



GUHAN SUBRAMANIAN

NITHYASRI SHARMA

Citigroup-Wachovia-Wells Fargo

Shortly after 2:00 am on Friday, October 3rd, 2008, Vikram Pandit, CEO of Citigroup, received a phone call at his home. Normally Pandit wouldn't answer his phone at this hour, but these were no ordinary times, and the caller was no ordinary person. Robert Steel, CEO of Wachovia, was on the line. "We cut a new deal," Steel said simply.¹

Pandit was floored. Just a few days earlier, Citigroup had entered into an exclusive, week-long negotiating period to reach a deal to acquire Wachovia. Citigroup had even extended Wachovia a line of credit to keep the bank alive for the week while they negotiated.² But at 9:00 pm on Thursday night, Wells Fargo made an offer to acquire Wachovia for \$7.00 per share in Wells Fargo stock, and at 11:00 pm, the Wachovia board had met by conference call and accepted it.

Pandit sprung into action. He notified his board and summoned the troops to the offices of Davis, Polk & Wardwell, Citigroup's outside counsel, in midtown Manhattan. "Come on in," he told one top executive, without elaborating.³ The Citigroup board and top officers had been "running on fumes" all week, trying to seal the deal with Wachovia before its week-long exclusivity expired. One executive was so groggy from lack of sleep that he forgot his corporate ID card when he showed up at Davis Polk's offices at 450 Lexington Avenue.⁴ The assembled group lent new meaning to Citigroup's motto: "Citi never sleeps."

The Citigroup board and top officers set up an impromptu war room at Davis Polk. Everyone was stunned, and furious. If they were just going to go with someone else, "why would [Wachovia] be wasting time getting to that level of detail?" one commented.⁵ Another Citigroup official was more blunt: "What has transpired here is complete moral irresponsibility."⁶

The Wachovia-Wells Fargo deal went across the newswire. When the markets opened on Friday, the Citigroup board watched helplessly as their stock lost 14% of its value within minutes, amounting to approximately \$17 billion. Pandit needed an action plan, and fast.

Professor Guhan Subramanian and Research Associate Nithyasri Sharma prepared this case. Cases are developed solely as the basis for class discussion. They are not intended to serve as endorsements, sources of primary data, or illustrations of effective or ineffective management. This case is also available as HBS 910-006.

Copyright © 2010 President and Fellows of Harvard University. No part of this publication may be reproduced, stored in a retrieval system, used in a spreadsheet, or transmitted in any form or by any means—electronic, mechanical, photocopying, recording, or otherwise—without permission. To order copies or request permission to reproduce materials call 1-617-495-3356, write Harvard Law School Case Development and Distribution, ATTN: Amanda Barry, 1563 Massachusetts Avenue, Cambridge, Ma 02138, or email abarry@law.harvard.edu.

Background

The Financial Crisis of 2008-2009

Between 1997 and 2006, the global housing market boomed. According to the S&P/Case Schiller home-price index, U.S. house prices rose by 124% during this period, and housing prices in the rest of the world experienced similar growth.⁷ With increasing confidence that the housing market could only go up, American banks aggressively expanded their lending to “subprime” borrowers, who had higher risk of default. By 2006, nearly 20% of all new mortgages were considered subprime.⁸

In 2006, the housing bubble burst. Mortgage holders suddenly found themselves unable to make their payments, and the inventories of unsold homes increased substantially. The crisis in the housing market directly affected consumer spending, and created downward pressure on economic growth. When the housing market was growing, the financial sector had turned many financial assets, including mortgages, into securities that could be bundled and bought and sold by investors. The complex packaging and re-packaging of mortgages (“securitization”) made it difficult to measure the actual risk exposure of these securities. As the housing market fell, the market for these securitized mortgages fell with it. The term “toxic assets” entered the lexicon as a reference to these underperforming assets. With most U.S. banks holding large portfolios of toxic assets, the banking industry went into a tailspin.

The Savior: Citigroup, Inc.

Citigroup was one of the world’s major financial institutions. It was formed through a combination of Citicorp and Travelers Group in April 1998. As of 2008, Citigroup had 200 million customer accounts and conducted business in more than 100 countries.⁹

Vikram Pandit took the reins as CEO of Citigroup on December 11, 2007. Pandit had earned a B.S. in Electrical Engineering, an M.S. in Electrical Engineering, and a Ph.D in Finance, all from Columbia University, and then began his investment banking career at Morgan Stanley. He quickly rose through the ranks but left in 2005 to form a hedge fund, Old Lane Partners. In 2007, Citigroup bought Old Lane for \$800 million, thereby bringing Pandit into the Citigroup fold.

Like many others in the industry, Citigroup fell victim to the subprime mortgage crisis in 2007 through its particularly large exposure to toxic assets. Citigroup had already taken \$40 billion in write-downs since the start of the crisis, and acknowledged that it would take a further write-down of approximately \$15 billion for the third quarter of 2008.¹⁰ Although acquiring Wachovia would have increased Citi’s exposure to toxic assets, it would have also given Citigroup a long-desired major presence in U.S. retail banking.

The Distressed: Wachovia Corp.

Based in Charlotte, North Carolina, Wachovia was one of the largest U.S. banks by assets and one of the 50 largest banks in the world.¹¹ In July 2008, the Wachovia board replaced CEO Ken Thomas with Robert K. Steel. Prior to becoming CEO, Steel served for almost 30 years at Goldman Sachs, holding various positions and rising to Vice Chairman from 2002-2004. Steel retired from Goldman in February 2004 but continued to serve as Advisory Director and then Senior Director to the firm. He was also a Senior Fellow at the John F. Kennedy School of Government at Harvard University from February 2004 until September 2006.

In October 2006, Steel was appointed Under Secretary for Domestic Finance at the U.S. Treasury Department, where he was the principal advisor to Treasury Secretary Henry Paulson on all matters of domestic finance. He served in this capacity until his appointment as CEO of Wachovia in July 2008. Steel received his undergraduate degree from Duke University in 1973 and an MBA from the University of Chicago in 1984.

When Steel entered the top job at Wachovia, the bank was already in disarray. In 2006, Wachovia had acquired Golden West Financial for \$26 billion. Golden West held a \$122 billion portfolio of “Pick-a-Payment” loans, Golden West’s specialty, which allowed borrowers to skip interest payments and instead add these payments to the principal.¹² “Pick-a-Payment” loans were particularly prone to default because they attracted home-buyers who were stretching beyond the constraints imposed by a traditional mortgage. Wachovia suffered \$9.3 billion of losses in the first half of 2008 from its “Pick-a-Payment” portfolio and other toxic assets.¹³

The Interloper: Wells Fargo

Headquartered in San Francisco, California, Wells Fargo was the product of a merger between California-based Wells Fargo & Co. and Minneapolis-based Norwest Corporation in 1998. Richard Kovacevich served as CEO of Wells Fargo from 1998 until June 2007, when he retired to the chairman position and John Stumpf became CEO. Prior to his career at Wells Fargo, Kovacevich held positions at General Mills, Citicorp (the predecessor to Citigroup), and the top job at Norwest. He earned his bachelors, masters, and MBA degrees from Stanford University.

In stark contrast to Citigroup, Wachovia, and virtually all of its major competitors, Wells Fargo maintained relatively high lending standards during the 2000s and so had very limited exposure to toxic assets. For Wells Fargo, a Wachovia acquisition would be a radical departure from its philosophy of organic growth and west-coast focus.¹⁴ However, a merger would create a powerhouse coast-to-coast combination, with Wells’ western focus perfectly complementing Wachovia’s south and southeastern focus (see **Exhibit 1**). **Exhibit 2** provides comparative stock price data for Wachovia, Citigroup, and Wells Fargo from January 1, 2007 to October 3, 2008.

The Matchmaker: Federal Deposit Insurance Corporation

The Federal Deposit Insurance Corporation (FDIC) was created in 1933, in response to the series of bank failures that occurred in the late 1920s and early 1930s. The FDIC’s mission is to ensure the safety and soundness of the U.S. banking system. It is an independent government agency that receives no appropriations from the U.S. Congress. Instead, the FDIC is funded entirely by premiums that banks and thrift institutions pay for deposit insurance coverage, and from its earnings on investments in U.S. Treasury securities.

When a bank fails, the FDIC takes over temporarily. It can either sell the “whole bank” to a willing buyer, which is its preferred approach, or it can sell assets piecemeal. In this process the FDIC will use the Deposit Insurance Fund (DIF) to absorb losses on a failed bank in order to induce buyers and give the bank a fresh start. For example, when IndyMac failed in June 2008, the FDIC absorbed \$9 billion in losses before selling it to a private equity consortium, bringing the DIF down to \$45 billion.¹⁵

Sheila Bair became the nineteenth Chairman of the FDIC in June 2006. Previously she was the Dean's Professor of Financial Regulatory Policy at the Isenberg School of Management at the University of Massachusetts-Amherst. She had held various government positions throughout her career, including Assistant Secretary for Financial Institutions at the U.S. Treasury Department,

Senior Vice President for Government Relations at the New York Stock Exchange, and Research Director and Counsel to Senate Majority Leader Bob Dole. Bair topped the *Wall Street Journal's* annual 50 "Women to Watch List" in 2008, and was also named the second most powerful woman in the world after Germany's Chancellor Angela Merkel by *Forbes* magazine. She earned both her bachelors and law degrees from the University of Kansas.

A Week When Nobody Slept: September 25th – October 3rd, 2008

Thursday, September 25th

On Thursday, September 25th, Washington Mutual announced it was being bought by J.P. Morgan in a government-brokered deal, one of the biggest bank failures to date. That night, Steel telephoned Pandit: "We'd like to talk to you."¹⁶ Steel was worried that the major ratings agencies were poised to cut Wachovia's credit ratings, which would potentially cause panic among Wachovia's investors and customers.¹⁷ Pandit was noncommittal. He responded that Citigroup was interested only if it didn't have to absorb Wachovia's highly toxic portfolio. The conversation ended inconclusively.

Friday, September 26th

The next day Wachovia's share price plummeted 27% to just \$10 per share, and Wachovia lost \$5 billion in deposits in a "silent run" on the bank.¹⁸ **Exhibit 3** provides minute-by-minute stock price data for Wachovia, Citigroup, and Wells Fargo during this period. Regulators informed Wachovia that it would be shut down within days if it were not acquired.¹⁹ Wachovia immediately began merger talks with Citigroup, Wells Fargo, and Banco Santander, the Spanish bank. Although Citigroup and Wells Fargo were both interested in Wachovia, both banks indicated that they were unlikely to bid more than a few dollars per share.

Saturday, September 27th

Banco Santander quickly exited the process, leaving just Citigroup and Wells Fargo. On Saturday morning Steel flew to New York City to continue negotiations with the remaining two banks. Around 8:15 am, Citigroup and Wells received a first look at Wachovia's internal books.²⁰ Timothy Geithner, then-president of the Federal Reserve Bank of New York, was also involved in the process, and personally reached out to executives from both camps. By Saturday evening, Wells Fargo had emerged as the favorite through its indications that it was willing to pay a premium for Wachovia and did not need government assistance in the deal.²¹

Sunday, September 28th

On Sunday morning, Wells Chairman Kovacevich and Wachovia CEO Steel had breakfast. Kovacevich assured Steel that Wells Fargo could do a deal without government assistance, and would be prepared to offer a price per share "in the teens," a premium over Wachovia's closing price of \$10 per share on Friday.²² Steel was jubilant, and Wachovia broke off negotiations with Citigroup in order to focus its attention on Wells.

The exhilaration would not last long. Around midday on Sunday, Kovacevich dropped a bombshell: Wells Fargo had developed concerns about a piece of Wachovia's portfolio, and would be unwilling to pay more than \$10 per share. For the next several hours, Steel and Wachovia's team tried to alleviate these concerns. Kovacevich nevertheless deflected their points: "It's not my call; it's our loan people."²³

Around 7:00 pm on Sunday evening, top officials from Wachovia, Wells Fargo, and the FDIC held a conference call. Kovacevich informed his counterparts that Wells Fargo was very wary of the Wachovia loan portfolio and needed more time to conduct the necessary due diligence. The Wachovia team "fell to the floor," and the government officials on the call were also shocked.²⁴

The FDIC then told Wachovia that it would be taking control of the process. The FDIC officials headed home to shower and prepare for a long night.²⁵ But then everything went dark: the FDIC stopped briefing Wachovia for several hours; Wells Fargo stopped returning Wachovia's phone calls; and Pandit, generally unsure of Citigroup's position in the game, went home around 11:00 pm.²⁶ Nobody knew what was going on.

