

**Motion Sequence Nos. 60-61
MBIA Presentation on the Parties' Motions for
Summary Judgment on Successor Liability:
Assumption of Liabilities**

MBIA Insurance Corp. v. Countrywide Home Loans, Inc., et al.,

Index No. 08/602825

Redacted Version

Portions redacted pursuant to Orders dated 11/29/2012 and 1/3/2013 on Mot. Seq. No. 67

Roadmap Of Argument

TOPIC

Implied Assumption Of Liabilities Under New York Law

Each Of The Hallmarks Of Implied Assumption Are Demonstrably Present Here

BAC's Conduct In Perspective

BAC's Defenses Rely on Flawed And Invented Legal Theories

Overview Of Argument

- The Doctrine of Implied Assumption of Liabilities is clearly defined in the law.
- Here, Bank of America:
 - Manifested an intent to assume Countrywide’s liabilities;
 - Announced to the world through its CEO and its Senior Officers that BAC would pay Countrywide’s liabilities;
 - In fact has paid more than \$25 billion in contingent Countrywide liabilities;
 - Left the remaining contingent creditors, such as MBIA, with an empty shell to pay their claims; and
 - Totally dominates and controls the decisions respecting payment not only of Countrywide’s obligations generally, but specifically of the obligations in this case.
- The facts upon which these conclusions are based are extensive, well-chronicled, and undisputed.
- It is hard to find a clearer case for the application of the implied assumption of liabilities doctrine.
- In the wake of this mountain of undisputed evidence, Bank of America’s only answer is an attempt to re-write clear law.
- This attempt cannot succeed, and summary judgment should be granted in favor of MBIA on this issue.

Implied Assumption Of Liabilities Under New York Law

New York Law Looks To The Totality Of The Circumstances To Determine Implied Assumptions

- New York recognizes four common-law exceptions to the rule that an asset purchaser is not liable for the seller's debts: (1) **a buyer expressly or impliedly assumes the seller's debts**; (2) transactions undertaken to defraud creditors; (3) a buyer who *de facto* merged with a seller; and (4) a buyer that is a mere continuation of a seller. *Cargo Partner AG v. Albatrans*, 352 F. 3d 41, 45 (2d Cir. 2003); *AT&S Transp., LLC v. Odyssey Logistics & Tech. Corp.*, 22 A.D.3d 750, 752 (2d Dep't 2005).*
- There is no dispute that New York law governs MBIA's implied assumption of liabilities claim. *BAC Mem. 43 n. 135*.
- Because a finding of implied assumption depends on the facts and circumstances of each case, courts look at the totality of the circumstances:
 - **"While no precise rule governs the finding of implied [assumption of] 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).
 - "Factors to be considered include conduct or representations of the buyer indicating such an intent, including admissions of liability by officers or other spokesmen of the buyer, and the effect of the transfer upon creditors of the seller corporation." *Marenyi v. Packard Press Corp.*, No. 90-CV-4439, 1994 WL 16000129, *6 (S.D.N.Y. 1994) (citing *Ladjevardian*, 431 F. Supp. at 839-40).
- BAC twists the language in *Ladjevardian* to graft on a reliance requirement that Courts applying New York law have explicitly stated does not exist. See *Haywin Textile Prod., Inc. v. Int'l Fin. Inv. and Commerce Bank Ltd.*, No. 00 Civ. 8633, 2001 WL 984721, *4 (S.D.N.Y. Aug. 24, 2001) (Reasoning that under "New York [law] for these purposes—defendant bears successor liability because of its relationship to predecessor, not because of its relationship to plaintiff").

*Emphasis added unless otherwise noted

The Hallmarks Of Implied Assumption Of Liabilities Under New York Law

1. Manifestation of Intent to Assume Predecessor's Liabilities
 - Courts look for conduct that “indicate[s] an intention on the part of the buyer to pay the debts of the seller.” *Ladjevardian v. Laidlaw-Coggeshell, Inc.*, 431 F. Supp. 834, 839 (S.D.N.Y. 1977).
 2. Admissions from Senior Management
 - “Admissions of liability on the part of officers or other spokesmen of the successor corporation are also considered in determining whether implied liability exists.” *Id.* at 840.
 3. Payments of Predecessor's Liabilities
 - Courts will also consider whether “the successor assumed all the predecessor's debts and obligations.” *Kidz Cloz, Inc. v. Officially for Kids, Inc.*, No. 00 CIV 6270 (DC), 2002 WL 1586877, *5 (S.D.N.Y. July 17, 2002).
 4. Purchaser Leaves Predecessor as Mere Shell
 - “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. . . . [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.” *Ladjevardian*, 431 F. Supp. at 839-40.
 5. Purchaser Exercises Domination and Control over the Resolution of Predecessor's Liabilities
 - Courts will find that the purchaser has impliedly assumed liabilities where the purchaser takes over and controls the resolution of ongoing liabilities, for instance, where “there [i]s evidence that [the purchaser corporation] not only continued work on an ongoing project but agreed to subsidize the [project] in the face of a possible threat of liability.” *City of Richmond, Va. v. Madison Mgmt. Grp., Inc.*, 918 F.2d 438, 451 (4th Cir. 1990).
 - “[C]ourts will pierce the corporate veil . . . where a parent dominates and controls a subsidiary.” *Freeman v. Complex Computing Co., Inc.* 931 F.Supp. 1115, 1120 (S.D.N.Y. 1996).
- No one hallmark is essential to establish assumption of liabilities under New York law, but *all* are present here.

**Hallmark No. 1:
BAC Has Manifested Its Intent to Assume
Countrywide Liabilities**

BAC Was Well Aware of CFC's Legal Liabilities Before It Purchased Countrywide

- In the months leading up to the Red Oak Merger, Bank of America's senior executives and spokespersons admitted that Bank of America was aware of Countrywide's mounting contingent liabilities, and BAC factored such liabilities into the cost of purchasing Countrywide.
 - Ken Lewis, BAC's CEO at the time, stated: "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 Ex. 15 (New York Times, "Bank of America Joins Parade of Mortgage-Related Losses," Jan. 23, 2008) at 2.*
 - BAC spokesperson Scott Silvestri stated: "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 Ex. 104 (Corporate Counsel, "The subprime mortgage meltdown gives rise to a litigation industry—with Countrywide in the crosshairs," March 1, 2008) at 2.*
- In this case, Mr. Lewis testified similarly:
 - Q. Did you expect that, when Bank of America took on the burden of Countrywide, it would have to incur some liabilities?
 - A. There was . . . due diligence that . . . focused on the things we . . . just talked about, and . . . that there would be additional losses. And I think . . . best we could, we projected those in terms of losses by product and things of that nature, and then that we knew there would be some legal issues because they were . . . already having some legal issues, and so **there were some reserves created, obviously not we didn't create enough.**

Bea Ex. 111 (K. Lewis Dep. Tr., Apr. 19, 2012) at 31:20-32:8.

BAC Intended To Assume Countrywide's Representation And Warranty Liabilities

- In January 2008, BAC noted the “rapid increase in claims that [Countrywide had received] during the last six months,” and expressed “a concern that the [Countrywide] reserve balance may be significantly understated.”
Oblak Ex. 186 (Email from BAC employee Randy Shearer, Jan. 9, 2008) at BACMBIA-X0000340165.

- On June 25, 2008, then CFO Joe Price presented the following numbers to the BAC Board regarding BAC's estimation of Countrywide's rep & warranty (“R&W”) exposure:

– CFC R&W Reserve	\$1.0 B
– BAC additional R&W	1.3 B
– BAC Mono-lines	<u>1.0 B</u>
	<u>\$3.3 B</u>

Oblak Ex. 12 (Price Presentation to BAC Board of Directors, June 25, 2008) at BACMBIA-B0000018329.

