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

MBIA INSURANCE CORPORATION,

Plaintiff,

-against-

COUNTRYWIDE HOME LOANS, INC., COUNTRYWIDE SECURITIES CORP., COUNTRYWIDE FINANCIAL CORP., COUNTRYWIDE HOME LOANS SERVICING, L.P., and BANK OF AMERICA CORP.

Defendants.

Index No.: 08/602825
IAS Part: 3 (Bransten, J.)

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON SUCCESSOR LIABILITY BASED ON *DE FACTO* MERGER AND ASSUMPTION OF LIABILITIES

(Motion Sequence No. 61)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Plaintiff MBIA Insurance Corporation ("MBIA" or "Plaintiff") respectfully submits this reply in further support of MBIA's motion pursuant to CPLR 3212(e) for summary judgment that Defendant Bank of America Corporation ("BAC") is liable as a successor for the liabilities of Countrywide Financial Corporation ("CFC"), Countrywide Home Loans ("CHL"), Countrywide Securities Corporation ("CSC"), and Countrywide Home Loans Servicing, LP ("CHLS") (collectively, the "Countrywide Defendants").

PRELIMINARY STATEMENT[1]

The transactions at issue here are the very paradigm of a *de facto* merger. But for BAC, "[t]o see what is in front of one's nose needs a constant struggle."[2] BAC focuses only on the (supposed) $45 billion sticker price paid by BAC for all of Countrywide's operating assets, to the exclusion of any other facts. For BAC, ignorance of those facts "is strength."[3] Well-settled doctrines of successor liability, however, take a more holistic view of transactions. As relevant here, the *de facto* merger doctrine looks past the mere accounting treatment of transactions and asks whether the transactions in issue are in substance, even if not in form, a merger. And the implied assumption of liabilities doctrine examines the asset purchaser's intent *vis-à-vis* the asset seller's liabilities and whether any consideration paid to the seller *remained available to satisfy the seller's creditors*.

Viewing the $45 billion sticker price in the broader context of the facts makes clear that, regardless of how the Asset-Stripping Transactions were treated as a *technical accounting* matter at a snapshot moment in time, the *practical implications* of the transaction were that all of Countrywide's operating assets were transferred to BAC and its non-CFC subsidiaries, and the consideration received by Countrywide did not remain available to pay creditors other than those that BAC favored, leaving remaining Countrywide creditors facing wind-down shell entities.

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[1] "SUF ¶ __" refers to MBIA's Rule 19-a Statement of Undisputed Facts; "Oblak Ex." to the Exhibits to the Affirmations of Jonathan B. Oblak, filed on September 28, 2012 and concurrently herewith; "CUF ¶ __" to MBIA's Rule 19-a Responses and Counterstatement of Facts; "Bea Ex." to the Exhibits to the Affirmation of Renee B. Bea, filed on November 7, 2012; and "Rosenberg Ex." to the Exhibits to the Affirmations of Jonathan Rosenberg, filed on September 28, 2012 and November 7, 2012.

[2] George Orwell, *In Front of Your Nose* (1945).

[3] BAC Mem. 49 (citing George Orwell, Nineteen Eighty-Four 6 (1949)).

BAC also errs in arguing that a single fact—BAC's state of incorporation—dictates the law that applies to MBIA's *de facto* merger claim. But that fact is not dispositive, and indeed it is peripheral to the choice-of-law inquiry. Numerous other factors, such as where the underlying fraud occurred and where a key perpetrator of fraud and asset seller (CHL) was incorporated, point overwhelmingly to New York law to govern the claim. Even if Delaware law applied, BAC misunderstands its content and relies on an outlier decision by a California judge.

MBIA begins by reiterating why New York law applies to MBIA's *de facto* merger claim, and why BAC's effort to have Delaware law applied is erroneous. *See* Point I, *infra*. MBIA then explains that BAC's single-minded focus on the technical accounting value paid to Countrywide during the Asset-Stripping Transactions is legally and factually irrelevant to the *de facto* merger and the implied assumption of liabilities doctrines. *See* Point II, *infra*. MBIA next explains that the undisputed facts satisfy New York law on *de facto* merger and warrant summary judgment in MBIA's favor, *see* Point III, *infra*, and that, even under BAC's misguided view of Delaware law, factual disputes preclude granting summary judgment in BAC's favor, *see* Point IV, *infra*. MBIA continues by showing that the separate doctrine of implied assumption of liabilities (as to which BAC concedes New York law applies) is satisfied on the undisputed facts here. *See* Point V, *infra*. Finally, MBIA explains that, while it has not pursued the fraud theory of successor liability at the summary-judgment stage given disputes of fact on its elements, MBIA is entitled to pursue that theory at trial if necessary. *See* Point VI, *infra*.

ARGUMENT

I. NEW YORK LAW APPLIES TO MBIA'S *DE FACTO* MERGER CLAIM

In this case, New York law clearly controls because: (i) North Carolina law, which (unlike Delaware) is the leading alternative to New York law, does not conflict with New York law; (ii) even if Delaware law were the alternative, there is no conflict between New York and Delaware law; and (iii) even if there were a conflict between New York and Delaware law, New York applies an interest analysis that overwhelmingly favors the application of New York law in this case.

BAC argues (BAC Oppn. 11-12, 15-16), contrary to New York's choice-of-law principles, that any analysis should begin and end with BAC's state of incorporation (apparently because BAC believes it will fare better if this Court adopts the erroneous interpretation of Delaware law promulgated by a lone California judge). New York rejects such a rigid approach, and instead follows a more flexible one that looks at *all* the relevant interests—an approach particularly appropriate here because *de facto* merger is an equitable doctrine.

A. There Is No Conflict Between New York Law, On The One Hand, And North Carolina Or Delaware Law, On The Other Hand

In New York, the "first step in choice of law analysis is determining whether an actual conflict exists between the jurisdictions involved." *K.T. v. Dash*, 37 A.D.3d 107, 111 (1st Dep't 2006). If no conflict exists, "then the law of the forum state where the action is being tried should apply." *SNS Bank, N.V. v. Citibank, N.A.*, 7 A.D.3d 352, 354 (1st Dep't 2004). BAC argues that there is a conflict between New York and Delaware law only as to the *de facto* merger doctrine. BAC Oppn. 8-18; BAC Mem. 43 n.135 (conceding absence of conflict between New York and Delaware on the implied assumption of liabilities doctrine).

North Carolina law is the more appropriate alternative (than Delaware law) to New York law because North Carolina is BAC's principal place of business and Delaware is merely its place of incorporation. *See* MBIA Oppn. 12-13; *Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp.*, 36 A.D.3d 17, 25 (1st Dep't 2006) ("the [law of the] state of the principal place of business takes precedence over state of incorporation"). There is no conflict between New York and North Carolina law, and consequently, New York law applies. *Compare Fitzgerald v. Fahnestock & Co.*, 286 A.D.2d 573, 575 (1st Dep't 2001), *with Lattimore & Assocs., LLC v. Steaksauce, Inc.*, No. 10 CVS 14744, 2012 WL 1925729, at *11 (N.C. Sup. Ct. May 25, 2012).

Even if Delaware (rather than North Carolina) law were the appropriate alternative to New York, New York law still would govern because there is no conflict between New York and Delaware law. *See* MBIA Mem. 18-20; MBIA Oppn. 14-15.

First, New York and Delaware law both recognize successor liability and recognize the *de facto* merger doctrine as one branch of such liability. *See Fischer v. Prodigi, Inc.*, No.

