

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,
LP and BANK OF AMERICA CORP.,

Defendants.

Index No.: 602825/08

IAS Part 3 (Bransten, J.)

Motion Sequence No. 60

**DEFENDANT BANK OF AMERICA CORPORATION'S MEMORANDUM OF LAW IN
SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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PRELIMINARY STATEMENT¹

The limited liability of corporations is firmly established in American law. That bedrock precept recognizes the importance to a corporation’s shareholders and creditors—be they individuals, pension funds, or other corporations—of not exposing the corporation’s assets to liabilities for its affiliates’ conduct. And it further recognizes the importance to the national economy of promoting investment, capital allocation, and corporate acquisitions (particularly where such transactions offer hope to struggling companies) by protecting investors or acquirers from the incalculable liabilities potentially associated with assets they acquire. To promote these objectives, it is a “deeply ingrained” legal and economic principle that parent corporations are not liable for the acts of their subsidiaries.² For the same reasons, it is equally well established that asset purchasers do not become liable for the pre-purchase conduct of asset sellers. In the words of MBIA’s own expert, these important principles “support the strong, long-standing, and consistent recognition of corporate separateness and the corresponding strong, long-standing, and consistent reluctance of the law to allow shareholders, creditors, or agents of one corporation to attach or obtain assets of another corporation by setting that separateness aside.”³

Successor-liability doctrines are narrow exceptions to the limited-corporate-liability axiom.

¹ As used in this brief, (i) “MBIA” means plaintiff MBIA Insurance Corporation; (ii) “BAC” means defendant Bank of America Corporation; (iii) “CFC” means defendant Countrywide Financial Corporation; (iv) “CHL” means defendant Countrywide Home Loans, Inc.; (v) “CSC” means defendant Countrywide Securities Corporation; (vi) “CHLS” means defendant Countrywide Home Loans Servicing, LP; (vii) “CW Bank” means Countrywide Bank, (viii) “Countrywide” refers to CFC and all its direct and indirect subsidiaries; and (ix) “BofA” refers to BAC and all its non-Countrywide subsidiaries. References to “Ex. __” are to Exhibits to the September 28, 2012 Affirmation of Jonathan Rosenberg, Esq. in Support of BAC’s Motion for Summary Judgment (the “Rosenberg Aff.”). “Ofcharsky Aff.” refers to the September 27, 2012 Affidavit of Edward J. Ofcharsky in support of BAC’s Motion for Summary Judgment and “Stokes Aff.” refers to the September 28, 2012 Affidavit of William Stokes in support of BAC’s Motion for Summary Judgment. Unless otherwise specified, all emphasis is added and all internal quotations and citations are omitted.

² See *United States v. Bestfoods*, 524 U.S. 51, 61 (1998).

³ Ex. 140 at 8.

Whatever their particular formulation, the single overriding policy of successor-liability doctrines is to ensure that a selling corporation does not cheat its creditors. Given that purpose, courts do not impose successor liability unless there is fraud, which is typically manifested by the buyer exchanging grossly inadequate value for the purchased assets or diverting that consideration outside the selling corporation. As the Second Circuit, applying New York law, has observed, “So long as the buyer pays a bona fide, arms-length price for the assets, there is no unfairness to creditors in thus limiting recovery to the proceeds of the sale”⁴

MBIA would turn these established and fundamental principles on their heads. It seeks to hold BAC liable as the successor to various Countrywide subsidiaries for events that long predated BAC’s July 2008 acquisition and subsequent asset purchases from CFC and its subsidiaries. But far from disadvantaging MBIA, these asset purchases provided immediate liquidity that significantly increased the value available to Countrywide’s creditors. MBIA does not dispute that (i) CFC, CHL, and CSC received more than \$45 billion in value in exchange for their respective assets (nor has MBIA even attempted to rebut expert valuation testimony that this consideration represented fair value); (ii) BAC has since 2010 contributed capital to CFC totaling an additional \$ [REDACTED] billion; and (iii) those funds were used to satisfy CFC’s and CHL’s obligations that expanded exponentially since 2008 in one of the worst economic environments in U.S. history. These simple, undisputed facts—standing alone—establish that there was no attempt to cheat Countrywide’s creditors, and therefore defeat MBIA’s bid to export Countrywide’s potential liabilities to BAC.

Background—BAC Acquires the Struggling and Liquidity-Constrained CFC

When credit markets began to tighten in 2007, mortgage companies like Countrywide were

⁴ *Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41, 45 (2d Cir. 2003).

among the first affected. After taking several steps to raise many billions of dollars in liquidity, CFC eventually sought an acquirer. In January 2008, BAC agreed to acquire CFC through a forward triangular merger, a common transaction in which the acquired company merges into the acquirer's wholly owned subsidiary. CFC merged into BAC subsidiary Red Oak Merger Corporation on July 1, 2008, and CFC's former shareholders received BAC stock as consideration. Undeniably, the Red Oak merger was critical for CFC and its shareholders and creditors, because absent the merger, CFC's ability to survive the financial crisis was uncertain.

But the merger triggered additional Countrywide liquidity needs. At the merger's July 1, 2008 closing, accounting and SEC rules required BAC to record Countrywide's assets and liabilities at their "fair value," i.e., the value that would be exchanged to buy the assets or assume the liabilities in an arm's-length transaction. Adjusting Countrywide's assets to their fair values reduced the regulator-mandated capital levels at CW Bank, which required an immediate cash infusion to meet its capital requirements. The merger's closing also triggered contractual change-in-control provisions that obligated CFC and CHL immediately to repay the \$11.5 billion credit line they had previously drawn to provide essential financing. Thus, Countrywide immediately needed to raise billions of dollars more in cash when the vast majority of their assets were illiquid mortgage loans, illiquid mortgage-servicing rights, and exotic derivative securities for which there was then no active market.

BAC and its affiliates stepped up and supplied the cash its new subsidiary needed by purchasing assets from CFC's subsidiaries at fair value. Between July 1 and 3, 2008, NB Holdings (another BAC subsidiary) bought for fair value various illiquid mortgage-loan portfolios, securities, and CFC's mortgage-servicing subsidiary, CHLS, for more than \$29 billion in immediate liquidity. NB Holdings contributed CHLS to BANA, BAC's consumer-banking

subsidiary. That also enabled BANA to guarantee CHLS's servicing obligations on certain loans, a condition imposed by two government-sponsored mortgage entities, Fannie Mae and Ginnie Mae, in return for their contractually required consent to the Red Oak merger.

The economy deteriorated even further by November 2008, resulting in Lehman Brothers' bankruptcy, Fannie Mae's and Freddie Mac's conservatorships, Washington Mutual's seizure, Wachovia's collapse, and the government's rescue of AIG, to name just a few casualties. But BAC continued to provide CFC and CHL with billions of dollars in additional liquidity and debt relief in exchange for substantially all of CFC's and CHL's remaining assets (including CHL's mortgage-business assets and CW Bank, which had been originating virtually all new Countrywide mortgages). This was a good deal for the Countrywide entities and their creditors. The record is uncontroverted that (i) the fair value that CFC and CHL received for the assets they sold in July and November 2008 was more than \$45 billion; and (ii) that amount exceeded these assets' fair value.

After these well-timed asset sales, CFC and CHL continued to (i) retain substantial assets (primarily mortgage loans, securities, and mortgage-servicing rights ("MSRs"), in addition to the cash BAC had provided), (ii) service the mortgage loans for the MSRs they held, and (iii) litigate and resolve outstanding legal claims against CFC and CHL, including claims seeking to compel them to repurchase mortgage loans they had sold before BAC had anything to do with Countrywide.

Nevertheless, MBIA asserts that by virtue of these fair-value asset sales, BAC should be responsible for CFC's, CHL's, and CSC's liabilities—all of which predate BAC's acquisition of Countrywide—because BAC supposedly (i) "de facto merged" with those entities, and (ii) implicitly assumed their liabilities. If accepted, MBIA's theories would radically expand the de

facto merger doctrine and severely undermine the vital, long-established principles of corporate separateness and limited corporate liability.

MBIA Theory #1: De Facto Merger

The de facto merger doctrine provides a narrow exception to the rule of limited corporate liability. While the elements of a de facto merger vary from state to state, they all have in common the goal of preventing fraudulent or bad-faith efforts to deprive the selling corporation (and its creditors) of consideration for its assets. That did not happen here.

Delaware law applies because it is the law of BAC's state of incorporation and therefore has the greatest interest in whether BAC should be held liable. The four Delaware-law elements for identifying a de facto merger are (i) failure to comply with the corporate-law statute governing asset-sale transactions, (ii) an injury arising from the statutory violation, (iii) the payment of grossly inadequate consideration for the assets, and (iv) an intent to harm the seller's creditors. There are no disputed material facts concerning these factors. It is undisputed that CFC and CHL complied with the governing statutes by obtaining both board and shareholder approval for the asset sales, as these asset-sale statutes demand. And given the undisputed factual record, MBIA cannot show that BAC provided grossly inadequate consideration or intended to harm CFC's creditors:

- Dr. John C. McConnell of Purdue University, a mortgage asset valuation expert, has concluded that BAC and NB Holdings paid at least fair value to CFC and CHL for their assets. MBIA has made no effort to rebut this opinion. It therefore cannot, as a matter of law, show that the consideration CFC and CHL received was grossly inadequate.
- BAC took additional steps to advantage CHL by, for example, structuring NB Holdings' acquisition of CHLS to provide a \$5.5 billion tax advantage and ensuring that CHL was compensated for that additional value.
- The claims of CFC's and CHL's creditors—including their bank lenders, public debt holders and contractual counterparties—were satisfied with more than \$30 billion in consideration in 2008 alone.

- BAC has since 2010 infused more than \$ [REDACTED] billion in capital into CFC and CHL, representing additional value to Countrywide's creditors.

Although Delaware law governs, MBIA likewise could not prove a de facto merger under New York law. The First Department has held that continuity of ownership is an indispensable element of such a claim, requiring a plaintiff to prove that the asset seller acquired an ownership interest in the asset purchaser *in the asset-sale transaction itself*. Continuity of ownership is the “essence of a merger” because its existence can expose a transaction as a subterfuge—a scheme to cheat creditors by moving assets for little or no consideration from one place to another, with the seller taking an ownership interest in the buyer. Thus, under New York law, it is not enough that the asset seller and purchaser were under common ownership at the time of the asset-sale transaction; unless the transaction is structured as an assets-for-equity transaction, it is a straightforward asset sale, and continuity of ownership cannot be satisfied as a matter of law. Here, it is undisputed that CFC, CHL, and CSC received only cash, demand notes, and the assumption of liabilities, altogether totaling more than \$45 billion in value that was used to pay CFC's and CHL's creditors. The fact that the consideration was not equity in the asset purchaser—standing alone—defeats any New York law de facto merger claim.

MBIA also cannot satisfy other New York de facto merger factors, for example:

- Neither CFC nor CHL dissolved, and they maintain meaningful corporate existences. Following the November 2008 asset sales, they have continued to hold assets including cash or demand notes, mortgage loans, and mortgage-servicing rights. And they have continued to service mortgages, pay liabilities, and defend litigation. Under controlling First Department authority, this is all that is necessary to defeat the dissolution element.
- There is no continuity of management, personnel, physical locations, assets, or general business operations between BAC and CFC or CHL. Setting aside that Countrywide's mortgage business does not continue at all, any remnants of that business indisputably reside not with BAC but within BANA, against which MBIA does not assert a de facto merger claim (which, in any event, the National Bank Act would preempt).

MBIA Theory #2: Implied Assumption of Liabilities

MBIA also claims that BAC impliedly assumed CFC's, CHL's, and CSC's pre-acquisition liabilities. An implied assumption of liabilities claim is, at bottom, an implied-contract or promissory-estoppel claim that an asset purchaser, through its unambiguous words or conduct, promised to pay the asset seller's liabilities, on which the seller's creditors reasonably relied to their detriment. This claim fails for at least two reasons.

- *First*, it attempts to impose on BAC an obligation inconsistent with the contracts under which BAC acquired substantially all of CFC's and CHL's assets. In those agreements, BAC either (i) disclaimed the assumption of any liabilities except for those it explicitly assumed, or (ii) specified the liabilities it was assuming. Decades of New York authority preclude any attempt to imply an assumption of liabilities that conflicts with express contractual terms.
- *Second*, MBIA could not have relied (let alone to its detriment) on anything BAC said or did regarding CFC, CHL, or CSC because MBIA had agreed to provide insurance for Countrywide's securitizations many months and years before (i) BAC agreed in January 2008 to acquire CFC; (ii) BAC representatives made the various statements that MBIA has cited (none of which was an "unambiguous" promise to pay CFC, CHL, or CSC liabilities); (iii) CFC or CHL (as BAC subsidiaries) settled various claims; and (iv) BAC or its legacy subsidiaries purchased any assets from CFC, CHL, or CSC.

FACTS**A. BAC and Its Subsidiaries.**

BAC is a Delaware corporation, a bank holding company, and a financial holding company. (Ex. 1 at 1.) Like all large bank and financial holding companies, BAC does not have significant operations of its own; instead, only BAC subsidiaries offer Bank of America's products and services to consumers. (Stokes Aff. ¶ 8.) BAC employs approximately 3,000 people, in contrast to the approximately 282,000 that BAC and its subsidiaries collectively employ worldwide.⁵ BAC's principal banking subsidiary is BANA, a federally chartered bank. Both GAAP and SEC regulations require BAC to report its financial results on a consolidated basis for all its operating

⁵ See Stokes Aff. ¶ 9; Ex. 1 at 1, 26.

subsidiaries.⁶

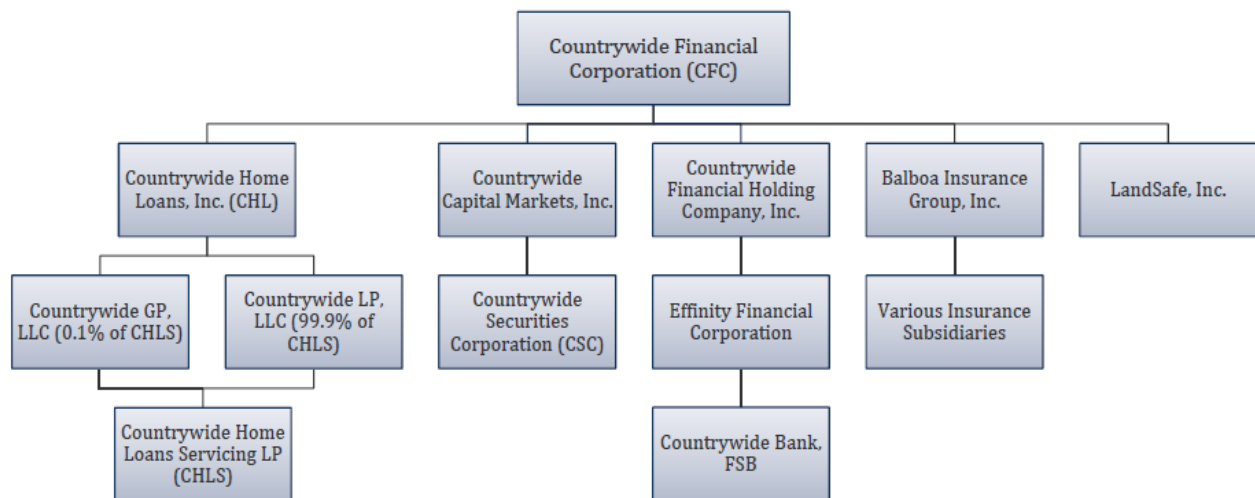
B. Pre-acquisition CFC and Its Subsidiaries.

