: 11/16/2015



**ROGERS TOWNSEND**  
ATTORNEYS AT LAW

ROGERS TOWNSEND & THOMAS, PC  
EVICTIONS DEPARTMENT

POST OFFICE BOX 100200 (29202)  
220 EXECUTIVE CENTER DRIVE  
COLUMBIA, SOUTH CAROLINA 29210  
P 803 227-7700 F 803.343.7013  
EMAIL EVICTION@RTT-LAW.COM  
WEBSITE RTT-LAW.COM

November 11, 2015

Mr. Harry R. Easterling, Jr.  
Special Referee for Dillon County  
120 N. Liberty Street  
Bennettsville, SC 29512

Re: Bank of America, N.A. successor by merger to BAC Home Loans Servicing, LP f/k/a  
Countrywide Home Loans Servicing, LP vs. Shawn Bethea  
Case No. 12-CP-17-0060; Dillon County  
Our File No. 714580-02270

Dear Sir:

Enclosed are an original and one copy of a Motion and proposed Writ of Assistance in the above-referenced matter. I would appreciate your reviewing the Motion and Writ, signing same and having them returned to me in the envelope provided.

Please indicate the eviction date on the second page of the Writ. I have enclosed a check in the amount of \$25.00 for filing the Motion.

Please call Kevin K. Brown at 803-744-1819 if you have any questions.

Very truly yours,

ROGERS TOWNSEND & THOMAS PC

Kevin K. Brown  
Eviction Department  
Rogers Townsend & Thomas, PC

A CERTIFIED  
TRUE COPY

CLERK OF COURT  
DILLON COUNTY

Enclosures:  
Motion for Writ of Assistance  
Proposed Writ of Assistance  
Return envelope

CLERK OF COURT  
DILLON COUNTY

2015 NOV 18 AM 10:29

FILED  
GWENT T. HYATT

STATE OF SOUTH CAROLINA  
COUNTY OF DILLON

IN THE COURT OF COMMON PLEAS

CASE NO. 12-CP-17-0060

MOTION  
INFORMATION FORM  
AND COVER SHEET

Bank of America, N.A. successor by merger to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP  Plaintiff

v.  
Shawn L. Bethea; South Carolina Department of Motor Vehicles;  Defendant

Check box above indicating submitting party

<u>name, S.C. Bar no, and address of plaintiff's attorney</u> Robert P. Davis (SC Bar #74030), Andrew W. Montgomery (SC Bar #79893), H. Guyton Murrell (SC Bar # 064134), John J. Hearn (SC Bar # 6635), Kevin T. Brown (SC Bar # 064236), Nikole Haltiwanger (SC Bar # 70491), Jason D. Wyman (SC Bar # 100271) 220 Executive Center Drive, Post Office Box 100200 (29202), Columbia, SC 29210. (803) 227-7700	<u>name, S.C. Bar no, and address of Defendant's attorney</u>  telephone:      fax: email:            other:
---	---

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- PROPOSED ORDER/CONSENT ORDER (Complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: \_\_\_\_\_  
Estimated Time Needed: \_\_\_\_\_ Court Reporter Needed: YES/NO

SECTION II: Motion Fee

- PAID — AMOUNT: \$ 25.00
- EXEMPT:
  - Rule to Show Cause in Child or Spousal Support
  - Domestic Abuse or Abuse and Neglect
  - Indigent status  State Agency v. Indigent Party
  - Sexually Violent Predator Act  Post-Conviction Relief
  - Motion for Stay in Bankruptcy
  - Motion for Publication  Motion for Execution (Rule 69, SEREPED TRUE COPY)
  - Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
- Name of Court Reporter: Shawn L. Bethea
- Other: \_\_\_\_\_

FILED  
GWENTHYATT  
2015 NOV 18 AM 10:29  
CLERK OF COURT  
DILLON COUNTY

SECTION III: Motion Type

- Written motion attached
  - Form Motion —
- I hereby move for relief or action by the court as set forth in the attached proposed order.

[Signature]  
Signature of Attorney for Plaintiff/Defendant

November 11, 2015  
Date submitted

JUDGE'S SECTION

- Motion Fee to be paid upon filing of the attached order.
- Other

JUDGE [Signature]  
CODE: \_\_\_\_\_ Date: 11/16/2015

CLERK'S VERIFICATION

Collected by: LL  
(print name)

Date Filed: \_\_\_\_\_

- MOTION FEE COLLECTED: 25.00
- CONTESTED — AMOUNT DUE: \_\_\_\_\_

SCCA/233 (11/2003) 714-580-02270

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----	x
SECURITIES AND EXCHANGE COMMISSION,	:
	:
Plaintiff,	:
	:
-v-	:
	:
	09 Civ. 6829 (JSR)
	:
BANK OF AMERICA CORPORATION	:
	:
Defendant.	:
-----	x

-----	x
SECURITIES AND EXCHANGE COMMISSION,	:
	:
Plaintiff,	:
	:
-v-	:
	:
	10 Civ. 0215 (JSR)
	:
BANK OF AMERICA CORPORATION	:
	:
Defendant.	:
-----	x

OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.

