IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE COUNTRYWIDE CORPORATION SHAREHOLDERS LITIGATION	:	**CONSOLIDATED C.A. No. 3464-VCN**

MEMORANDUM OPINION AND ORDER

Date Submitted: October 28, 2008
Date Decided: March 31, 2009

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NOBLE, Vice Chancellor

The parties to a shareholder class action seek certification of the class and approval of a proposed settlement pursuant to Court of Chancery Rule 23(e).

I. INTRODUCTION

Stockholders of Countrywide Financial Corporation ("Countrywide" or the "Company"), a then-Delaware corporation, brought this action following the January 11, 2008, announcement of its proposed merger with Bank of America Corporation ("BOA"). The Plaintiffs sought to enjoin the merger, alleging that the individual defendants, directors of Countrywide, had violated their fiduciary duties owed to Countrywide's stockholders. BOA was alleged to have aided and abetted such violations.

The Plaintiffs and the Defendants eventually negotiated a settlement agreement, subject to Court approval, by which virtually all claims surrounding the merger would be released. In exchange, the Defendants provided additional disclosures, but no additional monetary consideration. The merger has now closed.

The parties stipulated to the propriety of certifying a non-opt-out class pursuant to Court of Chancery Rules 23(a) and 23(b)(1) or (b)(2).[1] They have also submitted for the Court's review a settlement agreement which they negotiated. Before the Court are applications for certification of a class of Countrywide

[1] Stipulation of Settlement ¶ 14.

shareholders, approval of the negotiated settlement agreement, and an award of fees and expenses to Plaintiffs' attorneys.

Notice of the purported class action and the proposed settlement was duly sent to the members of the proposed class. Several shareholders have objected. Those objections emphasized the limited benefit of the proposed settlement to the shareholders and the broad release of claims. In addition, one objector focused on whether class certification is appropriate in the absence of an opportunity to opt-out.

II. BACKGROUND

During the summer of 2007, Countrywide, at one time the nation's largest underwriter of residential mortgages, started experiencing financial difficulties due in part to the onset of the current financial crisis. Softening in the housing markets and increased rates of loan default began directly affecting the mortgage industry: first impacting only the "subprime" markets, but eventually expanding into the mortgage markets more generally. The market for mortgage-backed securities began to dry up as credit tightened. Unable to sell mortgage loans into the market, in accordance with previously prevailing practices, the mortgage banking business saw increased need for capital and liquidity to support both the increasing number of loans it was forced to carry and to continue its lending business. The need to secure new capital sources was imperative.

In response, on August 22, 2007, Countrywide entered into an agreement (the "Investment Agreement") with BOA to secure additional funding, by which BOA invested $2 billion in Countrywide. In exchange for that investment, BOA negotiated numerous benefits beyond a 16% stake in the Company, including benefits that would accrue in the event that another company attempted to, or if BOA ever did, acquire Countrywide. Some in the marketplace, along with the Plaintiffs here, viewed the Investment Agreement as the first step toward BOA's ultimate acquisition of Countrywide.[2]

As the crisis deepened, problems grew. Increasing strain on Countrywide began to worry the Company's counterparties, and it became more difficult to engage in financing and hedging transactions that had previously been routine. Meanwhile, traditional revenue streams, such as loan origination fees, slowed along with the real estate market. Countrywide received word that it faced a potential downgrade of its credit rating in the event that it reported a loss for the fourth quarter of 2007. A fourth quarter loss was expected. The Countrywide board realized that more capital was needed, and it explored various opportunities. As Countrywide's stock price fell and bankruptcy rumors circulated, the situation became dire. The board assessed its options, including a merger transaction. Mere

[2] *See* Consolidated Class Action Compl. ¶ 51 (quoting a January 11, 2008, Wall Street Journal article asserting that the BOA investment was designed "to plant a flag at Countrywide").

investment by another financial firm or private equity group, in the board's opinion, would not have solved the company's capital or liquidity concerns.[3]

The board engaged BOA regarding a potential transaction. Although the board's financial advisors continued to explore other alternatives to raise funds, only BOA performed any due diligence with respect to a potential merger. The board decided that a transaction with BOA offered the most stability for Countrywide. On January 11, 2008, Countrywide announced that it had entered into an agreement with BOA pursuant to which the two companies would merge in an all stock transaction then worth approximately $4 billion. Under the terms of the Merger Agreement, Countrywide shareholders would receive 0.1822 shares of BOA common stock for each share of Countrywide common stock. Based upon BOA's January 10, 2008, closing price of $39.30, Countrywide shareholders would receive approximately $7.16 per share.

A. *The Delaware Action and Settlement*

On January 14, 2008, immediately following the merger announcement, Plaintiff Robert Freedman filed a complaint in this Court, followed by Plaintiff Anthony Caiafa on January 15, and Plaintiff Ming Fang Li on January 29. This Court consolidated the three actions on January 29, 2008. On February 25, 2008, these plaintiffs (the "Delaware Plaintiffs"), filed a Consolidated Verified Class

[3] Barry Decl., Ex. 4 at 26 (Form S-4A, filed May 28, 2008).

Action Complaint (the "Delaware Complaint"), alleging, among other things, that certain members of the Countrywide board (the "Countrywide Defendants") had breached their fiduciary duties by (i) agreeing to a merger which did not provide Countrywide shareholders with fair and adequate consideration; (ii) discouraging other bidders from making an offer for Countrywide; (iii) intending to solicit shareholder approval for the merger pursuant to a false and misleading preliminary proxy statement; (iv) agreeing to provisions in the merger agreement that allegedly insulated Countrywide's directors and officers from liability for breaches of fiduciary duty alleged in pending derivative actions; and (v) entering into the merger agreement without adequately valuing certain pending derivative claims.

On May 13, 2008, the Delaware Plaintiffs moved for a preliminary injunction to enjoin the Countrywide shareholders' vote on the merger pending additional disclosures concerning the background of the merger negotiations. Within days the parties agreed that the Defendants would make additional disclosures to Countrywide shareholders in settlement of the Consolidated Class Action. These additional disclosures, as summarized by the Delaware Plaintiffs, included the following information concerning the background of the merger: (i) no company other than BOA performed due diligence investigation of Countrywide regarding a potential merger; (ii) during a December 28, 2007, meeting, a BOA representative discussed a transaction scenario with Countrywide representatives that implied a 10% premium to Countrywide's December 26, 2007, closing price; (iii) at that same meeting Countrywide informed BOA of recently realized problems with its home equity line of credit business, which suggested greater than anticipated problems for fourth quarter 2007 results; and (iv) the result promised to impact Countrywide's credit ratings negatively.[4] These disclosures also provided greater detail about the assumptions underlying the fairness opinions relied upon by the Countrywide board in evaluating the merger, including: (i) the reasons the opinions included in their analysis that Countrywide would be faced with raising additional capital, on unfavorable terms, in the absence of a transaction with BOA; and (ii) that prior earnings projections had assumed a profitable fourth quarter 2007 and the retention of its investment grade credit ratings, assumptions which were substantially unlikely to prove correct.[5] On May 28, 2008, the preliminary proxy statement for the merger was amended a final time in order to include these additional disclosures. On June 13, 2008, the parties filed a Stipulation of Settlement (the "Proposed Settlement") requesting the Court's approval.

