UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the matter of the application of

THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures) *et al.*,

Petitioners,

-against-

WALNUT PLACE LLC *et al.*,

Intervenor-Respondents.

**11-cv-5988(WHP)**

**ADDENDUM OF EXHIBITS CITED IN THE BANK OF NEW YORK MELLON'S CONSOLIDATED RESPONSE TO OBJECTIONS**

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*The Bank of New York Mellon*

| Exhibits | |
|---|---|
| Exhibit | Description |
| A | Preliminary Order ("Order to Show Cause") dated June 29, 2011. *The Bank of New York Mellon, Petitioner, for an order, pursuant to CPLR § 87701, seeking judicial instructions and approval of a proposed settlement.* Index No. 651786/2011 |
| B | Supplemental Order ("Order") dated August 25, 2011. *The Bank of New York Mellon, Petitioner, for an order, pursuant to CPLR § 87701, seeking judicial instructions and approval of a proposed settlement.* Index No. 651786/2011 |
| C | Federal Housing Finance Agency Statement dated August 30, 2011 |
| D-1 | Adler "Material and Adverse" Opinion |
| D-2 | Daines Corporate Separateness Opinion |
| D-3 | Capstone Valuation Analysis |
| D-4 | Lin Servicing Opinion |
| D-5 | Lin Settlement Amount Opinion |
| E | Excerpts from Countrywide Financial Corporation Form 10-Q dated August 11, 2008 |
| F | Debtwire, *PIMCO, Blackrock and BofA settlement could bind other CFC RMBS investors* (February 15, 2011) |
| G | Bank of America Press Release dated December 15, 20011 |
| H | Transcript of August 5, 2011 hearing, *The Bank of New York Mellon, Petitioner, for an order, pursuant to CPLR § 87701, seeking judicial instructions and approval of a proposed settlement.* Index No. 651786/2011 |
| I | FT.com (*Financial Times*), Legacy Countrywide mortgage investors rally against potential settlement with Bank of America (February 23, 2011) |
| J | Gibbs & Bruns LLP Press Release dated January 28, 2011 |
| K | Gibbs & Bruns LLP Press Release dated March 31, 2011 |
| L | Dawn Kopecki, *Bank of America Among the Worst for Loan Modifications,* Bloomberg (Aug. 4, 2009) |

# EXHIBIT A

Fee pd 6/29/11 online

At IAS Part 39, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, 60 Centre Street, New York, New York, on the 29 day of June, 2011

PRESENT:

Hon. BARBARA R. KAPNICK J.S.C.

MOTION SEQUENCE # 001

In the matter of the application of

THE BANK OF NEW YORK MELLON,
(as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures),

Petitioner,

for an order, pursuant to CPLR § 7701, seeking judicial instructions and approval of a proposed settlement.

Index No. 651786/2011

**ORDER TO SHOW CAUSE**

UPON reading and filing the annexed Verified Petition, the Affirmation of Matthew D. Ingber, dated June 28, 2011 ("Ingber Affirmation"), and the exhibits annexed thereto, and The Bank of New York Mellon's Memorandum of Law In Support Of Its Verified Petition Seeking Judicial Instructions and Approval of a Proposed Settlement ("Memorandum of Law"),

SUFFICIENT CAUSE THEREFOR being alleged ~~APPEARING~~, IT IS

ORDERED, that anyone having an interest in the mortgage-securitization trusts listed on Exhibit A to the Verified Petition show cause before this Court at IAS Part 39, to be held at the Courthouse, 60 Centre Street, New York, New York, on the 17th day of November, 2011, at 2:15 o'clock in the afternoon ("Hearing Date"), or as soon thereafter as counsel may be heard, why an order should not be issued, pursuant to CPLR § 7701, granting judgment in favor of The Bank of New

(4) by publishing the Notice in *The Wall Street Journal (Global), Financial Times Worldwide, The New York Times, The Times (London), USA Today, Investors Business Daily,* and *The Economist Worldwide Edition* for at least three (3) business days in each publication;

(5) by publishing translated versions of the Notice in *Les Echos* (France), *Die Welt* (Germany), *Il Sole 24 Ore* (Italy), *Tages Anzeiger* (Switzerland), *NRC Handelsblad* (Netherlands); *The Nikkei* (Japan); *Straits Times* (Singapore); *New Straits Times* (Malaysia); *China Business News* (China); and *Korea Economic Daily* (South Korea) for at least three (3) business days in each publication;

(6) by issuing the Notice to the following media distribution wire services: *PR Newswire, Business Wire*, and *GlobeNewswire*;

(7) by posting the Notice, the Order to Show Cause, the Verified Petition, the Ingber Affirmation, and the Memorandum of Law, to http://www.cwrmbssettlement.com, a website created by the Trustee to provide Potentially Interested Persons with notice of this proceeding;

(8) by creating a hyperlink to www.cwrmbssettlement.com on BNY Mellon's investor reporting website, https://gctinvestorreporting.bnymellon.com/Home.jsp.; and

(9) by seeking to purchase banner advertisements announcing the Settlement, with a hyperlink to www.cwrmbssettlement.com, on the following websites: wsj.com, MarketWatch.com, Barrons.com, AllthingsD.com, IHT.com, SmartMoney.com, investors.com, ft.com, reuters.com, economist.com, Globalcustody.net, Assetman.net, FundServices.net, and yahoo.com.

IT IS FURTHER ORDERED that the Notice Program is approved, is the best notice practicable, is reasonably calculated to put interested parties on notice of this action, and

Court and served upon (i) any person who submitted any objection, and (ii) any person who has entered an appearance in this matter pursuant to CPLR § 320; and it is further

ORDERED that, except for good cause shown, no person other than Petitioner's counsel shall be heard on the Hearing Date unless such person has submitted an objection, or a submission in favor of or with respect to the Settlement, in accordance with this Order to Show Cause; and it is further

ORDERED that, during the pendency of this proceeding, all actions filed after the date of this Order to Show Cause relating to the subject matter of this proceeding shall be assigned or transferred to the Justice before whom this proceeding is pending; and it is further

ORDERED that the Court hereby retains exclusive jurisdiction over the Petitioner, the Covered Trusts and all Trust Beneficiaries (whether past, present or future) for all matters relating to the Settlement and this Article 77 Proceeding; and it is further

ORDERED that, during the pendency of this proceeding, the Trustee shall seek an instruction from the Court before responding to or taking any action with respect to assertions, allegations, notices, or directions from any Trust Beneficiary relating to the subject matter of this proceeding.

ENTER:

J.S.C.

BARBARA R. KAPNICK
J.S.C.

ORAL ARGUMENT
DIRECTED

J.S.C.

BARBARA R. KAPNICK
J.S.C.

# EXHIBIT B

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

BARBARA R. KAPNICK
J.S.C.

Index Number : 651786/2011

**BANK OF NEW YORK MELLON**

vs.

**FOR AN ORDER PURSUANT TO**

SEQUENCE NUMBER : 010

MODIFY

**PART** 39

**INDEX NO.** ______

**MOTION DATE** ______

**MOTION SEQ. NO.** ______

The following papers, numbered 1 to ____, were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). ______

Answering Affidavits — Exhibits ______ | No(s). ______

Replying Affidavits ______ | No(s). ______

Upon the foregoing papers, ~~it is ordered that this motion is~~ this unsigned Order to Show Cause by various proposed intervenor-respondents to add certain provisions to the Preliminary Order of this Court (Order to Show Cause) signed on June 29, 2011 is decided in accordance with the Order dated August 5, 2011, signed after an extensive hearing on the record on August 5, 2011.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______
FOR THE FOLLOWING REASON(S): ______

Dated: 8/5/11

______, J.S.C.
BARBARA R. KAPNICK
J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☑ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

-----------------------------------------------------------------------------------------------X

In the matter of the application of

THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures), BlackRock Financial Management Inc. (intervenor), Kore Advisors, L.P. (intervenor), Maiden Lane, LLC (intervenor), Maiden Lane II, LLC (intervenor), Maiden Lane III, LLC (intervenor), Metropolitan Life Insurance Company (intervenor), Trust Company of the West and affiliated companies controlled by The TCW Group, Inc. (intervenor), Neuberger Berman Europe Limited (intervenor), Pacific Investment Management Company LLC (intervenor), Goldman Sachs Asset Management, L.P. (intervenor), Teachers Insurance and Annuity Association of America (intervenor), Invesco Advisers, Inc. (intervenor), Thrivent Financial for Lutherans (intervenor), Landesbank Baden-Wuerttemberg (intervenor), LBBW Asset Management (Ireland) plc, Dublin (intervenor), ING Bank fsb (intervenor), ING Capital LLC (intervenor), ING Investment Management LLC (intervenor), New York Life Investment Management LLC (intervenor), Nationwide Mutual Insurance Company and its affiliated companies (intervenor), AEGON USA Investment Management LLC, authorized signatory for Transamerica Life Insurance Company, AEGON Financial Assurance Ireland Limited, Transamerica Life International (Bermuda) Ltd., Monumental Life Insurance Company, Transamerica Advisors Life Insurance Company, AEGON Global Institutional Markets, plc, LIICA Re II, Inc., Pine Falls Re, Inc., Transamerica Financial Life Insurance Company, Stonebridge Life insurance Company, and Western Reserve Life Assurance Co. of Ohio (intervenor), Federal Home Loan Bank of Atlanta (intervenor), Bayerische Landesbank (intervenor), Prudential Investment Management, Inc. (intervenor), and Western Asset Management Company (intervenor),

Petitioners,,

-against -

[VARIOUS PROPOSED INTERVENOR-RESPONDENTS]

for an order, pursuant to CPLR § 7701, seeking judicial instructions and approval of a proposed settlement,

-----------------------------------------------------------------------------------------------X

Index No. 651786/11
Mot. Seq. No. 008 and 010

Assigned to:
Kapnick, J.

**ORDER**

Upon hearing oral argument on the record on August 5, 2011 with respect to the issues of scheduling and expedited discovery, the Court hereby modifies its Order to Show Cause dated June 29, 2011 (Mot. Seq. No. 001) (the "Initial Order") as follows:

1. Any Potentially Interested Person who wishes to object to the Settlement may file with the Court, on or before August 30, 2011, a written notice of intention to appear and object

as provided in the Initial Order, except that they need not provide a detailed statement of their objection, but may just state the grounds for their objection, one of which may be that such Potentially Interested Person does not have enough information to evaluate the Settlement. The filing of a written notice by a Potentially Interested Person as described above shall preserve all rights of such Potentially Interested Person to seek discovery and to supplement its objection to the Settlement as need be.

2. Counsel for all Parties and all Potentially Interested Persons who have appeared in this action by August 30, 2011 shall meet and confer during the week of September 5, 2011 regarding the scope of and schedule for discovery.

3. All parties shall appear for a conference in IA Part 39, 60 Centre St., Rm. 208 on September 16, 2011 at 2:15 p.m., to address the scope of and schedule for discovery and further proceedings in this matter.

ENTER

Dated: August 5, 2011

J.S.C.

BARBARA R. KAPNICK
J.S.C.

# EXHIBIT C

# FEDERAL HOUSING FINANCE AGENCY

## STATEMENT

For Immediate Release
August 30, 2011

**Contact:** Corinne Russell (202) 414-6921
Stefanie Johnson (202) 414-6376

## Federal Housing Finance Agency Action Regarding Court Consideration of Proposed Bank of America Settlement

The Federal Housing Finance Agency (FHFA), in its capacity as conservator of Fannie Mae and Freddie Mac (the Enterprises), today filed an Appearance and Conditional Objection regarding the proposed settlement between Bank of America and a consortium of 22 investors being considered by a court in New York. This pleading was filed to obtain any additional pertinent information developed in the matter. The conservator is aware of no basis upon which it would raise a substantive objection to the proposed settlement at this time. In fact, FHFA considers it positive that the proposed settlement includes subservicing requirements, specific terms for the servicing of troubled mortgages and the curing of certain document deficiencies. Additionally, FHFA is encouraged that a number of significant market participants support the proposed settlement.

Due to its duty to preserve and conserve Enterprise assets, the conservator believes it prudent not only to receive additional information as it continues its due diligence of the proposed settlement, but also to reserve its capability to voice a substantive objection in the unlikely event that necessity should arise.

###

*The Federal Housing Finance Agency regulates Fannie Mae, Freddie Mac and the 12 Federal Home Loan Banks. These government-sponsored enterprises provide more than $5.7 trillion in funding for the U.S. mortgage markets and financial institutions.*

# EXHIBIT D-1

# MATERIAL AND ADVERSE OPINION OF PROFESSOR BARRY E. ADLER

I have been retained by Mayer Brown LLP ("Mayer Brown") to provide an expert opinion on issues of contract interpretation in connection with a potential settlement (the "Potential Settlement") involving securitization trusts for which Mayer Brown's client, The Bank of New York Mellon ("BNY Mellon") is trustee. I have not been retained as a lawyer in connection with this matter, nor do I owe any duty to Mayer Brown or BNY Mellon in connection with this matter. In this opinion, I make no recommendation to Mayer Brown or BNY Mellon. My compensation is based on hours worked and does not depend on the content of my opinion.

## 1. Qualifications

I am the Bernard Petrie Professor of Law and Business, New York University ("NYU"). I have taught at NYU since 1996. I have also held permanent or visiting appointments at Columbia University School of Law, Emory University School of Law, George Mason University School of Law, University of Virginia School of Law, and Yale Law School. I am the director of the annual NYU Workshop on Bankruptcy and Business Reorganizations and have been a director of the American Law and Economics Association. I teach or have taught Contracts, Bankruptcy, and Corporations, and have been the convener of the Contracts and Commercial Law Area Group at NYU School of Law. I have written a casebook and an edited reader in bankruptcy law, and have written numerous articles in the fields of bankruptcy, commercial, and corporate law.

**2. Question Presented**

For the purposes of this report, I have reviewed §2.03(c) of a document identified to me by Mayer Brown as an agreement (the "Pooling and Servicing Agreement") that governs mortgage loans (each a "Mortgage Loan") sold by, among others, Countrywide Home Loans, Inc. ("Countrywide") to a Depositor, which in turn deposited the Mortgage Loans with BNY Mellon as trustee or indenture trustee for holders of certificates or notes that comprise the beneficial ownership of the mortgages (the owners of or investors in such certificates or notes "Certificateholders"). This provision addresses specified breaches of certain representations and warranties in connection with specified Mortgage Loans. Under the provision, in the event such a breach is discovered in connection with such a loan, if such breach "materially and adversely affects the interests of the Certificateholders in that Mortgage Loan," the seller is obligated to cure the breach or replace or repurchase the Mortgage Loan.

In a document identified to me by Mayer Brown as the most recent Form10-Q filed with the Securities and Exchange Commission by Countrywide's parent, Bank of America Corp. ("Bank of America"), Bank of America takes what I assume to be the position that in order for a breach of a representation or warranty to materially and adversely affect the interests of Certificateholders and thus trigger a repurchase obligation it is not sufficient that the breach may have been instrumental to a purchaser in its decision to accept a Mortgage Loan. Rather I assume it to be Bank of America's position that there is no repurchase obligation unless a breach causes the Certificateholders to suffer a significant loss.

Below are my general views on the above-quoted language from §2.03(c) of the Pooling and Servicing Agreement and on the above-referenced Bank of America position. My opinion here is based solely on general principles of contract law as supported by references provided below. I have not broadly reviewed documents relevant to the Potential Settlement. I do not have knowledge of relevant events or of customary documents or practice in the commercial lending industry.

**3. Opinion**

An interpretive issue is presented by the phrase "materially and adversely affects the interests of the Certificateholders in that Mortgage Loan" as used in §2.03(c) of the Pooling and Servicing Agreement between Countrywide and BNY Mellon. Because the phrase applies to a breach of a representation or warranty used by the seller to induce a sale of a mortgage loan under the agreement, one might say that "material and adverse" refers to the mortgage buyer's purchase decision. Under this interpretation, if at the time of the sale a purchaser would not have accepted the mortgage had it been aware of facts inconsistent with a representation or warranty, then the breach is "material and adverse" to the interests of the purchaser (or owner), which could then demand that the seller buy back a mortgage subject to a repurchase obligation in the event of such breach.[*] (For simplicity here and hereafter, I ignore the possibility that a seller might satisfy its obligations under the Pooling

[*] Functionally, a warranty is a promise to make a promisee whole in the event that a factual assertion is false. So one might prefer to think of a warranty breach as a failure to cure or to provide compensation in the event of such falsity rather than as the falsity itself. That said, it is common for a breach of warranty to mean merely that a factual assertion is false and this the sense in which I use the term here.

and Servicing Agreement through cure or replacement.) The significance of any loss caused by the breach would be irrelevant.

This interpretation was apparently approved at least in part by the court in *Lehman Brothers Holdings, Inc. v. Laureate Realty Services, Inc.*, 2007 WL 2904591 (S.D. Ind. Sept. 28, 2007) [hereinafter *Laureate*]. *Laureate* addressed a dispute over a mortgage loan purchase and sale agreement between Laureate as seller and Lehman as purchaser of mortgage loans. Under the agreement, in the event that a party discovered a breach of specified seller's representation or warranty with respect to a mortgage loan, the purchaser could demand cure or repurchase of the mortgage loan provided that the breach "materially and adversely affects the interest of the owner of such" loan. *Id.* at *12. An issue in the case was whether Laureate's alleged failure to disclose relevant information about a loan sold under the agreement constituted a breach of representation or warranty sufficient to trigger the repurchase obligation. In Laureate' view, Lehman designated no evidence to suggest that the alleged breach would materially and adversely affect the owner of the loan and so Laureate moved for summary judgment against Lehman's repurchase demand. The court denied Laureate's motion for summary judgment in part because Lehman had proffered evidence that Lehman would not have purchased the loan in question "had they known about the negative information" that was the basis of the alleged breach. *Id.* at *13; *Cf., e.g., Resolution Trust Corp. v. Key Fin. Servs.*, 280 F.3d 12, 16 (1st Cir. 2002) [hereinafter *Resolution Trust*] (affirming that breach of a representation or warranty in connection with the sale of a mortgage loan is material if the breach "concerns a fact likely to influence the decision-making process," quoting, *U.S. ex rel. Roman v. Schlesinger*, 404 F.Supp 77, 85 (E.D.N.Y. 1975)).