The question before the Court is whether to grant the motion of plaintiff Securities and Exchange Commission ("S.E.C."), filed on February 4, 2010, seeking approval of a Proposed Consent Judgment that would resolve the two above-captioned cases. Given the somewhat tortured background of these cases and the difficulties the motion presents, the Court is tempted to quote the great American philosopher Yogi Berra: "I wish I had an answer to that because I'm getting tired

of answering that question."<sup>1</sup> However, after full consideration, the Court reluctantly grants the motion, on the terms specified below.

The Court begins where any court should: with the facts. In disapproving as neither fair, reasonable, adequate nor in the public interest the prior proposed settlement of the first of these two cases, 09 Civ. 6829 (the "Undisclosed Bonuses" case), the Court bewailed the absence of established facts supporting the proposal and expressed the hope that "the truth may still emerge." S.E.C. v. Bank of America Corp., 653 F. Supp. 2d 507, 512 (S.D.N.Y. 2009). Since then, the parties have conducted extensive discovery, assisted by the helpful decision of defendant Bank of America Corp. (the "Bank") to waive attorney-client privilege, resulting in the S.E.C.'s presentation to this Court of a 35-page Statement of Facts and a 13-page Supplemental Statement of Facts, the accuracy of which is not contested here by the Bank.<sup>2</sup> In addition, in response to questions

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<sup>1</sup> David H. Nathan, Baseball Quotations 150 (1993). Berra, a disciple of the equally profound professor Casey Stengel, has had a notable impact on the development of American law. See generally William D. Araiza et al., The Jurisprudence of Yogi Berra, 46 Emory L.J. 697 (1997).

<sup>2</sup> At the hearing on the instant proposed settlement held before this Court on February 8, 2010, the Court asked counsel for the Bank to affirm "that you have no material quarrel with the accuracy of the facts set forth in the SEC statement of facts and that the Court can consider those statements of fact as agreed to for the purposes of evaluating the settlement," to which Bank counsel responded "That's correct, your Honor." Transcript ("tr."), 2/8/10, at 6. The Court presumes that if the Bank felt any differently about the Supplemental Statement of

from the Court in an Order dated February 11, 2010, the parties have provided, and the Court has reviewed, hundreds of pages of deposition testimony and other evidentiary materials bearing on the case.

As a result of that review, it is clear to the Court that:

(1) the Proxy Statement that the Bank sent to its shareholders on November 3, 2008 soliciting their approval of the merger with Merrill Lynch & Co., Inc. ("Merrill") failed adequately to disclose the Bank's agreement to let Merrill pay its executives and certain other employees \$5.8 billion in bonuses at a time when Merrill was suffering huge losses; and

(2) the Bank failed adequately to disclose to its shareholders either prior to the shareholder approval of the merger on December 5, 2008 or prior to the merger's effective date of January 1, 2009 the Bank's ever-increasing knowledge that Merrill was suffering historically great losses during the fourth quarter of 2008 (ultimately amounting to a net loss of \$15.3 billion, the largest quarterly loss in the firm's history) and that Merrill had nonetheless accelerated the payment to certain executives and other employees of more than \$3.6 billion in bonuses.

Despite the Bank's somewhat coy refusal to concede the materiality of these nondisclosures, it seems obvious that a prudent Bank shareholder, if informed of the aforementioned facts, would have thought twice about approving the merger or might have sought its

---

Facts, it would have so informed the Court.

renegotiation. What is far from obvious, however, is why these nondisclosures occurred. The S.E.C. and the Bank have consistently taken the position that it was, at worst, the product of negligence on the part of the Bank, its relevant executives, and its lawyers (inside and outside), who made the decisions (such as they were) to non-disclose on a piecemeal basis in which inadequate data coupled with rather narrow parsing of the disclosure issues combined to obscure the combined impact of the information being withheld. In particular, it appears that the relevant decision-makers took the position that neither the bonuses nor the mounting fourth quarter losses had to be disclosed because the bonuses were consistent with prior years' bonuses and the losses were uncertain and, in any case, roughly consistent with prior quarters. See, e.g., Statement of Facts at 15, 29; Supplemental Statement of Facts at 5-8. Despite ever-growing indications that the latter assumption was erroneous, see, e.g., Supplemental Statement of Facts at 8, the relevant decision-makers stuck to their previous determinations so far as disclosure of the losses was concerned and appear never to have considered at all the impact that the accelerated payment of over \$3.6 billion in bonuses might have on a company that was verging on financial ruin.

