FILED: NEW YORK COUNTY CLERK 05/20/2013 INDEX NO. 651786/2011
NYSCEF DOC. NO. 822 RECEIVED NYSCEF: 05/20/2013

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of the application of

THE BANK OF NEW YORK MELLON, (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures), BlackRock Financial Management Inc. (intervenor), Kore Advisors, L.P. (intervenor), Maiden Lane, LLC (intervenor), Metropolitan Life Insurance Company (intervenor), Trust Company of the West and affiliated companies controlled by The TCW Group, Inc. (intervenor), Neuberger Berman Europe Limited (intervenor), Pacific Investment Management Company LLC (intervenor), Goldman Sachs Asset Management, L.P. (intervenor), Teachers Insurance and Annuity Association of America (intervenor), Invesco Advisors, Inc. (intervenor), Thrivent Financial for Lutherans (intervenor), Landesbank Baden-Wuerttemberg (intervenor), LBBW Asset Management (Ireland) plc, Dublin (intervenor), ING Bank fsb (intervenor), ING Capital LLC (intervenor), ING Investment Management LLC (intervenor), Nationwide Mutual Insurance Company and its affiliated companies (intervenor), AEGON USA Investment Management LLC, authorized signatory for Transamerica Life Insurance Company, AEGON Financial Assurance Ireland Limited, Transamerica Life International (Bermuda) Ltd., Monumental Life Insurance Company, Transamerica Advisors Life Insurance Company, AEGON Global Institutional Markets, plc, LIICA Re II, Inc., Pine Falls Re, Inc., Transamerica Financial Life Insurance Company, Stonebridge Life Insurance Company, and Western Reserve Life Assurance Co. of Ohio (intervenor), Federal Home Loan Bank of Atlanta (intervenor), Bayerische Landesbank (intervenor), Prudential Investment Management, Inc. (intervenor), and Western Asset Management Company (intervenor),

Petitioners,

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

Index No. 651786-2011

Kapnick, J.

THE BANK OF NEW YORK MELLON'S
<u>REPLY IN FURTHER SUPPORT OF THE SETTLEMENT</u>

DECHERT LLP
Hector Gonzalez
James M. McGuire
Mauricio A. España
1095 Avenue of the Americas
New York, New York 10036
(212) 698-3500

MAYER BROWN LLP
Matthew D. Ingber
Christopher J. Houpt
1675 Broadway
New York, New York 10019
(212) 506-2500

Attorneys for Petitioner
The Bank of New York Mellon

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

ARGUMENT 2

I. The Trustee Has the Power to Settle Reasonably and in Good Faith. 2

II. The Objectors Still Have No Evidence That the Settlement Is Unreasonable.....................4

A. The Servicing Improvements and Document Cures Are Reasonable............................4

B. The Settlement Amount Is Adequate. 8

CONCLUSION..14

TABLE OF AUTHORITIES

Page(s)

CASES

Abatie v. Alta Health & Life Ins. Co.,
458 F.3d 955 (9th Cir. 2006) 3

Assured Guar. Mun. Corp. v. Flagstar Bank, FSB,
892 F. Supp. 2d 596 (S.D.N.Y. 2012) 4

Cogdell v. Fort Worth Nat'l Bank,
544 S.W.2d 825 (Tex. Civ. App. 1977) 9

Conolly v. Universal Am. Fin. Corp.,
2008 WL 4514098 (Sup. Ct. Westchester Cnty. 2008) 5-6

In re AIG, Inc. Sec. Litig.,
2013 WL 68928 (S.D.N.Y. 2013) 7-8

In re Dun & Bradstreet Credit Serv. Customer Litig.,
130 F.R.D. 366 (S.D. Ohio 1990) 6

In re Stillman,
107 Misc. 2d 102 (Surr. Ct. N.Y. Cnty. 1980) 3

MBIA Ins. Corp. v. Countrywide Home Loans, Inc.,
2009 WL 8634075 (Sup. Ct. N.Y. Cnty. Aug. 24, 2009) 9

