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

MBIA INSURANCE CORPORATION,

Plaintiff,

-against-

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

Defendants.

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

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

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

PRELIMINARY STATEMENT

In 2008, BAC bought Countrywide[1] to expand its mortgage business and to take advantage of Countrywide's mortgage origination and servicing platforms, thereby asserting itself as a leader in the mortgage business. Following its purchase of Countrywide, BAC immediately began integrating Countrywide's core businesses into its own business operations and retired the Countrywide brand.

When BAC first announced its plans to purchase Countrywide, however, and increasingly thereafter, Countrywide's contingent liabilities were mounting, with regulators, investors, shareholders, and insurers all alleging that Countrywide had engaged in fraud and imprudent underwriting. Cognizant of these liabilities, BAC engaged in a series of transactions in an attempt to evade liability for Countrywide's fraud and other misconduct while acquiring its valuable assets and business operations. Specifically, BAC set out to acquire control over CFC and its subsidiaries, strip those companies of all their valuable assets and business operations, and merge those assets and business operations into BAC's same lines of business, while leaving shell entities behind to act as protective filters for Countrywide's mounting contingent liabilities and its most toxic assets.

New York law does not countenance such tactics to frustrate the rights of third-party victims of a predecessor company's wrongdoing. This case represents an extreme abuse of corporate formalities to try to gain the economic benefits of a *de jure* merger free of the

[1] As used in this motion, the term "Countrywide" refers collectively to CFC and its subsidiaries.

corresponding liabilities. To curb such abuse, New York law has developed successorship doctrines that protect creditors by looking past corporate form to the underlying substance of such transactions.[2] Under the undisputed facts, and as a matter of law, either of two independent bases for successor liability apply here to hold BAC liable as a successor to Countrywide. Accordingly, the Court should grant MBIA summary judgment that, if Countrywide is found primarily liable, BAC is liable as Countrywide's successor.

First, the doctrine of *de facto* merger is satisfied on this summary-judgment record. Each of the "hallmarks" of a *de facto* merger is present: (1) former Countrywide shareholders became BAC shareholders, and remained owners of CFC and its subsidiaries following the merger; (2) Countrywide ceased ordinary business operations, and the remaining legal entities were shorn of their assets and rendered mere corporate shells that are being wound down; (3) BAC assumed the ordinary business liabilities necessary for the ongoing operations of Countrywide's core businesses, including mortgage origination and servicing; and (4) BAC continues to operate the combined mortgage, banking, and capital markets businesses out of the same offices formerly occupied by Countrywide, has employed 19,300 former Countrywide employees to continue managing and operating the businesses, and continues to use Countrywide's operational assets in the combined business. *See* Argument Part II, *infra*.

Second, and in any event, the doctrine of implied assumption of liabilities applies to hold BAC liable as a successor to Countrywide. In very public declarations, aimed at national and global audiences, BAC's most senior corporate officers and spokespersons assured investors and creditors that BAC was aware of Countrywide's growing liabilities and that, having bought Countrywide, BAC intended to "stand up" and "clean it up." BAC's current CEO, Brian Moynihan, assured investors that BAC "will pay for the things that Countrywide did." BAC then contributed approximately $[redacted] billion to settlements of Countrywide's litigation and representation and warranty exposures, and committed another $[redacted] billion to a major investor settlement. BAC's senior executives, including the spokespeople who made these public

[2] As shown in Argument Part I, *infra*, New York law governs that issue here.

promises, have also been involved in approving and signing these agreements to resolve Countrywide's contingent liabilities. BAC cannot be allowed to promise to pay Countrywide's liabilities and then pay or fund payment of all of Countrywide's liabilities that have crystallized to date, while disclaiming responsibility for other future liabilities. *See* Argument Part III, *infra*.

SUMMARY OF UNDISPUTED FACTS RELEVANT TO THIS MOTION[3]

I. COUNTRYWIDE'S BUSINESSES PRIOR TO THE MERGER

Prior to the January 11, 2008 announcement of the merger between CFC and a subsidiary of BAC, CFC was a holding company whose subsidiaries, including CHL and CSC, were primarily engaged in mortgage origination and servicing, banking, capital markets, and insurance. SUF ¶¶ 6-7.

The mortgage business, which was Countrywide's "core" business, originated, purchased, sold, and serviced mortgage loans, was primarily housed within CHL, employed more than 22,000 people in 2007, and "generat[ed] 50% of [CFC's] revenues." SUF ¶¶ 8, 24; Oblak Aff. Ex. 3 at 2; Ex. 6 ("[r]eal estate lending is at our core," and "[r]eal estate lending is and will continue to be at the core of Countrywide's strategic vision."); Ex. 174 ("[CFC's] primary line of business is mortgage lending."). By late 2007, as credit markets tightened, CFC started using the deposit base of its banking subsidiary, Countrywide Bank, to fund mortgages originated through CHL. SUF ¶¶ 25-27. Countrywide Bank "had no infrastructure with which to originate any mortgage loans directly from homeowners or to interface with mortgage brokers." SUF ¶ 28. CHL owned all of the assets necessary to the operations of the mortgage business, including the non-banking financial centers, technology platform, physical offices, call centers, and equipment used in the mortgage origination and servicing business. SUF ¶¶ 10, 109; *see* Oblak Aff. Ex. 48 (Schedule 2.2).

[3] This summary draws from the more detailed recitation in MBIA's separate Rule 19-a Statement of Undisputed Facts ("SUF") and the Affirmation of Jonathan B. Oblak ("Oblak Aff."), which MBIA has filed concurrently with this motion.

The capital markets business, which included CSC, specialized in underwriting and trading mortgage-backed securities and trading mortgage loans. SUF ¶¶ 11-12. Prior to the merger, CSC was a registered securities broker-dealer. SUF ¶ 13.

The insurance business, Balboa Insurance Group, leveraged CFC's mortgage-origination business by providing various insurance products to Countrywide borrowers. SUF ¶¶ 19-20.

On January 10, 2008, BAC executives presented Countrywide to BAC's Board of Directors as the "largest independent mortgage servicer and originator in the United States" with "a leading mortgage technology platform" thus "present[ing] the corporation [*i.e.*, BAC] a one-time opportunity to acquire the leading US mortgage platform at a significantly discounted value, to offer broader mortgage capabilities to new and existing customers, and to enhance future profitability." SUF ¶¶ 1-4; Oblak Aff. Ex. 1.

II. THE INTEGRATION PLAN AND ITS ASSET-STRIPPING TRANSACTIONS

On January 11, 2008, CFC and BAC announced that they had entered into a Merger Agreement. SUF ¶ 5; Oblak Aff. Ex. 2 (Agreement and Plan of Merger). In the six months following the announcement of the planned merger, BAC developed an overall plan designed to integrate Countrywide's businesses into BAC through a coordinated series of transactions by which BAC would acquire control over, and then transfer to itself, all of Countrywide's productive assets, operations, and employees (the "Integration Plan"). SUF ¶¶ 38-54. From the outset, the purpose of the Integration Plan was to "[m]erge CFC into Red Oak and then assets out [sic] of Red Oak into B of A. This provides a filter for assets and liabilities." SUF ¶ 47; Oblak Aff. Ex. 18. The basic goal of the Integration Plan "from an operational standpoint" was to "consolidate as much of the business operations of Countrywide and Bank of America Mortgage as possible." SUF ¶¶ 38-39, 50-55, 48; Oblak Aff. Ex. 20. It was also decided prior to the merger that CFC and CHL would no longer engage in the mortgage business, and that CSC would also be shut down. SUF ¶¶ 49, 52-53, 165-166. "[W]e intend to move the mortgage origination and servicing operations housed in Countrywide Home Loans and CHL Servicing as

well as the loans and other assets into Bank of America, National Association ("BANA") on the merger date or shortly thereafter." Oblak Aff. Ex. 12.

The execution of the Integration Plan, described below, began just after the July 1, 2008 merger that continued former CFC stockholders' ownership over its assets, and then siphoned the valuable assets of the Countrywide entities into BAC entities through a series of asset-stripping transactions in July and November 2008, leaving behind shell Countrywide entities to provide "separation between the bank merger and what is left behind," *i.e.*, Countrywide's "toxic" assets and contingent liabilities. SUF ¶¶ 58-127, 246-248; Oblak Aff. Ex. 189; Ex. 308. Following the merger, the Integration Plan was completed in several steps because, while some transactions did not require regulatory approval, and thus could be completed immediately, others did require regulatory approvals. SUF ¶¶ 40-41, 43-46. These transactions, however, were contemplated as part of the Integration Plan as of at least April 2008. SUF ¶ 47.

A. Red Oak Merger

On July 1, 2008, CFC merged into a specially-formed BAC subsidiary named Red Oak Corporation, which was then renamed Countrywide Financial Corporation (the "Red Oak Merger"). SUF ¶ 58. The Red Oak Merger was a stock-for-stock transaction by which former CFC shareholders became BAC shareholders. SUF ¶¶ 59-60. Since the Red Oak Merger, CFC and its other wholly-owned subsidiaries have been owned by the shareholders of BAC (which at that point included former CFC shareholders through their ownership of stock of BAC). SUF ¶ 61. Also, as of the Red Oak Merger, both before and after the July and November 2008 Transactions, BAC was the sole shareholder of CFC and its subsidiaries. SUF ¶¶ 61, 63. Since the Red Oak Merger, BAC has dominated or controlled CFC, CHL, CSC, CHLS, and all other former subsidiaries of CFC. SUF ¶¶ 61-63, 93, 97-101,102, 110, 129, 140, 146, 149, 159, 177-188..

B. July 2008 Transactions

Immediately following the Red Oak Merger, between July 1 and 3, 2008, CFC and BAC engaged in a number of transactions by which CFC and its subsidiaries sold assets and subsidiaries to BAC and certain BAC subsidiaries. SUF ¶¶ 69.

On July 1, 2008, CHL sold a pool of residential mortgage loans to NB Holdings Corporation ("NB Holdings"), a wholly owned subsidiary of BAC, and novated (*i.e.*, transferred) a portfolio of derivative instruments to Bank of America, N.A. ("BANA"), a wholly owned subsidiary of BAC. SUF ¶¶ 70-77, 41.

On July 2, 2008, CHL sold to NB Holdings two entities that owned all of the partnership interests in CHL's substantial mortgage-servicing business, and CSC sold to Blue Ridge Investments, LLC (a wholly-owned subsidiary of BAC) a pool of securities. SUF ¶¶ 78-87.

On July 3, 2008, CHL sold another pool of residential mortgage loans to NB Holdings, and Countrywide Commercial Real Estate Finance ("CCREF"; a subsidiary of CFC) sold a pool of commercial mortgage loans to NB Holdings. SUF ¶¶ 88-92.

BAC controlled how CFC and CHL used the proceeds from the July 2008 Transactions, including causing CHL to pay off full amounts outstanding on $11.5 billion in revolving lines of credit (including amounts outstanding to BANA) and to contribute more than $5.5 billion to capitalize Countrywide Bank, which BAC later transferred to itself. SUF ¶¶ 95, 97.