Monday, September 29th

Around 12:30 am Monday morning, Wachovia still had no word from the FDIC. The Wachovia board meeting, tentatively scheduled for the (very) early morning, was cancelled, but Steel told his board to stand by.²⁷ In fact, senior officials at the FDIC, the Treasury Department, and other agencies were in a marathon session of talks. At 4:00 am, five hours before an expectant market would want word of a buyer or further punish Wachovia's stock, a deal was struck: Citigroup would be Wachovia's savior. Steel was notified first of the FDIC's decision. He responded that he was disappointed that Wachovia did not go to Wells Fargo, but Wachovia would do "the right thing for the company and the country."²⁸ At 6:00 am on Monday morning, the FDIC held an emergency board meeting and approved the recommendation for Wachovia to be acquired by Citigroup. The Wachovia and Citigroup boards quickly convened by conference call, and also approved the deal.

Because there was no time to get an asset purchase agreement in place by the time the markets would open, the two banks signed a three-page exclusivity agreement (see **Exhibit 4**). The agreement provided, among other things, that Wachovia would not "enter into or participate in any discussion with" or "enter into any . . . merger agreement" with another party for one week. Citigroup and Wachovia understood that they would work out the details of their deal and enter into a full-blown asset purchase agreement before the exclusivity expired on Monday, October 6th.

Despite not having an asset purchase agreement in hand, the basic terms were in place on the Monday morning. Citigroup would acquire most of Wachovia's assets and liabilities, including five depository institutions, and assume senior and subordinated debt of Wachovia, for \$1 per share of Citi stock, or \$2.16 billion in total value.²⁹ Wachovia would retain ownership of Wachovia Securities and Evergreen.³⁰ Analysts estimated that the "rump" assets left behind at Wachovia were worth approximately \$2 per share, which meant that the Citigroup deal implicitly valued Wachovia at \$3 per share.³¹ Although this number was a far cry from the \$10 per share closing price on Friday, weekend rumors had put Wachovia squarely on death's doorstep, and it was clear that the market would have pounded the stock further if Wachovia did not come up with a deal by the time the markets opened on Monday morning.

In a separate deal, the FDIC would absorb any losses beyond \$42 billion on a \$312 billion pool of Wachovia loans.³² In return, Citigroup granted the FDIC \$12 billion in preferred stock and warrants

to compensate the FDIC for bearing this risk.³³ Citigroup also extended Wachovia a line of credit to keep it alive for the one week while they negotiated exclusively.³⁴

The market responded positively to the deal, with Citi's stock price gaining roughly 4.5% in the opening minutes and continuing to experience modest gains throughout the morning. Later that day, the U.S. House of Representatives failed to pass H.R. 1424, the Emergency Economic Stabilization Act (EESA) of 2008. By a vote of 205-228, the House unexpectedly turned down President Bush's request for \$700 billion in bailout money for the troubled financial institutions.

The markets reeled at the news, with the Dow Jones Industrial Average widening its loss for the day to nearly 700 points within minutes and closing the day 778 points lower.³⁵ For its part, Wachovia closed one of the worst days in U.S. stock market history at \$1.84 per share, a cataclysmic fall from its \$10.00 close on Friday and even short of the \$3.00 price that Citigroup's deal implied. Citigroup closed at \$19.02, roughly a 6% loss for the day.

Tuesday, September 30th

While Congress and the President were desperately trying to resuscitate the EESA and stop the hemorrhaging in the financial markets, the Internal Revenue Service quietly issued IRS Notice 2008-83, a short and almost unnoticed adjustment that nevertheless had the potential to radically reshape the playing field for troubled banks. In a typical merger deal, the U.S. tax code states that an acquirer cannot use the acquired company's entire net operating losses (NOLs), if any, to offset its own profits immediately, in the same tax year. Instead, the acquirer must spread out the acquired company's NOLs over time. The restriction is intended to discourage acquirers from buying tax losses to shelter their own profits.

IRS Notice 2008-83 changed that for financial institution deals. Now, an acquiring bank could use the acquired bank's NOL's immediately, in the same taxable year. Treasury Secretary Henry Paulson wanted to make the troubled banks more attractive for potential acquirers by allowing acquirers to use built-in losses immediately to offset profits.³⁶ Some tax lawyers and other experts questioned the ability of the Treasury Secretary to change the tax code unilaterally, without Congressional authorization. Many lawmakers were outraged at the action, and contemplated proposing a bill in Congress to reverse the change.³⁷

The Treasury Department said that the change was not made to benefit any specific financial institution, but as a continued effort to create economic stability.³⁸ Nevertheless, many eyes turned to Wachovia. Analysts estimated that Wachovia had approximately \$75 billion of built-in losses in its loan portfolio,³⁹ which would yield approximately \$25 billion in value for any bank that had sufficient profits to offset those losses.⁴⁰ Only a few banks did. Among them: Wells Fargo. After walking away from buying Wachovia just days before, Wells Fargo was suddenly very interested. Wachovia's stock price went up 90% on Tuesday, closing the day at \$3.50 per share.

Wednesday-Thursday, October 1st & 2nd

For the next two days Citigroup and Wachovia continued to negotiate their deal under the auspices of their exclusivity agreement. Bob Steel spent most of his time at the famed Citigroup building in midtown Manhattan, negotiating the terms of the deal with Pandit's top officials. On Thursday afternoon, Steel and other Wachovia executives spent hours with their Citigroup counterparts discussing human-resource issues and transition plans. They explored details such as how Citigroup would reach out to Wachovia's branch managers and tellers to assure them that their jobs were safe. They also discussed plans to relocate Citigroup's retail-banking headquarters to

Charlotte, from New York. By the time the parties disbanded at 6:00 pm that evening, they were close to a deal.⁴¹ The lawyers planned for the parties to sign their merger agreement sometime on Friday.

Around 7:15 pm on Thursday night, Steel received an unexpected phone call from FDIC Chairman Sheila Bair. Steel recounted:

She asked me if I had heard from Mr. Kovacevich. I assured her I had not spoken to him since the initiation of the negotiations with Citi. She advised me that it was her understanding that he would be calling me to propose a merger transaction that would result in Wachovia's shareholders receiving \$7.00 per share of Wells Fargo common stock and encouraged me to give serious consideration to that offer. . . .

At approximately 9:00 pm, I received a call from Mr. Kovacevich telling me that momentarily he would be sending me a signed, Board-approved, merger agreement for the acquisition of all of Wachovia. At approximately 9:04 pm, I received an email from Mr. Kovacevich attaching an executed Agreement and Plan of Merger between Wachovia and Wells Fargo. That Agreement was for a stock-for-stock transaction that would result in Wachovia's shareholders receiving Wells Fargo stock worth approximately \$7.00 per share of common stock [approximately \$15 billion in total value].⁴²

Steel scheduled a board meeting for 11:00 pm that evening to review the Wells Fargo proposal. While he waited for his board to convene he called his outside counsel, eminent banking lawyer Rodgin Cohen at Sullivan & Cromwell. "I'm going to be sued by somebody," Steel told Cohen. "Pick your poison," Cohen responded.⁴³

Just after midnight, Steel and his board picked Wells Fargo. Steel described the meeting:

The company's advisors and I told the Board that we believed that unless a definitive merger agreement was signed with either Citigroup or Wells Fargo by the end of the day Friday, October 3 that the FDIC was prepared to place Wachovia's banking subsidiaries into receivership. After extensive consideration and discussion by the Board, the Board approved accepting the Wells Fargo Proposal. I executed the Agreement and Plan of Merger, and together with Jane Sherburne [Wachovia's General Counsel and formerly the number two in Citigroup's General Counsel office] called Mr. Kovacevich to inform him of the approval of Wachovia's Board of the Wells Fargo proposal.⁴⁴

Steel then called Chairman Bair to inform her of the news.⁴⁵ Next came the uncomfortable task of telling Pandit at Citigroup. Bair recommended that they call him "first thing in the morning." Steel responded adamantly: "Sheila, we're not waiting until the morning. We've done this; we've approved it. I think we have to call him now. I don't want him hearing this when he wakes up from someone else."

Bair relented but put the burden on Steel: "You should do it."

Steel agreed, but with a condition: "I think you should be on the phone, since you married us."

Steel and Bair conferenced in Sherburne, Wachovia's general counsel, and the three of them called Pandit at his home shortly after 2:00 am.

Not surprisingly, Pandit was asleep. "Bob, what's going on?" he asked groggily.

Steel chose his words carefully. “Well, there’s been an important development. . . . We received an unsolicited proposal from Wells Fargo for the entire company of Wachovia, \$7 a share, no assistance, and a Wells Fargo board-approved doc that we’ve accepted. We think this is the right thing to do.”

Pandit was stunned, but kept his composure. “Well, that’s interesting. . . . Let’s work with you, and let’s see what we can do and get this thing resolved.”

“No, no. You don’t understand.” Steel paused. “I’ve signed it already.”

Pandit was now awake. “We have a deal! You know you can’t do this, because we actually have an exclusive arrangement with you. You are not allowed to sign.” Pandit then appealed to Bair: “Madame Chairwoman?”

But Bair was stoic: “I can’t get in the way of this.”

Pandit asked Steel and Sherburne to leave the conversation so that he could speak with Bair privately. After they hung up, he pleaded his case: “This is not right. It’s not right for the country; it’s just not right!”

But Bair made clear that the decision was final.

Friday, October 3rd

Pandit convened his team at Davis Polk. His first question: What happened to our exclusivity agreement with Wachovia? Citigroup officials and their lawyers scrambled to find out. What they discovered shocked them, and shocked Pandit.

After Monday’s debacle, the EESA had been salvaged and had found its way back to Congress. On Wednesday, October 1st, the Senate passed the bill by a vote of 74-25. And on Friday morning, the House passed the bill on its second try, by a vote of 263-171. President Bush signed the legislation into law early Friday afternoon.

When the Citigroup camp read the recently-minted statute, they discovered Section 126(c):

SEC. 126: FDIC AUTHORITY

(c) UNENFORCEABILITY OF CERTAIN AGREEMENTS - No provision contained in any existing or future standstill, confidentiality, or other agreement, that directly or indirectly -

- (A) affects, restricts, or limits the ability of any person to offer or acquire,
- (B) prohibits any person from offering to acquire or acquiring, or
- (C) prohibits any person from using any previously disclosed information in connection with any such offer to acquire or acquisition of,

all or part of any insured depository institution, including any liabilities, assets, or interest therein, in connection with any transaction in which [the FDIC] exercises its authority under section 11 or 13, shall be enforceable against or impose any liability on such person, as such enforcement or liability shall be contrary to public policy.

The Citigroup officials realized that Section 126(c) seemed to render their exclusivity agreement with Wachovia unenforceable as “contrary to public policy.” According to the *Wall Street Journal*, “Citigroup officials were caught off-guard by the [Section 126(c)] provision, with senior officials not being aware of it until Friday afternoon – after President George W. Bush had signed the bill into law.”⁴⁶ The *Journal* also reported that the FDIC had inserted Section 126(c) into the rescue legislation during the previous week– around the same time that FDIC Chairman Bair had intervened to broker the Citigroup-Wachovia deal.⁴⁷ A Wells Fargo spokesperson insisted that Wells had “no role” in inserting Section 126(c) into the EESA.⁴⁸ Citigroup asked Davis Polk for its guidance on how to interpret Section 126(c) of the EESA (see **Exhibit 5** for Davis Polk’s memorandum to Citi).

