

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

11103729

THOMAS O'HARE, Derivatively on Behalf of  
Himself and All Others Similarly Situated,

Plaintiff,

vs.

BRIAN T. MOYNIHAN, CHARLES O.  
HOLLIDAY, JR., SUSAN S. BIES,  
WILLIAM P. BOARDMAN, FRANK P.  
BRAMBLE, SR., VIRGIS W. COLBERT,  
CHARLES K. GIFFORD, D. PAUL JONES,  
JR., MONICA C. LOZANO, THOMAS J.  
MAY, DONALD E. POWELL, CHARLES O.  
ROSSOTTI, and ROBERT W. SCULLY,

Defendants,

-and-

BANK OF AMERICA CORPORATION,

Nominal Defendant.

Index No.: \_\_\_\_\_

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

Plaintiff designates New York County as the  
place of trial

The basis of *venue* is:

Venue is proper in this Court because  
defendants maintain executive offices in this  
County and have conducted business within  
this County

SUMMONS

Defendant Resides at:

Bank of America Tower  
One Bryant Park, BofA  
113 West 42nd Street  
New York, NY 10036

**FILED**

MAR 28 2011

NEW YORK  
COUNTY CLERK'S OFFICE

SUMMONS

## SHAREHOLDER DERIVATIVE ACTION

*To the above named Defendants:*

**YOU ARE HEREBY SUMMONED** to answer the complaint in this action and to *serve* a copy of your answer on Thomas O'Hare, the Plaintiff, within twenty (20) days after the service of this summons, exclusive of the day of service, where service is made by delivery upon you personally within the state, or within thirty (30) days after completion of service where service is made in any other manner. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

THOMAS O'HARE, Derivatively on Behalf of      No.  
Himself and All Others Similarly Situated,

Plaintiff,

vs.

BRIAN T. MOYNIHAN, CHARLES O.  
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MAY, DONALD E. POWELL, CHARLES O.  
ROSSOTTI, and ROBERT W. SCULLY,

Defendants,

-and-

BANK OF AMERICA CORPORATION,

Nominal Defendant.

**SHAREHOLDER DERIVATIVE  
COMPLAINT**

**DEMAND FOR JURY TRIAL**

**FILED**

MAR 28 2011

NEW YORK  
COUNTY CLERK'S OFFICE

SHAREHOLDER DERIVATIVE COMPLAINT

## INTRODUCTION

1. Plaintiff, by and through his attorneys, brings this action derivatively on behalf of nominal defendant Bank of America ("BofA" or the "Company") and alleges upon personal knowledge as to himself and his own acts, and as to all other matters based upon the investigation conducted by his attorneys which included, among other things, a review of Securities and Exchange Commission ("SEC") filings, documents, analyst reports, news reports, press releases, and other publicly-available information regarding the Company, as follows:

2. This is a shareholder derivative action brought on behalf of the Company against the members of its Board of Directors ("Board") and certain of its executive officers seeking to remedy defendants' breaches of fiduciary duties and other violations of the law that occurred from at least January 20, 2010 through October 19, 2010 ("Relevant Period").

3. BofA is a bank holding company and a financial holding company. The Company is a financial institution, serving individual consumers, small and middle market businesses, large corporations and governments with a range of banking, investing, asset management and other financial and risk management products and services.

4. During the Relevant Period, defendants issued materially false and misleading statements regarding the Company's business. Defendants concealed defects in the recording of mortgages and improprieties with respect to the preparation of foreclosure paperwork that harmed BofA's investors and the Company when BofA had to temporarily discontinue foreclosures and admit to the problems it was experiencing. For much of the Relevant Period, defendants also concealed that BofA had previously engaged in a practice known as "dollar rolling," wherein it omitted billions of dollars in debt from its balance sheet reported to the public. Indeed, BofA admitted that it wrongly classified the transactions as sales when they were



actually a form of secured borrowing. As a result of defendants' false statements, BofA's stock traded at artificially inflated prices during the Relevant Period, reaching a high of \$19.48 per share on April 15, 2010.

5. On May 20, 2010, BofA filed its Form 10-Q for the first quarter of 2010 in which it disclosed aspects of its "repo-to-maturity" transactions (dollar rolling), claiming the transactions did not have a material impact on BofA's balance sheet. Subsequently, on May 26, 2010, *The Wall Street Journal* reported that BofA had hidden billions of dollars in debt from investors when reporting its financial statements. In September 2010, news surfaced about foreclosure improprieties at BofA and other large banks. On October 8, 2010, BofA announced a nationwide foreclosure halt pending a review of its foreclosure processes and possible irregularities with respect to its previously completed foreclosure activities.

6. On October 13, 2010, the attorneys general of 50 states, led by the State of Iowa, announced a probe into United States banks regarding loan underwriting guidelines and their allowance for credit losses. The attorneys general launched an investigation of the practices that banks used in evicting delinquent borrowers. Upon this news, BofA stock fell \$0.69 per share to close at \$12.60 per share on October 14, 2010, on volume of 511 million shares.

7. On October 19, 2010, BofA announced its third quarter 2010 financial results, reporting a net loss of \$7.3 billion and a diluted earnings per share ("EPS") loss of \$0.77. BofA further reported receiving \$18 billion in claims about faulty home loans that it may have to repurchase. Upon this news, BofA stock dropped \$0.54 per share, to close at \$11.80 per share on October 19, 2010 – a one-day decline of 5% on volume of 574 million shares.