The court's opinion in *Laureate* is not entirely clear on the question of how one is to interpret "material and adversely affects." The court observed that Lehman had designated evidence that the alleged breach "had an adverse effect on Lehman as it remains undisputed that Lehman lost $13 million on the transaction." *Laureate*, 2007 WL 2904591, at *13. This observation raises the possibility that the court believed "material" goes to the loan purchase decision while "adverse" goes to the loan outcome. Such a reading is awkward and may not have been intended. Still, *Laureate* suggests that a court might determine that there is a repurchase obligation at least in part by reference to how a breach could have affected the initial purchase decision.

The contractual language at issue in *Laureate* is similar to that in §2.03(c) of the Pooling and Servicing agreement between Countrywide and BNY Mellon and so the court's interpretation of the repurchase obligation in *Laureate* may suggest a similar interpretation of the Pooling and Servicing Agreement. But the *Laureate* approach, or one like it, is not the only word on how to interpret such language. For example, in *Wells Fargo Bank N.A. v. LaSalle Bank Nat'l Ass'n*, 643 F. Supp. 2d 1014 (S.D. Ohio 2009), as in *Laureate*, a court was asked to address alleged breaches of representations and warranties in connection with the sale of mortgage loans placed in a trust on behalf of certificateholders. Although the reported opinion is somewhat opaque on the point, apparently the related pooling and servicing agreement provided that the seller could be subject to a repurchase obligation if there were "a breach of any representation or warranty with respect to a [m]ortgage [l]oan … which … materially and adversely affects the value of such [m]ortgage [l]oan, the related [m]ortgaged [p]roperty or the interests of the [t]rustee or any [c]ertificateholder in the [m]ortgage [l]oan or the related [m]ortgaged [p]roperty". First Amended Complaint at ¶35, *Wells Fargo Bank N.A. v. LaSalle Bank Nat'l Ass'n,* 3:07-cv-0049-MRM (Apr., 22, 2009) (Doc. # 17) (ellipses in the original). In a motion, Wells Fargo, as trustee for certificateholders, asked that the court clarify how it might demonstrate a material and adverse effect. The court responded, in part, as follows:

> Wells Fargo appears to be arguing here that it can prove a material and adverse effect on the loans or the mortgaged property by showing that this loan would have been rejected by the investors had they known what Wells Fargo claims should have been [disclosed]. In the Court's opinion, that position begs the question. To put it another way, the fact that an investor might have made a different decision had he or she different information may make that information material to the investor's decision, but it does not make the omission of that information cause a material and adverse effect on the loan. "Material information" and "material effect" are not the same thing.

*Wells Fargo Bank N.A. v. LaSalle Bank Nat'l Ass'n*, Case No. 3:07-cv-0049-MRM, Doc. # 299, slip op. at 2 (S.D. Ohio Oct. 27, 2009) (Decision and Order Granting In Part and Denying in Part Plaintiff's Motion for Clarification) [hereinafter *Wells Fargo*].

The rejection by *Wells Fargo* of a purchase-decision approach to "material and adverse" suggests that whether a breach of a representation or warranty materially and adversely affects the interests of a purchaser (or owner) turns on whether the breach caused a significant loss to the purchaser (or owner). And this is presumably what the court intended in a related jury instruction, which provided that the plaintiff must "prove by a preponderance of the evidence" that a breach of a representation or warranty "caused a material and adverse effect on the value of the loan, the value of the property, or the interests of the investors." General Jury Charge at 22, *Wells Fargo Bank N.A. v. LaSalle Bank Nat'l Ass'n,* Case No. 3:07-cv-0049-MRM (Nov. 24, 2009) (Doc. # 351).

It is possible to distinguish *Laureate* from *Wells Fargo* based on the contractual language applicable in each case. As noted, the language in *Laureate* refers to a breach that materially and adversely affects the interest of the owner of a mortgage loan. In contrast, the comparable language in *Wells Fargo* refers to a breach that materially and adversely affects "the value of" a mortgage loan, the related mortgaged property or the interests of the trustee or any certificateholder in the mortgage loan or the related mortgaged property. *Cf.*, *e.g., LaSalle Bank Nat'l Ass'n v. Citicorp Real Estate, Inc.*, 2002 WL 181703 (S.D.N.Y. Feb. 5, 2002) (addressing similar language). The difference between the two provisions and between the respective interpretations may suggest that unless a repurchase obligation is expressly conditioned on a material and adverse effect on "value" such obligation may be triggered by a mere determination that the purchaser would not have accepted the loan but for the breach. This would mean that §2.03(c) of Pooling and Servicing agreement between

Countrywide and BNY Mellon, which does not expressly condition the seller's repurchase obligation on a breach that materially and adversely affects "value," could be triggered if the breach merely affects the buyer's purchase decision, and this interpretation could be bolstered by the observation that the parties *elsewhere*, in another portion of §2.03(c) addressed to a particular set of representations and warranties, expressly conditioned a contractual outcome on a change in value.[**]

Such interpretation is not necessary, however. The omission of an express reference to "value" need not imply that "material and adverse" refers to something other than a loss in value of an owner's interest caused by a breach, as a material and adverse effect on an owner's interest in a mortgage loan can be read as a reference to a significant loss caused by the breach and suffered by the owner in any manner—whether through a reduction in the value of a mortgage loan or through some other means—rather than as a reference to a purchase decision.[***] Indeed, it might seem more natural for the parties to have expressly

[**] According to §2.03(c), for specified representations and warranties made to the best of a seller's knowledge, if it is discovered "that the substance of such representation and warranty is inaccurate and such inaccuracy materially and adversely affects the value of the related Mortgage Loan or the interests of the Certificateholders therein, notwithstanding that Seller's lack of knowledge with respect to the substance of such representation or warranty, such inaccuracy shall be deemed a breach of the applicable representation or warranty."

[***] Under this approach, §2.03(c) of the Pooling and Servicing agreement between Countrywide and BNY Mellon could be interpreted such that a breach could not trigger a repurchase obligation if it caused a Mortgage Loan but not the Certificateholders' interests in that Loan to lose value, while an inaccuracy in a best-of-seller's-knowledge representation or warranty could be deemed a breach regardless of the seller's knowledge even if only the Mortgage Loan, but not the Certificateholders' interests, lost value. Such an interpretation would give meaning to "value of the related Mortgage Loan" as that language appears in the section even while "materially and adversely affects the interests of the Certificateholders in that Mortgage Loan" is interpreted as a reference to a loss of value in those interests caused by a breach. In any case, and regardless whether there is a plausible argument that there can be a loss of value in a Mortgage Loan without a loss of value in the interests of Certificateholders in that Loan, the law will

(. . . Continued)

addressed the buyer's purchase decision if they meant for an influence on that decision to be the basis for a determination that a breach materially and adversely affects the interests of a mortgage owner. Thus, the *Wells Fargo* approach may, but need not, depend on a reference to "value" in the applicable contractual language.

Turning now to the merits of the alternative approaches, an advantage of the *Wells Fargo* approach is that it can limit purchaser opportunism. This point may be illustrated by the following hypothetical case.

Assume that a seller of mortgage loans represents that the origination practices used by the seller have in all material respects met customary industry standards. Imagine that a seller substantially disregards such standards in the origination of a loan sold to a purchaser on behalf of certificateholders but that the breach does not significantly diminish the value of the loan. Imagine further that subsequent to this transaction, the real estate market crashes and as a consequence of this external event the loan declines precipitously in value. Now consider the question of how to interpret a provision in the contract between the seller and the buyer that gives the latter an option to insist on a repurchase if a breach in a representation or warranty with respect to a mortgage loan materially and adversely affects the interests of the certificateholders.

---

(Continued . . .)

not necessarily interpret a contract to give every term meaning. As explained by a leading treatise, although the law "prefers an interpretation which gives effect to all parts of the contract rather than one which leaves a portion of the contract ineffective or meaningless … sometimes particular words or provisions of a contract will be disregarded in order to give effect to the general meaning of a contract." 11 Williston on Contracts §32:9 (4th ed.) (database updated 2011).

Under the *Laureate* approach, or one like it, the purchaser might prevail and force the seller to repurchase the loan because, at the time of purchase, the seller might have rejected the loan had it known of the seller's poor origination practices. If, however, events subsequent to the sale, but prior to the real estate market collapse, revealed the loan to be of then acceptable value notwithstanding the seller's breach, the buyer might never have asked the seller to repurchase the loan but for the market collapse. It is not clear why the parties would have desired a contractual provision that permitted what they might, at the time of contract, have agreed would be buyer opportunism in a case such as this. That is, one might doubt that the permissibility of such strategic behavior by the buyer constitutes an accurate interpretation of the parties' agreement.

While the *Laureate* interpretation of "material and adverse" invites the sort of opportunism just described, the *Wells Fargo* interpretation is consistent with what may well have been the parties' contractual intent to combat such opportunism. This is so because, under the *Wells Fargo* approach, not any breach triggers the repurchase obligation, only one that significantly injures the buyer. Such a result is a seemingly reasonable outcome for this illustration.

This illustration is hypothetical, but it is not fanciful. In another case, based on events in Nevada, to which Wells Fargo (as well as LaSalle Bank) was a party, *Wells Fargo Bank N.A. v. LaSalle Bank Nat'l Ass'n*, 2011 WL 743929 (D. Nev. Feb. 23, 2011), Wells Fargo, again as trustee for certificateholders' interests in mortgage loans, sought a capacious definition of "material and adverse." In this pursuit, Wells Fargo unsuccessfully sought to exclude the testimony of the seller's expert, who concluded, in the court's words, "that the decline in the housing and real estate markets in Las Vegas in 2007-2009 caused material and adverse affects, not a breach of any representation." *Id.* at *4. This expert's conclusion, while perhaps not a legal opinion, does put forward the merit in an interpretation of "material and adverse" that precludes a repurchase obligation when the buyer's motivation to invoke the clause is not a loss caused by the seller's breach.

Although not directly on point here, the interpretive approach adopted in *Wells Fargo* also parallels aspects of the common law material breach doctrine. That doctrine addresses the situation where a party breaches a contract but nevertheless seeks to hold her counterparty to the agreement. In general terms (and at the risk of oversimplification), if the party's breach is material and uncured, she may not insist on her counterparty's performance. If the party's breach is not material, however, although the party is liable in damages for her breach, her counterparty is not released from the contract and the breaching party can thus enjoy the benefit of her bargain despite her breach. *See*, *e.g.*, Restatement (Second) Contracts §§ 237; 241; 242; 243; 250 (1981). A virtue of this common law rule is that the counterparty is unable to use a trivial breach as an excuse to free himself from what turns out to be—for reasons unrelated to the breach—a burdensome bargain. Similarly, the *Wells Fargo* interpretation of a provision such as §2.03(c) of the Pooling and Servicing Agreement could prevent purchaser abrogation of a transaction that has—for reasons other than the seller's breach—become burdensome.[****]

None of the foregoing suggests that the *Wells Fargo* approach is ideal. It is not. Notably, to say that a material adverse effect on an interest in a loan is one that reduces the value of that interest does not help determine how much of a reduction in value constitutes a "material" reduction. The few cases cited here as examples suggest that an inquiry into the consequences of a breach of a representation or warranty may require case-by-case analysis regardless of how one interprets "material and adverse" (though I offer no view as to whether this is in fact the case). Such an inquiry would be difficult under any circumstances but would be further complicated, and subject to inconsistent results across cases, where the standard provides no principled guidance, and a court might be reluctant to embark on such a course.

In sum, then, it is not possible to conclude with any confidence how a court would interpret a provision such as §2.03(c) of the Pooling and Servicing Agreement. And I make no such prediction. Notably, in addition to the competing considerations discussed here, there may be cases or circumstances of which I am unaware, including but not limited to industry standards or practices, that would lead a court—through the admission of extrinsic

[****] *Resolution Trust Corp*, cited earlier in the text, opined that the standard for material breach is different, and may include a higher threshold, when the victim of breach attempts to "walk away from" an agreement rather than merely enforce a contractual repurchase obligation that is expressly triggered by a material breach in a representation or warranty. 280 F.3d at 17. The court was not, however, interpreting the language that appears in §2.03(c) of the Pooling and Servicing Agreement between Countrywide and BNY Mellon and, in any case, for the reasons given, the argument made above about the possible intention of the parties to avoid opportunism applies even to a repurchase obligation provided for as part of a contract.

evidence or otherwise—to reach one conclusion or another.[*****] But, for the reasons described here, based solely on general contract principles, and taking the language of the provision at face value, it appears to be a reasonable position that a determination of whether a breach materially and adversely affects the interests of Certificateholders should turn on the harm caused by the breach.

Dated: May 27, 2011

Barry Adler

Professor Barry E. Adler

[*****] Different jurisdictions have different rules and standards regarding contract interpretation and the admissibility of evidence. I offer no opinion on such differences or on the particular rules or standards that would apply to this case.

# EXHIBIT D-2

Jason H. P. Kravitt
Sean T. Scott
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606

Matthew D. Ingber
Mayer Brown LLP
1675 Broadway
New York, NY 10019-5820

Dear Gentlemen:

You have asked for my opinion in connection with a potential settlement (the "Potential Settlement") involving securitization trusts (the "Trusts") for which Mayer Brown's client, The Bank of New York Mellon ("BNY Mellon" or the "Trustee") is trustee or indenture trustee. In particular, I have been asked to consider two legal theories (veil piercing and successor liability) under which the Trustee could potentially seek to recover money from Bank of America Corporation ("BAC") if certain BAC subsidiaries were liable for damages to the Trusts and unable to meet their respective obligations. In particular, you have asked me to focus on certain business combination transactions between Countrywide Financial Corporation ("CFC"), Countrywide Home Loans, Inc. ("CHL") and Countrywide Home Loans Servicing ("CHLS") on the one hand, and BAC and its subsidiary, NB Holdings Corporation ("NB Holdings") on the other, in 2008, and whether such transactions provide a basis for the Trustee to recover from BAC under either a veil piercing or successor liability theory. Below are my general views of how those doctrines likely would come into play.

This memo describes in general terms the law of veil-piercing and successor liability in Delaware, New York and California (as described in Appendix A, any of these could apply) and describes how these laws may apply to a potential case against BAC. This does not constitute legal advice, but gives my general opinions as an academic interested in corporate law and is limited by the available factual record and certain assumptions I make. Both veil piercing and successor liability are fact-intensive legal theories; any ultimate judicial determination may turn on documents or testimony that would be produced at trial that I haven't seen. Much of my understanding comes from review of public filings and transaction documents as well as from discussions with BAC and legacy Countrywide personnel. I have not independently verified the accuracy of any facts discussed or assumed. This opinion is intended solely for your information, and I make no recommendation regarding the Settlement to either Mayer Brown or the Trustee.

Rob Daines

Robert Daines
Pritzker Professor of Law and Business
Stanford Law School

# Contents

## SUMMARY

Based on my understanding of the facts, and as further explained below:

- A veil piercing claim would likely fail.
  - First, from a policy perspective, it is generally not a good idea to pierce the veil for contractual claims (like a breach of warranty claim against CHL). To be blunt, the mere fact that creditors, including judgment creditors, will otherwise not be paid in full is no reason to pierce the veil. If investors in the trust certificates (the "Investors") agreed to bear the risk that Countrywide would someday fail, they presumably charged for this risk.
  - The mere fact that BAC bought Countrywide is no reason to pay creditors with BAC's assets that they were not relying on when they invested. Unless the value of Countrywide's assets was materially reduced in the Transactions (as defined below), Investors were not harmed by either the Transactions or the Acquisition of Countrywide and there is no reason to overturn the original bargain.
  - The general presumption against veil piercing for sophisticated contract creditors (like Investors) is a foundational legal rule. It is in fact extremely valuable and one of the few things on which commentators almost universally agree. To pierce the corporate veil simply because creditors would otherwise lose money would destroy this valuable and fundamental rule of corporate law.
  - Moreover, most veil piercing claims fail in the face of proper observance of corporate formalities. Based on my discussion with BAC management and review of corporate disclosures, it appears they did take steps to ensure that formalities were observed sufficiently to make a veil piercing claim difficult, as would be expected.
  - Thus, BAC very likely has a valid defense to claims that it lacked corporate separateness and it is highly unlikely that Investors' losses would qualify as injustice or the result of BAC's actions.

- To succeed on a piercing claim, the Trustee would probably need to show that BAC siphoned off value from Countrywide by materially underpaying for the assets it purchased in the Transactions. If it could show this, then both precedent and policy would support veil-piercing (as well as other claims against BAC, including successor liability and fraudulent conveyance).
  - Based on my understanding of the facts, however, this may not be easy to show. As discussed later in this memorandum:
    - According to BAC representatives, the pricing for the Transactions was based on valuations initially done in connection with the Acquisition, which was an arm's-length transaction between two unrelated parties. If this is true, it may be difficult for the Trustee to prove that BAC gave less than fair consideration in the Transactions.

    - There was a plausible business purpose for the Transactions.
    - I have seen no evidence to support a claim of asset stripping.