Later on Friday, FDIC Chairman Bair issued a statement:

Since the close of our bidding process, Wells has apparently re-assessed its position and come forth with this new offer that does not require FDIC assistance. . . . The FDIC stands behind its previously announced agreement with Citigroup. . . . The FDIC will be reviewing all proposals and working with the primary regulators of all three institutions to pursue a resolution that serves the public interest.⁴⁹

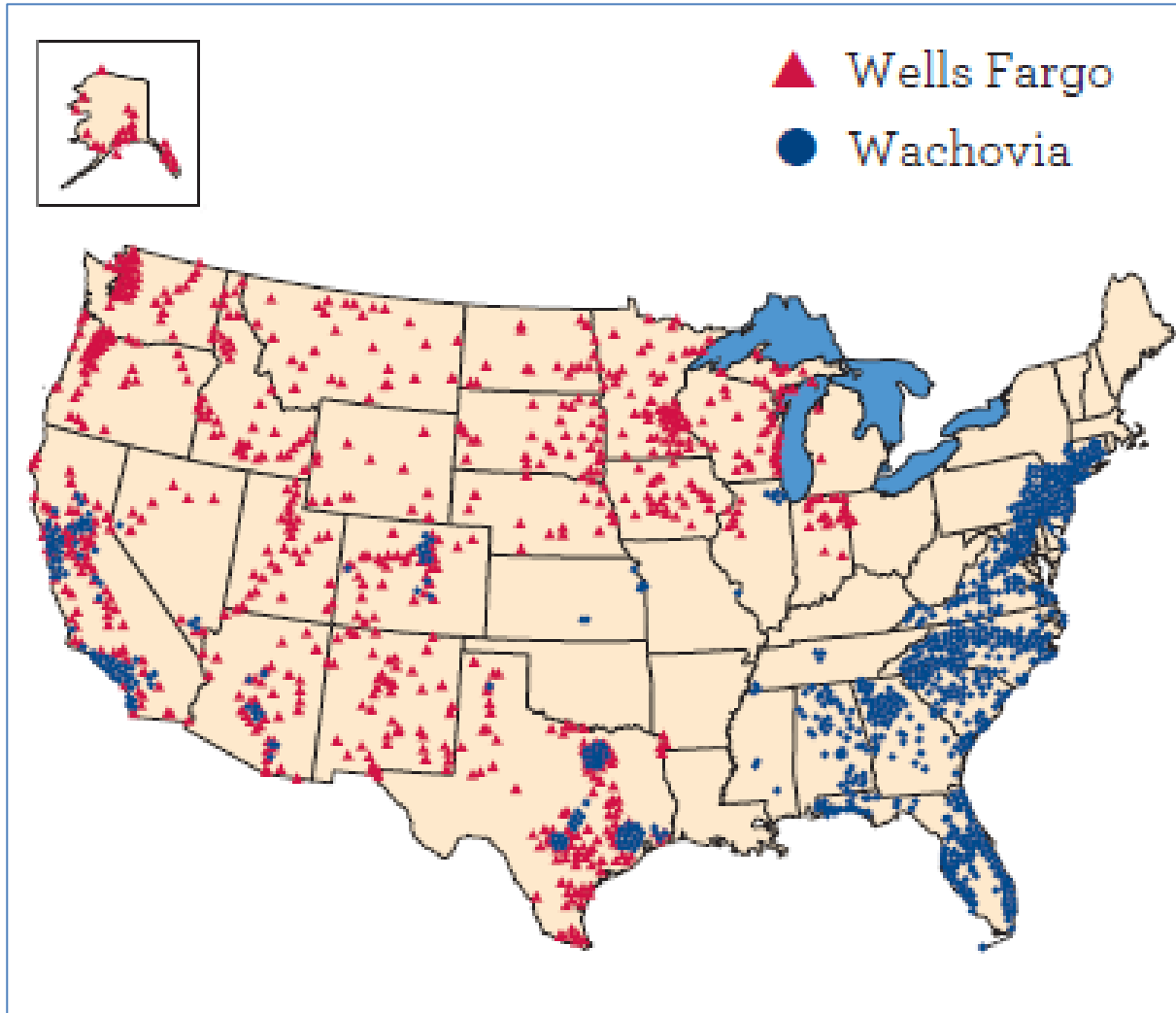
What Now?

Throughout Friday, Pandit and his team of executives and legal counsel feverishly lobbied government officials, who had encouraged the merger in the first place, to intervene on Citigroup’s behalf. They argued that Citigroup had entered into an extremely risky transaction on good faith, only to be completely blindsided days later. In a statement released Friday, Citigroup asserted that “Wachovia’s agreement to a transaction with Wells Fargo is in clear breach of [the] Exclusivity Agreement between Citi and Wachovia. In addition, Wells Fargo’s conduct constitutes tortious interference with the Exclusivity Agreement.”⁵⁰

Back at the offices of Davis Polk, Pandit wondered what his next move ought to be. Should he challenge IRS Notice 2008-83 as an unauthorized change to the tax code? Should he sue Wells Fargo for “tortious interference” with his exclusivity agreement? Or should he simply bid again, in the hopes of beating out Wells Fargo?

As he mulled his options, he did not want to look at the full-page advertisement that his staff had taken in *USA Today* that morning (see **Exhibit 6**). The ad heralded “A New Partnership” and “A New World:” “Citibank and Wachovia – Uniting to provide strength, security, and service.” Pandit wondered: could victory be salvaged from this debacle?

Exhibit 1 Wachovia and Wells Fargo Branches



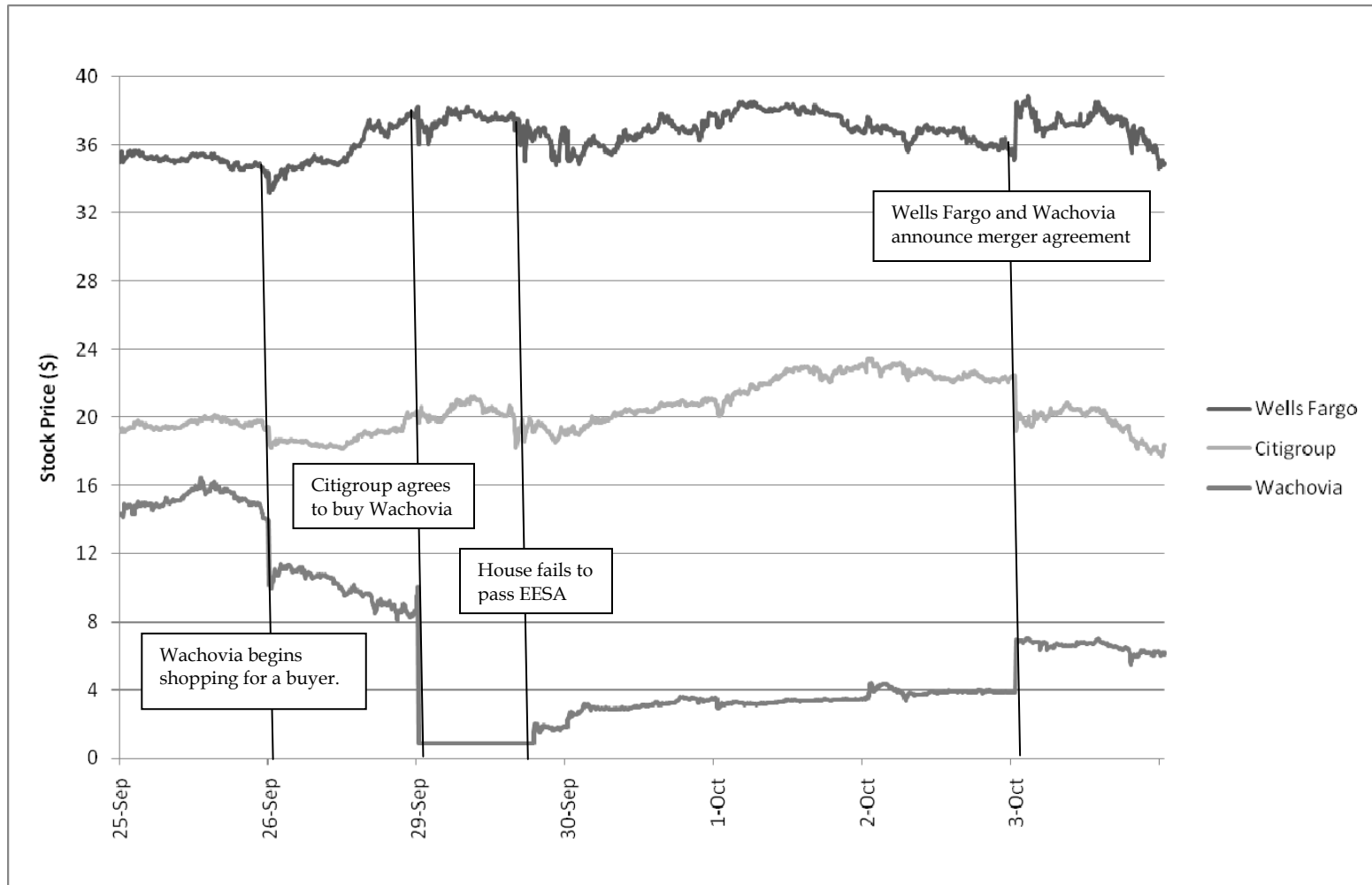
Source: Wells Fargo press release, https://www.wellsfargo.com/downloads/pdf/wachovia/news/wellsfargo_retail.pdf, accessed July 2009.

Exhibit 2 Historical Stock Price Data (January 1, 2007 – October 3, 2008)



Source: Thomson DataStream, accessed July 2009.

Exhibit 3 Minute-by-Minute Stock Price Data (September 25 - October 3, 2008)



Source: NYSE TAQ database, accessed July 2009.

Exhibit 4 Wachovia-Citigroup Exclusivity Agreement (Monday, September 29, 2008)

Citigroup Inc.

September 29, 2008

Wachovia Corporation

Ladies and Gentlemen:

JCS

October
 6, 2008

 Citigroup Inc. ("Citigroup") and Wachovia Corporation ("Wachovia") are party to that non-binding term sheet dated September 29, 2008 (the "Term Sheet") setting forth the terms and conditions of a proposed transaction between them (the "Transaction"). Citigroup and Wachovia will continue to proceed to negotiate definitive agreements (the "Definitive Documentation") relating to the Transaction in form and substance satisfactory to each of them with a view to executing such Definitive Documentation prior to ~~(DATE)~~ (the "Exclusivity Termination Date").

In consideration of the foregoing and other good and valuable consideration the receipt and adequacy of which are hereby acknowledged, Wachovia hereby agrees that, during the period commencing on the date hereof and ending on Exclusivity Termination Date, Wachovia shall not, and shall not permit any of its subsidiaries or any of its or their respective officers, directors, employees, investment bankers, attorneys, accountants, consultants or other agents or advisors ("**Representatives**") to, directly or indirectly, (i) solicit, initiate or take any action to facilitate or encourage the submission of any Acquisition Proposal, (ii) enter into or participate in any discussions or negotiations with, furnish any information relating to Wachovia or any of its subsidiaries, assets or businesses or afford access to the business, properties, assets, books or records of Wachovia or any of its subsidiaries to, otherwise cooperate in any way with, or knowingly assist, participate in, facilitate or encourage any effort by, any third party that is seeking to make, or has made, an Acquisition Proposal, (iii) grant any waiver or release under any standstill or similar agreement with respect to any class of equity securities of Wachovia or (iv) enter into any agreement in principle, letter of intent, term sheet, merger agreement, acquisition agreement, option agreement or other similar instrument relating to an Acquisition Proposal. As of the date hereof, Wachovia will, and will cause its Representatives to, terminate any discussions or negotiations with respect to any Acquisition Proposal.

"**Acquisition Proposal**" means, other than the Transaction, any offer, proposal or inquiry relating to, or any third party indication of interest in, (i) any acquisition or purchase, direct or indirect, of 15% or more of the consolidated assets of Wachovia, or over 15% of any class of equity or voting securities of Wachovia or any of its subsidiaries whose assets, taken as a whole, constitute more than 15% of the consolidated assets of Wachovia, (ii) any tender offer (including a self-tender offer) or exchange offer that, if consummated, would result in such third party's beneficially owning 15% or more of any

class of equity or voting securities of Wachovia or any of its subsidiaries whose assets, taken as a whole, constitute more than 15% of the consolidated assets of Wachovia, (iii) a merger, consolidation, share exchange, business combination, reorganization, recapitalization, liquidation, dissolution or other similar transaction involving Wachovia or any of its subsidiaries whose assets, individually or in the aggregate, constitute more than 15% of the consolidated assets of Wachovia or (iv) any other transaction the consummation of which could reasonably be expected to impede, interfere with, prevent or materially delay the Transaction or that could reasonably be expected to dilute materially the benefits to Citigroup of the Transaction.

The parties agree that in the event of any breach of this letter agreement, the parties would be irreparably harmed and could not be made whole by monetary damages. Each party accordingly agrees (i) not to assert by way of defense or otherwise that a remedy at law would be adequate and (ii) that the remedy of specific performance of this letter agreement is appropriate in any action in court, in addition to any other remedy to which such party may be entitled.

This agreement shall be governed by, and construed in accordance with, the laws of the State of New York. The parties hereby irrevocably and unconditionally submit to the exclusive jurisdiction of any state or federal court sitting in New York City, Borough of Manhattan, over any suit, action or proceeding arising out of or relating to this letter agreement. The parties hereby irrevocably and unconditionally waive any objection to the laying of venue of any such suit, action or proceeding brought in any such court and any claim that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum. The parties hereby agree that a final judgment in any such suit, action or proceeding brought in any such court shall be conclusive and binding upon you and may be enforced in any other courts to whose jurisdiction the parties are or may be subject by suit upon such judgment.