Like BAC, CFC had no significant operations of its own, but owned operating subsidiaries.

(Ex. 2 at 1.) CFC’s principal wholly owned subsidiaries included:

- *Countrywide Home Loans, Inc.*, which originated, bought, serviced, and sold non-commercial mortgages.
- *Countrywide Home Loans Servicing, LP*, a CHL subsidiary, which serviced the mortgages that CHL owned through mortgage servicing rights.
- *Countrywide Bank*, which held customer deposits, invested in mortgage loans and home-equity lines of credit originated through CHL, and by the end of 2007 originated the vast majority of Countrywide’s mortgages.
- *Countrywide Securities Corporation*, which primarily underwrote and traded mortgage-backed securities.

(Ex. 2 at 1–2, 7, 15; Exs. 3–4.) Before the BAC acquisition, CFC was structured as follows:



⁶ See Ex. 17 ¶ 13 (“All majority-owned subsidiaries—all companies in which a parent has a controlling financial interest through direct or indirect ownership of a majority voting interest—shall be consolidated”); SEC Regulation S-X, 17 C.F.R. § 210.3-01(a) (“There shall be filed, for the registrant and its subsidiaries[,] consolidated, audited balance sheets as of the end of each of the two most recent fiscal years.”).

C. Countrywide's Business Deteriorates as Credit Markets Freeze in 2007.

As a mortgage lender, Countrywide had significant financing needs. Before August 2007, it met those needs by issuing corporate bonds known as commercial paper and selling mortgage loans in the secondary market, primarily in the form of mortgage-backed securities. (Ex. 2 at 17–18, 49, 109–11.) But in August 2007, the weakening housing market and concerns about loan performance curtailed secondary-market demand for many mortgage loans and securities, and the commercial-paper market essentially froze, shutting down Countrywide's access to liquidity from public sources. (*See id.* at 1, 17–18, 49–51, 61–62, 109–11; Ex.7; Ex. 8 at 25; Ex. 9.)

In response, Countrywide took several steps to improve its capital position:

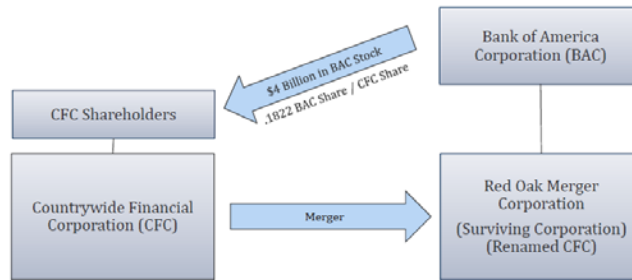
- In August 2007, CHL drew down the full amount of CFC and CHL's \$11.5 billion revolving credit lines, providing liquidity for immediate funding needs. (*See* Ex. 2 at 17, 110; Ex. 10.)
- To address longer-term liquidity needs, CFC accelerated its previously planned migration of its mortgage-loan origination from CHL to CW Bank, which was less vulnerable to capital-market stress because its primary funding source was more stable customer deposits. (*See* Ex. 2 at 17, 51, 108, 148.) By September 30, 2007, more than 90% of Countrywide's loan origination occurred in CW Bank. (Ex. 2 at 4, 64; Ex. 3 at BACMBIA-B0000003085.)
- CFC sought and received additional capital through a \$2 billion preferred-stock investment from BAC in August 2007. (*See* Ex. 11 at 2.)

D. BAC Acquires CFC in a Triangular Merger.

1. The Acquisition Structure.

As the financial crisis deepened in fall 2007, CFC's financial uncertainty grew: hunting for an acquirer, it turned to BAC as a potentially interested party. On January 11, 2008, BAC and CFC signed a Merger Agreement under which CFC would merge with and into a BAC subsidiary, Red Oak Merger Corporation. (*See* Ex. 8 at Appendix A; Ex. 12.) At closing, CFC's shareholders would receive 0.1822 shares of BAC stock for each old CFC share, resulting in former CFC shareholders owning less than 3% of BAC's publicly issued stock. (*See* Ex. 8 at

17–18; *id.* at Appendix A § 1.4(c).) This common structure, a forward triangular merger, is depicted as follows:

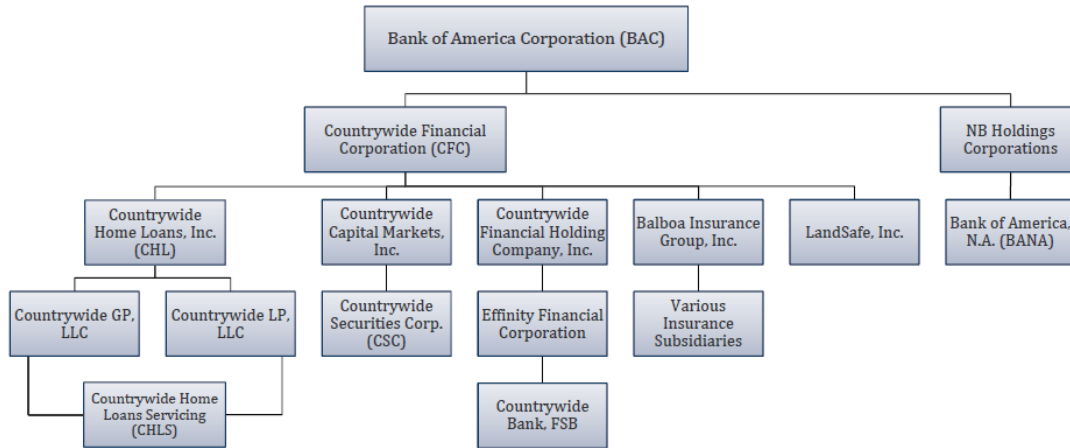


The Delaware Court of Chancery, in litigation concerning the fairness of the Red Oak merger to CFC’s former shareholders, concluded on an extensive record that the merger consideration fairly represented CFC’s value: “There is no suggestion that any entity other than [BAC] was interested in (or capable of) acquiring Countrywide,”⁷ and “no evidence that the price paid by [BAC] was anything other than fair.”⁸

Red Oak would be renamed CFC immediately after the merger closed, and would remain a wholly owned BAC subsidiary. (*See* Ex. 13 at 3.) Thus, when the merger closed on July 1, 2008—dubbed “Legal Day 1” or “LD1”—BAC’s relevant corporate structure was as follows:

⁷ *In re Countrywide Corp. S’holders Litig.*, C.A. No. 3464-VCN, 2009 WL 846019, at *8 (Del. Ch. Mar. 31, 2009) (“*Countrywide I*”).

⁸ *In re Countrywide Corp. S’holders Litig.*, C.A. No. 3464-VCN, 2009 WL 2595739, at *3 (Del. Ch. Aug. 24, 2009) (“*Countrywide II*”), *aff’d*, *Ark. Teacher Ret. Sys. v. Caiafa*, 996 A.2d 321, 322 (Del. 2010) (“[W]e affirm the Vice Chancellor’s decision on the basis of the reasons in his opinion,” and find no basis for a “claim that the [CFC] board fraudulently conducted or inadequately priced the merger transaction.”); *see also Countrywide I*, 2009 WL 846019, at *14 (finding “precious little doubt that the consideration received by the Countrywide shareholders was anything other than at least fair”).



2. BAC Fair-Values CFC’s Assets upon Closing, as GAAP Required.

SEC rules require public companies like BAC to apply generally accepted accounting principles (GAAP) to their financial statements.⁹ When the acquisition closed on July 1, 2008, GAAP required BAC to include Countrywide’s assets and liabilities on its consolidated financial statements. (See p. 7, *supra*.) GAAP also mandates that acquirers use the purchase method of accounting for the acquisition. (See Ex. 18 ¶ 9 & p. 109 n.5; Ex. 19 ¶ 16.) Under purchase accounting, the acquirer generally records the acquired company’s assets and liabilities at their “fair values”—in this context, “the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants”—as of the acquisition’s closing.¹⁰ These fair values equate to the price that would be established through an arm’s length transaction; any excess of the purchase price over fair value (i.e., the fair value of the acquired company’s assets less the fair value of its liabilities) must be recorded as “goodwill.”¹¹

As the unrebutted expert accounting opinion of Dr. Thomas L. Porter establishes, BAC

⁹ See SEC Division of Corporation Finance, Financial Reporting Manual § 1400 (Sept. 30, 2008) (“Regulation S-X and U.S. GAAP must be followed by domestic issuers.”).

¹⁰ Ex. 18 ¶ 20; Ex. 144 ¶ 5; see also Ex. 19 ¶ 25.

¹¹ Ex. 18 ¶ 34.

followed this procedure in accounting for the Red Oak merger.¹² Consistent with GAAP,¹³ BAC used the same methods to value Countrywide's assets and liabilities that BAC used to determine fair values for other purposes at BAC. (See Exs. 20 at 99:7–12; 21 at 224:25–225:15; see also Ex. 19 ¶¶ 2, 72–76; Ex. 21 at 218:21–220:11; Ex. 122 at BACMBIA-W0000002090; Ex. 123 at BACMBIA-A0000110763; Ex. 124; Ex. 125 at BACMBIA-X0000340186; Ex. 126 at 207:23–208:4, 216:13–217:4.)

E. The Change-in-Control Provisions for which Other CFC and CHL Creditors Had Bargained Before 2008.

Unlike MBIA, many of CFC's other contractual counterparties negotiated "change-in-control" provisions that (i) required their consent to any change in control of CFC (or CHL), or (ii) immediately accelerated any debt CFC or CHL owed them upon the sale of substantially all of CFC's or CHL's assets.

Bank Credit Lines. The governing credit agreements for CFC and CHL's \$11.5 billion revolving credit lines included provisions that made any outstanding amounts immediately due and payable at the lenders' option upon a change in control of CFC. (See Ex. 22 at §§ 2.08(d) and 2.09; see also Exs. 23–27 at §§ 1.01, 2.08(d), and 2.09.)

Agreements with FNMA and GNMA. Among the most important buyers of Countrywide mortgages were FNMA (commonly known as Fannie Mae) and GNMA (Ginnie Mae). To ensure their protection in a sale of a mortgage servicer that was servicing mortgage loans that Fannie Mae and Ginnie Mae owned, their respective guidelines required that servicers obtain Fannie Mae's and Ginnie Mae's consent to any change in control. (See Ex. 40 at Ch. 2, § 204; Ex. 41 at Chapter 13(B)(2).)

¹² Ex. 19 ¶¶ 51–62.

¹³ *Id.* ¶¶ 52, 64.

CFC and CHL Public Debt Indentures. Other major creditors were investors who owned CFC's and CHL's public debt. The governing indentures—the contracts between the bond issuers (CFC and CHL) and the public investors—contained provisions that required any purchaser of substantially all CFC's or CHL's assets to assume the public debt. (See Ex. 29 at Article Nine; Exs. 30–32 § 901; Ex. 33 § 5.01; Ex. 34 § 8.1; Ex. 35 § 10.01; Ex. 36 § 10.1; Exs. 37–38 at Clause 19(D)(1); Ex. 39 at Condition 4.4.)

F. Countrywide Meets Its Liquidity Needs by Selling Its Illiquid Assets at Fair Value.

When the Red Oak merger closed on July 1, 2008, CFC and its subsidiaries immediately needed substantial liquidity to satisfy obligations triggered by the merger:

- The Red Oak merger triggered the change-in-control provisions in the revolving credit lines, obligating CFC and CHL to repay immediately approximately \$11.5 billion.¹⁴ Failing to repay those credit lines would not only have resulted in a default under those loan agreements, but also would have triggered a cross-default under many of CFC's and CHL's public bond indentures, which in turn would have accelerated more than \$15 billion in additional outstanding debt obligations. (See Ofcharsky Aff. ¶ 2; Ex. 29 at Article Six; Ex. 31 §§ 601, 602; Ex. 32 §§ 601, 602; Ex. 33 §§ 6.01, 6.02; Ex. 37 at Condition 9; Ex. 38 at Condition 9; Ex. 39 at Condition 7, Condition 7.2.)
- CW Bank required liquidity. After CW Bank's assets and liabilities were adjusted per GAAP's requirements to reflect their fair value as of the acquisition's closing,¹⁵ CW Bank needed additional capital to meet its minimum tier 1 capital requirements set by its regulator, the Office of Thrift Supervision (OTS). (See Rosenberg Aff. ¶¶ 29–32; Ofcharsky Aff. ¶ 4; Exs. 47, 48, 52.)

Combined, CFC and its subsidiaries had just \$6.6 billion in cash on hand but needed billions more, and their access to funds and ability to sell their own assets in the midst of a credit crisis had never been worse. (Ex. 54 at F:276.)

BAC's wholly owned subsidiaries, NB Holdings and BANA, provided that liquidity. They supplied CFC and its subsidiaries with cash or cash equivalents totaling \$29.45 billion (which is

¹⁴ See Ex. 20 at 135:10–136:22; see also Ex. 8; Ex. 22 at §§ 2.08(d) and 2.09; Exs. 23–27 at §§ 1.01, 2.08(d), and 2.09.

¹⁵ See Ex. 18 ¶ 20; Ex. 144 ¶ 5.

also the fair value Dr. McConnell calculated for that consideration) in a series of July 2008 transactions called the “Legal Day 2” or “LD2” transactions.¹⁶ The most significant was NB Holdings’ purchase of CHL’s mortgage-servicing subsidiary, CHLS, in exchange for a \$19.68 billion demand note (later adjusted to \$18.04 billion), which Dr. McConnell calculated had a fair value equal to its \$18.04 billion face amount.¹⁷ This purchase was necessary not only to provide urgently needed liquidity, but also to satisfy the demands of Fannie Mae and Ginnie Mae. (*See* Rosenberg Aff. ¶¶ 25–27 and Exs. 42, 44, 55–73.) As a condition to their consent to the Red Oak merger (which was triggered under the change-in-control guidelines described above), Fannie Mae and Ginnie Mae had demanded that BANA guarantee CHLS’s obligations to service loans that Fannie Mae and Ginnie Mae had purchased. (*See id.*; Ofcharsky Aff. ¶ 2; p. 12, *supra.*) But after CFC and its subsidiaries became BANA affiliates through CFC’s merger with Red Oak, BANA could not simply guarantee those CHLS obligations because of the federal regulatory limit on transactions with affiliates (which included various loans, hedges, and other outstanding transactions between BANA and Countrywide entities). (*See* Ofcharsky Aff. ¶ 8; Ex. 46.) If CHLS were to become a wholly owned BANA subsidiary, however, such a guaranty would not count toward that federal regulatory ceiling.¹⁸ Thus, NB Holdings’ purchase of CHLS and subsequent contribution of CHLS to NB Holdings’ subsidiary, BANA, allowed CFC and CHL to satisfy their creditors, and enabled BANA to provide the guaranty that Fannie Mae and Ginnie Mae demanded. (*See* Ofcharsky Aff. ¶¶ 7–8.)