- The outcome of a successor liability claim is uncertain and would depend on where the case was brought, whether BAC underpaid in the Transactions, and other factual findings. Based on the facts as I understand them, BAC has a reasonable argument that any successor liability claim would be defeated.
  - Policy arguments seem to favor BAC and to argue against a finding of successor liability. Moreover, if BAC <u>did</u> pay a fair price for the assets, there is little reason for a court to find successor liability. Indeed doing so would undermine valuable corporate law rules.
    - In general, buyers do not (and should not) become liable for the seller's debts, especially if the seller's creditors were sophisticated and informed about the risks they faced at the time of their investment.
    - There are exceptions to this general policy, but they are aimed at deterring fraud and protecting creditors' reasonable expectations about the risks they took.
    - If BAC paid a fair price for the assets, the sales did not hurt Investors and there would be no reason to hold BAC entities liable for losses that Investors agreed to bear. Thus, absent potential fraudulent underpayment, there would be little policy justification for invoking successor liability based on the Transactions.
    - A finding of successor liability in this case would effectively grant Investors a windfall based on BAC's acquisition. If Investors knowingly accepted Countrywide credit risk, they should have access to Countrywide assets and no more. The mere fact that BAC subsequently bought Countrywide, after the alleged contractual breaches, is no reason to impose additional financial cost on BAC and would not plausibly deter the losses the Investors now face.
  - If the Trustee can show that BAC paid an unfair price that materially reduced the assets available to satisfy Investor claims, successor liability (or a similar theory) could well succeed.
  - Nonetheless, as a matter of practice, successor liability claims are rarely successful.
  - It appears that BAC likely has valid defenses to successor liability claims (especially under Delaware law).
  - The more difficult question is whether BAC would be liable under the de facto merger doctrine. Though I think the economic arguments and bulk of the case law favor BAC, I cannot ignore the stream of case law in New York and elsewhere that is something of a wildcard -- the relatively wooden application of which could theoretically hold BAC liable. The recent MBIA decision in New York is an example of this. A simple reading of some New York cases may lead to a conclusion that

BAC would be liable under a de facto merger theory. But as I conclude below, I do not believe that New York law will apply. Moreover, while the ultimate outcome is a difficult question, turning on unknown facts and developing law, in the end, I think a successor liability case would be difficult to win if a court concluded that BAC paid a fair price in the Transactions. At the very least, as discussed in more detail below, BAC has a reasonable argument that a successor liability claim would be defeated.

## BACKGROUND

### LEGACY BANK OF AMERICA

BAC is a Delaware corporation, a bank holding company and a financial holding company, with its principal executive offices in Charlotte, NC. Prior to its acquisition of Countrywide, BAC had approximately $1.7 trillion in assets, and employed approximately 210,000 people across three primary business segments, (i) Global Consumer and Small Business Banking, (ii) Global Corporate and Investment Banking, and (iii) Global Wealth and Investment Management.[1]

### LEGACY COUNTRYWIDE

Prior to the Acquisition, (as defined below) Countrywide was engaged in real estate finance-related businesses, including mortgage banking, banking and mortgage warehouse lending, dealing in securities and insurance underwriting. As of June 30, 2008, Countrywide had assets with a book value of $172 billion, and employed approximately 44,000 people.

### COUNTRYWIDE ACQUISITION

On January 11, 2008, BAC announced the acquisition of Countrywide for approximately $4 billion in an all stock transaction. On July 1, 2008, in accordance with the terms of the merger, Countrywide shareholders received .1822 of a share of Bank of America in exchange for each share of Countrywide stock (the "Acquisition"). BAC also cancelled $2 billion of Countrywide's Series B convertible preferred shares that it held prior to the Acquisition. BAC's initial purchase price allocation indicated that the fair value of net assets acquired was negative $0.2 billion, resulting in associated goodwill of approximately $4.4 billion.[2] Over the next few months, BAC and Countrywide entities entered into several transactions, which, I understand from discussions with BAC personnel, were anticipated as of the merger date and which served to integrate Countrywide's operations with those of BAC (the "Transactions").

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[1] Bank of America Corporation, Form 10-K for the year ended December 31, 2007.
[2] Bank of America Corporation, Form 10-K for the year ended December 31, 2008, p. 125.

## ANALYSIS AND UNDERSTANDING OF FACTS

I have reviewed certain documents, public filings, and have spoken with Bank of America management familiar with the Transactions.[3] This section describes my understanding of the details surrounding the Acquisition and Transactions, as well as the operations, corporate structure and governance of the Countrywide entities.

After the announcement of the Acquisition in January of 2008, BAC determined that it would integrate Countrywide's operations with its existing operations, and determined that certain operations could be integrated immediately after the Acquisition, while others required third-party consent from regulators and contractual parties. To accomplish this, it planned a series of transactions:

- Shortly after the merger closed, CHL would sell to NB Holdings:
    a. two pools of mortgage loans (the "Initial Loan Sales"); and
    b. the vast majority of Countrywide's mortgage servicing rights and related assets.

  These transactions did occur shortly following the merger and are referred to as the "LD-2 Transactions" (for Legal Day 2, or day 2 following the Acquisition's legal closing).

- Following the necessary consents and approvals, BAC would buy:
    a. substantially all of CHL's remaining assets, including its mortgage origination operations (the "Asset Purchase Agreement"); and
    b. the stock of significant CFC subsidiaries, including its interest in Countrywide Bank, FSB (the "Stock Purchase Agreement"). These transactions occurred on November 7, 2008, 100 days following the merger, and are referred to as the "LD-100 Transactions."

## THE LD-2 TRANSACTIONS

### The Initial Loan Sales

The Initial Loan Sales consisted of the transfers of two pools of mortgage loans from CHL to NB Holdings in exchange for approximately $9.4 billion in cash and promissory notes. These transfers were made pursuant to the Master Mortgage Loan Purchase and Subservicing Agreement, which was executed on July 1, 2008. Deal No. 2008-1 was effectuated through a purchase confirmation and was closed on July 1, 2008 for approximately $6.9 billion.[4] Deal No. 2008-002 was also effectuated through a purchase confirmation and closed on July 3, 2008 for approximately $2.5 billion.[5]

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[3] Appendix B contains a list of documents I have received in connection with this engagement. I have also relied on certain assertions made by BAC management, although I have not verified those assertions.

[4] BACMBIA-C0000161250-1257.

[5] BACMBIA-C0000161224-1231.

**July 2, 2008 - LD-2**

On July 2, 2008, NB Holdings entered into the Purchase and Sale Agreement with CHL whereby NB Holdings acquired CHL's membership interests in Countrywide GP, LLC and Countrywide LP, LLC, whose sole assets were equity interests in Countrywide Home Loans Servicing LP ("Servicing LP"). Servicing LP was the operating entity which serviced the vast majority of residential mortgage loans for the Countrywide entities. As consideration for this valuable asset, NB Holdings issued a promissory note to CHL for approximately $19.7 billion. My understanding is that the primary assets of Servicing LP were mortgage servicing rights and reimbursable servicing advances.[6]

In addition to the LD-2 Transactions, on July 3, 2008, Countrywide Commercial Real Estate Finance ("CCREF") sold a pool of commercial real estate loans to NB Holdings for approximately $237 million.[7]

***Valuation***

In my conversations with BAC representatives, they said that the valuation used to determine the consideration for the Acquisition was also used to determine the consideration for the Initial Loan Sales and LD-2. This is supported by Countrywide's Form 10-Q for the quarter ended June 30, 2008.

Note 2 to the financial statements described the Acquisition as well as several of the Transactions. The note stated, "The Company [CFC] expects to record no material gain or loss on these transactions after giving effect to purchase price adjustments." Under purchase price accounting, all assets and liabilities of CFC would be adjusted to fair value in connection with the Acquisition. Since the Transactions took place immediately subsequent to the Acquisition, and CFC did not record any material gain or loss in connection with the Transactions, it may be difficult for the Trustee or some other potential plaintiff to demonstrate that the consideration paid in connection with the Initial Loan Sales and LD-2 did not represent the fair value of the net assets transferred.

***Approval and Execution***

From what I have seen, it appears that the Initial Loan Sales and LD-2 were documented, approved, and executed properly. Both sales were approved by the Board of Directors of CHL through a unanimous written consent dated July 1, 2008, and executed by Andrew Gissinger, III. Mr. Gissinger was a legacy Countrywide employee, served as President, Chief Operating Officer and Head of Mortgage Lending for Countrywide. It is my understanding that Mr. Gissinger stayed on with Countrywide for a short time after the Acquisition. The Purchase and Sale Agreement and the Master Mortgage Loan Purchase and Subservicing Agreement were each executed by Gissinger on behalf of CHL, and by Joe Price, Chief Financial Officer, on behalf of NB Holdings. The purchase confirmation for Deal No. 2008-1 was executed by Mr. Gissinger on behalf of CHL and by Mr. Price on behalf of NB Holdings. The purchase confirmation for

[6] Countrywide Financial Corporation, Form 10-Q for June 30, 2008, p. 6.
[7] BACMBIA-C0000161613-1628.

Deal No. 2008-2 was executed by Monica Brudenell, Senior Vice President, on behalf of CHL and Jeffrey Brown, Treasurer, on behalf of NB Holdings.

## THE LD-100 TRANSACTIONS

On November 7, 2008, BAC entered into a series of transactions with Countrywide entities, including the Stock Purchase Agreement and the Asset Purchase Agreement. Through the Stock Purchase Agreement and the Asset Purchase Agreement, BAC entities purchased substantially all of the remaining operating assets of legacy Countrywide, including its mortgage origination business and Countrywide Bank, FSB.

In connection with the Stock Purchase Agreement, BAC issued a promissory note to CFC for approximately $3.6 billion and assumed approximately $16.6 billion in CFC's public debt in exchange for CFC's equity interest in Effinity Financial Corporation ("Effinity"), its subsidiaries, as well as dozens of other direct and indirect subsidiaries of CFC.

In connection with the Asset Purchase Agreement, BAC issued a promissory note to CHL for approximately $1.76 billion in exchange for all assets utilized in CHL's mortgage business, including, but not limited to, (i) a pool of residential mortgages, (ii) remaining mortgage servicing rights, (iii) securities, (iv) real estate acquired through foreclosure on mortgage loans, (v) the technology platform, (vi) furniture fixtures and equipment, (vii) third party contract rights, (viii) real property owned by CHL, and (ix) mortgage servicing advance receivables.[8]

### *Valuation*

BAC managers informed me that the price for the LD-100 purchases was determined using the same methods and assumptions they used to value Countrywide at the time of BAC's initial acquisition, with the exception of a change to account for the interest rate environment. It is also my understanding that no material gain or loss was recorded in connection with LD-100. While I cannot verify these claims, if BAC essentially purchased all of Countrywide's assets at prices largely based on the original third-party negotiations, then BAC may have overpaid for these assets given the severe deterioration in the markets between July and November of 2008.

While the mortgage industry was already in a state of decline at the time of the Acquisition, the mortgage industry and financial markets nearly collapsed between the Acquisition in July and LD-100 (in November). Specifically, on September 6, 2008, the U.S. Treasury placed government sponsored enterprises Fannie Mae and Freddie Mac into conservatorship. On September 15, 2008, Lehman Brothers filed for bankruptcy protection, becoming the largest bankruptcy in U.S. history with $600 billion in assets. On September 25, 2008, in the largest bank failure in U.S. history, Washington Mutual was seized by its regulator, the Office of Thrift Supervision, and the FDIC was appointed receiver. Any one of these events by itself could have had a significant negative impact on the mortgage industry, and therefore on valuations of mortgage industry assets and participants. In combination, the effects were devastating.

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[8] Asset Purchase Agreement, Schedule 2.2.

Therefore, if BAC bought the stock and assets in November at prices that roughly approximate a value set in third party negotiations in July, this would suggest that BAC over-paid (rather than underpaid) for those stock and assets at LD-100.

***Approval and Execution***

The Asset Purchase Agreement was approved by the sole stockholder of CHL via written consent, executed on October 14, 2008 by Anne McCallion, Chief Financial Officer. I understand that Ms. McCallion was a legacy Countrywide finance executive and remained with Countrywide for approximately six months after the Acquisition. Further, the Asset Purchase Agreement was approved by the Board of Directors of CHL via unanimous written consent dated October 14, 2008, and executed by Board members Jack Schakett and Kevin Bartlett, each of whom were legacy Countrywide senior executives. The Asset Purchase Agreement was executed by Ms. McCallion on behalf of CHL and by Mr. Price on behalf of BAC.

The Stock Purchase Agreement was approved by the Board of Directors of CFC via unanimous written consent dated October 3, 2008 by Helga Houston, Greg Hobby, and Helen Eggers. I understand that all three directors were legacy BAC employees. The Stock Purchase Agreement was executed by Ms. McCallion on behalf of CFC and by Mr. Price on behalf of BAC.

**OTHER INTERCOMPANY ACTIVITY POST ACQUISITION**

There is other evidence that would appear to contradict any potential claim of asset stripping on the part of BAC.

First, in connection with the Transactions, BAC and NB Holdings issued numerous promissory notes to CFC and CHL in an aggregate amount exceeding $30 billion. Based on discussions with Bank of America management, I understand that all of these promissory notes were settled, either in cash or as part of an offset for items paid by BAC and or NB Holdings on behalf of Countrywide. While I have not had the opportunity to independently verify this through a review of BAC's books and records, public filings are consistent with this assertion.

Second, based on my discussions with Bank of America management, no dividends have been paid up to any BAC entities from the Countrywide entities. Again, while I have not been able to verify this in BAC's books and records, this assertion is consistent with the standalone Countrywide financial statements I have reviewed.

Third, BAC has made capital contributions exceeding $3 billion since the Acquisition. If an entity were engaged in fraudulent asset stripping, I would expect to see quite a different set of facts.

Fourth, intercompany transactions appear to be fairly limited, and ostensibly seem to favor Countrywide in their application. BAC utilizes certain Countrywide employees, and is charged for their services, but because CFC is in "wind down," BAC does not allocate corporate expenses to CFC or its subsidiaries. This practice is consistent with how BAC treats other similarly situated subsidiaries.

## CORPORATE STRUCTURE AND GOVERNANCE OF COUNTRYWIDE

BAC may well have had legitimate business purposes for integrating the mortgage business of Countrywide, including its servicing operations, with BAC's existing operations. BAC managers assert that the Transactions made business sense given: (i) BAC's lower cost of funding, (ii) management experience, (iii) tax-related issues, and (iv) efficiencies.

BAC and the Countrywide entities appear to have observed corporate formalities. Based on my discussions with BAC management, I understand that CFC and CHL had their own officers and directors, held regular Board meetings and maintained minutes documenting those meetings.

Since the date of the Acquisition, CFC and its subsidiaries, including CHL, have maintained separate accounting systems, and have produced balance sheet and profit and loss statements at the subsidiary level.

Since the Acquisition, CFC and its subsidiaries have maintained separate bank accounts from BAC and its other subsidiaries.

At the time of the Acquisition, Countrywide employed approximately 44,000 people. Approximately 20,000 of those employees have remained on with BAC in some capacity. Countrywide entities currently employ approximately 600 employees, primarily dedicated to resolving representation and warranty claims. After the Acquisition, BAC's own management team began to run the combined operations.

## Continuation of Countrywide's Business

With the exception of Balboa Insurance, BAC has discontinued use of Countrywide's trade names. Further, Countrywide's mortgage origination business had declined dramatically as of the Acquisition date. Further, BAC announced that it would not originate "pay option arm mortgages," which represented a significant percentage of loans originated by Countrywide.

In late 2007, Countrywide discontinued lending and sales of subprime mortgage loans, and prior to June 30, 2008, Countrywide discontinued lending and sales of home equity loans, except for additional draws under existing loan agreements and securitizations. Following is a comparison of revenue from Countrywide's Loan Production segment for the first two quarters of 2007 compared to 2008.

- Three months ended March 31, 2007 - $1.2 billion
- Three months ended June 30, 2007 - $1.5 billion
- Three months ended March 31, 2008 - $1.1 billion
- Three months ended June 30, 2008 - $762 million

The volume of loans sold was also in decline:

- Three months ended June 30, 2007 - $109 billion
- Three months ended June 30, 2008 - $57 billion

## THE LEGAL RISKS: WHEN SHOULD BAC BE LIABLE FOR THE DEBTS OF A SUBSIDIARY?

### THE BENEFITS OF LIMITED LIABILITY

As a general matter, a firm (including a holding company or wholly-owned subsidiary) is liable for its own debts and no others. There are good reasons for this rule, even when it results in unpaid creditors and even when the firm's shareholders could afford to pay the debt themselves.

First, this rule allows individuals and firms to limit the amount of capital they will risk in any one venture: if a venture in Firm A goes bad, creditors will not be able to dismantle a successful Firm B or claim all of the owner's assets. This encourages firms to make the risky investments that are necessary for economic growth, which benefits shareholders and society.

Second, this rule makes it easier for creditors to monitor the creditworthiness of the debtor. Creditors of Subsidiary B need only keep track of Subsidiary B's activities and financial condition, and do not need to worry that creditors from Subsidiary A will swoop in and lay a claim to Subsidiary B assets on which they had been relying. Thus, they can save money by effectively ignoring Subsidiary A's assets, liabilities and activities as well as the assets of Subsidiary A creditors. Creditors pass these cost savings on to borrowers and shareholders in the form of a lower interest rate, better terms or more available credit.

Commentators point out a host of other potential benefits arising from limited liability, including vibrant and accurate capital markets, and offer enthusiastic praise, calling limited liability "the greatest single discovery of modern times."[9] Thus, there is a robust presumption against piercing the corporate veil or holding a successor liable for another firm's debts. This presumption is so important that it has been widely recognized as "the essential role of organizational law."[10] Refusing to pierce the corporate veil is simply the court's way of enforcing the terms of the original bargain between a corporation and its voluntary creditors.

### WHEN TO IGNORE LIMITED LIABILITY

When should we ignore this general rule against veil piercing or successor liability? For contractual creditors, the answer is: not often. Contractual creditors are free to protect themselves from the risk of loss by insisting on additional protections (guarantees, security interests, or restrictive covenants), charging higher prices to compensate for this risk or by refusing to deal with the firm. Thus, absent some form of misrepresentation or opportunism that defeats a creditor's reasonable expectations about the assets available to satisfy a debt, there is relatively little reason to overturn the default rule.[11]

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[9] NICHOLAS MURRAY BUTLER, WHY SHOULD WE CHANGE OUR FORM OF GOVERNMENT 82 (1912).

[10] These arguments are outlined in Henry Hansmann and Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L. J. 387 (2000).

