COHN LIFLAND PEARLMAN
HERRMANN & KNOPF LLP
Peter S. Pearlman
Jeffrey W. Herrmann
Park 80 Plaza West-One
Saddle Brook, NJ 07663
(201) 845-9600

WOLF POPPER LLP
Lester L. Levy
Robert C. Finkel
Anthony D. Green
845 Third Avenue
New York, NY 10022
(212) 759-4600

Attorneys for Plaintiff

STATE OF NEW JERSEY, DEPARTMENT OF TREASURY, DIVISION OF INVESTMENT, on behalf of COMMON PENSION FUND A, Plaintiff, v. MERRILL LYNCH & CO., INC., and BANK OF AMERICA CORPORATION, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION HUDSON COUNTY Docket No.: **COMPLAINT AND JURY DEMAND**

Plaintiff, the State of New Jersey, Department of Treasury, Division of Investment, on behalf of Common Pension Fund A ("NJ DOI"), by its attorneys, Cohn Lifland Pearlman Herrmann & Knopf LLP and Wolf Popper LLP, alleges the following based upon the investigation of NJ DOI and its counsel, including a review and analysis of the public filings of Merrill Lynch & Co., Inc. ("Merrill") and Bank of America Corporation ("Bank of America")

with the U.S. Securities and Exchange Commission (the "SEC"); research reports by securities analysts; transcripts of Merrill and Bank of America conference calls; press releases and media reports; agreements between NJ DOI and Merrill; and other documents and materials related to Merrill.

NATURE OF THE ACTION

1. NJ DOI brings this action for breach of contract and negligent misrepresentation to enforce NJ DOI's rights with respect to (i) NJ DOI's purchase of $300 million of Merrill 9.00% Non-Voting Mandatory Convertible Non-Cumulative preferred stock Series 1, with a liquidation preference of $100,000 per share ("Series 1 Preferred Shares" or "Preferred Shares"), pursuant to a "Share Subscription Agreement" between NJ DOI and Merrill dated as of January 15, 2008, and (ii) NJ DOI's exchange of those Preferred Shares for 11 million shares of Merrill common stock (at an exchange ratio of $27.68 per common share) pursuant to a "Share Exchange Agreement" between NJ DOI and Merrill, dated as of July 28, 2008.

1. Merrill Lynch repeatedly misrepresented its financial position to the NJ DOI and investors generally. If NJ DOI had known Merrill's true financial condition, it would not have participated in the January 2008 offering and would not have agreed to a conversion in July 2008 that gave up anti-dilution reset rights. Second, Merrill represented that all investors would receive the same economic terms in the conversion. NJ DOI communicated to Merrill repeatedly that that fact was critical to its decision to convert. Merrill breached that representation to NJ DOI by giving one investor a preferential deal.

2. Specifically, Merrill breached the representations and warranties in the Share Subscription Agreement and the Share Exchange Agreement in two respects.

3. First, Merrill breached the representations and warranties in the Share Subscription Agreement and Share Exchange Agreement that (i) reports filed with the SEC "did not ... contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading" (Section 3.6(a)); (ii) Merrill's financial statements filed with the SEC were "prepared in accordance with GAAP [generally accepted accounting principles]" and "fairly present in all material respects the consolidated financial position of the Company" (Section 3.6(b)); and (iii) Merrill "has implemented and maintains disclosure controls and procedures and internal control over financial reporting designed to ... provide reasonable assurance regarding the reliability of financial reports and the preparation of financial statements for external purposes in accordance with GAAP" (Section 3.6(c)).

4. In fact, Merrill's financial statements were incomplete, did not "present in all material respects the consolidated financial position of the Company" and were not "prepared in accordance with GAAP," as was represented and warranted by Sections 3.6(a)-(c) of the Share Subscription Agreement and Share Purchase Agreement.

5. Merrill disclosed certain assets in SEC filings on only a "net" basis, and under-stated Merrill's exposure to in excess of $58.0 billion of high risk corporate Collateralized Debt Obligations, Collateralized Loan Obligations, Residential Mortgage-Backed Securities and Commercial Mortgage-Backed Securities that were purportedly hedged by monoline insurers (the "High Risk Insured Assets").

6. The Merrill financial statements filed with the SEC beginning with the third quarter of 2007 through the third quarter of 2008 were in violation of GAAP (Statement of Financial Accounting Standards 107 and 133, Accounting Principles Board No. 28, Statement of Position 94-6, among others) since, *inter alia*, they failed to disclose the existence and the associated risks and uncertainties for: (i) in excess of $58.0 billion of High Risk Insured Assets; and (ii) that the insurance coverage for the risk exposures of the High Risk Insured Assets (disclosed in January 2009 as being $58.0 billion at September 26, 2008 and $50.3 billion at December 26, 2008) was obtained from monoline insurers that were themselves at risk of defaulting as evidenced by downgrades in their credit ratings beginning in 2007.

7. Merrill first revealed the under-reporting of these High Risk Insured Assets and the magnitude of Merrill's reliance on monoline insurers at year-end December 26, 2008.

8. Merrill further breached the representation and warranty in Section 3.13 of the Disclosure Statements to the Share Exchange Agreement that if Merrill allowed any of the other six holders of Preferred Series to convert their Preferred Shares to a new series of preferred shares, those preferred shares "will have a reference price" of $33.00.

9. Merrill represented that all investors except one would be converting their preferred stock into common and would be foregoing the anti-dilution reset feature. Merrill also represented that the one investor not receiving common stock had regulatory issues that precluded that investor from owning common stock, so that investor was receiving a new class of preferred stock that had a reference price of $33.00 and did not contain an anti-dilution reset feature. Merrill represented that the terms of the preferred stock issued to this one investor would be "economically equivalent" to the terms being offered to all other investors.

10. In fact, Merrill entered into a contemporaneous agreement with a different Series 1 shareholder (TPG-Axon Capital), holding $500 million of the Preferred Shares, providing for the issuance of a new series of preferred shares (Series 3) with a $22.50 reference price – terms that were substantially more valuable than the terms for conversion of NJ DOI's Preferred Shares into Merrill common shares.

11. The preferential terms that Merrill agreed to with TPG violated Merrill's representation and warranty to NJ DOI that any new issuance of preferred shares "will have a reference price" of $33.00.

12. NJ DOI agreed to exchange its Preferred Shares, and forfeit valuable anti-diluation features, in reliance on the completeness and accuracy of Merrill's representations and warranties. Because of Merrill's true adverse, undisclosed financial condition, Bank of America was required on January 15, 2009 to sell common stock warrants to the U.S. government. Those warrants would have triggered anti-dilution provisions of the Preferred Shares entitling NJ DOI to 19.4 million (rather than 11 million) Merrill common shares.

13. NJ DOI seeks, as a remedy for Merrill's breach of its representations and warranties, and negligent misrepresentation, to be awarded rescissory or compensatory damages.

THE PARTIES

14. Plaintiff, the State of New Jersey, Department of Treasury, Division of Investment, is an instrumentality of the State of New Jersey, with offices at 50 West State Street, Trenton, New Jersey.

15. The New Jersey Division of Investment manages investments for at least seven public retirement systems, providing benefits for more than 780,000 current and future retirees.

16. Common Pension Fund A is a common trust fund managed by the New Jersey Division of Investment, established pursuant to N.J.S.A. 52:18A-90.1.

17. The New Jersey Division of Investment has the authority to commence litigation on behalf of the Common Pension Fund A.

18. Defendant Merrill was, at relevant times, a business entity organized under the laws of the State of Delaware.

19. Merrill does business and maintains offices in Hudson County, New Jersey.

20. On December 5, 2008, Merrill's shareholders approved the Merger Agreement between Merrill and Bank of America Corporation ("Bank of America") pursuant to which Merrill agreed to be acquired by Bank of America.

21. The merger was consummated on January 1, 2009 (the "Merger").

22. Merrill, in connection with the Merger, was merged into a wholly-owned subsidiary of Bank of America.

23. Defendant Bank of America is a Delaware corporation with its principal offices located in Charlotte, North Carolina.

24. At all relevant times, Bank of America operated as a bank and financial holding company.

25. Bank of America, as the successor entity in the merger, currently does business under the name Bank of America Merrill Lynch.

26. Bank of America does business and maintains offices in Hudson County, New Jersey.

27. Bank of America is liable for the acts and omissions alleged herein as the parent company and successor-in-interest to Merrill.

28. Among other things, Bank of America assumed Merrill's obligations under Series 1, Series 2, and Series 3 of the Preferred Shares (as further described herein) and thus is a necessary party for NJ DOI to obtain complete relief.

29. Section 6.10 of the Share Subscription Agreement and the Share Exchange Agreement vest "exclusive jurisdiction" over any dispute rising out of those agreements in "the appropriate courts of the State of New Jersey."

30. Section 6.10 of the Share Subscription Agreement and the Share Exchange Agreement provides that New York substantive law shall be applied to the claims asserted herein.

SUBSTANTIVE ALLEGATIONS COMMON TO EACH CAUSE OF ACTION

I. Background of Merrill's Financial Difficulties

A. Merrill's Portfolio of High Risk Assets

31. Merrill reported net losses in each of the four quarters of 2007.

32. Those losses were substantially attributable to declining values of complex financial instruments such as securitizations and collateralized debt obligations, categories of asset-backed securities and mortgage-backed securities, including related derivative positions used as either hedges or investments in their own right.

33. Securitization involves the pooling of mortgages or other cash-flow producing financial assets, such as bonds and car loans, into securities that are then sold to investors.

34. Merrill originated mortgages and other loan products primarily to aggregate and securitize those instruments into "asset-backed" ("ABS") or "mortgage-backed" ("MBS") securities to be sold to third parties.

35. Asset-backed securities (or ABS) generally refer to non-real estate securitized fixed income investments, such as securities backed by car or credit card loans.

36. Mortgage-backed securities (or MBS) generally refer to fixed income investments backed by real estate mortgages.

37. Collateralized Debt Obligations ("CDOs") are a generic category of all securitized fixed-income assets.

38. Merrill receives fees for structuring and distributing the CDOs and asset and mortgage-backed securities sold to investors.

39. CDO assets are divided into different tranches with varied levels of risk and return: super senior and senior tranches (rated AAA), mezzanine tranches (rated AA to BB), and equity tranches (unrated).

