EFiled: Aug 24 2009 4:01PM EDT
Transaction ID 26742189
Case No. 3464-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

MEMORANDUM OPINION

Date Submitted: June 5, 2009
Date Decided: August 24, 2009

Pamela S. Tikellis, Esquire, Robert J. Kriner, Jr., Esquire, A. Zachary Naylor, Esquire, Scott M. Tucker, Esquire, and Meghan A. Adams, Esquire of Chimicles & Tikellis LLP, Wilmington, Delaware; Lynda J. Grant, Esquire of Cohen, Milstein, Hausfeld & Toll, P.L.L.C., New York, New York; Steven J. Toll, Esquire and Julie Goldsmith Reiser, Esquire of Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Washington, DC; Jeffrey W. Golan, Esquire and William J. Ban, Esquire of Barrack, Rodos & Bacine, Philadelphia, Pennsylvania, Attorneys for Lead Plaintiffs.

Thomas A. Beck, Esquire, Richard P. Rollo, Esquire, and Scott W. Perkins, Esquire of Richards, Layton & Finger, P.A., Wilmington, Delaware; Eric M. Roth, Esquire, Stephen R. DiPrima, Esquire, Martin J.E. Arms, Esquire, Graham W. Meli, Esquire of Wachtell, Lipton, Rosen & Katz, New York, New York; and Brian E. Pastuszenski, Esquire and Stuart M. Glass, Esquire of Goodwin Proctor LLP, Boston, Massachusetts, Attorneys for Countrywide Defendants.

David C. McBride, Esquire, Martin S. Lessner, Esquire, and Danielle Gibbs, Esquire of Young Conaway Stargatt & Taylor, LLP, Wilmington, Delaware and Bradley J. Butwin, Esquire, Jonathan Rosenberg, Esquire, William J. Sushon, Esquire, and B. Andrew Bednark, Esquire of O'Melveny & Myers LLP, New York, New York, Attorneys for Defendant Bank of America Corporation.

Stuart M. Grant, Esquire, Jay W. Eisenhofer, Esquire, Michael J. Barry, Esquire, and Diane Zilka, Esquire of Grant & Eisenhofer, P.A., Wilmington, Delaware; Blair A. Nicholas, Esquire, Niki L. Mendoza, Esquire, Matthew P. Siben, Esquire, David A. Thorpe, Esquire, and John F. Worm, Esquire of Bernstein Litowitz Berger & Grossmann LLP, San Diego, California; and Lester L. Levy, Esquire, Carl L. Stine, Esquire, and Robert Plosky, Esquire of Wolf Popper LLP, New York, New York, Attorneys for Objectors and Proposed Plaintiffs in Intervention 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.

Andre G. Bouchard, Esquire and Joel Friedlander, Esquire of Bouchard Margules & Friedlander, P.A., Wilmington, Delaware; Richard B. Drubel, Esquire and Matthew J. Henken, Esquire of Boies, Schiller & Flexner LLP, Hanover, New Hampshire; Philip Korologos, Esquire of Boies, Schiller & Flexner LLP, New York, New York; George A. Zelcs, Esquire of Korein Tillery LLC of Chicago, Illinois; Stephen M. Tillery, Esquire, Douglas R. Sprong, Esquire, and Christopher A. Hoffman, Esquire of Korein Tillery LLC, St. Louis, Missouri, Attorneys for Objector SRM Global Fund Limited Partnership.

NOBLE, Vice Chancellor

I. BACKGROUND

Stockholders of Countrywide Financial Corporation ("Countrywide"), a then-Delaware corporation, brought this action following the January 11, 2008, announcement of its proposed merger with Bank of America Corporation ("BOA"). A more extensive discussion of the background of the events leading up to this merger appears in the Court's March 31, 2009, Memorandum Opinion and Order,[1] which rejected a proposed settlement of the litigation, but overruled numerous objections to it.

