**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), et al.**

**Index No. 651786-2011**

# Kapnick, J.

# Expert Reply Report of Tamar Frankel

I have been asked by the firm of Reilly Pozner LLP to examine and evaluate three reports submitted by the applicants' experts, namely those of Professor John H. Langbein (hereinafter Professor Langbein), Mr. Robert I. Landau (hereinafter Mr. Landau) and Professor Daniel R. Fischel (hereinafter Professor Fischel).

The following points summarize the opinions I discuss in more detail below:

- The Trustee's assumption of expansive powers necessarily gives rise to expanded duties. *See infra* ¶ 1.

- If Professor Langbein's position holds and default trust law applies, the commensurate duties apply. *See infra* ¶ 5.

- Trustees do not have *rights* with respect to trust property. They have *entrusted powers and duties relating to trust property. See infra* ¶ 9.

- The Trustee does not have the power to declare whether an Event of Default has occurred or forbear on an Event of Default. The Event of Default is a state of affairs that exists regardless of the Trustee's declaration or purported forbearance. *See infra* ¶ 10.

- The Trustee may not circumvent the Governing Agreements' amendment procedures by extending the mandated 60-day cure period. *See id.*

- The timing of the Trustee's advisor reports raises serious questions about the Trustee's performance of its duty of care. *See infra* ¶ 12.

- It is not the role of a Trustee to be objective, but rather an *advocate* for the beneficiaries. Yet, here the Trustee acted as an objective judge at best, and at worst took action adverse to the Covered Trusts. *See infra* ¶ 15.

- The Trustee's delegation of negotiations to the Insiders constituted a violation of its fiduciary duties to the Outsiders. The Trustee failed in its duty to act as an *advocate* for the Outsiders. *See infra* ¶¶ 23-24.

- The Trustee's failure to notify the Outsiders constitutes a violation of its duty of care. Such a notice does not require canvassing all investors as Professor Langbein suggests, and was part of the Trustee's usual practice. *See infra* ¶¶ 20-22.

- A trustee may not benefit from the entrusted property and power. These were given to it for the sole purpose of performing its services *for the benefit of its beneficiaries*. Yet this Trustee used its trust powers to benefit itself, including an indemnity and a release. *See infra* ¶¶ 32-38.

The reports submitted by Professor Langbein, Mr. Landau, and Professor Fischel are failed attempts to justify the Trustee's actions during the negotiation of the proposed settlement. Professor Fischel opines that the Trustee acted reasonably, but he ignores ample evidence to the contrary. Mr. Landau attempts to exculpate the Trustee by resorting to purported industry practices, but he does so without any discussion of how industry practice comports or does not comport with trust law. Professor Langbein relies on trust default law but focuses primarily on expansive powers. He ignores (and in some instances contradicts) the Trustee's previous position that its actions are confined by the Governing Agreements. The Trustee cannot cherry-pick. It cannot resort to default trust law to assume expansive powers not enumerated in the Governing Agreements, while confining its duties to the Governing Agreements.

Moreover, the Trustee's experts have a fundamental misapprehension about the Trustee's status with respect to the claims at issue. The Trustee does not *own* the claims. Any "ownership" accruing to the Trustee is merely legal ownership, but the beneficial interest remains with the trust beneficiaries. The Trustee is not free to dispose of the beneficiaries' claims in any way it sees fit.

Indeed, Professor Langbein concedes that the Trustee must act with reasonable care.[1] Where a Trustee fails to act with reasonable care, the Court must interject.[2] Here, the Trustee failed to act with reasonable care. As just one example – and as confirmed by the Trustee's own experts – the Trustee assumed a *neutral* role rather than an advocacy role during negotiations. It follows that the Trustee failed to maximize recovery to the trusts, and its failure to protect its beneficiaries' assets with the same vigor the beneficiaries would protect their own assets constitutes a lack of care.