MBIA Ins. Corp. v. Countrywide Home Loans, Inc.,
2013 WL 1845588 (Sup. Ct. N.Y. Cnty. 2013) 4

Trustees of S. Cal. IBEW-NECA Pension Plan v. Rios,
2009 WL 3232224 (C.D. Cal. 2009) 3

OTHER AUTHORITIES

Adam Levitin, *The BoA MBS Settlement* (June 30, 2011), *available at* http://www.-creditslips.org/creditslips/2011/06/the-boa-mbs-settlement.html (last visited May 19, 2013) 6

Restatement (Second) of Trusts (1959) 3

PRELIMINARY STATEMENT

After nearly two years, it is striking what little the objectors have to offer. They complain about the settlement amount, but they offer no expert evidence at all that $8.5 billion is not a fair settlement amount. They say that the Trustee should have rolled the dice with trust assets, but their own expert witness has acknowledged that it would have been reasonable for the Trustee to conclude that the trusts would recover no more than than $4.8 billion if the settled claims were litigated. They criticize the Trustee for obtaining unprecedented servicing *remedies* rather than arguing about speculative and difficult-to-prove claims for servicing *breaches*, but they offer no evidence of actual breaches and no path to proving servicer liability. On all of these points, their only "evidence" that the Trustee could have done better is the opening negotiating positions of the Institutional Investors, who, with complete understanding of those positions and the information supporting them, have actively supported this Settlement and indeed affirmatively requested that the Trustee enter into it.

After massive discovery and two years of proceedings, the objectors now even concede that settlement is the best course. After first taking the extreme position that the Trustee *lacked the power* to settle, the objectors now request that the Court order the parties to engage in yet more negotiations, along with more discovery. That strategy might give more objectors a seat at the table—a seat that AIG previously declined—but there is no reason to think that it would result in a penny more for the trusts. Mediation, which the Court cannot compel Bank of America or Countrywide to agree to (*see* BNYM Response 39-41),[1] would render the Settlement

[1] Citations to the May 3, 2013 filings are as follows: "BNYM Statement" refers to the BNYM Brief in Support of the Settlement (docket 750); "AIG Opp." refers to the AIG objection (docket 588); and "CP Opp." refers to the Cranberry Park objection (docket 719). Citations to the May 13, 2013 filings are as follows: "BNYM Response" refers to the BNYM Response to Objections (docket 793); "AIG Response" refers to the AIG response (docket 771); "CP

null and void, depriving thousands of Certificateholders the remedy that they (and, for that matter, the market[2]) have come to expect.[3]

Almost all of the objections in the oppositions filed by AIG and the small group joining it, and Cranberry Park, have been addressed before, and this reply is limited to addressing the handful of new arguments and developments in expert discovery. In short, the objectors have still, after multiple rounds of briefing, offered no viable argument for why the Court should disapprove the Trustee's entry into this Settlement or further delay the Certificateholders' receipt of the Settlement's substantial benefits.

ARGUMENT

I. The Trustee Has the Power to Settle Reasonably and in Good Faith.

Cranberry Park appears to be the lone objector still asserting that the Trustee cannot settle trust claims without express contractual authority. CP Response 5. Apparently, Cranberry Park believes that the Trustee may not take even "*necessary*" actions with respect to trust claims unless the PSAs explicitly say so. *Id.* Of course, the PSAs also do not explicitly say that the Trustee may sue the Master Servicer, review loan files, or give formal notice to Certificateholders that the Trustee received a Notice of Non-Performance or that it was having conversations with Bank of America and Countrywide—that is, all of the things the objectors

---

Response" refers to the Cranberry Park response (docket 792); and "Institutional Investors' Response" refers to the Institutional Investors' response (docket 763).

[2] This past Friday, the Amherst Securities Group, a leading RMBS advisor, reported that the securities covered by the Settlement are trading at a premium to similar securities, even though "the timing of and amount of [the settlement] payment is still unknown and there is a minute chance it does not happen." Amherst Mortg. Insight, *Subsequent Recoveries—What Is the Market Telling Us?* (May 17, 2013) (Ex. 1).

