MBIA Presentation on The Parties' Motions for Summary Judgment on Successor Liability Based on De Facto Merger (Motion Sequence Nos. 60-61)

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
Overview: Bank Of America "Integrates" And "Combines" Countrywide's Productive Assets And Operations Into Itself
Bank Of America's De Facto Merger With Countrywide Under New York Law
Choice Of Law: New York Law Controls The De Facto Merger Claim
Even If Delaware Law Did Control, And It Does Not, Bank Of America Would Be Liable Under The Correct Delaware De Facto Merger Standard
Conclusion

Overview: Bank Of America "Integrates" And "Combines" Countrywide's Productive Assets And Operations Into Itself

BAC Cannot Avoid Countrywide's Liabilities Through Abuse Of The Corporate Form

- MBIA's successor liability claim seeks to redress an extreme abuse of corporate form– where BAC attempted to gain the economic benefits of acquiring all of Countrywide's operating assets, free of the corresponding liabilities.

- To curb such abuse, New York and other states have developed successor liability doctrines that protect creditors by looking past the corporate form to the underlying substance of the transactions:
  - "[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." Fitzgerald v. Fahnestock, 286 A.D.2d 573, 575 (1st Dep't 2001) (citing Grant-Howard Assocs. v. Gen. Housewares Corp., 63 N.Y.2d 291, 296 (1984)).*
  - Successor liability is premised on "the familiar law that a corporation cannot disable itself from responding to liability for its acts by distributing its assets." Cyr v. B. Offen & Co., Inc., 501 F.2d 1145, 1153 (1st Cir. 1974) (citing Pierce v. United States, 255 U.S. 398 (1921)).
  - Liability is imposed as an "exception[in] response to inequities [that] occur if the doctrine that corporations are separate and distinct entities is blindly accepted." Monroe v. Interlock Steel Co., Inc., 487 N.Y.S.2d 1013, 1015 (N.Y. Sup. Ct. 1985).

- Under at least two successor liability doctrines–de facto merger and implied assumption of liabilities–MBIA is entitled to summary judgment on the record before the Court.

* Emphasis added throughout presentation, unless otherwise indicated.

BAC Is No Mere "Shareholder"; It Merged Countrywide's Business Into Its Own And Is Liable As A Successor

- BAC is not just a "shareholder" of Countrywide, as it argued to the Court at the outset of the case. See BAC Reply Mem. I.S.O. Mot. To. Dismiss, Nov. 13, 2009, at 7 ("Although there was an actual merger between the BAC subsidiary and Countrywide Financial, there was no merger between BAC and Countrywide Financial; BAC simply became Countrywide Financial's sole shareholder.").
- Instead, BAC engineered a series of transactions through which it acquired <u>all</u> of Countrywide's operating assets:
  - The "Red Oak Merger" was a July 1, 2008, stock-for-stock transaction by which former CFC shareholders became BAC shareholders, when CFC merged into a specially-formed BAC subsidiary named Red Oak Merger Corporation. See Oblak Ex. 154 (BAC Form 8-K, July 1, 2008).
  - The "July 2008 Transactions" immediately followed the Red Oak Merger–between July 1 and July 3, 2008–and involved CFC and its subsidiaries (principally CHL) selling assets and subsidiaries to BAC and certain BAC subsidiaries. Oblak Ex. 28 (CFC Form 8-K July 8, 2008).
  - The "November 2008 Transaction" took place on November 7, 2008 and included the sale to BAC of "substantially all" of CFC's and CHL's remaining assets and **all** operations through an "Asset Purchase Agreement" (as to CHL) and "Stock Purchase Agreement" (as to CFC). Oblak Ex. 47 (BAC Board Minutes, Sept. 19, 2008) at BACMBIA-W0000001965-66.
- The goal of these transactions was to thoroughly integrate Countrywide's businesses into BAC's own:
  - "**The success of the merger will depend**, in part, on our ability to realize the anticipated benefits and cost savings **from combining the businesses of Bank of America and Countrywide**. However, to realize these anticipated benefits and cost savings, **we must successfully combine the businesses of Bank of America and Countrywide**." Oblak Ex. 321 (BAC Form S-4, Feb. 13, 2008) at BACMBIA-C0000003258.
  - BAC's former CEO, Ken Lewis, explained that the "objective after we bought Countrywide . . . [was] to **combine the companies**" and Bank of America then planned "for the **integration of Bank of America and Countrywide mortgage businesses**." Bea Ex. 111 (K. Lewis Dep. Tr., April 19, 2012) at 8:8-8:19.
  - "The concept was **all parts of the business** regardless of what the function was . . . **would operate in the Bank Of America structure**, again, regardless of legal entity." Oblak Ex. 114 (B. Desoer Dep. Tr., May 15, 2012) at 158:6-158:11.
- These transactions fall squarely within New York's de facto merger doctrine of successor liability, which "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.

BAC Intended To Assume Countrywide's Liabilities, And Is Thus Liable As Successor On That Basis As Well

- BAC's intent to assume Countrywide's liabilities was acknowledged internally prior to the merger with Countrywide:
  - Per Bank of America's CFO, Joe Price, the day before the Red Oak Merger: BAC "will not explicitly guarantee or assume the CFC debt," but its **"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 Ex. 108 (J. Price Talking Points, June 30, 2008) at BACMBIA-X0000121449.
  - On June 25, 2008—six days before the Red Oak Merger—Price explained to the Bank of America Board of Directors that BAC "currently anticipate[s] covering $2.3 billion [of Countrywide's rep & warranty exposure] 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." Oblak Ex. 12 (J. Price Talking Points, June 25, 2008) at BACMBIA-B0000018297-98.
- BAC's intent has been subsequently confirmed by its current CEO, Brian Moynihan, in repeated, public statements:
  - "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," Nov. 16, 2010).
  - "Our company bought [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).
- BAC's intent has been confirmed by its payment of billions of dollars in settlements on Countrywide's behalf:
  - October 2008 settlement of claims by 11 States' Attorneys General for **$8.4 billion**. Oblak Ex. 17 (American Banker, "Post-Purchase Optimism on Mortgages at B of A," Oct. 28, 2008) at BACMBIA-A0000133313; Oblak Ex. 347 (BAC Press Release, Oct. 6, 2008).
  - December 2010 settlement with Fannie Mae, and Freddie Mac for **$2.8 billion**. Oblak Ex. 116 (Reuters, "BofA Settles Sour Mortgages with Fannie Mae, Freddie," Jan. 3, 2011).
  - April 2011 settlement with Assured Guaranty for at least **$1.57 billion**. Oblak Ex. 118 (Assured Press Release, Apr. 15, 2011).
  - June 2011 settlement with the Trustee of 530 Countrywide trusts ("BONY Settlement") for **$8.5 billion**. Oblak Ex. 55 (BAC Form 10-Q, June 30, 2011) at 175-76; Oblak Ex. 208 (BAC Form 8-K, June 28, 2011) at 2.
  - December 2011 settlement with U.S. Department of Justice for **$335 million**. Oblak Ex. 178 (Order, Dec. 28, 2011, U.S. v. CFC, 11-CV-10540).
  - February 2012 settlement with FHA for **$1 billion**. Oblak Ex. 252 (U.S. Attorney's Office Press Release, Feb. 9, 2012).
  - July 2012 settlement with Syncora for **$375 million**. Oblak Ex. 349 (Syncora Settlement Agreement, July 17, 2012).
- These statements and conduct readily satisfy the doctrine of implied assumption of liability: "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).

BAC's Integration Plan Was To Merge The Two Businesses, While Avoiding Countrywide's Contingent Liabilities

- BAC sought to structure the acquisition of Countrywide and integrate Countrywide's businesses into its own, while attempting to avoid assuming Countrywide's contingent liabilities:
  - BAC planned to "[c]onduct the [Countrywide] integration in a manner that . . . [m]inimizes risks . . . [of] liabilities (e.g., outstanding debt obligations) and contingent liabilities (e.g., litigation and regulatory risk) of legacy Countrywide legal entities." Oblak Ex. 361 (Countrywide Charter Collapse Overview).
- In its own, pre-litigation words, BAC's motives and machinations are clear: BAC intended to use a corporate structure that enabled it to sort out assets and liabilities and decide what to keep and what to leave behind:
  - As of January 25, 2008, BAC planned, as its first step in the integration, to "[m]erge CFC into Red Oak and then [transfer] assets out of Red Oak into B of A. This provides a **filter for assets and liabilities**." Oblak Ex. 18 (Draft Executive Staff Meeting Minutes, Jan. 28, 2008) at BACMBIA-X0000018074.
  - BAC's plan was that "CFC, CHL and their subsidiaries will not transfer directly to BAC but will continue to exist and **provide separation between the bank merger and what is left behind**." Oblak Ex. 216 (Charter Collapse Update, Dec. 9, 2008) at BACMBIA-C0000036786.
  - Although BAC retained CFC and CHL as shell entities, it kept them as "**orphans**" in an attempt to "**avoid any potential legal ramifications.**" See Rosenberg Ex. 4 (BAC Legal Entity Planning Spreadsheet).
  - "In November [2008] our goal was to move all assets from CFC and CHL to BAC, fully cognizant that some investors would not grant consent and other loans were **too toxic** to move. So **what is left at CHL are those loans that we could/would not move**." Oblak Ex. 63 (Email from E. Ofcharsky to A. Perez, C. Smith, S. Shetti, April 8, 2009) at BACMBIA-O0000029487.

BAC's Senior Management Confirmed The Goal Of The Integration Plan

- Then-CEO Ken Lewis described BAC's purchase of Countrywide as a "**onetime opportunity to acquire the best mortgage platform in the business** at a time when the value is very attractive," and BAC valued Countrywide's "product expertise and a sales culture that tops [BAC's] capabilities," and "industry-leading technology." Oblak Ex. 13 (BAC Strategic Announcement Discussions, Jan. 11, 2008) at BACMBIA-H0000000125-26.

- Mr. Lewis also testified as follows:

  Q. Okay. So is it fair to say your rationale was not to hold Countrywide as a standalone business but instead to operate it together with the operations of Bank of America's existing businesses?

  A. Well, I mean, I don't know how many times I have to say it, but the–the **objective was to present a common set of products and a common brand** to our–to that combined set of customers. That was the objective. Bea Ex. 111 (K. Lewis Dep. Tr., April 19, 2012) at 21:9-21:18.

- In his June 25, 2008 presentation to BAC's Board, CFO Joe Price stated that Bank of America's goal, "[f]rom an operational standpoint," was to "**consolidate as much of the business operations of Countrywide and Bank of America Mortgage as possible**," and "to **move the mortgage origination and servicing operations** housed in [CHL] . . . and [CHLS] into BANA on the merger date or shortly thereafter." Oblak Ex. 12 (Presentation to BAC Board of Directors, June 25, 2008) at BACMBIA-B0000018304-05.

- At a September 2008 BAC Investor Conference Barbara Desoer, the head of the combined mortgage operations at Bank of America, explained BAC's rationale as follows: "Why Countrywide? Why now? The simple answer is that we saw opportunity. . . . With Countrywide we are now America's leading home loan provider." Bea Ex. 90 (B. Desoer Remarks for BAC Investor Conference, Sept. 15, 2008) at BACMBIA-P0000015686-87.

- Ms. Desoer explained that, "[p]ost Legal Day One the enterprise would have capabilities in terms of distribution and product and servicing that we did not have pre-Legal Day One," putting Bank of America "in a position to provide the products and services our customers need." Oblak Ex. 114 (B. Desoer Dep. Tr., May 15, 2012) at 212:16-213:6.

BAC Contests Successor Liability As A Litigation Strategy

- BAC knows it is responsible for Countrywide's liabilities, and it knows the financial markets expect it to assume those liabilities:
  - "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." "Mortgage Crisis Presents a New Reckoning to Banks," New York Times, Dec. 9, 2012 (quoting a Bank of America spokesman).
  - A Countrywide "bankruptcy filing by [Bank of America] would cast doubt on the entire company's willingness to support its other subsidiaries and damage Bank of America's standing in the credit markets or with rating firms, hurting its ability to borrow." Bea Ex. 38 (Bloomberg, "BAC said to Keep Countrywide Bankruptcy as ' Nuclear Option' to End Losses," Sept. 16, 2011).
- But BAC continues to contest successor liability in order to gain leverage in resolving litigation with Countrywide's contingent creditors, such as MBIA.
- BAC has confirmed this strategy in cases such as Walnut Place LLC v. BONY, where it argued that post-merger, Countrywide does not have the means to pay injured plaintiffs:
  - In support of the $8.5 billion BONY settlement, Capstone Valuation Services LLC concluded that as of March 31, 2011, the "value of the assets of CFC would enable a maximum recovery of no more than $4.8 billion," even after having already received "capital contributions exceeding $3 billion." Oblak Ex. 83 (Capstone Report, June 6, 2011) at 3; Bea Ex. 42 (R. Daines Expert Report, June 7, 2011) at 11.
- This enables BAC to try to settle claims at a substantial discount:
  - "The 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, "BAC Said to Keep Countrywide Bankruptcy as 'Nuclear Option' to End Losses," Sept. 16, 2011).

BAC's De Facto Merger
With Countrywide Under New York Law

Bank of America Achieved The Same Result Of A Classic De Jure Merger By Integrating Countrywide's Operations Into Its Own

- "Under New York law, there are at least three ways in which a corporation can acquire the business of another: The purchaser can buy the seller's capital stock, it can buy the seller's assets, or it can merge with the seller to form a single corporation." Cargo Partner AG v. Albatrans, Inc., 352 F.3d 41, 44-45 (2d Cir. 2003).

- "[W]hen two corporations merge to become a single entity"–a classic de jure merger–"the successor corporation [is] automatically liable for the debts of both predecessors." Id. at 45.

- Here, BAC achieved the same result of a de jure merger by integrating all of CFC's productive assets and operations into its own businesses: **this is a de facto merger**.

- 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. Id.; AT&S Transp., LLC v. Odyssey Logistics & Tech. Corp., 22 A.D.3d 750, 752 (2d Dep't 2005).

De Facto Merger Is An Equitable Doctrine That Looks Past Mere Form To The Substance Of The Transactions

- The purpose of the de facto merger doctrine is to prevent abuse of the corporate form to avoid liabilities.

- "**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 de facto merger doctrine looks at whether the transactions at issue are in substance, even if not in form, a merger. See AT&S Transp., 22 A.D.3d at 752.

- "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 source remains to pay for the victim's injuries.'" Morales v. City of New York, 18 Misc.3d 686, 688 (Sup. Ct. Kings Cty. 2007) (internal citations omitted).

Fraud Is <u>Not</u> An Element Of De Facto Merger

- There are four separate doctrines upon which successor liability can be established, and fraud is an element of **only one** of those doctrines:
  - The purchasing corporation was a **mere continuation** of the selling corporation;
  - The purchasing corporation **expressly or impliedly assumed the predecessor's liability**;
  - There was a consolidation or merger in fact of seller and purchaser (i.e., a "**de facto merger**"); or
  - The transaction was entered into **<u>fraudulently</u> to escape such liabilities.** Schumacher v. Richards Shear Co., Inc., 59 N.Y.2d 239, 245 (1983); AT&S Transp., 22 A.D.3d at 752.

- Courts have explicitly refused to require a showing of fraud for the other three bases for successor liability:
  - "There being **no allegation of fraud, we consider the applicability of the remaining three** [successor liability] exceptions." Sweatland v. Park Corp., 587 N.Y.S.2d 54, 55 (4th Dep't 1992).
  - Fraud is not required to establish de facto merger because to do so would "render redundant the fraudulent conveyance doctrine, which is meant to provide a separate and independent basis for imposing successor liability." Miller v. Forge Mench P'ship Ltd., No. 00 Civ. 4314, 2005 WL 267551, *12 (S.D.N.Y. Feb. 2, 2005).
  - "Unlike the fourth exception, which requires an allegation of fraud, the **assumption of liability exception is not based on fraud.**" Pollack v. Laidlaw Holdings, Inc., No. 90 Civ. 5788, 1995 WL 261518, *19 (S.D.N.Y. May 3, 1995).

- Bank of America distorts the applicable legal standard by falsely contending that fraud is required to show successor liability:
  - ". . . courts do not impose successor liability unless there is fraud . . ." BAC Mem. 2.
  - "These exceptions derive from a single policy objective—to protect creditors from fraudulent efforts to shield the seller's assets—and so all require some form of fraud or bad faith conduct." BAC Mem. 19.

New York Recognizes At Least Four "Hallmarks" Of De Facto Merger—All Of Which Are Present In This Case

- **The fundamental inquiry is whether the acquiring corporation has "effectively merged," integrating its business with that of the seller.** Fitzgerald, 286 A.D.2d at 574.

- **The non-exclusive "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. at 574-75.

- De facto merger is a **flexible doctrine**, and looks past form to the **substance** of the transaction:
  - "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)); see also City of New York v. Pfizer & Co., 260 A.D.2d 174 (1st Dep't 1999)).

- These factors are "only indicators"; "not all of these factors are needed" to establish a de facto merger, so long as continuity of ownership is present. At Last Sportswear, Inc. v. Newport News, No. 602208/2009, 2010 WL 4053105, at *4 (Sup. Ct. N.Y. Cty., Oct. 5, 2010); see also In re N.Y.C. Asbestos Litig. ("Van Nocker"), 15 A.D.3d 254, 256-57 (1st Dep't 2005).

The Transactions At Issue Here Are The Very Paradigm Of A De Facto Merger

- Bank of America did not acquire Countrywide "merely for the purpose of holding it as a subsidiary, but rather has effectively merged with" Countrywide–integrating its "core" businesses into Bank of America, while leaving behind shell entities holding "**toxic**" assets and massive liabilities. See Fitzgerald, 286 A.D.2d at 574; Oblak Ex. 63 (Email from E. Ofcharsky to A. Perez, C. Smith, V. Shetti, April 8, 2009) at BACMBIA-O0000029487; Oblak Ex. 308 (Email from E. Ofcharsky to M. Kanaga, Jan. 9, 2009) at BACMBIA-P0000094840; Oblak Ex. 56 (E. Ofcharsky Dep. Tr., May 18, 2012) at 297:3-298:5.

- The entire purpose of Bank of America's otherwise unnecessarily complicated method of merging Countrywide's business operations was two-fold:

GOALS:

- Achieve integration of business to:
  - Maximize efficiencies
  - Maximize opportunities (including federal preemption).
  - Streamline operations
- Conduct the integration in a manner that:
  - Minimizes risks that liabilities (e.g., outstanding debt obligations) and contingent liabilities (e.g., litigation and regulatory risk) of legacy Countrywide legal entities
  - Minimizes the risk of operations deemed to have been assumed or guaranteed by Bank of America Corporation and its subs

Oblak Ex. 361 (Countrywide Charter Collapse Overview).

- Bank of America's plan from the very beginning was to "[m]erge CFC into Red Oak and then **[transfer] assets out of Red Oak into B of A. This provides a filter for assets and liabilities.**" Oblak Ex. 18 (Draft Executive Staff Meeting Minutes, Jan. 28, 2008) at BACMBIA-X0000018074.

Continuity of Ownership

First, 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. Van Nocker, 15 A.D.3d at 256.
  - The "**essence of a merger**" is that the predecessor and successor "**become owners together of what formerly belonged to each**." Cargo Partner, 352 F. 3d at 47.

- There is no dispute that BAC used its own stock to acquire CFC's stock in the Red Oak Merger. Oblak Ex. 8 (BAC Form 8-K, Jan. 11, 2008); Oblak Ex. 9 (CFC Form 10-K, Jan. 11, 2008); Oblak Ex. 23 (BAC Form 10-K, Dec. 31, 2008); Oblak Ex. 154 (BAC Form 8-K, July 1, 2008).

- As a result, CFC's former shareholders continued as owners of CFC and its subsidiaries following the Red Oak Merger, by virtue of their owning BAC stock received in the Red Oak Merger. Id.

- 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, as those assets were transferred to BAC during the Asset-Stripping Transactions.