C. November 2008 Transactions

On November 7, 2008, pursuant to an Asset Purchase Agreement, BAC purchased substantially all of CHL's remaining assets and operations, including all assets associated with CHL's mortgage-origination operations, which included: mortgage loans; mortgage-servicing rights; the technology platform used in CHL's mortgage operations; furniture, fixtures, and equipment; contract rights with third parties (including rights under real estate leases for property used in the mortgage businessendor contracts, intellectual property licenses, and other contracts material to the mortgage operations); real property owned by CHL and used in the mortgage business; mortgage servicing advance receivables; and any other assets of CHL used in

Countrywide's mortgage business. SUF ¶ 107; Oblak Aff. Ex. 48 (Asset Purchase Agreement). The assets so purchased were identified by BAC businesspersons by parsing CFC's and CHL's balance sheets to select assets that would be "peeled away from CHL and CFC" to BAC and its non-CFC subsidiaries, and to exclude "toxic" assets that would stay behind at CFC or CHL. SUF ¶¶ 105, 110, 126, 127; Oblak Aff. Ex. 306; Ex. 304; Ex. 64 (email explaining that BAC sought to "separate[e] the good and bad assets."). BAC also identified contingent liabilities to be "left behind" at CHL. SUF ¶¶ 110, 126, 127.

In addition, pursuant to a Stock Purchase Agreement dated November 7, 2008, BAC purchased the stock of significant CFC subsidiaries, including Countrywide Bank and Balboa Insurance.[4] SUF ¶¶ 103, 114, 148, 279; Oblak Aff. Ex.301 (Stock Purchase Agreement). The goodwill previously allocated to Countrywide Bank and Balboa was transferred to BAC as part of this transaction. SUF ¶¶ 64-68. The net result of the November 2008 Transactions was the transfer of "substantially all" of CFC's and CHL's remaining assets to BAC. SUF ¶¶ 44, 105-108. BAC subsequently contributed the assets and subsidiaries purchased as part of the November 2008 Transactions to its non-CFC subsidiaries, and BANA immediately contributed billions in excess capital created by the transfers back to BAC. SUF ¶ 105.

D. The Asset-Stripping Transactions Were Approved Without Any Meaningful Consideration By CFC's Or CHL's Boards

The July and November 2008 Transactions were approved by CFC's and CHL's boards of directors through a cursory process, without any apparent consideration of the impact of these transactions on CFC and its subsidiaries or on their creditors, and without review of any meaningful information. Following the Red Oak Merger, the directors of CFC, CHL, and other CFC subsidiaries were replaced with employees of BAC or its subsidiaries. SUF ¶ 62; Oblak Aff. Ex. 99 ("Directors pre LD1 were resigned/retired. . . BofA put in their own board"). These boards did not attempt to negotiate the sales or sell CFC's or CHL's assets to third parties, nor

[4] Countrywide Bank was subsequently merged with BANA on April 27, 2009. SUF ¶¶ 44, 124, 167, 219.

did they obtain any independent valuations or opinions regarding the value of the assets or the Countrywide enterprise. SUF ¶ 94.

At the time of the November 2008 Transactions, CFC's board consisted of Helga Houston, Greg Hobby, and Helen Eggers, all of whom were BAC employees prior to the Red Oak Merger. SUF ¶¶ 62, 149. None of these directors was able to recall any information considered in connection with their approval of the November 2008 Transactions, despite the fact that these transactions involved billions of dollars and the sale of substantially *all* of CFC's assets. SUF ¶¶ 152-157.

As for CHL, on July 1, 2008, in the midst of the July 2008 Transactions, its entire board of directors had been replaced with Andrew Gissinger, a legacy Countrywide executive hired by BAC. SUF ¶ 129. The July 2008 Transactions were approved by Mr. Gissinger within the first three days after he was appointed the sole member of CHL's board. SUF ¶¶ 132-138; *see, e.g.*, Oblak Aff. Ex. 39 (same day he was appointed); Ex. 40 (day after appointed). Mr. Gissinger was not only unable to recall any information considered in connection with his approval of those billion-dollar transactions, but was also unable to recall any of the transactions themselves. SUF ¶¶ 131, 132, 135, 136, 142. By the time of the November 2008 Transactions, Mr. Gissinger had been replaced by Jack W. Schakett and Kevin W. Bartlett, former Countrywide employees employed by BAC or its non-CFC subsidiaries after the Red Oak Merger. SUF ¶ 144. Kevin Bartlett was appointed to the board of directors on October 14, 2008, the same day he approved the November 2008 Transactions. *Cf.* Oblak Aff. Ex. 196(Unanimous Written Consent signed October 14, 2008) *with* Ex. 74 (appointing Mr. Bartlett to the board on October 14, 2008). As with the other directors, Mr. Bartlett was unable to recall considering any information prior to approving those billion-dollar transactions involving CHL. SUF ¶ 147.

E. Impact of the Asset-Stripping Transactions

Through the Asset-Stripping Transactions, BAC transferred all the operating assets of CFC, CHL, and other CFC subsidiaries to itself and its non-CFC subsidiaries and converted CFC and its remaining subsidiaries into litigation management entities. SUF ¶¶ 247, 265. CFC and

its subsidiaries no longer engaged in mortgage origination and servicing, banking, insurance, or capital markets.[5] SUF ¶¶ 167, 169, 214, 248. Following the Asset-Stripping Transactions, CSC was deregistered as a broker/dealer and shut down, SUF ¶ 175, and CFC and CHL ceased to own or operate a stand-alone business, operating instead in a "wind-down" or liquidation mode, with neither company engaged in revenue-producing business activities, SUF ¶¶ 171, 172. Instead, CFC's and CHL's activities have been primarily dedicated to resolving representation and warranty claims, and "dealing with all of this litigation." SUF ¶¶ 173; Oblak Aff. Ex. 164 at 281:13-19. But even these "wind-down" activities are dominated and controlled by BAC. BAC's approval is required before a Countrywide-originated mortgage loan can be repurchased. SUF ¶ 178. [redacted] SUF ¶ 182. BAC funds repurchases indirectly, using CHL as a pass through entity to create a "paper trail" and to absorb loan losses, even if those loans will be transferred to BAC for final disposition. SUF ¶ 186; Oblak Aff. Ex. 182. BAC employees also control the negotiations and resolution of bulk claims and litigation involving the Countrywide Defendants. SUF ¶ 188.

Meanwhile, CFC's and CHL's former mortgage-origination business was integrated into BAC's mortgage business, known internally at BAC as Consumer Real Estate Services ("CRES"), and externally branded as Bank of America Home Loans. SUF ¶ 212. BAC formally merged CFC's former banking subsidiary and CHL's former mortgage servicing subsidiary into BANA. SUF ¶ 213. In addition, BAC dissolved or absorbed CFC's capital-markets business into its own capital-markets business. SUF ¶ 214. The insurance business was moved to a BAC subsidiary and later sold in 2011 to raise money for BAC. SUF ¶ 215.

As a result of integrating Countrywide's business operations into its own operations, BAC significantly expanded its mortgage, banking, and servicing businesses—and related

[5] CFC did briefly retain ownership over a minor reinsurance subsidiary that was in "run-off" because BAC intended to sell it off and therefore did not transfer it on November 7, 2008. SUF ¶ 115; Oblak Aff. Ex. 4 at BACMBIA-C0000043143; Ex. 308.

revenues—using the businesses and operations formerly owned by CFC and CHL. SUF ¶ 218. The combined mortgage business, housed in BAC's mortgage division, has enjoyed increased mortgage origination activities, and concomitant revenues, as a result of its acquisition of CFC's mortgage business. SUF ¶¶ 208-210, 217. Just one week after the November 2008 Transactions, BAC reported that it expected "to originate nearly $270 billion [in new home loans] for full year 2008, *with over $200 billion driven by our legacy CFC distribution channels*." Oblak Aff. ¶ 218, Ex. 97 at BACMBIA-R0000042405 (emphasis added). BAC's projections for 2009 expected "Countrywide to contribute $9.5 billion to [BAC's] revenue line." Oblak Aff. Ex. 98 at BACMBIA-Q0000028192. Since the Asset-Stripping Transactions, BAC reported that its CRES mortgage division has generated income from mortgage banking operations alone of, on average, $499 million per quarter through the second quarter of 2012, even accounting for billions in expenses taken for contingent liabilities paid on behalf of CFC and CHL. SUF ¶ 217.

In addition, as BAC planned, BAC gained significant market share in the mortgage origination and servicing sectors through its integration of Countrywide's mortgage business into its own. Prior to the Red Oak Merger, BAC's head of CRES, Barbara Desoer, predicted for BAC's Board of Directors that acquiring all of CFC's loan business and combining it into one BAC entity would give BAC "a leading market share position—roughly 25%" of all new home loan originations. Oblak Aff. Ex. 16 at BACMBIA-O0000002037. Shortly after the Red Oak Merger, Ms. Desoer stated in an October 2008 interview that "B of A's accomplishments since taking over Countrywide on July 1, include[d] making 250,000 loans to borrowers and booking $51 billion of business in the third quarter." Oblak Aff. Ex. 17 at BACMBIA-A0000133313. Similarly, current CEO Brian Moynihan testified that BAC "ended up with the largest servicing platform in the country." Oblak Aff. Ex. 96 at 75:23-24. Following the November 2008 Transactions, CHL employees became employees of BAC and its non-CFC subsidiaries, and since that time BAC and its non-CFC subsidiaries have employed at least 19,300 former Countrywide employees. SUF ¶ 192. In connection with the November 2008 Transactions, BAC assumed the liabilities associated with former Countrywide employees transferred to BAC

and its non-CFC subsidiaries, including future liabilities and some existing liabilities associated with benefits and payroll. SUF ¶ 201; *see* Oblak Aff. Ex. 50 (showing employee liabilities flagged to go to BAC). In contrast, CFC and CHL currently employ a *de minimis* number of people—270—in comparison to the more than 45,000 employees CFC and its subsidiaries employed as of July 1, 2008. SUF ¶ 194.

On April 27, 2009, BAC announced that the combined Bank of America Home Loans mortgage operations would be based in Calabasas, California, at CFC's and CHL's former headquarters. SUF ¶ 198. An April 27, 2009 BAC press release explained, "[t]he Bank of America Home Loans brand represents the combined operations of Bank of America's mortgage and home equity business and Countrywide Home Loans, which Bank of America acquired on July 1, 2008. The Countrywide brand has been retired." Oblak Aff. Ex. 341. In connection with the November 2008 Transactions, BAC purchased substantially all of CFC's and CHL's assets, including the technology and know-how relating to the mortgage business, and continues to use these assets in BAC's mortgage business today. SUF ¶ 200.

