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) Petitioner, for an order pursuant to CPLR § 7701 seeking judicial instructions and approval of a proposed settlement.	Index No. 651786/2011 Assigned to: Kapnick, J.

REPLY AND REBUTTAL EXPERT REPORT OF

PROFESSOR JOHN C. COATES IV

I. Introduction and Scope of Engagement

I have prepared this report at the request of Intervenor American International Group, Inc. (***AIG***). I previously rendered an opinion concerning the Trustee's failure to adequately consider BAC's successor liability and other legal doctrines and avenues through which the Covered Trusts could maximize recovery. This report is submitted in response to reports filed on behalf of the Trustee by Professors Robert M. Daines (***Daines March 2013 Report***) and Daniel Fischel (***Fischel Report***). It is also submitted in further support of my initial report. Capitalized terms used and not defined herein have the meanings in my initial report, dated February 28, 2013 (***Coates Initial Report***).

II. Opinions

Having reviewed the Daines March 2013 Report and the Fischel Report, as well as the other documents cited in my initial report, it is my opinion that:

1. As a preliminary matter, the Daines March 2013 Report and the Fischel Report spend many words attacking my initial report by describing tasks or analyses that I did not do for purposes of that initial report, such as engaging in fair value analysis or reaching bottom-line legal conclusions about various possible claims. See, e.g., Fischel Report (at paragraph 19): "Professor Coates … has … reached no conclusions on the very same claims and transactions he criticizes the Trustee for not adequately investigating." I had not conceived of my role as trying to do the Trustee's work for it, or to substitute my judgment for that of a court in evaluating the Claims. It would be an unusual expert who offered to tell a court how to rule in a case. Rather, I conceived of my task as evaluating some types of information that the Trustee could have obtained before deciding whether to proceed with the Settlement and on what terms. Nothing in the Daines March 2013

Report or the Fischel Report changes any of my views on what I in fact opined about, or my conclusions: The Trustee had available to it many steps that would have enabled it to engage in an adequate evaluation of the Claims, many of which it did not take at all, and some of which it did undertake in a constrained and limited fashion, undermining their value for arriving at an objective understanding of the potential value of the Claims, and thus for an objective evaluation of the Settlement.

2. Having reviewed the documents identified in my initial report, as well as the Daines March 2013 Report and the Fischel Report and the exhibits to those reports, I have seen no evidence that prior to the Petition the Trustee obtained from third parties any information about potential fiduciary duty or fraudulent conveyance claims that Countrywide or its subsidiaries might have had against BAC and its subsidiaries. The Daines March 2013 Report responds to this void in the record as if my initial report had suggested that ***his*** initial report had been remiss in not addressing those claims.
    a. For example, the Daines March 2013 Report stresses that such claims would not have been claims that the Trustee could have brought directly, as if that were sufficient to make such claims irrelevant to the Trustee's evaluation of the Settlement.
    b. But the reason that such claims should have been considered by the Trustee – not by Professor Daines, who apparently was not asked about them by the Trustee – is that they could affect the maximum recovery that the Trustee could have obtained from direct Claims against Countrywide and its subsidiaries.
    c. As noted in my initial report, the Trustee seems to have believed, based on information from Capstone (whose analysis was limited by the Trustee), that the

maximum recovery from Countrywide and its subsidiaries was limited to assets on the balance sheet of those entities.

d. The failure of the Trustee to consider potential additional claims that those entities might have brought against BAC and its subsidiaries meant that the Trustee's comparison of the Settlement with the potential value of the Claims was inadequately informed.