- More importantly, as even BAC's own expert admitted, there is also continuity of ownership by BAC before and after the Asset-Stripping Transactions:
  - Professor John Coffee testified that because "BAC owned a hundred percent of the stock of CFC after the transaction," the July and November 2008 Transactions are "purchase and sale transactions by a parent company that owns 100 percent of these entities and **there's continuity of ownership**."
    Oblak Ex. 24 (Prof. J. Coffee Dep. Tr., Aug. 17, 2012) at 235:4-236:16.

Bank of America's Use Of An Asset Sale Approach Does Not Impact Continuity Of Ownership

- BAC is wrong that Van Nocker requires that continuity of ownership be shown by "proof that the asset seller gained an ownership interest in the asset purchaser through the asset sale." BAC Mem. 35.
- New York courts have explicitly rejected such a reading of Van Nocker:
  - In At Last Sportswear, New York Supreme Court Justice Madden rejected an argument that continuity of ownership was not established because "consideration for the sale of [the predecessor's] assets was cash and not stock." Justice Madden explained that "the requirement of ownership continuity **does not exalt form over substance**. The **fact that the seller's owners retain their interest** in supposedly sold assets (through their ownership interest in the purchaser) **is the 'substance' which makes the transaction inequitable.**" Accordingly, "that the transaction was structured as an asset purchase for cash" is "not dispositive." At Last Sportswear, 2010 WL 4053105, at *4 (internal citations and quotations omitted).
  - In City of Syracuse, United States District Court Judge D'Agostino, citing Van Nocker among other cases, explained that "the continuity-of-ownership element is designed to identify situations where the shareholders of a seller corporation **retain some ownership interest in their assets after cleansing those assets of liability** . . . Thus, although continuity of ownership is typically satisfied where the purchasing corporation pays for the acquired assets with shares of its own stock, **a court can still find continuity of ownership where a corporation pays for the assets in cash**." City of Syracuse v. Loomis Armored, No. 5:11-cv-755, 2012 WL 4491119, *8 (N.D.N.Y. Sept. 28, 2012) (internal citations and quotations omitted).
- Even the cases relied upon by Van Nocker reject such a formalistic approach to continuity:
  - In Cargo Partner, the court found "[t]here was continuity of stockholders (and thus ownership)" where "the buying corporation owned all of the selling corporation's stock when the seller's assets were transferred to it," such that the purchaser and seller became "**owners together of what formerly belonged to each**." Cargo Partner, 352 F.3d at 47; see also Cargo Partner v. Albatrans Inc., 207 F.Supp.2d. 86, 98-99 (S.D.N.Y. 2002) aff'd 352 F. 3d 41 (2d. Cir. 2003) ("Whether the seller's owners acquire their ownership interest in the purchaser through payment in shares of stock or through other means, there exists in either case the essential inequity (which was the original basis of the "de facto merger" exception) that the seller's owners retain their interest in the transferred assets while cutting off the higher-priority interest of the seller's creditors.").
- "[T]hat the transaction was structured as an asset purchase for cash . . . **represent[s] just the sort of formalities that the de facto merger doctrine ignores**." Nettis, 241 F.3d at 194.

It Does Not Matter That Bank Of America Accomplished Its De Facto Merger Through Multiple Transactions Rather Than One

- "[T]here 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. Ind. Agent Ctr., Inc., 775 F.2d 38, 42 (2d Cir. 1985).

- The focus is on **<u>substance, not form</u>**; it does not matter that a de facto merger was effectuated through a series of transactions.

  - De facto merger can be established through predecessor's initial acquisition of seller's stock, followed by seller's subsequent transfer of its assets and liabilities to the purchase in exchange for consideration. Fitzgerald, 286 A.D.2d at 575; see also New York v. Westwood-Squibb Pharm. Co., 62 F. Supp. 2d 1035, 1040 (W.D.N.Y. 1999) (same).

  - Courts **should "not turn a blind eye to the reality" that a series of transactions "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].").

- Like the purchaser in the Fitzgerald and Westwood-Squibb cases, Bank of America first acquired the predecessor's (here, Countrywide's) stock, and then subsequently transferred the assets in exchange for consideration.

Cessation of Ordinary Business Operations

Second, Countrywide Ceased Its Ordinary Business Operations, Including Its Core Mortgage Origination And Servicing Operations

- Another "hallmark" indicating a *de facto* merger is "cessation of ordinary business and dissolution of the acquired corporation as soon as possible." *Fitzgerald, 286 A.D.2d at 574.*
- The Countrywide Financial Corporation consolidated companies no longer engage in their ordinary pre-Red Oak Merger business operations—mortgage origination and servicing, capital markets, banking or insurance—and were rendered unable to engage in any meaningful revenue-generating business operations going forward.
  - "CFC does not originate, securitize, or service real estate loans" and "CFC has ***no operations that by themselves are economically viable*** on a go-forward basis." *Oblak Ex. 83 (Capstone Report) at 7.*

- Countrywide Home Loans, Inc. ("CHL") will not be used for future new mortgage originating or servicing business post LD1:

subsidiary of Bank of America Corporation, and simultaneously be renamed Countrywide Financial Corporation
- Subsequent to Legal Day One, Countrywide Bank FSB ("CW Bank") will be merged into Bank of America, N.A. ("BANA"):
  - Take actions to preserve Colorado expansion prior to consummation
- Countrywide Home Loans, Inc. ("CHL") will not be used for future new mortgage originating or servicing business post LD1:
  - Additional analysis is being performed to evaluate options to restructure CHL itself and address its existing portfolio of loans, mortgage servicing rights and tax net operating losses
  - Date to be determined based upon completion of analysis

Oblak Ex. 21 (BAC/Countrywide Transition Steering Committee Presentation, April 18, 2008) at BACMBIA-B0000009918.

- CHL has no ongoing operations and is in a wind-down mode.

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Considerations:
- CHL has received [redacted] in capital infusions in the past year from BAC.
- CHL has been granted an exception to BAC's subsidiary capital policy.
- CHL has no ongoing operations and is in a wind-down mode.
- CHL continues to mitigate its losses with various investors, bearing the related legal costs.
- CHL incurred legal costs in excess of [redacted] in the last four quarters.
- Prior to the most recent capital infusion of [redacted] in April, 2011, CHL had negative equity.
- BAC currently owes [redacted] to CHL as of 3/31. This amount was increased by [redacted] after quarter end.

Oblak Ex. 82 (Separability Analysis).

Bank of America's Own Documents Confirm Countrywide Is No Longer Engaged In The Consolidated Mortgage Business

- Bank of America's own internal documentation confirmed that in 2009, following the Asset-Stripping Transactions, Countrywide Financial Corporation would not (1) originate loans, (2) broker loans, (3) purchase loans, (4) sell loans, (5) service loans, or (6) securitize loans.

	Has or will your legal entity engage in any of the following activities in 2009 (Yes or No)					
Entity Name / Subsidiary	**1. Originate Loans** (Underwrites and makes the credit decision. Data on applications that do not result in an origination must also be reported by the entity that makes the credit decision)	**2. Broker Loans** (Takes application and passes it to another entity to originate / make the credit decision)	**3. Purchase Loans** (Purchases mortgage loans from other lenders or entities – both internal and external)	**4. Sell Loans** (Sells mortgage loans to other entities or legal structures – both internal and external)	**5. Service Loans** (Collects and processes loan payments, and provides customer service, escrow administration, investor accounting, collections, loss mitigation and foreclosure services)	**6. Securitize Loans** (Pools real estate loans with other similar loans and sold as securities)
Countrywide Financial Corp (fka Red Oak Merger Corp) (Delaware)	NO	NO	NO	NO	NO	NO

Legacy Countrywide Entities as of 12/31/2009, BACMBIA-X0000439371, produced on Jan. 4, 2013 pursuant to Justice Bradley's Order after having been improperly withheld on spurious and shifting grounds of privilege.

Bank of America Transferred CFC's and CHL's Mortgage Servicing Business To Its Own Operating Subsidiaries

- Through the July 2008 Transactions, CHL's mortgage loan servicing business (CHLS), mortgage servicing rights, mortgage loan portfolio, and securities trading portfolio were all sold to Bank of America subsidiaries.
  - The July 2008 Transactions involved the sale of a pool of residential mortgage loans from CHL to Bank of America's NB Holdings ("NBH") subsidiary for approximately $9 billion; novation of derivative instruments to BANA for $1.5 billion in cash; sale of two entities that owned all of the partnership interests in the CHLS to NBH for approx. $19.7 billion; sale of CSC's securities for approx. $147 million to a BAC subsidiary; and sale of Countrywide Real Estate Finance's commercial mortgage loans to NBH for $238 million.
- The July 2008 Transactions put CFC and CHL out of the mortgage servicing business.
- The servicing entity—CHLS—was initially held as a BANA subsidiary to provide a "buffer" due to litigation risk, and then was merged into BANA in July 2011. Oblak Exs. 205 & 210 (see below); Oblak Ex. 55 (BAC Form 10-Q, Aug. 4, 2011).

> • Legal Environment: Original decision for the servicing company was to provide a buffer between BANA and CHL, Inc because of concerns of litigation

Oblak Ex. 210 (Countrywide Transition: End State Servicing Analysis Presentation, May 12, 2009) at BACMBIA-K0000002287.

> Assess risk to "corporate separateness" of positioning servicing transfer as "quasi-merger" (transfer of entire servicing business) in order to limit third party consent rights
> Determine if CHLS, LP will be merged into BANA at the same time that the CHL assets are transferred to NBHC or from NBHC to BANA so can restructure CHL/CHLSLP agreements with appropriate parties in mind

Oblak Ex. 205 (Pre-Charter Collapse Transfers Project List) at BACMBIA-Y000001039.

Bank of America Shut Down Or Merged Countrywide Securities Corporation's Operations

- CSC was deregistered as a securities broker-dealer, and the capital markets business was shut down or absorbed into BAC's corresponding business. Oblak Ex. 212 (Legal Entities List, Oct. 31, 2008), at Row 64.

Combine two capital markets organizations creating the best platform

Combine two capital markets organizations creating the best platform for the distribution and trading of mortgage related securities and whole loans to enhance revenues and deliver optimal best execution and pricing for the Mortgage Services Group.

Merged Business: (CFC business **wholly absorbed** into parallel existing BAC business)

- Trading and Analytics Group in Calabasas: 25 person capital markets staff to support secondary marketing

Merged Business: (CFC business wholly absorbed into parallel existing BAC business)

- Fixed income securities trading (mortgages and rates)
- Commercial real estate loan origina
- Securities Operations
- Distressed loans (new entity is CAM

- Securities Operations

Sunset Businesses: (CFC businesses will transition into BAC only temporarily to be **shut down** or divested)

- Hong Kong broker/dealer and sales office

Sunset Businesses: (CFC businesses will transition into BAC only temporarily to be shut down or divested)

- Exit purchase and securitization of 3rd party distressed loans (CAMCo)
- …and valuation business
- …ut retain valuation tools for internal use
- Exit the CFC Commercial Real Estate Finance small loan origination business
- Exit Futures Introducing Broker business
- End the designation of CFC primary broker dealer

- End the designation of CFC primary broker dealer.

Oblak Ex. 287 (BAC/Countrywide Transition Steering Committee Presentation, May 15, 2008) at BACMBIA-A0000061369.

- BAC's current CEO Brian Moynihan testified that with regards to CSC, "I think most of it got shut down ultimately. We already had a business engaged in that, **we just shut it down**." Oblak Ex. 96 (B. Moynihan Dep. Tr., May 2, 2012) at 70:20-71:9.
- "Capital Markets and **Countrywide Securities Corp are expected to be shut down after the merger**." Oblak Ex. 191 (BAC Preliminary Purchase Accounting for Red Oak Merger) at Row 156.
- In the end, "it was final cleanup . . . Countrywide Securities was no longer going to be a broker-dealer . . . was no longer going to be in operation." Oblak Ex. 289 (B. Williams Dep. Tr., Feb. 2, 2012) at 65:5-65:21.

Bank of America Transferred "Substantially All" Of CHL's Remaining Assets And All Remaining Operating Assets On November 7, 2008

- On November 7, 2008, pursuant to an Asset Purchase Agreement, "**substantially all**" of CHL's remaining assets, and **all** of CHL's remaining operating assets, were sold to BAC. Oblak Ex. 48 (Asset Purchase Agreement, Nov. 7, 2008) at Schedule 2.2; Oblak Ex. 47 (Minutes of BAC Board Meeting, Sept. 19, 2008) at BACMBIA-W0000001965.

> (i) the pool of residential mortgage loans referred to in Bank of America, N.A.'s application filed with the Office of the Comptroller of the Currency on October 10, 2008 (the "Application"), (ii) mortgage servicing rights, (iii) bank-eligible and investment grade securities referred to in the Application, (iv) "real estate owned" (real property acquired through foreclosure on mortgage loans), (v) the technology platform used in the mortgage operations of Countrywide Financial Corporation and its subsidiaries ("CFC"), (vi) furniture, fixtures and equipment (other than de minimus furniture, fixtures and equipment designated in Seller's general ledger as remaining with Seller), (vii) contract rights with third parties, including rights under real estate leases (for property used in CFC's mortgage business), vendor contracts, intellectual property licenses and other contracts related to the mortgage operations of CFC, (viii) real property owned by CHL and used in CFC's mortgage business, (ix) mortgage servicing advance receivables and (x) any other assets of Seller used in CFC's mortgage business.

- This asset sale included CHL's technology platform, physical offices, call centers, and equipment used in the mortgage origination and servicing business. Id.; see also 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.").
- Through this transaction, BAC acquired "**all remaining assets at CHL that are relevant to operating and managing the mortgage operations of Bank of America**. This will also result in **CHL ceasing ongoing activities in connection with mortgage and servicing origination**." Letter from P. Wertz to Office of the Comptroller of the Currency, Oct. 10, 2008, BACMBIA-C0000167307 (produced after BAC abandoned its prior claim of privilege on Nov. 29, 2012, after MBIA's Reply brief was filed).

Bank of America Transferred "Substantially All" Of CFC's Remaining Assets And All Remaining Operating Assets On November 7, 2008

- On November 7, 2008, pursuant to an Stock Purchase Agreement, "**substantially all**" of CFC's remaining assets and **all** of CFC's remaining operating assets and subsidiaries, were sold to BAC.
Oblak Ex. 47 (Minutes of BAC Board Meeting, Sept. 19, 2008) at BACMBIA-W0000001965-66; Oblak Ex. 301 (Stock Purchase Agreement, Nov. 7, 2008).

WHEREAS, the Corporation and Countrywide Financial Corporation ("CFC," and together with CHL, the "Countrywide Subsidiaries") propose to enter into a Stock Purchase Agreement (the "Stock Purchase Agreement," and together with the Asset Purchase Agreement and all related ancillary agreements, the "Purchase Agreements"), pursuant to which CFC will sell to the Corporation all of the equity interests in certain subsidiaries of CFC (the "Stock Purchase," and together with the Asset Purchase, the "Acquisitions"), which equity interests constitute, together with the assets to be acquired in the Asset Purchase, substantially all of CFC's assets;

- The Asset Purchase Agreement explicitly stated that BAC was purchasing all "**assets of [CHL] used in CFC's mortgage business.**" Oblak Ex. 48 (Asset Purchase Agreement, Nov. 7, 2008) at Schedule 2.2.

- The Stock Purchase Agreement identified 72 subsidiaries, including Countrywide Bank and Balboa Insurance, that were also sold. Oblak Ex. 301 (Stock Purchase Agreement, Nov. 7, 2008) at Schedule 2.3(a)-(b).

- The goodwill previously associated with CHL's servicing business and CSC was reallocated to Countrywide Bank "**to reflect [BAC's] prospective views of the entities**" that the servicing business would be "sold" and CSC would "be shut down." That goodwill was then transferred to BAC as part of the November 2008 Transactions. Oblak Ex. 191 (BAC Preliminary Purchase Accounting for Red Oak Merger) at Row 156.

The CFC And CHL "Orphan" Entities Are Mere Shells, And Were Not Retained To Conduct Ongoing Operations

- 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).
  - "CFC and many of its subs continue to exist and will continue to exist," however, "[m]ost have been **skinnied down** and **do not have active ongoing business** nor do they have associates . . . [they] **aren't active entities**." Id.
  - The "**potential litigation associated with CFC**" is identified as one of the reasons to "**continue the separate existence of many CFC legal entities** for some period of time." Oblak Ex. 175 (Email from E. Lepley, Jan. 15, 2008) at BACMBIA-C0000001730.
  - Former Countrywide employee Irene Briones testified that she "didn't think Countrywide Financial still existed, 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 281:13-19.
  - "CFC, CHL and their subsidiaries will not transfer directly to BAC but will **continue to exist and provide separation** between the bank merger and what is left behind." Oblak Ex. 216 (Charter Collapse Update, Dec. 9, 2008) at BACMBIA-C0000036786.
- Countrywide's activities "are **limited to managing its representations and warranties exposure** and its owned inventory, serving as a master servicer for certain originated HELOC securitizations, marketing loans held for sale and **addressing litigation concerns** related to its mortgage activities that primarily occurred before 2008." Oblak Ex. 85 (Notes to CHL Consolidated Financial Information, Dec. 31, 2010) at BACMBIA-L000003634.

The CFC And CHL Shell Entities Were "Shorn" Of Assets, And Retained Only "Bad" Or "Toxic" Assets And Massive Contingent Liabilities

- Bank of America transferred: (i) all of CFC's and CHL's assets, except for "**bad**" or "**toxic**" assets that "**could not**" be moved; (ii) a minor subsidiary BAC intended to sell off; and (iii) massive contingent liabilities.

From: Ofcharsky, Edward
Sent: Fri Jan 09 08:51:01 2009
To: Kanaga, Mary K
Subject: Re: legal entities
Importance: Normal

We did not plan to re brand as these fall in one of three buckets: toxic (CFC and CHL); company in wind down and potential sale (Balboa Re)

toxic (CFC and CHL)

Oblak Ex. 308 (Email from E. Ofcharsky to M. Kanaga, Jan. 9, 2009) at BACMBIA-P0000094840.

Two separate transactions. In July 2008 we moved Servici
left loans as is for all parties. In November our goal wa
from CFC and CHL to BAC, fully cognizant that some invest
consent and other loans were too toxic to move. So what i
those loans that we could/would not move and they have to be left branded as
is under Countrywide.

Teams should have excluded these loans from any bra
be prudent to validate.

too toxic to move.

we could/would not move

Oblak Ex. 63 (Email from E. Ofcharsky to A. Perez, C. Smith, S. Shetti, April 8, 2009) at BACMBIA-O0000029487.

From: Ofcharsky, Edward
Sent: Tue Apr 14 16:27:34 2009
To: Pranger, Laura K
Subject: RE: CHL Loans to Remain - Fire drill from last week - ?
Importance: Normal

At that time, we were working with George Saled and Jeff Bray and all parties where advised that there would be loans left behind, but servicing LP would continue to service these loans under a subservicing agreement. Phase I and II were not widely publicized events due to the sensitive nature of the activities, separating the good and bad assets.

separating the good and bad assets.

Oblak Ex. 64 (Email from E. Ofcharsky to L. Pranger, April 14, 2009).