603891/2006, 2007 WL 2815494 (Sup. Ct. N.Y. Cnty. July 23, 2007) (applying New York law because "[t]he laws of Delaware and New York are substantially the same on the issue of successor liability") (citations omitted); *Cargo Partner AG v. Albatrans Inc.*, 352 F.3d 41, 45 (2d Cir. 2003) (citing *Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239, 245 (1983)) (recognizing *de facto* merger exception); *Fitzgerald*, 286 A.D.2d at 574 (same); *accord Elmer v. Tenneco Resins, Inc.*, 698 F. Supp. 535, 540 (D. Del. 1988) (same); *Magnolia's at Bethany, LLC v. Artesian Consulting Eng'rs*, No. S11 C-04-013, 2011 WL 4826106, at *3 (Del. Super. Ct. Sept. 19, 2011) (same).

Second, New York and Delaware law are also the same concerning the fundamental elements of the *de facto* merger doctrine, namely that the doctrine applies where the transactions at issue are in substance, even if not in form, a merger. *Compare, e.g., AT & S Transp., LLC v. Odyssey Logistics & Tech. Corp.*, 22 A.D.3d 750, 752 (2d Dep't 2005) (the *de facto* merger "factors are analyzed in a flexible manner that disregards mere questions of form and asks whether, in substance, it was the intent of the successor to absorb and continue the operation of the predecessor"); *with Fidanque v. Am. Marcaibo Co.*, 92 A.2d 311, 315-16 (Del. Ch. 1952) ("Whether a particular transaction is in reality a merger or otherwise depends to a great extent on the circumstances surrounding each particular case and in determining the question all the elements of the transaction must be considered."); *Xperex Corp. v. Viasystems Tech. Corp., LLC*, No. 20582-NC, 2004 WL 3053649, at *2 (Del. Ch. July 22, 2004) ("[T]his Court is one of equity and will not allow sham transactions to achieve mischief."). Both jurisdictions also agree that any analysis of whether a *de facto* merger occurred requires application of a flexible standard that looks at the particular facts and circumstances of each case. *Id.*

To be sure, New York law is relatively more developed than Delaware law concerning the *de facto* merger doctrine insofar as New York courts have articulated a non-exclusive set of "hallmarks" to aid in analyzing whether a *de facto* merger has occurred.[4] *Compare, Fitzgerald*,

[4] The law on *de facto* merger in the creditor context is much less developed in Delaware as compared to New York. MBIA Oppn. 15-16. A review of the scant authority in Delaware shows that the factors considered by Delaware courts vary depending on the facts and circumstances of each case. *See, e.g., Xperex Corp. v. Viasystems Tech. Corp., LLC.*, No. 20582-NC, 2004 WL 3053649, at *2 (Del. Ch. July 22, 2004) (noting that "*Drug, Inc. v. Hunt* [35 Del. 339 (1933)]… did not set forth the only circumstances in which a Delaware corporation will be considered the successor of another corporate entity."); *Magnolia's at Bethany, LLC v. Artesian Consulting Eng'rs*, No. S11 C-04-013-ESB, 2011

286 A.D.2d at 574; *with, Fidanque*, 92 A.2d at 316. But New York's greater development of the law does not create an actual conflict, especially because New York and Delaware law are in accord on the more general doctrinal issues that both have addressed. *K.T.*, 37 A.D.3d at 112 (applying forum state law where application "would not threaten the policy underlying" foreign jurisdiction's law). Moreover, when the Delaware cases that considered the *de facto* merger doctrine in the context of shareholder appraisal rights are properly put to one side, any differences between Delaware and New York law do not present a genuine conflict because those differences would not have a significant possible effect on the outcome. *Fin. One Pub. Co. Ltd. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 331 (2d Cir. 2005).

B. New York's Stronger Interests Mandate The Application Of New York Law

Even if this Court determined that there were a conflict between New York and Delaware law as to the *de facto* merger doctrine, New York law rejects the rigid approach BAC would have this Court take to analyzing which state's law applies. BAC asks (BAC Oppn. 11-14) that this Court look no further than BAC's state of incorporation. Where a *genuine* conflict exists, however, New York's choice-of-law framework applies an "interest analysis" to give "effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issues in the litigation." *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 72 (1993); *see also DaSilva v. C & E Ventures, Inc.*, 83 A.D.3d 551, 553 (1st Dep't 2011) ("the law of the situs of the injury applies").[5] New York's interest analysis is a flexible approach that takes into account all relevant contacts including the location of the tort and injury (here, New York), the plaintiff's domicile (New York), and the underlying claims at issue (New York). *Id.*; MBIA Mem. 22-26; MBIA Oppn. 18-21.

WL 4826106, at *3 (Del. Super. Ct. Sept. 19, 2011) (rejecting the notion that fraud is required to show *de facto* merger, and identifying three factors to create a *de facto* merger: (1) the transfer of all of the seller's assets; (2) payment in stock to the seller's shareholders; and, (3) the predecessor's agreement to assume the debts and liabilities of the seller.). At best, *Maine* (the erroneous decision by a California judge upon which BAC relies) represents "other" factors that might be considered under Delaware law in connection with analysis of a *de facto* merger claim. *See Hayden Capital USA, LLC v. Northstar Agri Industries, LLC*, No. 11 Civ. 594, 2012 WL 1449257, at *4 (S.D.N.Y. April 23, 2012). However, as MBIA previously explained (MBIA Oppn. 16-18), those additional factors are not applicable in the context of creditor claims like those at issue here.

[5] *Hayden's* application of the law of the state of incorporation is distinguishable because in that case contacts with New York were otherwise "non-existent" and the parties did not raise the principal place of business as an alternative jurisdiction for choice of law purposes. *See Hayden Capital*, 2012 WL 1449257, at *7.

New York law is favored where, as here, the torts and injury alleged occurred in New York. *See Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC*, 446 F. Supp. 2d 163, 192 (S.D.N.Y. 2006); *Colon v. Multi-Pak Corp.*, 477 F. Supp. 2d 620, 625-626 (S.D.N.Y. 2007); *Pryor Cashman Sherman & Flynn, LLP v. Tractmanager, Inc.*, No. 603515/05, 2007 N.Y. Slip Op. 31332(U), at *10 (Sup. Ct. N.Y. Cnty. May 18, 2007) ("A corporation suffers its injury where its principal place of business is located because that is where its damages are felt."). Indeed, courts have applied this principle in the specific context of successor liability to protect a New York resident plaintiff from a situation where it would suffer injury if prevented from holding a successor corporation liable. *See Fischer*, 2007 WL 2815494, at *5-6 (New York has strong interest in protecting its resident where successor corporation transferred all the operating assets out of the predecessor corporation rendering it insolvent); *Sweatland v. Park Corp.*, 181 A.D.2d 243, 246 (4th Dep't 1992) (tort creditors "need protection against attempts by ongoing businesses to avoid liability through transfer of their operations to another legal entity."). Accordingly, because the contacts in this case overwhelmingly favor New York (MBIA Mem. 22-26; MBIA Oppn. 18-21), New York law applies.

II. THE AMOUNT BAC PAID IN CONNECTION WITH THE ASSET-STRIPPING TRANSACTIONS IS NOT RELEVANT TO THE DOCTRINES OF *DE FACTO* MERGER AND IMPLIED ASSUMPTION OF LIABILITIES

BAC's fixation on the consideration paid in exchange for *all* of Countrywide's operating assets misses the equitable purpose of successor liability. The amount BAC paid does not negate a finding of successor liability because: (i) it is legally irrelevant to the question of successor liability; and it is also factually irrelevant because (ii) Countrywide's remaining creditors were prejudiced by the Asset-Stripping Transactions; (iii) the cursory process by which the Asset-Stripping Transactions were approved was dominated by BAC, in that the transactions were not arms'-length nor was there independent director review; and (iv) the $45 billion was exchanged among commonly controlled companies within the BAC enterprise, and was used to a significant extent to pay or assume liabilities to creditors favored by BAC (including BAC's non-CFC subsidiaries).