III. BAC'S ASSUMPTION OF COUNTRYWIDE'S LIABILITIES

A. BAC's Public Admissions Of Liability

In the months leading up to and following the Red Oak Merger, BAC's most senior executives and spokespersons made public statements admitting that CFC's liabilities were factored into the purchase of CFC, and that BAC intended to "clean [] up" those liabilities. SUF ¶¶ 2, 24, 225, 226; Oblak Aff. Ex. 294 (quoting BAC's CEO, Brian Moynihan, in a *New York Times* article). For example, on March 1, 2008, Scott Silvestri, a BAC spokesperson said Countrywide's liabilities were factored into the purchase of CFC:

> We bought the company and all of its assets and liabilities …. *We are aware of the claims and potential claims against the company* and have factored those into the purchase.

Oblak Aff. Ex. 104 (emphasis added).

In an interview with the *New York Times* for an article discussing the impact of mortgage-related loss exposure on banks, BAC's former CEO, Ken Lewis, confirmed that BAC was aware of CFC's legal liabilities and accepted them as part of the cost of the acquisition:

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

Oblak Aff. Ex. 15 at 2.

Addressing investor questions in November 2010, BAC's current CEO Brian Moynihan addressed BAC's plans to deal with claims and lawsuits against Countrywide by stating, "[t]here's a lot of people out there with a lot of thoughts about how we should solve this, but at the end of the day, we will pay for the things that Countrywide did." Oblak Aff. Ex. 105 [Bloomberg article]. Shortly thereafter, in December 2010, Mr. Moynihan told a *New York Times* reporter, for an article concerning BAC's financial woes, that "[o]ur company bought it [Countrywide] and we'll stand up; we'll clean it up." Oblak Aff. Ex. 294. Later, during his deposition, Mr. Moynihan testified that "[i]t is important for [public disclosures] to be accurate," and that he personally takes care to "speak carefully and make sure I say what I mean." Oblak Aff. Ex. 96 at 28:14-18; 30:7-12. Regarding his comment to the *New York Times*, he reaffirmed that the statement was truthful and accurate when he made it, that "[w]e want to clean it up, absolutely," and that "was our intention then and that is our intention now." Oblak Aff. Ex. 96 at 122:12, 150:23-25.

Mr. Moynihan also told investors that, in responding to repurchase claims, BAC "will make sure that we will pay when due." Oblak Aff. Ex. 293. He confirmed this in his testimony, stating that BAC would pay settlements "when they were due…we will pay legitimate claims." Oblak Aff. Ex. 96 at 146:3-147:14. Internal documents confirm such representations made by BAC's senior executives. For example, a document from the files of Joe Price (the CFO of BAC at the time) discussing BAC's Integration Plan, and dated the day before the Red Oak Merger,

explains that while BAC "will not *explicitly* guarantee or assume the CFC debt," BAC's "intent at this time is to see that the debt is satisfied as it comes due. Practically, we recognize the consequences of not honoring the debt would be potentially severe…" Oblak Aff. Ex. 108 (emphasis added).

B. BAC Has Paid Or Funded Payment Of All Of Countrywide's Liabilities As They Came Due

Consistent with its public statements acknowledging Countrywide's liabilities and its plan to satisfy Countrywide's liabilities as they came due, BAC has also been actively engaged in negotiating and funding the resolution of disputes with CFC's and CHL's contingent creditors. SUF ¶¶ 221, 232, 235. For example, in the months leading up to the Red Oak Merger, BAC negotiated with several State Attorneys General regarding exposure stemming from CHL's allegedly fraudulent underwriting and loan-origination practices. SUF ¶ 234. As part of the settlement of these claims, BAC was required to indemnify legacy CHL in connection with its loan-modification responsibilities. SUF ¶ 235. BAC was in charge of the program, and therefore it necessarily impacted BAC financially. SUF ¶ 235(a). Barbara Desoer, who became head of combined mortgage operations at BAC, testified that this program "targeted [] a subset of just the Countrywide borrowers" and did not cover liabilities related to "legacy Bank of America borrowers." Oblak Aff. Ex. 115 at 346:24-347:5. Indeed, because BAC agreed to cover the costs of CFC and CHL liabilities and to modify Countrywide loans, several State Attorneys General dismissed their lawsuits against Countrywide, and several others agreed not to bring suit. SUF ¶ 235.

Since the Red Oak Merger, BAC has continued to assume Countrywide's contingent liabilities as they come due. For example, BAC funded a payment of $2.8 billion to Fannie Mae and Freddie Mac to settle repurchase claims. SUF ¶ 236. [redacted] SUF ¶ 236. BAHLS subsequently agreed to "absorb the legacy CHL liability for exposure under rep[resentations] and warranties given to the GSEs" in June 2010,

and engaged in a series of transactions, including capital contributions to CHL, that resulted in BAC assuming the entire cost of the settlement and a net $[redacted] billion increase in CHL's capital position. SUF ¶ 236.

On April 14, 2011, BAC announced an agreement with Assured Guaranty Ltd. to settle claims relating to insurance provided on both BAC- and Countrywide-sponsored RMBS deals. SUF ¶ 237(a). The agreement called for a $1.1 billion payment to Assured and also included a cost sharing reinsurance agreement that had an expected value of approximately $470 million. SUF ¶ 237(b). Under a cost sharing agreement with BAC, CHL would be responsible for [redacted] SUF ¶ 237(c); Oblak Aff. Ex. 119. The day following announcement of the agreement, BAC contributed $[redacted] billion to CFC, which CFC in turn contributed to CHL, which CHL in turn used to pay Assured. SUF ¶ 237(c).

On June 28, 2011, BAC announced a proposed $8.5 billion cash settlement relating to 530 legacy Countrywide residential mortgage-backed private-label trusts. SUF ¶ 238. [redacted] SUF ¶ 238(b). But, again, BAC will pay for CHL's share of the settlement when it occurs because BAC made "an unconditional commitment to pay directly or to make a capital contribution to cover CHL's portion of the settlement payment in the event that the settlement is approved by the courts." SUF ¶ 238(c); Oblak Aff. Ex. 167 at CWMBIA0018539208.

On December 21, 2011, BAC announced its agreement to pay $335 million to settle with the U.S. Department of Justice over allegations that CFC racially discriminated against mortgage applicants. SUF ¶ 239. The Consent Order effecting this settlement was signed by Michael Schloessmann, who holds positions at both BANA and Countrywide, on behalf of CFC and CHL, and by Greg Hobby, a BAC employee, on behalf of Countrywide Bank. SUF ¶ 239(a).

In February 2012, BAC announced that it would pay $1 billion to settle claims that Countrywide defrauded the Federal Housing Authority ("FHA") by making loans to unqualified

borrowers. SUF ¶ 240. BAC's CEO, Mr. Moynihan, testified that some of the claims related to "legacy Countrywide origination activities and servicing activities" and therefore constituted claims that accrued "before we [BAC] owned Countrywide." Oblak Aff. Ex. 96 at 95:03-04.

On July 17, 2012, BAC agreed to pay $375 million to settle a lawsuit brought by Syncora on account of losses arising from Countrywide RMBS issuances that Syncora insured. SUF ¶ 242. [redacted] SUF ¶ 242(a); Oblak Aff. Ex. 121. This settlement was funded by BAC through a capital contribution of approximately $[redacted] billion, on the same day as the settlement, from BAC to CFC, which CFC in turn contributed to CHL. SUF ¶ 242(c). BAC's records acknowledge that this capital contribution was sponsored by CRES—the business unit within BAC that houses the combined mortgage business—and that [redacted] SUF ¶ 242(d); Oblak Aff. Ex. 204. The settlement agreement was signed by Mr. Schloessmann on behalf of CFC, CSC, and CHL. SUF ¶ 239(a); Oblak Aff. Ex. 121.

Since November 7, 2008, CFC and CHL have incurred massive operating losses, so there is no way they could have paid all of these contingent liabilities as they came due. Indeed, BAC concluded [redacted] even after BAC had injected billions into these entities. SUF ¶¶ 246, 254; Oblak Aff. Ex. 82. Over the six quarters following the Asset-Stripping Transactions, through the first quarter of 2010, CFC's net losses, before taxes, ranged from -$458 million to -$950 million *per quarter*. SUF ¶ 249. The principal source of CFC's losses has been its mortgage banking losses, which represent, on average, losses of $916 million per quarter over the six quarters following the Asset-Stripping Transactions. SUF ¶ 249; Oblak Aff. Ex. 84 at 593. CFC's and CHL's net worths were also

drastically reduced following the Asset-Stripping Transactions such that, absent capital contributions from BAC, these entities would not have been able to pay for billions in contingent liabilities on their own. Following the Asset-Stripping Transactions, CHL's equity balance was reduced from $2.447 billion as of June 30, 2008 to $173 million as of November 30, 2008. SUF ¶ 249. By March 2009, CHL's equity balance had already dropped to *negative* $53 million, prompting a capital infusion by BAC of approximately $[redacted] million to bring CHL's equity balance back to positive in May 2009. SUF ¶¶ 249, 250. And as noted above, several additional capital infusions tied to the payments of settlements of CHL's contingent liabilities followed. SUF ¶¶ 241, 242, 250. By December 31, 2011, in spite of billions in capital infusions, CHL's shareholder equity was a *negative* $[redacted] billion. SUF ¶ 255.

BAC is paying for CFC's and CHL's contingent liabilities, contributing approximately $[redacted] billion to CFC and CHL thus far—and committing to paying at least another $[redacted] billion to CHL—to cover Countrywide's costs in connection with litigations and settlements, including the settlement of representation and warranty exposure stemming from loans originated by CHL. SUF ¶¶ 235-243. Notwithstanding its extensive record of assuming Countrywide's liabilities, BAC argues in the instant litigation that MBIA's claims somehow fall outside BAC's responsibilities as a successor to Countrywide.

ARGUMENT

To prevail on a motion for summary judgment under CPLR 3212, the moving party must show "sufficient evidence to demonstrate the absence of any material issues of fact," *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986), such that judgment is appropriate "as a matter of law," *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

As shown below, this Court should grant MBIA summary judgment that BAC is liable as the successor in interest to the Countrywide Defendants.[6] Although the general rule is that the

[6] It is undisputed that BAC is liable as the successor to CHLS. CHLS *de jure* merged into BANA on July 1, 2011. SUF ¶ 101; *Notice of Merger and Name Change*, filed in *MBIA v. Countrywide Home Loans*, No. 602825/08, Dkt. (July 21, 2008) (stating that "effective July 1, 2011, BAC Home Loans Servicing, L.P. (f/k/a Countrywide Home Loans Servicing, L.P.) has

buyer of a corporation's assets does not ordinarily become liable for the debts of the seller, *see Fitzgerald v. Fahnestock & Co., Inc.*, 286 A.D.2d 573, 574 (1st Dep't 2001); *AT & S Transp., LLC v. Odyssey Logistics & Tech. Corp.*, 22 A.D.3d 750, 752 (2d Dep't 2005), two long-standing exceptions to that rule apply here as a matter of law on the undisputed facts. *First*, there was a *de facto* merger of Countrywide with BAC. *Second*, and in any event, BAC assumed Countrywide's liabilities.[7] Before turning to those exceptions, MBIA explains that New York substantive law governs.

