Exhibit 5

to Affidavit of Kathy D. Patrick in Support of the Institutional Investors' Statement in Support of the Settlement

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

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

---x

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.

---x

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.

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

---x

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.

---x

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.

I. **Background**

The facts of this matter have been discussed extensively in previous decisions of this court. Thus, only details necessary to the instant motions are referenced herein.

MBIA brought this action on September 30, 2008 against the Countrywide Defendants.[1] MBIA alleges that Countrywide fraudulently induced MBIA to insure fifteen residential mortgage-backed securitizations ("Securitizations") and that Countrywide breached the representations and warranties in the transaction documents related to the Securitizations. On August 24, 2009, MBIA filed an amended complaint (the "Amended Complaint"). The Amended Complaint added, among other things, a cause of action alleging successor liability against BAC. This successor liability claim for Countrywide's alleged liabilities is premised on a series of transactions entered into by BAC and the Countrywide Defendants in 2008.

A. *Transactions Between BAC and the Countrywide Defendants*

On January 11, 2008, BAC agreed to acquire Countrywide Financial Corporation ("CFC") through a forward triangular merger, whereby CFC merged into BAC's wholly-owned subsidiary, Red Oak Merger Corporation (the "Red Oak Merger"). (BAC

---

[1] The "Countrywide Defendants" or "Countrywide" are Countrywide Home Loans, Inc. ("CHL"), Countrywide Securities Corporation ("CSC"), Countrywide Financial Corporation ("CFC") and Countrywide Home Loans Servicing, LP ("CHLS").

Statement of Undisputed Material Facts Under Rule 19-a ("BAC 19-a Statement") ¶ 24.)[2] Before the merger closed, CFC was a holding company whose subsidiaries were primarily engaged in mortgage origination and servicing, banking, capital markets, and insurance businesses. (MBIA Rule 19-a Statement of Undisputed Material Facts ("MBIA 19-a Statement") ¶ 6.) At that time, CFC's direct and indirect subsidiaries included Countrywide Home Loans ("CHL"), Countrywide Home Loans Servicing ("CHLS"), and Countrywide Capital Markets, Inc., which in turn owned Countrywide Securities Corporation ("CSC"). (MBIA 19-a Statement ¶ 7.)

When the Red Oak Merger closed on July 1, 2008, Red Oak Merger Corporation was renamed Countrywide Financial Corporation. (BAC 19-a Statement ¶ 30.) As consideration for the Red Oak Merger, CFC's shareholders received BAC stock. (BAC 19-a Statement ¶ 27.)

Immediately following the July 1, 2008 Red Oak Merger – between July 1 and 3, 2008 – certain CFC subsidiaries, CHL and CSC, sold assets to BAC subsidiaries (the "July 2008 Transactions"). (MBIA 19-a Statement ¶¶ 70-71, 78, 87-89.) These asset sales to BAC subsidiaries were done "[t]o support Bank of America Corporation's ('BAC') strategic model for the residential mortgage business and to provide efficiency in

---

[2] Unless otherwise noted, all facts cited in this Background section are unopposed.

[BAC's] funding and liquidity plans." (BAC Responses to MBIA Rule 19-a Statement of Undisputed Material Facts ("BAC Resp. to MBIA 19-a Statement") ¶ 41).[3]

The July 2008 Transactions were followed by additional asset sales on November 7, 2008 (the "November 2008 Transactions"). The November 2008 Transactions included the sale to BAC of "substantially all of CFC and CHL's remaining assets." (MBIA 19-a Statement ¶ 105.) These transactions were effectuated through a Stock Purchase Agreement, by which BAC purchased from CFC its 100% equity ownership of Effinity Financial Corp. (BAC 19-a Statement ¶ 120), and an Asset Purchase Agreement, through which BAC purchased substantially all of CHL's remaining assets. (BAC 19-a Statement ¶ 132.)

MBIA maintains that the July 2008 and November 2008 Transactions were part of a plan developed by BAC before the closing of the Red Oak Merger. MBIA contends that following the announcement of the proposed Red Oak Merger on January 11, 2008, BAC planned to integrate and transition Countrywide's businesses into BAC's business through a series of transactions by which BAC would acquire control over, and then transfer, all of Countrywide's productive assets, operations and employees to itself. (MBIA 19-a Statement ¶ 38.) MBIA refers to this as the "Integration Plan" and points to

[3] BAC notes that the document cited contains a note suggesting that latter portion of this sentence – "to provide efficiency in [BAC's] funding and liquidity plans" – be changed to "to assist in efficiency in funding and liquidity plans." (BAC Resp. To MBIA 19-a Statement ¶ 41.)

Bank of America documents that pre-date the closing of the Red Oak Merger and discuss BAC's plan to "[m]erge CFC into Red Oak and then assets out of Red Oak and into BofA" to "provide[] a filter for assets and liabilities." (Affirmation of Jonathan B. Oblak in Support of MBIA's Motion for Summary Judgment ("Oblak Affirm.") Ex. 18 at BACMBIA-X0000018074.)

BAC disputes that the July 2008 and November 2008 transactions were part of any "Integration Plan" and urges the Court to look at these two asset sales as distinct from the *de jure* Red Oak Merger. BAC disputes that the use of "BAC" in the documents highlighted by MBIA shows "any effort to combine BAC and Countrywide's business operations." (BAC Response to MBIA 19-a Statement ¶ 47.) Instead, BAC points to deposition testimony stating that BAC was used "generically" to refer to the Bank of America group of companies. (*Id.*)

II. **Analysis**

Although "[i]t is the general rule that a corporation which acquires the assets of another is not liable for the torts of its predecessor," *Schumacher v. Richards Shear Co.*, Inc., 59 N.Y.2d 239, 244–45 (1983), a corporation may be held liable for the torts of its predecessor if (1) there was a consolidation or merger of seller and purchaser, (2) it expressly or impliedly assumed the predecessor's tort liability, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations. *Id.* at 245.

MBIA grounds its successor liability claim in the first and second of these exceptions: (1) that there was a de facto merger between BAC and the Countrywide Defendants and (2) that BAC impliedly assumed the Countrywide Defendants' liabilities.[4] BAC and MBIA each seek summary judgment on MBIA's successor liability claim.