First, the adequacy as an accounting matter of the consideration paid in a sale of assets is

not relevant to the inquiry of whether a *de facto* merger or assumption of liabilities occurred under New York law. *See, e.g., In re Matter of N.Y.C. Asbestos Litig. ("Van Nocker")*, 15 A.D.3d 254, 256-57 (1st Dep't 2005) (identifying four "hallmarks" of a *de facto* merger that do not include adequacy of consideration); *Cargo Partner*, 352 F.3d at 46 (same). BAC's assertion that successor liability cannot be shown where a purchaser pays "fair value" (BAC Oppn. 5-8), like its prior attempt to impose a fraud requirement (BAC Mem. 18-20), conflates the *de facto* merger doctrine with fraudulent conveyance law, which is a separate and distinct basis for imposing liability on a purchaser of assets. *Miller v. Forge Mench P'ship Ltd.*, 2005 WL 267551, at *12 (S.D.N.Y. 2005). In a constructive fraudulent conveyance analysis, the fundamental issue is whether the seller received adequate consideration for the assets transferred. In contrast, the *de facto* merger doctrine is not concerned with how much the seller was paid for transferred assets, but rather, whether the seller's shareholders retain an ownership interest in the assets sold following a transaction that involved the transfer of an ongoing business. *Cargo Partner*, 352 F.3d at 47 (the "essence" of a *de facto* merger is that the purchaser and seller "become owners together of what formerly belonged to each"); *At Last Sportswear, Inc. v. Newport News*, No. 602208/2009, 2010 WL 4053105, at *4 (Sup. Ct. N.Y. Cnty., Oct. 5, 2010) ("The fact that the seller's owners retain their interest in supposedly sold assets (through their ownership interest in the purchaser) is the 'substance' which makes the transaction inequitable;" finding not dispositive that a "transaction was structured as an asset purchase for cash") (internal citations omitted).

Similarly, the question of whether a purchaser expressly or impliedly assumes the predecessor's liabilities depends on whether the circumstances "indicate an intention on the part of the buyer to pay the debts of the seller." *Ladjevardian v. Laidlaw-Coggeshall, Inc.*, 431 F. Supp. 834, 839 (S.D.N.Y. 1977). The consideration paid does not conclude an analysis of "the effect of the transfer upon creditors of the predecessor corporation," *id.* at 839-40, because the relevant question is *whether such consideration remains available to creditors after the transactions are completed*—and here it did not (*see* below and Point V *infra*). Therefore, the amount BAC paid for Countrywide's assets is simply irrelevant as a legal matter to whether

BAC is liable as Countrywide's successor.

Second, even as a factual matter, the $45 billion figure says nothing about the effect of the asset transfers on Countrywide's remaining creditors or whether any of that consideration remained available to pay contingent creditors like MBIA. In this case, Countrywide's contingent creditors were indisputably harmed. MBIA Oppn. 5-7, 41. Any amounts actually paid to CFC and CHL were not available as a resource for satisfying Countrywide's debts generally, but instead were immediately paid out to BAC-preferred creditors or to capitalize entities BAC intended to take over. SUF ¶¶ 256-265; CUF ¶¶ 78-99. The only assets left behind at CFC and CHL were "toxic" and illiquid assets that were plainly insufficient to satisfy expected contingent liabilities. SUF ¶¶ 47, 111-112, 126-127; CUF ¶¶ 113, 116-121. The Asset-Stripping Transactions put Countrywide into "wind-down" mode and left CFC, CHL, and CSC without viable business operations such that creditors cannot look to future business revenues to satisfy claims. SUF ¶¶ 168-176, 246-255; CUF ¶¶ 114-121. Under these facts, any amounts paid were not available "as a resource for satisfying the seller's debts," *Cargo Partner*, 352 F.3d at 45, but rather were immediately distributed pursuant to BAC's plan, for BAC's benefit.

Third, that the amount collectively paid for Countrywide's assets may have represented fair value for accounting purposes does not mean the process by which the transactions were planned and executed was fair. The manner in which the Asset-Stripping Transactions were approved was devoid of a fair process, and did not produce a fair outcome *vis-à-vis* CFC's and CHL's remaining creditors. *See Asarco LLC v. Americas Mining Corp.*, 396 B.R. 278, 392 (S.D. Tex. 2008) (that the transferee had a legitimate business purpose for the transfer "does not necessarily negate complaints about the manner in which the transfer was structured," where "there were elements of the transactions that were unfair to creditors") (applying Delaware law). In planning the Asset-Stripping Transactions, BAC cherry-picked Countrywide's operating and revenue producing assets and "skinnied" CFC, CHL, and CSC down to wind-down entities lacking any viable business operations. SUF ¶¶ 38-54, 58-127, 105-109, 168-173, 246-248, 265; CUF ¶¶ 114-136. BAC controlled the process by which the prices were determined, SUF ¶¶ 38-

56, 95-108, 122-127, 165-167, 177-188; CUF ¶¶ 14-47, and by which the transactions were approved, SUF ¶¶ 62, 129, 143-144, 149; CUF ¶¶ 36-41. Moreover, there is substantial evidence that all of this was done at a time when CFC and CHL were insolvent or on the brink of insolvency, while at the same time BAC estimated billions in additional liabilities existed that were not covered by the reserves on Countrywide's balance sheets. SUF ¶¶ 163, 220-221, 231, 233-235; CUF ¶¶ 48-58. Indeed, the primary goal behind the structure of the Asset-Stripping Transactions was to minimize the risk of Countrywide's "liabilities" and "contingent liabilities" to BAC and its non-CFC subsidiaries, using CFC and CHL as "filter[s] for assets and liabilities." Oblak Ex. 18 at BACMBIA-X0000018074 (BAC's plan as of January 25, 2008, was to "[m]erge CFC into Red Oak and then [transfer] assets out of Red Oak into B of A. This provides a filter for assets and liabilities."); Ex. 361 (identifying the "goal" of "conduct[ing] the integration in a manner that: [m]inimizes risks [of] liabilities (e.g., outstanding debt obligations) and contingent liabilities (e.g., litigation and regulatory risk) of legacy Countrywide legal entities."). Under such circumstances, BAC's "fair value" metric cannot overcome the patent unfairness of the transactions, which by design disadvantaged CFC's and CHL's "left behind" creditors.

Fourth, it is particularly disingenuous for BAC to focus on the amount of consideration where, as here, such remuneration either never left the BAC enterprise, or to the extent it was paid out, it was immediately paid out to creditors that served BAC's best interests, in a manner that was made possible because the transactions were done among commonly controlled companies. SUF ¶¶ 62, 129, 143-144, 149; CUF ¶¶ 36-41. Having already identified certain preferred creditors, *see* Oblak Ex. 362, BAC was able to design the Asset-Stripping Transactions to segregate Countrywide's valuable assets and business operations from its massive contingent liabilities, while simultaneously paying off creditors that served BAC's own interests, including banking counterparties key to BAC's other business goals. SUF ¶¶ 256-264; CUF ¶¶ 74-107. Indeed, of the $45 billion, *at least* $18.7 billion of the consideration paid in connection with the July 2008 Transactions was promptly paid out to creditors favored by BAC, paid to BANA, or

contributed to Countrywide Bank to satisfy BAC's own interests,[6] and $15.5 billion was an assumption of debt in connection with the November 2008 Transactions to protect BAC's reputational and financial interests, and not a payment made to Countrywide (SUF ¶ 120). Thus, the only unfair "windfall" in this case was the $4 billion worth of BAC stock paid to CFC's former shareholders, ahead of creditors and at a time when CFC and CHL were likely insolvent. SUF ¶¶ 59-60, 64; Oblak Ex. 9.