Under the terms of the Proposed Settlement agreement, as amended, the Court was asked to certify a class consisting of "all record and beneficial owners of Countrywide common stock at any time from and including August 21, 2007,"

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[4] Delaware Pls.' Br. in Supp. of Settlement at 17-18.
[5] *Id.*

through the date of consummation of the merger.[6] The Proposed Settlement would release the Defendants from a wide range of potential claims, defined as:

> any and all claims, . . . under state, federal, common or statutory law, . . . that have been or could have been asserted in the Action or in any court, tribunal or proceeding by or on behalf of Plaintiffs or any member of the Class against [the Defendants[7]] which . . . relate in any manner to . . . the Investment Agreement, the Investment, the Merger Agreement, the Merger, the Preliminary Proxy Statement, the Proxy Statement Amendments or the Definitive Proxy Statement, including without limitation the decision to enter into the Investment Agreement, the decision to enter into the Merger Agreement, and any disclosures, nondisclosures or public statements made in connection with any of the foregoing . . . .[8]

The release expressly limits its scope by carving certain claims from its reach. Claims which would survive the settlement are defined to include:[9]

> common law fraud claims, federal securities claims, . . . to the extent that such common law fraud, federal securities . . . claims are not based upon the Investment Agreement, the Investment, the Merger Agreement, the Merger, the Preliminary Proxy Statement, the Proxy Statement Amendments, or the Definitive Proxy Statement, or any disclosures, non-disclosures, or public statements concerning any of the foregoing; or (iii) the derivative claims asserted on behalf of Countrywide in (a) Counts I through IX [of the Complaint in the California] Shareholder Derivative Action . . . .[10]

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[6] Stipulation of Settlement at ¶ 19(a).
[7] *See id.* at ¶ 19(h) (Released Persons).
[8] *Id.* at ¶ 19(g).
[9] The Settlement Proponents have offered an amendment to the Proposed Settlement's release. Def.'s Br. in Op. to SRM Obj. at 3. At the October 28, 2008, settlement hearing, they submitted an amended version of a proposed order and judgment originally annexed as Exhibit D to the Stipulation of Settlement. Tr. at 120-22. The Court presumes that amendment, and evaluates the Proposed Settlement as amended. The revised provision is cited: "Tr. at 120-22 Ex. D (amendment)."
[10] *See infra* Part II.B., discussing the California Action.

On June 25, 2008, Countrywide's shareholders voted, nearly unanimously, to approve the merger. The merger closed on July 1, 2008.

B. *The California Derivative Action and the Federal Objectors*

Five (now former) shareholders of Countrywide (the "Federal Objectors")[11] commenced derivative actions against Countrywide officers and directors in the United States District Court for the Central District of California (the "California Action") in the fall of 2007.[12] They alleged that certain members of the Countrywide board breached their fiduciary duties by, among other things, abandoning prudent lending practices, engaging in illegal insider sales, and manipulating the company for personal gain. On February 15, 2008, following the merger announcement, the Federal Objectors amended their complaint to include essentially the same merger related claims previously filed in this Court by the Delaware Plaintiffs. On March 28, Countrywide's motion to stay the merger-

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[11] They are: Arkansas Teacher Retirement System, Fire & Police Pension Association of Colorado, Public Employees Retirement System of Mississippi, Louisiana Municipal Police Employees Retirement System, and Central Laborers Pension Fund.

In addition, Educational Retirement Board of New Mexico, OppenheimerFunds, Inc. and its subsidiaries, Evergreen Equity Index Fund, Evergreen Market Index Fund, and Evergreen Market Index Value Fund have also tendered objections that are fundamentally the same as those of the Federal Objectors. The Court's disposition of the Federal Objectors' objections applies equally to them.

Finally, several objections have been submitted *pro se* by Gary Lawson, Frank Melfi, Jonathan Lee Riches, and Herbert and Linda Morey. Although they present no doctrinally precise objection, they do complain generally about the overall fairness of the Proposed Settlement and the amount of attorneys' fees sought by counsel for the Delaware Plaintiffs. For discussion of these objections, see Parts III.A., III.C.2., and note 110, *infra*.

[12] The complaint (the "Derivative Complaint") is found at Bary Decl., Ex. 12.

related claims brought in the California Action was granted in favor of the Delaware Action.[13]

On December 1, 2008, the California Action was dismissed based on a well-settled standing principle of Delaware law that once the Countrywide/BOA merger closed, the Federal Objectors no longer had standing to pursue derivative claims on behalf of Countrywide.[14] Those Federal Objectors now appear here to oppose the Proposed Settlement. The Court has granted the Federal Objectors limited discovery for the purpose of presenting their opposition.[15]

The Federal Objectors consider those now dismissed derivative claims to be worth as much as $2 billion. They argue that the Countrywide board failed both to value these derivative claims in pricing the Company and in negotiating the merger with BOA, and to carve these claims out of the merger, either by selling them or by preserving them in a litigation trust. According to the Federal Objectors, these failures resulted in reduced merger consideration and form the basis for a direct

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[13] The Federal Objectors moved to intervene as of right under Court of Chancery Rule 24(a). They seek to take control of this litigation and pursue claims fairly pled in the Delaware Complaint. Compl. ¶¶ 19, 25, 34. The Court finds their interests adequately represented by the Delaware Plaintiffs. Alternatively, the Federal Objectors seek permissive intervention under Court of Chancery Rule 24(b). The Court sees no reason justifying a deviation from of the typical procedure of addressing their concerns through consideration of their objections. If they prevail on their objections, it may be appropriate to consider in greater depth their intervention application. The Federal Objectors' purpose appears to be, not so much becoming a party, but conferring lead counsel status on their attorneys. *See In re TD Banknorth S'holders Litig.*, 938 A.2d 654, 662 (Del. Ch. 2007).

[14] *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132 (C.D. Cal. 2008).

[15] *In re Countrywide S'holders Litig.*, 2008 WL 4173837, at *3 (Del. Ch. Sept. 10, 2008).

claim for breach of fiduciary duty. The Federal Objectors seek to pursue these direct merger-related claims, and the Proposed Settlement would surrender them despite the fact that the underlying derivative claims are expressly carved from the its reach.

