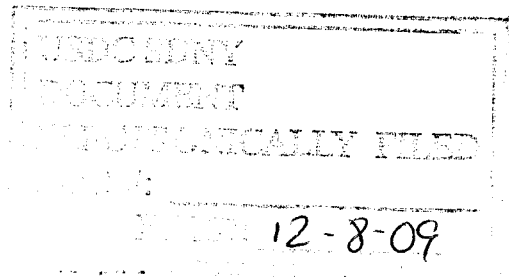


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
SECURITIES AND EXCHANGE COMMISSION, :
 :
 Plaintiff, :
 :
 -v- :
 :
 BANK OF AMERICA CORPORATION :
 :
 Defendant. :
----- X

09 Civ. 6829 (JSR)

MEMORANDUM ORDER



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

By letter dated November 18, 2009, Bank of America has requested that the Court compel the production of (1) documents regarding the SEC's internal review of the Joint Proxy Statement at issue in this case, as well as documents relating to the SEC's policies and practices with respect to comparable cases, and (2) SEC communications with officials of other government agencies concerning the matters at issue in this case. By letter dated November 20, 2009, the SEC opposed the requests.

Because the documents sought are internal SEC communications, BofA cannot claim to have relied on them in preparing the Joint Proxy Statement. As a result, the cases that BofA cites regarding reliance on public SEC documents as a defense are inapposite. And the one case cited by defendant that does not involve solely public SEC documents did not address this issue and so is likewise irrelevant.

Moreover, BofA had previously attested by letter to the SEC that it would not "assert staff comments and the declaration of

effectiveness as a defense in [this] proceeding." Nor, under section 26 of the Exchange Act, can the SEC's "failure to act . . . be construed to mean that [it] has in any way passed upon the merits of, or given approval to, . . . any transaction . . . [or] be deemed a finding . . . that such statement or report . . . is not false or misleading." 15 U.S.C. § 78z.

The Court concludes therefore that the requested materials are not reasonably calculated to lead to admissible evidence, and therefore denies the motion to compel.¹

SO ORDERED.



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

Dated: New York, New York
December 7, 2009

¹Accordingly, the Court need not reach the SEC's other grounds for denying the request, such as burdensomeness and privilege.