A. *Summary Judgment Standard*

A party moving for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Failure to make such a showing mandates denial of the motion, notwithstanding the sufficiency of the opposition. *Id.* If there is a prima facie showing, the party opposing must then demonstrate the existence of a factual issue requiring a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

---

[4] In its moving brief, MBIA "reserves its right at trial to pursue successor liability under other exceptions." (MBIA Moving Br. 17 n.7.) Although BAC objects, arguing that MBIA never sought relief under such a theory, review of the Amended Complaint reveals that MBIA asserted a claim for successor liability generally, which encompasses the fraud theory at issue. *See Schumacher*, 59 N.Y.2d at 244-45. MBIA was not required to seek summary judgment on this theory in order to preserve it for trial.

"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,

---

[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]

---

[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

[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,

---

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.

---

[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

[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

CFC, CHL, nor CSC became shareholders of BAC as a result of either the July or November 2008 Transactions.

MBIA counters that the July and November 2008 Transactions need not be viewed in isolation, and that a finding of ownership continuity does not hinge on the Countrywide entities gaining an equity interest in BAC as a result of both the July and November 2008 Transactions. MBIA asserts that the "transaction" for the purpose of this de facto merger analysis includes the Red Oak Merger and that the three transactions – the Red Oak Merger and the July and November 2008 Transactions – should be viewed jointly for the purpose of this analysis and that this joint view establishes ownership continuity. Further, MBIA argues that it need not show that each individual transaction was a stock-for-assets transaction.

a. Joint Consideration of the Red Oak Merger and the July and November 2008 Transactions

Before determining whether a formal stock-for-assets transaction must be shown for ownership continuity, the threshold issue is how the transactions are to be viewed – either separately as BAC urges or together. BAC points to no New York authority requiring that these transactions be considered separately or precluding their joint consideration, although it contends that Delaware's doctrine of independent legal significance requires the July 2008 Transactions and the November 2008 Transaction to each be viewed in isolation. (BAC Reply Memorandum in Further Support of Its Motion for Summary Judgment ("BAC Reply Br.") at 14-15.) Again, however, BAC cites to no New York case law employing this Delaware doctrine for this or any purpose.

Turning to the facts, there is no dispute that BAC used its own stock to acquire CFC's stock in the Red Oak Merger (BAC 19-a Statement ¶ 27; MBIA Responses to BAC's Rule 19-a Statement of Undisputed Facts ("MBIA Resp. to BAC 19-a Statement") ¶ 27) or that the July and November 2008 Transactions followed the July 2008 closing of the Red Oak Merger.

BAC maintains that the form of these transactions – specifically, their timing and their kind – precludes the Court from viewing the transactions together for ownership continuity purposes. However, New York courts have emphasized that "[t]he requirement of ownership continuity does not exalt form over substance." *At Last Sportswear, inc. v. Newport News*, 2010 WL 4053105, at *4 (Sup. Ct. N.Y. Cty. Oct. 5, 2010) (quoting *Cargo Partner AG v. Albatrans, Inc.*, 207 F. Supp. 2d 86, 104 (S.D.N.Y. 2002)).

In *Fitzgerald*, the First Department demonstrated this focus on substance over form, holding that de facto merger can be established where, like here, an asset buyer's initial acquisition of seller's stock was followed by seller's transfer of its assets and liabilities to the buyer in exchange for non-stock consideration. *Fitzgerald*, 286 A.D.2d at 575. Other New York courts similarly have looked to multiple transactions jointly in finding continuity of ownership where asset sales were preceded by acquisition of the seller's stock by the asset buyer. *See Arnold Graphics Indus., Inc. v. Indep. Agent Ctr., Inc.*, 775 F.2d 38, 42 (2d Cir. 1985) (finding de facto merger where asset buyer merged with seller a year before assets transferred from seller to buyer and noting "there is no requirement that all of the events necessary to a finding of *de facto* merger occur at the same time.").

The facts of the instant transaction appear in line with *Fitzgerald* and the analysis of New York law in *Arnold Graphics*. In both cases, as here, there was a stock purchase whereby the alleged successor bought an entity and then later sold the entity's assets to itself. Accordingly, for the purpose of the ownership continuity analysis, BAC has not demonstrated that the transactions here must be viewed separately, and the Court agrees with MBIA's position that they should instead be viewed together.

BAC disputes the relevance of *Arnold Graphics* and *Fitzgerald*, arguing that any comparison is inappropriate since the asset transfers in these cases were not for fair consideration. BAC's focus on fair value in this context appears off-point. Neither the *Arnold Graphics* nor the *Fitzgerald* courts focused on whether fair value was paid in finding it appropriate to consider multiple transactions together for the de facto merger analysis. Moreover, to the extent that consideration is mentioned, the *Arnold Graphics* court notes its irrelevance. *Arnold Graphics Indus.*, 775 F.2d at 42-43 ("Whether or not, as ETC contends, mere cancellation of the IAC debt might have constituted adequate consideration for ETC's acquisition of IAC's assets, the fact remains that ETC repeatedly stated that it had assumed IAC's liabilities as well.").

b. Form of the Transactions and Ownership Continuity

Considering the transactions together, the next issue is whether the asset sales are required to be stock-for-asset transactions in order to satisfy ownership continuity. In factually analogous situations, New York courts have held that this is not the case – a transaction need not be a strict stock-for-assets sale in order for ownership continuity to exist. *Fitzgerald*, 286 A.D.2d at 575; *Arnold Graphics Indus., Inc.*, 775 F.2d at 42; *see also Ortiz v. Green Bull, Inc.*, 2011 WL 5554522, at *10 (E.D.N.Y. Nov. 14, 2011) ("Thus, although a continuity of ownership is "typically satisfied where the purchasing corporation pays for the acquired assets with shares of its own stock," a court can still find continuity of ownership where a corporation pays for the assets in cash.").

While BAC cites to a number of cases in which courts refused to find that asset-for-cash transactions satisfied ownership continuity (*see* BAC Moving Br. 35-37 n. 107-112 and BAC Reply Br. 14), none of these cited cases involve the situation presented in this matter – a stock-for-stock transaction followed by an asset purchase. *See, e.g., Jasper*

& Black, LLC v. Carolina Pad Co., LLC, 2012 WL 413869, at *8 (S.D.N.Y. Feb. 9, 2012) (no continuity of ownership for alleged single-step transaction whereby Carolina Pad purchased assets from seller for cash); *Danstan Prop. v. Merex Corp.*, 2011 WL 135843 (S.D.N.Y. Jan. 7, 2011) (noting lack of ownership continuity where Purchase Agreement for single transaction at issue did not provide for transfer of stock for assets).