8. On November 16, 2010, a New Jersey bankruptcy judge dismissed a BofA claim against a debtor, citing testimony of a BofA employee who admitted that BofA (through its

acquisition of Countrywide Financial Corp. in July 2008) routinely did not transfer essential documents for loans sold to investors. As *American Banker* reported on Monday, November 22, 2010, "The BofA employee's admission that the lender customarily held on to promissory notes could also undermine the industry's position that document transfers to securitization trusts are fundamentally sound."

9. The true facts, which were known by the defendants but concealed from the investing public during the Relevant Period, were as follows:

- (a) BofA did not properly record many of its mortgages when originated or acquired, which severely complicated the foreclosure process when it became necessary;
- (b) Defendants failed to maintain proper internal controls related to foreclosure processing;
- (c) BofA did not have adequate personnel to process the large numbers of foreclosed loans in its portfolio;
- (d) BofA's failure to properly process both mortgages and foreclosures impaired BofA's ability to dispose of bad loans; and
- (e) BofA engaged in a practice known internally as "dollar rolling" to remove billions of dollars of debt from its balance sheet over the prior years.

10. As a result of defendants' false statements and omissions, BofA's common stock traded at artificially inflated prices during the Relevant Period. However, after these revelations were disclosed to the public, the Company's stock price plummeted nearly 42% from their Relevant Period high.

### **JURISDICTION AND VENUE**

11. This Court has jurisdiction over defendants because defendants transact business within the State of New York, have committed tortious acts within the State of New York, and

have committed tortious acts outside of the state that have caused injury to persons and property within the State of New York.

12. Venue is proper in this Court because defendants maintain executive offices in this County and have conducted business within this County.

### **PARTIES**

13. Plaintiff Thomas O'Hare is a current shareholder of BofA and has been a shareholder of the Company during the Relevant Period. Plaintiff resides in Wayland, Massachusetts.

14. Defendant BofA is a bank holding company and a financial holding company. The Company is a financial institution, serving individual consumers, small and middle market businesses, large corporations and governments with a range of banking, investing, asset management and other financial and risk management products and services. BofA is headquartered in Charlotte, North Carolina, and has branch offices throughout the United States, including many in the State of New York.

15. Defendant Brian T. Moynihan ("Moynihan") is, and at all relevant times was, President, Chief Executive Officer ("CEO") and a director of BofA. Moynihan has served as a director since January 2010.

16. Defendant Charles O. Holliday, Jr. ("Holliday") is, and at all relevant times was, a director of the Company. Holliday has served as a director since September 2009.

17. Defendant Susan S. Bies ("Bies") is, and at all relevant times was, a director of the Company. Bies has served as a director since June 2009.

18. Defendant William P. Boardman ("Boardman") is, and at all relevant times was, a director of the Company. Boardman has served as a director since June 2009.

19. Defendant Frank P. Bramble, Sr. ("Bramble") is, and at all relevant times was, a director of the Company. Bramble has served as a director since January 2006.

20. Defendant Virgis W. Colbert ("Colbert") is, and at all relevant times was, a director of the Company. Colbert has served as a director since January 2009.

21. Defendant Charles K. Gifford ("Gifford") is, and at all relevant times was, a director of the Company. Gifford has served as a director since April 2004.

22. Defendant D. Paul Jones, Jr. ("Jones") is, and at all relevant times was, a director of the Company. Jones has served as a director since June 2009.

23. Defendant Monica C. Lozano ("Lozano") is, and at all relevant times was, a director of the Company. Lozano has served as a director since April 2006.

24. Defendant Thomas J. May ("May") is, and at all relevant times was, a director of the Company. May has served as a director since April 2004.

25. Defendant Donald E. Powell ("Powell") is, and at all relevant times was, a director of the Company. Powell has served as a director since June 2009.

26. Defendant Charles O. Rossotti ("Rossotti") is, and at all relevant times was, a director of the Company. Rossotti has served as a director since January 2009.

27. Defendant Robert W. Scully ("Scully") is, and at all relevant times was, a director of the Company. Scully has served as a director since August 2009.

28. Defendants Moynihan, Holliday, Bies, Boardman, Bramble, Colbert, Gifford, Jones, Lozano, May, Powell, Rossotti, and Scully are collectively referred to herein as the "Individual Defendants."

#### **DUTIES OF THE INDIVIDUAL DEFENANTS**

29. By reason of their positions as officers and/or directors of the Company, and

because of their ability to control the business and corporate affairs of the Company, the Individual Defendants owed the Company and its shareholders the fiduciary obligations of good faith, trust, loyalty, and due care, and were, and are, required to use their utmost ability to control and manage the Company in a fair, just, honest, and equitable manner. The Individual Defendants were, and are, required to act in furtherance of the best interests of the Company and its shareholders so as to benefit all shareholders equally and not in furtherance of their personal interests or benefit.

30. Each director and officer of the Company owed to BofA and its shareholders the fiduciary duty to exercise good faith and diligence in the administration of the affairs of the Company and in the use and preservation of its property and assets, and the highest obligations of fair dealing. In addition, as officers and directors of a publicly held company, the Individual Defendants had a duty to promptly disseminate accurate and truthful information with regard to the Company's revenue, margins, operations, performance, management, projections, and forecasts, so that the market price of the Company's stock would be based on truthful and accurate information.

31. The Individual Defendants, because of their positions of control and authority as directors and/or officers of BofA, were able to, and did, directly and/or indirectly, exercise control over the wrongful acts complained of herein, as well as the contents of the various public statements issued by the Company. Because of their executive, managerial and/or directorial positions with BofA, each of the Individual Defendants had access to adverse, non-public information about the financial condition, operations, and misrepresentations made.

32. At all times relevant hereto, each of the Individual Defendants was the agent of the other Individual Defendants and of BofA, and was at all times acting within the course and

scope of such agency.