[11] By contrast, tort victims (involuntary creditors) do not do business with the firm voluntarily and cannot protect themselves against the risk of non-payment that comes from limited liability. Thus, there is a much stronger public

Because the Trustee's potential claims against Countrywide are contract claims, there is a relatively weak policy justification for piercing the veil. The Investors voluntarily assumed a risk that Countrywide would be unable to meet its obligations if it breached any representations and warranties or other contractual terms, and they could take that risk into account and charge accordingly. When a contractual creditor is misled about a corporation's financial condition, this argument is less persuasive. However, in this case, misstatements to Investors, if any, would have been made before BAC's involvement. Therefore, from a pure policy perspective, there is generally no reason to pierce the corporate veil merely because CHL is a BAC subsidiary, even if it is insolvent and BAC is not.[12] I think the cases are generally consistent with this reasoning; a veil-piercing claim is highly unlikely to succeed based simply on BAC's ownership of Countrywide.

This analysis would change if it could be shown that Bank of America skimmed the cream off Countrywide and left Investors with the dregs, thus siphoning off value for itself. If BAC bought substantially all of Countrywide's assets at an unfair price, this would obviously rob Countrywide's creditors of the protection they bargained for. In such circumstances, there would be sound legal and economic reasons to hold BAC liable under veil-piercing, successor liability, or similar theories.

Note, though, that there is a difference between value-reducing asset stripping, which unexpectedly increases investors' credit risks by diluting the assets to which they had claim, and either (a) asset sales - for which a buyer pays a fair value and leaves creditors unharmed; or (b) careful legal planning and acquisition structuring, such as a buyer who takes steps to limit its exposure to creditor claims by, for example, purchasing the assets with a corporation instead of a general partnership. The Trustee or other litigants would likely have to attack the value paid by BAC in the LD-2 or LD-100 Transactions under any asset-stripping theory, and show that the consideration was materially less than fair value.

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interest in veil piercing or finding successor liability if that is necessary to protect involuntary creditors, although even in such circumstances, the presumption against veil piercing is robust.

[12] This is generally true for contract creditors; I am excluding, as beyond the scope, any arguments unique to the housing crisis or systemic financial risk.

## VEIL PIERCING

Veil piercing law is notoriously difficult to characterize and has been described as "a doctrinal mess,"[13] perhaps in part because of its rare and relatively unpredictable application. Prominent corporate law scholars (and now Federal Judge) Frank Easterbrook and (former Dean of Chicago Law School) Daniel Fischel famously observed that:

> '[p]iercing' seems to happen freakishly. Like lightening, it is rare, severe and unprincipled. There is consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law.[14]

Even the doctrine's most ardent defenders say it is "a scourge on corporate law,"[15] "troublesome and mysterious" and "applied by courts in an extremely discretionary manner, in accordance with the individual consciences of judges[.]"[16]

The test for this rare exception to the general rule of limited liability is deceptively simple. The common formulation is that courts will hold a shareholder liable for the corporation's debts when: (1) the debtor corporation is completely dominated or controlled by its shareholder; and (2) when failing to pierce would result in a fraud, injustice or a wrong. This rule is easy to state, but hard to apply:

(1) *Domination/control*: It is difficult to know what factors a court will consider important in determining whether a parent dominated and controlled a wholly owned subsidiary. Courts look to a long list of factors – as many as nineteen – to answer this question. Frustratingly, none of these factors is dispositive and there is little guidance about which factor is important, necessary, sufficient or frankly even relevant. Nevertheless, there are some general patterns which I describe below.

(2) *Fraud/Injustice/Wrong*: What counts as a fraud or injustice? This is another wildcard and often differs from judge to judge; what one considers injustice, another may find a bargained-for risk. Generally, however, the injustice or wrong must be significant, even if it does not rise to the level of fraud.

Finally, courts sometimes vacillate about whether <u>both</u> domination and fraud/wrong are required or whether fraud alone is enough.

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[13] Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81, 84 (2010).
[14] Frank H. Easterbrook and Daniel Fischel, *Limited Liability and the Corporation*, 52 U. CHI. LAW REV. 89, 89 (1985).
[15] Oh, *supra* at 81.
[16] STEPHEN PRESSER, PIERCING THE CORPORATE VEIL §1.1 (2010).

Successful veil piercing claims are relatively uncommon. For instance, one study of reported cases found that veil piercing succeeded in only 8% of cases where, as seems likely here, the parent did not make any misrepresentations.[17] Moreover, courts are reportedly less likely to pierce the veil when the shareholder is a corporation than they are when the shareholder is a person.

Below, I describe generally the law of Delaware, New York and California.

**PIERCING THE CORPORATE VEIL IN DELAWARE**

Although Delaware is recognized as the center of corporate law, it lacks any simple rules for when it will pierce. In 1968, the Delaware Supreme Court laid down the broad principle that they would pierce only "in the interest of justice, when such matters as fraud, contravention of law or contract, public wrong, or where equitable consideration among members of the corporation require it, are involved."[18] Lower courts expressly decline to clarify the vague standard ("the legal test . . . cannot be reduced to a single formula.") and reserve the power to pierce as needed to avoid inequitable results.[19] Because of this uncertainty, influential Delaware judges sometimes prefer to avoid veil piercing and to instead use alternative legal theories, such as fraudulent conveyance or tortious interference with contract, that better focus on the key question: is the parent culpable for the losses of its subsidiary's creditors?

In spite of the indeterminacy of Delaware's formal law, it is important to note that Delaware courts have traditionally been conservative on veil piercing and sensitive to transaction planners' need for certainty. Recent surveys rank Delaware as one of the states that is least likely to pierce. In the words of the *Harco* court, "It should be noted at the outset that persuading a Delaware Court to disregard the corporate entity is a difficult task."[20]

Below I discuss factors that Delaware courts have examined in veil piercing cases.

**Mere Instrumentality or "Exclusive Domination and Control"**

Delaware courts sometimes refuse to pierce unless the owner exerts "exclusive domination and control" over the debtor corporation, such that it becomes a "mere instrumentality" or establishes that the parent and the subsidiary operated as a "single economic entity."

It is well-settled that the parent-subsidiary relationship, by itself, is not enough to justify piercing the corporate veil and that a parent corporation does not necessarily dominate and control even a wholly owned subsidiary. Moreover, a plaintiff must show "exclusive" control by the parent corporation (and not simply by employees of the parent corporation). For example, in *Hart Holding Co. v. Drexel Burnham Lambert, Inc,* the intercorporate connections between the California partnerships and the Delaware corporation were thick: only Drexel Burnham employees were permitted to own partnership assets; the partnerships had none of their own

[17] Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1064 n.141 (1991).
[18] *Pauley Petroleum Inc. v. Continental Oil Co.*, 239 A.2d 629, 633 (Del. Ch. 1968).
[19] *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 989 (Del Ch. 1987).
[20] *Harco Nat'l Ins. Co. v. Green Farms. Inc*., 1989 WL 110537, at *4 (Del. Ch. Sept. 19, 1989).

employees; and senior Drexel Burnham employees performed all of the work for these partnerships. Despite all this, Chancellor Allen held that while "the partnership may indeed have been dominated and controlled by certain employees of Drexel," the plaintiffs had not shown that Drexel Burnham itself "controlled and directed the operations of the partnerships." [21]

The common test used to examine whether the corporation was dominated and controlled is to ask whether the subsidiary adheres to corporate formalities: whether it maintains its own board of directors and separate books and records, and documents any transfers between the corporation and its shareholders.[22] Following these formalities weighs against piercing "because it demonstrates that those in control of a corporation treated the corporation as a distinct entity and had a reasonable expectation that the conventional attributes of corporateness, including limited liability, would be accorded to it."[23] Failure to keep records and maintain formalities is penalized in part because it can make it harder for creditors to verify that the firm's assets remained available to repay their debts.

As noted above, the Countrywide subsidiaries appear to have adhered to corporate formalities with respect to the LD-2 and LD-100 Transactions, which would tend to weigh against veil piercing here. The Transactions were well documented, each entity maintained their own officers and directors, and each entity maintained separate books and records.

**Fraud or something like it**

In Delaware, the failure to observe corporate formalities, by itself, is probably not enough to justify piercing the corporate veil. Even after a gross failure to observe corporate formalities and after unreported asset transfers, the *Harco* court refused to pierce until plaintiffs could demonstrate that the transfers were done with the intent to defraud the corporation's creditors and not for some other valid corporate purpose.

Thus, "mere domination and control" are insufficient; Delaware courts typically refuse to pierce the corporate veil unless there is also some element of fraud, deceit or asset-stripping: "Beyond according respect for the formalities some weight, however, the cases inevitably tend to evaluate the specific facts with a standard of 'fraud' or 'misuse' or some other general term of reproach in mind."[24] Thus, plaintiffs must show that the corporation is "a sham and exist[s] for no other purpose than as a vehicle for fraud."[25]

Delaware courts have the power to pierce if there is a wrong or injustice that falls short of outright fraud, including a "contravention of law or contract, public wrong, or . . . equitable consideration among members of the corporation."[26] In particular, applying Delaware law, the

[21] *Hart Holding Co. v. Drexel Burnham Lambert, Inc.*, C.A. No. 11514, 1992 WL 127567, at *11 (Del. Ch. May 28, 1992).
[22] *Harco Nat'l Ins. Co.*, 1989 WL 110537, at *6.
[23] *See Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 989 (Del. Ch. 1987).
[24] *Id.*
[25] *Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood*, 752 A.2d 1175, 1183–84 (Del. Ch. 1999).
[26] *Pauley Petroleum Inc. v. Cont'l Oil Co.*, 239 A.2d 629, 633 (Del. 1968); *see also Harco Nat'l Ins. Co.*, 1989 WL 110537, at *5 ("It is not necessary in Chancery, therefore, to show that a defendant accused of fraud has to have known or believed that his statement was false or to have proceeded in reckless disregard of the truth.").

District of Delaware noted that under the "alter ego" inquiry, if the corporation fails to observe corporate formalities, undercapitalization, or asset-stripping, the plaintiff need only show an element of injustice or unfairness rather than fraud.

The mere fact of nonpayment does not count as an injustice, however. A host of cases state that mere insolvency is not enough to allow piercing of the corporate veil. Instead, the fraud or injustice must consist of something more than the alleged wrong in the complaint and relate to a misuse of the corporate structure.

***Asset-Stripping***

Courts are most likely to pierce when shareholders engage in asset-stripping -- siphoning off the firm's assets and providing little or no (or inadequate) consideration in return.[27] Observance of corporate formalities will not save a corporation from piercing where the corporation engaged in asset-stripping. In this case, courts need not find common law fraud (or an investor's reliance on a misstatement), but something less – even an element of wrong.

The reason that asset-stripping alone may justify veil piercing is that: (a) Delaware cases explicitly state that fraud on its own may justify veil piercing; and (b) the fact of asset-stripping may serve double duty, as it may show both prongs of the test. The logic is that asset-stripping typically occurs when a shareholder so dominated and controlled the corporation that the corporation agreed to a transaction that made the firm materially worse off (and the shareholder better off, presumably), which by definition works a fraud or injustice on the corporation and its creditors. Thus, transactions that suggest fraud at the corporation's expense go a long way to showing the "mere instrumentality" test.

Successful asset stripping cases are often egregious. For example, in *Pereira v. Cogan*,[28] the court dismissed defendant's motion to dismiss plaintiff's veil piercing claim after finding a pattern of extreme asset-stripping and other fraudulent conveyances was sufficient injustice to warrant piercing the corporate veil, even though the defendants observed corporate formalities. In *Geyer v. Ingersoll Publications Co.*,[29] the court found three conveyances intended to benefit the parent corporation's other business partners were sufficient to support an instrumentality theory of piercing the corporate veil. Other cases involve transfers to a parent corporation for inadequate consideration.

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While extremely rare, Delaware courts have pierced on "public policy" grounds before. The Chancery Court appears to have applied this justification in *David v. Mast*, No. 1369-K, 1999 WL 135244, at *1 (Del. Ch. Mar. 2, 1999) where it pierced even though the shareholder followed corporate formalities when an almost-insolvent roofing company owned by a single individual shareholder violated Delaware's consumer protection policies when it advertised ten-year roofing guarantees that it knew it wouldn't be able to pay out. This "public policy" exception creates some additional uncertainty on the merits of a veil-piercing claim here given the importance of the underlying dispute.

[27] *Mabon, Nugent & Co. v. Texas Am. Energy Corp.*, 1988 WL 5492, at *1-4 (Del. Ch., Jan. 27, 1988) (together with soft assurances that the parent corporation would be liable for the subsidiaries' debt); *United States v. Golden Acres, Inc.*, 702 F. Supp. 1097, 1106 (D. Del. 1988) (applying federal common law and including failure to observe corporate formalities); *Harco Nat'l Ins. Co.*, 1989 WL 110537, at *2 (together with operation of the business "in an informal and cavalier manner").

[28] No. 00 CIV. 619(RWS), 2001 WL 243537, at *21 (S.D.N.Y. Mar. 8, 2001).

[29] *Geyer v. Ingersoll Publications Co.*, 621 A.2d 784, 793 (Del. Ch. 1992).

An extreme case of undercapitalization or asset-stripping is more likely to suggest fraudulent intent and to justify veil-piercing which gives the debtor full relief. For a more moderate case, less suggestive of fraudulent intent to avoid a judgment, the doctrine of fraudulent conveyance and simply recapturing any value reduction makes more sense.

Here, the facts as I understand them seem to weigh against a successful asset-stripping claim under Delaware law: (1) BAC paid very substantial consideration for the assets acquired in the LD-2 and LD-100 Transactions, and the resulting intercompany debt was paid in full by BAC; (2) that price was based on prices determined by the Acquisition, which was presumably adequate because it was approved by the Countrywide shareholders, (3) BAC did not take any dividends from the subsidiaries at issue, and instead has made additional capital contributions to support the operations of those subsidiaries; and (4) there were ostensibly valid corporate purposes for the Transactions at the time, and I have seen not seen evidence that the purpose of the Transactions was to render Countrywide entities judgment-proof. Most importantly, BAC managers say that they paid for the assets based on fair-value accounting and subsequent disclosures in Countrywide's public financial statements do not recognize any substantial gains or losses from those transactions. If true, this is a strong defense against asset stripping, particularly when the value of Countrywide's assets were likely dropping during this time. (See the valuation subsection of The LD-100 Transactions section, on page 10.)

**PIERCING THE CORPORATE VEIL IN NEW YORK**

Commentators describe New York's law as obscure, but generally agree that it is relatively difficult to pierce the corporate veil in New York state courts. Commentators have described its laws as "'nearly impregnable'"[30] and "somewhat more restrictive on piercing than cases from the rest of the country."[31] Moreover, some federal courts (interpreting New York law) appear even less willing to pierce for contract creditors who do business with the corporation voluntarily and who have agreed to bear the risk. The courts note that "There is a general tendency not to pierce the corporate veil…, particularly in contract cases where the complaining party has chosen to deal with the protected party and has had the opportunity to negotiate the terms of liability, thereby protecting himself from the harmful effects of wrongdoing."[32]

The New York rule is easier to state than Delaware's; piercing is permissible when: "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud wrong against the [petitioner] which resulted in [that petitioner's] injury."[33]

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[30] William D. Harrington, *Business Associations*, 43 SYRACUSE L. REV. 25, 65 (1992).

[31] Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1052 (1992) ("As a group, the New York decisions seem somewhat more restrictive on piercing than cases from the rest of the country.").

[32] *See, e.g.*, *Matter of Tax Indebtedness of Coppola*, 91-CV-0919(JBW), 1994 WL 159525, at *4 (E.D.N.Y. Jan. 10, 1994) (citing *Carte Blanche (Singapore) PTE., Ltd. v. Diners Club Int'l, Inc.*, 758 F. Supp. 908, 913 (S.D.N.Y. 1991)).

[33] *In re Morris v. N.Y. State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993).

Because both elements of the test must be shown, New York's rule is arguably stricter than Delaware (where only fraud is required). This distinction may be illusory, however; a court that finds that the Transactions constituted a fraud or wrong is also very likely to be able to find that CHL was dominated or controlled; that is, "fraudulent" related-party transfers between wholly owned subsidiaries are very likely to be the product of dominated boards, even if formalities were followed and records were kept.

**Complete Domination**

To evaluate whether owners have exercised "complete domination of the corporation," New York courts typically look to a long list of factors, many of which focus on the whether the owner observed corporate formalities.

> (1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, *i.e.*, issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arm's length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own.[34]

The list of factors is longer in New York, but there is little analysis to guide their application; none of these factors is dispositive and no weights are given for the individual factors. Several factors (like "undercapitalization" and "common ownership") may be unhelpful truisms; a firm that can't pay its debts is by definition undercapitalized and there is almost always some common ownership link in a veil piercing case.

The most important factors are probably those focusing on whether corporate formalities were observed (separate board meetings held, separate records kept) and whether the separate identity of the firm was respected by its owner. The use of interlocking directors and similar facts "in and of themselves [are] insufficient facts to justify the imposition of such liability on the parent corporation,"[35] absent a showing of other failings like shared bank accounts, addresses, and records or the personal use of corporate funds. Examples of activity considered domination include the following: the absence of formalities such as corporate meetings and records, inadequate capitalization of the subsidiary; the intermingling of personal and corporate funds, and the use of corporate property for other purposes, including the formation of a second

[34] *Passalacqua Builders, Inc. v. Resnick Developers S., Inc*., 933 F.2d 131, 139 (2d Cir. 1991).
[35] *Pebble Cove Homeowners' Ass'n, Inc. v. Fid. N.Y. FSB,* 153 A.D.2d 843, 843 (2d Dep't 1989).

corporation with overlapping ownership, officers, directors, and personnel; and inadequate documentation of intercompany transfers.[36]

Careful observance of corporate formalities limits many veil piercing claims, even if the formalities are observed solely for the purpose of limiting predictable exposure to creditors. However, the courts often blend unity of interest tests (prong 1) with tests about whether asset transfers harmed creditors (prong 2). As a result, simple observance of formalities is alone probably insufficient to insulate BAC from any veil piercing claims. If a court found that BAC fraudulently paid a materially unfair price in the Transactions, thereby reducing the value of CFC and/or CHL, a court could probably find something in the above list of 10 factors to justify piercing. Absent that, the observance of formalities may provide BAC with an important defense.