III. THE UNDISPUTED FACTS ESTABLISH ALL OF THE "HALLMARKS" OF A *DE FACTO* MERGER UNDER NEW YORK LAW

The *de facto* merger doctrine is "applied when the acquiring corporation has not purchased another corporation merely for the purpose of holding it as a subsidiary, but rather has effectively merged with the acquired corporation," which is exactly what happened here.[7] *Fitzgerald*, 286 A.D.2d at 574. BAC did not buy Countrywide to hold and to run as a subsidiary; rather, it bought Countrywide to divest it of all of its valuable business operations, to merge those operations into BAC's own operations, and to exploit CFC's and CHL's subsidiary status to provide separation between Countrywide's valuable assets and business operations and Countrywide's contingent creditors. The *de facto* merger doctrine ensures that "a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as concomitant to the benefits it derives from the good will purchased." *Id.* at 575 (citing *Grant-Howard Assocs. v. Gen. Housewares Corp.*, 63 N.Y.2d 291, 296 (1984)).

While no bright-line rule controls, New York generally recognizes four "hallmarks" which support a finding that *de facto* merger occurred: (1) continuity of ownership; (2) cessation of ordinary business and dissolution of the acquired corporation as soon as possible; (3)

[6] Oblak Exs. 30 at Rows 42, 62, 63 (BAC's plan for use of July 2008 Transaction proceeds showing $11.5 billion used to pay off lines of credit, $1.7 used to pay off CSC borrowings, and $5.5 used to capitalize Countrywide Bank); 362 (BAC planning document indicating other debts flagged for payment, including convertible debt and medium term notes totaling $5.2 billion, for which MBIA is unable to determine the ultimate amount paid because BAC refused to provide detailed accounting entries that would reveal such information); 363 (BAC contributes the transferred assets to BANA, "BANA returns capital to its parent in a cash distribution, which is *ultimately returned up to BAC*…") (emphasis added).

[7] The undisputed evidence of a *de facto* merger here includes the fact that after the Asset-Stripping Transactions BANA did *de jure* mergers with CHL's largest subsidiary, CHLS, and CFC's largest subsidiary, Countrywide Bank, which shows a very high degree of integration of Countrywide's former operations into BAC and its non-CFC subsidiaries.

assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and (4) continuity of management, personnel, physical location, assets, and general business operations. *Fitzgerald*, 286 A.D.2d at 575; *Sweatland*, 181 A.D.2d at 246. "These factors are analyzed in a flexible manner that disregards mere questions of form and asks whether, in substance, it was the intent of the successor to absorb and continue the operation of the predecessor." *AT & S Transp.*, 22 A.D.3d at 752 (citing *Nettis v. Levitt*, 241 F.3d 186 (2d Cir. 2001); *City of N.Y. v. Pfizer & Co.*, 260 A.D.2d 174 (1st Dep't 1999)). While a finding of *de facto* merger does not require all four factors be established, the undisputed facts show that each factor is present here.

A. There Is Continuity Of Ownership Over The Transferred Business Assets And Subsidiaries

Unable to contest the undisputed facts that establish continuity of ownership in this case, BAC attempts to persuade this Court to adopt an unreasonably narrow view of this factor that has already been rejected in New York. MBIA Oppn. 25-26. That the seller's shareholders (i.e. CFC's shareholders) retain their interest in the transferred assets after they are sold (here, by becoming shareholders of the acquiring company (i.e. BAC)) clearly establishes continuity of ownership. *At Last Sportswear, Inc.*, 2010 WL 4053105, at *4 ("The requirement of ownership continuity does not exalt form over substance. The fact that the seller's owners retain their interest in supposedly sold assets (through their ownership interest in the purchaser) is the 'substance' which makes the transaction inequitable."; finding not dispositive that a "transaction was structured as an asset purchase for cash") (internal citations omitted). Continuity of ownership can be established by both direct and indirect ownership. *Van Nocker*, 15 A.D.3d at 256.

In this case, CFC's shareholders became BAC shareholders through the Red Oak Merger, and as BAC shareholders, the former CFC shareholders continued to own the assets transferred from CFC, CHL, and CSC to BAC and its non-CFC subsidiaries. SUF ¶¶ 59-61. Thus, continuity of ownership is established regardless of whether the Court accepts that the Red Oak Merger was one of a series of transactions designed to acquire control over and then to transfer

Countrywide's assets and operations to BAC (and its non-CFC subsidiaries).[8] Analyzing these transactions together is particularly appropriate, however, in view of the *de facto* merger doctrine's focus on substance over form. *See Fitzgerald,* 286 A.D.2d at 574 (*de facto* merger can be found in scenario of an acquisition followed by a transfer of assets); *Arnold Graphics Indus., Inc. v. Indep. Agent Ctr., Inc.*, 775 F.2d 38, 42 (2d Cir. 1985) (that the seller was acquired and operated as a wholly-owned subsidiary for a year before assets were transferred "is not a significant distinction since there is no requirement that all of the events that are necessary to a finding of *de facto* merger occur at the same time"); *New York v. Westwood-Squibb Pharm. Co.*, 62 F. Supp. 2d 1035, 1040 (W.D.N.Y. 1999) (*de facto* merger can be established through predecessor's initial acquisition of seller's stock, followed by seller's subsequent transfer of its assets and liabilities to the purchaser in exchange for consideration).

B. Countrywide Ceased Its Ordinary Business Operations

There can be no reasonable dispute that CFC, CHL, and CSC are out of business and in a "wind down" status with "no operations." MBIA Oppn. 26-29; SUF ¶¶ 168-176, 246-250; CUF ¶¶ 114-136; Oblak Ex. 82 (April 2011 BAC memorandum: "CHL has no ongoing operations and is in a wind-down mode."); Ex. 83 at 7 ("CFC has no operations that by themselves are economically viable on a go-forward basis."); Rosenberg Ex. 4 ("CFC and many of its subs…have been skinnied down and do not have active ongoing business nor do they have associates…[they] *aren't active entities*…"). The economic reality that CFC, CHL, and CSC are out of business is not impacted by the fact that they are named in numerous lawsuits and retain valid corporate status. *Christie v. Delta Trading Corp.*, No. 601195/105, 2007 WL 2691976 (N.Y. Sup. Ct. 2007) ("The mere fact that [the predecessor corporation] is somehow still listed as active and that it has defended itself in a number of lawsuits does not establish that it 'has remained in existence in a meaningful way.'") (quoting *Van Nocker*, 15 A.D.3d at 257). BAC attempts to overcome the fact that Countrywide is out of business by offering the Court a self-serving and misleading portrait of left-behind assets and wind-down operations at CFC and CHL.

[8] It is rather obvious, however, that the Red Oak Merger and Asset-Stripping Transactions *were* part of a single integrated plan to merge Countrywide's business operations into BAC's operations. SUF ¶¶ 35-44, 47, 104, 110-113.

BAC Oppn. 24-28. The indisputable conclusion that CFC, CHL, and CSC are shell entities is not disturbed by BAC's efforts at misdirection.