33. To discharge their duties, the officers and directors of BofA were required to exercise reasonable and prudent supervision over the management, policies, practices and controls of the financial affairs of the Company. By virtue of such duties, the officers and directors of BofA were required to, among other things:

- a. manage, conduct, supervise and direct the business affairs of BofA in accordance with all applicable laws;
- b. neither violate, nor knowingly permit any officer, director, or employee of BofA to violate, applicable laws, rules and regulations;
- c. establish and maintain systematic and accurate records and reports of the business and affairs of BofA and procedures for the reporting of the business and affairs to the Board and to periodically investigate, or cause independent investigation to be made of, said reports and records;
- d. neither engage in self-dealing, nor knowingly permit any officer, director or employee of BofA to engage in self-dealing;
- e. ensure that the Company complied with its legal obligations and requirements, including acting only within the scope of its legal authority and disseminating truthful and accurate statements to the SEC and the investing public;
- f. conduct the affairs of the Company in an efficient, business-like manner so as to make it possible to provide the highest quality performance of its business, to avoid wasting the Company's assets, and to maximize the value of the Company's stock;
- g. properly and accurately guide investors and analysts regarding the true financial condition of the Company at any given time, including making accurate statements

about the Company's financial results and prospects, and ensuring that the Company maintained an adequate system of financial controls such that the Company's financial reporting would be true and accurate at all times; and

h. remain informed regarding how BofA conducted its operations, and, upon receipt of notice or information of imprudent or unsound conditions or practices, to make reasonable inquiry in connection therewith, and to take steps to correct such conditions or practices and make such disclosures as necessary to comply with applicable laws.

34. Each Individual Defendant, by virtue of his or her position as a director and/or officer, owed to the Company and its shareholders the fiduciary duties of loyalty, good faith, the exercise of due care and diligence in the management and administration of the affairs of the Company, as well as in the use and preservation of its property and assets. The conduct of the Individual Defendants alleged herein involves a violation of their obligations as directors and/or officers of BofA, the absence of good faith on their part, and a reckless disregard for their duties to the Company and its shareholders that the Individual Defendants were aware, or should have been aware, posed a risk of serious injury to the Company. The conduct of the Individual Defendants, who were also officers and/or directors of the Company, has been ratified by the remaining Director Defendants who collectively comprised all of BofA's Board during the Relevant Period.

35. The Individual Defendants breached their duties of loyalty and good faith by allowing defendants to cause, or by themselves causing, the Company to misrepresent its financial results and prospects, as detailed herein, and by failing to prevent employees and/or officers of the Company from taking such illegal actions. In addition, the Company is now the subject of class action litigation alleging violation of federal securities laws, which necessitates



the Company to incur excess costs arising from the Individual Defendants' wrongful course of conduct.

36. Additionally, BofA has established a Code of Ethics ("Code") that applies to all employees of the Company. The conduct of the Individual Defendants alleged herein constitutes a violation of the Company's Code. The Code provides, among other things, the following:

To ensure the integrity of its consolidated financial statements, Bank of America has established internal accounting and operating controls and procedures, including disclosure controls and procedures, and a Disclosure Committee. All associates responsible for the preparation of the corporation's financial statements, or who provide information as part of that process, must maintain and adhere to these controls so that all underlying transactions, both within Bank of America and with third parties, are properly documented, recorded and reported. In addition, all associates have the responsibility to promote full, fair, accurate, timely and understandable disclosure in reports and documents that Bank of America files with or submits to the U.S. Securities and Exchange Commission or other global regulators, as well as in other public communications made by the corporation.

#### **CONSPIRACY, AIDING AND ABETTING, AND CONCERTED ACTION**

37. In committing the wrongful acts alleged herein, the Individual Defendants have pursued, or joined in the pursuit of, a common course of conduct, and have acted in concert with, and conspired with, one another in furtherance of their common plan or design. In addition to the wrongful conduct herein alleged as giving rise to primary liability, the Individual Defendants further aided and abetted and/or assisted each other in breach of their respective duties.

38. During all times relevant hereto, the Individual Defendants collectively and individually initiated a course of conduct that was designed to and did:

(a) Conceal the fact that the Company was improperly misrepresenting its financial results in order to allow defendants to artificially inflate the price of the Company's shares;

(b) Maintain the Individual Defendants' executive and directorial positions at BofA and the profits, power, and prestige that the Individual Defendants enjoyed as a result of these positions; and



(c) Deceive the investing public, including shareholders of BofA, regarding the Individual Defendants' management of BofA's operations, the Company's financial health and stability, and future business prospects, specifically related to the Company's financials that had been misrepresented by the Individual Defendants throughout the Relevant Period.

39. In furtherance of this plan, conspiracy, and course of conduct, the Individual Defendants collectively and individually took the actions set forth herein.

40. The Individual Defendants engaged in a conspiracy, common enterprise, and/or common course of conduct during the Relevant Period. During this time, the Individual Defendants caused the Company to conceal the true facts that BofA was misrepresenting its financial results and violating applicable laws. In addition, defendants also made other specific false statements about BofA's financial performance and future business prospects, as alleged herein.

41. The purpose and effect of the Individual Defendants' conspiracy, common enterprise, and/or common course of conduct was, among other things: (1) to disguise the Individual Defendants' breaches of fiduciary duty, abuse of control, gross mismanagement, waste of corporate assets and unjust enrichment; (2) to conceal adverse information concerning the Company's operations, financial condition and future business prospects; and (3) to artificially inflate the price of BofA's stock so the Individual Defendants could protect and enhance their executive and directorial positions and the substantial compensation and prestige they obtained as a result thereof.