3. In the Daines March 2013 Report, the Trustee has now belatedly asked Professor Daines to address Countrywide's potential fraudulent conveyance and fiduciary duty claims. Professor Daines's opinions on those potential claims contain clear errors, as I discuss below. But before rebutting the substance of those opinions, it is worth noting that in this respect, and in other places, the Daines March 2013 Report is no longer a report by a purportedly neutral advisor providing information to the Trustee relevant to its evaluation of the Settlement. Rather, it is a report being used by both the Trustee and BAC to advocate litigation positions in favor of the Settlement by making arguments (in response to filings by the intervenors) that go well beyond the substance of the issues addressed in the initial Daines Report, which was limited to veil-piercing, successor liability and related choice of law issues. This shift in role is telling, and certainly calls into question the neutrality of the advice contained in the initial Daines Report. The Daines March 2013 Report also offers explicit bottom-line legal opinions on issues relevant to an evaluation of the Settlement. It is one thing for an academic advisor to provide advice to a fiduciary in advance of a possible settlement (provided that advice is adequately informed) and to assist the fiduciary in evaluating that settlement, but it is another thing altogether for that same academic to help the fiduciary defend the settlement after the

fiduciary has agreed to it, in an adversarial litigation in which the academic reaches well beyond the scope of their initial advice.

4. Not only does the Daines March 2013 Report reflect a fundamentally different role for its author, but it also (at, e.g., 12, n.9, 13, 14, 16-22) adopts ***BAC's*** arguments from ***unrelated*** litigation brought by third parties against BAC – in which the Trustee has no role whatsoever. Among other things, the Daines March 2013 Report misleadingly quotes out of context parts of a report that I have prepared in another unrelated lawsuit – from five years ago, not involving BAC, the Trustee, or any of the issues relevant to my report in this matter – that were first used in an identical, misleading fashion by lawyers for BAC (note: not by lawyers for the Trustee, but for ***BAC***). In doing so, the Daines March 2013 Report, however, fails to note that (a) in that prior report of mine it is clear that it was not addressed to fraudulent conveyance, fiduciary duty, or successor liability doctrines, (b) that even as to the doctrines it did address (such as veil-piercing and substantive consolidation), it plainly stated that there were "limited circumstances under which corporate separateness will be ignored," (c) that the facts at issue in that prior case did not involve any set of M&A transactions that were being alleged to have resulted in successor liability, whether under the de facto merger doctrine or otherwise; and (d) that in the same report I emphasized that the benefits of the principle of corporate separateness would be undermined if "courts were to frequently or casually ignore corporate separateness," and did not in any way imply that doctrines such as the de facto merger doctrine, which is triggered only upon transactions that have significant and unusual effects upon the companies involved, are inconsistent with economic efficiency. It is one thing to offer advice about a potential settlement; it is another thing to offer

opinions that are tailored to defending that settlement after it has been agreed; it is yet a third thing to adopt and restate tendentious and misleadingly partial descriptions of facts taken straight from an adversary in the case being settled.

5. With respect to the potential fraudulent conveyance claims that Countrywide might have had against BAC, the Daines March 2013 Report contains several clear errors.

   a. First, it states (at 13) that Countrywide could have brought fraudulent conveyance claims ***only*** "if Countrywide were in bankruptcy," because only companies "in bankruptcy" can assert such claims, "due to provisions of the Bankruptcy Code." However, while the federal Bankruptcy Code does contain fraudulent conveyance provisions, so too do the laws of most states, including New York. N.Y. Debtor Creditor Law §§ 270 through 281. Those state fraudulent conveyance statutes provide a cause of action outside of bankruptcy. Id. §§ 278 and 279.

   b. Second, the Daines March 2013 Report ignores the fact that the Trustee's entire successor liability analysis – which the initial Daines Report was meant to inform – was predicated upon Countrywide (and its affiliates) being potentially unable to pay the Claims – i.e., that it was or would become insolvent, limiting recoveries under the Claims. If that were true, then a bankruptcy of Countrywide was entirely plausible to expect, if the Trustee had pursued the Claims, and in fact it was something that BAC's own managers considered. Deposition of Joe Price in *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, Index. No. 602825/2008 (May 23, 2012) at 315:7-9 (Price recalls "preserving the optionality [of putting Countrywide into bankruptcy] on or around before LD1.") In such event, then a fraudulent conveyance action under the U.S. Bankruptcy Code would also have been possible, and in a bankruptcy

proceeding, such a claim might have been pursued on behalf of creditors, including (for example) by the Trustee, in the bankruptcy proceeding.