- In that presentation—six days before the Red Oak Merger—Mr. Price, explained to the Bank of America Board of Directors that in considering its planned acquisition and integration of Countrywide into the BAC framework, BAC had “**significantly increased our estimate of [representation and warranty] exposure** since earlier this year” and that “[o]f the total \$3.3 billion in estimated exposure, we currently anticipate covering \$2.3 billion either through existing reserves or purchase accounting. **The remaining \$1 billion is assumed to come through our income statement over the next 4 years at about 250 million per annum.**” *Id. at BACMBIA-B0000018297-298;*

 *Id. at BACMBIA-B0000018298.*

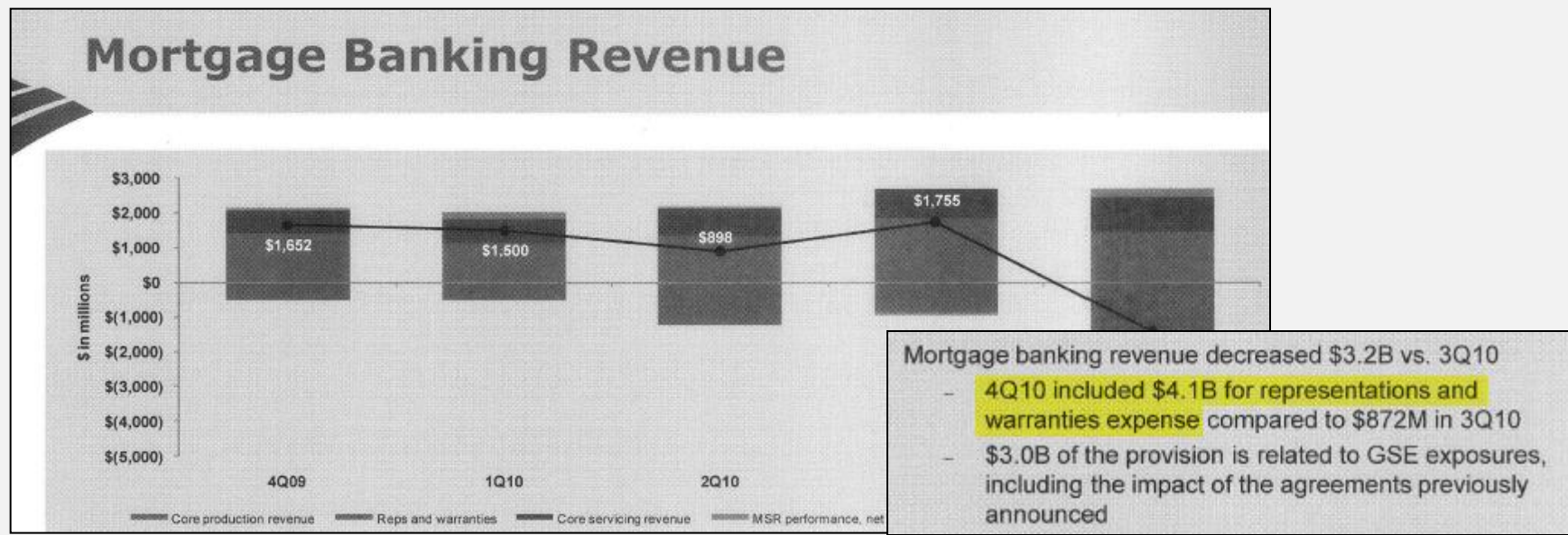
- Mr. Price then told the BAC Board that **an additional \$1 billion** in Countrywide litigation exposure would likewise not be covered by existing reserves or purchase accounting, and that the additional \$1 billion, or \$250 million per annum, would “**flow through our income statement over the next four years.**” *Id. at BACMBIA-B0000018300.*
- As a result, BAC anticipated that an **additional \$2 billion would flow through its income statement over the next four years for Countrywide's R&W exposure and litigation exposure** that was not covered by reserves or through purchase accounting. *Id. at BACMBIA-B0000018295-300.*

BAC Recognized The Importance Of The Admission In The Joe Price Talking Points And Tried To Conceal It

- BAC's extensive history of discovery abuses included improperly clawing-back Oblak Ex. 12 (BACMBIA-B0000018282, the "Joe Price Talking Points"), the June 25, 2008 document containing Joe Price's talking points to the BAC Board of Directors, on April 11, 2012, during the deposition of Amy Brinkley.
- BAC sought to improperly claw-back this document not because it contained privilege material, but because it constitutes evidence that BAC had planned to impliedly assume Countrywide's contingent liabilities *before* July 1, 2008.
- It took several meet and confers, and a motion to compel, before MBIA secured unencumbered use of this document.

Bank of America Continued To Take Losses From Rep & Warranty Exposure Through The Combined Business



- During the years following the merger, Bank of America continued to charge the rep & warranty liabilities against the earnings of the combined business.
- During a January 20, 2010 earnings call discussing rep and warranty liabilities, BAC's then-CFO, Joe Price, stated: "Look, I think the way to think about it is Countrywide had a reserve. We adjust that purchase accounting. **We've been adding to it quarterly** or dealing with it quarterly with expenses each quarter since then and **we'll continue to manage it that way.**" Oblak Ex. 122 (Email from G. Hobby to B. Desoer, J. Schakett, M. Schloessmann, et al., Jan. 20, 2010) at BACMBIA-G0000001275.



Oblak Ex. 116 (BAC 4th Quarter 2010 Earnings Results).

**Hallmark No. 2:
Public Statements By Senior BAC Executives Confirm
That BAC Assumed Countrywide's Liabilities**

BAC's CEO Has Publicly Stated That BAC Will Pay Countrywide's Liabilities As They Come Due

- Since acquiring substantially all of Countrywide's assets, BAC's current CEO, Brian Moynihan, has consistently made public statements designed to convince the public, its regulators, its creditors, and the market that BAC will cover the costs of Countrywide's liabilities:
 - In November 2010, Mr. Moynihan told investors that: "There'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'll pay for the things that Countrywide did.**" *Oblak Ex. 105 (Bloomberg, "Bank of America in 'Hand-to-Hand Combat' Over Mortgage Disputes, CEO Says," Nov. 6, 2010).*
 - In December 2010, Mr. Moynihan told a *New York Times* reporter, for an article concerning BAC's financial problems, that "[o]ur company bought it [Countrywide] and **we'll stand up; we'll clean it up.**" *Oblak Ex. 294 (New York Times, "Batting Cleanup at Bank of America," Dec. 11, 2010).*
 - During his deposition in this case, Mr. Moynihan testified, regarding his comment to the *New York Times*, that the statement was truthful and accurate when he made it, that "[w]e want to clean it up, absolutely," and that that "**was our intention then and that is our intention now**"—as the following clip demonstrates. *Oblak Ex. 96 (B. Moynihan Dep. Tr., May 4, 2012) at 122:12, 150:21-151:3;*  *Id. at 149:24-151:3*
 - Mr. Moynihan also testified that he meant what he said when he said BAC will "clean it up."  *Id. at 121:5-122:12.*
 - Mr. Moynihan confirmed in his deposition that he told investors that, in responding to repurchase claims, Bank of America "will make sure that **we will pay when due,**" and he confirmed this in his testimony, stating that BAC would pay settlements "when they were due. . . **we will pay legitimate claims.**" *Id. at 149:15-23; 146:12-147:14.*
- At no point did he deny BAC's responsibility to pay legitimate creditors of Countrywide.

Other Representatives of BAC Have Confirmed That BAC Has Paid And Will Continue To Pay For Countrywide's Liabilities

- In response to a suit brought by the DOJ against Countrywide, “Dan Frahm, a Bank of America spokesman, stressed that the allegations were focused on Countrywide’s conduct from the years 2004 to 2008, before Bank of America purchased it.” *Oblak Ex. 120 (New York Times, “Countrywide Will Settle Bias Suit,” Dec. 21, 2011) at 2.*
 - Mr. Frahm told the *New York Times*: “We discontinued Countrywide products and practices that were not in keeping with our commitment and **will continue to resolve and put behind us the remaining Countrywide issues.**” *Id.*
- Just a few weeks ago, a spokesman for Bank of America stated: “**We have resolved many Countrywide mortgage-related matters**, established large reserves to address these issues and identified a range of possible losses beyond those reserves, which we believe adequately addresses our exposures.” *New York Times, “Mortgage Crisis Presents a New Reckoning to Banks,” Dec. 9, 2012.*
- And just three days ago, BAC negotiated a settlement with Fannie Mae covering \$11.6 billion worth of claims against Countrywide and BANA. Mr. Moynihan issued the following public statement: “Together, these agreements are a significant step in resolving our remaining legacy mortgage issues, further streamlining and simplifying the company and reducing expenses over time.” *Bank of America Press Release, “Bank of America Announces Settlement with Fannie Mae to Resolve Agency Mortgage Repurchase Claims on Loans Originated and Sold Directly to Fannie Mae Through December 31, 2008,” Jan. 7, 2013.*

By Assuming Liabilities, BAC Stabilizes Its Position In The Market

- Just before the Red Oak Merger, BAC's then-CFO, Joe Price, noted that the consequences of BAC's failure to honor Countrywide debt "would be potentially severe" for BAC.