In brief, Countrywide, at one time the nation's largest underwriter of residential mortgages, faced increasing pressure to find new sources of capital and liquidity as the mortgage industry suffered the effects of the current financial crisis. First, a transaction agreement with BOA secured additional funding. Continued deepening of the financial crisis increased capital needs, despite the recent infusion of new funding from BOA. Second, the Countrywide board engaged BOA regarding a more comprehensive transaction. The Countrywide board decided that a merger transaction with BOA offered the most stability for Countrywide, and on January 11, 2008, Countrywide announced that it had entered into an agreement

[1] *In re Countrywide Corp. S'holders Litig.*, 2009 WL 846019 (Del. Ch. Mar. 31, 2009). The Court presumes familiarity with its prior opinion.

with BOA pursuant to which the two companies would merge in an all stock transaction then worth approximately $4 billion to Countrywide's shareholders.

Several Countrywide shareholders immediately filed suit here (the "Delaware Plaintiffs"). The Delaware Plaintiffs' Consolidated Verified Class Action Complaint (the "Delaware Complaint") sought to enjoin the merger; it alleged 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 Delaware Plaintiffs and the Defendants negotiated a settlement agreement by which virtually all claims surrounding the merger would be released. In exchange, the Defendants provided supplemental disclosures in advance of a vote on the merger, but no additional monetary consideration. Countrywide shareholders voted overwhelmingly in favor of the merger, which closed on July 1, 2008.

Numerous objectors appeared in opposition to the proposed settlement. This Court overruled those objections in its prior opinion, with one exception. SRM Global Fund Limited Partnership ("SRM") objected to the loss of certain common law fraud claims based on statements made by BOA's Chief Executive Officer, Kenneth Lewis ("Lewis") on January 14, 2008, in a speech to the Delaware State Chamber of Commerce in which Lewis dismissed rumors of Countrywide's

impending bankruptcy and asserted that Countrywide "had a very impressive liquidity plan [and] . . . backup lines in place"[2] (the "Lewis Statements"). The Court refused to approve the proposed settlement as long as these common law fraud claims were included within the scope of its accompanying release because those claims were "uniquely individual," and thus predominated over the injunctive relief forming the basis upon which mandatory class treatment rested.[3]

The settlement proponents promptly modified the scope of the settlement's release, expressly carving out common law fraud claims based on the Lewis Statements. The proposed settlement, as amended, (the "Proposed Settlement") is before the Court for approval. SRM again objects. This time, SRM protests the Proposed Settlement's release of potential federal securities law claims arising out of the Lewis Statements.[4]

[2] SRM Oct. 8, 2008, Obj. at 4-8.
[3] *In re Countrywide Corp. S'holders Litig.*, 2009 WL 846019, at *13.
[4] The parties debate whether this objection was raised in SRM's original objection or is asserted for the first time here, and whether consideration of it is proper in either event. If one searches hard enough, an outline of the argument can be gleaned; the Court, accordingly, considers the objection.

II. DISCUSSION

A. *Class Certification*[5]

Delaware law favors the voluntary settlement of corporate disputes.[6] In considering whether or not to approve a proposed settlement, the Court must evaluate whether the proposed settlement is fair and reasonable in light of all relevant factors.[7] The parties supporting the settlement bear the burden of persuading the Court that it is in fact fair and reasonable.[8]

When the action being settled is brought as a class action, the Court must also evaluate whether the action is one that may be properly maintained as a class action.[9] The proper course "is for the Court of Chancery to make an explicit finding on the record that the action satisfies the criteria of [Court of Chancery] Rule 23 and is thus properly maintainable as a class action."[10]

The question of final certification requires the Court first to consider whether the action satisfies all four elements of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. If these

[5] The Court's earlier opinion addressed class certification and related issues, but did not finally resolve them because of the conclusion that the Settlement as then proposed should not be approved. That task must now be completed; the effort here does not reprise the Court's previous analysis in any detail.
[6] *Rome v. Archer*, 197 A.2d 49, 53 (Del. 1964).
[7] *Polk v. Good*, 507 A.2d 531 (Del. 1986).
[8] *Fins v. Pearlman*, 424 A.2d 305 (Del. 1980).
[9] The Court discussed the propriety of certifying a non-opt-out class action which did not include certain common law fraud claims in its prior opinion. *See In re Countrywide Corp. S'holders Litig.*, 2009 WL 846019, at *12-14.
[10] *Prezant v. DeAngelis*, 636 A.2d 915, 925 (Del. 1994).