¹⁶ *See* Ex. 13 at 5; Ex. 68 ¶¶ 48, 52. The initial aggregate value of the consideration in the July 2008 asset sales was approximately \$31.0 billion, but the demand note NB Holdings provided was subsequently adjusted downward from \$19.68 billion to \$18.04 billion as part of the purchase accounting process. *See* Ex. 56; 65 at Cells D:7, D:23–25; Ex. 66 at BACMBIA-V0000028694–97, BACMBIA-V0000028727–29 .

¹⁷ *See* Ex. 56; Ex. 68 ¶ 412; n.18, *supra.*

¹⁸ *See* Ofcharsky Aff. ¶ 8; *see also* 12 C.F.R. § 223.3(h) (2002) (defining “covered transaction” to include issuance of guaranty to affiliate); 12 C.F.R. § 223.2(b) (2002) (defining “affiliate” to exclude subsidiaries unless the subsidiary is a depository institution, financial subsidiary, or directly controlled by affiliate or shareholder).

The other July 2008 asset-sale transactions mostly involved CHL and included the following:

- NB Holdings purchased (i) two pools of residential mortgage loans from CHL for demand notes with face values (and fair values) of \$6.94 billion and \$2.53 billion, respectively; and (ii) two pools of commercial mortgage loans from Countrywide Commercial Real Estate Finance, Inc., and CW Bank for demand notes with face values (and fair values) totaling \$273.5 million. (See Ex. 13 at 5; Exs. 57–59; Exs. 63–64; Ex. 68 ¶ 412; Ex. 71; Exs. 73–74.)
- CHL novated a portfolio of derivative securities contracts to BANA for \$1.8 billion in cash, under which BANA assumed CHL’s positions under the contracts. (See Ex. 13 at 5.)
- CSC sold a portfolio of securities to Blue Ridge Investments, a BAC subsidiary, for \$147 million in cash. (See Ex. 13 at 5; Ex. 66; Ex. 76.)

G. BAC Purchases Substantially All of CFC’s and CHL’s Remaining Assets in November 2008.

On November 7, 2008, BAC purchased substantially all of CFC’s and CHL’s remaining assets in the “Legal Day 100” or “LD100” transactions. (Exs. 87, 98.) These asset sales occurred as the economy was about to enter a free fall that would end up essentially erasing the long-term value of Countrywide’s mortgage-related assets. (See Exs. 78–84.) At this precarious point, BAC provided CFC and CHL with additional consideration totaling approximately \$20 billion in face value (with a fair value of \$16.74 billion)¹⁹ for assets with book values of approximately \$18.6 billion (which had a fair value of \$15.8 billion).²⁰ The sales also allowed BAC to put Countrywide’s assets to more efficient use and streamlined regulatory oversight in at least two ways.

First, these transactions allowed BAC to consolidate its banking assets under one bank charter subject to only one regulator, a practice BAC followed in other acquisitions in which the target company owned a bank, such as Fleet and LaSalle. (Ofcharsky Aff. ¶¶ 11–14.) In 2008, CW Bank was a thrift, regulated by the OTS. (See Ex. 2 at 19.) BANA, on the other hand, is a

¹⁹ Ex. 68 at ¶¶ 29, 30, 49, 53–55.

²⁰ *Id.* ¶¶ 19, 20, 24–27, 53.

national bank that is regulated by the Office of the Comptroller of the Currency (OCC). (*See Stokes Aff.* ¶ 4 and Ex. 111.) Thus, in November 2008, BAC purchased from CFC its 100% equity ownership of Effinity, a CFC subsidiary that owned CW Bank (as well as several other mortgage-related CFC subsidiaries, including Balboa and LandSafe, Inc.), and in April 2009, CW Bank merged into BANA. (Exs. 87, 110.) These transactions ensured that all BAC banking assets were subject only to OCC regulation and eliminated the additional cost of OTS regulation.²¹

Second, the November 2008 asset sales helped to centralize BAC's mortgage assets under BANA, which improved efficiency and reduced the overall regulatory burden. The operating assets of CHL, which was no longer originating new mortgages, could be used more efficiently by BANA. (*See Ofcharsky Aff.* ¶ 15 and Ofcharsky Exhibit A.) And BANA was subject only to a single, federal regulatory scheme (because the National Bank Act preempted state law).²² By contrast, before the Red Oak merger, CHL and CHLS needed to secure separate licenses and comply with different regulations in every state in which they did business.²³ Thus, having already brought CHLS under BANA's ownership in July 2008, BAC continued to centralize the mortgage business in November 2008 by acquiring (and contributing to BANA) substantially all of CHL's remaining mortgage-related operating assets. (*See Ex. 122 at 9–10 (aligning Countrywide business with BAC target environment).*) In July 2011, CHLS directly merged into BANA, as CW Bank had done, which ensured that CHLS would not again become subject to a 50-state regulatory scheme, as contemplated by the Dodd-Frank Act, which became effective in

²¹ *See Ofcharsky Aff.* ¶ 14; Ex. 112.

²² *See Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 21 (2006) (holding that National Bank Act preempts state regulation of national-bank subsidiaries); *see also Ofcharsky Aff.* ¶ 9.

²³ *See Ofcharsky Aff.* ¶ 9; *see also, e.g.*, N.Y. Banking Law §§ 589-599 (McKinney 2012); Cal. Fin. Code §§ 50000-50706 (West 1999).

July 2011. (See Stokes Aff. ¶ 11 and Exs. 113–115.)

The values of the assets sold and consideration received by CFC and CHL in the July and November 2008 transactions are summarized in the following chart:

ASSET SALES	CHL			CFC		
	Aggregate fair value of assets sold ²⁴ (in billions)	Aggregate book value of consideration ²⁵ (in billions)	Aggregate fair value of consideration ²⁶ (in billions)	Aggregate fair value of assets sold ²⁷ (in billions)	Aggregate book value of consideration ²⁸ (in billions)	Aggregate fair value of consideration ²⁹ (in billions)
July 2008	\$29.03	\$29.03	\$29.03	N/A	N/A	N/A
Nov. 2008	\$7.96	\$9.35	\$9.28	\$10.68	\$11.51	\$11.11
Total³⁰	\$32.89	\$34.28	\$34.21	\$10.68	\$11.51	\$11.11
TOTAL CHL AND CFC				\$43.57	\$45.79	\$45.32

ARGUMENT

A party seeking summary judgment need only “make a prima facie showing” that it should prevail as a matter of law and tender “sufficient evidence to demonstrate the absence of any material issues of fact.”³¹ The burden then shifts to the opposing party to come forth with

²⁴ See Ex. 68 ¶¶ 5, 19–21, 24–25, 27–28, 397; Ex. 18.

²⁵ See Ex. 137, Ex. 2.1; Ex. 68 ¶ 401.

²⁶ See Ex. 68 ¶¶ 5, 19–22, 24–25, 27–30, 48, 401, 412–13, Exs. 32–34.

²⁷ See *id.* ¶¶ 4, 36, 375.

²⁸ See Ex. 137, Ex. 2.1.

²⁹ See Ex. 68 ¶¶ 4, 49, 412–13, Exs. 32–34.

³⁰ In the November 2008 transactions, BAC purchased approximately \$4.1 billion in demand notes that NB Holdings had provided to CHL in the July 2008 transactions. Accordingly, \$4.1 billion has been subtracted from the total aggregate value of the assets that CHL sold and the total aggregate face value and fair value of the consideration that CHL received in the July and November 2008 transactions combined. See Ex. 68 ¶ 401.

³¹ *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986).

“evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.”³² Under this standard, BAC is entitled to summary judgment on MBIA’s successor-liability claims of de facto merger and implied assumption of liabilities.

I. ASSET PURCHASERS ARE NOT LIABLE FOR ASSET SELLERS’ PRE-TRANSACTION LIABILITIES ABSENT FRAUD OR BAD FAITH.

“[D]eeply ingrained in our economic and legal systems” is the hornbook corporate-law principle that “a parent corporation . . . is not liable for the acts of its subsidiaries.”³³ This limited-liability concept is at the core of our financial markets.³⁴ Limited liability promotes investment because a corporation can launch a new venture through a subsidiary without putting all the corporation’s assets at risk. Limited liability encourages investors to diversify their portfolios because all their assets are not at risk with each separate investment.³⁵

Because of these cornerstone limited-liability principles, an acquiring corporation does not become liable for the pre-acquisition conduct or liabilities of an acquired corporation that the acquirer maintains as a subsidiary. This concept underlies triangular mergers, which the Delaware Supreme Court has observed “are common and have a myriad of legitimate justifications.”³⁶ In a forward triangular merger like BAC’s acquisition of CFC, the seller merges into the buyer’s subsidiary; as a result, the seller and all of its assets and liabilities come to reside in the buyer’s subsidiary without exposing the *buyer’s own* assets to those liabilities. (See Ex. 138 ¶¶ 36–37.) CFC—and all its assets *and* liabilities—became vested in Red Oak, a

³² *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, 562 (1980).

³³ *Bestfoods*, 524 U.S. at 61.

³⁴ See Ex. 138 ¶ 21 (“Without limited liability, stock markets—and the ability they provide for a wide range of investors to participate in value creation and economic growth—could not exist.”).

³⁵ See *id.* ¶¶ 15–16; see also Ex. 140 at 8–9 (stating corporate separateness benefits corporations, shareholders, and creditors by reducing the cost of capital and enhancing transferability and liquidity).

³⁶ *Lewis v. Ward*, 852 A.2d 896, 906 (Del. 2004).

wholly owned BAC subsidiary, which kept CFC's creditors in the same position as they were before the triangular merger; those creditors continued to have access to CFC's assets, as if no merger had occurred.

It is equally well established that an asset purchaser does not become liable for an asset seller's liabilities simply by buying the assets.³⁷ Based on that fundamental rule, the Bank of America entities did not become liable for the legacy Countrywide entities' obligations by virtue of the asset purchases and sales that followed the triangular merger. Thus, NB Holdings' July 2008 asset purchases from CHL and CSC, and BAC's November 2008 asset purchases from CFC and CHL—straightforward asset sales that were predicated on fair value—did not render NB Holdings or BAC liable for the Countrywide Defendants' respective liabilities. The four narrow exceptions to this rule apply only where: (i) the purchaser implicitly or expressly assumes the seller's debts; (ii) the buyer and seller de facto merged; (iii) the buyer is a “mere continuation” of the seller; or (iv) the asset sale was undertaken to defraud creditors.³⁸ These exceptions derive from a single policy objective—to protect creditors from fraudulent efforts to shield the seller's assets—and so all require some form of fraud or bad-faith conduct.

It follows that courts do not impose successor liability under any of these theories when the asset purchaser pays valuable consideration that the seller, in turn, uses to pay creditors.

Obviously, if the seller receives fair value for its assets, creditors suffer no harm. As the Second

³⁷ See *Drug, Inc. v. Hunt*, 168 A. 87, 94–95 (Del. 1933) (“If the transaction . . . constituted a bona fide sale for value of all of the assets and property of one corporation to another . . . it is conceded that [the purchaser] would not be liable for the debts or for damages caused by a tortious act committed by the selling corporation before the sale was consummated.”); *Van Nocker v. A.W. Chesterton Co.*, 15 A.D.3d 254, 255 (1st Dep’t 2005) (“It is the general rule that a corporation which acquires the assets of another is not liable for torts of the predecessor.”); see also Ex. 141 at 77:6–11 (“And so one way of resolving the differences is to structure an asset deal because then you can be more specific about what liabilities are being transferred and you can resolve differences between buyer and seller based on that.”).

³⁸ *Kretzmer v. Firesafe Prods. Corp.*, 24 A.D.3d 158, 1585 (1st Dep’t 2005).

Circuit explained in *Cargo Partner AG v. Albatrans, Inc.*, imposing successor liability under such circumstances would give the seller's creditors an unfair windfall:

So long as the buyer pays a bona fide, arms-length price for the assets, there is no unfairness to creditors in limiting recovery to the proceeds of the sale—cash or other consideration roughly equal to the value of the purchased assets would take the place of the purchased assets as a resource for satisfying the seller's debts. . . . [A]llowing creditors to collect against the purchasers of insolvent debtors' assets would give the creditors a windfall by increasing the funds available compared to what would have been available if no sale had taken place.³⁹

The transactions at issue here were fair-value sales of illiquid assets for liquid assets that were available—and needed—to satisfy the sellers' debts. BAC and its subsidiaries replaced the illiquid CFC and CHL assets with liquid consideration valued at more than \$45 billion that CFC and CHL could (and did) use to pay their respective creditors. Dr. McConnell's unrebutted valuation testimony is that CFC and CHL received fair value in these transactions.⁴⁰ Far from frustrating creditor expectations, those transactions left CFC's and CHL's creditors *better off* by unlocking CFC's illiquid assets' value during the worst liquidity crisis in generations.⁴¹ Putting BAC's assets at risk would provide a windfall that CFC and CHL creditors neither expected nor deserve—precisely the inequitable outcome that courts seek to avoid.⁴²

³⁹ 352 F.3d at 45 (cited in *Van Nocker*, 15 A.D.3d at 256).

⁴⁰ See Ex. 68 ¶ 3 (opining that BAC paid \$1.41 billion in excess of the fair market value of the assets it received in the July and November 2008 transactions); *D'Elia v. Menorah Home & Hosp. for Aged & Infirm*, 51 A.D.3d 848, 854 (2d Dep't 2008) (defendant entitled to summary judgment where plaintiff failed to provide any evidence to rebut defendant's expert opinion); see also *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, 108 F. Supp. 2d 549, 584 (W.D. Va. 2000) (no genuine issue of material fact on value of mining rights where plaintiff failed to offer evidence to rebut testimony of defendant's economic expert).

⁴¹ Ex. 84 at 6 (former Federal Reserve Chairman Greenspan characterizes the financial climate in October 2008 as a "once in a century credit tsunami"); see also Exs. 78–83.

⁴² See, e.g., *Cargo Partner*, 352 F.3d at 45.

II. BAC IS ENTITLED TO SUMMARY JUDGMENT ON MBIA'S DE FACTO MERGER CLAIM.

A. Delaware Law Governs MBIA's de Facto Merger Claim.

1. *There Is a Conflict Between New York and Delaware de Facto Merger Law.*

While both New York and Delaware law disfavor successor liability,⁴³ the tests they employ to determine whether a de facto merger has occurred are different.⁴⁴ A threshold distinction is whether courts look to the existence of a statutory violation to assess a de facto merger claim. Under Delaware law, courts examine (among other things) whether an asset sale complies with the governing corporate-law statute.⁴⁵ No Delaware court applying Delaware law has found a de facto merger absent proof that the transaction at issue violated the applicable asset-sale statute.⁴⁶ By contrast, New York law does not examine the applicable asset-sale statute.⁴⁷ Nor does the law of California, where CSC is incorporated, which examines factors similar to New York.⁴⁸

⁴³ *Hayden Capital USA, LLC v. Northstar Agri Indus., LLC*, No. 11 Civ. 594 (DAB), 2012 WL 1449257, at *4 (S.D.N.Y. Apr. 23, 2012) (“[B]oth New York and Delaware recognize that when one company sells or transfers all of its assets to another company, the acquiring company generally does not become liable for the debts or liabilities of the seller/transferor.”).