C. *SRM's Objections*

SRM Global Fund Limited Partnership ("SRM") also objects to the Proposed Settlement. SRM had invested heavily in Countrywide, and its investment approached nearly 58 million shares at its peak.[16] SRM claims that it purchased and held investments in Countrywide in reliance on continuing misrepresentations by both Countrywide and BOA regarding Countrywide's financial condition. SRM points to allegedly false and misleading statements made as early as July 24, 2007. It alleges losses in excess of $690 million. SRM argues that those losses give rise to substantial state common law fraud and federal securities law fraud claims against both Countrywide and BOA. Although SRM has retained counsel for the evaluation of such claims, it has yet to initiate litigation.

SRM argues the Proposed Settlement threatens to release these claims for inadequate consideration. SRM also objects on the grounds that class certification pursuant to Court of Chancery Rule 23(b)(1) or (b)(2) is improper. At the

[16] SRM Obj. at Ex. B.

settlement hearing, the Defendants submitted a revised Final Settlement Agreement which purports to carve out the majority of claims SRM seeks to assert.[17]

The language of the carve-outs for common law fraud and federal securities law claims embrace nearly all potential claims detailed in SRM's objection, including claims that focus on statements by certain Countrywide directors during July 24, 2007, and October 26, 2007, earnings calls, a December 3, 2007, statement by Defendant Mozilo during a CNBC interview, and a December 28, 2007, telephone conversation with Countrywide executives.[18] However, one claim remains ensnared by the revised stipulation.

SRM alleges that substantial fraud claims exist based on statements made by Kenneth Lewis ("Lewis"), the Chairman, Chief Executive Officer, and President of BOA, on January 14, 2008, three days after announcement of the merger (the "Lewis Statements").[19] SRM contends that, in a speech to the Delaware State Chamber of Commerce, Lewis dismissed rumors of Countrywide's impending bankruptcy and asserted that Countrywide "had a very impressive liquidity plan [and] . . . backup lines in place," and that these statements were false. This alleged misrepresentation induced SRM to hold, rather than sell, its shares of

[17] Tr. at 120-22, Ex. D (amendment).
[18] SRM Obj. at 4-8.
[19] *Id.* at 9; Tr. at 119.

Countrywide.[20] SRM claims losses of $80 million following the Lewis Statements.[21] Because these statements fall within the wording of the Proposed Settlement that releases claims "related . . . in any way to . . . the Merger," the Settlement Proponents and SRM both agree that approval of the Proposed Settlement would release SRM's common law claims based on the Lewis Statements.[22] BOA argues that the Lewis Statements relate directly to the merger process and would justifiability be surrendered by the Proposed Settlement.[23] SRM disagrees, and challenges the propriety of their inclusion in the release.

SRM relies on *Continental Insurance Co. v. Mercadante*,[24] a New York case, for the proposition that those induced to hold, instead of sell, securities in reliance on fraudulent misrepresentations may state a cause of action. A common law fraud "holder" claim under *Mercadante* requires SRM to prove that the Lewis Statements (1) were false and (2) material, and (3) known to Lewis to be false at the time of their making, and (4) subsequently caused SRM, (5) justifiably to rely on them to its (6) detriment by holding, instead of selling shares in Countrywide.[25]

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[20] SRM Obj. at 9.
[21] Tr. at 119.
[22] *Id.* at 116-17, 121-23.
[23] SRM complains of "substantial" causes of action that have yet to find their way into any complaint. SRM Obj. at 3.
[24] 225 N.Y.S. 488 (N.Y. Sup. Ct. 1927).
[25] *Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 421 (N.Y. 1996); RESTATEMENT (FIRST) OF TORTS § 525 (1938).

Mercadante is still good law despite both its vintage and the extensive intervening developments surrounding securities fraud litigation.[26]

According to SRM, the falsity of the Lewis Statements concerning the financial viability of Countrywide is confirmed by several Countrywide directors who, in a meeting with SRM several months later, disclosed that Countrywide had ceased being a viable company as early as July 2007, nearly six months before the Lewis Statements.[27] SRM alleges Lewis knew his statements to be false, as discovery of the true financial condition of Countrywide occurred during the merger due diligence process—a process Lewis characterized as twice the typical amount.[28]

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[26] *See In re WorldCom, Inc. Sec. Litig.*, 382 F. Supp. 2d 549, 559 (S.D.N.Y. 2005) ("New York recognizes a claim [of] fraud where investors were induced to retain securities in reliance on a defendant's misrepresentations."). Securities fraud litigation has become a nearly exclusive federal cause of action. The Securities and Exchange Act of 1934, and SEC Rule 10b-5 promulgated thereunder, created a federal cause of action for securities fraud. However, actions under it may be brought only by those who purchased or sold in reliance on material misrepresentations (or omissions). *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723 (1975). "Holder" claims such as SRM's remained state law actions. Congress, with the passage of the Securities Litigation Uniform Standards Act of 1998, preempted state law holder class actions, committing them to federal courts exclusively. *See Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Dabit*, 547 U.S. 71, 126 (2006). The individual holder claim which SRM alleges remains a state law action.

[27] SRM Obj. at 9.

[28] *Id.*

III. DISCUSSION

The Federal Objectors and SRM have each raised carefully targeted challenges to approval of the settlement of this class action.[29] Because their contentions define the principal, discrete issues for resolution, the Court turns to them first, before taking the more familiar path through the thickets of class certification and consideration of whether to approve the Proposed Settlement.

A. *The Federal Objectors*

In determining whether to approve a proposed settlement, the Court must evaluate the facts and circumstances of the case, the nature of the claims and defenses asserted, and then, applying its own business judgment, determine whether the proposed settlement is fair.[30] In performing this task, the Court must balance the strong policy favoring the settlement of such suits against the policy of ensuring that shareholders' interests are properly protected.[31] The Court balances the value of all claims being compromised by the Proposed Settlement, including those claims expressly released by the settlement, against the benefits conferred to

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[29] Both tender general fairness objections which are addressed in Part III.C. *infra*. Also, they have, to an extent, joined in each others' objections. For convenience, the Court ascribes to each the specific set of objections that each has more vigorously advanced.

[30] *Polk v. Good*, 507 A.2d 531, 535 (Del. 1986); *Rome v. Archer*, 197 A.2d 49, 53-54 (Del. 1964).

