Exhibit C

CONFIDENTIAL MATERIAL – SUBJECT TO STIPULATION AND ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION

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

MBIA INSURANCE CORPORATION, Plaintiff, -against- COUNTRYWIDE HOME LOANS, INC., COUNTRYWIDE SECURITIES CORP., COUNTRYWIDE FINANCIAL CORP., COUNTRYWIDE HOME LOANS SERVICING, L.P., and BANK OF AMERICA CORP. Defendants.	Index No.: 08/602825 IAS Part: 3 (Bransten, J.)

EXPERT REPORT OF PROFESSOR JOHN C. COATES IV

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I. Introduction and Scope of Engagement

I have prepared this report at the request of plaintiff, MBIA Insurance Corporation (***MBIA***), concerning (a) certain transactions (*the* ***Red Oak Merger*** *and the* ***Asset Stripping Transactions***, defined below) among Bank of America Corporation (***BAC***) and various of its wholly owned subsidiaries, on the one hand, and Countrywide Financial Corporation (***CFC***), Countrywide Home Loans, Inc. (***CHL***) and other wholly owned subsidiaries of CFC (***Other Subs***), on the other hand, and the relationship of those transactions to merger and acquisition (***M&A***) customs and practices, (b) the economic effects of those transactions as compared to the economic effects of a *de jure* merger, (c) how the relationship of the procedures through which those transactions were approved compared to corporate governance customs and practices, (d) the conduct and statements of BAC regarding CFC's and CHL's liabilities and a comparison of such conduct and statements to the conduct and statements of a party to a *de jure* merger, and (e) the economic and policy rationales for successorship doctrines and how those relate to the Asset Stripping Transactions and BAC's assumption of CFC's and CHL's liabilities.

II. Summary of Opinions

Based on my (i) prior practice experience as an attorney, (ii) my research and teaching of law at Harvard Law School, specializing in M&A of financial institutions, including banks and bank holding companies, (iii) my consulting experience, and (iv) my review and consideration of the documents listed in Exhibit C, it is my opinion that:

1. The Red Oak Merger and the Asset Stripping Transactions are inconsistent with M&A customs and practices for how a purchaser would customarily effect the acquisition of a stand-alone entity;
2. The Asset-Stripping Transactions had equivalent economic effects on CFC, CHL and the Other Subs and their business operations as if they had been *de jure* merged into BAC and its subsidiaries: CFC and its subsidiaries ceased operating a business while BAC

(a) continued maintaining the ownership, management, personnel, physical location and the bulk of the assets and business operations through other BAC commonly controlled and owned subsidiaries and (b) assumed those liabilities necessary for the operation of those businesses;

3. The procedures by which the Asset-Stripping Transactions were approved were inconsistent with corporate governance customs and practices for economically similar transactions, and certainly inconsistent with "best practices,"" and were instead consistent with practices for transactions in which the parties did not face a conflict of interest, which did not represent a "last period" for CFC, CHL and the Other Subs, and which did not confront the parties with significant ongoing solvency concerns;

4. BAC's conduct and public statements in connection with the Asset-Stripping Transactions were consistent with its having assumed all the liabilities of CFC and CHL as in a *de jure* merger; and

5. Recognizing (a) the Asset-Stripping Transactions as a *de facto* merger and (b) BAC's statements both before and after, and its conduct since the Asset-Stripping Transactions as an assumption of liabilities is consistent with the economic and policy rationales underlying successorship doctrines.

The bases for these opinions, as well as additional opinions, are set out in Part V below.

III. Background and Credentials

A. Academic Experience

I am the John F. Cogan Professor of Law and Economics and Research Director of the Program on the Legal Profession at the Harvard Law School (***Harvard***). At Harvard, I teach, among other courses: the basic courses on contracts; the basic course on corporations, partnerships, limited liability companies and other business organizations; and advanced courses on M&A, corporate control and governance, the regulation of financial institutions, and securities law and regulation, including basic principles of accounting, economics and finance as they relate to corporate, securities or financial

institutions law or the design and implementation of business transactions. I have also taught at Harvard Business School and the Harvard Kennedy School, including courses on corporate governance and M&A. Before joining the Harvard faculty in 1997, I taught M&A at New York University for five years, and at Boston University, where I taught courses on M&A and the regulation of financial institutions, including national banks, federal savings banks, and bank holding companies. A copy of my *curriculum vitae* (including a list of all of my publications in the last ten years) is attached as Exhibit A.

B. Prior Work Experience

Before joining the Harvard faculty, I was a partner at the New York law firm of Wachtell, Lipton, Rosen & Katz, one of the nation's leading bank and financial institution M&A law firms and consistently ranked one or two in *American Lawyer's* AmLaw 100. I worked at Wachtell Lipton from 1988 to 1997. I no longer practice law, have not maintained my license to practice law in New York, and am not licensed to practice law in Massachusetts. In my practice at Wachtell Lipton, I represented bank holding companies and other large public companies and other firms involved in large financial transactions, including stock and asset purchases, corporate mergers, business combinations, joint enterprises, public offerings, private placements, recapitalizations and buyouts. I routinely advised parties as to their rights and obligations under transaction agreements and relevant banking, securities and corporate laws and regulations, as well as the customs and practices of the financial institution M&A bar with respect to such transactions. I was frequently involved in the preparation of documents filed by public companies under the US securities laws, and personally prepared numerous applications for regulatory approval of bank and bank holding company M&A transactions.

C. Consulting and Litigation Experience

Since joining Harvard, I have provided or am providing paid or unpaid consulting services to the Securities and Exchange Commission (***SEC***), the U.S. Department of Justice (***DOJ***), the U.S. Department of the Treasury, the Office of the White House Counsel, the New York Stock Exchange, members, subcommittees and staff of the U.S. Senate and House of Representatives, and organizations and individuals actively involved in corporate and financial transactions, including private equity funds, mutual funds, hedge funds, public and private companies, law firms, investment and commercial banks, regulatory agencies, trade organizations, and entrepreneurs. As a consultant and while at Wachtell Lipton, I am or was a principal advisor in more than 50 completed corporate transactions, including buyouts, each involving more than $100 million, including transactions involving AT&T; GE; IBM; Sara Lee; USAir; and Valero Energy. I have consulted with or advised an array of commercial and investment banks and other financial institutions, in M&A transactions and financings, such as Goldman, Sachs & Co.; State Street; and Wells Fargo. I have testified as an expert witness seven times at trial and more than twenty times by deposition, for both plaintiffs and defendants, in disputes concerning corporate governance and M&A, and have never been disqualified as an expert in these fields. A list of recent cases in which I have testified or been deposed is attached as Exhibit B.

D. Publications and Speaking Engagements

I have studied and written extensively about the law and economics of corporate transactions, such as M&A transactions, as well as the contracts and customs and practices of business persons and lawyers relevant to such topics. I am the author of several articles and books, including chapters in M. LIPTON & E. STEINBERGER,

TAKEOVERS AND FREEZEOUTS (the leading practitioner-oriented treatise on M&A), and for seven years, I co-authored the leading treatise on M&A in the financial industry, FINANCIAL INSTITUTIONS MERGERS AND ACQUISITIONS. My articles have appeared or are forthcoming in top journals, both peer-reviewed and non-peer-reviewed, including *Harvard Business Law Review, Yale Journal on Regulation, Stanford Law Review, California Law Review, University of Pennsylvania Law Review, Texas Law Review, Journal of Corporation Law*, *Business Lawyer, Yale Journal on Regulation, Journal of Economic Perspectives, Journal of Legal Analysis, Journal of Accounting Research,* and *Journal of Empirical Legal Studies.* The Delaware Supreme and Chancery Courts have cited several of my articles. My research methodologies include legal analysis, historical and recent-event case studies, large-scale empirical data gathering and analysis, and econometric and statistical analysis. My current research includes detailed, large-sample empirical studies of takeover bids; executive compensation and tenure and its effect on M&A; the market structure of the legal profession and the roles of lawyers in the M&A context; factors affecting M&A completion rates; and differences in M&A contracts between transactions involving public and private targets.

I have been invited to be a speaker at the law schools or faculties of Oxford, Yale, Stanford, NYU, Columbia, Chicago, Penn, Texas, Berkeley, Virginia, Northwestern, and Georgetown, among others; at Harvard Business School, the Stern School of Business at New York University, University of Chicago Graduate School of Business, and the Wharton School; the Federal Judicial Center, the American Law Institute, the American Bar Association, the International Bar Association, and the American Association of Law Schools; the National Bureau of Economic Research, the American Law and Economics Association, and the Federal Reserve Bank of New York; the Royal College of Spain,

and the High Level Group of Corporate Law Experts established under the auspices of the European Union. I am or have been a member of the Legal Advisory Committee to the New York Stock Exchange, the American Bar Association, the American Association of Law Schools, the American Law Institute, and the board of directors of the American Law and Economics Association.

IV. Compensation

I will receive a fee of $950 per hour for time spent on this litigation. I understand I may be asked to give further testimony or opinions in this case. My compensation is not dependent either on the opinions I express or the outcome of this case.

V. Opinions

I was asked by MBIA to consider how the structure and effect of the Red Oak Merger and the Asset-Stripping Transactions (as defined below) compare to M&A customs and practices and to evaluate whether the Asset-Stripping Transactions had equivalent economic effects on CFC, CHL and the Other Subs and their business operations as if they had been merged *de jure* into BAC and its subsidiaries. Based upon my review of the record, I have concluded that the economic effects on CFC, CHL and the Other Subs of the Asset-Stripping Transactions were equivalent to the effects of merging those companies *de jure* into BAC and its subsidiaries.

Generally, there are two post-acquisition economic approaches to managing a target company: (1) a method by which the target is integrated into the purchaser's existing business, and (2) a method by which the target is maintained largely intact as an operating business. BAC did not follow either of these customary methods. The Asset-Stripping Transactions are not consistent with efforts to continue the operation of two separate businesses. Rather, the non-customary approach employed by BAC had no

apparent purpose other than to extract CFC's business operations and related assets, integrate them into BAC's lines of business, and leave contingent liabilities behind in shell entities—in this case, CFC and CHL.

Notwithstanding the corporate structuring gymnastics employed by BAC, the Asset-Stripping Transactions achieve the economic equivalent of a *de jure* merger. As explained further below, the resulting impact on CFC and CHL's business operations—which continue to operate through BAC's lines of business with the same owners, same employees, same offices, and same technology platforms—could have been accomplished through a *de jure* merger of BAC with CFC and CHL, except in that case BAC would have formally assumed CFC's and CHL's legal liabilities.

My analysis proceeds in three steps: First, I review the factual background for the Red Oak Merger and the Asset-Stripping Transactions, and consider the effects of those transactions. Second, I review M&A customs and practices in economically comparable transactions, and compare those customs and practices to BAC's actions. Third, I consider whether BAC's approach to integrating CFC, CHL and the Other Subs and their business operations had the equivalent economic effect as if they had been merged *de jure* into BAC and its subsidiaries.

A. The Asset-Stripping Transactions

On January 11, 2008, Countrywide Financial Corporation and BAC announced that they had entered into a Merger Agreement.[1] Prior to the announcement of the Merger Agreement, CFC was a holding company whose subsidiaries were primarily

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[1] BACMBIA-B0000001644, Agreement and Plan of Merger (hereinafter ***Merger Agreement***), at 1 (Jan. 11, 2008); BACMBIA-W000001913, Minutes of Special Meeting of Board of Directors of BAC, at 3 (Jan. 10, 2008) (Board resolution whereby Board approved then subsequently executed January 11, 2008 Merger Agreement).

engaged in five business segments: (i) Mortgage Banking, (ii) Banking, (iii) Capital Markets, (iv) Insurance and (v) Global Operations.[2]

Mortgage Banking was CFC's "core business, generating 50% of [CFC's] revenues" and employing more than 22,000 people in 2007.[3] In describing its Mortgage Banking operations, CFC stated, "[w]e originate, purchase, sell and service non-commercial mortgage loans nationwide."[4] The Mortgage Banking business was historically housed at CHL[5] until late 2007 when CFC began migrating the mortgage origination business to Countrywide Bank, FSB (***Countrywide Bank***), another CFC subsidiary.[6] In order to conduct Mortgage Banking operations, CFC required financing

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[2] CFC Annual Report (Form 10-K), at 1 (fiscal year ended Dec. 31, 2007) (hereinafter *CFC 2007 Annual Report*); *see also* BACMBIA-C0000043140, Countrywide Organization Chart Original Structure (Pre-July 2008 - condensed).

[3] CFC 2007 Annual Report at 2, 28; Pl.'s Ex. 2783, CWMBIA0015937542 at 549 ("Real estate lending is at our core."), and 552 ("Real estate lending is and will continue to be at the core of Countrywide's strategic vision."); BACMBIA-B0000000688, CFC Overview & Outlook at 691 ("CFC's various businesses are synergistic, with real-estate lending as its core.").

[4] CFC 2007 Annual Report at 1; BACMBIA-C0000000001 ("They are the largest or 2nd largest servicer with $1.3Tr. [*sic*] About 13% of market….They are top originator—14.8% market share."); BACMBIA-B0000000688, CFC Overview & Outlook at 690 (noting CFC is "top overall originator" and "top servicer with $1.5 T servicing portfolio and 9 MM+ loans" with "50K+ employees," "highly efficient operations," and a "leading technology platform").

[5] CFC 2007 Annual Report at 4; BACMBIA-A0000015499, Email dated Mar. 5, 2008 ("Mortgage origination was already being phased into CW Bank from CHL (60-70% by fall 2007)").

[6] Christopher Dumont testified that Countrywide migrated, "the mortgage origination and fulfillment teams from Countrywide Home Loans into Countrywide Bank." Dumont Dep. 19:16-19, Jan. 27, 2012. Mr. Dumont testified that moving the mortgage origination business from CHL to Countrywide Bank was important because Countrywide "needed to move the associates and the lending operations into the bank to better facilitate our ability to continue to operate." *Id.* 21:7-22:20. This is because "the credit markets were beginning to become constrained. And that moving inside the bank enabled us to have better liquidity." *Id*. 22:25-23:04. *See also* Pl.'s Ex. 2783, CWMBIA0015937542, at 547 ("It is a strategic priority at Countrywide Financial to move certain mortgage operations under the umbrella of Countrywide Bank, FSB. The

which it had traditionally generated through the sale and securitization of mortgage loans it originated or purchased.[7] By late 2007, as credit markets became constrained, CFC developed alternative strategies to finance mortgage origination including, among other things, (1) turning to Countrywide Bank, which, through its deposit base, provided "stable funding and more access to reliable sources of funds", (2) securing $11.5 billion of unsecured credit lines, (3) issuing $2.0 billion of 7.25% convertible cumulative preferred stock to BAC, and (4) working to increase deposits at Countrywide Bank.[8] By December 31, 2007, over 90% of monthly mortgage loan production occurred at Countrywide Bank.[9]

The Banking business segment was split between Countrywide Bank and Countrywide Warehouse Lending.[10] Countrywide Bank took deposits and invested in home loans and, as noted above, by the end of 2007, the vast majority of Countrywide's "core" mortgage loan production had moved to Countrywide Bank.[11] Countrywide Warehouse Lending was a non-depository lender that made investments in mortgage-backed securities (***MBS***), commercial real estate and construction loans and provide short

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Integration of our home and loan business with the Bank is a primary component of CFC's plans for expansion and strategic growth over the next several years."); BACMBIA-C0000000001, Email dated Aug. 15, 2007 ("They have a bank – $56B deposit plus FHLB advances to fund $75B of mortgages…Again, someone should take over it.").

[7] CFC 2007 Annual Report at 17.

[8] *Id.*; Prior to LD1, BAC also recognized that new home loan origination was dependent on access to liquidity from a financial institution like Countrywide Bank, noting the combined company would "most effectively fund these operations from the depository institutions." BACMBIA-J0000001227 at p. 24.

[9] CFC 2007 Annual Report at 4; *see also* Pl.'s Ex. 3433, BACMBIA-B0000003080 at 084 ("Almost all originations currently funded by Bank (92% in Oct-07)").

[10] CFC 2007 Annual Report at 11.

[11] *Id.* at 2, 4.

term financing to mortgage lenders.[12] Banking employed 2700 people, not including the people counted above under the Mortgage Banking business.[13]

The Capital Markets business, which included Countrywide Securities Corporation (***CSC***), specialized in trading and underwriting mortgage backed securities and trading mortgage loans on behalf of the Mortgage Banking business segment.[14] Capital Markets employed 850 people in 2007.[15] CSC was a registered securities broker dealer.[16]

The Insurance business, managed through Balboa Insurance Group (***Balboa***) and Balboa Reinsurance Group, offered property, casualty, life and disability insurance and reinsurance to cover primary mortgage insurers.[17] The Insurance business employed 2600 people.[18] Global Operations, which employed 4800 people, was responsible for certain software licensing and support and offshore services for the company's units abroad.[19]

As of June 30, 2008, each of CFC and BAC were Delaware corporations, registered with the SEC and listed on the New York Stock Exchange (***NYSE***). Each of CHL, CSC, and Countrywide Home Loans Servicing, LP (***Servicing LP***) were wholly-owned direct or indirect subsidiaries of CFC, and CHL was a New York corporation. Between the time the Merger Agreement between BAC and CFC was announced and

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[12] *Id.* at 2, 11.

[13] *Id.* at 28.

[14] *Id.* at 2, 13-14, 75-76.

[15] *Id.* at 28.

[16] *Id.* at 13.

[17] *Id.* at 2, 15; BACMBIA-B0000000439, Email dated Jan. 14, 2008.

[18] CFC 2007 Annual Report at 28.

[19] *Id.* at 16, 28.

June 30, 2008, CFC and its subsidiaries employed a workforce of more than 42,000 people.[20]

1. The Red Oak Merger

On July 1, 2008, BAC acquired the stock of CFC pursuant to the Merger Agreement dated January 11, 2008.[21] In that transaction (the ***Red Oak Merger***):

1. CFC merged with a subsidiary of BAC named Red Oak Merger Corporation (***Red Oak***), which was then renamed Countrywide Financial Corporation (***CFC***).

2. Because CFC merged into Red Oak, the resulting legal entity retained all of CFC's preexisting liabilities, and CHL remained a wholly owned subsidiary of CFC.

3. BAC issued 0.1822 of a share of its common stock for each share of CFC stock, worth approximately $4.2 billion, based on an average of the closing prices of BAC's common stock for the period commencing two trading days before and ending two trading days after January 11, 2008, as calculated by BAC.[22]

As a result of the Red Oak Merger, BAC booked approximately $4.4 billion of goodwill on its financial statements for its acquisition of CFC under generally accepted accounting principles (***GAAP***) .[23] That $4.4 billion goodwill value was calculated after taking account of CFC's accrued liabilities, including certain contingent liabilities, as

[20] CFC 2007 Annual Report at 28; BAC's First Supplemental Responses and Objections to Plaintiff's Interrogatories (May 2, 2012), Supplemental Response to Interrogatory No. 13, at 27-28 ("On July 1, 2008, CFC together with its subsidiaries had 42,815 employees. As of November 1, 2011 approximately 19,300 former Countrywide employees have at some time since July 1, 2008, worked for a non-Countrywide BofA subsidiary. As of November 1, 2011, approximately 270 employees continue to work for CFC subsidiaries.").

[21] BACMBIA-B0000001644, Merger Agreement.

[22] BAC, Annual Report (Form 10-K), at 125 (for year ended Dec. 31, 2008) (hereinafter *BAC 2008 Annual Report*); CFC, Quarterly Report (Form 10-Q), at 55 (Aug. 11, 2008).

[23] BAC 2008 Annual Report at 125.

required by GAAP.[24] Goodwill was preliminarily allocated to CFC and its subsidiaries based on a percentage allocation of historical operating income at each entity.[25] Under BAC's own internal calculations, this operating income would have called for *at least* $1.6 billion to be allocated to CHL and another $400 million to CSC. BAC, however, reallocated those amounts to Countrywide Bank based on its "prospective view" of CHL and CSC using its "operating income methodology."[26] Accordingly, BAC allocated $3.8 billion of goodwill to Countrywide Bank, where 99% of home loan origination was taking place as of the Red Oak Merger, with the remainder allocated to Balboa, which had profitable insurance operations.[27]

Since the Red Oak Merger, CHL and other former wholly-owned subsidiaries of CFC have been indirect wholly-owned subsidiaries of BAC, except for: (i) Countrywide Bank, which was sold to BAC on November 7, 2008 and then merged with Bank of America, N.A. (***BANA***) on April 27, 2009; (ii) the Servicing LP, which was sold to NB Holdings Corporation (***NB Holdings***), a wholly owned subsidiary of BAC, on or about July 2, 2008, and then merged with BANA in July 2011; and (iii) dozens of other subsidiaries of CHL and CFC which were transferred to BAC on November 7, 2008.[28]

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[24] Price Dep. 157:13-20, May 23, 2012.

[25] BACMBIA-A0000098425 at 457, Preliminary Purchase Accounting Allocation for Legal Day 1, dated Aug. 1, 2008.

[26] *Id.*; BACMBIA-A0000098457; BACMBIA-H0000006599 (containing hidden worksheets explaining BAC's operating income methodology).

[27] *Id.;* Pl.'s Ex. 3696, BACMBIA-H0000007842, at 845.

[28] CFC Quarterly Report (Aug. 11, 2008) at 6; BACMBIA-C0000161342 (July 2, 2008 Purchase and Sale Agreement between NB Holdings and CHL); BACMBIA-C0000168443 (November 7, 2008 Stock Purchase Agreement between BAC and CFC); Pl.'s Ex. 3203, BACMBIA-C0000019538*; see also* BACMBIA-H0000003065, Bank of America/Countrywide Limited Pre-Transaction and Post-Transaction Organization Charts; BACMBIA-A0000125271, Legal Entity Steps; Eckerle Dep. 149:11-14, April 6,

Also since the Red Oak Merger, CHL and any other former wholly owned subsidiary of CFC has been owned by the shareholders of BAC, indirectly, through their ownership of stock of BAC.