I. NEW YORK LAW APPLIES TO MBIA'S SUCCESSOR LIABILITY CLAIMS[8]

Because MBIA filed its lawsuit in New York, New York's choice of law rules determine which state's substantive law applies to MBIA's successor liability claims against BAC. *See*

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been merged into Bank of America, N.A. It will be known as 'Bank of America, N.A., successor by merger to BAC Home Loans Servicing, L.P.'"). BAC conceded successor liability as to CHLS based on the fact that "those entities have [*de jure* merged] into Bank of America, N.A. Bank." Hearing Tr. (Oct. 5, 2011), at 7-8, *MBIA v. Countrywide Home Loans*, No. 602825/08 (N.Y. Sup. 2008); Hearing Tr. (Mar. 9, 2012), at 20-21, *MBIA v. Countrywide Home Loans*, No. 602825/08 (N.Y. Sup. 2008) ("Countrywide Bank merged and the Servicing entity Countrywide Home Loans Servicing . . . with respect to those entities, if they have liability, the legacy Bank of America entities will certainly pay for those, because they're part of the legacy Bank of America."); *see also Biederman v. Liebmann Breweries*, 1 A.D.2d 708, 708 (3d Dep't 1955) ("On merger of corporations the rule generally is that the possessor corporation shall assume all the obligations of the merged corporation in the same manner as if it had itself incurred them"); *Jacklets v. City of New York*, 272 A.D.2d 260, 260 (1st Dep't 2000) (holding that liability of corporation for injuries sustained in accident occurring before it merged into another corporation neither ceased nor became impaired as result of merger).

[7] Although this motion addresses only the *de facto* merger and assumption-of-liabilities exceptions under New York law, MBIA reserves its right at trial to pursue successor liability under other exceptions, namely the exception for a buyer who fraudulently entered into the transaction to escape the predecessor's liabilities.

[8] Because New York law is the only law that the parties briefed in dispositive motions previously presented to this Court in this litigation, MBIA has presented its arguments for summary judgment under New York law. MBIA addresses the choice-of-law issue here because BAC has indicated that it intends to re-argue the issue of choice-of-law, but MBIA likewise notes that BAC has previously raised its position that Delaware law should apply in its responding papers (*see* BAC Mem. I.S.O. Mot. To Dismiss, Nov. 13, 2009, at 6, n.5), and the Court subsequently elected to apply New York law—and not Delaware law. *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 36 Misc. 3d 1215(A), at *4-7 (Sup. Ct. N.Y. Cnty. 2010). Consequently, having failed to appeal this Court's decision, BAC should not now be heard—three years later—to re-argue this issue, and therefore, the application of New York law to MBIA's successor liability claims should be treated as the law of the case.

Tanges v. Heidelberg N. Am., Inc., 93 N.Y.2d 48, 54 (1999) ("Because New York is the forum state, we must look to New York choice of law rules…").

In New York, the "first step in choice of law analysis is determining whether an actual conflict exists between the jurisdictions involved." *K.T. v. Dash*, 37 A.D.3d 107, 111 (1st Dep't 2006). If no conflict exists, no further analysis is required, and the law of the forum state will apply. *SNS Bank, N.V. v. Citibank, N.A.*, 7 A.D.3d 352, 354 (1st Dep't 2004) ("If there is [no conflict], then the law of the forum state where the action is being tried should apply"). If, on the other hand, a *genuine* conflict exists, New York courts conduct an "interest analysis" to choose which jurisdiction's law will apply. *Schultz v. Boy Scouts of Am.*, 65 N.Y.2d 189, 197 (1985) ("Interest analysis became the relevant analytical approach to choice of law in tort actions in New York."); *DaSilva v. C & E Ventures, Inc.*, 83 A.D.3d 551, 553 (1st Dep't 2011) (same); *Locke v. Aston*, 31 A.D.3d 33, 37 (1st Dep't 2006) ("New York…uses an interest analysis to determine 'which of two competing jurisdictions has the greater interest in having its law applied in the litigation.'").

A. There Is No Genuine Conflict Between New York and Delaware Successor Liability Law

Here, there is no conflict between New York and Delaware law on successor liability because the law is substantially the same in both jurisdictions. *See Fischer v. Prodigi, Inc.*, No. 603891/06, 2007 WL 2815494 (Sup. Ct. N.Y. Cnty. July 23, 2007) (declining to address the choice of law issue regarding successor liability claim because "[t]he laws of Delaware and New York are substantially the same on the issue of successor liability") (citations omitted). Specifically, in both New York and Delaware a successor corporation will be liable for the predecessor's misconduct or debts where, *inter alia*, the successor impliedly or expressly assumes the seller's debts, or *de facto* merges with the seller. *Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41, 45 (2d Cir. 2003) (citing *Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239, 245 (1983)); *Fitzgerald*, 286 A.D.2d at 574; *accord Elmer v. Tenneco Resins, Inc.*, 698 F. Supp. 535, 540 (D. Del. 1988) (same); *Magnolia's at Bethany, LLC v. Artesian Consulting Eng'rs*, No.

S11C-04-013-ESB, 2011 Del. Super. LEXIS 435, at *6 (Del. Super. Ct. Sept. 19, 2011) (same); *Ross v. Desa Holdings Corp.*, No. 05C-05-013 MMJ, 2008 WL 4899226, at *4 (Del. Super. Ct. Sept. 30, 2008) (successor liability exists where, *inter alia*, the purchaser expressly or impliedly assumes such obligations or the transaction amounts to a consolidation or merger of the seller into the purchaser). Because there is no genuine conflict between New York and Delaware successor liability laws, any further choice of law analysis is unnecessary. 19A JAMES L. BUCHWALTER ET AL., N.Y. JUR. 2D CONFLICT OF LAWS § 2 (2d ed.) ("a choice-of-law analysis is unnecessary if no relevant conflict exists between the laws.").

Despite these clear precedents to the contrary, BAC may argue, as it has in other litigations, that there is a conflict between New York and Delaware successor liability laws based on New York and Delaware courts' application of the *de facto* merger exception—only one of the four exceptions giving rise to successor liability.[9] A genuine conflict only arises, however, where the applicable law from each jurisdiction provides differing rules that will have a "significant *possible* effect on the outcome of the trial," *e.g.*, where a remedy is available in one jurisdiction but not the other. *Fin. One Pub. Co. Ltd. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 331 (2d Cir. 2005) (holding that for an actual conflict of law to exist, the "differences must be 'relevant' to the issue at hand, and must have a 'significant *possible* effect on the outcome of the trial.'") (citing *Tronlone v. Lac d'Amiante Du Quebec, Ltee*, 297 A.D.2d 528 (1st Dep't 2002); *Simon v. Philip Morris, Inc.*, 124 F. Supp. 2d 46, 71 (E.D.N.Y. 2000)). Here, BAC cannot establish a genuine conflict between Delaware and New York law because: (i) both jurisdictions agree that the objective of the *de facto* merger exception is to protect third party creditors such as MBIA that have claims against the transferring corporation after a *de facto* merger occurs, and (ii) notwithstanding any asserted differences between how each jurisdiction

[9] New York and Delaware do not differ in their application of the assumption-of-liabilities exception to successor liability. *See Schumacher*, 59 N.Y.2d at 239 (holding that a successor is liable if "it expressly or impliedly assumed the predecessor's tort liability"); *accord Ross*, 2008 WL 4899226, at *4 (holding that the buyer's liability exists where there is "assumption of liability.").

has applied the *de facto* merger exception, both New York and Delaware provide a remedy to third party creditor victims based on the same four successor liability exceptions so that any such difference would not have a "significant *possible effect* on the outcome of the trial" in this litigation. *Fin. One*, 414 F.3d at 331.

First, the purported divergence upon which BAC has previously relied is the fact that, in the very limited number of Delaware cases that have had occasion to specifically address the *de facto* merger exception, Delaware courts have applied this exception to cases where there is evidence of possible prejudice to creditors. *Fidanque v. Am. Maracaibo Co.*, 33 Del. Ch. 262, 270, 92 A.2d 311, 316 (1952) ("If the transaction had been one in which in some manner the assets of [the seller] would have been so impaired that the rights of creditors or dissenting stockholders might have been jeopardized, there would then have been merit to plaintiffs' contention."). This application of the *de facto* merger exception does not, however, present an actual conflict with New York law—rather, it simply reflects Delaware's articulation of the policy rationale behind the *de facto* merger exception, *i.e.*, to protect creditors who may be harmed by the abuse of corporate formalities. *Drug, Inc. v. Hunt*, 35 Del. 339, 362, 168 A. 87, 96 (1933) (observing that courts have allowed claims against the transferor to proceed at law against the transferee "in an apparent effort to prevent injustice to creditors or other persons having claims against the transferring corporations…"). New York also recognizes that a policy rationale for the *de facto* merger doctrine is the protection of a company's creditors when a purchaser takes all of the assets and goodwill of that company. *Fitzgerald*, 286 A.D.2d at 575 ("The concept upon which [the *de facto* merger] doctrine is based is that a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the goodwill purchased.") (internal quotation marks omitted); *Morales v. City of New York*, 18 Misc. 3d 686, 688 (Sup. Ct. Kings Cty. 2007) ("The policies that guide an assessment of successor liability include 'the concept that a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased…and the desire to ensure

that a source remains to pay for the victim's injuries.'") (citations omitted); *Grant-Howard Assoc. v. Gen. Housewares Corp.*, 63 N.Y.2d 291, 296-97 (1984) (same). New York courts' articulation of the hallmarks of a *de facto* merger are simply New York's effort to give effect to that purpose. *See Fitzgerald*, 286 A.D.2d at 574 ("The hallmarks of a de facto merger include: continuity of ownership; cessation of ordinary business and dissolution of the acquired corporation as soon as possible; assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and, continuity of management, personnel, physical location, assets and general business operation.").

The fact that the few Delaware cases that do address the *de facto* merger doctrine have failed to articulate a clear set of factors or hallmarks, however, does not mean that Delaware is in conflict with New York. *See, e.g.*, *Fidanque*, 33 Del. Ch. at 270, 92 A.2d at 316. On the contrary, both New York and Delaware recognize that the fundamental inquiry at the heart of the *de facto* merger exception is whether the transactions at issue are in reality a merger, thus giving rise to a recognition in *both* jurisdictions that courts should apply a flexible standard that looks at the particular facts and circumstances of each case. *See Fidanque*, 33 Del. Ch. at 269, 92 A.2d at 315-16 ("Whether a particular transaction is in reality a merger or otherwise depends to a great extent on the circumstances surrounding each particular case and in determining the question all the elements of the transaction must be considered."); *AT & S Transp.*, 22 A.D.3d at 752 (the *de facto* merger "factors are analyzed in a flexible manner that disregards mere questions of form and asks whether, in substance, it was the intent of the successor to absorb and continue the operation of the predecessor"); *Sweatland v. Park Corp.*, 181 A.D.2d 243, 246 (4th Dep't 1992) ("Public policy considerations dictate that, at least in the context of tort liability, courts have flexibility in determining whether a transaction constitutes a de facto merger.").