BAC points to the following language in *Van Nocker* for the proposition that continuity of ownership requires a stock-for-assets transaction:

> The first criterion, 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.*

Van Nocker, 15 A.D.3d at 256 (emphasis added). This language, however, provides just one example of how shareholders of a predecessor corporation could become "direct or indirect shareholders" of the successor corporation. The *Van Nocker* court went on to explain that continuity could be found where "the parties to the transaction became owners together of what formerly belonged to each." *Id.* (citing *Cargo Partner AG v. Albratrans, Inc.*, 352 F.3d 41, 47 (2d Cir. 2003).) In the *Cargo Partner* case, on which that *Van Nocker* statement relies, the court noted that continuity could be found where "continuity of shareholders" is established, including where "the buying corporation owned all of the selling corporation's stock when the seller's assets were transferred to it." *Cargo Partner AG*, 352 F.3d at 47 (citing *Fitzgerald*, 286 A.D.2d at 575).

While the *Van Nocker* court found ownership continuity lacking since neither the asset seller or any of its shareholders became a shareholder of the asset buyer, the instant facts are to the contrary. *Van Nocker*, 15 A.D.3d at 256. Here, as alleged in *Fitzgerald*, CFC shareholders became shareholders of BAC and continued to be so when the July and November 2008 Transactions occurred.

To distinguish *Fitzgerald*, BAC argues that ownership continuity only can be shown where the asset seller engineers the transaction so to evade creditors while retaining ownership of the assets. (BAC Reply Br. 12; BAC Opp. Br. 22.) This argument appears to be an attempt to graft a scienter requirement onto the ownership continuity analysis. In so doing, BAC conflates de facto merger with a separate and distinct basis for successor liability – fraud. A corporation may be held liable for the debts of its predecessor where "the transaction is entered into fraudulently to escape such obligations." *Schumacher*, 59 N.Y.2d at 245. However, that basis for successor liability is not at issue here. Instead, focusing solely on de facto merger, the Court finds no basis in the case law to require a showing of the Countrywide Defendants' fraudulent intent for ownership continuity purposes.

For these reasons, BAC's motion for summary judgment on MBIA's de facto merger claim based on lack of ownership continuity is denied.

The Court notes that MBIA likewise seeks summary judgment. Viewing all facts in the light most favorable to the non-moving party, as required for the purpose of this summary judgment motion, *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 (2012), the Court finds issues of fact precluding the granting of summary judgment in favor of MBIA.

Moreover, even if this Court were to find that MBIA were entitled to a finding of ownership continuity, this finding would not be sufficient in and of itself to grant MBIA's motion. Although *Van Nocker* counsels that a de facto merger finding does not "necessarily require the presence of each" hallmark, 15 A.D.3d at 256, the satisfaction of one hallmark – even one as essential as ownership continuity – would not justify the granting of summary judgment in MBIA's favor, particularly given the factual issues identified below. *See Cargo Partner AG*, 352 F.3d at 47 ("Continuity of ownership might not alone establish a de facto merger, but ... it *is* the substance of a merger.") (internal quotations omitted) (emphasis in original).

ii. **Cessation of Ordinary Business**

The second hallmark of de facto merger under New York law is "cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction." *Van Nocker*, 15 A.D.3d at 256. The dissolution criterion "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." *Id.* at 257 (citing *Fitzgerald*, 286 A.D.2d at 575.). A corporation is a mere "shell" where it is "incapable of doing business except through defendant [the alleged successor]." *Fitzgerald*, 286 A.D.2d at 575.

In support of its motion for summary judgment, BAC asserts that CFC and CHL were not rendered "empty shells" after the July and November 2008 Transactions, as they continued to service loans, evaluate mortgage-repurchase claims, and defend litigation. (BAC Moving Br. 40-41.) In addition, BAC maintains that CFC, CHL, and CSC continued to hold substantial assets. *Id.* However, in light of the disputed factual issues identified below, the Court finds that neither party has shown that it is entitled to summary judgment.

a. Disputed Facts Regarding CFC and CHL's Continued Operations

While BAC asserts that CFC and CHL had a continued existence after the Transactions, there is a material issue of fact as to the extent of their operations. MBIA asserts that these entities have "no operations."[10] *See* Oblak Aff. Ex. 82 (April 2011 memorandum noting that "CHL has no ongoing operations and is in a wind-down

[10] For each of the factual disputes referenced in this opinion, the documents cited are not intended to be an exhaustive list but instead were chosen as illustrative of the factual dispute.

mode"); Oblak Aff. Ex. 212 ("Index of FR Y-10 Reportable Entities on Organization Chart as of 10/31/08" document noting that "CFC and many of its subs continue to exist and will continue to exist. Most have been skinnied down and do not have active ongoing business nor do they have associates. I can't say for certain that no employee is employed by any legal entity under CFC. If there are any, it would be small because there aren't any active entities in that list."); Oblak Affirm. Ex 325 at BACMBIA-X0000150290 (October 2008 email from a "Vice President, BofA Countrywide Transition" stating that "Countrywide Securities will wind down."). BAC disputes that the Countrywide Defendants have no operations and contests MBIA's interpretation of the term "wind-down mode," BAC Resp. to MBIA 19-a ¶ 171. *See also* November 7, 2012 Affidavit of Joseph Loevner ¶¶ 4-6 (discussing CHL's repurchase of loans).

Further, BAC asserts that CHL "services" loans; however, MBIA notes that CHL is not engaged in servicing and that those responsibilities were transferred to "Countrywide Home Loans Servicing, LP (which will change its name to BAC Home Loans Servicing L.P. on 4.27[.08])." *See* Oblak Affirm. Ex. 212. (October 2008 spreadsheet entitled "Countrywide Transition, Legal Entity List".) Again, since BAC relies, in part, upon CHL's servicing of loans to show that CHL is not an "empty shell." *See* BAC 19-a Statement ¶ 162; Rosenberg Affirm. Ex. 121. Therefore, the issue of whether CHL services loans is a material fact in dispute by the parties.

Moreover, to the extent that CHL and CFC engage in any activities, MBIA asserts they are controlled by BAC, demonstrating that CHL and CFC are "incapable of doing business except through" BAC. *Fitzgerald*, 286 A.D. at 575. MBIA makes two principal arguments in this regard: (1) that BAC controls the repurchase process and (2) that BAC controls the resolution of litigation brought against the Countrywide Defendants.

