Exhibit 108

to

Affidavit of Daniel M. Reilly
in Support of Joint Memorandum of
Law in Opposition to Proposed Settlement

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: HON. EILEEN BRANSTEN, JUSTICE PART 3

MBIA INSURANCE CORPORATION,

Plaintiff,

-against-

COUNTRYWIDE HOME LOANS, INC., COUNTRYWIDE SECURITIES CORP., COUNTRYWIDE FINANCIAL CORP., COUNTRYWIDE HOME LOANS SERVICING, LP AND BANK OF AMERICA CORP.,

Defendants.

Index No.: 602825/08
Motion Date: 1/10/13
Motion Seq. No.: 060

The following papers, numbered 1 to 3, were read on this motion for summary judgment.

	Papers Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, this motion is decided in accordance with the accompanying memorandum decision.

Dated: April 29, 2013

Eileen Bransten, J.S.C.
Hon. Eileen Bransten

Check One: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMITORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(s): _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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MBIA INSURANCE CORPORATION,

Plaintiff,

-against-

Index No.: 602825/08
Motion Seq. Nos.: 60, 61
Motion Date: 1/10/13

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

Defendants.

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BRANSTEN, J.

Motion sequence numbers sixty and sixty-one are consolidated for disposition.

This matter comes before the Court on the summary judgment motions submitted by MBIA Insurance Corporation ("MBIA") and Bank of America Corp. ("BAC"). Each motion seeks summary judgment under CPLR 3212(e) on MBIA's successor liability claim under the theories of de facto merger and assumption of liabilities. Each theory will be addressed in turn.

For the reasons that follow, MBIA and BAC's motions are denied.

"It is axiomatic that summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue of fact or where such issue is even arguable." *Trolone v. Lac d'Amiante Du Quebec, Ltee*, 297 A.D.2d 528, 528-29 (1st Dep't 2002). The summary process "classically and necessarily requires that the issues be first exposed and delineated" since "[i]ssue-finding, rather than issue-determination, is the key." *Id.*

B. *De Facto Merger*

MBIA asserts that the Red Oak Merger, coupled with the July and November 2008 Transactions, amounted to a de facto merger of BAC and the Countrywide Defendants, and that accordingly, BAC is liable for the breach of contract and fraud claims asserted by MBIA against Countrywide. BAC maintains that this claim fails as a matter of law because there was no de facto merger, rendering successor liability inapplicable. For the reasons that follow, neither BAC nor MBIA is entitled to summary judgment on the de facto merger claim under New York law.

1. Choice of Law

The threshold issue for the de facto merger analysis is choice of law. While BAC asserts that Delaware law governs, MBIA contends that New York law is applicable.

After consideration of the relevant factors, MBIA's de facto merger claim is properly governed by New York law.

i. New York Choice of Law – Determination of Whether an Actual Conflict Exists

Since New York is the forum state, New York choice of law rules are applicable. *Padula v. Lilarn Properties Corp.*, 89 N.Y.2d 519, 521 (1994). "The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved." *In re Allstate Ins. Co. (Stolarz)*, 81 N.Y.2d 219, 223 (1993). Laws are in conflict "[w]here the applicable law from each jurisdiction provides different substantive rules." *Int'l Bus. Mach. Corp. v. Liberty Mut. Ins. Co.*, 363 F.3d 137, 143 (2d Cir.2004); *see also Elson v. Defren*, 283 A.D.2d 109, 115 (1st Dep't 2001) (finding no "meaningful conflict" between New York and Idaho laws with respect to vicarious liability"). The differences must be "relevant" to the issue before the Court. *Fin. One Pub. Co. Ltd. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 331 (2d Cir. 2005) (applying New York choice of law rules) (quoting *Trolone v. Lac d'Amiante Du Quebec, Ltee*, 297 A.D.2d 528 (1st Dep't 2002)). "In the absence of substantive difference ... a New York court will dispense with choice of law analysis; and if New York law is among the relevant choices, New York courts are free to apply it." *Harbinger Capital Partners Master Fund I v. Wachovia Capital Markets*, 27 Misc.3d

1236(A), at *9 (Sup. Ct. N.Y. Cty. 2010) (quoting *Int'l Bus. Mach. Corp. v. Liberty Mut. Ins. Co.*, 363 F.3d 137, 143 (2d Cir. 2004).