⁴⁴ *See, e.g., id.* at *6 (“Accordingly, the Court finds that an actual conflict exists between New York and Delaware law on the issue of de facto merger.”); *Allstate Ins. Co. v. Countrywide Fin. Corp.*, 824 F. Supp. 2d 1164, 1172 (C.D. Cal. 2011) (“*Allstate I*”) (concluding that “a true conflict exists between New York and Delaware law” on de facto merger).

⁴⁵ *See Hariton v. Arco Elecs., Inc.*, 188 A.2d 123, 125 (Del. 1963) (holding that asset sale in compliance with governing statute was not a de facto merger even though “Plaintiff’s contention that this sale has achieved the same result as a merger is plainly correct”); *Heilbrunn v. Sun Chem. Corp.*, 150 A.2d 755, 757 (Del. 1959) (concluding that asset sale in compliance with governing statute was not a de facto merger even though “[t]he argument that the result of this transaction is substantially the same as the result that would have followed a merger may be readily accepted”).

⁴⁶ *See Hariton v. Arco Elecs., Inc.*, 182 A.2d 22, 25 (Del. Ch. 1962) (“[I]n each of the cases cited as recognizing the [de facto] merger doctrine, . . . there was a failure to comply with the statute governing sale of assets.”), *aff’d*, 188 A.2d 123, 125 (Del. 1963).

⁴⁷ *See, e.g., Van Nocker*, 15 A.D.3d at 256 (holding that New York law requires the following factors to find a de facto merger: (1) continuity of ownership between the seller and the buyer arising from the sale; (2) cessation of ordinary business and dissolution of the seller as soon as possible after the asset sale; (3) the buyer’s assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller’s business; and (4) continuity of management, personnel, physical location, assets, and general business operations between the buyer and the seller).

⁴⁸ *See Centerpoint Energy, Inc. v. Superior Court*, 157 Cal. App. 4th 1101, 1121 (2007) (listing questions examined as “(1) was the consideration paid for the assets solely stock of the purchaser of its parent; (2) did the purchaser Cont’d...

Thus, a conflict exists, even though BAC is entitled to summary judgment under either Delaware or New York de facto merger law. Because the underlying analysis differs,⁴⁹ and MBIA is seeking to impose successor liability on a Delaware corporation, Delaware law applies.

2. *Delaware Has the Greatest Interest in Determining Whether BAC, a Delaware Corporation, de Facto Merged with Its Direct and Indirect Subsidiaries.*

a. **Because both BAC and CFC are Delaware corporations, Delaware law should govern any claim that they de facto merged.**

In deciding choice-of-law issues, New York courts look to the Restatement (Second) of Conflict of Laws.⁵⁰ Under Restatement Section 302, “except in the unusual case where . . . some other state has a more significant relationship to the occurrence and the parties,” the law of the state of incorporation governs matters affecting a corporation’s rights and liabilities, including its relations with creditors.⁵¹ This is especially so when the rights and liabilities are “peculiar to corporations,” such as with “mergers, consolidations and reorganizations.”⁵² That is because corporations are creations of state law, a “key purpose” of which “is to structure and channel liability,” thus giving the state of incorporation the greater interest in determining when to

continue the same enterprise after the sale; (3) did the shareholders of the seller become the shareholders of the purchaser; (4) did the seller liquidate; and (5) did the buyer assume the liabilities necessary to carry on the business of the seller?”).

⁴⁹ See *Fin. One Pub. Co. Ltd. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 331-32 (2d Cir. 2005) (holding that material conflict had been shown even though party argued that outcome would be the same under either jurisdiction’s law).

⁵⁰ See, e.g., *Babcock v. Jackson*, 12 N.Y.2d 473, 482 (1963); *In re Rezulin Prods. Liab. Litig.*, 392 F. Supp. 2d 597, 619 n.117 (S.D.N.Y. 2005) (noting that the New York Court of Appeals “has adopted the approach of the Restatement and relied heavily on it as persuasive authority in most of its major conflict of laws decisions”).

⁵¹ Restatement (Second) of Conflict of Laws § 302 (1971) (“Restatement”); see also *id.* § 302 cmt. a (“Other such matters [governed by § 302] affect the interests of the corporation’s creditors.”).

⁵² *Id.* § 302 cmt. a; see *Allstate I*, 824 F. Supp. 2d at 1172 (“Even corporate functions which implicate the rights of creditors, such as mergers and reorganizations, fall within [section 302].”); see also *Dexia Holdings, Inc. v. Countrywide Fin. Corp.*, No. 11 Civ. 7165 (MRP), 2012 WL 1798997, at *8 (C.D. Cal. Feb. 17, 2012).

subject its corporations to liability.⁵³ Indeed, “it would be impractical to have matters” such as mergers, consolidations and reorganizations, “which involve a corporation’s organic structure or internal administration, governed by different laws.”⁵⁴ Accordingly, Delaware has the greatest interest in whether CFC and BAC—both creatures of Delaware law—de facto merged.⁵⁵

Delaware’s interest far outweighs the interest New York might have in applying its laws to claims brought by one of its corporate residents, such as MBIA.⁵⁶ None of the facts relevant to the de facto merger claim involved any interaction between BAC and MBIA, much less interaction that occurred in New York.⁵⁷ Applying the law of the plaintiff’s residence would therefore frustrate the goals that Restatement Section 302 seeks to advance—namely, “certainty, predictability and uniformity of result”⁵⁸—because the applicable state’s law would depend entirely on the serendipity of the plaintiff’s residence, even though the transactions underlying the de facto merger claim would be the same. The need for uniformity is especially acute here

⁵³ *Allstate I*, 824 F. Supp. 2d at 1172; see also *Planet Payment, Inc. v. Nova Info. Sys., Inc.*, No. 07 Civ. 2520 (CBA), 2011 WL 1636921, at *7 (E.D.N.Y. Mar. 31, 2011) (finding that alleged successor corporation’s state of incorporation has greatest interest in outcome of de facto merger claim).

⁵⁴ Restatement § 302 cmt. e.

⁵⁵ See *Allstate I*, 824 F. Supp. 2d at 1172.

⁵⁶ See *id.* at 1173 (holding that Delaware’s interests outweigh plausible interests of plaintiff’s state of residence).

⁵⁷ See *Planet Payment*, 2011 WL 1636921, at *7–8 (rejecting argument “that Tennessee has an interest based on the conduct of the parties in Tennessee” because “although these contacts might have relevance to the underlying breach of contract action, it is not clear how they are relevant to Elavon’s liability as a successor corporation”); *Carriero v. Rhodes Gill & Co.*, No. 91 Civ.A. 10515 (RGS), 1995 WL 866092, at *2 (D. Mass. Jan. 13, 1995) (rejecting “as beside the point” argument that plaintiff’s home state where accident occurred had greater interest in successor liability “because the controversy to be decided involves [the successor corporation’s] corporate identity and not the ultimate issue of product liability”).

⁵⁸ Restatement § 302 cmt. b (noting that factors listed in section 6 of the Restatement, such as “needs of the interstate and international systems, certainty, predictability and uniformity of result, protection of the justified expectations of the parties, implementation of the relevant policies of the state with the dominant interest in the decision of the particular issue, and ease in the application of the law to be applied . . . will usually lead to the application of the local law of the state of incorporation”).

because parallel claims against BAC are pending in other jurisdictions throughout the country.⁵⁹

Applying the law of BAC's state of incorporation ensures that a single state's law applies to all de facto merger claims against BAC arising from its transactions with Countrywide.⁶⁰

While the various agreements under which the Countrywide Defendants sold assets to BAC and its legacy subsidiaries include choice-of-law provisions that variously point to New York and Delaware law to govern the agreements' terms,⁶¹ those provisions do not dictate the law to apply in determining whether a de facto merger has occurred. None of those agreements gave rise to any obligations between BAC and MBIA, and indeed none has anything to do with MBIA.⁶² There is thus no basis for distorting those agreements to cover MBIA's claims against BAC, and very good reason not to—applying them to the de facto merger claim would lead to the absurd and unworkable consequence that different states' laws would govern different aspects of the de facto merger claim.⁶³

⁵⁹ See *Hart v. Gen. Motors Corp.*, 129 A.D.2d 179, 185 (1st Dep't 1987) (emphasizing "the need for uniformity in the application of the pertinent law to this controversy" over validity of purchase agreements in light of "the pendency of virtually identical actions"). Other Countrywide-related successor-liability claims against BAC are pending in California state and federal courts, and Washington and Georgia state courts. See Rosenberg Aff. ¶ 4; Exs. 154–56.

⁶⁰ See Restatement § 302 cmt. e ("Application of the local law of the state of incorporation will usually be supported by those choice-of-law factors favoring the needs of the interstate and international systems, certainty, predictability and uniformity of result, protection of the justified expectations of the parties and ease in the application of the law to be applied."); see also *Allstate I*, 824 F. Supp. 2d at 1173 (observing that "applying Delaware law to de facto merger questions will allow Delaware to provide its corporations with one bright-line rule rather than subjecting them to the vagaries of multiple states' rules"); *A.B. Data, Ltd. v. Graphic Workshop, Inc.*, 240 Wis. 2d 325, 2000 WL 1742440, at *4 (Wis. App. 2000) (noting that entities "need to know that the successor liability of the state of incorporation will control" because "[o]therwise . . . a corporation would be required to know the successor liability law in all fifty states").

⁶¹ Ex. 55 § 12; Ex. 56 § 7; Ex. 58 § 7; Ex. 60 § 7; Ex. 62 § 7; Ex. 63 § 10; Ex. 71 § 8.09; Ex. 73 § 10; Ex. 87 § 9.6; Ex. 91 § 7; Ex. 92 § 3; Ex. 93. § 2; Ex. 95 § 2.12; Ex. 98 § 10.1; Ex. 101 § 7; Ex. 102 § 3; Ex. 103 § 2.

⁶² See *Planet Payment*, 2011 WL 1636921, at *5 n.3 (noting that plaintiff could not have contended that choice-of-law provision in purchase agreement governed de facto merger claim); *Hayden*, 2012 WL 1449257, at *7 (observing that defendants "were not parties to the contract at issue in this case and are not bound by its forum selection clause").

⁶³ See *supra* note 62.

b. Delaware also has the greatest interest in whether BAC de facto merged with CHL or CSC.

For these same reasons, Delaware law governs MBIA's claims that BAC de facto merged with CHL and CSC. New York courts, like others around the country,⁶⁴ have repeatedly held that the alleged successor's (here, BAC's) state of incorporation has the paramount interest in successor-liability claims.⁶⁵ CHL's and CSC's incorporation in other states⁶⁶ does not alter this result because the buyer's state of incorporation—here, Delaware—has an interest in whether and when a buyer can be liable as the seller's successor, while “there is no comparable interest in the state of incorporation of the” seller, which faces primary liability regardless of any successor liability.⁶⁷

B. MBIA Cannot Raise a Disputed Material Fact Issue Concerning de Facto Merger Under Delaware Law.

1. Delaware Law Examines Four de Facto Merger Factors.

Delaware courts recognize the de facto merger doctrine “only in very limited contexts” and “only in a few instances involving sales of assets.”⁶⁸ Delaware de facto merger law asks four questions: (i) “did the asset transfer comply with the statute governing such an asset sale”; (ii)

⁶⁴ *Carrero*, 1995 WL 866092, at *2 (“As to the issue of corporate successorship, Rhode Island has the greater interest because both [the alleged predecessor and successor] were incorporated under Rhode Island law.”); *A.B. Data*, 2000 WL 1742440, at *4 (concluding after interest analysis “that rules affecting successor liability must be governed by the laws of the state where [the alleged predecessor and successor] elected to incorporate”); *Allstate I*, 824 F. Supp. 2d at 1172 (concluding that state of incorporation had greater interest in having its law applied to de facto merger claim).

⁶⁵ *See, e.g., Hayden*, 2012 WL 1449257, at *7 (“Plaintiff’s only claim against the PICO Defendants is for successor liability, and this Court agrees with the other courts to have considered the issue that the state of incorporation has a strong interest in such claims.”) (applying New York choice-of-law rules); *Planet Payment*, 2011 WL 1636921, at *7 (“In a claim of successor liability, there is no comparable interest in the state of incorporation of the ‘merged’ entity. . . . Its liability is not at issue, and its state of incorporation has no comparable interest in the liability of the actual defendant.”) (applying New York choice-of-law rules).

⁶⁶ *See* Ex. 6 ¶¶ 10, 12; *see also* Exs. 15–16.

⁶⁷ *Planet Payment*, 2011 WL 1636921, at *7.

⁶⁸ 1 Balotti & Finkelstein’s Delaware Law of Corporations & Business Organizations, ch. 9, § 9.3.

“were creditors or stockholders injured by a failure to comply with the statute governing an asset sale”; (iii) “was adequate consideration received and held by the transferor corporation in exchange for the assets that were transferred”; and (iv) “was the sale designed to disadvantage shareholders or creditors”?⁶⁹ These factors are grounded in long standing Delaware law.

Statutory Compliance and Injury: The first factor—compliance with the statute governing asset sales—stems from Delaware’s long standing doctrine of independent legal significance. That doctrine recognizes, among other things, that each section of the Delaware Corporation Law must be analyzed separately and independently, even when it overlaps with others.⁷⁰ Thus, corporations may choose to conduct their transactions under either the asset-sale statute or the merger statute, even if the result—the acquisition of another corporation’s assets—would be the same under both.⁷¹ As the Delaware courts have held:

There is nothing new about such a result. For many years drafters of plans of corporate reorganization have increasingly resorted to the use of the sale-of-assets method in preference to the method by merger. . . . No Delaware case has held this use of the sale-of-assets statute is improper.⁷²

Thus, Delaware courts will not retroactively convert an asset sale into a merger that imposes the seller’s liabilities on the asset purchaser, so long as the asset sale complies with the

⁶⁹ *Me. State Ret. Sys. v. Countrywide Fin. Corp.*, No. 10 Civ. 302 (MRP), 2011 WL 1765509, at *7 (C.D. Cal. Apr. 20, 2011); *see also supra* Part II.A.1.

⁷⁰ *See, e.g., Hariton*, 182 A.2d at 26 (“There is authority in decisions of courts of this state for the proposition that the various sections of the Delaware Corporation Law conferring authority for corporate action are independent of each other and that a given result may be accomplished by proceeding under one section which is not possible, or is even forbidden under another.”).

⁷¹ *See Orzeck v. Englehart*, 195 A.2d 375, 377 (Del. 1963) (noting “the uniform interpretation given to the Delaware Corporation Law over the years to the effect that action taken in accordance with different sections of that law are acts of independent legal significance even though the end result may be the same under different sections”); *Heilbrunn*, 150 A.2d at 757 (“This result is made possible, of course, by the overlapping scope of the merger statute and the statute authorizing the sale of all the corporate assets.”); *Hariton*, 188 A.2d at 125 (“This is so because the sale-of-assets statute and the merger statute are independent of each other. They are, so to speak, of equal dignity, and the framers of a reorganization plan may resort to either type of corporate mechanics to achieve the desired end.”).

