

1 (“CSC”), Countrywide Home Loans (“CHL”), and Countrywide Capital Markets
2 (“CCM”) as the “Countrywide Defendants.” Plaintiffs also purport to include
3 Bank of America and NB Holdings Corporation (“NB Holdings”) in this category.
4 Plaintiffs contend the Countrywide Defendants made materially untrue or
5 misleading statements or omissions regarding Countrywide’s loan origination
6 practices in public offering documents associated with 427 separate offerings.
7 Also named as defendants are Countrywide special-purpose issuing trusts, several
8 current or former Countrywide officers and directors, and a number of banks that
9 served as underwriters on one or more of the offerings at issue.

10 All of the defendants filed motions to dismiss the AC. After the motions
11 were fully briefed, the Court heard extensive oral argument on October 18, 2010.
12 The Court dismissed the action without prejudice on the basis of standing and the
13 statute of limitations on November 4, 2010. The Court reserved judgment on the
14 remaining issues until after Plaintiffs had cured the chief pleading deficiencies the
15 Court identified in that Order. *See Maine State Ret. Sys. v. Countrywide Fin.*
16 *Corp.*, 722 F. Supp. 2d 1157 (C.D. Cal. 2010).

17 On December 6, 2010, Plaintiffs filed a Second Amended Complaint
18 (“SAC”) which reduced the offerings in the case to 14 separate public offerings
19 between October 2005 and December 2006 and set forth the alleged bases for
20 tolling. Docket No. 227. The Court held an additional hearing on March 23, 2011,
21 at which the motion to dismiss filed by Bank of America and NB Holdings, Docket
22 No. 175, was discussed. Bank of America and NB Holdings argued the Securities
23 Act Section 15 control person liability claims, 15 U.S.C. §77o, should be dismissed
24 against them. The Court adjudicates that motion in this Order. The motion to
25 dismiss is **GRANTED** for the reasons that follow.

26 II. BACKGROUND

27 In July 2008, Defendant CFC merged into a wholly-owned Bank of America
28 subsidiary named Red Oak Merger Corporation, pursuant to the terms of an

1 Agreement and Plan of Merger, dated as of January 11, 2008. SAC ¶ 38. The
2 transaction was a stock-for-stock *de jure* merger and was approved as fair by the
3 Delaware Supreme Court sitting *en banc*. *Id.*; *Arkansas Teacher Ret. Sys., et al. v.*
4 *Caiafa*, 996 A.2d 321 (Del. 2010).¹ Red Oak Merger Corporation was
5 subsequently renamed Countrywide Financial Corporation (“CFC”), which
6 remained a subsidiary of Bank of America. Docket No. 176-3 (Close Decl. Ex. 2
7 [CFC Form 10-Q dated August 11, 2008] at 27). Four months later, on November
8 7, 2008, “substantially all of Countrywide’s assets were transferred to Bank of
9 America . . . along with certain of Countrywide’s debt securities and related
10 guarantees.” SAC ¶ 38. The SAC further alleges that CFC ceased filing its own
11 financial statements at that time and its assets and liabilities are now included in
12 Bank of America’s financial statements. SAC ¶ 38.

13 According to the SAC, the Countrywide brand was retired shortly after the
14 merger and currently CFC’s former website redirects the user to the Bank of
15 America website. SAC ¶ 38. In addition, Bank of America has assumed CFC’s
16 liabilities, having paid to resolve other litigation arising from misconduct such as
17 predatory lending allegedly committed by CFC. SAC ¶ 38. Finally, Plaintiffs
18 allege “many of the same locations, employees, assets and business operations that
19 were formerly CFC continue under the Bank of America Home Loans brand.”
20 SAC ¶ 38.

21 Defendant NB Holdings, a wholly-owned subsidiary of Bank of America, is
22 alleged to be one of the shell entities used to effectuate the Bank of America-CFC
23 merger, and a successor in interest to Defendant CHL. SAC ¶ 39. Plaintiffs claim
24 that on July 3, 2008, CHL completed the sale of substantially all of its assets to NB
25 Holdings. SAC ¶ 39.