elements are satisfied, the Court must then determine whether the action should be maintained under one or more of the subdivisions of Rule 23(b) that "divide class actions into three categories based upon the wrongs alleged and/or the relief sought."[11] The Court's prior opinion addressed each requirement of Rule 23(a) in detail, finding that, "except for the [common law fraud claims] related to the Lewis Statements, the Court would certify the defined class of former Countrywide stockholders."[12] The Court now expressly holds that the action satisfies all four elements of Rule 23(a).

The Court next considers the requirements of Rule 23(b). In its previous opinion, the Court found that, absent the common law fraud claims arising out of the Lewis Statements, "this action would be predominantly equitable in nature, and proper for class treatment under either Court of Chancery Rule 23(b)(1) or 23(b)(2)."[13] Over and again our courts certify actions challenging the propriety of director behavior in connection with a merger as a (b)(1) or (b)(2) class. The reasons supporting such a practice are well-settled:

> Typically an action challenging the propriety of director action in connection with a merger transaction is certified as a (b)(1) or (b)(2) class because plaintiff seeks equitable relief (injunction); because all members of the stockholder class are situated precisely similarly with respect to every issue of liability and damages; and because to litigate

[11] *Id.* at 921.
[12] *In re Countrywide Corp. S'holders Litig.*, 2009 WL 846019, at *14.
[13] *Id.*

> the matters separately would subject the defendant to the risk of different standards of conduct with respect to the same action.[14]

Subject to the further analysis and discussion in connection with SRM's second basis of objection,[15] the Court now expressly finds this action challenging the exercise of fiduciary responsibility in a corporate merger to be one suitable for class treatment pursuant to Rules 23(b)(1) and (b)(2). The Court will not require that class members be afforded an opt-out right.

B. *The SRM Objections*

SRM objects to the Proposed Settlement on three grounds. First, that the Proposed Settlement provides no monetary compensation to SRM and the class in exchange for the release of claims based on the Lewis Statements under federal securities laws. Second, that money damage claims predominate, rendering a mandatory class action impermissible. And third, that the general release provision of the Proposed Settlement is overbroad because to release claims arising from the Lewis Statements is to release claims predicated on operative facts different from those upon which the underlying action is based, in violation of the rule set forth in *In re Philadelphia Stock Exchange*.[16]

---

[14] *In re Mobile Commc'ns Corp. of America, Inc. Consol. Litig.*, 1991 WL 1392, at *15 (Del. Ch. Jan. 7, 1991) (internal citations omitted); *see also Turner v. Bernstein*, 768 A.2d 24, 30-31 (Del. Ch. 2000).
[15] *See infra* Part II.B.2.
[16] 945 A.2d 1123 (Del. 2008).

In addition, SRM requests that the Court require a recently discovered statement by Lewis be expressly carved out of the Proposed Settlement's general release provision because potential common law fraud claims arise from it.

1. The Absence of Monetary Consideration in this Settlement is not Unfair

This SRM objection repeats a now familiar refrain: the absence of monetary compensation renders this settlement unfair. To the extent SRM takes issue generally with the practice and history of approving class action settlements that surrender arguable claims in exchange for only therapeutic disclosures, the Court overrules that objection because of its predicate: the absence of a monetary benefit is not fatal to a settlement which, almost by definition, confers only a therapeutic benefit. To the extent that SRM takes issue with the fairness of surrendering claims in this particular settlement for only therapeutic disclosures, the Court must again overrule that objection. As discussed in the Court's prior opinion, there is no evidence that the price paid by BOA was anything other than fair.[17] There is no evidence of any other potential acquirer. It appears from the record that, but for the BOA acquisition, the Countrywide shareholders would have faired (even more) poorly. "Where the transaction challenged is or appears to be fully and fairly