The burden is on the party asserting a conflict – here, BAC – to demonstrate its existence. *Portanova v. Trump Taj Mahal Assoc.*, 270 A.D.2d 757, 759-60 (3d Dep't 2000) ("[P]laintiffs have failed to establish the existence of any conflict between the legal principles herein and the applicable law of New Jersey ... As a consequence, we need not engage in any choice of law analysis."); *see also Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 194 (1st Dep't 1998) (concluding that movant failed to meet burden of demonstrating that its proposed choice of law should be applied).

MBIA asserts that there is no conflict between North Carolina and New York law with regard to de facto merger. This statement is not opposed by BAC. (BAC Reply Br. 4).[5] Thus, there is no showing of actual conflict between New York and North Carolina law and no need to engage in an interest analysis as between the two states.

BAC contends that Delaware de facto merger law is in conflict with New York. Specifically, BAC argues that Delaware, unlike New York, looks to the existence of a statutory violation to assess a de facto merger claim. MBIA disputes this, contending that Delaware courts consider statutory violations only in the context of suits brought by shareholders and not in suits, like the instant action, involving creditors. Accordingly,

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[5] During oral argument, BAC counsel noted that "North Carolina law actually is consistent with our view of New York law." (1/9/13 Tr. 164: 8-9.)

without the statutory violation element, MBIA maintains that New York law is in line with Delaware.

Here, as discussed below, BAC points to no "meaningful conflict" between Delaware and New York with regard to the de facto merger claim.

Delaware takes a holistic view of the transaction in weighing de facto merger, emphasizing that "[w]hether a particular transaction is in reality a merger or otherwise depends to a great extent on the circumstances surrounding each particular case and in determining the question all elements of the transaction must be considered." *Fidanque v. Am. Maracaibo Co.*, 92 A.2d 311, 315-16 (Del. Ch. 1952). New York takes a similarly broad view, analyzing the "four hallmarks" of de facto merger "in a flexible manner that disregards mere questions of form and asks whether, in substance, it was the intent of the successor to absorb and continue the operation of the predecessor." *AT&S Transp. v. Odyssey Logistics & Tech. Corp.*, 22 A.D.3d 750, 752 (2d Dep't 2005); *see also Sweatland v. Park Corp.*, 181 A.D.2d 243, 246 (4th Dep't 1992) (noting that public policy considerations require that "courts have flexibility in determining whether a transaction constitutes a de facto merger"). *Cf. Int'l Flavors & Fragrances, Inc. v. St. Paul Protective Ins. Co.*, 98 A.D.3d 854, 855 (1st Dep't 2012) (finding conflict between "rigorous" Illinois four-factor de facto merger analysis and New York's "flexible" approach).

While certain Delaware courts have considered statutory compliance as part of the "circumstances" surrounding the transaction, not all Delaware courts have. Some courts weighing creditor claims have referenced – although not held dispositive – whether the asset sale complies with Delaware's asset sale statute, 8 Del. C. § 271 ("Section 271" or "asset sale statute"), *see Drug, Inc. v. Hunt,* 168 A. 87 (Del. 1933), while other courts have considered de facto merger claims in creditor cases without reference to the statute. *See Xperex Corp. v. Viasystems Tech. Corp., LLC*, 2004 WL 3053649, at *2 (Del. Ch. July 22, 2004); *Magnolia's at Bethany, LLC v. Artesian Consulting Engineers, Inc.*, 2011 WL 4826106, at *3 (Del. Super. Sept. 19, 2011).

Further, BAC points to no authority for the proposition that compliance with the asset sale statute is a requisite element for de facto merger claims under Delaware law. BAC cites to only two Delaware cases, *Hariton v. Arco Electronics* and *Heilbrunn v. Sun Chemical Corporation*, to support its argument that statutory compliance is an element of Delaware's analysis. Both of these cases were brought by shareholders dissenting from an asset sale who sought to avail themselves of the statutory remedy of appraisal that was provided under the Delaware merger statute but not under Section 271. *Hariton v. Arco Elec.*,182 A.2d 22 (Del. 1962); *Heilbrunn v. Sun Chem. Corp.*, 150 A.2d 755 (Del. 1959). The Supreme Court of Delaware in each of these cases refused to recognize the transaction at issue as a de facto merger for this purpose and denied plaintiffs' appraisal

request. Given the nature of the claim and the remedy sought, the inquiry in both *Hariton* and *Heilbrunn* necessarily focused on whether the transaction complied with the asset sale statute because, if so, plaintiffs had no right to the damages sought. While compliance with statutory formalities was a relevant inquiry in those analyses, it is not relevant to the instant analysis, where the claim is not brought by dissenting shareholders and the remedy sought is not appraisal. Nor does the instant claim attack the validity of the transaction under the asset sale statute. Thus, it does not appear that statutory compliance is a relevant factor – or even a factor – in the de facto merger claim as presented in this case. Since this is the only conflict asserted by BAC, it does not appear that there is a meaningful conflict between New York and Delaware.[6]