As of and since the Red Oak Merger, BAC has dominated or controlled CFC, CHL and all other former subsidiaries of CFC. Each member of the boards of directors of CFC and its subsidiaries has been an employee of BAC, whose employment depended on decisions of the management of BAC. Following the Red Oak Merger, all transactions between BAC and CFC, CHL or any other former wholly owned subsidiary of CFC have been transactions between commonly owned and controlled corporations.

2. The July Transactions

Shortly following the Red Oak Merger, between July 1 and 3, 2008, CFC and its subsidiaries sold assets and subsidiaries to BAC and certain of BAC's subsidiaries (the ***July Transactions***). In connection with the July Transactions:

1. On July 1, 2008 CHL sold a pool of residential mortgage loans to NB Holdings for approximately $6.9 billion, subject to certain adjustments.[29]

2. On July 1, 2008, CHL also novated a portfolio of derivative instruments to BANA in exchange for $1.5 billion in cash.[30]

2012 ("Legal Day 1 is that point in time when Countrywide joins the Bank of America family. Becomes part of the Bank of America family.").

[29] CFC Current Report (Form 8-K), at 5 (filed July 8, 2008); BACMBIA-C0000161028 (July 1, 2008 Purchase and Subservicing Agreement between CHL and NB Holdings); BACMBIA-C0000161141 (July 1, 2008 Demand Note for $6.9 billion); BACMBIA-C0000161250 (July 1, 2008 Purchase Confirmation for purchase between CHL and NB Holdings); BACMBIA-C0000161322 (July 1, 2008 CHL resolution approving purchase agreement); Pl.'s Ex. 3176, BACMBIA-C0000161006 (July 1, 2008 NB Holdings resolution approving Purchase and Subservicing Agreement); BACMBIA-C0000161016 (July 1, 2008 BANA resolution approving Master Contribution Agreement); BACMBIA-C0000161591 (July 1, 2008 Master Contribution Agreement between NB Holdings and BANA).

3. On July 2, 2008, CHL sold two entities that owned all of the partnership interests in the Servicing LP to NB Holdings for approximately $19.7 billion, subject to certain adjustments.[31] In connection with this sale, NB Holdings issued to CHL a promissory note. In addition, in connection with the sale of the Servicing LP, CHL agreed to assume all liabilities of the Servicing LP as of July 2, 2008. The Servicing LP owns mortgage servicing rights and reimbursable servicing advances and performs servicing functions related to those loans as well as subservicing for residential mortgage loans.[32]

4. On July 2, 2008, CSC sold to Blue Ridge Investments, LLC, a wholly owned subsidiary of BAC, a pool of securities for approximately $147 million in cash.[33]

5. On July 3, 2008 CHL sold another pool of residential mortgage loans to NB Holdings for approximately $2.5 billion, subject to certain adjustments. These loans, together with the loans sold on July 1, 2008, excluded loans pledged by CHL pursuant to secured financing arrangements.[34]

6. On July 3, 2008, Countrywide Commercial Real Estate Finance (***CCREF***), another subsidiary of CFC, sold to NB Holdings a pool

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[30] *See* CFC Quarterly Report (Aug. 11, 2008) at 6 (explaining that consideration for novation of derivatives was $1.5 billion, not the $1.8 billion originally reported in CFC's Form 8-K dated July 8, 2008).

[31] Although Countrywide publicly disclosed the consideration paid for the sale of the Servicing LP was $19.7 billion, BAC's internal documents show an immediate adjustment downward of $1.4 billion resulting in a total price of $18.3 billion. *See* BACMBIA-R0000006093 at "Notes LD2", Row 6 ("CHL records I/C note with NB Holdings for sale of TX LP - 19,676,240,840 subsequently adjusted to 18,272,291,819.") *compared with* CFC Current Report (July 8, 2008), at p. 5.

[32] CFC Current Report (July 8, 2008), at 5; BACMBIA-C0000161342 (July 2, 2008 Purchase and Sale Agreement between NB Holdings and CHL); BACMBIA-C0000161271 (July 2, 2008 Demand Note for $19.7 billion); BACMBIA-C0000161595 (July 2, 2008 Amendment to Operating Instrument of Countrywide); BACMBIA-C0000161598 (July 2, 2008 additional amendment); BACMBIA-C0000161601 (July 2, 2008 additional amendment); BACMBIA-C0000161603 (July 2, 2008 additional amendment); BACMBIA-C0000161203 (July 2, 2008 Master Services Agreement between CHL and CHL Servicing); BACMBIA-C0000161609 (July 2, 2008 Contribution Agreement between NB Holdings and BANA).

[33] CFC Current Report (July 8, 2008), at 5.

[34] *Id.*

of commercial mortgage loans for $238 million, subject to certain adjustments.[35]

3. The November Transactions

On November 7, 2008, BAC purchased substantially all of CHL's remaining assets and operations, including all assets associated with CHL's mortgage origination operations, such as mortgage loans, mortgage servicing rights, bank-eligible and investment grade securities, the technology platform used in CHL's mortgage operations, furniture, fixtures, and equipment, contract rights with third parties, and real property owned by CHL, pursuant to an Asset Purchase Agreement dated November 7, 2008 (the ***Asset Purchase Agreement***).[36]

BAC also purchased the stock of significant CFC subsidiaries, including Countrywide Bank and Balboa, pursuant to a Stock Purchase Agreement dated November

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[35] *Id.*; CFC Amended Current Report (Form 8-K/A), at 7 (filed Sept. 17, 2008); BACMBIA-C0000161613 (July 3, 2008 Commercial Real Estate Loan Purchase and Sale Agreement between CFC and NB Holdings); BACMBIA-C0000161216 (July 3, 2008 Amendment to Limited Partnership Agreement of CHL Servicing); BACMBIA-C0000161224 (July 3, 2008 Purchase Confirmation between CHL and NB Holdings); BACMBIA-C0000161010 (June 30, 2008 Minutes of Countrywide Commercial Real Estate Finance Board of Directors).

[36] BACMBIA-C0000168172, at 210, Asset Purchase Agreement, Schedule 2.2; BAC Current Report (Form 8-K), at 1 (filed Nov. 10, 2008); Pl.'s Ex. 3658, BACMBIA-W0000001964 (Sept. 19, 2008 Minutes of Special Meeting of BAC BOD); Pl.'s Ex. 3656, BACMBIA-J0000002304, Email from Vikas Thakur to Greg Hobby dated October 31, 2008 (referencing "assets that we peeled away from CHL and CFC in the asset sale"); Pl.'s Ex. 3657, BACMBIA-L0000000899 (November 4, 2008 summary of charter collapse pro forma); Pl.'s Ex. 3743, BACMBIA-A0000133936 ("75% of Countrywide's assets being sold to BANA"); Pl.'s Ex. 3696, BACMBIA-H000007845 (November 25, 2008 pro forma of subsidiary sale from CFC to BAC); BACMBIA-C0000074770 (March 17, 2009 email from Ofcharsky to Weiss, indicating all CFC and CHL leases should be assigned to BANA); Pl.'s Ex. 3754, BACMBIA-O0000029482 at 487 (April 8, 2009 email from Ofcharsky to Arturo Perez, "In November our goal was to move all assets from CFC and CHL to BAC"); BACMBIA-C0000020953 (November 12, 2008 charter collapse email from Ofcharsky to Kanaga).

7, 2008 (the ***Stock Purchase Agreement***).[37] The $4.2 billion of goodwill allocated to Countrywide Bank and Balboa was transferred to BAC as part of this transaction.[38] These were the ***November Transactions***, and together with the July Transactions, the ***Asset-Stripping Transactions***.

As of November 7, 2008, substantially all of CFC and its subsidiaries' employees became employees of BAC and its non-CFC subsidiaries.[39] BAC continues to employ a large number of those employees.[40] Through these transactions, BAC acquired all of the

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[37] BACMBIA-C0000168443, at 490, Stock Purchase Agreement, Schedule 2.3 (b) (listing Countrywide Bank and Balboa as transferred subsidiaries); Pl.'s Ex. 3311, BACMBIA-C0000168495, Amendment to Stock Purchase Agreement between BAC and CFC, Nov. 7, 2008; BACMBIA-C0000168498, Supplemental Agreement to Stock Purchase Agreement between BAC and CFC, March 6, 2009; Hobby Dep. 209:18-24, May 3, 2012 (under Stock Purchase Agreement, CFC subs were transferred, along with certain assets, to BAC).

[38] Pl.'s Ex. 3696, BACMBIA-H0000007845, at "CFC Consolidated" Worksheet, Row 81.

[39] *See* BACMBIA-R0000042142 ("As a result of the restructuring, employees of CHL became associates of Bank of America National Association (BANA) or the Servicing LP."); BAC's First Supplemental Responses and Objections to Plaintiff's Interrogatories (May 2, 2012), Supplemental Response to Interrogatory No. 13, at 27-28 ("On July 1, 2008, CFC together with its subsidiaries had 42,815 employees. As of November 1, 2011, approximately 19,300 former Countrywide employees have at some time since July 1, 2008, worked for a non-Countrywide BofA subsidiary. As of November 1, 2011, approximately 270 employees continue to work for CFC subsidiaries."); Ofcharsky Dep. 319:14-24, May 18, 2012 & May 25, 2012; BACMBIA-Q0000048603 (Oct. 20, 2008 email from Thakur describing effort to "move associates from CHL/CFC to BANA for November 7th"); Pl.'s Ex. 3742, BACMBIA-R0000008824, at 825 (Dec. 11, 2008 email from Snelson to Reddick "It looked like we were going to leave some executives behind. Subsequent to this note it was discussed that ALL employees would go. I remember as I was surprised at the decision.").

[40] BACMBIA-R0000042142 ("As a result of the restructuring, employees of CHL became associates of Bank of America National Association (BANA) or the Servicing LP."); BAC's First Supplemental Responses and Objections to Plaintiff's Interrogatories (May 2, 2012), Supplemental Response to Interrogatory No. 13, at 27-28 ("On July 1, 2008, CFC together with its subsidiaries had 42,815 employees. As of November 1, 2011, approximately 19,300 former Countrywide employees have at some time since July 1, 2008, worked for a non-Countrywide BofA subsidiary. As of

operating assets of CFC, CHL and the Other Subs.[41] BAC also acquired all of the offices, technology, and other business assets of CFC and its subsidiaries.[42]

In connection with the November Transactions, BAC issued a promissory note to CHL for approximately $3.05 billion,[43] issued a promissory note to CFC for approximately $3.5 billion,[44] and assumed $16.6 billion in debt securities and related guarantees.[45] Although there is conflicting evidence, it appears the promissory notes issued to CHL and CFC were collectively adjusted downward to $5.4 billion based on certain fair value adjustments that were determined by BAC.[46]

November 1, 2011, approximately 270 employees continue to work for CFC subsidiaries.").

[41] Pl.'s Ex. 3357, BACMBIA-H0000009591, at 593 ; Pl.'s Ex. 3696, BACMBIA-H0000007845 (pro forma for purchase of CFC assets/assumption of debt); Pl.'s Ex. 3204, BACMBIA-C0000036782, at 786 (explaining the November Transactions were structured so that "[c]ertain subsidiaries of Countrywide Financial Corporation (CFC) that have ongoing business operations important for the integrated Bank of America lines of businesses will be sold to Bank of America Corporation (BAC). These legal entities are <u>not</u> merging or otherwise changing at this time, however CFC will no longer be a parent in its ownership chain.") (emphasis in original).

[42] *Id.*

[43] Pl.'s Ex. 3549, BACMBIA-C0000168237, Demand Note to CHL, Nov. 7, 2008.

[44] BACMBIA-C0000168502, Demand Note to CFC, Nov. 7, 2008.

[45] Pl.'s Ex. 3549, BACMBIA-C0000168237, Demand Note to CHL, Nov. 7, 2008; BAC's First Supplemental Responses and Objections to Plaintiff's Interrogatories (May 2, 2012), Supplemental Response to Interrogatory No. 1; Price Dep. 94:5-14.

[46] During the first quarter of 2009, the Asset Purchase Agreement was amended twice, once on January 5, 2009 and then again on March 6, 2009. Pursuant to these amendments the purchase price under the Asset Purchase Agreement was decreased from approximately $3.0 billion to approximately $1.8 billion. CHL's balance sheets, however, suggest the Asset Purchase Agreement price was actually increased to $3.6 billion. *See* BACMBIA-C0000168230, Amendment to Asset Purchase Agreement, January 5, 2009 (time to amend agreement extended from 60 days to 120 days); BACMBIA-C0000168233, Supp. Amendment to the Asset Purchase Agreement, March 6, 2009 (lowering purchase price from approximately $3.0 billion to approximately $1.8 billion); Pl.'s Ex. 3552, BACMBIA-C0000168508, Amendment to the Demand Note, March 6, 2009 (lowering amount of note to approximately $1.8 billion); BACMBIA-

4. Merger of Countrywide Bank and Servicing LP Into BANA

On April 27, 2009, Countrywide Bank converted to a national bank with the name Countrywide Bank, N.A. and immediately thereafter merged with and into BANA, with BANA as the surviving entity.[47] In April 2009, the Servicing L.P. was renamed as Bank of America Home Loans Servicing, L.P. (***BAHLS***)[48] and subsequently, in July 2011 BAHLS merged into BANA.[49]

5. Process of Approving the Asset-Stripping Transactions

Q000001633, Amendment to Demand Note, March 6, 2009 (amendment to demand note lowering amount to $1.8 billion); BACMBIA-R0000006150, BAC Demand Note Roll Forward (showing in Column D the demand note relating to the Asset Purchase Agreement adjusted upward by approximately $623 million after an initial draw on the note of $1 billion); BACMBIA-L0000002069, CHL Monthly Balance Sheets October 2008 through July 2009, at worksheet "043100-CHL", Row 24 (131800 Commercial Intercompany) (shows the Asset Purchase Agreement demand note starting with a balance of $3.049 billion in Column K, an upward adjustment of $624 million, and a cash draw of $1 billion in Column P).

Pursuant to an amendment to the Stock Purchase Agreement dated March 6, 2009, the purchase price was increased from approximately $3.5 billion to approximately $3.6 billion. Pl.'s Ex. 3553, BACMBIA-C0000168242, Amendment to Demand Note, March 6, 2009 (increasing demand note amount to approximately $3.6 billion). However, contrary to this amendment, CFC's accounting for the Stock Purchase Agreement reflects a purchase price adjustment downward to approximately $1.8 billion. In addition, an amendment to the Stock Purchase Agreement appears to reduce the demand note to $1.8 billion. *See* BACMBIA-C0000168498, Supplemental Amended Stock Purchase Agreement, March 6, 2009; BACMBIA-R0000006150, BAC Demand Note Roll Forward, March 6, 2009, at Rows C:43-C:47 (showing in Column C "outstanding principle" on the Stock Purchase Agreement demand note as of 12/31/08 of $3.464 billion and "marks and other adj" of negative $1.697 billion, resulting in a balance of $1.766 billion); BACMBIA-Q0000001633, Amendment to Demand Note.

[47] BAC Quarterly Report (Form 10-Q), at 7 (for period ending Mar. 31, 2009).

[48] Ofcharsky Dep. 628:6-629:1.

[49] Pl.'s Ex. 3577, BAC Quarterly Report (Form 10-Q) at 174 (for period ending June 30, 2011) ("BAC Home Loans Servicing, LP . . . was . . . merged with and into BANA in July 2011"). What was formerly known as Countrywide Home Loans Servicing LP is now known as BAHLS since "on the date that the savings bank merged into Bank of America National Association, Countrywide Home Loans Servicing, LP, changed its name to BAC Home Loan Servicing LP." Ofcharsky Dep. 73:17-20.

The Asset-Stripping Transactions were approved pursuant to a cursory process, with BAC-insider directors appointed after the Red Oak Merger to essentially rubber-stamp the transactions without due diligence or discussion. Since the Red Oak Merger, former directors of CFC, CHL and the Other Subs have been employees of BAC or its subsidiaries. All of the directors of CFC and Countrywide Bank who approved the November Transactions were long standing employees of BAC.[50] With respect to CFC, at the time of the November Transactions, these consisted of Helga Houston, Greg Hobby, and Helen Eggers, all of whom were BAC employees prior to July 1, 2008.[51] With respect to Countrywide Bank, as of September 2008, these consisted of Ken Lewis, Bruce Hammonds, Keith Banks, Liam McGee, Amy Brinkley, Brian Moynihan, Barbara Desoer, and Joe Price.[52] Many of the same directors of Countrywide Bank were simultaneously sitting on BANA's board of directors.[53] With respect to CHL, at the time of the November Transactions, these consisted of Jack W. Schakett and Kevin W. Bartlett, both of whom were former Countrywide employees who had been retained as BAC employees after the Red Oak Merger.[54]

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[50] Pl.'s Ex. 3555, BACMBIA-C0000168521 (CFC unanimous consent, listing Board members).

[51] Hobby Dep. 10:11-12:22; Houston Dep. 13:9-17:16, April 23, 2012; Eggers Dep. 248:23-249:5, April 27, 2012.

[52] Pl.'s Ex. 3596, BACMBIA-L0000000400.

[53] Hearing Tr. (March 9, 2012), at 16, *MBIA v. Countrywide Home Loans, et al.,* Case No. 602825/08 (N.Y. Sup. 2008) (BAC's counsel identifying Ken Lewis, Amy Brinkley, Joe Price, Bruce Hammonds, and Barbara Desoer as BANA board members at the time of the Asset-Stripping Transactions).

[54] Robert Daines' Expert Report in support of Bank of New York Mellon Settlement, at 11 (June 7, 2012) (hearinafter ***Daines Report***) ("the Asset Purchase Agreement was approved by the Board of Directors of CHL via unanimous written consent dated October 14, 2008, and executed by Board members Jack Schakett and Kevin Bartlett, each of whom were legacy Countrywide senior executives."); Bartlett Dep. 123:17-124:3; 124:23-125:14, May 11, 2012; Schakett Dep. 30:2-7, July 13, 2011.

The November Transactions were not approved at a meeting of the board of directors of CFC or CHL. Rather, they were approved by written consents, in lieu of a meeting.[55] There are no minutes of a board meeting reflecting that the boards of those companies deliberated about the November Transactions. Instead, there are board resolutions prepared by BAC's employees attached to the consents that the CFC and CHL board members were asked to sign.[56]

There is nothing in the discovery produced in this action or in the public record that indicates that the CFC and CHL boards attempted to negotiate the terms of the November Transactions on behalf of CFC or CHL.[57] Rather, those boards approved the transactions as proposed by BAC and its representatives without any meaningful discussion or analysis.[58] The CFC and CHL boards did not obtain any third-party valuation opinion, or solvency opinion, for purposes of evaluating the fairness of the November Transactions and their impact on CFC, CHL and their creditors.[59] Moreover, the CFC and CHL boards did not review or consider the adequacy of representation and warranty and litigation reserves of CFC and CHL prior to approving the November Transactions.[60]

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[55] Bartlett Dep. 124:23-125:14; Pl.'s Ex. 3555, BACMBIA-C0000168521 (CFC unanimous consent, approving Stock Purchase Agreement); BACMBIA-C0000168260 (CHL unanimous consent, approving Asset Purchase Agreement).

[56] Pl.'s Ex. 3555, BACMBIA-C0000168521 (CFC unanimous consent, approving Stock Purchase Agreement); BACMBIA-C0000168260 (CHL unanimous consent, approving Asset Purchase Agreement).

[57] Hobby Dep. 224:25-225:15 ("I don't recall there being a negotiation as part of the—part of the transaction.").

[58] Bartlett Dep. 130:3-138:10; Houston Dep. 32:24-33:7 (Houston did not recall discussing the sale of CFC's assets to Bank of America with her fellow directors).

[59] Hobby Dep. 214:19-25, 220:24-221:9.

[60] Hobby Dep. 222:11-23; Houston Dep. 35: 21-38:18.

Based on my review of the documents and testimony provided in this action, there is no evidence that:

- the CFC and CHL boards obtained information sufficient for them to value the businesses of CFC and CHL as of the time of the Asset-Stripping Transactions;
- the CFC and CHL boards consulted independent advisors of any kind in connection with the Asset-Stripping Transactions;[61]
- the CFC and CHL boards were informed at the time of the Asset-Stripping Transactions about their duties and obligations as directors in considering those transactions;
- the CFC and CHL boards ever considered the possibility that the interests of CFC and CHL might diverge from those of BAC, or how such a divergence might be addressed, or what alternatives there might be to proceeding with the Asset-Stripping Transactions;
- the CFC and CHL boards ever attempted to identify the size of any potential synergies that might arise from combining the businesses of BAC and its other subsidiaries (such as BANA) with the businesses of CFC and CHL as they existed prior to the Asset-Stripping Transactions;
- the CFC and CHL boards obtained forecasts for the results of operations of CFC and CHL after the Asset-Stripping Transactions;
- the CFC or CHL boards developed any plans for the future operation of CFC and CHL after the Asset-Stripping Transactions or for how CFC and CHL would be able to generate revenues sufficient to pay those entities' liabilities in the ordinary course after the Asset-Stripping Transactions.

In contrast, there is sworn testimony consistent with the boards of CFC and CHL not understanding that those entities were distinct from BAC and were owed duties by them that were distinct from their obligations to BAC as employees of BAC.[62]

6. Impact of the Asset-Stripping Transactions on Countrywide

[61] Houston Dep. 49:8-12.

[62] *See* Houston Dep. 55:8-19 (Houston considered herself to be a Bank of America employee, as opposed to a Countrywide employee, during the time she served on CFC's Board) and 55:23-56:5 (Houston did not recall receiving any remuneration from Countrywide in exchange for her service on CFC's Board).