- Our 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 and would likely impact the company's ability to continue successfully borrowing in public debt markets

Oblak Ex. 108 (J. Price Talking Points For Delivery, June 30, 2008) at BACMBIA-X0000121449.

- As reflected in the press, Bank of America does not want the public, or the market, to "doubt . . . the entire company's willingness to support its . . . subsidiaries" because that would "damage Bank of America's standing in the credit markets or with rating firms, hurting its ability to borrow."

Bea Ex. 38 (Bloomberg, "BofA Said to Keep Countrywide Bankruptcy as 'Nuclear Option' to End Losses," Sept. 16, 2011) at 2.

- Moody's believes that BofA is likely to support CFC debt, else stiff consequences for the big bank's reputational risk

Oblak Ex. 157 (Email from BAC's M. Hakes to J. Price and others, May 5, 2008).

BAC Recognizes The Importance Of Its Statements In The Market

- Because BAC knows that its statements influence the public, Mr. Moynihan acknowledged that BAC has “a deep disclosure process that we go through,” and when he personally speaks on behalf of BAC, Mr. Moynihan testified: “I speak carefully and make sure I say what I mean.” *Oblak Ex. 96 (B. Moynihan Dep. Tr., May 2, 2012) at 29:3-4, 30:11-12.*
- Mr. Moynihan also testified that “[i]t is important for them [BAC’s public statements] to be accurate.” *Id. at 27:19-28:18.*
- Mr. Moynihan also agreed that he, as CEO of BAC, is aware that BAC’s public statements influence the following parties:
 - “regulators”
 - “customers” and
 - “creditors” *Id. at 29:5-25.*

**Hallmark No. 3:
BAC Has Paid Countrywide's Liabilities
As They Become Due**

BAC Has Paid *All* Of Countrywide's Liabilities As They Come Due

- Consistent with its pre-merger intentions, Bank of America has engaged in a pattern of paying for, or funding the payment of, all contingent liabilities of CFC and its remaining subsidiaries, including CHL and CSC, as they come due by ***negotiating, approving, expressly assuming, and financing the settlement of disputes*** with Countrywide's creditors and regulators. *See Oblak Ex. 12 (J. Price Presentation to the BAC Board of Directors, June 25, 2008).*
- Bank of America has already contributed or committed to contribute more than **\$ [REDACTED] billion** to cover Countrywide's contingent liabilities, including settlements with regulators, the Federal Housing Authority, government sponsored entities, monoline insurers, and private investors. *Oblak Ex. 349 (Settlement Agreement and Release between BAC, BANA, CFC, CSC, CHL, Syncora and Syncora Holdings, July 17, 2012); Oblak Ex. 204 (Legal Entity Action Request, July 17, 2012) at BACMBIA-Y0000013391; Oblak Ex. 162 (CHL's Selected Fin. Info., Dec. 31, 2011) at CWMBIA0018539316; Oblak Ex. 167 (CFC Selected Consolidated Fin. Info. Sept. 30, 2011) at CWMBIA0018539218; Oblak Ex. 119 (CFC's Selected Fin. Info., Mar. 31, 2011) at CWMBIA0018539233; Oblak Ex. 117 (Dec. 31, 2010 CFC Consolidated Fin. Info.) at BACMBIA-L0000003643-3644; Oblak Ex. 348 (Legal Entity Action Request, April 23, 2012).*
- Just three days ago, BAC negotiated an additional settlement of **\$11.6 billion** of "claims relating to the origination, sale and delivery of substantially all residential mortgage loans originated and sold directly to Fannie Mae . . . by entities related to ***Countrywide Financial Corporation (legacy Countrywide)*** and Bank of America, National Association (BANA)." *Bank of America Press Release, "Bank of America Announces Settlement with Fannie Mae to Resolve Agency Mortgage Repurchase Claims on Loans Originated and Sold Directly to Fannie Mae Through December 31, 2008," Jan. 7, 2013.*
- Fannie Mae's 8-K states that "Bank of America will pay Fannie Mae approximately \$10.3 billion pursuant to the resolution agreement" and, "[p]ursuant to the compensatory fee agreement, Bank of America will make an initial payment to Fannie Mae of \$1.3 billion, which amount represents a portion of the compensatory fees expected to be owed based on the parties' initial estimates." In total, Bank of America will pay approximately \$11.6 billion. *Fannie Mae 8-K, Jan. 7, 2013.*

Bank of America Began Its Work To Resolve And Pay For Countrywide's Liabilities Before It Completed The Red Oak Merger

- Even *before the Red Oak Merger* was complete, Bank of America began to negotiate settlements on behalf of Countrywide with several State Attorneys General regarding exposure stemming from CHL's fraudulent underwriting and loan-origination practices:
 - Two months after completing the Red Oak Merger, BAC's Barbara Desoer noted that “[f]or the past several months, BAC representatives have been meeting *intensively* with interested state attorneys general across the country to talk about what more can be done to help Countrywide borrowers.” *Oblak Ex. 113 (B. Desoer Talking Points with Chairman Frank, Sept. 15, 2008) at BACMBIA-0000098902.*
- As part of the settlement of these claims, **Bank of America indemnified CHL** in connection with its loan-modification responsibilities.

Bank of America Corporation (“BAC”) hereby undertakes and agrees that if, and to the extent that, (i) there occurs a breach or violation by CFC of the Order, and (ii) CFC incurs fines, penalties or other monetary damages (“Damages”) as a consequence thereof, then BAC shall indemnify and hold harmless CFC in the amount of such Damages.

Oblak Ex. 111 (Assurance of Voluntary Compliance between BAC and Pennsylvania, Jan. 15, 2009).

- Because Bank of America 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.

The AGs of California, Connecticut, Florida, and Illinois have agreed to dismiss their lawsuits and we hope other AGs who filed such suits will do the same.

Oblak Ex. 109 (Email attaching the Leadership Package for December 1st Nationwide Homeownership Retention Program, Dec. 31, 2008) at CWMBIA0013355535.

Bank Of America Has Paid Or Agreed To Pay Billions To Resolve Countrywide's Contingent Litigation Liabilities