c. Third, the Daines March 2013 Report also states (at 12) erroneously that my initial report "concedes [that] a fraudulent conveyance claim requires 'proof that less than adequate consideration was paid in the relevant transaction.'" This quote misleadingly leaves out the word "constructive" used in that specific place in my initial report (as in the legal doctrine, "constructive fraudulent conveyance," as contrasted with "actual fraudulent conveyance"). More importantly, the statement in the Daines March 2013 Report rests on the false assumption that a fraudulent conveyance claim requires proof of less than fair consideration. In fact, under New York law, a fraudulent conveyance from a debtor to a party in control of a debtor can proceed on the ground that such a conveyance is not in good faith, without proof that less than fair consideration was paid. *See Southern Industries, Inc. v. Ernest Jeremias et al.*, 66 A.D.2d 178 (2d Dep't 1978).

d. Since BAC was wholly in control of Countrywide and its subsidiaries at the time of the Asset-Stripping Transactions, such a claim would be entirely feasible without addressing the difficult factual issues involved in reconstructing the value of the assets transferred in such conflict of interest transactions.

e. Indeed, fraudulent conveyance doctrine has developed as it has precisely ***because*** of the difficulties of such proof in contexts where the recipient of a transfer or conveyance is in control of the debtor that is or becomes insolvent, where normal market constraints between arm's-length parties are not relevant, and where the party in control of both debtor and transferee can "manage" the factual record in any way

useful to interfere with third party creditors' ability to obtain information relevant to a fair valuation of the transferred assets.

6. The Daines March 2013 Report also contains clear errors in its discussion of the potential fiduciary duty claims that Countrywide and its subsidiaries might have had, which again the Trustee failed to investigate at all prior to filing the Petition.

   a. The Daines March 2013 Report, for example, states (at 14) that fiduciary duty claims would not be successful ***because*** (the report asserts) "undisputed evidence establishes that fair value was paid" in the Asset-Stripping Transactions that BAC imposed on Countrywide and its subsidiaries following BAC's acquisition of those companies.

   b. The Daines March 2013 Report provides no support for this assertion, and it is inconsistent with corporate law generally, including Delaware law. Numerous Delaware decisions establish that in a conflict-of-interest transaction, such as the Asset-Stripping Transactions, the burden is on the interested fiduciaries to establish that the transactions were at a fair price ***and*** were the result of a fair process. Proof of one alone does not suffice. *See, e.g.*, *Kahn v. Tremont Corp.*, 694 A.2d 422, 432 (Del. 1997) ("process" is "so intertwined with price that … a finding that the price negotiated by the Special Committee might have been fair does not save the result" where the process is unfair); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983) ("The concept of fairness has two basic aspects: fair dealing and fair price.… However, the test for fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness."). (There are methods to shift the burden of proof of fairness from the fiduciary in such cases, but none were used in the Asset-Stripping Transactions.)

c. If there are uncertainties as to valuation, those would be resolved against the fiduciary. The fact that – in a proceeding completely unrelated to this one – another plaintiff in a suit against BAC and its subsidiaries has chosen not to contest the valuation of the price paid by BAC to Countrywide in the Asset-Stripping Transactions should have no relevance here, particularly if the Trustee is attempting to arrive at a neutral, objective understanding of Countrywide's assets (much less advocating for its beneficiaries), and not simply accept the litigation positions taken by BAC at face value. It is even more surprising to see BAC's factual assertions in that litigation being advanced in the Daines March 2013 Report, since (as best one can tell from it) Professor Daines has done no independent investigation of those assertions.

7. The Daines March 2013 Report also contains new opinions – beyond the scope of his initial report, as Professor Daines conceded at his deposition – on the relevance of the choice of law provisions in the PSAs. The Daines March 2013 Report asserts (at 15) without any support that the "claims for breaches of representations and warranties are *origination* claims, not *servicing* claims." But Professor Daines fails to note that the BAC Master Servicer is under a duty pursuant to section 2.03(c) of the PSAs to provide notice of breaches and to respond once informed of the breaches. Claims arising from the Master Servicer's breaches of those duties are servicing claims, and not merely origination claims. I have seen no evidence that the Trustee evaluated the possibility of bringing actions related to those duties in approving the Settlement.