27 ¹ A court may take judicial notice of the existence of another court’s opinion, which is not
28 subject to reasonable dispute over its authenticity. Fed. R. Evid. 201(b); *Lee v. City of*
Los Angeles, 250 F.3d 668, 690 (9th Cir. 2001).

1 Plaintiffs bring suit against Bank of America for violation of Section 15 of
2 the Securities Act, 15 U.S.C. § 77o, for the acts of its subsidiary CFC. SAC ¶ 240.
3 A parent corporation ordinarily is not liable for the acts of its subsidiary. *U.S. v.*
4 *Bestfoods*, 524 U.S. 51, 61 (1998). Plaintiffs argue, however, that Bank of
5 America is a successor in interest to CFC, CSC, CCM and CHL. SAC ¶ 241.
6 Plaintiffs contend the asset transfer that occurred between Bank of America and its
7 subsidiary CFC in November 2008, when viewed in conjunction with the July
8 2008 *de jure* merger, actually constituted a *de facto* merger. SAC ¶ 38.

9 Plaintiffs bring suit against NB Holdings for violation of Section 15 of the
10 Securities Act, as a successor in interest to Defendant CHL. SAC ¶¶ 39, 241. The
11 allegations against NB Holdings are not clear. Indeed, the Court can only guess at
12 the factual or legal basis for the conclusory allegation that “by virtue of their
13 control, ownership, offices, directorship, and specific acts,” CFC, CSC, CCM and
14 CHL—and Bank of America and NB Holdings as their successors in interest—
15 “had the power and influence and exercised the same to cause the Issuer
16 Defendants to engage in the acts described herein.” SAC ¶ 241.

17 III. APPLICABLE LAW

18 A. CHOICE OF LAW

19 Successor liability is governed by state law under the Erie doctrine. As to
20 matters governed by state law, a federal court must follow the choice of law rules
21 of the state in which it is sitting to determine which state’s law to apply. WRIGHT,
22 MILLER, AND COOPER, FEDERAL PRACTICE & PROCEDURE § 4506 (2010); *Paracor*
23 *Fin. Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1164 (9th Cir. 1996). This
24 rule applies even if the court’s jurisdiction is based on a federal question. *SEC v.*
25 *Elmas Trading Corp.*, 683 F. Supp. 743, 748 (D. Nev. 1987) (citing numerous
26 examples where a federal court applied state choice of law rules to state law issues
27 pendent to federal question claims).

28

1 Defendants cite *In re Lindsay* for the proposition that the Court should apply
2 federal choice of law rules in federal question cases. 59 F.3d 942, 948 (9th Cir.
3 1993). However, three years after *In re Lindsay*, the Ninth Circuit articulated
4 specifically:

5 In a federal question action where the federal court is exercising
6 supplemental jurisdiction over state claims, the federal court applies
7 the choice-of-law rules of the forum state—in this case, California.
8 *Paracor Fin., Inc.*, 96 F.3d at 1164 (citing *Elmas*, 683 F. Supp. at 747-49; *In re*
9 *Nucorp Energy Sec. Litig.*, 772 F.2d 1486, 1491-92 (9th Cir. 1985)). Thus,
10 California choice of law rules govern here with respect to the state law issue of
11 successor liability.

12 California generally applies the “governmental interest” approach to choice
13 of law analysis. *Love v. Assoc. Newspapers, Ltd.*, 611 F.3d 601, 610 (9th Cir.
14 2010); *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 107-08 (Cal. 2006).
15 Under this approach,

16 (1) the court examines the substantive laws of each jurisdiction to
17 determine whether the laws differ as applied to the relevant
18 transaction, (2) if the laws do differ, the court must determine whether
19 a true conflict exists in that each of the relevant jurisdictions has an
20 interest in having its law applied, and (3) if more than one jurisdiction
21 has a legitimate interest, the court [must] identify and apply the law of
22 the [jurisdiction] whose interest would be more impaired if its law
23 were not applied. Only if both [jurisdictions] have a legitimate but
24 conflicting interest in applying its own law will the court be
25 confronted with a “true conflict” case.