40. Merrill defined super senior ABS CDOs in its 2007 Form 10-K as "the senior most tranche in an ABS CDOs capital structure" with "priority to the proceeds from liquidated cash ABS CDO assets."

41. The credit rating of the super senior ABS CDOs was "typically AAA at inception of the underwriting."

B. Monoline Insurance

42. Monoline insurance is insurance for debt instruments, such as ABS, MBS, CDOs, or leveraged loans, which guarantee the timely payment of bond principal and interest.

43. The insurance is called "monoline" because it is issued by insurers that insure only financial assets.

44. A common type of monoline insurance is called a "credit default swap."

45. In a credit default swap, one party (a monoline insurer such as MBIA, Inc.) insures the risk of loss on a debt instrument in return for premium payments during the term of the credit default swap.

46. Because monoline insurance and credit default swaps are intended to protect against loss, they are sometimes referred to as a hedge.

47. AIG, although not technically a monoline insurer, also provided insurance against loss to financial assets similar to the insurance provided by monoline insurers.

48. Other monoline insurers include ACA Capital Holdings Inc., XL Capital Ltd., and Ambac Financial Group, Inc.

49. Monoline insurers earn small annual premiums that are customarily less than 1% of the stated value of the issued financial assets.

50. When the risk that insured assets may default increases, the risk that the monoline insurers may be unable to pay the insured amounts also increases.

51. The insurer's credit rating may be lowered when the likelihood of pending or potential claims increases.

52. In accordance with GAAP, the insured party is required to disclose if the amount of its monoline insurance is compromised due to the lowered credit of monoline insurers, and then take an appropriate write-down or reserve.

53. As U.S. Secretary of the Treasury, Timothy Geithner stated in a July 10, 2009, speech to House Financial Services and Agriculture Committees, Joint Hearing on Regulation of OTC Derivatives, the monoline insurers were thinly capitalized, yet sold enormous amounts of protection far beyond their ability to pay:

> Under our existing regulatory system, some types of financial institutions were allowed to sell large amounts of protection against certain risks without adequate capital to back those commitments. The most conspicuous and most damaging examples of this were the monoline insurance companies and AIG. **These firms and others sold huge amounts of credit protection on mortgage-backed securities and other more complex real-estate related securities without the capacity to meet their obligations in an economic downturn**.
>
> Banks were able to get substantial regulatory capital relief from buying credit protection on mortgage-backed securities and other asset-backed securities from **thinly capitalized, special purpose insurers subject to little or no initial margin requirements**
> .
> The apparent ease with which derivatives permitted risk to be transferred and managed during a period of global expansion and ample liquidity **led financial institutions and investors to take on larger amounts of risk than was prudent**.
> [Emphasis added.]

54. Financial institutions, such as Merrill, took advantage of this lack of regulation of the monoline insurers to create the appearance of a safety net on the potential for losses on its CDOs and other risky financial assets.

55. Prior to the fourth quarter or 2007, Merrill did not quantify its reliance on monoline insurers.

56. In the 2007 Form 10-K, filed February 28, 2008, Merrill only disclosed its exposure to monoline insurers on U.S. super-senior ABS CDS of $19.9 billion.

57. It was not until January 16, 2009 that Merrill disclosed its aggregate exposure to monoline insurance.

58. In a Form 8-K filed on January 16, 2009, Bank of America, as the surviving corporation in the Merger, acknowledged that as of year end December 26, 2008 Merrill had a previously undisclosed concentration of $50.3 billion of monoline insurance, in addition to the previously disclosed $19.9 billion of monoline insurance underlying the super senior U.S. ABS CDOs. The Form 8-K further disclosed that Merrill's concentration of monoline insurance at September 26, 2008 (in addition to the insurance on the U.S. Super Senior ABS CDOs) was $58.0 billion.

II. Merrill's Third Quarter 2009 Financial Performance

59. Merrill issued a press release on October 5, 2007 pre-announcing preliminary third quarter 2007 operating results, disclosing that the Company had been unable to sell billions of dollars of its CDOs, and that it would take "[w]rite-downs of an estimated $4.5 billion, net of hedges, related to incremental third quarter market impact on the value of CDOs and sub-prime mortgages."

60. On October 24, 2007, Merrill issued a press release stating that actual write-downs for the third quarter were $7.9 billion.

61. Merrill described the $7.9 billion in write-downs as "significantly greater than the incremental $4.5 billion write-down Merrill disclosed at the time of its earnings pre-release."

62. On November 7, 2007, Merrill filed its Form 10-Q for the third quarter of 2007 with the SEC.

63. Merrill's third quarter Form 10-Q substantially incorporated the financial results and financial information quoted above from the October 24, 2007 press release and represented that the financial disclosures in the Form 10-Q complied with GAAP.

64. Merrill's third quarter Form 10-Q, however, only disclosed Merrill's exposures net of hedges (including monoline insurance) to the High Risk Insured Assets and to Merrill's "AAA-rated super senior CDO net exposure."

65. Merrill failed to disclose its gross exposure to the High Risk Insured Assets, and the gross amount of monoline insurance established as a hedge against that gross exposure.

66. Merrill's disclosure of the High Risk Insured Assets on a net basis, rather than a gross basis, obscured the risk of loss on the High Risk Insured Assets as well as the risk that the monoline insurers could fully satisfy their obligations in the event of a default on the High Risk Insured Assets.

67. Merrill's third quarter 2007 Form 10-Q was materially false and misleading, among other reasons, because Merrill's risk of loss on CDOs and High Risk Insured Assets, including "AAA-rated super senior CDOs," was dependent on undisclosed concentrations of Merrill's monoline insurance.

III. NJ DOI's January 15, 2008 Investment In Merrill Series 1 Preferred Shares

68. On January 15, 2008, Merrill and NJ DOI executed the share Subscription Agreement pursuant to which NJ DOI purchased 3,000 shares of Merrill's Series 1 Preferred Stock for $300 million.

69. NJ DOI's Preferred Share purchase was part of a seven-investor private placement of an aggregate of $6.6 billion of Preferred Shares.

70. On January 15, 2008, Merrill announced, first in a press release and later that same day in a more detailed Form 8-K filed with the SEC, that it had enhanced its capital position by reaching "separate agreements with each of Korean Investment Corporation, Kuwait Investment Authority, Mizuho Corporate Bank, TPG-Axon Capital, The New Jersey Division of Investment, The Olayan Group and T. Rowe Price Associates, Inc. ... to sell an aggregate of 66,000 shares of newly issued 9.00% Non-Voting Mandatory Convertible Non-Cumulative Preferred Stock, Series 1, par value $1.00 per share and liquidation preference $100,000 per share [i.e., the Series 1 Preferred Shares], at a price of $100,000 per share, for an aggregate purchase price of approximately $6.6 billion."

A. Representations And Warranties In The Share Subscription Agreement

71. The Share Subscription Agreement contained a number of "Representations and Warranties" (as titled by the agreement) by Merrill concerning its financial statements.

72. Section 3.6(a) represented and warrantied that "[s]ince January 1, 2005, the Company and each of its Subsidiaries has timely filed or furnished all reports, registration statements, proxy statements and other materials, together with any amendments required to be made with respect thereto, that were required to be filed with (A) the SEC under the Securities Act or the Exchange Act, (B) the Office of Thrift Supervision, (C) the Federal Deposit Insurance Corporation ("FDIC"), (D) the Federal Reserve Board, or (E) any other federal, state or foreign Governmental Entity..." and that all such reports "complied in all material respects with all of the statutes and published rules and regulations enforced or promulgated by the regulatory authority

with which they were filed and (A) with respect to reports filed with the SEC, did not as of the date of filing thereof with the SEC contain any untrue statement of material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading and (B) with respect to all other reports, were complete and accurate in all material respects as of their respective dates."

73. Section 3.6(b) represented and warrantied that "[e]ach of the consolidated balance sheets, and the related consolidated statements of income, changes in stockholders' equity and cash flows, included in the Reports filed with the SEC under the Exchange Act (A) have been prepared from, and are in accordance with, the books and records of the Company and its Subsidiaries, (B) fairly present in all material respects the consolidated financial position of the Company and its consolidated Subsidiaries as of the dates shown and the results of the consolidated operations, changes in stockholders' equity and cash flows of the Company and its consolidated Subsidiaries for the respective fiscal periods or as of the respective dates therein set forth... (C) complied as to form, as of their respective dates of filing with the SEC, in all material respects with applicable accounting requirements and with the published rules and regulations of the SEC with respect thereto and (D) have been prepared in accordance with GAAP consistently applied during the periods involved...."

74. Section 3.6(c) represented and warrantied that "[t]he records, systems, controls, data and information of the Company and its Subsidiaries are recorded, stored, maintained and operated under means (including any electronic, mechanical or photographic process, whether computerized or not) that are under the exclusive ownership and direct control of the Company

or its Subsidiaries or accountants (including all means of access thereto and therefrom)... The Company (A) has implemented and maintains (x) disclosure controls and procedures and (y) internal control over financial reporting... designed to (x) ensure that material information relating to the Company, including its consolidated Subsidiaries, is made known to the chief executive officer and the chief financial officer of the Company by others within those entities, and (y) provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP, respectively, and (B) has disclosed, based on its most recent evaluation prior to the date hereof, to the Company's outside auditors and the audit committee of the Company's Board of Directors (x) any significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting... that are reasonably likely to adversely affect the Company's ability to record, process, summarize and report financial information and (y) any fraud, whether or not material, that involves management or other employees who have a significant role in the Company's internal control over financial reporting."

75. Merrill acknowledged in Section 3.16, that NJ DOI "will rely upon the truth and accuracy of the foregoing representations."

76. Merrill's representations and warranties contained in Section 3.6 of the Share Subscription Agreement were materially false as of January 15, 2008 due to Merrill's materially false and misleading and incomplete third quarter 2007 Form 10-Q.

B. Series 1 Preferred Shares' Mandatory Conversion Ratios

77. The Certificate of Designations for the Preferred Shares were filed with the SEC as an exhibit to a Form 8-K on January 16, 2008.

78. The Certificate of Designations outlined the rights of the Series 1 Preferred Shares (the "Certificate of Designations").

79. The Series 1 Preferred Shares were entitled to 9.00% dividends.

80. Under Section 3(a) of the Certification of Designations, the Series 1 Preferred Shares, if not converted earlier, would automatically convert into Merrill common stock on October 15, 2010 (the "mandatory conversion date").