8. The Daines March 2013 Report attaches a number of reports filed ***on behalf of BAC*** in connection with the *MBIA* litigation, some responsive to my report in that case, and offers

his opinion that the experts in that case offered "reasonable rebuttals" to my conclusions in that case. However, Professor Daines nowhere addresses the fact that much of the information reflected in those reports was available prior to the Trustee's decision to enter into the Settlement, but was nowhere reflected in the Trustee's evaluation of the Settlement. Nor does the Daines March 2013 Report offer any specific response to the claims made by MBIA in its case – rather, he falls back on the fact that ***BAC*** asserts in that case – based on its own, highly interested view of the facts – that BAC paid fair value in the Asset-Stripping Transactions. Nowhere does Daines analyze relevant New York case law to address whether the burden is on a plaintiff to prove the unfairness of consideration in a de facto merger, instead offering (at n. 14, at 26) one cite to a Federal court decision (*Cargo Partner*) that in fact does not support his unusual view of New York de facto merger law, but rather states that there is no "unfairness" to creditors from a transaction if the buyer pays "a bona fide, ***arms-length*** price" for the assets, which is not the same thing as a conflicted fiduciary estimating a "fair price" based on an asset-by-asset valuation of the company being acquired (emphasis added). Moreover, in that case, as Professor Daines fails to note, there was no continuity between the buyer's shareholders and seller's shareholders, as there indisputably were in the Asset-Stripping Transactions carried out by BAC. See *Cargo Partner AG v. Albatrans, Inc. et al*., 352 F.3d 41, 43 (2003) ("here, there is no continuity between the stockholders of the selling corporation and the purchasing corporation post-acquisition"). By contrast, he does not cite or review the facts of any of the numerous New York state court decisions finding de facto mergers on facts much closer to those involved in the Asset-Stripping Transactions.

9. While Professor Daines says he has reviewed the "lengthy choice of law briefing in MBIA" and that he has not changed his choice of law opinions from his initial report, he provides no explanation or reasons for sticking with his bottom line conclusions – of which there were in fact two, somewhat different ones: (a) at 38, "New York law may not … apply," and (b) at 41, "I do not expect" New York courts to apply New York law. He takes this position despite the many contacts between New York and the Claims, including:

   a. The Trustee's principal place of business and state of incorporation,

   b. The location of the alleged wrongful conduct by the defendants,

   c. The location of a substantial number of investors,

   d. The choice of law designated in the PSAs,

   e. The state of incorporation of CHL (the originator of many of the relevant home loans and Countrywide's principal operating subsidiary during the relevant time frame), and

   f. The choice of law designated in the 2008 Asset Purchase Agreement and Stock Purchase Agreements for the Asset-Stripping Transactions.

   Nor does he respond to the fact that the Trustee translated "may not" and "I do not expect" into a *zero* probability on both the choice of law question and on what would happen even if Delaware law applied, since it attached zero weight to the possibility that the Claims could produce a recovery in excess of what Capstone found Countrywide's net assets to be. This is another example of Professor Daines apparently choosing to side entirely with BAC's litigation positions in other proceedings without any explanation

rather than providing a neutral or objective comparison of the strength and weakness of the positions taken by BAC and the other parties to those cases.

10. The Daines March 2013 Report also asserts (at 23) that my initial report "incorrectly states that one New York court has 'concluded' that it would apply New York law to a successor liability claim against Bank of America." What the Daines March 2013 Report does not note is that the source for that statement was the initial Daines Report itself, which stated (at 40) that the court in the MBIA case had judged New York law and Delaware "substantially similar," and then went on to state "Although the New York Supreme Court did not explain its choice of law decision or discuss why it presumed the application of New York's substantive law, the decision might influence other New York courts." As I noted in my initial report, these facts (taken directly from the initial Daines Report) are hard to square with the Trustee's apparent belief that there was a zero chance that a New York court would apply New York law had the Trustee brought the Claims in a New York court.