[3] All citations to "Ex. " reference the exhibits to the Affirmation of Matthew D. Ingber in The Bank of New York Mellon's Reply in Further Response to Objections, dated May 20, 2013 and filed simultaneously with this brief.

claim it should have done. The PSAs also do not explicitly state that the Trustee may engage in the mediation that both AIG and Cranberry Park seek—a step that would have no purpose if (as Cranberry Park suggests, and AIG's own experts have opined) the Trustee had no power to settle anything anyway. Cranberry Park further requests "an informed and orderly vote by all investors" (*id.* at 3), another procedure that appears nowhere in the PSAs. Cranberry Park's additional suggestion that any release of claims is an "amendment" of the PSAs is a novel interpretation that has no support in contract law generally and contradicts authority holding specifically that trustees may settle trust claims. *See* BNYM Statement 13-14.

AIG's response to the showing that the standard of review to be applied in this proceeding is whether the Trustee acted "beyond the bounds of a reasonable judgment" (*In re Stillman*, 107 Misc. 2d 102, 110 (Surr. Ct. N.Y. Cnty. 1980) (quoting *Restatement (Second) of Trusts* § 187 cmt. e (1959)) is nothing more than a series of baseless complaints. AIG claims that BNYM "cite[d] no authority" for various propositions, for example, that "bad faith 'requires not just that a conflicting motive exist, but also that the trustee has awareness of the conflicting motive, and the trustee then acts on it to the detriment of beneficiaries.'" AIG Response 5 (quoting BNYM Statement 16). AIG is wrong. BNYM's citations to supporting authorities filled more than a page in its Response (at 8-9). *See, e.g.*, *Trustees of S. Cal. IBEW-NECA Pension Plan v. Rios*, 2009 WL 3232224, at *5 (C.D. Cal. 2009) ("Even if a conflict of interest exists, its significance in determining how much deference to afford the entity's decision depends on the 'nature, extent, and effect' the alleged conflict actually had on the entity's decision-making process.") (quoting *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 970 (9th Cir. 2006)). It is AIG that cites no authority for the proposition that bad faith is established by hypothetical

conflicting interests, that the Trustee did not even recognize, and that had no effect on its decision to enter into the Settlement.

II. The Objectors Still Have No Evidence That the Settlement Is Unreasonable.

In its Statement, the Trustee pointed out that the objectors still, after two years, have presented no evidence that the $8.5 billion settlement amount is too low. AIG calls this "a baffling misstatement" (AIG Response 8) and declares that the settlement amount is "woefully inadequate" (*id.* at 9), yet it still offers no *evidence* either (a) that $8.5 billion is an unreasonable settlement amount or (b) that Countrywide could pay more than $4.8 billion.

A. The Servicing Improvements and Document Cures Are Reasonable.

AIG asserts that the Trustee did not "receive any compensation for claims stemming from servicing misconduct, document exceptions, or loan modifications." AIG Response 9.

AIG and Cranberry Park claim that the Settlement's servicing and document indemnity provisions are worthless, because Bank of America is already required to meet or exceed industry standards. CP Opp. 25-26; AIG Response 15-16. That is contrary to the PSAs, which subject the Master Servicer to only an undefined "prudent servicing" standard. PSA § 3.01. *See* PSA (Ex. 2). Equating "prudent" with "above average" would mean that, by definition and regardless of performance, half of all servicers would always be acting imprudently. That is not a plausible reading of the contracts. More importantly, the objectors fail to observe that the PSAs require that the Master Servicer act with gross negligence or bad faith before it can be liable for servicing failures. *Id.* § 6.03; *see also Assured Guar. Mun. Corp. v. Flagstar Bank, FSB*, 892 F. Supp. 2d 596, 606 (S.D.N.Y. 2012) (court held that servicing is subject to a gross negligence/bad faith standard, after which plaintiffs abandoned their servicing claims); *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.,* 2013 WL 1845588, at *17 (Sup. Ct. N.Y. Cnty. 2013) (adopting the gross negligence/bad faith standard for servicing breaches).