Edward Ofcharsky's Testimony Confirms He Meant What He Wrote—CFC And CHL Were Left With "Bad" Or "Toxic" Assets

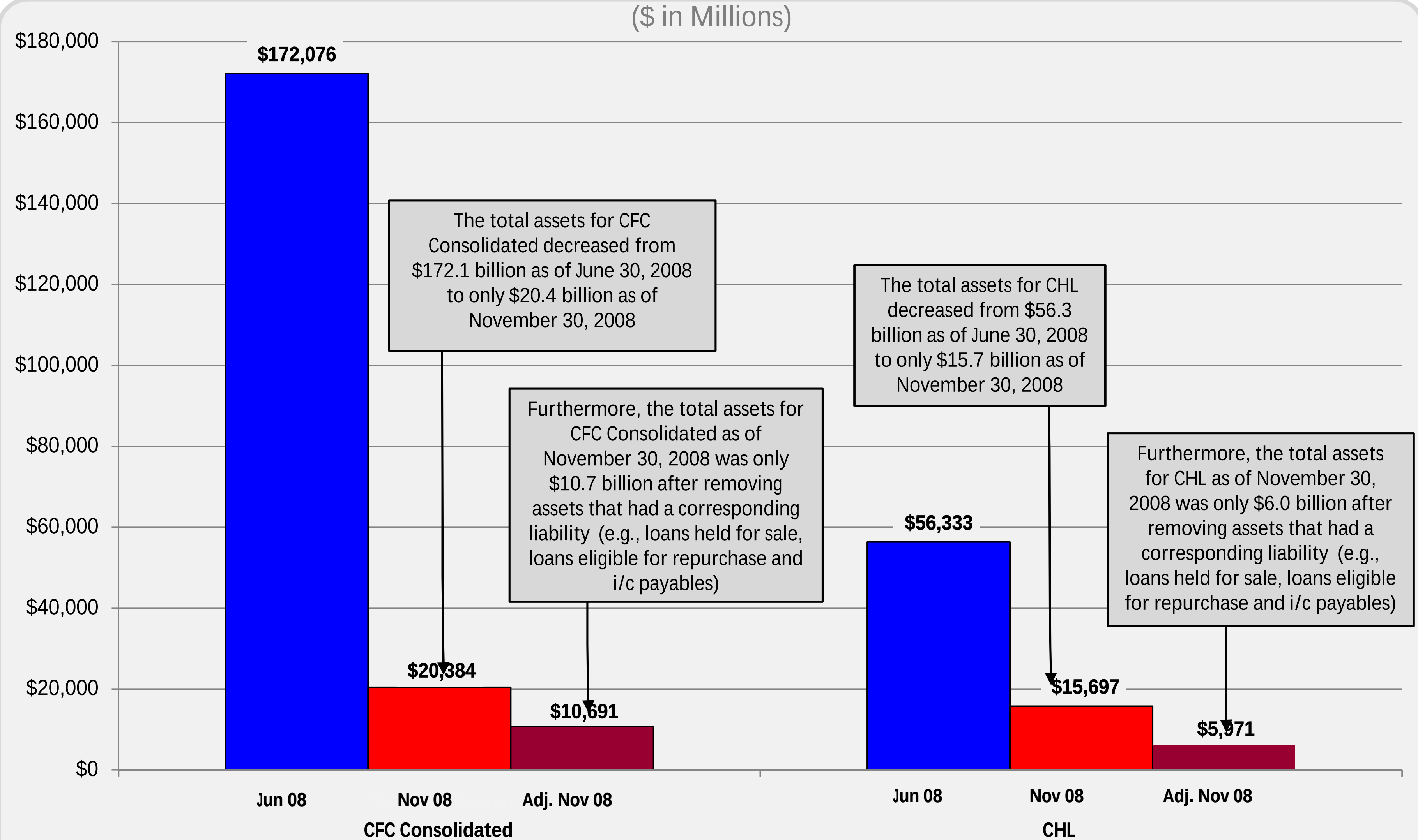
Ed Ofcharsky, the change manager who oversaw the Red Oak Merger and the November 2008 Transactions, explained what he meant when he described the assets left behind at CFC and CHL as "toxic" and "bad":

Q. Okay. And then at the top you . . . answer the question–"We did not plan to rebrand, as these fall in one of three buckets: one, toxic (CFC and CHL)," two, "company in wind-down," three, "and potential sale (Balboa Re)." So with regard to toxic, what were you describing there? **A.** . . . what was left in CHL after the November transaction were **loans that we couldn't get investor consents on**. . . . I believe mortgage servicing rights we couldn't get the consents on. And there were **past-due loans** that . . . **legally we couldn't move** over. . . . And kind of classified those, just a slang term because it's past due, kind of call it **toxic**. **Q.** And **that was your term, "toxic"**? **A.** That's my term, yeah. Oblak Ex. 56 (E. Ofcharsky Dep. Tr., May 18, 2012) at 297:3-298:5.

Q. Well, was the goal to identify the loans that presented the greatest risk and leave them under the CFC brand? **A.** No. It was to **sequester** or to leave the **subprime and distressed loans that were 60 days past due**, ready to go into foreclosure, and **leave them with the Countrywide name**. Id. at 280:6-12.

Q. The next sentence says, "Phase I and II were not widely publicized events due to the sensitive nature of the activities, separating the good and bad assets." . . . [W]hat did you mean when you said they "were not widely publicized"? . . . **A.** . . . It was not something that was widely publicized. **Q.** And . . . in your email here, does "good assets" refer to the loans that did transfer as part of the November 7, 2008 transactions? **A.** There were good assets that were there that we couldn't move because we couldn't get the consents. And **the "bad assets" related to, you know, the past due loans, the loans, you know, in default or ready to go to foreclosure. I mean, those didn't get transferred.** **Q.** But your statement here is related to "separating the good and the bad assets." What did you mean by that? **A.** **"Separating" is they didn't . . . transfer.** Bea Ex. 17 (E. Ofcharsky FGIC Dep. Tr., Oct. 19, 2012) at 179:19-180:21 (objection omitted).

The Result: In Just A Few Short Months, Countrywide Was A Shell Of Its Former Self

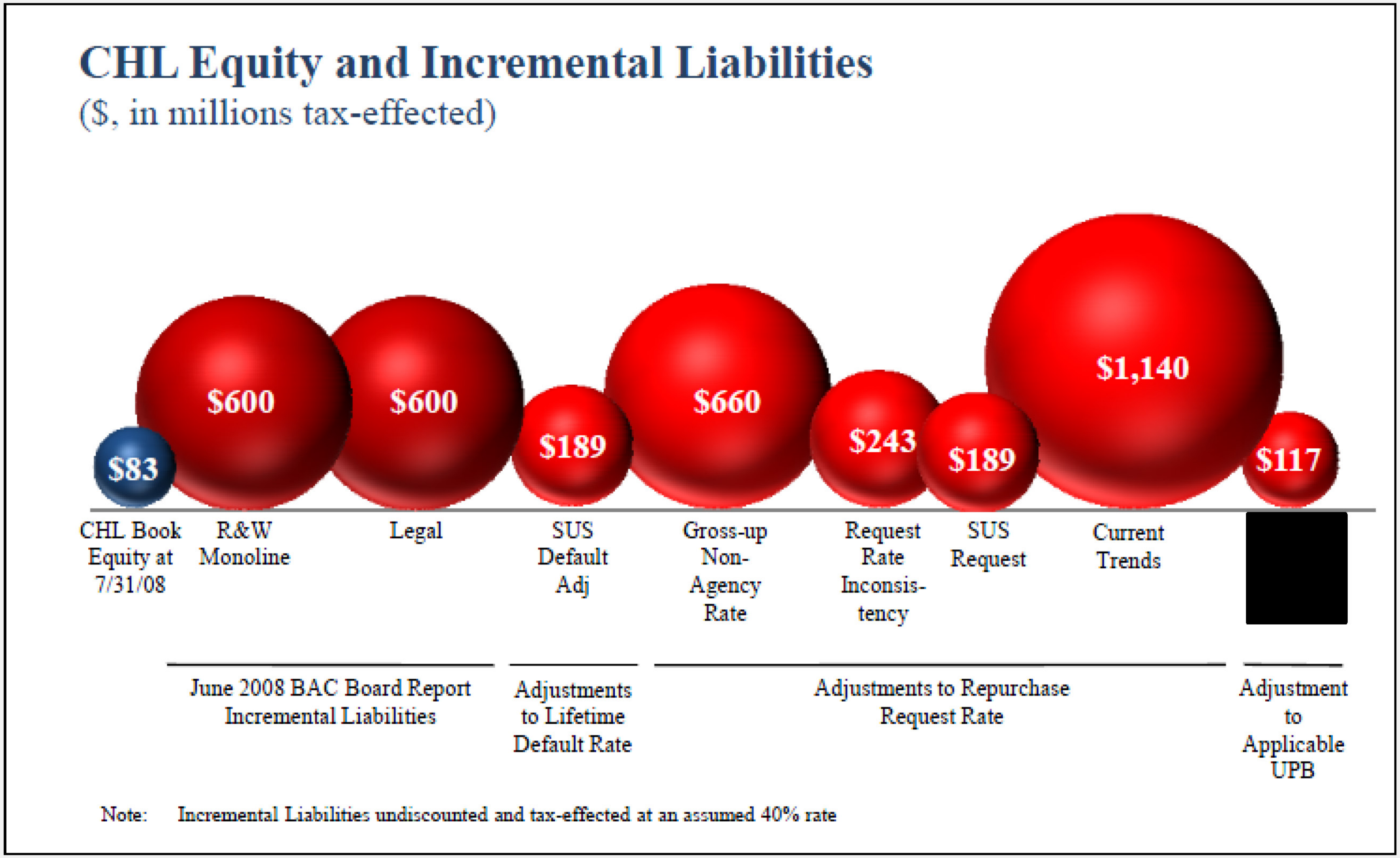


Oblak Ex. 199 (CFC Consolidated Balance Sheet, June 30, 2008); Oblak Ex. 201 (CFC Consolidated Balance Sheet, Nov. 30, 2008).

Countrywide's Massive Contingent Liabilities Exceeded Its Assets

- The magnitude of the litigation settlements since the Asset-Stripping Transactions illustrates just how inadequate CFC's and CHL's left-behind assets were to address Countrywide's mounting contingent liabilities.
  - Properly adjusted, CFC and CHL combined were left with a maximum of $10.7 billion in assets.
  - In contrast, just four of the settlements since the Asset-Stripping Transactions alone exceeded the total assets of CFC and CHL combined, **adding up to $13.97 billion in liabilities**:
    - Federal Housing Authority (2012)– $1.0 billion Oblak Ex. 96 (B. Moynihan Dep. Tr., May 2, 2012) at 95:03-04.
    - Bank of New York Mellon (2011)– $8.5 billion Oblak Ex. 208 (BAC Form 8-K, June 29, 2011) at Item 8.01.
    - Assured Guaranty (2011)– $1.57 billion Oblak Ex. 119 (CFC Consolidated Financial Statement, Mar. 31, 2011) at CWMBIA0018539232-33.
    - Freddie Mac/Fannie Mae (2010)– $2.8 billion Oblak Ex. 116 (Reuters, "BofA settles sour mortgage with Fannie Mae, Freddie Mac," Jan. 3, 2011).
- In addition, Bank of America and Countrywide knew at the time of the November 2008 Transactions that Countrywide faced dramatic increases in representation and warranty and litigation claims.
- MBIA alone sought to recover some $459 million in claims paid as of September 30, 2008 which, as this Court now knows, has grown to $3.5 billion in claims paid on the 15 Securitizations at issue in this case. Compl., MBIA v. Countrywide Home Loans, Inc., et al., Index. No. 602825/2008 (Sept. 30, 2008).

Even Before The November 2008 Transactions, Any One Of Countrywide's Expected Liabilities Would Have Wiped Out CHL's Equity

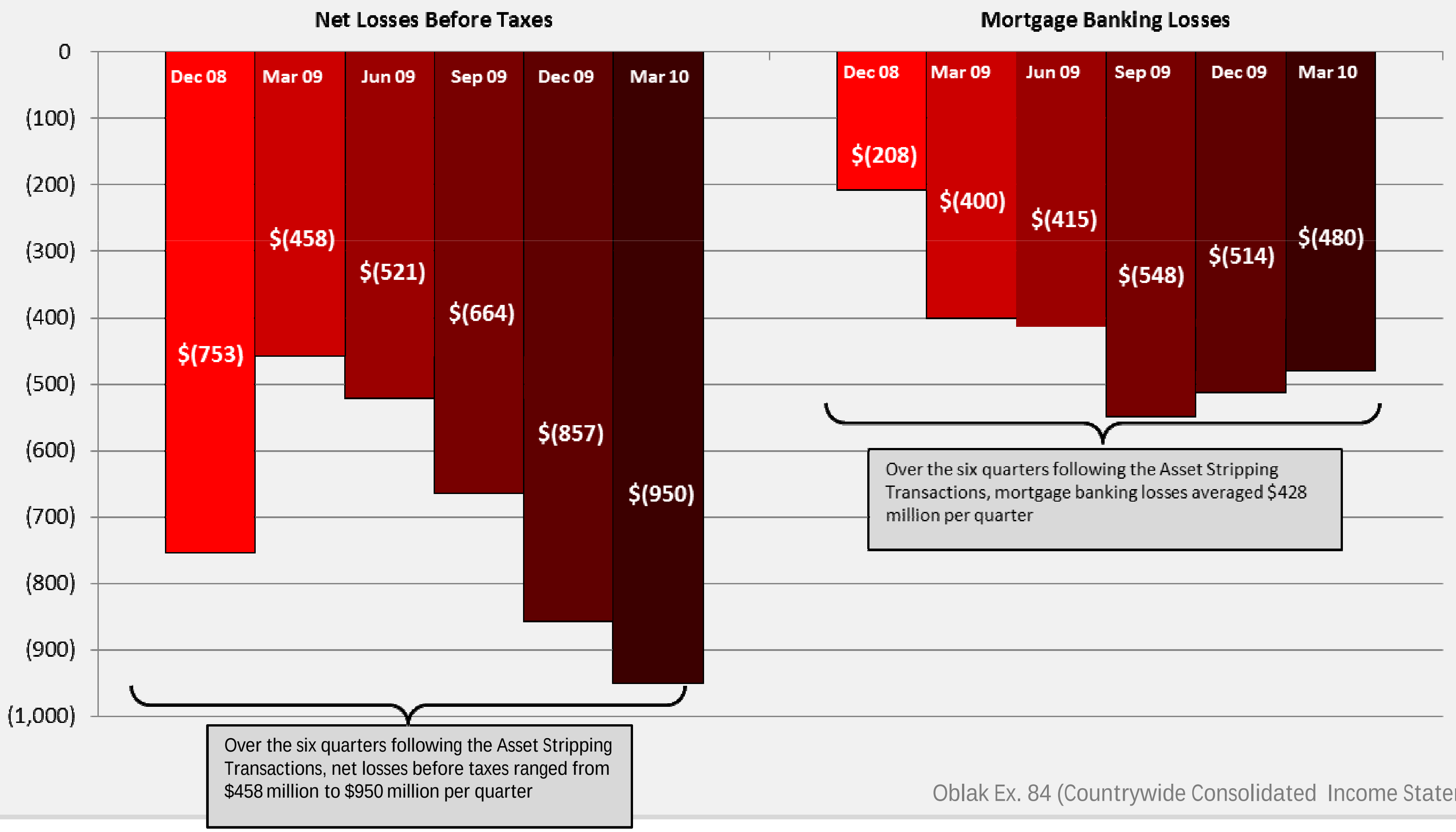


Bea Ex. 27 (S. Winn Expert Report, Aug. 2, 2012) at 80.

Countrywide Was Left With No Operating Assets, And Incurred Massive Operating Losses Without A Viable Revenue Source

- Because Countrywide was left with "**no operations that by themselves are economically viable**," and was put into "**wind down**" mode, it was unable to generate any meaningful revenues that could offset the massive losses it incurred following the Asset-Stripping Transactions. Oblak Ex. 83 (Capstone Report) at 7.

Countrywide Consolidated Income Trend (Dec. 31, 2008 to Mar. 31, 2010)



Oblak Ex. 84 (Countrywide Consolidated Income Statement).

Countrywide Is "Incapable" Of Conducting Its "Wind-Down" Activities Except Through Bank of America

- Formal dissolution of the predecessor is not required: "[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.

- A company is a "mere shell" where the alleged successor has "rendered [the predecessor] incapable of doing business except through [the successor]." Fitzgerald, 286 A.D.2d at 575.

- Here, CFC and CHL are incapable of carrying out their "limited" activities of "**managing its representations and warranties exposure**" and "**addressing litigation concerns** related to its mortgage activities that primarily occurred before 2008" except through Bank of America. See Oblak Ex. 85 (CHL Selected Consolidated Financial Information, Dec. 31, 2010) at BACMBIA-L000003634.

  - Countrywide cannot repurchase loans without Bank of America approval.
  - Bank of America sets a dollar limit on, and controls funding of, repurchases.

Bank of America Approval Is Required Before Countrywide Can Repurchase A Countrywide Mortgage Loan

- Bank of America's approval is required before a Countrywide-originated mortgage loan can be repurchased:
  - 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.
  - The current President of Countrywide Home Loans conceded that Bank of America's "**workout strategies group approval [was required] in order for BAC to repurchase a monoline loan.**" Oblak Ex. 288 (M. Schloessmann Dep. Tr., Aug. 29, 2012) at 1012:18-1013:18.
  - Susan Welsh, a Bank of America employee in charge of monoline repurchase resolution, testified that Bank of America "put in place [a process] so that the loans . . . that were a potential repurchase were . . . reviewed and discussed" by the Pending Management Review (PMR) committee, and that **all** members of the PMR committee had to agree to repurchase the loan, including the BAC employees like Ms. Welsh. Oblak Ex. 76 (S. Welsh Dep. Tr., Sept. 11, 2012) at 129:10-14, 133:14-134:05.

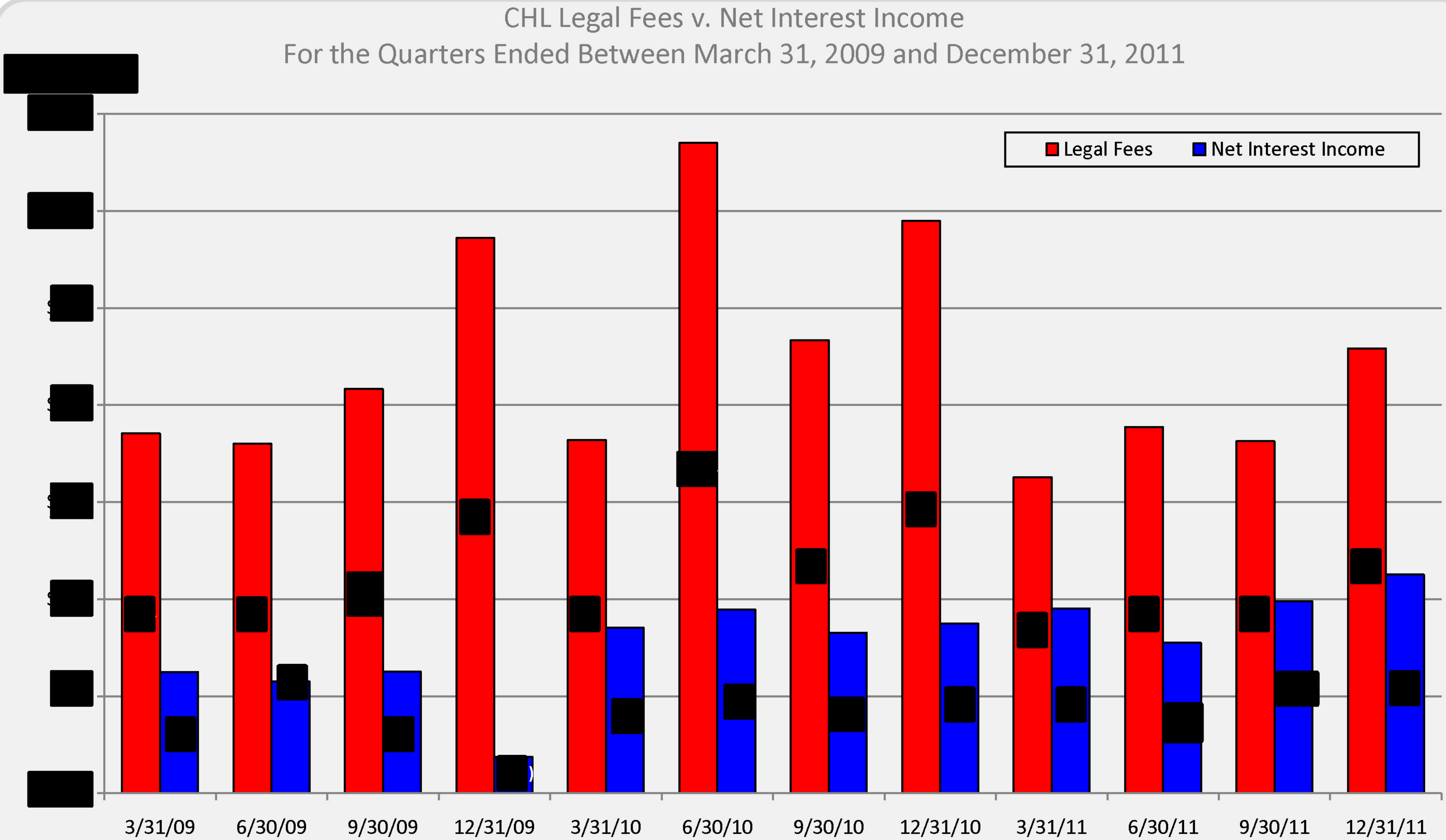
Bank of America Sets A Monthly Dollar Limit And Controls Funding For Repurchases Of Countrywide Originated Loans

- Bank of America sets a monthly limit on the dollar amount of Countrywide repurchases that can be approved, and only Bank of America's Repurchase Oversight Group ("ROG") can approve additional repurchase amounts above that "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.