A parallel investigation by the Attorney General of the State of New York (conducted, perhaps ironically, by a former high-ranking official of the S.E.C.) reached a more sinister interpretation of what happened. Just one day before the S.E.C. presented its proposed

settlement of these cases, the Attorney General brought a civil action against the Bank, its former chief executive officer Kenneth D. Lewis, and its former chief financial officer Joseph L. Price, accusing them of masterminding a massive fraud and manipulation. Compl. ¶ 1, New York v. Bank of America, et. al., filed in New York State Supreme Court on February 4, 2010. According to the first numbered paragraph of the Complaint, not only had "Bank of America's management misled its shareholders," but in so doing they were "motivated by self-interest, greed, hubris, and a palpable sense that the normal rules of fair play did not apply to them." Indeed, "Bank of America's management thought of itself as too big to play by the rules and, just as disturbingly, too big to tell the truth." Id.

While even in an era of purple prose, such language may seem deepest violet, it is nonetheless the equivalent of alleging that the Bank and its top officers purposely defrauded their shareholders or, at the very least, acted in reckless disregard of the facts and the law -- a far more culpable state of mind than mere negligence.

As a result, the Court, in assessing the Proposed Consent Judgment, was obliged, in its view, to inquire into whether the evidence before the Attorney General was sufficiently different from that before the S.E.C. as to render unreasonable the latter's conclusions on which the proposed settlement was premised. Although the Bank objected "to any consideration being given to allegations made in other proceedings . . . or to any other extrajudicial

materials," Letter from Bank counsel to the Court (Feb. 16, 2010), the Court regards this objection as frivolous. While it is not this Court's role in assessing the instant motion to determine which of the competing inferences drawn by the S.E.C. and the Attorney General is correct, it is indubitably this Court's obligation to determine whether the S.E.C. has ignored evidence of intentional fraud so compelling as to cast in doubt the reasonableness of the factual assumptions on which the proposed settlement rests. When, moreover, the seemingly contrary assertions are being made by another governmental agency that has conducted its own lengthy investigation, to fail to make a modest inquiry into the basis for those assertions would be a dereliction of this Court's duty.<sup>3</sup>

The Court therefore requested, and received, certain testimony obtained by the Attorney General's office bearing on certain questions the Court had previously identified as significant to evaluating whether the Bank's nondisclosures were purposely fraudulent or not. For example, the Court requested from the Attorney General, as it had

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<sup>3</sup> More problematic, perhaps, was this Court's reluctant agreement to accept the Attorney General's request that its materials be reviewed only on an *ex parte* basis, *i.e.*, only by the Court. Although the Court, as stated in its Order of February 11, 2010, would have preferred that the Attorney General release these materials to the public, the Court fully understands that, on the one hand, the Attorney General has legitimate concerns about premature release of information relating to a still-ongoing investigation, while, on the other hand, the parties to the instant case have a legitimate concern that the Court's determinations be made on a record fully available for their scrutiny. As it happens, however, the Court's conclusions set forth below render this dispute moot.

previously requested from the parties here, deposition testimony concerning the precipitous termination on December 10, 2008 of the Bank's then General Counsel, Timothy Mayopoulos. According to the parties here, this event was the result of a last-minute decision, urged upon management by several members of the Board of Directors, to keep Brian Moynihan, now CEO of the Bank, from leaving the Bank by offering him the General Counsel position. See Supplemental Statement of Facts at 11-13. But the event is described in the Attorney General's Complaint as motivated by the discovery by Mayopoulos's immediate superior, Price, that Mayopoulos now "knew too much" about the mounting Merrill losses that the Bank was trying to keep secret. Compl. ¶ 156.

Upon review of the underlying materials provided by the parties here and by the Attorney General, the Court concludes that none of the evidence directly contradicts the Bank's assertion that Mayopoulos' termination was unrelated to the nondisclosures or to his increasing knowledge of Merrill's losses. This is not to say that plausible contrary inferences might not be drawn. For example, as the Court noted at the hearing on February 8, 2010, the Bank's account does not necessarily explain why Mayopoulos, a hitherto valued employee, was asked to leave the premises immediately. Tr., 2/8/10, at 18. Still, the Court is fully satisfied that the view of Mayopoulos's firing advanced by the Bank is supported by substantial evidence.