[31] *Polk*, 507 A.2d at 535; *Barkan v. Amsted Indus. Inc.*, 567 A.2d 1279, 1283 (Del. 1989).

the class.[32] The burden of persuading the Court that a settlement is fair and reasonable belongs to the Settlement Proponents.[33]

In conducting this evaluation, the Court is not required to try the case or decide the merits of settled or released claims.[34] The Court, however, must examine the merits of such claims in order to determine whether the Proposed Settlement is fair and reasonable.[35] In determining whether the settlement is fair and reasonable, the Court's discretion is properly informed by the following factors: (1) the probable validity of the claims; (2) the apparent difficulty of enforcing the claims through the Courts; (3) the collectibility of any judgment; (4) the delay, expense and trouble of litigation; (5) the amount of the compromise as compared with the amount and collectibility of the judgment; and (6) the views of the parties involved, both pro and con.[36] In addressing the Federal Objectors' fairness challenge the first, second, and fifth factors are of dispositive importance, while the third, fourth and sixth factors provide little assistance.[37]

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[32] *See Sullivan v. Hammer*, 1990 WL 114223, at * 5 (Del. Ch. Aug. 7, 1990); *In re MCA, Inc. S'holders Litig.*, 598 A.2d 687, 693 (Del. Ch. 1991).

[33] *Barkan*, 567 A.2d at 1285-86.

[34] *In re Phila. Stock Exch., Inc.*, 945 A.2d 1123, 1137 (Del. 2008).

[35] *In re TD Banknorth*, 938 A.2d at 657.

[36] *Polk*, 507 A.2d at 536.

[37] To be sure, there would collectibility concerns if such claims were successful. While the Countrywide directors are indemnified for claims against them, that indemnification is provided by BOA Acquisition Sub—a corporate entity created solely for the purpose of the merger—and not BOA. Tr. at 104-05. One questions the extent to which BOA Acquisition Sub could answer in money damages. However, the Court approaches the issue in something of an evidentiary vacuum and can do little more than note those concerns. As to potential delays, expense or trouble facing possible litigation, the Court envisions no concerns beyond those attending the

The Federal Objectors' fundamental dissatisfaction lies with the loss of standing to pursue the derivative claims they asserted in the California Action by operation of law following the close of the merger. The loss of standing to pursue the derivative claims is, of course, not a function of the Proposed Settlement. Indeed, the settlement carves those claims from its reach.[38] The loss of standing is a function of fundamental Delaware law: "[I]t is well established that a merger which eliminates a derivative plaintiff's ownership of shares of the corporation for whose benefit she has sued terminates her standing to pursue those derivative claims."[39]

Importantly, the standing rule about which the Federal Objectors complain is not without exception. Where the merger eliminating a derivative plaintiff's ownership of shares, and thus her standing to pursue derivative claims, has been "perpetrated merely to deprive shareholders of the standing to bring a derivative action," then her case is excepted from the derivative standing rule.[40] Despite the Court's allowance of limited discovery into the Countrywide Defendants' pre-merger consideration of pending derivative claims, the Federal Objectors' have

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typical litigation of this ilk. If anything, the minor discovery the Federal Objectors have already been allowed might suggest a minor reduction in such delay and expense, cutting in favor of the Federal Objectors on this factor.

[38] ". . . the Released Claims shall not include . . . (iii) the derivative claims asserted on behalf of Countrywide . . .". Tr. at 120-22, Ex. D (amendment).

[39] *Lewis v. Ward*, 852 A.2d 896, 900-01 (Del. 2004) (citing *Lewis v. Anderson*, 477 A.2d 1040, 1049 (Del.1984)).

[40] *Id.* at 902. *See also Gentile v. Rossette*, 906 A.2d 91 (Del. 2006).

presented no concrete evidence of pretext. Although one cannot conclude that the directors of Countrywide were oblivious to the additional benefit (to them) of the merger, avoiding derivative liability was neither the only nor the principal reason for supporting the transaction. The economic realities confronting Countrywide at the time left little choice.

The Federal Objectors have an additional complaint about loss of standing to pursue the derivative claims. Even if the derivative claims were pursued by BOA, the Countrywide shareholders' proportional recovery from the claims would be reduced by virtue of the merger. Now that their shares have been exchanged for shares of BOA the former Countrywide shareholders hold approximately 2% of BOA's shares.[41] Thus, any benefit from the successful pursuit of the derivative claims would be shared with the balance of the BOA shareholders; it would not accrue solely to the Countrywide shareholders. The Federal Objectors are correct about the disproportional consequences. Dilution of "pass through" claims of the acquired entity always befalls former shareholders of the acquired entity. That is what happens with a merger.

To avoid the effects of Delaware law, the Federal Objectors reshape their fundamental complaints about derivative standing into two novel theories of direct

[41] Federal Obj. at 25.

liability, both of which they argue have value equal to that of the derivative claims and, thereby, render the proposed settlement fundamentally unfair.

The Federal Objectors first contend that the Countrywide directors had a fiduciary duty to value the derivative claims pending against them at the time the merger was negotiated (the "failure-to-value" claim). Second, they argue that regardless of the value ascribed to the derivative claims, the board had a fiduciary duty to preserve such value (the "failure-to-preserve" claim), either by extracting additional consideration from BOA or by assigning the derivative claims to a litigation trust that could pursue the claims for the benefit of Countrywide's shareholders.[42]

The Federal Objectors have not offered case law supporting their theory that the Countrywide Defendants owed a fiduciary duty to their shareholders to undertake a separate and discrete valuation of the derivative claims pending against them during the merger negotiation process. Similarly, they have not offered case law supporting the theory that individual corporate assets more generally must be separately valued in advance of a merger. Although the Federal Objectors have pointed to several Delaware cases discussing the valuation of derivative claims,

[42] Both the failure-to-value claim and the failure-to-preserve claim would be released under the terms of the Proposed Settlement.

none of those cases recognizes the duty which the Federal Objectors would have imposed.[43]

The paucity of case law alone, of course, does not *ipso facto* preclude the Federal Objectors from success on such a claim. The Countrywide board made no effort to value the derivative claims already pending in California. Such claims are not easily valued. The Federal Objectors have summarized these claims as: breaches of fiduciary duty by certain Countrywide board members by their, among other things: (i) abandoning prudent lending practices by focusing the business more heavily on risky (and potentially more lucrative) loans such as pay-option adjustable rate mortgages and home equity lines of credit; (ii) engaging in illegal insider sales by enacting a stock repurchase program at the same time the individual directors were selling their own shares; and (iii) manipulating the corporate machinery for their own benefit.[44] Claims arising out of a board's bad judgment—for example, in improvident investments or risky underwriting protocols—are difficult to win because of the deference accorded the board's

[43] *See Merritt v. Colonial Foods, Inc.*, 505 A.2d 757 (Del. Ch. 1986) (entire fairness challenge to a cash-out merger admittedly entered for the purpose of ending derivative litigation); *Oliver v. Boston Univ.*, 2006 WL 1064169 (Del. Ch. Apr. 14, 2006) (entire fairness standard used to measure claims surrounding proper allocation of merger consideration); *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 1994 WL 198726 (Del. Ch. May 16, 1994) (allowing consideration the value of derivative claims in an 8 *Del. C.* § 262 appraisal action seeking fair valuation of stock); *In re TD Banknorth*, 938 A.2d at 654 (settlement in the context of a cash-out merger, subject to entire fairness, review not approved where class representative failed to present a fairness of process claim of "substantial strength," which would be surrendered by the settlement).