42. The Individual Defendants accomplished their conspiracy, common enterprise and/or common course of conduct by causing the Company to purposefully, recklessly or negligently misrepresent its financial results. Because the actions described herein occurred under the authority of the Board, each of the Individual Defendants was a direct, necessary and

substantial participant in the conspiracy, common enterprise, and/or common course of conduct alleged herein.

43. Each of the Individual Defendants aided and abetted and rendered substantial assistance in the wrongs alleged herein. In taking such actions to substantially assist the commission of the wrongdoing alleged herein, each Individual Defendant acted with knowledge of the primary wrongdoing, substantially assisted the accomplishment of that wrongdoing, and was aware of his or her overall contribution to, and furtherance of, the wrongdoing.

### **BACKGROUND**

44. BofA, a financial holding company, provides a range of banking and non-banking financial services and products in the United States and internationally. On July 1, 2008, BofA acquired Countrywide Financial Corporation ("Countrywide") by issuing 107 million shares of BofA common stock for 583 millions shares of Countrywide common stock. This acquisition dramatically increased the number of home mortgage loans serviced by BofA from 4 million pre-acquisition to 14 million post acquisition. Even more significantly, a much higher proportion of Countrywide loans were delinquent and likely to lead to foreclosure than those BofA had previously serviced.

45. Prior to the acquisition, Countrywide had utilized a company called Mortgage Electronic Registration Systems, Inc. ("MERS") to record the vast number of mortgage loans it was originating using extremely aggressive lending practices. In order to save time and money on registering the mortgage liens in the public records of the various counties in which Countrywide originated the loans, Countrywide used MERS to track the movement of the loans through the securitization process. However, the process led to a great deal of confusion. Through the process of working with MERS, the mortgages on homes became separated from

the notes on the homes. As a result, MERS might have been the mortgage holder, but not the noteholder. Countrywide continued to be the servicer, but with no real rights to payments or rights to foreclose. These defects began surfacing in various foreclosure proceedings in 2009, but the extent of the problems were concealed by BofA.

46. Following the acquisition, BofA executives decided to use Countrywide's homegrown mortgage-servicing technology, but soon discovered that Countrywide's system did not interface well with BofA's system. More alarming, however, was BofA's discovery that information was missing from many Countrywide loan files, making it difficult to communicate with borrowers. This problem became a critical when loans went into foreclosure, since paperwork and recording problems made it difficult, if not impossible, to foreclose on certain loans.

47. Indeed, Countrywide's common practice was to retain notes it should have transferred. In an Opinion dated November 16, 2010, the United States Bankruptcy Court for the District of New Jersey noted testimony by Linda DeMartini, a supervisor and operational team leader for the Litigation Management Department for BAC Home Loans Servicing L.P.:

As to the location of the note, Ms. DeMartini testified that to her knowledge, the original note never left the possession of Countrywide, and that the original note appears to have been transferred to Countrywide's foreclosure unit, as evidenced by internal FedEx tracking numbers. She also confirmed that the new allonge [a sheet of paper attached to a bill of exchange for the purpose of documenting endorsements] had not been attached or otherwise affixed to the note. She testified further that it was customary for Countrywide to maintain possession of the original note and related loan documents.

48. By year-end 2009, BofA had more than \$20 billion in non-performing loans and was conducting tens of thousands of foreclosures. In order to prevent a collapse in BofA's stock price and prevent borrowers from attempting to prevent foreclosures due to faulty procedures, defendants concealed the paperwork and recording problems associated with the loans, which

inhibited efficient foreclosures. Additionally, for years prior to 2010, BofA had engaged in a practice intended to make its financial statements appear more favorable. This practice, known in the industry as Repo 105, involved BofA misclassifying billions of dollars of debt as sales on quarter-end balance sheets. This practice was concealed from investors at the beginning of the Relevant Period.

### **DEFENDANTS' FALSE AND MISLEADING STATEMENTS**

49. On January 20, 2010, BofA issued a press release announcing its fourth quarter and full-year 2009 financial results. The Company reported full-year 2009 net income of \$6.3 billion and a net loss for the fourth quarter of 2009 of \$5.2 billion or a diluted EPS loss of \$0.60.

The Company stated:

“While it’s disappointing to report a loss for the fourth quarter, there were a number of important accomplishments worth noting,” said Chief Executive Officer and President Brian T. Moynihan. “First, we repaid the American taxpayer, with interest, for the TARP investment. Second, we have taken steps to strengthen our balance sheet through successful securities offerings. And third, all of our non-credit businesses recorded positive contributions to our results.”

50. On April 9, 2010, *The Wall Street Journal* published an article about large banks, including BofA, that had concealed their debt levels from investors over the previous five quarters. The article, entitled “Big Bank Mask Risk Levels; Quarter-End Loan Figures Sit 42% Below Peak, Then Rise as New Period Progresses; SEC Review,” stated:

Major banks have masked their risk levels in the past five quarters by temporarily lowering their debt just before reporting it to the public, according to data from the Federal Reserve Bank of New York.

\* \* \*

Excessive borrowing by banks was one of the major causes of the financial crisis, leading to catastrophic bank runs in 2008 at firms including Bear Stearns Cos. and Lehman Brothers. Since then, banks have become more sensitive about showing high levels of debt and risk, worried that their stocks and credit ratings could be punished.

\* \* \*

"The efforts to manage the size of our balance sheet are appropriate and our policies are consistent with all applicable accounting and legal requirements," a Bank of America spokesman said.