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[6] Certain federal courts have found a conflict between Delaware and New York de facto merger law. One federal district court in the Southern District of New York identified a conflict based on the "continuity of ownership" element. *See Hayden Cap. USA, LLC v. Northstar Agri Indus., LLC,* 2012 WL 1449257, at *5-6 (S.D.N.Y. Apr. 23, 2012) (finding that Delaware courts do not consider ownership continuity satisfied unless seller's shareholders acquired a direct ownership interest in the successor corporation, while New York ownership continuity allows for "indirect" ownership). Another court in the Central District of California noted a conflict, finding that Delaware requires "an intent to commit fraud or otherwise harm creditors" for a finding of de facto merger. *Allstate Ins. Co. v. Countrywide Fin. Corp.*, 824 F. Supp. 2d 1164, 1171-72 (C.D. Cal. 2011). However, BAC does not assert a conflict as to either the continuity of ownership or intent to defraud. For that reason, the Court will not consider here whether a conflict exists on either basis, but notes that in any event, even if a conflict existed between New York and Delaware law on these points, the interest analysis favors the application of New York law.

ii. New York Choice of Law – Interest Analysis

Even if there were a conflict, New York law still would apply. If an actual conflict existed, the Court then would consider which jurisdiction, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation, an analysis often called "interest analysis." *K.T. v. Dash*, 37 A.D.3d 107, 111 (1st Dep't 2006) (internal quotations omitted). Under the facts of this case, the interest analysis favors North Carolina, and thus, New York law.

Since MBIA asserts successor liability against BAC for the transactions at issue, the relevant entity for the interest analysis is BAC. *Schultz v. Boy Scouts of America, Inc.*, 65 N.Y.2d 189, 197 (1985) (the court's required interest analysis must particularly focus on, and then apply "the law of the jurisdiction having the greatest interest in the litigation ... and ... the [only] facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict."). *Cf. Serio v. Ardra Ins. Co.*, 304 A.D.2d 362, 362 (1st Dep't 2003) (considering contacts of defendant Ardra Ins. Co. in determining choice of law for veil piercing claim brought against Ardra). MBIA asserts its own contacts as part of its conflicts analysis, and BAC asserts contacts for CHL in its papers. Since choice of law questions are decided on an issue-by-issue basis, *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 72 (1993), the interest analysis for the de facto merger claim centers on the transactions giving rise to the

potential successor liability. Thus, MBIA's contacts with CHL as they pertain to the primary liability claims asserted are not germane to the conflicts analysis as to its successor claim. In addition, CHL's contacts – as well as the contacts for the other Countrywide subsidiaries that were parties to the July and November 2008 Transactions – are likewise not significant in the conflicts analysis, since the liability of the asset sellers is not at issue in the successor claims.

Here, BAC cites to its state of incorporation – Delaware. However, aside from its incorporation in Delaware, BAC asserts no other ties to that jurisdiction. *See UBS Sec. LLC v. Highland Capital Mgmt., L.P.*, 924 N.Y.S.2d 312, at *3 (Sup. Ct. N.Y. Cty. Mar. 1, 2011) (Fried, J.) (rejecting argument that law of the place of incorporation is applicable to veil piercing claim because "[o]ther than being incorporated in the Cayman Islands, SOHC has no obvious ties to that jurisdiction."), *aff'd* 93 A.D.3d 489 (1st Dep't 2012).

BAC instead contends that Restatement (Second) Conflict of Laws § 302 supplants New York's traditional interest analysis and renders state of incorporation the most significant interest. However, BAC cites to no New York state case law supporting this categorical disregard of the interest test.[7] Instead, BAC's state of incorporation is a

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[7] BAC points to a California federal district court opinion to support the application of Section 302. In that case, *Allstate Insurance Corporation v. Countrywide Financial Corporation*, the district court applied Delaware law to a de facto merger claim based on the defendant's incorporation in Delaware. Applying New York conflict principles, the *Allstate* court noted that Section 302 "is a local extension of the interest analysis required under New York law." *Allstate Ins. Co. v. Countrywide Fin. Corp.*, 824 F. Supp. 2d 1164, 1172 (C.D. Cal.

contact under New York's interest analysis but it is not *the only* relevant contact.