Turning to MBIA's repurchase-related argument, MBIA argues that BAC's approval is required before Countrywide may repurchase a mortgage loan at the behest of entities, such as MBIA. *See* Oblak Affirm. Ex. 185 (September 2008 email from a Countrywide Bank employee re: MBIA status, discussing loans submitted for repurchase and suggesting that loans be put before a committee so that "BAC can make a go/no-go decision if they want."); Oblak Affirm. Ex. 103 (deposition testimony of CHL Senior Vice President stating that both Countrywide and Bank of America were required to approve repurchase requests and that "it would not be sufficient to approve a repurchase request if only the Countrywide individuals on [the repurchase] committee approved the repurchase request."). BAC responds by pointing to other deposition testimony, stating that the repurchase committee referenced by MBIA made decisions "by consensus" and not at the direction of BAC. *See* BAC Resp. to MBIA 19-a ¶ 178 (citing to Oblak Ex. 76 at 133: 14-134: 05).

By way of another example, MBIA also asserts that BAC controls the repurchase evaluation process, again raising the issue of whether the Countrywide Defendants are incapable of doing business except through BAC. *See* Oblak Affirm. Ex. 288 at 1012: 18-1013: 18 (deposition testimony from the President and Chief Operating Officer of CFC stating "BAC adopted a process for the monoline insurer repurchase demands where there was an additional step at the front end, namely through investor review, and an additional level of approval required at the back end, namely in the workout strategies group approval in order for BAC to repurchase a monoline loan."). Further, MBIA contends that BAC controls the funding for repurchases. *See* Oblak Affirm. Ex. 102 (July 2009 email from a legacy BAC employee directing that repurchase funds intended for MBIA be "short[ed]").

Again, BAC disputes MBIA's contention that it controlled the funding for repurchases, arguing that requests were vetted by a Repurchase Oversight Group comprised of both Countrywide and BAC employees. *See* Rosenberg Opp. Affirm. Ex. 245. Further, BAC notes that this BAC-Countrywide collaborative repurchase committee determined the monthly spending on repurchases, not BAC independently. *Id.*; BAC Resp. to MBIA 19-a ¶ 182 (citing Oblak Affirm. Ex. 248 at 932: 16-23). Moreover, BAC asserts that CHL ultimately makes all "approved" repurchases. *See* BAC Opp. Br. 28; Affidavit of Joseph Loevner ¶ 4.

MBIA next asserts that CFC, CHL, and CSC's participation in litigation activities only underscores the Countrywide Defendants' inability to operate independently, since BAC participates in – and funds the settlement and resolution of – litigation involving the Countrywide Defendants. *See* Oblak Affirm. Ex. 347 (October 2008 email from "Bank of America" employee stating "[a]s you know, we've been in negotiations with several state Attorneys General to reach an agreement on lawsuits brought against Countrywide Financial Corporation..."); Oblak Affirm. Ex. 117 at BACMBIA-L0000003643-44 (noting that BAC and its non-CFC subsidiaries contributed financially to the payment of CHL's litigation settlement with Fannie Mae and Freddie Mac); Oblak Affirm. Ex. 119 at CWMBIA0018539232 (March 31, 2011 CFC Selected Consolidated Financial Information noting that BAC made a cash contribution to CFC, which in turn made a capital infusion to CHL, to resolve litigation brought by Assured Guaranty); MBIA 19-a Statement ¶ 242 (discussing financing of the Syncora litigation settlement) (citing Oblak Affirm. Ex. 121).

Again, BAC disputes MBIA's assertions, claiming that it did not have a role in the state Attorneys General settlement referenced in Oblak Affirm. Ex. 347. *See* BAC Resp. to MBIA 19-a ¶ 235. Further, BAC disputes that the capital infusion referenced in Oblak Affirm. Ex. 119 was used to fund CHL's settlement of litigation with Assured Guaranty, and argues that the documents cited by MBIA to establish BAC's role in this settlement refer to Bank of America generically and not BAC specifically. (BAC Resp. to MBIA 19-a ¶ 237.)

Viewing these disputed facts again in the light most favorable to the non-moving party, *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 (2012), the Court finds that each parties' arguments raise competing inferences, precluding resolution in either party's favor and rendering summary judgment inappropriate.

b. Disputed Facts Regarding CFC and CHL's Assets

In further support of its motion for summary judgment, BAC asserts that CFC and CHL continue to hold substantial assets after the July and November 2008 Transactions, demonstrating that they continue to exist in a meaningful way. The value of these assets, however, is another fact in dispute.

BAC points to the November 2008 Asset Purchase and Stock Purchase Agreements entered into by CHL and CFC as demonstrative of the "substantial assets" left at the entities. *See* Rosenberg Affirm. Ex. 98, Schedule 2.2 (November 7, 2008 Asset Purchase Agreement between BAC and CHL); Rosenberg Affirm. Ex. 87, Schedule 2.3(b) (November 7, 2008 Stock Purchase Agreement between BAC and CFC). BAC also highlights that in the November 2008 Transactions, CFC retained 39% of the assets it still held before the transaction (totaling around $8 billion), while CHL retained 28% of its pre-sale assets (equal to nearly $6.3 billion). *See* Oblak Affirm. Ex. 206 at BACMBIA-X0000153927. In addition, CSC continued to hold $288 million in assets. *See* Rosenberg Affirm. Ex. 77.

While the *Van Nocker* court noted that retention of substantial assets cuts against a dissolution finding, MBIA disputes whether the Countrywide Defendants' remaining assets are, in fact, "substantial." In *Van Nocker*, the First Department identified eight categories of "substantial assets" retained by the asset seller post-transaction. Here, MBIA asserts that, following the asset sales, the Countrywide Defendants were left only with those loans "too toxic" to sell, and that the BAC's asserted valuation of these assets on this motion fails to account for their illiquid and "toxic" nature. *See* Oblak Affirm. Ex. 63 (April 2009 email from "Change Manager" stating "[i]n November our goal was to move all assets from CFC and CHL to BAC, fully cognizant that some investors would not grant consent and other loans were too toxic to move. So what is left at CHL are those loans that we could/would not move and they have to be left branded as is under Countrywide."); Oblak Ex. 56 at 280: 6-12 (deposition testimony of same "Change Manager" for the BAC-Countrywide transition, stating that the goal with regard to CFC loans was "to sequester or to leave the subprime and distressed loans that were 60 days past due, ready to go into foreclosure, and leave them with the Countrywide name.").

