

1 Michael Winsor
2 Special Assistant Attorney General
3 Montana State Auditor's Office
4 840 Helena Avenue
5 Helena, MT 59601
6 (406) 444-2040

7 Attorney for the Securities Department

8 **BEFORE THE STATE AUDITOR AND COMMISSIONER OF SECURITIES**
9 **STATE OF MONTANA**

10 In the matter of:) CAUSE NO: SEC-2009-20
11))
12)) **CONSENT AGREEMENT AND FINAL**
13)) **ORDER**
14 BANC OF AMERICA SECURITIES LLC and)
15 BANC OF AMERICA INVESTMENT)
16 SERVICES, INC.,)
17 Respondent.)

18 _____
19 Consent Agreement dated this 5th day of May, 2009, between the
20 Montana Securities Department (Department), acting pursuant to the authority of the Securities
21 Act of Montana, Mont. Code Ann. § 30-10-101, *et seq.*, and Mont. Code Ann. § 2-4-603, and
22 Banc of America Securities LLC and Banc of America Investment Services, Inc.

23 WHEREAS, Banc of America Securities LLC ("BAS") and Banc of America Investment
24 Services, Inc. ("BAI" and, together with BAS, "Respondents"), are broker-dealers registered in
25 the state of Montana; and

26 WHEREAS, coordinated investigations into Respondents' activities in connection with
27 certain of their sales practices regarding the underwriting, marketing, and sale of Auction Rate
28 Securities ("ARS") during the period of approximately August 1, 2007, through February 11,
2008, have been conducted by a multistate task force; and

WHEREAS, Respondents have cooperated with regulators conducting the investigations
by responding to inquiries, providing documentary evidence and other materials, and providing
regulators with access to facts relating to the investigations; and

1 consent to the entry of this Order,

2 IT IS HEREBY ORDERED:

3 1. This Order concludes the investigation by the Department and any other action
4 that the Department could commence under applicable Montana law on behalf of Montana as it
5 relates to Respondents' underwriting, marketing, and sales of ARS, provided however, that
6 excluded from and not covered by this paragraph 1 are any claims by the Department arising
7 from or relating to the "Order" provisions contained herein.

8 2. This Order is entered into solely for the purpose of resolving the referenced multistate
9 investigation, and is not intended to be used for any other purpose.

10 3. Respondents will CEASE AND DESIST from violating Mont. Code Ann. §§ 30-10-
11 201(13)(g) and 30-10-201(13)(k) and will comply with the Mont Code Ann. § 30-10-101, *et seq.*

12 4. Within ten days after the date of this Order, Respondents shall pay the sum of
13 \$101,661.34. Payment shall be deposited into the general fund of Montana. Payment shall be
14 made payable to the State of Montana, sent to the State Auditor's Office, attention to Michael
15 Winsor, 840 Helena Avenue, Helena, Montana, 59601.

16 5. In the event another state securities regulator determines not to accept
17 Respondents' settlement offer, the total amount of the Montana payment shall not be affected,
18 and shall remain at \$101,661.34.

19 6. Respondents shall comply with the following requirements:

20 a. **Eligible Investors**

21 i. No later than October 21, 2008, BAC shall have caused Blue
22 Ridge to offer to buy back, at par plus accrued and unpaid interest or dividends,
23 Eligible ARS (as such term is defined below) for which auctions are in failed
24 mode from Eligible Investors (as such term is defined below) who purchased such
25 Eligible ARS from Respondents prior to February 13, 2008 (the "Offer"). For
26 purposes of the Offer, Eligible ARS means ARS purchased from Respondents on
27 or before February 13, 2008, that were subject to an auction failure on or after
28

1 February 11, 2008. The Offer shall remain open for a period between October 10,
2 2008, and December 1, 2009, unless extended by Blue Ridge.