Professor Langbein is wrong in his passing comment that "persons objecting to the Trustee's decision-making . . . bear the burden of showing why the Trustee's decision was an abuse of discretion."[3] "The burden of proving that a discretionary power has been properly used is on the person who is asserting rights resulting from the use of the power."[4]

## Trustee's Powers and Duties

1. Professor Langbein does not dispute that the Trustee lacked express authority under the Governing Agreements to settle with BoA. He relies on sections 2.01 and 8.02 of the PSAs as implying such power. As I stated in my initial report, powers can be implied from express powers, but those powers depend on the circumstances and are subject to court interpretation. Here, the Trustee assumed powers not enumerated in the Governing Agreements. Regardless of whether the power to negotiate or settle can generally be implied from express powers in the Governing Agreements, it is the Trustee's *assumption of powers* that subjects it to the duties that apply to the exercise of such powers. The Trustee's powers must be commensurate with its duties such that expansive powers

[1] Expert Report of Professor Langbein, 7 (Mar. 14, 2013).
[2] *Id.* at 12 (quoting *In re Estate of Stillman*, 107 Misc.2d 102, 110 (N.Y. Surr. Ct. 1980)).
[3] *Id.* at 12.
[4] Bogert's Trusts and Trustees § 560 (citing *In re Jaeck's Will*, 42 N.Y.S.2d 514 (Sur. Ct. 1943)).

which require significant discretion (such as the power to negotiate and settle) necessarily give rise to commensurate duties that require the Trustee to exercise that discretion with great care.

2. I agree with the Principles of the Uniform Trust Law noted by Professor Langbein. These principles demonstrate the status of any trustee. The trustee's powers and activities relate to the *services* that the trustee undertakes to perform. To enable the trustee to perform these services, *and for no other purpose*, the trustee is entrusted with the necessary property and power. Trustees are subject to different degrees of duties and constraints depending on the nature and magnitude of the entrustment that they receive. The services that trustees undertake to perform signal: (1) the necessary powers and assets with which the trustees are entrusted in order to enable them to perform their services; and (2) the duties that are attached to those powers. These duties ensure that trustees will not use entrusted power and assets for any other purpose other than the one related to their service and to ensure that the trustees perform their services with care.

3. Professor Langbein's report is replete with generalities, which are improperly linked to the Trustee's powers. Words like "managing the estate," resorting to the Uniform Trust Law or implying powers that are *unnecessary to perform the Trustee's services* are inappropriate. Further, the powers of "administering trust" are related in Professor Langbein's dictionary to "powers . . . that a *legally competent, unmarried individual has with respect to individually owned property* . . . ."[5] Therefore, some differences between the Trustee discussed in this case and an *unmarried individual* should be noted when dealing with the powers and duties of the Trustee.

4. Professor Langbein states that a trustee's powers cover any power "necessary to perform the trust" unless the trust documents prohibit or limit the power.[6] However, a trustee does not "perform" a trust. A trustee performs *services that involve trusting*. It is reliance by people on others to serve honestly and well. Therefore, a trustee does not have power without attached duties of trustworthiness. The limited duties or complete absence of duties, which the Trustee claims, cannot go hand-in-hand with expanded powers which Professor Langbein claims for the Trustee. Powers given in trust are accompanied by duties of loyalty and care of the recipient of the powers.

5. Professor Langbein states that "modern trust law" endows the Trustee with "all the powers necessary to perform the trust" and relies on New York State "default" trust law.[7] Yet, the Trustee, through counsel, has repeatedly taken the position that the Trustee's conduct is governed by the Governing Agreements and therefore its duties are limited to those set forth therein.[8] If Professor Langbein's position holds and default trust law applies, it applies in full and brings in its expansive duties. There are no powers in trust law (applicable to other people's money) without duties (with respect to other people's money). Significantly, the text Professor Langbein cites expressly recognizes that

[5] Professor Langbein at 3.
[6] *Id.*
[7] *Id.*
[8] *See, e.g.*, Hrg. Tr. 11:3-14:5 (Sept. 21, 2011) (Ingber).

professional trustees, such as the Trustee here, have higher standards of care than ordinary trustees.[9]

6. Professor Langbein's assertion that courts and public policy favor settlement is not disputed.[10] Yet, not all settlements and circumstances are equal. Public policy certainly does not support [redacted]

7. Professor Langbein mistakenly asserts that the power to forbear an Event of Default is ancillary to the power to settle under the Restatement of Trusts.[11] The Restatement of Trusts does not go that far. A trustee under the Restatement has necessary power to administer the trust.[12] Yet, the present case deals with the power to *forbear* an Event of Default. Professor Langbein links the power to *forbear an Event of Default* to *an Event of Default* which is related to the *power to administer the trust* which is related to the *necessary power to administer the trust*. There comes a point in which derivation ceases. The rise of an Event of Default does not relate to management. It is an event, caused by third parties, *which dictates* the Trustee's changing services and duties.

