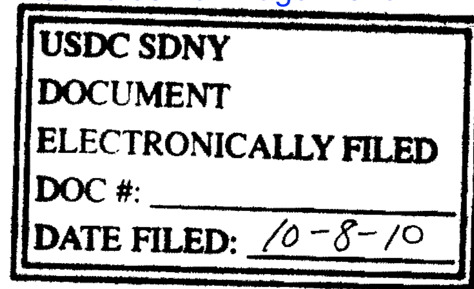

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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IN RE: BANK OF AMERICA CORP. SECURITIES, DERIVATIVE, AND EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) LITIGATION
---x
THIS DOCUMENT RELATES TO:

CONSOLIDATED SECURITIES ACTION
---x

Master File No. 09 MD 2058 (PKC)

MEMORANDUM AND ORDER

P. KEVIN CASTEL, District Judge:

All defendants move for the certification for interlocutory appeal of the Court's Memorandum and Order of August 27, 2010 (the "August 27 Opinion"), which granted in part and denied in part the motions to dismiss the Consolidated Amended Class Action Complaint (the "Complaint"). In re Bank of Am. Corp. Sec., Derivative, and Emp. Ret. Income Sec. Act (ERISA) Litig., 2010 WL 3448194 (S.D.N.Y. Aug. 27, 2010). Alternatively, they move for reconsideration under Local Civil Rule 6.3. For the reasons explained, their motions are denied.

Section 1292(b) of Title 28 of the United States Code provides that:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . . .

District courts have "first line discretion" to grant or deny a motion for interlocutory appeal. Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 47 (1995). "[U]se of this certification procedure should be strictly limited because 'only exceptional circumstances [will] justify a departure from the basic policy of postponing appellate review until after entry of a final

judgment.'" In re Flor, 79 F.3d 281, 284 (2d Cir. 1996) (per curiam) (alteration in original) (quoting Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21, 25 (2d Cir. 1990)); accord Westwood Pharm., Inc. v. Nat'l Fuel Gas Distribution, 964 F.2d 85, 89 (2d Cir. 1992) (cautioning district courts to exercise "great care" in granting certification, because, "after all, the district courts are presumed to be more familiar with a case than is the court of appeals prior to briefing and argument."). "Interlocutory appeal is limited to extraordinary cases where appellate review might avoid protracted and expensive litigation, and is not intended as a vehicle to provide early review of difficult rulings in hard cases." In re South African Apartheid Litig., 624 F. Supp. 2d 336, 339 (S.D.N.Y. 2009) (quotation marks and alteration omitted). Such an appeal is "strongly disfavored in federal practice." In re Adelphia Commc'n Corp., 2008 WL 361082, at *1 (S.D.N.Y. Feb. 7, 2008) (quotation marks omitted).

The defendants have not satisfied the high threshold of section 1292(b). Rather than "materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b), granting their motion would grind this action to a halt. Characterized with generosity, it would promote nothing more than "early review of difficult rulings in hard cases." In re South African Apartheid Litig., 624 F. Supp. 2d at 339. I briefly review the issues that defendants contend merit immediate appellate review. Familiarity with the August 27 Opinion is assumed.

First, defendants revisit arguments as to whether plaintiffs adequately pleaded an obligation to provide intra-quarter updates beyond the required SEC Form 10-Q filings. The August 27 Opinion thoroughly aired this issue. See In re Bank of Am., 2010 WL 3448194, at *31-34. Defendants acknowledge that the authorities they cite as "ground for difference of opinion" did not arise in the context of outstanding proxies amid a shareholder vote on a merger (Def. Mem. at 8), although they contend that this factual posture is immaterial to stating a Rule

14a-9 claim. They also raise certain hypothetical scenarios that are not present in this case, and seek further guidance as to a "ready limiting principle." (Def. Mem. at 12) But section 1292(b) is not a vehicle to solicit advisory opinions, and a court is to decide only the case and controversy before it. See generally Oneida Indian Nation of New York State v. Oneida Cnty, 622 F.2d 624, 628 (2d Cir. 1980) (2d Cir. 1980). To the extent that they argue that Resnik v. Swartz, 303 F.3d 147 (2d Cir. 2002), may have impliedly overruled prior Second Circuit authority cited by the Court (Reply at 4 & n.8.), such a contention does not raise a substantial ground for difference of opinion. 28 U.S.C. § 1292(b). The defendants have not pointed to the "exceptional circumstances" that warrant immediate appellate review. In re Flor, 79 F.3d at 284.

Second, as to the defendants' arguments going toward transaction causation, I note that the Court first raised the issue sua sponte in a pretrial conference of May 19, 2010, and that the issue went unpressed by any party before the Court requested letter briefs on the subject. (Docket # 279, 284.) While defendants correctly note that the Second Circuit has not ruled on section 14(a) transaction causation when a plaintiff class consists of shareholders in an acquiring entity, "[i]t has long been clear that a plaintiff alleges sufficient causation when the plaintiff points to a material violation of the proxy rules in a situation where shareholder approval was necessary for a company to complete an allegedly unfavorable transaction." Koppel v. 4987 Corp., 167 F.3d 125, 137 (2d Cir. 1999). Again, the defendants have not pointed to the type of "exceptional circumstances" that warrant immediate appeal. In re Flor, 79 F.3d at 284.

Finally, defendants seek interlocutory appeal as to whether statements contained in an acquisition agreement incorporated in or attached to an SEC filing are actionable under the federal securities laws. As the August 27 Opinion discussed in great detail, the Complaint alleged that statements in the Joint Proxy and the so-called "Merger Agreement" were belied by

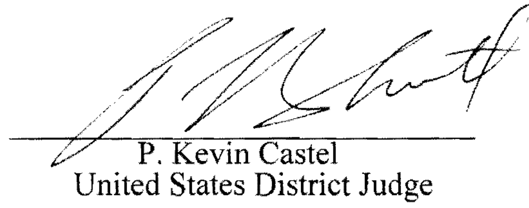
secret covenants between parties to the transaction. See In re Bank of Am., 2010 WL 3448194, at *24-28. Defendants cite no authority that indicates "a substantial ground for difference of opinion" as to whether the allegation fails to state an actionable claim. 28 U.S.C. § 1292(b). For instance, the admonition that a company's representations must be viewed "together and in context," Olkey v. Hyperion 1999 Term Trust, Inc., 98 F.3d 2, 5 (2d Cir. 1996), is not contrary to the August 27 Opinion.

To the extent that the defendants contend that the '33 Act does not recognize a claim arising out of the so-called "Merger Agreement," (Reply Br. at 8-9) the August 27 Opinion noted the brief and summary nature of the defendants' arguments going toward the '33 Act, which focused on the pleading of a state-of-mind requirement. 2010 WL 3448194, at *60-62. Consequently, the August 27 Opinion was similarly focused on allegations going toward the defendants' state of mind. Defendants now raise a new argument, which goes toward which representations plausibly "constitute a statement of fact" under the '33 Act. (Reply Br. at 9.) Section 1292(b) is not a vehicle for raising new arguments on appeal.

Defendants' motion for reconsideration pursuant to Local Civil Rule 6.3 also is denied. Defendants have cited no controlling decision or overlooked information that would alter the conclusions of the August 27 Opinion. See, e.g., Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995).

The defendants' motions are DENIED. (Docket # 308, 310, 312.) The Clerk is directed to terminate the motions.

SO ORDERED.



P. Kevin Castel
United States District Judge

Dated: New York, New York
October 7, 2010