3 ii. "Eligible Investors" shall mean:

4 (a) Natural persons (including their IRA accounts,
5 testamentary trust and estate accounts, custodian IGMA and UTMA
6 accounts, and guardianship accounts) who purchased Eligible ARS from
7 Respondents;

8 (b) Charities, endowments, or foundations with Internal
9 Revenue Code Section 501(c)(3) status that purchased Eligible ARS
10 from Respondents and that had \$25 million or less in assets in their
11 accounts with Respondents as determined by the customer's aggregate
12 household position(s) at Respondents as of September 9, 2008; or

13 (c) Small Business that purchased Eligible ARS from
14 Respondents. For purposes of this provision, "Small Business" shall
15 mean Respondents' customers not otherwise covered in paragraph
16 III.6.a.ii(a) and ii(b) above that had \$15 million or less in assets in their
17 accounts with Respondents as of September 9, 2008.

18 iii. Respondents will have provided prompt notice to customers of the
19 settlement terms and Respondents will have established a dedicated telephone
20 assistance line, with appropriate staffing, to respond to questions from customers
21 concerning the terms of the settlement.

22 **b. Relief for Eligible Investors Who Sold Below Par**

23 No later than December 31, 2008, Respondents shall have promptly provided
24 notice to any Eligible Investor that Respondents could reasonably identify who sold
25 Eligible ARS below par between February 11, 2008, and September 22, 2008. Such
26 investors will be paid the difference by Respondents between par and the price at which
27 the Eligible Investor sold the Eligible ARS. Any such Eligible Investors identified after
28 December 31, 2008, shall be promptly paid the difference between par and the price at

1 which the Eligible Investors sold the Eligible ARS.

2 **c. Consequential Damages Claims**

3 No later than October 10, 2008, Respondents shall make reasonable efforts
4 promptly to notify those Eligible Investors who own Eligible ARS that, pursuant to the
5 terms of the settlement, an independent arbitrator, under the auspices of the Financial
6 Industry Regulatory Authority ("FINRA"), will be available for the exclusive purpose of
7 arbitrating any Eligible Investor's consequential-damages claim.

8 Respondents shall consent to participate in the North American Securities
9 Administrators Association ("NASAA") Special Arbitration Procedure (the "SAP")
10 established specifically for arbitrating claims arising out of an Eligible Investor's
11 inability to sell Eligible ARS. Respondents shall notify Eligible Investors of the terms of
12 the SAP. Nothing in this Order shall serve to limit or expand any party's rights or
13 obligations as provided under the SAP. Arbitration shall be conducted, at the customer's
14 election, by a single non-industry arbitrator and Respondents will pay all forum and filing
15 fees.

16 Arbitrations asserting consequential damages of less than \$1 million will be
17 decided through a single chair-qualified public arbitrator who will be appointed through
18 the FINRA list selection process for single arbitrator cases. In arbitrations where the
19 consequential damages claimed are greater than or equal to \$1 million, the parties can, by
20 mutual agreement, expand the panel to include three public arbitrators who will be
21 appointed through FINRA's list procedure.

22 Any Eligible Investors who choose to pursue such claims through the SAP shall
23 bear the burden of proving that they suffered consequential damages and that such
24 damages were caused by their inability to access funds invested in Eligible ARS. In the
25 SAP, Respondents shall be able to defend themselves against such claims; provided,
26 however, that Respondents shall not contest liability for the illiquidity of the underlying
27 ARS position or use as part of their defense any decision by an Eligible Investor not to
28 borrow money from Respondents.

1 All customers, including but not limited to Eligible Investors who avail
2 themselves of the relief provided pursuant to this Order, may pursue any remedies against
3 Respondents available under the law. However, Eligible Investors that elect to utilize the
4 SAP are limited to the remedies available in that process and may not bring or pursue a
5 claim relating to Eligible ARS in another forum.

6 **d. Institutional Investors**

7 Respondents shall endeavor to work with issuers and other interested parties,
8 including regulatory and governmental entities, to expeditiously and on a best efforts
9 basis provide liquidity solutions for institutional investors that purchased Eligible ARS
10 from Respondents and are not entitled to participate in the buyback under Section III
11 (“Institutional Investors”).

12 Beginning on December 31, 2008, and then quarterly thereafter, Respondents
13 shall submit a written report to a representative specified by NASAA outlining the efforts
14 in which Respondents have engaged and the results of those efforts with respect to
15 Institutional Investors’ holdings in Eligible ARS. The written reports will be submitted
16 20 days following the end of the quarter. Respondents shall confer with the
17 representative no less frequently than quarterly to discuss Respondents’ progress to date.
18 Such written reports and quarterly meetings shall continue until no later than December
19 31, 2009. Following every quarterly meeting, the representative shall advise
20 Respondents of any concerns and, in response, Respondents shall detail the steps that
21 Respondents plan to implement to address such concerns.