8. Mr. Landau notes that a forbearance agreement is "reasonable and consistent with industry custom and practice."[13] In his opinion, the Trustee "has the right to exercise, or forbear from exercising, its rights against the master servicer, including by declaring (or not) an Event of Default . . . provided the Trustee makes that decision reasonably and in good faith. Mr. Landau and Professor Langbein miss the mark.

9. First, trustees do not have *rights* with respect to trust property. They have *entrusted powers relating to trust property*. Trustees derive their powers from the trust instruments and must exercise them for the benefit of the beneficiaries. They may not exercise any other powers with respect to trust property without assuming duties governing their exercise of such powers. For example, §2.03(c), dealing with a repurchase remedy of faulty assets, provides that the remedy is "available to Certificateholders, the Depositor or *the Trustee on their behalf"* (emphasis added).

10. Second, the Trustee has no right, nor the power to declare, nor the power to *not declare an Event of Default*. The Event of Default is triggered by the actions of others as described in the Governing Agreements. When these actions occur the Trustee is authorized to investigate whether the Master Servicer has breached the Governing Agreements, or whether the breach was material, or whether it has been cured. These

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[9] *See* Restatement (Third) Trusts § 77 ("If the trustee possesses, or procured appointment by purporting to possess, special facilities or greater skill than that of a person of ordinary prudence, the trustee has a duty to use such facilities or skill.").
[10] *See* Professor Langbein at 4.
[11] *Id.* at 6 ("Precisely because the Trustee in this case had the power to conclude the Settlement Agreement, it had the power to take ancillary steps such as entering into prudent tolling agreements.")
[12] Restatement (Second) Trusts § 186; Restatement (Third) Trusts § 85.
[13] Expert Report of Mr. Landau, ¶¶ 30-36 (Mar. 14, 2013).

permissible actions must be exercised within the 60-day cure-period. The Trustee may not amend the Governing Agreements except as provided in PSA §10.01.[14]

11. [redacted], is speculative at best and short-sighted and unrealistic at worst. There are other ways to receive not only constructive but better solutions for trust beneficiaries. A trustee could keep pressure on the Servicer and the Sellers, and initiate litigation to keep it up. "Constructive resolution" can be achieved sometimes under the pressure of court proceedings rather than in friendly and non-public negotiations.

## The Duty of Care

12. Mr. Landau cites PSA §8.02.[16] "Trustees may consult with . . . financial advisers . . . and the advice . . . shall be full and complete authorization and protection in respect of any action taken or suffered or omitted by it hereunder in good faith . . . ." Regardless of whether this provision even applies under the circumstances, the text expressly includes a good faith requirement. Here, the timing of the reports alone raises serious questions about the Trustee's good faith reliance. Had the Trustee sought expert opinions *before* the Settlement Amount had been reached, those opinions could have contributed to an actual evaluation of BoA's potential liability and the probability of recovery. The advisors' analysis could also have been used to bolster the Trustee's position against BoA. Instead, the Trustee passively relied on the Insiders to negotiate the Settlement Amount with BoA, and only after the Settlement Amount was reached did the Trustee obtain its advisors' opinions.

13. Professor Langbein writes: "Nothing is improper in the Trustee's consulting experts after settlement terms have been negotiated in the course of arm's length bargaining but before the Trustee had bound itself to any of those terms in a final agreement . . . ."[17] This statement dismisses the value of hiring advisors to guide the Trustee through negotiations as opposed to hiring advisors to merely justify the result of the negotiations. Moreover, this statement arguably is in agreement with the asserted facts that the expert opinions were sought *after* the agreement was reached rather than being consulted in the course of the negotiations.[18] Further, the statement presupposes that the negotiations between the Insiders and BoA were at arm's length. I understand there is dispute about this fact. It is unclear on what basis Professor Langbein believes the negotiations were at arm's length.