This letter agreement may be executed in counterparts, either one of which need not contain the signature of more than one party, but both such counterparts taken together will constitute one and the same agreement.

If the foregoing accurately summarizes our understanding, we request that you approve this letter agreement and evidence such approval by causing a copy of this letter agreement to be executed and returned to the undersigned.

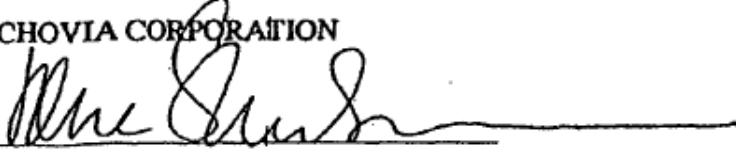
Very truly yours,

CITIGROUP INC.

By: _____
Name:
Title:

Agreed and accepted:

WACHOVIA CORPORATION

By:  _____
Name:
Title:

Source: "The Citi-Wachovia Exclusivity Agreement," The New York Times: Deal Book. October 3, 2008, <http://dealbook.blogs.nytimes.com/2008/10/03/the-citi-wachovia-exclusivity-agreement>, accessed July 2009.

Exhibit 5 Memorandum from Davis, Polk, & Wardwell to Citigroup (Friday, October 3, 2008)**Section 126(c) of EESA**

Sections 11 and 13 of the Federal Deposit Insurance Act ("FDIA") contain a special "bankruptcy code" for FDIC-insured banks and thrifts, which are otherwise exempt from the Bankruptcy Code, which applies to regular companies. Most of Sections 11 and 13 relate to banks or thrifts that are closed and put into receivership or conservatorship. In a closed bank transaction, the FDIC takes control of a closed bank and attempts to liquidate it for maximum value. The recent failures of Indymac and WaMu were closed bank transactions. Both were put into receivership. In the Indymac situation, the FDIC transferred Indymac's good assets and liabilities to a "bridge bank" in order to be able to liquidate Indymac in an orderly fashion over a period of time. In WaMu, the FDIC sold all of the insured and uninsured deposits to JP Morgan, resulting in no loss to the deposit insurance fund.

Section 13(c), however, contains provisions governing "open bank assistance" when the FDIC provides assistance to a bank that has not been closed to prevent it from failing. The FDIC used its open bank assistance powers during the S&L crisis in the 1980s, but has not done so since 1992. The reason is that something called the "least cost resolution" condition was added to Section 13 in 1991. This condition prohibits the FDIC from providing open bank assistance unless it can demonstrate that providing such assistance before closing an insured institution would be less costly to the U.S. taxpayer than closing the institution and putting it into receivership. Because putting an insured institution into receivership effectively wipes out all contingent claims and gives the FDIC extraordinary powers to repudiate not only executory contracts but also any contracts that it finds to be "burdensome" within a reasonable period of time, it is virtually impossible to satisfy the least cost test for open bank assistance. Section 13(c) contains a "systemic risk" exception, however, to the least cost resolution requirement if the FDIC, the Federal Reserve and Treasury determine, in consultation with the President, that putting the institution into receivership would "have serious adverse effects on economic conditions or financial stability."

Section 126(c) of the Emergency Economic Stabilization Act of 2008 ("EESA") adds a new subparagraph (11) to Section 13(c) of the FDIA. This new subparagraph is designed to protect any person who bids for all or any portion of an insured depository institution in a closed bank or open bank transaction. It is not designed to protect a person who bids for a bank or bank holding company outside a closed bank or open bank bidding process. It is our understanding that the FDIC inserted it into EESA to address past situations where a third party attempts to interfere with the bidding process in a closed bank situation (e.g., JP Morgan bidding for WaMu) by asserting that the bidding process is inconsistent with a standstill, confidentiality or other agreement that the third party entered into with the closed institution before or after the bidding process. It was also expressly designed to serve the same function in an open bank transaction involving FDIC assistance.

Thus, Section 126(c) (new Section 13(c)(11) of the FDIA) provides in relevant part as follows: "No provision contained in any ... agreement that, directly or indirectly ... affects, restricts or limits the ability of any person to offer to acquire or acquire ... all or part of any insured depository institution ... in connection with any transaction in which the [FDIC] exercises its authority under

section 11 or 13, shall be enforceable against or impose any liability on such person, as such enforcement or liability shall be contrary to public policy."

To argue that this language was designed to protect a party like Wells Fargo, which is bidding for an insured institution like Wachovia in a transaction that is wholly outside any FDIC closed bank or open bank bidding process would be to turn the statute on its head. The purpose of the statute is to protect bidders like Citigroup who make bids that are accepted by the FDIC in an open bank transaction, such as the bid Citigroup made for Wachovia that clearly prevented Wachovia from being put into receivership on Monday, September 29, which the FDIC, the Fed and Treasury determined would have had "serious adverse effects on economic conditions or financial stability." It was not designed to invalidate agreements between a bidder and a troubled bank that have been accepted by the FDIC in an FDIC bidding process in order to protect persons like Wells Fargo who choose not to participate in that process or who make bids that are rejected by the FDIC. The FDIC has expressly stated in a press release that Wells Fargo terminated its participation in the FDIC's open bank bidding process for Wachovia. In effect, Wells Fargo was willing to let Wachovia be put into receivership on Monday, September 29.

Instead, Citigroup rescued Wachovia from failure last Monday and provided it with credit and liquidity support to keep it afloat as part of its open bank transaction agreements with the FDIC and Wachovia. It borders on the frivolous to argue that Section 126(c) was designed to render unenforceable Citigroup's agreements entered into with the FDIC or Wachovia as part of the FDIC's bidding process in order to avoid interfering with the ability of Wells Fargo to enter into an agreement with Wachovia after and outside the FDIC bidding process. This is not what Section 126(c) says and it is preposterous to argue that this is what Section 126(c) was intended to do.

Source: Davis, Polk & Wardwell. Used with permission.

Exhibit 6 Advertisement in *USA Today* (Friday, October 3, 2008)

USA TODAY • FRIDAY, OCTOBER 3, 2008 • 11A

A new
partnership.



A new
world.

**Citibank and Wachovia.
Uniting to provide strength,
security and service.**

Citibank is honored to enter into a partnership with Wachovia. Wachovia's strength in banking, along with their award-winning customer service, convenient locations, industry-leading technology and dedicated employees make them the perfect partner for Citibank.

Together, we will be part of the largest financial services company in the world, with 200 million customers in 170 countries and a total deposit base in excess of \$1.3 trillion. With this financial strength comes an unprecedented range of banking products and services and unparalleled access to 4,300 branches and over 28,000 ATMs across the United States. All of which provides our customers with more than just a bank. It provides them with a partner they can rely on. If you have questions or want to know more, come in and speak with one of our banking specialists or visit www.citibank.com.



Citi never sleeps™



Member
FDIC

Source: *USA Today* Friday, October 3, 2008 (page 11A).

-
- ¹ Enrich, David and Dan Fitzpatrick. "Wachovia Chooses Wells Fargo, Spurns Citi Deal: Deal Avoids Need for Taxpayer Cash; Pandit Vows a Fight." *The Wall Street Journal*. October 4, 2008. A1
- ² Bray, Chad. "Wachovia lost deposits as Citi fought Wells bid." *MarketWatch*. October 11, 2008.
- ³ Enrich, David and Dan Fitzpatrick. "Wachovia Chooses Wells Fargo, Spurns Citi Deal: Deal Avoids Need for Taxpayer Cash; Pandit Vows a Fight." *The Wall Street Journal*. October 4, 2008. A1
- ⁴ Dash, Eric and Ben White. "Wells Fargo Swoops In." *The New York Times*. October 4, 2008. www.nytimes.com
- ⁵ Enrich, David and Dan Fitzpatrick. "Wachovia Chooses Wells Fargo, Spurns Citi Deal: Deal Avoids Need for Taxpayer Cash; Pandit Vows a Fight." *The Wall Street Journal*. October 4, 2008. A1
- ⁶ Ibid.
- ⁷ "CSI: The Credit Crunch – Central Banks Have Played A Starring Role." *The Economist*. October 18, 2007.
- ⁸ Ibid.
- ⁹ Citigroup 2008 Annual Report.
- ¹⁰ Bawden, Tim. "Citigroup buys debt-hit Wachovia." *The Times*. September 30, 2008. www.thetimes.com
- ¹¹ "Why the world's banks are in trouble: The top 50 world banks, ranked by assets and market value" *guardian.co.uk*. <<http://www.guardian.co.uk/news/datablog/2009/mar/25/banking-g20#>> Retrieved July 22, 2008.
- ¹² Bawden, Tim. "Citigroup buys debt-hit Wachovia." *The Times*. September 30, 2008. www.thetimes.com
- ¹³ Wachovia Press Releases:
- "Wachovia Reports 1st Quarter Results; Announces Initiatives to Further Enhance Capital Base and Flexibility." *Wachovia Press Release*. April 14, 2008.
- "Wachovia Details 2nd Quarter Loss; Outlines Initiatives to Preserve and Generate Capital, Protect Strong Liquidity and Reduce Risk." *Wachovia Press Release*. July 22, 2008.
- ¹⁴ Guerrero, Francesco and Julie MacIntosh. "Wachovia move rests on bail-out." *The Financial Times*. September 29, 2008.
- ¹⁵ White, Ben and Eric Dash. "Wachovia, Looking for Help, Turns to Citigroup." *The New York Times*. September 27, 2008.
- ¹⁶ Enrich, David and Matthew Karnitschnig. "Citi, U.S. Rescue Wachovia – Latest Shotgun Deal Creates Nation's Third Largest Bank." *The Wall Street Journal*. September 30, 2008.
- ¹⁷ Ibid.
- ¹⁸ Rothacker, Rick. "\$5 billion withdrawn in one day in silent run." *Charlotte Observer*. October 11, 2008. CharlotteObserver.com
- ¹⁹ Ibid.
- ²⁰ Dash, Eric and Andrew Ross Sorkin. "Citigroup Buys Bank Operations of Wachovia." *The New York Times*. September 30, 2008.
- ²¹ Enrich, David and Matthew Karnitschnig. "Citi, U.S. Rescue Wachovia – Latest Shotgun Deal Creates Nation's Third Largest Bank." *The Wall Street Journal*. September 30, 2008.
- ²² Ibid.
- ²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Taub, Stephen. "Deal for Wachovia Goes to Citigroup." *CFO.com*. September 29, 2008.

³⁰ "Citi and Wachovia Reach Agreement-in-Principle for Citi to Acquire Wachovia's Banking Operations in An FDIC-Assisted Transaction." *Citigroup Press Release*. September 29, 2008.

³¹ Enrich, David and Dan Fitzpatrick. "Wachovia Chooses Wells Fargo, Spurns Citi Deal: Deal Avoids Need for Taxpayer Cash; Pandit Vows a Fight." *The Wall Street Journal*. October 4, 2008. A1

³² Sender, Henry and Joanna Chung. "Citigroup avoids missteps of other bailouts." *The Financial Times*. September 29, 2008.

³³ Ibid.

³⁴ Bray, Chad. "Wachovia lost deposits as Citi fought Wells bid." *MarketWatch*. October 11, 2008.

³⁵ Lueck, Sarah, Damian Paletta and Greg Hitt. "Bailout Plan Rejected, Markets Plunge, Forcing New Scramble to Solve Crisis." *The Wall Street Journal*. September 30, 2008. www.wsj.com

³⁶ Appelbaum, Binyamin. "After Change in Tax Law, Wells Fargo Swoops In." *The Washington Post*. October 4, 2008. A1

³⁷ Paley, Amit. "A Quiet Windfall For U.S. Banks: With Attention on Bailout Debate, Treasury Made Change to Tax Policy." *The Washington Post*. November 10, 2008. A1

³⁸ Appelbaum, Binyamin. "After Change in Tax Law, Wells Fargo Swoops In." *The Washington Post*. October 4, 2008. A1

³⁹ Ibid.

⁴⁰ Paley, Amit. "A Quiet Windfall For U.S. Banks: With Attention on Bailout Debate, Treasury Made Change to Tax Policy." *The Washington Post*. November 10, 2008. A1

⁴¹ Enrich, David and Dan Fitzpatrick. "Wachovia Chooses Wells Fargo, Spurns Citi Deal: Deal Avoids Need for Taxpayer Cash; Pandit Vows a Fight." *The Wall Street Journal*. October 4, 2008. A1

⁴² Affidavit of Robert K. Steel. October 5, 2008.

⁴³ Sorkin, Andrew Ross. Too Big To Fail. New York, New York: Penguin Group, 2009. (502)

⁴⁴ Affidavit of Robert K. Steel. October 5, 2008.