22 **e. Relief for Municipal Issuers**

23 Respondents shall refund refinancing fees to municipal auction rate issuers that
24 issued such securities through Respondents in the initial primary market between August
25 1, 2007, and February 11, 2008, and refinanced those securities through Respondents
26 after February 11, 2008. Refinancing fees are those fees paid to Respondents in
27 connection with a refinancing and are exclusive of legal fees and any other fees or costs
28 not paid to Respondents in connection with the transaction.

1 **f. Repayment of Interest on Loans Provided To Eligible Investors**

2 To the extent that Respondents loaned money to Eligible Investors secured by
3 Eligible ARS, after February 11, 2008, at an interest rate that was higher than that paid on
4 such Eligible ARS, Respondents shall refund the difference to such Eligible Investors.
5

6 **g. Penalties**

7 i. Respondents shall pay a total civil penalty of FIFTY MILLION
8 (\$50,000,000) DOLLARS, which shall be allocated among and paid to the
9 Commonwealth of Massachusetts, the state of New York, and such other states
10 and territories that enter administrative or civil consent orders approving the
11 terms of the NASAA settlement (together with the Commonwealth of
12 Massachusetts and the state of New York, the "Approving States"). Any such
13 allocation shall be made at the discretion of the Approving States;

14 ii. The Department's portion of the civil penalty shall be \$101,661.34
15 and shall be paid to the Department no later than ten business days after the date
16 of the Consent Order.

17 **h. In Consideration of the Settlement**

18 The Department will:

- 19 i. Terminate the investigation of Respondents' underwriting,
20 marketing, and sale of ARS to Eligible Investors as defined herein; and
21 ii. Refrain from taking legal action, if necessary, against Respondents
22 with respect to their institutional investors until December 31, 2008; the
23 Department shall issue continuances of that period as it deems appropriate; and
24 iii. The Department will not seek additional monetary penalties from
25 Respondents in connection with all underlying conduct relating to Respondents'
26 underwriting, marketing, and sale of ARS to investors.

27 i. If, after this Order is executed, Respondents fail to comply with any of the
28 terms set forth herein, the Department may take appropriate remedial action.

1 7. If payment is not made by Respondents, or if Respondents default in any of their
2 obligations set forth in this Order, the Department may vacate this Order, at its sole discretion,
3 upon 10 days notice to Respondents and without opportunity for administrative hearing.
4

5 8. This Order as entered into by the Department waives any disqualification contained in
6 the laws of Montana, or rules or regulations thereunder, including any disqualifications from relying
7 upon the registration exemptions or safe harbor provisions that BAI, BAS, or any of their affiliates
8 may be subject to as a result of the findings contained in this Order. This Order also is not intended to
9 subject BAI or BAS or any of their affiliates to any disqualifications contained in the federal securities
10 laws, the rules and regulations thereunder, the rules and regulations of self regulatory organizations, or
11 various states' or U.S. Territories' securities laws, including, without limitation, any disqualifications
12 from relying upon the registration exemptions or safe harbor provisions. In addition, this Order is not
13 intended to form the basis for any such disqualifications.
14

15 9. For any person or entity not a party to this Order, this Order does not limit or create
16 any private rights or remedies against Respondents including, without limitation, the use of any e-
17 mails or other documents of Respondents or of others for auction rate securities sales practices, limit
18 or create liability of Respondents, or limit or create defenses of Respondents to any claims.
19

20 10. Nothing herein shall preclude Montana, its departments, agencies, boards,
21 commissions, authorities, political subdivisions and corporations, other than the Department and only
22 to the extent set forth in paragraph 1 above, (collectively, "State Entities") and the officers, agents or
23 employees of State Entities from asserting any claims, causes of action, or applications for
24 compensatory, nominal and/or punitive damages, administrative, civil, criminal, or injunctive relief
25 against Respondents in connection with certain auction rate securities sales practices at Respondents.
26

27 11. This Order and any dispute related thereto shall be construed and enforced in
28

1 accordance with, and governed by, the laws of Montana without regard to any choice of law
2 principles.