Settlement	Amount	How Funded
Syncora	\$375 million	BAC funded: through capital contribution to CFC and CHL made same day as settlement. The contribution was funded by the combined mortgage operations and the "amount of the capital contribution takes into account the on-going expenses and the losses that CFC and its subsidiaries . . . have incurred on amounts recorded as contingent liabilities in connection with various legal proceedings and claims, the resolution of which is significant to BAC." <i>Oblak Ex. 349 (Settlement Agreement and Release between BAC, BANA, CFC, CSC, CHL, Syncora and Syncora Holdings, July 17, 2012); Oblak Ex. 204 (Legal Entity Action Request, July 17, 2012) at BACMBIA-Y0000013391.</i>
Department of Justice (DOJ)	\$335 million	BAC funded: through a capital contribution of \$ [REDACTED] "to partially cover CHL's share of the recent settlement with the U.S. Department of Justice and certain State Attorneys General." <i>Oblak Ex. 348 (Legal Entity Action Request, April 23, 2012).</i>
Bank of New York Mellon (BONY Mellon)	\$8.5 billion	BAC will fund: CHL's unaudited 12/31/11 financial statements state "BAC makes an unconditional commitment to pay directly or to make a capital contribution to cover CHL's portion of the settlement payment." <i>Oblak Ex. 167 (CFC Selected Consolidated Fin. Info., Sept. 30, 2011) at CWMBIA0018539218.</i>
Assured Guaranty	\$1.57 billion	BAC funded: through a capital contribution made on April 15, 2011 to CFC, which in turn made a capital contribution to CHL in the form of a demand note. <i>Oblak Ex. 119 (CFC's Selected Consolidated Fin. Info., March 31, 2011) at CWMBIA0018539233.</i>
FHLMC (Freddie Mac)	\$1.28 billion	BAC funded: Bank of America agreed to "absorb the legacy CHL liability for exposure under reps 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] increase in CHL's capital position. <i>Oblak Ex. 117 (CFC Consolidated Fin. Info., Dec. 31, 2010) at BACMBIA-L0000003643-44.</i>
FNMA (Fannie Mae)	\$1.52 billion	BAC funded: Bank of America 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] increase in CHL's capital position. <i>Id.</i>
FNMA (Fannie Mae) 2013	\$11.6 billion	Just three days ago, BAC negotiated an additional settlement of \$11.6 billion of "claims relating to the origination, sale and delivery of substantially all residential mortgage loans originated and sold directly to Fannie Mae from January 1, 2000 through December 31, 2008 by entities related to Countrywide Financial Corporation (legacy Countrywide) and Bank of America, National Association (BANA)." <i>Bank of America Press Release, "Bank of America Announces Settlement with Fannie Mae to Resolve Agency Mortgage Repurchase Claims on Loans Originated and Sold Directly to Fannie Mae Through December 31, 2008," Jan. 7, 2013.</i>
TOTAL	\$25.18 billion	


BAC Has Paid All Countrywide Creditors When Their Debts Come Due

- BAC's own attorneys explained yesterday that, so far, BAC has not permitted a single Countrywide debt to go unpaid when that debt has come due.

No evidence that any Countrywide creditor has not been paid when its debt became due.



Why Would BAC Pay \$25 Billion Worth Of Countrywide Contingent Liabilities If It Was Not Obligated To Do So

- BAC's CEO, Brian Moynihan, testified that BAC has the funds available to cover the payment of legacy Countrywide liabilities.  *Oblak Ex. 96 (B. Moynihan Dep. Tr., May 2, 2012) at 107:20-108:10.*

- BAC's denial of successor liability here directly contradicts Mr. Moynihan's statements, as well as BAC's conduct in assuming more than \$25 billion in Countrywide contingent liabilities.

- Indeed, making payments of this magnitude, to third parties, that BAC was not obligated to pay, would be a waste of corporate assets.

- And Mr. Moynihan confirmed that he had no intention of doing what is not in the best interest of BAC's shareholders:
 - Q. Again, you resolved these claims because you thought they were in the best interests of Bank of America's shareholders?
 - A. We resolved the claim that we thought was in the best interest of the company, yes.

Id. at 121:5-11 (objection omitted).

CFC And CHL Could Not Have Paid These Contingent Liabilities On Their Own

- BAC has paid for or funded payment of Countrywide's contingent liabilities because the Asset-Stripping Transactions left Countrywide unable to do so on its own.
- BAC has acknowledged that, as independent entities, CFC and CHL “**would likely not be able to settle existing claims or pay any judgments due to limited capital,**” even after BAC had injected billions into these entities.

• If **CFC** were separated from BAC, it would likely not be able to settle existing claims or pay any judgments due to limited capital. This is not likely a viable option.

• If **CHL** were separated from BAC, it would likely not be able to settle existing claims or pay any judgments due to limited capital. This is not likely a viable option.

Oblak Ex. 82 (BAC Separability Analysis, April 2011).

- BAC's former CFO, Joe Price, testified:
 - Q. Barring additional capital contributions from Bank of America to the Countrywide entities, is it fair to say that up until the time you ceased to be CFO, the legacy Countrywide entities could not have afforded to pay 8 and a half billion dollars for that settlement on their own?
 - A. My recollection is **they would have needed supplemental capital**, you know, or notes, borrowings may have been borrowings. *Oblak Ex. 26 (J. Price Dep. Tr., May 23, 2012) at 378:2-17 (objection omitted).*

BAC Makes Its Capital Contributions With The Express Purpose Of Covering The Costs Of Countrywide's Liabilities

- When BAC made its most recent capital contribution to CFC on July 17, 2012—the same day that BAC successfully negotiated the Syncora settlement on Countrywide's behalf—BAC noted that it was making the capital contribution with the specific purpose of covering Countrywide's contingent liabilities:

BAC will contribute \$ [REDACTED] of capital, through the delivery of a demand promissory note to CFC, which will in turn contribute that demand promissory note to CHL. The amount of the capital contribution takes into account the on-going expenses and the losses that CFC and its subsidiaries (collectively, CW) have incurred on amounts recorded as contingent liabilities in connection with various legal proceedings and claims, the resolution of which is significant to BAC.

Oblak Ex. 204 (Legal Entity Action Request, July 17, 2012).

- In connection with the BONY Mellon settlement, 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.” *Oblak Ex. 167 (CFC Selected Consolidated Financial Information, Sept. 30, 2011) at CWMBIA0018539218.*
- When BAC made its capital contribution to CFC on April 23, 2012, BAC noted that it was contributing the funds explicitly to cover “CHL's share of the . . . settlement.”

Rationale/Justification:

The funds will be used to partially cover CHL's share of the recent settlement with the U.S. Department of Justice and certain State Attorneys General (the “DoJ Settlement”) related to mortgage loan servicing obligations.

Oblak Ex. 348 (Legal Entity Action Request, April 23, 2012).

- In connection with the earlier Fannie Mae and Freddie Mac settlements, BAC agreed to “**absorb the legacy CHL liability** for exposure under reps and warranties given to the GSEs,” ultimately assuming the entire cost of the settlement through a series of transactions that resulted in a net \$ [REDACTED] increase in CHL's capital position. *Oblak Ex. 117 (CFC Selected Consolidated Fin. Info., Dec. 31, 2010) at BACMBIAL-0000003643-44.*