Rather than waste years litigating over how, if at all, gross negligence claims could be proved, the Settlement provides a huge cash payment and imposes objective measures that virtually guarantee significantly improved performance. It supplements the prudent-servicing standard with specific mandates for subservicing of loans at high risk of default and for the performance of loan modifications. Settlement Agreement ¶¶ 5(a)-(b) (Ex. 11 in Response).[4] It couples those terms with a requirement that the Master Servicer report and benchmark its performance against that of other servicers using objective and quantifiable criteria. *Id.* ¶ 5(c). Those benchmarks are enforceable with automatic monetary penalties if the Master Servicer's performance falls short of industry averages. *Id*. The Settlement thereby raises the performance standard (from "prudent" to "above average"), largely erases the gross negligence exculpation, provides transparency into servicing performance, and creates an automatic enforcement mechanism. The document cure provisions create a new remedy that is no longer restricted to the limited resources of Countrywide, and that identifies the specific loans with defects that might actually injure the trusts. *Id.* ¶ 6. The Settlement has already resulted in the cure of approximately half of the serious exceptions still outstanding, thereby *avoiding* losses before they happen. Litigation could not have done that, nor could the mediation that the objectors now request. Certificateholders are unquestionably better off as a result.

A recognized expert in mortgage securities, Philip Burnaman of The GreensLedge Group, opined that the reasonable value of the servicing improvements viewed as of the time the Trustee entered into the Settlement is at least $2.5 to 3.1 billion. Burnaman Report 5 (Ex. 51 in

---

[4] All citations to "Ex. in Response" reference the Ingber Affirmation filed with The Bank of New York Mellon's Brief in Response to Objections.

Support).[5] Such non-monetary terms are recognized as valuable consideration in settlement. *See, e.g.*, *Conolly v. Universal Am. Fin. Corp.*, 2008 WL 4514098, at *8 (Sup. Ct. Westchester Cnty. 2008) ("It is not essential that the settlement of a class action founded in allegations of malgovernance of a corporation end in a money payment. 'Corporate therapeutics' procedures which will prevent the same ills from recurring are a benefit to shareholders. In some ways, a resolution which ends with corporate reforms may be more beneficial to the shareholders than a monetary settlement.") (citations omitted); *In re Dun & Bradstreet Credit Serv. Customer Litig.*, 130 F.R.D. 366, 371 (S.D. Ohio 1990) ("[T]he settlement affords significant non-monetary relief directed at averting the conditions that Plaintiffs claim led to the damages they suffered. This non-monetary relief provides a benefit to all Class Members.").

One of AIG's own experts recognized the value of the servicing improvements, which he publicly praised when they were first announced in 2011. Professor Levitin, who now sings a different tune, wrote then that the "settlement has some very precise operational reforms mandated and a *much more serious verification mechanism*, including a requirement that audits of the servicers be done by firms that do not have significant other dealings with them." Adam Levitin, *The BoA MBS Settlement*, June 30, 2011, *available at* http://www.creditslips.org/-creditslips/2011/06/the-boa-mbs-settlement.html (last visited May 19, 2013) (Ex. 3). In fact, Professor Levitin believed that the servicing improvements were "an embarrassment" for the Office of the Comptroller of the Currency and the Federal Reserve, because they showed "just how weak the OCC/Fed Consent Orders are." *Id.* "The OCC and Fed had significantly greater leverage over the servicers than the investor coalition does," he wrote, "yet they were only able to extract generic operational reform promises." *Id.*

[5] All citations to "Ex. in Support" reference the Ingber Affirmation filed with The Bank of New York Mellon's Brief in Support of the Settlement.