3 12. Respondents, through their execution of this Order, voluntarily waive their right to a
4 hearing on this matter and to judicial review of this Order under Mont. Code Ann. § 30-10-308.

5 13. Respondents enter into this Order voluntarily and represents that no threats, offers,
6 promises, or inducements of any kind have been made by the Department or any member, officer,
7 employee, agent, or representative of the Department to induce Respondents to enter into this
8 Order.
9

10 14. This Order shall be binding upon Respondents and each of their successors and
11 assigns with respect to all conduct subject to the provisions above and all future obligations,
12 responsibilities, undertakings, commitments, limitations, restrictions, events, and conditions.
13

14 DATED this 5th day of May, 2009.

15
16 BY ORDER OF MONICA J. LINDEEN
17 State Auditor and Securities Commissioner

18 By: 
19 LYNNE EGAN
20 Deputy Securities Commissioner

21 SUBSCRIBED and SWORN to before me this 5th day of May, 2009

22
23 (SEAL)

24 
(Signature)

25 Michelle Marise Huffel
(Printed name)

26 Notary Public for the State of Montana

27 Residing at Helena

28 My commission expires March 29, 2012

1 **CONSENT TO ENTRY OF CONSENT AGREEMENT AND FINAL ORDER BY**
2 **BANC OF AMERICA SECURITIES LLC AND BANC OF AMERICA INVESTMENT**
3 **SERVICES, INC.**

4 Banc of America Securities LLC ("BAS") and Banc of America Investment Services, Inc.
5 ("BAI" and, together with BAS, "Respondents"), hereby acknowledge that they have been served
6 with a copy of this Administrative Order, have read the foregoing Order, are aware of their right
7 to a hearing and appeal in this matter, and have waived the same.

8 Respondents admit the jurisdiction of the Department, neither admit nor deny the
9 Findings of Fact and Conclusions of Law contained in this Order, and consent to entry of this
10 Order by the Department as settlement of the issues contained in this Order.
11

12 Respondents agree that they shall not claim, assert, or apply for a tax deduction or tax
13 credit with regard to any state, federal, or local tax for any administrative monetary penalty that
14 Respondents shall pay pursuant to this Order.

15 Respondents state that no promise of any kind or nature whatsoever was made to them to
16 induce them to enter into this Order and that they have entered into this Order voluntarily.

17 Steve Chaiken represents that he/she is ^{Managing Director} of BAS, and that, as such, has
18 been authorized by BAS to enter into this Order for and on behalf of BAS.
19

20 _____ represents that he/she is _____ of BAI
21 and that, as such, has been authorized by BAI to enter into this Order for and on behalf of BAI.
22

23 Dated this ____ day of _____, 2009.

24 BANC OF AMERICA SECURITIES LLC

25 By: Steve Chaiken

26 Title: Managing Director
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUBSCRIBED AND SWORN TO before me this 28 day of April 2009.

(SEAL)

XAVIER MIRANDA
Notary Public - State of New York
No. 01MB8138426
Qualified In New York County
My Commission Expires Jan. 09, 2010

Xavier Miranda

(Signature)

XAVIER MIRANDA

(Printed name)

Notary Public for the State of New York
Residing at County of New York

My commission expires: JANUARY 9, 2010

///

BANC OF AMERICA INVESTMENT SERVICES,
INC.

By: _____

Title: _____

SUBSCRIBED AND SWORN TO before me this _____ day of _____ 2009.

(SEAL)

(Signature)

(Printed name)

Notary Public for the State of _____

Residing at _____

My commission expires: _____

BANC OF AMERICA INVESTMENT SERVICES,
INC.

By: *Ronald J. Newth*

RONALD J. NEWTH

Title: *COO/SUP*


1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

State of *Massachusetts*)
) ss.
County of *Suffolk*)

SUBSCRIBED AND SWORN TO before me this *28th* day of *April* 2009.

Mary Ann Carroll
Notary Public

My commission expires:
July 4, 2014

 MARY ANN CARROLL
Notary Public
Commonwealth of Massachusetts
My Commission Expires
July 4, 2014