Second, as both New York and Delaware courts have already recognized, there is no genuine conflict between New York and Delaware law because both provide a remedy to creditors of a seller where a purchaser of assets is shown to be a successor based on any one of four exceptions. *See Fischer*, 2007 WL 2815494 ("The laws of Delaware and New York are

substantially the same on the issue of successor liability."); *Schumacher*, 59 N.Y.2d at 245 (recognizing four common-law exceptions to the rule that a purchaser of assets is not liable for seller's debts: (1) assumption of liabilities, (2) transaction undertaken to defraud creditors, (3) *de facto* merger, and (4) mere continuation); *Cargo Partner*, 352 F.3d at 45 (same); *Elmer*, 698 F. Supp. at 540 (same); *Magnolia's at Bethany*, 2011 Del. Super. LEXIS 435 at *8 (same); *Ross*, 2008 WL 4899226, at *4 (same). Unlike cases finding a genuine conflict because one jurisdiction offers a remedy or cause of action for which the other has no equivalent, in this case, a claim for successor liability is available in both New York and Delaware. *Cf. Fin. One*, 414 F.3d at 332 (finding an actual conflict because a number of provisions of Thai substantive law had no New York equivalent); *Engel v. Clapper*, 14 A.D.3d 855, 856-57 (3d Dep't 2005) (finding no conflict because Quebec's no-fault statute and New York's no-fault statute both allow recovery to injured passengers in vehicular accident in New York). Therefore, any variance in how New York and Delaware courts discuss one of the four exceptions giving rise to successor liability does not give rise to a genuine conflict of law.[10]

B. Even If There Is A Genuine Conflict, New York Law Applies

Nevertheless, if the Court concludes that there is a genuine conflict between New York and Delaware laws on successor liability, it must be resolved by selecting New York law. In conducting an interest analysis, New York courts give "effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issues in the litigation." *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 72 (1993); *Matter of Allstate Ins. Co.*, 81 N.Y.2d 219, 225 (1993) ("the preferred analytical tool in tort cases is to apply 'interest analysis' where the policies underlying the competing laws are considered."); *see also Shaw v. Carolina Coach*, 82 A.D.3d 98, 101 (2d Dep't 2011) ("'the law of the jurisdiction having the greatest interest in resolving the particular issue' is given

[10] Even under Delaware law, MBIA would be entitled to summary judgment as a matter of law on the basis of the *de facto* merger exception—*see infra* Argument Part III.C discussing the impact of the transactions on creditors. This further supports the conclusion that Delaware law would not have a "significant *possible effect* on the outcome of the trial" that could give rise to a conflict. *Fin. One*, 414 F.3d at 331.

controlling effect") (citing *Cooney*, 81 N.Y.2d at 72, 74). Here, because New York has the most significant "relationship or contact with the occurrence or the parties," and thus also has the greatest concern in the outcome of this litigation, New York law applies.

First, because the torts alleged by MBIA occurred in New York and injured a New York corporation, New York has the strongest interest in ensuring that a source remains to pay for MBIA's injuries. *See Colon v. Multi-Pak Corp.*, 477 F. Supp. 2d 620, 625 (S.D.N.Y. 2007) ("Where, as here, the plaintiffs are New York residents, the accident occurred in New York, the product at issue was sold to the plaintiff's employer in New York, and the defendant manufacturer continues to do business in New York, that state has the greatest interest in regulating the defendant manufacturer's conduct, notwithstanding that the manufacturer is incorporated and has its principal place of business in another state."); *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC*, 446 F. Supp. 2d 163, 192 (S.D.N.Y. 2006) ("the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders."); *Drenis v. Haligiannis*, 452 F. Supp. 2d 418, 427 (S.D.N.Y. 2006) ("A tort occurs in 'the place where the injury was inflicted,' which is generally where the plaintiffs are located."). Here, it is indisputable that the bulk of the alleged misconduct that harmed MBIA, a New York corporation, overwhelmingly occurred in New York at the hands of CHL, another New York corporation. MBIA is a New York corporation, headquartered in Armonk, New York. SUF ¶ 272. CHL, the principal actor and counterparty to the contracts from which the Countrywide Defendants' liability in this case emanates, is also a New York corporation. SUF ¶¶ 273, 275. In soliciting MBIA's business, CHL sent requests for bid to MBIA in New York during 2004-2007. SUF ¶ 287. CHL also sent materially false and misleading loan tapes and Mortgage Loan Schedules to MBIA in New York. SUF ¶ 288; Am. Comp. ¶¶ 142-143. Moreover, CHL made the representations and warranties in the various agreements governing the 15 securitizations at issue in this case, and upon which MBIA's breach of contract claims are based. SUF ¶ 275. Countrywide also made presentations to MBIA in MBIA's offices in New York, marketing itself and making various representations

regarding its loan origination, servicing, and risk practices. SUF ¶ 286; Am. Comp. ¶ 39. Moreover, as a result of Countrywide's conduct, MBIA has paid out billions in claims under the Insurance Agreements, thus suffering injury in New York. SUF ¶ 289; *Pryor Cashman Sherman & Flynn, LLP v. Tractmanager, Inc.*, No. 603515/05, 2007 N.Y. Slip Op. 31332(U), at *10 (Sup. Ct. N.Y. Cnty. May 18, 2007) ("A corporation suffers its injury where its principal place of business is located because that is where its damages are felt.").

Second, because this case arises in the insurance context, New York has a particularly strong interest in ensuring that a source remains from which MBIA, the victim of Countrywide's malfeasance, can recover. *See Colon*, 477 F. Supp. 2d at 625; *Fischer*, 2007 WL 2815494 ("it is established that New York has an especially strong interest in applying its law when one of its domiciliaries alleges that he has been defrauded.") (internal quotations omitted). New York has an strong interest in ensuring that its regulations are properly applied to companies subject to those regulations, and that the consequences of violating New York's regulations are not effectively circumvented by the abuse of corporate formalities BAC has engaged in here. As this Court has expressly recognized, MBIA is an insurance company regulated by the New York State Department of Financial Services (f/k/a New York Insurance Department) and whose business activities are subject to New York Insurance Law. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 34 Misc. 3d 895, 905 (Sup. Ct. N.Y. Cnty. 2012). Moreover, New York Insurance Law also governs Countrywide's conduct as an applicant for insurance in New York, and in particular its representations to New York insurers such as MBIA. *Id.* The misrepresentations made to MBIA in New York, and Countrywide's conduct in New York, form the basis, at least in part, for MBIA's claim that it was fraudulently induced to provide financial guarantee insurance pursuant to the Insurance Agreements, and has suffered billions of dollars in losses as a result of the Countrywide Defendants' misconduct. SUF ¶ 289; *see generally* Am. Comp. Moreover, as a result of the Asset-Stripping Transactions, BAC transferred to itself all of CHL's (a New York corporation) assets used in Countrywide's mortgage business, SUF ¶¶ 105-108; Oblak Aff. Ex. 48 (Asset Purchase Agreement Schedule 2.2), putting CFC and CHL out of

business and leaving MBIA and other creditors without remedy against shell corporations. Accordingly, New York has a particular interest here in protecting its citizens from attempts by a company to avoid liability by transferring the assets and operations, including substantially all of the assets and operations of a New York company, to another legal entity outside of New York.

Third, although BAC will undoubtedly point to the fact that Countrywide's parent company, CFC, is incorporated in Delaware, the weight of CFC's contacts favor the application of New York law. CFC's principal operating company was CHL[11], a New York corporation that intentionally availed itself of New York law when it chose to incorporate itself in New York and market its products and services to New York companies, including MBIA. SUF ¶¶ 273, 275, 286. Indeed, Countrywide's very origins are in New York, where CHL was started in 1969 by its founder, Angelo Mozilo, more than seventeen years before CFC was incorporated in Delaware. SUF ¶ 282; Oblak Aff. Ex. 295. Moreover, the vast majority of CFC's remaining assets belong to its New York subsidiary, CHL. Oblak Aff. Ex. 82 ("[redacted]"). In addition, CFC's CSC subsidiary, a Delaware corporation that served as the underwriter for the 15 securitizations, had its principal places of business in New York and California. SUF ¶¶ 284-285.

Fourth, BAC and the Countrywide Defendants have voluntarily availed themselves of New York law when entering into contracts, *including those at issue in this case*. New York law governs the central transaction documents corresponding to each of the 15 securitizations, into which MBIA alleges it was fraudulently induced, and on which MBIA's contract claims against the Countrywide Defendants are based. SUF ¶¶ 274-275. Even many of the critical agreements between BAC and Countrywide that give rise to successor liability are governed by New York law. For example, New York law governs the Asset Purchase Agreement, by which BAC transferred substantially all of CHL's remaining assets to itself, and New York law also governs the Stock Purchase Agreement, by which, along with the Asset Purchase Agreement, BAC

[11] Certainly if CHL, which represents the vast majority of CFC's current assets, were considered in isolation for choice of law purposes, there could be no doubt that New York's interest would predominate for choice of law purposes.

transferred substantially all of CFC's assets to itself. Oblak Aff. Ex. 48 (§ 10.1, Asset Purchase Agreement); Ex. 301 (§ 9.6, Stock Purchase Agreement). New York law also governs the demand notes corresponding to the November 2008 Transactions. Oblak Aff. Ex. 58, Ex. 60. Likewise, New York law governs the agreements by which the July 2008 Transactions were effectuated. *See, e.g.*, Oblak Aff. Ex 31. (§11, Master Mortgage Loan Purchase and Subservicing Agreement).

C. The Internal Affairs Doctrine Does Not Apply Because MBIA's Rights As A Third Party Creditor Are At Issue

BAC may also argue, as it has elsewhere, that Delaware law applies under the internal-affairs doctrine because BAC and CFC are both incorporated in Delaware. *See Maine State Ret. Sys. v. Countrywide Fin. Corp.*, No. 2:10-CV-0302, 2011 WL 1765509, at *4 (C.D. Cal. 2011). The fact that BAC is a Delaware corporation does not control, and the internal affairs doctrine does not apply, where the rights of *external* third party creditors, such as MBIA, are at issue. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983) ("Different conflict principles apply, where the rights of third parties *external* to the corporation are at issue."); *Cooper Indus., LLC v. City of South Bend*, 899 N.E.2d 1274, 1290 (Ind. 2009) ("The fact the successor corporation was incorporated in Delaware does not control. While the law of the state of incorporation may determine issues relating to the internal affairs of a corporation, different principles apply where the rights of third parties external to the corporation are at issue.") (citing *First Nat'l City Bank*, 462 U.S. at 621); *Curbow Family LLC v. Morgan Stanley Investments Advisors*, No. 651059/10, 2012 N.Y. Slip Op. 22197, at *4 (Sup. Ct. N.Y. Cnty. July 18, 2012) (defining the "internal affairs" doctrine to govern "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders").