- "We must ensure that all repurchase activity is conducted in the CHL entity . . . **This paper trail is critical** . . ." Oblak Ex. 182 (Email from M. Schloessman to J. Cohen, K. Martin, J. Baker, et al., Nov. 11, 2008) at BACMBIA-X0000271172.

§ Cindy Simantel, the former head of Countrywide's Repurchase Department and Senior Vice President of the combined Countrywide/Bank of America Repurchase Department, explained that "[a]fter legal day one [Countrywide and Bank of America] started to transition the two [repurchase] departments together," and that "at the time that **we merged the two departments** together we merged the Bank of America associates in with the Countrywide. We took everybody in together." Oblak Ex. 247 (C. Simantel Dep. Tr., Feb. 23, 2011) at 136:5-136:19; Oblak Ex. 248 (C. Simantel Dep. Tr., Aug. 24, 2012) at 911:17-24.

Countrywide's Interest Income From Left-Behind Toxic Assets Is Not A Business Operation, And Is Insufficient To Even Cover Legal Fees



For every quarter between 2009 and 2011, legal fees exceeded net interest income for CHL. The legal fees do not include changes to the rep and warrant reserves, litigation settlements, or other potential legal expenses not classified within "legal fees" on the income statement. *See Oblak Ex. 84 (Countrywide Income Statement); Oblak Exs. 159, 161, 307 (Countrywide Financial Statements).*

Continuity of Management, Personnel, Physical Location, Assets, and General Business Operations

Third, Bank of America Continues Countrywide's Business Operations Using The Transferred Assets

- A third hallmark here of de facto merger is 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. Fitzgerald, 286 A.D.2d at 574; Morales, 18 Misc.3d at 690.
- As acknowledged by Bank of America's current CEO, Bank of America "**ultimately put the operations of the two companies together**." Oblak Ex. 96 (B. Moynihan Dep. Tr., May 2, 2012) at 64:13-14.
  - Bank of America transferred all of Countrywide's operational assets to its own operating subsidiaries.
  - Bank of America integrated Countrywide's business operations into its own business operations and became a mortgage market leader.
  - Bank of America continues to operate the businesses it transferred and benefit from the revenues associated with those operations.
  - Bank of America hired 19,300 former Countrywide employees, including managers, to run the combined operations.
  - Bank of America runs the combined mortgage operations from Countrywide's former headquarters in Calabasas, California.
- CHLS and Countrywide Bank have been merged into BANA, which is further evidence of how thoroughly and completely the Countrywide mortgage business has been absorbed by Bank of America.

Bank of America's Integration Plan: Combine Core Countrywide Businesses With Bank Of America Operations

Prior to the announcement of the planned Red Oak Merger in January 2008, CFC was a holding company whose subsidiaries, including **CHL** and **CSC**, were primarily engaged in mortgage origination and servicing, banking, capital markets, and insurance. Oblak Ex. 5 (CFC Overview & Outlook Presentation, Dec. 2007).

- Bank of America intended from the outset to combine and integrate Countrywide's core business operations with its own:
  - CEO Ken Lewis described BAC's purchase of Countrywide as a "**onetime opportunity to acquire the best mortgage platform in the business** at a time when the value is very attractive," and BAC valued Countrywide's "product expertise and a sales culture that tops [BAC's] capabilities," and "industry-leading technology." Oblak Ex. 13 (BAC Strategic Announcement Discussions, Jan. 11, 2008) at BACMBIA-H0000000125-26.
  - In his June 25, 2008 presentation to BAC's Board, CFO Joe Price stated that Bank of America's goal, "[f]rom an operational standpoint," was to "**consolidate as much of the business operations of Countrywide and Bank of America Mortgage as possible**," and "to **move the mortgage origination and servicing operations** housed in [CHL] . . . and [CHLS] into BANA on the merger date or shortly thereafter." Oblak Ex. 12 (Presentation to BAC Board of Directors, June 25, 2008) at BACMBIAB0000018304-305.
  - "The success of the merger will depend, in part, on our ability to realize the anticipated benefits and cost savings from combining the businesses of Bank of America and Countrywide. However, to realize these anticipated benefits and cost savings, **we must successfully combine the businesses** of Bank of America and Countrywide." Oblak Ex. 321 (BAC Form S-4, Feb. 13, 2008) at BACMBIA-C0000003258.
  - "[U]ntil Countrywide Bank and **Home Loans are merged into other BAC legal entities**, they will continue to be regulated by the OTS." BACMBIA-X0000001205 (Email produced pursuant to Justice Bradley Order on Jan. 4, 2012).

Integration of Countrywide's Operations Into BAC's Operations Was A "Core Objective" Of The Integration Plan

I) Core objectives of a Bank of America Transition event and impact to partners

The integration of Countrywide into the Bank of America organization is a significant endeavor and required a significant amount of planning for a successful and flawless execution. With Countrywide being more than just a mortgage company (e.g. Banking, Insurance, Capital Markets, etc.), the integration of all these pieces and parts into the already complex Bank of America infrastructure is a large and challenging activity.

The combined entities began mobilizing resources (some 700 strong) from all parts of the organization including finance, human resources, all facets of mortgage (i.e. originations, fulfillment, servicing, default management, etc.), facilities, technology, training & communications, and many more, to create an implementation plan. When developing the integration plan, much of the sequencing was done around technology capacity, customer and associate impact, and readiness of marketplace partners and organizations. Additionally, the initial focus out of the gate for the Transition team was to ensure alignment across the combine entity in the areas of:

- Credit Policy
- Regulatory Policy
- New regulations being cascaded into the combined entity
- Our combined entity's Public Policy commitments
- Making Home Affordable

Bea Ex. 61 (BAC/Countrywide Transition Mortgage Lending Deployment Presentation, May 20, 2009) at BACMBIA-C0000101513.

- Bank of America-Countrywide Transition Executive Mary Kanaga testified that the BAC-Countrywide "transition" that she led meant "**taking everything, people, process and technology activities from two companies and blending them** to get to a target state." Oblak Ex. 20 (M. Kanaga Dep. Tr., May 10, 2012) at 42:4-10.

The Combined Mortgage Operations Are Run Through Bank of America, And Not Through Countrywide

Following the July and November 2008 Transactions, all Countrywide primary businesses were ultimately integrated into Bank of America, shuttered (CSC) or sold off. **None of Countrywide's primary businesses remained as separate businesses operated through legacy-Countrywide subsidiary corporations**:

Mortgage and Servicing:

- Barbara Desoer, head of the combined mortgage unit, conceded that "the **combined business include[s] both the origination functions of the legacy Countrywide entities** as well as the origination functions of the Bank Of America mortgage operations." Oblak Ex. 114 (B. Desoer Dep. Tr., May 15, 2012) at 17:23-18:05.

> The 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 Ex. 341 (BAC Press Release, April 27, 2009) at 2.

- Current CEO Brian Moynihan testified that, as a result of BAC's acquisition of Countrywide, BAC was "**number one in the mortgage business**" and "ended up with the **largest servicing platform in the country.**" Oblak Ex. 96 (B. Moynihan Dep. Tr., May 2, 2012) at 75:2-76:2.

- Mary Kanaga, who headed the BAC/Countrywide Transition for Bank of America, testified that once the Integration Plan was complete, "**we were working under one name and one brand and so it wasn't this is Countrywide and this is Bank Of America. It was all one.**" Oblak Ex. 20 (M. Kanaga Dep. Tr., May 10, 2012) at 26:10-12.

BAC Has Integrated And/Or Discontinued Countrywide's Banking, Insurance And Capital Markets Business

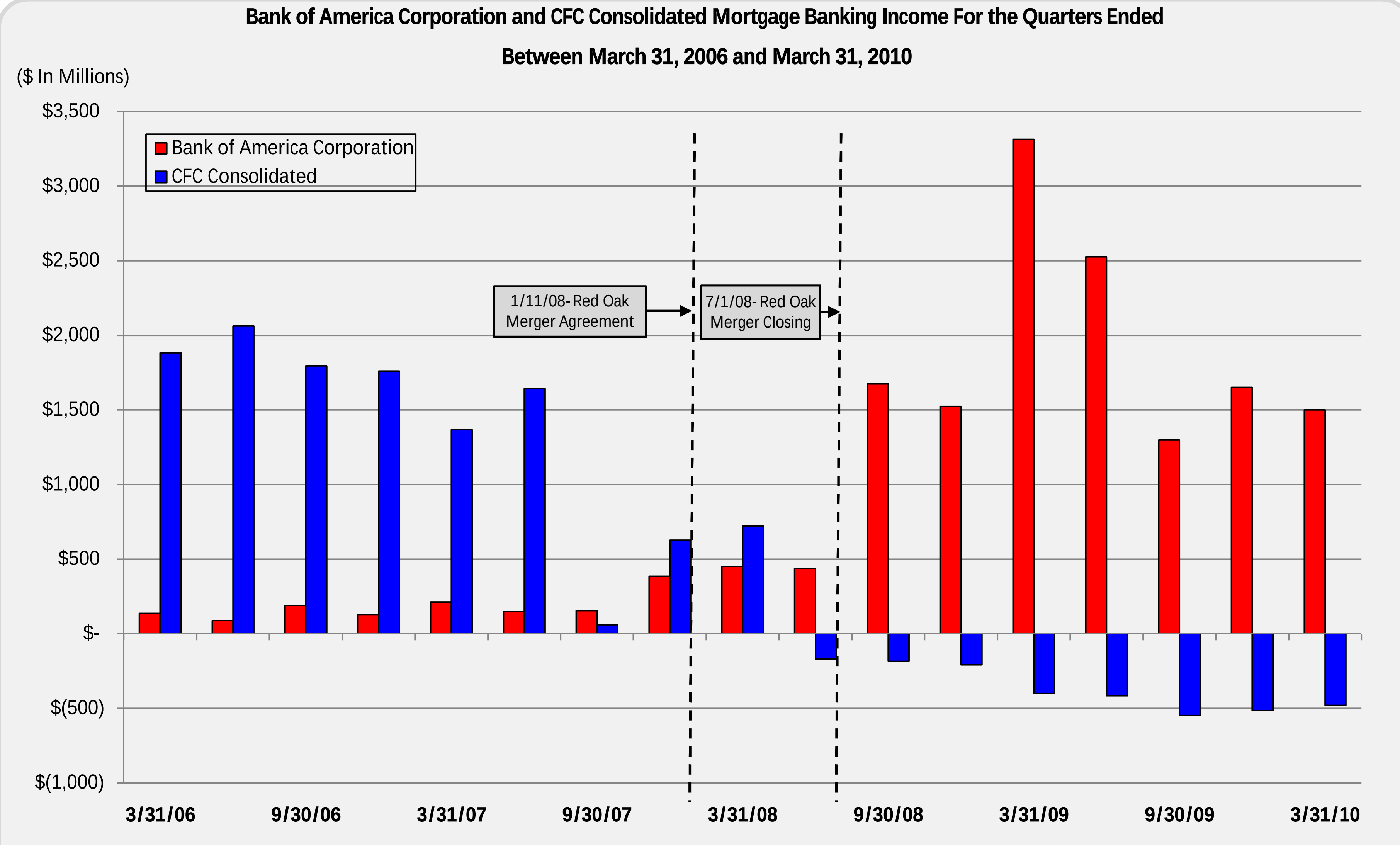
Banking and Insurance:

- 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. Oblak Ex. 50 (Pro Forma for Purchase of CFC Assets/Assumption of Debts); Oblak Ex. 249 (Bank of America/Countrywide Transition Execution Kick-Off, July 22-24, 2008) at BACMBIA-A0000071879; Oblak Ex. 54 (BAC Form 10-Q, May 7, 2009) at 7.
- BANA increased its deposit base by $52 billion through the merger with Countrywide Bank. See Oblak Ex. 23 (BAC 2008 From 10-K) at 18-19; Oblak Ex. 50 (Pro Forma for Purchase of CFC Assets/Assumption of Debts) (showing $52 billion of deposits transferred).
- BAC continued to operate the Balboa Insurance business, using its original brand name, through 2011, until it sold that business to raise capital. Oblak Ex. 187 (International Business Times, "Bank of America Sells Merrill Unit to Julius Baer," Aug. 13, 2012) at 2.

Capital Markets:

- BAC either discontinued or completely absorbed the capital-markets functions once handled by CSC into its own capital markets business, and CSC was deregistered as a broker/dealer and shut down. Oblak Ex. 96 (B. Moynihan Dep. Tr., May 2, 2012) at 70:20-71:9 (testifying regarding CSC "I think most of it got shut down ultimately. We already had a business engaged in that, we just shut it down, I think."); Oblak Ex. 289 (B. Williams Dep. Tr., February 2, 2012) at 65:5-67:19 ("My understanding was Countrywide Securities was no longer going to be a broker-dealer, so [my responsibilities included] the . . . boxing up desks, making sure the computers got returned, general admin . . . since that was no longer going to be in operation."); Oblak Ex. 191 (BAC Preliminary Purchase Accounting for Red Oak Merger) at Row 156 ("Capital Markets and Countrywide Securities Corp are expected to be shut down after the merger."); see also Oblak Ex. 287 (BAC/Countrywide Transition Tollgate 2–Target Environment Presentation to BAC/Countrywide Transition Steering Committee, May 15, 2008) at BACMBIA-A0000061369.

Integration Impact: Bank of America's Mortgage Banking Income Skyrockets While Countrywide's "Core" Source Of Income Disappears



Sources: BAC Quarterly SEC Filings 2006 to 2010; CFC Quarterly SEC Filings 2006 to 2008; Oblak Exs. 84, 307.

Bank of America Continues To Operate The Combined Business, Benefiting From The Associated Revenues

- Barbara Desoer, then Head of Global Technology and Operations, told 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 Ex. 16 (B. Desoer CFC Board Presentation, June 25, 2008) at BACMBIA-00000002037.
  - Through its purchase of Countrywide, BAC went from being a marginal player in the mortgage business to becoming the top originator and servicer, tripling its mortgage banking income from the prior year. Oblak Ex. 23 (BAC 2008 Form 10-K); Oblak Ex. 96 (B. Moynihan Dep. Tr., May 2, 2012) at 75:2-76:2 (after purchasing and integrating CHLS, BAC was "number one in the mortgage business" and "ended up with largest servicing platform in the country."); Oblak Ex. 90 (B. Desoer Draft Remarks for BAC Investor Conf., Sept. 15, 2008) at BACMBIA-P0000015687.
- The combined mortgage business has enjoyed increased mortgage origination activities and revenues as a result of its acquisition of CFC's mortgage business:
  - 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 Ex. 97 (Management Team Update Presentation, Nov. 17, 2008) at BACMBIA-R0000042405.
  - BAC projected "Countrywide to contribute $9.5 billion to [BAC's] revenue line in 2009." Oblak Ex. 98 (BAC Board of Directors Q4 FY 2008 and 2009 Financial Review, Dec. 9, 2008) at BACMBIA-Q0000028192.
  - Following the Asset-Stripping Transactions, 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 Ex. 23 (BAC 2008 Form 10-K) at 19, 30.
- Since the Asset-Stripping Transactions, BAC reported that its 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. Oblak Ex. 54 (BAC Form 10-Q, March 31, 2009) at 3; Ex. 86 (BAC Form 10-Q, June 30, 2009) at 3; Ex. 87 (BAC Form 10-Q, Sept. 30, 2009) at 3; Ex. 88 (BAC 2009 Form 10-K) at 114; Ex. 89 (BAC Form 10-Q March 31, 2010) at 3; Ex. 90 (BAC Form 10-Q, June 30, 2010) at 3; Ex. 91 (BAC Form 10-Q, Sept. 30, 2010) at 3; Ex. 92 (BAC 2010 Form 10-K) at 137; Ex. 93 (BAC Form 10-Q, March 31, 2011) at 119.
- **BAC achieved these dramatic gains by integrating Countrywide's business into BAC and its non-CFC subsidiaries.**

It Is Immaterial That BAC Varied Some of Countrywide's Origination Practices Following Integration

- BAC's assertion that the resulting business was not identical to Countrywide's business is not dispositive: "[T]he de facto merger test **requires continuity of general business operations, not complete identity or uniformity in every material characteristic** of the predecessor and successor entities." Miller, 2005 WL 267551, at *11 (internal citations and quotations omitted).
- That BAC purportedly "aligned" Countrywide's "core" business operations and assets with its own business model does not negate the integration and combination of BAC and Countrywide operations.
- In the words of Barbara Desoer, the head of the combined mortgage business unit:

> **Bank of America Home Loans Presentation**
>
> Ms. Desoer provided an update on the Home Loans & Insurance business. She noted that her presentation would concentrate on the first mortgage side of the business and that she is looking forward to a different discussion about strategy in the fall at the strategic offsite meeting. She then discussed three areas of focus beginning with recognizing the capabilities that the Bank acquired from Countrywide Financial Corporation ("Countrywide"). She noted that Countrywide's core operational strengths, scalable platforms, and many talented associates are valuable assets that have now been aligned to the Bank's business model and responsible lending principles. Next, she commented on the second area of focus: understanding how well the Bank is executing in the current environment to gain market share and generate revenue growth. She reported that the transition is on track to be completed this month, and throughout, the Bank has grown market share and done so faster and more profitability than

Oblak Ex. 256 (Minutes of Meeting of Board of Directors of BAC, June 23, 2010) at BACMBIA-W0000002074.

BAC's Semantic Attempt To Distinguish The Combined Business From Countrywide's Business Is Belied By The Evidence

- First, BAC achieved its dramatic gains in market position and mortgage revenues by integrating Countrywide's mortgage operations into its own. Oblak Ex. 96 (B. Moynihan Dep. Tr., May 2, 2012) at 75:2-76:2 (BAC became "number one in the mortgage business" with "the largest servicing platform in the country"); Oblak Ex. 97 (Management Team Update Presentation, Nov. 17, 2008) at BACMBIA-R0000042405 (BAC expected to originate nearly $270 billion new residential mortgages in 2008, "over $200 billion driven by our legacy CFC distribution channels."); Oblak Ex. 98 (BAC Board of Directors Q4 FY 2008 and 2009 Financial Review, Dec. 9, 2008) (BAC projected "Countrywide to contribute $9.5 billion to [BAC's] revenue line in 2009.").

- Second, BAC coveted Countrywide's scale and capability, and the success of the combined mortgage business (and all its products) depended on that scale and capability:
  - The Head of Mortgage Operations, Barbara Desoer, testified that **"[BAC] had a business but it didn't have the scale and capability."** Oblak Ex. 114 (B. DeSoer Dep. Tr., May 15, 2012) at 100:02-13.
  - Ms. Desoer also explained that BAC was "**acquiring capabilities from Countrywide that [BAC] didn't have**, and we want to keep." Bea Ex. 89 (B. Desoer CRE/ISG Leadership Call Tr., June 16, 2008) at BACMBIA-P0000083973.