81. The initial reference price for conversion of the Preferred Shares was $52.40 per share (based on the three-day average closing price of Merrill Common Stock as of January 11, 2008).

82. Section 3(a) provided three separate scenarios for the exchange ratio of the Preferred Shares into common stock based on the average closing price of Merrill common stock immediately prior to conversion.

83. First, if the 20-day average price was higher than $61.30 (calculated as 117% of the reference price of $52.40 per share), investors would receive approximately 1,631 Merrill common shares for every one share of Series 1 Preferred Shares (calculated by dividing the $100,000 liquidation preference of each Preferred Share by $61.30 per share).

84. Second, if the 20-day average price was lower than or equal to $52.40, investors would receive approximately 1,908 common shares for every one share of Preferred Shares (calculated by dividing the $100,000 liquidation preference of each Preferred Share by $52.40 per share).

85. Third, if the 20-day average price was between $52.40 and $61.30, investors would receive between 1,631 and 1,908 common shares for every one share of Series 1 Preferred

Shares (calculated by dividing the $100,000 liquidation preference of each Preferred Share by the 20-day average price of Merrill common shares).

86. Under Section 3(b) of the Certificate of Designations, investors could elect to convert each Preferred Share anytime prior to October 15, 2010 into 1,631 common shares of Merrill, which represented the minimum number of shares permitted under the conversion formula.

C. Preferred Shares Reset Feature

87. The Preferred Shares had a reset feature, pursuant to Sections 3(a)(ii)(A) and 3(a)(vii) of the Certificate of Designations.

88. In the event Merrill issued, in the aggregate, on or before January 15, 2009, $1 billion or more of common stock or securities that were convertible into or exchangeable or exercisable for common stock, the reference price of the Series 1 Preferred Shares (which was initially $52.40) would be reset to the lowest common share price or purchase price per share contained in any of the reset triggering securities issued.

89. This reset reference price was subject to upward adjustment comparable to a reduction in the initial conversion rate, based on subsequent price appreciation on Merrill common stock (similar to the adjustment feature of the initial reference price).

90. For example, if Merrill issued $1 billion or more of common stock on or before January 15, 2009, at $20.00 per share, the reference price would be reset to $20.00 enabling NJ DOI to convert on October 15, 2010 its Series 1 Preferred Shares into 15 million shares of Merrill Common Stock ($100,000 / $20.00 = 5,000 x 3,000 = 15 million).

91. Those 15 million shares would be subject to revision downward in the event that Merrill Common Stock appreciated (by as much as 17% above the $20.00 reference price) after the reset event.

92. Any appreciation above 17% would not result in further dilution of the number of shares received on conversion.

93. The reset feature was an important right of the Series 1 Preferred Shares to NJ DOI to avoid dilution to its equity interest if Merrill raised equity capital at prices below $52.40 per share.

IV. Merrill Announces Its 2007 Fourth Quarter Earnings Results On January 17, 2008

94. Merrill, in Section 3.7 of the Disclosure Schedules annexed to the Share Subscription Agreement, informed NJ DOI that: "the Company intends to report a material net loss for the Fourth Quarter as a result of material losses and writedowns attributable to subprime, Collateralized Debt Obligations ('CDOs') and other asset classes, including monoline exposure. It is possible that these losses and writedowns could cause the Company's capital ratio to fall below the level required by the [SEC] to be classified as 'well capitalized.'"

95. On January 17, 2008, Merrill issued a press release, prior to the opening of the U.S. securities markets, reporting its operating results for the fourth quarter of 2007.

96. Merrill's net loss for the fourth quarter of 2007 was $9.8 billion, or $12.01 per diluted share, significantly below net earnings of $2.3 billion, or $2.41 per diluted share for the fourth quarter of 2006.

97. The fourth quarter loss was primarily the result of write-downs that Merrill took in the quarter of $11.5 billion against U.S. Super Senior ABS CDOs and U.S. sub-prime residential mortgages to reflect the resale value of those assets.

98. In addition, Merrill recorded in the fourth quarter a negative credit valuation adjustment of $2.6 billion against hedges with monoline insurers on U.S. ABS CDOs.

99. A credit valuation adjustment is a charge against income that reflects the decreased likelihood that a monoline insurer will satisfy its obligations under an insurance policy.

100. Merrill disclosed in its Form 10-K for fiscal 2007, filed with the SEC on February 28, 2008, for the first time, that Merrill had $30.4 billion of outstanding Super Senior CDOs and a hedge against that position of $23.6 billion in monoline insurance.

101. Merrill's fourth quarter 2007 financial results and 2007 Form 10-K were materially false and misleading because, among other things, Merrill did not disclose in excess of $50 billion in exposure to High Risk Insured Assets purportedly secured by over $50 billion in monoline insurance.

102. This concentration of hedges with monoline insurers created a material risk factor that was undisclosed to investors, including NJ DOI.

103. This information was first disclosed on January 16, 2009, when Bank of America announced Merrill's financial results for the period ended December 26, 2008.

V. Merrill Announces Its First Quarter 2008 Earnings Results On April 17, 2008

104. Merrill issued a press release on April 17, 2008, prior to the opening of U.S. trading, reporting operating results for the first quarter 2008.

105. Merrill's net loss for the first quarter of 2008 was $1.96 billion, or $2.19 per diluted share, compared to net earnings of $2.16 billion, or $2.26 per diluted share for the first quarter of the prior fiscal year.

106. When Merrill held its conference call on April 17, 2008, at 8:00 a.m., to discuss its First Quarter 2008 earnings, John Thain, Merrill's then-CEO, stated that "I would characterize our First Quarter results as good operating results in a very difficult environment... In terms of leverage, we have been reducing our balance sheet... Our leveraged loan book was down from $18 billion at the end of the Fourth Quarter to $14 billion... Those were done through cash sales, right around our marks... Our subprime position is down from $2.7 billion to $1.4 billion. So our balance sheet's in good shape... You saw from the press release we had $1.5 billion of net write-downs on ABS CDOs, obviously much, much lower than the Fourth Quarter of last year."

107. Merrill's First Quarter 2008 financial results were materially false and misleading because, among other things and as detailed below, Merrill continued to not disclose its over $50 billion of exposure to additional High Risk Insured Assets that were only reported net of unquantified monoline insurance.

VI. Merrill Announces Its Second Quarter 2008 Earnings On July 17, 2008

108. Merrill, in connection with its earnings report for the Second Quarter of 2008, announced on July 17, 2008, that it was taking write-downs of $9.7 billion, consisting of $3.5 billion on ABS CDOs, $1.3 billion on residential mortgage related exposures, $0.3 billion on leveraged finance commitments, and $2.9 billion against financial guarantor exposures and other items.

109. Merrill's net loss for the Second Quarter of 2008 was $4.7 billion, or $4.97 per diluted share, compared to net earnings of $2.1 billion, or $2.24 per diluted share, for the year-ago Quarter.

110. John Thain, in the Second Quarter of 2008 earnings conference call on July 17, 2008, held at 5:00 p.m., stated that "...we would look at all of our options, and decide what we thought made the most sense for the long-term interest of our shareholders. **And right now, we think we are in a good position. We are well-capitalized with a 9.5 Tier 1, and 15.5 total, versus risk weighted assets. And we have also been able to, and will continue to shrink our risk weighted assets.** So, we will look at this really from both directions, as how much capital do we need, and how we can improve our risk weighted asset ratios by reducing risky assets? **But right now, we believe that we are in a very comfortable spot in terms of our capital**." (Emphasis added.)

111. Nevertheless, Merrill's financial statements were materially misleading because, although the Company took write-downs on its ABS CDOs, it still did not disclose, among other things, its additional exposure of over $50.3 billion of High Risk Insured Assets to monoline insurance.

VII. The Modification Of NJ DOI's Share Subscription Agreement In July 2008

112. On Monday, July 21, 2008, Merrill contacted NJ DOI to modify the Share Subscription Agreement.

113. Because Merrill provided NJ DOI with material non-public information, Merrill required, and NJ DOI agreed to sign, a confidentiality agreement.

114. Merrill explained to NJ DOI, subject to the confidentiality agreement, that it was in discussions regarding the sale of the substantial majority of its CDO portfolio and the termination of certain of its monoline hedges, the terms of which would result in additional material losses for Merrill.

115. Merrill further explained that, as a result of that transaction (as well as the losses that Merrill had accumulated since the third quarter of 2007), Merrill would need to sell common shares to shore up its capital.

116. Merrill informed NJ DOI that the continuation of the reset features on the Preferred Shares would preclude Merrill from selling the additional common shares at an attractive price because of the potential further dilution from those features prior to January 15, 2009.

117. Accordingly, Merrill requested NJ DOI's agreement to waive the reset feature.

118. NJ DOI informed Merrill that it was agreeable in principle to redeeming the reset feature of the Preferred Shares, providing that the redemption was on the same terms as agreed to by other Preferred Share investors.

119. Merrill informed NJ DOI that it was having the same communications with the other Preferred Share investors to determine if they would agree to redeem the reset features.

120. The confidentiality agreement prohibited NJ DOI from discussing the contemplated transaction with any third party, including the other six holders of the Preferred Shares.

121. Because NJ DOI was unable to discuss the proposed transaction with third parties, including the other investors, NJ DOI was required to rely upon the accuracy of Merrill's representations of the commitments of those investors in its negotiations.

122. From July 21, 2008 through July 28, 2008, NJ DOI and Merrill continued to negotiate the terms pursuant to which NJ DOI would be willing to redeem the reset feature of the Share Subscription Agreement.

123. NJ DOI informed Merrill throughout the negotiations that it would not agree to convert its Preferred Shares or redeem the reset feature unless NJ DOI got at least as good a deal as the other investors including TPG.

124. NJ DOI specifically insisted that it get at least as good terms as TPG because it was familiar with and respected TPG's senior management.

125. On Sunday, July 27, 2008, Eric Steifman, a Merrill managing director and Co-Head of Investment Banking, and William Clark, Director of NJ DOI, agreed in principle (i) that NJ DOI would exchange its 3,000 Preferred Shares (including $4.5 million of accrued unpaid dividends) for 11 million Merrill common shares (an exchange ratio equivalent to $27.68 per share on the Preferred Shares) and redeem the reset features, (ii) but only on condition that all other investors, including TPG-Axon Capital ("TPG"), not get a better deal on the exchange of its Preferred Shares.