The objectors also complain of a "sleight of hand" concerning Bank of America's responsibility for any servicing breaches. AIG Response 15. There is no sleight of hand; neither Bank of America nor the Trustee has ever disputed that Bank of America took on servicing liability. What is misleading is AIG's assertion that Bank of America's *servicing* liability includes "many billions of dollars" of losses for failing to pursue *representation-and-warranty* claims against Countrywide. *Id.* Aside from the defect common to all of the objections—namely, that there is no evidence of such liability beyond allegations by the Institutional Investors—AIG ignores that the servicer cannot be liable for failing to collect from Countrywide more money than Countrywide has. In other words, Bank of America's responsibility for servicing does not give the Trustee an end-run around the limits on Countrywide's ability to pay for breaches of representations and warranties that Countrywide, and it alone, made.

AIG's final point is that the Trustee did not assign a dollar value to the purported servicing breaches. But as the Trustee's counsel explained, that was a conscious decision: because "we certainly discussed how difficult it would be to value any alleged servicing wrongdoing" (Kravitt Tr. 486:20-22 (Ex. 4)), "[w]hat we focused on in the settlement was the quality of the servicing remedies as opposed to trying to put a dollar figure on any past transgressions" (*id.* at 485:15-18). Though AIG calls this a "glaring deficiency" (AIG Response 9), it does not even try to value the claims itself, explain how they could meaningfully be valued, or explain how the Trusts could have obtained a *better* remedy than the servicing improvements included in the Settlement. In fact, although it admits that "[w]hether the Master Servicer has failed to perform is a *fact* that exists or does not exist—it is not something that turns on the decision of a group of Certificateholders" (*id.* at 24) AIG's only evidence that servicing breaches or document exceptions occurred at all are allegations in the *Institutional Investors'* Notice of

Non-Performance (*see, e.g.*, *id.* at 15). The Trustee agreed with those same investors that the package of consideration in the Settlement Agreement adequately compensated the trusts, the same approach that AIG recently took in settling claims brought by its own shareholders. *See In re AIG, Inc. Sec. Litig.*, 2013 WL 68928, at *12 (S.D.N.Y. 2013) (approving settlement where "[p]arties claim to have taken a holistic approach to settlement, and that they considered the relevant information that was available to them").[6]

B. The Settlement Amount Is Adequate.

On the settlement payment, AIG reiterates its now-familiar criticism of the work of one of the Trustee's pre-settlement experts, Brian Lin. These critiques are not evidence that the Settlement is too small, or even that the Trustee was not reasonable in relying in part on Lin's report. The only evidence that AIG has presented with respect to Countrywide's potential repurchase liability comes, once again, from the opening negotiation positions of the same Institutional Investors who support the Settlement. AIG Response 11. AIG's attempt to derive a $50+ billion "repurchase liability" from the Burnaman report by altering Mr. Burnaman's actual breach rate variables to ones it deems "more realistic" is similarly unavailing. *Id.* at 12. AIG could have cited its own expert's "simulation" of repurchase liability, but it withdrew that opinion after the Trustee's expert pointed to critical flaws in the analysis. Once those errors were corrected, that opinion provided yet further evidence that the Settlement is reasonable. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Cowan Tr. 129:4-24 (Ex. 5).

---

6 The other argument, in which AIG itself did not join, that the PSAs prohibit loan modifications unless the servicer repurchases the loan, is simply wrong. *See* Institutional Investors' Response at 22-27.

The best that the objectors can offer now is an extremely misleading cash-per-trust comparison to Bank of America's recent settlement with MBIA (averaging the settlement payment across 15 litigated second-lien trusts—without regard to the size of the trusts, projected collateral losses, or product type[7]). But that comparison ignores several key terms of that settlement, in particular (1) that Bank of America received not only a release of repurchase liability to MBIA on those trusts *and* 31 first-lien trusts but also a release of several other claims and warrants for nearly five percent of MBIA's stock, and (2) that MBIA as a monoline insurer had direct rights with lower thresholds than have ever been applied to trust claims. AIG Response 12-13.