14. Mr. Landau suggests that the timing of the reports is irrelevant because "it would not have been appropriate or customary for the Trustee to decide whether to accept the

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[14] [redacted], *see* Dep. Ex. 50 (BNYM_CW-00270959—960), and accordingly granted itself a power that does not exist under the Governing Agreements—the power to "forbear." In granting itself this purported power, it essentially amended the cure-period under the Governing Agreements without following the amendment procedures set forth in the Governing Agreements.

[15] Professor Langbein at 6.

[16] Mr. Landau ¶¶ 22-24.

[17] Professor Langbein at 8.

[18] *Id.* at 7-8.

Settlement based on experts who were hired to advocate for the Trust's position. Any reasonable Trustee would have taken an *objective* look at the strength and weaknesses of the Trusts' claims."[19] Similarly, Professor Langbein suggests that "reliance on stated facts is a common and sensible practice in matters in which the expert has not been engaged to conduct fact finding."[20]

15. And yet, it is not the appropriate position of a Trustee to be the *objective* judge. The Trustee is an *advocate for the beneficiaries*. A Trustee occupies the position of a *party, similar to the position taken by Professor Langbein and Mr. Landau now*. Yet in this case the Trustee took the position of an objective judge, at best. At worst, the Trustee took action adverse to the Covered Trusts when its advisors relied on the *facts provided by the opposing party. That is the party against whom a court claim may be brought.* This reliance is not common nor sensible practice for advisors involved in evaluating claims for a party in a *court settlement* proposal. Consequently, it is surprising and highly uncommon to seek a perfunctory court approval of such a settlement under such process. The Trustee makes this request asserting that it conducted an adequate factual examination, and appropriately evaluated the claims it would agree to extinguish.

16. Mr. Landau suggests that [redacted] Yet, the directives to the experts were inappropriate. For example, [redacted]! Other experts relied on, or were directed to rely on, BoA's unverified representations.[3] The Trustee's approach signals serious lack of care.

17. Further, it appears that [redacted]

18. Mr. Landau notes that there was a dispute about whether the Notice of Non-performance triggered any cure period."[26] Yet, this dispute is irrelevant. The Trustee acted as if the cure-period had been triggered.[27] Its actions spoke louder than words. Further, the PSAs do not limit an Event of Default to the situations in which the parties have agreed that such an event has occurred. Therefore, a dispute regarding the sufficiency of the notice of non-performance does not preclude an Event of Default from occurring.

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[19] Mr. Landau ¶ 26 (emphasis added).
[20] Professor Langbein at 7.
[21] Mr. Landau ¶ 27.
[22] Dep. Ex. 138 (BNYM_CW-00273353-57) at –00273355.
[23] Lin Report at 4 & 8; Daines Report at 8 fn. 3; [redacted] (BNYM_CW00285677—BNYM_CW-00285678).
[25] Dep. Ex. 44 (BNYM _CW-00271138- BNYM _CW-00271139) [redacted] Mr. Landau ¶ 35.
[27] [redacted]

19. Mr. Landau avers that the Trustee's passivity was appropriate, stating that "less participation. . . would have been appropriate under the circumstances."[28] After all, according to Mr. Landau, the Trustee has no economic interest and investors have more expertise.[29] This is a surprising observance. The Trustee should not have an economic interest which is lower than that of the investors. That is why the Trustee represents the Outsiders as well. In addition, if Mr. Landau meant "economic interest" of the Trustee, then the observation is doubly surprising. The Trustee should never have a personal economic interest in this case, and should always have *great economic interest which is that of its beneficiaries*. The evidence, however, suggests that the Trustee *did* have an economic interest in the case, and that this is why it repeatedly sought a broad release to be included in the proposed settlement and why it is seeking release from liability for its settlement-related activities.

20. Professor Langbein suggests that trustees rarely canvass all holders before making a decision to settle their claims, nor does the Trustee need the consent of all investors before settling their claims because that would be impractical.[30]

21. Obtaining consent from investors is not necessarily the impractical exercise of canvassing all investors as Professor Langbein suggests. The Trustee could have provided notice to all investors that it would act absent contrary instructions. [redacted] Providing notice to investors would have allowed them the opportunity to consider exercising rights afforded to them under the PSAs, and it would have provided them with an opportunity to obtain counsel to evaluate and protect their rights.