Further, MBIA contends that BAC overstates the value of CFC and CHL's balance sheets assets, as BAC does not account for the Countrywide Defendants' remaining liabilities. MBIA points to balance sheets showing liabilities offsetting the value of the Countrywide Defendants' remaining purported assets. *See* Rosenberg Affirm. Ex. 118 at X:178 and X:740 (showing $5.1 billion balance tied to offsetting $5.4 billion liability). BAC responds that liabilities are not relevant to the cessation analysis, maintaining instead that only assets matter. However, where assets are paired with liabilities, their corresponding value is, by mathematical rules, diminished. Thus, to the extent that the Court must weigh whether the assets remaining are "substantial," it makes little sense to look at the assets in a vacuum without considering whether – and to what extent – their values are reduced by correspondent liabilities.

Accordingly, there is an issue of fact regarding whether the assets remaining, given their purported kind and quality, qualify as "substantial" and whether, taken with the liabilities alleged to be held by the Countrywide Defendants, the entities have been rendered "shells."

Further, BAC notes that both CFC and CHL remain corporations "in good standing" where they are incorporated.[11] In light of the numerous pertinent factual issues

---

[11] BAC also notes that "CSC's business was shut down, not continued elsewhere." (BAC Reply Br. 20.) While BAC concedes that this entity has ceased ordinary business operations, it argues that CSC is not an empty shell because, as discussed above, it continues to hold assets and defend litigation.

discussed above, this is a fact worthy of note but not dispositive of the issue. As *Fitzgerald* made clear, "[s]o long as the acquired corporation is shorn of its assets and has become, in essence, a shell, legal dissolution is not necessary before a finding of de facto merger will be made." 286 A.D.2d at 575.

For each of these issues, viewing all facts in the light most favorable to the non-moving party, as required for the purpose of this summary judgment motion, *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 (2012), the Court finds issues of fact precluding the granting of summary judgment in favor of BAC. For the same reasons, the Court also finds issues of fact precluding summary judgment in favor of MBIA.

iii. Continuity of Management, Personnel, Physical Location, Assets and General Business Operation

Under New York law, an additional hallmark of de facto merger is continuity of management, personnel, physical location, assets, and general business operation. *Kretzmer v. Firesafe Prod. Corp.*, 24 A.D.3d 158, 159 (1st Dep't 2005).

BAC's principal argument in favor of summary judgment centers on the placement of the Countrywide Defendants'[12] remaining mortgage business – including managers, personnel, assets and operations – in BAC's subsidiary, Bank of America, N.A.

[12] BAC makes no arguments as to CSC regarding its operation following the transactions at issue in this case. As such, BAC makes no arguments as to management continuity, or the lack thereof, with respect to CSC.

("BANA"), instead of in BAC. BAC argues that it cannot "continue" the management of the Countrywide Defendants since it does not currently hold these mortgage business assets.

BAC's argument urges the Court to focus on form over substance. However, New York courts have emphasized that the de facto merger analysis requires just the opposite – a flexible analysis 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 Trans. LLC v. Odyssey Logistics & Tech. Corp.*, 22 A.D.3d 750, 752 (2d Dep't 2005). Looking past the form of the transactions to their substance, the Court finds that disputed issues of fact remain as to whether BAC continued the management, personnel, physical location, assets and general business operations of the Countrywide Defendants.

Here, it is undisputed that through the November 2008 Transactions, BAC itself acquired "substantially all of CFC and CHL's remaining assets" under two agreements – an Asset Purchase Agreement and a Stock Purchase Agreement – to which BAC was a party. (MBIA 19-a Statement ¶ 105; Oblak Affirm. Exs. 48 and 301). The "majority" of these assets were then transferred to BANA, while some stayed at BAC and others went to CHLS. Oblak Affirm. Ex. 53; *see also* Oblak Affirm. Ex. 189 (November 10, 2008 Charter Collapse Bulletin stating "BAC immediately contributed those assets to

Bank of America, N.A. ('BANA') with the mortgage servicing rights and related assets being contributed further into Countrywide Home Loans Servicing, Limited Partnership (Servicing LP)."); BAC Resp. to MBIA 19-a Statement ¶ 123.)

Through the Red Oak Merger, which closed on July 1, 2008, BAC acquired CFC. In the days following the Red Oak Merger, CFC and its subsidiaries, now owned by BAC, sold assets to certain BAC subsidiaries, BANA and NB Holdings (the July 2008 Transactions). There are disputed issues of fact regarding BAC's involvement in the planning and execution of the July 2008 Transactions, referred to internally by BAC as the Legal Day ("LD") 1-3 Transactions (BAC Resp. to MBIA 19-a ¶ 42). MBIA points to a BAC presentation for the proposition that BAC directed the LD 1-3 Transactions. *See* Oblak Affirm. Ex. 22 (July 2008 BAC presentation entitled "Countrywide Funding Strategy: Review of Legal Day 1-3 Activities" stating that "BAC sold at fair value certain assets from Countrywide Financial ("CFC") subsidiaries to NB Holdings Corporation ("NBHC") and subsequently contributed said assets to Bank of America, N.A. ("BANA")."). BAC disputes that it "planned" or "carried out" the LD 1-3 Transactions. (BAC Resp. to MBIA 19-a Statement ¶ 93.)

In assessing BAC's argument and MBIA's opposition, the Court notes the dearth of case law addressing management continuity in this context. Here, MBIA cites to federal cases assessing de facto merger under the statutory framework of CERCLA, while

BAC cites to veil piercing cases, arguing that a finding of management continuity would be tantamount to piercing the veil. Both arguments are inapposite and highlight the lack of developed case law in this area.

CERCLA, the Comprehensive Environmental Response, Compensation, and Liability Act, promotes "broad remedial policies" that have led courts to "consider the traditional [de facto merger] doctrine in a somewhat more flexible manner." *See New York v. Westwood-Squibb Pharmaceutical Co., Inc.*, 981 F. Supp.768, 788 (W.D.N.Y. 1997). Accordingly, a de facto merger analysis under CERCLA appears to be guided by CERCLA's broad policy aims, which are, of course, not present in the instant case.

In addition, BAC cites to no de facto merger cases applying a veil piercing analysis, nor has the Court identified any applicable precedent. However, in the one case addressing this point, a federal district court found that no such veil piercing showing was required because de facto merger "emphasize[s] continuity over uniformity," and therefore a "court need not formally disregard the corporate form to recognize the realities of the transaction that took place here." *Miller v. Forge Mench P'ship,* 2005 WL 267551, at *8 (S.D.N.Y. Feb. 2, 2005).

Thus, that BAC and BANA are separate entities – parent and subsidiary – is a factor the Court has taken into account. However, there are disputed facts in the record regarding the substance of the transaction and the integration of Countrywide's assets.