**Fraud or Wrong**

Even if a creditor is able to show that a corporation was completely dominated and controlled by its owner, New York courts typically refuse to pierce the corporate veil unless a creditor can also show that "such domination was used to commit a fraud or wrong against the [petitioner] which resulted in [that petitioner's] injury."[37]

It is not always clear, of course, what counts as a "fraud" or "wrong." Generally speaking, it takes more than nonpayment or breach of contract to count as a "wrong"; if nonpayment and breach were enough to justify veil piercing, every valid claim on an insolvent corporation would succeed and the exceptions to limited liability would completely swallow the rule.

Thus, New York courts require something like fraud, deception or "bad-faith" actions, such as knowingly collecting fees from customers when performance was impossible or attempting to avoid federal regulation. This wrong need not amount to full-blown common law fraud and very often actions that amount to misrepresentation or deceit are sufficient. Insolvency itself is not a fraud or a wrong.

***Asset Stripping***

Although many aspects of the fraud test are unclear, it is clear that "stripping of corporate assets by shareholders to render the corporation judgment proof constitutes a fraud or wrong justifying piercing the corporate veil."[38] Examples include cases where parent corporations

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[36] *See, e.g.*, *Commercial Sites, Co. v. Prestige Photo Studios, Inc.*, 272 A.D.2d 360 (2d Dep't 2000); *Anderson St. Realty Corp. v. RHMB New Rochelle Leasing Corp.*, 243 A.D.2d 595, 596 (2d Dep't 1997); *Simplicity Pattern Co. v. Miami Tru-Color Off-Set Serv*., 210 A.D.2d 24, 25 (1st Dep't 1994).

[37] *Lederer v. King*, 214 A.D.2d 354, 354 (1st Dep't 1995) ("Plaintiff was not required to plead or prove fraud in order to pierce the corporate defendant's corporate veil, but only that the individual defendant's control of the corporate defendant was used to perpetrate a wrongful or unjust act toward plaintiff") (citing *In re Morris v. N.Y. State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 141, 623 N.E.2d 1157 (1993)).

[38] For example of in-depth analysis of incriminating facts in federal asset-stripping cases, *see Carte Blanche (Singapore) PTE, Ltd. v. Diners Club Int'l, Inc.*, 758 F. Supp. 908 (S.D.N.Y.1991); *Smoothline Ltd. v. N. Am. Foreign Trading Corp.*, 00 CIV. 2798 DLC, 2002 WL 31885795 (S.D.N.Y. Dec. 27, 2002); *Matter of Arbitration between Holborn Oil Trading Ltd. & Interpol Bermuda Ltd.*, 774 F. Supp. 840 (S.D.N.Y. 1991); *United Rubber,*

denude subsidiaries of their assets in order to render them unable to honor their obligations, particularly in advance of a contemplated judgment.[39] Such transfers often are without consideration and are tantamount to fraudulent conveyances. Pending litigation is not a requirement, however; courts may pierce when owners strip assets from a corporation in order to make it judgment-proof, even if owners were simply on notice of impending litigation.[40]

This focus on whether the debtor received fair consideration is evident in cases that show veil piercing is unavailable when the "evidence establishe[s] that the challenged transfers were made for fair consideration or to satisfy an antecedent debt and also that the net effect of the transfers was not to prefer any creditor over plaintiffs."[41]

Thus, NY courts often sensibly and implicitly apply the norms of fraudulent conveyance law to claims of asset-stripping as they arise in veil piercing claims. Even asset sales from dominated and undercapitalized corporations will not justify veil piercing absent proof that the value of assets removed was greater than the value of the contributed services.[42]

In my opinion, is very unlikely that the mere fact that BAC acquired Countrywide and operates it as a wholly-owned subsidiary would justify veil piercing. BAC is likely to have observed the corporate formalities and maintained the separate corporate identity of CHL with sufficient care and rigor to succeed on the "complete domination" prong.[43] Moreover, BAC did not own, much less control, CHL at the time the underlying liabilities were created – and New York law requires that an owner exercised domination "*in respect to the transaction attacked*"[44] and that the attacked transaction harmed creditors. Thus, veil piercing on these grounds alone is very unlikely. To succeed on veil piercing in New York, I think the Trustee would have to prove that BAC paid too little in the Transactions, thus fraudulently removing value from CHL to the detriment of its creditors. I do not have any reason to think that would be an easy task and it may in fact be very difficult. As noted above, I understand that the prices paid in the Transactions

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*Cork, Linoleum & Plastic Workers of Am., AFL-CIO v. Great Am. Indus., Inc.*, 479 F. Supp. 216, 240 (S.D.N.Y. 1979); *Directors Guild of Am., Inc. v. Garrison Productions, Inc*., 733 F. Supp. 755, 762 (S.D.N.Y. 1990).

[39] *888 7th Ave. Assocs. Ltd. P'ship v. Arlen Corp.*, 172 A.D.2d 445, 445 (1st Dep't 1991); *see* also *Chase Manhattan Bank (Nat. Ass'n) v. 264 Water St. Assocs.*, 174 A.D.2d 504, 505 (1st Dep't 1991).

[40] *See, e.g., Godwin Realty Assocs. v. CATV Enters.*, 275 A.D.2d 269, 270 (1st Dep't 2000) ("The stripping of corporate assets by shareholders to render the corporation judgment proof constitutes a fraud or wrong justifying piercing the corporate veil. Although no action had been commenced at the time of liquidation, there was evidence that defendant was nonetheless on notice of the presently asserted claims by building owners with respect to building damage and unauthorized use of electricity.") (citing *Matter of Arbitration between Holborn Oil Trading Ltd. & Interpol Bermuda Ltd.*, 774 F. Supp. 840, 847 (S.D.N.Y. 1991), which quotes *Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Int'l, Inc*., 758 F.Supp. 908, 917 (S.D.N.Y.1991)).

[41] *See, e.g., Rebh v. Rotterdam Ventures Inc.*, 277 A.D.2d 659, 661 (3d Dep't 2000).

[42] *Ravens Metal Products Inc. v. McGann*, 267 A.D.2d 527, 528-29 (3d Dep't 1999) .

[43] *Pebble Cove Homeowners' Ass'n, Inc.*, 153 A.D.2d at 843. *See also A. W. Fiur Co., Inc. v. Ataka & Co., Ltd.*, 71 A.D.2d 370, 374 (1st Dep't 1979) ("A subsidiary corporation over which the parent corporation exercises control in everyday operations may be deemed an instrumentality or agent of the parent. The determinative factor is whether the subsidiary corporation is a dummy for the parent corporation." (citations omitted)); *Feszczyszyn v. Gen. Motors Corp.*, 248 A.D.2d 939, 940 (4th Dep't 1998) (company "substantially responsible for its own day-to-day operations and the hiring and termination of most of its employees," with different directors on the board, is not dominated by parent).

[44] *See In re Morris*, 82 N.Y.2d at 141.

were based on arm's length prices paid in connection with the Acquisition. (See the valuation discussions related to the LD-2 and LD-100 transactions on pages 9 and 10.)

## PIERCING THE CORPORATE VEIL IN CALIFORNIA

The general standard for veil piercing in California is familiar: a plaintiff must prove both (1) unity of interest and ownership between the corporation and its shareholder, and (2) that there will be an inequitable result if the veil is not pierced.[45] In my view, California courts are actually fairly conservative about veil piercing in practice.

Not to be outdone by New York's list of ten factors, California courts consider a list of nineteen that can inform one or both prongs of the test:[46]

- "Commingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses;
- The treatment by an individual of the assets of the corporation as his own;
- The failure to obtain authority to issue stock or to subscribe to or issue the same;
- The holding out by an individual that he is personally liable for the debts of the corporation;
- The failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities;
- The identical equitable ownership in the two entities;
- The identification of the equitable owners thereof with the domination and control of the two entities;
- Identification of the directors and officers of the two entities in the responsible supervision and management;
- Sole ownership of all of the stock in a corporation by one individual or the members of a family;
- The use of the same office or business location;
- The employment of the same employees and/or attorney;
- The failure to adequately capitalize a corporation; the total absence of corporate assets, and undercapitalization;
- The use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation;
- The concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities;
- The disregard of legal formalities and the failure to maintain arm's length relationships among related entities;

[45] *Automotriz Del Golfo De Cal. S.A. De C.V. v. Resnick*, 47 Cal.2d 792, 796 (1957).
[46] *Associated Vendors, Inc. v. Oakland Meat Co., Inc.*, 210 Cal. App. 2d 825, 838-41 (Cal. Ct. App. 1962) (bullets added; citations omitted).

- The use of the corporate entity to procure labor, services or merchandise for another person or entity;
- The diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another;
- The contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions; and
- The formation and use of a corporation to transfer to it the existing liability of another person or entity."

How a court will apply a nineteen-factor test is perhaps anybody's guess. The *Associated Vendors, Inc.* court noted that while several factors usually support a trial court's decision to pierce, that determination is a factual one, and an appellate court approaches it with a deferential standard of review. Below I describe how these factors are usually considered (some regularities emerge).

**Unity of Interest**

***Failure to Observe Corporate Formalities***

The typical tests apply in California, including "failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities . . . the failure to obtain authority to issue stock or to subscribe to or issue the same . . . [and] the disregard of legal formalities and the failure to maintain arm's length relationships among related entities[.]"[47] Failing to observe these corporate formalities can go a long way towards satisfying the unity of interest prong. As discussed above, it appears that BAC and CHL observed corporate formalities. CHL had its own officers and directors, and its board of directors held meetings and maintained minutes of those meetings.

***Identification of a Shareholder with the Corporation***

Courts ask whether the corporation and the shareholder are, in all but legal name, the same entity. A leading case, *Associated Vendors, Inc.*, lists factors such as "the identical equitable ownership in the two entities . . . the identification of the equitable owners thereof with the domination and control of the two entities . . . identification of the directors and officers of the two entities in the responsible supervision and management . . . sole ownership of all of the stock in a corporation by one individual or the members of a family . . . the use of the same office or business location . . . the employment of the same employees and/or attorney . . . [and] the holding out by an individual that he is personally liable for the debts of the corporation."[48]

[47] *Id.* at 840.
[48] *Id.* at 838.

While this list of factors suggests that a parent-subsidiary relationship would almost always meet the "unity of interest" prong, in practice the courts avoid this outcome by blurring this test with the second prong of the *Automotriz* test and generally requiring facts that show manipulation or bad faith even when a subsidiary is wholly owned and controlled by the parent.[49] Thus, failure on this prong alone is insufficient to justify piercing; courts tend to look also for deception or manipulation. Conversely, even consolidated financial statements and interlocking directors show unity of interest where there is asset stripping that suggests bad faith.

***Control and Domination: "Mere Instrumentality" or Single-Enterprise Liability***

Finally, a California court may find a unity of interest where it determines that a subsidiary corporation is a "mere instrumentality" of the parent corporation. Obviously, in practice, a wholly-owned subsidiary will act as its sole shareholder directs, so the term "mere instrumentality" must mean more than this: typically it is used when there is an element of asset-stripping, deception, manipulation or fraud (and the shareholder simply uses the debtor corporation as a pawn in some underlying wrong).[50] Thus, the focus is not on corporate formalities as much as whether creditors were deceived about the risks they were taking.

California courts examine whether the subsidiary is financially independent and consider financial dependence as a factor indicating control. However, even financial dependence is not enough to justify veil piercing unless it is done "'for the purpose of perpetrating a fraud.'"[51] Thus, the test primarily focuses on times when the debtor engaged in fraud with the assistance of affiliates or when the debtor was grossly and intentionally undercapitalized (rather than due to economic distress). In *Las Palmas Associates v. Las Palmas Center Associates*, which is probably the leading case on single-enterprise liability in California, the court explained, "[I]t would be unjust to permit those who control companies to treat them as a single or unitary enterprise and then assert their corporate separateness in order to commit frauds and other misdeeds with impunity."[52] In such cases, the same facts that lead the court to conclude that there is unity of interest will also suggest fraud or asset-stripping sufficient to satisfy the inequity prong of the test.

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[49] *Id.* at 839. In *Pathology, Inc. v. Cal. Health Laboratories, Inc.*, the court held that "intercorporate connections" between a parent and its wholly-owned subsidiary did not rise to the level of "manipulative control" required to meet the unity of interest prong even when the parent and subsidiary had interlocking directors and officers, the parent kept the subsidiary's books at its corporate headquarters, and employees often transferred between the two corporations. *Institute of Veterinary Pathology, Inc. v. Cal. Health Laboratories, Inc.*, 116 Cal. App. 3d 111, 120 (Cal. Ct. App. 1981) (requiring "direct evidence of manipulative control of its subsidiaries which would require imposition of liability.").

[50] *Electro Lock, Inc. v. Core Indus., Inc.*, No. B134386, 2002 WL 1057468, at *17–18 (Cal. Ct. App. May 28, 2002) (piercing to parent corporation where parent corporation's management treated subsidiary's president as a "puppet," provided all administrative assistance and legal advice, and forced the subsidiary to sell products at a loss to the parent corporation); *ADO Finance, A.G. v. McDonnell Douglas Corp.*, 931 F. Supp. 711, 717–18 (C.D. Cal. 1996) (piercing for jurisdictional purposes to sole individual shareholder who appointed the board, directed business decisions, managed daily operations, spun off subsidiaries for less than their true value, and loaned substantial sums of money to the parent); *Institute of Veterinary Pathology, Inc.*, 116 Cal.App.3d at 120.

[51] *Sonora Diamond Corp. v. The Superior Court of Tuolomne Cnty.*, 83 Cal. App. 4th 523, 539 (Cal. Ct. App. 2000).

[52] *Las Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 235 Cal. App. 3d 1220, 1250 (Cal. Ct. App. 1991); *see also Electro Lock*, 2002 WL 1057468, at *19; *ADO Finance, A.G.*, 931 F. Supp. at 718.

**Inequitable Result**

***Undercapitalization***

Inadequate capitalization may lead to an "inequitable result" to justify piercing; however, in practice, courts find this only when a corporation's woefully inadequate financing suggests an intent to evade liability for debts that the corporation could reasonably expect to incur in the ordinary course of business.[53] California generally does not infer "misconduct or injustice" from a corporation's mere "inability to meet the balance of its [debts]."[54] Thus, once again the cases are generally consistent with the idea that piercing is inappropriate to overturn bargained-for risks.

In imputing bad faith from a corporation's undercapitalization, the industry standards for capitalization are relevant. Courts may also consider whether normal business or industry risks led to the company's inability to pay debts in the future.

***Siphoning off Corporate Assets***

A finding of asset stripping or a diversion of assets may itself (if sufficiently egregious) justify a veil-piercing claim. *Associated Vendors* lists "the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another" and "the failure to maintain arm's length relationships among related entities" as factors to consider.[55]

The fact of asset-stripping may serve double duty, as it is considered under both prongs of the *Automotriz* test. As discussed above, the logic is that because the corporation's shareholder so dominated and controlled the corporation, the corporation agreed to a transaction that made the firm worse off (and the shareholder better off, presumably). Such a transfer may have worked a fraud or injustice on the corporation and its creditors. Thus, courts have found unity of interest in the parent corporation's control of the subsidiary, and injustice in the parent's siphoning assets from the subsidiary in certain cases.[56] Conversely, courts have refused to pierce

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[53] *Automotriz Del Golfo De Cal. S.A. De C.V.*, 47 Cal. 2d at 796-97; *Minton v. Cavaney*, 56 Cal. 2d 576, 580 (1961); *Carlesimo v. Schwebel*, 87 Cal. App. 2d 482, 493 (Cal. Ct. App. 1987) ("[I]nadequate financing, where such appears, is a factor, and an important factor, in determining whether to remove the insulation to stockholders normally created by the corporate method of operation."). The Ninth Circuit held in 1988 that "the California Supreme Court has held that undercapitalization alone will justify piercing the corporate veil," but this reading of California law is disputed. *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538, 1544 (9th Cir. 1988). *But see* STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL § 2.5 (2010); *Carlesimo*, 87 Cal. App. 2d at 493 (refusing to pierce because plaintiffs did not show that "the financial setup of the corporation is just a sham, and accomplishes injustice").

[54] *Sonora Mining Corp.*, 83 Cal. App. 4th at 539 ("The alter ego doctrine does not guard every unsatisfied creditor of a corporation but instead affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form."); *see also Pearl v. Shore*, 17 Cal. App. 3d 608, 617 (Cal. Ct. App. 1971) (holding that where undercapitalization resulted not from a bad faith "initial undercapitalization" but from poor management, undercapitalization alone was not sufficient to justify piercing).

[55] *Associated Vendors, Inc.*, 210 Cal. App. 2d at 838.

[56] *Electro Lock, Inc.*, 2002 WL 1057468, at *19; *ADO Finance, A.G.*, 931 F. Supp. at 718.

where the parent company was found not to have drained its subsidiary of assets,[57] or even when a sole shareholder liquidated his wholly-owned corporation and started a new corporation, but did not pay inadequate consideration.[58]

I have not seen any evidence that BAC or its subsidiaries drained the Countrywide entities of their assets. See sections titled LD-2 Transactions and LD-100 Transactions above.

### SUMMARY

Based on what I understand, in my opinion courts likely would not pierce the corporate veil to allow the Trustee to recover money from BAC. From an economic perspective, the Investors agreed to bear the risk that Countrywide would someday fail and they presumably charged for this risk. The fact that BAC bought Countrywide is no reason to pay creditors with BAC's assets; Investors were not relying on BAC's assets when they invested.

Unless the value of Countrywide's assets was materially reduced in the Transactions, Investors were not harmed by either the Transactions or the Acquisition of Countrywide and there is no reason to overturn the original bargain. Based on what BAC managers have said about how the prices were determined, it may be difficult to establish that Countrywide did not receive fair value.

I believe Delaware law is likely (but not certain) to apply. Though there is no simple rule in Delaware, adherence to corporate form and standard procedures are important and help to defeat veil piercing claims. And unless the Trustee can prove that the Transactions harmed creditors, I do not think the Delaware courts will pierce the veil.