- Third, the combined mortgage business rests upon Countrywide's technology platforms:
  - Scott Berry, offered by Countrywide as being most knowledgeable regarding Countrywide's technology platforms, testified that BAC migrated "all of the Bank of America loans on to the Countrywide servicing platform," and that BAC "sunsetted" its own underwriting technology platform, replacing it with the legacy Countrywide CLUES automated underwriting system. Oblak Ex. 215 (S. Berry Dep. Tr., July 21, 2011) at 62:11-63:02, 64:20-65:22.
  - "We intend to migrate the legacy Bank of America origination, fulfillment and servicing processes to Countrywide's platforms." Oblak Ex. 12 (Presentation to BAC Board of Directors, June 25, 2008) at BACMBIA-B0000018288.
  - BAC planned to "[a]ggressively merge Bank of America's secondary marketing desk into Countrywide's technology platform." Oblak Ex. 219 (BAC/Countrywide Transition Tollgate 3– Integrated Plan Presentation to BAC/Countrywide Transition Steering Committee, June 26, 2008) at BACMBIA-A0000068720.

Bank of America Hired Thousands Of Former Countrywide Employees That Were "Critical" To Continuing Operations

- BAC hired at least 19,300 former Countrywide employees to continue and expand the combined Countrywide-Bank of America business operations, including several senior managers who remain employed in these various lines of business at Bank of America. Oblak Ex. 10 (BAC's First Supplemental Resp. and Obj. to Pl.'s Interrog., May 2, 2012) at Resp. to Interrog. No. 13; see also 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).
  - BAC's CEO, Mr. Lewis stated, "**we will keep a number of [Countrywide's] senior people** who are very, very good operators." Oblak Ex. 13 (BAC Strategic Announcement Discussions, Jan. 11, 2008) at BACMBIA-H0000000131.
  - Ms. Desoer noted that Countrywide's "**many talented associates are valuable assets.**" Oblak Ex. 256 (Minutes of Meeting of Board of Directors of BAC, June 23, 2010) at BACMBIA-W0000002074.
  - "Countrywide has . . . **extremely talented associates who will help us build the best mortgage business in the country.**" Bea Ex. 57 (Proposed Mortgage Lending and Servicing Practices of BAC Following Its Acquisition of CFC, May 29, 2008) at CWMBIA-F00000093167.
  - The "**objective** of the [retention] program is **to identify and retain positions that are critical to running Countrywide before and after the merger**, and needed to support the integration with BAC." Bea Ex. 59 (Email from D. Honadel, Feb. 8, 2008) at BACMBIA-A0000007196.

- "**Retaining talent and subject matter expertise**" was a reason the combined mortgage operations were in Countrywide's former headquarters. Oblak Ex. 115 (B. DeSoer Dep. Tr., May 16, 2012) at 272:19-25

> – As a result of the restructuring, employees of CHL became associates of Bank of America National Association (BANA) or Servicing LP. This will not impact benefits or payroll for legacy Countrywide associates.

Oblak Ex. 192 (Charter Collapse Update Project Groundhog Countrywide Transition Finance, Dec. 9, 2008) at BACMBIA-C00000371111.

Bank of America Hired Former Countrywide Senior Executives

- Bank of America retained many senior managers following announcement of the Red Oak Merger, including:

Jack Shackett (Chief Operations Officer)	Laura Milleman (Chief Accounting Officer)
Kevin Bartlett (Chief Investment Officer)	Joshua Adler (Managing Director)
Sandy Samuels (Chief Legal Officer)	Frank Aguilera (Managing Director)
Mark Fisher (Managing Director, Chief Compliance Officer)	Andrew Gissinger (Executive Managing Director)

Bea Ex. 4 (A. Gissinger Dep. Tr., May 12, 2011) at 22:06-23:04; Bea Ex. 15 (J. Schackett Dep. Tr., July 13, 2011) at 29:08-30:07, 335:22-337:17; Oblak Ex. 75 (K. Bartlett Dep. Tr., May 11, 2012) at 39:4-41:12; Oblak Ex. 10 (BAC's First Supp. Resp. to MBIA's Interrog., May 2, 2012) at Resp. to Interrog. No. 13; Oblak Ex. 51 (G. Snelson Dep. Tr., May 25, 2012) at 18:3-20.

- Bank of America trumpets that it did not retain the most senior Countrywide executives, but look at the facts:

  – Angelo Mozilo (CW CEO) was under criminal investigation, named in numerous lawsuits, and eventually sanctioned and permanently barred from serving as an officer or director of any public company by the SEC.

  – David Sambol (CW COO) was initially hired, and intended as head of the combined BAC and Countrywide mortgage business, but then was terminated and replaced by Barbara Desoer. Bea Ex. 7 (B. Hammonds Dep. Tr., March 21, 2012) at 50:14-51:02 ("**[a]fter working with David a number of us thought that he was not going to be right for the job** for a variety of reasons. The primary ones, I think, were that he was fighting the transition process . . . David spent a tremendous amount of time defending Countrywide practices, which had shown to be very flawed . . . [a]nd there were some **outside pressures, people even from the U.S. Senate calling for David to leave the company**."); Bea Ex. 54 (Wall Street Journal, "In a Reversal, BofA Shuns Countrywide President," May 29, 2008) at BACMBIA-Q0000020494 ("**After insisting for months that it would stand by David Sambol**, Bank of America Corp. said the president and chief operating officer of Countrywide Financial Corp., will not be in charge of the companies' combined mortgage business, after all."), at BACMBIA-Q0000020495 ("**Mr. Sambol still will collect his $28 million incentive package, since it was Bank of America's decision for him to leave unexpectedly soon**.").

  – Both David Sambol and Eric Sieracki (CW CFO), who were initially hired, were also named in lawsuits and barred from serving as officers or directors of a public company by the SEC. It is no surprise BAC terminated them.

Bank of America Operates The Combined Business At Former Countrywide Locations, Including Countrywide's Former Headquarters

- Bank of America Home Loans now operates out of CFC's and CHL's former headquarters in Calabasas, California. Oblak Ex. 12 (J. Price Talking Points for Countrywide Update Presentation to BAC Board of Directors, June 25, 2008) at BACMBIA-B0000018286 ("The combined operations will be headquartered out of Calabasas and rebranded `Bank of America Home Loans' in early 2009."); Ex. 114 (B. Desoer Dep. Tr., May 15, 2012) at 177:02-08 (as President of the combined company, Desoer moved her office to Calabasas, California).

- Bank of America planned to base the combined mortgage business in Countrywide's former headquarters in Calabasas, California because it wanted to retain key former Countrywide associates based in California:

  - Mortgage Line of Business Headquarters to be in Calabasas, CA

  Oblak Ex. 12 (Countrywide Update Presentation to BAC Board of Directors, June 25, 2008) at BACMBIA-B0000018323.

- The combined repurchase department also operates out of many former Countrywide offices, including offices in Westlake, California and in Arizona. Oblak Ex. 219 (BAC/Countrywide Transition Tollgate 3– Integrated Plan Presentation to BAC/CW Transition Steering Committee, June 26, 2008) at BACMBIA-A0000068720 (BAC planned to "[a]ggressively merge Bank Of America's secondary marketing desk into Countrywide's technology platform and combine operations in Calabasas, California."); Oblak Ex. 215 (S. Berry Dep. Tr., July 21, 2011) at 68:15-69:12 (testifying that he continued to work in the same physical location after becoming a Bank of America employee); Oblak Ex. 288 (M. Scholessmann Dep. Tr., Aug. 29, 2012) at 962:07-14 (Schloessman gave an Investor Audit presentation for BAC's Workout Strategies Group at Countrywide's former Westlake office); Oblak Ex. 248 (C. Simantel Dep. Tr., Aug. 24, 2012) at 914:10-915:23 (BAC operated its repurchase department out of former Countrywide offices in Westlake, Pasadena, Brea, and Arizona).

BAC's Holding Company Structure Is No Defense To De Facto Merger Liability

- **BAC admits that Countrywide's mortgage operations were continued at Bank of America.** BAC Mem. 41-42.

- BAC argues, contrary to NY law, that BAC's holding company structure precludes a de facto merger because BAC continues the former Countrywide operations through its BANA subsidiary, and not at the holding company level.
  - This technical argument improperly elevates form over substance, against the basis of the de facto merger doctrine: "[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 operations of the predecessor**." MBIA Opp'n 30-31; see AT&S Transp., 22 A.D.3d at 752.
  - A purchaser of assets may be liable as a successor on a de facto merger theory even if some of the seller's assets were transferred to the purchaser's subsidiary as opposed to the purchaser itself. Westwood-Squibb Pharm., 981 F. Supp. at 789.

- BAC also controlled the planning and execution of the July and November 2008 Transactions in every meaningful respect, and cannot avoid the de facto merger doctrine merely by orchestrating the integration of the continued operations and assets into its wholly owned and controlled subsidiaries.
  - It "**would effectively gut the de facto merger doctrine** [if t]o avoid liability, a purchasing corporation would **merely need to create a wholly-owned subsidiary to formally acquire the assets** of a corporation." See In Re Alleged PCB Pollution, 712 F.Supp. 1010, 1017 (D. Mass. 1989).

- BAC's own integration approach shows it intended to absorb and continue all of Countrywide's operations: "The concept was **all parts of the business** regardless of what the function was . . . **would operate in the Bank of America structure**, again, **regardless of legal entity**." Oblak Ex. 114 (B. Desoer Dep. Tr., May 15, 2012) at 158:06-09.

Bank of America Does Not Distinguish Between Legal Entities In Operating The Combined Business Operations

- Not even the executives running the combined business operations at Bank of America distinguish between legal entities in how they operate the combined mortgage operations, or any of Bank of America's lines of business for that matter.
  - Barbara Desoer, head of the mortgage business, concedes that she "[ran] the business regardless of which part of the business came from legacy Countrywide and which part came from legacy Bank Of America," that she "**didn't pay attention**" to "separate legal entities" and that "[i]n general **[she] didn't observe separate legal entities in the way that [she] operated the [combined] business**." Oblak Ex. 115 (B. Desoer Dep. Tr., May 16, 2012) at 239:17-240:10; id. at 451:3-21.
  - BAC's current Chief Executive Officer, Brian Moynihan, explained that BAC is run by lines of business, and not by legal entity. "[W]e lead [BAC] through activities and lines of business" and "we combined operations. **I don't know what [former Countrywide] businesses are running in what legal entities**." Oblak Ex. 96 (B. Moynihan Dep. Tr., May 2, 2012) at 42:16-43:6; id. at 215:12-21.

Assumption Of Liabilities Ordinarily Necessary For The Uninterrupted Continuation Of The Business

Fourth, Bank of America Assumed The Liabilities Necessary To Continue Countrywide's Business Operations

- This factor looks at whether the successor assumed the liabilities that would ordinarily be necessary to continue the predecessor's business operations without interruption: "The proper inquiry regarding the assumption of the seller's liability is whether the purchaser assumed the existing seller's contracts, such as manufacturing or sale representative contracts, **necessary to continue the ordinary business without interruption.**" McDarren v. Marvel Entm't Grp., No. 94 CIV. 0910, 1995 WL 214482, *8 (S.D.N.Y. April 11, 1995); Miller, 1995 WL 267551, at *9 (same).

- This factor has been 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, compliance, 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).

- Bank of America concedes this point, arguing that this factor is "immaterial," and "even if it were necessary, the assumption of liabilities alone is not enough to show a de facto merger." BAC Mem. 42.

Bank of America Assumed Numerous Debts And Liabilities Necessary To Continue Countrywide's Business Operations

- Bank of America assumed $15.5 billion of CFC's and CHL's public debt, which was necessary to continue funding the combined mortgage business operations at competitive rates and to preserve BAC's borrowing reputation in the public markets. See BAC Mem. 42; Oblak Exs. 156-158 (Rating Agency Reactions to BAC Announcement on Debt); Oblak Ex. 192 (Charter Collapse Update Project Groundhog Countrywide Transition Presentation, Dec. 9, 2008) at BACMBIA-C0000037113 ("**Debt in CFC/CHL moved directly into BAC** entities and therefore we have lost the ability to isolate going forward."); Oblak Ex. 193 (Note Summary, Nov. 1, 2008).
- BAC expressly assumed, in its Asset Purchase Agreement, the liabilities associated with employing former Countrywide employees, including wages and benefits:
  - "**Buyer shall assume and be solely responsible for the costs of all employment and employee benefits-related liabilities and obligations** that arise on or after the Closing Date and that relate to any Transferred Employee . . . and Seller shall not have any liability with respect to any such Transferred Employee . . . that relates to such Transferred Employee's employment with Buyer or any of its Affiliates." Oblak Ex. 48 (Asset Purchase Agreement, Nov. 7, 2008) at BACMBIA-C0000168196.
- BAC expressly assumed, in its Asset Purchase Agreement, the liabilities necessary to continue the business with respect to the ownership and operation of the CFC's and CHL's mortgage assets:
  - The Asset Purchase Agreement states that: "**Buyer shall . . . assume**, pay, perform and discharge when due the **liabilities with respect to the ownership and operation of the Purchased Assets** only to the extent arising from or relating to any event, circumstance or condition occurring on or after the Closing." Id. at BACMBIA-C0000168182.
- BAC assumed more than $50 billion in deposit liabilities of CFC's former banking subsidiary, Countrywide Bank. Oblak Ex. 301 (Stock Purchase Agreement); Oblak Ex. 50 (Pro-Forma for Purchase of CFC Assets/Assumption of Debt).
- BAC transferred mortgage-origination to BAC's federal lending identification numbers (and retired Countrywide's federal lending numbers), without which a mortgage lender cannot originate qualifying federal housing mortgages. Oblak Ex. 213 (CFC Government Lending IDs Transition Presentation, Oct. 24, 2008) at BACMBIA-A0000030603.

Bank of America Assumed Leases And Third-Party Contracts Necessary To Countrywide's Business Operations

- BAC assumed all leases and third-party contracts necessary to the "mortgage operations of CFC" in connection with the November 2008 Transactions:

> than de minimus furniture, fixtures and equipment designated in Seller's general ledger as remaining with Seller), (vii) contract rights with third parties, including rights under real estate leases (for property used in CFC's mortgage business), vendor contracts, intellectual property licenses and other contracts related to the mortgage operations of CFC, (viii) real property owned by CHL and used in CFC's mortgage business, (ix) mortgage servicing advance receivables and (x) any other assets of Seller used in CFC's mortgage business.

Oblak Ex. 48 (Asset Purchase Agreement, Nov. 7, 2008) at Schedule 2.2.

- Ed Ofcharsky, the execution manager for the November 2008 Transactions, explained that:
  - "**All owned facilities and leases moved**." Oblak Ex. 296 (Email from E. Ofcharsky to M. Kanaga, Nov. 12, 2008).
  - As part of the November transaction "**for the entities that were sold, if those entities had leases or property, just make sure that they got transferred** appropriately if it was necessary." Oblak Ex. 57 (E. Ofcharsky Dep. Tr., May 25, 2012) at 458:16-19, 459:2-6.

- Bank of America also identified itself as CHL's successor-in-interest for purposes of continuing third-party contracts necessary to the ongoing operations:

> As an FYI. the philosophy of how the CHL collapse was handled was to identify any agreements that would be at risk by leaving them in the name of the original contracting (collapsed) party. Those (rare few) were addressed proactively, all others were handled the next time we touched the agreement. In those cases we simply used (BANA) "as successor in interest to" (CHL) language in the preamble of the amendment. From a practical standpoint, we have not had a case yet where the supplier was not willing to continue to take our money to continue providing their product/services. Hope this helps. Mack

Oblak Ex. 212 (Countrywide Transition Legal Entity Planning Spreadsheet) at BACMBIA-C0000118128.

There Is No "Fair Value" Defense To Successor Liability Based On De Facto Merger

- Bank of America's fixation on the $45 billion in consideration paid in exchange for all of Countrywide's operating assets, as an accounting matter, misses the equitable purpose of successor liability. See BAC Mem. 2, 4, 6, 17, 20.

- The adequacy of the consideration paid in a sale of assets is legally irrelevant, as it is **<u>not a factor</u>** relevant to the inquiry of whether a de facto merger occurred under New York law. See, e.g., Van Nocker, 15 A.D.3d at 256-57 (identifying four "hallmarks" of a de facto merger that do not include adequacy of consideration); Cargo Partner, 352 F.3d at 46 (same).

- As with Bank of America's misguided attempt to impose a fraud requirement for successor liability, its attempt to introduce a "fair value" defense conflates the de facto merger doctrine with fraudulent conveyance law, which is a separate and distinct basis for imposing liability on a purchaser of assets. See Miller, 2005 WL 267551 at *12.

  – The de facto merger doctrine is not concerned with how much the seller was paid for transferred assets, but rather, whether the seller's shareholders retain an ownership interest in the assets sold following a transaction that involved the transfer of an ongoing business. Cargo Partner, 352 F.3d at 47 (the "essence" of a de facto merger is that the purchaser and seller "become owners together of what formerly belonged to each.").

  – By contrast, in a constructive fraudulent conveyance analysis, the fundamental issue is whether the seller received adequate consideration for the assets transferred.

Choice Of Law: New York Law Controls
The De Facto Merger Claim

New York De Facto Merger Law Applies In This Case

- Under New York choice of law rules, the parties' principal places of business inform the relevant jurisdictions, which in this case are New York (MBIA's headquarters) and North Carolina (BAC's headquarters).
- There is no conflict between New York and North Carolina law, so New York law applies.
- Bank of America attempts to avoid the application of New York de facto merger law by pointing to Delaware law, and relying on one California judge's erroneous articulation of Delaware law.
  - First, "Delaware holds a recognized concern for transactions that seek to shelter assets from creditors," and has developed a limited body of case law analyzing facts that are sufficient, but not necessary, to establish a de facto merger. Xperex Corp. v. Viasystems Tech. Group, No. 20582-NC, 2004 WL 3053649, at *2 (Del.Ch. July 22, 2004).
  - Second, the Maine decision Bank of America peddles as Delaware law relies on an inapposite line of shareholder cases that are not applicable to creditor claims such as those at issue in this case.
- In any event, there is no genuine conflict between New York and Delaware law because both jurisdictions apply the de facto merger doctrine to protect third-party creditors and provide creditors with a similar remedy such that application of New York law would have no "significant possible effect on the outcome." Fin. One Pub. Co. Ltd v. Lehman Bros. Special Fin., Inc., 414 F.3d 325, 331 (2d Cir. 2005).
- Even if there is a conflict, New York has the strongest interest in the application of its law because the wrongful conduct alleged and the injury—the controlling contacts in cases like this one—both point to New York law. By contrast, Delaware has no interest. See Schultz v. Boy Scouts of Am., 65 N.Y.2d 189, 197 (1985).
- The "internal affairs" doctrine, which applies to matters "involv[ing] primarily a corporation's relationship to its shareholders," does not apply where third party interests, such as MBIA's as a third-party creditor, are at issue. Rest. 2d Conflict of Law § 302; see also UBS Sec. LLC v. Highland Capital Mgmt., L.P., 30 Misc.3d 1230 (A) (Sup. Ct. N.Y. Cty. Mar. 1, 2011).

New York Choice Of Law Looks First At Whether There Is A Genuine Conflict, And Second At States' Interests Only If There Is A Conflict

- New York choice of law rules govern because the suit was filed in New York. See 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.").

- **Step 1:** Is there a genuine conflict?

  - 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).

  - A **genuine conflict** only arises 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). See Fin. One Pub. Co., 414 F.3d at 331.

  - If no genuine 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.").

- **Step 2:** If there is a genuine conflict, conduct an "interest analysis."

  - Only if a genuine conflict exists, New York courts conduct a **flexible "interest analysis"** to choose which jurisdiction's law will apply. See Schultz, 65 N.Y.2d at 197 ("Interest analysis became the relevant analytical approach to choice of law in tort actions in New York."); see also DaSilva v. C & E Ventures, Inc., 83 A.D.3d 551, 553 (1st Dep't 2011).