26 *Love*, 611 F.3d at 610 (quoting *Downing v. Abercrombie & Fitch*, 265 F.3d 994,
27 1005 (9th Cir. 2001)) (alteration in *Love*). “As a default, the law of the forum state
28 will be invoked, and the burden is with the proponent of foreign law to show that

1 the foreign rule of decision will further the interests of that state.” *CRS Recovery,*
2 *Inc. v. Laxton*, 600 F.3d 1138, 1142 (9th Cir. 2010). Plaintiffs argue the Court
3 should apply the governmental interest approach in this case and conclude that
4 California law applies. Plaintiffs reason that Defendants have failed to meet their
5 burden of establishing first that there is true conflict between Delaware and
6 California law and next that Delaware has a greater interest in having its law
7 applied. The Court disagrees on both counts.

8 First, the Court concludes there is a true conflict between Delaware and
9 California law. Although both states recognize *de facto* merger, Delaware courts
10 use the doctrine of *de facto* merger sparingly, “only in very limited contexts.”
11 *Binder v. Bristol-Myers Squibb, Co.*, 184 F. Supp. 2d 762, 769 (N.D. Ill. 2001);
12 BALOTTI AND FINKELSTEIN, DEL. L. OF CORP. AND BUS. ORG. § 9.3 (2010). Some
13 treatises have gone so far as to conclude that “Delaware has rejected the *de facto*
14 merger doctrine.” AARON RACHELSON, CORPORATE ACQUISITIONS, MERGERS AND
15 DIVESTITURES § 4:6 (2011). *But see Heilbrunn v. Sun Chemical Corp.*, 150 A.2d
16 755, 757 (Del. 1959) (“The doctrine of *de facto* merger has been recognized in
17 Delaware.”). Because Delaware respects a corporation’s ability to structure
18 transactions to its advantage, so long as the statutes governing such transactions are
19 fully complied with, Delaware is reluctant to find an asset sale is a *de facto* merger
20 in the absence of fraud. *See, e.g., Heilbrunn v. Sun Chemical Corp.*, 146 A.2d 757,
21 760 (Del. Ch. 1958) (dismissing *de facto* merger allegations because, *inter alia*, the
22 purchase was made in conformity with Delaware statutory authority, and the
23 complaint did not clearly allege that the transaction was fraudulent or the
24 consideration insufficient), *aff’d* 150 A.2d 755 (Del. 1959); *Bryant, Griffith &*
25 *Brunson, Inc. v. General Newspapers*, 178 A. 645, 648 (Del. Super. 1935)
26 (concluding that the transfer of assets, in the absence of fraud or other equitable
27 considerations, does not constitute *de facto* merger). Delaware thus requires intent
28 to defraud, for example, an allegation that the sale was designed to disadvantage

1 shareholders or creditors. *See In re McKesson HBOC, Inc. Secs. Litig.*, 126 F.
2 Supp. 2d 1248, 1277 (N.D. Cal. 2000) (applying Delaware law); *Stauffer v.*
3 *Standard Brands, Inc.*, 178 A.2d 311, 316 (Del. Ch. 1962) (“In the absence of
4 fraud, the separate entity of a corporation is to be recognized.”).

5 California, on the other hand, is more willing to find *de facto* merger if the
6 court concludes—notwithstanding the structure of the transaction—that an asset
7 sale produces the same result as a merger. *See Marks v. Minn. Mining & Mfg. Co.*,
8 187 Cal. App. 3d 1429, 1436-38 (1986). In *Marks*, the trial court set forth a
9 checklist for determining whether an asset sale constituted a *de facto* merger and
10 created successor liability. *Id.* at 1436. The factors are:

11 (1) was the consideration paid for the assets solely stock of the
12 purchaser or its parent; (2) did the purchaser continue the same
13 enterprise after the sale; (3) did the shareholders of the seller become
14 shareholders of the purchaser; (4) did the seller liquidate; and (5) did
15 the buyer assume the liabilities necessary to carry on the business of
16 the seller?

17 *Id.* An allegation of fraud or intent to harm is not required if all the indicia of a
18 merger are present. The Court thus finds a material difference between California
19 and Delaware law.