Following the Asset-Stripping Transactions, CFC and CHL ceased to own or operate a stand-alone business, and instead operated in a "wind down" mode, in which neither company attempts to generate new business or revenue.[63] Since the Asset-Stripping Transactions, those companies are, and have been, essentially in a form of business liquidation, "primarily dedicated to resolving representation and warranty claims."[64]

In the six quarters following the Asset-Stripping Transactions (4th quarter of 2008 through the 1st quarter of 2010), CFC had, on a consolidated basis: (i) income (loss) before taxes ranging from *negative* $458 million to *negative* $950 million per quarter; (ii)

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[63] Pl.'s Ex. 3688, BACMBIA-I0000065612, at 613 ("CHL has no ongoing operations and is in wind-down mode."); CWMBIA0018539193, at 198, CFC Consolidated Financial Information, June 30, 2011 ("Since the acquisition by BAC, CFC has been in the process of winding down its mortgage banking and other real estate finance-related business."); Daines Report at 11 ("CFC is in 'wind down'"); Pl.'s Ex. 3696, BACMBIA-H000007845 (pro forma balance sheet of CFC); BACMBIA-L0000003629, at 636, CHL Selected Financial Information, Dec. 31, 2010 ("Explanation #9—Accrued Expenses and Other Liabilities…The amounts primarily represent legal and other reserves. As part of CHL's wind-down activities, the reserves are periodically used for their intended purpose."); BACMBIA-I0000083788, CFC Consolidated Financial Statements, Sept. 30, 2010; Ofcharsky Dep. 156:22-25 (explaining that "there was an entity, CHL," but that before July 1, 2008, the "decision was they [CHL] weren't going to do any new mortgage lending, any more servicing.").

This conclusion is echoed by Bruce Bingham of Capstone Valuation Services, LLC, who prepared a report on behalf of Bank of New York Mellon, trustee for Countrywide-issued RMBS, attempting to value CFC in connection with BAC, BAHLS, CFC, and CHL's proposed $8.5 billion settlement of RMBS claims. Mr. Bingham concluded that, as of March 31, 2011, CFC had "negative earnings," "minimal operating revenues," "does not originate, securitize, or service real estate loans," "has no operations that by themselves are economically viable on a go-forward basis," and "has no intangible assets (including contractual rights, trademarks and trade names, technical knowhow, technology, patents, copyrights, assembled workforce, or customer lists) with any value." B. Bingham, Capstone Valuation Analysis, prepared for Bank of New York Mellon, pp. 7-8 (June 6, 2011) (hereinafter ***Capstone Report***).

[64] Daines Report at 11. One former Countrywide employee, who now works for Bank of America, testified that she was not "aware there was any more Countrywide. It's just strictly Bank of America." Tinsley Dep. 700:17-19, April 1, 2011 & June 30, 2011.

personnel expense of $30 million in the 1st quarter of 2010, in comparison to $230 million in the 3rd quarter of 2008; and (iii) net premises and equipment worth $19 million in the 1st quarter of 2010, in comparison to $1.26 billion in the 3rd quarter of 2008.[65] Since the first quarter of 2010 through the fourth quarter of 2011, CFC's consolidated mortgage banking income in the thirteen quarters since the Asset-Stripping Transactions (through December 31, 2011) represents, on average, a *negative* ████ million per quarter.[66] By contrast, BAC has reported that since the Asset-Stripping Transactions, its new combined mortgage business, known as Mortgage, Home Equity and Insurance Services (***MHEIS***),[67] has generated income from its mortgage banking operations alone of, on average ████ million per quarter through the 4th quarter of 2011,[68] even accounting for billions in expenses taken for liabilities paid on behalf of CFC and CHL.[69]

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[65] *See* Pl.'s Ex. 3357, BACMBIA-H0000009591, at 593, "Income Stmt Trend" and "Balance Sheet Trend." For the following seven quarters (2nd quarter of 2010 through 4th quarter of 2011) CFC had, on a consolidated basis, income (loss) before taxes averaging negative ████ billion per quarter.

[66] *Id.*; CWMBIA0018539241, CFC Selected Consolidated Financial Information, Dec. 31, 2011; CWMBIA0018539267, CFC Selected Consolidated Financial Information, Dec. 31, 2010.

[67] This business segment was called MHEIS until April 27, 2009, when "Bank of America's Home Equity and Insurance Services group and Countrywide's mortgage and insurance groups will combine under the name Home Loans and Insurance." BACMBIA-C0000078911. Then, from 2011 to the present MEHIS been called "Consumer Real Estate Services." At all times these business segment descriptions included mortgage origination and servicing operations and related revenues. For purposes of this report I use "MHEIS" to refer to this business segment irrespective of its name at a particular point in time.

[68] BAC Quarterly Report (Form 10-Q), at 3 (for period ending Mar. 31, 2009); BAC Quarterly Report (Form 10-Q), at 3 (for period ending June 30, 2009); BAC Quarterly Report (Form 10-Q), at 3 (for period ending Sept. 30, 2009); BAC Annual Report (Form 10-K), at 114 (for year ending Dec. 31, 2009); BAC Quarterly Report (Form 10-Q), at 3 (for period ending Mar. 31, 2010); BAC Quarterly Report (Form 10-Q) at 3 (for period ending June 30, 2010); BAC Quarterly Report (Form 10-Q), at 3 (for period ending Sept. 30, 2010); BAC Annual Report (Form 10-K), at 137 (for period ending Dec. 31, 2010) (herinafter *BAC 2010 Annual Report*); BAC Quarterly Report

In fact, BAC's MHEIS business segment has enjoyed increased mortgage origination activities, and concomitant revenues, as a result of its acquisition of CFC's mortgage business.[70] Prior to July 1, 2008, Barbara Desoer, the head of MHEIS, told BAC's board of directors that acquiring all of CFC's loan business and combining it into one BAC entity would give BAC "a leading market share position—roughly 25%" of all new home loan originations.[71] Indeed, in an interview with *American Banker* in October 2008, Ms. Desoer reported that "B of A's accomplishments since taking over Countrywide on July 1, include[d] making 250,000 loans to borrowers and booking $51 billion of business in the third quarter."[72] Brian Moynihan, BAC's current CEO, testified that after purchasing and integrating the Servicing LP, BAC "ended up with

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(Form 10-Q), at 119 (for period ending Mar. 31, 2011); BAC Quarterly Report (Form 10-Q), at 128 (for period ending June 30, 2011); BAC Quarterly Report (Form 10-Q), at 143 (for period ending Sept. 30, 2011); BAC Annual Report (Form 10-K), at 153 (for period ending Dec. 31, 2011).

[69] BAC experienced mortgage banking losses in the Fourth Quarter of 2010 and Second Quarter of 2011 due to substantial increases in representation and warranty provisions. BAC 2010 Annual Report, at 42; BAC Quarterly Report (Form 10-Q), at 13 (for period ending June 30, 2011). Excluding these two quarters, the average mortgage banking income since the Third Quarter of 2008 has been $1.7 billion per quarter.

[70] BAC 2008 Annual Report, at 18-19, 30 ("Total revenue increased . . .[including] higher mortgage banking income and insurance premiums due to the acquisition of Countrywide," and "[a]t July 1, 2008, after consideration of purchase accounting adjustments the Countrywide acquisition contributed $86.2 billion to total loans and leases, $17.4 billion to securities, $17.2 billion to MSRs and $63.0 billion to total deposits," and "[m]ortgage banking income grew $3.1 billion due primarily to the acquisition of Countrywide," more than triple BAC's previous year's mortgage banking income); BACMBIA-W000001913, Minutes of Special Meeting of Board of Directors, Jan. 10, 2008, at 1 ("…the transaction presents the corporation a one-time opportunity to acquire the leading US mortgage platform at a significantly discounted value, to offer broader mortgage capabilities to new and existing customers, and to enhance future profitability….The corporation would also acquire a leading mortgage technology platform.").

[71] Pl.'s Ex. 3586, BACMBIA-O0000002036, at 037.

[72] Pl.'s Ex. 3599, BACMBIA-A0000133311, at 313.

largest servicing platform in the country."[73] Indeed, BAC represented to federal regulators that the "complex integration" it had planned would "unlock the inherent value of the newly combined company."[74]

In the middle of November 2008—one week after the November Transactions—BAC noted that it expected "to originate nearly $270 billion [in new home loans] for full year 2008, *with over $200 billion driven by our legacy CFC distribution channels*."[75] In 2009, BAC expected "Countrywide to contribute $9.5 billion to [BAC's] revenue line."[76]

In effect, through the Asset-Stripping Transactions, BAC transferred to itself CFC's mortgage business and converted CFC and its remaining subsidiaries into litigation management entities.[77] Moreover, BAC has used the businesses and operations formerly owned by CFC and CHL to expand BAC's mortgage origination and related revenues. BAC has significantly expanded its home loans business as a result of acquiring the assets, customers, and operations of CFC and CHL, including most notably Countrywide Bank.

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[73] Moynihan Dep. 75:23-24, May 2, 2012.

[74] Pl.'s Ex. 3598, BACMBIA-Q0000025196, at 209.

[75] Pl.'s Ex. 3600, BACMBIA-R0000042401, at 405 (emphasis added).

[76] BACMBIA-Q0000028100, at 192; *see also*, BACMBIA-O0000034381, at 418 ("We estimate that the legacy Countrywide organization contributed over $600 million in pre-tax, pre-merger expense earnings in Q1 2009.").

[77] Pl.'s Ex. 3688, BACMBIA-I0000065612 (CHL has "no ongoing operations and is in a wind-down mode" and "continues to mitigate its losses with various investors, bearing the related legal costs."); BACMBIA-L0000003629, CHL Selected Financial Information, Dec. 31, 2010, at 634 ("Currently, the activities at CHL are limited to managing its representations and warranties exposure and its owned inventory, serving as a master servicer for certain originated HELOC securitizations, marketing loans held for sale and addressing litigation concerns related to its mortgage activities that primarily occurred before 2008"); Capstone Report at 7 (as of March 31, 2011, "CFC lacked any operations except for managing its obligations under certain servicing agreements which remained at CFC and certain repurchase agreements for assets sold prior to the Acquisition").

BAC's public statements made at the time of the Red Oak Merger and the November Transactions further indicate its longstanding plan to integrate the mortgage operations of Countrywide with BAC. For example, in BAC's 8-K and Press Release dated July 1, 2008, BAC stated:

> Bank of America Corporation today completed its purchase of Countrywide Financial Corp. to create the nation's leading mortgage originator and servicer.
>
> Mortgages are one of the three main cornerstone consumer financial products along with deposits and credit cards, said Bank of America Chairman and Chief Executive Officer Kenneth D. Lewis. This purchase significantly increases Bank of America's market share in consumer real estate, and as our companies combine, we believe Bank of America will benefit from excellent systems and a broad distribution network that will offer more ways to meet our customers' credit needs.
>
> Now we begin to combine the two companies and prepare to introduce our new name and way of operating, said Barbara Desoer, president of the combined mortgage, home equity and insurance businesses. We have the opportunity to renew America's confidence in homeownership with unmatched capabilities to deliver the products homebuyers need and understand and give customers a simple process and service experience they've come to expect.
>
> The company reiterated its combined national consumer mortgage division will be based in Calabasas, Calif. The combined company will begin originating mortgage and home equity products under the Bank of America brand by mid-2009.[78]

Similarly, in an 8-K dated November 7, 2008, BAC stated:

> On November 7, 2008, in connection with the integration of Countrywide Financial Corporation ("Countrywide") with [BAC's] other businesses and operations, Countrywide and its subsidiary Countrywide Home Loans, Inc. ("CHL") transferred substantially all of their assets and operations to [BAC], and as part of the consideration for such transfer, [BAC] assumed debt securities and related

[78] BAC Current Report (Form 8-K) (filed July 1, 2008).

> guarantees of Countrywide in an aggregate amount of approximately $16.6 billion.[79]

Finally, in a Press Release dated April 27, 2009, BAC introduced the Bank of America Home Loans (***BAHL***) brand and explained that:

> The Bank of America Home Loans brand represents the combined operations of Bank of America's mortgage and home equity business and Countrywide Home Loans, which Bank of America acquired on July 1, 2008. The Countrywide brand has been retired.[80]

As Ms. Desoer explained, "[o]ur real concern was as of July 1st, 2008 being able to speak with one voice to all constituents."[81] BAC's CEO similarly explained that, "the objective was to present a common set of products and a common brand to our—to that combined set of customers. That was the objective."[82]

B. The Asset-Stripping Transactions Were Inconsistent with M&A Customs and Practices for Economically Comparable Transactions

As a matter of custom and practice, purchasers in the M&A context employ one of two general post-acquisition methods of managing a newly acquired target with its own stand-alone business: absorption and confederation.[83] The most common method is

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[79] BAC Current Report (Form 8-K) (filed Nov. 10, 2008).

[80] BAC, Press Release, April 27, 2009, *Bank of America Responds to Consumer Desire for Increased Transparency in Home Loan Process with Tools that Clarify Mortgage Terms and Foster Informed Homeownership, Company Launches Bank of America Home Loans Brand, Reinforces Responsible Lending Practices*. *See also* BACMBIA-C0000078911 ("On Customer Day One the new external brand—Bank of America Home Loans—will launch externally. To align with this new external brand, 'Home Loans & Insurance' will be the new internal name . . .").

[81] Desoer Dep. 36:06-09, May 15, 2012 & May 16, 2012.

[82] Lewis Dep. 21:15-18, April 19, 2012. *See also* BACMBIA-A0000071724, Bank of America/Countrywide Transition Execution Kick-Off, July 22-24, 2008, at 877 ("Integrate CFC and BAC into a single entity in the minds of our associates, shareholders, customers, and key influencers.").

[83] These methods are distinct from the legal methods used to effect M&A transactions (*e.g.*, stock purchase, merger, asset purchase, etc.), and refer to how the

"absorption"—to integrate the newly acquired target into the purchaser's existing business—customarily on a rapid basis.[84] The absorption method results in the purchaser integrating all of the newly acquired target's assets, business and operations with the purchaser's pre-acquisition business. The absorption method is the best way to achieve cost-savings and other synergies from combining the two firms' businesses. Of course, the absorption method customarily results in all the creditors of the acquired company (including contingent creditors) having a full claim on all of the assets of the combined businesses.

A second general method of post-acquisition management—less common for large "strategic" purchasers such as BAC but common for "private equity" owners and some conglomerates, and occasionally used as a differentiation strategy by some strategic purchasers—is to leave the newly acquired business (its assets and operations, personnel, and culture) largely intact, and to consolidate limited back-office or general administrative functions. In such a "confederation" strategy, the target not only remains intact, but also keeps its operating business. The confederation method has the benefit of preserving the culture and organizational capital of the target while permitting limited efficiencies to be realized through the consolidation of the back-office and administrative

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purchaser puts the target's assets and operations to economic use after the acquisition, through whatever legal method. In addition to the methods discussed in the text, some purchasers buy targets with a view to immediately or quickly selling off some of the target's business units.

[84] Indeed, it is common for M&A consultants to recommend that the purchaser plan to integrate the target within the first 100 days after the acquisition, so as to most quickly achieve synergies and cost-savings and dissipate uncertainties regarding strategy and control that may arise as a result of the deal. Timothy J. Galpin & Mark Herndon, *The Complete Guide to Mergers and Acquisitions* (2007), at e-book location 1178 ("Merger integration is like pulling off a bandage: it can be slow and painful, or it can be fast and painful—get it done quickly."); *see also* Michael F. Spratt & Mark L. Feldman, *Five Frogs on a Log* (1999).

functions. The confederation method allows a purchaser to keep contingent and other creditors confined to bringing claims against the same business and entity with which they did business prior to the acquisition, but by the same token the confederation method also leaves that business largely intact as a potential source for repayment.

BAC did not follow either of these customary methods following its acquisition of CFC, nor did it follow any other customary method of post-acquisition integration.[85] Rather than following a confederation strategy and leaving CFC largely intact, BAC carried out a near-complete integration of operating assets and employees consistent with an effort to extract CFC's value and achieve the kinds of cost savings and other synergies customarily associated with the absorption strategy.[86] It transferred to itself—within six months of its acquisition of control of CFC—the bulk of CFC's assets, employees,

[85] In fact, prior to the Red Oak Merger, BAC considered whether Countrywide Bank should be merged into BANA to create a single banking entity or left as a separate bank, and whether CHL should remain an active business and "engage in new business" or become inactive, and thus "NOT engage in new business" post-merger. BAC elected to pursue a "Single Entity" strategy for Countrywide Bank, whereby it "merges into BANA and as a whole is regulated by the OCC," and elected to make CHL "Inactive" whereby "CHL will NOT engage in new business (new mortgage origination, new servicing or other new products)." *See* Pl.'s Ex. 3103, BACMBIA-B0000007204, at 205.

[86] BACMBIA-W0000002083, at 087 ("…decisions to: headquarter the mortgage line of business in Calabasas, rebrand the combined mortgage line of business in early 2009, integrate Countrywide's deposit franchise into BAC's deposit model including a deposit pricing reset…and migrate the legacy Bank of America origination, fulfillment and servicing processes to Countrywide's platforms….Bank of America plans to retain most of Countrywide's insurance and mortgage servicing related businesses while exiting various capital markets businesses."); BACMBIA-C0000019449 (discussing scope of Project Groundhog as including the "legal entity sale of approximately 60 companies," the sale of $15 billion or 70% of the assets of CHL to BAC," and "Associates Moving to BANA and CHLSLP from CHL effective 11/1" including "about 9,000 Associates…"); BACMBIA-J0000001227, at 249 ("From an operational standpoint, we want to consolidate as much of the business operations of Countrywide and Bank of America mortgage as possible so Barbara's team can drive the operational efficiencies we desire."); BACMBIA-A0000055220 (regarding Capital Markets business, "[o]n Legal Day 1, a significant amount of Assets will be moved from Countrywide to Bank of America Corporation…the management of the combined corporation's securities assets will be managed on [BAC's] system…the target state [is] combination of the entities…").

offices and facilities, know-how and technology, networks and client relationships. At the same time, BAC did not follow an absorption strategy, because it left intact a set of shell entities whose main business purpose is to "manage" toxic assets and contingent liabilities.[87] This non-customary, hybrid method has no apparent purpose other than to extract the ongoing business generated by the assets owned by CFC without taking on all its contingent obligations, and without leaving behind sufficient assets for those obligations to be satisfied.[88]

C. The Asset-Stripping Transactions Had the Equivalent Economic Effects as a *De Jure* Merger

MBIA has asked me to evaluate whether the Asset-Stripping Transactions had equivalent economic effects on CFC, CHL and the Other Subs and their business operations as if they had been merged *de jure* into BAC and its subsidiaries. Based upon my review of documents and testimony provided in this case, I have concluded that the

[87] Briones Dep. 281:13-19, August 4, 2011 ("A. I didn't think Countrywide Financial still exists, outside of a shell corporation. Q. When you say it's a shell corporation, what do you mean by that? A. I believe it is still there to deal with all of this litigation."); Ofcharsky Dep. 297:3-20, 535:3-5 (Ofcharsky commented that "everything that stays" at "CHL, [CFC], maybe Balboa . . . fall[s] into one of three buckets: one, toxic (CFC and CHL), two, company in wind down, three, and potential sale (Balboa Re);" regarding the word "toxic" Ofcharsky explained that he was "[d]escribing there that what was left in CHL after the November transaction were loans that we couldn't get investor consents on," and "[w]ell, I said 'toxic,' but just meaning those were the ones that were the past due ones that I was aware that we couldn't move."); Daines Report at 11 (CFC is in 'wind down').

[88] Pl.'s Ex. 3204, BACMBIA-C0000036782, at 786 ("Certain subsidiaries of [CFC] that have ongoing business operations important for the integrated [BAC] lines of business will be sold to [BAC]," and "[s]ubstantially all of the assets of [CHL] will be sold to BAC," but "CFC, CHL and their subsidiaries will not transfer directly to BAC but will continue to exist and provide separation between the bank merger and what is left behind."); Hearing Tr. (Dec. 9, 2009), at 40, *MBIA v. Countrywide Home Loans, et al.,* Case No. 602825/08 (N.Y. Sup. 2008) (BAC's counsel explained, "Bank of America has already done a lot of work to try to structure these transactions to avoid exactly what they are talking about," namely, an obligation to pay for CFC and CHL's contingent liabilities.).

Asset-Stripping Transactions had the same economic effects on CFC, CHL and the Other Subs as if they had merged *de jure* into BAC and its subsidiaries.[89] For purposes of understanding the economic effects of the Asset-Stripping Transactions as compared to the effects of a *de jure* merger, the question is not precisely how much consideration CFC and CHL received in connection with these sales, because—even in a transaction structured as a *de jure* merger, the acquiring or surviving entity provides consideration. Rather, the economic effects is best understood from the structure and design of the transactions, and the impact such transactions had on the business operations of BAC, CFC, and CHL.

The Asset-Stripping Transactions are not consistent with efforts to continue the operation of two separate businesses. What BAC accomplished through the Asset-Stripping Transactions—the integration of all of CFC's lines of business into BAC's lines of business[90]—could have been accomplished thru a *de jure* merger. However, in that scenario, BAC would have formally assumed all of CFC's and CHL's legal liabilities. The Asset-Stripping Transactions, on the other hand, are consistent with an effort to achieve the same integration of operations and business that would typically be

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[89] BAC does not dispute that it has assumed liabilities associated with Countrywide Bank and the Servicing LP because "Countrywide Bank merged and the Servicing entity Countrywide Home Loans Servicing . . . with respect to those entities, if they have liability, the legacy Bank of America entities will certainly pay for those, because they're part of the legacy Bank of America." Hearing Tr. (March 9, 2012), at 20-21, *MBIA v. Countrywide Home Loans, et al.,* Case No. 602825/08 (N.Y. Sup. 2008); *see also* Hearing Tr. (October 5, 2011), at 7-8, *MBIA v. Countrywide Home Loans, et al.,* Case No. 602825/08 (N.Y. Sup. 2008) (BAC's counsel stated that with respect to Countrywide Bank and the Servicing LP, "there are no de facto merger successor liability issues with respect to those entities because those entities have *du jour* [sic] emerged [sic] into Bank of America, N.A. Bank.").