If This Court Were To Consider Any Other State Law, North Carolina Law Is The Only Plausible Alternative

- Under New York's choice of law rules, courts view the state of a company's principal place of business as more important than its state of incorporation. Lloyd's, London v. Foster Wheeler Corp., 36 A.D.3d 17, 25 (1st Dep't 2006) ("[T]he [law of the] state of the **principal place of business takes precedence over state of incorporation**"); see also Elson v. Defren, 283 A.D.2d 109, 116 (1st Dep't 2001) ("While Avis is a Delaware corporation, it maintains its **principal place of business in New York and is therefore considered a New York domiciliary for choice of law purposes**."); UBS Sec. LLC v. Highland Capital Mgmt. L.P., 30 Misc.3d 1230(A), at *3 (Sup. Ct. N.Y. Cty. 2011), aff'd, 93 A.D. 3d 489 (1st Dep't 2012) (applying New York law because "[o]ther than being incorporated in the Cayman Islands, [defendant] has no obvious ties to that jurisdiction.").

- Bank of America's principal place of business is in North Carolina. Bea Ex. 32 (BAC Bylaws, Feb. 24, 2011) at Article II, Section 1 (BAC is headquartered in North Carolina); Bea Ex. 112 (BAC Invitation to 2012 Shareholder's Meeting, Mar. 28, 2012) (BAC holds annual shareholder meetings in North Carolina); Bea Ex. 65 (BAC Info. Sheet, June 30, 2012) (BAC has more than 187 banking centers and 465 ATMs in North Carolina).

- Aside from being incorporated in Delaware, BAC cites no other obvious ties to that jurisdiction. See UBS Sec. LLC , 30 Misc.3d 1230(A), at *3 (applying New York law because "[o]ther than being incorporated in the Cayman Islands, [defendant] has no obvious ties to that jurisdiction.").

- If the Court were to consider another jurisdiction's law, North Carolina substantive law is the only plausible alternative to New York substantive law, and not Delaware law.

- Bank of America ignores principal place of business, and argues (wrongly) that state of incorporation is relevant, relying on two factually inapposite cases. BAC Mem. 25 (citing Hayden, 2012 WL 1449257, at *7, and Planet Payment, 2011 WL 1636921, at *7).

New York And North Carolina Apply The Same De Facto Merger Test

New York	North Carolina
"[C]ontinuity of ownership."	"[C]ontinuity of shareholders achieved by paying for the acquired assets via transfer, to the seller's shareholders, of shares in the purchasing corporation."
"[C]essation of ordinary business and dissolution of the acquired corporation as soon as possible."	"[T]he seller 'ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.'"
"[A]ssumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation."	"[A]ssumption by the purchaser of 'those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller.'"
"[C]ontinuity of management, personnel, physical location, assets and general business operation."	"[C]ontinuation of the management, personnel, physical location, assets, and general business operations of the seller."

Fitzgerald, 286 A.D.2d at 574.

Lattimore & Assocs., LLC v. Steaksauce, Inc., No. 10 CVS 14744, 2012 WL 1925729, at 11 (N.C. Super. Ct. May 25, 2012) (internal citations omitted).

BAC Is Wrong To Contend That North Carolina Applies A More Stringent Continuity Of Ownership Standard

- There is no conflict between New York and North Carolina de facto merger law, and therefore New York law applies. BAC concedes that the factors are the same, but incorrectly argues that application of the continuity of ownership requirement is more stringent in North Carolina.

- The Lattimore case did not establish a stricter continuity requirement:
  - "In its traditional form, [t]he **de facto merger exception emphasizes the continuity of the acquired company's shareholders in the surviving enterprise**." Lattimore, 2012 WL 1925729, at ¶ 60 (internal quotations omitted).
    - Under the "traditional" test, continuity is established where purchaser and seller "**become owners together of what formerly belonged to each**." Cargo Partner, 352 F.3d at 47.
  - Lattimore did not present a serious continuity of ownership question, and the court did not have occasion to address other circumstances that might give rise to continuity of ownership.
  - Recognizes de facto merger is an "**equitable doctrine**," and that a more flexible approach would be appropriate if court were presented with a non-arm's length transaction or "plausible evidence of irresponsible dealings, fraud or wrongful advantage," such as are present here. Lattimore, 2012 WL 1925729 at ¶¶ 51, 76.
  - Relies on New York case law which is more flexible than the singular fact pattern BAC suggests is required to establish continuity of ownership. See, e.g., City of Syracuse v. Loomis Armored, No. 5:11-CV-744, 2012 WL 4491119, at *8 (N.D.N.Y., Sept. 28, 2012) ("[A]lthough a continuity of ownership is **typically** satisfied where the purchasing corporation pays for the acquired assets with shares of its own stock, a court can still find continuity of ownership where a corporation pays for the assets in cash."); see also Nettis, 241 F.3d at 194 ("that the transaction was structured as an asset purchase for cash . . . represent[s] just the sort of formalities that the de facto merger doctrine ignores.").

- Continuity of ownership is established here because (1) BAC paid CFC's shareholders with BAC stock to acquire control over the whole of the Countrywide enterprise, including all of its assets and operations, and CFC's former shareholders continued as "shareholders in the surviving enterprise," and (2) BAC's ownership continued before and after the asset transfers. Lattimore, 2012 WL 1925729, at ¶60.

BAC Seeks To Exploit Delaware's Less Developed Law As A Conflict, But New York And Delaware Protect The Same Interests

- By contrast to the well-settled New York law that BAC seeks to avoid, Delaware law is sparse and unsettled, with only limited authority addressing de facto merger in the creditor context.

- BAC wants to apply Delaware law, but ignores tests set by controlling Delaware cases in the creditor context.

- Delaware's Drug v. Hunt decision recognizes certain facts sufficient (without more) to establish de facto merger, but these are not the only facts that give rise to de facto merger liability.
  - The 1933 decision of Drug Inc. v. Hunt, 35 Del. 339 (1933), identified **circumstances <u>sufficient</u> to find a de facto merger**—namely: (1) where one corporation transfers all of its assets to another corporation, (2) payment is made in stock, issued by the transferee directly to the shareholders of the transferring corporation, in exchange for their stock in that corporation, and (3) the transferee agrees to assume all the debts and liabilities of the transferor. 35 Del. 339, 361-62 (1933); see also Magnolia's at Bethany, LLC v. Artesian Consulting Engineers, Inc., No. S11 C-04-013, 2011 WL 4826106, at *3 (Del. Super. Ct. Sept. 19, 2011) (applying the Drug v. Hunt factors); Marnavi v. Keehan, Civ. No. 08-389-LPS, 2012 WL 5275470 at *14 (D. Del., Oct. 25, 2012) (same).
  - However, Drug v. Hunt "**did not set forth the only circumstances** in which a Delaware corporation will be considered the successor of another corporate entity." Xperex Corp., 2004 WL 3053649, at *2.
  - Chancellor Chandler rejected a reading of Drug v. Hunt that would limit analysis of a de facto merger to the factors identified in that case, explaining that "**Delaware law holds a recognized concern for transactions that seek to shelter assets from creditors**. Moreover, **this Court is one of equity and will not allow sham transactions to achieve mischief**." Id. at *2.

There Is No Genuine Conflict Because Both New York And Delaware Agree The Purpose Of The Doctrine Is To Protect Third-Party Creditors

- New York and Delaware do not conflict because they protect the same fundamental policy interest and applying New York law "would not threaten the policy underlying" Delaware law. K.T., 37 A.D.3d at 115-16 (applying New York's tort law "since application of New York's tort law 'would not threaten the policy underlying [Brazil's rule of law].'") (emphasis omitted).

- Both jurisdictions agree that the public policy 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:

  – Delaware:

    - "Delaware law holds a recognized **concern for transactions that seek to shelter assets from creditors.**" Xperex Corp., 2004 WL 3053649, at *2.
    - The de facto merger doctrine is applied "in an apparent effort **to prevent injustice to creditors** or other persons having claims against the transferring corporations." Drug, 35 Del. at 361-62.

  – New York:

    - "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 source remains to pay for the victim's injuries.**'" Morales, 18 Misc.3d at 688 (citation omitted).

There Is No Genuine Conflict Because Both New York And Delaware Provide Similar Remedies To Aggrieved Creditors

- New York and Delaware do not conflict because they provide **similar remedies.** See Engel v. Clapper, 14 A.D.3d 855, 856-57 (3d Dep't 2005) (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).

- Because both jurisdictions provide a similar remedy to third party creditor victims—**a right to recover any judgment from the successor**—any minor difference would not have a "significant possible effect on the outcome of the trial" in this litigation. Fin. One, 414 F.3d at 331 (internal citations omitted).
  - 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, 352 F.3d at 45 (citing Schumacher, 59 N.Y.2d at 245); 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, 2011 WL 4826106, at *5 (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).
  - In contrast to Hayden—the case BAC relies on to establish a conflict—there is no significant possible effect on the outcome in this case because here 100% of CFC's shareholders became BAC's shareholders, and received BAC stock as consideration, such that continuity of shareholders is established, whereas in Hayden the predecessor corporation had only received a partial membership interest in an intermediate holding company such that divergent views on continuity of ownership would impact the outcome of the claim in that case. See Hayden Capital USA, LLC v. Northstar Agri Indus., LLC, No. 11 Civ. 594, 2012 WL 1449257, at *2, *6 (S.D.N.Y. April 23, 2012).

- In fact, a New York court has previously found no conflict of law because "**[t]he laws of Delaware and New York are substantially the same on the issue of successor liability.**" Fischer v. Prodigi, Inc., No. 603891/06, 2007 WL 2815494, at *4 (Sup. Ct. N.Y. Cty. July 23, 2007).

BAC Attempts To Manufacture A Conflict By Relying Upon An Erroneous California Decision, And Not Delaware Law

- Bank of America fails to offer this Court the proper standard under Delaware law, and instead attempts to manufacture a conflict of law by pointing to a **California** judge's erroneous interpretation of Delaware law. Maine State Ret. Sys. v. Countrywide Fin. Corp., No. 2:10-CV-0302, 2011 WL 1765509, at *5 (C.D. Cal. April 20, 2011).

- Relying on Judge Pfaelzer's decision in Maine, BAC contends that Delaware law examines four factors, including whether:
  - (i) the asset sale complied with the applicable corporate-law statute governing such sale;
  - (ii) creditors or stockholders were injured by such a failure to comply;
  - (iii) the consideration the asset seller received was "grossly inadequate;" and
  - (iv) the transaction was engineered to harm shareholders or creditors. BAC Mem. at 25-26.

- Judge Pfaelzer admits it is, "difficult to find much authority elucidating the circumstances under which Delaware would recognize de facto merger. The parties have not set forth the applicable test Delaware would apply," and therefore crafts her own amalgamation of factors based on the "meager authority" in Delaware. Maine State Ret. Sys., 2011 WL 1765509, at *5.

- The Maine decision erroneously requires a showing of fraud to establish a de facto merger, which no Delaware Court has ever required. See Maine, 2011 WL 1765509, at *7.
  - That approach conflates the de facto merger doctrine, which **does not require** a showing of intent to defraud (either in Delaware or New York), with other separate and independent doctrines that do require such a showing. Miller, 2005 WL 2676551, at *12 ("[N]o independent showing of fraud or injustice is required under the de facto merger doctrine."); Magnolia's at Bethany v. Artesian Consulting Eng'rs, No. S11 C-04-013, 2011 WL 4826106, at *3 (Del. Super. Ct. Sept. 19, 2011) (identifying the Drug v. Hunt factors, and not fraud, as relevant to whether there has been a consolidation or merger in fact); Marnavi v. Keehan, Civ. No. 08-389-LPS, 2012 WL 5275470 at *14 (D. Del., Oct. 25, 2012) (same).

The Maine Decision Erroneously Applies Law Developed In The Shareholder Context To Creditor Claims

- The Maine decision fails to recognize that the shareholder context involves very different concerns from those presented by the creditor context, as here:
  - In the shareholder context, the injury alleged is that the asset sale did not furnish fair value to the selling corporation or its shareholders. Under such circumstances, shareholders whish to obtain an independent appraisal of their shares, or ask the court to veto the sale—both of which are remedies normally available to shareholders only where there was a de jure merger, not an asset sale.
  - The creditor context at issue here is far different. Creditors are not seeking to invoke Delaware statutory rights designed to allow shareholders to maximize the value of their shares. Rather, MBIA is invoking an equitable doctrine to allow it to recover for injuries it sustained—recovery that may well be unavailable from the primary wrongdoer (which BAC has stripped to a shell) and instead is available only from the successor.

§ Judge Batts' opinion in Hayden does not adopt Maine; to the contrary, Judge Batts cites to the Drug v. Hunt factors as the controlling factors, and at best recognizes Maine as providing "**other factors** that would support a finding of de facto merger." See Hayden, 2012 WL 1449257, at *4.

§ Notably, Hayden finds a conflict between Delaware and NY law only on the issue of whether continuity can be shown by direct and/or indirect ownership. That asserted difference is irrelevant to this case and thus cannot present the 'significant possible effect' required for a genuine conflict.

Even If This Court Concludes There Is A Conflict Between New York And Delaware, New York Has The Strongest Interest

- 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) (internal citation omitted).

New York Contacts	Delaware Contacts
The bulk of the alleged underlying **misconduct that harmed MBIA** occurred in New York. Oblak Exs. 257-271 (requests for bid sent from Garret Galati, a CHL employee, to MBIA); Oblak Ex. 305 (CSC presentation regarding market trends and mortgage product offerings, reflecting data from CHL and CFC, Dec. 1, 2006); Oblak Ex. 283 (meeting invitation for "Countrywide Meeting," Dec. 12, 2006).	BAC is incorporated in Delaware. Rosenberg Ex. 1 (BAC 2011 Form 10-K).
As a result of CW's misconduct, MBIA suffered **injury in New York.** Pryor Cashman Sherman & Flynn, LLP v. Tractmanager, Inc., No. 603515/05, 2007 WL 2175666, at *10 (Sup. Ct. N.Y. Cty. May 18, 2007) ("A corporation suffers its injury where its principal place of business is located because that is where its damages are felt.").	CFC is incorporated in Delaware. Rosenberg Ex. 14 (CFC Delaware Incorp. Cert., Sept. 27, 2012).
MBIA is a New York Corporation, headquartered in Armonk, New York. Amend. Compl. ¶8.	
CHL is a New York corporation. Oblak Ex. 3 (CFC 2007 Form 10-K) at Exhibit 10.109c.	
CSC, which served as the underwriter for the securitizations insured by MBIA, had a principal place of business in New York. Oblak Ex. 81 (BAC Monoline Strategy Presentation, Nov. 2008) at BACMBIA-G0000001460 (CSC "[s]tructured the deals[;] Hired and oversaw the firms completing due diligence[; and] Negotiated with the monolines.").	
BAC conducts substantial business in New York. Bea Ex. 64 (BAC Info. Sheet, June 30, 2012).	
MBIA is regulated by the New York State Department of Financial Services and Countrywide's conduct as an applicant for insurance implicates New York Insurance Law. Oblak Exs. 123-137 (Insurance Agreements).	
On November 7, 2008, BAC transferred substantially all of CHL's assets (a New York corporation) to itself. Oblak Ex. 48 (Asset Purchase Agreement, Nov. 7, 2008).	

Location Of The Injury And The Alleged Misconduct Control, And These Interests Point To New York Law

- First, because the torts alleged by MBIA occurred in New York and most importantly, injured a New York corporation, New York has the strongest interest in ensuring that a source remains to pay for MBIA's injuries.
  - "[T]he significant contacts are, almost exclusively, **parties' domiciles and the locus of the tort.**" See generally Schultz, 65 N.Y.2d at 197.

- 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. Am Compl. ¶ 8.
  - 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. Oblak Ex. 3 (CFC 2007 Form 10-K) at Exhibit 10.109c; Oblak Exs. 123-37 (Insurance Agreements); Oblak Exs. 138-152 (Pooling & Servicing/Sale & Servicing Agreements.); Oblak Exs. 352-359 (Mortgage Loan Purchase Agreements).
  - In soliciting MBIA's business, CHL sent requests for bid to MBIA in New York during 2004-2007 and sent materially false and misleading loan tapes and Mortgage Loan Schedules to MBIA in New York. Oblak Exs. 257-271 (Requests for Bid).
  - 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. Oblak Exs. 123-152 (Pooling & Servicing/Sale & Servicing Agreements.); Oblak Exs. 352-359 (MLPAs).
  - 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. Oblak Ex. 305 (CSC Presentation to MBIA, Dec. 1, 2006); Oblak Ex. 283 (Meeting Invitation to MBIA for Countrywide Meeting, Dec. 12, 2006).

- MBIA has paid out billions in claims under the Insurance Agreements, thus **suffering injury in New York**.
  - "A corporation suffers its injury where its principal place of business is located because that is where its damages are felt." Cashman, 2007 WL 2175666, at *10.

New York Also Has The Strongest Interest Because Its Insurance Law Governs Liability

- 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 v. Multi-Pak Corp., 477 F. Supp. 2d 620, 625 (S.D.N.Y. 2008); Fischer, 2007 WL 2815494, at *4 ("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).
- 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. Cty. 2010).
- 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.
- 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, effectively putting CFC and CHL out of the mortgage business and leaving MBIA and other creditors without a remedy against shell corporations. Oblak Ex. 48 (Asset Purchase Agreement, Nov. 7, 2008) at Schedule 2.2.
- As such, 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 CHL, a New York company, to another legal entity outside of New York.

New York's Interest Also Strongest Because BAC and Countrywide Availed Themselves Of New York Law In Transactions At Issue

- Third, 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 underlying insurance obligations
  - 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. Oblak Exs. 123-137 (Insurance Agreements); Oblak Exs. 138-152 (Pooling & Servicing/Sale & Servicing Agreements).
- New York law governs many of the critical agreements between BAC and Countrywide that give rise to successor liability.
  - New York law governs the November 2008 Asset Purchase Agreement, by which BAC transferred substantially all of CHL's remaining assets to itself. Oblak Ex. 48 (Asset Purchase Agreement) at § 10.1.
  - New York law governs the November 2008 Stock Purchase Agreement, by which BAC transferred substantially all of CFC's assets to itself. Oblak Ex. 301 (Stock Purchase Agreement) at § 9.6.
  - New York law also governs the demand notes issued as part of the November 2008 Transactions. Oblak Exs. 58 & 60 (Demand Notes, Nov. 7, 2008).
  - New York law governs the agreements by which the July 2008 Transactions were effectuated. See, e.g., Oblak Ex. 31 (Master Mortgage Loan Purchase and Subservicing Agreement, July 1, 2008) at §11.

New York Also Has The Strongest Interest Because Countrywide Has Significant Contacts With New York

- Fourth, although BAC contends that Countrywide's parent company, CFC, is incorporated in Delaware, the weight of CFC's contacts favor the application of New York law.
  - In 2005-2007, the principal counterparty that dealt with MBIA was CHL, CFC's principal operating company during that time period and 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. Oblak Ex. 3 (CFC 2007 Form 10-K) at Exhibit 10.109c; Oblak Exs. 123-37 (Insurance Agreements); Oblak Exs. 138-152 (Pooling & Servicing/Sale & Servicing Agreements); Oblak Exs. 352-359 (Mortgage Loan Purchase Agreements).
  - 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. Oblak Ex. 295 (New York Times, "Long After Fall, Countrywide's Mozilo Defended His Legacy," Feb. 17, 2011).
  - The vast majority of CFC's remaining assets belong to its New York subsidiary, CHL. Oblak Ex. 82 (Separability Analysis) ("CHL comprises over 85% of CFC's balance sheet" as of 2011).
  - 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. Am. Compl. ¶12.
  - That Countrywide Bank (a CFC subsidiary) became more involved in funding mortgage originations in the months leading up to the acquisition does not, as BAC contends, alter the analysis. CHL continued to own the infrastructure for loan origination during that period and loan servicing continued to be done by CHLS, a subsidiary of CHL. As Bank of America itself represented to the Federal Reserve Board, "[u]ntil the credit crunch of last summer, about 48% of CHL's origination volume was typically underwritten by Countrywide Bank. The remainder of CHL's volume historically has been securitized or sold to others. Since the subprime credit crunch, a much larger percentage of CHL's production has been underwritten by Countrywide Bank . . . **[n]o CHL assets were transferred to Countrywide Bank**" and Countrywide Bank has "**[h]istorically lack[ed] any origination infrastructure.**" Oblak Ex. 174 (BAC App. to Fed. Res. Bd., Feb. 15, 2008) at MBIAFRS-00000134, n. 9.
- Given New York's overwhelming interest, even if there were a conflict, New York law would apply.