20 Next, the Court concludes both states have a legitimate interest in having
21 their law applied. Delaware is the state of incorporation of CFC. SAC ¶ 34.
22 California is the forum state of this lawsuit and the headquarters of CFC, at least
23 before the *de jure* merger in July 2008. *Id.*

24 Finally, having concluded there is a true conflict of law, the Court
25 determines which state has a greater interest in having its law applied. According
26 to Section 302 of the Restatement,

27 (1) Issues involving the rights and liabilities of a corporation, other
28 than those dealt with in § 301, are determined by the local law of

1 the state which, with respect to the particular issue, has the most
2 significant relationship to the occurrence and the parties under the
3 principles stated in § 6.

4 (2) The local law of the state of incorporation will be applied to
5 determine such issues, except in the unusual case where, with
6 respect to the particular issue, some other state has a more
7 significant relationship to the occurrence and the parties, in which
8 event the local law of the other state will be applied.

9 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (2010). Comment *a* to the
10 Restatement explains that Section 302 is concerned with issues involving matters
11 that are peculiar to corporations and other associations, whereas the rule of Section
12 301 is concerned with issues arising from corporate acts of a sort that can also be
13 done by individuals. *Id.*, cmt. *a, e*; see *Chrysler Corp. v. Ford Motor Co.*, 972 F.
14 Supp. 1097, 1102 (E.D. Mich. 1997). The particular issue in this case is successor
15 liability by virtue of *de facto* merger. Mergers, reorganizations, and matters that
16 may affect the interests of the corporation's creditors all fall within the scope of
17 Section 302, which prescribes the law of the state of incorporation. RESTATEMENT
18 (SECOND) OF CONFLICT OF LAWS § 302, cmt. *a, e*. Thus, because the issue of
19 whether an asset transfer constitutes a *de facto* merger is peculiar to corporations,
20 Delaware law applies.

21 B. DE FACTO MERGER DOCTRINE

22 It is a “well-settled rule of corporate law, [that] where one company sells or
23 transfers all of its assets to another, the second entity does not become liable for
24 the debts and liabilities, including torts, of the transferor.” *Polius v. Clark Equip.*
25 *Co.*, 802 F.2d 75, 77 (3d Cir. 1986). This is the general rule of successor liability,
26 recognized in all jurisdictions: “when a corporation purchases all or most of the
27 assets of another corporation, the purchasing corporation does not assume the debts
28 and liabilities of the selling corporation.” *Raytech Corp. v. White*, 54 F.3d 187,

1 192 n.6 (3rd Cir. 1995) (citing 15 W. FLETCHER, CYCLOPEDIA OF THE LAW OF
2 PRIVATE CORPORATIONS § 7122 at 232). There are four widely recognized
3 exceptions to this rule of successor non-liability:

4 (1) there is an express or implied agreement of assumption, (2) the
5 transaction amounts to a consolidation or merger of the two
6 corporations, (3) the purchasing corporation is a mere continuation of
7 the seller, or (4) the transfer of assets to the purchaser is for the
8 fraudulent purpose of escaping liability for the seller's debts.

9 *Id.* Plaintiffs argue the second exception applies here, that the transaction amounts
10 to a *de facto* merger of the two corporations and has left the selling corporation,
11 CFC, unable to satisfy its creditors. "A *de facto* merger may be found where an
12 asset sale took place that amounted to a merger." *Binder*, 184 F. Supp. 2d at 770.
13 Under the *de facto* merger doctrine, the purchaser is liable for all the seller's debts
14 by operation of law, the same as in a merger.

15 Delaware courts use the doctrine of *de facto* merger sparingly, "only in very
16 limited contexts." *Id.* at 769. It is therefore difficult to find much authority
17 elucidating the circumstances under which Delaware would recognize *de facto*
18 merger. The parties have not set forth the applicable test Delaware would apply.
19 And, although Bank of America and NB Holdings advocate for Delaware law, they
20 argue only that Delaware requires an allegation that the asset sale was engineered
21 to disadvantage shareholders and creditors. Neither party analyzes the transactions
22 at issue using Delaware law. From the meager authority the Court has found
23 dealing with the *de facto* merger doctrine under Delaware law, the Court can glean
24 only a few factors considered by Delaware courts when considering the issue.