[17] *In re Countrywide Corp. S'holders Litig.*, 2009 WL 846019, at *14.

priced, it is not the case that a settlement must include a monetary element in order to pass muster as fair and reasonable."[18]

SRM asserts that its claims under federal securities laws premised on the Lewis Statements amount to more than $65 million,[19] and their release for no monetary consideration would be unfair. Perhaps SRM's objection to the fairness of releasing federal securities law claims arising out of the Lewis Statements was not squarely encompassed by the Court's prior opinion. The Court therefore directly addresses the fairness of surrendering those claims. In assessing the fairness of the Proposed Settlement in relation to the release of such claims the Court focuses its evaluation primarily on the probable validity of the claims, and the apparent difficulty of enforcing them.[20]

Private federal securities fraud actions based upon federal securities statutes and their implementing regulations require proof of (1) a material misrepresentation (or omission), (2) made with scienter, (3) in connection with the purchase or sale of a security, (4) reliance, often referred to as "transaction causation," (5) economic loss, and (6) loss causation.[21] Despite multiple rounds of

[18] *In re Wm. Wrigley Jr. Co. S'holders Litig.*, 2009 WL 154380, at *6 (Del. Ch. Jan. 22, 2009).
[19] SRM May 1, 2009, Obj. at 1, 5-6.
[20] *See Polk v. Good*, 507 A.2d 531, 536 (Del. 1986) ("The considerations applicable to such an analysis include: (1) the probable validity of the claims, (2) the apparent difficulties in enforcing the claims through the courts, (3) the collectibility of any judgment recovered, (4) the delay, expense and trouble of litigation, (5) the amount of the compromise as compared with the amount and collectibility of a judgment, and (6) the views of the parties involved, pro and con.").
[21] *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005).

briefing on the issue by SRM, it remains unclear whether the Lewis Statements contain any actionable falsity. Comparing the Lewis Statements to the disclosures found in the final BOA proxy disclosures reveals no obvious false and material,[22] or perhaps even new, information.

If the Lewis Statements are anything more than casual, immaterial, remarks, they appear directed toward BOA shareholders for the purpose of assuring them that the acquisition was a good investment, and that they should view the proposed merger favorably. Based on the limited record before the Court, the Lewis Statements seem mere optimistic puffery; not actionable under federal securities law.[23] SRM faces difficulty demonstrating the Lewis Statements were false, material, and made with scienter.[24]

The most (if not the only) salient claims arising out of the plunge in Countrywide shares were derivative, and were actively pursued by certain Countrywide shareholders before the Countrywide/BOA merger. By operation of law, those shareholders lost standing to pursue their claims once the merger was

[22] A fact is material if there is a substantial likelihood that a reasonable shareholder would view it as having significantly altered the total mix of information available. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988).

[23] *Pollio v. MF Global, Ltd.*, 608 F. Supp. 2d 564, 570-72 (S.D.N.Y. 2009) (statements that company had strong liquidity position, and that rumors to the contrary were "without merit" were not actionable).

[24] *Cf. Tellabs Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007).

consummated.[25] Attempts by other objectors to circumvent those effects, while perhaps theoretically cognizable, were so novel and speculative they presented negligible settlement value.[26] The Court found their surrender in the Proposed Settlement to be fair.[27]

The Court finds SRM's purported federal securities law claims based on the Lewis Statements to be yet another likely unavailing attempt to mitigate losses resulting from Countrywide's collapse. The loss, by release, of this option of limited utility does not defeat the overall fairness of the Proposed Settlement.[28] Because SRM's potential federal securities law claims possess no obvious value, surrendering them in the context of this settlement for only therapeutic disclosures is neither unfair nor unreasonable.