The same is also probably true in New York and California, given the importance that they place on corporate formalities (which I understand BAC will be able to show). Given the unpredictability of veil-piercing law, it is impossible to know for sure, but I would be reasonably confident that a veil piercing claim is unlikely to succeed; a sensible opinion would not pierce in this case, absent unexpected and highly unusual facts, such as BAC significantly underpaying in the Transactions.

## SUCCESSOR LIABILITY

Generally speaking, a corporation which acquires the assets of another corporation is not liable for the seller's debts. This is not surprising: when you buy a used car from a neighbor, you don't have to start paying his mortgage as well. The corporate equivalent of this rule is well-established and comes from the idea that corporations are persons and therefore liable for their debts and not the debts of others (not even of their affiliates). This rule is taught in every introductory corporate law class and relied on every day by business planners. Thus, it is indisputable that BAC would not normally become liable for Countrywide's debts when it bought Countrywide assets.

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[57] *Cf. Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101 (C.D. Cal. 2003).
[58] *Katzir's Floor & Home Design v. M-MLS.Com*, 394 F.3d 1143, 1149 (9th Cir. 2004).

There are four main exceptions to this general rule. The buyer may be liable if: 1) it agrees to assume liability; 2) the buyer is a mere continuation of the selling company; 3) there is fraud; or 4) the asset sale is a de facto merger between the buyer and seller.

The reason for the first exception is obvious: a buyer can agree to take on a debt and the law will enforce it. The other exceptions are generally intended to protect third parties from bearing credit risk they did not agree to. Courts often protect creditors, and hold buyers liable, when there is an opportunistic use of the corporate form to defeat a creditor's reasonable expectations about the assets available to satisfy a debt.

As with veil piercing, successor liability is not used simply to prevent creditors from losing money. There is nothing wrong with a corporation selling assets and retaining the liabilities; as long as the seller receives equivalent value in return, its creditors have a claim on the proceeds and should in theory be unharmed. Moreover, if contractual creditors do not like this rule, they are free to bargain for additional protections (security interests, change of control provisions, etc).

Successor liability is thus often invoked as something of a backstop, when a court believes that a third party has been harmed or forced to bear credit risk they didn't bargain for. Many of the cases enforce essentially the same basic policy as fraudulent conveyance law and support or complement the goal.[59] This logic is evident in the recent decision *Maine State Retirement System v. Countrywide Financial Corporation,* where the court dismissed a successor liability claim against BAC on the grounds that plaintiffs had not alleged that the Transactions harmed creditors.

There are two more points before jumping into the law. First, these exceptions are relatively uncommon; claims for successor liability are "overwhelming[ly] reject[ed]" by courts. The fact that I spend more time discussing the exceptions (than the rule) should not imply there are more exceptions. Second, I don't believe that New York or Delaware courts have actually ever held a buyer liable on facts similar to those here; California has already ruled that Delaware law applies. Existing cases generally involve unrelated buyers and sellers, while here the buyers and sellers were both wholly-owned subsidiaries of the same firm; although the doctrine should apply to corporate affiliates.[60] The common ownership of affiliates may actually increase the risk of harm to creditors that the doctrine was designed to prevent, and so the doctrine could apply.

## SUCCESSOR LIABILITY IN DELAWARE

The law on successor liability in Delaware follows the general common law principles: "Absent unusual circumstances 'a successor corporation is liable only for liabilities it expressly

[59] Scholars and commentators sometimes justify successor liability in tort as a possible way to deter misbehavior: if buyers are liable for the seller's tort liabilities, it will reduce the price it pays to acquire the seller's business (which should give sellers an incentive to avoid tort liability). This justification does not work for contractual debts and thus isn't relevant in this case.

[60] This is true even though, as one commentator has stated, "[i]t should be obvious that successor liability will apply to transactions between related corporations as well as between unrelated sellers and purchasers." Phillip I. Blumberg, *The Continuity of the Enterprise Doctrine*: *Corporate Successorship in United States Law*, 10 FLA. J. INT'L L. 365, 414 (1996).

assumes[.]'"[61] However, this rule "'is not absolute'" as 'in some limited situations where an avoidance of liability would be unjust, a purported sale of assets for cash or other consideration may be found to transfer liabilities of the predecessor corporation.'"[62] Although the cases are ultimately fact intensive, a review of the law suggests that it would be an uphill battle to hold BAC liable as a successor to CHL.

Delaware recognizes the same four general exceptions, which are reviewed below.

**Assumption of Liability**

Delaware courts read this exception strictly and typically find assumption of liability only expressly stated by the asset purchase agreement. Absent a buyer's express assumption of liability, Delaware courts are reluctant to find a buyer did so implicitly. For example, in *Fountain*, a buyer's agreement to conclude all of its predecessor's work was found not to be an implicit assumption of corporate liabilities.[63] Delaware courts focus on the language of the contract rather than intent or even the buyer's statements to third parties.

According to the terms of the Asset Purchase Agreement executed in connection with the LD-100 Transaction, the assumed liabilities included certain obligations related to public debt securities, and "liabilities with respect to the ownership and operation of Purchased Assets only to the extent arising from or relating to any event, circumstance or condition occurring on or after the Closing…"[64] In fact, the Asset Purchase Agreement specifically describes liabilities to be retained by CHL, including, inter alia,

> …all Liabilities of Seller or any of its Subsidiaries arising in connection with any litigation, complaint, claim, demand, action, cause of action, suit, arbitration, inquiry, proceeding, or investigation by or before any Government Authority, except to the extent arising from Buyer's ownership and operation of the Purchased Assets after Closing…[65]

Similarly, the Purchase and Sale Agreement executed in connection with the LD-2 Transaction states:

> Seller [CHL] assumes all debts, liabilities, commitments and obligations of any kind, whether fixed, contingent or absolute, matured or unmatured, liquidated or unliquidated, accrued or not accrued, asserted or not asserted, known or unknown, determined, determinable or otherwise, of GP, LP or Servicing LP to the extent such debt, liabilities, commitments or obligations attributable to any action or inaction prior to the date of Closing.[66]

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[61] *Mason v. Network of Wilmington, Inc.*, No. A. 19434-NC., 2005 WL 1653954, at *5 (Del. Ch. July 2005) (quoting *Fell v. S.W.C. Corp.*, 433 F. Supp. 939, 945 (D. Del. 1977)).
[62] *Fell*, 433 F .Supp. at 945; *see also Mason*, 2005 WL 1653954, at *5.
[63] *Fountain v. Colonial Chevrolet Co*, 1988 WL 40019, at *8 (Del. Super. Ct. 1988).
[64] Asset Purchase Agreement, Section 2.3.
[65] Asset Purchase Agreement, Schedule 2.4-1.
[66] Purchase and Sale Agreement, Section 1.3.

Based on the foregoing language, it appears unlikely that the Trustee could successfully argue that BAC expressly assumed liability on the Investors' claims here.

**Mere Continuation**

Delaware courts interpret this exception narrowly. In order to recover under this theory, "it must appear that the former corporation is the same legal entity as the latter."[67] In other words, "it must be the same legal person, having a continued existence under a new name."[68] As the *Elmer* court stated, "[t]he test is not the continuation of the business operation, but rather the continuation of the corporate entity."[69]

Obviously, purchased assets will typically continue in their same use after a sale, without triggering a finding that the buyer was a "mere continuation" of the seller. Therefore, this is essentially a test for fraud and the emphasis appears to be on the word "mere": the new buyer may not be merely the seller in new clothes. If the buyer has the seller's same business, same workforce, same owners, same officers and directors, same customers, it is unlikely that the asset sale had an real economic purpose and more likely that it was motivated by the desire to leave seller's creditors with fewer assets to claim (what else would justify the expense and tax consequences of an asset sale to an identical entity?).

This concern about the buying entity being a sham does not apply here. It is my understanding from the transaction documents that with respect to the LD-100 Transactions, the buyer was BAC, a large public firm and independent legal entity that has significantly more assets and operations than those which it acquired in the Transactions at issue. Further, as described on page 13, Countrywide's business had changed dramatically in the months leading up to the Acquisition, and BAC, while still in the mortgage business, was ceasing to originate the type of mortgages which contributed to Countrywide's prior operating results. The combination of legacy BAC and legacy Countrywide, two publicly held entities, could not be construed as a mere continuation of legacy Countrywide. In fact, I am not aware of a case finding a publicly held buyer to be a mere continuation of the assets of a publicly held seller.

In *Elmer*, one of the leading cases on this issue, the court suggested that related party transactions might be treated differently than arms-length transactions. In reaching the determination that the successor corporation was not the "mere continuation" of the predecessor, the *Elmer* court relied in part on the fact that the sale between predecessor and successor occurred on an arms-length basis and that each corporation had different owners.[70] Although this weighs in favor of holding BAC liable, I found no precedent for courts actually holding a successor liable on these grounds.

**Fraud**

I have not found any Delaware case that analyzed fraud in the successor liability context, so it seems unlikely that they would hold BAC liable under this theory. Other states that have

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[67] *Elmer v. Tenneco Resins, Inc.*, 698 F. Supp. 535, 542 (D. Del. 1988); *see also Fountain*, 1988 WL 40019, at *8.
[68] *Elmer*, 698 F. Supp. at 542.
[69] *Id.*
[70] *Id.*

found successor liability on this ground generally follow the standards of fraudulent conveyance law, although what counts as fraud or valuable consideration in such a case is very fact specific.

Thus, it seems unlikely that Delaware courts would hold BAC liable under this exception, unless the Trustee were able to establish that the Transactions effectively constituted a fraudulent conveyance.

**De Facto Merger**

It seems unlikely that Delaware courts would grant successor liability under this exception as well. I have not found Delaware cases that actually use the de facto merger doctrine to protect creditors following an asset sale. Cases typically only refer to the possibility and suggest it would be applied narrowly at any rate and only "for the protection of creditors or stockholders who have suffered by reason of failure to comply with the statute governing such sales."[71] Because I have seen no allegations or facts that BAC failed to comply with Delaware law governing asset sales and harmed creditors by re-directing the purchase price to another BAC entity, it would be difficult for a court to impose liability on BAC under the Delaware de facto merger exception.

There are two additional reasons I believe Delaware courts would not apply the doctrine here:

***Uncertainty***

Delaware courts are loathe to characterize a sale of assets as a de facto merger because it would create a great deal of uncertainty, making it hard to make reliable plans and execute complex transactions, which is Delaware law's bread and butter. Delaware is the corporate law capital of the US in large part because it facilitates enormously complex transactions by offering predictable rules where possible. A broad de facto merger doctrine negates this advantage because dealmakers would not be able to reliably plan on what rights a court would enforce (i.e. when will a court say that the sale was "really" a de facto merger?). This would reduce the value of Delaware law.

This concern sometimes arises in a different context (i.e. when shareholders assert rights that they would have in a merger, but not in an asset sale) but the court's response is instructive: Delaware rejects shareholder de facto merger claims in favor of rules that allow for legal certainty in transaction planning. Delaware vigorously defends the idea that "action taken under one section of [the General Corporation Law] is legally independent, and its validity is not dependent upon, nor to be tested by the requirements of other unrelated sections under which the same final result might be attained by different means."[72] As a leading treatise has summarized, the doctrine of independent legal significance and its accompanying reluctance to find a de facto

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[71] *Heilbrunn v. Sun Chem. Corp.*, 150 A.2d 755, 758 (Del. 1959); *see also Finch v. Warrior Cement Corp.*, 141 A. 54 (Del. Ch. 1928); *Drug, Inc. v. Hunt*, 168 A. 87 (Del. Ch. 1933). These older cases demonstrate that the de facto merger doctrine may be applied when the transaction is structured to permit the consideration to be distributed directly to the stockholders without coming into the possession of the selling corporation.

[72] *Rauch v. RCA Corp.*, 861 F.2d 29, 31 (2d Cir. 1988) (quoting *Rothschild Int'l Corp. v. Liggett Group*, 474 A.2d 133, 136 (Del. 1984)).

merger, "has become a keystone of Delaware corporate law and is continually relied upon by practitioners to assure that transactions can be structured under one section of the General Corporation Law without having to comply with other sections which could lead to the same result."[73]

Although such shareholder de facto merger claims are quite different from the claim the Trustee would bring, Delaware's determined and total resistance to these shareholder claims suggests that the Trustee would face an uphill battle. Delaware courts are likely to recognize the significant uncertainty that such a novel ruling would impose if they were to find a de facto merger under the circumstances here.

***Economic Harm***

Secondly, Delaware courts are likely to apply the de factor merger test somewhat conservatively. As the *Maine State Retirement System v. Countrywide Financial Corporation* suggests, Delaware courts sensibly focus on the underlying economic realities: they reject de facto merger claims unless plaintiffs can show that the selling firm received inadequate compensation, thereby damaging creditors. This would lead them to avoid some of the unpredictable and formal legal tests New York courts sometimes apply.

Thus, in my opinion, it is highly unlikely that a de facto merger claim would succeed in Delaware absent a showing that the Transactions materially reduced the value of the selling corporations. As discussed earlier, given the facts and circumstances surrounding the LD-2 and LD-100 Transactions as I understand them, it would be unlikely that a plaintiff could demonstrate that these transactions materially reduced the value of CHL. (See the valuation discussions related to the LD-2 and LD-100 transactions on pages 9 and 10.)

**SUCCESSOR LIABILITY IN NEW YORK**

New York's successor liability law is more developed than Delaware's, though it too follows the general rule that a buyer is not charged with the seller's preexisting liabilities unless: 1) it agrees to assume liability; 2) the buyer is a mere continuation of the selling company; 3) there is fraud; or 4) the asset sale is a de facto merger between the buyer and seller.[74] This standard applies for both tort and contract debts.

The law is generally consistent with the general description given above, but since it is applied by judges of widely different exposure to and experience with business claims, it is less predictable than decisions by the Delaware judiciary and there are decisions that grant successor liability more readily than Delaware courts would.

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[73] JESSE A. FINKELSTEIN & R. FRANKLIN BALOTTI, DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 9.4 (2010).

[74] *See Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239, 244 (1983).

**Assumption of liability**

A corporation can expressly assume the liability of its predecessor, but courts will not impose liability when a buyer explicitly disclaims it. Most New York courts focus on the language of the contract, even when determining implied liability.[75]

Although a buyer might implicitly assume liability by its words or actions, there are few cases that actually find this, so the standard is unclear. One might argue that Brian Moynihan, BAC's CEO, implicitly assumed liabilities by promising to honor Countrywide's liabilities[76] and by paying certain of CFC's and/or CHL's liabilities in settlements.[77] I doubt this would ultimately work, however. First, to my knowledge, no New York court has ever found such a statement to be sufficient basis for successor liability. Second, courts are clear that a seller's payments to one creditor do not imply it has assumed liability to other parties.[78] Third, most courts focus on the contract rather than what is implied by statements or payments to third parties. Finally, even cases that look to verbal statements often require that someone was misled by the statement and relied to their detriment. A federal court, applying New York law, has held that "[w]hile 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."[79] The Trustee's claims against BAC do not fit this pattern: I haven't seen a claim that Investors were misled by these statements or payments.

**Mere continuation**

A buyer can be liable for the seller's debts if "the purchasing corporation was a mere continuation of the selling corporation."[80] For the "mere continuation" doctrine to apply, the "purchasing corporation must represent merely a 'new hat' for the seller."[81] It is not enough to allege that the seller's president became one of several of the successor's vice presidents and that the buyer and seller shared customers.

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[75] *See City of N.Y. v. Charles Pfizer & Co.*, 260 A.D.2d 174, 175 (1st Dept. 1999); *Grant-Howard Assocs. v. General Housewares Corp.*, 115 Misc.2d 704, 707 (N.Y. Sup. Ct. N.Y. Cty. 1982).

[76] Mike Taylor, *BofA Gets Pugilistic With Mortgage Putback Crowd*, N.Y. OBSERVER, Nov. 16, 2010, available at http://www.observer.com/2010/wall-street/bofa-gets-pugilistic-mortgage-putback-crowd.

[77] BAC made approximately $2 billion in capital contributions to CFC, who in turn made contributions to CHL to reimburse CHL for amounts paid to the GSE's in connection with representation and warranty liabilities. Under the terms of the agreements with the GSE's the seller and the servicer were jointly and severally liable for the obligations under the reps and warranties given to the GSE's.

[78] *See Hayes v. Equality Specialities*, 740 F. Supp. 2d 474, 482 (S.D.N.Y. 2010); *Marenyi v. Packard Press Corp.*, No. 90-cv-4439, 1994 WL 16000129, at *6 (S.D.N.Y. June 9, 1994) (settlement of one claim did not amount to an assumption of all debts of seller).

[79] *Beck v. Roper Whitney, Inc*. 190 F. Supp. 2d 524, 537 (W.D.N.Y. 2001). Two unreported cases go into more detail, citing "factors such as whether the buyer's conduct or representations indicate such an intent, including admissions of liability by officers or other spokesmen of the buyer, and the effect of the transfer upon creditors of the seller corporation." *Vasquez v. Ranieri Cheese Corp*., No. 07-CV-464, 2010 WL 1223606, at *11 (E.D.N.Y. Mar. 26, 2010).

[80] *Schumacher*, 59 N.Y.2d at 245.

[81] *Ladjevardian v. Laidlaw-Coggeshall, Inc.*, 431 F. Supp. 834, 839 (S.D.N.Y. 1977) (citations omitted).

Thus, this exception has been described as essentially that of a corporate reorganization, where one corporation is dissolved and another, essentially identical corporation, survives.[82] Courts thus often refuse to find "mere continuation" when the selling corporation continues to exist after the asset sale; the "fact that the vendor corporation continued to exist after the sale and apparently received fair consideration for its assets [was] sufficient to take this case out of the 'mere continuation' exception."[83] A shell corporation shorn of its assets continuing for a year was sufficient to avoid the finding of "mere continuation."[84]

This concern should not apply here because, as I understand:

- The buyer in LD-100 was BAC, at the time an enormous public company that could not in any way be viewed as simply a continuation of Countrywide.
- The business operations changed following the purchase:
  - As discussed on page 13, Countrywide's business had changed dramatically in the months leading up to the Acquisition – loan production and sales were down approximately 50% in the second quarter of 2008 compared to the second quarter of 2007.
  - The Acquisition combined Countrywide's operations with those of BAC, and BAC phased in its own management team to run the combined operations.
  - Over 50% of legacy Countrywide employees were severed subsequent to the Acquisition.