Moreover, any suggestion that the internal affairs doctrine applies in this context also improperly fails to recognize that a fundamental rationale for the successor liability doctrine is to make whole an injured third party (here, MBIA) that was entirely unrepresented in the

succession transactions between CFC and its subsidiaries and BAC and its non-CFC subsidiaries. *See Sweatland*, 181 A.D.2d at 246 ("tort claimants need protection against attempts by ongoing businesses to avoid liability through transfer of their operations to another legal entity."). Accordingly, numerous courts have rejected the application of the internal affairs doctrine under such circumstances, instead examining the totality of contacts and conduct, most importantly the conduct that injured the plaintiff. *See, e.g.*, *Colon*, 477 F. Supp. 2d at 625-26 (finding that New York law governs plaintiffs' successor liability claim "[w]here, as here, the plaintiffs are New York residents, the accident occurred in New York, the product at issue was sold to the plaintiff's employer in New York, and the defendant manufacturer continues to do business in New York, that state has the greatest interest in regulating the defendant manufacturer's conduct, notwithstanding that the manufacturer is incorporated and has its principal place of business in another state."); *UBS Sec. LLC v. Highland Capital Mgmt., L.P.*, 30 Misc. 3d 1230 (A) (Sup. Ct. N.Y. Cnty. Mar. 1, 2011) ("When determining conflicts issues, the courts of this state do not automatically apply the 'internal affairs' choice-of-law rule"); *see also Van Doren v. Coe Press Equip. Corp.*, 592 F. Supp. 2d 776, 786 (E.D. Pa. 2008) ("Pennsylvania's interest in protecting its citizens [in tort cases] will be greatly hindered if it is unable to hold out-of-state successor corporations liable for injuries suffered by its citizens for [tort harms] occurring within the state."); *Young v. Fulton Iron Works Co.*, 709 S.W.2d 927, 937 (Mo. Ct. App. 1986) ("a resident of Missouri can justifiably expect that if he is injured [in this state] the issue of whether a corporate successor to the company that manufactured the product can be held liable will be decided by Missouri law, not by the law of the state in which the transaction between the corporations happened to occur."); *Litarowich v. Wiederkehr*, 170 N.J. Super. 144, 150, 405 A.2d 874, 877 (1979) (applying law of state where injury occurred upon concluding that "[t]he corporate parties chose a body of local law to govern themselves, but they cannot thereby shut out a tort claimant whose concerns were unrepresented in the acquisition arrangements."); *Barron v. Kane & Roach, Inc.*, 79 Ill. App. 3d 44, 47, 398 N.E.2d 244, 246 (1979) ("The question before us, namely Birdsboro's liability for injuries sustained [at the hands of its]

predecessor . . . is to be determined by the law of Illinois, the situs of the injury and the domicile of the injured party."). *See generally Schultz*, 65 N.Y.2d at 197 ("the significant contacts are, almost exclusively, parties' domiciles and the locus of the tort"). Accordingly, there can be no dispute that New York law controls.

II. THE ASSET-STRIPPING TRANSACTIONS RESULTED IN A *DE FACTO* MERGER OF CFC, CHL, AND CSC INTO BAC

"The *de facto* merger doctrine creates an exception to the general principle that an acquiring corporation does not become responsible thereby for the pre-existing liabilities of the acquired corporation. This doctrine is applied when the acquiring corporation has not purchased another corporation merely for the purpose of holding it as a subsidiary, but rather has effectively merged with the acquired corporation." *Fitzgerald*, 286 A.D.2d at 574. The doctrine is based on the concept that "a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as concomitant to the benefits it derives from the good will purchased." *Id.* at 71 (citing *Grant-Howard*, 63 N.Y.2d at 296).

The "hallmarks" of a *de facto* merger include: (1) continuity of ownership, (2) cessation of ordinary business and dissolution of the acquired corporation as soon as possible, (3) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation, and (4) continuity of management, personnel, physical location, assets, and general business operations. *Id.* Courts will also examine "whether the acquiring corporation was seeking to obtain for itself intangible assets such as good will, trademarks, patents, customer lists and the right to use the acquired corporation's name." *Id.* "These factors are analyzed in a flexible manner that disregards mere questions of form and asks whether, in substance, it was the intent of the successor to absorb and continue the operation of the predecessor." *AT & S Transp.*, 22 A.D.3d at 752 (citing *Nettis v. Levitt*, 241 F.3d 186 (2d Cir. 2001); *City of New York v. Pfizer & Co.*, 260 A.D.2d 174 (1st Dep't 1999)). Additionally, a finding of *de facto* merger does not necessarily require the presence of

all of these factors, though some courts have held that continuity of ownership is a necessary element. *See, e.g.*, *In re N.Y.C. Asbestos Litig.*, 15 A.D.3d 254, 256-57 (1st Dep't 2005).

Notably, "there is no requirement that all of the events that are necessary to a finding of *de facto* merger occur at the same time." *Arnold Graphics Indus. v. Indep. Agent Ctr., Inc.*, 775 F.2d 38, 42 (2d Cir. 1985). Thus, courts should "not turn a blind eye to the reality" that a series of transactions (such as the Asset-Stripping Transactions here) "constituted a single, integrated transaction." *Orr v. Kinderhill Corp.*, 991 F.2d 31, 35 (2d Cir. 1993); *see also HBE Leasing Corp. v. Frank*, 48 F.3d 623, 635 (2d Cir. 1995) ("[i]t is well established that multilateral transactions may under appropriate circumstances be 'collapsed' and treated as a single integrated transaction [for a fraudulent conveyance analysis].").

MBIA applies these factors in turn below, all of which are satisfied under the undisputed facts.

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

Continuity of ownership is established where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation. *In re N.Y.C. Asbestos Litig.*, 15 A.D.3d at 256. This factor is relevant to *de facto* merger because "the essence of a merger" is continuity of ownership. *Id.*

Here, there is no dispute that BAC used its own stock to acquire CFC's stock in the Red Oak Merger. As a result, the same shareholders that owned CFC and its subsidiaries prior to the Red Oak Merger continued as owners of those legal entities following the Red Oak Merger. SUF ¶ 61. Thus, throughout execution of the Integration Plan, the former stockholders of CFC continued to have ownership of the assets that were once held by CFC and its subsidiaries that became, during the Asset-Stripping Transactions, assets of BAC. Accordingly, as even BAC's own expert admitted, continuity of ownership is satisfied. Oblak Aff. Ex. 24 at 235:17-23.

B. Countrywide Ceased Its Ordinary Business Operations

Another factor that supports a finding that a *de facto* merger occurred is the cessation of the acquired corporation's ordinary business operations and the dissolution of the acquired corporation as soon as possible. *Fitzgerald*, 286 A.D.2d at 574. Here, there is no dispute that CSC was delisted as a registered securities broker and ceased all business operations. SUF ¶¶ 174-175; *and see Fitzgerald*, 286 A.D.2d at 575 (finding *de facto* merger where the acquired corporation withdrew its membership from the New York Stock Exchange and surrendered its broker dealer number, rendering it incapable of engaging in securities trading activities).

Although, unlike CSC, CFC and CHL have minimal continuing operations to manage litigation and repurchase claims, those nominal operations do not create a genuine dispute of fact as to the cessation-of-operations factor. To the contrary, New York courts have held that, "[s]o long as the acquired corporation is shorn of its assets and has become, in essence, a shell, legal dissolution is not necessary before a finding of a *de facto* merger will be made." *AT & S Transp.*, 22 A.D.3d at 753; *Fitzgerald*, 286 A.D.2d at 575. That rule squarely applies here. Within a few months of the Red Oak Merger, the Asset-Stripping Transactions rendered CFC and CHL little more than shell entities. SUF ¶¶ 168-173. The November 2008 Transactions involved the sale to BAC of substantially all of CFC's and CHL's assets "used in CFC's mortgage business," such as intangible assets, technology, customer lists, and intellectual property. SUF ¶¶ 105-109; Oblak Aff. Ex. 48 at Schedule 2.2; *and see Wensing v. Paris Indus.-New York*, 158 A.D.2d 164, 167 (3d Dep't 1990) (*de facto* merger exception applies where in addition to the sale of "fixed" assets, record shows successor "also acquired all intangible assets, such as good will, and such other assets as trademarks, patents, customer lists and phone numbers"). Significant CFC subsidiaries, including Countrywide Bank and Balboa Insurance, which with CHL's assets comprised substantially all of CFC's assets, were also sold to BAC as part of the November 2008 Transactions. SUF ¶¶ 106, 114. CFC and CHL were left with only "toxic" assets that could not be moved, a minor subsidiary BAC intended to sell, and massive contingent liabilities. SUF ¶¶ 126-127. Thus, CFC and CHL no longer engage in their ordinary

pre-Red Oak Merger business operations and were rendered unable to engage in any revenue-generating business operations. SUF ¶¶ 165-176. CFC and CHL no longer originate or service home loans, market services or insurance products to customers, securitize mortgage loans, accept deposits, or acquire new customers. SUF ¶¶ 168-176. CFC and CHL are out of business.

As to CFC's and CHL's "wind-down" activities of "dealing with all of this litigation" and evaluating and responding to repurchase requests, these are mere by-products of a protracted liquidation process dominated and controlled by BAC. BAC's approval is required before a Countrywide mortgage loan can be repurchased. SUF ¶ 178. [redacted] SUF ¶¶ 183-184. The funding and booking of repurchase-related transactions is little more than an elaborate fiction, with BAC actually funding repurchases but using CHL as a pass through entity to absorb loan losses and deliver repurchased loans to BAC for final disposition. SUF ¶¶ 182, 185-187; Oblak Aff. Ex. 182. Moreover, as explained further below, BAC negotiates, authorizes, and pays for the resolution of litigation involving CFC and CHL. SUF ¶¶ 180, 188, 235-242. These facts demonstrate that Countrywide is no longer capable of doing business except through BAC, thus rendering CFC and CHL mere shell entities. *See Fitzgerald*, 286 A.D.2d at 375.

C. BAC Continues Countrywide's Business Operations

The continuation of the predecessor's business operations—as evidenced by a continuity of management, personnel, physical location, assets, and general business operations within the successor—is undisputed, and also supports a finding of *de facto* merger. *Fitzgerald*, 286 A.D.2d at 574; *Morales*, 18 Misc. 3d at 690. Here, BAC continues to operate the businesses it transferred through the Asset-Stripping Transactions, and the revenues associated with those operations benefit BAC and its non-CFC subsidiaries.

First, in its 2008 Annual Report, BAC boasted that "the Countrywide acquisition contributed $86.2 billion to total loans and leases, $17.4 billion to securities, $17.2 billion to MSRs and $63.0 billion to total deposits," and that "[m]ortgage banking income grew $3.1

billion due primarily to the acquisition of Countrywide." Oblak Aff. Ex. 23 at 19, 30. BANA increased its deposit base by $52 billion through the merger with Countrywide Bank and opened a new branch in Colorado. Oblak Aff. Ex. 23; Ex. 50 (pro-forma accounting spreadsheet showing $52 billion deposit liability transferred); Ex. 249 at BACMBIA-A000071879. As acknowledged by BAC's current CEO, BAC "ultimately put the operations of the two companies together." Oblak Aff. Ex. 96 at 64:13-14.