MBIA contends that BAC's intent to integrate the Countrywide Defendants' assets with its own did not observe the formalities of any BANA separateness. MBIA points to BAC documents discussing the "integration of Countrywide." *See* Bea Affirm. Ex. 61 (May 20, 2009 "Bank of America/Countrywide" transition presentation discussing the "integration of Countrywide" into "the already complex Bank of America infrastructure" and noting that the "combined entities began mobilizing resources (some 700 strong) from parts of the organization"); Oblak Affirm. Ex. 20 (Bank of America-Countrywide transition employee deposition testimony noting that the "transition" entailed "taking everything, people, process and technology activities from two companies and blending them to get to a target state."). BAC disputes the existence of an "integration plan" for BAC and the Countrywide Defendants' assets. (BAC Resp. to MBIA Rule 19-a Statement ¶ 47) and maintains that the statements quoted above do not demonstrate BAC's plan to integrate Countrywide's assets, *see id.* ¶ 38. Further, BAC maintains that BANA conducts different activities than BAC. *See* September 28, 2012 Affidavit of William Stokes ¶ 8.

Given the facts of the instant case, particularly the disputed facts regarding BAC's role in the transactions and its intent with regard to "integrating" the Countrywide Defendants through the July and November 2008 transactions, the Court cannot hold as a matter of law on summary judgment that BAC's decision to transfer certain assets to

BANA in and of itself precludes management continuity. *See Miller,* 2005 WL 267551, at *8. The Court heeds the exhortations to look at substance instead of being beholden to form. Viewing the substance of the transactions at issue here, the Court finds disputed issues of fact as to management continuity, and such disputed issues are not rendered irrelevant by BAC's decision to place certain assets in BANA.

a. Additional Disputed Issues of Fact as to Management Continuity

Moreover, BAC and MBIA raise additional disputed issues of fact that cannot be resolved at this time, precluding resolution in either party's favor. BAC argues that it did not merely integrate and absorb the Countrywide Defendants' mortgage business; instead, it transitioned Countrywide's business into a form "consistent with Bank of America's consumer business model." (BAC Reply Br. 16 (citing BAC Opp. Br. 29-33).) *See* Affidavit of Barbara Desoer ¶ 6.). MBIA contends that the Countrywide Defendants' assets were not incorporated into a new, different Bank of America business but that Bank of America continued Countrywide's business via its "leading US mortgage platform." (Oblak Affirm. Ex. 1 at BACMBIA-W0000001913; Oblak Affirm. Ex. 13 at BACMBIA-H0000000125-26.) The characterization of the Countrywide Defendants' post-transaction businesses and the extent to which these operations were incorporated into or consistent with BAC's business model are inherently factual disputes that are not amenable to summary judgment.

BAC also contends that the post-Transaction mortgage business was not operated out of CFC and CHL's former headquarters in Calabasas, California, while MBIA asserts that it was and still is operated there. *See* Oblak Affirm. Ex. 12 at BACMBIA-B0000018286; Oblak Affirm. Ex. 322 at 277: 22-278: 06. BAC maintains that Countrywide's senior management was not part of the post-transition mortgage operations, Desoer Aff. ¶¶ 18-19, while MBIA contends that Bank of America retained many senior Countrywide managers. *See* Bea Affirm. Ex. 15 at 29:6-9, 335:14-336:2 (deposition testimony of CFC Chief Operations Officer stating that "the majority of [Countrywide] executive managing directors stayed on after the "Bank of America transaction"). These are relevant facts for management continuity analysis that again are not amenable to summary judgment.

Here, the dispute goes far beyond "the mere hiring of some of the predecessor's employees." *Kretzmer*, 24 A.D.3d at 159.[13] Instead, the facts in dispute as to management continuity reach the types of business continued, as well as where and by whom that business was managed. Accordingly, considering these disputed facts in the light most

[13] Indeed, it appears that more than a "mere number" of the Countrywide Defendants' employees – almost half – went on to work for Bank of America subsidiaries after the Transactions. *See* Oblak Affirm. Ex. 10 (BAC's First Supplemental Responses and Objections to Plaintiff's Interrogatories, Supplemental Response to Interrogatory No. 13).

favorable to the non-moving party, the Court finds that each raise competing inferences, rendering summary judgment in either party's favor inappropriate. Management continuity therefore remains an issue for trial.[14]

iv. Assumption of Liabilities Ordinarily Required to Continue Operations

The final of the de facto merger hallmarks requires "assumption by the successor of liabilities ordinarily necessary for continuation of the predecessor's business." *Miller*, 2005 WL 267551, at *9. There are few New York state cases defining the precise contours of this test; however, New York courts have looked to whether the buyer assumed the seller's existing contracts, royalty obligations, or outstanding debts. *See id.* (citing *McDarren v. Marvel Enter. Grp., Inc.*, 1995 WL 214482, at *9 (S.D.N.Y. Apr. 11, 1995); *see also Morales v. City of New York*, 18 Misc.3d 686, 693 (Sup. Ct. Kings Cty.

---

[14] In *Van Nocker*, the First Department focused on the first two hallmarks of de facto merger – continuity of ownership and cessation of ordinary business – finding that management continuity, even if shown, would not be sufficient in and of itself to justify a finding of de facto merger. *Van Nocker*, 15 A.D.3d at 258-59 ("Given the clear absence of the first two de facto merger factors, it does not avail plaintiff that the third factor (assumption of liabilities necessary for uninterrupted business operations) apparently is present, or that she may have raised an issue as to the presence of the fourth factor (continuity of management, personnel, physical location, assets and general business operation)."). Accordingly, the Court notes that management continuity, while a hallmark of de facto merger, appears to be of secondary importance to continuity of operations and cessation of ordinary business and further is not dispositive on its own. The same is true of the assumption of liabilities necessary for uninterrupted business operations prong. *See* Point II.B.2.iv.

2007).[15]

Here, the Asset Purchase Agreement entered into between CHL and BAC on November 7, 2008 states that, among other things, BAC explicitly assumed: (1) "the costs of all employment and employee benefits-related liabilities and obligations that arise on or after [closing] that relate to any Transferred Employee [CHL employee]"; (2) "contract rights with third parties, including rights under real estate leases ... vendor contracts, intellectual property licenses and other contracts related to the mortgage operations of CFC." Oblak Affirm. Ex. 48, Section 5.5 and Schedule 2.2.

