FILED: NEW YORK COUNTY CLERK 05/03/2013 INDEX NO. 651786/2011
NYSCEF DOC. NO. 674 RECEIVED NYSCEF: 05/03/2013

Exhibit 84

to

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

FILED: NEW YORK COUNTY CLERK 03/14/2013 INDEX NO. 651786/2011
NYSCEF DOC. NO. 540 RECEIVED NYSCEF: 03/14/2013

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY 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), BlackRock Financial Management Inc. (intervenor), Kore Advisors, L.P. (intervenor), Maiden Lane, 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 Advisors, 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), 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,

for an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.

Index No. 651786-2011

Kapnick, J.

EXPERT REPORT OF ROBERT M. DAINES

CONFIDENTIAL

of obtaining information. *See id.* at 13.

[4] It would be entirely rational — if not mandatory — for the Trustee to consider such a risk.

While Professor Coates mentions several things that the Trustee could have considered, it is important to note that a group of sophisticated and highly motivated investors preferred the Trustee's approach (settling the claims) to Professor Coates's suggestion that they pursue additional information or litigation. The twenty-two institutional investors that participated in the negotiation of, and support, the Settlement represent sophisticated entities such as Freddie Mac, ING Investments, BlackRock, PIMCO and MetLife — among the world's largest investors. My understanding is that, as a group,

and thus were highly motivated to make value-maximizing decisions about whether and on what terms their claims should settle. *See* Institutional Investors' Responses and Objections to the Steering Committee's First Set of Interrogatories (Aug. 27, 2012), Exhibit A.

Professor Coates offers no reason to think that these sophisticated, highly motivated investors made poor decisions about settling or seeking additional information. In fact, these investors were likely in the best position to decide whether to support a settlement, having strong incentives to make a rational decision about the strength of Bank of America's corporate

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[4] *See* Griffin Dep. 227:25-229:8

Golin Dep. 152:18-153:12

Mirvis Dep. 128:14-24

Koplow Dep. 36:10-16

separateness defense and the costs of pursuing the additional information and litigation strategy Professor Coates has suggested. I understand that [redacted] *See* Golin Dep. 313:14-22. I suspect that these investors weighed the benefits of additional research and litigation and found them wanting.

It is undisputed that in reaching their decision to support the Settlement, the institutional investors relied, in part, on their view that Bank of America had a strong separateness defense and Countrywide had limited assets. *See* Institutional Investors' Statement in Support of Settlement and Consolidated Response to Settlement Objections, Case No. 1:11-cv-05988-WHP, Dkt. No. 124 (S.D.N.Y. Oct. 31, 2011), at 24-26 ("The successor liability risk here is obvious. . . . The case for successor liability or de facto merger is far from clear. . . . It was inherently reasonable for the Trustee to settle for twice the likely recovery from Countrywide, given the prospect that successor liability issues might be lost. Settlement is also entirely reasonable given the very real possibility that Bank of America might yet bankrupt Countrywide, leaving the Trusts fighting for what they could get in a Countrywide bankruptcy. . . . It was not unreasonable for the Trustee to conclude that certainty, and the substitution of Bank of America as a solvent obligor, were a better outcome for the Trusts than years of uncertain litigation at the end of which there might be only a bankrupt Countrywide to satisfy the Trustee's claims. Given the risks, the Trustee's decision to settle might well have been the only truly *prudent* conclusion to be drawn.").[5]

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[5] *See also id*. at 6-7 ("Evaluation of any settlement necessarily requires consideration not only of the terms of the proposed settlement but an estimate of the likely outcome of a litigated alternative. . . . Speculative claims that Bank of America is liable as a successor in interest for contracts with the Countrywide Mortgage Sellers do little to assure investors that years of contested litigation will not end with only an insolvent Countrywide to respond to their claims.").

facto merger should be whether fair consideration was paid.[14] I have seen no evidence that the consideration here was grossly inadequate. Rather, the undisputed McConnell report suggests that fair value was paid. And, as indicated in my initial report, New York and Delaware courts have not held a buyer liable on facts similar to those here. *See* Ex. 3 (Daines Rep.) at 28.

5. Other issues raised by Professor Coates are outside the scope of my report.

Professor Coates devotes a significant portion of his report to critiques of the Trustee's methods and process — *e.g.*, contending that the Trustee should have used probability weightings or litigated (like MBIA) rather than settled. *See* Coates Rep. at 12-19. These issues fall well outside the scope of my assignment and analysis and may be better suited for an expert on trustee's functions.

Respectfully submitted,

Robert M. Daines
March 14, 2013

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[14] *See, e.g.*, *Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41, 45 (2d Cir. 2003) ("So long as the buyer pays a bona fide, arms-length price for the assets, there is no unfairness to creditors in thus limiting recovery to the proceeds of the sale-cash or other consideration roughly equal to the value of the purchased assets would take the place of the purchased assets as a resource for satisfying the seller's debts. Moreover, as the magistrate judge observed, allowing creditors to collect against the purchasers of insolvent debtors' assets would 'give the creditors a windfall by increasing the funds available compared to what would have been available if no sale had taken place.'").

EXHIBIT 3

EXHIBIT D-2

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Sean T. Scott
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Matthew D. Ingber
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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.

Robert Daines
Pritkzer Professor of Law and Business
Stanford Law School

- § 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.
  - o Policy arguments seem to favor BAC and to argue against a finding of successor liability. Moreover, if BAC did 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.
  - o 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.
  - o Nonetheless, as a matter of practice, successor liability claims are rarely successful.
  - o It appears that BAC likely has valid defenses to successor liability claims (especially under Delaware law).
  - o 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.

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

Professor Robert Daines