⁷² *Heilbrunn*, 150 A.2d at 757; *see also id.* (deeming irrelevant that the “transaction is substantially the same as the result that would have followed a merger”).

governing statute.⁷³ Only where the transaction violates that statute does Delaware law step in, provided the other elements are satisfied, and deem a transaction a merger, rather than an asset sale.⁷⁴ Two Delaware Supreme Court decisions—*Drug, Inc. v. Hunt* and *Hariton v. Arco Electronics, Inc.*—illustrate this principle. In *Drug*, the seller sold all its assets in exchange for the purchaser’s stock, but the purchaser transferred its stock, not to the seller, but directly to the seller’s shareholders.⁷⁵ Because this violated Delaware’s asset-sale statute, which requires the seller to receive the consideration, the court treated the sale as a de facto merger.⁷⁶ In *Hariton*, by contrast, the court concluded that a similar transaction was not a de facto merger because, unlike in *Drug*, the transaction required that the seller receive the purchaser’s stock and then distribute it to the seller’s shareholders before the seller’s dissolution.⁷⁷ Thus, the statutory violation in *Drug*—the consideration’s payment directly to the seller’s shareholders—was absent in *Hariton*, and so no de facto merger resulted.⁷⁸ Further, even if a creditor-plaintiff can prove a

⁷³ See *id.* at 758; *Alcott v. Hyman, P.R.M., Inc.*, 184 A.2d 90, 94 (Del. Ch. 1962) (“[T]here is no statutory limitation on the right of a Delaware corporation to sell its assets on such terms and conditions and for such consideration as its board of directors deems expedient and for the best interests of the corporation.”), *aff’d*, 208 A.2d 501 (Del. 1965); *Hariton*, 188 A.2d at 125 (finding no de facto merger where “it is admitted that the provisions of the statute were fully complied with”).

⁷⁴ Compare *Orzeck*, 195 A.2d at 378 (“In the case before us the statute has been complied with and a stockholder has no ground to claim injury.”), with *Drug, Inc.*, 168 A. at 95 (“That the transaction in question did not constitute a sale of the assets of that corporation . . . under [the applicable section] of the General Corporation Laws is, therefore, apparent.”).

⁷⁵ *Drug, Inc.*, 168 A. at 89, 95.

⁷⁶ *Id.* at 95 (“From these provisions, it is apparent that the consideration for the transfer of its assets was not paid to Household Products, Inc., but to its stockholders. That the transaction in question did not constitute a sale of the assets of that corporation to Drug, Incorporated, under section 64A of the General Corporate Laws is, therefore, apparent.”); *id.* at 96 (“[W]here one corporation transfers all of its assets to another corporation, and payment is made in stock, issued by the transferee directly to the shareholders of the transferring corporation, in exchange for their stock in that corporation, the transferee agreeing to assume all the debts and liabilities of the transferor, it is, also, well settled that persons having claims against the transferor may, in most cases, at least, proceed at law in the first instance, against the transferee . . .”).

⁷⁷ 182 A.2d at 23.

⁷⁸ *Id.* at 27 (“I conclude that the transaction complained of was not a de facto merger either in the sense that there was a failure to comply with one or more of the requirements of Section 271 of the Delaware Corporation Law, or that the result accomplished was in effect a merger entitling plaintiff to a right of appraisal.”).

violation of the governing statute, which could not be the case here, the plaintiff must also prove that it “suffered an injury by reason of [defendant’s] failure to comply with the statute governing such sales.”⁷⁹

Adequacy of Consideration and Intent to Harm Creditors: The third and fourth factors—inadequate consideration or fraudulent intent—also rest on more than half a century of black-letter Delaware law. In *Heilbrunn*, for example, the Delaware Supreme Court affirmed the Chancery Court’s holding that “Plaintiffs . . . may not complain of a corporate purchase made in conformity with Delaware statutory authority unless such transaction is *fraudulent* as having been carried out for *grossly inadequate consideration or otherwise made in bad faith*.”⁸⁰ This requirement exists because “in the absence of fraud, it is a long-standing principle of Delaware law that an asset sale is not a merger.”⁸¹

2. *MBIA Cannot Show That CFC and BAC de Facto Merged Under Delaware Law.*

a. MBIA cannot prove that BAC paid grossly inadequate value for substantially all of CFC’s assets.

CFC’s only asset sale following the Red Oak merger was under the November 7, 2008 Stock Purchase Agreement (SPA), in which CFC sold its stock in Effinity Financial Corporation to BAC. As Dr. McConnell’s unrebutted expert report shows, the value of the aggregate consideration BAC provided was \$11.11 billion, compared to the \$10.68 billion value of the assets CFC sold. (See p. 17, nn. 31 and 33, *supra*.) MBIA therefore cannot show that CFC

⁷⁹ *Orzeck*, 195 A.2d at 378 (citing *Drug*, 168 A. 87); *Heilbrunn*, 150 A.2d at 758.

⁸⁰ 146 A.2d 757, 760 (Del. Ch. 1958), *aff’d*, 150 A.2d 755 (Del. 1959); see also *Alcott*, 184 A.2d at 94 (concluding that there is no de facto merger claim “unless the price fixed for the sale of corporate assets is *shockingly disproportionate* to their actual value”).

⁸¹ *Me. State*, 2011 WL 1765509, at *7 (citing cases); see also *Bryant, Griffith & Brunson, Inc. v. Gen. Newspapers, Inc.*, 178 A. 645, 648 (Del. Super. Ct. 1935); *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1277 (N.D. Cal. 2000) (no de facto merger “unless the transaction has been structured to disadvantage creditors or shareholders”) (applying Delaware law).

received grossly inadequate consideration for its assets—to the contrary, the consideration it received exceeded the value of the transferred assets. For this reason alone, there is no basis under Delaware law to impose CFC’s obligations on BAC.⁸²

This valuable consideration also establishes BAC’s intent, as BAC obviously would not have provided CFC with fair value for its assets if BAC had intended to harm CFC’s creditors.⁸³ And the undisputed evidence also demonstrates that BAC used methods designed to capture fair value. GAAP required BAC to record all of CFC’s assets and liabilities on BAC’s consolidated financial statements at their fair values as of the acquisition date. (See Ex. 18 ¶¶ 6–7, 34; Ex. 19 ¶¶ 15–17.) BAC’s method of calculating the fair value of CFC’s assets and liabilities was evenhanded, because BAC applied that same method to value its own assets. (See Rosenberg Aff. ¶ 17; Exs. 20–21.) BAC then paid CFC for the assets based on the valuation amounts that this same methodology generated. (See, e.g., *id.*; Rosenberg Aff. ¶ 18; Exs. 122–126.)

Relying on this and other evidence, accounting expert Dr. Thomas Porter concluded that “BAC’s methods for calculating fair value were designed to produce values that approximated the prices at which those assets would be exchanged in an arms’ length sales transaction in an orderly market. . . . And once those values were determined, consideration was paid to the Countrywide entities based on those values.”⁸⁴ MBIA has not even tried to rebut this

⁸² See *Heilbrunn*, 146 A.2d at 760 (“Plaintiffs . . . may not complain of a corporate purchase made in conformity with Delaware statutory authority *unless* such transaction is fraudulent as having been carried out for *grossly inadequate* consideration or otherwise made in bad faith.”); *Alcott*, 184 A.2d at 94 (concluding that there is no de facto merger claim “*unless* the price fixed for the sale of corporate assets is *shockingly disproportionate* to their actual value”).

⁸³ See *Me. State*, 2011 WL 1765509, at *7 (Delaware law requires plaintiffs to “allege that the sale was designed to disadvantage shareholders or creditors”).

⁸⁴ Ex. 19 ¶ 76; see also Ex. 137 ¶ 12 (“Far from stripping assets from Countrywide, the July and November 2008 transactions were designed to provide Countrywide consideration equal to a reasonable approximation of the assets’ fair value.”); *id.* ¶ 24 (“This means that the method BofA used was designed to ensure that the economic benefit to Countrywide from the assets it was selling would not be affected.”).

unassailable conclusion.

The consideration that BAC provided immediately converted CFC's illiquid assets—when it otherwise would have taken at least months to sell those entities at uncertain valuations in the midst of the financial crisis, if they could be sold at all—into resources that allowed CFC to pay its creditors and stave off an immediate and devastating default. BAC assumed \$9.7 billion of CFC public debt securities, thereby reducing Countrywide's total liabilities.⁸⁵ And CFC also received a demand note ultimately worth \$1.7 billion, for which it received payment in full. (Ex. 92; Ex. 137 ¶¶ 18–19.) CFC also subsequently (in 2010 and later) received more than \$ [REDACTED] billion in capital contributions from BAC. (See Exs. 128–136.) Because the undisputed value that BAC provided (in a far more liquid form than the CFC assets it acquired) cannot be reconciled with an intent to harm CFC's creditors, MBIA cannot establish that CFC and BAC de facto merged.⁸⁶

b. CFC indisputably complied with the statute governing its asset sale.

CFC's November 7, 2008 Effinity stock sale amounted to the sale of substantially all of CFC's assets.⁸⁷ Delaware General Corporation Law Section 271(a) authorizes a corporation to sell substantially all its assets subject only to approval by the board and a majority of the shareholders.⁸⁸ There is no dispute that CFC complied with this statute. The CFC directors

⁸⁵ Ex. 137 ¶¶ 12, 18; Ex. 68 ¶¶ 12, 30, 55, 437; Ex. 20 at 225:11–15 (“[W]hat I was trying to convey was that since, you know, we had asset sales at fair value, the compensation for that fair value transfer gave [the Countrywide entities] sufficient resources to pay them—pay their public debt. And that’s what we intended to do.”); Ex. 122 at BACMBIA-W0000002090 (“Mr. Price then provided an update on the capital and funding implications of the transaction . . . noting that the transfer will be at fair market value, consistent with how the Corporation values the assets in purchase accounting.”).

⁸⁶ See *Heilbrunn*, 146 A.2d at 760 (“Plaintiffs . . . may not complain of a corporate purchase made in conformity with Delaware statutory authority *unless such transaction is fraudulent . . . or otherwise made in bad faith.*”)

⁸⁷ See Exs. 21, 88–89; see also *Thorpe by Castleman v. CERBCO, Inc.*, 676 A.2d 436, 444 (Del. 1996) (parent company’s sale of subsidiary’s stock can be sale of “substantially all” the parent’s assets).

⁸⁸ 8 Del. C. § 271(a).

approved the SPA and the stock-purchase transaction by unanimous written consent without a meeting, as Delaware General Corporate Law Section 141(f) explicitly authorizes.⁸⁹ BAC, as CFC's sole stockholder, also approved the transaction. (See Ex. 90.) Accordingly, BAC indisputably complied with the governing asset-sale statute.

3. *CHL Did Not de Facto Merge with BAC under Delaware Law.*

a. **MBIA cannot show that CHL received grossly inadequate consideration, defeating any inference that BAC intended to harm CHL's creditors.**

Just as with CFC, the undisputed facts establish that CHL received fair value for the assets it sold to BAC. The only transaction between CHL and BAC was CHL's sale of substantially all its assets to BAC under the November 7, 2008 Asset Purchase Agreement (APA). (Exs. 98, 99 at BACMBIA-C0000168262.) In that transaction, CHL sold assets that Dr. McConnell valued at approximately \$3.86 billion. (Ex. 68 ¶¶ 53, 135, 239, 247, 270, 271, 279, 382, and Exhibit 18 thereto.) In exchange, BAC paid approximately \$5.18 billion in value: BAC assumed CHL debt worth \$5.79 billion and replaced an outstanding note from NB Holdings to CHL that carried a balance of \$4.1 billion with a note worth \$3.55 billion (thereby offsetting the assumed debt by \$.55 billion). (*Id.* ¶ 49.) In other words, BAC paid a *premium* of more than \$1.3 billion for the CHL assets it acquired in November 2008. (See p. 17, *supra.*) MBIA has offered no rebuttal to these valuations and therefore cannot establish—as Delaware law requires—that CHL received grossly inadequate consideration. (See n. 44, *supra.*)

The earlier July 2008 transactions in which CHL sold its assets to BAC legacy subsidiaries cannot supply a basis for MBIA's de facto merger claim because (i) the transactions did not

⁸⁹ See Ex. 88; 8 Del. C. § 141(f) (“[A]ny action required or permitted to be taken at any meeting of the board of directors or any committee thereof may be taken without a meeting if all members of the board or committee, as the case may be, consent thereto in writing or by electronic transmission, and the writing or writings or electronic transmission or transmissions are filed with the minutes of proceedings of the board, or committee.”).

constitute a sale of “substantially all” of CHL’s assets; and (ii) the purchaser was not BAC but a different entity—NB Holdings.⁹⁰ But even if the Court were to consider these sales, CHL received fair value, not grossly inadequate consideration, in those transactions, too. (*See* Ex. 68 ¶¶ 19–21, 28, 48, 412–13; Exs. 32–33, 122–126.) In all CHL’s asset sales to BAC’s legacy subsidiaries, CHL received a total of \$34.21 billion in value for assets worth \$32.89 billion. (*See* p. 17, *supra*; Ex. 68 ¶¶ 5, 58.) Apart from that premium, BAC increased the value available to CHL by advising CHL to reorganize its tax structure to yield a \$5 billion tax savings in the sale of the CHLS interests. (*See* Ex. 127 at 203:2–208:15.)

Likewise, CHL’s asset sales indisputably benefited its creditors. The transactions ensured that CHL could repay its \$11.5 billion credit lines, which had become fully due on July 1, 2008.⁹¹ The liquidity CHL obtained in these asset sales also allowed it to repay part of its approximately \$20.4 billion in intercompany debt to CFC. And CFC used that repayment to recapitalize CW Bank, ensuring that CW Bank could meet its tier 1 capital requirements and continue its operations.⁹² This recapitalization of the entity where virtually all of CFC’s mortgage originations occurred as of September 2007, in turn, provided a continuing source of capital for CFC, which itself guaranteed CHL’s public debt. (Exs. 31–32, 36–37.) Similarly, in the November 7, 2008 asset purchase, BAC assumed approximately \$5.8 billion of CHL’s public debt obligations. (*See* Ex. 68 ¶ 55 and Exhibit 34 thereto.) These transactions provided CHL with badly needed, ready liquidity that CHL risked being otherwise unable to obtain, especially

⁹⁰ *See Magnolia’s at Bethany, LLC v. Artesian Consulting Eng’rs, Inc.*, No. S11 C-04-013-ESB, 2011 WL 4826106, at *3 (Del. Super. Ct. Sept. 19, 2011) (holding that the “elements necessary to create a de facto merger under Delaware law” include the act of “one corporation transfer[ing] all of its assets to another corporation” and dismissing de facto merger claim because alleged successor “only acquired some of [the alleged predecessor’s] assets” (citing *Drug, Inc.*, 168 A. at 96)); *see also Me. State*, 2011 WL 1765509, at *5 (holding that exceptions to “rule of successor non-liability” arise “where one company sells or transfers all of its assets to another”).

⁹¹ *See* Ex. 22 at §§ 2.08(d) and 2.09; *see also* Ofcharsky Aff. ¶¶ 2, 5; Exs. 23–27 at §§ 1.01, 2.08(d), and 2.09.

⁹² *See* Rosenberg Aff. ¶¶ 30–36 and Exs. 47, 50, 52; *see also* Ofcharsky Aff. ¶¶ 4–5.

given the dismal economic conditions. (Exs. 7–10, 78–84.) Far from showing an intent to harm CHL’s creditors, these circumstances show that CHL’s creditors *benefited* from the asset sales.

For this reason alone, MBIA cannot prove that CHL de facto merged with BAC.⁹³

b. CHL’s asset sales indisputably complied with the corporate-law statutes governing those sales.