11. Finally, the Fischel Report stresses none of these substantive points (other than to label the mere mention of hoary doctrines such as fiduciary duty "inflammatory rhetoric," the irony of such labeling being hard to overlook). Instead, he simply argues that the information-gathering and analysis that I pointed out in my initial report had not been done by the Trustee (or had been done in a very constrained fashion) because it would cost money. That in a trivial sense is true of any step a fiduciary might take in respect of any decision, and it cannot be the case that the mere fact that anything a fiduciary might do would cost money excuses it from having to defend not taking any action whatsoever in making a fiduciary decision. Nor can it be (as the Fischel Report suggests (at

paragraph 15)) that a fiduciary must have a "guarantee" that the expense will produce a more favorable outcome for it to have a responsibility to incur the expense – that, again, would eliminate any meaningful responsibility on the part of fiduciaries, who could always correctly point out that few if any things in life are guaranteed. Perhaps most importantly, however, the Fischel Report never addresses the fact that the Trustee was to be reimbursed and indemnified for all costs associated with the Settlement, as reflected in [redacted], thereto, and the side letter agreement between the Trustee and the BofA Master Servicer.

12. The Fischel Report (at paragraph 18) further argues that I should have considered that additional steps taken by the Trustee could have made the outcome of the settlement negotiations with BAC worse. If, indeed, the Trustee determined that further investigation into the claims and defenses might hurt the chances of settlement, and therefore declined to make such investigations, it cannot then be heard to ask the Court for determinations that it "evaluated…the strengths and weaknesses of the claims being settled, [and] considered . . . the positions presented by . . . Bank of America, and Countrywide . . ." and that its "deliberations appropriately focused on the strengths and weaknesses of the . . . alternatives available or potentially available to pursue remedies for the benefit of Trust Beneficiaries . . . ." (Proposed Final Order and Judgment at ¶¶ i, j.) I have seen no evidence to suggest that the Trustee did anything to analyze its options in a meaningful way: there are no specific deadlines, risks analyses related to time, data relating to Countrywide's ongoing revenues and/or losses or risks, etc.
13. Several of the steps I reviewed in my initial report would not have generated significant expense or delay. For example, attempting to quantify the probabilities reflected in the

successor liability analysis in Professor Daines's initial report, and then relating them to possible outcomes of bringing such claims, as a way of assessing whether the benefit (on a probability-weighted basis) might outweigh those costs. Asking Professor Daines to add fraudulent conveyance and fiduciary duty claims to his report would – if Professor Daines is to be believed – have not significantly delayed the Settlement, as Professor Daines says the time he had was more than ample to do the analyses he was asked to do. The Trustee could have engaged a true choice-of-law expert, moreover, on a time track that would have paralleled the work that Professor Daines and Capstone were doing for their initial reports. In any event, the thoroughness of the Trustee's investigation should not have been driven by a desire for expediency, and the Trustee certainly could have hired its various advisors much earlier in the process or wait until a thorough analysis was done before concluding the process.

14. I have seen nothing in the record that the Trustee ever took seriously the prospect of costing out litigation through all possible appeals, despite the fact that the discovery phase of a lawsuit would have generated significant new information relevant to the successor liability and other claims it had available to it. Even now, there is nothing in the Trustee's responsive reports to show how much time or expense such steps would have been expected to generate. Whatever the costs of these steps were, the record I have reviewed suggests that the Trustee does not seem to have spent the small amount of time and effort to seriously consider whether to incur them, which would have entailed something more than the record reflects the Trustee did. Such costs would in all likelihood have paled before even a small percentage chance of improving a successor liability claim, given the very large size of the Claims and the relatively small size of the

stated assets of Countrywide as valued by Capstone. The point is thus not whether I can demonstrate after the fact that the Trustee failed to engage in a cost-justified action, but that the Trustee failed to incur the basic costs that would have been incurred by a fiduciary acting with the goal of obtaining a fair and full assessment of the alternatives to the Settlement.

15. Both the Fischel and the Daines March 2013 Reports attempt to make much of the fact that some financial institutions favor the Settlement. Neither provides any basis for concluding that they have evaluated the reasons those institutions may have for wanting to settle that may differ from the evaluation that the Trustee was responsible for conducting. Any particular investor may have different interests, some arising due to relationships with BAC or other interested parties, some due to separate interests or resource constraints, etc.