2. Federal Securities Law Claims based on the Lewis Statements do not Predominate over Equitable Claims

SRM next argues that these same federal securities law claims arising out of the Lewis Statements predominate over the equitable claims found in the Delaware Complaint, and thus, foreclosing these claims as a part of a non-opt-out class action would be improper. The Court previously rejected the Proposed

[25] *See In re Countrywide Corp. S'holders Litig.*, 2009 WL 846019, at *6 (quoting *Lewis v. Ward*, 852 A.2d 896, 900-01 (Del. 2004)).
[26] *See id.* at *6-8.
[27] *Id.* at *10.
[28] "Validity of a settlement does not depend on every compromised claim in a lawsuit being supported by independent consideration." *Polk*, 507 A.2d 538.

Settlement because common law fraud claims based on the Lewis Statements would be foreclosed by it, and those claims were "uniquely individual."[29] SRM argues that "[p]recisely the same principle applies"[30] to federal securities law claims based on the Lewis Statements.

The common law fraud claims based on the Lewis Statements were not improperly foreclosed by the Proposed Settlement merely because they were money damage claims. There is nothing *per se* objectionable about foreclosing money damage claims in a mandatory class action.[31] Rather, it was their uniquely individual nature that precluded their treatment on a class-wide basis.[32] Required proof of individual facts, particularly individual reliance, rendered common law fraud claims based on the Lewis Statements improper for class treatment.[33] Delaware case law recognizes the frequent difficulty, and impropriety, of class-wide treatment of common law fraud claims, and the Court drew its conclusion from those cases.[34] Because "proof of individual reliance is not required to establish a federal securities law claim,"[35] those same concerns do not attend the

[29] *In re Countrywide Corp. S'holders Litig.*, 2009 WL 846019, at *13.
[30] SRM June 3, 2009, Supp. Obj. at 1.
[31] *See Noerr v. Greenwood*, 2002 WL 3172074, at *5 (Del. Ch. Nov. 22, 2002).
[32] *See In re Countrywide Corp. S'holders Litig.*, 2009 WL 846019, at *12 n.87 (collecting federal cases).
[33] *Id.* at *12-13.
[34] *Id.* at *13 nn.95-96 (collecting Delaware cases).
[35] *Basic Inc.*, 485 U.S. at 241-42.

federal securities law claims based on the Lewis Statements.[36] Both the United States Supreme Court and the Delaware Supreme Court have recognized the validity of executing a general release that encompasses federal claims in the settlement of a state law class action.[37] Federal securities law claims arising out of the Lewis Statements may be properly foreclosed in this non-opt-out class action settlement.[38]

3. The Release Provision of the Proposed Settlement is not Overbroad

SRM argues that the Proposed Settlement's general release provision is overbroad because claims based on the Lewis Statements arise out of operative

[36] SRM points out that it could plead its potential federal securities law claims without relying on a fraud on the market theory, by alleging individual reliance. Thus, it argues, these federal securities law claims would mirror the common law fraud claims, requiring proof of individualized facts ill-suited for class treatment. Perhaps such pleading is possible. However, such a result proposes an exception that cannot be. Class action case law clearly supports the surrender of federal securities law claims in the settlement of state law claims. That propriety cannot be overcome merely by choosing to plead the claims differently. Such an exception would swallow the rule, as such a choice in pleading might always be possible for at least a portion of class members.

[37] *See Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367 (1996); *Nottingham Partners v. Dana*, 564 A.2d 1089 (Del. 1989).

[38] This Court has refused to certify a non-opt-out class action settlement releasing certain federal securities law claims when those claims were "the most prominent possible claims of those purposed to be adjudicated or released. . . ." *Raskin v. Birmingham Steel Corp.*, 1990 WL 193326, at *6 (Del. Ch. Dec. 4, 1990). That is not the case here, despite the fact that settlement negotiations secured no monetary consideration. Although the claims alleged in the Delaware Complaint were weak, the Court is not convinced, despite their weakness, that the underlying claims were not a more prominent body of possible claims than the federal securities law claims predicated on the Lewis Statements. As a result, releasing federal securities law claims here does not run afoul of *Raskin*. The case is, however, instructive. As discussed in the Court's previous opinion, *Raskin* teaches that, in the context of a proposed settlement, a court must evaluate not only claims asserted in the complaint but also those barred by the effect of any included release when accessing whether a case is one wholly or predominantly for a money judgment. *Id.* at *7. The Court has sought to adhere to that principle.