Second, BAC hired at least 19,300 former Countrywide employees to continue and to expand the combined Countrywide-BAC business operations, including several senior managers who remain employed in these various lines of business at BAC. SUF ¶¶ 189-193; *and see AT & S Transp.*, 22 A.D. 3d at 753 (offer of employment to predecessor employees and hiring of two former managers supported finding of *de facto* merger).

Third, BAC has continued the operations and businesses of CFC and CHL through physical offices and locations formerly owned and occupied by CFC and CHL. SUF ¶¶ 198-200. For example, Bank of America Home Loans now operates out of CFC's and CHL's former headquarters in Calabasas, California. SUF ¶ 198; Oblak Aff. Ex. 114 at 177:02-08 (Desoer testified that as President of the combined company, she moved her office to Calabasas, California). The choice of this location was motivated by a desire to "[r]etain[] talent and subject matter expertise" from the legacy Countrywide business. Oblak Aff. Ex. 115 at 272:19-25. The combined repurchase department also operates out of many former Countrywide offices, including offices in Westlake, California and in Arizona. SUF ¶ 200.

Fourth, BAC has continued to use the assets acquired from CFC, CHL, and CSC in its ongoing business operations. SUF ¶¶ 208-219. The servicing business, a major asset formerly owned by CHL, has now been merged into BANA and renamed Bank of America Home Loans Servicing. SUF ¶¶ 98-101. Likewise, CFC's banking subsidiary, Countrywide Bank, was merged into BANA along with its deposits and customer base, a few months after it was sold to BAC by CFC. SUF ¶¶ 213, 219. BAC continues to operate the combined mortgage business using the assets, including the technology platform formerly used in CFC's and CHL's mortgage

and servicing operations, mortgage servicing rights, furniture, fixtures, equipment, and real property. SUF ¶¶ 208-214. BAC continued to operate the Balboa Insurance business through 2011 until it sold that business to raise capital. SUF ¶ 215; Oblak Aff. Ex. 187.

Fifth, the continuation of the Countrywide entities' business operations by BAC is powerfully demonstrated by the fact that CFC's and its subsidiaries' former customers, upon visiting the former Countrywide website, are redirected to the Bank of America Home Loans website. Oblak Aff. ¶ 359.

In short, there is no genuine dispute that BAC has integrated and continued the traditional mortgage and servicing operations which were once the "core" of CFC's and CHL's business. Likewise, BAC has either discontinued or completely absorbed the capital-markets functions once handled by CSC into its own capital markets business. SUF ¶ 214. Therefore, BAC has continued the operations of the Countrywide Defendants' predecessors through the assets, subsidiaries, managers, personnel, and properties BAC acquired from CFC and its subsidiaries.

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

Courts have found this factor satisfied where, *inter alia*, the successor assumed contracts with independent contractors, or the successor assumed certain royalty obligations of the predecessor. *See Fitzgerald*, 286 A.D.2d at 575 (finding *de facto* merger could be proven through a showing that the acquired corporation ceased filing its own financial statements; that trading, legal, and management departments were subsumed within the acquiring corporation; and that, after surrendering its own broker dealer number, the acquired corporation did business under the acquiring company's broker dealer number); *AT & S Transp.*, 22 A.D.3d at 753 (finding assumption of contracts with independent contractor is evidence of *de facto* merger); *Morales*, 18 Misc. 3d at 693 (successor assumed royalty obligations to co-inventors of certain acquired assets).

Here, in connection with the Asset-Stripping Transactions and BAC's integration or absorption of CFC's, CHL's, and CSC's lines of business, BAC assumed numerous obligations

necessary to the ongoing operation of the mortgage origination, banking, servicing, and insurance businesses. SUF ¶¶ 201-207. Following the Asset-Stripping Transactions, BAC transferred the mortgage-origination business so that it was done under BAC's federal lending identification numbers (and retiring Countrywide's federal lending numbers), without which a mortgage lender cannot originate qualifying federal housing mortgages. SUF ¶ 202. On a going-forward basis, BANA assumed the deposit liabilities of CFC's former banking subsidiary, and BAC expressly assumed all liabilities with respect to the operating assets used in CFC's and CHL's mortgage business. SUF ¶ 203. In retaining a significant portion of Countrywide's former employees, BAC took on Countrywide's liabilities for their wages and benefits in connection with their ongoing employment in the lines of business BAC moved from CFC, CHL, and CSC to BAC and its non-CFC subsidiaries. SUF ¶ 201.

During the development of its Integration Plan, BAC reviewed Countrywide's leases and vendor contracts, and made plans—that it presumably carried out in connection with executing the Integration Plan—to assume obligations on those leases and contracts that were material to ongoing business operations. SUF ¶¶ 204-205. Building leases are necessary to ongoing operations because personnel need physical office space from which to operate the business. Similarly, contracts with third-party vendors to provide security, janitorial services, and courier services were among the essential contracts BAC planned to assume. SUF ¶¶ 204-205.

CFC filed its last financial statement with the Securities and Exchange Commission in August 2008 for the period ended June 30, 2008, and since then its financial reporting has been consolidated with BAC's financial reporting. SUF ¶ 207. Likewise, pursuant to a Management Services Agreement, all Countrywide back-office operations, including accounting, compliance, document management, finance, foreclosure services, human resources, information technology services, audit functions, legal, marketing and public relations, payroll, purchasing, tax accounting, telecommunications, and general management functions are now performed by BAC. SUF ¶ 206; Oblak Aff. Ex. 300.

In sum, BAC intentionally continued in effect, and assumed responsibility for, numerous liabilities and obligations of Countrywide that were essential to BAC's ability to continue to operate Countrywide's lines of business. This factor thus powerfully supports a finding of *de facto* merger. Along with the other factors described above, it shows that Countrywide's business operations survived intact after the series of transactions between Countrywide and BAC, that Countrywide's shareholders (having become BAC shareholders) retained their ownership interests in the transferred assets, and that BAC left behind mere shell entities that (it hoped) would bear the brunt of Countrywide's liabilities to third-party victims such as MBIA. The evidence of *de facto* merger is powerful and undisputed and fully supports summary judgment on the issue.

III. IN ANY EVENT, BAC ASSUMED CFC'S AND CHL'S LIABILITIES THROUGH ITS STATEMENTS AND CONDUCT

Even in the unlikely event this Court were to conclude that summary judgment on successor liability based on the *de facto* merger doctrine is unwarranted, the Court should nonetheless grant summary judgment on successor liability based on the assumption-of-liabilities doctrine.[12] "While no precise rule governs the finding of implied liability, the authorities suggest that the conduct or representations relied upon by the party asserting liability must indicate an intention on the part of the buyer to pay the debts of the seller." *Ladjevardian v. Laidlaw-Coggeshall, Inc.*, 431 F. Supp. 834, 839 (S.D.N.Y. 1977); *see also Beck v. Roper Whitney Inc.*, 190 F. Supp. 2d 524, 537 (W.D.N.Y. 2001).

Though BAC engaged in an elaborate set of transactions to carve out and leave behind Countrywide's contingent liabilities, because of reputational and regulatory concerns, BAC has

[12] While BAC sought to maintain Countrywide as a bankruptcy remote entity through an elaborate exploitation of corporate formalities—presumably to preserve the possibility of bankrupting Countrywide as a leverage point in litigation and shield itself from the repercussions of a Countrywide bankruptcy—BAC has continued to pay Countrywide's debts as they come due (and indicated an intent to do so in the future) because it has recognized the reputational repercussions of failing to do so would be severe, and indeed has enjoyed the reputational benefits of its representations that it will continue to pay those debts as they come due. *See* Oblak Aff. Ex. 108 (noting that while BAC "will not explicitly guarantee or assume the CFC debt," BAC's "intent at this time is to see that the debt is satisfied as it comes due. Practically, we recognize the consequences of not honoring the debt would be potentially severe…").

nonetheless paid or funded payment of all those liabilities to date as they came due.[13] BAC's officers and spokespersons made numerous statements, and BAC engaged in a pattern of conduct, confirming this intent to assume Countrywide's liabilities as they came due. Moreover, a finding of implied assumption is warranted because Countrywide's contingent creditors will otherwise be left without a viable remedy as a result of the Asset-Stripping Transactions.

A. BAC's Officers And Spokespersons Admit BAC Assumed Countrywide's Liabilities

"Admissions of liability on the part of officers or other spokesmen of the successor corporation are also considered in determining whether implied liability exists." *Ladjevardian,* 431 F. Supp. at 840. The statements of senior BAC officers such as those identified *supra,* at Part III.A, are significant because they reflect that BAC considered CFC's and CHL's contingent liabilities in deciding to purchase those entities and then made public disclosures that impacted investors' and creditors' expectations regarding BAC's satisfaction of legitimate claims against CFC and CHL. The statements made by BAC's current CEO that BAC bought Countrywide and intends to "stand up" and "clean it up" and that BAC "will make sure that we will pay when due" should be afforded significant added weight because Mr. Moynihan testified these statements were truthful and accurate when made, and the sentiments of his public statements are echoed in his testimony and email communications. SUF ¶¶ 222-228; Oblak Aff. Ex. 294.

Moreover, the intent reflected in such statements is confirmed by BAC's Integration Plan documents. For example, Joe Price's talking points, dated the day before the Red Oak Merger, explain that while BAC "will not explicitly guarantee or assume the CFC debt," BAC's "intent at this time is to see that the debt is satisfied as it comes due. Practically, we recognize the consequences of not honoring the debt would be potentially severe…" Oblak Aff. Ex. 108.

[13] The class of liabilities contemplated by this basis for successor liability encompasses a wider range of liabilities than those strictly necessary for ongoing operations, which is one element of a *de facto* merger, as described above in Argument Part II.D, and it includes debt obligations and contingent liabilities.

B. BAC Assumed All Countrywide's Liabilities As They Came Due

BAC has also engaged in a pattern of paying for the contingent liabilities of CFC and its remaining subsidiaries, including CHL and CSC, as they came due by negotiating, approving, expressly assuming, and financing the settlement of disputes with Countrywide's creditors and regulators. As noted above, BAC has already contributed or committed to contributing more than $[redacted] billion to cover the Countrywide Defendants' contingent liabilities, including settlements with regulators, the FHA, government sponsored entities, monoline insurers, and private investors. SUF ¶¶ 235-243. This pattern of conduct "indicate[s] an intention on the part of the buyer [BAC] to pay the debts of the seller [Countrywide]." *Ladjevardian*, 431 F. Supp. at 839.

That BAC funneled its assumption of liabilities through capital contributions to CFC and CHL does not change the fact that the contributions were made specifically for the purpose of paying for Countrywide's liabilities. Indeed, BAC's own internal financial accounting of these various payments explains that BAC is paying for Countrywide's liabilities. In connection with the proposed $8.5 billion RMBS investor settlement, BAC specifically made "an unconditional commitment to "pay directly or to make a capital contribution to cover CHL's portion of the settlement payment." SUF ¶ 238(c); Oblak Aff. Ex. 167 at CWMBIA0018539218. In connection with the Fannie/Freddie settlement, BAC elected to "[redacted]" SUF ¶ 236(c); Oblak Aff. Ex. 117 at Explanation No. 8. [redacted] SUF ¶ 241(b); Oblak Aff. Ex. 204. Thus, these are not contributions in the ordinary course of business, but rather are directly tied to payment of Countrywide's contingent liabilities and reflect BAC's financially assuming those liabilities as they come due.