22. The Trustee's past conduct also shows that notice is customary. [redacted] Here, by contrast, the Trustee never provided notice to certificateholders of the forbearance agreements or the settlement negotiations until the negotiations were over and [redacted]

23. Professor Langbein does not dispute that the Trustee did not take an active role in the settlement negotiations. He notes that the Insiders had at stake "tens of billions of dollars worth of Trust certifications" and that they were "strongly aligned with the Trustee and strongly adverse to CA/CW."[32] [redacted]

[28] Mr. Landau ¶ 46.
[29] *Id.*
[30] *See* Professor Langbein at 8-9.
[31] Dep. Ex. 146 (BNYM_CW-00008784-88).
[32] Professor Langbein at 8.

[redacted] No one represented the Outsiders. Professor Langbein indirectly concedes that *the Outsiders had no representation.* The Trustee failed to perform its duty of representing and caring for the interests of its Outsider beneficiaries. Now it argues for the Court to rely on its judgment and approve this Settlement. Professor Langbein's suggestion that relying on the Insiders would constitute the Outsiders' protection is hollow in light of the denial of any representation by the Insiders.

24. Therefore, the Trustee's passivity during negotiations cannot be exonerated from liability for lack of care. Once the Trustee assumed the power to negotiate the termination of claims and the amount paid for such termination of beneficiaries' rights, the Trustee could not delegate as it has done in this case.[33] This case involved billions for a large number of trusts. About half of the 530 trusts that were subject to negotiation by Insiders were [redacted] and were [redacted]. To be sure, the Insiders held a certain percentage of the votes in these trusts. But the dollar investments of the unrepresented investors exceeded those of the Insiders. The Trustee's delegation of negotiation to anyone is a violation of its duties. The Trustee's delegation of negotiations to "representatives" [redacted] is a doubly wrongful violation of the Trustee's duties.

25. Professor Langbein notes that the negotiations in this case posed a "collective action problem" and "holding out behavior possibility."[34] In plain English these words mean obstructive behavior and attempted blackmail. The language is entirely inappropriate. The Outsiders are the owners of the financial interests and money that was being negotiated away and the Trustee was and is their servant. Professor Langbein's use of this language, however, demonstrates the Trustee's and his attitude when dealing with other people's money and fails to recognize that the money and claims which they negotiated or agreed to forego do not belong to anyone but the investors. A disdainful view of beneficial owners is improper especially by those who are entrusted with these owners' money. The Trustee should not have the discretion to provide information to one group of beneficiaries and withhold it from another. Under principles of fiduciary duties as well as §10.08 of the PSA no investor should be preferred to another unless expressly so provided. The Trustee did not seek guidance or permission before acting but rather acted first and then asked the Court for protection from its own liabilities.

26. Professor Langbein proposes a justification for the Trustee's treatment of the Outsiders: [redacted] In fact, the Trustee could have benefitted from the opinions of the true owners. It

[33] *See* 3 SCOTT AND ASCHER ON TRUSTS, Part 5 - Trust Administration § 17.3.2 - Delegation of Authority to Do Particular Acts (2012).
[34] Professor Langbein at 9.
[35] *Id.* at 9.

could evaluate competing rationales in determining how to act. Efficiencies would rise [redacted].

27. Professor Langbein noted that the Settlement did not purport to extinguish the rights of the Outsiders because they had no rights. *"[T]o the extent that the certificate holders did not have rights in the first place to bring the claims being compromised, these claims belong to the Trustee."*[36] No right concerning the trust property—to income or to giving it away—belongs to the Trustee. Even if one Outsider might not have the right to negotiate a settlement, it does not mean that the Trustee has the *right* to usurp that power and do with it as he pleases. It might have a *duty* to act, but never a *right*.

## Conflicts of Interest

28. Professor Langbein challenges the argument that the Trustee acted in conflict of interest with its beneficiaries.[37] In addition, he seeks "articulation" of "how the supposed conflict affected the trustee's decision to enter the Settlement six months later."[38]

29. The "articulation" is that the Settlement did not appear (like beautiful Aphrodite rising from the foam) at the end of six months. The settlement was the *product of negotiations* that lasted six months. This settlement product is suspect because during the period of negotiations the Trustee operated under conflict of interest. Any service, in which the Trustee is concerned about *its interests, is tainted* and the final decision of the Trustee at the end of the process at any period—whether six months or more—is therefore tainted with this conflict of interest. The conflict of interest—tending to self-interests—appeared at the beginning of the process, continued throughout the process, and culminated in a tainted decision at the end of the process.