**Hallmark No. 4:
BAC Left CFC and Its Subsidiaries as Mere Shells**

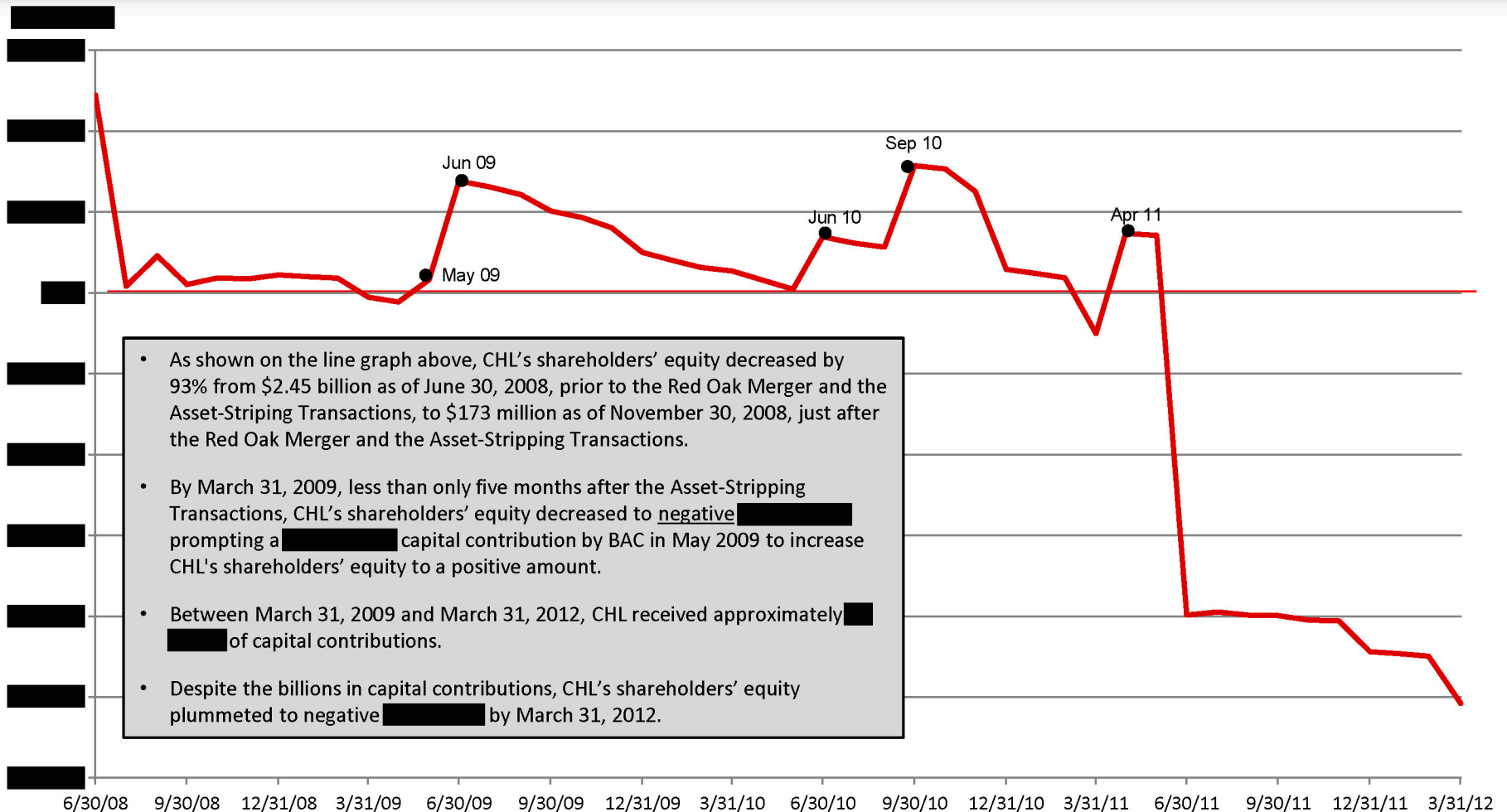
The Asset-Stripping Transactions Leave Countrywide's "Left Behind" Creditors Without A Remedy

- “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.” Here there exists more than a **real possibility that the contingent creditors of Countrywide have been left without a remedy** as a result of the Asset-Stripping Transactions. *Id.* at 839-40.
- CFC and CHL were rendered mere shell entities by the Asset-Stripping Transactions:
 - Bank of America kept CFC and CHL as “**orphan**” legal entities “[t]o avoid any potential legal ramifications.” *Rosenberg Ex. 4 (Legal Entity Planning Spreadsheet, Oct. 31, 2008)*.
 - “CFC and many of its subs continue to exist and will continue to exist,” however, “[m]ost have been **skinned down and do not have active ongoing business nor do they have associates . . . [they] aren’t active entities.**” *Id.*
 - Former Countrywide employee Irene Briones testified that she “didn’t think Countrywide Financial still exists, outside of a **shell corporation**” and that “**it is still there to deal with all of this litigation.**” *Oblak Ex. 164 (I. Briones Dep. Tr., Aug. 4, 2011) at 281:9-19.*

The Legacy CFC And CHL Entities Have No Viable Business Operations

- 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 Bank of America. *Oblak Ex. 82 (Separability Analysis, April 2011); Oblak Ex. 83 (Capstone Report, June 6, 2011).*
- CFC does not have any plans "to restart these operations in any capacity or to participate in any activities beyond the contractual obligations related to discontinued operations." *Oblak Ex. 83 (Capstone Report, June 6, 2011) at 7.*
- Without Bank of America 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. *See Oblak Ex. 82 (Separability Analysis, April 2011).*

Countrywide Home Loans Total Shareholders' Equity June 30, 2008 Through March 31, 2012

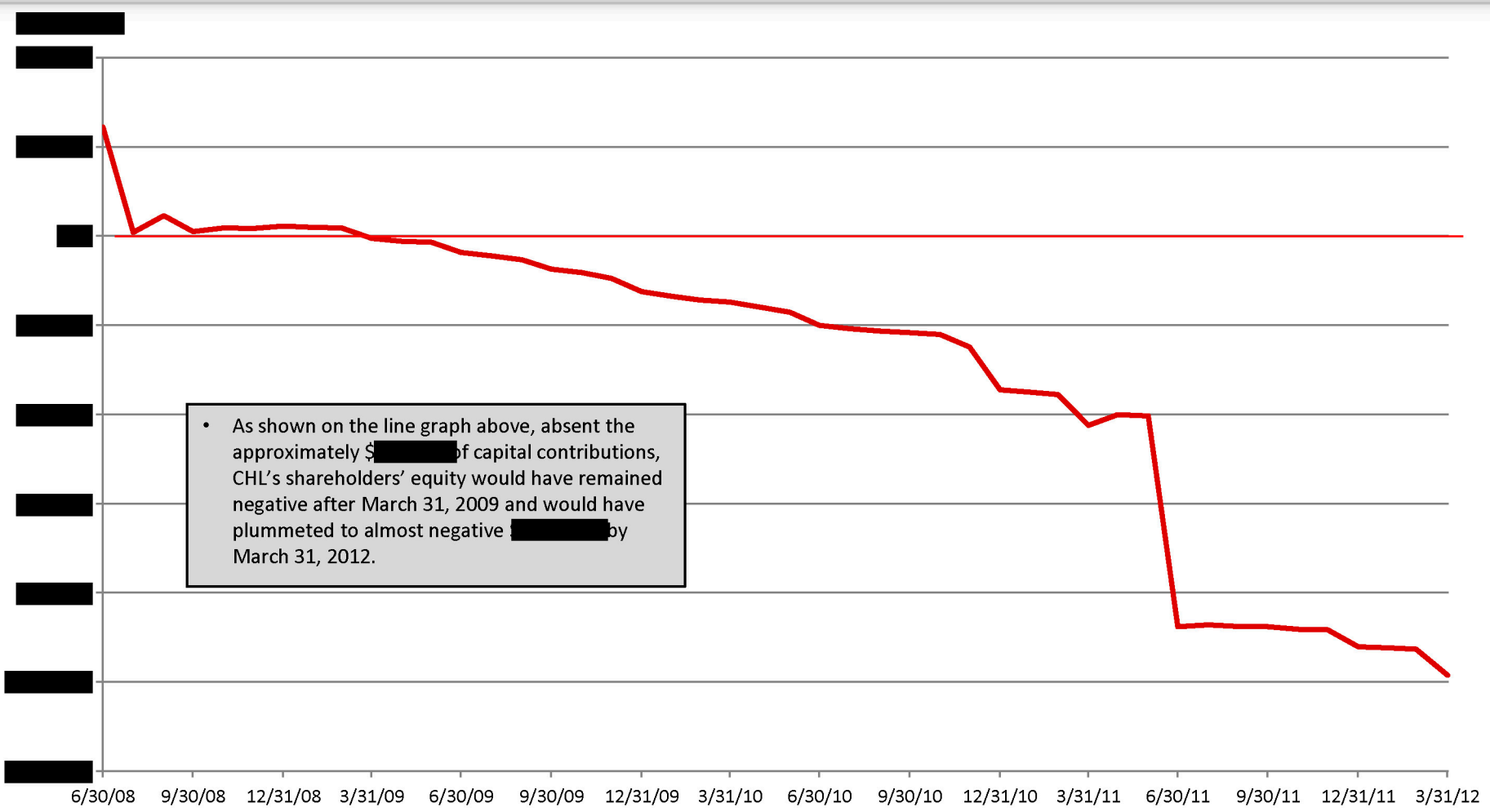


- As shown on the line graph above, CHL's shareholders' equity decreased by 93% from \$2.45 billion as of June 30, 2008, prior to the Red Oak Merger and the Asset-Stripping Transactions, to \$173 million as of November 30, 2008, just after the Red Oak Merger and the Asset-Stripping Transactions.
- By March 31, 2009, less than only five months after the Asset-Stripping Transactions, CHL's shareholders' equity decreased to negative [REDACTED] prompting a [REDACTED] capital contribution by BAC in May 2009 to increase CHL's shareholders' equity to a positive amount.
- Between March 31, 2009 and March 31, 2012, CHL received approximately [REDACTED] of capital contributions.
- Despite the billions in capital contributions, CHL's shareholders' equity plummeted to negative [REDACTED] by March 31, 2012.