25 One factor Delaware courts consider when determining whether to find *de*
26 *facto* merger is whether consideration was received and held in exchange for the
27 assets that were transferred. In *Fehl v. S.W.C. Corp.*, the District of Delaware
28 explained:

1 In general, no liability has been found under a de facto merger theory
2 so long as the transfer was in the ordinary course of business and the
3 seller received and held consideration. *McKee v. Standard Minerals*
4 *Corp.*, 18 Del. Ch. 97, 156 A. 193 (1931). Only in a few cases, where
5 the consideration passed directly to the transferor' stockholders
6 without coming into possession of the transferor corporation, has a de
7 facto merger been found. *McKee v. Standard Minerals Corp., supra;*
8 *Drug v. Hunt*, 5 W.W. Harr. 339, 168 A. 87 (1933); *Bryant, Griffith &*
9 *Brunson v. General Newspaper*, 6 W.W. Harr. 468, 476, 178 A. 645
10 (1935). See generally, FOLK, THE DELAWARE GENERAL
11 CORPORATION LAW, 421-423.
12 433 F. Supp. 939, 947 (D. Del. 1977) (finding no *de facto* merger where the assets
13 were sold for good consideration). *Drug v. Hunt*, 168 A. 87 (Del. 1933), is a
14 Delaware case in which the Supreme Court of Delaware agreed with a creditor of
15 the transferor corporation, *i.e.*, seller, that an asset sale constituted a *de facto*
16 merger and imposed successor liability on the transferee corporation, *i.e.*, the
17 buyer. The court found consideration was not received and held by the transferor
18 corporation because the consideration—which was stock in the purchasing
19 corporation—was paid directly to the stockholders of the transferor corporation,
20 not to the transferor corporation itself. *Id.* at 96. Therefore, there was no
21 consideration received and held by the transferor corporation. The court in *Drug v.*
22 *Hunt* distinguished another case, *Butler v. New Keystone Copper Co.*, 93 A. 380
23 (Del. Ch. 1915), because in *Butler* the stock issued by the purchasing corporation,
24 in return for the asset transferred, was given to the selling corporation and not to its
25 shareholders. In that case, then, the transaction was found to be an asset sale.
26 *Drug*, 168 A. at 96. The consideration must also be adequate. See *Heilbrunn v.*
27 *Sun Chemical Co.*, 146 A.2d at 760 (“Plaintiffs . . . may not complain of a
28 corporate purchase made in conformity with Delaware statutory authority unless

1 such transaction is fraudulent as having been carried out for a grossly inadequate
2 consideration or otherwise made in bad faith.”).

3 A second factor Delaware courts consider is whether the asset transfer
4 complied with the statute governing such an asset sale. *See id.*; *Orzeck v.*
5 *Englehart*, 195 A.2d 375, 378 (Del. 1963) (observing that *de facto* merger “has
6 been recognized in cases of sales of assets for the protection of creditors or
7 stockholders who have suffered an injury by reason of failure to comply with the
8 statute governing such sales.”); *Heilbrunn*, 150 A.2d at 757-58; *Binder*, 184 F.
9 Supp. 2d at 769-70. These cases have held form more sacred than substance, by
10 reasoning that intent is manifested in following statutory forms and guidelines and
11 that where the parties follow the mechanical guidelines of the statute, then the
12 method chosen must be honored even though the form selected may be comparable
13 to a merger. *See, e.g., Hariton v. Arco Elecs., Inc.*, 188 A.2d 123, 125 (Del. 1963).
14 In *Hariton*, the Delaware Supreme Court held that a sale of assets, combined with
15 the assumption of liabilities by the purchasing corporation and the dissolution of
16 the selling corporation did not constitute a *de facto* merger even though the same
17 object was achieved as would have been accomplished by acting under the merger
18 statute. The Court reasoned that the merger statute and the sale-of-assets statute
19 are independent of each other, “of equal dignity, and the framers of a
20 reorganization plan may resort to either type of corporate mechanics to achieve the
21 desired end.” *Id.* at 125. Delaware recognizes this principle as the doctrine of
22 independent legal significance. BALOTTI AND FINKELSTEIN, DEL. L. OF CORP. AND
23 BUS. ORG. § 9.4 (2010).