Further, MBIA asserts that BAC and its non-CFC subsidiaries assumed various third-party and vendor contracts and leases required for the operation of the Countrywide Defendants' mortgage business. *See* Oblak Affirm. Ex. 212 at BACMBIA-C0000118128.0162 (BAC "Countrywide Transition – Legal Entity" spreadsheet discussing transfer of supplier contracts originally in CHL's name to BANA and noting that BAC first identified "any agreements that would be at risk by leaving them in the name of the original contracting (collapsed) [CHL] party," and "[i]n those cases [where there was a risk involved,] we simply used (BANA) 'as successor in interest to' (CHL) language in the preamble of the amendment. From a practical standpoint, we

[15] This hallmark, assumption of liabilities ordinarily required to continue operations, is distinct from the separate assumption of liabilities theory of successor liability, *see infra,* Point II.C.

have not had a case yet where the supplier was not willing to continue to take our money to continue providing their product/services"); Oblak Affirm. Ex. 296 (November 12, 2008 email from "Change Manager," subject "Charter Collapse Update," noting that "[a]ll owned facilities and leases moved."); Oblak Affirm. Ex. 297 (March 2009 email from "Change Manager" requesting list of all CFC and CHL leases assigned to BANA in November 2008).

BAC argues in response that any liabilities were assumed by BANA, not BAC. As noted above, however, agreements governing November 2008 Transactions were executed by BAC and there is an issue of fact regarding BAC's involvement in the planning and direction of the July 2008 Transactions. *See supra* Point II.B.2.iii. Just as the Court cannot hold as a matter of law that the placement of purchased assets in BANA precludes a finding of management continuity, likewise the Court cannot hold that the assignment of leases and contracts to BANA prevents a finding of assumption of liabilities in the de facto merger context. Since there are disputed issues of fact regarding the role of BANA with respect to the transactions at issue, for the reasons discussed above, the Court cannot find in favor of either party with respect to this hallmark of de facto merger.[16]

---

[16] BAC's arguments as to CSC on this point are entirely derivative of its arguments as to cessation of business operations. Since summary judgment is denied as to the cessation of business operations hallmark as to CSC, it is likewise denied here.

v. Additional Arguments

In addition to its arguments regarding the four de facto merger hallmarks above, BAC contends that MBIA's successor liability claim fails as a matter of law, given BAC's assertion that it paid "fair value" for the assets in the July and November 2008 Transactions. As a result, BAC maintains that MBIA's claims here amount to an attempt to secure a "windfall." BAC does not point to any New York case law establishing that "fair value" or "fair consideration" is a defense to a claim of de facto merger, nor does BAC identify any cases in which courts analyzed the four well-hewn de facto merger hallmarks yet held that consideration trumped all.[17] Instead, BAC makes several unsupported assertions that courts do not impose successor liability where the asset purchaser pays valuable consideration that is used by the seller to pay creditors, since "obviously" the creditors suffer no harm. (BAC Moving Br. 19; BAC Reply Br. 3.)

The *Cargo Partners* dicta that BAC references is no more persuasive. In *Cargo Partners*, the court begins by noting that through a typical asset sale, the amount paid will "ordinarily be available to satisfy debts" and that "[s]o long as the buyer pays a bona fide, arms-length price for the assets, there is no unfairness to creditors" in limiting their

[17] Indeed, as discussed above, to the extent that one court addressed the issue of consideration, it did so to note its irrelevance. *See Arnold Graphics Indus.*, 775 F.2d at 42-43 ("Whether or not, as ETC contends, mere cancellation of the IAC debt might have constituted adequate consideration for ETC's acquisition of IAC's assets, the fact remains that ETC repeatedly stated that it had assumed IAC's liabilities as well.").

recovery to those proceeds. 352 F.3d at 45. The court then goes on, however, to note that successor liability provides an exception to this general rule. *See Miller*, 2005 WL 267551, at *13 (analyzing same passage from *Cargo Partners* and noting that court "carved out an exception to its 'windfall' principle for de facto merger"). Here, the issue is whether two of those successor liability exceptions – de facto merger and assumption of liability – are viable in light of the evidentiary record. Whether payment of fair value in the ordinary course would result in "fairness" to creditors is collateral to the matter at bar, as demonstrated by the fact that BAC can point to no New York case law demonstrating that "fair value" is a "hallmark" considered in the de facto merger or assumption of liabilities analyses.

The principle underlying the de facto merger doctrine is that a purchaser cannot escape the assumption of liabilities ordinarily attendant with a merger by labeling the transaction something else. Whether fair value is paid for the assets acquired has no bearing on whether a New York court will look at a transactions or series of transactions and deem them "in substance a consolidation or merger of seller and purchaser." *Cargo Partner AG*, 352 F.3d at 45. Thus, BAC's argument that its payment of "fair value" defeats MBIA's successor liability claim fails.[18]

---

[18] Further, BAC notes several times in its papers that failure to grant it summary judgment here will "chill future corporate rescues, thereby thwarting all they provide in terms of liquidity to struggling companies and their creditors, and overall benefit to the nation's economy." (BAC Opp. Br. 50.) As noted throughout this opinion, for this set of summary judgment motions, the

***

The de facto merger claim requires the Court to analyze the four hallmarks discussed above in a flexible manner, disregarding "mere questions of form" and asking "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. Looking past the form of the transactions to their substance, the Court notes that the parties have raised – and the Court has identified – numerous factual issues in dispute as to the remaining hallmarks of de facto merger. In light of these factual issues, the Court denies both parties' motions for summary judgment as to de facto merger.

C. *Assumption of Liabilities*

As noted above, de facto merger is not the only circumstance that may render a corporation liable for the liabilities of its predecessor. In addition, a corporation may be held liable where it expressly or impliedly agreed to assume its predecessor's liabilities. *Schumacher*, 59 N.Y.2d 239, 244-45. "While no precise rule governs the finding of implied liability, the authorities suggest that the conduct or representations relied upon by

---

Court is viewing all facts asserted in the light most favorable to the non-moving party to determine whether factual issues exist, requiring trial of the action. *See Vega*, 18 N.Y.3d at 503. As with any set of summary judgment motions, this is a highly fact-intensive inquiry that is circumscribed by the circumstances of this case. To the extent that BAC invites the Court to make broad policy pronouncements outside the confines of this matter, the Court declines.

the party asserting liability must indicate an intention on the part of the buyer to pay the debts of the seller." *Ladjevardian v. Laidlaw-Coggeshall, Inc.*, 431 F. Supp. 834, 839 (S.D.N.Y. 1974).