⁴⁵ This account of the conversation comes from Sorkin, Andrew Ross. Too Big To Fail. New York, New York: Penguin Group, 2009. (502-503)

⁴⁶ Enrich, David, Dan Fitzpatrick and Damian Paletta. "Fed Pushes to Resolve Wachovia Deal Dispute: Citi, Wells Fargo Discuss Carve-Up; Sparring in Court." *The Wall Street Journal*. October 6, 2008. A1

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ "FDIC Chairman Sheila Bair Comments on Agreement to Merge by Wells Fargo and Wachovia." *FDIC Press Release*. October 3, 2008.

⁵⁰ "Citi Statement on Wachovia's Breach of Exclusivity Agreement." *Citigroup Press Release*. October 3, 2008.



GUHAN SUBRAMANIAN
NITHYASRI SHARMA

Bank of America-Merrill Lynch

Question: Wasn't Mr. Paulson, by his instructions, really asking Bank of America shareholders to take a good part of the hit of the Merrill losses?¹

Answer from Ken Lewis, Chairman & CEO, Bank of America: What he was doing was trying to stem a financial disaster in the financial markets, from his perspective.

Question: Had it been up to you would you [have] made the disclosure [of the larger-than-expected Q4 losses at Merrill Lynch]?

Answer: It wasn't up to me.

Question: Had it been up to you.

Answer: It wasn't.

Question: Why do you say it wasn't up to you? Were you instructed not to tell your shareholders what the transaction was going to be?

Answer: I was instructed that "We do not want a public disclosure."

Question: Who said that to you?

Answer: Paulson.

In late December 2008, the Bank of America (BofA) board of directors had to decide whether to declare a Material Adverse Change (MAC) in order to walk away from its deal to acquire Merrill Lynch. The BofA shareholders had already approved the deal two weeks earlier, but they were not aware of \$12 billion in losses that Merrill Lynch was forecasting for the fourth quarter of 2008. BofA CEO Ken Lewis was under pressure from Treasury Secretary Henry Paulson and Federal Reserve Board Chairman Ben Bernanke to close the deal. In fact, Paulson had threatened to have the board and top managers removed if BofA did not. (See **Exhibit 1** for a list of persons involved in the deal and **Exhibit 2** for a timeline of events.)

The board convened on December 22nd, 2008, to consider its options. Should it close the Merrill Lynch deal "for the good of the country," in effect forcing its own shareholders to bear Merrill Lynch's losses? Or should it declare a MAC and risk invoking the wrath of the U.S. federal

Professor Guhan Subramanian and Research Associate Nithyasri Sharma prepared this case. This case was developed from published sources. HBS cases are developed solely as the basis for class discussion. Cases are not intended to serve as endorsements, sources of primary data, or illustrations of effective or ineffective management.

Copyright © 2010 President and Fellows of Harvard College. To order copies or request permission to reproduce materials, call 1-800-545-7685, write Harvard Business School Publishing, Boston, MA 02163, or go to www.hbsp.harvard.edu/educators. This publication may not be digitized, photocopied, or otherwise reproduced, posted, or transmitted, without the permission of Harvard Business School.

government in a precarious economic environment? Were there other options? With the deal slated to close within a week, the board had to decide.

Background

Bank of America

Bank of America, headquartered in Charlotte, North Carolina, operated throughout the United States and several countries around the world. Originally founded by Amadeo Giannini in San Francisco as the Bank of Italy in 1904, the bank had 24 branches throughout California within ten years. In 1928, Giannini orchestrated the acquisition of TransAmerica Corp. and Bank of America in New York. At the height of the Great Depression, Giannini consolidated the various institutions under the name “Bank of America,” eventually creating one of the largest banks in the United States. This was eventually acquired by NationsBank (formerly North Carolina National Bank) in 1998, one of the largest mergers at the time, and the resulting institution became known as Bank of America Corporation (BofA).

Ken Lewis assumed the position of CEO at BofA in 2001 after the retirement of Hugh McColl. A lifelong employee who had moved up through the ranks, Lewis received his B.A. in Finance from Georgia State University, and began his career in 1969 at North Carolina National Bank, a BofA predecessor. Between 2001 and 2008, Lewis engineered acquisitions worth more than \$162 billion, including Countrywide Financial Corp., a failing mortgage giant, in July 2008.² By 2008, BofA was the largest retail bank in the United States. Lewis had been celebrated on Wall Street for his business acumen, and in late 2008, *American Banker* hailed Lewis as “Banker of the Year.”³

Merrill Lynch

Merrill Lynch was founded in the early 20th century by Charles Merrill and his friend Edmund Lynch. Merrill Lynch became one of the leading providers of wealth management, securities trading and sales, corporate finance and investment banking services. In the 2000s Merrill Lynch sought a position in the lucrative mortgage business as many of its competitors had already done.⁴ Between January 2005 and January 2007, Merrill Lynch acquired 12 major residential or commercial mortgage-related institutions and assets, including First Franklin, a domestic subprime lender.⁵ (Subprime loans are loans to borrowers who have a bad credit history, and therefore have a higher risk of default.) Although a latecomer to the market, by 2006 Merrill Lynch was the largest underwriter of Collateralized Debt Obligations (CDOs),⁶ financial instruments that repackage loans for resale into a secondary market.

Between 1997 and 2006, the global housing market boomed and banks expanded their lending to subprime borrowers. By 2006, nearly 20% of all new mortgages were considered subprime.⁷ However, when the housing bubble burst in late 2006, mortgage holders suddenly found themselves unable to make their payments, and the inventories of unsold homes increased substantially. As house prices fell, the market for the securitized mortgages fell as well. With most U.S. banks holding large portfolios of subprime assets, the banking industry went into a tailspin and Merrill Lynch was among the biggest victims. In October 2007, Merrill Lynch announced a \$7.9 billion write-down due to its exposure to mortgage CDOs, resulting in a \$2.3 billion loss for the quarter, the largest thus far in Merrill’s history.⁸ In fact, for the last quarter of 2007 and the first three quarters of 2008 combined, Merrill wrote down more than \$46 billion due to bad bets on real estate and other mortgage-related investments.⁹

Merrill's board ousted CEO Stan O'Neal in October 2007, and chose John Thain as his replacement. Prior to Merrill Lynch, Thain had served as the CEO of the New York Stock Exchange from January 2004 to December 2007. He also worked at Goldman Sachs, serving as President and Co-Chief Operating Officer from 1999-2004. Thain received his B.A. in electrical engineering from MIT in 1977 and an MBA from Harvard in 1979.

A Desperate Bid to Save Lehman Brothers

Lehman's financial condition deteriorated rapidly throughout the summer of 2008. Richard Fuld, CEO of Lehman, was desperate to find a solution and had even approached BofA in July about a possible deal. Lewis rejected the overture at the time.¹⁰ On September 9th, 2008, Treasury Secretary Paulson telephoned Lewis, encouraging him to consider acquiring Lehman. "If there's a good financial deal there, I could see doing it," Lewis said.¹¹

On Friday, September 12th, 2008, Lehman Brothers prepared for the worst. Timothy Geithner, then-president of the New York Federal Reserve, informed Paulson that Lehman was in a precarious position and might not open for business on Monday morning. Paulson met with Ben Bernanke, chairman of the Federal Reserve Board, to discuss a "private sector solution" to Lehman's plight, and Bank of America and Barclays emerged as the two potential saviors.¹²

Fed officials called an emergency meeting of a number of Wall Street CEOs at 6:00 p.m. on Friday evening, September 12th, to discuss the potential sale of Lehman Brothers. Conspicuously absent was the team from Bank of America. In fact, BofA officials were en route to the meeting when an assistant from Geithner's office telephoned Brian Moynihan, BofA's president of global corporate and investment banking at the time, to call them off: "Given your bank's role in the merger discussions, we believe it would be inappropriate for you to attend the meeting."¹³ As soon as Paulson arrived in New York City, he received a call from Greg Curl, BofA's Global Corporate Strategic Development and Planning Executive. Curl made it clear that, after assessing Lehman's financial condition, BofA would only agree to the deal if the government was willing to guarantee up to \$40 billion in losses.¹⁴

A "Shotgun Wedding" between Bank of America and Merrill Lynch

Thain approaches Lewis to acquire Merrill Lynch

Negotiations continued in earnest throughout the weekend of September 13th-14th, 2008, but no solutions emerged. With the possibility of a Lehman Brothers bankruptcy growing more likely, Merrill Lynch became anxious about its own survival. At 6:30 a.m. on Saturday morning, Thain received a call from Gregory Fleming, Merrill Lynch's president and Chief Operating Officer. "'I've been thinking about this,' Fleming said resolutely. 'We have to call Ken Lewis.'"¹⁵ Thain resisted the idea in favor of raising money by selling off certain assets instead.¹⁶

Fleming called again, just a few minutes later, to try to convince Thain to consider a deal with Bank of America. "'We should see if we can put it together,' Fleming insisted. 'We should use the weekend [of September 13th-14th] to do that.'"¹⁷ Thain replied that he still wasn't ready to consider a deal, but he would keep an open mind and make the call if necessary.¹⁸

Around 9:00 a.m. on Saturday morning, September 13th, bankers and lawyers reconvened at the New York Federal Reserve to decide the fate of Lehman. Thain, Peter Kraus, and Peter Kelly of Merrill Lynch gathered in a corner. "Lehman's not going to make it," Thain said, acknowledging that

Merrill Lynch would be the next victim of the burgeoning financial crisis.¹⁹ Thain called Fleming and told him to set up a meeting with Lewis.

Meanwhile, Gregory Curl, Joe Price (BofA's Chief Financial Officer), and Ed Herlihy from Wachtell, Lipton, Rosen & Katz (BofA's outside counsel) made their way to a mid-morning meeting with Paulson and Geithner. At the meeting, Curl made it clear that BofA was not willing to buy Lehman unless the government was prepared to provide assistance in the amount of \$70 billion, a significant increase from the \$40 billion they had asked for just a day earlier.²⁰ During the meeting, Herlihy received a call from Fleming of Merrill Lynch, who said that Thain would meet with Lewis at 2:30 p.m. that afternoon. Herlihy insisted that "[Thain had] to make the call [himself]" in order to demonstrate that he was willing to do a deal.²¹ At Fleming's urging, Thain finally made the call to Lewis and set up the logistics for the meeting on Saturday afternoon. Meanwhile, Thain was also approached by John Mack, CEO of Morgan Stanley, about a potential deal as well, and scheduled a meeting with him later on Saturday evening.

As soon as Lewis arrived in New York City, he met Thain at the BofA corporate apartment in the Time Warner Center.²² Thain opened the conversation bluntly: "I'd like to explore whether you'd have an interest in buying a 9.9 percent stake in the company and providing a large liquidity facility."²³ Lewis countered that he was "not really interested" in buying 9.9 percent of the company - he wanted to buy the whole bank.²⁴ After a half-hour of discussions, Lewis suggested that they should meet again with Greg Curl and Greg Fleming a few hours later.²⁵

Merrill Lynch officials also engaged in talks with Morgan Stanley and Goldman Sachs throughout Saturday. However, negotiations halted with Morgan Stanley when they asked for more time to conduct the necessary due diligence, since Merrill Lynch needed to do the deal quickly. Goldman officials continued to express interest in buying a 9.9 percent stake in Merrill Lynch, and preliminary negotiations proceeded through Saturday evening.²⁶

Negotiations also continued with BofA at Wachtell's offices on West 52nd Street. Merrill officials camped out with their lawyers from Shearman & Sterling on the 34th floor, and BofA's team huddled on the 33rd.²⁷ By Saturday afternoon, Fleming strongly indicated that he wanted "something with a 3-handle," meaning a final deal price of at least \$30 per share - a 76% premium over Merrill's stock price on the previous Friday.²⁸ BofA didn't reject the number outright, and by 3:00 a.m. on Sunday morning, Fleming indicated to Peter Kelly, Merrill's deal lawyer, that Bank of America would be willing to pay as much as \$30 per share.²⁹

Kelly was unconvinced: "I can't believe they're going to pay us \$30. Greg, this trade is never going to happen. It doesn't make any sense. We're on our knees here." When Fleming insisted that \$30 was feasible, Kelly responded angrily: "You're getting gamed right now and you don't know it! You need to wake up and figure out how you're getting gamed, because there's no way they're doing a \$30 trade! They're going to lead us to the altar and they're going to renegotiate it at \$3, or they're just going to let us go."³⁰

Bank of America and Merrill Lynch agree to deal terms

At 8:00 a.m. on Sunday, September 14th, Thain and Lewis met once again at the BofA corporate apartment. Over coffee, Thain tried to make a case for a high valuation for Merrill, despite the free-falling stock price.³¹ (See **Exhibit 3** for daily stock prices of Bank of America and Merrill Lynch between January 1, 2007 and September 15, 2008.)