[44] Federal Obj. at 12; Barry Decl., Ex. 12.

business judgment.[45] Claims surrounding the Company's stock repurchase program alleging the Countrywide board directed the acquisition of overvalued assets seem equally difficult to win given that the purchases were made at market prices which, presumably, were the result of active trading by rational investors.[46] Although claims arguably tied to self-interest and a lack of loyalty are conceptually more likely to succeed, their value is unlikely to approach the $2 billion figure alleged by the Federal Objectors.[47]

In any event, the Federal Objectors have not shown that the consideration paid by BOA for Countrywide was unfair. Indeed, they come close to conceding the opposite. There is no suggestion that any entity other than BOA was interested in (or capable of) acquiring Countrywide. In addition, there is no reason to believe that a longer period to search for an acquirer—if indeed Countrywide could have survived such longer period—would have been fruitful. In the absence of an acquisition, the fate of Countrywide might well have been bleak. Moreover, the more reasonable inference is that BOA had no interest in pursuing any derivative claim that it might have acquired along with its acquisition of Countrywide. For

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[45] *See In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106 (Del. Ch. 2009).

[46] *Id.* at 137 (proving corporate waste in a stock repurchase program requires showing "an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration.").

[47] The Federal Objectors allege $848 million in insider trading. Federal Obj. at 12. While this sum is significant, it, combined with the risks inherent in litigation, demonstrates derivative claims worth less than the Federal Objectors contend.

that reason, there is no basis to believe that BOA could have been persuaded to pay more for Countrywide because of the various derivative claims—however one might have gone about valuing them. In short, the board's failure to value these derivative claims within the confines of the BOA transaction did not likely harm Countrywide's shareholders because those claims could not have been expected to enhance the consideration paid to the shareholders.

The Federal Objectors next assert that whatever value the derivative claims have the Countrywide board's failure to preserve that value constituted a breach of fiduciary duty. The Federal Objectors argue such value should have been preserved by carving the asset out of the merger transaction and establishing a litigation trust for the benefit of the Countrywide shareholders.[48]

As to the claim that the Countrywide board, in response to BOA's indifference to the derivative claims, should have carved them out and established a litigation trust, the Federal Objectors again present a novel theory. There are no Delaware cases supporting such a rule. Indeed, such a rule seems at odds with the realities attending mergers generally. Almost invariably some assets of a target company will have little or no value to an acquirer (meanwhile a third party, or even the shareholders, might assign value to them). Indeed, some business combinations find an acquirer purchasing an entire entity solely for the purpose of

[48] *Id.*

acquiring a single asset or line of business. If derivative claims are to be viewed as assets of a company—and they are—then their treatment must be logically consistent with how other assets are treated. The Countrywide board decided to sell the entire corporate entity instead of auctioning off assets separately. Given the present record and Delaware case law, that decision is unlikely to be found objectionable. It certainly appears insulated from attack.[49] BOA likely found other assets of Countrywide unwanted and valueless. Yet it is often the synergies derived from the retention of desired assets—while undesired assets are disposed of by the acquirer—that makes business combinations economically viable. Frequently, selling an enterprise as a whole, rather than piecemeal, is the best method to maximize shareholder value. The Federal Objectors' failure-to-preserve theory would seemingly require the sifting out and retention of unwanted assets for the shareholders' benefit when any sale is contemplated. Such a novel theory is unlikely to find success.

More importantly, both the failure-to-value claims and the failure-to-preserve claims are squarely centered on the process of the merger negotiation. Because this merger was a stock-for-stock transaction of two widely held corporations, the result of which left control still vested in a "large, fluid,

[49] See text accompanying note 51 *infra*.

changeable and changing market,"[50] the Countrywide board's decisions surrounding the merger are subject to the protections of the business judgment rule.[51] Successful assertion of the Federal Objectors' claims would require them to overcome this "almost impenetrable barrier."[52] The business judgment rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[53] The presumption protects a board-approved transaction unless the plaintiff can show that a majority of the directors were self-interested, lacked independence, were grossly negligent in failing to inform themselves, or that the transaction can be attributed to no rational business purpose.[54] The Federal Objectors fail to demonstrate any facts suggesting their claims could overcome the insulating effects of the business judgment rule. To the contrary, the record demonstrates that, facing increasing pressure, the Countrywide board determined that some arrangement providing stability was necessary. It adequately explored possible opportunities, and settled on this transaction with BOA; after receiving fairness opinions from two independent financial advisors, it

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[50] *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1290 (Del. 1994) (quoting *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 47 (Del. 1994)).
[51] *Paramount Commc'ns, Inc., v. Time Inc.*, 571 A.2d 1140, 1151-52 (Del. 1990).
[52] *Sullivan*, 1990 WL 114223, at *5.
[53] *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).
[54] *Brehm v. Eisner*, 746 A.2d 244, 264 n.66 (Del. 2000).

unanimously approved the merger.[55] On these facts, the prospects that the Federal Objectors would overcome the presumption of the business judgment rule are poor.

Because these failure-to-value and failure-to-preserve claims are novel, and given the defense of the business judgment rule, it appears unlikely these claims would be successfully enforced. Facing such poor prospects of success, the Court finds the probable validity of the Federal Objectors' claims to be minimal. Any significant monetary recovery on these claims is unlikely.

The parties debate the context against which the surrender of these claims should be measured under the fifth factor of *Polk* that requires the Court to compare the amount of compromise to the amount of any potential judgment. The Settlement Proponents argue that these claims are surrendered as a part of the overall consideration achieved in the merger, while the Federal Objectors argue that they should be measured only against the consideration provided by the Proposed Settlement.[56] The Court need not resolve this debate. Using either measure, surrendering functionally worthless claims in the context of this settlement would be fair, reasonable, and, applying the Court's own business judgment, acceptable.[57]

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[55] Barry Decl., Ex. 4 at 31, 34 (Form S-4A, filed May 28, 2008); Tucker Aff., Ex. 9 (minutes of a special meeting of the Board of Directors of Countrywide, Jan. 10, 2008).

[56] Tr. at 44, 82-83.

[57] The Settlement Proponents also argue that disclosure of the derivative claims in the proxy materials related to the merger, combined with overwhelming shareholder approval of the merger results in a ratification of the Countrywide board's decisions surrounding such claims.

Accordingly, the Federal Objectors' Objections are overruled.