Sources

Oblak Ex. 199 (CFC Consolidating Balance Sheet, June 30, 2008) BACMBIA-R0000006045; Oblak Ex. 200 (CFC Consolidating Balance Sheet, July 31, 2008) BACMBIA-R0000006044; Oblak Ex. 309 (CFC Consolidating Balance Sheet, Aug. 31, 2008) BACMBIA-R0000006041; Oblak Ex. 310 (CFC Consolidating Balance Sheet, Sept. 30, 2008) BACMBIA-R0000006046; Oblak Ex. 311 (CFC Consolidating Balance Sheet, Oct. 31, 2008) BACMBIA-R0000006047; Oblak Ex. 201 (CFC Consolidating Balance Sheet, Nov. 30, 2008) BACMBIA-R0000006048; Oblak Ex. 312 (CFC Consolidating Balance Sheet, Dec. 31, 2008) BACMBIA-R0000006049; Oblak Ex. 202 (CHL Entity Level Balance Sheet, 2009) BACMBIA-V0000028056; Oblak Ex. 85 (CHL Selected Consolidated Financial Information, Dec. 31, 2010) BACMBIA-L0000003629; Oblak Ex. 170 (CHL Selected Consolidated Financial Information, June 30, 2011) CWMBIA0018539288; Oblak Ex. 173 (CHL Selected Consolidated Financial Information, Mar. 31, 2012) CWMBIA-G0000202829.

Countrywide Home Loans Total Shareholders' Equity - Adjusted for Capital Contributions June 30, 2008 Through March 31, 2012



As shown on the line graph above, absent the approximately \$ [redacted] of capital contributions, CHL's shareholders' equity would have remained negative after March 31, 2009 and would have plummeted to almost negative [redacted] by March 31, 2012.

Sources
 Oblak Ex. 199 (CFC Consolidating Balance Sheet, June 30, 2008) BACMBIA-R0000006045; Oblak Ex. 200 (CFC Consolidating Balance Sheet, July 31, 2008) BACMBIA-R0000006044; Oblak Ex. 309 (CFC Consolidating Balance Sheet, Aug. 31, 2008) BACMBIA-R0000006041; Oblak Ex. 310 (CFC Consolidating Balance Sheet, Sept. 30, 2008) BACMBIA-R0000006046; Oblak Ex. 311 (CFC Consolidating Balance Sheet, Oct. 31, 2008) BACMBIA-R0000006047; Oblak Ex. 201 (CFC Consolidating Balance Sheet, Nov. 30, 2008) BACMBIA-R0000006048; Oblak Ex. 312 (CFC Consolidating Balance Sheet, Dec. 31, 2008) BACMBIA-R0000006049; Oblak Ex. 202 (CHL Entity Level Balance Sheet, 2009) BACMBIA-V0000028056; Oblak Ex. 85 (CHL Selected Consolidated Financial Information, Dec. 31, 2010) BACMBIA-L0000003629; Oblak Ex. 170 (CHL Selected Consolidated Financial Information, June 30, 2011) CWMBIA0018539288; Oblak Ex. 173 (CHL Selected Consolidated Financial Information, Mar. 31, 2012) CWMBIA-G0000202829.

**Hallmark No. 5:
BAC Exercises Domination and Control Over The
Resolution of Countrywide Liabilities**

BAC Controls The Negotiating And Settling Of Countrywide-Based Liabilities

- Courts will find that the purchaser has impliedly assumed liabilities where the purchaser takes over and controls the resolution of ongoing liabilities, for instance, where “there [i]s evidence that [the purchaser corporation] not only continued work on an ongoing project but agreed to subsidize the [project] in the face of a possible threat of liability.” *City of Richmond v. Madison Management Group, Inc.*, 918 F.2d 438, 451 (4th Cir. 1990).
- It is well settled that “courts will pierce the corporate veil . . . where a parent dominates and controls a subsidiary.” *Freeman v. Complex Computing Co., Inc.* 931 F.Supp. 1115, 1120 (S.D.N.Y. 1996) (citing a long string of citations).

BAC Dominates And Controls The Resolution Of Countrywide's Repurchase Request Liabilities

- Susan Welsh testified that BAC had to “fix the [Countrywide repurchase] process” so that “Countrywide could adhere to their . . . contractual obligations . . . and get through the . . . repurchase volumes that they had.” *Oblak Ex. 76 (S. Welsh Dep. Tr., Sept. 11, 2012) at 64:11-15.*
- BAC also took over the negotiation and resolution of Countrywide's liabilities with monolines who filed suit against Countrywide, such as MBIA:

The relationship with MBIA was initially operationally executed through the team in Jacksonville led by Susan Welsh. Her team has been the point of contact to MBIA since late 2008.

Oblak Ex. 101 (Memo Re: Representation and Warranties Repurchase Reserve Related to Second Lien Securitizations Insured by MBIA) at BACMBIA-X0000205211.

- Bank of America changed Countrywide's process such that BAC sets a monthly limit on the dollar amount of Countrywide repurchases that can be approved, and only BAC's Repurchase Oversight Group (“ROG”) can approve anything above the “cap” or limit:
 - Cindy Simantel, Senior Vice President in the combined Repurchase Department and former head of Countrywide's Repurchase Department, testified that the repurchase department “**had an amount set at the beginning of the month,**” and “would go to the [Repurchase Oversight Group] in order to notify them of a request to increase that. Because we **had to have the funds in our repurchase accounts** moved over and so **they had to take care of that for us.**”
Oblak Ex. 248 (C. Simantel Dep. Tr., Aug. 24, 2012) at 1211:14-1212:1.
 - Shareef Abdou, Senior Vice President, Senior Group Operations Manager, testified that “**it had to be both sides** would agree” to approve the repurchase of a Countrywide mortgage loan and agreed that “it would not be sufficient to approve a repurchase request if only the Countrywide individuals . . . approved the repurchase request.” *Oblak Ex. 103 (S. Abdou Dep. Tr., Sept. 7, 2012) at 74:3-22.*

BAC Dominates And Controls The Resolution Of Countrywide's Repurchase Request Liabilities

- BAC created its own strategy to “eradicate” Countrywide’s monoline exposure. *Oblak Ex. 76 (S. Welsh Dep. Tr., Sept. 11, 2012) at 68:20-69:3.*

Monoline Strategy Presentation

November __, 2008



Monoline activity

- Most monolines pursuing repurchase claims with increasing levels of frequency and hostility:
 - Assured: Repurchase demands for 2005-J and 2007-D
 - Ambac: No demand made to date
 - FGIC: Repurchase demands for 2006-H, 2006-S2, 2006-S3, 2006-S5, and 2007-C
 - FSA: Repurchase demands for 2005-C, 2005-D, 2006-F, 2007-A, and 2007-B
 - MBIA: In litigation
 - XL: Repurchase demands for 2005-K and 2006-D (minimal)
- Also demanding significant amounts of loan level data

Suggested Path to Resolution

- Convince monolines to forego litigation for negotiated resolution process
 - Undertake critical and reasonable internal review of issues raised by monolines
 - Quickly repurchase loans where position is weakest to build credibility and eliminate “poster children”
 - Assess legal and financial risk encompassed by discrete issues, including non-negotiable issues
 - Work through middle ground on loan-by-loan basis—commit to repurchase for failures of “prudent underwriting”
 - Expand resources dedicated to file review to increase review flow
 - Use process with others as leverage to potentially defuse MBIA litigation

Oblak Ex. 81 (BAC Monoline Strategy Presentation, November 2008) at BACMBIA-G0000001465; BACMBIA-G0000001477

BAC's Business Persons Have Controlled The Negotiation And Authorization Of Payments To Cover Countrywide's Contingent Liabilities.