[90] *See* Kanaga Dep. 74:2–75:14, May 10, 2012 (BAC integrated each of the five Countrywide business segments—mortgage banking, banking, capital markets, insurance and global operations—into a "new environment, consolidated environment" at BAC).

accomplished through a *de jure* merger while also attempting to leave contingent liabilities behind in shell entities—in this case, CFC and CHL.

By virtue of the Asset-Stripping Transactions, the business operations of CFC and CHL were effectively merged into BAC, NB Holdings, and BANA, thus accomplishing what would traditionally be done through a *de jure* merger. Except, in this case, the business merger was accomplished by parsing through CFC and CHL's balance sheets, asset-by-asset,[91] to structure the transactions in a way that left toxic assets and contingent liabilities behind on CFC and CHL's balance sheets.[92] Regardless, the ultimate outcome is the same—the business operations of CFC and CHL were merged into BAC and its non-CFC subsidiaries.[93]

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[91] BACMBIA-C0000018825, at 826 (noting that the attached CHL balance sheet, at BACMBIA-C0000018826, is "being used to determine the assets and debt that are going to be part of the sale in November to BAC"); BACMBIA-H0000007334–BACMBIA-H0000007336 at 336, "CFC Proforma 10.31.08" and "CHL Proforma 10.31.08" (completed pro-forma balance sheets identifying, by account, the assets and liabilities that stay with CHL/CFC or go to BAC and its non-CFC subsidiaries and identifying accrued and representation and warranty liabilities as staying); Snelson Dep. 176:1-25, May 25, 2012 ("Q: Now, you said you were involved in the identification and definition of the assets and liabilities to be included and excluded? A: That's correct. Q: Can you explain to me what that process entailed? [Objection. A:] I was provided with a pro forma that showed that a certain roll-up level, roll-up meaning certain level of detail on a balance sheet of which assets were going to be sold, which liabilities were going to be assumed, and in order for me and my team to effect the transaction, we had to take that higher-level pro forma down to an account-level basis. And so we had to go account by account and determine, based upon the guidance we were given, whether the asset stayed or left, whether the liability stayed or left. It was an iterative process where we took a stab at it and then had many meetings going through line item by line item with attorneys and project managers and treasury counterparts to determine which individual account-level assets and liabilities were to move.").

[92] *Id.*; Pl.'s Ex. 3637, BACMBIA-P0000094840 (responding to Mary Kanaga's question regarding "everything that 'stays'," Ofcharsky responds, "these fall into one of three buckets: toxic (CFC and CHL); company in wind down and potential sale (Balboa Re).").

[93] BACMBIA-J0000001227, at 250 ("we intend to move the mortgage origination and servicing operations housed in [CHL] and CHL Servicing as well as the loans and other assets into BANA on the merger date or shortly thereafter"); BACMBIA-

1. The Ownership of CFC Did Not Change Which is Consistent With A' *De Jure* Merger

CFC and its subsidiaries would have had the same owners had CFC *de jure* merged into BAC rather than engaging in the Asset-Stripping Transactions. Before and after the Asset-Stripping Transactions, BAC and its shareholders, directly or indirectly owned 100% of each of the stock of NB Holdings, BANA, CFC, CHL, and the Other Subs.[94] In addition, BAC used its own stock to acquire CFC's stock in the Red Oak Merger.[95] As a result, the same shareholders that owned CFC and its subsidiaries prior to the Red Oak Merger continued as owners of those legal entities following the Red Oak Merger. CFC's shareholders became shareholders of BAC, and BAC's shareholders prior to the Red Oak Merger continued to own the bulk of the outstanding shares of BAC after the Red Oak Merger.

2. CFC and BAC's Business Operations Were Combined Which is Consistent With A *De Jure* Merger

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C0000021650, Mortgage Lending Charter Collapse Project Overview, Nov. 13, 2008, at 652 ("The primary objective of this project is to transition CFC mortgage origination and refinance to take place under the Bank of America, N.A. legal name, including: The update of the legal name and associated attributes of legal documents") and at 653 ("Sales and Fulfillment must have the capability to provide loan documentation and disclosures that appropriately display Bank of America, N.A. as the legal name."); BACMBIA-C0000003237, BAC Registration Statement (Form S-4), at 258 (filed Feb. 13, 2008) ("The success of the merger will depend, in part, on our ability to realize the anticipated benefits and cost savings from combining the businesses of Bank of America and Countrywide….we must successfully combine the businesses of Bank of America and Countrywide."); BACMBIA-B0000006468 ("Eliminate [CSC's] primary dealer designation….consolidate the BAC/CFC business to business relocation lending operations."); BACMBIA-A0000061344 ("Combine BAC and CFC product organizations into a single business unit."); Eckerle Dep. 19:5-21:6 (describing the combining of CFC and BAC's systems and processes).

[94] *See* CFC Current Report at 2, 5 (July 8, 2008) (describing stock-for-stock merger of CFC and its subsidiaries into Red Oak Merger Corporation, a wholly-owned subsidiary of BAC, and noting NB Holdings and BANA are wholly-owned subsidiaries of BAC).

[95] *Id.*

Prior to the Red Oak Merger, BAC stated, "[W]e intend to move the mortgage origination and servicing operations housed in Countrywide Home Loans and CHL Servicing as well as the loans and other assets into BANA on the merger date or shortly thereafter."[96] This plan was carried out through the Asset-Stripping Transactions.

The July Transactions occurred immediately following the Red Oak Merger. In the July Transactions, BAC caused CFC and CHL to sell pools of mortgage loans, novate a book of derivatives to BANA, sell securities held by CSC, and sell the Servicing LP to NB Holdings.[97] Following these transactions, it appears BAC caused CHL to use $7.3 billion of the cash proceeds from the July Transactions to make a loan to its parent, CFC.[98] CFC in turn used the proceeds from that loan to infuse $5.5 billion in capital to Countrywide Bank and to loan CSC $1.7 billion to repay certain Federal borrowings.[99]

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[96] BACMBIA-J0000001227, at 250; Pl.'s Ex. 3103, BACMBIA-B0000007205 (recommending that CHL become "Inactive" such that "CHL will NOT engage in new business (new mortgage origination, new servicing or other new products"); BACMBIA-C0000021650, Mortgage Lending Charter Collapse Project Overview, Nov. 13, 2008, at 652 ("The primary objective of this project is to transition CFC mortgage origination and refinance to take place under the Bank of America, N.A. legal name, including: The update of the legal name and associated attributes of legal documents") and at 653 ("Sales and Fulfillment must have the capability to provide loan documentation and disclosures that appropriately display Bank of America, N.A. as the legal name."); BACMBIA-C0000003237, BAC Registration Statement (Form S-4), at 258 (filed Feb. 13, 2008) ("The success of the merger will depend, in part, on our ability to realize the anticipated benefits and cost savings from combining the businesses of Bank of America and Countrywide….we must successfully combine the businesses of Bank of America and Countrywide."); BACMBIA-B0000006468 ("Eliminate [CSC's] primary dealer designation….consolidate the BAC/CFC business to business relocation lending operations."); BACMBIA-A0000061344 ("Combine BAC and CFC product organizations into a single business unit."); Eckerle Dep. 167:12-19, 239:11-18, 276:9-24.

[97] BACMBIA-C0000018289, Countrywide Funding Strategy: Review of Legal Day 1-3 Activities, at 301 ("The loans sold by CHL constituted substantially all of the residential mortgage loans owned by CHL including loans previously pledged pursuant to secured financing arrangements."); CFC Current Report, at 2 (July 8, 2008).

[98] Pl.'s Ex. 3693, BACMBIA-A0000064323, Funding Plan Cash Flow Summary at "Transaction summary" worksheet; BACMBIA-A0000065553 ("We do have an

Later, in connection with the November Transactions, BAC caused CFC and CHL to transfer Countrywide Bank and all operational assets relating to the Mortgage Business to BAC and its subsidiaries.[100] Balboa was also sold to BAC as part of the November Transactions. CSC was deregistered as a securities dealer and all of CSC's operations were either "dissolved" or absorbed into BAC's parallel business operations.[101] As of the November Transactions, all CHL employees became BAC employees.[102]

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intercompany note agreement for CHL to loan proceeds from the sale of Servicing LP to CFC for its use to pay off its interco loans and repo with CW Bank."); BACMBIA-C0000018289, Countrywide Funding Strategy: Review of Legal Day 1-3 Activities, at 301 (summary of transactions and cash flows).

[99] *Id.*

[100] BACMBIA-C0000168172, Asset Purchase Agreement, Schedule 2.2; BACMBIA-C0000168443, Stock Purchase Agreement, Schedule 2.3(b); BACMBIA-C0000025169, Charter Collapse–Project Timeline (noting that BAC will purchase from CHL "all of its assets" and "certain subsidiaries of CFC, other than entities that are specifically excluded"); Pl.'s Ex. 3204, BACMBIA-C0000036782, Charter Collapse Update Project Groundhog Countrywide Transition Finance, December 9, 2008, at 786 ("Certain subsidiaries of [CFC] that have ongoing business operations important for the integrated [BAC] lines of business will be sold to [BAC]" and "[s]ubstantially all of the assets of [CHL] will be sold to BAC."); BACMBIA-C0000019449 (discussing scope of Project Groundhog as including the "legal entity sale of approximately 60 companies" and the "sale of $15 billion or 70% of the assets of CHL to BAC"); Pl.'s Ex. 3203, BACMBIA-C0000019538 ("Certain material subsidiaries of [CFC] and substantially all of the assets (certain loans, mortgage servicing rights, technology, real property and other assets) of [CHL], that have ongoing business operations that are important for the integrated [BAC] lines of business will be sold to [BAC]."); BACMBIA-O0000006921, at 924 ("Merge/eliminate Countrywide entities from a legal and finance perspective across the Corporate Financial Organization, Insurance, Mortgage Lending, Mortgage Servicing, and National Monitoring Services…").

[101] Prior to July 1, 2008, BAC planned to merge CFC's entire capital markets business, including CSC, into BAC. *See* Pl.'s Ex. 2787, BACMBIA-A0000061369 ("Merged Business: CFC business wholly absorbed into parallel existing BAC business"). Likewise, the plan was to "sunset" CFC's securities business "into BAC only temporarily to be shut down or divested." *Id. See also* Moynihan Dep. 70:12-71:07 ("Countrywide Securities, they had a small business[,] . . . most of it got shut down ultimately. We already had a business engaged in that, we just shut it down").

[102] Pl.'s Ex. 3204, BACMBIA-C0000036782, Charter Collapse Update Project Groundhog Countrywide Transition Finance, December 9, 2008, at 786 ("As a result of the restructuring, employees of CHL became associates of [BANA] or Servicing LP.");

Following the Asset-Stripping Transactions, CFC and CHL ceased their mortgage origination, servicing, capital markets, banking, and insurance businesses.[103] Presently, CFC and CHL do not originate or service home loans, market services, sell products or insurance, securitize mortgage loans, open new bank accounts, issue new credit cards, accept deposits, or acquire new customers. CFC no longer owns Countrywide Bank, the Servicing LP, or any insurance subsidiaries.[104] Instead, CFC's and CHL's main ongoing operations are dedicated to "managing" contingent liability claims.[105] All new loan originations take place under the newly combined business at MHEIS under the BAHL

Pl.'s Ex. 3348, BACMBIA-C0000034686 ("Occurred November 7, 2008. All employees of CHL & CFC (other than specifically identified employees) were transferred to become employees of Bank of America, N.A. (BANA)"); BACMBIA-C0000020953 ("Associates of CHL and CFC moved November 1, 2008, including severance pool.").

[103] BACMBIA-A0000136637 ("CHL will continue to exist, but it will no longer be an operating company actively engaged in the business of servicing mortgage loans."); Pl.'s Ex. 2787, BACMBIA-A0000061344, at 370 (Capital Markets Target Environment Executive Summary) ("Sunset Businesses: CFC businesses will transition into BAC only temporarily to be shut down or divested"—(i) "Exit purchase and securitization of 3rd party distressed loans (CAMCo);" (ii) "Exit CSE (Countrywide Servicing Exchange) MSR (Mortgage Servicing Rights) brokerage and valuation business" (iii) "Exit CAI (Countrywide Alternative Investments) 3rd party asset management business but retain valuation tools for internal use" (iv) "Exit CPAS (Countrywide Portfolio Accounting Services) business" (v) "Exit the CFC Commercial Real Estate Finance small loan origination business" (vi) "Exit Futures Introducing Broker business" (vii) "End the designation of CFC primary broker dealer,").

[104] Williams Dep. 55:13-23, Feb. 2, 2012; BACMBIA-C0000069419, Plan and Agreement of Merger of Countrywide Bank, FSB With and Into Bank of America, National Association; BACMBIA-O0000007596, Asset Indemnification Agreement.

[105] Capstone Report at 7 ("CFC lacked any operations except for managing its obligations under certain servicing agreements which remained at CFC and certain repurchase agreements for assets sold prior to the Acquisition."); BACMBIA-V0000028456, at 461 "Explanation 1" ("Currently, the activities at CHL are limited to managing its representations and warranties exposure and its owned inventory, serving as a master servicer for certain originated HELOC securitizations, marketing loans held for sale and addressing litigation concerns related to its mortgage activities that primarily occurred before 2008."). *See also*, Briones Dep. 281:13-19 ("A. I didn't think Countrywide Financial still exists, outside of a shell corporation. Q. When you say it's a shell corporation, what do you mean by that? A. I believe it is still there to deal with all of this litigation.").

brand.[106] Ms. Desoer testified that she ran the new BAHL business "regardless of which part of the business came from legacy Countrywide and which part came from legacy Bank Of America."[107]

In addition, following the Asset-Stripping Transactions, BAC caused CFC and CHL to eliminate funding sources that were essential to CHL's Mortgage Banking business.[108] Specifically, the proceeds from the July Transactions were immediately applied to pay off CHL's $11.5 billion unsecured lines of credit which were a critical funding source for the mortgage business prior to the Red Oak Merger. The proceeds were also used to infuse $5.5 billion in capital into Countrywide Bank, another critical source of funding that was subsequently transferred to BAC with the November Transactions. The elimination of CFC's and CHL's funding sources and the sale of Countrywide Bank are not consistent with an effort to continue originating and funding mortgage loans at CFC or CHL, which is the primary goal of a mortgage origination business.

Given their current configuration and assets, and BAC's decision to move all of CFC's and CHL's operating assets into BAC's MHEIS, CFC and CHL cannot generate revenues, much less earnings. What changed over time for CFC and CHL is that their recognition of liabilities increased.[109] In effect, these "left behind" entities have risks and

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[106] Barbara Desoer testified that "the combined business include[s] both the origination functions of the legacy Countrywide entities as well as the origination functions of the Bank Of America operations." Desoer Dep.14:25-15:07. *See also* BACMBIA-O0000071419, at 426-428 (describing impact of Customer Day One, customer/deposits conversion, and mortgage origination, servicing, and insurance integration); BACMBIA-A0000047771; Eckerle Dep. 278: 7-15.

[107] Desoer Dep. 240:05-10.

[108] CFC 2007 Annual Report at 16-17.

[109] *See infra* Part V.E.

liabilities, and a fixed claim on BAC represented by the intercompany notes, but no ability to produce revenues or any meaningful assets beyond those notes.

3. The Combined Business Operations Continued In the Same Offices, With the Same Employees, Using the Same Operational Assets and Technology Which is Consistent With A *De Jure* Merger Scenario

Meanwhile, BAC continues to operate the businesses that it transferred through the Asset-Stripping Transactions, and the revenues associated with those operations inure to the benefit of BAC, not CFC or CHL. In public statements BAC boasted that, "the Countrywide acquisition contributed $86.2 billion to total loans and leases, $17.4 billion to securities, $17.2 billion to MSRs and $63.0 billion to total deposits….Mortgage banking income grew $3.1 billion due primarily to the acquisition of Countrywide."[110] In addition, BANA increased its deposits by $52 billion[111] as a result of the transfer of and subsequent merger with Countrywide Bank, and allowed BAC to expand with a new branch in Colorado.[112] BAC's CEO, Brian Moynihan, testified that BAC "ultimately put the operations of the two companies together."[113]

[110] BAC 2008 Annual Report, at 19, 30.

[111] Pl.'s Ex. 3696, BACMBIA-H0000007845, Pro Forma Balance Sheet for November Transactions at "CFC Consolidated" worksheet, BQ:95; BACMBIA-A0000071724, Bank of America/Countrywide Transition Execution Kick-Off, July 22-24, 2008, at 879 ("Convert 800 K Countrywide Deposit accounts and corresponding customers to BAC sales, servicing and accounting platforms, incl. Small Business Customers.").

[112] BACMBIA-P0000098808 ("Ability to maintain Colorado branch of Countrywide Bank, FSB"); BACMBIA-Q0000000859, OCC Conditional Approval #900, April 23, 2009, at 2 (noting that BAC intends to retain Countrywide's main office in Colorado as a branch).

[113] Moynihan Dep. 64:11-12; *see also* Lewis Dep. 28:17-23 ("Q: You intended to take advantage of the best capabilities in each platform—A: Correct. Q: -- and put it together -- A Correct. Q -- for the new business? A: Correct.").

Before and after the November Transactions, the directors and officers of each of CFC, CHL and the Other Subs reported to and were directed by management of BAC. In fact, all of the former CFC directors were replaced by veteran BAC employees after the Red Oak Merger. Similarly, BAC and its non-CFC subsidiaries have hired 20,000 CFC employees, leaving behind a reported 270 to manage CFC's "wind down."[114] Among the former CFC employees are Christopher Dumont, who has ongoing management responsibilities for parts of the MHEIS business segment, and Michael Schloessmann who handles repurchase demands made to both CHL and BAC.[115] Indeed, today BAC employs numerous former Countrywide employees. For instance, BAC currently employs Scott Berry, an individual who worked for CHL until July 1, 2008, when he became an employee of BAC.[116] As a BAC employee, Mr. Berry assisted BAC with its efforts to "migrate" all BAC loans onto the Countrywide servicing platform."[117] Other examples of former Countrywide employees who held (or continue to hold) significant

[114] CWMBIA0018539193, at 198 ("Since the acquisition by BAC, CFC has been in the process of winding down its mortgage banking and other real estate finance-related business."); BAC's First Supplemental Responses and Objections to Plaintiff's Interrogatories (May 2, 2012), Supplemental Response to Interrogatory No. 13, at 27-28 ("On July 1, 2008, CFC together with its subsidiaries had 42,815 employees. As of November 1, 2011 approximately 19,300 former Countrywide employees have at some time since July 1, 2008, worked for a non-Countrywide BofA subsidiary. As of November 1, 2011, approximately 270 employees continue to work for CFC subsidiaries."); *see also*, Coulter Dep. 89:06-09, April 30, 2011 ("Q. Was there anybody still working for Countrywide only after legal—after July 1st, 2008? A. I don't know the legal construct but my—in my opinion, no."); BACMBIA-V0000028456, at 461 "Explanation 1" ("Currently, the activities at CHL are limited to managing its representations and warranties exposure and its owned inventory, serving as a master servicer for certain originated HELOC securitizations, marketing loans held for sale and addressing litigation concerns related to its mortgage activities that primarily occurred before 2008.").

[115] Desoer Dep. 90:20-91:04.

[116] Berry Dep. 4:18-21, July 21, 2011 & Sept. 9, 2011.

[117] Berry Dep. 62:11-20.

positions in the combined company under BAC include Kevin Bartlett,[118] Jack Schakett; [119] Andrew Gissinger,[120] Irene Briones,[121] Debbie Brown,[122] Celia Coulter,[123] Michael J. Gross,[124] Jens Christian Ingerslev,[125] Pauline Munro-Kennedy,[126] Iain Stobie,[127] Kathryn Tinsley[128]—and several others.[129] It is unclear how many, if any, of CFC and CHL's current employees are Countrywide employees versus just BAC employees "on loan" to CFC and CHL.[130]

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[118] Prior to the Red Oak Merger, Mr. Bartlett worked as Countrywide's Chief Investment Officer. Bartlett Dep. 36:14-16. Following the Red Oak Merger, he worked in Secondary Marketing at BAC. *See id.* 40:02-20.

[119] Schakett Dep. 29:08-07.

[120] Gissinger Dep. 21:16-22:21, May 12, 2011.

[121] Briones Dep. 282:25-283:03 ("A. BAC acquired CFC and so myself, I'm a BAC employee now as of the day of the merger.").

[122] Brown Dep. 34:16-35:10, Feb. 11, 2011 & Mar. 26, 2011.

[123] Coulter Dep. 26:19-27:04.

[124] Gross Dep. 25:25-26:12, April 27, 2011.

[125] Ingerslev Dep. 24:13-18, Mar. 2, 2011 & May 20, 2011.

[126] Munro-Kennedy Dep. 89:12-25, May 5, 2011.

[127] Stobie Dep. 46:07-15, Aug. 5, 2011.

[128] Tinsley Dep. 700:08-13.

[129] Pl.'s Ex. 3590, BACMBIA-A0000064103; Desoer Dep. at 280:18-286:04. *See also* BAC's First Supplemental Response to Interrogatory No. 13 (identifying Christopher DuMont, Mary Eyre, Tim Forest, Sili Jacobson, Devra Lindgren, William McManus, Steve Smith, Joshua Adler, Frank Aguilera, David John Anderson, Monica Brudenell, Irene Briones, Michelle Cousar, Todd Dal Porto, Xiaoyun (Sharon) Deprano, Mike Drawdy, Mark Elbaum, Charles Emley, Mark Fisher, Maria Garcia, Larry Hoan, Christian Ingerslev, Douglas Jones, Vijay Lala, Trevor Lung, David Mentesana, Joseph Miller, Sandra Miller, Pauline Munro-Kennedy, Deanne Radonic, Gene Soda, Kathy Tinsley, Mitchell Turley as former Countrywide employees who are now BAC employees).