Because CHL is a New York corporation, the corporate-law statute governing its asset-sale transactions is New York Business Corporation Law Section 909. That statute authorizes a corporation to sell all or substantially all its assets if authorized by the corporation’s board of directors and approved by its shareholders.⁹⁴ The consideration for such an asset sale can include “cash or other property, real or personal, including shares, bonds or other securities of any other domestic or foreign corporation or corporations.”⁹⁵

The only transaction in which CHL sold all or substantially all its assets was under the November 7, 2008 APA. (*See* Ex. 98.) MBIA cannot dispute that CHL complied with BCL Section 909 in that transaction. The CHL directors approved the APA by unanimous written consent, as BCL Section 708(b) permits.⁹⁶ CFC, as CHL’s sole stockholder, also approved the transaction by written consent, as BCL Section 615(a) authorizes.⁹⁷ Thus, CHL’s asset sales

⁹³ *See Heilbrunn*, 146 A.2d at 760.

⁹⁴ *See* N.Y. Bus. Corp. Law § 909(a)(1)–(2).

⁹⁵ *Id.* § 909(a)(3).

⁹⁶ *See* Ex. 99; N.Y. Bus. Corp. Law § 708(b) (“[A]ny action required or permitted to be taken by the board . . . may be taken without a meeting if all members of the board . . . consent in writing to the adoption of a resolution authorizing the action.”).

⁹⁷ *See* Ex. 100; N.Y. Bus. Corp. Law § 615(a) (“Whenever under this chapter shareholders are required or permitted to take any action by vote, such action may be taken without a meeting on written consent, setting forth the action so taken, signed by the holders of all outstanding shares entitled to vote thereon or, if the certificate of incorporation so permits, signed by the holders of outstanding shares having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted.”).

complied with the governing corporate-law statutes.⁹⁸

4. *CSC Did Not Sell Substantially All Its Assets to BAC.*

Based on the undisputed facts in the record, CSC could not have de facto merged with BAC. As described above, a threshold requirement for a de facto merger claim is that the alleged predecessor transfer all or substantially all its assets to the alleged successor.⁹⁹ MBIA cannot dispute that CSC's only asset sale to a BAC subsidiary was a sale of securities to Blue Ridge Investments for \$147 million. (*See* Ex. 13 at 5; Exs. 66, 76.) This was indisputably neither (i) a sale of assets to BAC, nor (ii) a sale of substantially all of CSC's assets, because CSC retained \$288 million in assets after the transaction.¹⁰⁰ Thus, BAC is entitled to summary judgment on MBIA's claim that CSC de facto merged with BAC.¹⁰¹

C. Even If New York Law Applied, BAC Would Still Be Entitled to Summary Judgment on MBIA's de Facto Merger Claim.

The same result would apply under New York law—i.e., MBIA cannot prove that BAC de facto merged with CFC, CHL or CSC. Courts applying New York law evaluate four factors to determine whether a de facto merger has occurred: “(1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible

⁹⁸ *See, e.g., Hariton*, 188 A.2d at 125 (finding no de facto merger where “it is admitted that the provisions of the statute were fully complied with”).

⁹⁹ *See supra* note 93.

¹⁰⁰ *See Rosenberg Aff.* ¶ 50 and Ex. 77; *see Barasch v. Williams Real Estate Co.*, 33 Misc.3d 1219(A), 2011 WL 5386252, at *6 (Sup. Ct. N.Y. Co. 2011) (“[O]ur courts have held that, regardless of the ultimate size of a transaction, where a company retains property and/or assets sufficient to continue the operation of some part of its business, it is not a sale, exchange, or disposition of ‘all or substantially all’ of a company’s assets.”) (citing cases); *Soho Gold, Inc. v. 33 Rector St. Ltd.*, 227 A.D.2d 314, 315 (1st Dep’t 1996) (corporation’s sale of property did not constitute sale of “substantially all of the assets of the corporation” where “[t]he corporation retained other valuable property”).

¹⁰¹ *See Magnolia's*, 2011 WL 4826106, at *3 (dismissing de facto merger claim because alleged successor acquired only some of alleged predecessor’s assets); *see also Golub v. Kidder, Peabody & Co.*, No. 89 Civ. 5903 (CSH), 2000 WL 1024688, at *4 (S.D.N.Y. July 25, 2000) (“[T]he successor liability doctrine, applicable to asset-purchase cases, has no office to perform in the case at bar . . . [where the defendant] purchased the stock, not the assets of [the company].”).

after the transaction; (3) the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operation."¹⁰² MBIA cannot raise disputed issues of material fact, let alone satisfy its burden of proof,¹⁰³ on the first, second, or fourth elements, entitling BAC to summary judgment.¹⁰⁴ Indeed, the absence of the first factor alone requires that summary judgment be entered in BAC's favor.

1. MBIA Cannot Satisfy the Continuity-of-Ownership Requirement.

In the First Department's controlling 2005 decision, *Van Nocker v. A.W. Chesterton Co.*, the court held that continuity of ownership is an indispensable prerequisite to a de facto merger because it is the "essence of a merger"¹⁰⁵—"a situation where the parties to the transaction become owners together of what formerly belonged to each."¹⁰⁶ Continuity of ownership therefore requires proof that the asset seller gained an ownership interest in the asset purchaser through the asset sale itself¹⁰⁷—i.e., that the seller "merged" into the buyer under the guise of an

¹⁰² *Van Nocker*, 15 A.D.3d at 256.

¹⁰³ *Desclafani v. Pave-Mark Corp.*, No. 07 Civ. 4639 (HBP), 2008 WL 3914881, at *3 (S.D.N.Y. Aug. 22, 2008) ("The party asserting successor liability has the burden of proving facts which bring the case within one of the[] four exceptions." (citing *Marenyi v. Packard Press Corp.*, 90-CV-4439 (CSH), 1994 WL 16000129, at *6 (S.D.N.Y. June 9, 1994))).

¹⁰⁴ *See, e.g., Van Nocker*, 15 A.D.3d at 259 ("Given the clear absence of the first two de facto merger factors, it does not avail plaintiff that the third factor . . . apparently is present, or that she may have raised an issue as to the presence of the fourth factor (continuity of management, personnel, physical location, assets and general business operation."); *see also Kretzmer*, 24 A.D.3d at 158–59 (affirming summary judgment dismissing de facto merger claim where "plaintiff offered no facts to raise a triable issue regarding any continuity of ownership" and concluding that "[t]he mere hiring of some of the predecessor's employees is insufficient to raise a triable issue as to continuity of management").

¹⁰⁵ *Van Nocker*, 15 A.D.3d at 256; *accord Subramani v. Bruno Mach. Corp.*, 289 A.D.2d 167 (1st Dep't 2001); *Kretzmer*, 24 A.D.3d at 158–59; *see also New York v. Nat'l Serv. Indus., Inc.*, 460 F.3d 201, 212 (2d Cir. 2006) (observing that *Van Nocker* "explicitly held that continuity of ownership is the touchstone" of de facto merger).

¹⁰⁶ *Van Nocker*, 15 A.D.3d at 256 (quoting *Cargo Partner*, 352 F.3d at 47).

¹⁰⁷ *See id.* ("The first criterion, continuity of ownership, exists where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation *as the result of* the successor's purchase of the predecessor's assets."); *Buja v. KCI Konecranes Int'l PLC*, 12 Misc.3d 859, 864 (Sup. Ct. Monroe Co. Apr. 12, 2006) ("There is no evidence that any shareholders of Shepard Niles became direct or indirect shareholders of
Cont'd...

asset sale that enabled the seller to continue to benefit from the transferred assets (through its new ownership stake in the buyer) while shielding those assets from the seller's creditors. For this reason, New York courts have repeatedly dismissed de facto merger claims when there was no "continuity of ownership," regardless of other factors.¹⁰⁸

Because continuity of ownership requires that the asset seller acquire an equity interest in the purchaser in the asset-sale transaction itself, courts routinely dismiss de facto merger claims unless the asset buyer paid for the assets with shares of the buyer's own stock.¹⁰⁹ Similarly, many courts have ruled that as a matter of law there can be no continuity of ownership—and thus, no de facto merger—when the seller receives cash or other non-stock consideration that

Konecranes as a result of the purchase of assets by Konecranes."); *Desclafani*, 2008 WL 3914881, at *4 ("The continuity of ownership factor looks to whether the shareholders of the predecessor become, at the time of the sale of the assets, shareholders of the successor corporation."); *Conn. Indem. Co. v. 21st Century Transp. Co.*, No. 99 Civ. 7735 (ILG), 2001 WL 868340, at *6 (E.D.N.Y. July 27, 2001) ("[T]here is no continuity of ownership . . . as evidenced by the fact that [seller's] shareholders did not become [buyer's] shareholder as a result of the purchase."); *Shamis v. Ambassador Factors Corp.*, 34 F. Supp. 2d 879, 897 (S.D.N.Y. 1999) ("The 'continuity of ownership' factor looks to whether shareholders of the predecessor become, at the time of the sale of assets, shareholders of the successors corporation.").

¹⁰⁸ See, e.g., *Wash. Mut. Bank, FA v. SIB Mortg. Corp.*, 4 Misc. 3d 1001(A), 2004 WL 1433133, at *3 (Sup. Ct. Kings Co. June 18, 2004) ("[T]he continuity of ownership remains, at the very least, a strict and essential requirement of the doctrine of de facto merger in contract cases."); *Buja*, 12 Misc.3d at 863 ("Courts have determined that continuity of ownership is a necessary element of any de facto merger finding."); *Priestley v. Headminder, Inc.*, 647 F.3d 497, 505–06 (2d Cir. 2011) ("[C]ontinuity of ownership is the essence of a merger, and the doctrine of de facto merger cannot apply in its absence."); *Nat'l Serv. Indus.*, 460 F.3d at 212 ("[S]everal New York courts have held . . . that, because continuity of ownership is the essence of a merger, a de facto merger will not be found in the absence of this element."); *Cargo Partner*, 352 F.3d at 46 ("[W]e are confident that the doctrine of de facto merger in New York does not make a corporation that purchases assets liable for the seller's contract debts absent continuity of ownership."); *Said v. SBS Elecs., Inc.*, No. 08 CV 3067(RJD)(JO), 2010 WL 1287080, at *3 (E.D.N.Y. Mar. 31, 2010) ("Absent a showing of a continuity of ownership, the de facto merger exception does not apply."); *Riverside Mktg., LLC v. SignatureCard, Inc.*, 425 F. Supp. 2d 523, 536 (S.D.N.Y. 2006) ("Continuity of ownership . . . is essential to the finding of de facto merger.") (Mukasey, J.).

¹⁰⁹ See, e.g., *Jasper & Black, LLC v. Carolina Pad Co.*, No. 10 Civ. 3562 (LTS)(HBP), 2012 WL 413869, at *8 (S.D.N.Y. Feb. 9, 2012) (dismissing de facto merger claim for failure to plead continuity of ownership because "Plaintiff fails to allege that [asset purchaser] purchased [assets] with shares of stock, and in fact, the . . . Asset Purchase agreement explicitly states that [purchaser] purchased [seller's] assets with cash"); *Danstan Props. v. Merex Corp.*, No. 09 Civ. 6137 (RMB)(RLE), 2011 WL 135843, at *4 (S.D.N.Y. Jan. 7, 2011) ("Plaintiff and defendant agree that stock was not transferred under the Purchase Agreement. Accordingly, there is no continuity of ownership between the parties."); *Riverside Mktg.*, 425 F. Supp. 2d at 536 ("iDine did not buy Signature's assets for stock; thus there was no continuity of ownership.").

does not transfer an ownership interest in the buyer.¹¹⁰ Thus, in *Van Nocker*, the First Department affirmed summary judgment in the defendant’s favor because the buyer “paid for [the seller’s] assets with cash, not with its own stock, and neither [the seller] nor any of its shareholders has become a shareholder of [the buyer].”¹¹¹

Under this controlling First Department authority, MBIA cannot establish continuity of ownership in the July and November 2008 asset sales by CFC, CHL, or CSC. It is undisputed that none of these entities gained an ownership interest in BAC through the asset sales, but instead received non-stock consideration including cash, demand notes, and the assumption of liabilities. (See Exs. 13 at 5, 55–60, 71, 87, 91–93, 98, 101–103.) Thus, the “essence of a merger” under New York law is absent here because BAC transferred no equity interest in itself as part of the consideration for the July and November 2008 asset sales.¹¹² Rather, CFC, CHL, and CSC exchanged illiquid assets in those straightforward asset sales for an equivalent amount of liquid assets that enabled them to pay creditors.¹¹³ Because MBIA cannot show the required continuity of ownership as a matter of law, BAC is entitled to summary judgment for that reason

¹¹⁰ *Van Nocker*, 15 A.D.3d at 256 (“There is no continuity of ownership between Old H-T and New H-T, since New H-T paid for Old H-T’s assets with cash, not with its own stock, and neither Old H-T nor any of its shareholders became a shareholder of New H-T.”); *Doktor v. Werner Co.*, 762 F. Supp. 2d 494, 499 (E.D.N.Y. 2011) (holding that continuity of ownership “does not exist where, as here, there is a sale of assets for cash”); *Vasquez v. Ranieri Cheese Corp.*, No. 07 Civ. 464 (ENV)(VVP), 2010 WL 1223606, at *13 (E.D.N.Y. Mar. 26, 2010) (“[T]here is no continuity of ownership where assets are purchased solely with cash.”); *Desclafani*, 2008 WL 3914881, at *4 (“Numerous courts have held that this factor is not satisfied where the assets are purchased solely with cash and, thus, none of the predecessor corporation’s shareholders become shareholders of the successor corporation as a result of the asset purchase.”); *Marenyi*, 1994 WL 16000129, at *11 (“[C]ontinuity of ownership does not exist. . . . The consideration paid for Packard’s assets was in the form of cash and, primarily, the assumption of accrued liabilities.”).

¹¹¹ *Van Nocker*, 15 A.D.3d at 256.

¹¹² *Id.*; see also *Subramani*, 289 A.D.2d at 168; *Kretzmer*, 24 A.D.3d at 158–59; *Nat’l Serv. Indus.*, 460 F.3d at 212.

¹¹³ See *Cargo Partner*, 352 F.3d at 45 (“So long as the buyer pays a bona fide, arms-length price for the assets, there is no unfairness to creditors in limiting recovery to the proceeds of the sale—cash or other consideration roughly equal to the value of the purchased assets would take the place of the purchased assets as a resource for satisfying the seller’s debts.”).

alone.¹¹⁴

MBIA has argued that it can prove “continuity of ownership” because BAC indirectly owned CFC’s and CHL’s assets before the asset sales, and owned them directly immediately thereafter.¹¹⁵ But such “common ownership” does not constitute “continuity of ownership” under *Van Nocker*, because the seller’s continuing interest in the assets (through an ownership stake in the buyer) does not arise “as the result of the successor’s purchase of the predecessor’s assets, as occurs in a stock-for-assets transaction.”¹¹⁶

MBIA’s approach would radically expand and inequitably distort the de facto merger doctrine. In fact, it would nullify this element; *any* transaction between a parent company and a subsidiary would constitute “continuity of ownership” because the buyer-parent *always* indirectly owns the subsidiary’s assets before the sale, and *always* owns the assets directly after the sale. But MBIA has it backward. The continuity-of-ownership test is not about the *buyer’s* continuity of ownership; it is about the *seller’s*. It is the *seller’s* continuity of ownership that is the “essence” of the doctrine, as that element is what establishes the *seller’s effort* to shield *its assets from its creditors*. And there was obviously *no* continuity of ownership *on the part of CFC and CHL* in the CFC and CHL asset sales to BAC.