126. Eric Steifman, on behalf of Merrill, orally agreed with William Clark, on behalf of NJ DOI on Sunday, July 27, 2008, that Merrill would not offer TPG (or any other Preferred Share investor) better conversion terms than it offered NJ DOI.

127. NJ DOI reiterated throughout July 28, 2008, that it continued to be willing to convert the Preferred Shares to common shares as long as TPG did not receive better economic terms.

128. A draft of a Disclosure Statement circulated the morning of July 28, 2008 reflected that one holder had not yet committed to exchange its Series 1 Preferred Shares for Common Stock and a second holder was anticipated to convert its Series 1 Preferred shares to a new series of preferred stock without any reset feature.

129. NJ DOI was told that the one holder that had elected to convert their Series 1 stock into a New Series of Preferred Shares (Mizuho Corporate Bank), was not allowed, according to regulatory restrictions, to own common stock.

130. NJ DOI was told, however, that the New Series would have a net present value comparable to NJ DOI's conversion to Common Stock, and have no reset feature.

131. Merrill told NJ DOI that the other four holders of the Series 1 Preferred Shares (Korean Investment Corporation, Kuwait Investment Authority, The Olayan Group and T. Rowe Price Associates, Inc.) had already agreed to convert their Preferred Shares to common shares on the same terms as offered to NJ DOI.

132. Discussions between Merrill and NJ DOI continued on Monday, July 28, 2008, until Eric Steifman, on behalf of Merrill, informed William Clark, on behalf of NJ DOI, that TPG had orally agreed to redeem its Preferred Shares for common shares on the same terms as NJ DOI had been offered.

133. NJ DOI, on July 28, 2008, in reliance on Steifman's representations, delivered to Merrill a signed signature page to the proposed agreement.

134. On July 28, 2009, at approximately 5:25 p.m., Merrill issued a press release informing investors that it was taking further action to enhance its capital position, as follows:

(a) A "substantial sale of U.S. super senior ABS CDO securities, resulting in an exposure reduction of $11.1 billion from June 27, 2008";

(b) "Agreement to terminate ABS CDO hedges with monoline guarantor XL Capital Assurance Inc. ("XL") and settlement negotiations with other monoline counter parties";

(c) "Plans to issue new common shares with gross proceeds of approximately $8.5 billion through a public offering launched [July 29, 2008] (excluding a fifteen percent, or approximately $1.3 billion, option granted to the underwriter to purchase additional shares of common stock to cover over-allotments)"; and

(d) "Exchange of all of the outstanding mandatory convertible preferred securities for common stock or new preferred securities, which eliminates the reset features in the original securities."

135. The press release represented that:

> In addition, $5.4 billion of the $6.6 billion of outstanding mandatory convertible preferred holders have agreed to exchange their outstanding preferred stock for approximately 195 million shares of common stock, plus accrued dividends payable in cash or stock at the option of the holder. A holder of $1.2 billion of outstanding mandatory convertible preferred has agreed to exchange their securities for new mandatory convertible preferred securities with a reference price of $33.00 [i.e., the Series 2 Preferred Shares]. The reset feature for all securities exchanged has been eliminated.

136. The press release was consistent with Steifman's representation to Clark that all holders had agreed to exchange their Series 1 Preferred Shares for common stock on the same terms, except for one holder who exchanged for Series 2 Preferred Shares with a reference price of $33.00.

137. By email dated Tuesday, July 29, 2008 at 9:33 a.m., Merrill delivered to NJ DOI a fully executed signature page and copies of the Share Exchange Agreement and schedules, dated "as of" July 28, 2008.

138. Article III of the Agreement transmitted at 9:33 a.m. is entitled "Representations and Warranties of the Company [Merrill]."

139. In Section 3.13 thereof, entitled "Current Transactions; Issuances," Merrill represented and warrantied that

> No Concurrent Transaction contains terms that are more favorable in any material respect to the purchaser in such Concurrent Transaction than those granted by the Company in favor of [NJ DOI] in [the Share Exchange Agreement].

140. "Concurrent Transaction" was defined in Section 6.1 of the Share Exchange Agreement to mean "any agreement on the date hereof to exchange shares of the Series I Preferred Stock for shares of the Company's Common Stock by a party other than Purchaser."

141. Merrill also delivered Disclosure Schedules to the Share Exchange Agreement to NJ DOI on July 29, 2008.

142. Footnote 1 on page 1 of the Disclosure Schedules stated that

> The Company Disclosure Schedule has been prepared and delivered pursuant to the Share Exchange Agreement .... The Company Disclosure Schedule and the information and disclosures contained herein are intended to qualify and limit the representations and warranties of the Company contained in the Agreement.

143. Section 3.13 of the Disclosure Schedules represented and warrantied that

> It is anticipated that *at least one holder* of Preferred Shares may not exchange its Preferred Shares for Common Stock and *at least one holder* of Preferred Shares may exchange its Preferred Shares for an equal number of shares of a new series of 9% Non-Voting Mandatory Convertible Non-Cumulative Preferred Stock, par value $1.00 per share and liquidation preference $100,000 per share (the "New Series"). The New Series *will have* substantially the same voting rights, and qualifications, limitations and restrictions as the Preferred Shares but *will have* a reference price of $33.00 and no reset protection. [Emphases added.]

144. An earlier draft of Section 3.13 of the Disclosure Schedules that had been provided to NJ DOI, had read:

> It is anticipated that *one or more holders* of Preferred Shares may not exchange its Preferred Shares for Common Stock and *at least one holder* of Preferred Shares may exchange its Preferred Shares for an equal number of shares of a new series of 9% Non-Voting Mandatory Convertible Non-Cumulative Preferred Stock, par value $1.00 per share and liquidation preference $100,000 per share (the "New Series"). The New Series will have substantially the same voting rights, and qualifications, limitations and restrictions as the Preferred Shares but will have a reference price of $[ ] and no reset protection. [Brackets in the original]

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145. The change in the language of Section 3.13 of the Disclosure Schedule from "one or more holders" to "at least one holder" and the use of "at least one holder" to describe the investors who both "may not exchange its Preferred Shares for Common Stock" and who "may exchange its preferred Shares for an equal number of shares of a new series of [Preferred Shares]" reflected the parties' intent and understanding as of the end of the day on July 28, 2009 that the same investors who may not be converting to Common Stock were not retaining their Series 1 Preferred Shares but rather were converting to a different class of preferred shares – *i.e.*, that no investors were retaining Series 1 Preferred Shares.

146. On July 29, 2008, at approximately 6:14 a.m., Merrill issued a press release correcting the July 28, 2008 press release. The July 29, 2008 press release revealed that a second holder of $500 million of Preferred Shares had not exchanged their Series 1 Preferred Shares for common shares.

147. Merrill subsequently disclosed on July 31, 2008, in the Registration Statement for the July 29, 2008 common stock offering, that the investor that held the $500 million of Preferred Shares (that was known to NJ DOI to be TPG) had been issued a new Series 3 of Preferred Shares that retained the 9% dividend, had no remaining reset rights, and had a reference price of $22.50.

148. Merrill's agreement with TPG on those terms violated Merrill's representation and warranty in Section 3.13 of the Disclosure Schedules that investors in a "New Series" of Preferred Shares "will have" a reference price of $33.00 and Steifman's representation that no investor, and specifically not TPG, would be given exchange rights that were better than NJ DOI's rights.

149. Merrill represented and warrantied in Section 3.6(a) of the Share Exchange Agreement that "[s]ince January 1, 2005, the Company and each of its Subsidiaries has timely filed or furnished all reports, registration statements, proxy statements and other materials, together with any amendments required to be made with respect thereto, that were required to be filed with (A) the SEC under the Securities Act or the Exchange Act, (B) the Office of Thrift Supervision, (C) the Federal Deposit Insurance Corporation ("FDIC"), (D) the Federal Reserve Board, or (E) any other federal, state or foreign Governmental Entity..." and that all such reports "complied in all material respects with all of the statutes and published rules and regulations

enforced or promulgated by the regulatory authority with which they were filed and (A) with respect to reports filed with the SEC, did not as of the date of filing thereof with the SEC contain any untrue statement of material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading and (B) with respect to all other reports, were complete and accurate in all material respects as of their respective dates."

150. Merrill also represented and warranted in Section 3.6(b) of the Share Exchange Agreement, as it had in the Share Subscription Agreement, that its filings with the SEC complied with GAAP, SEC rules and regulations, and that those filings fairly presented the Company's financial condition:

> Each of the consolidated balance sheets, and the related consolidated statements of income, changes in stockholders' equity and cash flows, included in the Reports filed with the SEC under the [Securities Exchange Act of 1934, as amended] (A) have been prepared from, and are in accordance with, the books and records of the Company and its Subsidiaries, (B) fairly present in all material respects the consolidated financial position of the Company and its consolidated Subsidiaries as of the dates shown and the results of the consolidated Subsidiaries for the respective fiscal periods or as of the respective dates therein set forth, subject, in the case of any unaudited financial statements, to normal recurring year-end audit adjustments, (C) complied as to form, as of their respective dates of filing with the SEC, in all material respects with applicable accounting requirements and with the published rules and regulations of the SEC with respect thereto and (D) have been prepared in accordance with GAAP consistently applied during the periods involved, except as otherwise set forth in the notes thereto.

151. Merrill further represented and warrantied in Section 3.6(c) of the Share Exchange Agreement, that it maintained proper records and controls:

> The records, systems, controls, data and information of the Company and its Subsidiaries are recorded, stored, maintained and operated under means (including any electronic, mechanical or photographic process, whether computerized or not) that are under the exclusive ownership and direct control of the Company or its Subsidiaries or accountants (including all means of access

> thereto and therefrom)... The Company (A) has implemented and maintains (x) disclosure controls and procedures and (y) internal control over financial reporting ... designed to (x) ensure that material information relating to the Company, including its consolidated Subsidiaries, is made known to the chief executive officer and the chief financial officer of the Company by others within those entities, and (y) provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP, respectively, and (B) has disclosed, based on its most recent evaluation prior to the date hereof, to the Company's outside auditors and the audit committee of the Company's Board of Directors (x) any significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting... that are reasonably likely to adversely affect the Company's ability to record, process, summarize and report financial information and (y) any fraud, whether or not material, that involves the management or other employees who have a significant role in the Company's internal control over financial reporting. As of the date hereof, to the knowledge of the Company after inquiry of its Chief Accounting Officer, Chief Financial Officer and General Counsel, there is no reason that its outside auditors and its chief executive officer and chief financial officer will not be able to give the certifications and attestations required pursuant to the rules and regulations adopted pursuant to Section 404 of the Sarbanes-Oxley Act of 2002, without qualification, when next due.