At the same time, Peter Kraus and Peter Kelly of Merrill met with Gary Cohn and David Viniar of Goldman Sachs. Prior to the meeting, Cohn had indicated to Viniar that Goldman's offer would be "in the low single digits," well below the price Fleming hoped to extract from BofA.³² Negotiations proceeded, and later that afternoon, Kraus called Fleming, who was negotiating with BofA, and asked him to send a due diligence team to Goldman. Fleming responded that he wasn't "sending anybody anywhere. [They had] a good deal in hand [with BofA] and [they were] going to finish it."³³ Negotiations with Goldman halted at this point, leaving BofA as the only option.

Later that day, at Wachtell's headquarters, Fleming and Curl settled on a price for the deal: Bank of America would buy Merrill Lynch outright for \$29 per share in BofA stock. The deal would not receive any support from the federal government. Fleming had also convinced Curl to authorize Merrill's end-of-year bonus payouts, equaling about \$5.8 billion.³⁴ Fleming telephoned Thain to inform him of the deal. At 5:00 p.m. on Sunday, Bank of America's board met by conference call and approved the deal. At 6:00 p.m., Merrill's board met at the St. Regis hotel on East 55th Street.³⁵ Thain called Lewis immediately afterwards: "[The decision] was unanimous," Thain told Lewis. "You have a deal."³⁶

The deal was officially announced on Monday, September 15th, 2008. BofA would purchase Merrill Lynch for approximately \$50 billion in BofA stock, with an exchange ratio of 0.8595 BofA shares for each share of Merrill Lynch and no "collar" provision that would protect against stock fluctuations on either side.³⁷ The deal valued Merrill at \$29 per share, a 70% premium over Merrill's closing stock price on the previous Friday. BofA's shares fell 21% to \$26.55, and Merrill's shares rose one penny to \$17.06, a substantial discount from the new implied value of \$22.82. Both banks scheduled their required shareholder votes for December 5th, 2008. The deal was set to close on or around December 31st, 2008, pending regulatory approvals and other closing conditions.

Bank of America Shareholders Vote on the Deal

In a joint proxy statement distributed to shareholders of both companies on November 3rd, 2008, Merrill Lynch reported \$5.1 billion in losses for the third quarter of 2008. The merger agreement, attached to the proxy statement, included a provision stating that Merrill would not "pay any amounts to Employees not required by any current plan or agreement (other than base salary in the ordinary course of business)."³⁸ However, the proxy statement failed to report that Bank of America had already agreed to a \$5.8 billion bonus schedule. Thus, BofA shareholders were not aware of forthcoming bonus payments at Merrill Lynch.

A few days later, on November 12th, a preliminary earnings forecast prepared by Merrill Lynch estimated that fourth quarter 2008 losses would be about \$5.3 billion.³⁹ However, this forecast omitted any projected losses for November and December 2008 from Merrill's portfolio of CDOs and other illiquid assets.⁴⁰ Records later showed that Nelson Chai, CFO of Merrill Lynch, indicated that the November 12th forecast was not valid, but BofA conducted no additional analysis regarding Merrill's fourth quarter losses.⁴¹

The next day, Tim Mayopoulos, BofA's general counsel, met with Nicholas Demmo and Ed Herlihy, BofA's lawyer at Wachtell, Lipton, and brought up a pressing question: should BofA disclose Merrill's projected fourth quarter losses to shareholders?⁴² One week later, on November 20th, Mayopoulos, Herlihy, Demmo, Joe Price (Bank of America's CFO), Teresa Brenner (a BofA mergers and acquisitions lawyer), and other Bank of America officials revisited the question.⁴³ The participants unanimously agreed that disclosure to BofA's shareholders was not required because a reasonable investor ought to expect that Merrill would experience losses, given that Merrill had

averaged \$5 billion in quarterly losses over the previous four quarters.⁴⁴ In addition, Wachtell advised that BofA shareholders did not need to know about Merrill's fourth quarter loss projections unless losses were expected to be worse than fourth-quarter results for Goldman Sachs, Morgan Stanley and other peers.⁴⁵ (See **Exhibit 4** for Quarterly Earnings and **Exhibit 5** for Quarterly Earnings per Share for Merrill Lynch, Morgan Stanley, and Goldman Sachs.)

On December 1st, Price and Curl asked Mayopoulos to look into the Material Adverse Change (MAC) clause in the Bank of America-Merrill Lynch merger agreement.⁴⁶ A MAC clause is a standard condition in a merger or acquisition agreement that provides the acquirer with an exit if there are certain negative changes in the target's business between the signing and the closing of the deal (see **Exhibit 6** for full text of the MAC clause). Mayopoulos reviewed this provision of the agreement and predicted that a court would not find a MAC because of similarities between Merrill Lynch and other firms in the industry.⁴⁷

On December 3rd, Price told Mayopoulos that the estimated losses were approximately \$7 billion, and based on this information, Mayopoulos continued to advise that there was no disclosure obligation.⁴⁸ Around 4 p.m. that same day, Lewis, Price, Thain and Neil Cotty, CFO of BofA's global wealth and investment-management business, met by conference call and updated their forecasts to approximately \$9 billion in losses.⁴⁹

On December 5th, BofA shareholders voted to approve the deal. Prior to the shareholder vote, there was no disclosure to Bank of America shareholders about the projected fourth quarter losses at Merrill and no disclosure that BofA officials were evaluating a possible MAC claim.⁵⁰ Merrill's shareholders also voted to approve the deal. Since the announcement of the deal on September 15th, BofA shares had plunged nearly 57% to \$14.34, valuing the acquisition at just \$19.7 billion, a far cry from the \$50 billion valuation in September.⁵¹

Merrill Lynch Forecasted Losses Spiral Upward

On December 8th, the Merrill Lynch board's compensation committee approved \$3.6 billion in bonus payments, pared down from the original \$5.8 billion.⁵² Moreover, although Merrill typically made bonus payments in January or February, Merrill accelerated the 2008 bonus payments to December 29th – just days before the BofA-Merrill deal was expected to close.⁵³

The loss estimates at Merrill Lynch continued to escalate through December. At a BofA board meeting on December 9th, Price delivered a presentation about the worsening financial conditions at Merrill Lynch, including the \$9 billion in expected fourth-quarter losses.⁵⁴ Soon afterwards, Mayopoulos sought a meeting with Price to discuss these projections, but the meeting never took place, as Mayopoulos was unexpectedly fired on December 10th.

On December 14th, Price told Lewis that Merrill's projected fourth quarter losses had exploded from \$9 billion to approximately \$12 billion.⁵⁵ After hearing these projections, Lewis immediately conferred with his lawyers to determine whether Merrill's numbers were bad enough to invoke the MAC clause in the merger agreement to call off the deal.⁵⁶ Lawyers from Wachtell, Lipton opined that BofA had a weak case to invoke the MAC clause to exit the deal.⁵⁷

On December 17th, Lewis telephoned Paulson to inform him of BofA's intention to declare a MAC unless the government could provide substantial financial support. In an internal discussion, Paulson described the losses at Merrill Lynch as "breath-taking."⁵⁸ Paulson immediately told Lewis to come to Washington that evening to meet with Bernanke and himself. At the meeting, Bernanke and Paulson

informed Lewis that failing to complete the Merrill acquisition would be disastrous to an already turbulent U.S. economy, and would further destabilize markets.⁵⁹ Fed officials instructed Lewis to “stand down” and postpone declaring a MAC while they explored options, including government financial support.⁶⁰ As Paulson explained, “In my view, and the view of the numerous government officials working on the matter, the interests of the nation and Bank of America were aligned with respect to the closing of the Merrill Lynch transaction. An attempt by Bank of America to break its contract to acquire Merrill Lynch would have threatened the stability of our entire financial system and the viability of both Bank of America and Merrill Lynch.”⁶¹ Over the next few days, emails flew back and forth between Wachtell’s lawyers and BofA officials over whether the MAC clause could be invoked.

What Now?

Around 2:00 a.m. on December 19th, Eric Roth of Wachtell sent a confidential e-mail to Brian Moynihan and several Wachtell lawyers including Herlihy and Demmo. In this email, Roth included a four-page memo (intended as “talking points” for Lewis) providing an explanation as to why it would be difficult and risky for BofA to invoke the MAC clause. Roth stated that “at first blush, those of us who aren’t lawyers might think that these terrible quarter numbers...gives rise to a ‘material adverse change’ and gives us the right to walk away from the merger,”⁶² but he subsequently detailed several reasons as to why the claim was not viable and cited that “no Delaware court has ever found that a MAC occurred permitting an acquiror to terminate a merger agreement.”⁶³

However, around 3:00 p.m. on December 19th, executives from BofA and lawyers from Wachtell, including Roth, held a conference call with Thomas Baxter, general counsel for the Federal Reserve Bank of New York, and Scott Alvarez, general counsel for the Federal Reserve Board of Governors, and others.⁶⁴ A subsequent e-mail from Teresa Brenner, a BofA mergers and acquisitions lawyer, to Brian Moynihan reported that Roth had “made a very strong case as to why there is a MAC.”⁶⁵ Thus, Wachtell was advising BofA that it could not successfully argue a MAC, while simultaneously informing Fed officials that BofA had reasonable grounds to argue a MAC and was prepared to do so.

At 4:00 p.m. on December 19th, Lewis held a conference call with his board of directors to discuss the potential risks of invoking the MAC clause.⁶⁶ Immediately afterwards, Lewis spoke with Paulson and Bernanke.⁶⁷ Fed officials once again strongly urged Lewis to halt any proceedings to invoke the MAC, but also indicated that they were actively considering financial support to cover Merrill’s losses.

By December 21st, Fed officials became skeptical that Lewis would, or even could, invoke the MAC clause. In a conversation that same day, Paulson told Lewis: “I’m going to be very blunt, we’re very supportive of Bank of America and we want to be of help, but...the government...does not feel it’s in your best interest for you to call a MAC, and that we feel so strongly...we would remove the board and management if you called it.”⁶⁸

“Let’s de-escalate,” said Lewis, after hearing Paulson’s words.⁶⁹ The next day, December 22nd, Bernanke called Paulson and said that BofA’s board wanted a letter committing to a support package.⁷⁰ In response, Paulson immediately called Lewis: “Ken, we can’t give you a letter.” If there were a letter, Paulson explained, “Treasury would have to disclose the letter publicly, and that would only raise more concerns in the market.”⁷¹ Lewis conveyed this message in an email to his Board: “I just talked with Hank Paulson. He said that there was no way the Federal Reserve and the Treasury could send us a letter of any substance without public disclosure which, of course, we do not want.”⁷²

Lewis convened his board later that day by teleconference. At the board meeting, Lewis conveyed management's recommendation that BofA should not invoke the MAC clause, even though Lewis personally felt that BofA should declare a MAC. Regulatory approvals were imminent, which would clear the way for the deal to close. Should BofA complete the Merrill Lynch deal "for the good of the country?" Or should it declare a MAC and risk invoking the wrath of the U.S. government? Was there a "third way" that avoided these negative consequences? The board had to decide.