facts different from those upon which the Delaware Complaint was based. *In re Philadelphia Stock Exchange* teaches:

> In any settlement of litigation, including class actions, a release of claims is an essential, bargained-for element, with the defendants customarily seeking a release with the broadest permissible scope. But, the scope of a release of claims cannot be limitless, if only because of substantive due process concerns. The general issues implicated here are what limiting principle dictates how inclusive the settlement class may be, and whether that limiting principle was properly applied to the facts at bar. In Delaware, the limiting principle is 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 action.[39]

The plaintiffs in *In re Philadelphia Stock Exchange* alleged that the Exchange, its board, and certain strategic investors breached their fiduciary duties to the class in approving certain investments in the recently demutualized Exchange. Objectors argued that claims based on the prior demutualization of the Exchange could not validly be foreclosed by a general release provision included in a settlement of the action. The Supreme Court disagreed, concluding that the "Demutualization was a fact upon which those claims for relief were predicated."[40] The earlier demutualization was found to be a part of the same set of operative facts upon which the settled action was based because "Demutualization was a fact upon

[39] *In re Phila. Stock Exch., Inc.*, 945 A.2d at 1145-46 (internal quotations omitted).
[40] *Id.* at 1148.

which those claims for relief were predicated."[41] Demutualization enabled the defendants to enter into the challenged transactions. "The claims for breach of fiduciary duty . . . arose out of the Demutualization . . . ."[42]

Here, the Delaware Complaint accused individual defendants of soliciting shareholder approval of the merger pursuant to false and misleading statements contained in a BOA preliminary Form S-4.[43] It accused BOA of aiding and abetting in the breach of those fiduciary duties.[44] It quoted statements made by Lewis in support of the merger in the days immediately following its announcement.[45]

The BOA/Countrywide merger is the predicate event upon which the Lewis Statements were based. SRM claims to have relied upon the Lewis Statements in predicting how Countrywide shareholders would vote on the proposed merger. Claims based on the Lewis Statements must be viewed as a part of the same set of operative facts upon which the Delaware Complaint was based. Both SRM's claims surrounding the Lewis Statements and the Delaware Complaint attack behaviors entirely a part of a single unitary transaction.[46] Although temporal

[41] *Id.*
[42] *Id.*
[43] Roth Aff., Ex. A ¶ 2.
[44] *Id.* at ¶¶ 135-40.
[45] *Id.* at ¶¶ 72, 90.
[46] The Delaware Complaint also alleged impropriety in an investment agreement executed between Countrywide and BOA before the merger. As a result, the operative facts upon which this underlying action is based are quite broad, including challenges to the Countrywide/BOA

distinctions might be drawn, the events nevertheless remain a part of the same common nucleus of facts.

It is common for a defendant to negotiate for as broad a release as possible when settling litigation. Often, settlement cannot be reached absent such "global peace."[47] There is no legal requirement that a cause of action be the subject of a claim for specific relief or actually litigated in order to be released.[48] Because the Lewis Statements cannot be characterized as "unrelated, or tangential to, or remote from, the conduct that forms the basis for the specific claims for relief asserted,"[49] approving the parties' inclusion of claims arising from them in the Proposed Settlement's general release provision is not improper.

4. Subsequently Identified Statements

In a supplement to its objections, filed in June 2009, almost a year after the close of the BOA/Countrywide merger, SRM alleges that it "subsequently identified an additional statement by Lewis on April 23, 2008, reaffirming his previous misrepresentations, which supports the same common law fraud holder

---

relationship generally. This further justifies a finding that statements made by Lewis immediately following the merger announcement are a part of the same set of operative facts upon which the Delaware Complaint is based. Claims based on the Lewis Statements are clearly based on the same theory: certain individuals at Countrywide and BOA behaved improperly in laying the groundwork for, and ultimately consummating, the merger of the two entities.