[130] Although BAC's counsel has represented that some unspecified number of employees were "on loan" to CHL, the Management Services Agreement between BANA and CFC does not offer any additional details regarding this arrangement, nor have I been able to identify any Service Level Agreements covering such an arrangement. *See* Hearing Tr. (April 5, 2011), at 44-45, *MBIA v. Countrywide Home Loans, et al.,* Case

BAC has continued the operations and businesses of CFC, CHL and the Other Subs through physical offices and locations formerly owned by CFC, CHL and the Other Subs. For example, BAHL, which represents the combined mortgage operations of BAC and CHL under the MHEIS business segment, operates out of CFC and CHL's former headquarters in Calabasas, California.[131] Barbara Desoer, President of the combined mortgage business effective July 1, 2008, testified that BAC's decision to place BAHL's headquarters in Calabasas was motivated by a desire to "[r]etain[] talent and subject matter expertise" from the legacy Countrywide business.[132]

When customers ask about loans, deposit accounts, or other accounts formerly originated or owned or managed by CFC, CHL and the Other Subs, they are now directed to BAC personnel.[133] Similarly, when customers go to CFC's former website, they are

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No. 602825/08 (N.Y. Sup. 2008) (BAC counsel represented that "Bank of America Corp. loaned lawyers and laypersons to Countrywide to work in the Workout Strategy [repurchase group] and they were operating functionally as Countrywide employees." BAC's counsel also stated that these BAC employees are loaned "pursuant to intercompany transactions. There is a service agreement."); BACMBIA-C0000168334, Management Services Agreement dated Nov. 1, 2008, generally and at 338 ("Service Level Agreements"). Former CFC employees who are now employed by BAC are not aware of any separate agreement that covers the services they provide to CFC or CHL. *See, e.g.,* Briones Dep. 283:03-10.

[131] BAC Current Report (July 1, 2008). Ms. Desoer testified that not only was her office based in Calabasas, but her "business was based there, yes." Desoer Dep. 177:02-08. *See also* Eckerle Dep. 277: 22-278:6 (testifying that the combined mortgage organization was located in Calabasas, California at Countrywide's prior location).

[132] Desoer Dep. 271:24-272:25.

[133] *See* BACMBIA-C0000103746 (template letter to former Countrywide customers, dated July 27, 2009, informing them "your former Countrywide Bank personal deposit accounts will move to the Bank of America system" and instructing the Countrywide customers that "if [they've] set up any external transfers using Countrywide Bank Online…please follow instructions below to reschedule them through Online Banking at Bank of America"); BACMBIA-E0000028667 (November 2009 email attaching list of Countrywide sites that were re-branded as Bank of America sites); BACMBIA-P0000006441 (Bank of America personnel discussing taking Countrywide websites offline in September of 2008). If one types "Countrywide" into the Google

automatically redirected to BAHL's website.[134] BAC draws no distinction between BAC and Countrywide from (i) a business perspective,[135] (ii) a customer service perspective,[136] (iii) a borrower perspective, or (iv) or vendor perspectives.[137]

BAC continues to operate a home loan origination business substantially similar to the one operated by CFC and its subsidiaries before the November Transactions. For example, virtually all of the reporting systems that MHEIS now uses were originally Countrywide technologies.[138] Thus, although BAC planned to change several key aspects of Countrywide's former loan origination and underwriting practices to ensure that the newly combined company operated in line with BAC's risk standards and business values,[139] BAC essentially combined Countrywide's mortgage loan business with BAC's operations to form BAHL, the public brand name for MHEIS.

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search engine, the first two items returned (as of June 5, 2012) are related to Bank of America: the Wikipedia entry for Bank of America Home Loans, and Bank of America's primary website, www.bankofamerica.com. Old Countrywide customer service numbers have been disconnected.

[134] *See* www.countrywide.com or customer.countrywide.com which automatically redirect to www.bankofamerica.com.

[135] Kanaga Dep. 23:14–24:7.

[136] Kanaga Dep. 26:2–17.

[137] Kanaga Dep. 26:13–27:2.

[138] Stobie Dep. 102:14-103:10.

[139] *See, e.g.,* Pl.'s Ex. 3190, BACMBIA-A000016736 ("there will be much tighter credit underwriting once [Countrywide is] owned by BAC."). *See also* Desoer Dep. 47:2-48:4 (discussion regarding changes to Countrywide underwriting standards and elimination of some Countrywide products); BACMBIA-A0000098902, at 905; Pl.'s Ex. 3597, BACMBIA-A0000098902, at 904 ("Finally, you know that Bank of America has already made many changes at Countrywide: Countrywide no longer offers subprime mortgage loans. Countrywide no longer offers nontraditional forward mortgages that may result in negative amortization. Countrywide has significantly curtailed offering other nontraditional mortgages, such as 'low documentation' loans.").

In addition, in July 2011, BAC announced that MHEIS's operations relating to the servicing of so-called "legacy" assets would be split from BAHL into a group called "Legacy Asset Servicing".[140] This new group became responsible for handling home loan default servicing, managing the "legacy" portfolio of loans, and handling resolution of representation and warranty disputes with Government Sponsored Entities (***GSEs***), private investors, and monolines such as MBIA.[141] According to BAC's CEO, Brian Moynihan, the "legacy" portfolio consists of discontinued and certain vintages of loans originated by both CHL and BAC between 2004 and 2007.[142] BAHL, on the other hand, continues the traditional mortgage and servicing operations in which CFC and CHL were once engaged—namely mortgage origination, home loans servicing, mortgage operations (*e.g.,* closing services), and insurance services.[143] Both of these divisions continue to be housed at BAC under its MHEIS business.[144]

4. BAC Assumed the Essential Obligations Necessary To Operate The Business Which Is Consistent With A *De Jure* Merger

In connection with the Asset-Stripping Transactions and BAC's integration of CFC's lines of business into BAC's lines of business, BAC assumed numerous obligations that are necessary to the ongoing operation of the mortgage, banking, servicing and insurance businesses.

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[140] MBIA00975839, BAC Presentation "Legacy Asset Servicing" presented at July 2011 BAC Investor Conference, at 3.

[141] *Id.*

[142] Moynihan Dep. 153:4-20, 188:25-189:6.

[143] MBIA00975839, at 841.

[144] *See generally* Pl.'s Ex. 3370, BAC Public Presentation, Addressing Legacy Mortgage Issues, June 29, 2011 (discusses resolution of "legacy" issues within the Consumer Real Estate Services (formerly MHEIS) business).

For example, BAC assumed obligations on leases and third party vendor contracts.[145] Building leases are critical to the ongoing operations of these businesses because associates working in these lines of business need physical office space from which to work. Likewise, third party vendors would include necessary services such as security, janitorial services, and courier services, which are necessary to the day-to-day functioning of these lines of business. BAC also transferred CFC's federal lending identification numbers, which are necessary to CFC's business because a mortgage lender cannot originate federal housing mortgages without these identification numbers.[146] BANA, a direct or indirect wholly owned subsidiary of BAC also assumed all of the deposit liabilities and customers of Countrywide Bank.[147]

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[145] *See* BACMBIA-A0000061344, BAC/Countrywide Transition, Tollgate 2—Target Environment, May 15, 2008, at 381 ("Opportunity to renegotiate vendor contracts (*e.g.*, security installation/maintenance, contract security services, audit services)."); BACMBIA-A0000109012, at "CC Milestones" Worksheet ("Coordinate with Legal to revisit, and modify as necessary, the population of CFC contracts that were considered business critical for LD1 contract review effort" and "Finalize an action plan for each business critical contract that requires consents or will challenge the charter collapse process."); BACMBIA-C0000020953 ("All owned facilities and leases moved.").

[146] *See generally* BACMBIA-C0000021650, Mortgage Lending Charter Collapse Project Overview, Nov. 13, 2008, at 652 ("The primary objective of this project is to transition CFC mortgage origination and refinance to take place under the Bank of America, N.A. legal name, including: [1.] The update of the legal name and associated attributes of legal documents [2.] The transition of Government Agency registrations (FHA, VA, Rural Housing) [3.] The management of loan origination and refinance pipelines.") and at p. 4 ("Sales and Fulfillment must have the capability to provide loan documentation that includes new FHA Lender IDs issued under Bank of America for origination and refinancing," and same for VA and Rural Housing Lender IDs); BACMBIA-C0000024840, Bank of America Integration of Countrywide Bank VA Lending, Nov. 11, 2008, at 842 ("Legacy Countrywide employees will begin originating loans under Bank of America's name and VA Lender ID" as of Customer Day One.); BACMBIA-A0000130602, CFC Government Lending IDs Transition, at 603 ("Transition from CFC lender IDs to BANA lender IDs").

[147] Pl.'s Ex. 3696, BACMBIA-H0000007845, Pro Forma Balance Sheet for November Transactions at "CFC Consolidated" worksheet, BQ:95; BACMBIA-A0000071724, Bank of America/Countrywide Transition Execution Kick-Off, July 22-24, 2008, at 879 ("Convert 800 K Countrywide Deposit accounts and corresponding

The business liabilities BAC assumed also included *all* "liabilities with respect to the ownership and operation of Purchased Assets" but "only to the extent arising … *after* the Closing," *i.e.*, after the date of the November Transactions. The "Purchased Assets" included:

1. *all* technology used in CHL's mortgage operations,
2. *all* furniture, fixtures and equipment (*FF&E*) (other than *de minimus* FF&E retained by CHL for its wind-down),
3. *all* of its contract rights with third parties,
4. *all* of its real property used in CFC's mortgage business,
5. *all* of its real property acquired through foreclosure,
6. *all* of CHL's mortgage servicing rights,
7. *all* of its mortgage servicing advance receivables, and
8. *any other asset* used in CHL's mortgage business.[148]

BAC also ultimately took on liabilities for the wages and benefits of the approximately 19,300 former CFC employees who continue to work for BAC.[149]

In sum, BAC acquired all of the operating assets (as opposed to financial assets) of CFC, CHL and the Other Subs, and assumed all of their senior debt and operating liabilities, but other contingent liabilities, including representation and warranty and litigation liabilities arising prior to the November Transactions remained allocated to

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customers to BAC sales, servicing and accounting platforms, incl. Small Business Customers.").

[148] *See* BACMBIA-C0000168172, Asset Purchase Agreement, Section 2.2 and Schedule 2.2.

[149] *See* BAC's First Supplemental Responses and Objections to Plaintiff's Interrogatories (May 2, 2012), Supplemental Response to Interrogatory No. 13, at 27-28 ("As of November 1, 2011 approximately 19,300 former Countrywide employees have at some time since July 1, 2008, worked for a non-Countrywide BofA subsidiary. As of November 1, 2011, approximately 270 employees continue to work for CFC subsidiaries.").

CFC's and CHL's balance sheets. As explained in Part V.B above, the Asset-Stripping Transactions were not consistent with efforts to continue the operation of two separate businesses. Instead, what BAC accomplished through the Asset-Stripping Transactions – the integration of all of CFC's lines of business into BAC's lines of business – could have been accomplished through a *de jure* merger of BAC with CFC and CHL. By virtue of the Asset-Stripping Transactions, the operations of CFC and CHL were effectively merged into BAC and its non-CFC subsidiaries, accomplishing what would traditionally be done through a *de jure* merger except that the transactions were structured – at least as a formal matter – so as to leave toxic assets and contingent liabilities with CFC and CHL.

D. The Process By Which The Asset-Stripping Transactions Were Approved Is Inconsistent with Corporate Governance Customs and Practices

I was also asked to offer an opinion regarding the compliance of the Asset-Stripping Transactions with corporate governance customs and practices generally, and "best practices" for economically similar transactions. Such general customs and practices, and "best practices," arise out of a number of social, ethical, and cultural norms, as well as economic forces.[150] Here, the Asset-Stripping Transactions were approved through a cursory process that fell far short of customary corporate governance practices, much less "best practices." In particular, as discussed below, the Asset-Stripping Transactions: (i) involved conflicts of interest between BAC and its subsidiaries, on the one hand, and CFC, CHL and the Other Subs, on the other hand; (ii) were essentially "last period" transactions from the perspective of CFC and CHL;

[150] Such customs and practices may also arise out of and respond to corporate law, including the fiduciary duties imposed on directors and officers of corporations, such as CFC and CHL. However, I do not offer any opinions on this source of customs and practices in this report.

and, (iii) raised a substantial basis for concern regarding CFC and CHL's ability to meet expected future obligations to creditors.

Under these circumstances, the boards of CFC and CHL should have given heightened scrutiny to the proposed transactions and followed the customary corporate governance practices, if not the "best practices", described below.

Before reviewing the actual procedures by which the Asset-Stripping Transactions were approved, it is important to note several economic features of the transactions that dictate the custom and practice called for in connection with approving such transactions. First, the Asset-Stripping transactions were "conflict-of-interest" transactions. A "conflict-of-interest" transaction is a transaction, the terms of which are approved or determined on behalf of one party by another party, which is also an "interested" party. An "interested party" to a transaction is a party with a material interest in the outcome of a transaction. In other words, an "interested party" is a party who "stands on both sides" of the transaction, as is customarily said, because it will be affected by the outcome of the transaction and has a reason to want the transaction to be structured in a certain way and/or to include particular terms.

Here, BAC was the controlling shareholder of both CFC and CHL, on the one hand, and NB Holdings and BANA, on the other hand. As noted above, the boards of directors of all the corporate parties to the Asset-Stripping Transactions were employees of BAC at the time the transactions were approved. As a result, the directors were beholden to and dependent on BAC and its senior management for their jobs. Because of that dependency, BAC – through its employee-director-appointees on those boards— stood on both sides of the transactions. Each director had inevitably conflicting loyalties in reviewing the specifics of the transactions. These transactions were zero sum games in

that any allocation of a benefit in those transactions to one side—*i.e.,* to BAC or one of its non-CFC subsidiaries—necessarily meant that the same benefit could not be allocated to the other side—*i.e.,* to CFC or CHL. Anything the directors might have done to improve the Asset-Stripping Transactions from the perspective of CFC or CHL would have reduced the attractiveness of those transactions to BAC.[151]

Second, the Asset-Stripping Transactions were essentially "last period" transactions from the perspective of CFC and CHL. That is, unlike an ordinary course business transaction, in which a corporation exchanges something of value for something else with a customer or supplier or financing counterparty, these transactions essentially brought the business of CFC and CHL to an end. While ordinary business transactions

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[151] Ordinarily, where a buyer and a seller are wholly owned, there is not necessarily a conflict of interest in any transaction between them, because any benefit to one that harms the other will have offsetting effects on the common owner. Here, however, going into the Asset-Stripping Transactions BAC had concerns regarding whether CFC and CHL's expected contingent liabilities were greater than the amounts reserved for such liabilities and CFC and CHL's ability to pay for those liabilities. *See* BACMBIA-B0000018293, Talking Points to Board of Directors Presentation, June 25, 2008, at 298 ("Of the total $3.3 billion in estimated exposure, we currently anticipate covering $2.3 billion either through existing reserves or purchase accounting. The remaining $1 billion is assumed to come through our income statement over the next 4 years at about 250 million per annum. This amount is not accruable under FAS 5 at the merger date."); Brinkley Dep. 176:5-13, April 11, 2012 (testifying that she "assum[es Joe Price] is talking about Bank of America Corporation" when discussing the future P&Ls to which Countrywide losses would be charged); Price Dep. 315:7-9 (Price recalls "preserving the optionality [of putting Countrywide into bankruptcy] on or around before LD1."); BACMBIA-W0000002083, at 088–089 (noting that among "other items to be considered in purchase accounting" the "one with significant variability is the litigation exposure" and that while "a great deal of this exposure is not accruable in purchase accounting under FAS 5" the general counsel was able to provide BAC's Board of Directors with "a detailed update on the legal exposure and *quantified a range of such exposure*.") (emphasis added). As a result, the ordinary premise that conflicts of interest are not a serious concern in transactions among wholly owned subsidiaries does not apply here. Because BAC had concerns that CFC and CHL had expected liabilities that they could not pay, the Asset-Stripping Transactions were "interested" transactions, just as would a transaction between a parent company and a partly owned subsidiary in a freezeout, or between a CEO and his company in a buyout.

may produce intangible or "soft" benefits in the form of improved customer relations or access to strategic relationships or assets, last-period transactions do not, because they bring the company's business to an end. As described above, the Asset-Stripping Transactions were of the "last period" type—they were essentially "sale" transactions, in which the companies' ongoing revenue-generating capacity was being turned into a financial asset that had no upside, and was thus more similar to cash than to operating assets. As a result, the boards of directors of these companies were presented with transactions that were the most significant types of transactions that a corporation can face, in which there is comparatively less reason or room for the exercise of fine business judgment based on "soft" forms of gain, such as ongoing customer relationships, or supplier relationships, or other business-synergistic intangibles. Although common in all M&A transactions, companies engaged in "last period" transactions in particular must take into account expected liabilities, above and beyond accounting accruals, in determining the impact of such a transaction on the company. Moreover, no "strategic" considerations were relevant, because the companies would have no business requiring a strategy after the transactions were over. Put simply, the companies were being sold, putting more pressure on the boards to obtain the maximum possible price on behalf of CFC and its subsidiaries and all of CFC's and its subsidiaries' claimants, and to use whatever information and resources that they could obtain to do so.

Under these circumstances, in which the boards of CFC and CHL were considering conflict-of-interest transactions that also represented the "last period" for the companies, corporate governance practices are customarily understood as involving heightened levels of activity by the boards. Specifically, those customs involve, at a minimum, gathering all reasonably available information about the transactions and

plausible alternatives. They would also customarily involve the retention of new, independent directors, who could review the transactions free of any bias or conflict facing the BAC employees. At a minimum, they would have retained independent legal advisors, from whom the directors could have obtained independent advice about their legal obligations and about corporate governance practices, and an independent financial advisor and/or negotiating agent, to whom at least the task of analyzing the value of the companies in relation to the value of the proposed transaction and reasonable alternatives could be delegated by the conflicted directors.

In addition, the new directors or advisor or agent could be tasked with negotiating on behalf of the companies with BAC, to try to improve the terms of the transactions for CFC and CHL. Customary corporate governance practices would involve an effort by the directors to meet and deliberate on the merits of the transactions before approving them, and to document the information they had considered and the reasons for approving the transactions, as compared to any available alternatives. Customary corporate governance practices would involve disclosing the terms of the proposed transactions to relevant parties, including creditors, particularly where, as here, the companies had a substantial basis for concern that CFC and CHL had mounting liabilities above and beyond existing reserves.[152]

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[152] *See* BACMBIA-W0000002083, at 088–089 (noting that among "other items to be considered in purchase accounting" the "one with significant variability is the litigation exposure" and that while "a great deal of this exposure is not accruable in purchase accounting under FAS 5" the general counsel was able to provide BAC's Board of Directors with "a detailed update on the legal exposure and *quantified a range of such exposure*.") (emphasis added); BACMBIA-B0000018283, Talking Points to Board of Directors Presentation, June 25, 2008, at 298 ("Of the total $3.3 billion in estimated exposure, we currently anticipate covering $2.3 billion either through existing reserves or purchase accounting. The remaining $1 billion is assumed to come through our income statement over the next 4 years at about 250 million per annum. This amount is not accruable under FAS 5 at the merger date."); Brinkley Dep. 176:5-13 (testifying that she

In this case, however, the BAC employees on the CFC Board of Directors did little to no due diligence when they approved the asset transfers for November 2008. For instance, CFC Board member Helen Eggers testified that she did not recall consulting with any legal or financial advisors or conducting a solvency analysis before signing the October 3, 2008 unanimous consent.[153] Eggers' fellow board member Helga Houston testified that she recalled no solvency analysis conducted in connection with the unanimous approval of the Asset Purchase Agreement.[154]

Similarly, CHL Board member Kevin Bartlett testified that he recalled no discussions with other Board members about the transaction, and he recalled taking no steps to gather information in connection with the unanimous consent.[155] Bartlett did not recall retaining any financial advisors in connection with the transaction between CHL and Bank of America, nor did he recall performing any analysis to ensure CHL would remain solvent after the transaction.[156] In fact, Mr. Bartlett joined the CHL Board of Directors the *same day* he signed the unanimous consent, making it difficult to imagine

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"assum[es Joe Price] is talking about Bank of America Corporation" when discussing the future P&Ls to which Countrywide losses would be charged); Price Dep. 315:7-9 (Price recalls "preserving the optionality [of putting Countrywide into bankruptcy] on or around before LD1.").

[153] Eggers Dep. 278:23-279:13, 292:2-294:10 (Eggers recalled consulting no advisors in connection with her decision to enter into the Stock Purchase Agreement with Bank of America).

[154] Houston Dep. 41:16-42:23.

[155] Bartlett Dep. 129:23-130:7.

[156] Bartlett Dep. 153:7-22 (did not recall retaining financial advisors) and 165:21-166:1 (did not recall any liquidity or capital adequacy analysis performed).

that he engaged in extensive Board-level discussion before entering into the Asset Purchase Agreement.[157]

Countrywide Bank board member Barbara Desoer, when asked whether she recalled any meetings that she attended "on the part of the board of directors of Countrywide Bank," stated, "I do not."[158] She also could not recall "how it came to pass that [she] became a director of Countrywide Bank." [159] Ms. Desoer testified that she did not have to change anything she had been doing previously for BAC as a result of her becoming a member of the board of Countrywide Bank.[160]

The boards of CFC, CHL or the Other Subs did not even bother to meet and deliberate on the transactions. Rather, they signed written consents attached to resolutions, all drafted by BAC employees.[161] They signed and approved the agreements for the November Transactions well in advance of the actual transactions,[162] and no record exists of any effort to validate any basis for approving the transactions or the valuation of the assets. No disclosures were made to creditors, nor were any detailed

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157 *Compare* Pl.'s Ex. 3557, CWMBIA-G0000196811 (Bartlett elected to CHL Board of Directors on October 14, 2008), *with* Pl.'s Ex. 3547, CWMBIA-G0000196813 (Bartlett signs unanimous consent to sell substantially all CHL's assets to Bank of America on October 14, 2008).