The SEC now is seeking detailed information from nearly two dozen large financial firms about repos, signaling that the agency is looking for accounting techniques that could hide a firm's risk-taking. The SEC's inquiry follows recent disclosures that Lehman used repos to mask some \$50 billion in debt before it collapsed in 2008. Some banks make big trades that don't show up in quarter-end balance sheets. That is what happened recently at Bank of America involving a trade designed to mature before the end of 2009's first quarter, people familiar with the matter say.

Two Bank of America traders bought \$40 billion of mortgage-backed securities from clients for one month, while at the same time agreeing to sell the securities back before quarter's end, according to people familiar with the matter. This "roll" trade provided the clients with cash and the bank with fees.

Robert Qutub, then Bank of America's chief financial officer for global markets, told Michael Nierenberg, a former Bear Stearns trader who oversaw the traders who made the roll trade, to cap the size of the short-term transaction, people familiar with the matter say.

A week later, however, the amount tied to the trade shot up to \$60 billion, these people say, before dropping to \$25 billion, one of these people said, appearing to some at headquarters that the group had defied the order to cap the trade.

A bank spokeswoman said "the team was aware of and worked within its risk limits."

51. On April 16, 2010, BofA issued a press release announcing its first quarter 2010 financial results. The Company reported net income of \$3.2 billion or \$0.28 diluted EPS. The Company stated:

Two factors primarily drove results in the first quarter:

- Provision for credit losses fell by \$3.6 billion from the year-ago period, reflecting an improvement in credit quality.
- Strong capital markets activity, including record sales and trading driven by industry-leading corporate and investment banking positions, helped drive results for Global Banking and Markets.

"With each day that passes, the 2010 story appears to be one of continuing credit recovery, and our results reflect a gradually improving economy," said Chief Executive Officer and President Brian T. Moynihan. "Our customers — individuals, companies, and institutional investors — increasingly see the value of our integrated capabilities. We also are seeing ample indications that those integrated capabilities hold promise for long-term shareholder value."

52. On May 7, 2010, BofA filed its Form 10-Q for the quarter ended March 31, 2010.

The Company disclosed aspects of its prior failure to accurately report its balance sheets. BofA stated:

At the end of certain quarterly periods during the three years ended December 31, 2009, the Corporation had recorded certain sales of agency mortgage-backed securities (MB S) which, based on a more recent internal review and interpretation, should have been recorded as secured borrowings. These periods and amounts were as follows: March 31, 2009 — \$573 million; September 30, 2008 — \$10.7 billion; December 31, 2007 — \$1.8 billion; and March 31, 2007 — \$4.5 billion. As the transferred securities were recorded at fair value in trading account assets, the change would have had no impact on consolidated results of operations. Had the sales been recorded as secured borrowings, trading account assets and federal funds purchased and securities loaned or sold under agreements to repurchase would have increased by the amount of the transactions, however, the increase in all cases was less than 0.7 percent of total assets or total liabilities. ***Accordingly, the Corporation believes that these transactions did not have a material impact on the Corporation's Consolidated Balance Sheet.***

In repurchase transactions, typically, the termination date for a repurchase agreement is before the maturity date of the underlying security. However, in certain situations, the Corporation may enter into repurchase agreements where the termination date of the repurchase transaction is the same as the maturity date of the underlying security and these transactions are referred to as "repo-to-maturity" (RTM) transactions. The Corporation enters into RTM transactions only for high quality, very liquid securities such as U.S. Treasury securities or securities issued by government-sponsored entities. The Corporation accounts for RTM transactions as sales in accordance with GAAP, and accordingly, de-recognizes the securities from the balance sheet and recognizes a gain or loss in the Consolidated Statement of Income. At March 31, 2010 and December 31, 2009, the Corporation had outstanding RTM transactions of \$3.0 billion and \$6.5 billion that had been accounted for as sales.



53. On July 16, 2010, BofA issued a press release announcing the Company's second quarter 2010 financial results. The Company reported net income of \$3.1 billion or \$0.27 diluted EPS. The Company stated:

"Our quarterly results show that we are making progress on our strategy to align around our three core customer groups — consumers, businesses, and institutional investors — and create the financial institution that customers tell us they want, built on a broad relationship of clarity, transparency, and helping them manage through challenging times," said Chief Executive Officer and President Brian Moynihan. "We improved our capital foundation through retained earnings, and credit quality improved even faster than expected. We have the most complete financial franchise in the world, and we are focused on executing our strategy and delivering outstanding long-term value to our customers and shareholders."

54. After releasing its second quarter 2010 results on July 16, 2010, BofA hosted a conference call with investors, media representatives and analysts. During the conference call, defendant Moynihan stated:

We did make \$3.1 billion in net income for the quarter, but importantly, with the earnings, we are continuing to move our core franchise forward. Our credit quality continues to improve, in some cases faster than we anticipated as we came into this year. As the management team and I put together the principles we're going to operate under to make sure that we can position this company now and in the future in the way it needs to be positioned, one of the principles we've been focused on is to continuing [sic] to strengthen our balance sheet.

\* \* \*

At the same time, we're devoting a ton of effort and expense to working through defaults, short sales and modifications, and we're attempting to help every customer we can. In spite of all that hard work, we'll continue to see elevated foreclosures, short sales and other liquidations for the next several quarters as we clean up the legacy Countrywide portfolio.

55. On October 8, 2010, BofA announced a nationwide foreclosure halt pending a review of its foreclosure processes. The purpose of the halt was to determine whether there were irregularities with respect to the Company's previously completed foreclosure activities.