The Internal Affairs Doctrine Does Not Apply

- The Court of Appeals of New York does not agree with BAC: "We reject any automatic application of the so-called 'internal affairs' choice-of-law rule." Greenspan v. Lindley, 36 N.Y.2d 473, 478 (1975).

- This doctrine does not apply where third party interests, such as MBIA's interests as a third-party creditor in this case, are at issue. UBS Sec., 30 Misc. 3d 1230 (A) ("When determining conflicts issues, the courts of this state do not automatically apply the 'internal affairs' choice-of-law rule").

  - BAC argues that Delaware law applies under the internal-affairs doctrine because BAC and CFC are both incorporated in Delaware. See Maine State Ret. Sys., 2011 WL 1765509, at *4.

  - State of incorporation is not dispositive; it is peripheral; the fact that BAC is a Delaware corporation does not control.

  - In any event, 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."); Curbow Family LLC v. Morgan Stanley Inv. Advisors, No. 651059/10, 2012 N.Y. Slip Op. 22197, at *4 (Sup. Ct. N.Y. Cty. 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") (citations omitted).

  - 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 asset transfers 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.").

The Internal Affairs Doctrine Should Also Be Rejected Where Claimants Would Be Injured By Transfer Of Assets Out Of State

- New York courts have also expressly recognized the interest in protecting a New York resident plaintiff from a situation where it would suffer injury if prevented from holding a successor corporation liable.
  - "New York has an especially strong interest in applying its law when one of its domiciliaries alleges that he has been defrauded." Fischer, 2007 WL 2815494.
  - Tort creditors "need protection against attempts by ongoing businesses to avoid liability through transfer of their operations to another legal entity." Sweatland, 181 A.D.2d at 246.
- New York has such an interest here, as the Asset-Stripping Transactions represent BAC's attempt to put Countrywide's assets out of the reach of tort creditors like MBIA, such that MBIA's ability to recover is prejudiced absent successor liability.
  - The November 2008 Transactions transferred 72% of CHL's remaining assets and 87% of CFC's assets
  - The "left behind" Countrywide entities were left with "toxic" or "bad" illiquid assets, and no business operations.

	Asset Balance		
	As of 9.30.08	$ Transferr	% Transferr
Corporation	21,103	12,963	61%
CHL Consolidated	22,899	16,600	72%
Countrywide Financial Holdings	107,365	107,365	100%
Insurance (ex Re)	3,281	3,281	100%
Balboa Reinsurance	1,386	-	0%
Capital Markets	636	-	0%
Landsafe	432	432	100%
Other Subsidiaries	1,577	14	1%
Eliminations	(23,012)	(22,520)	98%
Consolidated CFC	**135,667**	**118,135**	**87%**

Oblak Ex. 52 (BAC Pro-Forma Accounting).

Bank of America Is Wrong In Claiming Restatement Section 302 Calls For Application Of Delaware Law

- Restatement Section 302(a), upon which Bank of America relies to invoke the "internal affairs" doctrine, actually makes clear that it only applies to matters "**which involve primarily a corporation's relationship to its shareholders**," and does not apply to matters involving a company's creditors. Rest. 2d Conflict of Law § 302(a).
  - Restatement Section 302 specifically distinguishes what it deems "internal affairs" from matters that "include, for example, the **making of contracts, the commission of torts and the transfer of property**" such as the issues in this case, and states that "**[t]here is no reason why corporate acts of the latter sort should not be governed by the local law of different states.**" Id. at Cmt. e.
  - Restatement Section 302(a) enumerates the limited scope of matters that fall within this Section that "affect the interests of a corporation's creditors," none of which are at issue here. Id. at § 302(a) ("the issuance of bonds, the declaration and payment of dividends, loans by the corporation to directors, officers and shareholders, and the purchase and redemption by the corporation of outstanding shares of its own stock.").

The Court Already Applied New York Law To MBIA's De Facto Merger Claim, And BAC Abandoned Its Appeal On The Issue

- BAC acknowledges that this Court already applied New York Law to MBIA's de facto merger claim
  - BAC argued that Delaware law should apply in its responding papers in support of its Motion to Dismiss MBIA's Amended Complaint in 2009. BAC Mem. I.S.O. Mot. To Dismiss, Nov. 13, 2009, at 6 n.5 ("Because all of the relevant entities that participated in the merger are incorporated in Delaware, Delaware law applies to the question of successor liability.").
  - Instead, the Court 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. Cty. 2010).

- BAC sought review of the Court's application of New York law, but abandoned its appeal as to that issue
  - BAC filed a Notice of Appeal, and its Pre-Argument Statement before the First Department arguing that because "the relevant entities whom MBIA asserted were central to the successor liability analysis are incorporated in Delaware . . . Delaware law governs the successor liability issue." See Defs.' Pre-Argument Statement at 6.
  - BAC failed to perfect that issue on appeal, apparently fearing an adverse ruling on the subject.
  - BAC should not now be heard to revisit an issue that it could have resolved more than a year ago had it perfected its appeal.

Even If Delaware Law Did Control, And It Does Not, Bank Of America Would Be Liable Under The Correct Delaware De Facto Merger Standard

Under The Proper Delaware De Facto Merger Standard, MBIA Is Entitled To Summary Judgment On De Facto Merger

- The proper analysis of whether a de facto merger occurred is articulated in recent Delaware decisions which follow Delaware's first creditor case—Drug v. Hunt.
- Drug v. Hunt identified facts **<u>sufficient</u>** to establish a de facto merger:
  - Where one corporation transfers all of its assets to another corporation;
  - Payment is made in stock, issued by the transferee directly to the shareholders of the transferring corporation, in exchange for their stock in that corporation; and,
  - The transferee agrees to assume all the debts and liabilities of the transferor. Drug, 35 Del. at 361-62; Magnolia's at Bethany, 2011 WL 4826106, at *3 (same); Marnavi, 2012 WL 5275470, at *14 (same).
- Subsequent cases make plain that Drug, Inc.v. Hunt "**did not set forth the only circumstances** in which a Delaware corporation will be considered the successor of another corporate entity." Xperex Corp., 2004 WL 3053649, at *2.
- Chancellor Chandler concluded in Xperex that a de facto merger could still be established even where there was (1) the use of an intermediate corporate entity to transfer the assets, (2) the **transaction was not structured as an assets-for-stock purchase**, or (3) the alleged **successor did not agree to assume the predecessor's liabilities**. Id.
- In Xperex, the Chancery Court was faced with transactions among affiliates, like those at issue in this case, and explained that "Delaware law holds a recognized **concern for transactions that seek to shelter assets from creditors**. Moreover, **this Court is one of equity** and **will not allow sham transactions to achieve mischief**." Id.

Bank of America Took Over All of Countrywide, And Transferred <u>All</u> Assets That It "Could" Transfer From Countrywide To Bank of America

- Like the purchaser in Drug v. Hunt, Bank of America "took over all of the assets of [Countrywide], including its good will," and then transferred **<u>all</u>** the assets of Countrywide that could be transferred to its own businesses, leaving behind only "toxic" or "bad" assets that Bank of America "could/would not" move.

> Two separate transactions. In July 2008 we moved Servicing LP under BANA and left loans as is for all parties. In November our goal was to move all assets from CFC and CHL to BAC, fully cognizant that some investors would not grant consent and other loans were too toxic to move. So what is left at CHL are those loans that we could/would not move and they have to be left branded as is under Countrywide.

Oblak Ex. 63 (Email from E. Ofcharsky to A. Perez, C. Smith, V. Shetti, April 8, 2009) at BACMBIA-00000029487.

- When asked about an email he wrote stating that BAC did "not plan to rebrand [certain Countrywide entities], as these fall in one of three buckets: one, toxic (CFC and CHL),' two, 'company in wind-down,' three, 'and potential sale (Balboa Re)," Ed Ofcharsky explained that by "toxic" he was "[d]escribing . . . what was left in CHL after the November transaction were **loans that we couldn't get investor consents on**. . . . I believe mortgage servicing rights we couldn't get the consents on. And there were **past-due loans** that . . . **legally we couldn't move** over. . . . kind of classified those, just a slang term because it's past due, kind of call it toxic. Oblak Ex. 56 (E. Ofcharsky Dep. Tr., May 18, 2012) at 297:3-298:5.

- The fact that de minimus assets were left behind will not preclude satisfaction of this factor, particularly because of the equitable principles implicated where "transactions . . . seek to shelter assets from creditors." Xperex Corp., 2004 WL 3053649, at *2.

BAC Paid Countrywide's Shareholders Directly In Stock

- Also similar to what happened in Drug v. Hunt, in this case "all of the stockholders of [Countrywide] became stockholders of [BAC] in exchange for their stock in [CFC]." Drug, 35 Del. at 360.

- The Delaware Chancery Court in Xperex rejected a formalistic reading of this indicator, noting that the fact that a transaction was not structured as an assets-for-stock purchase is not dispositive. Xperex Corp., 2004 WL 3053649, at *2.

- It does not matter that the de facto merger did not happen all at once, because the evidence shows that BAC contemplated that the transfer of Countrywide's assets would take place in multiple steps, beginning with the acquisition of control over Countrywide through the Red Oak Merger ("Legal Day 1" or "LD1"), then the July 2008 Transactions ("Legal Day 2" or "LD2"), and the November 2008 Transactions ("Charter Collapse"):

  – The plan was to "[m]erge CFC into Red Oak [and] then **[transfer] assets out of Red Oak into B of A. This provides a filter for assets and liabilities**." Oblak Ex. 18 (Email from P. Van Tuy to M. Eyre, Jan. 28, 2008) at BACMBIA-X0000018074.

  – In Mr. Ofcharsky's own words, the Countrywide transition as a whole had multiple parts:

13:58:45 Q Okay. So to make sure I have it right, then,
13:58:47 for let's say the Countrywide transition as a whole had
13:58:50 LD One, LD Two, and then the four phases of charter
13:58:54 collapse. Would that be accurate?
13:58:55 A That is accurate.

Oblak Ex. 57 (E. Ofcharsky Dep. Tr., May 25, 2012) at 520:12-16.

BAC Intended To Assume Countrywide's Debts And Liabilities

- Subsequent Delaware precedent makes clear that the fact that the purchaser "did not agree to assume [the seller's] liabilities" is not dispositive. See Xperex, 2004 WL 3053649, at *2; Drug, 35 Del. at 361-62.

- The facts of this case, however, closely resemble those of Drug v. Hunt because Bank of America assumed all of the liabilities necessary to continue Countrywide's business operations, and, as did the purchaser in Drug v. Hunt, Bank of America also assumed many other liabilities.

- In addition, Bank of America impliedly assumed Countrywide's contingent liabilities based on its intent to assume Countrywide's liabilities and pay liabilities when due:

  – Joe Price, BAC's then-CFO, explained the day before the Red Oak Merger 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 Ex. 108 (J. Price Talking Points) at BACMBIA-X000121449.

  – During a January 20, 2010 earnings call discussing rep and warranty liabilities, Mr. 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 et al., Jan. 20, 2010) at BACMBIA-G0000001275.

  – Mr. Moynihan, BAC's current CEO, also told investors that, in responding to repurchase claims, Bank of America "will make sure that **we will pay when due**," and that BAC would pay settlements "when they were due . . . **we will pay legitimate claims**." Oblak Ex. Oblak Ex. 96 (B. Moynihan Dep. Tr., May 2, 2012) at 146:5-147:14.

BAC Pushes An Erroneous Standard Based On A California Decision, But Even Under That Standard MBIA Is Entitled To Summary Judgment

- Citing the Maine decision from California, BAC contends that under Delaware law the Court must examine four factors to determine whether a de facto merger has occurred, including whether:
  - (i) the asset sale complied with the applicable corporate-law statute governing such sales;
  - (ii) creditors or stockholders were injured by such a failure to comply;
  - (iii) the consideration the asset seller received was "grossly inadequate"; and
  - (iv) the transaction was engineered to harm shareholders or creditors. BAC Mem. 25–26, 28.
- **The Maine test relies on an inapposite line of cases and makes little sense in the creditor context, but even if applied here, MBIA is entitled to summary judgment, or at the very least there is a question of fact.**

First, The Asset Sales Did Not Comply With Corporate Statutes

- The asset sales did not comply with either the Delaware Asset Transfer Statute—Del. Gen. Corp. L. § 271(a) (relevant to **CFC** as a Delaware corporation) or New York's standard for the duties of directors—N.Y. Bus. Corp. L. § 717 (relevant to **CHL** as a New York corporation).

- **As to CFC**, to comply with § 271(a) the directors of a Delaware corporation must decide that a transfer of substantially all the assets is "for the best interests of the corporation." In addition, where a subsidiary proposes to transfer assets to its parent in circumstances where the subsidiary is insolvent and therefore owes duties to creditors, subsidiary directors must "**ac[t] in utmost good faith and exercis[e] scrupulous fairness.**" Alcott v. Hyman, P.R.M., Inc., 208 A.2d 501, 507 (Del. 1965); see also N. Am. Catholic Ed. Programming Found. v. Gheewalla, 930 A.2d 92, 101-02 (Sup. Ct. Del. 2007) (directors of insolvent company have duty to preserve assets for benefit of creditors); In re Broadstripe, LLC, 444 B.R. 51, 105 (D. Del. 2010) ("[W]hen the decision is to sell the company . . . the gravity of the transaction places a special burden on the directors to make sure they have a basis for an informed view.").

- **As to CHL**, to comply with § 717, a director must "perform his duties as a director in **good faith and with that degree of care which an ordinarily prudent person** in a like position would use under similar circumstances." N.Y. Bus. Corp. L. § 717

The Insolvency, Or Near Insolvency, Of CHL And CFC Created Duties For Their Directors

- BAC cannot establish compliance with the applicable statutes because CHL and CFC were insolvent or in the zone of insolvency.

- As a result, BAC cannot show that the CFC and CHL directors satisfied their obligations in approving the transactions given the duties that arose in light of those companies' dire financial positions.
  - MBIA's solvency expert, Scott Winn, concluded that CHL was insolvent because:
    - (i) CHL had unreasonably small capital following the July 2008 and November 2008 Transactions, and
    - (ii) CHL failed the balance sheet test, i.e., the then-present fair salable value of CHL's assets following the conveyances was less than the amount that would be required to pay CHL's probable liabilities on existing debts as they became absolute and matured. Bea Ex. 27 (S. Winn Expert Report, Aug. 2, 2012) at 6.

- Under these circumstances, as BAC's own expert Professor John Coffee testified, "**[o]nce we reach actual insolvency . . .** as defined in Delaware, **the duties of directors are to try to preserve the assets for the benefit of creditors.**" Oblak Ex. 24 (J. Coffee Dep. Tr., Aug. 17, 2012) at 139:20-140:11.
  - Even if CFC and CHL were not technically insolvent, it remains a disputed fact whether CFC and CHL were on the verge of insolvency such that CFC's and CHL's boards should have done much more work to investigate the impact of the Asset-Stripping Transactions on Countrywide's solvency and creditors. Bea Ex. 27 (S. Winn Expert Report, Aug. 2, 2012) at 6-9, 27-28, 36; Bea Ex. 25 (J. Coates Expert Report, June 22, 2012) at 54-59.

Countrywide's Financial State Was Tenuous Enough That BAC Considered Putting Countrywide Into Bankruptcy Prior To Merger

- Just before the Red Oak Merger, BAC was concerned that CFC's and CHL's expected contingent liabilities exceeded their ability to pay for those contingencies. See Oblak Ex. 12 (June 25, 2008 Presentation to BAC's Board of Directors) at BACMBIA-B0000018292-94, BACMBIA-B0000018298, BACMBIA-B0000018300.

- BAC even considered putting Countrywide into bankruptcy shortly before the Red Oak Merger:

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

- Then, through the Asset-Stripping Transactions, BAC transferred all of the revenue-generating assets of CFC and CHL to BAC in exchange for financial assets, most of which were quickly paid out to favored creditors such as BANA or used to fund large capital contributions to Countrywide Bank. See Oblak Ex. 47 (Minutes of BAC Board Meeting, Sept. 19, 2008) at BACMBIA-W0000001966; Oblak Ex. 48 (Asset Purchase Agreement, Nov. 7, 2008) at Schedule 2.2; Oblak Ex. 301 (Stock Purchase Agreement, Nov. 7, 2008).

- The Asset-Stripping Transactions left CFC and CHL with no upside while they faced substantial and growing claims from contingent creditors.

- Even BAC's own expert conceded that CFC was insolvent as of Legal Day 1:

  Q. Was Bank of America in crisis mode at that point in time?

  A. We're talking about CFC and CHL which have liabilities and those liabilities can't be paid off with the illiquid assets they had. There was no visible way that you could meet the liabilities of CFC or CHL with the assets in hand. You essentially had the choice of . . . . taking Bank of America's offer or putting the company into bankruptcy reorganization.

  Oblak Ex. 24 (J. Coffee Dep. Tr., Aug. 17, 2012) at 269:8-22.

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

- The multi-billion dollar July and November 2008 Transactions were approved by CFC's and CHL's boards of directors through written consents, without meetings or any apparent deliberations, or any effort to assess the impact of the transactions on Countrywide's solvency:
  - **NO** meeting to discuss the impact of these transactions on CFC and its subsidiaries (including CHL) or on their creditors
  - **NO** review of any meaningful information
  - **NO** negotiation with BAC or attempt to sell to third parties
  - **NO** independent valuations or opinions regarding the value of the assets sold or the value of the Countrywide enterprise
  - **NO** solvency opinion or analysis
- Following the Red Oak Merger, the directors of CFC were replaced with employees of BAC or its subsidiaries (Helga Houston, Helen Eggers, and Greg Hobby), and the CHL directors were replaced with former Countrywide employees now beholden to BAC for their employment (Andrew Gissinger, Kevin Bartlett, Jack Schakett).

> Directors pre LD1 were resigned/retired. New directors as of LD1 for that entity. He was one of the directors. He is a legacy bank of America associate along with two others. Others were legacy countrywide officers who would have had business responsibilities. (BofA put in their own board).

Oblak Ex. 99 (Capstone Notes of Interview with BAC's G. Hobby, May 5, 2011) at CAPSTONE-MBIA00000006.

CHL's Sole Director Approved The July 2008 Transactions & Transferred Away Billions Of Dollars Without Any Meaningful Review and Consideration

- In late June 2008, all directors of CHL were removed except for Andrew Gissinger, who continued as the sole board member who approved the July 2008 Transactions. Oblak Ex. 71 (Written Consent In Lieu of Annual Meeting of CHL Board of Directors) at CWMBIA-G0000196734.
  - Mr. Gissinger testified that "[BAC] came to me and said, listen . . . we would like to have you take this role in the event that it's needed or there's any signature or documents that would be required. I said yes." Mr. Gissinger remained at BAC "**in case anything needed to be signed** on behalf of the company." Bea Ex. 4 (A. Gissinger Dep. Tr., May 12, 2011) at 22:17-23:4, 28:16-20.
  - The multi-billion dollar July 2008 Transactions were approved by Mr. Gissinger shortly after he became the sole member of CHL's board. See, e.g., Oblak Ex. 39 (Am. 1 to Countrywide GP Operating Instrument) at BACMBIA-C0000161596 (same day he became the sole member); Ex. 40 (Am. 1 to Countrywide LP Operating Instrument) at BACMBIA-C00000161599 (day after became sole member).