First, BAC's portrait of Countrywide drastically overstates the assets available to pay creditors and ignores the poor quality of the assets left behind. BAC asserts (BAC Mem. 25) that CFC and CHL retained 39% and 28% of their assets, respectively, following the November 2008 Transactions based on a misleading comparison between the value of the assets of these entities at September 30, 2008 and the anticipated value of the assets that would ultimately be transferred as part of the November 2008 Transactions. BAC's analysis, however, fails to include the July 2008 Transactions, which involved the transfer of almost $30 billion in value, largely by CHL. Had BAC considered these transactions as just part of its analysis, it would have resulted in far lower percentages of assets remaining at CHL and CFC. BAC also misleadingly analyzes CFC solely on a stand-alone basis, as opposed to CFC on a consolidated basis, to avoid the dramatic impact of the transfer of all of CFC's consolidated operating assets and most of its subsidiaries. The more appropriate analysis[9] illustrates that after the Asset-Stripping Transactions, CFC on a consolidated basis only retained 12% of the assets it had on June 30, 2008. Finally, BAC ignores the fact that CSC only retained 2% of the assets it had on June 30, 2008 and it was left unable to operate as a securities broker-dealer. CFC's and CHL's balance sheets also greatly overstate actual assets available to pay creditors because, for example, more than half of the so-called "assets" on CHL's balance sheet have no independent value and are tied to corresponding liabilities. MBIA Oppn. 28-29; *and see* Oblak Aff. Exs. 58-59, 83 (Exhibit B states "CFC does not own these assets, nor is the offsetting liability outstanding"), 99; Rosenberg Ex. 118. Moreover, CFC's and CHL's balance sheets say nothing about the "toxic" and illiquid quality of those assets and omit their expected contingent liabilities that were vastly higher than amounts reserved. Oblak Aff. Exs. 12, 186, and 190; SUF ¶¶ 47, 111-112, 126-127, 233; CUF ¶¶ 48-58, 108-109, 113, 116-121. BAC has admitted, in other contexts, that Countrywide's remaining assets are insufficient to

[9] The more appropriate analysis would be to compare the balance sheets of CFC, on a consolidated basis, pre- and post-Asset Stripping Transactions (comparing the balance sheets as of November 30, 2008 to June 30, 2008 as opposed to September 30, 2008), and to analyze the resulting composition of those November 30, 2008 balance sheets, which would conservatively include the remaining value received from BAC as part of the July 2008 and November 2008 Transactions.

satisfy creditor judgments. In connection with seeking court approval for a settlement in which BAC proposed paying $8.5 billion to settle RMBS investor lawsuits, BAC put forward CFC's balance sheets and income statements to show that *even after billions in capital infusions* from BAC since November 2008, CFC *cannot* now satisfy a judgment against it, has no business operations that are viable on their own, has no plans to restart operations in the future, and is rapidly losing money. Oblak Exs. 83, 99. Far from representing a meaningful source of recovery, Countrywide has only fixed, sterile assets that are inadequate to satisfy creditor claims.

Second, although BAC is dismissive of the significance of its dominance and control over CFC's, CHL's and CSC's continued existence, these facts are relevant under First Department authority because a company is a mere "shell" where it is "incapable of doing business except through [the alleged successor]." *Fitzgerald*, 286 A.D.2d at 575. It is indisputable that BAC dominates and controls the repurchase process, having ensured that no repurchase request can be approved without BAC authorization, SUF ¶ 178, and that [redacted] Oblak Ex. 248 at 1211:23-1212:1; SUF ¶ 182. Moreover, BAC controls the resolution of repurchases and litigation with Countrywide's counterparties. SUF ¶¶ 180, 182, 187-188, 234-242; CUF ¶ 68; Bea Ex. 5 at 73:10-23. Therefore, the evidence shows that CFC, CHL, and CSC are mere shells, unable to conduct these "wind-down" activities except through BAC.

Third, BAC fails to explain that it controls the fate of CFC, CHL and CSC and has maintained them on life-support not to continue any meaningful business operations, but instead in an attempt to quarantine massive contingent liabilities and provide a buffer to shield BAC in the event of a CFC bankruptcy. SUF ¶¶ 230, 241-243, 250, 253-255; Rosenberg Ex. 4 (showing BAC's plan to maintain CFC and CHL as "orphans" to "avoid any potential legal ramifications"). BAC cannot indefinitely avoid the consequences of its *de facto* merger with Countrywide by employing the very types of corporate formalities rejected by the *de facto* merger doctrine. *Time Warne Cable Inc. v. Networks Group, LLC*, No. 09 Civ. 10059, 2010 WL

3563111, at * 7 (S.D.N.Y. Sept. 9, 2010) ("[T]he absence of formalities is at the heart of the *de facto* merger exception, which is why a *de facto* merger is "analyzed in a flexible manner that disregards mere questions of form and asks, whether, in substance, it was the intent of the successor to absorb and continue the operation of the predecessor.") (citing *Nettis*, 241 F.3d at 194).

C. BAC Continues Countrywide's Business Operations Using Countrywide's Former Assets, Employees, And Physical Locations

BAC bought Countrywide because it saw value in Countrywide's business operations, platforms, and technology, and BAC intended to continue Countrywide's "core" business operations by merging them into BAC's lines of business. SUF ¶¶ 4, 36-37; CUF ¶¶ 2, 5, 11. There is also no dispute that BAC continues to use Countrywide's assets, managers, employees, physical locations, platforms, and technology in the combined mortgage business today. SUF ¶¶ 189-219; CUF ¶¶ 41-46. Rather, BAC makes a disingenuous attempt to raise an issue of fact by arguing that the result of merging Countrywide's business operations into BAC's operations was a combined mortgage company that was more closely aligned with a legacy-BAC model. BAC Oppn. 31-35. Notwithstanding BAC's misdirection, however, this factor is readily established based upon the undisputed facts.

First, the mere fact that the resulting business was not identical to Countrywide's business is not dispositive. "[T]he *de facto* merger test requires continuity of general business operations, not complete identity or uniformity in every material characteristic of the predecessor and successor entities." *Miller v. Forge Mench P'ship Ltd.*, 2005 WL 267551, at *11 (S.D.N.Y. 2005) (internal citations and quotations omitted). Through its purchase of Countrywide, BAC overnight went from being a second-tier player in the mortgage business to becoming the top originator and servicer, tripling its mortgage banking income from the prior year. SUF ¶ 57; Oblak Exs. 14 ("[BAC] gains immediate scale becoming the largest mortgage originator and servicer"), 16, 23, 90, 96. There can be no doubt that BAC achieved these dramatic gains by integrating Countrywide's business into BAC and its non-CFC subsidiaries. SUF ¶¶ 57, 189-219; CUF ¶¶ 41-46. Moreover, the combined business derived its *capabilities* to engage in such

large-scale operations from Countrywide's mission-critical technology and personnel, regardless of which products BAC elected to offer through that platform. *Id*.; Oblak Ex. 14 at 100:02-13 ("[BAC] had a business but it didn't have the scale and capability…"); Bea Ex. 89 ("we're acquiring capabilities from Countrywide that [BAC] didn't have…").