152. Merrill also represented in Section 3.7 of the Disclosure Schedules that "[t]he Company is engaged in discussions regarding the sale of the substantial majority of its CDO portfolio and the termination and settlement of certain of its monoline hedges."

153. Merrill acknowledged, in Section 3.14 of the Share Exchange Agreement, "that [NJ DOI] will rely upon the truth and accuracy of the foregoing representations."

154. As alleged herein, the foregoing representations and warranties with regard to Merrill's financial statement and financial records were materially untrue at the time made.

155. NJ DOI would not have agreed to exchange its Preferred Shares or to terminate the reset feature if it had known the full extent of Merrill's financial problems, including the concentration of monoline insurance.

156. However, Merrill failed to disclose in the Disclosure Schedule or otherwise, in violation of Section 3.6(a)-(c) of the Share Exchange Agreement, that, among other things:

(a) Merrill still retained over $50 billion of additional High Risk Insured Assets that were only reported on a net basis, and over $50 billion of monoline insurance on those CDOs. Although Merrill had conceded the materiality of, and disclosed its exposure to, US Super-Senior ABS CDOs, which had the highest priority to payment and highest credit rating of all of its CDOs, Merrill still failed to disclose that it had any significant exposure, let alone over $50 billion worth, to other, riskier, types of assets with lower priority to payment and lower credit ratings;

(b) the identities and credit-worthiness of the entities with which Merrill held monoline insurance on the aforementioned over $50 billion of exposure to monoline insurance hedges on its High Risk Insured Assets. Due to the very large exposure and the riskiness of the underlying assets, if Merrill had a high concentration of insurance with a few insurers, or if a substantial proportion of its insurance was held with insurers that had low credit ratings, this is material to understanding the likelihood that its insurance would provide an effective hedge against a high degree of defaults;

(c) it still had many of the exact same kind of troubled assets and risky loans that it was writing off in the second quarter of July 2008, which it discussed in its July 17, 2008 conference call and 8-K disclosing its earnings for that quarter, and which had become illiquid and would also need to be written off. For instance, in the fourth quarter of 2008, Merrill would need to write down $1.924 billion worth of leveraged loans (which, by their nature, are to less than creditworthy persons and entities) and write-downs of commercial real estate and

commercial MBSs would inexplicably jump from merely $37 million in the second quarter of 2008 to $1.131 billion in the fourth quarter of 2008; and

(d) that it had not prepared its financial results in accordance with GAAP, despite its representations and warranties in Section 3.6(b) of the Share Exchange Agreement.

157. SFAS 133 states that disclosures about credit risk previously included in SFAS 105, *Disclosure of Information about Financial Instruments with Off-Balance Sheet Risk and Financial Instruments with Concentrations of Credit Risk*, should continue to be required. SFAS 105 states that disclosure of information about concentrations of credit risk from exposures with an individual counterparty or groups of counterparties in the same industry or region or having similar economic characteristics should be required. SFAS 105 further states:

> Depending on the risks associated with an individual counterparty or groups of counterparties, a concentration of credit risk can be perceived as favorable or unfavorable, that is, as indicative of more or less credit risk. However, lack of diversification in a portfolio is generally considered--other factors being equal--to indicate greater exposure to credit risk. Concentration information also allows investors, creditors, and other users to make their own assessments of the credit risk associated with the area of concentration.

VIII. Merrill's Public Statements with Respect to the Third Quarter 2008 Asset Sale

158. On July 28, 2008, in the same press release issued by Merrill announcing the "Initiatives to Further Enhance Capital Position," Thain was quoted as saying: "The sale of the substantial majority of our CDO positions represents a significant milestone in our risk reduction efforts.... Our consistent focus has been to opportunistically reduce risk, and in order to take advantage of this sizeable sale on an accelerated basis, we have decided to further enhance our capital position by issuing common stock. The actions we announced both today and on July 17 will materially enhance the company's capital position and financial flexibility going forward."

159. The table below summarizes the effect of this transaction (as subsequently reported in Merrill's SEC filings):

	4Q07	1Q08	2Q08	3Q08
US Super Senior ABS CDO net exposures ($ millions)				
US ABS CDO net exposures				
Long	30,400	26,300	19,900	6,381
Short (CDS protection from financial guarantors)	23,600	19,800	15,600	5,295
Net Exposure	6,800	6,500	4,300	1,086

1. The third quarter of 2008 column reflects the U.S. Super Senior ABS CDO sales, termination of XL Assurance monoline hedges, and settlements of monoline hedges with various other counterparties that Merrill announced on July 28, 2008.

2. On the surface, without knowing that Merrill had not yet disclosed its High Risk Insured Assets, which turned out to be highly material, those asset sales seemed to significantly reduce Merrill's long exposure to problematic asset classes from $19.9 billion to $6.38 billion and its short exposure from $15.6 to $5.3 billion, bringing its net exposure down to just $1.1 billion to this problematic asset class.

3. Thus, Merrill led NJ DOI, and the market, to believe that Merrill had cleansed the balance sheet of the vast majority of Merrill's exposure to ABS CDOs and monoline insurers.

4. A July 29, 2008 article in The Wall Street Journal, *Merrill Aims to Raise Billions More*, noted that "Merrill said its remaining $8.8 billion in super-senior CDO exposures is hedged by $7.2 billion in offsetting 'short exposure,' meaning it bets the market prices will decline. Merrill said $6 billion of that coverage is with 'highly rated' financial institutions and

$1.1 billion with a single bond insurer, MBIA Inc. MBIA currently has an investment-grade rating."

5. A Goldman Sachs analyst report on July 29, 2008, titled *Capitulation trade – painful but necessary to move forward*, reported that Merrill common stock offering, sale of its ABS CDO portfolio, agreement to terminate hedges with XL Capital Assurance, and conversion of all Series 1 Preferred Shares, "[a]lthough painful, ... put[s] these issues largely behind it ... enabl[ing] the firm to focus on existing business opportunities in the marketplace."

6. A July 30, 2008 article in The Wall Street Journal, *Merrill Bites Credit Bullet — Thain's CDO Sale Could Inspire Peers To Join Bloodletting*, stated, in regard to Merrill's sale of $30 billion of CDOs for an average price of 22 cents on the dollar: "Merrill has taken its lumps and moved on. If enough financial firms do the same, moribund markets could awaken from their stupor."

IX. Merrill and Bank of America Announce Merger Agreement

7. On September 15, 2008, Merrill and Bank of America announced that they had entered into an agreement whereby Bank of America would acquire all of Merrill for approximately $50 billion in Bank of America common stock and provide Merrill common stock holders with 0.8595 shares of Bank of America common stock in exchange for each Merrill common share that they owned.

X. Merrill Announces Its Third Quarter 2008 Financial Results on October 16, 2008

8. Merrill issued a press release on October 16, 2008, prior to the opening of trading, announcing its results for the third quarter of 2008.

9. Merrill reported a net loss for the third quarter of $5.2 billion, or $5.58 per diluted share, compared with a net loss of $2.2 billion, or $2.82 per diluted share, for the year-ago quarter.

10. Among the "significant items" driving third quarter losses, identified in the October 16, 2008 press release, were write-downs and asset losses totaling $12.1 billion, previously announced on July 29, 2009:

> - Net write-downs of $5.7 billion resulting from the previously announced sale of U.S. super-senior ABS CDOs and the termination and potential settlement of related hedges with monoline guarantor counterparties.
>
> * * *
>
> - Net write-downs of $3.8 billion, principally from severe market dislocations in September, including real estate-related asset write-downs and losses related to certain government-sponsored entities and major U.S. broker-dealers, as well as the default of a U.S. broker-dealer.
>
> * * *
>
> - Net losses of $2.6 billion, resulting primarily from completed and planned asset sales across residential and commercial mortgage exposures

11. The October 16, 2008 press release also included a quote from John Thain stating that, "[w]e continue to reduce exposures and de-leverage the balance sheet prior to the closing of the Bank of America deal."

12. On November 4, 2008, Merrill filed its Form 10-Q for the third quarter of 2008 (ended September 26, 2008) with the SEC.

13. Merrill's November 4, 2008 Form 10-Q substantially incorporated the financial results and financial information quoted above from the October 16, 2006 press release and represented that the financial disclosures in the Form 10-Q complied with GAAP.

XI. Merger With Bank of America

14. The Merrill shareholders voted to approve the Merger with Bank of America on December 5, 2008. The Merger was consummated on January 1, 2009.

15. In the Merger Agreement, Bank of America specifically assumed the terms of the Series 1 Preferred Shares, the Series 2 Preferred Shares, and the Series 3 Preferred Shares and converted each into Series 2 Preferred Shares, and Series 3 Preferred Shares, respectively:

> **Treatment of Merrill Lynch Preferred Stock**
>
> Upon completion of the merger, (i) each share of Merrill Lynch Preferred Stock Series 1 issued and outstanding immediately prior to completion of the merger will be converted into one share of Bank of America Preferred Stock Series 1, (ii) each share of Merrill Lynch Preferred Stock Series 2 issued and outstanding immediately prior to completion of the merger will be converted into one share of Bank of America Preferred Stock Series 2, (iii) each share of Merrill Lynch Preferred Stock Series 3 issued and outstanding immediately prior to completion of the merger will be converted into one share of Bank of America Preferred Stock Series 3....
> The terms of the Bank of America Preferred Stock Series 1, Bank of America Preferred Stock Series 2, [and] Bank of America Preferred Stock Series 3 ...will be substantially identical to the terms of the corresponding series of Merrill Lynch preferred stock....

XII. Bank of America Announces Merrill's Fourth Quarter 2008 Financial Results On January 16, 2009

16. Before the opening of the financial markets on January 16, 2009, at 6:01 a.m., two weeks after Merrill was acquired by Bank of America, Bank of America reported that Merrill had recorded a massive $15.31 billion loss in the fourth quarter of 2008, its largest loss in any of the past six quarters of consecutive losses.

17. Included in the loss was a credit valuation adjustment of $3.22 billion related to Merrill's concentration of monoline financial guarantee exposure, including $2.9 billion of losses attributable to the previously undisclosed concentration of monoline insurance underlying the High Risk Insured Assets.