16. Finally, the Fischel Report offers a cute but utterly unpersuasive "event study" purporting to prove that the Settlement must be a good idea because the market did not move in response to its announcement in a way showing that BAC would gain from the Settlement. The Fischel Report offers no way to assess the degree to which the market understood the very things that the Trustee was tasked to evaluate: i.e., the potential value of the Claims as compared to the Settlement. Nor does it provide any basis to know whether the market anticipated the settlement, or the possibility that the settlement would (or would not) be challenged, or would (or would not) be approved, and what might happen if it were not approved. Without further analysis of this kind, the market response analyzed in the Fischel Report is utterly uninformative on the merits of the

Settlement itself. It is informative of the lengths to which the Trustee will go to defend its ill-informed Settlement.

Appendix A

Dep. Ex. No.	Date	Description
		Deposition Exhibits
1	6/28/2011	Settlement Agreement
4		Proposed Final Order and Judgment
5	6/28/2011	Side letter agreement (Ex. C to Settlement Agreement)
13	7/1/2005	Pooling and Servicing Agreement dated as of July 1, 2005, CWALT Mortgage Pass-Through Certificates, Series 2005-35CB (BNYM_CW-00217617-857)
52		[redacted] (BNYM_CW-00270587-89)
138	4/23/2011	Email dated 4/23/11 from Mr. Kravitt [redacted] (BNYM_CW-00273353-357)
		Court Documents
2	6/29/2011	The Bank of New York Mellon's Verified Petition (DKT0001)
	6/29/2011	BNYM's memorandum in support of verified petition (Docket #12 in state court)
	8/08/2011	AIG's Memorandum of Law in Support of Verified Petition to Intervene (DKT0109)
131	10/31/2011	The Bank of New York Mellon's Consolidated Response to Objections (DKT 126, S.D.N.Y.)
	2/26/2012	Order: Stipulation of Parties (DKT 527, NY Sup. Ct.)
		Advisors' Opinions
10		Daines Opinion (BNYM_CW-00249578-635)
11	5/27/2011	Barry E. Adler's Report dated 5/27/11 (BNYM_CW-00120115-128)
12	6/7/2011	Capstone Valuation Services, LLC's Countrywide's valuation analysis dated 6/07/2011 (BNYM_CW-00249770-784)
27	5/27/2011	Substantive Consolidation Opinion of Professor Barry Adler (BNYM_CW-00120129-142)
		Expert Opinions
	2/28/2013	John Coates's 3/28/2013 Report (Unredacted)
	3/14/2013	John Langbein's 3/14/2013 Opinion (Unredacted)
	3/14/2013	Robert Landau's 3/14/2013 Opinion (Unredacted)
	3/14/2013	Phillip Burnaman's 3/14/2013 Opinion (Unredacted)
	3/14/2013	Daniel Fischel's 3/14/2013 Opinion (Unredacted)
	3/14/20113	Daines opinion (Unredacted)
		Deposition Transcripts
	5/23/2012	Deposition of Joe Price in *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.,* Index. No. 602825/2008 (May 23, 2012)
133	9/19-9/20/2012	Kravitt Deposition Transcripts, September 19-20, 2012
	10/2-10/3/2012	Lundberg Deposition Transcripts, October 2-3, 2012
	11/14/2012	Scrivener Deposition Transcript, November 14, 2012
	12/03/2012	Bailey Deposition Transcript, December 3, 2012
	12/12/2012	Laughlin Deposition Transcript, December 12, 2012
	12/13/2012	Adler Deposition Transcript, December 13, 2012
	12/17/2012	Patrick Deposition Transcript,
	1/03/2013	Griffin Deposition Transcript, January 3, 2013
	1/08/2013	Stanley Deposition Transcript, January 8, 2013
	1/18/2013	Bingham (Capstone) Deposition Transcript, January 18, 2013
	1/24/2013	Daines Deposition Transcript, January 24, 2013