158 Desoer Dep. 316:13-18.

159 *Id.* 317:09-11.

160 *Id.* 317:16-20.

161 *See* Pl.'s Ex. 3547, CWMBIA-G0000196813 (unanimous consent in lieu of meeting of directors, signed by CHL board of directors on October 14, 2008, entering into Asset Purchase Agreement with BAC); Pl.'s Ex. 3555, BACMBIA-C0000168521 (unanimous consent in lieu of meeting of directors, signed by CFC board of directors on October 3, 2008, entering into Stock Purchase Agreement with BAC).

162 The unanimous consent in connection with the Stock Purchase Agreement was entered into on October 3, 2008, and the unanimous consent in connection with the Asset Purchase Agreement was entered into on October 14, 2008. Pl.'s Ex. 3547, CWMBIA-G0000196813; Pl.'s Ex. 3555, BACMBIA-C0000168521. The two agreements closed on November 7, 2008.

minutes kept of relevant board meetings.[163] Indeed, the boards of CFC and CHL appear to have conducted no analysis to determine whether the Asset-Stripping Transactions were in the best interests of CFC, CHL or the Other Subs, or were entirely fair in any other respect to CFC, CHL or the Other Subs, or even represented a reasonable business decision for anyone other than BAC.

Instead of retaining an independent financial advisor for the boards of CFC and CHL to provide advice about the value of the businesses that CFC and CHL owned, BAC had its own internal' team, headed by BAC veteran Michael Friedlander, tasked with calculating fair value prices on an asset-by-asset basis to be the basis for the purchase accounting for the transactions.[164] Such asset-by-asset valuation efforts are not customarily viewed as equivalent to valuing a business or collection of businesses as a whole. Moreover, the boards of CFC and CHL had signed off on the transactions long before BAC's self-serving valuations were complete.[165] Moreover, for the purpose of

[163] *See* Houston Dep. 30:13-17 (Houston did not recall reviewing minutes of CFC Board meetings); Bartlett Dep. 125:9-11 (same, for CHL Board meetings).

[164] Snelson Dep. 115:13-116:11 (explaining that the "fair value of the assets were determined by different groups of individuals and coordinated by Michael Friedlander" for the July Transactions) and 160:16-19 (explaining he "got valuation numbers quoted by Michael Friedlander again" in connection with Project Groundhog, a/k/a the November Transactions) and 249:9-14 ("[Q: W]ho was involved in the fair value determinations that resulted in those adjustments? A: Fair value adjustments would have come from Michael Friedlander and whatever group he worked with to get them."); Jones Dep. 145:10-21, May 16, 2012 (testifying that "calculating the fair value of assets and liabilities with respect to Countrywide" was "led by Michael Friedlander."); BACMBIA-A0000109012, at "CC Milestones" Worksheet ("Fair Value impacts—confirm assumptions with Accounting Policy and market updates/push downs, accordingly" assigned to "Michael Friedlander").

[165] *See* Pl.'s Ex. 3547, CWMBIA-G0000196813 (unanimous consent in lieu of meeting of directors, signed by CHL BOD on October 14, 2008, entering into Asset Purchase Agreement with BAC); Pl.'s Ex. 3555, BACMBIA-C0000168521 (unanimous consent in lieu of meeting of directors, signed by CFC BOD on October 3, 2008, entering into Stock Purchase Agreement with BAC); BACMBIA-J0000002304 (Email from Friedlander referring to "updated marks as of 10/31").

analyzing whether the processes used to approve the Asset-Stripping Transactions were consistent with corporate governance customary or best practices, it matters little what CFC or CHL ultimately received in consideration for the Asset-Stripping Transactions. The fact remains that the boards of these companies did not perform any analyses to determine whether such consideration was fair or adequate to address CFC's and CHL's future obligations. There is simply no record evidence to suggest that the Asset-Stripping Transactions were in any way understood as business decisions by the CFC or CHL boards, or at all negotiated by those boards on behalf of CFC, CHL and the Other Subs, or their creditors. Rather, the evidence shows that the Asset-Stripping Transactions were planned by BAC long before the Red Oak Merger, and forced on CFC and CHL without any meaningful corporate governance process.[166]

Such a lack of due diligence and oversight by a board of directors, even without the heightened standards applicable to "last period" conflict of interest transactions, is contrary to ordinary customs and practices of corporate governance, much less "best practices." In this case, however, additional facts render particularly egregious the CFC and CHL boards' total lack of due diligence. According to the testimony of Joe Price, the CFO of BAC, prior to or on July 1, 2008, BAC considered putting CFC into bankruptcy.[167] BAC had concerns that the liabilities of CFC, CHL and the Other Subs

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[166] Internal BAC documents show that the plan to leave CFC and CHL with no revenue-generating assets was a plan that BAC created prior to the Red Oak Merger. *See* Pl.'s Ex. 3170, BACMBIA-B0000009918, Presentation to the Steering Committee, April 8, 2008 (showing that before in April 2008, BAC's plan was that "Countrywide Home Loans, Inc. ('CHL') will not be used for future new mortgage originating or servicing business post LD1"); Desoer Dep. 154:07-12 (BAC's "plan as of April of 2008 was to cease new origination and servicing out of Countrywide Home Loans after the merger."); *see also* Daines Report at 8.

[167] Price Dep. 315:7-9 (Price recalls "preserving the optionality [of putting Countrywide into bankruptcy] on or around before LD1.").

exceeded existing reserves and were increasing.[168] Such factors are particularly problematic because the Asset-Stripping Transactions left CFC and CHL without operating businesses capable of generating revenues to meet future obligations.[169] For example, BAC disclosed to its Board of Directors prior to July 1, 2008 that BAC had determined that CFC and CHL's *expected* representation and warranty liabilities alone exceeded CFC and CHL's accrued liability reserves as of March 31, 2008 by at least $2.3

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[168] *Id.*; BACMBIA-B0000018283, Talking Points to Board of Directors Presentation, June 25, 2008, at 298 ("Of the total $3.3 billion in estimated exposure, we currently anticipate covering $2.3 billion either through existing reserves or purchase accounting. The remaining $1 billion is assumed to come through our income statement over the next 4 years at about 250 million per annum. This amount is not accruable under FAS 5 at the merger date."); BACMBIA-W0000002083 at 088–089 (noting that among "other items to be considered in purchase accounting" the "one with significant variability is the litigation exposure" and that while "a great deal of this exposure is not accruable in purchase accounting under FAS 5" the general counsel was able to provide BAC's Board of Directors with "a detailed update on the legal exposure and *quantified a range of such exposure*.") (emphasis added); Price Dep. 204:7-23 (explaining that BAC determined additional reserves were needed based on "adopting the same loss curves we utilized in estimating the credit mark, in essence, moving from a slow growth to a mild recession coupled with higher assumed exposure to monoline insurers."); BACMBIA-G0000001458, Monoline Strategy Presentation, at 482 (summarizing status of claims and negotiations as of September 2008 with GSEs, private investors, mortgage insurers, and monoline insurers and notes increasing claim activity, *e.g.*, "substantial increase in additional repurchase requests expected," and "[i]nitial assessment is strongly suggestive of significant R&W exposure."); Pl.'s Ex. 3288, BACMBIA-Q0000025398, Corporate Audit Report, at 399 (regarding CFC loan put back claims the audit report concludes, "[o]pen items (put back requests and claim denials) have increased significantly this year reaching 16,296 by the end of August 2008 . . . most likely estimate is that resolution of these current open claims will result in a loss of approximately $1 billion. Management is finalizing its calculation of the representation and warrant reserve for Q3 2008."); Pl.'s Ex. 3573, CWMBIA-B0000011309, Investor Claims Process, at 319 (noting that in the first half of 2008 CFC received 11,000 repurchase requests).

[169] *See* BACMBIA-A0000136637 ("CHL will continue to exist, but it will no longer be an operating company actively engaged in the business of servicing mortgage loans."); *see also* Pl.'s Ex. 3103, BACMBIA-B0000007206 (showing that as of March 19, 2008, BAC anticipated that moving CHL's mortgage operations to BAHL and leaving CHL with no revenue generating assets would likely lead to a situation where "Near term, capital requirements may increase or capital levels may not be adequate over the period of CHL asset runoff because of the very nature of those assets (illiquid, lesser asset quality)."

billion.[170] BAC planned to address $1.3 billion of this excess liability through "existing reserves or purchase accounting" and assume the remaining $1 billion through BAC's income statement over four years.[171] Early assessment projections showed CHL and CFC's subsidiaries' "other liabilities" were forecasted to balloon by billions of dollars in the years following the Asset-Stripping Transactions. [172] In addition, threats of litigation against CFC and CHL were on the rise before July 1, 2008, and certainly before the November Transactions.[173] Following the July Transactions, BAC considered the impact of increasing claims and litigations, including the lawsuit brought by MBIA on September 30, 2008, and increasing trends in repurchase claims and concluded that reserves should be increased.[174]

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[170] BACMBIA-B0000018320, Presentation to BAC Board of Directors entitled "Countrywide Update", June 25, 2008, at 329 (reflecting BAC's "additional estimates" of $2.3 billion of representation and warrant exposure, including $1 billion just for monolines, above and beyond Countrywide's "total R&W reserve.").

[171] BACMBIA-B0000018283, Talking Points to Board of Directors Presentation, June 25, 2008 ("Of the total $3.3 billion in estimated exposure, we currently anticipate covering $2.3 billion either through existing reserves or purchase accounting. The remaining $1 billion is assumed to come through our income statement over the next 4 years at about 250 million per annum. This amount is not accruable under FAS 5 at the merger date."); Brinkley Dep. 176:5-13 (testifying that she "assum[es Joe Price] is talking about Bank of America Corporation" when discussing the future P&Ls to which Countrywide losses would be charged).

[172] BACMBIA-B0000013713, Countrywide Net Interest Income by Legal Entity, May 1, 2008, at "chl and other nii(2)".

[173] Lewis Dep. 31:24-32:8 (". . . we knew there would be some legal issues because they were—they were already having some legal issues, and so there were some reserves created, obviously not—we didn't create enough.").

[174] BACMBIA-R0000039688, MHEIS & CFC Transition Investor Relations Follow Ups, Oct. 4, 2008, at 692-693; BACMBIA-G0000001458, Monoline Strategy Presentation, at 482 (summarizing status of claims and negotiations as of September 2008 with GSEs, private investors, mortgage insurers, and monoline insurers and notes increasing claim activity, *e.g.*, "substantial increase in additional repurchase requests expected," and "[i]nitial assessment is strongly suggestive of significant R&W exposure."); Price Dep. 204:7-23 (explaining that BAC determined additional reserves were needed based on "adopting the same loss curves we utilized in estimating the credit

Under such circumstances, general custom and practice would have required extensive investigation and documentation by the boards, including third party valuations and solvency analyses, for the boards to satisfy themselves that CFC and CHL would be able to meet their future obligations following the Asset-Stripping Transactions. Even when there are no specific concerns about insolvency of a target company of an M&A transaction, solvency representations such as those included in the Asset-Stripping Transactions[175] are typically backed by significant work including a solvency analysis. Customarily a third party advisory firm, with expertise in finance and valuation, is hired to investigate the assets, liabilities, capital, and repayment capacity of the target company

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mark, in essence, moving from a slow growth to a mild recession coupled with higher assumed exposure to monoline insurers."); Pl.'s Ex. 3288, BACMBIA-Q0000025398, Corporate Audit Report, at 399 (regarding CFC loan put back claims the audit report concludes, "[o]pen items (put back requests and claim denials) have increased significantly this year reaching 16,296 by the end of August 2008 . . . most likely estimate is that resolution of these current open claims will result in a loss of approximately $1 billion. Management is finalizing its calculation of the representation and warrant reserve for Q3 2008."); Pl.'s Ex. 3573, CWMBIA-B0000011309, Investor Claims Process, at 319 (noting that in the first half of 2008 CFC received 11,000 repurchase requests); BACMBIA-X0000001617, Regulator Update (Sept. 9, 2008), at 635 ("Extraordinarily adverse media, legislative, regulatory, political, litigation and economic environment increases financial and reputational risk and creates disctractions").

[175] BACMBIA-C0000168172, Asset Purchase Agreement, at 180 (Defining "Solvent" to mean "with respect to any Person on any date of determination, that on such date (a) the fair value of the property of such Person is greater than the total amount of liabilities, including contingent liabilities of such Person, (b) the present fair salable value of the assets of such Person is not less than the amount that will be required to pay the probable liability of such Person on its debts as they become absolute and matured, (c) such Person does not intend to, and does not believe it will, incur debts or liabilities beyond such Person's ability to pay such debts and liabilities as they mature and (d) such Person is not engaged in business or a transaction, and is not about to engage in business or a transaction, for which such Person's property would constitute unreasonably small capital. The amount of contingent liabilities at any time shall be computed as the amount that, in light of all the facts and circumstances existing at such time, represents the amount that can reasonably be expected to become an actual or matured liability."), and at 193 ("3.16 Solvency. Seller is and, after giving effect to the transactions contemplated hereby, will be Solvent.").

and to provide either an opinion or a report documenting that the target company is in fact solvent, and will not be rendered insolvent as a result of the transaction.[176] In this case, however, BAC and CFC/CHL have represented that no such analyses were performed in connection with CHL making solvency representations to BAC.[177] The failure to conduct any meaningful analyses of the impact of the Asset-Stripping Transactions on CFC's and CHL's solvency at a time when there was a substantial basis for concern about the ability of these entities to meet expected future obligations

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[176] *See, e.g.*, Samuel C. Thompson, Jr., *A Lawyer's Guide to Modern Valuation Techniques in Mergers and Acquisitions*, 21 Iowa J. Corp. L. 457, 468-69 (1996); Oscar N. Pinkas, *No Collateral and No Cash: Fraudulent Avoidance in Private Equity-Leveraged Buyouts*, 27-8 American Bankruptcy Institute Journal 18 (2008); Robert Reilly, *Procedural Checklist for the Review of Solvency Opinions*, 27-6 American Bankruptcy Institute Journal 50 (2008). For examples, *see* PriCellular Corp. Schedule 13E-3/A (July 2, 1998), Exhibit 99.B3 (referring to solvency opinion); Acterna Corp. Schedule 13E-3/A (June 1, 1998), Exhibit 99.1 (solvency opinion dated May 21, 1998).

[177] Letter from Rosenberg to Oblak (Jan. 9, 2012) at 9-10 ("As I informed MBIA during our November 11, 2011 call, BAC conducted a reasonable search for any solvency analysis supporting CHL's representation in Asset Purchase Agreement Section 3.16 and determined that no such analysis is in BAC's possession, custody, or control."); Letter from Rosenberg to Justice Bransten (Jan. 9, 2012) at 4 ("In response to MBIA's request for any solvency analysis or independent valuation relating to the BAC-Countrywide transactions, BAC agreed to conduct reasonable searches and has informed MBIA that any responsive documents have already been produced."); Letter from Rosenberg to Justice Bransten (Mar. 14, 2012) at 7 ("As we explained in our October 18, 2011 letter, Asset Purchase Agreement Section 3.16 did not require that CHL perform a "solvency analysis" or provide a "solvency analysis" to BAC."); Letter from Concannon to Justice Bransten (Mar. 14, 2012) at 1-2 (arguing that it is "speculation" that "solvency analyses performed in connection with the November 7, 2008 Asset Purchase Agreement" exist and arguing that Mssrs. Shackett's and Gissinger's testimony does not "indicate[] the existence of the [] solvency analyses MBIA now seeks."); BAC's Mem. Opp. MBIA's Mot. To Compel (Mot. Seq. 51), filed June 19, 2012, at 15-16, *MBIA v. Countrywide Home Loans, et al.,* Case No. 602825/08 (N.Y. Sup. 2008) (representing that BAC's investigation has not yielded solvency analyses relating to the Asset-Stripping Transactions); Concannon Aff. ISO Countrywide Mem. Opp. MBIA's Mot. To Compel (Mot. Seq. 51) filed June 19, 2012, at ¶ 14, *MBIA v. Countrywide Home Loans, et al.,* Case No. 602825/08 (N.Y. Sup. 2008) ("None of the former CFC and CHL Board members and employees interviewed by Countrywide's counsel has any recollection of preparing or receiving the type of solvency analysis that MBIA seeks, apart from the four categories of documents already produced to MBIA," which do not include solvency analyses relating to the Asset-Stripping Transactions).

represents a total abandonment of the CFC and CHL directors' basic duties to do what is in the best interests of CFC and CHL.

In sum, the massive gap between good or even minimal corporate governance practices and the process by which the Asset-Stripping Transactions were approved, in which BAC dominated the entire process, and the complete lack of diligence, investigation, engagement or meaningful deliberation or decision-making by the directors of CFC and CHL all reinforce my opinion that the Asset-Stripping Transactions were little more than badly disguised and failed efforts to ape the formalities of customary M&A transactions, aimed at obtaining the economic benefits of a merger of the companies' operations while attempting to avoid the liability consequences of a *de jure* merger of BAC with CFC and CHL.

E. BAC's Statements And Conduct Are Consistent With Its Assumption Of CFC And CHL's Contingent and Other Liabilities Similar To A *De Jure* Merger

MBIA has also asked me to consider whether BAC's conduct *vis-à-vis* creditors of CFC and CHL is consistent with BAC having assumed the remaining contingent liabilities of CFC and CHL, as it would have done in a *de jure* merger. BAC's statements regarding CFC's and CHL's liabilities, and BAC's management, assumption, and payment of CFC's and CHL's debts and certain of their contingent liabilities, are consistent with BAC having assumed all those liabilities. Moreover, because the Asset-Stripping Transactions would otherwise jeopardize the customary expectations of creditors, with "left behind" creditors lacking an adequate remedy against the mere shell entities that CFC and CHL became, BAC's statements and conduct are consistent with BAC's having' assumed all of CFC's and CHL's remaining contingent liabilities.

1. <u>BAC's Statements Reflect Its Assumption of Countrywide's Liabilities</u>

In addition, BAC's CEO and its other senior executives and spokespersons have made statements indicating that BAC planned to assume the liabilities of CFC and CHL at the time of the Red Oak Merger. For example, in an interview published on March 1, 2008, a Bank of America spokesperson acknowledged Countrywide's liabilities:

> Handling all this litigation won't be cheap, even for Bank of America, the soon-to-be largest mortgage lender in the country. Nevertheless, the banking giant says that Countrywide's legal expenses were not overlooked during negotiations. 'We bought the company and all of its assets and liabilities,' spokesman Scott Silvestri says. '*We are aware of the claims and potential claims against the company* and have factored those into the purchase.'[178]

Similarly, former CEO Ken Lewis was quoted in a January 23, 2008 *New York Times* article reporting on the acquisition of CFC and its subsidiaries, in which he acknowledged that Bank of America knew of the legal liabilities of CFC and its subsidiaries and impliedly accepted them as part of the cost of the acquisition:

> We did extensive due diligence. We had 60 people inside the company for almost a month. It was the most extensive due diligence we have ever done. So we feel comfortable with the valuation. We looked at every aspect of the deal, *from their assets to potential lawsuits* and we think we have a price that is a good price.[179]

After BAC had completed the purchase of Countrywide, in December of 2010, CEO Brian Moynihan told a reporter for the *New York Times* that "Our company bought it [Countrywide] and we'll stand up; we'll clean it up."[180] In February of 2010, CEO

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[178] Amy Miller, *Collateral Damage: The subprime mortgage meltdown gives rise to a litigation industry with Countrywide in the crosshairs*, Corporate Counsel, Feb. 22, 2008.

[179] Julie Creswell, *Bank of America Joins Parade of Mortgage-Related Losses,* New York Times, Jan. 23, 2008.

[180] Pl.'s Ex. 3361, N.D. Schwartz, "Batting Cleanup at Bank of America", New York Times, Dec. 11, 2010, at 6. *See also* Moynihan Dep. 134:18-19 (testifying that this statement in the *New York Times* article accurately reflected his view) and 151:09-19 ("Q.

Brian Moynihan wrote to Barbara Desoer—the President of the combined MHEIS mortgage company, stating that with regards to "legacy c[ountry]wide[,] I want to keep stressing we are cleaning up someone else's mess."[181] Thus it was BAC's goal "to distinguish the legacy Countrywide practices and products that [BAC] no longer continued and [because BAC was] cleaning that up."[182]

Finally, when BAC assumed Countrywide's liabilities to several State Attorneys General in October of 2008, Mr. Price stated in a press release that "[t]he cost of restructuring these loans is within the range of losses we [BAC] estimated when we acquired Countrywide."[183]

The statements of senior BAC officers such as those identified above are significant because they reflect that BAC considered CFC's and CHL's contingent liabilities in deciding to purchase those entities and have since made public disclosures that impact investors' and creditors' expectations regarding BAC's satisfaction of legitimate claims against CFC and CHL.

2. <u>BAC's Conduct In Resolving Settlements Of Countrywide's Contingent Liabilities Is Consistent With An Assumption Of Such Liabilities</u>

BAC has been actively involved in negotiating, litigating, and paying settlements in connection with CFC and CHL's contingent liabilities. Prior to July 1, 2008, BAC

Now, you use the words clean up many times when talking about Countrywide; isn't that true? . . . A. I have used the statement before, yes. Q. And specifically in talking about Countrywide? A. In talking about the work that comes from in the mortgage business I have used it many times and I have used it about Countrywide.").

[181] Pl.'s Ex. 3365, BACMBIA-10000079573, at 579.

[182] Moynihan Dep. 156:05-07; *see also id.* 220:21-24 ("Yes, we paid a lot money for Countrywide. In terms of operational cost, in terms of rep and warranty expenses, a lot of things.").