24 A third factor Delaware courts consider is whether creditors or stockholders
25 have suffered an injury from such failure to comply. *See, e.g., Heilbrunn*, 146
26 A.2d at 759; *Heilbrunn*, 150 A.2d at 758-59. In *Heilbrunn*, the Supreme Court of
27 Delaware rejected the application of *de facto* merger doctrine because it failed to
28

1 see how any injury had been inflicted upon the plaintiffs, who were stockholders of
2 the purchasing corporation. 150 A.2d at 758-59.

3 A fourth factor is fraud or bad faith. Under Delaware law, the separate legal
4 existence of corporate entities should be respected—even when those separate
5 corporate entities are under common ownership and control. *Allied Capital Corp.*
6 *v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1038 (Del. Ch. 2006); *Stauffer*, 178
7 A.2d at 316 (“In the absence of fraud, the separate entity of a corporation is to be
8 recognized.”). Thus, in the absence of fraud, it is a long-standing principle of
9 Delaware law that an asset sale is not a merger.² *Bryant, Griffith & Brunson, Inc.*,
10 178 A. at 648; *Heilbrunn*, 146 A.2d at 760 (dismissing *de facto* merger allegations
11 because, *inter alia*, the complaint did not clearly allege that the transaction was
12 fraudulent or the consideration insufficient). To state a successor-liability claim
13 under the *de facto* merger doctrine, therefore, the complaint must allege that the
14 sale was designed to disadvantage shareholders or creditors. *In re McKesson*, 126
15 F. Supp. 2d at 1277.

16 Accordingly, the Court applies the following factors to its analysis of
17 whether Plaintiffs have adequately pleaded successor liability due to *de facto*
18 merger: (1) was adequate consideration received and held by the transferor
19 corporation in exchange for the assets that were transferred; (2) did the asset
20 transfer comply with the statute governing such an asset sale; (3) were creditors or
21 stockholders injured by a failure to comply with the statute governing an asset sale;
22 and (4) was the sale designed to disadvantage shareholders or creditors?

23 C. MOTION TO DISMISS STANDARD

24 A Rule 12(b)(6) motion to dismiss should be granted when, assuming the
25 truth of the plaintiff’s allegations, the complaint fails to state a claim for which
26 relief can be granted. *See Simon v. Hartford Life, Inc.*, 546 F.3d 661, 663-64 (9th
27

28 ² The Court notes that the SAC specifically disclaims fraud. SAC ¶ 3 (“The Complaint asserts no allegations of fraud on the part of any Defendant.”)

1 Cir. 2008). In the past, a complaint could not be dismissed for failure to state a
2 claim “unless it appear[ed] beyond doubt that the plaintiff [could] prove no set of
3 facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*,
4 355 U.S. 41, 45-46 (1957). In *Twombly v. Bell Atlantic Corp.*, 550 U.S. 544
5 (2007), the Supreme Court expressly retired *Conley*’s “no set of facts” language
6 and required judges to engage in a “context-specific” review of the complaint.
7 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009). Pleading labels or conclusions is
8 no longer sufficient. *Twombly*, 550 U.S. at 555. “To survive a motion to dismiss,
9 a complaint must contain sufficient factual matter, accepted as true, to ‘state a
10 claim to relief that is plausible on its face.’” *Iqbal*, 129 S. Ct. at 1949 (quoting
11 *Twombly*, 550 U.S. at 570).

12 IV. DISCUSSION

13 The Court dismisses Bank of America and NB Holdings from this lawsuit
14 because the SAC fails to adequately allege *de facto* merger under Delaware law.
15 With respect to NB Holdings there are no allegations to support the claim that NB
16 Holdings is a successor in interest to CHL. The SAC alleges NB Holdings is a
17 shell entity used to effectuate the *de jure* merger between Bank of America and
18 CFC, and that NB Holdings is a successor to CHL, but does not explain on what
19 basis Plaintiffs make these allegations. SAC ¶ 39. The SAC states only that CHL
20 sold “substantially all of its assets to NB Holdings” on July 3, 2008. SAC ¶ 241.
21 These allegations are insufficient to plead successor liability under the doctrine of
22 *de facto* merger. Moreover, while the SAC alleges that NB Holdings “had the
23 power and influence and exercised the same to cause the Issuer Defendants to
24 engage in the acts described herein,” there is not a single factual allegation to
25 support this conclusion. Count III is hereby **DISMISSED WITH PREJUDICE**
26 against NB Holdings for failure to state a claim.