- 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. *Oblak Ex. 181 (Consent to Judgment in United States v. Bank of America Corp., 1-12-cv-00361, signed by M. Schloessmann, April 4, 2012); Oblak Ex. 121 (Cost Sharing Agreement between the Bank of America Parties, the Countrywide Parties and First Franklin, signed by M. Schloessman, July 2012).*
- BAC's own CEO acknowledged that he and other senior managers approved the proposed \$8.5 billion RMBS investor settlement. *Oblak Ex. 96 (B. Moynihan Dep. Tr., May 2, 2012) at 52:18-21.*
- BAC also negotiated the State Attorneys 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. *Oblak Ex. 17 ("Post Purchase Optimism On mortgages at BofA," Oct. 28, 2008); Oblak Ex. 109 ("Comprehensive FAQ: Countrywide National Homeownership Retention Program) at CWMBIA001335536-550); Oblak Ex. 111 (Letter Agreement, Jan. 15, 2009); Oblak Ex. 112 (Letter Agreement, Dec. 16, 2010); Oblak Ex. 113 (Talking Points, Desoer/Finucane Briefing with Chairman Frank, Sept. 15, 2008); Oblak Ex. 179 (State of Nevada Second Amended Complaint, Nov. 2, 2011) at 3; Oblak Ex. 347 (Leadership Package for the AG Agreement, Oct. 6, 2008) at BACMBIA-R0000039813-40.*

BAC's Conduct In Perspective

Why Is BAC Straddling The Fence

- BAC knew it had to take on certain Countrywide liabilities to protect its reputation and the mortgage business it acquired from Countrywide, *Oblak Ex. 12 (Price Presentation to the BAC Board, June 25, 2008)* at BACMBIA-B0000018297-298, so BAC devised a strategy to:
 - **First:** *Separate the toxic assets* from the revenue-generating assets that BAC transferred to itself and leave empty shells behind;
 - **Second:** *Secure its reputation by reassuring the market*, BAC's regulators, the public, and creditors that Countrywide liabilities would be assumed by BAC;
 - **Third:** *Maintain CFC and CHL on life-support* to preserve the bankruptcy option to use the threat of pulling the plug as leverage with individual Countrywide creditors.
- The New York implied assumption of liabilities doctrine simply does not permit a corporation to “pillage the assets of [another corporation], unilaterally leaving behind only a ‘shell’ corporation which is incapable of satisfying the claims of other creditors, and expect to escape liability.” *Haywin Textile Prod., Inc. v. Int’l Fin. Inv. and Commerce Bank Ltd.*, No. 00 Civ. 8633, 2001 WL 984721, 4-5 (S.D.N.Y. Aug. 24, 2001) (quoting *Ladjevardian*, 431 F.Supp. at 839-40).
- Interestingly in *Haywin* as here, the successor took assets to satisfy pre-existing debt. The Court observed that because the successor sold the predecessor’s assets to satisfy the predecessor’s debt, the successor “assumed full responsibility for any claims against Azmat [the predecessor].”
Id. at 5.

BAC Has Preserved The Bankruptcy Option To Obtain Leverage Over Contingent Creditors

- BAC knew that the Asset Stripping Transactions it planned and effectuated would leave Countrywide unable to pay its rising contingent liabilities right from the start, and consequently, BAC initially considered putting Countrywide into bankruptcy:

Q. Okay. When did the issue of **whether to put Countrywide into bankruptcy** first arise at Bank of America?

MR. ROSENBERG: Do you understand the question?

THE WITNESS: I believe so.

Q. I'd just like a date, please.

MR. ROSENBERG: Give a date.

A. My -- my recollection is **preserving the optionality was on or around before Legal Day 1.**

Oblak Ex. 26 (J. Price Dep. Tr., May 23, 2012) at 314:23-315:9.

- Although BAC knows it will ultimately **"pay legitimate claims,"** in the end, BAC continues to contest successor liability in order to gain leverage in resolving litigation with Countrywide's contingent creditors such as MBIA. *Oblak Ex. 96 (B. Moynihan Dep. Tr., May 2, 2012) at 146:12-147:14.*

- BAC has confirmed this strategy in cases such as *Walnut Place LLC v. BONY*, where it has argued that Countrywide-post-merger does not have the means to pay injured plaintiffs:
 - In support of the BONY settlement, Capstone Valuation Services LLC concluded that as of March 2011, the "value of the assets of CFC would enable a maximum recovery of no more than \$4.8 billion" to explain why BAC's offer of \$8.5 billion would be a good deal. *Oblak Ex. 83 (Capstone Report, June 6, 2011) at 3.*
- This enables BAC to settle claims at an enormous discount:
 - Per *Bloomberg's* September 16, 2011 article, "[t]he threat of a Countrywide bankruptcy is a 'nuclear' option that Chief Executive Officer Brian T. Moynihan could use as leverage against plaintiffs seeking refunds on bad mortgages." *Bea Ex. 38 (Bloomberg, "BoFA Said to Keep Countrywide Bankruptcy as 'Nuclear Option' to End Losses," Sept. 16, 2011)*

The Asset-Stripping Transactions Were Designed To Impair Contingent Creditors' Recovery Against Countrywide's Operations

- Bank of America's conduct in designing the Asset-Stripping Transactions was for its own benefit, and **not** for the benefit of MBIA or any of Countrywide's other "left behind" creditors.
 - The Asset-Stripping Transactions were not designed, as Bank of America has suggested, altruistically to provide CFC and CHL with liquidity for the benefit of creditors.
 - Instead, the vast majority of the cash that went into CFC and CHL as part of the Asset-Stripping Transactions was immediately paid out to favored creditors or contributed to Countrywide Bank while Bank of America transferred to itself all the productive assets of Countrywide.
 - The end results of this process were:
 - all of Countrywide's productive assets went to BAC (and its non-CFC subsidiaries);
 - creditors beneficial or useful to BAC were paid in full (including BAC's own banking subsidiary);
 - other Countrywide creditors, such as MBIA, were left with claims against shell entities with insufficient assets and no viable business operations; and
 - BAC made billions. BAC's Press Release from the First Quarter of 2009 boasted:

Net revenue nearly quadrupled to \$5.2 billion primarily due to the acquisition of Countrywide and from higher mortgage banking income

Bea Ex. 109 (BAC Press Release, "Bank of America Earns \$4.2 Billion in First Quarter," April 20, 2009) at 6.

**BAC's Defenses Rely On Flawed
And Invented Legal Theories**

**BAC Defense No. 1: *Ladjevardian* Is Good Law Today—
It Is Just Bad Law For BAC**

Ladjevardian Is Good Law Today—It Is Just Bad Law For BAC

- BAC’s statement that *Ladjevardian* is “a 1977 federal court decision that has not been followed since” is patently false. *BAC Mem. at 48.*
 - Numerous courts all over the country have cited and relied on *Ladjevardian* and its underlying rationale for the implied assumption exception in their adjudication of successor liability claims:
 - ***Haywin Textile Prod., Inc. v. Int’l Fin. Inv. and Commerce Bank Ltd., No. 00 Civ. 8633, 2001 WL 984721, *5 (S.D.N.Y. Aug. 24, 2001)*** (“IFIC cannot pillage the assets of Azmat, unilaterally leaving behind only a ‘shell’ corporation which is incapable of satisfying the claims of other creditors, and expect to escape liability”) (citing *Ladjevardian*, 431 F. Supp. at 839-40).
 - ***Antiphon, Inc. v. LEP Transport, Inc., 454 N.W.2d 222, 225-26 (Mich. App. 1990)*** (“The factors to consider are: (1) the effect of the transfer on the creditors of the predecessor corporation; and (2) admissions of liability on the part of officers or other spokespersons of the successor corporation.”) (citing *Ladjevardian*, 431 F. Supp. at 839).
 - ***Morris Ave. Corp. v. Daniel Realty Corp., 429 So.2d 268, 271-72 (Ala. 1983)*** (“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 . . . The presence of such an intention depends on the facts and circumstances of each case. One of the facts to be considered is the effect of the transfer upon creditors of the predecessor corporation.”) (quoting *Ladjevardian*, 431 F. Supp. at 839).
- In addition, *Ladjevardian* is cited as relevant precedent by Fletcher in 15 WILLIAM M. FLETCHER, CYCLOPEDIA OF LAW OF THE PRIVATE CORPORATIONS SECTION 7124.