30. Professor Langbein asserts that "indemnifying trustees is a routine trust practice."[39] According to Professor Langbein, the side letter [redacted][40] confirmed an existing indemnity,[41] [redacted] On this point as well, Professor Langbein asserts a general correct statement and applies it incorrectly to the particular case. Trustee indemnification is routine with respect to routine activities that are clearly within the Trustee's services. Indemnification is not routine with respect to activities that are questionable. In fact, the more questionable the activities are, the more likely the indemnification would be judged to be against public policy. Wrongful acts may not be indemnified under the Governing Agreements.

31. Professor Langbein's second argument supports this conclusion. If the Trustee was covered by an existing indemnity, why did the Trustee seek confirmation? It is because,

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[36] *Id.*
[37] *Id.* at 6.
[38] *Id.*.
[39] *Id.* at 10.
[40] [redacted]
[41] Professor Langbein at 11.

as noted, the requested indemnification was far from being "routine." It demonstrated the Trustee's concern of being exposed to claims by the Outsiders when they would discover how, why and for how much, the Trustee settled their claims without their knowledge. The Trustee worried about its own liability, and rightly so. Additionally, the Trustee appears to have been acting under the direction of investors.[42] Therefore, pursuant to PSA Section 8.05(i)(c), the Trustee lost its indemnification from the Master Servicer. [redacted]

32. Professor Fischel and Mr. Landau's assertions[43] are similar to Professor Langbein's. Professor Fischel adds however, a sharper note: even if the Trustee did receive an expanded indemnity, the receipt does not pose a conflict of interest.[44] The Trustee used its entrusted powers to seek benefits for itself. Regardless of whether it was a "confirmation" or a new or expanded indemnity, the Trustee used its trust powers to obtain the benefit of certainty with respect to the uncertain legitimacy of its actions, and [redacted].[45]

33. Mr. Landau waters down the importance of the release which the trustee sought. First, he writes, the release is "nothing more than a request . . . in a draft of the Proposed Final Order and Judgment that the court be permitted to consider language preventing certain types of claims against the Trustee."[46] Second, seeking a release does not constitute conflict if it is "subject to Court approval."[47] Third, the request was never submitted to the Court so it "is a non-issue."[48] However, even if it was "just a thought" which persisted for some time, it demonstrates the Trustee's concerns for its liability and its attempts (though unsuccessful) to be covered for such possible liabilities. This continued concern points to conflicting interests. It is hard to truly serve and identify with the interests of those whom you worry will sue you.

34. Professor Langbein repeats the same arguments and adds: "Frankel has rummaged through debris on the cutting room floor in search of a conflict of interest and not finding any actual conflict, she is left to point wistfully to one that might have been."[49]

35. Mr. Landau and Professor Langbein's comments[50] are confusing: First, a bar on claims, which the Trustee seeks, is in effect a release. Second, a conflict is demonstrated even if the release was requested during the process of negotiations but did not make it to the final document. The quest for a release demonstrates great attention to self-protection. This attitude presents a conflict of interest: asking how can I protect myself, rather than

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[42] [redacted] (BNYM_CW00285677—BNYM-_CW00285678); [redacted] (BNYM_CW00285661—BNYM_CW00285674); Hr. Tr. 7:5-34 (Sept. 9, 2011) (S.D.N.Y.).
[43] Professor Fischel ¶¶ 27-32; Mr. Landau ¶¶ 37-40
[44] Professor Fischel at ¶ 29.
[45] Dep. Ex. 62, BNYM_CW-00270712-15 at -00270712.
[46] Mr. Landau ¶ 47.
[47] *Id.*
[48] *Id.*
[49] Professor Langbein at 10.
[50] Mr. Landau ¶ 47; Professor Langbein at 9-11.

how can I protect the interests of those who trusted in me and relied on me? Provisions that did not make it to the final draft may indicate conflicts just as those that saw the light of day before the Court.