[183] Pl.'s Ex. 3124, BACMBIA-A0000111117, at 121.

began to negotiate a settlement with several State Attorney Generals on behalf of CHL to settle legal exposure relating to CHL's fraudulent underwriting and loan origination practices.[184] These negotiations culminated in a settlement announced on October 6, 2008 pursuant to which BAC agreed to incur an estimated $8.4 billion in mortgage principal and interest rate adjustments,[185] and which required that BAC indemnify legacy CHL in connection with its loan modification responsibilities.[186] Overall, BAC committed a total of $70 billion to its home loan modification program, and because BAC was in charge of the program it necessarily impacted BAC financially.[187] Ms. Desoer testified that this program "targeted [] a subset of just the Countrywide

[184] *See* Pl.'s Ex. 3597, BACMBIA-A0000098902 (noting that as of September 2008, "for the past several months, BAC representatives have been meeting intensively with interested state attorney general across the country to talk about what more can be done to help Countrywide borrowers"); *see also* BACMBIA-C0000008511, BAC/Countrywide Transition Tollgate 3 dated June 26, 2008, at 526 (before Red Oak Merger, BAC's plan was to not only address Countrywide's legacy liabilities to State Attorney Generals, but also to "formulate [a] GSE team and start organizing for negotiation prior to LD1"). During her deposition, Ms. Desoer confirmed that prior to LD1, BAC modified approximately 200,000 Countrywide loans. *See* Desoer Tr. 369:12-23 (" So some of those would have been pre-Legal Day One prior to the transition that brought the group of Countrywide companies under the umbrella of the Bank Of America group of companies").

[185] *See* Pl.'s Ex. 3602, CWMBIA0013355527, at 557 ("Bank of America today announced the creation of a proactive home retention program, that will systematically modify troubled mortgages with up to $8.4 billion in interest rate and principal reductions for nearly 400,000 Countrywide Financial Corporation customers nationwide.").

[186] BAC entered into several indemnification agreements in connection with its settlements with various State Attorney Generals. *See, e.g.,* Pl.'s Ex. 3604, CWMBIA-G000079391, Indemnification Agreement, April 23, 2009 (stating "Bank of America Corporation ('BAC') hereby undertakes and agrees that if, and to the extent that, (i) there occurs a breach or violation by CFC of the Order, and (ii) CFC incurs fines, penalties or other monetary damages ('Damages') as a consequence thereof, then BAC shall indemnity and hold harmless CFC in the amount or such Damages."); *see also* Pl.'s Ex. 3360, CWMBIA-G000079405 (same Indemnification Agreement entered into in January 2009, where Pennsylvania Attorney General is a third party beneficiary); Pl.'s Ex. 3605, CWMBIA-G0000107681(same Indemnification Agreement entered into in December 2010, where Texas Attorney General is a third party beneficiary).

[187] Pl.'s Ex. 3597, BACMBIA-A00000098902, at 903.

borrowers" and did not cover liabilities related to "legacy Bank of America borrowers."[188] Indeed, because BAC agreed to cover the costs of CFC and CHL liabilities and to modify Countrywide loans, several State Attorney Generals dismissed their lawsuits against Countrywide, and several others agreed to not bring suit.[189]

Since the fall of 2008, BAC has continued to negotiate and pay for the settlement of lawsuits brought against CFC and CHL for legal exposure Countrywide faces as a result of its pre-2008 conduct. For example, BAC paid $600 million to settle a class action lawsuit by investors alleging that Countrywide's risky mortgage portfolio endangered the company's economic viability.[190]

BAC also paid $2.8 billion to Fannie Mae and Freddie Mac, *i.e.* the GSEs, to settle repurchase claims.[191] Under the terms of the settlement agreement, CHL and BAHLS are jointly and severally liable for the representation and warranty liability.[192] BAHLS agreed in June 2010 to assume $1.5 billion of the representation and warranty liability from CHL.[193] In connection with BAHLS' agreement to assume this liability, $1.5 billion of the representation and warranty reserve was transferred from CHL to

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[188] Desoer Dep. 346:21-347:05.

[189] Pl.'s Ex. 3602, CWMBIA0013355527, at 535 ("The AGs of California, Connecticut, Florida, and Illinois have agreed to dismiss their lawsuits and we hope other AGs who filed such suits will do the same. Further, AGs of other states participating in the agreements have agreed not to file such lawsuits.").

[190] *See* The Associated Press, *$600 Million Countrywide Settlement*, New York Times (Aug. 3, 2010).

[191] *See* E. Comlay & J. Rauch, *Update 7- BofA settles sour mortgage with Fannie Mae, Freddie*, Reuters (January 3, 2011). *See also* Pl.'s Ex. 3577, BAC Quarterly Report, at 177 (Aug. 4, 2011) ("On December 31, 2010, the Corporation reached agreements with the GSEs, under which the Corporation paid $2.8 billion to resolve repurchase claims involving first–lien residential mortgage loans sold directly to the GSEs by entities related to legacy Countrywide (the GSE Agreements).").

[192] Pl.'s Ex. 3397, BACMBIA-L0000003637, at 643, "Explanation 8".

[193] *Id.*

BAHLS, with a note receivable issued by CHL to indemnify BAHLS against all losses.[194] In the second quarter of 2010, "[BAC] subsequently purchased CHL's note from [BAHLS] and contributed this note to CFC, after netting a tax liability of $555 million associated with the [representation and warranty] reserve. This resulted in a tax-effected capital infusion to CFC of $945 million, which CFC then infused into CHL."[195] Then in September 2010, "in a series of transactions" BAC agreed to "absorb the legacy CHL liability for exposure under rep[resentations] and warranties given to the GSEs. As part of this series of transactions, BAC agreed to infuse an additional amount of capital of $1 billion into CFC which in turn contributed the capital down to CHL as reimbursement for amounts CHL had paid to the GSEs under this obligation. As a result of the June and September transactions, CHL's GSE [representation and warranty] reserve was removed from CHL's books and CHL's capital position was enhanced by approximately $2 billion."[196] BAC assumed these legacy liabilities of CHL's mortgage business because BAC had left CHL with insufficient assets to cover those liabilities.

On April 14, 2011, BAC also announced an agreement with Assured Guaranty Ltd (***Assured***) to settle claims relating to twenty-nine RMBS transactions insured by Assured, consisting of both BAC and Countrywide-sponsored RMBS.[197] The agreement

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[194] *Id.*

[195] *Id.*; *see also*, CWMBIA0018539193, at 202 ("[D]uring Q2 2010, BAC and BAC Home Loans Servicing LP . . . agreed to assume the full cost of the representation and warranty expense associated with the GSE portfolio originated by CHL.").

[196] Pl.'s Ex. 3397, BACMBIA-L0000003637, at 643, "Explanation 8".

[197] *See* Press Release, Assured Guaranty Ltd, *Assured Guaranty Ltd. Announces Settlement with Bank of America*, April 15, 2011. During his deposition, Mr. Moynihan admitted that BAC was the entity that entered into this settlement with Assured. *See* Moynihan Dep. 119:11 ("We [BAC] settled with Assured."). *See also* Pl.'s Ex. 3371, BAC Quarterly Report, at 53 (Aug. 4, 2011) ("On April 14,2011, [Bank of America], including its legacy Countrywide affiliates, entered into an agreement with Assured

with Assured included cash of $1.1 billion to Assured, as well as a "cost sharing reinsurance agreement" that had an expected value of approximately $470 million.[198]

[199] During 2011, Assured was paid cash payments of $1 billion with the remaining $57 million payable on March 31, 2012.[200]

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On June 28, 2011, BAC announced that it had agreed to pay $8.5 billion in cash plus related fees and expenses of $100 million to settle investor claims relating to 530 legacy Countrywide residential mortgage backed private label trusts.[203] BAC is

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Guaranty Ltd. and subsidiaries (Assured Guaranty), to resolve all of this monoline insurer's outstanding and potential repurchase claims related to alleged representations and warranties breaches involving 29 first- and second-lien RMBS trusts where Assured Guaranty provided financial guarantee Insurance (the Assured Guaranty Settlement).").

[198] CWMBIA0018539225, CFC Selected Consolidated Financial Information, March 31, 2011, at 233.

[199] *Id.*

[200] CWMBIA0018539238, CFC Selected Consolidated Financial Information, December 31, 2011 at 246-247.

[201] *Id.*

[202] *Id.*

[203] *See* Pl.'s Ex. 3371, BAC Quarterly Report, at 174 (for period ended June 30, 2011) ("On June 28, 2011, the Corporation, BAC Home Loans Servicing, LP (BAC HLS, which was subsequently merged with and into BANA in July 2011), and its legacy Countrywide affiliates entered into a settlement agreement with the Bank of New York Mellon (BNY Mellon), as trustee (the Trustee), to resolve all outstanding and potential

specifically named as a party to the proposed settlement.[204] In addition, BAC agreed to implement certain servicing standards and address documentation deficiencies at an estimated cost of $400 million. In connection with seeking court approval for this settlement, BAC assisted Bank of New York Mellon, the trustee for the Countrywide mortgage backed securities at issue, in preparing a report supporting the settlement by providing Bank of New York Mellon's experts with access to non-public unaudited financial information for CFC and CHL and allowing the experts to interview BAC, CFC, and CHL employees in furtherance of their work.[205] The Capstone Report concluded that BAC's offer is fair because if investors sought to recover a judgment directly from CFC or CHL, even in a liquidation scenario, CFC/CHL would be unable to

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claims related to alleged representations and warranties breaches (including repurchase claims), substantially all historical loan servicing claims and certain other historical claims with respect to 525 legacy Countrywide first-lien and five second-lien non-GSE residential mortgage-backed securitization trusts (the Covered Trusts) containing loans principally originated between 2004 and 2008 for which BNY Mellon acts as trustee or indenture trustee (the BNY Mellon Settlement)"). As Mr. Moynihan described it, "[t]he claims were around the private label securitization trusts of Countrywide." Moynihan Dep. 99:21-22; *see also id.* 106:03-05 ("The representation and warranty liabilities were with regard to legacy Countrywide originations.").

[204] *See* BAC's Current Report (Form 8-K) (filed June 29, 2011), at Exhibit 99.2, Settlement Agreement between BONY and BAC, at 19 (listing "Bank of America Corporation ('BAC'), and BAC Home Loans Servicing, LP ('BAC HLS')" as parties to the Settlement Agreement). BAC's CEO, Brian Moynihan, testified that he "approved the settlement with the rest of management." Moynihan Dep. 52:18-19; *see also id.* at 99:03-06 ("We settled with Bank of New York and -- actually, we agreed to settle with Bank of New York and the various parties to that agreement.").

[205] Capstone Report at 3 ("We prepared our analysis with access to the information contained in Exhibit A [which identifies unaudited financial information], as well as information gathered from our discussions with certain senior members of CFC management . . ."); Daines Report at 1 ("Much of my understanding comes from review of public filings and transaction documents as well as from discussions with BAC and legacy Countrywide personnel.") and at 46-52 (identifying non-public organization charts, unaudited financial statements, and transaction documents provided by BAC upon which Professor Daines relied).

satisfy a judgment greater than $4.8 billion.[206] If, however, the $8.5 billion settlement is approved, the entire cost will be borne by BAC.

,[207] BAC also made "an unconditional commitment to pay directly or to make a capital contribution to cover CHL's portion of the settlement payment in the event that the settlement is approved by the courts."[208]

On December 21, 2011, BAC also announced it agreed to pay $335 million to settle with the U.S. Department of Justice over allegations that CFC racially discriminated against mortgage applicants.[209] In connection with this settlement, BAC made specific representations regarding its own lending practices, and the consent order specifically notes that "Defendants represent that [CFC and CHL] no longer originate residential loans."[210] The Consent Order effecting this settlement was signed by BAC

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[206] *See BofA settles on mortgage repurchase claims*, Reuters.com, June 29, 2011; *see also*, BAC Current Report, at 2 (June 29, 2011) ("On June 29, 2011, the Corporation announced that it, BAC Home Loans Servicing, LP ('BAC HLS'), Countrywide Financial Corporation and Countrywide Home Loans, Inc. entered into a Settlement Agreement dated as of June 28, 2011 (the 'Settlement Agreement') with The Bank of New York Mellon ('BNY Mellon'), as trustee (the 'Trustee'), to resolve all outstanding and potential claims related to alleged representations and warranties breaches (including repurchase claims), substantially all historical loan servicing claims and certain other historical claims with respect to 530 legacy Countrywide first-lien and second-lien residential mortgage-backed securitization (RMBS) trusts (the 'Covered Trusts')."). *See also*, BAC Current Report (June 29, 2011), Exhibit 99.2, at 19 (Settlement Agreement between BONY and BAC).

[207] CWMBIA0018539208, CFC Selected Financial Information, Sept. 30, 2011, at 215.

[208] *Id.* at 218.

[209] *See* Charlie Savage, *Countrywide Will Settle a Bias Suit*, New York Times (December 21, 2011).

[210] Consent Order, Dec. 21, 2011, at 4, *United States v. Countrywide Financial Corporation, et al.,* Case No. CV11-10540- PSG (AJW) (C.D. Cal.).

employee Michael Schloessmann on behalf of CFC and CHL, and by Greg Hobby on behalf of Countrywide Bank.[211]

In February 2012, BAC announced that it would pay $1 billion to settle claims that Countrywide defrauded the FHA by making loans to unqualified buyers.[212] During his deposition, Mr. Moynihan testified that BAC paid to settle FHA's claims, some of which related to "legacy Countrywide origination activities and servicing activities"[213] and therefore constituted claims that accrued "before we [BAC] owned Countrywide."[214]

BAC's participation in negotiating and funding these settlements of claims and litigation related to liabilities of CFC and CHL that arose prior to the Red Oak Merger is consistent with what creditors and investors would expect had BAC *de jure* merged with CFC and CHL – that BAC would make payments to settle claims against CFC and CHL.

3. <u>BAC Had Grounds For Concern That CFC And CHL Would Be Unable To Pay For Expected Liabilities</u>

The evidence establishes that BAC was aware of the magnitude of CFC's contingent liabilities as of June 30, 2008. For example, although CFC's consolidated balance sheets leading up to the Red Oak Merger reflected a provision of only $1.0 billion for representation and warranty reserves, BAC's additional estimates of expected liabilities were $1.3 billion for added representation and warranty liabilities and another $1.0 billion dedicated mainly to monoline representation and warranty liabilities.[215]

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[211] *Id.* at 15-16.

[212] Mr. Moynihan confirmed that it was BAC who negotiated and covered the costs for the settlement on behalf of Countrywide. *See* Moynihan Dep. 93:18-19 ("Bank Of America had the cash and we made the payment and settled the case.").

[213] Moynihan Dep. 95:03-04.

[214] Moynihan Dep. 91:12-13.

[215] BACMBIA-B0000018320, Presentation made to BAC Board of Directors, June 25, 2008, at 329.

Moreover, at the time of the Red Oak Merger, BAC's Board of Directors was presented with estimates of CFC and its subsidiaries' litigation exposure above and beyond any accounting reserves.[216] BAC's then-CEO admitted that, "we knew there would be some legal issues because they were – they were already having some legal issues, and so there were some reserves created, obviously not – we didn't create enough."[217]

Furthermore, the evidence also establishes that BAC had a substantial basis for concern that these legal liabilities were *increasing* following the Red Oak Merger, as reflected by BAC's assessments of projected liabilities and concerns regarding mounting claims against the Countrywide companies.[218] Consequently, BAC's decision to strip all

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[216] BACMBIA-W0000002083, at 088–089 (noting that among "other items to be considered in purchase accounting" the "one with significant variability is the litigation exposure" and that while "a great deal of this exposure is not accruable in purchase accounting under FAS 5" the general counsel was able to provide BAC's Board of Directors with "a detailed update on the legal exposure and *quantified a range of such exposure*.") (emphasis added).

[217] Lewis Dep. 31:24-32:8.

[218] *See* BACMBIA-G0000001458, Monoline Strategy Presentation, at 482 (summarizing status of claims and negotiations as of September 2008 with GSEs, private investors, mortgage insurers, and monoline insurers and notes increasing claim activity, *e.g.*, "substantial increase in additional repurchase requests expected," and "[i]nitial assessment is strongly suggestive of significant R&W exposure."); BACMBIA-W0000002083, at 088–089 (the general counsel was able to provide BAC's Board of Directors with "a detailed update on the legal exposure and *quantified a range of such exposure*.") (emphasis added); Pl.'s Ex. 3288, BACMBIA-Q0000025398, Corporate Audit Report, at 399 (regarding CFC loan put back claims the October 10, 2008 audit report concludes, "[o]pen items (put back requests and claim denials) have increased significantly this year reaching 16,296 by the end of August 2008 . . . most likely estimate is that resolution of these current open claims will result in a loss of approximately $1 billion. Management is finalizing its calculation of the representation and warrant reserve for Q3 2008."); Pl.'s Ex. 3573, CWMBIA-B0000011309, Investor Claims Process dated August 8, 2009, at 319 (noting that in the first half of 2008 CFC received 11,000 repurchase requests); Desoer Dep. 119:17-21 (reviewing document that states that the Servicing LP was originally kept separate "to provide a buffer between BANA and Countrywide Home Loans Inc. because of concerns of litigation."); Compl., filed Sept. 30, 2008, *MBIA Insurance Corp. v. Countrywide Home Loans, Inc., et al.*, Index No. 602825/2008 (N.Y. Sup. 2008).

of CFC's and CHL's remaining productive assets in the November Transactions was made after BAC had completed assessments reflecting CFC and CHL's increasing contingent legal exposure.

As noted above, BAC stripped CFC and CHL of all of their respective operating assets, leaving them mere shells of their former corporate selves. Consequently, because BAC had information showing that CFC and CHL's contingent liability exposure substantially exceeded accrued reserves and was increasing, it also follows that BAC should have recognized that the Asset-Stripping Transactions could leave each of CFC and CHL with insufficient assets to cover its expected liabilities. These circumstances combined with the Asset Stripping Transactions reflect an effort by BAC to 'shield itself from CFC's and CHL's contingent liabilities by leaving CFC and CHL as shell entities to "provide separation between the bank merger and what is left behind."[219] '

Another factor that is consistent with BAC's assumption of CFC's and CHL's contingent liabilities is the fact that these liability expenses were expected to be dealt with through the profits of the combined mortgage business at BAC. Such an approach would be consistent with creditors' expectations regarding how contingent liabilities would be satisfied had CFC and CHL *de jure* merged into BAC. In presenting the proposed Red Oak Merger to BAC's Board of Directors, Mr. Price, the CFO of BAC, explained that BAC planned to deal with the additional expected liabilities through BAC's income statement over four years.[220] As of June 29, 2011, BAC disclosed that it

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[219] Pl.'s Ex. 3204, BACMBIA-C0000036782, at 786 ("CFC, CHL and their subsidiaries will not transfer directly to BAC but will continue to exist and provide separation between the bank merger and what is left behind.")

[220] BACMBIA-B0000018283, Talking Points to Board of Directors Presentation, June 25, 2008, at 298 (explaining that BAC plans to deal with $1 billion of the estimated exposure "through our income statement over the next 4 years. . ."); Brinkley Dep. 176:5-

had taken a total representation and warranty expense of approximately $22 billion over the prior six quarters,[221] and these reserves were charged to BAC's MHEIS revenues.[222]

Despite cautioning its employees that "it is important to respect corporate formalities of these separate legal entities to help prevent liabilities and contingent liabilities of legacy Countrywide from being implicitly guaranteed or assumed by Bank of America,"[223] BAC's statements and payments of CFC's and CHL's contingent liabilities are more consistent with BAC's having done the exact opposite, thereby blurring the supposed line between the companies in the eyes of creditors and even BAC's own executives. For instance, when asked whether it is BAC or CFC that holds the "reserves for representation and warranties of legacy Countrywide," BAC's CEO denied knowing whether legacy Countrywide reserves were booked to a particular "legal

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13 (testifying that she "assum[es Joe Price] is talking about Bank of America Corporation" when discussing the future P&Ls to which Countrywide losses would be charged).

[221] Pl.'s Ex. 3370, BAC Public Presentation, "Addressing Legacy Mortgage Issues" dated June 29, 2011, at 4.

[222] *See* MBIA00975554, Tr. of BAC Q1 2010 Earnings Call, at p. 4 (Neil Cotty, interim CFO and CAO explained that "[p]roduction income includes the expense for reps and warranties, which was flat with the fourth quarter at around $500 million."); MBIA00975491, BAC 1Q10 Earnings Results Presentation, at p. 14 ("Production income remains impacted from expenses associated with reps and warranties."); MBIA00975621, Tr. of BAC Q2 2010 Earnings Call, at p. 4-5 ("Charles Noski, CFO commented that BAC had increased "reps and warranties expense by 722 million to $1.2 billion a a result of our continued evaluation of our exposure to repurchases, including our exposure to repurchase demands from certain monoline insurers," and that the "mortgage banking income [] dropped [] as a result of higher reps and warranties expense."); MBIA00975572, 2Q10 Earnings Results Presentation, at p. 17 (Showing graphically that the mortgage banking revenue results included "$1.2 billion for reps and warranties."); MBIA00975767, Tr. of Q4 2010 Earnings Call, at p. 5 (Charles Noski, CFO explained that "Home Loans and Insurance was significantly impacted by legacy costs, including the goodwill impairment charge, reps and warranties expense, and litigation costs. Our first mortgage banking business, however, excluding these costs, was profitable in the quarter.").

[223] Pl.'s Ex. 3617, BACMBIA-A0000079901, at 903.

entity"—stating that instead, BAC "run[s] the company from the top not from the legal entity basis."[224] With regards to what corporate entity maintains what portion of former Countrywide lines of business, BAC's CEO testified: "I'm saying we combined operations. I don't know what businesses are running in what legal entities."[225]

Likewise, the President of BAC's BAHL division, Barbara Desoer, did not know whether BAHL or CFC covered the costs when "Bank of America agreed to pay $108 million to settle Federal Trade Commission allegations that Countrywide charged struggling homeowners excessive fees."[226] When asked whether it is true that "[i]n general [she] didn't observe separate legal entities in the way that [she] operated the business?," Ms. Desoer answered, "That is correct."[227]

4. The Asset-Stripping Transactions Jeopardize Creditor's Customary Expectations

The Asset-Stripping Transactions jeopardized the customary expectations of contingent creditors. Although BAC assumed certain debts, and caused CFC and its subsidiaries to repay certain debts in connection with the Asset-Stripping Transactions,[228] BAC entirely dominated and controlled the process and decision-making regarding which debts or liabilities would be assumed by BAC and which would be left behind at CFC

[224] Moynihan Dep. 84:18-85:02.