[47] *In re Phila. Stock Exch., Inc.*, 945 A.2d at 1137; *Raskin*, 1990 WL 193326, at *6-7.

[48] *In re Phila. Stock Exch., Inc.*, 945 A.2d at 1147.

[49] *Id.* at 1148 (internal quotations omitted).

claim."[50] On April 23, 2008, at a meeting of BOA shareholders, Lewis allegedly stated that "the deep due diligence we performed [in connection with BOA's acquisition of Countrywide] confirmed our belief that there is great long-term value embedded in Countrywide's business."[51] SRM requests that the Court require any potential common law fraud claims based on this statement ("the April 23 Statement") be expressly excluded from the scope of the Proposed Settlement's general release provision.

SRM tenders common law holder claims under *Continental Insurance Co. v. Mercadante*, which requires a plaintiff to prove, among other things, individual reliance on a materially false statement, known by its maker to be false at its making.[52] At this late date, it seems apparent that SRM could not have relied on the April 23 Statement in deciding to hold, instead of selling, Countrywide stock; it appears that SRM was no longer a Countrywide shareholder by operation of the merger agreement when the April 23 Statement was discovered.

In its prior opinion, the Court refused to approve the Proposed Settlement because common law fraud claims based on the Lewis Statements would be foreclosed on a non-opt-out class-wide basis. An objector is not obligated to present its common law fraud claims to the court with the specificity required for

[50] SRM June 3, 2009, Supp. Obj. at 1.
[51] *Id.*
[52] 225 N.Y.S. 448 (N.Y. Sup. Ct. 1927).

the filing of a complaint.[53] It must, however, direct the Court's attention to at least some colorable claim.[54] This requires, at minimum, demonstrating the plausible satisfaction of each required element of the claim at issue.

Although the Court may be somewhat skeptical of SRM's common law fraud claims based on the Lewis Statements,[55] the required elements of the claim were plausibly demonstrated. As presented, potential common law fraud claims centered on the April 23 Statement are not. SRM has not shown that it relied before July 1, 2008, on a statement only recently discovered. Consequently, not only has SRM failed to demonstrate plausibly a required element of the claim, but it has failed to demonstrate the satisfaction of the very element that rendered its common law fraud claims based on the Lewis Statements ill-suited for class-wide treatment: individual reliance. As a result of this failure, the Court concludes that there is nothing objectionable in surrendering common law fraud claims based on the April 23 Statement in a non-opt-out class action settlement.[56]

---

[53] *See generally In re Resorts Intern. S'holders Litig. Appeals*, 570 A.2d 259, 266 (Del. 1990) ("All challenges to the fairness of the settlement must be considered, but in so doing the trial court is under no obligation to actually try the issues presented."); *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1284 (Del. 1989) ("[T]he Court of Chancery must carefully consider all challenges to the fairness of the settlement but without actually trying the issues presented.").

[54] *See, e.g., Kahn v. Sullivan*, 594 A.2d 48, 59 (Del. 1991) ("[T]he approval of a class action settlement by the Court of Chancery does require more than a cursory scrutiny of the issues presented."); *Nottingham Partners*, 564 A.2d at 1102 (the Court's consideration of a settlement should be the product of an "orderly and logical deductive process").

[55] *In re Countrywide Corp. S'holders Litig.*, 2009 WL 846019, at *13 n.94.

[56] SRM also argues that the April 23 Statement "reaffirms" the prior misrepresentations allegedly found in the Lewis Statements. Perhaps this is true. If the value of the April 23 Statement is

III. CONCLUSION

For the foregoing reasons, SRM's remaining objections to the Proposed Settlement are overruled. The Court finds class treatment proper, certifies the action as a class action, and approves the Proposed Settlement.

A final implementing order will be entered.

---

purely evidentiary, the Court need not carve out merits-based claims that arise from the statement in order to preserve its factual value for SRM.