B. *The SRM Objections*

As a general proposition, Delaware courts favor the settlement of litigation.[58] Settlements almost invariably include a general release provision, binding on the class, which disposes of all liability associated with the challenged transaction to the broadest extent allowable under law. Indeed, settlement is often not possible without granting such "global peace" to the defendants.[59] A settlement and release can effectively secure "global peace" because Full Faith and Credit principles direct that courts treat the rulings of another jurisdiction with the same respect they would afford their own.[60] Because of this principle, approval of a class action settlement containing a broad release of claims functionally disposes of claims belonging to parties not actually before the Court, and often over which it would be unable to assert jurisdiction.[61]

As a result of these preclusive effects, the settlement of a class action which does not provide members a right to opt-out uniquely implicates due process rights

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After the completion of briefing in this matter, the Delaware Supreme Court address ratification in *Gantler v. Stephens*, -- A.2d --, 2009 WL 188828, at *13 (Del. Jan. 27, 2009) ("the only director action or conduct that can be ratified is that which the shareholders are specifically asked to approve"). The Court, in this instance, need not consider application of the ratification doctrine.

[58] *Rome*, 197 A.2d at 53.

[59] *In re Phila. Stock Exch., Inc.*, 945 A.2d at 1137; *Raskin v. Birmingham Steel Corp.*, 1990 WL 193326, at *6-7 (Del. Ch. Dec. 4, 1990).

[60] *Matsushita v. Epstein*, 516 U.S. 367, 373 (1996).

[61] *See Raskin*, 1990 WL 193326, at *6.

under the Fourteenth Amendment to the United States Constitution. The Court of Chancery must participate in the consummation of the settlement and ensure that the fiduciary nature of the class action is respected, and that its approval of any class-based settlement does not offend due process.

Due process concerns are implicated in this process because, generally, a court may not bind in judgment one who is not a party to the litigation before it.[62] The class action, where suit is conducted by a representative on behalf of others, is a departure from that general proposition. Equitable notions of fairness and efficiency justify the use of the class action device.[63] Yet its departure from the usual course requires ardent respect for the limits of due process, limits that dictate when a party may be constitutionally bound by litigation conducted by another. Court of Chancery Rule 23 is designed to protect the due process rights of absent class members. Only through strict compliance with Rule 23 may a court's judgment bind the absent members.[64] Settlements reached in the absence of strict compliance will fail to deliver the "global peace" defendants seek.[65]

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[62] *See, e.g.*, *Martin v. Wilks*, 490 U.S. 755, 762 (1989).

[63] *See, e.g.*, Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 ARIZ. L. REV. 687, 688-90 (Summer 1997).

[64] "The due process clause in the federal Constitution precludes binding an absent class member by a class action unless the class representative provided adequate and full representation." *Nottingham Partners v. Dana*, 564 A.2d 1089, 1100 n.25 (Del. 1989) (citing *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940)).

[65] *See Prezant v. De Angelis*, 636 A.2d 915 (Del. 1994) (compliance with Rule 23 provides protection "from a possible collateral attack on the validity of the settlement by a class member").

* * *

A condition precedent to class certification is a two step analysis outlined under Chancery Court Rule 23.[66] First, the Court must determine whether the class satisfies the following four Rule 23(a) prerequisites to class certification:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[67]

If the mandates of subsection (a) are satisfied the Court must then determine where within the subsection (b) framework the action most properly fits.[68] Subsection (b) divides class actions into three separate categories.

> Subdivision (b)(1) applies to class actions that are necessary to protect the party opposing the class or the members of the class from inconsistent adjudications in separate actions. Subdivision (b)(2) applies to class actions for class-wide injunctive or declaratory relief. Subdivision (b)(3) applies when common questions of law or fact predominate and a class action would be superior to other means of adjudication.[69]

As to the claims presented in the Delaware Complaint, the Court has little trouble satisfying itself that the requirements found in subsection (a) were

[66] *Nottingham Partners*, 564 A.2d at 1094.
[67] Ct. Ch. R. 23(a).
[68] *Nottingham Partners*, 564 A.2d at 1094.
[69] *Id.* at 1095.

satisfied.[70] Moreover, the request for injunctive relief found in the Delaware Complaint—enjoining the consummation of the merger—would support certification under subsection (b)(2) of a class comprised of stockholders generally.[71] Had the class certification analysis been conducted at some point before settlement, the Court would likely have certified a subsection (b)(2) class action.

However, the certification decision was delayed until settlement was reached.[72] The parties have stipulated to the propriety of certifying this class under either subjection (b)(1) or subsection (b)(2) of Court of Chancery Rule 23, and have requested certification on that basis. The distinctions between the subsections of Rule 23(b) are "not well defined,"[73] and the categories are not mutually exclusive.[74] It is possible for an action to be properly certified under multiple

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[70] This, of course, does not replace the inquiry required by *Prezant*, 636 A.2d at 915. *See* discussion *infra* Part III.C.1.
[71] *In re Prodigy Commc'ns. Corp. S'holders Litig.*, 2002 WL 1767543, at *4 (Del. Ch. July 26, 2002) ("[T]he law recognizes that when a claim is asserted on behalf of a class of stockholders challenging the fairness of the terms of a proposed transaction under Delaware law, the class will ordinarily consist of those persons who held shares as of the date the transaction was announced and their transferees, successors and assigns.").
[72] The Court considers the certification inquiry in light of the Proposed Settlement. *See Frazer v. Worldwide Energy Corp.*, 1990 WL 61192, at *3 (Del. Ch. May 3, 1990) ("[T]he class certification question must be determined based upon the posture of the case as it realistically exists at the time of the certification. That approach is inherent in the Rule itself, which provides that any class certification order 'may be conditional, and may be altered or amended before the decision on the merits.'").
[73] *Dieter v. Prime Computer, Inc.*, 681 A.2d 1068, 1076 (Del. Ch. 1996); *Noerr v. Greenwood*, 2002 WL 31720734 (Del. Ch. Nov. 22, 2002).
[74] *Leon N. Weiner and Assocs. Inc. v. Krapf*, 584 A.2d 1220, 1226 (Del. 1991).

subdivisions.[75] Under either subdivision (b)(1) or (b)(2) certification would create what is often called a "mandatory" class because the Court is not obligated under the rules to provide an opportunity for members to opt-out, and here, the parties have requested that the Court refrain from exercising its discretionary power to grant such a right.[76]

Subsection (b)(1) is further subdivided. Subdivision (b)(1)(A) asks whether, absent class treatment, defendants face the risk of "inconsistent or varying adjudications with respect to individual members of the class."[77] Our courts have noted that certification under subdivision (b)(1)(A) requires a "total absence of individual issues."[78] Subdivision (b)(1)(B) also tests the similarity of interests, but focuses on the risks to members of the class, instead of risks to the defendant in the absence of class treatment. It asks whether individual adjudications "would as a practical matter be dispositive of the interests of the other members."[79] If so, class treatment is preferable. "[C]lass actions usually meet both subparts of subsection (b)(1) of Rule 23 or neither of them,"[80] as each focuses on the individuality of the actions belonging to the class members. Certification under