[225] Moynihan Dep. 215:18-20.

[226] Desoer Dep. 450:22-25 (quoting news article about Countrywide acquisition), 451:11-12 (Desoer: "The amount related assessment with the Federal Trade Commission is approximately correct.").

[227] Desoer Dep. 451:18-21.

[228] As discussed in Part V.A above, BAC paid certain lessors and other creditors, assumed remaining public debt, and BANA assumed all deposit liabilities of Countrywide Bank.

and CHL. As a result, BAC favored certain "useful" creditors in connection with the Asset-Stripping Transactions.

For example, BAC claims that CHL's revolving lines of credit "had" to be repaid due to change of control provisions. Evidence shows, however, that prior to the Red Oak Merger, it remained an open question whether or not BAC would seek to renegotiate those lines of credit or pay them off.[229] Once BAC determined that after the Red Oak Merger it would cause CHL to cease originating mortgage loans, BAC elected not to renegotiate those lines of credit because if CHL was going out of the mortgage business, then it no longer needed funding for that business.[230] Accordingly, BAC caused CHL to pay off approximately $11.5 billion that was outstanding under six credit agreements.[231] Under two of those credit agreements where the amount outstanding totaled approximately $9.1 billion, the managing administrative agent was JP Morgan Chase and the administrative agent was BANA.[232] Other banks playing senior roles under those two credit agreements included ABN AMRO, Citibank and Deutsche Bank.[233] As

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[229] Pl.'s Ex. 3380, BACMBIA-Q0000045164, at 166 ("All debt agreements will be examined for change in control including: Decision repayment *or modification* of CFC's revolving credit agreements (($11.48 bn)") (emphasis added) and 168 ("Assess the need to either repay the facilities or methods to renegotiate the terms before LD1.").

[230] *Id.* at 169 (Noting under "Key Assumptions" that "All commercial paper or liquidity funding facilities will be shut down.").

[231] *See* CFC Current Report (July 8, 2008), at 4 (identifying six credit facilities terminated on July 1, 2008 after all amounts were repaid thereunder).

[232] CFC Current Report (July 8, 2008), at 4 (identifying BANA as administrative agent for $6.44 billion credit agreement and $2.64 billion credit agreement).

[233] There were also two credit agreements with a total amount outstanding of $1.2 billion where Barclay's was the managing administrative agent and other senior roles were played by BNP Paribas, Royal Bank of Canada and Société Générale. The remaining $200 million paid off on July 1, 2008 was outstanding under two credit agreements where the lender was William Street Credit Corporation. *Id.* *See also* Pl.'s

administrative agent under those two credit agreements, in my experience BANA also would have been a major lender. BANA thus received a significant portion of the approximately $9.1 billion repaid under those two credit agreements.

BAC also assumed $16.6 billion of outstanding bond obligations in the November Transactions. Among these obligations were indentures and agreements governing bond obligations issued or guaranteed by CHL and CFC. The evidence shows that BAC's decision to assume CFC and CHL's debt obligations can be traced back to the reaction of the investing and lending public in May 2008 when BAC announced that it had not yet decided whether it would assume CFC's debt obligations.[234] Analysts and ratings agencies criticized BAC and predicted that if BAC failed to assume those obligations it would have "stiff consequences" for BAC's "reputational risk", thereby negatively impacting BAC's future borrowing capabilities.[235] Following this very public criticism, BAC elected to take good care of CFC's and CHL's major creditors in order to avoid harming BAC's own borrowing power in the credit markets.

Ex. 3693, BACMBIA-A0000064323, at "Revolving LOC Paydown Forecast" Worksheet (showing balances of the six credit facilities planned for termination).

[234] BAC Registration Statement (Form S-4/A), at 59-60 (filed May 21, 2008) ("Bank of America is currently evaluating alternatives for the disposition of the remaining Countrywide indebtedness, including the possibility of redeeming, assuming or guaranteeing some or all of this debt, or allowing it to remain outstanding as obligations of Countrywide (and not Bank of America). Bank of America has made no determination in this regard, and there is no assurance that any of such debt would be redeemed, assumed or guaranteed.").

[235] BACMBIA-O000038664-666 (S&P's Victoria Wager writing on May 2, 2008 regarding BAC's S4/A filing, "In light of BAC's new language regarding the treatment of CFC's indebtedness we need to downgrade ratings"); BACMBIA-P0000056708-717 (BAC's Meghan Hakes writes on May 5, 2008, "Moody's believes that BofA is likely to support CFC debt, else stiff consequences for the big bank's reputational risk"); Pl.'s Ex. 3174, BACMBIA-C0000005193 (analyst writing on May 5, 2008, "Many investors believe that BAC does not want the negative publicity from renegotiation to ruin a solid reputation. But on May 1, BAC announced that it might not guarantee CFC's debt, which is most likely the first step in renegotiating the deal.").

Other than the "useful" creditors who benefited from BAC's selective payment or assumption of liabilities needed for the ongoing operation of BAC's business and the businesses that it stripped away from CFC, CHL and the Other Subs, remaining creditors were disadvantaged because the Asset-Stripping Transactions were structured in a way to screen CFC and CHL's operational assets and income from these remaining creditors. Moreover, it matters little how much CFC or CHL received in connection with the Asset-Stripping Transactions because the evidence shows that BAC controlled the allocation of value for its own benefit, directed CFC's and CHL's use of proceeds to pay off "useful" creditors, while leaving CFC and CHL as shell entities with no revenue-generating capacity, and toxic assets with no capacity to grow over time.[236] Among the remaining creditors whose rights were jeopardized by the Asset-Stripping Transactions were CFC and CHL's contingent creditors, such as MBIA.

One sign that a transaction, such as the Asset-Stripping Transactions, may work injustice or jeopardize creditors' rights is when it is contrary to custom to structure the transaction in the way in which it was structured. As previously discussed, the Asset-Stripping Transactions were contrary to custom in two respects. They did not reflect the customary means of integrating or owning a target after an acquisition, and they did not reflect customary corporate governance practices in their design and approval. Rather, they appear to have been carefully crafted for the specific purpose of isolating contingent creditors from the revenues and assets of CFC and CHL's chief business operations that were integrated into BAC.

[236] *See* Pl.'s Ex. 3357, BACMBIA-H0000009591, at 593, "Income Stmt Trend" Worksheet (showing CFC's consistent negative net income before taxes from the third quarter of 2008 through the first quarter of 2010); Capstone Report at 7-8 (CFC has no assets or operations which have the prospect of generating income).

The facts of this case illustrate why such asset-stripping transactions are contrary to multiple norms and customs. By stripping a target company of its operations and assets, such transactions leave contingent creditors with no effective recovery against the revenues and earnings of the business and operations that they legitimately expected the company with which they did business would continue to own. If such transactions were routinely permitted to stand, they would blast a hole in the legitimate and just expectations of creditors. Purchasers could follow BAC's footsteps and upon any acquisition immediately engage in similar asset-stripping transactions: transfer all useful operating assets to a new commonly owned entity, and assume only the liabilities due to creditors whose continued support was necessary for the ongoing business, thus capturing all of the upside of the target company, while leaving behind all other liabilities in a shell holding company with no capacity to generate revenues or earnings.

This method of undermining creditors' legitimate expectations is not simply "business as usual." It is not simply reliance by a purchaser on conventional expectations about the limited liability of a corporation. It is not simply reliance by a purchaser on the stand-alone legal status of the target corporation – *i.e.*, the use of a triangular merger to prevent the target's liabilities from affecting the rest of the purchaser's business and assets. By engaging in and structuring the Red Oak Merger and the Asset-Stripping Transactions in the manner that it did, BAC was trying to have its cake and eat it too. It followed up its acquisition of CFC stock with the Asset-Stripping Transactions – transactions that were concededly not at arm's-length – and left CFC with no operating assets or ongoing business, and thus no possibility of generating earnings on a going forward basis. Creditors should not be expected to have to contract against such conveyances, which go well beyond the mere incidents of a change of control.

Indeed, as a result of these non-arms length negotiated asset transfers, CFC and CHL have no revenue generating assets today.[237] They are shells of their former business selves, and their main function today is to deal with the high volume of repurchase requests and other litigation exposures for the business they originated prior to the asset stripping.[238] A more complete example of asset-stripping would be difficult to imagine.

All of these facts taken together provide strong evidence that, notwithstanding BAC's initial efforts to quarantine CFC and CHL's contingent liabilities at the legacy shell entities to the disadvantage of contingent creditors, BAC has instead, through its statements and conduct, assumed CFC's and CHL's contingent liabilities.

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[237] *See e.g.,* Capstone Report at 7-8 (CFC has no assets or operations which have the prospect of generating income); Pl.'s Ex. 3357, BACMBIA-H0000009591, at 593, "Income Stmt Trend" Worksheet (showing CFC consolidated had negative net income before taxes and negative mortgage banking income over six quarters following the Red Oak Merger); CWMBIA0018539267, at 270, CFC Selected Consolidated Financial Information, Dec. 31, 2010 (showing CFC consolidated had negative net income before taxes for 2010); CWMBIA0018539279, at 283, CHL Selected Financial Information, Dec. 31, 2010 (showing CHL had negative net income before taxes for 2010); CWMBIA0018539238, at 241, CFC Selected Consolidated Financial Information, Dec. 31, 2011 (showing CFC consolidated had negative net income before taxes for 2011); CWMBIA0018539313, at 317, CHL Selected Financial Information, Dec. 31, 2011 (showing CHL had negative net income before taxes for 2011); Coulter Dep. 90:18-23 ("[D]id you have an understanding at some point that Countrywide stopped originating loans? [Objection] A. From my vantage point, it was all Bank of America starting July 1, 2008."); Briones Dep. 282:14-18 ("Q. Do you know if Countrywide Financial engages in any loan origination activities? A. Like I said, I think it is just a shell corporation.").

[238] *See, e.g.,* Daines Report at 12 (remaining CFC employees are "primarily dedicated to resolving representation and warranty claims); BACMBIA-V0000028461, CHL Selected Financial Information, Dec. 31, 2010, at "Explanation 1" ("Currently, the activities at CHL are limited to managing its representations and warranties exposure and its owned inventory, serving as a master servicer for certain originated HELOC securitizations, marketing loans held for sale and addressing litigation concerns related to its mortgage activities that primarily occurred before 2008."); Briones Dep. 281:13-19 ("A. I didn't think Countrywide Financial still exists, outside of a shell corporation. Q. When you say it's a shell corporation, what do you mean by that? A. I believe it is still there to deal with all of this litigation.").

F. The Economic and Policy Rationales for Successorship Doctrines and the Characteristics of the Asset-Stripping Transactions

"Successorship" doctrines fulfill important economic purposes. In general, legal doctrines that respect the separate legal status of separate legal entities are economically efficient. They allow parties to partition different businesses among different creditors, who can then extend credit to a specific debtor, reducing the cost of capital. However, it is also clear that the use of separate corporations can increase the risks of fraud and opportunism, which can increase the risks to creditors, increase the overall cost of capital, and impose a general drag on economic activity. Various doctrinal exceptions to the general rule of no legal liability within a corporate group for commonly controlled corporations have evolved to reduce the risks of fraud and opportunism, including *de facto* merger, assumption of liabilities, and other successorship doctrines.

"Successorship" doctrines are born of three interlocking threats to economic efficiency must be balanced in the context of fraud.

1. First, it is clear that fraud itself can be harmful to creditors, and increase capital costs, and reduce economic activity. Laws banning fraud are ancient and found in every legal regime.

2. Second, it is also clear that the mere allegation of fraud can be both damaging to a defendant and tempting for a plaintiff to assert, and that the damage to the defendant from the allegation may not be reversed even if ultimately the defendant defeats a fraud claim. As a result, the law typically requires heightened pleading and proof requirements for fraud claims – requiring, for example, that a defendant be affirmatively shown to have intended to deceive.

3. Third, these heightened pleading and proof requirements come with their own cost because it will often be difficult for true victims of fraud to be able to obtain the evidence needed to satisfy these requirements. If all the law did was simply to elevate pleading and proof requirements, the result would be more instances of unproveable fraud, and thus more fraud – with, again, a harmful effect on economic activity.

In response to these three threats and in the interest of economic efficiency, the law has developed various "quasi-fraud" doctrines, including constructive fraudulent transfer statutes, as well as the *de facto* merger and other successorship doctrines to eliminate, or at least reduce, these threats to economic efficiency.

A summary way of understanding the economic rationale for the *de facto* merger and other successorship doctrines is that the law reduces some of the burdens on a plaintiff in a transactional context where the following threats to economic efficiency are present: (a) the use of the corporate form, which as noted above can increase the risk of fraud or opportunism; (b) one or more significant business combination transactions, in which the legitimate expectations of creditors regarding the ongoing business and operations of a counterparty can be dramatically changed and which are relatively uncommon and not in the ordinary course of business (thereby minimizing the degree to which the ordinary rules of corporate separateness are affected); and (c) various other factual factors, articulated in different ways by different courts in different jurisdictions, that are viewed as "badges" of fraud, or, put in the language of social science, are correlated with fraud risk. These factors include, but are not limited to: lack of arm's-length dealing; common ownership, management, or control; transfer of substantially all of a company's assets, particularly when the transferring company becomes a shell; or the transferring company was rendered insolvent by the conveyance. The economic upshot of these doctrines is effectively to put the burden of justifying unusual and large corporate business combination transactions on a defendant, ***without*** requiring a plaintiff to affirmatively plead fraud, which would trigger the competing threats and the heightened requirements previously noted.

Collectively, *de facto* merger, successorship and related doctrines serve the important economic purposes of reducing the incidence of fraud in particular fact settings where fraud is most likely, without generally undermining the economic value of corporate separateness.

In this case, characterizing (a) the Asset-Stripping Transactions as a *de facto* merger and (b) BAC's statements both before and after, and its conduct since the Asset-Stripping Transactions as an assumption of liabilities would be consistent with the underlying rationale for successorship doctrines. The Asset-Stripping Transactions were uncommon and not in the ordinary course of business and uncharacteristically complex and had the practical effect of a *de jure* merger. The effect of the Asset-Stripping Transactions was that CFC and CHL transferred substantially all their assets and subsidiaries to BAC and its non-CFC subsidiaries, leaving CFC and CHL with toxic assets, contingent liabilities, and without business operations. Moreover, as explained above, the Asset-Stripping Transactions were approved pursuant to a cursory process that was contrary to applicable corporate governance customs and practices. In addition, BAC has directed the payment of or assumed the debt of CFC and CHL, made statements suggesting it would be responsible for CFC's and CHL's contingent liabilities, and actually paid so many of these liabilities that the economic result is the same as though a *de jure* merger had occurred. And finally, the Asset-Stripping Transactions threatened to jeopardize, and in fact did jeopardize, the legitimate expectations of creditors regarding the ongoing business operations of CFC and CHL. Taken as a whole, it is difficult to imagine a clearer example than the Asset-Stripping Transactions and the selective, but pervasive, assumption of liabilities, of the type of corporate engineering that threatens to undermine the economic value of corporate separateness through an abuse of corporate

formalities to achieve a result that is not economically efficient and jeopardizes creditors' reasonable expectations.

Dated: June 22, 2012

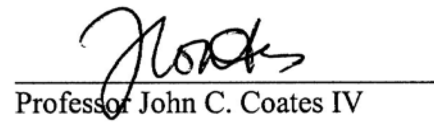

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Exhibit A

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John F. Cogan Jr. Professor of Law and Economics	6/06 – Present
Research Director, Program on the Legal Profession	6/07 - Present
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Assistant Professor of Law	6/97 - 6/01

Teaching Corporations, Corporate Governance and Boards of Directors, Mergers & Acquisitions, Contracts, Financial Institutions Regulation, Legal Profession and advanced seminars

Securities and Exchange Commission, Washington, D.C.

Independent Distribution Consultant	5/04 – 9/11

Wachtell, Lipton, Rosen & Katz, NYC

Partner	1/96 - 5/97
Associate (Full- or Part-Time)	3/88 - 12/95

Specialized in corporate, securities, M&A, and financial institutions law and regulation

Managed legal work for large corporate mergers and acquisitions, recapitalizations, buyouts, freezeouts, and public offerings

Advised participants in proxy fights, auctions, and hostile takeovers

Managed disclosure and compliance "crises" at public companies, particularly financial institutions

New York University School of Law, NYC

Visiting Professor	7/05 – 12/05
Adjunct Assistant Professor	1/93 -5/97
Lecturer	1/92 - 12/93

Boston University Law School, Boston, MA

Lecturer 1/95 – 6/97

MEMBERSHIPS / AFFILIATIONS
PRESENT OR PAST

American Law Institute — Member

New York Stock Exchange — Member, Legal Advisory Board

American Bar Association — Member, Section on Business Law

American Law and Economics Association — Member, Board of Directors

Association of American Law Schools — Member

European Corporate Governance Institute — ECGI Research Associate

National Bureau of Economic Research — Invited Speaker / Researcher

Harvard Business School / Harvard Law School
Ad Hoc Group on Corporate Governance — Founding Member

Harvard Center on Lawyers and the Professional Services Industry — Research Director

Committee on Capital Market Regulation — Task Force Member and Primary Author

EDUCATION

New York University School of Law — J.D. Cum Laude, May 1989

New York University Law Review — 1988-89—Editorial Board, Articles Editor
1987-88—Staff Member

Law Review Alumni Association Award — Third in Class
George P. Foulk Memorial Award — Scholarship
Pomeroy Prize — Outstanding Academic Performance
Order of the Coif
American Jurisprudence Awards (contracts, procedure, securities)

University of Virginia — B.A. (History), Highest Distinction, May 1986

Thesis: "Christianity, Kingship and a Carolingian Lord"
Younger Prize — Distinction in American History
Jefferson Scholar — Four-year Merit-Based Scholarship
Echols Scholar — Academic and Leadership Merit

PUBLICATIONS

Recent Publications

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Exhibit C

Materials Relied Upon

Documents Produced in MBIA v. Countrywide Home Loans, et al.

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BACMBIA-A0000061344 (Plaintiff's Exhibit 2787)
BACMBIA-A0000064102 (Plaintiff's Exhibit 3590)
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MBIA00975491
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Deposition Transcripts and Exhibits

Debra Brown Deposition Transcript and Exhibits, February 11, 2011 & March 26, 2011

Pauline Munro Kennedy Deposition Transcript and Exhibits, March 10, 2011 & May 5, 2011

Jens Christian Ingerslev Deposition Transcript and Exhibits, March 2, 2011 & May 20, 2011

Kathryn Tinsley Deposition Transcript and Exhibits, April 1, 2011 & June 30, 2011

Michael J. Gross Deposition Transcript and Exhibits, April 27, 2011

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Scott Berry Deposition Transcript and Exhibits, July 21, 2011 & September 9, 2011

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Ian Stobie Deposition Transcript and Exhibits, August 5, 2011

Christopher Dumont Deposition Transcript and Exhibits, January 27, 2012

Brad Williams Deposition Transcript and Exhibits, February 2, 2012

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James Eckerle Deposition Transcript and Exhibits, April 6, 2012

Amy Brinkley Deposition Transcript and Exhibits, April 11, 2012

Ken Lewis Deposition Transcript and Exhibits, April 19, 2012

Helga Houston Deposition Transcript and Exhibits, April 23, 2012

Helen Eggers Deposition Transcript and Exhibits, April 27, 2012

Brian Moynihan Deposition Transcript and Exhibits, May 2, 2012

Gregory Hobby Deposition Transcript and Exhibits, May 3, 2012

Mary Kanaga Deposition Transcript and Exhibits, May 10, 2012

Kevin Bartlett Deposition Transcript and Exhibits, May 11, 2012

Barbara Desoer Deposition Transcript and Exhibits, May 15, 2012 & May 16, 2012

Joseph Jones Deposition Transcript and Exhibits, May 16, 2012

Edward Ofcharsky Deposition Transcript and Exhibits, May 18, 2012 & May 25, 2012

Joe Price Deposition Transcript and Exhibits, May 23, 2012

Gregory Snelson Deposition Transcript and Exhibits, May 25, 2012

SEC Filings

Bank of America Corp., Annual Report Form 10-K for Year Ended December 31, 2007

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Bank of America Corp., Quarterly Report Form 10-Q for period ending June 30, 2008

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Countrywide Financial Corp., Quarterly Report Form 10-Q for period ending June 30, 2008

Countrywide Financial Corp., Current Report Filing Form 8-K filed July 08, 2008

Countrywide Financial Corp., Current Report Filing Form 8-K filed August 07, 2008

Acterna Corp. Schedule 13E-3/A June 01, 1998 and Exhibit 99.1

PriCellular Corp. Schedule 13E-3/A July 02, 1998 and Exhibit 99.B3

MBIA v. Countrywide Home Loans, et al. (N.Y. Sup. Index No. 08-602825) Documents

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Bank of America Corporation's Mem. Opp. MBIA's Motion to Compel (Mot. Seq. 51), June 19, 2012

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Defendants' Reply Mem. in Support of Their Motion to Dismiss The Am. Complaint

Letter from Concannon to Justice Bransten (July 21, 2011)

Letter from Rosenberg to Justice Bransten (January 9, 2012)

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Transcript of July 27-28, 2011 Phone Conference with Justice Bransten

Transcript of August 18, 2011 Phone Conference with Justice Bransten

Transcript of October 5, 2011 Hearing before Justice Bransten

Transcript of March 9, 2012 Hearing before Justice Bransten

Transcript of March 23, 2012 Hearing before Justice Bransten

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