56. On October 13, 2010, the attorneys general of 50 states, led by the State of Iowa, announced a probe into United States banks regarding loan underwriting guidelines and their

allowance for credit losses. The attorneys general, moreover, launched a joint investigation of the practices banks used in evicting delinquent borrowers from their homes. Upon this news, BofA's stock fell \$0.69 per share to close at \$12.60 per share on October 14, 2010, on volume of 511 million shares.

57. On October 19, 2010, BofA announced its third quarter 2010 financial results. The Company reported a net loss of \$7.3 billion and a diluted EPS loss of \$0.77. BofA further reported receiving \$18 billion in claims regarding faulty home loans that the Company may have to repurchase. On this news, BofA's stock dropped \$0.54 per share, to close at \$11.80 per share on October 19, 2010 – a one-day decline of 5% on volume of 574 million shares.

58. In November 2010, BofA was conducting 102,000 foreclosure files in five separate offices, attempting to retroactively document mortgage recording and transfers so that the Company could complete foreclosures in various locations with varying rules.

59. On November 16, 2010, a New Jersey Bankruptcy Judge dismissed a BofA claim against a debtor, citing testimony of a BofA employee who admitted that BofA/Countrywide routinely did not transfer essential documents for loans sold to investors. Additionally, as *American Banker* reported on Monday, November 22, 2010: "The BofA employee's admission that the lender customarily held on to promissory notes could also undermine the industry's position that document transfers to securitization trusts are fundamentally sound."

60. The true facts, which were known by the defendants but concealed from the investing public during the Relevant Period, were as follows:

- (a) BofA had not properly recorded many of its mortgages when originated or acquired, which severely complicated the foreclosure process when it became necessary;
- (b) Defendants failed to maintain proper internal controls related to foreclosure processing;



- (c) BofA did not have adequate personnel to process the large numbers of foreclosed loans in its portfolio;
- (d) BofA's failure to properly process both mortgages and foreclosures impaired BofA's ability to dispose bad loans; and
- (e) BofA engaged in a practice known internally as "dollar rolling" to remove billions of dollars of debt from its balance sheet over the prior years.

### **DERIVATIVE AND DEMAND EXCUSED ALLEGATIONS**

61. Plaintiff brings this action derivatively in the right, and for the benefit, of BofA to redress injuries suffered, and to be suffered, by BofA as a direct result of the breaches of fiduciary duty, abuse of control, gross mismanagement, waste of corporate assets and unjust enrichment, as well as the aiding and abetting thereof, by the Individual Defendants. BofA is named as a nominal defendant solely in a derivative capacity. This is not a collusive action to confer jurisdiction in this Court that it would not otherwise have.

62. Plaintiff will adequately and fairly represent the interests of BofA and its shareholders in enforcing and prosecuting its rights.

63. Plaintiff is the owner of BofA common stock and was the owner of BofA common stock at all times relevant to the Individual Defendants' wrongful course of conduct alleged herein.

64. At the time that this action was commenced, the BofA Board consisted of the following directors: defendants Moynihan, Holliday, Bies, Boardman, Bramble, Colbert, Gifford, Jones, Lozano, May, Powell, Rossotti, and Scully.<sup>1</sup>

65. As a result of the facts set forth herein, plaintiff has not made any demand on the BofA Board to institute this action against the Individual Defendants. Such demand would be a

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<sup>1</sup> On or about March 16, 2011, BofA appointed Mukesh Ambani to the Company's Board as a director.

futile and useless act with respect to each and every one of the Individual Defendants because they are incapable of making an independent and disinterested decision to institute and vigorously prosecute this action for the following reasons:

a. The Company has admitted that Defendants Moynihan and Gifford were not independent directors pursuant to the requirements of the listing standards of the New York Stock Exchange ("NYSE") and the Director Independence Categorical Standards ("Categorical Standards"). Specifically, Gifford was employed by Bank of America or a predecessor and received compensation from the Company that exceeded the threshold set forth in the listing standards of the NYSE and the Categorical Standards, and Moynihan served as the Company's CEO;

b. The Company or its subsidiaries received legal services from a law firm where Rossotti's immediate family member served as a partner. Thus, Rossotti is not disinterested from considering a demand upon the Board;

c. The Company or its subsidiaries purchased products or services from La Opinion and NSTAR (the local energy utility provider where the Company's Massachusetts offices are located), where Lozano and May have served as executive officers, respectively. Thus, Lozano and May are not disinterested from considering a demand upon the Board;

d. Additionally, defendant Moynihan lacks independence from defendants Boardman, Powell, and Scully as they are defendants who are not disinterested and/or independent and who exert influence over the compensation for defendant Moynihan by virtue of their positions as members of the Compensation and Benefits Committee. The Compensation and Benefits Committee annually reviews and approves corporate goals and objectives relevant to the compensation for defendant Moynihan, evaluates his performance in light of those goals

and objectives, and approves his compensation level based upon these evaluations. This lack of independence renders these defendants incapable of impartially considering a demand to commence and vigorously prosecute this action;

e. Defendants face a substantial likelihood of being held liable for breaching their fiduciary duties of loyalty and good faith as alleged herein, and are therefore incapable of disinterestedly and independently considering a demand to commence and vigorously prosecute this action;

f. BofA's non-employee directors have received, and continue to receive, substantial compensation in the form of cash and stock option awards. These defendants are interested in maintaining their positions on the Board so as to safeguard their substantial compensation and stock options. The following chart illustrates the substantial compensation that these directors have received, which demonstrates that demand upon such individuals would be futile:

<b>2009 DIRECTOR COMPENSATION</b>				
<b>DIRECTOR</b>	<b>FEES EARNED OR PAID IN CASH</b>	<b>STOCK AWARDS</b>	<b>OTHER COMPENSATION</b>	<b>TOTAL</b>
Susan S. Bies	\$71,672	\$143,344	-	\$215,016
William P. Boardman	\$71,672	\$143,344	-	\$215,016
Frank P. Bramble, Sr.	\$97,918	\$160,000	-	\$257,918
Virgis W. Colbert	\$99,944	\$199,888	-	\$299,832
Charles K. Gifford	\$90,028	\$160,000	\$1,537,166	\$1,787,194
Charles O. Holliday, Jr.	\$48,000	\$96,000	-	\$144,000
D. Paul Jones, Jr.	\$71,672	\$143,344	-	\$215,016
Monica C. Lozano	\$97,918	\$160,000	-	\$257,918
Thomas J. May	\$110,000	\$160,000	-	\$270,000
Donald E. Powell	\$71,672	\$143,344	-	\$215,016
Charles O. Rossotti	\$114,986	\$199,888	-	\$314,874
Robert W. Scully	\$54,792	\$109,584	-	\$164,376

g. The entire BofA Board and senior management participated in the wrongs complained of herein. For the reasons described herein, BofA's directors are not disinterested or independent. Pursuant to their specific duties as Board members, each was charged with the management of the Company and the conduct of its business affairs. Each of the above referenced defendants breached the fiduciary duties they owed to BofA and its shareholders in that they failed to prevent and correct the dissemination of the Company's false and misleading statements. Thus, the BofA Board cannot exercise independent objective judgment in deciding whether to bring this action or whether to vigorously prosecute this action because its members are interested personally in the outcome because their actions have subjected BofA to millions of dollars in potential liability for violations of applicable securities laws;

h. Defendant Moynihan certified certain of BofA's SEC filings. Accordingly, demand is futile as he faces a substantial likelihood of liability for breach of fiduciary duties owed to BofA;

i. Defendants Jones, Powell, Rossotti, and Scully were aware of the Company's ongoing unlawful and improper business practices and the dissemination of materially false and misleading statements and, yet, still permitted the Company to portray to the public the Company's false and misleading information despite their heightened fiduciary obligations as members of the Company's Audit Committee. As such, defendants Jones, Powell, Rossotti, and Scully breached their fiduciary duties of loyalty and good faith to the Company. Additionally, the failure of these defendants to perform their duties as members of the Audit Committee with loyalty and in good faith raises a substantial likelihood of non-exculpated personal liability on their part. As a result, defendants Jones, Powell, Rossotti, and Scully cannot impartially consider a demand on the Board to commence litigation against themselves;

j. Each of the key officers and directors knew of and/or directly benefited from the wrongdoing complained of herein thereby rendering demand futile;

k. The Individual Defendants approved and/or permitted the wrongs alleged herein to have occurred and participated in efforts to conceal or disguise those wrongs from BofA's stockholders or recklessly and/or negligently disregarded the wrongs complained of herein, and are therefore not disinterested parties;

l. In order to bring this suit, all of BofA's directors would be forced to sue themselves and persons with whom they have extensive business and personal entanglements, which they will not do, thereby excusing demand;

m. The acts complained of constitute violations of the fiduciary duties owed by BofA's officers and directors and these acts are incapable of ratification;

n. Each of the Individual Defendants authorized and/or permitted the false statements disseminated directly to the public and which were made available and distributed to shareholders, authorized and/or permitted the issuance of various of the false and misleading statements and are principal beneficiaries of the wrongdoing alleged herein, and thus could not fairly and fully prosecute such a suit even if they instituted it;

o. Any suit by the Company's current directors to remedy these wrongs would likely expose the Individual Defendants and BofA to further violations of the securities laws that would result in civil actions being filed against one or more of the Individual Defendants, thus, they are hopelessly conflicted in making any supposedly independent determination whether to sue themselves;

p. BofA has been, and will continue to be, exposed to significant losses due to the wrongdoing complained of herein, yet the Individual Defendants have not filed any

lawsuits against themselves or others who were responsible for that wrongful conduct to attempt to recover for BofA any part of the damages BofA suffered and will suffer thereby; and

q. If the current directors were to bring this derivative action against themselves, they would thereby expose their own misconduct, which underlies allegations against them contained in a class action complaint for violations of securities law, which admissions would impair their defense of the class action and greatly increase the probability of their personal liability in the class action, in an amount likely to be in excess of any insurance coverage available to the Individual Defendants. Thus, the Individual Defendants would be forced to take positions contrary to the defenses they will likely assert in the securities class action.

66. Moreover, despite the Individual Defendants having knowledge of the claims and causes of action raised by plaintiff, the current Board has failed and refused to seek to recover for BofA for any of the wrongdoing alleged by plaintiff herein.

67. Plaintiff, moreover, has not made any demand on shareholders of BofA to institute this action since demand would be a futile and useless act for the following reasons:

a. BofA is a publicly held company with over 10 billion shares outstanding, and thousands of shareholders;

b. Making demand on such a number of shareholders would be impossible for plaintiff who has no way of finding out the names, addresses or phone numbers of shareholders; and

c. Making demand on all shareholders would force plaintiff to incur huge expenses, assuming all shareholders could be individually identified.



68. Furthermore, the conduct complained of herein could not have been the product of good faith business judgment, and each of these directors faces a substantial likelihood of liability for breaching their fiduciary duties because, through their intentional misconduct, they have subjected BofA to substantial damages. Furthermore, the conduct of the Individual Defendants has subjected the Company to potential liability in connection with a securities fraud class action entitled, *Pipefitters Local No. 636 v. Bank of America Corp., et al.*, Case No. 11-Civ-0733, currently pending in the United States District Court for Southern District of New York. Through their intentional misconduct, Individual Defendants have subjected the Company to potential costs, fines, and judgments associated with the securities class action. Such actions by the Individual Defendants cannot be protected by the business judgment rule. Accordingly, making a pre-suit demand on the Individual Defendants would be futile.