27 With respect to Bank of America, the SAC fails to adequately plead *de facto*
28 merger with CFC. Plaintiffs seek to combine two separate transactions, the July

1 2008 *de jure* merger between Red Oak Merger Corporation and CFC with the
2 November 2008 asset sale between CFC and Bank of America, as constituting one
3 transaction that amounts to a *de facto* merger between Bank of America and its
4 new subsidiary CFC. The first transaction, the *de jure merger*, has already been
5 reviewed by the Delaware courts and found to be fair. *Arkansas Teacher Ret. Sys.,*
6 *et al. v. Caiafa*, 996 A.2d 321 (Del. 2010). The second transaction, the asset sale,
7 is not properly alleged to constitute *de facto* merger under Delaware law as the
8 Court explains below. Plaintiffs' attempt to characterize two separate, legal
9 transactions as one combined fraudulent transaction must fail under Delaware law.
10 Delaware respects the independent legal significance of transactions, even when
11 under common ownership and control, as long as they comply with statutory
12 authority. *See Hariton*, 188 A.2d at 125; BALOTTI AND FINKELSTEIN, DEL. L. OF
13 CORP. AND BUS. ORG. § 9.4 (2010).

14 Viewing the November 2008 asset sale in the context of the *de facto* merger
15 doctrine, the Court concludes the SAC does not adequately state a claim against
16 Bank of America. First, the SAC fails to plead that adequate consideration was not
17 received and held by CFC in exchange for the assets that were transferred to Bank
18 of America. In fact, as contemporaneous public SEC filings make clear, Bank of
19 America acquired CFC's assets in exchange for valuable consideration totaling
20 billions of dollars that included the assumption of "debt securities and related
21 guarantees of Countrywide in an aggregated amount of approximately \$16.6
22 billion." Docket No. 176-11 (Close Decl., Ex. 6 [Bank of America Form 8-K
23 dated Nov. 10, 2008] at 399).³ CFC has retained that consideration and its
24

25 ³ The Court takes judicial notice of Bank of America's Current Report on Form 8-K filed
26 with the SEC on or about November 10, 2008 as facts "capable of accurate and ready
27 determination by resort to sources whose accuracy cannot reasonably be questioned."
28 Fed. R. Evid. 201(b)(2). The Court may consider this document for this motion to
dismiss as it is a matter of public record. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir.
1994).

1 creditors can look to Bank of America to satisfy those of CFC's obligations that
2 Bank of America has assumed. Because Plaintiffs have not alleged that CFC did
3 not receive and hold adequate consideration for its assets, Plaintiffs have not
4 properly alleged *de facto* merger.

5 Second, the SAC does not allege that the asset sale failed to comply with the
6 relevant Delaware statutes governing such a sale. The Delaware Supreme Court
7 allows parties to choose whatever reorganization plan they wish, asset sale or
8 merger, so long as they follow the mechanical guidelines of the statute. *Hariton*,
9 188 A.2d at 125. Third, the SAC does not allege that creditors or stockholders
10 have suffered an injury as a result of Bank of America's failure to comply with the
11 statutory requirements of an asset sale. *Heilbrunn*, 150 A.2d at 758-59. Fourth, as
12 Bank of America has repeatedly emphasized, the SAC does not allege that the
13 November 2008 asset sale was designed to disadvantage stockholders or creditors.
14 *In re McKesson*, 126 F. Supp. 2d at 1276-77. Accordingly, the Court **DISMISSES**
15 **WITH PREJUDICE** Count III against Bank of America for failure to state a
16 claim.

17 V. CONCLUSION

18 The Court **DISMISSES** Count III against Bank of America and NB
19 Holdings. The dismissal is **WITH PREJUDICE**. As no further claims are
20 alleged against them, Bank of America and NB Holdings are **DISMISSED** from
21 the lawsuit entirely.

22
23 **IT IS SO ORDERED.**

24
25 DATED: April 20, 2011

26 
27 Hon. Mariana R. Pfaelzer
28 United States District Judge