Moreover, BAC's business persons have been involved in negotiating and authorizing these payments to cover Countrywide's contingent liabilities. For example, BAC's Michael Schloessmann and Greg Hobby are identified as signatories on several settlement agreements on behalf of CFC, CHL, CSC, and other former CFC subsidiaries. SUF ¶ 239; Oblak Aff. Ex. 181 (Schloessmann), Ex. 121 (Schloessman). BAC's own CEO acknowledged that he and other senior managers approved the proposed $8.5 billion RMBS investor settlement. SUF ¶ 238(a). BAC also negotiated the State Attorney General settlements on Countrywide's behalf, indemnified Countrywide in connection with those settlements, and assumed certain obligations under the various consent orders with certain States. SUF ¶ 235.

The purported limitations on liability that BAC wrote into the agreements by which it transferred Countrywide's assets to itself do not foreclose successor liability under the assumption-of-liabilities doctrine. *First*, "[a]n express disclaimer is not enough []to preclude the imposition of liability on the purchaser of corporate assets if 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." *See Marenyi v. Packard Press Corp.*, No. 90-CV-4439, 1994 WL 16000129, at *6 (S.D.N.Y. 1994) (citing *Ladjevardian*, 431 F. Supp. at 839). In this case, BAC's subsequent conduct has been to *repeatedly* assume and pay all those very liabilities as they have become due, consistent with statements to that effect made by corporate officers and spokespersons both before and after the Asset-Stripping Transactions. SUF ¶¶ 220-244. This demonstrates an intent by BAC to pay all Countrywide's contingent liabilities as they come due. Despite cautioning its employees that "it is important to respect corporate formalities of these separate legal entities to help prevent liabilities and contingent liabilities of legacy Countrywide from being implicitly guaranteed or assumed by Bank of America," BAC's statements and payments of CFC's and CHL's contingent liabilities demonstrate an intent by BAC to pay all those liabilities, thereby blurring the line between the companies in the eyes of creditors and even BAC's own senior business executives. Oblak Aff. Ex. 220 at BACMBIA-A0000079903; Ex. 115 at 450:22-25 ("Q: In general you didn't observe separate legal entities in the way that you operated the

business? A: That is correct."). Unlike in this case, the cases in which courts declined to find assumption based on explicit disclaimers did so in circumstances lacking any evidence of contradictory statements or conduct that evidenced an intent to pay for those purportedly disclaimed liabilities. *Wensing*, 158 A.D.2d at 167 (assumption exception not applicable where there was a contractual disclaimer and plaintiff did not otherwise point to any facts suggesting an agreement to assume those liabilities); *Beck*, 190 F. Supp. 2d at 537 (while contract limiting liability established no *express* assumption of liabilities, it did not foreclose finding of *implied* assumption based on "admissions of liability on the part of officers or other spokespersons of the alleged successor corporation."); *Marenyi*, 1994 WL 16000129, at * 7 (declining to find implied assumption based on single subsequent settlement due to absence of any contrary representations by corporate officers or spokespersons and additional subsequent disclaimers of liability); *Morales*, 18 Misc. 3d at 689 (assumption exception not applicable where there was a contractual disclaimer and plaintiff did not otherwise point to any facts suggesting an agreement to assume those liabilities).

Second, the agreements underlying the Asset-Stripping Transactions were not negotiated at arm's length and were approved pursuant to a cursory process, by boards beholden to BAC. SUF ¶¶ 128-164; *see Ripley v. Int'l Railways of Cent. Am.*, 8 A.D.2d 310, 316-17 (1st Dep't 1959), *aff'd*, 8 N.Y.2d 430 (1960) (concluding that dominance and control of parent corporation "precluded any possibility of genuine arm's length bargaining" between subsidiary and parent).[14]

[14] The process by which the Asset-Stripping Transactions were planned and approved, which was dominated and controlled by BAC, also gives rise to BAC's liability as CHL's successor pursuant to the Insurance Agreements. Under the Insurance Agreements, in connection with the contemplated sale of substantially all of its assets, CHL had an obligation to negotiate for BAC to assume its obligations as its "successor." Oblak Aff. Exs. 123 to 137 at 4.04(a). ("This Insurance Agreement shall be a continuing obligation of the parties hereto and shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns…" (4.04(a))); *see Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union, AFL-CIO v. Owens-Illinois, Inc.*, 758 F. Supp. 962, 971 (D.N.J. 1991) ("Stating that [the seller] had an affirmative obligation to secure the purchaser's assumption of the agreement may be viewed as simply another way of recognizing that [the seller] would be liable to the Union if the purchaser did not assume the agreement."). BAC exercised complete domination

Even though, at the time of the transfers, BAC was aware of Countrywide's mounting litigation and representation and warranty and fraud liabilities, the boards of CFC and CHL did not engage in any meaningful discussions or due diligence regarding the impact of these transactions on creditors or how such liabilities would be addressed. SUF ¶¶ 130-132, 134-136, 140, 142, 147, 150, 152, 156-158, 163-164, 231. Under these circumstances, where a self-serving limitation on liability was not negotiated at arm's length, such a provision may be set aside, particularly in light of BAC's prior and subsequent conduct evidencing an assumption and payment of Countrywide's contingent liabilities. *See* 13 AM. JUR. 2D CANCELLATION OF INSTRUMENTS § 26 ("A contract may be set aside if the parties did not bargain at arms' length.") (2d ed.).

C. The Asset-Stripping Transactions Leave Contingent Creditors Without Adequate Remedy Against Countrywide

"One of the facts to be considered [in applying the assumption-of-liabilities doctrine] is the effect of the transfer upon creditors of the predecessor corporation." *Ladjevardian*, 431 F. Supp. at 839. "[A] finding of implied assumption is more likely" where the predecessor became "a mere 'shell'" following the asset sales as opposed to one where "the predecessor corporation continues as a viable corporate entity" because there exists a "real possibility" that the creditors of Countrywide have been left without a remedy as a result of the Asset-Stripping Transactions. *Id.* at 839-40. As explained *supra*, at Part II.E, the Asset-Stripping Transactions rendered CFC and CHL shell entities. Both CFC and CHL are no longer engaged in any meaningful business, and all operational assets necessary to CFC's and CHL's "core" mortgage business were transferred to BAC. SUF ¶¶ 168-173, 246-247. Since November 2008, neither CFC nor CHL has had any viable business operations, nor are there any plans for either of these entities to resume any meaningful, income-generating business operations. SUF ¶¶ 171-173. Similarly,

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over the Asset-Stripping Transactions, causing CHL to breach its obligations under such successor clauses. *See Zinaman v. USTS N.Y., Inc.*, 798 F. Supp. 128, 132 (S.D.N.Y. 1992). Moreover, BAC did so for its own benefit and, as a result, assumed liability as CHL's successor under the Insurance Agreements. *See Kaliner v. Mt. Vernon Monetary Mgmt. Corp.*, No. 07 Civ. 4643(LMM), 2008 WL 4127767, at *2 (S.D.N.Y. Sept. 3, 2008) (citing *Gorrill v. Icelandair/Flugleidir*, 761 F.2d 847, 853 (2d Cir.1985); *Nat'l Mkt. Share, Inc. v. Sterling Nat'l Bank*, 392 F.3d 520, 525 (2d Cir.2004)).

CSC was shut down and its business has been absorbed into BAC's capital markets division. SUF ¶¶ 174-175, 248.

Since the Asset-Stripping Transactions, CFC and CHL have incurred massive operating losses and, by December 31, 2011, each had a negative net worth of more than $[redacted] billion, such that contingent creditors now face "wind-down" entities that cannot pay liabilities as they come due without financial assistance from BAC. SUF ¶¶ 249-255. Left without any viable business operations capable of generating revenues, CFC and CHL have been losing billions of dollars annually. SUF ¶¶ 249, 252. The "left behind" Countrywide entities were left with toxic assets that are illiquid and insufficient to satisfy the massive contingent liabilities these companies face. SUF ¶¶ 126-127, 251, 254-255. Thus, without BAC's funding of payments of Countrywide's liabilities as they come due, it is far more than a "real possibility" that contingent creditors who do not settle their claims on terms acceptable to BAC are left without a remedy against these shell Countrywide entities.

Moreover, although BAC will argue that it paid billions in consideration in connection with the Asset-Stripping Transactions, the consideration paid by BAC is irrelevant to the question of whether BAC assumed Countrywide's liabilities or the impact these transactions had on Countrywide's "left behind" creditors. The process by which BAC executed the Asset-Stripping Transactions was fundamentally unfair to contingent creditors, and aimed specifically at shielding BAC from legitimate Countrywide creditor claims. BAC used its domination and control of the Asset-Stripping Transactions to ensure that certain creditors beneficial or useful to BAC were paid in full, while contingent creditors such as MBIA are left to face shell entities that are winding down and without sufficient assets to pay liabilities. SUF ¶¶ 126-127, 256-264, 265-266. BAC was driven by its concern over its own borrowing relationships and its credit ratings to cause Countrywide to pay off its bank creditors while BAC assumed the public debt of CFC and CHL. SUF ¶¶ 256, 262-264. BAC may argue that "change of control" clauses required Countrywide to pay off those bank creditors. But this ignores the fact that BANA itself was a significant bank creditor of Countrywide that benefitted from those payments, which

repaid the credit lines *in full*, SUF ¶¶ 257-258, which explains in part why BAC did not even attempt to renegotiate the terms of those bank loans so that Countrywide could continue as a viable entity with its own financing sources. BAC may also argue it was "required" to assume all the public debt of CFC and CHL because contractual provisions were triggered by of the sale of substantially all of CFC's and CHL's assets. But it was BAC that elected to transfer all those assets. If BAC had left Countrywide as a substantial operating business, no assumption by BAC of the debt of CFC and CHL would have been required.

As a result, the Asset-Stripping Transactions were not designed, as BAC has suggested, altruistically to provide CFC and CHL with much needed liquidity for the benefit of their creditors. All the cash that went into CFC and CHL as part of the Asset-Stripping Transactions was paid out to favored creditors while BAC transferred to itself all the productive assets of Countrywide. The end results of this process were (1) to transfer all Countrywide's productive assets to BAC, (2) to pay creditors beneficial or useful to BAC, and (3) to leave other Countrywide creditors such as MBIA with claims against shell entities with insufficient assets and no viable business operations. If BAC had wished to benefit all the creditors of Countrywide, it could have pursued one of several other courses of action, including funding Countrywide as an ongoing business or putting Countrywide into bankruptcy, where all creditors would be treated equally.

BAC's undisputed statements and conduct, particularly in light of the impact of the Asset-Stripping Transactions on creditors, fully support a finding on summary judgment that BAC has implicitly assumed Countrywide's liabilities.

CONCLUSION

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

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Respectfully submitted,

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