**Fraud**

Although NY courts, in theory, recognize the fraud exception, the only published cases on this are from 1865 and 1892.[85] Given the lack of precedent, it seems unlikely that NY courts would hold BAC liable under this exception unless the Trustee was able to show that the LD-2 and LD-100 Transactions were unfair and not bona fide. Based on the facts as I understand them, this would be a very difficult showing to make. Other states that have found successor liability on this ground generally follow the standards of fraudulent conveyance.

**De facto merger**

The concept of de facto merger in New York is frequently litigated. It has been described as a "judge-made device for avoiding patent injustice that might befall a party simply because a

[82] *In re Seventh Jud. Dist. Asbestos Litig.*, 788 N.Y.S.2d 579, 581 (N.Y. Sup. Ct. Ont. Cty. 2005).

[83] *Ladjevardian*, 431 F. Supp. at 839.

[84] For instance, in *Douglas v. Stamco*, 363 Fed. Appx. 100, 102 (2d Cir. 2010), the fact that the Seller was not dissolved for more than a year made the "mere continuation" doctrine inapplicable; the creditor retained a claim only against the bankrupt Seller. Thus, in New York, the "mere continuation" doctrine may be more formalistic than the "quick dissolution" standard in de facto mergers. The "quick dissolution" under a de facto merger "may be satisfied, notwithstanding the selling corporation's continued formal existence, if that entity is shorn of its assets and has become, in essence, a shell.'" *In re N.Y. City Asbestos Litig*., 15 A.D.3d 254, 257 (1st Dep't 2005).

[85] *See* George W. Kuney, *Successor Liability in New York*, N.Y. St. B.A. J. 24, 22–27 (September 2007) (stating that no New York court has used fraud to find successor liability). Professor Kuney must mean in the modern era, as two cases from the 19th century have done so. *See Cole v. Millerton Iron Co*., 133 N.Y. 164 (1892); *Booth v. Bunce*, 33 N.Y. 139 (1865).

merger has been called something else."[86] However, the test is nevertheless unpredictable in practice, in part because judges differ as to what constitutes "patent injustice" and some courts apply the tests in a way that would allow the exception to swallow the rule of buyer non-liability.

There are four tests for de facto merger:

1. continuity of ownership;
2. the seller ceasing ordinary business operations and dissolving as soon as possible after the transaction;
3. the buyer assuming liabilities ordinarily necessary to continue the seller's business uninterrupted; and
4. the buyer continuing the successor's management, personnel, physical location, assets and general business operation.

Frustratingly, these tests sound a lot like the first three exceptions (express assumption, mere continuation or fraud), rather than tests for a new fourth exception. Indeed, some courts have observed that "the mere-continuation and de-facto-merger doctrines are so similar that they may be considered a single exception."[87] The doctrine is thus unpredictable and there is even a disagreement about how the four-factor test should be applied: several decisions suggest that the courts apply a "flexible" standard: i.e., they consider all of the factors and that any of these factors could trigger a de facto merger.[88] However, recently, federal courts, applying New York law, have tried to identify factors that were a prerequisite for a finding of de facto merger.[89] Given this uncertainty, it is impossible to predict with confidence what would happen. But as discussed, BAC certainly has a reasonable argument that the de facto merger doctrine would not apply.

***Continuity of Ownership***

Continuity of ownership exists "where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation as the result of the successor's purchase of the predecessor's assets, as occurs in a stock-for-assets transaction."[90] Although in practice, this is typically found only when the assets are sold for stock (which didn't happen here), this test would likely be satisfied in a case against BAC given that both the seller

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[86] *Cargo Partner AG v. Albatrans Inc.*, 207 F. Supp. 2d 86, 104 (S.D.N.Y. 2002) (citations omitted).
[87] *Cargo Partner AG v. Albatrans Inc.*, 352 F.3d 41, 45, n.3 (2d Cir. 2003) (hereinafter "*Cargo Partner AG II*").
[88] *Sweatland v. Park Corp.*, 181 A.D.2d 243, 246 (4th Dep't 1992) ("[w]hile factors such as shareholder and management continuity will be evidence that a de facto merger has occurred, those factors alone shall not be determinative.").
[89] *Cargo Partner AG II*, 352 F.3d at 47. More recently, then-Judge Sotomayor held, for a Second Circuit panel in *National Service Industries*, that the same is true in the tort context. "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.'" *N.Y. v. Nat'l Serv. Indus., Inc.*, 460 F.3d 201, 211 (2d Cir. 2006) The one New York state court to discuss *National Service Industries* does so approvingly. *Morales v. City of N.Y.*, 849 N.Y.S.2d 406, 411 (N.Y. Sup. Ct. Kings Cty. 2007).
[90] *In re N.Y. City Asbestos Litig.*, 15 A.D.3d at 256.

and buyer were wholly owned subsidiaries. However, this obviously isn't enough to justify a finding of de facto merger.

***Quick dissolution***

The second element of a de facto merger "may be satisfied, notwithstanding the selling corporation's continued formal existence, if that entity is shorn of its assets and has become, in essence, a shell."[91] This would ultimately turn on a factual determination. Countrywide and its subsidiaries continue to exist – and it has been longer than the year courts sometimes use in the "mere continuation" test – which would argue against de facto merger. However, they are no longer active businesses and appear to be winding up their affairs in preparation for dissolution, which could favor a de facto merger.

***Buyer assumes liabilities necessary to sustain the enterprise***

The third element of a de facto merger examines the "assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation."[92] This is obviously similar to the first theory of successor liability, the assumption of liability, and so courts focus on the language of the contracts.[93] To my knowledge, this element has, however, never been the decisive factor in a finding of successor liability.[94] This factor cuts both ways: the contractual language clearly disclaims various liabilities, including those arising from the Trustee's and Investors' likely claims here, but BAC also likely did assume most of the liabilities necessary to continue the Countrywide business, which would weigh in favor of the Trustee's claim.

***Continuity of management and personnel***

This factor is heavily fact dependent, and will hinge on the extent to which the management, personnel, and physical plant between the predecessor and successor overlap. However, there is no clear standard applied to determine whether this factor has been satisfied.[95]

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[91] *Buja v. KCI Konecranes Intern. Plc.*, 815 N.Y.S.2d 412, 412 (N.Y. Sup. Ct. Monroe Cty. 2006) (citing *In re N.Y. City Asbestos Litig.*, 15 A.D.3d at 257; *In re AT&S Transp., LLC v. Odyssey Logistics & Technology Corp.*, 22 A.D.3d 750, 753 (2d Dep't 2005); *Fitzgerald v. Fahnestock & Co., Inc.*, 286 A.D.2d 573, 575 (1st Dep't 2001).

[92] *Fitzgerald*, 286 A.D.2d at 574.

[93] *See Morales,* 849 N.Y.S.2d at 412-413 (explaining that this element was already addressed under the section of the case explaining the defendant's express assumption of its predecessors' royalty obligations to the plaintiffs.); *Trystate Mechanical, Inc. v. Tefco, LLC,* No. 7343/10, 2010 WL 3960604 (N.Y. Sup. Ct. Kings Cty. Oct. 2010); *Buja,* 815 N.Y.S.2d at 417 (looking at the "contract between the parties, 'Acquisition of Assets of Shepard Niles Inc by Konecranes, Inc.'").

[94] Indeed, the fact that the defendant has assumed some of its predecessor's liabilities was ruled insufficient, in light of the other missing elements of the de facto merger analysis, to ultimately result in a finding of successor liability. *In re N.Y. City Asbestos Litig.*, 15 A.D.3d at 258-59.

[95] Compare *Trystate,* 2010 WL 3960604, (which found that the plaintiff had appropriately pled successor liability, citing affirmatively the continuity of some key personnel, namely, the fact that the COO in the successor corporation was the President of the predecessor corporation) to *Buja*, 815 N.Y.S.2d at 417 (where continuity of equipment, inventories, accounts receivable, naming rights, customer lists, intellectual property, phone numbers, and goodwill were not sufficient to reach "continuity of management").

That said, "[t]he mere hiring of some of the predecessor's employees is insufficient to raise a triable issue as to continuity of management."[96] Nor does the continued use of a predecessor's name or goodwill constitute the necessary continuity.[97] Whatever extra is needed is left undefined, and thus to the judgment of the court.

This test is uncertain in part because buyers will often (and appropriately) want to use the seller's assets in the same business, and in mergers with synergies there will often be overlap between the buyer's and seller's operations. Therefore, some overlap and continuity should be expected, and absent the sort of concerns discussed in connection with the "mere continuation" test (i.e. where the buying entity is identical to the selling entity and appears to be a simple attempt to defraud creditors), there is no reason to penalize buyers by taxing them with seller's liability just because they continue to employ the assets in a similar business. Moreover, such a rule would be wasteful to the degree that it discouraged valuable mergers or prohibited valuable integration; society and even creditors are no better off if sellers simply acquire the buyer, but operate it as a stand-alone entity without integrating its operations.

As discussed on page 13, BAC not only transitioned in its own management team, but over half of the legacy Countrywide employees were severed subsequent to the Acquisition, and approximately 600 have remained with Countrywide.

In the end, although I think the economic arguments and bulk of the case law weigh against a claim for successor liability based on de factor merger, there is uncertainty as to how a New York court would rule on such a claim. As discussed, however, BAC's position that the de facto merger doctrine would not apply is certainly reasonable.

### SUCCESSOR LIABILITY IN CALIFORNIA

This memo does not discuss the law of successor liability in California. The recent decision by a Federal District court judge, *Maine State Retirement System v. Countrywide Financial Corporation*, suggests that California courts would apply Delaware law (reviewed above).

## Summary

Based on my understanding of the facts, it would probably be a bad idea for courts to hold BAC liable as a successor, especially if it paid a fair price in the Transactions; if Investors were not harmed by the Transactions, there is no reason to hold BAC entities liable. A finding of successor liability would effectively grant Investors a windfall based on BAC's acquisition and would undermine valuable corporate law rules. This would be costly for society and discourage valuable transactions that will be deterred by the possibility of an adverse ruling. Imposing additional liabilities on BAC would function as something of an unexpected tax on its merger. Given the importance of mergers (and asset sales and subsequent integration) to a recovering banking and mortgage industry, such a rule could have harmful effects.

If Delaware law applies, as I think it would, BAC would probably not be liable unless the Trustee could show that BAC materially underpaid in the Transactions. Assumption of liability

[96] *Kretzmer v. Firesafe Prods. Corp.*, 24 A.D.3d 158, 159 (1st Dep't 2005).
[97] *Buja*, 815 N.Y.S.2d at 417.

arguments will likely fail given the express language to the contrary in the Transaction Documents; "mere continuation" is unlikely because the primary purchaser was BAC, an entity that that had approximately $1.7 trillion in assets prior to the transactions at issue; and a de facto merger is unlikely because Delaware courts eschew the kind of uncertainty such a holding would bring and tend to focus on whether the sale harmed creditors.

The more difficult question is whether BAC would be liable under the de facto merger doctrine under New York law. I think the economic arguments and bulk of the case law favor BAC, but it is possible – though not likely – that the Trustee could succeed on this. New York case law on this is sometimes erratic and a number of cases interpret the law in a way that would make BAC liable. New York courts could follow the lead of the recent decision in *MBIA v. Countrywide* and find that de facto merger allegations are plausible enough to survive a motion to dismiss. The Trustee's best chance to recover under this theory would be to appeal to the strain of cases that look at simple tests and ignore the underlying economic reality (the benefits of consolidating operations, the need for legal certainty, and the need to focus on whether creditors were harmed in the Transaction). The potential for a favorable ruling however is muted by the fact that New York law may not even apply.

While the ultimate outcome is a difficult question, turning on unknown facts and developing law, in the end, I believe that a successor liability case would be difficult to win unless the Transactions materially reduced the value of the legacy Countrywide subsidiaries. It is simply too hard to explain why BAC should be liable – and a fundamental rule of corporate transactions set aside – if the Transactions caused no harm to Investors.

Dated: June 7, 2011

Rob Daines

Professor Robert Daines

## Appendix A Choice of Law

Veil piercing and successor liability are matters of state (rather than federal) law and each state has its own laws. Therefore, you have asked me to consider which state laws might apply to a veil piercing or successor liability claim against BAC. I describe the likely outcomes if a suit is brought in New York, in Delaware (where Bank of America and Countrywide are incorporated), or in California (Countrywide's physical headquarters).

As described below, I expect a court would probably apply Delaware law.

**New York as Forum State**

If suit is brought in New York, New York's choice of law rules will determine which state's substantive law governs. Typically, New York courts (and federal courts applying New York law) simply apply the law of the state of incorporation to veil piercing and successor liability claims.[98] Thus, a New York court would likely apply Delaware law because Countrywide and Bank of America are both incorporated in Delaware.

First, some argue this is dictated by the "internal affairs" rule, which holds that the internal affairs of a firm are governed by the state of incorporation (internal affairs include the relationship between managers, officers and shareholders, shareholder rights the rules governing mergers, limited liability and the duties of control shareholders).

Second, Delaware may have a greater interest in having its laws apply. New York courts typically apply "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 issue raised in the litigation."[99] New York courts typically find that the state of incorporation has a stronger interest in veil piercing and successor liability claims. For example, in *Soviet Pan Am v. Travel Committee, Inc.*, 756 F. Supp. 126 (S.D.N.Y. 1991), the court (applying New York's choice of law doctrine) found that the state of incorporation (Maryland) had the greatest interest in deciding successor liability and corporate veil piercing claims even though New York had the greater interest in deciding the underlying breach of contract claims.[100] Thus, "[b]ecause a

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[98] *See Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995) (affirming that, under New York's choice of law rules, "'[t]he law of the state of incorporation determines when the corporate form will be disregarded and liability will be imposed on shareholders.'"); *see also Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 132-33 (2d Cir. 1993) (applying Texas law to corporate veil piercing and alter ego claims against a Texas corporation, even though "the debentures for which Appellant [Kalb] seeks to hold Appellee [AFC] liable were issued, purchased, and payable in New York," "the underwriters were based in New York," and "the debentures contained a clause stating that New York law should govern"); *Time Warner Cable, Inc. v. Networks Groups, LLC*, No. 09 Civ. 10059(DLC), 2010 WL 3563111, at *3-4 (S.D.N.Y. Sept. 9, 2010) (explaining that, in a case where Time Warner sued Networks Groups and TMG (corporations incorporated in Colorado), under New York's choice of law principles, "the law of Colorado governs the plaintiff's veil-piercing claim"); *U.S. Fid. & Guar. Co. v. Petroleo Brasileiro S.A.-Petrobras*, No. 98 Civ. 3099(THK), 2005 WL 289575, at *5 (S.D.N.Y. Feb. 4, 2005) ("The question of successor liability in this proceeding . . . should be governed by the law of . . . the jurisdiction of the relevant entities' incorporation," meaning that the New York court applied Brazilian law since the defendant corporation was incorporated in Brazil).

[99] Interest analysis follows the court's determination that there is "actual conflict" between the states' laws that could apply. *Burnett v. Columbus McKinnon Corp.*, 69 A.D.3d 58, 60 (4th Dep't 2009).

[100] *Soviet Pan Am*, 756 F. Supp. at 131.

corporation is a creature of state law whose primary purpose is to insulate shareholders from legal liability, the state of incorporation has the greater interest in determining when and if that insulation is to be stripped away," and therefore Maryland had the greater interest in applying its law to the successor liability claim.

However, there are several ways that New York law could apply. First, both parties may consent (either explicitly or implicitly by failing to raise the issue) and New York law may be judged "substantially similar" to Delaware's.[101] This was the case in the recent *MBIA v. Countrywide* case.[102] Although the New York Supreme Court did not explain its choice of law decision or discuss why it presumed the application of New York's substantive law, the decision might influence other New York courts.[103]

Second, a court might decide that the rights of creditors and third parties should not be governed by the "internal affairs rule." The United States Supreme Court held, for instance, that "the law of the state of incorporation normally determines issues relating to the *internal* affairs of a corporation" but that "[d]ifferent conflicts principles apply . . . where the rights of third parties *external* to the corporation are at issue."[104] Such a rule may make sense as a policy matter: shareholders may select a state of incorporation based on the protection it offers them, but there is less reason to think that shareholders will select (or incorporation states provide) rules that provide the right protection for creditors.[105]

Third, it is always possible that, despite general precedent, a court could decide that New York has a unique interest in having its law apply to this particular case, as it is my understanding that most, if not all, of the Pooling and Servicing Agreements relating to the original loan transfers were governed by New York law, as were the vast majority of the

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[101] For example, in *Wausau Business Ins. Co. v. Turner Constr. Co.*, 141 F. Supp. 2d 412 (S.D.N.Y. 2001), a New York construction company sought to pierce the corporate veil of a Delaware corporation to reach the parent corporation based on sums owed for breach of contract. *Id.* at 415. The court noted that even though New York choice of law principles would require the application of Delaware law (the state of incorporation), "some courts . . . have adopted the law the parties agree to employ rather than the law of the state of incorporation where there is no substantive difference between the two state law approaches to piercing the corporate veil." *Id.* at 417. The court applied New York law, since both parties relied on New York law in their briefs and "the standards for piercing the corporate veil are substantially similar under Delaware and New York law." *Id; see also In re Saba Enter., Inc.*, 421 B.R. 626, 648-52 (Bankr. S.D.N.Y. 2006) (discussing line of cases that allows for application of New York's substantive law if parties have consented to New York law and substantial similarity between laws exists).

[102] *See* Order on Countrywide and BAC's Motion to Dismiss *MBIA Insurance v. Countrywide Home Loans*, Index No. 602825/2008 (N.Y. Sup. Ct. N.Y Cty. Apr. 27, 2010).

[103] *See id* at 11-12.