18. Bank of America's January 16, 2009 Form 8-K revealed, for the first time, that Merrill Lynch had additional monoline insurance, in the form of Credit Default Swaps, of $50.3 billion and $58.0 billion at December 26, 2008 and September 26, 2008, respectively. The filing explained that "the gross notional amount of CDS [was] purchased as protection to hedge predominantly Corporate CDO, CLO, RMBS and CMBS exposure."

19. Bank of America's January 16, 2009, press release disclosed that as a result of Merrill's fourth quarter 2008 results, Bank of America was required to obtain additional U.S. government financial assistance:

> In view of the continuing severe conditions in the markets and economy, the U.S. government agreed to assist in the Merrill acquisition by making a further investment in Bank of America of $20 billion in preferred stock carrying an 8 percent dividend rate.
>
> In addition, the government has agreed to provide protection against further losses on $118 billion in selected capital markets exposure, primarily from the former Merrill Lynch portfolio. Under the agreement, Bank of America would cover the first $10 billion in losses and the government would cover 90 percent of any subsequent losses. Bank of America would pay a premium of 3.4 percent of those assets for this program.
>
> * * *
>
> Transition Update
>
> Significant negative Fourth-Quarter items for Merrill Lynch include:
>
> -- Credit valuation adjustments related to monoline financial guarantor exposures of $3.22 billion.

-- Goodwill impairments of $2.31 billion.

-- Leveraged loan writedowns of $1.92 billion.

-- $1.16 billion in the U.S. Bank Investment Securities Portfolio writedowns.

-- Commercial real estate writedowns of $1.13 billion.

20. The extent of the losses incurred at Merrill during the fourth quarter were staggering.

XIII. Bank of America's January 15, 2009 Sale of Warrants To the U.S. Government

21. After Merrill's true losses and exposures became known to Bank of America, Bank of America threatened to back out of the Merger. Subsequently, as noted above, the United States Department of the Treasury agreed, on January 15, 2009 (one day prior to the public release of Merrill's Fourth Quarter 2008 financial results) with Bank of America to enter into a securities purchase agreement, pursuant to which Bank of America sold 800,000 shares of the Registrant's "Fixed Rate Cumulative Perpetual Preferred Stock, Series R" and a warrant to purchase 150,375,940 shares of Bank of America's common stock, for an aggregate purchase price of $20 billion in cash.

22. On the January 16, 2009 conference call, Joe Price, the CFO of Bank of America stated,

> [W]e entered into several agreements with the various government agencies in light of Merrill Lynch's fourth quarter **loss.** These actions will replenish capital and provide protection, essentially insurance against significant down side risk on a pool of 118 billion in capital markets related exposures. Now, in doing this, **we've insulated in large part future significant losses from the asset classes that drove Merrill Lynch's loss. This wrapped pool includes assets** that when combined with other losses, where exposure no longer exists, represents some two-thirds of Merrill Lynch's fourth quarter loss.
>
> **Generally speaking, the wrap covers** domestic, predisruption or legacy leverage loans, and commercial real estate loans, those that were largely acquisition related

> facilities originally intended to be securitized, **CDOs, financial guarantor counter party exposure**, certain trading counter party exposure and certain investment securities are covered under the wrap. [Emphasis added.]

23. The warrants issued by Bank of America to the U.S. Government were priced at $13.30 per warrant, equivalent to $15.47 per warrant if denominated in Merrill shares, based on the .8596 exchange ratio.

24. Because the warrants were convertible into common stock, the issuance of the warrants to the U.S. government would have triggered the reset feature (of the Preferred Shares) and would have entitled NJ DOI to a reduced reference price of $15.47 per share, which would have resulted in NJ DOI receiving over 19.4 million Bank of America common shares, rather than the 11 million shares of Merrill stock it received pursuant to the Share Exchange Agreement, on the eventual conversion of the Preferred Shares into Bank of America common shares (300 million / $15.47).

XIV. Reactions To Merrill's January 2009 Disclosures

25. Following Bank of America's January 16, 2009 announcement of Merrill's earnings, the price per share of Bank of America's common stock dropped further from its prior close of $8.32 per share, to close on January 16, 2009 at $7.18 per share, a decline of 14%. The cumulative decline on both January 15 and January 16, 2009, from the January 14, 2009 closing price of $10.20 per share, totaled $3.02, or 31%.

26. A January 17, 2009, article in The New York Times, highlighted the question of when Merrill's losses became known (emphasis added):

> "**The question is, when did Merrill Lynch know they had these losses? A lot of times companies would disclose losses of that magnitude," said Michael Mayo, an analyst at Deutsche Bank. "This was dramatic."**

27. Further, in a January 25, 2009, interview with CNBC, John Thain made clear that the issues plaguing Merrill had existed before he even took over as CEO of Merrill in Third Quarter of 2007, stating that: "over the course of the year – we continued to have – positions – **that really were there when I first started**– primarily in mortgage and mortgage-related assets and– later in the year in credit and credit-related assets– that– continued to deteriorate in value. And so over the course of the year that I was at Merrill– I was constantly shedding assets, selling assets... it was really just a continued decline in asset values... the vast majority of the losses in the Fourth Quarter [of 2008] were from positions that had been there since I started." (Emphasis added.)

28. Thus, despite his pronouncements on July 17, 2008, that Merrill had cleansed its balance sheet and improved its financial condition after the write-downs taken at the time, Thain knew that Merrill held these troubled assets. Despite the fact that these assets were declining in value, Merrill misrepresented to NJ DOI that Merrill was well-capitalized and omitted to inform NJ DOI that it retained great exposure to these already-materialized or, at least, highly probable losses.

29. The Wall Street Journal also noted, in a January 23, 2009 article titled *Thain Ousted in Clash at Bank of America — Surprise Losses at Merrill Unit Led to Former Chief's Fall*, that the losses surprised the market because "Wall Street believed Merrill's biggest problem was losses tied to debt pools underpinned by subprime securities. In a securities filing this week, Merrill detailed a much wider array of losses, including write-downs of commercial property and leverage loans, and losses tied to credit bets."

30. That same article further illustrated the extent to which Thain and Merrill's management failed to disclose Merrill's losses, noting that "[w]hen [Kenneth Lewis, CEO of Bank of America] asked Mr. Thain what happened, he did not get a 'good explanation for what was happening and why,' according to one person familiar with the losses... Merrill board members have complained that Mr. Thain didn't fully inform them last month that mounting losses at the bank threatened to derail the deal [with Bank of America] until the federal government agreed to step in with further assistance." Thus, even Merrill's board members and Bank of America's management have claimed to have been caught off-guard by the magnitude of Merrill's losses reported in the fourth quarter of 2008.

XV. Merrill Violated GAAP By Failing to Previously Disclose Its Aggregate ABS CDO Exposure

A. Composition of Merrill's ABS CDO Exposure

31. It was not until January 16, 2009, that Merrill disclosed that it actually had a previously undisclosed exposure to more than $50.313 billion in High Risk Insured Assets, with $9.581 billion of that exposure in non-investment grade or unrated assets.

32. Merrill had previously only disclosed its long and short positions on Super-Senior ABS CDOs (beginning in the fourth quarter of 2007), which was misleading because it implied that this category represented Merrill's primary concentration of hedged assets.

33. The Management's Discussion and Analysis section of SEC Form 10-K filings are to include certain quantitative and qualitative information about the registrant's market risk.

34. For quantitative disclosures, registrants are to categorize market risk sensitive instruments into (a) instruments entered into for trading purposes and (b) instruments entered into for other than trading purposes.

35. Separate quantitative information is to be presented, to the extent material, for each market risk exposure category (i.e. interest rate risk, foreign currency exchange risk, commodity price risk and other relevant market risks, such as equity price risk).

36. For qualitative disclosures, the registrant needs to discuss its primary market risk exposures. This includes changes in either the registrant's primary market risk exposures or how those exposures are managed, when compared to what was in effect during the most recently completed fiscal year and what is known or expected to be in effect in future reporting periods.

37. Although Merrill High Risk Insured Assets were just as, if not more, illiquid than the Super Senior U.S. CDOs, due to their low priority of payment (over $9 billion of those ABS CDOs were below investment-grade), Merrill failed to disclose the existence of this over $50.3 billion worth of exposure until January 16, 2009, rendering all of its previous SEC filings since (and including) the third quarter of 2007 materially false, incomplete, and misleading.

38. Statement of Financial Accounting Standards 133, *Accounting for Derivative Instruments and Hedging Activities* ("SFAS 133") requires that an entity that holds or issues derivative instruments shall disclose its objectives for holding and issuing those instruments, the context needed to understand those objectives and its strategies for achieving those objectives. The description of the derivative instrument should include the type of hedging instrument, the entity's risk management policy for the hedge and a description of the items or transactions for which risks are hedged.

39. Merrill failed to disclose this material information despite the fact that similar CDO investments had already led to enormous losses, not only at Merrill, but at other financial institutions, as well:

(a) Citigroup had some of the greatest losses attributable to its ABS CDOs, with $13.6 billion in write-downs on its ABS CDO exposure in the fourth quarter of 2007 alone.

(b) Lehman Brothers, Inc., which had held on to large positions in subprime and other lower-rated mortgage tranches when securitizing the underlying mortgages, in the second fiscal quarter, reported losses of $2.8 billion and was forced to sell off $6 billion in assets. In the first half of 2008 alone, Lehman stock lost 73% of its value. Finally, on September 15, 2008, Lehman filed for Chapter 11 bankruptcy citing bank debt of $613 billion, $155 billion in bond debt, and assets worth $639 billion.

(c) Wachovia Corporation, which also had heavy exposure to risky loans such as adjustable rate mortgages due to its acquisition of Golden West Financial in 2006, in the Second Quarter of 2008, reported an $8.9 billion loss and was eventually forced by the FDIC to enter into merger discussions with Citigroup and Wells Fargo, with Wells Fargo finally announcing a purchase of Wachovia on October 3, 2008.

40. If Merrill's controls and record-keeping were sufficient, which Merrill claimed they were in the Share Subscription Agreement and Share Exchange Agreement, Merrill's own experience with the US Super-Senior ABS CDOs, and the experience of other companies with similar assets, would have alerted Merrill that the full magnitude of the High Risk Insured Assets, and the offsetting monoline insurance positions, were required to be disclosed by January 2008, and in July 2008 along with the disclosure with respect to the hedged position on the US Super-Senior ABS CDOs.