36. The mistaken conclusions in these three opinions are based on an erroneous view of what a fiduciary's conflict of interest means and the rationale for the prohibition on conflicts of interest. The mistake relates to the view of a trustee as the recipient of the rights and property of other people for the joint interest: the Trustee is a partner of the beneficiaries in the property and power which they bestow on it. Under this mistaken view, each partner can tend to its own interests while, of course, performing its promises, like a good honest person.

37. That, however, is a wrong and dangerous view of the prohibition on conflicts of interest behavior by a trustee. A trustee may receive compensation for its services. A trustee may not benefit from the entrusted property and power which are given to it for the sole purpose of performing its services *for the benefit of its beneficiaries*. In this case the Trustee attempted to use its purported or real power to relieve itself of potential liabilities. This relief is valuable. The valuable relief was sought not by an exchange with the beneficiaries of the trust but by the use of purported or legitimate trustee power. Yet trust powers do not belong to the Trustee for its own benefit, and were never given to the Trustee for that purpose. They were powers in trust for the benefit of the trusting owners. Therefore, the Trustee was not allowed to exercise these powers for its own benefit-that is, to release itself of liabilities.

38. Regardless of whether the Trustee was allowed to reach the Settlement or not, its use of trust powers or attempt to use trust powers to benefit itself is a violation of its duties to avoid conflicting interests. Bargaining on behalf of the Trust and extracting or attempting to extract benefits for itself, is precisely what conflict of interest is about. There is no difference between a trustee that gains protection from claims by negotiating a deal by using its trust powers, and a trustee that receives cash for negotiating a deal by using trust powers. Both are prohibited. Both taint the use of trust power with a wrong.

## Standard of Review

39. Professor Fischel states that "[a]llegations of conflict are particularly important to address because they affect how much deference should be accorded to the Trustee in its decision to enter into the Settlement."[51] He correctly connects the standard of review to the question of whether the Trustee was conflicted. Courts should not defer to the decisions of a conflicted trustee.

40. Professor Langbein states that in "circumstances in which a trustee acts in respect to a matter over which the trustee has discretion, the court will apply an abuse-of-discretion standard when reviewing the trustee's exercise of that discretion."[52] Otherwise "any

[51] Professor Fischel ¶ 27.
[52] Professor Langbein at 11.

litigant [could] force the court in effect to assume the work of trust administration and thereby supplant the contractually designated trustee."[53]

41. And yet, the description of the Trustee's actions and its dire consequences do not fit this particular case. First, the Settlement in question is not "trust administration." Neither is a forbearance of an Event of Default "trust administration." Second, deference should not be given to a trustee that acted unreasonably. Third, it is unlikely that investor-beneficiaries would find it of interest to "force" a Court to function routinely as a trustee. It is, however, the function of the Court to supervise and check the improper use of trust powers. It is in the interest of this society to induce people to trust trustees' services and assure potential beneficiaries that any improper exercise of trust powers, especially when they involve settlement of beneficiaries' claims against a third party, did not involve conflicts of interest or lack of care.

42. Professor Langbein completes his statement with an assertion that the Trustee has expertise in this case because "the work of a corporate trust department acting under agreements such as the PSAs . . . is a highly specialized function carried out by only a few major American financial institutions such as the Trustee in the case."[54] That is even though Professor Langbein acknowledged the need of such a department to engage expert counsel and other experts.[55]

43. The answer is first, that the Settlement in question is far from the usual functions of a corporate trust department, certainly before an Event of Default. Second, it is unclear that this function requires the exalted specialization that Professor Langbein describes. In fact, there are many other far smaller institutions that perform the same functions well, especially in the case of a financial meltdown, which few trustees of this sort commanded experience. The most important feature of a trustee is to be trustworthy.

44. Mr. Landau added that "[c]orporate trustees regularly make these types of decisions" presumably referring to settlements.[56] Here, [redacted][8] and quantifying a settlement amount is not something this Trustee has experience with.[59] In fact, [redacted].[60]

## Conclusion

[53] *Id.*
[54] *Id.* at 12.
[55] *Id.*
[56] Mr. Landau ¶ 43.
[57] Buechele Dep. at 153:11-20 (Nov. 27, 2012).
[58] *Id.* at 155:21-156:3.
[59] Hr. Tr. 54:15-22 (Feb. 7, 2012).
[60] Buchele Dep. at 92:11-13 [redacted].