**COUNT I  
(AGAINST THE INDIVIDUAL DEFENDANTS FOR BREACH OF FIDUCIARY DUTY)**

69. Plaintiff incorporates by reference each of the preceding paragraphs as though they were set forth in full herein.

70. The Individual Defendants owed a fiduciary duty to BofA to supervise the issuance of the Company's press releases and public filings to ensure that they were truthful and accurate and that such filings conformed to applicable securities laws. The Individual Defendants, however, breached their fiduciary duties by failing to properly supervise and monitor the adequacy of BofA's internal controls and by allowing the Company to issue and disseminate misleading statements and filings.

71. The Individual Defendants have engaged in a sustained and systematic failure to exercise their oversight responsibilities and to ensure that BofA complied with applicable laws,

rules and regulations.

72. As members of the BofA Board, the Individual Defendants were directly responsible for authorizing, permitting the authorization of, or failing to monitor the practices that resulted in violations of applicable laws as alleged herein. Each of them had knowledge of, and actively participated in, approved, and/or acquiesced in the wrongdoing alleged herein or abdicated his or her responsibilities with respect to this wrongdoing. The alleged acts of wrongdoing have subjected the Company to unreasonable risks of loss and expenses.

73. Each of the Individual Defendants' acts in causing or permitting the Company to disseminate material misrepresentations and omissions to the investing public and abdication of his or her oversight responsibilities to the Company have subjected the Company to liability for violations of applicable laws, and therefore were not the product of a valid exercise of business judgment, constituting a complete abdication of their duties as officers and/or directors of the Company. As a result of the Individual Defendants' breaches, BofA is the subject of a major securities fraud class action lawsuit by defrauded investors, and the Company's reputation in the business community and financial markets has been irreparably tarnished.

**COUNT II**  
**(AGAINST THE INDIVIDUAL DEFENDANTS FOR GROSS MISMANAGEMENT)**

74. Plaintiff incorporates by reference each of the preceding paragraphs as though they were set forth in full herein.

75. The Individual Defendants had a duty to BofA and its shareholders to prudently supervise, manage, and control the operations, business, and internal financial accounting and disclosures of the Company. The Individual Defendants, however, by their actions, and by engaging in the wrongdoing alleged herein, abandoned and abdicated their responsibilities and duties with regard to prudently managing the business of BofA in a manner consistent with the



duties imposed upon them by law. By committing the misconduct alleged herein, The Individual Defendants breached their duties of due care, diligence, and candor in the management and administration of BofA's affairs and in the use and preservation of the Company's assets.

76. During the course of the discharge of their duties, the Individual Defendants were aware of the unreasonable risks and losses associated with their misconduct. Nevertheless, the Individual Defendants caused BofA to engage in the scheme described herein which they knew had an unreasonable risk of damage to the Company, thus breaching their duties to the Company. As a result, the Individual Defendants grossly mismanaged BofA, thereby causing damage to the Company.

**COUNT III  
(AGAINST THE INDIVIDUAL DEFENDANTS FOR CONTRIBUTION AND  
INDEMNIFICATION)**

77. Plaintiff incorporates by reference each of the preceding paragraphs as though they were set forth in full herein.

78. BofA is alleged to be liable to various persons, entities and/or classes by virtue of the facts alleged herein that give rise to defendants' liability to the Company.

79. BofA's alleged liability on account of the wrongful acts, practices, and related misconduct alleged arises, in whole or in part, from the knowing, reckless, disloyal and/or bad faith acts or omissions of the Individual Defendants, and the Company is entitled to contribution and indemnification from each defendant in connection with all such claims that have been, are, or may in the future be asserted against BofA by virtue of the Individual Defendants' misconduct.

**COUNT IV  
(AGAINST THE INDIVIDUAL DEFENDANTS FOR ABUSE OF CONTROL)**

80. Plaintiff incorporates by reference each of the preceding paragraphs as though

they were set forth in full herein.

81. The Individual Defendants' conduct, as alleged herein, constituted an abuse of their control over BofA.

82. As a direct and proximate result of the Individual Defendants' abuse of control, the Company has suffered, and will continue to suffer, damages for which the Individual Defendants are liable. Plaintiff, moreover, has no adequate remedy at law.

**COUNT V  
(AGAINST THE INDIVIDUAL DEFENDANTS FOR  
WASTE OF CORPORATE ASSETS)**

83. Plaintiff incorporates by reference each of the preceding paragraphs as though they were set forth in full herein.

84. The Individual Defendants' conduct, as alleged herein, constituted a waste of the corporate assets of BofA.

85. As a direct and proximate result of the Individual Defendants' abuse of control, the Company has suffered, and will continue to suffer, damages for which the Individual Defendants are liable. Plaintiff, moreover, has no adequate remedy at law.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for judgment as follows:

A. Against all of the Individual Defendants and in favor of the Company for the amount of damages sustained by the Company as a result of the Individual Defendants' breaches of fiduciary duties;

B. Awarding to plaintiff the costs and disbursements of the action, including reasonable attorneys' fees, accountants' and experts' fees, costs, and expenses; and

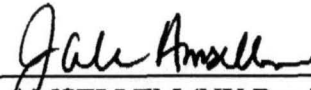
C. Granting such other and further relief as the Court deems just and proper.

## JURY DEMAND

Plaintiff demands a trial by jury.

DATED: March 25, 2011

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