AIG argues that the $8.5 billion settlement amount must be compared not to Lin's bottom-line estimate of damages, but to a range that assumes that *every* arguable breach is an actual breach, is incurable, and had a material and adverse effect on Certificateholders. *See* Institutional Investors' Response 16. These assumptions are not even defensible, and the Trustee's consideration that it might not win 100% of the time is certainly not unreasonable. *See Cogdell v. Fort Worth Nat'l Bank*, 544 S.W.2d 825, 827 (Tex. Civ. App. 1977) ("there exists the possibility that Trustee would recover a substantially greater amount than the amount of the settlement, but there is also the possibility that Trustee would recover a lesser amount or nothing") (citation omitted); Fischel Report 9 (Ex. 38 in Support) ("[I]n making the decision to settle, the Trustee avoided . . . the risk that extending the proceedings would result in developments that would not improve the ultimate outcome but rather the opposite, a result less

---

[7] The trusts at issue in litigation between MBIA and Bank of America and Countrywide were all composed of second-lien loans. *See* Amended Complaint at 1, *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 2009 WL 8634075 (Sup. Ct. N.Y. Cnty. Aug. 24, 2009). By contrast, the Covered Trusts are overwhelmingly first-lien trusts. By their very nature, however, second liens have greater loss severities, and therefore losses, than do first liens.

favorable than the $8.5 billion plus the Servicing Improvements and the Document Remedy, in the extreme case a recovery of zero."). AIG also forgets that Lin explicitly did not account for legal haircuts, including the possible need to prove loss causation, Countrywide's inability to pay, and the costs and uncertainty associated with litigation that indisputably would last many years.

On the question of Countrywide's ability to pay, the objectors still have no response at all to the $4.8 billion maximum recovery from Countrywide calculated by Capstone. The only hint that the Trustee might have been able to recover more in litigation comes from their litigation expert's (Professor Coates) recent recanting of his sworn deposition testimony that 45% is a reasonable estimate of the chance of winning on successor liability. Because AIG wrongfully accuses us of a "misleading use of Professor Coates' deposition testimony" (AIG Response 14 n.42), we provide further context here.

At deposition, Professor Coates testified as follows:

> Q. All right. Let's do it this way: Tell me what's your opinion on the probability weighting of Countrywide's liabilities being imposed on Bank of America under a successor liability theory?
>
> A. As currently informed, I believe it's above 50 percent.
>
> Q. Okay. Can you say how much above 50 percent?
>
> A. No, not with any great precision.
>
> Q. Could reasonable minds differ and perhaps somebody suggest it's under 50 percent?
>
> A. Yes.
>
> Q. So would it be unreasonable to assume that the most likely outcome here would be that the trustee would have failed on its successor liability claim, would that be unreasonable?
>
> A. It would be—*I think it would be reasonable to believe that someone could reach a reasonable judgment that there was less than a 50 percent*

chance of prevailing. So if that's your question, the answer is yes. However, just to be clear and complete, I don't believe it would be anywhere close to a zero.

Q. If you have less than 50 percent chance of prevailing on something, that means the most likely outcome is that you won't prevail, right?

A. Correct by definition. It's not, however, my opinion. My opinion is that it is, in fact, more likely than not.

* * *

Q. All right. And a reasonable person looking at this could conclude that it was more likely than not that successor liability would fail.

A. I think I said that, yes.

Coates Tr. 224:18-225:21; 228:15-19 (Ex. 6) (emphasis added).

In his new affirmation, issued just days ago and well after his deposition testimony, Professor Coates says that "the Settlement Proponents distort my testimony when they state that my best estimate of the likelihood of a court imposing successor liability on Bank of America is between 45% and 65%." Coates Aff. ¶ 3. But that is exactly what he said under oath:

Q. If I'm understanding your testimony, based on the work that you've done, your *best analysis of the likelihood of success of imposing successor liability on Bank of America for Countrywide's liabilities* would be between 45 percent and 55 percent likelihood of success?

A. No. *Between 45 and 65* centered at 55.

Coates Tr. 227:18-24 (Ex. 6) (emphasis added). That 45%-65% range is 45 to 65 percentage points higher than actual experience—in dozens of cases, the percentage in which Bank of America has been held liable as a successor to Countrywide is exactly zero. Daines Report 20-21 (Ex. 26 in Support). But even that grossly inflated range is dispositive. It means that there is no dispute that the Trustee could reasonably have concluded that the most likely outcome would have been a loss on successor liability. Coates Tr. 228:15-19 (Ex. 6) ("Q: All right. And a reasonable person looking at this could conclude that it was more likely than not that successor

liability would fail. A: I think I said that, yes."). Thus, the decision to accept $8.5 billion—which is $3.7 billion more than the maximum Countrywide could pay assuming it had no other unsecured creditors—was not just reasonable, it was compelled. This is reason alone to approve the Settlement.