In this unique case the Trustee denied an Event of Default, or attempted to avoid it. It allowed some of the investor-beneficiaries who were Insiders, to negotiate a settlement, and denied other investors the opportunity to be involved in the negotiations and protect their own interests. The Trustee bargained for and received an indemnity for itself; it secured a release for its settlement activities, [redacted] While [redacted] the Trustee was passive in its representation of the Covered Trusts. It did not participate in key settlement negotiations; it waited until after the Settlement Amount had been agreed upon in principle, to obtain advisor opinions. It used these opinions to justify the position of the potential defendant in this case. Nothing in Professor Fischel's, Professor Langbein's, or Mr. Landau's reports alters my conclusion that the Trustee acted in conflicts of interest and breached the duty of care requiring the Court's close examination of the settlement's merits and the Trustee's release of liabilities.

Appendix A
Documents Relied On

| Dep Ex. No. | Deposition Exhibits |
|---|---|
| **13** | PSA CWALT 2005-35CB (BNYM_CW-00217617-857) |
| **44** | E-mail from Mr. Kravitt, Subject: [redacted] (BNYM_CW-00273353-57) |
| **46** | Forbearance Agreement (BNYM_CW-00271275-81) |
| **50** | Email from Kravitt [redacted] Subject: RE: [redacted] (BNYM_CW-00270959-60) |
| **52** | Forbearance Agreement (BNYM_CW-00270587-89) |
| **53** | Email from Kravitt [redacted], Subject: [redacted] (BNYM_CW-00270970) |
| **62** | Email from Kravitt [redacted] Subject: [redacted] (BNYM_CW-00270712-15) |
| **138** | Email from Kravitt [redacted] Subject: [redacted] (BNYM_CW-00273353-57) |
| **118** | Email from Ingber, [redacted] Subject: [redacted] (BNYM_CW-00255381-84) |
| **146** | [redacted] letter [redacted] (BNYM_CW-00008784-88) |
| **210** | Email from Madden [redacted] Subject: [redacted] (BNYM_CW-00254990-98) |
| **235** | Email from Matthew Ingber [redacted], Subject: [redacted] |
| **Date** | **Court Documents** |
| **6/29/2011** | Bank of New York Mellon's Verified Petition and Exhibits A through F (DKT0001 - DKT0007) |
| **4/13/2012** | The Institutional Investors' Response to Order to Show Cause Why the Court Should Not Compel Discovery (DKT 250), April 13, 2012 |
| **Date** | **Deposition Transcripts** |
| **9/19-20/2012** | Kravitt Deposition Transcripts, September 19-20, 2012. |
| **10/2-3/2012** | Lundberg Deposition Transcripts, October 2-3, 2012 |
| **11/27/2012** | Buechele Deposition Transcript, November 27, 2012 |
| **12/3/2012** | Bailey Deposition Transcript, December 3, 2012 |
| **1/3/2013** | Griffin Deposition Transcript, January 3, 2013 |
| **1/18/2013** | Bingham Deposition Transcript, January 18, 2013 |
| **Date** | **Hearing Transcripts** |
| **9/21/2011** | Transcript of Hearing before Judge Pauley, September 21, 2011 (S.D.N.Y) |
| **4/24/2012** | Transcript of Hearing before Justice Kapnick, April 24, 2012 |
| **2/7/2013** | Transcript of hearing before Justice Kapnick, February 7, 2013 |
| **Date** | **Advisors' Opinions** |
| **6/6/2011** | Capstone Valuation Services, LLC's Countrywide valuation analysis (BNYM_CW-00249770-784) |
| **6/7/2011** | Robert Daines's 6/07/2011 Opinion |
| **6/7/2011** | Brian Lin's 6/7/2011 Opinion |
| **6/28/2011** | Brian Lin's 6/28/2011 Opinion |
| | **Expert Reports** |
| **3/14/2013** | Langbein Report |
| **3/14/2013** | Landau Report |
| **3/14/2013** | Fischel Report |
| | **Additional Docs** |
| | [redacted] (BNYM_CW00285677-678; BNYM_CW00285675-676; BNYM_CW00285661-674) |