Second, BAC's entire argument relies on avoiding or distorting the compelling undisputed facts which establish that this factor is met. *See* MBIA Oppn. At 32-33. For example, although BAC trivializes the platforms, technology, and workforce it acquired, the record establishes that these aspects of Countrywide's business were central to the value BAC ascribed to the Countrywide enterprise. SUF ¶¶ 36, 37, 40, 48, 50, 51-54; Oblak Ex. 256 ("[Ms. Desoer] noted that Countrywide's core operational strengths, scalable platforms, and many talented associates are valuable assets that have now been aligned to the Bank's business model and responsible lending principles."). To start, BAC delivered BAC stock worth $4 billion to CFC's shareholders based on its assessment of the value of Countrywide's operations and assets. SUF ¶¶ 58-68. Throughout the assessment phase, from January to June 2008, BAC spent significant resources focused on the proprietary technologies that were essential to the Countrywide lending platform. SUF ¶ 211. The CLUES underwriting platform, for example, was Countrywide's proprietary mortgage underwriting technology to which BAC transitioned its own mortgage lending operations, and was one of the key prizes BAC sought in purchasing Countrywide. SUF ¶ 211. Likewise, several complementary technologies were also integrated into the combined mortgage operations, giving BAC a lending platform it could not have otherwise achieved through internal development. *Id*.; Oblak Ex. 12 ("migrate the legacy Bank of America origination, fulfillment and servicing processes to Countrywide's platforms"). BAC also gives short-shrift to the importance of the 19,300 of Countrywide's employees it did hire, ignoring, for example, that it viewed those employees as essential to the business, and that retaining these critical employees was the principal reason BAC decided to run the combined

mortgage business from Countrywide's former headquarters in Calabasas, California. SUF ¶¶ 189-193; CUF ¶¶ 5, 9.[10]

BAC's last-ditch effort to avoid this factor is to admit that Countrywide's operations were absorbed into the BAC enterprise, but then to argue that because those operations are continued at BANA and not at BAC, this factor is not fulfilled. BAC Oppn. 29-30. This argument is yet another attempt by BAC to elevate form over substance, contrary to the premise of the *de facto* merger doctrine. BAC's argument ignores the fact that BAC was in charge of the planning and controlled the transactions in every meaningful respect. Oblak Ex. 114 at 158:06-09 ("The concept was all parts of the business regardless of what the function was…would operate in the Bank of America structure, again, *regardless of legal entity*.") (emphasis added); SUF ¶¶ 38-56, 62, 95-108, 122-127, 129, 143-144, 149, 165-167, 177-177; CUF ¶¶ 14-47. The notion that BAC could avoid liability because it subsequently placed the assets and operations elsewhere in the BAC enterprise offends the very same premise that the substance, and not the form, of the transactions inform the *de facto* merger inquiry. *See In Re Alleged PCB Pollution*, 712 F.Supp. 1010 (D. Mass. 1989) (noting that it "would effectively gut the *de facto* merger doctrine [if to] avoid liability, a purchasing corporation would merely need to create a wholly-owned subsidiary to formally acquire the assets of a corporation…").

D. BAC Assumed The Liabilities Necessary To Continue Countrywide's Business Operations

As to this factor, BAC does not actually dispute the facts presented by MBIA, but rather argues about the legal significance of such facts. BAC Oppn. 33-34. The law, however, supports a finding that this factor is met. This factor looks at whether the successor assumed the liabilities that would ordinarily be necessary to continue the predecessor's business operations. *Miller*, 1995 WL 267551, at *9. It is undisputed that BAC, by itself or through its non-CFC subsidiaries, assumed "business-critical" contracts with vendors and service providers to

[10] *See also* Bea Exs. 57 ("Countrywide has excellent technology…and extremely talented associates who will help us build the best mortgage business in the country."), 59 ("objective of the [retention] program is to identify and retain positions that are critical to running Countrywide before and after the merger, and needed to support the integration with BAC."); Oblak Ex. 115 (Ms. Desoer testified that "[r]etaining talent and subject matter expertise" was a reason the combined mortgage operations were in Countrywide's former headquarters).

continue Countrywide's business operations without interruptions. BAC Oppn. 43 ("to the extent any BofA entity assumed responsibility for Countrywide's day-to-day operational liabilities, it was BANA…"); SUF ¶¶ 201-207; *McDarren v. Marvel Entm' Grp., Inc.*, 1995 WL 214482, at *8 (S.D.N.Y. 1995) ("The proper inquiry regarding the assumption of the seller's liability is whether the purchaser assumed the existing seller's contracts, such as manufacturing or sale representative contracts, necessary to continue the ordinary business without interruption."). It is also undisputed that BAC, through its non-CFC subsidiaries, assumed the wage and benefit liabilities for Countrywide's former employees, SUF ¶ 201, and canceled Countrywide's federal lending identification numbers, transferring lending to take place under its own numbers (and thus assuming the corresponding obligations that come with lending pursuant to federal guidelines), SUF ¶ 202.

IV. AT BEST, BAC'S ERRONEOUS DELAWARE STANDARD RAISES DISPUTED ISSUES OF FACT THAT PRECLUDE SUMMARY JUDGMENT

The undisputed facts also establish that BAC is liable as Countrywide's successor under a proper Delaware law analysis because the Asset-Stripping Transactions resulted in a *de facto* merger of Countrywide into BAC. *See Fidanque*, 92 A.2d 311, 315-16 (Del. Ch. 1952) ("Whether a particular transaction is in reality a merger or otherwise depends to a great extent on the circumstances surrounding each particular case and in determining the question all the elements of the transaction must be considered."); *Magnolia's at Bethany, LLC v. Artesian Consulting Eng'rs*, No. S11 C-04-013-ESB, 2011 WL 4826106, at *3 (Del. Super. Ct. Sept. 19, 2011) (successor liability exists where, *inter alia*, the transaction amounts to a consolidation or merger of the seller into the purchaser).

In an attempt to overcome the undisputed facts, BAC relies on an erroneous four-factor *de facto* merger test to argue that BAC is entitled to summary judgment under Delaware law that it is not Countrywide's successor. BAC Oppn. 18-19. BAC's articulation of Delaware law is simply wrong, and relies on an inapposite line of cases addressing shareholder appraisal rights and a lone California judge's erroneous interpretation of Delaware law in the creditor context. MBIA Oppn. 16-18. Even assuming, *arguendo*, that BAC's erroneous pronouncement of

Delaware law were correct, at best the application of this so-called four-factor test raises material issues of fact that would preclude summary judgment in BAC's favor.

First, there is a genuine dispute of fact as to whether the failure of CFC's and CHL's boards to consider *any* information or do *any* work prior to approving the Asset-Stripping Transactions prevents the transactions from complying with the asset-transfer statutes. MBIA Oppn. 35-40; Del. Gen. Corp. L. § 271(a) (relevant to CFC as a Delaware corporation); N.Y. Bus. Corp. L. § 717 (relevant to CHL as a New York corporation). The issue of CFC's and CHL's solvency is clearly in dispute, as the parties submitted competing expert reports on the issue.[11] *See* Bea Ex. 27. If CFC and CHL were insolvent, the directors of these financially troubled entities would have had legal duties that, on the facts of this case, clearly were not fulfilled. *See, e.g., Alcott v. Hyman, P.R.M., Inc.*, 208 A.2d 501, 507 (Del. 1965) (where subsidiary proposes to transfer assets to parent in circumstances where subsidiary is insolvent and therefore owes duties to creditors, subsidiary's non-independent directors must "ac[t] in utmost good faith and exercis[e] scrupulous fairness"); N.Y. Bus. Corp. L. § 717 ("A director shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances."); *N. Am. Catholic Ed. Programming Found. v. Gheewalla*, 930 A.2d 92, 101-102 (Sup. Ct. Del. 2007) (directors of insolvent company have duty to preserve assets for benefit of creditors); *In re Broadstripe, LLC*, 444 B.R. 51, 105 (D. Del. 2010) ("[W]hen the decision is to sell the company…the gravity of the transaction places a special burden on the directors to make sure they have a basis for an informed view."). Even if CFC and CHL were in the zone of insolvency, rather than actually insolvent, the directors should have done sufficient work to satisfy themselves that CFC and CHL were not, in fact, insolvent. Bea Ex. 25. Those directors also, under those circumstances,