Section 302 provides that the law of the state of incorporation governs certain matters "peculiar to corporations and other associations" except where "with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties." As the comments explain, "[m]any of the mattters that fall within the scope of the rule of this Section involve the 'internal affairs' of a corporation – that is the relations *inter se* of the corporation, its shareholders, directors, officers or agents." Cmt. a.

Consistent with comment a, to the extent that New York courts have considered Section 302 in conducting interest analyses, courts have found it applicable to conflict of law issues pertaining to shareholder disputes. *See Zion v. Kurtz*, 50 N.Y.2d 92, 100 (1980) (applying law of the state of incorporation in shareholder dispute alleging corporation's violation of shareholders' agreement and noting "that is the generally accepted choice-of-law rule with respect to such 'internal affairs' as the relationship between shareholders and directors); *Hart v. General Motors Corp.*, 129 A.D.2d 179, 183-84 (1st Dep't 1987) (citing "internal affairs doctrine" and applying law of the state of incorporation in shareholder derivative action against corporation and directors challenging board authorization of stock purchase); *Greenspun v. Lindley*, 44 A.D.2d 20,

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2011). However, as the *Allstate* court conceded, "New York has not explicitly adopted Section 302." *Id.* For the reasons noted, *infra*, this Court declines the invitation to do so.

22 (1st Dep't 1974), *aff'd* 36 N.Y.2d 473 (1975) (applying law of incorporation state in vetting demand requirement in shareholder derivative suit); *Sokol v. Ventures Educ. Sys. Corp.*, 10 Misc.3d 1055(A), at * 5 (Sup. Ct. N.Y. Cty. June 27, 2005) (applying law of incorporation state to dispute regarding minority shareholder rights).

In the one case not involving a shareholder dispute in which the Restatement was considered by a New York court, the court found Section 302 inapplicable, noting that "the courts of this state do not automatically apply the 'internal affairs' choice-of-law rule." *UBS Sec. LLC v. Highland Capital Mgmt., L.P.*, 924 N.Y.S.2d 312 (Sup. Ct. N.Y. Cty. Mar. 1, 2011), *aff'd* 93 A.D.3d 489 (1st Dep't March 13, 2012) (rejecting assertion that Restatement Section 302 dictated choice of law in dispute involving third-party creditor claim alleging abuse of corporate form) (citing *Greenspun v. Lindley*, 36 N.Y.2d 473, 478 (1975)).

Since determination of whether BAC is successor to the Countrywide Defendants at issue here is not a "matter[] peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders," *UBS Securities LLC*, 30 Misc. 3d 1230(A), at *3, no rigid application of the "internal affairs" rule is appropriate to the instant successor liability claim. Instead, the traditional New York state interest analysis governs.

For conflicts purposes under New York law, it is the parties' domiciles – and not the state of incorporation – that typically governs. As the First Department explained, for the purpose of the interest analysis, "the most significant contacts are, almost exclusively, the parties' domiciles and the locus of the tort." *Elson v. Defren*, 283 A.D.2d 109, 115 (1st Dep't 2001).

As discussed above, MBIA notes that BAC is both headquartered and has its principal place of business in Charlotte, North Carolina. (Affirmation of Renee B. Bea in Opposition to BAC's Motion for Summary Judgment ("Bea Affirm.") Ex. 32.) Thus, under New York conflict of law principles, BAC is domiciled in North Carolina. *See Elson*, 283 A.D.2d at 116 (finding defendant to be a New York domiciliary despite its incorporation in Delaware since "it maintains its principal place of business in New York and is therefore considered a New York domiciliary for choice of law purposes."); *Weisberg v. Layne-New York Co., Inc.*, 132 A.D.2d 550, 551-52 (2d Dep't 1987) ("While the defendant is a New York domiciliary by virtue of its having incorporated in New York, for choice-of-law purposes, it must be treated as a New Jersey entity inasmuch as it maintains its principal place of business in that State and thus, it may be said that its corporate presence is much more pronounced in that State than in either New York or New Hampshire.").