It is important to emphasize, with respect not just to Mayopoulos's termination but with respect to all the events that the Attorney General interprets so very differently from the S.E.C., that the Court is not here making any determination as to which of the two competing versions of the events is the correct one (an issue not before the Court). Rather, the Court, after a careful review of voluminous materials, determines only that the S.E.C.'s conclusion that the Bank and its officers acted negligently, rather than intentionally, in causing the nondisclosures that are the predicates to the settlement here proffered, is a reasonable conclusion, supported by substantial evidence, that a reasonable regulator could draw. The Court will therefore proceed to evaluate the proposed settlement on the basis that the S.E.C. was acting reasonably in proposing a settlement premised on the assumption that the Bank's nondisclosures were the result of negligence.

The Court accordingly turns to the question of whether, even on that assumption, the settlement is fair, reasonable, adequate, and in the public interest. The proposed settlement has essentially two components: a package of prophylactic measures designed to prevent such nondisclosures in the future; and a penalty provision that is supposed also to serve the purpose of partially compensating victims.

The package of prophylactic measures includes, among other items, the following:

- the Bank's engagement, in consultation with the SEC, of an independent auditor to assess over the next three years whether the Bank's accounting controls and procedures are adequate to assure proper public disclosures;

- the Bank's engagement, in consultation with the SEC, of an independent disclosure counsel to report solely to the Bank's audit committee on the adequacy of the Bank's public disclosures over the next three years;

- the Bank's engagement of an outside compensation consultant to advise a fully independent compensation committee of the Bank's board as to the terms of executive compensation over the next three years; and

- the Bank's submission of executive compensation recommendations to the shareholders, for a nonbinding vote of approval or disapproval, over the next three years.

No one can quarrel that these remedial steps are helpful, so far as they go, and may help to render less likely the kind of piecemeal and mincing approach to public disclosure that led to the Bank's problems in the instant cases. Given that the apparent working assumption of the Bank's decision-makers and lawyers involved in the underlying events at issue here was not to disclose information if a rationale could be found for not doing so, the proposed remedial steps should help foster a healthier attitude of "when in doubt, disclose."

In order to further strengthen these prophylactic measures, the Court suggested at the hearing on February 8, 2010 that the independent auditor and the disclosure counsel not just be chosen in consultation with the S.E.C., but rather be fully acceptable to the S.E.C., with the Court having the final say if the two sides could not agree on the selections. The parties, by letters dated February 16, 2010, have subsequently agreed to these suggestions, which will therefore need to be incorporated in a revised Proposed Consent Judgment to be presented to the Court, as detailed below.

The Court also suggested that the compensation consultant, which the present proposal provides will be chosen solely by the Bank's compensation committee (not even in consultation with the S.E.C.), be chosen jointly by the compensation committee, the S.E.C., and the Court. The reason for this suggestion was the Court's perception that too many compensation consultants have a skewed focus when it comes to executive compensation, concentrating on what they perceive is necessary to attract and keep "talent" (however defined), and more generally favoring ever larger compensation packages, while rarely taking account of limits that a reasonable shareholder might place on such expenditures. In its letter of February 16, 2010, however, the Bank rejects this proposal outright, noting in its letter that the "SEC has consistently stated that it does not seek to enforce any particular philosophy or impose any substantive judgments on the form or amount of compensation." But the Bank's strong defense of the

sacred cow of executive compensation is besides the point: the Court only suggested that giving the S.E.C. and/or the Court some role in the selection of the compensation consultant might provide a modicum of objectivity in that selection. Nonetheless, the Court does agree that the manner of selection of the compensation consultant is sufficiently peripheral to the main concerns of these cases as not to constitute a "dealbreaker," particularly in light of the requirement of a nonbinding shareholder vote on compensation for the next three years.

The part of the proposed settlement that presents the greatest difficulty is, however, the penalty package, which essentially consists of a \$150 million fine. Though that amount is considerably greater than the \$33 million that the Court rejected in the prior proposed settlement of the Undisclosed Bonuses case, it is still very modest in light of the fact that it now covers both cases -- that is, all the nondisclosures that were material to the proposed merger with Merrill, a merger that may yet turn out well but that could have been a Bank-destroying disaster if the U.S. taxpayer had not saved the day. From this perspective, the amount of the fine appears paltry.