[104] *First Nat'l City Bank v. Banco paro el Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983) (emphasis in original). Plaintiffs in *Maine State*, involving similar claims against Bank of America, argued that in "matters that affect[s] the rights of third parties, such as creditors" interest analysis should apply. Brief for Plaintiff at 14 *Maine State Ret. System v. Countrywide Fin. Corp., et al.*, No. 2:10-CV-00302 (C.D. Cal. Sept. 16, 2010), 2010 WL 4774120.

[105] The comments to Restatement (Second) of Conflict of Laws Section 302 could also be persuasive (even though New York is not a "Restatement" state), since they indicate that "[t]he reasons for applying the local law of the state of incorporation carry less weight when the corporation has little or no contact with this state other than the fact that was incorporated there. In such situations, some other state will almost surely have a greater interest than the state of incorporation in the determination of the particular issue." Restatement (Second) of Conflict of Laws § 302 cmt. g (1971).

operative agreements relating to the Transactions at issue. A recent case hinted that New York law rather than the law of the firm's domicile might apply to corporate claims "in the rare circumstance where the corporation has no contacts with its state of incorporation, other than the fact of incorporation, and has more significant contacts with the forum state."[106,107]

I do not expect this, however. Delaware, contracting parties and capital markets generally all have a strong interest in the clarity offered by a bright line rule (like following the law of the state of incorporation), while an ad hoc "state's interest" analysis would generate a great deal of uncertainty and I have seen no argument that New York or California have a unique interest in applying their choice of law here..[108]

**Delaware as Forum State**

If Delaware is the forum state, in my opinion Delaware courts are likely to apply Delaware law. Delaware has adopted the Second Restatement's approach to analyzing choice of law problems and therefore will attempt to determine the state with the "most significant relationship" to the issues.[109]

The Restatement (Second) of Conflicts creates a strong presumption that the law of the state of incorporation governs a firm's "internal affairs" - including matters that affect creditors.[110] Oddly, there is not much precedent about whether veil piercing claims and successor liability are "internal affairs" subject to Delaware substantive law or, instead, other

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[106] *See Sokol v. Ventures Educ. Systems Corp.*, No. 602856/02, 2005 Slip Op 51963U, at *4 (N.Y. Sup. Ct. N.Y. Cty. 2005). However, even in this case the court still applied Delaware law even though all the significant contacts (besides incorporation) were with New York.

[107] If New York courts considered creditors' claims as rooted in tort (fraud) or contract (breach of warranty or misrepresentation), it is unclear which law would instead apply. In tort cases, "the court should focus almost exclusively on the parties' domiciles and the locus of the tort." *See Roselink Investors, LLC v. Shenkman*, 386 F. Supp. 2d 209, 225 (S.D.N.Y. 2004); *see also Padula v. Lilarn Prop. Corp.*, 620 N.Y.S.2d 310, 311 (1994) (discussing New York choice of law principles in tort).

If New York contract analysis is applied, the court applies a "center of gravity" test, which will be fact specific and may point to New York rather than Delaware law. *See Matter of Allstate Ins. Co (Stolarz)*, 81 N.Y.2d 219, 226 (1993) ("The 'center of gravity' or 'grouping of contacts' choice of law theory applied in contract cases enables the court to identify which law to apply without entering into the difficult, and sometimes inappropriate, policy thicket. Under this approach, the spectrum of significant contacts—rather than a single possibly fortuitous event—may be considered. Critical to a sound analysis, however, is selecting the contacts that obtain significance in the particular contract dispute. As we have noted, the traditional choice of law factors should be given 'heavy weight' in a grouping of contacts analysis.").

[108] In *Sokol*, the court did not apply New York law, even though the firm's principal place of business was in New York and it had "no office, employees, or contacts in Delaware, and conduct[ed] no business there." 2005 Slip Op 51963U, at *4. Instead, it ultimately applied Delaware law because the parties had previously "agreed to govern [the firm's] internal affairs in accordance with the laws of Delaware" and because the firm conducted business across the United States outside of New York. As a result, Delaware law governed the firm's internal affairs, but New York governed other claims. *Id*. at *5.

[109] *Liggett Group Inc. v. Affiliated FM Ins. Co.*, 788 A.2d 134, 137 (Del. Super. Ct. 2001). See factors set out in Section 6 of the Restatement (Second), as well as specialized sections depending on the matter at hand. *See Travelers Indem. Co. v. Lake*, 594 A.2d 38, 45-47 (Del. 1991).

[110] Restatement (Second) of Conflicts § 302 cmt. A (1971). However, "corporate acts that can also be done by individuals" are subject to the "most significant relationship" test. The test is set out in Section 6 of the Restatement (Second) of conflicts. *Id.*

corporate acts subject to the "most significant relationship" test. In either case, however, Delaware courts are likely to apply Delaware law.

First, given Delaware's special place in corporate law, Delaware courts are especially vigorous in protecting the "internal affairs doctrine" and tend to construe it broadly.[111] Second, Delaware courts are likely to decide that Delaware has more significant interests in resolving claims of veil piercing and successor liability here, involving as they do the questions of limited liability, shareholder liability for corporate debts, rules governing acquisitions, and the role of officers, directors and control shareholders. Sophisticated contracting parties and investors benefit from the clarity offered by a bright line rule like following the law of the state of incorporation.[112] The Supreme Court has noted that "a corporation - except in the rarest situations - is organized under, and governed by, the law of a single jurisdiction."[113]

**California as Forum State**

Under California choice of law rules, Delaware's substantive law could apply in one of two ways.[114] First, as the Central District of California recently found in the *Maine State* case, successor liability claims against Bank of America could be considered an internal corporate affair.[115] Second, a court could decide that Delaware's law "would be more impaired [than

[111] In *In re Washington Mutual, Inc.*, the U.S. Bankruptcy Court for the District of Delaware (applying Delaware's choice of law rules) rejected the plaintiff mortgage holder's attempt to pierce the corporate veil between Washington Mutual, Inc., the Washington-incorporated savings and loan holding company, and Washington Mutual Bank, its Washington-incorporated subsidiary after the latter was taken over by the FDIC and the former filed for Chapter 11 bankruptcy. *In re Washington Mutual, Inc.*, No. 08–12229 (MFW), 2010 WL 3238903, at *1 (Bankr. D. Del. Aug. 13, 2010). The court found that "Delaware's choice-of-law rules require a court sitting in Delaware to look to a company's state of incorporation to determine the relationship between the corporate entity and its shareholders. Because both WMI and WMB are incorporated in the state of Washington, the Court applies Washington law in deciding whether WMI can be held liable for WMB's actions." *Id*, at *11 (citation omitted)." *See also Maine State Ret. System v. Countrywide Fin.*, No. 2:10-CV-0302, 2011 WL 1765509, at *4 (C.D. Cal. Apr. 20, 2011) (applying Delaware law in a case involving identical parties to the one at hand after discussing Section 302 of the Restatement (Second) of Conflict of Laws and finding that "[t]he particular issue . . . is successor liability by virtue of *de facto* merger. Mergers, reorganizations, and matters that may affect the interests of the corporation's creditors all fall within the scope of Section 302, which prescribes the law of the state of incorporation.").

[112] In addition, "[a]pplication of the local law of the state of incorporation will usually be supported by those choice-of-law factors favoring the needs of the interstate and international systems, certainty, predictability and uniformity of result, protection of the justified expectations of the parties and ease in the application of the law to be applied"; this sort of "[u]niform treatment . . . can only be attained by having the rights and liabilities of those persons with respect to the corporation governed by a single law." Restatement (Second) of Conflict of Laws § 302 cmt. e.

[113] *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 90 (1987); *see Examen, Inc. v. VantagePoint Venture Partners 1996*, 873 A.2d 318, 324 (Del. Ch. 2005); *McDermott, Inc. v. Lewis*, 531 A.2d 206, 216-17 (Del. 1987). (quoting *CTS* and emphasizing the importance of having a single state govern the internal affairs of a corporation).

[114] *Love v. Assoc. Newspapers, Ltd.*, 611 F.3d 601, 610 (9th Cir. 2010) (setting out California's approach to interest analysis).

[115] *Maine State Ret. System*, 2011 WL 1765509, at *4 ("The particular issue in this case is successor liability by virtue of *de facto* merger . . . because the issue of whether an asset transfer constitutes a *de facto* merger is peculiar to corporations, Delaware law applies.") California has adopted the internal affairs doctrine and "[i]n general, courts in California follow this rule and apply the law of the state of incorporation in considering claims relating to internal corporate affairs." *In re Sagent Tech., Inc., Derivative Litig.*, 278 F. Supp. 2d 1079, 1087 (N.D. Cal. 2003). As noted above, however, whether successor liability and corporate veil piercing, in particular, are internal affairs when third parties are involved is disputed. In *Oncology Therapeutics Network Connection v. Virginia Hematology Oncology*

California's] if its law were not applied."[116] It is possible that the issues could be characterized as "external" to corporate affairs or that California has a more substantial interest given that Countrywide and potential claimants are there.[117] However, it seems more likely that a California court would apply Delaware law given (1) the precedent set by the recent Federal court decision applying Delaware law to similar claims on these facts,; and (2) the public's interest in predictability, uniformity of results, and protecting the expectations of parties.[118] I have not seen any evidence or arguments that California has a unique interest in having its law apply.

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*PLLC*, No. C 05-3033 WDB, 2006 WL 334532, at *12 (N.D. Cal. Feb. 10, 2006), the court discussed which law would apply to defendant Oncology Networks' proposed alter ego claims against a second Virginia corporation, allegedly created by the plaintiff to avoid liability. The court distinguished the facts of that case from prior applications of the internal affairs by noting that prior cases "do[] not involve an effort by an *outsider* to pierce the corporate veil based on alter ego. Moreover, it is not clear to us that an 'alter ego' claim such as that asserted by plaintiff involves 'internal' affairs of the corporation, as opposed to affairs 'external' to the corporation." *Id.* at *17. Instead, the court found that the interests of the state of incorporation would factor into a broader interest analysis. *Id.*

[116] *See Love*, 611 F.3d at 610 (quoting *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1005 (9th Cir. 2001)).

[117] *See Wilson v. Louisiana-Pacific Resources, Inc.*, 187 Cal. Rptr. 852, 858 (Cal. Ct. App. 1982) (noting, although in a context unrelated to corporate veil piercing or successor liability, that the internal affairs doctrine has never been "followed blindly in California").

[118] In *Schlumberger Logelco, Inc. v. Morgan Equip. Co.*, No. C 94-1776 MHP, 1996 WL 251951, at *3 (N.D. Cal. May 3, 1996), the court held that Austrian law would apply to an alter ego claim to pierce the corporate veil of an Austrian corporation to reach its parent corporation for unpaid debts. Citing the Second Circuit's decision in *Kalb*, discussed above, the court found "that the law of Austria, as the state of incorporation, governs plaintiffs' alter ego claim" and that "Austria has a substantial interest in determining whether to pierce the corporate veil of one of its corporations. *Id; see also Sunnyside Dev. Co., LLC v. Opsys Ltd.*, No. C 05-0553 MHP, 2005 WL 1876106, at *3 (N.D. Cal. 2005) (finding "no reason to depart from the analysis set forth in the *Schlumberger*" and applying British law to determine whether to pierce the corporate veil based on an alter-ego theory of liability against a British corporate defendant).

# Appendix B Materials reviewed

**SEC Filings**

***Bank of America***

Bank of America Corporation, Form 10-K, for the year ended December 31, 2008, filed February 27, 2009.

Bank of America Corporation, Form 10-Q, for the three months ended June 30, 2008, filed August 7, 2008.

Bank of America Corporation, Form 10-Q, for the three months ended September 30, 2008, filed November 6, 2008.

Bank of America Corporation, Form 10-Q, for the three months ended March 31, 2011, filed May 5, 2011.

Bank of American Corporation, Form 8-K, Current Report for January 11, 2008.

Bank of American Corporation, Form 8-K, Current Report for April 21, 2008.

Bank of American Corporation, Form 8-K, Current Report for May 28, 2008.

Bank of American Corporation, Form 8-K, Current Report for July 1, 2008.

Bank of American Corporation, Form 8-K, Current Report for July 21, 2008.

Bank of American Corporation, Form 8-K, Current Report for October 6, 2008.

Bank of American Corporation, Form 8-K, Current Report for November 7, 2008.

Bank of American Corporation, Form 8-K, Current Report for November 12, 2008.

Bank of American Corporation, Form 8-K/A, Current Report for December 31, 2008.

Bank of American Corporation, Form 8-K, Current Report for February 27, 2009.

Bank of American Corporation, Form 8-K, Current Report for March 3, 2009.

Bank of American Corporation, Form 8-K, Current Report for May 28, 2009.

Bank of American Corporation, Form 8-K, Current Report for October 16, 2009.

***Countrywide***

Countrywide Financial Corp., Form 10-K, for the year ended December 31, 2004, filed March 15, 2005.

Countrywide Financial Corp., Form 10-K, for the year ended December 31, 2005, filed March 1, 2006.

Countrywide Financial Corp., Form 10-K, for the year ended December 31, 2006, filed March 1, 2007.

Countrywide Financial Corp., Form 10-K, for the year ended December 31, 2007, filed February 29, 2008.

Countrywide Financial Corp., Form 10-K/A, for the year ended December 31, 2007, filed April 24, 2008.

Countrywide Financial Corp., Form 10-Q, for the three months ended March 31, 2008, filed May 12, 2008.

Countrywide Financial Corp., Form 10-Q, for the three months ended June 30, 2008, filed August 11, 2008.

Countrywide Financial Corp., Form 10-Q, for the three months ended June 30, 2007, filed August 9, 2007.

Countrywide Financial Corp., Form 8-K, Current Report for January 9, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for January 11, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for January 17, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for January 30, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for January 31, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for February 15, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for March 13, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for April 3, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for April 30, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for June 2, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for June 25, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for July 8, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for September 17, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for October 14, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for October 21, 2008.

Countrywide Financial Corp., Form 11-K, for the fiscal year ended December 31, 2007, filed June 30, 2008.

**Financial Statements**

Countrywide Financial Corporation, Selected Consolidated Financial Information (Unaudited) March 31, 2011.

Countrywide Financial Corporation, Selected Consolidated Financial Information (Unaudited) December 31, 2010.

Countrywide Home Loans, Selected Financial Information (Unaudited) March 31, 2011.

Countrywide Home Loans, Selected Financial Information (Unaudited) December 31, 2010.

**Corporate Organization Charts**

Countrywide Financial Corp Organization Chart, dated March 31, 2008.

Bank of America Corporation, Organization Chart with Countrywide entities, dated July 31, 2008.

Bank of America Corporation, Organization Chart with Countrywide entities, dated October 31, 2008.

Bank of America Corporation, Organization Chart with Countrywide entities, dated January 31, 2011.

**Other Documents**

Demand Note dated July 1, 2008 (BACMBIA-C0000161141 – 145).

Repayment Demand Notice dated July 2, 2008 (BACMBIA-C0000161146 – 147).

Repayment Demand Notice dated July 2, 2008 (BACMBIA-C0000161148 – 149).

Demand Note dated July 3, 2008 (BACMBIA-C0000161219 – 223).

Demand Note dated July 2, 2008 (BACMBIA-C0000161271 – 275).

Amendment to Mortgage Servicing Rights Purchase Agreement dated July 1, 2008 (BACMBIA-C0000161200 – 202).

Minutes to a Special Meeting of the Board of Directors of Countrywide Commercial Real Estate Finance, Inc., dated June 30, 2008 (BACMBIA-C0000161010 – 012).

Countrywide Home Loans, Inc. Action by Unanimous Written Consent of Directors in Lieu of Meeting of Directors, dated July 1, 2008 (BACMBIA-C0000161322 – 324).

Amendment No. 3 to Limited Partnership Agreement of Countrywide Home Loans Servicing LP, dated June 26, 2008 (BACMBIA-C0000161216 – 218).

Amendment No. 1 to Operating Instrument of Countrywide GP, LLC, dated July 2, 2008 (BACMBIA-C0000161595 – 597).

Amendment No. 1 to Operating Instrument of Countrywide LP, LLC, dated July 2, 2008 (BACMBIA-C0000161598 – 600).

Amendment No. 2 to Operating Instrument of Countrywide GP, LLC, dated July 2, 2008 (BACMBIA-C0000161601 – 602).

Amendment No. 2 to Operating Instrument of Countrywide LP, LLC, dated July 2, 2008 (BACMBIA-C0000161603 – 604).

Master Services Agreement, dated July 2, 2008 (BACMBIA-C0000161203 – 215).

Countrywide Home Loans Servicing LP Action by Written Consent of the General Partner, dated July 1, 2008 ((BACMBIA-C0000160997 – 999).

Countrywide GP, LLC Action by Written Consent of Sole Member, dated July 1, 2008 (BACMBIA-C0000161000 – 001).

Countrywide LP, LLC Action by Written Consent of Sole Member, dated July 1, 2008 (BACMBIA-C0000161002 – 003).

Assignment (GP), dated July 1, 2008 (BACMBIA-C0000161244 – 245).

Assignment (LP), dated July 1, 2008 (BACMBIA-C0000161246 – 247).

Assignment (SLP), dated July 1, 2008 (BACMBIA-C0000161248 – 249).

Bailment Agreement, dated July 1, 2008 (BACMBIA-C0000161258 – 264).

Bailment Agreement, dated July 1, 2008 (BACMBIA-C0000161265 – 270).

Bailment Agreement, dated July 3, 2008 (BACMBIA-C0000161276 – 282).

Bailment Agreement, dated July 3, 2008 ((BACMBIA-C0000161283 – 288).

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Termination of Master Services Agreement, dated November 7, 2008 (BACMBIA-C0000168315 – 316).

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Assignment and Assumption Agreement for Hedge Participation Agreement, dated November 7, 2008 (BACMBIA-C0000168282 – 284).

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Contribution Agreement, dated November 1, 2008 (BACMBIA-C0000168147 – 150).

Contribution Agreement, dated November 1, 2008 (BACMBIA-C0000168162 – 166).

Contribution Agreement, dated November 7, 2008 (BACMBIA-C0000168573 – 576).

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