[11] BAC alleges that Mr. Winn was directed not to address the impact of the Asset-Stripping Transactions because his expert report addressed Countrywide's solvency as of July 30 and November 30, 2008. But this empty accusation ignores the fact that BAC refused to produce more detailed financial information regarding all the accounting entries for CFC and CHL that occurred during July and November 2008 and that, therefore, Mr. Winn's analysis was necessarily limited to the month-end information produced in this action. June 27, 2012 H'rg Tr. 56: 25- 57:8.

should have done sufficient work to understand fully the impact of the Asset-Stripping Transactions on the companies and their creditors. *Id.*

Second, there is a genuine dispute regarding whether BAC paid fair consideration in connection with the Asset-Stripping Transactions. MBIA Oppn. 41-42. BAC misleads the Court by failing to acknowledge that fair consideration as a legal standard and fair value as an accounting standard are not the same thing. In addition to a payment of fair value, fair *consideration* also requires that there was an arm's-length relationship between the parties and that the transferee acted in good faith. *See Peltz v. Hatten,* 279 B.R. 710, 736–37 (D. Del. 2002) (To ascertain the presence of reasonably equivalent value "courts consider a host of factors, including the good faith of the parties, the difference between the amount paid and the fair market value, and whether the transaction was at arm's length."). There is overwhelming evidence that the transactions were not at arms' length (SUF ¶¶ 61, 128-164, 266; CUF ¶¶ 59-62), and that CFC and CHL did not act in good faith in transferring these assets (SUF ¶¶ 128-164, 266-271; CUF ¶¶ 63-73), and thus summary judgment to BAC is plainly not warranted on this fact-intensive judicial inquiry. *See In re Fruehauf Trailer Corp.,* 444 F.3d 203, 213 (3d Cir. 2006) ("In conducting this factual analysis, a court does look to the 'totality of the circumstances,' including (1) the 'fair market value' of the benefit received as a result of the transfer, (2) 'the existence of an arm's-length relationship between the debtor and the transferee,' and (3) the transferee's good faith."); *Peltz,* 279 B.R. at 736 ("… governing case law dictates that in determining whether [] 'reasonably equivalent value,' [was received] the court should examine the 'totality of circumstances'…").

Third, even though the undisputed facts clearly establish that certain creditors were disadvantaged by the Asset-Stripping Transactions (the second factor in the *Maine* test) (MBIA Oppn. 40-41), there remains a dispute as to whether BAC *intended* to defraud or disadvantage creditors through those transactions (MBIA Oppn. 42-44). In this case, there is significant circumstantial evidence that demonstrates (at a minimum) BAC's "calloused indifference" to the harm that would befall certain creditors, giving rise to a finding of intent. MBIA Oppn. 42-44; *and*

see 6 Del. C. § 1304(b); *Lippe v. Bairnco Corp*., 249 F. Supp. 2d 357, 374–75 (S.D.N.Y. 2003); *China Res. Prods. (U.S.A.) Ltd. v. Fayda Int'l Inc*., 856 F. Supp. 856, 863 (D. Del. 1994); *Asarco*, 396 B.R. at 386-388 ("AMC acted with intent to hinder, delay, or defraud ASARCO's creditors if it knew that proceeding with the transaction as structured was substantially certain to hinder, delay, or defraud ASARCO's creditors."). "The question of whether the defendants acted in good faith, or whether they actually intended to hinder, delay or defraud the plaintiff, presents a triable issue of fact." *Trustees of Hamilton Coll. v. Cunningham*, 418 N.Y.S.2d 251, 254 (1979).

V. BAC IS INDEPENDENTLY LIABLE AS COUNTRYWIDE'S SUCCESSOR BECAUSE BAC ASSUMED COUNTRYWIDE'S LIABILITIES

The undisputed facts of this case also establish successor liability based on the implied assumption of liabilities doctrine. As MBIA explained in its prior memoranda of law, each of the elements of that doctrine are satisfied. *See* MBIA Mem. 11-16, 35-42; MBIA Oppn. 47-50. BAC's most senior officers made telling public admissions establishing that BAC took Countrywide's mounting legal troubles into account in establishing the price that BAC paid in the Red Oak Merger, and that BAC intended to "pay for the things that Countrywide did" and "stand up" and "clean up" Countrywide's liabilities. MBIA Mem. 11-13, 36-40; MBIA Oppn. 48-49. Moreover, such admissions, which are corroborated by sworn testimony and documents, were not off-hand comments as BAC suggests, but were made in response to inquiries by journalists and investors asking how BAC intended to address Countrywide's liabilities. *See id.*; SUF ¶¶ 220-230.

It is also indisputable that the Asset-Stripping Transactions harmed creditors. MBIA Mem. 40-42; MBIA Oppn. 49-50. As explained in Points II and IV, *supra,* any cash paid to CFC, CHL or CSC in connection with the Asset-Stripping Transactions was immediately dissipated according to BAC's plan to distribute such funds to preferred creditors or subsidiaries BAC intended to transfer to itself in subsequent transactions. SUF ¶¶ 256-265; CUF ¶¶ 74-95. As a consequence, CFC, CHL, and CSC are mere shell entities that BAC put into "wind down," with no viable business operations. SUF ¶¶ 168-176, 246-255; CUF ¶¶ 114-129. Having been left with no viable business operations capable of generating revenues, and saddled with "toxic" assets and massive contingent liabilities, even BAC admits (when it serves their purposes) that CFC, CHL,

and CSC cannot satisfy judgments against them. SUF ¶¶ 249-255; CUF ¶¶ 137-146. These facts establish the factors considered in *Ladjevardian*, and provide a far more compelling basis for a finding of implied assumption than in other cases where courts have concluded such liability exists. *See* MBIA Oppn. 50.

Other evidence confirms that BAC intended to assume Countrywide's liabilities based upon BAC's consistent and well-established pattern of paying for the contingent liabilities of CFC, CHL, and CSC as settlements have been reached. *Ladjevardian*, 431 F. Supp. at 839; SUF ¶¶ 235-243. Yet despite this pattern, BAC continues to insist that it has not assumed Countrywide's massive remaining contingent liabilities. In fact, BAC has gone to great lengths to keep CFC and CHL out of bankruptcy by negotiating, approving, expressly assuming, and financing more than $[redacted] billion towards the settlement of disputes with Countrywide's creditors and regulators. BAC has thus demonstrated that it intends to pay all Countrywide's contingent debts as they come due. As BAC has shown by resisting successor liability in this and other cases, however, until a settlement is reached, it will not acknowledge the reality that it has become liable for all of Countrywide's liabilities.

A. Assumption Of Liabilities Does Not Require Reliance

Unable to dispute the evidence of implied assumption of liabilities under existing law, BAC attempts to inject a reliance requirement into this doctrine. But it would nullify the doctrine (and defy common sense) to require that contract or tort creditors such as MBIA, whose claims accrued before the predecessor-successor transaction(s) took place, must demonstrate that, in their dealings with the predecessor, they relied on a future transaction between the predecessor and the successor.[12] *See* MBIA Oppn. 46-47. For this reason, New York courts have expressly