The "locus of the tort" for the successor liability claim is not established by the parties. BAC makes no argument on this point, and while MBIA urges the Court to look to where its primary liability allegations arose, *see* MBIA Moving Br. 23, the fraud and breach of contract claims asserted by MBIA are not at issue on this successor liability claim. Thus, the Court is left with little at which to look to ascertain the locus of the successor liability claim, which most appropriately appears to be where the transactions at issue occurred.[8]

The inquiry therefore distills down to whether New York, North Carolina, or Delaware has the most significant contacts. As noted above, the "most significant contacts" are the parties' domiciles and the locus of the tort. Since the parties have not identified the situs of the tort, the Court is left to look at the domicile asserted – North Carolina. While the Court notes that BAC is incorporated in Delaware, the significance of BAC's domicile in North Carolina carries the most weight. Accordingly, the parties agree that North Carolina law does not conflict with New York law. Thus, New York law applies.

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[8] The Court notes as an aside that the agreements by which the November 2008 Transactions were effectuated each selected New York as the governing law. *See* Oblak Affirm. Ex. 48 (§ 10.1, Asset Purchase Agreement); Ex. 301 (§ 9.6, Stock Purchase Agreement); Exs. 58 & 60 (demand notes for November 2008 Transactions); Ex 31 (§ 11, Master Mortgage Loan Purchase and Subservicing Agreement). While not a factor in this analysis, it is worthy of note that BAC voluntarily selected to have New York law govern the agreements constructing the November 2008 Transactions.

2. Application of New York Law

New York law recognizes de facto merger "when a transaction, although not in form a merger, is in substance a consolidation or merger of seller and purchaser." *Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41, 45 (2d Cir. 2003).[9] A de facto merger occurs "when the acquiring corporation has not purchased another corporation merely for the purpose of holding it as a subsidiary, but rather has effectively merged with the acquired corporation." *Fitzgerald v. Fahnestock & Co.*, 286 A.D.2d 573, 574 (1st Dep't 2001). Underlying the de facto merger doctrine is the concept that "a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased." *Id.* at 575. De facto merger is aimed at avoiding the "patent injustice which might befall a party simply because a merger has been called something else." *Cargo Partner AG*, 352 F.3d at 46.

The four "hallmarks" of de facto merger under New York law include: (1) continuity of ownership; (2) cessation of ordinary business and dissolution of the acquired corporation as soon as possible; (3) assumption by the successor of liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and (4) continuity of management, personnel, physical location, assets and general business operation. *Id.* A finding of de facto merger does not "necessarily require" the

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[9] The federal cases cited in this section apply New York state law in their analyses.

presence of each factor. *Van Nocker v. A.W. Chesterton Co.*, 15 A.D.3d 254, 256 (1st Dep't 2005) (citing *Fitzgerald*, 286 A.D.2d at 256). Instead, "[t]hese factors are analyzed in a flexible manner that disregards mere questions of form and asks whether, in substance, it was the intent of the successor to absorb and continue the operation of the predecessor." *AT&S Transp.*, 22 A.D.3d at 752. Each factor will be considered in turn.

i. Continuity of Ownership

Under New York law, continuity of ownership "describes a situation where the parties to a transaction 'become owners together of what formerly belonged to each.'" *Van Nocker*, 15 A.D.3d at 256. This hallmark has been deemed "essential" to a de facto merger finding, as ownership continuity "is the essence of a merger." *Id.* at 258; *Cargo Partner AG*, 352 F.3d at 47.

BAC moves for summary judgment, asserting that MBIA cannot demonstrate this hallmark. BAC points to *Van Nocker*, arguing that continuity requires "shareholders of the predecessor corporation [to] become direct or indirect shareholders of the successor corporation *as a result of* the successor's purchase of the predecessor's assets, as occurs in a stock-for-assets transaction." *Van Nocker*, 15 A.D.3d at 257 (emphasis added). Thus, BAC asserts that MBIA cannot demonstrate ownership continuity since neither

ORDER

Accordingly, it is

ORDERED that defendant Bank of America Corporation's motion for summary judgment (motion sequence no. 60) is denied; and it is further

ORDERED that plaintiff MBIA Insurance Corporation's motion for summary judgment (motion sequence no. 61) is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
April 29 2013

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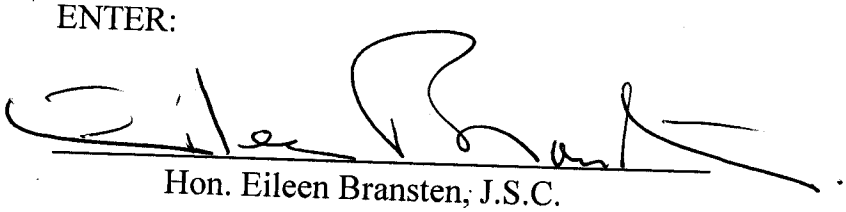

Hon. Eileen Bransten, J.S.C.