BAC first seeks summary judgment based on the express disclaimers of liability included in the November 2008 Transactions' purchase agreements. *See* Rosenberg Affirm. Ex. 98 at Schedule 2.4 (November 7, 2008 Asset Purchase Agreement between BAC and CHL); *Id.* Ex. 87 § 1.2 and Schedule 1.2(a) (November 7, 2008 Stock Purchase Agreement between BAC and CFC). Such express disclaimers can carry great weight, particularly as to a finding of express assumption of liabilities. *See Wensing v. Paris Indus.- N.Y.*, 158 A.D.2d 164, 166-67 (3d Dep't 1990) ("These [liability disclaimer] provisions evince a clear intent that Leaner was not assuming any liability for products sold prior to its acquisition of assets."); *see also Descalfani v. Pave-Mark Corp.*, 2008 WL 3914881, at *4 (S.D.N.Y. Aug. 22, 2008) (noting that asset buyer "expressly did not assume and Pave-Mark expressly retained such liability under the APA"); *Peralta v. WHM Tool Grp., Inc.*, 2005 WL 2002454, at *3 (E.D.N.Y. Aug. 19, 2005) ("With respect to the [assumption of liabilities] exception, defendant cannot be held to have expressly or impliedly assumed the predecessor's [ ] liability as to products sold prior to the asset purchase since it specifically disavowed such liability in the Asset Purchase Agreement.").

However, where evidence is introduced demonstrating an intent by the asset buyer to pay the debts of the seller, express disclaimers do not preclude a finding of implied assumption of liabilities. *Marenyi v. Packard Press Corp.*, 1994 WL 16000129, at *6 (S.D.N.Y. June 9, 1994) (noting that express disclaimer does not preclude imposition of liability on asset purchaser where other facts and circumstances demonstrate buyer's intent to pay seller's debts). Factors demonstrative of such an intent include: (1) admissions of liability by officers or other spokesmen of the buyer, as well as (2) the effect of the transfer upon creditors of the seller corporation. *Id.*

There are material facts in dispute as to both factors. By way of example, to demonstrate admissions of liability by BAC officers, MBIA points to statements by BAC's current CEO, Brian Moynihan, stating that BAC "will pay for the things that Countrywide did," will "stand up" and "clean it up," as well as "when they were due ... pay legitimate claims." Oblak Affirm. Ex. 105 at 1 (November 10, 2010 Bloomberg article quoting Brian Moynihan); Ex. 294 at 7 (December 11, 2010 New York Times article quoting Brian Moynihan); Ex. 96 at 146: 2-147:14 (deposition of Brian Moynihan). Further, MBIA points to statements by BAC's CFO, made prior to the Red Oak Merger, in which the CFO wrote that BAC "will not explicitly guarantee or assume the CFC debt" but its "intent at this time is to see that the debt is satisfied as it comes due." (Oblak Affirm. Ex. 108 at 2.) BAC offers alternate explanations for Mr.

Moynihan's statements, offering, for example, that Moynihan's "clean it up" statement refers to the "mortgage crisis" generally and not the assumption of the Countrywide Defendants' debt. *See* BAC Resp. to MBIA Rule 19-a Statement ¶ 225 (citing Oblak Affirm. Ex. 96 at 106: 23-25). Moreover, BAC maintains that any discussion of paying Countrywide's debts was not intended to be a wholesale assumption of all Countrywide debts. *See* BAC Resp. to MBIA Rule 19-a Statement ¶ 230 (citing Oblak Affirm. Ex. 26 at 224:18-225:21). Viewing the evidence in the light most favorable to the non-moving party, both sides raise issues of fact in their respective summary judgment motions with regard to the meaning and import of statements, which are not amenable to resolution at this juncture.

Further, the effect of the transfer upon the Countrywide Defendants' creditors likewise raises issues of fact. As the *Ladjevardian* court explained, a "finding of implied assumption is more likely" where the asset seller becomes a "mere shell" as a result of the sale, creating the "real possibility" that creditors are "left without a remedy." *Ladjevardian*, 431 F. Supp. at 839-40. For the reasons discussed *supra* with regard to the cessation of ordinary business de facto merger hallmark, the Court finds that there are questions of fact outstanding regarding whether the Countrywide Defendants were rendered "shells" following the July and November 2008 Transactions. BAC points to the consideration paid to the Countrywide Defendants for the assets sold in these

Transactions, arguing that Countrywide's creditors were not left without a remedy post-sale. As noted above, however, the value of the assets – and liabilities – remaining at CFC and CHL post-Transaction is a factual issue disputed by the parties, rendering summary judgment on this point inappropriate.

BAC seeks to circumvent these factual issues by arguing that MBIA has failed to demonstrate its reliance on any BAC statements or conduct. BAC derives this reliance requirement from contract law, arguing that an implied assumption claim is "nothing more than a contract claim based on an asset buyer's implied agreement to pay the asset seller's liabilities." (BAC Moving Br. 45.) This novel contractual argument has facial appeal but no support in successor liability case law. This is likely because the implied assumption theory – and the successor liability doctrine generally – do not focus on the conduct of the third-party bringing the successor liability claim. The focus instead is on the relationship between asset buyer and seller and the buyer's post-acquisition conduct with respect to the assets. An examination of the third-party claimant's reliance on the acts of the asset buyer is immaterial to this analysis.

While BAC points to *Ladjevardian* to support its attempt to graft a reliance requirement on the implied assumption analysis, the language of the case compels a finding to the contrary. In describing when implied assumption may be found, the *Ladjevardian* court noted the weight of authorities suggested that "the conduct or representations *relied upon by* the party asserting liability must indicate an intention" by the buyer to assume the seller's debts. *Id.* (emphasis added). BAC asserts that the use of "relied upon" in this sentence evinces the existence of a reliance requirement, notwithstanding that the court nowhere discusses or itself relies upon any showing of reliance. BAC makes much of the *Ladjevardian* court's observation that the asset buyer sent a letter to all customers, including plaintiffs; however, the court points to that letter to demonstrate the buyer's statement that it would assume certain liabilities of the seller, i.e. customer credit and debit balances, not for the proposition that plaintiffs relied upon that letter. *Id.* at 840. Viewing this "relied upon" language in the context of the entire sentence – and the opinion as a whole – it is clear that it is interchangeable with "asserted" or "cited," and does not create a reliance requirement. Thus, BAC's attempt to impose a reliance requirement on MBIA using the language of *Ladjevardian* fails.

III. **Conclusion**

For the reasons noted above, both BAC and MBIA's motions for summary judgment as to MBIA's de facto merger claim are denied. In addition, the Court finds issues of fact precluding summary judgment on MBIA's implied assumption of liabilities claim.

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

ENTER:

Hon. Eileen Bransten, J.S.C.