B. Merrill's Failure to Appropriately Write Down Its Monoline Insurance Hedges Prior to January 2009

41. Merrill wrote down $3.2 billion of its monoline guarantor exposure (i.e., the value Merrill has given its monoline insurance) in the fourth quarter of 2008. $2.9 billion of the write down was attributed to its High Risk Insured Assets. Additionally, the write-down of its monoline guarantor exposure for the fourth quarter of 2008 was even larger than the write-down it announced in July 2008 with respect to the second quarter of 2008, by which time the credit ratings for many monoline insurers had already been reduced to below-investment grade or just a rating or two higher than below investment grade.

42. Merrill failed to disclose its over $50 billion in exposure to hedges on High Risk Insured Assets until January 2009 in its Form 8-K, despite the fact that this information was clearly material after Merrill became aware, at least, by the third quarter of 2007 that defaults on the underlying collateral were ballooning and would likely far exceed the ability of some monoline insurers to pay.

43. During late 2007 and throughout 2008, the credit ratings of monoline insurers had been precipitously slashed and many of the most prominent monoline insurers suffered enormous financial losses, for instance:

(a) AIG (which had entered into credit default swaps to insure $441 billion worth of securities originally rated AAA and, of those securities, $57.8 billion were structured debt securities backed by subprime loans) was downgraded to AA in September 2008, received an $85 billion loan from the Federal Reserve Bank on September 16, 2008, reported over $13.2 billion in losses over the first six months of 2008, and eventually received over $180 billion from the Federal Reserve Bank.

(b) MBIA (which provided $5.7 billion of credit default insurance for Merrill) had been downgraded from AAA to AA in April to June of 2008 by various credit rating agencies and, on June 19, 2008 (about a month prior to the July 2008 write-downs by Merrill), MBIA's credit rating was cut to A2 by Moody's – a five grade rating cut.

(c) XL Capital Assurance ("XL Capital") (which provided monoline insurance to Merrill) was cut by Moody's on February 7, 2008 from the highest credit rating to A3 (a six-grade rating cut) and, on June 20, 2008, to B3 (below-investment grade), citing the bond insurer's "severely impaired financial flexibility." Merrill did write down all of its hedges with XL Capital in July 2008, but failed to do so with its many other hedges until the fourth quarter of 2008.

(d) BMI, from whom Merrill purchased monoline insurance, according to Merrill's January 17, 2008 conference call, had a credit rating of bbb- (junk rating) from A.M. Best (another global full-service credit rating organization) until June 2008, when its credit rating was raised only to bbb+ (still junk).

(e) Ambac, another bond insurance firm, was also downgraded by Moody's in June 2008 to Aa3, a fall of three notches from its previous credit rating of AAA.

44. Despite the fact that the credit ratings of monoline insurers had suffered such extraordinary losses and there was overwhelming evidence that the entire industry was in great distress, Merrill still failed appropriately to disclose the magnitude of or reassess the value of its hedges on its exposure to debt instruments and the likelihood of these institutions being able to pay in the event that the insured debt instruments defaulted.

45. Merrill also violated GAAP by failing to properly disclose the fair value of its hedges on its exposure to debt instruments as required under paragraph 10 of the Statements of Financial Accounting Standards ("SFAS") 107, Disclosures About Fair Value of Financial Instruments.

46. According to the SFAS 107, Merrill was required to "disclose, either in the body of the financial statements or in the accompanying notes, the fair value of financial instruments for which it is practicable to estimate that value."

47. Further, SFAS 107, ¶ 10 requires that the disclosures in the notes "shall be presented together with the related carrying amount in a form that makes it clear whether the fair value and the carrying amount represent assets or liabilities and how the carrying amounts relate to what is reported in the statement of financial position."

48. Statement of Position 94-6 issued by the American Institute of Certified Public Accountants ("SOP 94-6") states that entities should make disclosures regarding current vulnerability due to certain concentrations: "Vulnerability from concentrations arises because an entity is exposed to risk of loss greater than it would have had it mitigated its risk through diversification."

49. Considering the wide-ranging status and differing financial circumstances of the various monoline insurers, the information, required by SFAS 107, SOP 94-6, and SFAS 133 was vital to understanding the risks that Merrill faced in its exposure to monoline guarantors.

50. Merrill's failure to disclose the very existence of its more than $50 billion of hedges on its High Risk Insured Assets with monoline insurance, its SEC filings, which were incorporated into the Share Subscription Agreement and Share Exchange Agreement and were

warrantied therein to be true and materially complete, from, at least, the Third Quarter of 2007 were materially misleading, false, and incomplete.

51. January 2009 was the first time that Merrill disclosed the value and breakdown of its credit default swaps concerning High Risk Insured Assets.

52. According to Bank of America's Form 8-K filed on January 16, 2009, this previously undisclosed exposure represented "the gross notional amount of CDS purchased as protection to hedge predominantly Corporate CDO, CLO, RMBS, and CMBS exposure."

53. The filing further revealed that this "exposure was $50.3 billion and $58.0 billion at December 26, 2008 and September 26, 2008, respectively."

54. This exposure accounted for $2.9 billion of the Fourth Quarter of 2008 write-downs and was one of the reasons why Bank of America had to raise additional capital and seek asset guarantees from the government.

C. Merrill Violated GAAP by Failing to Disclose The Amount of Its High Risk Insured Asset Financial Guarantor Exposure

55. Merrill violated GAAP (and, therefore, also its warranties and representations in the Share Subscription and Share Exchange Agreements that its financial reports filed with the SEC complied with GAAP) by failing to properly disclose material concentrations of risk arising from its exposure to both the underlying assets insured by the $50 billion in hedges with financial guarantors as well as its massive dependence on the financial guarantors to hedge its Corporate CDO, CLO, RMBS, and CMBS exposure.

56. According to Paragraph 15A of SFAS 107, Merrill was required to disclose "all significant concentrations of credit risk from all financial instruments, whether from an individual counterparty or groups of counterparties." The standard states, "[g]roup concentrations of credit risk exist if a number of counterparties are engaged in similar activities and have similar economic characteristics that would cause their ability to meet contractual obligations to be similarly affected by changes in economic or other conditions." Further, if a

significant concentration of risk represents a material contingency, the risk must be disclosed in the Company's interim financial statements in accordance with APB No. 28, Interim Financial Reporting**.**

57. Merrill violated SFAS 107 because it was heavily reliant on monoline financial guarantors to hedge in excess of $50 billion worth of assets. Because these counterparties were engaged in similar activities and are similarly affected by changes in economic conditions, as was witnessed in the events discussed above, Merrill should have disclosed its massive concentration of credit risk to monolines on its non-US Super Senior CDO hedges.

58. In addition, Merrill violated SFAS 107 because it did not disclose its significant exposure to CLOs, RMBS, and CMBS until the January 16, 2009 conference call. These asset categories were similarly affected by economic conditions throughout 2007 and 2008.

D. Merrill's Exposure to Commercial Real Estate and Commercial MBS Defaults

59. Merrill's commercial real estate and commercial mortgage-backed securities write-downs increased from $37 million in the Second Quarter of 2008 to $854 million in the Third Quarter and, most appallingly, to $1.131 billion in the Fourth Quarter of 2008, as reported on January 16, 2009.

60. The deterioration of the commercial real estate market did not accelerate at such a pace in the second half of 2008 to justify such an increase in write-offs.

61. Rather, insufficient write-offs were taken at the end of the second quarter whereby Merrill failed to recognize the problems inherent in the commercial real estate market.

62. Merrill's write-downs of legacy leveraged loans also increased from $348 million in the Second Quarter of 2008, to $546 million in the Third Quarter of 2008, and then, finally, to $1.924 billion in the Fourth Quarter of 2008. These extraordinary increases in the fourth quarter

illustrate that Merrill was not following a conservative assessment of its exposures in commercial real estate and leveraged finance and had failed to "substantially reduce[]" that exposure.

63. SFAS 115, *Accounting for Certain Investments in Debt and Equity Securities*, defines assets held as "trading securities" (Merrill classifies its mortgage backed securities as "trading securities") as those assets that have "readily determinable fair values" and "[s]ecurities that are bought and held principally for the purpose of selling them in the near term (thus held for only a short period of time)." SFAS 115 goes on to require that "[u]nrealized holding gains and losses for trading securities shall be included in earnings." According to the comments at the end of SFAS 115, in determining that the changes in fair value should be reported in earnings, "[t]he [Financial Accounting Standards Board ("FASB")] concluded that unrealized changes in fair value for trading securities should be reported in earnings because that reporting reflects the economic consequences of the events of the enterprise (such as changes in fair values) as well as the transactions (such as sales of securities) when those events and transactions occur and results in more relevant reporting."

64. Merrill violated GAAP by failing to include unrecognized losses that were determinable in prior periods, despite that these losses due to mortgage defaults had already led to the failures or government seizures of:

(a) American Home Mortgage, the then tenth largest retail mortgage lender in the United States, filed for Chapter 11 bankruptcy on August 6, 2007 after being unable to deliver on about US $800 million in commitments for housing loans, and had laid off nearly ninety percent of its 7,000 employees.

(b) Countrywide Financial, a one-time $500 billion real estate mortgage lender with 62,000 employees, 900 offices and assets of $200 billion, had suffered a well-publicized financial implosion, first drawing on an $11.5 billion credit line in August 2007, then seeking another $2 billion from Bank of America in exchange for a 16% equity interest, and, finally, was sold completely to Bank of America on January 11, 2008 for a mere $4 billion - a far cry from the $500 billion at which it had once been valued.

(c) Fannie Mae, a purchaser and securitizer of mortgages with the purpose of making funding available to institutions that lend money to home buyers, and Freddie Mac, which buys mortgages on the secondary market, pools them, and sells them as mortgage-backed securities to investors on the open market, were both placed into conservatorship by the Federal Housing Finance Agency on September 7, 2008. As of July 2008, Fannie Mae and Freddie Mac owned or guaranteed about half of the U.S.'s $12 trillion mortgage market.

(d) IndyMac, which originated and acquired (from other originators) a mortgage pool consisting of 1,708 mortgage loans with an aggregate principal balance outstanding of $642 billion failed on July 11, 2008.