[12] BAC's argument (BAC Oppn. 45; BAC Mem. at 12-13, 49) that MBIA's claim of successor liability fails because MBIA did not negotiate change-in-control provisions into the Insurance Agreements is a nonsensical diversion tactic. Such provisions would have been unworkable in the context of providing "credit enhancement" to CHL-originated residential mortgage backed securities ("RMBS") through insurance, which is what MBIA did in this case. *See, e.g.*, Oblak Exs. 123-137. Change-in-control provisions are not found in insurance contracts governing arrangements for a credit enhancement on RMBS securities because the obligations created by such contracts are intended to be continuing, and ratings agencies could not assign a credit rating to a RMBS security if the insurer upon whose capital strength that rating is based could be released from its insurance obligations upon a change in the control of the Master Servicer. *Id.* Even assuming, *arguendo*, MBIA could have negotiated such a provision, any failure to honor such a clause would provide MBIA with a breach of contract claim against Countrywide, and no claim against BAC, leaving MBIA facing the same shell Countrywide entities it faces now. *Id.*

rejected successors' arguments that a reliance element should be imposed, explaining that the proper analysis is premised on whether the "defendant bears successor liability because of its relationship to predecessor, not because of its relationship to plaintiff." *Haywin*, 2001 WL 984721 at *4; *see also Kidz Cloz, Inc. v. Officially for Kids, Inc.*, No. 00 CIV 6270, 2002 WL 1586877, *5 (S.D.N.Y. July 17, 2002) ("New York law does not…require plaintiffs to allege that the successor assumed the predecessor's debts and obligations [with regards] to a [particular] party to the lawsuit"); *see also Moriarty v. LSC Ill.s Corp.*, No. 98c 1997, 1999 WL 1270711, *6 (N.D.Ill. 1999) ("The assumption doctrine focuses on [the] defendant [purchaser's] *post-acquisition* conduct."). This Court should similarly reject BAC's effort to add a reliance element where the law does not impose one.

B. BAC's Self Serving Disclaimers Cannot Extinguish MBIA's Rights

Similarly, this Court should not countenance BAC's suggestion (BAC Oppn. 42-44) that MBIA's equitable rights could be extinguished by self-serving disclaimers BAC wrote into its own insider contracts with Countrywide. Rejecting such a notion, "[t]he Court of Appeals has indicated that agreements apportioning liability between defunct and successor corporations 'cannot affect the rights of a stranger to their contract.'" *Wensing v. Paris Indus.–New York*, 158 A.D.2d 164, 168 (3d Dep't 1990); *see also Cyr v. B. Offen & Co., Inc.*, 501 F.2d 1145, 1153 (1st Cir. 1974) ("the protective language in the purchase agreement, specifically excluding the assumption of any tort liability…cannot determine the rights of third parties" who bring successor liability claims against the purchaser). Indeed, "that the transaction was structured as an asset purchase for cash and the agreement expressly sought to limit the purchaser's liability are not dispositive" under New York law. *At Last Sportswear*, 2010 WL 4053105, at *1 (internal quotation marks omitted). Moreover, such provisions should be set aside because the Asset-Stripping Transactions, and the contracts by which they were effectuated, were not negotiated at arms' length and were approved pursuant to a cursory process controlled by BAC that gave no consideration to the impact of the transactions on Countrywide's creditors. SUF ¶¶ 61, 128-164; CUF ¶¶ 59-73, 78, 100; *see Haywin Textile Prod., Inc. v. Int'l Fin. Inv.*, No. 00 Civ. 8633, 2001

WL 984721, at *5 (S.D.N.Y. Aug. 24, 2001); *Ripley v. Int'l Rys. of Cent. Am.*, 8 A.D.2d 310, 316-17 (1st Dep't 1959), *aff'd*, 8 N.Y.2d 430 (1960) (dominance and control of parent corporation "precluded any possibility of genuine arm's length bargaining" between subsidiary and parent). BAC cannot simply contract itself out of those liabilities, particularly at a time when BAC estimated billions in additional liabilities at Countrywide not covered by reserves and Countrywide was insolvent or on the verge of insolvency. SUF ¶ 231; CUF ¶¶ 51-53. Therefore, BAC's self-serving contractual limitations on liability, which were not negotiated at arm's length, are not determinative of MBIA's rights and must be disregarded for purposes of successor liability analysis.

VI. MBIA IS ENTITLED TO PURSUE THE FRAUD DOCTRINE AT TRIAL

BAC's suggestion that MBIA cannot pursue successor liability under the fraud doctrine at trial is simply wrong. As an initial matter, whether or not MBIA has pursued the fraud exception as a distinct basis for successor liability, BAC put fraud at issue in this case, arguing (erroneously) throughout this litigation that a showing of fraudulent intent is required to establish successor liability. *See* BAC Mem. 2. As a result, the parties have engaged in discovery which has resulted in the accumulation of direct and circumstantial evidence of BAC's intent, including (but not limited to) the facts that: (i) the transactions were among insiders; (ii) substantially all of Countrywide's assets were transferred; (iii) CFC and CHL were insolvent or on the verge of insolvency following the Asset-Stripping Transactions; (iv) BAC and Countrywide expected at the time of the Asset-Stripping Transactions that Countrywide would incur substantial debts; (v) BAC and Countrywide were aware of Countrywide's legal woes and mounting contingent liabilities; (vi) BAC structured the Asset-Stripping Transactions to transfer *all* of Countrywide's operational assets, and leave behind "bad" or "toxic" assets at CFC and CHL; (vii) BAC planned to use CFC and CHL as a "filter" to provide "separation" between Countrywide's valuable assets and its mounting contingent liabilities; (viii) BAC paid Countrywide's shareholders $4 billion, ahead of any of Countrywide's creditors; and (ix) BAC caused CFC and CHL to use the proceeds from the Asset-Stripping Transactions to pay off BAC's preferred creditors. *See, e.g.*,

MBIA Oppn. 44; SUF ¶¶ 256-265; CUF ¶¶ 74-95. To the extent evidence of BAC's intent was not produced in this action, it is because BAC, as the party that controls such information, failed to produce it despite professing its relevance to MBIA's successor liability claim.

Moreover, MBIA did not abandon the fraud theory by electing not to waste the Court's time on an issue that cannot be resolved on summary judgment. The fraud doctrine of successor liability raises issues of scienter which, as MBIA explained *supra* at Point IV, are inappropriate for disposition on a motion for summary judgment. *See Farmers Prod. Credit Ass'n of Middletown v. Taub*, 504 N.Y.S.2d 448, 449 (1986) ("The existence of actual intent, as distinguished from intent presumed in law (*see* Debtor and Creditor Law § 276), is generally a question of fact which precludes summary judgment…[t]he question of whether the defendants acted in good faith, or whether they actually intended to hinder, delay or defraud the plaintiff, presents a triable issue of fact.") (citing *Trustees of Hamilton Coll.*, 418 N.Y.S.2d at 254); *Silverman Partners LP v. Verox Group*, No. 08 CIV 3103 (HB), 2010 WL 2899438, at *6 (S.D.N.Y. July 19, 2010) (finding the fraud exception can be established upon a finding under Section 276 of the New York Debtor and Creditor Law that a conveyance was made with an actual intent to hinder, delay and/or defraud creditors). Therefore, successor liability under a fraud theory is more appropriately addressed at trial.

Finally, the Amended Complaint plainly states a cause of action for successor liability generally, *see* Am. Compl. ¶ 200-207, which is all that is required for MBIA to pursue all available theories of such liability. *See Bradley v. Condon*, 217 N.Y.S.2d 821, 823 (Sup. Ct. Suffolk Cty. 1961) ("Different legal theories or grounds of liability do not necessarily create different causes of action and are not required to be separately stated and numbered."); *Metzger v. Dell Pub. Co.*, 136 N.Y.S.2d 888, 892 (Sup. Ct. 1955) ("Different legal theories or different grounds of liability do not make different causes of action"); *see also Silverman Partners LP*, 2010 WL 2899438, at *5 ("While Plaintiff has only based its successor liability claim on the de facto merger exception, the facts indicate that the mere continuation and transactions undertaken to defraud creditors exception may apply as well.").

CONCLUSION

This Court should grant summary judgment in favor of MBIA that, to the extent the Countrywide Defendants are primarily liable to MBIA on the claims in this action, BAC is liable as a successor to those entities.

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Respectfully submitted,

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