The distinction between common ownership, which is not a New York de facto merger element, and continuity of ownership, which is an essential New York-law element, is illustrated in *TMS Entertainment Ltd. v. Madison Green Entertainment Sales, Inc.*¹¹⁷ There, the court granted summary judgment dismissing a de facto merger claim under New York law for lack of

¹¹⁴ See *supra* notes 109, 112.

¹¹⁵ (See Pl. Mem. of L. in Opp. to Defs.’ Mot. to Dismiss the Am. Compl., *MBIA Ins. Co. v. Countrywide Fin. Corp.*, Index No. 602825/08 (N.Y. Sup. Ct. Nov. 4, 2009) (NYSCEF. No. 24), at 19.).

¹¹⁶ *Van Nocker*, 15 A.D.3d at 256.

¹¹⁷ No. 03 Civ. 0517 (GBD), 2005 WL 476663 (S.D.N.Y. Feb. 28, 2005).

continuity of ownership, even though the asset sales were between sister companies that were not only under common ownership, but also had the same individual (the majority shareholder of the ultimate parent company) as the “sole decision-maker on behalf of all parties to the agreements.”¹¹⁸ “As a result of all the transactions, [the seller] had no management, no employees, no assets, and no ongoing business.” It was not “operating as a business,” and only had “outstanding debt in the millions, including owing plaintiff \$1,040,000.”¹¹⁹ The court nevertheless dismissed the de facto merger claim because there was “no evidence to support a finding that there has been a continuity of ownership.”¹²⁰

2. *MBIA Cannot Establish That Either CFC or CHL Has Been Dissolved.*

To prove New York de facto merger law’s dissolution requirement, a plaintiff must also show that the asset seller *both* ceased its ordinary business *and* dissolved as soon as possible after the asset sales.¹²¹ As this Court previously observed, the First Department in *Fitzgerald v. Fahnestock* concluded that “dissolution” can be shown in some circumstances if the asset sale rendered the seller an “empty shell, shorn of assets.”¹²² Under either formal or “empty shell” dissolution, however, the underlying rationale is the same—to prevent the seller from denying its creditors access to the assets it received from the buyer. Accordingly, decisions after *Fitzgerald*—including from the First Department—have recognized that even a minimal

¹¹⁸ *Id.* at *2.

¹¹⁹ *Id.*

¹²⁰ *Id.* at *3.

¹²¹ See *Van Nocker*, 15 A.D.3d at 257; *Marenyi v. Packard Press Corp.*, No. 90 CIV. 4439 (CSH), 1994 WL 533275, at *2 (S.D.N.Y. Sept. 30, 1994) (noting that dissolution is separate from cessation of ordinary business and finding no dissolution because alleged predecessor continued to exist for “more than a year after the assets sale” during which it obtained revenues and maintained “a small staff” that “continued to keep the books, prepare tax returns and deal with creditors and unresolved litigation”).

¹²² Order at 12–13, *MBIA Ins. Co. v. Countrywide Fin. Corp.*, Index No. 602825/08 (N.Y. Sup. Ct. Apr. 27, 2010) (citing *Fitzgerald v. Fahnestock*, 286 A.D.2d 573, 575 (1st Dep’t 2001)).

continuing existence after the asset sale (such as by maintaining assets¹²³ or defending litigation¹²⁴) defeats the “empty shell” standard and shows that the seller has not dissolved.¹²⁵ As one court recently explained, the dissolution element cannot be met as long as “the predecessor corporation continues to exist after the transaction, in however gossamer a form.”¹²⁶

Of course, CFC and CHL still existed after the 2008 asset sales, and even now continue to exist. (See Exs. 14–15.) Nor can MBIA show that CFC and CHL were rendered “empty shells,” like the seller in *Fitzgerald*, because of the following undisputed facts:

- Like the seller in *Van Nocker*, CFC and CHL continued to hold substantial assets.¹²⁷ Following the November 7, 2008 asset sales, CFC held cash, receivables, mortgage loans, investments in subsidiaries, and other assets totaling approximately \$3.7 billion on a stand-alone basis and \$20.4 billion on a consolidated basis. (See Rosenberg Aff. ¶ 79, Exs. 91–93, 101–103, 118.) Likewise, CHL’s balance sheet, after giving effect to the November 7, 2008 transactions, showed total assets of more than \$15.7 billion. (See *id.* ¶ 103, Ex. 118.)
- Like the asset seller in *Buja*,¹²⁸ CFC and CHL have continued to defend litigation here and in other courts across the country. (See Rosenberg Aff. ¶ 81, Exs. 119–120.)
- CHL has continued to service loans and evaluate and pay mortgage-repurchase claims,

¹²³ See, e.g., *Van Nocker*, 15 A.D.3d at 257 (concluding that dissolution element was not satisfied where predecessor (i) maintained its corporate existence for two years; (ii) retained its “minute books, stock ledger records and related corporate records” and “substantial assets,” including cash on hand, receivables, claims and choses in action, income taxes recoverable, raw materials and supplies, automobiles, certain real property, and purchase orders; and (iii) had continuing obligations).

¹²⁴ See, e.g., *Buja*, 12 Misc.3d at 864 (concluding that the cessation and dissolution element was not met where asset seller was in bankruptcy for almost two years after asset sale; company continued existence “in a meaningful way” by being represented in ongoing litigation).

¹²⁵ See *Van Nocker*, 15 A.D.3d at 257; *Buja*, 12 Misc.3d at 864; *Manfredi Chevrolet, LLC v. Land*, 29 Misc.3d 1209(A), 2010 WL 4027686, at *3 (Sup. Ct. Richmond Co., Sept. 30, 2010) (finding no successor liability where asset seller did not sell all its assets and “is in fact still listed as an active foreign business corporation as recorded by the New York Department of State”).

¹²⁶ *Doktor*, 762 F. Supp. 2d at 499.

¹²⁷ *Van Nocker*, 15 A.D.3d at 257 (concluding that dissolution element was not satisfied where predecessor, among other things, held assets (including cash, receivables, claims and choses in action, income taxes recoverable, raw materials and supplies, automobiles, certain real property, and purchase orders) and maintained its corporate existence for two years).

¹²⁸ *Buja*, 12 Misc.3d at 864 (court rejected de facto merger claim because seller’s continuing defense of claims against it, despite seller’s admitted insolvency, meant it had not dissolved as a matter of law).

including mortgage-repurchase claims that MBIA has lodged.¹²⁹

Accordingly, MBIA cannot show the dissolution required to prove a de facto merger under New York law.

3. *MBIA Cannot Show Continuity of Management, Personnel, Physical Location, Assets, or Business Operations Between Any Countrywide Defendant and BAC.*

New York de facto merger law also requires that MBIA establish the continuity of management, personnel, physical location, assets, and general business operations between each of the alleged Countrywide Defendants and its alleged successor, BAC.¹³⁰ Setting aside that no such continuity exists here because the Countrywide Defendants' former assets have been incorporated into a new, different mortgage business,¹³¹ MBIA cannot show continuity with BAC for a separate reason: the remnants of Countrywide's mortgage business—including remaining managers, personnel, assets, and operations—are indisputably not housed in BAC, but rather in BANA, BAC's separate, federally chartered banking subsidiary. (Ofcharsky Aff. ¶¶ 17–18; Exs. 104–109.) MBIA has not asserted a claim that BANA de facto merged with any Countrywide entity. And with good reason: because BANA is a federally chartered bank, any state-law claim that BANA de facto merged would be preempted.¹³²

BAC, by contrast, is a bank holding company that has no operations, but rather owns operating subsidiaries, including BANA. (See Ex. 1 at 1.) This holding company structure is

¹²⁹ See Pl. Mem. of L. in Supp. of Mot. for Summ. J., *MBIA Ins. Co. v. Countrywide Fin. Corp.*, Index No. 602825/08 (N.Y. Sup. Ct. Sept. 19, 2012) (NYSCEF. No. 1971)], at 40–44 (discussing CHL's continuing repurchase efforts); Ex. 121.

¹³⁰ *Van Nocker*, 15 A.D.3d at 256.

¹³¹ Ex. 145 at 214:9–17; Ex. 146 at 27:17–20.

¹³² See *Watters*, 550 U.S. at 11–12, 21 (holding National Bank Act preempts state regulation of national-bank subsidiaries); *Fidelity Trust Co. v. Camp*, 337 F. Supp. 1396, 1401 (D. Conn. 1972) (holding Bank Merger Act “prohibits merger, de facto or otherwise, without the express approval of the Comptroller.”); see also National Bank Act, 12 U.S.C. §§ 215a-3, 215a-3(a) (requiring OCC approval for merger by national bank with nonbank subsidiary or affiliate); Bank Merger Act, 12 U.S.C. § 1828(c) (requiring FDIC approval for merger by FDIC-insured institutions).

commonplace among America's largest financial institutions because, among other reasons, it enables them to compete in many businesses and enter new ones without placing the entire enterprise at risk. (See Stokes Aff. ¶¶ 6–8; Ex. 138 ¶¶ 25–29; see also Stokes Aff. ¶¶ 3–7.) In fact, MBIA itself uses a holding company structure to operate its various insurance businesses.¹³³ Thus, because BAC has no continuity of management, personnel, physical location, assets, or general business operations with any of the Countrywide Defendants, this factor weighs heavily in favor of summary judgment for BAC on MBIA's de facto merger claim under New York law.¹³⁴

4. *Any Liabilities BAC Assumed Cannot Demonstrate a de Facto Merger Without Continuity of Ownership.*

The remaining New York law factor is immaterial. While MBIA may point to BAC's assumption of CFC's and CHL's liabilities as evidence that a de facto merger occurred, the only existing liabilities BAC assumed were for CFC's and CHL's public debt. Assuming these liabilities was not necessary to run CFC's, CHL's, or CSC's businesses, because CFC's and CHL's failure to repay their public debt would have no effect on other entities' ability to underwrite, originate, and service loans. But even if it were necessary, the assumption of liabilities alone is not enough to show a de facto merger, especially where, as here, the plaintiff is unable to satisfy the ownership-continuity factor. See *supra* notes 109, 112.

¹³³ See Ex. 5 at 1 (noting that MBIA, Inc., “conduct[s its] financial guarantee business, as well as related reinsurance, advisory and portfolio services, through [its] wholly-owned subsidiaries National Public Finance Guarantee Corporation (‘National’), [its] United States (‘U.S.’) public finance only financial guarantee company, and MBIA Insurance Corporation (‘MBIA Corp.’)”).

¹³⁴ *Kretzmer*, 24 A.D.3d at 158 (finding “insufficient evidence of any continuity of management, personnel, physical location, assets and general business operations” because “[t]he mere hiring of some of the predecessor’s employees is insufficient to raise a triable issue”); *Buja*, 12 Misc.3d at 865–66 (finding no “significant continuity of operation” even though asset purchaser hired seller’s former employees, retained an officer, and used the seller’s name, customer lists, and other intangibles in marketing and advertising); *Broydo v. Baxter D. Whitney & Sons, Inc.*, 24 Misc.3d 1207(A), 2009 WL 1815092, at *3 (Sup. Ct. Kings Co. June 23, 2009) (no continuity of management, personnel, or physical location where asset purchaser marketed products under asset seller’s name).

III. MBIA'S IMPLIED-ASSUMPTION CLAIM FAILS AS A MATTER OF LAW.

MBIA's fallback successor-liability claim rests on an equally narrow exception to the rule against successor liability—that BAC *impliedly* assumed CFC's and CHL's alleged liability to MBIA.¹³⁵ BAC is entitled to summary judgment on this claim because (i) its contracts with CFC and CHL contradict the implied term MBIA is attempting to read into them; and (ii) MBIA could not have relied to its detriment on any of the vague, equivocal BAC statements and conduct that supposedly constitute BAC's implied promise to pay CFC's or CHL's liabilities, because they all occurred *well after* MBIA contracted with Countrywide.

A. BAC's Agreements with CFC and CHL Specify the Liabilities That BAC Assumed, Precluding Any Claim That BAC Assumed Others.

MBIA does not claim that BAC expressly assumed the Countrywide Defendants' alleged liability to MBIA. The agreements governing the only two transactions in which BAC purchased assets from the Countrywide Defendants spell out explicitly which liabilities BAC would, and would not, assume from CFC and CHL. BAC's APA with CHL expressly excluded the liabilities at issue here, providing that CHL would retain "all Liabilities . . . arising or resulting from the use, ownership, lease, license, operation, or disposition of the Purchased Assets prior to the Closing," as well as "all Liabilities . . . arising in connection with any litigation . . . except to the extent arising from [BAC's] ownership and operation of the Purchased Assets after closing." (Ex. 98 at Schedule 2.4.) BAC's SPA with CFC achieved a

¹³⁵ Unlike the de facto merger doctrine, as to which Delaware conflicts with New York law, there are virtually no Delaware cases addressing the implied-assumption-of-liabilities theory of successor liability. Because there is currently no clear basis to determine whether Delaware law conflicts with New York law on this issue, New York law applies to MBIA's implied-assumption claim. See *Sagamore Corp. v. Diamond W. Energy Corp.*, 806 F.2d 373, 377 (2d Cir. 1986) (citing *Colgate Palmolive Co. v. S/S Dart Can.*, 724 F.2d 313, 317 (2d Cir. 1983), *overruled in part on other grounds*, *Norfolk S. Ry. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004)). To the extent that the SPA's Delaware choice of law provision would counsel for Delaware law's application to the SPA's effect on the claim, Delaware law does not conflict with that of New York. See *Fountain v. Colonial Chevrolet Co.*, 1988 WL 40019, at *7 (Del. Super. Ct. Apr. 13, 1988) (no assumption of liabilities where asset purchase contract was silent on liability assumption).

similar result by listing on a schedule the liabilities that BAC *would* assume. (*Id.*, Ex. 87 § 1.2.)

And both agreements included integration clauses that prohibit efforts to modify their unambiguous terms with evidence of oral or written understandings outside their four corners.

(Exs. 87 § 9.4, 98 §10.12.) Thus, as a matter of law, BAC cannot be deemed to have assumed litigation liabilities to parties like MBIA that were not included in those contracts.¹³⁶

It is black-letter New York contract law that a party cannot imply into an agreement a term that is inconsistent with the contract's express provisions.¹³⁷ Applying this controlling precedent, New York courts have held that where the parties' asset-purchase agreement expressly provides that the asset purchaser is not assuming any liabilities, or specifies which liabilities the asset purchaser is assuming, a third party cannot imply an assumption of liabilities that conflicts with the agreement's express terms.¹³⁸ Therefore, because an implied assumption of liabilities by BAC would be inconsistent with the APA's and SPA's unambiguous terms, BAC is entitled to summary judgment on MBIA's implied-assumption claim.¹³⁹

¹³⁶ *Riverside Mktg.*, 425 F. Supp. 2d at 535 (“When an agreement provides specifically that a purchaser is to assume liability only for certain claims, and the claim at issue is not within an enumerated category, there is no assumption of liability.”).