An even more fundamental problem, however, is that a fine assessed against the Bank, taken by itself, penalizes the shareholders for what was, in effect if not in intent, a fraud by management on the shareholders. This was among the major reasons the Court rejected the earlier proposed settlement. See S.E.C. v. Bank of America Corp., 653

F. Supp. at 509. Where management deceives its own shareholders, a fine most directly serves its deterrent purposes if it is assessed against the persons responsible for the deception. If such persons acted out of negligence, rather than bad faith, that should be a mitigating factor, but not a reason to have the shareholder victims pay the fine instead.

Although the pending complaint of the New York Attorney General against the top two Bank officials allegedly responsible for the deceptions may, if proven in court, partially serve this deterrent purpose, it is not part of the settlement pending before this Court and may have its own evidentiary weaknesses. The parties to the instant cases, however, attempt to mitigate the Court's concerns by proposing that, pursuant to the "Fair Fund" provisions of the Sarbanes-Oxley Act, the \$150 million be distributed solely to Bank shareholders who were harmed by the Bank's nondisclosures (Bank "legacy" shareholders) and not to former Merrill shareholders who now own Bank stock (Merrill "legacy" shareholders), nor to Bank officers or directors who had access to the undisclosed information. Although this proposal was not specifically incorporated into the Proposed Consent Judgment presented to the Court, the parties subsequently agreed to the Court's proposal that it be incorporated, and thus any revised Proposed Consent Judgment to be presented to the Court must include such terms.

What the proposal does, in effect, is to transfer \$150 million from all shareholders to those current Bank shareholders who were victimized by the non-disclosures. Since the S.E.C. in its letter dated February 16, 2010 estimates that this latter group is roughly around 50 percent of all current Bank shareholders, the effect is to transfer \$75 million from Merrill "legacy" shareholders to Bank "legacy" shareholders. Put another way, it serves to renegotiate the price that Bank shareholders would have paid to Merrill shareholders for purchasing Merrill shares if the disclosures had been made.

But the effect is very modest, amounting perhaps to no more than a few pennies per share. Moreover, while the "legacy" Merrill shareholders may have received something of a windfall as a result of the nondisclosures, they were not responsible for those nondisclosures. Rather, the responsibility was that of the Bank's executives, who, although barred from receiving any part of the \$150 million fine, are not contributing to its payment in any material respect.

In short, the proposed settlement, while considerably improved over the vacuous proposal made last August in connection with the Undisclosed Bonuses case, is far from ideal. Its greatest virtue is that it is premised on a much better developed statement of the underlying facts and inferences drawn therefrom, which, while disputed by the Attorney General in another forum, have been carefully scrutinized by the Court here and found not to be irrational. Its

greatest defect is that it advocates very modest punitive, compensatory, and remedial measures that are neither directed at the specific individuals responsible for the nondisclosures nor appear likely to have more than a very modest impact on corporate practices or victim compensation. While better than nothing, this is half-baked justice at best.

So should the Court approve the proposed settlement as being fair, reasonable, adequate, and in the public interest? If the Court were deciding that question solely on the merits -- de novo, as the lawyers say -- the Court would reject the settlement as inadequate and misguided. But as both parties never hesitate to remind the Court, the law requires the Court to give substantial deference to the S.E.C. as the regulatory body having primary responsibility for policing the securities markets, especially with respect to matters of transparency. While such deference can never be absolute -- since the Judgment ultimately entered is the Court's and is enforced by the Court's contempt power -- the Court would fail in its duty if it did not give considerable weight to the S.E.C.'s position.

Even more weighty, however, in this Court's view, are considerations of judicial restraint. This Court, it may be obvious, does not abdicate its role of seeking to plumb the depths of any proposal presented for its approval. But the considerable power given federal judges to assure compliance with the law should never be confused with any power to impose their own preferences. We can balk

when a bank tries to escape the implications of hiding material information from its shareholders, and we can protest when the regulatory agency in charge of deterring such misconduct seems content with modest and misdirected sanctions; but, in the words of a great former Justice of the Supreme Court, Harlan Fiske Stone, "the only check upon our own exercise of power is our own sense of self-restraint." United States v. Butler, 297 U.S. 1, 79 (1936). In the exercise of that self-restraint, this Court, while shaking its head, grants the S.E.C.'s motion and approves the proposed Consent Judgment provided that, by no later than this Thursday, February 25, 2010, the parties present the Court with a proposed Consent Judgment that includes the revised provisions to which they have consented, as set forth above.

SO ORDERED.

  
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JED S. RAKOFF, U.S.D.J.

Dated: New York, New York  
February 22, 2010

Prepared by:

Date:

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Motion to Admend The Record on Appeal

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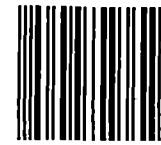
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