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[75] *Id.*
[76] Ct. Ch. R. 23(d)(2) grants a discretionary power to provide opt-out if the court finds that right necessary to protect the interests of absent members. *Nottingham Partners*, 564 A.2d at 1101.
[77] Ct. Ch. R. 23(b)(1)(A).
[78] *O'Malley v. Boris*, 2001 WL 50204, at *6 (Del. Ch. Jan. 11, 2001).
[79] Ct. Ch. R. 23(b)(1)(B).
[80] *Turner v. Bernstein*, 768 A.2d 24, 35 (Del. Ch. 2000).

subdivision (b)(1)(A) or (b)(1)(B) may be appropriate when injunctive relief is sought, even if money damage claims accompany it.[81] However, this is only true when the damages recoverable by each member of the class can be determined on an identical, per share, basis.[82] Otherwise, certification under either subdivision of subsection (b)(1) is improper.

Class certification under subsection (b)(2) is proper when the relief sought is primarily "final injunctive or corresponding declaratory relief with respect to the class as a whole."[83] The subsection "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."[84]

In *Phillips Petroleum Co. v. Shutts*, the Supreme Court of the United States held that, in an action primarily seeking money damages, due process prevents a state from constitutionally exercising jurisdiction over absent members of a plaintiff class without allowing those absent members notice and an opportunity to opt-out of the action.[85] The Court expressly limited its holding to "those class actions which seek to bind known plaintiffs concerning claims wholly or

[81] *Noerr*, 2002 WL 31720734, at *5.
[82] *Id.* at *5-6.
[83] Ct. Ch. R. 23(b)(2).
[84] Fed. R. Civ. P. 23 (advisory committee notes) (1966). Judicial interpretation of the Federal Rules respecting class actions and the Advisory Committee Notes to the Federal Rule's 1966 amendments are persuasive authority for the interpretation of Court of Chancery Rule 23. *Nottingham Partners*, 564 A.2d at 1094; *see also Leon N. Weiner and Assocs.*, 584 A.2d at 1220 (Federal Rules advisory notes are persuasive authority).
[85] 472 U.S. 797, 811-12 (1985).

predominantly for money judgments."[86] Thus, the holding of that case does not reach adjudication of claims predominantly seeking injunctive or other equitable relief. The Delaware Supreme Court has recognized, in reliance on this express limitation, that certification for settlement purposes of a non-opt-out class action under subsection (b)(2) challenging the validity of a corporate merger is appropriate as long as the money damage claims foreclosed by the settlement do not predominate over equitable claims.[87]

SRM challenges the propriety of class certification by arguing that its common law fraud claims for money damages are individual and thus predominate over the equitable relief found in the Delaware Complaint. It also argues that because those claims would be foreclosed as a function of the Proposed Settlement, its approval would run afoul of the rule found in *In re Philadelphia Stock Exchange, Inc.*,[88] which held that "a settlement can release claims that were not specifically asserted in the settled action, but only if those claims are based on the same identical factual predicate or the same set of operative facts as the underlying

[86] *Id.* at 811 n.3.
[87] *See Nottingham Partners*, 564 A.2d at 1098-1101. Federal courts share this view despite disagreement over the predominance inquiry. *Compare Allison v. CITGO Petroleum Corp.*, 151 F.3d 402, 412 (5th Cir. 1998), *Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, AFL-CIO*, 216 F.3d 577, 581 (7th Cir. 2000), *and Murray v. Auslander*, 244 F.3d 807 (11th Cir. 2001), *with Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2d Cir. 2001), *and Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003).
[88] 945 A.2d 1123 (Del. 2008).

action."[89] Both of these bases for objection rest on the same premise: to foreclose the individual common law fraud claims of SRM by virtue of certification of a class action and approval of the Proposed Settlement would violate due process.[90] This is true because this Court must consider the scope of the Proposed Settlement's release in the certification analysis:

> [I]n assessing whether a case is one "wholly or predominantly for a money judgment" . . . it is necessary to consider not simply the claims asserted in the complaint, but also those that will be barred by *res judicata* effect of a judgment or, in the context of a settlement, those that are to be released.[91]

Thus, SRM's money damages claims are subject to the consequences of class treatment, despite their absence from the Delaware Complaint, as a result of the preclusive effects of the Proposed Settlement.

SRM's common law fraud claims based upon the Lewis Statements are uniquely individual. Under New York law, SRM would be required to prove its individual reliance on the Lewis Statements.[92] This requires proof of a

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[89] *Id.* at 1146.

[90] As a result, the Court may address the propriety (or impropriety) of class certification which involves SRM's money damages claims without drawing a distinction between subsections (b)(1) and (b)(2) because the dispositive inquiry—whether predominating *individual* interests exist—is here applicable to a mandatory class action certified under either subsection.

[91] *Raskin*, 1990 WL 193326, at *7 (emphasis original).

[92] *See Primavera Familienstifung v. Askin*, 130 F. Supp. 2d 450, 494 (S.D.N.Y. 2001) (collecting cases). *See also Peil v. Speiser*, 806 F.2d 1154, 1163 n.17 (3d Cir. 1986) ("While the fraud on the market theory is good law with respect to the Securities Acts, no state courts have adopted the theory, and thus direct reliance remains a requirement of a common law securities fraud claim.").

"sufficiently direct communication"[93] to SRM upon which it could justifiably rely.[94] Both of these inquiries require a merits determination of facts uniquely individual. It cannot be said that the named Plaintiffs either share this cause of action with SRM or could sufficiently raise the merits of the claim in SRM's stead. New York law teaches that these holder claims are individual in nature, and, thus, class-wide treatment of them is improper.

Our courts also recognize the uniquely individual nature of common law fraud claims. In *Gaffin v. Teledyne, Inc.* the Delaware Supreme Court held that "a class action may not be maintained in a purely common law or equitable fraud case since individual questions of law or fact, particularly as to the element of justifiable reliance, will inevitably predominate over common questions of fact."[95] While the Supreme Court did not expressly prohibit the certification of a class which merely includes, but does not exclusively present, common law fraud claims, subsequent case law suggests that certification of such classes would be inappropriate.[96]

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[93] *In re WorldCom, Inc. Sec. Litig.*, 382 F. Supp. 2d at 559.

[94] Demonstrating that reliance was justified may prove difficult, and further suggests the need for an individual inquiry. New York Courts are "particularly disinclined to entertain claims of justifiable reliance" by sophisticated investors. *Askin*, 130 F. Supp. 2d at 495.