¹³⁷ *See Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 304 (1983) (“No obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship.”); *see also Peralta v. WHM Tool Grp., Inc.*, No. 04 Civ. 3826 (CPS), 2005 WL 2002454, at * 3 (E.D.N.Y. Aug. 19, 2005) (“[D]efendant cannot be held to have expressly or impliedly assumed the predecessor's tort liability as to products sold prior to the asset purchase since it specifically disavowed such liability in the Asset Purchase Agreement.”).

¹³⁸ *See Freeman v. Complex Computing*, 931 F. Supp. 1115, 1121 (S.D.N.Y. 1996) (holding that express provision excluding liabilities “precludes the possibility that a contradictory obligation may be implied”), *rev'd in part on other grounds*, 119 F.3d 1044 (2d Cir. 1997); *see also Desclafani*, 2008 WL 3914881, at *4 (finding “frivolous” implied assumption of liabilities claim where asset purchase agreement provided that asset-purchaser did not assume liability); *Riverside Mktg.*, 425 F. Supp. 2d at 535 (dismissing implied-assumption claim because “[w]hen an agreement provides specifically that a purchaser is to assume liability only for certain claims, and the claim at issue is not within an enumerated category, there is no assumption of liability”); *Conn. Indem. Co.*, 2001 WL 868340, at *6 (concluding that plaintiff could not establish implied agreement to assume liabilities where purchase agreement excluded all pre-purchase liabilities).

¹³⁹ *See Freeman*, 931 F. Supp. at 1121 (dismissing implied-assumption claim that was inconsistent with asset-purchase agreement's express provisions); *Riverside Mktg.*, 425 F. Supp. 2d at 535 (same).

B. MBIA Could Not Have Relied on BAC's Statements or Conduct.

Even if the APA's and SPA's unambiguous terms did not bar MBIA's implied-assumption claim, that claim would still fail because MBIA cannot establish that it detrimentally relied on any BAC statements or conduct. An implied-assumption claim is nothing more than a contract claim based on an asset buyer's *implied* agreement to pay the asset seller's liabilities.¹⁴⁰ A party seeking to enforce an implied contract must establish reasonable reliance to its detriment on the other party's unambiguous promise.¹⁴¹ Allowing MBIA to press an implied-assumption recovery without that showing would be inequitable and contrary to all precedent: it would provide MBIA a windfall remedy for which it neither bargained nor had any reason to expect would be available.

MBIA identifies three categories of BAC conduct that allegedly resulted in an implied assumption of liabilities: (i) BAC's alleged payment of settlements (or contributions of capital to

¹⁴⁰ See *Goldmark v. Magnolia Anti-Friction Metal Co.*, 30 A.D. 580, 582 (1st Dep't 1898) (“[T]he foundation of the plaintiff's claim against this [defendant] is the assumption of that obligation by the [defendant], and that is a contract, either express or implied”); see also *Riverside Mktg.*, 425 F. Supp. 2d at 535 (noting an exception to asset purchaser non-liability rule where “the purchaser expressly or impliedly agrees to assume the obligations”); *Conn. Indem. Co.*, 2001 WL 868340, at *6 (“[P]laintiff may also establish that the purchasing corporation expressly or impliedly agreed to assume the selling corporation's liability.”).

¹⁴¹ See E.A. Farnsworth, *Contracts*, § 2.19 (Little Brown & Co. 2d ed. 1990) (“First, the promisee must rely on the promise.”); see also *Schwartz v. Miltz*, 77 A.D.3d 723, 724-25 (2d Dep't 2010) (“The elements of a cause of action based upon promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise.”); *Sanyo Elec. v. Pinros & Gar Corp.*, 174 A.D.2d 452, 453-54 (1st Dep't 1991) (denying counterclaim for promissory estoppel where party “failed to make even a colorable showing of at least two of the essential elements of a cause of action for promissory estoppel—i.e., a clear and unambiguous promise and reasonable reliance thereon by the party to whom the promise was made”); *Ripple's of Clearview, Inc. v. Le Havre Assocs.*, 88 A.D.2d 120, 122-23 (2d Dep't 1982) (same); *Kotlyarsky v. N.Y. Post*, 195 Misc. 2d 150, 155 (Sup. Ct. Kings Co. 2003) (“promissory estoppel is available only where a party reasonably relies on the promise”); *Marenyi*, 1994 WL 16000129, at *6 (holding that implied assumption applies where “other facts and circumstances, relied upon by the plaintiff, demonstrate an intention on the part of the buyer to pay the debts of the seller”); 15 William M. Fletcher, *Cyclopedia of Law of the Private Corporations* § 7124 (“In order for a promise to be implied, the conduct or representations relied upon must evidence an intention on the part of the purchasing company to assume the old corporation's liabilities in whole or in part.”); *Steele v. Delverde S.R.L.*, 242 A.D.2d 414, 415 (1st Dep't 1997) (“This doctrine may be invoked only where the aggrieved party can demonstrate the existence of a clear and unambiguous promise upon which he or she reasonably relied, thereby sustaining injury; as a general matter, an oral promise will not be enforced on this [promissory estoppel] ground unless it would be unconscionable to deny it.”).

its subsidiary CFC to fund settlements) on Countrywide's behalf; (ii) vague, informal statements by BAC representatives concerning the CFC acquisition or Countrywide's liabilities; and (iii) BAC's purchase of the Countrywide Defendants' assets. (See Ex. 6 ¶¶ 121–29.) But MBIA could not have detrimentally relied on any of those BAC statements and actions because they all occurred months or more *after* MBIA executed its last insurance agreement with the Countrywide Defendants on May 31, 2007.¹⁴² Thus, MBIA could not have changed its position *vis-à-vis* BAC, CFC, or CHL in reaction to BAC's conduct.

First, the earliest settlement MBIA has invoked was Countrywide's October 2008 loan-modification program (which BAC did not fund, in any event), more than 18 months after the last MBIA insurance agreement's execution. (Ex. 6 ¶ 112.) Nor is it relevant that MBIA contends that the funds used to settle a potential CFC or CHL liability may have originated from BAC, because “[t]he mere fact of voluntary payment of some of the debts of the predecessor will not ground an inference that the successor assumed all of the former's debts.”¹⁴³ Thus, the post-acquisition Countrywide settlements cannot, as a matter of law, support MBIA's implied-assumption claim.

Second, MBIA could not have relied on the vague statements by BAC employees that it cites to support its claim. The public statements MBIA has cited in its Amended Complaint all concern the adequacy of BAC's pre-acquisition due diligence of CFC or how the prevailing

¹⁴² See Ex. 6 ¶ 73; *Burke v. Liberty Mut. Ins. Co.*, 201 A.D.2d 773, 774 (3d Dep't 1994) (granting defendant's summary judgment motion because “actions alleged to have been taken by defendant subsequent to plaintiff's delivery of the general release cannot support plaintiff's claim of estoppel”); see also *Marlanx Corp. v. Lage*, 307 A.D. 2d 824, 826 (1st Dep't 2003) (“Marlanx raises a feigned issue of fact regarding the fraud and breach of contract causes of action. Plaintiff cannot sue for either based on the alleged representation, made after the initial agreement, that defendants would pay for the costs of corporate reinstatement. Assuming for purposes of this motion that plaintiff's claim is true, a subsequent oral representation constitutes neither consideration nor a basis for inducing reliance.”).

¹⁴³ *Marenyi*, 1994 WL 16000129, at *7; see also *Allstate Ins. Co. v. Countrywide Fin. Corp.*, 842 F. Supp. 2d 1216, 1231 (C.D. Cal. 2012) (“*Allstate II*”) (“The fact that Bank of America has voluntarily paid certain debts of Countrywide does not mean that it was legally obligated to pay them, nor that it is legally obligated to pay others.”).

conditions at CFC or in the mortgage market generally affected the acquisition price. (See Ex. 6 ¶¶ 128–30.) These statements were all made *long after* MBIA executed its last Countrywide insurance contract, and so MBIA could not have relied on them as a matter of law. See n. 146, *supra*. Nor would any reliance on such statements be reasonable. Far from the required “unambiguous” promise to stake BAC’s assets to pay for potentially billions of dollars of CFC liability, the statements merely reflect BAC’s reasonable attempts to assess CFC’s potential losses and liabilities in negotiating the price it paid to acquire CFC—and all its assets and liabilities—in the Red Oak merger. None of these statements resembles the “unambiguous” promise necessary to transform an ordinary asset purchase into an implied assumption of the seller’s liabilities.¹⁴⁴

Equally vague and unavailing are two statements by BAC CEO Brian Moynihan in 2010, years after the last insurance agreement’s execution, and while BAC was actively defending successor-liability claims in this and other courts:¹⁴⁵

- an alleged remark quoted in a December 2010 *New York Times* article that “[o]ur company bought it [Countrywide] and we’ll stand up; we’ll clean it up.”¹⁴⁶ Moynihan testified that “clean it up” referred not to tapping all of BAC’s assets to pay for all of CFC’s liabilities, but to “do[ing] our best to help America get out of the mortgage crisis that they found themselves in after 2007, 2008[; and the] operational work to help the million—the 1.6 million customers through the process of modification and dealing with the most serious issue they could face, yes, that is the work we are doing. We do it every day.” (Ex. 143.)
- an alleged comment to *Bloomberg* that “at the end of the day, we’ll pay for the things

¹⁴⁴ See, e.g., *Brinsights, LLC v. Charming Shoppes of Delaware, Inc.*, No. 06 Civ. 1745 (CM), 2008 WL 216969, at *5 (S.D.N.Y. Jan. 16, 2008) (finding that even in conjunction with other statements, assurance that “the contract will be taken care of” did not constitute clear and unambiguous promise); *Cohen v. Lehman Brothers Bank*, 273 F. Supp. 2d 524, 529-30 (S.D.N.Y. 2003) (defendant’s statement that “‘she would work through’ the issues raised by plaintiffs about the deal” prior to execution of a loan mortgage agreement could not be construed as a clear and unambiguous promise); *Allstate II*, 842 F. Supp. 2d at 1231 (“The fact that Bank of America has voluntarily paid certain debts of Countrywide does not mean that it was legally obligated to pay them, nor that it is legally obligated to pay others.”)

¹⁴⁵ See Rosenberg Aff. ¶ 81; Exs. 119–120.

¹⁴⁶ Ex. 142.

Countrywide did.” (Ex. 147.) Consistent with Mr. Moynihan’s testimony, another court has already held that this statement at most reflects the intent “to voluntarily pay” certain Countrywide liabilities, not to legally assume them.¹⁴⁷

These vague and indefinite statements stand in stark contrast to the alleged successor’s statements in the sole authority that MBIA has cited in describing its implied-assumption claim,¹⁴⁸ *Ladjevardian v. Laidlaw-Coggeshall, Inc.*,¹⁴⁹ a 1977 federal court decision that has not been followed since.¹⁵⁰ In *Ladjevardian*, the court found that factual issues precluded summary judgment because the asset purchaser, Laidlaw-Coggeshall, had made statements *directed to the plaintiffs* on which the plaintiffs *specifically relied*: that (i) plaintiffs’ accounts would be transferred to Laidlaw-Coggeshall due to a “merger agreement” and “combination of the two firms”; and (ii) Laidlaw-Coggeshall would “*assume* any credit balance owed to customers of [the seller] and that any debit balance *would become an obligation* of Laidlaw-Coggeshall.”¹⁵¹ The plaintiffs thereafter maintained their accounts, notwithstanding their previous instruction to the alleged predecessor before the merger “to make no further purchases on their behalf except with their written authorization” and to deliver their holdings to another bank.¹⁵² MBIA, in contrast, cannot possibly show similar reliance here, because its decision to contract with Countrywide occurred at the latest in May 2007, many months before BAC even agreed to acquire CFC.

¹⁴⁷ *Allstate II*, 842 F. Supp. 2d at 1230.

¹⁴⁸ Memorandum of Law in Support of Plaintiff’s Motion to Compel [Mot. No. 50] at 11–13 (Apr. 17, 2012) (quoting *Ladjevardian*, 431 F. Supp. at 839–40).

¹⁴⁹ 431 F. Supp. 834 (S.D.N.Y. 1977).

¹⁵⁰ This is because, as Judge Haight observed in *Marenyi v. Packard Press Corp.*, 90 Civ. 4439 (CSH), 1994 WL 16000129 (S.D.N.Y. June 9, 1994), *Ladjevardian* relies on fraudulent-conveyance law, and there is no reason to impose successor liability under an implied-assumption theory where a fraudulent-conveyance claim would be available. Thus, *Ladjevardian* is an outlier at best and discredited at worst.

¹⁵¹ *Ladjevardian*, 431 F. Supp. at 839–40.

¹⁵² *Id.* at 837–38 (“before the acquisition, Mahin and Zohreh became dissatisfied with the services of Laidlaw, Inc., and instructed that firm to make no further purchases on their behalf except with their written authorization. They also made several demands on Laidlaw, Inc., including the delivery of Zohreh’s stocks to Chase Manhattan Bank.”).

Third, MBIA likewise could not have detrimentally relied on the Red Oak merger (July 1, 2008) or subsequent asset-sale transactions because they all occurred well after MBIA last agreed to provide insurance to the Countrywide Defendants in May 2007. BAC did not even agree to acquire CFC until January 11, 2008, more than six months after the last MBIA–Countrywide insurance agreement was signed. And unlike other Countrywide creditors, such as the lenders whose loans to Countrywide immediately became due when CFC changed control on LD1, MBIA chose not to negotiate change-in-control provisions in its insurance contracts that would require new Countrywide owners to guarantee or assume CFC’s or CHL’s liabilities.¹⁵³ And yet it obviously knew how to do just that because MBIA bargained for provisions in these same contracts concerning changes in control of the securitization trusts it was insuring—but not changes in control of CFC or CHL.¹⁵⁴ In the words of MBIA’s own corporate-governance expert, “because corporate separateness is a clear default rule *that can more cheaply be varied by contract than alternatives*, it is more economically efficient for corporations and creditors alike for corporate separateness to generally be respected in the case of insolvent corporations and related parties.”¹⁵⁵

CONCLUSION

The unifying principle behind MBIA’s successor-liability claims is the requirement that BAC has defrauded Countrywide’s creditors, either by transferring assets out of CFC, CHL, and CSC for no or grossly inadequate consideration or by inducing creditors to rely on promises that BAC later broke. The undisputed facts show exactly the opposite—namely, that BAC and its subsidiaries (i) paid more than \$45 billion in value for CFC’s and CHL’s assets, a premium to

¹⁵³ See *supra* pp. 12–13.

¹⁵⁴ See Sheth Aff. Exs. 18–20, 22–25, 29 § 2.06(f).

¹⁵⁵ Ex. 140 at 9.

their fair value; (ii) contributed billions of dollars more in the years following those asset purchases; and (iii) ensured that CFC and CHL used those funds to pay their creditors. None of these undisputed facts remotely supports a conclusion that BAC tried to cheat Countrywide's creditors. Rather, they show that the Countrywide asset-sale transactions were at least fair and provided CFC and CHL with badly needed liquidity in the midst of the financial crisis. There is no basis in settled doctrine for MBIA to now punish BAC for rescuing Countrywide by exposing BAC's assets to MBIA's claims against Countrywide—claims that long preceded BAC's appearance on the scene. BAC is therefore entitled to summary judgment on MBIA's successor-liability claims.

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