AS AND FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANTS MERRILL AND BANK OF AMERICA FOR BREACH OF CONTRACT UNDER <u>SECTION 3.6(a)-(c) OF THE SHARE PURCHASE AGREEMENT</u>

65. Plaintiff repeats and realleges each and every of the Common Allegations (¶¶ 1-224) above, as if set forth in full herein.

66. The Share Exchange Agreement covenanted in Section 3.6 thereof, *inter alia:*

(a) that Merrill's SEC filings complied with GAAP;

(b) that Merrill's SEC filings fairly presented the Company's financial condition;

(c) that the Company maintained proper records and controls; and

(d) that Merrill had no undisclosed material liabilities or obligations.

67. Merrill breached the Share Subscription Agreement because the foregoing representations and warranties were untrue.

68. Merrill, in violation of these terms, failed to disclose in any of its SEC filings, prior to the filing of the January 16, 2009 Form 8-K, and in violation of GAAP, *inter alia*, that Merrill had $50.3 billion of undisclosed exposure to monoline insurers on its coverage for High Risk Insured Assets.

69. NJ DOI has been damaged as a proximate result of Merrill's breach of contract.

70. NJ DOI should be awarded damages, including rescissory damages, against Merrill and Bank of America for this breach of contract.

AS AND FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANTS MERRILL AND BANK OF AMERICA FOR BREACH OF CONTRACT UNDER SECTION 3.6(a)-(c) OF THE SHARE EXCHANGE AGREEMENT

71. Plaintiff repeats and realleges each and every of the Common Allegations (¶¶ 1-224) above, as if set forth in full herein.

72. The Share Exchange Agreement covenanted in Section 3.6 thereof, *inter alia*:

(a) that Merrill's SEC filings complied with GAAP;

(b) that Merrill's SEC filings fairly presented the Company's financial condition;

(c) that the Company maintained proper records and controls; and

(d) that Merrill had no undisclosed material liabilities or obligations.

73. Merrill breached the Share Exchange Agreement because the foregoing representations and warranties were untrue.

74. Merrill, in violation of these terms, failed to disclose in any of its SEC filings, prior to the January 16, 2009 Form 8-K, and in violation of GAAP, *inter alia*, that Merrill had at least $50.313 billion of undisclosed exposure on its coverage to monoline insurers for High Risk Insured Assets, with $9.581 billion of that coverage for non-investment grade or unrated ABS CDOs.

75. NJ DOI has been damaged as a proximate result of Merrill's breach of contract.

76. NJ DOI should be awarded damages, including rescissory damages, against Merrill and Bank of America for this breach of contract.

AS AND FOR A THIRD CAUSE OF ACTION AGAINST DEFENDANTS MERRILL AND BANK OF AMERICA FOR BREACH OF CONTRACT UNDER SECTION 3.13 OF THE SHARE EXCHANGE AGREEMENT AND DISCLOSURE STATEMENTS

77. Plaintiff repeats and realleges each and every of the Common Allegations (¶¶ 1-224) above, as if set forth in full herein.

78. The Share Exchange Agreement modified the initial contract (the Share Subscription Agreement) that was entered into with NJ DOI in January 2008.

79. The Share Exchange Agreement and appended Disclosure Statements covenanted in Section 3.13 thereof that no Series 1 Preferred Shareholder would exchange their Preferred Shares for a different class of preferred shares that "will have" a reference price other than $33.00.

80. Preferred shares with a reference price of $33.00 (plus the right to continue to receive 9% dividends) was economically equivalent to the terms on which NJ DOI converted its Preferred Shares to common shares.

81. Merrill violated the representations and warranties in the Share Exchange Agreement by granting TPG preferential terms.

82. TPG received Series 3 Preferred Shares that were entitled to dividends and carried a reference price of $22.50 per share and were convertible (even with the potential 17% increase to the reference price), for more shares per Preferred Shares than NJ DOI received on the conversion of its Preferred Shares for 11 million common shares.

83. NJ DOI has been damaged as a proximate result of Merrill's breach of contract.

84. NJ DOI should be awarded damages, including rescissory damages, against Merrill and Bank of America for this breach of contract.

AS AND FOR A FOURTH CAUSE OF ACTION AGAINST DEFENDANTS MERRILL AND BANK OF AMERICA, FOR NEGLIGENT MISREPRESENTATION

85. Plaintiff repeats and realleges each and every of the Common Allegations (¶¶ 1-224) above, as if set forth in full herein.

86. Defendants were in a special relationship of trust and confidence with NJ DOI and owed a duty to impart correct information to NJ DOI.

87. Merrill at all relevant times sought to induce NJ DOI to rely on its representations and agree to new contractual terms directly impacting NJ DOI's ownership of Merrill Preferred Shares. NJ DOI was asked by Merrill to sign a confidentiality agreement that prevented NJ DOI from discussing the terms of the Share Exchange Agreement with any other

Preferred Shareholder. Merrill, thus, placed itself in a position of trust and confidence by requiring that Merrill be the only source of information concerning the Share Exchange Agreement for NJ DOI.

88. A special relationship existed also because Merrill was aware that NJ DOI was seeking assurances that (a) no other holder of Series 1 Preferred Shares would be receiving more favorable terms in connection with the Share Exchange Agreement and (b) that Merrill would not incur write-downs or face capital deficiencies that were not consistent with its then-foreseeable financial circumstances as Merrill had disclosed them to NJ DOI.

89. Defendants, at least, negligently falsely represented and warrantied, orally and in writing, that no Series 1 Preferred Shareholder had or would receive more favorable terms than NJ DOI.

90. Merrill did, in fact, provide better terms for TPG, which received the Series 3 Preferred Shares that were entitled to dividends and carried a reference price of $22.50 per share and thus, could have been exchanged for more shares than NJ DOI was able to at a conversion rate of $27.68 per share.

91. Additionally, Defendants, at least negligently falsely represented in the Share Subscription Agreement and Share Exchange Agreement, *inter alia*:

(a) that Merrill's SEC filings complied with GAAP;

(b) that Merrill's SEC filings fairly presented the Company's financial condition;

(c) that the Company maintained proper records and controls; and

(d) that Merrill had no undisclosed material liabilities or obligations.

92. Nevertheless, in contradiction of these representations, Defendants failed to disclose in any of its SEC filings and in violation of GAAP, *inter alia*, that Merrill had in excess of $50.3 billion of undisclosed exposure to monoline insurance on its coverage for High Risk Insured Assets.

93. NJ DOI relied upon Merrill's assurances (as Merrill intended) that the representations made, as detailed above, were true and, in reliance thereupon, entered into the Share Subscription Agreement and the Share Exchange Agreement modifying NJ DOI's rights under the Share Subscription Agreement.

94. NJ DOI has been damaged as a proximate result of Merrill's negligent misrepresentation.

95. The Share Exchange Agreement should be rescinded and the terms of the Share Subscription Agreement should be reinstated.

96. NJ DOI should be awarded damages, including rescissory damages, against Merrill and Bank of America for this negligent misrepresentation.

AS AND FOR A FIFTH CAUSE OF ACTION AGAINST DEFENDANTS MERRILL AND BANK OF AMERICA FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

97. Plaintiff repeats and realleges each and every of the Common Allegations (¶¶ 1-224) above, as if set forth in full herein.

98. Merrill violated the covenant of good faith and fair dealing by entering into a share exchange agreement with TPG that provided TPG with substantially preferential conversion terms after having represented and warranted to NJ DOI orally and in writing that it

would not negotiate preferential conversion terms with any of the other Preferred Shareholders, and particularly agreeing not to do so with respect to TPG.

99. NJ DOI has been damaged as a proximate result of Merrill's breach of the covenant of good faith and fair dealing.

100. NJ DOI should be awarded damages, including rescissory damages, against Merrill and Bank of America for this breach of the covenant of good faith and fair dealing.

WHEREFORE, Plaintiff demands judgment against the defendants as follows:

A. Declaring and determining that Merrill and Bank of America (as Merrill's successor in interest) breached the terms of the Share Subscription Agreement and Share Exchange Agreement.

B. Declaring and determining that Merrill and Bank of America (as Merrill's successor in interest) negligently misrepresented to NJ DOI material facts to induce NJ DOI to enter into the Share Redemption Agreement and the Share Exchange Agreement..

C. Declaring that Merrill and Bank of America (as Merrill's successor in interest) breached the terms of the implied covenant of good faith and fair dealing.

D. Declaring that rescissory damages for claims with respect to the Share Exchange Agreement should be based on a revised reference price equal to the $15.47 exercise price of the warrants issued on January 15, 2009;

E. Awarding NJ DOI rescissory or compensatory damages;

F. Awarding NJ DOI pre-judgment interest;

G. Awarding NJ DOI the costs, expenses, and disbursements incurred in this action, including reasonable attorneys' and experts' fees; and

H. Awarding NJ DOI such other and further relief as the Court may deem just and proper in light of all the circumstances of this case.

CERTIFICATION PURSUANT TO R.4:5-1

1. I hereby certify that the matter in controversy is not the subject of any other action pending in any Court, or of a pending arbitration proceeding.

2. To my knowledge, no other action or arbitration procedure is contemplated.

3. I have no knowledge at this time of the names of any other party who should be joined to this action.

DESIGNATION OF TRIAL COUNSEL

Pursuant to Rule 4:25-4, the Court is advised that Jeffrey W. Herrmann, Esquire, is hereby designated as trial counsel until such time as other counsel listed herein are either admitted *pro hac vice* and/or are appointed by this Court.

NOTICE PURSUANT TO RULE 1:5-1(a)

TAKE NOTICE that the undersigned attorneys do hereby demand, pursuant to Rule 1:5-1(a) that each party herein serving pleadings and interrogatories and receiving answers thereto, serve copies of all such pleadings and answered interrogatories received from any party, including any documents, papers and other materials referred to therein, upon the undersigned attorneys, and take notice that this is a continuing demand.

JURY DEMAND

Pursuant to Rule 4:35-1, Plaintiff hereby demands trial by jury.

Dated: July __, 2009

COHN LIFLAND PEARLMAN
HERRMANN & KNOPF LLP

By:__________________________

Peter S. Pearlman
Jeffrey W. Herrmann
Park 80 Plaza West-One
Saddle Brook, NJ 07663
(201) 845-9600

and

WOLF POPPER LLP
Lester L. Levy
Robert C. Finkel
Anthony D. Green
845 Third Avenue
New York, NY 10022
(212) 759-4600

Attorneys for Plaintiff