- Mr. Gissinger was not able to recall **any** information considered in connection with his approval of those billion-dollar transactions or even anything about the transactions themselves. See, e.g., Oblak Ex. 72 (A. Gissinger Dep. Tr., Aug. 9, 2012) at 319:24-320:13.
  - For example, Mr. Gissinger testified that he could not recall: (i) how he came to sign various written consents by which billions in assets were simply transferred away to capitalize Countrywide Bank; (ii) any discussions regarding the documents he signed; (iii) any investigation done or solvency analysis conducted; (iv) or any actions he took whatsoever to satisfy himself that the resolutions he approved were appropriate. Id. at 353:16-354:15.

CHL's Board Of Directors Also Approved The November 2008 Transactions Without Any Meaningful Consideration

- Similarly, there is no evidence that the CHL directors who replaced Mr. Gissinger by the time of the November 2008 Transactions, Jack Schakett and Kevin Bartlett, considered any information prior to approving those transactions. Oblak Ex. 74 (Written Consent of CHL Sole Shareholder) at CWMBIA-G00000196811.

- Kevin Bartlett was appointed to the CHL board of directors on October 14, 2008, the **same day** he approved the November 2008 Transactions. Compare Oblak Ex. 196 (Unanimous Written Consent signed Oct. 14, 2008) at CWMBIA-G00000196814, with Ex. 74 (Written Consent of CHL Sole Shareholder) at CWMBIA-G00000196811 (appointing Mr. Bartlett to the board on Oct. 14, 2008).

- Mr. Bartlett did not recall considering any information, or having any discussions **with anyone** prior to approving these billion-dollar transactions. Oblak Ex. 75 (K. Bartlett Dep. Tr., May 11, 2012) at 129:23-131:2.

- Moreover, even though the Asset Purchase Agreement contained a representation that CHL was solvent and would remain solvent following the November 2008 Transactions, Mr. Bartlett also testified he could not recall the fact there was a solvency representation and warranty, or that any analysis was done to determine whether CHL "was and would be solvent." Id. at 147:23-148:21.

- In fact, Mr. Bartlett was adamant he could not even remember the agreements he signed:

  Q. And, I take it, you don't recall taking any steps to verify the accuracy of the representations and warranties included here in the asset purchase agreement?

  A. **I don't recall the agreement or signing an agreement or signing the unanimous written consent that seems to pertain to this agreement, so I don't.**

  Id. at 152:23-153:6 (objection omitted).

CFC's Board Of Directors Approved The Asset-Stripping Transactions Without Any Meaningful Consideration

- CFC's directors were similarly unable to recall any information considered or steps taken in connection with approving the November 2008 Transactions, despite the fact that these transactions involved billions of dollars and the sale of substantially all of CFC's assets.

- CFC Board Member Helen Eggers, the Risk Executive for BAC's mortgage business, testified that she could not recall signing the Unanimous Written Consent by which the Stock Purchase Agreement was approved. Oblak Ex. 70 (H. Eggers Dep. Tr., April 27, 2012) at 270:16-271:24.

- Despite the fact that the CFC Board was agreeing to transfer away substantially all of CFC's assets, none of the CFC Board Members could recall having performed or considered any liquidity analysis.

- Greg Hobby, member of the BAC-Controlled CFC Board, testified:

> **Q.** Did you review any analysis of the liquidity and/or the capital adequacy of either CFC or CHL before you consented as a director of CFC to the execution of the stock purchase agreement?
> **A.** I don't recall a specific liquidity analysis that I would have reviewed at that time.

Oblak Ex. 68 (G. Hobby Dep. Tr., May 3, 2012) at 220:24-221:9 (objection omitted).

The BAC-Dominated Countrywide Boards Did Not Negotiate The Terms Of The Asset-Stripping Transactions On Countrywide's Behalf

- Andrew Gissinger, CHL's only remaining Director after BAC terminated the others, testified that he did not recall negotiating the terms of the transactions on CHL's behalf:

> **Q.** Did you have any negotiations with Mr. Price before signing this?
> **A.** **Negotiations? I don't understand**.
> **Q.** . . . [W]as this a negotiated deal?
> **A.** I don't understand your terminology or question.
> **Q.** How did you come to agree to the transaction set forth in this document for Countrywide Home Loans?
> **A.** I don't recall the specifics of how this came to fruition.
> **Q.** Did you communicate with Mr. Price about this transaction before you signed this document?
> **A.** I don't recall.

Oblak Ex. 72 (A. Gissinger Dep. Tr., Aug. 9, 2012) at 380:9-25.

§ CFC Board Member Helen Eggers testified:

> **Q.** Do you recall there being any negotiation between CFC and BAC regarding the terms of the Stock Purchase Agreement?
> **A.** I don't recall.

Oblak Ex. 70 (H. Eggers Dep. Tr., April 27, 2012) at 289:23-290:2.

The CFC Board's Failure To Do Anything Does Not Satisfy Delaware Section 271

- In order to establish whether the approval by CFC's board of the Stock Purchase Agreement and the November 2008 Transactions complied with the Delaware asset transfer statute (Section 271(a)), BAC must **affirmatively prove that CFC's board "in fact acted in utmost good faith and exercised most scrupulous fairness"** in determining that those transactions were "for the best interests of" CFC. Alcott, 208 A.2d 501, 507 (Del. 1965).

  – Those duties arise because CFC was insolvent and the Asset-Stripping Transactions were conflict of interest transactions, in that BAC stood on both sides of the transaction, and none of CFC's directors were independent. All of CFC's directors were long-standing employees of BAC selected to replace CFC's former board of directors for purposes of approving the Asset-Stripping Transactions. Oblak Ex. 99 (Capstone Notes of Interview with BAC's G. Hobby, May 5, 2011) at CAPSTONE-MBIA00000006.

  – The record shows that CFC's directors did not act with "utmost good faith" and "most scrupulous fairness" because they **failed to do <u>any</u> work or consider <u>any</u> information** in connection with approving the sale of substantially all of CFC's assets—and all of CFC's ordinary business operations—to BAC. See Boyer v. Wilmington Materials, Inc., 754 A.2d 881, 901 (Del. Ch. 1999) (transaction was not the product of fair dealing because directors, inter alia, failed to seek independent legal or independent financial advice).

- Even if the November 2008 Transactions were only subject to the Delaware business judgment rule and not to the higher standard discussed above, CFC's directors failed even that more liberal test because they exercised **no judgment** at all. They never determined in any way those transactions were "for the best interests of" CFC.

- Accordingly, CFC's directors failed to comply with Delaware Section 271, and, at least, there is a question of fact such that BAC is not entitled to summary judgment.

The CHL's Board's Failure To Do Anything Does Not Satisfy New York Business Corporations Law Section 717

- Under New York law, BAC must show under N.Y. Bus. Corp. L. § 717 that each of CHL's directors indisputably "perform[ed] his duties as a director . . . in **good faith and with that degree of care which an ordinarily prudent person** in a like position would use under similar circumstances." N.Y. Bus. Corp. L. § 717.

- BAC's argues compliance with N.Y. Bus. Corp. L. § 909 (governing the sale, lease, exchange, or other disposition of assets), but ignores § 717.

- As with CFC's board, CHL's board **failed to do <u>any</u> work or consider <u>any</u> information** in connection with approving the various asset sales by which substantially all of CHL's assets—and all of CHL's business operations—were sold to BAC and its non-CFC subsidiaries.

- The testimony of CHL's directors shows that BAC cannot establish that CHL's directors discharged their statutory duties of loyalty, good faith, and due care, and at the very least suffice to raise a genuine dispute as to the satisfaction of that duty. See N.Y. Bus. Corp. L. § 717.

Second, Despite The Consideration Bank of America Paid, Countrywide Was Left Unable To Pay Contingent Creditors

- Creditors were indisputably harmed by the Asset-Stripping Transactions, supporting a finding of de facto merger under even BAC's erroneous Delaware standard.
- The consideration Bank of America paid did not remain available "as a resource for satisfying the seller's debts," but rather was immediately distributed, pursuant to Bank of America's plan, for Bank of America's benefit. See Cargo Partner, 352 F.3d at 45.
  - The "**toxic**" and "**bad**" assets left behind at CFC and CHL are insufficient to satisfy Countrywide's massive contingent liabilities.
  - Any actual consideration paid (as opposed to debt assumed) was immediately paid out according to Bank of America's own plan to Bank of America-preferred creditors, to the detriment of Countrywide's other creditors, or to capitalize Countrywide subsidiaries that BAC intended to take over.
  - Countrywide was left with no viable business operations and was put into "**wind down**" mode, such that creditors cannot look to future business revenues to satisfy claims, and leaving Countrywide unable to deal with massive operating losses and massive contingent liabilities.
- BAC makes no showing that this factor in its test is satisfied, and is not entitled to summary judgment on that basis alone.
- Even if BAC had complied with applicable asset transfer statutes, and even under its statement of the Delaware standard, the prejudice caused to creditors thus creates de facto merger liability.

The Asset-Stripping Transactions Were Insider Transactions Approved Through A Process That Was Unfair To Creditors

- The process by which the transactions were planned and executed was unfair from a legal perspective, regardless of whether there was fair value for technical accounting purposes.
  - That the transferee had a legitimate business purpose for the transfer "does not necessarily negate complaints about the manner in which the transfer was structured," where "there were elements of the transactions that were unfair to creditors." Asarco LLC v. Americas Mining Corp., 396 B.R. 278, 392 (S.D. Tex. 2008) (applying DE law).

- The Asset-Stripping Transactions were approved in a manner that was devoid of a fair process, and did not produce a fair outcome vis-à-vis CFC's and CHL's remaining creditors.
  - BAC cherry-picked Countrywide's operating and revenue producing assets and "skinnied" CFC, CHL, and CSC down to wind-down shell entities lacking any viable business operations.
  - BAC controlled the process by which the prices were determined, and by which the transactions were approved.
  - The Asset-Stripping Transactions were also executed at a time when CFC and CHL were insolvent or on the brink of insolvency, and at the same time that BAC estimated billions in additional contingent liabilities that were not covered by the reserves on Countrywide's balance sheets.

Bank of America Designed The Asset-Stripping Transactions To Disadvantage Creditors

- Indeed, a primary goal behind the structure of the Asset-Stripping Transactions was to minimize the risk of Countrywide's remaining "liabilities" and "contingent liabilities" to BAC and its non-CFC subsidiaries, using CFC and CHL as "**filter[s] for assets and liabilities**." Oblak Ex. 18 (Executive Staff Meeting Minutes, Jan. 8, 2008) at BACMBIA-X0000018074; Oblak Ex. 361 (Countrywide Charter Collapse Overview).
  - A spreadsheet detailing BAC's plan regarding each of 121 Countrywide legal entities shows BAC planned to maintain only two of those entities—CFC and CHL—as "**orphans**" to "**avoid any potential legal ramifications**." Rosenberg Ex. 4 (Legal Entity Planning Spreadsheet).
  - BAC planned that "CFC, CHL and their subsidiaries will not transfer directly to BAC but will continue to exist and **provide separation between the bank merger and what is left behind**." Oblak Ex. 189 (Charter Collapse Bulletin, Nov. 10, 2008).
  - **BAC identified "the potential litigation** associated with CFC" **as one of the reasons to** "**continue the separate existence of many CFC legal entities for some period of time**." Oblak Ex. 175 (Email from E. Lepley, Jan. 15, 2008) at BACMBIA-C000001730.
  - "Phase I and II [of charter collapse] were not widely publicized events due to the sensitive nature of the activities, **separating the good and bad assets**." Oblak Ex. 64 (Email from E. Ofcharsky to L. Pranger, April 14, 2009) at BACMBIA-X0000303303.
  - "In July 2008 we moved Servicing LP under BANA and left loans as is for all parties. In November our goal was to move all assets from CFC and CHL to BAC, fully cognizant that some **investors would not grant consent and other loans were too toxic to move**. So **what is left at CHL are those loans that we could/would not move** and they have to be left branded as under Countrywide." Oblak Ex. 63 (Email from E. Ofcharsky to A. Perez, C. Smith, V. Shetti, April 8, 2009) at BACMBIA-O0000029487.
  - **Regarding everything that "stays"** at Countrywide, Mr. Ofcharsky explained "[w]e did not plan to re-brand as **these fall in one of three buckets: toxic (CFC and CHL); company in wind down and potential sale (Balboa Re)**." Oblak Ex. 308 (Email from E. Ofcharsky, Jan. 9, 2009) at BACMBIA-P00094840.

- Under such circumstances, BAC's accounting "fair value" metric cannot overcome the patent unfairness of the transactions, which by design disadvantaged CFC's and CHL's "left behind" creditors.

The Consideration Paid Either Stayed With Bank of America Or Was Directed To Uses Beneficial To Bank of America

- The consideration either never left the Bank of America enterprise or it was paid out to creditors that would benefit BAC's interests–made possible by the fact the transactions were done among commonly-controlled companies.
- Of the $45 billion BAC claims was paid, at least $18.7 billion was immediately funneled to Bank of America-preferred creditors—including BAC's own banking subsidiary—who were paid **in full** while other "left behind" creditors were left to face shell entities.
  - $11.5 billion to banking and capital markets counterparties—key to Bank of America's ability to borrow and conduct other business—who were paid <u>in full</u> even as Countrywide faced insolvency. $700 million of this was paid to BANA. See Oblak Ex. 30 (Spreadsheet Planning Countrywide's Use Of July 2008 Transaction Proceeds).
  - $5.5 billion capital infusion to Countrywide Bank, which BAC intended to merge into its own banking subsidiary. Id.
  - $1.7 billion used to pay off CSC federal funding as part of process of shutting CSC down. Id.
  - Another $5.2 billion in convertible debt and medium term notes was flagged for repayment, but BAC did not produce information sufficient to confirm these payments. Oblak Ex. 362 (Funding Options For Legal Day One) at BACMBIA-X000366638.
- Another $15.5 billion represented an assumption of debt to protect BAC's reputational interests and to continue Countrywide's former operations, and not a payment made to Countrywide.
- The only "windfall" in this case was the $4 billion worth of BAC stock paid to CFC's former shareholders in the Red Oak Merger, **ahead of creditors** and at a time when CFC and CHL were likely insolvent.

Third, BAC Intentionally Disadvantaged Creditors

- The facts also show that BAC intentionally disadvantaged Countrywide's contingent creditors known and anticipated at the time of the Asset-Stripping Transactions.

- Whether the Asset-Stripping Transactions were designed with an **intent to hinder, delay, or defraud certain creditors can be shown circumstantially** through evidence of certain non-exclusive **"badges of fraud"** that may cumulatively give rise to an inference of intent, or through a showing that the successor displayed a "calloused indifference" to the harm that would befall creditors. See 6 Del. C. § 1304(b); Lippe v. Bairnco Corp., 249 F. Supp. 2d 357, 374–75 (S.D.N.Y. 2003); China Res. Prods. v. Fayda Int'l Inc., 856 F. Supp. 856, 863 (D. Del. 1994).

- An asset seller's receipt of reasonably equivalent value for the asset sale is **not** the litmus test for fraudulent intent under Delaware law.
  - The Delaware Court of Chancery has held that "where there is an **actual intent**, the question of the presence or absence of a valuable or an **adequate consideration is immaterial**." Richards v. Jones, 142 A. 832, 834 (Del. Ch. 1928); see also Mitchell v. Wilmington Trust Co., 449 A.2d 1055, 1060 (Del. Ch. 1982) ("where there is **actual intent to defraud** by both the grantor and grantee, the **fairness of the consideration becomes irrelevant**."); Asarco, 396 B.R. at 393 ("Despite the Court's finding that ASARCO received reasonably equivalent value for the SPCC shares, taking the circumstantial evidence as a whole, the Court, nevertheless, finds that AMC possessed the requisite fraudulent intent.").

The Evidence Establishes Multiple "Badges Of Fraud" That Show Bank of America's Intent To Hinder, Delay, or Defraud Creditors

- Numerous badges of fraud are present, supporting an inference that the Asset-Stripping Transactions were intentionally designed to disadvantage and defraud creditors:
  - (i) the transactions were among insiders;
  - (ii) substantially all of CFC's and CHL's assets were transferred;
  - (iii) there is evidence CFC and CHL were insolvent, or on the verge of insolvency ,after the Asset-Stripping Transactions;
  - (iv) Countrywide and BAC anticipated, at the time of the Asset-Stripping Transactions, that Countrywide would incur substantial debts;
  - (v) Countrywide had been sued and threatened with additional legal actions prior to the Asset-Stripping Transactions;
  - (vi) BAC structured and planned the Asset-Stripping Transactions to separate and transfer Countrywide's "good" and "crown" assets to BAC and its non-CFC subsidiaries, and leave "bad" or "toxic" assets behind at CFC and CHL;
  - (vii) BAC planned to use the CFC and CHL legal entities to provide "separation" or a "filter" between Countrywide's valuable operational assets and its mounting contingent liabilities;
  - (viii) BAC paid Countrywide's shareholders $4 billion, ahead of any of Countrywide's creditors, and;
  - (ix) BAC caused CFC and CHL to use the proceeds from the Asset-Stripping Transactions to immediately satisfy creditors beneficial to BAC's interests, to the detriment of CFC's and CHL's other creditors. See MBIA Opp'n 42-44; MBIA Reply 20.
- Given the extensive evidence of fraudulent intent in this case, MBIA is entitled to summary judgment under BAC's interpretation of Delaware law, and also intends to present a fraud theory of successor liability at trial based on such evidence. Farmers Prod. Credit Ass'n of Middletown v. Taub, 121 A.D.2d 681, 682 (2d Dep't 1986) ("The existence of actual intent . . . is generally a question of fact which precludes summary judgment . . . [t]he question of whether the defendants acted in good faith, or whether they actually intended to hinder, delay or defraud the plaintiff, presents a triable issue of fact.").
- The Amended Complaint states a cause of action for successor liability that would entitle MBIA to pursue a fraud theory. See Bradley v. Condon, 217 N.Y.S.2d 821, 823 (Sup. Ct. Suffolk Cty. 1961) ("Different legal theories or grounds of liability do not necessarily create different causes of action and are not required to be separately stated and numbered."); Metzger v. Dell Pub. Co., 207 Misc. 182, 187 (Sup. Ct. 1955) ("Different legal theories or different grounds of liability do not make different causes of action.").

Fourth, BAC Cannot Show Adequate Consideration Because The Asset-Stripping Transactions Were Not At Arms-Length Or In Good Faith

- Courts applying Delaware law regarding the adequacy of consideration look not only at whether technical accounting fair value was paid but also at whether there was an **arms'-length relationship** between the parties and whether the parties acted in **good faith**.
- To ascertain the presence of reasonably equivalent value "courts consider a host of factors, including the **good faith** of the parties, the difference between the amount paid and the fair market value, and whether the transaction was at **arms length**." See Peltz v. Hatten, 279 B.R. 710, 736–37 (D.Del. 2002).
  - These are fact-intensive judicial inquiries based on the "totality of the circumstances": "In conducting this factual analysis, a court does look to the '**totality of the circumstances**,' including (1) the 'fair market value' of the benefit received as a result of the transfer, (2) 'the existence of an **arm's-length relationship** between the debtor and the transferee,' and (3) the transferee's **good faith**." See In re Fruehauf Trailer Corp., 444 F.3d 203, 213 (3d Cir. 2006).
- The Asset-Stripping Transactions were not arms'-length transactions. In fact, BAC sat on both sides of the Asset-Stripping Transactions.
- The evidence also establishes the lack of good faith of the transferors, CFC and CHL, in view of the fact their directors were beholden to BAC, did not understand they had separate duties to CFC and CHL, and failed to do any due diligence into the transactions by which all of CFC's and CHL's operating assets were transferred out of the reach of Countrywide and its contingent creditors.
- Even if Delaware law applies, and it does not, MBIA is entitled to summary judgment.

Conclusion

Conclusion

- Bank of America planned and executed the full "integration" and "combination" of Countrywide's productive assets and business operations into its own businesses.
- As a result, Bank of America de facto merged with Countrywide, leaving CFC and CHL behind as "orphans" to act as "filters" for contingent liabilities.
- MBIA's de facto merger claim is governed by New York law: there is no genuine conflict between New York law and that of other potential jurisdictions, and the parties' contacts overwhelmingly favor New York.
- Even if Delaware law did control, Bank of America would be liable under the correct Delaware de facto merger standard.