Exhibit 1 List of persons involved in the deal

<i>Bank of America</i>	
Kenneth D. Lewis	President, Chairman, and Chief Executive Officer
Joe Price	Chief Financial Officer
Neil Cotty	Chief Financial Officer of Global Finance
Gregory L. Curl	Director of Corporate Planning
Brian Moynihan	President, Global Corporate and Investment Banking
Timothy Mayopoulos	Bank of America General Counsel
Teresa Brenner	Bank of America Mergers and Acquisitions lawyer
<i>Merrill Lynch</i>	
John A. Thain	Chairman and Chief Executive Officer
Nelson Chai	Chief Financial Officer
Gregory J. Fleming	President and Chief Operating Officer
Peter S. Kraus	Executive Vice President and member of management committee
Peter Kelly	In-house counsel
<i>Wachtell, Lipton, Rosen & Katz</i>	
Edward D. Herlihy	Partner
Nicholas G. Demmo	Partner
Eric M. Roth	Partner
<i>U.S. Government</i>	
Henry M. "Hank" Paulson	Secretary of the Treasury
Benjamin S. Bernanke	Chairman of Federal Reserve Board
Timothy F. Geithner	President, Federal Reserve Bank of New York
Scott G. Alvarez	Federal Reserve Board General Counsel
Thomas Baxter	Federal Reserve Bank of New York General Counsel
<i>Others</i>	
Richard S. Fuld	Chairman and Chief Executive Officer of Lehman Brothers
John J. Mack	Chairman and Chief Executive Officer of Morgan Stanley
Gary D. Cohn	Co-President and Co-Chief Operating Officer, Goldman Sachs
David A. Viniar	Chief Financial Officer, Goldman Sachs

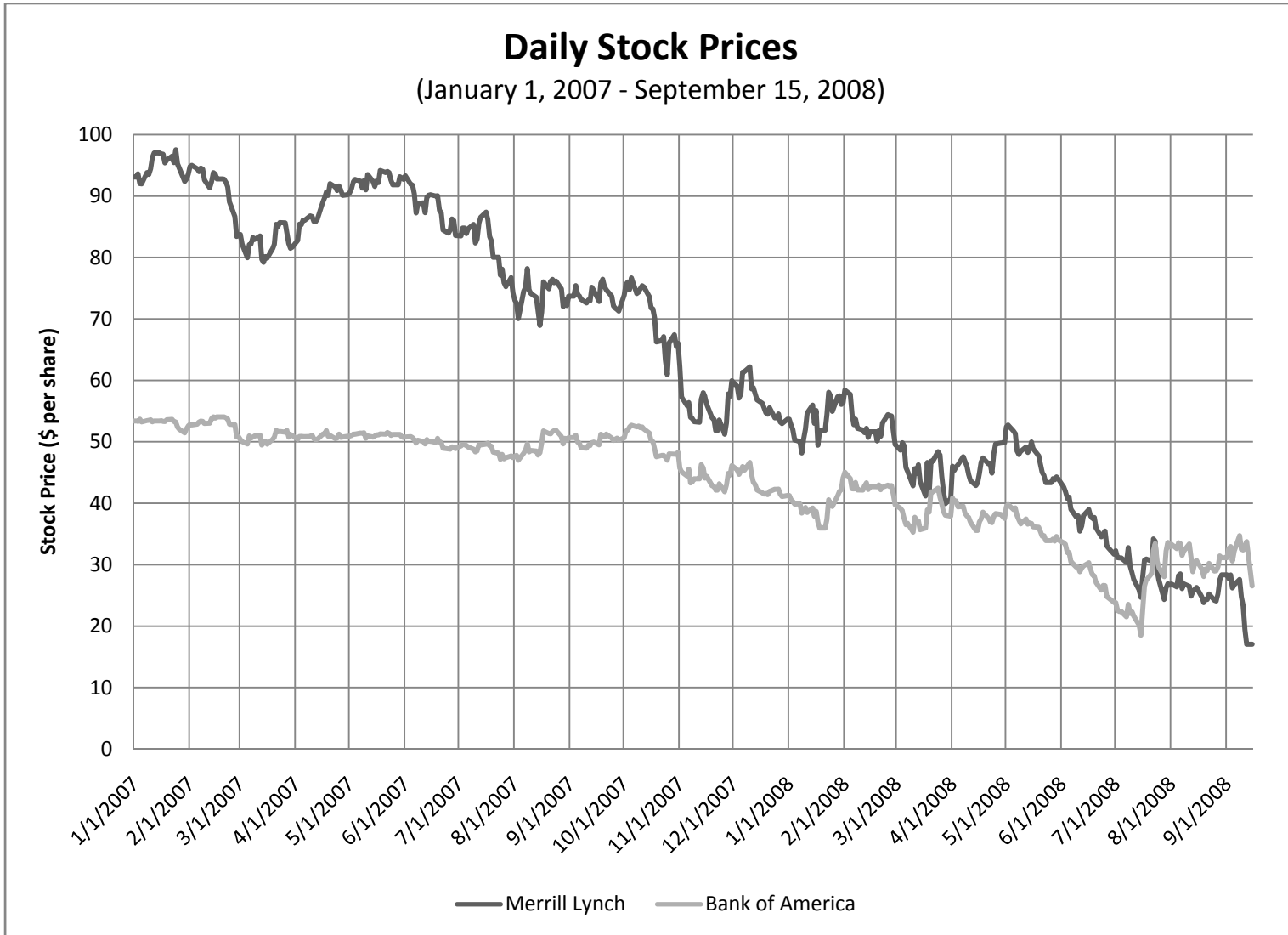
Source: Casewriters.

Exhibit 2 Timeline of events

<i>DATE</i>	<i>EVENT</i>
September 12 th , 2008	<ul style="list-style-type: none"> Fed officials determine that Lehman is in a precarious position, Treasury Secretary Paulson calls bank chiefs for an emergency meeting at New York Federal Reserve
September 13 th , 2008	<ul style="list-style-type: none"> Negotiations for Lehman continue Thain realizes that Merrill Lynch is the next victim and approaches Ken Lewis about a deal
September 14 th , 2008	<ul style="list-style-type: none"> Bank of America agrees to acquire Merrill Lynch
September 15 th , 2008	<ul style="list-style-type: none"> Deal is announced. Bank of America stock price drops 21%
November 3 rd , 2008	<ul style="list-style-type: none"> Proxy statement is distributed to shareholders.
November 12 th , 2008	<ul style="list-style-type: none"> Bank of America receives preliminary earnings forecasts from Merrill Lynch, estimating fourth quarter 2008 losses to be approximately \$5.3 billion
November 13 th , 2008	<ul style="list-style-type: none"> Mayopoulos meets with lawyers from Wachtell, Lipton to discuss disclosure obligations
November 20 th , 2008	<ul style="list-style-type: none"> Lawyers and officials from Bank of America meet by conference call once again to discuss possible disclosure obligation. Decision is made that no disclosure is necessary at this time
December 1 st , 2008	<ul style="list-style-type: none"> Mayopoulos asked to investigate potential MAC claim
December 3 rd , 2008	<ul style="list-style-type: none"> Merrill Lynch fourth quarter loss forecasts updated to \$9 billion
December 5 th , 2008	<ul style="list-style-type: none"> Shareholders of Bank of America and Merrill Lynch vote to approve the deal.
December 8 th , 2008	<ul style="list-style-type: none"> Merrill Lynch's compensation committee votes to approve \$3.6 billion in bonuses
December 9 th , 2008	<ul style="list-style-type: none"> \$9 billion in projected losses at Merrill Lynch is disclosed at Bank of America's board meeting. Mayopoulos seeks a meeting with Price.
December 10 th , 2008	<ul style="list-style-type: none"> Mayopoulos is unexpectedly fired
December 14 th , 2008	<ul style="list-style-type: none"> Loss projections are updated to \$12 billion. Lewis meets with lawyers to discuss the viability of a MAC claim.
December 17 th , 2008	<ul style="list-style-type: none"> Lewis calls Paulson, insisting that Bank of America has a case for a MAC and he wants to exit the deal. Paulson asks Lewis to come in and meet with Bernanke and himself. Fed officials ask Lewis to hold off while they consider options, including more financial assistance.

Source: Casewriters.

Exhibit 3 Daily Stock Prices for Merrill Lynch and Bank of America (January 1, 2007-September 15, 2008)



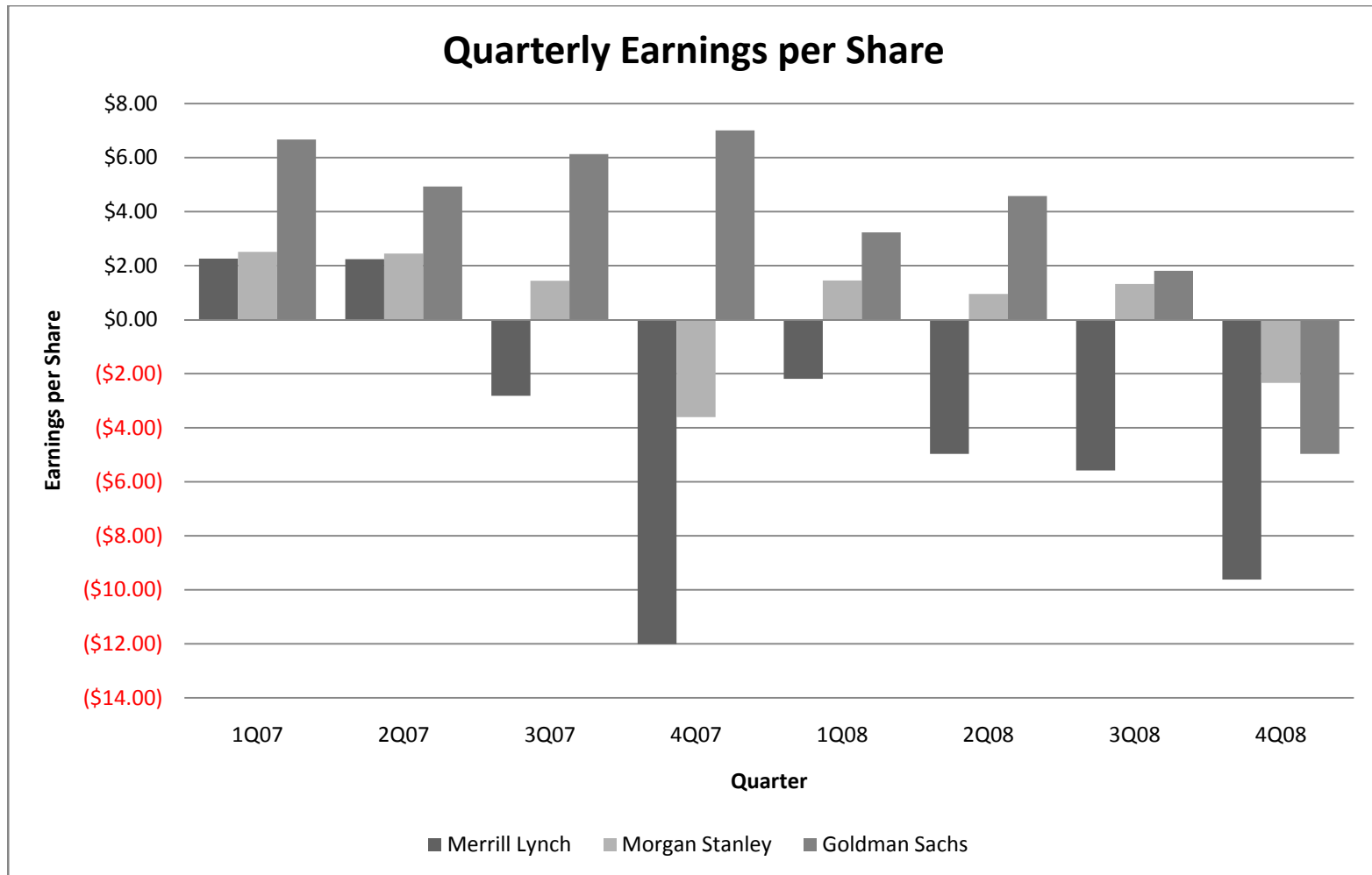
Source: Thomson Datastream, accessed January 2010.

Exhibit 4 Quarterly Earnings for Merrill Lynch, Morgan Stanley, and Goldman Sachs from 1Q07-4Q08



Source: Casewriters' diagram based on Quarterly Earnings Reports.

Exhibit 5 Quarterly Earnings per Share for Merrill Lynch, Morgan Stanley, and Goldman Sachs from 1Q07-4Q08



Source: Casewriters' diagram based on Quarterly Earnings Reports.

Exhibit 6 Material Adverse Change (MAC) clause from Bank of America-Merrill Lynch merger agreement

3.8 Absence of Certain Changes or Events. (a) Since June 27, 2008, no event or events have occurred that have had or would reasonably be expected to have, either individually or in the aggregate, a Material Adverse Effect on Company. As used in this Agreement, the term “Material Adverse Effect” means, with respect to Parent or Company, as the case may be, a material adverse effect on (i) the financial condition, results of operations or business of such party and its Subsidiaries taken as a whole (provided, however, that, with respect to clause (i), a “Material Adverse Effect” shall not be deemed to include effects to the extent resulting from (A) changes, after the date hereof, in GAAP or regulatory accounting requirements applicable generally to companies in the industries in which such party and its Subsidiaries operate, (B) changes, after the date hereof, in laws, rules, regulations or the interpretation of laws, rules or regulations by Governmental Authorities of general applicability to companies in the industries in which such party and its Subsidiaries operate, (C) actions or omissions taken with the prior written consent of the other party or expressly required by this Agreement, (D) changes in global, national or regional political conditions (including acts of terrorism or war) or general business, economic or market conditions, including changes generally in prevailing interest rates, currency exchange rates, credit markets and price levels or trading volumes in the United States or foreign securities markets, in each case generally affecting the industries in which such party or its Subsidiaries operate and including changes to any previously correctly applied asset marks resulting therefrom, (E) the execution of this Agreement or the public disclosure of this Agreement or the transactions contemplated hereby, including acts of competitors or losses of employees to the extent resulting therefrom, (F) failure, in and of itself, to meet earnings projections, but not including any underlying causes thereof or (G) changes in the trading price of a party’s common stock, in and of itself, but not including any underlying causes, except, with respect to clauses (A), (B) and (D), to the extent that the effects of such change are disproportionately adverse to the financial condition, results of operations or business of such party and its Subsidiaries, taken as a whole, as compared to other companies in the industry in which such party and its Subsidiaries operate) or (ii) the ability of such party to timely consummate the transactions contemplated by this Agreement.