**BAC Defense No. 2: Reliance is Not a Requirement
for the Implied Assumptions Exception to Successor
Liability Because the Doctrine Focuses on Post-
Acquisition Conduct**

BAC Is Wrong That Assumption Of Liabilities Requires Reliance

- Under New York law, the “defendant bears successor liability because of its relationship to [the] predecessor, **not because of its relationship to plaintiff.**” *Haywin*, 2001 WL 984721, at *4.
- BAC resorts to linguistic acrobatics to twist the plain meaning of the language of the Court in *Ladjevardian*. *BAC* Opp’n 37 n. 114 (quoting *Ladjevardian*, 431 F. Supp. at 839).
 - The *Ladjevardian* Court stated that: “[t]he 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*, 431 F. Supp. at 839.
 - Plainly, what this means is that the conduct alleged by the party asserting liability must indicate an intention on the part of the buyer to pay the debt. No fair reading of this language could extract a reliance requirement.
- Any doubt is laid to rest by *Haywin*. In *Haywin* the Court firmly established that assumption of liabilities is based solely on the relationship between successor and predecessor, and not on any relationship with plaintiff. *Haywin*, 2001 WL 984721, at *4.
 - In contrast to contract law that requires the demonstration of an intended, relied-upon relationship between plaintiff and defendant, “[w]hen a party sues claiming that the defendant is a successor-in-interest . . . his argument is not premised upon his particular status, but rather upon the defendant’s position of exposure to general liability for the debts of the predecessor.” *Id.*
- Consequently, BAC is not liable as successor because of its relationship with **MBIA** (or because of MBIA’s reliance on that relationship), but rather, BAC is liable as Countrywide’s successor because of BAC’s relationship with **Countrywide**.
 - *Kidz Cloz*, 2002 WL 1586877, at 5 (“New York law does not . . . require plaintiffs to allege that the successor assumed the predecessor’s debts and obligations [with regards] to a [particular] party to the lawsuit”).

The Implied Assumption Doctrine Focuses On Post-Acquisition Conduct


- Furthermore, if this Court were to adopt BAC's argument that MBIA must show that it relied on BAC's statements that BAC would assume Countrywide's liabilities **before** MBIA agreed to enter into the insurance agreements with Countrywide would nullify the entire doctrine of implied assumption of liabilities.
 - This is because most of the doctrine's beneficiaries are, like MBIA, contract or tort creditors whose claims accrued before the successor comes in and strips the predecessor of all of its assets. It would be **impossible** for such creditors to demonstrate that, in their dealings with the predecessor, they relied on **future** statements and representations not yet made by the not-yet identified successor.
- This is precisely why courts have recognized that “[t]he assumption doctrine focuses on [the] defendant [purchaser’s] **post-acquisition** conduct”—and not its pre-acquisition conduct. *Moriarty v. LSC Ill. Corp., No. 98 c 7997, 1999 WL 1270711, at *6 (N.D. Ill., Dec. 29, 1999) (emphasis in original).*

**BAC Defense No. 3: BAC's Self-Serving Disclaimers Do Not
Insulate BAC From Liability**

BAC's Attempt To Disclaim Liability In Agreements It Prepared Does Not Foreclose Liability Under Assumption Of Liabilities Doctrine

- “An 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.” *Marenyi, 1994 WL 16000129 at 6 (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.
- Unlike here, 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, v. Paris Indus.-N.Y., 158 A.D.2d 164, 166-67 (3d Dep't 1990)* (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 v. Roper Whitney, Inc., 190 F. Supp.2d 524, 537 (W.D.N.Y. 2001)* (contractual limitation only foreclosed express assumption, not implied);
 - *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 v. City of New York, 18 Misc.3d 686, 689 (N.Y. Sup. Ct. Kings Cty. 2007)* (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).

Self-Serving Contractual Disclaimers Are Not Enforceable When They Are Not Negotiated At Arm's Length

- Contractual disclaimers have no effect in circumstances such as the present case—where BAC dominated and controlled the CFC and CHL Boards' approvals of the Asset Transfers, and thus, the transfers were not negotiated at arms' length. *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).
- 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 (2d ed.)* ("A contract may be set aside if the parties did not bargain at arms' length.").
- Following the Red Oak Merger, BAC replaced the legacy Countrywide individuals on the CFC and CHL Boards with individuals loyal to **BAC**, not CFC. Essentially, "BofA put in their own board." *Oblak Ex. 99 (May 5, 2011 Capstone Interview Notes with BAC executive G. Hobby) at CAPSTONE-MBIA00000006.*
- CFC Board Member Helen Eggers testified:
 - Q. And in that time period that you were on CFC's board of directors, you were an employee of Bank of America?
 - A. **I work for Bank of America.** *Oblak Ex. 70 (H. Eggers Dep. Tr., Apr. 27, 2012) at 265:19-265:22.*
- CFC Board Member Helga Houston testified: 
 - Q. Do you recall receiving any payment from Countrywide as a result of your board service on CFC?
 - A. Not that I recall.
 - Q. Did you consider yourself to be—to have any duty of loyalty to Bank of America as an employee of Bank of America?
 - A. I don't—I'm not sure I understand what you mean.
 - Q. Okay. At this time when you sat on CFC's board of directors, did you feel you—did you consider that you owed a duty of loyalty to Bank of America?
 - A. I don't know how to interpret "duty of loyalty." **I carried out my responsibilities as an employee of Bank of America.**
Oblak Ex. 67 (H. Houston Dep. Tr., April 23, 2012) at 56:24-57:18 (objections omitted).

**BAC Defense No. 4: Successor Liability Does Not Require
that Plaintiffs Negotiate Contract Terms to Protect
Themselves From Future Hypothetical Asset Stripping
Transactions**

BAC's Change Of Control Argument Is Nonsensical

- BAC's argument that MBIA's claim of successor liability should fail due to assumption of liabilities because MBIA did not negotiate change-in-control provisions into the Insurance Agreements makes no sense. *BAC Opp'n 45; BAC Mem. 12-13, 49.*
- Successor liability is not dependent on contractual provisions that "might have been."
- In any event, such provisions would be unworkable and would not provide MBIA with any real remedy.
 - Change-in-control provisions such as those found in CFC's and CHL's loan agreements call for an acceleration of the maturity of debt upon a change of control. But that type of provision is never found in insurance contracts governing arrangements for credit enhancement on RMBS securities because there is no debt to accelerate and the obligations created by such contracts are intended to be continuing. Ratings agencies could not assign a credit rating to an RMBS security if the insurer upon whose credit that rating is based could be released from its insurance obligations upon a change in the control of the Master Servicer. MBIA has never disclaimed those obligations, and has faithfully paid them.
 - Likewise, a change-of-control provision conditioning the transfer of substantially all of Countrywide's assets upon the consent of MBIA (like the provision in a contract between AMBAC and EMC Mortgage) is toothless, as was born-out when JP Morgan (EMC's alleged successor) ignored the supposed consent rights of AMBAC (which BAC argues MBIA could have also negotiated), leaving AMBAC with a damages claim against EMC and a successor liability claim against JP Morgan.
 - So even assuming, arguendo, that MBIA could have negotiated such consent provisions, any failure to honor such a clause would **provide MBIA with only a breach of contract claim against Countrywide**, and no claim against BAC, **leaving MBIA facing the same shell Countrywide entities** it faces now.

Conclusion

- BAC is liable as CFC's successor in interest because BAC's conduct establishes the Hallmarks of Implied Assumption of Liabilities:
 - BAC has manifested its intent to assume all of Countrywide's legacy liabilities;
 - Members of BAC's senior management have made repeated public statements intended to confirm BAC's assumption of all Countrywide's legacy liabilities;
 - BAC has paid *all* of Countrywide's liabilities;
 - BAC left CFC and its subsidiaries as mere shells; and
 - BAC exercises domination and control over the resolution of Countrywide liabilities.

- This is as clear a case as there could be for the application of the Implied Assumption Doctrine.