[95] *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 474 (Del. 1992).

[96] *Manzo v. Rite Aid Corp.*, 2002 WL 31926606, at *3 (Del. Ch. Dec. 19, 2002) ("The requirement that plaintiff plead and prove actual and reasonable reliance on the false representations made by the defendants is fatal to a class action claim of either common law or equitable fraud."); *Dieter*, 681 A.2d at 1076 (refusing to certify common law fraud claims for class treatment); *Oliver v. Boston Univ.*, 2000 WL 1091480, at * 10 (Del. Ch. July 18, 2000)

The demand for individualized proof of reliance required by SRM's common law fraud claims would introduce new and substantial legal and factual issues not found in the Delaware Complaint's injunctive requests. SRM's common law fraud claims are therefore uniquely individual. As a result, the Court finds these individual money damage claims improperly foreclosed by the Proposed Settlement because they predominate over the injunctive relief which forms the basis upon which class treatment is justified.

Thus, the efforts to include SRM's individual claims based on the Lewis Statements within the reach of the class action and the scope of the proposed release precludes both class certification and approval of the proposed settlement.

C. *Class Certification and the Settlement in General*

If the debate surrounding the Lewis Statements is put to the side, the Court is satisfied that class treatment is proper and that the Proposed Settlement should be approved.

1. Class Certification

In general, the evaluation of a motion for class certification starts with the four elements of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and

(noting that to allow class treatment of common law fraud claims "would frustrate the inherent practical benefits of a class action").

(4) adequacy of representation.[97] In this instance, each of these criteria is readily satisfied.

The test of numerosity under Rule 23(a)(1) is whether joinder of all class members would be impractical, not impossible.[98] There is no bright-line cutoffs, but numbers "in excess of forty, and particularly in excess of one hundred, have sustained the numerosity requirement."[99] Countrywide's final Form 10-K indicates that 580,784,609 shares were outstanding as of February 26, 2008, and notice was mailed to in excess of 430,000 potential class members.[100] Joinder of over 430,000 stockholders would be impracticable.

Next the Court must determine whether common questions of law or fact exist.[101] Commonality is satisfied "where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated."[102] The Plaintiffs allege injuries which all investors share in proportion to their holdings stemming from a common course of action by the Defendants in the alleged breaches of fiduciary duties owed to the class in connection with the merger. This is sufficient to meet the commonality requirement.

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[97] *See* Ct. Ch. R. 23(a); *see also supra* text accompanying notes 66-70.
[98] *Leon N. Weiner and Assocs.*, 584 A.2d at 1225.
[99] *Id.*
[100] Tucker Aff., Ex. 13 (Form 10-K); Aff. of Mailing ¶ 5.
[101] Ct. Ch. R. 23(a)(2).
[102] *Leon N. Weiner and Assocs.*, 584 A.2d at 1225.

Similarly, the typicality requirement of subsection (a)(3) would also be met. Typicality requires that that "the legal and factual position of the class representative must not be markedly different from that of the members of the class."[103] Here, the plaintiffs, like all class members, were shareholders at the time of the merger negotiations and proxy disclosure challenged in this action. All were affected in the same manner. The proposed class would satisfy the typicality requirement.

To complete its review of the requirements of Rule 23(a), the Court must determine that the representative plaintiffs will fairly and adequately protect the interests of the class.[104] No material conflicts of interest have been shown between the named Plaintiffs and the class members as to remaining claims. The named Plaintiffs share similar motivations with the balance of the class. In addition, named Plaintiffs have retained competent counsel, experienced in litigation of this sort. The Court finds the named Plaintiffs are adequate class representatives.[105]

The Court next turns its attention to the requirements of Rule 23(b). Without the fraud claims premised on the Lewis Statements, this action would be

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[103] *Id.*

[104] Ct. Ch. R. 23(a)(4).

[105] That the purported class representatives may have negotiated a settlement without fully accounting for the interests of SRM does not otherwise disqualify them.

predominantly equitable in nature, and proper for class treatment under either Court of Chancery Rule 23(b)(1) or 23(b)(2).[106]

Accordingly, except for the matters raised in the SRM Objections related to the Lewis Statements, the Court would certify the defined class of former Countrywide stockholders.

2. The Settlement

But for the problems with the scope of the release, the settlement negotiated by the Delaware Plaintiffs would be approved. As discussed, allegations surrounding pending derivative claims, including the allegation that Countrywide directors were disloyally motivated to enter the merger to escape liability, possess negligible value.[107] There is little reason to doubt the same is true of remaining allegations of fiduciary duty violations centered on process and oversight. As for claims of unfair merger consideration, the record demonstrates that no other entity was interested in acquiring Countrywide. No one has made a serious challenge to the fairness of the merger consideration paid by BOA. Indeed, there is precious little doubt that the consideration received by the Countrywide shareholders was anything other than at least fair.

Turning to the disclosure claims found in the Delaware Complaint, they too are weak and would likely not support a money damages award now that the

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[106] *See e.g.*, *Turner*, 768 A.2d at 30.
[107] *See Polk,* 507 A.2d at 536. *See also supra* Part III.A.

merger has closed.[108] In any event, the settlement secured additional disclosures that resulted in a vote by better informed shareholders.

Simply because no monetary consideration resulted from the settlement does not render it unfair. "Delaware Courts have often approved settlements of merger class litigation that entail only non-monetary relief."[109] Given the poor prospects of the claims surrendered as a result of the Proposed Settlement the Court would, applying its own business judgment, in the absence of SRM's fraud claims based upon the Lewis Statements, find it to be fair, reasonable, and in the best interests of the proposed class of former Countrywide stockholders within the framework of *Polk v. Good*.[110]

IV. CONCLUSION

For the foregoing reasons, the application for class certification and approval of the settlement presented to the Court by the Settlement Proponents cannot be approved. The parties have a number of options at their disposal. They include: (1) amending the class structure to allow for opt-out rights; (2) amending the release contained in the Proposed Settlement to carve out the common law fraud

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[108] *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 360 (Del. Ch. 2008) (citing *In re Triarc Cos.*, 791 A.2d 872 (Del. Ch. 2001)).

[109] *In re Wm. Wrigley Jr. Co. S'holders Litig.*, 2009 WL 154380, at *5 (Del. Ch. Jan. 22, 2009) (collecting cases).

[110] In reaching this conclusion, the Court has considered the objections of the individual former stockholders identified in note 11 *supra*. Those objections are overruled for the reasons set forth above.

claims centered on the Lewis Statements; or (3) abandoning their efforts to settle this litigation altogether.

Thus, for the time being, the application to certify a class and to approve the stipulated settlement is denied.[111]

IT IS SO ORDERED.

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[111] In light of this conclusion, the Court defers consideration of any award of attorneys' fees and expenses.