(b) Since June 27, 2008 through and including the date of this Agreement, Company and its Subsidiaries have carried on their respective businesses in all material respects in the ordinary course of business consistent with their past practice.

(c) Since June 27, 2008 through and including the date of this Agreement, neither Company nor any of its Subsidiaries has (i) except for (A) normal increases for or payments to employees (other than officers subject to the reporting requirements of Section 16(a) of the Exchange Act (the “Executive Officers”)) made in the ordinary course of business consistent with past practice or (B) as required by applicable law or contractual obligations existing as of the date hereof, increased the wages, salaries, compensation, pension, or other fringe benefits or perquisites payable to any Executive Officer or other employee or director from the amount thereof in effect as of June 27, 2008, granted any severance or termination pay, entered into any contract to make or grant any severance or termination pay (in each case, except as required under the terms of agreements or severance plans listed on Section 3.11 of the Company Disclosure Schedule, as in effect as of the date hereof), or paid any cash bonus in excess of \$1,000,000 other than the customary year-end bonuses in amounts consistent with past practice and other than the monthly incentive payments made to financial advisors under current Company programs, (ii) granted any options to purchase shares of Company Common Stock, any restricted shares of Company Common Stock or any right to acquire any shares

of its capital stock, or any right to payment based on the value of Company's capital stock, to any Executive Officer or other employee or director other than grants to employees (other than Executive Officers) made in the ordinary course of business consistent with past practice under the Company Stock Plans or grants relating to shares of Company Common Stock with an aggregate value for all such grants of less than \$1 million for any individual, (iii) changed any financial accounting methods, principles or practices of Company or its Subsidiaries affecting its assets, liabilities or businesses, including any reserving, renewal or residual method, practice or policy, (iv) suffered any strike, work stoppage, slow-down, or other labor disturbance, or (v) except for publicly disclosed ordinary dividends on the Company Common Stock or Company Preferred Stock and except for distributions by wholly-owned Subsidiaries of Company to Company or another wholly-owned Subsidiary of Company, made or declared any distribution in cash or kind to its stockholder or repurchased any shares of its capital stock or other equity interests.

Source: Bank of America-Merrill Lynch merger agreement, SEC filings.

Endnotes

¹ The following is an excerpt from the testimony of Ken Lewis to the Attorney General of New York. 26 February 2009.

² Craig, Susanne, Carrick Mollenkamp, Deborah Solomon, and Dan Fitzpatrick. "Street Scenes: The Players Remaking Financial World." *The Wall Street Journal*. 19 September 2008, at A1.

³ "Lewis Named Banker of the Year." *American Banker*. 27 October 2008. http://www.americanbanker.com/issues/173_219/-365749-1.html.

⁴ Morgenson, Gretchen. "How the Thundering Herd Faltered and Fell." *The New York Times*. 9 November 2008.

⁵ Morgenson, Gretchen. "How the Thundering Herd Faltered and Fell." *The New York Times*. 9 November 2008.

⁶ Morgenson, Gretchen. "How the Thundering Herd Faltered and Fell." *The New York Times*. 9 November 2008.

⁷ "CSI: The Credit Crunch - Central Banks Have Played A Starring Role." *The Economist*. October 18, 2007.

⁸ Morgenson, Gretchen. "How the Thundering Herd Faltered and Fell." *The New York Times*. 9 November 2008.

⁹ Craig, Susanne, Carrick Mollenkamp, Deborah Solomon, and Dan Fitzpatrick. "Street Scenes: The Players Remaking Financial World." *The Wall Street Journal*. 19 September 2008, at A1.

¹⁰ Sorkin, Andrew Ross. Too Big To Fail. New York, New York: Penguin Group, 2009. At 205.

¹¹ Sorkin, 246.

¹² Stewart, James B. "Eight Days: The battle to save the American financial system." *The New Yorker*. 21 September 2009.

¹³ Sorkin, 299.

¹⁴ Sorkin, 300.

¹⁵ Sorkin, 309.

¹⁶ Sorkin, 309.

¹⁷ Sorkin, 311.

¹⁸ Sorkin, 311.

¹⁹ Sorkin, 312.

²⁰ Sorkin, 319.

²¹ Sorkin, 319.

²² Stewart, James B. "Eight Days: The battle to save the American financial system." *The New Yorker*. 21 September 2009.

²³ Sorkin, 327.

²⁴ Sorkin, 327.

²⁵ Sorkin, 328.

²⁶ Stewart, James B. "Eight Days: The battle to save the American financial system." *The New Yorker*. 21 September 2009.

²⁷ Craig, Susanne et al. "The Weekend That Wall Street Died - Ties That Long United Strongest Firms Unraveled as Lehman Sank Towards Failure." *The Wall Street Journal*. 29 December 2008, at A1.

²⁸ Sorkin, 332.

²⁹ Sorkin, 339.

³⁰ Sorkin, 339.

³¹ Craig, Susanne et al. "The Weekend That Wall Street Died - Ties That Long United Strongest Firms Unraveled as Lehman Sank Towards Failure." *The Wall Street Journal*. 29 December 2008, at A1.

³² Sorkin, 342.

³³ Sorkin, 353.

³⁴ Sorkin, 359.

³⁵ Sorkin, 359.

³⁶ Stewart, James B. "Eight Days: The battle to save the American financial system." *The New Yorker*. 21 September 2009.

³⁷ Bank of America Press Release. "Bank of America Buys Merrill Lynch Creating Unique Financial Services Firm." 15 September 2008. <http://newsroom.bankofamerica.com/index.php?s=43&item=8255>.

³⁸ Bank of America-Merrill Lynch Proxy Statement, Section 5.2(c).

³⁹ Fitzpatrick, Dan. "Calculating Merrill's Losses – A 'Wild A- Guess'" *The Wall Street Journal*. 16 October 2009.

⁴⁰ Cohan, William D. "Funky Math helped BofA close Merrill deal." CNNMoney.com 24 November 2009.

⁴¹ Cohan, William D. "Funky Math helped BofA close Merrill deal." CNNMoney.com 24 November 2009.

⁴² Story, Louise, and Eric Dash. "Bank of America Chief Forgoes Pay for 2009." *New York Times*. 15 October 2009.

⁴³ Davidoff, Stephen. "Some Mysteries in the BofA Deal." *New York Times: Dealbook*. 17 November 2009.

⁴⁴ Davidoff, Stephen. "Some Mysteries in the BofA Deal." *New York Times: Dealbook*. 17 November 2009.

⁴⁵ Story, Louise, and Eric Dash. "Bank of America Chief Forgoes Pay for 2009." *New York Times*. 15 October 2009.

⁴⁶ Davidoff, Stephen. "Some Mysteries in the BofA Deal." *New York Times: Dealbook*. 17 November 2009.

⁴⁷ Davidoff, Stephen. "Some Mysteries in the BofA Deal." *New York Times: Dealbook*. 17 November 2009.

⁴⁸ Davidoff, Stephen. "Some Mysteries in the BofA Deal." *New York Times: Dealbook*. 17 November 2009.

⁴⁹ Fitzpatrick, Dan. "Calculating Merrill's Losses – A 'Wild A- Guess'" *The Wall Street Journal*. 16 October 2009.

⁵⁰ Davidoff, Stephen. "Some Mysteries in the BofA Deal." *New York Times: Dealbook*. 17 November 2009.

⁵¹ Fitzpatrick, Dan and Susanne Craig. "Merrill/BofA Deal Goes to a Vote Today." *The Wall Street Journal*. 5 December 2008 at C1.

⁵² Fitzpatrick, Dan and Kara Scannell. "BofA Hit by Fine Over Merrill; Bank Pays SEC \$33 Million in Bonus Dispute; Sally Krawcheck Hired in Shake-Up." *The Wall Street Journal*. 4 August, 2009.

⁵³ Farrell, Greg & Julia MacIntosh. "Merrill paid bonuses as losses mounted ahead of sale to BofA." *The Financial Times*. 22 January 2009. www.ft.com.

⁵⁴ Fitzpatrick, Dan. "Calculating Merrill's Losses – A 'Wild A- Guess'" *The Wall Street Journal*. 16 October 2009.

⁵⁵ Letter from Andrew Cuomo, New York Attorney General. April 23, 2009.

⁵⁶ Farrell, Greg. "Merrill's troubles anger BofA executives." *Financial Times*. 15 January 2009.

⁵⁷ Fitzpatrick, Dan, Susanne Craig, and Deborah Solomon. "In Merrill Deal, U.S. Plays Hardball." *The Wall Street Journal*. 5 February 2009, at A1.

⁵⁸ Crittenden, Michael. "Fed Emails Bash BofA Chief in Tussle over Merrill Deal." *The Wall Street Journal*. 11 June 2009, at A1.

⁵⁹ Fitzpatrick, Dan, Deborah Solomon, and Susanne Craig. "BofA's Latest Hit; Treasury to Inject \$20 Billion More; Stock at 1991 Level." *The Wall Street Journal*. 16 January 2009, at C1.

⁶⁰ Reisinger, Sue. "WHAT PRICE VICTORY? Thanks, in part, to a strategy formulated by Wachtell's deal team, Bank of America got \$20 billion to cover Merrill Lynch losses." *American Lawyer* 31(12). 1 December 2009.

⁶¹ Bank of America and Merrill Lynch: How did a private deal turn into a Public Bailout, PART III. Hearing before the H. Committee on Oversight and Government Reform and Subcommittee on Domestic Policy. 111th Congress, 1st Session. (16 July, 2009) (Prepared Testimony of Henry Paulson, former Secretary of Treasury).

⁶² Roth, Eric M. "Talking Points – PRIVILEGED AND CONFIDENTIAL." Message to Brian T. Moynihan et. al., 19 December 2008. E-mail correspondence <http://www.scribd.com/doc/21321791/Bank-of-America-Documents-Given-to-Congress-Set-2>.

⁶³ Roth, Eric M. "Talking Points – PRIVILEGED AND CONFIDENTIAL." Message to Brian T. Moynihan et. al., 19 December 2008. E-mail correspondence <http://www.scribd.com/doc/21321791/Bank-of-America-Documents-Given-to-Congress-Set-2>.

⁶⁴ Reisinger, Sue. "WHAT PRICE VICTORY? Thanks, in part, to a strategy formulated by Wachtell's deal team, Bank of America got \$20 billion to cover Merrill Lynch losses." *American Lawyer* 31(12). 1 December 2009.

⁶⁵ Brenner, Teresa. "Re: Updated Meeting logistics." Message to Brian T. Moynihan. 19 December 2008. E-mail correspondence <http://www.scribd.com/doc/21321791/Bank-of-America-Documents-Given-to-Congress-Set-2>.

⁶⁶ Reisinger, Sue. "WHAT PRICE VICTORY? Thanks, in part, to a strategy formulated by Wachtell's deal team, Bank of America got \$20 billion to cover Merrill Lynch losses." *American Lawyer* 31(12). 1 December 2009.

⁶⁷ Reisinger, Sue. "WHAT PRICE VICTORY? Thanks, in part, to a strategy formulated by Wachtell's deal team, Bank of America got \$20 billion to cover Merrill Lynch losses." *American Lawyer* 31(12). 1 December 2009.

⁶⁸ Testimony of Ken Lewis to Andrew Cuomo, Attorney General of New York. Office of the Attorney General of New York. February 26th, 2009. Under 12 U.S.C. § 1818(e)(1), a Federal banking agency has the power to "remove [an institution-affiliated party] from office or to prohibit any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution."

⁶⁹ Paulson, Henry M. Jr. On the Brink: Inside the Race to Stop the Collapse of the Global Financial System. New York, New York: Hachette Book Group, 2010, at 430.

⁷⁰ Paulson, 430

⁷¹ Paulson, 430

⁷² Lewis, Ken. "Privileged and Confidential to Board of Directors." Message to Bank of America Board of Directors. 22 December 2008. Email correspondence.