Since his deposition, and since the implications of his sworn testimony became clear to the objectors, Professor Coates claims to have suddenly realized that the likelihood of success on successor liability is actually 65% to 75%—in other words, that the *minimum* of his new range is the *maximum* of the old one. He seeks to explain away his prior testimony by saying that he "was not . . . offering a bottom line conclusion." Coates Aff. ¶ 4. He explained during his deposition that a "bottom line opinion" means "a binary yes or no," or "the actual truth," rather than "a probability assessment." Coates Tr. 213:20-214:18 (Ex. 6). Yet a (revised) probability assessment is just what his new affirmation offers.

Moreover, he made clear that he was not just prepared but "quite confident" about the very probability assessment that he now disavows:

> Q: Have you done the work sufficient to form an opinion on the question of the likelihood of success on a claim of de facto merger with respect to imposing Countrywide's liabilities on Bank of America?
>
> A: I don't know how to answer that question. *I certainly have done the work to form an opinion about the elements of a conclusion that a New York court would apply de facto merger doctrine to the Bank of America Countrywide transactions.* It's of course, always possible that some other facts might come out that would be relevant and so which—some of which I can't anticipate. I do believe I could render a view—*I have an opinion about the likelihood, as we've already discussed.*
>
> * * *
>
> So there are things that I would do that I have not done if I were being asked to give a bottom line opinion of the ultimate issue. *Having said that, I do feel* ***quite confident that I could give an opinion about probabilities*** *based on what I know now.*

Id. 211:11-25; 212:25-213:5 (Ex. 6) (emphasis added).

> Q: Have you performed the work necessary to perform a probability weighting of the likelihood of success of imposing Countrywide's liabilities on Bank of America?
>
> A: Yes. I have an opinion about that.

Id. 219:9-13 (Ex. 6).

> Q: Have you analyzed all of the issues that you think Professor Daines should have analyzed in reaching his opinion?
>
> A: Sitting here today, I can't think of any issue that I would have, had I been in his shoes tried to analyze, that I haven't tried to analyze.

Id. 222:12-17 (Ex. 6).

> Q: And based on the information that you've seen that's been obtained in discovery in MBIA, has that made it more or less likely in your mind that a successor liability claim would succeed?
>
> A: More.
>
> Q: Okay. And your—the opinion you gave earlier about the probability of success of a successor liability claim, that's taking into account everything that you've learned in your work up to today, right?
>
> A: Correct.

Id. 240:6-16 (Ex. 6).

Professor Coates's newly-minted opinion lacks all credibility. He would have the Court believe that he *forgot* that, when hired to support MBIA's position on successor liability, he believed that MBIA was more likely than not to prevail. The Court will have an opportunity to assess Professor Coates's changing testimonies at trial. In any event, even under his newfound opinion, there still is a significant chance (as much as 35%) that the Trustee would recover no more than $4.8 billion after years of litigation. As the Trustee said in its Verified Petition (¶ 63) the day that this case began, that, by itself, proves the reasonableness of the Settlement.

CONCLUSION

For all of the foregoing reasons, the Court should grant the Trustee's Verified Petition.

Dated: May 20, 2013
New York, New York

Respectfully submitted,

s/Matthew D. Ingber

Matthew D. Ingber
Christopher J. Houpt
MAYER BROWN LLP
1675 Broadway
New York, New York 10019
(212) 506-2500

Attorneys for Petitioner
The Bank of New York Mellon

Hector Gonzalez
James M. McGuire
Mauricio A. España
DECHERT LLP
1095 Avenue of the Americas
New York, New York 10036
(212) 698-3500